2000 paper by John C. Nicholson SC before he was appointed to the bench.

THE NATURE OF A LIFE SENTENCE

The starting point for any analysis of the nature of a life sentence can conveniently begin by re-stating the remarks of Hunt J (as he then was) in **R v Petroff** (NSW Supreme Court, unreported, 12 Nov 1991).

'The indeterminate nature of a life sentence has long been the subject of criticism by penologists and others concerned with the prison system and the punishment of offenders generally. Such a sentence deprives a prisoner of any fixed goal to aim for, it robs him of any incentive and it is personally destructive of his morale. The life sentence imposes intolerable burdens upon most prisoners because of their incarceration for an indeterminate period, and the result of that imposition has been an increased difficulty in their management by the prison authorities'.

A further insight into life imprisonment is given by Crocket J. remarks in **R v Denyer** [1995] 1 V.R. 186 at 193
"If no non-parole period is fixed and the prisoner is sentenced to life imprisonment then he must remain in custody until the day of his death. His release can only be ordered by the Executive exercising the royal prerogative of mercy. Assuming a life expectancy of about (certainly not less than) 71 years, the sentence is for all practical purposes one of at least 50 years [in this case]. It may very well be longer. Certainly he can entertain no hope or expectation of ever gaining his release. He is devoid of incentive to rehabilitate himself. He is entitled to no remissions. A like offender who was say, 41 years of age at the time of the sentence would be incarcerated for 20 years less of his lifetime than would be the applicant. This is a very substantial difference in penalties. The length of the sentence served and, thus, the measure of the punishment inflicted is dependent upon the pure chance of the offender's age."

When considering the nature of life imprisonment it is worth a moment to consider the value of incarceration as a tool of social engineering:
"The second thing involves the basic effectiveness of gaol as a means of controlling criminality and of dealing with it. Imprisonment in a gaol is the long accepted conventional method of achieving the four main ends of criminal justice:... It is a method the efficacy of which is, of course, not high: it has been used, perhaps, because it is the least worst of the methods which have to date been available. There are other ways of achieving those ends. This is not the place to canvass them. But when a Court comes to consider whether a prisoner should be kept in gaol for life or should (now or later) be released, the Court may and, in my opinion, should consider - to use a common phrase - whether there is now a better way.

The third thing involves a matter of fundamental justice. Mr Crump was, when sentenced, in his twenties. If he remains in gaol for life, he may remain there for forty years or more. On such an application as this, the Court must consider whether , whatever be the offence, such a length of imprisonment can be justified. (I put aside sociopathic offenders, serial killers and the like). It may be that it cannot. Subject to the Court being satisfied as to future offences, there must, I think, be a limit to what justice can require." [R v Crump, CCA 30-5-94 per Mahoney J.A..at pp6-7].

Retribution Alone Important
The cases recognise competing tensions between the purposes of punishment:-
'The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from others when determining what is an appropriate sentence in a particular case. They are guidelines to the appropriate sentence but sometimes they point in different directions'. *Veen No.2* (1964) CLR 465 at 476.

To the above stated purposes could be added denunciation of the criminal act.

The imposition of a life sentence focuses the punishment for the criminal act on one purpose only - retribution. Denunciation, deterrence (personal or general), protection of society, or rehabilitation are no better achieved by the imposition of a life sentence than of a substantial prison sentence [of say a non-parole period of 20 years].

Absence of Parole means rehabilitation irrelevant:
The legislature has intended parole as a benefit to prisoners to ameliorate the punitive aspects of prison in favour of rehabilitation and freedom:
"The intention of the legislature in providing for the fixing of minimum terms is to provide for mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom, when appropriate, once the prisoner has served the minimum time that a judge determines justice requires that he must serve having regard to all the circumstances of his offence. [*Deakin v The Queen* 54 ALR 765 at 766; see also *Bugmy v The Queen* 169 CLR 525 at 530-531; 536].

Denying a life prisoner the benefit of parole can only mean that considerations of the rehabilitation of the prisoner plays no part as a component of the sentencing considerations. Rehabilitation of the prisoner becomes an irrelevance in the life

sentence. [see also *R v Denyer* ante at p. 193 'devoid of incentive to rehabilitate'; *Petroff* (*ante*) 'deprives a prisoner of any fixed goal to aim for, it robs him ot any incentive and is personally destructive of his morale.

That fact seems born out in the administration of the life sentence by the custodial authorities. Classification of life prisoners within the gaol system is at a more measured pace than with other prisoners, responding not, to rehabilitation progress, but to considerations such as fighting institutionalisation. Life prisoners remain in maximum security conditions for far longer than prisoners serving determinate sentences. Similarly their classification as medium security prisoners is also much more measured. Some have been classified as minimum security, but this classification is likely to be upgraded at the whim of politicians or the press. [see *The Application of Leonard Keith Lawson* ante].

Purposes of Punishment - only one counts!
To fully comprehend what the majority of the High Court was saying in the famous passage of *Veen* earlier referred to 164 CLR 465., the phrase *'protection of society'* as it is used in that passage deserves a moment's consideration.

There two possibilities as to its meaning: the first postulates a meaning in a broad and general way:- i.e. sentencing in criminal matters imposes a punishment which is designed to make society a safer place for all the community by the use deterrence, denunciation, custody, and so on. [see for example *R v Rushby* [1977] 1 NSWLR 594 ...
'one of the main purposes of punishment, ...is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment. In all civilised countries, in all ages, it has been the main purpose of punishment, and it still continues so.'(emphasis supplied)

Alternatively, the phrase 'protection of society'takes its meaning from the context of the arguments in *Veen* [No. 2] . Arguably its meaning is specific, related to the incarceration of those criminals who would be a continuing danger if they remained at large in the community. In *Veen* [No 2] the appellant was arguing that his life sentence amounted to preventative detention imposed upon him because of his past history. The majority [Mason CJ, Brennan, Dawson, Toohey JJ]. observed [at 470].:
"The obvious difference between *Veen* [No. 1] and the present case is that it was then uncertain but is now known that the applicant has a propensity to kill when he is under the influence of alcohol and under stress."

Later in their judgment the majority observes [at p.473].:

"It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society: it is another to say that the protection of society is not a material factor in fixing an appropriate sentence."

It must be clear the phrase 'protection of society'as used by the majority in *Veen* [No.2] is to be understood as confined to the incarceration of a particular criminal who is a continuing danger to the community. If that is so, then the passage delineating the purposes of punishment reads more coherently [cf. however, discussion of Badger-Parker J in *The Application of Leonard Keith Lawson [for a determinate sentence]* NSW Supreme Court, unreported 31-5-94 at pp 34-37].:
The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. [p.476].

In the past in this State 'protection of society'as used in this sense has been used to justify a life sentence. [see R v Garforth, CCA unreported 23-5-94. See also *R v Park*, unreported, S. Ct [(Sperling J) at p.2 who speaks of 'incapacitation that is, removal for a time at least of the offender against the possibility of recurrent criminal activity')]. The position in Victoria seems different. [cf. as demonstrated by *The Queen v Bugmy*, ante; *R v Denyer* ante]. But in this case it is not necessary to argue whether the Victorian or NSW position is the correct one, because, in this case such a purpose of punishment [of protecting society from the prisoner] could not be called upon by the Crown to justify a life sentence.

Deterrence irrelevant in life sentence
Clearly as a matter of principle, if all other purposes of punishment could be achieved by the imposition of a determinate sentence it would be impermissible to impose a life sentence on this (or indeed any) accused solely for the purpose of achieving deterrence of others in the community. '*The Chief purpose of the criminal law is to deter those who are tempted to breach its provisions'* [*Walden v* Hensler 75 ALR 173 at 179]. observed Brennan J. However, so far as general deterrence is concerned, he continued :
"[W]hen a law proscribes conduct which an ordinary person without special knowledge of the law might engage in the honest belief that he is lawfully entitled to do so, the secondary deterrent purpose - that is, the purpose of educating both the offender and the community in the law's proscriptions so that the law will come to be known and obeyed - must be invoked to justify the imposition of a penalty for breach. In such a case, care must be taken in imposing a penalty lest the offender be made to shoulder an unfair burden of community education." [*Walden v Hensler* ante see also *Veen* No.2, ante at p. 472].

Nor does personal deterrence figure prominently as a basis for imposing a life sentence, for the sentence means the prisoner will never be released to test whether the deterrence imposed has worked. A sentence of 10, 15 or 20 years may be imposed to satisfy demands of personal deterrence, but there comes a point well short of a life sentence where the increase of years is really an exercise of the doctrine known in economics as the 'doctrine of diminishing returns'.

There is a real question in any event, at least in so far as murder charges are concerned whether there is any greater efficacy in imposing the ultimate penalty of death or life imprisonment when substantial determinate sentences are available. [see for example the experiences in Lebos, Jamaica, the Bahamas, United States, and also in South Africa prior to the repeal of the death penalty there].

Thus, the nature of a life sentence (at least that part of the sentence which goes beyond what a determinate sentence would otherwise have been) in this case - as with others [see for example: *Garforth* ante at p. 13:
'There are some cases where the level of culpability is so extreme that the community interest in retribution and punishment can only be met through the imposition of the maximum penalty. As we have indicated, we believe that this is such a case'; see also Crump at p. 22-23 per Hunt C.J. at C. L. In the present case, I accept the argument put by the Crown. These crimes in their totality...by their objective seriousness fell within the worst category of cases for which, despite the subjective feature of his youth at the time of the crimes (he was twenty four), the maximum penalty of penal servitude for life (in the sense of for the term of Crump's natural life) was appropriate..... I do not intend to repeat the appalling circumstances of those crimes;.... The new subjective feature of the rehabilitation which has been achieved by Crump, and which is now emphasised, cannot - in my view - outweigh that objective seriousness to make such a punishment any less appropriate now [than it was when Taylor J first sentenced him] The element of retribution in this case requires - it demands - that he still be given a life sentence, and one which means what it says.'(emphasis supplied)].

would be based upon retribution.

In such a case where 'retribution'is the motive, justice is based only upon the concept of 'an eye for an eye'It has been said that *Justice's* blindness is explained by the fact that she lost 'an eye for an eye'To take this metaphor a little further, *Justice* being blind cannot see what is in the scales, she cannot tell which way they are tilting. Put another way, focusing only on retribution robs the court of the opportunity of seeing such merits as a convicted prisoner can put before the courts.
"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* CCA unreported 23-6-94 per Badger-Parker J. at p. 26].

Nature of a life sentence - Conclusion
In the normal course of sentencing, even in cases of incarceration, the sentence is designed to serve a number of purposes including denunciation, protection of society, deterrence (personal and general), retribution and reform. In this case, however, a life sentence is motivated only by the concept of retribution and punishment *R v Garforth* (*ante*); *R v Crump* (*ante*) per Hunt CJ at CL at 22-23..

In the normal course of sentencing parity is aimed for, disparity to be shunned. However, given that a life sentence must mean a variation in the number of years served in prison, disparity (and some would argue unfairness) is tolerated as an integral and essential part of the sentence [Garforth was 25 at time of sentence for worst case category of murder (being one murder). His life expectancy was one of probably 50 years at the time of sentence. Glover, aged 57 at sentence, was also sentenced to life for worst case category of murder (being 6 murders), giving him a life expectancy and probably a sentence of half that of Garforth. The prisoner was 19 at the time of arrest. Accepting a life expectancy of 70 years he will serve the greatest sentence for a worst case category of murder. Parity - a fundamental sentencing principle, counts for nothing - when retribution is the sole aim of sentencing!.]

Sentencing to incarceration overwhelmingly involves the imposition of a specific or determinate period of imprisonment. Appeal courts focus upon whether the specific period fairly reflects an appropriate punishment. Life sentences do not lend themselves to that assessment of fairness. Fairness is to be assessed not against the passage of time, but against the occurrence of an event - the prisoner's death.

Where life sentences fall within the range of sentences for murder
Any examination as to where life sentences fall within the range of sentences available for murder, becomes significant if one bears in mind as a proper approach to sentencing the remarks of Napier CJ of South Australia in the 1950's who observed [*Webb v O'sullivan* [1952] SASR 65 @ 66].:
The courts should endeavour to make the punishment fit the crime, and the circumstances of the offender, ... Our first concern is the protection of the public, but subject to that, the court should lean towards mercy. We ought not to award the maximum which the offender will warrant, but rather the minimum which is consistent with the due regard for the public interest.

It is conceded that in New South Wales, sentencing principles approved by the Court of Criminal Appeal do not adopt the 'minimum which is consistent with due regard to the public interest'approach - but rather a 'sentencing range'approach. But the 'minimum which is consistent with due regard to the public interest'may be an acceptable way of defining the lower limits of the 'sentencing range'approach used in New South Wales.

There is no single correct appropriate penalty for a particular crime. [*R v Park*, unreported, S.Ct. (Sperling J) 3.8.2000] Sentencing judges normally have a range of sentences available to them. Sentencing is a discretionary exercise, the judge in

exercising his discretion synthesises the various purposes of punishment as required by an examination of the objective and subjective circumstances of the offence and offender. It is recognised that different judges may look at the same factual matrix and arrive at different sentencing results. However, provided each results falls within an appropriate range of sentences for that offence and offender, no appealable error is made. Appeal courts have been very careful to preserve the wide sentencing discretion of judges. [see *House v The King* 55 CLR 499 and *Crassen v The King* 55 CLR 509 at 519].

The top of the range of sentences available for any offence and for any offender must be the maximum sentence prescribed by law. Put another way, a maximum penalty must always be the top end of the range. However, before one can appreciate the significance of the top of the range sentence for murder, it is not enough to recognise that it carries a maximum sentence of life imprisonment without parole.

In the case of murder, in discussing ranges it is appropriate to recall that the legislature substituted maximum sentences of 25 years for all those offences, with the exception of murder, which previously carried 'life imprisonment'[see Act No218 of 1989 which substituted 25 years maximum penalty for manslaughter, attempted murder and other crimes previously carrying a maximum penalty of life imprisonment]. While one must concede it in no way suggests a new (and lower) maximum sentence for murder, its value is in considering whether 25 years can have a significance in the range of sentences appropriate for murder. One of the consequences of a determinate 'head'sentence - even one of 25 years - is usually the imposition of a minimum term or non-parole period. Sentences greater than 25 years have now been imposed for multiple murders *[R v Mrish*, (3 murders), unreported, S.Ct. (Hidden J) 13.12.1996 23 yrs MT, 5 yrs AT; *R v Jang* (2 murders), unreported, S.Ct. (Bell J) MT 18 yrs AT 6 yrs; *De Gruchy* (3 murders), unreported, CCA [2000] 51 MT 21 yrs AT 7 yrs; *R v Georgiou & Harrison* (3 murders, 1 attempt), S.Ct. [2000] 287 (Dowd J) MT 28 yrs AT 5 yrs; *R v Harris* (3 murders, 1 armed rob), S.Ct. [2000] 285 (Bell J) 40 yrs 25 yr NPP.] - in all cases a non-parole period has also been imposed.

Thus, penal servitude for life without parole must always be the top of the range of sentences for murder, not only because it has a capacity to extend beyond the determinate maximum which elsewhere has been substituted for life, but also because the sentence is entirely indeterminate in its nature, that is there is no determinate minimum term or non-parole period.

Finally, in considering what is the 'top of the range'of sentences for this crime it is important to stress, that there is not a 'pre-determined'or 'inevitable'or 'mandated'sentence called for. For each offence [2 murders]., or for the totality of the two offences being dealt with here, there is a range of sentences of which life imprisonment can only equal the top of the range. Nothing in *Veen* [No.2] [ante] undermines this proposition. [In particular the following passage is **not mandating maximum sentences** for offences, but simply observing circumstances in which it is permissible to impose the maximum sentence:
'The second subsidiary principle material to this case is that the maximum penalty prescribed for an offence is intended for cases falling within the worst category of cases for which that penalty is prescribed: That does not mean that a lesser penalty must be imposed if it be possible to envisage a worse case;...A sentence which imposes the maximum penalty offends this principle only if the case is recognisably outside the worst category. at 478]

As Sperling J says in *R v Park* (*ante* at p.1):
'There is no single correct appropriate penalty for a particular crime'.

A potted history of life sentences in N.S.W - A measure of the statutory maximum of 'life imprisonment'
Prior to 1981 any person convicted of murder was automatically sentenced to life imprisonment. Life was the mandatory penalty. However, all prisoners were considered for release on licence. At the time of the introduction of the Sentencing Act in 1989 there were only two prisoners who had served more than 35 years imprisonment [Leonard Keith Lawson and Eric Turner. Each of those had originally been sentenced to death, had the death penalty commuted, been released - one on licence, the other on parole, and both had committed murder whilst out.]., and in both of those cases the imprisonment had not been continuous.

Thus, 'Life'prior to 1989 meant no more than an indeterminate sentence, generally well short of natural life. The vast bulk of prisoners serving life were released between 8 and 14 years after their sentence had been imposed. [see graphs of s13A applicants].

In 1982, Section 19 of the Crimes Act 1900 was amended. The penalty for murder was still life imprisonment unless there were mitigating circumstances which related to the objective circumstances of the murder. [See R v Bell (1985) 2 NSWLR 466]. In such a case the court was permitted to pass a determinate sentence. As s.19 was then interpreted, almost all murders were still subject to a 'life'sentence. Again there was an expectation by the sentencing judge (at least at the time of initial sentencing [See s.13A (9)(a). Now Sch.1 Clause 7(a) *Crimes (Sentencing Procedure) Act* 1999.]) that these 'life'prisoners would be released on licence by the Release on Licence Board. Whether these prisoners would have served any longer period than the earlier life prisoners is moot, because at the time the Sentencing Act was introduced in 1989, none of the prisoners sentenced under this regime had been processed to release.

In 1989, the penalty for murder was again amended. [Act No, 218 of 1989; S, 19A commenced on 12 January 1990]. Now s.19A(2) of the Crimes Act 1900 provided that a prisoner sentenced to life imprisonment for murder would serve the term of his natural life in prison. However, elsewhere in s.19A, the provisions of s.442 of the Crimes Act now applied to murder, thereby permitting the Court to sentence murderers to a determinate sentence, comprised of a minimum term and an additional term. This was consistent with the then Government's pledge of 'truth in sentencing'However, in the case of a

prisoner sentenced to life imprisonment pursuant to s. 19A, the Court was not entitled to set a minimum term. [cf. Victoria s.11(1) Sentencing Act 1991 which provides:
'If a court sentences an offender to be imprisoned in respect of an offence for -
(a) the term of his or her natural life; ...
the court must, as part of the sentence, fix a period during which the offender is not eligible to be released on parole unless it considers that the nature of the offence or the past history of the offender make the fixing of such a period inappropriate.].

Interestingly, when s.19A was introduced no statutory guidelines appeared for the setting of a term of natural life. Case law subsequently set the ambit of discretion. [See *Veen* [No.2] ante; *Garforth* ante; *R v Steel* unreported CCA 17-12-96; *Twala* unreported CCA 4-11-94]

By way of contrast s.13A(8) of the Sentencing Act 1989 provided [s.13A(8)(c) *Sentencing Act* 1989, now s.6(4) Sch.1 *Crimes (Sentencing Procedure) Act* 1999.] a retrospective power to the Court to sentence prisoners who were serving 'life'sentences imposed prior to 1989 (which as earlier described were invariably subject to release on licence) to the term of natural life, that is a sentence equivalent to s.19A(2) of the Crimes Act. In respect of this natural life sentence prescribed by s.13A(8) there is a statutory guideline:- - a most serious case of murder *and* in the public interest. [s.13A(2)]. 'With respect, it is difficult to conceive a judge of the Supreme Court passing any natural life sentence if such a sentence was not in the public interest. Given that almost all murder cases could be described as 'a most serious case of murder'it is likely that this court would not get much assistance from these statutory guidelines.

In 1996 s.431B was inserted into the Crimes Act. It makes the passing of a natural life sentence mandatory in certain circumstances. S.431B(1) provides:
'A court is to impose a sentence of penal servitude for life on a person who is convicted of murder, if the court is satisfied that 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 (emphasis supplied)'.

The defence here must accept that s.431B(1) is not to be interpreted as limiting natural life sentences only to s.431B offences. However, the very existence of the section supports the proposition that natural life sentences are at the top of the range of sentences available. Further, it is argued that the statutory guidelines appearing in S.431B(1) set a legislative norm or definition of 'worst'case. It was earlier submitted that in this case there is no need to weight the sentence for the 'protection of the community'if that phrase means 'continuing dangerousness of the prisoner'Further, it is submitted that an analysis of the facts of the instant case illustrate that it does not qualify as such a worst case as defined by s.431B(1). Given the prisoner's age at the time of the offence, it is worth having regard to the observations of Greg James J in *R v Petrivonvic* as to the Second Reading Speech on the *Crimes Amendment (Mandatory Life Sentences) Bill* in 1995.
'28 In the Second Reading Speech on the Crimes Amendment (Mandatory Life Sentences) Bill in 1995, the Attorney-General referred to that statement and described the provision as requiring the imposition of a sentence of penal servitude for life if the court is satisfied that 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 be met '**only**'through the impsotion of that sentence. Otherwise he said s.442 provided for the exercise of a discretion to impose les than a life sentence. The Attorney-General and the drafting of the provision appear to have envisaged that it is the form the murder takes (ie., its factual circumstances) which is relevant. The Attorney-General said:-

'It is appropriate to observe here that the offence of murder takes many and varied forms. It is difficult, if not impossible, to foresee every factual circumstance capable of constituting a murder which, on its face, demonstrates an extreme degree of criminality. **We are not so prescient that we can confidently assert that there will never come a time when such a crime calls for something less than life imprisonment. It may well do so when the offender is a juvenile**. For this reason the discretion to impose less than life remains, although it is a discretion which cannot be lightly exercised in the face of the principle expressed in the Bill'.

30 When the successor to the Bill as originally introduced came before the Legislative Council on 17 April 1996, the Attorney-General reiterated his earlier observations, but added in the light of the report of the standing Committee on Law and Justice, a reference to an exemption for juveniles and a greater clarity to the role to be performed by s.442:-

'Section 442 allows a sentencing judge to impose less than a life sentence in the exercise of his or her discretion.

The preservation of that discretion does no more than recognise the possibility that a murder, which, on its face, demonstrates an extreme degree of criminality, may nevertheless call for something less than life imprisonment. For this reason the discretion to impose less than life remains ...'(Emphasis supplied.)

Impact of setting a life sentence upon the administration of criminal justice in this State
The world is getting smaller. Modern technology makes it easier for practitioners in this State to study decisions in other jurisdictions, and practitioners in other jurisdictions to study decisions and trends in this state. The administration of justice now has to look outward to note what is happening in other jurisdictions, as well as inward to assess what is appropriate for N.S.W., particularly in the light of what is happening in other jurisdictions. The impact of other jurisdictions should have greater persuasive power where there are a number of respected jurisdictions all following similar trends. [The assessment of the impact of a Court on the society it serves is not a new phenomenon. The Supreme Court of the United States, as indeed

other appeal courts such as the Supreme Court of Canada and the High Court of Australia are other examples. However, the assessment of the impact of a Court on the society it serves cannot be limited only to courts of ultimate appeal.]

Again, to illustrate the point : in New South Wales, since the introduction of life (meaning life) imprisonment in 1990, 16 prisoners have been given life sentences, 3 have died in custody although 2 have successfully appealed. In addition 12 prisoners [Lawson, Baker, Crump, Boyd, and Cribb]. have had their s13A applications refused on the basis that a life (meaning natural life) sentence is an appropriate sentence for each of them. Two have successfully appealed and had their sentences redetermined. That would bring the number of prisoners serving life (meaning life) to 21. That figure appears substantially higher than any other state in the Commonwealth [For instance in Victoria where a number of prisoners have been sentenced to life imprisonment, only one as at July 1994 had been refused parole , Tailor, found guilty of murder committed as a result of the Russell Street bombing. Tailor was 51 years of age and had a lengthy record for serious crimes of violence. Will need to contact the Bureau of Crime Statistics to compare N.S.W with all other states.].

In the light of these figures, to the academic or other informed observer the administration of justice in this State must be tinged with a greater recognition of 'retributive'justice than is found in other jurisdictions. Such a justice has as its basis the philosophy of 'an eye for an eye', 'a life for a life'Many penologists see life imprisonment as a 'living death'[See also Hunt J in *Petroff* (*ante*): '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'.], offering nothing to the prisoner but institutionalisation. The two prisoners who have served the longest periods of imprisonment in this state are examples. The prisoner Lawson spends 23 hours a day in his tiny cell even though his cell door is open the regulation 8 hours. Turner also shows signs of gross institutionalisation, even though he is housed in a small minimum security prison.

If this Court is to participate meaningfully in the administration of criminal justice in this century it must recognise that its role in criminal justice is changing, it is an instrument of social change - operating not only for the general population by its use of denunciation of crime and use of deterrence. It also has a role, at least since *Griffiths* [*Griffiths v The Queen* (1976) 137CLR 293 where the High Court approved of the use of the 'Griffith's remand pending the reformation of the accused, a task that the then Chief Justice of N.S.W. Sir Laurence Street had claimed was no function of the court. See *R v Griffiths* [1975] 1 NSWLR 229 at 232:

'[S]uch sentencing practice takes the judge who embarks upon it significantly beyond the ordinarily accepted judicial role. It places him [sic], in effect, in a supervisory relationship with the man or woman who may have been dealt with according to this practice, and it commits to the judge who follows this course a degree of involvement with the progress of the criminal during such period as may be specified in [the *Griffith's* remand] ... In our view this is not a permissible sentencing procedure ... [T]he power of adjournment is not properly exercised, if the adjournment is ordered on an integral part of the sentencing process in the way in which it is involved in the practice under consideration here'.]
to be involved in oversighting the rehabilitation and reform of accused persons. While it is important to stress that no one is looking for a 'Griffith's remand'here, what is being looked for is the social commitment to the prisoner which was acknowledged in *Griffiths*.

It is worth repeating the remarks of Mahoney JA in *Crump* [*ante* at p.6].*:*

The second thing involves the basic effectiveness of gaol as a means of controlling criminality and of dealing with it. Imprisonment in a gaol is the long accepted conventional method of achieving the four main ends of criminal justice.... It is a method the efficacy of which is, of course, not high.... There are other ways of achieving those ends.... But when a court comes to consider whether a prisoner should be kept in gaol for life or should (now or later) be released, the Court may and, in my opinion, should consider - to use a common phrase - whether there is now a better way.

This court, as the oldest Supreme Court established in Australia, is looked to by other state Supreme Courts for trends and developments in the jurisprudence of criminal justice [See for example the use of Guideline Sentencing Judgments.]. In that context it is important that this court recognises the value of life, when sentencing - it is easy enough for the court to place great value on the lost life of the murdered victims. That, of course, is as it should be. However, the life of the offender is also important. To forever confine that life to the inside perimeters of a prison is to come as close as this State's sentencing law permits to take the offender's life from him entirely. That this Court has done so on 21 prior occasions speaks significantly to other jurisdictions about this Court's approach to the administration of criminal justice. With respect it is not an approach that should be reinforced or extended by the imposition of life (meaning natural life) imprisonment in a case involving a young man who was a teenager at the time of his offences *[Jameson, Elliott & Blessington (1992) 60 A Crim R 68 at 80.]*. While said in another context, Gleeson CJ observes:
'With respect to the learned sentencing judge, however, I have a problem concerning his recommendation that the appellants should never be released. Counsel were agreed that this would have no legal effect if and when an application to fix a determinate sentence is made. There does not appear to have been any statutory basis for the making of the 'recommendation', nor, for that matter, does there seem to be any statutory basis for appealing where the offender is a young person, and there are so many different possibilities as to what might happen in the future, it is normally not appropriate for a

sentencing judge to seek to anticipate decisions that might fall to be made by other persons, and in other proceedings, or under other legislation, over the ensuing decades. For that reason, I should indicate that I do not support the recommendation made by Newman J'."

What the Court says constitutes a 'worst'case; and in that context whether subjective features can mitigate what is otherwise a 'worst'case

There are a number of cases in which this Court has applied the appellation of 'worst'case of murder Some of the cases are conveniently collected *R v Petrinovic* [1999] NSWSC 1131 per Greg James at para.46 and in *R v Park*, NSWSC, unreported 3.8.2000 per Sperling J at para.40.. What characteristics comprise a 'worst'case can be distilled by an analysis of the judgments of the Court of Criminal Appeal in the bulk of them. The cases where a life sentence has been upheld by the Court of Criminal Appeal or not appealed from by the prisoner receiving it [Lawson *ante*]. appear to fall into one or more of the following categories:

* Sex Related Killings [Trotter 10-8-93; Garforth; Cribb; Suckling; possibly Street; however, cf Letts].
* Multiple Killings [Street; Glover; Cameron; Baker; Steele; Street; Milat however, cf Turner, Petroff, Davis & Wiggins - Campbell J. Those latter cases demonstrate that multiple killings, even executions do not necessarily equate with a life sentence].
* Thrill killings [Baker/Crump; Suckling; possibly Milat].
* Serial Killings. [Milat; Cameron; Glover, Steele].
* Killings of a particularly violent brutal nature [Cribb; Boyd, Turner; Garforth; however, cf Johnstone; Letts].
* Lingering Dangerousness [Lawson, Suckling; Cribb; Turner; Steele].

What constitutes 'Worst Case'- analysis of the cases:

Garforth

[Unreported N.S.W. C.C.A. 23-5-95; Abduction, sexual assault and murder (tying hands and feet and throwing her in dam to drown) of nine year old girl. Results of psychiatric examination not tendered; no mitigating features before court. Young man with long criminal record, mainly for dishonesty.]:

'At the time of the offence the applicant was unemployed. He was living with his de facto wife and their two young children. He had been living in the Bargo area for only about six weeks. Otherwise there was very little material before Newman J as to his background. His criminal record was a lengthy one. However, as his Honour remarked, it showed him as a thief rather than a thug. It contained a large number of offences of dishonesty, but none involved any violence.

Other than these basic facts there was virtually nothing before his Honour as to the applicant's circumstances, mental state, personality or background. He had been psychiatrically examined but the psychiatrist's report was not tendered in evidence..'.

The failure to tender the psychiatric report in circumstances where its existence must have been known to the Court raised a *Jones v Dunkel* [101 CLR 298]. type situation where the Court must have been able to draw a conclusion that the psychiatric evidence would not have assisted the prisoner, Garforth, on the plea.

'In the light of the paucity of material before Newman J as to the applicant's background, there was little from which mitigating features could be obtained...Newman J concluded that the maximum sentence was called for....

...His honour listed various features capable of producing the result that this should be regarded as a case of the worst type, and then asked himself whether there were mitigating circumstances which required a different conclusion. He concluded that there were not. This process of reasoning does not involve the error attributed to it by counsel. Nor does it involve any risk of injustice. What his Honour was doing was considering sequentially the arguments for and against a conclusion that this was a case of the worst type. At the end of his judgment his Honour weighed the arguments together and, to use an expression quoted in **R v Young** ... arrived at an appropriate synthesis.'(emphasis supplied) [pp4-7].

Both the trial judge and the Court of Criminal Appeal in their respective approaches did not assess the objective criminality and then determine whether there was any features, excluding subjective features, mitigating that objective criminality as per *Bell* [ante] There was no applying the post 1982 s.19 test.

The Court of Criminal Appeal in *Garforth* appears to have taken the view that the approach by the trial judge when evaluating whether this was a worst case of murder was entitled to take into account any mitigating features, including subjective features, when assessing whether 'at the end of the day'this was a worst case. The subjective material, given its paucity, was so inadequate in its impact as to permit the trial judge without falling into error to come to a view this was a worst case. The subjective material in the case of the prisoner has a much stronger impact.
'...[L]ife imprisonment is to be imposed only in the worst type of case... [T]here are cases in which such a severe punishment fits the crime. This is one such case.

We return to the concepts of dangerousness and rehabilitation. It is now well settled that the protection of society - and hence the potential dangerousness of the offender is a relevant matter on sentence....This factor cannot be given such weight as to lead to a penalty which is disproportionate to the gravity of the offence. But it can be used to offset a potentially mitigating feature of the case such as the offender's mental condition, which might otherwise have led to a reduction of penalty...

There are some cases in which the circumstances of an offence on their own suggest the possibility of dangerousness. This is one of them. The nature of the applicant's actions leads to a question whether he might act similarly in the future....

There are some cases where the level of culpability is so extreme that the community interest in retribution and punishment can only be met through the imposition of the maximum penalty. As we have indicated, we believe that this is such a case'. *Garforth* (*ante*) pp 11-13.

The features which made this a worst case were the 'circumstances of the offence'- firstly because the brutal, callous nature of the killing of a young child, associated as it was with abduction and sexual assault qualified the offence as one so extreme that 'retribution'and 'punishment'were called for; secondly, because the 'circumstances of the offence'suggest continuing dangerousness. Neither of those factors was mitigated by any of the subjective material, nor by psychiatric evidence which may have given a mitigating insight into the prisoners mental state at the time of the offence, or addressed the question of future dangerousness. The importance of Garforth's case is that it clearly conceives that subjective features may mitigate what might otherwise be a worst case.

Cribb

[unreported, N.S.W. C.C.A. 23-6-94; Appellant applied for re-determination of three life sentences; possible outcome could

have been to give him a determinate minimum term, but whole of life additional term. This in effect was what he applied for. Mother and her two young children had been abducted and terrorised for a day. The mother had been raped, all had been tied to trees, abandoned in the bush, the appellant had returned and knifed each of them in the presence of the still surviving victim(s).]

'It is not to be overlooked that there were three murder charges against the applicant, to each of which he pleaded guilty, together with a most serious rape. Whether or not any of the murders considered alone could be described as of the worst kind, given the horrific circumstances, is a matter upon which opinions might differ, but given that there were three killings, I am satisfied that the concession made by counsel for the applicant, that the case was within the category of worst cases, was entirely proper. Further, the determination of the appropriate sentence for those counts of murder had to take into account:-

1. The rape and the need to impose an appropriate sentence in respect of it.

2. The fact that by reason of his breach of parole the prisoner was in any event liable to serve the balance of his parole,...

3. That while on remand prior to his trial on the murder charges, the applicant had escaped from lawful custody and whilst at large had committed offences of kidnapping, rape, larceny and indecent assault in respect of which...he was sentenced to penal servitude for 10 years...

When all of those matters are taken into account, and particularly the fact that these were multiple murders committed in the most horrific circumstances, a conclusion that the appropriate sentence was a sentence for the prisoners natural life was obviously a *possible* outcome and *was an outcome very likely to result in the absence of compelling subjective circumstances*.'(emphasis supplied) [Per Badger-Parker J (with whom the other members of the Court agreed) at pp17-18].

Again in Cribb it is clear that the Court was prepared to take account of 'compelling [favourable] subjective circumstances'as capable of mitigating what otherwise might be a worst case. What elevated the case to 'worst'case status was the 'horrific circumstances'in the context of a multiplicity of killings. The breach of parole and the subsequent escape and associated offences while 'compelling subjective matters'were entirely unhelpful to the applicant. In the instant case, the prisoner's subjective matters are both compelling and helpful.

Twala

[Unreported N.S.W. CCA 4 November, 1994 applicant viciously attacks estranged wife in public street in horrifying pre-meditated attack intending to do her severe and painful harm - potential for lingering dangerousness if in another relationship of dependency].

It is argued that *Twala* defined 'worst'case in different terms from other cases, in particular excluding from consideration 'subjective features'The test propounded here has echoes of the test propounded for s.19 post 1982 in *Bell.*

'However, in order to characterise any case as being in the worst case category, it must be possible to point to particular features which are of very great heinousness **and it must be possible to postulate the absence of facts mitigating the [objective] seriousness of the crime** (as distinct from subjective features mitigating the penalty to be imposed). Of course, it goes without saying, that the court is entitled to consider the facts in the seven cases [in which a life (meaning natural life) sentence has already been imposed] ...to assist in the calculation of the degree of criminality in the subjective case.'[per

Badger-Parker J (with whom the other members of the court agreed) at p.8]. [Emphasis added.]

Arguably this test of worst case as stated by Badger-Parker J. differed from the test as that same judge stated it in *Cribb* [ante] where the presence of adverse subjective circumstances and the absence of favourable compelling circumstances left open a finding of worst case.

The court of criminal appeal found *Twala* was not a worst case because the killing had been influenced by a mental disturbance of the prisoner and so impacted upon the objective features of the crime [consistent with the approach in *Bell]*. In the instant case, there are circumstances which mitigate the objective seriousness of the crime [See evidence of Dr Jolly and Mr W.J. Taylor.]

The Court of Criminal Appeal later R v Fernando & Anor [1999] NSWCCA 66 at p.148, para 345., examining the principle, said:-
"An excellent illustration of the application of the principle espoused by Badgery-Parker J is Twala's case itself. There, the learned trial judge had found that the murder in question fell within the category of the worst type of case and imposed a sentence of penal servitude for life. At his trial the appellant had raised a defence of diminished responsibility which had been rejected by the jury. However, as Badgery-Parker J pointed out in his judgment despite the rejection by the jury of the defence of diminished responsibility, the killing itself was clearly influenced by the mental disturbance of the accused resulting from the break down of his relationship with his wife (who was the victim) upon whom he had become very heavily, even obsessively dependent. In other words the accused's mental condition was a fact which mitigated the seriousness of the crime and was not a subjective fact. Accordingly, the Court of Criminal Appeal held that the trial judge had fallen into error in not taking into account that fact when determining that the case fell within the category of the worst type of case."

Further, although the Court of Criminal Appeal found in Twala there was lingering dangerousness to the community, it held that to hold the prisoner in custody for longer than 20 years would amount to preventative detention [However, cf Mason J. in Veen [No. 1] 1979 CLR 458 at 469 applied in Veen [No.2] ante:
"In my opinion, his Honour's observations express the principle which is to be applied to cases of this kind. They demonstrate that in such a case there is no opposition between the imposition of a sentence of life imprisonment with the object of protecting the community and the proportionality principle. The court imposes a sentence of life imprisonment on taking account of the offenders record, his propensity to commit violent crime, the need to protect the community and the very serious offence [of manslaughter] of which he stands convicted, imprison for life being a penalty appropriate to very serious manslaughter when it is attended by the additional factors to which I have referred."
[Twala did not have any prior criminal record - nor does the prisoner].:

Lawson
[Unreported N.S.W. Supreme Court (Badger-Parker J) 31 May 1994 - an application for re-determination of life sentence, Therefore possible for a determinate minimum term and an additional term of life (meaning natural life) to be set. Killed 16 year old victim after planned rape of her. Earlier convictions for rape. Fled to girls boarding school, conducted siege during which a pupil was killed by a shot discharged by him (not charged with that matter) moments before his arrest.]

“I start as the authorities require me to start with an evaluation of the offence viewed objectively...I have no difficulty in concluding that, objectively, it was a crime which fell into that worst category of cases for which the maximum sentence prescribed by law may be appropriate.

I then turn to look at the applicant’s antecedent criminal history, in order to determine whether “the instant offence is an uncharacteristic aberration or whether the offender has manifested ... a continuing attitude of disobedience of the law” [Veen [No.2] 166 CLR at 477]., whether ”it illuminates the moral culpability of the offender in the instant case, or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender and other offenders from committing further offences of a like kind.” [ibid].

The prisoner’s antecedent criminal history includes only one group of offences, but they are offences of the utmost gravity...[T]he conclusion cannot be otherwise than that they were grave offences, premeditated and carefully planned and prepared. They were serious offences in themselves and they illuminate the moral culpability of the offender in the instant case in that they contribute to the picture of him of a person solely concerned with his own gratification at whatever cost to others. Further, they are relevant as showing his dangerous propensity....

Next it is relevant to consider the subjective features of the case, that is to say those which apply particularly to this prisoner and upon which he is entitled to rely in mitigation of the penalty which should be imposed upon him....

Finally, it is necessary to form a conclusion, on the basis of the psychiatric evidence, as to what it was that has caused this man to commit such dreadful crimes in the past and as to the extent to which the community will be at risk of similar criminal behaviour should he be released....

I have to deal with a man who has committed a crime of the utmost gravity, such as could appropriately be dealt with by the imposition of the maximum sentence (by which I mean a sentence for the term of his natural life). His past record affords no reason why such a sentence should not be imposed, on the contrary, affording as it does evidence of his dangerous propensity, its tendency is entirely in favour of the imposition of the maximum penalty subject, of course, to the psychiatric evidence. There is, on the other hand, evidence of commendable steps taken by the prisoner towards his own rehabilitation in the course of which he has not only expressed remorse but endeavoured, within the limits imposed upon him by his imprisonment, to make some recompense to the community for the harm that he has inflicted upon it and upon some individual members of it. Those are circumstances which attract leniency and could lead to a conclusion that the appropriate sentence is something less than the statutory maximum... (emphasis supplied)

...[T]he conclusion I have reached [is] that the objective criminality involved in the applicant’s crime might appropriately be dealt with by the imposition of a maximum sentence. In that context, the question is whether the risk to the community entailed in his eventual release is such that the protection of the community requires the imposition of that maximum sentence notwithstanding the prisoner’s powerful subjective claim to a measure of leniency...

I am persuaded beyond reasonable doubt by the evidence of Dr Delaforce and Dr Barclay that there is a very significant risk that, if released, the prisoner left to his own devices would present a danger to the community...

Ultimately I find myself persuaded that the risk to the community,...is of such significance...that it must be given such weight as to neutralise the effect of the other subjective matters to which I have referred...and that the only appropriate sentence in the circumstances would be a sentence of imprisonment for the term of the applicant's natural life." [pp39-46].

In Lawson's case the court viewed the objective facts as bringing it within "worst" case category, weighed the subjective facts as capable of mitigating, but held that lingering dangerousness "neutralised" them and left the case as one requiring a life sentence. On the approach adopted by Badger-Parker J. the subjective features were capable of bringing what was "objectively" a worst case back to something less that could have called for a sentencing option outside the life (meaning life) sentence reserved for "worst" case. [In this case because of the lingering dangerousness of the offender, his Honour held the only sentence appropriate was a life sentence. cf Twala ante. With respect to his Honour, it has been argued in these submissions that a life sentence is always at the top of the range, and that no sentence is mandated].

Conclusion - "worst" case scenario

It is clear from the authorities cited above [see also R v Boyd unreported N.S.W. CCA 18 Sept 1995 per Gleeson CJ at p. 7]. that a case which qualifies as "worst" case can be re-assessed as something less than "worst" case if there is present features [such as elements of provocation or substantial impairment] which mitigate the seriousness of the crime. Further, it would appear that subjective features may be taken into account to mitigate what amounts on the objective features as a "worst" case scenario to something less than a "worst" case. Finally, multiple killings and killings of a particularly violent or brutal nature do not require a finding of "worst" case - or at least do not require a finding that life imprisonment is the only available sentence.