That's still life[1]

CRIMINAL LAWYERS ASSOCIATION OF THE NORTHERN TERRITORY (CLANT)

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The first article I submitted to *Balance* was in 1999. In it I called for the reform of the Northern Territory's mandatory murder sentencing laws, which were then and are still the harshest and most unfair in the nation. I revisited this issue briefly in my column in the first edition of Balance for 2016. There having since been a change in government, but not the law, it is worth raising the issue once again, as I did in my submissions on the occasion of the ceremonial opening of the Supreme Court in Alice Springs on 5 May 2017.[2]

Continuing publicity in the media regarding the sentencing of Zak Grieve by Mildren J in 2013[3] has focussed on the anomalousness and injustice of the current regime. Grieve was sentenced on the basis that he had planned to assist two co-offenders to kill the victim, but had got cold feet and not been present when the murder was carried out. Nevertheless, Grieve was unable to successfully call in aid the very limited exceptional circumstances provisions of s 53A(7) of the *Sentencing Act*, and was sentenced to a longer non-parole period than the principal offender. Although not as well publicised, the third person convicted of murder in that case, Darren Halfpenny, was unable to obtain a reduction of his sentence for his plea of guilty or his offer to give eyewitness evidence for the Crown. In the circumstances, Mildren J recommended that both Grieve and Halfpenny be considered for conditional release some years before becoming eligible for parole, but that decision will be a matter for the Executive in years to come.

Judges have from time-to-time vented their frustration at the unfairness of these laws. For example, in imposing a murder sentence in 2001, Bailey J said:

> As things stand, there is no incentive and no reason why anyone accused of murder, in the Northern Territory, would plead guilty. The sentence is the same whether a case goes to trial for days, weeks or months on end, or whether the offender admits his guilt, demonstrates true remorse, and puts forward something which can properly be accepted as mitigation… Just as a trial is almost inevitable on a charge of murder in this jurisdiction, so is an appeal almost inevitable. A convicted murderer has nothing to lose and everything to gain by appealing.[4]

Despite the 2004 reforms, these words ring as true today as they did when they were pronounced.

Extraordinarily, and notwithstanding the compelling logic of these observations by Justice Bailey, at least seven of the offenders sentenced for murder in the Northern Territory did so after entering a plea of guilty. None of them was or could be credited with so much as a day less than the statutory minimum on either their head sentence or their non-parole period.

The Northern Territory's murder sentencing regime is not only harsh and unfair, it is ruinously expensive and

contributes substantially to this jurisdiction's crisis of hyper-incarceration. In 1999, the average period served in Australian prisons by persons convicted of murder before conditional release was around 13 years. The gross disparity between the Northern Territory and the rest of the nation appears to have narrowed somewhat, as interstate politicians have ratcheted up statutory penalties following "my-laws-are-tougher-than-yours" election campaigns. Now, for example, Queensland also has mandatory life imprisonment with a 20-year minimum non-parole period for murder. But the NT is still in a class of its own: our exceptional circumstances provisions for earlier parole release are far more restrictive than those applicable in Queensland, and have only been utilised on two occasions. Similarly to the NT, NSW murderers are now required to serve on average a minimum of 20 years before being able to apply for parole, but in contrast to the NT the average head sentence for murder in NSW is not life, but 25 years.[5] And when the non-parole period expires, it is exceptionally difficult for murderers to get parole in the NT: they can only be conditionally released by a unanimous decision of the Parole Board sitting with a specially augmented quorum.

Since the commencement of the *Criminal Code* in 1984, 63 offenders have been sentenced to life imprisonment for murder in the Northern Territory. Of them, five are currently on parole in the NT, six have died, and ten have been transferred interstate. The remaining 42 are still in an NT prison. At $322 per person per day[6], the cost of incarcerating this cohort of prisoners is just shy of $5 million per annum. If each serves the mandatory minimum of 20 years and is released, we will have expended $100 million to incarcerate them. In reality though, under the current laws, at a reasonable guess these prisoners, some of whom will never be released, will serve on average 30 years. Add up those costs and you get $150 million.

The non-parole period of eight of these NT prisoners has expired or will expire before 2020. A further four will become eligible to apply for parole by 2025. Some, perhaps many, would have a reasonable prospect of living successfully in the community if they could get parole. But after at least 20 years of incarceration, the only responsible way to admit them to parole is after a transitional period of graduated release. As matters stand, however, no prisoner convicted of murder is eligible for work release, which makes it exceptionally difficult to properly ready them for a parole application.

It must be accepted that there are few votes in ameliorating the punishment of murderers. However, the current arrangements are both unconscionable and unsustainable. A reference should be made to either the Northern Territory Law Reform Committee or another suitably expert body to inquire into murder sentencing laws and make appropriate recommendations for reform. Judicial discretion should be restored, although it seems to me that there may be merit in following the precedent established in NSW, where life does indeed mean life: a judge has the power to impose a sentence of life imprisonment, in which case no non-parole period may be fixed. Such drastic sentences must of course be reserved for the most drastic cases.

As with the 2004 reforms, the most complex challenge will be to fashion practical and fair transitional provisions, because each of the 45 persons in the NT convicted of murder with a non-parole period would need to be re-sentenced. A similar process was undertaken in NSW some years ago, and indeed to a limited extent a similar process was successfully undertaken in our jurisdiction following the commencement of the *Sentencing (Crime of Murder) and Parole Reform Act 2003* (NT). It is a big and difficult job, but it is a job we can do, and one we must do.

1 My thanks to Sophie McKay from the Northern Territory Parole Board Secretariat, and Helen Edney, Northern Territory Legal Aid Commission Librarian, for compiling and checking information used in this article. The views expressed and any errors are mine.

2 *http://www.clant.org.au/images/images/Supreme_Court_opening_subs_050517.pdf*

3 *http://www.smh.com.au/good-weekend/zak-grieve-the-man-who-wasnt-there-20141113-11lrok.html*

4 Quo Cheng Lai (Sentencing Remarks, 16 February 2001, Bailey J, Darwin (SCC 9909126))

5 *http://www.bocsar.nsw.gov.au/Documents/BB/bb76.pdf*

6 Australian Productivity Commission, Report on Government Services 2016, ("Total net operating expenditure and capital costs per prisoner per day", Table 8A.7) accessed at *http://www.pc.gov.au/research/ongoing/report-on-government-services/2016/justice/corrective-services/rogs-2016-volumec-chapter8.pdf*