OUR REFERENCE

M.Carey

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DATE

DIRECTOR'S CHAMBERS

ODPP
New South Wales

14 May 2019

The Hon James Wood AO QC
Chairperson
NSW Sentencing Council
GPO Box 31
Sydney NSW 2001
By email: sentencingcouncil@justice.nsw.gov.au (Attn: Joseph Waugh)

Dear Mr Wood,

Sentencing Council Review of Sentencing for Murder and Manslaughter

Thank you for the opportunity to make a preliminary submission in relation to the Sentencing Council's Review of Sentencing for Murder and Manslaughter. The below comments, limited to the nominated topics of particular interest, will be supplemented by further input as the Review process progresses.

1. The standard non-parole periods for murder and whether they should be increased

I consider that the standard non-parole periods (SNPP) for murder are adequate and do not require an increase.

The Review may, though, benefit from discussion as to whether there should be a SNPP for domestic and family violence homicide where the offender had a history of such violence in relation to the victim. One clear benefit of such an approach would be to send a clear, unequivocal message to the community that such violence in not acceptable.

2. The sentences imposed for domestic and family violence-related homicides

I consider that there is valid community disquiet in relation to some sentences imposed for domestic and family violence-related homicide. Such sentences can appear to not appropriately reflect the full circumstances of the offending where the homicide occurred in circumstances of ongoing domestic violence perpetrated by the offender upon the victim. Some of the aggravating factors in the *Crimes (Sentencing Procedure) Act 1999*, such as s21A(2)(ea) and (eb), offences committed in the presence of a child and in the home of the victim, and, more specifically, (2)(d), a record of previous convictions, particularly as it

relates to serious personal violence offences, go some way to a recognition of the reality in which domestic and family violence-related homicide occurs.

Arguably, though, they do not go far enough, as they do not adequately reflect the true nature of domestic and family violence. Not all such violence involves physical violence. It can also involve, in combination or in isolation, emotional and psychological violence, for example, control, coercion, threats and isolation. Not all domestic and family violence is reported and, even where reported, results in a conviction.

As such, the Sentencing Council should consider in its Review whether a further s21A(2) aggravating factor or factors is required to reflect the reality of homicides (and other relevant offences) committed as part of an ongoing pattern of domestic and family violence.
Such consideration would include defining domestic and family violence for the purpose of s21A(2) to include all forms of such violence, not just physical, and not limiting such history to resulting criminal convictions or to where such evidence was admitted at trial. It should also be limited to perpetrator offenders, not victim offenders. (It is also not intended that homicides committed without a background of abuse be captured.)

A stand-alone reference to domestic and family violence as an aggravating factor would send a clear message to the public, including the family and friends of the victim, that such violence is taken seriously, and would ensure that any sentence clearly reflects this.
Conversely, consideration could also be given to including, as a mitigating factor in s21A(3), a history of domestic or family violence committed upon the offender by the victim; albeit the need for such recognition at sentencing for this category of offender is, given current conviction and sentencing patterns, arguably less than for perpetrator offenders.

Consideration could also be given in the Review to how the mitigating factors referred to a s21A(3)(c) and (g), the offender was provoked by the victim and the offender is unlikely to re-offend, are applied. These two mitigating factors have the capacity to undermine advances in legislative and judicial understanding of domestic and family violence if not applied appropriately, including within the framework of related legislative provisions.
(Attention could also be directed to (e) and (f), the offender's lack of a criminal history or a significant criminal history, and the offender as a person of good character: for domestic and family violence perpetrators, good character may provide the same cloak of respectability as it did and does for perpetrators of child sexual abuse).

As such, the Review, in relation to s21A(3)(c), could consider whether sentences are being mitigated by victim behaviour that would not give rise to the partial defence of extreme provocation as per s23 of the *Crimes Act 1900* and whether this approach is appropriate.
The Review could also consider, in relation to s21A(3)(g), the seemingly accepted proposition that an offender who kills within the context of domestic and family violence is unlikely to re-offend (as opposed to an offender who kills outside this parameter).

Whilst this may be true of victim offenders, it is arguably not a valid proposition when referring to offenders with a history of domestic and family violence perpetrated upon the homicide victim. To suggest that as a class, perpetrator offenders are unlikely to re-offend because they "only" offended against, for example, an intimate partner, has the potential to be seen as a subtle form of victim blaming and as an undervaluing of (overwhelmingly) women's lives. It also ignores the reality that offenders who commit offences in the context of ongoing domestic violence are just as likely to re-offend as any other offender, but perhaps as against a more limited and defined cohort or community of victims.

With respect to the other topics outlined in the Terms of Reference, particularly the impact of sentencing decisions on the family members of homicide victims, I raise for consideration the following issues:

- Whether, where there is a history of domestic and family violence as against the victim, family victims should be able to refer to this in their Victim Impact Statement (VIS), even where such evidence was not admitted at trial. A VIS is the only way family members of homicide victims are able to participate in the sentencing process. For many, being unable to outline the devastating effect a history of domestic and family violence, which culminated in the homicide of the victim, had on the victim, their children and the family in general, is heartbreaking. It makes the VIS process artificial, undermining its value and robbing families of the ability to truly speak of and for the victim.
- Sentencing courts using terminology such as "not in the worse category". Phrases such as this may be viewed as insulting to family victims and should not be used.
- Whilst not strictly part of the sentencing process, the lengthy appeal process, particularly with regard to the number of extensions provided where a Notice of Intention to Appeal (NIA) has been filed but no further action taken in relation to an appeal, can be an incredibly stressful, distressing and demoralising time for family victims. Consideration could be given to how this process can be more responsive to the needs of family victims.

I note that the Review could also consider whether further judicial education as to the dynamics of domestic and family violence would assist with the sentencing process.

Finally, I note the statistics in relation to Aboriginal and Torres Strait Islander (ATSI) women and children and domestic and family violence, both as victims and victim offenders, and I would suggest the Review consider responses and recommendations that take into account both the statistics and ATSI-led suggestions and solutions.

Yours faithfully,

[redacted]

Peter McGrath SC
Deputy Director of Public Prosecutions