

MANDATORY LIFE SENTENCES IN NEW SOUTH WALES

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I. INTRODUCTION

The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case.¹

That is the law.

A mandatory life sentence denies the opportunity of reform, if that term is intended to mean reform or rehabilitation to a state in which the offender may once again become an acceptable member of society and take his place there again. (An offender on a life sentence is likely to be male). Nevertheless:

[it is not] only where there is no chance of rehabilitation that the maximum penalty of life imprisonment can be imposed. There are some cases where the level of culpability is so extreme that the common interest in retribution and punishment can only be met through the imposition of the maximum penalty.²

(Note that this terminology is repeated in part in the mandatory life sentences legislation referred to below).

A mandatory life sentence will prevent the offender from committing further offences in society, but may not necessarily deter him from committing offences in prison. Indeed, without the hope of release or the possibility of more severe punishment (except in the nature of withdrawal of privileges and the like), what incentive exists to behave in prison? Many of these prisoners become difficult to manage:

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1 *Veen v The Queen (No 2)* (1987) 164 CLR 465 at 476, per Mason CJ, Brennan, Dawson and Toohey JJ.

2 *R v Garforth* (unreported, NSW CCA, Gleeson CJ, McInerney and Mathews JJ, 23 May 1994) at 13.

[A life sentence] deprives a prisoner of any fixed goal to aim for, it robs him of any incentive and it is personally destructive of his morale. The life sentence imposes intolerable burdens upon most prisoners because of their incarceration for an indeterminate period, and the result of that imposition has been an increased difficulty in their management by the prison authorities.

There is no evidence that the prospect of a mandatory life sentence deters anyone from committing the type of offence that is likely to attract such a penalty. The worst opportunistic murderers do not stop and think about the possible consequences, if they are caught, before killing. Terrorists are already prepared to die for their cause when they commit their crimes. Drug traffickers of the type for whom this penalty has been made available do not expect to be detected, let alone caught and punished.

Society is protected by such a penalty but we should ask: is that level of protection really required, especially at a financial cost of over \$60,000 pa (at present) per prisoner, in gaols that are bursting at the seams and cost, on average, \$75 million to build and \$25 million per annum to maintain? The non-pecuniary costs must also be added to the equation.

Retribution. That is why we have such penalties. At a superficial level they satisfy the desire to punish, vicariously.

If one says "mandatory life imprisonment" quickly and often, without thinking about it too deeply, it sounds tough; and that is what politicians like to do. It is easier and cheaper than taking time and committing resources to the development of policies that can address the causes of crime and reduce its incidence. The 'tough' approach appeals to people who are driven by retribution; and they vote.

II. CRIME

Since humankind first organised its society we have had crime. It is highly likely that we will always have crime. The best we can hope to achieve is to contain its incidence within socially acceptable limits. We do that in part by marking our disapproval of it by punishing the offenders who are able to be caught.

The most effective ways of containing crime, however, are those directed to preventing it in the first place. A person who is well educated, is employed, lives with a family in a comfortable residence (preferably owned by him or her), has good health care and lawful and accessible leisure pursuits is less likely to commit frightening offences (allowing for the occasional errant driver, the 'white collar' offender whose greed is insatiable or the person whose temporary passions overcome reason and restraint and cause him or her to act in a homicidal fashion).

3 *Ibid* at 11, citing *R v Petroff* (unreported, NSW CCA, Hunt CJ at CL, 12 November 1991).

III. BEFORE THE ACT

The death penalty for murder and rape was abolished in New South Wales in 1955. A mandatory life sentence was provided at that time for murder, but administrative action meant that it was rarely served in full. Such sentences were reviewed after 10 years and, on average, life prisoners were released after about 13 years.

The *Crimes (Homicide) Amendment Act 1982* (NSW) enabled a lesser fixed sentence to be imposed where the offender's "culpability for the crime is significantly diminished by mitigating circumstances".

While the Release on Licence Board was operating (1984-1990), the average life term served was 11.7 years and only 7.5 per cent of life prisoners served more than 15 years.

The *Crimes (Life Sentences) Amendment Act 1989* (NSW) inserted s 19A into the *Crimes Act 1900* (NSW). This section provides for a 'life meaning life' – never to be released – sentence for, as the Attorney General said in the Second Reading Speech, "the very worst and most serious and heinous examples of this crime". However, this is not a mandatory sentence for murder.

Section 33A was also inserted at that time into the *Drug Misuse and Trafficking Act 1985* (NSW) (which had allowed for ordinary indeterminate life sentences) providing for 'life meaning life' for involvement with large commercial quantities of hard drugs; but a discretion was preserved to the court to impose a lesser determinate sentence. So it, too, is not a mandatory life sentence for any particular offence.

IV. THE ACT

The *Crimes Act* provides, by s 19A, that the penalty for murder is penal servitude for life and that a person so sentenced "is to serve that sentence for the term of the person's natural life". The *Crimes Amendment (Mandatory Life Sentences) Act 1996* (NSW) (which commenced on 30 June 1996) provides, by enacting s 431B(1) of the *Crimes Act* that a 'life meaning life' sentence is to be imposed upon a person convicted of murder:

if the court is satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence.

(Echoes of *R v Garforth*).

That provision has never been invoked, although offenders have continued to receive 'life meaning life' sentences under s 19A by the exercise of ordinary sentencing discretion (which might incorporate the operation of s 413B(1) by implication). Moreover, the operation of s 442 is specifically preserved. That section enables penal servitude of a lesser duration to be imposed. Therefore, s 431B(1) also does not operate to impose a mandatory life sentence for murder.

A 'life meaning life' sentence is also to be imposed on a person convicted of trafficking in large commercial quantities of heroin or cocaine if the test stated above for murder is satisfied. However, in addition, the offence must involve a high degree of planning and organisation and the use of other people acting at the direction of the offender; the offender must have been solely or principally responsible for planning, organising and financing the offence; the drug must be of a high degree of purity; and the person must have committed the offence solely for financial reward.⁴ If those additional conditions are fulfilled there is no discretion to impose a lesser sentence.

Again, no person has been sentenced under this provision.

V. COMMENT

The *Crimes Amendment (Mandatory Life Sentences) Act 1996* (NSW) has been essentially a red herring, despite the justified outrage that greeted its proposal. It was unnecessary in the first place, however, the opposition to it in principle was otiose because there is no need to resort to its principles in practice.

The provisions of s 19A and statements in such cases as *R v Garforth* are all that is required to ensure that deserving murderers are never to be released and s 33A is an adequate provision in relation to drug offences.

The New South Wales Law Reform Commission said in its Discussion Paper on *Sentencing*:

Nevertheless, it might reasonably be argued that, at a time when the common law has come under criticism, a restatement of the law by the legislature operates to support and reinforce the law and the courts which have an independent constitutional duty to ascertain and apply it. In this context, it may matter little that the criticism is ill-informed or inappropriate: the legislature might reasonably consider that it has a responsibility to lend its weight to supporting the law as applied by the courts. This argument is, by its very nature, a political rather than a legal one.⁵

That political argument could safely be left to the politicians and their supporters while the courts continue about their business, were it not for the concern that incursions of this kind into well established and adequate law might be the thin end of the wedge. That is a particular worry at times of elections when opposing sides traditionally attempt to outdo each other in terms of 'toughness' in their approaches to dealing with law and order ('thickness' may be a more appropriate description). It is not difficult to foresee the regulators, having got their foot in the door by supposedly acting in response to public

⁴ *Crimes Act 1900* (NSW) s 431B(2).

⁵ New South Wales Law Reform Commission Discussion Paper 33, *Sentencing*, April 1996, paragraph 4.73 at 112. It must be noted that the NSW LRC ultimately recommended that s 431B of the *Crimes Act 1900* (NSW) be repealed: New South Wales Law Reform Commission Report 79, *Sentencing*, December 1996, Recommendation 48 at 207. This recommendation was ignored by the government.

demand which was in fact created by their endorsement of media alarm, moving to enact truly mandatory penalties that go beyond a reaffirmation of existing law and extending them to offences that may be temporarily of larger concern.

As the Law Reform Commission said about genuine mandatory and prescribed minimum sentences:

The potential rigidity of such sentences interferes with the discretion of the sentencing judge, which must be preserved if justice is to be done in individual cases. Further, the introduction of mandatory life sentences is likely to have an adverse impact on the efficiency of the criminal justice system. Persons facing such sentences are likely to be less willing to plead guilty to the charges laid against them. This will place an increased burden on the courts, and prosecution and law enforcement agencies

– not to mention corrective services.

In addition to such pragmatic considerations, the principles involved are important. Barwick CJ said in *Palling v Corfield*:

It is beyond question that the Parliament can prescribe such penalty as it thinks fit for the offences which it creates. It may make the penalty absolute in the sense that there is but one penalty which the court is empowered to impose and, in my opinion, it may lay an unqualified duty on the court to impose that penalty. The exercise of the judicial function is the act of imposing the penalty consequent upon conviction of the offence which is essentially a judicial act.

He continued, however:

Ordinarily the court with the duty of imposing punishment has a discretion as to the extent of the punishment to be imposed; and sometimes a discretion whether any punishment at all should be imposed. It is both unusual and in general, in my opinion, undesirable that the court should not have a discretion in the imposition of penalties and sentences, for circumstances alter cases and it is a traditional function of a court of justice to endeavour to make the punishment appropriate to the circumstances as well as to the nature of the crime.

‘Justice’ means justice to both the community and the individual. It has been a hard won commodity in most societies and we should think carefully before we allow the government of the day to shackle it.

6 *Ibid*, paragraph 4.76 at 114.

7 (1970) 123 CLR 52 at 58.

8 *Ibid*.