Sentences for Wilful Murder and Murder

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Capital punishment was formally abolished in Western Australia in 1984. Since then, State Parliament has enacted a series of measures which have made the consequences of a murder or wilful murder conviction progressively more harsh. This paper traces the history of murder and wilful murder sentences and argues that the current scheme is unnecessarily complicated and inflexible. Against this background, it is suggested that the recent High Court decision in R v Mitchell *was both predictable and defensible.*

ON 5 March 1996, the High Court of Australia handed down its decision in *R v Mitchell*.[1] Mitchell had pleaded guilty to four counts of wilful murder committed in an extremely violent manner on a 31 year old woman, her 16 year old son and her two daughters aged seven and five years. He also pleaded guilty to three counts of indecently interfering with a dead body by sexual penetration and one count of sexual penetration of a child under 13. Full details of the circumstances of the offences were not revealed publicly because of their appalling depravity.

In the early morning of 22 February 1993, Mitchell had driven to a remote property in Greenough and killed all four victims by inflicting horrific blows on their heads and necks with a tomahawk. After killing the mother, Mitchell sexually abused her dead body. Before killing the seven year old girl, he sexually penetrated her with a vibrator, causing massive internal injuries. He was 24 at the time of the offences and had committed them under the combined influence of amphetamines and cannabis. Pursuant to section 282(a)(i) of the Criminal Code, the sentencing judge, Owen J, imposed a sentence of 'strict security life imprisonment'. However, His

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1. (Unreported) Full Ct 5 Mar 1996 no 96/005; see Editorial 'For the Term of His (or Her) Natural Life' (1995) 19 Crim L Journ 61.

Honour did not consider that it was, in the terms of the relevant legislation, 'appropriate' to make an order to the effect that Mitchell should never be eligible for parole.[2] This meant that Mitchell's case would first be reviewed by the Parole Board 20 years from the date of the sentence.[3] By a majority, the Court of Criminal Appeal allowed a Crown appeal and ordered that Mitchell should never be eligible for parole.[4] However, a unanimous High Court set this order aside.

Although the decision in *Mitchell* has understandably attracted particular media and political comment,[5] this paper shows that it is simply the latest event in the convoluted history of sentences for wilful murder and murder. It further argues that the current statutory scheme is over-complicated and that key aspects of it are not supported by arguments of principle, consistency or policy. With respect to *Mitchell* itself, it is argued that the High Court's decision was both predictable and defensible. The final part of the paper considers the further dilemmas which have been posed by changes that came into force in January 1995[6] requiring the sentencing judge to fix the period before the first statutory review by the Parole Board.

SENTENCES FOR MURDER: A HISTORY

1. The period to 1984

The Criminal Code has always distinguished between wilful murder and murder as a matter of substantive law. Wilful murder requires the prosecution to prove that the defendant intended to kill,[7] whereas murder is generally based upon proof of an intent to do grievous bodily harm (GBH).[8] However, it is striking that the authors of the Code drew no distinction between the two offences in terms of penalty. Both offences attracted a mandatory death sentence, though the Governor's power to commute such sentences was exercised with progressively increasing frequency.[9]

The punishments for murder and wilful murder were first differentiated in 1961, when the death penalty was restricted to cases of wilful murder

2. S 40D(2a) of the Offenders Community Corrections Act 1963 (WA), formerly the Offenders Probation and Parole Act 1963 (WA), introduced by the Criminal Law Amendment Act 1988 (WA) .
3. Offenders Community Corrections Act, s 34.
4. *Mitchell* (1994) 72 A Crim R 200.
5. See L Morfesse 'Parole Break for Greenough Killer' *The West Australian* 6 Mar 1996, 3. The State premier expressed his surprise at the decision and stated that he was seeking the advice of the Director of Public Prosecutions.
6. Criminal Law Amendment Act 1994 (WA).
7. S 278.
8. S 279(1).
9. B Purdue *Legal Executions in Western Australia* (Sydney: Foundation Press, 1993).

and a mandatory life sentence was introduced for murder.[10] However, the practical differences were not as great as might be imagined. Very few offenders were actually executed[11] and it is notable that both those convicted of murder and those whose death sentences were commuted to life imprisonment were now required to serve the same minimum period of 15 years' imprisonment before possible release by the Governor's exercise of 'the Royal Mercy'.[12]

When parole was introduced in 1963,[13] a rather curious situation arose with respect to life sentence prisoners. Those who had been convicted of wilful murder or murder were still governed by the Criminal Code provisions relating to the *Royal Mercy* but other 'lifers'[14] could now be released on *parole* under the Offenders Probation and Parole Act (WA). Release on parole could be ordered by the Governor, following a favourable report from the newly established Parole Board. However, in 1965, *all* lifers became subject to release on parole rather than via the prerogative. Release was still by order of the Governor but the Parole Board was required to furnish a report with respect to all lifers at their first 'statutory review date' (SRD) and at specified intervals thereafter.[15]

The 1965 Act is an important landmark because it was the first time that there was a clear differentiation between wilful murder and murder sentences in terms of the minimum period which was to be served in prison. In the case of wilful murder, the first SRD was 10 years from the date of *commutation* of the death penalty. In the case of all other life sentences, including those imposed for murder, it was five years from the date of *sentence*.

In 1980, the distinction between wilful murder and murder sentences was further entrenched with the introduction of 'strict security life imprisonment'.[16] This was not, at the time, a sentence imposed by the courts but was an order which could be made in cases where the Governor commuted a death penalty. The situation was therefore as follows. In the

10. The Criminal Code Amendment Act 1961 (WA), which came into force on 29 June 1962.
11. Purdue supra n 9.
12. Criminal Code s 706A. Earlier release was permitted if the Governor was satisfied that there had been a miscarriage of justice or if such action seemed proper in view of the offender's 'serious ill health', provided the Governor was satisfied that it was unlikely that release would endanger any person's life.
13. Offenders Probation and Parole Act 1963 (WA).
14. This included some cases of manslaughter, armed robbery and rape which attracted a maximum of life imprisonment at the time. Of these offences, only armed robbery now carries a life sentence. Since 1984, the maximum for manslaughter has been 20 years. This has also been the maximum for aggravated sexual assault since 1985.
15. Offenders Probation and Parole Amendment Act 1965 (WA).
16. Acts Amendment (Strict Security Life Imprisonment) Act 1980 (WA).

case of wilful murder, the court still imposed the death penalty but in practice this was invariably commuted. If it was commuted to life imprisonment, the first SRD remained, as it had been since 1965, at 10 years from the date of commutation. However, if it was commuted to strict security life imprisonment, the period jumped to 20 years. In the case of murder and other life sentences the first SRD remained at five years from the date of sentence.

The following table summarises the history up to 1984.

Table One: Sentences for Murder and Wilful Murder up to 1984

	Wilful Murder	**Murder**
Up to 1961	Death sentence Possible commutation	Death sentence
1961–1965	Death sentence – 15 years minimum if commuted	Life imprisonment — minimum 15 years before release
1965–1980	Death sentence – 10 years to first SRD if commuted	Life imprisonment — 5 years before first SRD
1980–1984	Death sentence – 20 years to first SRD if commuted to strict security life; 10 years to first SRD if commuted to life	Life imprisonment — 5 years before first SRD

2. 1984 -1985: The abolition of capital punishment

Eric Edgar Cook, the last person to be executed in Western Australia, was hanged in Fremantle Prison on 26 October 1964. However, capital punishment was formally abolished only in 1984.[17] This marked the end of a grisly history. The first judicial executions appear to have been of two Aboriginal men in 1840,[18] though the first to attract widespread attention was that of the first white person to be executed. In the language of a contemporary newspaper report, 15 year old John Gaven was 'launched into eternity' in 1844.[19] Due to his small size, heavy weights had to be attached to his feet to ensure that the hanging was successful. After his death, his head was 'taken away to further the ends of science' and found to be of 'extraordinary formation.'

17. Acts Amendment (Abolition of Capital Punishment) Act 1984 (WA).
18. Purdue supra n 9, 1.
19. F Dunn 'First Hanging Victim was 15' *Sunday Times* 10 Sept 1995, 12 ('Liftout'), who quoted directly from the contemporary newspaper report; see also J E Thomas & A Stewart *Imprisonment in Western Australia* (Perth: UWA Press, 1978) 9-10.

Recent research in Western Australia has also mirrored findings from elsewhere, in that minority groups are grossly over-represented amongst the statistics of those who were executed: 40 per cent of those put to death between 1840 and 1964 were of Aboriginal descent and 15 per cent were of Asian descent.[20]

With the abolition of the death penalty, the courts were spared the hypocritical ritual of imposing a sentence which was not going to be carried out. It now became the judge's responsibility in cases of wilful murder to choose between a sentence of strict security life or simple life imprisonment. In the case of strict security life, the first SRD remained at 20 years, though this now ran, of course, from the date of sentence rather than the date of commutation. In the case of life sentences, as we have seen, the period before the first SRD had previously been 10 years if the sentence resulted from commutation of a death penalty and five years if the sentence had been imposed by the courts. However, the 1984 legislation made no express provision for cases where a life sentence was imposed for wilful murder and, for a short time, all life sentences were treated in the same way, namely, with a first SRD five years from the date of sentence. This was apparently an oversight and in 1985, Parliament restored the differential; if life imprisonment was imposed for wilful murder, the period before the first SRD was now 10 years from the date of sentence but remained at five years in other cases.[21]

3. 1987-1995: Toughening up life sentences

Although the public perception might be that the abolition of the death penalty was an act of leniency, the following tables show that this would be a misjudgment. In fact, lifers now face considerably longer minimum terms than they faced prior to abolition. There have been three important developments in the past decade. First, in 1987, Parliament increased the period before the first SRD from 10 to 12 years in the case of life sentences for wilful murder and from five to seven years in the case of other life sentences.[22] Then, in 1988, Parliament empowered a sentencing judge on imposing a sentence of strict security life for wilful murder to make a 'natural life order' to the effect that the offender should never be released on parole.[23]

Most recently, murderers were a prime target of the Coalition Parties' law and order policy during the State election campaign in 1992. Although the Coalition Government has not implemented its original proposals,[24]

20. Purdue supra n 9.
21. Offenders Probation and Parole Amendment Act 1985 (WA).
22. Acts Amendment (Imprisonment and Parole) Act 1987 (WA).
23. Offenders Community Corrections Act 1963 (WA) s 40D(2a).
24. Originally the proposal seems to have been for strict security life to require a period of 30 years, and life a period of 20 years before the first SRD.

significant changes came into force on 20 January 1995.[25] The first SRD is no longer fixed by statute but must be set by the sentencing court under the following parameters:

1. Strict security life for wilful murder: 20-30 years (or natural life)
2. Life imprisonment for wilful murder: 15-19 years
3. Life imprisonment for murder: 7-14 years

The following tables summarise the progressive tightening of the law:

Table Two: Sentences for Wilful Murder from 1985–1995

	Strict security Life imprisonment	Life imprisonment
1985–1987	20 years before first SRD	10 years before first SRD
1987–1988	20 years before first SRD	12 years before first SRD
1988 – 1994	20 years before first SRD or order never to be released	12 years before first SRD
1995 onwards	20-30 years before first SRD or order never to be released	15-19 years before first SRD

Table Three: Murder and other life sentences 1965–1995[26]

	Life imprisonment for murder	Other life sentences
1965–1987	5 years before first SRD	5 years before first SRD
1987–1994	7 years to first SRD	7 years before first SRD
1995 onwards	7-14 years before first SRD	7 years before first SRD

FOUNDATIONS OF SAND: WILFUL MURDER AND MURDER DISTINGUISHED

The previous section has shown that the current sentencing structure hinges upon the distinction between wilful murder and murder; in practice, this means the distinction between an intention to kill and an intention to do GBH. Whilst there is in theory a distinction between an intent to kill and an

25. Criminal Law Amendment Act 1994 (WA).
26. Table Two is limited to the period from abolition of the death penalty to the present. Table Three goes back to 1965 because there were no significant changes between 1965 and 1987.

intent to do GBH, it is submitted that this is insufficient in itself to support an automatic and substantial differentiation in sentence.

The first point to note is that GBH has a relatively narrow definition under the Criminal Code, being limited to bodily injuries which are either 'life threatening' or which cause or threaten to cause 'permanent injury to health'.[27] It will not always be easy for a jury to distinguish an intent to kill from an intent to do such serious injuries. Furthermore, the Criminal Code in Western Australia stands quite alone in the way it classifies murder offences. The common law has long taken the view that an intent to kill *or* to do GBH constitutes the mens rea for murder. In Queensland, the distinction between murder and wilful murder was abolished 25 years ago[28] and the Northern Territory Criminal Code adopted the Queensland model.[29] At the time of the influential Murray Report in 1983, the death penalty still applied in cases of wilful murder. Murray had not been asked to consider the question of capital punishment but his comments on murder are instructive. Murray stated that the offence of wilful murder should remain as long as the death penalty was retained but strongly implied that if capital punishment was abolished, wilful murder and murder could profitably be merged into the generic offence of murder. He made no attempt to support the distinction between wilful murder and murder in principle. Paradoxically, as we have seen, the abolition of capital punishment has been followed by a *greater* differentiation between the two offences in terms of sentence.

The distinction between an intent to kill and an intent to do GBH is also a very crude measure of the overall seriousness of an offence because it takes no account of the circumstances in which the offence occurred.[30] As Windeyer J stated in *Cobiac v Liddy*:

> The whole history of criminal justice has shewn that severity of punishment begets the need of a capacity for mercy.... [A] capacity in special circumstances to avoid the rigidity of inexorable law is of the very essence of justice.[31]

These comments are applicable even where a person has the intent to kill and reflects the fact that there may be mitigating considerations. The Chief Justice's Gender Bias Task Force and other experts have noted that the law in Western Australia lacks sufficient flexibility. This is both because of the rigid statutory sentencing scheme with its long periods before the

27. S 1. The common law definition is more flexible: see *DPP v Smith* [1961] AC 290; *Saunders* [1985] Crim L Rev 230.
28. Offenders Probation and Parole Act Amendment Act 1974 (Qld).
29. Criminal Code 1983 (NT) s 162.
30. See generally A Ashworth *Sentencing and Criminal Justice* (London: Weidenfeld & Nicolson, 1992) 113-114.
31. (1968) 119 CLR 257, 269.

first SRD[32] and because of the restricted range of partial excuses under the Criminal Code.[33]

Further problems arise from the fact that 'dangerous act murder' under section 279(2) of the Criminal Code is punished in the same way as murder based upon an intent to do GBH ('intentional murder'). Dangerous act murder simply requires proof that the victim was killed as a result of an act which was objectively likely to endanger life where this act was carried out in the prosecution of an unlawful purpose. There are obvious objections to imposing liability for murder on such an objective basis.[34] For present purposes, however, it is sufficient to note a striking paradox. A fine distinction, based upon subjective culpability, leads to the delineation of sentences for wilful murder and intentional murder. However, there are potentially greater differences in culpability between intentional murder and dangerous act murder because the latter offence can be established even where the offender did not intend to hurt anyone and did not recognise the likelihood of injury occurring.[35] These differences in culpability do not result in any differentiation in terms of sentence.

WILFUL MURDER: STRICT SECURITY LIFE OR LIFE IMPRISONMENT

When a judge sentences an offender for wilful murder, (s)he must first decide whether to impose strict security life or life imprisonment. The legislation provides no criteria for the exercise of this discretion but several cases have shown that the courts will focus mainly on the gravity of the offence and the protection of the community. In *R v Jackson*,[36] the appellant was a retired civil servant with no prior record. His gambling habit had left him penniless and he and his de facto partner were unable to sustain the lifestyle to which they had become accustomed. He decided to kill himself but did not wish to leave his partner to face the financial mess and the shame. He decided on murder/suicide but, although he shot his

32. *The Report of the Gender Bias Task Force* (Perth: Ministry of Justice, 1994) expressed concern at the lack of flexibility in cases where women killed their violent partners and advocated a maximum rather than a mandatory life sentence. Malcolm CJ and Murray J have also supported extra-judicially the abolition of the mandatory sentence: see WA Law Reform Commission *Report on the Criminal Process and Persons Suffering from Mental Disorder* (Perth: Govt Printer, 1991); WA Law Society *The Murray Report and its Aftermath* (Perth, 1991).

33. See N Morgan 'Criminal Law Reform 1983-1995: An Era of Unprecedented Legislative Activism' (1995) 25 UWAL Rev 283, 294 -295.

34. B Fisse *Howard's Criminal Law* 5th edn (Sydney: Law Book Co, 1990) 70-71. The author describes the existence of such laws as a 'barbarous relic'.

35. S 279; *Gould v Barnes* [1960] Qd R 283.

36. [1990] WAR 105.

partner, he did not have the courage to shoot himself. He pleaded guilty to wilful murder and was sentenced to strict security life imprisonment. The Court of Appeal agreed with the trial judge that the offence was indeed premeditated, planned and deliberate but considered that the motive and antecedents of the offender indicated that the offence was 'of such a nature, committed under such circumstances and by such a person that it was unlikely that it would be repeated'. The court therefore substituted a term of life imprisonment.

Jackson therefore confirmed that risk to the community was a relevant consideration in choosing between life and strict security life. In *R v Monaghan*,[37] counsel seems to have attempted to elevate community risk from being a relevant consideration to being a prerequisite but this was rejected by the court. Monaghan's offence was one of extreme violence. He and his co-offender Napier suspected that the victim had been informing the police about their activities in the Australian Nationalist Movement. They lured him to a park where they beat him about the head with iron bars, cut his throat and threw him in the river. Monaghan did have something of a record which led the court to express concerns about the risk to the community. However, it also held that strict security life imprisonment should be imposed in bad cases of wilful murder such as this *irrespective of the degree of risk to the community*.[38] Subsequent unreported cases have confirmed that whilst community risk is relevant, it is neither a prerequisite nor a paramount consideration.[39]

Most of the cases also refer to the rehabilitation of the offender. However, rehabilitation is generally not treated as a primary and independent concern but, rather, as part of the assessment of community risk in the sense that the risks are obviously reduced if there are good prospects of rehabilitation.

STRICT SECURITY LIFE: NATURAL LIFE TERMS AND THE MITCHELL CASE

If an offender has been sentenced to strict security life imprisonment, the sentencing judge must decide whether to make an order under section 40D(2a) of the Offenders Community Corrections Act 1963 (WA) which states:

> Where a court imposes a sentence of strict security life imprisonment on a person the court may, if it considers that the

37. (1990) 3 WAR 466; and see the case comment in (1991) 15 Crim L Journ 297.
38. Id, Kennedy J 472.
39. *Fry* (unreported) WA Sup Ct 12 Jul 1991 no 25; *O'Connor* (unreported) WA Sup Ct 22 Sept 1994 no 37.

making of an order under this section is appropriate, order that the person is not to be eligible for parole.

If such an order is made, the Governor can never order the prisoner's release on parole.[40]

The legislation provides no guidance for a court on the exercise of this dramatic power beyond the vague proposition that it 'may' make such an order if it considers it 'appropriate'. The different views expressed in *Mitchell* are testimony to the complexity of the question of what is 'appropriate'. As indicated, the sentencing judge, Owen J, had declined to make a natural life order but the Court of Criminal Appeal held by a majority that an order should be made.[41] A unanimous High Court set aside the order.[42] The case is best considered by reference to five interrelated themes.

1. The nature of the appellate inquiry

The High Court ruled that the use of the word 'may' in section 40D(2a) did not mean that a sentencing judge retains a discretion whether or not to make an order once (s)he considers such an order to be 'appropriate'. The word 'may' was used here not to give a discretion, but to confer a power which was to be exercised 'upon proof of the particular case out of which such power arises'.[43] Put simply, an order under section 40D(2a) *must* be made once the sentencing judge considers it appropriate in the circumstances.

Following this interpretation, the High Court was critical of some passages in the majority judgments in the Court of Criminal Appeal in which their Honours had indicated that Owen J had erred in the exercise of a *discretion* within section 40D(2a). The proper question, said the High Court, was whether there was an appealable error in the way in which Owen J had construed and applied the term 'appropriate'.

It is submitted, with respect, that the High Court's comments in this regard appear somewhat over-stated and over-technical. When read as a whole, the judgments of the majority of the Court of Criminal Appeal do seem to have focused on the manner in which Owen J had construed and applied the word 'appropriate'; insofar as the judgments used the word 'discretion' this seems to have been done with reference to His Honour's evaluation of what was 'appropriate'. Nevertheless, the message is clear: the role of appellate courts is *not* to consider whether they would have reached a different decision if they had been exercising the powers of a

40. Offenders Community Corrections Act 1963 (WA) s 40D(2b).
41. *Mitchell* supra n 4, Kennedy and Ipp JJ (Murray J dissenting).
42. Dawson, Toohey, Gaudron, McHugh and Gummow JJ.
43. *Mitchell* supra n 1, 12. The Court quoted with approval from *McDougall v Paterson* (1851) 138 ER 672, 677.

sentencing judge at first instance.[44]

2. Balancing the relevant considerations

(i) The general principles

The High Court held that the 'phrase "considers ... appropriate" [in section 40D (2a)] indicates the striking of a balance between relevant considerations so as to provide the outcome which is fit and proper'. In his lengthy sentencing remarks, Owen J had noted that the considerations which were at issue were essentially the same as those which he had already addressed in deciding on strict security life rather than life imprisonment. As we have seen, these considerations were primarily the circumstances of the offence and the question of risk. However, in the Court of Criminal Appeal, Kennedy J considered that whilst:

> His Honour ... made some references, in general terms, to the circumstances of the offences with which he was concerned, when he came to consider the exercise of his discretion, he does not appear to have given this factor significant weight. In this, I believe that he was in error.[45]

The High Court strongly rejected this as misreading Owen J's position; their Honours stated that Owen J had 'continually returned ... to the intrinsic seriousness of the offences. His Honour is to be taken as having meant what he said'.

Although Ipp J stated that he agreed with Kennedy J and that he was simply adding some comments of his own, it is submitted that his approach was significantly different. In the passage just quoted, Kennedy J criticised Owen J in terms of his emphasis on the *seriousness of the offences*. Ipp J, by contrast, saw the question as essentially one of *community risk*:

> *The overriding factor* in determining whether the court should exercise its powers under section 40D(2a) *is risk to the community, not matters relating to the punishment of the offender*. The punishment ... was properly imposed when the offender was sentenced to strict security life imprisonment.[46]

The High Court firmly rejected Ipp J's view and stated that the legislation does not indicate any particular 'overriding factor'.[47]

(ii) The facts of the case

The Court held that there was no appealable error in the way in which Owen J had balanced the various considerations:

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44. *Mitchell* supra n 1, 14.
45. *Mitchell* supra n 4, 221, 223.
46. Id, 225 (emphasis added).
47. *Mitchell* supra n 1, 14.

> In particular, Owen J considered whether the more general and objective factors relating to punishment outweighed the potential of the applicant to be rehabilitated.... His Honour was entitled to have regard to the unchallenged expert evidence that the appellant would not constitute a danger to the public, drug taking to one side, and that he had a constructive attitude to the future.... Owen J, again correctly to our minds, had regard to the possibility of the later emergence of facts, presently unascertainable, but apparent 20 years or more hence, which might then indicate that the appellant no longer constitutes a danger to the public.[48]

3. The question of prognosis

Whilst the prognosis of risk is not an overriding consideration, it remains very significant. Unfortunately, the High Court did not resolve an important difference of opinion as to how the question of prognosis should be posed. Ipp J stated:

> By the very nature of the decision, it will nearly always be a matter of difficulty to determine at the date of sentencing whether in 20 years time a wilful murderer will continue to pose a significant risk to the community. Nevertheless, if required, the court must, by process of prognostication, determine this issue as best as it can.[49]

With respect, this is not the correct way to pose the problem of prognosis. An order under section 40D(2a) leads to denial of parole *for the offender's lifetime*. The question ought therefore to be whether the offender poses a serious risk during the rest of his/her lifespan. Owen J considered the case on this basis and in his dissent Murray J referred to the difficulty of any prognosis 'for the whole of perhaps up to 45 or 50 years of life remaining in him'.[50] Kennedy J's views are not easy to discern, though His Honour does refer without adverse comment to Owen J's sentencing remarks with respect to prognosis.

Although the High Court did not clarify which approach applies, it is submitted that their approval of Owen J's approach amounts to an implicit rejection of Ipp J's analysis. This, of course, does nothing to resolve the problem of *how* accurate predictions are to be achieved, but at least the basic question can be more specifically addressed by the relevant experts.

4. The question of age

Mitchell was 24 years old at the time the offences were committed. Thus, he would hardly qualify for mitigation on the basis of youth. However, the fact that he was relatively young and had a long projected lifespan clearly made the problem of prognosis particularly difficult. The problem is

48. Id, 13.
49. *Mitchell* supra n 4, 225.
50. Id, 230, 233.

particularly acute if, as argued above, the proper question should be one of prognosis for the remainder of the person's life and not merely at a point some 20 years from the date of sentence.

This concern had weighed heavily with Murray J who drew attention to the comments of Dawson, Toohey and Gaudron JJ in *R v Bugmy*:

> The appellant was 27 years of age when the minimum term was fixed. He will be over 45 years before the likelihood that he will re-offend will become a matter for assessment. *It is not possible to say now what the likelihood will be then ... simply because of the impossibility of making a forecast of future behaviour so far ahead.*[51]

Murray J considered that the power contained in section 40D(2a) was 'truly exceptional' and required 'clear evidence of the most cogent kind' and was not satisfied that Mitchell's future was so devoid of prospects that he should forever be denied parole.

Since the question of prognosis should relate to the whole of the offender's remaining lifespan, it is clear that the age of the offender may come to play a very significant role. In principle, it is very hard to argue that a person who is 25 years old should, simply for that reason, be treated differently from one who is 45; but if the crux of the matter is prognosis, the practical reality is that prognostication becomes increasingly difficult the longer the likely lifespan of the offender.

5. The prerogative of mercy

An offender who is subject to a 'natural life' order can never be released on parole. However, section 5(3) of the Offenders Community Corrections Act (WA) states that 'nothing in this Act in any way affects Her Majesty's royal prerogative of mercy'. Furthermore, section 679 of the Criminal Code expressly preserves the Governor's power to extend the Royal Mercy to any prisoner undergoing a sentence of strict security life imprisonment.

As a matter of general constitutional principle, it is understandable that the prerogative has been preserved, but it is potentially confusing in this context. Ipp J stated :

> It is odd ... that section 40D(2a) requires the court to exercise a discretion when — no matter what the court decides — it is the Executive that will resolve the issue of release from imprisonment.[52]

Ipp J's comments seem to leave open the argument that an order under section 40D(2a) does not 'close the door' forever. However, as pointed out earlier, the prerogative is an unstructured and unregulated mechanism which was abandoned some 30 years ago as a means of releasing life sentence

51. *Bugmy* (1990) 169 CLR 525, 537 (emphasis added).
52. *Mitchell* supra n 4, 223.

prisoners.[53] The possibility of prerogative release should be left aside by a sentencing court in the same way that, in the context of other life sentences, the courts do not take account of the fact that the Attorney-General may, in exceptional cases, request the Parole Board to review a case before the first SRD.[54]

6. Summary

Section 40D(2a) poses some major conceptual and practical dilemmas. It is conceptually confusing in that it requires the sentencing court to revisit the very same issues which have already been canvassed in deciding to impose strict security life rather than life imprisonment. In practice, it will be extremely difficult for a judge at the time of sentence to make a prognosis as to the threat which an offender poses for the rest of his or her life, particularly if that offender is relatively young.

One is then drawn inevitably to the following question: if section 40D(2a) was not applicable in *Mitchell*, when would it apply? None of the judgments provides an answer to this question, but it should be acknowledged that Mitchell was not a 'serial killer' in the sense of having committed a number of pre-planned killings over a period of time. It is submitted that the court will have much stronger grounds for a prognosis in respect of the calculating 'serial killer' rather than the person who kills only once in a violent frenzy.

THE NEW LAWS: FIXING THE PERIOD BEFORE THE FIRST SRD

The legislative provisions which govern life sentences for murder and wilful murder now generate an additional complexity beyond that which applied in *Mitchell*. This is the requirement that the court must set the period before the first SRD; 20 to 30 years in the case of strict security life imprisonment for wilful murder; 15-19 years in the case of life imprisonment for wilful murder and 7-14 years in the case of murder.[55] It

53. See pp 208-209.

54. Offenders Community Corrections Act s 34(2)(a). The writer has been informed of only two situations in which this power has been exercised. The first was where there had been an inexplicably long delay of over 12 months in the commutation of a death sentence. In this case the Parole Board reviewed the case at a date just over 10 years from the date of sentence rather than 10 years from the date of commutation. In another case the prisoner had successfully appealed to the High Court against her conviction for murder. However, she was convicted again at her re-trial. The Parole Board reviewed this case at a date which was calculated by reference to the date of the original sentence rather than the re-trial.

55. There have not yet been any appellate decisions on the new provisions perhaps because,

is submitted that numerous problems arise from the new structure. Although, for reasons of space, these arguments can only be sketched here, they guarantee hours of future debate.

- The legislation seems to assume that it is possible to 'fine tune' life sentences and yet, as we have seen, the range is too high to permit sufficient flexibility.[56]
- *Mitchell* raised the problem of the 'duplication' of reasoning if an order was considered under section 40D(2a). The problem of duplication will now arise in *all* wilful murder cases. The court will be forced to consider the same factors in choosing between life and strict security life and then in determining the precise minimum term.
- The thorny question of prognosis, with its inevitable reliance on expert evidence, will presumably arise in all murder and wilful murder cases as judges seek to determine public risk as a factor relevant to the period before first SRD.
- The choice in *Mitchell* boiled down to whether there should be a parole review after 20 years or no such review. The choice is now between a review sometime in the next 20-30 years or no review. The prognosis of risk becomes increasingly difficult as the relevant periods become longer. Since strict security life can extend to a 30 year review date, it is now even less likely that an order will be made under section 40D(2a). This can hardly have been the Government's intention but it is the inevitable result of the legislative structure.

CONCLUSIONS

The current law and practice with relation to sentences for murder and wilful murder is in urgent need of review. The distinction between wilful murder and murder is incapable of supporting a big differential in sentence outcome. In the context of determining the precise form of a life sentence, judges are required to undertake a repetitive and complicated inquiry. In particular, they must consider the prognosis of risk at a time far in advance of any possible release on parole. By elaborately specifying the periods before the first SRD, the current scheme seems to have lost sight of the fact that there is never any guarantee of release under any form of life sentence.

It is this writer's view that justice would best be served by a simpler system. Ideally, the distinction between wilful murder and murder should be abolished and life imprisonment should be a maximum rather than a mandatory sentence. Within this scheme, it would be possible for a judge

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to judge by reports in *The West Australian*, the periods have been set at the bottom of the relevant scale.

56. See pp 212-213.

to set the minimum term which the offender should serve on the basis of the *seriousness of the offence*. If a mandatory sentence is retained, a wider range of excuses and partial excuses should be available as part of the substantive law. Questions of *prognosis* are best considered at the time the person becomes eligible for release rather than at the far earlier sentencing stage.