

BALANCE

LAW SOCIETY NORTHERN TERRITORY

LIFE WITHOUT PAROLE - SHEER VENGEANCE ?

By Mark Hunter*

In the criminal justice system, "retribution" is the term commonly used to describe one of the purposes of sentencing. In the absence of a sentence mandated by legislation, the sentencer is required to consider, in addition to retribution, the protection of society, deterrence (personal or general) and rehabilitation in determining an appropriate sentence in a particular case - *R v Veen No.2* (1988) CLR 465 at 476. Denunciation of the criminal act goes hand in hand with retribution, but can be identified as a fifth sentencing purpose.

Section 5(1) of the *Sentencing Act*, 1995 (NT) replicates the common law position.

These sentencing purposes overlap and one normally cannot be considered in isolation from the others. The sentencer's job can be a difficult one because the different sentencing purposes "...are guidelines to the appropriate sentence but sometimes they point in different directions." *Veen* (ante).

Mandatory life

Mandatory sentencing in the magistrates' courts of the Northern Territory creates a "hit or miss" sentencing process where the punishment specified by law for a particular offence may or may not be the sentence which would be appropriate after weighing up all the sentencing purposes.



Mandatory sentencing in the Supreme Court of the Northern Territory applies to every case of murder, for which legislation specifies imprisonment for life, without the possibility of parole ("life sentence")¹. In this way, it is argued, the legislature has for one crime removed from the sentencing equation all but one of the purposes of sentencing: retribution.

In New South Wales mandatory life sentencing exists in respect of murders so heinous as to objectively fall within the "worst category" of the crime². Judges in that state retain a discretion to impose a determinate sentence for all other murders. Mandatory life sentencing for murder exists in no other Australian jurisdictions.

Under mandatory life sentencing, vengeance (retribution) exists as the sole focus of a government policy that is implemented by the courts. None of the sentencing purposes are

evaluated as part of an individualised sentencing exercise.

Since torture and execution are, like murder, uncivilised practices, the imposition of a life sentence may rank as the ultimate act of vengeance by a civilised society.

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New South Wales Court of Criminal Appeal:

It is the common experience of judges who have had to consider section 13A applications to note the remarkable effect which imprisonment for a decade or more so often has upon young offenders — notwithstanding how brutally and callously they acted when they committed the crime or crimes. Time and again one wonders: 'how could this apparently well adjusted applicant be the person who committed such a crime?' Gone is the brashness. Gone is the bravado. Spent is the passion. Young offenders can change so much during a very long time in gaol as to present almost an entirely different sort of person. - *R v Crump* NSWCCA unrep. 30/5/93.

Justice and correction

Territory juries demonstrate a marked propensity to acquit on charges of murder. It cannot be assumed that jurors are unaware that a guilty verdict must inevitably result in a life sentence, irrespective of the circumstances of the crime. Mandatory sentencing offers an accused no incentive to plead guilty. A homicide rate in the Territory persistently more than *twice* the national average is indicative of a sentencing policy which fails to protect the community.

At the same time, an ever increasing number of lifers languish in the Territory's prison population, the size of which is more than *three times* the national average on a per capita basis. The cost of maintaining this population increased by almost \$1 million to \$148 million over the last financial year.¹¹

The classification of prisoners serving determinate sentences focuses on rehabilitation combined with secure incarceration. Lifers are kept in maximum security conditions far longer. Without the prospect of eventual release, changes to their classification by prison authorities tend to be based upon their keepers' desire to avoid institutionalisation.

Management problems associated with an increasing number of prisoners devoid of the hope of eventual release are not hard to imagine. The homicide rate within prison is nationally up to seven times higher than in the non-prison community.¹²

Parity of sentencing

In the Northern Territory, as in New

South Wales, causing death with an intent to cause grievous bodily harm constitutes murder. Such a killing is in New South Wales accepted as being not as objectively serious as causing death with a specific intention to kill - *R v Lowe* NSWCCA unrep. 19/2/92, per Grove J.

Where an intention to kill is present, the objective seriousness of a serial, contract or thrill killing will normally be greater than, for example, a killing of passion committed without premeditation.

Mandatory life sentencing ignores the principle of parity of sentencing. Disparity between offenders in the number of years to be served becomes essential, and "...fairness is assessed not against the passage of time but against the occurrence of an event — the prisoner's death."¹³

It has been widely reported that the pace of executions in Texas under (then) Governor George W. Bush quickened in the lead up to the recent presidential election. This is not surprising, despite the abject failure of capital punishment to lower the homicide rate. Governments in Australia and elsewhere demonstrate a propensity toward populist, knee jerk responses on law and order issues.

Conclusion

Justice Wood, in the New South Wales Court of Criminal Appeal, recently described mandatory life sentencing as a "harsh and discriminatory regime" that runs the risk of establishing "a significant population of geriatric prisoners" - *R v Harris* NSWCCA unrep. 20/12/00.

Almost ten years ago, Justice Hunt (as he then was) made the following observations in the Court of Criminal Appeal of New South Wales:

A civilised country does not act in the way that Moses laid down. Capital punishment has been abolished, and (except in extraordinary circumstances, which do not exist in this case) the law does not regard itself as permitting a slower and more painful death by locking away the murderer and throwing away the key." *Petroff*, NSWCCA unreported 12/11/91.

Approximately twenty prisoners in New South Wales, having been refused a determinate sentence by the Supreme Court, are now serving life sentences.¹⁴

The *proper* role of the criminal justice system was eloquently expressed by

Justice Badgery-Parker in the following terms:

It is natural in every case of violent crime, for the victims and their relations and friends to demand a severe punishment. No one would fail to understand that. However, the need which the criminal justice system exists to fulfil is the need to interpose between the victim and the criminal an objective instrumentality which, while recognising the seriousness of the crime from the victim's point of view and, in the case of murder, the magnitude of the loss which the victim's family and friends have sustained, attempts to serve a range of community interests which include but go beyond notions merely of retribution. - *R v Cribb* NSWCCA unreported 23/6/94.

If it can be assumed that eventually a Territory government will see the wisdom of individualized sentencing for murder, the protection of the community is best served by the law being changed sooner rather than later.

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1. *Criminal Code* (NT), s.164.
2. *Crimes Act*, 1900 (NSW) s.19A and *R v Twala* NSWCCA unrep.4/11/94 per Badgery-Parker]
3. Donnelly H., Cumines S. and Wilczynski A. - *Sentenced Homicides in N.S.W. 1990-1993*, Judicial Commission of N.S.W., 1995, Ch. VII.
4. *Sentencing Act*, 1989 (NSW), s.13A.
5. *R v Hudson* NTSC unrep.1999 per Bailey J. See also generally Goldflam, R. *That's Life* (Balance 10/99).
6. "The quality of mercy is not strain'd,/It droppeth as the gentle rain from heaven/ Upon the place beneath: it is twice bless'd;/ It blesseth him that gives and him that takes..." (Act IV Sc 1) 7. See Strange C. - *Qualities of Mercy*, University of British Columbia Press, 1996.
8. James M. and Carcach C. *Homicide in Australia 1989-1996*, Australian Institute of Criminology, 1997.
9. Ibid.
10. *When life means life*, seminar paper by John Nicholson SC, Sen. Public Defender, NSW.
11. NT Correctional Services Report, 1999-2000.
12. James and Carcach, op. cit.
13. Nicholson, op. cit.
14. Ibid.