

# ANROWS

AUSTRALIA'S NATIONAL RESEARCH  
ORGANISATION FOR WOMEN'S SAFETY  
*to Reduce Violence against Women & their Children*

**The Law Reform and Sentencing Council**  
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## **Review of sentencing for murder and manslaughter**

Dear The Honourable James Wood AO QC

Australia's National Research Organisation for Women's Safety (ANROWS) thanks the New South Wales Sentencing Council for the opportunity to make a preliminary submission to help shape issues for consultation in the review of sentencing for the offences of murder and manslaughter.

ANROWS is an independent, not-for-profit organisation established as an initiative under Australia's National Plan to Reduce Violence against Women and their Children 2010-2022. ANROWS is jointly funded by the Commonwealth and all state and territory governments of Australia. ANROWS was set up with the purpose of establishing a national level approach to systematically address violence against women and their children.

Our mission is to deliver relevant and translatable research evidence which drives policy and practice leading to a reduction in the incidence and impacts of violence against women and their children. Every aspect of our work is motivated by the right of women and their children to live free from violence and in safe communities. We recognise, respect and respond to diversity among women and their children and we are committed to reconciliation with Aboriginal and Torres Strait Islander Australians.

ANROWS commends this call for preliminary submissions. This submission uses relevant evidence from research produced or commissioned by ANROWS to identify significant issues pertinent to the review of sentencing for the offences of murder and manslaughter.

We would be very pleased to further assist the Council, if required.

Yours sincerely

  
**Dr Heather Nancarrow**  
Chief Executive Officer

8 March 2019

## Introduction

The dynamics of domestic and family violence are gendered. These gendered dynamics are important at all stages of addressing domestic and family violence, including sentencing for homicide offences committed in the context of domestic and family violence. This preliminary submission focuses on female homicide offenders in the context of domestic and family violence.

The NSW Sentencing Council has called for preliminary submissions to help frame the issues to be addressed during consultations on their review of homicide sentencing. ANROWS is offering this preliminary submission to help pinpoint key concerns for the review as identified in ANROWS research. This preliminary submission highlights areas for the NSW Sentencing Council's consideration, in relation to:

1. The devastating impact of domestic and family violence on our community.
2. The principles that courts apply when sentencing for cases involving domestic and family violence, including:
  - 2.1. the high rates of female homicide offenders who are primary victims of domestic and family violence;
  - 2.2. the barriers women face in leaving abusive relationships;
  - 2.3. the rising female prison population and lack of support/services for women in prison; and
  - 2.4. female homicide offenders who identify as Aboriginal and Torres Strait Islander.
3. Further issues, including,
  - 3.1. the impact of violence-supportive community attitudes—these attitudes (including whether domestic and family violence is perceived to be a serious crime) affect women's ability to report violence and receive assistance, as well sentencing decisions; and
  - 3.2. the judicial education required to support any proposed changes to sentencing.

Within these areas of focus, ANROWS is recommending the following key issues for consultation:

- ***Key issue for consultation #1: The characteristics of intimate partner homicides perpetrated by women—the high levels of primary victims, the high numbers of offenders named as protected parties on Domestic Violence Orders, and the killing of a partner while in the relationship, rather than in the context of separation—are very different to intimate partner homicides perpetrated by men.***
- ***Key issue for consultation #2: This gendered difference should be considered in relation to the sentencing principle of the need to protect the community from the offender.***
- ***Key issue for consultation #3: Social framework evidence should be considered in the context of homicides committed within abusive relationships.***
- ***Key issue for consultation #4: Barriers seeking help, safety, and/or leaving may impact the effectiveness of deterrence as a sentencing principle.***
- ***Key issue for consultation #5: Lack of understanding about these barriers may negatively influence sentencing decisions.***

- *Key issue for consultation #6: The rising female prison population and lack of adequate support resources may impact the effectiveness of the principle of rehabilitation.*
- *Key issue for consultation #7: The damaging effects of incarceration on children in perpetuating cycles of violence and disadvantage.*
- *Key issue for consultation #8: The high proportion of primary victims who become homicide offenders; barriers to seeking help, safety, and/or leaving; and the rising female prison population (and lack of support) should all be addressed in consultation with Aboriginal and Torres Strait Islander communities.*
- *Key issue for consultation #9: Community attitudes can affect ability to recognise or report intimate partner violence, and can affect sentencing.*
- *Key issue for consultation #10: Law reform can be an important tool for shifting community attitudes.*
- *Key issue for consultation #11: Judicial attitudes affect sentencing decisions.*
- *Key issue for consultation #12: Law reform alone cannot address the devastating impact of domestic and family violence.*

## 1. The devastating impact of domestic and family violence

This section outlines evidence from ANROWS research about the prevalence of domestic and family violence, the health impacts of domestic and family violence, and characteristics of male-offender intimate partner homicide.

### 1.1. What do we know about occurrence and prevalence?

The *National Plan to Reduce Violence Against Women and their Children 2010-2022* (Council of Australian Governments, 2011) identifies domestic and family violence and sexual assault as gendered crimes that have an unequal impact on women. Domestic and family violence and sexual assault are the most pervasive form of violence experienced by women in Australia (COAG, 2011). Domestic and family violence usually involves

an overt or subtle expression of a power imbalance, resulting in one person living in fear of another and usually involves an ongoing pattern of abuse characterised by coercive and controlling behaviours. (Backhouse & Toivonen, 2018, p.5)

Tactics of domestic and family violence can be physical, sexual, verbal, psychological/emotional, financial, social, spiritual and legal. Broadly, domestic violence refers to violence against an intimate partner or ex-partner, and domestic and family violence also includes violence perpetrated against children, older people, parents (by children), and other kin or family members.<sup>1</sup> The majority of people who experience this kind of violence are women in their homes, at the hands of men they know (Backhouse & Toivonen, 2018).

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<sup>1</sup> “Intimate partner” includes a current partner (living with), previous partner (has lived with), boyfriend/girlfriend/date and ex-boyfriend/ex-girlfriend (has never lived with) (ABS cited in ANROWS, 2018).

In Australia, approximately one in four women have experienced at least one incident of emotional, physical, or sexual violence by an intimate partner (Australian Bureau of Statistics cited in Australia's National Research Organisation for Women's Safety, 2018).<sup>2</sup>

Domestic and family violence does not affect all women equally. Although violence is perpetrated against women from all cultures, ages and socio-economic groups, the extent, nature and impact of such violence is not evenly distributed across communities in Australia, and domestic and family violence may present in unique ways in diverse communities (Mitra-Kahn, Newbiggin, & Hardefeldt, 2016). In Australia, it is important to understand domestic and family violence in Aboriginal and Torres Strait Islander communities within the context of colonisation, and to recognise that “one-size-fits-all” definitions of domestic and family violence ignore local nuances and cultural differences—that is, experiences of Aboriginal or Torres Strait Islander women have a “*radical specificity*” given their political, social and cultural histories, and those experiences cannot be deduced from the mainstream literature on violence against women (Blagg, Bluett-Boyd, & Williams, 2015, p.9; see also Mitra-Kahn et al., 2016). While there is limited evidence on the prevalence of domestic and/or family violence in Aboriginal and Torres Strait Islander communities, it is estimated that three in five women who identify as Aboriginal or Torres Strait Islander have experienced physical or sexual violence by an intimate partner since the age of 15 (Webster, 2016).

As indicated above, there are tactics of abuse that are specific to particular communities. Women without permanent immigration status in Australia, women from Culturally and Linguistically Diverse (CALD) communities, women in prison, women with disabilities and/or activity limitations, and people identifying as LGBTIQ are vulnerable to tactics of abuse that exploit their unique lived situation—for example, not complying with immigration processes, taking advantage of a lack of knowledge of local legal systems or rights, taking control over someone's finances, or threatening to “out” someone's sexual orientation (see for example, Mitra-Kahn et al., 2016; Day, Casey, Gerace, Oster, & O'Kane, 2018; Vaughan et al., 2016). There is a lack of available data on the prevalence of domestic and family violence in diverse communities, and many of the main reporting mechanisms struggle to capture information from, for example, women in the CALD community, or women with disabilities (see Poljski & Murdolo cited in Mitra-Kahn et al., 2016; Cox, 2016).

Domestic violence between intimate partners also has damaging effects on children. An estimated 187,800 women who have experienced violence by a current partner have been pregnant during the relationship (and of these women, nearly one in five experienced violence during pregnancy) (ABS cited in ANROWS, 2018). For violence perpetrated by previous partners, this percentage increased significantly: nearly half of women who experienced violence by a previous partner and were pregnant at some point in that relationship experienced violence during their pregnancy (ABS cited in ANROWS, 2018). Additionally, 65 percent of women who had children in their care when they experienced violence by a current or former partner reported that the children had seen or heard the violence (ABS cited in ANROWS, 2018). This number has also been estimated to be as high as one in

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<sup>2</sup> A growing area of focus and concern is intimate partner sexual violence (IPSV). IPSV has unique impact, including difficulty recognising or defining the abuse as abuse, longer-lasting trauma, increased barriers to seeking help, and higher levels of physical injury (Backhouse & Toivonen, 2018). IPSV is particularly relevant to considerations of homicides in the context of domestic and family violence, because IPSV is a significant indicator of escalating frequency and severity of domestic and family violence, and, significantly, women who experience IPSV are at a much higher risk of being killed, particularly if they are also being physically assaulted (Toivonen & Backhouse, 2018).

four children who have witnessed violence against their mother or stepmother (National Council to Reduce Violence against Women and their Children cited in Wakefield & Taylor, 2015). Children who live with such violence are more likely to have a range of health, development and social problems, and are at higher risk of perpetrating or becoming a victim of violence, which perpetuates intergenerational cycles of violence (Kaspiew et al., 2017; Campo, Kaspiew, Moore, & Tayton; Flood & Fergus; Holt, Buckley, & Whelan; Humphreys, Houghton, & Ellis; Richards; Stith et al., all cited in Webster, 2016).

Domestic and family violence also is costly to the economy—in 2015-2016, the total annual cost of violence against women and their children in Australia was estimated to be \$22 billion (KPMG cited in ANROWS, 2018).

## **1.2. Health impact and burden of disease**

One way of measuring the impact of domestic and family violence is to look at the burden of disease. Burden of disease is the impact on a population of living with illness, injury, disability, or premature death.

An ANROWS report, *Examination of the burden of disease of intimate partner violence against women in 2011* estimated the amount of burden that could have been avoided if no adult women in Australia had been exposed to violence by an intimate partner during their lifetime, using a dataset that only included diseases that were a direct consequence of intimate partner violence (Ayre, Lum On, Webster, Gourley, & Moon, 2016). In the report, it was conservatively estimated that 2.2 percent of the disease burden experienced by women aged 18 years and over in 2011 was attributable to physical/sexual/emotional violence by an intimate partner (Ayre et al., 2016). Intimate partner violence contributed more to the burden of disease of adult women in their reproductive age (18-44 years) than any other risk factor: an estimated 5.1 percent (Ayre et al., 2016). Importantly, more than one-quarter (27%) of this burden was fatal (Ayre et al., 2016). In fact, physical/sexual intimate partner violence was responsible for almost half (45%) of the total burden due to homicide & violence among adult women in 2011 (Ayre et al., 2016).<sup>3</sup>

Just as with data on prevalence, data on health outcomes of domestic and family violence for women in diverse communities is limited. This is partly attributable to definitional inconsistencies, but also results from smaller community populations and a lack of means to appropriately administer surveys (for example, lack of interpreters) (Lum On, Ayre, Webster, & Moon, 2016). However, the rate of burden attributable to such intimate partner violence is estimated at 6.4 percent of the overall burden among Aboriginal and Torres Strait Islander women, and 10.9 percent for the 18-44 age group, which is more than any other factor (Webster, 2016). Significantly, 34 percent of the burden is fatal (Ayre et al., 2016). Close to two-thirds (63.7%) of the burden of homicide and violence among Aboriginal and Torres Strait Islander women is due to intimate partner violence (Webster, 2016).

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<sup>3</sup> An ANROWS review of literature on health burden found that there were particular health outcomes that stood out as having evidence of increased risk due to exposure to intimate partner violence: depression, termination of pregnancy and homicide (Lum On et al., 2016).

### **1.3. Men who kill female intimate partners**

Before turning to a discussion of female intimate partner homicide offenders, we will first consider male-perpetrated intimate partner homicides in the context of the devastating impacts of domestic and family violence to highlight the gendered differences.

The Australian Domestic and Family Violence Death Review Network recently reviewed intimate partner homicides between 1 July 2010 and 30 June 2014 that followed an identifiable history of domestic violence (Domestic Violence Death Review Team, 2018). Of the 152 cases identified, the majority involved a male killing their current or former intimate partner (79.6%),<sup>4</sup> and the majority of those males who killed a female had been the primary abuser against that female prior to her death (92.6%) (DVDRT, 2018). No males killed a female intimate partner who had been a primary abuser against them (DVDRT, 2018). Almost a quarter (24%) of the males who killed their current or former female partners were named as respondents in Domestic Violence Orders protecting the female homicide victim at the time of the death (DVDRT, 2018).

The report points out that these homicides do not occur without warning. In the cases where a male domestic violence abuser killed a female intimate partner:

- 76.2 percent had previously used physical violence against that partner;
- 80 percent had been emotionally or psychologically abusive;
- 61 percent had been socially abusive; and
- 2.4 percent were known to be sexually abusive (DVDRT, 2018).

Over a third (36.2%) of the males who killed their female partners had stalked the woman either during the relationship or after it had ended (DVDRT, 2018). Actual or intended separation was a characteristic in over half of the male homicide offender cases (DVDRT, 2018).

Almost 20 percent of males who killed a female partner, and over 20 percent of females who were killed by a male partner identified as Aboriginal. The report notes that this statistic needs to be interpreted cautiously and understood in conjunction with other literature on domestic and family violence in Aboriginal and Torres Strait Islander communities (DVDRT, 2018). The standout characteristics of the homicides identified by the Domestic Violence Death Review Team, therefore, show that men are killing their female intimate partners as part of a pattern of abuse and control.

## **2. Principles applied during sentencing for homicide in the context of domestic and family violence**

As identified by the NSW Sentencing Council, in reviewing sentencing for homicide, it will be important to consider the principles that courts apply in sentencing cases involving domestic and family violence. This section of the submission considers sentencing principles in relation to female homicide offenders who have been primary victims of domestic and family violence. In particular, the principles of general and specific deterrence (s 3A (b)), protecting the community from the offender (s

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<sup>4</sup> This figure is supported by prior research. From mid-2002 to mid-2012, 488 women in Australia were killed by an intimate partner, which represents 75 percent of total victims killed by an intimate partner (Bryant & Bricknell cited in ANROWS, 2018).

3A (c)), and rehabilitation of the offender (s 3A (d))—and their applicability in situations where women kill their abusive partners—are flagged here for consideration (see *Crimes (Sentencing Procedure) Act 1999*). For all three principles, we ask the Council to consider the unique implications for Aboriginal and Torres Strait Islander women.

### **2.1. A high proportion of women homicide offenders are primary victims of intimate partner violence**

In the review by the Domestic Violence Death Review Team (2018), it was found that of all intimate partner homicides between 2010 and 2014 that followed a history of domestic violence, only 18.4 percent involved women killing their current or former male partner (all female homicide offenders in this dataset killed males). In 60.7 percent of these cases, the woman homicide offender was a primary victim of domestic violence killing her male abuser. In only 2 of the 28 female-offender cases was the female homicide offender the primary abuser of the male intimate partner homicide victim. A quarter (25%) of the women who killed male intimate partners were, at the time of the homicide, the protected party under a Domestic Violence Order naming the male homicide victim as the respondent. The majority of women who killed a male partner were in a relationship with that partner at the time of the homicide (82.1%).

Almost half of the female homicide offenders (46.4%), and over one third of the male homicide victims (35.5%) identified as Aboriginal, however, again, these statistics need to be interpreted cautiously and understood in conjunction with other literature on domestic and family violence in Aboriginal and Torres Strait Islander communities (DVDRT, 2018).

These characteristics of intimate partner homicides perpetrated by women—the high levels of primary victims, the high numbers of offenders named as protected parties on Domestic Violence Orders, and the killing of a partner while in the relationship, rather than in the context of separation—should be consulted on in relation to the need to protect the community from the offender (s 3A (c)).

ANROWS endorses the recommendation of Women’s Legal Service NSW to use social framework evidence in homicide matters involving a history of family and domestic violence.<sup>5</sup> The following section on barriers to seeking help, safety, and/or leaving explains some of the social framework in which intimate partner homicides are occurring.

***Key issue for consultation #1: The characteristics of intimate partner homicides perpetrated by women—the high levels of primary victims, the high numbers of offenders named as protected parties on Domestic Violence Orders, and the killing of a partner while in the relationship, rather than in the context of separation—are very different to intimate partner homicides perpetrated by men.***

***Key issue for consultation #2: This gendered difference should be considered in relation to the sentencing principle of the need to protect the community from the offender.***

***Key issue for consultation #3: Social framework evidence should be considered in the context of homicides committed within abusive relationships.***

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<sup>5</sup> Please note upcoming ANROWS research [Transforming legal understandings of intimate partner violence](#), led by Associate Professor Stella Tarrant, University of Western Australia.

## **2.2. Barriers to seeking help, safety, and/or leaving**

In reviewing homicide sentencing principles, ANROWS asks the council to consult on barriers to seeking help, safety, and/or leaving for women in abusive relationships. While ANROWS does not condone violence as a response to violence, the idea that leaving a violent relationship is easy, safe, or possible needs to be interrogated. This interrogation could help address assumptions about the options and choices of women in abusive relationships that may influence sentencing decisions. Further, barriers to seeking help and leaving dangerous situations should be considered in relation to deterrence (s 3A (b)) as a sentencing principle for women who have killed their abusive male partners.

An analysis of the 2012 Australian Bureau of Statistics Personal Safety Survey found that around 81,900 women wanted to leave their current (at the time of the survey) violent partner, but never have (Cox, 2016).<sup>6</sup>

A fundamental barrier to safety for women experiencing domestic and family violence is recognising the violence as such. An analysis of the 2012 Australian Bureau of Statistics Personal Safety Survey found that regarding the most recent incident of violence by a cohabiting partner, less than half of those who experienced an incident of physical violence believed it was a crime, and this dropped to a third for incidences of sexual violence (Cox, 2016).

Financial stress is a significant but under-addressed barrier to safety for women experiencing domestic and family violence. Financial stress can be produced through financial abuse (attempting to prevent or control someone's ability to acquire, use, or maintain resources) (Cortis & Bullen, 2015). In Australia, financial abuse has been estimated to occur among 80-90 percent of women who seek support for domestic and family violence (Evans; Macdonald, both cited in Cortis & Bullen, 2016). Even when overt financial abuse is absent, domestic and family violence has enduring economic effects, due to, for example, difficulties in sustaining education, job-searches, or employment (McFerran; Staggs, & Riger, both cited in Cortis & Bullen, 2015).<sup>7</sup> Violence can also undermine compliance with welfare and employment services, entrenching economic dependence on the violent partner (Brush cited in Cortis & Bullen, 2015); women may hold debt or bad credit due to violence (Consumer Utilities Advocacy Centre cited in Cortis & Bullen, 2015); and violence can also act as a barrier to accessing child support (Fehlberg & Millward cited in Cortis & Bullen, 2015).<sup>8</sup> In interviews with service providers, Cortis and Bullen (2016) found that they identified financial issues as a major factor in a woman's decision to stay in or leave a violent relationship. Additionally, diverse communities face extra financial vulnerabilities (Cortis & Bullen, 2016). These financial stresses

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<sup>6</sup> Further analysis of the 2016 ABS PSS Survey is pending. Updated information will be made available on the ANROWS website as it is finalised.

<sup>7</sup> These difficulties may have been driven by issues, for example, with childcare, housing, poor mental and/or physical health, or lack of skills or employment history resulting from domestic and family violence (Braaf & Meyering cited in Cortis & Bullen, 2015).

<sup>8</sup> In an ANROWS study of women experiencing disadvantage (Cortis & Bullen, 2016), women who had experienced violence experienced worse outcomes than women who had not in relation to: secure housing, going without food, not being able to socialise due to associated costs, not being able to pay bills, and they also reported greater difficulties accessing support services. These poorer outcomes still persisted years later. Domestic and family violence generally raises the risk of poverty: there are costs associated with escaping abuse (such as moving), employment income loss, and legal costs (Cortis & Bullen, 2015).



increase the likelihood that a female homicide offender may come before the court for killing a violent intimate partner that they had never separated from.

Beyond economic issues, many other barriers stand in the way of informal or formal help-seeking. A recent ANROWS report, “The forgotten victims: Prisoner experience of victimisation and engagement with the criminal justice system” (“Forgotten victims”), found evidence that low numbers of women experiencing domestic and family violence seek help (Day et al., 2018).<sup>9</sup> Day et al. (2018) summarised the existing research as showing that a substantial proportion of women do not engage in help-seeking because there are barriers at different levels: the individual (e.g. fear, intimidation, sexual orientation), socio-cultural (e.g. family, socialisation, role expectations, race, ethnicity, culture) and structural (e.g. social isolation, perceived effectiveness of law enforcement and medical services).

For women who do leave, barriers to safety—or even to permanently leaving a partner—do not disappear. About half of women who are no longer in a relationship with their violent partner reported that they separated from the violent partner several times prior to the final separation (Cox, 2016). Additionally, leaving a violent partner does not necessarily mean an end to violence: two out of five women experienced violence while temporarily separated from their violent male former cohabiting partner, and six out of ten women who experienced violence while temporarily separated reported an increase in violence during the separation (Cox, 2016). Further, a quarter of women who are no longer in a relationship with their violent partner reported that the violence increased after their final separation (Cox, 2016).

Housing stress is a huge barrier to safety or to permanently leaving a violent partner—Breckenridge et al. (2016) found that women were more likely to return to their partner if they had difficulty maintaining independent accommodation. According to the 2016 ABS Personal Safety Survey (2017), around one in five women returned to violent partners because they had no financial support, or nowhere else to go. An ANROWS study, *Domestic and family violence and parenting: Mixed method insights into impact and support needs*, found that nearly 60 percent of women who had separated from their partners reported experiencing housing stress post-separation (Kaspiew et al., 2017). Many women who leave their homes following domestic and family violence struggle to find suitable accommodation: over 90 percent of first requests by domestic and family violence clients to Specialist Homelessness Services for long-term accommodation were unable to be met (AIHW, 2016). And despite policy reforms that prioritise victim/survivors remaining in their homes, many women are still forced to leave because of mortgage stress, rental unaffordability and lack of support due to social isolation. Again, diverse communities face additional hurdles to accessing safe and appropriate accommodation, for example, those in Aboriginal and Torres Strait Islander communities, women and children on temporary visas (Vaughan et al., 2017), women in remote areas (Wendt, Chung, Elder, Hendrick, & Hartwig, 2017), and women with disabilities (Maher et al., 2018). Insecure housing has many flow-on affects: it can affect child protection issues, custody issues, the ability to retain possessions, the ability to get and keep a job, and the ability to maintain social connections (Cortis & Bullen, 2016).

For diverse communities, barriers to safety are even more complex. Involvement of the criminal justice system (for example, calling the police) for Aboriginal and Torres Strait Islander women is

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<sup>9</sup> This is supported by statistics that show that when a woman’s most recent physical assault was perpetrated by a male cohabiting partner, one in nine did not tell *anyone* about the assault (Cox, 2016).

complicated, because the criminal justice system is viewed by many as a direct source of harm to themselves and their families (Nancarrow cited in Day et al., 2018). Research suggests that Aboriginal and Torres Strait Islander women often seek interventions that allow them to remain in their communities (Blagg et al., 2015), which is not commonly supported by current interventions. Blagg et al. (2015) point out that Aboriginal and Torres Strait Islander women must continually balance reporting violence to the police with the potential consequences for themselves and other family members that may result from approaching the police (see also Day et al., 2018). These barriers may result in high numbers of Aboriginal or Torres Strait Islander female homicide offenders coming before the court who have never previously reported violence perpetrated against them.

Additional barriers to support, leaving, and/or safety for CALD communities can include, for example, lack of access to information about personal rights, economic dependence, lack of familial support or social isolation, limited proficiency in English, immigration regimes that promote dependence, previous adverse experiences with police, fear of deportation, and concerns about discrimination (Yoshioka, DiNoia, & Ullah; Lee; Raj & Silverman, all cited in Day et al., 2018; Mitra-Kahn et al., 2016; Vaughan et al., 2016). All of these barriers, again, lessen the likelihood that a woman before the court has had an appropriate opportunity to disclose or report violence against her.

For women with disabilities or activity limitations, barriers to leaving or seeking support and safety can include physically, procedurally or attitudinally inaccessible services; inaccessibility of public materials; lack of accessible alternative accommodation; social stereotypes; poor understanding of disability (Dyson, Frawley, & Robinson, 2017; Maher et al., 2018; Thiara, Hague, Bashall, Ellis, & Mullender cited in Day et al., 2018); and poor recognition of the forms of violence that are specific to women with disabilities as violence (Shah, Tsitsou, & Woodin cited in Day et al., 2018; see also Mitra-Kahn et al., 2016; Maher et al., 2018; Dyson, Frawley, & Robinson, 2017). These barriers show that it is not always possible or safe to seek help.

Women in remote areas, too, have compounded barriers. They may struggle with the issue that the people to whom they could report the abuse might be known either to them or the perpetrator (Wendt et al., 2017; Fugate, Landis, Riordan, Naureckas, & Engel; Lichtenstein & Johnson both cited in Day et al., 2018). This makes it at the very least difficult, and at worst dangerous, to report violence.

Although in the report by the Domestic Violence Death Review Team (2018) there were no identified female homicide offenders killing female victims in relationships with an identifiable history of domestic violence, women in same-sex relationships also face additional barriers that should be acknowledged. For example, they may not have a “safe” person to tell about the abuse; may have a belief that service providers would not take violence between women seriously (Turell & Herrmann cited in Day et al., 2018); may have experienced or be fearful of police discrimination or brutality (Grant et al. cited in Day et al., 2018; see also Mitra-Kahn et al.); and may be alert to the recentness of the criminality of same-sex relationships (Mitra-Kahn et al., 2016).

Due to these barriers, it is unsurprising that there are low numbers reported across most studies of help-seeking by women experiencing violence. However, significantly, even those that show higher disclosure rates report that when women did seek help, many still found that nobody assisted them (Fanslow & Robinson cited in Day et al., 2018). Research has shown that those who reach out and have a negative experience feel deserted, silenced, and blamed for their victimisation (Moe cited in Day et al., 2018). In “Forgotten victims”, women spoke about having to go through complex

procedures in order to access support services. For at least one participant who talked about having to jump through hoops to access support, she felt that “I would sooner rather cop a beating every day of my life from my partner than go back to one of them”; and another talked about the responses being “useless” (Day et al., 2018, p.58). So even when women do reach out for help, there still may not be viable avenues out of an abusive situation, and reaching out could actually result in worsening abuse or exacerbating feelings of being trapped.

Other avenues of help-seeking can be similarly negative. The research by Day et al. revealed many studies that showed that disclosure to a health professional does not usually result in victims being connected to relevant services or resources (Baccus et al.; Mertin, Moyle, & Veremeenko, both cited in Day et al., 2018). It also found that even when women reported incidents to the police,<sup>10</sup> there continued to be significant barriers to their safety, such as the abuser not being arrested; the victim being arrested for defending herself; the victim feeling they were not listened to or their experience was being trivialised; abuser manipulation of the police; stereotyping of race, socio-economic status and/or sexuality by police; and language barriers (Wolf, Ly, Hobart, & Kernic cited in Day et al., 2018). Additionally, there were reports of breaches of intervention orders not being taken seriously by the police (Victorian Law Reform Commission cited in Day et al., 2018). When asked about accessing services, 36 percent of the women in “Forgotten victims” said they would not turn to the police in the future for domestic and family violence issues (Day et al., 2018). Additionally, women with children also face concerns that child protective services may become involved; and those that do seek help from CPS report that the burden is shifted to them—the woman remaining in the relationship is seen to be the endangering factor, rather than the abusive partner’s actions (Meyer cited in Day et al., 2018).

These many and varied barriers should be consulted on in relation to deterrence (s 3A (b)) as a sentencing principle for women who have killed their abusive male partners, and to highlight assumptions about the options and choices of women in abusive relationships that may influence sentencing decisions.

***Key issue for consultation #4: Barriers seeking help, safety, and/or leaving may impact the effectiveness of deterrence as a sentencing principle.***

***Key issue for consultation #5: Lack of understanding about these barriers may negatively influence sentencing decisions.***

### **2.3. Rising female prison population and lack of support**

“Forgotten victims” examined women’s experiences of support and help in prison. While it was focused on women in prison generally, and not just intimate partner homicide offenders, it provides insight into the challenges and lack of support for incarcerated women. The report notes that women are the fastest growing section of the prison population in Australia (Day et al., 2018). Despite this rising population, and the differences in the types of offending that have resulted in men and women being incarcerated, the services available are mostly designed around our understanding of male

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<sup>10</sup> The number who report to the police is low. For example, of women who have experienced violence by a former partner since the age of 15, 65 percent had never contacted the police, and this rises to 82 percent when it is violence by a current partner (ABS cited in ANROWS, 2018).

prisoners and male offending (Day et al., 2018). This brings into question the effectiveness of incarceration as a mode of rehabilitation for women (s 3A (d)).

The report highlights existing research that points to the impact of incarceration on pre-existing symptoms of trauma, which is a key issue for women in prison (Covington & Bloom; Stathopoulos, Quadara, Fileborn, & Clark; Zust, all cited in Day et al., 2018). This is especially so for women who have been in abusive relationships. The experience of incarceration for women was described as “a continuation of repeated physical abuse and chronic emotional stress previously experienced in their interpersonal relationships” (Day et al., 2018, p.42). The ideologies and workings of prisons shadow the ideology and workings of abuse by an intimate partner. That is, prisons “are built on an ethos of power, surveillance and control, which serve the dual purposes of security and punishment”—these are the very same tactics used by perpetrators of intimate partner violence (Covington & Bloom cited in Day et al., 2018). This is highlighted by comments from a prison service provider who reflected:

It keeps the cycle going. A woman who's been abused in the community by a partner and then ends up in prison is then abused by the system and then is abused by the male prison officers and strip searched by the prison officers. It goes on and on and on so how do you expect that woman to get released, get out and expect anything different from herself when she gets out? (2018, p.59)

This research highlights the way in which a victim of domestic and family violence will be vulnerable to re-victimisation upon release, and not only does prison not serve to address the underlying issues that led to offending, it may even exacerbate them.

The damaging effects of incarceration on reinforcing trauma explored in “Forgotten victims” is backed up by a recent survey of NSW prisoner health. The survey found that 43.3 percent of women in prison reported having contemplated suicide at some point in their lives, and 28.6 percent of women in prison had attempted suicide at least once (Justice Health & Forensic Mental Health Network, 2017). Consistent with prior studies on the high number of women in prison who have been victimised in some way, the survey found that 70.8 percent of women in prison reported having been involved in at least one abusive relationship, and 40 percent of women had been involved in more than one violent relationship (JHFMHN, 2017). In relation to supports from family and friends, or the accessibility of women’s prisons, 41.8 percent of the women had not received any visits from family or friends in the 4 weeks prior to being interviewed (JHFMHN, 2017). Day et al. (2018) also point, importantly, to the lack of support for ex-prisoners or women preparing to re-enter the community. In “Forgotten victims”, both service providers and incarcerated women stressed the lack of resources and services available to women who had left prison, and the fact that many women who had been released were not empowered to be able to access help independently (Day et al., 2018).

Additionally, while the prisoner health survey included the entire prison population and not just those in prison for homicide, it found that more than half of women in prison had at least one child under the age of 16 (JHFMHN, 2017). When turning to homicide specifically, though the custodial parent is not noted, the Domestic Violence Death Review Team report (2018) found that of the 152 homicides they examined that were preceded by a history of domestic violence, there were at least 107 children under the age of 18 who survived the homicide involving one or both of their parents. The damaging effects of incarceration, and the potential effects on children in perpetuating cycles of violence and

disadvantage, should be considered in relation to sentencing principles, especially the goal of rehabilitation.

***Key issue for consultation #6: The rising female prison population and lack of adequate support resources may impact the effectiveness of the principle of rehabilitation.***

***Key issue for consultation #7: The damaging effects of incarceration on children in perpetuating cycles of violence and disadvantage.***

## **2.4. Aboriginal and Torres Strait Islander identifying female offenders**

Taking into account all of the above, particular attention needs to be paid to the effects of incarceration on female offenders who identify as Aboriginal or Torres Strait Islander. Aboriginal and Torres Strait Islander women comprise 2 percent of the adult female population and 34 percent of the adult female prison population (Walters & Longhurst cited in Maher et al., 2018; see also Blagg et al., 2018). It is particularly important to acknowledge the specific experiences of Aboriginal and Torres Strait Islander women given the rates of female homicide offenders identifying as Aboriginal. According to the Domestic Violence Death Review Team (2018), almost half of the female homicide offenders who killed intimate partners identified as Aboriginal. While the report cautions that this data needs to be read alongside literature on Aboriginal and Torres Strait Islander experiences and perpetration of domestic and family violence, it shows the high rates of Aboriginal and Torres Strait Islander women intimate partner violence homicide offenders who need to be considered in any review of sentencing. This is especially in light of the fact that the Domestic Violence Death Review Team report (2018) noted that of the 13 cases involving Aboriginal female homicide offenders, in only one had the female offender been identified as the primary abuser (although in two cases information about perpetrator/victim status was unavailable).

***Key issue for consultation #8: The high proportion of primary victims who become homicide offenders; barriers to seeking help, safety, and/or leaving; and the rising female prison population (and lack of support) should all be addressed in consultation with Aboriginal and Torres Strait Islander communities.***

## **3. Further issues for consultation: community and judicial attitudes**

### **3.1. Community attitudes**

This section focuses on community attitudes. This is not only because community attitudes may affect sentencing decisions, but also because ANROWS wishes to emphasise that law reform—while not the only step, as explored in the next section—can be an important tool for shifting attitudes.

In 2017, ANROWS administered the National Community Attitudes towards Violence against Women Survey (2017 NCAS), a survey aiming to help understand attitudes toward violence against women, what influences those attitudes, and if there have been changes to those attitudes over time. It studies violence-supportive attitudes, such as holding women responsible for violence perpetrated against them, minimising violence against women, disregarding the need to gain consent for sexual activity, and mistrust of women's reports of violence. All of these attitudes affect the way a woman

coming before a court for sentencing will be perceived, as well as affecting her options and decisions prior to attending court, and in particular, whether her account is believed.

The 2017 NCAS shows the pervasiveness of violence-supportive attitudes held in the community. The 2017 NCAS found a lot of improvement in community attitudes, but still noted some concerning trends since the previous NCAS in 2013, such as:

- 25 percent of respondents thought that women prefer a man to be “in charge” of the relationship;
- Two in five respondents said that many women exaggerate the unequal treatment of women;
- 23 percent agreed that many women tend to exaggerate the problem of male violence; and
- 32 percent agreed that a female victim who does not leave an abusive partner is partly responsible for the abuse continuing. (Webster et al., 2018)

The data becomes more worrying in relation to sexual violence and reporting or being believed; for example:

- 31 percent of respondents agreed that “a lot of times”, women who say they were raped had “led the man on and then had regrets”;
- 42 percent agreed that sexual assault accusations are commonly used to get back at a man;
- 23 percent agreed that women find it flattering to be pursued, even if they are not interested;
- 12 percent still agree that women “often” say no when they mean yes;
- 28 percent believed that when a man is very sexually aroused, he may not realise that a woman doesn’t want to have sex;
- 33 percent agreed that rape results from men not being able to control their need for sex;
- 19 percent still do not agree that rape in marriage is a crime; and
- 13 percent agreed that a woman reporting intimate partner violence is shameful for her family. (Webster et al., 2018)

These attitudes bear on all stages: recognising domestic and family violence, telling anybody about it, reporting to the police, and having the police believe you. It also means that in a trial for a woman accused of homicide of an intimate partner, sexual violence is still not understood or taken seriously, and in particular, the responsibility of the man is overlooked.

Another ANROWS report, *Media representations of violence against women and their children*, foregrounds this issue (Sutherland et al., 2016). It involved a quantitative and qualitative review of the extent and nature of reporting on violence against women in the Australian media. Importantly, it found that only 17 percent of media items included any explicit information to help audiences understand the broader context in which violence against women is perpetrated—that is, media items tended to focus on individual incidents without any information on social context or the underlying drivers of violence (Sutherland et al., 2016).<sup>11</sup> This again has implications for how abusive relationships are understood. The study found that not only did the media items make perpetrators invisible, but the way that the stories were structured, the chosen angles to the story, how people were represented, and the words chosen to describe them, all contributed to minimising the harms of

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<sup>11</sup> Additionally, relating back to barriers to safety, few of the items studied contained any information for women seeking help (Sutherland et al., 2016).

sexual, domestic and family violence (Sutherland et al., 2016). Sutherland et al. (2016) reflected that a common criticism of media reports is the way that reports represent violence against women bears little resemblance to women's common experiences of gender-based violence. These representations have the potential to make domestic and family violence unrecognisable when presented to the court. Again, the representations also impact recognition and reporting of domestic and family violence.

***Key issue for consultation #9: Community attitudes can affect ability to recognise or report intimate partner violence, and can affect sentencing.***

***Key issue for consultation #10: Law reform can be an important tool for shifting community attitudes.***

### **3.2. Judicial attitudes and education**

While the above provides some insight into judicial attitudes, given that the judiciary are drawn from the general population, ANROWS has conducted research specifically into judicial attitudes and education. This bears importance because of the influence these attitudes may have on sentencing. Although it is not specifically an area of consultation, ANROWS wishes to emphasise that sentencing and legislative change is only one piece to addressing an issue. While important, sentencing and legislative change do not sufficiently address underlying attitudes that influence the application of those laws. That is, as an Australian Law Reform Commission (ALRC) report states:

education, training, and accountability play a critical role in shaping “legal culture” – and thus in determining how well the system operates in practice... while it is of utmost importance to get the structures right, achieving systemic reform and maintaining high standards of performance rely on the development of a healthy professional culture – one that values lifelong learning and takes ethical considerations seriously. (ALRC cited in Wakefield & Taylor, 2015)

Similarly, the need for education and professional development opportunities for legal professionals was a key recommendation by the ALRC and the New South Wales Law Reform Commission (NSWLRC) in their report on responding to domestic and family violence (ALRC & NSWLRC cited in Wakefield & Taylor, 2015).

In 2015, ANROWS conducted a state-of-knowledge review and a survey of judicial officers in Victoria and Queensland (Wakefield & Taylor, 2015). In the review, the authors identified research showing the impact of conceptions of “stranger violence” (that is, stereotypes of violence being committed by strangers in public places) on the way domestic and family violence is understood. If working from a concept of stranger violence, many characteristics of domestic and family violence will appear unusual, such as the possible unwillingness of victims to cooperate in proceedings; victims having difficulty leaving a dangerous situation, or not wanting to leave; and victims presenting with unexpected emotions and behaviours (Kaye & Knipps cited in Wakefield & Taylor, 2015). The authors also cite a study that showed the tendency in court for both parties to be held responsible for violence in domestic and family violence situations (Meier cited in Wakefield & Taylor, 2015). Further, as highlighted in the report of the Queensland Premier's Special Taskforce on Domestic and Family Violence, lack of understanding of domestic and family violence can leave open the possibility that perpetrators will exploit the legal system as a further tool of abuse (cited in Wakefield & Taylor, 2015).

Despite these concerning trends, studies in Australia show that judicial staff tend to feel they have a high level of understanding of domestic and family violence. For example, a survey across Queensland and New South Wales found that 71-90 percent of magistrates felt like they were adequately trained to deal with domestic and family violence (Carpenter & Field cited in Wakefield & Taylor, 2015). Worryingly, that same survey found that 74 percent of respondents agreed that women use domestic and family violence as a tactic in family law matters, despite a long history of the family court failing to recognise or take domestic and family violence into account, and despite documented evidence of women's averseness to raising domestic and family violence in court (Carpenter & Field cited in Wakefield & Taylor, 2015).

The survey conducted in 2015 across Victoria and Queensland by Wakefield and Taylor bore similar results. Ninety-six percent of the judicial officers who responded to the survey agreed or strongly agreed that they understood the dynamics of domestic and family violence (Wakefield & Taylor, 2015). Further, the majority (77%) also agreed that they understood the impact of domestic and family violence for people from diverse backgrounds (Wakefield & Taylor, 2015). These responses run in contradiction to the many studies that show the issues with women's experiences in court (see for example Vaughan et al., 2016).<sup>12</sup> Within the same survey, participants identified what they considered to be the major risk factors for serious domestic and family violence—in contradiction to existing evidence,<sup>13</sup> judicial officers cited use of drugs as the biggest risk factor, followed by mental illness, alcohol use, and then controlling behaviour (Wakefield & Taylor, 2015).

Wakefield and Taylor's survey also asked respondents about their attitudes toward education on domestic and family violence. One question asked if respondents had education on domestic and family violence in the previous year, and of those who responded: 37.5 percent had not had any form of education on domestic and family violence in the previous year, while nearly a third (27.5%) had one training session and over a third (35%) had between two and five sessions (Wakefield & Taylor, 2015). Despite high levels of confidence in their own abilities to understand the dynamics of domestic and family violence, responses were split as to whether respondents thought judicial officers in their state received sufficient training in domestic and family violence to make informed decisions (Wakefield & Taylor, 2015).<sup>14</sup>

Overall, Wakefield and Taylor (2015) used existing literature to recommend important elements of training:

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<sup>12</sup> Please also note forthcoming ANROWS research, [\*Exploring the impact and effect of self-representation by one or both parties in Family Law proceedings involving allegations of family violence\*](#) led by Dr. Jane Wangmann, University of Technology Sydney.

<sup>13</sup> For example, the National Risk Assessment Principles (NRAP) developed by ANROWS identify evidence-based high-risk factors for domestic and family violence. Wakefield & Taylor's survey (2015) included many of these evidence-based principles, but they were not commonly identified by judicial officers as major risk factors, such as: history of violence; separation (actual or pending); non-lethal strangulation; stalking; threats to kill; perpetrator's access to weapons; escalation (in frequency and/or severity); coercive control; and pregnancy (Toivonen & Backhouse, 2018).

<sup>14</sup> Responses also varied regarding how many hours of training on domestic and family violence was sufficient, though the highest number (over a third) indicated that 5-10 hours per year was sufficient, and close to a further third replied that 2-4 hours was sufficient (Wakefield & Taylor, 2015).



- ensuring concrete understanding of dynamics and complexities of domestic and family violence (ALRC & NSWLRC cited in Wakefield & Taylor, 2015);
- breaking down the myths and realities of domestic and family violence (Carpenter & Field cited in Wakefield & Taylor, 2015);
- increasing understanding and empathy toward victims (Meier cited in Wakefield & Taylor, 2015); and
- understanding and evaluating patterns of domestic and family violence behaviour (Futures Without Violence cited in Wakefield & Taylor, 2015).

Consideration of attitudes and education is fundamental to a review of sentencing procedures because, firstly, attitudes influence decisions on the application of law, and secondly, law reform alone will not be sufficient to address the devastating impact of domestic and family violence.

***Key issue for consultation #11: Judicial attitudes affect sentencing decisions.***

***Key issue for consultation #12: Law reform alone cannot address the devastating impact of domestic and family violence.***

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