

# **FROM MARBLE TO MUD: THE PUNISHMENT OF LIFE IMPRISONMENT**

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## Introduction - The meaning of "life"

"I sentence you to penal servitude for life". These words, spoken by countless judicial officers sentencing convicted murderers<sup>1</sup> in the criminal courts of this country, have not had the same meaning or effect for each prisoner suffering this punishment throughout history.

"Life" is an intriguing word which is capable of use in various contexts and so capable of having an array of meanings. We might all think about what "life" means to us *personally* before restricting it to the punishment context - What is the meaning of life? That takes me to the title of the paper, and the use of the metaphors "marble" and "mud" in describing the contents of "life". In his novel, *The House of the Seven Gables* (1851), Nathaniel Hawthorne wrote, "Life is made up of marble and mud", and although the word "life" can take on more colourful meanings such as "bubbliness, vigour, vivacity, animation", quintessentially life is the state of existence as a living individual involving one's manner of living, namely, the activities one takes part in at given places and at given times. These activities in living may be described as episodes of "marble" (a white, glistening, highly polished stone) or "mud" (moist, soft, sticky earth found in marshes, swamps, at the bottom of rivers and ponds, or in highways after rain - to make turbid or foul with dirt). Ideally our life, as in our time spent physically existing on earth, should be all "marble", or at least significantly more "marble" than mud, but it is perhaps inevitable, as Nathaniel Hawthorne says, that life, everyday living, will involve both "marble" and "mud".

Although this description of what life involves may be somewhat simplified and unsophisticated, it is pertinent when considering what "life" means in the context of punishment. In this century we have seen abolition of capital punishment in all Australian jurisdictions<sup>2</sup> and in its place the maximum, or in some cases mandatory, sentence for murder has universally been set at penal servitude for life. The last person hanged in Australia for murder was Ronald Ryan. His execution was in Victoria in February 1967 and occurred in controversial circumstances<sup>3</sup>. Accordingly with capital punishment consigned to the past, it is vitally important to probe the full import of the sentence of life imprisonment, its method of implementation, its meaning for the convicted and its compatibility with humanitarian principles. Literally a sentence of life imprisonment must mean that a person will serve the remainder of their existence as a human being on earth in a state of incarceration. If life is made up of "marble and mud" then the stage of life, the number of years one may potentially be incarcerated, the place, and conditions of such incarceration under a life sentence will arguably be determinative as to how much "marble" and how much "mud" there will ultimately be in one's life. If a sentence of life imprisonment translates to being held in prison for fifty years or more until death, and acknowledging that imprisonment involves the most serious form of deprivation of liberty of the person imposing confinement in a particular place and restraint on the activities and movements of the individual from place to place, then one's life may well move from episodes of "marble" and "mud" to a continuum of "mud" without the hope of the brighter tomorrow which all of us, to some extent, see for our own lives.

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<sup>1</sup> Although the punishment of penal servitude for life has been and still is available as the maximum sentence for crimes other than "murder", it is in relation to the crime of "murder" that the punishment has been most significantly utilised in practice. Accordingly I will focus on that crime in this paper.

<sup>2</sup> Some as late as 1985, namely New South Wales where the death penalty remained for the crimes of piracy, treason and arson of naval dockyards until repealed by the *Crimes (Death Penalty Abolition) Act* 1985 and *Miscellaneous Acts (Death Penalty) Act* 1985. The death penalty was abolished for the crime of murder in NSW in 1955 with the passage of the *Crimes (Amendment) Act, 1955* (No.16). Western Australia was the last Australian state to abolish capital punishment for the crime of murder in 1984.

<sup>3</sup> B Jones, *The Penalty is Death*, Melbourne, Sun Books, 1968: 268-269. Ryan was hanged for the murder of a prison warder which occurred during a prison escape. There is still an air of uncertainty surrounding Ryan's execution as allegations still persist that it was not Ryan who fired the gun that killed the warder.

## The punishment of imprisonment - a brief historical perspective

New South Wales was, in effect, created as a type of prison, a penal colony which received British convicts having death sentences commuted to sentences of transportation and others simply being sentenced to transportation for seven, fourteen years or life. Exemplary capital punishment stood at the centre of eighteenth-century English penal policy with over 200 offences carrying the death penalty, however the majority of capital offenders were spared the noose with the exercise of the royal prerogative of mercy or options of punishment short of death under the *Transportation Acts*<sup>4</sup>. The execution of all those convicted of capital offences was not a viable option for the government and transportation was one punishment alternative utilised to overcome overcrowding in holding prisons in England, where at that time there were no facilities for the long term imprisonment of convicts. It is significant that there was executive discretion in the determination of the length and type of punishment from the earliest days of British settlement in Australia. This uncertainty of punishment was a fertile ground for arguments and proposals for change.

The movement against transportation in the early nineteenth century was influenced by philosophers like Jeremy Bentham and the Italian criminologist, Cesare Beccaria. Bentham's campaign for certainty of punishment and to establish the penitentiary as the principal instrument for criminal punishment saw the abolition of the death penalty for a long list of offences in the late 1820s and early 1830s. "Bentham's penitentiary offered a system where the punishment could be better measured to fit the crime and *would be carried out in every case*."<sup>5</sup> Life imprisonment, literally translated as being imprisoned "for the term of his natural life" was provided as a punishment for certain crimes, however the death penalty was still retained for a number of criminal offences including murder.

By the mid nineteenth century imprisonment became the principal element in penal thinking and one of the biggest problems confronting prison administrators was the maintenance of order. The flogging of prisoners was a form of additional punishment and prisoner's rights in this regard formally closed those measures of unchecked physical coercion, the hallmark of earlier brutal systems of punishment<sup>6</sup>. Alternative strategies for maintaining orderly behaviour included indulgences or privileges and the shortening of sentences. Executive action in providing tickets of leave and release of prisoners on licence before the expiration of sentences was common and was also utilised in the case of those sentenced to imprisonment for the term of their natural lives. Although it must be conceded that there were prisoners that died in prison and thus may technically be regarded as having served "natural life" sentences, the life expectancy of such prisoners would necessarily have been effected by the conditions under which they were held and the availability and extent of medical treatments. It was extremely rare for "life sentence" or any other prisoners to serve twenty or thirty years in prison. Bentham's philosophy for certainty in punishment by specified terms of imprisonment was arguably not exemplified in the practical implementation of prison sentences.

Moving into the twentieth century, executive intervention into the duration of prison sentences imposed by judicial officers became quite systematic and this was especially true of life sentences. Ivan Potas commented in his 1989 *Trends and Issues* paper on "Life imprisonment in Australia" that "the reality is that life sentences are generally commuted or

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<sup>4</sup> D Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales*, Cambridge, Cambridge University Press, 1991: 12.

<sup>5</sup> Above at 14 (emphasis added).

<sup>6</sup> Above at 42.

mitigated by subsequent executive intervention."<sup>7</sup> When capital punishment for the crime of murder began to be abolished in Australian jurisdictions beginning with Queensland in 1922<sup>8</sup>, the death sentences were universally commuted to sentences of life imprisonment and this punishment was substituted as a mandatory sentence to be imposed by the courts when a person was convicted of murder. The sentence of life imprisonment then took its place at the pinnacle of criminal punishments in Australian jurisdictions. Accordingly, the logical and important question that arises is, what did the mandatory sentence of penal servitude for life mean in practice?

### **Life imprisonment in practice**

The meaning of the sentence of penal servitude for life as it was when prescribed as the penalty for murder in New South Wales in 1955<sup>9</sup> retained the misleading and vague character it had largely had throughout the history of its existence. It rarely meant that a person would actually be kept in custody for the rest of his her life, but it was continued to be characterised as an indeterminate sentence when imposed by a court, subject to review at an "appropriate" time by executive action. In New South Wales the power under the now repealed s.463 *Crimes Act* was used to release persons sentenced to penal servitude for life as it had been used, although not always strictly in this legislative form, as a method of early release of offenders from sentences imposed since the time of settlement of the colony. This was known as release on licence<sup>10</sup>.

In the first major study of life sentences in Australia conducted by Arie Freiberg and David Biles for the Australian Institute of Criminology<sup>11</sup>, the authors noted that the sentence of life imprisonment is viewed "in most penal systems ... as an indeterminate sentence to which legislative and administrative provisions for release are applicable ... (and) for most there is the possibility of release at some date."<sup>12</sup> It should be noted that occasionally a judicial officer might make a recommendation that a particular prisoner sentenced to penal servitude for life should "never be released"<sup>13</sup>, implicitly acknowledging that a life sentence did not ordinarily involve the incarceration of a prisoner for the remainder of his or her natural life.

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<sup>7</sup> I Potas, "Life Imprisonment in Australia", No 19 in *Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology, Canberra, August 1989: 1.

<sup>8</sup> After Queensland, the death penalty for murder was abolished in New South Wales in 1955, Tasmania in 1968, Northern Territory and Australian Capital Territory in 1973, Victoria in 1975, South Australia in 1976 and Western Australia in 1984. Taken from I Potas and J Walker, "Capital Punishment", No 3 in *Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology, Canberra, February 1987: 2.

<sup>9</sup> The sentence of penal servitude for life for the crime of murder remained a mandatory sentence in New South Wales until an amendment to s.19 *Crimes Act* (NSW) in 1982 allowed a limited discretion for judges to reduce the sentence and impose a determinate sentence of imprisonment when "the person's culpability for the crime is significantly diminished by mitigating circumstances" - See *Crimes (Homicide) Amendment Act* 1982 assented to on 23 April 1992 and came into operation in relation to persons arraigned for murder on or after 14 May 1982.

<sup>10</sup> Release on licence under s.463 *Crimes Act* (NSW) was administered by the executive government with the ultimate power resting with the Executive Council on advice from the Minister for Corrective Services. It became the practice of the Minister to refer the file of a life sentence prisoner to the Parole Board (established in 1950) after a period of 10 years had been served, for the Life Sentence and Governor's Pleasure Review Committee to report on prisoners who should be released. A Release on Licence Board was established in 1983 to make recommendations to the Minister for Corrective Services and where release was recommended the Minister would ordinarily recommend to the Executive Council that the prisoner be granted a licence to be at liberty for a period of 5 years. Importantly, though, the Minister did retain a power to veto the recommendations of the Release on Licence Board.

<sup>11</sup> A Freiberg and D Biles, *The Meaning of Life: A Study of Life Sentences in Australia*, Australian Institute of Criminology, Canberra, 1975.

<sup>12</sup> Above at 22.

<sup>13</sup> There are some notable examples of this in the New South Wales jurisdiction, such as John Travers, Michael Murdoch and the three Murphy brothers convicted of the murder of nurse, Anita Cobby in June 1987. Maxwell J commented that each of the prisoner's official files would be marked "Never to be released" and that if the executive ever came to consider the release of these men from prison they should "show the same mercy that they showed Mrs Cobby on the night of February 2, 1986 in the boiler paddock. The community would expect nothing less." (16 June 1987). It should be noted that this was a judicial recommendation only as the courts had no power at that time to fix minimum terms when a life sentence was imposed. Freiberg and Biles note that where such a statement is made by way commutation, it cannot bind a future exercise of the Royal Prerogative in determining release, for the prerogative is absolute. See above at 22 (n73).

The provision for release of life sentence prisoners on licence in New South Wales is illustrative of comparable schemes operating in other states at the same time<sup>14</sup>, and the various administrative mechanisms that were created within the confines of the executive government over a number of years for the releasing of life sentence prisoners on licence developed a pattern of tariff minimum sentences. Data from the 1975 Freiberg and Biles study of life sentences reveals that in New South Wales from 1940, when the death sentence was commuted by the government in all cases to a sentence of penal servitude for life, until 1974 there were 156 "lifers" released, which included prisoners convicted of murder, serving an average of 13 years 7 months in custody before release. The longest period served was one of 30 years 6 months and the shortest 1 year 5 months<sup>15</sup>. Freiberg and Biles did find that on a proper analysis of the data the overall average figure was misleading "and persons serving a life sentence (for whatever offence) could expect to serve between 16 and 19 years if released" in the years between 1950 and 1974<sup>16</sup>. The data shows that the average time served by life sentence prisoners in other states was between 11 years (South Australia) and 13 years 9 months (Victoria).

Subsequent to that major study, a number of shorter studies dealing with the meaning of a "life sentence" in practice have been conducted, and taking New South Wales as the example, the data reveals that there was a gradual decline in the time spent in custody for life sentence prisoners. In a survey conducted in January 1990, when the major amendment to the sentence for murder was accomplished in New South Wales with the introduction of s.19A *Crimes Act*<sup>17</sup>, researchers examining the "Lifer Release on Licence" files of the 161 prisoners released between October 1981 and October 1987, learnt that "the mean length of time served before their first release on licence was 11.7 years (minimum of 3 years, and maximum of 34 years) and 149 of those had served 15 years or less." Of the 238 lifers still in prison at the time of the survey 32 (13.4%) had been in prison for more than 12 years and only 13 (5.5%) for more than 15 years<sup>18</sup>.

An analysis of these various groups of data certainly presents a picture that from the universal commutation and eventual abolition of the death penalty up to the time of the 1989/90 sentencing reforms in New South Wales most life sentence prisoners could expect to be released within 15-20 years of conviction and in the immediately preceding decade it became unusual to serve more than 13 years in custody and exceptional to serve any more than 15 years. What is clearly evidenced in New South Wales and other states in relation to the implementation and practical effect of the sentence of life imprisonment is the executive as opposed to judicial discretion and control in the determination of the final duration of such sentences. Certainly there were extremely few life sentence prisoners in the Australian jurisdictions prior to 1990 who were serving their sentence in the literal sense as "natural life" sentences without any prospect of release at some future time. It was a symbolic punishment which expressed the community abhorrence of the crime committed by the prisoner, but which did not, in practice, translate into a sentence of infinite duration.

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<sup>14</sup> See Freiberg and Biles above n10 at 54-70.

<sup>15</sup> Above at 53-54

<sup>16</sup> Above at 53.

<sup>17</sup> s.19A *Crimes Act* (NSW) providing for a maximum sentence for the crime of murder of penal servitude for the term of an offender's natural life commenced operation on 12 January 1990 - *Crimes (Life Sentences) Amendment Act*, 1989.

<sup>18</sup> M Nguyen Da Huong & B Thompson cited by Serious Offenders Review Board in an annexure to its reports to the Supreme Court in all s.13A *Sentencing Act* applications, and quoted in J.Nicholson "Resentencing Serious Offenders: A Commentary on the New South Wales Model" (1992) 16 *Criminal Law Journal* 216 at 217.

It interesting to find that R.P. Roulston writing in 1965<sup>19</sup> about the "life sentence" of the time noted that the pattern in New South Wales was essentially similar to that in England and that the part played by the executive in determining the length of prison sentences stems from the "prerogative of mercy which is still exercised in exceptional cases whereby the Governor may remit any portion of any sentence imposed on any convicted prisoner." Roulston went on to comment that "The view that twenty years is the nominal maximum for murder - traditionally regarded as the gravest crime - is in harmony with the general sentencing policy of judges. A fixed sentence of over ten years is a rarity and over fifteen years quite exceptional."<sup>20</sup> Therefore it seems that there was a general acceptance by both the judiciary and the community that a life sentence when imposed would not mean the offender would spend the rest of his or her life behind bars, but that they could expect to be released with 20 years, that marking a sufficient condemnation of their criminal behaviour. In fact it was reported in the *Sydney Morning Herald* shortly after the election of a Coalition government in New South Wales in March 1988 that the government's penal policy for murder was:

"Murder will bring automatic life imprisonment, *in practice not less than 20 years* ... Judges will be given the power to order, rather than just suggest, that a prisoner never be released in cases such as the Anita Cobby murder."<sup>21</sup> (emphasis added)

With those policy statements in mind, that takes us to the next interesting chapter in the punishment of life imprisonment and its current status in New South Wales and other Australian jurisdictions.

### **The contemporary meaning of life imprisonment in Australia**

Firstly dealing with New South Wales, the "truth in sentencing" rhetoric of the Coalition government elected to office in 1988 brought important ramifications for the meaning of the life sentence when imposed for a murder conviction. The "truth" was directed to ensuring that the length of time specified by judicial officers for individual prison sentences was to be served in practice without executive interference<sup>22</sup>. Accordingly penal servitude for life came to be legislatively prescribed as a sentence to be served "for the term of the person's natural life."<sup>23</sup>, perhaps somewhat contrary to the general judicial acceptance and government policy that in practice such a sentence generally meant no more than 20 years imprisonment. At the same time came the unfettered discretion to impose determinate sentences upon those convicted of murder<sup>24</sup>, including the fixing of minimum terms of imprisonment in accordance with the *Sentencing Act 1989*.

What then happened in relation to the sentencing of those convicted of murder from this time? A study by the Judicial Commission of New South Wales, *Sentenced Homicides in New South Wales 1990-1993*, revealed that during the period of the study of the 93 offenders convicted of and sentenced for murder under s.19A *Crimes Act*, six received sentences of "natural life

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<sup>19</sup> R.P.Roulston "Length of Imprisonment. Who is Responsible?" (1965) 39 *ALJ* 94.

<sup>20</sup> Above at 95.

<sup>21</sup> "Promises the government is likely to hold itself to" *Sydney Morning Herald* March 22, 1988: 7.

<sup>22</sup> Whether or not the provisions of the *Sentencing Act 1989* resulted in literal "truth in sentencing" has been the subject of academic comment - See for example D Brown "What truth?" (1989) 14 *Legal Service Bulletin* 161; J Chan "The New South Wales Sentencing Act 1989: Where does Truth Lie?" (1990) *Criminal Law Journal* 249; D Brown "Battles Around Truth: A Commentary on the *Sentencing Act 1989*" (1992) 3 *Current Issues in Criminal Justice* 329. One major argument that there is no strict truth in the sentencing regime created by the *Sentencing Act 1989* is the provision for minimum terms and that the total sentence imposed can comprise a custodial and a parole component.

<sup>23</sup> s.19A(2) *Crimes Act*, 1900 (NSW).

<sup>24</sup> s.19A(3) *Crimes Act*, 1900 (NSW) - "Nothing in this section affects the operation of section 442 (which authorises the passing of a lesser sentence than penal servitude for life)."

and the remainder received determinate sentences. The typical sentence was "described as a minimum term of 12 years and an additional term of six years, making a total of 18 years."<sup>25</sup> Since the completion of that study there have been a number of others sentenced to penal servitude for life for the crime of murder in New South Wales and the present total is 14 males<sup>26</sup> which, although only representing a small minority of the overall total of persons sentenced to imprisonment upon conviction for murder since January 1990, is still a significant number when the contemporary practical effect of the sentence is realised. Those men will serve their sentence for the remainder of their natural life with no prospect of release save perhaps for the exercise of the royal prerogative of mercy<sup>27</sup>

Some of the notable "natural lifers" in New South Wales are "backpacker killer", Ivan Milat sentenced to seven concurrent life terms after being convicted of the murders of seven young backpackers<sup>28</sup>; "granny killer", John Glover serving six concurrent life terms for the murders of six elderly women on the north shore of Sydney<sup>29</sup>; "Central coast massacre" culprit, Malcolm Baker serving six concurrent life terms for the shooting murders of six people within the space of an hour in 1992<sup>30</sup>; and the infamous Arthur ("Neddy") Smith<sup>31</sup> convicted of murder in 1998 and sentenced to a natural life term whilst serving a life term imposed under s.19 *Crimes Act*, 1900 (NSW) for a murder conviction in October 1987. All these cases were found were judicially determined to fall within the "worst category of cases" of murder and thus attracted the maximum punishment available. These are examples of cases where the prisoner no longer can expect the executive review of their life sentence after serving ten years in prison to determine whether a release on licence should be granted. The judicial determination at the time of sentencing will stand unless circumstances arise whereby the exercise of prerogative of mercy might be considered to allow release of the prisoner before he dies in prison.

The availability of the natural life sentence as a maximum sentence has resulted in a number of such sentences being passed upon conviction for the crime of murder, however it is important to note that in June 1996, s.431B *Crimes Act* commenced operation in New South Wales. This section provides for a mandatory sentence of penal servitude for life in cases of murder where "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 that sentence."<sup>32</sup>

This is the contemporary stark reality of a sentence of penal servitude for life in New South Wales. What then is the current meaning of a life sentence in other Australian jurisdictions? Table 1 below provides a list of the present position in all states and territories of Australia

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<sup>25</sup> Judicial Commission of New South Wales, *Sentenced Homicides in New South Wales 1990-1993*, No.10 in Monograph Series, Sydney, June 1995: 75-76.

<sup>26</sup> This figure excludes two other males who were sentenced to penal servitude for life upon conviction for murder and subsequently died in custody - (1) Maxwell Harold Trotter (sentenced to "natural life" on 10 August 1993 and died in custody from natural causes); (2) Robert Mark Steele (sentenced to "natural life" on 12 May 1994 then aged 22years. Shortly after sentencing he committed suicide in prison). Also this figure does not include one other male, Win Piew Chung, who was sentenced to "natural life" on 17 April 1998 for commercial drug trafficking (s.33/33A *Drug Misuse and Trafficking Act* 1985 (NSW)). There are also a number of other prisoners serving life sentences in New South Wales who were sentenced prior to the 1990 amendment to the punishment for murder. Some examples are John Travers and the others convicted of the murder of Anita Cobby; and Stephen Jamieson and the others convicted of the murder of Janine Balding. They can apply to have their life sentences re-determined under s.13A *Sentencing Act*, 1989 but none have yet made such an application.

<sup>27</sup> See s.19A(6) *Crimes Act*, 1900 (NSW) which expressly provides that nothing in the section affects the prerogative of mercy.

<sup>28</sup> *R v Ivan Robert Marko Milat* (Supreme Court of NSW, Hunt CJ at CL, 27 July 1996)

<sup>29</sup> *R v John Wayne Glover* (Supreme Court of NSW, Wood J, 29 November 1991)

<sup>30</sup> *R v Malcolm George Baker* (Supreme Court of NSW, Newman J, 6 August 1993)

<sup>31</sup> *R v Arthur Stanley Smith* (Supreme Court of NSW, Simpson J, 17 April 1998)

<sup>32</sup> s.431B was inserted into the *Crimes Act*, 1900 by the *Crimes (Mandatory Life Sentences) Amendment Act*, 1995.

regarding the maximum punishment for the crime of murder and whether the practical effect of the punishment is determined by judicial order or executive action. Some significant cases in each jurisdiction are noted in relation to the issue of a natural life sentence and the availability of parole for those sentenced to life terms.

**Table 1 - A comparison of the provisions for the punishment of the crime of murder in Australian states and territories**

<b>State/Territory</b>	<b>Punishment for murder</b>	<b>Judicial or Executive determination</b>	<b>Significant cases</b>
New South Wales	Life (maximum s.19A <i>Crimes Act</i> ; mandatory s.431B)	Judicial determination of sentence - "worst class of case". No provision for fixing a minimum term when natural life sentence imposed.	<i>Glover; Baker; Milat; Smith.</i>
Victoria	Life (maximum s.3 <i>Crimes Act</i> )	Judicial determination of sentence, can impose life sentence and set a non-parole period.	<i>Stanley Taylor; Knight; Lowe; Beckett; Camilleri.</i>
Queensland	Life (mandatory s.305 <i>Criminal Code</i> )	Executive determination - s.166 <i>Corrective Services Act 1988</i> - "life" prisoner not eligible for parole until at least 15 years served. (Qld Community Corrections Board)	<i>R v Hadlow; R v Streeton; R v D; R v Fox; R v Paddon.</i>
South Australia	Life (mandatory s.11 <i>Criminal Law Consolidation Act</i> )	Judicial discretion to fix a non-parole period when life sentence imposed for murder (s.32 <i>Criminal Law (Sentencing) Act, 1988</i> ).	<i>R v Von Einem (1985) 38 SASR 207; R v Miller (Truro murders):R v Murphy (1996) 66 SASR 406; Inge v The Queen</i>
Western Australia	"Wilful murder" - Strict security life "Murder" - Life (mandatory - s.282 <i>Criminal Code</i> )	Judicial responsibility to fix a minimum period within range specified, when life sentence imposed for wilful murder or murder (s.90 <i>Sentencing Act 1995</i> ). When strict security life imprisonment imposed, judicial discretion to fix minimum period or order offender not to be paroled (s.91 <i>Sentencing Act, 1995</i> .)	<i>Mitchell v The Queen</i>

Tasmania	Life (maximum - s.158 <i>Criminal Code</i> 1924)	Judicial determination of sentence - "worst category of case".	<i>R v Martin Bryant</i>
Northern Territory	Life (mandatory - s.164 <i>Criminal Code</i> 1983)	Judicial discretion to fix a non-parole period when life sentence imposed for murder (s.53 <i>Sentencing Act</i> 1995)	
Australian Capital Territory	Life (mandatory s.12 <i>Crimes Act</i> )	Executive determination as to release from life sentence	

The table illustrates that most Australian jurisdictions now provide the sentencing capacity to judges to impose a natural life sentence as a maximum punishment for the crime of murder. In some states, such as South Australia, the imposition of a life sentence remains mandatory, however there is a judicial discretion to fix a non-parole period or minimum term in respect of the life sentence. This provision was the subject of recent decision by the High Court in the case of *Christopher Inge v The Queen*<sup>33</sup> and Kirby J provided an extensive and detailed analysis of the fixing of non-parole periods where a life sentence is imposed and that it is "irrelevant or misleading" to calculate the non-parole period by reference to the supposed life expectancy of the prisoner<sup>34</sup>. This is an interesting decision in that in New South Wales the calculation of the life expectancy of the prisoner by reference to the *Australian Life Tables* has been used by some judges in projecting the number of years which a prisoner may potentially serve if sentenced for the term of his natural life. It is in fact some indication of the potential impact on the manner of living for an individual punished with the indeterminate life sentence, however it is also clear that it does provide a somewhat misleading reference point if the sentencing judge is minded to mitigate the full impact of the life sentence by fixing a minimum term or non-parole period. It has been most unusual in practice to for a non-parole period fixed in relation to a sentence of life imprisonment to exceed 20 years.

With that fact in mind, it is the cases where no minimum term is attached to a life sentence that raise the most serious issues of contemporary concern about the punishment. The stark reality of the current meaning of life imprisonment was underlined by Vincent J of the Supreme Court of Victoria in the recent case of *R v Leslie Alfred Camilleri*<sup>35</sup> who, at the age of 29 years, was sentenced to life imprisonment on two counts of murder without possibility of parole. His Honour remarked:

"It is terrible to contemplate the prospect that, as a consequence of the order which in my view justice and the proper application of sentencing principles would require in your case, you may never be released from prison. However, I consider that my duty is clear. Through your own actions, you have *forfeited your right ever to walk among us again.*"<sup>36</sup> (emphasis added).

<sup>33</sup> [1999] HCA 55 (7 October 1999)

<sup>34</sup> Above per Kirby J at para 63.

<sup>35</sup> *R v Leslie Alfred Camilleri* [1999] VSC 184 (27 April 1999)

<sup>36</sup> Above at para 37.

Other examples of comparatively young men in other Australian jurisdictions serving natural life sentences are available, such as Martin Bryant responsible for the Port Arthur massacre in Tasmania and Andrew Garforth, Brendon and Vestor Fernando in New South Wales. The sentence of life imprisonment for these men is being locked away from society with little or no hope for release, a never ending confinement in a prison which they could endure for in excess of 50 years. Although it may provide a "truth" and certainty in punishment is that just in the context of a supposedly humane and enlightened society.

## Conclusion

The human reality of this "ultimate" penal sanction was highlighted in a 1995 United Nations Paper on life imprisonment<sup>37</sup>. It involves "social isolation, total dependence, suspension of time, prolonged sexual abstinence, loneliness and loss of responsibility, combined with a regimentation and routinisation of life". Research into the psychological and sociological effects of life imprisonment has found that it may cause "desocialisation and institutionalisation." Considering whether life is primarily made up of "marble" or "mud" in a never ending environment of this type, one can strongly argue that this is an extreme form of punishment that takes "life" in the real sense of the word away from a person so sentenced and their existence continues as one covered in "mud". It is arguable that the contemporary thrust of "truth" in sentencing for the meaning of life imprisonment has resulted in regression in this form of punishment to the harsh, retributive regimes of another era. There was a glimmer of "marble" even in the administration of life sentence in the eighteenth and nineteenth centuries. Therefore is timely to consider the fairness and appropriateness of such a penalty in the context of a supposedly "just" and enlightened society with the experience of oppressive punishment regimes expressly consigned to the past.

We should take heed of the Council of Europe observation that "a crime prevention policy which accepts keeping a prisoner for life even if he is no longer a danger to society would be compatible neither with modern principles on the treatment of prisoners during the execution of their sentence nor with the idea of the reintegration of offenders into society.", and their subsequent recommendation that the "overall objective of the management of life prisoners is their safe release into society once they have served a sufficient period in custody to mark the seriousness of their offences."<sup>38</sup> A clear issue of contemporary concern is the management of natural life prisoners in the custodial setting where effectively no further "punishment" can be imposed upon them for offences against prison discipline nor for any criminal offences committed inside prison, including further killings. Judicial imposition of a natural life sentence without possibility of release at the time of conviction for the crime of murder is arguably repugnant and approaching the realms of a cruel and unusual punishment. Considering the history of the punishment of life imprisonment, the least we could provide in the contemporary context is a review mechanism for life-sentence prisoners after ten or fifteen years to assess each individual as to suitability for conditional release. Should we have the power to remove all the "marble" from one's life?

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<sup>37</sup> United Nations, *Life Imprisonment*, implemented for WWW by *Institute for Information Engineering at Vienna University*, Vienna, 1995.

<sup>38</sup> Above at para 16.