

WOMEN'S SAFETY NSW

**Submission to the NSW Sentencing Council Review of
Sentencing for Murder and Manslaughter, including
penalties imposed for domestic and family violence
homicides.**

7 February 2020

Prepared by:

Hayley Foster, Chief Executive Officer
Milan Sharma, Research Assistant
Victoria Principe, Research Assistant
Renata Cvetkovska, Research Assistant
Vivian Nguyen, Research Assistant

Table of Contents

1. INTRODUCTION	3
2. ADDRESSING THE TERMS OF REFERENCE AND OVERVIEW	3
3. SENTENCING FOR DOMESTIC RELATED HOMICIDE	3
3.1. ISSUE IDENTIFIED 1: INADEQUATE SENTENCING OF PERPETRATORS OF DOMESTIC VIOLENCE	3
3.1.1. A LACK OF JUSTICE	3
3.2. ISSUE IDENTIFIED 2: ELIMINATING THE DEFENCE OF PROVOCATION	5
3.3. ISSUE IDENTIFIED 3: PROPORTIONALITY AND CUMULATIVE SENTENCING	7
3.4. ISSUE IDENTIFIED 4: CHARACTER EVIDENCE	9
3.5. ISSUE IDENTIFIED 5: AGGRAVATING FACTOR FOR LONG-TERM PERPETRATORS	10
3.6. ISSUE IDENTIFIED 6: MITIGATING FACTOR FOR LONG-TERM VICTIMS	11
3.7. ISSUE 7: DOMESTIC VIOLENCE OFTEN DOESN'T RESULT IN A PROTECTION ORDER OR A CRIMINAL CONVICTION	12
3.8. ISSUE IDENTIFIED 8: COURSE OF CONDUCT	13
3.9. ISSUE IDENTIFIED 9: JUDGE'S REMARKS	14
3.10. ISSUE IDENTIFIED 10: BENCH BOOK	15
3.11. ISSUE IDENTIFIED 11: DOMESTIC VIOLENCE SENTENCING GUIDELINES	16
4. CONCLUSION	17
5. BIBLIOGRAPHY	18
A. ARTICLES/BOOKS/REPORTS	18
B. CASES	18
C. LEGISLATION	18
D. OTHER	19

1. Introduction

Women's Safety NSW is a peak representative body for women's specialist domestic and family violence services in NSW. Our members include all Women's Domestic Violence Court Advocacy Services who support women in 114 Local Courts across NSW and in the family law courts, as well as coordinating the NSW Government's Victim Safety Response - Safer Pathway. Women's Safety NSW advocates on behalf of our members for systematic reform to increase women's safety, justice and wellbeing in the context of domestic and family violence.

The aim of our submission to the NSW Sentencing Council is not to replicate the submissions provided by Women's Legal Service NSW, the Australian National Research Organisation for Women's Safety, Domestic Violence NSW or Legal Aid NSW. It is to offer the perspective and understanding of a diverse range of frontline specialist domestic and family violence workers from metropolitan, regional and rural areas who see these cases in high volume as well as providing a voice for victim/survivors of domestic and family violence. The workers who have completed the surveys relied upon for this submission include Service Managers, Coordinators, Support Workers, Court Advocacy Workers, Intake and Referral Officers, Counsellors, and Aboriginal and Multicultural Specialist Workers.

The victims/survivors who have completed the surveys were all heterosexual women with 43% identifying as culturally and linguistically diverse, aged 25 to 44 years (43%) and 45 to 64 years (57%). The women surveyed were from inner metropolitan (57%), outer metropolitan (29%), and regional areas (14%). The range of demographic responses have provided a rounded perspective on sentencing for domestic related homicide.

2. Addressing the Terms of Reference and Overview

To address the terms of reference, Women's Safety NSW conducted two online surveys of WDVCAS/FASS frontline workers ("workers") and victims/survivors of family violence in January/February 2020. The surveys sent out focused on understanding what workers and victims/survivors thought of the current legal structure and its impact on homicide victims' families. Our recommendations have been based on their professional observation and assessment as well as their personal experiences with the criminal legal system. The specific examples provided in this submission were obtained from these surveys. They do not include any information that could be used to identify victims, survivors or workers.

3. Sentencing for Domestic Related Homicide

3.1. Issue Identified 1: Inadequate sentencing of perpetrators of domestic violence

3.1.1. A lack of justice

In 2020, 100% of victims/survivors and 84% of frontline workers surveyed expressed that the current sentences for domestic homicide were **not adequate**. A further 100% of frontline workers and victims/survivors surveyed also believed that sentences for domestic homicide **do not represent justice for victims and their families**. It was expressed wholeheartedly that many saw sentences as a *'slap on the wrist'* and in turn women's lives were devalued exponentially because of shorter sentencing. One worker stated that *'it still sends the message that women/victims are the objects of their partners. The way many of these cases are reported in the media include victim blaming and justifications which are not OK'*. Those who were aware that the victim had children felt it to be *'nowhere near adequate enough'* particularly when *'no remorse was expressed'* by the accused. One survivor reported that, *'all sentencing for domestic violence cases are too weak, not long enough and lack support for the victim'*.

3.1.2. Ineffective deterrence

One hundred percent (100%) of both workers and victims thought that current sentences for domestic homicide **did not serve as an appropriate deterrent for perpetrators of domestic violence**. In general, workers believed *'that they [perpetrators] can get away with murder, literally'*. Further, that current sentences send the message to perpetrators that the murdering of their partner or ex-partner is not a *'serious crime'*. In one scenario a worker described that men who are often seen as *'a 'good guy' apart from the murder (DV)...can be let off and if the woman has mental health then his act is justified'*.

3.1.3. Minimisation and justification of violence

By way of example, Alice* was a mother of five with children ranging from 6 years to 18 years, and was subjected to domestic violence before being murdered by her perpetrator. Prior to being convicted, the accused demonstrated limited regard for the court through non-compliance with court requests and hearing dates. The following year after Alice's death, her perpetrator pleaded guilty to her murder. Due to his plead, the accused was not subject to the maximum penalty of imprisonment for life,¹ instead being provided with a discounted sentence of 18 years minimum imprisonment before appealing and obtaining a further sentence reduction as the Court was convinced the crime committed was not *'cruel enough'*.

3.1.4. Failure to account for impact/ retribution

The justice delivered for Alice's death from the perspective of her family was perceived to be inadequate. Unfortunately, Alice's children are now reliant on financial support from various societal funding platforms and one of Alice's children is currently a mental health patient. The family felt that the nature and seriousness of the victim's death was devalued through the legal system particularly as the perpetrator *'expressed no remorse and [had] only ever worried about making sure the impact of his actions [didn't] impact him too much'*. The impact on this decision did not take into account interest in retribution from Alice's children or the community from which Alice's mother was a member.

3.1.5. Public interest

¹ Crimes Act 1900 (NSW) s 19A(1).

A just sentence within a community which has been impacted by domestic violence can create a positive outcome and deter perpetrators from offending or reoffending. These sentences allow young children and adolescents to understand what respectful relationships are and enforce a heightened moral awareness. In NSW alone, domestic and family violence specifically costs the NSW economy in excess of \$4.5 billion per annum.² A High Court decision reiterated that ‘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’.³ Women’s Safety NSW is pleased that the High Court holds this position and hopes that retribution is enforced towards male offenders within NSW and Australia-wide.

“The institutions and systems that are in our community need to do more for victims AND perpetrators when DV is initially recognised. There are so many children-including a lot of boys who don't get the support they need early enough. We have to have more than a criminal justice response because victims only report once things are very severe. More services for boys and men in healthcare and other settings especially mental health, child protection services (where victim blaming is rife.....she's not protective enough of the children, rather than asking the father how is DV helping you be a good dad or even involving them in the CP process) and drug and alcohol services which is where perpetrators are intersecting with systems before they get to the criminal justice service.” - Esther*, Family Member of Victim of Domestic Homicide.

Recommendations

Women’s Safety refers to the recommendations as outlined in the issues below to address the inadequacy of sentencing in domestic homicide matters.

3.2. Issue Identified 2: Eliminating the Defence of Provocation

Women’s Safety NSW believes that the defence of provocation facilitates a culture of victim blaming and excusing and minimising people’s violence. In Victoria the defence of provocation has been abolished, however it still exists in NSW. Here, the partial defence of extreme provocation is currently in operation to reduce a charge of murder to manslaughter.⁴

Eighty-eight percent (88%) of frontline workers and 100% of victims/survivors surveyed believed that the defence of provocation should not be available to domestic homicide offenders where they are the primary aggressor. The question posed to workers and victims/survivors sought to understand their experience of provocation in relation to domestic violence.

² Department of Communities & Justice, ‘The effects of domestic and family violence’, *Department of Communities & Justice* (Web Page, 24 September 2019) <<https://www.facs.nsw.gov.au/domestic-violence/about/effects-of-dv>>.

³ NSW Sentencing Council, *Homicide* (Consultation Paper, October 2019) 54.

⁴ *Ibid* s 23(1).

Below are several responses from workers and victims/survivors surveyed who are in favour of abolishing the defence of provocation as there is a strong understanding that it allows for victim blaming:

“All actions are determined by the personal choice of the offender no matter what actions of the victim. The offender can choose to walk away from a victim they believe is “provoking” him/her other than kill them. It is ridiculous to suggest that an offender has their personal choice completely subjugated by a victim’s so-called ‘provocation.’” - Phoebe*, WDVCS Worker, Metropolitan.

“It is simply an excuse - violence and abuse are a choice.” - Faith*, Survivor.

“It’s just an EXCUSE .. we all have a monster inside of us & it is up to us to control that monster .. light sentencing makes that a lot easier for perpetrators to not have to do!” - Cate*, Survivor.

“The person who is dead cannot say what occurred before hand and the investigation does not critically review the evidence to determine provocation. Anyway provocation is different to defending your life.” - Esther*, Family Member of Victim of Domestic Homicide.

“DV victims/survivors live in a cycle of violence often lasting years. The perpetrators make a choice to use violence as a method of coercion and control. If a perpetrator is has killed their partner then they made a choice to do that, that is murder not manslaughter. The defence of provocation is often used as a tactic when the perpetrator is jealous or there has been a recent separation, neither of these is a reason to murder and then you have your sentence reduced on a technicality that should not even be available to fall back on.” - Jenny*, DV Crisis Service Manager, Western Sydney.

“Provocation allows for victim blaming, unless the homicide was self-defence I do not believe it should be admissible.” - Hui*, WDVCS Worker, Regional.

“It should be abolished. Anyone would fight for their life and needs, yet the victim has been overpowered and is now dead. They cannot provide evidence to the contrary. It is nothing like a stranger entering your home and you need to protect your loved ones. It is not even close to the same force when the victim ends up dead. This is where the justice system needs to understand the dynamics of domestic violence and identifying the primary perpetrator and the specialist forensic history of the couple and family.” - Gabriella*, WDVCS Worker, Regional.

“It does not apply in this case, women do not provoke in order to be killed or assaulted.” - Ellie*, WDVCS Coordinator, Regional.

“There is no reason to excuse killing someone by being provoked. The very nature of DV is such that the victim is never in any position of control or power.” - Andrea*, DV Specialist Service Coordinator, Regional.

Similar sentiments were also expressed by victims. The overwhelming feeling is that the partial defence is being used to gain a shorter sentence which then in turn allows perpetrators to re-offend. It also highlights to society that the loss of self-control over provocation is acceptable. One survivor explains that *‘a dead victim CANNOT DEFEND HERSELF’*, another survivor states that

'they always use this excuse, but she made me do it and they constantly blame victims for fighting back'.

From both workers and victims/survivors it is perceived that victim blaming constitutes a large part of the perpetrator's defence.

Women's Safety NSW are mindful that the partial defence of extreme provocation can also be utilised in cases whereby a long-term survivor of domestic violence kill their long-term abuser so as to reduce a charge of murder to manslaughter.⁵ In such cases, it is suggested that other defences, such as that of self-defence, and mitigation in sentencing are more appropriate mechanisms for tailoring the offence and the sentence in the circumstances, rather than holding onto the defence of provocation.

Recommendation

Women's Safety NSW recommend removing the defence of provocation altogether, and instead focussing reforms on self-defence. We feel as though this would allow for more effective sentencing across all criminal proceedings, particularly in domestic violence related cases.

3.3 Issue Identified 3: Proportionality and Cumulative Sentencing

Sometimes courts must deal with concurrent offending, for example, sexual assault or terrorism, against the victim who the perpetrator has also killed. Presently, the court applies the "totality" principle - which states that when the court is sentencing an offender for two or more offences, the court is required to impose a sentence reflecting the **totality** of the criminality arising from those offences (this is **concurrent sentencing**). This often results in offenders getting shorter jail sentences in the case of gender-based crimes (such as domestic or sexual violence) which can diminish their "seriousness" in light of the accompanying substantive or "more serious" crime of murder/manslaughter.

Women's Safety NSW is concerned that applying the totality principle and concurrent sentencing to murder/manslaughter cases involving domestic or sexual violence diminishes the major impact these serious gender-based crimes have on the community and allows offenders to get away with the same jail sentence or less.

As stated above at Issue 1, 100% of both workers and victims thought that current sentences for domestic homicide did not serve as an appropriate deterrent for perpetrators of domestic violence.

In fact, instead of jail sentences, many perpetrators of domestic violence are ordered to undergo rehabilitation programs run by criminal justice agencies or community organisations to address their abusive behaviours. However, recent BOCSAR research has shown there is little evidence

⁵ Ibid.

to suggest that behaviour change programs are actually successful deterrents for medium to high-risk domestic violence offenders.⁶ This means offenders will be able to re-offend sooner.

To prevent this, we need sentencing to act as a strong deterrent against gender-based crimes, and we believe this can only be done when the principle of proportionality is used appropriately/effectively. The principle of proportionality means that the severity of the punishment should fit the crime. If gender-based crimes (such as domestic abuse or sexual assault) were treated as **more serious**, not less, and **cumulative sentencing** was applied, it would result in longer jail sentences for offenders with accompanying murder/manslaughter charges. This would in turn send a strong message to the community that gender-based crimes will not be tolerated and will not go unpunished.

Sixty-seven percent (67%) of DFV workers surveyed agreed that sentences for multiple serious offences should be served cumulatively. For example, where there has been physical, sexual and homicide offences related to the same incident, the sentence actually served would be the total of all the penalties for each offence added together.

When asked “What message do current sentences for domestic homicide send to perpetrators?” workers surveyed said:

“That they can take someone's life, and within a few years, be free to live their life again, while that victim's family lives with the trauma forever.” - Rona*, Domestic Violence Service Worker, Metropolitan.

“You can be held less culpable than for a non-dv homicide.” - Phoebe*, WDVCS Worker, Metropolitan.

“It's no big deal, maybe 'do a few years'.” - Olivera*, WDVCS Coordinator, Regional.

When asked “What message do current sentences for domestic homicide send to domestic violence victims/survivors?” workers surveyed said:

“That they [victims] are not safe because perpetrators are not worried about court outcomes.” - Olivera*, WDVCS Coordinator, Regional.

“A couple of years in jail and then [the perpetrator] can live their life again. they get away with it too lightly.” - May*, Domestic Violence Officer, Regional.

Recommendation

⁶ See Sara Rahman and Suzanne Poynton, 'Evaluation of the EQUIPS Domestic Abuse Program, Contemporary Issues in Crime and Justice' (Issue Paper No 211, NSW Bureau of Crime Statistics and Research, March 2018) 12.

We also recommend the current **process of concurrent sentencing be replaced with a cumulative sentencing** approach for homicides involving gender-based crimes such as sexual, domestic or family violence. Having perpetrators serve time cumulatively will send a strong message to the community that sexual violence and other serious crimes will not be tolerated and there will be serious consequences in **addition** to any homicide sentencing.

3.4 Issue Identified 4: Character Evidence

The use of character evidence as a mitigating factor in sentencing was also an issue addressed within both surveys. **One hundred percent (100%) of victims/survivors surveyed believed that character should not be available as a mitigating factor in sentencing for domestic homicide. Ninety percent (90%) of workers also responded 'no' to this question.**

A study conducted by Domestic Violence Resource Centre Victoria stated in their findings that particularly where the offender had not been shown to be violent or abusive in the past, the judge accepted that the offender was 'otherwise of good character'. These judicial remarks coupled with character evidence can be misleading in the context of domestic and family violence. Indeed, when examining intimate partner homicides committed by males towards their female partners and ex-partners, death review teams have found the narrative around the "good guy just snapping" as not holding weight.⁷ To the contrary, most intimate partner homicides by males towards their female partners and ex-partners are committed in the context of ongoing coercive control, regardless of whether this control has constituted a criminal offence or resulted in an protection orders.⁸ It is also the case that perpetrators of domestic and family violence often present as "good guys" and positive contributors to the community even whilst perpetrating violence and abuse behind closed doors at home. This can in fact serve as a barrier for women and children seeking safety and support as friends, family members and community may not believe them when they disclose the violence and abuse they are experiencing.

By allowing such appearances and contributions to community in a public sense to serve as a mitigating factor in the sentence for killing their partner or ex-partner, a strong message is sent to the victim, her family and the broader community that violence behind closed doors is of a less serious nature, and can be somewhat excused if the perpetrator reflected well in public.

This view is strongly reflected in the survey responses of both domestic violence workers and victims/survivors:

"No matter your position in society, your job, your community service etc there is no excuse for violence or abuse" - Devina*, Survivor.

"Again, violence and abuse are a choice. "Upstanding" members of the community wouldn't choose abuse!" - Faith*, Survivor, 25-44 years.

⁷ Natasha Stott Despoja, 'New report shows men don't just 'snap'', *Our Watch* (online, 8 June 2018) <<https://www.ourwatch.org.au/News-media/Latest-news/New-report-shows-men-don-t-just-snap?feed=LatestNewsFeed>>.

⁸ NSW Domestic Violence Death Review Team, *Report 2015-2017* (Report No 5, June 2017) 2.

“Nobody knows what is going on behind closed doors, it should not weigh much, if the person can behave in public.” - Isla*, Multicultural Specialist Worker, WDVCS Hunter Region.

“They are clearly not an upstanding member of the community if they murder their partner / children. As we know perpetrators are generally able to control their behaviours within the wider community and used DFV at home where they cannot be held accountable. This should not come into sentencing.” - Hui*, WDVCS Hunter Region.

“Case by case e.g. mental health, drug use. However, there should never be any excuse to the fact...” - Fara*, Support Worker WDVCS Parramatta.

“The nature of domestic violence is that it is hidden behind closed doors. Many of the perpetrators are seen as ‘good blokes’ by the outside world. Unless the perpetrator has been a victim of abuse and then lashes out.” - Desi*, Intake and referral WDVCS, Hunter Region.

“How can they be an upstanding member of the community if they are / have committed a crime.” - Chitra*, Coordinator for DV Referrals and Support, Western Sydney.

Recommendation

Women’s Safety NSW recommends that character evidence should not be available as a mitigating factor in sentencing for domestic homicide.

3.5 **Issue Identified 5: Aggravating Factor for Long-Term Perpetrators**

According to *R v Murray* [2015] NSWSC 1034, domestic violence offences must be condemned as they are ‘committed by the very people who should be interested in protecting, rather than harming, those who they have injured’.⁹ In other words, it is a more egregious crime to be murdered in your very own home by someone who is supposed to love and care for you, and by someone upon which you have dependence and reliance, than by a complete stranger.

Women’s Safety NSW believes that NSW should mirror the jurisdiction of Queensland, South Australia, Western Australia, New Zealand, Canada and Ireland, by treating the existence of domestic violence by the homicide offender as an aggravating factor. **This view was supported by 100% of frontline workers/members and victims/survivors surveyed.** Andrea*, a DV Specialist Service Coordinator, believes that a greater sentence should be given to a homicide offender who has a history of domestic violence because this history shows ‘*a predisposition to violence*’ and ‘*a defined pattern of abusive behaviours*’. By treating domestic violence by the homicide offender as an aggravating factor, the Courts can send a strong message that it takes domestic violence incidents seriously, particularly when they result in death. The Court would also send a strong message that domestic violence is not characterised by a one-off incident, but rather a recurring and cyclical pattern of coercion and control.

Canada’s policymakers have been aware of intimate partner homicides and have sought to hold male perpetrators accountable since 1996. It was found that in ‘2015, in Canada, the rate at

⁹ *R v Murray* [2015] NSWSC 1034, 4.

which women were killed by an intimate partner was more than five times the rate for men'.¹⁰ The passing of Bill C-41 in 1996, included:

*A statutory statement stipulating that an offender who abuses a spouse or child may be subject to harsher penalties. As such, judges are now to consider the existence of a spousal relationship between an offender and his/her victim as an aggravating factor in sentencing.*¹¹

By comparison there is limited literature on this issue in current Australian states and the impact it has on survivors.

“Absolutely and in our case a breach of an AVO and involvement with the MERIT program should have been aggravating factors. The AVO was treated as an aggravating factor but the sentence should have been much more harsh because the breach resulted in a murder. The offender was also involved in MERIT a drug and alcohol forensic program because he ran an RBT the total disregard for laws should mean harsher sentences.” - Esther*, Family Member of Victim of Domestic Homicide.

Recommendation

In circumstances where a homicide offender has subjected their victim to domestic violence, this should be treated as an aggravating factor. Women's Safety NSW hopes that by implementing this recommendation, NSW can set an example Australia-wide on aggravating factors for long-term perpetrators of domestic and family violence.

3.6 Issue Identified 6: Mitigating Factor for Long-Term Victims

It should be noted that presently there are limited ways in which domestic homicide offenders who have been the long-term victims of domestic violence can use this to lessen their sentence for homicide. **Ninety-four percent (94%) of frontline workers/members and 57% of victims/survivors surveyed believed that the Crimes Sentencing Procedure Act (NSW) should be amended to recognise prior domestic family violence experienced by the homicide offender as a mitigating factor in their sentence.** According to Ellie*, a WDVCS Coordinator, *‘long term victims often snap after being threatened, psychologically abused for years on end’*. Dobash and Dobash state that ‘women’s violence differs from that perpetrated by men in terms of nature, frequency, intention, intensity, physical injury and emotional impact...the problem of intimate partner violence is primarily one of men’s violence to women partners and not the obverse’.¹² While ‘men kill in revenge, out of jealousy, for honour, as the climax in a chain of violence, for profit, even for sport; when women kill it is mostly as a form of self-preservation (or protection of children) in response to violence inflicted upon them’.¹³ Using an intimate partner

¹⁰ Myrna Dawson, ‘Punishing femicide: Criminal justice responses to the killing of women over four decades’ (2015) 64(7) *Current Sociology* 14, 16.

¹¹ Ibid 15.

¹² Russell P Dobash and R Emerson Dobash, ‘Women’s Violence to Men in Intimate Relationships: Working on a Puzzle’ (2004) 44(3) *British Journal of Criminology*, 343-344.

¹³ Graeme Coss, ‘Provocative Reforms: A Comparative Critique’ (2006) 30(3) *Criminal Law Journal* 139.

homicide dataset from 2000 to 2014, the NSW Domestic Violence Death Review Team revealed that '89% of men killed by a female intimate partner had been the primary domestic violence abuser in the relationship'.¹⁴ These statistics highlight the harsh realities of domestic violence and the torturous psychological impact it has on women in the long-term.

Gail*, a survivor, stated that:

"If this is about women killing their partners after prolonged abuse. No one could live without snapping in some way. They are relentless. They should be able to get help rather than go to prison."

Faith*, a survivor also stated that:

"Even if you have been a long-term victim yourself, you still know the difference between right and wrong and you are still making the choice to choose to abuse."

Recommendation

In circumstances where the homicide offender had been suffering long term domestic violence at the hands of their abuser and subsequently killed them, we believe this should be regarded as a mitigating factor.

3.7 Issue 7: Domestic violence often doesn't result in a protection order or a criminal conviction

Unfortunately, **89% of frontline workers and 86% of victims/survivors surveyed reported domestic violence as going uncharged and/or not subject to a protection order 'a lot' or 'a great deal'**. Fara*, a WDVCAS support worker, believes that domestic violence goes uncharged because '*victims may not feel safe to re-report a breach*', there is a '*lack of evidence*', the '*police aren't supportive*', or the '*situation [is] deemed hopeless*'. According to Olivera*, a WDVCAS Coordinator, there are '*too many stories where some police act as 'proxy family law advisors' and or take the view that 'it is a family law matter' instead of DV*'. Although Devina*, a survivor of domestic violence, contacted the police multiple times, her abuser was only arrested after he attempted to murder her.

It is clear then, that in addition to barriers to reporting domestic and family violence to police, even when such violence is reported, it does not always result in final protection orders and successfully prosecuted offences.

3.7.1 Evidence which should be made admissible in proving a history of domestic and family violence

Frontline workers/members and victims/survivors responded with a variety of different suggestions when they were asked which evidence should be made admissible in proving that there has been a history of domestic violence. The respondents placed great emphasis on using evidence which may not in itself be a crime, but which is helpful in establishing coercive control and a pattern of abuse.

¹⁴ NSW DVDRT (n 11) xiv.

Examples of coercive behaviour which respondents said should be regarded as evidence in establishing coercive control include: mind games, belittling, locking the victim in their house, using children as pawns, and phone checking. They advised that a history of domestic violence and coercive control can best be established by using diary entries, apprehended domestic violence orders (ADVOs), police reports, phone recordings (regardless of whether the offender knew they were being recorded), health records, witness statements, bank statements, victim impact statements, support letters from services, and evidence from friends and family.

Cate*, a 25-44 year old survivor recommended that the offender's drug history should also be admissible. Cate's* best friend was tragically murdered by her partner after the Court at her domestic violence matter hearing had refused to admit evidence that his high use of prohibited drugs was making him more violent and aggressive.

Esther*, Family Member of Victim of Domestic Homicide:

"It's less about evidence and more about the skill of the people in the system understanding how the perpetrators behaviour fits with DV and how perpetrators use systems to further perpetuate abuse. We need specialist systems to deal with DV."

Annette*, another survivor of domestic violence, recommended the use of social framework testimony:

"Evaluating a parent's fitness by considering past acts of violence to other family members results in decisions that are more likely to protect children than decisions that discount or disregard spousal abuse. Social framework experts put clinical data in perspective, usually without any clinical relationship with the parties. The social framework expert clarifies the contradictions and the misconceptions regarding domestic abuse. The hybrid expert offers a clinical opinion about the abuse and effects in this particular relationship and explains the behavior of the abused person. Too often lawyers offer clinically based testimony but overlook useful social framework testimony. This reluctance may result from an erroneous belief that battered women's syndrome testimony remains the only admissible expert testimony in a domestic violence case. Although evidence regarding battered women's syndrome establishes a self-defense claim to murder or assault, it remains inadequate when attempting to explain fundamental contradictions within an abusive relationship."

3.8 Issue Identified 8: Course of Conduct

Eighty-eight percent (88%) of frontline workers/members and 100% of victims/survivors surveyed also believed that New South Wales should provide the court with particulars of injury or loss resulting in a 'course of conduct' that involves domestic violence. 'Course of conduct' refers to 'a series of controlling and coercive actions intended to cause, and causing, severe pain and suffering to the victim'.¹⁵ England and Wales have introduced a 'controlling and coercive behaviour in an intimate or family relationship' offence.¹⁶ In 2000, the Queensland Taskforce on Women and the Criminal Code recognised that the concept of 'course of conduct'

¹⁵ Heather Douglas, 'Do We Need a Specific Domestic Violence Offence?' (2015) 39(2) *The University of Queensland* 467.

¹⁶ *Serious Crime Act 2015* (UK) s 76.

is at the core of domestic violence offences as opposed to a single incident.¹⁷ However, to date, NSW has not provided statutory recognition to the 'course of conduct' nature of domestic violence offences.

Recommendation

We recommend that New South Wales should provide the court with particulars of injury or loss resulting in a 'course of conduct' that involves domestic violence.

3.9 Issue Identified 9: Judge's Remarks

Workers and victims/survivors were questioned if the judge's remarks mattered for domestic homicides. The responses were varied across both surveys with the majority of workers believing it achieved a favourable outcome especially if a judge was held back by precedent on a sentencing. According to Hui*, a WDVCS worker, *'if for some reason Judges have to follow a particular sentencing law/recommendation, they can at least remark on the nature of the crime to the perpetrators and let them know that there are no excuses for their behaviour'*. One victim/survivor believed that judge's remarks were important for domestic homicides, but only from a *'good judge'*, indicating that there are judges' remarks which do not convey the seriousness of domestic violence/homicides and whose comments can be detrimental. Comparatively, one victim believed that *'words without actions are pointless'*. It is important to note in practice, as reported in the Consultation Paper, NSW Supreme Court sentencing remarks have often diminished the nature and seriousness of the crime.

Judge's remarks have been criticised extensively in academia with reports demonstrating that sentencing remarks have been significantly varied between male and female offenders. For remarks that showed a history of domestic violence between the offender and the victim 'judges acknowledge a lack of understanding regarding the difficulties experienced by female victims of domestic violence'.¹⁸ Unfortunately, it was found that judges were voiced being unable to comprehend, 'why a woman would not reach out for assistance or leave a violent relationship'.¹⁹ For Aboriginal female offenders it was perceived by some judges that they were unable to comprehend, 'the serious nature and consequences of the violence continually perpetrated upon her by the male victim'.²⁰ These remarks highlight the importance of judges having specific knowledge and understanding of the nature and dynamics of men's violence against women, as well as specific cultural knowledge and competency.

A study by Murdoch University examined 79 domestic murder cases in NSW and Victoria between 2002 and 2010.²¹ Of the 79 cases collected, five involved female offenders and all were featured

¹⁷ Taskforce on Women and the Criminal Code and Office of Women's Policy, *Report on the Taskforce on Women and the Criminal Code* (Report, February 2000) 112.

¹⁸ Marion Whittle and Guy Hall, 'Intimate Partner Homicide: Themes in Judges' Sentencing Remarks' (2018) 25(6) *Psychiatry, Psychology and Law* 922, 929.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ Murdoch University, 'Wicked Women and Devastated Men: An analysis of judges' remarks in domestic murder cases', *Murdoch University News* (online, 7 March 2018)

in the top 10 sentences handed down by judges.²² In addition to higher sentences, judges used 'vilifying' adjectives to describe female offenders, these included 'wicked', 'extremely manipulative', 'callous' or 'heartless'.²³ Furthermore, the research found, women were often shamed by judges for having little regard for the deceased and carried out the crime with heartless determination. The negative evaluation of female offenders by judicial officers helps to explain why women continually reject or refuse to seek assistance. According to Olivera*, a WDVCS Coordinator, *'Judges should not be able to make any comments that are seen to be 'victim blaming' i.e. she went to his house, she responded to the text messages etc - and on that point, [judicial officers] should not be able to either.'*

Given how influential judges remarks can be, remarks which are violence supportive, excusing, and minimising or victim blaming can have serious ramifications. Phoebe*, a WDVCS Assistant Coordinator, stated that *'Judges hold positions of authority in our society and the strongest message should come from them'*. This view was echoed by Jenny*, a DV Crisis Service Manager. According to Jenny*, *'Judges remarks could potentially deter offenders'*, as they are *'are often reported in the media and hold weight'*. Similarly, Gabriella*, a WDVCS worker, believed that the judge's remarks *'need to express the fear of the victim, the absolute crime of the actions and the zero tolerance and disgust of the community to their self centred actions'*.

Women's Safety NSW agrees with the aforementioned views and would like to bring the Sentencing Council's attention to the words of Annette*, a survivor/victim of domestic violence: *'Finding just outcomes in individual cases remains important and requires shifts not just in legal rules but in legal practice and legal cultures, but preventing such homicides requires much more.'*

Recommendation

Women's Safety NSW recommends that judges (and magistrates) undertake mandatory training to understand the nature and dynamics of domestic and family violence and its impact on survivors as well as cultural competency training.

3.10 Issue Identified 10: Bench Book

From those surveyed, **100% of workers and victims/survivors believe that the NSW Sentencing Bench Book should be updated to guide judicial officers on sentencing decisions and include specific information about domestic family violence.** The response is also reflective of conclusive research found on judicial remarks. By updating the bench book, judicial officers may be able to gain a deeper understanding of the difficulty domestic violence victims face. Suggestions also include more training and discussion with victims for both judges and magistrates as it is commonly believed that *'our laws are out of date and protect perpetrators'*.

<<https://www.murdoch.edu.au/news/articles/wicked-women-and-devastated-men-an-analysis-of-judges-remarks-in-domestic-murder-cases>>.

²² Ibid.

²³ Guy Hall, Marion Whittle and Courtney Field, 'Themes in Judges Sentencing Remarks for Male and Female Domestic Murderers' (2016) 23(3) *Psychiatry, Psychology and Law* 395, 400.

“There is too much room for discretion in sentencing in DV matters. In the local court a change of Magistrate can come to the bench with vastly different sentencing practices than his/her predecessor, lack of consistency then sends community the wrong message - same for Judges.”

- Olivera*, WDV CAS Coordinator.

“Judges (and Magistrates) should be mandated to have education around domestic violence” - Ellie*, WDV CAS Coordinator.

“There needs to be consistency and [judicial officers] need to recognize this is becoming an Australian Epidemic!” - Rona*, Domestic Violence Court Advocacy Worker.

“We need as many updates as possible as well as mandatory DFV Training for [judicial officers]” - Hui*, WDV CAS Worker.

“Also more training and discussion with victims for those making decisions so they are not just nameless faces in a court, pictures in an evidence folder or another victim to be dealt with. The justice system is not really part of the change cycle and there are so many opportunities missed.”

- Esther*, Family Member of Victim of Domestic Homicide.

Recommendation

Women’s Safety NSW recommends that the NSW Bench Book be updated to guide judicial officers on sentencing decisions and include specific information about domestic family violence. If necessary, we recommend that a separate book could be published in conjunction with the Bench Book to reiterate the severity of domestic violence not only in NSW, but nationwide.

3.11 Issue Identified 11: Domestic Violence Sentencing Guidelines

The Sentencing Council for England and Wales has a guideline on sentencing in the context of domestic abuse,²⁴ which the courts are required to consider. This guideline states that offending behaviour that occurs in a domestic context makes the offending **more serious**.

One hundred percent (100%) of DFV workers surveyed agreed that NSW should introduce sentencing guidelines for domestic violence offences.

Phoebe*, a WDV CAS Worker from a metropolitan area put it this way:

“A person should be able to feel completely safe in the domestic context so any offending should be treated more seriously than similar crimes in a non-domestic context.”

Recommendation

²⁴ UK Sentencing Council, ‘Overarching Principles: Domestic Abuse Definitive Guideline’, *UK Sentencing Council* (Web Page, 24 May 2018) <<https://www.sentencingcouncil.org.uk/publications/item/overarching-principles-domestic-abuse-definitive-guideline/>>.

We recommend NSW **introduce sentencing guidelines for a domestic violence offence**. This guideline should state that offending behaviour that occurs in a domestic context makes the offending **more serious**.

4 Conclusion

We suggest that the NSW Sentencing Council consider the recommendations that we have made to domestic violence related homicide. Women's Safety NSW recommends that all recommendations if used be consistently revised to represent the continual change in nature of both the law and domestic violence. We thank you for the opportunity to make this submission and look forward to seeing the revised legislation.

5 Bibliography

A Articles/Books/Reports

Coss, Graeme, 'Provocative Reforms: A Comparative Critique' (2006) 30(3) *Criminal Law Journal* 139

Dawson, Myrna, 'Punishing femicide: Criminal justice responses to the killing of women over four decades' (2015) 64(7) *Current Sociology* 14

Dobash, R Emerson and Russell P Dobash, *When Men Murder Women* (Oxford University Press, 2015)

Dobash, Russell P and R Emerson Dobash, 'Women's Violence to Men in Intimate Relationships: Working on a Puzzle' (2004) 44(3) *British Journal of Criminology*

Douglas, Heather, 'Do We Need a Specific Domestic Violence Offence?' (2015) 39(2) *The University of Queensland* 467

Hall, Guy, Marion Whittle and Courtney Field, 'Themes in Judges Sentencing Remarks for Male and Female Domestic Murderers' (2016) 23(3) *Psychiatry, Psychology and Law* 395

NSW Domestic Violence Death Review Team, *Report 2015-2017* (Report No 5, June 2017)

NSW Sentencing Council, *Homicide* (Consultation Paper, October 2019)

Rahman, Sara and Suzanne Poynton, 'Evaluation of the EQUIPS Domestic Abuse Program, Contemporary Issues in Crime and Justice' (Issue Paper No 211, NSW Bureau of Crime Statistics and Research, March 2018)

Taskforce on Women and the Criminal Code and Office of Women's Policy, *Report on the Taskforce on Women and the Criminal Code* (Report, February 2000)

Whittle, Marion and Guy Hall, 'Intimate Partner Homicide: Themes in Judges' Sentencing Remarks' (2018) 25(6) *Psychiatry, Psychology and Law* 922

B Cases

R v JB [1999] NSWCCA 9

R v Murray [2015] NSWSC 1034

C Legislation

Crimes Act 1900 (NSW)

Crimes Act 1900 (NSW)

Serious Crime Act 2015 (UK)

D Other

Department of Communities & Justice, 'The effects of domestic and family violence', *Department of Communities & Justice* (Web Page, 24 September 2019)
<<https://www.facs.nsw.gov.au/domestic-violence/about/effects-of-dv>>

Despoja, Natasha Stott, 'New report shows men don't just 'snap'', *Our Watch* (online, 8 June 2018) <<https://www.ourwatch.org.au/News-media/Latest-news/New-report-shows-men-don-t-just-snap?feed=LatestNewsFeed>>

Murdoch University, 'Wicked Women and Devastated Men: An analysis of judges' remarks in domestic murder cases', *Murdoch University News* (online, 7 March 2018)
<<https://www.murdoch.edu.au/news/articles/wicked-women-and-devastated-men-an-analysis-of-judges-remarks-in-domestic-murder-cases>>

UK Sentencing Council, 'Overarching Principles: Domestic Abuse Definitive Guideline', *UK Sentencing Council* (Web Page, 24 May 2018)
<<https://www.sentencingcouncil.org.uk/publications/item/overarching-principles-domestic-abuse-definitive-guideline/>>