



## **Report to the Honourable the Attorney-General on Mandatory Minimum Non-Parole Periods**



**Government of South Australia**  
Attorney-General's Department



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## REPORT TO THE HONOURABLE THE ATTORNEY-GENERAL ON MANDATORY MINIMUM NON-PAROLE PERIODS

### INTRODUCTION

In June 2015, the Attorney-General requested the Sentencing Advisory Council (the Council) to advise on the operation of the scheme which provides for mandatory minimum non-parole periods for certain criminal offences. The terms of reference were as follows:

"To consider the operation of Part 3 Division 2 of the *Criminal Law (Sentencing) Act 1988* as amended by the *Criminal Law (Sentencing) (Dangerous Offenders) Amendment Act 2007* which came into operation on 1 November 2007"

The reference followed a number of concerns which had been expressed by the Court of Criminal Appeal and other courts in relation to various aspects of the scheme.

The Council embarked on the preparation of a Discussion Paper on the terms of reference. However, in the current session of Parliament the government introduced the Sentencing Bill 2016. The Bill, if passed, would repeal the *Criminal Law (Sentencing) Act 1988* ('the Act'). It would retain many of the provisions in the present Act, revising some of them, while at the same time introducing various sentencing reforms.

The Bill in its present form re-enacts the mandatory minimum non-parole provisions as they exist in the current Act.

When the Bill was introduced, the Attorney-General met with the Chair of the Council to discuss the reference to the Council. It was decided at this meeting that instead of continuing with the Discussion Paper, the Council would report directly to the Attorney-General on its recommendations and that consideration would be given to them by the government, it being recognised that the Bill would not be debated before the resumption of Parliament in 2017. If it was thought appropriate after such consideration, the Bill could be amended prior to it being debated.

As recorded above, the reference to the Council arose out of difficulties which the courts had encountered in applying certain requirements of the legislation. These matters have been the main focus of the Council's consideration of the terms of reference.

It is well-known that controversy surrounds mandatory sentencing provisions in their various forms. The argument in support of such schemes is around adequacy, consistency and transparency in sentencing (New South Wales Law Reform Commission Report 134 May 2012, para 2.113). The contrary argument emphasises the importance of tailoring a sentence to the facts of the particular case and allowing the court sufficient flexibility to take all relevant factors into account.

The arguments for and against mandatory sentencing are well documented and the reality is that the current mandatory minimum non-parole provisions are supported in principle by both major parties. These considerations, coupled with the terms of reference provided to the Council, render it unnecessary for the Council to enter into a policy debate on the merits or otherwise of this form of mandatory sentencing. Instead the Council considers it appropriate to comment on the present scheme in response to the specific criticisms which it has attracted. The extensive reviews undertaken by the New South Wales Law

Reform Commission and the NSW Sentencing Council in relation to the standard non-parole periods scheme in that jurisdiction have followed a similar course.<sup>1</sup>

## **BACKGROUND TO THE MANDATORY MINIMUM NON-PAROLE PERIOD SCHEME**

In 2007, the *Criminal Law (Sentencing) Act 1988 (SA)* was amended to insert provisions which established a mandatory minimum non-parole period scheme. The purpose of the scheme was to provide for statutorily prescribed non-parole periods in respect of murder and other serious offences in which the victim was totally and permanently incapacitated. It was a clear purpose of the scheme that non-parole periods would increase.

The scheme fixes a minimum non-parole period for murder of imprisonment for 20 years, and a minimum non-parole period of four-fifths of the head sentence in respect of “a serious offence against the person”.

Section 32(10)(d) of the Act defines “a serious offence against the person” as:

- (i) a major indictable offence (other than an offence of murder) that results in the death of the victim or the victim suffering total incapacity; or
- (ii) a conspiracy to commit an offence referred to in subparagraph (i); or
- (iii) aiding, abetting, counselling or procuring the commission of an offence referred to in subparagraph (i).

“Total incapacity” occurs if the victim is rendered permanently physically or mentally incapable of independent function.

The sentencing court is granted a limited discretion to fix a non-parole period shorter than the prescribed minimum, but only where one or more of three defined “special reasons” exist. The court is also empowered to impose a non-parole period longer than the prescribed minimum in circumstances provided for in the Act.

The basis of the scheme is set out in section 32A of the Act which provides as follows:

### **32A—Mandatory minimum non-parole periods and proportionality**

- (1) If a mandatory minimum non-parole period is prescribed in respect of an offence, the period prescribed represents the non-parole period for an offence at the lower end of the range of objective seriousness for offences to which the mandatory minimum non-parole period applies.
- (2) In fixing a non-parole period in respect of an offence for which a mandatory minimum non-parole period is prescribed, the court may—
  - (a) if satisfied that a non-parole period that is longer than the prescribed period is warranted because of

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<sup>1</sup> NSW Sentencing Council, *Standard Non-Parole Periods Interim Report* (November 2011) [4.88]; NSW Sentencing Council, *Standard Non-Parole Periods Final Report* (December 2013) [0.2]; New South Wales Law Reform Commission, *Interim Report on Standard Minimum Non-Parole Periods*, Report No 134 (2012) [2.111 - 2.114]; New South Wales Law Reform Commission, *Sentencing Final Report*, Report No 139 (2013) [0.17].

- any objective or subjective factors affecting the relative seriousness of the offence, fix such longer non-parole period as it thinks fit; or
- (b) if satisfied that special reasons exist for fixing a non-parole period that is shorter than the prescribed period, fix such shorter non-parole period as it thinks fit.
- (3) In deciding whether special reasons exist for the purposes of subsection (2)(b), the court must have regard to the following matters and only those matters:
- (a) the offence was committed in circumstances in which the victim's conduct or condition substantially mitigated the offender's conduct;
  - (b) if the offender pleaded guilty to the charge of the offence- that fact and the circumstances surrounding the plea;
  - (c) the degree to which the offender has cooperated in the investigation or prosecution of that or any other offence and the circumstances surrounding, and likely consequences of, any such co-operation.
- (4) This section applies whether a mandatory minimum non-parole period is prescribed under this Act or some other Act.

Appendix A sets out the steps which the courts are required to take in fixing a non-parole period pursuant to the mandatory minimum non-parole provisions.

## **1. THE LOWER END OF THE RANGE OF OBJECTIVE SERIOUSNESS**

The courts have encountered various difficulties in applying the mandatory minimum non-parole provisions. Most criticism has been reserved for the directive that the period prescribed as the minimum non-parole period "represents the non-parole period for an offence at the lower end of the range of objective seriousness for offences to which the mandatory minimum non-parole period applies."

The scheme provides that the statutorily prescribed minimum non-parole period is appropriate for an offence at the lower end of the range of objective seriousness and this is a consideration which must be taken into account in cases in which the court is deciding whether to impose a non-parole period either longer or shorter than the prescribed minimum. This requires a complicated and somewhat artificial comparison between the offence before the court and a hypothetical offence at the lower end of the range of objective seriousness.

It is this requirement which led the Full Court to make the following comments in *R v A,D* [2011] SASFC 5 in relation to sentencing for murder:

*In this way the mandatory or prescribed period operates as a yardstick or benchmark. Parliament has chosen to identify 20 years as an appropriate non-parole period for an offence of murder "at the lower end of the range of objective seriousness". It is a strange benchmark. The benchmark is*

*identified by reference only to objective seriousness . The court has to compare a particular case, taking account of objective and subjective factors, with a benchmark that is affected by objective factors only. The court is not able to compare like with like. The process is not easy to explain. But this is the statutory task.*

When discussing the process whereby the court might fix a non-parole period shorter than the statutory minimum the court said:

*The court has to ask itself whether, bearing in mind that a non-parole period of 20 years is appropriate for an offence at the lower end of the range of objective seriousness, the special reasons present in the case warrant or support a shorter non-parole period for this offence and this offender.*

*This is a complicated process. It will cause difficulty for sentencing courts. We cannot identify any good reason for sentencing in this fashion. But that is Parliament's choice.*

Later, when discussing the fixing of non-parole periods for serious offences against the person the court added:

*The difficulties of comparison that we have already identified will apply here. No doubt further problems will arise in later cases. Parliament is entitled to encourage the fixing of longer non-parole periods. But we respectfully suggest that the complexity of the process, illustrated by the differing opinions in judgments of the court, is such that Parliament should reconsider how to achieve its aims.*

In the earlier Full Court case of *R v Ironside* [2009] SASC 151, Doyle CJ referred to the unrealistic process arising from the requirement to apply the statutory benchmark in its present form. He commented:

*So, as I have said, the prescribed period is identified as a yardstick or benchmark. It is appropriate for an offence of the relevant kind at the lower end of the range of objective seriousness. Any aspects or circumstances of the particular offence that are referred to in s 32A(2) then have to be identified, and in light of those matters the particular offence has to be compared with the benchmark or yardstick, with a view to deciding whether the particular offence, in light of that comparison, warrants a non-parole period equal to, longer than or shorter than the prescribed period.*

*This is a difficult process.*

*To explain the difficulty, and the process involved, it is convenient to consider separately the question of whether the non-parole period should be longer than the prescribed period and the question of whether the non-parole period should be shorter than the prescribed period. In practice, a court will usually not approach the matter in this sequential fashion. But it is necessary to do so to identify the matters that have to be considered.*

*When considering the first of these questions a court must have regard to all of the circumstances that would be taken into account in fixing a non-parole period for an offence other than a serious offence against the person. The reference in s 32A(2)(a) to "objective or subjective factors affecting the relative seriousness of the offence" must be a reference to all of the objective and subjective circumstances that are usually considered in fixing a non-parole period. By considering all of these circumstances the court makes an assessment of the seriousness of the relevant offence, but with a view to fixing a non-parole period. I refer, without repetition, to the earlier citations on that point. But in the case of a serious offence against the person, the court, when considering the first question, does not go directly to the fixation of a non-parole period, but considers whether, in the light of all relevant circumstances, a non-parole period longer than the non-parole period appropriate for an offence at the lower end of the range of objective seriousness (ie the prescribed period) is called for.*

*Thus, the court must consider whether the "objective or subjective factors" call for a non-parole period longer than the prescribed period, bearing in mind that the prescribed period is appropriate for an offence at the lower end of the range of objective seriousness. Parliament clearly intends the fixing of a non-parole period in respect of a serious offence against the person to be approached in this indirect fashion, and by reference to the statutory benchmark or yardstick.*

*The task of the court is a difficult one. The court has to compare the non-parole period that is appropriate in the light of all relevant circumstances (the objective or subjective factors) with a non-parole period that is appropriate having regard only to the "objective seriousness" of an offence of a relevant kind at the lower end of the range of seriousness. As a matter of logic, the comparison is impossible, because one is not comparing like with like. One is comparing a putative or potential non-parole period arrived at on one basis (a consideration of all relevant circumstances) with a non-parole period identified by reference only to the objective circumstances or objective seriousness of the offence.*

*However, the process of sentencing is not an exercise in logic. When, as is sometimes necessary, a court considers the sentence that is appropriate for joint offenders, and takes into account their different circumstances, the court makes a comparison of an evaluative kind. It is not an exercise in logic. A similar process of evaluation is called for by s 32A, but is made more difficult by the fact that the comparison is between a putative non-parole period and a prescribed non-parole period that are arrived at in the light of, and based on, different considerations. But this is what Parliament requires the court to do.*

*When considering whether a non-parole period shorter than the prescribed period is appropriate, the court must again bear in mind that the prescribed period is an appropriate non-parole period for an offence at the lower end of the range of objective seriousness.*

*Then the court must direct its attention to s 32A(2)(b) and to s 32A(3). The court can now consider only the matters referred to in s 32A(3).*

*If one or more of the matters identified in s 32A(3) is present, the court*

*must then consider whether that matter or those matters call for a shorter non-parole period than the prescribed period. Remembering that the prescribed period is an appropriate non-parole period for an offence of the relevant kind at the lower end of the range of objective seriousness, the court will ask itself whether the identified matters that are present call for a shorter non-parole period having regard to their mitigating effect, and the relevance of the identified matters to the fixing of a non-parole period.*

*Once again there is a difficulty in making the relevant comparison. One is not comparing like with like. The difficulty is increased by the fact that the court must engage in the unfamiliar task of arriving at a putative or possible non-parole period by reference only to the limited matters identified in s 32A(3), rather than by reference to all of the circumstances (subjective and objective) that would usually be relevant.*

None of the decisions dealing with s 32A have expressly adopted the approach of identifying those factors that go to ascertaining the objective seriousness of the offence. However, it appears that in assessing the objective seriousness of offences, this distinction has on occasion tacitly informed the decision-making process of sentencing judges in South Australia.

Nevertheless, there are a number of cases in which there does not appear to be any clear distinction drawn between circumstances of the offence and circumstances of the offender in fixing a non-parole period. For the most part, South Australian courts in sentencing do not clearly identify those factors going to the objective seriousness of the offence, nor do they draw a sharp division between circumstances of the offence and circumstances of the offender. This tends to demonstrate that the legislation is unworkable in this respect.

It is apparent from the remarks in the cases referred to above that the directive in the Act to treat the mandatory non-parole period as representing the non-parole period for an offence at the "lower end of objective seriousness" has caused serious difficulty.

This gives rise to the question whether it is necessary to employ this description of the level of seriousness when the Act already provides that the prescribed non-parole period is to be regarded as the **minimum** non-parole period.

It appears that the concept of objective seriousness may have been borrowed from legislation in New South Wales which introduced standard non-parole periods in February 2003. It was the first Australian jurisdiction to do so. The scheme was achieved by amendments to the *Crimes (Sentencing Procedure) Act 1999 (NSW)* which set standard non-parole periods for a range of offences. The non-parole periods were expressed as being the appropriate periods "for an offence in the middle of the range of objective seriousness".

In *R v Way* (2004) 60 NSWLR 168, the New South Wales Court of Criminal Appeal held that the legislation created a mandatory scheme in the sense that the standard non-parole periods had a determinative significance and that sentencing courts were required to commence by asking whether there were reasons for not imposing the standard non-parole period.

This was the approach taken in New South Wales Courts for seven years. However, in

*Muldrock v The Queen* (2011) 244 CLR 120 the High Court overruled *R v Way* and held that on a proper construction of the Act the provision of standard non-parole periods did not have a determinative significance, but that they were to be regarded as legislative signposts and a matter to be taken into account by a court in determining the appropriate sentence.

Since *Muldrock*, the Act has been amended to more accurately reflect the decision in that case.

In view of the fact that standard non-parole periods in the New South Wales legislation were to be regarded as a guide for the fixing of non-parole periods for offences in the middle of the range of objective seriousness this had to be clearly stated in the legislation.

The South Australian scheme differs significantly in a number of respects including the fact that it provides for a "mandatory minimum non-parole period". As the prescribed non-parole period is described as a mandatory minimum there is no apparent need to add a further description tying the standard non-parole period to "an offence at the lower end of the range of objective seriousness". As previously discussed it is this latter description which has caused considerable difficulty in the application of the legislation by the courts.

At the outset, the requirement to consider the "range of objective seriousness" gives rise to the problem of distinguishing between objective and subjective considerations. In some situations there is little difficulty in identifying the difference between an objective consideration and a subjective consideration relevant to sentencing. However, there are also a number of grey areas in applying this dichotomy. Furthermore, although it is common to speak of subjective and objective considerations in the sentencing process, there is no readily identifiable range of objective seriousness for particular offences with which the courts are familiar. The concept of a range of seriousness according to both subjective and objective factors is far more recognizable and it is not uncommon for the courts to be provided with tables indicating such a range for particular offences.

The Victorian Sentencing Advisory Council comments in its *Sentencing Guidance Report* (2011) as follows:

7.11 *There has been considerable debate in New South Wales as to what constitutes an 'objective' factor, as opposed to a factor personal to the offender. For example, premeditation or pre-planning an offence could be considered an aspect of the offending, or an aspect personal to the offender, as could provocation.*

7.12 *There has been some judicial guidance around whether particular factors may be considered in assessing the objective seriousness of the offence, but there has not been a clear resolution on which factors can be considered in determining the objective seriousness of the offence. A Justice of the New South Wales Court of Criminal Appeal has observed that the judgment of the High Court in *Muldrock v The Queen* ('Muldrock') has 'left somewhat opaque the meaning of the term "objective seriousness".'*

As the courts in South Australia have pointed out, the problems with the legislation go

further and lead to anomalies. In the case of serious offences against the person, the head sentence is calculated by reference to subjective and objective considerations so that the effect of providing that the minimum non-parole period is four-fifths of the head sentence incorporates into that minimum both subjective and objective considerations. When deciding whether to impose a non-parole period longer than the minimum the court is also required to take into account both subjective and objective considerations. Although the minimum non-parole period in the case of serious offences against the person based on four-fifths of the head sentence is thereby calculated by reference to subjective and objective considerations, it is then used as representing the lower end of the range of objective seriousness.

Against this framework, the requirement to have regard to a standard restricted to objective considerations in deciding whether to increase the non-parole period above the minimum or reduce it below that minimum is somewhat illogical and difficult to justify.

### SUMMARY: LOWER END OF THE RANGE OF OBJECTIVE SERIOUSNESS

Section 32(5) of the Act prescribes mandatory minimum non-parole periods with respect to murder and serious offences against the person. The Act provides that those periods can be increased at the discretion of the court and reduced in the event that one or more of the circumstances described as "special reasons" exists. But the prescribed minimum is the starting point.

Section 32A(1) of the Act provides:

"If a mandatory minimum non-parole period is prescribed in respect of an offence, the period prescribed represents the non-parole period for an offence at the lower end of the range of objective seriousness for offences to which the mandatory minimum non-parole period applies."

Whilst accepting that a standard for comparison in the present context should be allotted a location within a range, this is achieved by fixing a mandatory minimum. The fact that it is referred to as a minimum and may be increased for more serious cases places it at the lower end of seriousness.

Bearing these considerations in mind, there is no need to complicate the legislation by introducing the concept of the lower end of the range of objective seriousness. The legislation would operate more effectively and in a less cumbersome manner if section 32A(1) were repealed.

The Council recommends accordingly.

## **2. SETTING A FRESH NON-PAROLE PERIOD**

There is no provision in the Act which deals specifically with the situation of offenders who received non-parole periods prior to the introduction of the scheme but who, for whatever reason, require the setting of a fresh non-parole period.

Applications for the setting of non-parole periods are dealt with under section 32 of the Act. Insofar as it is relevant to the present issue section 32 provides as follows:

### **32—Duty of court to fix or extend non-parole periods**

- (1) Subject to this section, where a court, on convicting a person of an offence, sentences the person to imprisonment, the court must—

- (a) if the person is not subject to an existing non-parole period-fix a non-parole period; or
  - (b) if the person is subject to an existing non-parole period-review the non-parole period and extend it by such period as the court thinks fit (but not so that the period of extension exceeds the period of imprisonment that the person becomes liable to serve by virtue of the sentence, or sentences, imposed by the court); or
  - (c) if the person is serving a minimum term imposed in respect of an offence against a law of the Commonwealth or is liable to serve such a term on the expiry of an existing non-parole period-fix a non-parole period in respect of the sentence, or sentences, to be served upon the expiry of that minimum term.
- (2) Where the sentence of imprisonment is imposed for an offence committed during a period of release on parole or conditional release from a previous sentence of imprisonment or detention, the court, in fixing a non-parole period under subsection (1)(a), must have regard to the total period of imprisonment (or detention and imprisonment) that the person is, by virtue of the new sentence and the balance of the previous sentence, liable to serve.
- (3) Where a prisoner is serving a sentence of imprisonment but is not subject to an existing non-parole period, the sentencing court may, subject to subsection (5), fix a non-parole period, on application by the prisoner or the presiding member of the Parole Board.
- (4) The fact that the prisoner has completed a non-parole period previously fixed in respect of the same sentence of imprisonment or that a court has previously declined to fix a non-parole period in respect of that sentence does not preclude an application under subsection (3).
- (5) The above provisions are subject to the following qualifications:
  - (a) a non-parole period may not be fixed in respect of a person who is liable to serve a total period of imprisonment (or detention and imprisonment) of less than one year;
  - (ab) if fixing a non-parole period in respect of a person sentenced to life imprisonment for an offence of murder, the mandatory minimum non-parole period prescribed in respect of the offence is 20 years;
  - (b) where a person who is subject to a sentence of life imprisonment is further sentenced to imprisonment by the Magistrates Court or the Youth Court, the question of whether a non-parole period should be fixed or extended must be referred to the court by

which the sentence of life imprisonment was imposed;

- (ba) if fixing a non-parole period in respect of a person sentenced to imprisonment for a serious offence against the person, the mandatory minimum non-parole period prescribed in respect of the offence is four-fifths the length of the sentence.

The impact of the amendment in section 32(5)(ab) in situations where a defendant has been subject to a non-parole period prior to the passing of the mandatory minimum non-parole period scheme has been considered in three cases. In *R v Marshal* (Ruling of David J, Supreme Court of South Australia, 7 November 2008) the applicant was convicted of murder in June 1986 and sentenced as a child to be detained during the Governor's pleasure. At that time there was no power to set a non-parole period in these circumstances. Following legislative changes the applicant received a non-parole period of 13 years and six months in August 1989 backdated to 17 April 1986.

Thereafter the applicant was released on parole from time to time but continued to offend and was returned to custody on various occasions. Suffice to say that at the time of his application to the Court for the setting of a non-parole period in November 2008 he was serving a sentence and his parole had been cancelled pursuant to s 75 of the *Correctional Services Act 1982*. The original sentence for murder had been re-activated.

On the hearing of the application to set a non-parole period, the question arose whether s 32(5)(ab) of the Act was applicable, requiring the imposition of the mandatory minimum non-parole period of 20 years. Justice David stated that this provision did not apply to the application made before him which he determined pursuant to s 32(3).

A similar situation arose in *R v Earley* [2014] SASC 202. The applicant was convicted of murder and in February 1991 was sentenced to imprisonment for life with a non-parole period of 18 years. He served a substantial sentence (in excess of 20 years) and was released on parole. He subsequently breached parole by committing further offences (not being scheme offences), and was returned to custody. He applied for a new non-parole period to be set. On the application, it was accepted by all parties, and by the court, that the mandatory minimum non-parole period scheme would apply to the setting of the new non-parole period.

The Court was not referred to *R v Marshal*. Justice Stanley concluded that there was no special reason to fix a non-parole period lower than the statutory minimum, and fixed a non-parole period of 26 years in respect of the original murder and subsequent offending. This non-parole period was backdated to the date on which the applicant was originally taken into custody in respect of the murder.

His Honour referred to the case of *R v Beauregard-Smith* (2001) 79 SASR 408, and the general principle that in fixing a non-parole period following the cancellation of a previous grant of parole, current sentencing standards are to be applied. At [19] his Honour said:

*Section 32(5)(ab) is specific in its terms. It refers to the fixing of a non-parole period. It does not differentiate between a first non-parole period and a subsequent non-parole period. If it was Parliament's intention that*

*the provision have application only when fixing a non-parole period for the first time, so much could have been reflected in the terms of the section or referred to in the Second Reading Speech. However, the explanation of clauses in the Second Reading Speech notes that "...any non-parole period fixed in relation to the sentence of life imprisonment for an offence of murder must be at least 20 years." The use of the term 'any' suggests an intention to cover the field in relation to first and subsequent non-parole periods. Accordingly, I consider I am constrained in my sentencing discretion by s 32(5)(ab).*

Finally, the issue was raised again in *R v Brady* [2015] SASC 115.

In that case, the applicant pleaded guilty to murder and was sentenced to life imprisonment with a non-parole period of 14 years and 5 months in October 1992. On 30 January 2008, he was released on parole after serving approximately 15 years and nine months referable to the murder. The applicant's response to parole was poor and he was returned to custody for short periods after breaching conditions of his parole. In April 2009, Mr Brady committed the offence of aggravated causing harm with intent to cause harm for which he was sentenced to six years imprisonment. In the District Court Judge Chivell declared Mr Brady a serious and repeat offender and declined to set a non-parole period.

Mr Brady then appealed to the Supreme Court against the decision not to fix a non-parole period. On appeal, Justice Vanstone held that the imposition of a non-parole period in these circumstances is governed by s 32(2) rather than s 32(5)(ab) and there was no obligation to apply the mandatory minimum non-parole provisions. Her Honour pointed out that Justice Stanley had not been referred to the approach taken by Justice David in *R v Marshal*. Her Honour stated at [9-10]:

*In my views 32(2) rather than s 32(5)(ab) governs this situation. The new non-parole period is to be set having regard to the new sentence and "the balance" of the previous (life) sentence. It is not set in relation to the whole of the sentence of life imprisonment, as contemplated in s 32(5)(ab). I am reinforced in my view by the following. Were the Earley approach followed, the Court would face the unattractive prospect of setting at least a 20 year non-parole period in relation to a sentence for which a man had already served a (previously set) non-parole period. To backdate the new non-parole period to the date when the original one commenced would create a fiction, of which one vice would be that it would cover periods of time when the applicant was in the community on parole.*

*In my opinion, any non-parole period fixed here should be fixed in relation to what is seen to be the balance of the outstanding life sentence for murder (taking into account the non-parole period extensions on account of the other offences, totalling 17 months) and the sentence in the District Court for aggravated causing harm with intent.*

Subsequent to the decision in *R v Earley*, but before *R v Brady* was decided, the Director of Public Prosecutions (DPP) wrote to the Attorney-General bringing this problem to his attention. He pointed out the difficulty which could arise if "special reasons" were established on the first occasion on which the non-parole period was fixed giving rise to the question whether the court was bound by the earlier decision or whether the

discretion can be exercised afresh. He also stated that the decision in *Earley* would be problematic in cases in which offenders were sentenced prior to the introduction of minimum non-parole periods. Other difficulties are referred to in the cases discussed above.

Read literally, s 32(5)(ab) applies to the fixing of non-parole periods for murder whether for the first time or subsequently. The same can be said for s 32(5)(ba) which applies to the fixing of non-parole periods for serious offences against the person. No doubt this is why prosecution and defence counsel argued that s 32(5)(ab) applied in the circumstances of *Earley's* case. The contrary position should be clearly stated in the legislation.

The DPP suggested in his memorandum that the legislation should be clarified. The Council agrees with this suggestion and recommends that the imposition of the mandatory minimum non-parole period should apply only to the first fixing of the non-parole period.

### **3. CRIMINAL LAW (SENTENCING) ACT 1988 SECTION 18A**

Section 18A of the Act allows the sentencing judge to fix a single sentence of imprisonment where the offender is being sentenced for multiple offences. In arriving at a final single sentence, it is appropriate for the judge to identify notional head sentences for each offence before arriving at a sentence that reflects the overall criminality of the offender's conduct: *R v Major* (1998) SASR 488 at 49.

Section 32(5a) of the Act addresses some aspects of fixing mandatory non-parole periods when the court utilises s 18A. It provides as follows:

#### **32—Duty of court to fix or extend non-parole periods**

(5a) If—

- (a) a court sentences a person under section 18A to the 1 penalty for a number of offences; and
- (b) a mandatory minimum non-parole period is prescribed (mandatory period) in respect of any of those offences,

any non-parole period to be fixed by the court under that section—

- (c) must be a period not less than the mandatory period prescribed in respect of the relevant offence; and
- (d) if there is more than 1 such offence in respect of which a mandatory period is prescribed—must be a period not less than the greater of any such mandatory period; and
- (e) must be commenced or be taken to have commenced on the date specified by the court (which may be the day on which the person was first taken into custody or a later date specified by the court that occurs after the day on which the defendant was taken into custody but before the day on which the person is sentenced).

Although the subsection deals with the situation where more than one offence is subject to the mandatory non-parole period scheme and is the subject of a sentence pursuant to s 18A, no reference is made to offences included in a composite sentence which are not subject to the scheme.

This does not present a problem when sentencing for murder where the head sentence must be imprisonment for life. However, there is a difficulty if a serious offence against the person and a further offence not subject to the mandatory non-parole scheme is included in the sentence passed pursuant to s 18A. Is it the case that the calculation of four-fifths of the sentence to arrive at the non-parole period is to be based on all offences incorporated in the global penalty including the notional sentence for the offence not subject to the scheme?

This problem was discussed by Vanstone J in *R v Sully* (2012) 112 SASR 157. In that case, the appellant was sentenced in the District Court for the offences of causing serious death by dangerous driving, three counts of causing harm by dangerous driving (one count alleging serious harm) and leaving the scene of an accident after causing death by dangerous driving. Vanstone J drew attention to the fact that the trial judge sentenced the appellant pursuant to s 18A so as to impose one sentence for all offences of four and a half years imprisonment.

Her Honour said:

*In the case of the appellant the judge utilised s 18A of the Criminal Law (Sentencing) Act 1988 (SA) to impose one sentence for all offences, being a sentence of four and a half years imprisonment. The judge indicated a starting point for the offences... of three and a half years imprisonment.*

*The non-parole period was fixed on the basis of the view taken by the judge (and promoted by counsel on both sides) that the mandatory minimum of "four-fifths the length of the sentence": s 32(5)(ba) applied only to the notional period of three years imprisonment which the judge said she would have imposed for the causing death offence, had it stood alone. I shall say more of this approach a little later. The non-parole period attributable to that offence, once the mandatory minimum proportion was applied, was about 28.8 months. The final non-parole period was one of 30 months.*

Later in her judgment Vanstone J, with whom Sulan and Anderson JJ agreed on this point, said:

*Before leaving this topic I make an additional observation about the interpretation of s 32 of the Sentencing Act. In my view there is a respectable argument that where s 18A is utilised, and the mandatory minimum non-parole period is a proportion rather than a figure, then the proportion must apply to the whole of the head sentence. That may not seem a just result, but it might be dictated by the terms of s 32. Parliament contemplated a situation in which a person might be sentenced for one or more offences attracting a mandatory minimum non-parole period, as well as other offences.*

Referring to s 32(5a) Her Honour said:

*The argument to which I refer runs as follows. It can be seen that*

*subsection (5a)(c) requires that the non-parole period fixed by the judge is to be "not less than the mandatory period prescribed in respect of the relevant offence". The mandatory period prescribed for the relevant offence (causing death by dangerous driving) is "four-fifths the length of the sentence": s 32(5). Because only one sentence was being imposed for all offences, the proportion could only be applied to that sentence. Therefore, returning to the wording of subsection (5a), the non-parole period to be fixed by the Court under s 18A had to be a period of not less than four-fifths of the length of the (total) sentence. Reading the subsection as requiring the mandatory minimum proportion to be applied only to the sentence attributable to the relevant offence requires the construction of a fiction, to the effect that a head sentence has been fixed for the relevant offence alone. The whole point of s 18A is that a single penalty taking into account multiple offences can be fixed.*

With respect to her Honour it was appropriate to draw attention to the perception of injustice which the section appears to have created. Accepting her interpretation of the Act there would seem to be a sound argument for an amendment to s 32(5a) so as to permit the course adopted by the trial judge in *R v Sully*. There would seem to be no logical or just reason for requiring offences not subject to the mandatory non-parole scheme to be treated as such simply because they were part of a composite sentence.

The Council recommends that s 32(5a) be amended so as to provide that in fixing the non-parole period the notional head sentence for those offences subject to the mandatory provisions should be calculated and then increased to the extent considered necessary by the sentencing judge by reason of the further offences not subject to the mandatory provisions, thereby arriving at the actual non-parole period to be imposed.

#### **4. SPECIAL REASONS IN SUBSECTIONS 32A(3)(b) AND (c)**

Some difficulty has been encountered in interpreting subsections 32A(3)(b) and (c).

It is convenient to repeat the wording of s 32A(3) which sets out the special reasons which may lead to the court fixing a non-parole period that is shorter than the prescribed period:

##### **32A—Mandatory minimum non-parole periods and proportionality**

- (3) In deciding whether special reasons exist for the purposes of subsection (2)(b), the court must have regard to the following matters and only those matters:
  - (a) the offence was committed in circumstances in which the victim's conduct or condition substantially mitigated the offender's conduct;
  - (b) if the offender pleaded guilty to the charge of the offence—that fact and the circumstances surrounding the plea;
  - (c) the degree to which the offender has cooperated in the investigation or prosecution of that or any other offence and the circumstances surrounding, and likely consequences of, any such co-operation.

These subsections have been discussed in the following Full Court cases.

R v Jones (2010) 108 SASR 479

The respondent was charged and tried for the offence of murder. He was found not guilty of murder but guilty of manslaughter. The trial judge imposed a head sentence of imprisonment for nine years.

The sentence was subject to the mandatory minimum non-parole provisions in s 32A. The trial judge found that "special reasons" existed so as to permit the fixing of a non-parole below the statutory minimum. A non-parole period of five years imprisonment was imposed.

An application by the DPP for leave to appeal against the sentence was refused.

At an early stage in the proceedings prior to trial the respondent made a formal written offer to plead guilty to manslaughter. This offer was not accepted by the DPP and the respondent did not plead guilty to manslaughter at the trial.

When addressing the imposition of the non-parole period in the course of his sentencing remarks the trial judge said:

*In setting a non-parole period, the prosecution has urged that I should set a mandatory minimum non-parole period of at least four-fifths of the head sentence. I have considered s 32A(3) of the Criminal Law (Sentencing) Act (1988) which provides that if special reasons exist I am entitled to fix a non-parole period that is shorter than the prescribed period of four-fifths of the head sentence.*

*In my view, having regard to your cooperation in the investigation and your cooperation in the prosecution of the offence, and to those matters I have referred to in these reasons and, in particular, your frankness with the police when interviewed, your assistance to the police in taking them to recover the weapon, and your earlier offer to plead guilty to manslaughter, I am satisfied that special reasons do exist and that I can apply a non-parole period of less than the prescribed minimum.*

And later:

*You could have pleaded guilty to manslaughter when you were arraigned but you were aware that the prosecution would not accept that plea in answer to the charge.*

It is apparent from these remarks that the trial judge did not indicate whether he was relying on s 32A(3)(b) or (c) in determining that special reasons existed, nor did the appeal turn on this issue. However, in separate judgments the members of the Full Court discussed the application of these subsections.

Anderson J was of the view that the trial judge probably proceeded under s 32A(3)(c) and considered that the offer to plead guilty to manslaughter was one of the matters which constituted co-operation in the investigation or prosecution of the offence. He added:

*There is no doubt, in my view, that there is present in this matter at least one of the qualifying matters, namely co-operation, under s 32A(3)(c). I do not consider that the early offer to plead to manslaughter can bring*

*the respondent within s 32A(3)(b). He did not plead guilty. He offered to plead guilty prior to trial. There is a difference in an offer to the Director of Public Prosecutions to plead guilty with an offer to plead guilty on arraignment. There is a question, in my view, as to whether an offer to plead was intended by Parliament to be relevant under s 32A(3)(c). The judge did not indicate whether he found both (b) and (c) as special reasons, or merely (c). It is not necessary for this decision because of the presence of one of the qualifying matters. I would await an appropriate case in which to decide this.*

*That offer to plead guilty to manslaughter made by the respondent, together with the other factors mentioned by the judge, may have been considered by him as relevant to subsection (c). The judge was entitled to find that the aspect of co-operation opened the gateway for a consideration of whether special reasons existed. That is not to say that special reasons did exist for fixing a non-parole period shorter than four-fifths of the head sentence.*

David J agreed with Anderson J that the early offer to plead guilty to manslaughter did not bring the respondent within s 32A(3)(b). However he stated that the offer to plead did satisfy s 32A(3)(c). His Honour held that there had been no error in the judge's application of s 32A.

Peek J pointed out that the trial judge found the respondent "was positively contrite in a way that extended beyond a mere plea of guilty". He went on to say:

*I consider that the resolution of the precise question of whether such a situation may fall within s 32A(3)(b) may be less simple than might first be supposed and as I do not find it necessary to pursue that matter to finality in these proceedings, I will reserve my position.*

*However, there is one matter that I should address out of respect for the tentative view expressed by Anderson J that the respondent's offer to plead guilty may not come within s 32A(3)(c) (the co-operation provision) because Parliament intended that only a plea (as distinct from an offer to plead) will come within s 32A(3)(b) and, accordingly, an offer to plead will also not be relevant under s 32A(3)(c).*

*With the greatest respect, I cannot accept the proposition or the reasoning. Section 32A(3)(c) specifically refers to co-operation "in the investigation or prosecution of that or any other offence". In my view, it is quite plain that an early offer to plead to a charge of which an accused is later convicted is "co-operation in the prosecution" in a case where, as here, it subsequently transpires that the accused is convicted of no more than the charge as to which he offered to plead guilty. If it should be the case that the present circumstances do not come within s 32A(3)(b) (as to which I have reserved my opinion), it is my view that that is all the more reason why they do come within s 32A(3)(c). I cannot discern any reason why the Parliament would not have so intended and, in fact, I consider that there are clear indications that Parliament did positively intend that s 32A(3)(c) should have broad application.*

R v Hansen [2011] SASFC 10

In this case the appellant was found not guilty of murder but guilty of manslaughter. He was sentenced to 12 years imprisonment with a 10 year non-parole period. He appealed against the sentence on the grounds that the sentence was manifestly excessive and that the sentencing judge erred in failing to reduce the non-parole period below the mandatory minimum.

The appeal was dismissed.

One of the grounds of appeal was that the sentencing judge should have reduced the non-parole period below the mandatory minimum of four-fifths of the head sentence by reason of s 32A(3)(c).

The appellant relied upon an offer to plead guilty to manslaughter which was made in a letter to the DPP before the appellant was committed for trial on the charge of murder. The offer was made on the basis of excessive self-defence. The DPP rejected the offer. The verdict of the jury that the appellant was guilty of manslaughter was explicable on the basis that, while the jury considered that the appellant may have had a defensive purpose, his response was excessive.

It was argued on appeal that the offer to plead guilty to manslaughter was relevant both as a general mitigating factor in relation to sentence and also as being a "special reason" under s 32A(3)(c). Although the sentencing judge accepted that the circumstances answered the criterion in that subsection, he found that they were insufficient to constitute "special reasons" to enable the non-parole period to be reduced below the minimum.

Vanstone J (Sulan J concurring) dealt with the argument based on s 32A(3)(c) as follows:

*As far as I am aware, this Court has not authoritatively stated whether an offer to plead guilty can qualify under s 32A(3)(c) as co-operation in the investigation or prosecution of the offence. Inasmuch as subsection (3)(b) deals with pleas of guilty, it could be argued that, in drafting and enacting subsection 3(c), Parliament had in mind matters unrelated to pleas of guilty. In any event, as seen, here the judge was prepared to treat the offer of a plea of guilty as relevant co-operation in the prosecution of the crime. Because I agree with the judge that, notwithstanding that finding, there were not special reasons to fix a non-parole period shorter than the prescribed period, it is not necessary to further discuss the ambit of subsection (3)(c).*

White J noted that in *R v Jones* both David J and Peek J accepted that an unaccepted offer by an accused person to plead guilty to a lesser offence which matches the ultimate verdict could amount to co-operation for the purposes of s 32A(3)(c). Anderson J did not decide the issue.

However, in the present case, White J held that he did not have to reach a conclusion on this issue.

R v Brougham (No 2) [2015] SASFC 127

The appellant was convicted of manslaughter after a trial by Judge alone on a charge of murder. He was sentenced to imprisonment for 15 years with a non-parole period of 12

years. One of the grounds of appeal against sentence was that the trial judge was in error in concluding that an offer by the appellant to plead guilty to manslaughter at the committal stage along with the manner in which the defence was conducted at trial, constituted a special reason pursuant to s 32A(3)(c) of the Act.

The circumstances of the offer to plead guilty to manslaughter are set out in the sentencing remarks of the trial judge. It appears that the appellant's solicitor contacted a solicitor in the office of the DPP at the time of the committal hearing and advised that he had formal instructions that the appellant would plead guilty to manslaughter on a particular factual basis. The DPP was not prepared to accept a plea of guilty on the factual basis put by the defence. This argument was rejected by the trial judge who stated in his sentencing submissions:

*Your counsel submits that by offering to plead guilty to manslaughter, combined with the manner in which the defence conducted the trial, and in particular because there was little cross-examination of the majority of the witnesses, I should conclude that you have cooperated in the investigation and prosecution and as a consequence of that cooperation, I should reduce the mandatory minimum non-parole period to less than four-fifths of the head sentence. In my view, the circumstances surrounding your offer to plead guilty and the manner in which the trial was conducted do not satisfy me that special reason exists to reduce the mandatory non-parole period. I am not satisfied that the manner in which the defence was conducted, nor your offer to plead in the circumstances of this case, satisfies the requirement of special reasons.*

An appeal against this finding of the trial judge was rejected.

As part of the argument in support of the ground the appellant's counsel relied upon the remarks made by Peek J in *R v Jones* set out above. Peek J, who was a member of the court in *Brougham*, made the following response to the argument:

*Those remarks were directed to a very basic question, arising in the early days of s 32A, of whether a defendant's prior offer to plead guilty to the crime of which he is later convicted can constitute "co-operation" within s 32A(3)(c). In support of my then (and present) view that it can do so, I called in aid two interstate cases which held that such an offer can be co-operation and mitigatory under general common law sentencing principles.*

*Of course, whether such an offer can constitute "co-operation" under s 32A(3)(c) and whether it does constitute "co-operation" in a particular case are two very different questions. In Jones, only the first question was under consideration; the Judge's sentencing remarks in Jones made clear that if at law such an offer can constitute "co-operation" for the purposes of s 32A(3)(c), then there were no features to call in question the Judge's decision that mitigatory co-operation did exist and constituted special reasons within s 32A(3)(c).*

*I might say that I did not then envisage that one day it might be argued, in the stark context of a trial by Judge alone, that an appellant had in fact "co-operated" with the prosecution despite the trial Judge's later findings of fact (upon which the verdict of manslaughter is based) that*

*important parts of the defendant's version given in evidence were deliberately false, which falsity had also been a central part of the factual proposal rejected by the prosecution.*

*However, that is what is now being argued here. I accept that my words "general sentencing principles do require an allowance to be made..." were too general and would best be replaced by the words "general sentencing principles do require consideration of whether an allowance should be made"*

Stanley and Parker JJ agreed with the reasons of Peek J in dismissing the appeal.

#### SUMMARY: SPECIAL REASONS, SUBSECTIONS 3(b) and 3(c)

##### Subsection (b)

Subsection (b) requires that the offender has pleaded guilty to the charge of the offence. "Offence" could only mean the offence upon which sentence is to be passed. It is clear that if the offender pleaded guilty to an alternative offence which was not accepted by the prosecution but in respect of which he or she was found guilty, subsection (b) would apply.

It would appear from the wording of the subsection and the approach in the cases summarised above that an offer to plead guilty as opposed to an actual plea of guilty would not qualify under subsection (b).

The only suggestion that this may not be as obvious as it seems has come from Peek J in *R v Jones* who stated that the construction of subsection (b) "may be less simple than might first be supposed" and that he reserved his opinion on the issue.

Mr Ian Press SC suggested an amendment to the Council which would put beyond doubt the requirement for the special reason in subsection (b). The Council agrees with the proposed amendment and recommends that the subsection should read as follows:

- (b) if the offender pleaded guilty in court to the charge of the offence of which the offender was ultimately convicted, whether that plea is accepted by the Director of Public Prosecutions or not—that fact and the circumstances surrounding the plea.

##### Subsection (c)

The other issue is whether an offer to plead guilty to a lesser offence of which the defendant is subsequently convicted but which is not accepted by the prosecution and does not result in a formal plea of guilty is relevant to co-operation by the defendant as described in subsection (c). This situation was discussed in the three cases referred to above.

It is the view of a majority of the Council members that the mere offer by a defendant to plead guilty to the offence of which he or she is subsequently convicted should not be regarded as a matter to take into account, whether considered alone or in conjunction with other matters, when considering the special reason provided for in subsection (b). The defendant is not bound by the offer and the variety of circumstances in which a claimed offer might be made could result in the court being required to investigate such circumstances.

The majority of the Council recommends that subsection (c) be amended so as to

exclude an intimation or offer of a plea of guilty from consideration as to whether co-operation exists.

## 5. SERIOUS PSYCHIATRIC OR PSYCHOLOGICAL ILLNESSES

It is well recognised that mental disorder or severe intellectual handicap may reduce the culpability of a defendant, albeit that he or she has committed an offence. The disorder or handicap may be relevant to sentencing. In *R v Letteri* (unreported decision of the NSW Court of Criminal Appeal 18 March 1992) Badgery-Parker JA in reasons with which Gleeson CJ and Scheller AJ agreed said:

*The principle then is clear enough. It is correctly stated as follows - that whereas general deterrence is a relevant consideration in every sentencing exercise, it is a consideration to which less weight should be given in the case of an offender suffering from a mental disorder or severe intellectual handicap. In an extreme case, the proper application of this principle may produce the result that considerations of general deterrence are totally outweighed by other factors. In every case it is a matter of balancing the relevant factors in a manner no different from that which is involved in every sentencing exercise.*

These remarks were cited with approval by Kirby P in *R v Champion* (1992) 64 A Crim R 244, at 254. His Honour said (p 254):

*The reason for this variation on the usual theme is not hard to find. It is imputed to the general community that it will understand that a person with the intellectual capacities of a child will need to be deterred but may need special attention in order that the deterrence will be effective. Moreover, the full understanding of the authority and the requirements of the law, which may be attributed to the ordinary individual of adult intellectual capacities, cannot be expected of a person who, although adult in bodily form, retains the intellectual capacities of a child. Because the constraints which may be demanded of a person with ordinary adult intellectual capacities may not operate, or operate as effectively, in the case of a person with significant mental handicaps, the community (reflected by the judges) applies to such people the principles of general deterrence in a way that is sensibly moderated to the particular circumstances of their case. General deterrence still operates: see Roadley [(1990) 51 A Grim R 336 at 343]. It is in place for the protection of the community and the victims of offences which the community rightly takes most seriously. But as that principle falls upon a person such as this applicant, it is necessarily a consideration to which less weight can, and therefore should, be given.*

These and other cases dealing with this issue are discussed in detail in *R v Wiskich* [2000] SASC 64.

The question arises whether a case of this nature should constitute a special reason for the purposes of s 32A(3). The *Sentencing Act 1991* (Vic) s 10A(2) provides that special reasons relevant to imposing minimum non-parole periods includes situations where:

### **10A—Special reasons relevant to imposing minimum non-parole periods**

- (2) For the purposes of section 9B, 9C, 10 or 10AA, a court may make a finding that a special reason exists if—

...

- (b) the offender—
  - (i) is of or over the age of 18 years but under 21 years at the time of the commission of the offence; and
  - (ii) proves on the balance of probabilities that he or she has a particular psychosocial immaturity that has resulted in a substantially diminished ability to regulate his or her behaviour in comparison with the norm for persons of that age; or
- (c) the offender proves on the balance of probabilities that—
  - (i) at the time of the commission of the offence, he or she had impaired mental functioning that is causally linked to the commission of the offence and substantially reduces the offender's culpability...

The discussion relating to this issue arose while this Report was being written and there was insufficient time to investigate the matter further. The Council does not suggest a special reason or reasons worded precisely in the way in which it is expressed in the Victorian legislation. However the Council does recommend that consideration be given to the formulation of a special reason or reasons to cater for what might be described as the most serious of the conditions described in *R v Wiskich*. A medical condition of this nature is relevant to the length of the head sentence and it is arguable that, in certain circumstances, it should constitute a special reason for the purposes of the mandatory minimum non-parole scheme.

## 6. R V HALLCROFT

Another occurrence during the time this Report was being written was the handing down of the decision of the Full Court in *R v Hallcroft* [2016] SASCFC 137.

This was an appeal by the DPP against a non-parole period imposed on the respondent who was convicted of murder.

The respondent was an acquaintance of the victim. It is not in dispute that the respondent stabbed and clubbed the victim on 1 January 2015 causing fatal injuries. He then severed the victim's legs and placed his body in a wheelie bin which was left in the street.

The respondent offered to plead guilty to manslaughter but this was rejected by the DPP. He pleaded guilty to murder on his first arraignment in the Supreme Court.

The respondent was sentenced to imprisonment for life and the sentencing judge fixed a non-parole period of 15 years.

The grounds of appeal were as follows:

- The non-parole period of 15 years is manifestly inadequate;
- The Judge erred in failing to make a finding as to whether special reasons existed pursuant to s 32A(3) of the Act;
- The Judge erred in fixing a non-parole period of 15 years as there were no special reasons to justify a non-parole period below the mandatory minimum non-

parole period or, in the alternative, a non-parole period of 5 years below that mandatory period; and

- The Judge erred in imposing a discount in excess of 30 per cent.

It appears that the sentencing judge decided on a notional non-parole period of 22 years, before considering a reduction for the plea of guilty. She considered that this notional period should be subject to a reduction of 30 per cent on account of the guilty plea pursuant to s 10C(2)(d) of the Act. However, due to a miscalculation, the actual reduction was 31.8 per cent.

The sentencing judge did not refer to the mandatory minimum non-parole period provisions. However, the Full Court came to the conclusion by implication that she must have found that there were special reasons.

The circumstances of the appeal gave rise to a consideration of the interaction between the mandatory minimum non-parole provisions and those sections of the Act which provide for a reduction of sentence for a plea of guilty.

Section 10C of the Act is the provision relevant to the reduction by reason of the plea of guilty in the present case.

Section 10C(2)(d) provides that if the defendant pleads guilty to the offence-

- (d) During the period commencing on the day on which the defendant is committed for trial for the offence or offences but before the commencement of a trial for the offence or offences and if the defendant satisfies the sentencing court that he or she could not reasonably have pleaded guilty at an earlier stage in the proceedings because of circumstances outside of his or her control-the sentencing court may reduce the sentence that it would otherwise have imposed by up to 30%.

In the judgment of the Chief Justice in which the other four members of the Court concurred his Honour referred to s 10C and s 32A(2) which authorises the sentencing court to impose a non-parole period that is longer than the prescribed period or to impose a non-parole period shorter than the prescribed period if "special reasons" are established. He said:

*Both parties rightly accepted that the provisions could be read together and coherently without one impliedly abrogating the other. Sections 10C and 32A(2) of the CLSA can be read together because both provisions confer discretions. The former with respect to the extent of the reduction for a guilty plea and the latter allowing the fixing of a non-parole period below the statutory minimum. Statutory discretions are governed by the legislative context in which they are conferred. Once it is accepted that s 10C of the CLSA does not impliedly repeal 32A of the CLSA, and that s 32(5)(ab) of the CLSA does not preclude any reduction pursuant to s 10C, the relevant questions are:*

- *in what circumstances will the denial, by reason of the statutory minimum, of a reduction of the minimum non-parole period in accordance with s 10C of the CLSA, amount to special reasons within the meaning of s 32A(2)(b) of the CLSA;*

- *if special reasons are found to exist, to what extent does the imposition of the statutory minimum non-parole period by s 32(5)(ab) CLSA constrain the extent of the reduction which should be made to a non-parole period for murder pursuant to the discretion conferred by s10C(2) CLSA.*

Later in his judgment the Chief Justice referred again to the interaction between s 10C and s 32A(3):

*Plainly enough Parliament must have contemplated that some defendants charged with murder would plead guilty. Accordingly special reasons to reduce the statutory minimum will not be made out by the mere making of a guilty plea. It is a necessary condition for the reduction of a non-parole period below the statutory minimum, that the statutory minimum prevents the Court from giving full effect to the reduction it would otherwise have made on account of the offender's plea of guilty. However, the inability to give effect to that reduction will only amount to a special reason to depart from the statutory minimum if the failure to do so would result in a sentence so manifestly disproportionate to all of the circumstances of the case that the case should be treated as an exception to the rule.*

*The disproportion to which I refer is largely to be measured by the difference between the minimum non-parole period and the non-parole period which would be fixed in accordance with s 32A and s 10C of the CLSA if the benchmark of 20 years were not also the minimum non-parole period.*

*Even though the primary indication of injustice and disproportion is the extent of the reduction which is denied by the application of the statutory minimum, it will also be necessary to consider:*

- *the seriousness of the offence;*
- *the degree of contrition;*
- *the reasons for and circumstances surrounding the entry of the guilty plea.*

*If those qualitative factors operate adversely to a defendant the primary quantitative measure of disproportion may not constitute special reason to reduce the non-parole period. I acknowledge that those factors must also be considered in determining the extent of the reduction in accordance with s 10C of the CLSA and, in particular, s 10C(4) of the CLSA. Care must be taken not to double count them. In determining the extent of the reduction pursuant to s10C of the CLSA, the seriousness of the offence of murder, and the legislative expectation of the application of the minimum non-parole period, will operate as limiting factors.*

*The ultimate question in the exercise of the discretion is whether:*

- *the quantitative difference between the minimum non-parole period and the non-parole period which would have been fixed if a period of 20 years was a benchmark only; and*
- *the qualitative evaluation of the seriousness of the offence and the*

*circumstances of the guilty plea,*

*require that the case be treated as an exception to the rule.*

By way of conclusion the Chief Justice pointed out that the sentencing judge reduced the notional non-parole period selected as a starting point by the maximum, or rather a little more than the maximum, allowed for the respondent's guilty plea by s 10C. He pointed out that the judge did not restrict that reduction by reason of the seriousness of the offence and the statutorily imposed minimum non-parole period even though there were strong reasons to allow less than the maximum reduction in this case. He referred to the respondent's "less than heartfelt contrition and the horror of the offence and its aftermath".

In the view of the Chief Justice there were special reasons to make an exception to the statutory minimum in the case. In his view, a proper application of the principles discussed in the judgment could be expected to yield a non-parole period of between 16 and 18 years. It was an error of law to reduce the non-parole period by the full amount of 30% without moderating that reduction by reference to the statutory minimum non-parole period.

Despite these considerations, the Chief Justice decided that other circumstances arising from the way in which the case was dealt with, including the error of the sentencing judge rendered it appropriate not to interfere with the non-parole period which had been imposed.

The judgment reflects the complexity of the mandatory minimum non-parole scheme generally and, further, forebodes some difficult issues when it comes to future cases involving the interaction between the scheme and the earlier provisions in the Act dealing with discounts for pleas of guilty.

In the meantime it is of significance to note that the Chief Justice made various comments relevant to aspects of the advice of the Council which are set out above.

The judgment referred to the "complex statutory regime" which required interpretation. The Chief Justice referred to the fact that the phrase "objective seriousness" lacked clarity. When speaking of the dichotomy of subjective and objective sentencing factors he observed, as the Council has done in its advice, that "the denotation of those terms is nowhere comprehensively set out".

These points are relevant to the Council's recommendation that the concept of "objective seriousness" be removed from the legislation.

### **Sentencing Advisory Council**

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## APPENDIX A

### Summary of Steps to be taken by the Courts in Applying the Mandatory Non-Parole Provisions

#### MURDER

##### Fixing The Head Sentence

The head sentence is imprisonment for life.

##### Fixing The Non-Parole Period

The starting point for the fixing of the non-parole period (NPP) is 20 years.

##### Fixing A NPP Longer Than 20 Years

If the court is considering fixing a NPP **longer** than the mandatory period of 20 years it must consider all "objective or subjective factors affecting the relative seriousness of the offence". These are the matters relevant according to established principles.

However, the court must also take into account that the mandatory period is a NPP appropriate for "an offence at the lower end of the range of objective seriousness". The mandatory period operates as a yardstick or benchmark. The court does not exercise a discretion at large.

##### Fixing A NPP Shorter Than 20 Years

If the court is considering fixing a non-parole period **shorter** than the mandatory period it must first consider whether "special reasons" exist. If there are no "special reasons" there is no power to fix a NPP shorter than 20 years.

If "special reasons" exist, the court can fix a NPP shorter than the mandatory period but only if those special reasons support fixing a NPP that is shorter than the mandatory period.

If considering a NPP shorter than 20 years the court must ask itself whether, bearing in mind that a NPP of 20 years is appropriate for an offence at the lower end of the range of objective seriousness, the special reasons present in the case warrant or support a shorter NPP for this offence and this offender.

Note that the presence of "special reasons" does not mean that the court can fix a NPP in accordance with existing or established principles. The presence of factors amounting to "special reasons" merely enables the court to consider whether **those** factors warrant or support a NPP shorter than the mandatory period.

#### SERIOUS OFFENCES AGAINST THE PERSON

##### Fixing The Head Sentence

First, the court fixes a head sentence in accordance with established principles. Objective matters relating to the offence and subjective matters relevant to the offender are taken into account.

##### Fixing The Non-Parole Period

The mandatory minimum NPP is 4/5ths the length of the head sentence.

If there are no "special reasons" the court will consider the NPP, applying established

principles taking into account objective matters relating to the offence and subjective matters relating to the offender, but bearing in mind that 4/5ths of the head sentence is the appropriate period for an offence at the lower end of the range of objective seriousness.

### **Fixing A NPP Longer Than 4/5ths Of The Head Sentence**

If the court is considering fixing a NPP **longer** than the mandatory period of 4/5ths of the head sentence it must consider all "objective or subjective factors affecting the relative seriousness of the offence". These are the matters relevant according to established principles.

However, the court must also take into account that the mandatory period is a NPP appropriate for "an offence at the lower end of the range of objective seriousness". The mandatory period operates as a yardstick or benchmark. The court does not exercise a discretion at large.

### **Fixing A NPP Shorter Than 4/5ths Of The Head Sentence**

If "special reasons" exist the court will consider whether the special reasons warrant or support a shorter NPP than the mandatory period. In doing so the court will bear in mind the impact of the special reasons and that 4/5ths of the head sentence is the appropriate NPP for an offence of the relevant kind which is at the lower end of the range of objective seriousness.