

21 February 2020

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

By email: sentencingcouncil@justice.nsw.gov.au

Dear The Honourable James Wood AO QC,

Review of sentencing for the offences of murder and manslaughter, including penalties imposed for domestic and family violence homicides and the standard non-parole periods of murder Consultation Paper

1. Women's Legal Service NSW (**WLS NSW**) thanks the NSW Sentencing Council for the opportunity to provide a submission in response to the Consultation Paper on sentencing for homicide, including penalties imposed for domestic and family violence homicides and the standard non-parole periods of murder (**Homicide Consultation Paper**).

About Women's Legal Service NSW

2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims support, care and protection, human rights and access to justice.



Women's Legal Service NSW
PO BOX 206 Lidcombe NSW 1825
Admin (02) 8745 6900
Fax (02) 9749 4433

www.wlsnsw.org.au
Women's Legal Resources Ltd.
ACN 002 387 699
ABN 88 002 387 699



3. WLS NSW welcomes the NSW Sentencing Council's review of sentencing for the offences of murder and manslaughter, particularly in relation to the sentences imposed in the context of domestic and family violence related homicides.
4. As raised in our preliminary submission, WLS NSW submits the context in which the homicide occurs needs to be considered in this review, and particularly consider the circumstances in which female primary victims ultimately kill their violent abusers.
5. We continue to advocate that the final report of the NSW Legislative Council Select Committee on the Partial Defence of Provocation (2013) (**Partial Defence of Provocation Report**) is relevant to this current review. Recommendations in that inquiry included:
 - 5.1 The Office of the Director of Public Prosecutions develop a guideline in relation to the prosecution of homicides in a domestic context to *"provide clear direction to assist prosecutors in determining the appropriate charge to lay against defendants, particularly in circumstances where there is a history of violence toward the defendant"*;¹
 - 5.2 Evidence of domestic and family violence be adduced in homicide matters;²
 - 5.3 The *"NSW Government develop and implement an education package on the nature and dynamics of domestic and family violence targeting the legal sector and the community more broadly"*;³
 - 5.4 *"The Attorney General issue a reference to the NSW Law Reform Commission requiring that it undertake a comprehensive review of the law of homicide and homicide defences in NSW, including reforms made in accordance with the recommendations in this report, to commence at the end of five years from the date of this report"*.⁴
6. We note the comprehensive review of homicide and homicide defences in NSW has not yet taken place and we continue to recommend this review be commissioned by the Attorney General.

¹ New South Wales Legislative Council Select Committee on the Partial Defence of Provocation, *The partial defence of provocation: Final Report*, 2013, Recommendation 1.

² Ibid, Recommendation 2.

³ Ibid, Recommendation 10.

⁴ Ibid, Recommendation 11.

7. To look at one issue, such as sentencing in isolation from the system is problematic and limits opportunities for transformative reform.
8. In summary, we recommend:
 - 8.1 The NSW Sentencing Council consider the context in which domestic and family violence homicides occur, including circumstances when primary victims-survivors kill their violent abusers.
 - 8.2 Legislative reform to facilitate the use of contemporary social framework evidence in homicide matters involving domestic and family, such as the social entrapment framework.
 - 8.3 The inclusion of further information in the Bench Books on domestic violence (as outlined at paragraph 54).
 - 8.4 A legislative amendment to allow discretion to order intensive correctional orders in exceptional circumstances for manslaughter, such as when a victim of domestic violence ultimately kills their abusive partner in the context of serious domestic violence.
 - 8.5 That there be a 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.
 - 8.6 The NSW Sentencing Council consider the recommendations made in the NSW Legislative Council Select Committee on the Partial Defence of Provocation Final Report.

Domestic Violence Homicides

Violence against women and domestic violence homicides

9. There were 1,132 recorded homicides between 2000 - 2014.⁵ Of these, 338 occurred where there was *“an identifiable history of domestic violence.”*⁶ Of these, 204 (60%) were identified domestic violence homicides where a person was killed by their current

⁵ NSW Government, *NSW Domestic Violence Death Review Team Report 2015-17*, Sydney, 2017, p 8.

⁶ Ibid.

or former intimate partner.⁷ Women were killed in 162 of 204 (79%) matters and men in 42 of 204 (21%) matters.⁸ Of the 42 men, 35 were killed by their current or former female partner. In 89% (31) of these cases the men killed were *"the primary domestic violence aggressor in the relationship"*.⁹

10. The NSW Domestic Violence Death Review Team as part of their methodology defines intimate partner homicide as:

"where a person is killed by a current or former intimate partner in a domestic violence context".¹⁰

Accountability of predominant aggressor

11. We are concerned by the language used by some police, prosecutors, defence and judicial officers to minimise, mask or mutualise domestic violence perpetrated by a primary aggressor against a primary victim or to victim-blame.¹¹
12. This is an issue also raised by the NSW Domestic Violence Death Review Team.¹²
13. It is imperative that the predominant aggressor is held accountable through attitudes, language and actions during the police investigation as well as when charging, prosecuting and sentencing of offences in the context of domestic violence, including homicide.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid, p 9.

¹⁰ Ibid, p 5.

¹¹ Most recently a Detective Inspector in Queensland commented after the brutal killing of a mother and three children by the children's father and after acknowledging there was a protection order in place for the woman and previous instances of family violence that police wanted to keep an *"open mind"* about the father's motives stating: *"Is this an issue of a woman suffering significant domestic violence and her and her children perishing at the hands of the husband, or is it an instance of a husband being driven too far by issues he's suffered by certain circumstances into committing acts of this form?"* in Michael McGowan and Ben Smee, 'Queensland police spark anger with 'open mind' comment on murder of Hannah Clarke and children', *The Guardian*, 20 February 2020 accessed at: <https://www.theguardian.com/australia-news/2020/feb/20/queensland-police-spark-anger-with-open-mind-comment-on-of-hannah-clarke-and-children>

¹² Ibid, p 75. *NSW Government, NSW Domestic Violence Death Review Team Annual Report 2013-15*, Sydney, 2015, p 54-55.

Mitigating and aggravating factors

14. The context in which an offence takes place is relevant in sentencing.
15. We submit the use of contemporary social framework evidence and expert witnesses in the nature and dynamics of domestic violence is vital both in matters when the predominant aggressor kills in a domestic violence context and when the primary victim kills the primary aggressor as outlined in the section on this below.
16. We note there is a mitigating factor "*the offender was provoked by the victim*".¹³ Caution should be exercised in this factor being available to the primary/predominant aggressor as this has the effect of excusing the deliberate violent behaviour of the primary aggressor.
17. We refer to the framing in New Zealand of a mitigating factor of "*conduct of the victim*" and to the New Zealand Law Reform Commission recommendation to amend section 9(2)(c) of the *Sentencing Act 2002* (NZ) to clarify that "*conduct of the victim*" includes prior family violence against the offender.¹⁴
18. If implemented, we are interested in whether such a provision holds a predominant aggressor in domestic violence accountable or is used to blame the domestic violence victim. Similarly, we are interested in how such a provision would operate with respect to a domestic violence victim who ultimately kills the predominant aggressor in the context of serious domestic violence.
19. We repeat our concern that this inquiry is limited to sentencing when what is needed is a comprehensive inquiry into homicide and homicide defences in the context of domestic violence.
20. We are also concerned that the mitigating factor that "*the offender does not have any record (or any significant record) of previous convictions*"¹⁵ does not acknowledge the under reporting of domestic violence to police. We note the NSW Sentencing Council acknowledges research that highlights significant numbers of domestic violence offenders

¹³ Section 21A (3)(c) of the *Crimes (Sentencing Procedure) Act 1999*.

¹⁴ New Zealand Law Commission, *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide*, Report 139, 2016, Recommendation 10

¹⁵ Section 21A (3)(e) of the *Crimes (Sentencing Procedure Act 1999*

not been subject to a protection order or charged for domestic violence offences prior to their committing homicide in a domestic violence context.

21. Further, as acknowledged in the Consultation Paper, there may be very serious offences, such as sexual assault, which have not been charged.
22. We submit other records, such as medical records, are relevant and should be considered and the Judge can decide what weight to give such evidence.

Sentencing guidelines about the domestic violence context of an offence

23. We note the Consultation Paper refers to the Sentencing Council for England and Wales having *"guidelines on sentencing in the context of domestic abuse, which the courts are required to consider"*.
24. One of the non-exhaustive list of aggravating factors is *"using contact arrangements with a child to instigate an offence"*.
25. Social science research highlights that different forms of child abuse by a father who has perpetrated family violence may start or intensify post separation as a way of punishing or deliberately causing the mother distress.¹⁶
26. We would welcome consideration of these factors.

Women who kill their intimate partners

27. Based on the work of a number of researchers, Coss notes the different motivations and distinguishing features of men killing their female intimate partners and women killing their male intimate partners:

"men kill in revenge, out of jealousy, for honour, as the climax in a chain of violence...when women kill it is mostly as a form of self-preservation (or protection of children) in response to violence inflicted upon them".¹⁷

28. As outlined above, the main risk factor for intimate partner homicides is prior domestic violence. This data highlights the need for this review to consider the context in which

¹⁶ Cited in Lundy Bancroft, Jay Silverman, Daniel Ritchie, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (2nd ed), 2012, p 160.

¹⁷ Coss cites research by Dobash and Dobash, Polk and Wilson and Daly in Graeme Coss, "Provocative reforms: A comparative critique," *Criminal Law Journal*, Vol 30, 2006 p 139.

domestic and family violence homicides occur, including female primary victims of domestic and family violence killing their violent intimate partners.

29. Women killing their violent intimate partners in the context of domestic and family violence has been discussed in research over many years. This includes Wallace's study of NSW Police homicide files from 1968 - 1981, where it was found that 70% of women who killed their husbands did so in the context of violence perpetrated by their husbands.¹⁸ Further, Bradfield reviewed homicide cases over the period from 1980 - 2000, and identified that there were 76 cases where women had killed their male intimate partner; and in 86% of these cases there had been a history of physical violence.¹⁹

The use of contemporary social framework evidence and expert witnesses

30. In considering sentences to be imposed for homicide in the context of domestic and family violence, there is a need to consider a range of factors, including the nature and dynamics of domestic and family violence and the history of the relationship and not just consider the isolated incident of the homicide.
31. This is supported by the NSW Coroner in the *NSW Domestic Violence Death Review Team Report 2015-17* who identified:

*A theme throughout this report is the importance of viewing domestic violence holistically, as episodes in a broader pattern of behaviour rather than as incidents in isolation from one another.*²⁰

32. The NSW Legislative Council Select Committee on the Partial Defence of Provocation recommended in 2013 that NSW implement the use of social framework evidence similar to how it is used in Victoria.²¹
33. Following an extensive review of homicide defences, with a particular focus on victims of family violence who kill their violent intimate partners, the Victorian Law Reform

¹⁸ Alison Wallace, *Homicide: The Social Reality*, NSW Bureau of Crime Statistics and Research, Sydney, 1986 p 110 (123).

¹⁹ Rebecca Bradfield, *The treatment of women who kill their violent intimate partners within the Australian criminal justice system*, PhD Thesis, University of Tasmania, 2002 (Bradfield, thesis) p 194.

²⁰ NSW Government, *NSW Domestic Violence Death Review Team Report 2015-17*, p v.

²¹ New South Wales Legislative Council Select Committee on the Partial Defence of Provocation, *The partial defence of provocation: Final Report*, 2013, Recommendation 2.

Commission recommended²² and the Victorian Government introduced legislative provisions in 2005²³ to ensure social framework evidence could be admitted in criminal trials where intimate partner violence is raised. While Victoria has since repealed defensive homicide, social framework evidence can still be used in matters of self-defence in the context of domestic and family violence.²⁴

34. Toole notes that the use of social framework evidence *"is of critical importance as it directly confronts the problem abused women have faced in having their belief in lethal conduct considered genuine and reasonable"*.²⁵
35. It is particularly important that contemporary theories of violence and social science evidence are utilised as outdated theories can reinforce gender bias in the law.
36. This has been clearly highlighted in research commissioned by Australia's National Research Organisation for Women's Safety (ANROWS) *Transforming legal understandings of intimate partner violence* which found *"the theory of violence used can significantly change the narrative of the facts in a manner that either supports ... a claim to have acted in self defence or undercuts it."*²⁶
37. In this research Tarrant et al consider a recent Western Australian case, *Western Australia v Liyanage*²⁷ in which a woman killed her husband after a long history of coercive and controlling violence perpetrated by the husband against the accused.
38. In this matter the prosecution adopted a theory of violence of *"a bad relationship with incidents of violence"* and the expert witnesses a theory of violence of *"the battered women's syndrome"* or a combination of the two theories.²⁸

²² Victorian Law Reform Commission (VLRC), *Defences to Homicide: Final Report, 2004*, Recommendation 25.

²³ Section 9AH(3)(a) - (f), *Crimes Act 1958* (Vic), repealed.

²⁴ See s 322J & s 322M of the *Crimes Act 1958* (Vic)

²⁵ Toole (2012) cited in Kate Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence: A comparative perspective*, Deakin University, Palgrave Macmillan, 2014, p 124.

²⁶ Stella Tarrant, Julia Tolmie, & George Giudice, *Transforming legal understandings of intimate partner violence* (Research report 03/2019) Sydney: ANROWS, 2019, p 14.

²⁷ Tarrant et al analysed documents from the trial and appeal: *Western Australia v Liyanage* [2016] WASC 12; *Western Australia v Liyanage* [2016] WASC 31; *Western Australia v Liyanage* [2017] WASCA 112

²⁸ Stella Tarrant, Julia Tolmie, & George Giudice, *Transforming legal understandings of intimate partner violence*, p 14.

39. Tarrant et al highlight that neither of these two theories of violence focus on the pattern of abuse by the primary aggressor, instead presenting the violence as a *“series of discrete violence incidents (which may amount to crimes), in between which the victim/survivor is free to leave or implement other safety strategies”*.²⁹
40. Both theories of violence assume that the *“safety measures that are currently available to respond to Intimate Partner Violence are effective”* and in the case of the first theory *“that it is reasonable to place the responsibility for safety on the victim/survivor”*.³⁰
41. Tarrant et al catalogue a range of evidence challenging the assumption of the availability of effective safety measures, including Government commissioned inquiries and reports and Domestic Violence Death Review reports.³¹
42. Death reviews show that some primary victims of domestic violence have been killed by their violent partner despite seeking help from several sources, sometimes with inadequate responses to disclosures, and trying to implement a range of safety strategies.³²
43. Further, the action that this first theory of violence implies women should take - report to police, obtain an apprehended violence order, stay temporarily in refuge accommodation and/or leave the relationship *“require victim initiation and generate a **one-off reaction** to the immediate episode of physical violence”*. However, *“these are not strategies that effectively manage the **ongoing threat** that victims/survivors of intimate partner violence may be living with”*.³³
44. The theory of battered women's syndrome originally developed by Dr Lenore Walker in 1979³⁴ and as outlined by Tarrant et al posits that intimate partner violence is cyclical, characterised by three phases: *“tension building, acute battering and loving contrition”*,

²⁹ Ibid, p 15.

³⁰ Ibid, p 15.

³¹ Ibid, p 15, 21.

³² Ibid p 21. See also: NSW Government, *NSW Domestic Violence Death Review Team Report 2015-17*, pages 69-120.

³³ Stella Tarrant, Julia Tolmie, & George Giudice, *Transforming legal understandings of intimate partner violence*, p 15.

³⁴ Ibid, p 16.

and following several cycles of battering the victim-survivor develops a *"learned helplessness"*, believing there is *"nothing she can do to escape the violence"*.³⁵

45. As Tarrant, Stubbs and Tomlie note the theory was intended to *"justify the victim's/survivor's choices and explain them as reasonable"*, which is necessary for a successful defence of self-defence.³⁶ However, because the actions seem contrary to *"rational decision-making in response to a "bad relationship"* where it is assumed the violence is a *"series of discrete violence incidents ... in between which the victim/survivor is free to leave or implement other safety strategies"*, while the victim's-survivor's choices and beliefs may be honestly held they are viewed as irrational.³⁷ As Tarrant et al note this is reinforced by pathologising the woman by saying she is suffering a *"syndrome"*.³⁸
46. This highlights how a theory of violence can undercut a claim of self-defence, reinforcing gender bias in the law and why it is important that contemporary theories of violence and social science evidence are utilised.
47. A contemporary theory of violence which has been adopted by the New Zealand Family Violence Death Review Commission is the theory of social entrapment.
48. This framework has three dimensions:
 1. *The social isolation, fear and coercion that the predominant aggressor's coercive and controlling behaviour creates in the victim's/survivor's life;*
 2. *the lack of effective systemic safety options; and*
 3. *the exacerbation of these previous two dimensions by the structural inequities associated with gender, class, race and disability.*³⁹
49. Tarrant et al describes it as follows:

³⁵ Ibid.

³⁶ Ibid; Julie Stubbs & Julia Tomlie, 'Falling short of the challenge? A comparative assessment of the Australian use of expert evidence on the battered woman syndrome', *Melbourne University Law Review*, 23(3) 1999

³⁷ Stella Tarrant, Julia Tolmie, & George Giudice, *Transforming legal understandings of intimate partner violence*, p 16.

³⁸ Ibid.

³⁹ Ibid, p 17.

*A social entrapment framing asks us to document the predominant aggressor's pattern of abusive behaviour and understand how it constrains the primary victim's/survivor's ability to resist the abuse, while simultaneously considering the wider operations of power in her life.*⁴⁰

50. It is important that coercive and controlling behaviour is recognised and made visible. The NSW Domestic Violence Death Review Team has been critical of prosecutors who have focused only on physical violence, ignoring coercive and controlling behaviour, thus reinforcing the damaging misconception that non-physical violence is not violence.⁴¹
51. It is also important that experts are domestic and family violence and trauma informed and understand the gendered nature of domestic violence.
52. We note with concern that in the matter of *Western Australia v Liyanage*, two psychiatrists were able to provide expert witness testimony, but the expert witness testimony of a social worker with expertise in domestic violence to explain the nature and dynamics of domestic violence was rejected on the grounds it was not relevant and unnecessary as this knowledge “*would at least usually be well within the capacity of a juror to appreciate without expert assistance*”.⁴²
53. The *NSW Domestic Violence Death Review Team Report 2015-17* touches on the role of domestic violence expert witnesses, noting this as an area of interest.⁴³

Recommendation One

The NSW Sentencing Council consider the context in which domestic and family violence homicides occur, including circumstances when primary victims-survivors kill their violent abusers.

Recommendation Two

Legislative reform to facilitate the use of contemporary social framework evidence in homicide matters involving domestic and family violence, such as the social entrapment framework.

⁴⁰ Ibid, p17-18.

⁴¹ NSW Government, *NSW Domestic Violence Death Review Team Report 2015-17*, p 75.

⁴² *Liyanage v The State of Western Australia* [2017] WASCA 112, paragraph 165.

⁴³ NSW Government, *NSW Domestic Violence Death Review Team Report 2015-17*, p 76.

Bench books

54. We support the inclusion of further information about domestic violence in the Bench Books including:

- the nature and dynamics of domestic violence, including coercive and controlling behaviour;
- risk factors, including that women are most at risk of serious harm or being killed during and/or soon after separation;⁴⁴
- that abuse often continues after separation;
- response based practice which highlights the importance of framing and use of language so as not to minimise, mask or mutualise domestic violence perpetrated by the primary aggressor or victim blame;⁴⁵
- contemporary theories of violence and social science evidence, such as the social entrapment framework.

Recommendation Three

We recommend the inclusion of further information on domestic violence (as outlined at paragraph 54) in the Bench Books.

Role of ongoing education

55. As part of the introduction of the use of social framework evidence in Victoria there was education to demonstrate its use and application. Green commented that this education was useful to educate *“lawyers, judicial officers and jury members that all of this evidence is relevant in cases of intimate partner homicide”*.⁴⁶ We note that the NSW Legislative Council Select Committee Inquiry on the Partial Defence of Provocation also

⁴⁴ Cherie Toivonen, & Corina. Backhouse, *National Risk Assessment Principles for domestic and family violence* (ANROWS Insights 07/2018). Sydney, NSW: ANROWS, 2018 accessed at:

<https://www.anrows.org.au/research-program/national-risk-assessment-principles/>

⁴⁵ See, for example, Centre for Response Based Practice, accessed at:

<https://www.responsebasedpractice.com> and Safe and Together: <https://safeandtogetherinstitute.com/>

⁴⁶ Betty Green (2012) cited in Kate Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence: A comparative perspective*, Deakin University, Palgrave Macmillan, 2014, p 124.

recommended that an education package on the nature and dynamics of domestic and family violence be developed to target the legal sector and wider community.⁴⁷

56. It is important that everyone working in the criminal justice system is able to understand the nature and dynamics of domestic violence and be aware of and able to identify coercive and controlling behaviour; understand how to take instructions relating to domestic violence; understand risk factors, including that women are most at risk of serious harm or being killed during and/or soon after separation and the importance of screening for risk and ongoing risk assessment and safety planning; and be aware of the social entrapment framework.

Changes to sentencing

57. We note in the matter of *R v Silva* [2015] NSWSC 148 (6 March 2015) Jessica Silva was convicted of manslaughter for the killing of her ex-partner on the basis of excessive self-defence. Ms Silva had been in a 4 year relationship with the deceased in which the deceased had been abusive towards her. She had sought to separate from the deceased. The court found she acted to “*protect her brother and father from the deceased and to protect herself from being further violently assaulted*”.⁴⁸ We note Justice Hoeben Chief Judge at Common Law described the “*exceptional circumstances*” of this matter and Ms Silva received a suspended sentence.⁴⁹
58. We note with concern that the option for a suspended sentence is no longer available for manslaughter offences. We believe there should be discretion to order intensive correctional orders in exceptional circumstances for manslaughter, such as when a victim of domestic violence ultimately kills their abusive partner in the context of serious domestic violence.
59. This highlights the need for ongoing monitoring and evaluation of changes to law and legal processes.

Recommendation Four

A legislative amendment to allow discretion to order intensive correctional orders in exceptional circumstances for manslaughter, such as when a victim of domestic violence

⁴⁷ New South Wales Legislative Council Select Committee on the Partial Defence of Provocation, *The partial defence of provocation: Final Report, 2013*, Recommendation 10.

⁴⁸ *R v Silva* [2015] NSWSC 148 (6 March 2015), paragraph 37.

⁴⁹ *R v Silva* [2015] NSWSC 148 (6 March 2015), paragraph 44.

ultimately kills their abusive partner in the context of serious domestic violence.

Recommendation Five

That there be a 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.

Reforming self-defence

60. The Australian Law Reform and NSW Law Reform Commissions' *Family Violence - A National Legal Response* made several recommendations relating to homicide defences.⁵⁰ Several of these recommendations related to ensuring defences of homicide "accommodate the experiences of family violence victims who kill".⁵¹
61. We note the *Partial Defence of Provocation Report* recommendation that the Attorney General commission the NSW Law Reform Commission to undertake a comprehensive review of homicide and homicide defences remains unimplemented.
62. To achieve transformative reform we need to consider the whole system and not just an isolated area , such as sentencing.

Recommendation Six

The NSW Sentencing Council consider the recommendations made in the NSW Legislative Council Select Committee on the Partial Defence of Provocation Final Report.

Child Homicides

Possible new aggravating factors

63. We note reference in the Consultation Paper to the recent new aggravating factor in s 9(9B) of the *Penalties and Sentences Act 1992* (Qld):

⁵⁰ Australian Law Reform and NSW Law Reform Commissions' *Family Violence - A National Legal Response, 2010*, Recommendations 14.1-14.5.

⁵¹ Australian Law Reform and NSW Law Reform Commissions' *Family Violence - A National Legal Response, 2010*, p 61.

In determining the appropriate sentence for an offender convicted of the manslaughter of a child under 12 years, the court must treat the child's defencelessness and vulnerability, having regard to the child's age, as an aggravating factor.

64. We support consideration been given to the vulnerability of a person because of age. We note this is already recognised at s 21A(2)(l) of the *Crimes (Sentencing Procedure) Act* 1999 with reference both to the victim being “*very young or very old*”.
65. We do not support stipulating the age as we believe this is arbitrary and a decision about aggravation should turn on the particular facts of the matter.

Specific offence of child homicide

66. We raise concerns about a specific offence of child homicide where but for this offence, the person would be guilty of manslaughter.
67. As raised above, the law in NSW already recognises the vulnerability of a person because of age in aggravating factors.
68. While such an offence has existed in Victoria for 10 years, the Consultation Paper notes there have only been three successful convictions. Further, this offence only applies if the child who has been killed was under the age of 6 years.

General comments

69. The issue of mandatory sentencing in relation to domestic violence homicides and child homicides has been raised.
70. Given the seriousness of such offences, we understand why some advocate for this position.
71. We oppose mandatory sentencing as we recognise the importance of judicial discretion.
72. However, we acknowledge that change is required. We support cultural change within the criminal justice system to better understand the nature and dynamics of domestic violence, to challenge victim blaming, to make the violence of the predominant aggressor visible and to hold the conduct of the primary aggressor to account. This requires an extensive community education campaign addressing all facets of the community, including those working within the criminal justice system.

If you would like to discuss any aspect of this submission, please contact Liz Snell, Law Reform and Policy Coordinator on 02 8745 6900.

Yours faithfully,

Women's Legal Service NSW

Philippa Davis

Principal Solicitor