Mandatory life for cop deaths

By Nicholas Cowdery AM QC

The New South Wales Government's legislation to require that a person convicted of murdering a police officer be sentenced to (natural) life imprisonment sparked much controversy – and rightly so[1].

The *Crimes Amendment (Murder of Police Officers) Bill* 2011 inserts into the *Crimes Act 1900* a new section 19B, subsection (1) of which provides:

> 19B Mandatory life sentences for murder of police officers
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> (1) A court is to impose a sentence of imprisonment for life for the murder of a police officer if the murder was committed:
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> (a) while the police officer was executing his or her duty, or
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> (b) as a consequence of, or in retaliation for, actions undertaken by that or any other police officer in the execution of his or her duty,
>
> and if the person convicted of the murder:
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> (c) knew or ought reasonably to have known that the person killed was a police officer, and
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> (d) intended to kill the police officer or was engaged in criminal activity that risked serious harm to police officers.

Other subsections provide that this does not apply to anyone under the age of 18 years at the time of the murder or to anyone suffering from 'a significant cognitive impairment', not being a temporary self-induced impairment.

It needs to be said that this is not, in fact, a provision requiring 'mandatory' (natural) life imprisonment to be imposed for any murder of a person who happens to be a police officer. It does not cover all of the ways in which a person may commit the offence of murder (as a principal or accessory) and there are particular requirements to be met before the provision applies. Attorney General Greg Smith SC said that he hoped that the provision would never be used. Of course one hopes that the need for it to be considered would never arise; but if it does, there are some significant conditions in the provision that would need to be satisfied and those circumstances are rarely encountered.

No other Australian jurisdiction has such a provision. Mandatory sentences and minimum sentences have existed and do exist in some states and territories and they have had a sorry history.

This bill was introduced by the police minister in the Legislative Council and the government claimed that it honoured a commitment made (presumably to the Police Association) in 2002; therefore it was not part of any 'law and order auction' campaign which the attorney general had expressly eschewed in November 2010.

So is any harm done to the rule of law and the ability of the courts to do justice?

Chief Justice Brennan[2]: 'A law that purports to direct the manner in which the judicial power should be exercised is constitutionally invalid'. He included any legislated direction for the exercising of an available discretion.

Chief Justice Spigelman[3]: 'The preservation of a broad sentencing discretion is central to the ability of the criminal courts to ensure justice is done in all the extraordinary variety of circumstances of individual offences and individual offenders.'

Chief Justice Gleeson[4]: the sentencing task is 'a synthesis of competing features which attempts to translate the complexity of the human condition and human behaviour into the mathematics of units of punishment usually expressed in time or money'.

Chief Justice Spigelman (again)[5]: 'As is the case with respect to the task judges face when they come to sentence a convicted criminal, what is involved [in making parole decisions] *is a process of balancing overlapping, contradictory and incommensurable objectives. The requirements of deterrence, rehabilitation, denunciation, punishment and restorative justice do not point in the same direction. These tasks – whether sentencing or release on parole – involve a difficult process of weighing and balancing such matters.'*

And again[6]: 'Specifically, the requirements of justice, in the sense of just desserts, and of mercy, often conflict. Yet we live in a society which values both justice and mercy.'

How unrealistic it is, therefore, and unjust, to prescribe a mandatory penalty for any serious offence before it has been committed and all the circumstances are known and without knowing anything of the offender; and experience has shown that such measures do create injustice.

We have been there in New South Wales.[7] In the late

1870s and early 1880s there was public controversy about allegedly light sentences being imposed for serious offences. On 26 April 1883 the Criminal Law Amendment Act prescribed, for five categories of maximum sentences, corresponding mandatory minimum sentences: life (seven years); 14 years (five years); 10 years (four years); seven years (three years); and five years (one year). When the law was implemented, injustices quickly became apparent and after public reaction against the provisions they were repealed on 22 May 1884 – after one year and three weeks.

In its editorial on 27 September 1883 (while the legislation was still in force) the *Sydney Morning Herald* said:

> We have the fact before us that in a case where a light penalty would have satisfied the claims of justice, the judge was prevented from doing what he believed to be right, and was compelled to pass a sentence which he believed to be excessive, and therefore unjust, because the rigidity of the law left him no discretion.

We have been there again more recently. In 1996 the Crimes Amendment (Mandatory Life Sentences) Act inserted section 431B into the *Crimes Act 1900* which provided mandatory (natural) life sentences for murder (of anyone) and for some drug offences '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'*. The provision was never expressly used and it was repealed and re-enacted as section 61 of the *Crimes (Sentencing Procedure) Act 1999*. It has still not been used – life sentences have continued to be imposed under the traditional tests of worst class of offence and general sentencing principles and in accordance with other legislated provisions of general application – but the section is still there.

We are there at the national level. On 19 May 2011 in the Supreme Court of the Northern Territory in Darwin, Kelly J was forced by a mandatory minimum sentencing regime to sentence Edward Nafi[8] to an unjustly long sentence (in her Honour's view) for a repeat offence of bringing a boatload of people into Australian waters. Her Honour said:

> So far as sentencing principles are concerned, I am required to take into account such of the matters set out in s 16A(2) of the Crimes Act as are relevant and known to me. Having done so, I am required by s 16A(1) of that Act to impose a sentence which is 'of a severity appropriate in all the circumstances of the offence'. However, I am prevented from doing this by the mandatory sentencing regime in s 236B of the Migration Act. That section provides that for the offence to which you have pleaded guilty, the Court must impose a minimum sentence of five years imprisonment with a minimum non-parole period of three years. In the case of a repeat offence, the mandatory minimum sentence is eight years imprisonment with a minimum *non-parole period of five years*.

And later:

> You will be convicted and sentenced to imprisonment for eight years commencing on 15 June 2010. I fix a non-parole period of five years.
>
> Had it not been for the mandatory minimum sentencing regime, taking into account the maximum penalty prescribed for this offence and the factors I have already set out I would have considered an appropriate penalty to have been a term of imprisonment for three years with a non-parole period of 18 months.
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> I therefore recommend that the Commonwealth Attorney-General exercise his prerogative to extend mercy to you, Mr Nafi, after you have served 18 months in prison. There is no guarantee that this will occur. It is a matter for the Attorney-General whether this recommendation is accepted.

Her Honour cited Mildren J in *Trenerry v Bradley*[9]:

> Prescribed minimum mandatory sentencing provisions are the very antithesis of just sentences. If a Court thinks that a proper just sentence is the prescribed minimum or more, the minimum prescribed penalty is unnecessary. It therefore follows that the sole purpose of a prescribed minimum mandatory sentencing regime is to require sentencers to impose heavier sentences than would be proper according to the justice of the case.

So much more is that the case when it is not the minimum that is mandated, but *the* penalty.

Mandatory sentences for all but the most minor regulatory offences are objectionable because they remove or unreasonably fetter the court's discretion and inevitably lead to injustice. As Chief Justice Spigelman once observed, no judge wants to be an instrument of injustice. Nor does any prosecutor. And the community does not want it to occur in their name.

Mandatory sentences that discriminate between occupational groups in the community on the basis of occupation are doubly offensive. Inevitably the families and associates of murder victims from other occupations, quite reasonably, ask why 'their' victim's loss is not viewed by the law as serious enough to attract the mandatory maximum sentence. A fair question to ask is what qualifies police officers for this special treatment *post mortem* and why is the existing law inadequate?

Already in section 21A of the *Crimes (Sentencing Procedure) Act 1999* there are prescribed aggravating factors (in a long list) where '(a) the victim was a police officer, emergency services worker, correctional officer, judicial officer, council law enforcement officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation or voluntary work'. It seems quite unnecessary to single out police officers for special consideration from that list of public service providers and only in limited circumstances. There is no epidemic of police murders of the qualifying kind needing to be addressed (even if such a measure might have success in dealing with it, which is doubtful).

The prescribed standard non-parole period for the murder of a police officer, where a term of years is to be imposed, is 25 years imprisonment.

One of the traditional justifications advanced for mandatory sentencing of any kind is the need to ensure consistency in sentencing.

Sir Anthony Mason[10]:

> Just as consistency in punishment – a reflection of the notion of equal justice – is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community.

But there is no indication that any worrying inconsistency has been evident in the cases of police officers (as opposed to any other types of public employees) who have been intentionally or recklessly killed while executing their duties or as a consequence of or in retaliation for executing them; so that argument does not apply. The cases of police officers Carty and McEnallay have been cited in media reports, but those cases, properly assessed, do not reveal any such problem (even if there is dissatisfaction with the final outcomes for other reasons).

There is no reason to believe that these provisions, against the background of the existing heavy penalties that are already available, would have any additional deterrent effect. There is every reason to expect, however, that in the rare case where they could apply, there would be no offer of a plea of guilty and there would be a strong impetus for negotiation of the charge and of the facts of the most thorough kind, even at the instigation of the prosecutor. That prolongs the anxiety for the families of the victims, among others.

In a submission to the attorney general the Bar Association raised as an alternative proposition (to its opposition to mandatory sentencing) the prescription of non-parole periods for such life sentences and, indeed, for (natural) life sentences generally. What an excellent idea! But it hasn't succeeded this time.

Endnotes

1. At the time of writing the bill had passed in the Legislative Council and a Greens amendment to insert a provision to enable the specification of a non-parole period had been defeated.
2. *Nicholas v The Queen* (1998) 193 CLR 173 at 188.
3. *R v Jurisic* (1998) 45 NSWLR 209 at 221C.
4. *Weininger v The Queen* (2003) 212 CLR 638.
5. Address to the NSW Parole Authorities Conference, 10 May 2006.
6. (1999) 73 ALJ 876.
7. Judge G D Woods in his 'A History of Criminal Law in NSW' (Federation Press, 2002) describes this chapter of our history in some detail.
8. SCC 21102367.
9. (1997) 6 NTLR 175 at 187.
10. *Lowe v The Queen* (1994) 154 CLR 606 at 610-611.