

Submission to the Sentencing Council – Department of Justice
New South Wales

Review of sentencing for the offences of murder and manslaughter, including penalties imposed for domestic and family violence homicides and the standard non-parole periods for murder

The Sentencing Council is to review the sentencing for the offences of murder and manslaughter under sections 19A, 19B and 24 of the Crimes Act 1900 (NSW), in particular:

- the standard non-parole periods for murder and whether they should be increased; and
- the sentences imposed for domestic and family violence related homicides.

In undertaking this review, the Sentencing Council should consider:

- Sentences imposed for homicides and how these sentencing decisions compare with sentencing decisions in other Australian states and territories;
- The impact of sentencing decisions on the family members of homicide victims;
- The devastating impact of domestic and family violence on our community;
- The application of section 61 of the Crimes (Sentencing Procedure) Act 1999 in the context of life sentences imposed for murder;
- The principles that courts apply when sentencing for these offences, including the sentencing principles applied in cases involving domestic and family violence; and
- Any other matter the Council considers relevant.

By way of introduction and background, I was an employee with Corrective Services New South Wales (CSNSW) for 30 years, commencing as a Probationary Prison Officer in 1984 and completed my career at the rank of Superintendent in 2014. I appeared on numerous occasions as a subject expert witness at Judicial hearings (District & Supreme Courts), Administrative Appeals Tribunal & Coronial Inquests for CSNSW, in relation to the classification and protective custody of inmates and removal of hanging points within prison and court cells. Received a Commissioner's Commendation for significant work and dedication given to CSNSW. Received a Deputy Commissioner's Commendation for loyal and dedicated service and outstanding contribution to Offender Management & Operations Branch – CSNSW.

I have trained hundreds of both custodial and non custodial staff in the specialised area of inmate classification and placement of inmates throughout NSW. I was responsible for the classification of thousands of inmates throughout the NSW Correctional system during my career, also being an active member of the Serious Offenders Review Council and its sub-committees and delegate of the Deputy Commissioner on the Board of Management – Death in Custody Committee and other numerous high level steering committees.

I provided numerous information sessions to both internal groups and external agencies (both law enforcement agencies and NGO's), as well as overseas correctional law enforcement delegations about the inmate classification system, protective custody and policies & procedures within CSNSW.

The standard non-parole periods for murder and whether they should be increased:

During part of my professional career within CSNSW, both as a Deputy Superintendent of Inmate Classification and Assistant Director of Inmate Placement & Classification, I was responsible for the classification of numerous inmates that had been convicted of murder and manslaughter. This involved assigning the inmate an initial classification rating when first sentenced and during the course of the inmates incarceration as a member of the Serious Offenders Review Council (SORC) and reviewing and recommending the regression and progression of a convicted murderers within the correctional system.

From a perspective of initially when an offender is convicted of murder and commences his/her custodial sentence within the correctional system, the inmate requires a detailed case management plan to be developed in order to manage this offender that is incarcerated for the next 15, 20, 30 or 40 years of their life or even for the rest of their natural life if sentenced to a term of Life imprisonment.

As a rule, it was extremely important to have access to the 'Judges Sentencing Remarks' (JSR) when assigning a classification rating and developing a case plan for the offender. The SORC have set guidelines when an offender who is classed as a Serious Offender and is convicted of murder, is able to progress through the NSW correctional classification system in line with detailed policy and procedures that are under pinned by legislation.

However, a number of concerns arise and disputes take place when a Serious Offender that is convicted of murder can be considered for release back into the community under parole supervision and invariably raises media attention, political interest and concerns by the victims family and community in general.

On too many instances, the sentence imposed for murder does not reflect community expectation and allows advocates to demand for longer sentences to be imposed by the courts for the offence of murder.

I have classified offenders that have been convicted of multiple murders and those convicted of one murder. Individual circumstances are taken into consideration by the sentencing Judge as to the relevant facts involved in the case, re: plea of guilty, has the body been found, medical and psychiatric reports, showing remorse, etc.

When dealing with offenders that have been convicted and sentenced for the offence of murder, requires detailed information to be recorded within the JSR, that ultimately assists corrections staff and the parole authority to ensure that every risk factor has been taken into consideration before allowing the offender to progress to a minimum security classification and engage in external leave programs and to eventually be considered for release on parole supervision with specific conditions to comply with.

I was responsible for contributing to the progression of serious offenders during my role within the Inmate Classification Branch, by providing a submission that would allow serious offenders to be staged and progress to various security & classification levels at different time frames of their non-parole period.

This staged progression allowed the careful and structured management of the offender in custody and also provided a clear pathway for the inmate to follow and be able to achieve during their custodial sentence.

On too many occasions, the release of a murderer from custody upon serving their non-parole period and/or when into their additional term, has created significant heartache for the victims family and public outrage, along with a media frenzy. Recent events such as the future release of triple murderer 'Berwyn Rees' (27 Years NPP) or child murderer 'Michael Guider' (12 years NPP), highlights these very concerns and can never be understood and accepted by the community and that of the victims families.

Consideration:

Should there be categories established for the offence of murder that allow for specific non-parole periods, subject to individual circumstances of the offender and factors involving the offence. Currently there are specific guidelines contained within Section 18(1)a *Crimes Act 1900* (NSW) that provide established non parole periods for the offence of murder.

Rather than having specific non-parole periods, there should be in legislation the ability to scale a non-parole period from 20 to 50 years, with the option to impose a Life parole period and further options of imposing a sliding 10 to 20 year parole period.

The JSR should clearly indicate by the Sentencing Judge at the time, the prospects, if any, of rehabilitation and release and reintegration back into the community. The old term of **'recommended never to be released'** which currently still applies to a number of offenders that are in custody in New South Wales and were incorporated within a JSR /Judges Comments and recorded on the warrant of commitment, should be replaced in the future with **'subject to compliance of correctional and parole authorities'**.

To sentence an offender for the offence of Murder and remove that offender from society for a significant period of time, sometimes involving 15, 20 or 30 years and then expect that the offender can return back to society fully rehabilitated, places a significant amount of responsibility and expectation on CSNSW. CSNSW is often criticised for the management of long term serious offenders and are presented with obstacles when attempting to progress these types of offenders into pre-external leave programs, prior to release from custody.

Yet, when the offender has engaged in specific aspects of their case management plan, addressed their offending behaviour via targeted therapeutic programmes and achieved participation in the pre-external leave programs, they are still challenged by the legal process and associated external pressures outside of the correctional system.

I fully support that an offender who is convicted of murder, should be very closely monitored whilst in custody to ensure that they are complying with detailed requirements involving employment, engage in targeted offending programs and to be of good behaviour and conduct, during their incarceration. There should be zero-tolerance in any adverse or negative behaviour displayed by the offender whilst in custody. At the same time, if the offender has fulfilled all of his/her obligations as set down by the Courts and Corrective Services, then support should be given to allow reintegration back into the community.

“Ultimately, it is the sentencing Judge that determines what the non-parole period of offender convicted of murder is and any backlash as to why is the offender now being released back into the community, should be really redirected to the original sentencing judge and comments recorded within their judgement”

Two Tier Sentencing Structure for Murder:

Establishing of Categories of Murder and a two tier sentencing structure, such as;

Categories and scale of seriousness:

Murder Category One - **Life Sentence (with no possibility of release, term of whole natural life)**

Aggravating circumstances that would apply to this category (examples only);

- The murder occurred whilst the commissioning of a number of violent crimes, such as, sexual assault, robbery, arson, assassination, kidnapping;
- The murder involved torture, cruelty or was particularly violent;
- The murder involved terrorist acts and the use of bombs, vehicles, weapons of destruction;
- The murder involved criminal gangs, multiple victims;
- The murder victim was a **law enforcement officer** performing his/her duties;
- The victim was a Judge/Prosecutor/Judicial Officer, Witness or Juror that was murdered to prevent the performance of their duties, and;
- The offender had a previous conviction for murder or a serious violent offence.

Murder Category Two - **20 to 50 year non-parole period with a Life sentence parole period or a sliding 10 to 20 year parole period.**

- An offence of murder that does not fall within Murder Category One.

Examples:

1. The situation of a first time young adult offender between the ages of 18 to 25 that is convicted of a murder as opposed to an offender who is over the age of 60 with the same category offence.

Factors such as likelihood of the offender being released to the community after serving 20 to 50 year non-parole period and will be in the age bracket of 45 to 50.

2. The offender who is 60 years of age and over and has served 20 to 50 year non-parole period and being released to the community in the age bracket of 80 and over.

These two examples can vary significantly and one can take on the view that when a young adult offender serves a significant period in custody for murder and is still able to be released back into the community at a reasonable adult age, may successfully be able to return as a law abiding citizen and hopefully never re-offend and return to custody.

As opposed to an elderly offender who may well be in his late 60's, 70's or 80's and has already served a significant period in custody, what risk would this offender now pose to the community in this age bracket ?

Reference is made to an article featured in the *Sunday times Website* – 'How jail time is determined in South Africa' – dated 6 June 2018 by Law for All;

“While it isn’t an easy task to determine the appropriate punishment, there are three principles that the courts use to guide them in determining the correct sentence” says Nagtegaal. These principles are collectively known as the “Triad of Zinn”: the gravity of the offence, the circumstances of the offender, and public interest.

Reference is made to a publication by NSW Bureau of Crime Statistics and Research – Sentencing snapshot: Homicide and related offences – issue paper no.76 February 2012;

The average age of an adult offender convicted of homicide in NSW during the years 2009 to 2010 was 35 years. Of these, 84.1 per cent were male, and 59.5 per cent had no prior convictions in the previous five years. The most common penalty imposed on homicide offenders was a full-time prison sentence. Among those that received prison sentences, the average minimum term was just over 8.5 years and the average aggregate sentence was 11.8 years. Of those who committed a murder, 100 percent received a prison sentence, with an average minimum term of 20 years and an average aggregate sentence of 25 years.

When an offender is sentenced to a term of imprisonment for murder, Corrective Services NSW is responsible for the housing, management, care and rehabilitation of that offender for a significant set period of time as determined by the courts. In conjunction with the State Parole authority, these two state sanctioned authorities have a significant responsibility and role to play, in order to ensure that the offender is not only detained in a safe and humane manner and environment, not posing a risk to other inmates, not posing a risk to correctional staff, not posing a risk to the correctional centre and not posing a risk to the community, but must also ensure that the offender is suitable to be released back into the community under some type of supervision for a determined period as set down by the sentencing Judge.

So to just expect that a Judge sentences an offender to a 25 year non-parole period for the offence of murder and then expectations that the offender will return to society rehabilitated and as law abiding citizen, does not always eventuate as intended.

A convicted murderer in custody does not necessarily have to engage in a violent offender program if the victim was a spouse.

A convicted murderer will need to engage in a specific violent offender therapeutic program, where the offence involved significant violence, such as (robbery with a weapon, or physical violence by the offender), such as in the case of an armed robbery or robbery of a person/s, business or organisation, etc.

Section 61 Crimes (Sentencing Procedure) Act 1999 creates mandatory life sentences for certain offences if the prosecution can establish certain requirements.

This means, the court is required to give a life sentence if an offender commits murder or a serious heroin or cocaine trafficking offence in NSW, only if the prosecution can prove beyond reasonable doubt as to each of the following requirements:

In the case of murder:

- *There was an extreme level of culpability (criminality by the offender), and*
- *The community interest in retribution, punishment, community protection and deterrence can only be met through imposing a life sentence.*

Life imprisonment was introduced in NSW in 1990. Since then, 16 people in NSW have received life sentences, out of which, 3 have died in custody. These figures are much higher than in any other state in Australia.

Generally, a two-step process is involved when considering the necessity for a term of life imprisonment.

First, the court must find that the facts of the case and the offender's actions were so severe that a life sentence ought to be considered.

If the crime attracts such a consideration, the court must then decide whether there were any circumstances, personal or other, that may deter the court away from such a heavy penalty (of life).

For example, where the court does not believe that there is a need to protect the community from this individual, and where there is another more appropriate type of punishment available.

In other cases, the individual facts of the crime may be so appalling that the need to sentence a person to prison for the remainder of his/her life overcomes any possible prospects of rehabilitation that person had. (Reference Source: The Law on Mandatory Life Sentences in NSW – By Criminal Defence Lawyers Australia – 6/5/2018)

Reference is made to: Judicial Commission of NSW – Sentenced Homicides in NSW 1994-2001;

Regardless of what changes do occur to sentencing levels, the sentencing task and the accompanying reasons for sentence will have to be approached with particular care and diligence, so as to address all mitigating and aggravating features as defined by the new Act 428 in justification of the sentence.

Whether the new legislation does create a major change in murder sentencing patterns remains to be seen, and the Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002 calls for the creation of a Sentencing Council to monitor and report on sentencing trends and practices under the new legislation. Homicide sentencing will no doubt attract the attention of this body and other independent researchers in the years ahead.

Victims Impact and importance on the sentence length imposed for murder:

If considering an increase in the standard non-parole period of murder, I provide the following example of an actual case involving an offender committing separate murders and serving two separate sentences. Not identifying the offender by name, Offender X had been convicted of a murder and served a relatively short non-parole period and then being released on parole.

Then the unimaginable occurred again, Offender X whilst now living in the community, attempting an armed robbery at a service station, murders an overseas student, that was working part time at the service station. Offender X receives a non-parole period again for the conviction of murder, this is now his second murder conviction.

With no family in Sydney (NSW) to speak and raise their anguish and heartache on the victims behalf, no media to detail and report Offender X's shocking criminal history and now being convicted for a second time for the offence of murder and again only given a specific non-parole period.

The victims family in this case does not have any bearing and unfortunately the courts have allowed the opportunity for Offender X to be released again into the community at some point, after committing two separate murders of innocent people.

This is totally unacceptable and there needs to be some form of accountability and mechanism that will not allow this scenario to occur ever again. The victims family, regardless if they voice their concerns or not and regardless if they reside in NSW, Interstate or Overseas, need to be represented in a more robust and responsible format by the Judiciary (Prosecution and Judge).

Summary:

As I have outlined within this submission, I would strongly support that the standard non-parole period for murder be increased. However, there needs to be a greater emphasis on the structure of the sentence being imposed for the offence of murder. As we are fully aware, years pass and at some stage the offender that has served 12, 15, 20 or 30 years becomes eligible for release on parole.

By introducing a sliding scale for the 'Category Two Murder' offence, this will enable the Sentencing Judge and Judicial system the opportunity to establish a sentence that clearly reflects the seriousness of the offence and the impact that it has had on the victims family and the community.

However, just as it is important to reflect on the impact of the victims family and the concerns of the community when this offence has occurred, it is also important to consider that the offender at some stage will be released from custody, due to the sentence imposed by the Judge.

It is crucial that both the keeper of the offender (CSNSW) and the SPA are actively engaging in a pro-active and on-going management plan for the whole of sentence of the offender.

By increasing the non-parole period for the offence of murder, does in fact require a more whole of sentence approach and planning. We tend to lose site of the purpose and intention of *Section 3A (d) Crimes (Sentencing Procedure) Act 1999, which is;*

(d) To promote the rehabilitation of the offender

It would be of immense benefit to the authorities (CSNSW and SPA) that are managing the offender for a significant period of both incarceration and community supervision, that the Sentencing Judge specifies set milestone dates that the offender must have achieved and complied with, this will ensure that the rehabilitation aspects are achieved. This will require a collaborative approach involving the Judiciary, CSNSW and SPA.

If there is to be a greater emphasis to ensure that an offender serving a sentence for murder is being held accountable for their actions, recognising the harm done to the victims of the crime and the community and deterring others from committing the same offence, then collectively there needs to be a number of changes beginning with the sentencing structure and requirements.

Recommendations:

- 1. That consideration be given in establishing a two tier structure of sentencing for the conviction of Murder as described and outlined within this submission. A review by the Sentencing Council and Judiciary should be undertaken to explore the introduction of a sliding sentence for the Category Two Murder conviction (20 year minimum – 50 year maximum) and expanding the context of imposing a Life Sentence as described in Category One Murder conviction.**
- 2. That a significant amount of consideration should be made at the sentencing of an offender and included in the 'Judges Sentencing Remarks' to ensure that it is very clear, concise and documented by the sentencing Judge at the time, that there is an expectation that the offender will be released from custody under some form of parole supervision if not sentenced to a Life Sentence. That the term '*subject to compliance of correctional and parole authorities*', be incorporated within the 'Judges Sentencing Remarks' and endorsed on the warrant of commitment under 'special comments'.**

- 3. That both Corrective Services NSW and State Parole Authority will in the first initial three (3) month period of the offenders custodial sentence, develop a sentence pathway and case management plan for the offender that will take into consideration the Sentencing Judges comments and ensure that victims and community expectations have been taken into consideration when considering the progression of the offender within the prison classification system and eventual release of the offender under parole consideration.**
- 4. That the State Parole Authority have an active and continuous role, involvement and responsibility in the sentencing pathway and case management plan of an offender convicted for murder in the beginning of the offenders custodial sentence and not only when the offender is nearing his/her non-parole period and seeking parole consideration. This early involvement will ensure that consistency is in place and that there is an on-going contribution and holistic approach of the offenders custodial sentence from beginning, during and completion of the non-parole period.**
- 5. That when the sentence of an offender for murder is delivered by the Sentencing Judge, it should be clearly identified that if the offender has complied with all the requirements of the sentencing pathway and case management plan developed by Corrective Services and the State Parole Authority, that the granting of parole will be given all consideration, and any concerns expressed and raised by the victims family and community concerns will be a major contributing factor when considering release or refusal of parole.**
- 6. That the Sentencing Council should ensure that there are very specific comments and details within the Judges Sentencing Remarks at the time of sentencing of an offender for murder. This will contribute immensely in the long term when the offender is nearing the completion of their non-parole period and is seeking release on parole. The victims family and the community are to be better informed of the procedure and process of when considering parole and although may not accept or express concerns that the offender should be released at that specific point, will allow them to be better informed and aware that the offender has had to comply with requirements of the sentencing pathway and case management plan that was set in place through-out the offenders custodial sentence.**
- 7. That when a victims family is located outside of NSW, in another State or Territory of Australia or Overseas, there needs to be some form of accountability and mechanism that will direct the Sentencing Judge to consider the impact of the victims family, although not made available due to circumstances that are unavoidable. The victims family, regardless if they voice their concerns or not and regardless if they reside in NSW, Interstate or Overseas, need to be represented in a more robust, responsible and documented format at the time of sentencing of an offender for murder.**

Should the Sentencing Council require additional information, wish to have a more formal discussion or to provide further comment in relation to this submission, please do not hesitate to contact me.

Forwarded for your consideration,

Domenic Pezzano JP