



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

May 2018

Call for submissions

Submissions are being called for by the Queensland Sentencing Advisory Council for its review of penalties imposed on sentence for criminal offences arising from the death of a child (child homicide offences).

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

The consultation paper, Terms of Reference and details on how to make a submission can be found on the Council's website: www.sentencingcouncil.qld.gov.au

Submission deadline: Tuesday 31 July 2018

About child homicide

National and international research indicates that between 8 and 19 per cent of all homicides involve a child victim. 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' (Crime and Misconduct Commission 2013).

A child is at greatest risk of homicide in their first year of life. Risk of homicide significantly decreases as a child matures, and increases again in the later teenage years (Crime and Misconduct Commission 2013). This is confirmed by the Council's research findings which identified the highest proportion of child homicides involved those under one, and the next highest proportion were children aged 15–17 years.

Family members are the most common perpetrators of child homicide, with parents or parent equivalents representing the highest proportion of perpetrators. This pattern is somewhat different for older child victims, who are more likely to be killed by a person unknown to them. The Council's research confirms that child homicide is a diverse offence category and occurs in a broad range of circumstances, making it difficult to identify a 'typical' child homicide case.

Child homicide offences

As murder and manslaughter are the most common offences charged where a child's death is due to physical abuse or neglect, the Council's consultation paper focuses on sentencing for these offences. For the purpose of this review, a child has been defined as a person under 18 years of age.

Murder

Murder is the most serious offence against the person in Queensland and in the case of adult offenders, carries a mandatory life sentence. Minimum non-parole periods also apply, ranging from 20 years to up to 30 years where the person has a previous conviction for murder or has been found guilty of multiple murders. A court may also set a longer non-parole period.

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. 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. In the case of children killed by carers or people known to them, this is 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.
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 in circumstances where the offender intends to cause grievous bodily harm to ‘some person’.
4. The death is caused by administering any stupefying or overpowering thing for either of the purposes mentioned in paragraph 3).
5. The death is caused by willfully stopping the breath of any person for either of such purposes.

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.

Intention is expressly an ‘element’ (or ingredient) of murder in most cases. 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.

Foreseeability, likelihood and probability are not the same as intent. 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.

Manslaughter

Manslaughter is also a very serious offence, which carries a maximum penalty of life imprisonment.

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 with an intention to kill or do grievous bodily harm done under provocation or while the person is of 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).

The majority of unlawful killings in Queensland involving a child victim result in a conviction for manslaughter rather than murder.

If the court imposes a sentence of life imprisonment for manslaughter, a minimum non-parole period of 15 years applies. If a sentence of 10 years or more is imposed, or the offender is declared convicted of a serious violent offence (which for sentences under 10 years is discretionary), they must serve either 80 per cent or 15 years of their sentence (whichever is less) in prison before being eligible to apply for release on parole.

Sentenced homicide offences

Between 2005–06 and 2016–17, 479 offenders were sentenced for a homicide offence as their most serious offence (MSO) (see table below), all of whom received a custodial sentence. Of these, 62 offenders were sentenced for a child homicide offence, of whom 37 were convicted of manslaughter and 25 were convicted of murder.

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 [^]	25	11.3	37	14.3	62	12.9
Offenders with only adult victim/s ^{^^}	195	88.6	222	85.7	417	87.1
TOTAL	220	100.0	259	100.0	479	100.0

Source: QGSO

[^] Offenders with at least one victim aged under 18 have been classified as a child homicide offender.

^{^^} Offenders with all victims aged 18 and older have been classified as an adult homicide offender.

Offenders sentenced as adults (aged over 17 years) accounted for 95.8 per cent (n=459) of homicide offenders sentenced over the 12-year period. All adult homicide offenders received a custodial sentence (imprisonment with a parole eligibility or release date, a partially suspended sentence or a wholly suspended sentence).

All adult offenders sentenced for murder received a life sentence as this is the mandatory sentence in Queensland for this offence. The minimum non-parole period for offenders sentenced as an adult for the murder of a child ranged from 15 years (reflecting a shorter minimum non-parole period prior to a 2012 amendment raising it to 20 years) to 34.8 years.

The Council's findings show the median prison sentence length for adult offenders sentenced for manslaughter involving an adult or a child victim were relatively similar — 8.0 years compared to 7.5 years. However, while the sentencing range of manslaughter of an adult was fairly wide, falling between 3 and 18 years (the majority of sentences falling in the range of 7 to 10 years), the sentencing range for manslaughter of a child was much narrower — from 1.5 to 10 years, the majority of which fell in the 7 to 9 year range. The median non-parole period for offenders sentenced for manslaughter of a child victim was 3.9 years, with a maximum non-parole period of 8.0 years.

Challenges in sentencing child homicide offences

Stakeholders consulted in the early stages of this review raised a number of challenges in investigating and prosecuting child homicide offences. These include:

- the difficulty in determining the cause of death, particularly in very young children and the need for specialist pathology reports which require specialist expertise and time to prepare
- the fact there are often few or no witnesses to the events leading to the death and that those involved are often the child's parent or another family member, and
- the difficulty of establishing clear intent by an offender to harm or kill the child, particularly given the level of force required to cause a fatal injury to a child may be relatively low compared to that required to cause the death of an adult.

These complexities help to explain why child homicide cases are so different to homicide cases involving adult victims, and why child homicide charges often result in a manslaughter conviction rather than a conviction for murder.

Another challenge from a sentencing perspective is the broad range of circumstances in which manslaughter of a child is committed. Courts have long acknowledged that manslaughter attracts the widest range of possible sentences of all serious offences because it may be committed in an infinite variety of circumstances, ranging from a moment's inattention to systematic and gratuitous violence. In the case of child homicide, the conduct causing a child's death may range from acts of criminal neglect (such as providing inadequate supervision of a young child in a bath), to the use of physical violence and intentional killing reduced to manslaughter due to the operation of the partial excuse of diminished responsibility where the person's capacity was substantially impaired (for example, due to a significant mental illness).

Questions

Sentencing purposes

The Terms of Reference ask the Council to consider whether the existing sentencing purposes are adequate for the purpose of sentencing child homicide offenders, and whether specific additional legislative guidance is required.

Under section 9(1) of the *Penalties and Sentences Act 1992 (Qld)* (PSA), the only purposes for which a sentence may be imposed are:

- **punishment** — to punish the offender to an extent or in a way that is just in all the circumstances
- **rehabilitation** — to establish conditions to help the offender rehabilitate
- **deterrence** — to deter the offender (known as **personal or specific deterrence**) or other members (known as **general deterrence**) of the community from committing the same or a similar offence
- **denunciation** — to denounce (indicate disapproval of) the offending behaviour
- **protection** — to protect the Queensland community from the offender, or
- a combination of these purposes.

In the case of offences involving violence against another person or resulting in physical harm, section 9(3) of the PSA provides that the court must have regard primarily to factors including the need to protect any members of the community from the risk the person might pose to them and the circumstances of the offence, including the death or injury to any member of the public.

Queensland courts have recognised deterrence and denunciation as being primary sentencing considerations when sentencing for offences of violence against child victims. Courts have also recognised just punishment as a separate and important sentencing purpose in this context.

The need for community protection is generally assessed on a case-by-case basis and often in the context of considering if the offender should be declared convicted of a serious violent offence, which has implications for how much time the offender must serve in custody before being eligible to apply for release on parole.

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 factors

When determining a sentence the court must consider all the factors relevant to the offence, the offender and the victim. Factors relevant to the offence include:

- the maximum (and any minimum) penalty prescribed for the offence
- its nature and seriousness, including any physical, mental or emotional harm caused to a victim, and
- its prevalence (how common it is).

Factors relevant to the offender include:

- the extent to which the person is to blame for the offence (also referred to as the offender's culpability)
- the person's character (including any previous criminal convictions), age and intellectual capacity
- any remorse (or lack of remorse)
- how much assistance the person gave to law enforcement authorities in the investigation of the offence or other offences
- any time spent in pre-sentence custody for the offence, and
- other aggravating and mitigating factors.

The court must also take into account whether the offender pleaded guilty.

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 the court places on them.

Question 2: Sentencing factors

The list below sets out the selection of sentencing factors courts must take into account under the *Penalties and Sentences Act 1992 (Qld)* when sentencing a person for an offence that involves 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: <ul style="list-style-type: none"> • 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

Maximum penalties

The only penalty for murder when committed by an adult offender is mandatory life imprisonment (or an indefinite sentence, which does not permit parole but may eventually convert to life imprisonment following review by the court). The law sets mandatory minimum non-parole periods for people convicted of 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.

The maximum penalty for manslaughter is life imprisonment. This is not a mandatory penalty. It is up to the court to impose an appropriate sentence in the particular circumstances of each case.

Special provisions apply if a person is sentenced to life imprisonment for manslaughter (in which case a minimum non-parole period of 15 years applies) or if the sentence imposed is 10 years or more or the offender is otherwise declared convicted of a serious violent offence (in which case, the person must serve either 80 per cent or 15 years of their sentence (whichever is less) before being eligible to apply for parole).

Sentencing flexibility

The Terms of Reference asked 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 a mandatory sentence – a fixed penalty prescribed by Parliament for committing a criminal offence. 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 (e.g. the mandatory sentence of life imprisonment for murder).
- Mandatory minimum non-parole periods which apply to a term of imprisonment imposed (e.g. the mandatory non-parole periods that apply to murder).

While mandatory sentences are said to promote certainty and consistency in sentencing, they are also often criticised on the basis that they prevent the court from imposing a sentence that reflects the individual circumstances of the offence and the offender and that they can result in injustice.

In addition to the mandatory sentence and minimum non-parole periods that apply to murder in Queensland, the serious violent offence (SVO) scheme under Part 9A of the PSA is another example of a mandatory sentencing scheme. In contrast to the mandatory sentence for murder, this requires a person to serve a particular proportion of their sentence (80 per cent or 15 years of their sentence, whichever is less) in custody before being eligible to apply for release on parole.

However, this scheme still allows the court to set what it considers is an appropriate sentence even where the making of an SVO declaration is mandatory. For example, for sentences of 10 years or higher, a judge may order a head sentence at the lower end of the available sentencing range to ensure the declaration operates in a way that is just in all the circumstances.

There are other forms of sentencing guidance that are less restrictive than forms of mandatory sentencing that provide guidance to a court in sentencing but preserve the court’s discretion. However, even when these provisions have been introduced, often manslaughter is not included in these schemes. For example, while NSW has introduced numerical standard non-parole periods for a range of violent offences, including murder, no standard non-parole period has been established for manslaughter. This is likely because of the broad scope of circumstances in which manslaughter is committed and offender culpability.

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 a child in sentencing

When sentencing offenders for child homicide offences the court must take into account the aggravating and mitigating factors relevant to the offence, offender and victim. An aggravating factor the court should consider is the vulnerability of the victim due to age or disability. 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.

In 2008, Victoria introduced a separate stand-alone offence of child homicide into the *Crimes Act 1958* (Vic) 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) (Victoria, Parliamentary Debates, Legislative Assembly, 6 December 2007, 4413 (Rob Hulls, Attorney-General)). In 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.

In Queensland, in addition to the sentencing purposes and factors that courts must apply in all cases, a circumstance of aggravation for the serious violent offence regime was introduced in 2010 and applies to sentencing for a serious violent offence, such as manslaughter, where the victim was under 12 years or that caused the death of a child 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. As discussed above, 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.

There is no requirement that a court must consider making a SVO declaration if the sentence is less than 10 years as the making of this order is discretionary in this case. Based on the Council’s analysis of data for 2005–06 to 2016–17, of the offenders sentenced for manslaughter of a child and sentenced to imprisonment, a quarter (25.9%, or seven offenders) were declared convicted of a serious violent offence.

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?

Need for reform

During preliminary consultation, the Council has heard from community members and stakeholders about potential options for reform, including:

- the introduction of specific offences that apply where a person’s actions have contributed to the death of a child – such as the offence of child homicide in Victoria and criminal neglect in South Australia;
- changing the approach to sentencing for current homicide offences, such as increasing sentence lengths, non-parole periods, or removing suspended sentences as a sentencing option;
- improving outcomes for family members of children who have died as a result of homicide, such as through the provision of information and potential use of restorative justice processes;
- a stronger focus on prevention, such as through monitoring offenders who have committed child homicide offences by making them subject to reporting obligations and including their details on the Child Protection Offender Register.

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.

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?

Improving understanding of sentencing for child homicide

A number of studies have found the primary way the general public is informed about sentencing is via the media. 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).

The publication of sentencing remarks is another way in which courts can promote better community understanding of the sentencing process and outcomes. 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.

Some of the approaches undertaken include:

- preparing summary judgments for matters of public interest and/or legal significance for the internet and publication in newspapers
- streaming suitable judgments online
- 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
- commenting on multimedia such as YouTube about selected cases (for example by a court employed retired judge).

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?

More information

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