13 March 2019

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

Dear Mr Wood

Review of sentencing for murder and manslaughter: preliminary submission

Thank you for the opportunity to make a preliminary submission to the NSW Sentencing Council's review of sentencing for murder and manslaughter.

Legal Aid NSW suggests that the Sentencing Council consider the following points and matters as part of its review.

Sentencing is a highly complex exercise that calls for the judiciary to consider many different factors to arrive at an appropriate and just outcome in all of the circumstances. Legal Aid NSW maintains that any legislative intervention to limit or restrict the discretion of the sentencing judge should be carefully reasoned, be capable of being applied clearly and consistently with reference to determined factors, and be justified in all of the circumstances.

Judicial discretion is important in cases involving murder and manslaughter because of the diverse range of circumstances in which those offences occur. Judicial discretion in cases of manslaughter is particularly important in achieving individualised justice. While the taking of life has been recognised by the courts and legislature as a serious crime, the offence of manslaughter has the greatest variety of circumstances affecting culpability[1].

Standard Non-Parole Periods

Legal Aid NSW would be concerned about any increase in the Standard Non Parole Period (SNPP) for murder. The offence of murder has a maximum penalty of life imprisonment, already providing sufficient scope for sentencing for a wide range of

[1] *R v Blacklidge (*NSWCCA, unreported 12 December 1995).

offending conduct. The Sentencing Council should examine data from the Judicial Commission and consider the effect that the SNPP has had on sentencing trends for murder[2]. There should be no increase in the SNPP unless supported by evidence based reasons.

Mandatory life sentences

Legal Aid NSW would be concerned about any further fettering of judicial discretion by expanding the application of section 61 of the *Crimes (Sentencing Procedure) Act 1999* (CSP Act) in relation to murder. On the introduction of section 61 of the CSP Act, the then NSW Attorney General appropriately acknowledged that the offence of murder takes many and varied forms[3]. For this reason some judicial discretion to impose less than life imprisonment was retained.

In our view, there should be no further restriction on judicial discretion by expanding the application of section 61, including by reference to the nature of the relationship between the victim and the offender. Such a factor is likely already to be a relevant consideration in sentencing, but it has the potential to produce arbitrary and disproportionate outcomes if it is included in section 61 of the CSP Act.

Intimate partner homicide where the offender had been the primary domestic violence victim in the relationship

Legal Aid NSW suggests that the Sentencing Council give particular consideration to the current sentencing principles and sentence outcomes for intimate partner homicide offenders who were the primary victim of domestic violence in the relationship with the deceased person.

We note the following findings from a Domestic Violence Death Review Team Report. 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[4].

Considerations in sentencing for homicides involving domestic and family violence (DFV)

When considering homicides involving DFV, the Sentencing Council should consider what factors are taken into account in sentencing proceedings and whether there is any evidence that such homicides result in different sentencing outcomes.

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[2] Judicial Commission of NSW, 'The impact of the standard non-parole period sentencing scheme on sentencing patterns in New South Wales'. Monograph 33 – May 2010.

[3] The Hon. J. W. Shaw, Second Reading Speech. Crimes Amendment (Mandatory Life Sentences) Bill 1996. 17 April 1996.

[4] NSW NSW Domestic Violence Death Review Team Report, 2015 – 2017.

Factors and principles that might be considered in the sentencing of homicides involving DFV could include the following:

- how DFV is recognised, understood and explained in sentence proceedings and any contribution of gender-based attitudes;
- how expert evidence on DFV is used in sentencing proceedings;
- the use of provocation as a mitigating factor in sentencing in a DFV context; and
- the availability of non-legislative judicial guidance on DFV.

We note that courts are already taking into account several statutory aggravating factors when sentencing for intimate partner homicides. These factors may include that the offence occurred in the home, was a breach of trust or was committed in front of a child. If there is a history of previous convictions or breaches of supervision orders relating to DFV offences, then other aggravating factors arise. Sentencing principles relating to general deterrence and specific deterrence will also be given greater weight, resulting in a harsher sentence where there is a history of violence.

A discussion paper recently published by the Domestic Violence Resource Centre Victoria contains an analysis of factors taken into account when an intimate partner homicide occurs[5]. Given differences between jurisdictions, we suggest that a similar review of cases in NSW would be helpful in better understanding sentencing in such cases. We refer the Sentencing Council to the Judicial Commission of NSW, *Sentencing Trends and Issues – Sentencing for Domestic Violence*, which analysed factors affecting NSW sentences for domestic homicides and domestic violence in general[6]. The Australian Law Reform Commission also considers some of the above issues in its *Family Violence Report* of 2010, and makes various recommendations in relation to recognising family violence in sentencing.

High risk offenders

Legal Aid NSW suggests that the Sentencing Council also consider the impact of the high risk offender scheme on the detention and supervision of offenders who have served sentences for murder and manslaughter. The *Crimes (High Risk Offenders) Act 2006* was initially extended to high risk violent offenders in 2013 and has been further expanded by legislative amendments in 2016, 2017 and 2018. The availability of orders under that regime is relevant to the question of the deterrent effect and necessity of longer sentences for murder or manslaughter.

[5] Domestic Violence Resource Centre, '*Out of character?* Legal responses to intimate partner homicides by men in Victoria 2005–2014', 2016, p 65; Ch 10, at www.dvrcv.org.au/sites/default/files/out_of_character_dvrcv.pdf, accessed 16 June 2017.
[6] Judicial Commission of NSW, *Sentencing Trends and Issues No 45 - Sentencing For Domestic Violence,* 2016, pp 20-24.

Recent changes to sentencing legislation

We suggest that the Sentencing Council consider recent changes to sentencing legislation as a result of the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act* 2017 (NSW), and the impact this has had, or may have, on sentencing for manslaughter. Suspended sentences were abolished by this Act. Section 67 of the *(Sentencing Procedure) Act 1999* now precludes the court from ordering an Intensive Corrections Order in the case of a sentence of imprisonment for murder or manslaughter. While such sentencing options are only relevant for an extremely limited number of cases[7], we suggest that the Sentencing Council consider the appropriateness of this limitation on sentencing options for manslaughter offences at the lower end of the scale of criminality.

We also suggest that the Sentencing Council consider the potential and actual impact of the Early Appropriate Guilty Plea sentencing discount scheme on offences for murder and manslaughter, in particular the exception for any discount in cases of extreme culpability.

If you have any questions about this preliminary submission, please contact Julia Brown, Senior Law Reform Officer, Strategic Law Reform Unit, at Legal Aid NSW, on [redacted] or at [redacted]

Yours sincerely

[redacted]

Brendan Thomas
Chief Executive Officer

[7] The Judicial Information Research System (JIRS) reports that, between January 2008 and June 2018, 11 sentences for an offence under section 24 of the *Crimes Act 1900*, involved a dismissal, or a non-custodial or custodial sentence served in the community.