

22 January 2019

New South Wales Sentencing Council  
GPO Box 31  
Sydney NSW 2001

**By email:** [sentencingcouncil@justice.nsw.gov.au](mailto:sentencingcouncil@justice.nsw.gov.au)

To Whom it May Concern

**Re: Review of sentencing for murder and manslaughter**

Rape & Domestic Violence Services Australia (R&DVSA) welcome the opportunity to make a preliminary submission to the Sentencing Council review of sentencing for murder and manslaughter.

R&DVSA is a national, non-government organisation that provides a range of specialist trauma counselling services to people whose lives have been impacted by sexual, family or domestic violence.

As such, our submission focuses on sentencing for domestic and family violence related homicides.

In framing the consultation paper, R&DVSA recommend that the Sentencing Council consider:

- The need for education to counter outdated judicial views about domestic and family violence;
- The impact of any reform on women who kill their abusive partner, in circumstances where they were the primary victim of domestic or family violence; and
- The need for consultation with Indigenous communities.

We consider each issue briefly below.

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## Outdated judicial views about domestic violence

R&DVSA is concerned that many judicial officers prescribe to outdated views about domestic and family violence that may impact their assessments of sentencing factors such as culpability, harm, risk and social costs.<sup>1</sup> It is imperative that judicial officers are properly educated about domestic and family violence so that they are equipped to make informed and fair sentencing assessments.

Outdated judicial views about domestic and family violence are clearly evident upon examining sentencing remarks for domestic violence related homicides. A 2017 study by Buxton-Namisnyk and Butler considered all available sentencing remarks on domestic violence related homicide finalised by way of conviction in NSW since July 2000.<sup>2</sup> They found that sentencing remarks commonly reflected inappropriate and gendered stereotypes that undermine victims' claims to justice and improperly lend support to offenders' defences.<sup>3</sup> For example, sentencing remarks commonly:

- Minimised perpetrator accountability. For example, judges often characterised domestic violence as a "loss of control" or described perpetrators as motivated by innocent intentions such as "jealousy." This type of language masks the true dynamics of domestic violence as an attempt to maintain power and control, motivated by a perpetrators' belief that he is entitled to possess or control his partner.<sup>4</sup>
- Used mutualising language. For example, judges regularly attributed violence "to a relationship" rather than to the perpetrator, by using terms such as "violent relationship", "turbulent relationship", or "rocky relationship".<sup>5</sup> Given that the vast majority of cases of intimate partner homicide involve a clear primary domestic violence victim and a primary domestic violence abuser,<sup>6</sup> this mutualising language is inaccurate and places inappropriate blame on the victim.
- Invoked stereotypes. For example, judges often reflected problematic stereotypes about how "proper victims" should behave. In one case, a judge indicated that the victim was too "young" or "inexperienced" to appreciate the danger posed by her abusive partner and suggested that if she "knew better" she would have ended the relationship prior to her death. This ignores the dynamics of power and control central to domestic violence as well as the risks associated with leaving a relationship.<sup>7</sup>
- Minimised non-physical domestic violence. For example, judges described perpetrators who primarily used non-physical forms of domestic violence as controlling and manipulative but

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<sup>1</sup> Christine Bond and Samantha Jeffries, 'Similar Punishment? Comparing Sentencing Outcomes in Domestic and Non-Domestic Violence Cases' (2014) 54 *British Journal of Criminology* 849.

<sup>2</sup> Emma Buxton-Namisnyk and Anna Butler, 'What's language got to do with it? Learning from discourse, language and stereotyping in domestic violence homicide cases' (2017) 29(6) *Judicial Officers' Bulletin* 49.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid 51-52.

<sup>5</sup> Ibid 52.

<sup>6</sup> The NSW Domestic Violence Death Review Team found that in 77 of the 78 intimate partner homicides between 2015-2017, there was a clear primary domestic violence victim and a primary domestic violence abuser: NSW Domestic Violence Death Review Team, *Annual Report 2015-2017* (2017) NSW Attorney General and Justice, 132.

<sup>7</sup> Ibid.

not “violent”. This overlooks the relevance of non-physical forms of domestic violence as risk factors in the period prior to homicide.<sup>8</sup>

We note that the NSW Domestic Violence Death Review Team also discussed the use of problematic language by higher court judicial officers when describing domestic violence in remarks on sentence in their Annual Report 2012-2013.<sup>9</sup>

According to Bond and Jeffries, outdated judicial views may be the cause of differential sentencing outcomes between domestic violence and non-domestic violence related offences. In their study of NSW sentencing outcomes from 2009 until 2012, Bond and Jeffries found that domestic violence offenders received more lenient sentence outcomes than offenders who perpetrated violence outside of domestic contexts.<sup>10</sup> They found that fewer domestic violence cases resulted in full-time imprisonment compared with non-domestic violence cases, and that those domestic violence cases which did result in imprisonment received shorter average prison terms.<sup>11</sup>

We note that Bond and Jeffries’ findings have been disputed in research conducted by the *NSW Bureau of Crime Statistics and Research (BOSCAR)*.<sup>12</sup>

Regardless, the need for judicial education in relation to domestic and family violence is justified on the basis of sentencing remarks alone.

As Buxton-Namisnyk and Butler write, “judicial officers wield significant social power with respect to discussing, naming and representing domestic violence.”<sup>13</sup> In order to shift social understandings of domestic violence in the right direction, it is imperative that judges use their sentencing remarks to:

- Reinforce that domestic violence is unacceptable;
- Hold perpetrators accountable and recognise the centrality of power and control in domestic violence related homicides;
- Reject justifications for domestic and family violence that minimise perpetrator accountability such as that violence is caused by a “loss of control” or drugs or alcohol;
- Reflect the value of the victim’s life and avoid victim-blaming judgments;
- Recognise that non-physical forms of violence can be equally, if not more, damaging than physical violence; and
- Recognise the significant impact that domestic and family violence has on society.<sup>14</sup>

Thus, R&DVSA recommend that judicial officers receive comprehensive and ongoing training in relation to the dynamics, complexities and impacts of domestic and family violence. This must include physical, sexual, psychological, emotional, financial, social and spiritual violence.

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<sup>8</sup> Ibid 52, 56.

<sup>9</sup> NSW Domestic Violence Death Review Team, *Annual Report 2012-2013* (2013) NSW Attorney General and Justice, 28-29.

<sup>10</sup> Bond and Jeffries, above n 1.

<sup>11</sup> Ibid.

<sup>12</sup> Neil Donnelly and Suzanne Poynton, “Prison penalties for serious domestic and non-domestic assault” (2015) 110 *NSW Bureau of Crime Statistics and Research* 1.

<sup>13</sup> Buxton-Namisnyk and Butler, above n 2, 49.

<sup>14</sup> Bond and Jeffries, above n 1; Buxton-Namisnyk and Butler, above n 2.

## Women who commit homicide offences in response to domestic or family violence

R&DVSA is concerned that proposals to sentence domestic violence related homicide more harshly<sup>15</sup> may have an unintended impact on women who kill their abusive partners, in circumstances where they were the primary victim of domestic or family violence.

According to the NSW Domestic Violence Death Review Team:

- Of 78 intimate partner homicides perpetrated between 2015-2017, 10 (13%) involved homicides where a male primary domestic violence abuser was killed by a female primary domestic violence victim.<sup>16</sup>
- Of 204 intimate partner homicides perpetrated between 2000-2014, 31 (15%) involved homicides where a male primary domestic violence abuser was killed by a primary domestic violence victim.<sup>17</sup>

Thus, it is critical that the Council consider how any reform to sentencing practices may impact women convicted of killing their abusive partners.

For many decades, feminist activists have “challenged the legal system to adopt a more realistic appraisal of the life circumstances of women who kill in response to abuse.”<sup>18</sup> This activism has “focused on self-defence as the preferred strategy for battered women charged with killing an abusive spouse and thus less attention has been paid to sentencing.”<sup>19</sup>

However, Stubbs and Tolmie argue there is a need for greater attention to sentencing practices in circumstances where a battered woman kills her abusive partner.<sup>20</sup> They state:

*Myths and stereotypes about domestic violence may significantly shape sentencing outcomes in these cases ... [W]e cannot assume that a judge's attempts to contextualise the women's offending for the purposes of sentencing will necessarily challenge rather than reinforce stereotypes about sex/gender, violence against women or Indigenous peoples.*<sup>21</sup>

As argued above, R&DVSA believe that judicial education is critical to ensure fair sentencing of domestic violence related homicides. This applies equally to circumstances where women kill their abusive partners. Through education, judges may be supported to understand the gendered and racialised social context in which a woman may kill her abusive partner. In this way, education may help shift the dominant framework applied to battering from one of individual pathology to one that acknowledges the full social context of offending.<sup>22</sup>

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<sup>15</sup> See, for example, APP ‘NSW orders review into murder sentences’, SBS online, 23 November 2018, <https://www.sbs.com.au/news/nsw-orders-review-into-murder-sentences>.

<sup>16</sup> NSW Domestic Violence Death Review Team, *Annual Report 2015-2017* (2017) NSW Attorney General and Justice, 193.

<sup>17</sup> Ibid. We note this statistic does not include a breakdown of the gender of perpetrators.

<sup>18</sup> Julie Stubbs and Julie Tolmie, ‘Battered Women Charged With Homicide: Advancing the Interests of Indigenous Women’ (2008) 41(1) *The Australian and New Zealand Journal of Criminology* 138, 138.

<sup>19</sup> Ibid 151.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

Further, R&DVSA caution against any reform that would instigate a mandatory minimum sentence for domestic violence related homicide, or otherwise limit judicial discretion when sentencing a woman for killing her abusive partner. To do so may have an unjust impact for the following reasons:

- Innocent women may come under heightened pressure to accept a plea bargain, due the uncertain law on self defence as applied to these situations;<sup>23</sup> and
- Judges may be constrained from taking into account the full social context of offending and be obligated to impose unjustly harsh sentences on women who kill their abusive partners.<sup>24</sup>

It is imperative that the sentencing process allow judges to recognise gendered and racialized inequalities as forming part of the context for offending, where women kill their abusive partners.

### **The need for consultation with Indigenous communities**

R&DVSA caution that the Council must recognise the specific ways that Indigenous communities may be impacted by any reform to sentencing practices and give strong emphasis to their interests. This should be achieved through extensive and ongoing consultation with Indigenous communities, including women and children impacted by family and domestic violence.

Domestic and family violence related homicide impacts Indigenous communities in a myriad of specific ways, that differ from impacts on non-Indigenous communities. For example:

1. Indigenous men and women are overrepresented as victims of domestic and family violence related homicide.<sup>25</sup> In approximately 24% of intimate partner homicides in Australia in 2003-2004, one or typically both partners were Indigenous, despite the fact that Indigenous people made up 2.4% of the Australian populations.<sup>26</sup> According to the National Homicide Monitoring Project, in 2013-2014:
  - Approximately 60% of Indigenous male homicide victims died in domestic homicide incidents, compared with 16% of non-Indigenous male victims; and
  - Approximately 80% of Indigenous female homicide victims died in domestic homicide incidents, compared with 72% of non-Indigenous female victims.<sup>27</sup>
2. A higher proportion of Indigenous domestic and family violence related homicides involve a female offender. There may be countless reasons for this disparity. For example, Stubbs and Tolmie cite the following factors as possible explanations:
  - Indigenous women who experience family violence may face difficulties gaining access to support from agencies, leaving them without legal means of protecting themselves from violence. Cunneen and Kerley note that “physical force may be the only resistance to domestic violence available given a range of pressures which militate against involvement of the police.”<sup>28</sup>

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<sup>23</sup> Ibid 150-151.

<sup>24</sup> Ibid 152. See, for example, the discussion of *R v Burke* [2000] NSWSC 356.

<sup>25</sup> Ibid 139.

<sup>26</sup> Ibid.

<sup>27</sup> National Homicide Monitoring Project, ‘Victims and Offenders, 2009-10 TO 2013-14’, accessed at: [http://www.crimstats.aic.gov.au/NHMP/2\\_victims-offenders/](http://www.crimstats.aic.gov.au/NHMP/2_victims-offenders/)

<sup>28</sup> Quoted in Stubbs and Tolmie, above n 17, 141.

- Since Indigenous women are substantially overrepresented within the criminal justice system for all offences, including violent and non-violent offences, they are much more likely than non-Indigenous battered women to have a prior record, which in turn may be interpreted to undermine their claim to victim status.<sup>29</sup>
  - Evidence suggests that Aboriginal women in some Australian communities may have fewer reservations than non-Aboriginal women about responding to physical force with force.<sup>30</sup>
  - HREOC notes that “Indigenous scholars also argue that the violent responses to violence by Australian Indigenous women may be more structured” and may include the “implementation of payback or customary law”.<sup>31</sup>
  - Indigenous women commonly face “enormous pressures arising from the combined effects of poverty, violence, sole parenthood, alcohol and substance abuse, and gender and race discrimination”.<sup>32</sup>
3. Indigenous perpetrators of domestic violence offences are sentenced more harshly than non-Indigenous perpetrators. In their study of NSW sentencing outcomes from 2009 until 2012, Bond and Jeffries found that when sentenced under comparable statistical circumstances, Indigenous offenders were more likely to be sentenced to prison than their non-Indigenous counterparts.<sup>33</sup> We note that the methodology of this study was critiqued in research conducted by BOSCAR.<sup>34</sup> However, the BOSCAR study also found that Indigenous offenders found guilty of a serious domestic violence related assault were sentenced more harshly than non-Indigenous offenders.<sup>35</sup>
  4. Indigenous women who kill their abusive partner may be judged adversely on the basis of racialised stereotypes of “the battered women”.<sup>36</sup> Where Indigenous women do not conform to white stereotypes of femininity as passive and helpless, they may be seen as not entitled to a particular defence or mitigation of sentence.<sup>37</sup> This is reflected in the higher proportion of Indigenous women serving sentences for killing violent men. According to Stubbs and Tolmie, of 25 homicide cases involving battered women defendants from 2000 to 2007, 100% of Indigenous women were convicted compared with 67% of non-Indigenous women.<sup>38</sup>
  5. Indigenous offenders may be subject to racially prejudiced judicial assessments of blameworthiness, harm, risk and social costs.<sup>39</sup> For example, judges are more likely to construe Indigenous offenders as inherently dangerous, while they perceive non-Indigenous

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<sup>29</sup> Ibid

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Samantha Jeffries and Christine EW Bond, ‘Taking the Problem Seriously? Sentencing Indigenous and Non-Indigenous Domestic Violence Offenders’, 0(0) *Australian and New Zealand Journal of Criminology* 1.

<sup>34</sup> Donnelly and Poynton, above n 12.

<sup>35</sup> Ibid.

<sup>36</sup> Stubbs and Tolmie, above n 17, 143.

<sup>37</sup> Ibid.

<sup>38</sup> Stubbs and Tolmie, above n 17, 148.

<sup>39</sup> Jeffries and Bond, above n 32.

domestic violence offenders as struck by a momentary loss of control.<sup>40</sup> Similarly, judges are more likely to perceive the harmful effect of family violence on the Indigenous community, while minimising the impact of a white offender's violence on a largely invisible white community.<sup>41</sup>

6. Indigenous communities may have different perspectives and interests in regards to criminal justice responses to domestic and family violence. For example, Bond and Jeffries state that many Indigenous women see strategies of punitiveness as "another tool of racial oppression wielded against their communities."<sup>42</sup> They perceive that the increased use of incarceration may have deleterious effects on Indigenous communities, by further fragmenting families and acting a precursor to further violence.<sup>43</sup>

Given the complexity of these considerations, R&DVSA does not consider it appropriate to make any specific recommendation about sentencing responses to Indigenous domestic and family violence related homicide.

However, we strongly recommend that the Council consult extensively with Indigenous communities and give strong emphasis to their interests.

If you have any questions or would like to discuss further, please do not hesitate to contact me on (02) 8585 0333 or by email at [kajhalm@rape-dvservices.org.au](mailto:kajhalm@rape-dvservices.org.au).

Yours faithfully,

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**Rape & Domestic Violence Services Australia**

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<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid 14.

<sup>43</sup> Ibid 14-15.