



Sentencing Conference 2010  
Canberra 6 & 7 February 2010

## **Informing the Public about Sentencing**

### **Dr John Anderson, University of Newcastle NSW**

To start with, I think we have to put the concept of 'life sentence' into perspective. There is work by Professor Dirk van Zyl Smit, who is now the Professor of Comparative and International Penal Law in the UK. Professor van Zyl Smit was previously a professor of criminology at Capetown, South Africa. There is not a lot of research or literature around about life imprisonment. It seems to have been – as Professor van Zyl Smit has said – not subjected to particularly strict scrutiny because it has become accepted as the natural and lesser alternative to the death penalty. Lest it get in the way of the move to abolish the death penalty universally it probably has not been subjected to quite the same detail of research and interest.

Where the death penalty has been abolished, of course, a life sentence is the most severe sanction available and it has widespread use. I am going to focus in this paper on Australian jurisdictions although the work of Professor van Zyl Smit was concerned with England, Wales, Germany, the International Criminal Court, and also the United States where, of course, a number of the jurisdictions still have the death penalty. What he found, and what I am testing in Australian jurisdictions is the proposition that there is widespread tolerance of what he describes as the 'shortcomings' of life imprisonment. Certainly, I would agree with that summation in relation to talking about a principled approach to the use of sentencing and life imprisonment as a particular sentencing disposition.

When measured against the principles of proportionality, cruel and unusual punishment, equality before the law and the sorts of principles that related to respect for human dignity, the life sentence has a number of shortcomings even though it has widespread use. Professor van Zyl Smit says, and I think this is also clear from the Australian the material, that it is because of its definitional uncertainties. It is not clear to the public and certainly there are complex machinations that go on behind what a sentence of life imprisonment actually means. There are also political considerations, and I will discuss concepts such like 'punitiveness', 'populist punitiveness', and 'penal populism', and will examine whether whether or not these are populist rather than principled measures.

There is other material available, particularly in England and Wales, where there are both discretionary and mandatory life sentences. Clare Valier has written about the life sentence there and has commented that it has a very vague and elastic meaning. It has been of perennial concern, what it actually means. ('Minimum Terms of Imprisonment in Murder, Just Deserts and the Sentencing Guidelines' [2003] *Criminal Law Review* 326). She concludes by saying, basically, "life imprisonment has assumed a particular

notion of penal severity, called up in the service of political expediency”, a theme that does seem to run through the literature and research so far.

What I want to show in this presentation is that there are significant variations, in form and in practical implementation of the life sentence for murder throughout the Australian jurisdictions. I do want to focus on it being labelled as a ‘mandatory’ sentence, although I think I can also extend my arguments in a number of ways to the case where it is a maximum sentence. What Professor van Zyl Smit concludes is that legislatures and courts have the scope not to follow popular sentiment but to undertake a principled analysis of life imprisonment, which may lead to a move towards the more widespread abolition of life imprisonment. This is probably something that it is very important to consider and test, having regard to the widespread abolition of the death penalty, making us think more about life imprisonment as the natural and lesser alternative.

I will focus on labelling life imprisonment and also labelling it as a mandatory sentence, and the extremeness of those labels is really only used for the crime of murder in some Australian jurisdictions, although it is used, of course, as a maximum penalty for other serious crimes. In relation to Australian jurisdictions I highlight the ambiguities and uncertainties that are apt to mislead the public as well as work against any principled application of the sentence. The label is seemingly used to respond to what is perceived to be the popular sentiment in favour of tough sentences generally and in particular for serious crimes. However, the circumstances of murder vary very significantly in nature and severity such that a mandatory sentence of life imprisonment for this crime clearly undermines the established common-law and constitutional principles I referred to earlier: proportionality, equality before the law and respect for human dignity.

In the eight Australian jurisdictions the meaning of ‘life imprisonment’ takes on three major forms. It is either a maximum sentence with or without the possibility of release on parole after a determinative period. It can be a mandatory sentence but with the prospect of release on parole after a determinative period, or a mandatory sentence with no prospect of release on parole. Into the first category fall New South Wales, Victoria, Tasmania and the ACT, and into the second, Queensland, South Australia, Western Australia and the Northern Territory. The New South Wales jurisdiction also falls into the third category, which I will discuss in the context of section 61 of the *Crimes (Sentencing Procedure) Act 1999* (NSW)

In implementation, in those jurisdictions there is a varying degree of and significant differences in judicial and administrative determination of actual duration of life sentences. There is also a prominent role for executive government institutions, particularly parole boards -which exist in most jurisdictions, although some of those parole boards only have recommendatory or advisory functions rather than being able to release offenders.

Of course, there have been changes in the last couple of decades to what life sentencing means. The Victorian Sentencing Task Force and Ivan Potas’ studies back in 1989 and more recent data from the New South Wales Judicial Commission and from Victoria, show that the life sentence of average 12-15 years is considered an adequate level of punishment; we are now seeing those sorts of figures in those jurisdictions where it is a non-parole period attached to a life sentence. For example,

This occurs in Victoria and New South Wales, where you cannot attach a non-parole period to a life sentence but you can have a determinant sentence for murder in preference to a life sentence.

Of course, some of those jurisdictions where it is a maximum sentence – New South Wales, Victoria, Tasmania, and the ACT of course – do allow for determinant sentencing as a head sentence and some very lengthy determinant sentences have been imposed, up to 45 years in New South Wales, for example. What that shows is that in a number of jurisdictions it does mean ‘natural life’ but, of course, that does not always translate to reality because of the discretion to fix non-parole periods and also the release mechanisms that are available through the complexity of statutory provisions.

So, for example, the NSW *Crimes Act 1900*, the *Crimes Sentencing Procedure Act 1999*, and the corrections and parole legislation, provides these complex mechanisms for determining what life sentencing means in the various jurisdictions. For example, you will find in New South Wales and the ACT, that whilst both have no discretion to fix a non-parole period, in the ACT you have a procedure where prisoners can apply, through the Sentencing Administration Board, for release on licence after ten years. In New South Wales there is simply no similar prospect. The prerogative of mercy operates as it does still in every other jurisdiction but of course, that rarely happens and the system relies upon all the other mechanisms.

In Queensland it is possible for a prisoner serving a term of (for example) fifteen-years to apply to the Queensland Parole Board to be released unless the Court has set a minimum term -for example twenty years or less where there have been multiple murders or the prisoner has come back from a previous conviction for murder. There are mandatory minimums in some jurisdictions, like South Australia, and standard non-parole periods in the Northern Territory of 20-25 years, although they are subject to excepting provisions within those periods.

There is no clear meaning of a life sentence in Australia, . Of course, in the Commonwealth jurisdiction there is a sentence of life imprisonment as a maximum but not for murder, or rather, there is a sentence for murder in that jurisdiction but the State jurisdictions have not adopted that particular provision. We have a variety of what I would call forms and implementation. What does that mean for understanding whether the sentence of life imprisonment is an effective measure in sentencing or whether it is simply a penal populist measure that needs to be taken apart? Whether it should exist or not is another question, that I will discuss.

In Victoria, Tasmania and the ACT a natural-life sentence is a very rare outcome. The parole boards play a very prominent role in those jurisdictions because the legislative schemes do really favour the implementation of a non-parole period. The case of *R v Denyer* (1995) 1 VR 186 per Crockett J at 193, in Victoria is a very good example of where the Victorian Court of Criminal Appeal looked at the natural-life sentence and focused particularly on the substantial difference in penalties dependent purely on the defendant’s age.

The unique position of New South Wales: under their section 61 of the Crimes Sentencing Procedure Act [life imprisonment] is not a true mandatory sentence. It has most recently been looked at in the case of *Burrell*, a very high profile case in New South Wales, and also those later cases that I mentioned there, *R v Jeffrey Gilham*

[2009] NSWSC 138; *R v BW & SW (No 3)* [2009] NSWSC 1043. Of course, *SW* was the case where a mother had starved her seven-year-old daughter to death, and there were very clear statements made in those judgments that section 61 is not a mandatory life sentence. It does allow the courts discretion to impose a lesser sentence, even though it is expressed in those terms in the legislation.

My arguments in that regard are that the 'mandatory' label is misleading. There are different levels of culpability in murder, and in cases where offenders are responsible for conduct occasioning death. The early-release mechanisms show that the mandatory sentence was obviously not an appropriate first-instance disposition anyway, and once released they are also unlikely to be subject to parole conditions and supervision for the term of their natural life and there is, of course, a number of studies that show that these are the offenders that have the lowest recidivism rates, in any event.

Labelling is an interesting concept. Behind the labelling we have to look at fairness to the offender, the victim, and communication to the public. It has been discussed in relation to criminal offences but I think we can extend it to sentencing dispositions. Arguably, if it is a 'mandatory' label it must mean what it says. Therefore, the numerous variations that we see show ambiguity and undermine the prospect of an informed public understanding of the sentence. Studies like New South Wales' BOCSAR from 2008 and others show that the public is poorly informed about crime and criminal justice issues generally and relies heavily on media portrayal.

The practical reality of life imprisonment is that it is an indeterminate sentence which is not effectively communicated to the stakeholders and the public. What the 'mandatory' label does is simply heighten ambiguity. It does not promote public confidence in the sentencing process, and the work of Professor Julian Roberts, Professor of Criminology at the University of Oxford, has been significant in the discussion on mandatory sentencing. The ambiguity undermines public confidence.

I would briefly like to mention that the presumptive sentence in the Western Australian legislation is a bit different, although understanding the difference between a mandatory and a presumptive sentence, of course, is going to be difficult in practice for the public.

Essentially, having regard to denunciation and its links to retribution and general deterrence, I was interested in whether such a sentence has effectively any principled application or whether it is simply a populist punitive measure. One of the arguments I am making here is that to be effectively denunciatory there must be informed public understanding of the nature and effect of the sentence of life imprisonment, and that is not something that is very clear in the mechanisms that currently exist in Australian jurisdictions. My argument is that, rather than political perception of popular public sentiment, the public must be better informed through education and consultation, to improve understanding of the life sentence and to actually then challenge whether the life sentence is an appropriate sentencing disposition at all.

The points in this slide are about the principled approach, and certainly Professor van Zyl Smit refers to these.. Life imprisonment as it currently exists undermines those constitutional principles, and legal principles of proportionality, human dignity, and equality before the law. Arguably, A principled approach to life imprisonment is not possible under the current schemes in Australian jurisdictions. That leads to the

question whether it can ever be justified when we do apply a proper principled approach to sentencing.

My conclusion is that the life imprisonment sentence is really an inauspicious legacy of the abolition of the death penalty for murder. It is an ineffective attempt to denounce murder, because in practice it rarely results in the type of sentence one might infer from its natural meaning. It is an appeal to populist sentiment by governments and politicians wanting to be seen as tough on crime, and its definitional ambiguity really undermines any effectiveness that it might have, and does not permit a principled approach to its use. We need to shift to more moderate penal policies with proportionality as the central principle. The desirability of parsimony, of course, has to be linked with education and consultation of a fully informed public, in a systematic and balanced way.

This is not out of the ordinary. There are some jurisdictions that have abolished it in all its forms. Some European, South American and Scandinavian jurisdictions have abolished life imprisonment completely and there are other jurisdictions, of course, with more constitutional arguments like France and Italy, where it does still exist but with a right to be considered for release.

Thank you.