**SUBMISSION TO THE NEW SOUTH WALES SENTENCING COUNCIL**

**by University of Newcastle Legal Centre**

**REVIEW OF SENTENCING FOR MURDER**

**Preliminary submissions to frame the issues to be addressed in consultations**

- **The sentence of life imprisonment as the maximum sentence for murder**

**Background**: The sentence of life imprisonment currently operates as the most severe sanction available under criminal law in Australian jurisdictions yet is attended by ambiguity and misconception at the core of its meaning.[1] Historically prisoners subject to this sanction would not necessarily spend their life imprisoned and the sentence predominately operated as an 'indeterminate sentence' embedded with a review mechanism that availed offenders with the opportunity for rehabilitation and subsequent release on parole. This practical operation of the 'life sentence' caused some confusion and controversy in the community.[2]

In New South Wales, the 'truth in sentencing reforms'[3] of the late 1980s and early 1990s changed the meaning of life imprisonment as the maximum sentence for murder in this jurisdiction to mean 'for the term of the person's natural life'.[4] There is no provision for the fixing of a non-parole period when this maximum sentence is imposed, however a lesser determinate sentence can be imposed as the operation of s 21(1) *Crimes (Sentencing Procedure) Act 1999* (NSW) is not affected.[5] In the mid 1990s a 'mandatory life sentence' for murder was introduced into the legislative framework in certain circumstances.[6] Pursuant to the current threshold set out in s 61(1) *Crimes (Sentencing Procedure) Act 1999* (NSW), the court is to sentence an offender convicted of murder to life imprisonment 'if the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence'. This construction renders the provision devoid of discretion as it prevents the court from imposing a sentence other than the 'natural life' term when that level of culpability has been found to exist in an individual case of murder.[7] It is arduous to reconcile the legislative architecture found in s 61(1) with the preservation of s 21(1) *Crimes (Sentencing Procedure) Act 1999* (NSW), which allows for the general power to reduce penalties and the courts have likewise struggled with resolving this issue.[8]

---

[1] NSW Law Reform Commission, *Discussion Paper – Sentencing,* Report No 33 (1996) 4.70.

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

[3] 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>.

[4] *Crimes Act 1900* (NSW) s 19A(2). See also, Michael Cain and Veronica Roby, 'The Impact of Truth in Sentencing' (1992) 2 *Sentencing Trends – An Analysis of NSW Sentencing Statistics* 2.

[5] *Crimes Act 1900* (NSW) s 19A(3).

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

[7] *Ngo v R* [2013] NSWCCA 142, [29].

[8] Ibid [30].

In 2011 a 'mandatory life sentence' for the murder of a police officer while the officer was on duty, or as a consequence of or in relation to actions taken by that officer or any other police officer in the execution of their duty was introduced into the *Crimes Act 1900* (NSW).[9]

Although the 'truth in sentencing' reforms can be understood at face value in terms of ensuring prisoners serve the sentences that are imposed by the courts, they must also be understood in the political climate that operated at the time, notably the Coalition parties' platform that the Australian Labour Party was 'soft on crime'[10] and had effectively undermined sentencing in NSW through the remission system operating in the 1980s. The 'truth in sentencing' solution must be viewed in the context of strong political rhetoric as to getting tough on crime in a 'law and order' environment and preferencing these populist motives over 'substantive penological objectives'.[11] This ideology toward sentencing facilitates a penological landscape whereby the nature of the offence is not separated from the offender, and community expectations dictate retributory sentencing. This was evidenced by the societal tension during the high profile murders of Anita Cobby and Janine Balding[12], which immediately preceded the 'truth in sentencing' reforms. The murders garnered sustained and emotionally heightened media coverage that fuelled the sentencing reforms.

At the same time, the decision by the High Court in *The Queen v Kilic*[13] illustrates the necessity to understand both the crime and the criminal as interconnecting but separate entities that cohere when delivering a final sentence. Leading contemporary sentencing theorist Andrew von Hirsch emphasised the concerns about curtailing the process of judicial discretion in sentencing at the whims of media pressure and politically sensitive decision-making, noting that the introduction of the natural life sentence found its character as 'largely concerned with fostering and exploiting public resentment of crime and criminals'.[14]

**Practical operation of life imprisonment for murder in NSW:** A distinction should be made between an offender who is deserving of a life sentence as a maximum penalty, and whether this means that they must be imprisoned for the remainder of their natural life.[15] It is a requirement of justice to impose a non-parole period so that an offender serves that period in custody as punishment; an offender is able to fulfil the remainder of their sentence on parole, under supervision to foster rehabilitation whilst re-integrating into society.[16] This significant mechanism does not currently operate in relation to the maximum penalty of life imprisonment under NSW law. Dunford J in *R v Phuong Canh Ngo (No 3)*[17],

---

[9] *Crimes Act 1900* (NSW) s 19B.
[10] Alexandra Smith, 'Scaring up the votes', *The Sydney Morning Herald,* 27 January 2003, <https://www.smh.com.au/politics/nsw/scaring-up-the-votes-20030127-gdg66o.html>.
[11] George Zdenkowski, 'Sentencing Trends: Past, Present and Prospective' in Duncan Chappell and Paul Wilson (eds), *Crime and the Criminal Justice System in Australia: 2000 and Beyond* (2000) 161, 184.
[12] See, *R v John Raymond Travers and Others* (unreported, SC (NSW), 16 June 1987, Maxwell J); *R v Michael James Murdoch, Leslie Joseph Murphy, Michael Patrick Murphy, and Gary Steven Murphy* (1987) 37 A Crim R 118; and *R v Stephen Wayne Jamieson; R v Matthew James Elliott; R v Mathew Blessington* (1992) 60 A Crim R 68.
[13] *The Queen v Kilic* (2016) 259 CLR 256, [19]-[20].
[14] Andrew von Hirsch, 'Law and Order' in Andrew von Hirsch and Andrew Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy* (2nd ed, 1998) 410, 412.
[15] In *R v Phuong Chan Ngo* [2001] NSWSC 1021[43] Dunford J expressed that Ngo should remain under sentence for the remainder of his life but was not necessarily deserving of remaining in custody for the entirety of this time.
[16] *Muldrock v The Queen* (2011) 281 ALR 652.
[17] [2001] NSWSC 1021.

citing *R v Harris*[18] acknowledged that "where a life sentence is imposed, the Court has no power to set a non-parole period".[19] The standard non-parole period scheme does not operate in line with 'worst case offences' such as *Ngo,* where a mandatory life sentence was imposed for the first political murder in Australian history. Dunford J acknowledged that he would have fixed a non-parole period to Ngo's life sentence, if he had the power to do so and it would have been a very lengthy period of time.[20]

Taking that background together with the current sentencing and jurisprudential landscape into account, our submission is that it is now ripe for the NSW Sentencing Council to re-consider the life sentence without parole as the maximum penalty for murder. Consultation should be undertaken to determine whether at the very least there should be provision for affixing a non-parole period to a sentence of life imprisonment as was recommended by the NSW Law Reform Commission in their 2013 report on *Sentencing*.[21]

- **The availability of mechanisms for release from a life sentence for murder**

It is acknowledged that if the maximum penalty in murder cases is to remain at life imprisonment then lengthy determinate periods of time should be available for fixing non-parole periods relative to the extant standard non-parole periods for murder. Under that scheme, the periods set for murder and murder of particular victims, including a child, being 20 and 25 years respectively, represent guidance for when the crime falls into 'the middle of the range of objective seriousness'. They should 'be applied with the suggested maximum non-parole period of 35 years to determine the comparative length of any non-parole periods in the most serious cases'[22] and to ensure sentencing judges impose proportionate sentences.

As there is currently a lack of sufficient and discriminating guidance regarding the circumstances under which it is appropriate for the Court to deny a non-parole period and fix a sentence of life imprisonment, it is submitted in the alternative that if this practice is to be maintained, a mandatory order should be made that a natural life sentence be subject to incremental judicial review.[23] This suggested reform would have been appropriate in the case of *Ngo*, for instance, as well as other cases where it is inappropriate or impossible to fix a non-parole period based on future dangerousness, or factors addressed by a mandatory life sentence under s 61 *Crimes (Sentencing Procedure) Act 1999* (NSW). A new category of life sentences emerges which acknowledges the sentencing principle of rehabilitation and restores the right to hope in offenders who commit the most serious murders, extending the standard non-parole period scheme to apply in line with the maximum penalty for murder. As per Dunford J in *Phuong*, affirming the remarks of Wood CJ in *R v Harris* [2000] NSWCCA 469; 50 NSWLR 409 [123] that 'Parliament might usefully give consideration to whether the Court should have power to fix a non-parole period in cases to which s 61(1) applies'.

---

[18] [2000] NSWCCA 469; 50 NSWLR 409 [22].
[19] *R v Phuong Cahn Ngo (No 3)* [2001] NSWSC 1021 [43].
[20] *R v Phuong Cahn Ngo (No 3)* [2001] NSWSC 1021 [43].
[21] New South Wales Law Reform Commission [NSWLRC], *Sentencing,* Report 139 (July 2013), [8.26] – [8.37]and Recommendation 8.1.
[22] John 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, 163.
[23] John 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, 162.

**Consideration of public opinion:** There is a foreseeable concern for a negative public response to allowing the 'worst case' murder offenders the opportunity for parole. "Public attitudes have become a key factor in shaping sentencing policy" [24] and the general trend seems to be that the public interest is in retribution and public safety. It is a general trend that the public view criminal penalties as too lenient, as evidenced by the NSW Parliament, *Public opinion on sentencing: recent research in Australia* which showed 59 per cent of respondents viewing sentences as too lenient; an even higher 79 per cent of respondents viewed sentences for violent crimes as too lenient.[25] Public concern can be overcome with humanitarian arguments, although this does not mean it should be overlooked with regard to the importance of public safety.

Allowing non-parole periods to be fixed to life sentences will likely cause increasing concerns of leniency for the most serious of offences, as well as fear among the community. The NSW Department of Correctional Services acknowledges:

> [P]arole is a concession to the offender, but a concession which it is expected will benefit the community by bringing the life of the offender under the guidance and control of a skilled officer with the intention of assisting resettlement in the community and so providing the environmental influences which will militate against the offender committing further criminal activity.[26]

**A 'right to hope':** It must be remembered that the paramount objective of parole is to provide the prisoner with an incentive for rehabilitation by giving them hope of an early release.[27] Without hope, there is no motivation in an offender to make amends or reform themselves whilst in prison. Importantly 'the 'right to hope' has been recognised by the European Court of Human Rights as a fundamental aspect of humanity'. [28] In the context of a modern and enlightened society, it is important for community members to maintain faith in the ability for humans to change. In the case that an offender commits such a heinous crime and never rehabilitated themselves whilst in custody, the prisoner may never be considered suitable for parole, meaning he or she would never be released.[29]

- **International approaches to the sentence of life imprisonment for murder and the role of international human rights instruments**

The conceptualisation of 'natural life', as it pertains to sentencing provisions, has come under judicial scrutiny and academic examination in the international landscape.[30] The deconstruction for the use of a 'natural life' sentence in the United Kingdom has garnered its profile amid common law challenges[31] to the European Court of Human Rights utilising

---

[24] NSW Parliament Research Service, Parliament of NSW, *Public opinion on sentencing: recent research in Australia* (e-brief 08/2014, June 2014) 1.
[25] Ibid.
[26] NSW Department of Corrective Services, Annual Report, year ended 30 June 1997, p. 99 16 (for cost of incarceration); NSW Council on the Cost of Government, Service Efforts and Accomplishments - Law, Order and Public Safety 1997, p. 72 (for cost of community orders).
[27] NSW Parliament Library Research Service, NSW Parliament, *Parole: an overview* (Briefing Paper No 20/99, November 1999) 2.
[28] Penal Reform International & University Of Nottingham UK*, Life Imprisonment: A* Policy Briefing (April 2018)
[29] NSW Parliament Library Research Service, NSW Parliament, *Parole: an overview* (Briefing Paper No 20/99, November 1999) 6.
[30] See, e.g., John Anderson, 'Indefinite, Inhumane, Inequitable - The Principle of Equal Application of the Law and the Natural Life Sentence for Murder: A Reform Agenda' (2006) 29(3) *UNSW Law Journal* 139.
[31] See *Vinter & Others* (Application nos. 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013).

Article 3 of the European Convention of Human Rights (ECHR).[32] The Article stipulates a uniform prohibition on torture, providing that 'no one shall be subjected to torture or to inhumane or degrading treatment or punishment'.[33]

The ECHR has historically conceptualised sentencing with a strong adherence to the maintenance of human rights with the Court continually concluding that a mandatory sentence of life imprisonment is a contravention of Article 3 and the human rights it upholds.[34] It is asserted that if the United Kingdom and European convention is to limit retribution to the benefit of restoring liberty in as many cases as possible; this subsequently creates a persuasive argument for New South Wales to follow the same trajectory.

Australia has signed and ratified the International Covenant on Civil and Political Rights (ICCPR)[35] which contains Article 7 stipulating 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. There is a clear parallel in the language utilised between Article 3 of the ECHR and Article 7 of the ICCPR. Arguably, it can be concluded that there exists a sentencing contravention to the ICCPR Article 7 by ordering life without parole or the possibility of review and that to enforce such a punitive measure undermines established common law and 'internationally recognised sentencing principles'.[36] It is paramount to maintain these benchmarks given their role in preventing inhumane treatment and misuse of punitive measures, significantly as they stand in industrialised nations.[37]

In 2013 the notable authority of *Vinter & Others v United Kingdom*[38] illustrated the Grand Chamber of the European Court of Human Rights averseness to perpetuating inhumane treatment in sentencing through the absence of a review or parole mechanism. While the Grand Chamber recognised that judicial discretion should be retained and that discretion may extend to imposing life sentences, it nevertheless held that it is a violation of human dignity to deny life prisoners any prospect of release or review mechanism as it infringes upon Article 3 of the ECHR, citing an earlier judgment from 2008.[39] The judges ruled 16 to one that the 'whole-life' tariff clearly breached human rights and to allow this breach would constitute a contravention to Article 3, noting that any progress toward rehabilitation would be obsolete as the 'punishment would remain fixed and unreviewable'.[40]

In the decision of *Murray v The Netherlands*[41] recently in 2016 the Grand Chamber found that the life sentence of a mentally disabled prisoner was de facto irreducible, constituted

---

[32] Opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953). The *European Convention on Human Rights* has been incorporated into the domestic law of England and Wales through the *Human Rights Act 1998* (UK) c 42, which commenced operation on 2 October 2000.

[33] *European Convention on Human Rights,*

[34] See e.g. *Murray v The Netherlands* (Application no. 10511/10).

[35] Mathew Harper, *European Court of Human Rights rules that irreducible life sentences violate human dignity* (23 August 2017) Human Rights Law Centre < https://www.hrlc.org.au/human-rights-case-summaries/2017/8/23/european-court-of-human-rights-rules-that-irreducible-life-sentences-violate-human-dignity>.

[36] John L Anderson, 'The Label of Life Imprisonment in Australia: A principled or populist approach to an ultimate sentence', (2012) 35(3) *UNSW Law Journal* 747.

[37] Andrew von Hirsch and Andrew Ashworth (eds), Principled Sentencing: Readings on Theory and Policy (Hart Publishing, 2nd ed, 1998) vi.

[38] *Vinter & Others* (Application nos. 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013).

[39] *Kafkaris v Cyprus* (Application no. 21906/04) [2008] ECHR.

[40] Dominic Casciani, *Killers' life terms 'breach their human rights'* (9 July 2013) BBC News < https://www.bbc.com/news/uk-23230419>.

[41] *Murray v The Netherlands* (Application no. 10511/10).

inhuman punishment and was thus inherently incompatible with Article 3 of ECHR.[42] Within their judgment, the court clarified the relevant principles for rehabilitation and review of life sentences as was developed in *Vinter.* Accordingly, Article 3 had to be interpreted as requiring reducibility of life sentences, in the sense of a review allowing the domestic authorities to consider whether any changes in the life prisoners are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds.[43] Justifications for sentencing, while grounded in penological merit at the time of delivery, is not an unmalleable process; the justifications may shift as the offenders' rehabilitation and understanding of the offence shifts, thus giving rise to the need for a review mechanism.[44]

**Overall,** if a 'natural life' sentence is to remain as the maximum sentence for murder, it is paramount there is a review mechanism in New South Wales to allow at least the prospect of release and progress toward rehabilitation. The European Court of Human Rights has shown clear and repeated supported for the principle that all prisoners, including those subject to a life sentence, should be given the opportunity to atone for their crime, work toward rehabilitation and ultimately have the prospect of release if rehabilitation is achieved. The Court has demonstrated the reasoning behind this is to further promote humane, equitable and proportionate punishment. This begs the question; why does New South Wales not have the same conceptualisation of proportionality within the ambit of criminal sentencing? Human rights and the protections they hold on liberty are the fabric of social cohesiveness and as such should be transparent in our sentencing regimes.

- **Penalties for domestic and family violence homicide – standard non-parole periods**

In the 2012 – 2013 one woman a week and 1 man a month was killed by a current or former partner.[45] It is based on this statistic that the objective seriousness of domestic and family violence homicides be considered in the review of the penalties for murder. Current sentencing patterns for murders in the domestic and family setting vary considerably. When considering an appropriate sentence for domestic violence homicides the case of *Muldrock v The Queen* provides some notable considerations for sentencing.[46] The High Court ruled in the case of *Muldrock v The Queen* the correct approach to sentencing was to consider all factors relevant to the sentence of the individual. Furthermore the court ruled that each of these factors where to be given due weight and the court was required to make a value judgement as to the nature of the offence when determining a proportionate sentence. Further guidance in determining the sentence can be provided by the standard non-parole period set in *Crimes (Sentencing Procedure) Act 1999* (NSW) and a period of 25 years has been set where the victim was a child under 18 years. Arguably this period should also be set where the victim was in a domestic or other family relationship with the perpetrator, particularly where the relationship is of an intimate kind.

In our submission the NSW Sentencing Council should include in this review of sentencing for murder, consideration of whether the standard non-parole period of 25 years fixed for child

---

[42] *Nicole Bürli, 'Grand Chamber clarifies principles for life sentence of prisoner with mental disability' (2 May 2016) Strasbourg Observers* < https://strasbourgobservers.com/2016/05/02/grand-chamber-clarifies-principles-for-life-sentence-of-prisoner-with-mental-disability/#more-3213>.

[43] Ibid.

[44] Ibid.

[45] Australian Institute of Health And Welfare, *Family, Domestic and Sexual Violence in Australia* (2018)

[46] *Muldrock v The Queen* (2011) 281 ALR 652

victims and for various categories of occupation where the offence arose because of the victim's occupation should be extended to murders arising out of a domestic relationship, particularly where there has been a history of domestic and family violence.

Submission prepared for the University of Newcastle Legal Centre

Research for, and formulation of, this submission was undertaken by LLB (Hons) /Dip Leg Prac students Annabelle Huxley, Kate Alexander and Sian Hunter under the supervision of Professor John Anderson, Newcastle Law School, University of Newcastle.

8 March 2019