



Submission to the NSW Sentencing Council Consultation Paper – October 2019

Prepared by
Domestic Violence NSW
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About Domestic Violence NSW

Domestic Violence NSW Inc (DVNSW) is the peak body for specialist domestic and family violence services in NSW. DVNSW provides a representative and advocacy function for specialist services and the women, families and communities they support.

DVNSW's mission is to eliminate domestic and family violence through leadership in policy, advocacy, partnerships and the promotion of best practice. We work with our members, government at all levels, and communities to create a safer NSW for all.

DVNSW member services represent the diversity of specialist services working in NSW to support women, families and communities impacted by domestic and family violence including:

- Crisis and refuge services
- Transitional accommodation and community housing providers
- Family support services
- Neighbourhood centres and drop in centres
- Specialist homelessness service providers
- Men's behaviour change programs and networks
- Community organisations working with high risk communities
- Specialist women's legal support services
- Women and children's support services
- Safe at Home programs

DVNSW members are all non-government organisations, some entirely government funded, others supported through philanthropic donations or partnerships with industry or the corporate sector. Many of our members have multiple government and non-government funding streams.

DVNSW advocates for best practice, continuous system improvements, developing innovative policy responses to domestic and family violence, building workforce capacity and ensuring representation at all levels of government. We provide policy advice government on prevention and response and work with communities and the media to increase awareness and represent the sector on a number of state and federal advisory bodies. We co-convene and provide a secretariat function for the NSW Women's Alliance with Rape and Domestic Violence Services Australia.

We acknowledge the work and practice wisdom of specialist women's services and domestic and family violence practitioners in the sector that underpin the recommendations in this submission. DVNSW thanks the specialist services that have developed best practice over decades of working with women and children who have shared their expertise with us. We also pay tribute to those who have experienced domestic or family violence and to our advocates, colleagues and partners in government and non-government agencies.

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Introduction

Domestic violence is common in Australia. It is a pattern of abusive behaviour through which a person seeks to control and dominate another person. It occurs in the context of family relationships, intimate partner relationships, and in the form of child abuse.

Domestic violence does not take the form of a single incident. It is characterised by ongoing behaviour that gradually and negatively undermines the victim's confidence and their ability to leave the violent person. The severity and frequency of violence often escalate over time.

Domestic violence is gendered violence – that is, the violence is perpetrated against a woman due entirely to her gender. And the violence takes many forms, none of which is mutually exclusive. While physical violence may be the most visible form, others such as sexual, emotional, social, spiritual and economic abuse can be equally harmful. Domestic violence is common in Australia. It is complex, and different from other forms of interpersonal violence. At its most extreme, domestic violence ends in homicide and at current rates, a woman dies at the hand of her partner or former partner at the rate of one woman each week in Australiaⁱ.

According to the 2017 report of the NSW Homicide Death Review Team, reporting on data for the period 1 July 2000 to 30 June 2014, there were 204 cases where a person was killed by a current or former intimate partner in a context of domestic violence (162 females and 42 males)ⁱⁱ. Key data findings include:

- 79% of intimate partner homicide victims were women.
- 98% of women killed by an intimate partner had been the primary domestic violence victim in the relationship.
- 37% of women in this dataset were killed by a former intimate partner, and almost two-thirds of these women had ended the intimate relationship with the domestic violence abuser within three months of being killed.
- Women killed by an intimate partner were aged between 15 and 80 years of age.
- 12% of women killed by an intimate partner identified as Aboriginal.
- 89% of men killed by a female intimate partner had been the primary domestic violence abuser in the relationship. All 7 men killed by a male intimate partner had been the primary domestic violence victim in the relationship.
- 31% of men killed by an intimate partner identified as Aboriginal.
- 24% of men who killed an intimate partner suicided following the murder.
- Males who killed an intimate partner were aged between 17 and 87 years of age.
- 26% of females who killed an intimate partner were acquitted at trial

DVNSW asserts that the approach taken by the Sentencing Council in reviewing sentences for homicide and manslaughter in domestic violence cases ought to take the gendered nature of the offence into consideration. Rules of evidence and unconscious bias towards women and victimhood work to filter and silence the stories of women at trial DVNSW believes that there ought to be increased judicial acknowledgement of 'social framework evidence' to incorporate the social realities

of women's lived experience and the context of domestic violence related homicide and manslaughter.

This submission takes a selective approach to the issues raised in the Consultation Paper and offers the following:

Are the sentences imposed for homicide in the context of domestic or family violence adequate? Why or why not?

The advice in this section does not relate to sentences for victims/survivors who kill their abuser.

Page 45 of the consultation report indicates that homicides in NSW that involve domestic violence appear to

“attract a slightly lower average sentence than other homicides” and that there is

“little difference in the head sentences and non-parole periods between homicides that do and do not involve domestic violence or intimate partner violence.”

However, there seems to be some large differences in the sentences for homicides that do not involve domestic violence compared to intimate partner violence (see Table 4.2: Page 50). It would be helpful if there was thoroughgoing analysis undertaken of these differences to better understand the reasons for the differential sentences imposed for homicides that involve intimate partner violence, compared to other categories of homicides.

Recommendation 1

That further analysis of the differences between homicides that do not involve domestic violence compared to intimate partner violence as noted on Table 4.2: Page 50 of the Consultation Report.

Are the current sentencing principles relating to sentencing for domestic violence homicides appropriate? Why or why not? How could the current sentencing principles relating to sentencing for domestic violence homicides be changed?

The Consultation Paper states

“Where past incidents of domestic violence by the offender are a part of the context for the killing of a family member, it is unclear whether a court can take this into account. The issue is complicated when the offender’s past conduct is unproved or uncharged.”

DVNSW has two broad concerns that arise from this inclusion in the Consultation Paper. Firstly, that the lack of clarity about what can be introduced into evidence about an offender's past behaviours, noting that domestic violence is a series of behaviours, often coercive and controlling behaviours, and often spanning years, that lead up, and contribute to, an act of homicide, place the defence at a possible disadvantage in proving motive. Secondly, the lack of clarity with respect to unproven or uncharged domestic violence offences may also disadvantage the prosecution case. It is proven that victims of domestic violence are often reluctant reporters of violence, and even when finally motivated to report, do so long after a first, or sequence of incidents of violence^{iii iv}.

DVNSW notes that a definition of coercive control behaviour is included in the definition of domestic and family violence in the current version of the Bench Book.^v However, section 4.53 of the Consultation Paper identifies a case involving *'decades of possessiveness, control and abuse'* did not meet the threshold to be brought into evidence at trial. DVNSW recommends that the threshold test be re-examined.

Recommendation 2

That the threshold test for introducing coercive control – possessiveness, control and abuse – in the Bench Book be re-examined.

Additionally, *'prosecutors may sometimes charge only the most serious or most recent conduct'* which precludes a full account of the perpetrator's offending history and the victim's experience of domestic violence within a relationship and therefore a possible compromised trial process and appropriate sentencing.

Besides threatened physical violence and stalking, most of the behaviours recognised as coercive control are not criminal unless a court has previously issued an intervention or protection order.^{vi} This is sending out a message to the community and victims that the abuse inflicted upon them is only criminal if it violates a court order.^{vii} This would be a similar situation if coercive control that was uncharged was not considered to be admissible as evidence.

Recommendation 3

That courts processes must ensure that the social and gender context in which a homicide occurs, and that the past history of the behaviour of the offender is adequately taken into consideration, even if that behaviour is uncharged and unproven

Should additional aggravating factors be legislated? Why or why not?

DVNSW considers that some aggravating factors ought to be taken into consideration in the prosecution and sentencing of homicide when the relationship between the (male) offender and (female) victim involves domestic and gendered violence, and that violence is proven or otherwise. In the case of LGBTIQ relationships, the features of the power dynamics present within the relationship equate to the gendered nature of domestic violence.

Recommendation 4

That the Council consider

- how NSW laws can treat gender as an aggravating circumstance in cases involving a female victim and male offender in the same way as international countries such as Ireland, New Zealand and Canada
- adopting as law the South Australia approach that the *'fact that the offender was in a relationship with the victim, or formerly in a relationship with the victim, aggravates certain types of offences and attracts a harsher penalty'*
- developing guidelines consistent with the *Sentencing Council for England and Wales'* and consider including the range of aggravating factors that a court is required to consider when sentencing in the context of domestic abuse
- including 'coercive control' as an aggravating factor

What changes, if any, should be made to the law to allow domestic violence context evidence to be admitted to sentencing proceedings?

DVNSW is firmly of the view that the social framework – the sociological context – within which domestic violence and homicide occurs should be taken into consideration in the prosecution and sentencing of domestic homicide. The dynamics of domestic violence are nuanced and complex and must be treated accordingly. This includes importantly, in the investigation, prosecution and sentencing of homicide where a victim of domestic violence may murder their partner following sustained abuse – reported or otherwise.

Recommendation 5

That the following context be taken into consideration in the courts approach to homicide prosecution and sentencing

- ‘social framework evidence’ in all homicide matters involving domestic and family violence
- special attention is paid to how women are affected by years of domestic abuse and how this information may be relevant in understanding the operation of defences and excuses, especially in homicide cases
- that coercive and controlling behaviour in the lead up to a homicide by an abuser of a victim is admitted as evidence
- ensure that lawyers, judicial officers, jury members and judges understand how to apply the use of social framework evidence in domestic and family violence cases
- ensure that lawyers, judicial officers, jury members and judges understand and appreciate the nuance that all social framework evidence is relevant in cases of intimate partner homicide

What changes, if any, should be made to bench books to assist courts in sentencing for domestic violence related homicide?

Given the place of bench books in assisting the court, DVNSW make the following recommendation.

Recommendation 6

- dynamics of domestic and family violence and the gendered nature of domestic and family violence be reflected in various bench books
- instruction for judicial officers on how to appropriately apply the use of ‘social framework evidence’ in prosecuting and sentencing domestic violence homicide
- instruction on how to identify coercive controlling behaviour and how to apply the use of this evidence appropriately
- advice on appropriate language to use when discussing domestic and family violence, *‘particularly in the context of remarks on sentence’^{viii}*
- advice for lawyers, judicial officers and jury members to understand that all ‘social framework evidence’ is relevant in cases of intimate partner homicide.

Conclusion

Domestic violence is far too prevalent in Australia. It is characterised by a series of coercive and controlling behaviours that at their most extreme, results in partner homicide.

Between 1 July 2010 and 30 June 2014 there were 152 intimate partner homicides in Australia that followed an identifiable history of domestic violence. The majority of these homicides involved a

man killing his female intimate partner (121 cases, or 80%). The majority of men who killed a female intimate partner in the context of domestic violence had used violence in that partnership.

Domestic violence is gendered and the complex sociological dimensions of domestic violence must be taken into consideration in the courts treatment of homicide.

ⁱ [Australian Institute of Criminology \(AIC\) 2017](#). The 2017 National Homicide Monitoring Program report by the AIC showed that over a 2-year period from 2012/13 to 2013/14, there were 99 female victims of intimate partner homicide. Women continue to be over-represented as victims of intimate partner homicide, accounting for 79% of all intimate partner homicides. Cited by Our Watch <https://www.ourwatch.org.au/Understanding-Violence/Facts-and-figures>

ⁱⁱ [http://www.coroners.justice.nsw.gov.au/Documents/2015-2017_DVDRT_Report_October2017\(online\).pdf](http://www.coroners.justice.nsw.gov.au/Documents/2015-2017_DVDRT_Report_October2017(online).pdf)

ⁱⁱⁱ https://www.women.nsw.gov.au/__data/assets/pdf_file/0004/280912/Reporting_Violence_to_the_Police_-_BOCSAR_survey.pdf

^{iv} <http://www.safelives.org.uk/policy-evidence/about-domestic-abuse/how-long-do-people-live-domestic-abuse-and-when-do-they-get>

^v National Domestic and Family Violence Bench Book; and

<https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4533.0Main+Features72013>

^{vi} NSW Legislation: Crimes (Domestic and Personal Violence) Act 2007 No 80: *an offence (other than a personal violence offence) the commission of which is intended to coerce or control the person against whom it is committed or to cause that person to be intimidated or fearful (or both).*

^{vii} <https://theconversation.com/its-time-coercive-control-was-made-illegal-in-australia-114817>

^{viii} NSW Domestic Violence Death Review Team, Annual Report 2013-2015 (2015) 54