Submission No 20

INQUIRY INTO SECURITY CLASSIFICATION AND MANAGEMENT OF INMATES SENTENCED TO LIFE IMPRISONMENT

Organisation: Justice Action

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NSW Legislative Council Inquiry:

Security Classification and Management of Prisoners Sentenced to Life Imprisonment

Submission by Justice Action

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1. Executive Summary

This NSW Parliamentary Inquiry is about to consider a proposal for exclusion and punishment which is more severe than ever before.

It will consider reducing prisoners serving total life to the status of "living dead". They would be denied the opportunity for self development, and would be held under deliberately destructive high security conditions for the rest of their lives. Such changes would effectively legitimise torture and violate the United Nations Declaration on the Right to Development. The proposal violates fundamental moral and legal principles in a civilised society.

This situation follows the recent TV exposure of a victim's grief and anger after hearing that the offender would be classified under reduced security.

The Inquiry was established at the request of the Minister of Corrective Services, David Elliott, following his intervention in the reclassification of lifer Andrew Garforth. The Commissioner of Corrective Services decided to reduce Garforth's security classification from A2 to B on the recommendation of the Serious Offenders Review Council. This reclassification would have allowed Garforth to apply for work and rehabilitation courses. The Council notified Christine Simpson, the mother of the victim, of the classification change. She contacted the media and her story was broadcasted on Channel 9's *A Current Affair* on the 13th of July 2015.

Mrs Simpson then created an online petition to have the reclassification revoked. The petition gained 30,000 signatures in 24 hours. Under media pressure Minister David Elliott then ordered Commissioner Severin to revoke Andrew Garforth's reclassification. He later ordered all other total lifers be returned to maximum security.

The Inspector of Custodial Services examined what had occurred and found that the Minister's action in response to media attention was illegal. Minister Elliott was legally required to consult the Serious Offenders Review Council before his decision. He then went through the motions of consultation and made the same decision.

The classification and treatment of lifers based on anything other than security offends many principles of the justice system. This submission to the Inquiry focuses specifically on the following principles.

1.1. Philosophy of Hope

At the core of both the criminal justice system, religious and humanist beliefs lie the notions of human dignity, the ability to atone for past mistakes and forgiveness. For example, Jesus preached the ethnic of forgiveness, reconciliation and love for each human individual, whilst Allah is the Forgiving and the Merciful. Such religious notions emphasise the importance of rehabilitation and just punishment in facilitating a safer, more moral society. The notion of "an eye for an eye" represents a restraint on revenge or retaliation. This principle is based on the idea that human beings were created by God, and thus will always exist in relation to God, regardless of their actions.

Those who commit crimes should be punished, but their punishment should never deny their dignity or humanity. Without hope and rehabilitation total life prisoners would become the "living dead". They would have no opportunity or resources to develop spiritually and individually. Instead they would simply remain the people they were when convicted, awaiting their impending death.

1.2. The Rule of Law

The Australian justice system is based upon the Rule of Law. According to A V Dicey *(The Law of the Institution (1885))*, the Rule of Law embodies the notion that there should be the existence of regular law or rules as opposed to the arbitrary wishes of people. John Finnis (Natural Law and Natural Rights, 1980) further elaborated on the principle of the rule of law determining it requires clear prospective laws which are not open to a number of interpretations.

In so doing, rules must be coherent and sufficiently stable to allow people to be guided by their knowledge of the content of the rules. The people with authority to make, administer and apply the rules must be accountable and administer the law consistently and in accordance with its tenor. It follows that victims cannot be involved in sentencing or post sentencing processes as they lack the ability to view the case objectively.

Victims and their experiences are acknowledged through Victim Impact Statements (VIS). According to section 28 of the *Crimes (Sentencing Procedure) Act 1999*, a VIS can be read out and considered at any point after conviction and before sentencing. Victims' involvement may result in offenders being treated inconsistently, which undermines the notion of all individuals being equal in the eyes of the law. Victim interference in sentencing brings the threat of introducing subjective considerations into this process.

As part of the Rule of Law, it is the judiciary that determines an offender's sentence. The sentence is objectively determined based on considerations of proportionality to the harm caused by the crime, thus drawing on the idea of retributive justice. It is this objectivity of the court in making these assessments that secures the equality of treatment before the law and ensures the rule of law. Any attempts by victims or politicians to alter or increase punishment undermine the fundamental principles of our criminal justice system.

In contrast, the use of VIS in the reclassification of prisoners is not legislated and is provided for only under guidelines that have been written by the Serious Offenders Review Council. The use of VIS is applied in an ad hoc manner. The usage of VIS in reclassification is a breach of the Rule of Law as there is no accountability in the application of VIS and no guarantee all persons will be treated in the same manner and the policy not arbitrarily enforced in circumstances where a particularly vocal victim exists.

1.3. Reconciliation with Victims and the Community

Rehabilitation of offenders, irrespective of sentence or security classification, enables prisoners to reconcile with themselves, the victims and the community. Part of this process of reconciliation involves reflecting upon and attempting to make sense of what has occurred. Specifically for prisoners it is an opportunity to interpret their actions and understand the harm they have caused. As a result, access to rehabilitative programs and services should not be dependent on the prospect of release.

The prisoner's deeper insight into the impact of their actions can have a positive impact on the experiences of victims. This provides victims with a means to come to terms with what has occurred, gain, comfort and closure and attempt to move forward. A prisoners' greater remorse for their actions and empathy for the victims' experiences allows for victims' greater closure and could provide a certain amount of comfort. Even if the victim does not currently wish to engage with the offender, the rehabilitation of the prisoner remains critical as it creates the potential for reconciliation and for victims to seek closure in the future if they later wish to do so.

1.4. Prospect of Release

Every individual is legally entitled to the prospect of being released, even if they are serving a total life sentence. This entitlement is the Royal Prerogative of Mercy where the offender has the power to request release under section 114 of the *Crimes (Appeal and Review) Act 2001*.

Individuals who are serving a sentence of total life are entitled to apply for a review of their sentence if they can argue, for example that they have paid sufficient penalty, are no longer a public risk, have changed as a person and should be given conditional liberty.

Prisoners are therefore entitled to rehabilitative opportunities as these services prepare prisoners and by putting them in a positive position to apply to be considered for release. This reaffirms the importance of rehabilitative services and necessitates their availability.

1.5. The Right to Development

The right to development is recognised by the United Nations as a human right:

> The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.
> - Article 1.1, Declaration on the Right to Development

Educational and rehabilitative programs provide ways of enriching the cultural, social and spiritual lives of people in prison. All prisoners regardless of sentence, have the right to access prison programs and services for personal development as they do not have any alternative supplier for development services while in prison.

1.6. The Right to Privacy

In high profile cases, the media is easily able to exploit public interest for commercial gain. Before a trial there are already significant restrictions on reporting. There is a need to also create privacy rights for victims of crime after the trial. This needs to also apply to prisoners as they are the other part of the relationship.

Once the trial is over and the offender has been sentenced, the offender should have the right to serve the court's sentence without interference from the media, the victim, and the politicians. This right is inherent in the controlled environment of a prison managed by the state, and the current legal obligation of staff not to use their trusted access to sell information to the media. Registered victims should only be notified of changes to a prisoner's management if it relates to safety concerns. Any other position only disturbs the victim and interferes with the prisoners rehabilitation.

1.7. Security Classification

The only consideration when deciding the security classification of any prisoner should be the prevention of prison escapes. Any attempt to deliberately punish certain prisoners through administrative means outside the sentencing court's decision is an interference with the authority of the court. Changes to sentences would require a statutory change, not the personal assessment of a minister for political purposes. This is a clear breach of the Separation of Powers as the minister has no weight with regards to the decisions of the Judicature.

Reassessment of security classifications is an expert and informed matter for which there are very significant structures involving Committees with additional checks. The opinions of victims, media or politicians is irrelevant, and their inclusion is neither just nor efficient for the stated public purposes of imprisonment.

Removing the possibility of reclassification and hope creates an extremely dangerous environment for staff and other prisoners. It removes any incentive for lifers to behave well and refrain from harming themselves or others.

To deliberately deprive lifers of the right to personal development would be removing their humanity - defined as torture – and places greater burdens on taxpayers and correctional facilities management. The idea of being deliberately destructive degrades us as a community.

Lifers invest decades of effort in the hope of better treatment in the future, access to rehabilitation, education programs, employment and possible freedom. It is extremely unlikely that lifers would attempt to escape, as it is counter-productive to their review for potential release. After such a period of institutionalisation, prison becomes their home isolated from the outside world.

1.8. Recommendations

Justice Action's recommendations emphasise the key principles of hope, fairness and community building in a corrective environment for all people including those sentenced to total life.

Recommendation 1
In accordance with principles of the Rule of Law, victims should have no influence on the sentencing or post-sentencing processes of the justice system relating to the offender.

Recommendation 2
Victims should not be notified of changes to the security classification of a prisoner unless it could affect their safety.

Recommendation 3
Ministerial intervention in administrative matters relating to individuals should not be permitted. This should be the responsibility of the Commissioner upon the advice of expert Committees and Boards appointed for the purpose. The issues are too emotional to expect politicians to resist taking short term political benefit.

Recommendation 4
Every prisoner should be encouraged to improve their behaviour and develop personally, with the prospect of hope and reconciliation with the community.

Recommendation 5
Both the victim and the offender should have the right to privacy protected in legislation.

2. The Philosophy of Hope

2.1. Overview

The philosophy of hope as embodied in various religious faiths, which form a useful basis in understanding the rehabilitative nature of the criminal justice system. Ideas of human dignity, atonement and forgiveness are at the core of the criminal justice system. Changing the security classification system to deny or reduce prisoner access to rehabilitative programs and services takes away hope from prisoners serving life sentences and excludes them totally. While retribution is a key notion that influences the achievement of the purposes of sentencing there should be a balance of retributive and restorative justice concepts.

2.2. Religion

At the heart of many faiths are the ideas of human dignity and worth, the ability to atone for past mistakes, and forgiveness. These ideas are similarly reflected in the criminal justice system. Denying or reducing prisoner access to rehabilitative programs and services will take away hope from prisoners serving life sentences and exclude them totally.

A common thread that runs through religious thought is the ability to atone for past wrongdoing and hope for change and self-improvement: Jesus preached the ethic of forgiveness, reconciliation and love for each human individual,[1] Allah is the Forgiving, the Merciful (al-Nisa: 110), in Judaism, complete spirituality involves self-improvement and community engagement,[2] Sikhism stresses values of mercy, forgiveness, compassion and benevolence. These are only a handful of the multitude of faiths of many people. Behind them, ideas of atonement, change and self-improvement are central to their image of social inclusiveness, cohesion, and human dignity.

Such religious concepts emphasise the importance of rehabilitation and just punishment in facilitating a safer, more moral society. In Christianity, the notion of "an eye for an eye" represents a restraint on revenge or retaliation. This principle is based on the idea that human beings were created by God, and thus will always exist in relation to God, regardless of their actions. For this reason, those who commit crimes should be punished, but their punishment should never deny their dignity and inherent humanity, highlighting the role of spirituality and rehabilitation.

Religion thus reinforces a 'hopeful' approach by affirming the worth of the individual. Christianity, for example, affirms the worth of people, who are all made in God's own image. As Pope John Paul II explained: "dignity of human life must never be taken, even in the case of someone who has done great evil".[3] Thus Catholic teachings say that punishments should never deny a person's intrinsic humanity.[4] All people are inextricably bonded to the human family,[5] and an intrinsic part of humanity is continued development, and self-improvement.

The purpose behind the criminal justice system reflects many of these religious principles of atonement, rehabilitation and forgiveness. Denying or reducing lifers' access to programs and services is in direct conflict with these principles. It wholly excludes prisoners serving life sentences from the intrinsic part of humanity that is their ability to atone and denies their right to self-improvement.

[1] Michael L. Hadley, 'The Spiritual Roots of Restorative Justice' (State University of New York Press, 2001) 16.

[2] Ibid 9.

[3] Dora W. Klein, 'The Dignity of the Human Person: Catholic Social Teaching and the Practice of Criminal Punishment' (2014) 60 Loyola Law Review 1, 1.

[4] Ibid 8.

[5] James Logan, 'Healing memory, ontological intimacy, and U.S. imprisonment: toward a Christian politics of "good punishment" in civil society', (2012) 75(4) Law and Contemporary Problems 77, 88.

2.3. Vengeance and Retributive Justice

Retributive justice refers to justice through the imposition of punishment. Traditionally, a system based on retributive justice requires offenders to be punished for committing an offence so that a certain moral balance can be restored.[6]

Retributive justice is 'offender focused', emphasising the offenders' 'deservingness' of negative treatment. This ultimately results in society assigning a negative value or lowered social status to the offender.[7] This personal vengeance is the key feature that distinguishes retributive justice from restorative justice.[8]

The Crimes (Sentencing Procedures) Act 1999 states that one of the purposes of sentencing is 'to recognise the harm done to the victim of the crime and to the community',[9] which is absolutely vital to achieving justice. Retribution is a key factor that influences the achievement of this purpose. It encompasses the notion that the punishment must be proportional to the harm caused by an individual's criminal behaviour. However, victims and the media often neglect to consider this requirement of proportionately of punishment to the harm caused, due to feelings of resentment and other adverse personal effects resulting from the crime.

The primary focus of retributive justice is to injure offenders in proportion to the injuries they have caused. Once punishment has been inflicted, the offence is considered to be behind the offender and their victims, and both parties can move on with their lives.[10]

However, retributive justice has been criticised for being indistinguishable from the notions of revenge and vengeance. The ideals behind the concepts of vengeance and retribution both focus on responses to wrongs committed against victims and attempt to administer justice. However, vengeance is focused on personal feelings, whereas retribution is focused on objective judgement.

There needs to be a clear distinction between the two concepts, as our criminal justice system must remain solely focused on retribution and not persuaded by personal vengeance. This is only achievable if objective state decision makers, rather than subjective victims, make sentencing and post sentencing decisions.

The Hon. David Levine, Chair of the Serious Offenders Review Council NSW, stated that permitting the further intrusion of the jury or victims into the sentencing process could be seen to "amount to the validation of vengeance and vendetta which hitherto the whole of the rule of law and the administration of criminal justice has been at pains to prevent".[11]

Grief often greatly affects the judgment of victims making it difficult for them to present objective input regarding sentencing. Thus, it is argued that allowing victims to contribute to sentencing decisions may compromise the role of judges, and the impartiality and objectivity of the criminal justice system.

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[6] Wenzel, M. Okimoto, T. G. and Cameron, K. 'Do retributive and restorative justice processes address different symbolic concerns?' (2012) 20(1) Critical Criminology 25.

[7] Gromet, D. M., & Darley, J. 'Restoration and retribution: How including retributive components affects the acceptability of restorative justice processes' (2006) 19 Social Justice Research, 395–432.

[8] Okimoto, T. G., & Wenzel, M. 'The symbolic meaning of transgressions: Towards a unifying framework of justice restoration' in K. Hegtvedt & J. Clay-Warner (eds.), Advances in group processes (Emerald, 2008), 291-326.

[9] Crimes (Sentencing Procedures) Act 1999 (NSW) s 3A.

[10] Walen, Alec, 'Retributive Justice', The Stanford Encyclopedia of Philosophy (Summer 2015 Edition), Edward N. Zalta (ed.) <http://plato.stanford.edu/archives/sum2015/entries/justice-retributive/>.

[11] David Levine, "Victims of Crime: The geometry in the courtroom and in the Administration of Sentences" (2011) 14.

Decisions made in the case of *R v Previtera* emphasise the need for objectivity in sentencing, particularly in cases where the victim is deceased. Furthermore, it is made apparent that views of family members of the victim should not contribute to the determination of the gravity of harm occasioned to the primary victim.[12] This is because family members cannot know the exact parameters of harm caused to the victim; thus, harm caused may be over or under stated.

The case of *R v Previtera* also highlighted the rule of law concerning the universality of the value of human beings and that in death we are all equal. Thus, to enforce this rule, special discretionary influence cannot be given to victims unless it is given to all victims, otherwise it would undermine the current criminal justice system.

When the above is considered, it becomes necessary to question the limits of punishment. Following the administrative decision made by the judiciary, there can be no additional punishment inflicted on any offender, this includes the revocation of privileges that an offender has rightfully and objectively earned through good behaviour and participation in the available rehabilitative programs. Revocation of such privileges through ministerial intervention, as a result of social pressure breaches the limits of punishment.

2.4. Rehabilitation and Restorative Justice

The ideals that underpin the notion of restorative justice, in contrast to retributive justice, focus upon facilitating a collective resolution between stakeholders when considering the appropriate consequences for the offence.[13] Though it is not a primary outcome of the process, the procedures of restorative justice can often lead to reconciliation when the reality of the circumstances and sufferings of both parties are realised.[14] Its cathartic and practical benefits give it substantial value in the administration of justice, providing various opportunities for legal and emotional restoration to occur, and provide hope for normality for both the victim and the offender.

According to the AIC, restorative justice is a 'tertiary crime prevention measure' which aims to rehabilitate offenders and prevent reoffending. A report by the AIC in 2004 revealed that, where restorative methods have been utilised, there was up to a 20% reduction in 'reoffending across different types of offences and regardless of gender, criminal history, age and Aboriginality of the offenders'.[15]

The Australian judicial system, as well as the judicial systems of most of the Western world are based on principles of retributive justice, with a focus on 'just desserts' – that is, justice is defined as the appropriate punishment of an individual for an act that is considered harmful to society. Our judicial system's focus on retribution, punishment and deterrence often overshadows the notions of equity and rehabilitation as key purposes of the justice system.

By contrast, the justice system in place in Scandinavian states place emphasis on rehabilitation and equity whilst maintaining a focus on restorative justice; this has resulted in significant reductions in recidivism. This is an ideal model, as it still entails therapeutic processes for the benefit of victims, yet also aims to rehabilitate offenders so that they can understand the harm they have caused, and try not to cause further harm once released.

[12] R v Previtera (1997) 94 A Crim R 76.

[13] Armstrong, J. 'Restorative Justice as a Pathway for Forgiveness: How and Should Forgiveness Operate Within the Criminal Justice System?' in Maamri, M.R., Verbin, N. and Worthington, Jr., E.L. (eds) A Journey through Forgiveness (Inter-Disciplinary Press, 2010).

[14] Ibid.

[15] Australian Institute of Criminology, 'Restorative justice as a crime prevention measure', Report No 20 (2004).

3. The Rule of Law in the Australian Justice System

3.1. Overview

The entire Australian legal system is based on Dicey's rule of law, which states all people are equal under a coherent system of rules and that no person can override the boundary of their powers as set out by the law. Under the Australian criminal justice system, there are set rules given to the role of the court, administrators, prisoners and victims in the administration of justice. Recent events have revealed an increasingly harsh attitude towards prisoners, as well as the increasing influence of victims over the system, and even the violation of the rule of law by ministers.

3.2. Diceyan Theory

"Every man, whatever be his rank or condition, is subject to the ordinary law of the realm, and amendable to the jurisdiction of the ordinary tribunals."[16]

The Australian justice system is based on the rule of law. According to A V Dicey, the Rule of Law is the notion that there should be the existence of regular law or rules and not the arbitrary wishes of people.[17] John Finnis further writes on this principle, stating that the Rule of Law requires clear prospective laws that are not widely interpretable.[18] A rule must be coherent and sufficiently stable to guide people in their working knowledge of it. Moreover the people given the authority to make, administer and apply the rules must be accountable to and act consistently with the tenor of its principles.

The principle of the Rule of Law is in place to ensure equality and fairness. One important concept is the necessity for those with legislative authority to act within the bounds of their capacity.[19] No person, whatever their legislative status, can override the boundary of their powers as marked by the law.

In his review of the security classification of lifers, the Inspector of Custodial Services outlined that only the Commissioner can only revoke the classification of lifers after "seeking and considering the recommendations of the Review Council."[20] Additionally, classification decisions should not be "based on the concerns of victims of crime or other community members."[21] The Minister for Corrections failed to adhere to these guidelines when he revoked the classification of lifer Andrew Garforth, because his decision was based upon the widely publicised and highly emotive campaign led by Christine Simpson and *A Current Affair*.

3.3. The Role of the Court

The judiciary's function is to interpret and apply the law in resolving legal issues between the government and persons, and between persons.[22] Under the *Crimes (Sentencing Procedure) Act 1999*,[23] the NSW court exercising criminal jurisdiction has power to impose penalties for an offence. It also has discretion over sentencing procedures, for imprisonment, good behaviour bonds, and other areas.[24]

[16] Albert Venn Dicey, Introduction to the Study of the Law of the Constitution, (Indianapolis: Liberty Fund, 1893) 183.
[17] Albert Venn Dicey, The Law of Institution (Macmillan, 1st ed, 1885).
[18] John Finnis, Natural Law and Natural Rights (OUP Oxford, 2nd ed, 2011).
[19] Kevin Lingren, The Rule of Law (2012) 3.
[20] Inspector Custodial Services, 'Lifers: Classification And Regression' (Department of Justice, 2015).
[21] Ibid.
[22] Odgers, James Rowland. Australian Senate Practice. No. 1-1976. Government Printer, South Africa, 1976.
[23] Crimes (Sentencing and Procedure) Act 1999 (NSW).
[24] Ibid.

A sentence as penalty for a criminal offence is objectively determined based on considerations of proportionality to the harm caused by the crimes, thus drawing on the idea of retributive justice. It is this objectivity of the court in making these assessments that secures the equality of treatment before the law and ensuring the rule of law. Any attempts by victims or politicians to alter or increase punishment undermine the fundamental principles of our criminal justice system.

In contrast, the use of victim impact statements in the reclassification of prisoners is not legislated and is provided for only under guidelines that have been written by the Serious Offenders Review Council. The ad hoc usage of victim impact statements in reclassification is a breach of the Rule of Law, as there is no accountability in the application of victim impact statements and no guarantee that all persons will be treated in the same manner. There is a danger this policy could be arbitrarily enforced in circumstances where a particularly vocal victim exists. Victims cannot be involved in sentencing or post sentencing procedures as they lack the ability to view the case impartially. Ultimately, the court bears the final responsibility for making an objective determination based upon equality and accountability.

3.4. Victim Impact Statements

There has been increasing support for greater victim involvement in sentencing procedures, especially where cases involve serious offences such as homicide. Chief Justice Spigelman emphasised this when he stated that there is a 'new focus on the impact of the criminal justice system on those members of the community most affected by a particular crime.' Most notably this has been seen through proposals to allow victim impact statements to be considered in sentencing.

A Victim Impact Statement (VIS) is defined as a statement containing particulars of any personal harm suffered by a primary victim, or the impact of the primary victim's death on family members in the case of a family victim.[25] Victim Impact Statements are not normally taken into consideration in the sentencing process and are seen primarily as a therapeutic, cathartic process for victims. However, according to section 28 of the *Crimes (Sentencing Procedure) Act 1999*, a VIS can be read out and considered at any point after conviction, but before sentencing.

It should be noted that where a victim has been killed, the court might consider an impact statement from a family member as they determine the appropriate sentence for offender, if the prosecutor makes an application to the presiding member of the jurisdiction. This is because the court may consider the impact of the death of the primary victim to be an aspect of harm inflicted on the community.[26]

Allowing Victim Impact Statements to be considered when delivering a sentence for a crime committed is problematic because it deviates from the core principle of the Rule of Law – that in death, all lives are equal.[27] If Victim Impact Statements are considered in sentencing, it will no longer be solely the offence that determines the sentence.

The case of R v Previtera exemplifies the inappropriateness of taking a VIS into account, especially in relation to sentencing for homicide cases. It is 'offensive to fundamental concepts of equality and justice for criminal courts to value one life as greater than another' and a sentence must be proportionate to the objective seriousness of an offence.[28] This was later reinforced by R v Bollen that ascertained that a VIS by relatives of the victim in a homicide case 'can never be relevant to the sentence.'[29]

[25] Crimes (Sentencing Procedure) Act 1999 (NSW) s 26.
[26] Ibid s 28.
[27] Kirchengast T 'Sentencing law and the 'emotional catharsis' of victim's rights in NSW homicide cases' 30 Sydney Law Review 615, 615-637.
[28] R v Previteria (1997) 94 A Crim R 76.
[29] (1998) 99 A Crim R 510 at 529.

Critics are concerned that 'the content of the victim impact statements may move the court, consciously or subconsciously, to accord greater weight in sentencing to retribution than may otherwise be justified'.[30] Any sentence handed down should be proportionate in severity to the offence committed, which is determined by an objective third party. Therefore, the subjective nature of a VIS written by the victim's family is at odds with the sentencing process. If considered by the court, the sentences passed on offenders would be heavily influenced by the 'resilience, vindictiveness or other personal attributes of the victim'.[31]

Though judicial consideration of VIS may at first seem like a humane and conciliatory act, it is likely that such interferences would undermine the integrity of the legal system and its respect for equality of life, by introducing subjective considerations into the sentencing and security classification processes. By undermining notions of equality and fairness, the use of victim impact statements runs counter to the rule of law and the role of the court in the Australian justice system.

[30] Martin Hinton, 'Guarding Against Victim-authored Victim Impact Statements' (1996) 20 Criminal Law Journal 310, 313.
[31] Ibid 314.

4. Reconciliation with Victims and the Community

4.1. Overview

The process of reconciliation involves attempting to make sense of what has occurred, in order to reconcile offenders, victims and the wider community. For prisoners, this process involves rehabilitative programs that allow them to reflect upon their actions and coming to an understanding of the harm they have caused. Prisoners' deeper insight into the impact of their actions can have a great positive impact on the experiences of victims. Prisoners' greater remorse for their actions and empathy for the victims' experiences allow can provide a certain amount of closure and comfort. Community support and compassion, through a range of services and programs, assist victims in attempting to reconcile themselves to the crime that has occurred and the offender, and thus aid their attempt to move on and find some sense of normalcy.

4.2. Importance of Rehabilitative Programs

All prisoners, regardless of their sentence, security classification or prospects of release, must be allowed access to rehabilitative programs and services. Rehabilitative programs are necessary in order to give prisoners a deeper insight into the impact of their actions, allowing them to reflect upon and attempt to make sense of what has occurred. Prisoners undergoing rehabilitation can have a significant positive impact on victims. Even if the victims does not currently wish to engage with the offender, the rehabilitation of the prisoner remains critical as it creates the potential for reconciliation and for victims to seek closure in the future if they later wish to do so.

4.3. Community Support for Victims

Community compassion should be the central focus in the aftermath of a crime. This can be achieved by providing the victim with the required health and social support to help overcome their suffering and financial compensation to indicate community care. This will ensure recognition of the victim's traumatic experience and future safety precautions taken for the society as a whole. The focus should be on restorative justice and it is the responsibility of the community to support victims so that they can reconcile themselves with their experiences and with the perpetrator who caused the harm.

5. Punishment and the Prospect of Release

5.1. Overview

Every individual is legally entitled to the prospect of being released. For those serving a life sentence, the prospect of release comes in the form of a Royal Prerogative of Mercy, a power of the Crown. This reaffirms the importance of rehabilitative services and their availability to increase prisoners' chances of release. However, an increasing focus on punishment, such as through chemical castration and anti-libido treatments, ignore the fundamental fact that prisoners are still human and that they have the right to not be tortured.

5.2. Life Sentences

Life imprisonment is the most severe punishment in the Australian Justice System. Those serving a life sentence are serious offenders, with very limited opportunity for parole or release, depending on the date they were sentenced.[32] They also cannot have their classification reduced to minimum security.[33]

According to section 61(1) of the *Crimes (Sentencing Procedure) Act 1999 (NSW)*,[34] a court is to impose a life sentence if:

> [The] level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence.

However, in R v Petroff,[35] Hunt CJ At CL, observed:

> Such a sentence deprives a prisoner of any fixed goal to aim for, it robs him of any incentive and it is personally destructive of his morale.

The punishment of Andrew Garforth and other lifers should not be shaped only by purposes of retribution, community protection and danger. The very realistic prospect of rehabilitation is thus completely disregarded. Everyone, including prisoners, has a fundamental right to development and for prisoners, rehabilitative programs is a key mechanism that prisoners can participate in to better themselves. This represents an inconsistency between sentencing approach and outcomes, which can lead to injustice for individual offenders.[36]

The case of R v Lewthwaite provides another relevant example.[37] Lewthwaite's case was also described as 'one of the worst types' by the court, according to experts Lewthwaite was seen as forever dangerous. However, Slattery AJ's judicial remarks stated that Lewthwaite had evidenced significant maturation, psychological development and rehabilitation after serving, at that time, 18 years in prison. He was released in 1999 and has not re-offended. It is never possible to rule out the potential for rehabilitation or psychological recovery of an offender and thus the law must allow for review of sentences.

32 Inspector of Custodial Services, above n 20, 5.
33 Ibid.
34 Crimes (Sentencing and Procedure) Act 1999 (NSW) s 61.
35 R v Petroff (unreported, Court Of Criminal Appeal, NSW, 12 November 1991).
36 R v Jurisic (1998) 45 NSWLR 209 (Spigelman CJ).
37 R v Lewthwaite (unreported, Supreme Court Of Australia, 31 July 1992).

5.3. Prospect of Release

Prisoners are entitled and must be allowed access to rehabilitative opportunities as these services prepare prisoners and put them in a positive position to apply for release to be considered. This reaffirms the importance of rehabilitative services and necessitates their availability.

Every individual is legally entitled to the prospect of being released, even if they are serving a life sentence. This entitlement is the Royal Prerogative of Mercy where the Crown has the power to request the release of an individual under section 114 of the *Crimes (Appeal and Review) Act 2001*[38] and due to the separation of powers this cannot be blocked by parliament. However, the enthusiastic rhetoric of 'prospect of release' is undermined by its limited application. In recent years the 'prospect of release' has been made redundant because it is only applicable under Commonwealth law, for corporations, electoral and taxation offences. At best, individuals who are serving a sentence of 'natural life' are entitled to apply for a review of their sentence if they can argue that they have paid sufficient penalty, are no longer a public risk, are changed as a person and/or should be given a second chance at conditional liberty.

5.4. Chemical Castration

'Chemical castration' refers to the ingestion of libido reducing substances.[39] Media outlets and politicians claim that this forced treatment will reduce the rate of paedophilic assaults. This is untrue. Therefore, forced chemical castration is destructive to the welfare of the offender and leads the public into a false sense of security.

Media coverage on forced chemical castration so far has led viewers to believe that it will result in a reduced risk of children being attacked. Sex offenders are not typically motivated by sexual paraphilia (a psychiatric diagnosis of abnormal sexual orientation), but by aggression and dominance. Thus, the Royal Australian And New Zealand College Of Psychiatrists argues and research shows that chemical castration will have a very limited effect on some patients and is more effective on those who have volunteered for the treatment, as opposed to those who it is forced upon.

Libido reducing substances have been shown to have very significant side effects, acting as a poison. These include breast enlargement, weight gain and reduction of bone density, which may lead to osteoporosis.

Furthermore, there are a number of less invasive programs that are effective in reducing recidivism among those who commit sex offences against children. These programs are designed to equip offenders with the skills to avoid triggers that cause them to offend and to teach offenders coping strategies for use where triggers cannot be avoided.

Representation of chemical castration thus far has been misleading, debasing of public values and is giving the community a false sense of security. Chemical castration is ineffective and destructive. Forced chemical castration of offenders will not increase the safety of children at all and poses a very significant threat to the welfare of prisoners subjected to the treatment.

The gap between popular opinion and medical evidence in the case of chemical castration is an example of a wider problem that occurs when the media and general public influence complex judicial issues. This demonstrates the danger of allowing politicians to adopt populist policies without considering the human rights of vulnerable individuals.

[38] Crimes (Appeal and Review) Act 2001 (NSW) s 114.

[39] Lee JY and Cho KS 'Chemical castration for sex offenders: physicians views' (2013) 28 Journal of Korean Medical Science 2, 171-172.

5.4.1. A Taskforce

On 26th August, Attorney General, Gabrielle Upton, and the Minister For Justice and Police, Troy Grant, issued a media release announcing a taskforce on anti-libido treatment of child sex offenders.[40] It will examine anti-libido treatment as a sentence option with the aim of protecting children and preventing recidivism.

However, the taskforce does not invite the inclusion of those most affected by the policy. 'The taskforce includes representatives from Corrective Services NSW, the Department of Premier and Cabinet, the Justice Health & Forensic Mental Health Network, NSW Health, The NSW Police Force, The Office Of The Director Of Public Prosecutions, The Public Defenders Office, The NSW Bar Association And The Law Society Of NSW'.[41] It also includes representatives from a number of victims' organisations, including the Homicide Victims' Support Group, Enough Is Enough and a number of others. There has been no attempt to include child sex offenders in the consultation process.

The Taskforce will report to the NSW Government by the end of the year.[42]

[40] New South Wales Government, Taskforce on Anti-Libido Treatment of Child Sex Offenders (Media Release 26 August 2015).
[41] Ibid.
[42] Ibid.

6. The Right to Development

All prisoners can benefit from, and are entitled to access rehabilitative and educational programs. As discussed above, these programs enable offenders to recognise the harm they have caused and the ramifications of their actions. This can improve the ways in which offenders interact with prison staff, other prisoners, family, friends and the general community. The human right to development is recognised by the United Nations as a human right:

> The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.
> - Article 1.1, Declaration on the Right to Development.[43]

Educational and rehabilitative programs provide ways of enriching the cultural, social and spiritual lives of all prisoners, regardless of their sentence or classification. Various benefits of these programs include an enhanced cognitive and mental state, development of social skills, an opportunity for future employment after release, reduced substance abuse and recidivism, personal development and self-expression.

Recidivism and re-imprisonment are significant problems for ex-prisoners. In 2010, approximately two-thirds of the prison population experienced repeat imprisonment.[44] Prisonisation, stigmatisation and disconnection from society contribute greatly to reoffending. Educational services allow prisoners to gain confidence in their potential, increase their skillset and educate them as to how to reintegrate into the community upon their release. This would aim to increase the likelihood of a smooth transition back into life on the outside.

The Education in Correctional Settings Policy highlights the need for providing educational services for prisoners and is in line with the right to development.

> [All prisoners within correctional facilities] should be provided with access to educational programmes which are comprehensive and which meet individual needs and aspirations, no matter what their legal status... No inmate should be disadvantaged financially or otherwise for taking part in education.[45]
> - Article 3.7, Education in Correctional Settings Policy.[46]

This policy aims at improving overall education services within correctional facilities and aiding offenders through the transitional process of imprisonment. It highlights the importance of preparing prisoners for release by focusing on improving their cognitive skills, a vital requirement for employment. All prisoners, regardless of their conviction, are entitled to development via education. Restricting such a necessity violates both the Education in Correctional Settings Policy and the United Nations Declaration on the Right to Development.

[43] United Nations General Assembly 'Declaration on the Right to Development' 4 December 1986 (Accessed 28 September 2015).
[44] Letter from Commissioner Severin to Jeffrey McKane, 17 June 2013.
[45] Basic Principles for the Treatment of Prisoners, GA Res 45/111, UN GAOR, 45th sess, 68th plen mtg, UN Doc A/RES/45/111 (14 December 1990).
[46] United Nations General Assembly 'Declaration on the Right to Development' 4 December 1986 (Accessed 28 September 2015).

Restricted access to educational resources limits future employment opportunities and a prisoner's self-development process. The case of Jeffrey McKane demonstrates the unfortunate deprivation of the right to development through education. Although McKane has provided various alternatives to overcome the lack of resources available at Goulburn Correctional Centre, such as paying for the cost of education himself, his request has been repeatedly denied. McKane states "Access to courses is prioritised on a needs basis, with a focus on the educationally disadvantaged."[47] Due to his "strong educational and employment background" McKane has been neglected of any educational opportunities for further development. This violates the United Nations Basic Principle for Treatment of Prisoners, which states "All prisoners shall have the right to take part in cultural activities and education aimed at the full development of the human personality."[48]

It is therefore vital to offer a Right to Development by providing the prison population with adequate educational and rehabilitative resources. This would not only reduce recidivism, but also enhance cognitive and social skills. Such skills can be utilised after release and create a window for employment opportunities. The Right to Development through education further encourages social independence and allows offenders to become functional members of society. Deprivation of such basic resources should not be punitive under any circumstance. The United Nations emphasise education is a basic need of which no individual should be deprived, further supporting the Right to Development for offenders regardless of conviction.

[47] Letter from Commissioner Severin to Jeffrey McKane, 17 June 2013.

[48] United Nations General Assembly Resolutions 45/11 'Basic Principles for the Treatment of Prisoners, Article 6' 14 December 1990 (Accessed 19 October 2015).

7. The Right to Privacy

The issue of prisoners' right to privacy is raised by security reclassification when confidential prisoner details are released by Corrective Services to the media, upsetting victims and prisoners alike and sparking public outrage.

The intrusion into prisoner privacy impedes the proper functioning of the reclassification system. The experiences of victims and offenders are exploited by politicians and used by the media as marketing strategies. Senior prison officers and the review committee are better able to assess the suitability of the prison for the prisoner and whether the prisoner's needs are being adequately met. Swamping the process with media attention and politicising grief clouds the process and impedes the functioning of the system, damaging all parties involved.

Once the trial is over and a sentence is laid down which is deemed proportionate to the crime committed, the offender then has the right to serve his or her sentence, without interference from the victim, the public or politicians. There is no positive outcome to be gained by informing politicians, media or victims of changes to the management of a sentence unless it could affect the safety of victims and the community. It only disturbs the victim and interferes with the prisoner, affecting their dignity and negatively impacting on their psychological wellbeing.

There is therefore the need to create and implement policy to ensure the right of victims and offenders to privacy. To preserve a prisoners right to privacy, registered victims should only be notified of changes to a prisoner's classification if it relates to the safety concerns of the victims and the wider community. This right would also involve ensuring that victims could not engage with the media in relation to offenders.

8. Security Classification

8.1. Overview

Reassessment of security classifications is an expert and informed matter for which there are very significant structures involving Committees with additional checks. The opinions of victims, media or politicians are irrelevant, and their inclusion is neither just nor efficient for the stated public purposes of imprisonment. There is a role for administrators, prisoners and victims in the security classification and re-classification processes. However, this balance should not be altered, as inappropriate involvement of ministers and victims undermines the oversight of regulatory bodies and the judiciary.

The only consideration when deciding the security classification of any prisoner should be the prevention of prison escapes. Any attempt to deliberately punish certain prisoners through administrative means outside the sentencing court's decision is an interference with the authority of the court and contravenes the Separation of Powers doctrine. Changes to sentences would require a statutory change, not the personal assessment of a minister for political purposes.

Further, removing the possibility of reclassification and hope creates an extremely dangerous environment for staff and other prisoners, undermining the decades of effort placed in the hope for rehabilitation and possible freedom in the future.

8.2. The Role Of Administrators

While courts have accepted over time that they have jurisdiction to consider applications made by prisoners for review of decisions made by correctional administrators, the managerial aspects of prison decision-making have regularly been held to be non-justiciable.[49] In Prisoners *A to XX v State of NSW*,[50] the decision to not allow or supply condoms was outside the jurisdiction of the court, illustrating how management decisions are beyond the court's scope to determine. Thus, it follows that a policy of the Commissioner, or the Department of Corrective Services made with the concurrence of the Minister relating to prison administration is not reviewable within the grounds of unreasonableness or otherwise.[51]

Based on the assumption that correctional officers are in the best position to determine the welfare and security of prisoners, the courts often take a 'hands-off' approach to issues of prison conditions, deferring to the judgment of administrators.[52] These administrators include the Serious Offenders Review Council (SORC), which have the authority to provide advice and make recommendations to the corrective services commissioner with respect to the security classification of serious offenders, and the developmental programs provided.[53]

The Serious Offenders Review Council is established by part 9 of the *Crimes (Administration of Sentences) Act 1999 (NSW).* It is composed of three judicially qualified persons, two members of Corrective Services NSW and up to nine community members.[54] Its functions include making recommendations to the Commissioner regarding the security classification of serious offenders,[55] and in so doing consider the public interest and submissions made by the state and by victims.[56]

In making its decision, the SORC must take into account the protection of the public, the victim's family, the offender's time in custody, preceding conduct, and the offender's rehabilitation.[57] Protection of the community has greater importance where the offender is serving a life sentence.[58]

[49] Edney R, 'Judicial deference to the expertise of correctional administrators: the implications for prisoners' rights' (2001) 5 Australian Journal of Human Rights 1.
[50] (1994) 75 A Crim R 205.
[51] Prisoners A to XX v State of NSW (1994) 75 A Crim R 205, 208–11.
[52] Inspector of Custodial Services, above n 20.
[53] Crimes (Administration of Sentences) Act 1999 (NSW) s 197.
[54] Ibid, s 195.
[55] Ibid, s 197.
[56] Ibid, ss 197, 198.
[57] Ibid, s 198.
[58] Ibid, s 199.

8.2.1. Ministerial Involvement

Under the *Crimes (Administration of Sentences) Act 1999*, the Commissioner has the care, direction, control and management of correctional centres, complexes, and all offenders held within.[59] Under new regulations, they must not vary the designation of a high security offender without seeking and considering recommendations of the Review Council.[60] In the exercise of its administrative function, the Commissioner is subject to the control and direction of the Corrective Services Minister.

The statute provides clear scope for the involvement of the Minister in affecting decisions relating to the security classification of serious offenders. However, in the case of Garforth, it is clear that the Minister intervened in order to placate a victim and to gain a political advantage by appearing to be harsh on prisoners. This is clearly in breach of the apparent objectivity of the justice and corrective systems. The involvement of the Minister in the Garforth reclassification exemplifies the limited ability of politicians to remain objective when considering certain matters.

Furthermore, after a review of the policies on prisoner reclassification, it is clear that these decisions must be made objectively, and should be based purely on the evidence presented. Any decision maker must not be influenced by the values held by their (or any other) political party, nor can they respond to social pressure. All literature clearly states that only relevant matters must be considered in the decision making process. It is explicitly stated that the potential threat to society in the event of prisoner escape and the potential for positive participation in rehabilitative programs must be considered in the decision making process. Social pressure and political motivation are not relevant to the process as neither addresses the above areas for consideration.

Decisions regarding the classifications of serious offenders go beyond the needs of the community, they target the security and welfare of prisoners, and their right to not be treated arbitrarily whilst imprisoned. Decision-making should be carried out with impartiality.[61] The Minister involved in the decision regarding Garforth's security was clearly under the influence of both the values held by his political party and social pressure from the victim's family and the general public, in conflict with the crucial need for objective decision making.

Further, setting aside decisions of the SORC without giving consideration to their recommendation exposes the Minister to a risk of judicial review. If a decision-maker fails to take into account an issue to which they are bound to have regard, the legitimacy of the decision is undermined and could potentially result in the decision being set aside by a court.[62] Given that the Minister gave too much consideration to the opinion of the victim and of the general public, and gave too little consideration to the recommendations made by the SORC, there has evidently been a significant oversight on the part of the Minister in the context of administrative and policy decisions in this case.

[59] Ibid, s 232.
[60] Crimes (Administration of Sentences) Regulation 2014 (NSW) reg 17.
[61] Touchie J, 'On the possibility of impartiality in decision-making' (2001) 2 Macquarie Law Journal.
[62] Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40, 15.

8.3. The Role Of Prisoners

Just as victims maintain the right to make submissions to the SORC, the conduct of the offender in question is also considered. It is mandated under the *Crimes (Administration of Sentences) Act 1999* that the conduct of the offender, as well any participation in rehabilitative programs (and the subsequent positive or negative outcomes) be considered.[63]

Once sentenced, it is the role of the offender to serve the term of imprisonment determined by the presiding judge or magistrate. Whilst imprisoned and after release, the offender is expected to remain on good behaviour, and to participate in rehabilitative courses so that, upon release, they can be successfully integrated back into the community.

8.4. The Role of Victims

8.4.1. Victims Of Crime

Every crime involves the commission of a legal wrong, a perpetrator and one or more victims. Criminal victims are people who have been 'threatened, harmed or killed, by another person.'[64]

8.4.2. Role of Victims in Sentencing and Security Classification

As the system currently stands, victims in the criminal justice system have no significant role. Chief justice Spigelman explained that victims act more as witnesses and play 'virtually no role in criminal proceedings.'[65] He also placed emphasis on the shift in focus to the 'impact of the criminal justice system on those members of the community most affected by a particular crime.'[66] This raises questions regarding the current position of victims in the criminal justice system and where it should be in terms of upholding the Rule of Law and administration of justice.

Victims have the ability to submit Victim Impact Statements prior to sentencing. During the process of security reclassification, they may also make submissions to the Review Council regarding the change, which must be considered by the Council before it makes a decision.[67] However, Corrective Services has the final responsibility for dealing with offences after sentencing.

The primary consideration in the reclassification of offenders is the safety of the public. Essentially, a judgement is made regarding the likelihood of a successful escape, and an analysis of any potential harm to the community should such an escape occur. The secondary focus is the potential for the offender to benefit from rehabilitation courses made available to them. Thus, the Council in charge of security changes is required to consider submissions from victims, but the primary consideration must be given to the public interest and safety and the potential rehabilitation of the offender.

It is imperative that we acknowledge the grief and suffering of the victims and their families. However, this grief should not be expressed through the sentencing or post sentencing processes. Regardless of the crime or crimes committed, prisoners still have human rights and should never be tortured, treated arbitrarily or vilified by victims.

[63] Crimes (Administration of Sentences) Act 1999 (NSW) s 69.
[64] VOCAL, Welcome to VOCAL (2015), Victims of Crime Assistance League, <http://vocal.org.au/>.
[65] Spigelman J, 'Address to Parole Authorities Conference 2006' (2006) 8(1) Judicial Review 11.
[66] Ibid.
[67] Crimes (Administration of Sentences) Act 1999 (NSW) s 68.

Calls to increase the legal consideration of victim impact statements, and the recent statement by NSW Corrections Minister David Elliott proposing the establishment of a new process for prisoner's management 'aimed at ensuring the welfare of families is the first and foremost priority,'[68] are collectively compromising the integrity of the system which seeks to provide security for victims and protect the rights of prisoners.

Enabling victims to gain greater influence over the system would serve to promote vengeance rather than retribution. Therefore, it is clear that in the best interests of the offender, victim and integrity of our legal system that victims are not involved in the sentencing and post-sentencing security classification processes.

The Hon. David Levine, the Chair Of The Serious Offenders Review Council has publicly stated that he is opposed to the expansion of the roles of victims, as this would contradict the Rule of Law. Allowing victims to influence sentencing decisions would result in some lives appearing to have more value than others.

Levine also argues that further involvement of victims and juries in the administration of justice could be interpreted as an attempt at the privatisation of state functions.[69] It is also feasible that state permitted victim involvement could appear to condone and validate the ideas of vengeance, which is exactly what the rule of law and the administration of criminal justice aim to prevent.

8.4.3. Acknowledgement Of Victimhood

Under NSW law, it is acknowledged that a victim may range in classification, from an individual person, to a city, to a nation.[70] It is argued that people of modern society live in an era of continued violence that is internationalised and politicised, but often not viewed in the public eye. Furthermore, it is acknowledged that victims of such violence receive less compassion than those who are affected by 'natural violence' i.e. are victims of natural disasters such as tsunamis, floods, fires and earthquakes.

It is of the highest importance that Corrective Services NSW communicates with victims to ensure that their expectations of the criminal justice system and the greatest potential level of involvement they could achieve are realistic. The system must ensure that victims do not feel powerless, however their perceptions of their power and abilities must be realistic.

8.4.4. Rights of Registered Victims

In light of the media retaliation to the security reclassification of Andrew Garforth and other 'lifers', we must question the role of victims and their influence on sentence administration post sentencing.

The *Victims Rights and Support Act 2013* (NSW) acknowledges and outlines the right of victims with regard to access to particular information, including changes to a prisoner's classification, and providing victim impact statements.[71]

[68] Matthew Benns, 'Softer jail conditions to end for 10 life-term prisoners after Daily Telegraph blew whistle on change to minimum security' The Daily Telegraph (Online), 20 July 2015. <http://m.dailytelegraph.com.au/news/softer-jail-conditions-to-end-for-10-life-term-prisoners-after-daily-telegraph-blew-whistle-on-change-to-minimum-security/story-fni0cx4q-1227449128430>.

[69] The Hon. David Levine AO RFD QC, "Victims of Crime: The geometry in the courtroom and in the Administration of Sentences" (2011) (accessed 23/07/2015) <http://www.aic.giv.au/media_library/conferences/2011-victim/presentations/levine.pdf>.

[70] Ibid.

[71] Victims Rights and Support Act 2013 (NSW).

Corrective Services NSW has created a victims register that aims to recognise victims of crime, and ensure their safety.[72] Under the *Crimes (Administration of Sentences) Act 1999* (NSW) the register records victims wishing to be informed about possible parole of the offender.[73] Other information may also be available in accordance with the victims' charter in the *Victims Rights and Support Act 2013* (NSW).[74] The register does not provide victims with regular updates on offenders, only notifying victims if the offender is to be released, or their classification changed.

There are two key problems with the register. The first refers to the accessibility of the website, as it can be difficult to navigate and information is not always easily accessible. The tone of the website and associated correspondence is bureaucratic and detached, and thus does not reflect the key objective of the register, that is, to provide support and empathy to the victims of crime.[75] As has been discussed above, allowing victims to access information regarding prisoners is a breach of the prisoner's right to privacy, particularly when such information is then revealed to the media and subsequently publicised.

These issues further highlight the politicisation of victims and their experiences. The establishment of the register creates a façade of a caring government, however, an examination of the flaws of the register reveals a government that appears to care about victims, whilst only genuinely caring about their political interests.

8.5. Reclassification

Security reclassification procedures ensure that the level of security placed upon an offender is appropriate to their health and mental needs, balanced against the risk of escape, or injury being caused to the prisoner, prison staff, or the wider community.
Removing the possibility of reclassification and hope creates an extremely dangerous environment for staff and other prisoners. It removes any incentive for lifers to behave well and refrain from harming themselves or others.

To deliberately deprive lifers of the right to personal development would be removing their humanity – defined as torture – and places greater burdens on taxpayers and correctional facilities management. The idea of being deliberately destructive degrades us as a community.

Lifers invest decades of effort in the hope of better treatment in the future, access to rehabilitation, education programs, employment and possible freedom. It is extremely unlikely that lifers would attempt to escape, as it is counter-productive to their review for potential release. After such a period of institutionalisation, prison becomes their home isolated from the outside world.

[72] Ibid.
[73] Crimes (Administration of Sentences) Act 1999 (NSW) s 256(2).
[74] Victims Rights and Support Act 2013 (NSW) s 6.
[75] Inspector of Custodial Services, above n 20.

9. Case Study: Andrew Garforth

9.1. Profile Summary

Andrew Garforth is one of twelve prisoners who had their security reclassification from A2 to B revoked in July 2015. His case received significant media coverage and community outrage.

Garforth was sentenced to life imprisonment without the possibility of parole after he pled guilty to the murder of Ebony Simpson in 1992. Ten months later, he appealed against this sentence. Garforth sought special leave to appeal to the High Court against the severity of his sentence on the basis that he pled guilty to the offence committed; however his application was refused.

At the time of the offence Garforth was unemployed. He was thirty years old and living with his de facto wife and two young children. Although he had a lengthy criminal record, it predominantly consisted of accounts of summary offences and did not make reference to any violent offences.

In 1995, Mr Garforth stated that he had suffered a number of assaults in prison.[76]

9.2. Reclassification And Subsequent Revocation

The Serious Offenders Review Council (SORC) advised that Garforth's prisoner classification status be lowered from A2 (maximum security) to B (medium security). On this advice, Corrective Services NSW downgraded Garforth's security status, making him eligible to apply for some work within the prison and undertake some rehabilitation courses.[77] The SORC's decision was reviewed and supported by Corrective Services NSW Commissioner Peter Severin.

Upon discovering the security downgrade, Christine Simpson, the victim Ebony Simpson's mother, contacted the media. A story on the issue was broadcasted on Channel 9's programme A Current Affair on the 13th of July 2015.[78] Mrs Simpson then created a successful online petition, collecting 30,000 signatures in 24 hours, to have the reclassification revoked. Corrective Services Minister David Elliott then revoked the classification decision and Garforth's classification was returned to its original maximum-security level. Mr Elliott stated "I have come over the top of the Serious Offenders Review Committee and have today instructed the Commissioner that Garforth gets zip."[79]

A Current Affair falsely quoted Justice Action's Coordinator as having said that the Simpson family "needs to get over it."[80] The transcript shows our statement focussed on the reconciliation of both the family and Garforth:
It's a shame for the family to still hold onto such anger towards the man after such a long period, after twenty-three years. It's a good thing for him and a good thing for the community. It's absolutely essential that Corrective Services does focus on moving him into a lighter less security place. It's to their benefit, everybody's benefit, that he can then move on and get some measure of freedom and improvement. It's a really sad thing to have lost their child but to link it to the man, to the offender, is a shame. They should at some stage, clear the air, move on with their lives, and let him move on with his life as well.[81]

Justice Action encourages victims and their families to focus on moving past their anger and experiences, and with the support of the wider community to find a sense of normalcy.

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[76] World Heritage Encyclopaedia, Andrew Garforth (2015) Gutenberg Self-Publishing Press <http://self.gutenberg.org/articles/andrew_garforth>.

[77] Miles Godfrey, 'Ebony Simpson's killer Andrew Peter Garforth will 'die in jail' says Corrective Services Minister David Elliot' The Daily Telegraph (Online), 14 July 2015 < http://www.dailytelegraph.com.au/news/nsw/ebony-simpsons-killer-andrew-peter-garforth-will-die-in-jail-says-corrective-services-minister-david-elliott/story-fni0cx12-1227441075006?sv=c4cdeca5da781a0ded640b6eb225088>; Justice Corrective Services, Fact Sheet 9: Classification and Placement of Inmates, (March 2015) NSW Government .<http://www.correctiveservices.justice.nsw.gov.au/Documents/CSNSW%20Fact%20Sheets/fact_sheet_9_classification.pdf>.

[78] Channel 9, 'Ebony', A Current Affair, 13 July 2015 <http://aca.ninemsn.com.au/article/9007485/ebony>.

[79] Ibid.

[80] Channel 9, above n 78.

[81] Ibid.

9.3. Involvement of the Victim: Mrs Simpson

The state is responsible for the regulation of criminal offences and the punishment of offenders, as the crimes concern the community as a whole. Though Mrs Simpson's grief is not misplaced, it is not the responsibility of the victim to punish the offender. It is the role of the State to administer objective and just retribution, as opposed to personal vengeance.

Upon being informed of Andrew Garforth's classification change, Mrs Simpson's stated, "I am Ebony's mother. It is up to me, not someone sitting on a board."[82] Mrs Simpson evidently believes that it is her right as the mother of the victim of Garforth's crime to decide what happens to him. However, it is the decision and responsibility of the justice system to determine what happens to Garforth, not that of Mrs Simpson.

The crucial point that must be considered with reference to the Garforth case is the limits of victim's involvement. The state has failed to clarify Mrs Simpson of her rights. She was told that she was permitted to make a submission to the SORC regarding Garforth's reclassification. However, she was not informed of the limits of her influence which ended with her submission.[83] Evidently, it was also not made clear that she does not have any rights to make decisions regarding the treatment, classification and management of Garforth as a prisoner, which is the responsibility of the SORC and Corrective Services NSW.

9.4. Procedural Injustice

The involvement of Corrective Services Minister David Elliott in setting aside the decision of Peter Severin and the Serious Offenders Review Council regarding Andrew Garforth's security classification raises concerns about the Separation of Powers. In particular it highlights the issues of exploitation of decision-making powers for political advancement and the overreach of the executive into the role of courts and administrators. Ultimately, prisoners have a right to not be treated arbitrarily by administrative decision-makers in their exercise of power and politics.

Loss of neutrality and disrespect for the prisoner's voice in the decision-making process damages the welfare of prisoners.[84] It also disregards the individual's right to procedural fairness in relation to sentencing and prisoner administration.[85] As stated by J.R. Paget, Inspector of Custodial Services, 'where the state treats prisoners in a way that denies them a modicum of dignity and humanity, it should not be surprised if they respond accordingly.' [86]

[82] Channel 9, above n 78.

[83] Crimes (Administration of Sentences) Act 1999 (NSW) s 68.

[84] Emily Gold and Melissa Bradley, The Case for Procedural Justice: Fairness as a Crime Prevention Tool (September 2013) U.S Department of Justice: Community Oriented Policing Services <http://cops.usdoj.gov/html/dispatch/09-2013/fairness_as_a_crime_prevention_tool.asp>.

[85] Ibid.

[86] Inspector of Custodial Services, Submission to Government Body, Full House: The growth of the inmate population in NSW, April 2015, 6.

9.5. Politicising Grief

David Elliott's revocation of Garforth's classification decision could be viewed as an act of political opportunism. After Mrs Simpson sparked public outrage about Garforth's reclassification, Elliott made a number of statements arguing, "this [the reclassification] is not what this government was elected for" and that "it is essential that any reclassification of prisoners reflects community expectations.0"[87]

However, Elliott has incorrectly interpreted the purpose of classification, as is stated in the Corrective Services NSW manual. Classification is a security rating for safety purposes, not a form of punishment.[88] Elliott abused his authority, exploited Mrs Simpson's anger and grief and affirmed this misunderstanding of the law for his own political advantage so as to appear be acting solely with the victims of crime and the community's best interest at heart. Elliott's action of revoking Garforth's reclassification only illustrates the deficiencies of the government in caring for and supporting victims. The fact that Mrs Simpson had no support and thus felt the need to publicly demonstrate her grief and anger on national television with a victims' organisation beside her highlights this exploitation and manipulation of victims.

This was again highlighted by the struggle of Katrina Keshishian. After being the victim of a violent sexual assault, Ms Keshishian had to go public with her story to obtain the victims' compensation she deserved. The government had reduced victims' payments but she was successful in getting her claim reassessed.[89] The government has been unresponsive to victims' personal needs but has tried to satisfy them with more pain for the offenders – a return to the failed system of vengeance.

[87] Gold and Bradley, above n 84.

[88] Corrective Services NSW, 'Offender classification and case management policy and procedures manual', s 14(1).

[89] Tim Barlass, 'NSW Premier Mike Baird admits crime compensation 'mistake' after Katrina Keshishian campaign', The Sydney Morning Herald (online), 15 March 2015 <http://www.smh.com.au/nsw/nsw-state-election-2015/nsw-premier-mike-baird-admits-crime-compensation-mistake-after-katrina-keshishian-campaign-20150313-143kgb.html>.

10. Conclusion

The philosophy of hope is essential to the rehabilitative aspects of the criminal justice system. Where prisoners are denied to access to rehabilitative programs and services, they are also denied hope and are thus totally excluded. While the Australian system is based on retribution, it is essential that a balance is found between the need for retribution, and the need to rehabilitate the offender in order to avoid further harm to the original victim and other members of the community.

Dicey's rule of law states that all people are equal under a coherent system of rules and that no person can override the boundary of their powers as set out by the law. Australian law dictates the respective roles of the court, administrators, prisoners and victims. Recent events have revealed an increasingly harsh attitude towards prisoners, as well as the increasing influence of victims over the system, and even the violation of the rule of law by ministers. The case of Andrew Garforth, and the circumstances surrounding the revocation of his reclassification, has exemplified the inability of ministers to remain unswayed by public pressure, and thus violate the rule of law when interfering in decisions regarding prisoners.

In order for the justice system to serve its purpose, there must be some level of reconciliation between the offender, victims and the community. While victims may not wish to make contact with the offender, they must at least detach themselves from the offender, so that both parties can attempt to regain a sense of normalcy. Therefore, reconciliation for victims can refer to moving past the event and for offenders, it means benefiting from rehabilitative programs so that they can avoid causing future harm.

Whether a prisoner is serving a life sentence or not, every prisoner is entitled to the prospect of release. Where a prisoner is serving a life sentence, the prospect of release comes in the form of the Royal Prerogative of Mercy, which may be granted by the Crown. This places emphasis on the necessity of prisoner access to adequate rehabilitative services; as such access can only improve their chance of release.

All prisoners have the right to educational programs, as well as rehabilitative ones. As discussed above, these programs enable offenders to recognise the harm they have caused. This can improve the way that prisoners interact with prison staff, other prisoners, family, friends and the general community.

Not only do prisoners have the rights to education and development, they also have a right to a certain degree of privacy. Once the trial is over and the offender has been sentenced, the offender should have the right to serve the court's sentence without interference from the media, the victim or politicians. This right is inherent in the controlled environment of a prison managed by the state, and the current legal obligation of staff not to use their trusted access to sell information to the media. Any other position only disturbs the victim and interferes with the public policy of rehabilitation of the prisoner.

Procedural fairness is a higher standard of justice than the kneejerk reaction for vengeance or retribution. In considering the case of Andrew Garforth, whose crimes elicited great emotion, it is even more important that measured reflection be given in regard to sentencing. Furthermore, the wider community and general public must draw their attention not only to the suffering of a victim and their family, but the suffering of the offender themselves.

Life sentences, are the most severe form of punishment in Australia, and are often easily justified by persuasive politicians and the media who often give little consideration to the importance of prisoners' rehabilitation. Public dialogue on the subject of sentencing lends itself easily toward simplification. In the case of Andrew Garforth's sentence, outrage and emotion were allowed to prevail over the concerns of an offender who continues to have rights despite his previous crime.

Therefore, post-sentencing procedures should remain free from the influence of victims' emotions and the public input that often follows selective media attention afforded to certain cases. It is only when this occurs that a just and impartial system with a focus on restoration may be maintained.

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12. Appendix

12.1. Appendix A – Terms of Reference

LEGISLATIVE COUNCIL

STANDING COMMITEE ON LAW AND JUSTICE

Inquiry into the security classification and management of inmates sentenced to life imprisonment

1. That the Standing Committee on Law and Justice inquire into and report on the security classification and management in custody of the following categories of inmates subject to sentences of life imprisonment:

   (a) inmates serving a sentence of life imprisonment for the term of their natural lives,

   (b) inmates serving a sentence of life imprisonment who are subject to non-release recommendations as defined in clause 1 of Schedule 1 to the Crimes (Sentencing Procedure) Act 1999, and

   (c) inmates serving a sentence of life imprisonment that is an 'existing life sentence', as defined in clause 1 of Schedule 1 to the Crimes (Sentencing Procedure) Act 1999, who have not had a specified term and non-parole period set for the sentence under clause 4 of that schedule.

2. That in conducting its inquiry, the committee examine:

   (a) whether the existing legislation, policies and procedures for determining the security classification and custodial management of such inmates are appropriate and consistent with community expectations,

   (b) the impact of security classification and custodial management of such inmates on registered victims and the role of registered victims in the classification and management decision making process,

   (c) communication with registered victims prior to and following a security classification and custodial management decision being made and the form that any communication should take,

   (d) whether it is appropriate to reclassify and provide inmates sentenced to life imprisonment with access to rehabilitative programs and services if they have little or no prospect of release from custody, and

   (e) the impact of inmate security classification and management decisions on the operation of the correctional system.

Committee membership

The Hon Natasha Maclaren-Jones MLC	Liberal Party	*Chair*
The Hon Lynda Voltz MLC	Australian Labor Party	*Deputy Chair*
The Hon David Clarke MLC	Liberal Party	
The Hon Daniel Mookhey MLC	Australian Labor Party	
Mr David Shoebridge MLC	The Greens	
The Hon Bronnie Taylor MLC	The Nationals	

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