AUSTRALIAN LAWYERS FOR HUMAN RIGHTS

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Law Reform and Sentencing Council Secretariat
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By email: sentencingcouncil@justice.nsw.gov.au

Dear Council Secretary,

Review of sentencing for murder and manslaughter

Australian Lawyers for Human Rights (**ALHR**) is grateful for the opportunity to provide this submission in relation to the New South Wales Sentencing Council's (the **Council**) review of sentencing for murder and manslaughter - Consultation Paper (**Consultation Paper**).

About ALHR

ALHR was established in 1993 and is a national network of over 800 Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees as well as specialist national thematic committees. Through the provision of training, education, publications, CLE courses, conferences, seminars and mentoring, ALHR assists members to continue to develop their knowledge of human rights law and incorporate human rights principles into their areas of legal practice in Australia.

1. Summary

1.1. ALHR notes that at paragraph 1.5 the Consultation Paper states that this *'review exists in the context of concerns in the media that the sentences imposed on homicide offenders are inadequate'*. In this regard, ALHR joins the Bar Association of NSW in calling on the NSW Sentencing Council to consider concerns of this nature raised by the media against the backdrop of empirical research which:

> *… 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.*[1]

1.2. ALHR considers that the existing sentencing framework governing sentencing for murder and manslaughter in NSW is largely appropriate in ensuring that the human rights of the

[1] Bar Association of NSW, Submission No 22 to the NSW Sentencing Council, *Review of Sentencing for Murder and Manslaughter*, February 2020, 1 [6]. See also Karen Gelb, *More Myths and Misconceptions* (Report, Sentencing Advisory Council, 2 September 2008) 3; Kate Warner, 'Sentencing Review 2006-2007' (2007) 31 *Criminal Law Journal* 359, 359; Kate Warner et al, *July Sentencing Survey* (Report, Criminology Research Council, April 2010) 78-86; Kate Warner et al, Public Judgement on Sentencing: Final Results from the Tasmania Jury Sentencing Survey (Australian Institute of Criminology, Trends and Issues in Criminal Justice, No. 407, 10 February 2011).

victims of crime are recognised, the human rights of the community are protected, and the human rights of the perpetrator are not unduly inhibited.

1.3. **However, ALHR questions the perceived need for life sentences to be imposed and in particular opposes mandatory life sentences and mandatory minimum sentences where there has been a particular category of victim.**

1.4. **ALHR is concerned that the Consultation Paper raises the possibility of introducing some form of mandatory sentencing in relation to murder and manslaughter.**

1.5. **ALHR is strongly opposed to mandatory minimum prison terms on the basis that such sentencing regimes impose unacceptable restrictions on judicial discretion and independence, and undermine fundamental human rights and rule of law principles.**

1.6. **Changes that ALHR would take this opportunity to call for:**

- The removal of the mandatory sentencing requirement under s 19A of the *Crimes Act 1900* (NSW).
- A review of the sentencing requirements for the sentence of life imprisonment, with a particular focus on the principles of international human rights law and the potential for alternative, rehabilitation-focused sentencing tools that are employed to positive effect in other jurisdictions around the world.
- The repeal or amendment of s *61(1) of the Crimes (Sentencing Procedure) Act 1999* (NSW) (**C(SP)A**) to ensure that a two-stage sentencing process is not used in imposing a natural life sentence and to legislate 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.[2]
- ALHR supports and endorses the call by Rape and Domestic Violence Services Australia[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 and/or family violence (**DFV**) related homicides.
- ALHR supports the previous submissions made by the Rule of Law Institute and the Aboriginal Legal Services calling for the introduction of a Public Interest Monitor, who would appear at any hearing for an emergency detention order, similar to the Queensland and Victoria regimes.[4] The Public Interest Monitor would serve as an important protective function for offenders.
- ALHR supports further training and guidance for judges and magistrates in relation to sentencing in cases of DFV-related homicides. ALHR also recognises the need to consider a wide range of factors in such cases, including the nature and dynamics

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[2] Ibid.

[3] Rape and Domestic Violence Services Australia Submission to the NSW Sentencing Council, *Review of Sentencing for Murder and Manslaughter 30 January 2020*

[4] Rule of Law Institute, Submission to the Department of Justice, *Review of the Crimes (High Risk Offenders) Act 2006 (NSW)*12 February 2016, 4.

of DFV and the history of the relationship, and supports reforms to better facilitate the use of DFV context evidence.

1.7. ALHR submits that the NSW legislative framework otherwise provides sound mechanisms by which a court can seek to achieve a balance between the overlapping purposes of sentencing established at common law and now found in s 3A of C(SP)A.

2. Mandatory Sentencing

2.1. ALHR is strongly opposed to mandatory minimum prison terms on the basis that such sentencing regimes impose unacceptable restrictions on judicial discretion and independence, and undermine fundamental human rights and rule of law principles.

2.2. There is little evidence mandatory minimum sentences are effective and moreover they are arbitrary, depart from well-established principles of common law; and 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.

2.3. Further, they are contrary to long-held principles of justice and the human rights standards that Australia is bound to uphold. ALHR considers that mandatory sentencing offends basic notions of human rights, justice and the rule of law, and is inappropriate for a modern democracy with an independent judiciary. The existence of an independent, impartial and competent judiciary is an essential component of the rule of law.[5]

Human rights implications of mandatory sentencing

2.4. By being arbitrarily fixed in advance, such provisions constitute arbitrary detention contrary to Article 9(1) of the International Covenant on Civil and Political Rights (**ICCPR**), to which Australia is a party. Further, by removing the power of an appeal court to impose a lesser sentence, they effectively deprive persons of the right to have their sentences reviewed by a higher tribunal, contrary to Article 14(5) of the ICCPR.

2.5. The right to liberty, security of person and freedom from arbitrary detention is set out in Article 9(1) of the ICCPR.[6] ALHR also notes that in *A v Australia*[7] the United Nations Human Rights Committee (**UNHRC**) indicated that detention is arbitrary if disproportionate in the prevailing circumstances.[8] In our submission this would include sentences that are disproportionate to the circumstances of a crime.[9] In its Concluding Observations on Australia in 2000 the UNHRC noted that mandatory imprisonment raised serious issues of compliance with various articles of the Covenant and urged Australia to reassess legislation

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5 Ibid.

6 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art. 9 ('ICCPR').

7 UNHRC, *Views: Communication No.560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (30 April 1997) ('*A v Australia*').

8 Ibid 23.

9 Law Council of Australia, Mandatory Sentencing Discussion Paper (May 2014) available here: https://www.lawcouncil.asn.au/docs/ff85f3e2-ae36-e711-93fb-005056be13b5/1405-Discussion-Paper-Mandatory-Sentencing-Discussion-Paper.pdf. See also Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 3rd ed, 2013) 363.

regarding mandatory imprisonment so as to ensure that all Covenant rights are respected.[10]

2.6. In ALHR's view any mandatory life sentence or mandatory minimum sentencing regime that prohibits the court from attributing the weight it deems appropriate to the seriousness of the offending and the circumstances of the offender is bound to result in terms of imprisonment that are arbitrary. Mandatory sentencing provisions therefore breach Australia's obligations under Article 9(1) of the ICCPR in that they amount to arbitrary detention.

2.7. The right to a fair trial is captured in Article 14(1) of the ICCPR, which guarantees that everyone who faces trial shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal. Mandatory sentencing provisions represent a legislative incursion into an area traditionally reserved for judicial discretion. In ALHR's view this gives rise to concerning implications for the independence of the judiciary and more broadly for the rule of law.

2.8. Mandatory minimum prison terms also violate the right to have one's sentence reviewed by a higher court and therefore in ALHR's submission constitute a violation of Article 14(5) of the ICCPR which provides that: '*Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law*.'[11]

2.9. The UNHRC considers that the right to appeal is absolute. The absolute nature of the right to appeal means that it must apply to all types of crimes. In order to effectively protect the right to appeal, the appeal court cannot limit the scope of trial to the legal issues.[12]

2.10. The United Nations Special Rapporteur on the Independence of the Judiciary has also observed that the right of appeal contained in Article 14(5):

> *...is negated when the trial judge imposes the prescribed minimum sentence, since there is nothing in the sentencing process for an appellant court to review. Hence, legislation prescribing mandatory minimum sentences may be perceived as restricting the requirements of the fair trial principle and may not be supported under international standards.*[13]

2.11. ALHR submits that mandatory sentencing provisions effectively extinguish substantive judicial review of an offender's sentence and therefore fail to comply with important procedural safeguards with respect to criminal proceedings. In ALHR's view such measures are inconsistent with Australia's obligations under Article 14(5) of the ICCPR. We note that the right to a fair trial is not only a fundamental human right but a key prerequisite to a healthy democracy.

2.12. It has sometimes been suggested that minimum sentencing provisions are 'human rights compatible' if they do not apply to children and preserve judicial discretion because there

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[10] *Report of the Human Rights Committee*, UNGAOR, 55th sess, Supp No 40, UN Doc A/55/40 (2000) [22].

[11] ICCPR, art. 14(5).

[12] *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (30 April 1997).

[13] Dato' Param Cumaraswamy, 'Mandatory Sentencing: The Individual and Social Costs' (2001) 7 *Australian Journal of Human Rights* 7, 14.

is no minimum non-parole period proposed.[14] For the reasons set out above and below, ALHR rejects this suggestion.

Unjust outcomes

2.13. Mandatory minimum sentencing provisions remove the judicial discretion which, in ALHR's view, is critical to ensuring the integrity of our criminal justice system. In consequence they potentially result in unjust, harsh and disproportionate sentences where the punishment does not fit the crime. It is not possible for Parliament to know in advance whether a minimum mandatory penalty will be just and appropriate across the full range of circumstances in which an offence of manslaughter or murder may be committed.

2.14. The Law Council of Australia has previously commented:

> *Prescribing minimum sentences in legislation removes the ability of courts to consider relevant factors such as the offender's criminal history, individual circumstances or whether there are any mitigating factors, such as mental illness or other forms of hardship or duress. This prescription can lead to sentences that are disproportionately harsh and mean that appropriate gradations for sentences are not possible thereby resulting in inconsistent and disproportionate outcomes.*[15]

2.15. Sentences should be of a severity appropriate in all the circumstances of the offence.[16]

2.16. If the Courts are unable to exercise discretion in sentencing, there will be no difference in outcomes. For example, a young person with a clean record and a very low level of involvement in the subject offence will receive the same sentence as a person with a much higher level of seniority in the criminal endeavour. ALHR notes that where more than one offender is involved in the commission of an offence, a normal and proper consideration of sentencing is the degree of participation of the offender in the offence.[17]

2.17. **ALHR submits that the setting of maximum penalties is sufficient to guide the sentencing of offenders in individual manslaughter and murder cases in that maximum penalties allow the Executive to indicate the seriousness of the offence, while also allowing judicial officers appropriate flexibility in sentencing individuals.**[18]

2.18. ALHR also notes that mandatory sentencing does not eliminate inconsistency in sentencing by removing judicial discretion. It simply moves that discretion to other parts of the criminal

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[14] ALHR, Submission No 6 to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into Crimes Legislation Amendment (Powers, Offences, and Other Measures) Bill 2015*, 24 April 2015, 4-5.

[15] Law Council of Australia, Submission No 7 to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012,* 28 February 2012, 5; Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012*, op cit.

[16] See, for eg, *Crimes Act 1914* (Cth), s 16A(1).

[17] *Lowe v The Queen* (1984) 154 CLR 606, 609 (Gibbs CJ); *Pastras v The Queen* (1993) 65 A Crim R 584, 588.

[18] Legal Aid NSW, Submission No 20 to the Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill,* March 2012, 2.

justice system, such that it is exercised by police and prosecutors when determining the charges that will be pursued against individual offenders.

Violation of established principles of common law

2.19. ALHR is also of the view that mandatory minimum sentencing regimes violate the principle that justice should be delivered on an individualised basis and offend the principle of proportionality in sentencing. The proportionality principle requires that a sentence should neither exceed nor be less than the gravity of the crime having regard to the objective circumstances.[19]

2.20. Justice requires a proper consideration of all the circumstances of the offence and the offender. Mandatory minimum sentences deprive people of their liberty without the balancing process required by the principle of proportionality and make individual justice impossible.

Constitutional issues and regard for Australia's Westminster system of government

2.21. In ALHR's view mandatory minimum penalties have the potential to undermine the separation of powers. To have the legislature pronouncing individual sentences for individual offenders is inconsistent with the division of responsibilities between the executive, the legislature and judiciary and therefore detracts from the independence of the judiciary.

2.22. ALHR strongly supports Australia's system of government, derived from the Westminster system, and founded on a clear separation of powers whereby the power of government is balanced between the legislature and executive that establish laws, and the judiciary who interprets these laws. The implementation of mandatory sentencing means that the terms of sentencing are set by the executive and are not reviewable by the courts.

2.23. In the words of former Human Rights Commissioner, Tim Wilson MP:

> *...the separation of powers is designed to limit the power of the Parliament to impose its will on the public. It is designed to protect the individual from the tyranny of the majority. It is designed to preserve and protect the freedom of all individuals from the abuse of government power. Mandatory sentencing compromises the well-thought-out structures of our democracy, to address popular concerns*.[20]

Counterproductive effect upon costs of administration of justice

2.24. ALHR is concerned that mandatory minimum sentencing often unnecessarily increases the costs of the administration of justice. Mandatory sentencing regimes remove the incentives

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[19] *Veen v The Queen* (No 2) (1988) CLR 465, 472,485–486,490–491, 496; *Hoare v The Queen* (1989) 167 CLR 348, 354; *R v Dodd* (1991) 57 A Crim R 349, 354; *R v Whyte* (2002) 55 NSWLR 252, [156]–[158].

[20] Tim Wilson, Speech delivered at Queensland Law Society Mandatory Sentencing Policy Paper Launch, 4 April 2014, available here: https://www.humanrights.gov.au/about/news/speeches/queensland-law-society-mandatory-sentencing-policy-paper-launch.

for offenders to plead guilty and to assist authorities with investigations (in the expectation that such assistance will be taken into account in sentencing).

No deterrence value

2.25. Further, mandatory minimum sentencing regimes are not an effective method of reducing the offending behaviour at which they are targeted. Mandatory sentencing regimes are often promoted as deterring or decreasing crime rates, however there is no evidence to show that they either deter individual offenders or even decrease crime rates.

2.26. Mandatory minimum sentencing does not offer individualised deterrence. Research has established that criminals are deterred more by an increase in their likelihood of apprehension than by an increase in the magnitude of their punishment, meaning that likely capture is a more effective deterrent than a mandatory minimum sentence.

2.27. Given mandatory minimum sentencing has been shown to have no general deterrent effect on offending, the significant risks of injustice that result from such provisions far outweigh any perceptible benefits.

2.28. A 2008 report by the Victorian Sentencing Advisory Council found that the 'empirical basis for marginal deterrence is disputed', concluding that 'there is little evidence to suggest a more serious penalty is a better deterrent than a less severe penalty'.[21]

2.29. The Tasmanian Law Reform Institute echoed this finding, stating unequivocally in its 2008 report:

> *The Institute's view is that mandatory minimum penalties for rape or sexual offences are inappropriate. They can lead to injustice because of inflexibility, they redistribute discretion so that the (less visible) decisions by the police and prosecuting authorities become more important, they lead to more trials as offenders are less likely to plead guilty and there is little basis for believing that they have any deterrent effect on rates of serious crime.*[22]

2.30. **In light of the above considerations ALHR considers that mandatory sentencing, even for crimes as serious as murder and manslaughter, offends basic notions of human rights, justice and the rule of law, and is inappropriate for a modern democracy with an independent judiciary. The existence of an independent, impartial and competent judiciary is an essential component of the rule of law**

3. Life sentences

3.1. A sentence of life imprisonment, is Australia's harshest and most severe sanction.[23]

3.2. In jurisdictions that do not entertain the use of the death penalty, life imprisonment is often considered as the 'natural and lesser alternative'.[24]

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[21] Adrian Hoel and Karen Geib, *Sentencing Matters: Mandatory Sentencing* (Report, Victorian Sentencing Advisory Council, 2008) 14.
[22] Tasmanian Law Reform Institute. *Sentencing: Final Report No 11* (2008) 41.
[23] John L. Anderson, 'The Label of Life Imprisonment' (2012) 35 *UNSW Law Journal* 747, 747.
[24] Dirk van Zyl Smit, *Taking Life Imprisonment Seriously in National and International Law* (Kluwer Law International, 2002) 15.

3.3. As a result, the consequence of life imprisonment has gone 'without being closely scrutinised as to its practical operation and alignment with the purposes and principles of sentencing'.[25]

3.4. This lack of review has revealed a number of strong disadvantages to the use of life sentences as a means to punish offenders.

3.5. Most significantly, the life sentence takes away the ability of an offender to be rehabilitated, one of the key purposes of sentencing.[26]

3.6. International human rights law also stipulates that rehabilitation should be a key aim of incarceration.

3.7. The ICCPR highlights that 'reform and social adaptation of prisoners' be an essential aim of imprisonment.[27]

3.8. The *Convention on the Rights of the Child* (**CRC**) explicitly says that sentencing for juvenile offenders should 'reinforce the child's respect for the human rights ... of others' taking into account 'the desirability of promoting the child's reintegration'.[28]

3.9. In NSW, those convicted of murder may be sentenced to life imprisonment without parole. Their sentences may only be reduced if the Executive exercises its prerogative of mercy.[29]

3.10. In *R v Petroff* (NSW Supreme Court, unreported, 12 November 1991) Hunt J (as he then was) stated:

> *The indeterminate nature of a life sentence has long been the subject of criticism by penologists and others concerned with the prison system and the punishment of offenders generally. Such a sentence deprives a prisoner of any fixed goal to aim for, it robs him of any incentive and it is personally destructive of his morale. The life sentence imposes intolerable burdens upon most prisoners because of their incarceration for an indeterminate period, and the result of that imposition has been an increased difficulty in their management by the prison authorities.*[30]

3.11. In *R v Denyer* [1995] 1 VR 186, the Supreme Court of Victoria examined an appeal against a life sentence with a non-parole period which was imposed on a 21-year-old prisoner who pleaded guilty to three counts of murder.[31] Here, the Court recognised the inhumane 'disproportionate and unfair nature'[32] of life imprisonment whereby a non-parole period of

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[25] Anderson, above n 22, 747.
[26] See C(SP)A, s 3A(d).
[27] ICCPR, art. 10. See also *United Nations Standard Minimum Rules for the Treatment ('Nelson Mandela Rules'),* GA Res 70/175, UN GAOR, 70th sess, Agenda Item 106, UN Doc A/RES/70/175 (17 December 2015), which provide guiding contains guiding principles regarding rehabilitation, education and post-release services.
[28] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art. 40.1.
[29] See *R v Harris* (2000) 50 NSWLR 409, 429 (Wood CJ).
[30] *R v Petroff* (NSW Supreme Court, unreported, 12 November 1991) 1-2 (Hunt J).
[31] Anderson, above n 22, 747.
[32] Ibid.

30 years was imposed. The Court highlighted that Denyer was 'devoid of the incentive to rehabilitate himself and was entitled to no remissions'.[33]

3.12. In the UK case, *R v Lichniak* [2003] 1 AC 903, Lord Bingham noted that, if the effect of the appellants' life sentences had been that they 'forfeited [their] liberty to the state for the rest of [their] days', he would have had 'little doubt' that these sentences would have breached Article 3 of the *European Convention on Human Rights* (**ECHR**),[34] (which prohibits torture, and 'inhuman or degrading treatment or punishment') due to their disproportionality.[35] His Lordship further stated that: '[i]ndeed, any mandatory or minimum mandatory sentence arouses concern that it may operate in a disproportionate manner in some cases'.[36]

3.13. In October 2014, the UNHRC found that the life sentences imposed on two Australian juvenile offenders, Bronson Blessington and Matthew Elliott, provided no genuine chance of release and were thus in breach of the ICCPR in that they violated their right against 'cruel, inhuman or degrading treatment'.[37] This was in light of the introduction of the *Crimes (Administration of Sentences) Act 1999* (NSW) which effectively barred the release of either offender unless they were granted compassionate release, that is, if they were close to death or so physically incapacitated that they were no longer capable of committing a crime.[38]

3.14. As Fitz-Gibbon explains:

> *The UNHRC finding recognised that the retrospective sentencing legislation imposed not only removed the hope of release but also denied both the opportunity to rehabilitate and to have that rehabilitation recognised through release at a later date.*[39]

3.15. In recent years, the European Court of the Human Rights (**ECtHR**) has developed jurisprudence on the compatibility of human rights with life sentences without the possibility of parole.

3.16. In *Vinter v United Kingdom* [2016] III Eur Court HR 317 (***Vinter***), the Grand Chamber of the ECtHR held that an irreducible life sentence breaches Article 3 of the ECHR. The Grand Chamber ruled that for a life sentence to remain compatible with the ECHR, there had to be both 'a prospect of release and a possibility of review'.[40]

3.17. Review of a sentence is necessary because changes in the factors justifying detention (punishment, deterrence, public protection and rehabilitation) may be so significant that a person's continued incarceration may 'no longer be justified on legitimate penological

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[33] Ibid.
[34] *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art. 3 ('ECHR').
[35] *R v Lichniak* [2003] 1 AC 903, 909 [8].
[36] Ibid 911 [13].
[37] UNHRC, *Views: Communication No. 1968/2010*, 112th sess, UN Doc CCPR/C/112/D/1968/2010 (17 November 2014) ('*Blessington v Australia*').
[38] *Crimes (Administration of Sentences) Act 1999* (NSW) s 154A(3)(a).
[39] Kate Fitz-Gibbon, 'Life without Parole in Australia: Current Practices, Juvenile Sentencing and Retrospective Sentencing Reform', in Dirk van Zyl Smit and Catherine Appleton (eds), *Life Imprisonment and Human Rights* (Hart Publishing, 2016) 86.
[40] *Vinter v United Kingdom* [2016] III Eur Court HR 317, 346 [110] ('*Vinter*')

grounds'.[41] Without fixing a time limit, the Court noted the 'clear support' in European domestic and international law for a guaranteed review within the first 25 years of a sentence.[42]

3.18. Moreover, a prospect of release is necessary because of the consensus in European and international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.[43]

3.19. Drawing on these sources, the Grand Chamber concluded that it would be a violation of human dignity to detain someone without any prospect of release or review of their sentence.

4. A Human Rights Act

4.1. ALHR strongly supports the introduction of comprehensive, human rights-specific legislation in NSW and at the federal level.[44] Australia is the only developed democracy that does not have any such legislation or a Bill of Rights.

4.2. The ACT, Victoria and Queensland have each passed human rights-specific legislation.

4.3. In the Victorian context, Justice Weinberg stated:

> *We have yet to discover the extent to which the protection afforded by the Charter operates in relation to a series of problems that arise on a regular basis in the course of the criminal justice system. In particular, what impact, if any, does the Charter have upon...many of the highly technical, and arguably oppressive, provisions dealing with sentencing which are now to be found in Victorian sentencing law…* [45]

4.4. Although Australian courts are still yet to consider whether sentencing laws are incompatible with human rights, examples from the UK and Canada suggest that legislated human rights frameworks can provide increased protections against disproportionate sentences.[46]

4.5. In *Reyes v The Queen* [2002] 2 AC 235, Lord Bingham argued that where, in a jurisdiction with a charter of rights, a sentencing law is said to breach a protected right:

> *A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own predilections and moral values into the constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary*

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[41] Ibid 349 [119].
[42] Ibid 349-350 [120].
[43] Ibid 347 [114].
[44] See Human Rights for NSW Alliance, Submission to the Australian Human Rights Commission's *Free and Equal: An Australian Conversation on Human Rights* Project (19 November 2019) available here: https://alhr.org.au/hr4nsw-national-conversation/.
[45] Justice Mark Weinberg, 'Human Rights, Bills of Rights and the Criminal Law' (Paper presented at Bar Association of Queensland 2016 Annual Conference, Brisbane, 27 February 2016) 20-21.
[46] See Andrew Dyer, '(Grossly) Disproportionate Sentences: Can Charters of Rights Make a Difference?' (2017) 43 *Monash University Law Review* 198.

> *protection of that right in the light of evolving standards of decency that mark the progress of a maturing society.*[47]

4.6. In *R v Smith* [1987] 1 SCR 1045, Lamer J held that, while the Parliament was owed some deference, it was not entitled, by privileging sentencing aims such as general deterrence, to require the imposition of sentences that are 'grossly disproportionate to what the offender deserves'.[48]

4.7. In *R v Nur* [2015] 1 SCR 773, the Supreme Court of Canada struck down a provision that required a minimum penalty of three years for a possession of a firearm, determining that it was in violation of section 12 of the *Canadian Charter of Rights and Freedoms*,[49] which protects the right not to be subjected to any cruel and unusual treatment or punishment.[50]

4.8. In *R v Lloyd* [2016] 1 SCR 130, the Supreme Court indicated:

> *[T]he reality is this: mandatory minimum sentences that, as here, apply to offences that can be committed in various ways, under a broad array of circumstances and by a wide range of people are vulnerable to constitutional challenge. This is because such laws will almost inevitably include an acceptable reasonable hypothetical for which the mandatory minimum will be found unconstitutional. If Parliament hopes to sustain mandatory minimum penalties for offences that cast a wide net, it should consider narrowing their reach so that they only catch offenders that merit the mandatory minimum sentences.*[51]

5. Sentencing principles that apply in cases of murder and manslaughter

Question 3.1: Life sentences for murder
(1) Are the existing principles that relate to imposing life sentences for murder appropriate? Why or why not?
(2) If not, what should change?
Question 3.2: Particular categories of murder victim
(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?
Question 3.3: Victim impact statements
(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?
Question 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?

[47] *Reyes v The Queen* [2002] 2 AC 235, 246 [26].
[48] *R v Smith* [1987] 1 SCR 1045, 1073.
[49] *Canada Act 1982* (UK) c 11, sch B pt I, s 12 ('*Canadian Charter of Rights and Freedoms*').
[50] *R v Nur* [2015] 1 SCR 773, 814-815 [82]-[83].
[51] *R v Lloyd* [2016] 1 SCR 130, 133.

(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?
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?
Question 3.6: Industrial manslaughter What principles should apply when sentencing for a workplace death that amounts to manslaughter under the current law?

Life sentences for murder

5.1. The main legislative sections that guide sentencing judges on whether to impose a life sentence for murder can be found in ss 19A-B of the *Crimes Act 1900* (NSW) (**Crimes Act**) and ss 21 and 61 of the C(SP)A.

5.2. Section 19A of the Crimes Act states that a person who commits the crime of murder is liable to imprisonment for life.

5.3. Section 19B of the Crimes Act creates an exception to the general rule under 19A where a particular category of victim (namely a police officer in the line of duty) is murdered. Under s 19B(1) the imposition of a life sentence for the murder of a police officer must be imposed if the murder was committed—

> *a) while the police officer was executing his or her duty, or*
>
> *b) as a consequence of, or in retaliation for, actions undertaken by that or any other police officer in the execution of his or her duty,*
>
> *and if the person convicted of the murder—*
>
> *c) knew or ought reasonably to have known that the person killed was a police officer, and*
>
> *d) intended to kill the police officer or was engaged in criminal activity that risked serious harm to police officers.*

5.4. Section 19A of the Crimes Act is qualified by ss 21 and 61 of the C(SP)A, which encapsulates the balancing exercise inherent in sentencing.

5.5. Section 21 of the C(SP)A gives the sentencing judge the general power to reduce penalties, stating at s 21(1) that:

> *if by any provision of an Act an offender is made liable to imprisonment for life, a court may nevertheless impose a sentence of imprisonment for a specified term*

and further at s 21(5):

> *this section does not limit any discretion that the court has, apart from this section, in relation to the imposition of penalties.*[52]

5.6. Section 21A of the C(SP)A gives the sentencing judge the power to take into account both aggravating and mitigating features of offending (in relation to the latter, prospects of rehabilitation, insight into offending and remorse are some significant factors) and reflects Parliament's intention that the judiciary have discretion to sentence a person having regard to an exhaustive list of factors in that section.

5.7. Meanwhile, s 61 of the C(SP)A offers the following guidance to sentencing judges:

> *...a court is to impose a sentence of imprisonment for life on a person who is convicted of murder if the court is satisfied that* ***the level of culpability*** *in the commission of the offence is* ***so extreme*** *that the* ***community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence.*** [emphasis added]

5.8. The sentencing principles contained in s 19A of the Crimes Act and ss 21 and 61 of the C(SP)A allow for the court to weigh, on the basis of the mitigating and aggravating factors before them, the appropriate sentence to be imposed to give effect to the proportionality principle and the other purposes of sentencing set out at s 3A of the C(SP)A. The principles under s 3A give effect to the common law principles espoused by the High Court in *Veen v The Queen (No 2)* (1988) CLR 465*,* in which the importance of (and difficulties inherent in) considering the overlapping purposes of sentencing was discussed:

> *… sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.*[53]

5.9. In *R v Kilic* (2016) 259 CLR 256*,* the High Court explained what is meant by an 'offence within the worst category' 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.*[54] [emphasis added]

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[52] Note however that s 21 of the C(SP)A does not authorise a court to impose a lesser or alternative sentence for the murder of a police officer which otherwise falls under s 19B(1) of the Crimes Act – see 19B(5) of the Crimes Act.

[53] *Veen v The Queen (No 2)* (1988) CLR 465, 476 (Mason CJ, Brennan, Dawson and Toohey JJ).

[54] *R v Kilic* (2016) 259 CLR 256, 265-266 (Bell, Gageler, Keane, Nettle and Gordon JJ).

5.10. It is clear that the factors to be considered by the sentencing judge often overlap and it is the discretion of the Court that is all important in reaching a decision on sentencing that will align with its overarching purposes. Section 19B of the Crimes Act, in mandating life sentences for the murder of a police officer in the line of duty is therefore not in furtherance of the ultimate aim of the sentencing process, that is to allow for the balancing of complex interwoven circumstances to decide upon an appropriate sentence. Mandatory sentencing is, as aforementioned, proven to lead to unjust, unfair and damaging outcomes,[55] which undermine the rule of law.[56] The existing principles and provisions that relate to mandatory life sentencing for the killing of a police officer in the line of duty are therefore misguided, inappropriate, and should be repealed to allow for judicial discretion to inform all sentencing decisions.

5.11. **For the reason explained above in section 2 of this submission, it is ALHR's very firm view that the existing principles and provisions that relate to sentencing for the killing of particular categories of victim are not appropriate, nor are they consistent with Australia's international human rights law obligations. ALHR opposes the mandatory sentence provision with respect to the murder of a police officer.**

5.12. Although not mandated under s 61(1) of the C(SP)A, the interpretation that has consistently been given to the provision has led to a two-stage process in imposing the maximum penalty of life imprisonment '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.'[57] ALHR shares the view of the Bar Association of NSW that this approach is not consistent with an instinctive-synthesis approach to sentencing and does not allow for sufficient consideration of the subjective factors of the offender in determining whether to impose a natural life sentence[58]. **ALHR therefore supports the Bar Association of NSW in its suggestion that s 61(1) of the C(SP)A be repealed or amended to ensure 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.'[59]**

Victim impact statements

5.13. The impact upon the loved ones of victims of murder and manslaughter (referred to as 'family victims' in the C(SP)A) is immeasurable and unfathomable. It is impossible to adequately recognise this harm by one mechanism alone and to attempt to do so would be misguided.

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[55] See Hilde Tubex, 'Mandatory Sentencing Leads to Unjust, Unfair outcomes – It Doesn't Make us Safe' *The Conversation* (5 January 2016) available here: https://theconversation.com/mandatory-sentencing-leads-to-unjust-unfair-outcomes-it-doesnt-make-us-safe-52086.

[56] See Law Council of Australia, Policy Discussion Paper on Mandatory Sentencing (May 2014) [63]-[67] available here: https://www.lawcouncil.asn.au/docs/ff85f3e2-ae36-e711-93fb-005056be13b5/1405-Discussion-Paper-Mandatory-Sentencing-Discussion-Paper.pdf.

[57] Bar Association of NSW, Submission No 22 to the NSW Sentencing Council, *Review of Sentencing for Murder and Manslaughter*, February 2020, 3[12]; *Dean v The Queen* [2015] NSWCCA 307; *Knight v The Queen* [2006] NSWCCA 292; *R v Valera* [2002] NSWCCA 50.

[58] Ibid

[59] Ibid.

5.14. However, the provisions relating to victim impact statements (**VIS**) in sentencing for homicide – contained in Division 2 of the C(SP)A – attempt to provide one mechanism by which the harm caused to family victims is recognised, giving effect to the common law principles that sentencing judges must have regard to the effect of the crime on the victim.[60]

5.15. This common law principle is again recognised in the statutory purposes under s 3A(g) of the C(SP)A:

> *The purposes for which a court may impose a sentence on an offender are as follows –*
>
> *…*
> *(g) to recognise the harm done to the victim of the crime and the community.*

5.16. Section 21A of the C(SP)A enunciates the aggravating factors to be taken into account in determining the appropriate sentence, referring to victims in particular contexts,[61] and giving effect to the purpose at 3A(g).

5.17. The statutory scheme for VIS generally sits within this established framework of recognising the harm done to the victims of crime.

5.18. Section 27 of the C(SP)A applies only in relation to certain offences that, objectively, land on the more serious end of the spectrum in relation to their impact upon the victim and community.[62]

5.19. The requirements for the contents of VIS are set out in s 28 of the C(SP)A and include, for the primary victim, any personal harm, emotional suffering or distress, harm to relationships or any economic loss that arises as a result of the preceding impacts.

5.20. In relation to murder and manslaughter, s 28(2) would apply, which allows the family members of the victim to prepare a VIS 'that contains particulars of the impact of the primary victim's death on the family victim and other members of the primary victim's immediate family.'[63]

5.21. It should also be noted that the preparation of a VIS is not mandatory,[64] and the absence of a VIS does not give rise to an inference that an offence had little or no impact upon a victim or victim's family.[65]

5.22. The process of preparing and tendering a VIS gives voice to the victims of crime.[66]

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[60] *Porter v R* [2008] NSWCCA 145, [54]; *Siganto v The Queen* (1998) 194 CLR 656, [29].
[61] Although VIS in some form may be tendered in sentencing for any offence under the common law, where the Court considers it appropriate – see *Porter v R* [2008] NSWCCA 145, [53].
[62] See C(SP)A, s 27.
[63] Section 29(3) of the C(SP) A allows that a VIS may relate to more than one victim.
[64] See C(SP)A, s 29(4).
[65] See C(SP)A, 30E(5)-(6).
[66] See also C(SP)A, ss 30(2), 30D(1) and 30(H).

5.23. Section 30E of the C(SP)A then governs how the court is to use the VIS in informing its decision on sentencing, under sub-section (3):

> *a victim impact statement of a family victim may also be taken into account by a court in connection with the determination of the punishment for the offence on the basis that the harmful impact of a primary victim's death on family victims is an aspect of harm done to the community.*

5.24. Section 30E does not impose upon the court a requirement to give particular weight to a VIS and this 'balancing act' referred to previously remains a matter for the court.

5.25. The statutory framework governing the provision and consideration of VIS in cases of murder and manslaughter thus, in the view of ALHR, appropriately forms one mechanism by which the harm caused to the family members of the victims of murder and manslaughter may be recognised.

6. Sentencing for domestic violence related homicide

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?

6.1. Whilst the Consultation Paper has identified that sentences for DFV-related homicides are comparable to other categories of homicide,[67] we note and agree with the observations made by Legal Aid NSW in its submission regarding the relatively small sample size and the difficulty of drawing concrete conclusions as to the adequacy of sentences in such cases.[68] Likewise, we support the recommendation of Legal Aid NSW that the NSW Sentencing Review continually undertake reviews of sentences for DFV-related homicides, as part of its mandate to review sentencing trends and practices.[69]

6.2. ALHR further supports the submissions made by Women's Legal Service NSW and Domestic Violence NSW that in considering sentences to be imposed for homicide in the context of DFV, there is a need to take into account the context in which the homicide

[67] NSW Sentencing Council, Consultation Paper (October 2019) 49-50 [4.19].
[68] Legal Aid NSW, Submission No 36 to the NSW Sentencing Council, *Review of Sentencing for Murder and Manslaughter*, 28 February 2020, 8.
[69] Ibid.

occurs, including the nature and dynamics of DFV and the history of the relationship, and particularly consider the circumstances in which female primary victims kill their violent abusers.[70] In this regard, we note the findings of the NSW Domestic Violence Death Review Team in its 2015-2017 report that:

- Between 1 July 2000 and 30 June 2014: 31 (89%) of the 35 men killed by a female intimate partner had been the primary domestic violence perpetrator in the relationship.
- All 7 men killed by a male intimate partner had been the primary domestic violence victim in the relationship; and 26% of females who killed an intimate partner were acquitted at trial.[71]

6.3. Further ALHR supports the recommendations of Rape and Domestic Violence Services Australia:[72]

- 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;
- If any changes are made to the law, 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.
- 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.

Social framework evidence

6.4. ALHR refers to the submissions made by Women's Legal Service NSW, Domestic Violence NSW and Rape and Domestic Violence Services Australia, which highlight the importance of social framework evidence and expert witnesses in the nature and dynamics of DFV in the prosecution and sentencing of DFV-related homicides.[73]

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[70] Women's Legal Service NSW, Submission No 34 to the NSW Sentencing Council, *Review of Sentencing for Murder and Manslaughter*, 21 February 2020, 2 [4].
[71] NSW Domestic Violence Death Review Team, *Report 2015–2017* (2017) 9.
[72] Op cit.
[73] Women's Legal Service NSW, Submission No 34 to the NSW Sentencing Council, *Review of Sentencing for Murder and Manslaughter*, 21 February 2020, 5 [15]; Domestic Violence NSW, Submission No 33 to the NSW Sentencing Council, *Review of Sentencing for Murder and Manslaughter*, February 2020, 6.

6.5. The Victorian Law Reform Commission (**VLRC**) recommended the Victorian Government introduce legislative provisions in 2005 to ensure social framework evidence could be admitted in criminal trials where intimate partner violence is raised.[74]

6.6. The evidence can include the history of the relationship between the accused person and a family member, the nature and dynamics of violent relationships generally, and the effects of family violence.[75]

6.7. The VLRC also recognised that this evidence should be supplemented wherever possible with expert evidence on family violence, including case-specific expert evidence.[76]

6.8. ALHR is of the view that DFV evidence is relevant and should be considered in a sentencing where a homicide is perpetrated against an intimate partner, whether in the case of a man who kills as part of a pattern of DFV or a woman who kills in response to DFV.

6.9. ALHR notes that such evidence can be considered in sentencing under current law. As the NSW Bar Association states in its submission: '[e]ven 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.'[77]

6.10. That being said, at paragraph 4.53, the Consultation Paper states:

> *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.*

6.11. Likewise, the VRLC had identified that, at the time, the existing rules 'may unfairly limit the use of evidence and prevent evidence that may have a high degree of probative value from being considered'.[78]

6.12. As noted in the Consultation Paper at paragraph 4.54, the Domestic Violence Resource Centre Victoria Resource Centre has also found that the ways in which the legal professionals involved understood family violence played an important role in whether it was considered relevant to sentencing.[79]

6.13. Therefore, if specific DFV social context evidence provisions are introduced, ALHR supports the recommendation by Domestic Violence NSW that this needs to be accompanied by instruction for judicial officers on how to appropriately apply the use of 'social framework evidence' and advice for lawyers, judicial officers and jury members to

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[74] Victorian Law Reform Commission ('VLRC'), *Defences to Homicide: Final Report* (October 2004) xxiii.
[75] *Crimes Act 1958* (Vic) s 322J.
[76] VLRC, *Defences to Homicide: Final Report* (October 2004) 160.
[77] Bar Association of NSW, Submission No 22 to the NSW Sentencing Council, *Review of Sentencing for Murder and Manslaughter*, 6 February 2020, 8 [43]
[78] VLRC, *Defences to Homicide: Final Report* (October 2004) 131.
[79] NSW Sentencing Council, Consultation Paper (October 2019) 58 [4.54]; Domestic Violence Resource Centre Victoria, *Out of Character? Legal Responses to Intimate Partner Homicides by Men in Victoria 2005-2014*, Discussion Paper No 10 (2016) 105-106.

understand that all 'social framework evidence' is relevant in cases of intimate partner homicide.[80]

Judicial training

6.14. ALHR strongly supports comprehensive ongoing training in relation to the dynamics, complexities and impacts of DFV for participants in the criminal justice system, including judicial officers.

6.15. As suggested by Women's Legal Service NSW and Domestic Violence NSW, this could include more detailed information provided in bench books, to better reflect:

- 'the value of the victim's life and avoid victim-blaming judgments';[81]
- 'that non-physical forms of violence can be equally, if not more, damaging than physical violence';[82]
- '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'; and
- 'contemporary theories of violence and social science evidence, such as the social entrapment framework'.[83]

6.16. ALHR recognises that addressing DFV-related homicide requires a holistic approach that goes beyond reforms to criminal sentencing.

6.17. ALHR also supports other non-legislative reforms, such as the recommendations made by the Domestic Violence Death Review Team in its 2015-2017 Report and referred to in paragraph 1.26 of the Consultation Paper, including reforms addressing the underlying structural and cultural issues that contribute to domestic violence homicide.[84]

6.18. In this regard, ALHR endorses the statement made by the Women's Legal Service NSW that:

> *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.*[85]

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[80] Domestic Violence NSW, Submission No 33 to the NSW Sentencing Council, *Review of Sentencing for Murder and Manslaughter*, February 2020, 6.
[81] Rape and Domestic Violence Services Australia, Submission No 15 to the NSW Sentencing Council, *Review of Sentencing for Murder and Manslaughter*, 30 January 2020, 3 [8.4].
[82] Ibid 3 [8.5]
[83] Women's Legal Service NSW, Submission No 34 to the NSW Sentencing Council, *Review of Sentencing for Murder and Manslaughter*, 21 February 2020, 12 [54].
[84] NSW Sentencing Council, Consultation Paper (October 2019) 9-10 [1.26].
[85] Ibid 15 [72].

7. 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?*

7.1. We note that the Consultation Paper states at paragraph 1.11 that the sentences for child murder are higher than most other cases of murder.

7.2. In relation to sentences for child manslaughter, the Consultation Paper found them to be comparable to other cases of manslaughter.[86] As Legal Aid NSW stated in its submission:

> *The courts have recognised the inherent difficulties in deducing sentencing patterns from past cases due to the breadth of culpability covered. Given this acknowledged difficulty, it would be concerning to base sentencing reform, particularly increasing the severity of sentences, on sentencing statistics gleaned from such a small sample. Lower sentences may simply reflect the fact that many of these cases involve tragic, complex circumstances, which courts must balance appropriately. In our view, there is no clear evidence of a pattern of inadequacy and, consequently, no increases to existing penalty provisions are warranted.*[87]

7.3. Accordingly, ALHR does not support changes to sentencing principles or penalty provisions relating to child murder or manslaughter.

7.4. ALHR does not consider it necessary to introduce new aggravating factors for child homicides, noting that the age of a victim and breach of a relationship of trust are already aggravating factors recognised at s 21A(2) of C(SP)A.

7.5. ALHR also expresses concern in regards to creating new offences for child neglect and child homicide.

7.6. The Consultation Paper refers to the specific offence of child homicide which was introduced in Victoria, which provides that a person who kills a child under the age of 6 years in circumstances that, but for this section, would constitute manslaughter is guilty of child homicide, and not of manslaughter.[88]

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[86] NSW Sentencing Council, Consultation Paper (October 2019) 78 [5.42].
[87] Legal Aid NSW, Submission No 36 to the NSW Sentencing Council, *Review of Sentencing for Murder and Manslaughter,* 28 February 2020, 10.
[88] *Crimes Act 1958* (Vic) s 5A.

7.7. As the Consultation Paper indicates, there have only been 3 successful convictions under this provision in its 10+ years of operation.[89] Given the broad range of circumstances in which manslaughter of a child is committed, which can range from 'a moment's inattention to systematic and gratuitous violence',[90] and existing aggravating factors relevant to child homicide, ALHR does not support the introduction of a specific offence of child homicide.

7.8. With respect to child neglect, ALHR echoes Legal Aid NSW's concerns that such offences may further criminalise vulnerable women experiencing chronic disadvantage and/or DFV.[91]

8. Penalties for murder and manslaughter – options for reform

Question 6.1: Maximum penalty for manslaughter
What changes, if any, should be made to the maximum penalty provisions that relate to manslaughter?
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?
Question 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?
Question 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?
Question 6.5: 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?
Question 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?
Question 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?

[89] NSW Sentencing Council, Consultation Paper (October 2019) 85 [5.81].
[90] Queensland Sentencing Advisory Council, *Sentencing for Criminal Offences Arising from the Death of a Child: Consultation Paper Summary* (May 2018) 4, available here: https://www.sentencingcouncil.qld.gov.au/__data/assets/pdf_file/0006/566502/child-homicide-offences-consultation-paper-summary.pdf.
[91] Legal Aid NSW, Submission No 36 to the NSW Sentencing Council, *Review of Sentencing for Murder and Manslaughter,* 28 February 2020, 10; NSW Sentencing Council, Consultation Paper (October 2019) 86 [5.88].

Question 6.8: Concurrent serious offences
What new provisions, if any, should apply where a homicide offender has committed one or more additional serious offences?
Question 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?
Question 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?
Question 6.11: Alternatives to imprisonment for manslaughter
What alternatives to imprisonment should be available for manslaughter offenders?

Mandatory life imprisonment

8.1. For the reasons outlined above in section 2 of this submission ALHR is opposed to mandatory terms of life imprisonment

Redetermining life sentences

8.2. ALHR proposes that it would be consistent with international human rights law to have a scheme of judicial redetermination of natural life sentences for murder.

8.3. 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.

8.4. As a society we have a positive duty to ensure rehabilitation for prisoners. A life sentence without the possibility of release, without any hope of release, is a violation of human dignity. It is permanent banishment from society and fails to recognise any possibility of rehabilitation.

8.5. In *Vinter* the Grand Chamber of the ECtHr held that it was a violation of human dignity to deny natural life prisoners any prospects of release, or review of their sentence.[92]

8.6. In the wake of the Grand Chamber's judgement in *Vinter*, van Zyl Smit, Weaterby and Creighton proposed that a 'Vinter review' would allow for life sentences to be reviewed to determine if ongoing detention was justifiable, and that under this proposed system justification for the original life sentence imposed would also be reviewable at a later date.[93]

Managing high risk offenders

8.7. The offences of murder and manslaughter fall within s 5A of the *Crimes (High Risk Offenders) Act 2006* (NSW) (**CHRO Act**). As such, offenders serving sentences of

[92] *Vinter* [2016] III Eur Court HR 317, 346 [110]
[93] Dirk van Zyl Smit, Pete Weatherby, Simon Creighton, 'Whole Life Sentences and the Tide of European Human Rights Jurisprudence: What Is to Be Done?' (2014) 14 *Human Rights Law Review* 59, 77-79.

imprisonment are subject to the prospect of continuing detention and other orders upon expiry of their sentence.

8.8. **AHLR supports the Bar Association of NSW's observation that '(t)he 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.'**[94]

8.9. ALHR also refers to the remarks of Mason and Brennan JJ in *Williams v The Queen* (1986) 161 CLR 278 where their Honours said:

> *Personal liberty was held by Blackstone to be an absolute right vested in the individual by the immutable laws of nature and have never been abridged by the laws of England 'without sufficient cause'...*
>
> *The right to personal liberty cannot be impaired or taken away without lawful authority and then only to the extent and for the time which the law prescribes*.[95]

8.10. Accordingly, the imposition of restrictions on personal liberty once a prisoner has undertaken their sentences should be one carefully exercised from within a human rights law framework.

8.11. ALHR acknowledges that in some circumstances there may be a legitimate role of the government in protecting the community against very high risk offenders. **However, ALHR stresses the important safeguards that should be in place in ensuring that any orders are 'only to the extent and for the time which the law prescribes'; and consistent with Australia's international human rights law obligations.**

8.12. In saying that it is important to understand accurately the risk of re-offending. In a 2017 study conducted by the Research School of Finance, Actuarial Studies and Statistics, Professors Broadhurst and Maller drew upon the records of 1088 persons arrested in Western Australia during 1984 to 2005, for offences such as murder, manslaughter and dangerous driving causing death.[96] From the 1088 persons, only three were charged with a homicide offence in the 22 years following.[97]

8.13. ALHR supports the previous submissions made by the Rule of Law Institute and the Aboriginal Legal Services calling for the introduction of a Public Interest Monitor, who would appear any hearing for an emergency detention order, similar to the Queensland and Victoria regimes.[98] The Public Interest Monitor would serve as an important protective function for offenders.

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[94] Bar Association of NSW, Submission No 22 to the NSW Sentencing Council, *Review of Sentencing for Murder and Manslaughter*, 6 February 2020, 15 [80].

[95] *Williams v The Queen* (1986) 161 CLR 278, 292.

[96] Roderic Broadhurst et al, 'The Recidivism of Homicide Offenders in Western Australia' (2017) 51 *Australian & New Zealand Journal of Criminology* 395.

[97] Ibid.

[98] Rule of Law Institute, Submission to the Department of Justice, *Review of the Crimes (High Risk Offenders) Act 2006 (NSW)*12 February 2016, 4.

Alternatives to imprisonment for manslaughter

8.14. The prison population in NSW is approaching a staggering all-time high. Statistics released by the NSW Bureau Crime Statistics and Research on 4 February 2020 show the NSW prison population rose by 3.6% or 470 people in 2019 to 13,635.[99]

8.15. There needs to be significant investment made by the NSW Government to introduce early intervention strategies and reforms for alternatives to prison, as well as to properly fund long justice reinvestment initiatives across NSW.

8.16. ALHR proposes, as the Bar Association of NSW does, that Intensive Correction Orders should be available for less serious manslaughter offences.

9. Conclusion and Recommendations

9.1. **ALHR urges the Sentencing Council not to recommend the introduction of mandatory minimum sentences for the offences of murder and manslaughter.**

- There is little evidence that mandatory minimum sentences are effective and moreover they are arbitrary, depart from well-established principles of common law; and 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. Further, they are contrary to long-held principles of justice, and the human rights standards that Australia is bound to uphold.
- ALHR considers that mandatory sentencing offends basic notions of human rights, justice and the rule of law, and is inappropriate for a modern democracy with an independent judiciary. The existence of an independent, impartial and competent judiciary is an essential component of the rule of law.

9.2. **ALHR calls for the repeal of the existing principles and provisions that relate to sentencing for the killing of particular categories of victim as they establish a mandatory sentencing regime that is inconsistent with Australia's international human rights law obligations, well-established principles of common law and the doctrine of the separation of powers. Judicial discretion should inform all sentencing decisions.**

9.3. **ALHR supports the Bar Association of NSW call for the repeal or amendment of s 61(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) to ensure that appropriate weight is given to the subjective circumstances of the offender when imposing sentences of life imprisonment.**

9.4. **ALHR supports further training and guidance for judges and magistrates in relation to sentencing in cases of DFV-related homicides. ALHR also recognises the need to consider a wide range of factors in such cases, including the nature and dynamics**

[99] NSW Bureau of Crime Statistics and Research, *NSW Custody Statistics: Quarterly Update December 2019* (4 February 2020) available here:https://www.bocsar.nsw.gov.au/Pages/bocsar_media_releases/2020/mr-Custody-Dec-2019.aspx.

of DFV and the history of the relationship, and supports reforms to better facilitate the use of DFV context evidence.

9.5. **ALHR supports the previous submissions made by the Rule of Law Institute and the Aboriginal Legal Services calling for the introduction of a Public Interest Monitor, who would appear any hearing for an emergency detention order, similar to the Queensland and Victoria regimes.**

9.6. **ALHR strongly supports the introduction of a Human Rights Act in NSW as this would provide a mechanism to challenge legislation that allows for disproportionate and unjust sentencing outcomes and that is inconsistent with human rights standards that Australia is bound to uphold.**

ALHR is happy to provide any further information or clarification in relation to the above if the Council so requires.

If you would like to discuss any aspect of this submission, please email me at: [redacted]

Yours faithfully

Kerry Weste
President

Australian Lawyers for Human Rights

ALHR