Report

Homicide

New South Wales
Sentencing Council

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NSW GOVERNMENT

NSW Sentencing Council

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Terms of reference

The Sentencing Council is to review the sentencing for the offences of murder and manslaughter under sections 19A, 19B and 24 of the *Crimes Act 1900* (NSW), in particular:

- the standard non-parole periods for murder and whether they should be increased; and
- the sentences imposed for domestic and family violence related homicides.

In undertaking this review, the Sentencing Council should consider:

- Sentences imposed for homicides and how these sentencing decisions compare with sentencing decisions in other Australian states and territories;
- The impact of sentencing decisions on the family members of homicide victims;
- The devastating impact of domestic and family violence on our community;
- The application of section 61 of the *Crimes (Sentencing Procedure) Act 1999* in the context of life sentences imposed for murder;
- The principles that courts apply when sentencing for these offences, including the sentencing principles applied in cases involving domestic and family violence; and
- Any other matter the Council considers relevant.

[Received 23 November 2018.]

Executive summary

0.1 The Attorney General, by terms of reference received on 23 November 2018, asked us to review the sentencing for the offences of murder and manslaughter, including penalties imposed for domestic and family violence homicides and the standard non-parole periods ("SNPPs") for murder.

0.2 In October 2019, we released a consultation paper that described the law and data relating to sentencing homicide in NSW and around Australia. In it, we asked a range of questions about what changes, if any, should be made to existing law and practice. In preparing this report, we have drawn on the 53 submissions that responded to one or more of these questions.

Background

0.3 Homicide and personal violence have devastating consequences for all parts of society. Domestic violence in particular has far reaching effects.

0.4 This review arises in the context of concerns in the media that the sentences imposed on homicide offenders are inadequate and, in particular, do not adequately take domestic violence into account.

Murder

0.5 The maximum penalty for murder is life imprisonment. In certain circumstances, where the murder is of a police officer, the penalty is mandatory life imprisonment. A life sentence, if imposed, is to be served for the term of the offender's natural life, with no possibility of parole.

0.6 An SNPP applies to all cases of murder except where an offender is sentenced to life imprisonment. The SNPP for murder is 20 years or 25 years where the victim was a child under 18 years old, or a public official exercising public or community functions and the murder was due to their occupation or voluntary work.

0.7 We examined the sentencing statistics for the three years between 1 April 2015 and 31 March 2018. Of the 85 adults who were in the category for the 20 year SNPP for murder, 5 received life sentences. The remaining 80 received a mean head sentence of 25.6 years and a mean non-parole period of 18.9 years. The mean head sentences and non-parole periods for murder have also been steadily increasing since 2003. The mean and median head sentences in NSW are longer than in the other jurisdictions that have determinate sentences.

0.8 Twenty-seven cases (31.8%) involved domestic violence, 17 (20%) of which involved intimate partner violence. There was little or no difference between the average head sentences for domestic violence and non-domestic violence murders and the average non-parole periods for the two categories.

0.9 In the 6 years between 1 April 2012 and 31 March 2018, 17 adult offenders were sentenced for murder of a victim under 18 years. The mean head sentence was just over 32 years and the mean non-parole period was just under 24 years.

Manslaughter

0.10 The maximum penalty for manslaughter in all cases in NSW, including where the victim is a child, is 25 years' imprisonment. There is no SNPP for manslaughter.

0.11 We examined the sentencing statistics for the 5 years between 1 April 2013 and 31 March 2018. Of the 89 adult offenders, 4 received a non-custodial sentence. The 80 adult offenders sentenced to a term of imprisonment, for whom we have data, received head sentences ranging from 3 to 16 years (with a mean of 8 years) and non-parole periods ranging from 1.5 to 12 years (with a mean of 5.3 years).

0.12 Of the 83 adult offenders for whom we have case information, the offences of 27 (32.5%) involved domestic violence and 8 (9.6%) of these involved intimate partner violence.

0.13 The average head sentences and non-parole periods for NSW are in the middle of the range of the average head sentences and non-parole periods for the Australian jurisdictions for which we could obtain data.

Our approach to this report

0.14 There are certain features of the criminal justice system that, while they can cause a sense of grievance about the sentence imposed in some cases, are necessary to ensure courts have the capacity to respond appropriately to different circumstances. These include:

- separate offences of murder and manslaughter with different maximum penalties
- within the offence of murder, different SNPPs depending on the category of victim
- prosecutorial discretion as to the ultimate charge or plea, and
- judicial discretion as to what sentence will be imposed.

0.15 In our view, the sentences that are imposed for homicide are, generally, appropriate. We affirm the importance of judicial discretion in sentencing. It is essential that a court has the ability to take into account the individual circumstances of each case. We also note that whole of life sentences are imposed in the most serious cases of murder, including those involving sexual assault and domestic violence.

General sentencing principles (Chapter 2)

0.16 The principle of totality and the aggravating and mitigating factors, which apply to the sentencing of all offences, are particularly important to understanding homicide sentences.

0.17 The current approaches to these principles are appropriate and we do not recommend changes to the existing law.

Totality

0.18 Totality is relevant in cases where a homicide offender has committed other offences. The totality principle requires a court, when sentencing an offender for two or more offences, to impose a sentence reflecting the totality of the criminality arising from those offences. It ensures that the overall sentence is neither too harsh nor too lenient. Application of the totality principle generally determines whether sentences for multiple offences are to be served concurrently, cumulatively or partly cumulatively. Recent sentences illustrate that the principle is being applied appropriately.

Aggravating and mitigating factors

0.19 When sentencing an offender for murder or manslaughter, a NSW court must take into account any relevant aggravating and mitigating circumstances from the lists set out in s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW). It is important that the section is not an exhaustive list of the matters that a court may take into account.

0.20 While some submissions support adding to the list of aggravating factors, chiefly in the areas of offences involving domestic violence or offences against young victims, in our view the existing provisions either adequately cover the field or the courts have been able to take the circumstances into account without the need for an express provision. In such cases, we prefer not to increase the risks of double counting (and consequent appeals) which would follow from adding to the list of factors in s 21A.

0.21 Suggestions about adding domestic violence-related factors arise partly as the result of a 2018 Supreme Court sentencing decision where it was said that an assessment of relevant case law "indicates that without anything more, the murder of a partner has not ordinarily been considered the type of case in respect of which s 61 has application" (that is, deserving of a life sentence). However, the statement is not consistent with the conclusions in other cases. Subsequent cases have shown that courts impose life sentences in cases of domestic violence murder, without the need of express statutory recognition of a new circumstance of aggravation.

Domestic violence context (Chapter 3)

0.22 A number of submissions have pointed to the importance of using evidence of domestic violence when assessing the seriousness of, and the appropriate sentence for, a homicide. Such evidence includes social framework evidence and evidence of expert witnesses on the nature and dynamics of domestic violence in sentencing.

0.23 Subject to the fundamental principle that an offender is not to be punished for an offence for which they have not been convicted, a sentencing court can have regard to evidence of domestic violence to assist in understanding the context of an offence, so long as it is admissible in the particular case and meets the relevant evidential standard in accordance with general law.

0.24 In our view, it is not necessary to legislate more generally to recognise domestic violence and we do not recommend any changes to the law of evidence or to the standard of proof in sentencing hearings. Changes to the law may not make a difference and may prove counterproductive.

0.25 In reaching our conclusion, we examined a number of recent cases. The cases illustrate four reasonably common ways in which evidence of domestic violence intersects with homicide sentencing:

- where the primary victim of domestic violence kills their abusive partner
- where the offender causes death but is also a victim of domestic violence from the primary offender (such as where two adults are responsible in different ways for the death of a child)
- where the offender was brought up in an environment of exposure to domestic violence, and
- where there is a broader context of abuse of the deceased by the offender.

0.26 The cases we examined demonstrate evidence being used in the sentencing process to show the devastating impact of domestic violence, including evidence of sustained histories of violence and controlling conduct and evidence of the psychological and psychiatric consequences of domestic violence.

0.27 Addressing domestic violence homicide requires a holistic approach that goes beyond reforms to criminal sentencing. In particular, there is a need to ensure cultures or attitudes do not permit or minimise domestic violence. One way to do this is through the language used in trials and sentencing remarks about domestic violence.

0.28 The use of language in domestic violence homicide cases has been criticised as, in some cases, diminishing or minimising domestic violence, and failing to hold perpetrators accountable. Improvements in the use of language have been noted in recent years and there are many examples of positive and well-informed language being used in domestic violence cases.

0.29 Some bench books provide guidance on the nature and dynamics of domestic violence and seek to dispel some of the common myths and misunderstandings of domestic violence. These include the *National Domestic and Family Violence Bench Book* and the Judicial Commission of NSW's *Equality Before the Law Bench Book*.

0.30 It is important for all professionals in the criminal justice system to be equipped with the skills to recognise and appropriately discuss domestic violence. This includes being able to recognise the range of behaviours that constitute domestic violence.

0.31 It is imperative that the profession maintains appropriate educational programs to ensure that they are equipped to support the court in appropriate cases. This should

include engaging with peak bodies to ensure a proper understanding of the issues, including the effects of trauma.

0.32 We will continue to monitor the sentencing of domestic violence cases as part of our Annual Report which reviews sentencing trends and practices.

Standard non-parole periods for murder (Chapter 4)

0.33 There are three SNPPs for murder: for murder generally (20 years), where the victim was a public official (25 years), and where the victim was a child (25 years).

0.34 We support retaining the existing SNPPs for murder. There is a clear rationale for a higher SNPP (25 years) to apply where the victim was a child or a particular type of public official. Their age or occupation exposes them to a special vulnerability.

0.35 We do not support increasing the length of the current SNPPs for murder, as there is insufficient evidence suggesting that the sentences imposed are inadequate. We note that, unlike other offences with SNPPs, the mean non-parole period imposed in murder cases is close to the SNPP prescribed by legislation, and there has been an increase in the mean non-parole periods imposed in murder cases in recent years.

0.36 We do not support introducing additional SNPPs for murder. Matters that could be the subject of a new SNPP, such as the presence of several aggravating factors, can already be considered when assessing the objective seriousness of the offence. As these factors, along with the existing SNPP for murder, are already taken into account in sentencing, there is no need for new SNPPs to be introduced.

Life sentences for murder (Chapter 5)

0.37 A life sentence is available as a maximum penalty for murder and as a mandatory penalty for the murder of a police officer in certain circumstances. In each case the life sentence is imposed for the term of the offender's natural life without the possibility of parole.

Section 61 – "mandatory" life

0.38 Under s 61 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), a court is to impose a sentence of life imprisonment for murder if the court is "satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence".

0.39 There is uncertainty about the operation of s 61, with two broad approaches being adopted by the courts: a two-stage approach, and an approach consistent with instinctive synthesis. As a result, some stakeholders have suggested the repeal or

amendment of s 61.[1] Two appeals that raise s 61 issues have recently been argued in the Court of Criminal Appeal ("CCA"). In our view, the government should await the outcome of these appeals before deciding whether it is necessary to repeal or amend s 61.

Mandatory whole of life sentences

0.40 A mandatory whole of life sentence (that is, life imprisonment without parole) is available only for the murder of a police officer in particular circumstances. One of the exceptions to the mandatory sentence is where the offender had a significant cognitive impairment when the offence was committed.

0.41 While we accept that the existing provision is part of the law of NSW, we maintain an in principle objection to mandatory sentences. We do not propose any changes to the existing provision, either by extending the categories of victim for which a mandatory whole of life sentence should be imposed or by changing the exceptions.

0.42 In relation to offenders who fit within the "significant cognitive impairment" exception, we note that, where the victim is a police officer, the higher SNPP of 25 years will apply, as will the aggravating factor that the victim was a public official executing their duties.

Life with parole for murder

0.43 Some submissions argued that parole should be available for life sentences on grounds such as that it would give judges greater discretion and flexibility, encourage rehabilitation, recognise human rights and bring NSW into line with other Australian jurisdictions.

0.44 A majority of the Sentencing Council consider that parole should continue not to be available where the maximum penalty of life imprisonment is imposed for murder. The law was changed to clarify that life sentences must be served for the term of the offender's natural life due to community concern that offenders who were sentenced to life imprisonment were being released earlier. The community's expectation is that "life means life". Allowing the possibility of life with parole for murder could undermine public confidence in the administration of justice.

Indefinite or reviewable sentences (Chapter 6)

0.45 There are a number of options, apart from life sentences with parole, for detaining or supervising homicide offenders indefinitely until certain criteria are met. These include indefinite sentences in some parts of Australia and the high risk offenders regime – involving continuing detention orders and extended supervision orders – in NSW.

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1. NSW Bar Association, *Submission MU22* [18]; Australian Lawyers for Human Rights, *Submission MU37* [5.12]; The Public Defenders, *Preliminary Submission PMU13*, 8.

0.46 Schemes allowing for indefinite sentences generally involve an assessment of the ongoing dangerousness of an offender at the time of initial sentencing. They sometimes require ongoing review of an offender's risk, and only permit continued detention for as long as an offender remains a danger to the community. However, risk assessments at the time of sentencing are less likely to be accurate.

0.47 In our view, indefinite sentences for adults should not be introduced in NSW. We prefer the existing high risk offenders regime, which involves a risk assessment at the end of a sentence.

0.48 Many submissions called for a requirement that a person sentenced for a homicide should be required to reveal the location of the victim's body to be eligible for parole, as is the case in other parts of Australia. In our view, however, such a requirement may be inflexible and operate unjustly in certain cases and can only be effective so long as there is a parole period available. The existing sentencing and parole regimes provide sufficient incentives for a homicide offender to disclose the location of their victim's body, including the fact that the State Parole Authority must, when considering whether it is in the interests of the safety of the community to release an offender, have regard to "whether the offender has failed to disclose the location of the remains of a victim".

Manslaughter (Chapter 7)

0.49 The offence of manslaughter incorporates a wide range of circumstances and degrees of culpability that call for a wide range of sentences. Sentences imposed in other cases can, therefore, often be of limited assistance. Although some manslaughter sentences are now closer to the maximum penalty, there is still a significant difference between manslaughter and murder sentencing.

0.50 In recent years there have been a number of successful inadequacy appeals against manslaughter sentences. This shows that the appeal system can adjust manslaughter sentences and provide guidance for any subsequent relevant cases.

0.51 There is insufficient evidence about the general inadequacy of sentencing for manslaughter to justify a proposal for change. Options that we considered, but rejected, include increasing penalties, introducing an SNPP for some categories of manslaughter, introducing mandatory minimum sentences and enacting special child homicide provisions.

0.52 However, we do recommend removing the restriction that prevents courts from imposing intensive correction orders ("ICOs") in appropriate manslaughter cases. [**Recommendaton 7.1**]

0.53 Under the current sentencing regime, removing the availability of ICOs leaves only lesser non-custodial penalties, such as community correction orders and conditional release orders, to deal with manslaughter cases at the lower end of the scale of criminality. The situation is anomalous. There is no reason why the harsher conditions that are only available for ICOs (when compared with other non-custodial options) and

the stricter enforcement procedures that are available for ICOs should not be available for appropriate cases of manslaughter.

Recommendation

Recommendation 7.1

Section 67 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) should be amended to allow a court to impose an intensive correction order for the crime of manslaughter, in appropriate cases.

1. Introduction

In Brief

This is a review of the sentencing for homicide - murder and manslaughter - including penalties imposed for domestic violence homicides and the standard non-parole periods for murder. Homicide and personal violence have devastating consequences and sentencing for homicide is often the subject of community concern. The sentences for homicide are generally appropriate. Judicial discretion should be preserved to ensure sentences respond appropriately to individual cases.

Terms of reference

1.1 The Attorney General has asked us to review the sentencing for the offences of murder and manslaughter, including penalties imposed for domestic violence homicides and the standard non-parole periods for murder. The terms of reference for this review, which we received on 23 November 2018, state:

The Sentencing Council is to review the sentencing for the offences of murder and manslaughter under sections 19A, 19B and 24 of the Crimes Act 1900 (NSW), in particular:

- the standard non-parole periods for murder and whether they should be increased; and
- the sentences imposed for domestic and family violence related homicides.

In undertaking this review, the Sentencing Council should consider:

- Sentences imposed for homicides and how these sentencing decisions compare with sentencing decisions in other Australian states and territories;
- The impact of sentencing decisions on the family members of homicide victims;
- The devastating impact of domestic and family violence on our community;
- The application of section 61 of the Crimes (Sentencing Procedure) Act 1999 in the context of life sentences imposed for murder;
- The principles that courts apply when sentencing for these offences, including the sentencing principles applied in cases involving domestic and family violence; and
- Any other matter the Council considers relevant.

Consultation Paper

1.2 We released a consultation paper in October 2019.[1] It described the law and data relating to the sentencing of homicide in NSW and around Australia. It also asked a range of questions about what changes, if any, should be made to the existing law and practice in relation to sentencing for homicide. We do not reproduce the same detail in this report.

1.3 We received 53 submissions in relation to the questions raised. These are listed in Appendix A and some may be viewed on our website.

1.4 We also received over 248 submissions in response to the sentencing decision in relation to the murder of Allecha Boyd.[2] These submissions called for amendments to the law so that offenders sentenced for murder are not released from imprisonment if

1. NSW Sentencing Council, *Homicide*, Consultation Paper (2019).
2. *R v Shephard* [2020] NSWSC 141.

they have not disclosed the location of the victim's body. While our resources do not permit us to publish such a large volume of submissions, nor to respond personally to all who provided input, we thank those who raised the issue of "no body, no parole".

1.5 We also conducted consultations, including with family members of homicide victims. These are listed in Appendix B.

Background to this review

The impact of homicide

1.6 Homicide and personal violence have devastating consequences for all parts of society, including the victims themselves, their children, other family members, friends, colleagues and the community.[3] Estimations of the economic impact of homicide are often made, but the emotional and personal costs of such offending are too great to be measured.[4]

1.7 Domestic violence has disastrous impacts. One study has found that intimate partner violence is the leading contributor to illness, disability and premature death for women aged 15 to 44 years.[5] The World Health Organization has said that violence against women is “a global public health problem of epidemic proportions, requiring urgent action”.[6]

1.8 Domestic violence is the most common reason people seek help from government-funded homelessness services, especially for women[7] and Indigenous people.[8] It affects the psychological, emotional and physical wellbeing of children, as well as their

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3. Australia, *The National Plan to Reduce Violence against Women: Immediate Government Actions* (2009) 2; *National Plan to Reduce Violence against Women and Their Children: Safe and Free from Violence* (Council of Australian Governments, 2011) 1; S Riger, S Raja and J Camacho, “The Radiating Impact of Intimate Partner Violence” (2002) 17 *Journal of Interpersonal Violence* 184, 184; S Meyer, “When Mothers are Killed by Their Partners, Children often Become “Forgotten” Victims. It’s Time They Were Given a Voice” *The Conversation* (7 October 2019) <www.theconversation.com/when-mothers-are-killed-by-their-partners-children-often-become-forgotten-victims-its-time-they-were-given-a-voice-124580>.
4. *National Plan to Reduce Violence against Women and Their Children: Safe and Free from Violence* (Council of Australian Governments, 2011) 1.
5. VicHealth, *The Health Costs of Violence: Measuring the Burden of Disease Caused by Intimate Partner Violence* (2004) 10.
6. World Health Organization, *Global and Regional Estimates of Violence against Women: Prevalence and Health Effects of Intimate Partner Violence and Non-Partner Sexual Violence* (2013) 3.
7. *National Plan to Reduce Violence against Women and Their Children: Safe and Free from Violence* (Council of Australian Governments, 2011) 7.
8. Australian Institute of Health and Welfare, *Specialist Homelessness Services 2013–14* (2014) 25.

social and cognitive development.[9] Domestic violence is a significant risk factor for child abuse and neglect.[10]

Public concern with sentencing of homicide

1.9 This review arises in the context of concerns in the media that the sentences imposed on homicide offenders are inadequate. The following views were recorded in the two years leading up to this report:

- Serious homicide offenders should be sentenced to life imprisonment, and retribution and community protection should be emphasised.[11] For example, Matthew De Gruchy, who was convicted of the homicide of three family members, and Michael Guider, who was convicted of various sex offences and the homicide of a child, should be serving sentences of life imprisonment.[12]
- Domestic violence perpetrators who commit homicides against intimate partners or family members are sentenced too leniently,[13] or should be sentenced to life imprisonment.[14]
- People convicted of domestic violence homicides over the past few decades have not been sentenced to life imprisonment.[15]
- Recent NSW Supreme Court sentencing remarks may have diminished the seriousness of domestic violence homicide.[16] One example is the use of the term

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9. K Richards, *Children's Exposure to Domestic Violence in Australia*, Trends and Issues in Crime and Criminal Justice No 419 (Australian Institute of Criminology, 2011) 3.
10. *National Plan to Reduce Violence against Women and Their Children: Safe and Free from Violence* (Council of Australian Governments, 2011) 7.
11. C Mardon, "Family Killer to Walk Free", *The Illawarra Mercury* (27 July 2019) 6; J Carroll, "No Parole: Mandurama Baby Killer Loses Bid for Freedom, Appeal Date Set", *Western Advocate* (7 May 2019) 1–2; C Urquhart, "Why are so Many Violent Criminals on the Loose in our Suburbs?" *news.com.au* (14 April 2019); "There'll be Anger, Tears and Fears until we Put a Full Stop to These Short Sentences", *The Australian* (5 September 2019) 13.
12. J Fife-Yeomans and E Barr "Killer in our Midst", *The Daily Telegraph* (16 August 2019) 16–17; C Mardon, "Family Killer to Walk Free" *The Illawarra Mercury* (27 July 2019) 6.
13. A Hennessy, "Grim State of Affairs: Qld Tougher on Partner Killers", *The Daily Telegraph* (14 November 2018) 8; A Hennessy, "Stats Lay Bare Soft Wife Killer Sentences", *The Daily Telegraph* (15 November 2018) 9; M O'Neill, "Fury Builds over Ristevski Sentence", *news.com.au* (26 April 2019).
14. "Jail Domestic Killers for Life, Top Cop Says", *The Sydney Morning Herald* (24 November 2018) 15.
15. A Hennessy, "Sentence Reviews for Evil DV Killers", *The Daily Telegraph* (23 November 2018) 5; A Hennessy, "Grim State of Affairs: Qld Tougher on Partner Killers", *The Daily Telegraph* (15 November 2018) 8.
16. A Hennessy, "Grim State of Affairs: Qld Tougher on Partner Killers", *The Daily Telegraph* (15 November 2018) 8. See *R v AKB (No 8)* [2018] NSWSC 1628 [30].

"worst category", which sometimes leads members of the public to think the judge has underestimated the seriousness of the homicide.[17]

- Mandatory sentences of life imprisonment should be imposed on people convicted of homicide against children,[18] or who kill and sexually assault the victim.[19]
- Sentences of life imprisonment are especially appropriate where the homicide victim is a police officer,[20] or where the offender refuses to reveal the location of a victim's body.[21]
- Homicide offenders should serve multiple sentences consecutively instead of concurrently, especially where serious sex offences or multiple victims are involved.[22]
- Non-parole periods for homicide offenders should be longer,[23] particularly where homicide offenders may commit further offences while on parole.[24]
- Many domestic violence perpetrators who commit homicide against partners or family members are inappropriately sentenced to non-parole periods that are less than the standard non-parole period.[25]
- Continuing detention orders or continuing supervision orders should be imposed on homicide offenders more frequently and with stricter conditions.[26]

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17. A Hennessy, "Grim State of Affairs: Qld Tougher on Partner Killers", *The Daily Telegraph* (15 November 2018) 8. See *R v AKB (No 8)* [2018] NSWSC 1628 [37]. See also *R v Kilic* [2016] HCA 48, 259 CLR 256 [18]–[20].
18. T Chamberlin, "Punish the Mongrels Properly: Grandfather Wants Mandatory Penalties for Child Killers", *The Courier Mail* (14 February 2019) 21.
19. C Miranda, "I Want Life to Mean Life for Sex Killers", *The Daily Telegraph* (5 December 2020) 12.
20. M Carr, "Killer Blow", *Newcastle Herald* (15 August 2019) 1.
21. D Gusmaroli, "Kid Killers Should Stay in Jail", *The Daily Telegraph* (25 May 2019) 14.
22. T Barlass, "Victims' Mother Fears Freed Paedophile Will Offend Again", *The Sydney Morning Herald* (5 September 2019) 3; M Morri and J Fife-Yeomans, "Lock Sicko up for Life", *The Daily Telegraph* (5 September 2019) 4.
23. C Urquhart, "Why are so Many Violent Criminals on the Loose in our Suburbs?" *news.com.au* (14 April 2019).
24. B Hills, "Paroled Killer on Rape Charges", *The Sunday Telegraph* (16 December 2018) 3; N Bielby, "Reform Needed to Keep Women Safe", *Newcastle Herald* (16 March 2019) 8.
25. A Hennessy, "Stats Lay Bare Soft Wife Killer Sentences", *The Daily Telegraph* (15 November 2018) 9.
26. P Duffin, "Vile Serial Predator in Bid to Exit Prison", *The Daily Telegraph* (5 September 2019) 5; D Oliver, "Locked up: Rapist Involved in Wagga Woman's Abduction Denied Release", *Daily Advertiser* (25 September 2019) 1; D Cornwall, "Balding Case Predator: Bid to Stop Release", *The Australian* (5 September 2019) 3; J Fife-Yeomans, "Cross-Dressing Serial Killer to Have Assessment ahead of Parole", *The Daily Telegraph* (online, 21 May 2020).

- There is limited value in considering evidence of good character of an offender who has killed someone.[27]
- Some judges are unwilling to impose life sentences and will not put cases in the "worst" category.[28]

Homicide in NSW

1.10 The following sections set out the basic definitions, maximum penalty information and data for murder and manslaughter in NSW. Further detail may be obtained from our consultation paper.[29]

1.11 In relation to both murder and manslaughter, NSW Police recorded 78 incidents of murder or manslaughter in 2018, which was a 39% reduction, and one of the lowest number of incidents, since 2000.[30]

Murder

Definition and maximum penalties

1.12 In NSW, a person commits murder if they kill another person and:

- they acted with reckless indifference to the person's life, or
- they intended to kill the person, or
- they intended to cause "grievous bodily harm" to the person, or
- they killed the person while attempting to commit, or during or after actually committing, a "crime punishable by imprisonment for life or for 25 years".[31]

1.13 The maximum penalty for murder is life imprisonment.[32] In certain circumstances, where the murder is of a police officer, the penalty is mandatory life imprisonment.[33] A life sentence, if imposed, is to be served for the term of the offender's natural life, with no

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27. J Scherer, "My Father Murdered My Mother. Domestic Violence Survivors Need Better Support", *SBS News* (online, 23 January 2020).
28. J Fife-Yeomans, "Fiends Living among Us", *The Daily Telegraph* (19 May 2020) 6.
29. NSW Sentencing Council, *Homicide*, Consultation Paper (2019).
30. NSW Sentencing Council, *Homicide,* Consultation Paper (2019) [1.9].
31. *Crimes Act 1900* (NSW) s 18(1)(a).
32 *Crimes Act 1900* (NSW) s 19A(1).
33. *Crimes Act 1900* (NSW) s 19B.

possibility of parole.[34] When setting a determinate sentence, a court is usually required to set a non-parole period.[35]

1.14 A standard non-parole period applies to all cases of murder except where an offender is sentenced to life imprisonment and, therefore, is not eligible for parole.[36] The standard non-parole period for murder is 20 years.[37] However, the standard non-parole period is 25 years if the victim was:

- a child under 18 years old, or
- a public official exercising public or community functions and the murder was due to their occupation or voluntary work.[38]

Statistics

1.15 In the three-year period between 1 April 2015 and 31 March 2018:[39]

- There were 100 cases that resulted in sentences; 96 were committed by adult offenders and 4 were committed by juvenile offenders.
- Of the 85 adult offenders who committed offences involving victims who are not in a special standard non-parole period category, 5 (5.9%) were sentenced to life imprisonment.
- All 80 of the remaining offenders were sentenced to a determinate term of imprisonment, with head sentences of imprisonment ranging from 13 to 45 years (with a mean of 25.6 years) and non-parole periods ranging from 8.5 to 33.7 years (with a mean of 18.9 years).
- Unlike other offences with standard non-parole periods,[40] the mean non-parole period for murder (18.9 years' imprisonment) is close to the standard non-parole period (20 years' imprisonment).
- The mean head sentences and non-parole periods for murder have also been steadily increasing since 2003 when the mean head sentence was 19.25 years and the mean non-parole period was 14.1 years.[41]

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34. *Crimes Act 1900* (NSW) s 19A(1)–(2); *R v Harris* [2000] NSWCCA 469, 50 NSWLR 409 [122].
35. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44(1).
36 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D(1)(a).
37. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A, table, item 1.
38. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A, table, item 1A–1B.
39. NSW Sentencing Council, *Homicide*, Consultation Paper (2019) [2.24]–[2.29], [4.13]-[4.17].
40. See, eg, NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) appendix B.

- Of the 85 sentenced offences committed by adult offenders involving victims who are not in a special standard non-parole period category, 17 (20%) involved intimate partner violence and a further 10 involved other forms of domestic violence. This makes a total of 27 (31.8%) that involved some form of domestic violence.
- Of the 27 cases involving domestic violence, one offender was sentenced to life imprisonment.[42] No offender was sentenced to life imprisonment in any of the 17 cases involving intimate partner violence. There was little or no difference between the average head sentences for domestic violence and non-domestic violence murders and the average non-parole periods for the two categories.

Victims under 18 years

1.16 In the 6-year period between 1 April 2012 and 31 March 2018:[43]

- NSW courts imposed 21 sentences for murder involving a victim under the age of 18. Of these, 17 were committed by adult offenders and 4 were committed by juvenile offenders.
- There is a general trend of longer sentences for the murder of children and particularly lengthy sentences where the child victim is killed in the context of domestic violence.
- Head sentences ranged from 20 to 45 years (with a mean of 32.2 years for both domestic violence and non-domestic violence child victims). Non-parole periods ranged from 13 to 33 years (with a mean of 23.9 years for domestic violence child victims and 23.6 years for non-domestic violence child victims).

Comparison with other jurisdictions

1.17 We obtained sufficient data for meaningful comparison with four other Australian jurisdictions – the Northern Territory, Tasmania, Victoria and the Australian Capital Territory. The mean and median head sentences in NSW are longer than in the other jurisdictions that have determinate sentences. The mean and median non-parole periods in NSW are also longer than in the other jurisdictions. If murders involving victims in a special standard non-parole period category were also taken into account, the NSW averages would be even longer.[44]

Manslaughter

1.18 In NSW, a person may be found guilty of manslaughter in three ways:

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41. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) appendix B table B3.
42. *R v Xie* [2017] NSWSC 63.
43. NSW Sentencing Council, *Homicide*, Consultation Paper (2019) [5.26]–[5.33] table 5.1.
44. NSW Sentencing Council, *Homicide*, Consultation Paper (2019) [1.18]–[1.21].

- as the result of an alternative verdict to a charge of murder
- as the result of a guilty verdict on a charge of manslaughter, or
- following a plea of guilty to a charge of manslaughter.

Definition and maximum penalty

1.19 In the *Crimes Act 1900* (NSW), manslaughter is defined as "every other punishable homicide" that is not murder.[45]

1.20 The elements of the offence of manslaughter are set out in the common law. There are two types of manslaughter:

- **Voluntary manslaughter.** This is where the elements of murder are otherwise made out, but a mitigating factor such as substantial impairment by abnormality of mind, provocation or excessive self-defence reduces the offence to manslaughter.[46]
- **Involuntary manslaughter.** This is where the offender has caused the death of another person, but they have a lower level of mental culpability than that required for murder.[47] There are two sub-types of involuntary manslaughter: manslaughter by unlawful and dangerous act and manslaughter by gross negligence.

1.21 The maximum penalty for manslaughter in all cases in NSW, including where the victim is a child, is 25 years' imprisonment.[48] There is no standard non-parole period for manslaughter.

Statistics

1.22 In the five-year period, 1 April 2013 to 31 March 2018:[49]

- There were 92 manslaughter cases; 89 were committed by adult offenders and 3 were committed by juvenile offenders.
- Of the 89 offences committed by an adult offender, the court imposed a term of imprisonment in 85 cases. Of the remaining 4 cases, in 2 the offender was given a suspended sentence, and in 2 the offender was given a bond with supervision.

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45. *Crimes Act 1900* (NSW) s 18(1)(b).
46. *R v Lavender* [2005] HCA 37, 222 CLR 67 [2]. See also *Crimes Act 1900* (NSW) s 23(1), s 23A(1), s 421.
47. *R v Lavender* [2005] HCA 37, 222 CLR 67 [2].
48. *Crimes Act 1900* (NSW) s 24.
49. NSW Sentencing Council, *Homicide*, Consultation Paper (2019) [2.48]–[2.52], [4.21]–[4.24].

- Of the 85 offences committed by adult offenders where a term of imprisonment was imposed, a total or indicative sentence for the manslaughter offence (where it was the principal offence) was given for 80 cases.
- The 80 cases received head sentences of imprisonment ranging from 3 to 16 years (with a mean of 8 years) and non-parole periods ranging from 1.5 years to 12 years (with a mean of 5.3 years).
- Of the 83 offences committed by an adult offender for which we have case information, 27 (32.5%) involved domestic violence and, of those, 8 (9.6%) involved intimate partner violence.

Victims under 18 years

1.23 In the 5 years from April 2013 to March 2018:[50]

- Of the 83 manslaughter cases for which we have data, 10 (12%) involved a victim who was under 18 years old. All but one case involved domestic violence.
- Head sentences ranged from 4 to 12 years (with a mean of 8 years). Non-parole periods ranged from 1.5 to 9 years (with a mean of 4.9 years). The mean head sentence of 8 years is approximately the same as that for all 80 manslaughter offences we reviewed that received a sentence of imprisonment.

Comparison with other jurisdictions

1.24 We obtained sufficient data for meaningful comparison of manslaughter sentences with four other Australian jurisdictions – Northern Territory, Queensland, Tasmania and Victoria. The mean and median head sentence and non-parole period for NSW is in the middle of the range of the mean and median head sentence and non-parole period for these other jurisdictions.[51]

Our approach to this report

1.25 As we note above, this review has been conducted against a background of dissatisfaction with some sentences and, in some cases, disappointment and anguish from the families of victims. We acknowledge the contributions made by family members to this review.[52]

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50. NSW Sentencing Council, *Homicide*, Consultation Paper (2019) [5.36]–[5.42].
51. NSW Sentencing Council, *Homicide*, Consultation Paper (2019) [1.22]–[1.25].
52. A Haydar, *Preliminary Submission PMU2;* E Culleton, *Preliminary Submission PMU14;* E Culleton, *Submission MU30*; T Knight, *Submission MU53;* C Hoskin, *Submission MU48;* J Bradley, *Submission MU45;* M Hoskin, *Submission MU50;* T Boyd, *Submission MU43;* S Dunbier, *Submission MU40;*

1.26 We know that there are certain features of the system that give rise to a sense of grievance about the sentence imposed in some cases. These include:

- separate offences of murder and manslaughter with different maximum penalties (including mandatory life for the murder of police officers in certain circumstances)
- within the offence of murder, different standard non-parole periods depending on the category of victim
- prosecutorial discretion as to the charges that are proceeded with or the pleas that are accepted, and
- judicial discretion, within the law and sentencing principles, as to what sentence will be imposed.

Nevertheless, these features are necessary to ensure the system is flexible enough to respond appropriately to different circumstances.

1.27 In our view, the sentences that are imposed for homicide are, generally, appropriate. The Court of Criminal Appeal ("CCA") is available to correct sentences that are found to be manifestly inadequate. We will continue to monitor sentencing decisions for homicide, including CCA appeals, as part of our annual report on sentencing trends and practices.[53]

1.28 In considering some of the options for reform included in our consultation paper and proposed in submissions, we conclude that there should be no additions to the offences that attract mandatory penalties. We affirm the importance of judicial discretion in sentencing, particularly a court's ability to take into account the individual circumstances of each case. In light of this, we prefer to allow the common law to develop guidance in terms of how a court should respond in particular circumstances rather than constrain the court through legislative mandate.

1.29 The data that we describe above shows that there has been an upward trend in the length of prison sentences handed down for murder and manslaughter since the turn of the century. We also note the imposition of life sentences in the most serious cases of murder, including those involving sexual assault and domestic violence.

1.30 In past reviews, we have dealt with concerns about the shortcomings of sentencing in ways that have a particular relevance to homicide cases. For example, we have addressed concerns about community safety by recommending a high risk violent

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Homicide Victims Support Group, *Preliminary Submission PMU18*; Victims' roundtable, *Consultation* CMU1.

53. See, eg, NSW Sentencing Council, *Sentencing Trends and Practices,* Annual Report 2019 (2020) ch 3.

offenders regime.[54] We have also supported courts taking account of the harm caused to the victim and the community through the reception of victim impact statements in murder cases.[55]

Outline of this report

1.31 This report has six other chapters:

- **Chapter 2**, **General sentencing principles**, considers the principle of totality and the aggravating and mitigating factors as they apply when sentencing for homicide.
- **Chapter 3**, **Evidence of domestic violence when sentencing for a homicide**, discusses the importance of courts being able to take into account domestic violence evidence and notes that courts are able use this evidence so long as it is admissible and for a permitted purpose. It also considers the need to use language that appropriately recognises domestic violence and its impact.
- **Chapter 4**, **Standard non-parole periods for murder**, considers the existing standard non-parole periods for the murder of different categories of victim and concludes that no changes should be made.
- **Chapter 5, Life sentences for murder**, considers the current arrangements for life sentences for murder, including the mandatory life sentence for the murder of a police officer in certain circumstances and the fact that a life sentences is for the term of the offender's natural life without the possibility of parole. We conclude that no changes should be made to the existing arrangements.
- **Chapter 6, Indefinite or reviewable sentences**, considers options, apart from life sentences with parole, for detaining or supervising homicide offenders indefinitely until certain criteria are met. We conclude that the existing high risk offenders regimes is sufficient to address offenders who present a risk to the community and that the existing sentencing and parole regimes provide sufficient incentive to a homicide offender to disclose the location of the victim's body.
- **Chapter 7, Manslaughte**r, considers sentencing for manslaughter, and concludes that, generally, there is not sufficient evidence about the inadequacy of sentencing for manslaughter to justify any proposals for change. However, we do propose lifting the current restriction that prevents courts imposing an intensive correction order in appropriate cases of manslaughter.

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54. NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options*, Report (2012). See *Crimes (High Risk Offenders) Act 2006* (NSW).
55. NSW Sentencing Council, *Victims' Involvement in Sentencing*, Report (2018).

2. General sentencing principles

In Brief

The principle of totality and the aggravating and mitigating factors, which apply to all offences, are particularly important to understanding homicide sentences. The current approaches to these principles are appropriate and we do not recommend changes to the existing law.

2.1 When considering the general sentencing principles that apply in the sentencing of all offenders, there are two topics that are particularly important in understanding homicide sentences:

- the principle of totality as it applies where the courts deal with multiple offences, and
- the aggravating and mitigating factors set out in s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ("*Crimes (Sentencing Procedure) Act*").

Totality and concurrency

2.2 When sentencing an offender for murder or manslaughter, courts may also need to deal with concurrent offending. For example, an offender may have also committed a sexual assault against the victim. In such cases, the principle of totality is an important consideration. It generally determines whether the sentences imposed for each offence are to be served concurrently, cumulatively or partly cumulatively.

2.3 We consider that the current approach to sentencing for multiple offences is appropriate and do not recommend any change.

The principle of totality

2.4 The totality principle requires a court, when sentencing an offender for two or more offences, to impose a sentence reflecting the totality of the criminality arising from those offences.[1] In other words, the sentence must be a just and appropriate measure of the total criminality involved.[2]

2.5 The totality principle ensures that the overall sentence imposed is not too harsh. It operates to prevent an accumulation of sentences resulting in a disproportionate or "crushing" overall sentence.[3]

2.6 At the same time, the totality principle ensures that the overall sentence is not too lenient. Where, for example, a court is sentencing for murder, it should not entirely disregard the sentences for the other offences. Otherwise, the offender would "in effect only be punished for the murder and not for the other offences".[4]

Concurrent and cumulative sentences

2.7 Application of the totality principle generally determines whether sentences are to be served concurrently, cumulatively or partly cumulatively.[5] Concurrent sentences commence and run at the same time, whereas cumulative sentences run consecutively (one after another). A sentence may be served partly concurrently and partly cumulatively.

2.8 In applying the totality principle, the question is whether the sentence for one offence can entirely comprehend and reflect the criminality of the other offence.[6] If so, then the sentences should be concurrent. Otherwise, there is a risk that the combined sentences will exceed what is needed to reflect the totality of the two offences.[7]

2.9 If not, the sentence should be at least partially cumulative. Otherwise, there is a risk that the total sentence will fail to reflect the total criminality of the two offences. This is so

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1. See, eg, *Nguyen v R* [2016] HCA 17, 256 CLR 656 [64].
2. *Mill v R* (1988) 166 CLR 59, 63, citing D A Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2nd ed, 1979) 56–57; *Postiglione v R* (1997) 189 CLR 295, 305–306, 307–308; *R v KM* [2004] NSWCCA 65 [55]–[56].
3. *R v Holder* [1983] 3 NSWLR 245, 260; *R v MMK* [2006] NSWCCA 272 [12]; *R v Aslett* [2004] NSWSC 1228 [188]; *Azzopardi v R* [2011] VSCA 372, 35 VR 43 [69]; *R v Yates* [1985] VR 41, 48.
4. *R v Maiden* [2000] NSWCCA 519 [10]. See also *R v Purdey* (1993) 31 NSWLR 668, 680.
5. *R v MMK* [2006] NSWCCA 272 [11].
6. See, eg, *R v MMK* [2006] NSWCCA 272 [11], [13]; *Cahyadi v R* [2007] NSWCCA 1 [27]–[28].
7. *Cahyadi v R* [2007] NSWCCA 1 [27].

regardless of whether the two offences represent two discrete acts of criminality or are part of a single episode.[8]

2.10 However, the courts are careful to avoid accumulating sentences in a way that would amount to double punishment for the one course of conduct.[9]

Totality and concurrency in practice

2.11 Some submissions and media reports raise concerns about the adequacy of sentences for homicide offenders who commit multiple offences.[10] Some have called for these offenders to serve multiple sentences cumulatively instead of concurrently or partly concurrently, especially where serious sex offences or multiple victims are involved.[11]

2.12 However, one submission argues that "mandatory cumulation of sentences" would "undermine the court's discretion".[12] Another submission considers there is "no need to introduce specific provisions to deal with homicide offenders who have committed additional serious offences", as:

- this could further complicate the sentencing process, without leading to any improvement in sentencing practice
- there is no evidence that the current approach to sentencing multiple offences is defective, as it already takes into account the entirety of an offender's conduct, and
- in circumstances where a killing occurs in the course of other serious criminal offending, such as sexual assault, the law already recognises this fact as justifying a significant degree of accumulation of the sentences.[13]

2.13 There is no general rule that determines how multiple sentences should be imposed depending on, for example, the number of victims involved. Rather, the controlling

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8. *Cahyadi v R* [2007] NSWCCA 1 [27].
9. *R v Terkmani (No 2)* [2017] NSWSC 1567 [72]–[73].
10. See, eg, E Culleton, *Preliminary Submission PMU14;* Fighters against child abuse Australia, *Submission MU08,* 9–10, 17–18; Women's Safety NSW, *Submission MU28,* 7–9; Victims of Crime Assistance League, *Submission MU31,* 3; T Barlass, "Victims' Mother Fears Freed Paedophile Will Offend Again", *The Sydney Morning Herald* (5 September 2019) 3; M Morri and J Fife-Yeomans, "Lock Sicko up for Life", *The Daily Telegraph* (5 September 2019) 4.
11. See, eg, Women's Safety NSW, *Submission MU28,* 7–9; Victims of Crime Assistance League, *Submission MU31,* 3; M Morri and J Fife-Yeomans, "Lock Sicko up for Life", *The Daily Telegraph* (5 September 2019) 4.
12. Legal Aid NSW, *Submission MUI36,* 15.
13. NSW Bar Association, *Submission MU22,* [71]–[72].

question is whether the sentence imposed can encompass the total criminality of all the offences.[14] We consider that this is appropriate.

2.14 For example, the Court of Criminal Appeal ("CCA") recently considered a case where the offender was sentenced for sexual intercourse with an 11-month-old child, having already been convicted of the manslaughter of that child. The CCA said that "the two crimes, in their nature and in the particular way they were committed, were not only very serious, they were also different". Therefore, it was not appropriate to characterise the criminality of the child sexual offence as substantially reflected in the manslaughter offence, just because they occurred in the same episode and both involved the infliction of harm to the child.[15]

2.15 However, the fact that there is more than one victim involved will generally require an increase in the otherwise appropriate sentence.[16] It is important for the sentence imposed "to recognise the fact that several people have been victimised by the offending conduct".[17]

2.16 The CCA recently considered a case where the offender was sentenced for three offences against three different victims: wounding with intent to murder, causing grievous bodily harm with intent to murder, and attempting to wound with intent to murder. She was sentenced to an aggregate sentence of 9 years' imprisonment, with a non-parole period of 4 years and 6 months.[18]

2.17 The CCA found that the aggregate sentence was manifestly inadequate, as "[t]hese were serious crimes committed against three separate victims with the intention to kill".[19] Despite the offender's reduced moral culpability, due to her mental health issues, it:

> remained necessary for the objective gravity of each of these offences to be reflected tangibly in the indicative sentences, and then the aggregate sentence to be imposed reflecting the totality of her crimes.[20]

2.18 The offender was resentenced to an aggregate term of imprisonment of 14 years, with a non-parole period of 8 years.

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14. See, eg, *R v Jarrold* [2010] NSWCCA 69 [56].
15. *R v Toohey* [2019] NSWCCA 182 [58].
16. *Vaovasa v R* [2007] NSWCCA 253 [16].
17. *R v Gommeson* [2014] NSWCCA 159 [106]. See also *R v Hamid* [2006] NSWCCA 302 [133]–[136]; *R v Amati* [2019] NSWCCA 193 [112]–[115].
18. *R v Amati* [2019] NSWCCA 193 [12].
19. *R v Amati* [2019] NSWCCA 193 [131].
20. *R v Amati* [2019] NSWCCA 193 [120].

2.19 In another recent case, the offender pleaded guilty to the offences of solicit to murder and murder, which involved two separate victims. The court considered that:

> Necessarily, because these are two separate offences, and to recognise the different victims involved and the effect upon each of the different victims, these sentences will need to be accumulated. The appropriate method of doing that would be to commence the sentence for solicit to murder first and then to accumulate the sentence for murder on that sentence by a period of 3 years.[21]

Aggravating and mitigating factors

2.20 When sentencing an offender for murder or manslaughter, a NSW court must take into account any relevant aggravating and mitigating circumstances from the lists set out in s 21A of the *Crimes (Sentencing Procedure) Act*.

2.21 The section is not an exhaustive list of the matters that a court may take into account as aggravating or mitigating an offence.[22] In fact, s 21A(1)(c) provides that the court is to take into account any other objective or subjective factor that affects the relative seriousness of an offence.

2.22 Applying the factors in s 21A is part of the general sentencing exercise of identifying relevant objective and subjective features.[23] As one submission observes, s 21A "reflects Parliament's intention that the judiciary have discretion" when sentencing an offender, having regard to the list of factors in that section.[24] If the s 21A factors were circumscribed in some way, this could limit the court's ability to consider all the circumstances of a case.

2.23 Courts are also careful to avoid double counting aggravating factors in s 21A(2) where, for example, these factors are taken into account in evaluating the objective seriousness of the offence. In other words, a factor that is relevant to determining objective seriousness should not also be taken into account as an aggravating factor in s 21A(2).[25]

2.24 We consider that the current law relating to aggravating and mitigating factors is appropriate and do not recommend any changes.

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21. *R v Sales* [2020] NSWSC 1183 [91].
22. *R v Way* [2004] NSWCCA 131, 60 NSWLR 168 [104].
23. See, eg, R Howie, "Section 21A and the Sentencing Exercise" (2005) 17 *Judicial Officers' Bulletin* 43, 43.
24. Australian Lawyers for Human Rights, *Submission MU37* [5.6].
25. See, eg, *Clinton v R* [2018] NSWCCA 66 [39]; *R v A (No 5)* [2015] NSWSC 670 [43].

Aggravating factors

2.25 Aggravating factors are those factors that make an offence more serious and may warrant a higher penalty. Many of the aggravating factors in s 21A(2) of the *Crimes (Sentencing Procedure) Act* concern factors specific to the offence, such as where the offence:

- involved the actual or threatened use of violence or a weapon
- was committed in company
- involved gratuitous cruelty
- was motivated by hatred or prejudice against a group of people
- was committed without regard for public safety
- involved multiple victims or a series of criminal acts, or
- was part of a planned or organised criminal activity.

2.26 Some of the factors in s 21A(2) relate to the victim of the offence, such as where the victim:

- exercises public or community functions, or
- was vulnerable (for example, because the victim was very young or very old, or had a disability).

2.27 Other aggravating factors in s 21A(2) concern the offender, such as where the offender:

- has a record of previous convictions, or
- abused a position of authority or trust in relation to the victim.

Mitigating factors

2.28 Mitigating factors are those factors that may warrant a reduction in the penalty imposed by the court. Some of the mitigating factors in s 21A(3) of the *Crimes (Sentencing Procedure) Act* concern factors specific to the offence, such as where:

- the injury, emotional harm, loss or damage caused by the offence was not substantial, or
- the offence was not part of a planned or organised criminal activity.

2.29 Other factors in s 21A(3) relate to the offender, such as where the offender:

- was provoked by the victim or acting under duress

- was a person of good character
- is unlikely to reoffend
- has good prospects of rehabilitation (due to the offender's age or another reason)
- was not fully aware of the consequences of their actions due to age or any disability
- pleaded guilty to the offence, or
- assisted law enforcement authorities.

The s 21A factors in practice

2.30 In determining the appropriate sentence for an offence, the court is required to take into account the factors listed in s 21A(2) and (3) that are relevant and known to the court.[26] However, the fact that any such factor is relevant and known does not require the court to increase or reduce the sentence for the offence.[27]

2.31 Courts should not use the lists as a kind of checklist, so that the presence of a factor automatically leads to an increase or reduction in the seriousness of the offence or the culpability of the offender.[28] The weight that is attached to particular factors is a matter to be determined by the court in each case.[29]

2.32 For example, provocation is to be taken into account under s 21A(3)(c) to mitigate the seriousness of the offence.[30] However, the extent to which provocation will constitute a mitigating factor depends on the relationship between the offender and victim and the circumstances of the particular case.[31]

2.33 In one manslaughter case, the court took into account the "long history of extreme provocation" from the victim (who resided with the offender) towards the offender in mitigation of the sentence.[32] Whereas in a murder case, the sentencing judge held that the fact that the offender's wife had said that their marriage was over did not amount to a mitigating factor.[33]

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26. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(1)(a)–(b).
27. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5).
28. R Howie and G Bellew, *Sentencing Law NSW* (LexisNexis) [02-060.5] (retrieved 19 January 2021).
29. R Howie and P Johnson, *Criminal Practice and Procedure NSW* (LexisNexis) [5-s 21A.1] (retrieved 19 January 2021).
30. *Williams v R* [2012] NSWCCA 172 [42].
31. *R v Mendez* [2002] NSWCCA 415 [16].
32. *Pitt v R* [2014] NSWCCA 70 [57].
33. *R v Maglovski (No 2)* [2013] NSWSC 16 [81].

2.34 The list of aggravating factors in s 21A(2) includes where the offence was committed in the presence of a child under 18 years of age. To establish this aggravating factor, there must be evidence that the child actually witnessed the offence or its immediate aftermath.[34] Another aggravating factor is where the offence was committed in the home of the victim or any person. This factor is not limited to circumstances where the offender was an intruder in the victim's home or another home.[35]

2.35 In one case, in which the offender murdered his father and stepmother, the court found that both of these aggravating factors applied. The offences were witnessed by the victims' children (aged 12 and seven respectively) and occurred in the victims' home.[36] The offender was sentenced to a total of 42 years' imprisonment, with a non-parole period of 33 years.[37]

2.36 In another case, the offender was convicted of the manslaughter of one victim and pleaded guilty to assault occasioning actual bodily harm in relation to another victim. The court treated the fact that the offences occurred in the presence of a child under 18 as an aggravating factor. Although the child was not in the same room when his father (the deceased victim) was struck by the offender, he was close enough to come in and witness the assault on the other victim, while his father was lying on the ground.[38]

2.37 Another aggravating factor in s 21A(2) is where the offender abused a position of trust or authority in relation to the victim.[39] To establish this aggravating factor, there must have existed, at the time of the offending, a particular relationship between the offender and the victim that went beyond "the usual duty of care arising between persons in the community in their everyday contact or their business and social dealings".[40]

2.38 In a recent case, the CCA found that the offender had a position of trust in relation to his former partner, even though he had separated from her and an apprehended domestic violence order regulated his conduct towards her.[41] In another case, in which the offender murdered his estranged wife, the court found that there was a breach of trust:

> It was in the context of the marital relationship that the offender obtained the key to the property that he used to try to enter the home from which he had been barred. It was in that context that he acquired knowledge of the layout of

34. *R v Seymour* [2012] NSWSC 1010 [43]–[44].
35. *Jonson v R* [2016] NSWCCA 286 [40]–[41], [50]. See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(eb).
36. *R v Breen* [2015] NSWSC 1757 [41]–[42].
37. *R v Breen* [2015] NSWSC 1757 [96].
38. *R v Tanks* [2016] NSWSC 519 [19].
39. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(k).
40. *Suleman v R* [2009] NSWCCA 70 [22].
41. *Turnbull v R* [2019] NSWCCA 97 [134], [136].

the premises and the habits of its occupants. These are practical examples demonstrating the breach of trust.[42]

Proposals to add factors to s 21A

2.39 Some submissions support adding to the list of aggravating factors in s 21A(2),[43] particularly to make express reference to offences involving domestic violence or offences against young victims (which we outline in more detail below). Other submissions oppose adding more aggravating factors to the list.[44] Some submissions are concerned that adding new factors to s 21A may run the risk of double counting some factors and lead to unnecessary appeals.[45]

2.40 In our view, the existing provisions either adequately cover the field or the courts have been able to take the circumstances into account without the need for an express provision. In such cases, we prefer not to increase the risk of double counting (and consequent appeals) which would follow from adding to the list of factors in s 21A.

Young victims/children

2.41 One submission supports including the "defencelessness and vulnerability" of victims under the age of 12 as an aggravating factor.[46]

2.42 In Queensland, courts must, when determining the appropriate sentence for an offender convicted of the manslaughter of a child under 12 years, "treat the child's defenceless and vulnerability, having regard to the child's age, as an aggravating factor".[47] This reflects a recommendation made by the Queensland Sentencing Advisory Council in October 2018.[48]

2.43 Section 21A(2) already recognises certain aggravating factors that are relevant in child homicide cases (for example, that the victim was vulnerable because they were very young and that the offender abused a position of authority or trust).[49] In one case,

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42. *R v Goodbun* [2018] NSWSC 1025 [149].
43. See, eg, Rape and Domestic Violence Services Australia, *Submission MU15* [32]–[33]; Women's Safety NSW, *Submission MU28,* 10–11; Victims of Crime Assistance League, *Submission MU31,* 4.
44. See, eg, NSW Bar Association, *Submission MU22,* 9; Legal Aid NSW, *Submission MU36,* 9; Australian Lawyers for Human Rights, *Submission MU37,* 21.
45. Legal Aid NSW, *Submission MU36*, 9; NSW Bar Association, *Submission MU22* [38].
46. Bravehearts Foundation, *Submission MU05,* 2.
47. *Penalties and Sentences Act 1992* (Qld) s 9(9B), inserted by *Criminal Code and Other Legislation Amendment Act 2019* (Qld) s 9.
48. Queensland Sentencing Advisory Council, *Sentencing for Criminal Offences Arising from the Death of a Child*, Final Report (2018) rec 1.
49. Australian Lawyers for Human Rights, *Submission MU37,* 21. See also NSW Bar Association, *Submission MU22* [46].

where the offender pleaded guilty to the manslaughter of her infant daughter, the court found that both of these aggravating circumstances applied.[50]

2.44 In our view, including a child's defencelessness and vulnerability as an additional aggravating factor may increase the risk of double counting. There is already the potential to double count, or even triple count, the victim's age when sentencing an offender in a child murder case, as this:

- is included as an aggravating circumstance under s 21A(2)(l)
- affects the objective seriousness of the offence, and
- is reflected in the standard non-parole period of 25 years for murder, where the victim was a child under 18 years.[51]

Domestic violence

2.45 There was some support in submissions for the following additions to the list of aggravating factors:

- gender-based circumstances of aggravation (where the offender is a man and the victim is a woman)[52]
- prior domestic violence incidents by the offender[53]
- relationship-based circumstances of aggravation[54]
- coercive control by the offender,[55] and
- using contact arrangements with a child to instigate an offence.[56]

2.46 In our view, the preferable approach is for the sentencing judge to consider relevant circumstances of a relationship in each individual case, in accordance with established sentencing principle. In addition to the risk of double counting, there is also a potential for confusion, particularly as understanding of the nature of domestic violence continues

50. *R v MB* [2017] NSWSC 619 [50].
51. *R v Ross* [2014] NSWSC 707 [51]–[56]. See also *R v Abrahams* [2013] NSWSC 952 [63]; *R v Hill* [2014] NSWSC 1010 [25]; *R v PJS* [2009] NSWSC 153 [30].
52. Domestic Violence NSW, *Submission MU33*, 5; Rape and Domestic Violence Services Australia, *Submission MU15* [32].
53. Women's Safety NSW, *Submission MU28,* 10.
54. Domestic Violence NSW, *Submission MU33*, 5; Victims of Crime Assistance League, *Submission MU31*, 4.
55. Domestic Violence NSW, *Submission MU33*, 5.
56. Women's Legal Service NSW, *Submission MU34* [24]–[26].

to evolve. For example, there may be problems with the admission of evidence that does not strictly fall within the terms of any new or altered factors.

2.47 While the existing statutory list of aggravating factors does not cover the range of domestic violence related behaviour by an offender in the context of a homicide, the following aggravating circumstances are seen as particularly relevant to domestic violence situations:

- the offender abused a position of trust or authority in relation to the victim
- the offence was committed in the victim's home, and
- the offence was committed in the presence of a child under 18 years of age.[57]

2.48 Suggestions about adding to the list of aggravating factors arise partly as the result of a 2018 Supreme Court sentencing decision where it was said that an assessment of relevant case law "indicates that without anything more, the murder of a partner has not ordinarily been considered the type of case in respect of which s 61 has application" (that is, as deserving of a life sentence).[58] The case itself involved a substantial sentence of imprisonment for 36 years with a non-parole period of 27 years and it is unlikely an appeal would have been successful on the basis of manifest inadequacy. However, the statement about domestic violence murders is not consistent with the conclusions in other cases.

2.49 Subsequent cases have shown that courts do impose life sentences in cases of domestic violence murder, without the need of express statutory recognition of a new circumstance of aggravation.[59] In one of these cases, the sentencing judge observed:

> Crimes of violence against domestic partners require a substantial emphasis upon deterrence in the sentencing response. That a person can extinguish the life of their partner because he or she might show an interest in another person is the antithesis of what a mature, humane and law-abiding society will tolerate.[60]

2.50 Some submissions also support the possibility of mitigation in exceptional cases where primary victims of domestic violence kill their abusers.[61] Using evidence of a domestic violence context as a mitigating factor, where the offender is the primary victim of

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57. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(ea)-(eb), s 21A(2)(k).
58. *R v AKB (No 8)* [2018] NSWSC 1628 [34].
59. *R v Holdom* [2018] NSWSC 1677; *R v O'Connor* [2018] NSWSC 1734.
60. *R v O'Connor* [2018] NSWSC 1734 [43].
61. Victims of Crime Assistance League, *Submission MU31*, 4–5; Women's Safety NSW, *Submission MU28*, 12.

domestic violence, presents a number of additional challenges. First, any proposed mitigating factor would need to be carefully approached to ensure that a primary abuser cannot use it to their advantage. Secondly, there is a need to ensure that the law is not seen as encouraging fatal violence in any circumstance.[62]

2.51 The above discussion raises issues surrounding the use of domestic violence evidence that we address in the next Chapter.

2.52 Some submissions proposed that certain offences, such as killing a child or partner, should disqualify an offender from relying on the mitigating factor that they were a "person of good character".[63] Such a provision is similar to the special rule for child sex offences that states that "the good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor".[64] However, in the case of child sexual offences, the court must also be satisfied that the relevant factor "was of assistance to the offender in the commission of the offence". In our view, it is undesirable, except in very clearly circumscribed cases, such as in relation to child sexual offences, to rule out factors that a court may take into account when assessing an individual case.

62. See *Osland v R* [1998] HCA 75; 197 CLR 316 [165].

63. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(f); Fighters Against Child Abuse Australia, *Submission MU08,* 10, 18–19; Women's Safety NSW, *Submission MU28,* 9.

64. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5A).

3. Evidence of domestic violence when sentencing for a homicide

In Brief

It is important to ensure that a sentencing court can take into account evidence of domestic violence that may be relevant to a homicide case. Nothing in the law prevents evidence of domestic violence being taken into account so long as it is for a permitted purpose and is admissible evidence. There are indications that courts are taking evidence of domestic violence into account. It is also important to take care in the language that is used to describe domestic violence.

3.1 One issue that is highlighted in a number of submissions is the extent to which a sentencing court can use evidence of domestic violence when assessing the seriousness of, and determining the appropriate sentence for, a homicide.

3.2 Subject to the fundamental principle that an offender is not to be punished for an offence for which they have not been convicted,[1] a sentencing court can have regard to evidence of domestic violence to assist in understanding the context of an offence. In our view, the law does not need to change. Changes to the law may not make a difference and may prove counterproductive.

The importance of evidence of domestic violence

3.3 Some submissions emphasise the need to ensure that a sentencing court can take into account evidence of domestic violence. This can include the history of the relationship, and "social framework evidence" on the nature and dynamics of domestic violence as it applies to the case before it. It can apply to all domestic violence homicides. For example, some submissions and commentators are concerned about capturing all relevant dynamics or behaviours that have contributed to the victim being killed by an abusive partner or family member. This is especially so in relation to cases where a primary victim of domestic violence kills their abusive partner.[2]

3.4 A number of submissions point to the importance, when sentencing, of social framework evidence and expert witnesses on the nature and dynamics of domestic violence.[3] One submission highlights the need for social framework evidence as a way of dispelling dangerous myths as to why women don't leave violent relationships.[4] One submission refers to the arbitrary exclusion of established bodies of research relating to Indigenous women. It observes that justice outcomes for Indigenous women who are victims of domestic violence would improve if courts could use the extensive body of knowledge about domestic violence and Indigenous people in a more structured and uniform way, through social entrapment theory, without removing judicial discretion.[5]

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1. *R v De Simoni* (1981) 147 CLR 383, 389; *R v Olbrich* [1999] HCA 54, 199 CLR 270 [53].
2. Australian Lawyers for Human Rights, *Submission MU37* [6.2]. Rape and Domestic Violence Services Australia, *Submission MU15* [27]; Victims of Crime Assistance League Inc, *Submission MU31,* 4–5; Domestic Violence NSW, *Submission MU33,* 6; Women's Legal Service NSW, *Submission MU34* [4], [8.1], [15], [53]; Australia's National Research Organisation for Women's Safety, *Submission MU35*, 3–4.
3. Women's Legal Service NSW, *Submission MU34* [15], [30]; Domestic Violence NSW, *Submission MU33*, 6; Australian Lawyers for Human Rights, *Submission MU37* [6.4]; Women's Safety NSW, *Submission MU28* [3.8]. See also Victorian Law Reform Commission, *Defences to Homicide,* Final Report (2004) 160–161 (although this may be more in the context of trial, rather than sentencing).
4. Rape and Domestic Violence Services Australia, *Submission MU15* [30].
5. Australia's National Research Organisation for Women's Safety, *Submission MU35*, 4.

3.5 The use of such models or frameworks can help ensure, for example, that a woman's use of force in response to intimate partner violence is assessed within its social context, including her particular circumstances. These provisions are necessary because:

> Such a framework requires documentation of the full suite of coercive and controlling behaviours by the predominant aggressor, including the strategic and retaliatory dimensions of this behaviour and its temporal development. It also requires an examination of the responses of family, community and agencies to the abuse, and the manner in which any structural inequities experienced by the primary victim/survivor support the aggressor's use of violence and compound her experience of entrapment.[6]

3.6 These observations can also apply to situations where evidence of domestic violence is being taken into account in determining the seriousness of an offence committed by the primary perpetrator of domestic violence against the primary victim.

3.7 Some submissions highlight the need to take into account a wide range of factors when assessing the domestic violence context of an offence.[7] These factors include, but are not limited to, patterns of ongoing, abusive behaviour that can include physical, sexual, psychological, verbal, financial, social, cultural and legal abuse.[8]

3.8 One submission highlights the need to ensure that coercive and controlling behaviours are included in this context.[9] Another submission observes:

> It is important that coercive and controlling behaviour is recognised and made visible. The NSW Domestic Violence Death Review Team has been critical of prosecutors who have focused only on physical violence, ignoring coercive and controlling behaviour, thus reinforcing the damaging misconception that non-physical violence is not violence.[10]

3.9 Examples of such behaviours include mind games, belittling, locking the victim in their house, using children as pawns, and phone checking.[11] The move towards criminalising

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6. S Tarrant, J Tolmie and G Giudice, *Transforming Legal Understandings of Intimate Partner Violence*, Research Report, Issue 3 (Australia's National Research Organisation for Women's Safety, 2019) 5.
7. Victims of Crime Assistance League, *Submission MU31*, 4–5; Women's Safety NSW, *Submission MU28*, 12–13; Rape and Domestic Violence Services Australia, *Submission MU15* [28].
8. Victims of Crime Assistance League, *Submission MU31*, 3.
9. Women's Safety NSW, *Submission MU28*, 12–13.
10. Women's Legal Service, *Submission MU34* [50]. See, eg, NSW Domestic Violence Death Review Team, *Report 2015–2017* (2017) 75.
11. Women's Safety NSW, *Submission MU28*, 13.

coercive conduct in domestic relationships may, in future, have an impact on sentencing for homicide. Recent developments in the recognition of coercive control include:

- the establishment by the NSW Parliament, on 21 October 2020, of the Joint Select Committee on Coercive Control
- the release of a discussion paper on coercive control by the Department of Communities and Justice[12]
- two private members bills currently before the NSW Parliament,[13] and
- the recent enactment of coercive control offences in the United Kingdom and Ireland.[14]

Calls for reform

3.10 Some submissions specifically call for changes to the law to facilitate the use of social framework evidence.[15]

3.11 The need to take such matters into account has led to proposals and reforms, in some states, to provide expressly for evidence to be presented to a court about the domestic violence context of a particular offence. A number of these reforms and proposed reforms could ensure that context evidence is considered at sentencing, even though they were intended to operate primarily in cases involving partial defences to murder. In Victoria, provisions about evidence of family violence were introduced in 2005[16] in response to a Victorian Law Reform Commission recommendation for legislation to ensure social framework evidence could be admitted in trials involving partial defences to murder where prior domestic violence is raised.[17] A particular concern was to address questions that a jury may well ask, such as, “why didn't she just leave the relationship or call the police?”, as well as to counter false claims that the offender killed the victim in self-defence because the victim attacked first.[18] Similar provisions have been introduced in Western Australia.[19]

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12. NSW Department of Communities and Justice, *Coercive Control*, Discussion Paper (2020).
13. Crimes (Domestic and Personal Violence) Amendment (Coercive Control: Preethi’s Law) Bill 2020 (NSW); Crimes (Domestic and Personal Violence) Amendment (Coercive and Controlling Behaviour) Bill 2020 (NSW).
14. *Domestic Violence Act 2018* (Ireland) s 39; *Serious Crime Act 2015* (UK) s 76; *Domestic Abuse (Scotland) Act 201*8 (UK) s 1–2.
15. See, eg, Women’s Legal Service, *Submission MU34* [8.2], [15].
16. *Crimes Act 1958* (Vic) s 322J, originally *Crimes Act 1958* (Vic) s 9AH(3) inserted by *Crimes (Homicide) Act 2005* (Vic) s 6.
17. Victorian Law Reform Commission, *Defences to Homicide*, Final Report (2004) [4.11]–[4.35] rec 25.
18. Victoria, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 6 October 2005, 1350.

3.12 The Western Australian and Victorian provisions are broadly similar. They set out the evidence of domestic violence that courts may take into account, where relevant, including (but not limited to) such matters as:

- the history of the relationship, including violence by the offender towards the person, or by the person towards the offender, or by the offender or the person in relation to any other person
- the cumulative effect of domestic violence, including the psychological effect, on the person or another relevant person
- social, cultural or economic factors that impact on the person or another relevant person
- the general nature and dynamics of relationships affected by domestic violence, including the possible consequences of separation from a person who perpetrates domestic violence
- the psychological effect of domestic violence on people who are or have been in a relationship affected by domestic violence
- social or economic factors that impact on people who are or have been in a relationship affected by domestic violence
- responses by family, community or agencies to domestic violence, including further violence that a relevant person may use to prevent, or in retaliation to, any help-seeking behaviour or use of safety options by the person
- ways in which social, cultural, economic or personal factors have affected any help-seeking behaviour undertaken by the person, or the safety options realistically available to the person, in response to domestic violence, and
- ways in which inequities experienced by the person, including inequities associated with (but not limited to) race, poverty, gender, disability or age exacerbated violence towards the person, or the lack of safety options.[20]

3.13 In 2013, the NSW Legislative Council Select Committee on the Partial Defence of Provocation recommended that NSW implement provisions similar to those in Victoria.[21]

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19. *Evidence Act 1906* (WA) s 38(1) inserted by *Family Violence Legislation Reform Act 2020* (WA) s 94.
20. *Crimes Act 1958* (Vic) s 322J(1); *Evidence Act 1906* (WA) s 38(1).
21. NSW Legislative Council Select Committee on the Partial Defence of Provocation, *The Partial Defence of Provocation*, Final Report (2013) rec 2.

The amending Act that responded to the Committee's recommendations did not include any such provisions.[22]

3.14 Some submissions support ongoing training in relation to the dynamics, complexities and impacts of domestic violence so that professionals in the criminal justice system, including lawyers and judicial officers, can properly apply social framework evidence.[23]

Current use of evidence of domestic violence

3.15 Nothing in the law appears to prevent evidence of domestic violence being taken into account at sentencing, so long as it is admissible in the particular case and meets the relevant evidential standard in accordance with general law.

3.16 There is always a need for continuing professional development on issues surrounding domestic violence for legal and other professionals involved at different stages of the criminal justice process in gathering, presenting and using such evidence. In this regard we note the House of Representatives Standing Committee on Social Policy and Legal Affairs, in a 2017 report on the family law system, observed the necessity for professionals in family law to have a strong understanding of the complexities of family violence.[24] The Report noted the Judicial College of Victoria's renewed focus on providing family violence education to magistrates which was the result of the recommendations of the Victorian Royal Commission into Family Violence that "more comprehensive family violence education should be provided to all judicial officers and other family law professionals in Victoria".[25]

Evidence in sentencing proceedings

3.17 The general law relating to evidence has an impact on the reception and use of evidence of domestic violence context in all cases, including homicide cases. Two areas where this is particularly illustrated are in relation to admission of evidence and the standard of proof.

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22. *Crimes Amendment (Provocation) Act 2014* (NSW). See also NSW, Department of Attorney General and Justice, *Reform of the Partial Defence of Provocation: Calls for Submissions on the Exposure Draft Crimes Amendment (Provocation) Bill 2013* (2013).
23. Australian Lawyers for Human Rights, *Submission MU37* [6.14]; Domestic Violence NSW, *Submission MU33*, 6.
24. Australia, House of Representatives Standing Committee on Social Policy and Legal Affairs, *A Better Family Law System to Support and Protect those Affected by Family Violence* (2017) [8.2].
25. Australia, House of Representatives Standing Committee on Social Policy and Legal Affairs, *A Better Family Law System to Support and Protect those Affected by Family Violence* (2017) [8.16]–[8.17].

Admission of evidence

3.18 The *Evidence Act 1995* (NSW) ("*Evidence Act*") does not apply to sentencing hearings, unless the court directs that it applies to all or part of the proceedings. A court must make such a direction if:

- a party to the sentencing proceeding asks for it
- the court considers that the fact to be proved will be significant in determining the sentence, and
- it is appropriate to make such a direction in the interests of justice.[26]

3.19 This law impacts on cases where there is evidence of domestic violence that would be detrimental to the offender but it would not be admissible under the *Evidence Act* because, for example, it is hearsay evidence or a lay opinion.

Standard of proof

3.20 Different evidential standards apply depending on whether the evidence is in aggravation or mitigation, so that:

- facts found against the offender must be proved beyond reasonable doubt, and
- it is sufficient for matters favourable to the offender to be proved on the balance of probabilities.[27]

3.21 These different evidential standards may have an impact on the gathering of evidence for a sentencing hearing.

Our conclusion

3.22 Given that courts can have regard to evidence of domestic violence to understand the context of an offence when sentencing, our view is that it is not necessary to legislate more generally to recognise domestic violence and we do not recommend any changes to the law of evidence or to the standard of proof in sentencing hearings. Any requirement to consider particular types of evidence that can be taken into account may be overly prescriptive and limit the ability of the law to adapt to new circumstances and understanding of domestic violence.

3.23 There are also practical considerations that arise from the nature of the sentencing hearing. In a sentencing hearing, defence counsel have an obligation to present their clients' cases to the best of their ability. There is also an obligation to the court to

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26. *Evidence Act 1995* (NSW) s 4(2)–(4).
27. *R v Isaacs* (1997) 41 NSWLR 374, 377–78; *Cheung v R* [2001] HCA 67; 209 CLR 1 [14]–[20]; *R v SG* [2003] NSWCCA 220 [24]; *R v Olbrich* [1999] HCA 54; 199 CLR 270 [27].

present cases as efficiently as possible. It will often be appropriate for the prosecution to decide not to press for resolution of issues relating to background conduct that have not been agreed and are not based on clear or cogent evidence, will prolong proceedings, have no meaningful prospect of being found proved beyond reasonable doubt, and will have a limited role to play in the sentence even if proved.

3.24 Some submissions reject making specific changes to the law to allow domestic violence context evidence to be admitted.[28] One observes that unintended consequences of such provisions may include "reducing guilty pleas and increasing the trauma of proceedings for victims' families due to the reduced likelihood of the parties agreeing to the facts of the case".[29] Another submission argues against any form of prescriptive legislation in this area, given the complexity of issues involved in domestic violence homicide cases that involve a variety of relationships, surrounding circumstances and histories and different forms of conduct.[30]

3.25 We consulted with legal practitioners involved in some recent cases.[31] The consensus is that there is no need for express provisions.

3.26 In reaching our conclusion, we have reviewed recent cases where sentencing courts have taken evidence of domestic violence into account, both in favour of the offender and against the offender's interests. We outline some of these in the following paragraphs.

Situations where evidence of domestic violence may be relevant

3.27 We set out in the following paragraphs four reasonably common ways in which evidence of domestic violence intersects with homicide sentencing. These are not closed or fixed categories. The devastating impact of domestic violence is frequently taken into account in such cases.

The primary victim of domestic violence kills their abusive partner

3.28 The facts surrounding situations where the primary victim of domestic violence (or parent of primary victims of domestic violence) kills their abusive partner will often provide a partial defence to murder on the basis of excessive self defence, extreme provocation or substantial impairment. The parties will have gathered relevant evidence for the purpose of plea negotiation and/or trial, and the evidence, which often includes expert evidence, remains relevant on sentence.

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28. Legal Aid NSW, *Submission MU36*, 9; NSW Bar Association, *Submission MU22* [43].
29. Legal Aid NSW, *Submission MU36*, 9.
30. NSW Bar Association, *Submission MU22* [38].
31. See, eg, *Lees v R* [2019] NSWCCA 65; *Drew v R* [2016] NSWCCA 310; *Roff v R* [2017] NSWCCA 208.

3.29 While courts are cautious not to give legal sanction to premeditated killing,[32] such caution does not preclude a court from considering an offender's exposure to domestic violence when assessing the objective criminality.[33] However, it is only in exceptional cases that the fact an offender has been subjected to domestic violence will justify a sentence other than imprisonment. In some domestic violence-related manslaughter cases, courts have said that, in exceptional cases, a non-custodial sentence may be appropriate where:

- provocation has been found as a partial defence to murder, and
- there is a history of domestic violence perpetrated against the offender by the deceased.[34]

3.30 An example is a 2018 case where the offender was found guilty of manslaughter by reason of substantial impairment by abnormality of mind in relation to the death of her abusive partner who was killed by a man (the co-offender) with whom she was having a relationship.

3.31 The sentencing judge considered the offender's serious moral culpability against a background of domestic violence. The judge observed that it was a serious manslaughter case involving the offender intending that her co-offender would kill the victim in a planned attack involving her first drugging the victim. However, the gravity was to be understood in the "unusual and extreme circumstances which then existed in her life". The judge stated:

> I have kept in mind that the Offender was involved in the killing of [the victim] for what she perceived as being a benefit for her and her children in being able to live in a new relationship with [the co-offender]. In some circumstances, that scenario could be considered as a cold-blooded motive to dispose of a partner to clear the way for a new life with a preferred new partner.
>
> Such a characterisation however would oversimplify and distort the reality of the Offender's case. There was a powerful body of both factual and psychiatric opinion evidence adduced at the trial, and repeated on sentence, which demonstrated a sustained history of "intimate partner violence" directed to her by [the victim] from the time that she was a teenager. Having entered a relationship with him at an age when she had neither the judgment nor

32. *Osland v R* [1998] HCA 75; 197 CLR 316 [165]; *R v Tarrant* [2018] NSWSC 774 [200]–[201].
33. *R v Peters* [2002] NSWSC 1234 [73].
34. *R v Bogunovich* (1985) 16 A Crim R 456, 461–462. See also *R v Russell* [2006] NSWSC 722 [85]–[88]; *R v Jukes* [2006] NSWSC 1065 [49]; *R v Silva* [2015] NSWSC 148 [54]–[63]; *R v Alexander* (1994) 78 A Crim R 141, 145–146.

> experience to make a sensible decision, she was almost immediately pregnant and in the next six years had four children to [the victim].
>
> I accept that there was a sustained history of violence and controlling conduct on the part of [the victim] directed to the Offender. In the context of sentencing domestic violence offenders, the Courts have recognised that it typically involves the exercise of power and control over the victim, is commonly recurrent, may escalate over time, may affect a number of people beyond the primary target (including children) and that it contributes to the subordination of women with domestic violence typically involving the violation of trust by someone with whom the victim shares, or has shared, an intimate relationship so that the domestic violence offender may no longer need to resort to violence in order to instil fear and control.[35]

3.32 After applying a discount of 35% for a plea of guilty and assistance to the authorities, the judge imposed a head sentence of 8 years' imprisonment with a non-parole period of 5 years.

3.33 In finding the facts at sentencing, the judge accepted evidence that had previously been presented to the jury about the interrelationship between intimate partner violence and post-traumatic stress disorder that involves the following symptoms:

> (a) re-experiencing the battering as if it were reoccurring even when it is not;
>
> (b) attempts to avoid the psychological impact of battering by avoiding activities, people and emotions;
>
> (c) hyperarousal or hypervigilance;
>
> (d) disrupted interpersonal relationships;
>
> (e) body image distortion or other somatic concerns; and
>
> (f) sexuality and intimacy issues.[36]

3.34 The judge also accepted that repeated cycles of violence and reconciliation can result in the following beliefs and attitudes:

> (a) the abused person believes that the violence was his or her fault;

35. *R v Tarrant* [2018] NSWSC 774 [223]–[225].
36. *R v Tarrant* [2018] NSWSC 774 [96].

(b) the abused person had an inability to place the responsibility for the violence elsewhere;

(c) the abused person fears for his or her life and/or the lives of his or her children (if present);

(d) the abused person has an irrational belief that the abuser is omnipresent and omniscient.[37]

Offender causes death but is also a victim of domestic violence from the primary offender

3.35 Cases where an offender is criminally responsible for a killing, but is also the victim of domestic violence from the primary offender, sometimes involve two adults. Both adults are responsible in different ways for the death of a child – an extremely violent male offender, and a mother guilty of manslaughter by gross criminal negligence for not removing the child from an abusive situation and/or not seeking urgent medical assistance. Such cases require a thorough presentation of the relevant domestic violence context. Cases of this type go some way to explaining superficially lenient sentences that appear in the statistics for the manslaughter of children.[38]

3.36 In one 2018 case, the sentencing judge's remarks included an explanation of relevant psychological and psychiatric consequences of domestic violence and related these to relevant sentencing concepts. The offender pleaded guilty to the manslaughter of her two-year-old daughter. Her liability was in part founded on a failure to remove her daughter from the violent domestic relationship which had commenced one month before the death and also a failure to seek urgent medical attention in her daughter's final hours as she drifted in and out of consciousness. Over the month-long relationship, her partner, the co-offender, committed escalating and gratuitously violent assaults on the child, which were ultimately fatal.

3.37 The judge commented on the very serious objective circumstances of the offending which deserved the harshest condemnation. This involved "unrelenting, systemic, gratuitous and extreme violence against the child" committed with the offender's knowledge, "without any capacity in the child to defend herself, and in circumstances where she was entitled to expect her mother would protect her".[39]

3.38 The judge, however, concluded:

> While I accept … that, objectively speaking, [the offender] had opportunities to remove her daughter from the brutality of the violence that was progressively

37. *R v Tarrant* [2018] NSWSC 774 [97].
38. See [1.23].
39. *R v AS* [2018] NSWSC 930 [62].

> and repeatedly being inflicted upon her, her underlying subclinical psychiatric and psychological debilities, combined with what I am satisfied was [the co-offender's] abuse, control and coercion of her, effectively compromised her ability to see, with any clarity, the extreme risk he posed to her child's safety; a situation that was only ever going to deteriorate and which, with the sustained assaults to [the victim's] face and head, was almost inevitably going to result in fatal consequences.
>
> While [the co-offender's] repeated acts of physical violence and gratuitous cruelty were stark and numerous, I am well persuaded that despite the objective gravity of [the offender's] criminal neglect of her daughter, her moral culpability for that offending is significantly reduced by her subjective circumstances and the complexity of her psychosocial profile. In short, not only was she the victim of his violence and his determination to render her submissive by the threat of further violence, her exposure to a series of complex and traumatic events in her childhood, inclusive of sexual submission to her father and stepmother, meant her ability to protect her child was incapacitated in direct conformity with her incapacity to protect herself.[40]

3.39 After applying a 50% discount for the early guilty plea and for assistance to authorities, the judge imposed a head sentence of 3 years' imprisonment with a non-parole period of 16 months. The co-offender, who was convicted of murder, received a head sentence of 44 years' imprisonment with a non-parole period of 33 years.[41]

3.40 The court had before it, amongst other things, reports from an expert forensic psychologist and a psychiatrist, as well as detailed affidavits from the offender and her solicitor.[42]

3.41 In another recent case, the offender pleaded guilty to manslaughter by gross negligence of her 12-year-old daughter who she failed to protect from brutal assaults by her partner who also subjected her to repeated beatings.[43]

3.42 Expert evidence was before the court on the psychological impact of the partner's infliction of terror and repeated beatings on the offender and her children.[44] The impact consisted of post-traumatic stress disorder and severe depression in the offender.[45] The sentencing judge was satisfied that "these conditions, and the history of violence,

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40. *R v AS* [2018] NSWSC 930 [64]–[65].
41. *R v Khazma* [2019] NSWSC 416 [98].
42. *R v AS* [2018] NSWSC 930 [5].
43. *R v TP* [2018] NSWSC 369.
44. *R v TP* [2018] NSWSC 369 [39]–[51].
45. *R v TP* [2018] NSWSC 369 [5], [39].

abuse and manipulation, caused [the offender] to disassociate from the family situation and that she felt powerless and frozen into inaction." This had a significant impact on the offender's failure to take action to protect her daughter.[46]

3.43 After applying a discount of 20% for the guilty plea and assistance to authorities, the court imposed a sentence of 4 years' imprisonment with a non-parole period of 18 months.

The offender was brought up in an environment of exposure to domestic violence

3.44 One of the ways in which the devastating impact of domestic violence on our community is reflected in the sentencing process is in the flexibility required to deal with offenders who themselves are within the criminal justice system to a large degree because of the cycle of domestic violence. In many homicides that have occurred in a context of domestic violence, the offender has been raised against a background of violence.

3.45 The High Court considered this issue in depth in *Munda*[47] which, together with the decision of *Bugmy*,[48] shows the need for the full range of judicial discretion to incorporate the often conflicting purposes of sentencing. *Munda* in particular emphasised the strong need for sentences to denounce such offending and recognise the dignity of the victim.[49] In *Bugmy* the High Court explained that an upbringing characterised by exposure to alcohol abuse and violence may mitigate the sentence because the offender's moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way. Such a background may leave a mark on a person throughout life and compromise the person's capacity to mature and learn from experience. The majority explained:

> An offender's childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced. However, the inability to control the violent response to frustration may increase the importance of protecting the community from the offender.[50]

3.46 In these cases it is crucial that evidence is presented about the offender's exposure to domestic violence (and other aspects of disadvantaged upbringing) and its lifelong consequences. This will often impact on the sentencing process, including, for example,

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46. *R v TP* [2018] NSWSC 369 [48].
47. *Munda v Western Australia* [2013] HCA 38; 249 CLR 600.
48. *Bugmy v R* [2013] HCA 37; 249 CLR 571.
49. *Munda v Western Australia* [2013] HCA 38; 249 CLR 600 [55].
50. *Bugmy v R* [2013] HCA 37; 249 CLR 571 [44].

when assessing moral culpability. The assessment depends heavily on the quality and depth of the available information.[51]

3.47 The *Bugmy Bar Book* currently has a chapter on childhood exposure to domestic and family violence.[52] The Bar Book project was commenced, following *Bugmy*, to assist practitioners in presenting cases for the sentencing of offenders with a range of relevant conditions or background potentially relevant to sentence. The *Bugmy Bar Book* is available on the Public Defenders' website[53] and through a link on the Judicial Commission of NSW's Judicial Information Research Service. Our understanding is that the research material is provided to sentencing judges without objection from the prosecution, with the real issue generally being the obligation for the offender to prove on balance the existence of the relevant background in their case. The material included also provides information to help defence practitioners better understand and explore their clients' experiences thereby improving the quality of the material put in support of the subjective case.[54]

Where there is a broader context of abuse of the deceased by the offender

3.48 Subject to the law and principles of sentencing, the courts routinely take into account and act upon evidence of domestic violence that goes beyond the homicide event. Such evidence may be used for a variety of purposes including:

- to show that the offender is not a person of prior good character
- to bear on the seriousness of the offence for which the offender is to be sentenced
- to assess the need for specific deterrence in relation to the offence for which the offender is to be sentenced, and
- to rebut a claim that prospects of rehabilitation are good and enhance the importance to be given to specific deterrence.[55]

3.49 It is of some significance that the cases where broader context was taken into account were cases where the offender agreed with the underlying facts.

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51. N Cowdery, J Hunter and R McMahon, "Sentencing and Disadvantage: The Use of Research to Inform the Court" (2020) 32 *Judicial Officers' Bulletin* 43, 43.
52. Public Defenders NSW, "Childhood Exposure to Domestic and Family Violence" in *The Bugmy Bar Book* (10 November 2019) <www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/bar-book/pdf/BBP_DFV_chapter-Nov2019.pdf> (retrieved 31 March 2021).
53. Public Defenders of NSW, *The Bugmy Bar Book* (10 November 2020) <www.publicdefenders.nsw.gov.au/barbook> (retrieved 31 March 2021).
54. N Cowdery, J Hunter and R McMahon, "Sentencing and Disadvantage: The Use of Research to Inform the Court" (2020) 32 *Judicial Officers' Bulletin* 43, 44.
55. NSW Bar Association, *Submission MU22* [43].

3.50 For example, in a 2017 case, where the offender killed his former partner, agreed facts included that the offender was controlling and violent towards her, subjected her to verbal abuse and physical assaults, that he was "very possessive and jealous" and that the former partner "had few friends and rarely went out during their relationship".[56] The sentencing judge stated that the offender's actions must be considered "in the context of his history of violence" towards his former partner, "as well as his belief that he owned her and that no one else was entitled to see her" and observed that the offence was "preceded by years of physical torment and threats".[57] The sentencing judge also used the evidence of domestic violence as a counterweight to some subjective features of the offender's case, for example, by declining to sentence the offender on the basis that he was of prior good character, because of the agreed history of acts of domestic violence and abuse over a sustained period before the offences.[58]

3.51 In another case, despite a defence submission that there was no history of domestic violence, the sentencing judge noted that the agreed facts referred to times when the offender damaged or destroyed property belonging to family members, or stood leaning into his wife's face during arguments and yelling at her, or engaged in aggressive conduct after excessive drinking, and one time when, during an argument with his wife, he threatened her with a gun.[59] The CCA, in a severity appeal in this case, observed:

> Whilst there is no specific category of "domestic violence murder", the offending in the present case cannot be divorced from the context in which it was committed. The commission of offences in the context of domestic violence, and in the context of a breach of an ADVO, were circumstances which attracted a need for specific deterrence, general deterrence and denunciation.[60]

3.52 In another recent case, the violence against the victim and her sister commenced around four years before the victim's death, and escalated to such an extent that the violence in the victim's last days was so brutal and savage as to be described as "close to the top of the broad and diverse spectrum of conduct that can be charged as homicide".[61] The judge observed:

> The relevance of the history of violence towards [the victim and her sister] is that it establishes with clarity that the offender is not a person of good character in spite of his lack of a substantial criminal history and the

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56. *R v Villaluna* [2017] NSWSC 1390 [7].
57. *R v Villaluna* [2017] NSWSC 1390 [45], [50].
58. *R v Villaluna* [2017] NSWSC 1390 [67].
59. *R v Goodbun* [2018] NSWSC 1025 [199].
60. *Goodbun v R* [2020] NSWCCA 77 [261].
61. *R v JK* [2018] NSWSC 250 [18].

> documentary evidence tended on his behalf. No submission to the contrary was made by Senior Counsel who appeared for him at the sentencing hearing. The history of violence places the murder in its true context and establishes that the events of 20–22 September 2015 were not isolated but formed part of a consistent pattern of cruel and barbaric abuse of a helpless child.[62]

3.53 The CCA has recently, by majority, affirmed such an approach to evidence of domestic violence in a case involving sustained episodes, over seven weeks, of physical, psychological and verbal abuse leading up to the murder of the offender's three-year-old son. The majority held that although it would be an error to sentence a person for an uncharged offence, conduct which might constitute an uncharged offence may be taken into account in sentencing for a more serious offence, and may demonstrate the objective seriousness of the charged offence.[63] The majority observed that the sentence imposed for the murder was higher than it would have been without a history of several weeks of violent and brutal treatment before the victim's death, but the judge was not in error to rely on it in determining the appropriate sentence.[64]

3.54 Two aspects of the case are somewhat unusual: the integral connection between the background abuse and the final acts causing death (which is not necessarily so in other cases), and the relatively easy proof of the background abuse. The offender and her co-offender pleaded not guilty and there was a trial at which there was evidence of observations from medical and health practitioners and of direct observations of a number of acts from the offender's 22-year-old son who was living with them at the time. The offender also accepted many of the forms of assault in a series of police interviews.

Language about domestic violence

3.55 Addressing domestic violence homicide requires an holistic approach that goes beyond reforms to criminal sentencing. In particular, there is a need to ensure that cultures or attitudes do not permit or minimise domestic violence. One way to do this is through the language used in trials and sentencing remarks about domestic violence.

3.56 It is essential that judges use careful and considered language in trials and sentencing remarks for domestic violence homicides. Judicial statements are influential regardless of the subject matter and are especially so in domestic violence cases.[65]

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62. *R v JK* [2018] NSWSC 250 [21].
63. *LN v R* [2020] NSWCCA 131 [40]–[41].
64. *LN v R* [2020] NSWCCA 131 [59]–[60].
65. NSW Domestic Violence Death Review Team, *Report 2017–2019* (2020) 145.

3.57 Such cases often attract significant and widespread media attention. The language of the court is frequently echoed in media reports and, in turn, shapes community attitudes about domestic violence.[66]

3.58 Several submissions to this review raise concerns about the language used in trials and sentencing remarks in domestic violence homicide cases.[67] They argue that it often diminishes or minimises domestic violence.[68] One submission says that it can contribute to an unwillingness in the community "to address the realities of domestic violence".[69]

3.59 The use of language in domestic violence cases has been the focus of several reports and recommendations by the Domestic Violence Death Review Team.[70] It is important to note that since it first raised this issue in 2013, the review team says there has been positive progress by the judiciary in promoting a more nuanced understanding of domestic violence.[71]

3.60 There are many examples of positive and well-informed language being used in domestic violence cases.[72] For example, in a recent case where the offender killed his former partner, the judge said:

> Like too many women before her, [the victim] died because the man with whom she had been involved could not accept her right to autonomy. The offender acted from a profound sense of entitlement, clearly believing that [she] had to conform to his wishes rather than pursue her own.
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> …
>
> Whilst there are men in the community, and it is mostly men, who view women as second class citizens who must bend to their will, when that attitude results in the commission of crime, and particularly violent crime, the

66. NSW Domestic Violence Death Review Team, *Report 2017–2019* (2020) 145.
67. See, eg, Rape and Domestic Violence Services Australia, *Submission MU15,* 2–3; Women's Safety NSW, *Submission MU28,* 14–15; Victims of Crime Assistance League, *Submission MU31,* 4; Legal Aid NSW, *Submission MU36,* 9.
68. Women's Safety NSW, *Submission MU28,* 15; Women's Legal Service NSW, *Submission MU34* [11]; Victims of Crime Assistance League, *Submission MU31,* 5.
69. Victims of Crime Assistance League, *Submission MU31,* 4.
70. See NSW Domestic Violence Death Review Team, *Annual Report 2012–2013* (2015) rec 15, 28–29; NSW Domestic Violence Death Review Team, *Annual Report 2013–2015* (2015) rec 1, 53–55; NSW Domestic Violence Death Review Team, *Report 2017–2019* (2020) 144–148.
71. NSW Domestic Violence Death Review Team, *Report 2017–2019* (2020) 145.
72. NSW Domestic Violence Death Review Team, *Annual Report 2013–2015* (2015) 53; NSW Domestic Violence Death Review Team, *Report 2017–2019* (2020) 145.

> courts will impose heavy punishment. Such conduct is never acceptable and it will be strongly repudiated by the courts.[73]

3.61 In another case, where the offender murdered his wife, the sentencing judge described domestic violence as a "profoundly serious problem in this community, extending, not infrequently, to the murder of a spouse or partner". The judge also stated that:

> Too often, these are crimes committed by men against women who have chosen to live a separate life – a decision the male partner is not prepared to accept.
>
> …
>
> The courts must ensure that those who commit offences like those now before this Court pay a heavy price for their crimes, to punish them, to denounce the crime, and to deter others. The victims of domestic violence must be protected insofar as the courts are able to afford them protection.[74]

Use of bench books

3.62 Several submissions support education for judges about the nature and dynamics of domestic violence, its different forms, and its impact on victims.[75] It was submitted that this could help to ensure judges are better informed about domestic violence and use appropriate language to discuss or describe it in trials and sentencing remarks.

3.63 Some submissions suggest that judges should use sentencing remarks to denounce domestic violence and correct misconceptions, including about why domestic violence homicides occur.[76] One submission says that judges should:

- reinforce that domestic violence is unacceptable
- hold perpetrators accountable and recognise the centrality of power and control in domestic violence homicides
- reject justifications for domestic violence that minimise predator accountability (for example, that such violence is caused by a "loss of control")

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73. *R v Seo* [2019] NSWSC 639 [79], [82].
74. *R v Goodbun* [2018] NSWSC 1025 [202]–[204]. See also *Goodbun v R* [2020] NSWCCA 77 [64].
75. See, eg, Domestic Violence NSW, *Preliminary Submission PMU16,* 7; Rape and Domestic Violence Services Australia, *Submission MU15* [9]–[10]; Women's Safety NSW, *Submission MU28,* 15–16; Legal Aid NSW, *Submission MU36,* 9; Australian Lawyers for Human Rights, *Submission MU37,* 20.
76. See, eg, K Fitz-Gibbon, J McCulloch and J Maher, *Preliminary Submission PMU17,* 5; Australia's National Research Organisation for Women's Safety, *Submission MU35,* 8; Legal Aid NSW, *Submission MU36,* 9.

- reflect the value of the victim's life and avoid victim-blaming
- recognise the impact of non-physical forms of violence, and
- recognise the significant impact that domestic violence has on society.[77]

3.64 Several submissions support including information about domestic violence in bench books.[78] Some submissions suggest that this should include guidance about using appropriate language when describing or discussing domestic violence.[79]

3.65 The issue has been recognised and discussed in the *National Domestic and Family Violence Bench Book* which was introduced in 2017 and includes a section that dispels common myths and misunderstandings of domestic violence.[80] It also includes a section with de-identified victim experiences of domestic violence.[81]

3.66 The Judicial Commission of NSW's *Equality Before the Law Bench Book* contains a section about women, which also includes information about domestic violence.[82] Notably, the bench book encourages judges to:

> be aware that **judicial language influences societal values and behaviours** as an adjunct to the exercise of judicial discretion in sentencing and other decisions. Language is power and judicial officers wield significant social power with respect to discussing, naming and representing domestic violence. This power ensures judicial discourses echo through media representation and reflect social understandings of domestic violence.[83]

3.67 The bench book also suggests that judges, in sentencing remarks and judgments:

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77. Rape and Domestic Violence Services Australia, *Submission MU15,* 2–3.
78. Rape and Domestic Violence Services Australia, *Submission MU15,* 3–4; Women's Safety NSW, *Submission MU28,* 15–16; Domestic Violence NSW, *Submission MU33,* 6; Women's Legal Service NSW, *Submission MU34,* 12; Legal Aid NSW, *Submission MU36,* 9.
79. Domestic Violence NSW, *Submission MU33,* 6; Women's Legal Service NSW, *Submission MU34,* 12.
80. Australian Institute of Judicial Administration, "Myths and Misunderstandings" in *National Domestic and Family Violence Bench Book,* (June 2020) [4.1] <dfvbenchbook.aija.org.au/dynamics-of-domestic-and-family-violence/myths-and-misunderstandings/> (retrieved 3 April 2021).
81. Australian Institute of Judicial Administration, "Victim Experiences" in *National Domestic and Family Violence Bench Book,* (June 2020) <dfvbenchbook.aija.org.au/victim-experiences/> (retrieved 3 April 2021).
82. See Judicial Commission of NSW, "Women" in *Equality Before the Law Bench Book* (2020) ch 7 <www.judcom.nsw.gov.au/publications/benchbks/equality/section07.html> (retrieved 3 April 2021).
83. Judicial Commission of NSW, "Cultural and Social Attitudes to Domestic Violence" in *Equality Before the Law Bench Book* (2020) [7.5.2] <www.judcom.nsw.gov.au/publications/benchbks/equality/section07.html#p7.5.2> (retrieved 3 April 2021) (emphasis in original).

- reject statements that locate the cause of domestic violence outside the offender
- reject statements that blame the person who experiences the domestic violence
- encourage perpetrator accountability
- avoid mutualising language
- avoid gendered stereotypes and "stereotyped moral judgments about the victim's conduct", and
- recognise that domestic violence is more than physical violence and includes other forms of abuse.[84]

Education for other professionals in the criminal justice system

3.68 As well as education for judicial officers, some submissions support education about domestic violence for other professionals in the criminal justice system.[85]

3.69 Narratives of domestic violence in judges' sentencing remarks may be shaped by the evidence and information presented by the prosecution and defence lawyers. At a foundational level, this is shaped by the evidence gathered by police officers during the investigation stage.[86]

3.70 It is important for all professionals in the criminal justice system to be equipped with the skills to recognise and appropriately discuss domestic violence. This includes being able to recognise the range of behaviours that constitute domestic violence.[87]

3.71 It is imperative that the profession maintains appropriate educational programs to ensure that members are equipped to support the court in appropriate cases. This should include engaging with peak bodies to ensure a proper understanding of the issues, including the effects of trauma.

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84. Judicial Commission of NSW, "Cultural and Social Attitudes to Domestic Violence" in *Equality Before the Law Bench Book* (2020) [7.5.2] <www.judcom.nsw.gov.au/publications/benchbks/equality/section07.html#p7.5.2> (retrieved 3 April 2021); Judicial Commission of NSW, "Practical Considerations" in *Equality Before the Law Bench Book* (2020) [7.7] <www.judcom.nsw.gov.au/publications/benchbks/equality/section07.html#p7.7> (retrieved 3 April 2021).
85. See, eg, L Findlay, J Stubbs, A Steel and L McNamara, *Preliminary Submission PMU09,* 5; Legal Aid NSW, *Submission MU36,* 9; Australian Lawyers for Human Rights, *Submission MU37,* 20.
86. NSW Domestic Violence Death Review Team, *Annual Report 2013–2015* (2015) 55.
87. NSW Domestic Violence Death Review Team, *Annual Report 2013–2015* (2015) 56.

Ongoing review

3.72 We will review the sentencing of domestic violence cases as part of our annual reports, where we review sentencing trends and practices. This will provide an opportunity to gauge changes in language used in sentencing remarks, and an opportunity to consider the extent to which courts are appropriately recognising the dynamics of domestic violence.[88]

88. Legal Aid NSW, *Submission MU36,* 8; Australian Lawyers for Human Rights, *Submission MU37,* 17.

4. Standard non-parole periods for murder

In Brief

There are three standard non-parole periods for murder: murder generally (20 years), where the victim was a public official (25 years), and where the victim was a child (25 years). We support retaining the existing standard non-parole periods for murder, without change.

4.1 In NSW, the standard non-parole period ("SNPP") for murder is 20 years.[1] It is 25 years if the victim was:

- a public official exercising public or community functions, and the murder was due to their occupation or voluntary work,[2] or
- a child under 18.[3]

4.2 We consider that the current law is appropriate and do not recommend any changes.

The current standard non-parole periods for murder

4.3 In NSW, legislation sets out SNPPs (in years) for a range of serious offences, including murder. This scheme is meant to provide guidance to sentencing courts when setting appropriate non-parole periods for these offences.

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1. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A, table, item 1.
2. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A, table, item 1A.
3. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A, table, item 1B.

4.4 A non-parole period is the minimum period of time that an offender must serve in prison before they are eligible for release on parole. An SNPP represents the non-parole period for an offence that, taking into account the objective factors that affect the relative seriousness of the offence, "is in the middle range of seriousness".[4]

4.5 An SNPP operates as a guidepost in sentencing, along with the maximum penalty for the offence.[5] When sentencing for an offence to which an SNPP applies, the sentencing court must also consider other legislated and common law sentencing considerations.[6]

4.6 The SNPPs in NSW are based on the seriousness of the offence, the maximum penalty, and sentencing trends for the offence. They also take into account "[t]he community expectation that an appropriate penalty will be imposed having regard to the objective seriousness of the offence".[7]

4.7 SNPPs do not apply where an offender is:

- sentenced to life imprisonment (and is therefore ineligible for parole), or
- under 18.[8]

4.8 There are three SNPPs prescribed for murder, which we outline below.

Murder generally

4.9 The SNPP for murder, where the victim is not in one of the special SNPP categories, is 20 years.[9] This was introduced in 2003.[10]

4.10 Similar to NSW, the Northern Territory ("NT") and South Australia have a standard or mandatory minimum non-parole period of 20 years for murder.[11]

Where the victim was a public official

4.11 An SNPP of 25 years applies:

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4. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54A(2).
5. Judicial Commission of NSW, *Sentencing Bench Book,* "Standard Non-Parole Period Offences" (online, retrieved 20 January 2021) [7-895].
6. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54B(2).
7. NSW, *Parliamentary Debates,* Legislative Assembly, Second Reading Speech, 23 October 2002, 5813, 5816.
8. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D(1)(a), s 54D(3).
9. Crimes (Sentencing Procedure) Act 1999 (NSW) pt 4 div 1A, table, item 1.
10. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A, inserted by *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW) [4].
11. *Sentencing Act 1995* (NT) s 53A; *Sentencing Act 2017* (SA) s 47(5)(b).

where the victim was a police officer, emergency services worker, correctional officer, judicial officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation.[12]

4.12 This was introduced in 2003.[13] Even before this SNPP was introduced, the common law recognised that people in certain occupations are exposed to a degree of risk,[14] which should be given weight in sentencing. For example, courts have long accepted that the fact the victim was a police officer is an aggravating factor.[15]

4.13 In a recent case, the court considered that the fact the victim was a judge, and was targeted for this reason, meant that the murder was "of the highest level of objective seriousness" and the offender's culpability was "extreme".[16]

4.14 One submission observes that the SNPP for the murder of certain public officials "sets a guidepost that reflects the added seriousness of these cases" and "recognise[s] the additional risk involved in certain occupations".[17] Like NSW, the NT has an SNPP of 25 years for murders involving a victim who was a specified kind of public official, and the offence was connected to the victim's occupation.[18]

Where the victim was a child

4.15 The SNPP for murder where the victim was a child under 18 is 25 years. This was introduced in 2008.[19]

4.16 The murder of a child was always viewed as a crime of extreme gravity.[20] The SNPP of 25 years applies to "recognis[e] the terrible loss where the victim is both a vulnerable and valuable member of the community".[21]

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12. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A, table, item 1A.
13. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A, inserted by *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW) sch 1 [4].
14. Judicial Commission of NSW, *Sentencing Bench Book,* "Victims who Exercise Public or Community Functions" (online, retrieved 21 January 2021) [11-060].
15. See, eg, *R v Adam* [1999] NSWSC 144 [44]–[46]; *R v Penisini* [2004] NSWCCA 339 [20]; *R v Holton* [2004] NSWCCA 214 [100], [125].
16. *R v Warwick* [2020] NSWSC 1168 [30].
17. Legal Aid NSW, *Submission MU36,* 5.
18. *Sentencing Act 1995* (NT) s 53A(3)(a).
19. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A, table, item 1B, inserted by *Crimes (Sentencing Procedure) Amendment Act 2007* (NSW) sch 1 [8]. Between 20 December 2002 and 31 December 2007, the standard non-parole period was 20 years.
20. Judicial Commission of NSW, *Sentencing Bench Book,* "Standard Non-Parole Period – Child victims" (online, retrieved 21 January 2021) [30-020].

4.17 Like NSW, the NT has a minimum non-parole period of 25 years for murders involving a victim under 18.[22]

Should the standard non-parole periods for murder change?

4.18 Submissions to this review reflect mixed views about SNPPs for murder. Some oppose SNPPs for murder as well as for other offences.[23]

4.19 Some submissions support changes to the existing SNPPs for murder, such as:

- imposing a higher SNPP for murder "based on a set of scalable or aggravating factors"[24]
- allowing the possibility of parole for life sentences for murder, and prescribing an SNPP of 30 years for cases where a life sentence is imposed,[25] and
- including an intimate partner as a category of victim whose murder attracts an SNPP of 25 years.[26]

4.20 Other submissions oppose increasing the existing SNPPs for murder or introducing any new SNPPs.[27]

No changes to the existing standard non-parole periods for murder

4.21 We support retaining the existing SNPPs for murder. This meets the community expectation that the punishment imposed for murder must be proportionate to the gravity or seriousness of the offence.[28] In our 2013 report on SNPPs, we considered that murder is a sufficiently serious offence to be retained in the SNPP scheme.[29]

4.22 In particular, there is a clear rationale for a higher SNPP (25 years) to apply where the victim was a child or a particular type of public official. Their age or occupation exposes

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21. NSW, Parliamentary Debates, Legislative Council, Second Reading Speech, 17 October 2007, 2668.
22. *Sentencing Act 1995* (NT) s 53A(1)(b), s 53A(3)(c).
23. Legal Aid NSW, *Submission MU36,* 14–15; NSW Bar Association, *Submission MU22,* 12–13.
24. NSW Police Force and Office for Police, *Preliminary Submission PMU10,* 1.
25. University of Newcastle Legal Centre, *Submission MU26,* 15
26. Victims of Crime Assistance League, *Submission PMU31*, 6.
27. The Public Defenders, *Preliminary Submission PMU13,* 1; NSW Bar Association, *Submission MU22*, 13; Legal Aid NSW, *Submission MU36*, 14–15.
28. NSW, *Parliamentary Debates,* Legislative Assembly, Second Reading Speech, 23 October 2002, 5813, 5815.
29. NSW Sentencing Council, *Standard Non-\Periods,* Report (2013) [3.4].

them to a special vulnerability. In our 2013 report, we considered it appropriate to include vulnerability as a factor for identifying offences that should be subject to an SNPP.[30]

4.23 We do not support increasing the length of the current SNPPs for murder, as there is insufficient evidence suggesting that the sentences imposed are inadequate. Data indicates that:

- unlike other offences with SNPPs,[31] the mean non-parole period imposed in murder cases is close to the SNPP prescribed by legislation, and
- there has been an increase in the mean non-parole periods imposed in murder cases.

4.24 We reviewed all murder cases where the Supreme Court of NSW imposed a sentence between 1 April 2015 and 31 March 2018. There were 100 cases in total; 96 committed by an adult offender and 4 committed by a juvenile offender. Of the 96 offences committed by an adult, 85 offences involved a victim who was not in one of the special SNPP categories.

4.25 Of these 85 cases, 5 offenders received a life sentence (for which parole is unavailable) and 80 were sentenced to a determinate term of imprisonment. Of those 80 cases, the mean non-parole period imposed was 18.9 years.[32] This is close to the SNPP of 20 years.

4.26 We also reviewed sentencing data for the 17 murders involving an adult offender killing a child under 18 in the 6-year period from April 2012 to March 2018. We compared child murder cases involving domestic violence with those that did not involve domestic violence. For those cases involving domestic violence, the mean non-parole period was 23.9 years. For those cases that did not involve domestic violence, the mean non-parole period was 23.6 years.[33] This is close to the SNPP of 25 years.

4.27 Data also indicates an increase in the mean non-parole period imposed in murder cases, compared with those recorded in our 2013 report on SNPPs.[34] For example, the mean non-parole period for murder cases between 5 October 2011 and 31 March 2013, where the victim was not in a special SNPP category, was 16.8 years.[35]

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30. See NSW Sentencing Council, *Standard Non-Parole Periods,* Report (2013) [2.21]–[2.24].
31. See, eg, NSW Sentencing Council, *Standard Non-Parole Periods,* Report (2013) appendix B.
32. NSW Sentencing Council, *Homicide,* Consultation Paper (2019) table 2.1.
33. NSW Sentencing Council, *Homicide,* Consultation Paper (2019) table 5.1.
34. NSW Sentencing Council, *Standard Non-Parole Periods,* Report (2013).
35. NSW Sentencing Council, *Standard Non-Parole Periods,* Report (2013) appendix B table B3.

No additional standard non-parole periods for murder

4.28 We do not support introducing additional SNPPs for murder.

4.29 Matters that could be the subject of a new SNPP (for example, the presence of several aggravating factors) can already be considered when assessing the objective seriousness of the offence. As these factors, along with the existing SNPP for murder, are already taken into account in sentencing, there is no need for new SNPPs to be introduced.

5. Life sentences for murder

In Brief

A life sentence is available as a maximum penalty for murder and as a mandatory penalty for the murder of a police officer in certain circumstances. In each case the life sentence is imposed for the term of the offender's natural life without the possibility of parole. There are two sources of law relating to life sentences for murder - the common law principles relating to the "worst case" category and s 61 of the *Crimes (Sentencing Procedure) Act 1999* (NSW). We do not propose changes to the exceptions to the mandatory life sentence for the murder of a police officer. There should also be no additional categories of victim to whom a mandatory life sentence should apply. Parole should continue not to be available where the maximum penalty of life imprisonment is imposed for murder.

5.1 In NSW, in addition to murder, a sentence of life imprisonment is available for a limited number of serious offences, including certain drug offences[1] and sexual offences.[2] This

1. *Drug Misuse and Trafficking Act 1985* (NSW) s 33(3)(a), s 33AC(4).
2. *Crimes Act 1900* (NSW) s 61JA, s 66A, s 66EA(1).

chapter is concerned with sentences of life imprisonment for murder[3] and for the murder of a police officer.[4]

Life sentences in NSW

5.2 On 12 January 1990, a number of sentencing reforms came into force. These reforms introduced the current law, which sets a maximum (non-mandatory) penalty of life imprisonment for murder.[5]

5.3 As we discuss further below,[6] under common law, a court may impose the maximum penalty where the case is considered to be in the "worst case" category.

5.4 Section 61 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ("*Crimes (Sentencing Procedure) Act*") requires a court to sentence an offender convicted of murder to life imprisonment if:

> the court is satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence.[7]

5.5 Prior to 12 January 1990,[8] it was possible to receive a life sentence with a non-parole period. The current law provides that a life sentence, if imposed, is to be served for the term of the offender's natural life, with no possibility of parole.[9]

5.6 Before the 1990 reforms, a sentence of life imprisonment was largely a symbolic punishment, which rarely meant an offender would be kept in prison for the rest of their life. Instead, "life" was an indeterminate sentence imposed by a court.[10]

5.7 Offenders sentenced to life imprisonment could be released from prison on licence and serve the remainder of their sentence in the community. The 1990 reforms were introduced in part as a response to concerns that many offenders sentenced to life

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3. *Crimes Act 1900* (NSW) s 19A.
4. *Crimes Act 1900* (NSW) s 19B.
5. *Crimes Act 1900* (NSW) s 19A, inserted by *Crimes (Life Sentences) Amendment Act 1989* (NSW) sch 1(4).
6. See [5.12].
7. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 61(1).
8. On the commencement of the *Sentencing (Life Sentences) Amendment Act 1989* (NSW) sch 1 (1).
9. *Crimes Act 1900* (NSW) s 19A(2); *R v Harris* [2000] NSWCCA 469, 50 NSWLR 409 [106]–[122].
10. J Anderson, "From Marble to Mud: The Punishment of Life Imprisonment" (Conference Paper, History of Crime, Policing and Punishment Conference, 9–10 December 1999) 4.

imprisonment were being released on licence and not serving an actual life sentence.[11] These reforms are commonly referred to as "truth in sentencing".

5.8 There are few circumstances in which an offender serving a life sentence may be released. One is where the offender was sentenced to mandatory life imprisonment before 12 January 1990 and applies to the Supreme Court of NSW ("Supreme Court") for the determination of a sentence with a non-parole period.[12] The Supreme Court may:

- redetermine a mandatory life sentence and impose a sentence (including a life sentence) with or without a non-parole period, and
- in the case of offenders who were subject to a non-release recommendation from the original sentencing judge, only impose a life sentence with or without a non-parole period.[13]

5.9 The other circumstance is where the offender is released in exercise of the prerogative of mercy.[14] An offender is entitled to request release and the Governor, on advice of the Premier, may exercise this power.[15]

When to impose a life sentence

5.10 There are two sources of law that are relevant when a court must decide whether to impose a life sentence for murder in NSW:

- common law principles relating to cases in the "worst case" category and use of the maximum penalty, and
- s 61 of the *Crimes (Sentencing Procedure) Act*.

5.11 There is uncertainty about the operation of s 61, with two broad approaches being adopted by the courts. As a result, some stakeholders have suggested the repeal or

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11. NSW, *Parliamentary Debates,* Legislative Council, Second Reading Speech, 7 December 1989, 14528–14529.
12. *Crimes (Sentencing Procedure) Act 1999* (NSW) sch 1 cl 2(1); originally under *Sentencing Act 1989* (NSW) s 13A(1)–(2) as repealed by *Crimes Legislation Amendment (Sentencing) Act 1999* (NSW) sch 1 effective 3 April 2000.
13. *Crimes (Sentencing Procedure) Act 1999* (NSW) sch 1 cl 4.
14. *R v Harris* [2000] NSWCCA 469, 50 NSWLR 409 [122], [125].
15. The prerogative of mercy is preserved under legislation. See, eg, *Criminal Appeal Act 1912* (NSW) s 27; *Crimes (Appeal and Review) Act 2001* (NSW) s 114; *Crimes Act 1900* (NSW) s 19A(6); s 19B(6); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 102.

amendment of s 61.[16] Two appeals that raise s 61 issues have recently been argued in the Court of Criminal Appeal ("CCA").[17] In our view, the government should await the outcome of these appeals before deciding whether it is necessary to repeal or amend s 61.

Common law: "worst case" category

5.12 At common law, a court may impose a life sentence where the case is considered to be in the "worst case" category. A case is in the worst case category if:

- it has features "which are of very great heinousness", and
- there is "an absence of facts mitigating the seriousness of the crime (as distinct from the subjective features mitigating the penalty to be imposed)".[18]

Some offences may be so heinous that the subjective features "should be disregarded either wholly or substantially".[19] The High Court has more recently discussed the concept of the "worst case" category and the need to consider all the circumstances of the offence and the offender.[20] We consider this case in relation to the application of s 61, below.[21]

5.13 Reserving life sentences for cases in the worst case category does not mean that the court must impose a lesser sentence if it can envisage a worse case.[22]

5.14 For example, the CCA in 1994 observed that, despite factors that might justify a lesser sentence, such as a guilty plea or the possibility of rehabilitation:

> [t]here are some cases where the level of culpability is so extreme that the community interest in retribution and punishment can only be met through the imposition of the maximum penalty.[23]

5.15 The CCA has held that the common law continues to apply along with s 61(1) of the *Crimes (Sentencing Procedure) Act*. The CCA has also noted that it is possible the

16. NSW Bar Association, *Submission MU22* [18]; Australian Lawyers for Human Rights, *Submission MU37* [5.12]; The Public Defenders, *Preliminary Submission PMU13*, 8.
17. See [5.30].
18. *R v Twala* (Unreported, NSWCCA, 4 November 1994) 6.
19. *R v Harris* [2000] NSWCCA 469, 50 NSWLR 409 [103]–[105].
20. *R v Kilic* [2016] HCA 48; 259 CLR 256.
21. [5.22].
22. *Veen v R (No 2)* (1988) 164 CLR 465, 478; *R v Twala* (Unreported, NSWCCA, 4 November 1994) 2.
23. *R v Garforth* (Unreported, NSWCCA, 23 May 1994) 13.

common law principles could justify a life sentence outside of the circumstances envisaged by s 61(1).[24]

Section 61: "mandatory" life

5.16 Under s 61(1) of the *Crimes (Sentencing Procedure) Act*, a court is to impose a sentence of life imprisonment for murder if the court is "satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence".[25]

5.17 Section 61(3) expressly preserves the court's ability to impose a "sentence of imprisonment for a specified term" instead of a life sentence.[26]

Origins

5.18 Section 61 was first introduced in 1996,[27] and was based on the CCA's statement in *Garforth*, quoted above.[28] However, the words "community protection and deterrence" were added to the original statement on the basis that they are "well-understood and commonly applied sentencing principles which, given statutory expression, will provide further legislative authority to our courts to impose a punishment commensurate with the crime".[29] The second reading speech stated that "[n]o departure from that law and practice is effected by the provisions of this bill".[30]

5.19 The decisions in *Garforth*, both at first instance and on appeal, demonstrate an appropriate synthesis of all relevant considerations, which when weighed up nonetheless indicate that nothing other than life imprisonment was appropriate in that case.[31]

Interpretation

5.20 The application of s 61 has been subject to different interpretations. The two lines of authority can be broadly characterised as the two-stage approach and the instinctive synthesis approach.

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24. *R v Harris* [2000] NSWCCA 469, 50 NSWLR 409 [90].
25. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 61(1).
26. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21(1), s 61(3).
27. *Crimes Act 1900* (NSW) s 431B(1), inserted by *Crimes Amendment (Mandatory Life Sentences) Act 1996* (NSW) sch 1.
28. [5.14]. *R v Garforth* (Unreported, NSWCCA, 23 May 1994) 13; *R v Koloamatangi (No 6)* [2017] NSWSC 1631 [112].
29. NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 17 April 1996, 84.
30. NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 17 April 1996, 85.
31. *R v Garforth* (Unreported, NSWSC, 9 July 1993) 15; *R v Garforth* (Unreported, NSWCCA, 23 May 1994)

5.21 The line of authority for the two-stage approach commenced with *R v Harris* in 2000[32] and has been followed in a number of cases since.[33] It was favoured by the CCA as recently as *Dean v R* in 2015.[34] This approach has variously required the court to first assess either the offender's culpability in the sense of "blameworthiness" or alternatively "objective facts" or "objective seriousness". If it determines that a life sentence is called for, the court has a discretion, pursuant to s 21(1) of the *Crimes (Sentencing Procedure) Act* as to whether to reduce the sentence because of the offender's subjective circumstances. The *Dean* case itself did not consider prior cases that supported a one-stage approach.[35] The cases subsequent to *Dean* have demonstrated significant inconsistency in the approach to s 61(1), highlighting its difficulties.[36]

5.22 A two-stage approach is contrary to the instinctive synthesis approach to sentencing. That approach was considered by the High Court in *Kilic* on appeal from the Court of Appeal of Victoria in relation to offences that fall within the "worst case" category. The High Court stated that, under the common law, "[b]oth the nature of the crime and the circumstances of the criminal are considered in determining whether the case is of the worst type".[37] The High Court further observed:

> It is potentially confusing ... and likely to lead to error to describe an offence which does not warrant the maximum prescribed penalty as being "within the worst category". It is a practice which should be avoided.[38]

5.23 The High Court also suggested that the two-stage approach may raise false expectations among victims if the case is identified as a worst case and then is reduced because of subjective factors.[39]

5.24 The High Court has not subsequently had an occasion to consider the application of s 61(1). However, recognising the difficulties faced by a court in NSW when applying s 61(1), Justice Hamill has, in sentencing three different murder cases, held the correct approach to s 61 is:

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32. *R v Harris* [2000] NSWCCA 469, 50 NSWLR 409 [94]. See also *R v Miles* [2002] NSWCCA 276 [204]; *Knight v R* [2006] NSWCCA 292 [24]; *SW v R* [2013] NSWCCA 103 [114], [135], [147].
33. See, eg, *R v Miles* [2002] NSWCCA 276 [204]; *Knight v R* [2006] NSWCCA 292 [24]; *Barton v R* [2007] NSWSC 651 [104]–[111]; *SW v R* [2013] NSWCCA 103 [135], [147].
34. *Dean v R* [2015] NSWCCA 307 [74].
35. See, eg, *R v Petrinovic* [1999] NSWSC 1131 [25]; *R v Harris* [2000] NSWSC 285 [79].
36. *R v Stanford* [2016] NSWSC 1434 [161], [165]; *R v Walsh* [2018] NSWSC 1299 [24]; *R v LN (No 10)* [2017] NSWSC 1387 [132]–[134]; *R v Koloamatangi (No 6)* [2017] NSWSC 1631 [134], [135], [168].
37. *R v Kilic* [2016] HCA 48; 259 CLR 256 [18].
38. *R v Kilic* [2016] HCA 48; 259 CLR 256 [19].
39. *R v Kilic* [2016] HCA 48; 259 CLR 256 [20].

> for the sentencing judge to consider all of the evidence relevant to the sentencing discretion, apply the relevant sentencing principles (common law and statute) and make an assessment of the extremity of the offender's culpability and the "community interest in retribution, punishment, community protection and deterrence." The sentencing Judge must consider whether the **only** way that the community interest so identified can be met is by the imposition of a life sentence. This is not a multi-stage process. Rather, it is an intuitive evaluation of the all of the material and principles and an application of the legislation providing for mandatory life sentences.[40]

5.25 The impediment to confidence that the instinctive synthesis approach is correct, in NSW, is the anomaly that s 61(3) preserves a discretion to impose something other than a life sentence.[41] If this stood alone it could easily be read as meaning no more than if the terms of the section are not met, the judge retains the discretion to impose something other than life. However, it must be read in conjunction with the express absence of an equivalent for serious drug offending in s 61(2). So, in cases of murder but not serious drug offending, construing s 61 as a whole may allow for something other than a life sentence to be imposed even though the terms of the section are met. The question then arises as to how this can be done, if all considerations have already been taken into account in determining whether the terms of s 61 are met.

5.26 Arguably, the section does no useful work. As Justice Simpson has noted on a number of occasions in the CCA, s 61 is "devoid of any content" and not needed - because any judicial officer satisfied that it has been met would always be obliged to impose a life sentence, without recourse to the section.[42]

Options for reform

5.27 The sentencing decisions outlined above demonstrate significant inconsistency of approach. Consistency of approach is desirable in sentencing. Clarity of communication in sentencing is essential for victims' families and the community.

5.28 A number of submissions are critical of s 61 as currently framed. One supports complete repeal of s 61(1).[43] Some support repealing s 61(1) or amending it to make clear that a two-stage process is not to be used.[44] One submission notes that, if the

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40. *R v Qaumi* [2017] NSWSC 774 [193] (emphasis in original). See also *R v Martin* [2018] NSWSC 84 [60]–[62]; *R v JK* [2018] NSWSC 250 [47].
41. See, eg, *R v Merritt* [2004] NSWCCA 19; 59 NSWLR 557 [36]–[37].
42. *Ngo v R* [2013] NSWCCA 142 [29]; *El-Zeyat v R* [2015] NSWCCA 196 [43]–[44].
43. University of Newcastle Legal Centre, *Submission MU26*, 14.
44. NSW Bar Association, *Submission MU22* [18]; Australian Lawyers for Human Rights, *Submission MU37* [5.12].

repeal option is followed, consideration should be given to preserving the safeguard in s 61(6) for offenders who are under the age of 18 years.[45]

5.29 Two submissions do not support any change to s 61 as it currently stands.[46] They argue against an amendment which may fetter sentencing discretion. They do not argue for any positive role for s 61. Another submission leaves open the possibility of the courts reassessing the two-stage approach without the need for legislative amendment.[47]

5.30 We are currently aware of two appeals that have been argued in the CCA in relation to s 61. In the appeal of a 2016 decision in *R v Rogerson and McNamara*[48] one ground of appeal is that the sentencing judge erred in the application of s 61. In the other appeal, of a 2020 decision in *R v CC*,[49] the terms of s 61 may be relevant to resentencing if error is made out. The Chief Justice has convened a five judge bench for this appeal.

5.31 While it is possible that these appeals will resolve the uncertainty around the application of s 61(1), it is also possible that the appeals may not resolve the uncertainty or may produce an otherwise undesirable result. There will be a need to review these decisions once they are handed down. If, in light of these decisions, the government considers that amendment is required, the Council would welcome a further request for advice.

Mandatory whole of life sentences

5.32 In NSW, a mandatory whole of life sentence (that is, life imprisonment without parole) is available only for the murder of a police officer in particular circumstances.[50]

5.33 Before 14 May 1982, a mandatory life sentence was imposed for murder, without exception.[51] However, at that time, offenders sentenced to mandatory life sentences could be released on licence. The possibility of release (either on parole or some form of release on licence) applies in other Australian jurisdictions where mandatory life sentences are available for murder.[52]

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45. Public Defenders, *Preliminary Submission PMU13*, 8.
46. Monash Gender and Family Violence Prevention Centre, *Preliminary Submission PMU17*, 4; Legal Aid NSW, *Submission MU36,* 4.
47. Public Defenders, *Preliminary Submission PMU13*, 8.
48. *R v Rogerson (No 57)* [2016] NSWSC 1207.
49. *R v CC* [2020] NSWSC 946.
50. *Crimes Act 1900* (NSW) s 19B.
51. *Crimes Act 1900* (NSW) s 19, amended by *Crimes (Amendment) Act 1955* (NSW) s 5(b). See NSW Sentencing Council, *Homicide*, Consultation Paper (2019) [2.6]–[2.10].
52. *Criminal Code* (NT) s 157; *Sentencing Act 1995* (NT) s 53A; *Criminal Code* (Qld) s 305; *Corrective Services Act 2006* (Qld) s 181(2); *Criminal Law Consolidation Act 1935* (SA) s 11(5); *Sentencing Act 2017* (SA) s 47.

5.34 The Council maintains an in principle objection to mandatory sentencing as constraining judicial discretion to impose a sentence that is appropriate in all the circumstances. In 1996, the NSW Law Reform Commission ("NSWLRC") set out reasons for opposing mandatory whole of life sentences. The reasons were that they:

- apply without regard to relevant circumstances, leading to arbitrary and capricious results
- remove judicial discretion and interfere with judicial independence, and
- have a negative effect on the efficiency of the criminal justice system, because offenders are less willing to plead guilty to offences carrying a sentence of mandatory life imprisonment.[53]

Notwithstanding submissions calling for the repeal of s 19B of the *Crimes Act 1900* (NSW) ("*Crimes Act*") on these and similar grounds,[54] we accept that a mandatory whole of life sentence for the murder of a police officer, in limited circumstances, is part of the law of NSW.

5.35 We do not propose any changes to the existing provision, either by extending the categories for which a mandatory whole of life sentence should be imposed or by changing the exceptions. We also do not propose that a mandatory minimum sentence (for a term less than life) should be imposed where certain mental health exceptions apply as is suggested by one submission.[55]

Mandatory life for the murder of a police officer

5.36 In 2011, a new penalty provision was inserted into the *Crimes Act,* providing a life sentence for the murder of a police officer in certain circumstances.[56] The mandatory penalty applies if:

- the offender murders a police officer
- the police officer was executing their duty or the murder occurred as a reaction to a police officer executing their duty
- the offender knew or ought to have known that the victim was a police officer, and

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53. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [9.11].
54. Australian Lawyers for Human Rights, *Submission MU37* [5.10]–[5.11]; Legal Aid NSW, *Submission MU36*, 5; NSW Bar Association, *Submission MU22* [19], [51].
55. Police Association of NSW, *Submission MU20*, 3.
56 *Crimes Act 1900* (NSW) s 19B, inserted by *Crimes Amendment (Murder of Police Officers) Act 2011* (NSW) s 3.

- the offender intended to kill the police officer or was engaged in criminal activity that risked harm to police officers.[57]

5.37 A life sentence imposed under this provision, as with all life sentences in NSW, is a whole of life sentence that is to be served for the term of the offender's natural life, with no possibility of parole.[58] The intention behind this provision was to provide an effective deterrent against the murder of police officers.[59]

5.38 However, the mandatory life sentence under this section does not apply if the offender:

- was under 18 years old when the offence was committed, or
- had a significant cognitive impairment when the offence was committed.[60]

The significant cognitive impairment cannot be a temporary, self-induced impairment.[61]

5.39 These exceptions recognise the well-established sentencing principles relating to the sentencing of young people and people with mental illness or cognitive impairments whereby, for example, deterrence is given less emphasis as one of the purposes of sentencing. However, it does not rule out the possibility that offences committed by people with cognitive impairments, even significant ones, may qualify for a life sentence, as we mention below.[62]

5.40 Since the introduction of the mandatory penalty provision in 2011, there has been only one case where an offender has been sentenced to life imprisonment for the murder of a police officer.[63] However, the provision does not cover all cases where an offender kills a police officer. There will be cases where, depending on the circumstances, the killing of a police officer does, for example, amount to manslaughter or to murder that does not attract a mandatory life sentence.[64]

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57. *Crimes Act 1900* (NSW) s 19B(1).
58 *Crimes Act 1900* (NSW) s 19B(2).
59. NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 26 May 2011, 1095.
60 *Crimes Act 1900* (NSW) s 19B(3).
61. *Crimes Act 1900* (NSW) s 19B(3)(b).
62. [5.39].
63. *R v Jacobs (No 9)* [2013] NSWSC 1470.
64. See, eg, *Barbieri v R* [2016] NSWCCA 295; N Cowdery, "Mandatory Life for Cop Deaths" (2011 Winter) *Bar News* 43, 43.

The significant cognitive impairment exception

5.41 As already noted, one of the exceptions to life imprisonment for the murder of a police officer is that "the person had a significant cognitive impairment at that time (not being a temporary self-induced impairment)".[65]

5.42 One submission, from the Police Association, has drawn attention to the "considerable angst and confusion" over the relationship between the term "significant cognitive impairment" and the existing defences and partial defences to murder on the grounds of mental health,[66] namely:

- a finding of not guilty by reason of mental illness,[67] after which a court may, among other appropriate orders, direct that the person be detained in such place and in such manner as it thinks fit and the person is then managed as a forensic patient, and
- the partial defence of substantial impairment by abnormality of mind which results in a finding of manslaughter.[68]

5.43 The Police Association submits that:

> Where an accused person is found to have met the required mental elements to be convicted of murder, and yet be exempt from the mandatory sentence under subsection 19B(3)(b), many affected persons are likely to perceive a significant injustice.
>
> The definition of significant cognitive impairment, and its difference with the other thresholds, should be clarified to alleviate that perception of injustice.[69]

5.44 In the second reading speech, in 2011, it was acknowledged that "[t]he decision on whether a cognitive impairment is significant would be a matter for the courts to determine".[70] The meaning of "significant cognitive impairment" is unclear simply because the question has not come before the courts for a decision. It is contrary to ordinary sentencing principles not to consider mental health issues no matter how heinous the crime.

5.45 In the one recent case where the issue might have been relevant, the prosecution rejected a plea to manslaughter, but accepted a plea to murder and, in doing so,

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65. *Crimes Act 1900* (NSW) s 19B(3)(b).
66. Police Association of NSW, *Submission MU20*, 3.
67. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 38(1).
68. *Crimes Act 1900* (NSW) s 23A(1).
69. Police Association of NSW, *Submission MU20*, 3.
70. NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 26 May 2011, 1095.

conceded that the applicant had a "significant cognitive impairment".[71] The agreement between the prosecution and the defence eliminated the need for a judicial finding on this term. In an appeal on this case, Justice Simpson noted that many questions, therefore, remain unresolved. For example, it is not yet resolved whether there is any relationship between "substantial impairment" caused by abnormality of mind (for manslaughter) and a "significant cognitive impairment".[72] It would have been open to the offender in this case to seek to argue that he was subject to a significant cognitive impairment. Justice Simpson noted his mental illness "was plainly severe".[73] Removing the exception might lead to more outcomes of not guilty on the grounds of mental illness and consequent management of the offender by the Mental Health Review Tribunal.

5.46 The recently commenced *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) has changed the terminology surrounding mental health and cognitive impairment in the criminal justice system. Among other things, it changed the substantial impairment provision in the *Crimes Act* so that an offender must be "substantially impaired by a mental health impairment or a cognitive impairment".[74] The definition of "cognitive impairment" that applies to the substantial impairment provision does not apply to the police officer murder provision, which refers to a "significant cognitive impairment".[75] The meaning of "significant cognitive impairment" will, therefore, remain to be determined by the courts. Although, the courts will likely be guided by the new definitions even if they are not determinative in relation to s 19B of the *Crimes Act*.

Existing sentencing principles will continue to apply

5.47 We expect that the courts will apply existing sentencing principles to ensure an adequate and appropriate sentence is imposed where the offender fits within the "significant cognitive impairment" exception.

5.48 In such cases, the CCA has said that if the victim was a police officer acting in the execution of their duty, this can be taken into account in the sentence by considering *both*:

- the higher standard non-parole period as a relevant sentencing guidepost, and
- the fact that the victim was a public official exercising their duties as an aggravating factor.

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71. *Barbieri v R* [2016] NSWCCA 295 [39]–[40].
72. *Barbieri v R* [2016] NSWCCA 295 [37]–[38].
73. *Barbieri v R* [2016] NSWCCA 295 [127].
74. *Crimes Act 1900* (NSW) s 23A; *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) s 28.
75. *Crimes Act 1900* (NSW) s 19B(3)(b).

The CCA's view was that doing so would not amount to prohibited double counting.[76]

5.49 The courts have traditionally accepted the fact that if the victim was a police officer in the course of duty this substantially aggravates the seriousness of an offence.[77] This is because police officers, in the course of duty, "are called upon to place themselves in danger and do so for the benefit of the community at large".[78] The courts have also recognised that "police who are threatened with or subjected to violence in the course of duty, are entitled to the full protection of the law, and that offenders who are involved in crimes of this kind must expect condign sentences".[79]

5.50 We also note that, while mental illness or cognitive impairment can make an offender an unsuitable subject of a deterrent sentence, it is well-settled law that considerations of the protection of society (motivated by the potential dangerousness of the offender) can be used to offset potentially mitigating features of a case, such as the offender's mental state.[80]

No additional categories of victim

5.51 Another reform option could be to expand mandatory whole of life sentences to cases of murder of other victims apart from police officers. The consultation paper raised the question of whether mandatory sentencing should be expanded, for example, to some of the categories of murder to which special standard non-parole periods ("SNPPs") attach, such as where the victim is a child, or where the victim is a certain kind of public official, while exercising public or community functions, and where the offence arose because of the victim's occupation or voluntary work.[81] Some submissions support expanding the categories of victim to adult and child victims of rape *and* murder[82] and to law enforcement officers; in particular correctional officers.[83]

5.52 We consider that the categories of murder victim for a mandatory whole of life sentence should not be expanded. The question of expanding categories is a highly contentious issue and there are invidious choices involved, including breaching the principle that all are equal before the law.

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76. *Barbieri v R* [2016] NSWCCA 295 [81]–[84].
77. *R v Penisini* [2004] NSWCCA 339 [20]; *Barbieri v R* [2016] NSWCCA 295 [124].
78. *R v Penisini* [2004] NSWCCA 339 [20]. See also *R v Barbieri* [2014] NSWSC 1808 [144]–[145]; *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 2 of 2002* [2002] NSWCCA 515 [22], [26].
79. *R v Adam* [1999] NSWSC 144 [44]–[45].
80. *R v Garforth* (Unreported, NSWCCA, 23 May 1994) 11; *Ng v R* [2011] NSWCCA 227 [64].
81. See NSW Sentencing Council, *Homicide*, Consultation Paper (2019) [2.19], [3.33].
82. E Culleton, *Submission MU30*, 17; T Knight, *Submission MU53*, 4.
83. D Pezzano, *Submission MU16*, 14–15.

5.53 In our opinion it is sufficient that other categories of vulnerable workers are covered by the existing SNPP provisions and circumstances of aggravation. As one submission notes: "there is already adequate scope to reflect the seriousness of conduct against vulnerable victims, and … no additional categories are required".[84]

5.54 It is an aggravating factor to be taken into account in deciding the appropriate sentence when:

- the victim was an emergency services worker, correctional officer, judicial officer, council law enforcement officer, health worker, teacher, community worker, or other public official, exercising public or community functions, and
- the offence arose because of the victim's occupation or voluntary work.[85]

5.55 When this circumstance of aggravation arises, a SNPP of 25 years also applies.[86]

5.56 Even before these provisions existed, the law regarded the murder of "a public person or public official, because of that person's occupation, as being especially serious".[87]

5.57 In one case, the Supreme Court said that to murder a public official in the context of pending criminal proceedings makes the offence an especially serious one.[88] In that particular case, the offender was awaiting prosecution in the Land and Environment Court. The victim, a compliance officer with the Office of Environment and Heritage, was to give evidence in the case. The Court said:

> the law must emphasise the importance of protecting public officials discharging these functions, even more so where the laws which they are required to apply are not popular in the community.[89]

5.58 The statutory list of public officials is not exhaustive. For example, it has been held that murder is "greatly aggravated" when it involves the killing of a member of parliament for political ends. Such an offence is considered not only an offence against the victim, but also a "direct attack on our system of democratic representative government" and a strike at "the very fabric of our public institutions":[90]

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84. Legal Aid NSW, *Submission MU36*, 5.
85. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(a).
86. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A, table, item 1A.
87. *R v Turnbull (No 26)* [2016] NSWSC 847 [77].
88. *R v Turnbull (No 26)* [2016] NSWSC 847 [78].
89. *R v Turnbull (No 26)* [2016] NSWSC 847 [110].
90. *R v Ngo (No 3)* [2001] NSWSC 1021 [23].

> In particular our system of parliamentary elections and pre-selection of parliamentary candidates operates without physical violence or intimidation, and a clear message must be sent that there is no room in this country for killings, violence or intimidation as part of the political process.[91]

5.59 Another recent case involved a campaign of murderous violence against the Family Court, its judges and practitioners, between 1980 and 1985. The offender murdered a Family Court judge, the wife of another Family Court judge, and attempted to murder another two Family Court judges and a Family Court practitioner. In relation to the murder of the judge, the Supreme Court imposed a sentence of life imprisonment without parole on the grounds that the murder was of the highest level of objective seriousness and the level of the offender's culpability was extreme. The Court observed that a particular factor was that the victim was "a serving judge, who was murdered because of the work which he did".[92] In relation to the whole course of offending the Court observed:

> It is a hallmark of Australian democracy and the peaceful co-existence which we all enjoy as an enlightened society that there is an independent, strong and dedicated judiciary. The Australian Constitution ensures that this is so. This is how Australian citizens safely and peacefully settle their disputes. A sustained period of violence aimed at an Australian Court and its Judges, solely in retribution for those Judges properly executing their obligations and functions in peacefully adjudicating disputes in accordance with the law, cannot be viewed as anything other than an attack on the very foundations of Australian democracy. It is an offending which, at its core, is completely antithetical to the very foundations of government in Australia.[93]

5.60 We consider the sentencing of offenders who kill children and the sentencing of offenders who commit other serious offences against homicide victims elsewhere in this report.[94]

Life with parole for murder

5.61 In NSW, the maximum penalty for murder is life imprisonment.[95] A court cannot currently set a non-parole period when imposing a life sentence. A majority of the

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91. *R v Ngo (No 3)* [2001] NSWSC 1021 [25].
92. *R v Warwick (No 94)* [2020] NSWSC 1168 [30].
93. *R v Warwick (No 94)* [2020] NSWSC 1168 [98].
94. See [2.2]–[2.19] and [7.31]–[7.43].
95. *Crimes Act 1900* (NSW) s 19A(1).

members of the Council considers that this is appropriate and does not recommend any changes to the current law.

Should parole be available for life sentences?

5.62 NSW is the only Australian jurisdiction where parole is not available for life sentences for murder. In other Australian jurisdictions, parole is available in some form:

- In Queensland, South Australia and the Northern Territory, a mandatory sentence of life imprisonment for murder may be imposed with a non-parole period.[96] The form of non-parole period varies across these jurisdictions.
- In the Australian Capital Territory, Tasmania, Victoria and Western Australia, there is a discretionary sentence of life imprisonment for murder with parole or release on licence available in some form.[97] In Victoria, for example, a sentencing court must fix a determinate non-parole period to a sentence of life imprisonment unless it is inappropriate because of the "nature of the offence or the past history of the offender".[98]
- In Commonwealth criminal law, a sentence of life imprisonment with a non-parole period is available.[99]

5.63 Previous reviews by the NSW Sentencing Council and the NSWLRC have called for the possibility of a non-parole period with a sentence of life imprisonment.[100] However, government has not adopted these recommendations.

5.64 In 2012, the Council recommended that it should be possible for a court to impose a life sentence with a non-parole period, subject to the continuing availability of life sentences

96. *Criminal Code* (Qld) s 305; *Corrective Services Act 2006* (Qld) s 181; *Penalties and Sentences Act 1992* (Qld) s 160D(3)–(4); *Criminal Law Consolidation Act 1935* (SA) s 11; *Sentencing Act 2017* (SA) s 47, s 48; *Criminal Code* (NT) s 157; *Sentencing Act 1995* (NT) s 53, s 53A.
97. C*rimes Act 1900* (ACT) s 12(2); *Crimes (Sentencing) Act 2005* (ACT) s 32(1)–(2); *Crimes (Sentence Administration) Act 2005* (ACT) s 288, s 290; *Criminal Code* (Tas) s 158; *Sentencing Act 1997* (Tas) s 17(2), s 18(1); *Crimes Act 1958* (Vic) s 3(1); *Sentencing Act 1991* (Vic) s 11(1); *Criminal Code* (WA) s 279(4); *Sentencing Act 1995* (WA) s 90.
98. *Sentencing Act 1991* (Vic) s 11(1).
99. *Crimes Act 1914* (Cth) s 19AB.
100. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) rec 47; NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options*, Report (2012) rec 7; NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [8.33]–[8.37] rec 8.1.

without parole where required by existing laws.[101] In 2013, the NSWLRC adopted the Council's recommendation.[102] It considered that such an amendment:

- would bring this aspect of NSW law more into line with other Australian jurisdictions, and
- could potentially result in more life sentences for murder being imposed, especially where the future dangerousness of the offender was unpredictable at the time of sentencing (this assessment of dangerousness could be revisited by the Serious Offenders Review Council and the State Parole Authority at a later time).[103]

5.65 The NSWLRC did not consider that such an amendment should have retrospective effect. It noted it would not prevent parliament from specifying individual offences or circumstances for which the only available sentence is life imprisonment without parole.[104]

5.66 Several submissions to this review argue that parole should be available for life sentences in NSW. They argue that the current regime:

- denies judges discretion in sentencing[105]
- denies offenders hope[106]
- does not promote rehabilitation, which is a key purpose of sentencing[107]
- can create difficulties in managing these offenders in prison, as they may feel they have "nothing to lose"[108]

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101. NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options*, Report (2012) rec 7.
102. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [8.33]–[8.37] rec 8.1. See also NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options*, Report (2012) [5.148].
103. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [8.34].
104. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [8.36]–[8.37].
105. M Hanlon, *Submission MU01,* 1; J Harris, *Submission MU03,* 1; R Margo, *Submission MU10,* 1; D Zabow, *Submission MU14,* 1; J Mohr, *Submission MU21,* 1; C Hesse, *Submission MU23,* 1; University of Newcastle Legal Centre, *Submission MU26,* 12; J McCallum, *Submission MU32,* 1.
106. J Harris, *Submission MU03,* 1; H Sanderson, *Submission MU06,* 1; R Margo, *Submission MU10,* 1; Y Pritchard, *Submission MU13,* 1; A Miles, *Submission MU18,* 1; D Singer, *Submission MU19,* 1; J Mohr, *Submission MU21,* 2; J Quin, *Submission MU29,* 2.
107. D Zabow, *Submission MU14,* 1; A Miles, *Submission MU18,* 2; Australian Lawyers for Human Rights, *Submission MU37,* 9; University of Newcastle Legal Centre, *Submission MU26,* 6–7, 11.
108. R Margo, *Submission MU10,* 1; Legal Aid NSW, *Submission MU36,* 13.

- is especially onerous for young offenders, as they may spend several decades in prison[109]
- does not take into account the future dangerousness posed by the offender[110]
- results in a significant economic cost to the community,[111] and
- is inconsistent with the law in other Australian jurisdictions.[112]

5.67 Commentators also note that such regimes:

- unequally distribute punishment depending on the age of an offender when sentenced[113]
- violate the human rights of offenders,[114] and are contrary to international norms and benchmarks,[115] and
- violate the principle of proportionality in sentencing.[116]

5.68 Arguments in favour of life sentences with parole include that this would:

- give judges greater discretion and flexibility[117]

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109. NSW Bar Association, *Submission MU22* [57] citing *R v Harris* [2000] NSWCCA 469, 50 NSWLR 409 [124]; *R v Garforth* (Unreported, NSWCCA, 23 May 1994) 5, 11; University of Newcastle Legal Centre, *Submission MU26,* 5, citing *R v Harris* [2000] NSWCCA 469, 50 NSWLR 409 [124].
110. See, eg, NSW Bar Association, *Submission MU22* [62]; University of Newcastle Legal Centre, *Submission MU26,* 5, citing *R v Harris* [2000] NSWCCA 469, 50 NSWLR 409 [124]–[126].
111. J Harris, *Submission MU03,* 1; L Allen, *Submission MU12,* 1; Y Pritchard, *Submission MU13,* 1; D Singer, *Submission MU19.* 1. See also R Margo, *Submission MU10,* 1; A Miles, *Submission MU18,* 2; C Hesse, *Submission MU23,* 1.
112. H Sanderson, *Submission MU06,* 1; L Allen, *Submission MU12,* 1; D Singer, *Submission MU19,* 1; NSW Bar Association, *Submission MU22* [53]; C Hesse, *Submission MU23,* 1; University of Newcastle Legal Centre, *Submission MU26,* 4; C McIntosh, *Submission MU27,* 1.
113. J L Anderson, "Recidivism of Paroled Murderers as a Factor in the Utility of Life Imprisonment" (2019) 31 *Current Issues in Criminal Justice* 255, 255–256.
114. D van Zyl Smit and C Appleton, *Life Imprisonment: A Global Human Rights Analysis* (Harvard University Press, 2019) 11–34, 297–308; *International Covenant on Civil and Political Right*s, 999 UNTS 171 (entered into force 23 March 1976) art 7, art 10.
115. D van Zyl Smit and C Appleton, *Life Imprisonment: A Global Human Rights Analysis* (Harvard University Press, 2019); Penal Reform International and University of Nottingham, *Life Imprisonment: A Policy Briefing* (Penal Reform International, 2018) 6–10.
116. J L Anderson, "The Label of Life Imprisonment in Australia: A Principled or Populist Approach to an Ultimate Sentence" (2012) 35 *UNSW Law Journal* 747, 754–756.

- allow for more equitable and proportionate distribution of punishment[118]
- appropriately recognise the human rights of offenders[119]
- give offenders an opportunity and incentive to rehabilitate[120]
- potentially improve prison security,[121] and
- bring NSW into line with other Australian jurisdictions.[122]

5.69 Other submissions support life sentences without the possibility of parole for certain cases. One submission supports this where, for example, the murder:

- occurred during the commission of other violent crimes
- involved torture, cruelty or was particularly violent, or
- involved multiple victims.[123]

5.70 Another submission supports a mandatory life sentence without the possibility of parole where the offender commits sexual assault as well as murder. The submission argues that this would meet:

> the sentencing purposes of just punishment, crime prevention, community protection, community condemnation, making the offender accountable and recognising the harm done to the victim and their loved ones as well as the community.[124]

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117. University of Newcastle Legal Centre, *Submission MU26,* 16; Legal Aid NSW, *Submission MU36,* 13. See *R v Ngo (No 3)* [2001] NSWSC 1021 [43]; *R v Harris* [2000] NSWCCA 469; 50 NSWLR 409, [122]–[134].
118. J L Anderson, "The Label of Life Imprisonment in Australia: A Principled or Populist Approach to an Ultimate Sentence" (2012) 35 *UNSW Law Journal* 747, 754–759.
119. D van Zyl Smit and C Appleton, *Life Imprisonment: A Global Human Rights Analysis* (Harvard University Press, 2019) 11–34, 297–308.
120. L Allen, *Submission MU12,* 1; A Miles, *Submission MU18,* 2; Y Pritchard, *Submission MU13,* 1; University of Newcastle Legal Centre, *Submission MU26,* 6.
121. Legal Aid NSW, *Submission MU36,* 13.
122. Legal Aid NSW, *Submission MU36,* 13.
123. D Pezzano, *Submission MU16,* 5.
124. E Culleton, *Preliminary Submission PMU14,* 3.

Our view

5.71 The majority of members of the Sentencing Council considers that the current law, which sets a maximum penalty for murder of life imprisonment and does not allow non-parole periods for life sentences, is appropriate.

5.72 The penalty of life imprisonment is not imposed in all murder cases. It is reserved for the worst and most serious examples of this offence.[125]

5.73 As discussed above, a life sentence for murder can only be imposed under common law where the case is in the "worst case" category. Similarly, under s 61 of the *Crimes (Sentencing Procedure) Act*, a court is to sentence an offender to life imprisonment for murder if the court is satisfied that the level of culpability is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met by imposing a life sentence.[126]

5.74 In practice, this is a high threshold to overcome. Murder cases that have attracted life sentences under s 61, and in which the court made a finding of "worst case", include where the offender:

- murdered and mutilated an 11 year old girl[127]
- murdered his mother, father and sister[128]
- murdered his wife and grandchildren (two of the three murders were found to be in the "worst category of case"),[129]
- pleaded guilty to 11 counts of murder, after he started a fire in a nursing home where he was employed as a registered nurse[130]
- pleaded guilty to aggravated sexual assault and murder of a teacher from a school where he worked[131]
- murdered five members of his wife's family[132]

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125. NSW, *Parliamentary Debates,* Legislative Council, Second Reading Speech, 7 December 1989, 14528–14529.
126. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 61(1).
127. *R v Coulter* [2005] NSWSC 101 [68].
128. *R v Gonzales* [2004] NSWSC 822 [110]–[115].
129. *R v Walsh* [2009] NSWSC 764 [40].
130. *Dean v R* [2015] NSWCCA 307 [64].
131. *R v Stanford* [2016] NSWSC 1434 [160]–[161].
132. *R v Xie* [2017] NSWSC 63 [38].

- murdered his girlfriend, the man she went home with and that man's son[133]
- pleaded guilty to the murder of his cellmate during lock-down (while already serving two life sentences for murder),[134] and
- murdered a Family Court judge, the wife of another Family Court judge and a member of a congregation that helped his former wife.[135]

5.75 Data indicates that only a small number of offenders in NSW receive life sentences for murder. We reviewed all cases of murder where a NSW court imposed a sentence in the three-year period between 1 April 2015 and 31 March 2018. There were 100 cases in total, of which 96 were committed by an adult offender and four were committed by a juvenile offender.

5.76 Of the 96 offences committed by an adult offender, 85 offences involved victims who were not in a special SNPP category. Of those 85 adult offenders, five (5.9%) were sentenced to life imprisonment. The remaining 80 offenders, whose victims were not in a special SNPP category, were sentenced to a determinate term of imprisonment. Of these offenders, 37 (46.3%) received a head sentence of 25 years' imprisonment or more.

5.77 We acknowledge that the punishment of life imprisonment without the possibility of parole is a significant punishment for those five offenders who represent a small minority of offenders sentenced for murder in that three-year period. It must be emphasised that this small number of offenders reflects the fact that judges are giving thorough and careful consideration to the imposition of a life sentence and it would not have been imposed in any of those five cases unless the judges decided there was no other punishment appropriate taking into account all the circumstances of the offence(s) and the offender.

5.78 As discussed above, the law was changed to clarify that life sentences must be served for the term of the offender's natural life due to community concern that offenders who were sentenced to life imprisonment were being released earlier.[136] Accordingly, the community's expectation is that "life means life".[137] Allowing the possibility of life with parole for murder could undermine public confidence in the administration of justice.

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133. *R v O'Connor* [2018] NSWSC 1734 [52], [59].
134. *R v Walsh* [2018] NSWSC 1299 [37]–[39].
135. *R v Warwick (No 94)* [2020] NSWSC 1168 [94].
136. NSW, *Parliamentary Debates,* Legislative Council, Second Reading Speech, 7 December 1989, 14529.
137. See, eg, G Smith, "Law Reform Commission Report on Sentencing" (Media Release, Attorney General and Minister for Justice, 2013) 2.

5.79 The possibility of parole for offenders sentenced to life imprisonment could create further distress for victims' families, who have lost loved ones due to horrific acts. During our consultation with victims' families, some were open to the possibility of parole for life sentences. In this context we note that the courts can, in appropriate cases, already fix very lengthy non-parole periods of more than 30 years.[138] However, others were strongly opposed to the possibility of parole, believing it would not take account of their loss.[139]

5.80 Multiple applications for parole over the term of an offender's life may also retraumatise the victim's family. The number of applications for parole could possibly be regulated through an appropriate review mechanism and any concerns about repeated applications could be addressed through time limits and/or other conditions relating to an offender's rehabilitation, which may reduce the trauma for the victim's family. Although we consider such an approach has some potential, we have decided to prioritise the avoidance of the potential for retraumatising families of victims who have suffered the worst types of murder.

5.81 Although some submissions express concern that the lack of parole availability may create security issues, inmates with life sentences now have their own security classification category with particular management requirements.[140] This was introduced in response to a recommendation made by the Legislative Council Standing Committee on Law and Justice in 2016.[141]

5.82 In determining the correctional centre in which a "Category Life" inmate is to be placed, the Commissioner of Corrective Services must take into account that such inmates should be confined at all times by a secure physical barrier, unless extraordinary circumstances exist.[142]

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138. *R v Evans (No 3)* [2017] NSWSC 1523; *R v Qaumi* [2017] NSWSC 774; *R v Droudis (No 16)* [2017] NSWSC 20.
139. Victims Roundtable, *Consultation MU01.*
140. *Crimes (Administration of Sentences) Regulation 2014* (NSW) r 14A, r 20(a1); Corrective Services NSW, *Fact Sheet 9: Classification and Placement* (May 2019).
141. Legislative Council Standing Committee on Law and Justice, *Security Classification and Management of Inmates Sentenced to Life Imprisonment,* Report 58 (2016) rec 1.
142. *Crimes (Administration of Sentences) Regulation 2014* (NSW) r 20(a1).

6. Indefinite or reviewable sentences

In Brief

There are a number of options, apart from life sentences with parole, for detaining or supervising homicide offenders indefinitely until certain criteria are met. These include indefinite sentences in some parts of Australia and the high risk offenders regime in NSW. Indefinite sentences should not be introduced in NSW. The existing sentencing and parole regimes provide sufficient incentives for a homicide offender to disclose the location of their victim's body.

6.1 There are a number of options, outside of life sentences with parole, for detaining or supervising homicide offenders until they meet a specified criterion, such as ceasing to be a danger to the community or revealing the location of their victim's body. In NSW, there are orders under the high risk offenders regime – continuing detention orders and extended supervision orders – which the NSW Supreme Court may impose at the end of an offender's sentence. Elsewhere in Australia, there are various forms of indeterminate sentence that may be imposed by the sentencing court.

6.2 We do not recommend introducing indefinite sentences in NSW. We consider that the existing scheme, which provides for continuing detention and extended supervision orders, is the preferable way to manage high risk violent offenders and protect community safety.

Indefinite sentencing

6.3 An indefinite sentence is a sentence of imprisonment with no specified endpoint.[1] Schemes allowing for indefinite sentences generally involve an assessment of the ongoing dangerousness of an offender at the time of initial sentencing. They sometimes

1. NSW Sentencing Council, *High Risk Violent Offenders: Sentencing and Post-Custody Management Options,* Report (2012) [4.5].

require ongoing review of an offender's risk, and only permit continued detention for as long as an offender remains a danger to the community.[2]

6.4 NSW has no scheme for indefinite reviewable detention for adults.[3] Indefinite sentences are available for adults in all other Australian states and territories, except for the Australian Capital Territory.[4]

6.5 The main argument in support of indefinite sentences is that they contribute to community safety by preventing an offender from being released into the community, and thereby preventing reoffending.[5] However, a key issue with indefinite sentences is that the risk an offender poses to the community is generally assessed at the time of initial sentencing. Risk assessments at this time are less likely to be accurate, as they may be many years before the offender's release, and before any engagement in rehabilitation or treatment programs.[6]

6.6 Some submissions to this review oppose indefinite sentences.[7] One reason is that a scheme for managing high risk offenders has already been established.[8]

Continuing detention and extended supervision orders

6.7 In 2006, legislation was introduced in NSW permitting the Supreme Court to make a continuing detention order or an extended supervision order in relation to a serious sex offender. Continuing detention orders allow offenders to be detained in prison, whereas extended supervision orders allow for stringent supervision of offenders in the community, including by electronic monitoring.

6.8 Since 2013, this scheme has applied to high risk violent offenders in response to a recommendation made by the NSW Sentencing Council.[9] The Supreme Court can

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2. NSW Sentencing Council, *High Risk Violent Offenders: Sentencing and Post-Custody Management Options,* Report (2012) [4.6].
3. A system of provisional sentencing is available for child offenders: *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 2A.
4. *Sentencing Act 1991* (Vic) s 18A–18P; *Penalties and Sentences Act 1992* (Qld) s 162–179; *Sentencing Act 1995* (NT) s 65–78; *Sentencing Act 2017* (SA) pt 3 div 5; *Sentencing Act 1997* (Tas) s 19–23; *Sentencing Act 1995* (WA) s 98–101.
5. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [10.4].
6. NSW Sentencing Council, *High Risk Violent Offenders: Sentencing and Post-Custody Management Options,* Report (2012) [5.84]–[5.85].
7. Rape and Domestic Violence Services Australia, *Submission MU15* [35]; Legal Aid NSW, *Submission MU36,* 16; NSW Bar Association, *Submission MU22* [80].
8. Legal Aid NSW, *Submission MU36,* 16; NSW Bar Association, *Submission MU22* [80].

make a continuing detention or extended supervision order for a high risk sex or violent offender if it "is satisfied to a high degree of probability that the offender poses an unacceptable risk of committing another serious offence" if not kept in detention or under supervision.[10]

6.9 Some submissions support the current scheme.[11] Unlike indefinite sentences, the continuing detention and extended supervision scheme allows orders to be made towards the *end* of an offender's sentence.[12] The risk that an offender poses to the community can be more accurately identified at this time.[13]

6.10 In determining whether to make an order, the court can consider matters including the offender's participation in any treatment or rehabilitation program.[14] The scheme encourages offenders to participate in rehabilitation activities, as they are required to be warned, at the time of sentencing, about the prospect of continuing detention or extended supervision when their sentence expires.[15]

6.11 Other features of the scheme that protect community safety include:

- community safety is the paramount consideration for the court in deciding whether to make a continuing detention order or extended supervision order,[16] and
- offenders on extended supervision orders are under strict supervision (conditions may include electronic monitoring, movement restrictions, regular reporting and participation in rehabilitation programs).[17]

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9. See NSW Sentencing Council, *High Risk Violent Offenders: Sentencing and Post-Custody Management Options*, Report (2012) rec 4.
10. *Crimes (High Risk Offenders) Act 2006* (NSW) s 5B(d), s 5C(d).
11. Rape and Domestic Violence Services Australia, *Submission MU15* [35]; Legal Aid NSW, *Submission MU36,* 16.
12. NSW Sentencing Council, *High Risk Violent Offenders: Sentencing and Post-Custody Management Options,* Report (2012) [5.84].
13. NSW Sentencing Council, *High Risk Violent Offenders: Sentencing and Post-Custody Management Options,* Report (2012) [4.139], [5.84]. See also Rape and Domestic Violence Services Australia, *Submission MU15* [34]; NSW Bar Association, *Submission MU22* [80].
14. *Crimes (High Risk Offenders) Act 2006* (NSW) s 9(3)(e), s 17(4)(e).
15. *Crimes (High Risk Offenders) Act 2006* (NSW) s 25C; Legal Aid NSW, *Submission MU36*, 16.
16. *Crimes (High Risk Offenders) Act 2006* (NSW) s 9(2), s 17(2).
17. *Crimes (High Risk Offenders) Act 2006* (NSW) s 11.

No body, no parole

6.12 Many submissions to this review support the principle of "no body, no parole" or "no body, no release".[18] That is, a person sentenced to prison for murder or manslaughter should be required to reveal the location of the victim's body to be eligible for parole.

6.13 Several Australian states and territories have enacted "no body, no parole" laws. The laws restrict parole authorities from ordering the release of an offender unless satisfied that the offender has cooperated with authorities, including by disclosing the location of the victim's body.[19]

6.14 The arguments given in support of "no body, no parole" laws include that they could:

- ensure greater certainty for the families of victims[20]
- dissuade offenders from refusing to cooperate with the police investigation,[21] and
- give families closure by enabling them to put the body of their loved one to rest.[22]

6.15 We consider that the current approach in NSW is appropriate. There are already incentives to disclose the location of the victim's body after a homicide, in that this can amount to assisting authorities and attract a discount at sentencing.[23]

6.16 Considerable leniency may be available to an offender who, for example, reports a murder and their involvement in it as well as disclosing the location of the body.[24] This is consistent with the policy of the criminal law to encourage voluntary disclosure of crimes, particularly where they might otherwise not be discovered.[25]

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18. See, eg, NSW Police Force and Office for Police, *Preliminary Submission PMU10*, 1; Police Association of NSW, *Submission MU20,* 4; S Dunbier, *Submission MU40,* 1; C Angwin, *Submission MU42,* 1; D Heffernan, *Submission MU44,* 1; J Bradley, *Submission MU45,* 1; A Humphreys, *Submission MU46,* 1; M Lewis, *Submission MU47,* 1; C Hoskin, *Submission MU48,* 1; J Montague, *Submission MU49,* 1; M Hoskin, *Submission MU50,* 1; L Shephard, *Submission MU51,* 1; T Grieve, *Submission MU52,* 1.
19. *Corrections Act 1986* (Vic) s 74AABA; *Corrective Services Act 2006* (Qld) s 193A; *Correctional Services Act 1982* (SA) s 67(6); *Parole Act 1971* (NT) s 4B(4); *Sentence Administration Act 2003* (WA) s 66B.
20. NSW Police Force and Office for Police, *Preliminary Submission PMU10,* 1.
21. Police Association of NSW, *Submission MU20,* 4.
22. See, eg, Please pass Allecha's law, *Submission MU38*, 75; C Angwin, *Submission MU42,* 1; D Heffernan, *Submission MU44,* 1; A Humphreys, *Submission MU46,* 1; M Lewis, *Submission MU47,* 1; M Hoskin, *Submission MU50,* 1; L Shephard, *Submission MU51,* 1.
23. *R v Purtill* [2012] NSWSC 1475 [49]. NSW Bar Association, *Submission MU22* [26].
24. *R v Panetta* [2014] NSWSC 27 [80]; *Cameron v R* [2017] NSWCCA 229 [57].
25. *R v Ellis* (1986) 6 NSWLR 603, 604.

6.17 Current parole laws also provide some incentive for offenders to disclose the location of the victim's remains.[26] The State Parole Authority must, when considering whether it is in the interests of the safety of the community to release an offender, have regard to "whether the offender has failed to disclose the location of the remains of a victim".[27]

6.18 This helps to hold offenders accountable for their behaviour by focusing attention on what they have done to make amends for their offence. It is also relevant to whether an offender has made progress towards rehabilitation, and whether they still present a risk to the community.[28]

6.19 Preventing the State Parole Authority from releasing an offender unless they have disclosed the location of the victim's remains could be inflexible, and operate unjustly in cases where there are legitimate limits to an offender's knowledge of this. For example, there may be a co-offender who was involved in the disposal of the body, or the offender may have significant mental health issues that prevent them from being able to provide useful information about the location.[29]

6.20 There are certain inherent limitations to "no body, no parole" regimes. The first is that such provisions offer no incentive to revealing the location of a body where the offender is subject to a life sentence.

6.21 Another limitation of "no body, no parole" laws is that an offender who is subject to a determinate sentence must ultimately be released when their sentence expires, without parole supervision, even if they have not revealed the location of the body.[30] An offender can only be subject to continuing detention or extended supervision at the end of their sentence in limited circumstances.[31]

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26. NSW, *Parliamentary Debates,* Legislative Council, Second Reading Speech, 18 October 2017, 51.
27. *Crimes (Administration of Sentences) Act 1999* (NSW) s 135(3)(e).
28. NSW, *Parliamentary Debates,* Legislative Council, Second Reading Speech, 18 October 2017, 51.
29. Legal Aid NSW, *Submission MU36,* 7.
30. See *Crimes (Administration of Sentences) Act 1999* (NSW) s 8.
31. [6.3]–[6.6].

7. Manslaughter

In Brief

The offence of manslaughter incorporates a wide range of circumstances and degrees of culpability that call for a wide range of sentences. In recent years there have been a number of successful inadequacy appeals against manslaughter sentences. There is insufficient evidence about the general inadequacy of sentencing for manslaughter to justify a proposal for change. Intensive correction orders should be available for appropriate manslaughter cases.

Nature of the offence

7.1 It is generally accepted that the offence of manslaughter is almost unique in its variety,[1] incorporating a wide range of circumstances and degrees of culpability.[2] The objective seriousness of the offence ranges broadly, for example, "from a joke gone wrong to

1. *R v Forbes* [2005] NSWCCA 377 [133]; *Anderson v R* [2018] NSWCCA 49 [47].
2. *R v Blacklidge* (Unreported, NSWCCA, 12 December 1995) 4.

facts just short of murder".[3] We also note that there may be some matters that involve a plea to manslaughter that could otherwise have resulted in a jury verdict of murder.

7.2 The Court of Criminal Appeal ("CCA") has said that, while there is a hierarchy of seriousness between murder with a maximum penalty of life imprisonment, and manslaughter with a maximum penalty of 25 years' imprisonment:

> the existence of such a hierarchy does not lead to the situation that, where sentences of less than twenty-five years have been imposed for murder, sentences for manslaughter must generally be imposed for a significantly lesser period.[4]

7.3 However, there are cases requiring more lenient sentences. The Court observed this in 1981 in relation to the case of a woman who shot her de facto spouse as a sudden response to his provocative and intolerable conduct over a lengthy period of time:

> In a case ... where there is material justifying a degree of understanding and of sympathy towards the appellant, the task of sentencing is particularly difficult. It is necessary to evaluate the demands of the criminal justice system, the expectations of the community at large, the subjective circumstances of the person coming forward for criminal judgment and the interest of society in protecting itself and its members from criminal activity amounting, as in the present case, to the taking of a life.[5]

7.4 The wide range of circumstances means a wide range of applicable sentences.[6] This is so even within single categories of manslaughter,[7] such as those involving diminished responsibility[8] or excessive self-defence.[9] Therefore, sentences imposed in other cases are of limited assistance.[10] Even when it is possible to identify, for example, a number of cases where a parent or carer kills a child, it may not be possible to establish a

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3. *R v Forbes* [2005] NSWCCA 377 [133].
4. *R v Hoerler* [2004] NSWCCA 184 [28].
5. *R v Hill* (1981) 3 A Crim R 397, 402 (Street CJ, Nagle CJ at CL and Lee J agreeing).
6. *Pitt v R* [2014] NSWCCA 70 [52]; *Hamzy v R* [2018] NSWCCA 53 [175]; *R v BW (No 3)* [2009] NSWSC 1043 [177].
7. *R v Forbes* [2005] NSWCCA 377 [134]; *Stephens v R* [2009] NSWCCA 240 [28].
8. *R v Forbes* [2005] NSWCCA 377 [135].
9. *Vuni v R* [2006] NSWCCA 171 [29]–[31].
10. *Hamzy v R* [2018] NSWCCA 53 [175]; *Goundar v R* [2012] NSWCCA 87 [44]–[45]; *Misiepo v R* [2017] NSWCCA 210 [58]; *Anderson v R* [2018] NSWCCA 49 [47]; *R v Guider* [2002] NSWSC 756 [44]–[45]; *R v Blacklidge* (Unreported, NSWCCA, 12 December 1995) 4–5 (Gleeson CJ).

sentencing pattern. This is because the number of cases may be too few to establish a pattern, and the relevant circumstances may vary too greatly.[11]

7.5 It is also not possible to establish a hierarchy of seriousness between voluntary and involuntary manslaughter.[12] As one Supreme Court judge noted:

> An attempt to graduate the very many categories of conduct that can constitute manslaughter into descending orders of objective severity, and then to attempt to place a specific offence at any particular point either in the range for the relevant category or overall, would in my view be a fruitless exercise, by reason of the wide range of circumstances, objective and subjective, which this offence encompasses.[13]

7.6 Despite the wide range of sentences, the statistics suggest that, in the period from January 2008 to 23 September 2018, no head sentence was imposed in the range of 20–25 years' imprisonment.[14] The longest head sentence imposed was 19 years' imprisonment, with a non-parole period of 13 years. This was a case that involved a guilty plea to manslaughter by unlawful and dangerous act where the offender's vehicle, while evading police, struck and killed an 18 month old child in a backyard.[15] The next longest sentence was a head sentence of 18 years' imprisonment for manslaughter by unlawful and dangerous act, that was part of a partially cumulated sentence of 19 years which also took into account the aggravated sexual assault of the victim.[16]

7.7 More recently, in March 2021, the Supreme Court imposed a sentence of 21 years and 7 months, with a non-parole period of 16 years and two months on an offender who was found not guilty of murder but guilty of manslaughter on the grounds of substantial impairment for an extremely violent, sustained knife attack upon her mother in the presence of a four-year-old child. The Court allowed a 10% discount because the offender had offered to plead guilty to manslaughter. The Court observed:

> This is an instance when the offender's disabilities cannot require a sentence substantially less than the maximum sentence available. In light of the extreme gravity of this crime, the very great harm done, and the need to protect the community from the offender, a stern sentence is called for.[17]

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11. *R v Forbes* [2005] NSWCCA 377 [135].
12. *Anderson v R* [2018] NSWCCA 49 [47].
13. *R v Guider* [2002] NSWSC 756 [43].
14. Judicial Commission of NSW, *Sentencing Statistics* (Judicial Information Research System).
15. *R v Chandler (No 2)* [2017] NSWSC 1758.
16. *R v Attwater* [2017] NSWSC 1710.
17. *R v Camilleri* [2021] NSWSC 221 [111].

7.9 Although some manslaughter sentences are now closer to the upper limit, there is still a significant difference between sentences for manslaughter and sentences for murder.

Inadequacy appeals

7.10 Recent CCA cases show that there are cases where that court has corrected sentences for manslaughter which it has found to be manifestly inadequate. Although they are highly dependent on the circumstances of each case, to an extent, these may stand as authority and serve as a reference point for similar situations. In one case, the CCA noted:

> The protean nature of the offence of manslaughter is such that it necessarily covers a wide range of circumstances which might often be regarded, of themselves, as unique. If that were a basis on which to decline to intervene, it would follow that this Court would decline to intervene in the majority of these types of cases that come before it. That ... would reflect an incorrect application of principle.[18]

7.11 The subsequent use of one of the cases described below, *R v Loveridge*,[19] in relation to "one punch" and alcohol-fuelled manslaughter, shows the impact that such appeals can have on sentencing decisions.[20]

7.12 In one 2013 case,[21] the CCA increased a sentence of 9.5 years with a non-parole period of 7 years to one of 16 years, 2 months with a non-parole period of 12 years (both included a 10% discount for the plea of guilty to excessive self-defence). The offender, who was armed and, immediately before the incident, had been involved in discussions about a drug deal, shot and injured a police officer who was executing a search warrant. The police officer was killed by crossfire from a colleague. The offender had unreasonably believed that victim was not a police officer. The CCA identified the case as "a most serious example" of manslaughter.[22] In finding the sentence manifestly inadequate, the CCA emphasised the gravity of crimes committed against serving police officers and the need for specific and general deterrence in such cases.[23]

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18. *R v Yardley* [2019] NSWCCA 291 [71].
19. *R v Loveridge* [2014] NSWCCA 120.
20. See, eg, *R v Lambaditis* [2015] NSWSC 746 [96]–[102]; *Lambaditis v R* [2016] NSWCCA 117 [21], [25]–[35]; *R v Dyer* [2014] NSWSC 1809 [23]; *R v Field* [2014] NSWSC 1797 [91]–[92]; *R v Matthews* [2015] NSWSC 49 [22], [51]; *R v Jones* [2017] NSWSC 19 [53]; *R v Merrick (No 5)* [2016] NSWSC 661 [133].
21. *R v Nguyen* [2013] NSWCCA 195.
22. *R v Nguyen* [2013] NSWCCA 195 [95].
23. *R v Nguyen* [2013] NSWCCA 195 [98].

7.13 In another 2013 case,[24] where the offender was found guilty of manslaughter after a trial for murder, the CCA increased a sentence of 7 years, 9 months with a non-parole period of 5 years, 9 months to one of 12 years with a non-parole period of 8 years, 9 months (both included a 15% discount for a plea of guilty to manslaughter offered before the trial). The offender had been involved in an affray involving 11 people in a carpark that was a premeditated ambush in retaliation for an earlier attack. The offender fired a bullet that killed a passing truck driver. The CCA found that the sentencing judge had given inadequate weight to specific deterrence. Aggravating features applicable to both offences were that they involved the actual use of a weapon, were committed without regard to public safety and the affray was aggravated by the degree of planning and organisation.[25]

7.14 In the 2014 case of *R v Loveridge*,[26] the CCA increased a sentence of 6 years with a non-parole period of 2 years to one of 10.5 years with a non-parole period of 7 years (including a 25% discount for the guilty plea). The offender was drunk and assaulted several people around Kings Cross in the course of an evening. After the first assault, for no reason and without notice, he punched the victim to the head, knocking him to the ground and causing him to hit his head on the pavement. The resulting skull fracture and severe brain injuries proved fatal. The court concluded that the offence was a "serious example of unlawful and dangerous act manslaughter which deserved substantial punishment".[27] In allowing the appeal, the CCA observed that:

> use of lethal force against a vulnerable, unsuspecting and innocent victim on a public street in the course of alcohol-fuelled aggression accompanied ... by other non-fatal attacks by the [offender] upon vulnerable, unsuspecting and innocent citizens in the crowded streets of Kings Cross on a Saturday evening, called for the express and demonstrable application of the element of general deterrence as a powerful factor on sentence in this case.[28]

7.15 The CCA further observed that far more was involved than was usually the case in "so-called one-punch manslaughter" including the fact that the offender stood to be sentenced for five separate but interrelated crimes, committed while he was on conditional liberty for another act of serious and indiscriminate violence, his intention to get drunk, his knowledge of his anger management issues, and his apparent intention to

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24. *Mariam v R* [2013] NSWCCA 338.
25. *Mariam v R* [2013] NSWCCA 338 [55].
26. *R v Loveridge* [2014] NSWCCA 120.
27. *R v Loveridge* [2014] NSWCCA 120 [232].
28. *R v Loveridge* [2014] NSWCCA 120 [105].

act in a repeated violent fashion towards people in the street.[29] The CCA also observed that:

> the commission of offences of violence, including manslaughter, in the context of alcohol-fuelled conduct in a public street or public place is of great concern to the community, and calls for an emphatic sentencing response to give particular effect to the need for denunciation, punishment and general deterrence.[30]

7.16 In another 2014 case,[31] the CCA increased a sentence of 6 years, 8 months with a non-parole period of 5 years to one of 11 years, 4 months with a non-parole period of 8 years (including 5% for a guilty plea on the day of the trial). The offender, a cyclist under the influence of alcohol, rode past an elderly women, dismounted, and pushed her causing her to fall backwards and sustain a brain injury from which she later died. The CCA found that this was a serious offence of manslaughter. The objective gravity of the offence and the offender's high moral culpability were not adequately reflected in the sentence and the principles of general and specific deterrence had not been taken into account.[32]

7.17 The CCA observed:

> Guidance to sentencing judges that may be provided by this decision includes the need for general deterrence when elderly or vulnerable persons are attacked in public places. Public confidence in the justice system would not be served by allowing a sentence that was manifestly inadequate to stand nor would the requirement for general and specific deterrence.[33]

7.18 In a 2019 case,[34] the CCA increased a sentence of 3.5 years with a non-parole period of 1.5 years to one of 6 years, 4 months with a non-parole period of 4 years, 9 months (including a 10% discount for a guilty plea). In the context of a family provision settlement after the death of their adoptive father, the offender killed his brother in a dispute over the timing of the sale of the family home. The offender punched him several times about the head causing him to fall backwards to the floor and sustain acute intracranial bleeding from which he subsequently died.

7.19 The CCA noted that the offence occurred in the context of a domestic relationship and that “there is a strong need for this Court to provide guidance and governance for the

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29. *R v Loveridge* [2014] NSWCCA 120 [201]–[207].
30. *R v Loveridge* [2014] NSWCCA 120 [216].
31. *R v Wood* [2014] NSWCCA 184.
32. *R v Wood* [2014] NSWCCA 184 [87]–[90].
33. *R v Wood* [2014] NSWCCA 184 [101].
34. *R v Yardley* [2019] NSWCCA 291.

sentencing of persons who commit offences such as this in those circumstances".[35] The court observed that the offender's conduct was:

> constituted, quite simply, by wanton and repeated acts of violence perpetrated on someone who was essentially defenceless and who, to the [offender's] knowledge was in a fragile medical state. ... The characteristics which I have identified reflect offending of considerable seriousness, and of far greater gravity than the sentencing judge found.[36]

Our conclusion

7.20 We do not consider that there is sufficient evidence that sentencing for manslaughter is inadequate to justify a proposal for change. In particular, we note that inadequacy appeals in the CCA are ensuring that appropriate sentences are imposed and that principles are established for the courts to follow in future.

7.21 Further, the statistics outlined in the consultation paper show that sentences in other Australian jurisdictions are broadly consistent with the sentences for manslaughter in NSW.[37]

7.22 In not proposing change, we note that previous reviews that have considered options to move the sentencing range for manslaughter have similarly concluded that a change is neither feasible nor desirable given the diversity of scenarios that can constitute manslaughter.[38]

Rejected options for reform

7.23 In reaching our conclusion not to change the law in relation to sentencing for manslaughter, we considered a number of options that we raised in our Consultation Paper.

Increased penalties

7.24 In the consultation paper we noted there might be some scope to increase penalties in relation to manslaughter, which has a current maximum penalty of 25 years'

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35. *R v Yardley* [2019] NSWCCA 291 [71].
36. *R v Yardley* [2019] NSWCCA 291 [78].
37. NSW Sentencing Council, *Homicide*, Consultation Paper (2019) appendix C.
38. M D Finlay, Review of the Law of Manslaughter in New South Wales, Report (NSW Attorney General's Department, 2003) [6.1], [11.8]–[11.9]; NSW Sentencing Council, *Standard Non-Parole Periods,* Report (2013) [2.48].

imprisonment.[39] For example, in the Australian Capital Territory, the maximum penalty for manslaughter has been increased from 20 to 28 years' imprisonment where the victim was pregnant.[40] One submission supports increasing the maximum penalty to 30 years.[41]

7.25 A number of submissions, however, oppose increasing the maximum penalty for manslaughter generally.[42] Some note that:

- sentencing for manslaughter seems to be in line with that for other Australian jurisdictions[43]
- there is no evidence that current maximum penalty is inadequate[44]
- the difference between penalties for murder and manslaughter "reflects the difference in moral opprobrium for each offence",[45] and
- the current maximum penalty adequately acknowledges the seriousness of taking a human life.[46]

Standard non-parole period

7.26 The observations we outline above raise the question of whether a standard non-parole period would ever be appropriate for particular categories of manslaughter, let alone manslaughter generally.

7.27 Some submissions support this position.[47] One observes:

> There is no "middle of the range" for an offence which covers such diverse behaviour, and it is therefore not a useful exercise to compare cases which encompass such a wide range of culpability. It would be impossible to set an appropriate SNPP, or to apply any SNPP during sentencing."[48]

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39. NSW Sentencing Council, *Homicide*, Consultation Paper (2019) [6.4].
40. *Crimes Act 1900* (ACT) s 15, s 48A.
41. D Pezzano, *Submission MU16*, 30.
42. Legal Aid NSW, *Submission MU36*, 11.
43. Legal Aid NSW, *Submission MU36*, 11; NSW Bar Association, *Submission MU22*, [31].
44. Legal Aid NSW, *Submission MU36*, 11.
45. NSW Bar Association, *Submission MU22*, [47].
46. NSW Bar Association, *Submission MU22*, [48].
47. Legal Aid NSW, *Submission MU36*, 7; NSW Bar Association, *Submission MU22*, 6.
48. Legal Aid NSW, *Submission MU36*, 7.

7.28 One notes that this is especially given the fact that it is not possible to establish a hierarchy of seriousness for the types of manslaughter.[49]

Mandatory minimum

7.29 Some submissions oppose the option of having a mandatory minimum penalty, either generally or specifically in relation to manslaughter.[50]

7.30 We agree that a mandatory minimum penalty is inappropriate, especially in situations where there is such a broad range of offending, in particular where some cases may involve offenders who are themselves victims of severe abuse.

Special child homicide provisions

7.31 In the consultation paper we raised the particular issue of homicide sentencing where there are child victims. The statistics for child murder suggest that such cases tend to attract significantly longer sentences than many other cases of murder. This is perhaps due, at least in part, to the special standard non-parole period for child murder. On the other hand, even taking into account the wide range of culpability involved in different cases of manslaughter, it is possible that sentence lengths for child manslaughter may not adequately reflect the seriousness of these cases. This is especially so in light of the comments that courts have made about the seriousness of such offending in certain circumstances.[51] One submission agreed:

> the sentencing for the death of a child as manslaughter does not meet community expectations nor do sentences properly reflect the nature of these crimes and the defencelessness and vulnerability of the child victim.[52]

7.32 Other jurisdictions have expressed similar concerns about the sentencing patterns for child manslaughter. For example, the Queensland Sentencing Advisory Council found that sentencing patterns for such matters were inadequate, and did not reflect the unique and significant vulnerability of victims who are young children.[53] The Council noted that

> [w]hile the factual circumstances establishing manslaughter are diverse, [it] would have expected on average, sentences for offences committed against

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49. NSW Bar Association, *Submission MU22*, [30].
50. D Pezzano, *Submission MU16*, 13; NSW Bar Association, *Submission MU22* [49]–[50]; The Public Defenders, *Preliminary Submission PMU13*, 2; Australia's National Research Organisation for Women's Safety, *Submission MU35*, 4; Legal Aid NSW, *Submission MU36*, 11–12; Australian Lawyers for Human Rights, *Submission MU37* [1.3]–[1.5], [2.1]–[2.30].
51. NSW Sentencing Council, *Homicide*, Consultation Paper (2019) [5.45]–[5.50].
52. Bravehearts Foundation Ltd, *Submission MU5*, 2.
53. Queensland Sentencing Advisory Council, *Sentencing for Criminal Offences Arising from the Death of a Child*, Final Report (2018) 153.

> children to be higher than those committed against adults had their high level of vulnerability been accorded significant weight in sentencing.[54]

7.33 One submission does not support this view, pointing to the low number of cases and suggesting that conclusions cannot not be drawn, observing

> it would be concerning to base sentencing reform, particularly increasing the severity of sentences, on sentencing statistics gleaned from such a small sample. Lower sentences may simply reflect the fact that many of these cases involve tragic, complex circumstances, which courts must balance appropriately. In our view, there is no clear evidence of a pattern of inadequacy and, consequently, no increases to existing penalty provisions are warranted.[55]

7.34 A variety of options have been proposed to deal with this issue. In our view, none of them will have the effect of achieving a change in the sentencing levels for manslaughter in appropriate cases. Our preferred approach, as outlined above, is to rely on CCA guidance in cases where sentences for the manslaughter of children are found to be inadequate.

Special statements of principle

7.35 The Canadian *Criminal Code* requires a court, when sentencing for an offence involving child abuse, to give "primary consideration to the objectives of denunciation and deterrence of such conduct".[56] NSW could consider introducing a similar statement of principle.

7.36 However, we note that, when sentencing for the manslaughter of children, NSW courts already tend to emphasise retribution and deterrence.[57] Accordingly, such a statement might have a limited practical effect.

Special aggravating factors

7.37 In Queensland, the following aggravating factor was introduced into the *Penalties and Sentences Act 1992* (Qld) in 2019:

> In determining the appropriate sentence for an offender convicted of the manslaughter of a child under 12 years, the court must treat the child's

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54. Queensland Sentencing Advisory Council, *Sentencing for Criminal Offences Arising from the Death of a Child*, Final Report (2018) 153.
55. Legal Aid NSW, *Submission MU36*, 10.
56. *Criminal Code 1985* (Canada) s 718.01.
57. *R v Hoerler* [2004] NSWCCA 184 [42]; *R v BW (No 3)* [2009] NSWSC 1043 [181]; *R v Wilkinson* (Unreported, NSWSC, Wood CJ at CL, 9 April 1998) 21; *R v Howard* [2001] NSWCCA 309 [19]; *R v Howard* [2000] NSWSC 876 [35].

> defencelessness and vulnerability, having regard to the child's age, as an aggravating factor.[58]

7.38 This reflected a recommendation by the Queensland Sentencing Advisory Council in October 2018.[59] We note that The *Crimes (Sentencing Procedure) Act 1999* (NSW) ("*Crimes (Sentencing Procedure) Act*") includes an aggravating factor that "the victim was vulnerable, for example, because the victim was very young".[60]

A new offence

7.39 A specific child homicide offence was introduced in Victoria in 2008. The provision, since amended, now states:

> A person who, by his or her conduct, kills a child who is under the age of 6 years in circumstances that would constitute manslaughter is guilty of child homicide.[61]

7.40 The offence had a maximum penalty of 20 years' imprisonment (the same as that for manslaughter), but this was increased to 25 years' imprisonment in 2020 when Victoria also legislated to make maximum penalty for manslaughter 25 years in order to bring it into line with other parts of Australia.[62]

7.41 The offence was intended to encourage courts to impose sentences of imprisonment that were closer to 20 years than those typically imposed for manslaughter where a young child is the victim.[63] The new offence would focus on age and vulnerability as key elements, and allow the courts to develop a new approach to such offences, unconstrained by existing practices that apply for manslaughter.[64]

7.42 The Victorian offence was introduced in response to public dissatisfaction with some sentences imposed for the manslaughter of young children, and to comments by the Victorian Court of Appeal in a 2007 leniency appeal against a sentence imposed for the manslaughter of a 5 month old child. The Court said:

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58. *Penalties and Sentences Act 1992* (Qld) s 9(9B), inserted by *Criminal Code and Other Legislation Amendment Act 2019* (Qld) s 9.
59. Queensland Sentencing Advisory Council's *Sentencing for Criminal Offences Arising from the Death of a Child,* Final Report (2018) rec 1.
60. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(l).
61. *Crimes Act 1958* (Vic) s 5A, inserted by the *Crimes Amendment (Child Homicide) Act 2008* (Vic) s 3, amended by *Crimes Amendment (Manslaughter and Related Offences) Act 2020* (Vic) s 4.
62. *Crimes Amendment (Manslaughter and Related Offences) Act 2020* (Vic) s 4. See Victoria, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 6 February 2020, 181.
63. Victoria, *Parliamentary Debates*, Legislative Assembly, 6 December 2007, 4413.
64. Victoria, *Parliamentary Debates*, Legislative Assembly, 6 December 2007, 4413–4414. See also *DPP v Woodford* [2017] VSCA 312 [5]–[6]; *R v Hughes* [2015] VSC 312 [14]–[15].

> for a long time it has remained common for courts to impose sentences in cases of this kind in the order of something less than half the statutory maximum and thereby to create a situation in which current sentencing practices appear to ill accord with the requirements of just punishment and specific and general deterrence. It has resulted in sentences which fail to represent the seriousness of the individual circumstances of the cases that come before the court.[65]

7.43 In the 12 years since the offence was introduced, there have been six successful convictions. These convictions resulted in sentences of 8.5 to 9.5 years' imprisonment, with non-parole periods of 5.5 to 7 years.[66] In light of the small number of cases, it is impossible to form any view about whether the new offence has changed sentencing patterns. There is, therefore, insufficient evidence to suggest that introducing such an offence would change sentencing patterns in NSW.

Intensive correction orders

Recommendation 7.1

Section 67 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) should be amended to allow a court to impose an intensive correction order for the crime of manslaughter, in appropriate cases.

7.44 Recommendation 7.1, by removing manslaughter from the list of offences that may not be subject to an intensive correction order ("ICO"), is aimed at giving courts as broad a sentencing discretion as possible for manslaughter cases.

7.45 Currently, under s 67 of the *Crimes (Sentencing Procedure) Act*, ICOs are not available as a sentencing option for a number of serious offences, including manslaughter.[67] This arrangement has been productive of error in at least one case where the District Court recently imposed an ICO for manslaughter and had to reopen proceedings to correct the error.[68] Having determined that the appropriate sentence was 22 months, the Judge concluded that he could only direct that the sentence be served by full-time custody, but made a substantial finding of special circumstances imposing a non-parole period of 12 months.

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65. *DPP v Arney* [2007] VSCA 126 [15]. See also *DPP v Woodford* [2017] VSCA 312 [47].
66. *DPP v Woodford* [2017] VSC 108; *R v Hughes* [2015] VSC 312; *R v Rowe* [2018] VSC 490; *R v Vinaccia* [2019] VSC 683; *DPP v McDonald* [2020] VSC 845; *DPP v Staples* [2020] VSC 683.
67. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 67(1)(a).
68. *R v Toyer (No 2)* [2021] NSWDC 92 [6], [8].

7.46 Since the effective abolition of suspended sentences,[69] only lesser non-custodial penalties remain, such as community correction orders and conditional release orders, to deal with manslaughter cases at the lower end of the scale of criminality. This situation is anomalous.

7.47 Some submissions supported ICOs being available for less serious manslaughter cases.[70]

7.48 In making this recommendation with respect to manslaughter, we do not comment on any other offences that are excluded from ICOs that could, in appropriate cases, also be subject to an ICO.

Origin of the manslaughter exception

7.49 The manslaughter and other exceptions, which have applied to ICOs since the sentencing reforms of 2018 originally applied only in the case of home detention. Home detention was introduced as a sentencing option in 1996.[71] The intention of the original legislation was to exclude "immediately" any person who might "present a threat to the safety of the community" because of the seriousness of their offence.[72] It was also felt that imprisonment should be reserved for those whose crimes merited the "harshest of sanctions".[73] In addition to manslaughter, the original excluded offences included murder and attempted murder, certain sexual offences, offences involving firearms, instances of serious assault, stalking or intimidation and domestic violence against a co-resident.

7.50 In recommending the removal of these constraints on eligibility for home detention, in 1996,[74] the NSW Law Reform Commission highlighted the example of manslaughter which it said:

> covers a wide range of unlawful killing, with varying degrees of culpability. As a result, people convicted of manslaughter may receive sentences ranging from long terms of imprisonment to immediate release on a bond. There is arguably no reason automatically to exclude these offenders from home

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69. *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW) sch 1 [14].
70. Australian Lawyers for Human Rights, *Submission MU37* [8.16]; Legal Aid NSW, *Submission MU36*, 17; Women's Legal Service, *Submission MU34* [8.4]; NSW Bar Association, *Submission MU22* [81]; D Pezzano, *Submission MU16*, 23.
71. *Home Detention Act 1996* (NSW) s 6(a), repealed by *Crimes Legislation Amendment (Sentencing) Act 1999* (NSW) sch 1; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 76(a), repealed by *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW) sch 1 [30].
72. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 20 June 1996, 3385.
73. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 20 June 1996, 3385.
74. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) rec 36.

> detention when it is an appropriate sanction in the circumstances of their case.[75]

7.51 In recommending that the majority of home detention exclusions (including manslaughter) not be carried over into a reformed sentencing regime, the Law Reform Commission, in 2013, observed:

> Rigid exclusions that pay no regard to the objective circumstances of the case, or to the subjective circumstances of the offender, can operate to inappropriately limit the sentencing discretion that is important for a viable sentencing system.[76]

Non-custodial sentencing for manslaughter

7.52 Unlike murder, there are cases where a sentence that is not full-time imprisonment would be appropriate.

7.53 In the period 2008–2019, of the 318 cases where manslaughter was the most serious offence, 16 cases involved a sentence less than full-time imprisonment. The sentencing orders made are set out in Table 7.1.

Table 7.1: Sentences for manslaughter less than full-time imprisonment, 2008–2019

Penalty	Number
s 10(1)(a) dismissal	1
s 9 bond	3
Community correction order	1
Suspended sentence	8
Pre-reform intensive correction order	1
Periodic detention	2

Source: Judicial Commission of NSW, Judicial Information Research System.

7.54 This suggests a range of offending that can appropriately be subject to lesser penalties. One submission observes that such figures clearly show that courts require flexibility to respond to the variety of circumstances raised in manslaughter cases.[77] One

75. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [7.9].
76. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [9.41].
77. Legal Aid NSW, *Submission MU36*, 17.

submission particularly draws attention to manslaughter where a victim of domestic violence kills their abusive partner in the context of serious domestic violence.[78]

7.55 As the CCA noted in an appeal against the leniency of a sentence of periodic detention for manslaughter:

> There is no single correct sentence to be imposed in respect of a particular offence and sentencing judges have a broad sentencing discretion … particularly in relation to the offence of manslaughter. In my opinion, her Honour's findings and the sentence which she imposed were open to her in the circumstances of this case.[79]

Intensive correction orders compared with community correction orders

7.56 While the ICO shares some elements in common with the next most serious penalty (which is available for manslaughter) - the community correction order ("CCO") - they differ in important ways, with the ICO being the stricter penalty on the scale of available penalties both in terms of potential conditions and enforcement.

7.57 Both the ICO and the CCO have two standard conditions. The first for each is that the person not commit any offence. However, for the ICO, the second standard condition is that the person submit to supervision by a community corrections officers, while for the CCO, the second standard condition is that the person appear before the court if called on to do so at any time during the CCO's term. (A CCO may, however, have an additional condition that requires an offender to submit to supervision by a community corrections officer.)

7.58 Additional conditions may be added to each order, at the court's discretion. In the case of an ICO, the court must include at least one such additional condition, unless there are good reasons not to. In the case of a CCO, the court may impose one or more additional conditions.

7.59 Some possible additional conditions are common to each order. They include requirements:

- to participate in a rehabilitation program or receive treatment
- to abstain from alcohol or drugs or both
- not to associate with particular people, and
- not to go to a particular place or area.

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78. Women's Legal Service, *Submission MU34* [58].
79. *R v Irvine* [2008] NSWCCA 273 [33].

However, some possible additional conditions are stricter for ICOs. The curfew condition, which is available for an ICO, cannot exceed 12 hours a day for a CCO. Community service work cannot exceed 750 hours for an ICO, compared with 500 hours for a CCO.

7.60 The ICO has two additional conditions that may not be imposed for CCOs, namely, home detention and electronic monitoring.

7.61 In the area of enforcement, the State Parole Authority deals with more serious failures to comply with an ICO and, if the Authority revokes an ICO, the offender returns to custody and may potentially serve the balance of the sentence by full-time imprisonment. On the other hand, breaches of a CCO are referred back to the court which may resentence the offender.

7.62 There is no reason why the harsher conditions that are only available for ICOs and the stricter enforcement procedures should not be available for appropriate cases of manslaughter. In the recent case where the imposition of an ICO for manslaughter was corrected,[80] the Judge commented on the incongruity that a CCO was available yet the "more severe and onerous" ICO was not. When ordering that the sentence be served by full-time detention, he also observed that the offender in the case was "one of the more deserving" of an ICO that he had encountered since the sentencing reforms of 2018.[81]

80. See [7.45].

81. *R v Toyer (No 2)* [2021] NSWDC 92 [6], [8].

Appendix A: Submissions and preliminary submissions

Submissions

MU01 Dr Margaret Ann Hanlon, 9 January 2020

MU02 Georgina Frampton, 13 January 2020

MU03 Jane Harris, 14 January 2020

MU04 Jessica Carroll Smith, 14 January 2020

MU05 Bravehearts Foundation Ltd, 15 January 2020

MU06 Helen Sanderson, 18 January 2020

MU07 Dorothy Jones, 21 January 2020

MU08 Fighters Against Child Abuse Australia, 22 January 2020

MU09 Joyce Page, 24 January 2020

MU10 Robin Margo, 25 January 2020

MU11 Emilia Della Torre, 28 January 2020

MU12 Lisbeth Allen, 28 January 2020

MU13 Yvette Pritchard, 28 January 2020

MU14 Derrick Zabow, 29 January 2020

MU15 Rape and Domestic Violence Services Australia, 30 January 2020

MU16 Domenic Pezzano, 3 February 2020

MU17 Iris Ryall, 4 February 2020

MU18 Allan Miles, 5 February 2020

MU19 Diane Singer, 6 February 2020

MU20 Police Association of NSW, 6 February 2020

MU21 James Mohr, 7 February 2020

MU22 NSW Bar Association, 7 February 2020

MU23 Colin Hesse, 7 February 2020

MU24 Robert Wade, 7 February 2020

MU25 Julie Marshall, 7 February 2020

MU26 University of Newcastle Legal Centre, 7 February 2020

MU27 Carlotta McIntosh, 7 February 2020

MU28 Women's Safety NSW, 7 February 2020

MU29 Jane Quin, 7 February 2020

MU30 Eileen Culleton, 7 February 2020

MU31 Victims of Crime Assistance League, 10 February 2020

MU32 Judith McCallum, 7 February 2020

MU33 Domestic Violence NSW, 14 February 2020

MU34 Women's Legal Service NSW, 21 February 2020

MU35 Australia's National Research Organisation for Women's Safety, 24 February 2020

MU36 Legal Aid NSW, 28 February 2020

MU37 Australian Lawyers for Human Rights, 6 March 2020

MU38 Form letters on "no body, no parole"

MU39 Brenton Venables, 4 March 2020

MU40 Sharon Dunbier, 4 March 2020

MU41 Jacqueline Montague, 4 March 2020

MU42 Cody Angwin, 4 March 2020

MU43 Tammara Boyd, 4 March 2020

MU44 Diane Heffernan, 5 March 2020

MU45 Joyce Bradley, 5 March 2020

MU46 Aaron Humphreys, 5 March 2020

MU47 Margaret Lewis, 5 March 2020

MU48 Cheryl Hoskin, 5 March 2020

MU49 Judith Montague, 5 March 2020

MU50 Megan Hoskin, 6 March 2020

MU51 Lucy Shephard, 6 March 2020

MU52 Tara Grieve, 7 March 2020

MU53 Tess Knight, 15 March 2020

Preliminary submissions

PMU01 Rape and Domestic Violence Services Australia, 22 January 2019

PMU02 Amani Haydar, 8 February 2019

PMU03 Sex Workers Outreach Project, 6 March 2019

PMU04 NSW Department of Family and Community Services, 7 March 2019

PMU05 Women's Legal Service NSW, 7 March 2019

PMU06 NSW Bar Association, 7 March 2019

PMU07 Fighters Against Child Abuse Australia, 8 March 2019

PMU08 Domenic Pezzano, 8 March 2019

PMU09 L Findlay, J Stubbs, A Steel and L McNamara, 8 March 2019

PMU10 NSW Police Force and Office for Police, 8 March 2019

PMU11 University of Newcastle Legal Centre, 8 March 2019

PMU12 ANROWS, 8 March 2019

PMU13 Public Defenders, 9 March 2019

PMU14 Eileen Culleton, 10 March 2019

PMU15 Legal Aid NSW, 14 March 2019

PMU16 Domestic Violence NSW, 15 March 2019

PMU17 Dr Kate Fitz-Gibbon, Professor Jude McCulloch, Professor Jane Maree Maher, 15 March 2019

PMU18 Homicide Victims' Support Group, 28 March 2019

PMU19 Office of the Director of Public Prosecutions, 14 May 2019

Appendix B: Consultations

Victims' roundtable (CMU1)

5 February 2020

Ms Donna Anderson

Mr Warwick Anderson

Ms Trish Connolly (Domestic Violence NSW)

Ms Minouche Goubitz (Homicide Victims Support Group)

Mr Henry Johnston

Ms Tess Knight

Ms Vanessa MacDougall (Victims of Crime Assistance League)

Ms Rachael Martin (Wirringa Baiya Aboriginal Women's Legal Centre)

Ms Liz Snell (Women's Legal Service)

Ms Charmaigne Weldon (Wirringa Baiya Aboriginal Women's Legal Centre)

Ms Belinda Baker (CMU2)

14 April 2020

Ms Belinda Baker, Crown Prosecutor, ODPP

Ms Janet Manuell SC (CMU3)

18 May 2020

Ms Janet Manuell SC, Public Defenders