

30 January 2020

The Honourable James Wood AO QC  
Chairperson  
New South Wales Sentencing Council  
GPO Box 31  
Sydney NSW 2001

**By email only:** [sentencingcouncil@justice.nsw.gov.au](mailto:sentencingcouncil@justice.nsw.gov.au)

Dear The Honourable James Wood AO QC,

**Re: Review of sentencing for murder and manslaughter – Consultation Paper**

1. Rape & Domestic Violence Services Australia welcome the opportunity to contribute to the NSW Sentencing Council's review ('**this review**' or '**the review**') of sentencing for murder and manslaughter – Consultation Paper ('**the consultation paper**').

**Introduction.**

2. Rape & Domestic Violence Services Australia is a non-government organisation that provides a range of trauma specialised counselling services for those who have experienced sexual, domestic and/or family violence and their supporters.<sup>1</sup>
3. Our services include the NSW Rape Crisis Counselling Service for people in NSW whose lives have been impacted by sexual violence; Sexual Assault Counselling Australia for people accessing the Redress Scheme resulting from the Royal Commission into Institutional Responses to Child Sexual Abuse; and the Domestic and Family Violence Counselling Service for Commonwealth Bank of Australia customers and staff who are seeking to escape domestic and/or family violence.

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<sup>1</sup> Generally, Rape & Domestic Violence Services Australia prefer the term *people who have experienced sexual assault and/or domestic and family violence* to describe individuals who have suffered this type of violence, rather than the terms survivors or victims. This is in acknowledgement that, although experiences of sexual assault and/or domestic and family violence are very significant in a person's life, they nevertheless do not define that person. However, in this submission, Rape & Domestic Violence Services Australia will sometimes use the term victims as this accords with the language used in the legislation.

4. In providing this submission, Rape & Domestic Violence Services Australia do not propose to address every question as set out by the NSW Sentencing Council in the consultation paper.

### **Our Preliminary Submission dated 22 January 2019.**

5. Rape & Domestic Violence Services Australia provided a preliminary submission to this review on 22 January 2019 ('our preliminary submission').<sup>2</sup> We reiterate our sentiments from this preliminary submission, and again recommend that the NSW Sentencing Council comprehensively consider the following within the context of this review:

- 5.1 The need for education to counter outdated judicial views as to domestic and/or family violence;
- 5.2 The impact of any reform on women who kill their abusive partner, in circumstances where they were the primacy victim of domestic and/or family violence; and
- 5.3 The need for consultation with Indigenous communities.

We provide summary commentary on each of the above points below.

### **Outdated judicial views about domestic and/or family violence**

6. Rape & Domestic Violence Services Australia reiterate our concerns that many Judicial Officers in NSW continue to prescribe to views not based on current evidence regarding domestic and/or family violence that may impact their assessments of sentencing factors such as culpability, harm, risk and social costs.<sup>3</sup>
7. Unfortunately, these views not based on current evidence about domestic and/or family violence are clearly evident upon examining sentencing remarks for domestic violence related homicides. We note that the NSW Domestic Violence Death Review Team discuss the use of problematic language by Higher Court Judicial Officers when describing domestic violence in remarks on sentencing.<sup>4</sup>
8. As Buxton-Namisnyk and Butler (2017) write, "*judicial officers wield significant social power with respect to discussing, naming and representing domestic violence.*"<sup>5</sup> In order to shift social understandings of domestic and/or family violence in the right direction, it is imperative that Judges use their sentencing remarks to:

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<sup>2</sup> Rape & Domestic Violence Services Australia, *Preliminary Submission to the NSW Sentencing Council's review of sentencing for murder and manslaughter* (PMU01, 2019).

<sup>3</sup> Christine Bond and Samantha Jeffries, 'Similar Punishment? Comparing Sentencing Outcomes in Domestic and Non-Domestic Violence Cases' (2014) 54 *British Journal of Criminology*, 849.

<sup>4</sup> NSW Domestic Violence Death Review Team, *Annual Report 2012-2013* (2013) NSW Attorney General and Justice, 28-29.

<sup>5</sup> Emma Buxton-Namisnyk and Anna Butler, 'What's language got to do with it? Learning from discourse, language and stereotyping in domestic violence homicide cases,' (2017) 29(6) *Judicial Officers' Bulletin*, 49.

- 8.1 Reinforce that domestic and/or family violence is unacceptable;
  - 8.2 Hold perpetrators accountable and recognise the centrality of power and control in domestic violence related homicides;
  - 8.3 Reject justifications for domestic and/or family violence that minimise perpetrator accountability such as that violence is caused by a “*loss of control*” or drugs or alcohol;
  - 8.4 Reflect the value of the victim’s life and avoid victim-blaming judgments;
  - 8.5 Recognise that non-physical forms of violence can be equally, if not more, damaging than physical violence; and
  - 8.6 Recognise the significant impact that domestic and/or family violence has on society.<sup>6</sup>
9. Rape & Domestic Violence Services Australia reiterate that Judicial Officers should receive comprehensive and ongoing training in relation to the dynamics, complexities and impacts of domestic and/or family violence. This must include physical, sexual, psychological, emotional, financial, social and spiritual violence, as well as the intersectionality of such violence with other socioeconomic indicators.<sup>7</sup>
  10. That all Judicial Officers receive comprehensive and ongoing training in relation to the dynamics, complexities and impacts of domestic and/or family violence, including as to the many different forms of abuse and violence.
  11. We therefore welcome discussions in the consultation paper as to ‘*including information about family and domestic violence in a bench book.*’<sup>8</sup> It is entirely appropriate to include guidance on what constitutes domestic and/or family violence in a variety of different contexts within the relevant Bench Book.
  12. Further, our organisation is supportive of the use and application of the National Domestic and Family Violence Bench Book (**‘National Bench Book’**) as to sentencing principles. We note this was a recommendation from the 2010 Family Violence Review undertaken by the Australian Law Reform Commission and NSW Law Reform Commission.<sup>9</sup> However, we acknowledge that this National Bench Book does not provide commentary or advice as to sentencing within the context of domestic and/or family violence.
  13. Rape & Domestic Violence Services Australia state that advice as to sentencing within the context of domestic and/or family violence provided within this National Bench

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<sup>6</sup> Christine Bond and Samantha Jeffries, ‘Similar Punishment? Comparing Sentencing Outcomes in Domestic and Non-Domestic Violence Cases’ (2014) 54 *British Journal of Criminology*, 849; Emma Buxton-Namisnyk and Anna Butler, ‘What’s language got to do with it? Learning from discourse, language and stereotyping in domestic violence homicide cases,’ (2017) 29(6) *Judicial Officers’ Bulletin*, 49.

<sup>7</sup> Rape & Domestic Violence Services Australia, *Preliminary Submission to the NSW Sentencing Council’s review of sentencing for murder and manslaughter* (PMU01, 2019), 3.

<sup>8</sup> NSW Sentencing Council, ‘*Homicide*,’ (Consultation Paper, October 2019), 69.

<sup>9</sup> Australian Law Reform Commission (ALRC) and NSW Law Reform Commission (NSWLRC), *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010), Recommendation 13.1.

Book that could be applied in NSW and be included in the relevant NSW Bench Book. The formulation and development of this type of guidance within any Bench Book should occur in consultation with domestic and/or family violence specialist organisations.

Recommendation 1: That the NSW Sentencing Council recommend that there is inclusion of advice as to sentencing within the context of domestic and/or family violence within any relevant Bench Book used in the NSW Court system. The development of this inclusion should occur in consultation with domestic and/or family violence specialist organisations.

### **Women who commit homicide offences in response to domestic and/or family violence**

14. Rape & Domestic Violence Services Australia reiterate our concerns as to overall harsher penalties of sentencing domestic violence related homicides, having an unintended impact on women who kill their abusive partners, in circumstances where they were the primary victim of domestic and/or family violence.
15. According to the NSW Domestic Violence Death Review Team:
  - 14.1 Of 78 intimate partner homicides perpetrated between 2015-2017, 10 (13%) involved homicides where a male primary domestic violence abuser was killed by a female primary domestic violence victim.<sup>10</sup>
  - 14.2 Of 204 intimate partner homicides perpetrated between 2000-2014, 31 (15%) involved homicides where a male primary domestic violence abuser was killed by a primary domestic violence victim.<sup>11</sup>
16. We acknowledge that the overwhelming majority of domestic violence related homicides occur in the context of male primary domestic violence abusers killing primary domestic violence victims.<sup>12</sup> However, cases where women kill their abusive partners, so called “*exceptional cases*”<sup>13</sup> should not be overlooked when considering any reform to the law in the context of sentencing for domestic violence related homicides. We provide further commentary on sentencing for domestic violence related homicides below.
17. It is critical that the NSW Sentencing Council consider how any reform to sentencing laws/practices may also impact women convicted of killing their abusive partners. Any possible unintended consequences of any reform to sentencing laws for domestic violence related homicides should be carefully monitored.
18. Rape & Domestic Violence Services Australia recommends that if any changes are made to the existing legislation there should be a mechanism for ongoing monitoring and evaluation of these changes. The process for ongoing monitoring should include

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<sup>10</sup> NSW Domestic Violence Death Review Team, *Annual Report 2015-2017* (2017) NSW Attorney General and Justice, 193.

<sup>11</sup> *Ibid.* We note this statistic does not include a breakdown of the gender of perpetrators.

<sup>12</sup> *Ibid.*

<sup>13</sup> NSW Sentencing Council, ‘*Homicide*,’ (Consultation Paper, October 2019), 59.

an opportunity to examine the effectiveness of any change to the legislation and ensure that no unintended consequences have arisen.

Recommendation 2: That there be a further mechanism for ongoing monitoring and evaluation of any changes to law and legal processes, with an opportunity to examine the effectiveness of any such changes, including seeking to address any unintended consequences.

19. Further, Rape & Domestic Violence Services Australia caution against any reform to the law that would instigate a mandatory minimum sentence for domestic violence related homicide, or otherwise limit judicial discretion when sentencing a woman for killing her abusive partner. To do so may have an unjust impact for the following reasons:

18.1 Innocent women may come under heightened pressure to accept a plea bargain, due to the uncertain law on self-defence as applied to these situations;<sup>14</sup> and

18.2 Judges may be constrained from taking into account the full social context of offending and be obligated to impose unjustly harsh sentences on women who kill their abusive partners.<sup>15</sup>

20. It is imperative that the sentencing process allow Judges to recognise gendered and racialised inequalities as forming part of the context for offending, where women kill their abusive partners.

### **The need for consultation with Indigenous Communities**

21. Rape & Domestic Violence Services Australia caution that the NSW Sentencing Council must recognise the specific ways that Indigenous communities may be impacted by any reform to sentencing laws/practices and give strong emphasis to their interests. This should be achieved through extensive and ongoing consultation with Indigenous communities, including women and children impacted by domestic and/or family violence. Domestic violence related homicide impacts Indigenous communities in a myriad of specific ways, that differ from impacts on non-Indigenous communities. We reiterate the below statistics from our preliminary submission to demonstrate the differences in the ways that Indigenous women and men may be significantly impacted by any law reform to sentencing for domestic violence related homicides.<sup>16</sup>

22. Indigenous men and women are overrepresented as victims of domestic and/or family violence related homicide.<sup>17</sup> In approximately 24% of intimate partner homicides in Australia in 2003-2004, one or typically both partners were Indigenous, despite the

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<sup>14</sup> Julie Stubbs and Julie Tolmie, 'Battered Women charged with Homicide: Advancing the interests of Indigenous Women,' (2008) 41(1) *The Australian and New Zealand Journal of Criminology*, 138, 150-151.

<sup>15</sup> *Ibid*, 152. See, for example, the discussion of *R v Burke* [2000] NSWSC 356.

<sup>16</sup> Rape & Domestic Violence Services Australia, *Preliminary Submission to the NSW Sentencing Council's review of sentencing for murder and manslaughter* (PMU01, 2019), 5-6.

<sup>17</sup> *Ibid*, 139.

fact that Indigenous people made up 2.4% of the Australian populations.<sup>18</sup> According to the National Homicide Monitoring Project, in 2013-2014:

- 21.1 Approximately 60% of Indigenous male homicide victims died in domestic homicide incidents, compared with 16% of non-Indigenous male victims; and
  - 21.2 Approximately 80% of Indigenous female homicide victims died in domestic homicide incidents, compared with 72% of non-Indigenous female victims.<sup>19</sup>
23. A higher proportion of Indigenous domestic and/or family violence related homicides involve a female offender. There may be many reasons for this disparity. For example, Stubbs and Tolmie (2008) cite the following factors as possible explanations:
- 22.1 Indigenous women who experience family violence may face difficulties gaining access to support from agencies, leaving them without legal means of protecting themselves from violence. Cunneen and Kerley (1995) noted that *"physical force may be the only resistance to domestic violence available given a range of pressures which militate against involvement of the police."*<sup>20</sup>
  - 22.2 Since Indigenous women are substantially overrepresented within the criminal justice system for all offences, including violent and non-violent offences, they are much more likely than non-Indigenous battered women to have a prior record, which in turn may be interpreted to undermine their claim to victim status.<sup>21</sup>
  - 22.3 Evidence suggests that Indigenous women in some Australian communities may have fewer reservations than non-Indigenous women about responding to physical force with force.<sup>22</sup>
  - 22.4 Human Rights and Equal Opportunity Commission (as it was known then) notes that *"Indigenous scholars also argue that the violent responses to violence by Australian Indigenous women may be more structured"* and may include the *"implementation of payback or customary law"*.<sup>23</sup>
  - 22.5 Indigenous women commonly face *"enormous pressures arising from the combined effects of poverty, violence, sole parenthood, alcohol and substance abuse, and gender and race discrimination"*.<sup>24</sup>
24. Based on the above, Rape & Domestic Violence Services Australia again strongly recommend that the NSW Sentencing Council extensively consult with Indigenous

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<sup>18</sup> *Ibid.*

<sup>19</sup> National Homicide Monitoring Project, 'Victims and Offenders, 2009-10 TO 2013-14', Accessed at: [http://www.crimstats.aic.gov.au/NHMP/2\\_victims-offenders/](http://www.crimstats.aic.gov.au/NHMP/2_victims-offenders/)

<sup>20</sup> Chris Cunneen and Kate Kerley, 'Indigenous women and criminal justice: Some comments on the Australian situation,' (1995) in Julie Stubbs and Julie Tolmie, 'Battered Women charged with Homicide: Advancing the interests of Indigenous Women,' (2008) 41(1) *The Australian and New Zealand Journal of Criminology*, 138, 141.

<sup>21</sup> Julie Stubbs and Julie Tolmie, 'Battered Women charged with Homicide: Advancing the interests of Indigenous Women,' (2008) 41(1) *The Australian and New Zealand Journal of Criminology*, 138, 141.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

communities on any reforms for sentencing for homicides, including domestic violence related homicides.

Recommendation 3: That the NSW Sentencing Council extensively consult with Indigenous communities on any proposed reforms to the law around sentencing for homicides, particularly sentencing for domestic violence related homicides.

#### Chapter 4: Sentencing for domestic violence related homicide.

25. As stated above, whilst we acknowledge that the majority of domestic violence related homicide occur in the context of a male primary domestic violence abuser killing their female primary domestic violence victim, there are also homicide cases where women kill their abusive partners. Rape & Domestic Violence Services Australia state that cases where women kill their abusive partners should be considered a special category, and any reform to the law as to sentencing for domestic violence related homicide must consider this context.

#### Consider the use of social framework evidence

26. It is also concerning that:

*“The Secretariat for the Domestic Violence Death Review Team has noted cases where past instances of domestic violence did not meet the threshold to be brought into evidence at trial. These cases result in the homicide being viewed as something anomalous or unexpected, rather than occurring against a pattern of behaviour.”<sup>25</sup>*

27. Within the above context, particularly in cases where women kill their abusive partners, we assert that the NSW Sentencing Council should consider the use of social framework evidence within the context of sentencing for domestic violence related homicide.

28. The use of social framework evidence may be a way of incorporating within sentencing provisions the consideration of the dynamics and history of the relationship and pattern of violence; and not the isolated incident of the homicide. These matters should always be considered based on each individual case.

29. We note that extensive commentary on the use of social framework evidence was provided in Women’s Legal Service NSW’s preliminary submission<sup>26</sup> and endorse their submission in this regard.

30. We do highlight that the use of social framework evidence may be a way of dispelling dangerous myths, particularly for jurors as to why women don’t leave violent relationships.

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<sup>25</sup> NSW Sentencing Council, ‘Homicide,’ (Consultation Paper, October 2019), 57.

<sup>26</sup> Women’s Legal Service NSW, *Preliminary Submission to the NSW Sentencing Council’s review of sentencing for murder and manslaughter (PMU05)*, 2019, 4.

Recommendation 4: That the NSW Sentencing Council recommend the inclusion of social framework evidence within any reform to the law as to sentencing for domestic violence related homicides.

31. Our organisation does acknowledge that if the use of social framework evidence is incorporated into the NSW criminal justice response, there will be a need for ongoing education as to its use for Judicial Officers, jurors, legal practitioners and the wider community.<sup>27</sup>

Recommendation 5: That together with the inclusion of the use of social framework evidence in NSW legislation, that there be a comprehensive and ongoing education program developed for Judicial Officers, jurors, legal practitioners and the wider community as to the application of social framework evidence.

### **Other jurisdictions considering a domestic violence related offence as 'aggravating' based on considerations of gender**

32. Rape & Domestic Violence Services Australia is supportive of the approach adopted in the Northern Territory and New Zealand around circumstances of aggravation for domestic violence related offences; where a male is the offender and a female is the victim.<sup>28</sup> Our organisation asserts that this approach sends a strong message within each of these respective communities that violence against women will not be tolerated and that domestic and/or family violence is often a gendered crime.

33. We would support the incorporation of an increased penalty for male offenders who assault and/or kill a female victim. This could be as an additional charge or incorporated into legislation as a circumstance of aggravation within an assault offence. However, we do acknowledge that the incorporation of a proposed increased penalty such as the above, may then present difficulties in the context of intimate partner homicides in LGBTIQ+ communities.

## **Chapter 6: Penalties for murder and manslaughter – options for reform.**

### **Managing High Risk Offenders**

34. Rape & Domestic Violence Services Australia agree with the discussion in the consultation paper that the risk a 'high risk offender' poses to the community should be assessed at the time of their release.<sup>29</sup> Although, we would argue that the risk that offender may pose to the community should also be considered at the time of sentencing.

35. Our organisation is supportive of the provisions in the *Crimes (High Risk Offenders) Act 2006* (NSW) as to continuing detention and/or supervision orders where an offender poses an unacceptable risk of committing another serious offence;<sup>30</sup> rather

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<sup>27</sup> *Ibid*, 5.

<sup>28</sup> NSW Sentencing Council, '*Homicide*,' (Consultation Paper, October 2019), 66.

<sup>29</sup> *Ibid*, 100.

<sup>30</sup> *Crimes (High Risk Offenders) Act 2006* (NSW), ss 5C & 5D.



than the use of indefinite sentencing. We state that the current provisions as to continuing detention and/or supervision orders should be maintained.

**Conclusion.**

36. In conclusion, our organisation welcomes the NSW Sentencing Council's review of sentencing for murder and manslaughter – Consultation Paper. However, we particularly acknowledge that any amendments made to sentencing laws, specifically as to sentencing for domestic violence related homicides should only be made if women who kill their abusive partners will not be further disadvantaged by any reform to the law.

37. Rape & Domestic Violence Services Australia urges the NSW Sentencing Council to consider the above and undertake to reform the law accordingly.

38. If you have any questions or would like to discuss further, please do not hesitate to contact me on [REDACTED] or by email at [REDACTED].

Yours faithfully,

**Rape and Domestic Violence Services Australia**



**Karen Willis**

**Executive Officer**