ANROWS

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

NSW Sentencing Council
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Homicide consultation paper (NSW)

Dear The Honourable James Wood AO QC

Australia's National Research Organisation for Women's Safety (ANROWS) would like to thank the NSW Sentencing Council for the opportunity to make a submission to this review of sentencing for murder and manslaughter, including the penalties imposed for domestic and family violence homicides.

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 in safe communities. We recognise, respect and respond to diversity among women and their children, and are committed to reconciliation with Aboriginal and Torres Strait Islander Australians.

This submission applies recently published ANROWS research evidence to the issues raised in the *Homicide Consultation Paper*, and is intended to supplement the information contained in our preliminary submission (PMU12) dated 8 March 2019. ANROWS acknowledges the assistance of Dr Maggie Hall, Lecturer, School of Social Sciences, University of Western Sydney in drafting this submission.

We would be very pleased to assist the NSW Sentencing Council further, as required.

Yours sincerely

[redacted]

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Aboriginal and Torres Strait Islander women experiencing domestic and family violence

Women's imprisonment rates have generally soared much faster than men's in recent decades (Human Rights Law Centre & Change the Record Coalition, 2017), with female prisoner numbers up 10 percent compared to a rise of just 4 percent for male prisoners in 2018 (Australian Bureau of Statistics, 2018a). In 2016, while Aboriginal and Torres Strait Islander women made up 2 percent of the adult population of Australia[1] they comprised 34 percent of all women imprisoned nationally (ABS 2016 cited in Human Rights Law Centre & Change the Record Coalition, 2017). In 2017, Aboriginal and Torres Strait Islander women were imprisoned at 21 times the rate of non-Indigenous women (Human Rights Law Centre & Change the Record Coalition, 2017).

In our preliminary submission to this review, ANROWS highlighted the "radical specificity" of Aboriginal and Torres Strait Islander women (Blagg, Bluett-Boyd, & Williams, 2015, p.9), stemming from their political, social and cultural histories, which cannot be deduced from the mainstream literature on violence against women. In recent ANROWS research, *Telling life stories: Exploring the connection between trauma and incarceration for Aboriginal and Torres Strait Islander women,* (Bevis, Atkinson, McCarthy & Sweet, 2020) there is an emerging theory that a high percentage of Aboriginal women incarcerated for violent crime have a possible diagnosis of complex trauma. This research found that almost all of the women studied had endured violence by an intimate partner (IPV) prior to entering prison (ANROWS, 2020).

Post-release, Aboriginal and Torres Strait Islander women face additional barriers and risks in abusive relationships, from lack of alternative housing to a reluctance to seek help from authorities and other services (Bevis et al., 2020). Incarcerated Aboriginal and Torres Strait Islander women are twice as likely as non-Indigenous women to have been imprisoned previously, and have a higher risk of being re-imprisoned after release (Human Rights Law Centre & Change the Record Coalition, 2017).

In order to honour the purposes of sentencing as set out in *Section 3A Crimes (Sentencing Procedure) Act 1999 (NSW)*, which includes promoting the rehabilitation of the offender, sentencing decisions affecting Aboriginal and Torres Strait Islander women need to consider the links between trauma and imprisonment, and the high rates and complexity of trauma in Aboriginal and Torres Strait Islander communities. Rehabilitation is unlikely when there are limited examples of trauma-informed programs in prisons specifically designed for Aboriginal and Torres Strait Islander women (ANROWS, 2020). Programs like the five-year-old Kunga Stopping Violence Program, which currently provides trauma-informed pre-and post-release support to Aboriginal and Torres Strait

[1] At the time of the ABS 2016 census, Aboriginal and Torres Strait Islander residents, a figure which includes children, represented 3.3% of the Australian population (ABS, 2018b).

Islander women in the Alice Springs Correctional Centre, represent an opportunity for alternatives (Q 6.11) to custodial sentences (Bevis et al., 2020).

> The male judge who sentenced me spoke wrong way about me. He said I was really dangerous, not a responsible person, and not a responsible person for my children. He did not listen to my history and why I did things, I wouldn't just be violent for nothing. That judge should have listened to my story and given me help in prison—given me rehab and counselling. *I am a young woman, and not a violent person until violence is done to me*. [emphasis added] (Bevis et al., 2020, p.40)

Community impact is also referenced in the purposes of sentencing set out in *s3A(c), (g) Crimes (Sentencing Procedure) Act 1999 (NSW)*. With respect to the sentencing principles relating to domestic violence homicides (Q 4.3), ANROWS supports a change that takes a wider view of community impact, and in particular considers the effect upon children. When an estimated 80 percent of Aboriginal and Torres Strait Islander women in prisons are mothers (Sherwood & Kendall, 2013), the idea of community impact needs to be extended beyond protecting the community from the perpetrator, and recognising community harm done by the perpetrator, to consider the long-term, cumulative, intergenerational effects of female Indigenous DFV victim/survivors and perpetrators being removed from their families and communities (Human Rights Law Centre & Change the Record Coalition, 2017).

Incarcerating Indigenous mothers fractures the mother-child relationship (Perry, 2013), and can lead to children suffering emotional and behavioural impacts, as well as experiencing poor health, insecure housing and disrupted education, all of which heighten the risk of the young person entering child protection or justice systems (Bevis et al., 2020; Sherwood & Kendall, 2013). These intergenerational impacts are not lost on incarcerated Aboriginal and Torres Strait Islander women, and cause distress that extends well beyond the concept of adequate punishment set out in *s3A(a) Crimes (Sentencing Procedure) Act 1999 (NSW)*:

> One woman worried about the welfare of her three children who were unsupervised, living in a town camp in Alice Springs away from their home community where their extended family resided. She was anxious about their wellbeing, fearful the whole time she was in prison, worried and stressed for the wellbeing of her daughters. (Bevis et al., 2020, p. 38)

Making changes to sentencing principles (Q 4.3) and offering alternatives to imprisonment for manslaughter (Q 6.11) based upon insights about the role of women in Indigenous communities is in line with National Outcome 3 of the *National Plan to Reduce Violence against Women and their Children 2010-2022* (the National Plan): Indigenous communities are strengthened. It is also in line with Australia's National priorities outlined in the Fourth Action Plan of the National Plan: Support Aboriginal and Torres Strait Islander women and their children.

RECOMMENDATION 1: ANROWS supports a wider view of community impact that better considers the role of community for Indigenous people, and the intergenerational impact on Indigenous children in the sentencing principles relating to domestic violence homicides (Q 4.3); as well as culturally safe, trauma-informed alternatives to imprisonment for manslaughter (Q 6.11) for these offenders.

There is a strong need for sentencing to develop holistic approaches tailored to women's circumstances as both offenders and DFV victim/survivors that include culturally safe, trauma-informed, individualised solutions. To this end, ANROWS does not support mandatory minimum penalties for manslaughter (Q 6.1) and murder (Q 6.2) that impact upon judges' and magistrates' broad discretion to consider the circumstances and background of an offender when it comes to sentencing.

RECOMMENDATION 2: ANROWS does not support mandatory minimum penalties for manslaughter (Q 6.1) and murder (Q 6.2), including domestic or family violence homicides (Q 4.1 and Q 4.2), that impact upon judges' and magistrates' broad discretion to consider the circumstances and background of an offender when it comes to sentencing.

We do however note that broad judicial discretion in NSW means "different judges can consider factors relevant to a woman's cultural background differently, if at all," (Human Rights Law Centre & Change the Record Coalition, 2017, p. 42). It is ANROWS's view that the concept of individualised justice, in which offences and offenders are treated alike with allowances made for difference, can be retained so long as it does not mean the arbitrary exclusion of established bodies of research evidence. Noting that in *Neal v The Queen* (1982) the High Court found it was "contrary to principle to accept that Aboriginal offending is to be viewed systemically as less serious than offending by persons of other ethnicities", ANROWS suggests that applying social entrapment theory (see page 5) in sentencing cases involving victims/survivors of DFV who use lethal force, would ensure more equitable justice. It is ANROWS's view that entrenching social entrapment theory would improve justice outcomes for Aboriginal and Torres Strait Islander women who are themselves victims/survivors of DFV by bringing the extensive body of knowledge about DFV and Indigenous radical specificity into sentencing decisions in a more structured and uniform way, without removing judicial discretion.

Social entrapment theory could build upon the 'Fernando principles' that, while not always applied, have been influential across a variety of Australian jurisdictions in providing a framework for considering disadvantage and the subjective circumstances of individual Indigenous offenders (ALRC, 2018), by bringing in the extensive body of knowledge about DFV. In essence, social entrapment theory better addresses the need to consider Indigenous female victims/survivors who use lethal force to respond to further victimisation, as whole people by integrating different evidence of disadvantage:

> A racially marginalised woman does not experience the barbs of sexism, merely as a woman; nor does she experience the barbs of racism, merely as raced. The shape of the barb and the harm it inflicts are produced within simultaneous multiple factors that are gendered, racialised, and classed and mutually constitute her identity and experiences.
>
> (Nancarrow, 2019 p. x)

In other words, DFV for Aboriginal and Torres Strait Islander women may be "best understood in intersectional terms, as it exists at the junction of multiple, rather than singular, forms of domination, coercion, and conflict" (Blagg et al., 2018, p. 7). Blagg's research confirmed earlier findings by Nancarrow (2016) that coercive control is not a necessary element for violence against Aboriginal and Torres Strait Islander women, as it does not capture other forms of interpersonal violence, such as couple fighting, that has roots in traditional Aboriginal dispute resolution. When the law makes no distinction between coercive control and couple fights, it brings women engaged in incident-based fights into the criminal justice system (Nancarrow, 2016). This is especially problematic for Aboriginal and Torres Strait Islander women, as gender-based violence intersects with the legacy and contemporary manifestations of colonialism, including the forced removal of children (Our Watch, ANROWS & VicHealth, 2015). By highlighting Indigenous women engaging in fighting, Nancarrow's research shows "the nature of violence between Indigenous couples is different from intimate partner violence in general, and that the legislation is applied in a formulaic manner with no effect, other than giving the police immediate (but not enduring) power over the perpetrator, and power over the victim" (Nancarrow, 2019, p. 184).

The current emphasis on zero tolerance for DFV that encourages mandatory arrest, charge and prosecution (Blagg, Bluett-Boyd & Williams, 2015), can also lead to negative sentencing outcomes for Aboriginal and Torres Strait Islander women who use lethal force in response to the threat of ongoing victimisation. For example, the cross application of DVPOs can render the threat of continued victimisation invisible via the context of mutuality, and result in the justice system failing to identify the real perpetrator (Nancarrow, 2019). Giving women a criminal record when they are victims of DFV increases the woman's distrust of police; demonstrates to them that the system colludes with the perpetrator; provides opportunity for the perpetrator to use the system to enhance their control; and increases the victim/survivor's vulnerability to the perpetrator's manipulation (Nancarrow, 2019).

Having a mandated social entrapment theory-based framework to apply in sentencing decisions would also help to avoid the effects of punitive populism that can incline judges not to apply the 'Fernando principles' due to the popularity of tough-on-crime penal approaches for Indigenous offenders. Research on pervasive punitive attitudes in Australian society has proposed that "the main factors contributing to the relationship between negative perceptions of Indigenous Australians and punitive attitudes are: systemic racism, Indigenous disadvantage and post-colonial relationship between Indigenous and non-Indigenous Australians" (Brookman & Wiener, 2017, p. 71). While wider work needs to be done reducing public demand for harsher sentencing by improving

perceptions of Aboriginal and Torres Strait Islander peoples (Brookman & Wiener, 2017), developing fairer judicial processes for sentencing Indigenous offenders could have a symbiotic effect.

ANROWS can also see merit in judges getting a feedback loop about the consequences of decisions. Presently this only occurs on appeals, which happen on the basis of legal doctrine, not factual matters, like the circumstances of defendants. In order to begin to address entrenched intergenerational disadvantage, there is a need to make it more visible to all decision-makers.

RECOMMENDATION 3: ANROWS supports judges having a feedback loop about the consequences of decisions based on factual matters, like the circumstances of defendants, to help render visible the impact upon entrenched intergenerational disadvantage.

Social Entrapment Theory

Recent ANROWS research, *Transforming Legal Understandings of Intimate Partner Violence* (2019) by Stella Tarrant, Julia Tolmie and George Giudice, highlights the impact social entrapment theory can make in understanding victim/survivor behaviour to better ensure justice. The research explains the obstacles women who use lethal force defensively to the (non-imminent) threat of further victimisation face when raising self-defence. Taking a case-study approach that involved the close analysis of court documents pertaining to *The State of Western Australia v. Liyanage* (SCWA, No. 27 of 2015), the research "looks at a situation where a woman's claims to have acted in self-defence against their abusive partner have been rejected" (Tarrant, Tolmie & Giudice, 2019, p. 4). It demonstrates the inadequacy of 'battered women syndrome' as "a model that conceptualises IPV as incidents of violence that take place in a bad relationship" (Tarrant, Tolmie & Giudice, 2019, p. 5). It points out the usual option is "the testimony has been taken as explaining the victim's/survivor's honestly held, but irrational, perceptions and choices (Stubbs & Tolmie, 1999 cited in Tarrant, Tolmie & Giudice, 2019, p. 16) meaning a female offender who argues self-defence is thought of as mentally deficient (irrational) and her options are usually (at best) seeing the murder sentence reduced to manslaughter. The research contrasts this approach with social entrapment model, in a way that is consistent with the approach used in Victoria (*Crimes Act 1958* (Vic) *ss. 322J & 322K*).

Social entrapment theory provides a multi-dimensional framework for analysing the facts of any particular case involving domestic and family violence (DFV), by drawing upon the significant body of literature documenting the particular manner in which entrapment is experienced by, and compounded for, women facing multiple forms of disadvantage. In situations where DFV is present in matters involving homicide, the court needs a clear process that renders visible the aggressor's pattern of abuse behaviour to understand how it constrains the primary victim's resistance and ability to escape the abuse, while simultaneously considering the wider operations of power in play in her life (Tolmie, Smith, Short, Wilson & Sach, 2018). This will involve determining the coercive and controlling behaviours employed by the aggressor and how they specifically limited the victim's ability

to be self-determining. The court would also need to consider how informal networks and agencies responded to any of the victim's help-seeking behaviour. Finally the court would need to look at how structural inequities (poverty, historical trauma, colonisation, disability, racism, sexuality and gender, geographic isolation) exacerbated both of the previous dimensions (Tolmie et al., 2018).

Transforming Legal Understandings of Intimate Partner Violence (2019) has been used as the basis for amendment to the *Evidence Act 1906* (WA). These proposed amendments concern the admissibility of evidence about family and domestic violence and the introduction of jury directions about family violence. They form the basis for the amendments to the *Evidence Act 1906* (WA) in the Family Violence Legislation Reform Bill 2019 (WA). The aims of the amendments are to help rectify misunderstandings about intimate partner violence (IPV) by all decision makers in the criminal justice system in the context where a primary victim of IPV raises self-defence (and possibly duress).

ANROWS thought the Council might like to consider how this proposed amendment is structured with a view to providing a social entrapment theory framework for allowing domestic violence context evidence to be admitted to sentencing proceedings (Q 6.6):

Section [C] Evidence of family violence

(1) Evidence of family violence includes evidence of:

- *(a) violence by the deceased/complainant against the accused;*
- *(b) the availability of effective safety options to stop violence by the deceased/complainant against the accused;*
- *(c) ways in which violence by the deceased/complainant against the accused (in paragraph [C] (1)(a)) or the lack of availability of effective safety options (in paragraph [C] (1)(b)) were exacerbated by structural inequities experienced by the accused, including inequities associated with (as the case may be) race, gender, poverty, disability or age.*

(2) Evidence of family violence includes expert evidence [specialised knowledge] of:

- *(a) the nature and patterns of violence enacted by family members;*
- *(b) the availability of effective safety options to stop violence by family members;*
- *(c) ways in which violence by family members (in paragraph [C] (2)(a)) or the lack of availability of effective safety options (in paragraph [C] (2) (b)) may be exacerbated by structural inequities experienced by a person the subject of family violence, including inequities associated with (as the case may be) race, gender, poverty, disability or age.*

Section [D] Family violence

"Family violence" means violence enacted by a family member against a person.

Section [E] Violence

(1) In this [Part] "violence" means harmful behaviour or a course of harmful behaviour which includes:

- *a) behaviour directed at the accused that is physically violent, including sexually violent, threatening or intimidating;*
- *b) behaviour directed at the accused, at a child of the accused, at another person or at property that either –*
  - *i. has as its purpose (or among its purposes) one or more of the relevant effects set out in subsection (2); or*
  - *ii. would be considered by a reasonable person to be likely to have one or more of the relevant effects set out in subsection (2).*

(2) The relevant effects are of –

- *a) making (or keeping) the accused dependant on, or subordinate to, the deceased/complainant;*
- *b) isolating the accused from friends, relatives or other sources of support;*
- *c) controlling, regulating or monitoring the accused's day-to-day activities;*
- *d) depriving the accused of, or restricting the accused's, freedom of action;*
- *e) restricting the accused's ability to resist violence;*
- *f) frightening, humiliating, degrading or punishing the accused, including punishing the accused for resisting violence.*

RECOMMENDATION 4: ANROWS recommends the mandated use of a social entrapment theory-based framework in sentencing decisions relating to victim/survivors of DFV who use lethal force.

The gendered nature of the law

As *Transforming Legal Understandings of Intimate Partner Violence* (2019) points out, simply adding social entrapment theory into sentencing will not always result in better access to justice for DFV victim/survivors who use lethal force, unless we also work on the "interpretive schema, relied on in the old common law to understand self-defence, marriage and violence" (Tarrant, Tolmie & Giudice, 2019, p. 78). Ideas like provocation and self-defence illuminate the inherent gender bias of the law, because they operate and privilege male ways of responding to threat. As per *The State of Western Australia v. Liyanage* (SCWA, No. 27 of 2015), a sleeping victim, even one with an extreme and sexually violent history, is always going to be make a homicide appear planned and calculated, which, by law, is viewed as worse than one that occurs through a seemingly uncontrollable flight of rage. Privileging immediacy of violence makes it very difficult for women who use lethal force to respond to non-imminent threat, to make use of provocation or self-defence. The law's assumptions about human behaviour are very much assumptions about male behaviour, and may play a role in the sharper rises in the incarceration of women. To help render visible these assumptions, it is important for changes to homicide sentencing law to be backed up with a review mechanism that relates to female offenders of domestic violence homicide, and in particular female victim/survivors of DFV who use lethal force.

RECOMMENDATION 5: ANROWS recommends a review mechanism that tracks sentencing decisions relating to victim/survivors of DFV who use lethal force.

Other approaches to domestic violence

ANROWS lends its support to the work of the NSW Domestic Review Team (NSWDVRT) who point out (s 1.26) that addressing domestic violence homicide requires a holistic approach that goes beyond simply reforming criminal sentencing. As indicated above in this submission, ANROWS does see scope for this review to address how sentencing interacts with structural inequality and systematic disadvantage and contributes to domestic violence homicide. We also agree with the NSWDVRT's point about the importance of improving the criminal justice system's language to describe domestic violence, and domestic violence homicide (s 1.27). With problematic legal discourse repeated verbatim in the media, sentencing remarks represent a voice of authority that can assist the NSW public to correct their social misconceptions about domestic and family violence.

The prevalence of social misconceptions about domestic and family violence is demonstrated in the National Community Attitudes to Violence against Women Survey (NCAS). Led by ANROWS, NCAS is one the one of the two key national surveys administered under the National Plan (COAG, 2011), and is the world's longest-running survey of community attitudes towards violence against women. In 2017, NCAS showed a decline in community understanding that perpetration and impacts of violence are gendered: that men are more likely to commit domestic violence and that women are more likely to suffer physical harm from domestic violence (Webster et al., 2018). It is also concerning that 23 percent of NCAS respondents 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).

Sentencing remarks are an opportunity to avoid misconceptions that fuel stereotypes about victims/survivors and perpetrators, particularly those that further entrench inequality and structural disadvantage. In research conducted by Julie Stubbs and Julia Tolmie involving Australian homicide offences arising from killing an abusive partner, the researchers point out that their "analysis of cases involving Indigenous battered women indicates that the battering they had experienced and their disadvantaged circumstances were commonly read as indicators of personal deficits, and any evidence of structural disadvantage was muted" (Stubbs & Tolmie, 2008). By translating structural disadvantage into pathology or personal deficit, the individualised focus of the criminal law obscures gender and race inequalities (Stubbs & Tolmie, 2008). Implementing social entrapment theory into sentencing for domestic and family violence homicide represents a clear path forward.

RECOMMENDATION 6: ANROWS supports the NSW Domestic Violence Review Team's call for a holistic approach to addressing domestic violence homicide; and encourages the Sentencing Council to take up the issues within its remit relating to structural inequality and disadvantage, and improving terminology about domestic violence used in sentencing.

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