

7 March 2019

The Honourable James Wood AO QC
Chairperson
New South Wales Sentencing Council
GPO Box 31
Sydney NSW 2001

By email: sentencingcouncil@justice.nsw.gov.au

Dear The Honourable James Wood AO QC,

Review of sentencing for the offences of murder and manslaughter, including penalties imposed for domestic and family violence homicides and the standard non-parole periods of murder

1. Women's Legal Service NSW ('**WLS NSW**') thanks the NSW Sentencing Council for the opportunity to provide a preliminary submission to the review of sentencing for the offences of murder and manslaughter, including penalties imposed for domestic and family violence homicides and the standard non-parole periods of murder.

About Women's Legal Service NSW

2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims support, care and protection, human rights and access to justice.
3. WLS NSW welcomes the NSW Sentencing Council's review of sentencing for the offences of murder and manslaughter, particularly in relation to the sentences imposed in the context of domestic and family violence related homicides.
4. WLS NSW considers that this review should also consider the context in which the homicide occurs, and particularly consider the circumstances in which female primary victims ultimately kill their violent abusers.



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5. We also consider that the final report of the NSW Legislative Council Select Committee on the Partial Defence of Provocation (2013) is relevant to this current review. Recommendations in that inquiry included:
 - 5.1 the Office of the Director of Public Prosecutions develop a guideline in relation to the prosecution of homicides in a domestic context to *"provide clear direction to assist prosecutors in determining the appropriate charge to lay against defendants, particularly in circumstances where there is a history of violence toward the defendant"*;¹
 - 5.2 evidence of domestic and family violence be adduced in homicide matters;²
 - 5.3 the *"NSW Government develop and implement an education package on the nature and dynamics of domestic and family violence targeting the legal sector and the community more broadly"*;³
 - 5.4 *"the Attorney General issue a reference to the NSW Law Reform Commission requiring that it undertake a comprehensive review of the law of homicide and homicide defences in NSW, including reforms made in accordance with the recommendations in this report, to commence at the end of five years from the date of this report"*.⁴
6. We note the comprehensive review of homicide and homicide defences in NSW has not yet taken place and we recommend this review be commissioned by the Attorney General.
7. In summary, we recommend:
 - 7.1 The Sentencing Council consider the context in which domestic and family violence homicides occur, including circumstances when primary victims/survivors kill their violent abusers.
 - 7.2 The Sentencing Council consider gendered patterns in domestic and family violence homicides.
 - 7.3 The use of social framework evidence in homicide matters involving domestic and family violence.
 - 7.4 The Sentencing Council consider the recommendations made in the NSW Legislative Council Select Committee on the Partial Defence of Provocation Final Report.
 - 7.5 That there be a mechanism for ongoing monitoring and evaluation of any changes to law and legal processes, with an opportunity to examine the effectiveness of any such changes, including seeking to address any unintended consequences.

¹ New South Wales Legislative Council Select Committee on the Partial Defence of Provocation, *The partial defence of provocation: Final Report*, 2013, Recommendation 1.

² Ibid, Recommendation 2.

³ Ibid, Recommendation 10.

⁴ Ibid, Recommendation 11.

Domestic Violence Homicides

Violence against women and domestic violence homicides

8. There were 1,132 recorded homicides between 2000 – 2014.⁵ Of these, 338 occurred where there was *“an identifiable history of domestic violence.”*⁶ Of these, 204 (60%) were identified domestic violence homicides where a person was killed by their current or former intimate partner.⁷ Women were killed in 162 of 204 (79%) matters and men in 42 of 204 (21%) matters.⁸ Of the 42 men, 35 were killed by their current or former female partner. In 89% (31) of these cases the men killed were *“the primary domestic violence aggressor in the relationship.”*⁹
9. The NSW Domestic Violence Death Review Team as part of their methodology defines intimate partner homicide as:

*“where a person is killed by a current or former intimate partner in a domestic violence context.”*¹⁰

Women who kill their intimate partners

10. Based on the work of a number of researchers, Coss notes the different motivations and distinguishing features of men killing their female intimate partners and women killing their male intimate partners:

*“men kill in revenge, out of jealousy, for honour, as the climax in a chain of violence...when women kill it is mostly as a form of self-preservation (or protection of children) in response to violence inflicted upon them.”*¹¹
11. As outlined above, the main risk factor for intimate partner homicides is prior domestic violence. This data highlights the need for this review to consider the context in which domestic and family violence homicides occur, including female primary victims of domestic and family violence killing their violent intimate partners.
12. Women killing their violent intimate partners in the context of domestic and family violence has been discussed in research over many years. This includes Wallace's study of NSW Police homicide files from 1968 – 1981, where it was found that 70% of women who killed their husbands did so in the context of violence perpetrated by their husbands.¹² Further, Bradfield reviewed homicide cases over the period from 1980 – 2000, and identified that

⁵ NSW Domestic Violence Death Review Team, Annual Report 2015-17, p8.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid, p9.

¹⁰ Ibid, p5.

¹¹ Coss cites research by Dobash and Dobash, Polk and Wilson and Daly in Graeme Coss, “Provocative reforms: A comparative critique,” *Criminal Law Journal*, Vol 30, 2006 p139.

¹² Alison Wallace, *Homicide: The Social Reality*, NSW Bureau of Crime Statistics and Research, Sydney, 1986 p110 (123).

there were 76 cases where women had killed their male intimate partner; and in 86% of these cases there had been a history of physical violence.¹³

13. The above data from academics, researchers and the NSW Domestic Violence Death Review Team strongly demonstrates the need for a review of sentences imposed for domestic and family violence related homicides. This should occur not only in the context of violent men killing their intimate partners but also in the context of women as the primary victim/survivor of domestic and family violence killing their violent intimate partners.

Recommendation 1

The Sentencing Council consider the context in which domestic and family violence homicides occur, including circumstances when primary victims/survivors kill their violent abusers.

Recommendation 2

The Sentencing Council consider gendered patterns in domestic violence homicides.

The use of social framework evidence

14. In considering sentences to be imposed for homicides in the context of domestic and family violence, there is a need to consider the nature and dynamics of domestic and family violence and the history of the relationship and not just consider the isolated incident of the homicide.
15. The Australian Law Reform and NSW Law Reform Commissions' *Family Violence – A National Legal Response* made several recommendations relating to homicide defences.¹⁴ Several of these recommendations related to ensuring defences of homicide "accommodate the experiences of family violence victims who kill".¹⁵
16. We refer to our submission to the NSW Legislative Council Select Committee on the Partial Defence of Provocation dated 27 August 2012 and supplementary submission dated 21 September 2012.¹⁶ The submissions were informed by the work of the NSW Domestic Violence Committee Coalition and its submission to the inquiry into the Partial Defence of

¹³ Rebecca Bradfield, *The treatment of women who kill their violent intimate partners within the Australian) criminal justice system*, PhD Thesis, University of Tasmania, 2002 (Bradfield, thesis) p194.

¹⁴ Australian Law Reform and NSW Law Reform Commissions' *Family Violence – A National Legal) Response, 2010*, Recommendations 14.1-14.5.

¹⁵ Australian Law Reform and NSW Law Reform Commissions' *Family Violence – A National Legal) Response, 2010*, p61.

¹⁶ WLS NSW Submission to the NSW Legislative Council inquiry into the Partial Defence of Provocation accessed at:

<https://www.parliament.nsw.gov.au/lcdocs/submissions/35582/0037%20Womens%20Legal%20Services%20NSW.pdf> and WLS NSW Supplementary submission accessed at:

<https://www.parliament.nsw.gov.au/lcdocs/other/8136/120921%20Ms%20Liz%20Snell%20Law%20Refor m%20and%20Policy%20Coordina.pdf>

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Provocation dated 17 August 2012.¹⁷ In our submission to that inquiry, we considered the context of intimate partner homicides, particularly where female intimate partners kill their violent intimate partners and the importance of social framework evidence where intimate partner violence is raised in criminal proceedings.

17. Following an extensive review of homicide defences, with a particular focus on victims of family violence who kill their violent intimate partners, the Victorian Law Reform Commission recommended¹⁸ and the Victorian Government introduced legislative provisions in 2005¹⁹ to ensure social framework evidence could be admitted in criminal trials where intimate partner violence is raised. This was also a recommendation of the NSW Legislative Council Select Committee on the Partial Defence of Provocation in 2013.²⁰ While Victoria has since repealed defensive homicide, social framework evidence can still be used in matters of self-defence in the context of domestic and family violence.²¹
18. Toole notes that the use of social framework evidence *"is of critical importance as it directly confronts the problem abused women have faced in having their belief in lethal conduct considered genuine and reasonable"*.²²
19. WLS NSW supports the use of social framework evidence due to its ability to provide the context in which to understand the issues in a particular case.²³
20. As part of the introduction of the use of social framework evidence in Victoria there was education to demonstrate its use and application. Green commented that this education was useful to educate *"lawyers, judicial officers and jury members that all of this evidence is relevant in cases of intimate partner homicide"*.²⁴ We note that the NSW Legislative Council Select Committee Inquiry on the Partial Defence of Provocation also recommended that an education package on the nature and dynamics of domestic and family violence be developed to target the legal sector and wider community.²⁵

¹⁷ NSW Domestic Violence Committee Coalition submission to the NSW Legislative Council inquiry into the Partial Defence of Provocation accessed at:
<https://www.parliament.nsw.gov.au/lcdocs/submissions/44297/0031%20New%20South%20Wales%20Domestic%20Violence%20Committee%20Coalition.pdf>

¹⁸ Victorian Law Reform Commission (VLRC), *Defences to Homicide: Final Report, 2004*, Recommendation 25.

¹⁹ Section 9AH(3)(a) – (f), *Crimes Act 1958* (Vic), repealed.

²⁰ New South Wales Legislative Council Select Committee on the Partial Defence of Provocation, *The partial defence of provocation: Final Report, 2013*, Recommendation 2.

²¹ See s322J & s322M of the *Crimes Act 1958* (Vic)

²² Toole (2012) cited in Kate Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence: A comparative perspective*, Deakin University, Palgrave Macmillan, 2014 p124.

²³ Julie Stubbs and Julia Tolmie, "Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome," *Melbourne University Law Review*, Vol. 23, 1999 at 71.1.

²⁴ Betty Green (2012) cited in Kate Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence: A comparative perspective*, Deakin University, Palgrave Macmillan, 2014 p124.

²⁵ New South Wales Legislative Council Select Committee on the Partial Defence of Provocation, *The partial defence of provocation: Final Report, 2013*, Recommendation 10.

21. Social framework evidence is important for its potential to dispel myths, for example, regarding why women do not leave violent relationships and why women victims of violence may ultimately kill either using weapons, such as knives or guns or in non-confrontational contexts, such as when their violent partner is sleeping.

Recommendation 3

The use of social framework evidence in homicide matters involving domestic and family violence.

Recommendation 4

The Sentencing Council consider the recommendations made in the NSW Legislative Council Select Committee on the Partial Defence of Provocation Final Report.

Recommendation 5

That there be a mechanism for ongoing monitoring and evaluation of any changes to law and legal processes, with an opportunity to examine the effectiveness of any such changes, including seeking to address any unintended consequences.

If you would like to discuss any aspect of this submission, please contact Melissa Marshall, Solicitor or Liz Snell, Law Reform and Policy Coordinator on 02 8745 6900.

Yours faithfully,

Women's Legal Service NSW

**Janet Loughman
Principal Solicitor**