

# **Centre for Women's Justice (CWJ) submission to Sentencing Council consultation on Miscellaneous Amendments to Sentencing Guidelines**

**30 November 2023**

## **Introduction**

Centre for Women's Justice (CWJ) is a lawyer-led charity focused on challenging failings and discrimination against women in the criminal justice system. We carry out strategic litigation and work with frontline women's sector organisations to challenge police and prosecution failings to tackle violence against women and girls (VAWG). As such we have gathered evidence which provides the basis for our recommendations for changes to sentencing guidelines to help ensure fair treatment of victims<sup>1</sup> of VAWG who are convicted of offences. We welcome the opportunity to make this submission, which only covers matters in which CWJ has relevant expertise.

Nearly 60% of women in prison and under community supervision in England and Wales are victims of domestic abuse.<sup>2</sup> Through our legal advice and casework service, we regularly receive referrals from women facing prosecution for a wide range of alleged offending resulting from their experience of domestic abuse and other forms of VAWG and exploitation.

Over the past thirty years CWJ's director, Harriet Wistrich, has been at the forefront of challenging convictions of women who have killed their abusive partner while subject to coercive control and other forms of domestic abuse. In 2021, CWJ published a major piece of research considering the barriers to justice for women who kill their abuser.<sup>3</sup> Our 2022 Double Standard report sets out how women's offending more broadly is often directly linked to their own experience of domestic abuse, and how victims can be unfairly criminalised in a wide variety of ways.<sup>4</sup> Our submission to the Sentencing Council consultation on sentencing for perverting the course of justice and witness intimidation summarised background evidence in this area.<sup>5</sup>

### **Question 1: What is your name?**

Katy Swaine Williams

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<sup>1</sup> We use the term 'victim' as that is the term used by most criminal justice and other official agencies, however the term 'survivor' is preferred by women's sector organisations.

<sup>2</sup> [Ministry of Justice \(2018\) Female Offender Strategy](#)

<sup>3</sup> [Centre for Women's Justice \(2021\) Women who kill: how the state criminalises women we might otherwise be burying](#)

<sup>4</sup> [Centre for Women's Justice \(2022\) Double Standard: ending the unjust criminalization of victims of VAWG](#)

<sup>5</sup> [Centre for Women's Justice \(2022\) CWJ submission to Sentencing Council consultation on Perverting the Course of Justice and Witness Intimidation Guidelines](#)

**Question 2: What is your email address?**

k.swilliams@centreforwomensjustice.org.uk

**Question 3: Are you answering as an individual? If so, are you happy for your name to be included in the consultation response document?**

I am answering on behalf of an organisation.

**Question 4: If you are answering on behalf of an organisation, group or bench, please provide the name of the organisation, group or bench**

Centre for Women's Justice

**Breach of a protective order guideline**

**Question 8: Do you agree with the proposed addition of breach of a stalking prevention order and (once it is in force) breach of a domestic abuse prevention order to the breach of a protective order guideline? If not, please provide any alternative suggestions.**

Yes, we agree.

**Mitigating factors and expanded explanations**

**Question 11: Do you agree with the proposed changes to the expanded explanation for the mitigating factor of remorse? If not, please provide any alternative suggestions.**

For some defendants, including women facing criminal proceedings who have been victims of domestic abuse and other forms of gender-based violence, the impact of trauma is likely to be relevant at every stage of proceedings. It is likely to inform her interaction with police at the scene of the alleged offence; following arrest and during any detention. It will affect her relationship with her defence lawyer and her ability to disclose the full circumstances surrounding her alleged offence. It will affect the defendant's ability to participate in court proceedings, including giving her best evidence. It is therefore important to guard against popular misconceptions about the impact of trauma and how victims 'should' behave, which may colour decision-making by magistrates, judges and juries. These matters are explored in detail in CWJ's research on women who kill their abuser.<sup>6</sup>

For all these reasons, it is essential that sentencers have a good understanding of the impact of trauma and can use this to inform their sentencing decisions and the management of proceedings, such as ensuring safeguards are in place to enable defendants to give their best evidence and allowing expert evidence to combat common myths and stereotypes that could lead to a misinterpretation of the defendant's behaviour at the time of the offence and during proceedings.

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<sup>6</sup> [Centre for Women's Justice \(2021\) Women who kill: how the state criminalises women we might otherwise be burying](#)

Women who have experienced trauma may have a range of responses, including disassociation. This can lead to women coming across as 'flat' or 'cold' when giving evidence, which can be interpreted as callousness or lack of remorse. As one lawyer told us:<sup>7</sup>

*She did not come across well in the witness box...she did not show a lot of emotion. [She] came across as a bit cold.*

This arose in media commentary on the case of Penelope Jackson, who was convicted in 2021 of murdering her husband. She had stabbed him to death and pleaded guilty to manslaughter due to loss of control following years of alleged abuse by the deceased. Jackson's apparently callous behaviour in the immediate aftermath of the offence, and apparent lack of remorse during the trial, was widely reported in the media. Lawyers acting for Ms Jackson on appeal highlighted how the widely publicised video of her response immediately after the killing had a major impact on the case, but Court of Appeal rejected this as a ground of appeal. Such behaviour may have been explicable by trauma/dissociation.

**Question 14: Do you agree with the proposed change to the age and/or lack of maturity factor? If not, please provide any alternative suggestions**

We agree with this change subject to the following comments.

It is important to ensure sentencers use an intersectional approach when considering age and maturity, giving proper consideration to gender and race and the different factors that can be relevant for young women and girls and for Black, minoritised and migrant young people, including Black, minoritised and migrant young women and girls. This must include consideration of the impact of care experience and how this intersects with gender, race and migrant status.

Young women and girls in contact with the criminal justice system are highly likely to be victims of abuse but face barriers to disclosure, as explained by Saba, aged 27:<sup>8</sup>

*If we do talk about it, who do we go to? Who will believe us? No one understood it. But just because we don't talk about what we go through, it doesn't mean that we're not struggling.*

63% of girls and young women (16–24) serving sentences in the community have experienced rape or domestic abuse in an intimate partner relationship.<sup>9</sup> Care-experienced young women may be more vulnerable and less likely to access support.<sup>10</sup> Stigma and devaluation can play a significant role in the criminalisation of young women on the margins

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<sup>7</sup> Ibid, p.45

<sup>8</sup> [Agenda and Alliance for Youth Justice \(2021\) 'I wanted to be heard': Young women in the criminal justice system at risk of violence, abuse and exploitation](#)

<sup>9</sup> [Wong, K. et al. \(2017\) T2A Final Process Evaluation Report, Policy Evaluation Research Unit](#)

<sup>10</sup> [Agenda and Alliance for Youth Justice \(2021\) Falling through the gaps: young women transitioning to the adult justice system](#); see also: [Agenda Alliance \(2023\) A Call To Action: Developing Gender Sensitive Support for Criminalised Young Women](#)

and the impact of this on their transition to adulthood.<sup>11</sup> Young migrant women may face additional barriers to accessing support, due to insecure immigration status which inhibits them from reporting abuse or seeking help due to fears of immigration control, as well as limits on their access to welfare support and services (such as No Recourse to Public Funds).<sup>12</sup> Agenda calls for a trauma-responsive response to young women and girls in contact with the criminal justice system, whose needs have historically been overlooked.<sup>13</sup>

Recent research confirmed that care-experienced children are disproportionately likely to have youth justice involvement compared to those without care experience, with some groups of 'ethnic minority' children being even more likely to have youth justice involvement. A significantly higher proportion of care-experienced children in this study received a custodial sentence compared to non-care-experienced children.<sup>14</sup> Custodial sentences were twice as common among Black and 'mixed ethnicity' care-experienced children compared to white care-experienced children.

The over-representation of care-experienced children in the criminal justice system particularly affects girls: care-experienced girls are more likely to receive both non-custodial and custodial sentences than girls without care experience, with the rates of immediate custodial sentences being 25 times higher for girls who have spent time in care.<sup>15</sup>

**Question 15: Do you agree with the proposed new mitigating factor and associated expanded explanation: Difficult and/or deprived background or personal circumstances? If not, please provide any alternative suggestions.**

We agree with the proposed change subject to the comments set out in response to question 14 above and as follows.

When considering the defendant's background circumstances or prospects of, or being in, work or education, it is essential for sentencers to take an intersectional approach which recognises the particular factors experienced by women and girls and how this can intersect with race and migrant status.

Women and girls in contact with the criminal justice system are highly likely to be victims of domestic abuse and other forms of violence against women and girls (VAWG). There is overwhelming evidence that many women are unfairly swept into the criminal justice system as a direct result of their experience of domestic abuse and other forms of VAWG. This is due to a lack of effective defences and the failure of criminal justice agencies to identify

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<sup>11</sup> [Sharpe, G. \(2023\) Women, Stigma and Desistance from Crime: Precarious Identities in the Transition to Adulthood](#)

<sup>12</sup> See for example: [Centre for Women's Justice & Imkaan \(2023\) Life or death? Preventing domestic homicides and suicides of Black and minoritised women; Hibiscus Initiatives \(2023\) Race, migration, criminalisation and mental health: The gendered experiences of Black, minoritised and migrant women in contact with the criminal justice system supported by Hibiscus Initiatives](#)

<sup>13</sup> [Goodfellow, P. \(2019\) Outnumbered, locked up and overlooked? The use of penal custody for girls in England and Wales](#)

<sup>14</sup> [Hunter, K. et al \(2023\) Policy Briefing – Care Experience, Ethnicity and Youth Justice Involvement: Key Trends and Policy Implications](#)

<sup>15</sup> [ONS, 2022](#), cited in [Staines, J. et al \(2023\) 'We need to tackle their well being first': understanding and supporting care-experienced girls in the youth justice system](#)

victims and take proper account of the context of abuse in which alleged offending may have occurred.<sup>16</sup>

There is a strong similarity between victims of domestic abuse who find themselves accused of offending as a consequence of their abuse, and victims of human trafficking and modern slavery who are compelled to commit offences as part of, or as a result of, their exploitation. VAWG can frequently be closely intertwined with modern slavery. Yet victims of VAWG who are not trafficking victims do not have a statutory defence when they are compelled to commit offences in very similar circumstances. And whereas householders defending themselves against an intruder are permitted by law to use disproportionate force provided this was reasonable in the circumstances as they genuinely believe them to be, no such latitude is allowed to domestic abuse victims defending themselves against their abuser.

The links between domestic abuse and women's offending are recognised in the Government's Female Offender Strategy (FOS, 2018)<sup>17</sup> and FOS Delivery Plan (2023)<sup>18</sup> but this has not yet translated into a strategic approach to ensuring the public interest is served in these cases, so that victims receive support, are diverted away from the criminal justice system where appropriate and, if prosecuted, have proper account taken of their experience of abuse. Key facts include the following:

- As well as being victims of VAWG and exploitation, the majority of women in contact with the criminal justice system are experiencing multiple disadvantage including mental health needs, harmful substance use and poverty.<sup>19</sup>
- Women are three times more likely to be arrested than their male partners at a domestic abuse incident involving counter-allegations, often where they have used force to protect themselves from further harm from their abuser.<sup>20</sup>
- 63% of girls and young women (16–24) serving sentences in the community have experienced rape or domestic abuse in an intimate partner relationship.<sup>21</sup>
- Of 173 women screened at HMP Drake Hall, 64% reported a history indicative of brain injury and for most this was caused by domestic violence.<sup>22</sup>

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<sup>16</sup> [Centre for Women's Justice \(2022\) Double Standard: ending the unjust criminalisation of victims of violence against women and girls](#)

<sup>17</sup> [Ministry of Justice \(2018\) Female Offender Strategy](#)

<sup>18</sup> [Ministry of Justice \(2023\) Female Offender Strategy Delivery Plan 2022 to 2025](#)

<sup>19</sup> [Ministry of Justice \(2018\) Female Offender Strategy; Home Office \(2007\) The Corston Report: A Report by Baroness Jean Corston of a Review of Women with Particular Vulnerabilities in the Criminal Justice System](#)

<sup>20</sup> [Hester, M. \(2012\) Portrayal of Women as Intimate Partner Domestic Violence Perpetrators](#). Professor Hester studied the following three sample groups: (1) All women recorded by the police as sole domestic violence perpetrator in a heterosexual relationship (N=32); (2) a random sample of sole male perpetrators; and (3) a random sample involving 32 cases where both partners were recorded at some time as perpetrator. These different sets of cases were then compared to assess differences and similarities in the rate of arrest where allegations were made. Analysis showed that an arrest was three times more likely to follow where the allegations were made against a woman, than where they were made against a man.

<sup>21</sup> [Wong, K. et al. \(2017\) T2A Final Process Evaluation Report, Policy Evaluation Research Unit](#)

<sup>22</sup> [The Disabilities Trust \(2019\) Making the link: Female offending and brain injury](#)

- More than half of arrests of women for alleged violence result in no further action<sup>23</sup>, highlighting the need for the police to respond to incidents of alleged violence in a gender-informed way.
- Women are more likely than men to commit an offence to support someone else's drug use (48% to 22%).<sup>24</sup>
- Some women are coerced into offending by abusive partners or face malicious allegations, as abusers use the criminal justice system as a way of extending control over their victim.<sup>25</sup>

Black, Asian, minoritised and migrant women face additional barriers to justice, with evidence of unequal treatment and outcomes throughout the criminal justice process.<sup>26</sup> These women may experience additional barriers to disclosing abuse and accessing support, and systemic racism from criminal justice agencies.<sup>27</sup> This is partly due to a lack of cultural competency as agencies fail to respond appropriately to evidence of abuse, misinterpret women's behaviour, and fail to ensure women are able to understand and participate fully in proceedings against them.<sup>28</sup> As one probation practitioner taking part in CWJ's research explained:<sup>29</sup>

*Women from 'ethnic minorities' don't speak up because they don't think they can get help... They don't have faith in the system.*

Women and girls from 'minority ethnic' groups are overrepresented at every stage of the criminal justice system.<sup>30</sup> Black women are twice as likely as white women to be arrested.<sup>31</sup> A

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<sup>23</sup> Five police forces responding to a Freedom of Information request by the Howard League provided data on 317 arrests of women for alleged violent incidents. More than half of the arrests for alleged violence (163) resulted in no further action or release without charge.

<sup>24</sup> [Light, M. et al \(2013\) Gender differences in substance misuse and mental health amongst prisoners](#)

<sup>25</sup> [Centre for Women's Justice \(2022\) Double Standard: ending the unjust criminalisation of victims of violence against women and girls](#)

<sup>26</sup> [Centre for Women's Justice \(2022\) Double Standard: ending the unjust criminalisation of victims of violence against women and girls, pp. 26 et seq.](#) See also: [Tackling Double Disadvantage \(2023\) 'One Year On' Progress Report; Centre for Women's Justice and Tackling Double Disadvantage Partnership \(2023\) Westminster Hall debate to be held on 5 July: That this House has considered the criminalisation of victims of violence against women from ethnic minority and migrant communities – Briefing for MPs; Hibiscus Initiatives \(2023\) Race, migration, criminalisation and mental health: The gendered experiences of Black, minoritised and migrant women in contact with the criminal justice system supported by Hibiscus Initiatives](#)

<sup>27</sup> [Tackling Double Disadvantage \(2023\) 'One Year On' Progress Report](#)

<sup>28</sup> [Centre for Women's Justice \(2022\) Double Standard: ending the unjust criminalisation of victims of violence against women and girls, pp.26 et seq](#)

<sup>29</sup> [Centre for Women's Justice \(2022\) No Safe Space: lessons for national policy and local practice from the West Midlands multi-agency response to women involved in offending or alleged offending who are victims of domestic abuse, p.31](#)

<sup>30</sup> [Ministry of Justice \(2022\) Women and the criminal justice system 2021](#)

<sup>31</sup> [Gov.uk \(2022\) Ethnicity facts and figures: arrests, para.7 'By ethnicity and sex'](#)



quarter of girls and nearly a fifth of young women prosecuted in 2021 were from 'minority ethnic'<sup>32</sup> groups.<sup>33</sup>

Given the significant disparities in experience outlined above, in relation to gender, race and migrant status and the intersection between those characteristics, it is essential for sentencers to be guided as to the particular factors that may arise for women and girls, including Black, Asian, minoritised and migrant women and girls.

**Question 16: Do you agree with the proposed new mitigating factor and associated expanded explanation: Prospects of or in work, training or education? If not, please provide any alternative suggestions.**

We agree with this change subject to the comments set out in response to questions 14 and 15 above.

**Question 17: Do you agree with the proposed new mitigating factor and expanded explanation relating to pregnancy? If not, please provide any alternative suggestions.**

We support the submissions made by Birth Companions and Level Up in relation to these proposals. In summary, we agree with the inclusion of a specific mitigating factor and expanded explanation on pregnancy, childbirth and postnatal care, but we refer you to the proposed revisions and further proposals put forward by [Birth Companions](#) and [Level Up](#), including the need to:

- Include evidence on risk
- Recognise problems with access to healthcare in general, including mental health provision (not only specialised midwifery care)
- Specify that 'postnatal care' (referred to in the title) should refer to the 24 months after the end of a pregnancy, given the clearly evidenced risks in the year after birth from conditions such as sepsis, thrombosis and thromboembolism, and the rate of deaths due to drug and alcohol use or suicide.
- Ensure the inclusion of postnatal care is reflected in the expanded explanation, which currently focuses only on pregnancy. This is a major oversight given the risks to the physical and mental health of women in the postnatal period, and the impact of separation from a child during the critical 'first 1001 days'; the period from conception to a child's second birthday.
- Change the word 'child' to 'baby/infant' throughout, to reflect the specific vulnerabilities associated with this period.
- Add further guidance to ensure mitigation relevant to pregnancy, birth and the postnatal period is applied in cases over the custody threshold, as well as those 'on the cusp', including where there is a mandatory minimum sentence.

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<sup>32</sup> CWJ aims to use language that challenges and does not contribute to racist ideas, actions and policies. CWJ uses the terms 'Black, Asian and minoritised women' and aims to be more specific where possible. When referring to data collected by others using different terminology, the author uses that terminology in quotation marks in order to ensure accuracy.

<sup>33</sup> [Ministry of Justice \(2022\) Women and the criminal justice system 2021](#)

We welcome the proposal announced by the Sentencing Council on 29 November for stronger guidance to discourage custodial sentencing for pregnant women.

## **Manslaughter**

**Question 18: Do you agree with adding the proposed aggravating factor relating to strangulation, suffocation or asphyxiation to the manslaughter guidelines? If not, please provide any alternative suggestions.**

Yes, we agree.

### **Strangulation as a gendered form of killing**

As noted in the Wade review, strangulation is a gendered form of killing, a method used almost exclusively by men towards women or sometimes towards men. It is conduct which encapsulates the vulnerability of the victim. It is also a very intimate form of killing as, certainly where manual strangulation is used, it is performed close up.

From our own observations there are two main circumstances in which this gendered form of killing arises. The first is in domestic homicides where there is usually a history of coercive and controlling behaviour by the offender towards the victim. In such cases, this is often non-fatal strangulation as a method of control to warn victims about how easy it would be to kill them if they stepped out of line. In the second type of case, strangulation may be used as a form of sadism or to enhance sexual pleasure and may take place both in existing relationships as well as in other forms of femicide.

CWJ were instrumental in bringing about the amendment that became s.70 Domestic Abuse Act 2021, which introduced the new standalone offence of non-fatal strangulation. We also supported the amendment introduced following a campaign by a sister organisation, 'We Can't Consent to This', which became s.71 Domestic Abuse Act, essentially codifying the law around consent to serious harm for sexual gratification. The latter amendment arises in some strangulation cases as well as other so-called "rough sex" cases which result in death. In order to assist campaigning to achieve these reforms we have produced evidence and helped to improve understanding of the nature of strangulation, and now sit on the expert advisory group of the Institute for Addressing Strangulation.

### **Case example: Anthony Williams**

In two recent manslaughter cases involving strangulation, CWJ were concerned with the relatively lenient sentences handed down. The first concerned the sentencing of 70 year old Anthony Williams who strangled and killed his wife Ruth in March 2020. He was cleared of murder by a jury, having pleaded to manslaughter by reason of diminished responsibility. Judge Paul Thomas at Swansea Crown Court sentenced him to five years imprisonment. The Court heard evidence that the killing took place a few days into lockdown when Williams was became depressed and anxious and his wife told him to "get over it". This reportedly led him to "snap" and, as he described, "throttle the living daylights out of her". The attack appears to have been sustained, starting in the bedroom and concluding as she attempted to escape to the front door. The pathologist found three fractured bones in her neck. It seems that the sentence was based on a report by a single psychiatrist who concluded that Williams was suffering from a depressive disorder following a 'dramatic deterioration of



mental health following retirement' and exacerbated by lockdown. Despite the evidence of serious harm from what must have been a terrifying and determined attack, Judge Thomas concluded that the offence fell into the sentencing bracket of a "low degree of responsibility".

The Court of Appeal declined to increase the sentence following submissions by the Attorney General under the unduly lenient scheme, relying on the absence of evidence that there was any previous history of domestic abuse by Williams towards his wife and concluding it was a "single incident, out of the blue". The court rejected the AG's submissions through counsel that, "This was an anxiety and depressive condition; not any form of delusional psychotic disorder... Greater weight should also have been given to Williams's suffering at the hands of her husband". Furthermore, from our observations, whilst there may have been no available evidence of previous violence or coercive control, the offence itself required some explanation beyond depression, which does not appear to have been explored.

#### **Case example: Sam Pybus**

In the second case Sam Pybus killed by strangulation Sophie Moss, a woman he had been seeing for extra marital sex who, he claimed, 'enjoyed erotic asphyxiation'. Pybus pleaded guilty to unlawful act manslaughter and was sentenced to 4 years and 8 months imprisonment.

Pybus is reported to have said that the strangulation "*lasted several minutes*" and "*left his hands hurting.*" The sentencing judge noted:

*You, in the course of consensual sexual activity with her, nevertheless applied compression for such a period of time, the pathologist says tens of seconds or even minutes, for long enough to lead to hypoxia, starving the brain of oxygen, which led to her death.*

However, he then concluded:

*I cannot, however, say that the risk of death or really serious harm was so high as to justify me categorising this case in category B of the Sentencing Council's Guidelines for sentencing in such cases.*

Leaving aside the concerning question as to whether the sex with such forceful and sustained strangulation was in fact consensual (since the victim was not able to provide her own account as to consent), it is unclear why the judge concluded the risk of death did not fall within the really serious harm category.

The Attorney General appealed the sentence as unduly lenient. CWJ applied to intervene alongside the campaigning organisation 'We Can't Consent to This' (WCCT). As part of our application to intervene we produced a bundle of evidence evidencing the body of research on the impact of and risks of both psychological and physical harm from strangulation as well as research on the prevalence of and understanding of strangulation within the context of domestic abuse.

The research, we argued, demonstrated that strangulation carries with it a high risk of death or serious harm and thus, in most cases, should result in an assessment of a high level of

culpability placing the offence at least within category B of the unlawful act manslaughter guidelines. In the particular facts of this case, where D described his hands as hurting following strangulation lasting many minutes, there was a very strong case for a category B level offence.

The court declined our application to intervene as misconceived. However, we reproduce below some of the evidence and argument made, which we believe supports the proposal to make strangulation an aggravating factor in such sentencing.

### **Evidence in support of making strangulation an aggravating factor in sentencing in these cases**

The CWJ submissions on the Domestic Abuse Bill January 2021 at paragraphs 4-7 highlighted the following:<sup>34</sup>

*4. It is widely recognised that non-fatal strangulation and suffocation (e.g. with a pillow) are a common feature of domestic abuse and a well-known risk indicator. The standard risk assessment tool used by police and domestic abuse services is the “DASH” checklist which includes a question about attempts to strangle, choke, suffocate, or drown the victim. The questions in the DASH checklist were identified through extensive research on factors associated with serious domestic violence and homicide. Research has found that a history of strangulation presents a seven-fold risk of death. Strangulation and asphyxiation are the second most common method of killing in adult female homicides, after stabbing. 29% were killed by this method in 2018, 43 women, as compared to only 3% of male homicides (which include male children and male perpetrators).*

*5. Importantly, research highlights how non-fatal strangulation is frequently used as a tool to exert power and control, and to instil fear, rather than being a failed homicide attempt. It sends the message that ‘if you do not comply this is how easily I can kill you.’ Researchers have observed that many abusers do not strangle to kill, but to show that they can kill, using strangulation as a tool of coercion, often accompanied by death threats. The result is compliance and passivity by the victim in the relationship in the longer term. Non-fatal strangulation is a gendered crime.*

*6. Reports on prevalence of strangulation within intimate partner violence describe a “hidden epidemic.” A range of studies indicates that whilst lifetime incidence of strangulation is between 3% and 9.7% in the adult population, this rises to 50-68% for victims of recurrent abuse. Two studies of intimate partner violence and sexual assaults where medical examinations took place found that strangulation was involved in 20% and 23% of cases respectively.*

*7. Reports describe strangulation as extremely painful and the inability to breathe as a “primal fear.” **Loss of consciousness can occur in 10 to 15 seconds and lack of oxygen to the brain results in mild brain damage. Studies report that between 8.9% and 38% of those strangled lose consciousness. Although there is little or no visible injury, numerous longer-term effects of strangulation are reported,***

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<sup>34</sup> [CWJ submission on Domestic Abuse Bill January 2021](#)

***including fractured trachea/larynx, internal bleeding, dizziness, nausea, tinnitus, ear bleeding, sore throat, a raspy voice, neurological injuries such as facial and eyelid droop, loss of memory and even stroke several months later as a result of blood clots. A further frightening array of symptoms is set out in a survey of 21 studies of neurological outcomes as well as increased risk of miscarriage.***

We went on to highlight that the high risk of death or GBH that is or ought to be obvious to an offender (voluntary intoxication not being exculpatory) is borne out by the above CWJ report<sup>35</sup> and the research of Sorensen, Joshi and Sivitz (2014)<sup>36</sup>.

The findings of Catherine White (consideration of data from case files of all patients attending at the Saint Mary's Sexual Assault Referral Centre from 2017-2019) were that:<sup>37</sup>

*Non-fatal strangulation in sexual assault is a gendered crime, with most victims female and most assailants male. Non-fatal strangulation is prevalent and this prevalence increases where the alleged perpetrator is a partner or ex-partner. Many are assaulted in their own homes, homes frequently shared with children. Visible non-fatal strangulation injuries are not the norm yet fear of death is not uncommon. Over 1 in 6 (15.7%) reported loss of consciousness suggesting that they were victims of a near lethal assault. That 27% had previously been a victim of non-fatal strangulation by the same alleged perpetrator indicates there are considerable numbers potentially living in fear and risk. Awareness of the risk of non-fatal strangulation, and an enhanced response to it, is required by those looking after victims and all those in the criminal justice system.*

The research of Catherine White found that when patients were asked to estimate how long the strangulation lasted, 'just under a quarter said it lasted less than 10 seconds with over a third saying they didn't know (para 9).' In addition, there was 'no evidence of a difference in the proportions of injuries according to whether the patient had been categorised as "active" or "passive" during the assault.'<sup>38</sup>

Patients spoke of the use of non-fatal strangulation as a threat (11.1) and said they would subsequently comply with the alleged perpetrator out of fear for themselves or their children. The research concluded that professionals needed to recognise this as a 'possible explanation as to the lack of injuries from either the non-fatal strangulation or the sexual violence alleged. In some of these cases, the perpetrator need only apply a small amount of pressure to the neck; even just the laying one of the hands to the neck and the victim then offers no resistance to what follows.'

White describes non-fatal strangulation as a unique crime and states that it ought to be seen as such. Neither to be treated as other physical assaults such as punching or kicking, nor should it be overlooked that it often takes place in a victim's home

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<sup>35</sup> *ibid*

<sup>36</sup> [Sorensen, Joshi and Sivitz \(2014\) A Systematic Review of Epidemiology of Non-fatal Strangulation](#)

<sup>37</sup> [White C, Martin G, Schofield AM, Majeed-Ariss R. \(2021\) 'I thought he was going to kill me': Analysis of 204 case files of adults reporting non-fatal strangulation as part of a sexual assault over a 3 year period.](#)

<sup>38</sup> *ibid*

address, which is supposed to be a place of safety (11.4).

We also referenced written evidence submitted by Helen Bichard, Trainee Clinical Psychologist, to the Domestic Abuse Bill Committee in May 2020 which highlighted that non-fatal strangulation carried the very real potential to cause significant and life-changing injuries to the brain and mind. Strangulation was shown to lead to arterial dissection, compromise of blood flow to and from the brain, cerebral swelling, delayed stroke and miscarriage.<sup>39</sup> Bichard's evidence stated that:

- It is thought strangulation might be the second most common cause of stroke in women under 40.
- Strangulation potentially carries all the consequences of other hypoxic-ischaemic injuries such as cardiac arrest (which it can itself provoke), but has its own additional burden.
- Neurological consequences include: loss of consciousness (indicating at least mild brain injury), paralysis, movement disorders, altered sensation, speech disorders, incontinence and seizures.
- Cognitive consequences include: amnesia, impaired executive function (decision-making, judgement)
- Psychological consequences include: existential fear, Post Traumatic Stress Disorder and other trauma reactions namely, dissociation, suicidality, depression, anxiety, personality change.
- Behavioural consequences include: increased compliant and submissive behaviour, aggression.<sup>40</sup>

The research also demonstrates that consent has to be informed and needs to be capable of being withdrawn at any point. It is submitted that the physical and psychological effects of strangulation as outlined above militate against this.

Furthermore, as the WCTT research briefing to parliament found:<sup>41</sup>

*In the majority of these homicides, the victim's alleged sexual history, even with previous partners, is part of the evidence presented in court to support her supposed consent. These along with her name, are widely reported in the press. Even in homicide cases where the criminal justice outcome could be said to be adequate, this brings a terrible toll on the families... And that previous sexual history may be part of the justification for a lighter sentence... This level of intoxication would have been taken as affecting her capacity to consent to sex, were this a rape case.*

## Conclusion

In conclusion, we consider that the evidence shows that strangulation, suffocation and asphyxiation are obviously dangerous (and degrading) acts, and should be treated more seriously than the law currently permits. This is particularly so where the purpose of the violence is the sexual gratification of the perpetrator or where strangulation occurs in a

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<sup>39</sup> [Written evidence submitted by Helen Bichard, Trainee Clinical Psychologist \(2020\)](#)

<sup>40</sup> Ibid

<sup>41</sup> [Consent defences and the Criminal Justice System Research Briefing – We Can't Consent to This, p83](#)

relationship, particularly where there is any evidence of a history of abuse. Judges should ensure that there has been adequate exploration of the historical dynamic of a domestic relationship before sentencing.

**Question 19: Do you agree with the proposed change to the aggravating and mitigating factors relating to coercive or controlling behaviour in the manslaughter guidelines? If not, please provide any alternative suggestions.**

### **Overview**

Yes, we agree that coercive and controlling behaviour should be highlighted as an aggravating factor where there is a history of such abuse towards the victim and a mitigating factor, where there is a history of such abuse towards the offender. We do not agree with the asymmetrical requirement that this abuse and coercive or controlling behaviour (CCB) must be regarded as 'significant' in cases where it is a mitigating factor, but not where it is an aggravating factor. In particular, assessments of what amounts to 'significant' can be based on a lack of understanding about the nature and impact of coercive and controlling behaviour which may involve minimal physical violence but maximum entrapment, locking a victim into a relationship from which she can see no escape.

### **So-called 'honour-based' abuse**

We support Southall Black Sisters' proposal to specifically highlight so-called 'honour-based' abuse as both an aggravating and mitigating factor in such cases. Like CCB, this dynamic is not always understood and specific reference to this context of a domestic relationship will help ensure that it is taken into account in sentencing considerations.

### **Courts do not take CCB sufficiently into account**

We note the Sentencing Council's comment:

*This would not place consideration of coercive or controlling behaviour at step one as the Review proposes, but as there is no evidence that courts are failing to take it into account in relevant cases, the Council was not in favour of changing the step one factors. An analysis of 2019 manslaughter transcripts also indicates that courts are taking controlling and coercive behaviour into account where there was evidence (in the limited number of cases where it featured).*

Based on our own research and work on cases, we do not agree that the courts sufficiently take CCB into account. This is partly because those prosecuting and defending may not sufficiently understand the dynamic that exists in relationships, so the evidence may not be adequately explored at trial. This failure is compounded by resistance from judges to admit expert evidence to support a defence case where a context of CCB exists. As the Wade review notes, at 5.4:<sup>42</sup>

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<sup>42</sup> Para 5.4.2 page 51

### **Coercive Control is Still Poorly Understood**

*A review of the controlling or coercive behaviour offence (March 2021) provides a quantitative analysis of data from the criminal justice system together with a qualitative analysis of how the offence is working with a view to identifying the need for policy changes. The key findings of the review included: (1) there are still difficulties in recognising coercive control (2) there is a lack of systematic data across the criminal justice system on inter alia the characteristics of coercive and controlling offences.*

### **Women Who Kill research**

As pointed out in our report, 'Women Who Kill: how the state criminalises women we might otherwise be burying', over the 30 years that Justice for Women (CWJ's sister organisation) has been campaigning on this issue, the average length of minimum tariffs for murder and fixed terms for manslaughter have increased. One lawyer commented:<sup>43</sup>

*When we started Justice for Women back in the early '90s we saw women who were able to successfully use manslaughter by reason of provocation or diminished [responsibility] and there was an understanding of the mitigating circumstances around the domestic abuse. The courts would sentence occasionally a non-custodial sentence or often two or three years at most. Whereas now, we're seeing sentences of 14 to 18 years for manslaughter, even in circumstances where the domestic abuse is recognised.*

One illustration of the lack of a gendered approach to sentencing policy to date, is the fact that the use of weapons is an aggravating factor in determining sentences, yet women – who are usually physically smaller than their abusive partner – are more likely to use a weapon than their bare hands when responding to violence. In 79% of the cases included in the 'Women Who Kill' research (n=73), women had used a weapon to kill their partner. By contrast, the second most common form of femicide is strangulation, a method of killing almost entirely absent when women kill their male partners.

There is widespread understanding within the criminal justice system that victim witnesses in cases of sexual violence may require special measures to enable them to give their best evidence, and some understanding that inconsistencies in accounts may be a factor in cases of sexual violence; judicial directions may be given in relation to this. However CWJ's research findings suggest that this recognition does not exist in the same way in cases where the women who have been subject to abuse are defendants, rather than victim witnesses, with the result that defendants are inhibited from giving their best evidence about any context of CCB.

In the Double Standard report, Naomi describes how she was seated next to her abusive ex-partner in court as a co-defendant, and how this influenced her to plead guilty in order to

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<sup>43</sup> [Centre for Women's Justice \(2021\) Women who kill: how the state criminalises women we might otherwise be burying, p.51](#)



avoid the trauma of going through a trial.<sup>44</sup> Some women taking part in the 'Women Who Kill' research highlighted that having to give evidence in front of the deceased's family and friends was a major barrier to disclosing the full extent of the abuse they had experienced.<sup>45</sup>

*During the trial I didn't want to talk about when the relationship was bad. His family were all there... In the forefront of my mind I knew I'd murdered him and that was enough. I didn't want to be embarrassed saying what he'd done to me...*

Another woman explains:<sup>46</sup>

*It didn't come out at trial...I didn't want to go into the abuse. I was friends with his brother...I knew his family were there. This made me feel terrible...X was really close to his brother. I don't know how he must have been feeling...I think this stopped me opening up. His daughter is only 13. You don't want to hear horrible things about your dad.*

It was not possible during the 'Women Who Kill' research to gain access to judges to hear their views and experiences, and this would be a valuable area for future research. However perspectives gained from others involved in the court process confirmed that the role of the judiciary is key and that they often have a limited understanding of the links between abuse and offending by the victim. One lawyer who had represented two women in cases with similar facts explained:<sup>47</sup>

*What these two cases tell you is that it's not about the rules, it's about the judges. The facts were quite similar... A more conservative judiciary is more of a problem for these types of cases than the letter of the law.*

There was also evidence of an over-reliance on medical evidence and a lack of understanding of Black, Asian, minoritised and migrant women's experiences. One woman explained:<sup>48</sup>

*The judge didn't accept their report [from a specialist organisation working with Black, Asian, minoritised and migrant women]. He said it had nothing to do with culture... basically they are trying to say that I was a westernised woman because I wore trousers, a top. I didn't dress not always in traditional clothing. I went to work. So this is what they classed as me being a Westernised woman... I think if it had, they would have understood like I said about, it doesn't matter how I'm dressed, I'm still an Asian woman and we still have to abide by the rules and restrictions of our society. Doesn't matter what face we put on.*

Additional challenges included memory, misleading evidence of 'violence on both sides', substance use and reliance on myths and stereotypes.<sup>49</sup>

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<sup>44</sup> [Ibid, p.51](#)

<sup>45</sup> [Ibid, p.36](#)

<sup>46</sup> [Ibid, p.37](#)

<sup>47</sup> [Ibid, p.40](#)

<sup>48</sup> [Ibid, p.50](#)

<sup>49</sup> [Ibid, pp.41-47](#)

## Judicial awareness-raising in New Zealand

It is widely recognised that it is difficult for women to rely on the law of self-defence where they have killed their abuser.<sup>50</sup> In New Zealand, increased understanding of the concept of 'social entrapment', judicial awareness raising and greater willingness to admit expert evidence on the dynamics of domestic abuse have led to some progressive decisions, including on sentencing.<sup>51</sup> The courts have recently shifted their approach both to the introduction of expert testimony on domestic violence by the accused at trial, and to sentencing in cases where women have used force against abusive partners and have either not succeeded with a self-defence claim or have pleaded guilty.

This was illustrated in the case of ***R v Ruddelle (2020)***, in which expert evidence was admitted about domestic abuse as a form of entrapment, comprising a cumulative pattern of harm rather than a series of single incidents. In this case the accused had stabbed her partner to death after years of domestic violence. Although she was not successful in arguing self-defence, she was found guilty of manslaughter rather than murder because it was not proved beyond reasonable doubt that she had intended to kill him.

The case is a significant legal development in terms of the kind of expert who could give evidence, the nature of the expertise provided and the approach to sentencing. Further evidence about the domestic violence and entrapment was admitted at sentencing, as the judge understood "the context of family violence is an integral feature of the offending here" and its relevance to culpability. He positioned the accused as an expert on her partner's violence and found she had "repeatedly sought help against violence in her life but that had led to short term response at best and removal of her children at worst".

The accused was of Maori heritage and further evidence of her entrapment was provided in a cultural report by an expert in Maori health. This enabled the judge to quality-check the pre-sentence report (PSR) initially presented, which had recommended imprisonment. The judge rejected the PSR, chastised the writer for a lack of professionalism and insisted on an improved report. The sentence then imposed was a period of home detention that enabled Ms Ruddelle to live at home and continue parenting her teenage son.

Since *Ruddelle* there have been cases other than homicide where evidence of domestic abuse and an understanding of social entrapment have been introduced at sentencing, including one case of aggravated burglary and three cases of (defensive) assault/wounding.

It appears these developments may result from judicial education. In its 2016 report *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide* (Report 139), the New Zealand Law Commission's recommendations included the continued education of judges, lawyers and police to improve understanding within the criminal justice system of the dynamics of domestic abuse. The NZ legal profession has adopted this approach. 'Family Violence' has been a theme of the District Court Judges Triennial

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<sup>50</sup> Howes, S et al (2021) Women who kill: why self-defence rarely works for women who kill their abuser, *Criminal Law Review* Issue 11 2021; Bettinson, V. and Wake, N., 'A new self-defence framework for domestic abuse survivors who use violent resistance in response' *Modern Law Review* (forthcoming, 2024)

<sup>51</sup> [Centre for Women's Justice \(2023\) Making self-defence accessible to victims of domestic abuse who use force against their abuser: Learning from reforms in Canada, New Zealand and Australia](#)

Conference since 2015. Since then, the New Zealand Institute of Judicial Studies provides regular judicial training on family violence and there is a New Zealand Bench Book on Family Violence.

### **Recent case examples in England and Wales**

CWJ's director, Harriet Wistrich, represented both Sally Challen and Fariessia Martin at appeal and subsequent retrials. Both cases were characterised by a history of coercive and controlling behaviour towards them by the deceased. That dynamic was not sufficiently understood or recognised at the original trials and in both cases, the women were convicted of murder. Following the quashing of the murder convictions at appeal, retrials were ordered and both women eventually pleaded guilty to manslaughter. In our view, insufficient account had been taken of the mitigating factors of a history of CCB in both cases.

#### **Sally Challen sentenced for manslaughter at retrial in 2019**

The appeal was allowed on the basis of fresh psychiatric evidence considered in the light of a new understanding of the history of CCB which was relevant to both defences of diminished responsibility and provocation. A retrial was ordered and submissions were made on behalf of Ms Challen to the Crown Prosecution Service that she would plead guilty to manslaughter. These submissions, highlighting that both the evidential and public interest tests in the Code for Crown Prosecutors favoured the acceptance of such a plea, were rejected whilst the CPS instructed their own new psychiatric expert. Eventually, his report supported a defence of diminished responsibility and the CPS then offered the plea. Judge Edis sentenced Ms Challen to a total of 14 years, reduced (allowing full credit for the guilty plea) to nine years and four months, which was the equivalent of the amount of time she had already served. Whilst recognising the context of abuse in the relationship, the sentence when compared to that given to Anthony Williams of five years (see answer to question 18 above) suggests that CCB is not sufficiently mitigatory.

#### **Fariessia Martin sentenced for manslaughter at retrial in 2021**

Following the successful appeal against Ms Martin's murder conviction in 2019, allowed on the basis of fresh psychiatric evidence of post-traumatic stress disorder caused by a history of abuse, representations were made to the CPS indicating her willingness to plead guilty to manslaughter on the basis of diminished responsibility or loss of control. The Crown refused to offer a plea. However on the first day of the retrial, before the jury was sworn in, the Crown decided to offer Ms Martin a plea to unlawful act manslaughter. This was after they had been presented with evidence that supported her account that she had been strangled twice by the deceased before she grabbed a kitchen knife to ward him off, but then fatally stabbed him. Despite the evidence of recent strangulation, along with substantial evidence of a history of serious coercive control causing psychiatric injury, Ms Martin was sentenced to ten years' imprisonment. The use of a knife, despite the threat faced, was seen as taking her into category B with a significantly higher starting point for sentencing.

If coercive control and a history of abuse were a proper mitigatory factor, this should have resulted in a lower sentence. If the Crown had accepted Ms Martin's earlier plea to loss of control through fear of serious violence, a more appropriate charge given the surrounding facts of this case, then the sentence would likely have been lower, as the circumstances would have fallen into the category C guideline and she would have been given full credit for a guilty plea.

## **Equalities and impact**

**Question 20: Are there any equalities issues relating to the proposals that should be addressed?**

We refer to our responses above and reiterate the need for sentencers to use a gendered and intersectional approach when making sentencing decisions, taking proper account of gender, race and migrant status, and how these intersect. This requires education about relevant factors for women and girls, including Black, minoritised and migrant women and girls.

**Centre for Women's Justice**

**30 November 2023**