

## THE LABEL OF LIFE IMPRISONMENT IN AUSTRALIA: A PRINCIPLED OR POPULIST APPROACH TO AN ULTIMATE SENTENCE

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### I INTRODUCTION

The sentence of life imprisonment in modern penal systems is the ‘most severe sanction at the disposal of the State’ in jurisdictions where the death penalty has been abolished.<sup>1</sup> It has singular significance as an ultimate penalty but its practical application and operation is an enduring enigma.

Life imprisonment is ‘still seen in many jurisdictions as the natural and lesser alternative to the death penalty’.<sup>2</sup> As a result the ‘life sentence’ has endured for many years in various countries, including Australia, without being closely scrutinised as to its practical operation and alignment with the purposes and principles of sentencing. The label of life imprisonment has become a contentious contemporary international sentencing issue with a significant profile in the jurisprudence of the European Court of Human Rights<sup>3</sup> and European countries generally<sup>4</sup> as well as in the United States.<sup>5</sup> It has not had a high profile in Australian jurisprudence or scholarship. This article aims to raise that profile by evaluating the use of life imprisonment for the crime of murder in Australia and whether this use reflects a principled or populist approach to this ultimate form of punishment.

Between the Australian jurisdictions there are significant variations in the form and practical implementation of sentences labelled as ‘life imprisonment’

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1 Dirk van Zyl Smit, *Taking Life Imprisonment Seriously in National and International Law* (Kluwer Law International, 2002) 1.

2 *Ibid* 215.

3 See, most recently, *Vinter v United Kingdom* (European Court of Human Rights, Grand Chamber, Application Nos 66069/09, 130/10 and 3896/10, 17 January 2012).

4 See Dirk van Zyl Smit, ‘Outlawing Irreducible Life Sentences: Europe on the Brink?’ (2010) 23 *Federal Sentencing Reporter* 39.

5 See, eg, Michael M O’Hear, ‘The Beginning of the End for Life without Parole?’ (2010) 23 *Federal Sentencing Reporter* 1.

available for murder. These variations highlight ambiguities and uncertainties that stymie any principled application and operation of the sentence as well as being apt to mislead the public. In some states and territories, the sentence of life imprisonment is mandatory upon conviction for murder; however, it is apparent that the circumstances of murder offences vary significantly in nature and severity. A mandatory sentence of life imprisonment for this crime arguably undermines a number of established common law and internationally recognised sentencing principles, including proportionality, equality before the law and respect for human dignity.

Further, the ambiguous meaning of life imprisonment has a negative impact on the utility of the sentence in relation to the sentencing purposes such as retribution, incapacitation, deterrence and denunciation. The 'life' and 'mandatory' labels are rather used to respond to what is perceived to be the popular sentiment for harsh sentences generally and in particular for serious violent crimes. The legislative prescription of life imprisonment as the maximum, and in some cases mandatory, sentence for large-scale commercial drug trafficking and violent sexual assault offences amplifies the political and reactionary nature of using the label of 'life imprisonment' in the context of perceived concerns about 'law and order' and the need for tough sentences.<sup>6</sup>

When entrenched common law and constitutional principles, such as proportionality and the prohibition against cruel, inhuman and degrading punishment are considered, the widespread use of life imprisonment in the international context has similarly been found to operate with definitional uncertainties and justified by pragmatic political considerations.<sup>7</sup> These definitional uncertainties include the actual custodial duration of a sentence of life imprisonment, the eventual prospect of release on parole and the nature and extent of any supervised release.<sup>8</sup> The pragmatic political considerations relate to a contemporary 'populist law and order ethos favouring tough penalties' that has emerged in Western industrialised nations.<sup>9</sup> This involves 'politicians tapping into, and using for their own purposes, what they believe to be the public's generally punitive stance ... [in order to] satisfy a particular electoral

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6 See, eg. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 61(2); *Crimes Act 1900* (NSW) s 61JA. The question of legislatively increasing the maximum penalty to life imprisonment for these types of crimes raises deeper issues than simply illustrating that the label of life imprisonment is being used in a populist way. Those deeper issues are beyond the scope of this paper, which focuses on the crime of murder and the principled or populist use of life imprisonment in that specific regard.

7 van Zyl Smit, 'Taking Life Imprisonment Seriously', above n 1, 215. In the context of England and Wales, see Martin Wasik, 'Sentencing in Homicide' in Andrew Ashworth and Barry Mitchell (eds), *Rethinking English Homicide Law* (Oxford University Press, 2000) 167–83; Barry Mitchell 'Multiple-Victim Murder, Multiple Murders and Schedule 21 to the Criminal Justice Act 2003' (2011) 75 *Journal of Criminal Law* 122.

8 See Claire Valier, 'Minimum Terms of Imprisonment in Murder, Just Deserts and the Sentencing Guidelines' [2003] *Criminal Law Review* 326, 326 where specific reference is made to 'life' as a 'somewhat vague and elastic term' in the context of the sentence for murder in England and Wales.

9 Andrew von Hirsch and Andrew Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 2<sup>nd</sup> ed, 1998) vi.

constituency',<sup>10</sup> which may fully or partly comprise those voters who are not aligned to a major political party and whose votes may be crucial in ultimately deciding which party can form a government. In this process, fundamental criminal justice principles, such as proportionality, equality and human dignity, are relegated or trumped in the political quest for electoral popularity. Politicians have little regard for the real effects of 'populist' criminal justice policies or even that they may well be 'at odds with a true reading of public opinion'.<sup>11</sup>

On the other hand, some jurisdictions have abolished sentences of life imprisonment through constitutional provisions or simply by not providing for this punishment in their legislation. Largely it seems this outlawing is based on express constitutional provisions<sup>12</sup> or successful curial arguments that 'imprisonment should have a "re-educative" function'<sup>13</sup> and a sentence of life imprisonment 'raises the possibility, at very least, that the offender will never be returned to society and therefore there is a risk that the success of the [re-education] that is supposed to happen in prison will never be put to the test'.<sup>14</sup> As such, the life sentence has been replaced with a finite maximum sentence for murder varying from 21 years in Norway to 60 years in Columbia and Mexico. Also, libertarian arguments that life imprisonment gives 'the state too much power over the individual'<sup>15</sup> appear to underpin the non-existence of the punishment in countries such as Spain and Norway.<sup>16</sup>

Certainly in the International Law Commission debates as to the maximum penalty to be made available to the International Criminal Court in sentencing those convicted of crimes against humanity, a strong argument was put forward

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10 Anthony Bottoms, 'The Philosophy and Politics of Punishment and Sentencing' in C M V Clarkson and R Morgan (eds), *The Politics of Sentencing Reform* (Clarendon Press, 1995) 18, 40.

11 Julian V Roberts et al, *Penal Populism and Public Opinion: Lessons from Five Countries* (Oxford University Press, 2003) 5, 8.

12 In countries such as Portugal and Brazil.

13 Dirk van Zyl Smit, 'Life Imprisonment: Recent Issues in National and International Law' (2006) 29 *International Journal of Law and Psychiatry* 405, 411. See also Dirk van Zyl Smit, 'Outlawing Irreducible Life Sentences', above n 4, 40.

14 van Zyl Smit, 'Life Imprisonment: Recent Issues', above n 13, 411. Such arguments persuaded the constitutional courts of Mexico and Peru to declare life imprisonment unconstitutional.

15 *Ibid.*

16 The 2011 mass murders in Norway by Anders Breivik and his subsequent sentencing to the maximum sentence of 21 years for murder brought that sentence under some international scrutiny and revealed the 'deeply ingrained' psyche in Scandinavian countries 'that criminals should have a second chance in society'. See Stefan Theil, 'Norway Shooter Gets Off Easy', *The Daily Beast* (online), 26 July 2011 <<http://www.thedailybeast.com/articles/2011/07/26/norway-shooter-breivik-gets-off-easy-maximum-sentence-is-21-years.html>>. At the same time it is clear that if a judge considers a prisoner is still dangerous after the prison term has been served in full then the prisoner can be given an additional rolling five-year tariff, which can result in indefinite imprisonment. See Sam Adams, Emma Reynolds and David Williams, 'I Wish He'd Got 21 Years for Each of His 77 Victims: Mother of Teenager Slain by Breivik Attacks Sentence that Could See Him Free in a Decade' *Daily Mail* (online), 24 August 2012 <<http://www.dailymail.co.uk/news/article-2192920/Anders-Breivik-sentenced-Mother-teenager-slain-attacks-speaks-out.html>>; Max Fisher, 'A Different Justice: Why Anders Breivik Only Got 21 Years for Killing 77 People' *The Atlantic* (online), 24 August 2012 <<http://www.theatlantic.com/international/archive/2012/08/a-different-justice-why-anders-breivik-only-got-21-years-for-killing-77-people/261532>>.

by Commissioners from South American and other countries where life imprisonment had been outlawed that ‘it undermines the human rights of offenders by denying them the opportunity to rehabilitate themselves so that they can later live in society as free citizens’.<sup>17</sup> Although ultimately the International Criminal Court was given the power to impose life imprisonment on convicted criminals, it was restricted ‘quite significantly’ in accordance with article 77.1 of the *Rome Statute of the International Criminal Court* to crimes of ‘extreme gravity ... as well as consideration of the personal circumstances of the convicted person’.<sup>18</sup> Accordingly, principled objections to life imprisonment with its ‘potential to deny liberty indefinitely’ resonate strongly in significant sections of the international community supporting at least a closer scrutiny of this ultimate sentence.<sup>19</sup>

## II LIFE IMPRISONMENT FOR MURDER IN AUSTRALIAN JURISDICTIONS

A number of different sentencing systems with varying degrees of judicial and administrative determination of the actual duration of life sentences for murder have developed over time in the several Australian jurisdictions. The prominent, although largely concealed, role of administrative boards and members of the executive government dealing with release of prisoners, including life sentence prisoners, to parole has been and still remains an important feature of the sentencing regimes in the Australian states and territories.<sup>20</sup> In practice the reality has been that imprisonment terms of 12 to 15 years have provided ‘an adequate level of punishment ... for a person sentenced to life imprisonment’ before release on licence or on parole in Australian jurisdictions.<sup>21</sup> In the past decade however, there has been a gradual increase in the length of total effective sentences and non-parole periods for murder attached both to life and determinate sentences. Notably between 2005 and 2010 the average non-parole period for prisoners sentenced to life imprisonment for murder in Victoria was 26 years and 10 months<sup>22</sup> while the median determinate sentence for murder was 19 years with a non-parole period of 15 years.<sup>23</sup>

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17 van Zyl Smit, ‘Taking Life Imprisonment Seriously’, above n 1, 174.

18 van Zyl Smit, ‘Taking Life Imprisonment Seriously’, above n 1, 190–1 citing *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).

19 van Zyl Smit, ‘Life Imprisonment: Recent Issues’, above n 13, 418.

20 See Don Weatherburn, Katrina Grech and Jessie Holmes, ‘Why Does NSW Have a Higher Imprisonment Rate than Victoria?’ (2010) 145 *Crime and Justice Bulletin* 1, 6.

21 Ivan Potas, ‘Life Imprisonment in Australia’ (1989) 19 *Trends and Issues in Crime and Criminal Justice* 1, 1–5; Kate Warner, *Sentencing in Tasmania* (Federation Press, 2<sup>nd</sup> ed, 2002) 297; Jason Keane and Patrizia Poletti, *Sentenced Homicides in New South Wales 1994–2001* (Judicial Commission of New South Wales, 2004) 22–3.

22 Government of Victoria, ‘Sentencing Trends in the Higher Courts of Victoria 2005–06 to 2009–10: Murder’ (Sentencing Snapshot No 109, Sentencing Advisory Council, May 2011) 5.

23 *Ibid* 7.

Table 1 below provides a summary of each of the Australian jurisdictions as to the current legislative schemes for the punishment of murder by life imprisonment. It illustrates that there are three major categories in this regard. These categories are: (1) maximum sentence with or without the possibility for release on parole after a determinate period, (2) mandatory sentence with a prospect for release on parole after a determinate period; and (3) mandatory sentence with no prospect of release on parole. Where there is no prospect of release on parole these life sentences are equivalent to ‘whole of life’ or ‘irreducible’ life sentences.<sup>24</sup> It can be argued that there is always a prospect of release for every life sentence prisoner through exercise of the prerogative of mercy; however such a prospect is extremely remote for most of those for whom a judicial determination has been made that they are never to become eligible for parole.

Table 1: Penalty for murder and release mechanisms for prisoners sentenced to life imprisonment in Australian jurisdictions

<b>A</b> Jurisdiction	<b>B</b> Penalty for murder – maximum or mandatory	<b>C<sup>a</sup></b> Essential meaning of the sentence of life imprisonment	<b>D<sup>a</sup></b> Release mechanisms for prisoners sentenced to life imprisonment
New South Wales	Life imprisonment Maximum: <i>Crimes Act 1900</i> (NSW) s 19A.  Mandatory (for murder of police officers): <i>Crimes Act 1900</i> (NSW) s 19B. Mandatory (extreme level of culpability criteria): <i>Crimes (Sentencing Procedure) Act 1999</i> (NSW) s 61(1).	For the term of the person's natural life: <i>Crimes Act 1900</i> (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: <i>Crimes (Sentencing Procedure) Act</i> (NSW) s 102.
Victoria	Life imprisonment (Level 1) Maximum: <i>Crimes Act 1958</i> (Vic) s 3(a).	For the term of the person's natural life: <i>Sentencing Act 1991</i> (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': <i>Sentencing Act 1991</i> (Vic) s 11(1).	If court declines to fix npp then release can only ultimately be by executive exercise of the prerogative of mercy: <sup>b</sup> preserved by <i>Sentencing Act 1991</i> (Vic) ss 106–7. Where npp fixed, after expiration of npp offender is considered for release on parole by Adult Parole Board: <i>Corrections Act 1986</i> (Vic) s 74.

24 In relation to the terminology ‘irreducible’ life sentences, which has been used extensively in the European Court of Human Rights jurisprudence to distinguish life sentences where there is a prospect, even remote, for release from those where the offender is to be imprisoned for their whole life without any prospect of release, see van Zyl Smit, ‘Outlawing Irreducible Life Sentences’, above n 13.

A Jurisdiction	B Penalty for murder – maximum or mandatory	C <sup>a</sup> Essential meaning of the sentence of life imprisonment	D <sup>a</sup> Release mechanisms for prisoners sentenced to life imprisonment
Queensland	Life imprisonment Mandatory: <i>Criminal Code Act 1899</i> (Qld) s 305 (or an ‘indefinite sentence’ in defined and restricted circumstances under <i>Penalties and Sentences Act 1992</i> (Qld) part 10).	Can be for the duration of a person’s natural life but usually released on parole after certain period of time. Court must make an order that person must not be released until a minimum of 20 or more specified years imprisonment has been served in certain circumstances: <i>Criminal Code Act 1899</i> (Qld) s 305(2). Otherwise prisoner may apply for release through executive after minimum of 15 years: <i>Corrective Services Act 2006</i> (Qld) s 181(3).	Considered for release on parole by Queensland Parole Board after expiration of 15 years or court-imposed minimum term of imprisonment or sooner if exceptional circumstances apply: <i>Corrective Services Act 2006</i> (Qld) s 176.  Otherwise release by exercise of the prerogative of mercy preserved: <i>Corrective Services Act 2006</i> (Qld) s 346.
South Australia	Life imprisonment Mandatory: <i>Criminal Law Consolidation Act 1935</i> (SA) s 11.	For the term of a person’s natural life. Court must fix a npp and the mandatory minimum npp is 20 years. Court may decline to fix a npp if it considers it would be inappropriate to do so because of specific factors: <i>Criminal Law (Sentencing) Act 1988</i> (SA) ss 32(1), (5)(ab), (c), 32A.	Considered for release on parole after expiration of npp and application to the South Australian Parole Board, which advises Governor (executive) as to release. If court declines to fix npp then prisoner can apply to court to fix npp at any subsequent time: <i>Criminal Law (Sentencing Act) 1988</i> (SA) s 32(3).
Western Australia	Life imprisonment Mandatory (qualified <sup>e</sup> ) – unless clearly unjust given the circumstances of the offence and that the person is unlikely to be a threat to community safety when released (then 20 years maximum applies): <i>Criminal Code Act 1913</i> (WA) s 279(4).	Court must either order that offender is never to be released (‘necessary to meet community’s interest in punishment and deterrence’) or set a minimum period of at least 10 years before becoming eligible for release on parole: <i>Sentencing Act 1995</i> (WA) ss 90(1), (3)–(4).	If minimum period served then considered for release on parole by the Governor after report from Prisoners Review Board: <i>Sentence Administration Act 2003</i> (WA) s 25(1). Where order made that prisoner is never to be released then not to be released except that prerogative of mercy is preserved: <i>Sentencing Act 1995</i> (WA) ss 96(3), 137, 142.
Tasmania	Life imprisonment Maximum: <i>Criminal Code Act 1924</i> (Tas) s 158.	For the term of the person’s natural life.  Discretion to fix eligibility for parole after determinate period: <i>Sentencing Act 1997</i> (Tas) s 18.	At expiration of npp considered for release by the Parole Board under <i>Corrections Act 1997</i> (Tas) s 72. Otherwise release by exercise of the royal prerogative of mercy preserved: <i>Corrections Act 1997</i> (Tas) s 89; <i>Sentencing Act 1997</i> (Tas) s 97.

A Jurisdiction	B Penalty for murder – maximum or mandatory	C <sup>a</sup> Essential meaning of the sentence of life imprisonment	D <sup>a</sup> Release mechanisms for prisoners sentenced to life imprisonment
Northern Territory	Life imprisonment Mandatory: <i>Criminal Code 1983</i> (NT) ss 157(1)–(2).	For the term of a person's natural life. Court must fix a npp and the standard npp is 20 years or 25 years where certain circumstances apply. Npp can only be shorter if there are exceptional circumstances. Court may refuse to fix npp where there is an extreme level of culpability: <i>Sentencing Act 1995</i> (NT) s 53A	Release may be ordered after expiration of npp by the Parole Board of Northern Territory having regard to protection of the community as the paramount consideration: <i>Parole of Prisoners Act 1971</i> (NT) ss 3GB, 5. If npp not fixed then release can only be by executive (the Administrator's) exercise of the prerogative of mercy: <i>Sentencing Act 1995</i> (NT) s 115(1).
Australian Capital Territory	Life imprisonment Maximum: <i>Crimes Act 1900</i> (ACT) s 12.	For the term of a person's natural life.  Court must not fix a npp: <i>Crimes (Sentencing) Act 2005</i> (ACT) s 65(5).	May be released on licence if served at least 10 years of sentence and application granted by executive after recommendation by Sentence Administration Board: <i>Crimes (Sentence Administration) Act 2005</i> (ACT) ss 288–98. Otherwise release by exercise of the prerogative of mercy preserved: <i>Crimes (Sentence Administration) Act 2005</i> (ACT) s 314A.

- a Columns C and D are restricted to the essential meaning of 'life imprisonment' and the release mechanisms, if any, available for offenders sentenced to life imprisonment. Only the rules and practices affiliated with sentences of life imprisonment are included even where powers exist in certain jurisdictions for the courts to impose determinate head sentences with non-parole periods upon persons convicted of murder, such as in New South Wales and Victoria.
- b *R v Denyer* [1995] 1 VR 186, 193 (Crockett J).
- c The legislative scheme for the penalty for murder now operating in Western Australia may be more accurately described as a 'presumptive' sentence.

### A A Principled Approach

As illustrated in Table 1 above, the sentence of life imprisonment in Australian jurisdictions can mean anything from a moderate length determinate period of 10 years imprisonment as a non-parole period to the term of an offender's natural life, which in turn varies significantly according to the age of the offender at the time of sentence.<sup>25</sup> This indeterminate and uncertain nature of life imprisonment, whether as a mandatory or maximum sentence, presents a

25 See *R v Denyer* [1995] 1 VR 186, 193 (Crockett J).

significant barrier to the realisation of the important principles of proportionality, equal application of the law and human dignity in sentencing.

### 1 Proportionality

Proportionality is a central sentencing principle, which has been recognised by the High Court of Australia in a number of cases as a limiting factor on punishment.<sup>26</sup> As the principle which underpins ‘just’ punishment is commensurate with the seriousness of an offence, it is implicit in the guiding principles stated in the sentencing legislation of several Australian jurisdictions.<sup>27</sup> Further, it is the touchstone of the prominent ‘just deserts’ theory of sentencing wherein both ordinal and cardinal proportionality are to be achieved in a just sentencing system.<sup>28</sup> As to ordinal proportionality, it is clear that in terms of harm and culpability most murder offences rank above all other criminal offences on a comparative scale. The major concern relates to cardinal proportionality and at what points the penalty scale of the sentencing system should be anchored in terms of its absolute levels of penalties. The difficulty in achieving cardinal proportionality is found in the fact that ‘the censure expressed through penal deprivations is, to a considerable degree, a convention ... [so that] we cannot perceive a single right or fitting penalty for a crime’.<sup>29</sup> In this way it is easier to identify manifest disproportion in punishment than to establish the accuracy of a particular relationship between seriousness of crime and the absolute levels of punishment. Because life imprisonment is an indeterminate sentence which varies considerably depending on the age of the prisoner at the time of sentence, the overall severity level of the penalty scale may be ‘significantly inflated or deflated’<sup>30</sup> such that it ‘cannot be reconciled with any genuine notion of

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26 *Veen v The Queen [No 1]* (1979) 143 CLR 458; *Veen v The Queen [No 2]* (1988) 164 CLR 465; *Hoare v The Queen* (1989) 167 CLR 348. See also Richard G Fox, ‘The Killings of Bobby Veen: The High Court on Proportion in Sentencing’ (1988) 12 *Criminal Law Journal* 339.

27 *Sentencing Act 1991* (Vic) ss 5(1)(a), 5(3); *Sentencing Act 1995* (WA) s 6(1); *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(a); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(a); *Penalties and Sentences Act 1992* (Qld) s 9(1)(a); *Sentencing Act 1995* (NT) s 5(1)(a); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(k).

28 This is a modern retributivist theory that was promoted in a major work by Andrew von Hirsch, Committee for the Study of Incarceration, *Doing Justice: The Choice of Punishments* (Northeastern University Press, 1976). It played a major role in the revival of retributivist sentiment in punishment systems. Andrew von Hirsch has written several subsequent books and articles promoting ‘just deserts’ theory, including in: Andrew von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (Rutgers University Press, 1985); Andrew von Hirsch, *Censure and Sanctions* (Oxford University Press, 1993); Andrew von Hirsch, ‘The Politics of “Just Deserts”’ (1990) 32 *Canadian Journal of Criminology* 397.

29 Andrew von Hirsch, ‘Proportionate Sentences: A Desert Perspective’ in Andrew Ashworth, Andrew von Hirsch and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 3<sup>rd</sup> ed, 2009) 120.

30 Andrew von Hirsch, ‘Commensurability and Crime Prevention: Evaluating Formal Sentencing Structures and Their Rationale’ (1983) 74 *Journal of Criminal Law and Criminology* 209, 213.



proportionality ... There is no satisfactory way of fitting life sentences on a sentencing severity scale'.<sup>31</sup>

In using the punishment of imprisonment for a range of criminal acts there is an inherent difficulty in determining what particular time periods of deprivation of liberty will be proportionate to the harm and culpability comprised in particular criminal acts. If the paramount level of punishment is life imprisonment, which cannot be clearly defined in terms of actual duration, then there is no discernible anchoring point for determining proportionality in punishment. Further, if there are administrative and other mechanisms in place to continually redefine the meaning of life imprisonment then true proportionality in sentencing cannot be attained. Therefore, the existence of parole and licence mechanisms to allow release of life sentence prisoners at differing times means that the ordinal ranking of offences becomes 'fundamentally compromised by its rooting within a cardinal system based upon criteria other than those of harm and culpability ... [such that] the criteria for ordinal proportionality are significantly indeterminate, permitting them to be shaped by ad hoc political decisions and by the ideologies of dominant groups'.<sup>32</sup> It is strongly argued on this analysis that the entire sentencing system is compromised by the indeterminate life sentence at its pinnacle such that proportionality in sentencing cannot truly be achieved at any point on the offence spectrum.

A 'just deserts' model of sentencing and the notion of penal censure itself are predicated on the basis that the overall level of punitiveness should be at moderate levels.<sup>33</sup> This links directly to the principle of 'parsimony', which operates to prevent the imposition of a sentence that is more severe than is necessary to achieve the purposes of the sentence.<sup>34</sup> The Australian Law Reform Commission has considered this principle to be consistent with 'evolving community perceptions' and noted that the '[*International Covenant on Civil and Political Rights*], and Australian community values, make certain punishments unacceptable'.<sup>35</sup> It is very difficult to characterise life imprisonment with its indeterminate numerical meaning as fitting into a scheme of penal censure that operates within an overall level of moderate punishment, a scheme which is arguably more about keeping with contemporary community expectations of

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31 David Wood, 'The Abolition of Mandatory Life Imprisonment for Murder: Some Jurisprudential Issues' in Heather Strang and Sally-Anne Gerull (eds), *Homicide: Patterns, Prevention & Control* (Australian Institute of Criminology, 1993) 237, 253.

32 Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Cambridge University Press, 2<sup>nd</sup> ed, 2001) 210–11.

33 von Hirsch, 'Proportionate Sentences: a Desert Perspective', above n 29, 120.

34 See Norval Morris, 'Desert as a Limiting Principle' in Andrew von Hirsch and Andrew Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 2<sup>nd</sup> ed, 1998) 180–4. See also Australian Law Reform Commission, *Sentencing of Federal Offenders*, Discussion Paper No 70 (2005) 109; *Webb v O'Sullivan* [1952] SASR 64, 66 (Napier CJ); *Sentencing Act 1991* (Vic) s 5(3).

35 Australian Law Reform Commission, *Sentencing*, Report No 44 (1988) 15.

appropriate levels of punishment.<sup>36</sup> The social and political context in Australia wherein there is ‘a flux of liberal and conservative ideologies ... [will] determine the cardinal limits of the system’<sup>37</sup> and it is strongly argued that cardinal and ordinal proportionality cannot be achieved in a parsimonious ‘just deserts’ sense within a scheme of penal censure where the apex is the ambiguous and uncertain punishment of life imprisonment.

## 2 Equal Application of the Law

The principle of equal application of the law is a basic tenet of common law legal systems and it has been recognised by the High Court of Australia in the context of criminal sentencing.<sup>38</sup> Equal application of the law is a fundamental principle underpinning consistent and fair sentencing practice and it has been aligned to the principle of proportionality in sentencing. It is fundamental to the judicial process that like cases are treated alike and different cases are treated differently. A mandatory life sentence for murder provides no scope for such internal discrimination of cases and clearly works against this fundamental common law principle. The circumstances of the crime of murder differ widely in severity and character ‘probably more so than any other crime, encompassing both contract and mercy killing’.<sup>39</sup> Although it is recognised that parliaments have the power to prescribe such mandatory penalties as considered fit, any removal of judicial discretion in sentencing, particularly for the broad spectrum of offending than can constitute murder, clearly challenges a principled approach to this important and complex task.<sup>40</sup>

Even where life imprisonment is provided as a discretionary maximum there are strong concerns as to equal application due to the inherent difficulties in equitably discriminating between cases deserving of the maximum indeterminate sentence and a lengthy determinate sentence. Inequitable disparity is most clearly

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36 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* (Butterworths, 2000) 186; Roberts et al, above n 11, 21–34, 93–106; Julian V Roberts, ‘Sentencing Policy and Practice: The Evolving Role of Public Opinion’ in Arie Freiberg and Karen Gelb (eds), *Penal Populism, Sentencing Councils and Sentencing Policy* (Hawkins Press, 2008) 15–19, 22–6; John Walker, Mark Collins and Paul Wilson, ‘How the Public Sees Sentencing: An Australian Survey’ (1987) 4 *Trends and Issues in Crime and Criminal Justice* 6; Geraldine Mackenzie, *How Judges Sentence* (Federation Press, 2005) 148–9; Kate Warner et al, ‘Gauging Public Opinion on Sentencing: Can Asking Jurors Help?’ (2009) 371 *Trends & Issues in Crime and Criminal Justice* 5.

37 Norrie, above n 32, 211.

38 *Lowe v The Queen* (1984) 154 CLR 606; *Leeth v The Commonwealth* (1992) 174 CLR 455; *Kruger v The Commonwealth* (1997) 190 CLR 1, 63–8 (Dawson J), 141–2 (McHugh J); *Siganto v The Queen* (1998) 194 CLR 656, 670–2 (Gaudron J); *Muir v The Queen* (2004) 206 ALR 189, 194 (McHugh and Hayne JJ); *Hili v The Queen* (2010) 242 CLR 520, 527 [18], 535 [49] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

39 Alex Bailin, ‘The Inhumanity of Mandatory Sentences’ [2002] *Criminal Law Review* 641, 641 citing *Reyes v The Queen* [2002] 2 AC 235 (Lord Bingham).

40 *Palling v Corfield* (1970) 123 CLR 52, 58 (Barwick CJ). See also Nicholas Cowdery, ‘Mandatory Life Sentences in New South Wales’ (1999) 22 *University of New South Wales Law Journal* 290, 290–2.

revealed by reference to the age of the offender at the time of sentence.<sup>41</sup> There is no clear guide as to what length of determinate sentence is the next step down from a ‘whole of life’ sentence in the context of no identifiable ‘litmus test’ of the relevant considerations for clearly delineating who is in the most serious category of murder offender attracting that sentence and who is out of this category, either marginally or otherwise. This inequity has most clearly been demonstrated in New South Wales where there is no express indication of relative weight to be given to recurring factors in murder cases so as to provide a transparent measure of seriousness in establishing the elusive dividing line for an appropriate degree of punishment. The necessary level of discrimination between cases at this most serious or ‘worst case’ level has not been present to ensure that outcomes of similar cases are, within reasonable bounds, the same.<sup>42</sup> Where life imprisonment cannot be given a definitive meaning as a maximum penalty then any attempt at discriminating between murder cases by imposing various finite terms through an intuitive synthesis of relevant factors is fundamentally flawed. Sentences cannot be applied so that like cases are treated alike and different cases treated differently.

### 3 Human Rights and Dignity

There is an important link between the principle of proportionality and another principle of sentencing that is a significant consideration in analysing the meaning and nature of the sentence of life imprisonment:

The concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading, particularly where ... it is almost exclusively the length of time for which an offender is sentenced that is in issue.<sup>43</sup>

The principle that prohibits cruel, inhuman or degrading punishment arguably extends to the Australian jurisdictions through article 7 of the *International Covenant on Civil and Political Rights*. The fact that the criminal law and sentencing is the preserve of the states in the Australian constitutional context may weaken this argument. Notwithstanding that, and perhaps more significantly, this principle may be argued to align closely with Australian community values and reflect evolving perceptions of fundamental human rights.<sup>44</sup> It effectively amounts to ‘an offender’s right not to have liberty restricted or taken away to [an] excessive extent’,<sup>45</sup> which is clearly an important value in any modern democratic society that operates according to the rule of law and recognises the paramount importance of human liberty.

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41 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) 29 *University of New South Wales Law Journal* 139, 148–55. See also below n 55.

42 Ibid 150, quoting *S v Dodo* [2001] 3 SA 382 (Ackermann J per curiam) (Constitutional Court).

43 Dirk van Zyl Smit and Andrew Ashworth, ‘Disproportionate Sentences as Human Rights Violations’ (2004) 67 *Modern Law Review* 541, 541.

44 See above text accompanying nn 34–5.

45 van Zyl Smit and Ashworth, above n 43, 560.

Clearly linked to this principle are human rights and dignity considerations,<sup>46</sup> which involve humanitarian concerns as to the practical effects of life imprisonment as an indeterminate sentence.

Research into the effects of long-term and life imprisonment has found that it may cause ‘desocialization and institutionalisation’ and there are clear risks to physical well-being.<sup>47</sup> As potentially the most serious form of deprivation of liberty of the person in a contemporary context, imprisonment imposes confinement with concomitant regimentation and severe restrictions on freedom of movement and activity. Although there has not been a successful challenge to the sentence of life imprisonment as a cruel, inhuman and degrading punishment in any common law country,<sup>48</sup> the pervasive uncertainty of the duration of the deprivation of liberty and other vagaries associated with life imprisonment severely impinge on the human dignity of the offender who, at the very least, is unsure as to ultimately being released from imprisonment. In this way there may be no ‘realistic opportunity to return to society to exercise the basic freedoms that they may have learnt to use responsibly’.<sup>49</sup> This opportunity is somewhat controversially seen as ‘a right to resocialisation’,<sup>50</sup> which may be indefinitely or absolutely denied to the life sentence prisoner and which has been an influential claim in countries where the sentence of life imprisonment has been abolished.<sup>51</sup> Certainly in the Australian context, the ‘terrible significance’ of the sentence of life imprisonment has been judicially recognised and this is exemplified by the oft-quoted statement of Hunt J in *R v Petroff*:

The indeterminate nature of a life sentence has long been the subject of criticism by penologists and others concerned with the prison system and the punishment of offenders generally. Such a 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

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- 46 van Zyl Smit, ‘Taking Life Imprisonment Seriously’, above n 1, 10–11. See also *Muir v The Queen* (2004) 206 ALR 189, 194 (McHugh and Hayne JJ).
- 47 R J Sapsford, ‘Life-Sentence Prisoners: Psychological Changes during Sentence’ (1978) 18 *British Journal of Criminology* 128, 142–3; Timothy J Flanagan, ‘The Pains of Long-Term Imprisonment: A Comparison of British and American Perspectives’ (1980) 20 *British Journal of Criminology* 148; Edward Zamble and Frank Porporino, ‘Coping, Imprisonment, and Rehabilitation: Some Data and Their Implications’ (1990) 17 *Criminal Justice and Behaviour* 53; John Howard Society of Alberta, Canada, *Effects of Long Term Incarceration* (1999) 15–16. See also van Zyl Smit, ‘Outlawing Irreducible Life Sentences’, above n 13, 43, in relation to the various resolutions and recommendations of the Council of Europe on the treatment of long-term prisoners and conditional release.
- 48 *Harmelin v Michigan*, 501 US 957 (1991); *R v Luxton* [1990] 2 SCR 711; *R v Boyd* (1995) 81 A Crim R 260, 269 (Gleeson CJ). Interestingly in the recent case of *Brown v Plata*, 563 US 12, 13 (2011) the US Supreme Court emphasised that ‘[p]risoners retain the essence of human dignity inherent in all persons. ... The basic concept underlying the Eighth Amendment is nothing less than the dignity of man’ in holding that the exceptional overcrowding in California’s prisons was a violation of the Eighth Amendment constitutional prohibition against cruel and unusual punishment, particularly because of the deprivation of basic sustenance, including adequate medical care.
- 49 van Zyl Smit, ‘Taking Life Imprisonment Seriously’, above n 1, 213–14.
- 50 *Ibid* 213.
- 51 See above text accompanying nn 13–14.

imposition has been an increased difficulty in their management by the prison authorities.<sup>52</sup>

Overall, it is certainly arguable from a normative perspective that the fundamental principles of proportionality, equality before the law, and human dignity, which underpin a just sentencing system, cannot be realised through life imprisonment as either a mandatory or maximum sentence for murder. This argument is fortified by evaluation of the specific practical application and functioning of the sentence of life imprisonment for murder in the several Australian jurisdictions.

## **B Practical Implementation and Operation of the Life Sentence for Murder**

In Victoria, the structure of the section providing a maximum sentence of life imprisonment for murder ‘creates a strong presumption that a non-parole period will be specified’.<sup>53</sup> The cases that should fall into the ‘exceptional’ life imprisonment category are identified by very broadly drafted excepting conditions,<sup>54</sup> which leave significant room for judicial interpretation. At the same time, such judicial interpretation is influenced by a penal context where there is a clear legislative preference shown for fixing a non-parole period and where instances when a natural life sentence would be imposed were anticipated to be quite rare. This is clearly reflected in the appellate court reasoning in a number of cases dealing with sentences for murder convictions, notably the case of *R v Denyer* where the court considered an appeal against a sentence of life imprisonment without eligibility for parole imposed on a 21 year old prisoner who pleaded guilty to three counts of murder. The momentous, disproportionate and unfair nature of a natural life sentence was clearly recognised by the court in allowing the appeal and fixing a non-parole period of 30 years imprisonment:

Assuming a life expectancy of about (certainly not less than) 71 years, the sentence is for all practical purposes one of at least 50 years. It may very well be longer. Certainly he can entertain no hope or expectation of ever gaining his release. He is devoid of incentive to rehabilitate himself. He is entitled to no remissions. A like offender who was, say, 41 years of age at the time of sentence would be incarcerated for 20 years less of his lifetime than would be the applicant. This is a very substantial difference in penalties. The length of the

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- 52 *R v Petroff* (Unreported, Supreme Court of New South Wales, Hunt CJ at CL, 12 November 1991) 1–2. In the contemporary context, this judicial observation could be extended to the punitive approaches taken in comparatively recent legislation that allows for the ongoing preventative detention of sex offenders after having completed the sentence originally imposed by the court. See *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) pt 2 (considered by the High Court in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575); *Dangerous Sexual Offenders Act 2006* (WA) pt 2; *Crimes (Serious Sex Offenders) Act 2006* (NSW) pt 3; *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) pt 3.
- 53 Richard Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (Oxford University Press, 2<sup>nd</sup> ed, 1999) 758.
- 54 *Sentencing Act 1991* (Vic) s 11(1) incorporates a proviso to fixing a non-parole period where the sentencing judge forms the opinion that doing so is inappropriate because of ‘the nature of the offence or the past history of the offender’.

sentence served and, thus, the measure of the punishment inflicted is dependent upon the pure chance of the offender's age.<sup>55</sup>

Arguably, these remarks by Crockett J illustrate recognition of the inherent unfairness and disproportionate nature of a life sentence where it means that the offender must remain incarcerated until the day they die or even where there is continuing uncertainty as to its meaning. Further, in practice it is apparent that it is comparatively rare for a sentencing judge in this jurisdiction, which is known to have a very modest use of imprisonment compared to other Australian jurisdictions,<sup>56</sup> to impose a life sentence without a non-parole period.<sup>57</sup> There are currently 47 prisoners serving a life sentence or equivalent in Victoria and only 12 of those do not have a non-parole period affixed to their sentence.<sup>58</sup> The ability to fix any determinate non-parole period for murder in this jurisdiction arguably gives more scope for the principle of proportionality to be applied in practice, however, the indeterminate life sentence remains as the maximum penalty making it difficult to clearly establish cardinal proportionality and thus to always ensure equal application of the law. The courts in this jurisdiction have not articulated clear and specifically weighted relevant considerations for determining when this ultimate sentence is to be used. In fact, the Victorian Court of Criminal Appeal has observed that '[i]t is ... not possible to say with any precision what are the parameters within which murders that deserve life imprisonment will fall'.<sup>59</sup>

Similarly, in Tasmania the 'true' natural life sentence option is available where the court denies the prisoner eligibility for parole. It is an extremely rare sentencing disposition in practice. It has been used only once in this jurisdiction in the notorious mass murder case of *R v Martin Bryant*<sup>60</sup> and specific criteria or relevant factors have not been articulated to mandate its imposition to accord with the principles of proportionality and equal application of the law.

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55 *R v Denyer* [1995] 1 VR 186, 193 (Crockett J with whom Southwell J substantially agreed). The appeal was allowed by a majority of 2:1 with Phillips CJ dissenting.

56 This could be said to be part of Victoria's moderate penal culture. Victoria has the second lowest imprisonment rate in the country after the ACT, which is an important indicator of the penal severity of a jurisdiction: see Australian Bureau of Statistics, *Prisoners in Australia 2010* (National Statistics Issue 4517.0, 8 December 2011) 17–19. See also Weatherburn, Grech and Holmes, above n 20, 4–6.

57 Fox and Freiberg above n 53, 877–8. See also Victorian Law Reform Commission, *Defences to Homicide*, Final Report (2004) 274 where it is noted that of the 131 offenders convicted of murder from 1997 to 2002 only 9 (or 6.9 per cent) were sentenced to life imprisonment. Some notable life imprisonment without eligibility for parole case examples in this jurisdiction are *R v Taylor* (Unreported, Victoria Court of Criminal Appeal, Young CJ, Gray and McDonald JJ, 22 June 1989); *R v Lowe* [1997] 2 VR 465; *R v Camilleri* [1999] VSC 184, *R v Camilleri* (2001) 119 A Crim R 106; *DPP v Farquharson* [2007] VSC 469, *R v Farquharson* (2009) 26 VR 410. Cf *R v Williams* [2007] VSC 131; *R v Hudson* [2008] VSC 389; *R v Knight* [1989] VR 705 where lengthy non-parole periods were fixed in relation to head sentences of life imprisonment.

58 See Department of Justice (Vic), *Statistical Profile of the Victorian Prison System 2005–06 to 2009–10* (2010) 27. Overall this represents a very small percentage of offenders serving sentences of imprisonment for offences of murder in this jurisdiction.

59 *R v Iddon and Crocker* (1987) 32 A Crim R 315, 328.

60 (Unreported, Supreme Court of Tasmania, Cox CJ, 22 November 1996).

Those somewhat flexible arrangements in Victoria and Tasmania can be compared and contrasted to New South Wales. Throughout the past two decades the complex and unique legislative changes to the meaning and form of a life sentence as well as the re-determination of existing life sentences have resulted in several categories of life sentence prisoners in New South Wales. Some of these 'lifers' do have a prospect of release on parole but others do not and this practical reality creates patent uncertainty and confusion for the lay observer.<sup>61</sup> According to data published by the Serious Offenders Review Council<sup>62</sup> 100 prisoners were serving life sentences in New South Wales ('NSW') as at 31 December 2010 representing 13.4 per cent of all serious offenders and one per cent of total prison inmates. Of these prisoners, 39 were serving natural life sentences, nine were serving life sentences subject to non-release recommendations,<sup>63</sup> 45 were serving life sentences having been re-determined by the Supreme Court with a determinate non-parole period, and seven were serving life sentences and eligible to apply for a determinate sentence or non-parole period.<sup>64</sup> These divergent categories of life sentence prisoners within the one jurisdiction resulting from various and convoluted legislative amendments to the punishment for murder and re-determination of life sentences create a substantial barrier to ensuring that the ultimate distribution of life imprisonment is proportionate, fair and equitable.

A further contrast can be made with the various Australian jurisdictions where the life sentence is mandatory upon conviction for murder but there is a prospect of release on parole through various judicial and/or administrative mechanisms. Again there is no uniformity in the method of implementation of the mandatory life sentence in each of the four jurisdictions although it is clear in practice that the overwhelming majority of life sentence prisoners in each

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61 In relation to public perceptions of crime and sentencing in Australia, see David Indermaur and Lynne Roberts, 'Perceptions of Crime and Justice' in Shaun Wilson et al (eds), *Australian Social Attitudes: The First Report* (UNSW Press, 2005) 141–60; Craig Jones, Don Weatherburn and Katherine McFarlane, 'Public Confidence in the New South Wales Criminal Justice System' (2008) 118 *Crime and Justice Bulletin* 1, 1–2; Brent Davis and Kym Dossetor, '(Mis)perceptions of Crime in Australia' (2010) 396 *Trends and Issues in Crime and Criminal Justice* 1. In relation to England and Wales specifically in the context of public understanding of the sentence of life imprisonment for murder, see also Barry Mitchell and Julian V Roberts, 'Sentencing for Murder: Exploring Public Knowledge and Public Opinion in England and Wales' (2012) 52 *British Journal of Criminology* 141; Barry Mitchell and Julian Roberts, 'Public Attitudes towards the Mandatory Life Sentence for Murder: Putting Received Wisdom to the Empirical Test' [2011] *Criminal Law Review* 6, 456–68.

62 Serious Offenders Review Council, Department of Corrective Services (NSW), *Annual Report for Year Ended December 2010* (2011) 19, 22–3.

63 That is life sentences imposed prior to 1990 when there was no judicial power to order an offender be imprisoned for the term of his or her natural life but sentencing judges could make a recommendation that an offender 'never be released'. For notorious examples see *R v Travers, Murdoch, Murphy, Murphy and Murphy* (Unreported, Supreme Court of New South Wales, Maxwell J, 16 June 1987); *R v Jamieson, Elliott and Blessington* (Unreported, Supreme Court of New South Wales, Newman J, 18 September 1990). These prisoners are not eligible to apply for re-determination of their life sentences until they have served a minimum of 30 years imprisonment.

64 These re-determination of life sentence procedures were originally provided for in *Sentencing Act 1989* (NSW) s 13A and are now found in *Crimes (Sentencing Procedure) Act 1999* (NSW) sch 1.

jurisdiction will be released from imprisonment at some undefined future point in time.<sup>65</sup>

The ‘mandatory’ nature of the sentence of life imprisonment in Queensland, South Australia and the Northern Territory is significantly modified in its practical implementation by the power of the court to fix a non-parole period so that the prisoner has a prospect of release on parole. Thus, although the life sentence must be imposed by the courts in these jurisdictions, that is clearly not the entire sentencing scheme for murder. The multi-layered scheme including administrative release mechanisms has negative ramifications for clear public understanding of the distinction between imposition of a mandatory sentence of life imprisonment which is for the whole life of an offender and the operation of largely hidden mechanisms allowing for conditional release of life sentence prisoners at some future time. To add to the potential for misunderstanding there are varying limitations on this judicial power in the three jurisdictions. Notably in Queensland, the sentencing judge has no power to fix a non-parole period to reflect the relative objective seriousness of the offence and subjective culpability of the offender unless the offender has been convicted of multiple counts of murder or has been previously sentenced for another offence of murder.<sup>66</sup> Accordingly, the custodial durations of most life sentences are determined entirely by the Queensland Parole Board once the prisoner has served a minimum of 15 years imprisonment.<sup>67</sup> Overall, the Queensland system is characterised by a largely inflexible scheme which relies heavily on administrative mechanisms to determine the actual custodial duration of a life sentence for convicted murderers,<sup>68</sup> and includes the potential of imprisonment for the term of a person’s natural life even though there is no express judicial power to make an order or recommendation in that regard.

In South Australia and the Northern Territory there are some similarities but also some clear contrasts to the other Australian jurisdictions. Both jurisdictions set a mandatory minimum non-parole period of 20 years. In South Australia this is for an offence of murder at the lower end of the range of objective

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65 Historically, this phenomenon has been evident for a significant period as the ‘life sentence’ label has largely translated to an indeterminate rather than an absolute sentence: see Arie Freiberg and David Biles, *The Meaning of ‘Life’: A Study of Life Sentences in Australia* (Australian Institute of Criminology, 1975) 54–7.

66 *Criminal Code Act 1899* (Qld) s 305(2). In such circumstances an order must be made for a minimum term of at least 20 years. For a recent example, see *R v Sica* [2012] QSC 184.

67 It may be less than 15 years if there are ‘exceptional circumstances’: *Corrective Services Act 2006* (Qld) s 176.

68 Although standing apart from other Australian jurisdictions, the Queensland system is comparable to the practice in many states of the US where mandatory sentences of life imprisonment are common and the release decision and thus custodial duration of imprisonment is left entirely to parole authorities. See van Zyl Smit, ‘Taking Life Imprisonment Seriously’, above n 1, 20–8; Kevin Reitz, ‘Sentencing’ in Michael Tonry (ed), *The Handbook of Crime and Punishment* (Oxford University Press, 1998) 542, 549–51; Michael Tonry, ‘Mandatory Penalties’ in Michael Tonry (ed), *Thinking About Punishment: Penal Policy Across Space, Time and Discipline* (Ashgate Publishing, 2009) 311–30.



seriousness<sup>69</sup> whereas in the Northern Territory it is for murders falling in the middle range of objective seriousness and the period can only be shorter if exceptional circumstances apply.<sup>70</sup> A Northern Territory judge may decline to fix a non-parole period to a sentence of life imprisonment when the culpability of the offender is ‘so extreme the community interest in retribution, punishment, protection and deterrence can only be met if the offender is imprisoned for the term of his or her natural life without the possibility of release on parole’.<sup>71</sup> This leaves the sentencing judge with a general legislative statement to determine when such extreme cases deserve the natural life sentence in a jurisdiction with a predominantly harsh penal culture.<sup>72</sup> There are no specific criteria or relevant considerations identified as to the nature of the harm or level of offender culpability that guide the sentencing judge in imposing such an extreme punishment in order to ensure proportionality and equal application of the law.

Also, in South Australia it is possible for a natural life sentence to be judicially imposed as a judge may decline to fix a non-parole period where it is considered inappropriate because of ‘(i) the gravity of the offence or the circumstances surrounding the offence; or (ii) the criminal record of the person; or (iii) the behaviour of the person during any previous period of release on parole or conditional release; or (iv) any other circumstance’.<sup>73</sup> In contrast to the Northern Territory, however, this power is qualified by the ability of the prisoner to make an application to the court at any subsequent time for a non-parole period to be fixed in relation to a sentence of life imprisonment. This effectively provides a form of judicial review as a life sentence prisoner progresses through their imprisonment. In practice a sentence of imprisonment for the term of a prisoner’s natural life has been imposed only in the most exceptional cases in this jurisdiction.<sup>74</sup>

A final contrast is the ‘mandatory’ life sentence in Western Australia. The legislative scheme existing in this jurisdiction effectively results in life imprisonment being a ‘presumptive’ sentence as it must be imposed upon any

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69 The court may fix a longer or shorter non-parole period as it thinks fit although it can be a shorter period only if special reasons exist having regard exclusively to the matters set out in *Criminal Law (Sentencing) Act 1988* (SA) s 32A(3): ‘(a) the offence was committed in circumstances in which the victim’s conduct or condition substantially mitigated the offender’s conduct; (b) if the offender pleaded guilty to the charge of the offence – that fact and the circumstances surrounding the plea; (c) the degree to which the offender has co-operated in the investigation or prosecution of that or any other offence and the circumstances surrounding, and likely consequences of, any such co-operation’.

70 *Sentencing Act 1995* (NT) s 53A(6).

71 *Sentencing Act 1995* (NT) s 53A(5).

72 The Northern Territory is recorded as having the highest imprisonment rate of all Australian jurisdictions, which is an important indicator of the severity or otherwise of the penal culture existing in a particular jurisdiction: Australian Bureau of Statistics, above n 56, 17–19.

73 *Criminal Law (Sentencing) Act 1988* (SA) s 32(5)(c).

74 See, eg, *R v Ellis* (Unreported, Supreme Court of South Australia, Matheson J, 20 November 1992); *R v Bunting and Wagner* (Unreported, Supreme Court of South Australia, Martin J, 29 October 2003) (the ‘Snowtown’ serial murders). Cf *R v Jarrett (No 3)* (1994) 74 A Crim R 121; *R v Miller* (2000) 76 SASR 151; *R v Vlassakis* (Unreported, Supreme Court of South Australia, Duggan J, 10 July 2002). See also *Inge v The Queen* (1999) 199 CLR 295, 318–19 (Kirby J).

person convicted of murder unless the sentence '(a) ... would be clearly unjust given the circumstances of the offence and the person; and (b) the person is unlikely to be a threat to the safety of the community when released from imprisonment'.<sup>75</sup> This 'presumptive'<sup>76</sup> rather than mandatory sentence in the true sense of that expression creates another layer of complexity and potential for unfairness and misunderstanding by the lay observer as it is actually possible to impose a determinate rather than a life sentence for murder. To further complicate the meaning of a life sentence in this jurisdiction once it is imposed the sentencing judge must then either set a minimum period of at least 10 years before the prisoner becomes eligible for parole or order the offender must never be released.<sup>77</sup> The latter order must be made 'if it is necessary to do so in order to meet the community's interest in punishment and deterrence',<sup>78</sup> which, like that in the Northern Territory, is a very general statement open to judicial interpretation and potentially wide variation in practical application in a jurisdiction which has a notoriously high imprisonment rate.<sup>79</sup>

The label of 'mandatory' in these four jurisdictions is misleading in all the variants of form and implementation that have been created for the sentence of life imprisonment. Although this sentence must ordinarily<sup>80</sup> be imposed upon conviction for murder in each jurisdiction it rarely translates to its 'truthful' form of a whole of life sentence, particularly as a result of judicial order. The extreme form of censure associated with imposition of the current ultimate penalty available to sentencing courts in every case of murder does not provide a mechanism for reflecting, in a transparent and equitable manner, the different levels of culpability that exist between the conduct constituting murder and the offenders who are responsible for such conduct. There is clearly a large spectrum of objective seriousness involved in the conduct that constitutes murder ranging from a single 'mercy' killing to extremely violent, cruel, pre-meditated, multiple and contract killings. Added to this are wide variations in the subjective blameworthiness and moral culpability of the person or persons responsible for the killing(s), ranging from recklessness and intentional motives of compassion to intentional killings for financial gain or callous and calculating offenders predicted to be an ongoing and vivid danger to the community. Overall, 'life imprisonment is ... disproportionately heavy for the crimes for which it is being

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75 *Criminal Code Act 1913* (WA) s 279(4). This unique system resulted from comparatively recent legislative amendments: *Criminal Law Amendment (Homicide) Act 2008* (WA) which commenced operation on 22 July 2008.

76 This is similar to the scheme in New Zealand where there is a presumptive rather than a mandatory sentence of life imprisonment for murder: *Crimes Act 1961* (NZ) s 172; *Sentencing Act 2002* (NZ) s 102.

77 *Sentencing Act 1995* (WA) s 90(1).

78 *Sentencing Act 1995* (WA) s 90(3).

79 Western Australia is recorded as having the second highest imprisonment rate of all Australian jurisdictions and thus may be described as having a generally severe penal culture: Australian Bureau of Statistics, above n 56, 17–19.

80 Noting the presumptive rather than mandatory nature of the sentence in Western Australia.

imposed',<sup>81</sup> notably when it has been made mandatory for a class of offence encompassing wide variations in criminal conduct and culpability.

These life imprisonment variants are further complicated by the array of release and parole supervision rules and administrative practices in the Australian jurisdictions. The power for release of prisoners sentenced to life imprisonment where a non-parole period has been fixed is vested in largely concealed administrative bodies whose members are appointed by the government of the day. Once released, the question arises as to whether parole conditions will extend for the remainder of the offender's natural life. In Tasmania, the Parole Board has the power to determine the appropriate period of a parole order and conditions as to supervision and other matters,<sup>82</sup> although a life sentence prisoner remains 'under sentence' even when this parole period expires.<sup>83</sup> In the ACT, any conditions considered appropriate can be imposed on a licence granted for the release of a life sentence prisoner, which may include the duration of the licence.<sup>84</sup> In Victoria, the Adult Parole Board can order release on parole with conditions as specified in the standard parole order plus any special conditions and set the date for expiry of parole.<sup>85</sup> The life sentence still remains and the offender is viewed as being on a form of conditional liberty<sup>86</sup> for the remainder of his or her life although not subject to indefinite supervision. On the other hand, if a life sentence prisoner is released on parole in South Australia there are time restrictions on the duration of a parole order with a minimum of three years and a maximum of 10 years so that, in this jurisdiction, it is most unlikely to endure for the remainder of a prisoner's natural life.<sup>87</sup>

In addition to the restrictive nature of a mandatory sentence of life imprisonment in the judiciary being able to properly reflect offence severity and offender culpability, it is strongly argued that the early release of prisoners subject to such a sentence demonstrates recognition by the legislature and executive that it was not necessarily the appropriate disposition in the first instance. Also, such prisoners, once released, will not in most cases be subject to a parole order for an indefinite period of time. Certainly there is an enormous contrast between conditional liberty in the community and serving life in prison without the prospect of release from such a controlling and restrictive environment. It may be contended that in certain cases, depending on assessment of risk to the community, there is a justification for having a convicted murderer remain on parole for the term of his or her natural life once released from prison.

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81 van Zyl Smit, 'Taking Life Imprisonment Seriously', above n 1, 214.

82 *Corrections Act 1997* (Tas) ss 72(3)(a)(ii), 72(5), 75.

83 *Corrections Act 1997* (Tas) s 78.

84 *Crimes (Sentence Administration) Act 2005* (ACT) s 295.

85 *Corrections Regulations 2009* (Vic) regs 83–4, sch 4 (Form 1 Parole Order).

86 Although particular conditions are likely to be removed over time if the parolee is not reported for a breach of the order.

87 *Correctional Services Act 1982* (SA) s 67(7).

However, the low rate of recidivism among such offenders generally<sup>88</sup> does not allow for the extrapolation of this argument to all convicted murderers and militates against the use of life imprisonment as a mandatory all-embracing sentence in such cases.

### C The Purposes of Sentencing and Life Imprisonment

Turning to the purposes of sentencing which are set out together with ‘just punishment’ in the sentencing legislation of the various Australian jurisdictions,<sup>89</sup> it may initially be contended that the sentence of life imprisonment serves retributive, incapacitative, deterrent and denunciatory purposes; they underpin its application and operation in practice. It has survived historically and has general utility because of the perceived necessity to punish the heinous crimes of dangerous offenders, deter them and others from committing such crimes and to symbolically express the moral outrage of the community.<sup>90</sup> In its truthful form of a natural life sentence with no prospect of release, it arguably manifests extreme forms of retribution and denunciation together with absolute incapacitation. This meaning of life imprisonment which has been promoted by ‘truth in sentencing’<sup>91</sup> and ‘law and order’ politics is particularly problematic in that, as evidenced by Table 1 above, different legislative schemes exist as to the availability of determinate non-parole periods and the administrative process for eventual release of life sentence prisoners in Australian jurisdictions. In practice the sentence of life imprisonment rarely takes its ‘truthful’ form<sup>92</sup> so that the meaning of the life sentence is not straightforward. Rather it is subject to a

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- 88 Shasta Holland, Kym Pointon and Stuart Ross, ‘Who Returns to Prison? Patterns of Recidivism among Prisoners Released from Custody in Victoria in 2002–03’ (Corrections Research Paper No 1, Department of Justice (Vic), 2007) 10, 15–16; Barbara Thompson, *Recidivism in NSW: General Study* (Research Publication No 31, NSW Department of Corrective Services, May 1995) 29–30, 39, 54–6. Lifetime parole raises other significant issues that are beyond the scope of this article.
- 89 *Sentencing Act 1991* (Vic) ss 5(1)(a), 5(3); *Sentencing Act 1995* (WA) s 6(1); *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(a); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(a); *Penalties and Sentences Act 1992* (Qld) s 9(1)(a); *Sentencing Act 1995* (NT) s 5(1)(a); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(k).
- 90 *R v Nichols* (1991) 57 A Crim R 391; *Jackson v R* (1988) 33 A Crim R 413.
- 91 This was an important political slogan in the late 1980s and throughout the 1990s and was associated with ‘the rise of the neo-retributive just deserts model’: see George Zdenkowski, ‘Punishment Policy and Politics’ in Martin Laffin and Martin Painter (eds), *Reform and Reversal Lessons from the Coalition Government in New South Wales 1988–1995* (Macmillan, 1995) 233. It was particularly prominent during the 1988 election campaign in NSW when the Coalition parties were elected on a law and order platform that emphasised ‘truth in sentencing’ in the sense that prisoners would serve the actual sentences of imprisonment imposed by the courts and remissions from those sentences would be abolished: see Anderson, above n 41, 141–3.
- 92 NSW is a relatively unique example where it does take this ‘truthful’ form. When life imprisonment is imposed in this jurisdiction there is no provision for affixing a non-parole period and there is no prospect of release unless the Governor on advice of the executive government exercises the prerogative of mercy. It was observed by Wood CJ at CL that such use of the prerogative would be expected to be rare and only arise in very exceptional circumstances: *R v Harris* (2000) 50 NSWLR 409, 429 [125]. Contrast that form to Queensland where even though a non-parole period is not usually fixed by a judge in a sentence of life imprisonment for murder, the sentence rarely takes its ‘truthful’ form because administrative mechanisms are invoked to allow for the release of the overwhelming majority of these prisoners.

complex mixture of judicial powers and administrative rules and practices such that the purposes underlying its application and operation cannot be clearly and consistently identified.

As both a maximum and mandatory sentence for murder, it is certainly arguable that life imprisonment is a form of denunciation through the court expressing public disapproval and condemnation of such serious offending. At the same time however, effective denunciation presupposes that the court as ‘an agency for the expression of public indignation and condemnation’<sup>93</sup> is imposing a sentence that an informed public fairly understands both as to its nature and effect. When this presupposition is tested in Australian jurisdictions it is difficult to conceive that the public has a clear understanding of the various forms and the methods of practical implementation of life imprisonment operating in each jurisdiction wherein the determination of the duration of such sentences is largely delegated to abstruse administrative bodies, such as Parole Boards. Although there is no empirical research directed to this specific public understanding, the available research shows that the Australian public has limited understanding of criminal justice issues and has little confidence in the courts particularly in relation to sentencing matters.<sup>94</sup> Arguably this research can be extrapolated to a lack of understanding and confidence in the courts being able to effectively express ‘moral outrage’ for or ‘condemnation’ of murder offences through the sentencing process when the sentence of life imprisonment suffers from definitional ambiguity and inconsistent, complex and modified forms of practical implementation.<sup>95</sup> Overall, this lack of clarity for the public underlines the unfairness inherent in the sentence of life imprisonment.

Further, it is strongly argued that when a life sentence is labelled as ‘mandatory’ for murder offences its denunciatory and deterrent effects are limited by the fact that there is no discrimination between the broad spectrum of cases constituting murder. These cases invariably involve a wide range of objective seriousness in the circumstances of the killings and significant variations in individual culpability of offenders.<sup>96</sup> There is no immediate reflection of these factors in the sentence imposed by the court. Further, the uncertainties then surrounding the form and implementation of the sentence of life imprisonment once imposed by the court means there are additional limits on the denunciatory effect of such a sentence. An important limit is that the community, on whose behalf the court is expressing moral outrage and condemnation, do not have complete understanding of the machinations of life

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93 *DPP v Coleman* (2001) 120 A Crim R 415, 420 [14] (Tadgell JA).

94 See, eg, Roberts et al, above n 11, 21–9; Indermaur and Roberts, above n 61, 141–60; Mike Hough and Julian V Roberts, *Confidence in Justice: An International Review* (Findings No 243, United Kingdom Home Office, 2004); Jones, Weatherburn and McFarlane, above n 61, 1–2; Davis and Dossetor, above n 61.

95 Specific research studies in England and Wales have shown that this is a valid extrapolation: see Mitchell and Roberts, ‘Sentencing for Murder’, above n 61; Mitchell and Roberts, ‘Public Attitudes towards the Mandatory Life Sentence for Murder’, above n 61.

96 See Bailin, above n 39; see above text accompanying nn 81–2.

imprisonment in practice. It is possible that as a maximum sentence, life imprisonment has a greater denunciatory effect but again the definitional uncertainty and different release mechanisms available significantly undermine the extent of this effect and again highlight its practical unfairness.

This argument can also be extended to retribution, general deterrence and incapacitation with their effectiveness as purposes of sentencing also undermined by the vagaries of form and practical implementation of the sentence of life imprisonment. The protective capacity, deterrent and retributive effects of a sentence of life imprisonment become questionable when it is not possible to accurately discern the duration that a convicted murderer will be incarcerated. There may be examples of offenders who are predicted to be of ongoing danger to the community and a natural life sentence will provide absolute incapacitation of, and extreme retribution against, such individuals. There are, however, comparatively few practical examples of such offenders and

using life sentences as a form of general incapacitation of a class of offenders, who are all assumed to be dangerous, challenges the principle that sentences must be proportionate even more strongly than a life sentence based on a positive finding of individual dangerousness in a specific case.<sup>97</sup>

Considering the limitations on the human capacity to accurately predict the risk of further serious offending by offenders, the role of incapacitation, in particular, can only be minimal.<sup>98</sup>

When there are numerous variations of what constitutes a ‘mandatory’ or ‘maximum’ sentence of life imprisonment for murder and its practical implementation, the attendant ambiguity undermines the prospect of informed public understanding of life imprisonment as a sentence thus perpetuating unfairness. It is already clear that the public, at least in NSW, ‘is generally poorly informed about crime and criminal justice ... due in no small measure to the way that crime and criminal justice issues are portrayed in the media’.<sup>99</sup> In the large majority of cases, life imprisonment does not, and rarely ever has, translated to a sentence for the term of a person’s natural life. It would be more correctly labelled as an indeterminate sentence that is determinable by executive mechanisms after a period of time set either by the court or the legislature. It seems this practical reality is not effectively communicated to all stakeholders, most notably the public. Adding the ‘mandatory’ label only serves to heighten ambiguity and confusion particularly when recent research has shown that

it is clear that public and legislative interest in mandatory sentencing laws has declined and is likely to continue to decline in the near future. Although the

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97 van Zyl Smit, ‘Taking Life Imprisonment Seriously’, above 1, 203–4.

98 Norval Morris, ‘Incapacitation within Limits’ in Andrew Ashworth, Andrew von Hirsch and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 3<sup>rd</sup> ed, 2009) 90–4; Andrew von Hirsch, ‘Selective Incapacitation: Some Doubts’ in Andrew von Hirsch and Andrew Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 2<sup>nd</sup> ed, 1998) 126.

99 Jones, Weatherburn and McFarlane, above n 61, 13.

public supports tough sentencing measures for violent offenders, the experience with mandatory sentencing legislation in a number of countries has shown that these laws do little to promote public confidence in the sentencing process.<sup>100</sup>

Overall, the argument as to the general utility of a sentence of life imprisonment lacks potency. It cannot be justified by reference to any of the established purposes or principles of sentencing apart perhaps from extreme forms of retribution and incapacitation that are at odds with a sentencing system that is based on proportionality in the contemporary context of a moderate 'just deserts' penal culture.

## **D A Populist Approach**

When the principles and purposes of sentencing discussed above are considered in the context of life imprisonment for murder in the Australian jurisdictions it is strongly contended that a principled approach is not used in the distribution and subsequent implementation of this sentence. Rather it is clearly open to contend that this sentence, particularly in its mandatory form, but also as a maximum punishment, is unfairly used as a political tool 'primarily for its anticipated popularity ... [and] to promote electoral advantage'<sup>101</sup> so as to appeal to the public's perceived retributive sentiment involving 'common-sense notions of "what we all know"; a stronger resonance between the government and the people, and a more direct tie between penal policy and the perceived public view'.<sup>102</sup>

### **1 Penal Populism**

Julian Roberts identifies mandatory sentencing as 'the most visible example' of 'penal populism' with increased populist pressures on the courts through the 'increasing "media-sation" of criminal justice'.<sup>103</sup> Mandatory sentences, including mandatory minimum sentences such as those used for non-parole periods affixed to life sentences in some Australian jurisdictions, are politically attractive in demonstrating that politicians are 'tough on crime'. This is particularly so where the public mood is one of heightened anxiety about crime and 'being on the right side of the crime issue is much more important politically than making sound and sensible public policy choices'.<sup>104</sup>

Often it is a particular case or believed crisis that is sensationalised in the media that sparks concern about sentencing and the perceived need to provide harsher penalties, including by way of mandatory sentences.<sup>105</sup> Certainly there are a number of examples of this occurring in Australian jurisdictions. The

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100 Julian V Roberts, *Mandatory Sentences of Imprisonment in Common Law Jurisdictions: Some Representative Models* (Department of Justice Canada, 2005) 7.

101 Roberts et al, above n 11, 64–5.

102 Liz Campbell, 'Criminal Justice and Penal Populism in Ireland' (2008) 28 *Legal Studies* 559, 560. See also John Pratt, *Penal Populism* (Routledge, 2006).

103 Roberts, 'Sentencing Policy and Practice', above n 36, 23.

104 Tonry, 'Mandatory Penalties', above n 68, 244.

105 Arie Freiberg, 'Sentencing: Trends and Issues' (2005) 86 *Reform* 7, 8.

creation of the natural life sentence for murder in NSW in 1990 can be clearly linked to the punitive ‘law and order’ political climate that existed at the time fuelled by then recent high-profile horrific murders of Anita Cobby and Janine Balding.<sup>106</sup> Over a decade later the impetus for the creation of the ‘aggravated sexual assault in company’ offence with a maximum sentence of life imprisonment was ‘a succession of gang rapes in the early 2000s, perpetrated by young Muslim men of Lebanese–Australian background (and of Pakistani backgrounds) ... [which] caught the media’s imagination and the populace’s attention’.<sup>107</sup> There is clear political expedience in such sentencing measures, which are designed to exploit perceived public resentment of criminals and crime, particularly serious and violent crime.<sup>108</sup>

It is apparent that the political rhetoric and posturing through this legislative increase in penalties gives the impression that something is being done rather than in fact having any discernible impact on crime or on achieving the sentencing objectives of denunciation, retribution and deterrence.<sup>109</sup> In fact although ‘tough talk’ has a certain political appeal, actual results of such punitive policies may well surprise voters who like to see themselves living in a just and democratic society but who in fact have limited understanding of, and insight into, all the machinations of the criminal justice system:

In a democratic state, voters have a right to know how the justice system works and how it affects people in real ways. It’s one thing to sit at home calling for harsher sentences because someone’s nicked your convertible Fiasco for the third time. It’s quite another to see what harsher penalties actually mean for criminals, for the justice system and, ultimately, for everyone who lives in its shadow ... Jails, as they’re run today, are possibly the worst place to send many criminals. They exacerbate drug abuse and health problems, they do nothing to increase a prisoner’s chance of finding employment, they brutalise young men and reinforce violent behaviour.<sup>110</sup>

Overall, it is apparent that politicians are not dealing with well-informed public opinion when formulating criminal justice and sentencing policies. The stark reality of penal policy responses to ‘consistent public clamour for escalation

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106 *R v Travers, Murdoch, Murphy, Murphy & Murphy* (Unreported, Supreme Court of New South Wales, Maxwell J, 16 June 1987); *R v Blessington, Elliott and Jamieson* (Unreported, Supreme Court of New South Wales, Newman J, 18 September 1990). The respective murders had taken place in February 1986 and September 1988 but the subsequent trials and appeals were prominent in the public domain for a number of years including at the time of the parliamentary debates surrounding the Crimes (Life Sentences) Amendment Bill in 1989 and 1990.

107 Graeme Coss, ‘Editorial: The Politics of Reaction’ (2008) 32 *Criminal Law Journal* 329, 331. See also, Kate Warner, ‘Gang Rape in Sydney: Crime, the Media, Politics, Race and Sentencing’ (2004) 37 *Australian and New Zealand Journal of Criminology* 344, 345–51, 358–9.

108 Andrew von Hirsch, ‘Law and Order’ in Andrew von Hirsch and Andrew Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 2<sup>nd</sup> ed, 1998) 417–20. See also Warner, above n 107, 347–8, 358–9.

109 David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press, 2001) 135. See also Coss, above n 107, 335.

110 Catharine Lumby, ‘Learning a Valuable Lesson from a Little Time in Jail’, *Sydney Morning Herald* (Sydney), 14 December 1998, 15.



of severity levels'<sup>111</sup> in punishment generally is a product of political opportunism and the fuelling of a punitive stance in the public through various media outlets. In fact it has been observed that when carefully constructed public opinion surveys have been undertaken, 'it has generally been found that people underestimate the severity levels of penalties imposed by the courts ... and the more information people have about specific crimes and offenders the less punitive they are likely to be'.<sup>112</sup> This has recently be reinforced in a groundbreaking Australian study of jurors' opinions on sentencing, which found that when jurors are educated about sentencing law their confidence in the criminal justice system is increased and 'the opinions of jurors towards sentences is not as punitive as public opinion polls suggest'.<sup>113</sup>

Accordingly, the contribution of public opinion to the evolution of sentencing policy and practice, including in relation to life imprisonment as a sentencing disposition, must be carefully evaluated. Public opinion in sentencing policy and practice can either lead – that is, be a cause of changes allowing 'public views to shape criminal justice policy development' – or it can follow – that is be 'affected by changes to sentencing policy, and ... not ... a justification for adopting a specific direction for reform'.<sup>114</sup> In determining whether public opinion leads or only follows sentencing policy changes, Julian Roberts observes that 'public sentiment expressed through the positions taken and speeches made by elected politicians, who, it was assumed, were able to divine the attitudes of their constituents' is an indirect means of assessing public opinion which is often influenced by political considerations and in fact largely excludes public views.<sup>115</sup> That is, it simply affects public opinion rather than it being a source of genuine influence. Penal populism is characterised by using perceived public sentiment in this way without complete understanding of what informed public opinion actually is in relation to sentencing policy and practice.

Survey research has shown that there is no one view about sentencing and punishment that is shared by all sections of the general public and factors such as sex, age, education, political allegiance, and income level all contribute to the 'punitiveness' or otherwise of particular individuals.<sup>116</sup> Accordingly, reliance on the 'view' of the general public as a whole is not always a credible indicator of the need for reform in a particular area of government concern. Arguably the perceived punitiveness of certain elements of the public has been seized upon by politicians in the hope of populist approval through attracting votes and winning elections. The reality is that there will always be diversity of opinion in this regard. Notwithstanding that, a well-informed public rather than the political

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111 Zdenkowski, 'above n 36, 184.

112 Ibid 186.

113 Warner et al, above n 36, 5.

114 Roberts, 'Sentencing Policy and Practice', above n 36, 20.

115 Ibid 20–1.

116 Jones, Weatherburn and McFarlane, above n 61, 1–2; Roberts et al, *Penal Populism*, above n 11, 21–34, 93–106; Roberts, 'Sentencing Policy and Practice', above n 36, 20–3; Walker, Collins and Wilson, above n 36, 6.

perception of public sentiment will be an important asset for decisions on general policy initiatives in sensitive areas such as sentencing for murder in the criminal justice system and can lead the making of such decisions. To achieve such informed public opinion it is clear that there must be more community education and consultation. In this regard it is now apparent that ‘most common law jurisdictions pay more and more systematic interest to public attitudes in the area of sentencing policy and practice’<sup>117</sup> so that input is encouraged and will shape sentencing policy and practice rather than simply be affected by the policy and practice established by the legislature, executive and judiciary. The role of sentencing councils and commissions ‘with members drawn from the general public in addition to criminal justice professionals such as judges and prosecutors’ in the contemporary Australian context is paramount in order to ensure ‘that the sentencing process is in some way reflective of community views’<sup>118</sup> and so arguably it will be more principled in application and implementation, including the use or otherwise of the sentence of life imprisonment.

## 2 Labelling

Labelling of both criminal offences<sup>119</sup> and sentencing dispositions raises important considerations of fairness to the offender, to any victim, and in communicating to the public in a symbolic and transparent way the nature of the wrongdoing and the punishment imposed. Labelling has also been employed as a populist device to at least give the impression that politicians are being tough on crime in response to perceived community concerns about serious violent crime. This is certainly apparent in the use of the label of life imprisonment and specifically ‘mandatory’ life imprisonment. When a sentence, including life imprisonment, is labelled as ‘mandatory’ it is a reasonable expectation from the perspective of any stakeholders in the criminal justice system that such a sentence must be imposed no matter what the circumstances of the offence or offender and that the sentence means what it says. Despite the fact that mandatory sentences have been heavily criticised and there is compelling evidence that mandatory sentencing, in completely removing judicial discretion, does ‘not have any significant effects on rates of serious crimes’ but rather has ‘considerable potential for injustice’<sup>120</sup> in that it clearly erodes the prospect of proportionality in sentencing, the use of the ‘mandatory’ label for life

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117 Roberts, ‘Sentencing Policy and Practice’, above n 36, 21.

118 Ibid 22–3.

119 As to the importance of the fair labelling of criminal offences generally, see James Chalmers and Fiona Leverick, ‘Fair Labelling in Criminal Law’ (2008) 71 *Modern Law Review* 217.

120 Andrew Ashworth, ‘Techniques for Reducing Sentencing Disparity’ in Andrew Ashworth, Andrew von Hirsch and Julian Roberts, *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 3<sup>rd</sup> ed, 2009) 252–3; Neil Morgan, ‘Capturing Crims or Capturing Votes? The Aims and Effects of Mandatories’ (1999) 22 *University of New South Wales Law Journal* 267; Tonry, ‘Mandatory Penalties’, above n 68, 303–5, 325–6.

imprisonment for murder in certain Australian jurisdictions is simply misleading and unfair to all, including the public.

By labelling life imprisonment as ‘mandatory’ the relevant Australian jurisdictions have blindly acquiesced in an obligatory uniform standard to replace the death penalty at the same time as attempting to capitalise on the strong overtones of severity attached to the label. As a result there is no scope for a sentencing court to ensure that the punishment is commensurate with the seriousness of the specific offence and culpability of the individual offender; individualised justice gives way to a disproportionate and unfair prescription. In the interests of fairness and equity it is important for all stakeholders to be informed as to the likely duration of imprisonment from the time that a sentence for murder is imposed. Mandatory sentences also must be distinguished from the label of ‘presumptive’ sentences which leave scope for judicial discretion<sup>121</sup> in certain specified circumstances, such as the Western Australian murder sentencing scheme.<sup>122</sup> It is most unlikely that the ‘presumptive’ label is well known and fairly understood by the general public and certainly not readily distinguishable from a mandatory life sentence in the strict sense that such a sentence must always be imposed upon conviction for murder.

In considering the label of ‘life imprisonment’ generally, including as a maximum sentence for murder, there are clear concerns as to its definitional ambiguity and its widespread use for stark political ends to reflect a ‘tough on crime’ approach to serious offences. The meaning of life imprisonment is distorted by uncertainty, which has a negative impact on the transparency of information about the true nature and effect of the sentence to the public. The misinformation transmitted by the labels serves only to further undermine public confidence in the criminal justice system. This is misleading populism and the sentence of life imprisonment is a populist punitive measure that cannot be proportionately, equitably and fairly applied to human beings in all of its current forms.

### **E Legislative Criteria for the Mandatory Life Sentence**

A final consideration is whether a principled approach to the mandatory sentence of life imprisonment can be restored through legislative criteria. NSW will be used as a case study in this regard because of the legislative attempt in this jurisdiction to prescribe criteria for when it is mandatory to impose a natural life sentence for murder. A sentence of life imprisonment, in addition to being the maximum penalty, is expressed as being mandatory upon conviction for 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

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121 Morris J Fish, ‘An Eye for an Eye: Proportionality as a Moral Principle of Punishment’ (2008) 28 *Oxford Journal of Legal Studies* 57, 71.

122 See above nn 75–8.

that sentence'.<sup>123</sup> The legislative formulation is adapted from the common law,<sup>124</sup> which in practice has arguably done little to ensure an equitable distribution of this most severe form of punishment.

The discretion to impose a lesser sentence than life imprisonment provided for in section 21(1) *Crimes (Sentencing Procedure) Act 1999* (NSW) is not affected by section 61(1).<sup>125</sup> So, first, it is patently arguable that the use of the term 'mandatory' is misleading. This provision has been judicially considered in a number of cases<sup>126</sup> with a comparatively recent statement of principle expounded in *Burrell v The Queen* where a unanimous court considered and approved the summary of general principles stated by McClellan CJ at CL in *Knight v The Queen*:

- the maximum penalty for an offence in the case of murder, life imprisonment, is intended for cases falling within the worst category of case for which that penalty is prescribed: [*Ibbs v The Queen* (1987) 163 CLR 447, 451–2] ...
- it is not possible to prescribe a list of cases falling within the worst category – ingenuity can always conjure up a case of greater heinousness: [*Veen v The Queen (No 2)* (1988) 164 CLR 465, 478; *R v Petroff* (unreported, Court of Criminal Appeal, NSW, Hunt CJ at CL, 12 November 1991)].
- a life sentence is not reserved only for those cases where the offender is likely to remain a continuing danger to society for the rest of his or her life or for cases where there is no chance of rehabilitation; the maximum may be appropriate where the level of culpability is so extreme that the community interest in retribution and punishment can only be met by a sentence of life imprisonment: [*R v Kalajzich* (1997) 94 A Crim R 41, 50–1; *R v Baker* (unreported, Court of Criminal Appeal, NSW, 20 September 1995); *R v Garforth* (unreported, Court of Criminal Appeal, NSW, 23 May 1994)].
- in many cases a two stage approach to the consideration of whether the maximum penalty should be imposed is appropriate. Firstly, consideration is given to whether the objective gravity of the offence brings it within the worst class of case and then consideration is given to whether the subjective circumstances of the offender require a lesser sentence: [*R v Bell* (1985) 2 NSWLR 466; *R v Valera* [2002] NSWCCA 50].

123 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 61(1). There is also provision for a mandatory life sentence for serious heroin and cocaine trafficking offences in *Crimes (Sentencing Procedure) Act 1999* (NSW) s 61(2) but that provision will not be further considered. More recently an amendment creating *Crimes Act 1900* (NSW) s 19B (*Crimes Amendment (Murder of Police Officers) Act 2011* commenced operation 23 June 2011) has prescribed a mandatory life sentence for the murder of police officers where a police officer is murdered while executing their duty or as a consequence of, or in retaliation for, actions undertaken while executing their duty and the person knew or ought reasonably to have known it was a police officer and they intended to kill the police officer or were engaged in criminal activity that risked serious harm to police officers.

124 See *R v Andrew Garforth* (Unreported, NSW Court of Criminal Appeal, Gleeson CJ, 23 May 1994) 13; *Veen v The Queen (No 2)* (1988) 164 CLR 465. See also New South Wales, *Parliamentary Debates*, Legislative Council, 21 September 1995, 1285–6 (Jeff Shaw, Attorney-General).

125 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 61(3). The provision was originally enacted as *Crimes Act 1900* (NSW) s 431B and applies to offences committed after 30 June 1996. It is important to note that the opposite is true in relation to the murder of police officers: *Crimes Act 1900* (NSW) s 19B(4).

126 See especially *R v Petrinovic* [1999] NSWSC 1131; *R v Harris* (2000) 111 A Crim R 415; *R v Miles* [2002] NSWCCA 276, *R v Merritt* (2004) 59 NSWLR 557; *Knight v The Queen* (2006) 164 A Crim R 126.

- it is the combined effect of the four indicia in section 61(1), which is critical: [*R v Merritt* (2004) 59 NSWLR 557].
- the absence of any one or more of the indicia of retribution, punishment, community protection or deterrence may make it more difficult for a sentencing judge to reach the conclusion that a life sentence is required although will not be determinative: [*R v Merritt* (2004) 59 NSWLR 557, 559].<sup>127</sup>

Further, in this case, the court observed that the:

tension between the apparent mandatory requirement to impose a life sentence where a case falls within sections 61(1) and 21(1) ... had been resolved in favour of recognising the continued existence of the discretion provided for by section 21(1), notwithstanding the fact that the section 61(1) criteria had been met in the circumstances where the offender's subjective circumstances justified a lesser sentence [than] one of life imprisonment.<sup>128</sup>

Accordingly, first in practical application the life sentence is not mandatory in the strict literal sense that an offender meeting the general criteria in section 61(1) must always be punished with a sentence of life imprisonment. There is still clear scope for the exercise of discretion not to impose a life sentence when the subjective circumstances of the offender are such that a lesser sentence is considered appropriate. This is patently illustrated in the case of *R v Merritt* where the offender had pleaded guilty to three counts of murdering his young children and determinate sentences totalling 34 years with a non-parole period of 27 years were substituted on appeal for the sentences of life imprisonment imposed at first instance.<sup>129</sup>

Second, although it may be argued that the legislative statement justifies retention of the natural life sentence out of a need for retribution where the culpability of the offender is so extreme that no other punishment is appropriate, the general terms of this legislative provision do 'nothing to provide the legislative guidance required to establish relevant criteria for determining who should receive a natural life sentence as opposed to the certainty of a determinate sentence'.<sup>130</sup> This fact is clearly illustrated in the statement of general principles by McClellan CJ at CL in *Knight v The Queen* extracted above; there is no definitive statement as to what considerations are specifically relevant to determining the proportionality between a particular murder or murders and the extraordinary punishment involved in the natural life sentence. In fact, the thrust of the statement of general principles is that such precision cannot be achieved. Apart from *Burrell* where the 53 year old offender was sentenced to life

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127 *Burrell v The Queen* (2009) 196 A Crim R 199, 250 [243] (Beazley JA, Grove and Howie JJ), quoting *Knight v The Queen* (2006) 164 A Crim R 126, 139 [23] (McClellan CJ at CL).

128 *Burrell v The Queen* (2009) 196 A Crim R 199, 252 [246].

129 (2004) 59 NSWLR 557, 576 where Wood CJ at CL set out the subjective and other circumstances that tempered the 'gravely serious ... objective criminality' involving 'willed and intentional acts of multiple murder'.

130 Anderson, above n 41, 143.

imprisonment<sup>131</sup>, section 61(1) has been considered and applied in a number of recent cases ranging across a variety of factual circumstances and offender culpability without establishing equitably discriminating criteria for the imposition of this ultimate punishment. Examples of three comparatively recent cases which have been held to fall within the category of ‘worst class of case’ and/or within the section 61(1) *Crimes (Sentencing Procedure) Act 1999* (NSW) level of extreme culpability criteria resulting in the imposition of sentences of life imprisonment are:

- The murder of the seven year old developmentally delayed and autistic daughter of the 34 year old female offender by starvation and neglect in circumstances which led Hulme J to describe the offender as ‘cold, callous, cruel and heartless towards her own little girl’;<sup>132</sup>
- The pre-meditated drowning murders of the two young grandchildren of the 69 year old male offender after beating and stabbing his wife to death in circumstances where there was an absence of any explanation for the offences, the offender entered pleas of guilty and was found to be unlikely to re-offend if released from prison;<sup>133</sup> and
- The meticulously planned, ‘extraordinarily cruel’ and merciless decapitation and stabbing murder of a hospital nursing manager by a 49 year old registered nurse (US citizen) who had been repeatedly unsuccessful in obtaining a position after his hospital employment contract ended and he believed the nursing manager was blocking his applications for employment.<sup>134</sup>

These diverse examples strongly support the argument that the general criteria in section 61(1) *Crimes (Sentencing Procedure) Act 1999* (NSW) is not sufficiently discriminating to ensure a proportionate and equitable distribution of the natural life sentence particularly considering that the age of the offender at the time of sentence will be a major determinant in the ultimate duration of such a sentence.<sup>135</sup> The present scheme does not strictly involve a ‘mandatory’ sentence nor does it provide principled guidance for the imposition of the maximum sentence of life imprisonment. It is strongly contended that section 61 *Crimes (Sentencing Procedure) Act 1999* (NSW) should be repealed as was recommended more than 15 years ago by the NSW Law Reform Commission.<sup>136</sup> This is unlikely to happen without a concurrent change in penal culture and the demise of the influence of ‘law and order’ politics in retributive criminal justice policymaking in NSW.<sup>137</sup>

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131 The objective circumstances of this murder case involved a financially motivated kidnapping and then killing of the wife of a wealthy managing director of an international corporation revealing a high level of planning and complete lack of remorse.

132 *R v BW & SW (No 3)* [2009] NSWSC 1043, [188].

133 *R v John Walsh* [2009] NSWSC 764.

134 *R v Marsh* [2012] NSWSC 208, [30]–[41], [59].

135 See *R v Denyer* [1995] 1 VR 186. See also Anderson, above n 41, 150–6, 167–72.

136 New South Wales Law Reform Commission, *Sentencing*, Report No 79 (1996) [9.16]–[9.17].

137 See Anderson, above n 41, 165.

Overall, such general legislative statements that exist in NSW and also in Victoria, the Northern Territory, South Australia and Western Australia<sup>138</sup> for determining whether the maximum or mandatory sentence of life imprisonment should be imposed do not assist in a fair and principled application of the life sentence to ensure proportionality and equitable distribution of punishment. This is particularly the case when the sentence is mandatory but also where it is provided as a maximum penalty subject to the vagaries of whether a crime falls within the ‘worst class of case’ category.<sup>139</sup>

### III CONCLUSION

Labelling life imprisonment as a mandatory sentence is largely an inauspicious legacy from the abolition of the death penalty for murder. Such labelling is an ineffective attempt to denounce and deter murder as the most serious offence in the criminal calendar. In practice, the legislation and administrative schemes in operation in Australian jurisdictions expose the practical reality that a sentence of life imprisonment rarely translates to the ‘whole of life’ form by which it might be generally understood in the broader community. Such labelling places all murders in one category for sentencing. Discrimination as to objective seriousness and offender culpability may be reflected in a non-parole period or postponed for executive consideration when the offender seeks release, but in most instances the duration of custodial confinement is uncertain. In the contemporary context, this misleading labelling of life imprisonment is best explained as an appeal to populist sentiment by governments and politicians so that they can be seen as ‘tough on crime’. Actual decision-making as to sentence duration is deferred to administrative bodies which operate largely sheltered from the public gaze.

Definitional ambiguity is a significant factor detracting from effectiveness in denunciation and the associated sentencing purposes of retribution and deterrence. Further, this ambiguity prevents a principled approach to the judicial imposition of a sentence of life imprisonment. It is strongly argued that there must be a shift in penal culture in sentencing for murder from policy and practices centred around penal populist notions and life imprisonment in its various forms, which has promoted ‘an intensification of punishment levels and an exploitation of fear’,<sup>140</sup> to a more moderate sentencing policy incorporating true ‘proportionality’ and express recognition of the desirability of parsimony in

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138 See Fon and Freiberg, above n 53; *Sentencing Act 1995* (NT) s 53A(5); *Criminal Law (Sentencing) Act 1988* (SA) s 32(5)(c); *Criminal Code Act 1913* (WA) s 279(4).

139 See *Ibbs v The Queen* (1987) 163 CLR 447, 451–2; *R v Twala* (Unreported, NSW Court of Criminal Appeal, Badgery-Parker J, 4 November 1994) 7. See also *R v Ryan*; *R v Coulter* [2011] NSWSC 1249, [15]–[17] for a recent example of where a contract killing based on financial motivation was held to be ‘very close’ but not within the worst category of murder offences.

140 George Zdenkowski, ‘Limiting Sentencing Discretion: Has There Been a Paradigm Shift?’ (2000) 12 *Current Issues in Criminal Justice* 58, 67.

punishment. Ideally such a shift would encompass a finite maximum sentence for the crime of murder benchmarked against average human life expectancy<sup>141</sup> and thus concordant in establishing cardinal proportionality. To assist in achieving a cultural shift of this nature one important strategy will be to provide information to the public in a systematic and balanced way and employ mechanisms for effective consultation, such as ‘sentencing commissions and councils with community representatives ... and creating community liaison officers who attempt to explain individual sentencing decisions [in murder cases] to the public and to the news media’.<sup>142</sup>

There are clearly strong arguments against labelling life imprisonment as a mandatory sentence and using the life imprisonment label as a maximum sentence for murder in Australian jurisdictions. Similar principled arguments can be formulated to promote the widespread abolition of the sentence of life imprisonment even as a discretionary maximum sentence.<sup>143</sup> The arguments used in the European, South American and Scandinavian countries that have resulted in life imprisonment being declared unconstitutional or unfair through legislative or judicial action<sup>144</sup> clearly illustrate that penal cultures can and do change. This change can ensure that there is an opportunity to test the ‘re-educative’ function of imprisonment and that liberty is an important human right that cannot be negated indefinitely by state punishment. Alternative mechanisms, such as a finite maximum sentence of 30 years imprisonment for murder, must be seriously considered in all Australian jurisdictions both to enhance community safety and to promote the perspicacious observation of fundamental sentencing principles and human rights.

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141 Although human life expectancy has increased due to various medical and technological advances, it has not increased markedly in the last two decades in Australia. The average life expectancy of a male born in 1990–92 is 74.32 years whereas for a male born in 2008–2010 it is 79.5 years: Australian Government Actuary, *Australian Life Tables 1995–97* (1999) 34; Australian Bureau of Statistics, *Australian Life Tables 2008–2010* (10 November 2011) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/3302.0.55.0012008-2010?OpenDocument#Data>>. Therefore it still permits of a useful benchmark in fixing proportionate determinate sentences of imprisonment.

142 See Roberts, ‘Sentencing Policy and Practice’, above n 36, 27.

143 van Zyl Smit, ‘Taking Life Imprisonment Seriously’, above n 1, 217.

144 *Ibid* 13, 189. See also above text accompanying nn 12–17.