



8 March 2019

The Hon James Wood AO QC
Chairperson
New South Wales Sentencing Council
GPO Box 3 Sydney NSW 2001

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

Dear Mr Wood

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 for murder

Thank you for the opportunity to make a preliminary submission to the NSW Sentencing Council with respect to its 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 for murder.

This submission is written by members of the Centre for Crime, Law and Justice, at the Faculty of Law, University of New South Wales. The views expressed in this submission are the views of the undersigned individuals.

Matters for Consideration

1 General Considerations (not limited to Domestic or Family Violence)

1.1 The social context of homicide

The social context of homicide should frame the consideration of reforms but remains poorly understood by parts of the legal profession and the public.¹

¹ Jenny Morgan and Victorian Law Reform Commission, *Who Kills Whom and Why?: Looking Beyond legal Categories* (Occasional Paper, 2002); Felicity Hampel, 'Legal Culture, Professional Education and Homicide Law

1.1.1 Indigenous offenders and the social context of homicide

The potentially disproportionate impact of any reforms in this area on Indigenous communities and offenders must be thoroughly examined in the formulation of recommendations and in the enactment of any changes. Whether an offender is being sentenced for perpetrating fatal domestic or family violence or has killed their abuser, the social, economic, political and cultural conditions experienced by Indigenous communities is likely to exacerbate the issues identified in this submission as affecting the sentencing of domestic and family violence related homicides.² Specifically, problematic relationships between police and Indigenous communities limits the availability of official histories of abuse through police reports or prior interventions. Indigenous women experience domestic and family violence at a higher rate, but face greater barriers due to a confluence of factors that impede their capacity to seek or derive substantial benefits from official assistance structures.³ This can significantly affect the extent to which mitigation is applied in a sentencing context. Moreover, in a study of sentencing for domestic violence offences in the lower courts, Jeffries and Bond found that Indigenous offenders were likely to receive harsher penalties.⁴ Many of the factors producing this disparity are equally applicable in the higher court context and warrant examination to determine how systemic factors operate to influence sentencing outcomes. The difficulties faced by sentencing courts in applying sentencing principles in a manner that appropriately recognises the extreme social disadvantage experienced by Indigenous offenders has been brought into sharp focus by recent High Court decisions.⁵

1.2 Sentencing should not be considered in isolation

Significant reviews undertaken by law reform bodies,⁶ parliamentary committees,⁷ and scholarly research⁸ have called for a comprehensive approach to homicide law reform. While

Reform' in Kate Fitz-Gibbon and Arie Freiberg (eds) *Homicide Law Reform in Victoria : Retrospect and Prospects* (Federation Press, 2015), p 36;

² See for example Julie Stubbs and Julia Tolmie, 'Battered Women Charged with Homicide: Advancing the Interests of Indigenous Women (2008) 41(1) *Australian and New Zealand Journal of Criminology* 138; Denise Wilson, 'Indigenous Populations and the Domestic Violence Death Review Process' in Myrna Dawson (ed), *Domestic Homicides and Death Reviews* (Palgrave Macmillan, 2017); Debbie Kirkwood et al, *Submission on the Department of Justice's Defensive Homicide: Proposals for Legislative Reform – Consultation Paper* (2013).

³ Wilson, above n 2.

⁴ Samantha Jeffries and Christine EW Bond, 'Taking the Problem Seriously? Sentencing Indigenous and Non-Indigenous Domestic Violence Offenders' (2015) 48(4) *Australian and New Zealand Journal of Criminology* 463.

⁵ *Munda v Western Australia* [2013] HCA 38; *Bugmy v The Queen* [2013] HCA 37.

⁶ Victorian Law Reform Commission, *Defences to Homicide: Final Report*, (2004); Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response, ALRC Report 114*, 2010; Law Reform Commission of WA, *Review of the law of Homicide, Final Report* (2007); Law Reform Commission of Western Australia, *Enhancing Family and Domestic Violence Laws, Final Report*, Project No 104 (2014).

⁷ The NSW Select Committee on the Partial Defence of Provocation recommended a comprehensive review be undertaken by the NSWLRC of the laws of homicide and defences to commence five years after the reforms following its report: rec 11. That review should extend to sentencing.

⁸ Fitz-Gibbon K and Stubbs J (2012) 'Divergent Directions in Reforming Legal Responses to Lethal Violence' *Australian & New Zealand J of Criminology* 45(3) 318-336; Kate Fitz-Gibbon and Arie Freiberg (eds) *Homicide law reform in Victoria : retrospect and prospects* (Federation Press, 2015); Sheehy E, J Stubbs & J Tolmie (2014) 'Securing Fair Outcomes for Battered Women Charged with Homicide: Analysing Defence Lawyering in *R v Falls*' 38(2) *Melbourne University Law Review* 666-708; Sheehy E, J Stubbs & J Tolmie (2012) 'Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand' *Sydney*

a comprehensive review may be beyond the scope of the Sentencing Council, these prior reviews and studies provide a strong foundation for the SC's work. A failure to recognise the broader context within which sentencing occurs has the potential to deliver unintended consequences.⁹ Sentencing should not be considered in isolation.

Achieving fair sentences requires attention to charging practices, prosecutorial decisions,¹⁰ plea negotiations, the availability and operation of defences and partial defences and evidentiary rules. Changing maximum penalties, SNPPs or minimum penalties will not necessarily produce fairer outcomes.

1.3 Moral culpability

Sentencing offers the opportunity to reflect different degrees of moral responsibility. For this reason, moves to reduce flexibility in sentencing for homicide offences, such as the introduction of baseline sentences in Victoria, have been lamented.¹¹

1.4 Accessible data on sentencing trends for homicides in NSW

There is a need for more accessible data on sentencing trends for homicide offences in NSW. Analysing trends effectively and assessing the impact of relevant reforms requires the capacity to specify and compare and contrast outcomes for different offences, categories of homicide (e.g. domestic violence related, and others) and to identify the basis on which an outcome was reached (e.g. plea).

1.5 The full range of sanctions for murder and manslaughter

Judicial discretion should be retained and include the possibility of a non-custodial sentence for murder in rare cases, such as in some cases involving euthanasia,¹² or for a victim who kills her abuser but does not meet the tests for self-defence or the new higher threshold for 'extreme provocation'. This is consistent with recommendations of the VLRC 2004 *Final Report on Defences to Homicide*.¹³

1.6 Sentencing with Respect to Provocation

We encourage the Sentencing Council to consider the particular issues that provocation raises for sentencing, both in instances where provocation operates as a partial defence, but also where the partial defence is not available but may be a relevant mitigating factor.

Law Review 34(3) 467-492; Sheehy E, J Stubbs & J Tolmie (2012) Battered women charged with homicide in Australia, Canada and New Zealand: How do they fare? *Australian & New Zealand J of Criminology* 45(3) 383-399; Stella Tarrant, "Self Defence Against Intimate Partner Violence: Let's do the work to see it" (2018) 43:1 *University of Western Australia Law Review* 196.

⁹ Kate FitzGibbon and Julie Stubbs, 'Divergent Directions in Reforming Legal Responses to Lethal Violence' (2012) 45(3) *Australian and New Zealand Journal of Criminology* 318.

¹⁰ See also Marcia Neave, 'The more things change the more they stay the same' in Fitz-Gibbon & Freiberg, above n 1.

¹¹ *Ibid*, 27-8.

¹² *R v Klinkerman* [2013] VSC 65 involved an attempted murder charge and resulted in a non-custodial sanction.

¹³ Victorian Law Reform Commission, *Defences to Homicide: Final Report*, (2004), above n 6.

Following the abolition of provocation in Victoria, provocation moved from an issue at trial to one at sentencing.¹⁴ Stewart and Freiberg recognised the need for a conceptual framework to guide sentencing with respect to provocation.¹⁵ They noted that:

‘Recognising the objectionable features of the partial defence of provocation does not mean that provocation is not a legitimate mitigating factor in sentencing...in appropriate cases. The abolition of the partial defence did not, and should not, entail the abolition of provocation per se.’¹⁶

Arguably in NSW, the task of determining how provocation should be dealt with in sentencing has been rendered more complex. Following recent reforms, provocation will sometimes be at issue in trial and in other matters will emerge at sentencing.

Limiting the circumstances in which provocation is available as a partial defence still leaves open the question of which cases it may be appropriate for provocation to be a mitigating factor in sentencing. Also, the higher threshold imposed by ‘extreme provocation’ will mean that cases that previously may have been sentenced as manslaughter will now be sentenced as murder. How should provocation be dealt with at sentencing in such cases?

2 Domestic and family violence related homicides

2.1 Definitions

The *Crimes (Domestic and Personal Violence) Act 2007 (NSW)* (s5) has a very broad definition of domestic relationship.¹⁷

Domestic and family violence are also complex categories that encompass a range of behaviours which extend beyond physical violence. The nuance of the lived experience of domestic and family violence must be recognised.¹⁸ Reforms premised on a simplistic understanding of these relationships is likely to disadvantage those who experience atypical forms of domestic and family violence or who do not satisfy common perceptions of a victim/survivor or perpetrator.

Not all homicides between people in a domestic relationship fit with conventional understandings of domestic or family violence. For instance, there may be good reasons for distinguishing cases that involve ongoing violence, and or coercion and control from those arising from a single act. There may also be policy grounds for distinguishing cases of euthanasia committed by a family member from domestic or family violence.¹⁹

¹⁴ Freiberg et al ‘Homicide law reform, provocation and sentencing’ in Fitz-Gibbon & Freiberg, above n 1, p 58.

¹⁵ *Provocation in Sentencing*, 2nd ed. (2009); Felicity Stewart and Arie Freiberg ‘Provocation in sentencing: a culpability based framework’ (2008) *Current Issues in Criminal Justice* 19, 3, 283; Freiberg et al. ‘Homicide law reform, provocation and sentencing’ in Fitz-Gibbon & Freiberg, above n 1.

¹⁶ Freiberg et al ‘Homicide law reform, provocation and sentencing’ in Fitz-Gibbon & Freiberg, above n 1, p 59.

¹⁷ *Crimes (Domestic and Personal Violence) Act 2007 (NSW)* s5.

¹⁸ State of Victoria, Royal Commission into Family Violence: Report and Recommendations, Vol I, Parl Paper No 132 (2014–16) ch1; Julia Tolmie, Rachel Smith, Jacqueline Short, Denise Wilson and Julie Sach, “Social Entrapment: A Realistic Understanding of the Criminal Offending of Primary Victims of Intimate Partner Violence” [2018]2 *New Zealand Law Review* 181.

¹⁹ *R v Klinkerman* [2013] VSC 65 involved an attempted murder charge.

2.2 Domestic and family violence are complex matters but remain poorly understood

Education of police, legal professionals and the judiciary is required.²⁰ The recently developed National Domestic Violence Benchbook represents a significant new resource in such education.²¹

2.3 Charging

Charging practices have been subject to question, especially because research indicates that, very often, murder charges have been laid where pleas to lesser charges have been accepted.²² Charging practices, and plea negotiations, have significant implications for sentencing.

The NSW Select Committee on the Partial Defence of Provocation recommended that charging guidelines be developed by the DPP.²³

2.4 Guilty pleas

Most people charged with a domestic violence related homicide offence committed against their abuser do not go to trial; they plead guilty, most often to manslaughter.²⁴ In the absence of a trial, the nature, history and context of the violence that they suffered may not be fully apparent to the sentencing judge. At sentencing a great deal will turn on any plea negotiations and agreed facts.

2.5 Sentencing in Domestic Violence or Family Violence homicides

2.5.1 The presentation of evidence

The presentation of appropriate evidence concerning domestic or family violence has significant implications for sentencing (as well as trials and verdicts).

The Law Reform Commission of Western Australia commented that 'some lawyers do not appreciate the importance of a history of violence (or do not believe that it can be used to establish a defence) and therefore do not seek detailed instructions about the violence.'²⁵

²⁰NSW Select Committee on the Partial Defence of Provocation Rec 10. <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2007/Partial%20defence%20of%20provocation_Final%20report.pdf>.

²¹ *National Domestic and Family Violence Benchbook* (2018) <<http://dfvbenchbook.aija.org.au/purpose-and-limitations>>.

²² Sheehy E, J Stubbs & J Tolmie (2012) 'Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand' *Sydney Law Review* 34(3) 467-492; Sheehy E, J Stubbs & J Tolmie (2012) 'Battered women charged with homicide in Australia, Canada and New Zealand: How do they fare?' *Australian & New Zealand J of Criminology* 45(3) 383-399.

²³ 'That the Director of Public Prosecutions include a specific guideline in the Prosecution Guidelines of the Office of the Director of Public Prosecutions in relation to homicides occurring in a domestic context. The guideline should 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' Select Committee on the Partial Defence of Provocation, Parliament of NSW, *The Partial Defence of Provocation* (2013), 157-168 Rec 1; see also Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response, ALRC Report 114*, 2010 Rec 13-2.

²⁴ Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, 'Battered women charged with homicide in Australia, Canada and New Zealand: How do they fare?' (2012) 45(3) *Australian and New Zealand Journal of Criminology* 383, 386.

²⁵ *Review of the Law of Homicide: Final report*, (2007) 97.

There is a substantial body of literature calling for reform of evidentiary rules and advocating the introduction of social framework evidence.²⁶ The NSW Select Committee on the Partial Defence of Provocation made recommendations to affirm the admissibility of evidence of domestic violence and for the introduction of social framework evidence,²⁷ but these reforms were not adopted. By contrast a specific provision concerning evidence of family violence was introduced in Victoria, initially s9AH and now s322J *Crimes Act* (Vic). Analysis and commentary concerning reforms adopted in Victoria and Queensland is instructive and indicates the need to revisit this matter in NSW.²⁸

In sentencing victims of domestic or family violence who kill their abuser, for example, evidentiary issues arise regarding the extent to which information that is inconsistent with evidence at trial can be taken into account in sentencing.²⁹ While the lack of conflict with the principle of finality and right to a fair trial provides some scope for the integration of evidence of a history of domestic violence, significant challenges remain. Historical failings of police and service agencies to respond effectively to domestic violence, and factors that present obstacles to the disclosure of domestic violence may mean that such evidence is not available or is difficult for the defence to muster.³⁰

Where evidence *is* available to show the exceptional circumstances within which the offending occurred, sentencing principles may be effectively applied to mitigate the culpability of the offender.³¹ The presentation of a defence at trial may make this material accessible to the court prior to the sentencing phase as a defining feature of the offending. This will, however, depend in part on the basis for any defence offered; for instance, where the trial proceeds other than on the basis of self-defence or provocation, evidence of a history of prior violence against the accused may not be considered relevant. Further, where inconsistencies between the evidence accepted at trial and information presented to a sentencing hearing arise, that additional material may be excluded or have very limited impact.

The sentencing of Simon Gittany for the murder of Lisa Harnum highlights the tensions that sentencing courts must navigate when making determinations about the relevance and weight to be attributed to evidence of prior abuse. In particular, the following excerpt demonstrates the pressure to separate the offence being sentenced from that prior conduct:

[38] However, it does not follow from the exclusion of the new evidence that Mr Gittany's intention to kill Ms Harnum must be characterised as being completely spontaneous. The task of assessing his state of mind and the degree of his moral

²⁶ Victorian Law Reform Commission, *Defences to Homicide: Final Report*, (2004); Julie Stubbs and Julia Tolmie, 'Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Women Syndrome' (1999) 23 *Melbourne University Law Review* 709.

²⁷ Select Committee on the Partial Defence of Provocation, Parliament of NSW, *The Partial Defence of Provocation* (2013); the committee heard differing views about whether there might be benefits in a legislative provision to facilitate having evidence of a history of domestic violence put before the courts. The relevant Victoria provision affirms that a wide range of social framework evidence may be relevant in family violence cases.

²⁸ See Heather Douglas, 'Social Framework Evidence' in Fitz-Gibbon & Freiberg, above n 1.

²⁹ See *Evidence Act 1995* (NSW) s 4, in relation to the application of the laws of evidence in sentencing proceedings.

³⁰ Sheehy E, J Stubbs & J Tolmie (2014) 'Securing Fair Outcomes for Battered Women Charged with Homicide: Analysing Defence Lawyering in *R v Falls*' 38(2) *Melbourne University Law Review* 666-708.

³¹ See for example *R v Silva* [2015] NSWSC 148, 54-61.

culpability is more complex than that. The evidence at trial revealed that, during the relationship, Mr Gittany engaged in an extraordinary degree of manipulative behaviour ultimately directed to sublimating Ms Harnum's will to his own. Small acts of defiance such as daring to wear her hair down were met with trenchant abuse.

[39] *It is of course important to bear in mind that Mr Gittany does not stand before this Court to be punished for his conduct throughout the relationship, nor does that conduct aggravate the offence. But it does inform the state of mind in which he committed the offence.* I cannot be satisfied on the evidence that Mr Gittany formed an intention to kill Ms Harnum at any point earlier than the short moments before her death, or that the offence was planned or premeditated in the traditional sense. However, I am satisfied that he must have anticipated the prospect that he would fly into a rage if ever she were to leave him. The evidence as to his conduct in the days leading up to her death reveals that he considered himself to be entitled to express a measure of rage in that event.

[40] In my view, that history informs the degree of moral culpability of the offence. The arrogance and sense of entitlement with which Mr Gittany sought to control Lisa Harnum throughout their relationship deny the characterisation of his state of mind in killing her as one of complete and unexpected spontaneity. By an attritional process, he allowed possessiveness and insecurity to overwhelm the most basic respect for her right to live her life as she chose. Although I accept that the intention to kill was formed suddenly and in a state of rage, it was facilitated by a sense of ownership and a lack of any true respect for the autonomy of the woman he claimed to love.³²

[emphasis added]

Here, the significance of the context of domestic violence is recognised, but the capacity for this history to meaningfully influence the sentence is shown to be limited. Constraints on the substantive influence of a history of domestic violence exist regardless of whether the history is detailed in official records, such as through prior convictions for assaults against the homicide victim.

Where prior convictions have been recorded, the principle of finality operates to ensure that the offender does not receive a sentence that amounts, in part, to an additional punishment for any earlier offences. This history of convictions is, however, relevant to an assessment of the weight to be applied to sentencing principles including deterrence and rehabilitation.³³ While this provides some scope for sentencing courts to acknowledge the context of the offence, this evaluation does not adequately reflect that the history of domestic or family violence is a defining feature of the homicide. This is a tension that is likely to endure without thoughtful consideration of how to better balance conflicting imperatives of fairness to the offender and reflecting community understandings of the nature and seriousness of homicides committed in the context of domestic and family violence.

In the absence of police records detailing the history of domestic or family violence, other evidence of witnesses to abuse or disclosures of abuse may be instructive. As above, however, where any inconsistency arises between such evidence and the facts found at trial, the evidence may be excluded or have a significantly diminished impact in the determination of

³² *R v Gittany* (No 5) [2014] NSWSC 49, 38-40.

³³ *JCW* [2000] NSWCCA 209; *R v Abrahams* [2013] NSWSC 952, 61-67. *R v Gittany* [2014] NSWSC 49, 31.

sentence. The tension here arises from the requirement that the offender only be sentenced for the offence proven. Evidence of prior alleged offences for which the offender has not been charged provide no legal basis for aggravating or otherwise meaningfully assisting a sentencing court. In light of the difficulties many victims and survivors of domestic and family violence experience in reporting instances of abuse, this creates a situation in which the true nature of the offending is not being addressed in the sentence.

2.5.2 Aggravating and Mitigating Factors

Case law indicates that domestic or family relationship is not a mitigating factor in NSW, and this position should be retained.³⁴

Debates about domestic or family relationship as an aggravating factor were reviewed by the ALRC.³⁵ The arguments against domestic or family relationship as an aggravating factor, including because it would focus on the relationship rather than the diverse and complex characteristics of domestic and family violence, and due to likely unintended consequences, such as for a victim who kills an abuser, remain persuasive.³⁶ Domestic or family relationship should not *per se* be an aggravating factor.

2.5.3 Extreme Provocation and its Consequences

Over the last two decades a raft of reforms to partial defences to murder have been enacted in a number of Australian jurisdictions. These changes have typically been catalysed by concerns that the gendered legacy of many criminal laws fail to adequately recognise and respond to the circumstances in which women kill, and instead facilitates a persistent resignation to the notion of masculine aggression as normal.

In New South Wales, the 2012 reforms that replaced provocation with extreme provocation have created barriers for victims of domestic or family violence charged with the homicide of their abuser. The imposition of an ordinary person test and the requirement that the provoking conduct must amount to a serious indictable offence in order to establish extreme provocation has been argued to present a greater barrier for victims and survivors of abuse than perpetrators of that abuse.

It remains of concern that the threshold of extreme violence for the partial defence of provocation excludes the most common form of domestic violence prosecuted in NSW courts, that is, common assault. Thus, some victims of domestic violence who kill an abuser may face murder convictions and longer sentences as a consequence of this new higher threshold excluding them from provocation. Both the threshold for provocation and sentencing where the threshold for extreme provocation is not met require review.

2.5.4 Objective Seriousness

A key aspect of the sentencing process is determining the objective seriousness of an offender's conduct in order to gauge the severity of the sentence that should be imposed.

³⁴ Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response*, ALRC Report 114, 2010 [13.129].

³⁵ Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response*, ALRC Report 114, 2010 [13.126-13.139; 13.196].

³⁶ Canadian experience suggests that the stipulation that an offence against a spouse or common law spouse is an aggravating factor has had deleterious effects resulting in a higher sentence for some abused women; Criminal Code s.718 2A (a)(ii); see Sheehy, E, 2014, *Defending Battered Women on Trial: Lessons from the Transcripts* UBC Press, Vancouver.

This is particularly relevant to sentencing for murder due to the existence of a standard non-parole period. Prevailing notions about the seriousness of domestic or family violence related homicides raise particular issues regarding deterrence for and denunciation of perpetrators of domestic or family violence who kill.

Bond and Jefferies assert that the tendency to categorise offences committed against strangers as more serious due to the perception of a greater risk to the community than offences committed in a domestic or family violence context further engrains the notion that offenders who abuse or kill their partners are less morally culpable than offenders who target unknown persons.³⁷ The nature of the offending and evidence before the court may support a conclusion that the offender's actions were a response to particular circumstances within the relationship and are not a risk to the community more generally. While this is an appropriate approach to the sentencing of victims of domestic or family violence who kill their abusers, these conditions may also operate to lessen the perceived objective seriousness of homicides committed by perpetrators of abuse.

An investigation into how domestic and family violence related homicides are typically positioned on the scale of objective seriousness should therefore be undertaken to determine whether this tendency is manifest in New South Wales. If domestic and family violence related homicides are primarily conceived of as falling below the mid-point of objective seriousness when committed by abusers, then any changes to the standard non-parole period for murder are unlikely to have any impact on outcomes for these offences.

The issues outlined above regarding the presentation of evidence also impact upon the capacity for sentencing judges to accurately determine the position of an offence on the scale of objective seriousness.

We would be happy to provide further elaboration on issues raised in this submission or assist the Sentencing Council in any other way.

Yours sincerely

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On behalf of:

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³⁷ Christine EW Bond and Samantha Jeffries, 'Similar Punishment?: Comparing sentencing outcomes in domestic and non-domestic violence cases' (2014) 54(5) *British Journal of Criminology* 389.