

# Sentencing for criminal offences arising from the death of a child

Consultation paper

**May 2018**



**Queensland Sentencing  
Advisory Council**  
*Inform. Engage. Advise.*

## Warning to readers

This consultation paper contains subject matter that may be distressing to readers. Anonymised, but explicit material describing fatal offences against children, drawn from sentencing remarks, is included in this paper.

If you need to talk to someone, support is available:

- [Lifeline Australia](#): 13 11 14
- [Kids Helpline](#): 1800 55 1800
- [Victim Assist Queensland](#): 1300 546 587 (business hours)
- [MensLine Australia](#): 1300 78 99 78

For information and assistance about child safety issues, please contact

- [Queensland Family & Child Commission](#): 3900 6000 (business hours)

### **Sentencing for criminal offences arising from the death of a child: Consultation paper**

Published by Queensland Sentencing Advisory Council, May 2018

© Queensland Sentencing Advisory Council 2018

This consultation paper is available for download from the Council's website:

[www.sentencingcouncil.qld.gov.au](http://www.sentencingcouncil.qld.gov.au)



This consultation paper is licensed under a Creative Commons Attribution 3.0 Australia licence. To view a copy of this licence, visit [creativecommons.org/licenses/by/3.0](http://creativecommons.org/licenses/by/3.0)

#### **Disclaimer:**

The content of this consultation paper are for the purposes of promoting discussion only and do not represent Queensland Government policy.

While all reasonable care has been taken in the preparation of this consultation paper, no responsibility or liability is assumed for any errors or omissions or any loss, damage or injury, financial or otherwise, suffered by any person acting or relying on information contained in or omitted from this publication.

This consultation paper follows the Melbourne University Law Review Association Inc, *Australian Guide to Legal Citation* (3rd ed., 2010) and reflects the law as at 31 March 2018.

#### **Queensland Sentencing Advisory Council**

The Queensland Sentencing Advisory Council is established by section 198 of the *Penalties and Sentences Act 1992* (Qld). The Council provides independent research and advice, seeks public views and promotes community understanding of sentencing matters. The Council's functions, detailed in section 199 of the Act, include:

- to inform the community about sentencing through research and education;
- to engage with Queenslanders to understand their views on sentencing; and
- to advise the Attorney-General on matters relating to sentencing, at the Attorney-General's request.

Further information:

Queensland Sentencing Advisory Council

GPO Box 2360, Brisbane Qld 4001

Tel: (07) 3224 7375

Email: [info@sentencingcouncil.qld.gov.au](mailto:info@sentencingcouncil.qld.gov.au)

## Foreword

The death of a child, in any circumstances, is tragic. Where a child dies as a result of assault or neglect, the impacts are not only felt by the child's immediate family and friends, but by the entire community.

The number of child deaths from assault and neglect in Queensland recorded over the 13 years since 2004–05 ranges from four to 14, with an average of just over eight deaths per year.<sup>1</sup> While the numbers are small, where a child's death occurs as the result of homicide, it 'shocks the public consciousness' because the victims are so often very young and innocent of any wrong doing or contribution to their death.<sup>2</sup>

On 25 October 2017, the Queensland Sentencing Advisory Council received a request from the Attorney-General and Minister for Justice to review the adequacy of penalties imposed on sentence for criminal offences arising from the death of a child. In referring this matter to the Council, the Attorney-General made reference to the perceived growing concern about whether current sentences are adequate, and to the review providing an opportunity for community members to share their views and to have these views considered in a constructive way.

The Council has been asked to consider and analyse current penalties imposed in Queensland, determine whether penalties adequately reflect the particular vulnerabilities of children, identify trends and anomalies in sentencing, examine the approach in other Australian jurisdictions and to consult with the community and key stakeholders. The approach to the review has been informed by preliminary public submissions, which closed 24 December 2017, and initial engagement with key stakeholders. The Council thanks all those who made a submission or who met with the Council during the initial stage of the review for their contributions.

The release of this paper marks the next stage of the review's consultation process and will assist discussion about sentencing for child homicide offences. The Council will use the results of these consultations to inform its advice to the Attorney-General, to be provided by 31 October 2018.

This paper briefly describes the context of the review, and provides information about child homicide and relevant offences in Queensland. It includes a series of questions which form the basis of consultation.

I encourage all Queenslanders to have their say on this important issue either by making a submission or participating in one of the Council's planned consultation activities. You can find out more about how to get involved by visiting the Council's website: [www.sentencingcouncil.qld.gov.au](http://www.sentencingcouncil.qld.gov.au).

The Council is committed to ensuring this review and its findings are based on the best available evidence, and will be releasing a separate research report which considers the nature and context in which child deaths occur in more detail — drawing on relevant local, national and international research. The research report will also analyse data on sentencing outcomes in Queensland for homicide offences involving both adult victims and child victims according to various factors, including the age of the victim. The research report will be made available on the Council's website during the consultation period.

The Council recognises when such a child death occurs, it is important the community can have confidence in the justice system's capacity to respond appropriately. The Council hopes through this review it can contribute to achieving this important outcome.



Professor Elena Marchetti  
**A/Chair**

## Queensland Sentencing Advisory Council

<b>A/Chair</b>	Professor Elena Marchetti
<b>Council members</b>	John Allen QC Debbie Kilroy OAM Tracy Linford APM Kathleen Payne Dan Rogers Warren Strange Helen Watkins
<b>Director</b>	Anne Edwards

## Acknowledgments

The Council's inquiries are informed by the knowledge and expertise of its members, research and policy analysis undertaken by its staff, and the contributions of key criminal justice agencies, other stakeholders and community members.

The Council would like to acknowledge the contributions of all those who made preliminary submissions, attended meetings to discuss issues relating to the inquiry, and who provided information and data to inform the preparation of this consultation paper. While not exhaustive, those who have contributed during the early stages of the review include community members, family members directly impacted by child homicide, victim support and advocacy groups, legal professional bodies, local and interstate criminal justice agencies, death review bodies, academic researchers and forensic health services.

In addition to hosting individual meetings, the Council convened a roundtable in early April 2018 with individuals who have specific expertise relevant to the review. The Council wishes to acknowledge the assistance provided by those who attended this meeting in advising the Council on technical, research and procedural issues relating to the inquiry.

It is also the Council's practice to establish a Project Board for every inquiry. The Council acknowledges the contributions of Project Board members and thanks Board members for giving so generously of their time during the initial stages of the review.

## Call for submissions

Submissions are being called for as part of the Council's review into penalties imposed on sentence for criminal offences arising from the death of a child.

You are invited to make a submission based on the questions in this consultation paper, or any issues arising from the Terms of Reference.

**Submission deadline: Tuesday 31 July 2018**

## Preparing submissions

This consultation paper raises questions in relation to seven key issues that reflect the Terms of Reference provided by the Attorney-General.

You are invited to respond to some or all of the questions. To assist in analysing responses, please identify the relevant question number/s in your submission.

Try to keep your responses succinct and focused on the question/s you are responding to. If you wish to provide attachments please indicate which question/s your attachment refers to.

## How your submission will be used

All submissions to this consultation paper, as well as additional consultation conducted with key stakeholders, will inform the Council's response to the Terms of Reference. A final report with recommendations will be provided to the Attorney-General by 31 October 2018 and released publicly via the Council's website: [www.sentencingcouncil.qld.gov.au](http://www.sentencingcouncil.qld.gov.au).

This consultation paper reflects the Council's commitment to listening to community members.

**Generally, submissions will be considered public and published on the Council's website unless clearly marked 'confidential'.**

Public submissions may be published on the Council's website, but with certain information redacted to protect the privacy of those making the submission.

Submissions marked as **'anonymous'** will have all identifying details removed (including the name or names of those making the submission) prior to publication.

The Council does not publish submissions that are received anonymously (that is, that do not include the name and contact details of the person making them).

Submissions marked **'confidential'** will not be published or referred to in publications. The Council treats confidential submissions as for the Council's information only.

Any personal information provided by individuals identified in this public consultation process will be collected only for the purpose of the review. Personal information will not be used within the final report. However, unless you explicitly request, details provided in your submission (other than personal information) may be directly or indirectly quoted in the final report, or other products associated with the final report. If you include details in your submission that you do not want publicly disclosed, please indicate this within your submission.

The *Right to Information (RTI) Act 2009* may apply to submissions provided as part of this consultation process. If subject to a RTI application, submissions (including those marked as confidential) will all be assessed as part of the RTI process.

While the Terms of Reference are restricted to reviewing sentencing for child homicide offences, the Council understands this topic is emotive. Submissions containing offensive, derogatory, highly-specific information about actual offending and/or issues beyond the scope of these Terms of Reference will not be referred to in the final report and may be excluded from the consultation process.

## Making a submission

### Online

To submit online go to [www.sentencingcouncil.qld.gov.au](http://www.sentencingcouncil.qld.gov.au)

### Email

To submit via email, please include in the subject line of your email 'Child homicide sentencing review submission'.

Please complete and include a submission form—see **Appendix 3** (page 77).

Email your submission to [submissions@sentencingcouncil.qld.gov.au](mailto:submissions@sentencingcouncil.qld.gov.au)

### Post

To make a postal submission, please include the following information on your correspondence 'Child homicide sentencing review submission'. Post your submission to:

Queensland Sentencing Advisory Council  
GPO Box 2360  
Brisbane Qld 4001

## Submission assistance

If you require any assistance to participate in this public consultation process, please contact the Council on (07) 3224 7375, or use the following services:

### Translating and Interpreting Service

If you need an interpreter, contact the Translating and Interpreting Service (TIS) on 131 450 and tell them:

- the language you speak
- the council's name—Queensland Sentencing Advisory Council
- the Council's phone number—(07) 3224 7375.

TIS will arrange an interpreter so you can talk with us. This is a free service.

### National Relay Service

The National Relay Service (NRS) is a free phone service for people who are deaf or have a hearing or speech impairment. If you need help contacting us, the NRS can assist. To contact the NRS you can:

- TTY/voice call—133 677
- Speak and Listen—1300 555 727
- SMS relay—0423 677 767

# Contents

Glossary.....	7
<b>1. Introduction.....</b>	<b>13</b>
Terms of Reference.....	13
Council's approach.....	13
Scope and terminology.....	14
Data sources.....	15
<b>2. The nature and extent of child homicide.....</b>	<b>17</b>
Extent of child homicide.....	17
Perpetrators of child homicide.....	17
Victims of child homicide.....	17
Context of child homicide.....	18
<b>3. Child homicide offences.....</b>	<b>19</b>
Unlawful killing.....	19
Duty provisions.....	19
Parties to an offence.....	19
Offences committed in prosecution of a common purpose.....	20
Murder.....	20
Intent.....	20
Foreseeability and probability are not intents.....	21
Manslaughter.....	21
Defences and excuses.....	21
Associated offences.....	23
<b>4. Sentencing process and framework.....</b>	<b>25</b>
Sentencing hearing.....	25
Legislative sentencing purposes and factors.....	25
Sentencing principles in case law.....	32
Maximum penalties.....	33
Sentencing process.....	34
Penalties and parole.....	35
<b>5. Sentencing outcomes in Queensland for child homicide.....</b>	<b>39</b>
Sentenced homicide offences.....	39
Homicide victims.....	40
Homicide offenders.....	44
Sentencing outcomes for homicide offenders.....	48
<b>6. Challenges in sentencing for child homicide.....</b>	<b>55</b>
Investigation and prosecution of child homicide offences.....	55
Sentencing 'range' for manslaughter.....	56

Mandatory sentencing and sentencing flexibility.....	58
Reflecting the vulnerabilities of children in sentencing .....	61
Involvement of co-offenders.....	63
Impact on family members.....	64
Preventative measures .....	65
Need for reform.....	66
 7. Improving understanding of sentencing for child homicide .....	 67
Role of the media and barriers to accurate reporting.....	67
Complexity of sentencing .....	68
Court communication and current barriers.....	68
Role of the Council .....	69
Victims of crime.....	69
Community views about sentencing.....	70
 Appendix 1: Terms of Reference.....	 73
Appendix 2: Consultation .....	75
Appendix 3: Submission form.....	77
Endnotes .....	79

## Figures

Figure 1: Council's approach to review of sentencing for criminal offences arising from the death of a child.....	13
Figure 2: Child homicide: location of offence by age of victim, 2005–06 to 2016–17 .....	42
Figure 3: Adult homicide: cause of death, 2005–06 to 2016–17 .....	43
Figure 4: Child homicide: cause of death, 2005–06 to 2016–17 .....	43
Figure 5: Offenders sentenced for homicide offences, age by type of victim, 2005–06 to 2016–17 .....	45
Figure 6: Offenders sentenced for homicide offences, gender by type of victim, 2005–06 to 2016–17 .....	45
Figure 7: Offenders sentenced for homicide offences, Aboriginal and/or Torres Strait Islander status by type of victim, 2005–06 to 2016–17.....	46
Figure 8: Relationship between offenders and child victims of homicide, 2005–06 to 2016–17 .....	46
Figure 9: Relationship between offenders and adult victims of homicide, 2005–06 to 2016–17 .....	47
Figure 10: Custodial sentence lengths for adult offenders sentenced for manslaughter (MSO) by victim type, 2005–06 to 2016–17 .....	51



## Tables

Table 1: Associated offences — offences that may be charged alongside murder or manslaughter .....	23
Table 2: Offenders sentenced for a homicide offence as their MSO, 2005–06 to 2016–17 .....	39
Table 3: Age of victims in child homicide offences, 2005–06 to 2016–17 .....	40
Table 4: Number of sentenced offenders per homicide victim, 2005–06 to 2016–17 .....	40
Table 5: Child homicide: offender-victim relationship by age, 2005–06 to 2016–17 .....	41
Table 6: Aboriginal and/or Torres Strait Islander status of child homicide victims, 2005–06 to 2016–17 .....	41
Table 7: Child homicide: cause of death by age, 2005–06 to 2016–17 .....	44
Table 8: Number and type of victim for offenders sentenced for a homicide offence as their MSO, 2005–06 to 2016–17 .....	44
Table 9: Homicide offence and victim type for young offenders convicted of homicide, 2005–06 to 2016–17 .....	48
Table 10: Sentence outcomes for young offenders convicted of homicide (MSO), 2005–06 to 2016–17 .....	48
Table 11: Penalty outcomes for adult offenders sentenced for homicide (MSO), 2005–06 to 2016–17 .....	49
Table 12: Median sentence lengths for adult offenders sentenced for homicide (MSO), by penalty type and victim type, 2005–06 to 2016–17 .....	50
Table 13: Summary of custodial sentence lengths for adult offenders sentenced for homicide (MSO), 2005–06 to 2016–17 .....	50
Table 14: Summary of custodial sentence lengths for adult offenders sentenced for manslaughter (MSO), by manslaughter category, 2005–06 to 2016–17 .....	52
Table 15: Summary of minimum time served by adult offenders sentenced for a child homicide offence and sentenced to imprisonment, 2005–06 to 2016–17 .....	53
Table 16: Summary of minimum time served by adult offenders sentenced for a child homicide offence and sentenced to imprisonment, 2005–06 to 2016–17 .....	54

## Case studies

1: <i>R v Potter; Ex parte A-G (Qld)</i> (2008) 183 A Crim R 497; [2008] QCA 91 (18 April 2008) .....	26
2: <i>R v Green &amp; Haliday; Ex parte A-G (Qld)</i> [2003] QCA 259 (19 June 2003) .....	26
3: <i>R v Chard; Ex parte A-G (Qld)</i> [2004] QCA 372 (8 October 2004) .....	29
4: <i>R v JV</i> [2014] QCA 351 (19 December 2014) .....	29
5: <i>R v Cramp</i> (Unreported, Supreme Court of Queensland, 30 January 2008) .....	30
6: <i>R v Riseley; Ex parte A-G (Qld)</i> [2009] QCA 285 (22 September 2009) .....	37
7: <i>R v Maygar; Ex parte A-G (Qld); R v WT; Ex parte A-G (Qld)</i> [2007] QCA 310 (28 September 2007) .....	57
8: <i>R v CGR</i> (Unreported, Supreme Court of Queensland, 13 April 2011) .....	58



# Questions

<b>Question 1: Sentencing purposes .....</b>	<b>27</b>
What are the most important sentencing purposes that should be taken into account by a court when sentencing an offender for an offence arising from the death of a child, and why?	
<b>Question 2: Sentencing factors .....</b>	<b>30</b>
The list of statutory sentencing factors sets out a selection of factors courts must take into account under the <i>Penalties and Sentences Act 1992 (Qld)</i> when sentencing a person for an offence that involved violence or resulted in physical harm to another person, including child homicide offences.	
2.1 Referring to this list, what are the most important factors that you consider should be taken into account when sentencing an offender for an offence arising from the death of a child, and why?.....	30
2.2 Are there any other sentencing factors not expressly listed in legislation, or referred to only in a general way, that you think are important in sentencing for these offences? If so, describe the factor/s and explain why they are important.....	30
Statutory sentencing factors .....	31
<b>Question 3: Sentencing factors (aggravating and mitigating).....</b>	<b>32</b>
Referring to the examples of aggravating and mitigating factors listed below, which factors in your view are the most important aggravating and mitigating factors to be taken into account by sentencing judges where a person is being sentenced for a criminal offence arising from the death of a child, and why?	
Examples of aggravating factors and examples of mitigating factors .....	32
<b>Question 4: Sentencing process.....</b>	<b>60</b>
What do you consider are the advantages and disadvantages of maintaining flexibility in the sentencing process when sentencing an offender for an offence arising from the death of a child?	
<b>Question 5: Reflecting particular vulnerabilities of children in sentencing.....</b>	<b>62</b>
5.1 How does a child victim's age and particular vulnerabilities impact on the seriousness of a homicide offence?.....	62
5.2 How can the particular vulnerabilities of child victims best be taken into account in sentencing for an offence arising from the death of a child?.....	62
<b>Question 6: Reforms.....</b>	<b>66</b>
6.1 Are any legislative or other changes needed in sentencing for child homicide offences? If so, what changes are needed and why? What would these changes add to the sentencing process?.....	66
6.2 Should any other reforms be considered to improve the sentencing process for child homicide offences? For example, should restorative justice approaches have any place in the sentencing process and if so, at what stage should they be considered? What might be some of the advantages and disadvantages of such approaches? .....	66
<b>Question 7: Community awareness .....</b>	<b>70</b>
7.1 What issues contribute to or detract from the community's understanding of sentencing for child homicide offences? .....	70
7.2 How can communication with community members and victims of crime about sentencing for child homicide offences be enhanced?.....	70



## Glossary

Accused	A person who has been charged with an offence but who has not yet been found guilty or not guilty. Also referred to as <b>defendant</b> .
Acquittal	A finding by a court that a person is not guilty of a criminal charge.
Agreed facts	Facts agreed to by the defence and the prosecution, regarding the charges that are brought before the court. Usually presented after a plea of guilty.
Aggravating factors	Facts or details about the offence, the victim and/or the offender that tend to increase the offender's culpability and the sentence they receive.
Alleged	What the prosecution says happened. The court (the judge or jury) will determine if it is true or not.
Antecedents	Background details about an offender, such as age, marital status, employment history and criminal history (this usually includes details of previous convictions and penalties).
Appeal	Review of all or part of a court's decision by a higher court.
Associated offences	For the purposes of this paper, offences of which an offender is charged and sentenced for which they are dealt with at the same time or in the same proceeding as for a child homicide offence. These offences may also be charged in other circumstances.
Bail	The release of a defendant into the community until a court decides the charge/s against them. Bail orders always include a condition that the defendant must attend court hearings. Additional conditions such as a requirement to reside at a certain address, or report to police may be added to a person's bail.
Beyond reasonable doubt	This is the level to which the prosecution in a criminal proceeding must prove that the accused person committed the alleged offence.
Case law	Law made by courts, including sentencing decisions and decisions on how to interpret legislation. This is also known as <b>common law</b> .
Charge	The name given to the formal record of an allegation that an accused person has committed an offence. A person is usually charged by police and, once charged, that person must appear before a court at a specified place, date and time.
Child homicide/ child homicide offences	Used throughout this paper to refer to the child death offences that are the subject of this review — murder and manslaughter.
Common law	Law made by courts, including sentencing decisions and decisions on how to interpret legislation. This is also known as <b>case law</b> .
Committal hearing	A preliminary examination by a Magistrates Court of the prosecution's evidence to determine whether there is enough evidence for the matter to go to trial in the District or Supreme Court.

Concurrent sentences	Individual sentences ordered for each offence in a case that are to be served at the same time. This means the shortest sentence is subsumed into the longest sentence (also called the 'head sentence'). For example, prison sentences of five years and two years served concurrently would be a total of five years' imprisonment.
Conviction	A determination of guilt made by a court.
Court of Appeal	A division of the Supreme Court. The Court of Appeal hears appeals against conviction, sentence or both. It is usually comprised of three judges.
Court ordered parole	A parole order where the parole release date is fixed by the court (meaning the offender is automatically released on that date). The court must fix a date for the offender to be released on parole if the offender has a sentence of three years or less and the sentence is not for a sexual offence or serious violent offence.
Crown	The prosecution may be referred to as the Crown. The Crown refers to the Queensland Government representing the community of Queensland.
Culpability	Blameworthiness; how responsible the person is for the offence and for the harm he or she caused.
Cumulative sentences	Individual sentences for each offence are served one after the other. For example, a person sentenced to five years and to two years ordered to be served cumulatively would have to serve a total of seven years' imprisonment.
Custodial sentencing order	A sentencing order that involves a term of imprisonment being imposed.
Defendant	A person who has been charged with an offence but who has not yet been found guilty or not guilty. Also referred to as <b>accused</b> .
Denunciation	Communication of society's disapproval of an offender's criminal conduct. One of the five statutory sentencing purposes in Queensland.
De Simoni (De Simoni principle)	The principle that a person should only be sentenced for an offence for which he or she has been found guilty.
Deterrence	Discouraging offenders and potential offenders from committing a crime by the threat of a punishment or by someone experiencing a punishment. One of the five statutory sentencing purposes in Queensland.
Filicide	The unlawful killing of a child by a parent (including a step-parent).
Head sentence — imprisonment	The total period of imprisonment imposed. A person will usually be released on parole or a suspended sentence before the entire head sentence is served.
Homicide	The unlawful killing of a person. Homicide is defined under the criminal law of each Australian state and territory and includes murder and manslaughter, murder-suicides and all other deaths classed by police as homicides, whether or not an offender was apprehended.

Imprisonment	Detention in prison.
Indefinite sentence	A sentence that can be ordered instead of a fixed term of imprisonment, when an offender is considered a serious danger to the community. This means there is no fixed date when they can apply for release on parole. The Court will periodically review and indefinite sentence.
Instinctive synthesis	Sentencing by taking account of all relevant factors, balancing different and conflicting features, to arrive at a single result which takes due account of them all.
Mandatory sentence	A sentence that is a fixed penalty prescribed by Parliament for committing a criminal offence, allowing no discretion for the court to impose a different sentence.
Maximum penalty	The highest penalty that can be given to a person convicted of a particular offence.
Mental Health Court	The Mental Health Court decides whether a defendant may have a defence to a charge because of mental illness at the time of the alleged offence. The court also determines whether a defendant is not fit for trial because of mental illness.
Mitigating factor	A fact or detail about the offender and their offence that tends to reduce the severity of their sentence.
Minimum time served in prison before release	The minimum time an offender must serve in prison before being eligible to apply for release on parole or, in the case of a person sentenced to imprisonment with a parole release date or a partially suspended sentence, the total time that must be served before their automatic release date.
Non-parole period	The time an offender serves in prison before being released on parole or becoming eligible to apply for release on parole.
Offender	A person who has been found guilty of an offence, or who has pleaded guilty to an offence.
Office of the Director of Public Prosecutions	The Office of the Director of Public Prosecutions (ODPP) represents the State of Queensland in criminal cases. Also referred to as the <b>prosecution</b> or the <b>Crown</b> .
Operational period (suspended sentence)	The period (up to five years) during which an offender who is subject to a suspended sentence must not commit a new offence punishable by imprisonment to avoid the risk of having to serve the suspended term of imprisonment in prison.
Parity (principle of parity)	Consistency between sentencing decisions involving co-offenders, which supports the principle of equality before the law.
Parole	The conditional release of a person from prison. When a person is released on parole, they serve the unexpired portion of their prison sentence in the community under supervision.
Parole eligibility date	The earliest date on which a prisoner may apply for release on parole.

Parole release date	The date on which a prisoner must be released on parole. A court can only set a parole release date can only be set if certain criteria are met. A parole release date cannot be set in certain circumstances, including if the sentence is greater than three years or if the person is being sentenced for a serious violent offence or a sexual offence.
Parsimony (principle of parsimony)	A sentence must be no more severe than is necessary to achieve the purposes for which the sentence is imposed.
Partially suspended sentence	Imprisonment of up to five years, with some actual prison time followed by release from prison with the remaining period of imprisonment suspended for a set period of time (called an 'operational period'). If the offender commits a further offence punishable by imprisonment during the operational period, they must serve the period suspended in prison (unless unjust to do so), plus any other penalties issued for the new offence.
Plea	The response by the accused to a criminal charge — 'guilty' or 'not guilty'.
Precedent	A sentencing decision that sets down a legal principle to be followed in similar cases in the future.
Principal offender	A person who actually does the act or makes the omission which comprises the offence.
Proportionality (principle of proportionality)	A sentence must be appropriate or proportionate to the seriousness of the crime.
Prosecution	A legal proceeding by the State of Queensland against an accused person for a criminal offence. Prosecutions are brought by the Crown (through the ODPP or police prosecutors).
Remand	To place an accused person in custody awaiting further court hearings dealing with the charges against them. A person who has been denied bail, or not sought it, will be placed on remand. This is also known as 'pre-sentence custody'.
Sentence	The penalty the court imposes on an offender.
Sentencing factors	The factors that the court must take into account when sentencing.
Sentencing principles	Principles developed under the common law, which serve as guideposts to assist judges and magistrates to reach a decision concerning the most appropriate sentence to impose. They include parity, parsimony, proportionality, totality and the De Simoni principle.
Sentencing purposes	The legislated purposes for which a sentence may be imposed. In Queensland there are five sentencing purposes for the sentencing of adults: punishment, deterrence, rehabilitation, denunciation and community protection.
Sentencing remarks	The reasons given by the judge or magistrate for the sentence imposed.



Serious violent offence	If a court convicts a person of an offence declared to be a serious violent offence, it means the offender is unable to apply for parole until they have served 80 per cent of their sentence or 15 years in prison, whichever is less. A number of offences are identified in legislation as being 'serious violent offences', such as violent offences (including manslaughter but not murder) and child sexual offences.
Supreme Court	The highest state court in Queensland. It comprises the trial division and the Court of Appeal. All trials and sentencing hearings for murder and manslaughter take place in the Supreme Court trial division.
Suspended sentence	A sentence of imprisonment of five years or less suspended in whole (called a 'wholly suspended sentence') or in part (called a 'partially suspended sentence') for a period of time (called an 'operational period'). If further offences punishable by imprisonment are committed during the operational period, the offender must serve the period suspended in prison (unless unjust to do so), plus any other penalties issued for the new offence.
Totality (principle of totality)	When an offender is convicted of more than one offence, the total sentence must be just and appropriate to the offender's overall criminal behaviour.
Victim	A person who has suffered harm directly because of a criminal offence, or a family member or dependent of a person who has died or suffered harm because of a criminal offence.
Victim impact statement	A written statement made by a victim which states the harm they have experienced from the offence and may include attachments such as medical reports, photographs and drawings.
Wholly suspended sentence	A sentence of imprisonment of up to five years but with no actual time served in prison as part of the sentence unless the person commits a further offence during the operational period. If further offences punishable by imprisonment are committed during the operational period, the offender must serve the period suspended (unless unjust to do so), plus any other penalties issued for the new offence.



# I. Introduction

## Terms of Reference

The Attorney-General has asked the Council to review penalties imposed on sentence for criminal offences arising from the death of a child.

In its report and recommendations, the Council has been asked to advise the Attorney-General of the following:

- **current penalties imposed on sentence** for offences arising from the death of a child and current sentencing practices;
- **whether the penalties imposed adequately reflect the particular vulnerabilities of these victims**;
- **whether current sentencing considerations are adequate** for the purpose of sentencing this cohort of offenders, and identify if specific additional legislative guidance is required;
- **ways to enhance knowledge and understanding of the community** in relation to penalties imposed on sentence for criminal offences arising from the death of a child; and
- **any legislative or other changes required to ensure the imposition of appropriate sentences** for criminal offences arising from the death of a child.

In developing its advice, the Council has been asked to have regard to relevant research and reports, examine the approach in other jurisdictions and to consult with the community and key stakeholders.

The Terms of Reference are at **Appendix I**. The Council must report back to the Attorney-General by 31 October 2018.

## Council's approach

The Council is conducting the review over five key stages (summarised in Figure I below).

**Figure I: Council's approach to review of sentencing for criminal offences arising from the death of a child**



The Council's preliminary consultation stage focused on scoping the issues and determining what should be explored as part of the review. This involved meeting with a number of key stakeholders including victims of crime advocacy groups, legal professionals, death review bodies, researchers and police.

On 26 October 2017, the Council issued a call for preliminary submissions which closed on 24 December 2017. The Council received 10 submissions in response, including from the Bar Association of Queensland, Queensland Homicide Victims' Support Group, Queensland Law Society, PACT (Protect All Children Today), family members of victims of child homicide, and the general public. Public submissions are available on the Council's website.

A list of submissions received and meetings held is set out in **Appendix 2**.

Issues identified through this preliminary research and consultation stage have informed this consultation paper.

## Scope and terminology

This review is specifically concerned with penalties imposed on sentence for criminal offences arising from the death of a child. The terms ‘child homicide’ and ‘child homicide offences’ are used throughout this paper to refer to the child death offences that are the subject of this review.

While different definitions of a ‘child’ are adopted for different purposes, for this review the Council has defined a ‘child’ as a person who is under the age of 18 years.

The review focuses on penalties imposed on sentence over a 12-year period from 2005–06 to 2016–17. This aligns with the Queensland Courts data held by the Council and captures all child homicide and adult homicide matters sentenced in Queensland over the relevant period.

Taking into account that issues raised in preliminary consultation and submissions have focused on sentencing outcomes for offences involving child abuse and neglect, the Council has determined the review should focus on the criminal offences of murder and manslaughter rather than other offences that might potentially involve the death of a child victim. For this reason, the Council does not specifically examine sentencing outcomes or issues relating to the offences of dangerous driving causing death, driving without due care and attention,<sup>4</sup> or unlawful striking causing death<sup>5</sup> in this consultation paper.

Unlike many other crimes which result in the death of a child, most cases of driving-related deaths arise from motor vehicle accidents where the offender has no prior association with the victims and no knowledge at all of their personal circumstances, such as their age. While there will be cases in which a person may cause the death of a child by driving carelessly or dangerously knowing there is a child in the car, these cases have not been highlighted to the Council as warranting specific examination.

The Council is aware there is legislation currently before the Queensland Parliament that, if passed, will result in higher maximum penalties applying for the offence of careless driving of a motor vehicle in circumstances where death or grievous bodily harm results than is currently the case.<sup>6</sup> These new penalties will apply irrespective of whether the person killed is a child or an adult.

There was only one case of unlawful striking causing death over the relevant data period. This offence was committed against an adult rather than a child victim.

While the Council has excluded these other homicide offences from consideration in this consultation paper, it is including analysis of ‘associated offences’ (offences that may be charged alongside the offences of murder and manslaughter of a child, such as cruelty to a child under 16 years and torture) in its research report. This is because associated offences may directly impact on the ultimate sentencing outcome in child homicide offence cases. Sentencing outcomes for offenders sentenced for non-homicide offences where another person has been sentenced for a child homicide offence relating to the same child victim (associated offenders) will also be included as part of this analysis.

Although not part of its initial analysis, the Council will take any issues raised about sentencing for other criminal offences that may be charged as the result of the death of a child into account in developing its final report and recommendations.

Decisions made by the Mental Health Court concerning child homicide offenders will not form part of this review as they are not sentencing decisions. These decisions include a finding that a person is of unsound mind at the time of the offence which means they are not criminally responsible for their actions. Defences to child homicide offences, including insanity, are discussed in section 3 of this paper.

As this is a review of sentencing, certain matters relevant to the operation of the criminal justice system and its response to people suspected of committing a child homicide offence or convicted of such an offence have been excluded from the review on the basis that they are out of scope. For this reason, the Council will not be considering issues such as the investigative process undertaken by law enforcement authorities or Child Safety Services, or the post-sentence management of prisoners by Queensland Corrective Services (QCS). The Council has also excluded cases that are the subject of current investigation or are before the courts to prevent prejudice of any current investigative or legal processes.

As required under the Terms of Reference, the review includes consideration of the approach taken in other Australian jurisdictions to the sentencing of child homicide offences. However, a direct comparison between Queensland sentencing outcomes and other jurisdictions will not be undertaken. This is because the legislative and penalty frameworks and sentencing approaches are unique to each jurisdiction and in such circumstances, comparisons are of little value.

## Data sources

Providing a comprehensive analysis of child homicide offences and the sentencing outcomes associated with these offences required integrating administrative data maintained by a number of different government agencies. The relevant time periods varied agency by agency depending on functional responsibility, which influences the recording and reporting of data.

To establish a baseline, the Queensland Family and Child Commission's (QFCC) child death register provided data about all relevant child deaths over the period 1 January 2004 to 30 June 2017. Predominantly this data was extracted from the register's *Fatal Assault and Neglect* category; however, additional extractions were made from the *Drowning and Transport* categories.

Offence and charge related data for all murder, manslaughter, attempted murder, grievous bodily harm and torture events were extracted from the Queensland Police Service (QPS) data system QPRIME (Queensland Police Records and Information Management Exchange) for the period 1 January 2002 to 31 December 2017. This extraction provided critical information about the circumstances of each offence.

Queensland Courts data was provided by the Queensland Government Statistician's Office (QGSO) detailing sentencing information for the offences of murder, manslaughter and other select offences involving both child and adult victims over the period 1 July 2005 to 30 June 2017. To provide greater detail about the situational and contextual factors associated with manslaughter cases involving both adult and child victims, approval was granted by the Supreme Court Library Committee for the Council to analyse sentencing remarks from the Queensland Sentencing Information Service (QSIG).

QCS provided detailed information about people sentenced and under the supervision of QCS for an offence arising from the death of a child over the same 12-year period as the Courts data. In addition to these administrative data sources, the Council undertook a comprehensive social science literature review. Key findings from this review are presented in section 2 of this paper.

To provide a national perspective, the Council secured data from the National Homicide Monitoring Project coordinated by the Australian Institute of Criminology. This national dataset contributed aggregate-level information about the nature and context of homicides across Australia, including child homicides over the period 1 July 2005 to 30 June 2014.

Additional and more detailed statistical and literature analyses will be provided in a complementary research report for this review, which will be released on the Council's website during the consultation period.



## 2. The nature and extent of child homicide

Crimes against children, especially those resulting in a child's death, provoke strong emotions. Understandably, community concern in response to such crimes appears to be universal, and national and international research into child homicide has consequently increased over the past three decades. However, as with most crime-related research, real limitations exist when attempting to translate research findings from one jurisdiction to another. Limitations include, but are not confined to, definitional and categorisation differences associated with child homicide across jurisdictions; small sample sizes; and varied research designs, data sources and topics under review.<sup>7</sup> Despite these limitations, a number of key findings derived from national and international research are relevant to the current review. Queensland findings are discussed in section 5 of this paper and will be the subject of a separate research report to be released by the Council during the consultation period.

### Extent of child homicide

National and international research reveals that child homicide accounts for between 8 and 19 per cent of all homicides.<sup>8</sup> Some research acknowledges a 'hidden figure' may exist for child homicide as some deaths, particularly those of very young children, may not come to the attention of official systems. While overall the crime of homicide involves more adult victims than child victims, when a child death is recorded, 'it is five times more likely to be due to homicide than is the case with a death in the adult population'.<sup>9</sup> Research classifies children as a distinct group of victims for homicide.<sup>10</sup>

### Perpetrators of child homicide

Family members are the most common perpetrators of child homicide, with parents or parent equivalents representing the highest proportion of perpetrators.<sup>11</sup> For filicide cases (that is, cases where the perpetrator is a parent, including a step-parent), research highlights three main perpetrator groups: mothers, fathers and stepfathers.<sup>12</sup> Patterns in the age of child victims and causes of death are observable based on these three categories.<sup>13</sup> Biological fathers and biological mothers are more likely than step-fathers to be involved in the death of very young children.<sup>14</sup> According to one major Australian study, one in six biological parents committed suicide as part of or after the child homicide. Of these, almost all were custodial parents (90%) and the majority were mothers (60%).<sup>15</sup>

About the same number of men (fathers, including step-fathers) and women (mothers) are perpetrators of child homicide, a situation not replicated for any other category of homicide in which men represent the greater proportion of perpetrators.<sup>16</sup> Research into child homicide suggests that 'when women do kill, the victim is often their child',<sup>17</sup> while male perpetrators have a greater involvement in homicides of non-biological children.<sup>18</sup> Research suggests that the greater involvement of women, and in particular mothers, in child homicide challenges established social constructs of motherhood/parenthood and femininity, and may contribute to the high levels of community condemnation.<sup>19</sup>

### Victims of child homicide

A child is at greatest risk of homicide in their first year of life.<sup>20</sup> Risk of homicide significantly decreases as a child matures, with the school-age period of 5 to 14 years recording the lowest risk levels across all age groups.<sup>21</sup> A child's risk of homicide increases again in the later teenage years.<sup>22</sup> Reflecting broader homicide trends, the risk of homicide from outside the family increases as a child ages, particularly into the mid to late teenage years.<sup>23</sup> This period also involves a marked reduction in the involvement of women as perpetrators of filicide and child homicide.<sup>24</sup>

Male and female children experience comparable levels of homicide, although some research records slightly more male child homicide victims.<sup>25</sup> Whether the child victim is male or female does not appear to be associated with any definable perpetrator group.<sup>26</sup> However, as children enter their mid to late teenage years, the proportion of male victims increases, aligning more with identifiable trends in adult homicide and reflective of the broadening of a person's social network, particularly with people outside their immediate families, and their external environment.<sup>27</sup>

## Context of child homicide

Child homicide is a diverse category of homicide.<sup>28</sup> Research acknowledging this diversity shifted from focusing on discovering motive to examining situational and contextual factors associated with offenders, victims and incidents. This recognises the often-complex interplay between a range of precipitating factors. The factors leading to child homicide are typically case-specific.

The majority of child homicides occur within the child's home.<sup>29</sup> For older children (mid to late teenage years) the prevalence of the home as the offence location reduces and public spaces become an increasingly common offence location. Shifts in location type can be explained by changes over time in the routines or day-to-day activities in which children typically engage, impacting their homicide risk/s.<sup>30</sup> For example, very young children typically spend more time at home in the care of their parents, while teenage children may be more likely to spend time in public places socialising with friends.

The cause of death recorded for child victims of homicide is also diverse, although male and female perpetrators differ in how they commit child homicide.<sup>31</sup> Male perpetrators are more likely than female perpetrators to use direct physical violence such as beating, while strangulation is the method most often used by female perpetrators.<sup>32</sup> The deaths of very young child victims are most often the result of asphyxiation, suffocation, smothering or drowning, and mothers are usually the perpetrator.<sup>33</sup>

Various child homicide studies document the alcohol or drug misuse of perpetrators.<sup>34</sup> However, confirming the extent to which an individual's substance misuse contributes to their offending is more contentious.<sup>35</sup> Increasingly, research suggests substance misuse is one of a range of economic, personal and social stressors child homicide perpetrators experience.<sup>36</sup> Differences associated with how individual studies assess the role of substance misuse in child homicide cases are also evident, while various studies also acknowledge that adult homicide perpetrators experience equally high or higher stressors, including substance misuse, and that the contribution of individual and/or multiple stressors may vary depending on gender, individual and/or situational circumstances.<sup>37</sup>

Collectively, it is difficult to construct a clear assessment about the role of substance misuse in child homicide. Australian police records for filicide cases show the proportion of offenders with alcohol present at the time of the incident was 12 per cent, while the proportion of perpetrators with drugs present was 20 per cent.<sup>38</sup> A recent NSW report showed that nearly half of those suspected of child homicide in abuse-related circumstances had previously come to official attention for drug or alcohol misuse.<sup>39</sup>

As with substance misuse, child homicide (and particularly filicide) research documents the presence of mental health issues among perpetrators. For example, many perpetrators of filicide recorded mental illnesses or disorders, with depression the most common condition followed by psychosis.<sup>40</sup> In addition, mothers who commit filicide were more likely to be diagnosed as having a mental illness than filicidal fathers,<sup>41</sup> more likely to be the primary carer for the child, and more likely to be victims of domestic violence.<sup>42</sup> However, as with substance misuse, inferring that mental illness precipitates child homicide would fail to acknowledge the multi-dimensional aspect of child homicide, the gendered profile of this crime and the fact that many people with a mental illness do not harm children.<sup>43</sup>

Some studies show a relatively low prevalence of mental health issues in perpetrators, for example 15 per cent nationally, while other findings reveal a much higher prevalence, from half in NSW to three quarters in Victoria.<sup>44</sup> The reasons for variation include differences in data sources and categorisation and possibly when and how individual studies approach the issue of mental health. Isolating the individual influence of either substance misuse or mental health issues is complex.<sup>45</sup> As a result, research tends to identify a range of factors, including substance misuse and mental health concerns, as risk factors in an effort to re-direct the focus onto informing intervention strategies.



## 3. Child homicide offences

### Unlawful killing

Killing a person<sup>46</sup> is either murder or manslaughter, depending on the circumstances of the case,<sup>47</sup> unless the killing is ‘authorised or justified or excused by law’<sup>48</sup> such as when a legal defence or excuse applies. Saying that someone is ‘criminally responsible’ for something means they are ‘liable to punishment as for an offence’.<sup>49</sup>

‘Killing’ means causing ‘the death of another, directly or indirectly, by any means whatever’.<sup>50</sup> A person causes someone else’s death if what they did (an ‘act’)<sup>51</sup> or did not do (an ‘omission’)<sup>52</sup> ‘is a substantial or significant cause of death, or substantially contributed to the death’.<sup>53</sup> It does not have to be the only cause.<sup>54</sup> A person can still be criminally responsible even when the death could have been avoided by the victim taking proper precaution or prevented by proper care or treatment,<sup>55</sup> or where the death was ultimately caused by ‘reasonably proper’ medical treatment, administered because of the injury and delivered in good faith.<sup>56</sup>

The most obvious way a person is held criminally responsible is by being a ‘principal offender’; the person who actually does the act or makes the omission which comprises the offence (for instance, the parent who strikes a fatal blow which kills a child). But culpability for child homicide offences extends beyond the principal offender.<sup>57</sup>

### Duty provisions

Queensland’s *Criminal Code* imposes legal duties on certain people. The two duties particularly relevant to child homicide<sup>58</sup> are the duty to provide necessities of life<sup>59</sup> (which can include medical aid)<sup>60</sup> and the duty of a person who has care of a child under 16 to provide the necessities of life, take reasonable precautions to avoid danger to life, health or safety and take reasonable action to remove the child from any such danger.<sup>61</sup>

The duty provisions do not create offences in themselves — they ‘are concerned with issues of causation in relation to offences against the person...where the relevant duty has been breached by a person, that person is taken to have caused any consequences to life, health or safety of anyone for whom the duty was imposed’.<sup>62</sup>

To determine whether a duty has been breached, it is necessary to consider what an ordinary, reasonable member of the community would do in the circumstances.<sup>63</sup> A person’s negligence must show such disregard for the life and safety of others that it warrants punishment.<sup>64</sup>

### Parties to an offence

People can be guilty of an offence if they:<sup>65</sup>

- do or do not do something to enable or aid (assist, help or encourage)<sup>66</sup> someone else in committing the offence;
- counsel (urge or advise)<sup>67</sup> another person in committing the offence; or
- procure (bring about, cause to be done, prevail on, persuade, try to induce)<sup>68</sup> any other person to offend.<sup>69</sup>

This can encompass a wide variety of activities such as planning, paying, driving and acting as lookout. It can cover partners who allow abuse of their children.<sup>70</sup> The same maximum penalties that apply to the principal offender will apply to any party to an offence.

## Offences committed in prosecution of a common purpose

Where two or more people plan to do something unlawful together and commit an offence when carrying out the plan,<sup>71</sup> each person is taken to have committed that offence provided the offence ultimately committed is of the kind likely to have resulted from the plan.

## Murder

The *Criminal Code* (Qld) sets out five different ways in which a person can be guilty of murder:

1. Intent to cause someone death or grievous bodily harm — it does not matter if the offender did not intend to hurt the particular person killed.<sup>72</sup> Grievous bodily harm means the loss of a distinct part or organ of the body; serious disfigurement or any bodily injury of such a nature that, if left untreated, would endanger (or be likely to endanger) life; or cause (or be likely to cause) permanent injury to health. It does not matter whether medical treatment is or could have been available.<sup>73</sup> In the case of children killed by carers or people known to them, this will be the most common way of prosecuting murder.
2. Felony murder — where the death is caused by an act ‘done in the prosecution of an unlawful purpose’ which was likely to endanger human life. It does not matter that the offender did not intend to hurt any person.<sup>74</sup>
3. Unlawful killing in order to carry out a crime or to facilitate the flight of an offender who has committed or attempted to commit a crime<sup>75</sup> in circumstances where the offender intends to cause grievous bodily harm to ‘some person’;<sup>76</sup> or
4. The death is caused by administering any stupefying or overpowering thing for either of the purposes mentioned in paragraph c); or<sup>77</sup>
5. The death is caused by willfully stopping the breath of any person for either of such purposes.<sup>78</sup>

For 3, 4 or 5, it does not matter that the offender did not intend to cause death, or did not know death was likely to result.<sup>79</sup>

## Intent

The criminal law focuses not only on the victim’s death, but also on what the offender meant to do and how the death was caused. Murder generally requires proof of intent. Manslaughter does not.<sup>80</sup>

The result that a person intended to cause in committing an offence is irrelevant — unless, as with murder, intention is expressly made an ‘element’ (or ingredient) of the offence.<sup>81</sup>

Where proof of the intention to produce a particular result is made an element of liability for an offence under the Code, the prosecution is required to establish that the accused meant to produce that result by his or her conduct.<sup>82</sup>

The word ‘intends’ means to have in mind, to have a purpose or design, to mean. It involves premeditation. The prosecution has to prove the accused person had the specific intention in his or her mind when committing the offence, but not necessarily for a long time. It is enough that they formed it in a matter of seconds, for instance, in a sudden flash of temper.

Unless the accused gives direct (and believable) evidence as to his or her intention, the intention of an accused at the relevant time will generally be a matter of inference by the jury from other facts proved.<sup>83</sup>

The law in Queensland presumes each person is, and was, of sound mind at any relevant time, until the contrary is proved.<sup>84</sup> But a person is not presumed to intend the natural and probable consequences of their actions.<sup>85</sup> The prosecution can refer to the presumption of sound mind, but cannot use it to try exclude evidence said to show the accused person was of unsound mind.<sup>86</sup> A judge must direct the jury on any evidence capable of supporting a finding of insanity.<sup>87</sup>

## Foreseeability and probability are not intents

Foreseeability, likelihood and probability are not relevant to proving intent in an offence under the *Criminal Code* (Qld).<sup>88</sup> A person's awareness of the probable consequences of their actions is not necessarily legal intent, even when recklessly performing the action over an extended period.

It is reckless to do something knowing it will probably produce a particular harm. This, combined with other evidence, can show intention to produce that harm — but it is distinct in law from that intention.<sup>89</sup>

Even where the recklessness is so strong that the person knows it is a 'virtual certainty' their conduct will produce a particular result, the jury must be satisfied the person meant to produce the particular result. However, virtual certainty would create a compelling, significant inference of intent.<sup>90</sup>

## Manslaughter

An unlawful killing in Queensland that is not murder is manslaughter.<sup>91</sup> Manslaughter is a very serious offence, which carries a maximum penalty of life imprisonment. It can involve a very broad range of factual circumstances from cases where the offender did not anticipate doing even serious physical harm, let alone death,<sup>92</sup> to circumstances where the offender intended to kill or cause grievous bodily harm but is found guilty of manslaughter because of a partial defence such as provocation.

There are four broad categories of conduct that fall within the offence of manslaughter:

1. A deliberate act without an intention to kill or do grievous bodily harm.
2. A deliberate act done under provocation or diminished responsibility.
3. Where liability for the unlawful killing arises as a result of being a party to the offence.
4. A criminally negligent act or act done in breach of a duty (for example, the duty of a parent to seek medical care for their child if they are sick or seriously injured).

Many unlawful child killings in Queensland result in an offender being convicted of manslaughter rather than murder for reasons including the nature of the conduct and the difficulty of establishing intent, even where the death is due to physical abuse. This issue is explored further in section 6 of this paper.

## Defences and excuses

### Partial defences and excuses

There are three partial defences which result in a person being found guilty of manslaughter where they would otherwise be guilty of murder.<sup>93</sup>

1. **Diminished responsibility**<sup>94</sup> — a state of abnormality of mind which substantially impairs a capacity to understand, to control, or to know the action is wrong.<sup>95</sup>
2. **Killing on provocation**<sup>96</sup> — losing self-control and killing in the heat of passion, caused by sudden provocation which could provoke an ordinary person, before there is time for that passion to cool.<sup>97</sup>
3. **Killing for preservation in an abusive domestic relationship**<sup>98</sup> — where the deceased person had committed acts of serious domestic violence against the person during an abusive domestic relationship, and the person believed (reasonably) that the killing was necessary for his or her preservation from death or grievous bodily harm.

### Acts independent of will and unforeseeable events

A person is not criminally responsible for<sup>99</sup> something occurring independently of their will (like a reflex defensive action, or sleepwalking)<sup>100</sup> or death<sup>101</sup> that the person does not (and a reasonable person would not) foresee as a possible consequence. This is a complete excuse from all criminal responsibility, but is not available to someone charged on the basis of criminal negligence.

A person is still criminally responsible for death or grievous bodily harm that results from a victim's defect, weakness or abnormality.<sup>102</sup> This does not mean a weakness only because the victim is a child or infant. This refers to a legal doctrine in civil law regarding inherent (but generally invisible) weaknesses in the victim, called the 'eggshell skull' rule. Put another way, the criminal law requires that an offender takes their victim as they find them.<sup>103</sup> Inherent weaknesses can include an aneurism<sup>104</sup> or enlarged spleen,<sup>105</sup> or defects, weaknesses, or abnormalities caused by artificial or foreign objects such as implants or artificial joints.<sup>106</sup>

## Insanity and powers of the Mental Health Court

An accused person is presumed to be of sound mind.<sup>107</sup> The accused person must raise the defence of insanity,<sup>108</sup> which will absolve him or her of all criminal responsibility if successful. This will usually involve psychiatrists carefully assessing the person and their medical history, and then giving evidence. The Mental Health Court (MHC) will determine if a person was of unsound mind ('insanity') at the time of the offence.<sup>109</sup>

The MHC can also decide whether a person charged with murder was of diminished responsibility when the offence was allegedly committed. If so, the murder proceeding is discontinued but proceedings for another offence (for instance, manslaughter) can progress.<sup>110</sup>

The MHC can also decide that a person is unfit for trial at the time of its decision. This unfitness can be temporary or permanent.<sup>111</sup> If it decides that the person is fit for trial, it must order that the proceeding for the offence be continued according to law.<sup>112</sup>

Findings of either unsoundness of mind or permanent unfitness for trial mean the prosecution will be discontinued.<sup>113</sup> Further proceedings cannot be taken against the person for the act or omission constituting the offence. A system under the *Mental Health Act 2016* (Qld) provides for the indefinite detention of these individuals, with review procedures which can lead to release at some future stage.<sup>114</sup>

If the MHC decides a person is unfit for trial and the unfitness is not permanent, the person's fitness is periodically reviewed by the Mental Health Review Tribunal.<sup>115</sup> The MHC must make a forensic order (mental health), forensic order (disability) or treatment support order for the person.<sup>116</sup> The proceeding is stayed until the Mental Health Review Tribunal decides the person is fit for trial. If it does not make that decision, proceedings will eventually be discontinued during or at the end of a review process (lasting up to seven years for offences with a maximum penalty of life imprisonment). The person cannot be prosecuted again for the discontinued offence (but the mental health order continues).<sup>117</sup>

A jury can also make decisions where there are concerns about the accused's mental state in a 'regular' court. This can lead to the person's admission to an authorised mental health service.<sup>118</sup>

The legal test determining insanity is whether, during the offence, the person was in such a state of mental disease or natural mental infirmity that they did not have the capacity to understand what they were doing, control their actions, or know they should not do what they did.<sup>119</sup> A mental disease is a condition that affects the functions of the mind — the ability to reason, remember and understand.<sup>120</sup>

If a person does not satisfy the requirements for the defence of insanity, but their mind was affected by delusions, they remain criminally responsible but only to the same extent as if what they had wrongly believed was real.<sup>121</sup>

## Other excuses and defences

There are other excuses and defences which can be relied upon in relation to unlawful killings but which are unlikely to feature in child homicide cases, including extraordinary emergency and self defence.<sup>122</sup>

## Intentional intoxication

The law about insanity does not apply to a person who is, to any extent, intentionally intoxicated, even if the person's mind is disordered by the intoxication 'in combination with some other agent' (including an underlying mental disorder).<sup>123</sup>

When an offence does not require the prosecution to prove a specific intent (as with manslaughter), voluntary intoxication does not relieve a person of criminal responsibility. It may help in considering the person's memory and in explaining their conduct. But it does not give rise to an acquittal at trial.<sup>124</sup> It cannot be a mitigating factor on sentence.<sup>125</sup>

However, any intoxication can be considered in deciding whether the accused person had an intention that must be proved as part of an offence (as with murder). Then, intoxication — whether complete or partial, intentional or unintentional — may be considered to determine whether the intention existed.<sup>126</sup>

A person is still responsible if their intoxication diminished their resistance to carrying out the intention. The prosecution must prove beyond reasonable doubt the person had the intention despite the intoxication.<sup>127</sup> If the intention did not exist, a person on trial for murder who is found to have caused the death of a person, would be guilty of manslaughter.

## Associated offences

There are other offences under the *Criminal Code* (Qld) which a person may be charged with when a child is injured but not killed.<sup>128</sup> Some may also be charged alongside murder or manslaughter if the alleged facts warrant it.

**Table 1: Associated offences — offences that may be charged alongside murder or manslaughter**

Offence	Criminal Code	Maximum Penalty	Intention is an element of the offence?
Attempt to murder	s 306	Life imprisonment	Yes, requires intent to kill (but not to cause grievous bodily harm).
Disabling in order to commit an indictable offence	s 315	Life imprisonment	Yes, requires intent to commit or to facilitate the commission of an indictable offence, or to facilitate the flight of an offender after the commission or attempted commission of an indictable offence.
Choking, suffocation or strangulation in a domestic setting (can include children) <sup>129</sup>	s 315A	7 years imprisonment	No.
Stupefying in order to commit an indictable offence	s 316	Life imprisonment	Yes, requires intent to commit or to facilitate the commission of an indictable offence, or to facilitate the flight of an offender after the commission or attempted commission of an indictable offence.

Offence	Criminal Code	Maximum Penalty	Intention is an element of the offence?
Acts intended to cause grievous bodily harm and other malicious acts	s 317	Life imprisonment	Yes, requires proof of one of four intents combined with stipulated acts including: <ul style="list-style-type: none"> <li>• to maim, disfigure or disable, or</li> <li>• to do grievous bodily harm or transmit a serious disease, or</li> <li>• to resist or prevent lawful arrest or detention, or</li> <li>• to resist or prevent a public officer from acting in lawful authority.</li> </ul>
Grievous bodily harm	s 320	14 years imprisonment	No.
Torture	s 320A	14 years imprisonment	Yes, requires intent - intentional infliction of severe pain or suffering (physical, mental, psychological or emotional; temporary or permanent) on a person by an act or series of acts done on one or more than one occasion.
Failure to supply necessities	s 324	3 years imprisonment	No.
Endangering life of children by exposure	s 326	7 years imprisonment	No.
Negligent acts causing harm	s 328	2 years imprisonment	No.
Cruelty to children under 16	s 364	7 years imprisonment	No.
Leaving a child under 12 unattended	s 364A	3 years imprisonment	No.

## 4. Sentencing process and framework

### Sentencing hearing

At a sentencing hearing, the prosecution and defence make oral and/or written submissions which can be supplemented by other documents. This provides the court with a summary of the facts of the case, the impact of the crime on identified victims, the offender's background, appropriate penalties and statements of principles from other cases. A written schedule of agreed facts will often be provided to the court and relied on for sentencing.

Family members can prepare a victim impact statement, which they can read aloud in the courtroom. The sentencing court must have regard to the harm done to, or impact of the offence on the victim mentioned in such a statement.<sup>130</sup>

At the end of the hearing, the court sets out the sentence and the reasons for the decision. All court proceedings are recorded and a transcript is prepared of the sentencing remarks.

Sometimes an offender will admit they are legally guilty of the offence, for example they are guilty of manslaughter, but disagree with the prosecution about what they did or did not do to make them guilty of it. For instance, a person might agree they failed to seek medical assistance for a child in his or her care following the child being physically assaulted by another person which resulted in the child's death, but not that they were responsible for causing the injuries to the child. This can result in a contested sentence. The court hears evidence, which can include witnesses giving evidence and being cross examined as occurs during a trial. The sentencing judge decides the facts on the balance of probabilities (as opposed to the more onerous test of beyond reasonable doubt, used in criminal trials).<sup>131</sup> A higher level of satisfaction on the part of the court regarding the standard of proof is required where the consequences of accepting an allegation are more adverse to the offender.

### Legislative sentencing purposes and factors

#### Sentencing purposes

Section 9 of the *Penalties and Sentences Act 1992 (Qld)* (PSA) sets out sentencing guidelines. It limits the purposes of sentencing to five matters (and combinations of them):

- punishment;
- rehabilitation;
- deterrence (two kinds — deterring the offender and deterring potential offenders);<sup>132</sup>
- denunciation; and
- community protection.

These purposes overlap and none of them can be considered in isolation; they are guideposts to the appropriate sentence, sometimes pointing in different directions.<sup>133</sup>

Section 9 of the PSA provides additional legislative guidance to Queensland courts in sentencing an offender for certain types of offences, including sexual offences against children under 16 years, and for offences involving violence or resulting in physical harm (discussed below).

Deterrence has a forward-looking, crime prevention focus and aims to discourage the offender and other potential offenders from committing the same or a similar offence through the penalty imposed.<sup>134</sup>

Denunciation in a sentencing context is concerned with communicating 'society's condemnation of the particular offender's conduct'.<sup>135</sup> The sentence imposed represents 'a symbolic collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law'.<sup>136</sup>



Queensland courts have recognised deterrence and denunciation as being primary sentencing considerations when sentencing for offences of violence involving child victims.<sup>137</sup>

When the vulnerability of children in the care of their parents or others is considered and the policy of the law with its concern for human life is regarded, it is obvious that appropriate deterrence must be maintained against causing the death of vulnerable infants. The effect of deterrence in this context is extremely important.<sup>138</sup>

The need for just punishment has also been expressly recognised by courts as a separate and important sentencing purpose in this context.<sup>139</sup> The Queensland Parole System Review Final Report (2016) noted:<sup>140</sup>

A sentence of imprisonment can confer a sense of retribution for the victim and, indeed, for all of us. Outrage about too lenient a sentence is outrage addressed towards the lack of retribution inherent in a sentence. But retribution is not revenge; it is an attempt to satisfy a society's sense that serious wrong doing deserves a proportionate response officially and in the public interest by way of the infliction of a penalty by a court.

There are circumstances in which deterrence is considered to have little or no relevance; this includes where a person has committed an offence while suffering a mental impairment, including offenders sentenced for manslaughter on the basis of diminished responsibility at the time of the offence.<sup>141</sup>

## CASE STUDY 1

***R v Potter; Ex parte A-G (Qld) (2008) 183 A Crim R 497; [2008] QCA 91 (18 April 2008)***

P pleaded guilty to manslaughter on the basis she was of diminished responsibility at the time of the offence. P killed her five-year-old daughter, M, by putting tape over her mouth and then holding a pillow over M's face for approximately 20 minutes until the child died from asphyxiation. P admitted to the offence, saying she had just snapped because her daughter would not do what she was told and kept being naughty. The Mental Health Court found P to be suffering from a major depressive disorder in the context of a vulnerable personality and significant psychosocial stressors (including a separation from her husband due to allegations of sexual interference with M and termination of a planned pregnancy). In dismissing an Attorney-General's appeal against the sentence, the Court of Appeal (by a majority) found that considerations of deterrence had little relevance in a case such as this and the sentence of eight years' imprisonment with parole eligibility after three years was not manifestly inadequate.

The need for community protection and its relevance in sentencing for child homicide offences depends on the individual circumstances in which the offence has occurred and the personal circumstances of the offender. A focus on the risk the offender poses of causing future harm to the community and need for community protection often arises in the context of determining whether it is appropriate for a sentencing court to make a declaration that an offender is convicted of a serious violent offence (SVO). The SVO scheme and its operation is discussed under the heading 'Serious violent offence declarations'.

## CASE STUDY 2

***R v Green & Haliday; Ex parte A-G (Qld) [2003] QCA 259 (19 June 2003)***

A 20-year-old mother, H, and her 23-year-old boyfriend, G, pleaded guilty to the manslaughter of the H's 18-month-old child, S, whom they had physically restrained at night to ensure she slept, causing her to suffocate and were sentenced to six years' imprisonment. The Court of Appeal in dismissing an application for the making of a serious violent offence declaration found that the circumstances did not demonstrate a need to protect the community from these offenders in light of their personal circumstances. This included H suffering from significant mental health issues and both H and G having reduced intellectual capacity, resulting in a reduced ability to cope with the ordinary stresses of life (in this case, S's sleeping difficulties). Both offenders were highly distressed and remorseful for what had occurred.



## QUESTION 1: SENTENCING PURPOSES

What are the most important sentencing purposes that should be taken into account by a court when sentencing an offender for an offence arising from the death of a child, and why?

### Sentencing guidelines for violent offences

Section 9 of the PSA has special rules about sentencing for offences involving violence against, or physical harm to, another person. For these offences, the general principles which make imprisonment the sentence of last resort and prefer a sentence allowing an offender to stay in the community do not apply.<sup>142</sup>

When sentencing for offences involving violence against, or physical harm to, another person, the sentencing court must have 'regard primarily to' factors which focus on risk to the community and public safety, the personal circumstances of any victim, the circumstances of the offence (including any death, injury, loss or damage), nature or extent of the violence used, and issues relevant to the offender (their past record, any attempted rehabilitation, personal circumstances, age and character and any medical, psychiatric, prison or other relevant report).<sup>143</sup> The general factors which courts must have regard to when sentencing offenders still apply.<sup>144</sup>

### General sentencing factors

General sentencing factors to which a court must have regard in sentencing include factors regarding the offence, such as the maximum (and any minimum) penalty prescribed, its nature and seriousness (including the effect on any child under 16 who may have been directly exposed to, or witnessed, it) and its prevalence (how common the offence is).

There are also factors relating to the offender which the court must take into account. For example:

- the extent to which he/she is to blame (culpability, which refers to the factors of intent, motive and circumstances determining how much the offender should be held accountable for his/her actions);<sup>145</sup>
- any aggravating or mitigating factors;
- the level of assistance given to law enforcement agencies in the investigation of the offence or other offences;
- time spent in pre-sentence custody for the offence; and
- other sentences imposed which have an impact on the sentence being imposed (and vice versa).

A court sentencing an Aboriginal or Torres Strait Islander person must consider any relevant submission made by a representative of the community justice group in their community.

Aggravating circumstances are those factors that would increase a sentence. Mitigating circumstances are those that would reduce a sentence. They can impact on the sentence imposed depending on their relevance and the weight that the court places on them.

Previous convictions must be treated as an aggravating factor if the court considers they can reasonably be treated as such. This is determined by considering the nature of the previous conviction, its relevance to the current offence and the time that has elapsed since the conviction.<sup>146</sup>

The fact an offence is a domestic violence offence must be treated as an aggravating factor, unless the court considers it is not reasonable because of the exceptional circumstances of the case. The definition of a 'domestic violence offence' would extend to circumstances in which a child's death is caused by a family member and the offender's conduct is also domestic violence or associated domestic violence.<sup>147</sup>

## Guilty plea as a mitigating factor

A Queensland sentencing court must take the offender's guilty plea into account and may reduce the sentence it would have otherwise imposed had the offender not pleaded guilty (taking into account the timing of the plea).<sup>148</sup> The courts have indicated the more serious the offence, the less significance a plea of guilty will carry in terms of the ultimate sentence imposed. However, even where the offence is quite serious, some reduction in the sentence is warranted in the event of a guilty plea.<sup>149</sup>

There are three reasons why a guilty plea is generally accepted as justifying a lower sentence than would otherwise be imposed:<sup>150</sup>

First, the plea is a manifestation of remorse or contrition. Secondly, the plea has a utilitarian value to the efficiency of the criminal justice system. Thirdly, in particular cases — especially sexual assault cases, crimes involving children and, often, elderly victims — there is particular value in avoiding the need to call witnesses, especially victims, to give evidence.

In the absence of remorse by the offender for their actions, the focus moves to the willingness of the offender to facilitate the course of justice.<sup>151</sup>

As to the utilitarian value of a plea, courts have recognised the public interest is served by an accused person who accepts guilt and pleads guilty to an offence charged,<sup>152</sup> even if there is a high likelihood of conviction had the case proceeded to trial.<sup>153</sup> This is because unless there is some incentive for an accused person to plead guilty, there is always a risk they will proceed to trial because they consider there is nothing to be lost by doing so.<sup>154</sup>

The degree of leniency may vary according to the degree of inevitability of conviction as it may appear to the sentencing judge, but it is always a factor to which a greater or lesser degree of weight must be given.<sup>155</sup>

The person's motive for pleading guilty is not a basis for not taking the plea into account.<sup>156</sup>

The extent to which a guilty plea may reduce the sentence that would otherwise have been imposed depends in part on how early or late the plea was entered,<sup>157</sup> although the circumstances of the case need to be considered. For example, if a person only pleads guilty to an offence after other charges to which he or she were not prepared to plead guilty are withdrawn, it cannot automatically be assumed the person has not pleaded guilty at the earliest opportunity.<sup>158</sup>

As discussed further under the heading 'Penalties and parole', it is common for an offender who enters an early guilty plea, accompanied by genuine remorse, to have a parole eligibility date or release date set by a court, or suspension of their sentence ordered after serving one-third of their head sentence in custody.<sup>159</sup>

In its preliminary submission to the Council, the Queensland Homicide Victims' Support Group was of the view any reduction for a guilty plea should be a maximum of 25 per cent of the head sentence, reducing to five per cent if the plea occurs at trial.<sup>160</sup>

## Key factors impacting on sentencing for child homicide

In addition to the general purposes and factors that apply in sentencing for any offence, and in particular offences involving personal violence or resulting in physical harm, there are factors that apply in sentencing offenders for the unlawful killing of a child that may be treated as aggravating.

Where the unlawful death of a child involves a violent act leading to the child's death, the young age of the child and abuse over a long period tends to support greater seriousness.

### CASE STUDY 3

#### ***R v Chard; Ex parte A-G (Qld) [2004] QCA 372 (8 October 2004)***

In the case of Chard, which involved sustained physical abuse of a baby aged seven and a half weeks at the time of his death over a four-day period by his mother's de facto partner, the Court of Appeal found that: 'The prolonged abuse of a baby of this age would call for a head sentence at least in the range eight to 10 years'.<sup>245</sup> The court allowed an Attorney-General's appeal against a sentence of six years substituting the initial sentence with a sentence of seven years ordered to be served cumulatively with 12 months imprisonment activated under an earlier suspended sentence for unrelated offences. The court accepted the main factor discounting the sentence that would otherwise have been imposed was the offender's timely plea to manslaughter after the prosecution agreed not to proceed with the charge of murder. The offender was 21 years at the time of the offence and had no prior convictions for violent offending. No recommendation for early parole was made.

In a later appeal decision in relation to a sentence of eight years' imprisonment with a SVO declaration imposed on a 21-year-old offender for the manslaughter of the 19-day-old child of his de facto partner, the Court of Appeal found the absence of prolonged abuse suggested the offender's criminality was 'no greater than that involved in *Chard*, even though the fact the victim in this case suffered serious head injuries, considered alone, might suggest otherwise'.<sup>246</sup> In this case, the child had suffered head injuries and other injuries suggested he was subject to a 'brutal assault'.

In the case of manslaughter involving child neglect (such as a failure to provide a child with access to food or required medical care), the extent to which the person's actions departed from reasonable community standards is a key consideration.<sup>247</sup>

### CASE STUDY 4

#### ***R v JV [2014] QCA 351 (19 December 2014)***

The Queensland Court of Appeal dismissed an appeal against a sentence of eight years' imprisonment imposed on an offender, JV, for the death of his 18-month-old twins (a son and a daughter) for which the twins' mother (the offender's de facto partner) was a co-accused. JV, who was 28-years-old at the time of the offending with no relevant prior criminal history, was sentenced to eight years for each count with the sentences ordered to be served concurrently. JV was ordered to be eligible to apply for parole after serving three years and nine months. For the last six months of their lives, his interaction with the twins was limited and he did not interact with them at all in the month preceding their deaths (although he had to pass their bedroom in order to access his bedroom). The cause of death was malnutrition.

The sentencing judge found there had been 'extensive and protracted departure from what might be regarded as reasonable community standards' and that it was 'not a case of some momentary or short-term inadvertence'.<sup>248</sup> The Court of Appeal agreed, finding, 'The departure from reasonable community standards by him was both profound and inexcusable' and with the sentencing judge's earlier finding that the respective culpabilities of he and his de facto partner were of a similar order.<sup>249</sup>

## CASE STUDY 5

### ***R v Cramp* (Unreported, Supreme Court of Queensland, 30 January 2008)**

A woman, C, pleaded guilty to the manslaughter of her three-year-old daughter, H, who fell in the shower and died some hours later of a brain haemorrhage. C had failed to seek medical attention when advised to do so by a neighbour, on the basis she had been a drug addict whose children had previously been removed from her, and she held a fear H's fall might result in her children being taken from her again. C did not appreciate the seriousness of the injury or the consequences if specialist medical assistance was not obtained. The sentencing judge described the case as being one of serious criminal neglect and imposed a sentence of five years' imprisonment. A non-parole period of 18 months was set taking into account her personal difficulties, that C sought some assistance from her neighbours and her plea of guilty.

### Approach in other jurisdictions

Some jurisdictions expressly include the need to consider a victim's age and vulnerability (which in Queensland is encompassed within the reference to 'the personal circumstances of any victim of the offence') and to other factors impacting on an offender's culpability, such as whether the offender is in a position of trust in relation to the victim. For example, in NSW, under s 21A(2) of the *Crimes (Sentencing Procedure) Act 1999*, the fact the victim was vulnerable (for example, was very young or very old or had a disability) is identified as a specific aggravating factor, as is that the offender abused a position of trust or authority in relation to the victim.<sup>161</sup> The *New Zealand Sentencing Act 2002* also lists relevant aggravating factors in sentencing for offences involving violence against, or neglect of, a child under the age of 14 years. They include 'the defencelessness of the victim', 'the magnitude of the breach of any relationship of trust between the victim and the offender', and 'deliberate concealment of the offence from authorities'.<sup>162</sup>

## QUESTION 2: SENTENCING FACTORS

The list of statutory sentencing factors (at page 31 below) sets out a selection of factors courts must take into account under the *Penalties and Sentences Act 1992* (Qld) when sentencing a person for an offence that involved violence or resulted in physical harm to another person, including child homicide offences.

- 2.1 Referring to this list, what are the most important factors that you consider should be taken into account when sentencing an offender for an offence arising from the death of a child and why?
- 2.2 Are there any other sentencing factors not expressly listed in legislation, or referred to only in a general way, that you think are important in sentencing for these offences? If so, describe the factor/s and explain why they are important.

### Statutory sentencing factors (set out in s 9, PSA)

#### Factors to which court must have primary regard in sentencing for any offence of violence or that resulted in physical harm to a person including those involving a child victim (s 9(3), PSA)

- (1) Need to protect from risk of physical harm to any members of the community
- (2) Personal circumstances of any victim
- (3) Circumstances of the offence, including death or injury to a member of the public; any loss or damage resulting from the offence
- (4) Nature or extent of the violence used, or intended to be used
- (5) Any disregard for the interests of public safety
- (6) Past record of the offender, including any attempted rehabilitation and the number of previous offences of any type committed
- (7) The offender's age, character and personal background/antecedents (including health issues, such as intellectual capacity, family, social, employment and vocational circumstances, and their current way of life and its interaction with the lives and welfare of others)
- (8) Any remorse or lack of remorse of the offender
- (9) Any medical, psychiatric, prison or other relevant report in relation to the offender
- (10) Anything else about the safety of members of the community the court considers relevant

#### Other sentencing factors to which a court must have regard (s 9(2), PSA)

- (11) The maximum penalty and any minimum penalty for the offence (e.g. mandatory life sentence and minimum non-parole periods for murder; and maximum life sentence for manslaughter)
- (12) The nature of the offence and how serious the offence was, including:
  - any physical, mental or emotional harm done to a victim, and
  - the effect of the offence on any child under 16 years who may have been directly exposed to, or a witness to the offence
- (13) Extent to which the offender is to blame for the offence (the offender's culpability)
- (14) Any damage, injury or loss caused by the offender
- (15) The offender's character, age and intellectual capacity
- (16) Presence of any aggravating or mitigating factor concerning the offender
- (17) Prevalence of the offence
- (18) How much assistance the offender gave to law enforcement agencies in the investigation of the offence or other offences
- (19) Time spent in custody by the offender for the offence before being sentenced
- (20) Other sentences imposed on the offender which have an impact on the sentence being imposed (and vice versa)
- (21) Submissions made by a representative of the community justice group in the offender's community, if the offender is an Aboriginal or Torres Strait Islander



### QUESTION 3: SENTENCING FACTORS (AGGRAVATING AND MITIGATING)

Referring to the examples of aggravating and mitigating factors listed below, which factors in your view are the most important aggravating and mitigating factors to be taken into account by sentencing judges where a person is being sentenced for a criminal offence arising from the death of a child, and why?

Examples of aggravating factors	Examples of mitigating factors
Victim particularly vulnerable due to age or disability	Guilty plea
Relevant criminal history	No criminal history or no relevant/recent convictions
Offence involved use of a weapon	Significant physical or mental health issues or low intellectual capacity
Abuse of a position of trust	Otherwise good character
Offence committed while subject to a court order or bail	Age of offender (young offender)
Significant and/or prolonged mental or physical suffering of the deceased child	Rehabilitation efforts after offence
Lack of remorse	Assistance to law enforcement authorities
Persistence/level of violence	Remorse
Offence was a domestic violence offence	Sought medical treatment for victim

### Sentencing principles in case law

Principles of sentencing established by case law are applied alongside the legislative factors and are equally important. Sentencing principles established by case law are referred to as 'common law' and courts have a duty to follow them. The principles are often discussed in judgments issued by the Queensland Court of Appeal.

A sentence must always be **proportionate** to the objective seriousness of the offending.<sup>163</sup> Proportionality, in the form adopted by Australian courts, sets the outer limits (both upper and lower) of punishment.<sup>164</sup> 'It is only within the outer limit of what represents proportionate punishment for the actual crime that the interplay of other relevant favourable and unfavourable factors ... will point to what is the appropriate sentence in all the circumstances of the particular case.'<sup>165</sup>

The **parity** principle ensures against unjustifiable disparity between sentences for offenders guilty of the same criminal conduct or common criminal enterprise. Ideally, people who are parties to the same offence should receive the same sentence, but matters which will create differences must be taken into account. These include each offender's 'age, background, previous criminal history and general character...and the part which he or she played in the commission of the offence'.<sup>166</sup>

When a sentencing court is dealing with multiple offences at once, or is sentencing for an offence and the person is already serving another sentence, it must look at the **totality** of all criminal behaviour. It must impose a sentence that is just and appropriate for all the offending. It can achieve this by making the sentences concurrent, so they run together, instead of making the sentences cumulative (that is, to be served one after the other).<sup>167</sup>

A sentencing judge can generally consider all of an offender's conduct, including conduct which would make the offence more or less serious — but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence.<sup>168</sup>

The acts, omissions and matters constituting the offence (and accompanying circumstances) for sentencing purposes are determined by applying common sense and fairness. Something which might technically constitute a separate offence is not necessarily excluded from consideration for that reason.<sup>169</sup> However, such things cannot be taken into account if they would establish:<sup>170</sup>

- a separate offence which consisted of, or included, conduct which did not form part of the offence of which the person was convicted;
- a more serious offence; or
- a circumstance of aggravation.

In such a case, the act, omission, matter or circumstance cannot be considered for any purpose either to increase the penalty or deny leniency. A person convicted of an isolated offence is entitled to be punished for that isolated offence. In restating these principles, the Queensland Court of Appeal has recognised it would be wrong to punish the person on the basis their isolated offence formed part of a pattern of conduct which had not been charged and of which the person has not been convicted.<sup>171</sup>

## Maximum penalties

### Murder

The only penalty for murder when committed by an adult is mandatory life imprisonment (or an indefinite sentence, which does not permit parole but may eventually convert to life imprisonment upon court review).<sup>172</sup> Even if parole is later granted, a life prisoner remains subject to supervision and restrictions until death (and can be returned to prison if the Parole Board Queensland (Parole Board) suspends or cancels parole).<sup>173</sup>

The law sets mandatory minimum non-parole periods for convicted murderers. This means the offender cannot apply for parole until they have served their non-parole period (unless they are granted 'exceptional circumstances' parole).<sup>174</sup>

The non-parole period for murder is generally 20 years (increased from 15 years in 2012).<sup>175</sup> It is 25 years if the person killed was a police officer in defined circumstances,<sup>176</sup> and 30 years if the person is being sentenced for more than one murder or has a previous conviction for murder.<sup>177</sup> A sentencing court can increase, but not decrease, the mandatory non-parole period.<sup>178</sup>

### Manslaughter

The maximum penalty for manslaughter is life imprisonment.<sup>179</sup> This is not a mandatory penalty. It is up to the court to impose an appropriate sentence in the particular circumstances of each case. If an offender is sentenced to the maximum penalty of life imprisonment for manslaughter (other than if sentenced with a serious organised crime circumstance of aggravation), their mandatory minimum non-parole period will be 15 years (unless increased by the court or release is via 'exceptional circumstances' parole, for instance, when the person is terminally ill).<sup>180</sup> If the head sentence is less than life, the general discretion with parole, discussed below, applies.

## Sentencing process

Sentencing is not a mechanical or mathematical exercise.<sup>181</sup> Queensland courts sentence using an ‘instinctive synthesis’ approach:<sup>182</sup>

the task of the sentencer is to take account of *all* of the relevant factors and to arrive at a single result which takes due account of them all. That is what is meant by saying that the task is to arrive at an “instinctive synthesis”. This expression is used, not as might be supposed, to cloak the task of the sentencer in some mystery, but to make plain that the sentencer is called on to reach a single sentence which...balances many different and conflicting features.

The High Court, in considering the proper approach to sentencing, has recognised ‘there is no single correct sentence’ and sentencing judges are to be allowed as much flexibility in sentencing as possible as is in keeping with consistency of approach and applicable legislation.<sup>183</sup>

Unless legislation fixes a mandatory penalty (as it does with murder), ‘there is no single sentence that is just in all the circumstances’.<sup>184</sup> Sentencing courts have a wide discretion, yet must take into account all relevant considerations (and only relevant considerations) including legislation and case law.<sup>185</sup>

The discretion can ‘miscarry’ when the sentence is clearly unjust, being ‘manifestly excessive’ or ‘manifestly inadequate’.<sup>186</sup> Such sentences, which an appeal court can set aside, fall ‘outside the range of sentences which could have been imposed if proper principles had been applied’.<sup>187</sup>

Consistency in sentencing requires like cases to be treated alike and different cases, differently.<sup>188</sup> Queensland’s Court of Appeal has stated that ‘community confidence in the sentencing process depends...on a wide variety of judges imposing sentences which are consistent, and which are formulated by reference to relevant discretionary factors and by having regard to the relevant legislation, comparable sentences, and the guidance of appellate court decisions’.<sup>189</sup> ‘The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances. It should be systematically fair, and that involves, amongst other things, reasonable consistency.’<sup>190</sup>

However, if cases show a range of sentences for similar offending are ‘demonstrably contrary to principle’, they do not have to be followed in future.<sup>191</sup>

Consistency does not require exact replication. The ultimate sentencing discretion lies somewhere between a non-punishment (like an unconditional discharge) and the maximum penalty set in the legislation.<sup>192</sup> The ‘so-called range’ is ‘merely a summary of the effect of a series of previous decisions’; it reflects Parliament’s recognition ‘the range of circumstances surrounding each offence will also be great’.<sup>193</sup> The history of a range of sentences for similar offending does not guarantee the range, including its upper and lower limits, is correct.<sup>194</sup> Previous sentences have been described as a guide only,<sup>195</sup> and stating them as a ‘range’ does not establish a sentencing pattern.<sup>196</sup> It is consistency in the application of relevant legal principles that is sought, not numerical equivalence.<sup>197</sup> Of more use are cases where the Court of Appeal has ‘laid down some relevant principle, delineated the yardsticks for particular offending, or re-sentenced’.<sup>198</sup>

Recording sentences for comparison is only useful if the ‘unifying principles’ revealed by those sentences are explained. The reasons why the sentences were fixed as they were must be clear<sup>199</sup> and it is important to properly characterise the offending conduct.<sup>200</sup> It is wrong to try to grade the criminality involved in manslaughter cases by closely comparing aggravating and mitigating factors, ‘as if there is only one correct sentence’. This involves ‘the illusion’ of an unattainable degree of precision which is ‘alien to the sentencing process’.<sup>201</sup> Seeking absolute precision and supposed conformity is difficult and inadvisable – there is ‘an inherent lack of exactitude’ characterising manslaughter sentences. The ‘infinitely varying circumstances’<sup>203</sup> in which manslaughter can be committed are discussed further in section 6, in the context of identifying a sentencing ‘range’ for manslaughter.



## Penalties and parole

A person sentenced for an offence that caused someone else's death will almost always be sentenced to imprisonment or other form of detention (see Tables 10 and 11). As explained above, for murder, life imprisonment is mandatory and mandatory minimum non-parole periods also apply.

### Penalty options

Penalties available to Queensland courts range from fines and good behaviour bonds, to community based orders such as community service and probation, to various forms of imprisonment. Imprisonment can involve parole, or imprisonment suspended wholly or partially. Release, subject to either of these conditions, can technically be set anywhere between the first and last day of the sentence, unless specific rules apply such as the minimum non-parole period for murder.<sup>204</sup>

### Head sentences and prison sentence options

The total sentence imposed is called a 'head sentence'. Most offenders will be released on parole, become eligible to apply for parole, or be released on a suspended sentence before the entire head sentence is served.<sup>205</sup>

Queensland courts can only set a parole release date for sentences of three years or less (and not for sexual or serious violent offences).<sup>206</sup> They can only impose suspended sentences for head sentences of five years or less<sup>207</sup> and will generally prefer parole over suspension when supervision is required.<sup>208</sup> Because of this, most sentences for child homicide involve the court setting a parole eligibility date. The offender will then be eligible for parole from that date, but must apply to the Parole Board.

### Release on parole during the head sentence

Parole is the supervised release of a prisoner to serve all or the remainder of their term of imprisonment in the community, subject to conditions and supervision. Consequences for non-compliance include returning to prison.<sup>209</sup> A prisoner released on parole is still serving their sentence.<sup>210</sup>

The sole purpose of parole 'is to reintegrate a prisoner into the community before the end of a prison sentence to decrease the chance that the prisoner will ever reoffend. Its only rationale is to keep the community safe from crime'.<sup>211</sup> Ministerial Guidelines to the Parole Board, which set out criteria for the Parole Board to use when considering applications, indicate that community safety should always be the highest priority.<sup>212</sup>

The Queensland Parole System Review recognised parole as being primarily a 'method that has been developed in an attempt to prevent reoffending'<sup>213</sup> and found that evidence suggests that parole does 'have a beneficial impact on recidivism, at least in the short term' and perhaps modestly.<sup>214</sup>

Research suggests that paroled prisoners are less likely to reoffend than prisoners released without parole.<sup>215</sup> The Parole System Review also found 'it is more risky to have a short period of parole' than a longer one.<sup>216</sup>

Parole places support, supervision and control over sentenced offenders.<sup>217</sup> There is a benefit to the community of having an offender rehabilitated rather than remaining for extended periods of time in prison.<sup>218</sup>

While community safety is the paramount consideration, supervising an offender on parole also saves public money.<sup>219</sup> The Parole System Review reported that the cost of keeping a prisoner in custody in Queensland at the time it reported was 'more than ten times greater than the cost of managing the prisoner in the community'.<sup>220</sup>

## Parole conditions and Parole Board powers

When deciding whether to grant a parole order, the Parole Board is not bound by the parole eligibility date fixed by the court, if it considers that the prisoner is not suitable for parole at the eligibility date because of information it received about the prisoner that was not before the sentencing court.<sup>221</sup> A sentencing court cannot make a recommendation for an offender's release on parole.<sup>222</sup>

Parole orders contain mandatory conditions such as carrying out lawful instructions made by QCS, giving a test sample of blood, breath, hair, saliva or urine, reporting and receiving visits as directed, notifying of a change of address or employment within 48 hours and not committing an offence.

The Parole Board can also add (and amend and remove) conditions necessary to ensure the prisoner's good conduct or to stop them committing an offence (for instance, a condition about residence, employment or participation in a program, or a curfew).<sup>223</sup> Leaving Queensland requires approval.<sup>224</sup>

QCS officers can also give directions to prisoners on parole, consistent with the parole order conditions, to restrict prisoner movements and enable their location to be monitored. Directions can be made regarding remaining at a stated place, wearing a stated device or installing a device or equipment at the prisoner's residence.<sup>225</sup>

QCS can make a written order, effective for no more than 28 days, amending a parole order on stated legislative grounds.<sup>226</sup> It can request an immediate suspension from the Parole Board.<sup>227</sup> Separately, the Parole Board may amend, suspend or cancel a parole order<sup>228</sup> on the grounds of failing to comply with the order, posing a serious risk of harm to another or an unacceptable risk of committing an offence, or preparing to leave Queensland without permission.

The three actions are also available for board-ordered (as opposed to court-ordered) parole where the board receives information after granting parole which would have resulted in it making a different parole order or not making one. The Parole Board can amend or suspend a parole order if the prisoner is charged with an offence.<sup>229</sup> Suspension or cancellation means a return to custody; a warrant can be issued for the prisoner's arrest.<sup>230</sup>

## When parole eligibility can be set

Where the sentence is not mandatory, it is common for an offender who enters an early guilty plea, accompanied by genuine remorse, to have a parole eligibility date or release date set, or suspension of their sentence after serving one-third of their head sentence in custody.<sup>231</sup>

A court sentencing an offender convicted after trial will usually not set a parole eligibility date. Legislation then automatically deems the person eligible to apply for parole once they have served 50 per cent of their head sentence.<sup>232</sup>

The Court of Appeal has noted that fixing a parole eligibility date earlier than the mid-point of the imprisonment, and much earlier than the 80 per cent mark applying to SVO declarations (see below), 'will usually ameliorate the sentence by creating at least a prospect, and perhaps a qualified expectation, of release on parole earlier than otherwise could be the case'.<sup>233</sup>

## Serious violent offence declarations

If a person is declared convicted of a serious violent offence, special provisions apply. If a SVO declaration is made, it means the offender must serve either 15 years' imprisonment or 80 per cent of their head sentence (whichever is less) before they can apply for parole.<sup>234</sup>

This can apply to a list of serious offences, including manslaughter, attempted murder, grievous bodily harm and torture.<sup>235</sup> It does not apply to murder, although the mandatory non-parole laws for murder work in the same way.

There are three ways a SVO declaration can be made:

1. The first is mandatory, where the person is convicted of a listed offence (or of counselling, procuring, attempting or conspiring to commit it) and is sentenced to 10 or more years' imprisonment. The court 'must' make the declaration.<sup>236</sup>
2. Where the person is similarly convicted of a listed offence but the head sentence is five or more years, and less than 10 years. Here the court 'may' make the declaration.<sup>237</sup>
3. The third way is also discretionary — where the offender is sentenced to imprisonment for an offence involving serious violence (or of counselling or procuring the use of, or conspiring or attempting to use, serious violence) or for an offence resulting in serious harm to another person.<sup>238</sup>

For the second and third ways, if the offence involved violence (or counselling or procuring the use, or conspiring or attempting to use, violence) against a child under 12, or caused the death of a child under 12, the court must treat the age of the child as an aggravating factor in deciding whether to make the declaration.<sup>239</sup> This change to the law came into effect on 26 November 2010.<sup>240</sup>

While one of the primary purposes of the SVO scheme is community protection, the Queensland Court of Appeal has noted that making a sentenced person serve most of their head sentence in prison deprives the person and the public of the benefit of a lengthy period of supervision of the person on parole.<sup>241</sup>

The sentence with the SVO declaration must still be just in all the circumstances, and this may require that the head sentence imposed be toward the lower end of the otherwise available range of sentences.<sup>242</sup>

Case law has developed to help courts decide when SVO declarations should be made for the second and third examples. This will usually rest on aggravating circumstances suggesting that protection of the public, or adequate punishment, requires a longer period in actual custody — reflecting that the offence is 'a more than usually serious, or violent, example of the offence in question and, so, outside 'the norm' for that type of offence'.<sup>243</sup>

Based on the Council's analysis of data for 2005–06 to 2016–17, of the adults sentenced for manslaughter with a child victim who received a term of imprisonment, a quarter (25.9%, or seven offenders) were declared to have been convicted of a serious violent offence.

## CASE STUDY 6

### ***R v Riseley; Ex parte A-G (Qld) [2009] QCA 285 (22 September 2009)***

The offender, R, unlawfully killed 19-day-old baby boy, L, the son of the young woman with whom R was living with at the time. He pleaded guilty to manslaughter and was sentenced to eight years' imprisonment.

The sentencing judge made a SVO declaration which would have meant R was eligible to apply for release on parole after serving 80 per cent of the sentence (6.4 years). L suffered a severe brain injury within the 12 to 24 hours prior to his death and had contusions along his spine consistent with being held around the chest and shaken repeatedly. L also suffered a fractured leg and a fractured rib. The offender was 21-years-old at the time of the offence and had no relevant criminal history.

On appeal, the Court of Appeal found while a serious aggravating fact was the life lost was that of a young and helpless baby, it did not appear there was prolonged violence and the offender's actions could be explained as being the actions of a tired and immature man who had suffered serious social disadvantage and was of less than average intelligence.

In light of this, and the offender's low risk of reoffending, the court ordered the serious violent offence declaration be set aside and a parole eligibility date set requiring him to serve a minimum of 3.5 years in custody before being eligible to apply for release on parole.

## Remand

When an accused person is not granted bail after being charged, they will be held in custody on remand. If the person is later sentenced to imprisonment, any time that he or she spent in custody in relation to that offence and for no other reason must be taken to be imprisonment already served under the sentence, unless the sentencing court otherwise orders.<sup>244</sup> This is often the reason why offenders are released from custody on or shortly after the day they are sentenced for serious offences — their sentence is backdated to the first day they went into custody.

## 5. Sentencing outcomes in Queensland for child homicide

The Council examined administrative data from different government agencies<sup>250</sup> over a 12-year period, between 2005–06 to 2016–17 for the offences of murder, manslaughter and other select offences. Additional statistical and literature analyses will be reported in the complementary research report which will be released during the consultation period.

### Sentenced homicide offences

#### Homicide offences as the most serious offence

Between 2005–06 and 2016–17, 479 offenders were sentenced for a homicide offence as their most serious offence (MSO) (see Table 2). Less than one fifth of these (13% or n=62) were sentenced for the homicide of at least one victim aged under 18 years.

For the purposes of this paper, unless otherwise specified, offenders with at least one victim aged under 18 years of age are classified as child homicide offenders, while offenders with *all* victims aged 18 years of age and over are classified as adult homicide offenders.

**Table 2: Offenders sentenced for a homicide offence as their MSO, 2005–06 to 2016–17**

	Murder		Manslaughter		Total homicide	
	N	% of total	N	% of total	N	% of total
Offenders with at least one child victim <sup>^</sup>	25	11.3	37	14.3	62	12.9
Offenders with only adult victim/s <sup>^^</sup>	195	88.6	222	85.7	417	87.1
<b>TOTAL</b>	<b>220</b>	<b>100.0</b>	<b>259</b>	<b>100.0</b>	<b>479</b>	<b>100.0</b>

Source: QGSO.

<sup>^</sup> offenders with at least 1 victim aged under 18 has been classified as a child homicide offender

<sup>^^</sup> offenders with all victims aged 18 and older have been classified as an adult homicide offender

#### Associated offences sentenced (child homicide offenders only)

Offenders sentenced for homicide may be sentenced for additional offences at the same court event. Of the 62 offenders sentenced for child homicide, 60 per cent (n=37) were sentenced only for their child homicide MSO at that court event. Twenty-five offenders were sentenced for additional offences.

The Council's research report will explore this issue in more detail, including the number of sentenced offences and most common associated offence types. A preliminary analysis reveals the most common offences sentenced in conjunction with a murder or manslaughter MSO are sexual offences and other homicide offences (murder, manslaughter and dangerous driving causing death).

## Homicide victims

There were 430 victims of homicide for sentenced events between 2005–06 and 2016–17, including 62 child victims (aged under 18 years).

### Victim characteristics

Table 3 indicates children aged under one year comprised the largest proportion of child victims (29.0%). The older end of the age range (15–17 years of age) accounted for the second most common category (25.8%). The age category of 1–4 years of age was also high, while traditional ‘school-age’ brackets registered the lowest percentages (9.7% for 5–9 years and 12.9% for 10–14 years).

**Table 3: Age of victims in child homicide offences, 2005–06 to 2016–17**

Victim age at death	Count	Percent
Under 1 year	18	29.0
1–4 years	14	22.6
5–9 years	6	9.7
10–14 years	8	12.9
15–17 years	16	25.8
<b>TOTAL</b>	<b>62</b>	<b>100.0</b>

Source: QFCC; QPRIME; QGIS.

Table 4 shows the majority of sentenced homicide cases over the 12-year period involved a single offender (87.2%), with little difference observed between child (83.9%) and adult homicide (87.8%).

**Table 4: Number of sentenced offenders per homicide victim, 2005–06 to 2016–17**

Number of sentenced homicide victims	Type of victim					
	All victims		Child victims		Adult victims	
	N	% of total	N	% of total	N	% of total
1 offender	375	87.2	52	83.9	323	87.8
2 offenders	37	8.6	10	16.1	27	7.3
3 offenders	18	4.2	0	0.0	18	4.9
<b>TOTAL</b>	<b>430</b>	<b>100.0</b>	<b>62</b>	<b>100.0</b>	<b>368</b>	<b>100.0</b>

Source: QGSO; QFCC; QPRIME; QGIS

Male (51.6%) and female (48.4%) victims of child homicide were relatively equal. However, the gender profile of adult victims was more marked, with males accounting for 62.5 per cent of homicide victims.

Patterns were also observable in the offender-victim relationship for child homicide (see Table 5). For the three younger age groups (0–9 years of age), the offender was most commonly a parent of the victim. For the 10–14 age group, acquaintances accounted for the most common offender-victim relationship. For the 15–17 age group, the offender was most commonly a stranger to the victim.

**Table 5: Child homicide: offender-victim relationship by age, 2005–06 to 2016–17**

Offender-victims relationship	Under 1 year	1-4 years	5-9 years	10-14 years	15-17 years	TOTAL
Parent	16	10	3	1	1	31
Mother	9	3	3	1	0	16
Father	7	7	0	0	1	15
Acquaintance	0	0	2	5	5	12
Stranger	0	0	0	1	7	8
Other known	0	3	0	2	3	8
Step-parent	0	2	2	1	0	5
Parent/carers boyfriend/girlfriend	2	2	0	0	0	4
Current or former intimate partner	0	0	0	0	4	4
<b>TOTAL</b>	<b>18</b>	<b>17</b>	<b>7</b>	<b>10</b>	<b>20</b>	<b>72</b>

Source: QFCC; QPRIME; QSIS.

Cautionary note: The sample sizes for this analysis are small.

Notes:

1) Where an offender has multiple victims or a victim has multiple offenders, each instance of the combination has been counted as the victim-offender relationship may differ in each instance.

2) 'Parent' includes both biological (n=30) and non-biological (n=1) parents.

3) 'Other known' includes friend (n=2), family friend (n=3), other family member (n=1), co-resident of parent/step-parent (n=1), and informal carer (n=1).

4) Intimate partner includes current intimate partners (n=1) and former intimate partners (n=3).

Where an offender is the parent of the child, the mother is the most common perpetrator for child victims aged under one year (56.3%). Conversely, the father is the most common perpetrator when a child victim is aged one to four years (70.0%). However, differences between mothers and fathers as perpetrators of child homicide is less pronounced for the youngest age category (under one year).

Table 6 shows that the majority (75.8%) of child victims of homicide were not Aboriginal and/or Torres Strait Islander people. Over the 12-year period there were seven Aboriginal and/or Torres Strait Islander victims (11.3%), however there were eight cases (12.9%) where Indigenous status could not be determined on the data available.

**Table 6: Aboriginal and/or Torres Strait Islander status of child homicide victims, 2005–06 to 2016–17**

Indigenous status of victims	N	%
Indigenous	7	11.3
Non-indigenous	47	75.8
Unknown	8	12.9
<b>TOTAL</b>	<b>62</b>	<b>100.0</b>

Source: QFCC

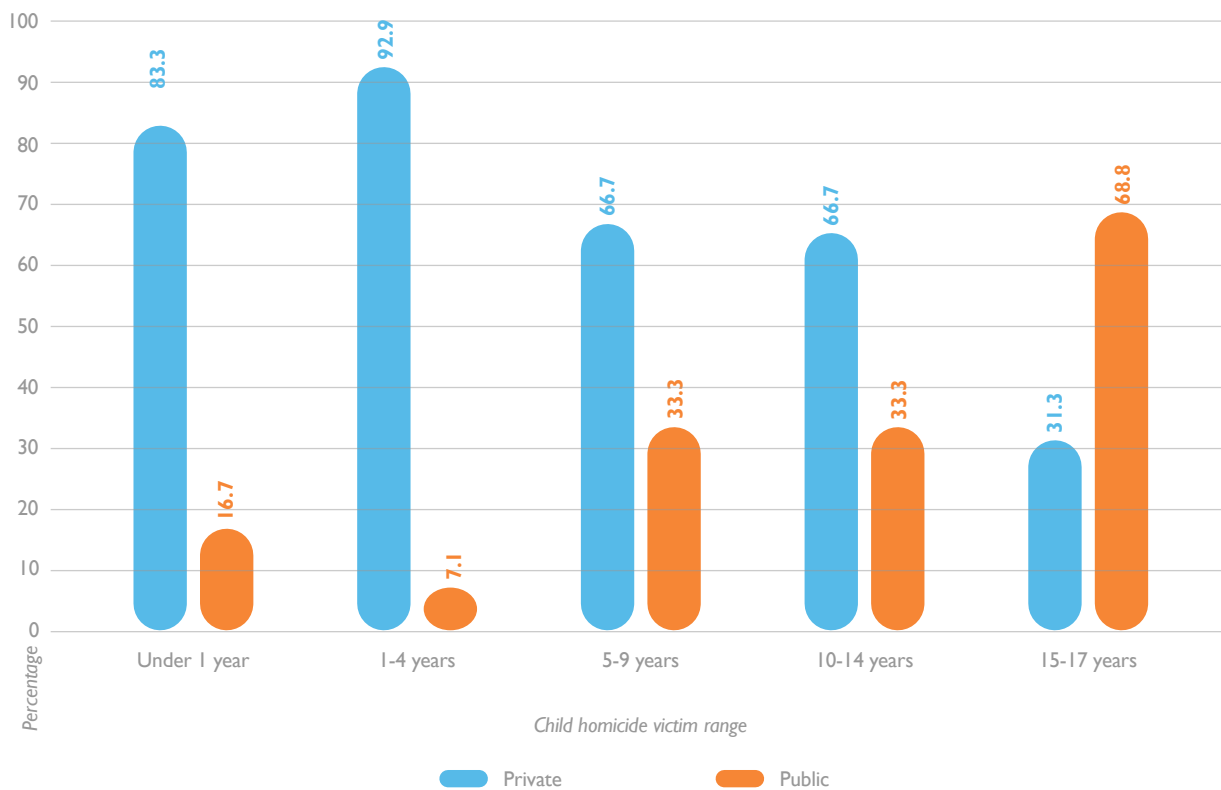
Note: the Aboriginal and/or Torres Strait Islander status for adult victims was not available.

## Homicide location

Both child and adult homicides were equally likely to occur in a private location (68.3% and 65.3% respectively) as opposed to a public location.

Figure 2 reveals that for child homicide, younger victims were most at risk of homicide in a private location (83.3% of under one year olds; 92.9% of children aged 1–4 years). In comparison, older child victims (aged 15–17 years) were more at risk of homicide in a public location (68.8%).

**Figure 2: Child homicide: location of offence by age of victim, 2005–06 to 2016–17**



Source: QFCC; QPRIME; QSIS.

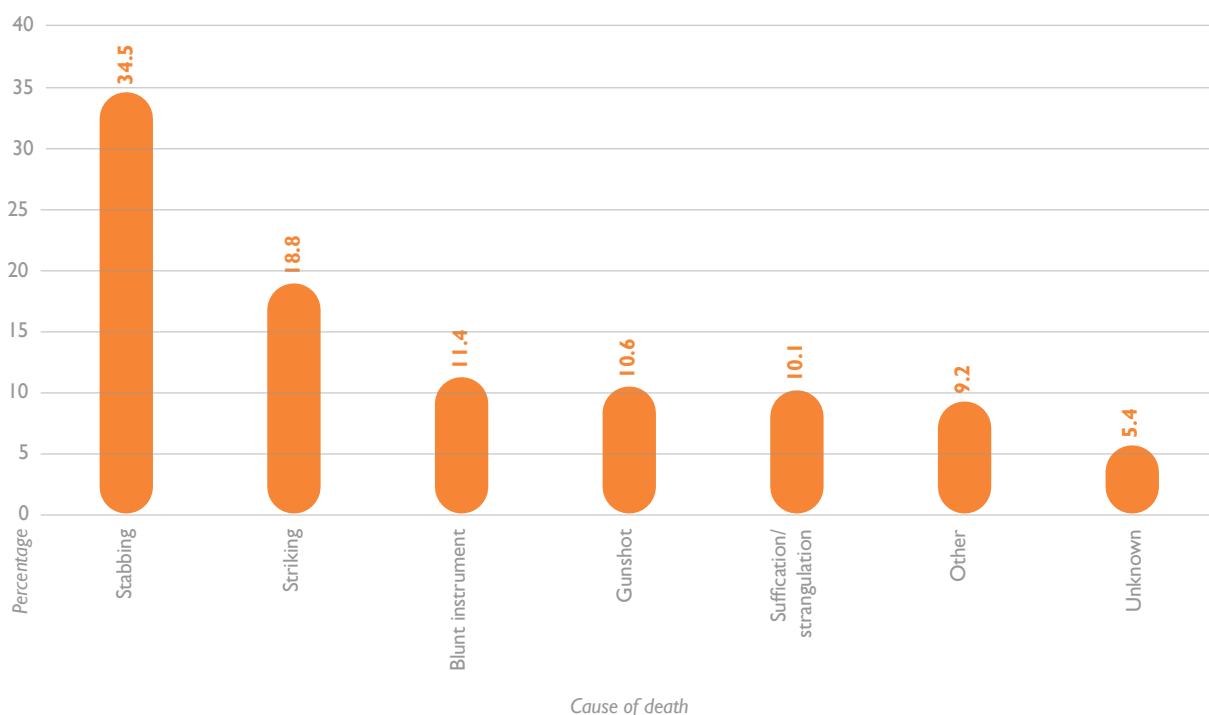
Cautionary note: The location of death is unknown for two victims. They have been excluded from all analyses relating to offence location

## Cause of death

For child homicide, the most common cause of death was striking (including punching, stamping, kicking or throwing) (21.0%). Striking was the second most common cause of death for adult homicide (18.8%). The most common cause of death for adult homicide was stabbing (34.5%) (see Figures 3 and 4).



**Figure 3: Adult homicide: cause of death, 2005–06 to 2016–17, n=368**



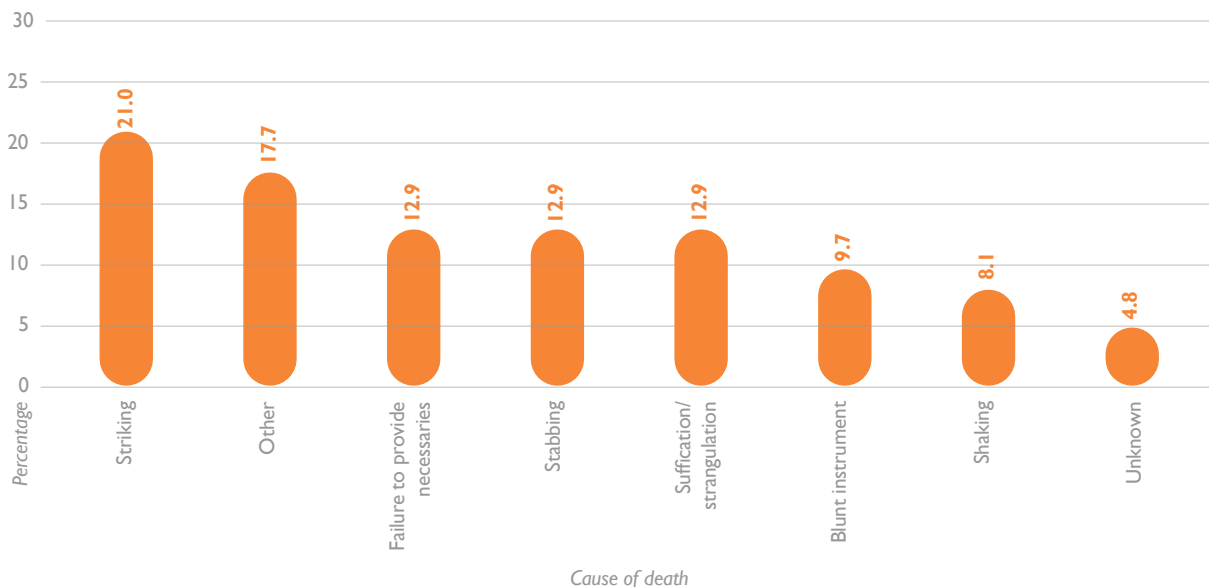
Source: QSIIS.

Notes:

1) 'Suffocation/strangulation' includes suffocation (n=11) and strangulation (n=26).

2) 'Other' includes vehicle (n=13), arson/fire (n=7), pharmacological (n=7), other (n=4), drowning (n=2), and failure to provide necessities (n=1).

**Figure 4: Child homicide: cause of death, 2005–06 to 2016–17, n=62**



Source: QSIIS.

Notes:

1) 'Suffocation/strangulation' includes suffocation (n=4) and strangulation (n=4).

2) 'Other' includes vehicle (n=4), drowning (n=2), pharmacological (n=2), other neglect (n=1), arson/fire (n=1), and gunshot (n=1).

The cause of death for child homicide displays observable age-related patterns (see Table 7). Death by shaking occurred only in the youngest age category and, along with failure to provide the necessities of life, was the most common cause of death for this age group. Stabbing occurred primarily in the 15–17 year age group and was the most common cause of death for this group. For the 1–4 year age group,

striking was the most common cause of death, while strangulation or suffocation was slightly more common than other causes of death in the 5–9 year age group. The 10–14 year age group had equal numbers of deaths caused by blunt instruments and by strangulation/suffocation.

**Table 7: Child homicide: cause of death by age, 2005–06 to 2016–17**

Cause of death	Age in years					Total
	Under 1	1-4	5-9	10-14	15-17	
Blunt instrument	0	0	1	2	3	6
Failure to provide necessities	5	3	0	0	0	8
Striking	3	7	1	0	2	13
Shaking	5	0	0	0	0	5
Stabbing	0	1	0	0	7	8
Strangulation/suffocation	2	0	3	2	1	8
Other	3	2	1	2	3	11
Unknown	0	1	0	2	0	3
<b>TOTAL</b>	<b>18</b>	<b>14</b>	<b>6</b>	<b>8</b>	<b>16</b>	<b>62</b>

Source: QFCC; QPRIME; QGIS.

Cautionary note: The sample sizes for this analysis are small.

Note: 'Other' includes vehicle (n=4), pharmacological (2), drowning (n=2), gunshot (n=1), arson/fire (n=1), other neglect (n=1).

## Homicide offenders

The majority of offenders were sentenced for homicide involving a single victim (94.4%), although there were seven homicide cases involving three victims (as shown in Table 8). Of the 479 offenders, 55 offenders (11.5%) had child victims only, with an additional seven offenders (0.2%) having both child and adult victims.

The maximum number of child only victims per offender was two, while for adult only and adult/child offenders the maximum number of victims was three.

**Table 8: Number and type of victim for offenders sentenced for a homicide offence as their MSO, 2005–06 to 2016–17**

Number of homicide victims	Type of homicide offender							
	All offenders		Child victims only		Adult victims only		Mixed victim ages	
	N	% of total	N	% of total	N	% of total	N	% of total
1 victim	452	94.4	49	89.0	403	96.6	0	0.0
2 victims	20	4.2	6	11.0	13	3.1	1	14.3
3 victims	7	1.4	0	0.0	1	0.2	6	85.7
<b>TOTAL</b>	<b>479</b>	<b>100.0</b>	<b>55</b>	<b>100.0</b>	<b>417</b>	<b>99.9</b>	<b>7*</b>	<b>100.0</b>

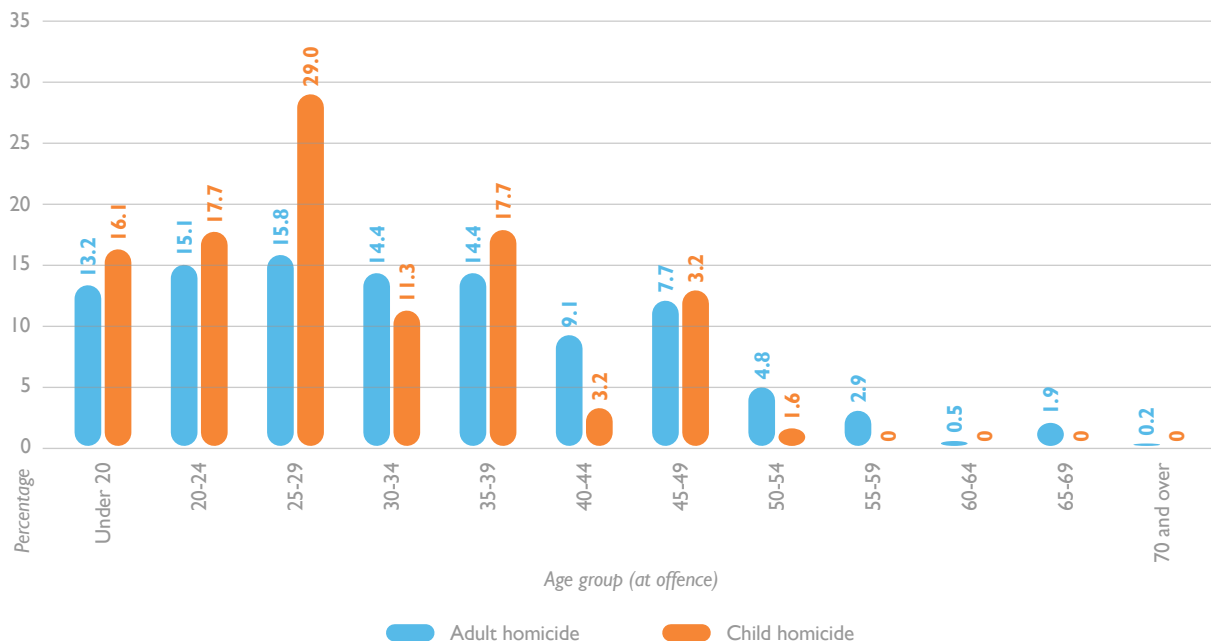
Source: QGSO; QFCC; QPRIME; QGIS.

\*Cautionary note: The sample sizes for this analysis are very small.

## Offender characteristics

The average age of offenders sentenced for child homicide was 28.8 years, slightly younger than those sentenced for adult homicide (33.6 years). As shown in Figure 5, the largest proportion of those sentenced for child homicide fell within the 25–29 age group (29%).

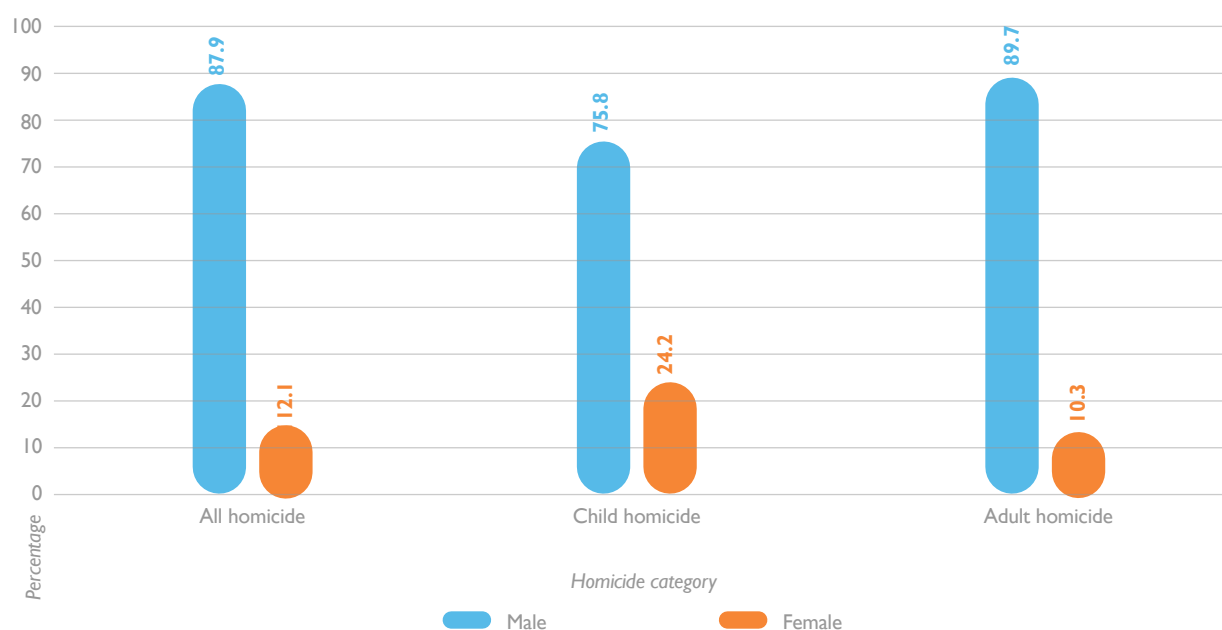
**Figure 5: Offenders sentenced for homicide offences, age by type of victim, 2005–06 to 2016–17**



Source: QGSO; QFCC; QPRIME; QSIS.

As shown in Figure 6, the majority of offenders sentenced for homicide were male (87.9%). Offenders sentenced for child homicide were also primarily male (75.8%); however, the proportion of female offenders was higher within the child homicide cohort at 24.2 per cent compared to 10.3 per cent of offenders sentenced for adult homicide.

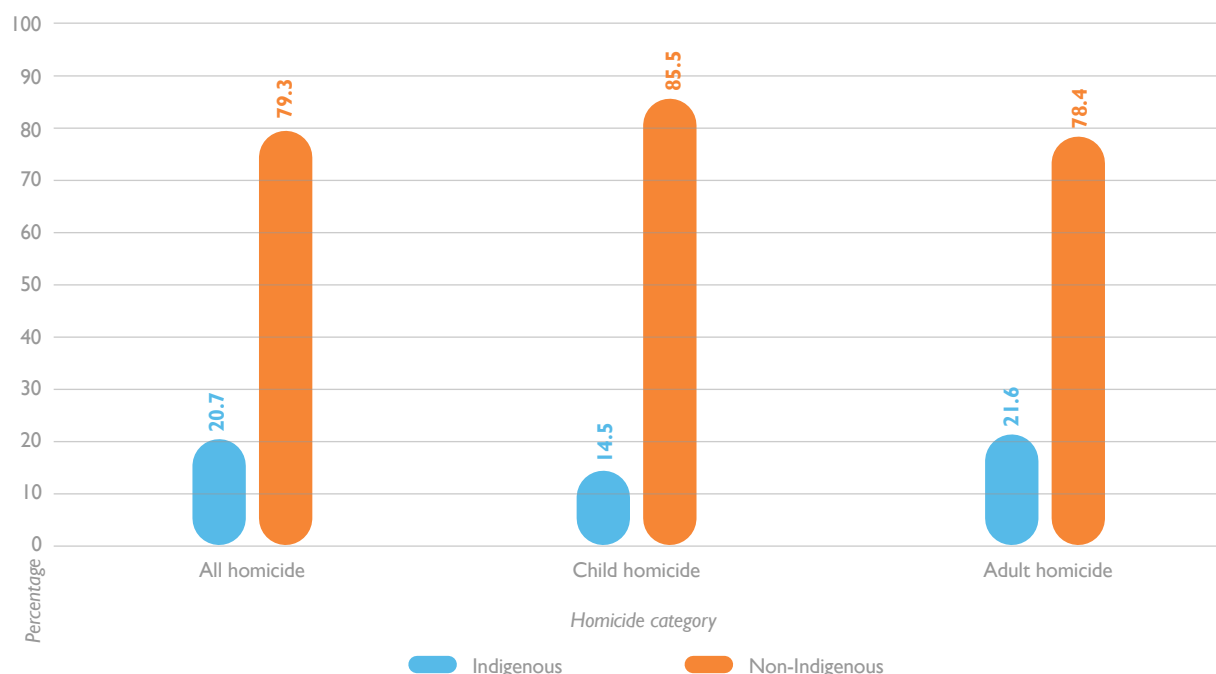
**Figure 6: Offenders sentenced for homicide offences, gender by type of victim, 2005–06 to 2016–17**



Source: QGSO; QFCC; QPRIME; QSIS.

Homicide offenders were most likely to be non-Indigenous (79.3%) (see Figure 7). The proportion of Aboriginal and/or Torres Strait Islander people sentenced for child homicide (14.5%) was lower than for those sentenced for adult homicide (21.6%).

**Figure 7: Offenders sentenced for homicide offences, Aboriginal and/or Torres Strait Islander status by type of victim, 2005–06 to 2016–17**

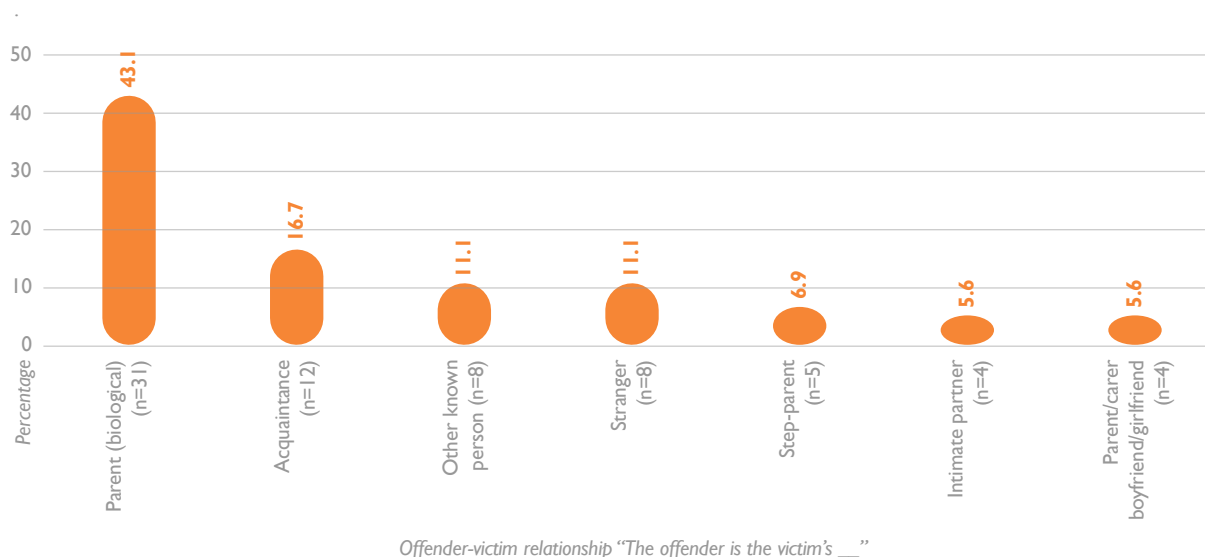


Source: QGSO; QFCC; QPRIME; QSIS.

## Offender relationship to victim

Parents (biological or non-biological) account for the most common relationship type within the child homicide category (43.1%) (see Figure 8). Mothers of child victims accounted for 51.6 per cent of those offenders classified as a 'parent' (n=31).

**Figure 8: Relationship between offenders and child victims of homicide, 2005–06 to 2016–17**



Source: QSIS

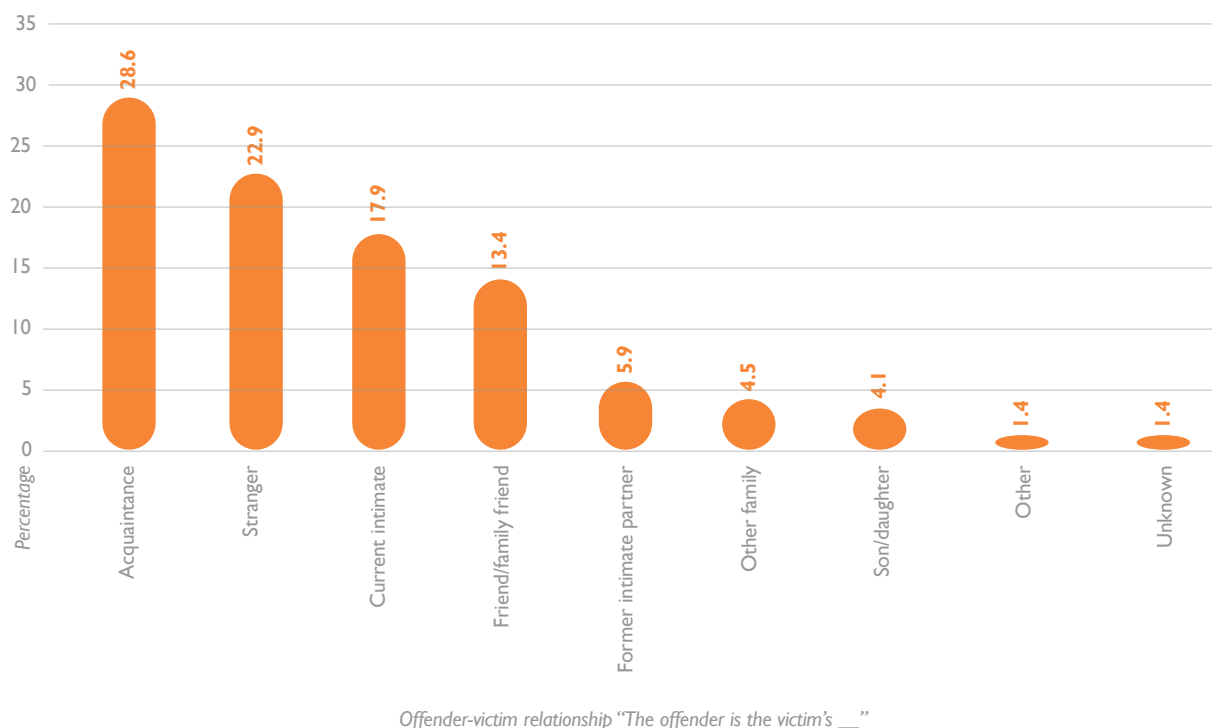
Notes: 1) where an offender has multiple victims or a victim has multiple offenders, each instance of the combination has been counted as the victim-offender relationship may differ in each instance, n=72.

2) 'Intimate partner' includes current intimate partners (n=1) and former intimate partners (n=3).

3) 'Other known' includes friend (n=2), family friend (n=3), other family member (n=1), co-resident of parent/step-parent (n=1), and informal carer (n=1).

Figure 9 shows for offenders sentenced for adult homicide the victim was most commonly an acquaintance (28.6%). Strangers comprised almost one quarter (22.9%) of adult homicides compared to 11.1 per cent for child homicides.

**Figure 9: Relationship between offenders and adult victims of homicide, 2005–06 to 2016–17**



Source: QSIIS.

Notes: 1) Where an offender has multiple victims or a victim has multiple offenders, each instance of the combination has been counted as the victim-offender relationship may differ in each instance, n=441.

2) 'Friend/family friend' includes friend (n=57) and family friend (n=2).

3) 'Other family' includes sibling (n=4), parent (biological) (n=2), grandchild (n=1), step-parent (n=1), and other family member (n=12).

4) 'Son/daughter (biological and non-biological)' includes son/daughter (n=15), and step-son/step-daughter (n=3).

5) 'Other' includes professional (n=4) and informal carer (n=2).

## Co-offenders and related offenders

Sentenced homicide offenders between 2005–06 and 2016–17 account for 418 distinct homicide events. Forty-eight homicide events, involved two or more offenders sentenced for the homicide of the same victim or victims<sup>251</sup> (they may have been tried and/or sentenced together or separately) and 370 events involved a single homicide offender. The majority of events with homicide co-offenders had adult victims (n=41 or 85.4%) while seven events involved child victims. In events involving child victims, a maximum of two offenders were involved, while homicides involving co-offenders with an adult victim had a maximum of eight offenders. The majority of homicide events were committed against an adult victim by an offender acting alone (76.7%).

Of the 48 homicide events involving co-offenders, two-thirds (n=32) involved all male co-offenders. The remaining one-third (n=16) of events involved both male and female offenders sentenced for homicide. No events involved all female co-offenders.

A slightly higher proportion of offenders sentenced for adult homicide had a co-offender (26.4%) compared to child homicide offenders (22.6%). Female offenders sentenced for child homicide were the least likely to have a co-offender (13.3%), compared to a quarter (25.5%) of male child homicide offenders. In contrast, female offenders sentenced for the homicide of an adult victim were the most likely to have

a co-offender or co-offenders (34.9%).

In addition to those sentenced as co-offenders for a child homicide, six people were sentenced for an offence relating to the death of a child that was not a homicide offence. Four people were sentenced for an offence of being an accessory after the fact and two were sentenced for cruelty to children under 16 years (one of whom was also sentenced for failing to supply the necessities of life). These six offenders were all co-charged with an offender who was sentenced for a homicide offence for the same event.

Two of these offenders were female and four were male, while three were parents of the child victim (two mothers and one father) and three were otherwise known to the child. Sentences imposed on these offenders ranged from a wholly suspended sentence to a sentence of 2.5 years imprisonment with parole eligibility after serving six months.

## Sentencing outcomes for homicide offenders

All 479 offenders sentenced between 2005–06 and 2016–17 for homicide offences as their MSO received a custodial sentence.

### Homicide offenders sentenced as children

Twenty offenders (4.2%) were aged under 17 years when they committed their homicide offence. These individuals were sentenced as children under the *Youth Justice Act 1992* (Qld). Eleven of these offenders (55.0%) were sentenced for murder (see Table 9).

Four in five young offenders (80%) were sentenced for adult homicide.

**Table 9: Homicide offence and victim type for young offenders convicted of homicide, 2005–06 to 2016–17**

Victim type	Homicide offence type		
	Murder	Manslaughter	Total
Child victim/s	2	2	4
Adult victim/s	9	7	16
<b>TOTAL</b>	<b>11</b>	<b>9</b>	<b>20</b>

Source: QGSO; QFCC; QPRIME; QSIS.

Cautionary note: The sample sizes for this analysis are small.

Almost half (45.0%) of young offenders received a prison sentence (see Table 10). The median sentence length was 8.5 years for those who did not receive a life sentence (n=4). An additional 35.0 per cent (n=7) of young homicide offenders received detention, with a median sentence length of five years.

**Table 10: Sentence outcomes for young offenders convicted of homicide (MSO), 2005–06 to 2016–17**

Penalty	N	%
Detention	7	35.0
Immediate release order	2	10.0
Imprisonment	9	45.0
Partially suspended sentence	1	5.0
Wholly suspended sentence	1	5.0
<b>TOTAL</b>	<b>20</b>	<b>100.0</b>

Source: QGSO.

Cautionary note: The sample sizes for this analysis are small.

## Homicide offenders sentenced as adults

Adults (aged over 17 years) accounted for 95.8 per cent (n=459) of homicide offenders sentenced over the relevant period.

### Summary of sentencing outcomes for homicide

All homicide offenders sentenced as an adult received a custodial sentence (imprisonment with a parole eligibility or release date, a partially suspended sentence of imprisonment or a wholly suspended sentence).

As shown in Table 11, only 20 (4.4%) of the 250 offenders sentenced for manslaughter received a wholly or partially suspended sentence of imprisonment, most of whom (75%) received a partially suspended sentence (meaning they were required to serve part of their sentence in prison). The median sentence length for partially suspended sentences was five years, with an average time to be served of 1.3 years (see Table 12).

Five offenders received a wholly suspended sentence, with a median sentence length of 3.3 years. Of those offenders, three involved homicides involving a child victim, while two involved adult victims.

**Table 11: Penalty outcomes for adult offenders sentenced for homicide (MSO), 2005–06 to 2016–17**

	N	Imprisonment		Partially suspended sentence		Wholly suspended sentence	
		N	%	N	%	N	%
Adult offenders sentenced for homicide	459	439	95.6	15	3.3	5	1.1
Murder	209	209	100.0	0	0.0	0	0.0
Manslaughter	250	230	92.0	15	6.0	5	2.0
Adult offenders sentenced for homicide with child victims	58	50	86.2	5	8.6	3	5.2
Murder	23	23	100.0	0	0.0	0	0.0
Manslaughter	35	27	77.1	5	14.3	3	8.6
Adult offenders sentenced for homicide with adult victims	401	389	97.0	10	2.5	2	0.5
Murder	186	186	100.0	0	0.0	0	0.0
Manslaughter	215	203	94.4	10	4.6	2	1.0

Source: QGSO; QFCC; QPRIME; QGIS.

As shown in Table 12, all adult offenders sentenced for murder received a life sentence as this is the mandatory sentence for this offence.

The median sentence for adult offenders sentenced for manslaughter involving either an adult or child victim across all custodial sentence types was 8.0 years. The median sentence was slightly higher for

offenders sentenced for the manslaughter of an adult (8.0 years) than the median sentence for those sentenced for the manslaughter of a child (7.5 years).

**Table 12: Median sentence lengths for adult offenders sentenced for homicide (MSO), by penalty type and victim type, 2005–06 to 2016–17**

	N	All custodial sentences (median length in years)	Imprisonment (median length in years)	Partially suspended sentence (median length in years)	Wholly suspended sentence (median length in years)
Adult offenders sentenced for homicide	459				
Murder	209	Life	Life	n/a	n/a
Manslaughter	250	8.0	8.5	5.0	3.3
Adult offenders sentenced for homicide with child victims	58				
Murder	23	Life	Life	n/a	n/a
Manslaughter	35	7.5	8.0	5.0	2.0
Adult offenders sentenced for homicide with adult victims	401				
Murder	186	Life	Life	n/a	n/a
Manslaughter	215	8.0	8.5	5.0	3.9

Source: QGSO; QFCC; QPRIME; QSIS.

Table 13 shows the range, mean and median sentence lengths for offenders sentenced to a custodial penalty.

**Table 13: Summary of custodial sentence lengths for adult offenders sentenced for homicide (MSO), 2005–06 to 2016–17**

	Summary of sentence length (years)					Life
	N	Mean	Median	Minimum	Maximum	N
Adult offenders sentenced for homicide						
Murder	209	n/a	n/a	n/a	n/a	209
Manslaughter	250	8.3	8.0	1.5	18	0
Adult offenders sentenced for homicide with child victims						
Murder	23	n/a	n/a	n/a	n/a	23
Manslaughter	35	6.8	7.5	1.5	10	0
Adult offenders sentenced for homicide with adult victims						
Murder	186	n/a	n/a	n/a	n/a	186
Manslaughter	215	8.5	8.0	3.0	18	0

Source: QGSO; QFCC; QPRIME; QSIS.

Note: Life sentences are not included in the calculation of the summary statistics.



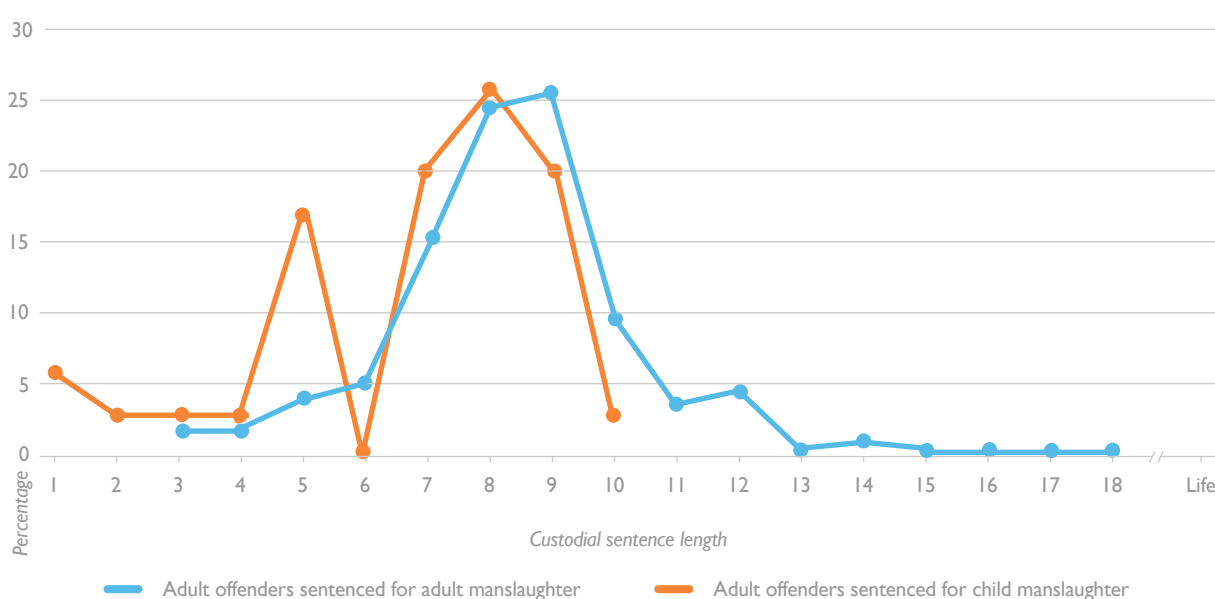
Table 13 and Figure 10 (below) show that while the sentencing range for manslaughter of a child and manslaughter of an adult overlap substantially, sentences for manslaughter of a child where this is the offender's MSO tend to be lower.

Prison sentences for manslaughter of a child recorded a lower mean (6.8 years versus 8.5 years), median (7.5 years versus 8.0 years), minimum (1.5 years versus 3 years) and maximum (10 years versus 18 years). The majority (75.3%) of sentences for adult manslaughter fall between 7 and 10 years imprisonment, but a small percentage of outliers (sentences significantly higher or lower than the majority of sentences) with much higher sentences exist for this category.

The sentencing range for manslaughter of a child is a little narrower, with 65.7 per cent of sentences falling between 7 and 9 years.

This analysis suggests greater consistency in sentences imposed by courts for manslaughter involving child victims than those involving adult victims, although substantiating such a finding requires further examination of case characteristics. Based on initial case analysis undertaken by the Council, there are likely to be significant differences in the factual circumstances for adult manslaughter rather than child manslaughter, for example, pre-planning and use of a weapon. These factors will impact the assessment of offence seriousness.

**Figure 10: Custodial sentence lengths for adult offenders sentenced for manslaughter (MSO) by victim type, 2005–06 to 2016–17**



Source: QGSO; QFCC; QPRIME; QSYS.

### Sentencing outcomes for manslaughter by type of conduct

The identified difference in median sentence length for manslaughter might be explained in part by the different types of offending conduct and offending profiles across adult and child victim types.

Table 14 presents sentencing outcomes for manslaughter based on broad categories of conduct falling within this offence. It shows the highest sentences for manslaughter involving both child and adult victims were for intentional killing reduced from murder to manslaughter by reason of the partial defence of provocation or diminished responsibility. The highest sentence imposed for manslaughter of a child was 10 years. During the 12-year period one offender was sentenced to a higher penalty of 15 years for manslaughter of a child by violent act; however, this not considered part of the Council's analysis of sentencing outcomes for manslaughter due to counting rules. This particular offender was sentenced for murder involving a different victim at the same court event as the manslaughter offence; therefore, the offender's murder offence is recorded as their MSO and used for analytical purposes.

As a result, this case is factored into the Council's current review under murder not manslaughter. This case is discussed at page 57 of this paper (*R v Maygar; Ex parte A-G (Qld); R v WT; Ex parte A-G (Qld)*).<sup>252</sup> The highest sentence for manslaughter of an adult was 18 years.

Median sentences were relatively consistent within the categories of manslaughter by violent or unlawful act or criminal negligence:

- 8.0 years for manslaughter by a violent or unlawful act involving either an adult or child victim; and
- 5.0 years for manslaughter by criminal negligence involving neglect (e.g. failure to seek medical care) for offences committed against children, compared with 4.8 years for the same category of offences committed against adults.

Some differences in outcomes for other manslaughter categories are identified, although caution is advised when interpreting this finding as the numbers of child manslaughter offences are quite small when broken down into these categories. By way of example, the median sentence for manslaughter by reason of diminished responsibility was 8.5 years where this involved an adult victim, and 7.7 years for offences committed against child victims. However, calculation of median sentence for child victim manslaughter under this category involves only two offenders.

**Table 14: Summary of custodial sentence lengths for adult offenders sentenced for manslaughter (MSO), by manslaughter category, 2005–06 to 2016–17**

Manslaughter category	N	Mean (years)	Median (years)	Minimum (years)	Maximum (years)
<b>Child homicide offenders</b>					
Manslaughter by violent or unlawful act	18	8.1	8.0	7.0	9.5
Manslaughter – provocation	1	10.0	10.0	10.0	10.0
Manslaughter – diminished responsibility	2	7.7	7.7	7.5	8.0
Manslaughter by criminal negligence: neglect	12	4.4	5.0	1.5	8.0
Manslaughter by criminal negligence: vehicle	1	9.0	9.0	9.0	9.0
<b>CHILD MANSLAUGHTER TOTAL</b>	<b>34</b>	<b>6.9</b>	<b>7.7</b>	<b>1.5</b>	<b>10.0</b>
<b>Adult homicide offenders</b>					
Manslaughter by violent or unlawful act	166	8.5	8.0	3.0	17.5
Manslaughter – provocation	19	9.2	9.0	7.0	12.0
Manslaughter – diminished responsibility	12	9.2	8.5	3.0	18.0
Killing for preservation in an abusive domestic relationship	1	7.0	7.0	7.0	7.0
Manslaughter by criminal negligence: neglect	6	5.0	4.8	3.0	7.0
Manslaughter by criminal negligence: vehicle	10	9.5	9.0	6.5	12.0
<b>ADULT MANSLAUGHTER TOTAL</b>	<b>214</b>	<b>8.5</b>	<b>8.0</b>	<b>3.0</b>	<b>18.0</b>

Source: QGSO; QSIS

Note: Manslaughter type is unknown for one case due to the unavailability of the sentencing remarks

There were also differences in the spread of sentences, with a wider spread of sentences observed across most manslaughter categories for offences committed against adult victims than offences against child victims. For example, in the case of manslaughter by violent or unlawful act involving an adult victim, sentences ranged from 3.0 to 17.5 years, compared to 7.0 to 9.49 years for offences committed against a child.

During the next stage of the review, the Council will explore how differing factual circumstances and offender-related characteristics might explain differences in sentencing outcomes.

### Parole eligibility for homicide offenders sentenced as adults

As discussed in section 4 of this paper, the grant of parole where an offender has a parole eligibility date is not automatic but subject to determination by the Parole Board.

Table 15 shows for adult offenders sentenced for child homicide the minimum time ordered to be served in prison before becoming eligible to apply for parole ranged from 1.5 years to 34.8 years. Parole periods differ significantly between the offences of murder and manslaughter because unlike murder, a mandatory minimum non-parole period does not apply to manslaughter unless a sentence of life imprisonment is imposed or the offender is declared convicted of a serious violent offence.<sup>253</sup> Adult offenders sentenced for murder of a child, have a median time before parole eligibility of 15 years. The median non-parole period of 3.9 years was associated with adult offenders sentenced for the manslaughter of a child.

**Table 15: Summary of minimum time served by adult offenders sentenced for a child homicide offence and sentenced to imprisonment, 2005–06 to 2016–17**

	Minimum time served (in years) for offenders sentenced as an adult for a child homicide offence				
	N	Mean (years)	Median (years)	Minimum (years)	Maximum (years)
<b>Offenders sentenced for the homicide of a child</b>	47	10.6	7.2	1.5	34.8
Murder	22	17.8	15.0	15.0	34.8
Manslaughter	25	4.3	3.9	1.5	8.0

Source: QCS; QGSO; QFCC; QPRIME; QSIS.

Notes:

1) The parole eligibility date was not known for three offenders.

2) Two offenders had a court ordered parole eligibility date. One offender was eligible for parole on the date of sentence and was released on parole that day. The second offender had a parole date set by the court to be nine months post the sentence date.

For offenders sentenced for the homicide of more than one victim, the minimum time to be served before being eligible to apply for parole is higher (see Table 16).

For offenders sentenced for the murder of a child, the median time before parole eligibility increases from 15 years involving one victim, to 27.3 years when there were three victims (this includes at least one victim aged under 18 years). A similar trend is found for offenders sentenced for child manslaughter. The median minimum time served before being eligible to apply for parole increases for child manslaughter from 3.7 years for offenders with one victim to 4.5 years for offenders with two victims.

**Table 16: Summary of minimum time served by adult offenders sentenced for a child homicide offence and sentenced to imprisonment, 2005–06 to 2016–17**

	Minimum time served (in years) for offenders sentenced as an adult for a child homicide offence				
	N	Mean	Median	Minimum	Maximum
<b>Child homicide</b>	47	10.6	7.2	1.5	34.8
1 victim	37	8.8	7.0	1.5	20.0
2 victims	6	11.7	10.1	3.7	22.0
3 victims	4	26.2	27.3	15.3	34.8
<b>Child murder</b>	22	17.8	15.0	15.0	34.8
1 victim	15	15.4	15.0	15.0	20.0
2 victims	3	19.0	20.0	15.0	22.0
3 victims	4	26.2	27.3	15.3	34.8
<b>Child manslaughter</b>	25	4.3	3.9	1.5	8.0
1 victim	22	4.3	3.7	1.5	8.0
2 victims	3	4.5	4.5	3.7	5.2

Source: QCS; QGSO; QFCC; QPRIME; QSIS.

Cautionary note: The sample sizes for this analysis are small.

Note: The victim count is the total number of victims per offender. This includes at least one victim aged under 18 years however some victims may be over 18 years of age.

## 6. Challenges in sentencing for child homicide

### Investigation and prosecution of child homicide offences

Stakeholders raised a number of challenges in investigating and prosecuting child homicide offences. These are not issues that directly concern sentencing, but provide a context in which sentencing occurs and may explain why these cases are so complex.

Police and forensic pathologists both agreed child death cases are among the most challenging to investigate, often requiring specialist expertise.<sup>254</sup> This is particularly true for very young children. For example, diagnosing cause of death in Sudden Unexpected Infant Deaths becomes a process of exclusion and often requires a multi-disciplinary and multi-agency approach involving a range of specialists in paediatrics and forensic pathology.<sup>255</sup> Because interpreting injuries is difficult, child homicide investigations typically involve complex and lengthy forensic analyses and are often highly sensitive. Family members may be under investigation and may deny or minimise their role. Forensic examination and interpretation of brain trauma and related injuries in infancy and childhood represents one of, if not the most, controversial areas for these specialists.<sup>256</sup> These difficulties stem predominantly from the vast developmental differences between adults and children, which hold implications for a child's, particularly a very young child's, vulnerability to force.<sup>257</sup>

The QPS has established a specialist Child Trauma Unit (CTU) as part of its statewide Child Protection and Investigation Unit providing 'high-level specialist investigative and operational assistance to regional investigators in sudden or unexplained deaths of children, and serious injuries and deaths resulting from suspected child abuse or neglect'.<sup>258</sup> The team, which comprises officers experienced in child abuse and suspicious death investigation, can be deployed across Queensland to assist regional and metropolitan investigations.<sup>259</sup>

From its establishment in 2013 to 30 June 2017, the CTU has been involved in 48 cases involving significant injury or the death of a child, resulting in criminal charges being laid, including for murder.<sup>260</sup>

Police note that unlike most homicides involving adult victims, child homicide investigations are often protracted as a result of their complexity and may take years.<sup>261</sup> Pathology results often take a long time because some processes require time to undertake, and in some cases reports may take 15 to 24 months to complete. Stakeholders identified a range of factors that may contribute to differences between the investigation of adult and child homicides including:

- child homicides involve few or no witnesses;
- medical help is often sought after the offence, whereas the death of an adult victim is more likely to be concealed;
- fatal injuries and cause of death are often difficult to determine — medical experts need to thoroughly interrogate all options to establish a cause of death and must rule out all possible natural causes of death which is more difficult than in adults. Ruling out genetic disorders, accidents (falls) and conditions which make bones more fragile (e.g. rickets) is more difficult for child victims; and
- undertaking autopsies of children is highly specialised, with only a limited number of appropriately qualified pathologists in Queensland (or nationally).<sup>262</sup>

Prosecuting these cases is also challenging. For instance, the level of force required to cause a fatal injury in a child can be quite low, and the various acts that could give rise to that force do not themselves support an inference the defendant intended to cause a serious injury to the child. Further, these cases often occur in circumstances of heightened stress and an inability to cope. For this reason, many cases may not lend themselves to an allegation of intentional killing, or intention to cause a serious injury to the child.

In cases where a defendant has failed to seek medical treatment and the child has died, it may also be difficult to establish intent. These are cases of neglect where the defendant may be unaware of the fatal nature of the injuries inflicted on the child and may be fearful of their child being taken away from them. It may also be difficult to determine the true nature of the child's injury until it has progressed to being fatal.

In some circumstances, evidentiary issues and the Crown's prospects of securing a conviction at trial may result in a decision being taken to accept a plea to a lesser charge, most commonly to accept a plea to manslaughter where the person is charged with murder. As discussed in section 3 of this paper, to prove murder, the Crown must establish beyond reasonable doubt that the person charged with the offence was responsible for the fatal act (or omission) that caused the child's death and did so intending to cause the child's death or cause the child grievous bodily harm (that is, meaning to cause that outcome).

During early consultations, victims of crime stakeholders raised concerns about the need for decisions made by prosecutors to be transparent.<sup>263</sup>

The current Queensland Director of Public Prosecutor's guidelines contain advice to prosecutors about when victims are to be consulted and what information is to be provided, including the provision of a notice of a decision to substantially change a charge, not to continue with a charge, or to accept a plea of guilty to a lesser charge.<sup>264</sup> The guidelines include advice that in all cases of homicide (including of children), an offer should not be accepted without consultation with the Director or Deputy Director.<sup>265</sup>

The difficulties of establishing intent to support a conviction for murder was also raised by some victims' stakeholders<sup>266</sup> who suggested that reforms might be considered to reduce the importance of establishing intent. The concern is that where the offender's actions involve serious physical abuse perpetrated over a number of hours or days, the label that attaches to these offences should be 'murder' not 'manslaughter'.

The Council is conscious any reforms to the basis on which criminal liability for murder is established would have significant implications beyond sentencing outcomes for child homicide offences.

Encouraging more offenders to plead guilty to murder where they intended to cause death or grievous bodily harm to a child might be another means of avoiding the need for prosecutors to establish this intent at trial. While there is no published evidence to suggest the current mandatory life penalty for murder, including mandatory minimum non-parole periods, deters offenders from pleading guilty to this charge, as discussed below, it is highly likely this is the case. This is because there is little apparent benefit to be gained by an offender pleading guilty — such as a reduction in the length of sentence imposed or in the non-parole period set.

## Sentencing 'range' for manslaughter

A number of child homicides result in offenders being convicted of manslaughter rather than murder. Often the conviction for manslaughter rather than murder is on the basis that the elements of murder (in particular, the person's intention to cause the child's death or cause the child grievous bodily harm) cannot be established to the required criminal standard of proof (beyond reasonable doubt).

Courts have long acknowledged manslaughter attracts the widest range of possible sentences of all serious offences<sup>267</sup> because it is an offence that may be committed in an infinite variety of circumstances, ranging from a moment's inattention to systematic and gratuitous violence.<sup>268</sup>

There is even further variation among cases where a violent assault caused the death — there can be 'comparatively minor force' (such as 'a modest single blow with unusual and fatal physiological consequences'<sup>269</sup>) ranging up to a sustained beating over a prolonged period, with gratuitous cruelty.<sup>270</sup> The personal culpability of the offender may also vary 'from a carer who acts out of despair or in circumstances bordering on accident, to the vicious acts of a sadist'.<sup>271</sup> The use of a weapon also makes the offence more serious.<sup>272</sup>

The broad range of circumstances that support a conviction for manslaughter and the wide range of culpability captured means identifying a clear sentencing pattern for manslaughter is particularly difficult. This applies particularly to manslaughter offences committed against children where the overall number



of cases involved is relatively small. As the NSW Court of Criminal Appeal has commented, in considering this challenge, while 'it may be possible to identify a distinct category of manslaughter for which variations on a basically similar factual situation can be identified... this can only be done if there is a significant number of cases which share the common characteristic and which represent a very broad range of differing circumstances'.<sup>273</sup>

While the Queensland Court of Appeal has been careful to avoid identifying a sentencing range for manslaughter involving child victims, it has made observations of a general nature about sentencing levels for particular types of cases committed in certain circumstances based on the outcomes of earlier decisions. For example, in a 2002 decision, the court found in a case involving the violent shaking of a 19-day-old baby leading to severe brain damage and the child's death 10 months later, by an offender with a significant prior criminal history for violence (including against children), a head sentence in the range of eight to nine years 'would ordinarily be called for'.<sup>274</sup> In a later 2014 decision, the court observed that 'a notional sentence of eight to nine years' imprisonment has tended to prevail in instances of protracted, cruel harm to an infant child which has resulted in fatality'.<sup>275</sup>

For the most serious categories of manslaughter, the Court of Appeal has recognised a sentence of 15 to 18 years' imprisonment is within range, even in circumstances where an offender has pleaded guilty.<sup>276</sup> As discussed in section 5 of this paper, sentences at this level for manslaughter of a child are quite rare, with only one case falling within this range over the relevant data period.<sup>277</sup>

## CASE STUDY 7

***R v Maygar; Ex parte A-G (Qld); R v WT; Ex parte A-G (Qld) [2007] QCA 310***  
**(28 September 2007)**

The offender, Maygar, pleaded guilty on the second day of his trial to offences including two counts of murder (of adult victim, C and 17-year-old victim, B), one count of manslaughter (of 17 year-old-victim, A) and four counts of rape of N, B's girlfriend. Maygar was sentenced to life imprisonment on each count of murder with a minimum non-parole period of 20 years (the mandatory non-parole period at the time for multiple counts of murder) and 15 years' imprisonment for manslaughter. The non-parole period was increased on appeal to 30 years for each of the sentences imposed for murder.

The offences took place at C's unit and garage. The death of A, the first victim (which resulted in the manslaughter conviction for Maygar, and a murder conviction for his co-offender, W) appeared to have been the result of A being struck with a metal bar while he was in a drunken state lying on a couch in the garage. The offender returned to the unit with W and told those present they had killed A and now had to dispose of the body, so they were 'hostages' and were 'all already dead' except for the person who could 'come up with a good place to dump the body'.

Maygar hit B, the second victim, with a metal bar several times, with a third co-offender, WT, joining in and cutting at B's throat with a broken knife. Maygar and W then raped N multiple times. N's 22-month old son was in the unit at the time (but removed by WT to another room). The third victim, C, was then killed by Maygar hitting him in the throat with one of the metal bars and by WT also hitting him multiple times using one of the metal poles. The assault continued with a hammer and broken knife. Maygar and W escaped in a van but were picked up by police. Maygar refused to be interviewed.

The Court of Appeal commented: 'the need for condign punishment is as strong as it could ever be bearing in mind considerations of denunciation of [the offender's] conduct and the vindication of the victims of his conduct. The horrific nature of these offences, and the unspeakable suffering endured by the victims and their families, makes this aspect of the sentencing function of special importance in this case'. The court found that: 'The circumstances of this case are such that the murders committed by Maygar are in the category of the worst imaginable examples of murder'.

Examples at the lower end of offence seriousness are often those involving criminal negligence resulting in the death of a child where the death has resulted from a caregiver's temporary lapse of attention. For example, causing the death by drowning of a child by leaving a young child unattended in a bath or leaving a young child in a car resulting in death due to dehydration.

## CASE STUDY 8

### **R v CGR (Unreported, Supreme Court of Queensland, 13 April 2011)**

CGR, a father, was sentenced for manslaughter for the unlawful killing of his nine-month-old daughter, M, for whom he had shared care with his ex-partner. On the day of his daughter's death he had responsibility for dropping M off at daycare but forgot she was in the baby seat in the back of the car and instead drove home. He parked the car in a sunny spot and did not return to it until some three or four hours later by which time M had died of dehydration. At the time he was said to have a lot of things on his mind, such as assignments due and negotiating the sale of some items. The offender was said to be greatly distressed both at the scene and in the period following. He was said to be an involved/hands-on father in the lives of his deceased daughter and his son. He cooperated with police and offered to plead guilty at the earliest opportunity and was found to have genuine remorse. He was sentenced to four years' imprisonment, suspended after serving six months in prison with an operational period of five years.

All these factors serve to make sentencing for offenders convicted of manslaughter challenging as it is likely an appropriate sentence in one case would not be so in another case, taking into account differences in the moral culpability of those involved (e.g. death due to momentary inattention of a caregiver versus cruel and deliberate physical abuse) and the conduct involved.

## Mandatory sentencing and sentencing flexibility

The Terms of Reference asks the Council to have regard to 'the importance of maintaining flexibility in the sentencing process to enable the imposition of a just and appropriate sentence in any individual case, taking into account an offender's culpability'. One of the principal means of limiting flexibility and discretion is mandatory sentencing, which in the case of child homicide, would require a particular sentence to be imposed in all cases where the death of a child occurs.

A mandatory sentence is a fixed penalty prescribed by Parliament for committing a criminal offence.<sup>278</sup> There are different forms of mandatory penalties in Queensland under current legislation that are relevant to this review:

- mandatory penalties that prescribe both the sentence type and head sentence duration (for example, the mandatory sentence of life imprisonment for murder); and
- mandatory minimum non-parole periods which apply to a term of imprisonment imposed (for example, serious violent offence declarations for people convicted of listed offences, which means they must serve 80 per cent of the sentence imposed before being eligible to apply for release on parole, and mandatory minimum non-parole periods that apply to offenders who receive a life sentence).



Arguments in favour and against mandatory sentencing provisions include:<sup>279</sup>

Against mandatory sentencing provisions	Support mandatory sentencing provisions
They constrain judicial discretion and interfere with the courts' capacity to adapt sentences to the objective facts and the subjective features of the case.	They deter offenders from engaging in criminal conduct (although there is little evidence they are effective and act a deterrent).
They displace discretion to other parts of the criminal justice system, namely the police and prosecution.	They promote consistency in sentencing.
They are inconsistent with the rule of law and the separation of powers.	They denounce the offending behaviour.
They reduce the incentive to plead guilty, resulting in increased workloads for the courts and prosecution, and impacts on witnesses who must participate in trials.	They ensure a minimum level of punishment for offenders convicted of the offence.
They increase the prison population and the associated cost to the state.	They protect the community through imprisonment of the offender.
There is little evidence they are effective and act a deterrent.	They send a clear and strong message about community expectations of sentencing for serious offences.

As noted in section 4 of this paper, murder by an adult carries a mandatory sentence of life imprisonment and a minimum non-parole period of 20 years (or higher if the victim is a police officer, in which case the minimum term is 25 years, or 30 years if the offender is convicted of multiple murders).

Queensland is one of only two Australian jurisdictions (the Northern Territory being the other)<sup>280</sup> in which murder carries both a mandatory (rather than presumptive) penalty of life imprisonment and mandatory minimum non-parole period.<sup>281</sup>

One of the likely consequences of the mandatory sentence for murder in Queensland is that there is little incentive for offenders to plead guilty, apart from the possibility the court will set an even higher non-parole period if the person is convicted at trial.

In Victoria, where murder does not carry a mandatory sentence, between 2009–10 to 2013–14 there were 125 proven murder charges, of which 48 per cent were the result of a guilty plea.<sup>282</sup> Based on the Council's analysis, in Queensland, over the same time period, there were 121 proven murder charges, of which 21.5 per cent were the result of a guilty plea.

While, those who support mandatory penalties argue these schemes promote consistency in sentencing, there is evidence that fixed penalties may result in unjust outcomes by treating different cases alike.<sup>283</sup> The existence of a mandatory penalty means courts are not able to take into account the individual circumstances of the offence and the offender when determining a sentence. Mandatory or fixed penalties suggest all offences within a category should attract the same penalty, irrespective of the individual circumstances of the case.

Even in the case of murder, it has been recognised there are different levels of moral culpability. While the degree of harm remains consistent (the death of a person), 'the range of culpability extends from mercy killings at one end of the scale to brutal, sadistic serial killings at the other'.<sup>284</sup>

The same arguments equally might apply to manslaughter due to the wide variety of circumstances in which this offence is committed and range of culpability involved.

While Protect All Children Today Inc (PACT), in its preliminary submission to the Council, supported harsher penalties for offenders convicted of child homicide offences, it was among those who supported the retention of judicial discretion and for basing sentences on the unique circumstances of each case.<sup>285</sup> PACT suggested it was important sentencing judges be able to take into account issues that impact on criminal culpability, such as any mental illness or impaired functioning of the offender, the likelihood of recidivism and the impact of incarceration.<sup>286</sup>

The Queensland Law Society (QLS) strongly supported the retention of sentencing discretion and argued against any form of mandatory sentencing being introduced.<sup>287</sup>

#### **Submission 9 (Queensland Law Society)**

We consider that it is essential that judicial discretion be maintained for sentencing in criminal matters. A mandatory sentence, by definition, prevents a court from fashioning a sentence appropriate to the facts of the case.

This view was shared by the Aboriginal and Torres Strait Islander Legal Service (ATSILS) and Legal Aid Queensland (LAQ) in face-to-face meetings.<sup>288</sup>

While some jurisdictions have introduced forms of numerical sentencing guidance to which courts must have regard when sentencing for certain offence types, but which retain some level of sentencing discretion, often manslaughter is not included in these schemes. For example, while NSW has introduced standard non-parole periods for a range of violent offences, including murder,<sup>289</sup> no standard non-parole period has been established for manslaughter.

Some other Australian jurisdictions set out a minimum term for manslaughter that must be ordered but only if certain criteria are met and with the ability of courts to depart where justified. These types of provisions have been introduced to deal with gang violence and forms of serious organised crime where there is an element of pre-planning involved in the offending and significant risk to community safety, with a view to deterring this form of crime.<sup>290</sup>

A Queensland provision, in the form of a circumstance of aggravation, creates a statutory mandatory penalty that applies to offenders who commit certain serious offences, including manslaughter, as a result of their involvement in a criminal organisation (referred to as a 'serious organised crime circumstance of aggravation').<sup>291</sup> In the case of offenders convicted of manslaughter where this circumstance of aggravation applies, the court must impose an additional seven years in addition to the sentence for the offence, which must be served in custody.<sup>292</sup>

As discussed in the context of serious violent offence declarations, courts must treat a child's age as an aggravating factor in deciding whether to declare an offender convicted of a serious violent offence in circumstances where the offence involves violence to a child under 12 years or that caused the death of a child under 12 years. The decision about whether to make this declaration where the sentence is less than 10 years is discretionary, and there is no requirement that a court must consider making a serious violent offence declaration in these circumstances.

In circumstances where the imposition of a serious violent offence declaration for a head sentence of 10 years or higher is mandatory, to ensure the declaration is just in all the circumstances, a judge may order a head sentence at the lower end of the available sentencing range.<sup>293</sup>

## **QUESTION 4: SENTENCING PROCESS**

What do you consider are the advantages and disadvantages of maintaining flexibility in the sentencing process when sentencing an offender for an offence arising from the death of a child?

## Reflecting the vulnerabilities of children in sentencing

As noted in section 4 of this paper, when sentencing offenders for child homicide offences the court must take into account a range of factors including the seriousness of the offence and any aggravating and mitigating factors. The vulnerability of a victim due to age or disability is a relevant aggravating factor courts will consider in sentencing.

A number of jurisdictions, including Queensland, have sought to ensure the particular vulnerabilities of children are reflected in the criminal law and taken into account in sentencing through legislative reform.

In 2008, Victoria introduced a separate stand-alone offence of child homicide into the *Crimes Act 1958*<sup>294</sup> on the basis that while the offence would have the same fault elements and maximum penalty as manslaughter, it would 'highlight that the victim was a young child' and by emphasising this vulnerability, aim 'to encourage the courts to impose sentences that are closer to the maximum term' (which in Victoria is 20 years).<sup>295</sup>

The offence of child homicide has the same elements of manslaughter, with one additional element of the unlawful killing involving the killing of a child under the age of six years. It is an alternative verdict on a charge of murder.<sup>296</sup> Since its introduction in 2008, only two people have been dealt with under this provision.<sup>297</sup>

While the intention at the time of introducing the new offence appeared to include that courts may impose higher sentences, the Victorian Court of Appeal, drawing on High Court authorities, has found it must be guided by the language used in the legislation rather than extrinsic material.<sup>298</sup> Consequently, it would be 'wrong in principle' to interpret the section as containing a direction that heavier sentences should be imposed for the new offence than had been the case for manslaughter of young children.<sup>299</sup>

In some other jurisdictions, such as NSW and New Zealand, the vulnerability or defencelessness of a victim is expressly identified in legislation as an aggravating factor for the purposes of sentencing.<sup>300</sup>

In Queensland, in addition to the sentencing purposes and factors courts must apply in all cases, as discussed in section 4 of this paper, a circumstance of aggravation for the SVO regime was introduced in 2010<sup>301</sup> that applies to sentencing of an offender for a serious violent offence, such as manslaughter, where the victim was under 12 years.

In these cases, a sentencing judge must treat the age of the child as an aggravating factor in deciding whether to declare an offender convicted of a serious violent offence. Offenders declared convicted of a serious violent offence must serve 80 per cent of the sentence, or 15 years (whichever is less) in prison before being eligible to apply for release on parole.

Similarly to the Victorian reforms, the intention behind treating the age of the victim as an aggravating factor for the purposes of the Queensland SVO regime was explained by the then Attorney-General, Cameron Dick, as being to 'strengthen the penalties imposed on such offenders' and 'ensure that genuine regard is had to the special vulnerability of these young victims'.<sup>302</sup>

The Explanatory Notes to the Bill introducing these changes explain this purpose was sought to be achieved 'without fettering judicial discretion in deciding whether to declare the offender to be convicted of a serious violent offence' taking into account that 'there will be cases where the community, despite the tragic consequences of the conduct, would not expect such a severe sanction'.<sup>303</sup>

Despite these legislative provisions, a number of preliminary submissions made to the Council raised concerns about sentencing courts placing insufficient weight on the vulnerability of child victims.<sup>304</sup>

Submissions described the particular vulnerability of children in terms of their:

- reliance on their parents for survival;<sup>305</sup>
- lack of physical and emotional maturity;<sup>306</sup>
- inability to protect themselves;<sup>307</sup> and
- age, in that the younger a child is, the more vulnerable they are.<sup>308</sup>

Some submissions suggested current sentences did not reflect this vulnerability or the societal expectation that children should be protected and those responsible for causing their deaths through their criminal behaviour, should be penalised at a level appropriate to their level of culpability.

#### **Submission 2 (Protect All Children Today (PACT))**

PACT argues that sentences for child related homicides should be far harsher given the vulnerability of the victim and their lack of physical and emotional maturity to protect themselves.

#### **Submission 4 (Anonymous)**

It is essential that the courts in sentencing demonstrate Australian societal values and expectations; that children, our most vulnerable members of society, are protected and we as a society have a responsibility to ensure they are safe and any abuse and associated criminal activity [is] penalised appropriate to the culpability of the offender.

#### **Submission 5 (M.Airoidi)**

My submission is that the sentencing we have seen, particularly of attacks by perpetrators of brutality against defenceless victims, e.g. children, the elderly and the disabled and “king hit” attacks, is woefully inadequate.

Those who were of this view called for sentences given to child homicide offenders to be increased (whether it be for murder or manslaughter). Some also thought non-parole periods should be increased or that parole should not be given at all<sup>309</sup> and that suspended sentences should not be available as a sentencing option for these offences.<sup>310</sup> Where sentenced for more than one offence, there was also support for prison terms to be served cumulatively rather than concurrently.<sup>311</sup> Broadly, those who made these submissions felt sentencing for child homicide offences did not reflect the child’s lost life and future and that an increase in sentence lengths and minimum time to be served in custody was warranted.

## **QUESTION 5: REFLECTING PARTICULAR VULNERABILITIES OF CHILDREN IN SENTENCING**

**5.1** How does a child victim’s age and particular vulnerabilities impact on the seriousness of a homicide offence?

**5.2** How can the particular vulnerabilities of child victims best be taken into account in sentencing for an offence arising from the death of a child?

## Involvement of co-offenders

As discussed in section 4 of this paper, the parity principle serves to ensure there is not an unjustifiable disparity between sentences imposed on offenders who are involved in the same criminal conduct or a common criminal enterprise. However, as the High Court has also recognised, while ‘it is obviously desirable that persons who have been parties to the commission of the same offence should, if other things are equal, receive the same sentence’.<sup>312</sup>

other things are not always equal, and such matters as the age, background, previous criminal history and general character of the offender, and the part which he or she played in the commission of the offence, have to be taken into account.

In practice, differences in sentencing outcomes for co-offenders sentenced for causing the unlawful death of a child, even when they are found guilty of the same offence as the principal offender, such as manslaughter, often occur on the basis of factors including:

- the different factual basis of sentencing — for example, one person may be found to have caused a fatal injury to a child while the other caregiver might simply have failed to seek required medical assistance following the injury or injuries being inflicted;
- assistance provided to authorities by one of the parties in support of the investigation and prosecution of the other party, which may be critical where the child was in the care of multiple people and it is unclear who was responsible for the fatal act or injury;
- variations in other post-offence conduct — for example, whether a plea of guilty was entered and at what stage in the process, as well as whether the parties demonstrate genuine remorse for their actions; and
- differences in the personal circumstances of these offenders — for example, factors such as an offender’s youth or immaturity and/or cognitive or mental impairment tend to operate as mitigating factors as does a lack of prior (or relevant) criminal history.

A commitment by one party to give evidence against another in cases of child homicide can be particularly important given the inherent difficulties in prosecuting these cases from an evidentiary perspective and in establishing the role of each party in causing the child’s death.<sup>313</sup> These difficulties arise even if both parties have pleaded guilty, as one party may contest the basis on which they are to be sentenced — for example, they may admit to failing to seek medical assistance, but not to physically assaulting the child or causing the injury that led to their death. In these circumstances, given the adverse consequences to the person of finding they were the one who caused the fatal injury (including the likely additional sentence that will be imposed and reputational impact), the court must be satisfied, to a high degree of satisfaction, that they were indeed the one who delivered the fatal injury.<sup>314</sup>

During preliminary consultation, some stakeholders referred to the offence of criminal neglect introduced in South Australia in 2005 as potentially overcoming some of the current evidentiary problems in securing a conviction where it is unclear which party caused the fatal injury. The South Australian provision applies in circumstances where the death or serious harm is caused to a child under 16 years or a vulnerable adult as a result of a person’s unlawful act, omission or course of conduct where the defendant had a duty of care to the victim (being the victim’s parent or guardian or having assumed responsibility for the victim’s care).<sup>316</sup> A jury can still convict a person of this offence if they have reasonable doubt about who committed the unlawful act that caused the victim’s death or serious harm and they are the view the defendant may have been responsible for the unlawful act. The offence carries a maximum penalty of 15 years’ imprisonment if the death of a child under 16 years or vulnerable adult results, or five years if a child or vulnerable adult suffers serious harm.

In contrast to Queensland, South Australia does not have a general duty provision that would otherwise apply in these circumstances requiring those who have the care of a child to protect that child from harm.<sup>317</sup>

## Impact on family members

As discussed in section 4 of this paper, family members of a child victim of homicide can choose to prepare a VIS, which a family member can read aloud in the courtroom. The sentencing court must have regard to the harm done to, or impact of the offence on, the victim mentioned in such a statement.<sup>318</sup>

The VIS also plays a part in homicide-related proceedings in the mental health system if the MHC decides a person was of unsound mind at the time the offence was allegedly committed or is unfit for trial.<sup>319</sup> Given this system involves dealing with people who are not criminally responsible for their actions, the *Mental Health Act 2016 (Qld)* refers to ‘unlawful acts’ instead of ‘offences’ in the victim context.<sup>320</sup> The definition of a VIS is almost identical to that for criminal courts, and includes reference to harm caused to a close relative of a victim. However, there is focus on the VIS including views about the risk the person represents to the victim or close relative and a request for a no-contact condition.<sup>321</sup> It is given, rather than read out, to the MHC and must not be disclosed to the person unless the victim or close relative requests this.<sup>322</sup>

The Council recognises the impact on family members of child homicide is profound. Speaking from their recent personal experience, the grandparents of a child victim of homicide submitted:<sup>323</sup>

### **Submission 1 (John and Susan Sandeman)**

It is important that families of a murdered child must not be ignored. The ongoing trauma they must face for the rest of their lives affects many areas. Family relationships, health and general well being, mental health issues, careers and work prospects for example. Most victims go through life on their own facing such things like waiting to submit letters to the parole board to prevent murderers being released. If and when they are released, victims always watch their back in case there is retribution from the murderer.

Courts have expressly acknowledged the challenges in sentencing for these offences in light of the significant loss that has been experienced.<sup>324</sup> The Queensland Court of Appeal has also recognised the cost to the family of losing a loved one in these circumstances.

Murder is a particularly evil act because its effects are not limited to the extinguishment of a life that might have been longer. It also has an ongoing effect upon the victim’s close ones. That effect is not limited to mere bereavement. As in this case, such people must also lament the cruel facts about how their loved one was killed.<sup>325</sup>

In the case of homicide offences, the very highest level of harm has been caused — the loss of a person’s life and violation of their physical integrity. Subject to this position being altered through legislative amendments,<sup>326</sup> the law has long recognised the sanctity of human life and the equal value ascribed to all lives under the law. The NSW Supreme Court has said on this basis: ‘It would therefore be wholly inappropriate to impose a harsher sentence upon an offender because the value of the life lost is perceived to be greater in the one case than it is in the other’.<sup>327</sup>

Concern about the differential treatment of murder through the setting of different minimum non-parole periods was reflected in a submission made by family members of a child victim of homicide:

### **Submission 1 (John and Susan Sandeman)**

a person who murders a police officer and someone committing multiple murders receives the 25 and 30 years [respectively]... Parole should not even be considered in cases of child murders. It is insulting and not acceptable from the victim’s point of view. Secondly, discrimination exists relating to the victim. There is gross discrimination in this legislation relating to age and the Rights of the Child. A murder is a murder. Someone’s life has been taken from a person’s actions of pure evil.



A VIS in the case of homicide is likely to be of limited relevance in assessing the harm caused to the primary victim given death has resulted. A VIS may, however, be useful in communicating to the sentencing court the broader impact of the offence on the victim's family and community and reinforce the human impact of crime,<sup>328</sup> as well as serving a number of other important purposes for victims and offenders. A VIS may, for example, increase an offender's awareness of the impact of their actions, support recognition of the wrong committed against an individual victim (and, in this context, its impact on family members) in a public forum, and provide a victim's family members with a sense of closure in relation to the crime, thereby promoting their recovery.<sup>329</sup>

The Queensland Homicide Victims' Support Group (QHVSOG) supported extending the current use of VISs to the introduction of community impact statements, citing potential for these to enable the sentencing judge to consider the broader impact of the crime and to empower community members impacted by such offending. In supporting this approach, the QHVSOG comments: 'Victims are not solely the direct relative — they are our friends, our sporting and work colleagues. They should have the right to state what the impact on their lives is'.<sup>330</sup>

Restorative justice approaches may provide another opportunity for family members of child homicide to communicate the impacts of the crime to the offender and assist in their recovery process. Restorative justice can describe a range of processes to address harm. These processes 'generally involve an offender admitting that they have caused the harm and then engaging in a process of dialogue with those directly affected and discussing appropriate courses of action which meet the needs of victims and others affected by the offending behaviour'.<sup>331</sup> The core of restorative justice is 'the opportunity for parties directly affected by a crime to come together to acknowledge the impacts and discuss the way forward'.<sup>332</sup>

Restorative justice processes were introduced as an alternative to traditional criminal justice options for young offenders, mostly in relation to minor, non-violent offences. However, there has been an increasing range of restorative approaches targeting adult offenders and victims of more serious types of crimes.<sup>333</sup>

While restorative justice approaches can operate at different stages of the criminal justice system, victim-focused, specialist post-sentencing processes are likely to be the most suitable for serious and violent crimes such as murder and manslaughter. This is because these processes tend to be 'driven by the needs of the victim, take many months to prepare and use advanced facilitators'.<sup>334</sup> An example of this approach is Victim Offender Conferencing in NSW.

The Dispute Resolution Branch in the Queensland Department of Justice and Attorney-General operates an Adult Restorative Justice Conferencing service for adult offenders, their victims and their respective families and provides support in the aftermath of a criminal offence. The service aims to provide an effective forum for responding to offending behaviour by convening a meeting to discuss what happened, who has been affected and how, as well as what needs to happen to address the harm caused. The service works with parties to ensure a referral is suitable and to prepare them for the meeting, ensuring it is not likely to cause further harm. The Council understands this service is currently used primarily as a diversionary option for criminal matters at the pre-trial stage, although a conference can also be requested at other stages of the criminal justice process, including as a pre-sentence and post-sentence option.

## Preventative measures

In addition to matters relating to the sentencing of child homicide offenders, some stakeholders have indicated their support for investigating preventative measures that might reduce the risks posed to children by offenders convicted of offences involving violence against children.<sup>335</sup> Under existing Queensland legislation, offenders convicted of certain serious offences against children can be included on the Child Protection Offender Register (CPOR).<sup>336</sup> Similar registers are also in operation in other Australian states and territories.



When an offender is convicted of a prescribed offence and other requirements under the legislation are met, they become a 'reportable offender'<sup>337</sup> and are subject to reporting obligations under the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004 (Qld)* (CPOROPPO Act). Offenders are required to keep details on the register up to date, report periodically on their personal details and when these change, and also to report particular travel plans. The QPS has responsibility for monitoring CPOR offenders and can share and record offender information on the National Child Offender System.

The current prescribed offences focus on sexual offences, and particularly sexual offences against children, but also include unlawful homicide where committed in circumstances that amount to murder.<sup>338</sup> A court also has discretion to order a person to comply with reporting obligations if satisfied that a person found guilty of a non-prescribed offence 'poses a risk to the lives or sexual safety of one or more children, or children generally'.<sup>339</sup> A court may make an offender reporting order on its own initiative or on application by the prosecution.<sup>340</sup> Prosecutors may make an application within six months of an offender being sentenced.<sup>341</sup>

In its 2016–17 Annual Report, the Domestic and Family Violence Death Review and Advisory Board recommended the Queensland Government review prescribed offences under the CPOROPPO Act with a view to broadening the scope to other violent offences against children, such as manslaughter and torture.<sup>342</sup> The Board has further recommended guidelines and educational resources should be developed to ensure prosecutors have the necessary knowledge to make applications for an offender reporting order as a matter of course for serious offences against children where these offences are not prescribed.<sup>343</sup> The Board's report and recommendations are currently being considered by the Queensland Government.

## Need for reform

The above discussion has identified a number of challenges in sentencing for child homicide.

The Council invites views on whether any legislative or other changes are needed in sentencing for child homicide and if so, what any changes proposed would contribute to the sentencing process.

The Council also welcomes views on other potential areas for reform to improve the sentencing process for child homicide offences, such as whether restorative justice approaches should have any place in the sentencing process for cases involving the death of a child, and the advantages and disadvantages of this approach.

### QUESTION 6: REFORMS

6.1 Are any legislative or other changes needed in sentencing for child homicide offences? If so, what changes are needed and why? What would these changes add to the sentencing process?

6.2 Should any other reforms be considered to improve the sentencing process for child homicide offences? For example, should restorative justice approaches have any place in the sentencing process and if so, at what stage should they be considered? What might be some of the advantages and disadvantages of such approaches?

## 7. Improving understanding of sentencing for child homicide

The Terms of Reference for this review ask the Council to have regard to specific issues in undertaking the review including:

- commentary expressing that penalties currently imposed on sentences for criminal offences arising from the death of a child may not always meet with the Queensland community's expectations;
- the Queensland Government and community expectation that penalties imposed on offenders convicted of criminal offences arising from the death of a child are appropriately reflective of the community's views that sentencing must punish the convicted offender, protect children from the offender and restate the community's abhorrence for such offending; and
- the significance of supporting and promoting public confidence in the criminal justice system to the overall administration of justice.

Among those matters the Council has been asked to report on, the Terms of Reference specifically ask the Council to identify any ways to enhance knowledge and understanding of the community in relation to penalties imposed for criminal offences arising from the death of a child, for example strategies to develop better communication with the community about these offences.

The QLS was among those legal stakeholders during preliminary consultations that expressly supported considering ways to educate the community about sentencing to ensure public awareness and understanding of sentencing processes.<sup>344</sup> Some victims of crime the Council met with also identified the importance to them of receiving information relevant to their case at appropriate stages of the process.<sup>345</sup>

### Role of the media and barriers to accurate reporting

Numerous studies have found the primary way the general public is informed about sentencing is via the media.<sup>346</sup> However, with the limited time and coverage the media is able to devote to an issue, journalists are unlikely to be able to provide a comprehensive understanding of what the sentencing judge took into account to determine an appropriate sentence. A complex case may only have some elements reported on, or in some instances, legislative restrictions mean key sentencing information that impacted on the sentence cannot be reported.

For example, there are legislative barriers to courts explaining a sentence is being reduced due to cooperation with law enforcement authorities; by undertaking to give evidence in a proceeding in future (PSA section 13A) or in recognition of prior significant cooperation with a law enforcement agency (PSA section 13B).

A section 13A sentence hearing is only partially open to the public. The actual penalty imposed is stated in open court. Other parts of the sentence must be heard in 'closed court', and the legislation does not allow departure from this. Only specific people are allowed to remain in court after it is closed — relevant court staff, the lawyers and the sentenced person. The closed court aspects include:

- anything said out loud relevant to the reduction of the sentence;
- a statement that the sentence is being reduced under section 13A;
- an 'indicative' sentence that would have been imposed if the offender did not agree to cooperate; and<sup>347</sup>
- the offender's written promise to cooperate and a record of evidence or what was said in closed court must be sealed and placed on the court file, and can only be opened by a court order.

Section 13B does not have the second 'indicative' sentence aspect because the cooperation has already occurred. An affidavit from a law enforcement agency must be provided to the court stating the nature, extent and usefulness of the cooperation given to the agency. Anything said out loud that is relevant to the reduction of the sentence must occur in closed court. The penalty imposed must be stated in open court. The affidavit, and a record of evidence or what was said in closed court (as opposed to the sentence imposed), must be sealed and placed on the court file, and can only be opened by a court order.

Prior to being sentenced for child homicide, offenders are also likely to have spent considerable time in pre-sentence custody on remand, which may not be clearly evident to the public based on media reports. For example, it may be the additional time an offender must serve in prison before being eligible to apply for release on parole may seem relatively brief, but this does not take into account the pre-sentence custody period or the fact that parole is not automatically granted.

The Victorian Sentencing Advisory Council found media reporting is selective, often choosing stories with the aim of entertaining rather than informing, focusing on criminal cases which are unusual, dramatic and violent.<sup>348</sup> This means the public may be given only a partial picture, and at times a distorted view, of what really took place, which may contribute to community dissatisfaction with sentencing outcomes.

## Complexity of sentencing

The PSA has been progressively amended since its introduction in 1992 to incorporate a substantial number of changes for various purposes. Among other provisions, the PSA currently contains:

- specific purposes of sentencing (just punishment, rehabilitation, deterrence, denunciation and community protection);
- principles and factors that courts must apply in all cases, in addition to specific principles and factors to which courts must have primary regard when sentencing for certain kinds of offences (e.g. offences involving violence, physical harm or sexual offences against children);
- serious violent offence provisions that apply to certain types of offences in certain circumstances;
- statutory mandatory minimum sentences;
- indefinite sentences for offenders assessed as being a serious danger to the community; and
- serious organised crime provisions.

The overall effect of these changes over time has been a marked increase in the complexity of the sentencing process, particularly (but not exclusively) for sentencing judges in the higher courts.

One of the risks of increasing the complexity of the sentencing process is to make it more difficult for the community (including the media reporting on these issues) to understand.

## Court communication and current barriers

In December 2017, the Chief Justice and another Supreme Court judge separately made comments about section 13A of the PSA.<sup>349</sup> The blanket rule in the legislation requiring courts to be closed and to seal records means there is a risk the public can misunderstand section 13A and 13B sentences. A sentence might appear very lenient in the absence of an explanation that the sentence has been reduced due to the person's significant cooperation.

The operation of these provisions has been raised in discussions with the Council by legal stakeholders as one of the substantial current barriers to community understanding of sentencing in homicide cases involving a co-accused. The Council invites views about whether reforms to these provisions might improve communication with the community about the factors that have impacted sentencing for child homicide offences.

The publication of sentencing remarks is another way in which courts can promote better community understanding of the sentencing process and outcomes. Currently in Queensland only some sentencing remarks of the Supreme and District Courts and the MHC are available on the Supreme Court Library's website. All Queensland Court of Appeal decisions are publicly available.

Courts across Australia, including Queensland, and internationally, have been grappling with ways to make sentencing reasons more accessible while also preserving the rights of individuals to privacy.<sup>350</sup> Some of the approaches undertaken include:<sup>351</sup>

- preparing summary judgments for matters of public interest and/or legal significance for the internet and publication in newspapers;<sup>352</sup>
- streaming suitable judgments online;<sup>353</sup>
- publishing a weekly online court newspaper;
- providing qualified media liaison officers to the courts, to engage with the media, and to manage other communications-related functions; and
- commenting on multimedia such as YouTube about selected cases (for example by a court employed retired judge).

These approaches have time and resource implications for courts that, taking into account increasing workload pressures being experienced by some Queensland courts,<sup>354</sup> would not be insignificant notwithstanding the potential to contribute to improved community understanding.

## Role of the Council

The Council's statutory functions under section 199 of the PSA include:

- to give information to the community to enhance knowledge and understanding of matters relating to sentencing;
- to publish information about sentencing;
- to research matters about sentencing and publish the outcomes of the research; and
- to obtain the community's views on sentencing.

Information published as part of this review, together with consultation activities, is one way the Council is contributing to community understanding about what factors impact on sentencing for child homicide offences.

It is also important once the review is concluded, other strategies are put in place to ensure community understanding of these issues is promoted to support public confidence in sentencing for these offences.

The BAQ and QLS in their submissions suggested strategies such as the implementation of a community education program, and improving community access to sentencing information and trends as a means of enhancing community understanding.

The Council welcomes views on this issue.

## Victims of crime

Research shows victims' satisfaction with the criminal justice process is affected by how victims are treated throughout the process and not just the outcome of the sentencing process.<sup>355</sup>

Significant changes were introduced to the *Victims of Crime Assistance Act 2009* (Qld) (VOCA Act) which commenced on 1 July 2017 following a review of the legislation.<sup>356</sup> The objective of these changes included to ensure the VOCA Act 'continues to provide an effective response to assist victims of crime'.<sup>357</sup>

Changes made to the VOCA Act include replacing the former Fundamental Principles for Victims of Crime in the Act with a Charter of Victims' Rights (Charter).<sup>358</sup> The Charter informs victims about what they can expect from government departments and non-government agencies that support victims. It also places a positive onus on relevant agencies to proactively provide information to victims, if appropriate and practical to do so. The Charter applies to the QPS and Office of the Director of Public Prosecutions, which are the two key agencies involved in investigating and prosecuting child homicide cases, as well as to non-government agencies funded to provide support to victims.

Information to be provided under the Charter includes:<sup>359</sup>

- information about the progress of a police investigation (unless this may jeopardise the investigation);
- major decisions made about the prosecution of an accused person, including the charges brought against the accused person (or a decision not to bring charges), any substantial changes to the charges and the acceptance of a plea of guilty to a lesser or different charge;
- the name of the person charged;
- information about court processes including hearing dates and how to attend court, and the results of criminal court proceedings against the accused person, including the sentence imposed and the outcome of any appeal; and
- if the victim is a witness at the accused's trial, information about the trial process and the victim's role as a witness.

There are processes that provide for a victim to make a complaint if they feel the Charter has not been followed.

Family members of child victims of homicide (including not just parents, but other family members who had a genuine personal relationship with the child when they died)<sup>360</sup> can also apply for financial assistance under the VOCA Act. Each family member (as a related victim) can access up to \$50,000 in financial assistance to aid in their recovery, which may include reimbursement of medical and counselling expenses, incidental travel expenses and other exceptional circumstance expenses (e.g. crime scene clean-up or repatriation expenses).<sup>361</sup> As part of this allocation, each family member is able to claim a lump sum payment of up to \$10,000 in recognition of the distress suffered as a result of becoming aware of the act of violence.<sup>362</sup> Up to \$8,000 is also available for funeral assistance.<sup>363</sup>

## QUESTION 7: COMMUNITY AWARENESS

7.1 What issues contribute to or detract from the community's understanding of sentencing for child homicide offences?

7.2 How can communication with community members and victims of crime about sentencing for child homicide offences be enhanced?

## Community views about sentencing

Ensuring sentencing practice and policies take into account community views has been a concern for governments, legislators and policy makers both in Australia and internationally. The concern, however, has been that any reliance on community views be based on properly researched and representative public opinion.<sup>364</sup>

A series of jury studies first initiated in Tasmania, then repeated in Victoria, have sought to assess public views about sentencing. These studies used jurors from real trials to gauge public opinion about sentences and sentencing. Using jurors as a proxy for investigating the views of members of the public has the advantage of ensuring research participants are as fully informed of the facts of the case and the background of the offender as the judge involved in the trial.

While both the Tasmanian and Victorian studies may have some issues with generalisability of their results due to response rates and the resulting representativeness of their samples, their findings provide an important insight into public opinion about sentencing, and how informing the public about sentencing can impact these opinions.<sup>365</sup>

The 2011 Tasmanian Jury Study found most jurors (52%) chose a more lenient sentence than the judge, four per cent chose the same sentence and 44 per cent chose a more severe sentence than the judge.<sup>366</sup>

The more recent Victorian Jury Study in 2013–2015, based on the Tasmanian study, also explored the gap between judges and jurors on severity issues and on the weight given to aggravating and mitigating factors.

The Victorian Study found when comparing a judge's sentence with the 918 jurors, 61.7 per cent were more lenient than the judge.<sup>367</sup> Further, not only were the majority of jurors more lenient than judges, but when jurors were asked to rate the appropriateness of the judge's sentence, the majority of jurors (86.7%) thought the judge's sentence was appropriate.<sup>368</sup> The study also examined whether the type of crime affected whether jurors were more lenient or more severe than the judge. The majority of jurors were more lenient in violent and other offence trials combined (69.7%) when compared with sex offence trials (49.7%). However, this result changed when the sex offences were divided into types: (1) rape and aggravated sexual assault (all non-consensual contact sex offences involving adults); (2) child sexual assault of children aged 12 years and older; and (3) child sexual assault involving children aged under 12. Jurors were more likely to conform to the overall pattern of juror leniency in sexual assault cases involving adults (60.5%) and children aged 12 years and older (54.8%). However in sexual assault cases involving child victims under 12 years of age, this was reversed with the majority of jurors (63.2%) returning more severe sentences than the judge.<sup>369</sup>

The same Victorian study also examined jurors' views on the relative importance of aggravating and mitigating factors. These factors are traditionally used by judges to assess the seriousness of offences and the offender's degree of culpability. Examples of aggravating factors included the offender abused a position of trust or power, victim vulnerability, prior convictions and substantial injury or harm caused. Examples of mitigating factors included showing remorse, first time offender, prior good character, age (either young or old) and offender has good prospects of rehabilitation. The study found jurors placed more weight in general on aggravating factors when present, but tended to give no or only a little weight to mitigating factors when present.<sup>370</sup> Four factors relating to the offence (abuse of trust/power, victim vulnerable; injury, harm or loss was substantial; and planned/organised offence) were invariably given more weight than the four factors relating to the offender (prior convictions; offender on bail; or parole; or on a suspended sentence or community order).<sup>371</sup>

While it is not possible to replicate the jury study as part of this review, given timeframes and the small number of cases for child homicide that proceed to trial and are sentenced each year, the Council will be running a series of focus groups with community members to seek to explore community views. This will supplement information gathered through submissions made and public consultation sessions to inform the development of the Council's final recommendations.





# Appendix I: Terms of Reference

## QUEENSLAND SENTENCING ADVISORY COUNCIL

### ***THE PENALTIES IMPOSED ON SENTENCE FOR CRIMINAL OFFENCES ARISING FROM THE DEATH OF A CHILD***

I, Yvette D'Ath, Attorney-General and Minister for Justice and Minister for Training and Skills, having regard to:

- commentary expressing that penalties currently imposed on sentences for criminal offences arising from the death of a child may not always meet with the Queensland community's expectations;
- the Queensland Government and community expectation that penalties imposed on offenders convicted of criminal offences arising from the death of a child are appropriately reflective of the community's views that sentencing must punish the convicted offender, protect children from the offender and restate the community's abhorrence for such offending;
- the complexities involved in a court's structuring of an appropriate sentence, taking into account the sentencing options and governing principles for sentencing in the *Penalties and Sentences Act 1992*;
- the importance of maintaining flexibility in the sentencing process to enable the imposition of a just and appropriate sentence in any individual case, taking into account an offender's culpability;
- the maximum penalties provided in the Criminal Code for offences arising from the death of a child; and
- the significance of supporting and promoting public confidence in the criminal justice system to the overall administration of justice

refer to the Queensland Sentencing Advisory Council, pursuant to section 199(1) of the *Penalties and Sentences Act 1992*, a review of the penalties imposed on sentence for criminal offences arising from the death of a child.

In undertaking this reference, the Queensland Sentencing Advisory Council will:

- consider and analyse the penalties currently imposed on sentence for criminal offences arising from the death of a child and report on current sentencing practices including types of sentencing orders, duration and (any) time ordered to be served in custody prior to the offender being released into the community or being eligible for release on parole;
- determine whether the penalties currently imposed on sentences for criminal offences arising from the death of a child adequately reflect the particular vulnerabilities of the category of these victims, such as including the relationship of dependence which may commonly exist

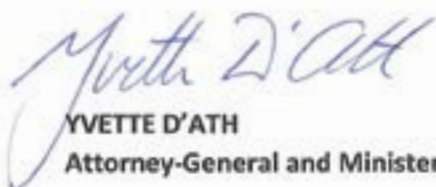


between the victim and the offender, the victim's often young age and associated limitations on their autonomy;

- identify any trends or anomalies that occur in such sentencing, for example the nature of the criminal culpability which forms the basis of a manslaughter charge which may affect any sentence imposed;
- assess whether the existing sentencing considerations of deterrence, denunciation, rehabilitation, punishment and the protection of the community are adequate for the purpose of sentencing this cohort of offenders, and identify if specific additional legislative guidance is required;
- identify and report on any legislative or other changes required to ensure the imposition of appropriate sentences for criminal offences arising from the death of a child;
- identify any ways to enhance knowledge and understanding of the community in relation to penalties imposed on sentence for criminal offences arising from the death of a child, for example strategies to develop better communication with the community about these sentences;
- examine the approach to sentencing for criminal offences arising from the death of a child in other Australian jurisdictions;
- have regard to any relevant research, reports or publications regarding sentencing practices for criminal offences arising from the death of a child;
- consult with the community and other key stakeholders, including but not limited to the judiciary, legal profession, victim of crime groups, child protection advocacy groups, or any relevant government department and agencies; and
- advise on any other matters relevant to this reference.

The Queensland Sentencing Advisory Council is to provide a report on its examination to the Attorney-General and Minister for Justice and Minister for Training and Skills by **31 October 2018**.

Dated the 25<sup>th</sup> day of OCTOBER 2017



YVETTE D'ATH

Attorney-General and Minister for Justice and Minister for Training and Skills

## Appendix 2: Consultation

### Submissions

No.	Date received	Person/organisation
1	29/11/2017	John and Susan Sandeman
2	8/12/2017	Protect All Children Today (PACT)
3	11/12/2017	Anonymous
4	13/12/2017	Anonymous
5	19/12/2017	M.Aioldi
6	20/12/2017	Queensland Homicide Victims' Support Group
7	24/12/2017	Justice for Hemi
8	15/01/2018	Bar Association of Queensland
9	17/01/2018	Queensland Law Society

### Meetings/forums

Date	Meeting
<b>21 November 2017</b>	Preliminary meeting with the Office of the Director of Public Prosecutions
<b>27 November 2017</b>	Lunchbox session with the Chief Magistrate of the Magistrates Court of Queensland
<b>5 December 2017</b>	Meeting with the Aboriginal and Torres Strait Islander Legal Service
<b>6 December 2017</b>	Meeting with the Director of Child Protection Litigation
<b>11 December 2017</b>	Meeting with the Victim Liaison Service, Office of the Director of Public Prosecutions
<b>13 December 2017</b>	Meeting with the Chief Forensic Pathologist, Forensic and Scientific Services, Queensland
<b>13 December 2017</b>	Preliminary meeting with John Allen QC, Public Defender
<b>18 December 2017</b>	Preliminary meeting with Legal Aid Queensland
<b>19 December 2017</b>	Meeting with the Department of Communities, Child Safety and Disability Services (following Machinery of Government changes, now Department of Child Safety, Youth and Women)
<b>20 December 2017</b>	Preliminary meeting with Queensland Police Service (Homicide and Child Trauma Unit)
<b>8 January 2018</b>	Preliminary meeting with the Queensland Law Society
<b>24 January 2018</b>	Meeting with General Manager, Qld Homicide Victims' Support Group
<b>30 January 2018</b>	Briefing of the Chief Justice of the Supreme Court
<b>6 February 2018</b>	Meeting with Queensland Police Service (Social Impact Statements)
<b>2 March 2018</b>	Attended the Coroners' monthly meeting
<b>9 March 2018</b>	Meeting with Clinton Schulz, Aboriginal member of the Queensland Child Death Review Panel
<b>20 March 2018</b>	Preliminary meeting with Justice for Hemi
<b>9 April 2018</b>	Subject Matter Expert Roundtable



## Appendix 3: Submission form

Thank you for your submission to the Queensland Sentencing Advisory Council. Please complete this form and include with your written submission (via email or post).

Questions marked with an \* are required.

<p><b>This submission is:</b></p> <p><input type="checkbox"/> from an individual</p> <p><input type="checkbox"/> on behalf of an organisation</p>	
<p><b>Submissions will be considered public and may be referred to by the Council and published online unless otherwise indicated.</b></p> <p>Private information (such as personal addresses, email addresses and phone numbers) is removed from all public submissions prior to publication. The Council does not accept submissions made anonymously.</p> <p><b>Treat this submission as:</b></p> <p><input type="checkbox"/> Public</p> <p><input type="checkbox"/> Public, but remove my name prior to publication</p> <p><input type="checkbox"/> Confidential — I do not want my submission to be made public</p>	
<b>Contact details</b>	
Name	
Organisation (if applicable)	
Position	
Email address	
Postal address	
City	
State	
Postcode	
Phone number	
<p><b>Queensland Sentencing Advisory Council stakeholder database</b></p> <p><input type="checkbox"/> Yes, add my details to the Council's stakeholder database so I can be kept informed about its work</p> <p><input type="checkbox"/> No, do not add my details to the Council's stakeholder database</p>	

The Queensland Sentencing Advisory Council manages personal information in accordance with the *Information Privacy Act 2009* (Qld). The information you provide will only be used for the purpose of informing the Council's work on its Terms of Reference. Your personal information will not be released to another party without your consent unless required or permitted by law.



## Endnotes

- <sup>1</sup> Queensland Child and Family Commission, *Annual Report: Deaths of children and young people, Queensland 2016–17* (2017) 8.
- <sup>2</sup> *R v Guode* [2017] VSC 285 (30 May 2017) 14–15 [73] (Lasry J).
- <sup>3</sup> The offence of dangerous driving causing death is found in the *Criminal Code* (Qld) s 328A(4). It is committed when a person operates, or in any way interferes with the operation of, a vehicle dangerously in any place and causes the death of another person. It is also an offence to cause grievous bodily harm in the same circumstances. The maximum penalty in either case is 10 years' imprisonment. This increases to 14 years if the offender was adversely affected by an intoxicating substance, excessively speeding, racing or left the scene knowing (or ought reasonably to have known) that the other person was killed or injured (other than to obtain medical or other help). The term 'operates a motor vehicle dangerously' means operating a vehicle at a speed or in a way dangerous to the public, having regard to all the circumstances. The prosecution must prove there was a situation which, viewed objectively, was dangerous. To be dangerous, there must be some feature which subjects the public to risk beyond the risk ordinarily associated with driving a motor vehicle, including driving by a person who may occasionally drive with less than due care and attention: see Queensland Supreme and District Courts, *Queensland Supreme and District Courts Criminal Directions Benchbook* (at March 2017 amendments) 129.1, 129.2 - Dangerous Operation of a Motor Vehicle s 328A [http://www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0019/86131/sd-bb-129-dangerous-operation-of-a-motor-vehicle.pdf](http://www.courts.qld.gov.au/_data/assets/pdf_file/0019/86131/sd-bb-129-dangerous-operation-of-a-motor-vehicle.pdf).
- <sup>4</sup> Under s 83 of the *Transport Operations (Road Use Management) Act 1995* (Qld) it is an offence for any person to drive 'a motor vehicle on a road or elsewhere without due care and attention or without reasonable consideration for other persons using the road or place'. The maximum penalty for this offence is 40 penalty units or 6 months' imprisonment.
- <sup>5</sup> The offence of unlawful striking causing death is found in *Criminal Code* (Qld) s 314A: where a person unlawfully strikes another person to the head or neck and causes their death. The maximum penalty is imprisonment for life. The person is not criminally responsible if the striking was done as part of a socially acceptable activity (such as sport) and it was reasonable in the circumstances. The accused person cannot rely on excuses of accident and prevention of repetition of insult, or the defence of provocation. There is a mandatory penalty for the offence – if the sentence is one of actual imprisonment (not a suspended sentence or intensive correction order), the court must order that the person not be released until they have served the lesser of 80 per cent of the term of imprisonment or 15 years.
- <sup>6</sup> Heavy Vehicle National Law and Other Legislation Amendment Bill 2018 (Qld) introduced into the Legislative Assembly on 15 February 2018. Clause 49 proposes to amend s 83 of the *Transport Operations (Road Use Management) Act 1995* (Qld) to apply a maximum penalty of 80 penalty units or 1 year's imprisonment if death or grievous bodily harm is caused, increasing to 160 penalty units or 2 years' imprisonment if death or grievous bodily harm is caused and the person is also unlicensed at the time of committing the offence. A mandatory licence disqualification period of 6 months is also to apply in either of these circumstances.
- <sup>7</sup> Debbie Kirkwood, 'Just say goodbye': Parents who kill their children in the context of separation' (Discussion Paper No. 8, Domestic Violence Resource Centre Victoria, 2012) 6, 19; Li Eriksson, Paul Mazerolle, Richard Wortley and Holly Johnson, 'Maternal and paternal filicide: Case studies from the Australian Homicide Project' (2016) 25 *Child Abuse Review* 18.
- <sup>8</sup> Crime and Misconduct Commission, 'Vulnerable victims: child homicide by parents' (Research and Issues No. 10, 2013) 2; Kirkwood, above n 7, 7; Christine Alder and Ken Polk, *Child Victims* (Cambridge University Press, 2001) 118.
- <sup>9</sup> Crime and Misconduct Commission, above n 8, 2.
- <sup>10</sup> Queensland Coroner's Court, 'Filicides' (2017) (unpublished); Alder and Polk, above n 8, 118.
- <sup>11</sup> Crime and Misconduct Commission, above n 8, 2.
- <sup>12</sup> Eriksson et al, above n 7; Alder and Polk, above n 8, 19; Thea Brown, Danielle Tyson and Paula Fernandez Arias (Monash University Filicide Project), Submission No 0167.001.0001 to *Royal Commission on Family Violence*, May 2015, 5.
- <sup>13</sup> Thea Brown, Danielle Tyson and Paula Fernandez Arias, 'Filicide and parental separation and divorce' (2014) 23 *Child Abuse Review* 83; Alder and Polk, above n 8, 123.
- <sup>14</sup> Brown, Tyson and Fernandez Arias, above n 13; Kirkwood, above n 7; Alder and Polk, above n 8, 25.
- <sup>15</sup> Kirkwood, above n 7, 19.
- <sup>16</sup> Kirkwood, above n 7, 16; Alder and Polk, above n 8, 3; Jason Keane and Paula Poletti, 'Sentenced Homicides in New South Wales 1994–2001' (Judicial Commission of New South Wales, 2004) 35.
- <sup>17</sup> Kirkwood, above n 7, 16.
- <sup>18</sup> Eriksson et al, above n 7; Alder and Polk, above n 8, Ch 1, Ch 7.
- <sup>19</sup> Eriksson et al, above n 7; Alder and Polk, above n 8, 4–5.
- <sup>20</sup> Crime and Misconduct Commission, above n 8, 3; Alder and Polk, above n 8, 118.
- <sup>21</sup> Alder and Polk, above n 8, 118–123.
- <sup>22</sup> Ibid 18.
- <sup>23</sup> Alder and Polk, above n 8, 123–125; Keane and Poletti, above n 16, 38.
- <sup>24</sup> Kirkwood, above n 7, 17; Alder and Polk, above n 8, 125.
- <sup>25</sup> Queensland Coroner's Court, above n 7; Kirkwood, above n 7, 18.
- <sup>26</sup> Kirkwood, above n 7, 17.

- <sup>27</sup> Alder and Polk, above n 8, 125–127.
- <sup>28</sup> Eriksson et al, above n 7; Alder and Polk, above n 8, 18, 116.
- <sup>29</sup> Tracey Cussen and Willow Bryant, ‘Domestic/family homicide in Australia’ (Research in Practice Number 38, Australian Institute of Criminology, 2015) 3–4; Alder and Polk, above n 8, 116 citing Silverman and Kennedy (1993).
- <sup>30</sup> Alder and Polk, above n 8, Ch 7.
- <sup>31</sup> Crime and Misconduct Commission, above n 8, 6–7; Alder and Polk, above n 8, Ch 7; Brown, Tyson and Fernandez Arias, above n 12, 5.
- <sup>32</sup> Kirkwood, above n 7, 18.
- <sup>33</sup> Alder and Polk, above n 8; Kirkwood, above n 7, 34–36.
- <sup>34</sup> Eriksson and al, above n 7; Alder and Polk, above n 8, 18–19.
- <sup>35</sup> Alder and Polk, above n 8, Ch 4, 70, 154, 157, 171.
- <sup>36</sup> Ibid 117.
- <sup>37</sup> Eriksson et al, above n 7, 18–20, 24; Alder and Polk, above n 8, Ch 7 & 8.
- <sup>38</sup> Cussen and Bryant, above n 29, 7.
- <sup>39</sup> NSW Ombudsman, ‘Report of reviewable deaths in 2014 and 2015, Volume 1: Child deaths’ (2017) 40.
- <sup>40</sup> Kirkwood, above n 7, 24–25, citing various studies.
- <sup>41</sup> Kirkwood, above n 7, 24; Eriksson et al, above n 7, 24–25.
- <sup>42</sup> Kirkwood, above n 7, 23; 35.
- <sup>43</sup> Kirkwood, above n 7, 19–21; Alder and Polk, above n 8, 4–9, Ch 4.
- <sup>44</sup> Kirwood, above n 7, 25 citing Mouzos and Rushworth (2003); NSW Ombudsman, above n 39, 41; Brown, Tyson and Fernandez Arias, above n 13, 85.
- <sup>45</sup> Jennifer Martin and Rhonda Pritchard, ‘Learning from tragedy: homicide within families in New Zealand 2002–2006’ (New Zealand Ministry of Social Development, 2010) 71.
- <sup>46</sup> A child becomes a person capable of being killed when it has completely proceeded in a living state from the body of its mother, whether it has breathed or not, and whether it has an independent circulation or not, and whether the navel-string (umbilical cord) is severed or not: s 292 of sch 1 of the *Criminal Code Act 1899* (Qld) sch 1 (‘*Criminal Code*’ (Qld)).
- <sup>47</sup> *Criminal Code* (Qld) s 300.
- <sup>48</sup> *Criminal Code* (Qld) s 291.
- <sup>49</sup> *Criminal Code* (Qld) s 1.
- <sup>50</sup> *Criminal Code* (Qld) s 293.
- <sup>51</sup> The act constituting the offence refers to some physical action, apart from its consequences: *Kapronovski v The Queen* (1973) 133 CLR 209, 231 (cited in *Pickering v The Queen* (2017) 260 CLR 151, 159–160 [22] (Keifel CJ and Nettle J) and 164 [39] (Gageler, Gordon and Edelman JJ)).
- <sup>52</sup> An act or omission which renders the person doing the act or making the omission liable to punishment is called an offence: *Criminal Code* (Qld) s 2.
- <sup>53</sup> *R v Sherrington & Kuchler* [2001] QCA 105 (6 April 2001) 2–3 [4] (McPherson JA) citing *Royall v R* (1991) 172 CLR 378, 398, 423. See Judge M J Shanahan, S M Ryan QC and Judge A J Rafter, LexisNexis, *Carter’s Criminal Law of Queensland*, [s 293.10] Scope of the provision (July 2013 update).
- <sup>54</sup> *R v Pagett* (1983) 76 Cr App R 279 cited in Shanahan, Ryan and Rafter, above n 53, [s 293.10] Scope of the provision (July 2013 update).
- <sup>55</sup> A person who causes someone else’s bodily injury which results in death is still criminally responsible for the death even though the injury could have been avoided by proper precaution of the injured person, or the death from the injury could have been prevented by proper care or treatment: *Criminal Code* (Qld) s 297.
- <sup>56</sup> Where a person does grievous bodily harm to another person, who has medical treatment but dies from either the injury or the treatment (even if this is the immediate cause of death), the first person is still deemed to have killed that person. The medical treatment must have been reasonably proper under the circumstances and applied in good faith: *Criminal Code* (Qld) s 298.
- <sup>57</sup> The person who helps, as a ‘party’ or as part of a joint criminal enterprise, can be found guilty of the same offence, or a lesser one: ‘this will frequently arise where the actual perpetrator is convicted of murder. Depending on the evidence admissible against a party, it may be open to a jury to [instead] convict that person of manslaughter’: Shanahan, Ryan and Rafter, above n 53, [s 8.55] Extent of liability of a party (June 2017 update).
- <sup>58</sup> There are also duties of persons doing dangerous acts in the *Criminal Code* (Qld) (s 288), of persons in charge of dangerous things (s 289) and a duty to do certain acts, the omission of which is or may be dangerous to life or health (s 290).
- <sup>59</sup> *Criminal Code* (Qld) s 285, and see Shanahan, Ryan and Rafter, above n 53, [s 285.1] Scope of section (published December 2011). A person in charge of someone who cannot provide themselves with the necessities of life (including because of their age), must provide them. A person who does not is held to have caused any consequences to the other person’s life or health.



- <sup>60</sup> *R v Macdonald and Macdonald* [1904] St R Qd 151, 170 (Cooper CJ), 178 (Chubb JJ).
- <sup>61</sup> *Criminal Code* (Qld) s 286. 'Person who has care of a child' is defined widely to include parent, foster and step parent, guardian or other adult in charge of the child.
- <sup>62</sup> John Devereux and Meredith Blake, *Kenny Criminal Law in Queensland and Western Australia* (LexisNexis Butterworths 9th ed, 2016) 144 [8.39]. Deliberate breaches are very rare (perhaps because they are essentially the same as murder by intending to cause someone death or grievous bodily harm, charged under the section regarding murder alone). An example of a deliberate breach is the case where a father and stepmother were convicted of murdering their 14-year-old daughter, having intentionally starved her to death in breach of the duty to provide her with the necessities of life: *R v Macdonald and Macdonald* [1904] St R Qd 151, a breach of *Criminal Code* (Qld) s 285 discussed in *Koani v The Queen* (2017) 349 ALR 56, 63 [27] (also citing *R v Young* [1969] Qd R 417, 442 (Lucas JJ)). McMurdo P's dissenting Court of Appeal judgment noted that *R v Macdonald and Macdonald* was the only instance to which the Court of Appeal had been referred of a murder conviction on the basis of intent to kill coupled with a breach of duty: *R v Koani* (No 2) [2017] 1 Qd R 273, 286 [39].
- <sup>63</sup> Devereux and Blake, above n 62, 145 [8.41] citing *R v Macdonald and Macdonald* [1904] St R Qd 151, 170 (Cooper CJ). See also Queensland Supreme and District Courts, above n 3, 93.2 Criminal Negligence s 289 (In Charge of Dangerous Things) <[http://www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0003/86097/sd-bb-93-criminal-negligence-s-280.pdf](http://www.courts.qld.gov.au/_data/assets/pdf_file/0003/86097/sd-bb-93-criminal-negligence-s-280.pdf)>.
- <sup>64</sup> *R v Bateman* (1925) 19 Cr App R 8, 11–12. See also Shanahan, Ryan and Rafter, above n 53, [s 303.30] Criminal negligence (published June 2015) citing *Nydam v R* [1977] VR 430, 445; Shanahan, Ryan and Rafter, above n 53, [s 285.10] Scope of the duty (published December 2011) and cases cited therein; *R v Watson* [1960] Qd R 332, 336 (Mack JJ) and *R v Pesnak & Anor* (2000) 112 A Crim R 410, 415 [24] (McMurdo P, Davies JA, Mackenzie JJ): 'Whilst intention is relevant to sentence, a major factor in criminal negligence manslaughter cases is the extent of the departure from reasonable community standards which constitutes the criminal negligence. The applicants did not intend to harm the deceased through their failure to obtain medical assistance for her; they believed her serious symptoms were caused by a spiritual struggle. Nevertheless their failure to respond to her obvious and increasingly serious symptoms constituted an extremely grave departure from reasonable community standards'.
- <sup>65</sup> *Criminal Code* (Qld) s 7. Note that Queensland also has a distinct offence of conspiring to murder, with a maximum penalty of 14 years' imprisonment: *Criminal Code* (Qld) s 309.
- <sup>66</sup> Queensland Supreme and District Courts, above n 3, 74.1–5 — Parties to an offence: ss 7, 8 <[http://www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0004/86080/sd-bb-74-parties-to-an-offence.pdf](http://www.courts.qld.gov.au/_data/assets/pdf_file/0004/86080/sd-bb-74-parties-to-an-offence.pdf)>.
- <sup>67</sup> *Ibid.*
- <sup>68</sup> *Ibid.*
- <sup>69</sup> If a person counsels someone to commit an offence, and the offence is in fact committed, it does not matter whether the offence committed was the specific one counselled or a different one, or that it was committed in a different way. What matters is that the facts constituting the offence actually committed are a probable consequence of carrying out the counsel: *Criminal Code* (Qld) s 9.
- <sup>70</sup> There must be at least intentional, positive encouragement by the aiding person. Voluntary and deliberate presence during the commission of a crime without opposition or real dissent may be evidence of wilful encouragement or aiding; *R v Beck* [1990] 1 Qd R 30, 37; *Jefferies v Sturcke* [1992] 2 Qd R 392, 395. However, depending on the circumstances, a person does not necessarily have to be present when the offence is committed. See Queensland Supreme and District Courts, above n 3, 74.3–4 — Parties to an offence: ss 7, 8 <[http://www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0004/86080/sd-bb-74-parties-to-an-offence.pdf](http://www.courts.qld.gov.au/_data/assets/pdf_file/0004/86080/sd-bb-74-parties-to-an-offence.pdf)>. There are different legal tests involved for the party provisions. Someone who aids or enables must mean to do so. Recklessness about the possibility that the first offender will physically commit the offence is not enough. The aider or enabler must know or expect it will happen; knowledge of possibility is not enough. He or she must have known that the elements of the offence committed (including any necessary intent) were intended by the main offender. The aiding or enabling act or omission must be intentional, for the purpose of enabling or aiding the main offender, even if it did not actually assist. For counselling or procuring, the main offender must have committed the offence when carrying out the counselling or procuring person's urging or advising. The offence must be a probable consequence of the urging or advising. Probable consequence means it could well have happened. See Queensland Supreme and District Courts, above n 3, 74.2, 6 — Parties to an offence: ss 7, 8 <[http://www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0004/86080/sd-bb-74-parties-to-an-offence.pdf](http://www.courts.qld.gov.au/_data/assets/pdf_file/0004/86080/sd-bb-74-parties-to-an-offence.pdf)>. See also Shanahan, Ryan and Rafter, above n 53, [s 7.40] Knowledge required (June 2017 update) and cases therein.
- <sup>71</sup> Queensland Supreme and District Courts, above n 3, 74.7 — Parties to an offence: ss 7, 8 <[http://www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0004/86080/sd-bb-74-parties-to-an-offence.pdf](http://www.courts.qld.gov.au/_data/assets/pdf_file/0004/86080/sd-bb-74-parties-to-an-offence.pdf)>. The first step is to determine what the plan was, and this is done by determining what the offenders were thinking, through looking at all of the surrounding circumstances. This extends to the possible consequences of the plan: See Shanahan, Ryan and Rafter, above n 53, [s 8.25] A common intention (June 2017 update). The second step involves looking at the offence actually committed and asking: was it committed in furtherance of the plan? The third step is determining whether the offence actually committed was a probable consequence of the plan, and this is determined by asking not what the defendant actually thought, but what a person of average competence and knowledge might be expected to foresee. It must be more than mere possibility; in that it could well have happened: Queensland Supreme and District Courts, above n 3, 74.8, 74.9 — Parties to an offence: ss 7, 8 <[http://www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0004/86080/sd-bb-74-parties-to-an-offence.pdf](http://www.courts.qld.gov.au/_data/assets/pdf_file/0004/86080/sd-bb-74-parties-to-an-offence.pdf)>. 56, [s 8.25] A common intention (June 2017 update). See also Shanahan, Ryan and Rafter, above n 53, [s 8.30] Offence committed in the prosecution of the common purpose (June 2017 update).
- <sup>72</sup> See *Criminal Code* (Qld) ss 302(1)(a) and 302(2) regarding intention to harm the person killed.

- <sup>73</sup> Grievous bodily harm is defined in *Criminal Code* (Qld) s 1. There are separate offences under ss 317 and 320 of the *Criminal Code* (Qld) of intentionally causing grievous bodily harm and other malicious acts (maximum penalty: life imprisonment) and causing grievous bodily harm (maximum penalty 14 years imprisonment).
- <sup>74</sup> *Criminal Code* (Qld) s 302(1)(b).
- <sup>75</sup> *Criminal Code* (Qld) s 302(1)(c). The crime must be such that the offender can be arrested without warrant (this covers most of the offences in the *Criminal Code*).
- <sup>76</sup> *Criminal Code* (Qld) s 302(1)(c).
- <sup>77</sup> *Criminal Code* (Qld) s 302(1)(d).
- <sup>78</sup> *Criminal Code* (Qld) s 302(1)(e).
- <sup>79</sup> *Criminal Code* (Qld) s 302(4).
- <sup>80</sup> See *R v Streatfield* (1991) 53 A Crim R 320, 326 (Thomas J, Cooper J agreeing): 'in passing a sentence for the crime of manslaughter the court is vitally concerned with the mind and culpability of the offender. The absence of intention to harm must be a very significant factor; and is probably the primary factor in assessing the quality of the offender's act that amounts to manslaughter'. See also *R v Hoerler* (2004) 147 A Crim R 520, 528 [26] (Spigelman CJ): 'Plainly, other circumstances being equal, the moral culpability of the offender is significantly higher where one person causes the death of another in circumstances where an intention to do so exists'.
- <sup>81</sup> See *Criminal Code* (Qld) s 23(2). Quote is from *Zuburoni v The Queen* (2016) 256 CLR 482, 490 [14] (Kiefel, Bell and Keane JJ) citing *Knight v The Queen* (1992) 175 CLR 495, 502–503 (Mason CJ, Dawson and Toohey JJ) and *Cutter v The Queen* (1997) 143 ALR 498, 509–510 (Kirby J).
- <sup>82</sup> This discussion is based on Queensland Supreme and District Courts, above n 3, 59.1 — Intention: <[http://www.courts.qld.gov.au/\\_\\_data/assets/pdf\\_file/0010/86059/sd-bb-59-intention.pdf](http://www.courts.qld.gov.au/__data/assets/pdf_file/0010/86059/sd-bb-59-intention.pdf)>. See cases cited therein: *R v Willmot* (No 2) [1985] 2 Qd R 413, 418–419; *Cutter v The Queen* (1997) 143 ALR 498; *R v Glebow* [2002] QCA 442; and *R v Reid* [2007] 1 Qd R 64.
- <sup>83</sup> *Knight v The Queen* (1992) 17 CLR 495, 502 (Mason CJ, Dawson and Toohey JJ) and *Cutter v The Queen* (1997) 143 ALR 498, 509 (Kirby J, dissenting as to the result; cited with approval in *Zaburoni v The Queen* (2016) 256 CLR 482, 490 [14] (Kiefel, Bell and Keane JJ)).
- <sup>84</sup> *Criminal Code* (Qld) s 26. See also Shanahan, Ryan and Rafter, above n 53, [s 23.55] Intention to cause a specific result (January 2017 update) citing *Fruet v R* [1974] WAR 78.
- <sup>85</sup> *Stapleton v The Queen* (1952) 86 CLR 358, 365; *Parker v The Queen* (1963) 111 CLR 610, 632 (Dixon CJ) cited in *Zaburoni v The Queen* (2016) 256 CLR 482, 504 [66] (Nettle J).
- <sup>86</sup> *Hawkins v R* (1994) 179 CLR 500, 513.
- <sup>87</sup> Shanahan, Ryan and Rafter, above n 53, [s 23.55] Intention to cause a specific result (January 2017 update) citing *Hawkins v R* (1994) 179 CLR 500 (see 508, 513, 517).
- <sup>88</sup> *Zaburoni v The Queen* (2016) 256 CLR 482, 489 [13] (Kiefel, Bell and Keane JJ), after discussing *R v Reid* [2007] 1 Qd R 64. It was noted that the Queensland Code is distinguished from its Commonwealth counterpart, which allows that a person has intention with respect to a result if the person is aware that the result will occur in the ordinary course of events (*Criminal Code Act 1995* (Cth) sch 1, s 5.2(3)): *Zaburoni v The Queen* (2016) 256 CLR 482, 490 [14].
- <sup>89</sup> *Zaburoni v The Queen* (2016) 256 CLR 482, 489 [10] (Kiefel, Bell and Keane JJ); see also 490 [14], 497 [42], 498 [43]–[44] (Kiefel, Bell and Keane JJ) and 501 [55] (Gageler J) citing *R v Willmot* [No 2] [1985] 2 Qd R 413, 418 and *R v Reid* [2007] 1 Qd R 64, 96–97 [108]–[109].
- <sup>90</sup> *Zaburoni v The Queen* (2016) 256 CLR 482, 490 [15] (Kiefel, Bell and Keane JJ), see also 497 [42] and 498 [44] (Kiefel, Bell and Keane JJ) and 504 [66], [68] (Nettle J).
- <sup>91</sup> *Criminal Code* (Qld) s 303(1).
- <sup>92</sup> *R v Skondin* [2015] QCA 138 (24 July 2015) 21 [80] (Holmes JA).
- <sup>93</sup> The ways in which these partial defences are raised at a trial are not the same. Diminished responsibility and killing on provocation apply where the prosecution first proves beyond reasonable doubt that murder was committed. Then, the defence must prove the partial defence on the less stringent test of 'on the balance of probabilities'. Regarding provocation, see *Criminal Code* (Qld) s 304(9) and Queensland Supreme and District Courts, above n 3, 98.3 — Provocation: s 304 (for offences post 4 April 2011) <[http://www.courts.qld.gov.au/\\_\\_data/assets/pdf\\_file/0017/86102/sd-bb-98-provocation-s304-for-offences-post-4-april-2011.pdf](http://www.courts.qld.gov.au/__data/assets/pdf_file/0017/86102/sd-bb-98-provocation-s304-for-offences-post-4-april-2011.pdf)>. Regarding diminished responsibility, see *Criminal Code* (Qld) s 304A(2) and Queensland Supreme and District Courts, above n 3, 100.1 Diminished Responsibility: s 304A <[http://www.courts.qld.gov.au/\\_\\_data/assets/pdf\\_file/0018/86103/sd-bb-100-diminished-responsibility-s-304a.pdf](http://www.courts.qld.gov.au/__data/assets/pdf_file/0018/86103/sd-bb-100-diminished-responsibility-s-304a.pdf)>. Killing for preservation in an abusive domestic relationship is different. It also reduces murder to manslaughter, but there is no evidential onus on the defendant — the prosecution must 'exclude' it, beyond reasonable doubt: Queensland Supreme and District Courts, above n 3, 99.2, 99.3 Killing for preservation in an abusive domestic relationship: s 304B <[http://www.courts.qld.gov.au/\\_\\_data/assets/pdf\\_file/0003/136497/sd-bb-99-killing-for-preservation-in-an-abusive-domestic-relationship-s-304b.pdf](http://www.courts.qld.gov.au/__data/assets/pdf_file/0003/136497/sd-bb-99-killing-for-preservation-in-an-abusive-domestic-relationship-s-304b.pdf)>.
- <sup>94</sup> *Criminal Code* (Qld) s 304A(1). This is different to being found of unsound mind and being dealt with under the *Mental Health Act 2016* (Qld).

- <sup>95</sup> The three capacities which can be impaired are: to understand what they are doing; to control their actions; to know that they should not do the act or omission. The abnormality can arise from either 'a condition of arrested or retarded development of mind or inherent causes' or be 'induced by disease or injury'.
- <sup>96</sup> *Criminal Code* (Qld) s 304(1).
- <sup>97</sup> See Queensland Supreme and District Courts, above n 3, 98.3 Provocation: s 304 (for offences post 4 April 2011) <[http://www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0017/86102/sd-bb-98-provocation-s304-for-offences-post-4-april-2011.pdf](http://www.courts.qld.gov.au/_data/assets/pdf_file/0017/86102/sd-bb-98-provocation-s304-for-offences-post-4-april-2011.pdf)>; and Shanahan, Ryan and Rafter, above n 53, [s 304.1] Scope of Section (September 2012 update). A defendant's intoxication can be considered in assessing whether they lost control because of the provocation as opposed to a sole cause of drink or drugs, but intoxication is not relevant to considering the impact of the provocation on the ordinary person: Queensland Supreme and District Courts, above n 3, 98.6 Provocation: s 304 (for offences post 4 April 2011) <[http://www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0017/86102/sd-bb-98-provocation-s304-for-offences-post-4-april-2011.pdf](http://www.courts.qld.gov.au/_data/assets/pdf_file/0017/86102/sd-bb-98-provocation-s304-for-offences-post-4-april-2011.pdf)>; *Censori v R* [1983] WAR 89 cited in Shanahan, Ryan and Rafter, above n 53, [s 304.15] The ordinary person (September 2012 update).
- <sup>98</sup> *Criminal Code* (Qld) s 304B.
- <sup>99</sup> *Criminal Code* (Qld) s 23(1) and see Queensland Supreme and District Courts, above n 3, 77.1 Unwilled Acts (Automatism) s 23(1)(a) <[http://www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0007/86083/sd-bb-77-unwilled-acts-automatism-s23.pdf](http://www.courts.qld.gov.au/_data/assets/pdf_file/0007/86083/sd-bb-77-unwilled-acts-automatism-s23.pdf)> citing *R v Falconer* (1990) 171 CLR 30, 63. Section 23 does not apply to sections 285–290 of the *Criminal Code* (Qld): Section 23(1) and *R v Hodgetts and Jackson* [1990] 1 Qd R 456 as discussed in Shanahan, Ryan and Rafter, above n 53, [s 23.40] Subject to the express provisions relating to negligent acts and omissions (January 2017 update).
- <sup>100</sup> Devereux and Blake, above n 62, 150–151 [8.56].
- <sup>101</sup> *R v Taiters* [1997] 1 Qd R 333, 335 (Macrossan CJ, Pincus JA, Lee JJ).
- <sup>102</sup> *Criminal Code* (Qld) s 23(1A).
- <sup>103</sup> Devereux and Blake, above n 62, 157 [8.68] citing *R v Martyr* [1962] Qd R 398; *Mamote-Kulang v R* (1964) 111 CLR 62; *R v Van Den Bemd* (1994) 179 CLR 137, 148.
- <sup>104</sup> Queensland Supreme and District Courts, above n 3, 78.3 Accident, s 23(1)(b).
- <sup>105</sup> Devereux and Blake, above n 62, 157 [8.69] citing *Mamote-Kulang v R* (1964) 111 CLR 62.
- <sup>106</sup> See *R v Steindl* [2002] 2 Qd R 542, 549 [29] (McMurdo P), 551 [41] (Davies JA), 554 [57] (Thomas JA).
- <sup>107</sup> *Criminal Code* (Qld) s 26. Insanity is covered by *Criminal Code* (Qld) ss 26, 27 and 28(1).
- <sup>108</sup> On the less stringent civil standard test – was it more probable than not that the person was insane?
- <sup>109</sup> Unsound mind is matched to the definition of insanity in the *Criminal Code* (Qld) ss 27(1) and 28(1) by its definition in s 109 of the *Mental Health Act 2016* (Qld).
- <sup>110</sup> *Mental Health Act 2016* (Qld) s 21(1), 110(2), 116(1), 120. Diminished responsibility bears the same meaning as it does in the *Criminal Code* (Qld) s 304A: *Mental Health Act 2016* (Qld) s 108.
- <sup>111</sup> *Mental Health Act 2016* (Qld) ss 21(1), 110(1), 118, 119, 121, 122.
- <sup>112</sup> *Mental Health Act 2016* (Qld) s 123.
- <sup>113</sup> *Mental Health Act 2016* (Qld) s 119(1) regarding unsound mind and s 122 regarding permanent unfitness for trial. Note that a person found by the Mental Health Court to be of unsound mind may still elect to be tried for the offence: s 119(2), and see also ss 158–160.
- <sup>114</sup> Queensland Supreme and District Courts, above n 3, 82.3 Insanity: ss 26, 27(1), (2), 28(1), (2) <[http://www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0003/86088/sd-bb-82-insanity-ss26-27-1-2-28-1-2.pdf](http://www.courts.qld.gov.au/_data/assets/pdf_file/0003/86088/sd-bb-82-insanity-ss26-27-1-2-28-1-2.pdf)>. See also *Mental Health Act 2016* (Qld) ss 21, 131, 133, 137, 138.
- <sup>115</sup> *Mental Health Act 2016* (Qld) ss 21(5), 28, 121. As to reviews, see ss 485–493.
- <sup>116</sup> *Mental Health Act 2016* (Qld) ss 132.
- <sup>117</sup> *Mental Health Act 2016* (Qld) ss 492(3)–(4).
- <sup>118</sup> This can occur when: (1) It is uncertain whether any accused person is capable of understanding the proceedings at the time of trial (*Criminal Code* (Qld) s 613). A jury can find that the person is of unsound mind. The judge can discharge the person, or admit them to an authorised mental health service to be dealt with under the *Mental Health Act 2016* (Qld); (2) It is alleged or appears that the person is not of sound mind at the time of trial (*Criminal Code* (Qld) s 645). A jury can find that the person is of unsound mind. The judge must admit the person to an authorised mental health service to be dealt with under the *Mental Health Act 2016* (Qld); (3) it is alleged or appears that the person was not of sound mind at the time when the act or omission alleged to constitute the offence occurred (*Criminal Code* (Qld) s 647). If the jury acquits the person on this ground, the judge must admit the person to an authorised mental health service to be dealt with under the *Mental Health Act 2016* (Qld). See also *Mental Health Act 2016* (Qld) s 189. Further, the Governor of Queensland can order that the person be placed in confinement as long as is required (*Criminal Code* (Qld) s 647(2)). In scenarios 1 and 2, the person can be retried again later.

- <sup>119</sup> *Criminal Code* (Qld) s 27(1).
- <sup>120</sup> *Criminal Code* (Qld) s 28(1) and Queensland Supreme and District Courts, above n 3, 82.1, 82.3 Insanity: ss 26, 27(1), (2), 28(1), (2) <[http://www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0003/86088/sd-bb-82-insanity-ss26-27-1-2-28-1-2.pdf](http://www.courts.qld.gov.au/_data/assets/pdf_file/0003/86088/sd-bb-82-insanity-ss26-27-1-2-28-1-2.pdf)>.
- <sup>121</sup> *Criminal Code* (Qld) s 27(2).
- <sup>122</sup> Further defences and excuses in the *Criminal Code* (Qld) are:
- compulsion (in respect only of manslaughter): s 31. See *Pickering v The Queen* (2017) 260 CLR 151 examining s 31(2);
  - mistake of fact: s 24;
  - extraordinary emergency: s 25;
  - defence of a dwelling: s 267 (It is lawful to use force to prevent or repel another person unlawfully entering or remaining in their home. The person in the home must reasonably believe that the other person intends to commit an indictable offence and that the force is necessary);
  - provocation (in respect of manslaughter only where the force used is unexpectedly fatal, and distinct from s 304 regarding murder): ss 268 and 269, read with *R v Prow* [1990] 1 Qd R 64;
  - prevention of repetition of insult (regarding manslaughter): s 270;
  - self-defence against unprovoked assault: s 271;
  - self-defence against provoked assault: s 272; and
  - aiding self-defence: s 273.
- <sup>123</sup> *Criminal Code* (Qld) s 28(2). See *R v Clough* [2011] 2 Qd R 222, discussed in Shanahan, Ryan and Rafter, above n 53, [s 28.10] The defence and intentional intoxication (May 2012 update); *Mental Health Act 2016* (Qld) s 109(2).
- <sup>124</sup> Queensland Supreme and District Courts, above n 3, 84.1 Intentional Intoxication: s 28 <[http://www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0005/86090/sd-bb-84-intentional-intoxication.pdf](http://www.courts.qld.gov.au/_data/assets/pdf_file/0005/86090/sd-bb-84-intentional-intoxication.pdf)>. See also Shanahan, Ryan and Rafter, above n 53, [s 28.10] The defence and intentional intoxication (May 2012 update) discussing *R v Kusu* [1981] Qd R 136.
- <sup>125</sup> *Penalties and Sentences Act 1992* (Qld) s 9(9A). Note that drug addiction, while also not an excuse, can have a different relevance to sentence: Shanahan, Ryan and Rafter, above n 53, [s 28.25] Relevance of intoxication to penalty (May 2012 update) citing *R v Hammond* [1997] 2 Qd R 195.
- <sup>126</sup> *Criminal Code* (Qld) s 28(3).
- <sup>127</sup> Queensland Supreme and District Courts, above n 3, 84.1, 84.2 Intentional Intoxication: s 28 <[http://www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0005/86090/sd-bb-84-intentional-intoxication.pdf](http://www.courts.qld.gov.au/_data/assets/pdf_file/0005/86090/sd-bb-84-intentional-intoxication.pdf)>. See also *Viro v R* (1978) 141 CLR 88, 112 (Gibbs J) reproduced in Shanahan, Ryan and Rafter, above n 53, [s 28.20] Intention to cause a specific result (May 2012 update). For a recent example where a person was found to have had intention despite intoxication, see *R v Lafaele* [2018] QCA 42 (23 March 2018) 7 [18]–[19].
- <sup>128</sup> This analysis does not purport to list all possible offences which could be charged, or to warrant the offences listed have been or are used frequently in respect of child homicide prosecutions.
- <sup>129</sup> See *Criminal Code* (Qld) s 1 ‘domestic relationship’ and *Domestic and Family Violence Protection Act 2012* (Qld) ss 9, 13, 16 and 19.
- <sup>130</sup> See *Penalties and Sentence Act 1992* (Qld) ss 9(2)(c)(i) and 179I–179N and *Victims of Crime Assistance Act 2009* (Qld) s 5.
- <sup>131</sup> *Evidence Act 1977* (Qld) s 132C.
- <sup>132</sup> The effect of deterrence in the context of vulnerable children in the care of their parents or others is extremely important: *R v Irvine* [1997] QCA 138 (8 May 1997) 3 (Macrossan CJ; Fitzgerald P and McPherson JA agreeing). See also *R v Hall* [2002] QCA 125 (5 April 2002) 9 [39] (White J) and *R v Howard* [2001] NSWCCA 309 (23 August 2001) [19] (Wood CJ at CL; Beazley JA and Sperling J agreeing).
- <sup>133</sup> *Veen v The Queen (No 2)* (1988) 164 CLR 465, 476 (Mason CJ, Brennan, Dawson, Toohey JJ).
- <sup>134</sup> Arie Freiberg, *Fox and Freiberg’s Sentencing: State and Federal Law in Victoria* (Law Book Co., 3rd ed, 2014) 251.
- <sup>135</sup> *Ryan v The Queen* (2001) 206 CLR 267, 302 [118] (Kirby J).
- <sup>136</sup> Ibid citing *R v M (CA)* [1996] 1 SCR 500, 558 (Lamer CJ).
- <sup>137</sup> See, for example *R v Riseley; Ex parte A-G (Qld)* [2009] QCA 285 (22 December 2009) 12 [47] (Keane JA; Holmes JA and McMurdo P agreeing).
- <sup>138</sup> *R v Irvine* [1997] QCA 138 (8 May 1997) 3 (Macrossan CJ; Fitzgerald P and McPherson JA agreeing).
- <sup>139</sup> See for example: *R v Hoerler* (2004) 147 A Crim R 520, 530–31 [42] (Spigelman CJ); *R v Suda* (Unreported, Supreme Court of Queensland, Jackson J, 4 March 2014) and observations made by the NSW Court of Criminal Appeal in *R v Dalton* [2005] NSWCCA 156 (26 April 2005) [63] (Smart JA; Santow JA and Hislop J agreeing) citing *R v Diftord* (unreported, NSW Supreme Court, 17 March 1992, Hunt CJ at CL) as authority for the proposition: ‘In crimes against young children heavy sentences reflecting the need for severe punishment are required’. On this issue of why punishment might not always be identified as a separate purpose by judges in sentencing, see Kate Warner, Julia Davis and Helen Cockburn, ‘The Purposes of Punishment: How Do Judges Apply a Legislative Statement of Sentencing Purposes?’ (2017) 41 *Criminal Law Journal* 69.
- <sup>140</sup> Queensland Parole System Review, *Queensland Parole System Review Final Report* (2016) 5 [35].
- <sup>141</sup> *R v Potter; Ex parte A-G (Qld)* (2008) 183 A Crim R 497, 513–514 [73] (Chesterman J, dissenting as to the result) referring to *R v Dunn* [1994] QCA 147 (13 May 1994); *The Queen v Kiltie* (1974) 9 SASR 453; *R v Elliott* [2000] QCA 267 (11 July 2000) [11]; *R v Neumann; Ex parte A-G (Qld)* [2007] 1 Qd R 53.
- <sup>142</sup> See *Penalties and Sentences Act 1992* (Qld) s 9(2A).



- <sup>143</sup> *Penalties and Sentences Act 1992* (Qld) s 9(3).
- <sup>144</sup> *Penalties and Sentences Act 1992* (Qld) ss 9(2)(b)–(r).
- <sup>145</sup> Andrew von Hirsch, *Doing Justice: The Choice of Punishments* (Northeastern University Press, 1986) 64–65 cited in Freiberg, above n 134, 280.
- <sup>146</sup> *Penalties and Sentences Act 1992* (Qld) s 9(10).
- <sup>147</sup> *Penalties and Sentences Act 1992* (Qld) s 9(10A). ‘Domestic violence offence’ is defined in s 1 of the *Criminal Code* (Qld).
- <sup>148</sup> *Penalties and Sentences Act 1992* (Qld) s 13.
- <sup>149</sup> See for example, *R v Bates*; *R v Baker* [2002] QCA 174 (17 May 2002) [58] and [60] (Williams JA) where the Court of Appeal allowed an appeal by an offender who received a life sentence on this basis substituting a determinate sentence of 18 years’ imprisonment finding that the failure of the sentencing judge to take the guilty plea into account in mitigation represented an error in the exercise of the sentencing discretion; and *R v Duong, Nguyen, Bui and Quoc* [2002] QCA 151 (30 April 2002) where the Court of Appeal accepted the offenders must receive some benefit for their guilty pleas notwithstanding its lateness [38] and that it involved ‘an horrendous crime calling for severe punishment’ [45]. In that instance, sentences of 12 years’ imprisonment on two offenders, and 9 years’ of imprisonment on the others with a SVO declaration were not disturbed on appeal.
- <sup>150</sup> *R v Thomson*; *R v Houlton* (2000) 49 NSWLR 383, 386 [3]. This principle has been cited with approval by the Queensland Court of Appeal. See, for example, *R v Bates*; *R v Baker* [2002] QCA 174 (17 May 2002) [76] (Atkinson J).
- <sup>151</sup> *Cameron v The Queen* (2002) 209 CLR 339 and *McQuire & Porter* (2000) 110 A Crim R 348, at 358, 362 and 366.
- <sup>152</sup> *R v Harman* [1989] 1 Qd R 414; *Cameron v R* (2002) 209 CLR 339, 360–61 [66]–[68] (Kirby J).
- <sup>153</sup> *R v Bulger* [1990] 2 Qd R 559, 564 (Byrne J).
- <sup>154</sup> *R v Bulger* [1990] 2 Qd R 559, 564 (Byrne J).
- <sup>155</sup> *R v Ellis* (1986) 6 NSWLR 603, 604 (Street CJ).
- <sup>156</sup> *R v Morton* [1986] VR 863, 867 cited with approval in *R v Bates*; *R v Baker* [2002] QCA 174 (17 May 2002) [83] (Atkinson J).
- <sup>157</sup> *R v Bates*; *R v Baker* [2002] QCA 174 (17 May 2002) [79] (Atkinson J).
- <sup>158</sup> *Atholwood v The Queen* (1999) 109 A Crim R 465, 468 (Ipp J) cited with approval in *R v Bates*; *R v Baker* [2002] QCA 174 (17 May 2002) [80] (Atkinson J).
- <sup>159</sup> See *R v Crouch*; *R v Carlisle* [2016] QCA 81 (5 April 2016) 8–9 [29] (McMurdo P, Gotterson JA and Burns J agreeing), *R v Tran*; *Ex parte Attorney-General (Qld)* [2018] QCA 22 (6 March 2018) 6–7 [42]–[44] (Boddice J; Philippides and McMurdo JA agreeing), *R v Rooney*; *R v Gehringer* [2016] QCA 48 (4 March 2016) 6 [16]–[17] (Fraser JA; Gotterson JA and McMeekin J agreeing) and *R v McDougall and Collas* [2007] 2 Qd R 87, 97 [20].
- <sup>160</sup> Submission 6 (QHVS).
- <sup>161</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 21A(2)(k)–(l).
- <sup>162</sup> *Sentencing Act 2002* (NZ) s 9A(2). The rationale for the introduction of this new provision in 2008 is identified in the Explanatory Note to the Bill: ‘While the *Sentencing Act 2002* provides generic aggravating factors that are relevant to offending against children, it does not expressly address the distinguishing characteristics of such offending. Offending against children involving violence or neglect is particularly abhorrent, and sentencing law should reflect this... The new section obliges the court to take into account the defencelessness of children, who cannot fight back or permanently escape the offender. It requires the court to consider the serious or long-term harm that can result from offending against children, and the breach of the special relationship of trust that children are entitled to enjoy with adults. Finally, it reminds the court that some offenders go to great lengths to conceal their offending, and that this must be considered an aggravating factor when sentencing’: Explanatory Note, *Sentencing (Offences Against Children) Amendment Bill 2008* (NZ) 1–2.
- <sup>163</sup> *Markarian v The Queen* (2005) 228 CLR 357, 385 [69] (McHugh J); *Veen v The Queen (No 2)* (1988) 164 CLR 465, 473–4 (Mason CJ, Brennan, Dawson, Toohey JJ). *Penalties and Sentences Act 1992* (Qld) s 9(11) expressly applies this principle to previous convictions.
- <sup>164</sup> Freiberg, above n 134, 237.
- <sup>165</sup> *Veen v The Queen (No 2)* (1988) 164 CLR 465, 491 (Deane J).
- <sup>166</sup> *Lowe v The Queen* (1984) 154 CLR 606, 609 (Gibbs CJ), affirmed in *Postiglione v The Queen* (1997) 189 CLR 295, 303 (Dawson and Gaudron JJ), 325 (Gummow J).
- <sup>167</sup> *Mill v The Queen* (1988) 166 CLR 59, 63 (Wilson, Deane, Dawson, Toohey, Gaudron JJ). See also *R v Hill* [2017] QCA 177 (22 August 2017) 7–8 [34]–[36] (Applegarth J; Sofronoff P and Atkinson J agreeing) and *Nguyen v The Queen* (2016) 256 CLR 656, 677 [64] (Gageler, Nettle and Gordon JJ).
- <sup>168</sup> *The Queen v De Simoni* (1981) 147 CLR 383, 389 (Gibbs CJ). See also *Nguyen v The Queen* (2016) 256 CLR 656, 667 [29] (Bell and Keane JJ), 676 [60] (Gageler, Nettle and Gordon JJ) and *R v D* [1996] 1 Qd R 363, 403. A circumstance of aggravation means ‘any circumstance by reason whereof an offender is liable to a greater punishment than that to which the offender would be liable if the offence were committed without the existence of that circumstance’: *Criminal Code* (Qld) s 1.

- <sup>169</sup> *R v D* [1996] 1 Qd R 363, 403.
- <sup>170</sup> *R v D* [1996] 1 Qd R 363, 403.
- <sup>171</sup> *R v D* [1996] 1 Qd R 363, 403–404.
- <sup>172</sup> *Criminal Code* (Qld) s 305(1). An indefinite sentence is the other option, which is stronger still and may eventually default to life imprisonment upon court review. See *Penalties and Sentences Act 1992* (Qld) ss 162–179. The mandatory sentence does not apply to offenders sentenced under the *Youth Justice Act 1992* (Qld), although a life sentence can still be imposed if the court considers the offence to be particularly heinous: ss 155 and 176.
- <sup>173</sup> *Corrective Services Act 2006* (Qld) s 205; see *R v Appleton* [2017] QCA 290 (24 November 2017) 8 [38] (Sofronoff P).
- <sup>174</sup> *Criminal Code* (Qld) s 305(2) and *Corrective Services Act 2006* (Qld) s 176, 177.
- <sup>175</sup> *Corrective Services Act 2006* (Qld) s 181(2)(c) as amended by *Criminal Law Amendment Act 2012* (Qld) s 7.
- <sup>176</sup> *Criminal Code* (Qld) s 305(4) and *Corrective Services Act 2006* (Qld) s 181(2)(b).
- <sup>177</sup> *Criminal Code* (Qld) s 305(2) and *Corrective Services Act 2006* (Qld) s 181(2)(a).
- <sup>178</sup> *Penalties and Sentences Act 1992* (Qld) s 160C(5) and s 160D(3); *Criminal Code* (Qld) s 305(2) and s 305(4) ('or more specified years'). See *R v Appleton* [2017] QCA 290 (24 November 2017) 2–3 [1]–[7], 8 [37], 9 [43] (Sofronoff P).
- <sup>179</sup> *Criminal Code* (Qld) s 310(1).
- <sup>180</sup> *Corrective Services Act 2006* (Qld) ss 181(2)(d) and 181 (2A). The *Corrective Services Act 2006* (Qld) does not define exceptional circumstances parole, but it has been noted that this is 'usually only granted if an offender is terminally ill': Queensland, Queensland Parole System Review, above n 140, 72 [322].
- <sup>181</sup> *Markarian v The Queen* (2005) 228 CLR 357, 372–375 [30]–[39] (Gleeson CJ, Gummow, Hayne and Callinan JJ) as cited in *Director of Public Prosecutions v Dalglish (a Pseudonym)* (2017) 49 ALR 37, 46 [45] (Kiefel CJ, Bell and Keane JJ). See also *Barbaro v The Queen*; *Zirilli v The Queen* (2014) 253 CLR 58, 72 [34] (French CJ, Hayne, Kiefel and Bell JJ).
- <sup>182</sup> *Director of Public Prosecutions v Dalglish (a Pseudonym)* (2017) 49 ALR 37, 39–40 [4]–[7] (Kiefel CJ, Bell and Keane JJ) citing *Wong v The Queen* (2001) 207 CLR 584, 611 [75] (Gaudron, Gummow and Hayne JJ).
- <sup>183</sup> *Markarian v The Queen* (2005) 228 CLR 357, 371 [27] (Gleeson CJ, Gummow, Hayne and Callinan JJ).
- <sup>184</sup> *Director of Public Prosecutions v Dalglish (a Pseudonym)* (2017) 91 ALJR 1063, 1067 [7] (Kiefel CJ, Bell and Keane JJ).
- <sup>185</sup> *Markarian v The Queen* (2005) 228 CLR 357, 371 [27] (Gleeson CJ, Gummow, Hayne and Callinan JJ) and *Barbaro v The Queen*; *Zirilli v The Queen* (2014) 253 CLR 58, 70 [25] (French CJ, Hayne, Kiefel and Bell JJ).
- <sup>186</sup> *Director of Public Prosecutions v Dalglish (a Pseudonym)* (2017) 49 ALR 37, 40 [7] (Kiefel CJ, Bell and Keane JJ).
- <sup>187</sup> *Barbaro v The Queen* (1993) 67 A Crim R 91; *Zirilli v The Queen* (2014) 253 CLR 58, 70 [26]–[27] (French CJ, Hayne, Kiefel and Bell JJ).
- <sup>188</sup> *R v Pham* (2015) 256 CLR 550, 559 (French CJ, Keane and Nettle JJ), citing *Wong* (2001) 207 CLR 584, 591 [6] (Gleeson CJ), 608 [65] (Gaudron, Gummow and Hayne JJ) and *Hili v The Queen* (2010) 242 CLR 520, 535 [49] (French CJ, Gummow, Hayne, Crennan, Kiefel, Bell JJ).
- <sup>189</sup> *R v Jones* [2011] QCA 147 (24 June 2011) 8 [27] (Daubney J; Muir and White JJA agreeing).
- <sup>190</sup> *Wong v The Queen* (2001) 207 CLR 584, 591 [6] (Gleeson CJ).
- <sup>191</sup> *Director of Public Prosecutions v Dalglish (a Pseudonym)* (2017) 49 ALR 37, 48 [50] (Kiefel CJ, Bell and Keane JJ).
- <sup>192</sup> *R v Streatfield* (1991) 53 A Crim R 320, 325 (Thomas J, Cooper J agreeing).
- <sup>193</sup> *R v Ryan and Vosmaer; Ex parte Attorney-General* [1989] 1 Qd R 188, 192–193 (Dowsett J).
- <sup>194</sup> *Hili v R* (2010) 242 CLR 520, 537 [54] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) citing *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 243 FLR 28, 98 [303]–[305] (Simpson J).
- <sup>195</sup> *R v Hoerler* (2004) 147 A Crim R 520, 532 [49] (Spigelman CJ), citing *R v Whyte* (2002) 55 NSWLR 252 at [168]–[189] and *Wong v The Queen* (2001) 207 CLR 584, 591 [6] (Gleeson CJ).
- <sup>196</sup> *R v Hoerler* (2004) 147 A Crim R 520, 531 [47] (Spigelman CJ). See also *R v Ross* [1996] QCA 411 (25 October 1996) 3, 5 (Moynihan, Mackenzie and Cullinane JJ), citing *R v Auberson* [1996] QCA 321 (3 September 1996) 7 (Fitzgerald P and de Jersey J, Pincus JA agreeing) and *The Queen v Walsh* (unreported C.A. No. 85 of 1986, judgment delivered 12 June 1986). See also *R v Green* [1999] NSWCCA 97 (18 May 1999) [24] (Barr J; Greg James J and Carruthers AJ agreeing).
- <sup>197</sup> *Barbaro v The Queen*; *Zirilli v The Queen* (2014) 253 CLR 58, 72 [34], 74 [40] (French CJ, Hayne, Kiefel and Bell JJ), citing *Hili v The Queen* (2010) 242 CLR 520, 535 [48]–[49] (French CJ, Gummow, Hayne, Crennan, Kiefel, Bell JJ).
- <sup>198</sup> *R v Bush (No 2)* [2018] QCA 46 (23 March 2018) 12 [76]–[77] (Sofronoff P, Morrison JA and Douglas J).
- <sup>199</sup> *Wong v R* (2001) 207 CLR 584, 606 [59] as reproduced in *Hili v The Queen* (2010) 242 CLR 520, 537 [55] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
- <sup>200</sup> *R v Bush (No 2)* [2018] QCA 46 (23 March 2018) 12 [77].
- <sup>201</sup> *R v Dwyer* [2008] QCA 117 (16 May 2008) 8 [37] (Keane JA).
- <sup>202</sup> *R v WAW* [2013] QCA 22 (22 February 2013) 7 [37] (de Jersey CJ).
- <sup>203</sup> *R v WAW* [2013] QCA 22 (22 February 2013) 6 [32] (de Jersey CJ).

- <sup>204</sup> See *Penalties and Sentences Act 1992* (Qld) ss 160A(4), (5) and 160G.
- <sup>205</sup> There are provisions in the legislation about when a parole release date must be ordered, when a parole eligibility date may be made instead, and when wholly or partially suspended sentences can be imposed. The Queensland Sentencing Advisory Council's website has information about this, for adults and young offenders. For adults, see <<http://www.sentencingcouncil.qld.gov.au/about-sentencing/sentencing-adult-offenders>> and for children see <<http://www.sentencingcouncil.qld.gov.au/about-sentencing/sentencing-child-offenders>>.
- <sup>206</sup> *Penalties and Sentences Act 1992* (Qld) s 160B.
- <sup>207</sup> *Penalties and Sentences Act 1992* (Qld) s 144. The limit is three years for Magistrates Courts — see *Criminal Code* (Qld) s 552H — although only the Supreme Court can sentence for murder or manslaughter: See *District Court of Queensland Act 1967* (Qld) ss 60, 61.
- <sup>208</sup> See, for example, *R v Farr* [2018] QCA 41 (20 March 2018) 8 (Philippides JA, Gotterson JA and Douglas J agreeing) where a suspended sentence was 'clearly undesirable' because of the offender's longstanding drug addiction. See also *R v Clark* [2016] QCA 173 (24 June 2016) 3–4 [5]–[6] (McMurdo P).
- <sup>209</sup> See <<https://www.qld.gov.au/law/sentencing-prisons-and-probation/sentencing-probation-and-parole/applying-for-parole>>.
- <sup>210</sup> *Corrective Services Act 2006* (Qld) s 214.
- <sup>211</sup> Queensland, Queensland Parole System Review, above n 140, 1 [3].
- <sup>212</sup> Mark Ryan MP, Minister for Police, Fire and Emergency Services and Minister for Corrective Services, *Ministerial Guidelines to Parole Board Queensland*, 3 July 2017, 2 [1.2], [1.3].
- <sup>213</sup> Queensland, Queensland Parole System Review, above n 140, 2 [8].
- <sup>214</sup> *Ibid* 38 [140] and see 2 [11] and 38 [139].
- <sup>215</sup> *Ibid* 1 [7].
- <sup>216</sup> *Ibid* 7 [46].
- <sup>217</sup> *R v Clark* [2016] QCA 173 (24 June 2016) 3–4 [5]–[6] (McMurdo P).
- <sup>218</sup> *R v Clark* [2016] QCA 173 (24 June 2016) 13 [52] (Morrison JA). See also *R v Riseley; Ex parte A-G (Qld)* [2009] QCA 285 (22 September 2009) 12 [48] (Keane JA).
- <sup>219</sup> Queensland, Queensland Parole System Review, above n 140, 8 [51].
- <sup>220</sup> *Ibid* 2 [10].
- <sup>221</sup> *Corrective Services Act 2006* (Qld) s 192.
- <sup>222</sup> *Penalties and Sentences Act 1992* (Qld) s 160A(3). See also *Corrective Services Act 2006* (Qld) s 192.
- <sup>223</sup> *Corrective Services Act 2006* (Qld) ss 200, 205(1).
- <sup>224</sup> *Corrective Services Act 2006* (Qld) ss 212, 213.
- <sup>225</sup> *Corrective Services Act 2006* (Qld) s 200A.
- <sup>226</sup> *Corrective Services Act 2006* (Qld) s 201. The amendment can be cancelled by the Parole Board at any time: s 202.
- <sup>227</sup> *Corrective Services Act 2006* (Qld) ss 208A–208C.
- <sup>228</sup> *Corrective Services Act 2006* (Qld) s 205, 208.
- <sup>229</sup> *Corrective Services Act 2006* (Qld) s 205(2)(c).
- <sup>230</sup> *Corrective Services Act 2006* (Qld) s 206.
- <sup>231</sup> See *R v Crouch; R v Carlisle* [2016] QCA 81 (5 April 2016) 8–9 [29] (McMurdo P, Gotterson JA and Burns J agreeing), *R v Tran; Ex parte Attorney-General (Qld)* [2018] QCA 22 (6 March 2018) 6–7 [42]–[44] (Boddice J; Philippides and McMurdo JA agreeing), *R v Rooney; R v Gehringer* [2016] QCA 48 (4 March 2016) 6 [16]–[17] (Fraser JA; Gotterson JA and McMeekin J agreeing) and *R v McDougall and Collas* [2007] 2 Qd R 87, 97 [20].
- <sup>232</sup> *Corrective Services Act 2006* (Qld) s 184(2). This is the general statutory rule, which a sentencing court can generally override. Other more specific legislative provisions can also mean more non-parole time, such as serious violent offence declarations (*Penalties and Sentences Act 1992* (Qld) Part 9A) and the serious and organised crime circumstance of aggravation provisions (*Penalties and Sentences Act 1992* (Qld) Part 9D).
- <sup>233</sup> *R v Tahir; Ex Parte A-G (Qld)* [2013] QCA 294 (4 October 2013) 9 [20] (Fraser JA, Holmes JA and Douglas J agreeing).
- <sup>234</sup> See *Penalties and Sentences Act 1992* (Qld), Part 9A and *Corrective Services Act 2006* (Qld) s 182(2).
- <sup>235</sup> *Penalties and Sentences Act 1992* (Qld) sch 1.
- <sup>236</sup> *Penalties and Sentences Act 1992* (Qld) ss 161A(a) and 161B(1).
- <sup>237</sup> *Penalties and Sentences Act 1992* (Qld) ss 161A(b) and 161B(3).
- <sup>238</sup> *Penalties and Sentences Act 1992* (Qld) ss 161A(b) and 161B(4). *Penalties and Sentences Act 1992* (Qld) s 4 defines serious harm as any detrimental effect of a serious nature on a person's emotional, physical or psychological wellbeing, whether temporary or permanent.
- <sup>239</sup> *Penalties and Sentences Act 1992* (Qld) s 161B(5).



- <sup>240</sup> *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld) ss 2 and 7. These provisions were proclaimed into force on 26 November 2010 (2010 SL No 330).
- <sup>241</sup> *R v Riseley; Ex parte A-G (Qld)* [2009] QCA 285 (22 December 2009) 12 [48] (Keane JA).
- <sup>242</sup> *R v McDougall and Collas* [2007] 2 Qd R 87, 95–97 [18]–[19].
- <sup>243</sup> *R v McDougall and Collas* [2007] 2 Qd R 87, 97 [21] citations omitted.
- <sup>244</sup> *Penalties and Sentences Act 1992* (Qld) s 159A.
- <sup>245</sup> *R v Chard; Ex parte A-G (Qld)* [2004] QCA 372 (8 October 2004) 5 [23] (Williams JA).
- <sup>246</sup> *R v Riseley; Ex parte A-G (Qld)* [2009] QCA 285 (22 September 2009) 8 [35] (Keane JA; Holmes JA and McMurdo P agreeing).
- <sup>247</sup> See *R v JV* [2014] QCA 351 (19 December 2014) 7 [31]–[32] (Gotterson JA; Morrison JA and McMeekin J agreeing).
- <sup>248</sup> Cited in *R v JV* [2014] QCA 351 (19 December 2014) 5 [20] (Gotterson JA).
- <sup>249</sup> *R v JV* [2014] QCA 351 (19 December 2014) 7 [32] (Gotterson JA; Morrison JA and McMeekin J agreeing).
- <sup>250</sup> These data sources include: Queensland Government Statistician's Office (QGSO), Queensland Treasury – Courts Database (1/7/2005 – 30/6/2017); Queensland Police Records and Information Management Exchange (QPRIME), Queensland Police Service 1/1/2002 – 31/12/2017; Queensland Corrective Services (QCS) (time period linked to court's database extraction); Queensland Family and Child Commission (QFCC) – Queensland Child Death Register (1/1/2004 – 30/6/2017); and Queensland Sentencing Information Service (QSIG), Supreme Court Library (time period linked to court's database extraction).
- <sup>251</sup> Offenders were not counted as having a co-offender within this analysis if: (1) the only co-offender was sentenced for a non-homicide offence; (2) the only co-offender was sentenced for a homicide offence outside of the 2005–06 and 2016–17 data period; or (3) the only co-offender was acquitted upon appeal.
- <sup>252</sup> *R v Maygar; Ex parte A-G (Qld); R v WT; Ex parte A-G (Qld)* [2007] QCA 310 (28 September 2007).
- <sup>253</sup> If a court sentences an offender to 10 years or more for manslaughter and other serious violence offences, the court must declare the offender sentenced of a serious violent offence. For shorter sentences, the court has discretion to declare the person convicted of a serious violent offence. In both cases, this means the offender must serve 80% of their sentence or 15 years (whichever is less) before being eligible to apply for release on parole: *Penalties and Sentences Act 1992* ss 161A–161B; *Corrective Services Act 2006* (Qld) s 182. For offenders sentenced to life imprisonment for manslaughter, the minimum non-parole period is 15 years, unless sentenced for manslaughter with a serious organised crime circumstance of aggravation, in which case the person must serve an additional seven years in custody: *Corrective Services Act 2006* (Qld) s 181. For a discussion of parole eligibility and the serious violent offence provisions, see page 35 & ff.
- <sup>254</sup> Meeting with the Chief Forensic Pathologist, Forensic and Scientific Services, Queensland on 11 December 2017 and preliminary meeting with Queensland Police Service (Homicide and Child Trauma Unit) on 20 December 2017.
- <sup>255</sup> Ling Li, 'Sudden Unexpected Infant Deaths' in Juan C. Troncoso, Ana Rubio and David Fowler (eds), *Essential Forensic Neuropathology* (Lippincott Williams & Wilkins, 2010) 173.
- <sup>256</sup> L.J. Dragovic 'Neuropathology of Brain Trauma in Infants and Children' in Troncoso, Rubio and Fowler (eds), above n 255, 181.
- <sup>257</sup> *Ibid* 183–184.
- <sup>258</sup> Queensland Police Service, *Annual Report 2016–17* (2016) 37.
- <sup>259</sup> *Ibid* 36–37.
- <sup>260</sup> *Ibid* 37.
- <sup>261</sup> Preliminary meeting with Queensland Police Service (Homicide and Child Trauma Unit) on 20 December 2017.
- <sup>262</sup> Meeting with the Chief Forensic Pathologist, Forensic and Scientific Services, Queensland on 11 December 2017 and preliminary meeting with Queensland Police Service (Homicide and Child Trauma Unit) on 20 December 2017.
- <sup>263</sup> Submission 6 (QHVS) and Submission 7 (Justice for Hemi).
- <sup>264</sup> Office of the Director of Public Prosecutions for Queensland, *Director's Guidelines* (30 June 2017).
- <sup>265</sup> *Ibid* 26.
- <sup>266</sup> For example, Submission 7 (Justice for Hemi).
- <sup>267</sup> *Pickering v The Queen* (2017) 260 CLR 151, 166 [47] (Gageler, Gordon, Edelman JJ) citing *R v Lavender* (2005) 222 CLR 67, 77 [22] (Gleeson CJ, McHugh, Gummow and Hayne JJ); Kiefel CJ and Nettle J made the same point in *Pickering* (162 [29]) also citing *R v Blackledge* (unreported, Court of Criminal Appeal, NSW, No 60510 of 1995, 12 December 1995), Gleeson CJ). *Blackledge* was cited with approval in *R v Potter; Ex parte A-G (Qld)* (2008) 183 A Crim R 497 by Keane JA (499 [4]) and Chesterman J, dissenting (514 [75]–[76]). See also *R v Boyer* (1981) 3 Crim App R (S) 35, 37 (Dunn LJ) as cited in *R v Hoerler* (2004) 147 A Crim R 520, 530 [39] (Spigelman CJ).
- <sup>268</sup> See *R v WAW* [2013] QCA 22 (22 February 2013) 9 [45] (Muir JA) and 6 [32] (de Jersey CJ); *R v Weinman* (1987) 49 SASR 248, 252: 'from a joke gone wrong to facts just short of murder' – as cited in *R v Hoerler* (2004) 147 A Crim R 520, 530 [39], and see 531 [43]–[44] (Spigelman CJ); *Pickering v The Queen* (2017) 260 CLR 151, 162 [29] (Kiefel CJ and Nettle JJ); *R v Lavender* (2005) 222 CLR 67, 77 [22] (Gleeson CJ, McHugh, Gummow, Hayne JJ). See also *R v Ross* [1996] QCA 411 (25

- October 1996) 3 (Moynihan, Mackenzie and Cullinane JJ); *R v Glenbar* (2013) 240 A Crim R 22, 38–9 and cases cited — *R v Robertson* (2010) 56 MVR 537, 546 [34]; *R v Mooka* [2007] QCA 36 (9 February 2007) 9 and *R v Whiting; Ex parte Attorney-General (Qld)* [1995] 2 Qd R 199, 202 (Davies and McPherson JJA and Derrington JJ).
- <sup>269</sup> *R v Skondin* [2015] QCA 138 (24 July 2015) 21 [80] (Holmes JA)
- <sup>270</sup> *R v Hoerler* (2004) 147 A Crim R 520, 531 [43] (Spigelman CJ).
- <sup>271</sup> *R v Hoerler* (2004) 147 A Crim R 520, 531 [43] (Spigelman CJ).
- <sup>272</sup> *R v Skondin* [2015] QCA 138 (24 July 2015) 21 [80] (Holmes JA).d
- <sup>273</sup> *R v Hoerler* (2004) 147 A Crim R 520, 530 [41] (Spigelman CJ).
- <sup>274</sup> *R v Hall; Ex parte A-G (Qld)* [2002] QCA 125 (5 April 2002) 5 [17] (Williams JA; White and Philippides JJ agreeing). The original sentence of four years' imprisonment was set aside and substituted with a sentence of six years (meaning the offender would be eligible to apply for parole after serving three years' imprisonment). In setting this sentence, the Court took into account the offender's plea of guilty and matters personal to him in mitigation, particularly his intellectual deficits. The Court also took into account the principles laid down in *R v Melano; Ex parte A-G (Qld)* [1995] 2 Qd R 186 suggesting that as it was an Attorney-General's appeal, 'moderation is called for': 5 [16] (Williams JA; White and Philippides JJ agreeing).
- <sup>275</sup> *R v JV* [2014] QCA 351 (19 December 2014) 7 [31] (Gotterson JA; Morrison JA and McMeekin J agreeing).
- <sup>276</sup> *R v Bates; R v Baker* [2002] QCA 174, cited in *R v Corry* [2006] QCA 203 (9 June 2006) 7 [25]–[27].
- <sup>277</sup> *R v Maygar; Ex parte A-G (Qld); R v WT; Ex parte A-G (Qld)* [2007] QCA 31 (28 September 2007).
- <sup>278</sup> Australian Law Reform Commission, *Same Crime, Same Time: Sentencing Federal Offenders*, Report 103 (2006) [21.54].
- <sup>279</sup> See, for example, Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final Report No 133 (2017) 274–75 and the Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (2014).
- <sup>280</sup> While South Australia also has a mandatory life sentence, there is discretion to depart from the minimum non-parole period of 20 years if 'special circumstances' exist: *Criminal Law Consolidation Act 1935* (SA) s 11; *Criminal Law (Sentencing) Act 1988* (SA) ss 32(5)(ab) and 32(2). The fact the offender pleaded guilty to the offence and the circumstances surrounding the plea, as well as the degree to which the offender has cooperated in the investigation or prosecution of that or any other offence are listed as relevant to determining if special circumstances exist: *Criminal Law (Sentencing) Act 1988* (SA) s 32A(3).
- <sup>281</sup> *Criminal Code* (Qld) s 305(1). An indefinite sentence is the other option, which is stronger still and may eventually default to life imprisonment upon court review. See *Penalties and Sentences Act 1992* (Qld) Part 10; *Criminal Code* (NT) ss 157(1)–(2); *Sentencing Act 1995* (NT) s 53A. In the Northern Territory, the mandatory minimum non-parole period of 25 years only applies in certain circumstances of aggravation (including where the victim was under 18 years of age).
- <sup>282</sup> Victorian Sentencing Advisory Council, *Guilty Pleas in the Higher Courts: Rates, Timing and Discounts* (2015) 28.
- <sup>283</sup> Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report*, Project 97 (2007) 299.
- <sup>284</sup> *Ibid.*
- <sup>285</sup> Submission 2 (PACT)
- <sup>286</sup> *Ibid.*
- <sup>287</sup> Submission 9 (QLS).
- <sup>288</sup> Meetings with the Aboriginal and Torres Strait Islander Legal Service (5 December 2017) and Legal Aid Queensland (18 December 2017).
- <sup>289</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54A and Table to pt 4, div 1A, Items 1A, 1B and 1. There are three standard non-parole periods prescribed for murder in NSW: 20 years for murder (general); 25 years for the murder of a person falling within a category of occupation; and 25 years for the murder of a child under 18 years. The standard non-parole period represents the non-parole that, taking into account the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54A(2).
- <sup>290</sup> For example, in Victoria, in sentencing an adult offender for manslaughter 'in circumstances of gross violence' a court must impose a term of imprisonment with a non-parole period of not less than 10 years, provided the prosecution has served and filed a notice of intention to seek the statutory minimum sentence under the relevant section, unless the court finds that a special reason exists not to do so: *Sentencing Act 1991* (Vic) s 9B(2). This requirement applies if: (a) the court is satisfied beyond reasonable doubt that either the offender was in company with two or more other people, or entered into an agreement, arrangement or understanding with two or more people to engage in the conduct that resulted in the victim's death; (b) that the offender: planned in advance to have and to use an offensive weapon or firearm and used this to cause the victim's death; planned in advance to engage in conduct that resulted in the victim's death and a reasonable person would have foreseen the conduct was likely to result in death; or (iii) caused two or more serious injuries to the victim during a sustained or prolonged attack on the victim: s 9B(3). Special reasons' not to set this minimum sentence can include that: the offender has assisted or given an undertaking to assist law enforcement authorities in the investigation or prosecution of an offence; the offender is over 18 but under 21 years at the time of the offence and is found to have a particular psychosocial immaturity resulting in substantially diminished capacity to regulate his or her behaviour; the offender has impaired mental functioning causally linked to the offence and that substantially reduces his

- or her culpability; and other 'substantial and compelling reasons' exist that justify this finding: *Sentencing Act 1991* (Vic) s 10A. For discussion of the rationale for introducing this approach, see Victoria, *Parliamentary Debates*, Legislative Assembly, 20 August 2014, 2824 (Robert Clark, Attorney-General).
- <sup>291</sup> *Penalties and Sentences Act 1992* (Qld) s 161Q.
- <sup>292</sup> *Penalties and Sentences Act 1992* (Qld) s 161R.
- <sup>293</sup> *R v McDougall and Collas* [2007] 2 Qd R 87, 95–97 [18]–[19].
- <sup>294</sup> Inserted by the *Crimes Amendment (Child Homicide) Act 2008* (Vic) which came into operation on 19 March 2008.
- <sup>295</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 6 December 2007, 4413 (Rob Hulls, Attorney-General).
- <sup>296</sup> *Crimes Act 1958* (Vic) s 421(1)(ab).
- <sup>297</sup> See *R v Hughes* [2015] VSC 312 (26 June 2015) and *Director of Public Prosecutions v Woodford* [2017] VSCA 312 (31 October 2017).
- <sup>298</sup> *DPP v Woodford* [2017] VSCA 312 (31 October 2017) [76] (Weinberg, Osborn and Priest JJA).
- <sup>299</sup> *DPP v Woodford* [2017] VSCA 312 (31 October 2017) [79] (Weinberg, Osborn and Priest JJA).
- <sup>300</sup> See discussion at page 30 of this paper.
- <sup>301</sup> *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld) s 7.
- <sup>302</sup> Queensland, *Parliamentary Debates*, Second Reading - Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2010, 3 August 2010, 2309 (Cameron Dick, Attorney-General).
- <sup>303</sup> Explanatory Notes, Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2010, 5.
- <sup>304</sup> Submission 1 (John and Susan Sandeman); Submission 2 (PACT); Submission 4 (Anonymous) and Submission 7 (Justice for Hemi).
- <sup>305</sup> Submission 1 (John and Susan Sandeman) and Submission 2 (PACT).
- <sup>306</sup> Submission 2 (PACT).
- <sup>307</sup> Ibid.
- <sup>308</sup> Ibid and Submission 4 (Anonymous).
- <sup>309</sup> Submission 1 (John and Susan Sandeman); Submission 3 (Anonymous); and Submission 5 (QHVSG).
- <sup>310</sup> Submission 6 (QHVSG).
- <sup>311</sup> Submission 6 (QHVSG).
- <sup>312</sup> *Lowe v The Queen* (1984) 154 CLR 606, 609 (Gibbs CJ), affirmed in *Postiglione v The Queen* (1997) 189 CLR 295.
- <sup>313</sup> See, for example, *R v Strbak* [2017] QSC 299 (11 December 2017).
- <sup>314</sup> See *Evidence Act 1977* (Qld) s 132C and discussion of the relevant degree of satisfaction required explained in *Briginshaw v Briginshaw* (1938) 60 CLR 336 in *R v Strbak* [2017] QSC 299 (11 December 2017) 5–6 [27]–[28] (Applegarth J).
- <sup>315</sup> Subject Matter Expert Roundtable, 9 April 2018.
- <sup>316</sup> *Criminal Law Consolidation Act 1925* (SA) s 14. The prosecution must establish that the person was, or ought to have been, aware that there was an appreciable risk that serious harm would be caused by the unlawful act but failed to take steps that he or she could reasonably be expected to have taken in the circumstances to protect the victim from harm which was, in the circumstances, so serious that a criminal penalty is warranted.
- <sup>317</sup> The Queensland duty provisions, including s 286 of the *Criminal Code* (Qld), are discussed at page 19 of this paper.
- <sup>318</sup> See *Penalties and Sentence Act 1992* (Qld) ss 9(2)(c)(i) and Part 10B and *Victims of Crime Assistance Act 2009* (Qld) s 5 (definition of 'victim').
- <sup>319</sup> *Mental Health Act 2016* (Qld) s 161 and see ss 133 and 165 regarding the Mental Health Court's use of the statement and weight to give to it. See ss 432, 464, 530, 742 and 743 regarding the Mental Health Review Tribunal's use of victim impact statements.
- <sup>320</sup> See *Mental Health Act 2016* (Qld) sch 3, 'victim' and 'victim impact statement'. There is also scope for victims of unlawful acts, close relatives of the victims, and other particular persons may apply to the chief psychiatrist to receive specific information about the person who committed the unlawful act, including when treatment in the community is authorised for the person: s 27.
- <sup>321</sup> *Mental Health Act 2016* (Qld) s 162.
- <sup>322</sup> *Mental Health Act 2016* (Qld) ss 163, 164.
- <sup>323</sup> Submission 1 (John and Susan Sandeman).
- <sup>324</sup> See, for example, *R v Bell* (Unreported, Supreme Court of Queensland, 3 September 2014, McMeekin J).
- <sup>325</sup> *R v Appleton* [2017] QCA 290 (24 November 2017) 6 [27] (Sofronoff P, McMurdo JA and Brown J agreeing).
- <sup>326</sup> The varied mandatory non-parole periods for murder are discussed in section 5 of this paper, under the headings 'maximum penalties' and 'murder'. The non-parole period for murder is generally 20 years (increased from 15 years in 2012). It is 25 years if the person killed was a police officer in defined circumstances, and 30 years if the person is being sentenced for more

- than one murder or has a previous conviction for murder.
- <sup>327</sup> *R v Previtera* (1997) 94 A Crim R 76, 86–87 (Hunt CJ at CL).
- <sup>328</sup> *R v Kellisar* [1999] VSC 357 (2 September 1999) [27] (Vincent J).
- <sup>329</sup> Julian V Roberts, ‘Victim Impact Statements and the Sentencing Process: Recent Developments and Research Findings’ (2003) 47 *Criminal Law Quarterly* 365, 372
- <sup>330</sup> Submission 6 (QHVS).
- <sup>331</sup> Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) Executive Summary and Parts I–II, 183.
- <sup>332</sup> Jane Bolitho and Karen Freeman, *The Use and Effectiveness of Restorative Justice in Criminal Justice Systems following Child Sexual Abuse or Comparable Harms* (Report for the Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney, 2016) 9.
- <sup>333</sup> *Ibid.*
- <sup>334</sup> *Ibid* 28.
- <sup>335</sup> For example, this was raised at the Subject Matter Expert Roundtable hosted by the Council on 9 April 2018.
- <sup>336</sup> *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld).
- <sup>337</sup> *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) s 5.
- <sup>338</sup> *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) sch 1, item 9 – s 300 *Criminal Code* (Qld).
- <sup>339</sup> *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) ss 13(1)–(2).
- <sup>340</sup> *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) s 13(5).
- <sup>341</sup> *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) s 13(5A).
- <sup>342</sup> Domestic and Family Violence Death Review and Advisory Board, *2016–17 Annual Report* (2017) 86–88, Recommendation 17.
- <sup>343</sup> *Ibid* Recommendation 18.
- <sup>344</sup> Submission 9 (QLS). This was also supported by a number of legal stakeholders at face-to-face meetings.
- <sup>345</sup> Meeting with representatives of Justice for Hemi, 20 March 2018.
- <sup>346</sup> Karen Gelb, *More Myths and Misconceptions*, Research Paper (Sentencing Advisory Council (Victoria), 2008) 6.
- <sup>347</sup> ‘Indicative sentence’ is a term used by the Queensland Court of Appeal in *R v McGrath* [2002] 1 Qd R 520, 522 [7]. See also, for instance, *R v KAQ; Ex parte A-G (Qld)* (2015) 253 A Crim R 201, 204 [4] (Holmes JA).
- <sup>348</sup> Gelb, above n 346, 6.
- <sup>349</sup> Chief Justice Catherine Holmes, ‘Presentation of Queen’s Counsel; recognition of newly-admitted barristers; and traditional exchange of Christmas Greetings’ (Speech delivered at the Brisbane, Banco Court, Wednesday 13 December 2017) 5 <<https://archive.sclqld.org.au/judgepub/2017/holmes131217.pdf>>; and *R v Strbak* [2017] QSC 317 (18 December 2017) 317, 9 [58]–[60] (Applegarth J).
- <sup>350</sup> Supreme Court of Queensland, *Electronic Publication of Court Proceedings Report* (2016); Lady Dorrian, *Report of the Review of Policy on Recording and Broadcasting of Proceedings in Court, and the Use of Live Text-Based Communications from Court* (2015).
- <sup>351</sup> The Hon Marilyn Warren AC, ‘The Obligation to Communicate: The Interaction Between Language and the Law’ (Speech delivered at the Richard Searby Oration, Deakin University, 21 September 2010) 27 <<https://www.supreme-court.vic.gov.au/contact-us/speeches/the-obligation-to-communicate-the-interaction-between-language-and-the-law>>.
- <sup>352</sup> The New South Wales Supreme Court started writing summaries in February 2014, and the Victorian Supreme Court in 2016. His Honour, Justice Applegarth released a summary judgment for the sentencing of Heidi Strbak for manslaughter of her son in December 2017: <[https://archive.sclqld.org.au/qjudgment/2017/judgment\\_Summary\\_R\\_v\\_Strbak\\_-\\_Findings\\_of\\_contested\\_facts.pdf](https://archive.sclqld.org.au/qjudgment/2017/judgment_Summary_R_v_Strbak_-_Findings_of_contested_facts.pdf)>.
- <sup>353</sup> The Supreme Court of Victoria streams audio recordings of sentencing remarks via an URL link accessed by password. The public can listen to, but not download the broadcast from the website: Supreme Court of Queensland, above n 350, 35–36 [192].
- <sup>354</sup> See, for example, Supreme Court of Queensland, ‘Observations on the Court’s caseload’, *Annual Report 2016–17* (2018) which notes that criminal lodgments increased by 38% over the 2016–17 financial year (an additional 650 defendants on the previous year): 5.
- <sup>355</sup> A summary of relevant research is contained in Commissioner for Victims’ Rights, South Australia, Submission No. 65 to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, 22 November 2016, 4.
- <sup>356</sup> These amendments were made by the *Victims of Crime Assistance and Other Legislation Amendment Act 2017* (Qld).
- <sup>357</sup> Explanatory Notes, *Victims of Crime Assistance and Other Legislation Amendment Bill 2016* (Qld) 1.
- <sup>358</sup> *Victims of Crime Assistance Act 2009* (Qld) ch 2 and sch 1AA.

- <sup>359</sup> *Victims of Crime Assistance Act 2009* (Qld) sch 1AA, pt 1, div 2.
- <sup>360</sup> See *Victims of Crime Assistance Act 2009* (Qld) s 26 (definition of 'related victim').
- <sup>361</sup> *Victims of Crime Assistance Act 2009* (Qld) ss 47–49.
- <sup>362</sup> *Victims of Crime Assistance Act 2009* (Qld) s 49(f).
- <sup>363</sup> *Victims of Crime Assistance Act 2009* (Qld) s 50. The amount granted for funeral expense assistance is deducted from the maximum amount of assistance available for the family member that has applied for funeral expense assistance (i.e. \$50,000): s 48(1).
- <sup>364</sup> For a discussion of how views on this issue have evolved in the United Kingdom, see Jeremy Horder, *Homicide and the Politics of Law Reform* (Oxford University Press, 2012) 53–57.
- <sup>365</sup> Response rates were 36% for the Tasmanian study and approximately 66% for the Victorian study. The improvement in Victoria may be partly due to the state's compulsory debrief of jurors after their verdict. The Victorian study also noted that different guilty plea rates for different offences means that jury trials are not representative of all criminal cases, with far more sex and violent offences in the sample. Both studies noted their samples were not reflective of the general community, or even of the juror population, with samples being older, more highly educated and earning more than the general population. Despite this, both considered their samples sufficiently representative for cautious use as a proxy for the broader public. The Victorian study also noted consistency between their jurors' findings and that of a major Australian representative study measuring community views on sentencing.
- <sup>366</sup> Kate Warner et al, 'Public judgement on sentencing: Final results from the Tasmanian Jury Sentencing Study', *Trends and Issues in Crime and Criminal Justice*, No. 407 (Australian Institute of Criminology, 2011), 3 (Figure 1).
- <sup>367</sup> Kate Warner et al, 'Measuring jurors' views on sentencing: Results from the second Australian jury sentencing study' (2017) 19(2) *Punishment & Society* 186.
- <sup>368</sup> *Ibid* 187.
- <sup>369</sup> *Ibid* 189.
- <sup>370</sup> *Ibid* 192.
- <sup>371</sup> *Ibid*.

Queensland Sentencing Advisory Council  
GPO Box 2360, Brisbane QLD 4001  
(07) 3224 7375  
[info@sentencingcouncil.qld.gov.au](mailto:info@sentencingcouncil.qld.gov.au)  
[www.sentencingcouncil.qld.gov.au](http://www.sentencingcouncil.qld.gov.au)