Murder and Mandatory Life in NSW: The puzzling application of s 61 *Crimes (Sentencing Procedure) Act.*

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Section 61(1) Crimes (Sentencing Procedure) Act 1999 (NSW), which makes the sentence of life imprisonment for murder mandatory in certain circumstances, has caused controversy and confusion from its inception. An important issue relates to the approach of the sentencing judge to determining in what circumstances this ultimate sentence should be applied. Most recently, the NSW Court of Criminal Appeal considered this issue in Rogerson v R; McNamara v R [2021] NSWCCA 160 in relation to a life sentence for murder imposed on former police detective, Glen McNamara. In confirming a differential form of two-stage approach to the imposition of a life sentence under s 61, the NSWCCA sought to avoid the prohibition established by the High Court of Australia in Markarian v The Queen by characterising the stages as (i) causal connection to culpability and (ii) utilitarian considerations, rather than a strict divide between objective and subjective factors. This approach was traced back through notorious NSW murder cases, such as Garforth, Harris, Knight and Dean as well as drawing on the stated intention of the NSW parliament for enacting s 61. The approach taken by Hamill J in R v Qaumi [2017] NSWSC 774, namely one stage in accordance with general sentencing practice using the instinctive synthesis approach confirmed in the High Court decisions of Markarian and Muldrock, was expressly rejected by the NSWCCA in McNamara although it had been applied by sentencing judges in a number of murder cases between 2017 and 2021.

This most recent NSWCCA decision may result in a more consistent approach to the application of s 61 in practice, however, it is still strongly arguable that this interpretation is inconsistent with the current approach to sentencing at common law and is likely to perpetuate injustice in the application of the ultimate sentence. Overall, there remains a lack of clear discriminating relevant criteria for the threshold imposition of a life sentence as opposed to the alternative of a lengthy determinate sentence. This makes it difficult, if not impossible, to ensure that a life sentence for murder is imposed fairly, equitably and proportionately. Ultimately it is argued that a logical step towards curing these deficiencies is to repeal s 61 followed by a full re-consideration of the availability of, and relevant factors for imposing, the sentence of life imprisonment in NSW.

I *Introduction*

The most extreme example of the late 20th century 'truth in sentencing reforms' in NSW is the natural life sentence implemented as the maximum sentence for murder.[1] Since the abolition of the death penalty, this is the most severe penalty in NSW, and it has been emphasised that it 'should only be imposed in extreme circumstances'.[2] The process of imposing this ultimate sentence is, however, 'not without complexity'[3] not least given its inherent connection with s 61(1) *Crimes (Sentencing Procedure) Act*[4], which provides:

> A court is to impose a sentence of imprisonment 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

[1] *Crimes Act 1900* (NSW) s 19A [hereafter referred to as *'Crimes Act'*]
[2] See, for example, *R v Farhad Qaumi, Mumtaz Qaumi & Jamil Qaumi* [2017] NSWSC 774, [182] (Hamill J) [hereafter referred to as '*Qaumi*']
[3] Ibid [181].
[4] Hereafter to referred to as '*CSP Act'*.

deterrence can only be met through the imposition of that sentence.

Thus, in determining if a natural life sentence is the mandated punishment for an offender convicted of murder it appears from s 61 that the court is required to undertake a process of determining the level of culpability in the commission of the murder offence and then weighing that against the community interests in achieving the traditional objectives of sentencing, excluding rehabilitation. The phrase, 'is to impose' makes the life sentence mandatory when the culpability of the convicted murderer is assessed at the extreme level where all stated purposes can only be met. Apart from the complexity in this assessment as to delineating the relevant factors contributing to the level of culpability in a murder offence and determining what is 'extreme', the task is further complicated by subsection (3) of s 61 *CSP Act,* which provides, 'nothing in subsection (1) affects section 21(1)'. This allows the court to 'impose a sentence of imprisonment for a specified term,' and an accompanying non- parole period.[5] There is no provision for affixing a non-parole period to a sentence of life imprisonment imposed when it is determined that s 61(1) has been found to be satisfied. Accordingly, depending on the age and life expectancy of the convicted murderer, the judicial interpretation of the s 61(1) benchmark evinces the potential for an inequitable and disproportionate differentiation in the ultimate duration of imprisonment imposed in sentencing for murder.

The court jurisprudence relating to s 61 has, over time, created a tension between a two-stage approach to its practical application and the established general approach to sentencing that the relative weights of all relevant considerations, including objective seriousness of the offence, subjective features of the offender and qualitative sentencing principles, must be synthesised in a single assessment to derive the appropriate sentence.[6] Further at common law, the legislative maximum penalty, including life imprisonment for murder, can only be applied where the nature of the crime and the circumstances of the criminal considered in this synthesis are found to place the case in the worst type where it is so grave as to warrant the imposition of the maximum prescribed penalty.[7] This tension between the legislative formulation in s 61 and the common law approach to sentencing was sought to be resolved in recent judicial decisions at appellate level, notably in *Rogerson v R; McNamara v R* where one appeal ground asserted the life sentence for murder imposed on former police detective, Glen McNamara was manifestly excessive and the sentencing judge erred in the application of s 61(1).[8]

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[5] It is important also to note here that there are standard non-parole periods for the crime of murder in the Table set out immediately following s 54 *CSP Act*. Items 1A and 1B specify a standard non-parole period of 25 years for certain categories of murder relating to the status of the victim/s, and Item 1 specifies a standard non-parole period of 20 years in 'other cases' of murder. In accordance with s 54B *CSP Act* the standard non-parole period is a matter, without limitation, to be taken into account in determining the appropriate sentence for an offender and represents the minimum period of imprisonment for an offence category 'in the middle of the range of seriousness' taking into account 'only the objective factors affecting the relative seriousness of that offence'- s 54A (2) *CSP Act.*

[6] *Markarian v The Queen* (2005) 228 CLR 357; *Muldrock v The Queen* (2011) 244 CLR 120.

[7] *The Queen v Kilic* (2016) 259 CLR 256, 265-266.

[8] *Rogerson v R; McNamara v R* [2021] NSWCCA 160 [hereafter referred to as *McNamara*]. Also see, *CC v R; R v CC* [2021] NSWCCA 71 where a 5-member bench of the NSW Court of Criminal Appeal was convened in an appeal against the sentence imposed upon CC following his guilty plea to the contract murder of a 15-year-old youth to avenge the death of the nephew of the man who had contracted him. The sentence imposed was 40 years imprisonment with a non-parole period of 30 years and the Crown appealed on the basis that this sentence was manifestly inadequate sentence and a life sentence was called for in all the circumstances. The majority found that it was not necessary to determine whether s 61(1) *CSP Act* permits a two-stage approach to sentencing because the sentencing judge did not adopt that approach ([50] – [54] Bathurst CJ, Hoeben CJ at CL and Wilson J agreeing). Adamson J agreed that the sentencing judge did not adopt a two-stage sentencing

The court in *McNamara* unanimously decided that s 61 permits a differential form of two stage approach to the imposition of a life sentence upon a conviction for murder. The stages were characterised as (i) factors with a causal connection to culpability and (ii) utilitarian sentencing considerations outside the culpability calculus. Such an interpretation may be within the modifications to the prohibition against a two-tiered approach to sentencing identified by the majority of the High Court in *Markarian*[9], notably the specific requirements of statutory sentencing regimes. It may result in a more consistent approach to the application of s 61 in practice, however, it is still strongly arguable that this interpretation is inconsistent with the current approach to sentencing at common law and this inconsistency cannot be justified on the basis of statutory modification to the common law. Such an approach to s 61 is likely to perpetuate injustice in the application of such an extraordinary sentence as natural life imprisonment.

Beyond this interpretation of the judicial approach required for imposition of a life sentence under s 61(1) it is evident that there remains a lack of clear discriminating relevant criteria for the imposition of a life sentence as opposed to the alternative of a lengthy determinate sentence permitted by s 61(3). This makes it difficult, if not impossible, to ensure that a life sentence for murder is imposed fairly, equitably and proportionately. Ultimately, we contend that a logical step towards curing this confusion, complexity and strong potential for inequity is first, to repeal s 61; second, to establish a detailed guideline for imposition of a natural life sentence as the maximum penalty for murder; and third a wholesale re-consideration of the availability of the natural life sentence as the ultimate punishment in NSW.

II *Judicial Interpretation and application of natural life sentence in murder cases*

(a) The short history of interpretation and application of s 61 *CSP Act*

The legislative formulation in s 61(1) for mandatory application of the natural life sentence can be traced back to the common law of sentencing for murder[10], but the practical interpretation and application of s 61 over more than two decades has done little to ensure an equitable distribution of this ultimate punishment.[11] In *R v Harris*[12] and subsequent cases[13], the judicial consideration of the relevant considerations contributing to what constitutes 'the level of culpability' in s 61(1) limited its reach to a first stage focus on those circumstances surrounding or causally connected to the offending , which was further narrowed in some cases to 'objective facts' or 'objective seriousness'. This can be summed up in the approach

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approach in this case, but observed that the proper construction of s 61(1) when applicable did involve consideration of two distinct stages of matters going only to culpability and then to the sentencing discretion at large ([78] – [84]). Hamill J dissented and stated that s 61 does not authorise a two-stage approach to sentencing and the judge must follow the general requirement to apply an 'instinctive synthesis' approach to the exercise of the sentencing discretion affirming his Honour's own decision in *Qaumi* ([93]).

[9] *Markarian v The Queen* (2005) 228 CLR 357, 375 (Gleeson CJ, Gummow, Hayne and Callinan JJ).

[10] See, for example, *R v Garforth* (NSWCCA, 23 May 1994) at 13.

[11] John L Anderson, 'The Label of Life Imprisonment in Australia: A Principled or Populist Approach to an Ultimate Sentence' (2012) 35(3) *University of NSW Law Journal* 747, 774.

[12] (2000) 50 NSWLR 409. In this case Bell J relied on earlier NSWCCA decisions in *R v Burke* [1983] 2 NSWLR 93 and *R v Bell* (1985) 2 NSWLR 466 which dealt with a then extant proviso to the proscription of a mandatory sentence of life imprisonment for murder 'unless it appears to the Judge that the person's culpability for the crime is significantly diminished by mitigating circumstances, whether disclosed by the evidence in the trial or otherwise'.

[13] See, for example, *R v Miles* [2002] NSWCCA 276; *R v Valera* [2002] NSWCCA 50; *R v Merritt* [2004] NSWCCA 19; *Knight v R* (2006); *Barton v R* [2009] NSWCCA 164 and *SW v R* [2013] NSWCCA 103.

stated in *R v Miles:*

> There is a two stage process involved in determining whether a life sentence is mandated. The Court must first determine whether on the objective facts the level of culpability is so extreme that it warrants the maximum penalty. The Court must then determine whether the subjective factors are capable of displacing the prima facie need for the maximum penalty.[14]

In the notorious case involving the only woman to be sentenced to natural life imprisonment for murder, *Knight v R,* the NSWCCA approved a summary of general principles as to the imposition of this sentence in murder cases, which included an interpretation of s 61(1) preferencing a two stage approach:

> In many cases a two stage approach to the consideration of whether the maximum penalty should be imposed is appropriate. Firstly, consideration is given to whether the objective gravity of the offences brings it within the worst class of case and then consideration is given to whether the subjective circumstances of the offender require a lesser sentence …
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> It is the combined effect of the four indicia in section 61(1), which is critical …
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> The absence of any one or more of the indicia of retribution, punishment, community protection or deterrence may make it more difficult for a sentencing judge to reach the conclusion that a life sentence is required although it will not be determinative …[15]

Subsequently, in *R v Dean*[16]*,* in a sentencing context subsequent to the High Court decisions in *Markarian* and *Muldrock* where instinctive synthesis had been confirmed as the correct general approach to sentencing[17], Latham J implicitly applied a two-stage approach to the interpretation of s 61(1) in sentencing the offender to life imprisonment for 11 counts of murder of residents of an aged care facility to which he had set fire ostensibly to cover up his theft of drugs for his personal use. On appeal, a ground asserting that the adoption of a two-stage approach to sentencing in this case resulted in error was dismissed with Ward JA, in the leading judgment, affirming the line of earlier decisions authorising a two-step process:

> As noted, the principal complaint now made in this Court is that her Honour applied a two-stage process to sentencing in that she first determined that the murder offences fell into the "worst case" category and then proceeded to consider whether there were considerations that warranted the conclusion that a sentence of less than life imprisonment was appropriate. It is said such an approach involves an undue focus on considerations of retribution and general deterrence at the first stage of the process …There is force in the Crown's submission that sentencing for murder mandates a two-stage sentencing approach of the kind adopted by her Honour. Certainly, the tension recognised in the authorities as existing between s 61(1) and s 61(3) can only readily be reconciled by assuming that there has been a determination that a life sentence is required to be imposed and then asking whether, in the circumstances, nevertheless a lesser (fixed term) sentence is appropriate. In other words, there must first be an assessment that the level of culpability is such that a life sentence is required, having regard to the four indicia specified in s 61(1), before one can sensibly apply s 21(1). … Her Honour did not err in adopting the two-stage approach that she did. I am not persuaded that anything in *Markarian* or *Muldrock* renders *Knight* plainly wrong … I also note that *Knight* did not in terms suggest that the so-called two stage approach was required to be applied in all cases; simply observing that in many cases such an approach is appropriate.[18]

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[14] *R v Miles* [2002] NSWCCA 276, [204] (Carruthers AJ).
[15] *Knight v R* (2006) 164 A Crim R 126, 139 [23] (McClellan CJ at CL, Adams J (with additional and qualifying remarks) and Latham J agreeing).
[16] [2013] NSWSC 1027.
[17] See above n 6.
[18] *Dean v R* [2015] NSWCCA 307, [83] – [97] (Ward JA, Adams and R A Hulme JJ agreeing). Special leave to appeal to the High Court was refused in November 2016 although Bell J remarked on that application, 'We would not wish to be taken to be endorsing everything stated by the Court of Criminal Appeal in determining this matter' – *Roger Dean v The Queen* [2016] HCA Trans 278.

Since *Dean*, later decisions have focussed on the one step instinctive synthesis approach to s 61(1), with Hamill J in *Qaumi* clearly stating*:*

> This is not a multi-stage process. Rather it is an intuitive evaluation of all material and principles and an application of the legislation providing for mandatory life sentences.[19]

Other cases where this approach to s 61(1) has been followed in sentencing for murder include, *R v Martin*[20]; *R v JK*[21]; *R v LN; R v AW (No 10)*[22]; and in the appeal in *Qaumi's* case[23] the NSWCCA made no criticisms of Hamill J's approach to s 61 in sentencing for the murders in that case. More recently in *R v Ney,* Johnson J approached s 61, while recognising the principles stated in *Knight,* in a manner demonstrating an instinctive synthesis approach in ultimately determining that a lengthy determinate sentence instead of a life sentence was appropriate on the murder conviction, particularly because of the offender's mental health issues. [24]

(b) The most recent interpretation and application of s 61 *CSP Act*

The cases subsequent to *Dean* have demonstrated significant inconsistency in the approach to s 61(1), highlighting the difficulties caused by the section. This culminated in the Court of Criminal Appeal's focus on attempting to resolve these difficulties in *McNamara* after such a resolution was not required in *CC v R; R v CC* even though a 5-member bench had been originally formed to attempt this resolution. In *McNamara,* a unanimous CCA clearly stated that s 61(1) did call for a two-stage approach to the imposition of a sentence of life imprisonment for murder, but it did not infringe the established general approach to sentencing from *Markarian.* The court expressly rejected the approach of Hamill J in *Qaumi* and instead put a re-interpretative gloss on the 'two-stage' approach to s 61(1). It was held that proper interpretation of the statutory language, taking into account the stated intention of the NSW parliament[25], called for a differential form of two-stage approach. The stages were expressly characterised as (i) factors with a causal connection to culpability and (ii) utilitarian sentencing considerations outside the culpability calculus, rather than a strict divide between objective and subjective factors as traditionally labelled. The interpretation of Adamson J in *CC v R; R v CC* was approved in this regard:

> The proper construction of s 61(1) arose recently before this Court, constituted by five members, in *CC v R; R v CC* [2021] NSWCCA 71. Three members of the Court determined that it was not necessary to decide whether s 61(1) permitted a two-stage approach, concluding that the sentencing judge, who had not imposed a life sentence, did not adopt that approach: at [50] per Bathurst CJ; [73] per Hoeben CJ at CL; and [96] per Wilson J. Hamill J (at [93]) adhered to the view he stated in *Qaumi*. Adamson J held that the correct approach was that stated in *R v Harris (Bell J)* as approved in *R v Harris (CCA)*, stating as follows (at [81]-[83]):
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> > "81 It is important to note, in response to CC's detailed submissions, that there is an important distinction, which is plain from the wording of s 61(1) of the *Crimes*

[19] *Qaumi* n 2 [193]. Also, in *R v Stanford* [2016] NSWSC 1434, it is apparent that although the sentencing judge referred to a two stage process for s 61 as appropriate, the remarks show his Honour weighed all relevant factors together in one synthesis in determining that nothing other than a life sentence was sufficient [161], [165] (R A Hulme J).
[20] [2018] NSWSC 84.
[21] [2018] NSWSC 250
[22] [2017] NSWSC 1387
[23] *Qaumi v R* [2020] NSWCCA 163
[24] *R v Ney* [2021] NSWSC 529 [184] – [189] (Johnson J).
[25] *Rogerson v R; McNamara v R* [2021] NSWCCA 160 [619] – [622] (The Court)

> *(Sentencing Procedure) Act 1999* (NSW) (the Act) between the factors germane to the matter about which the court is to be satisfied and the factors germane to the sentence to be imposed on an offender. The focus of the court's attention in s 61(1) is the offender's 'level of culpability in the commission of the offence'. *The assessment of this matter involves consideration of objective factors, such as the objective seriousness of the offence, as well as subjective matters, such as the offender's background, criminal history and any mental disease, disorder or incapacity.* By contrast, the instinctive synthesis required as part of the exercise of the sentencing discretion involves a consideration of *all* relevant matters, not merely those that affect the offender's level of culpability in the commission of the offence. There is a significant overlap in the matters germane to s 61(1) and those germane to sentencing but the matters relevant to s 61(1) are, inevitably, a subset of the matters relevant to sentencing: see *R v Burke* [1983] 2 NSWLR 93 at 101C-D (Nagle CJ at CL). Matters relevant to sentence which fall outside the purview of s 61(1) of the Act include whether the offender has demonstrated remorse or contrition, whether the offender has pleaded guilty and at what time the plea has been offered or entered, and whether the offender has given assistance to authorities in respect of this offence or other offences committed by the offender or by others.
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> 82 The distinction was drawn by Bell J in *R v Harris* [2000] NSWSC 285; (2000) 111 A Crim R 415 at [83]-[84] and approved by this Court on appeal from her Honour's decision in *R v Harris* (2000) 50 NSWLR 409; [2000] NSWCCA 469 at [60] (Wood CJ at CL, Giles JA and James J agreeing).
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> 83 If s 61(1) arises for consideration, the sentencing judge will be obliged to consider the matters that affect the offender's level of culpability for the offence. Even if the judge reaches the state of satisfaction provided for in s 61(1), there remains a discretion to impose a lesser sentence. The order in which relevant matters are addressed in the reasons is a matter for the sentencing judge." (emphasis added)

We consider that Adamson J's approach is correct. It accords with *R v Harris (CCA)* and *R v Harris (Bell J)* and the Parliament's intention in enacting the predecessor to s 61(1). To that end we note five further matters.

First, as noted, the proper approach to s 61(1) is that stated in *R v Harris (CCA)* and *R v Harris (Bell J)*. Second, that embodies a form of two-stage test, although for the reasons stated in *Dean*, it is not the form of two-stage test disavowed in *Markarian*. Third, even if the form of two stage test envisaged by *R v Harris (CCA)* and *R v Harris (Bell J)* was inconsistent with *Markarian*, then it would not matter because, for the reasons set out above, that approach reflects the clear intention of Parliament in enacting s 431B of the *Crimes Act* after *Garforth*, which was later re-enacted in the *Sentencing Procedure Act*. Fourth, care must be taken in describing s 61 as differentiating between an assessment of the "objective gravity" of the offending and the offender's subjective circumstances. As explained, what differentiates the two stages is whether the relevant factor is a "*circumstance surrounding or causally connected to the offence*" and that can include matters such as the offender's mental state, motive or personal background. Some matters may be relevant to both stages. Fifth, that said, a reference by a sentencing judge to *Knight*, or the adoption of a two-stage approach that differentiates between the "objective gravity" of the offending and the offender's subjective circumstances, will not constitute error of the kind stated in *House v The King*. Instead, the relevant question is whether the sentencing judge applied s 61 (and s 21(1)) in accordance with *R v Harris (Bell J)* and *R v Harris (CCA)*.[26]

(c) Will this interpretation ensure proportionate and equitable distribution of the ultimate natural life sentence?

[26] *Rogerson v R; McNamara v R* [2021] NSWCCA 160 [634] – [636] (The Court)

This recent resolution as to the correct interpretation of the approach to s 61 when sentencing for murder and deciding whether a natural life sentence is an appropriate outcome may result in a more consistent approach to the application of s 61 in practice, however, it is still strongly arguable that this interpretation is inconsistent with the established approach to sentencing at common law and does not promote the equal and consistent application of the law, in which 'similar cases are treated alike, and different cases are treated differently'.[27] It is certainly open to contend that in cases of murder, 'more so than any other crime'[28] given the wide disparity in the seriousness of the offending ranging from mercy killings to gruesome serial killings and calculated contract killings[29], broad variety of the character of offenders and the availability of determinate sentences as well as the indeterminate life sentence as a maximum punishment, equal and consistent application of the law is imperative.

The common objective feature in all murders is the death of one or more human beings, but complexity arises in the sentencing process with the judicial determination of objective seriousness based on what are classed as relevant factors in terms of the killing/s, victim/s and surrounding circumstances of a murder offence. This judicial construction of the relevant factors is pivotal in the assessment of whether the sentence imposed is proportionate to the gravity of the offence and equitable across the spectrum of offending and offenders in this offence category. Given that in the criminal offence hierarchy where death of a human being is an element of the crime , manslaughter or assault causing death when intoxicated rank next in the descending scale of ordinal proportionality considerations and both offences carry a maximum of 25 years imprisonment[30], there is potentially a stark chasm to the cardinal pinnacle of life imprisonment dependent largely on offender characteristics, such as age and health.

The judicial divergence as to the sentencing approach to s 61 has been resolved at one level, however, there remains a distinct lack of guidance as to the specific factors to be considered during sentencing for murder for clear delineation of that sentencing threshold of extreme offender culpability mandating a natural life sentence. This might in some ways be attributed to the fact that the seminal cases on the correct approach to sentencing[31] and properly categorising an offence as of the worst type justifying the maximum penalty[32] were all concerned with offences other than murder. In these cases the "objective seriousness" of the relevant offence could be assessed by the specific harm caused to the victim and with reference to the preceding and succeeding offence categories in terms of achieving ordinal proportionality. As no such 'yardstick' is available for sentencing in murder cases, the starting point becomes nebulous, which has the potential to impinge upon one of the fundamental functions of the court – the ability to accurately assess a case and impose a sentence that proportionately reflects the gravity of the crime and subjective circumstances of the convicted individual and that is equitable across that category of criminal offence. Ergo, to ensure consistency and proportionality is maintained in the sentencing process,a clearer framework for sentencing for murder offences is required if s 61 is to be maintained in its current form or at all.

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[27] Anderson n 11 756.
[28] Alex Bailin, 'The Inhumanity of Mandatory Sentences' [2002] *Criminal Law Review* 641 641 (citing *Reyes v The Queen* [2002] 2 AC 235 (Lord Bingham)).
[29] Anderson n 11 756.
[30] See sections 24 and 25A *Crimes Act.*
[31] *Markarian v The Queen* (2005) 228 CLR 357; *Muldrock v The Queen* (2011) 244 CLR 120.
[32] *The Queen v Kilic* (2016) 259 CLR 256.

III *What can be done about s 61?*

There is a strong argument that section 61(1) serves no useful purpose, and the short history of the jurisprudence demonstrates that it has simply resulted in a waste of time and judicial resources to attempt to resolve its intended meaning and how it should be applied in practice. The predecessor to s 61(1)[33] was introduced for political reasons following a state election in the 1990s during a time of rampant law and order politics marked by an 'auction' mentality that was designed to appeal to perceived populist sentiment as to tougher sentencing.[34] At the same time, it was acknowledged expressly that the legislative provision did no more than restate the common law as articulated by Gleeson CJ in the notorious case of *Garforth*[35] with addition of the words, "community protection and deterrence", adapted from the judgment of High Court in *Veen v R (No.2).*[36]

In addition to serving no useful purpose it has also become increasingly apparent during the 25 years of its existence that a principled approach to the mandatory sentence of life imprisonment for murder in s 61 has not been developed. A comparative examination of the cases where s 61 has been applied demonstrates that equitably discriminating criteria has not been established for determining the threshold of extreme culpability for imposition of the mandatory ultimate sentence.[37] The general criteria in s 61(1) have not been interpreted and applied in a consistent and equitable manner so as 'to ensure the proportionate and equitable distribution of the natural life sentence particularly considering that the age of the offender at the time of sentence will be a major determinant in the ultimate duration of such a sentence'.[38]

Various proposals have been put forward in seeking to overcome or remove the anomalies that s 61(1) introduces into the sentencing for murder. Ideally s 61(1) should be repealed and serious consideration should be given to abolishing the sentence of natural life imprisonment without the possibility of parole. The "mandatory" life sentence, however, remains 'the most visible example'[39] of a "tough on crime" agenda, the political rhetoric that underpins the operation of this section, and the belief that 'community safety is enhanced through the use of tougher sentences, especially the use of imprisonment'[40] makes repeal of s 61 and abolition of life imprisonment unlikely given the enduring influence of the court of public opinion. As such, any changes to the sentencing regime for murder need to be modelled around the current provisions of the Act and the common law.

If s 61 is to be retained, a more meaningful and valuable legislative contribution would be a

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[33] This was s 431B(1) *Crimes Act.*

[34] Julian V Roberts, et al, *Penal Populism and Public Opinion* (Oxford University Press, 2003), 53-57, 70-75; Russell Hogg, 'Mandatory Sentencing Laws and the Symbolic Politics of Law and Order' (1999) 5 *University of New South Wales Law Journal Forum* 3, 4; George Zdenkowski, "Punishment Policy and Politics" in M Laffin and M Painter (eds), *Reform and Reversal Lessons from the Coalition Government in New South Wales 1988-1995* (MacMillan Education Australia, 1995) 233.

[35] *R v Garforth* (NSWCCA, 23 May 1994) 13

[36] (1988) 164 CLR 465.

[37] See Anderson n 11 775-777, where diverse case examples are set out and analysed.

[38] Ibid 776. See also John Anderson, 'Indefinite, Inhumane, Inequitable – The Principle of Equal Application of the Law and the Natural Life Sentence for Murder: A Reform Agenda' (2006) 29 *UNSW Law Journal* 139, 150-156, 167-172; and *R v Denyer* [1995] 1 VR 186.

[39] Julian V Roberts, 'Sentencing Policy and Practice: The evolving role of public opinion' in Arie Freiberg and Karen Gelb (eds), *Penal Populism, Sentencing Councils and Sentencing Policy* (Hawkins Press, 2008), 18-19.

[40] Rob White, Santina Perrone and Loene Howes, *Crime Criminality and Criminal Justice* (Oxford University Press, 3rd ed, 2019), 498.

re-formulation of the provision to provide the courts guidance on the specific factors to be taken into consideration as to deciding levels of extreme culpability and the imposition of a natural life sentence. This legislative guidance could be in a similar form to s 21A *CSP Act* where both aggravating and mitigating circumstances are identified to assist the court in imposing the most appropriate sentence in the circumstances. If in any given case strong subjective circumstances are identified as a source of significant mitigation, it needs to be clearer to the sentencing judge they should give very careful thought to imposing the extraordinary sentence of life imprisonment without the possibility of parole. Further, the absence of any one or more of the indicia of retribution, punishment, community protection or deterrence as currently set out in s 61(1) as the sentencing objectives to be met in the community interest to punish the extreme level of culpability of the offender, should make it more difficult for the sentencing judge to reach a conclusion that a life sentence is required.[41]

IV *A pathway to reform*

A pathway to reform in retaining s 61 but modifying and improving its practical operation in the direction of equitable and proportionate distribution of the life sentence may be to look to international experience and notably the *Sentencing Act 2020 (UK).* Under this Act, minimum term starting points for murder – 12, 15, 25, 30 years and whole life order are provided in Schedule 21.[42] In addition aggravating and mitigating factors to be taken into consideration by sentencing judges are set out.[43] Unlike this regime, the reform proposal in relation to s 61 will be directed to the characteristics that make a life sentence an appropriate sentencing outcome as the maximum sentence, rather than attributing characteristics to five potential sentence starting points.

Accordingly, and assuming that s 61(1) *CSP Act* remains in its present form, the starting point should be for the court to determine whether, on the objective facts, the level of culpability is so extreme that it warrants the imposition of the maximum penalty, affirming that the assessment of the objective gravity of an offence is an essential part of the sentencing process.[44] This "objective culpability" will be determined 'by reference to the nature of offending'[45] and following the decision in *McNamara* this will include circumstances surrounding or causally connected to the offence as relevant factors. Depending on the particular case, 'objective factors, such as the objective seriousness of the offence, as well as subjective matters, such as the offender's background, criminal history and any mental disease, disorder or incapacity'[46] will be included for consideration in determining whether the extreme culpability threshold is reached. The objective circumstances in which the culpability of the offender will be considered as being 'so grave that it warrants the imposition of the maximum prescribed penalty'[47] of a natural life sentence, should include:

(a) Murder involves any of the following:-

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[41] *R v Merritt* (2004) 59 NSWLR 557.
[42] See *Sentencing Act 2020* (UK) s 322 and Schedule 21. [hereafter referred to as '*Sentencing Act'* Sch 21].
[43] See Kate Fitz-Gibbon, 'The mandatory life sentence for murder: An argument for judicial discretion in England' (2012) 13(5) *Criminology & Criminal Justice* 506, 508; Kate Fitz-Gibbon, 'Minimum sentencing for murder in England and Wales: A critical examination 10 years after the *Criminal Justice Act 2003*' (2016) 18(1) *Punishment and Society* 47.
[44] *R v Van Ryn* [2016] NSWCCA 1, [133] – [134]; *Khoury v R* (2011) 209 A Crim R 509, 523-524 (Simpson J, Davies J and Grove AJ agreeing); *R v Cage* [2006] NSWCCA 304, [17].
[45] *Muldrock v The Queen* (2011) 244 CLR 120.
[46] *Rogerson v R; McNamara v R* [2021] NSWCCA 160 [634], [636] (The Court)
[47] *The Queen v Kilic* (2016) 259 CLR 256, 265.

i. A substantial degree of premeditation or planning;[48]

ii. The abduction of the victim;[49]

iii. Sexual or sadistic conduct;[50] or

iv. Prolonged suffering or torture of the deceased;[51]

(b) The murder was of two or more persons;[52]

(c) The murder of a child if involving the abduction of the child;[53]

(d) The murder was committed for the purpose of advancing a political,[54] religious, racial or ideological cause;[55]

(e) The murder was committed for financial/economic gain;[56]

(f) The murder was committed to conceal another crime;[57]

(g) The murder arose from planned extortion;[58]

(h) Murder was intended to obstruct or interfere with the course of justice;[59]

(i) Murder of a Police Officer in the line of duty;[60]

(j) The offender has previously been convicted of murder.[61]

If no such features are present in the particular murder case, it should then be deemed to be a case where theoffence 'is not so grave as to warrant the imposition of the maximum prescribed penalty'.[62] Therefore,it becomes subject to the sentencing provisions under Part 4 Division 1A of the Act, in which a determinate sentence will be imposed with a non-parole period affixed and taking the standard non-parole periods into account when fixing the appropriate minimum period.[63] In circumstances where one or more of these features are present, each of the factors will carry equal weight in determining the level of objective culpability. If more than one of the factors are present in the commission of the offence, the court is to consider these as 'aggravating factors' in the overall assessment of the level of culpability of the offender.

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[48] *Sentencing Act* Sch 21 cl 2(2)(a)(i).
[49] See, for example, *R v Garforth* (SCNSW, Newman J, 9 July 1993).
[50] Ibid
[51] See, for example, *Charbaji v R* [2019] NSWCCA 28, [182] – [184]
[52] See, for example, *R v Adams (No 7)* [2017] NSWSC 179, [53]; *R v Milat* (SCNSW, Hunt CJ at CL, 27 July 1996); *R v Baker* (SCNSW, Newman J,6 August 1993).
[53] *Sentencing Act 2020* (UK) Schedule 21, cl 2(2)(b); *R v Garforth* (SCNSW, Newman J, 9 July 1993).
[54] *R v Ngo (No 3)* (2001) 125 A Crim R 495.
[55] *Sentencing Act* Sch 21 cl 2(2)(d).
[56] See, for example, *Adanguidi v R* (2006) 167 A Crim R 295; and *R v Smith* {2000] NSWCCA 202, [164] – [166].
[57] See, for example, *R v Villa* [2005] NSWCCA 4; *R v Lett* (NSWCCA, 27 March 1995); *R v Baker* [2019] NSWCCA 58.
[58] See, for example, *R v Liew* (NSWCCA, 24 December 1993).
[59] *Sentencing Act* Sch 21 cl 3(2)(d).
[60] *Crimes Act* s 19B; *Sentencing Act* Sch 21cl 2(2)(c); *R v Jacobs (No 9)* [2013] NSWSC 1470; *R v Barbieri* [2014] NSWSC 1808; *Barbieri v R* [2016] NSWCCA 295.
[61] *Sentencing Act* Sch 21, cl 2(2)(e).
[62] *The Queen v Kilic* (2016) 259 CLR 256, 265.
[63] See above n 5.

In accordance with the general authorities of *Muldrock*[64] and *McDowall v R*[65] there must be flexibility available for theJudge to 'identify fully the facts, matters and circumstances which bear on the sentence imposed, including those which go to objective seriousness.' Thus, upon determining the objective culpability, the court is to consider matters relating to subjective culpability, which may include all the subjective factors relevant to the offender in assessing whether the prima facie requirement for the maximum penalty can be displaced. This includes the consideration of any aggravating and/or any mitigating factors then any relevant statutory[66] or common law principles such as the *Bugmy*[67] principles. The aggravating and mitigating factors are in keeping with those provided for in section 21A *CSP* Act.

In terms of aggravating factors[68] specific to murder, these will include:-

(a) A significant degree of planning or premeditation;[69]

(b) The victim was particularly vulnerable because of age or disability;[70]

(c) Mental or physical suffering was inflicted on the victim before death;[71]

(d) The murder arose from the abuse of a position of trust;[72]

(e) Duress and/or threats were made against another person to facilitate the commission of the murder;[73]

(f) Concealment, destruction or dismemberment of the body;[74]

(g) The victim was exercising public or community functions,[75] and the offence arose because of the victim's occupation or voluntary work;[76]

(h) Involved the actual or threatened use of violence and/or weapon;[77]

(i) Involved the actual or threatened use of explosives or a chemical or biological agent;[78]

(j) Involved the offender causing the victim to take, inhale or be affected by a narcotic drug, alcohol or any other intoxicating substance.[79]

Given the observations in the case of *Elyard v R* that s 21A has made the sentencing task of courts 'more difficult or at least more prone to error,'[80] the distinction between these aggravating factors and the 'starting points' of objective culpability aim to ensure no 'double counting' and reduce the scope for error.

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[64] *Muldrock v The Queen* (2011) 244 CLR 120, [29].
[65] *McDowall v R* [2019] NSWCCA 29, [36].
[66] *CSP Act* s 3A
[67] *Bugmy v R* (2013) 249 CLR 571 – principles relating to the relevance of an offender's Aboriginality in sentencing.
[68] See *CSP Act* s 21A(2).
[69] *Sentencing Act* Sch 21 cl 9 (a).
[70] *Sentencing Act* Sch 21 cl 9 (b).
[71] *Sentencing Act* Sch 21 cl 9 (c).
[72] *Sentencing Act* Sch 21 cl 9 (d)
[73] *Sentencing Act* Sch 21 cl 9 (e).
[74] *Sentencing Act* Sch 21 cl 9 (g).
[75] *CSP Act* Pt 4 Div 1A.
[76] *Sentencing Act* Sch 21 cl 9 (f).
[77] *CSP Act* s 21A(2)(b), (c).
[78] *CSP Act* s 21A(2)(ca).
[79] *CSP Act* s 21A(2)(cb)
[80] [2006] NSWCCA 43 [39] (Howie J)

In addition to section 21A(3) *CSP Act,* the mitigating factors to be taken into account in murder cases would include specific culpability factors and other subjective matters, namely:-

(a) lack of premeditation;[81]

(b) The offender suffered from a mental disorder or mental disability which is causally connected to lowering the degree of culpability;[82]

(c) The offender was provoked (for example, by prolonged stress);[83]

(d) The offender acted to any extent in self-defence or fear of violence;[84]

(e) A reasonable belief by the offender that the murder was an act of mercy.[85]

After considering the subjective culpability features of the offence and offender, if the court is satisfied that the community interest in retribution, punishment, community protection and deterrence can ***only*** be met through the imposition of a life sentence then it may be imposed. If these interests can be met through another sentencing disposition, then imposition of a life sentence is inappropriate, and the court is to impose a determinate sentence and affix a non-parole period.[86]

Conclusively, this proposed sentencing framework provides the judiciary with a series of progressive considerations, commencing with the characterisation of the objective seriousness. This is followed by a synthesis of the relevant subjective factors, weighed against the objective seriousness and considered in conjunction with relevant sentencing principles, notably proportionality, but may extend to totality and parity, and the purposes of punishment. In this way, all the relevant factors are taken into account and afforded similar weight (where possible) without the need to impose a rigid "checklist" approach to sentencing. Further, this ensures a clear and careful delineation of the relevant factors considered during the sentencing process and ensures greater transparency in sentencing decisions.

V *Conclusion*

The natural life sentence was ostensibly implemented to serve as public denunciation, condemnation and retribution for extremely serious murders.[87] It was made "mandatory" in accordance with s 61 *CSP Act* in circumstances designed to equate to the worst type of case and 'leave the community in no doubt of [the] Government's intention to get tough on crime'.[88] The jurisprudence that has emerged from the interpretation and application of s 61 in practice has created various complexities that have diminished and stifled a consistent and proportionate approach to sentencing following an offender's conviction for murder. In twenty-five years of operation, this provision has been controversial, ineffective and

[81] *Sentencing Act* Sch 21 cl 10 (b).
[82] *Sentencing Act* Sch 21 cl 10 (c).
[83] *Sentencing Act* Sch 21 cl 10 (d).
[84] *Sentencing Act* Sch 21 cl 10 (e).
[85] *Sentencing Act* Sch 21 cl 10 (f).
[86] It is important to note that as a standard non-parole period represents the middle of the range of objective seriousness, the non-parole period set for an offence that has first been deemed with a "grave level" of objective culpability is likely to be above the standard non-parole period set out – see above n 5.
[87] Anderson n 11 767.
[88] Crimes Amendment (Mandatory Life Sentences) Bill, *New South Wales Parliamentary Proceedings*: Legislative Council, 21 September 1995, 1285-1286.

confusing to the extent that the best course of action would be to repeal it and undertake a full reconsideration of the natural life sentence as the ultimate maximum penalty for murder.[89]

In the contemporary NSW political and sentencing landscape that may be idealistic thinking. At the same time, however, it is clear reform is needed to the sentencing framework to ensure that in the assessment of the gravity of the crime, subjective culpability of the convicted individual and other relevant factors, consistency and proportionality are achieved to ensure fairness and also 'to promote the perspicacious observation of fundamental sentencing principles and human rights'.[90]

[89] See NSW Sentencing Council Report, *Homicide* (May 2021), Chapter 5, for a recent consideration of life sentences for murder.
[90] Anderson n 11 778.