The Queen v Leach [2004] NTSC 60

PARTIES:	THE QUEEN
	v
	LEACH, Martin
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	8312499
DELIVERED:	12 November 2004
HEARING DATES:	26 & 27 July and 26 & 27 October 2004
JUDGMENT OF:	MARTIN (BR) CJ

CATCHWORDS:

CRIMINAL LAW
Sentencing – murder – rape – life imprisonment – *Sentencing (Crime of Murder) Parole Reform Act* 2003 – Part 5 Transitional Provisions – application by the Director of Public Prosecutions pursuant to s 19(5) – whether to refuse to fix a non-parole period – level of culpability.

CRIMINAL LAW
Evidence – matters relating to proof – future probabilities – likelihood of re-offending – whether determination of fact.

STATUTES
Act of Parliament – interpretation – *Sentencing (Crime of Murder) Parole Reform Act* 2003 – s 19(5) – whether community interest to be assessed at time of application.

Sentencing (Crime of Murder) Parole Reform Act 2003, s 18 and s 19

Tepper v Kelly (1987) 45 SASR 340 at 343; *Tepper v Kelly* (1988) 47 SASR 271 at 273; *R v Harris* (2000) 50 NSWLR 409 at 419, *R v Coulston* [1997] 2 CR 446 p 463; *The Queen v Olbrich* (1999) 199 CLR 270; applied.

Veen v The Queen [No 1] (1979) 143 CLR 458; *Veen v The Queen [No 2]* (1988) 164 CLR 465, p 473, 475; *R v Sione Penisini* [2003] NSWSC 892, para 82; *R v Bell* (1985) 2 NSWLR 466; *Bugmy v The Queen* (1990) 169 CLR 525; considered.

R v SLD [2003] NSWCCA 310; *R v McNamara* [2004] NSWCCA 42 at [25]; not followed [in part].

REPRESENTATION:

Counsel:

Plaintiff:	R Wild QC & S Ozolins
Defendant:	R Goldflam

Solicitors:

Plaintiff:	DPP
Defendant:	NTLAC

Judgment category classification:	A
Judgment ID Number:	Mar0415
Number of pages:	106

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Leach [2004] NTSC 60
No. 8312499

BETWEEN:

THE QUEEN
Plaintiff

AND:

MARTIN LEACH
Defendant

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered 12 November 2004)

INDEX

Introduction

[1] This is an application by the Director of Public Prosecutions ("the Director") pursuant to the provisions of the Sentencing (Crime of Murder) and Parole Reform Act 2003 ("the Act"). The respondent is serving sentences of life imprisonment for two crimes of murder. In substance the Director seeks an order revoking the non-parole period of 25 years fixed by the Act together with an order refusing to fix a non-parole period in respect of those sentences.

[2] This application was heard together with an identical application in the matter of the *R v Andrew Christopher Albury* [2004] NTSC 59. The Act commenced operation on 11 February 2004 and these applications are the first of their type.

History

[3] By indictment dated 10 May 1984 the respondent was charged with two counts of murder and one count of rape. The first count charged that on 20 June 1983 at Darwin, the respondent murdered Janice Michelle Carnegie. Count three charged that on 20 June 1983 the respondent raped Ms Carnegie. The second count charged that on 20 June 1983 the respondent murdered Charmaine Jean Aviet.

[4] On 16 May 1984 the respondent was convicted by a jury on all counts. As required by the legislation, on the two counts of murder the learned sentencing Judge sentenced the respondent to imprisonment for life. In

respect of the crime of rape, on 18 June 1984 his Honour again imposed a sentence of imprisonment for life.

[5] At the time that the respondent was sentenced, the mandatory sentence for murder was imprisonment for life and the Court was not empowered to fix a non-parole period. Section 5 of the Criminal Law Consolidation Act and Ordinance required that a person convicted of murder be sentenced to imprisonment for life with hard labour and that the sentence could not be mitigated or varied by the court. From 1972 when the Parole of Prisoners Ordinance 1971 came into operation, s 4 of that Ordinance directed that the provisions relating to the fixing of non-parole periods did not apply where the offender was sentenced to imprisonment for life. An equivalent provision appears in the Parole of Prisoners Act which was in force at the time that the respondent was sentenced (s 4(3)). Section 4 was not repealed until the introduction of the Sentencing Act in 1996.

[6] On 1 July 1984, just under two months after the respondent was sentenced, the Criminal Code ("the Code") came into operation. Section 164 of the Code took over from s 5 of the Criminal Law Consolidation Act Ordinance. Section 164 provided that a sentence of life imprisonment for murder could not be mitigated or varied under the Code nor under any other law in force in the Territory. That provision remained in force until repealed by the Act in 2004.

[7] This brief outline of the history of the legislation demonstrates that until the commencement of the Act in 2004, upon conviction for murder the court was required to fix a mandatory sentence of life imprisonment and there was no power to fix a non-parole period in respect of such a sentence. In addition, if a sentence of life imprisonment was imposed for a crime other than murder, until the introduction of s 53 of the Sentencing Act in 1996 the court did not have power to fix a non-parole period. That situation was altered by s 53 of the Sentencing Act which gave the court power to fix a non-parole period in respect of a sentence of life imprisonment imposed for a crime other than murder. The restriction found in s 164 of the Code which prevented the court from fixing a non-parole period in respect of a sentence of life imposed for the crime of murder continued to apply.

[8] At the time the respondent was sentenced, therefore, imprisonment for life meant imprisonment for the term of the natural life without any possibility of release other than by way of Executive clemency. A previous practice of sending persons sentenced to life imprisonment to South Australia to serve their life sentences where they could take advantage of South Australian parole provisions had, by 1984, been discontinued. In the early 1990s it appears that the Cabinet of the Government adopted a policy that persons serving sentences of life would spend a minimum of 20 years in prison before being considered for release by the Executive. A policy to that effect was mentioned by the Minister for Correctional Services in answer to a question on 20 August 1992. The Minister said:

> "It is correct that the Territory has the strongest system in Australia for reviewing the sentences of life–sentenced prisoners. Under principles adopted by Cabinet last year, life-sentenced prisoners will spend a minimum of 20 years in prison in the Northern Territory before being considered for parole. Prisoners not accepted for parole after 20 years will have their sentences reviewed on a three-yearly basis, and recommendations from the Parole Board that life-sentenced prisoners be released will be considered by Cabinet before being passed to the Administrator."

[9] Notwithstanding the reference by the Minister to consideration of releasing prisoners on parole, there was no legislative basis for parole.

The New Scheme

[10] The Act came into operation on 11 February 2004. It amended the Sentencing Act and introduced s 53A to that Act. Section 53A provides for the fixing of non-parole periods in respect of sentences of life imprisonment imposed after the Act commenced. That section is in the following terms:

> "53A. Non-parole periods for crime of murder
>
> "(1) Subject to this section, where a court ('the sentencing court') sentences an offender to be imprisoned for life for the crime of murder, the court must fix under section 53(1) –
>
> (a) a standard non-parole period of 20 years; or
>
> (b) if any of the circumstances in subsection (3) apply – a non-parole period of 25 years.
>
> "(2) The standard non-parole period of 20 years referred to in subsection (1)(a) represents the non-parole period for an offence in the middle of the range of objective seriousness for offences to which the standard non-parole period applies.

"(3) The circumstances referred to in subsection (1)(b) are any of the following:

(a) the victim's occupation was police officer, emergency services worker, correctional services officer, judicial officer, health professional, teacher, community worker or other occupation involving the performance of a public function or the provision of a community service and the act or omission that caused the victim's death occurred while the victim was carrying out the duties of his or her occupation or for a reason otherwise connected with his or her occupation;

(b) the act or omission that caused the victim's death was part of a course of conduct by the offender that included conduct, either before or after the victim's death, that would have constituted a sexual offence against the victim;

(c) the victim was under 18 years of age at the time of the act or omission that caused the victim's death;

(d) if the offender is being sentenced for 2 or more convictions for unlawful homicide;

(e) if the offender is being sentenced for one conviction for murder and one or more other unlawful homicides are being taken into account;

(f) at the time the offender was convicted of the offence, the offender had one or more previous convictions for unlawful homicide.

"(4) The sentencing court may fix a non-parole period that is longer than a non-parole period referred to in subsection (1)(a) or (b) if satisfied that, because of any objective or subjective factors affecting the relative seriousness of the offence, a longer non-parole period is warranted.

"(5) The sentencing court may refuse to fix a non-parole period if satisfied the level of culpability in the commission of the offence is so extreme the community interest in retribution, punishment, protection and deterrence can only be met if the offender is imprisoned for the term of his or her natural life without the possibility of release on parole.

"(6) The sentencing court may fix a non-parole period that is shorter than the standard non-parole period of 20 years referred to in subsection (1)(a) if satisfied there are exceptional circumstances that justify fixing a shorter non-parole period.

"(7) For there to be exceptional circumstances sufficient to justify fixing a shorter non-parole period under subsection (6), the sentencing court must be satisfied of the following matters and must not have regard to any other matters:

(a) the offender is –

(i) otherwise a person of good character; and

(ii) unlikely to re-offend;

(b) the victim's conduct, or conduct and condition, substantially mitigate the conduct of the offender.

"(8) In considering whether the offender is unlikely to re-offend, the matters the sentencing court may have regard to include the following:

(a) whether the offender has a significant record of previous convictions;

(b) any expressions of remorse by the offender;

(c) any other matters referred to in section 5(2) that are relevant.

"(9) The sentencing court must give reasons for fixing, or refusing to fix, a non-parole period and must identify in those reasons each of the factors it took into account in making that decision.

"(10) The failure of the sentencing court to comply with this section when fixing, or refusing to fix, a non-parole period does not invalidate the sentence imposed on the offender.

"(11) This section applies only in relation to an offence committed –

(a) after the commencement of the *Sentencing (Crime of Murder) and Parole Reform Act 2003*; or

(b) before the commencement of that Act if, at that commencement, the offender has not been sentenced for the offence.

"(12) In subsection (3) –

'unlawful homicide' means the crime of murder or manslaughter.".

[11] The Act brought about substantial reform of the sentencing regime applicable to sentences of life imprisonment imposed for the crime of murder. First, upon a conviction for a single crime of murder, the court is now directed to fix at least the "standard" non-parole period of 20 years unless the circumstances identified in s 53A(3) apply. If those circumstances apply, the court is required to fix a non-parole period of at least 25 years. Subsection 53A(2) provides that the "standard non-parole period of 20 years" represents:

> "the non-parole period of an offence in the middle of the range of objective seriousness for offences to which the standard non-parole period applies".

[12] Although s 53A(1)(a) directs the court to fix a non parole period of 20 years, power is given to fix a non-parole period that is shorter than 20 years. The court may only fix a shorter period if satisfied that "exceptional circumstances" exist which "justify" fixing a shorter period. Subsection (7) prescribes the circumstances that are capable of amounting to exceptional circumstances for the purposes of the legislation and directs that the court "must not have regard to any other matters".

[13] As mentioned, if the circumstances in s 53A(3) apply, the court is directed to fix a non-parole period of at least 25 years. Those circumstances include sentencing for two or more crimes of murder or manslaughter. When the circumstances require the fixing of a non-parole of 25 years, there is no provision authorising the court to impose a non-parole period that is less than 25 years.

[14] Section 53A(4) empowers the court to fix a non-parole period that is longer than either 20 or 25 years:

> "if satisfied that, because of any objective or subjective factors affecting the relative seriousness of the offence, a longer non-parole period is warranted."

[15] The court may also refuse to fix a non-parole period. Section 53A(5) provides that the court may refuse to fix a period:

> "if satisfied the level of culpability in the commission of the offence is so extreme the community interest in retribution, punishment, protection and deterrence can only be met if the offender is imprisoned for the term of his or her natural life without the possibility of release on parole."

Transitional Provisions

[16] It is against the background of the previous legislation and the change in the sentencing regime that the transitional provisions applicable to the application before me must be considered. The relevant provisions for present purposes are as follows:

> "**PART 5 – TRANSITIONAL PROVISIONS**

Division 1 – Prisoners currently serving life imprisonment for murder

17. **Application of Division**

This Division applies in relation to a prisoner who, at the commencement of this Act, is serving a sentence of imprisonment for life for the crime of murder.

18. **Sentence includes non-parole period**

Subject to this Division –

(a) the prisoner's sentence is taken to include a non-parole period of 20 years; or

(b) if the prisoner is serving sentences for 2 or more convictions for murder – each of the prisoner's sentences is taken to include a non-parole period of 25 years,

commencing on the date on which the sentence commenced.

19. **DPP may apply for longer or no non-parole period**

(1) The Supreme Court may, on the application of the Director of Public Prosecutions –

(a) revoke the non-parole period fixed by section 18 in respect of the prisoner and do one of the following:

(i) fix a longer non-parole period in accordance with subsection (3) or (4);

(ii) refuse to fix a non-parole period in accordance with subsection (5); or

(b) dismiss the application.

(2) The Director of Public Prosecutions must make the application –

(a) not earlier than 12 months before the first 20 years of the prisoner's sentence is due to expire; or

(b) if, at the commencement of this Act, that period has expired – within 6 months after that commencement.

(3) Subject to subsections (4) and (5), the Supreme Court must fix a non-parole period of 25 years if any of the following circumstances apply in relation to the crime of murder for which the prisoner is imprisoned:

(a) the victim's occupation was police officer, emergency services worker, correctional services officer, judicial officer, health professional, teacher, community worker or other occupation involving the performance of a public function or the provision of a community service and the act or omission that caused the victim's death occurred while the victim was carrying out the duties of his or her occupation or for a reason otherwise connected with his or her occupation;

(b) the act or omission that caused the victim's death was part of a course of conduct by the prisoner that included conduct, either before or after the victim's death, that would have constituted a sexual offence against the victim;

(c) the victim was under 18 years of age at the time of the act or omission that caused the victim's death;

(d) at the time the prisoner was convicted of the offence, the prisoner had one or more previous convictions for the crime of murder or manslaughter.

(4) The Supreme Court may fix a non-parole period that is longer than a non-parole period referred to in section 18 or subsection (3) if satisfied that, because of any objective or subjective factors affecting the relative seriousness of the offence, a longer non-parole period is warranted.

(5) The Supreme Court may refuse to fix a non-parole period if satisfied the level of culpability in the commission of the offence is so extreme the community interest in retribution, punishment, protection and deterrence can only be met if the offender is imprisoned for the term of his or her natural life without the possibility of release on parole.

20. **Appeals**

(1) For Part X of the Criminal Code, a decision of the Supreme Court under section 19(1)(a)(i) or (ii) fixing or refusing to fix a non-parole period is taken to be a sentence passed by the Court.

(2) The Director of Public Prosecutions may appeal to the Court of Criminal Appeal under Part X of the Criminal Code against a decision of the Supreme Court under section 19(1)(b) dismissing an application as if the decision were a sentence passed by the Court fixing a non-parole period of 20 or 25 years (as the case may be).

(3) On an appeal under subsection (2), the Court of Criminal Appeal may confirm the decision of the Supreme Court or substitute another decision that would have been available to the Supreme Court.

21. **Effect of decisions**

(1) The failure of the Supreme Court to comply with section 19(3), (4) or (5) when fixing or refusing to fix a non-parole period does not invalidate the prisoner's sentence.

(2) For section 5 of the *Parole of Prisoners Act*, a non-parole period fixed by or under this section is taken to be a non-parole period fixed in pursuance of the *Sentencing Act*."

[17] The effect of the transitional provisions is to direct that all sentences of life imprisonment for the crime of murder which were being served at the commencement of the Act are taken to include a non-parole period. Section 18(b) provides that if the prisoner was serving sentences of life imprisonment for two or more convictions for murder, each of those sentences is taken to include a non-parole period of 25 years. All other life sentences for murder are taken to include a non-parole period of 20 years (s 18(a)). The non-parole periods fixed by s 18 are taken to have commenced on the date on which the sentence of life imprisonment commenced.

[18] The periods of 20 and 25 years fixed by s 18 of the Act correspond with the periods that s 53A of the Sentencing Act directs be fixed in respect of sentences imposed after the commencement of the Act. However, unlike the direction found in s 53A(2), there is no direction in the transitional provisions that the non-parole period of 20 years is a "standard" period which represents a period for an offence "in the middle range of objective seriousness".

[19] Section 19 of the Act provides that on application by the Director, the court may revoke the non-parole period fixed by s 18 and either fix a longer non-parole period or refuse to fix a non-parole period. There is no power to fix a non-parole period less than the period fixed by s 18.

[20] A prisoner serving a sentence of life imprisonment at the time that the Act commenced is not able to make any application in respect of a non-parole period fixed by s 18. Unlike the prisoner who is sentenced after the commencement of the Act, therefore, the prisoner already serving a sentence has no prospect of receiving a non-parole period of less than 20 years. The minimum period fixed by s 18 is 20 years and such a prisoner is unable to make any application in respect of that period.

[21] On an application by the Director in respect of a non-parole period of 20 years fixed by s 18 of the Act, if any of the circumstances set out in s 19(3) of the Act apply in relation to the crime of murder for which the prisoner was sentenced, the court must fix a non-parole period of at least 25 years. Those circumstances are identical to the circumstances now found in s 53A(3) of the Sentencing Act which, if they exist in respect of a crime of murder for which sentence is imposed after the commencement of the Act, require the court to fix a non-parole period of at least 25 years.

[22] On an application by the Director, pursuant to s 19(4) of the Act the court may fix a non-parole period longer than the periods of 20 or 25 years:

> "if satisfied that, because of any objective or subjective factors affecting the relative seriousness of the offence, a longer non-parole period is warranted".

[23] This is the same test as that to be applied when determining whether to impose a longer non-parole period than 20 or 25 years in respect of sentences imposed after the commencement of the Act (s 53A(4)). The attention of the court is drawn to the "relative seriousness of the offence" as determined by reference to any "objective or subjective factors" affecting that relative seriousness. The court is required, therefore, to consider the objective circumstances of the offending together with any matters personal or subjective to the offender which affect the gravity of the offending. Having assessed those matters the court must determine whether, by reason of those matters, a longer non-parole period is "warranted".

[24] As to the power to refuse to fix a non-parole period on an application by the Director, pursuant to s 19(5) of the Act the Legislature has set for the court a different test to be applied from that by which the court decides whether to impose a longer non-parole period. Section 19(5) provides that the court may refuse to fix a period:

> "if satisfied the level of culpability in the commission of the crime is so extreme the community interest in retribution, punishment, protection and deterrence can only be met if the offender is imprisoned for the term of his or her natural life without the possibility of release on parole".

[25] The terms of s 19(5) are identical to s 53A(5) of the Sentencing Act which empowers a court to refuse to fix a non-parole period in respect of sentences

of life imprisonment imposed after the commencement of the Act. These provisions focus on the "level of culpability in the commission of the crime". The court is directed to determine whether that level of culpability is "so extreme" that the specified community interests can only be met if the offender is imprisoned for life without the possibility of release on parole. The meaning of "culpability" in this context is discussed later in these reasons.

[26] The net effect of the transitional provisions is to create a degree of equality between those who were serving sentences before the commencement of the Act and those who are sentenced after that commencement. In substance, a minimum non-parole period of either 20 or 25 years is automatically applied to prisoners whether sentenced before or after the commencement of the Act unless the court orders otherwise. A significant difference is that those sentenced after the commencement of the Act have the opportunity of attempting to persuade the sentencing court to fix a period shorter than the "standard" period of 20 years by establishing the existence of specified "exceptional circumstances". Those sentenced before the Act commenced are deprived of that opportunity.

Sentencing Principles

[27] Although the respondent has previously been sentenced, on an application by the Director pursuant to s 19 of the Act, essentially the court is required to undertake a sentencing exercise. Unless excluded by the Act, the well settled principles and the provisions of the Sentencing Act governing the

exercise of the sentencing discretion apply. These include the principles enunciated by the High Court in *The Queen v Olbrich* (1999) 199 CLR 270. The Court may take into account facts adverse to the interests of the respondent only if those facts are agreed or have been proved beyond reasonable doubt. If the respondent seeks to establish facts in mitigation, the respondent bears the burden of establishing those facts on the balance of probabilities.

[28] Those sentencing principles must be applied when considering the objective or subjective factors affecting the relative seriousness of the offence as required by s 19(4) of the Act. Similarly, when addressing s 19(5), the usual principles will apply to the determination of the facts relevant to an assessment of the level of culpability of the respondent in the commission of the offence and to the determination of the underlying facts such as the likelihood of re-offending and the progress or otherwise towards rehabilitation.

Burden of Proof

[29] Counsel for the respondent submitted that in addition to making the determinations of fact to which I have referred, the court is required to be satisfied "beyond reasonable doubt" that a longer non-parole period is warranted (s 19(4)) or to be satisfied "beyond reasonable doubt" that the level of culpability is so extreme that the specified community interests can only be met if the offender is imprisoned for life without the possibility of release on parole.

[30] As this is an application by the Director, and as it is an application adverse to the interests of the respondent, speaking generally it is appropriate to identify the burden of making out a case for such orders as resting upon the Director. However, the critical question is whether the legislature intended that the ultimate judgment be attended by satisfaction to a particular degree.

[31] It is not unusual for a court to be empowered to take a particular course "if satisfied" that the course is appropriate or desirable. For example, s 40(1) of the Sentencing Act provides that a court which sentences an offender to a term of imprisonment for not more than five years may make an order suspending the sentence "where it is satisfied that it is desirable to do so in the circumstances". I am not aware of any authority or principle which would require the court to be satisfied according to a particular standard of proof that it is desirable to suspend the sentence. Either the court is satisfied that it is desirable to do so or it is not. A judgment of this type is not usually regarded as susceptible to analysis by way of degrees of satisfaction.

[32] In the context of the offence of unlawful possession, a similar question was considered by Cox J, and subsequently the South Australian Court of Appeal, in *Tepper v Kelly* (1987) 45 SASR 340 and (1988) 47 SASR 271. Upon a charge of having possession of property which at the time of the possession was reasonably suspected of having been stolen or obtained by unlawful means, a Magistrate held it was incumbent upon the prosecution to prove beyond reasonable doubt that the suspicion held by a police officer

was reasonably based. Cox J and the Court of Appeal both held that while the factual elements of possession and existence of suspicion had to be established beyond reasonable doubt, it was not appropriate to speak of the reasonableness of the suspicion being established beyond reasonable doubt. Cox J said (343):

> "It is for the court to form a judgment as to whether any suspicion, duly proved, should be properly characterised as a reasonable suspicion. Unless the complainant satisfies the court that the suspicion was reasonable the charge will not have been made out, so in that sense it is apt to speak of the complainant carrying the burden of satisfying the court of the reasonableness of the suspicion. But the court's judgment or opinion in that respect, as distinct from the proof of the underlying grounds or reasons, cannot be graded by reference to the standards of proof applicable in different jurisdictions to contested facts. A suspicion is either reasonable or not reasonable. To contrast (as the learned Magistrate did here) a suspicion that is reasonable on the balance of probabilities and a suspicion that is reasonable beyond reasonable doubt is to misconceive the requirements of the section."

[33] The Court of Appeal agreed with Cox J. White J said (273):

> "It is incongruous, even tautologous, in my opinion, to speak of "proof" beyond reasonable doubt of the reasonableness of a suspicion because reasonableness is a matter of opinion or judgment, not proof."

[34] In my opinion, in the context of judgments made by a court as to whether it is satisfied that a particular sentence or course is appropriate, it is inappropriate to attach a standard of satisfaction to the decision. The court is either satisfied that a particular course or sentence is appropriate or it is not. These are matters of judgment based upon facts proven to requisite standards. I am unable to discern any intention on the part of the

Legislature to impose a requirement that the court be satisfied to a particular standard before the orders authorised by s 19(4) and (5) can be made.

[35] Pursuant to s 19(4) of the Act, applying the requisite standards of proof the court must first determine the objective or subjective factors affecting the relevant seriousness of the offence. Having made those determinations, it is then for the court to form a judgment as to whether, by reason of those factors, it is satisfied that a longer non-parole period is warranted. That ultimate judgment is not circumscribed by reference to a particular standard of satisfaction.

[36] Pursuant to s 19(5) of the Act the court must determine the level of culpability in the commission of the offence. That determination is made by reference to facts which are proved to the requisite standards of proof. In addition, as the court is required to assess the community interest in protection and deterrence, the court is necessarily required to make a determination of matters such as the likelihood that the prisoner will offend again. A determination as to the likelihood that a prisoner will offend again upon release from prison is a fact which must be determined according to settled principles of sentencing and the requisite standards of proof.

[37] For the purposes of s19(5), having made the determinations of fact to which I have referred, the court is then required to make a judgment as to whether it is satisfied that the level of culpability is so extreme that the community interest in the identified factors can only be met if the prisoner is

imprisoned for life without possibility of release on parole. That ultimate judgment is not circumscribed by any requirement of satisfaction to a particular degree. Either the court is satisfied that the level of culpability is so extreme that the relevant community interests can only be met if the prisoner is imprisoned without the possibility of release on parole or it is not.

Future Probabilities - Facts

[38] I have indicated my view that the question of the likelihood that a prisoner will re-offend if released is a question of fact to be determined by the sentencing Judge. My attention was drawn to a number of New South Wales authorities concerning this question. It appears there may be a difference of opinion in New South Wales as to whether future probabilities and possibilities are facts for the purposes of the exercise of the sentencing discretion.

[39] In *R v SLD* [2003] NSWCCA 310, the New South Wales Court of Criminal Appeal was concerned with an appeal against sentence. The learned sentencing Judge had found that the offender posed "a significant level of future dangerousness" and that the offender was at substantial risk of re-offending in both violent and sexual ways. It was said on appeal that the finding could not be supported by the evidence to the requisite criminal standard of proof.

[40] In the course of a judgment with which Sully and Buddin JJ agreed, Handley JA referred to a submission, based on *Olbrich*, that findings by a sentencing Judge as to the future that are adverse to the offender can only be properly made to the criminal standard of proof. As to that submission, his Honour said [17]:

> "However that decision [*Olbrich*] was, in terms, limited to "facts", and future probabilities or possibilities are not "facts" in any meaningful sense."

[41] That statement met with the approval of Grove J, with whom Sully and Bell JJ agreed, in *R v McNamara* [2004] NSWCCA 42 at [25]. His Honour referred to remarks of Kirby ACJ in *R v Barton* (unreported, NSWCCA 28 July 1995) in which Kirby ACJ said:

> "Proof of matters relevant to deterrence are factors which may aggravate the seriousness of the case. The onus of establishing the nature of the deterrence alleged and the level of any propensity lies on the prosecution. It must establish contested matters to the criminal standard of proof."

[42] Grove J also cited the remarks of Mason P, with whom Wood CJ at CL and Sperling J agreed, in *R v Gieselmann* (unreported, NSWCCA 13 July 1998) as follows:

> "In considering the significance of the evidence touching on whether the applicant would remain a danger to others in the future by reason of her mental disorder, and for how long in the future, the learned judge reminded himself that the Crown must prove this matter beyond reasonable doubt."

[43] Having referred to the observations of Handley JA in *SLD*, and to the cited remarks in *Barton* and *Gieselmann*, Grove J observed that he preferred the views expressed in *SLD* "to the contrary expressions in *Barton* and *Gieselmann*". With respect, I do not agree. In my opinion, in the context in which they were made, the remarks in *Barton* and *Gieselmann* accord with well settled principles of sentencing.

[44] In *SLD*, Handley JA referred to a number of High Court authorities that discussed the difficulty of making future predictions and, in that context, the role of the sentencing Judge. Included in those authorities were remarks by Jacobs J in *Veen v R [No 1]* (1979) 143 CLR 458 in which his Honour said (489)"

> "… the court itself must be satisfied that the prisoner has a mental disorder which *will* lead him to kill or seriously injure in the future before proceeding to sentence on that basis." (my emphasis)

[45] Handley JA then referred to judgments which avoided the requirement of certainty found in the passage in the judgment from Jacobs J. His Honour cited other authorities which emphasise that a sentencing Judge is not required to be satisfied beyond reasonable doubt that a prisoner will in fact re-offend in the future and that it is sufficient if a risk of re-offending is established by the Crown. Handley JA then observed [32]:

> "Thus a finding that a prisoner is likely to re-offend does not even require a finding that it is more probable than not that he will do so, let alone a finding that this has been established beyond reasonable doubt."

[46] With respect, there has never been any doubt that it is not necessary for the Judge to be satisfied that an offender **will** re-offend before taking into account a proven risk that an offender **might** or is **likely** to re-offend. Jacobs J in *Veen [No 1]* was not asserting otherwise. His Honour was stating, correctly in my respectful opinion, that if a court is to sentence on the basis that an offender has a mental disorder which **will** lead him to kill in the future, those facts must be proven. Jacobs J was not commenting upon proof of a different fact, namely, a risk that an offender might or is likely to kill in the future.

[47] None of the authorities to which reference has been made suggest that before a sentencing Judge can sentence upon the proven basis that a person poses a risk of re-offending in the future, the Judge must be satisfied that the offender will re-offend in the future. Two different facts are involved. One is a finding that an offender will re-offend. The other is not a finding that the offender will re-offend. It is a finding that an offender poses a particular risk of re-offending. It is a matter for the Judge whether the Judge is satisfied that there is a risk of re-offending and, if so, whether the Judge is satisfied as to a particular degree or nature of the risk.

[48] Viewed in this way, a determination as to the degree or nature of the risk of re-offending in the future is a determination of fact which is governed by the settled principles of sentencing, including those laid down by the High Court in O*lbrich*. The difficulties that exist in proving future facts do not alter or undermine the fundamental principles concerning proof of facts in

sentencing. If the Crown is unable to prove an assertion as to a degree of risk of offending in the future, then the court is obliged to sentence without the benefit of a fact relevant to the exercise of the sentencing discretion. As was pointed out in *Olbrich* and confirmed in the majority judgment of Gleeson CJ, McHugh, Gummow and Hayne JJ in *Weininger v The Queen* (2003) 212 CLR 629 at [19] – [24], not all relevant facts can always be established and not all relevant facts can always be classified as aggravating or mitigating.

Maximum Penalty – Worst Category

[49] In the course of his submissions, counsel for the respondent developed a proposition that the power in s 19(5) of the Act to refuse to fix a non-parole period is intended to be used only in the "worst of the worst category" of cases of murder. This proposition was essentially based upon a comparison between the New South Wales and Northern Territory legislation.

[50] Speaking generally, it is a well settled principle of sentencing that the maximum penalty prescribed for an offence should be imposed only for those cases falling within the worse category of cases for that type of offence. It is not to the point that worse cases of the particular type of crime have been committed or can be imagined. If the offending falls within the worst category of the particular type of offending, the maximum sentence may legitimately be imposed: *R v Tait and Bartley* (1979) 24 ALR 473; *Veen v the Queen [No 2]* (1988) 164 CLR 465 at 476.

[51] Counsel for the respondent drew attention to provisions in New South Wales which require that a sentence of life imprisonment, which carries with it the prospect of never being released, be imposed 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 similarity of the wording of the New South Wales provision to the wording in s 19(5) of the Act is immediately apparent. It should be noted, however, that if the court in New South Wales is satisfied of the existence of the relevant criteria, it is required to impose the life sentence whereas s 19(5) provides that in those circumstances the court "may" refuse to fix a non-parole period.

[52] Counsel submitted that the cases in New South Wales in which life imprisonment, without the prospect of any release on parole, have been imposed involved circumstances significantly more aggravated than those of the respondent's crimes. Further, he contended that the difference between the New South Wales and Northern Territory provisions means that the test for refusing to fix a non-parole period in the Northern Territory is a more stringent test than the one to be applied in New South Wales. In substance, counsel argued that the power in s 19(5) of the Act to refuse to fix a non-parole period was intended to be used only in the "worst of the worst category" of cases.

[53] In my opinion, there is no warrant in the legislation or general sentencing principles to introduce the notion of "the worst of the worst category" into s 19(5) of the Act. The fact that the court retains a discretion pursuant to s 19(5) as opposed to the direction contained in the New South Wales provision does not reflect an intention on the part of the Legislature in the Northern Territory that the court should only refuse to fix a non-parole period if the case can be described as the "worst of the worst" category of murder.

[54] Unlike s 19(4) of the Act which directs attention to the relative seriousness of the offence, s 19(5) requires the court to consider the level of culpability in the commission of the crime. There is no specific Legislative direction that the power to refuse to fix a non-parole period can only be exercised in respect of crimes that are properly characterised as within the worst category of cases.

[55] As I have said, it is a well accepted principle of sentencing that the maximum penalty for a particular crime is reserved for those cases falling within the most serious category of cases of that type. The Legislature cannot have intended that the court should impose the dreadful penalty of refusing to fix a non-parole period in other than the worst cases. I agree with the observations of Wood CJ at CL in *R v Penisini* [2003] NSWSC 892 at [82] that the sentence which carries with it the prospect of never being released is reserved for the worst cases of murder and for those which answer the requirements of the relevant legislative provision. Although his

Honour was referring to a sentence of life imprisonment, the observations and the reasoning that led to those observations are equally applicable to an order refusing to fix a non-parole period in respect of a sentence of life imprisonment.

Culpability

[56] I turn the issue of the "level of culpability" as that expression is used in the sections which empower the court to refuse to fix a non-parole period. These sections, s 53A(5) of the Sentencing Act and s 19(5) of the Act, are to be construed in the context of the history of the legislation, the change in the sentencing regime, the provisions of the Acts in their entirety and the principles to which I have referred.

[57] As I have said, the test to be applied in determining whether to decline to fix a non-parole period is different from the test applicable in determining whether to fix a non-parole period longer than 20 or 25 years. In the latter situation, the court is required to consider the "objective or subjective factors affecting the relative seriousness of the offence". By way of contrast, in determining whether to refuse to fix a non-parole period, the court is not specifically directed to have regard to the seriousness of the offence nor to objective or subjective factors which affect that seriousness. The first step for the court is to determine the "level of culpability in the commission of the offence".

[58] There is a ready explanation for the distinction. The Legislature has recognised that a court will only contemplate declining to fix a non-parole period in those cases falling within the most serious category of cases of murder. The other sections are directed to determining whether to fix a non-parole period longer than 20 or 25 years are not necessarily concerned only with cases in the worst category. Hence in those sections the court is directed to an examination of the objective or subjective factors affecting the relative seriousness of the offence.

[59] The meaning of "culpability" was considered in 1985 by the New South Wales Court of Criminal Appeal in *R v Bell* (1985) 2 NSWLR 466. The Court was concerned with the provisions of the New South Wales Crimes Act which then specified that a sentence of life imprisonment was to be imposed for the crime of murder unless it appeared to the sentencing Judge that the offender's "culpability for the crime is significantly diminished by mitigating circumstances".

[60] In separate decisions which have subsequently been followed, Samuels and Lee JJ concluded that "culpability" meant "blameworthiness". Their Honours were of the view that for the mitigating circumstances to be regarded as significantly diminishing the offender's culpability, those circumstances had to be causally connected with the commission of the crime. Circumstances arising after the commission of the crime and usually relevant to the question of sentence, such as the offender's plea of guilty, remorse or assistance to the authorities, could not be taken into account

because they did not bear upon the question of culpability for the crime. On the other hand, an offender's mental state having an actual connection with the crime, while subjective to the offender, was considered relevant to the question of culpability.

[61] The New South Wales legislation was subsequently amended to provide that the court is required to impose a sentence of imprisonment for life for the crime of murder if satisfied "that the level of community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence." A sentence of life imprisonment under the New South Wales provisions is a sentence for the term of the natural life without the prospect of release on parole. In other words, at the time of the introduction of the new regime in the Northern Territory, the New South Wales provisions were in operation and the Northern Territory Legislature chose to enact provisions in almost identical terms which have the same effect as the New South Wales provisions.

[62] The relevant New South Wales provisions were considered in a number of authorities prior to the introduction of the new regime in the Northern Territory. In *R v Harris* (2000) 50 NSWLR 409 the New South Wales Court of Criminal Appeal considered the relevant provisions and the interpretation of the expression "level of culpability in the commission of the offence". In a very helpful judgment with which Giles JA and James J agreed, Wood CJ at CL approved of the principles enunciated in *Bell* in the following terms [60]:

> "Having regard to the terms of s 61 of the Procedure Act, and having regard also to the interpretation that had been given to the expression "culpability for the crime" (used in the proviso) in *Bell* (1985) 2 NSWLR 466, Bell J concluded, correctly in my view, that the assessment of the culpability of the prisoner, that was required, had to be directed "to the circumstances surrounding or causally connected with the offence", leaving aside matters such as remorse, pleas of guilty, prospects of rehabilitation and the like. In substance, this required attention to be given to the "blameworthiness" of the person standing for sentence, although that did not preclude consideration being given, for example, to the extent to which "the deprived life and upbringing of the accused" may have contributed to the commission of the offence."

[63] I respectfully agree with the views expressed by Wood CJ at CL. In assessing a level of culpability in the commission of the offence for the purposes of determining whether to refuse to fix a non-parole period, this Court is required to assess the blameworthiness of the offender in the commission of a murder that properly falls within the worst category of types of murder. The Court must have regard to "the circumstances surrounding or causally connected" with the crime.

Relative Seriousness of the Offence

[64] As I have said, in determining whether to fix a longer non-parole period than 20 or 25 years, the court is required to determine whether, because of any objective or subjective factors affecting the relative seriousness of the crime, a longer non-parole period is warranted. In this context it is only those factors which affect the relative seriousness of the crime to which the court is directed to have regard. A distinction must be drawn between those factors and subjective factors which, although not relevant to the seriousness of the crime, are capable of mitigating the sentence to be imposed: *R v Way*

[2004] NSWCCA 131 at [84] – [99]. For example, an offender's plea of guilty and cooperation with the authorities are significant features tending to mitigate the penalty to be imposed, but they do not affect the relative seriousness of the crime.

Material to be considered

[65] A question arose as to whether, on an application by the Director in respect of a non-parole period fixed by s 18 of the Act, the court is entitled to have regard to facts arising subsequent to the imposition of sentence. For example, can the court have regard to the response of a prisoner to incarceration and any progress or otherwise made by way of rehabilitation?

[66] The Director submitted that the application should be determined by reference to the circumstances existing at about the time of the offending and without regard to matters arising since the respondent was imprisoned. On the other hand, counsel for the respondent submitted that the respondent is entitled to have the court take into account material relevant to his rehabilitation over the past 20 years as that material is highly relevant to all the issues to which the court must have regard, particularly the future protection of the public.

[67] There is nothing in the wording and context of the legislation which suggests a legislative intention to deprive the court of relevant material that has emerged since an offender was sentenced. Section 19(5) of the Act requires the court to consider not only the level of culpability in the

commission of the offence, but also the community interest in retribution, punishment, protection and deterrence. There is no reason why that community interest should not be assessed as at the time that the court makes the decision on the application by the Director. It is a community interest which may, for various reasons, have changed over the period during which the prisoner has been serving the life sentence. It would be illogical, and potentially misleading, to attempt to assess that community interest solely as it stood when sentence was imposed.

[68] There are powerful reasons why the Legislature would intend that the court receive all relevant information capable of bearing upon the assessments required of the court, including facts that have emerged during the period of incarceration. The decisions required of the court affect the liberty of prisoners. The court is empowered to fix very lengthy minimum periods and to make the decision to impose the dreadful punishment of life without parole which effectively deprives a prisoner of any prospect of release. The nature of the orders to be imposed and their impact upon the lives of prisoners dictate that in the absence of the clearest words to the contrary, the provisions should be interpreted as supporting a legislative intention that the court should have available to it all relevant and up to date information concerning the prisoner. There is no basis for the illogical conclusion that the Legislature intended to place the court in the artificial and potentially misleading position of ignoring relevant material that has emerged during many years of incarceration.

[69] In considering this issue, regard must also be had to the timing of applications by the Director as required by s 19(2) of the Act. If a period of 20 or 25 years fixed by s 18 expired before the commencement of the Act, s 19(2)(b) requires the Director to make the application within six months of the commencement of the Act. In other circumstances, s 19(2)(a) provides that the Director must make the application not earlier than twelve months before the first 20 years of the prisoner's sentence is due to expire. In substance, therefore, the Legislature has specifically precluded the Director from making an application before a prisoner has served at least 19 years.

[70] In my opinion, the obvious reason for imposing the requirement that an application by the Director be delayed for such a long time is to enable the court to be put in the best position possible to make the assessments required of it. Numerous authorities have emphasised the difficulties facing sentencing Judges required to impose lengthy sentences of imprisonment and lengthy non-parole periods when endeavouring to predict the likely response of an offender to imprisonment. For example, in *Bugmy v The Queen* (1990) 169 CLR 525, in a joint judgment, Dawson, Toohey and Gaudron JJ observed that a minimum term of 18 years and 6 months was of such a length as to render impossible accurate forecasts as to the risk of offending and the protection of the community (537). Experience has demonstrated that on occasions persons convicted of horrific crimes and who appear to be incapable of rehabilitation have, over a period of many years, responded favourably to incarceration. By precluding a Director's

application for such a long period the Legislature has endeavoured to minimise the difficulties associated with future predictions as to human behaviour in response to lengthy periods of imprisonment.

[71] For these reasons, on an application by the Director pursuant to s 19 of the Act, evidence of matters occurring or emerging since the imposition of sentence is admissible if relevant to the seriousness of the offence, to a prisoner's culpability in the commission of the crime or to an assessment of the community interest in retribution, punishment, protection and deterrence as at the date of the hearing of the Director's application. Primary amongst material that is likely to be relevant to the specified community interests will be evidence of the progress or otherwise of the prisoner towards rehabilitation which includes evidence reflecting upon the likelihood that an offender will, if released, re-offend.

Facts

[72] The crimes were committed on 20 June 1983. The respondent was born on 11 January 1959 and was aged 24 at the time he committed the crimes.

[73] The naked bodies of the two young women murdered by the respondent were found bound and gagged in an area of bush near Berry Springs. The younger of the two deceased, aged 15 years, had sustained a single stab wound to the chest which penetrated at least 16 centimetres into the deceased's body and pierced the deceased's heart. Death would have occurred very quickly.

[74] The elder deceased, aged 18 years, had sustained two stab wounds. A wound at the inner aspect of the left breast had entered the left chest cavity and transfixed the left lung causing the lung to collapse. As a consequence a considerable quantity of blood had accumulated within the left chest cavity. That wound penetrated to a depth of approximately 16 centimetres.

[75] The second wound was situated in the left flank a few inches above hip level and beneath the ribs. The wound had penetrated the abdominal cavity, but there was no damage to any organs within that cavity.

[76] The pathologist who examined the body of the elder deceased formed the opinion that the cause of death was due to shock as a consequence of blood loss and the collapsed lung. He said it was difficult to assess how long the deceased would have survived, but it would have been perhaps five to ten minutes and possibly longer.

[77] Details of the events leading to the deaths were given by the respondent to the police during a lengthy interview on 27 June 1983. He said he arrived at the Berry Springs Nature Reserve at approximately 1pm. He spent time at the middle pool soaking his feet in the water. He then proceeded towards the waterfall and sat at the bottom of a set of stairs in the area where the deceased were swimming. The respondent noticed the deceased.

[78] The respondent said that after about thirty minutes he moved to a grassed area where he lay resting his head upon his helmet. He then moved to a bench seat nearby where he again lay resting his head on his helmet. In this

position the respondent was watching the deceased who were approximately 20 feet away.

[79] At about 4 – 4.30pm the only people remaining in the immediate area were the respondent, "an old couple" and the deceased. The respondent told police that at this time he felt he was "no longer in control" of his actions. He returned to his motor bike and removed a fishing knife. At this time the old couple moved away. The respondent said he then returned to the bench seat where he remained for about a minute watching the deceased. Holding the knife and his helmet in his right hand, the respondent then approached the deceased and told them to come with him. The elder of the deceased asked "why" to which the respondent replied that if they did not go with him they would "die right here".

[80] The respondent said that under threat of the knife the respondent held the wrist of the younger deceased and led her away from the waterfall area. The elder deceased was compelled to follow. The respondent directed the deceased to a gully where he ordered them to be seated back to back on the ground. The respondent cut the clothing from the deceased and used the clothing to gag and tightly bind the younger of the deceased by her hands and feet.

[81] According to the respondent, the elder deceased grabbed for the knife. The respondent stabbed her in the side penetrating the abdominal wall and into the abdominal cavity. He described the stabbing as in the lower left hand

rib cage. The respondent left the knife embedded up to its hilt in the young woman's side. The deceased asked the respondent to remove the knife from her side and he did so. He then gagged the deceased and tightly bound her hands behind her back.

[82] The respondent then vaginally raped the elder deceased until he ejaculated. The learned sentencing Judge described the rape as "entirely pitiless and cruel". His Honour found the crime was "obviously premeditated" and said that he found it difficult to conceive of a more terrible crime.

[83] The respondent told police that the younger of the victims was making noises. Immediately following the rape of the elder deceased, the respondent grabbed the younger deceased and pulled her towards him. He then stabbed her in the chest with the fishing knife. This wound penetrated the younger deceased's heart and death followed very quickly.

[84] According to the respondent he then stabbed the elder deceased in the chest puncturing her left lung. While the elder deceased was still alive and curled up into a ball writhing on the ground, the respondent walked away.

[85] The respondent related that after leaving the scene of the murders, he went to a toilet block where he washed his hands and the knife. He returned to his motor bike and placed the knife under the seat. He then left the area on his motor bike and travelled to an old bombing range near Leanyer where he threw the knife and sheath to the side of the dirt track. The respondent

returned to his residence where he washed his clothes and shaved off his beard.

[86] That evening the respondent was visited by a pastor. He told the pastor that he had killed two people at Berry Springs that day.

[87] The following day the respondent had a haircut and was seen vigorously washing his motor bike outside his house. Following reports of suspicions by neighbours, police attended at the respondent's home six days after the murders. The respondent participated in the record of interview to which I have referred. It is unnecessary to canvas any more details of the interview than those set out earlier in these reasons. The interview makes chilling and disturbing reading. Subsequently the respondent participated in a video taped re-enactment of the events at Berry Springs and took police to the bombing range where both the knife and sheath were recovered.

[88] Immediately after the jury delivered their verdicts the Judge imposed the mandatory sentences of life imprisonment for the crimes of murder. His Honour did not hear submissions as to the circumstances of the crimes or matters personal to the respondent. Subsequently submissions were made and evidence was given relevant to the question of sentence for the crime of rape.

Matters Personal

[89] An antecedent report disclosed that the respondent completed third year high school in New Zealand and had no formal qualifications or trade. He had an

unhappy childhood during which he received frequent beatings. Following his last year of school he was required to leave home and lived in the back of a car for six months. He stole food and clothing.

[90] At the age of 16 the respondent met his wife who he married in 1979. At the time of sentence there were two children of the relationship aged five years and four weeks.

[91] The respondent and his wife hitchhiked to Darwin in August 1978. Unable to find work they commenced hitchhiking back to Melbourne. A car in which they were travelling was involved in an accident south of Mataranka. The respondent was seriously injured. Following a period of convalescence he travelled to Victoria for a short time and then back to the Northern Territory.

[92] In May 1979 the respondent's wife was pregnant with her first child. They were living at an inner city boarding house. While residing at the boarding house the respondent raped a female resident at knife point. He broke and entered the victim's bedroom by slipping the catch on the bedroom door with the aid of the knife. Upon his entry into the bedroom he placed his hand over the victim's mouth and held the knife about eight inches from her body. The knife was a large pocket knife measuring about seven inches in length. The respondent admitted to police that the victim had submitted to sexual intercourse because he had the knife in his hand.

[93] The learned sentencing Judge imposed a sentence of three years imprisonment for the offence of rape. For an offence of breaking and entering and committing the felony of rape in the dwelling house, his Honour imposed a sentence of 12 months imprisonment to be served concurrently with the sentence of three years. He fixed a non-parole period of two years. The operation of both sentences was suspended. On a Crown appeal ((1979) 1 A Crim R 320) the Full Court of the Federal Court allowed the appeal and ordered that the respondent be imprisoned on each count for a period of three years, the sentences to be served concurrently. A non-parole period of one year and six months was fixed.

[94] The respondent was released from prison in June 1982. He resumed his relationship with his wife and held a job for some months with a cleaning company. That employment was terminated in December 1982 and, apart from employment for a period of one week in March 1983, the respondent remained unemployed. His wife was in full time employment.

[95] The respondent told the author of the antecedent report that in his view he did not have a medical condition which might have attributed to his conduct. He told the author that he had always had a bad temper and that the accident may have exacerbated that condition.

[96] At the time of sentence for the previous crime of rape, the sentencing Judge had available psychiatric and psychological evidence suggesting that the respondent was a very immature young man with personality difficulties

centred around emotional lability and inappropriate reactions to stress. A psychiatrist concluded that the respondent did not show clinically any evidence of mental illness and that depressive moods experienced by the respondent were a reflection of his life–long personality disorder. The psychiatrist was of the opinion that a head injury sustained by the respondent had exacerbated the abnormal behaviour tendencies.

[97] The sentencing Judge concluded that the respondent had "quite a severe personality disorder of a depressive nature" and that it was unlikely the respondent would offend again in a similar manner.

[98] Following the convictions for murder with which I am concerned, the respondent was examined by three psychiatrists and head scans were carried out. In a report of 30 April 1984, Dr Gauvin reported that the most recent EEG demonstrated no abnormality. A CAT scan examination was within normal limits. The sentencing Judge concluded that it was "most unlikely" that the motor car accident had resulted in any effect upon the respondent's conduct or his propensity for violence which predated the accident.

[99] The respondent told Dr Gauvin that he had previously experienced uncontrollable bursts of violence directed mainly towards his wife. He had suffered severe tempers from the age of eight. The respondent told Dr Gauvin of an occasion on which he had thrown an axe at his brother. He spoke of an incident approximately one year later which Dr Gauvin considered was an important incident because the respondent described

feelings similar to the recent feelings associated with the murders. On the previous occasion the respondent had been involved in an argument with his sister and had cut her hand with a knife. The respondent described to Dr Gauvin that the cutting of his sister was "partially purposeful and yet it had some feelings of unreality associated with it." The respondent said he had recently undergone a similar experience "associated with high arousal in the crime that he committed."

[100] The respondent told Dr Gauvin that he felt that he was "watching himself" commit the crimes. He was uncertain about why he had committed the crimes or how they had come about. He told Dr Gauvin he was a violent person and had undergone similar experiences throughout his life.

[101] Dr Gauvin concluded that the characteristic of violence had been a constant pattern throughout the respondent's life. He considered that there was no organic condition that predisposed him to the violence. Dr Gauvin concluded that the respondent had "a severe sociopathic personality disorder of an aggressive type" and that the respondent's "higher intelligence tends to lead him to a more creative posture …".

[102] Dr Gauvin summarised the position as follows:

> "I consider that his main difficulty is that as mentioned of a personality disorder of a sociopathic nature with high levels of aggressiveness and impulsivity. I consider that he is highly dangerous and in particular, in this man there is no defence of insanity or mental retardation."

[103] Dr Milton, a psychiatrist from New South Wales, gave evidence. He examined the respondent on 9 May 1984. Part of his evidence was as follows:

> "If I can refer to the opinion section of my report, I noted that Mr Leach was responsible for the death of 2 girls in the way that must have caused extreme mental and physical suffering. Evidence for remorse or guilt was lacking. His description of his victims' death agonies was graphic, suggesting that they made an impression on him but only in a cold and uncaring fashion. He states that he does not remember the offence clearly but his record of interview and the transcript of the re-enactment indicate that there was memory for many details of the killings. He maintains that his thoughts were in confusion at the time, indicating that he could hardly have formed an intent as a result. However his memory of the events particularly of how the girls died suggest he was seeking some form of stimulation or pleasure by his actions and that an intent would therefore have been present. The complexity of his actions is consistent with an intent having been formed. I formed the opinion that he knew what he was doing and that he knew it was wrong. He did not approach the girls until everyone else had left the area. He took care to wash himself and his clothing after the event. I could not find evidence of abnormality of mind as far as that legal term can be adapted to the discipline of psychiatry. He shows features of an anti social personality and although this term is listed in text books of psychiatry it refers essentially to individuals who's actions are not bound by conscience. It refers to the features of a particularly undesirable personality type. It does not in my view refer to an abnormality of mind reducing the obligation of that person to act in a responsible manner."

[104] Dr Milton went on to describe the respondent in the following terms:

> "I see him as being self-centred, as not caring about others, as being able to commit acts which would horrify the ordinary person but which would not create feelings of much consequence in him. I see him as being unwilling to accept responsibility for his own actions, I see him as not being able to maintain much steadiness in jobs or relationships, as a person who wouldn't experience much guilt, sympathy for others, and as a person who would perhaps have a certain amount of cunning at surviving in a relationship with others."

[105] Significantly, Dr Milton expressed the following view:

> "There's one other factor that I'd like to mention that I think happens in this very very bad background, and I've seen it in a number of instances, that is that the person seems almost hungry for emotional experience which has not been able to be obtained in a normal fashion, and that the need for emotional experience is sometimes such that the person seeks very intense stimulation, perhaps at times of stress, perhaps without stress, but the person seeks very intense stimulation and this sometimes is obtained through actual physical violence. Somehow the obtaining of that causes relief of tension."

[106] Dr Milton classified the respondent's personality disorder as severe. As to the prognosis for the future, Dr Milton expressed the following opinion:

> "It's unfortunately very bad, both for change in his attitude or stability, and with respect to the commission of further offences."

[107] In addition to the material I have mentioned, the sentencing Judge also had available reports from a psychiatrist, Dr Bartholomew, who saw the respondent on two occasions soon after the murders. In a report of 31 July 1983, Dr Bartholomew reported as follows:

> "This case is of interest as, from the history given by the prisoner, one would confidentially make a diagnosis of "psychopathic personality (aggressive)". His behaviour has been "psychopathic" since early youth (on his story). He speaks of his nearly ungovernable temper, his helping his older brother selling drugs (he being the "enforcer" injuring those who did not pay), and his attitude toward his wife who separated from him for a period – I went into training to kill her."

[108] Dr Bartholomew referred to a report by Dr Lopes dated 3 October 1979 prepared in connection with the previous crime of rape. Dr Bartholomew commented on what he described as a "rather extraordinary sanguine note"

made by Dr Lopes that "there is still hope here". Dr Bartholomew observed that "if that was a true assessment, things have changed – I see little reason for "hope" at this time."

[109] Dr Bartholomew was very pessimistic about the future. Referring to the respondent's "born again" attitude, Dr Bartholomew expressed the view that it was "glib/self-serving". Dr Bartholomew's ultimate conclusion was:

> "I put my money at this time on "Gross Aggressive Psychopath".

[110] Dr Bartholomew saw the respondent again on 25 February 1984. He reported that there was no evidence of any mental illness or mental retardation. As to the presentation of the respondent, Dr Bartholomew reported as follows:

> "The prisoner presented extremely well, rather better than on the first occasion, and demonstrated some real insights which he expressed very well. He discussed with me his pending divorce and did this in a most balanced manner. He also discussed a future that is largely to be seen as existence in an institution – did this in terms of "living" verus "existence" and his attitude towards suicide. I do not consider him to be suicidal."

[111] The diagnosis by Dr Bartholomew was that of "personality disorder" which he noted was a diagnosis made by a psychologist, Mr Dawson, in August 1979.

[112] The sentencing Judge expressed the view that there were no prospects of rehabilitation. He found that the respondent was dangerous and stated that he did not believe that any sentence would operate as a personal deterrent to

the respondent. Against the background of those findings his Honour imposed a sentence of imprisonment for life for the crime of rape.

Different Versions

[113] When interviewed by police seven days after the murders, the respondent gave a detailed and articulate account of the murders and of the circumstances preceding and subsequent to the murders. The respondent first gave an account in his own words at some length following which he was questioned in detail. He gave short answers to the questions that were responsive to the questions.

[114] Against that background, I am required to consider two additional and different reasons given by the respondent in 1986 and in 2004 in connection with these proceedings. The different reasons relate to the respondent's movements and motivation to commit the crimes. Before turning to those versions it is necessary to set out in some detail the reason given by the respondent to police in 1983 as to his movements and motivation.

[115] In his lengthy account of events, to the police in 1983, the respondent spoke of looking for work until about 11.30am following which he returned to his home to eat. He said he then "decided to go for a run on the bike to Berry Springs". The respondent then gave details of the events leading to the murders to which I have referred which included his statement that he reached a point when he felt that he was no longer in control of his actions. According to the respondent it was at that point that he went to his motor

bike to obtain the fishing knife. At about the same time the old couple started to leave.

[116] During detailed questioning after the respondent had given his version, the respondent was asked his reasons for travelling to Berry Springs on the day of the murders. He responded:

> "Yes, simply to take the bike for a run."

[117] The respondent was asked when he first noticed the girls. He said he first saw them swimming at the falls while he was there. Asked if he was particularly watching the girls at the falls, the respondent answered "No". Asked if he had ever seen the girls before, the respondent again answered "No". When asked subsequently what drew his attention to the girls, he answered "Their laughter".

[118] The respondent was questioned about his statement that he felt he was no longer in control of his actions and as to what motivated him to obtain the knife. The relevant questions and answers were as follows:

> Q.82 You have mentioned that at about 4pm you became aware that you were no longer in control of your actions. Can you tell me what you mean by that.
>
> A. At about that time I felt that I had lost control of my faculties and that something other then my own will was in control of my actions, this thing I believe to be demonic.
>
> Q.83 Can you tell me what you understand by the term 'Demonic'.
>
> A. Of Satan.

Q.84 Can you tell me what this occurrence caused to happen.

A. The occurrence caused the death of two young girls.

Q.85 Can you tell me what you were doing at the time you first felt this thing.

A. Preparing to leave.

Q.86 Had you been watching the girls at this stage.

A. Not watching, I had taken the occasional look over that way.

Q.87 Can you tell me what linked this happening to your subsequent approach to the two girls.

A. I can't even begin to answer that question.

Q.88 Can you tell me what made you go over to the car park and get this knife from under the seat.

A. The only answer that I can come up with is 'Satan'."

[119] The respondent was asked about his intention when he first approached the girls with the knife. He replied "I don't know". Asked why he stabbed the girls, the respondent answered:

> "I do not remember through the course of this affair any conscious thought at all."

[120] As mentioned a psychiatrist, Dr Gauvin, provided a reported dated 30 April 1984. He saw the respondent at the Berrimah gaol on 26 April 1984. In substance the respondent gave a version to Dr Gauvin similar to the version he had given to the police approximately ten months earlier.

[121] The respondent told Dr Gauvin that during the week before the offence "he felt quite normal, having a good time and this marriage had been for six months, "better than ever"". The respondent said that on the day of the offence he had been looking for work and, at approximately 11am, he stopped looking for work "and went for a ride on his bike to Berry Springs, since his bike needed "a run"".

[122] In addition to the matters previously discussed in paras [99] and [100] of these reasons, the respondent told Dr Gauvin that after he had been lying down for quite some time thinking about a friend who was staying with him, he got up and felt that something was really "bugging" him. He explained to Dr Gauvin that he had felt like this before at various times in his life and he tended to associate this feeling with "going off his head". As mentioned, the respondent spoke of feeling in a similar way to the way he felt when he had cut his sister at the age of eight years.

[123] Dr Gauvin reported as follows:

> "He again reiterated that his strange behaviour dated back to the time when he lacerated his sister's hand. He said that he feels that there is purpose and that he is in control but on the other hand is not. He picked up his knife as mentioned, and went back to the girls."

[124] Dr Gauvin reported that the respondent stated he had never seen the girls before. As to why he committed the crimes, Dr Gauvin reported in the following terms:

> "He tended to be uncertain about why he had gone it or how it had come about. He realised that he was a violent person and had similar experiences throughout his life.
>
> …
>
> In exploring his violence it would seem that he saw himself as always impulsively violent and this was uncontrollable (he said that this well preceded his head injury)."

[125] In the opinion of Dr Gauvin the respondent presented as "an intelligent, insightful integrated person". According to Dr Gauvin:

> "During the interview he showed superficial concern about his activities and his behaviour and yet at the same time would smile in a somewhat cavalier manner when describing aspects of his behaviour of a violent nature."

[126] As to the subsequent reasons given by the respondent, the version was given in a letter from the respondent to his mother dated 10 May 1986 and the third version is found in the respondent's affidavit and evidence in these proceedings.

[127] The respondent agreed in evidence that he wrote the letter knowing that his mother had been seeking an explanation for the respondent's crimes. At the outset of the letter the respondent wrote briefly about the past relationship between him and his mother. He wrote that their only contact being my mail, they seemed to be more closely knit than they had been "since the day I discovered I had a mind and a life of my own to abuse". The respondent wrote that he was glad this closeness was occurring and continued in the following terms:

"For me our close contact brings with it a burden, one that must be answered. Till now I have been content to pass off my crimes as mindless, the product of an aberrant mind, a psychopath. It is true to say that the state of mind was an aberration and that in truth I have many psychopathic traits but the act was by no means mindless, in fact it was carefully planned and executed, a product of love though that love was of itself an aberration a hateful thing. The answer to the questions in your mind lay back in the past, back to my last prison sentence in fact. On a visit about a third of the way through my first 18 month sentence Gerry [the respondent's wife] was very upset and it took nearly all of our ½ hour visit to extract from her the reason why. As it turned out Gerry was walking to the bus stop after our visit of the week before then when a Prison Officer stopped his car and asked her if she and Tabatha, who was then only a baby, would appreciate a lift – it was an offer too good for Gerry to pass up as it was around 34 degrees Celsius and the wait for the bus for an hour and a half long. The prisoner officer took Gerry home alright and escorted her to our flat, no. 34 Kurringal Flats Fannie Bay, but once there he tried to rape her. His attempt was aborted by the arrival of two of our friends with their son who saw more than enough to satisfy the police the charge of attempted rape was justified. After hearing this I laid a complaint with the Superintendent of Berrimah Prison while Gerry, on my instructions, laid charges with the Darwin Police. It is my belief that the Super warned the prisoner officer involved who, we know, then fled the NT avoiding the police completely to this day. After this my marriage began to break down, oh we had our problems before then but were coping, and I developed a hatred for prison officers in general and six in particular the officer involved, the Super and four other officers who were close friends of the one who ran and proceeded from that time on to harass me till I was released and again afterward when I returned this time.

What, you ask, has this to do with my present crimes? Well the hatred I spoke off took on massive proportions till the need for revenge was imperative. I spent the twelve months of my release following the four officers involved till I found the one weak link I needed to strike back, the girls I killed were the Nieces of one of the men and highly thought of by the other three. I raped them as I believed these six men had raped the love Gerry and I had for one another and killed our marriage costing me my wife, my daughter, and my life as it stood then. As I said my crimes were a composite of three different facets: - an aberrant hatred of the men who ruined my life, my love for my family and a psychopathic need to kill, to cost them as they had cost me. Now you know the truth try not to

judge me to (sic) harshly, I was insane with jealousy and hatred but did not at that time know it.

Sorry to hear your back isn't any better and the City Council are ripping you off, when I come home I'll tend the lawns myself. I thought you have a right to know the truth! Till now no-one else does."

[128] The third version given by the respondent is contained in his affidavit of 28 January 2004 filed in connection with these proceedings. In the affidavit the respondent spoke of the incident involving his wife and the prisoner officer in terms similar to the description he gave in the letter to his mother. He said that he arranged to see the Superintendent of the prison, Mr Mercer, to make a complaint on behalf of his wife. According to the respondent, Mr Mercer was made aware of the respondent's wife's "concerns" and the respondent specifically requested that the officer in question not be permitted any opportunity for any form of contact with the respondent's wife before, during or after her weekly visits.

[129] The respondent said that the officer was not charged. In the respondent's words, the officer "quietly left his job and disappeared from sight". The respondent formed "the strongly held conviction" that the officer had been warned off before police could arrest or had been let off because of his position as a prison officer. The respondent's affidavit continued as follows:

"27. Since the car accident, I have been largely occupied with my internal struggle to cope with, what seemed to me to have become the nightmarish landscape of my own mind. Long since lost in a juvenile belief that I was slowly becoming

insane, I now gave up on that front. Instead, I began to learn to focus this inner turmoil in an effort to harness it for use in a bid for revenge.

28. Absolutely incensed at what I believed to be a perversion of natural justice, simply because Gerry was married to a prisoner, I began along the road toward giving myself permission to do what would otherwise be unthinkable.

29. When I saw Janice Carnegie and Charmaine Aviet on the day I killed them, I recognised them as associates of a prison officer I had known from my time in Berrimah. I had nothing against this particular prison officer. I had seen him once at the Casuarina Shopping Centre with Janice Carnegie and Charmaine Aviet. I was sitting in the food court and they walked past. Until I saw them by chance again on the day of my crimes, it had never occurred to me that I would ever see them again let alone hurt them."

[130] The third version was repeated by the respondent to a psychiatrist, Dr Walton, who examined the respondent on 20 September 2004 for the purposes of these proceedings.

[131] The respondent told Dr Walton of the incident involving his wife and the prison officer. As to what he was told by the respondent concerning the respondent's reaction, Dr Walton reported in the following terms:

> "Mr Leach stated that he was overcome by homicidal rage when he learned of this. The matter was not investigated because, according to Mr Leach, the prison officer "disappeared". He reports that he had an "ongoing gutful of hatred".
>
> …
>
> Once he was released into the community, Mr Leach stated "I was working on my marriage, my family life", he believed with some success. In particular, the sexual relationship was satisfactory and he was not in a state of sexual frustration."

[132] The respondent told Dr Walton that well prior to the killings, in "a casual encounter at the Casuarina Shopping Centre," he observed victims in the presence of a prison officer whom he recognised. He said he did not encounter the victims again until the day in question.

[133] The account given by the respondent of the events on the day in question leading to the murders was reported by Dr Walton in the following terms:

> "On the day in question, Mr Leach set out to look for work. He was unsuccessful in that regard and he can recall feeling "hot, tired, frustrated" and thus he made his way to the swimming hole and literally cooled his heels. He stated that he had taken this diversion specifically towards not returning home in an angry and frustrated frame of mind."
>
> Mr Leach stated "I can't explain how they became a target. I've spent 21 years thinking about it. They became victims. I did to them what I felt towards society.""

[134] The respondent was called to give evidence. In examination, he was asked about the very different account given in the letter to his mother. The evidence was as follows:

> "Q. In that letter you give a very different account of the circumstances of your offence than the account that you've given in your own affidavit material filed in these proceedings. What do you say about that, Mr Leach?
>
> A. Well, I mean you've got to remember this was two years after I'd been sentenced to three life sentences. It was the process of coming in to gaol, prisoners right across Australia and as far as I know throughout the world, had a tendency to put life sentence for prisoners up on some sort of a pedestal, other prisoners, and when you've gone in to it, certainly for a period of time. The letter itself reflects that in a large extent. It reflects also the fact that I was struggling for a lot of answers

that weren't very easily coming. There was a lot of exaggeration and a lot of false claims in there. I mean (inaudible) as I said, you buy into this whole prisoner culture thing and you begin to live it for a while. Some of us eventually step out of it, some of us don't.

Q. And are you able to say why, assuming that you did write this letter to your mother – I appreciate you say you can't actually remember writing it, but I gather that you're not saying you didn't write it. Assuming that you did write this letter to your mother, are you able to say why you made these statements to your mother back in 1986?

A. For what it's worth. Have to think. Goes a long way back. I mean at one point here I made my statements carefully planned and executed. Right now I mean, I'd been type-cast as a lowest animal, essentially and certainly the early part of my sentence, that's exactly how I was treated and pure reaction. I would have done anything, said anything to get rid of that label. To be honest I probably still would. The fact that maybe I've got to serve the rest of my life in gaol, perhaps. That's what we're here to find out and if I've got to do that, I would like to live it as much like a human being as I can. It was reactive, it was an exaggeration and it was a falsehood, but it also ties in with the prison culture."

[135] During cross-examination about the letter to his mother, the respondent said that it was not just his mother asking an explanation for his behaviour. He was living in an extremely stressful situation and there were a lot more factors at play. He said his statements in the letter that he had developed a hatred for prison officers in general and six in particular were exaggerations. Asked why he was exaggerating this in a letter of explanation to his mother, the respondent replied:

"Well, for a variety of reasons really. One is the environment I'm being in and you've got to remember I am living in it, I'm not divorced from it and the second, of course, is that if I want to use the

worse case scenario for me to a great degree she's depicted from the comments and rumours of other people."

[136] As to the statement in the letter that his hatred took on massive proportions until the need for revenge was imperative, the respondent said that statement was not true. He described it as a very early attempt on his part to deal with the psychology of what happened and to understand what motivated him.

[137] Asked again to explain why he had given a false story to his mother, the respondent said:

> "I was trying to – the environment that I'm in. Lifers come in they get sentenced they get put on a pedestal, that's a fact of prison. Most of us fall for it, we begin to live it and believe it ourselves. Andy Aubrey's a perfect case in point. The vast majority of us snap out of it. That's one factor. Another factor is the fact that – well, let's face it there was an extreme reaction within society. That spilled over to within the prison. There's also the fact that I'm sitting here trying to protect my mother whatever other people might say by presenting the worst possible case from me whatever anybody else said would not have been anything other than an improvement."

[138] Subsequently the respondent was asked to explain how writing to his mother by way of an explanation had any connection with him being put on a pedestal within the prison environment:

> "Q. Mr Leach, just one matter if I might. You've spoken I think twice this morning in answer to questions about being put on a pedestal and that you tend – you can come to live on that basis that you're on the pedestal?
>
> A. New prisoners do, yes.
>
> Q. But I think you did say that this was one of the factors that led you to write to your mother in these terms. Could you explain to me if you're able to now, how writing to your mother by

way of an explanation had any connection with you being put on a pedestal within the prison environment?

A. The best that I can probably come to explain is when you come in here literally, I'm sure you're aware of it as anybody else in the justice system is, there's a pecking order of sorts in prison, the more severe the crime the higher up the pecking order. It changes your outlook. It changes the way you think, it changes the way you react to people [in] that situation. It certainly did with me and it certainly has with many of the people that have come in. Mr Wild sort of sits there and talks about lies and in cases that is true. It doesn't preclude the possibility of personally believing the lies at the time. You begin to live a lie."

[139] The respondent was also cross-examined about his motivation. He agreed that he told Dr Walton that he had "an ongoing gutful of hatred". Asked whether that was a true statement to Dr Walton, the respondent replied "subjectively, yes". Asked what he meant by that, the respondent replied:

> "Well, I mean I'm trying to think back over a 21 year period and remember everything that happened at a time where a state – there was a hell of a lot going in. So I mean subjectively, that's the way I remember it."

[140] The respondent then gave the following evidence about his statement to Dr Walton as to why the young women became targets:

> "Q. All right, over the page at the top of page 6, at the second paragraph you say: 'I can't explain how they became a target. I've spent 21 years thinking about it, they became victims. I did to them what I felt towards society.' Is that right?
>
> A. It's the best that I could come up with, the best – it's – I'm still struggling to explain today and that is the closest as I've come.

Q. Was it because they were related in some way to a prison officer that you selected then (sic) as the victims?

A. Mr Walton also discussed with me the idea of displaced anger which would allow a positive answer to that question. However, consciously, no, that is not correct.

Q. Mr Leach, I'm not looking for the right answer in these questions. I'm asking you to answer as honestly as you can, you understand that?

A. Well, the question you asked me is did I consciously select them and the answer to that is 'no'."

[141] The respondent was also cross-examined about his evidence that he reported the attempted rape of his wife by a prison officer to the Superintendent, Mr Mercer. He said he reported the substance of what his former wife had told him.

[142] As a consequence of the filing of the respondent's affidavit in these proceedings, the Director of Public Prosecutions obtained from the Northern Territory Correctional Services material from the respondent's official records. That material includes a letter from the respondent to the prison authorities dated 27 January 1980. The letter referred to the "unwanted advances" of a prison officer and his refusal to leave the respondent's home. In reports dated 26 January 1980 and 14 February 1980 by a Superintendent, Mr Mercer, reference is made to information circulating within the prison that a prison officer was having an intimate relationship with the respondent's wife. In the report of 14 February 1980 Mr Mercer stated as follows:

> "It is advised that Prisoner Leach reported to me at 4.15pm on 23 January, 1980, in my Office in the presence of A/C.P.O. Stiff and S.P.O. Birbeck, on behalf of his wife that a Prison Officer was paying attention to his wife Geraldine Leach at flat 134, Kurringal Flats, Fannie Bay.
>
> The substance of the complaint was entered in the Superintendent's Journal at that time, and I then and there when Leach had finished, instructed him not to discuss the matter with any other prisoners or persons."

[143] According to the records, the complaint was reported to an Acting Superintendent, Special Duties and, on 24 January 1980, the Acting Superintendent interviewed the respondent in the presence of Mr Mercer. It is reported that the respondent's wife was interviewed.

[144] Mr Mercer recorded in his report that he subsequently discussed with the respondent his belief that the respondent had been discussing the matter with other prisoners. The report records that Mr Mercer suggested to the respondent that he tell other persons that he was not alleging that the prison officer was sleeping with his wife, but that the prison officer was trying to develop a relationship.

[145] There is no mention in the material of a complaint that the prison officer attempted to rape the respondent's wife. During cross-examination the respondent acknowledged that he had read the material. He said it was incorrect to the extent that it suggested the complaint concerned an ongoing relationship between his wife and the prison officer, but correct to the extent that the complaint was received in that fashion by the general prison population.

[146] The respondent agreed he was very upset about the matter. He admitted that at times he has said he wanted to kill the prison officer. Asked if it was true that he wanted to kill him, the respondent replied that he was certainly angry enough to do so, but he suspected it was probably more of a verbal outburst. The respondent agreed that he harboured ill will towards that officer when he was released from prison. He denied that he followed the officer around or that he went looking for some way in which to revenge himself upon that officer.

[147] I refer to one further aspect of the evidence given by the respondent. At the time that the respondent was first cross-examined, the reports from Dr Bartholomew had not been provided to the respondent or the court. Subsequently the reports from Dr Bartholomew were tendered. The respondent was recalled for further cross-examination, specifically in connection with matters arising from the reports of Dr Bartholomew.

[148] Dr Bartholomew's report included the following passage:

> "His behaviour has been 'psychopathic' since his early youth (on his story). He speaks of his nearly ungovernable temper, his helping his older brother selling drugs (he being the 'enforcer' injuring those who did not pay'), and his attitude toward his wife who separated from him for a period – 'I went into training to kill her'."

[149] The respondent denied making those statements. He said Dr Bartholomew could not have obtained that information from him. He denied that the situation between him and his wife was one of anger. He said it was

strained. He agreed that in the time shortly after his accident he possessed a nearly ungovernable temper.

[150] The respondent denied that he had ever sold drugs or that he acted as his brother's enforcer. As to whether he exaggerated stories to Dr Bartholomew in order to improve his standing in gaol, the respondent replied:

> "I barely spoke to Dr Bartholomew at all. He asked a series of highly inflammatory questions, and as I understand it, he asked exactly the same questions of Andy Albury, who spat on him and walked out. I didn't spit on him. I just sat there and refused to answer most of his questions. Where he got his information from, I've no idea."

[151] Dr Gauvin also reported statements by the respondent concerning drug use. In his report of 30 April 1984, Dr Gauvin reported the following:

> "He stated that he had been involved in the drug scene through his brother's activity and he himself had taken heroin, speed, cannabis 'anything he could get his hands on'. He said he always paid for his habit by breaking and entering".

[152] Asked about statements in reports that he had given a history of having used hard drugs, the respondent said he had read those reports but that he had never used hard drugs. Asked if he could explain how the psychiatrist could report that he had given a history of using hard drugs, the respondent replied:

> "Totally I can't. I mean, my drug history for the record, marijuana and five sticks of LSD – lysergic acid trips, very early on in life. That's it. I don't even drink."

[153] The respondent said he did not recall telling any psychiatrists in the early or mid 80s that he had a history of hard drug use.

21 Years of Incarceration - Evidence

[154] The respondent has now been continuously in prison for a little over 21 years. Unlike those who examined the respondent in the mid 1980s and the sentencing Judge who were required to undertake the exceptionally difficult task of endeavouring to predict the likely response of the respondent to a lengthy period of incarceration, I have had the assistance of evidence concerning the behaviour of the respondent during the 21 years of incarceration. I have also had the assistance of expert medical evidence.

[155] In a report dated 20 September 2004 the Director of Correctional Services reported as follows:

> "**Institutional Behaviour:**
>
> Prisoner Leach is currently housed within the main prison Alice Springs Correctional Centre. He is employed in the Prison Laundry located in the Industries Section of the Institution where he carries out his work to a good standard according to his work supervisor.
>
> His supervisor also reports that he needs very little to nil supervision generally, although he does work within a secure environment. He holds a C1 Security rating.
>
> Since first incarcerated, Martin Leach has undertaken various courses through both Education and Programs Units including completion of an Associate Degree in Library Technology (undertaken through the Edith Cowan University of Western Australia via external studies). Others include personal computing, mathematics, Alcohol and Drug Assessment and Intervention, the Seasons Grief and Loss Program,

Brief Intervention / Alcohol Program and Men's Focus Group Program. Relevant reports are at Attachment A.

Records indicate he at times displays an arrogant and disrespectful behaviour level when having dealings with staff. There are reports noting threatening behaviour incidents where he has been dismissed from employment due to his attitude. One such incident led to Prison Misconduct charges being brought against him for attempting to intimidate a member of the Education staff. Reports also indicate he has had problems with other prisoners, at times resulting in physical altercations. In individual instances, Martin Leach has been the aggressor and a victim.

Leach received an additional three months term of imprisonment after being found guilty in the criminal courts in 1985 for an assault against an officer whilst housed at H.M. Goal (sic) and Labour Prison Alice Springs.

During the late 80's through early 90's, Leach establish (sic) a Toy making venture, working predominantly with wooden products, of which the finished articles such as Rocking Horses, Motor Cycles etc were donated to charity.

Corrections Medical Service reports that Martin Leach is currently being treated for Asthma and Arthritis. He has no other medical complaints at this time.

Copies of other relevant documentation are at Attachment B."

[156] The attachments to the Director's report demonstrate that, commencing in 1995, the respondent has undertaken and successfully completed studies in a large number of courses, including external studies. The respondent studied by correspondence to obtain an Associate Degree of Science.

[157] Additional material concerning the progress of the respondent over the years includes letters concerning the work performed by the respondent and his approach to his own education. In 1994 the Education Officer of the Darwin

Correctional Centre wrote to the TAFE Institute of the Northern Territory in the following terms:

> "As you see, he has little formal academic achievement recorded, but this does not reflect the true standard of his general education. Leach is an intelligent fellow who reads widely. He took over the library about three months ago and his impact upon it has been dramatic. His dedication to the work and the interest he has shown in library practice has been intense and this has been reflected in the high standard of cleanliness and order he has brought to the library. He has discovered library work as a possible career when he is eventually released, and the idea has become something of an emotional lifebuoy on the empty sea of his future.
>
> I have been assisting him with the Year Eleven English he has been working at through the Secondary Correspondence School and I have found him an articulate and logical thinker. He always achieves very high marks. I have no doubts about recommending him for the Library Aides Course and I am confident he will not only succeed but will prove an outstanding student. He tackles everything he does most meticulously and he is capable of sustaining motivation for an extended period."

[158] In 1996 the respondent wrote to Edith Cowan University in connection with difficulties related to completing his Associate Diploma of Applied Science (Library Technology). In that letter the respondent referred to projects on which he was working relating to the digitalising of National Office Skills Modules offered through the Education Centre.

[159] The respondent has continued to seek to use the skills he has acquired through his academic studies. He is currently involved in developing a database system for a Northern Territory community organisation. I have been provided with documentation related to that project. It is inappropriate to identify any further details and sufficient to observe that it is a significant

project which demonstrates that the respondent is putting his education to good use.

[160] A record of incidents involving the respondent demonstrates an occasional conflict with persons in authority which the respondent has explained in an affidavit dated 8 October 2004. The record also discloses occasional altercations with other prisoners which the respondent says were incidents of violence against him to which he declined to respond. In that context, the Medical Director of Northern Territory Prisons, Dr Wake, who in his role as Prison Medical Officer at both Darwin and Alice Springs prisons has known the respondent since 1993, reported on 19 October 2004 in the following terms:

> "Mr Leach's light body build, age being over 40, above average intelligence and Caucasian race all place him at increased risk of physical assault in Northern Territory prisons. Mr Leach has been seriously assaulted on a number of occasions during his current period of imprisonment. Since 1993 Mr Leach has uniformly been the victim in regard [to] these assaults. As far as I am aware he has done nothing to either warrant such assaults or to prolong the assaults once they have begun. On attendance at the medical clinic after such events, he appears philosophical that such things are part of prison life and actively seeks to reach compromise and understanding with the perpetrators. I do not believe that Mr Leach could be described as a violent man in the time and circumstance in which I have known him."

Psychological Assessment – 1999

[161] In 1999 the respondent was charged with threatening a female education coordinator. In the context of the respondent's offence history, the

coordinator perceived a risk by reason of the respondent's words, tone of expression and proximity to her.

[162] The psychologist who examined the respondent over a period of four days, reported the respondent's reaction to the education officer's perception of risk in the following terms:

> "Prisoner Leach said his intent was to express his feelings, particularly his long-standing frustration, at the time of this incident. He did not intend to make a threat as such."

[163] The psychologist reported the results of his assessment at some length. The following is a summary of the more significant features:

- The respondent dwells on past events in his life and attempts to manage the discomfort generated by those events through not expressing his emotions "and by organising his life in an inflexible and unyielding manner".

- The respondent "may particularly fear his own impulses and doubt his ability to control them – should his rigid efforts at self-control fail". The respondent perceives himself as an individual who "typically exhibits reasonable control over his impulses and behaviour".

- As to his perceptions, the respondent "is largely unaware of his drives and feelings – his motivations to act". The respondent's stronger motivations are unconscious, that is, not part of his controlled awareness.

- Although the respondent does not accept that he has an unconscious drive for emotional attachment with a woman, “he presents his strongest feelings as being for a female partner – someone to love and to love him – and for affirmation of his feeling of his own self-worth. His dominant drives are securing his personal safety and satisfaction of his creature comforts”.

- The respondent spends a great deal of time monitoring his environment for evidence that others are not trustworthy and may be trying to harm or discredit him. “He has learned to think of himself as a victim in almost every situation in which his own gratification is denied. This belief is not the product of conscious reflection, but is a habitual attitude and mind-set.” The respondent sees himself as a victim of the system.

- The respondent’s “interaction with others is problematic. Emotionally, he responds slowly to others. After expressing his emotions, he will most readily pick up on others’ negative responses – or attribute a negative response to them.”

- The lack of acceptance by the respondent that he has an unconscious drive for an emotional attachment with a woman “must be explored with him, if for no other reason than to make this drive conscious. Otherwise, the tenor of his interaction with women – when reflected back to him by them – will appear to him as hostile and argumentative.

Receiving such a response without the awareness of his action is likely to evoke a similar reaction on his part."

- The respondent "lives his life to a different set of social values to those of the average member of the community. He expresses high social disinhibition, along with high disinhibition with respect to interests, preferences and hostile acts. (He made the point that his reference group for disinhibition is the prisoner community, not the wider community – the wider community being the author's reference group). His disinhibition results indicate he lacks the self-monitoring to socially accepted standards of behaviour – the rules, mores, norms and conventions – that guide human interaction in society."

- The respondent possesses a "very high sense of guilt – that he is a bad person". He is "plagued by ruminative thoughts of worthlessness and personal failure".

- The respondent is a totally isolated individual who lacks any intellectual, spiritual, social or emotional support. His "intellectual satisfaction" appears to be derived through his study and his correspondence with "the system". "His spiritual requirement rests uneasily between his strong sense of guilt and his need for affirmation of intrinsic self-worth. His emotional needs – feelings for a female partner – will generate and engender problematic relationships with females with whom he has contact."

- Although the respondent says that he is critical of everybody, including himself, he is extremely critical of others “but not critical of his self”.

- The respondent has paranoid tendencies in that he perceives hostility being directed at him from others. However he has a low-average urge to act out hostility with below average physical aggression.

- The respondent’s “voluminous correspondence reflects the “prison culture” of defiance of authority. The correspondence “portrays a cognitive behavioural pattern that relieves him from the discomfort of responsibility. Thus being informed of the Rules, and having those Rules impartially and consistently applied, is of particular importance to him.”

- The respondent’s displays of anger are a tactic for concluding negotiations to his advantage when his diplomacy fails.”

Recent Psychiatric Assessment

[164] In addressing the question of the community interest in protection as it exists today, included in the material I am required to consider is the evidence concerning the respondent’s mental state at the time he committed the crimes to which I have referred and evidence as to his current mental state. I have already referred to the evidence of psychiatrists who examined the respondent in 1984 and to their conclusions as to his mental state at that time. In these proceedings, however, the respondent advanced evidence

through the psychiatrist, Dr Walton, upon which the respondent relies in challenging the views expressed by the psychiatrists in 1984.

[165] Dr Walton is an experienced forensic psychiatrist. As mentioned, he examined the respondent on 20 September 2004. Dr Walton has had access to a large volume of material concerning the circumstances of the crimes and including the reports of psychologists and psychiatrists who examined the respondent in 1979, 1984 and 1999. Dr Walton was also provided with material from the files of Correctional Services.

[166] In his report of 30 September 2004, Dr Walton noted that the two crimes of rape committed by the respondent, the second being committed against the elder deceased, are relevant to an assessment of the respondent's character and behaviour and of importance as to whether or not the respondent should ever be eligible for parole. Dr Walton reported as follows:

> "The earlier rape incident has commonalities with the later incident in that Mr Leach utilised a knife both as a threat and also to cut the victim's clothing. However, there would seem to be significant divergences. Prior to the first rape Mr Leach had consumed a considerable quantity of benzodiazepine medication and, in and of itself, this is likely to have rendered him quite markedly sedated, and he had also consumed some alcohol, he now being unable to recall the amount."

[167] Later in his report Dr Walton expressed the view that the first offence of rape "seems to have been driven principally by the seeking of sexual gratification, there being two incidents of sexual intercourse". Dr Walton noted that the second incident was markedly more aggressive in character

with the "sexualised element being a much more minor factor". He concluded"

> "I simply state that I believe it would be hazardous to draw strong comparisons between the two events in relation to the risk of offending in a similar fashion. The continuity between the two events, in my opinion, is tenuous."

[168] Dr Walton gave evidence. As to whether he attached any significance to the underlying commonality of the sexual aspect associated with the two sets of crimes, Dr Walton said he was reluctant to draw any hard and fast conclusions. He described his comment as "really a note of caution that it ought not to be automatically concluded that there was some sort of continuity between these two events wherein the explanation might lie in terms of some underlying mental disturbance." He added that he was introducing a caution against necessarily seeing the underlying commonality as evidence of an ongoing state of mind which might necessarily reflect a preparedness to engage in this type of behaviour in the future.

[169] Based on his examination of the respondent and the information given to him by the respondent, Dr Walton expressed his opinion of the respondent's motivation in the following terms:

> "I believe it is fair comment that in large part he remains perplexed and dissatisfied that he cannot fully articulate his motivation. He is able to explain that the ongoing frustration he was experiencing in the aftermath of the motor vehicle accident, with depressive and aggressive mood swings, likely was relevant, and he highlights the situation where he was incarcerated in relation to the first rape and then learned that a prison officer had attempted to rape his spouse as generating homicidal rage towards that individual. That situation remained unresolved in the sense that the prison officer simply

> disappeared from the scene. Mr Leach reports that in the aftermath of that, any deterring impact of incarceration was lost to him and he abandoned a belief in a just society. Once released to the community he struggled to find employment. In an effort to curb further expression of aggression towards his spouse generated by that particular frustration, he made his way to Berry Springs seeking relative tranquillity. There he observed the alleged victims, and while he did not know them, he did recognise them from the previous fleeting encounter. He does not seem to have made a conscious connection between the specific anger related to the prison officer who allegedly attempted to rape his spouse when Mr Leach was in custody, and the victims whom he had only seen previously in the presence of another prison officer, but, from a psychiatric perspective, that association very likely does have relevance to those particular victims being targeted. Thus the killings are very likely less random than is the first impression. It would appear there was a surge in his anger, he displacing his global frustration towards the particular victims, although he was inclined to regard this explanation as simplistic overall and a comprehensive understanding remains lost to him. His offending was opportunistic rather than simply impulsive or the result of carefully planned premeditation."

[170] Dr Walton questioned the labelling of the respondent as a psychopath (antisocial personality disorder) by those psychologists and psychiatrists who saw him around the time of his sentencing as a "problematic conclusion". Dr Walton was of the view that the respondent's prior criminal history, with the exception of the previous rape incident, is striking by its lack of serious offending. He expressed the view that the number of offences is much less than would usually be the case in persons attracting a label of antisocial personality disorder. Dr Walton's report continued:

> "Even if it is conceded that the label may properly apply to Mr Leach, it is well recognised that the condition may ameliorate, and, if anything, that does seem to be a discernible trend with Mr Leach, especially over the past decade. I suppose it could be argued that his having been continuously in a prison environment might tend to encourage conforming behaviour but, in my experience, persons with antisocial personalities continue to rebel

> against authority and there are ongoing offences, often of a quite serious nature, within a prison environment, and that situation does seem to be in some contrast with Mr Leach's conduct while incarcerated.
>
> In my opinion it cannot be safely concluded that Mr Leach exhibits an antisocial personality of immutable type implying a high risk of reoffending, where continuing incarceration might thus be justified to protect the community."

[171] Dr Walton expressed the opinion that the respondent is not suffering from a diagnosable major mental disorder. He said there is no evidence of any psychotic disturbance at any stage. Dr Walton also expressed the following conclusion:

> "To the extent that Mr Leach is suffering from a damage to his personality, that is largely irreversible and no particular psychiatric intervention is likely to be of assistance. As might be expected in any person, merely with the passage of time, Mr Leach does seem to have matured psychologically."

[172] Dr Walton also commented upon the suggestion that the respondent lacks remorse. The respondent told Dr Walton that he is a person who does not easily display emotion but was adamant that there were underlying feelings of regret and sorrow. When assessed previously by psychiatrists the respondent was in a "state of emotional dumbness". The respondent told Dr Walton he had been in solitary confinement and believes his lack of expressed emotion was misinterpreted as an absence of remorse.

[173] Dr Walton observed that the fact that the respondent does not display the usual signs of remorse needs to be placed in the context that the respondent is a man not given to obvious expression of any type of emotion. In

Dr Walton's view it would be incorrect to conclude that the lack of an obvious display of emotion excludes genuine underlying feelings of remorse.

[174] Dr Wake also commented upon this issue of remorse. He said the respondent is aware that, although he is articulate, he presents a "flat emotional response" and that people assume he must be cold and calculating. Dr Wake has discussed this aspect of the respondent's personality with him on many occasions over the years. Dr Wake believes the respondent when the respondent says that beneath the seeming cold exterior he experiences of sadness and remorse.

[175] There was an added factor to which Dr Wake referred. It relates to the prison environment in which expressions of emotion are not safe. Emotion is often seen as a sign of weakness and vulnerability which can lead to assaults. It is commonplace for prisoner to adopt a neutral emotional tone and over the years this becomes part of their institutionalised state. In Dr Wake's opinion this is what has happened to the respondent.

[176] As to whether the respondent remains a danger to others, Dr Walton expressed the following views:

> "The prediction of dangerousness has been much studied and attempted but such exercises are inherently flawed and it is not especially difficult to understand why. Dangerousness is not a characteristic of individuals but of situations, the individual's response in a particular set of environmental circumstances, and it is the latter which are virtually impossible to predict, for example, whether or not intoxicating substances may be ingested, the availability of weapons and the identification of meaningful targets

> of aggression. Generally speaking, attempts to predict an individual's capacity for future violence have been abandoned by forensic experts. Useful factors have been identified in terms of indicative risk but these validly apply to populations of persons rather than individuals. Furthermore, as the period of time extends from an index incident indicative of dangerous behaviour then the unreliability of the prediction increases exponentially. We do have the advantage in this case that over 20 years have now elapsed since the killings occurred and worrisome violence has not re-emerged.
>
> Perhaps the most reliable of a number of unreliable predictors is a person's past history of aggression. In Mr Leach's case there have been two notable incidents only and, as I have outlined above, I believe it would be inaccurate to conclude that the two incidents represent some form of continuing psychopathological process. Thus it certainly could not be stated that Mr Leach has a solidly-established history of recurring violent behaviour at a frequency which might lead to a safe conclusion that he is at significantly elevated risk of behaving violently again. Alternatively, it is correct to state that because he has exhibited a capacity for quite extreme violence on one particular occasion, that does place him in a somewhat elevated risk category of repetition. This is far from conclusive in terms of his actually behaving violently again."

[177] During cross-examination, Dr Walton agreed that a psychiatric expert is, not exclusively, but very substantially dependent upon what information is given by the person being examined. Dr Walton acknowledged the difficulty attached to drawing conclusions by reason of differing accounts over time. He accepted that if the version given in the respondent's letter to his mother was correct, it demonstrates that the respondent was a person at that time who was "prepared to exact revenge in a most indirect way in terms of the person he identified as the principal perpetrator".

[178] In the context of the changed thinking in psychiatry over the years, Dr Walton was asked what diagnosis he would now make of the respondent's mental state at the time of the killings. He said he would be

reluctant to casually label him as an antisocial personality disorder because he has reservations about that diagnosis. Dr Walton qualified that statement by adding that he was not saying that the label might not be validly applied, as currently described. He added that the childhood disturbance was not striking and the criminal history was not all that numerous or lengthy. There is a question about whether or not the respondent genuinely experiences remorse as opposed to being a person who does not exhibit any sort of emotion. In those circumstances Dr Walton said these were the reservations that he would have in terms of labelling the respondent as a clear cut case of antisocial personality disorder in today's terms.

[179] As to the circumstances of the crimes, Dr Walton said that some sort of reckless impulsive act, as opposed to a carefully premeditated and planned revengeful act, would be most consistent with an antisocial personalty. He agreed that the description of the crimes given by the respondent to the police in 1983 to the effect that he acted on the spur of the moment for reasons he could not explain would be impulsive and more consistent with an antisocial personality.

[180] As to a diagnosis if the true situation was as described by the respondent in his letter to his mother, Dr Walton responded:

> "Well, I would be less inclined to draw a psychiatric terminology in terms of attempting to explain that, your Honour, rather than ordinary language but he was a man seemingly frustrated that the original sexual assault incident had not been addressed. That he was then consumed with hate and revenge that this was an evil act rather than a particular of psychopathology as such."

[181] In re-examination Dr Walton was asked about the explanation for the letter given by the respondent in evidence. Not surprisingly, he said he really did not know how to make too much sense of the explanation of giving a worst case scenario. Dr Walton emphasised the context in which the letter was written being a long time ago and much more adjacent to the incident. He said there are indications that the respondent has changed in the interim.

[182] As might be expected, Dr Walton was an impressive witness. He was careful not to draw any dogmatic conclusions. He has the advantage of access to information concerning the respondent's conduct over the last 21 years while in custody. On the other hand, he has the disadvantage of not having seen the respondent at times reasonably proximate to his first crime of rape and the crimes of murder under consideration. In addition, I approach the evidence of Dr Walton with a degree of caution because it is clear from the content and tenor of his report that he has reached the view that the respondent should not be deprived of the opportunity of seeking release on parole.

[183] Dr Wake also expressed opinions of relevance in his report of 19 October 2004:

> "Mr Leach is not mentally ill and has never exhibited signs of mental illness in the years that I have known him. I do not believe that Mr Leach is personality disordered; in this regard he functions in a normal societal range of personalities. He does exhibit strong personality traits and these include being opinionated and self-righteous. Typically these traits are observed when he feels that the prison authorities have not acted in his best interests.

…

> There are factors that would suggest a good outcome should he be considered for a parole date. These include his age, education, above average intelligence and potential for a marriage relationship. He would require considerable help to reintegrate into the community including relationship counselling and regular intensive parole oversight."

Neuropsychological Assessment

[184] A neuropsychological assessment was performed by Dr Perdices on 11 October 2004. The assessment was of particular relevance in view of severe injuries sustained by the respondent in a motor vehicle accident in November 1979. The respondent has reported on a number of occasions that after the accident he experienced mood fluctuations and had great difficulty in controlling his emotions.

[185] Dr Perdices has reported that it is difficult to offer an opinion at this time about any possible effects of a brain injury on the respondent's behaviour in committing the crimes of murder. Given that limitation, his conclusions were as follows:

> "1) **Is there evidence of acquired brain injury as a consequence of the motor vehicle accident Mr Leach had in 1979?**
> The only area of impairment documented in Mr Leach's neuropsychological profile is a relatively mild-to-moderate impairment of verbal recall. It is possible that this deficit is a long-term residual effect of TBI he sustained in the 1979 motor vehicle accident. If so, it suggests that the extent and severity of acquired brain injury is quite mild. On the other hand, it is also likely that Mr Leach's impaired verbal recall may, to some extent, be attributable to stress, anxiety and depression, given the extent and severity of symptoms he reported on screening for these conditions.

2) **Opinion on the effect of any such injury on the commission of the offences for which Mr Leach is presently incarcerated.**
While it is difficult to offer an opinion, some 21 years after the fact, about the possible effects of an acquired brain injury on Mr Leach's behaviour on 20 June 1983, I can proffer the following with some degree of confidence.

First, the extent and severity of cognitive deficits documented on current assessment is quite limited: only verbal recall is compromised, and the severity of impairment is relatively mild. Even if this deficit can be clearly and exclusively attributed to Mr Leach's accident in November 1979 (see item 1 above), it suggests that the severity of TBI he sustained as a consequence of the accident was, if not relatively mild, at least not severe.

Second, Mr Leach committed the offences for which he is currently incarcerated in June 1983, almost four years after his motor vehicle accident. The vast proportion of cognitive recovery after TBI occurs within the first 12 to 18 months post trauma. That is, the severity of any neuropsychological deficit exclusively attributable to the 1979 accident is very likely, over a period of some four years, to have recovered to a level comparable to that documented on present assessment. If Mr Leach suffered from such a limited and relatively mild degree of cognitive impairment in June 1984, that cognitive impairment would not, *per se*, increase the risk of him committing a violent act such as murder or rape.

3) **Opinion on the current significance and affect of any such injury**
The level of and extent of cognitive impairment demonstrated by Mr Leach on current assessment do not, of themselves, provide a sufficient or necessary reason to suspect that he is, in future, at an increased risk of engaging in, aggressive, violent or antisocial behaviour. Conversely, if Mr Leach were to engage in such activities in future, such behaviour could not be readily attributed to or be considered a function of the (mild and limited) neuropsychological deficits he demonstrated on current assessment."

Mental State – Conclusions

[186] I am conscious of the advantage possessed by Dr Wake by reason of his long association in a professional capacity with the respondent. That association

did not begin until 1993 and it has occurred in the context of the disciplined and controlled prison environment. The psychiatrists who saw the respondent in 1983 and 1984 possessed the distinct advantage of observing the respondent at times proximate to the commission of the crimes.

[187] There is nothing in the material before me to suggest that the psychiatrists who saw the respondent in 1983 and 1984 misunderstood the information given to them. Having regard to all of the material before me, and bearing in mind my findings set out later in these reasons as to the circumstances attending the crimes and the respondent's motivation, I am satisfied that the conclusion reached by Dr Gauvin and the other psychiatrists who examined the respondent in 1983 and 1984 is supported by the motivation and conduct of the respondent in committing the murders and the rape.

[188] In connection with the respondent's first crime of rape, a psychiatrist concluded that the respondent possessed a life-long personality disorder. The sentencing Judge found that the respondent had "quite a severe personality disorder of a depressive nature". The three psychiatrists who saw the respondent in 1983 and 1984, and who had available the material prepared in connection with the sentencing of the respondent for the previous crime of rape, all agreed in the essence of their diagnoses. Dr Gauvin in particular obtained a detailed history from the respondent which is entirely consistent with the diagnosis.

[189] The respondent does not, and has not, suffered from a mental illness. At the time he committed the murders, the respondent was not suffering any residual symptoms from the injury sustained in the road accident in 1979 which were causally connected to the commission of the crimes.

[190] Notwithstanding the note of caution expressed by Dr Walton and the views of Dr Wake, I am satisfied that Dr Gauvin and the other psychiatrists who saw the respondent in 1983 and 1984 correctly diagnosed the respondent's mental state. In particular, I am satisfied that Dr Gauvin reached a correct diagnosis that the respondent was suffering from "a severe sociopathic personality disorder of an aggressive type."

Differing Versions – Motivation – Conclusions

[191] As to the respondent's motivation and whether he knew the victims before the day he murdered them, I am satisfied that the respondent gave the correct version to the police in the lengthy interview a few days after he committed the crimes. The respondent maintained the same version when seen by Dr Gauvin approximately ten months later. On both occasions the respondent said he had never seen the deceased before seeing them at Berry Springs on the day of the murder.

[192] The respondent has not sought to advance any reason why he gave an incorrect version to the police and Dr Gauvin about whether he had previously seen the deceased. There is no apparent motive for giving an incorrect version about that matter. On the contrary, if the respondent is to

be believed, once he was satisfied about the safety of his family, he freely admitted his guilt and did not attempt to hide anything.

[193] As I have said, the respondent first gave to the police a detailed account in his own words. It was an articulate account. In the lengthy interview that followed the respondent gave answers that were directly responsive to the questions. There is no hint of confusion or evasion. The account given by the respondent is chillingly convincing. The information given by the respondent to the police fitted with the objective facts ascertained during the course of the investigation. The description given by the respondent of his impulsive and aggressive behaviour is consistent with the history of behaviour given by the respondent to psychiatrists who saw him in 1979 and in 1983/1984.

[194] I reject the version given by the respondent in the letter of 10 May 1986 to his mother.

[195] The letter was written nearly three years after the commission of the crimes in a context totally different from the context in which the respondent spoke with the police and Dr Gauvin. The respondent had committed appalling crimes which were perpetrated against two young female persons. He had been publicly portrayed as a psychopath. Two years after the respondent had been sentenced, he was faced with a mother who was still seeking an explanation for the terrible crimes committed by her son.

[196] The material provided to me demonstrates that the respondent is an intelligent and insightful person. My own impression of the respondent from the way in which he answered questions and the content of those answers confirms that view. Given the context in which the respondent wrote to his mother, it would have been very difficult, if not impossible, for the respondent to admit to his mother that he was a psychopath who killed and raped for no reason.

[197] I reject the respondent's evidence that he was endeavouring to protect his mother by giving her the worst possible version. Such a version had been in the public arena for at least two years before the respondent wrote the letter. Similarly, I reject his explanation that because he had been put on a pedestal he began to live the lie and this led him to write to his mother in those terms. The entire explanation lacks credibility.

[198] The dominant theme in the letter is of a son who had been wronged by the authorities in a substantial way and who had, as a consequence, become "insane" with an "aberrant hatred" and jealously which drove him to commit the crimes. This picture stands in contrast to the public presentation of the respondent as a psychopath who killed and raped for no reason. While the respondent is intelligent enough to realise that his conduct could not be excused by his mother or anyone else, I am satisfied that he painted a false picture that he believed might give some comfort to his mother and on the basis of which he could ask her not to judge him too harshly.

[199] I also reject the third explanation given by the respondent which is contained in his affidavit and evidence in connection with these proceedings. The respondent has not sought to provide a satisfactory explanation for failing to give this version to his mother or to the police or psychiatrist in 1983/1984. It is a version that has taken over 20 years to come to light.

[200] From the perspective of the respondent, I have no doubt that the respondent now believes that a finding as to his mental state in 1983 and as to his motivation for the crimes will be a significant factor in determining whether the court will accede to the Director's application that the court refuse to fix a non-parole period. From the perspective of the respondent, a finding that in 1983 he was correctly diagnosed as an extremely dangerous psychopath, or a finding that he followed prison officers for a year and eventually murdered the two young women in a premeditated act of indirect revenge against the prison officers, are findings of extreme culpability. I am satisfied that the respondent took a feature from the false story he gave to his mother and sought to use it as an explanation for why he developed a hatred for prison officers and for the co-incidence of the trigger that set him on the course of committing the crimes. The respondent is endeavouring to avoid a conclusion that he suffers from the underlying and dangerous personality disorder diagnosed by Dr Gauvin.

[201] There is an added feature which confirms the views I have reached about the content of the letter and the respondent's third explanation. Underlying

these explanations is the respondent's assertion that he believed the prison officer had attempted to rape his wife. This assertion is not supported by the material contained in the Northern Territory Correctional Services files. As mentioned, the respondent's letter dated 27 January 1980 did not refer to an attempted rape. It referred to "unwanted advances" and to a refusal by the prisoner officer to leave the respondent's home. The report by Superintendent Mercer dated 14 February 1980 referred to an allegation that a prison officer was "paying attention" to the respondent's wife. There is no mention of a complaint of attempted rape.

[202] In connection with the respondent's current version, there is another relevant conflict between that version and the respondent's statements to the police and Dr Gauvin. This conflict is a further indication of the lack of credibility to be given to the respondent's current version.

[203] In describing the events to Dr Walton on 20 September 2004, the respondent told Dr Walton that before riding to Berry Springs he was feeling hot, tired and frustrated after unsuccessfully looking for work. The respondent said he did not want to return home in an angry and frustrated frame of mind. Thus the respondent provided a reason for travelling to Berry Springs and for being in an angry and frustrated frame of mind when he came across the young women.

[204] By way of contrast, when interviewed by the police the respondent did not give any hint that he was angry and frustrated following his search for work.

In the version given in his own words, the respondent told police he "decided to go for a run on the bike to Berry Springs". When later asked specifically his reasons for travelling to Berry Springs, he responded "simply to take the bike for a run".

[205] Ten months later in April 1984, again the respondent failed to make any mention of feeling angry and frustrated. He told Dr Walton that when he stopped looking for work he went for a ride on the bike to Berry Springs because his bike needed "a run".

[206] As I have said, the respondent gave a lengthy and detailed account of the events related to the murders. He spoke about his motivation. He was specifically asked why he had ridden to Berry Springs. In my view if the respondent had been feeling angry and frustrated, he would have told the police and Dr Gauvin about those feelings. There was no reason for him to be less than frank about that aspect.

Remorse

[207] I have found the issue of remorse to be particularly difficult. This issue is relevant to all of the community interests which I am required to consider.

[208] I reject the suggestion that at about the time of the murders the respondent experienced any remorse whatsoever. I am satisfied that when seen by Dr Gauvin the respondent was not experiencing any feelings of remorse. The respondent's letter to his mother two years later is notable for the absence of any hint of true remorse.

[209] In his affidavit of 28 September 2004 the respondent said that his "actions in 1983 have always filled [him] with personal disgust and self-reproach." I accept that, intellectually, the respondent feels that way, but it does not follow that he has experienced true remorse.

[210] The following passages taken from the affidavit of the respondent dated 28 September 2004 are relevant to the issue of remorse:

> "5. It is with no small sense of shame that I am first to admit that mine has not been a life to celebrate."
>
> …
>
> 8. My guilt and remorse are a cross I carry with me for the rest of my life. Irrespective of where I am housed. No action or apology can undo the pain, suffering and loss I am alone responsible for.
>
> 9. Nothing I say or do alters the fact that Janice Carnegie and Charmaine Aviet died by my hand.
>
> 10. I cannot reverse the great wrong I inflicted upon them, upon their families, their friends, the community of Darwin, or even my own family. However, perhaps an understanding of what happened, and why, can offer a better chance of healing.
>
> …
>
> 31. I will not deny that since 1983 my behaviour and attitudes have ranged across the entire gambit of human reaction to adverse and abhorrent circumstances. As have the people I wronged, society, and even those responsible for my care and custody. On those occasions when society has debated the death penalty, I have marvelled at how anyone might think a life sentence the more humane option. Four to five years of concern, even fear, followed by the quick escape of an execution, as opposed to the endless procession of days spent in self castigation, painfully aware of the atrophy and death of one's own humanity. The fact is, no punishment imposed by any court, or later experienced in a penal institution, can ever begin to approach in severity what my own conscience daily inflicts.

"Self is the only prison that can ever bind the sole" – Henry van Dyke.

32. Irrespective of whether I am in a prison cell, or granted the limited freedom of parole, the greater punishment will always come from within myself."

[211] Having regard to all of the material before me, including the evidence given by the respondent, I cannot escape the firm impression that while the respondent recognises at an intellectual level both the great wrong he has inflicted and that he is "a bad person", he is not truly remorseful. To that extent the respondent possesses "a strong sense of guilt." I note the view of Dr Wake that at times the respondent experiences "normal feelings of sadness and remorse", but as the psychologist reported in 1999 there are other factors influencing the respondent including his unconscious desire for "affirmation of his feeling of his own self-worth", his belief that he is a victim and his unconscious desire for an emotional attachment to a woman.

[212] On balance I am not persuaded that the respondent is truly remorseful. While the intellectual recognition and other factors to which I have referred might lead to feelings of sadness and remorse from time to time, I am satisfied that a deep seated indifference remains which is associated with the respondent's underlying personality disorder.

Future Support

[213] Dr Wake referred to the potential for a marriage relationship. That reference concerns the relationship that has been established between the

respondent and a woman with whom the respondent had a relationship in the mid 1970s. The woman concerned has filed an affidavit setting out details of the relationship that began when she and the respondent were 15 years of age. The child of the relationship was born in 1976 and died in 1995 at the age of 18.

[214] Prior to the child's death, the respondent and the child wrote to each other. The respondent and the child's mother have been in regular contact since 1995. In 2001 personal contact recommenced. In her affidavit the woman concerned expresses her love and support for the respondent and speaks of their plans to marry.

[215] The respondent told Dr Walton that the reunion in prison was "joyful", but indicated that in some ways it was his "biggest mistake". The respondent now misses the company considerably, feels rather more vulnerable and is worried that he may not be able to sustain the relationship in the future which might emotionally wound the woman concerned. The respondent described the woman to Dr Walton as "pure gold".

[216] I am satisfied that the woman concerned genuinely hopes to establish a long term relationship with the respondent. It appears, however, that the respondent is uncertain as to whether such a relationship can be sustained. Given the respondent's position, such uncertainty is not surprising. The possibility of future support of this type is too uncertain to be of any

significance, particularly in view of the psychologist's report that there will be difficulties associated with the type of relationship contemplated.

Victim Impact Statements

[217] The Director tendered recent statements made by the mother and sister of Janice Carnegie and the parents and sister of Charmaine Aviet. The statements are relevant to the overlapping community interests of punishment and retribution.

[218] The statements graphically demonstrate the terrible devastation brought by the respondent's crimes upon the families of the deceased. That devastation continues today. It is unnecessary to canvass the very personal and distressing details.

Findings

[219] I turn to specific findings of particular relevance to the questions I am required to determine. I am satisfied of the following facts:

1. The crimes committed by the respondent were of a brutal and horrific nature. The objective circumstances of the crimes, both individually and in conjunction with each other, place them at the highest end of the scale of seriousness for crimes of murder and rape. There are no objective circumstances that mitigate the seriousness of the crimes or the respondent's level of culpability in the commission of the crimes. Of particular significance are the following objective features:

- The crimes were opportunistic and premeditated.
- The victims were vulnerable young female persons in a public place of recreation.
- The victims were abducted at knifepoint.
- The respondent cut the victims' clothing from their bodies.
- The respondent intended to kill both deceased.
- The treatment of the victims while alive was brutal in the extreme, cruel and entirely pitiless.
- The respondent was completely indifferent to the suffering that he caused to the victims and to the taking of their lives.
- The respondent raped the elder deceased after he had stabbed her and, for a time, had left the knife embedded in her side up to its hilt.
- At the time of the rape, the deceased was naked and gagged. Her hands were bound tightly behind her back.
- The stabbing of the elder deceased and the rape were committed in front of the younger deceased who was also naked, gagged and tightly bound by her hands and feet.

2. There are no circumstances subjective to the respondent which mitigate the seriousness of the crimes or the respondent's culpability in the commission of the crimes. In all the circumstances I do not regard the respondent's relative youth as a mitigating factor. The respondent's history and mental state, coupled with the circumstances of the crimes, plainly demonstrate that these crimes were not causally connected to the respondent's age. This is not a case in which the immaturity of youth had any part in the commission of the crimes.

3. The respondent's level of culpability in the commission of the crimes was of the highest order.

4. The underlying personality disorder remains. During the 21 years of incarceration in a controlled and disciplined environment, the respondent has learnt to control his angry impulses and, in lay terms, has mellowed. The respondent has made the most of his time in custody to improve his education and to undertake worthwhile projects. The respondent's intelligence and insight has enabled him to understand the futility of conflict within the prison environment and to appreciate the need for him to ensure that he is mentally stimulated.

5. The respondent is not truly remorseful. He recognises the great wrong he has committed, but an underlying indifference remains.

6. As to the prognosis for the future should the respondent be released into the community, notwithstanding the respondent's progress over the last 21 years I have grave reservations about his capacity in the future to control his impulsive and aggressive responses in a relatively uncontrolled environment. If released, it is likely that the respondent would find himself under stress for a variety of reasons, particularly if he became involved in emotional relationships. If the respondent was released into the community, he would be at significant risk of responding in an inappropriate manner to such stressors. I am unable to be more precise as to the degree of risk other than to say that a significant risk exists.

7. I am similarly unable to say with certainty that the respondent would respond to stressors in a particular manner. I am satisfied, however, that a significant risk exists that the respondent would re-offend in a violent and aggressive manner involving crimes of a type similar to those he has previously committed.

8. My view in this regard has been reinforced by the respondent's conduct in connection with these proceedings. I am satisfied that in connection with his motivation to commit the crimes the respondent has not been entirely frank with this Court. In a manner which has demonstrated his intelligence and insight into issues critical to the determination by this Court, the respondent has endeavoured to place

a different complexion upon his mental state and motivation from that which in fact existed at the time of the murders.

9. Given the respondent's apparent progress over the previous 21 years, this lack of candour is disturbing. On one view it might be the action of a genuinely reformed person who is desperate for an opportunity to be considered for release on parole. Having considered that view, I reject it. On the basis of all the material before me I am satisfied that the respondent's lack of candour in this regard demonstrates both an insight into and an underlying indifference to the gravity of his criminal conduct. The respondent's primary concern and motivation are centred on what he perceives to be his own needs.

Summary

[220] By way of summary, the circumstances in which I am required to determine the Director's application are as follows:

- Prior to the commencement of the Sentencing (Crime of Murder) and Parole Reform Act 2003 on 11 February 2004, the mandatory sentence for the crime of murder was imprisonment for life and the Court was not empowered to fix a non-parole period.

- On 16 May 1984 the respondent was convicted by a jury of two crimes of murder and one crime of rape. The mandatory sentence of life imprisonment for the crimes of murder was imposed on 16 May 1984.

In respect of the crime of rape, a sentence of life imprisonment was imposed on 18 June 1984.

- The new sentencing regime provides that, subject to an order by the Court to the contrary on application by the Director, non-parole periods of either 20 or 25 years are automatically applied to sentences of life imprisonment that were imposed before the commencement of the Act.

- In respect of non-parole periods automatically fixed by the Act in respect of sentences of life imprisonment imposed before the commencement of the Act, the Director may apply to the Court for an order revoking the non-parole period and for an order either fixing a longer non-parole period or refusing to fix a non-parole period.

- On application by the Director, the Court may fix a non-parole period longer than the period automatically fixed if satisfied that because of any objective or subjective factors affecting the relative seriousness of the offence, a longer non-parole period is warranted.

- On application by the Director, the Court may refuse to fix a non-parole period if satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, protection and deterrence can only be met if the offender is imprisoned for the term of the offender's natural life without the possibility of release on parole.

- Unless excluded by the Act, the well settled principles of sentencing and the provisions of the Sentencing Act governing the exercise of the sentencing discretion apply.

- The power of the Court to refuse to fix a non-parole period is reserved for those crimes falling within the most serious category of crimes of murder.

- The power to fix a non-parole period longer than the period automatically fixed by the Act is not limited to crimes of murder falling within the most serious category of cases of that type.

- "Culpability" for the purposes of determining whether to refuse to fix a non-parole period means "blameworthiness". The Court is required to assess the blameworthiness of the offender by having regard to the circumstances surrounding or causally connected with the crime.

- Evidence of matters occurring or emerging since the imposition of sentence is admissible if relevant to the seriousness of the offence, to a prisoner's culpability in the commission of the crime or to an assessment of the community interest in retribution, punishment, protection and deterrence as at the date of the hearing of the Director's application.

- On 20 June 1983 the respondent, who was then aged 24, abducted at knifepoint from a public place of recreation at Berry Springs two

young women aged 18 years and 15 years. The respondent stabbed both young women to death and, after the elder deceased had been stabbed but before she died, the respondent raped her in the presence of the younger deceased who was still alive.

- The respondent intended to kill both deceased. His treatment of the victims while alive was brutal in the extreme, cruel and entirely pitiless. The respondent was completely indifferent to the suffering that he caused to the victims and to the taking of their lives.

- The respondent had previously committed a crime of rape in May 1979. That crime was committed in a dwelling house at knife point. After an appeal the respondent was sentenced to three years imprisonment and a non-parole period of one year and six months was fixed. The respondent was released from prison in June 1982.

- At the time the respondent committed the crimes of murder and rape in June 1983 the respondent was not suffering from a mental illness, but he had a severe sociopathic personality disorder of an aggressive type.

- The respondent had not seen either of the two young women before he saw them at Berry Springs shortly prior to the murders. Versions to the contrary given by the respondent to his mother in a letter of May 1986 and to this Court in connection with the application by the Director are untrue. In this Court the respondent has sought to place a

different complexion upon his mental state and motivation in an endeavour to avoid a conclusion that he suffers from an underlying and dangerous sociopathic personality disorder.

- During a little over 21 years in custody, the respondent has mellowed. In the controlled and disciplined environment of the prison, the respondent has learnt to control his angry impulses. He has made the most of his time in custody to improve his education and to undertake worthwhile projects.

- I am not persuaded that the respondent is truly remorseful. While intellectual recognition of the great wrong he has committed and other factors might lead to feelings of sadness and remorse from time to time, I am satisfied that a deep seated indifference remains which is associated with the respondent's underlying personality disorder.

- The victim impact statements graphically demonstrate the terrible devastation brought by the respondent's crimes upon the families of the deceased. That devastation continues today.

- The underlying personality disorder remains. If the respondent was to be released into the community, a significant risk exists that he would re-offend in a violent and aggressive manner involving crimes of a type similar to those he has previously committed.

- The objective circumstances of the crimes, both individually and in conjunction with each other, place them at the highest end of the scale of seriousness for crimes of murder and rape.

- There are no objective or subjective circumstances that mitigate the seriousness of the crimes or the respondent's level of culpability in the commission of the crimes.

- The respondent's level of culpability in the commission of the crimes was of the highest order.

Determinations

[221] It is against the background of the principles I have discussed and the findings set out earlier in these reasons that I must address the questions posed by ss 19(4) and (5) of the Act. The starting point is provided by my finding that the respondent's crimes are, individually and in conjunction with each other, of such gravity that they are properly characterised as in the worst category of crimes of murder. Next are my findings that there are no objective or subjective circumstances which mitigate the seriousness of the crimes or the respondent's culpability.

[222] I am left in no doubt that the respondent's level of culpability in the commission of the offence is extreme. Notwithstanding that finding, it does not automatically follow that I should refuse to fix a non-parole period. The community, through Parliament, has recognised that even in cases falling within the worst category of cases of murder, and even where the culpability

of the offender is extreme, nevertheless the court should not inflict the dreadful punishment of imprisonment for natural life without the possibility of release on parole unless satisfied that the level of culpability is "**so extreme**" that the community interest in retribution, punishment, protection and deterrence can "**only**" be met by such dreadful punishment.

[223] Limited assistance is gained by comparing the circumstances of the respondent's crimes with those cases in other jurisdictions in which life sentences without the possibility of parole had been imposed. The New South Wales cases are summarised by Wood CJ at CL in *Penisini*. I have also been referred to a number of cases in which determinate sentences have been imposed for horrific crimes of murder. There are undoubtedly many cases where both courses would reasonably be open to a sentencing Judge.

[224] My attention has also been drawn to a number of Victorian authorities in which the relevant issues have been discussed. It is unnecessary for me to canvass those authorities, but I endorse the following observations made in the joint judgment of Winneke P, Brooking JA and Southwell AJA in *R v Coulston* [1997] 2 VR 446 at 463:

> "Horrifying murders are not as rare as they used to be. Sentencing and appellate judges may gain considerable familiarity with these crimes. It would be unfortunate if the fact that truly horrifying murders are no longer as rare as they once were gave rise to the impression that they may not in appropriate circumstances be punished with the utmost severity. And sentencing and appellate judges must not allow their familiarity with horrifying crime to blunt their sensibility. Sentencing is governed by the intellect, but the emotions also have their proper part to play. These include abhorrence of what is abhorrent as well as merciful compassion.

Often a moral judgment from which emotion cannot be absent must be made about the wickedness of a crime. Victim impact statements may, as this very case shows, serve as a reminder to judges to whom vile crimes are no novelty of their effect on the indirect victims and of the lasting grief and legitimate indignation to which they may give rise.

As regards what may for brevity be called multiple murders, generally speaking at all events, the fact that the offender has committed not one but two or more murders is an important matter in considering whether to decline to fix a non-parole period. Judges who sentence murderers must not fail to have a proper regard to what used to be called the sanctity of human life – a phrase not heard nowadays in the criminal courts (but see *Wilson v R* (1992) 174 CLR 313 at 341) – in considering what justice according to law requires having regard to the terms of s 11(1). Perhaps in recent years other considerations have at times been allowed to overshadow this. The criminal who kills not one but two, three or four human beings can be given no longer sentence than the killer of a single victim. Two, three or four life sentences, served, as they must be, concurrently, are of the same duration as a single one. Differentiation is possible only as regards the non-parole period – by increasing that period or by refusing to fix one at all. Of course, everything depends on the circumstances. The perpetration of multiple killings may in a given case not even warrant the imposition of a life sentence, let alone the further momentous step of denial of the possibility of parole. We wish only to make it plain that, while everything depends on the circumstances of the particular case, those who kill a number of victims in horrendous circumstances, where no substantial factor pointing towards clemency is present, must in general expect to be seriously considered for the possible imposition of life sentences unmitigated by the hope of parole.

A further passage in the joint judgment in *Iddon and Crocker* at 328 should be noted: "Certainly … if there are cases in which no minimum term is to be set, then this is not one of them." This appears to accept that one possible view is that a judge sentencing for murder can in no circumstances refuse to fix a non-parole period. Such a view is plainly inconsistent with s 11(1) of the Sentencing Act. *Iddon and Crocker* is a frequently cited decision. It is probable that the passage referred to has on occasions led to an undue reluctance on the part of judges to deny a prisoner the possibility of parole in murder cases, upon the basis that this should very rarely if ever be done. Sentencing judges must remain fully conscious of what has been said in decisions of the highest authority about rehabilitation and the beneficial objects to be served by the fixing of

> a non-parole period. They will remain well aware that a sentence of life imprisonment with no possibility of parole is a sentence of the utmost severity. It is a dreadful sentence, at all events for an offender who is not of an advanced age. But dreadful crimes especially where the past history is bad, may require a dreadful punishment."

[225] From the perspective of the families of the deceased, the community interest in retribution and punishment can only be met by refusing to fix a non-parole period. However, the understandable wishes of the families of the deceased cannot be determinative of these aspects of community interest. The victim impact statements identify the devastating and permanent effects of the respondent's crimes which are part of the material relevant to an assessment of the community interest in retribution and punishment.

[226] As to the community interest in protection of the community, it must be borne in mind that the fixing of a non-parole period does not automatically mean that the respondent will be released on parole at the expiration of that period or at all. The fixing of a non-parole period only permits the respondent to seek release on parole after the expiration of that period. Whether the respondent would be released on parole would be a matter for the Parole Board. However, Parliament has directed that the court consider the issue of community interest in protection as one of the factors relevant to a determination as to whether the court should refuse to fix a non-parole period.

[227] In the context of community protection, as I have said I am satisfied that if the respondent was to be released into the community there would be a significant risk of re-offending in the same or similar manner.

[228] The other factor to which the court is directed is the community interest in deterrence. This involves general deterrence. Those who are minded to commit crimes of murder should understand that not only are they certain to spend at least 20 or 25 years in custody, in some circumstances they face the prospect of imprisonment for the term of their natural life without the possibility of release on parole. In appropriate cases that come within the terms of the legislation, the community expects the court to send a message by refusing to set non-parole periods.

[229] The court is entrusted with an exceptionally heavy responsibility. The Legislature has recognised that there are competing interests. As was said in *Coulston*, it is a dreadful punishment to sentence a person to the term of that person's natural life without the possibility of release on parole. For that reason alone, it is an order that will only be made in the clearest of cases.

[230] Having made those observations, it is also appropriate to recognise that the community, through the Legislature, has determined that in some circumstances dreadful crimes require dreadful punishment. The court must apply the directions of the Legislature.

[231] As I have said, the community interests may change over the years. I must assess those interests as they now exist. Obviously, I must determine the level of culpability as it existed at the time the crimes were committed.

[232] I am satisfied that, within the terms of the legislation, the respondent's dreadful crimes require the dreadful punishment of imprisonment for life without the possibility of release on parole.

[233] For the reasons I have given, I am satisfied that the level of the respondent's culpability in the commission of the crimes of murder is so extreme that the community interest in retribution and punishment can only be met if the respondent is imprisoned for life without the possibility of release on parole. In arriving at this decision I have paid careful regard to the respondent's conduct during the last 21 years while in custody. Notwithstanding the passage of time and a degree of progress to which I have referred, I am satisfied that the culpability is so extreme that, assessed today, these aspects of the community interest can only be met by imprisonment for life without the possibility of release on parole.

[234] Similarly, I am satisfied that the level of culpability is so extreme that the remaining community interests of protection and deterrence can only be met by such an order.

[235] In respect of both sentences of life imprisonment imposed for the crimes of murder, by order I revoke the non-parole period of 25 years fixed by s 18 of the Act and refuse to fix a non-parole period.