



Victims Of Crime Assistance League Inc NSW



NSW Sentencing Council

Submission:

Review of sentencing for the offences of murder and manslaughter.

January 2020

Victims of Crime Assistance League Inc NSW
(VOCAL)



Victims of Crime Assistance League (VOCAL) Inc. NSW is an incorporated Charity organisation that supports men, women and children who are victim-survivors of any crime type across the state of NSW. For the past 30 years we have provided information, guidance and support to individuals and families who have been impacted by crime. We also act in a consultative capacity to State and Federal governments on matters pertaining to victims' rights. VOCAL welcomes the opportunity to provide feedback to the NSW Sentencing Council for the review of sentencing for the offences of murder and manslaughter.

VOCAL's Victim Support Unit receives funding from NSW Department of Communities and Justice (Victims Services) to provide a free service to victims of crime in the Hunter region. The Unit consists of five victim support specialists who tailor trauma informed support to the individual needs of each client.

Homicide families unexpectedly undergo permanent changes to their family unit that elicit significant and strong emotions including complicated grief, loss, anger and anxiety. When the matter reaches the criminal justice system, trauma reactions are intensified, and when charges or legal outcomes minimise culpability there can be a sense of betrayal by the criminal justice system. We see the ongoing impact on the victims' families, continuing well after the legal system has dealt with the criminal matter. Our staff provide trauma informed care and support to homicide families and see the incredible emotional, physical, social and financial impact that murder and unlawful deaths has on family victims.

For the wider community, the ripple effect of homicide often leads to overwhelming feelings of unrest, mistrust, ongoing security issues and personal safety concerns. It can bring people together, or shatter relationships. The children of homicide will never be the same and face difficulties throughout their life. The community expects the criminal justice system to adequately and fairly punish a person who takes the life of another. This is a complex issue as each homicide is different in nature. For families, what they have known and experienced may be very different from the evidence in a court case.

Sentences for murder

The maximum, non-mandatory, sentence for murder in NSW is life imprisonment, with 'life' meaning 'for the term of the person's natural life'¹. However, a life sentence is often reserved as a maximum sentence only for the most serious offences, and the threshold set out in s 61(1) *Crimes (Sentencing Procedure) Act 1999* NSW articulates that the court is to sentence an offender to life imprisonment 'if 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'². The legal systems processes of categorising and comparing vicious and violent crimes is incompatible with the trauma being repeatedly suffered by homicide families.

In many jurisdictions across Australia, including Queensland, Northern Territory, Western Australia and South Australia, the crime of murder has attracted a mandatory, rather than a discretionary, life sentence³. VOCAL understands that mandatory sentences exclude and restrict the operation of judicial discretion and prevent the court from being able to give proper consideration to the individual circumstances of the case. We also acknowledge that mandatory sentences for murder can discourage early guilty pleas, and subject the victims' family to enter the criminal justice system.

If, however, NSW was to adopt mandatory life sentences for convictions of murder, VOCAL recommends that a non-parole period be assigned to the life sentence. This is to try and find a balance between accommodating for possible offender rehabilitation and ensuring community safety. As with

¹ Crimes Act 1900 (NSW) s19A(2).

² Crimes (Sentencing Procedure) Act 1999 s61(1).

³ Potas, I. (1989). *Life Imprisonment in Australia*. Trends and Issues in crime and criminal justice. Australian Institute of Criminology. ISSN 0817-8542.

all parole matters, after serving the mandatory non parole period an offender's release on parole is not guaranteed. If parole is granted, the offender is subjected to ongoing monitoring and supervision while in the community. In Queensland, for example, an offender who has received a life sentence and is granted parole after serving the mandatory non-parole period will remain on parole for the rest of their life. Parole can be revoked at any time if reoffending occurs, and monitoring can help ensure community safety.

Consecutive sentences

In cases where there is more than one homicide victim we strongly advocate for consecutive sentences, rather than sentences being carried out concurrently. For a horrific crime such as a double homicide, the sentence should be - at a minimum - partially cumulative, so that the total sentence reflects the separate criminality of the two offences must be factor at sentencing. Inconsistencies in sentencing are difficult for the community to understand, for example, in *R v Filippou*,⁴ the offender received a sentence of 31 years with 25 non-parole for 2 counts of murder. In 2018, Justice Davies sentenced an offender to 36 years with 27 years non-parole for one count of murder.

We are aware there is support for concurrent sentences to avoid 'crushing' the offender, as articulated by the court in *R v MAK*⁵;

'an extremely long total sentence may be "crushing" upon the offender in the sense that it will induce a feeling of hopelessness and destroy any expectation of a useful life after release'.

Inconsistencies within the legal system make it difficult to instil public confidence in sentencing for homicide and we witness that concurrent sentences fail to acknowledge the harm done to the victim and their families. The harm to victims' families not only includes the shock death of a loved one, but extends to the traumatic experience of the criminal justice system as well as complicated grief that is exacerbated at events including the anniversary of death, birthdays, family events and Christmas. In addition, ongoing harm occurs every time the media revisits the cases due to appeals, parole, or breaches of parole. More must be done to recognise and acknowledge the life-long trauma suffered by family members of homicide. The rights of the offender in sentencing is still given more weight than the rights of a victim, and recognising the ongoing harm to families and the wider community.

Domestic violence homicide

Domestic violence is rarely a one off incident, but rather a pattern of ongoing, abusive behaviour that can include physical, sexual, psychological, verbal, financial, social, cultural and legal abuse. NSW legislation sends a clear message to the community that domestic violence is unacceptable, yet in practice, system responses are disjointed and often leave vulnerable victims with no protection and offenders with little accountability. 'It is important that these laws are properly and efficiently enforced, not only to guarantee victims' safety but also to make sure public condemnation of this behaviour remains clear and strong'.⁶

Statistics in the consultation paper indicate that domestic violence homicides are given lesser sentences compared to non-domestic related homicides. With violence against women and children at a national crisis level, we believe that more can be done by the judicial system to instil public faith that domestic violence, particularly homicides, will be treated seriously. The homicide victim is not at fault and it is our view that victim blaming must stop, and the significant betrayal of the victim by the perpetrator must be factored into judicial and legal reckoning.

⁴ *R v Filippou* [2011] NSWSC 1379

⁵ *R v MAK* (2006) 167 cited Judicial Commission of New South Wales (2019) *Sentencing Bench Book*.

⁶ NSW Attorney General & Justice. (2012). *The NSW Domestic Violence Justice Strategy. Improving the NSW Criminal Justice System's Response to Domestic Violence, 2013-2017*.

Research on the social and legal attitudes towards family violence, shows that assaults on family members are routinely viewed as considerably less serious than assaults on strangers⁷. While sentencing and judicial remarks continue to minimise intimate partner homicide the community will remain dissatisfied and reluctant to address the realities of domestic violence. The value of life for a victim spouse (more often a woman who was killed by a man) may be interpreted as of less worth than that of a male victim. For families of domestic violence homicide victims, to hear sentencing remarks victim blaming or diminishing the perpetrators actions is offensive and shows a limited understanding, or a deliberate misrepresentation, of the complexities of domestic violence.

Domestic violence and Aggravating factors

In Australia, on average, one women per week is killed by her current or former partner⁸. Domestic violence is one of the most complex of crime types, and the impact on victims, their children and families can have devastating physical and psychological health impacts. VOCAL recommends that aggravating factors in s21A(2)⁹ be amended to include domestic and family related factors.

When attempting to leave an abusive relationship, victims are faced with a high number of complexities and challenges, and systems that are often ill-equipped and uncoordinated. The State systems response to a victim of domestic violence still needs significant improvement. It is well researched that the most dangerous time for a victim is after she ends an intimate relationship, however simultaneous police and legal responses are often inadequate and turn victims away with no protection orders. Several factors have been identified to predict when abusers may use lethal violence, which include a sense of ownership, centrality of the partner, risk taking behaviours, threats of homicide or suicide, the use of weapons, drugs or alcohol and anti-social behaviour¹⁰. It is common for several types of psychologically abusive behaviours (including stalking and death threats) to occur simultaneously and in the absence of physical assault, and because these behaviours are difficult to prove within the legal system, many domestic violence victims are left unsupported and unprotected by local authorities and their perpetrators escape criminal convictions. We note S21A(2)(eb) and S21A(2)(1)¹¹ and believe that consideration should be given to widening aggravating factors to capture the complexities of domestic violence homicides.

Domestic violence context evidence

Research from the Australian Institute of Health and Welfare 2019 indicates that 82% of women who have experienced physical or sexual violence from a current partner never contacted police.¹² In our experience victims are reluctant to report ongoing violence to police due to ongoing safety risks, fear of retaliation, the social judgements denigrating women, victim blaming and fear for the children of the relationship. Taking legal action against some abusers simply increases the risk. Many women prefer the help of support services to attempt to manage safety and risk, and such services are under resourced to cope with demand.

We recommend that social framework evidence is considered, allowing for previous family violence reports and risk assessment to provide context in domestic violence homicide cases. VOCAL believes understanding the context is essential in cases where the primary victim of intimate partner violence kills the primary abuser, and we stress that any reforms made to sentencing laws allow for special

⁷ Featherstone, L & Kaladelfos, A. (2018). *Man who burnt his wife alive gets at least 27 years' jail, but not life – as victim was no stranger*. The Conversation Media Group.

⁸ Our Watch (2020) *Facts and Figures*. <https://www.ourwatch.org.au/Understanding-Violence/Facts-and-figures>

⁹ Crimes (Sentencing Procedure) Act 1999

¹⁰ Geberth, V. (1998). *Domestic Violence Homicides*. Law and Order Magazine, 1998. Vol 46. No. 122. Practical Homicide Investigation.

¹¹ Crimes (Sentencing Procedure) Act 1999

¹² Australian Institute of Health and Welfare. (2019) *Family, domestic and sexual violence in Australia: continuing the national story 2019 – I brief*. Cat. No. FDV 4. Canberra: AIHW.

consideration for exceptional cases. We maintain that gendered issues and the ongoing, repeated trauma victims suffer in domestic violence relationships need to be carefully considered when the primary victim kills the primary abuser. We recommend a special category be considered for these types of cases.

Language

Judges play a significant role in denouncing violent behaviour, and the media are quick to circulate Judge's remarks that can fuel emotions. It is disheartening that language used in trials and sentencing remarks include 'describing domestic violence as a "loss of control", that an offender "lost his temper" or "snapped" or that he was motivated by "jealousy" or "anger" when he killed the victim¹³. This type of language indicates a belief that victims must have done something to provoke the offender to murder, diminishing the offender's accountability and eliminating that offender's choice. It sends a message that the victim was somehow responsible for their own death, because she did not comply with his will. The law for far too long has privileged the use of lethal male violence against women in response to threats to male honour and masculinity¹⁴. In reality, domestic violence is not a crime of losing of control; it is a crime based around the ultimate control of another person and this must be understood by sentencing Judges to ensure sentencing remarks are appropriate and respectful.

We strongly advocate that sentencing remarks should reflect the seriousness of the crime, without reference to excuses such as offenders "snapping" or "loss of temper" and that jealousy and anger are not mitigating factors. In matters of intimate partner homicide, murder does not occur in a vacuum; the complexities of intimate partner violence should be recognised with appropriate trauma informed language, referencing coercive control, controlling behaviour, entitlement and a violation of trust as well as recognising the victim's vulnerability in the situation. Victim blaming language in all homicide matters should be avoided.

Family members of homicide victims do not want to be compared to other cases. Their experience is unique and a family homicide often the worst thing they will ever experience. Sentencing remarks should acknowledge their trauma experience, and the fact that they may have found understanding the legal processes difficult to accept. Emphasis needs to be placed on explaining in court (and therefore on transcript) that in order to set a sentence that is fair and consistent to other homicides of similar circumstances, there is a legal requirement to consider many different factors.

In our experience the amount of information families take in at the time of sentencing can be limited due to hyper-arousal, trauma and grief. While the DPP may try to explain and answer questions of family members after court is dismissed, we assist many families with their continual struggle to remember, understand and comprehend what was said at sentencing, as well as the legal language. Court transcripts are important to many homicide families, and validating remarks from a sentencing Judge can provide comfort to family members.

In reality, the offender chose to use violence which resulted in the death of a person. The devastating outcome for the victim's family must be recognised and acknowledged in a more appropriate way at the time of sentencing.

¹³ Buxton-Namisnyk, E. & Butler, A. (2017). *What's language got to do with it? Learning from discourse, language and stereotyping in domestic violence homicide cases*. Judicial Officers' Bulletin. Judicial Commission NSW. Volume 29 No. 6.

¹⁴Fitz-Gibbon, K. (2017) *Homicide Law Reform in NSW: Examining the merits of the partial defence of 'extreme' provocation*. *MelbULawRW* 10; (2017) 40(3) Melbourne University Law Review 769.

Particular categories of murder victims

The standard non parole period in NSW for murder is 20 years and this is increased to 25 years in circumstances where the victim was a police officer, 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.

VOCAL requests that consideration be given to include intimate partner homicide victims into the special provisions category due to the vulnerability of victims, the power imbalance and the gendered nature of domestic violence. One study found in interviews with men who have killed their wives that either threats of separation by their partner or actual separations were most of the precipitating events that lead to the murder¹⁵. We witness the vulnerability that is increased when there is a breach of trust within the family unit and its effect on community.

Victim Impact Statements

VOCAL Inc. NSW participated in the 2018 review of victims' involvement in sentencing and we welcome the additional focus that is being placed on this issue. The issues outlined in the consultation paper indicate that there remains uncertainty and inconsistency with how the courts respond to victim impact statements.

Our experience with victim impact statements in homicide matters is consistent with working with victims of other crime types, being that most people value the opportunity to provide information to the court on how the crime has impacted different aspects of their lives. Many family members feel a sense of advocacy on behalf of the deceased, and this has been said to be a driving factor for them to submit a victim impact statement. One mother stated "My daughter doesn't have a voice now. I must be her voice". Considering trauma reactions, grief, loss and the emotional impact created by the criminal justice system, writing, submitting and reading victim impact is a highly emotional experience. We recommend that further consideration be given to whether there can be evidentiary weight given to victim impact statements.

Conclusion

VOCAL supports men, women and children whose lives have been impacted by violent crimes and we witness the ongoing impact homicide has on family members and the community. We see that any changes to sentencing legislation for homicide matters is complex and will require continual monitoring and reviewing. VOCAL thanks the NSW Sentencing Council for the opportunity to participate in this review.



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¹⁵Tjaden, P & Thoennes, N. (2000) *Extent, Nature and consequences of intimate partner violence*. Office of Justice Programs National Institute of Justice. United States Department of Justice.

References

Australian Institute of Health and Welfare. (2019) *Family, domestic and sexual violence in Australia: continuing the national story 2019 – 1 brief*. Cat. No. FDV 4. Canberra: AIHW.

Buxton-Namisnyk, E. & Butler, A. (2017). *What's language got to do with it? Learning from discourse, language and stereotyping in domestic violence homicide cases*. Judicial Officers' Bulletin. Judicial Commission NSW. Volume 29 No. 6.

Crimes Act 1900 (NSW) s19A(2).

Crimes (Sentencing Procedure) Act 1999 s61(1).

Featherstone, L & Kaladelfos, A. (2018). *Man who burnt his wife alive gets at least 27 years' jail, but not life – as victim was no stranger*. The Conversation Media Group.

Fitz-Gibbon, K. (2017) *Homicide Law Reform in NSW: Examining the merits of the partial defence of 'extreme' provocation*. MelbULawRW 10; (2017) 40(3) Melbourne University Law Review 769.

Geberth, V. (1998). *Domestic Violence Homicides*. Law and Order Magazine, 1998. Vol 46. No. 122. Practical Homicide Investigation.

Potas, I. (1989). *Life Imprisonment in Australia*. Trends and Issues in crime and criminal justice. Australian Institute of Criminology. ISSN 0817-8542.

R v Filippou [2011] NSWSC 1379

R v MAK (2006) 167 cited Judicial Commission of New South Wales (2019) *Sentencing Bench Book*.

NSW Attorney General & Justice. (2012). *The NSW Domestic Violence Justice Strategy. Improving the NSW Criminal Justice System's Response to Domestic Violence, 2013-2017*.

Our Watch (2020) *Facts and Figures*. <https://www.ourwatch.org.au/Understanding-Violence/Facts-and-figures>

Tjaden, P & Thoennes, N. (2000) *Extent, Nature and consequences of intimate partner violence*. Office of Justice Programs National Institute of Justice. United States Department of Justice.