SUBMISSION TO THE NSW SENTENCING COUNCIL

HOMICIDE Consultation Paper

by University of Newcastle Legal Centre

Question 6.3: Mandatory Life Imprisonment

(1) Should a sentence of mandatory life imprisonment apply to any other categories of murder? If yes, which ones?

1. *INTRODUCTION*

The imposition of a life sentence has been reserved for those circumstances in which the level of culpability 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 is enlivened when an individual is convicted under s 19A of the *Crimes Act 1900* in which a 'A person sentenced to imprisonment for life for the crime of murder is to serve that sentence for the term of the person's natural life.'[1] Pursuant to s 61(3) of the *Crimes (Sentencing Procedure) Act 1999* the court, under s 21 of the same Act, does have the ability to impose a sentence of imprisonment for a specified term, though this must be balanced against the level of culpability of the offender in the commission of the offence. The only truly mandatory life sentence is pursuant to s 19B of the *Crimes Act 1900* whereby a police officer has been murdered in the execution of his or her duty. Unlike a conviction under s 19A, if convicted under s 19B, s 21 of the *Crimes (Sentencing Procedure) Act 1999* (or any other provision) cannot be utilised to authorise a court to impose a lesser or alternative sentence.

We contend that the position that should be taken is not to impose a mandatory sentence of life imprisonment for those convicted of any murder. Rather, the process which is currently in place for those convicted under s 19A should be followed, with more robust guidance given to the judiciary regarding the factors that should be considered when determining if an individual should serve a sentence for the term of their natural life and whether or a non-parole period should be affixed.[2]

2. *RESPONSE TO QUESTION 6.3 POSED BY THE NSW SENTENCING COUNCIL*

We submit that there is no need to expand the categories of murder under which a sentence of life imprisonment should be fixed as mandatory in legislation. The progressive trend towards mandatory sentences for murder stifles the court's ability to impose a sentence that proportionately reflects the gravity of the crime and subjective circumstances of the convicted individual. Concern at the court's inability to diverge from the legislative 'shackles' in this regard and impose an alternative sentence, has been raised by the judiciary on a

[1] *Crimes Act 1900* (NSW) s 19A (2).

[2] See response to Question 6.4 below.

number of previous occasions. This is illustrated in *R v Ngo*[3] where Phuong Cahn Ngo ('Ngo') was convicted for the murder of the late John Newman MP. On sentence the trial Judge, Justice Dunford, stated that he was satisfied that Ngo was unlikely to re-offend and went on to make the following comment regarding the restraints placed on him by the current New South Wales sentencing laws:

> *Where a life sentence is imposed, the Court has no power to set a non-parole period and although I am satisfied that the prisoner should remain under sentence for the remainder of his life, nevertheless this is not a case where I believe he necessarily needs to be kept in custody for the whole of that time, and if I had the power to do so, I would fix a non-parole period, but it would be a very long one.*[4]

His Honour went on to make reference to (and support) the earlier comments of Wood CJ at CL in *R v Harris*[5] where his Honour invited the NSW Parliament to usefully consider whether the court should have power to fix a non-parole period in cases to which s 61(1) *Crimes (Sentencing Procedure) Act 1999* applies.

Ngo's case itself provides further justification for the author's opposition to extending the categories of murder to which a mandatory life sentence should apply. The killing of the late John Newman MP was (and still is) widely recognised as the first case of a politically motivated assassination in Australia. It was this finding of fact that convinced Dunford J that the level of culpability in the commission of the offence was so extreme that *"the community interest in retribution, punishment, community protection and deterrence"*[6] can only be met through the imposition of a sentence in terms of s 61(1). Accordingly, the legislative framework already allows the judiciary the flexible discretion to create any further "categories" of murder that in future should attract a life sentence, and the circumstances which warrant the imposition of such a penalty without the need for legislative prescription.

It is acknowledged that even if the s 61(1) criteria are met, a court can under s 21, having considered the offender's subjective circumstances, impose a lesser sentence than one of life imprisonment.[7] However at present, the only legislative based indicia available for determining this is for the court to consider whether the level of culpability in the commission of the offence is so extreme to warrant imprisonment for life, weighed against the community interests of retribution, punishment, community protection and deterrence. For example, in *R v Ngo*,[8] Dunford J, in imposing a life sentence under s 61(1), and after considering Ngo's subjective circumstances, ruled that he was satisfied that *"the level of culpability in the commission of the offence [was] so extreme that the subjective features must be disregarded …"*[9]

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[3] *R v Ngo* [2001] NSWSC 1021.
[4] *R v Ngo* [2001] NSWSC 1021, 43.
[5] *R v Harris* (2000) 111 A Crim R 415.
[6] *R v Ngo* [2001] NSWSC 1021, 26-27.
[7] *R v Merritt* (2004) 59 NSWLR 557.
[8] *R v Ngo* [2001] NSWSC 1021.
[9] *R v Ngo* [2001] NSWSC 1021, 42.

One of the fundamental principles underpinning the operation of the law is a consistent and fair sentencing practice. For the judicial process, this means that like cases are treated alike, and different cases are treated differently.[10] To create more 'categories' of murder that attract a mandatory life sentence, there exists no scope for such cases to be determined on the merits of the subjective factors of the particular offence and offender. This is in complete opposition to the approach supported by the abovementioned common law principle. This is more pronounced in cases of murder, 'more so than any other crime'[11] given the differentiation between the severity of an offence (which encompasses both contract and mercy killings),[12] and character of an offender. Thus, any removal of judicial discretion in sentencing, particularly considering the broad spectrum of offending that can constitute murder, is a clear departure from this principle.[13]

3. *RECOMMENDATION*

Overall, we submit that rather than identifying further categories of offences that would attract a mandatory life sentence, a more meaningful and valuable contribution from the legislature would be to provide the courts guidance on the specific factors to be taken into consideration on the imposition of a possible natural life sentence or to support the creation of judicial guideline judgment in this regard. At present, the question of culpability appears to disproportionately dominate the pool of relevant factors and while undoubtedly an important factor, it should not be the only or primary consideration taken into account. This legislative guidance could take a form similar to s 21A of the *Crimes (Sentencing Procedure) Act 1999* where both aggravating and mitigating circumstances are identified to assist the court to arrive at the most appropriate sentence outcome in the circumstances. We submit that if in any given case strong subjective circumstances are present, it needs to be made clearer to the judiciary that in such cases, they should think very carefully before imposing a life sentence without the possibility of parole. Further, we are of a view that the absence of any one or more of the indicia of retribution, punishment, community protection or deterrence should make it more difficult for the sentencing judge to reach a conclusion that a life sentence is required.[14]

4. *CONCLUSION*

The sentence of life imprisonment, both a 'maximum' and 'mandatory' sentence for murder, under ss 19A and 19B respectively, is a denunciation through the court expressing the public's

[10] John L Anderson, 'The Label of Life Imprisonment in Australia: A Principled or Populist Approach to An Ultimate Sentence', (2012) *UNSW Law Journal* 35(3) 747, 756.
[11] Alex Bailin, 'The Inhumanity of Mandatory Sentences' [2002] Criminal Law Review 641, 641 citing *Reyes v The Queen* [2002] 2 AC 235 (Lord Bingham).
[12] John L Anderson, 'The Label of Life Imprisonment in Australia: A Principled or Populist Approach to An Ultimate Sentence', (2012) *UNSW Law Journal* 35(3) 747, 756.
[13] John L Anderson, 'The Label of Life Imprisonment in Australia: A Principled or Populist Approach to An Ultimate Sentence', (2012) *UNSW Law Journal* 35(3) 747, 756; Nicholas Cowdery, 'Mandatory Life Sentences in New South Wales' (1999) 22 *University of New South Wales Law Journal* 290, 290–2
[14] *R v Merritt* (2004) 59 NSWLR 557.

disapproval and condemnation of such serious offending.[15] However, the 'court of public opinion' should not be the determinant of a sentence. The imposition of a life sentence should continue to be reserved for the most serious instances of murder, where there is an extreme level of culpability. Further, life imprisonment for 'the term of one's natural life' should never operate as a mandatory sentence as it stifles one of fundamental functions of the court – the ability to assess a case and impose a sentence that proportionately reflects the gravity of the crime and subjective circumstances of the convicted individual to ensure individual justice.

Question 6.4: Discretionary life imprisonment with a non-parole period

Should it be possible (without removing the possibility of a life sentence without parole) to impose a life sentence with a non-parole period? Why or why not?

The state of New South Wales ('NSW') stands alone in Australian jurisdictions in not providing the option for judicial officers to fix a non-parole period to a sentence of life imprisonment imposed for the crime of murder. We submit that the NSW government should amend the *Crimes Act 1900* and the *Crimes (Sentencing Procedure) Act 1999* to allow the possibility to impose a life sentence with a non-parole period. Essentially such an approach to sentencing for murder will better align with contemporary sentencing goals and principles, including affording all convicted murderers the opportunity for rehabilitation and eventual re-integration back into the community through a robust parole system, proportionality, and recognition of important universal human rights.

We will turn to address why we have made our primary submission to allow the possibility to impose a life sentence with a non-parole period for murder in the following submissions grouped under six headings: 1. General Background to the sentence of life imprisonment and current sentencing practice for murder in NSW 2. Proportionality and parity in sentencing 3. The 'Right to Hope' 4. The Rate of Recidivism 5. The Robust Nature of Parole, and 6. New South Wales and Victoria compared. We will then sum up in a short conclusion.

1. *General Background to the sentence of life imprisonment and current sentencing practice for murder in NSW*

The sentence of life imprisonment has largely been used as a mandatory or maximum sentence for murder since the abolition of forms of capital punishment in Australia and is perceived as a suitable denunciatory alternative in this regard.[16] In essence the life sentence where it means for the term of a prisoner's natural life without the opportunity for release to parole is tantamount to a death sentence as a prisoner so sentenced will never again have their liberty restored and they will eventually die while incarcerated.[17]

[15] John L Anderson, 'The Label of Life Imprisonment in Australia: A Principled or Populist Approach to An Ultimate Sentence', (2012) *UNSW Law Journal* 35(3) 747, 767.

[16] John L Anderson, 'Recidivism of paroled murderers as a factor in the utility of life imprisonment' (2019) 31(2), *Current Issues in Criminal Justice*, 255.

[17] A recent example in NSW is the death of Ivan Milat from natural causes while serving concurrent sentences of life imprisonment for multiple murder convictions.

The High Court in *The Queen v Kilic*[18] clarified the need to understand that when sentencing an offender the crime and the criminal are interwoven but should be viewed as distinct and unconnected when deciding the ultimate sentence.[19] The differentiation must be made in order to formulate an appropriate sentence taking account of all the relevant sentencing factors and purposes of sentencing, including an individual's prospects for rehabilitation and ensuring an opportunity is afforded for achieving this potential for rehabilitation.

In *R v Harris*[20] the NSW Court of Criminal Appeal (CCA) recognised the negative impact of a life sentence on a prisoner and placed particular attention on a Court's inability to predict the future dangerousness of the individual at the time of sentencing.[21] The Court also stated that the imposition of an indeterminate life sentence negates the ability of a prisoner to demonstrate the positive effects of the prison term and any rehabilitation undertaken while in custody that would, in other circumstances, affect their release.[22] Furthermore, in *R v Harris* Wood CJ at CL notes the impact of a life sentence on a young person in contrast to an older prisoner; with the younger offender faced with a longer, sometimes substantially longer, period in custody.[23] The CCA was signalling that the option to affix a non-parole period to a life sentence would be an appropriate option for the legislature to provide for a sentencing judge.

The controversial murder of the state politician John Newman in 1994 and the eventual conviction of his political rival Phuong Ngo in 2001, directly raised the issue that the Court in NSW did not have the power to set a non-parole period after imposing a life sentence. Dunford J in his sentencing judgment highlighted this point and went one step further and indicated that if he had had the ability to affix a non-parole period to the life sentence imposed on Phuong Ngo, he would have used this discretion to do so.[24] His Honour also affirmed the comments of Wood CJ at CL in *R v Harris* that 'the Parliament might usefully give consideration to whether the Court should have the power to fix a non-parole period in cases to which s 61(1) applies'.[25] In summary, there has been much judicial discussion on the relevance and necessity of having the option to fix a non-parole period after imposing a life sentence for murder in NSW, which leads into a consideration of proportionality in sentencing.

2. *Proportionality and Parity*

The disproportion between sentences of life imprisonment becomes apparent when considering the variable factor of age at the time the sentence is imposed.[26] Anderson highlights this disproportionate approach to sentencing by emphasising the unreasonable

[18] *The Queen v Killic* (2016) 259 CLR 256,
[19] Ibid, [19]-[20].
[20] *R v Harris* (2000) 50 NSWLR 409.
[21] Ibid, [124]-[126].
[22] Ibid.
[23] Ibid.
[24] *R v Phuong Cahn Ngo* (No 3) [2001] NSWSC 1021 [43].
[25] Ibid.
[26] John L Anderson, 'Recidivism of paroled murderers as a factor in the utility of life imprisonment', (2019) *Current Issues in Criminal Justice* 31(2) 255, 255.

practical outcome of a life sentence whereby the age of the offender is inextricably linked to the inequity produced.[27] It is unrealistic to propose that the future can be predicted without error and the current legislative structure does not account for 'the diverse circumstances which may arise in 20 years, let alone 50 [years]'.[28]

First, we submit that parity and proportionality in sentencing would be safeguarded when judges hold judicial discretion as to whether a life sentence should be set and if so, whether a non-parole should then be affixed having regard to all the circumstances of the case. Thus there is discretion to carefully weigh and compare the aggravating and mitigating factors subject to the individual offender,[29] notably in setting the length of a non-parole period consistently with the primary sentencing principle of proportionality.

Second, parity between sentences ensures that 'like cases be treated alike' and that there is a 'differential treatment of persons according to differences between them', ultimately the non-parole period provides the opportunity to enable 'different sentences to be imposed upon like offenders to reflect different degrees of culpability and/or different circumstances'.[30]

The non-parole period therefore has the tripartite capacity to act as a beacon of hope for release which in turn fosters the offender's rehabilitation;[31] to ensure parity and proportionality between sentencing murder cases which cross the s 61(1)[32] threshold and to create a more equitable justice system overall.

3. *The 'Right to Hope'*

In a broader and international context, the *International Covenant on Civil and Political Rights* (ICCPR, to which Australia is a signatory, at Article 10(1) states that 'All deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person', and Article 10(3) states that the fundamental objective of the prison system is the 'reformation and social rehabilitation of prisoners'. The interpretation of Article 10 in relevant jurisprudence is that prisoners, even those incarcerated for serious crimes, should have the prospect to be rehabilitated so that they can be re-integrated back into society.[33] The existence of indeterminate life sentences do not encourage prisoners to reform or rehabilitate themselves as there is no real prospect of release. The primary purpose of parole is to offer the prisoner an encouragement to rehabilitate and take up appropriate

[27] Ibid, 255-256.
[28] George Zdenkowski, 'Why Life that Means Life is as Bad as Death', *Sydney Morning Herald* (Sydney), 10 October 1989, 13.
[29] Penal Reform International & University Of Nottingham UK*, Life Imprisonment: A* Policy Briefing (April 2018) 14, 5.
[30] *Green v The Queen* [2011] HCA 49, 28.
[31] NSW Parliament Library Research Service, NSW Parliament, *Parole: an overview* (Briefing Paper No 20/99, November 1999), 2.
[32] John L Anderson, 'Indefinite, Inhumane, Inequitable' - The Principle of Equal Application of the Law and the Natural Life Sentence for Murder: A Reform Agenda (2006), *UNSW Law Journa*l, 29(3) 139, 165.
[33] Penal Reform International & University of Nottingham UK*, Life Imprisonment: A Policy Briefing* (April 2018)

opportunities by providing hope of an early release.[34] The European Court of Human Rights has repeatedly emphasised that a 'right to hope' is necessary facet of humanity.[35]

This 'right to hope' does not mean that every person convicted of murder falling within the most serious examples of this crime would ultimately be released to parole. It is just 'a right to hope' and no more, so that if a terrible murder has been committed and a sentence of life imprisonment imposed with a non-parole period, it is possible that the offender will not demonstrate sufficient progress to rehabilitation in custody to justify his or her release to parole.[36] This may be the case for the term of the offender's natural life or it may not be. Even with the 'right to hope' there will still be various and rigorous checks and balances to address any community fear that a murderer will not be rehabilitated and will murder again upon release to parole.

4. *The Rate of Recidivism*

With that potential fear in mind, it is clear that there may well be a perception in the general community regarding a prisoner convicted of a crime, particularly murder, that they will offend again and in a similar way. Contrary to that perception, recidivism statistics in Australia, as well as globally, highlight that in the majority of cases the possibility of a violent offender reoffending is surprisingly low. The analysis of this data does not remove the notion that a small proportion of convicted murderers will pose a significant risk of future dangerousness.[37] This is evident in the conviction of Adrian Bayley for the brutal rape and murder of Jill Meagher in Victoria.[38] Also, in NSW John Walsh was convicted of murdering an inmate while serving two life sentences for the murders of his two grandchildren and is an example that homologous murder can occur.[39] However, at the same time it is clear that the overwhelming majority of convicted murderers do not kill again if released to parole and rarely offend again in any serious or violent way. The low recidivism rate for convicted murderers in Australia and internationally provides significant evidence that should effectively counter the community perception that violent offenders and particularly murderers will reoffend upon release. The analysis of the available recidivism data further highlights that a judge should have an option to impose a life sentence with a non-parole period with the aim of rehabilitating the prisoner for their eventual safe release back into the community. A project is currently under way at the University of Newcastle to test the recidivism hypothesis gleaned from the available data in the specific context of NSW by reference to those of the 237 life sentence prisoners who had their life sentences re-determined by the Supreme Court in the 1990s and have subsequently been released to parole.

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[34] NSW Parliament Library Research Service, NSW Parliament, *Parole: An Overview* (Briefing Paper No 20/99, November 1999) 2.

[35] Penal Reform International & University of Nottingham UK*, Life Imprisonment: A Policy Briefing* (April 2018)

[36] NSW Parliament Library Research Service, NSW Parliament, *Parole: An Overview* (Briefing Paper No 20/99, November 1999) 6.

[37]John L Anderson, 'Recidivism of paroled murderers as a factor in the utility of life imprisonment' (2019) 31(2) *Current Issues in Criminal Justice* 255, 257.

[38] *R v Bayley* [2013] VSC 313.

[39] R v Walsh (2018) NSWSC 1299.

5. *The Robust Nature of Parole*

The NSW State Parole Authority operates as a separate statutory authority and is responsible for administering and determining parole applications. The central objective of the Authority is to provide the offender an incentive for rehabilitation through the hope of an early release.[40] The High Court articulated in *R v Shrestha,* '[N]otwithstanding that a sentence of imprisonment is the appropriate punishment for the particular offence in all the circumstances of a case, considerations of mitigation or rehabilitation may make it unnecessary, or even undesirable, that the whole of that sentence should actually be served in custody'.

The Parole Authority consists of at least 16 members who are responsible for making parole determinations, these include: 4 judicial officers, 2 official members (1 police officer, 1 Probation and Parole Service member) and 10 community members.[41] The decision to grant parole is determined by a panel, drawn from the members of the Parole Authority, of five members consisting of one judicial officer, two official members and two community members.[42] Accordingly, there is a significant cross-section of the community represented with a judicial officer as the chair and guiding hand.

The Parole Authority must not make an order directing the release of a prisoner to parole unless convinced that 'it is in the interests of the safety of the community'.[43] The consideration of community safety ultimately involves a determination based upon the safety of individual members of the community and the risk of the prisoner reoffending.[44] The balancing of the rehabilitation of the prisoner and the paramount duty to protect the community is the crucial test when making a determination of parole. The State Parole Authority has a rigorous structure with a broad representation of the wider community included in the parole determinations. The presence of a judicial member in the determination of parole adds weight to the legitimacy of the decisions, due to their lengthy experience and deep understanding of criminal offending and sentencing.

The robust nature of how parole is determined needs to be considered when assessing the suitability of whether there should be an option to fix a non-parole period to a life sentence. A judge at the time of sentencing does not have all the material to understand whether the offender will offend again and the effect any time in a correctional facility and participation in relevant rehabilitation programs, work/study release or other opportunities will have on a prisoner and their suitability for release back into the community. We submit that this important decision-making task should be left to the State Parole Authority to determine when all relevant information is available at the expiration of a proportionate non-parole period fixed by a judicial officer at the time of sentencing.

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[40] NSW Parliament Library Research Service, NSW Parliament, *Parole: An Overview* (Briefing Paper No 20/99, November 1999) 2.

[41] *Crimes (Administration of Sentences) Act* 1999 (NSW) s 183.

[42] State Parole Authority, *Membership*, (Web Page) <http://www.paroleauthority.nsw.gov.au/Pages/about-us/membership/membership.aspx>.

[43] *Crimes (Administration of Sentences) Act* 1999 (NSW) s 135(1).

[44] *Crimes (Administration of Sentences) Act* 1999 (NSW) s 135(2).

A modern and liberal approach to sentencing is underpinned by community members maintaining the confidence that human beings have the capability to be rehabilitated and ultimately re-integrated back into the community from which they came. In the case where a particularly heinous murder has been committed, it is possible, if the offender does not progress towards rehabilitation during their extensive time in a correctional facility, that they would never be considered to be suitable or safe to release by the State Parole Authority.

6. *New South Wales and Victoria compared.*

The following table[45] compares the NSW and Victorian penalties for murder, meanings of life imprisonment and release mechanisms available to those who have been sentenced to life imprisonment in each of these neighbouring states with similar size and heterogeneous populations.

Table 1: Penalties for murder in NSW and Victoria

Jurisdiction	Penalty for murder maximum or mandatory	Essential meaning of the sentence of life imprisonment	Release mechanisms for prisoners sentenced to life imprisonment
New South Wales	Life imprisonment Maximum: *Crimes Act 1900* (NSW) s 19A. Mandatory (for murder of police officers): *Crimes Act 1900* (NSW) s 19B. Mandatory (extreme level of culpability criteria): *Crimes (Sentencing Procedure) Act 1999* (NSW) s 61(1).	For the term of the person's natural life: *Crimes Act 1900* (NSW) s 19A(2). No discretion to fix a non- parole period ('NPP').	No prospect of release on parole. Otherwise release by exercise of the prerogative of mercy preserved: *Crimes (Sentencing Procedure) Act* (NSW) s 102.
Victoria	Life imprisonment (Level 1) Maximum: *Crimes Act 1958* (Vic) s 3(a).	For the term of the person's natural life: *Sentencing Act 1991* (Vic) s 109. Court must fix a determinate NPP unless considered inappropriate because of 'the nature of the offence or the past history of the offender': *Sentencing Act 1991* (Vic) s 11(1).	If court declines to fix NPP then release can only ultimately be by executive exercise of the prerogative of mercy: preserved by *Sentencing Act 1991* (Vic) ss 106–7. Where NPP fixed, after expiration of NPP offender is considered for release on parole by Adult Parole Board: *Corrections Act 1986* (Vic) s 74.

[45] John L Anderson, 'The Label of Life Imprisonment in Australia: A Principled or Populist Approach To An Ultimate Sentence', (2012) *UNSW Law Journal* 35(3) 747, 751

The stark difference between the meaning of a sentence of life imprisonment in the neighbouring states of NSW and Victoria highlights the inequity inherent in the former's criminal sentencing system for murder. In NSW there is no room for judicial discretion. A person sentenced to imprisonment for life for the crime of murder is to serve that sentence for the term of the person's natural life.[46] However, Victorian courts must fix a non-parole period when sentencing an offender to imprisonment for the term of their natural life, and a discretionary power exists by which an offender may be sentenced to life in prison without the possibility of parole if their criminal history or the nature of the present offence make a non-parole period inappropriate.[47]

An important aim of sentencing expressed in both the *Crimes (Sentencing Procedure) Act 1999* (NSW) and the *Sentencing Act 1991* (Vic) is to promote or facilitate the rehabilitation of the offender[48] and yet a life sentence without the possibility of parole, as is the sentencing procedure in NSW, is irreconcilable with the notion of rehabilitation.[49]

Case comparisons between the two states also highlight the inequity in the failure of NSW to provide for affixing a non-parole period to a sentence of life imprisonment. Adrian Bayley[50] is a notorious example. Bayley was convicted of the brutal rape and murder of Jill Meagher while he was on parole after serving a lengthy period of imprisonment for several rape convictions. The Victorian Court of Appeal observed that Bayley acknowledged that his prior criminal record revealed 'a shocking history of gratuitous violence inflicted upon vulnerable women'.[51] Although sentenced to life imprisonment for murder, Bayley was given a non-parole period of 35 years so that there is still potential for him ultimately to be released to parole albeit at an advanced age. In *DPP v Gargasoulas*,[52] the offender was charged with the murder of six people and reckless conduct endangering the lives of 27 others in the Melbourne CBD. Despite the shocking nature of the incident Weinberg JA in the Victorian Supreme Court did not exercise his discretionary power to sentence the offender to life imprisonment without parole. Instead, the offender was sentenced to life imprisonment with a very lengthy 46-year non-parole period, one of the longest non-parole periods fixed in Australian history. These cases when compared to several NSW cases where life sentences have been imposed for murders that may not necessarily be regarded at the same level of objective seriousness, such as Phuong Ngo[53], Daniel Holdom[54] and Vincent Stanford[55] encapsulates the more humane and proportionate effect of the legislative scheme for sentencing for murder in Victoria when compared to NSW, which is far too restrictive in not allowing judicial discretion to affix a non-parole period to a life sentence.

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[46] *Crimes Act 1900* (NSW) s 19A(2).
[47] *Sentencing Act 1991* (Vic) s 11(1).
[48] See *Crimes (Sentencing Procedure) Act 1999* (NSW) s3A(d) and *Sentencing Act 1991* (Vic) 1d(ii).
[49] See *Graham v Florida*,130 S. Ct 2011, 2032 (2010); Rachel Simpson, 'Parole: An Overview'(Briefing Paper 20/99, NSW Parliamentary Research Service, 1999).
[50] *R v Bayley* [2013] VSC 313; and *Bayley v R* [2013] VSCA 295.
[51] *Bayley v R* [2013] VSCA 295, [28].
[52] *DPP v Gargasoulas* [2019] VSC 87.
[53] *R v Phoung Cahn Ngo (No 3)* [2001] NSWSC 1021; *Ngo v R* [2013] NSWCCA 142.
[54] *R v Holdom* [2018] NSWSC 1677.
[55] *R v Stanford* [2016] NSWSC 1434.

7. *Conclusion*

Overall, we submit that NSW has a responsibility to introduce a discretionary judicial power by which offenders can be sentenced to life imprisonment with a determinate non-parole period. The NSW Law Reform Commission ('NSWLRC') recommended as far back as 1996 that the court, when imposing a life sentence, should have the discretion to determine the sentence with a minimum term at the end of which the offender will be eligible for release on parole.[56] This recommendation was reaffirmed by the NSWLRC in 2013 in a subsequent report addressing various aspects of sentencing in NSW.[57]

The notion of rehabilitation, an important aim of sentencing in NSW, is incompatible with a sentence of life imprisonment without the possibility of parole. The European Court of Human Rights, as well as the *International Covenant on Civil and Political Rights*, emphasise that the right to hope and human dignity are irrefutable rights and therefore extend to the incarcerated population, yet a natural life sentence is inherently undignified and leaves no room for hope. The primary sentencing principle of proportionality, the robust nature of parole coupled with the low rates of recidivism, should be carefully considered with these human rights in determining whether there should be a possibility of imposing a life sentence for murder with a non-parole period in the contemporary NSW sentencing landscape. A properly informed community without the misinformed influence of the rhetoric of populist punitiveness in the political process would accept the arguments favouring such an approach.

Question 6.5: Mandatory life imprisonment with a non-parole period

Should there be a mandatory sentence of life imprisonment for murder with a minimum non-parole period? Why or why not?

In the NSW context, a mandatory sentence of life imprisonment is starkly juxtaposed to the purposes of sentencing[58], namely, it is an 'extreme for[m] of retribution and incapacitation'[59] which is in absolute conflict with the entrenched requirements for proportionality and parity in sentencing.[60] We submit that NSW should abolish s 61(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and confirm the 'natural' life sentence of imprisonment as the maximum sentence for murder under s 19A *Crimes Act 1900* (NSW), which is not mandatory in any circumstances. Sentencing judges could determine the circumstances when a natural life sentence is to be imposed by reference to the extant common law sentencing jurisprudence and/or the establishment of a judicial guideline judgment detailing the relevant factors for consideration in imposing the maximum sentence for murder. This amendment would be further supported by the implementation of a *standard* non-parole period when a

[56] New South Wales Law Reform Commission, *Sentencing* Report No 79 (1996), [9.2] – [9.6], Recommendation 47.
[57] New South Wales Law Reform Commission, *Sentencing* Report No 139 (2013), [8.33] – [8.37], Recommendation 8.1.
[58] Crimes *(Sentencing Procedure) Act 1999* (NSW) s3A.
[59] John L Anderson, 'The Label of Life Imprisonment in Australia: A Principled or Populist Approach To An Ultimate Sentence', (2012) *UNSW Law Journal* 35(3) 747, 769.
[60] Ibid.

natural life sentence is imposed, as opposed to a *minimum* non-parole period, to promote an equitable approach which aligns with the purposes of sentencing.[61]

1. *Truth in Sentencing*

In the late 1980s and early 1990s the 'truth in sentencing reforms'[62] underpinned by a conservative political climate in NSW reformed the meaning of "life imprisonment". It is arguable that this climate, distinguished by the heinous murders of Janine Balding and Anita Cobby which became ingrained into the public psyche through concentrated media attention, was the incentive that led to the "natural" life sentence without the possibility of parole.[63] This extreme response to sentencing for murder presents a 'tough on crime' approach which is said to meet the perceived interests of the community in addressing particularly violent or 'worst case' murders.[64] The "natural" life sentence without the prospect of parole has thus been argued as '[s]tate-authorised vengeance…'[65], the 'most severe sanction at the disposal of the State'[66] and ultimately the 'inauspicious legacy from the abolition of the death penalty for murder.'[67] Life imprisonment in the context of NSW sentencing laws therefore acts as the substitute to capital punishment by means of its severity which derives its reasoning in the form of ultimate incapacitation and extreme retribution for the community.[68]

This background contradicts the notion that the offender and the criminal act, although interrelated, are ultimately distinct which highlights the importance of factoring in subjective features of the offender and the need for carefully considering them in reaching a proportionate sentencing outcome.[69] Under the present legislative scheme for sentencing for murder in NSW, once the threshold is crossed under s 61(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) the sentencing judge loses their discretion in sentencing offenders, which in turn highlights the juxtaposed nature of s 21 (the general power to reduce penalties) of the same Act. The subjective factors of the offender and prospects of rehabilitation are therefore entirely removed in order to make room for the disproportionate weight placed upon retribution and deterrence.[70]

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[61] Crimes *(Sentencing Procedure) Act 1999* (NSW) s3A.

[62] David Brown, *State of imprisonment: Prisoners of NSW politics and perceptions* (21 April 2015) The Conversation <http://theconversation.com/state-of-imprisonment-prisoners-of-nsw-politics-and-perceptions-38985>.

[63] John L Anderson, 'The Label of Life Imprisonment in Australia: A Principled or Populist Approach To An Ultimate Sentence', (2012) *UNSW Law Journal* 35(3) 747, 770.

[64] Ibid, 772.

[65] George Zdenkowski, 'Why Life that Means Life is as Bad as Death', *Sydney Morning Herald* (Sydney), 10 October 1989, 13.

[66] Dirk van Zyl Smit, *Taking Life Imprisonment Seriously in National and International Law* (Kluwer Law International, 2000) 1.

[67] John L Anderson, 'The Label of Life Imprisonment in Australia: A Principled or Populist Approach To An Ultimate Sentence', (2012) *UNSW Law Journal* 35(3) 747, 777.

[68] Ibid, 773.

[69] *The Queen v Kilic* (2016) 259 CLR 256, [19]-[20].

[70] John L Anderson, 'Indefinite, Inhumane, Inequitable' - The Principle of Equal Application of the Law and the Natural Life Sentence for Murder: A Reform Agenda (2006), *UNSW Law Journa*l, 29(3) 139, 141.

2. *Violation of Human Rights and Dignity*

Bronson Blessington and Matthew Elliot's joint communication to the United Nations Human Rights Committee ('HR Committee') in 2010 served to put the successive legislative changes to sentencing for murder in NSW under the spotlight. In 1990, Blessington and Elliot were tried in the NSW Supreme Court as adults and sentenced to life imprisonment with a judicial recommendation that they 'never be released' for their role in the 1988 rape and murder of Janine Balding, which occurred when they were aged 14 and 16 years respectively.

The *International Covenant on Civil and Political Rights* ('ICCPR'), which Australia has ratified, states that reformation and social rehabilitation of prisoners lies at the heart of the penitentiary system. Additionally, the ICCPR states that all prisoners, having been deprived of their liberty shall be treated with humanity and with respect for the "inherent dignity of the human person" and that no one shall be subjected "to torture or to cruel, inhuman or degrading treatment or punishment."[71] We submit that a sentence of life imprisonment without the possibility of parole is undignified and a form of torturous punishment; a sentence couched in revenge which has no place in the modern penal system.[72]

3. *Incentive for Rehabilitation*

One of the central tenants of sentencing is to promote the rehabilitation of the offender.[73] In cases of murder, once the 'level of culpability' is deemed 'so extreme' not only is the discretion of the judge to set a minimum non-parole period revoked, so too is the balancing act that is required in the exercise of sentencing.[74] Once a 'natural' life sentence has been imposed on the offender the balance between retribution for the community and the assurance that the offender has been adequately punished for their crime overrides any prospects they may have for rehabilitation.[75]

The length of any non-parole period reflects the level of the deviant behaviour to be adequately punished in the form of retribution and incapacitation but at the same time encourages offenders to reflect on their actions and heightens the incentive to engage in forms of rehabilitation leading to positive reformation. The non-parole period acts as a 'review mechanism' not an automatic gateway to the community and thus if the offender does become eligible for parole, it does not mean that it is automatically granted by the State Parole Authority.

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[71] United Nations, International Covenant on Civil and Political Rights, opened for signature on 16 December 1966.

[72] John L Anderson, "Indefinite, Inhumane and Inequitable – The principle of equal application of the law and the natural life sentence for murder: A Reform Agenda" (2006) 29(3) *University of New South Wales Law Journal* 139, 146.

[73] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(d).

[74] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 61(1).

[75] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(d).

4. *Suggestions for Reform*

We submit that NSW has a responsibility to abolish *mandatory* life sentences for murder under s 61(1). This should be supported by an additional discretionary power by which offenders sentenced to life imprisonment have a *standard* non-parole period available that may be set at the time of sentencing. 'Mandatory' life sentences eliminate the significance of judicial discretion and ultimately disregard central tenants of sentencing including parity, proportionality and equity under the law.[76] This sentence is therefore a torturous form of reprimand with a total disregard for rehabilitation[77] which is ultimately an anomaly as it really cannot work within the competing sections of s 61(1) and s 21 *Crimes (Sentencing Procedure) Act 1999* (NSW). The confusing nature of this interaction has been noted in the literature and in several cases.[78]

Section 61(1) *Crimes (Sentencing Procedure) Act 1999* (NSW) is arguably a form of legislative grandstanding grounded within conservative political rhetoric and a 'tough on crime' approach to sentencing.[79] The complications of this attitude with regard to the purposes of sentencing has been outlined above. Put most succinctly, mandatory life sentences are ingrained in '[b]ase notions of revenge and absolute incapacitation [and] should be replaced with progressive notions of managing life sentence prisoners in the custodial environment with a view to their eventual and safe release back into the community'.[80] Life imprisonment should, however, still be available as a maximum sentence which can be applied to the most extreme forms of murder where the aggravating factors of the offence are blatantly evident and the gravity of the criminal act is acknowledged.[81]

A minimum non-parole period attached to the life imprisonment sentence does not allow for the flexibility required in sentencing and ultimately creates a floor limit which further restricts judicial discretion and the potential to recognise the spectrum of offending in which murder exists. A *standard* non-parole period would therefore be more appropriate as it provides the legislative guidance utilised in other murder categories and further acts as an important signpost for comparative reference. This approach gives the sentencing judge the capacity to highlight the seriousness of the offence without cutting off any prospects of rehabilitation.[82]

The current standard non-parole periods for murder are as follows[83]:

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[76] John L Anderson, 'The Label of Life Imprisonment in Australia: A Principled or Populist Approach To An Ultimate Sentence', (2012) *UNSW Law Journal* 35(3) 747, 772-773.

[77] John L Anderson, 'Indefinite - A Brief Evolution of the Natural Life Sentence'(2006), *UNSW Law Journa*l, 29(3), 139, 146.

[78] See John L Anderson, 'The Label of Life Imprisonment in Australia: A Principled or Populist Approach To An Ultimate Sentence', (2012) *UNSW Law Journal* 35(3) 747, 773-777.

[79] John L Anderson, 'The Label of Life Imprisonment in Australia: A Principled or Populist Approach To An Ultimate Sentence', (2012) *UNSW Law Journal* 35(3) 747, 772.

[80] John L Anderson, 'Indefinite, Inhumane, Inequitable' - The Principle of Equal Application of the Law and the Natural Life Sentence for Murder: A Reform Agenda (2006), *UNSW Law Journa*l, 29(3), 139, 165-166.

[81] Ibid, 165-166.

[82] Ibid, 166.

[83] *Crimes (Sentencing Procedure) Act 1999* (NSW) Table following s 54D.

Item No	Offence	Standard non-parole period
1A	Murder—where the victim was a police officer, emergency services worker, correctional officer, judicial officer, council law enforcement officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation or voluntary work	25 years
1B	Murder—where the victim was a child under 18 years of age	25 years
1	Murder—in other cases	20 years

We submit that when the maximum sentence of life imprisonment is imposed a standard non-parole period of 30 years would be available as a guidepost to an appropriate non-parole period to be fixed in an individual case. The updated standard non-parole table would look as follows, with our suggestions in red:

Item No	Offence	Standard non-parole period
1AA	Murder – where the imposition of a maximum sentence of 'natural' life imprisonment has been set (in accordance with consideration of all relevant aggravating and mitigating factors)	30 years
1A	Murder—where the victim was a police officer, emergency services worker, correctional officer, judicial officer, council law enforcement officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation or voluntary work	25 years
1B	Murder—where the victim was a child under 18 years of age	25 years
1	Murder—in other cases	20 years

A standard non-parole period can be formulated which looks to the extant standard non-parole periods for murder (of persons of a specific occupation or child victims) set at 25 years[84] with the added 5 years to account for 'periodic reviews' and 'maturation' within the correctional system to prospectively rehabilitate the offender.[85] A standard non-parole allows flexible guidance for a court in setting a non-parole period that is longer or shorter than the standard non-parole period depending on the particular circumstances of the case and expressly highlighting the factors that result in the final non-parole period.[86] This judicial discretion therefore ensures more parity between sentences based within the reasoning of the non-parole periods when a 'natural' life sentence is imposed whilst also reflecting the differences in severity in cases which have crossed the threshold of seriousness for imposition of the maximum sentence.

5. *Conclusion*

A more equitable and proportionate sentencing system for murder in NSW would result from reforming the mandatory life sentence which looms over judges in the sentencing of

[84] Ibid.
[85] John L Anderson, 'Indefinite, Inhumane, Inequitable' - The Principle of Equal Application of the Law and the Natural Life Sentence for Murder: A Reform Agenda (2006), *UNSW Law Journa*l, 29(3), 139, 163.
[86] *Crimes (Sentencing Procedure) Act 1999* (NSW) s54B(3).

offenders whom are determined to cross the s 61(1) *Crimes (Sentencing Procedure) Act 1999* (NSW) threshold. The current approach to the offence of murder casts a long shadow over the significance of the prospects of rehabilitation, judicial discretion and parity within the sentencing process. The submission of a *standard* non-parole period of 30 years to accompany a *maximum* sentence of life imprisonment ensures flexibility and guidance whilst also providing ample room for recognising the severity of the offending itself. The proposed restructuring of the legislation which governs the offence of murder acknowledges the centrality of human rights within the Australian context, endorses a more comprehensive approach to the purposes of sentencing and ultimately works towards fostering a more just sentencing system for all concerned.[87]

Question 6.9: Redetermining natural life sentences

In what circumstances, if any, would it be appropriate to have a scheme of judicial redetermination of natural life sentences for murder?

1. *INTRODUCTION*

We welcome the opportunity to make submissions regarding the circumstances in which it would be appropriate to have a scheme of judicial redetermination of natural life sentences for murder. Redetermination schemes for those who are serving natural life sentences have previously been implemented in New South Wales, though have ultimately been rendered ineffectual for those convicted of murder under s19A of the *Crimes Act 1900* (NSW). Given the not insignificant history in NSW regarding possible redetermination schemes, we will first provide an overview of the development and ultimate rejection of such schemes, before providing comment on the circumstances in which it would now be appropriate to have a scheme of judicial redetermination of natural life sentences for murder. Finally, centred on the virtues of these previous schemes, we propose a judicial redetermination scheme to apply to all persons serving natural life sentences for murder.

2. *BACKGROUND*

One of the defining periods in NSW legislative reform history is the 'Truth in Sentencing' reforms. One of the most pivotal legislative amendments was the introduction of section 19A *Crimes Act 1900* (NSW)[88] in 1990, which created a maximum sentence of natural life imprisonment for the crime of murder, required to be for 'the term of the person's natural life'. However, this necessitated the amendment to several Acts in New South Wales to be in keeping with this "tough on crime" attitude. One such amendment was the *Sentencing Act 1989*[89] which was focused on being 'an Act to promote truth in sentencing,'[90] conferring the

[87] John L Anderson, 'The Label of Life Imprisonment in Australia: A Principled or Populist Approach To An Ultimate Sentence', (2012) *UNSW Law Journal* 35(3) 747, 778.
[88] *Crimes Act 1900* (NSW), s 19A.
[89] *Sentencing Act 1989* (NSW).
[90] *Sentencing Act 1989* (NSW), s 3.

power previously held by the executive to re-determine a sentence, to the judiciary by way of s 13A. Initially, 'any such person [was] not eligible to make an application unless the person [had] served at least 8 years of the sentence concerned'.[91] Under this scheme, the Supreme Court could determine a 'minimum' and 'additional' term to replace the original sentence of life imprisonment.[92] The rationale for this was to ensure a mechanism was available to 'cure the problems and uncertainties associated with the imposition of indeterminate sentences.[93] This power conferred to the judiciary was expanded by the *Sentencing (Life Sentences) Amendment Act 1993* in which the court could order a person never re-apply for a redetermination if the offence was considered "a most serious case of murder".[94] The *Sentencing Legislation Further Amendment Act 1997* inserted a new 'category' of person subject to the provisions of s13A – a 'non-release recommendation' prisoner. This captured individuals who were serving an existing life sentence, with the original sentencing court making a recommendation or observation, or an expression of opinion that the person should never be released from imprisonment.[95] Unlike those serving an 'existing life sentence,' persons subject to a 'non-release recommendation' were required to serve 'at least 20 years'[96] before they were eligible to make a redetermination application. The most recent amendment to this scheme was the *Crimes Legislation Amendment (Existing Life Sentences) Act 2001* which increased the period that an offender must serve, before a life sentence re-determination application can be made, to 'at least 30 years' for 'serious offenders the subject of non-release recommendations.'

Whilst the *Sentencing Act* has subsequently been repealed, the provisions of s 13A(1) *Sentencing Act 1989* continue to have effect through Schedule 1 of the *Crimes (Sentencing Procedure) Act 1999*. Yet even with this scheme in place, the circumstances in which a release (subject to a successful redetermination) will be granted arise only in circumstances where the offender is in 'imminent danger of dying, or is incapacitated to the extent that he or she no longer has the physical ability to do harm to any person'[97] and 'has demonstrated that he or she does not pose a risk to the community'.[98] Further, it must be noted that this Schedule does not have application for those who have been sentenced 'for the term of one's natural life' under s 19A *Crimes Act 1900*.[99] Thus, there is no mechanism to release those sentenced under s 19A to parole. The only avenue available for these offenders to be released is the exercise of the prerogative of mercy preserved in *Crimes (Sentencing Procedure) Act 1999.*[100] However, this will only be exercised where compassionate grounds, due to ill health or imminent death, can be substantiated. On this basis, we opine that there is a need to reconsider the current mechanisms in place to 'redetermine' a natural life sentence.

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[91] *Sentencing Act 1989* (NSW), s 13A.

[92] John L Anderson, *The Sentence of Life Imprisonment for the Crime of Murder in New South Wales: A Contemporary Analysis of Case Law and Sentencing Principles* (PhD Thesis, University of Newcastle, 2003).

[93] *Regina v Archibald Beattie McCafferty* unreported, SC (NSW), 15 October 1991, Wood J.

[94] *Sentencing (Life Sentences) Amendment Act 1993* (NSW), Sch 1, cl 1; *Sentencing Act 1989* (NSW), s 13A (8C).

[95] *Sentencing Legislation Further Amendment Act 1997*(NSW), Sch 1, cl 1; *Sentencing Act 1989* (NSW), s 13A (1).

[96] *Sentencing Legislation Further Amendment Act 1997*(NSW), Sch 1, cl 2; *Sentencing Act 1989* (NSW), s 13A (3)(b).

[97] *Crimes (Administration of Sentences) Act 1999* (NSW), s154A (3)(a)(i).

[98] *Crimes (Administration of Sentences) Act 1999* (NSW), s154A(3)(a)(ii).

[99] *Crimes (Sentencing Procedure) Act 1999* (NSW), sch 1 cl 1 'existing life sentence'.

[100] *Crimes (Sentencing Procedure) Act 1999* (NSW), s 102.

3. *RESPONSE TO QUESTION 6.9 POSED BY THE NSW SENTENCING COUNCIL*

Upon review of the previous redetermination scheme, and the subsequent amendments, we submit that it would be appropriate to have a scheme of judicial redetermination for all offenders convicted for murder, including those who have been convicted under s19A of the *Crimes Act 1900* and ordered to serve a 'natural life sentence'. At present, a 'non parole period' cannot be applied to such sentences.[101] It is the submission of the authors that whilst the imposition of such a burdensome penalty may be an adequate outcome at first instance if a murder falls into the 'worst class of case' category, the correctional system acknowledgement and focus on rehabilitation necessitates the introduction of some mechanism whereby an offender's natural life sentence can be subject to review sometime in the future. What follows is our recommendations regarding the implementation of a proposed re-determination scheme. In addition to providing legislative guidance for consideration, the recommendation also provides justification for both the specific provisions and overall suggested redetermination scheme.

4. *RECOMMENDATION*

We recommend implementation of a sentencing scheme whereby natural life sentences would remain subject to possible redetermination after the passing of a period of 30 years imprisonment. A "natural life sentence" would be defined as a sentence whereby the offender is sentenced to life imprisonment without the possibility of parole. As the focus of this review is with respect to the offence of murder, this scheme would apply to those convicted under s19A of the *Crimes Act 1900* and mostly sentenced under s 61 of the *Crimes (Sentencing Procedure) Act 1999*.

The recommendation is to allow such offenders an opportunity to bring before a Supreme Court judge, an application for redetermination of their sentence after spending no less than an initial period of 30 years in full time custody. As outlined in Part 4, Division 1 of the *Crimes (Sentencing Procedure) Act 1999* there are three standard non-parole periods currently prescribed for murder:

- 20 years for (general) murder committed on or after 1 February 2003;
- 25 years for the murder of a person falling within a category of occupation committed on or after 1 February 2003; and
- 25 years for the murder of a child, whenever committed.

Whilst life is the maximum sentence that can be imposed for murder, there is the ability for the judiciary to impose a determinate sentence, to which a non-parole period is affixed.[102] In cases where this approach to sentencing for murder has been taken, initially the data

[101] *Crimes Act 1900* (NSW) s 19A(2). See also *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 54(a) and 54D(1)(a) in relation to the exclusion of the standard non-parole period scheme from sentences of imprisonment for life or for any other indeterminate period.

[102] John L Anderson, 'Recidivism of paroled murderers as a factor in the utility of life imprisonment' (2019) 31(2), *Current Issues in Criminal Justice.*

revealed a median head sentence of 18 years, with a non-parole period of 13½ years.[103] Since this earlier study, the median head sentence has increased in more recent times to 19.8 years.[104]

Taking the current standard non-parole periods for murder and the median determinate sentences into account, by imposing an initial period of 30 years that must be served in full time custody before a redetermination application can be made by a prisoner serving a natural life sentence, offenders are incarcerated for a period of time that significantly exceeds these custodial periods and reflects the greater degree of seriousness in their crimes. We submit that this fact proportionately reflects the seriousness of the offending conduct as it is mandatory for the 30-year period imprisonment to be served before a redetermination application can be made.

Additionally, we submit that such a scheme provides an incentive for those sentenced to life imprisonment without parole to engage with programs offered by Corrective Services through education, vocational training and employment opportunities; psychology, disability, personality and behavioural disorders services and intensive drug and alcohol treatment where required.[105] The creation of a realistic incentive to rehabilitate, provides the offender with a goal to work towards and moves away from the notion that those sentenced to 'life imprisonment without the possibility of parole' are beyond rehabilitation. Additionally, this scheme removes hypotheses about an offender's future dangerousness,[106] allowing for a review of an offenders 'dangerousness' at the time of redetermination rather than notoriously unreliable predictions made at the time of sentencing that an offender will forever remain dangerous.

Upon judicial redetermination, the matters that the court would have regard to on the question of any such application should be:

(a) The safety of the community;
(b) The circumstances surrounding the offence for which the life sentence was imposed;
(c) All offences of which the person has been convicted at any time;
(d) Any report on the person made by the Serious Offenders Review Council and any other relevant reports prepared after sentence (including, for example, reports on the person's rehabilitation, psychological condition and readiness for release), made available for consideration;
(e) The age of the person (at the time the person committed the offence and also at the time of the re-determination application).
(f) The measures in place (if any) supporting the applicant's re-integration into society;
(g) The possible impact of a redetermination order on the victim's family.

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[103] Jason Keane and Patrizia Poletti *Sentenced homicides in New South Wales 1994–2001* (Judicial Commission of New South Wales, 2004) 22.
[104] Tom Gotsis and Matthew Dobson*, A statistical snapshot of crime and justice in New South Wales* (Statistical Indicators 5/18, September 2018) 55.
[105] Department of Communities and Justice, *Programs for offenders* (Webpage) <https://www.correctiveservices.justice.nsw.gov.au/Pages/CorrectiveServices/programs/offender-services-and-programs/offender-services-and-programs.aspx>.
[106]Andrew Dyer, 'Irreducible Life Sentences: What Difference Have the European Convention on Human Rights and the UK Human Rights Act Made?' (Legal Studies Research Paper No. 15/99, Sydney University Law School, December 2015) 17.

We suggest that the orders able to be made by the court on any given application for re-determination should be:
(a) Reject the application for re-determination; or
(b) Grant the application for re-determination and apply a non-parole period.

It is further proposed that should a decision be made to impose a non-parole period after a redetermination hearing, in keeping with s 24 *Crimes (Sentencing Procedure) Act 1999* "any time for which the offender has been held in custody in relation to the offence"[107] will count towards the initial 30 year period.

Should (a) above apply, the applicant may not reapply for any further redetermination within a period of between two (2) and five (5) years (as determined and ordered by the judge) from the date of the redetermination decision.

We suggest that the period of between two and five years provides the judiciary with sufficient scope to determine an appropriate period of time to pass before any particular applicant may re-apply, providing the offender with sufficient time to make greater and more meaningful steps towards rehabilitation thereby further reducing the risk they pose (if any) to the community. Therefore, the greater the rehabilitation, the more likely an offender is to be successful in a redetermination application. The question of the release of an offender will ultimately remain an executive function, determined by the relevant Parole Authorities under the *Crimes (Administration of Sentences) Act 1999.*

In addition to the above, the legislation should provide the following further directions to the court:
(4) *On any failed re-determination application, the court must not order that an applicant cannot make an application at any future time.*
(5) The *Criminal Appeal Act 1912* (NSW) *applies to determinations in the same way as the Act applies to an appeal against an original sentence.*

The single question to be decided on redetermination would be limited to the question of whether, in the circumstances, a non-parole period should now be affixed to the head sentence of life imprisonment. Accordingly, irrespective of the outcome on redetermination, the offender's head sentence remains a life sentence, subject to any appeal or application for inquiry that may be lodged regarding the original sentence or conviction. In this way, if an offender is subsequently released on parole under the provisions of the *Crimes (Administration of Sentences) Act 1999*, these conditions will remain with the individual for the 'term of their natural life,' though subject to periodic review.

Further, we strongly recommend that the above recommendations be made retrospective, allowing all current persons serving a natural life sentence imposed under s 19A *Crimes Act 1900* the opportunity to bring such an application for re-determination upon the expiration of the initial fixed period of 30 years in full time custody. A statistical consideration supporting retrospectivity is the more recent studies in recidivism amongst those convicted for

[107] *Crimes (Sentencing Procedure) Act 1999* (NSW), s 24 (a).

murder.[108] In Australia, studies have revealed such offenders rarely commit another murder or homicide offence upon release and only a very small proportion re-offend in a serious or violent way.[109] These low rates of violent recidivism and even lower rates of analogous or homologous homicide amongst this distinct group of offenders is also reflected internationally.[110] Accordingly, while it is conceded that some risk of re-offending exists, the fact is that the majority upon release go on to lead meaningful and largely law-abiding lives.[111] Such studies alone demonstrate that rehabilitation is not simply possible, but probable amongst those convicted of, and sentenced for, murder.

It is acknowledged that providing such persons the ability to apply for re-determination may potentially undermine the settled expectations of the victim's family in those cases. We submit that certainty is given to victims' families as there is a certain period (that being 30 years) that must be served before an application can be made. Even if a redetermination of sentence is made and parole is subsequently granted, the parole conditions (if any) still apply to the offender for 'the remainder of their natural life'.

Further, it is observed that under the *Victims Rights and Support Act 2013,* a 'relevant victim,' at the time of sentencing, has the right to prepare a victim impact statement to ensure that the full effect of the crime on the victim is placed before the court.[112] Additionally, relevant victims can currently make submissions concerning the granting of parole to a serious offender.[113] In keeping with these existing rights, we recommend that there exist under the proposed redetermination scheme, the ability for a statement to be submitted by a 'relevant victim' (which includes the family of victims) for consideration before the redetermination hearing. As is the case with current victim impact statements, it would be a question of weight for the presiding judge and one factor amongst others in deciding whether to 'redetermine' a sentence. By introducing such a scheme, the balance shifts from being "heavily against the offender" to balancing the interests of the community against the rehabilitation of the offender, which we submit is more in keeping with the purposes of sentencing as outlined in s3A *Crimes (Sentencing Procedure) Act 1999.*

Redetermination schemes have been met with stark opposition, particularly during the 'Truth in Sentencing' era. When commenting on 'life imprisonment without the possibility of parole,' the then Police Minister, Paul Whelan described these individuals as *'*animals (who) represent pure evil' who will '…never … see the exit sign at the prison gate'.[114] It is this attitude that has led to a sentencing regime predicated on denying offenders their fundamental human rights. At present, it is arguable that the indeterminate nature of a life sentence without parole places Australia in breach of the *International Covenant on Civil and Political Rights*

[108] John L Anderson, 'Recidivism of paroled murderers as a factor in the utility of life imprisonment' (2019) 31(2), *Current Issues in Criminal Justice* 255.
[109] Ibid.
[110] Ibid.
[111] Ibid.
[112] *Victims Rights and Support Act 2013* (NSW), s 6 (6.14). Provisions relating to the content and formal requirements of such statements and the procedures for tendering and consideration by the court are found in the *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 26-30N.
[113] *Victims Rights and Support Act 2013* (NSW), s 6 (6.16).
[114] *New South Wales Parliamentary Proceedings:* Legislative Assembly, 8 May 1997: 8337 per Mr Whelan, Minister for Police.

(ICCPR) ratified on 13 August 1980 by the Australian Government and acceded to on 25 September 1991. The suggested redetermination scheme would undeniably remove any suggestion that Australia remains in breach of its international treaty obligations. We submit that humanitarian considerations should remain of paramount concern and importance.

The retrospective nature of the abovementioned suggested scheme of judicial re-determination can be further justified on the basis that it serves to bring Australia (and in particular, the state of NSW) into line with its international obligations under Articles 7 and 10 of the ICCPR.[115] Article 7 (in part) states:

No one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment…

Article 10 (in part) states that:

(1) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
(2) ……..
(3) The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.

It has been accepted that Article 3 of the *European Convention on Human Rights* (ECHR) is in near identical terms to Article 7 of the ICCPR, which stipulates that: *"no one shall be subjected to torture or to inhumane or degrading treatment or punishment".*[116]

We submit that the interpretation of Article 7 can be derived from the meaning that the European Court of Human Rights (European Court) has attributed to Article 3 of the ECHR. The European Court has consistently held that where the law does not provide a prisoner any mechanism or possibility for review of a whole life sentence, then that law remains incompatible with Article 3. Further, an irreducible life sentence has consistently been held by the European Court to constitute 'inhumane and degrading treatment'.[117] This is because an irreducible life sentence gives no recognition or consideration to a prisoner's progress towards rehabilitation. Similarly, it provides no opportunity to consider whether the persons continued detention is justified on legitimate grounds and finally, it deprives the prisoner of any guidance as to what the prisoner must do to be considered for release at some later stage. It is the absence of any reducibility of sentence which places the NSW state law in question in breach of Article 3. We submit that the existence in Australian domestic law to the release of a prisoner on compassionate grounds under the prerogative of mercy due to ill health or greatly advanced age sometime immediately prior to the said persons pending death does not amount to a 'chance' or 'prospect' of later release.

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[115] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1996, 999 UNTS 171 (entered into force 23 March 1976) art 7, 10.
[116] *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), Art 3.
[117] *Vinter & Others v United Kingdom* (Application nos. 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013).

5. *CONCLUSION*

For there to be any genuine prospect of release, a prisoner must be given a legitimate opportunity to rehabilitate themselves and have those rehabilitative efforts count in the sense of there being a clear mechanism in place to review the prisoner's ongoing incarceration. The European Court has consistently found that release under exceptional circumstances on mere humanitarian grounds is not enough to classify the sentence as one which is reducible.[118] The above recommendations aim to address the systemic failings that currently exist, by providing a redetermination mechanism for those serving natural life sentences for murder, restoring their right to hope and the opportunity to start anew.[119]

Submission prepared for and on behalf of the University of Newcastle Legal Centre

Research for, and formulation of, the responses to Questions 6.3 and 6.9 of this submission was undertaken by LLB (Hons)/Dip Leg Prac student Hannah Williams under the supervision of Mr Daniel Matas, Solicitor, University of Newcastle Legal Centre and with assistance from Professor John Anderson, Newcastle Law School, University of Newcastle.

Research for, and formulation of, the responses to Questions 6.4 and 6.5 in this submission was undertaken by LLB (Hons)/Dip Leg Prac and JD/Dip Leg Prac students Amy Farrugia, Jessica Heaney and Joseph Minett under the supervision of Professor John Anderson, Newcastle Law School, University of Newcastle.

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[118] *Vinter & Others v United Kingdom* (Application nos. 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013); *Hutchinson v the United Kingdom* (Application no. 57592/08) [2016] ECHR 021 (January 2017).
[119]Pope Francis, 'Address of his holiness Pope Francis to penitentiary police and to staff of the penitentiary and justice administration for minors and the community,' (Speech, 14 September 2019) <http://www.vatican.va/content/francesco/en/speeches/2019/september/documents/papa-francesco_20190914_polizia-penitenziaria.html>.