CONTENTS

HOMICIDE VICTIMS SUPPORT GROUP (Aust) Inc.

SUBMISSION

MURDER AND MANSLAUGHTER SENTENCING REVIEW

1. PREFACE

1.1 The Homicide Victims' Support Group (Aust) Inc. (**HVSG**) is a Non-Government organisation founded in 1993 by the parents of Anita Cobby, who was murdered in 1986, Gary and Grace Lynch and the parents of Ebony Simpson who was murdered in 1992, Peter and Christine Simpson, in order to provide counselling, support, advocacy and information to families and friends of homicide victims throughout NSW. Currently the HVSG has approximately 4,400 family members and sadly, that number grows on average every 3 days.

1.2 The HVSG has been instrumental in changing numerous pieces of legislation over the past twenty five years and it continues to advocate for the family members it supports. When its families come up against problems or inequities, HVSG works with them to change or improve things for the next victim. Although many have experienced feelings of powerlessness in the past, they stood up and demanded many of the rights outlined below, changing legislation and public perception in the process. This fight for reform was one of the founding objectives of the HVSG.

1.3 In April 2016, Miming Listiyani (aged 27 years old) was murdered by her ex-boyfriend, Khanh Thanh Ly. He pleaded guilty and on 28 February 2018, Associate-Justice Mathews sentenced Ly to imprisonment, consisting of a non-parole period of 13 years with a balance of 5 years, making a total term of imprisonment of 18 years.

This case exemplified the sentencing problems within the criminal justice system.

1.4 Associate-Justice Mathews summarily dismissed the presence of any "aggravating factors"[1] in sentencing Ly, such as the brutality of the offence (Miming Listiyani's head was repeatedly smashed into concrete and she was strangled) or the prior relationship and abuse of trust by Ly.

1.5 **Instead, the court identified one mitigating factor in relation to the commission of the offence. Associate-Justice Mathews noted that Ly had previously served 7 years in a Queensland prison in 2007 for his involvement in the Bali Nine drug syndicate. She noted that after his incarceration, Ly was diagnosed with post-traumatic stress disorder (PTSD) and depression. Associate-Justice Mathews said,**

1.6 "In all the circumstances I am thoroughly convinced that this offence would not have occurred were it not for the offender's PTSD, where the state of a person's mental health materially contributes to the commission of the offence, the offender's moral culpability for the offence may be reduced. That is, in my opinion, definitely the situation in the present case. It can also mean that the offender is not an appropriate vehicle for general deterrence, resulting in a lower sentence than would otherwise have been imposed....Given that his PTSD was caused by his incarceration in Queensland, his

---

[1] Part 3 of the Sentencing Procedure Act sets out various sentencing procedures. Section 21A of Part 3 provides a list of the aggravating, mitigating and other factors a court 'is to take into account' when sentencing for an offence.

imprisonment in relation to this offence is likely to be particularly onerous for him."[2]

1.7 Ly was sentenced to a non-parole period of 13 years, that is, 7 years less than the standard non-parole period for murder.

1.8 Miming Listiyani's father, Sem Eu said of this crime, "My daughter did nothing wrong. I lost my daughter, I lost everything.'

1.9 Sem Eu and the Listiyani family will carry this loss for the rest of their lives. With it, they will never understand how the man that murdered their child, received a sentence that does not serve justice; a sentence that valued the murderer over the victim.

1.10 On the 13th September, 2018, Sem Eu (father of Miming Listyani), Martha Jabour (HVSG, Executive Director) and Minouche Goubitz (HVSG, trauma counsellor) met with NSW Attorney General, The Hon. Mark Speakman, MP. SC. They set out the details of Miming's case, and the inconsistencies, contradictions and injustices of the sentence that was delivered. Sem Eu acknowledged that he cannot change what happened to Miming or the court's judgement. However, he and the Listiyani family are determined to change this flawed system. They are determined that other families will not go through the trauma of such a sentence, that will only compound the trauma of their loss. It is through their courage and strength that this review was initiated. HVSG asks that you listen to their voice and that of other victims like them.

[2] R v Ly [2018] NSWSC 197 at [31] - [32].

TERM OF REFERENCE 1: HOMICIDE SENTENCES IN NSW AND OTHER AUSTRALIAN JURISDICTIONS

2. NEW SOUTH WALES SHOULD IMPOSE MANDATORY LIFE IMPRISONMENT FOR THE CRIME OF MURDER

2.1 The *Crimes Act 1900* (NSW) (**Crimes Act**) currently provides that a person who commits the crime of murder is liable to imprisonment for life,[3] but this provision is subject to section 21(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (the **Sentencing Procedure Act**), which is a general power to reduce penalties.[4] The result is that although imprisonment for life is an option available to a sentencing judge, this sentence is rarely imposed and is treated as a maximum possible sentence. In the instance of manslaughter, the perpetrator is liable to imprisonment for no more than 25 years.[5]

2.2 In contrast, respective legislation in Queensland, Northern Territory, Western Australia, and South Australia impose a mandatory life sentence for murder and assign a minimum non-parole period. We submit that New South Wales should adopt a similar model.

2.3 We set out the statutory sentencing standards for murder in each Australian state and territory in the table below.

Jurisdiction	**Murder**	**Manslaughter**
Australian Capital Territory	Maximum of life imprisonment[6]	Maximum of 20 years; maximum of 28 years in the

[3] Section 19A.

[4] Section 21(1).

[5] Section 24, *Crimes Act 1900* (NSW).

[6] *Crimes Act 1900* (ACT) s 12(2); *Crimes (Sentencing) Act 2005* (ACT) s 10.

		instance of an aggravated offence.[7]
New South Wales	Maximum of life imprisonment[8]	Maximum 25 years; judge may pass sentence for nominal punishment.[9]
Northern Territory	Mandatory life imprisonment[10]	Maximum life imprisonment.[11]
Queensland	Mandatory life imprisonment [12]	Maximum life imprisonment.[13]
South Australia	Mandatory life imprisonment[14]	Maximum life imprisonment, or a fine as the court awards, or be both imprisoned and pay a fine.[15]
Tasmania	Maximum of life imprisonment[16]	Maximum life imprisonment.
Western Australia	Mandatory life imprisonment,	Maximum life imprisonment.[18]

[7] *Crimes Act 1900* (ACT) s 15; *Crimes (Sentencing) Act 2005* (ACT) s 10.

[8] *Crimes Act 1900* (NSW), s 19A; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21(1).

[9] *Crimes Act 1900* (NSW) s 23A; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21(1).

[10] *Criminal Code 1983* (NT) s 157(1).

[11] *Criminal Code 1983* (NT) s 161.

[12] *Criminal Code Act 1899* (QLD) section 305(1).

[13] *Criminal Code Act 1899* (QLD) section 310.

[14] *Criminal Law Consolidation Act 1935* (SA) s 11.

[15] *Criminal Law Consolidation Act 1935* (SA) s 13.

[16] *Criminal Code Act 1924* (Tas) s 158; *Sentencing Act 1997* (Tas) s 17.

[18] *Criminal Code Act Compilation Act 1913* (WA) s 280.

	with exceptions [17]	
Victoria	Maximum of life imprisonment[19]	Maximum 20 years.[20]

2.4 As set out above, in a number of states and territories the presumptive position is that the perpetrator is given a life sentence and is kept incarcerated for the mandatory minimum non-parole period, and is then assessed by the state parole authorities for relevant factors, which may include:

(i) likelihood of reoffending;

(ii) any recommendation for parole, or comments made by the sentencing court;

(iii) any medical, psychological, or other risk assessment reports;

(iv) previous compliance with any community based release programs; and

(v) any recommended rehabilitation programs or interventions.

On conclusion of this assessment the parole authority may make an assessment to release the perpetrator back into the community, and the parole authority may also impose conditions on that release.

---

[17] *Criminal Code Act Compilation Act 1913* (WA) s 279(4); exceptions include if the sentence would be clearly unjust and if the person is unlikely to be a threat to the safety of the community; *Sentencing Act 1996* (WA) s 90.

[19] *Crimes Act 1958* (Vic) s 3.

[20] *Crimes Act 1958* (Vic) s 5.

2.5 HVSG submits that the process outlined above is the preferable model, as it allows a full assessment of the perpetrator to ensure that they are fit and able to return to the community, and have undergone an appropriate level of rehabilitation.

2.6 HVSG submits that the absence of mandatory life sentences in New South Wales removes the opportunity for a parole authority or equivalent to assess and confirm that the perpetrator is sufficiently rehabilitated such that they are fit and able to be released into the community. In New South Wales a judge may recommend or prescribe that a perpetrator undergo courses and treatment to increase the chances of rehabilitation, but the effect of these recommendations are not assessed, and attendance and commitment to these recommended treatments is not a precondition to release once a perpetrator's full sentence has been served. As such, it is possible that a perpetrator may be released into the community despite evidence that they may continue to pose a threat to that community.

2.7 HVSG understands that there are concerns surrounding the impact on judge's discretion in the instance that mandatory life sentences are imposed, but HVSG submits that, provided that the perpetrator is truly rehabilitated, discretion is preserved at the point of the parole

authority, who is generally provided with data to properly assess the perpetrator's likelihood of re-offending.

3. NEW SOUTH WALES SHOULD IMPOSE A MANDATORY MINIMUM NON-PAROLE PERIOD FOR MURDER, IN LINE WITH OTHER STATES AND TERRITORIES

3.1 The Sentencing Procedure Act provides that, where a perpetrator has been convicted of murder, a standard non-parole period of 20 years applies.[21]

3.2 The difference between the standard non-parole period imposed in New South Wales and the mandatory non-parole period imposed in the Northern Territory, Western Australia, South Australia, and Queensland is the regard the sentencing judge must have to those periods when determining a sentence. The High Court held in *Muldrock v The Queen* that the standard statutory non-parole period is not prescriptive, but must rather be used only as a legislative guidepost.[22]

3.3 The non-parole periods of other states and territories, where applicable, are set out in the table below.

Jurisdiction	**Statutory Non-Parole Period**
Australian Capital Territory	N/A[23]
New South Wales	Standard of 20 years[24]

[21] Division 1A, *Crimes (Sentencing Procedure) Act 1999* (NSW); standard parole period is 25 years where the victim is under the age of 18, or when the offence arose because of the victim's occupation or voluntary work, or if they occupied one of the positions listed in this section of the *Crimes (Sentencing Procedure) Act 1999* (NSW); the standard non-parole period only applies when the perpetrator is at least 18 years of age.

[22] *Muldrock v The Queen* (2011) 244 CLR 120 at [29].

[23] *Crimes Act 1900* (ACT) s 12; *Crimes (Sentencing) Act 2005* (ACT) s 10.

[24] Part 4, Division 1A, *Crimes (Sentencing Procedure) Act 1999* (NSW); standard parole period is 25 years where the victim is under the age of 18, or when the offence arose because of the victim's occupation or voluntary work, or if they

Northern Territory	Mandatory 20 Years[25]
Queensland	Mandatory 20 Years[26]
South Australia	Mandatory 20 Years[27]
Tasmania	N/A
Western Australia	Mandatory 10 Years[28]
Victoria	N/A

3.4 HVSG submits that New South Wales should impose a mandatory minimum non-parole period of 20 years, to increase consistency, facilitate justice, and to bring New South Wales in line with other Australian states and territories we consider to have a preferable model. This mandatory minimum sentence would replace the standard non-parole period of 20 years, which would bring New South Wales in line with other Australian states and territories.

3.5 Where the Sentencing Procedure Act provides a standard non-parole period of more than 20 years, for example where the victim was under the age of 18 and the current standard non-parole period is

occupied one of the positions listed in this section of the *Crimes (Sentencing Procedure) Act 1999* (NSW); the standard non-parole period only applies when the perpetrator is at least 18 years of age.

[25] *Sentencing Act 1995* (NT) s 53A(6); the mandatory minimum non-parole period is 25 years in instances listed in section 53A(3) of this Act.

[26] Section 181, *Corrective Services Act 2006* (Qld); section 305(1), *Criminal Code 1899* (Qld); the minimum mandatory period when the murder was committed by someone who has previously committed a murder is 30 years, and 25 if it was a murder against a police officer.

[27] *Criminal Law Consolidation Act 1935* (SA) s 11; *Criminal Law (Sentencing) Act 1988* (SA) s 32(5)(ab).

[28] *Sentencing Act 1996* (WA) s 90.

25 years, HVSG submits that this should be similarly converted to a mandatory minimum non-parole period.

4. SENTENCES FOR MURDER/MANSLAUGHTER IN A DOMESTIC CONTEXT SHOULD NOT BE HANDED MORE LENIENT SENTENCES

4.1 HVSG submits that sentences given to perpetrators whose victims were known to them in a domestic context should not be given a more lenient sentence that they would have received had their victim not been known to them.

4.2 In a tabular report produced by the Public Defenders website, in cases from 1991 fewer than 5 instances where a female was murdered by her male partner resulted in a life sentence. Of the cases that did result in a life sentence, the perpetrator had generally engaged in two or more murders, or had committed the murder in the presence of a child, or had murdered a child as well as their female partner.[29] It appears that in New South Wales the murder of a female partner alone will not ordinarily result in a life sentence.

4.3 In *R v AKB (No.8) [2018] NSWSC 1628* Justice Davies considered the case of 45 year old AKB, who had murdered his wife by setting her alight in the presence of her two young children. AKB was sentenced to 36 years with a minimum non-parole period of 27 years. Davies J conceded that this crime involved 'gratuitous cruelty' and was aggravated by the presence of two children who tried to save their mother, but declined to impose a life sentence because, among other reasons, the murder arose from a relationship between the deceased and the offender and, although Davies J affirmed that this did not decrease the seriousness of the crime, his Honour held

---

[29] Public Defender website <https://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/Sentencing%20Tables/Murder_killing_female_partner.aspx> accessed 25 February 2019.

that it meant that community protection does not need to be taken into account in sentencing.[30]

4.4 We submit that, as a result of the failure to consider victims of family violence as members of the community, domestic violence offenders are not considered a risk to the community at large. This results in more lenient prison sentences, with the overall effect that:

(a) those who murder intimate partners are not considered as much of a risk to the community;

(b) the judiciary signals to the community that the murder of intimate partners are not as serious; and

(c) victims and victim's families are not provided the same level of justice, and indeed are not considered to form part of the "community" when considering whether the community is placed at risk.

[30] Paragraph 29, *R v AKB [No. 8] NSWSC 1628.*

TERM OF REFERENCE 2: THE IMPACT OF SENTENCING ON FAMILIES OF VICTIMS

5. GENERAL

5.1 It is well-recognised that a homicide has an enormous impact on a victim's family. Family members are immediately impacted by the initial trauma and grief of losing a loved one, and also experience long-term consequences including a higher risk of suffering from mental illness (including post-traumatic stress disorder, anxiety, depression and/or substance abuse), and of experiencing financial distress, relationship breakdowns and social withdrawal.

5.2 Less recognised, however, are other significant impacts that a sentencing decision can have on family members, particularly their feelings of closure, their self-worth and purpose, and their belief and trust in the criminal justice system.

5.3 When sentencing decisions are handed down, family members often feel like the sentences do not adequately reflect the crime, that the victim's life and the impact of their death have been insufficiently valued, and that the consequential impacts of the victim's death (including financial hardship on surviving family) have not been recognised. This can lead them to re-experience the anger and grief they went through in the immediate aftermath of the victim's death, and can cause feelings of isolation, frustration and depression.

6. VICTIM IMPACT STATEMENTS

6.1 Following a 1997 amendment to the *Criminal Procedure Act 1986* (NSW), sentencing courts in New South Wales have allowed the submission of victim impact statements.

6.2 However, from 1997 until amendments to sentencing procedure in 2014, the decision in *R v Previtera* prohibited the Courts from

considering victim impact statements when deciding on an appropriate sentence.**31** Victim impact statements therefore had no weight in sentencing decisions. Underpinning this principle was the idea that it would be 'wholly inappropriate to impose a harsher sentence upon an offender because the value of the life lost is perceived to be greater in one case than it is in the other'.**32** The court took the view that it would be inappropriate to impose a harsher sentence on an offender, where a family member of the victim had made a moving victim impact statement, than on an offender who's victim had no family to make such a statement, and that the taking of both lives should be equal under the law.

6.3 In 2014, the Sentencing Procedure Act was amended to overrule Previtera and give Courts the discretion to take victim impact statements into account in determining a sentence.**33**

6.4 Victim impact statements can now alleviate the impact of sentencing decisions on family members by giving family members an opportunity to be heard. Family members are able to express their experiences of victimisation and their feelings about the crime, the offender and the impact of the deceased's death. In this way, victim impact statements serve a significant therapeutic role by providing family members with an avenue through which they can participate in the sentencing process.

6.5 This recognition of harm can humanise the sentencing process, assist family members to find closure and can reduce feelings of isolation, powerlessness or exclusion which arise from not being involved in

---

[31] *R v Previtera* (1997) 94 A Crim R 76.

[32] Ibid 86 to 86.

[33] *Crimes (Sentencing Procedure) Amendment (Family Member Victim Impact Statement) Act 2014 No 18* (NSW).

the process. Victim impact statements therein provide a sense of psychological satisfaction.

6.6 Family members are also given visibility, and the justice system can acknowledge family victims' loss; for example in the sentencing of Khanh Thanh Ly for the murder of Miming Listiyani, Associate-Justice Matthews recognised the family's harm by saying '[y]ou have lost a beautiful, much-loved and highly valued person who was central to your lives. On behalf of the Court I extend my deepest commiserations...'[34]. Whilst Associate-Justice Matthews recognised the Listiyani family's loss and grief, she did not take their victim impact statement into account when sentencing Khanh Thanh Ly.

6.7 Depending on how a victim impact statement is treated by the Court, it may not have a positive impact and in the Listiyani case, such treatment can hurt the family and add to their sense of disempowerment. Since the 2014 amendments to sentencing laws, judges have generally "considered" or "taken into account" victim impact statements, but the making of a statement does not generally increase the penalty imposed on an offender. Sentencing courts rarely indicate what, if any, weight has been given to the statement in the sentence calculation.[35]

6.8 Adding further confusion is the fact that there is no guidance on what evidentiary weight should be given to victim impact statements. Consequently, where family members do not understand the purpose and role of a victim impact statement (or believe that making a statement will have an explicit or defined impact on a sentence), they can feel like their expectations have not been met and may experience significant disappointment, anger and frustration, or feel that going through the process of making the statement was all for

---

[34] *R v Ly* [2018] NSWSC 197 at 41.

[35] See Booth, Tracey 'Victim Impact Statements and Sentencing Homicide Offenders: A Critical Analysis of Recent Changes to the Crimes (Sentencing Procedure) Act 1999 (NSW)' (2018) 41(1) UNSW Law Journal 130.

nothing. As the mother of one murder victim explained to HVSG, 'while family members value this opportunity [to make a victim impact statement] and many find the writing process to be therapeutic, they often wonder what if any influence their contribution had on the length of the sentence".

6.9 HVSG submits that additional guidelines on the evidentiary weight that courts should give to victim impact statements should be provided to sentencing authorities, to enhance transparency and improve consistency in the treatment of victim impact statements.

6.10 HVSG recognises that giving weight to victim impact statements may give the appearance that one life is more valuable than another. However, victim impact statements can and do play an essential role in reducing the impact of sentencing decisions on the family members of homicide victims. It is therefore essential for there to be a clear understanding between sentencing authorities, family victims and the community as to the impact that a victim impact statement will have on a sentencing decision. Current legislation is not clear enough. The introduction of further guidelines will also assist victim support groups to manage the expectations of family members who are making the statements and ultimately assist families to cope with the death of a loved one.

TERM OF REFERENCE 3: THE COMMUNITY IMPACT OF DOMESTIC AND FAMILY VIOLENCE

7. BACKGROUND

7.1 In Australia, 1 in 6 women and 1 in 16 men have experienced physical abuse by a current or former partner.[36] Further, one woman is murdered each week and a man is murdered each month by their current or former partner.[37] Domestic and family violence is a serious crime and can have significant and negative effects for not only victims and their children, family and friends, but also the wider community. Measuring the impact that these crimes can have on the community is complex, however this section aims to broadly cover the impact on children in the community and the economy, and will also touch on the unreported impacts.

8. CHILDREN

8.1 Across the nation, approximately 1 in 4 children will be exposed to family violence in their lives.[38] The children who are part of this statistic will unfortunately often grow up without a positive relationship model, and are left with lifelong scars as a result. They witness physical and emotional abuse, which often becomes the norm in their lives. At such a vulnerable stage in their lives, these children require support and guidance from their families and parents. These children often require medical attention and counselling in order to overcome depression, grief and post-

---

[36] Australian Institute of Health and Welfare. (2018) Family, domestic and sexual violence in Australia. < https://www.aihw.gov.au/reports/domestic-violence/family-domestic-sexual-violence-in-australia-2018/contents/summary>.

[37] Bryant, W & Bricknall, S. (2017). Homicide in Australia 2012-2014: National Homicide Monitoring Program report. Canberra: Australian Institute of Criminology.

[38] Indamuer, D. Australian Institute of Criminology. (2001) Young People and Domestic Violence, Pg 2.

traumatic stress disorder directly related to the domestic violence they have experienced.

8.2 Amongst those children exposed to violence are a significant portion of individuals who later offend themselves. Children who have been exposed to domestic and family violence have a higher chance of reoffending and in turn being charged with similar crimes.[39] This domino effect can continue for generations, widely impacting the community.

8.3 The violence experienced by the affected children also often attracts a broader economic impact on the community.

9. ECONOMIC

9.1 A report prepared by KPMG has estimated that the total cost of violence in Australia in 2015-2016 was $22 billion.[40] This cost has considered a myriad of aspects and impacts, including 'pain and suffering, the impact on the health system, production and consumption, children, justice and service system and transfer payments.'[41]

9.2 Amongst this figure, the most significant costs to the economy can be attributed to the flow on effects of violence relating to mental and physical pain and suffering, including the increasing demand and need for medical and health services. Victims of violence can often require significant assistance to mend their psychological wellbeing, but also require adequate care to cater for illness and pain.

9.3 Further, exposure to violence at home is one of the biggest catalysts to homelessness in Australia, including a higher rate of alcohol and

---

[39] NSW Government. (2018) Reducing domestic violence reoffending < https://www.nsw.gov.au/improving-nsw/premiers-priorities/reducing-domestic-violence-reoffending/>.

[40] KPMG (2016) 'The cost of violence against women and their children in Australia' Canberra: Department of Social Services.

[41] Ibid p 4.

drug abuse. Over 100,000 people in Australia are homeless, and amongst that statistic those who have been made homeless as a result of family breakdown are also the most likely to not have any incentive to return back to their home and remain on the street for an extended period of time. The economic cost of homelessness on the community is estimated to be $407 million.[42] This cost includes, but is not limited to, running homeless shelters and refuges as well as ensuring that these individuals have access to financial care and dependency.

10. UNREPORTED AND CHALLENGES IN MEASURING COST

10.1 In addition to the expense to the community, there are a vast amount of not-for-profit organisations that donate services, time and money to assist domestic violence victims. Many of these organisations provide their assistance voluntarily. The amount of unpaid work and voluntary tasks that people have provided to those in need of assistance is significant, however it is extremely difficult to measure.

10.2 A concerning aspect of the impact that domestic and family violence has on the community is that the statistics outlined above are only a portion of what is the probable reality. Due to the nature of domestic crime, those who experience violence are often likely to keep their feelings to themselves, are not always willing to seek assistance from others and can internalise their feelings. An additional impact should be considered as a separate portion of the community who is suffering. This should account for all unreported instances of violence and those people who actively choose not to seek assistance as well

[42] Ibid p 10.

as the ever-growing community awareness of violence in domestic and family situations.

TERM OF REFERENCE 4: THE APPLICATION OF SECTION 61 OF THE CRIMES (SENTENCING PROCEDURE) ACT TO LIFE SENTENCES FOR HOMICIDE

11. SECTION 61

11.1 Section 61(1) of the Sentencing Procedure Act requires courts to impose a life sentence on an offender convicted of murder if satisfied that the offender's '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.'

11.2 However, notwithstanding the fact that s 61(1) applies, s 61(3) preserves the court's discretion under s 21(1) to impose a sentence of imprisonment 'for a specified term' even though the Sentencing Procedure Act would otherwise imposed a sentence of life imprisonment.

12. APPLICATION OF SECTION 61

12.1 Section 61(1) makes clear that a life sentence for murder is reserved for the 'worst type' of murder case.[43] The section has been criticised by courts as being devoid of content,[44] since a sentencing judge's primary obligation is always to impose the sentence which is appropriate in all circumstances. Therefore, if an offender's culpability is so severe that the community interest in retribution, punishment, community protection and deterrence can *only* be met through a life sentence, then a sentencing judge has no option but

[43] *Ibbs v R* (1987) 163 CLR 447 at 451.

[44] See: *Ngo v R* [2013] NSWCCA 142 at [29].

to impose a life sentence, even without the requirement in s 61(1) that they do so.

12.2 Furthermore, courts have noted that it is difficult to reconcile s 61(1), which appears to mandate a life sentence for certain cases of murder, with 61(3) and 21(1) which give judges a discretion to impose an alternate sentence notwithstanding that mandate.[45]

12.3 In practice, many courts apply s 61 in a two-step process:[46]

(a) First, the court asks whether the seriousness of the offence places it within the 'worst case category' of offending for which s 61(1) imposes a life sentence.[47] Courts are reluctant to prescribe a list of cases which would fall within the worst category of offending;[48] in general, the sentencing judge must be able to point to particular features of the offence which are 'of very great heinousness'.[49] The absence of one or more of the indicia of retribution, punishment, community protection or deterrence is not decisive but may make it more difficult for the court to conclude that the offender's culpability can only be met by a life sentence.[50]

(b) If the court concludes that the offence falls within the worst category of offending, they next consider whether nevertheless the subjective circumstances of the offender mean that the court should exercise its s 21(1) discretion to impose a lesser sentence than life imprisonment.[51]

---

[45] *R v Ngo* at [30]; R v Harris (2000) 50 NSWLR 409 at [93]; Dean v R [2015] NSWCCA 307 at [69].

[46] R v Bell (1985) 2 NSWLR 466; R v Merritt (2004) 59 NSWLR 557 at [36] - [37].

[47] *R v Merritt* 59 NSWLR 557 at [39].

[48] Veen v R (No 2) (1988) 164 CLR 465 at 478.

[49] *R v Twala* NSWCCA unreported (3 November 1994) at [7].

[50] *R v Merritt* 59 NSWLR 557 at [53] - [54]; *R v Kalazich* (1997) 94 A Crim R 41 at 50.

[51] *R v Merritt* (2004) 59 NSWLR 557 at [36].

TERM OF REFERENCE 5: HOMICIDE SENTENCING PRINCIPLES (INCLUDING DOMESTIC AND FAMILY VIOLENCE PRINCIPLES)

13. SENTENCING PRINCIPLES

13.1 Sentencing statutes provide general rather than prescriptive guidance, and Australian judges maintain broad sentencing discretion.

13.2 Current sentencing principles operate as guides to promote 'individualised justice', an approach which involves an 'exercise in which all relevant considerations are simultaneously unified, balanced, and weighed by the sentencing judge'.[52] Invariably the 'guiding principles' applied to each individual case are at the discretion of the judiciary, resulting in sentencing inconsistencies across various classes of offences.

13.3 In NSW, the Sentencing Procedure Act sets out the purposes of sentencing at section 3A. On the one hand, the purposes include the need to ensure that an offender is adequately punished for an offence, that the harm done to a victim is recognised, and that the conduct of the offender is denounced.[53] On the other hand is the (disparate) need to promote the rehabilitation of the offender.[54]

13.4 Part 3 of the Sentencing Procedure Act sets out various sentencing procedures. Section 21A of Part 3 provides a list of the aggravating, mitigating and other factors a court 'is to take into account' when sentencing for an offence. Presumably, if a factor listed in s 21A arises in the circumstances of case, the courts will have regard to it

---

[52] Sarah Krasnostein & Arie Freiberg, Pursuing Consistency in an Individualistic Sentencing Framework: If You Don't Know Where You're Going, How Do You Know When You've Got There?, 76 L. & Contemp. Probs. 265, 268 (2013), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4354&context=lcp.

[53] *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 3A(a), (g), (f).

[54] *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 3A(d).

when sentencing. Evidence of the application of sentencing principles, however, suggests that this is not always the case.

14. APPLICATION OF SENTENCING PRINCIPLES: DOMESTIC VIOLENCE OFFENCES

14.1 In the context of a domestic violence offence, one would expect that a court would take into account at least the following aggravating factor under 21A(2):

(k) the offender abused a position of trust or authority in relation to the victim,

14.2 This factor, however, was overlooked in the recent decision of *R v Ly*.[55] In this case, the court at paragraph [12] summarily dismissed the presence of any "aggravating factors" and identified one mitigating factor in relation to the commission of the offence:

> *I will commence with discussing the aggravating and mitigating factors that are **required** to be taken into account under s21A....being factors relating to the offence as opposed to the offender... There are no aggravating factors under s 21A(2). The one mitigating factor under s21a(3)(b) is that the offence, being a spontaneous one, was not part of planned or organised criminal activity.*

14.3 In *R v Ly*, the offender and victim had been in a 2 year relationship and had conceived a child together (although this pregnancy was later terminated). In addition, the victim sustained multiple fatal injuries occasioned by acts such as 'the deceased's head being forced against the concrete pavement on numerous occasions'; 'extensive bruising of the neck, which indicated neck compression as well as injuries to the lips and mouth that were suggestive of suffocation';

---

[55] *R v Ly* [2018] NSWSC 197.

and 'stomping on the deceased's back or... heavily kneeling on her while forcing her head into the pavement.'[56] The court:

(a) failed to take into account that the offender clearly abused a position of trust, inciting violence against the victim with whom he had been in relationship for 2 years and following an evening where the offender picked up the victim from her home and spent the night out with her (s21(A)(2)(k); and

(b) appears to have briefly acknowledged the gratuitous cruelty involved in the offence (s21A(2)(f)), but ultimately concluded that the 'the objective seriousness of the offending in this case is less than submitted by the Crown, but more than submitted on behalf of the offender. It is at about the mid-point of objective seriousness for murder.'[57]

14.4 As to the aggravating factors relating to the offender personally, the court identified one regarding the offender's previous conviction in relation to the importation of drugs. The court, however, went on to rely on the PTSD suffered by the offender as a result of incarceration for this previous offence, as a mitigating factor demonstrating that the offender had good prospects of rehabilitation and therefore warranted a lesser sentence. Apologising to the family for a sentence he Honour described as likely to be considered 'completely inadequate',[58] the offender was convicted to a non-parole period of

[56] Ibid at [10].

[57] Ibid at [15].

[58] Ibid at [41].

13 years, that is, 7 years less than the standard non-parole period for murder.

14.5 Relevant aggravating factors, in the context of domestic violence homicides, have been overlooked and arguably misapplied in other domestic violence cases:

(a) In *R v AKB (No.8)*, the court reasoned that an offender who kills their spouse or partner is less of a threat to the community than an offender who kills a stranger.[59] His Honour's reasoning has the effect of creating a group of second-class citizens (partners and spouses). His Honour also considered it unlikely that the offender would have another partner after his prolonged period of incarceration, and also took into account the need to denounce this conduct as a matter of general deterrence. Unlike R v Ly his Honour did not give weight to the offender's PTSD.

(b) In *R v Hosseiniamraei*, the offender killed his wife after she left him and took out an Apprehended Domestic Violence Order (ADVO) following his repeated threats to kill her.[60] Despite this fact, as well as subsequent death threats and the offender's purchase of the murder weapon in the hours prior to his final meeting with the deceased, Hulme J did not accept that the offence was premeditated and thus held it was less serious than it otherwise might have been.[61] His Honour also did not consider that the offender's breach of the ADVO meant his offence was aggravated by the fact it was committed while on

[59] *R v AKB (No.8)* [2018] NSWSC 128.

[60] *R v Hosseiniamraei* [2016] NSWSC 1181.

[61] Ibid at [46].

conditional liberty.[62] This was contrary to previous judgments of the NSWSC which held that it is an aggravating factor that an offence was committed in breach of an ADVO.[63]

(c) There is uncertainty about the correct approach in domestic violence sentencing to s 21A(2)(eb): 'the offence was committed in the home of the victim...'. The NSW Sentencing Council noted that courts have previously approached this factor in line with the historic common law position that it applies only to intruders and not to offenders living in the same home as the victim.[64] Therefore some sentencing courts have dismissed the fact that a domestic violence offence was committed in the victim's home as a mere incident of the 'domestic context' of the offence.[65] Nevertheless, Justice Schmidt in *R v Murray* noted that '[t]he correctness of that construction has been questioned, but the issue has not been resolved', and ultimately took this factor into account in sentencing the offender.[66]

15. A NEED TO REINFORCE SENTENCING PRINCIPLES FOR DOMESTIC VIOLENCE OFFENCES

15.1 Courts have previously emphasised that while deterrence, community protection and denunciation are only some of the purposes of sentencing under s 3A of the Sentencing Procedure Act,

---

[62] Ibid at [23]; Sentencing Procedure Act s 21A(2)(j).

[63] See *Jeffries v R* [2008] NSWCCA 144; R v Murray [2015] NSWSC 1034 at [70].

[64] NSW Sentencing Council 'Sentencing for Domestic Violence: Report' (2016) 16.

[65] R v Valiukas at [32], R v Homann at [50].

[66] *R v Murray* [2015] NSWSC 1034 at [77].

they are to be attributed **significant weight** in the sentencing exercise for offences involving domestic violence.

15.2 Given growing evidence of a divergence from this position, HVSG submits that there is a need for courts to be re-directed and reminded by the legislature of this position.

15.3 The existence of a domestic relationship between an offender and victim is not to be regarded as rendering an offence of a lesser criminality: the seriousness of an offence is always to be assessed on its facts.[67] The High Court has observed that imposing a lesser punishment 'by reason of the victim's identity as the offender's partner would create a group of second class citizens, a state of affairs entirely at odds with the fundamental idea of equality before the law'.[68]

15.4 The importance of denouncing domestic violence offences was eloquently re-iterated by the NSW Supreme Court in *R v Archer* [2015] NSWSC. At [174]-[176], Wilson J said:

> *Sadly, it is rare that a week goes by in Australia without a woman somewhere in the country being murdered by her spouse or partner. Violent and non-fatal attacks by persons known to the victim are also common. That is something of which we as a community should be ashamed, and which the courts must seek to address when sentencing offenders such as Mr Archer.*
>
> *It is incumbent upon this Court to clearly signal the community's intolerance of domestic violence. The High Court has recently given powerful expression to the need for the*

---

[67] *Hussain v R* [2010] NSWCCA 184 at [80]; *R v Eckermann* [2013] NSWCCA 188 at [35].

[68] *Munda v Western Australia* (2013) 249 CLR 600 at [55].

courts to denounce domestic violence at [55] in Munda v Western Australia [2013] HCA 38,

> *"A just sentence must 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. A failure on the part of the state to mete out a just punishment of violent offending may be seen as a failure by the state to vindicate the human dignity of the victim; and to impose a lesser punishment by reason of the identity of the victim is to create a group of second-class citizens, a state of affairs entirely at odds with the fundamental idea of equality before the law." (per French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ)*

This court must be guided by that principle.

15.5 Unfortunately, as evident from the examples cited at paragraph 14.5 above, these principles are not consistently interpreted and applied in sentencing decisions at all levels of the court hierarchy.

15.6 HVSG submits that there is a need to return to the guiding principles advocated by members of the judiciary in cases like *R v Archer* and *Munda v Western Australia.* This may be achieved by:

(a) (**judicial education**) provision of sentencing information to judges, including:

(A) specific guidance on which mitigating, aggravating and other factors are likely to arise in domestic violence cases, and reasons why they should not be arbitrarily bypassed when determining sentences in certain classes of offences;

(B) access to sentencing statistics and databases to encourage the consistent application of relevant factors across various classes of offences.

In NSW, these educational tools may perhaps be best prepared and facilitated by the NSW Sentencing Council.

(b) (**legislative amendment**) adopting a "special rule" for domestic violence offences in the Sentencing Procedure Act. For example, ss21(5A) and (5AA) of the Sentencing Procedure Act set out special rules for child sexual offences and self-induced intoxication. A special rule can be developed for domestic violence offences. This rule may develop over time, but initially it should ensure that factors such as whether or not an offender knows the victim is not to be taken into account as mitigating factor in assessing the objective seriousness of an offence.

TERM OF REFERENCE 6:
IMPACT OF PUBLIC OPINION AND MEDIA COVERAGE ON SENTENCING

16. OVERVIEW

16.1 HVSG submits that, as an additional matter, the Sentencing Council should examine the impact of media coverage and social media attention on sentencing decisions.

16.2 There has been very little work on ascertaining the influence of public opinion on and perceptions of sentencing in Australia and even less on determining what, if any, particular role media attention (including social media) plays in this regard. While increasing attention has been paid to the impact of mass media and social media on jury selection and deliberation, the right to a fair trial and the principle of open justice, the issue of sentencing has remained largely untouched.

16.3 For this reason, HVSG believes that there would be considerable value in the Sentencing Council exploring the various dimensions of this issue in the context of domestic homicide sentencing.

16.4 To help inform the Sentencing Council's inquiries, the following section sets out:

(a) background on the current state of sentencing law in NSW as it relates to the considerations of public denigration and media attention; and

(b) HVSG's concerns in relation to the impact of public perceptions of domestic homicide has on the sentencing process.

17. "EXTRA-CURIAL" PUNISHMENT AND SENTENCING

17.1 Subsection 3A(a) of the Sentencing Procedure Act requires that that the offender be "adequately punished". The adequacy of a sentence may include an assessment of whether any incidental or extra-curial punishment has taken place and what, if any weight, it should bear on the overall sentence.

17.2 The question of whether public denigration or public humiliation constitutes extra curial punishment that should mitigate a sentence remains unresolved by the High Court.[69] The general state of the law in NSW is that where public scorn reaches such a proportion that it has a physical or psychological effect on the person, it may properly be considered by the sentencing court.[70]

17.3 The issue of whether adverse media coverage can be taken account by the court as a mitigating factor at sentencing has been the subject of increasing judicial consideration in NSW. The following recent NSW Supreme Court cases have considered the issue in the context of mitigating circumstances, including[71]:

(a) In *R v Curtis (No 3)* [2016] NSWSC 866, an insider trading case, the court considered that "[a] small number of extremely nasty remarks" published since the verdict had caused the suffering to the defendant and that "some small weight" should be given to that consideration;

(b) In *R v Wran* [2016] NSWSC 1015, a case of robbery and accessory after the fact to murder, the court referred to the "significant public attention" focused on the case, "ill-informed reporting", "egregoious articles" and "a sustained and

---

[69] *Ryan v R* (2001) 206 CLR 267.

[70] see eg *R v Allpass* (1993) 72 A Crim R 561.

[71] We note that the Sentencing Council has drawn attention to these cases: http://www.sentencingcouncil.justice.nsw.gov.au/Pages/Adverse-Media-Coverage-Affecting-Sentencing.aspx

unpleasant campaign by some of the daily newspapers circulating in Sydney". The court considered that this created an "unavoidable spectre of enduring damage" to the defendant's reputation" and was disproportionate to her involvement in the events. For this reason, the court concluded that a reduced sentence of was appropriate; and

(c) In *R v Obeid (No 12)* [2016] NSWSC 1815, the court considered whether the sentence for the defendant for wilful misconduct should be reduced given the extensive media coverage of the case. In contrast to the above cases, the court found that the media coverage did not constitute an extra-curial punishment on the basis that the defendant was a public figure, the case involved a matter of public importance (political corruption) and the news reporting did not sensationalise facts that were irrelevant to the offending conduct. The court did, however, take into account of the fact that the defendant's family had suffered as a result of the public attention and the resulting effect this had on the defendant but "only in the relatively limited sense".

17.4 HVSG notes that none of these decisions involved direct charges of murder or manslaughter. However, HVSG draws the Sentencing Council's attention to two high profile sentencing cases of domestic homicide where the court has declined to consider public attention or media coverage to amount to a mitigating factor:

(a) In *R v Gittany (No 5)* [2014] NSWSC 49, her Honour noted that she considered the impact upon sentence of public attention attracted by the defendant, if relevant, to be "very slight". The court noted that while some of the reporting may had been sensationalist, there was nothing to suggest that it was

malicious or untrue, and that the defendant had embraced the media attention to publicise his innocence;

(b) In *R v Keli Lane* [2011] NSWSC 289, the court noted the "invasive" and "relentless" media attention that the defendant was subjected to throughout the trial and the prior coronial inquests. While the court considered that the exceptional circumstances of the media involvement had the potential to warrant "some degree of reflection in the sentence to be imposed", it held that there was no clear evidence of the impact this had had on the defendant and therefore did not propose to make allowance for this as part of the sentence.

17.5 From the perspective of victims and families, it is important that sentencing decisions, and the factors that weigh upon the court, are consistent and transparent. To date, it appears that the courts have taken a reasoned and evidence-based approach to the weight to be given to the adverse impacts of media attention and public opinion at sentencing. The Sentencing Council should consider whether additional guidance should be provided to the courts to encourage active consideration and articulation of these issue and to discourage subjective and random application or unconscious influence.

18. PUBLIC PERCEPTIONS ON DOMESTIC HOMICIDE AND SENTENCING

18.1 Media coverage of the criminal justice system shapes the public's perception on crime, offenders and sentencing decisions. In turn public attitudes and community views toward justice influence judges and magistrates' sentencing decisions. As the Victorian Sentencing

Advisory Council has noted, the public is an active participant in the discourse of sentencing.[72]

18.2 In the context of domestic homicide, social and legal attitudes toward family violence show that there is a "hierarchy of violence" where gendered assaults on family members are viewed as considerably less serious than assaults on strangers.[73]

18.3 Interwoven with this hierarchy is the narrative of the "Good Bloke Under Pressure", which often appears in the media following cases of domestic homicide perpetrated by male offenders.[74] As Ford explains, the problem with this framing is that it "reinforces an underlying community belief that there are circumstances in which men... can be driven to this kind of response. That indeed the pressures of being a man can be so intense and suffocating that they feel they have no choice but to end the lives of everyone they're 'responsible' for." [75]

18.4 HVSG is concerned that the effect of this hierarchy and narrative is that, in sentencing decisions, domestic violence offenders – including perpetrators of domestic homicide – are seen as posing a lower threat to the community at large. This erases the experience of and threats posed to family victims and sends a message that they are less deserving and the crime they have experienced is less serious than other offences. The fact that from 1991 to 2018, only two of 93 cases of domestic homicide involved the imposition of a life

---

[72] Karen Gleb, "Myths and Misconceptions: Public Opinion Versus Public Judgment About Sentencing" (Sentencing Advisory Council, July 2006).

[73] Lisa Featherstone & Andy Kaladelfos, "'Hierarchy of violence' still evident in court sentencing" (The Conversation, 19 November 2018) https://theconversation.com/man-who-burnt-his-wife-alive-gets-at-least-27-years-jail-but-not-life-as-victim-was-no-stranger-106527 .

[74] Danielle Tyson, "Filicide in Australian Media and Culture" (May 2017); Clementine Ford, "The Problem with the 'Good Bloke' Narrative" (Sydney Morning Herald, 14 May 2018) https://www.smh.com.au/lifestyle/life-and-relationships/the-problem-with-the-good-bloke-narrative-20180514-p4zf6r.html

[75] Clementine Ford, "The Problem with the 'Good Bloke' Narrative" (Sydney Morning Herald, 14 May 2018) https://www.smh.com.au/lifestyle/life-and-relationships/the-problem-with-the-good-bloke-narrative-20180514-p4zf6r.html

sentence (and both involved the murder of a child or children in addition to a female partner) underlines this point.

18.5 A recent example of this is the decision of in *R v AKB (No 8)* [2018] NSWSC 1628, where Davies J held that a man guilty of murdering his wife by burning her alive because the level of culpability in the commission of the offence was not so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of a life sentence. A key matter in his Honour's reasoning was the fact that "the murder arose from the relationship between the deceased and the offender".[76] While the court emphasised that the murder of a spouse or a partner is no less serious than the murder of a stranger, it undermined this statement by suggesting that this form of offence does not give rise to the same need for community protection.

[76] *R v AKB (No 8)* [2018] NSWSC 1628 at [33].

19. CONCLUSION

19.1 HVSG supports some of the justice system's most vulnerable people. It has worked with family members impacted by homicide for almost three decades and uses its frontline experience to advocate for reform. HVSG welcomes the opportunity to engage with the Sentencing Council on this important review of murder and manslaughter sentencing.

19.2 HVSG asks that Council considers the importance of making NSW consistent with other jurisdictions in Australia that impose a mandatory sentence for murder with a minimum non-parole period. It asks for greater clarity and consistency in the legislation and guidelines around sentencing that will reflect the seriousness of any homicide.

19.3 In November 2016, the Listiyani family suffered an unimaginable loss. Their daughter was taken away from them, violently. The man who did this may be free in 2029. Sem Eu and HVSG are determined that Miming Listiyani's death will not be for nothing; that her death will be as meaningful as her short life was. HVSG and the Listiyani family are determined to change this flawed system. HVSG asks that you listen to this family's voice and that of other victims like them and that you work in partnership with HVSG to review and reform NSW sentencing laws.