THE *SENTENCING ACT*: AN HISTORICAL OVERVIEW*

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On Monday, 25 September 1989 the *Sentencing Act* 1989 came into force. Sentencing in New South Wales had been governed by the *Probation and Parole Act* 1983. That Act required a court, when sentencing an offender, to fix a maximum term (known as the "head sentence") and a minimum term (known as the "non-parole period" or "non-probation period"). Non-probation periods were fixed in respect of head sentences of three years or less, and the offender was entitled to release on probation at the expiration of that period. Non-parole periods were fixed in respect of head sentences of more than three years, and at the expiration of that period the offender was eligible to be considered by the Parole Board for release on parole. Head sentences and non-parole or non-probation periods could be, and normally were, reduced by remissions for good behaviour.

In certain circumstances (usually for punitive reasons), a court could decline to fix a non-probation or non-parole period.

The former approach to sentencing required a court to fix a head sentence which would reflect the offender's criminality, taking into account all the objective and subjective factors of the case, and then to determine the proportion of that sentence which should be served in custody prior to the release of the offender to conditional liberty (the non-probation or non-parole period). While that period was fixed with a view to the rehabilitation of the offender, it remained the minimum period for which the Court felt that the offender should be imprisoned, according to accepted principles of sentencing.[1] The special considerations applicable to the non-parole or non-probation period have been discussed more recently by the High Court in *Bugmy v The Queen*,[2] and by the Court of Criminal Appeal in *R v Chee Beng Lian*.[3]

Of course, the head sentence itself was required to be no more than the criminality of the offender called for,[4] and conditional release on probation or parole, while also directed to the offender's rehabilitation, was seen as an integral part of the sanction imposed by the sentencing order.

Sentences (that is, head sentences) had been subject to a system of remissions since European settlement in New South Wales. Non-parole periods were introduced by the

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1 *Power v The Queen* [1973] 131 CLR 623.

2 [1990] 169 CLR 525.

3 [1990] 47 A Crim R 444.

4 *Veen v The Queen* (2) [1988] 164 CLR 465.

Parole of Prisoners Act 1966 but, under that Act, were not subject to reduction by remissions. However, the 1983 Act introduced a system of reduction of the non-probation or non-parole period roughly proportionate to the remissions granted in respect of the head sentence. Courts were not entitled to increase either the head sentence or the non-probation or the non-parole period fixed so as effectively to negate the benefit of remissions.[5] However, in determining the non-probation or non-parole period since the 1983 Act came into force, there can be no doubt that the remission system did *sub silentio* influence the figures arrived at.

The development of the law relating to the impact of the remission system upon sentencing practice is traced in an important recent decision of the Court of Criminal Appeal,[6] to which reference will be made later in this paper.

SENTENCING ACT 1989

> *A foolish consistency is the hobgoblin of little minds ...*
> — Emerson

This Act was born of the perception by our political masters that the community did not understand (and, apparently, was incapable of understanding) that terms of imprisonment fixed by courts were normally reduced by remissions, so that offenders stayed in gaol for a shorter period than that specified by the court. "Truth in sentencing" is put at such a premium that the Act abolishes the remission system in its entirety.

Implicit in the parliamentary debate concerning the Act and, to an extent, in the terms of the Act itself is the recognition that the remission system did, in fact, influence the level of sentences passed. Both the Minister for Corrective Services, Mr Yabsley and the Minister for Police and Emergency Services, Mr Pickering, in their second reading speeches in the Legislative Assembly and the Legislative Council respectively, emphasised that the purpose of the Act was not to increase the time in fact spent in custody by offenders. This is consistent with the transitional provisions contained in Schedule 2 of the Act, the intention of which is that pre-*Sentencing Act* prisoners have their sentences (both head sentence and non-parole or non-probation period) re-determined by being credited with the remissions which they have earned or might have become entitled to. The re-determined sentence is then expressed according to the procedure established by the Act, and the resultant minimum term represents the actual period to be served.

In the light of *O'Brien*[7] and *Hoare*[8], courts were faced with the question whether the level of sentences passed should be reduced to take account of the fact that a remission system no longer exists. It is probably this aspect, more than any other, which engendered the anxiety of the legal profession, the prisons administration and the informed public about the impact of the Act on sentencing.

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5 *R v O'Brien* [1984] 2 NSW LR 449; *Hoare v The Queen* (1989) 63 ALJR 505.
6 *Reg v Maclay* (1990) 19 NSW LR 112.
7 Above n5.
8 Above n5.

Judges' views on the matter varied. Some believed that the level of minimum terms passed under the new Act should remain the same as that of non-probation or non-parole periods under the old, while others considered that the period ought to be discounted by the remissions which might have been anticipated under the old system (approximately one third). The matter has now been considered by the Court of Criminal Appeal in *Maclay*,[9] and the effect of the Court's decision is that neither approach is correct.

The Court was of the view that the *Sentencing Act* introduced a new system of sentencing, to which a fresh approach must be made (although one which is consistent with the general principles of sentencing established by the cases). At page 126 of the report the Court said:

> The primary task of sentencing judges is to apply the new sentencing system according to the terms of the statute paying due deference to established general principles of sentencing. It is not their primary function to do their best to replicate what they would have done under the old system. Many features of the old system have gone, including remissions, and the concept of beginning with a head sentence and thus fixing a non-parole period as a proportionate part of the head sentence. The process now begins, as a rule, with the fixing of a minimum term to which there is added an additional term, and the relationship between the two is governed by statute. In carrying out the task of fixing a minimum term in such a case as the present, the sentencing judge should address the prescribed maximum penalty fixed by statute, and the gravity of the offence, paying regard to the objective features of the case and subjective considerations relevant to the particular offender.
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> It is, of course, understandable that a judge may wish to have regard to sentencing patterns, including his or her own sentencing patterns, established under previous legislation.[10] Some caution will need to be exercised in translating such sentencing patterns into actual decisions under the new legislation. Statistical information is occasionally advanced in support of the contention that some judges may have responded subconsciously to the problem of the 'fictional element' introduced in the 1983 legislation and identified in *O'Brien* by increasing non-parole periods in a way that to some extent 'took account' of the remissions system, but if that were true it would only increase the need for caution to which we have referred. The question as to how prison terms resulting from sentences imposed under the new Act will compare with those resulting from earlier sentences is one the answer to which will emerge in due time. Preconceptions as to how they should compare cannot be allowed to dominate the appreciation of the new statute.

The decision interprets the legislation after an exhaustive review of the relevant authorities and, with respect, the view arrived at appears difficult to challenge. However, it leaves open the question whether the Act results in a new "tariff" of sentence, and it does little to allay fears that the effect of the Act will be to increase the time actually spent in custody by offenders. It is my observation, and that of my colleagues, that those fears have already been realised.

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9 Above n6.

10 *Regina v Paul James Oliver* (CCA 20 March 1980, unreported), quoted in *Regina v Visconti* [1982] 2 NSWLR 104 at 107; *Griffiths v The Queen* [1977] 137 Crim LR 293 at 326-327; *Regina v Pawa* [1978] 2 NZLR 190 at 191.

As observed above, the introduction by the *Probation and Parole Act* of remissions on minimum terms of imprisonment saw a perceptible rise in their length. The abolition of remissions by the *Sentencing Act* might (equally *sub silentio*) have brought about their reduction. That this has not occurred is apparent from a report of January 1991 on the operation of the Act by the NSW Bureau of Crime Statistics and Research. In his preface to that report, the Director of the Bureau, Dr Don Weatherburn, writes:

> The main finding of this report is that the courts do not appear to have reacted to the abolition of remissions under the *Sentencing Act* by shortening minimum custodial periods. This is consistent with the general principles enunciated by the NSW Court of Criminal Appeal in the recent case of *R v Maclay*. It makes an interesting contrast, however, with the court response to the introduction of remissions under the *Probation and Parole Act*.

A supplementary report of the Bureau of September 1991 found that shorter custodial sentences were being imposed in Local Courts, but that the sentencing practice in the District and Supreme Courts remained unchanged.

Maclay[11] recognised that the effect of the abolition of remissions might have to be taken into account in some cases to ensure that justice is done; for example, where an offender appears for sentence after the Act came into operation for a crime in respect of which a co-offender had been sentenced under the old system.[12] In *R v T*[13] the Court considered the special situation of an appellant sentenced under the old system whose appeal comes on for hearing after the Act came into force and who, the appeal having been successful, must be resentenced in accordance with the Act. It was held that the Court should determine the sentence which was appropriate under the old system, and then itself redetermine that sentence in accordance with the transitional provisions in Schedule 2. *T* was affirmed by the later decision of the Court in *Chee Beng Lian*,[14] and by the High Court in *Radenkovic v The Queen*.[15]

PROCEDURE

Minimum and additional terms

The Act might have achieved truth in sentencing by abolishing remissions but, otherwise, retaining the pre-existing procedure. Instead, Part 2 of the Act brings about a far-reaching change in the approach of a court to sentencing, which is spelled out in s5 as follows:

> 5. (1) When sentencing a person to imprisonment for an offence, a court is required:
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> (a) firstly, to set a minimum term of imprisonment that the person must serve for the offence; and
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> (b) secondly, to set an additional term during which the person may be released on parole.

11 Above n6 at 127.
12 See also *R v To & Ors (CCA, unreported, 15.3.91)*.
13 [1989] 47 A Crim R 29.
14 Above n3 at 453.
15 [1990] 65 ALJR 72.

(2) The additional term must not exceed one-third of the minimum term, unless the court decides there are special circumstances.

(3) If a court sets an additional term that exceeds one-third of the minimum term, the court is required to state the reason for that decision.

(4) The minimum and additional terms set for an offence together comprise, for the purposes of any law, the term of the sentence of the court for the offence.

On the face of it, the total of the minimum and additional terms is equivalent to the old head sentence, and the minimum term to the old non-probation or non-parole period. However, the section requires the court *firstly* to set the minimum term and only then to set the additional term which, in the absence of "special circumstances", must bear a fixed proportion to the minimum term. This is a far cry from the old system, by which a court began by determining the appropriate head sentence and, generally speaking, had an unfettered discretion to determine what proportion of that head sentence should represent the non-probation or non-parole period.

Clearly, the total sentence passed by a court must remain proportionate to the criminality of the offender,[16] and this is inherent in sub-s4. So much was affirmed by the Court of Criminal Appeal in *R v Moffitt*,[17] where it was explained that the "bottom up" approach set out in s5 prescribes the manner in which the sentence should be pronounced, not the reasoning by which it is determined. Badgery-Parker J said:[18]

> I think it clear that the section does not require that a sequential approach be adopted, and *R v Maclay* should not be understood as construing it thus. Section 5(1) controls a judicial act, not a process of reasoning leading to such an act; it prescribes a form of sentence to be pronounced, it does not purport to prescribe a mental process. What s5(1) does is to prescribe that a sentence must be composed of a minimum term and an additional term and that when it comes to the actual imposition of sentence, the sentence must be expressed as comprising first a minimum term and then an additional term; but the section does not necessarily require that the judge apply his mind first to the minimum term and secondly to the additional term.

The purpose of the discretion conferred by sub-s(2) upon a court to alter the proportion between minimum term and additional term is ameliorative: to enable the fixing of a minimum term less than that which might otherwise have been fixed, balanced by an additional term which would ensure a longer period of supervised liberty than would otherwise have been the case. In *Moffitt*, Samuels JA said:[19]

> It must be assumed that s5 has the rehabilitative purpose (affirmed by Pt 3 of the Act) generally perceived to be advanced by a system of release on parole; and regards it as adequately achieved in the ordinary course by setting the period during which a sentence may be served on parole at no more than one third of the preceding period of incarceration to be served for the same offence. This relationship is the statutory norm which may be varied if 'the court decides there are special circumstances'. 'Special circumstances' must

16 *Veen*, above n4.
17 [1990] 20 NSWLR 114.
18 Above n17 at 134.
19 Above n17 at 115-6.

> therefore include those circumstances, particular to the prisoner, which justify increasing the statutory proportion which the additional term bears to the minimum term. The purpose of parole being rehabilitative, any extension of that part of a sentence to be served on parole (the additional term) by increasing the time during which the support and supervision of the parole system is available, must be designed to benefit the prisoner. It follows that 'special circumstances' must mean those circumstances which justify enlarging in the prisoner's favour the existing rehabilitative purpose of s5.

The Court had regard to judicial interpretation of ss20A and 21(3) of the *Probation and Parole Act* 1983. Section 20A was inserted into the Act by our previous political masters in 1987, and provided that in the case of certain serious offences the non-parole period specified should be at least three-quarters of the head sentence. However, s21(3) empowered a court to specify a shorter non-parole period, "but only if it determines that the circumstances justify that course".

There can be no doubt that the purpose of s21(3) was to enable a court to give effect to exceptional subjective circumstances favourable to the offender, and the parameters of that discretion were considered by the High Court in *Griffiths v The Queen*.[20] That decision is somewhat complex, but suffice to say that their Honours were of the view that the discretion might be exercised where there were one or more subjective circumstances of an exceptional nature or where there was a combination of circumstances, none of them itself remarkable, which made the case as a whole exceptional.

In *Moffitt*, the Court held that the discretion to vary the statutory proportion provided by s5(2) of the *Sentencing Act* is more liberal than that considered by the High Court in *Griffiths*. Badgery-Parker J said:[21]

> It seems to me that the different structure of s5(2) of the *Sentencing Act* leads to a different conclusion; so too does the legislative history. Section 20A was avowedly introduced to 'toughen up' sentences in the case of serious crimes only. It was engrafted onto an existing system for that purpose. The object of the *Sentencing Act* was not to increase sentences — s3 spells out the object expressly. The requirement for a fixed proportion between minimum term and additional term is not limited to serious offences only, but is of general application. That being so, and noting that a different form of words has been chosen to express the circumstances in which a sentencing judge may depart from the prima facie rule, I am of opinion that while a judge should adhere to the one third rule unless clear reasons appear to the contrary, the finding of clear reason in a particular case will justify departure from it. It will not be every case where a judge believes that a longer period of supervision is needed that will amount to special circumstances. A judge may not give rein to his own personal philosophy that short periods of incarceration followed by long periods on parole should be the norm. If, however, it can be seen in an individual case that for reasons which can be identified in the facts of the individual case, a longer period of parole supervision is warranted than would be provided by adherence to the one third rule, the judge is entitled to regard that as a special circumstance justifying a departure.

20 [1989] 167 CLR 372.
21 Above n17 at 136.

That the discretion to vary the statutory proportion should not be used punitively was affirmed by the subsequent decision of the Court in *R v O'Sullivan*.[22]

Fixed terms

Section 6 provides that a court may decline to set minimum and additional terms for an offence and may, instead, set a fixed term of imprisonment. The offender is then required to serve the whole of that term, and is ineligible for release on parole.

Sub-s(2) of s6 provides that a court may set a fixed term:

(a) because of the nature of the offence or the antecedent character of the person; or

(b) because of other sentences already imposed on the person; or

(c) for any other reason that the court considers sufficient.

The provision is similar to s21(1) of the *Probation and Parole Act*, which empowered a court to decline to specify a non-parole period, and, like its predecessor, it requires the court to state the reason for its decision (sub-s(3)). The power will, no doubt, be used punitively in appropriate cases but, as foreshadowed by sub-paragraph (b) of sub-s(2), it may also be used pragmatically. For example, where an offender already serving a substantial minimum term appears for sentence for a further (perhaps, relatively minor) offence, the court may impose a fixed term of imprisonment to run concurrently with the minimum term already being served.

Section 7 provides that sentences not exceeding six months must be fixed terms. This, also, had its parallel in the *Probation and Parole Act*, which provided that a non-probation period could be fixed only where the head sentence exceeded six months.

Cumulative sentences

The pre-existing discretion to pass concurrent or cumulative sentences, where a court is dealing with an offender for several offences or is passing a further sentence upon an offender who is already serving a sentence, is undisturbed by the Act. However, the manner in which cumulative sentences might be passed is significantly altered by s9, which provides as follows:

9. (1) If a court imposes a further sentence of imprisonment which is to be cumulative on a previous sentence imposed by the court or to which the person is subject (being a previous sentence which has a minimum term), the further sentence must commence at the end of the minimum term of the previous sentence.

(2) If there is more than one previous sentence which has a minimum term, the further sentence must commence at the end of the minimum term that last expires.

(3) If the further sentence is imposed during the additional term for the previous sentence or during the additional term that last expires, the further sentence must commence on the day it is imposed or on an earlier day specified by the court.

22 CCA, unreported, 14.2.91.

(4) If a court imposes a further sentence that does not comply with this section, the further sentence is to be taken to commence at the time required by this section.

(5) This section has effect despite section 444 of the *Crimes Act* 1900 or any other law.

(6) Otherwise, this section does not affect any law relating to the time when a sentence commences or commenced, or comes to an end, or any power of a court to direct that a sentence is to commence at the expiration of another sentence.

(7) A reference in this section to a further sentence includes a reference to a sentence excluded from this Part by section 13.

This is a major departure from the old procedure, whereby a sentence could be accumulated only upon another head sentence. This was the procedure enshrined in s444 of the *Crimes Act*, to which reference is made in sub-s(5). In the event of cumulative sentences being imposed under that system, the court would then specify one "global" non-probation or non-parole period in respect of the totality of the head sentences.

Under the new Act, any further sentence of imprisonment can be accumulated only upon an existing minimum term, and there is no concept of a "global" minimum term in respect of a series of cumulative sentences. Section 12 of the Act provides that a court, when sentencing a person to more than one term of imprisonment, must set minimum and additional terms, or a fixed term, for each sentence.

Thus, if a court is sentencing an offender at the same time for a number of offences, it may fix a minimum term and additional term in respect of one of those offences. If it is minded to impose cumulative sentences in respect of the others, the next sentence (be it a minimum and additional term or a fixed term) must be specified to commence at the expiration of the minimum term already fixed, and so on. Likewise, if an offender who is already serving a minimum term previously passed, comes before a court for sentence on another matter, and the court is minded to pass a cumulative sentence, the new sentence must commence at the expiration of the minimum term then being served.

Sub-s(3) provides that if an offender appears for sentence on a charge at a time when he or she is serving the additional term previously fixed in respect of some other charge, the further sentence must commence on the day it is imposed or on any earlier day which the court might specify. In other words, if any existing minimum term has already expired, a further sentence cannot be expressed to commence at some future date. On the other hand, the power to backdate that further sentence is unfettered, and the somewhat Byzantine problems posed under the old law by the decision in *Larkin v Parole Board*[23] no longer trouble us.

The situation envisaged by sub-s(3) might arise where an offender has served an existing minimum term but has been refused parole, and then appears for sentence on some other matter (perhaps, an offence committed whilst in custody).

Equally, the sub-section would apply where an offender who has been on parole has had his or her parole revoked because of an offence committed whilst at liberty. By the

23 [1987] 10 NSW LR 57.

time he or she appeared for sentence on that offence, the offender would be serving the balance of the additional term originally imposed as a result of the revocation of his or her parole. As Badgery-Parker J observed in *Moffitt*,[24] the fact that the sentence for the fresh offence could not be accumulated upon the existing additional term does not justify increasing the minimum term objectively appropriate for that offence, but it is "a circumstance appropriate to be considered in determining what degree of leniency should be applied in recognition of mitigating factors". That principle has been affirmed by the Court of Criminal Appeal in *R v Harris*[25] and *R v Groombridge*.[26]

An interesting, and perhaps unforeseen, result of the combination of sub-ss(3) and (5) is their effect upon sentence for escaping from prison custody, pursuant to s34 of the *Prisons Act* 1952. That section provides that any sentence in respect of the escape should be served at the expiration of the term of imprisonment to which the prisoner was subject at the time of the escape. The effect of s9 of the *Sentencing Act* is that the requirement to accumulate the sentence for the escape would arise only if the prisoner were serving a minimum term at the time of the escape, and that that sentence could be accumulated only upon that minimum term. If the prisoner's minimum term had expired prior to the escape, the sentence for the escape could not commence any later than the day on which it was imposed and could, indeed, be backdated to, say, the date of the prisoner's re-arrest.[27]

Of course, nothing in s9 affects the accumulation of a sentence upon an existing fixed term, and the further sentence could be directed to commence during the course of or at the expiration of that term.[28]

Other matters

Further to assist an apparently obtuse public, s8 of the Act requires a sentencing court to specify the day on which a term of imprisonment commences and the day on which the prisoner will be eligible to be released on parole (if a minimum term is specified) or released outright (in the case of a fixed term).

Section 13 excludes certain types of sentences from the operation of Part 2 of the Act. They are:

(a) to imprisonment that will be required to be served by way of periodic detention under the *Periodic Detention of Prisoners Act* 1981; or

(b) to imprisonment in default of payment of any fine or penalty; or

(c) to imprisonment for life or for any other indeterminate period; or

(d) to detention in strict custody under section 428P(5) or 428ZB of the *Crimes Act* 1900; or

(e) to imprisonment under the *Habitual Criminals Act* 1957.

24 Above n17 at 123.
25 Unreported, 14.8.90.
26 Unreported, 20.9.90.
27 See *Gibbs v State of New South Wales* [1990] 21 NSWLR 416 at 421 and *O'Sullivan*, above n22.
28 See sub-s(6).

Of course, the Act does not affect at all the non-custodial options available to a sentencing court: a fine, recognizance, community service order, etc.

OTHER ASPECTS OF THE ACT

Parole

The Parole Board is replaced by a body known as the Offenders Review Board (Part 5 and Schedule 1). The procedure of the Board for the grant and refusal of parole, and for review of a refusal, is set out in Part 3.

Section 24 provides that, when a court imposes a sentence of imprisonment of three years or less which has a minimum term, the court must order the release of the prisoner on parole at the expiration of that minimum term. The prisoner is then entitled to release on parole at that time. This is similar to the procedure under the *Probation and Parole Act* relating to non-probation periods.

Where a minimum term is specified in respect of a sentence of more than three years, the prisoner can be released to parole only by the order of the Board after consideration of the matters set out in s17. The effect of that section is to remove the former presumption in favour of parole.

Section 24A provides that the Board may release a prisoner on parole although he or she is not eligible for release, if the prisoner is dying or the Board is satisfied that there are other exceptional extenuating circumstances. This replaces the former power of the Governor to release any prisoner on licence under s463 of the *Crimes Act* 1900, that section having now being repealed.

Children

Part 4 provides that the Act applies to children, and Schedule 4 contains some consequential amendments to the *Children (Criminal Proceedings) Act* 1987 and the *Children (Detention Centres) Act* 1987.

Remissions and prison discipline

Schedule 3 contains amendments to the *Prisons Act* 1952, which abolish all remissions and, as a necessary consequence, provide for new procedures for dealing with certain breaches of prison discipline. It is beyond the scope of this paper to analyse these: suffice it to say that the carrot has been replaced by quite a sizeable stick.

Life sentences

Consistency achieves its apotheosis in recent amendments to the *Crimes Act* and the *Drug Misuse and Trafficking Act* 1985, the effect of which is that persons sentenced to life imprisonment in the future will be imprisoned for the term of their natural lives. Life imprisonment can now be passed only for murder (*Crimes Act*, s19A) and the most serious offences under the *Drug Misuse and Trafficking Act* (S33A). Other offences which used to carry imprisonment for life now attract a maximum sentence of 25 years. Prisoners sentenced to life under the new system will not be eligible for early release under any circumstances, however extenuating.[29]

This extraordinary provision has necessitated amendment to a number of Acts, including the *Prisons Act* 1952. It is not intended to discuss these amendments for the purpose of this paper, except to note that s13A has been inserted into the *Sentencing Act*. That section enables existing life sentence prisoners who have served at least eight years to apply to the Supreme Court for the specification of minimum and additional terms which, if specified, replace the original sentence of life imprisonment. The procedure is somewhat akin to that introduced in Victoria in 1986.[30]

No doubt, our legislators saw some advantages in ensuring that most prisoners in New South Wales were serving determined sentences, and envisaged that the new life sentence would rarely, if ever, be passed. Certainly, experience thus far demonstrates that judges are making full use of the flexibility in sentence for murder which the amendments have achieved. However, in my view, it is regrettable that the courts have lost the power to pass an indeterminate sentence which, in appropriate cases, was a beneficial sentencing option. At the same time, I cannot conceive of a case in which the imposition of the new life sentence could be morally justified, and I trust that it will never be passed.

29 *Sentencing Act*, s25A (6).
30 See *Bugmy*, above n2.