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To whom it may concern

### **Submission in respect of the Homicide Consultation Paper**

1. The New South Wales Bar Association (**the Association**) welcomes the opportunity to make a submission on the Homicide Consultation Paper (**the Consultation Paper**).
2. Before directly addressing the questions posed by the NSW Sentencing Council in the Consultation Paper, the Association makes two observations regarding the misperception that sentences currently imposed for homicide offences inadequately reflect the gravity of such crimes and the undesirability of introducing mandatory sentences for offences of murder or manslaughter.

#### *Adequacy of Sentencing: the Perception of Leniency*

3. The Consultation Paper notes at paragraph 1.5 that this “*review exists in the context of concerns in the media that the sentences imposed on homicide offenders are inadequate*”.
4. The Association acknowledges the importance of maintaining public confidence in the criminal justice system and its operation.
5. However, the Association encourages the NSW Sentencing Council to consider these concerns raised by the media against the backdrop of empirical research.
6. Research consistently demonstrates that while there tends to be a community perception that sentences are in general too lenient, members of the public who have been informed about the facts of both the case and the specific offender in question actually reflect similar views to judges about appropriate sentencing outcomes when dealing with specific fact scenarios.<sup>1</sup>
7. For example, in one juror survey,<sup>2</sup> jurors involved in criminal cases were asked what they thought about sentencing generally and what they thought about the sentence imposed in the case they served on. When talking about sentencing in general, jurors felt that sentences imposed were too lenient. That is, for those cases where they relied on media reports alone, respondent jurors held the view that harsher penalties were warranted. However, the results changed significantly when

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<sup>1</sup> K Gelb, *More Myths and Misconceptions* (Sentencing Advisory Council (Vic), 2008) 3; K Warner, ‘Sentencing Review 2006–2007’ (2007) 31 *Crim LJ* 359, 359; K Warner et al, *Jury Sentencing Survey* (Report to the Criminology Research Council, April 2010) 78-86; K Warner et al, *Public judgment on sentencing: final results from the Tasmania Jury Sentencing Survey* (AIC, Trends and Issues in Criminal Justice, No. 407 Feb 2011).

<sup>2</sup> K Warner et al, *Jury Sentencing Survey* (2011) Criminology Research Council.

the same jurors were asked about the particular case in which they served in the jury. In these cases, around 50 per cent of jurors thought the sentence imposed was too harsh, with the other half believing the sentence imposed to be too lenient. These findings suggest that judges were striking an appropriate balance in their sentencing decisions.

8. More recent research has indicated that informed members of the community are slightly more, not less, lenient than judges, with the “majority of participants in every study impos[ing] a more lenient sentence than the judge”.<sup>3</sup> The Association is not aware of any studies that suggest a different situation with respect to sentences for homicide.

### *Mandatory Sentencing*

9. The possibility of introducing some form of “mandatory sentencing” in relation to murder and manslaughter is raised at various points in the Consultation Paper. The Association has consistently opposed any form of mandatory sentencing, including because maintaining individualised justice and broad judicial sentencing discretion should be regarded as essential attributes of our criminal justice system.
10. The Law Council of Australia has explained its consistent opposition to “the use of sentencing regimes which prescribe mandatory minimum sentences upon conviction for criminal offences” as follows:

*[S]uch regimes impose unacceptable restrictions on judicial discretion and independence, are inconsistent with rule of law principles and undermine confidence in the system of justice. Mandatory sentencing is also inconsistent with Australia’s voluntarily assumed international human rights obligations. Mandatory sentencing laws are by definition arbitrary and can limit an individual’s right to a fair trial by preventing judges from imposing an appropriate penalty based on the unique circumstances of each offence and offender. Such regimes are costly and there is a lack of evidence as to their effectiveness as a deterrent or their ability to reduce crime. Mandatory sentencing regimes create especially unjust outcomes for particular groups within society: indigenous peoples, juveniles, persons with a mental illness or cognitive impairment, and the impoverished. [...] [T]he evidence points to the significant financial and social cost of mandatory sentencing to individuals and to the community without a corresponding benefit in crime reduction.<sup>4</sup>*

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<sup>3</sup> See Victorian Sentencing Advisory Council, *Public Opinion About Sentencing: A Research Overview* (2018) 1.

<sup>4</sup> Law Council of Australia, *Mandatory Sentencing Policy* (May 2014), 2; see also *Mandatory Sentencing Discussion Policy Paper* (May, 2014).

## Responses to Questions

### Q 3.1: Life sentences for murder

Are the existing principles that relate to imposing life sentences for murder appropriate? Why or Why not?

11. The Association is concerned that the two-stage process involved in imposing life sentences under s 61(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) is not appropriate as it is contrary to an instinctive-synthesis approach to sentencing.
12. There has been some debate over many years regarding the two-stage approach to imposing natural life sentences in New South Wales (NSW) under s 61 (and former provisions). The two-stage approach as to whether the maximum penalty of life imprisonment should be imposed involves consideration being given to whether an offence's objective gravity (i.e. the level of culpability) brings it into the worst class of case. The second stage then involves consideration of whether the subjective circumstances of the offender require a lesser sentence than life imprisonment.<sup>5</sup> In *R v Bell*,<sup>6</sup> which dealt in 1985 with a former provision for the imposition of life sentences, Street CJ (dissenting) favoured an instinctive-synthesis approach.
13. In *R v Quami*,<sup>7</sup> the sentencing judge, who had to consider in that case whether life sentences should be imposed, was satisfied by the High Court's statements in cases such as *Markarian v The Queen*,<sup>8</sup> *Muldrock v The Queen*,<sup>9</sup> and most recently in *Kilic v The Queen*<sup>10</sup> that the correct approach does not involve a two-stage process.<sup>11</sup> In *Quami*, the sentencing judge applied what he considered to be the correct approach which was as follows:

*The correct approach to s 61 is for the sentencing judge to consider all of the evidence relevant to the sentencing discretion, apply the relevant sentencing principles (common law and statute) and make an assessment of the extremity of the offender's culpability and the "community interest in retribution, punishment, community protection and deterrence." The sentencing Judge must consider whether the **only** way that the community interest so identified can be met by the imposition of a life sentence [emphasis in the original]. This is not a multi-stage process. Rather, it is an intuitive evaluation of all of the material and principles and an application of the legislation providing for mandatory life sentences.<sup>12</sup>*

14. Whilst the Court of Criminal Appeal had most recently endorsed the two-stage approach in *Dean v R*,<sup>13</sup> since that time the High Court has held in *Kilic* that sentencing judges should avoid using the expression "within the worst category".<sup>14</sup> In *Kilic*, the High Court explained:

*What is meant by an offence falling within the "worst category" of the offence is that it is an instance of the offence which is so grave that it warrants the imposition of the maximum prescribed penalty for that offence. Both the nature of the crime and the circumstances of the criminal are considered in determining whether the case is of the worst type.<sup>15</sup>*

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<sup>5</sup> *Dean v R* [2015] NSWCCA 307; *Knight v R* [2006] NSWCCA 292; *R v Valera* [2002] NSWCCA 50.

<sup>6</sup> (1985) 2 NSWLR 466.

<sup>7</sup> [2017] NSWSC 774 (*Quami*).

<sup>8</sup> (2005) 228 CLR 357.

<sup>9</sup> (2011) 244 CLR 120.

<sup>10</sup> (2016) 259 CLR 256 (*Kilic*).

<sup>11</sup> *Quami*, [191]-[192].

<sup>12</sup> *Ibid* [193].

<sup>13</sup> [2015] NSWCCA 307.

<sup>14</sup> *Kilic*, [17]-[20].

<sup>15</sup> *Ibid* [18].

15. What the High Court described in *Kilic* was an instinctive-synthesis approach to the imposition of the maximum penalty, an approach that requires consideration of all the objective factors of the offence and all the subjective factors of the offender in a single, intuitive process.
16. In a different context, Gaudron, Gummow and Hayne JJ, in their joint judgment in the High Court case of *Wong v The Queen*,<sup>16</sup> disapproved of the two-stage approach to sentencing, which they said was “*wrong in principle*”.<sup>17</sup> Their Honours noted that in *AB v The Queen*,<sup>18</sup> McHugh J and Hayne J<sup>19</sup> expressed the same view.<sup>20</sup>
17. The inherent unfairness involved in using the two-stage approach to impose the harshest sentence available under the criminal law in this country is that only objective factors are taken into account in firstly determining whether such a sentence is warranted. The role of the offender’s subjective circumstances becomes subsidiary to the process as these circumstances only become relevant as to whether the determination already reached - that a life sentence should be imposed - can be displaced.
18. A two-stage process is not mandated by s 61(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW). However, given the interpretation that has consistently been given to the provision’s application, the Association would recommend that this provision should either be repealed or amended to ensure that a two-stage process is not to be used in imposing a natural life sentence.

### **Q 3.2: Life sentences for murder**

- (1) Are the existing principles and provisions that relate to sentencing for the killing of particular categories of victim appropriate? Why or why not?**
- (2) If not, what should change?**

19. For the reason explained above in relation to mandatory sentences generally, the Association opposes the mandatory sentence provision with respect to the murder of a police officer.
20. As regards the higher standard non-parole period for murder where the victim falls within a particular category, the Association addresses standard non-parole periods generally in response to Q 6.6 and concludes that there is little utility in retaining them. However, the Association does not oppose retaining provisions that specify that it is an “*aggravating factor*” where the victim falls within particular categories.

### **Q 3.3: Victim Impact Statement**

- (1) Do the current provisions relating to victim impact statements in sentencing for homicide appropriately recognise the harms caused by murder and manslaughter? Why or why not?**
- (2) If not, what should change?**

21. As noted in the NSW Sentencing Council’s report *Victims’ Involvement in Sentencing*,<sup>21</sup> the NSW statutory provisions about Victim Impact Statements (**VISs**) have evolved over time. Of relevance are the amendments in 2014 and 2019. The 2014 amendment enabled a court, on the application of a prosecutor, to take a family VIS into account for sentencing purposes where the court

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<sup>16</sup> (2001) 207 CLR 586 (*Wong*).

<sup>17</sup> *Ibid* [76].

<sup>18</sup> (1999) 198 CLR 111.

<sup>19</sup> *Ibid* [15]-[18] and [115] respectively.

<sup>20</sup> *Wong*, [76].

<sup>21</sup> Report (2018), [1.17].

considered it appropriate to do so. In the Second Reading Speech for the Crimes (Sentencing Procedure) Amendment (Family Member Victim Impact Statement) Bill 2014, it was noted:

*The new section 28 (4) provides that a victim impact statement given by a family member may be considered and taken into account in determining a sentence for an offence on the basis that the harmful impact of the primary victim's death on the members of the primary victim's immediate family is an aspect of harm done to the community.*

22. Following the NSW Sentencing Council's review of victims' involvement in the sentencing process in 2018 (required following the 2014 amendments), further amendments were implemented in May 2019.<sup>22</sup> In proceedings commenced on or after 27 May 2019, a court *must* consider a VIS when tendered and *may* make any comment on it that the court considers appropriate.<sup>23</sup> In proceedings commenced before 27 May 2019, a court has a discretion to receive and consider a VIS "*if it considers it appropriate to do so*".<sup>24</sup>
23. The Association submits that, following the 2018 review and the 2019 amendments, the current provisions relating to VISs in sentencing for homicide appropriately recognise the harms caused by murder and manslaughter.

#### **Q 3.4: Factors going to objective seriousness**

**(1) Are the existing factors considered relevant to the objective seriousness of an offence of murder or manslaughter appropriate? Why or why not?**

**(2) If not, what should change?**

**(3) Should any other factors be taken into account when assessing the objective seriousness of a particular murder or manslaughter offence?**

24. The Association submits that the existing factors considered relevant to the objective seriousness of an offence of murder and manslaughter are appropriate.
25. There are a wide range of factors that sentencing judges can take into account when sentencing offenders for offences of murder and manslaughter. Sentencing judges recognise that some categories of murder are more grievous than others. The Consultation Paper covers a number of factors specific to murder and manslaughter offences. There is no evidence that the existing factors are not appropriate or that sentencing judges are not assessing the factors appropriately.
26. In relation to the issue of concealing the location of a body, it is submitted that it would not be appropriate to include concealing the location of the body as a factor going to the objective seriousness of the offence. As noted in the Consultation Paper, a person charged with a criminal offence is entitled to plead not guilty without attracting the risk of the imposition of a penalty more serious than otherwise would have been imposed.<sup>25</sup> The position in NSW, that this issue be dealt with through the parole system, remains appropriate.
27. The existing factors are appropriate. The Association is of the view that there should not be other factors taken into account when assessing the objective seriousness of particular murder or manslaughter offences.

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<sup>22</sup> See *Crimes Legislation Amendment (Victims) Act 2018* (NSW).

<sup>23</sup> Section 30E(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), inserted by sch 3 to the *Crimes Legislation Amendment (Victims) Act 2018* (NSW).

<sup>24</sup> See s 28(1) of the *Crimes Sentencing Procedure Act 1999* (NSW), as worded prior to the amendments made by the *Crimes Legislation Amendment (Victims) Act 2018* (NSW).

<sup>25</sup> Consultation Paper at [3.83]

### **Question 3.5: Manslaughter**

**(1) Are existing laws and principles that apply to sentencing for manslaughter appropriate for dealing with the range of circumstances that can give rise to a conviction for manslaughter? Why or why not?**

**(2) If not, what should change?**

28. The offence of manslaughter covers a wide variety of circumstances. The sentencing scope for the offence of manslaughter is extremely wide and determining an appropriate sentence for manslaughter is “*notoriously difficult*”.<sup>26</sup>
29. It would be inappropriate to further complicate sentencing proceedings for the offence of manslaughter. As noted in the Consultation Paper, there are a wide range of applicable sentences for the offence of manslaughter and it generally may not be possible to establish a sentencing pattern because the relevant circumstances may vary too greatly.
30. It is submitted that a standard non-parole period would not be appropriate for the offence of manslaughter let alone for specific “categories” of manslaughter. This is particularly so given the fact it is not possible to establish a hierarchy of seriousness between types of manslaughter.
31. The statistics in the Consultation Paper show that the sentences for manslaughter in NSW are broadly consistent with sentences in other Australian jurisdictions. The NSW courts would appear, therefore, to have sufficient sentencing scope for the offence of manslaughter when fixing terms of imprisonment. However, as suspended sentences are no longer available for the offence of manslaughter, the Association recommends that courts be empowered to impose Intensive Correction Orders for manslaughter offences at the lower end of the spectrum of seriousness
32. The Association’s position is, therefore, that no changes are required to the existing sentencing laws and principles for the offence of manslaughter save for permitting the use of Intensive Correction Orders for less serious cases of manslaughter (see para 81 below). Any other changes would further complicate what can already be complex and lengthy sentencing proceedings.

### **Q 3.6: Industrial manslaughter**

**What principles should apply when sentencing for a workplace death that amounts to manslaughter under the current law?**

33. As noted in the Consultation Paper, there is currently no offence of “industrial manslaughter” in NSW. In addition to the general manslaughter law provided in sections 18 and 24 of the *Crimes Act 1900* (NSW), s 31(1) of the *Work Health and Safety Act 2011* (NSW) (**WHS Act**) provides for an offence of breaching a “*health and safety duty*” which arises under the Act where a person (including a corporation):

*without reasonable excuse, engages in conduct that exposes an individual to whom that duty is owed to a risk of death or serious injury or illness, and...the person is reckless as to the risk to an individual of death or serious injury or illness.*

For individuals, the maximum penalty is a fine of \$300,000 or 5 years’ imprisonment or both and in the case of corporations, the maximum penalty is a fine of \$3,000,000.

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<sup>26</sup> *R v Green* [1999] NSWCCA 97, [24].

34. Thus, the WHS Act focuses on risk and its elimination (or at least minimisation) as opposed to punishing behaviour that results in the manifestation of that risk. Further, under the current regime, proceedings are undertaken without a jury.
35. The Association submits that the present regime contained in the WHS Act is a far better way of legislating for responsible behaviour in industry because:
- (i) it focuses on risk rather than on outcomes; and
  - (ii) the prosecution of such offences is undertaken before a judge alone, so that the complex relationships that exist between corporations, individuals and company officers is made the subject of review by specialist judges who are obliged to give reasons for their findings.
36. Accordingly, the Association opposes the legislating of an offence of industrial manslaughter in the *Crimes Act 1900* (NSW).

**Q 4.1: Sentencing for domestic violence related homicide**

- (1) Are the sentences imposed for homicide in the context of domestic or family violence adequate? Why or why not?**
  - (2) What changes, if any, should be made to penalty provisions that relate to homicide in the context of domestic or family violence?**
  - (3) Are the current sentencing principles relating to sentencing for domestic violence homicides appropriate? Why or why not?**
  - (4) How could the current sentencing principles relating to sentencing for domestic violence homicides be changed?**
  - (5) Should additional aggravating factors be legislated? Why or why not?**
  - (6) What changes, if any, should be made to the law to allow domestic violence context evidence to be admitted to sentencing proceedings?**
37. The Association considers that relevant sentencing principles are being properly applied in connection with sentences imposed for domestic and family violence related homicides.
38. As Johnson J stated in *R v Cabill (No 4)*, “there is no single model for offences of domestic violence”.<sup>27</sup> Offences of domestic violence include varying and different relationships, surrounding circumstances and histories, and involve different modes of conduct. The complexity of issues involved in consideration of murder and manslaughter offences in these circumstances point strongly against any form of prescriptive legislation. As the NSW Public Defenders wrote in a preliminary submission:

*In many homicides that have occurred in a context of family violence, the offender has been raised against a background of violence. The High Court in Munda considered this issue in depth, and read in conjunction with the sentencing for another violent offender in Bugmy (causing harm short of death, and in a correctional centre) demonstrate the need for the full range of judicial discretion to incorporate the often conflicting purposes of sentencing. Munda in particular emphasised the strong need for sentences to denounce such offending and recognise the dignity of the victim. In Bugmy it was explained that an upbringing characterised by alcohol abuse and violence may mitigate the sentence because the offender’s moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way. Such a background may leave a mark on a person throughout life and compromise the person’s capacity to mature and learn from experience.*

<sup>27</sup> [2018] NSWSC 1896, [3].

39. The High Court’s subsequent judgment in *Kilic* recognised that there may be “*changes in community attitudes to some forms of offending*” over time, including “*changes in societal attitudes to domestic relations*”. However, the High Court emphasised that existing principles of sentencing can take into account such changes, observing that “[t]he requirement of currency recognises that sentencing practices for a particular offence or type of offence may change over time reflecting” such changes in community attitudes. The Court specifically referred to “*current sentencing practices for offences involving domestic violence*” departing from past sentencing practices because of those changes in societal attitudes.<sup>28</sup>
40. Notwithstanding a concern, historically, that domestic and family violence is not viewed and treated in the criminal justice system as seriously as it should be, the Association notes that, at para 1.11, the Consultation Paper states:
- [T]he statistics available to us show little difference in the head sentences and non-parole periods between homicides that do and do not involve domestic violence or intimate partner violence.*
41. Table 4.2 in the Consultation Paper shows little or no difference between the average head sentences for domestic violence and non-domestic violence murders and the average non-parole periods for the two categories. As regards a comparison sentences for domestic violence related manslaughter and other types of manslaughter, the differences between the various categories are attributable to the individual circumstances of each case.<sup>29</sup>
42. NSW courts have acknowledged the particular importance of general and specific deterrence, retribution and denunciation in homicides in the context of domestic violence.<sup>30</sup> The courts have rejected the idea that murder in cases of domestic or family violence should be sentenced more leniently as a distinct category of offence.<sup>31</sup> Aggravating features referred to in s 21A(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) have been interpreted and applied in a manner consistent with recognition of problematic features of domestic and family violence.
43. As regards “domestic violence context evidence”, there is no doubt that such evidence may be, and is, admitted into sentencing proceedings under current law. Even in the absence of prior criminal convictions, evidence of past similar conduct may be admitted to show that the offender is not a person of prior good character.<sup>32</sup> Further, in accordance with sentencing principle, evidence of past similar conduct may be admitted because it bears on the seriousness of the offence for which the offender is to be sentenced.<sup>33</sup> Evidence of past similar conduct may also be taken into account for the purposes of assessing the need for specific deterrence in relation to the offence for which the offender is to be sentenced.<sup>34</sup> The commission of other similar offences may tend to rebut a claim that prospects of rehabilitation are good and enhance the importance to be given to the sentencing purpose of specific deterrence. While there may be historic cases in this jurisdiction, or cases in other jurisdictions, where evidence of this kind was not admitted, the Association does not accept that there is any need in NSW for changes to the law designed to allow domestic violence context evidence to be admitted in sentencing proceedings.
44. The Consultation Paper observes, at para 1.26, that “[a]ddressing domestic violence homicide requires a holistic approach that goes beyond reforms to criminal sentencing”. The Association agrees but would go

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<sup>28</sup> *Kilic*, [21].

<sup>29</sup> See para 4.24 of the Consultation Paper.

<sup>30</sup> See paras 4.30-4.34 of the Consultation Paper.

<sup>31</sup> See para 4.36 of the Consultation Paper.

<sup>32</sup> See *R v Villaluna* [2017] NSWSC 1390, [67].

<sup>33</sup> See *Abbas v R* [2014] NSWCCA 188, [26].

<sup>34</sup> See *Thuong Nguyen v R* [2012] NSWCCA 184, [30]-[31].

further. It requires the kinds of reforms discussed at para 1.26, without any need or desirability to change current sentencing principles and practice.

**Q 5.1: Sentencing for child homicide**

**(1) Are the sentences imposed for the killing of children adequate? Why or why not?**

**(2) What changes, if any, should be made to penalty provisions that relate to the killing of children?**

**(3) Are the current sentencing principles relating to sentencing for the murder or manslaughter of children appropriate? Why or why not?**

**(4) How could the current sentencing principles relating to sentencing for the murder or manslaughter of children be changed?**

**(5) What other changes could be made to the law to deal more appropriately with cases involving the murder or manslaughter of a child?**

45. For the most part, the submissions made by the Association in respect of sentencing for domestic violence related homicide are applicable in this context. The Association considers that relevant sentencing principles are being properly applied in connection with sentences imposed for child homicide. The Association notes that para 1.11 of the Consultation Paper states that child murder is sentenced at a higher level than most other cases of murder. The courts have observed that manslaughter involving children is particularly serious, especially when the child is killed by a parent or family member.<sup>35</sup> The courts have emphasised the purposes of retribution and deterrence.<sup>36</sup> Aggravating features referred to in s 21A(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) have been properly taken into account. As in the case of domestic violence generally, there are few specific mitigating factors that relate specifically to the killing of young children.
46. The Association considers that no case has been made to change current sentencing law or practice in relation to child homicide or to create a specific child homicide offence. Adding specific aggravating factors to s 21A(2) is not necessary because those considerations are already properly taken into account under current law, and may be counter-productive bearing in mind the large number of successful appeals that have resulted from “double counting” of s 21A(2) aggravating factors.

**Q 6.1: Maximum penalty for manslaughter**

**What changes, if any, should be made to the maximum penalty provisions that relate to manslaughter?**

47. The Association considers that the current maximum penalty of 25 years’ imprisonment is appropriate and should not be increased. As Kirby J noted in *R v Lavender*,<sup>37</sup> in Australia:

*moral opprobrium of conviction of murder and the public understanding attaching to the labels of murder and manslaughter have repeatedly led to recommendations that the distinction be retained. Law reform and other bodies overseas have consistently reached identical conclusions.*

The difference in maximum penalties available for the offences of murder and manslaughter correctly reflects the difference in moral opprobrium for each offence.

<sup>35</sup> See *R v Byrne* [2001] NSWSC 1164, [39]; *R v Howard* [2001] NSWCCA 309, [20].

<sup>36</sup> See the Consultation Paper at paras 5.46-5.50.

<sup>37</sup> (2005) 222 CLR 67, 109 [131] (citations omitted).

48. Since the current maximum penalty for manslaughter is, other than imprisonment for life, the highest penalty known to the law in NSW, the seriousness of taking a human life is already acknowledged by s 24 *Crimes Act 1900* (NSW).

**Question 6.2: Mandatory minimum penalties**

**(1) For what types of homicide, if any, should mandatory minimum penalties be introduced?**

**(2) What should the duration of any mandatory minimum penalties be?**

49. As outlined above, the Association opposes the introduction of mandatory minimum penalties. In *Palling v Corfield*, Barwick CJ noted:

*It is both unusual and in general ... undesirable that the court should not have a discretion in the imposition of penalties and sentences, for circumstances alter cases and it is a traditional function of a court of justice to endeavour to make the punishment appropriate to the circumstances as well as to the nature of the crime.*<sup>38</sup>

50. Therefore, while constitutionally permissible, any attempt to fetter judicial discretion should be closely scrutinised since, as the Court of Criminal Appeal has acknowledged, “[t]he potentiality of injustice in mandatory punishment is impossible to gainsay”.<sup>39</sup> By their very nature, mandatory penalties are unable to take into account the circumstances of the individual offence or the individual offender, whereas courts must strive for individualised justice. Therefore, no mandatory minimum penalties should be introduced.

**Q 6.3: Mandatory life imprisonment**

**(1) Should a sentence of mandatory life imprisonment apply to any other categories of murder? If yes, which ones?**

**(2) What changes, if any, should be made to the existing provisions relating to mandatory life imprisonment for the murder of a police officer.**

51. The Association has taken a consistent position opposing any form of mandatory sentencing. As such the Association does not support the current provision under 19B *Crimes Act 1900* (NSW) in relation to mandatory life sentences for the murder of police officers, or for any other category of murder. The Association’s view is that the maintenance of individualised justice and broad judicial sentencing discretion should be regarded as an essential attribute of our system of criminal justice.
52. Whilst it is recognised that some offences and offending are of such great heinousness that the imposition of a life sentence will be called for, given the gravity of such a sentence this is matter that should be determined by a judicial officer after careful consideration of all objective and subjective factors having regard to the various purposes of sentencing.
53. As outlined above, the Association considers mandatory minimum sentences to be undesirable because these apply without regard to undoubtedly relevant circumstances of each case with consequent arbitrary and capricious results.<sup>40</sup> The NSW Law Reform Commission has noted that mandatory life sentences constitute the most extreme form of mandatory minimum sentencing.<sup>41</sup> No other Australian jurisdiction has such a provision where the minimum sentence that a court can impose is imprisonment for the whole of a person’s natural life without the possibility of release on parole or licence.

<sup>38</sup> (1970) 123 CLR 52, 58.

<sup>39</sup> *Karim v R; Magaming v R; Bin Labaiya v R; Bayu v R; Alomalu v R* (2013) 83 NSWLR 268, 297 [105] (Allsop P).

<sup>40</sup> NSW Law Reform Commission, *Discussion Paper 33: Sentencing* (1996) 208 [9.11].

<sup>41</sup> *Ibid.*

54. There is no evidence that objective factors which increase the heinousness of an offence of murder are not being given appropriate weight in current sentencing practices. Further, where additional offences are involved in some categories of murder such those also involving a sexual assault this is a factor to be taken in account in terms of the considerations required under s 61 and also in relation to accumulation of sentences when sentencing for more than one offence.
55. In addition, there are aggravating factors under s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) that are required to be taken into account by sentencing judges and that would be applicable to certain categories of murder. This includes where the victim was vulnerable or had a particular occupation and the offence arose because of that occupation or work.

**Q 6.4: Discretionary life imprisonment with a non-parole period**  
**Should it be possible (without removing the possibility of a life sentence without parole) to impose a life sentence with a non-parole period? Why or why not?**

56. The Association strongly supports the availability of discretionary life imprisonment with a non-parole period.
57. The crushing nature of a natural term life sentence with no prospect of release from prison has been long recognised, particularly for young offenders who given the general rate of life expectancy could potentially spend 50 years or more in prison.<sup>42</sup>
58. There have been a number of previous recommendations supporting the availability of a discretionary sentence of life imprisonment with the ability to set a non-parole period. Recommendation 7 of NSW Sentencing Council report on *High Risk Violent Offenders* was for amendment of the *Crimes (Sentencing Procedure) Act 1999* (NSW) to allow the court to impose a life sentence for any offence that attracts life as a maximum sentence and to specify in respect of that sentence a non-parole period. This recommendation was subject to provision being made for a court in appropriate circumstances to impose a “whole of life sentence”, being a sentence without the option of release on parole.<sup>43</sup>
59. The *High Risk Violent Offenders* report noted the case of *R v Ngo*,<sup>44</sup> in which the sentencing judge found that the culpability for the commission of that murder was so extreme that the community interest as defined in s 61(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) could only be adequately met by a sentence of life imprisonment. However, it was not a case where the judge believed that the offender needed to be kept in custody for the whole time and if the judge had had the power to do so he would have fixed a very long non-parole period. The sentencing judge echoed remarks made in the Court of Criminal Appeal decision in *R v Harris*<sup>45</sup> that: “...*Parliament might usefully give consideration to whether the Court should have power to fix a non-parole period in cases to which s 61(1) applies*”.<sup>46</sup>
60. NSW is the only jurisdiction in Australia where a life sentence is imposed for the term of an offender’s natural life with no possibility of release on parole or licence.
61. One of the issues that arises with the imposition of life sentences are difficulties of predicting the future dangerousness of an offender and the need to protect the community. This is most

<sup>42</sup> *R v Harris* [2000] NSWCCA 469; 121 A Crim R 342, [124], *R v Garforth* NSWCCA 23 May 1994 (unreported).

<sup>43</sup> NSW Sentencing Council, *High Risk Violent Offenders, Sentencing and Post Custody Management Options* (May 2012) 154.

<sup>44</sup> [2001] NSWSC 1021 (*Ngo*).

<sup>45</sup> [2000] NSWCCA 469 (*Harris*).

<sup>46</sup> *Ngo*, [43]. Comments to this effect were made in *Harris* at [122-123], [132] and [134].

particularly the case in relation to youthful offenders. Predicting future dangerousness is notoriously difficult and it has been remarked upon that the best point to assess an offender's dangerousness is at time when the offender might be considered for release.

62. In the decision of *Harris* it was noted that lengthy experience with the life redetermination procedure had seen a controlled and safe return to society of offenders once considered hopelessly violent and dangerous. This supported the observation that it may be that after a lengthy period of imprisonment, counselling and simple maturing, that an offender sentenced to life ceases to be dangerous.<sup>47</sup>
63. If a court did have the power to set non-parole periods for natural life sentences this does not mean that an offender would be released at the expiration of that non-parole period, because the parole authority would have to be satisfied that release was warranted based on an assessment as to the rehabilitation of the prisoner. Where an offender did not cease to be dangerous they would never be released on parole; however, there would be a process involved where an assessment would need to be carefully considered and subject to review.

#### **Q6.5 Mandatory life imprisonment with a non-parole period.**

##### **Should there be a mandatory sentence of life imprisonment for murder with a minimum non-parole period? Why or why not?**

64. The Association does not support a mandatory sentence of life imprisonment for murder with a minimum non-parole period.
65. Mandatory life sentences with minimum non-parole periods would involve the imposition of two mandatory sentences: first, the mandatory maximum head sentence that can be imposed at law and, second, a fixed mandatory minimum period before an offender could be released on parole. This would entirely remove any judicial discretion from the sentencing exercise. Such a sentence would be a sentence by Parliament and a complete departure from the concept of individualised justice which is a cornerstone of Australia's justice system.

#### **Q 6.6: Existing standard non-parole periods**

**(1) Should murder offences continue to attract a standard non parole period? Why or why not?**

**(2) Should the existing standard non parole periods for murder be changed? Why or why not?**

**(3) If yes, what should they be?**

66. In *Muldrock v The Queen*,<sup>48</sup> the High Court described the effect of a standard non-parole period in the following terms:

*The standard non-parole period represents the non-parole period for an hypothetical offence in the middle of the range of objective seriousness without regard to the range of factors, both aggravating and mitigating, that bear relevantly on sentencing in an individual case.*

While standard non-parole periods still serve as a yardstick for sentencing judges, the fact that these do not incorporate any relevant circumstances means that standard non-parole periods are now quite amorphous as a standard.

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<sup>47</sup> *Harris*, [126]-[127].

<sup>48</sup> (2011) 244 CLR 120, [31].

67. Even in the absence of standard non-parole periods, sentencing judges still derive guidance from the maximum penalty, s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and the wealth of previous authority both at first instance and, importantly, from the Court of Criminal Appeal. In those circumstances, there would appear to be little utility in retaining the standard non-parole periods for murder.
68. If, however, the standard non-parole periods are to be retained, there appears to be no evidence to suggest that the current sentences imposed are inadequate. In those circumstances, the Association sees no justification for an increase in the standard non-parole periods.

**Q 6.7: New standard non-parole periods**

**(1) Should any new standard non-parole periods be introduced for murder? Why or why not?**

**(2) If yes, what should they be and in what circumstances should they operate?**

69. The Association does not consider that there is a need for further standard non-parole periods to be introduced. As has been recognised by the Court of Criminal Appeal:

*Sentencing can be complicated in this State particularly in light of the introduction of provisions such as s. 21A and the standard non-parole period. Very experienced judges can fall into the traps that Parliament has unconsciously set for sentencing courts in the relevant legislation.*<sup>49</sup>

The introduction of further yardsticks – especially, a “*set of scalable or aggravating factors*”,<sup>50</sup> as some have proposed – is only likely to increase the complexity of the sentencing process, leading potentially to more appeals and a prolongation of the criminal process.

70. More importantly, those matters which might be the subject of a new standard non-parole period would, in any event, already be seen as increasing the objective gravity of the particular killing. Because such factors, along with the pre-existing standard non-parole period for murder, are already taken into account in determining the appropriate sentence, there is no need for new standard non-parole periods to be introduced.

**Q 6.8: Concurrent serious offences**

**What new provisions, if any, should apply where a homicide offender has committed one or more additional serious offences?**

71. The Association sees no need to introduce specific provisions to deal with homicide offenders who have committed additional serious offences. For the reasons already set out above, the introduction of additional rules is only likely to complicate the sentencing process still further, without leading to any improvement in sentencing practice.
72. Notably, there is no evidence that the current sentencing procedure is in some way defective. As the Consultation Paper has rightly pointed out, those offenders who have committed other offences in addition to the offence of murder must be sentenced for each offence and then the degree of accumulation or concurrency assessed.<sup>51</sup> The ultimate sentence will, therefore, be constrained by the principle of totality, which dictates that the sentence reflects the offender’s

<sup>49</sup> *R v Rossi-Murray* [2009] NSWCCA 177, [44] (Howie J).

<sup>50</sup> See NSW Police Force and Office for Police, *Preliminary Submission* PMU10, 1.

<sup>51</sup> See, generally, *Pearce v The Queen* (1998) 194 CLR 610.

overall criminality<sup>52</sup> Accordingly, pre-existing sentencing practice already takes into account the entirety of an offender's conduct.

73. Furthermore, in circumstances where a killing occurs in the course of other serious criminal offending, such as a sexual assault, the law already recognises such a fact as warranting a significant degree of accumulation between the homicide offence and the other offending. Consequently, there is no need to introduce specific provisions to deal with such eventualities.

#### **Q 6.9 Redetermining natural life sentences**

**In what circumstances, if any, would it be appropriate to have a scheme of judicial redetermination of natural life sentences for murder?**

74. If life imprisonment with a non-parole period was introduced in NSW, the Association would support a scheme of judicial redetermination of life sentences.
75. There are only a limited number of prisoners serving natural life sentences in NSW who would need to have their sentences redetermined at some point should such a scheme be introduced. The NSW Inmate Census recorded that 49 prisoners were serving natural life sentences in 2018.<sup>53</sup>
76. The Association would generally support as a model for redetermining life sentences the previous scheme that had been imposed for natural life sentence before 1990. However, under the previous scheme the Supreme Court had the power to prevent any further applications by an offender for a redetermination of a life sentence of imprisonment.<sup>54</sup> The Association would not support this aspect of the previous scheme. It is noted that, in its 1996 report on Sentencing, the NSW Law Reform Commission recommended the repeal of this provision preventing further applications as a matter of fundamental principle.<sup>55</sup>
77. It is submitted that, if such a scheme was introduced, it should apply to all current natural life sentences given the small number of offenders that would be involved. In practical effect it would have a retrospective operation. It is accepted that family victims of homicide would need to be supported so as to reduce any impact or effects that this process could have on them.
78. The Association would also support consideration being given to the alternative approach noted in the Consultation Paper which would involve a provisional sentencing scheme, where a notional sentence was imposed initially to be finalised later, taking into account information collected about an offender whilst in custody. Such information could include responses to mental health treatment, and assessments regarding an offender's prospects of rehabilitation. The Association would support this as an additional alternative approach, which may be a particular benefit in respect of offenders with mental health conditions that may respond to treatment. It is noted that such an option is already available in respect of young offenders although the Consultation Paper noted (at para 6.58) that it has not yet been used.

#### **Q 6.10: Managing high risk offenders**

**What provision, if any, should be made for the management of high risk of offenders in relation to murder or manslaughter?**

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<sup>52</sup> *Nguyen v The Queen* (2016) 256 CLR 656, 677 [64] (Gageler, Nettle and Gordon JJ).

<sup>53</sup> Corrective Services, *NSW Inmate Census 2018*, Statistical Publication No 47, August 2019.

<sup>54</sup> *Sentencing Act 1989* (NSW), s 13(8)(a).

<sup>55</sup> NSW Law Reform Commission, *Report 79: Sentencing*, December 1996, 220, [9.40].

79. The Association notes that the offences of murder and manslaughter fall within s 5A of the *Crimes (High Risk Offenders) Act 2006* (NSW) (**the CHRO Act**). As such, offenders serving sentences of imprisonment are subject to the prospect of continuing detention and other orders upon expiry of their sentence.
80. The Association submits that, while some issues remain with the instigation of proceedings under the CHRO Act in terms of notice and timeliness of applications, the availability of such orders renders the prospect of indefinite terms of imprisonment *at the point of sentencing upon conviction* irrelevant, even before consideration is given to social and moral aspects of such punishment. The best time to assess a prisoner's risk of re-offending is not made at the commencement of a period of imprisonment but towards its end.

**Q 6.11 Alternatives to imprisonment for manslaughter**

**What alternatives to imprisonment should be available for manslaughter offenders?**

81. The Association submits that Intensive Correction Orders should be available for less serious cases of manslaughter now that suspended sentences are no longer a sentencing option. There are, therefore, currently very limited non-custodial penalties for an offence that covers such a wide variety of circumstances.

*Conclusion*

82. Thank you again for the opportunity for the Association to comment on the Consultation Paper. If you would like any further information, or to discuss this letter further, our contact at first instance is the Association's Director of Policy and Public Affairs, Ms Elizabeth Pearson on [REDACTED] or by email at [REDACTED].

Yours sincerely

[REDACTED]

Tim Game SC  
President