

15 March 2019

Submission via email to:
sentencingcouncil@justice.nsw.gov.au

NSW Government Sentencing Council: Review of sentencing for murder and manslaughter

Thank you for this opportunity to provide a preliminary submission to assist with framing of the issues to be considered as part of the Council's review of sentencing for murder and manslaughter. This submission has been prepared by members of the *Monash Gender and Family Violence Prevention Centre* ('the Centre').

More details about our research centre are provided in the section one of the submission. We have also provided a short summary of current and recently completed projects being undertaken by members of the Centre which may be of interest to the Council.

Please find our submission attached to this letter.

We would welcome the opportunity to discuss any aspects of this preliminary submission or our wider research on family violence and criminal justice responses further.

Kind regards,

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Professor Jude McCulloch
Professor JaneMaree Maher

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1. Who we are

This submission has been prepared by academics from the *Monash Gender and Family Violence Prevention Centre* who also belong to the disciplines of criminology and sociology in the Monash University School of Social Sciences.

The *Monash Gender and Family Violence Prevention Centre* focuses on research examining the intersection of gender and the long-term prevention of family violence. Centre researchers work collaboratively with partners in government, social services, legal services, health and policing working to contribute to changing family violence patterns and outcomes. We identify family violence as a catastrophic and preventable social problem.

The Centre draws on local, national and international expertise as well as expertise from across the University, including social science, law, and medicine with a focus on building an evidence base to inform primary, secondary and tertiary prevention. Members of the Centre have been engaged in work that includes ground breaking research, engagement with government and civil society stakeholders, and innovative education offerings. Our research is grounded in qualitative and quantitative methods, combined with a well-developed understanding of the contemporary policy landscape.

Members of the Centre are engaged in:

- **Contract research and consultancy** - including on all aspects of family violence, family violence prevention and responses to family violence;
- **Policy development** including on perpetration interventions, risk assessment and risk management, mapping and developing linkages and collaborations between sectors and between multiple intersecting reforms and reform agendas;
- **Evaluations of programs and reforms** including large-scale multi-sector reforms;
- **Workforce capability building** on family violence prevention for practitioners and policy makers from a wide range of sectors; and
- **Expert lectures, seminars, industry briefings and opinions and family violence.**

2. Overview of this submission

Drawing on expertise and research projects undertaken by members of the Centre, our submission focuses on:

- Standard non-parole periods for murder,
- Mandatory life sentences for murder,
- Sentences imposed for domestic and family homicides, and
- Aggravating factors on sentence.

The submission also provides information about a current Australian Research Council discovery project currently being completed by members of the Centre which may be of interest to the Council's review.

3. Standard non-parole periods for murder

The Council's opportunity, as part of this review, to reconsider the standard non-parole period for

murder is welcomed. We note that the standard non-parole period for murder in NSW is presently set at 25 years for cases involving a child victim under 18 years of age and 20 years for all other murders.

Since its 2003 introduction the NSW standard no parole period sentencing scheme has been met with criticism from a range of relevant stakeholders, including academics, legal practitioners and members of the judiciary. Case law for the NSW courts and the High Court of Australia has also set out difficulties with the scheme, including the failure on the part of the legislation to sufficiently define what constitutes a 'mid range' offence of objective seriousness.

The scheme has also been critiqued as being unnecessarily complicated and punitive (see, for example, Fitz-Gibbon and Roffee, 2019; Johnson, 2003, Warner, 2003). Research undertaken by the Judicial Commission of NSW in 2010 revealed that since the introduction of the scheme sentences for murder have increased, in particular for cases where the offender pled not guilty and was convicted of murder following trial. There is limited evidence to support the need for and efficacy of this increase in sentences imposed.

The range of circumstances within which the offence of murder can be committed are vast and as such the application of a presumption minimum sentencing scheme is problematic as it fails to allow for individualised justice and proportionality to be achieved. This is a particularly concerning impact of the SNPPs given a body of research which has found that members of the community when properly informed are more concerned with the notion of proportionality than with punitive objectives such as deterrence and denunciation.

We recommend that the Council review the ongoing application and impact of the standard non-parole periods for murder addressing the underlying rationale and consequent efficacy.

4. Mandatory life sentences for murder

We understand that as part of this review the Council has been asked to consider the application of section 61 of the Crimes (Sentencing Procedure) Act 1999, which sets out mandatory life sentences for certain offences in New South Wales. Section 61(1) prescribes that:

A court is to impose a sentence of imprisonment for life on a person who is convicted of murder if the court is satisfied that the 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.

We believe that this guidance on the application of a life sentence for murder is sufficient and does not require extension or reform. Importantly, we would urge the Council not to recommend that a mandatory life term of imprisonment as the head sentence in all cases of murder. The decision to impose a life sentence for murder is best made by the judge at sentencing with consideration given to the individual circumstances of the offence and the offender, and the application of the relevant sentencing principles.

We recommend that the Council does not consider the introduction of a mandatory life sentence for murder, including for domestic and family homicides.

Section 61(6) prescribes that a life sentence should never be imposed in cases where the offender was less than 18 years of age at the time of the offence. This is an important protection that must be retained to ensure the rights of children facing such charges are adequately protected and to allow

for recognition of international human rights standards as well as the vulnerability of children in detention.

Should the Council make any recommendations to amend Section 61, we recommend that this protection for young persons in conflict with the law is retained, even for murder offences.

5. Sentences imposed for domestic and family homicides

The Council's focus in this review on the sentences imposed for domestic and family homicides represents an important opportunity to ensure that current sentencing practices are aligned with evolving community views on the seriousness of lethal violence committed by intimate partners and/or between family members.

We recognise the importance of the sentencing process in communicating a clear message to the public on the unacceptability of the use of lethal violence between intimate partners and/or family members. The remarks made by the judge on sentence are an intervention and a mechanism for creating accountability for intimate partner and family homicides. They afford a public opportunity to denounce the use of violence within intimate partner relationships, to clearly establish that such violence should not be excused nor justified as a less serious form of homicide, and to recognise failures or gaps in preventative responses in relation to the risk posed by the offender and in understanding the risk level faced by the victim prior to their death.

There has been much work undertaken by feminist and legal academics in recent years to recognise the importance of judicial storytelling and advocacy in the sentencing of gendered violence against women. The worldwide establishment of *Feminist Judgments* projects is one clear example of this (see further, Rackley 2010). This work has sought to recognise the importance of judicial discourse in providing a voice to often-silenced victims and to ensuring that legal judgments do not vilify and/or revictimise victims of gendered violence through the retelling of acts of homicide in a way that displaces blame or reallocates responsibility with the victim themselves (see further Fitz-Gibbon and Maher 2015; Maher et al 2005). We note this body of work as we encourage the Council in their review of sentencing practices domestic and family homicides to consider not only the numerical terms imposed in these cases but also the adequacy of remarks made on sentence. This focus would also assist in the Council's review of how sentencing principles are applied in cases involving domestic and family violence.

Building on the foundational work led by Professor Heather Douglas as part of the National Bench Book project, we recommend that the Council considers producing best practice guidance for judges in the sentencing of domestic and family homicides. This guidance could provide education on the nature and dynamics of domestic homicides, the importance of a gendered lens in understanding the use of lethal violence between intimate partners, and the need to ensure that remarks made on sentence cannot be interpreted as condoning the use of lethal violence through victim blaming narratives and the privileging of long held excuses and justifications for male violence. This is particularly important in cases where a male has killed a female intimate partner and successfully raised a partial defence to murder.

We recommend that the Council considers producing best practice guidance for judges in the sentencing of domestic and family homicides.

Professor Jude McCulloch is currently leading an Australian Research Council funded study with Dr

Kate Fitz-Gibbon, Professor JaneMaree Maher and Professor Sandra Walklate which involves the collection and analysis of ten years of sentencing decisions in cases of male perpetrated intimate partner homicide. This project, *Securing women's lives: Preventing intimate partner homicide* (Discovery Project 2017-2020) uses sentencing decisions and Coronial Court findings to count the number of women killed by intimate male partners in the 10-year period 2007-2016. For this project, we have analysed 94 homicide sentencing decisions from the NSW Supreme Court. We would welcome the opportunity to provide further project details, analysis and preliminary findings to the Council, including comparative data from other Australian states and territories.

Dr Kate Fitz-Gibbon has also collected and analysed sentencing practices in NSW for parricide offences (the killing of a mother or father by their child). This includes a case study analysis of 19 sentencing decisions handed down in parricide cases sentenced in the NSW Supreme Court in the period 1 January 2007 to 31 December 2016.

6. Aggravating factors on sentence

There has been an increasing tendency across Australian state and territory jurisdictions to treat domestic violence related offending as an aggravating feature on sentence (see further Douglas, 2015). This can involve identifying the presence of an intimate partner or familial relationship between the victim and offender as aggravating, as well as treating breaches of an intervention order and/or history of related violent offending as aggravating. We note the decision of the NSW Court of Criminal Appeal in *Jonson v R [2016] NSWCCA 286* and recommend that the Council review how sentencing decisions post *Jonson* have applied this approach, the extent to which it has impacted sentencing practices in domestic and family homicide offences, and whether a more effective approach would be to legislate the presence of an intimate relationship and/or domestic violence related offending as aggravating.

We recommend the Council review sentencing decisions post *Jonson* to determine how the aggravating factor has been applied, and the extent to which it has impacted sentencing practices in domestic and family homicide offences.

In some jurisdictions, for example the Northern Territory and New Zealand, there is case law which treats gender as an aggravating circumstance in cases involving a female victim and male offender (see *Criminal Code Act 1983* (NT); *Crimes Act 1961* (NZ)). As yet there is limited evidence to suggest that this is an effective approach in revealing the additional harms present in cases of domestic and family homicide. It may also limit attention to the differential gendered dynamics present in intimate partner homicides involving members of the LGBTIQ community and in familial homicides involving a child. In lieu of further evidence as to its merits, it is recommended that the Council does not adopt this specific approach.

We recommend that the Council does not seek to introduce gender as an automatic aggravating factor in sentencing of domestic and family homicides.

7. Summary of recommendations

This submission has made the following recommendations:

- We recommend that the Council review the ongoing application and impact of the standard non-

parole periods for murder addressing the underlying rationale and consequent efficacy.

- We recommend that the Council does not consider the introduction of a mandatory life sentence for murder, including for domestic and family homicides.
- Should the Council make any recommendations to amend Section 61, we recommend that this protection for young persons in conflict with the law is retained, even for murder offences.
- We recommend that the Council considers producing best practice guidance for judges in the sentencing of domestic and family homicides.
- We recommend the Council review sentencing decisions post *Jonson* to determine how the aggravating factor has been applied, and the extent to which it has impacted sentencing practices in domestic and family homicide offences.
- We recommend that the Council does not seek to introduce gender as an automatic aggravating factor in sentencing of domestic and family homicides.

8. References

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9. Appendix A: Current and recently completed research

Members of the *Monash Gender and Family Violence Prevention Centre* are currently engaged in a range of projects related to preventing and improving responses to intimate partner and family violence. Specifically, several of our current and recently completed research projects examine sentencing practice for homicide offences. Details of these projects are provided below.

- **Review of the Victorian Information Sharing Scheme**

Investigators: Jude McCulloch, JaneMaree Maher, Kate Fitz-Gibbon, Marie Segrave, Kathryn Benier, Kate Burns, Jasmine McGowan and Kate Thomas (contract research, Family Safety Victoria).

The research team have been contracted by Family Safety Victoria to conduct an independent Review of the new family violence Information Sharing Scheme that commenced in Victoria in 2018. The scheme is part of the broader reforms recommended by the Royal Commission. The Review considers any adverse impacts or unintended consequences of the scheme, as well as make recommendations to improve its operation. The findings of the Review will be tabled in Parliament and likely impact on family violence information sharing practice, policy and legislation.

- **Securing women's lives: Preventing intimate partner homicide**

Investigators: Jude McCulloch, Kate Fitz-Gibbon, Sandra Walklate, JaneMaree Maher (Funded by Australian Research Council)

This project aims to develop a framework for a new systematic preventive approach to intimate partner homicide. Intimate partner violence is the most common type of violence against women worldwide and the leading cause of death amongst Australian women aged between 15 and 44. The project intends to review a decade of intimate partner homicides in Australia to identify potential points of intervention that might have provided opportunities to prevent such killings. This new knowledge is intended to inform and assist in developing a more risk sensitive preventive approach to intimate partner homicides in Australia and overseas, enhancing women's security and preventing their deaths.

- **Perpetrator interventions in Australia: A national study of judicial views and sentencing practice for domestic violence offenders**

Investigators: Kate Fitz-Gibbon, JaneMaree Maher, Jude McCulloch. Partner Investigators: Victorian Sentencing Advisory Council, Australasian Institute of Judicial Administration (Funded by Australia's National Research Organisation for Women's Safety)

- **The killing of women in Victoria: Examining risks of violence and points of intervention**

Investigators: Kate Fitz-Gibbon (Funded by the Victorian Women's Trust).

This project examines the killing of women in Victoria (Australia). Using case analysis and interviews, the project will generate an in-depth understanding of the risks of violence and points of intervention common to cases of lethal violence against women in Victoria. The findings will provide an evidence base to illuminate women's experiences of lethal violence and to inform support services, prevention initiatives and justice system responses in Victoria.

- **Innovative legal responses to the prevention of intimate partner homicide in the UK, US and Canada**

Investigators: Kate Fitz-Gibbon (Fellowship awarded by The Winston Churchill Memorial Trust)

This project was part of a 2015 Churchill Fellowship awarded to Dr Kate Fitz-Gibbon to investigate the effectiveness of innovative and recently introduced legal responses to intimate homicide in the UK, USA and Canada. The project examined the merits of the offence of coercive control in England and the proposed offence of domestic abuse in Scotland, the New York integrated domestic violence court model and domestic violence death review committees internationally.

The full report, [2015 Churchill Fellow Report: The Peter Mitchell Fellowship to examine innovative legal responses to intimate homicide in the UK, USA, Canada](#), was published in 2016.