

Homicide

Legal Aid NSW submission to the NSW Sentencing Council

28 February 2020

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Legal Aid 
NEW SOUTH WALES

About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

Legal Aid NSW provides state-wide criminal law services through the in-house Criminal Law Division and private practitioners. The Criminal Law Division services cover the full range of criminal matters before the Local Courts, District

Court, Supreme Court of NSW and the Court of Criminal Appeal as well as the High Court of Australia.

The Legal Aid NSW Domestic Violence Unit (DVU) is a specialist unit helping clients who have experienced domestic and family violence with both their legal and non-legal needs. The DVU is made up of specialist lawyers and social workers who connect with clients at crisis point. The DVU provides legal advice and representation in a range of areas including: apprehended domestic violence orders, family law, care and protection, housing, social security, credit/ debt problems, victims' support, financial assistance matters and criminal law.

Legal Aid NSW welcomes the opportunity to make a submission to the Council's review of sentencing for homicide offences. Should you require any further information, please contact:

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Introduction

We welcome the opportunity to make a further submission to the NSW Sentencing Council's (the Council) review of sentencing for murder and manslaughter, in response to the Homicide Consultation Paper (the consultation paper).

In our preliminary submission to the review,¹ Legal Aid NSW noted our concerns about increases to standard non-parole periods, and our general view that there was already sufficient scope for sentencing the wide range of conduct encompassed by murder and manslaughter offences. We maintain that position, except to say that we support the introduction of parole on life sentences, a reform that has been recommended by both the Council and the NSW Law Reform Commission.²

The sentencing patterns discussed in chapter one of the consultation paper reveal that there is no inadequacy to be remedied in terms of sentencing patterns for homicide in NSW. Head sentences and non-parole periods for murder are longer than comparable jurisdictions and have increased over recent years. Our sentencing framework is effective in ensuring that penalties for these offences recognise the gravity of murder and manslaughter, while taking into account the individual circumstances of each case. As such, we consider that there is no basis on which to argue for significant change to either sentencing principles or available penalties.

Reforms based on community perceptions of leniency, as opposed to actual evidence of inadequate sentences, fail to consider the impact of education and information on community perceptions about sentencing. There is now ample research to show that community members are *more lenient* than sentencing judges once they are informed about the circumstances of the case.³ For this reason, we strongly support the establishment by the Council of education initiatives such as the Victorian Sentencing Advisory Council's 'Virtual You be the Judge' program. This campaign is also accompanied by downloadable resource packages that can be used by classroom teachers to encourage critical thinking about media reports on sentencing.

Our responses to the specific questions outlined in the consultation paper are set out below.

¹ Legal Aid NSW, *Review of sentencing for murder and manslaughter: Preliminary submission* (preliminary submission number PMU15), 13 March 2019.

² NSW Sentencing Council, *High-Risk Violent Offenders* (2012); NSW Law Reform Commission, *Sentencing*, Report 139 (2013).

³ Sentencing Advisory Council of Victoria, *Public Opinion about Sentencing: A Research Overview* (2018).

Consultation questions

3.1 Life sentences for murder

- (1) Are the existing principles that relate to imposing life sentences for murder appropriate? Why or why not?
(2) If not, what should change?

The current principles relating to the imposition of a life sentence for murder provide adequate and appropriate scope for courts to reflect the circumstances of the offence and of the offender. The exception to this is s 54 of the *Crimes (Sentencing Procedure) Act 1999 (the CSPA)*, which prevents the setting of a non-parole period for a life sentence and which we discuss further below.

In response to the issues raised in the consultation paper, Legal Aid NSW's general position is to support an instinctive synthesis approach to sentencing. This approach has been confirmed as the correct way for courts to determine a sentence, and means that the court identifies:

*all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case.*⁴

In keeping with this approach, we oppose legislative amendments that fetter discretion and interfere with the ability of sentencing courts to properly reflect the very wide range of circumstances in which homicides occur.

Section 61 of the CSPA, which provides for mandatory life sentences in certain cases, preserves the court's discretion to impose less than a life sentence when this is appropriate. We strongly support the retention of discretion in s 61, and as we stated in our preliminary submission, we would oppose any moves to expand the scope of the provision.

In relation to de facto life sentences, we suggest that no legislative clarity is required. Case law has properly recognised the fundamental principle of reflecting the seriousness of the offence, and the common law should be permitted to continue to respond to these cases as they arise.

In response to question 3.1, sentencing principles in relation to imposing life sentences for murder should remain as they are now, but non-parole periods for life sentences should be introduced, as discussed below.

⁴ *Markarian v The Queen* [2005] HCA 25.

3.2 Particular categories of murder victim

- (1) Are the existing principles and provisions that relate to sentencing for the killing of particular categories of victim appropriate? Why or why not?
- (2) If not, what should change?

We acknowledge the particular risks associated with certain occupations, and the need for sentences to reflect the seriousness of harm done to police officers in the course of their duties. However, the current structure of penalties for the murder of police officers is problematic.

Section 21A(2)(a) of the CSPA appropriately recognises that an offence is aggravated when it is committed against a police officer, emergency services worker, or other specified category of victim, if the offence arose because of the victim's occupation or work. Further, the higher standard non-parole period (**SNPP**) for the murder of certain categories of victim sets a guidepost that reflects the added seriousness of these cases.

These provisions recognise the additional risk involved in certain occupations, without changing the maximum penalty or the sentencing framework that applies in such cases. In contrast, s 19B of the *Crimes Act 1900* (NSW) (**Crimes Act**) creates an alternative mandatory sentencing framework for the murder of a police officer.

A separate sentencing framework for a particular category of victim sends a concerning message about the value of human life, in this case implying that the life of a police officer is inherently more valuable than that of other victims. In addition, the existence of mandatory life sentences creates a disincentive to plead guilty, leading to lengthier and more complex proceedings. This is not a sound trade-off, when other provisions already recognise the seriousness of this kind of offending.

We do not dispute the need to reflect the particular seriousness attached to the murder of public officials, however, s 21A of the CSPA and the guidepost of a higher SNPP already provide adequate mechanisms for doing so. We strongly oppose any expansion to s 19B of the Crimes Act, and we support the repeal of the provision on the basis that the equal value of all human life should be reflected by a single sentencing framework for murder. The appropriate penalty in each case will depend on whether the general criteria for a life sentence are met, as well as the outcome of a process of instinctive synthesis.

In relation to other categories of victim, our view is that there is already adequate scope to reflect the seriousness of conduct against vulnerable victims, and that no additional categories are required. For the reasons set out above, we oppose any additional penalties or mandatory sentencing schemes attaching to particular categories of victims. Victims should not be implicitly 'ranked' in importance by creating separate penalty regimes. Instead, particular harm done to specific categories of victims should continue to be considered as an aggravating factor as part of an instinctive synthesis approach.

3.3 *Victim impact statements*

- (1) Do the current provisions relating to victim impact statements in sentencing for homicide appropriately recognise the harms caused by murder and manslaughter? Why or why not?
- (2) If not, what should change?

In 2018 the Council gave in-depth consideration to the role of victims in sentencing and determined that the use of a victim impact statement was a matter that should continue to be guided by the common law, rather than legislative mandate.⁵ The current consultation paper has included consideration of victim impact statements because the 2018 review was not specifically directed towards homicide victims. However, that review did consider the broad experience of victims in all proceedings and received submissions specifically from homicide victim support groups.

We suggest that there is no sound reason to revisit the findings of that review, and that the common law should be allowed to continue to develop guidelines on the appropriate use of victim impact statements. It would be undesirable and unwieldy to create a separate legislative regime for homicide victims. In our view, such a scheme could also raise complications and unjust outcomes. For example, if it were mandated that all victim impact statements were to be taken into account in determining the appropriate sentence:

- a murder might result in different sentences based solely on whether the victim had a loving family to make a statement
- the families of multiple homicide victims may have very different views about sentencing, and the court would be required to balance these views
- the victim impact statement may contain information that is inconsistent with the facts found in the verdict, which would present a particular risk for fact-finders who must ensure there is a proper evidentiary basis for factors taken into account on sentencing.

3.4 *Factors going to objective seriousness*

- (1) Are the existing factors considered relevant to the objective seriousness of an offence of murder or manslaughter appropriate? Why or why not?
- (2) If not, what should change?
- (3) Should any other factors be taken into account when assessing the objective seriousness of a particular murder or manslaughter offence?

The consultation paper discusses a range of common law factors that are relevant to the assessment of objective seriousness. There is no evidence that courts are erring in applying these factors, and it is appropriate that the common law be left to develop factors that are appropriate to each individual case. We oppose further legislative factors relevant to assessing objective seriousness on the basis that they are unnecessary, and would limit the discretion of sentencing courts.

⁵ NSW Sentencing Council, *Victims' Involvement in Sentencing* (2018) p 42.

In relation to the disclosure of the location of a body, s 135 of the *Crimes (Administration of Sentences) Act 1999* provides that the State Parole Authority must have regard to whether an offender has failed to disclose the location of a victim's body. We would oppose any changes that would mandate more stringent application of that provision. There can be legitimate limits to an inmate's knowledge of the location of remains. For example, there may be a co-accused who was involved in the disposal of the body, a person may maintain their innocence, or they may have significant mental health issues which prevent them from being able to provide useful information about location. It would be unjust if the State Parole Authority was prevented from releasing a prisoner on parole in circumstances such as these.

3.5 Sentencing for manslaughter

- (1) Are existing laws and principles that apply to sentencing for manslaughter appropriate for dealing with the range of circumstances that can give rise to a conviction for manslaughter? Why or why not?
- (2) If not, what should change?

The statistics set out in chapters one and two of the consultation paper indicate that courts are appropriately exercising discretion in manslaughter cases. The use of supervised bonds and suspended sentences in a number of cases reflects the breadth of conduct covered by the offence.

We support the continued exclusion of manslaughter from the SNPP scheme. 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.

In response to the issues raised in chapter 6 below, we discuss the need for intensive correction orders to be made available for manslaughter offences.

4.1 Sentencing for DV related homicide

- (1) Are the sentences imposed for homicide in the context of domestic or family violence adequate? Why or why not?
- (2) What changes, if any, should be made to penalty provisions that relate to homicide in the context of domestic or family violence?
- (3) Are the current sentencing principles relating to sentencing for domestic violence homicides appropriate? Why or why not?
- (4) How could the current sentencing principles relating to sentencing for domestic violence homicides be changed?
- (5) Should additional aggravating factors be legislated? Why or why not?
- (6) What changes, if any, should be made to the law to allow domestic violence context evidence to be admitted to sentencing proceedings?
- (7) What changes, if any, should be made to bench books to assist courts in sentencing for domestic violence related homicide?

In relation to domestic or family violence homicide not involving intimate partners, the statistics indicate that sentences are comparable to other categories of homicide and are adequate.

It is difficult to say whether the sentences that are imposed for intimate partner homicide are adequate or not. We agree that any clear indication of a systemic tendency by courts to impose lesser sentences for intimate partner murders than other homicides would be cause for concern. However, the relatively low number of cases in this category (17 cases over three years) makes it difficult to draw concrete conclusions about sentencing patterns. The statistics in the consultation paper indicate that, between 2015 and 2018, the mean head sentence and non-parole period was slightly lower for intimate partner homicide than for other homicides. However, this conclusion is drawn from 17 cases over three years, and does not include cases sentenced after the 2018 sentencing reforms. Further, the distinction is based on the mean, which is more sensitive to outliers, particularly with a small number of cases—lower sentences may have been appropriate in the circumstances of some of these cases, but their effect in this small sample is to pull down the mean. In these circumstances, it would seem more appropriate to consider the median head sentence and non-parole period, which are on par with those imposed for other murders.

The Council has not provided detailed information in relation to the 17 cases in question and it is not possible to consider the adequacy of sentences imposed in the absence of this analysis.

Changes to penalty provisions should be based on unambiguous evidence demonstrating a need for reform. In our view, while sentencing trends should be closely monitored to ensure intimate partner homicides attract appropriate penalties, at this time the data presented in the consultation paper does not provide a sufficient evidence base for changes to penalty provisions.

We suggest that the Council should, on a regular basis, undertake a detailed review of sentences imposed for intimate partner homicide, as part of its statutory obligation to review sentencing trends and practices. This review should consider not only sentencing statistics, but also an in-depth analysis of cases, such as that carried out by the Domestic Violence Death Review Team. If changes to the Sentencing Bench Book and judicial training are implemented, these reviews would also provide an opportunity to gauge changes in language used in sentencing remarks, and consider whether and to what extent courts are appropriately recognising the dynamics of domestic and family violence when considering issues such as the good character of the defendant.

Current sentencing principles for domestic violence homicides are generally appropriate. In line with existing practice, we consider it appropriate that courts continue to consider whether the offender was a primary victim of domestic and family violence perpetrated by the deceased.

In general, we do not support the addition of factors to s 21A of the CSPA. The provision causes significant confusion, risks double counting of factors, and encourages a checklist approach to sentencing. Notwithstanding these concerns, it may be useful to amend s 21A(2)(j) so that it also refers to offences committed in breach of an ADVO. The amendment would require careful drafting to ensure that it does not go beyond codifying the existing common law, and to avoid double counting where the breach is separately charged.

We do not think there should be specific changes to allow context evidence to be admitted. The common law already provides for such evidence to be considered in sentencing.⁶ It is clear that ‘course of conduct’ provisions in the ACT and the Commonwealth have created confusion and there are significant complexities around giving legislative recognition to patterns of behaviour. Changes that are intended to better capture the dynamics of domestic and family violence may have the unintended consequence of 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.

We agree with the consultation paper that there are issues with the way that domestic violence is referred to in some sentencing remarks, and this can cause considerable distress for victims and the community. Research has found that language describing domestic violence as a “loss of control” persists, and that courts often accept and replicate offender explanations for their conduct which minimise personal responsibility.⁷

Remarks on sentence are an opportunity to denounce domestic and family violence and challenge cultural attitudes about why domestic violence homicides occur. We support changes to the Sentencing Bench Book to better reflect the nature and dynamics of domestic and family violence, to ensure that courts consider the context of this type of offending when sentencing. Additional content could draw from case law, domestic and family violence specialist services, existing Judicial Commission research on sentencing remarks and the National Domestic and Family Violence Bench Book. Amendments should include reference to the underreporting of domestic and family violence and the fact that this is commonly a result of coercion by the offender. We also support additional training on domestic and family violence for participants in the criminal justice system, including judicial officers.

We are also supportive of other non-legislative reforms, such as those suggested by the Domestic Violence Death Review Team in its 2015-2017 Report, which address the underlying structural and cultural issues that contribute to domestic violence homicide. For example, it would also be worthwhile to develop a guide for the media to improve reporting

⁶ See, for example, *R v Villaluna* [2017] NSWSC 1390

⁷ E Buxton-Namisnyk and A Butler, “What’s Language Got to Do with it? Learning from Discourse, Language and Stereotyping in Domestic Violence Homicide Cases” (2017) 29 *Judicial Officers’ Bulletin* 49.

around domestic and family violence homicides, and to improve the language used in the criminal justice system to describe domestic and family violence.

5.1 Sentencing for child homicide

- (1) Are the sentences imposed for the killing of children adequate? Why or why not?
- (2) What changes, if any, should be made to penalty provisions that relate to the killing of children?
- (3) Are the current sentencing principles relating to sentencing for the murder or manslaughter of children appropriate? Why or why not?
- (4) How could the current sentencing principles relating to sentencing for the murder or manslaughter of children be changed?
- (5) What other changes could be made to the law to deal more appropriately with cases involving the murder or manslaughter of a child?

Sentences imposed for the killing of children appear to be adequate. In relation to murder, sentences are higher than in cases involving a non-child victim. In relation to sentences for manslaughter, again, caution should be exercised before concluding that any inadequacy exists. The statistics outlined in the consultation paper are based on nine cases. The courts have recognised the inherent difficulties in deducing sentencing patterns from past cases due to the breadth of culpability covered.⁸ Given this acknowledged difficulty, 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.

We note that the consultation paper raises a number of child neglect offences without putting forward a specific proposal for comment. Criminal neglect offences raise concerns about the criminalisation of vulnerable women experiencing chronic disadvantage. Child neglect is often closely linked to family violence and victims of violence may struggle to be effective parents.⁹ Any new offences would require specific detailed consideration and Legal Aid NSW would welcome further consultation if the Council is considering recommending the introduction of such offences.

Existing sentencing principles relating to murder or manslaughter of children are appropriate and should not be changed. Aggravating factors in NSW already reflect the vulnerable position of children, and the relationship of trust with parents and carers.

We note that life sentences for child murder are imposed more commonly in Victoria, where non-parole periods may be set on life sentences. If reform to increase sentences for child homicide is desired, the Victorian experience suggests that introducing parole periods on life sentences in NSW may be effective in achieving this objective. The NSW

⁸ *R v Woodland* [2001] NSWSC 416; *R v Hoerler* [2004] NSWCCA 184.

⁹ Australian Law Reform Commission, *Family Violence—A National Legal Response*, Report 114, [20.8].

Law Reform Commission's 2013 report on Sentencing suggested that the introduction of parole on life sentences may have the result of increasing the use of life sentences by the courts.¹⁰

If any changes are recommended as part of this review, it is essential that they distinguish between adult and juvenile offenders who commit child homicide. Different considerations apply when dealing with child homicides by juvenile offenders, and care should be taken to reflect this in any recommendations.

In our view, an additional statement under s 3A of the CSPA relating specifically to the purposes of sentencing in child homicide cases is not required. However, if the Council concludes that additional guidance is required in relation to aggravating and mitigating factors, we would support changes to the Sentencing Bench Book to provide this guidance. In addition, we would support guidance on sentencing cases of child neglect resulting in death.

6.1 *Maximum penalty for manslaughter*

(1) What changes, if any, should be made to the maximum penalty provisions that relate to manslaughter?

Legal Aid NSW submits that there should be no changes to the maximum penalty for manslaughter. The statistics provided in chapter 2 of the consultation paper indicate that sentences for manslaughter are not approaching the maximum available penalty. For an increase in the maximum penalty to be warranted, in our view there should be evidence that courts are regularly imposing sentences at the top of the range, indicating that they may have imposed a higher sentence if one was available. This is not the case here. Further, there is no indication that a higher maximum penalty is required as a 'guidepost'. Sentences imposed for manslaughter are in line with those imposed in other states and territories,¹¹ with no indication that courts in NSW are being lenient or failing to properly recognise the circumstances of individual cases when sentencing. As such, we consider that the existing maximum penalty provides adequate scope for courts to impose appropriate sentences.

6.2 *Mandatory minimum penalties*

(1) For what types of homicide, if any, should mandatory minimum penalties be introduced?
(2) What should the duration of any mandatory minimum penalties be?

We strongly oppose mandatory minimum penalties for any offence. The significantly impinge on judicial discretion and the principle of individualised justice. When considering mandatory minimum penalties in the context of federal offences, the Australian Law

¹⁰ NSW Law Reform Commission, *Sentencing*, Report 139 (2013), [8.34].

¹¹ Consultation paper, chapter 1.

Reform Commission recommended amendments to ‘ensure that no mandatory minimum term of imprisonment is prescribed’, noting that:

*Prescribing mandatory terms of imprisonment ... is generally incompatible with sound practice and principle in this area. Mandatory sentencing has the potential to offend against the principles of proportionality, parsimony and individualised justice. In particular, the ALRC considers that the judiciary should retain its traditional sentencing discretion to enable justice to be done in individual cases.*¹²

Mandatory minimum penalties have been canvassed a number of times by the Council,¹³ and the arguments against such penalties have been clearly articulated by the Law Council of Australia in its 2014 discussion paper on mandatory minimum sentences. In summary, mandatory penalties:

- can result in unjust and disproportionate sentences
- do not demonstrably deter crime
- potentially increase recidivism
- do not have regard to rehabilitation prospects or risk of reoffending
- undermine community confidence in the criminal justice system
- displace discretion from the courts to law enforcement and prosecutors
- increase economic costs to the community, and
- are inconsistent with Australia’s international obligations.¹⁴

6.3 Mandatory life imprisonment

- (1) Should a sentence of mandatory life imprisonment apply to any other categories of murder? If yes, which ones?
- (2) What changes, if any, should be made to the existing provisions relating to mandatory life imprisonment for the murder of a police officer?

For the reasons set out in response to question 3.2 above, we do not support the existing mandatory penalty in s 19B of the Crimes Act. Our response to question 6.2 provides reasons for our strong opposition to any additional mandatory penalties.

In its 2012 report on High Risk Violent Offenders, the Council considered whether there should be any extension to the availability of life sentences. It recommended against any expansion, finding that:

*widening the category of offences for which a life sentence should be available (whether with or without the capacity to specify a NPP) could result in [an] unintended and inappropriate increase in sentencing.*¹⁵

¹² Australian Law Reform Commission, *Same Crime, Same Time*, Report 103 (2006), [21.63].

¹³ For example, NSW Sentencing Council, *Alcohol and Drug Fueled Violence*, Final Report (2015); NSW Sentencing Council, *Repeat Traffic Offenders*, Consultation Paper (2018); NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in NSW*, Final Report, Volume 3 (2009).

¹⁴ Law Council of Australia, *Mandatory Sentencing Discussion Paper* (2014).

¹⁵ NSW Sentencing Council, *High-Risk Violent Offenders* (2012), p 153.

6.4 Discretionary life imprisonment with a non-parole period.

(1) Should it be possible (without removing the possibility of a life sentence without parole) to impose a life sentence with a non-parole period? Why or why not?

We strongly support the introduction of non-parole periods to life sentences. This reform would bring NSW into line with other jurisdictions and would implement long-standing recommendations of both the Council and the NSW Law Reform Commission.¹⁶

There are a number of benefits to introducing parole on life sentences. First, the introduction of parole periods would considerably mitigate the human rights concerns raised by the existing life sentence regime in NSW. Second, it would provide courts with greater flexibility when dealing with the most serious cases of homicide, where the rehabilitative prospects of the offender are unknown at the time of sentencing. As suggested by the NSW Law Reform Commission,¹⁷ this may increase the use of life sentences, which has the further benefit of addressing any community concerns about the adequacy of sentencing in serious cases. This proposition seems to be borne out by sentencing statistics in Victoria, discussed above.

For prisoners with no prospect of parole, there is little incentive to engage with rehabilitation. In our experience, this can result in reduced compliance with correctional centre rules and even security breaches such as distribution of prohibited goods by offenders who feel like they have nothing to lose. As such, another reason to introduce parole on life sentences is that it would promote rehabilitation and good behaviour in custody, and potentially increase prison security.

Finally, if the use of life sentences increased as predicted by the NSW Law Reform Commission, more serious offenders would be subject to lifetime parole. The use of lifetime parole would provide a sounder footing for ongoing supervision of serious offenders than the existing high-risk offender scheme. Offenders who continue to pose a high risk at the end of their parole period would not be released. Those who were released would be monitored under the parole system. In both cases, ongoing detention and supervision would be in line with the sentence imposed by the court, rather than further orders after the expiry of a sentence.

If parole is introduced on life sentences, we submit that the non-parole period should be left open for the courts to determine. Minimum, maximum or standard non-parole periods would impinge on the court's discretion, and are unnecessary in circumstances where the availability of a life sentence already provides an unambiguous guidepost as to the seriousness with which the legislature views the offence.

¹⁶ NSW Sentencing Council, *High-Risk Violent Offenders* (2012); NSW Law Reform Commission, *Sentencing*, Report 139 (2013).

¹⁷ NSW Law Reform Commission, *Sentencing*, Report 139 (2013).

6.5 *Mandatory life imprisonment with a non-parole period.*

(1) Should there be a mandatory sentence of life imprisonment for murder with a minimum non-parole period? Why or why not?

We strongly oppose mandatory sentences and minimum non-parole periods for the reasons outlined above. Further, the reasons provided in the consultation paper (that the proposal would allow full assessment of an offender before they are released and would prevent people from being released without attempting rehabilitation) are already a feature of our parole system. These objectives would be equally as well served by providing courts with full discretion as to the parole period imposed, and relying on the existing processes of the Serious Offenders Review Council and the State Parole Authority to fully consider issues surrounding release at the time that parole is considered.

The basis for introducing parole on life sentences would be to increase the discretion available to courts when dealing with serious cases. Shifting to mandatory sentences or minimum non-parole periods undermines this intention, and would create additional limitations on courts trying to impose appropriate sentences.

6.6 *Existing standard non-parole periods*

(1) Should murder offences continue to attract a standard non-parole period? Why or why not?
(2) Should the existing standard non-parole periods for murder be changed? Why or why not?
(3) If yes, what should they be?

Legal Aid NSW has consistently raised concerns with the SNPP scheme. Although there has been some clarification in the wake of the decision in *Muldrock v The Queen*,¹⁸ the scheme still creates unnecessary confusion, and there continue to be issues with the transparency and consistency involved in the setting of SNPPs.

Although it predated the decision in *Muldrock*, the court in *R v Apps* discussed some of the difficulties in applying the SNPP for murder:

The crime of murder has a wide variation in the states of mind which must accompany the act which caused the death of the deceased. That particular state of mind is directly relevant to the determination of the objective seriousness of the crime charged, in that it is related to the commission of the crime itself ... Significantly, none of the various standard non-parole periods specified in the Table for the various forms of aggravated crimes relate to the state of mind with which the offender commits the crime. That fact leads me to the conclusion that, for murder, the standard non-parole period relates to a crime in the middle of seriousness relating to all the various states of mind which may constitute that crime. The Legislature could not have intended that a sentencing judge impose the same standard non-parole period for a murder involving an intent to kill as one without any such intent but during the commission by an accomplice of the accused of

¹⁸ [2011] HCA 39

*a crime punishable by imprisonment for life or for twenty-five years (Crimes Act 1900, s 18).*¹⁹

As stated above, the maximum penalty for murder offences already serves as a clear yardstick, leaving little work for the SNPP, particularly following the amendments subsequent to *Muldrock*.²⁰ As such, we support the removal of murder from the SNPP scheme. However, if murder is retained in the scheme, we oppose any increase to the SNPP, as no strong arguments supporting an increase have been provided in the consultation paper. The Council considered SNPPs in relation to offences attracting a maximum penalty of life imprisonment in its 2013 report on SNPPs, and found that existing SNPPs were appropriate.²¹

6.7 New standard non-parole periods

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| (1) Should any new standard non-parole periods be introduced for murder? Why or why not?
(2) If yes, what should they be and in what circumstances should they operate? |
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We oppose any new SNPPs for the reasons outlined above. Where SNPPs are established, this should be done in accordance with the clear principles established by the Council in its 2013 report on SNPPs.²² The consultation paper does not establish any clear basis for introducing new SNPPs for murder.

Question 6.8: Concurrent serious offences

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| (3) What new provisions, if any, should apply where a homicide offender has committed one or more additional serious offences |
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New provisions are strongly opposed by Legal Aid NSW. The common law should be allowed to develop and respond to individual cases as required. The case examples in the consultation paper demonstrate that courts already carefully consider how additional serious offences should be dealt with in sentencing. The suggested options of mandatory minimum non-parole periods, mandatory life sentences and mandatory cumulation of sentences all undermine the court's discretion and raise serious concerns in relation to interference with the institutional integrity of courts. These approaches offend the principle of individualised justice, which greatly increases the risk of perverse sentencing outcomes.

Question 6.9: Redetermining natural life sentences

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| (4) In what circumstances, if any, would it be appropriate to have a scheme of judicial redetermination of natural life sentences for murder |
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We support the ability to redetermine existing life sentences for the same reasons as we support introduction of a non-parole period on life sentences. At a minimum, the scheme

¹⁹ *R v Apps* [2006] NSWCCA 290.

²⁰ *Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Act 2013*.

²¹ NSW Sentencing Council, *Standard Non-Parole Periods* (2013), p 43.

²² NSW Sentencing Council, *Standard Non-Parole Periods* (2013), recommendation 2.1.

should allow for a non-parole period to be set on existing life sentences that do not come within the existing redetermination scheme.

We acknowledge the difficulty for families in retrospective application of such a scheme. Some options to recognise these concerns may include providing a minimum period that should apply before a redetermination application can be made, and providing that the outcome of redetermination is to set a non-parole period, rather than to reduce the head sentence. However, even with such provisions, extended periods of ‘life means life’ political discourse in NSW, mean that families would have high expectations in terms of maintenance of life sentences and would require substantial support to understand and participate in the redetermination process. It would also be helpful to offer support and education to families at the time of sentencing, so that they fully understand parole and/or redetermination processes.

Any redetermination process would require clear triggers for the offering of therapeutic programs in custody so that offenders have had an opportunity to participate in programs before applying for redetermination.

Introduction of a redetermination scheme should not replace the ability to set a non-parole period when imposing a life sentence.

6.10 Managing high risk offenders

(5) What provision, if any, should be made for the management of high-risk offenders in relation to murder or manslaughter?

In our view, no further provision should be made for the management of high-risk offenders. The Sentencing Council’s 2012 report on high risk violent offenders canvassed the option of indefinite detention and provided clear reasons for preferring a post-custody management scheme. It is unclear why the proposal is now being revisited when an extensive system for managing high-risk offenders has already been established.

The UK experience with indefinite sentences of Imprisonment for Public Protection (**IPPs**) is instructive. IPPs were imposed on large numbers of offenders, who ended up being detained for longer than their non-parole period due to a lack of available intervention programs in overcrowded prisons. After only seven years, IPPs were abandoned because the system proved to be ‘indefensible’.²³

The objectives of encouraging participation in rehabilitation activities is already met by s 25C of the *Crimes (High Risk Offenders) Act 2006*, which requires that offenders be warned about the prospect of post-custody management. Encouraging rehabilitation for those sentenced to life imprisonment would be better achieved by introducing the prospect of parole.

²³ Jacqueline Beard, *Briefing Paper: Sentences of Imprisonment for Public Protection*, House of Commons (UK) Paper No 6086 (2019).

6.11 Alternatives to prison for manslaughter

(6) What alternatives to imprisonment should be available for manslaughter offenders?

We strongly support the availability of intensive correction orders for manslaughter offences. As discussed, manslaughter encompasses a very broad range of behaviour and culpability. The consultation paper notes that between 2015 and 2018, there were two manslaughter cases where a suspended sentence was imposed, and two where a supervised bond was imposed. It is clear from this that courts require flexibility to respond to the range of circumstances raised by manslaughter cases.

In our view there is no sound basis for excluding manslaughter from Part 5 of the CSPA, and these orders should properly be available to courts in manslaughter cases.
