The Public Defenders

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Dear Council members,

Preliminary submissions – review of sentencing for murder and manslaughter

We are grateful for the opportunity to provide preliminary submissions in relation to the above review. We look forward to providing more comprehensive input later.

The Public Defenders have a wealth of experience with which we can explain our understanding of the sentencing of homicide offenders in the context of family violence as well as the impact of domestic and family violence on criminal offending.

As to the particular aspects of the review identified in the terms of reference, the Public Defenders do not currently support an increase in the standard non-parole periods for murder. Further, the Public Defenders are currently of the view that relevant sentencing principles are being properly applied in this state in connection with sentences imposed for domestic and family violence related homicides. We are of the view that the complexity of issues involved in consideration of murder and manslaughter offences in these circumstances point strongly against any further prescriptive legislation. We remain however open minded to consider any relevant material to support contrary positions that may arise in this review, and will respond to the same in our ongoing role in the Council's consideration of these important issues.

Regarding the matters raised for consideration the following preliminary submissions are advanced:

(I) Consideration of sentences imposed for homicides and how these compare with sentencing decisions in other Australian states and territories.

Reports of the Council and the Judicial Commission support the proposition that sentences for murder have increased in a meaningful way in NSW since the introduction of the 20 year standard non-parole period where a child / emergency services officer is not the victim. Sentencing decisions in the domestic and family violence context, in particular, have indicated very strong judicial understanding of the seriousness of the problem of these issues currently faced by Australian society: see considerations (III) and (V) below. We are not currently aware of any evidence recommending a further increase of sentences for murder. Murder is, unlike child sexual assault for example, an offence where society has for a very long time understood its gravity.

The New South Wales judiciary has also indicated a clear ability to respond to social problems connected with unlawful homicides not prosecuted as murder. The decision of the NSW Court of Criminal Appeal in *R v Loveridge* [2014] NSWCCA 120; 243 A Crim R 31 is an example of such responsiveness to society's repugnance at alcohol fuelled street violence in the so called 'one punch' context. Although there was also legislative response to this problem in the form of a new offence, with a mandatory minimum term of sentencing, this arose in the context of a problem with generally less complicated dynamics than those involved with family violence. The Public Defenders remain opposed to mandatory minimum sentencing even in that more simple domain (partly because of the capacity for it to appear to treat male violence as more serious than domestic violence).

The very frequently repeated description of the protean nature of manslaughter offending continues to render it highly unsuitable for any form of standard non-parole period, even to be used as a yardstick. Manslaughter offending in the context of family violence exposes a very wide range of circumstances of offending and offender, requiring flexibility of approach.

The couplet of decisions of the High Court in *Bugmy v The Queen* [2013] HCA 37; CLR 249 571 ('*Bugmy*') and *Munda v The Queen* [2013] HCA 38; 249 CLR 600 ('*Munda*') demonstrate the complexity of issues involved in violent offending by disadvantaged Aboriginal offenders exposed to domestic violence (*Munda* and not *Bugmy* involved unlawful homicide committed in a domestic context).

The 'mandatory' nature of the sentence of life imprisonment for murder in Queensland, South Australia and the Northern Territory means that a head sentence of life imprisonment must be imposed. In connection with this issue, or alternatively in consideration of s 61 of the *Crimes (Sentencing Procedure) Act* ('the *Sentencing Act*') as referred to below, it is suggested that analysis of an alternative availability of a determinate non-parole period in conjunction with a head sentence of life imprisonment should be considered for New South Wales.

These other jurisdictions also impose a minimum non-parole period for such offenders with limited discretion for downward movement therefrom. The decision of the Court of Criminal Appeal of South Australia in *R v Hallcroft* [2016] SASCFC 137; 126 SASR 415 highlights some of the real difficulties that occur where there is a mandatory minimum set, even with some limited room for exception: see judgment of Kourakis CJ (with which Peek, Stanley, Lovell and Doyle JJ agreed) at 427-9 [49] – [53].

Victoria's 'standard sentencing scheme' commencing on 1 February 2018 was introduced with a clear intent that lengths of sentences increase. The 'standard sentence' for murder is 25 years (as a total sentence). The first consideration of the operation of Victoria's scheme was given by Champion J in in *The Queen v Brown* [2018] VSC 742. The scheme was interpreted in a way consistent with a one-step instinctive synthesis approach to sentencing (a matter relevant to the out-dated two stage approach in NSW as to whether life imprisonment is to be imposed for murder, discussed below at (IV)). It is not considered that the Victorian sentences under this new scheme will indicate NSW murder sentences as inadequate. Contrariwise, another increase in NSW sentences is likely to be out of step with this new development in Victoria.

(II) Consideration of the impact of sentencing decisions on the family members of homicide victims

In terms of the impact of the sentencing decision itself on family members (as distinct from the impact of the offence), the role of well reasoned sentencing decisions is crucial. A judgment on sentence where the judicial officer articulates all the relevant principles and circumstances of the offence and offender that warrant the imposition of the relevant sentence serves these interests: *The Queen v Kilic* [2016] HCA 48; 259 CLR 256 ('*Kilic*').

The Court at 266 [20] also emphasised the practical need for the community to understand the sentencing process, and potential for feeling a sentencing judge has misunderstood the seriousness of an offence if it is said not be in the 'worst category', such that "In order to avoid difficulties of that kind, sentencing judges should avoid using the expression "worst category" and instead, in those cases where it is relevant to do so, state in full whether the offence is or is not so grave as to warrant the maximum prescribed penalty."

The undesirability of having too many legislative or common law phrases that are met, not met or met by proportion is a real issue for consideration on this topic.

The Public Defenders' experience is positive in terms of judicial officers' incorporation of the impact of the crime itself on family victims in the Remarks on Sentence, and extending their recognition of the family members' loss to them directly and articulating the loss and impact in the sentencing judgment, and taking this into account as an aspect of harm to the community when the Crown Prosecutor makes an application for this to be done.

It is unfortunately an eternally unavoidable problem that no matter how heavy the sentences are in homicide matters, there will be family members of the deceased who do not regard them as adequate. Other considerations such as support, well reasoned judgments, proper articulation of relevant principles and acknowledgment of harm - rather than the numbers of years imposed - are more conducive to reducing a negative impact of the sentencing process on family members of the deceased in a balanced way.

(III) Consideration of the devastating impact of domestic and family violence on our community

This consideration is reflected in the sentencing process in a number of ways including: imposing sentences which place importance on general deterrence, specific deterrence, denunciation, and recognition of the harm done to the community (in the way that victim impact statements have been used in recent years). It is reflected in the sentencing purpose of rehabilitation, to best ensure those who have killed in such a context are best integrated into the community as a less dangerous person. It is also reflected in the sentencing process in the flexibility required to moderate to a degree the punitive aspects of sentencing in

understanding the great number of offenders who are within the criminal justice system to a large degree because of the devastating cycle of abuse.

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

> *An offender's childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced. However, the inability to control the violent response to frustration may increase the importance of protecting the community from the offender.*

The Public Defenders are frequently involved in, and otherwise aware of, homicide sentencing decisions involving female survivors of childhood sexual abuse and domestic violence, or intimate partner violence as adults, which explains involvement in the conduct or inaction which has made them guilty of the unlawful killing of their partner or own children. It will not be submitted that there are any different considerations for women as a group; however looking at the issue from this perspective sometimes makes it easier to understand the complexity of sentencing, and the need for sensitive weighing of dynamic considerations.

At the commencement of his Remarks on Sentence in *R v Cahill (No 4)* [2018] NSWSC 1896 (a case where a guilty plea to manslaughter was accepted by the Crown on the basis of substantial impairment), Johnson J said:

> *Criminal courts throughout Australia are dealing all too often with offences of domestic violence. What may be regarded as a common case involves a male offender and a female victim, with offences being committed in a*

> *family or relationship setting. A common feature of offences of this type involves the exercise of control or domination by the male offender over the victim, including acts of violence.*
>
> *Victims who have been dominated, controlled and beaten by their partners over a significant period experience serious and long-lasting psychological trauma. What was once described as "battered woman syndrome" is now called "intimate partner violence", in recognition of the fact that violence in relationships is not confined to relationships between men and women.*
>
> *However, as this case illustrates, there is no single model for offences of domestic violence. (citations omitted)*

We are able to explain many examples of homicide offending which support this proposition that there is no single model for offences of domestic violence.

(IV) Consideration of the application of section 61 of the Crimes (Sentencing Procedure) Act 1999 in the context of life sentences imposed for murder

There is a long history in this state of applying a two-staged process in considering whether to impose a sentence of life imprisonment for murder: the first issue was whether on the objective facts the case was one calling for a life sentence under s.61(1) (and its predecessor), and the next whether in the exercise of the discretion conferred by s.21(1) the subjective features justify a lesser sentence of imprisonment for a specified term.

The Public Defenders are of the view that there is significant cause to doubt the correctness or desirability of an ongoing role for a two stage approach to considering whether the maximum penalty of life imprisonment needs to be imposed. Fundamentally, it is contrary to an instinctive synthesis approach to sentencing as is currently regarded as correct (but was not so conclusively regarded at the time some of the two stage authorities were decided). The purposes of sentence itemised in s.61(1), and the concept of culpability itself, turn necessarily to factors outside objective seriousness. The concept of culpability does not accord perfectly with the concept of 'objective factors only' for the purposes of s 54A of the *Sentencing Act*, and which needs to be considered in sentencing for murder, but nor has it been interpreted to

include all that is relevant to the imposition of a just sentence.[1] Its reason for additional inclusion as a focus of sentencing for murder is queried.

On 16 November 2016 special leave was refused by the High Court in the case of *Roger Dean v The Queen* [2016] HCA Trans 278, a case where the Court of Criminal Appeal had endorsed a two stage approach (and this was the point sought to be agitated before the High Court). Success in the individual case did not impress the Court as a reason for a grant of special leave, although Bell J remarked that 'We would not wish to be taken to be endorsing everything stated by the Court of Criminal Appeal in determining this matter.' This was prior to the High Court's decision in *Kilic*.

On 7 December 2016 in *Kilic* the High Court indicated that a sentencing Judge should avoid expressing an opinion that a particular offence is "in the worst category of offence": see consideration at 265-6 [17]-[20]. At 265-6 [18] their Honours said:

> *What is meant by an offence falling within the "worst category" of the offence is that it is an instance of the offence which is so grave that it warrants the imposition of the maximum prescribed penalty for that offence. Both the nature of the crime and the circumstances of the criminal are considered in determining whether the case is of the worst type. Once it is recognised that an offence falls within the "worst category", it is beside the point that it may be possible to conceive of an even worse instance of the offence. Thus, an offence may be assessed as so grave as to warrant the maximum prescribed penalty notwithstanding that it is possible to imagine an even worse instance of the offence.'*

This approach, although not articulated in connection with the NSW *Sentencing Act*, is consistent with an instinctive synthesis approach to whether a maximum penalty for murder should be imposed. What is crucial is consideration of whether it is appropriate in all of the circumstances to impose the maximum penalty and to explain the reasons for that conclusion. That conclusion is based ultimately on a consideration of the seriousness of the offending and the personal circumstances of the offender.

The NSW Court of Criminal Appeal has applied *Kilic* in cases other than murder, accepting that 'Both the nature of the offence and the circumstances of the respondent are to be considered in determining whether the offence is so grave as to warrant the imposition of the

[1] For a recent discussion of the concepts in the context of standard non-parole period offences (not murder and s 61) see *Tepania v R* [2018] NSWCCA 247

maximum penalty of 25 years imprisonment.': *R v Nolan* [2017] NSWCCA 91 at [66] (Price J with whom Hoeben CJ at CL and Fullerton J agreed).

Hamill J in sentencing for murder subsequent to *Kilic* declined to adopt the two staged approach in *Qaumi* [2017] SC 774: see [181] – [198]. A two stage approach was applied by McCallum J in *R v Terkmani (No 2)* [2017] NSWSC 1567, but it is not clear that the same result would not as well (and more clearly) have been achieved by a one-step instinctive synthesis approach as explained by the High Court in *Kilic*.

Whether by repeal of s 61 of the *Sentencing Act* (with consideration of maintenance of safeguard for juveniles), amendment of it, or by ongoing consideration by the courts with s 61 remaining as it is, consideration of the validity of a two stage process is submitted to be necessary.

It is further suggested that consideration of the prospect of non-parole periods being set with life sentences is worthwhile.

(V) Consideration of the principles that courts apply when sentencing for these offences, including the sentencing principles applied in cases involving domestic and family violence

The purposes of sentencing are set out in s 3A of the *Sentencing Act*.

The High Court has expressed in very strong terms the need for the courts to denounce domestic violence. In *Munda* at 620 [55] the majority emphasised the requirement for a just sentence to accord due recognition to the human dignity of the victim of domestic violence and the legitimate interest of the general community in the denunciation and punishment of a brutal, alcohol fuelled destruction of a woman by her partner. It was held that to impose a lesser punishment by reason of the identity of the victim as a domestic partner would be to create a group of second-class citizens, a state of affairs entirely at odds with the fundamental idea of equality before the law.

The Public Defenders are of the view that, consistently with this approach, each case needs to be considered on its own facts. Whereas there are important statements of principle relevant

to domestic and family violence in the cases binding NSW decision makers, problems would likely arise in attempting to define a range of sentences appropriate merely because of domestic relationship, or to qualify the sentencing discretion in such cases in any way more than is currently the case.

The High Court's subsequent judgment in *Kilic* recognised a societal shift in attitudes to domestic violence which may require current sentencing practices to depart from past practices, alongside a uniform application of principle: 266-7 [21] – [22].

There has been strong endorsement of these statements by the High Court by NSW sentencing courts, and by the NSW Court of Criminal Appeal in its review of the same. The particular importance of general and specific deterrence, retribution and denunciation in homicides in the context of domestic violence is strongly emphasised: see for example *R v Serutawake* [2014] NSWSC 1762 (Mathews AJ), *R v Murray* [2015] NSWSC 1034 (Schmidt J), *R v Cullen* [2015] NSWSC 768 (Harrison J) , *R v Archer* [2015] NSWSC 1487 (Wilson J) and on appeal [2017] NSWCCA 151, *R v Quinn (No 3)* [2016] NSWSC 1699 (Beech-Jones J) and on appeal *Quinn v R* [2018] NSWCCA 297.

Aggravating features referred to in s 21A(2) of the *Sentencing Act* have been interpreted and applied in a manner consistent with serious recognition of problematic features of domestic and family violence. For example it has been determined by a five judge bench of the Court of Criminal Appeal that the aggravating factor of committing a crime in the home of a victim, under s 21A(2)(eb) of the *Sentencing Act*, is made out in circumstances where the offender was not an intruder but was entitled to be in the home at the time: *Jonson v R* [2016] NSWCCA 286; (2016) 263 A Crim R 268.

At the same time, if the offender was not entitled to be in the home – for example where the offence was committed in breach of an Apprehended Domestic Violence Order — this will constitute a further aggravating feature pursuant to s 21A(2)(j). There is not understood to be any failure by NSW courts to take this aggravating feature into account where it occurs. The vulnerability of victims is often a highly relevant aggravating feature in homicide sentencing.

The commission of an offence in the presence of a child under 18 years of age is an aggravating factor under s 21A(2)(ea), recognising the deleterious effect that the commission of a crime, particularly one of violence, on a child's well-being and development. This can

sometimes be viewed as one of the most seriously aggravating features of a homicide where domestic relationships are involved.

The corollary of recognising this impact is understanding the complexity of issues involved where offenders have themselves been witness or victim to domestic violence, as referred to above.

Yours faithfully,

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