

The Hon James Wood AO QC
Chairperson
NSW Sentencing Council
GPO Box 31
SYDNEY NSW 2001

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

Dear Judge

Preliminary submission to NSW Sentencing Council – Review of sentencing for murder and manslaughter

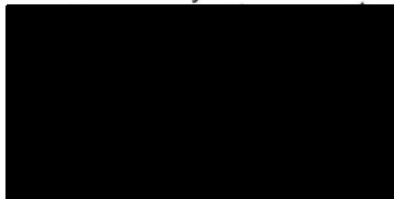
Thank you for the opportunity to provide a preliminary submission on the Terms of Reference (**ToR**) for the NSW Sentencing Council's review into sentencing for murder and manslaughter.

The Department of Family and Community Services (**FACS**) is supportive of this review and considers the ToR sufficient to ensure a useful evaluation of sentencing for the offences of murder and manslaughter, including sentences imposed for domestic and family violence-related homicides, under sections 19A, 19B and 24 of the *Crimes Act 1900*.

I enclose our specific comments relating to elements of the ToR.

If you require further information in relation to this submission, please contact Melinda Norton, Director Women NSW at melinda.norton@facs.nsw.gov.au.

Yours sincerely



Michael Coutts-Trotter
Secretary

- 6 MAR 2019

FACS preliminary submission to NSW Sentencing Council – Review of sentencing for murder and manslaughter

Impact of domestic violence on the community

Domestic violence remains one of the most serious social issues confronting NSW, and Australia as a whole.²² Research has highlighted that an identifiable history of domestic violence between the homicide victim and the offender is a common feature in a high proportion of homicides. This is particularly the case for women, many of whom are killed by a domestic violence perpetrator in a context of ongoing coercion and control.²³ Often, when a homicide occurs in a domestic violence context, there is a history of abusive behaviour that may have been known to service providers, friends, and family prior to the homicide.²⁴

While it is acknowledged that men can be victims of domestic violence, the vast majority of domestic violence is perpetrated by men against women.²⁵ In 2017, females were the victim in 68.3% of all domestic assaults reported to police, and males were perpetrators in 79.4% of the assaults.²⁶ Approximately one in four females (23.0% or 2.2 million) have experienced violence perpetrated by an intimate partner, compared with one in 13 males (7.8% or 703,700).²⁷ This has led to the view that domestic violence is a gendered harm.

It should also be noted that Aboriginal females were victims of domestic violence assault at a rate of 4.6 times that of non-Aboriginal females.²⁸ The rate of hospitalisation for Aboriginal females was 8.7 times higher than for non-Aboriginal females in 2016 – 17.²⁹

Current approach to sentencing for domestic violence-related homicides

FACS notes that this review has been precipitated, in part, by community concern about sentencing in cases of domestic violence-related homicide. The recent Supreme Court decision of *R v AKB* (no. 8) [2018] NSWSC 1828 (*R v AKB*), sparked criticism about the way sentencing law conceptualises risk to the community and the need for community protection.

In *R v AKB*, the Supreme Court sentenced AKB to 36 years' imprisonment, with a non-parole period of 27 years for the murder of his wife. AKB was found guilty of murdering his wife by locking her in her bedroom and burning her alive, whilst their two young children watched.

The Crown submitted that AKB's offending was within the worst category of murder and asked that a life sentence be imposed. Although Davies J acknowledged that this was a gruesome, confronting and shocking murder, he could not be persuaded that AKB's culpability was so extreme as to justify the imposition of a life sentence. This was because he could not be satisfied that all of the indicia in section 61 of the *Crimes (Sentencing Procedure) Act 1999* could be made out. Specifically, his Honour could not be satisfied that there was a need to protect the community from AKB because:

"This was a murder committed, not at large against a person unknown to the offender, by a person with no prior criminal record. I do not mean to suggest

²² NSW Domestic Violence Death Review Team (2017) *NSW Domestic and Family Violence Death Review Team Report 2015/2017*, p. 27.

²³ Alderidge and Browne, 'Perpetrators of Spousal Homicide: A Review' (2003) 4(3) *Trauma, Violence & Abuse* 265; Virueda and Payne, *Homicide in Australia: 2007-2008 National Homicide Monitoring Program Annual Report* (Australian Institute of Criminology, Canberra, 2010).

²⁴ *NSW Domestic and Family Violence Death Review Team Report 2015/2017*, p. 27.

²⁵ Australian Bureau of Statistics, *Personal Safety Survey Australia 2005*, ABS cat. No 4906.9, 2006, Canberra; Chan and Payne, *Homicide in Australia: 2008-09 to 2009-10 National Homicide Monitoring Program Annual Report*, (Australian Institute of Criminology, Canberra, 2013); Dobash, Dobash, Wilson and Daly, 'The myth of sexual symmetry in marital violence' (1992) 39(1) *Social Problems* 71; Grech and Burgess, *Trends and patterns in domestic violence assaults: 2001 to 2010*, (NSW Bureau of Crime Statistics and Research, Sydney, 2011).

²⁶ Department of Family and Community Services (2018) *Women in NSW 2018*

https://www.women.nsw.gov.au/__data/assets/pdf_file/0007/647206/NSW-2018-Annual-Report.pdf p. 62.

²⁷ *Women in NSW 2018*, p. 62.

²⁸ *Women in NSW 2018*, p. 62.

²⁹ *Women in NSW 2018*, p. 67.

thereby that the murder of a spouse or partner is any less serious than the murder of a stranger. However, it is a matter which is relevant to the issue of community protection.” [29]

The Court also noted the importance of consistency in sentencing and that a life sentence for the murder of a female partner has only been imposed in two of the 93 cases since 1991, and only where a child or children were also murdered.

FACS submits that the Sentencing Council should consider whether this current approach to sentencing in domestic violence-related homicides is adequate, considering the devastating impact domestic and family violence has on our community, as outlined above. In response to the emphasis the Court placed on consistency in sentencing, FACS submits that the fact that a life sentence for the murder of a female partner has rarely been imposed should not govern the continuing approach to sentencing in these circumstances.

Sentencing for domestic violence-related homicides where the offender is a ‘battered woman’³⁰

Women comprise a small minority of all homicide offenders. In the financial years 2012-13 and 2013-14 for example, only 12% of all homicide offenders in Australia were female.³¹ Evidence shows that when a female commits homicide, the victim is generally someone emotionally close to her, commonly a male intimate partner.³² When a woman kills an intimate partner, there has usually been a history of violence perpetrated against her. In NSW between 2000 and 2014, for example, 89% of men killed by a female intimate partner had been the primary domestic violence abuser in the relationship.³³ The homicide is also generally in response to an immediate attack or threat from the deceased.³⁴ Although, despite this immediate risk of harm, ‘battered women’ often do not respond spontaneously to an event due to differences in physical capacity. They will often wait for a safer opportunity to act against an abuser.³⁵

The legal system has historically been blind to the social context and experiences of women who kill their violent partners.³⁶ This adversely impacts battered women in the legal system. Gender bias in the construction of legal rules relating to criminal defences has been recognised. In particular, self-defence, which is the only complete defence to homicide, has been criticised for being constructed around a male paradigm, and therefore not being expansive enough to recognise the circumstances in which a battered woman kills her violent partner.³⁷ Attempts have been made to address inequalities for battered women in accessing self-defence through, for example, codifying self-defence provisions, and allowing the use of content and expert evidence on the dynamics of violent relationships. Despite this, battered women continue to be disadvantaged in accessing the defence of self-defence. As a result of these inequalities, battered women are less likely than male defendants to rely on a defence of self-defence, instead relying on partial defences or pleading guilty to alternative charges. This is problematic given that self-defence is the only defence to homicide that may vindicate a defendant’s actions and can (although not always) result in an

³⁰ Battered woman is a term commonly used to describe female offenders who kill male intimate partners in the context a violent relationship.

³¹ Bryant, W & Bricknell, S (2017) *Homicide in Australia 2012-13 to 2013-14: National Homicide Monitoring Program report*, Australian Institute of Criminology, available at <https://aic.gov.au/publications/sr/sr002>, p. 31.

³² Leader-Elliot, I (1993) ‘Battered but not beaten: women who kill in self-defence,’ *Sydney Law Review*, 15, p. 403.

³³ *Domestic Violence Death Review Team Report 2015-2017*, p. 7.

³⁴ Victorian Law Reform Commission (VLRC) 2004, *Defences to homicide: final report*, VLRC, available at https://www.lawreform.vic.gov.au/sites/default/files/VLRC_Defences_to_Homicide_Final_Report.pdf, p. 2.

³⁵ VLRC 2003, *Defences to homicide: Options paper*, VLRC, available at http://www.lawreform.vic.gov.au/sites/default/files/OptionsPaperFINALsmaller_size.pdf, p. 112.

³⁶ Eastel, P 2001, *Less than equal: Women and the Australian legal system*, Chatswood, Butterworths, p. 39.

³⁷ Stubbs, J & Tolmie, J (1994) ‘Battered woman syndrome in Australia: a challenge to gender bias in the law’, in J Stubbs (ed.), *Woman, male violence and the law*, Sydney, The Institute of Criminology, p. 195.; Stubbs, J 2016, ‘Murder, manslaughter and domestic violence’ in K Fitz-Gibbon & S Walklate, *Homicide, Gender and Responsibility: an international perspective*, Oxon, Routledge, p. 37.

acquittal.³⁸ Pleading guilty to manslaughter is the most common outcome for battered women.³⁹ Pleading guilty to manslaughter rather than defending a charge of murder reduces the risk of a lengthy sentence, particularly given significant sentencing discounts available for an early guilty plea in NSW.⁴⁰ Battered women may also be persuaded to enter an early guilty plea because it avoids the stress and trauma of a lengthy trial, and protects any children from having to give evidence in court.⁴¹ A significant proportion of cases in NSW involving battered women entering a guilty plea to a charge of manslaughter have displayed strong defensive components. This means that potentially deserving women are not only deprived of the opportunity of a full acquittal, but also receive significant custodial sentences.⁴²

Given this, FACS submits that the Sentencing Council should consider the potential adverse consequences for battered women if sentences, and non-parole periods, were to be increased for homicide offences committed in the context of an intimate relationship. In addition, in cases where a defence of self-defence, or other defences, have not been available or utilised and there is a finding of guilt, FACS submits that the domestic-violence circumstances of the offending should be given particular weight in mitigation of sentence and that this should be enshrined in legislation rather than left entirely to sentencing discretion.

Sentencing and children and young people

FACS considers that the current approach to sentencing children and young people, including in domestic violence-related homicides, should continue. In particular, the principles relevant to the sentencing of children enunciated by McClellan CJ in *KT v R* (2008) A Crim R 571 should continue to be applied and children and young people under 18 should continue to be excluded from the imposition of mandatory life sentences.

³⁸ Stubbs & Tolmie, 2005, p. 193.

³⁹ Sheehy, E, Stubbs, J & Tolmie, J (2012) 'Battered women charged with homicide in Australia: how do they fare?', *Australian and New Zealand Journal of Criminology*, 45, p. 386.

⁴⁰ Stubbs & Tolmie, 2005, p. 202.

⁴¹ Stubbs & Tolmie, 2005, p. 201-202.

⁴² Toole, 2012, p. 273.