Mandatory life sentences for Murder in the Northern Territory, the new reform legislation and the possibility of parole.

"It is, after all, the natural life of a human being, a citizen of this country."[1]

"Some crimes of murder result from conduct of such cruelty and brutality and cold-bloodedness, that there can be no doubt they deserve a natural life sentence, both to punish the offender and to provide for the protection of the community."[2]

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Introduction

During the last few years the Northern Territory Legislative Assembly has passed new laws which have introduced wide ranging and significant changes to the criminal law in the Northern Territory of Australia. These laws are:

- the *Sentencing (Crime of Murder) and Parole Reform Act,* which amended the *Criminal Code*, the *Sentencing Act* and the *Parole of Prisoners Act* and was passed in 2003. This Act commenced operation on the 11th February, 2004.[3]

- the *Criminal Code Amendment (Criminal Responsibility Reform) Act 2005* [4] which provides for the staged introduction of " the general principles of criminal responsibility in Chapter 2 of the Model Criminal Code." which have also been enacted by the Commonwealth Parliament and in the Australian Capital Territory. This Act also repealed the offences of manslaughter and dangerous act and replaced them with new manslaughter and harm related offences.

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[1] *Leach v The Queen [2006] HCA Transcrpt 465* (1 September 2006) Leave to Appeal application quote from Justice Kirby.
[2] Minister for Justice and Attorney-General - Second Reading Speech to the *Sentencing (Crime of Murder) and Parole Reform Bill 2003.*
[3] *Sentencing Act* Notes pages 85, 86 (p).
[4] This Act inserted a new PART IIAA – Principles of Criminal Responsibility in the Northern Territory Criminal Code which commenced on the 20 December 2006.

- The *Criminal Reform Amendment Act (No.2), 2006* which is the second stage of the continuing reform of the Northern Territory Criminal Code. This Act repealed existing homicide provisions (including section 164) and inserted the new Model Criminal Code provisions for murder (ss 156,157) except for diminished responsibility which was retained and "modelled on section 23A of the New South Wales *Crimes Act*."[5]

The intended effect by Government of this legislation with respect to sentencing for the offence of murder is threefold.

Firstly, to increase the number of people convicted of murder. Secondly, to maintain the sentence of mandatory life imprisonment and thirdly to provide for a non-parole period for most persons convicted of the offence of murder.

I will deal with these points shortly but at first I will describe briefly the history of the law with respect to sentencing for murder in the Northern Territory and make some general observations about mandatory sentencing.

The sentence for murder under the reforms remains as mandatory life imprisonment which includes a fixed non-parole period in most cases. That is, a prescribed maximum sentence in all cases and a mandated minimum mandatory sentence as the general rule.

A mandatory sentence for murder in the Northern Territory is of course nothing new. The fact that the sentence is mandatory attracts little attention for probably obvious reasons. The history of sentencing for offences that carry life imprisonment has in most case always been one where life means life, that is no non parole period. For example, it was only in 1996 that a non-parole period could be set for offences other than murder that carried life imprisonment.[6]

Yet it maybe worthwhile to refect upon this and I do so by the quotation of two judicial statements albeit from different contexts. The first is from Justice Mildren from the Northern Territory Supreme Court who said:[7]

> "Prescribed minimum mandatory sentencing provisions are the very antithesis of just sentences. If a court thinks that a proper just sentence is the prescribed minimum or more, the minimum prescribed penalty is unnecessary. It therefore follows that the sole purpose of a prescribed minimum mandatory sentencing regime is to require sentencers to impose heavier sentences than would be proper according to the justice of the case."

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[5] Explanatory Statement, Minister for Justice and Attorney-General - *Criminal Reform Amendment Bill (No2) 2006 Serial No.71. (General Outline)*
[6] With the enactment of section 53 of the *Sentencing Act, (NT)* in 1999.
[7] *Terry Ernest Curnow v Leonard David Pryce [1999] NTSC 116* at para 12 as quoted in Bronitt, S & Mc Sherry, B "Principles of Criminal Law" LawBook Co. 2005 at 139.

At the Federal level involving as it does the Australian constitution and the separation of powers in 1970 Barwick, CJ[8] stated the following with respect to mandatory sentences:

> It is beyond question that the Parliament can prescribe such penalty as it thinks fit for the offences *which it creates*. It may make the penalty absolute in the sense that there is but one penalty which the court is empowered to impose and, in my opinion it may lay an unqualified duty on the court to impose the penalty. (my emphasis in italics)
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> Ordinarily the court with the duty of imposing punishment has discretion whether any punishment at all should be imposed. It is both unusual and in general, in my opinion, undesirable that the court should not have a discretion in the imposition of penalties and sentences, for circumstances alter cases and it is a traditional function of a court of justice to endeavour to make the punishment appropriate to the circumstances as well as to the nature of the crime. But whether or not such discretion shall be given to the court in relation to a statutory offence is for the decision of the Parliament.

It is interesting to also note that the limited judicial discretion to refuse to set a non-parole period in a murder sentencing process by having to predict the future behaviour of the prisoner is akin to a form of preventive detention in my view. In the sense that at common law it is permissible to take into account in the sentencing process a "dangerous propensity" to kill or commit acts of serious violence when considering the protection of society and thus whether it is appropriate to impose a more severe penalty.[9]

This is akin to some extent to the new reforms to murder sentencing laws in the Northern Territory that are discussed in this paper. For example, in *The Queen v Albury [2004] NTSC 59* the Court revoked the non-parole period of 20 years mandated in the new legislation and refused to set a non-parole period. This was done on the basis that:

> In all the circumstances, and bearing in mind my finding that the respondent will almost certainly kill again if released, I am satisfied that the respondent's level of culpability in the commission of the crime of murder was so extreme that the community interest in retribution, punishment, protection and deterrence can only be met if the respondent is imprisoned for the term of his natural life without the possibility of release on parole.[10]

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[8] *Palling and Corfield (1970) 123 CLR 52* as quoted in "Criminal Laws Materials And Commentary on Criminal Law and Process in New South Wales" by Brown, Farrier, Egger, McNamara, Steel Federation Press 2006 at page 1232.
[9] *Veen No2. (1998) 164 CLR 465 at 477.*
[10] *The Queen v Albury [2004] NTSC 59 at* [75].

My point here is that *to some extent* the common law – the judge made law has reached the same position as the Parliament when it comes to preventive detention which emphasises the protection of society.[11]

Parole Board

The amendments to the *Parole of Prisoners Act* are also significant in that the Parole Board will now consist of 10 members when considering parole for a person serving life imprisonment for murder. The decision to release on parole will have to be unanimous and the board will have to consider the public interest and in doing so give substantial weight to the following factors:[12]

- the protection of the community as the paramount consideration;
- the likely effect of the prisoner's release on the victim's family;
- if the prisoner is an Aboriginal or Torres Strait Islander who identifies with a particular community of Aboriginals or Torres Strait Islanders – the likely effect of the prisoner's release on that community;

A substantial additional hurdle to possible release, especially the need to consider the effect on the victim's family and indigenous community given that the person may be otherwise suitable for release.

A Brief History of Sentencing for Murder in the Northern Territory

The effective immediate past provision concerning sentencing for murder in the Northern Territory was section 164 of the Criminal Code which provided that:[13]

> Any person who commits the crime of murder is liable to imprisonment for life which cannot be mitigated or varied under this Code or any other law in force in the Territory.

This meant, of course that the only recourse to obtain release from imprisonment was executive clemency – the Prerogative of Mercy, as there was no non-parole period.

During the 19th Century the death penalty applied to the offence of murder and in relation to Aboriginal people, the applicable law - the South Australian *Criminal Law*

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[11] Brown et al at 1227.
[12] *Sentencing (Crime of Murder) and Parole Reform Act, 2003 section 14.*
[13] Section 164 of the Northern Territory Criminal Code was firstly completely repealed by section 4 of the *Sentencing (Crime of Murder) and Parole Reform* Act*, 2003* which introduced the new penalty provisions. It was then again repealed (by No 34, 2006 s17) and replaced by section 157 of the Code which is now the penalty provision for murder in conjunction with section 53A of the *Sentencing Act*.

Consolidation Act, 1876 provided that the "death sentence be carried out on an Aboriginal native at or near the scene of the crime, by way of providing an example to other members of the tribe"[14].

In 1933, the "mandatory death penalty for murder"[15] was abolished by the Commonwealth if an Aboriginal person was convicted of the offence. These changes were apparently implemented because of the result in the *Tuckiar* trial where the Aboriginal defendant was wrongly convicted of murder, sentenced to death and later acquitted by the High Court of Australia[16]. The Court in such circumstances "could 'impose such penalty as appears to be just and proper', and could 'receive and consider any evidence which may be tendered as to any relevant native law or custom and its application to the facts of the case and any evidence which may be tendered in mitigation of penalty'".[17]

The death penalty was abolished in 1973 by section 4 of the *Criminal Law Consolidation Ordinance, 1973.*

Apart from the specific provision concerning Aboriginal people which remained after the abolition of the death penalty the sentence according to the *Criminal Law Consolidation Act* and Ordinance was that " a person convicted of murder be sentenced to imprisonment for life with hard labour and that the sentence could not be mitigated or varied by the Court."[18]

The exception for Aboriginal people convicted of murder which commenced in 1934 was abolished with the introduction of the Criminal Code in 1984 on the grounds that there was an "extremely high incidence of violent crime in the Territory"[19]

In *The Queen v Loader [2002] NTSCCA 61* Acting Justice Gallop, AJ summarised the history of section 164 of the Northern Territory Criminal Code:

> "When the Criminal Code was enacted in 1984, s 164 was worded differently, that is: "Any person who commits the crime of murder is liable to imprisonment for life which cannot be mitigated or varied under section 390."
> Section 390(1) of the Criminal Code was in the following terms:
> "A person liable to imprisonment for life or for any other term may be sentenced to imprisonment for any shorter term."

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[14] Gray, Stephen; Criminal Laws Northern Territory Federation Press 2004 at page 11.
[15] "The Role of the Legal Profession and the Courts in the Evolution of Democracy and Aboriginal Self Determination in the Northern Territory in the Twentieth Century" by Justice Dean Mildren; 7 Journal of Northern Territory History at page 51
[16] *Tuckiar v The King (1934) 52 CLR 335.*
[17] Gray at page 16.
[18] *R v Leach (BR Martin CJ) 145 NTR 1* at 3.
[19] The then Chief Minster of the Northern Territory the Hon. Paul Everingham as quoted in Gray at page 26 footnote 115.

> By Act No. 17 of 1996 the Criminal Code was amended so as to delete the words "section 390" and substitute the words "this Code or any other law in force in the Territory".
> The amendment of s 164 into its present form by the Sentencing (Consequential Amendments) Act 1996 as set out above gives some indication that the legislature intended that the punishment of imprisonment for life for murder should be mandatory rather than discretionary.
> Having considered counsel's arguments, the legislative history of s 164 and its plain words, I am of the opinion that a sentence of imprisonment for life is the only sentence which this court can impose in respect of the crime of murder."

Sentencing (Crime of Murder) and Parole Reform Act

The *Sentencing (Crime of Murder) and Parole Reform Act* has introduced significant changes to the laws that affect sentencing outcomes with respect to murder from those just outlined.

As a result the penalty for murder in the Northern Territory remains as mandatory life imprisonment[20]. But importantly, it is now subject to the requirement to fix a non-parole period of either - 20 years, 25 years or a longer period. For example, in the Bradley Murdoch case a non-parole period of 28 years was set by the Court.[21]

The Court may also fix a non-parole period shorter than 20 years in "exceptional" circumstances". Such circumstances are narrowly defined under the Act.[22] In addition, the Court may also refuse to set a non- parole period where the prisoners "level of culpability.. is so extreme" that imprisonment "for the term of his or her natural life without the possibility of release on parole" should be imposed.[23] The latter, is subject to the Prerogative of Mercy being exercised by the Administrator[24] on the advice of the Executive – the Cabinet.

These reforms also apply to existing prisoners serving life sentences for murder. A non-parole period of 20 years automatically applies unless a prisoner is serving a sentence for two or more murder convictions then a non- parole period of 25 years applies to each sentence.[25]

In addition, the Director of Public Prosecutions (DPP) in relation to those prisoners sentenced before the commencement of the reform legislation is granted power to apply to the Court to have the relevant non- parole period revoked. In those circumstances the

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[20] Section 157(1) and (2) of the NT Criminal Code
[21] *Murdoch v The Queen [2007] NTCCA 1*
[22] Section 53A(6), (7) and (8) of the *Sentencing Act.*
[23] Ss 53 and 53A of the *Sentencing Act.*
[24] Section 115 of the *Sentencing Act* and query whether a remission of sentence under section 114 of the Sentencing Act would also apply.
[25] Sections 18 of the *Sentencing (Crime of Murder) and Parole Reform Act.*

Court may dismiss the application, order a longer non-parole period or fix no non- parole period thereby re-instating the pre-existing sentence of life imprisonment without a non-parole period[26] - life means life in other words.

In *Crabbe*,[27] for example the Court revoked the automatic non-parole period of 25 years and imposed a new non-parole period of 30 years. The prisoner in that case had been convicted of 5 counts of murder after driving his truck into the Inland Hotel at Uluru (Ayers Rock) in 1983.

As mentioned the reforms apply in two different situations. Firstly, to persons convicted of murder after the commencement date on the 11th February 2004 – section 53A of the *Sentencing Act (NT)*. Secondly, the transitional provisions applying to persons convicted of murder before that date. The transitional provisions being ss 17, 18, 19 of the *Sentencing (Crime of Murder) and Parole Reform Act*. The reform provisions are slightly different in their application in these two situations.

Needless to say one is not dealing with the normal judicial discretion for sentencing as described earlier in this paper but one sharply constrained by the particular legislation.

Gleeson, CJ in *Leach v the Queen [2007] HCA 3* described section 19 of the transitional provisions in the following terms:

> The discretion, like the discretion conferred by certain provisions of s53A, is not at large. It is confined by statutory prescriptions, which, in a number of respects, modify the principles according to which a judge would otherwise fix a non-parole period.

Both section 53A and the transitional provisions provide that either the 20 year or 25 year non-parole period may be increased to a larger fixed term or that no non-parole period be set in certain circumstances.

In relation to section 53A and the 20 year non-parole period the statute describes it as the "standard" non-parole period and also as the "non-parole period for an offence in the middle of the range of objective seriousness for offences to which" that standard non-parole period applies.[28] That no doubt has significance when a Court is considering whether to increase a non-parole period above 20 years or considering the setting of a period less than 20 years in exceptional circumstances.[29]

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[26] ibid section 19.
[27] *The Queen v Crabbe [2004] NTSC 63*
[28] Section 53A (2) of the *Sentencing Act (NT).*
[29] Again in the Second Reading Speech to the *Sentencing (Crime of Murder) and Parole Reform Bill 2003* the Attorney-General stated: "As the standard non-parole period represents a non-parole period for an offence in the middle range of objective seriousness for the offence, any offence of which a non-parole period of less than 20 years is set, could not be more serious than an offence in the middle of the range of objective

In relation to the 25 year non-parole period it applies in the following circumstances:

- The victim was carrying out their occupation which involves the performance of a public function or community service;
- The conduct that caused death would have constituted a sexual offence;
- The victim was under the age of 18 years;
- The offender is being sentenced for 2 or more convictions for unlawful homicide, that is murder or manslaughter;[30]
- At the time of sentencing for murder the offender had one or more previous convictions for unlawful homicide;

The Court may fix a longer non-parole period than 20 or 25 years if it is "satisfied" that any of the "objective or subjective factors affecting the relative seriousness of the offence" warrants a longer non-parole period.[31]

The Court may refuse to fix a non-parole period altogether if it is "satisfied the level of culpability in the commission of the offence is so extreme the community interest in retribution, punishment, protection and deterrence can only be met if the offender is imprisoned for the term of his or her natural life without the possibility of release on parole."[32]

Exceptional Circumstances – a non-parole period less than 20 years

There is one important exception that applies to the non-parole period initially mandated by Parliament and that is, that in "exceptional circumstances" a non- parole period of less than 20 years may be set by the Court in relation to any persons convicted after the commencement date of section 53A.In the Second Reading Speech to the Bill which introduced these changes the Attorney-General said with respect to this that:

> It allows the court to substantially increase or refuse to set non-parole periods, but provides a discretion that can be applied to truly exceptional cases. Those include cases of wives who have a long history of having been victims of physical abuse, or cases where close relatives assist to end the suffering of a loved one in the last days of a terminal illness. However, the provision is, rightly, one with very limited application.[33]

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seriousness and can reasonably be anticipated to be one which would be in the lower end of the range of objective seriousness.

[30] Unlawful homicide is defined for these purposes in section 53A (12) of the *Sentencing Act (NT).*

[31] Section 53A (4) of the *Sentencing Act (NT).*

[32] Section 53A (5) of the *Sentencing Act (NT).*

[33] Second Reading Speech by the Attorney General and Minister for Justice introducing the *Sentencing (Crime of Murder) and Parole Reform Bill 2003.*

The statute provides that "exceptional circumstances" *can only apply* where the person is "otherwise of good character" and "unlikely to re-offend" and the victim's conduct or condition "substantially" contributes to the conduct of the offender.[34] The Attorney-General further described the latter requirement as meaning that there is "a substantial lessening of the offender's culpability".

Transitional arrangements for existing prisoners serving life sentences for murder

For those subject to the transitional arrangements, that is a person serving a sentence of imprisonment for life for the crime of murder at the time of the commencement of these changes – the situation is somewhat simpler. A non-parole period of 20 years automatically applies or 25 years for a person serving life imprisonment for two or more convictions for murder.[35]

These periods may be revoked only upon application by the DPP and the Court then:

- must impose a non-parole period of 25 years if the circumstances in section 53A (3) apply as immediately outlined in bullet point form above.
- may impose a longer non-parole period than 20 or 25 years "if satisfied that because of any objective or subjective factors affecting the relative seriousness of the offence, a longer non-parole period is warranted." This is to the same effect as section 53A(4) of the *Sentencing Act (NT)* , and
- "if satisfied the level of culpability in the commission of the offence is so extreme the community interest in retribution, punishment, protection and deterrence can only be met if the offender is imprisoned for the term of his or her natural life without the possibility of release on parole." The same as 53A (5) of the *Sentencing Act.*
- There is no provision that allows for exceptional circumstances to reduce a non-parole period and that is the most significant difference in the reform provisions between those sentenced before the commencement of the new regime and afterwards.[36]

One can see therefore that a tightly defined and confined judicial discretion applies to the sentencing task in these circumstances:

- to increase the mandated non-parole period in certain circumstances or to not fix one at all; and
- in exceptional circumstances to fix a shorter non-parole period but that the court "must not have regard to any other matters"[37] than those outlined in the statute.

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[34] Section 53A (7) and (8) of the *Sentencing Act (NT).*
[35] Sections 17 and 18 of the *Sentencing (Crime of Murder) and Parole Reform Act.*
[36] *R v Leach 145 NTR 1 at 9.*
[37] *R v Leach 145 NTR 1 at 5.*

So let's look at the two remaining areas where this from of discretion applies. Firstly, where a non- parole period may be increased and secondly where no non-parole period may be imposed.

CJ, Martin at first instance in *R v Leach* stated that the first "directs attention to the relative seriousness of the offence" whilst the second "requires the court to consider the level of culpability in the commission of the crime".

The relative seriousness of the offence which brings into play a limited discretion to increase the statutorily determined non-parole period requires the court to consider any objective or subjective factors that go to this issue only-that is, to the seriousness of the offence. Interestingly, in *R v Leach* at first instance Martin, CJ found that this does not authorise the taking into account of factors that may in the normal sentencing process be mitigatory. For example, a plea of guilty or co-operation with the investigating authorities.[38]

Yet in *The Queen v Crabbe [2004] NTSC 63* this view was revised to the following extent that mitigating factors can be taken into account to the extent that they are closely connected with the defendants culpability and thus affect the relative seriousness of the offence. His Honour, the Chief Justice of the Northern Territory Supreme Court said:

> Adopting a broad interpretation which I consider will achieve the purposes of the legislation, in my opinion the objective and subjective factors to which the court shall have regard are not limited to those that, literally speaking, have a direct causal connection with the commission of the offence. Factors such as immediate remorse, immediate cooperation with authorities and an early plea of guilty, while not directly linked in a causative way to the commission of the crime, are so closely connected with the offender's culpability as to amount to factors affecting the relative seriousness of the offence for the purposes of s 53A of the Sentencing Act and s 19(4) of the Act. To this extent, following detailed submissions and analysis of the decision in Way, I have been persuaded that my general observation in Leach that an offender's plea of guilty and cooperation with the authorities do not affect the relative seriousness of the crime was incorrect ([64]).
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> Such factors may affect the relative seriousness. It is a question of degree and timing. [102] Having reached that view, the question remains whether the broad interpretation I have adopted can reasonably encompass prospects of rehabilitation or the rehabilitation of an offender that has taken place over many years subsequent to the commission of the crimes. It is here that I have reached the view that the line must be drawn adverse to the respondent. [103]

In *Murdoch v The Queen* the Court of Criminal Appeal of the Northern Territory accepted that mitigating circumstances in such a manner could be taken into account but held that there were no such factors in that case in relation to the prisoners conduct and

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[38] *R v Leach 145 NTR 1 at 15 paragraph [64].*

upheld the trial judges sentence of a 28 year non-parole period, which was 8 years above the standard period.[39]

The second situation, where no non-parole period is to be considered is extensively canvassed in the *Leach* litigation which concluded in the High Court this year. *Leach v the Queen [2007] HCA 3.* Section 19(5) is as follows:

> The Supreme Court may refuse to fix a non-parole period if satisfied the level of culpability in the commission of the offence is so extreme the community interest in retribution, punishment, protection and deterrence can only be met if the offender is imprisoned for the term of his or her natural life without the possibility of release on parole.

The High Court unanimously approved the original decision of the court at first instance being Martin, CJ in *R v Leach 145 NTR 1*. The prisoner was serving life sentences for two murder convictions and one rape conviction. The case concerns the two murder convictions and the application of the new provisions to prisoners convicted of murder before the commencement of the *Sentencing (Crime of Murder) and Parole Reform Act* in February 2004.

The judge at first instance revoked the mandated 25 year non-parole period and refused to set a non-parole period under section 19(5) of the transitional provisions. The only Justice that dissented from this outcome during the appellate process would have imposed a non-parole period of 40 years.[40]

The key word "culpability" in this provision is not new to the criminal law and the sentencing task of the courts. It means moral blameworthiness or simply "blameworthiness".[41]

The power to refuse to fix a non-parole period is reserved for "the most serious" or "worst category" of crimes of murder.[42] In *The Queen v Albury [2004] NTSC 59* the Court revoked a non-parole period of 20 years and refused to set a non-parole period and stated that the court is not empowered to refuse to fix a non-parole period only on the basis that the prisoner is violent and dangerous and would kill again.

> [73] In particular, in respect of the question whether the court should refuse to fix a non-parole period, I emphasise that the court does not have the power to decline to fix a non-parole period solely on the basis that the respondent is a violent and dangerous person who would almost certainly kill again if released.

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[39] *Murdoch v The Queen [2007] NTCCA 1 at [375].*
[40] *R v Leach 145 NTR 1* and *Leach v The Queen [2007] HCA 3* at pages 6, 7.
[41] *R v Leach 145 NTR 1 at 14 paragraph [60].*
[42] *R v Leach 145 NTR 1 at 15 paragraph [63] and at 45.*

The fact that a murder conviction may fall into the worse category does not automatically mean life imprisonment without parole must apply. Nor does the fact that there is a finding that the prisoner's level of culpability is extreme. The prisoner's culpability must be so extreme that the community interest in retribution, punishment, community protection and deterrence 'can "*only*" be met through the imposition of that sentence.[43]

Thus the court has a "discretion"[44] to this extent under s19 (5) – the transitional provisions and 53A (5) of the *Sentencing Act (NT).* I have qualified my use of the word "discretion" because whilst the High Court decision in *Leach* was unanimous Gummow, Hayne, Heydon, Crennan ,JJ said that in relation to the presence of the word "may" in s19(5) that it is not indicative of a discretion to be exercised by the Court but:

> "to confer a power which is to be exercised upon the Court being satisfied of the matters described in the provision."[45]

The culpability or blameworthiness is assessed by "having regard to the circumstances surrounding or causally connected with the crime". That is, it must be assessed when the crime/s were committed. Whilst the community interest is assessed by taking into account relevant matters that have emerged since the original sentence and must be assessed at the time of sentencing or re-sentencing in the case of the transitional provisions.[46] Thus the latter may include the likelihood of re-offending and rehabilitation.[47]

Gleeson, CJ did say that there was a sentencing discretion that does exist within section 53A of the *Sentencing Act (NT)* and the transitional provisions and said variously that it was as not "at large" and was "a patchwork of legislative prescription and judicial discretion".

Significantly, in conclusion to his discussion on this issue he stated that there is no scope for the notion in this legislative scheme that an overriding notion of justice should determine the non-parole period or minimum time to be served in prison.

> The exercise of judicial discretion is constrained by legislative direction. A court cannot ignore the legislative context within which the judicial discretion is left to operate. In particular, a conclusion that, after all necessary or appropriate judicial decisions have been made within the scope of s.19, there remains an ultimate question as to the minimum term of incarceration that justice requires the prisoner to serve, is inconsistent with the legislative scheme.[48]

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[43] *R v Leach 145 NTR 1 at 47 paragraph [222].*
[44] *R v Leach 145 NTR 1 at 13 [53].*
[45] *Leach v the Queen [2007] HCA 3* at 17.
[46] *Ibid at 16 paragraph 67 and at 48 paragraph [231].*
[47] *R v Leach 145 NTR 1 at 9 [28]*
[48] ibid at page 8 paragraph 14.

This statute - the reforms are new and unique. The High Court made it clear that whilst there are similarities with New South Wales legislation "there are differences".[49] As whilst, section 61(1) of the NSW *Crimes (Sentencing Procedure) Act* was in the same terms. That is, that a life sentence is to be imposed if the court is "satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence" this provision in NSW is subject to a discretion to impose a lesser sentence "where the offender's subjective circumstances" so justify in section 21(1) of the NSW Act.[50]

Murder Sentences in NSW

Both Martin, CJ at first instance and Gleeson, CJ in the High Court looked at the comparable law in NSW and so it is instructive to take a look at one of the more recent cases in NSW referred to in the *Leach* litigation and the applicable legislation.

In *R v Merritt*[51] the defendant pleaded guilty to three counts of murder the victims being his own children. The Court of Criminal Appeal in NSW set aside the judge at first instances decision to impose life sentences without parole and imposed a total sentence of imprisonment for 34 years, with a non-parole period of 27 years.[52]

The relevant penalty provision for murder in NSW state:

- that a person is liable for imprisonment for life, which is to be served for the term of the person's natural life - section 19A of the Crimes Act.
- this is subject to the operation of the *Crimes (Sentencing Procedure) Act* which provides in section 61 that if the offenders "culpability is so extreme that the community's interest in any combination of "retribution, punishment, community protection and deterrence" could only be met through the imposition of a life sentence then that must be imposed[53]
- but both provisions were subject to section 21 of the *Crimes (Sentencing Procedure) Act* which provides that a range of subjective factors can be taken into account that may allow the setting of a determinative sentence and a fixed non-parole period. Thus discretion remains to impose a lesser sentence then life despite the mandatory requirement of s61.[54]

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[49] *Leach v the Queen [2007] HCA 3* at 7 per Gleeson, CJ.
[50] *Leach v the Queen [2007] HCA 3 at 7 and also see R v Merritt (2004) 59 NSWLR at 56; R v Merritt [2004] NSWCCA 19*
[51] *R v Merritt [2004] NSWCCA 19*
[52] ibid at [77], [80]
[53] ibid at [42], [52]-[54]
[54] *Leach v the Queen [2007] HCA 3* at 7.

Clearly the NT legislation provides no such discretion to take into account subjective – factors personal to the prisoner which may then lead to a determinant sentence that is a fixed head sentence less than life and a fixed non-parole period.

Whilst it is no doubt true to say as Martin, CJ did at first instance in *Leach* that sections 53A (5) of the Sentencing Act (NT) and s19 (5) of the transitional provisions are similar to s.61 of the NSW *Crimes (Sentencing Procedure) Act* the differences are more then the fact that there is a direction to impose a life sentence without release in NSW and in the NT a limited discretion remains with the court as to whether it should refuse to set a non-parole period.

As in NSW the court retains discretion as mentioned to impose a fixed sentence less than mandatory life imprisonment and also a fixed non-parole period.[55]

The Northern Territory Government intentions

It is therefore fair to say that the possibility of early release though standard non-parole periods are a significant change introduced by the reform legislation. In addition, a measure of tightly defined discretion has been granted to the Court when sentencing an offender for murder to impose a higher or lesser non-parole period than the standard one mandated by the legislation. The ultimate sanction of no non-parole period and therefore no release also remains.

The Attorney General at the time he introduced the Bill stated:

> Since December 2001, the government has conducted extensive research into the laws governing the penalties for murder, manslaughter and dangerous act, to ensure that the Northern Territory laws in these areas are appropriate and operate effectively. This review has resulted in the development of the bill I am introducing today.[56]
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> However, the review considered that a blanket policy of 20 years for review and consideration for release of all murder cases did not go far enough. It did not recognise that many crimes of murder include circumstances of aggravation which must be taken into account.

He further said that this reform Act represented:

> …a significant tightening of the position of the Northern Territory and ensure(s) that an appropriate minimum imprisonment period, or an order of no release, is

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[55] *R v Leach 145 NTR 1 at 13 [51].*

[56] SENTENCING (CRIME OF MURDER) AND PAROLE REFORM BILL (Serial 181) - Presentation and Second Reading Speech - 0/16/2003
Dr TOYNE Minister for Justice and Attorney-General

> available for offenders convicted of more heinous cases of murder. The penalty for murder will, of course, remain at mandatory life sentence in all cases, recognising that murder is the most serious of crimes.[57]

This assertion was based on the view that whilst the old section 164 of the NT Criminal Code stipulated a life sentence with no non-parole period – it was the then Government's policy that a review of each prisoner's sentence was conducted after 20 years imprisonment by the Parole Board. This review may then lead to the grant of executive clemency –that is, release from prison as a result of the Prerogative of Mercy.

> The review was prompted by the consequences of former government's policy of considering release of prisoners sentenced for murder after 20 years. Under that policy, the Parole Board was to review and make recommendations on those cases after 20 years had been served, with a review every three years thereafter.[58]
>
> It is clear that the former government's policy was deficient in a number of other aspects, not least of which being that it did not make any distinction between different cases of murder.

When reviewing the history of sentencing for murder in *R v Leach 145 NTR 1* Martin, CJ said at pp 3, 4

> "In the early 1990s it appears that the Cabinet of the Government adopted a policy that persons serving sentences of life would spend a minimum of 20 years in prison before being considered for release by the Executive. A policy to that effect was mentioned by the Minister for Correctional Services in answer to a question on 20 August 1992. The Minister said:
>
> "It is correct that the Territory has the strongest system in Australia for reviewing the sentences of life–sentenced prisoners. Under principles adopted by Cabinet last year, life-sentenced prisoners will spend a minimum of 20 years in prison in the Northern Territory before being considered for parole. Prisoners not accepted for parole after 20 years will have their sentences reviewed on a three-yearly basis, and recommendations from the Parole Board that life-sentenced prisoners be released will be considered by Cabinet before being passed to the Administrator."
>
> Notwithstanding the reference by the Minister to consideration of releasing prisoners on parole, there was no legislative basis for parole."

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[57] Second Reading Speech introducing the *Sentencing (Crime of Murder) and Parole Reform* Bill.
[58] ibid. See also *R v Leach (BR Martin CJ) 145 NTR 1* at page 4.

To make some sense of the Attorney's statement and the history of sentencing for murder in the Northern Territory to the uninitiated it is useful to look at proceedings of previous conferences of the Criminal Lawyers Association of the Northern Territory.

For example, in 2001 this conference passed a resolution in the following terms:

> "This conference resolve to request the Northern Territory Government to review its position in respect of mandatory life imprisonment for the offence of murder so that it is relatively consistent with the law in the rest of Australia."

A modest and conservative request one would have thought.

I am advised that the resolution was passed unanimously after the presentation of a paper[59] by Richard Coates and Rex Wilde, QC who proposed the motion after concluding that:

> "A minimum non-parole period of 15 to 20 years, with the current power maintained not to fix a non-parole period at all in certain circumstances would be a considerable advance. Alternatively, an assurance that the 20-year review principle would be implemented would be a step in the right direction."[60]

What then is the reality of the Attorney's position quoted above?[61]

In 1999 the then Chief Minister stated:

> "The Northern Territory Criminal Code provides that the punishment for murder is imprisonment for life, which cannot be mitigated or varied under the Code or by any other law. The life sentenced prisoners sentence is reviewed by the Parole Board after the prisoner has served 20 years of imprisonment. The Parole Board then makes a recommendation to the Attorney- General as to the release of the prisoner.[62]

The authors of the abovementioned paper Coates and Wild (at that time the Directors of the NT Legal Aid Commission and Public Prosecutions respectively) comment in reference to this statement by the then Chief Minister that they " know of no specific case where such a review, as specified in the Parliamentary answer, has been conducted."

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[59] A Lifetime For a Life – Mandatory Life Imprisonment for Murder. A Paper (unpublished) presented to the Criminal Lawyers Association of the Northern Territory in June 2001 at Bali by Richard Coates and Rex Wilde.

[60] ibid page 210.

[61] This paper having been presented just before the change of government in August 2001.

[62] NT Legislative Assembly Reports (8th Assembly Parliamentary Record No 20), 24 November 1999 as quoted in Coates and Wild at page 4.

They further comment that except for one prisoner it was unlikely that any other had yet served 20 years to enable such a review to take place.[63]

In any event what then happened to such a review if it did take place under the former government? Again according to the same authors the Chief Minister who was also the Attorney General had this to say in 2000:

> "The CLP Government's position is that life sentences mean life. The ability to plea for mercy is available to murderers after 20 years, but we are unmoved by such requests."[64]

It would appear that no one was ever released under this policy.

Criminal *Code Amendment (Criminal Responsibility Reform) Act 2005*

As I mentioned at the start it is also the intention of the Government to increase the number of persons convicted of the offence of murder.

The changes to mandatory life sentencing must also be seen in the context of the wide ranging changes to the Criminal Code of the Northern Territory which are being implemented through the Criminal *Code Amendment (Criminal Responsibility Reform) Act 2005*[65] which provides for the staged introduction of "the general principles of criminal responsibility in Chapter 2 of the Model Criminal Code.." which have also been enacted by the Commonwealth Parliament and in the Australian Capital Territory.

Relevantly, this will have important impacts upon the law of murder, manslaughter and dangerous act in the Northern Territory Code and consequently significant changes with respect to the number of people charged and convicted of murder in this jurisdiction

The Attorney General said in the Second Reading Speech to the *Sentencing (Crime of Murder) and Parole Reform Bill* that:

> It also became clear during our review that the offence of manslaughter may be operating as a potential escape route for court cases which should be treated as murder cases. Since 1989, there have been 27 murder convictions and 99 manslaughter convictions. In some cases of manslaughter, the facts were quite disturbing, and some appeared markedly similar to cases which had resulted in a murder conviction. The offences of manslaughter and dangerous act are now

[63] Coates and Wild at page 4.
[64] ibid at page 4.
[65] This Act inserting a new PART IIAA – Principles of Criminal Responsibility in the Northern Territory Criminal Code commenced on the 16/20 December 2006.

> being looked at in detail, and I hope to be in a position to be able to report back on this area of criminal law early next year.[66]

The Criminal Code of the Northern Territory which commenced operation in 1984 was and is significantly different to other jurisdictions within Australia especially in relation to the offences of murder, manslaughter and dangerous act and the principles of criminal responsibility that applied to them. The Territory Code does not include notions of reckless murder, and "most categories of involuntary manslaughter". The provision (section 154) dangerous act was in part included because there was no culpable driving offence. As Jenny Blokland stated:

> The need for a crime of "dangerous act" was in part the result of the decision to repeal the statutory offence of culpable driving upon the introduction of the Criminal Code (NT). Further, the common law concept of reckless murder' and most categories of involuntary manslaughter (except where death is foreseen as a possible consequence of the accused's action), were abolished .Without a provision such as s 154, the changes brought about by codification would have meant the law of homicide was deficient. The potential deficiencies were not, however, brought about by the O'Connor decision but rather by codification itself.
>
> The unusual recasting of the law of homicide was not mentioned in the legislative debates concerning the introduction of the Criminal Code (NT), though in the later amendments to the Criminal Code (NT), the unusual nature of the law of homicide in the Northern Territory has been advanced as the reason why s 154 was included.[67]

In relation to the principles of criminal responsibility that apply in the Northern Territory and the unique nature and effect of the dangerous act provision His Honour Justice Mildren stated in *Hofschuster* that:

> Under the Northern Territory's Criminal Code, the offences of murder and manslaughter are not the same as those offences at common law, and have their own peculiarities which are not always easy to understand or explain. The main reason for this is s 154, which establishes a crime unknown to the common law, viz dangerous act. The effect of the provisions of the Code relating to murder, manslaughter and dangerous act, is that in some circumstances, what would amount to murder or manslaughter in other jurisdictions is the crime of dangerous act in this Territory.[68]

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[66] Second Reading Speech by the Attorney General and Minister for Justice introducing the *Sentencing (Crime of Murder) and Parole Reform Bill 2003.*

[67] Blokland, J "Dangerous Acts: A Critical Appraisal of Section 154 of the Northern Territory Criminal Code" 19 Crim LJ 74 at 76.

[68] *Hofschuster 1992 65 A Crim R 167 at 175.*

It should also be noted that dangerous act is/was an alternative verdict to murder and manslaughter.[69]

In light of this situation the Northern Territory Government commissioned Professor Fairall to conduct a review[70] of the homicide and dangerous act provisions of the NT Code. He stated in his report that the offence of dangerous act under section 154 of the Code has had a significant "distorting impact" on the law of homicide in the NT. He further said that:

> "Manslaughter and even murder in other parts of Australia may be disposed of as a dangerous act in the Territory."[71]

This view is apparently based at least partly on the submissions of the DPP in the Northern Territory whose then Director stated:

> " as long ago as 1994 members of the High Court had strong comments to make in respect of Section 31 of the Criminal Code. This section is pivotal …to the operation of the whole of the Code but in particular to any consideration of the offences murder, manslaughter and dangerous act."[72]

Professor Fairall then further said:

> "The effect of section 31 is to drastically limit the operation of the homicide provisions. I agree with Mr. Wild that this aspect of the Code requires urgent attention. There are models available in other jurisdictions, including the Commonwealth *Criminal Code*, which could be adapted, or perhaps the more care-worn but now reasonably well-understood section 23 of the Griffith Code."
>
> "The possible repeal of section 31, whilst central to the present review, is a matter of some complexity, and raises matters at the heart of the fault theory that underlies the Code. Given the considerable judicial and academic criticism of section 31, urgent consideration should be given to reformulating this provision."[73]

Consequently, the government has introduced and the Legislative Assembly has passed changes that now include reckless and negligent manslaughter and recklessly endangering life and serious harm.[74] The offence of dangerous act has been abolished and

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[69] Section 318 of the Northern Territory Criminal Code.
[70] Review of Aspects of the Criminal Code of the Northern Territory. A Report by Professor Fairall Dean of Law, Adelaide University March 2004.
[71] Ibid at page 13.
[72] Ibid at 14.
[73] Ibid at 15.
[74] Department of Justice "Criminal Code Reform Issues Paper" released in 2006 states at page 2 that: "Secondly, the Reform Act also provides for the existing manslaughter and

the murder provisions revised to remove constructive murder but also to narrow the defence of provocation by removing "consideration of the subjective characteristics of the defendant, such as cultural and ethnic traits" to be consistent with the High Court decision of *Stingel* concerning the common law.[75]

Hence the enactment of the Commonwealth or Model Criminal Code in the Northern Territory in the *Criminal Code Amendment (Criminal Responsibility Reform) Act 2005* and associated legislation.

Conclusion

The changes that now provide for the fixing of non-parole periods by the court for the life sentence of murder in the Northern Territory now mean that a measure of proportionality has been brought into the sentencing regime. It should not be forgotten that the sentence of life imprisonment is still mandatory and despite the possibility of earlier release – the sentence remains for the term of a person's natural life.

The much criticised distinctiveness of the Northern Territory Criminal Code in terms of the principles of criminal responsibility is now set to conform in large measure to the rest of Australia with the introduction of the Model Criminal Code.

One of the clear outcomes of this change will be to increase the number of persons convicted of murder and thus add yet another factor, that will further increase the prison population of the Northern Territory.

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dangerous act provisions to be repealed and replaced by reckless and negligent manslaughter offences and by offences of: recklessly endangering life; recklessly endangering serious harm, negligently causing serious harm, and dangerous driving causing death or serious harm." Available at http://www.nt.gov.au/justice/docs/lawmake/P200605029%20_issues_paper_crim_code_reform.pdf

[75] Explanatory Statement, Minister for Justice and Attorney-General - *Criminal Reform Amendment Bill (No2) 2006 Serial No.71. (General Outline)*

Attachment A

53A. Non-parole periods for crime of murder

(1) Subject to this section, where a court ("the sentencing court") sentences an offender to be imprisoned for life for the crime of murder, the court must fix under section 53(1) –

(a) a standard non-parole period of 20 years; or

(b) if any of the circumstances in subsection (3) apply – a non-parole period of 25 years.

(2) The standard non-parole period of 20 years referred to in subsection (1)(a) represents the non-parole period for an offence in the middle of the range of objective seriousness for offences to which the standard non-parole period applies.

(3) The circumstances referred to in subsection (1)(b) are any of the following:

(a) the victim's occupation was police officer, emergency services worker, correctional services officer, judicial officer, health professional, teacher, community worker or other occupation involving the performance of a public function or the provision of a community service and the act or omission that caused the victim's death occurred while the victim was carrying out the duties of his or her occupation or for a reason otherwise connected with his or her occupation;

(b) the act or omission that caused the victim's death was part of a course of conduct by the offender that included conduct, either before or after the victim's death, that would have constituted a sexual offence against the victim;

(c) the victim was under 18 years of age at the time of the act or omission that caused the victim's death;

(d) if the offender is being sentenced for 2 or more convictions for unlawful homicide;

(e) if the offender is being sentenced for one conviction for murder and one or more other unlawful homicides are being taken into account;

(f) at the time the offender was convicted of the offence, the offender had one or more previous convictions for unlawful homicide.

(4) The sentencing court may fix a non-parole period that is longer than a non-parole period referred to in subsection (1)(a) or (b) if satisfied that, because of any objective or subjective factors affecting the relative seriousness of the offence, a longer non-parole period is warranted.

(5) The sentencing court may refuse to fix a non-parole period if satisfied the level of culpability in the commission of the offence is so extreme the community interest in retribution, punishment, protection and deterrence can only be met if the offender is imprisoned for the term of his or her natural life without the possibility of release on parole.

(6) The sentencing court may fix a non-parole period that is shorter than the standard non-parole period of 20 years referred to in subsection (1)(a) if satisfied there are exceptional circumstances that justify fixing a shorter non-parole period.

(7) For there to be exceptional circumstances sufficient to justify fixing a shorter non-parole period under subsection (6), the sentencing court must be satisfied of the following matters and must not have regard to any other matters:

(a) the offender is –

(i) otherwise a person of good character; and

(ii) unlikely to re-offend;

(b) the victim's conduct, or conduct and condition, substantially mitigate the conduct of the offender.

(8) In considering whether the offender is unlikely to re-offend, the matters the sentencing court may have regard to include the following:

(a) whether the offender has a significant record of previous convictions;

(b) any expressions of remorse by the offender;

(c) any other matters referred to in section 5(2) that are relevant.

(9) The sentencing court must give reasons for fixing, or refusing to fix, a non-parole period and must identify in those reasons each of the factors it took into account in making that decision.

(10) The failure of the sentencing court to comply with this section when fixing, or refusing to fix, a non-parole period does not invalidate the sentence imposed on the offender.

(11) This section applies only in relation to an offence committed –

(a) after the commencement of the *Sentencing (Crime of Murder) and Parole Reform Act 2003*; or

(b) before the commencement of that Act if, at that commencement, the offender has not been sentenced for the offence.

(12) In subsection (3) –

"unlawful homicide" means the crime of murder or manslaughter.