

No.19 Life Imprisonment in Australia

Written by Ivan Potas

As Marcus Clarke's classic book For the Term of His Natural Life reminds us, life imprisonment occupies a special place in Australian penological history. But unlike the convicts of last century who received such a sentence, contemporary 'lifers' rarely end their days within prison walls.

With the abolition of the death penalty in this country, life imprisonment is the most severe penalty available to sentencers. It is a penalty imposed in most cases only for murder. About 600 prisoners, or approximately 5 per cent of the total prison population, are currently serving an indeterminate life sentence in Australian correctional institutions.

How long is a life sentence likely to be? This Trends and Issues suggests that the average term of incarceration of lifers in Australia is about 13 years. However, there exist considerable variations between jurisdictions in the 'meaning of life'. For example, in Western Australia a 'strict security life imprisonment' sentence requires certain prisoners to serve a minimum term of 20 years imprisonment before they may be considered for release on parole.

At a time when 'truth in sentencing' has become an important issue in the punishment debate, this paper queries the appropriateness of continuing indeterminate sentences of this type. Greater certainty in the prison terms set for the most serious offences is likely to be viewed with favour by the public and offenders. Judicial officers would also no doubt welcome greater flexibility in setting maximum sentences for crimes at present punishable only by mandatory terms of life imprisonment.

Duncan Chappell Director

With the abolition of capital punishment in Australia, the sentence of life imprisonment has become the most severe sanction under the criminal law. 'Life imprisonment' is also called 'penal servitude for life', 'natural life' or even in certain circumstances 'strict security life imprisonment' (the terminology varies from time to time and from jurisdiction to jurisdiction). The history of life imprisonment in Australia demonstrates that this sentence does not usually carry the implication that prisoners who are subject to this sanction will spend the rest of their days in gaol.

A small percentage of lifers do die in prison by violent means (suicide or murder), as well as by natural causes, as do some offenders who are sentenced to determinate terms of imprisonment - prison is, after all, an extremely stressful, dangerous and

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unnatural environment. However, the reality is that life sentences are generally commuted or mitigated by subsequent executive intervention.

Broadly speaking, the decision to release lifers after a time is dependent upon a recommendation of a parole board or other specialist agency (in NSW the Release on Licence Board) made to a minister of the Crown and then conveyed ultimately for decision to the governor of the relevant jurisdiction (by convention the governor-in-council). In addition to commutation powers the various governors of the Australian States and the Governor-General of the Commonwealth have power to grant mercy (under the royal prerogative of mercy) within their respective jurisdictions, and so may override or otherwise mitigate the normal consequences of a sentence - that is, the governor may pardon the offender, or remit (reduce) or respite (postpone) the sentence which has been fixed by the court.

Some people mistakenly believe that it represents a fixed term, such as twenty years - a figure often cited in connection with life sentences. In Western Australia, for example, the special sentence of strict security life imprisonment means that the prisoner must serve a minimum term of twenty years behind bars before being considered for release, but release may not be granted at that time.

The figure of twenty years also applies to some Victorian lifers who were sentenced to death prior to 1974 and whose sentences were later commuted to life imprisonment with the benefit of remissions. These lifers were deemed to have had their sentences commuted to twenty years imprisonment by virtue of reg. 99 of the Community Welfare Services Regulations 1974. Lifers in this category were entitled to the same rate of remissions as those serving ordinary (that is determinate) sentences, meaning that a lifer in this category could expect to serve about thirteen and a half years of imprisonment. However reg. 100 of

the 1974 Regulations also made provision for the commutation of a life sentence without the benefit of remissions.

Interestingly, the Victorian Office of Corrections advises that between 1962 and the abolition of the death sentence in 1975, there were no death sentences commuted to life imprisonment. Instead some commuted life sentence prisoners in Victoria received extraordinarily long prison terms. For example, a sentence of 50 years with a minimum term of 40 years was not unusual. Sentences of this length, which are rarely imposed by Australian courts today, should also not be confused with the essentially indeterminate nature of a life sentence.

The Indeterminate Sentence

Life imprisonment, particularly where no minimum term is specified, is but one, albeit the most common, form of indeterminate sentence. It is a sentence which places the decision to release the prisoner outside the guidance of the courts and into the hands of another authority such as a parole board. Its distinguishing feature is that the prisoner has no guarantee of ever being released from custody.

In practice the majority of lifers are released after they have served a substantial term of imprisonment, usually in excess of ten, and in exceptional cases in excess of twenty, years

The distinguishing mark of the life sentence is the uncertainty of the date of release and therefore the uncertainly of the duration of the custodial portion of the sentence

It has been argued that this uncertainty can be a very cruel form of punishment because the decision to release or continue the incarceration is made in an arbitrary and capricious manner (Sheleff 1987, p. 47). It is also unfair in the sense that a young person sentenced to this penalty could, theoretically, serve many more years in custody than an older person. Conversely, an older person has a significantly greater chance of serving the balance of his life in gaol. The prospect of serving a life sentence is such that some offenders have indicated a preference for the death penalty, for example, *see ex parte Lawrence* [1972] 3 SASR 361 and *Gilmore* (Bedau 1977, p. 32).

While under Australian law life imprisonment is the ultimate sanction, very few life sentence prisoners are destined to die in prison. This situation could change - the law could provide that lifers should never be released. As will be seen, Western Australia has already moved in that direction.

The Key Question is Should Life Imprisonment Really Mean Imprisonment Until Death?

Life sentence prisoners (usually murderers) have amongst the lowest recidivism rates of any other category of prisoner (Potas & Walker 1987). This may be partly explained by the fact that low recidivism rates are a function of long-term imprisonment. Reconviction rates decline as offenders age and lifers, being generally much older (and perhaps wiser) upon release than their fellow prisoners may, for this reason also, be less likely to re-offend.

Long-term imprisonment can be both psychologically and physically harmful, and in some instances can lead to 'institutionalisation' with attendant difficulties for prisoners upon their release (Bottoms & Light 1987, p. 183).

Detaining prisoners in gaol can cost the community in excess of \$45,000 per prisoner per year (Mukherjee et al. 1989, p. 592).

For the above reasons, therefore, *it* can be argued that it is in the public interest that the majority of life sentence prisoners should not be required to serve the rest of their days in gaol. Rather, as soon as they

Table 1 Prisoners Serving Life Sentence by Offence and Sex Categories as at 30 June 1987											
Male	NSW	VIC	QLD	WA	SA	TAS	NT	Total			
Murder	180	112	120	66	42	31	6	557			
Attempted	5			2				7			
Murder											
Manslaughter	2		2					4			
Assault Grievous											
Bodily Harm	5		1					6			
Sexual Assault	1	1	5	1				8			
Other	1		4	2	1			8			
Total	194	113	132	71	43	31	6	590			
Female	NSW	VIC	QLD	WA	SA	TAS	NT	Total			
Murder	10	4	2	8	3	2		29			
Attempted								0			
Murder											
Manslaughter			1					1			
Total	10	4	3	8	3	2	0	30			

Source: Debaecker, F. (1989), Australian Prisoners 1987, Australian Institute of Criminology, Canberra

have served an appropriate period in gaol (determined by reference to the seriousness of the offence and background of the offender), *and* after careful consideration of the threat they may present to members of the community (based upon the best evidence available), the vast majority of lifers should eventually be released from prison.

Who Gets Life Imprisonment?

Data collected by the Australian Institute of Criminology reveal that the vast majority of all offenders serving life sentences in Australian penal institutions are convicted murderers.

The data show that on the night of 30 June 1987 there were 590 male and 30 female (total 620) prisoners serving life sentences in Australian prisons. Of these, 568 (95.2 per cent) of the male population and 29 (96.7 per cent) of the female population were convicted of murder.

Thus on 30 June 1987, less than one out of twenty prisoners serving life sentences in Australian gaols had not been convicted of murder.

Table 1 shows that after murder, the most common offences attracting life imprisonment are: sexual offences (there were eight such persons), attempted murder (seven persons), assault occasioning grievous bodily harm (six persons), and manslaughter (five persons). Included in the miscellaneous category 'other' are armed robbery, government security, and drug trafficking offences. If present trends continue, however, it is likely that the proportion of drug offenders serving life sentences will increase quite significantly.

Legislation and Life Imprisonment

Given that the statute books contain a large variety of offences which carry life imprisonment (except Victoria which has only three such offences), it is somewhat surprising that murderers out-number all other life sentence prisoners by such a large margin (20 to 1).

The explanation for this can be found partly in the fact that murder has attracted a mandatory, rather than a discretionary life sentence, and continues to do so in many jurisdictions. This may be contrasted with the majority of offences where life imprisonment is regarded as a maximum sentence only, reserved for the most serious offences of their kind. Other explanations are that many offences carrying life imprisonment are obsolete (for example, clipping coins), are likely to be committed mainly during war time (for example, treason), or - like political terrorism are not the type of offences that are commonly found in a country with a

relatively harmonious political and social climate. Less convincing is the argument that these offences are not committed because they carry the sentence of life imprisonment.

Table 2 provides a useful comparison of a selection of statutory penalties from a number of overseas jurisdictions.

The Netherlands stands out in stark contrast to the other jurisdictions because of its moderate penalties. The maximum penalty for murder is twenty years, and although theoretically a life sentence is possible, it has never been used (Downes 1988, p. 122). The Dutch are renowned for their low imprisonment rates (presently about 40 per cent of the Australian rates) and are often held up as a model for demonstrating that less use of imprisonment, and more particularly, short sentences, do not necessarily lead to a greater increase in the crime rate when compared with other countries. Of course crime rates are increasing in the Netherlands, as they are in most other industrialised countries, but such increases can be attributed to fundamental social and economic developments rather than sentencing policy (Downes 1988, p. 120; Rusche & Kirchheimer 1939, p. 294). There is no lack of political pressure in the Netherlands directed at increasing sentences in the belief that this may stem the rising tide of crime. However, the Dutch have demonstrated that through moderate sentencing policies, they have attained one of the most humane prison systems in the world, and they have achieved this without any demonstrably adverse effects on crime rates (Downes 1988, Chapter 4). Certainly in Australia it has been strongly argued that our statutory maximum penalties are too high and provide little guidance for the day-today decisions of sentencers (see Australian Law Reform Commission 1988).

Discretionary Life Sentence for Murder

Until recently, murder has carried a mandatory sentence of life imprisonment in all Australian jurisdictions except the ACT - a legacy flowing from the abolition of capital punishment. However, in the present decade, the two most populous states of Australia have moderated their statutory penalties by providing judges with a discretion in sentencing murderers. Thus in New South Wales, under the provisions of the Crimes (Homicide) Amendment Act 1982, the mandatory life sentence for murder has been ameliorated by enabling the sentencing judge to impose a less severe sentence where the offender's 'culpability for the crime' is found to be 'significantly diminished by mitigating circumstances'.

Even more recently Victorians have legislated to untie the hands of the sentencing judge. Section 8 of the Crimes (Amendment) Act 1986 amended the Victorian Crimes Act to enable the judge, faced with the prospect of sentencing a murderer, to choose between a natural life sentence and any other appropriate term.

The only other jurisdiction which provides its judges with a discretion to impose a sentence of imprisonment of less than life for murder is the Australian Capital Territory. Indeed,

in Wheeldon (1978) 18 ALR 619, a case involving a young man who had been found guilty of murdering his mother, the Federal Court of Australia declared that a mandatory life sentence for murder had not been substituted when the death penalty was abolished in 1973.

Increasingly, it is coming to be recognised that variations in offence seriousness should be reflected (so far as possible) in the severity of the sentence imposed, as determined by the judge in open court under established common law principles

Because the sentence of life imprisonment is at the very pinnacle of the sentencing hierarchy and is intended, amongst other things, to denounce only the most serious offences and at the highest possible level, it is important that this sentence should not be applied indiscriminately. Equally, persons serving life sentences should not be released after serving only a very short custodial term, except for a very good reason. If either of these prescriptions are ignored the symbolic or 'aweinspiring nature' of the life sentence itself will be diluted and trivialised.

Mandatory sentencing laws discourage guilty pleas, thus adding to the problems of cost and delay in criminal proceedings. Certainly there is now some evidence to suggest that a maximum, as opposed to a mandatory, sentence of life imprisonment increases guilty pleas and reduces the

Table 2 Current Maximum Penalties From Other Jurisdictions (Selected Offences)

Offence		United	United			
	Canada	Kingdom	States ¹	Sweden	France	Netherlands
Manslaughter	Life	Life	10	10	15	15
Attempted Murder	Life	10	10	Life	Life	10
Kidnapping	Life	Life	Life	Life	Life	12
Robbery	Life	Life	Life	10	Life	15
Extortion	Life	14	5	6	10	9
Arson	14	Life	10	Life	20	15
Perjury	Life/14	5	2	8	10	3
Aggravated	14	Life	10	10	15	6
Assault						
Forgery	14	Life	10	6	Life	5
Imprisonment rate						
per 100,000	108	97	287	49	72	34
population						

¹from U.S Model Penal Code

Adapted from Table 9.4, Sentencing Reform: A Canadian Approach, Report of the Canadian Sentencing Commission 1986, Department of Justice, Canada, p. 208. Adapted with permission of the Minister of Supply and Services Canada, 1989.

number of appeals against convictions. This was noted by the Law Reform Commission of Victoria shortly after discretionary sentencing for murder was introduced in that State (Victorian Law Reform Commission 1988, p. 68).

In short, there is now sufficient evidence to argue that it is wrong, as a matter of justice and of policy, to impose the same punishment on all murderers.

Drug Traffickers

Under Commonwealth law a person may be sentenced to life imprisonment for drug trafficking. Although this penalty has been available to the courts for some time, courts exercising federal jurisdiction have been reluctant to impose the maximum penalty. The first such case (and for many years the only case) resulting in a sentence of life imprisonment involved a large-scale drug importer named Van Dijk who was sentenced in Western Australia in June 1986. Another example, Mario Postiglione, was sentenced in the NSW Supreme Court on 28 July 1988 to life imprisonment for the offence of being knowingly concerned in the importation of five kg of pure heroin concealed inside soccer balls. A third, and most recent instance coming to the writer's attention at the time of writing was that of David John Kelleher. Kelleher, described in court as a Mr Big in the drug trade, was sentenced to life imprisonment in Sydney on 21 September 1988 upon a charge of conspiring to import 9.5 kg of heroin.

Apart from the federal legislation, New South Wales, Queensland, South Australia and the Northern Territory also prescribe life imprisonment as a punishment for some drug offences. However, with the exception of Queensland's Drugs Misuse Act 1986 under which the mandatory life sentence for certain drug offences has been introduced, the courts have shown a preference for imposing determinate sentences.

Queensland's mandatory drug laws were recently criticised at the International Criminal Law Congress held at the Gold Coast in June 1988. Many of the conference participants, consisting of eminent criminal lawyers, members of the judiciary, prosecutors and academic lawyers, objected to legislation which, in terms of punishment, could not discriminate between on the one hand, a run-of-themill, small-time drug pedlar and, on the other hand, a large-scale drug importer whose sole motive was profit and whose actions were bound to contribute to the chain of misery and death for which the trade is renowned.

A further consequence of the legislation is that the less serious as well as the more serious drug traffickers are beginning to clog up the court system. Understandably, these offenders are reluctant to plead guilty because of the penal consequences of doing so. Under normal circumstances guilty pleas and co-operation with authorities often attract leniency in sentencing, but such co-operation is not encouraged where life imprisonment is mandatory.

According to Supreme Court data, as at 25 October 1988 there were thirty-four drug trafficking charges awaiting trial in the Supreme Court of Queensland. This compares with thirty charges on the Supreme Court Criminal Lists in July 1988 and only one such charge in July 1987. Meanwhile there is little evidence that the drug problem in Queensland is abating and, in time, the Government of Queensland may decide that the mandatory sentencing laws serve no useful purpose other than to delay court proceedings and unnecessarily contribute to prison overcrowding.

Setting Minimum Terms for Lifers

In most jurisdictions courts are simply not empowered to set non-parole periods (or minimum terms) when they impose sentences of life imprisonment. In these circumstances lifers are simply given no indication when, if at all, they are likely to be released from custody. For them there is no 'light at the end of the tunnel'. However, *in two States, Victoria and South Australia, courts do have the power to set minimum terms upon lifers and in most circumstances do exercise this option.*

In Victoria the mandatory life sentence for murder was repealed by the Crimes (Amendment) Act 1986, and courts were given power to choose between imposing life imprisonment or a lesser sentence of fixed duration. At the same time courts were empowered to set nonparole periods in respect of life sentence prisoners. Offenders who previously had been sentenced to imprisonment for the term of their natural life (natural lifers) were allowed to apply to the Supreme Court for the setting of a minimum term. Those who had originally been sentenced to death prior to the abolition of the death penalty (effective from 1 July 1976) and had previously had their sentences commuted to life imprisonment were also allowed to apply to the Court to have a minimum term set.

The setting of minimum terms in concert with life sentences is a desirable reform. It provides a better yardstick as to the perceived severity of the offence and gives the prisoner as well as the community some idea as to the minimum duration of the custodial portion of the sentence. Of course, release at the minimum time is contingent upon the prisoner's good behaviour and this incentive contributes to the orderly management of penal institutions.

One distinctive feature of the Victorian model is that remissions are expressly excluded from applying to non-parole periods when set in conjunction with life sentences. In South Australia life sentence prisoners are treated in the same way as other long-term prisoners - that is, they are subject to the same incentives, including reductions in the minimum term for good behaviour. Only time will tell whether the approach taken in South Australia is to be preferred.

The fact that the South Australian and Victorian courts have power to set minimum terms does not mean that they will always exercise this option. In the Russell Street bombing case, which occurred in Melbourne in November 1986, for example, two men were given life sentences for the murder of a female police constable. However, the principal offender, 51 year-old Stanley Brian Taylor, was not given the benefit of a minimum term. This was the first and, at the time of writing, only occasion in which the Victorian Supreme Court had declined to set a non-parole period under the new empowering legislation of 1986. Taylor's accomplice, 25 year-old Craig William Minogue, was given a minimum term of 28 years, because, according to the judge, this man was not beyond redemption.

Never to Be Released

From time to time the courts have expressed the view that specific offenders should never be released from gaol. For example, this occurred in the case of Crump and Baker (unreported decision of the NSW Court of Criminal Appeal, 7 February 1975), and concerned the horrific and well publicised murder of Virginia Morse at a property in north-western New South Wales. In that case the Court of Criminal Appeal endorsed the following remarks of the trial judge: 'If ever there was a case where life imprisonment should mean what it says - imprisonment for the whole of your lives - this is it.'

Similar exhortatory statements can be found occasionally, as in the brutal sex murder in February 1986 of *Anita Cobby* in NSW and in the *David* and *Catherine Birnie* case (torture, rape and murder of four Perth women in late 1986). Until recently even the endorsement on a life sentence prisoner's file 'never to be released' did not have any binding legal effect

upon those charged with the responsibility for determining when the prisoner should be released. However, under the provisions of the *Criminal Law Amendment Act* No.70 of 1988 in Western Australia the law was amended so that a court which imposes a sentence of strict security life imprisonment can, where it considers appropriate, order that the person is not to be eligible for parole. This is intended to mean that the prisoner must serve the rest of his or her life in gaol.

Average Term Served By Life Sentence Releasees

Given that most lifers are eventually released, the question of how long they are likely to serve in prison becomes important. Researchers have examined this question and found that the average terms varied slightly from State to State (Freiberg & Biles 1975). An examination of their findings, which related to lifers released prior to 1975, suggests that they served, on average, between 11 and 14 years of their life sentences in custody. Since then there have been fluctuations in the general patterns, as can be illustrated by the NSW experience.

In **New South Wales** during the period 1975 to 1979 the average term served by lifers was a relatively high 14 years and 3 months. More recent data, for the period 29 February 1984 to 14 September 1987 reveal that the average term served by lifers was 11 years and 7 months.

In Victoria 46 of 119 prisoners who had been sentenced to natural life prior to 1986 were given an average minimum term of 11 years and 9 months. New lifers (those sentenced since 1986) received minimum terms averaging 14 years and 3 months (calculated on the basis of 24 prisoners sentenced between July 1986 and December 1987).

Queensland not only has the second highest number of life sentenced prisoners in Australia, but

also the longest serving. An analysis of 111 lifers released to parole between 1959 and June 1988 reveals that the average term served was 15 years and 9 months. This high average may be explained in part, by the very high proportion of lifers who had served more than 20 years imprisonment before release. The data reveal that there were 17 cases or 15.3 per cent of lifers who served over 20 years, with an average term of imprisonment of 27 years 2 months prior to their release.

South Australian figures show that the average non-parole period set by the sentencing court in respect of those with life sentences was 17 years and 8 months. With remissions this reduces to an effective minimum term of 13 years and 3 months. These figures relate to 37 life sentences imposed by the courts during the period 20 December 1983 and 27 July 1988.

There are considerable difficulties in making direct comparisons of Western Australian data with other jurisdictions because of WA's 'strict security life imprisonment' sentence. This unusual sanction, introduced in 1984, effectively requires 'strict security lifers' to serve a minimum term of 20 years imprisonment before they may be considered for release on parole and accordingly it will be some time before the first prisoners given this sentence may be considered for release. Freiberg and Biles (1975) reported an average term of 12 years and 11 months for male lifers released between 1900 and 1974 in Western Australia. More recent data relating to nine wilful murderers released between 1975 and 1987 however, indicate an average term of 13 years and 11 months was served. This may be compared with 33 murderers (that is not wilful murderers) released during this same period who served an average term of 6 years and 7 months.

Of course, the exercise of the royal prerogative of mercy is always possible. *Thus even the sentence of strict security life imprisonment may be commuted, so that offenders* subject to this sanction may be released prior to the expiration of their minimum review date of 20 years. In practice this is only likely to occur where the governor is of the opinion that special circumstances exist (see Offenders Probation and Parole Act 1963 [WA] s.40D).

The **Tasmanian** numbers are small and so are easily analysed. According to the Parole Board, from the date of the last execution in Tasmania on 14 February 1946 until 26 October 1987, 57 persons, including four women, were sentenced to life imprisonment. During this period three lifers died while serving their sentences in prison and 20 lifers were released to parole. The average custodial term served by the 20 releasees was 10 years and 3 months. If, however, the four shortest terms (between 2 and 6 years) are excluded, then the average custodial term served by these lifers increases to 11 years 3 months.

Tasmanian lifers do not appear to serve exceptionally long custodial terms, and Parole Board data as at the end of October 1987 suggest that the longest serving lifer still in gaol has been incarcerated for 17 years and six months. The longest term served by a life sentence releasee is 14 years and 10 months (released in 1965) and only eight cases out of a total thirty-four lifers still in prison have served 10 years or more

Conclusion

If there is a problem with the practice of releasing lifers it is that it fails to satisfy the principle of 'truth in sentencing' and invites the criticism that the imposition of a life sentence is nothing more than a sham designed to mislead a gullible public. There is some validity in this criticism and perhaps it is best met, not by ensuring that prisoners are never to be released, but by ensuring that only the very worst offenders are given this sentence. Inevitably this entails not only restricting the type of offences in

respect of which life sentences may be imposed but also abolishing mandatory life sentences. Better still, changing the label 'life imprisonment' to (for example) 'imprisonment for an indeterminate duration' might more honestly represent what is really intended by the sentence.

Reforms in some Australian jurisdictions which have extended discretion to the sentencing judge in murder cases are welcome developments, as are the powers to specify non-parole periods for those sentenced to life imprisonment. Such reforms serve to remove the aura of uncertainty and capriciousness surrounding this sentence and so contribute to the administration of justice in a positive way.

There is little merit in creating a regime which gives prisoners absolutely no hope of ever being released from prison. In the majority of cases such a drastic penalty serves little purpose other than perhaps, to exact uncompromising retribution for the harm done, to appease some advocates of the death penalty or to reassure those who may entertain a generally unfounded fear of the offender's potential for future harm.

Society must find a humane way of handling life sentence and long-term prisoners. One step towards this is to ensure that life and long-term sentences are imposed infrequently and in exceptionally bad cases only. Another step is to avoid the temptation of assuming that mandatory sentences, and particularly mandatory life imprisonment provisions provide a panacea for society's ills. Finally, in those rare cases where life imprisonment is appropriate, the sentence should be such that, while broadcasting both to the community at large and to the prisoners themselves, the total abhorrence of what they have done, preserves still a real glimmer of hope for such prisoners - a hope that one day, perhaps a long way, and in some cases a very long way, down the track, they will be given an opportunity to resume normal living.

Such demonstrable compassion should not be viewed as a sign of weakness but one of strength - a working symbol of a tolerant society which tempers justice with mercy and gives more than passing recognition to the cruelty and ultimate futility of imprisonment until death. It exemplifies a society which places a high premium on human life, including that of a condemned murderer, and accepts that over time, even the most violent offender may reform in character, attitude and behaviour

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