Sentencing for criminal offences arising from the death of a child

Final report

October 2018

Queensland Sentencing Advisory Council
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Warning to readers

This report contains subject matter that may be distressing to readers. Explicit material describing fatal offences against children, drawn from sentencing remarks, is included in this report.
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: Final report
Published by Queensland Sentencing Advisory Council, October 2018

This final report is available for download from the Council's website: www.sentencingcouncil.qld.gov.au

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

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Queensland Sentencing Advisory Council
Inform. Engage. Advise.

31 October 2018

The Honourable Yvette D'Ath
Attorney-General and Minister for Justice, Leader of the House
GPO Box 149
Brisbane Qld 4001

Dear Attorney-General

I am pleased to provide the Queensland Sentencing Advisory Council's, *Sentencing for Criminal Offences Arising from the Death of a Child: Final Report.*

This final report addresses the Terms of Reference you referred to the Council on 26 October 2017.

Yours sincerely

John Robertson
Chair
Queensland Sentencing Advisory Council

Contents

List of figures

List of tables

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Preface

When a child dies as a result of criminal abuse or neglect, it leads the community to question how to better protect children. Understandably, such deaths result in a deep sense of sadness for the loss of a vulnerable child, and a desire to ensure those responsible are held to account for their actions or inactions.

While the number of deaths due to child homicide in Queensland is small, these deaths are nevertheless deeply felt by the community. Children who have lost their lives as a result of homicide are not just a number or statistic — they represent a child lost to a family and community, and a young life cut far too short.

The Council acknowledges how important these Terms of Reference are, particularly for the Queensland community that has voiced its concern about violence against children — and most notably for the surviving families of victims who carry the greatest burden of all when a child dies by violence or criminal neglect.

This reference has been particularly complex and challenging for the Council. In responding to it, the Council has adopted a rigorous, evidence-based approach. We undertook a comprehensive review of the research relating to child homicide and literature across Queensland and other Australian jurisdictions, considered the legal framework regarding child homicide, and reviewed sentencing practices for homicide, comparing these to other serious offences of violence against children in Queensland.

At the heart of this reference was the question: is sentencing for child homicide in Queensland an adequate and appropriate reflection of the community's views? Our final position is that it is not, particularly in those cases involving the direct use of violence against a very young child who is uniquely vulnerable and defenceless.

But of course, it is not quite that simple.

Cases of child homicide — and particularly child manslaughter — occur in a diverse range of circumstances and are committed by a diverse group of offenders. In one case considered in the review, a father was convicted of the torture and manslaughter of his 13-month-old son. This occurred in circumstances where the offender perpetrated numerous violent assaults on the child. He denied responsibility and did not cooperate with the investigation. He pleaded guilty at a late stage, expressed no remorse and had a prior criminal history for violent offences, including domestic violence.

Another manslaughter case considered by the Council involved a father sentenced for the unlawful killing of his nine-month-old daughter. In this case he had forgotten she was in the car and had left her unattended for several hours during which time she died of dehydration. He was greatly distressed at the scene and afterwards. He cooperated with the investigation and pleaded guilty at the earliest opportunity.

Few would argue for a mandatory or even a similar sentence for these two offenders, and yet both are ultimately responsible for the death of a child.

This final report speaks to the instinctive synthesis that sentencing judges must adopt in their decisions — considering all relevant factors and balancing many different and conflicting features to arrive at a sentence that is systematically fair, consistent and just, given all the circumstances of the particular case.

The report draws on a range of information sources that assisted the Council in reaching its view about whether Queensland's approach to sentencing for child homicide is adequate and, if not, what are options for reform. These included:

- 10 focus groups with 103 members of the community across Queensland;
- two community summits (one in Logan, and a second in Townsville);
- a call for submissions and meetings with people with specific expertise in relation to child homicide as well as victims of crime support agencies;

- a review of administrative data over a 12-year period (2005–06 to 2016–17) for child and adult homicide and select comparator offences;
- an interjurisdictional scan of the approach to sentencing for child homicide in other Australian states and territories, and select overseas jurisdictions (with a focus on New Zealand, Canada, and the United Kingdom); and
- analysis of key sentencing purposes and factors referred to by the Supreme Court in sentencing for child manslaughter and adult manslaughter identified through a manual coding process.

An assessment of the evidence and information gathered has led the Council to the view that sentences for child manslaughter do not adequately reflect the defencelessness and vulnerability of child victims. Based on the Council's findings, while many in the community view offences against children — particularly those involving the use of violence against a young and vulnerable child victim — as being of the highest level of seriousness, this is not reflected in higher sentences being imposed. Even when sub-categories of manslaughter conduct are considered, the sentences imposed for offences with child and adult victims are largely the same.

After considering a range of possible approaches to address this problem, the Council determined that the best approach is to recommend introduction of a new statutory aggravating factor where the death of a child under 12 years has been caused. This will ensure that the community can have confidence that the courts are focusing on the defencelessness and vulnerability of the child victim as an aggravating factor when sentencing an offender for child homicide. Such an approach will still allow courts to impose a sentence that is just in the individual circumstances of the case, while making clear the expectation that higher sentences should be imposed.

Another key area highlighted during the review has been the need to ensure there are effective system responses to child homicide, including information and support offered to family members of child victims. A number of the Council's recommendations respond to these issues to ensure, as far as possible, the justice system is responsive to the needs and expectations of bereaved family members and that the information is delivered throughout the investigation and criminal justice process in a timely and sensitive way.

The Council was greatly assisted by and must acknowledge the many agencies that already provide information, support, or legal services — to both victims and defendants — in these matters. They include the Queensland Police Service, the Office of the Director of Public Prosecutions, Legal Aid Queensland, the Queensland Law Society, the Bar Association of Queensland, community legal centres, including Sisters Inside Inc. and the Aboriginal & Torres Strait Island Women's Legal Services NQ Inc., the Queensland Homicide Victims' Support Group, Protect All Children Today Inc. (PACT), Bravehearts, Court Network Queensland, and Victim Assist Queensland.

The Council also recognises the special contribution to the review made by those families bereaved by homicide, who gave us their time, expertise and experience to help the Council better comprehend the journey of families of child homicide victims. The Council was greatly assisted by hearing from these family members about their experiences of the criminal justice system. Although participation in these discussions may have at times been difficult for them, I hope they can find some reassurance in the fact that their contributions mattered and ensured that the human impact of these offences was not forgotten in the Council's deliberations.

I express my thanks to the judiciary, the legal professionals, the agencies, and the academics for their contributions to these Terms of Reference. I also gratefully acknowledge the community and the individuals who made private submissions, such was the strength of their views on this matter.

I also express my continuing gratitude to Council members who selflessly give their time to promote increased community understanding of sentencing matters. Each member brings a unique view and their combined expertise is invaluable to the Council. I would like to particularly thank Kathleen Payne and Dan Rogers who, alongside me, have formed the project board for this reference.

The Council's Secretariat must be particularly acknowledged. For the past twelve months the team has been immersed professionally within this complex and challenging reference. The work of our Secretariat, in fact most secretariats, is often overlooked. However, it is these members of our team who provide the backbone to our work. I thank you for your dedication, resilience and intellectual rigour.

John Robertson
Chair
Queensland Sentencing Advisory Council
October 2018

Acknowledgments

The response of the Queensland Sentencing Advisory Council (the Council) to these Terms of Reference has been informed by the knowledge and expertise of its members, the research and policy analysis undertaken by its Secretariat, 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 submissions, attended meetings to discuss issues relating to the review, and provided information and data to inform the preparation of this final report. While not an exhaustive list, those who have contributed 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 roundtables in April and August 2018 with individuals with specific expertise relevant to the review. The Council wishes to acknowledge the assistance provided by those who attended these meetings to advise on technical, research and procedural issues relating to the inquiry. The membership of this group is listed at Appendix 2.

The Council also convened a Victims of Crime Roundtable, attended by victim-support and advocacy groups, in May and August 2018. The Council wishes to acknowledge the assistance of those who attended these meetings and assisted the Council to better understand the impact of child homicide on victims' families and the wider community, and their experiences of the justice system. Attendees of these roundtables are listed at Appendix 2.

Two community summits were held for this review, one in Logan (16 July 2018) and the other in Townsville (19 July 2018). The Council would like to acknowledge those who participated in these summits as well as panel members:

- Dr Samantha Bricknell, Research Manager, Australia Institute of Criminology
- Bob Atkinson AO APM, former Queensland Police Commissioner (2000–2012) and former Commissioner for the Royal Commission into Institutionalised Responses to Child Sexual Abuse (2013–2017)
- Terry Martin SC, former District Court Judge (Logan summit)
- Stuart Durward SC, former District Court Judge (Townsville summit)
- Elaine Henderson, Family Support Coordinator, Queensland Homicide Victims' Support Group
- Detective Senior Sergeant Chris Hansel, Child Trauma Unit, Queensland Police Service
- Tony Keim, Media Manager, Queensland Law Society.

It is the Council's practice to establish a project board for every review. The Council acknowledges the outstanding contributions of the project board members, in particular Council members Kathleen Payne (Project Sponsor) and Dan Rogers, and thanks them for giving so generously of their time throughout the review. Jonty Bush acted as the Director of the Council Secretariat during the completion of the final report. The Council thanks Jonty for her contributions during this critical final phase of the review.

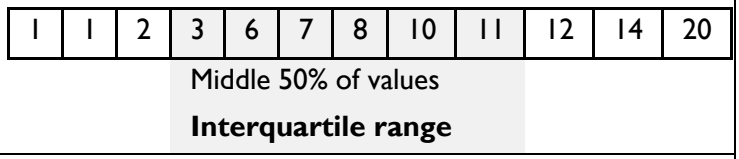
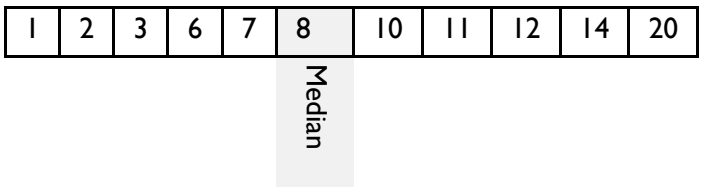
Abbreviations

ARJC	Adult Restorative Justice Conferencing
BAQ	Bar Association of Queensland
DJAG	Department of Justice and Attorney-General
DRB	Dispute Resolution Branch
FACAA	Fighters Against Child Abuse Australia
MHC	Mental Health Court
MSO	Most serious offence
NHMP	National Homicide Monitoring Program
ODPP	Office of the Director of Public Prosecutions (Queensland)
PACT	Protect All Children Today Inc.
PSA	*Penalties and Sentences Act 1992* (Qld)
SVO	Serious violent offence
QCS	Queensland Corrective Services
QHVSG	Queensland Homicide Victims' Support Group
QLS	Queensland Law Society
QPS	Queensland Police Service
QSIS	Queensland Sentencing Information Service
SME	Subject Matter Experts
VOC	Victims of Crime
VLRC	Victorian Law Reform Commission
VSAC	Victorian Sentencing Advisory Council

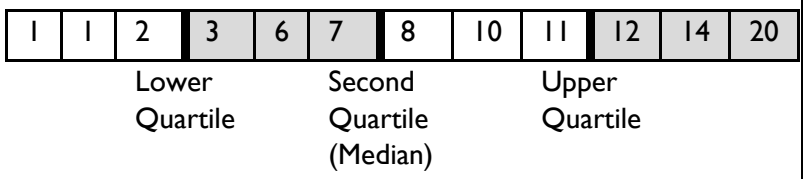
Glossary

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 a **defendant.**
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 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. An appeal against a sentencing decision of a magistrate can be heard by a District Court judge. An appeal against a sentencing decision of a District Court or Supreme Court judge can be heard by the Court of Appeal.
Associated offences	For the purposes of this report, associated offences are other offences the offender is charged with that 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 **common law**.
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 report to refer to the child death offences that are the subject of this review — murder or manslaughter of a person under the age of 18 years.
Common law	Law made by courts, including sentencing decisions and decisions on how to interpret legislation. This is also known as **case law**.
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.

Comparator offences	For this report, comparator offences refer to selected offences for both adult and child victims: attempted murder, acts intended to cause grievous bodily harm or other malicious acts, grievous bodily harm, torture, and cruelty to children under 16 years. The findings for comparator offences provide context for the findings for child homicide offences.
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 5 years and 2 years served concurrently would be a total of 5 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 usually comprises 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 3 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 5 years for one offence and to 2 years for another and ordered to be served cumulatively would have to serve a total of 7 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. Can be used interchangeably with **accused.**
Denunciation	Communication of society's disapproval of an offender's criminal conduct.
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) whether or not the child lives with them.
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 an indefinite sentence.
Instinctive synthesis	Sentencing by taking account of all relevant factors, balancing different and conflicting features, to arrive at a single result that takes due account of them all.
Interquartile range	The interquartile range is the middle 50% of an ordered data sample and is used as a measure of the spread of the values in a dataset. The advantage of using the interquartile range is that it is not affected by extreme values at either end of the distribution. 
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.
Mean	The mean is a measure used to determine where the centre of a distribution lies. The mean is calculated by adding up all the values in a dataset and dividing the sum by the total number of values. The mean is affected by outliers — extreme scores at either end of the distribution can cause the mean to shift significantly. Also referred to as the average.
Median	The median is a measure used to determine where the centre of a distribution lies. The median is the middle value (or the half-way point) of an ordered dataset. Half of the values lie above the median, and half below. The advantage of using the median is that, compared to the mean, it is relatively unaffected by extreme scores at either end of the distribution. 
Mental Health Court (MHC)	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.
Most serious offence (MSO)	For this report, the MSO refers to an offender's most serious offence at a court event. It is the offence receiving the most serious penalty, as ranked by the classification scheme used by the Australian Bureau of Statistics (ABS). An offender records one MSO per court event.
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 prosecution.
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 in order 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 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 (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	The person who actually does the act or makes the omission that 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).
Quartile	The quartiles are the three values that cut an ordered dataset into four equal parts. The first quartile is called the lower quartile, the second quartile is called the median, and the third quartile is called the upper quartile. 
Queensland dataset	For this report, this refers to the homicide offences sentenced between 1 July 2005 and 30 June 2017. The Queensland dataset was determined from a range of administrative data provided by agencies across government. Used interchangeably with the terms **12-year dataset** and **12-year period** in the report.
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, 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.

Significance/significant/ statistically significant/ statistical significance	These terms are used in relation to research findings in this report. Statistical significance is the likelihood that a relationship or difference between variables or groups is not caused by chance.
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 (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 that 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.

Executive summary

Introduction (Chapter 1)

This report presents the advice of the Queensland Sentencing Advisory Council (Council) following its review of penalties imposed on sentence for criminal offences arising from the death of a child, referred to the Council by the Attorney-General and Minister for Justice, the Honourable Yvette D'Ath MP on 26 October 2017.

In developing its final report and recommendations, the Council was asked to:

- consider and analyse penalties imposed on sentence for offences arising from the death of a child and report on current sentencing practices;
- determine whether the penalties currently imposed for these offences adequately reflect the particular vulnerabilities of these victims;
- identify any trends or anomalies that occur in such sentencing — for example, the nature of the criminal culpability forming the basis of a manslaughter charge, which may affect any sentence imposed;
- assess whether existing sentencing considerations are adequate for the purposes of sentencing these offenders and identify if specific additional legislative guidance is required;
- examine the approach in other Australian jurisdictions;
- identify and report on any legislative or other changes required to ensure the imposition of an appropriate sentence for these offences;
- identify ways to enhance community knowledge and understanding of the penalties imposed for these offences;
- consult with the community and other key stakeholders; and
- advise on any other matters relevant to this reference.

The focus of the review was on sentencing for the offences of murder and manslaughter (referred to throughout this report as 'child homicide offences'). These offences capture offences highlighted in submissions and consultation as being of most concern to the community with respect to current sentencing practices — that is, deaths caused as a result of child abuse and neglect.

A 'child' was defined for the Council's purposes, as a person aged under the age of 18 years.

The Council's approach

The review was initiated in late October 2017. The Council released a preliminary call for submissions inviting feedback on issues to be explored during the review; 10 submissions were received in response. During the early stages of the review, the Council negotiated with data custodians to develop a consolidated dataset for the review, developed a coding framework to guide its sentencing remarks analysis, commenced a review of relevant research literature on child homicide, and undertook a cross-jurisdictional analysis of legislation and case law guiding sentencing for child homicide offences. During these early stages, the Council also met with a number of stakeholders to better understand the complexities of the investigation, prosecution and sentencing for these offences.

In May 2018, the Council released a consultation paper — *Sentencing for Criminal Offences Arising from the Death of a Child*. This paper detailed the nature and extent of child homicide and provided an overview of the range of child homicide offences and the sentencing process and framework. The paper included seven questions based on the Terms of Reference including in relation to sentencing purposes and factors for child homicide, the sentencing process, the vulnerabilities of child victims in sentencing, the need for

reform, and ways to enhance community understanding. The Council received 29 submissions in response, which are referenced in this report.

The Council convened two specialist roundtables: a Subject Matter Expert Roundtable, attended by individuals with specific expertise relevant to the reference; and a Victims of Crime Roundtable, to explore the experience of the legal system by family members of victims of child homicide and their views on reform. These groups each met twice to consider key themes and issues arising from the Council's consultations.

The Council held six community information sessions across Queensland, and two community summits in Logan and Townsville. Participants at the summits heard from guest speakers and expert panel members before taking part in workshops to consider specific issues related to the review and to contribute their views. These consultation activities were in addition to individual meetings held at the request of the Council, or by others.

To inform its advice, the Council conducted 10 focus groups in six regions — Brisbane, the Sunshine Coast, Cairns, the Gold Coast, Mount Isa, and Longreach — with 103 general members of the community recruited to participate through random selection from a database maintained by a market research company. These focus groups allowed the Council to explore community views about whether sentencing for murder and manslaughter is adequate in Queensland, and also their assessments of offence seriousness. While not necessarily representative of the views of the broader community, this enabled the Council to explore community views in more detail to understand what makes child homicide offences different from offences committed against adults.

The Council also released a research report in July 2018 — *Child Homicide Offences in Queensland: A Descriptive Analysis of Offences Finalised by Queensland Criminal Courts, 2005–06 to 2016–17*. This report considered the profile of child homicide offenders, victims, offences and sentencing outcomes over this 12-year period.

The nature and extent of child homicide (Chapter 2)

According to the most recent national homicide data, based on police records, approximately 10 per cent of all homicides in Australia involve child victims. Queensland child homicide incidents represent a quarter of all child homicide incidents in Australia.

National figures also reveal that most child homicides occur in the child's home and the perpetrator is most often a parent. For homicides involving children aged 15 to 17 years, public spaces become more prominent as the site of homicide incidents, and parents less likely to be responsible for the death.

Nationally, almost a quarter of child homicide victims are aged under one year. In contrast, children aged 5 to 14 years comprise the lowest proportion of child homicide victims, with the proportion increasing again in the 15–17-year age group. Across Australia, it is more common for boys than girls to be child homicide victims, but in Queensland the gender of victims is close to half boys and half girls.

The research recognises child homicide is a 'gendered phenomenon'. While men comprise the majority of homicide and child homicide offenders, women represent a higher proportion of child homicide offenders than they do for any other category of homicide. The proportion of female offenders also increases for the subgroup of filicide, with female perpetrators more likely to kill younger child victims.

Where a homicide is committed by a parent, a child's biological parents are the most common perpetrators, but when non-biological children are homicide victims, stepfathers are overwhelmingly the main offenders. However, stepfathers are less likely than the biological parents to be involved in the deaths of very young children.

Research demonstrates there are also gender differences in how perpetrators commit child homicide. According to the national homicide data, male perpetrators are more likely to use the direct use of violence (beating), while strangulation/suffocation is the method most often associated with female perpetrators. Where child homicide is committed by a parent or step-parent, male perpetrators are also more likely than female perpetrators to have prior convictions, according to international research.

Common situational and contextual factors associated with child homicide include a history of domestic or other violence, substance misuse and mental illness. Child protection history, parental separation, and parenting very young children are among other factors that may increase the risk of child homicide occurring where perpetrated by a parent or step-parent. The circumstances of perpetrators and their families are also characterised by socio-economic disadvantage, unemployment and low education. However, the identified factors are not unique to child homicide. In addition, the presence of such factors does not precipitate child homicide; rather, the research discusses correlation as opposed to causation.

Child homicide offences (Chapter 3)

Murder and manslaughter

Under Queensland law, killing a person is either murder or manslaughter, depending on the circumstances of the case, unless the killing is 'authorised or justified or excused by law' such as when a legal defence or excuse applies.

Murder generally requires proof of intent to kill or to cause grievous bodily harm. Manslaughter does not.

In circumstances where the offender is charged with murder but does not plead guilty to the offence, the prosecution must prove to a jury beyond reasonable doubt that the offender had the requisite intent.

Unless the defendant gives direct (and credible) evidence as to his or her intention, the intention of a defendant at the relevant time will generally be a matter of inference by the jury from other facts proved.

Throughout the review, the issue of the legal elements required to establish the offence of murder was raised by community members and family members of victims of child homicide as an area of confusion warranting community education in the future.

Maximum penalties and parole eligibility

A conviction for murder, rather than manslaughter, has significant implications for sentencing.

The only penalty a court can impose for murder when committed by an adult in Queensland is mandatory life imprisonment (or an indefinite sentence, which does not permit parole but may eventually convert to life imprisonment upon court review). In contrast, life imprisonment for manslaughter is a maximum penalty only. Courts have discretion to set what they consider is an appropriate sentence in the context of the individual circumstances of the case.

Murder in Queensland also carries mandatory minimum non-parole periods (in most cases 20 years, but 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). A sentencing court can increase, but not decrease, the mandatory minimum non-parole period. A mandatory minimum non-parole period of 15 years applies to other life sentences, including life sentences imposed for manslaughter.

Even if parole is granted later, a life prisoner remains subject to supervision and restrictions until their death and can be returned to prison if the Parole Board Queensland suspends or cancels parole.

Queensland is one of only two Australian jurisdictions (the Northern Territory being the other) where murder attracts both a mandatory life sentence and mandatory minimum non-parole periods. In most other jurisdictions, a presumptive life sentence or maximum penalty of life imprisonment applies. Even if a life sentence must be ordered, as is the case in South Australia, courts have discretion in setting a shorter parole eligibility date where special reasons exist.

Sentencing for manslaughter

The Council's research shows that child homicide offenders are more likely than adult homicide offenders to be sentenced for manslaughter.

The high rate of child homicide offences that result in a conviction for manslaughter rather than murder can be understood in the context of the number of challenges in investigating and successfully prosecuting these cases. For example:

- there are often few or no witnesses to speak to the events leading to a child's death;
- family members may be under investigation, and there are often difficulties in establishing clear intent by an offender to seriously harm or kill the child;
- 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;
- the offender might have also been under the influence of drugs or alcohol making intent even more difficult to establish; and
- natural causes of death (such as congenital health conditions) or accidental injuries also need to be considered.

Even if the child's death can be confirmed as non-accidental, multiple people might have been in contact with the child in the days or hours leading up to the child's death, which makes identifying timelines (in terms of contact of specific individuals with the child) and the relevant window when the fatal injuries occurred particularly important.

Another feature of child manslaughter is the high level of factual variability — from the deliberate use of violence against a very young child, to a failure to seek medical assistance for an injured or unwell child, to leaving a young child unattended in a bath who subsequently drowns.

Manslaughter can involve a very broad range of factual circumstances from cases where the offender did not intend to cause any physical harm, let alone cause death, to circumstances where the offender intended to kill or cause grievous bodily harm but is found guilty of manslaughter because of the operation of a partial defence, such as diminished responsibility.

Courts have long acknowledged that manslaughter attracts the widest range of possible sentences of all serious offences on this basis. For this reference, the Council has reviewed a wide range of cases, which highlights the high level of variability.

While mandatory minimum sentences and minimum non-parole periods do not apply to the offence of manslaughter (unless a life sentence is imposed), this offence falls within scope of the serious violent offence (SVO) scheme under Part 9A of the *Penalties and Sentences Act 1992* (Qld) (PSA). If a person is declared convicted of a serious violent offence, 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 release on parole. The making of a declaration is mandatory where the person is convicted of a listed offence[1] (or of counselling, procuring, attempting or conspiring to commit it) and is sentenced to 10 years' imprisonment or more. Manslaughter is a listed offence.

Where a person is convicted of a listed offence but the head sentence is 5 or more years, and less than 10 years, the court 'may' make the declaration. There is also a power to make an SVO declaration where a sentence is for a shorter period.

In circumstances where the making of the declaration is discretionary, 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. This change to the law came into effect on 26 November 2010.

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[1] Offences subject to this requirement are listed in Schedule 1 of the *Penalties and Sentences Act 1992* (Qld).

Sentencing process and framework (Chapter 4)

Sentencing in Queensland, as in other Australian states and territories, is not a mechanical or mathematical exercise. Queensland courts apply an instinctive synthesis approach, taking into account all of the relevant factors and balancing different and sometimes conflicting features. As the High Court has recognised: 'there is no single correct sentence' and sentencing judges are to be allowed as much flexibility in sentencing as is in keeping with consistency of approach and applicable legislation:[2]

> [T]he 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, in the case of an offence like the one now under discussion, balances many different and conflicting features.[3]

Sentencing courts have a wide discretion, and yet must take into account all relevant considerations (and only relevant considerations) including legislation and case law.

Section 9 of the PSA sets out statutory sentencing guidelines for courts to apply in sentencing, including the purposes for which a sentence may be imposed, and other factors a court must take into account, such as the maximum and any minimum penalty prescribed, the nature of the offence and how serious it was (including harm to a victim), the extent to which the offender is to blame, any damage, loss or injury and the presence of any aggravating or mitigating factor relevant to the offender, and many other factors that may or may not arise in the individual case, including 'any other relevant circumstance' by which the parliament recognises the infinite variation in circumstances that may face a sentencing court.

In sentencing for an offence that involved the use of (or counselling or procuring the use of) or attempting or conspiring to use violence against another person, or that resulted in physical harm to another person (including child homicide), section 9(3) of the PSA requires that courts must have primary regard to specific factors listed. These include:

- the need to protect any members of the community from any risk of physical harm if a custodial sentence is not imposed;
- the personal circumstances of any victim;
- the circumstances of the offence, including the death of, or any injury caused to, a member of the public;
- the nature or extent of the violence used, or intended to be used;
- the past record of the offender;
- the antecedents, age and character of the offender; and
- any remorse or lack of remorse of the offender.

In addition, there are other factors and considerations identified in the PSA that a court must take into account in sentencing, such as an offender's guilty plea.

The Council was asked under its Terms of Reference to consider whether the current sentencing purposes of deterrence, denunciation, rehabilitation, just punishment and the protection of the community are adequate for the purposes of sentencing this cohort of offenders, and to identify if specific additional legislative guidance is required.

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2 *Markarian v The Queen* (2005) 228 CLR 357, 371 [27] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

3 *Wong v The Queen* (2001) 207 CLR 584, 611 [75]; [2001] HCA 64 (Guadron, Gummow and Hayne JJ) [emphasis in original, footnote omitted] referred to with approval in *Markarian v The Queen* (2005) 228 CLR 357, 373–375 [37] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

Most other Australian jurisdictions adopt similar sentencing purposes to those in Queensland. These general purposes are listed, with courts determining which are relevant and the weight to be given to each.

The Council's consultation and research findings suggest that from the community's perspective, in sentencing for child homicide, the most important purpose is punishment. Community summit participants thought general deterrence and denunciation were also important, whereas focus group participants thought specific deterrence was important. This generally reflects the view expressed that, due to the seriousness of the conduct involved and the vulnerability of child victims of these offences, a substantial penalty is warranted that reflects the seriousness of the offence, communicates through the penalty the community's abhorrence for this conduct, and deters others or the individual from committing such offences in future.

The most important purposes identified during the Council's review align with the principles articulated by the Queensland Court of Appeal and by other courts of criminal appeal in sentencing in these cases.

The Council considers that, while acknowledging there are potential advantages to the listing of specific purposes as primary purposes of sentencing for child homicide offences, any further guidance is unnecessary and may simply contribute to the complexity of the sentencing process. Further, this approach alone is unlikely to achieve higher sentences and would also create a specialist approach to sentencing for child homicide, when the same sorts of purposes equally apply to other offences involving violence, and to homicide offences committed against adult victims.

The Council's views about the need for other forms of legislative guidance — specifically, the relevance of a child's defencelessness and vulnerability to sentencing — are discussed below.

Current sentencing practices for child homicide (Chapter 5)

The Council examined the sentencing outcomes for murder and manslaughter where the victim was a child, and manslaughter where the victim was an adult, for cases sentenced between 1 July 2005 and 30 June 2017.

It found child homicide offenders are more likely than adult homicide offenders to be sentenced for manslaughter and receive shorter sentences on average; and that the majority of child homicide occurs in the home and is most likely to be committed by family members (usually parents or caregivers) who usually do not have a previous conviction for a violent offence.

Key findings are as follows:

- All offenders sentenced by Queensland criminal courts between 2005–06 and 2016–17 for homicide offences as their most serious offence (MSO) (N=479) received custodial sentences.
- 20 offenders were aged under 17 years at the time of the offence and were sentenced as children, of whom 11 (55.0%) were sentenced for murder.
- All adult offenders sentenced for murder received a life sentence (the mandatory sentence for murder).
- The average custodial sentence for manslaughter was 8.3 years. On average, offenders received significantly longer sentences for manslaughter of an adult (8.5 years) than a child (6.8 years).
- However, when sub-categories of homicide were identified (based on coding of sentencing remarks to identify the conduct forming the basis for the offence) median sentences for the manslaughter of a child and manslaughter of an adult, were relatively consistent within the categories of manslaughter by violent or unlawful act or criminal negligence:
  - 8.0 years for manslaughter by violent or unlawful act involving either an adult or a child victim; and
  - 5.0 years for manslaughter by criminal negligence involving neglect for offences committed against children, compared with 4.8 years for the same category of offences committed against adults.

- Of all offenders sentenced for manslaughter of a child (MSO and non-MSO), offenders with a victim aged 15 to 17 years received the longest average sentence (9.6 years) and recorded the highest maximum sentence (15 years).
- For child manslaughter, the median period to be served before being eligible to apply for parole was 3.7 years for offenders with one victim and 4.5 years for offenders with two victims (equivalent data for adult manslaughter cases were not analysed).

The data show that the reasons for the differences in average sentences for child manslaughter compared to adult manslaughter can largely be attributed to the very different factual circumstances and conduct that form the basis for these offences — for example, a far greater proportion of child manslaughter offences involved caregivers sentenced on the basis of criminal negligence or neglect (such as a failure to seek medical attention for an injured or unwell child, or leaving a child unattended in a bath or a vehicle) than adult manslaughter offences (32.4% compared to 2.7% for adult manslaughter cases). In contrast, a higher number of adult homicide offences involved a dangerous or unlawful act, such as the use of violence (78.4% adult manslaughter compared to 54.1% child manslaughter).

Manslaughter offences involving the use of physical violence are generally viewed by courts as more serious than cases of criminal negligence where there is no intention by the offender to cause serious harm but the child's death nevertheless results from the person's actions or inactions (such as leaving a child unattended in a bath or failing to seek medical assistance for an injured child).

The Council's sentencing remarks analysis also revealed that a higher proportion of offenders sentenced for adult manslaughter were sentenced on the basis of having a relevant prior criminal history, the use of a weapon, and/or committing the offence in the course of a planned or organised criminal activity.

The Council's analysis suggests that taking into account the different contexts in which manslaughter occurs, sentencing practices for different sub-categories of manslaughter committed against child victims are similar to those involving adult victims.

Approach to sentencing in other jurisdictions (Chapter 6)

Due to the different offence and sentencing regimes in other jurisdictions, a decision was made early in the review not to compare sentencing outcomes in Queensland with those in other jurisdictions. Further, to undertake this type of analysis, the Council would have needed access to both the available data and the associated sentencing remarks to enable victim age to be identified. These data were not available, nor could the analysis have been completed within the timeframes of the Terms of Reference.

However, a review of recent interstate cases, although not exhaustive, does suggest that sentences in these jurisdictions are broadly consistent with those in Queensland — although in a number of cases involving child murder, the non-parole period set by the Court was higher than the non-parole periods set for child murder in Queensland. One particularly serious New Zealand manslaughter case attracted a 17-year sentence with a 9-year non-parole period. Due to the operation of Queensland's SVO scheme, a Queensland Court would need to impose a much lower head sentence (just over 11 years and 3 months) to achieve this same non-parole period.

In reviewing the offence and sentencing frameworks, the Council also found that the laws of homicide across Australia are broadly consistent, although differences apply in terms of:

- the availability of partial excuses and defences to homicide;
- the legislating of sub-categories of homicide, such as in Victoria, which has introduced the offence of 'child homicide' (manslaughter of a child under the age of 6 years); and
- the fault element to establish these offence — for example, some jurisdictions include reckless indifference to the probability of causing death as a separate basis for establishing the offence of murder, although this still requires that the accused foresaw or realised the act would probably cause the death of the deceased.

Some specialist offences, such as the offence of infanticide, have formed part of the criminal law of other jurisdictions for many years. Others, such as the Victorian offence of child homicide, have been

introduced more recently to respond to specific concerns about sentencing in child homicide cases or, in the case of the South Australian offence of criminal neglect, evidentiary challenges in establishing who is responsible for the fatal act or omission in circumstances where more than one person lived with the child.

Current maximum penalties in Queensland for the offences of murder and manslaughter are broadly in line with other Australian jurisdictions, although there are some differences. For example:

- Queensland, South Australia and the Northern Territory are the only jurisdictions with a mandatory (as distinct from a presumptive) life sentence for murder;
- in the ACT, NSW, Tasmania and Victoria, manslaughter carries a defined-term maximum penalty, rather than a maximum penalty of life imprisonment, ranging from 20 to 25 years.

Of the jurisdictions reviewed, none distinguish between homicide offences committed against adults and those committed against children in terms of the maximum (or minimum) penalties that apply to those offences, although some set a higher standard or minimum non-parole period where the victim is a child or in other circumstances:

- NSW has introduced a standard non-parole period of 25 years for murder where the victim is a person under 18 years;
- In the Northern Territory, a minimum non-parole period of 25 years applies to murder involving a victim under 18 years.

In New Zealand, a presumptive life sentence applies to the offence of murder, which carries a minimum non-parole of 17 years where particular circumstances apply (including where the victim was particularly vulnerable because of age, health or any other factor), unless the sentencing court determines it is manifestly unjust to impose such a sentence.

There are some differences in terms of identification of aggravating factors in sentencing legislation, which are discussed below in the context of victim vulnerability.

While some jurisdictions, such as NSW and Victoria, have adopted standard defined-term non-parole periods and standard sentencing schemes to provide additional guidance to courts in sentencing, generally manslaughter is excluded from the scope of these schemes. This is likely due to the wide range of factual circumstances that can support a conviction for manslaughter.

Where defined-term minimum non-parole periods or sentences have been introduced for aggravated forms of manslaughter, the application of these schemes is generally confined to offences committed in very specific and limited circumstances. For example, in Western Australia, a court must impose a sentence of at least 15 years for manslaughter committed by an adult offender in the course of an aggravated home burglary.

Assessment of offence seriousness (Chapter 7)

Assessing seriousness

Offence seriousness is generally seen as comprising two key components: (1) the harm caused, and (2) the culpability (blameworthiness) of the offender.

In the case of homicide offences, the very highest level of harm has been caused — the loss of a person's life. As a general rule, offence seriousness is considered to increase with the level of harm caused. When assessing culpability, a judge will consider factors such as intent, motive and circumstances that bear on the person's blameworthiness. Offence seriousness tends to increase with the increased culpability of an offender.

For homicide offences, this means that an offender's actions performed with knowledge of the consequences are considered more serious than an offender acting with criminally negligent disregard for the consequences. That is why, despite the consequence of murder and manslaughter being the same (the death of the victim), the culpability for murder is higher — because the outcome was intended or foreseen as probable by the offender.

Many submissions to the Council and discussions by participants at the community summits indicated that community members view the vulnerability of a child, due to their age and reliance on parents, as making child homicide offences more serious than the same offences committed against adult victims. Generally, the view was that an offender's culpability was higher in circumstances where the victim was a child because of a child's inherent vulnerability and defencelessness.

Focus group participants identified the following factors as making a homicide offence more serious:

- **Victim type:** children are inherently vulnerable and homicides involving a child victim were seen as more serious. Vulnerable adults were also recognised, but children were viewed as more vulnerable.
- **Level of violence:** offence seriousness increased with the use of direct violence, and in particular where there was a history of prior violence against a child victim.
- **Culpability of the offender:** activities that suggested a conscious and deliberate course of conduct were seen as more serious. Examples cited included taking a weapon to the homicide event, inflicting direct violence on the victim, taking steps to conceal their actions, or frustrating criminal justice efforts.

Vulnerability

The Terms of Reference asked the Council to consider the particular vulnerabilities of children and whether these are adequately reflected in penalties imposed on sentence for this category of offences.

When sentencing 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. There is no explicit reference in the PSA to victim vulnerability; however, when sentencing an offender for any offence of violence, the court must have primary regard to section 9(3) of the PSA, which includes the personal circumstances of any victim.

The Council examined the approach in other jurisdictions in relation to victim vulnerability. 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 Western Australia, where legislation does not single out children as a particular category of victim, courts are required to take the vulnerability of the victim into account when assessing seriousness.

From the focus group research and consultation activities, it is clear that community members generally regard homicide offences as inherently more serious where the victim was a child and was therefore vulnerable. Legal and justice stakeholders also regarded vulnerability as a significant consideration to be taken into account when determining an appropriate sentence; however, they noted there were also other important factors to consider as well. The vulnerability of other victim groups was also identified (e.g. the elderly and people with a disability).

Public opinion and sentencing for child homicide (Chapter 8)

The Council's focus group results confirm earlier national and international research that shows as people become more informed about specific details about a case and the criminal justice system, they become more likely to view sentences imposed as appropriate. The Council's findings echo previous research findings that highlight the importance of improving community understanding of the system, and sentencing in particular, to promote community confidence.

The Council's findings also confirm previous research findings indicating that, while gaps between the sentences imposed and community perceptions of adequacy reduce as knowledge increases, this does not hold where crimes against children are concerned. In the case of the Council's research, the extent to which sentences for child manslaughter were viewed as 'adequate' depended on factors such as the nature of the conduct involved (e.g. whether the death was viewed as 'accidental' or as involving the deliberate use of violence) as well as perceptions about the child victim's level of vulnerability.

Assessing the appropriateness of sentencing for manslaughter of a child (Chapter 9)

The Council's approach

A key question for the Council in undertaking the review was whether sentences for child homicide — particularly where mandatory sentences do not apply — adequately reflected the vulnerabilities of child victims. Linked to this was the question of whether any legislative or other changes were required to ensure the imposition of appropriate sentences.

The Council adopted a mixed-methods approach, applying both quantitative and qualitative criteria to assessing appropriateness and adequacy of sentencing for child homicide against a number of measures. The measures used to assess appropriateness and adequacy were consistent with those adopted by other sentencing councils. In brief, they were:

- whether there is a lack of public confidence in sentencing;
- evidence of an inconsistency of approach in the treatment of child homicide offenders within the offence categories of murder and manslaughter and compared with other offence types;
- evidence of inconsistency of approach with other jurisdictions.

Under each of these broad criteria, additional criteria were considered, providing evidence in support of the Council's conclusions.

The Council's view

The Council found mixed evidence of a need for reform based on the criteria examined.

In particular, while the Council found that the law is being implemented consistently with current sentencing principles and case authorities, current sentencing levels appear to be out of step with community views of offence seriousness and appropriate sentencing levels where offences involve the death of a child and the use of direct violence against a child are concerned.

Based on submissions received, and the outcomes of the Council's consultations and focus group findings, sentencing for manslaughter cases involving direct use of violence against a young child are not viewed by the community as adequate.

After considering these views and other evidence gathered over the course of the review, the Council reached the view that sentencing for manslaughter offences committed against young children — particularly in cases involving the direct use of violence against a young child — does not adequately reflect the unique and significant vulnerabilities of child victims.

The range of sentences imposed for manslaughter committed against young children has remained stable over at least the last 30 years, with the majority falling within the range of 7 to 9 years. Given improved understanding of the significant long-term impacts of child abuse and neglect, and changes in community attitudes about the use of physical punishment against children, higher sentences for these offences, particularly those involving the direct use of violence, in the Council's view are warranted.

The Council has determined that the best means of achieving greater recognition of children's vulnerabilities in sentencing is to create a new statutory aggravating factor in section 9 of the PSA. Importantly, this approach will retain sentencing flexibility by taking into account the diverse circumstances in which these offences occur while emphasising the factors that make these offences more serious.

The reform recommended has the advantage of applying not just to the setting of the non-parole period, but also to the setting of the head sentence.

Under the Council's proposals, the new aggravating factor will apply where the court is sentencing an offender for an offence resulting in the death of a child under the age of 12 years, aligning with the existing age requirement for the making of an SVO declaration and when children are at highest risk of homicide due to abuse or neglect. It will be limited to the defencelessness of the child victim and their vulnerability, given that other specific aggravating features (such as the extent of violence used) are

already within the scope of section 9(3), and that children's defencelessness and vulnerability are the essence of what makes these offences more serious.

The new aggravating factor will support courts in setting a higher sentence than might previously have been the case through its former treatment as a general aggravating feature. It will support courts' treatment of these offences as more serious and therefore deserving of more severe punishment. It will also meet the sentencing purposes of deterrence and denunciation — sending a clear message to the community that violence against children of any kind is wrong and will not be tolerated.

The new provision will not restrict the ability of courts to take into account the many other factors importantly listed in section 9 of the PSA, including specific factors of relevance when sentencing for offences involving violence under section 9(3) of the Act, and the treatment of an offence as a domestic violence offence, which is also a statutory aggravating factor.

The Council recommends the operation of this new provision should be reviewed post-commencement. The intention of this review should be to ensure that the new provision is operating as intended.

Impact of the Serious Violent Offence (SVO) scheme

In presenting its advice, the Council has raised concerns that the SVO scheme may currently be exerting downward pressure on head sentences for child manslaughter, which will not be avoided through the introduction of a new aggravating factor. In particular, while more sentences of 10 years or more may be imposed, resulting in a requirement to make an SVO declaration, there is a risk, even with the reform recommended, that head sentences will be set below a level they otherwise might if courts had the discretion to set a parole eligibility date. This is because once a sentence reaches 10 years, the only way the court can take into account an offender's guilty plea and other factors in mitigation for the offence of manslaughter and other offences listed in Schedule 1 of the PSA in a meaningful way is to reduce the head sentence, rather than to set a parole eligibility date that takes these factors into account.

While the Council has made no recommendations about potential reforms to the SVO scheme, given the wide range of offences to which it applies and the Council's narrow Terms of Reference, the Council has identified this as an important area for future investigation.

Support and information for victims of crime (Chapter 10)

The sentencing of child homicide offenders comes at the end of a lengthy legal process for family members of victims of child homicide, including the reporting of the death, subsequent investigation, the decision to charge and prosecute, the committal and — where contested — the trial process. As the Council's research confirmed, the period from when a charge is laid through to the sentencing of an offender following a child's death can extend over many months, and often years.

For many family members of child homicide victims, the legal process is protracted, complex and confusing. Submissions made suggest that the communication and support currently provided throughout the process could be improved.

The treatment of related victims of homicide throughout the investigation and subsequent court proceedings can have a significant impact on their overall satisfaction with the criminal justice system. Positive engagement and support of family members of victims of child homicide can also promote understanding of the sentencing outcome by victims' families and this, in turn, can positively affect the community's understanding of the sentencing process.

Family members of victims of child homicide currently receive information and support via a number of channels during the investigation and court process. Criminal justice agencies are required to meet certain minimum standards in providing support and assistance to victims, set out under the *Victims of Crime Assistance Act 2009* (Qld) and in the Charter of Victims' Rights.

The Council has identified a number of elements of system responses it considers important for family members of victims of child homicide:

- a coordinated model of support for bereaved family members that involves criminal justice agencies and funded non-government service providers working closely together, but with clear delineation of responsibilities between these agencies;
- ensuring police allocate a dedicated Family Liaison Officer to each bereaved family member who requires dedicated support, whose role is to provide information and facilitate care and support to family members from the time a death occurs throughout the entirety of the person's contact with the criminal justice process, including any appeal processes;
- putting processes in place to formalise and ensure appropriate handovers occur between allocated police Family Liaison Officers where a change in staffing occurs while the case is still active;
- proactive provision of information throughout the process, including offers by prosecutors to meet with the family at key stages of the criminal justice process;
- provision of simple information at each meeting about the progress of the case, the purpose of each hearing, processes for family members who are witnesses, and possible sentences available for the offences charged;
- ongoing training for all those involved across the system about communicating effectively with bereaved persons, including the use of sensitive language; and
- training and information for support agencies and those offering peer support to bereaved family members on understanding key stages of the criminal justice process.

While some of these practices are already occurring, the Council considers it important that these policies, procedures, resources and training are reviewed and updated on an ongoing basis.

Other issues raised on behalf of family members of child victims included: the use of the victim's name in court proceedings, rather than the terms 'the victim' or 'the deceased'; providing victims with choice about when the victim impact statement (VIS) is read; and the display of photographs at the sentencing hearing.

As with investigation and subsequent court proceedings, how family members of victims of child homicide are treated during the sentencing process and ensuring their needs are recognised is important, both in terms of their levels of satisfaction with the criminal justice process and to assist with their recovery process.

The Council acknowledges the importance of the sentencing process operating in a way that supports the involvement of family members of child victims, including through the VIS process, and which gives appropriate recognition to the fact that a child's life has been lost, to ensure this loss is appropriately acknowledged.

Processes to respond to the needs and interests of victims can be supported through the development of practical information and resources.

Improving community understanding (Chapter 11)

Public confidence and the role of the media

Information and community education are paramount to build community confidence in the criminal justice system.

The review highlighted the important role of the media as the primary source of information for the wider community about sentencing and reinforced the critical role the media plays in how the justice system is perceived and understood.

While child homicide cases generally attract strong media interest, 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

description of what the sentencing judge took into account to determine an appropriate sentence. These issues are compounded by the fact that the word length available to a journalist is usually limited and some matters cannot be reported due to certain legislative restrictions.

Publication of sentencing remarks

Sentencing remarks (the judge's reasons for sentence) provide an explanation to the offender, victims, other parties, appeal courts and the public about how the judge reached the sentence imposed.

Sentencing remarks are an important means of supporting community understanding of sentencing and promoting informed community debate about sentencing issues. Providing access by media outlets and community members to sentencing remarks, and ensuring they are published in a timely way, is an important means of promoting a better understanding of the principles and factors taken into account by courts in sentencing in an individual case and ensuring accurate media reporting.

Sentencing remarks in Queensland are often delivered *ex tempore*. This means the majority of sentencing remarks are delivered orally, very shortly after submissions conclude at the end of the sentencing hearing.

There is sometimes a short delay between the time the sentence is delivered, and when the transcript of the audio recording is provided to the sentencing judge for review and revision. This process is required before the judgment can be approved to be published on the website of the Supreme Court Library Queensland (SCLQ).

The Council suggests there is a strong case for ensuring that sentencing remarks in child homicide cases are published and that this occurs at the time of — or shortly following — the sentence. The Council recommends consideration be given to strategies to increase the timeliness of providing sentencing remarks for child homicide matters heard in the Supreme Court of Queensland to the SCLQ and their subsequent publication.

Cooperation and sentencing in closed court

An issue raised with the Council as a potential barrier to understanding the reasons for sentence is the operation of sections 13A and 13B of the PSA. These provisions provide for sentencing discounts where a sentenced person has promised to help with the prosecution at a later date (section 13A) and recognise significant cooperation already given to law enforcement (section 13B).

The operation of these provisions means that the reasons for the sentence (which is discounted taking into account cooperation given or undertaken to be given) do not show that the sentence was reduced for this reason. This may result in a sentence that appears to the public to be unduly lenient and thereby risks undermining public confidence in the criminal justice system.

The Council recognises that any change to the operation of these provisions holds broader practical and policy implications than have been considered as part of this review. For this reason, the Council suggests the Queensland Government may wish to consider identifying this as an area of potential future reform to enable more detailed consideration to be given to this issue.

The Council also notes suggestions made about ways to ensure the reasons for sentence are better explained by the media, but without making specific reference to the fact that cooperation has been given.

Improving system responses (Chapter 12)

The Council's review suggests there are opportunities for research to inform practice, and for practice to inform research. This requires an ongoing commitment by professionals, researchers, criminal justice agencies, and other agencies tasked with the protection and support of Queensland children and their families to collect and report high-quality information at both an individual and system level. This supports informed and responsive policy decision-making and system responses.

The Council recommends that the Queensland Government give consideration to mechanisms that would allow for offences committed against children, victim–offender relationship and risk factors to be more easily identified without a requirement for manual coding. Further detailed consideration and

consultation is required to identify the best means to achieve this outcome and to support the analysis of these data.

Establishing processes that will support the analysis of high-quality data about homicide, including child homicide, will enhance the State's capacity to monitor both a category of offence (homicide) and a defined population (children) that the Queensland community has identified as being of concern.

Improving the availability of data on victim age and associated variables will also support the proposed evaluation of changes recommended by the Council to the PSA.

The Council further acknowledges the importance of state-based death review processes in response to child deaths and family violence. Such review processes are effective in identifying service failures for individual cases, but can also provide important insights into linkages between, and potentially disconnects across, individual fields of practice within both the criminal justice and human services sectors.

The Council recognises that examining system-wide issues can lead to improved practices, particularly over the longer term, and strongly supports extending the scope for current reviews to all child death cases to consider systemic issues, at both individual and aggregated levels. An authentic commitment to considering whether the entire system tasked with protecting children and families requires improvement, aimed at reducing further deaths, represents a positive result following the death of a child.

While the Council appreciates that certain child death cases are already examined (e.g. the Queensland Child Death Case Review Panels review all child deaths where the child was known to the child protection system within the 12 months prior to death), extending this review process to all child victims of homicide, irrespective of the situational or contextual circumstances, may help reduce future deaths. Reviewing all child homicide cases may identify missed opportunities for intervention, as well as prevention mechanisms for different situations and families. The Council recognises further detailed consideration and consultation is required to identify the best means to achieve this outcome, as well as resourcing implications.

Advice and Recommendations

The Council presents the following advice and recommendations based on the Council's extensive research and consultation over the 12-month period of the review, including:

- a comprehensive review of sentencing outcomes for child homicide and comparable offences over a 12 year period (2005–06 to 2016–17) and release of a statistical research report based on the findings;
- a cross-jurisdictional analysis of sentencing and offence frameworks for child homicide offences, with a focus on other Australian jurisdictions, New Zealand, the United Kingdom, and Canada;
- release of a public consultation paper (in May 2018) and call for submissions; in response to which, in addition to an earlier call for submissions, 39 submissions were received;
- the hosting of two community summits, one in Logan (16 July 2018) and the other in Townsville (19 July 2018), and six community information sessions — in Brisbane, Sunshine Coast, Cairns, Gold Coast, Mount Isa, and Longreach — as an opportunity for the general public to share their views on sentencing for child homicide offences and hear from experts in the field, including those providing support to family members of victims of child homicide;
- conducting 10 focus groups in six regions — Brisbane, the Sunshine Coast, Cairns, the Gold Coast, Mount Isa, and Longreach — using a random selection process with 103 general members of the community to gauge community awareness of murder and manslaughter and perceptions of 'appropriateness' of sentencing outcomes for these offences;
- meetings with key legal and victims' services stakeholders and others with specific expertise in the area of child homicide, including Subject Matter Expert (SME) and Victims of Crime (VOC) roundtables held in April and June, and again in August 2018, to discuss key issues relating to the review and reform options;
- consultation with state, interstate, national and international government and non-government organisations and research bodies and with victims of crime support and advocacy bodies;
- a detailed analysis of sentencing remarks for the offence of manslaughter committed against both child and adult victims to examine — at the micro level — the purposes and factors that sentencing judges treated as relevant for the purpose of sentencing, and the relative weight accorded to those factors.

The Council's Advice and Recommendations aim to: provide an evidence-based response to improve sentencing practices for child homicide; provide the ability to monitor the impacts of reforms recommended over time; and ensure family members of victims of child homicide receive the information and support they need throughout the criminal justice process.

Advice 1: Legislative sentencing purposes for child homicide

The current sentencing purposes as listed in section 9(1) of the *Penalties and Sentences Act* (Qld) are appropriate. Further statutory guidance on the application of these purposes to the sentencing of offenders for child homicide — such as to list specific purposes as the primary sentencing purposes — is not required to ensure children's vulnerability is reflected in sentencing or to achieve higher sentences.

Advice 2: Adequacy of penalties imposed on sentence for child homicide offences — manslaughter of a child under 12 years

Penalties imposed on sentence for manslaughter offences committed against children under 12 years — in particular, those offences involving the direct use of violence — do not adequately reflect the unique and significant vulnerabilities of child victims. Additional legislative guidance to respond to this issue is required (see Recommendation 1).

Advice 3: Impact of the serious violent offence scheme on sentencing

The Council is concerned that the operation of Part 9A of the *Penalties and Sentences Act 1992* (Qld) is exerting downward pressure on head sentences for child manslaughter in Queensland. A court is required, as a form of mandatory sentencing, to declare an offender convicted of a serious violent offence when imposing a sentence of 10 years or more for listed offences (including manslaughter). This unintended impact highlights the importance of fully considering all potential implications of reforms to sentencing law and practice.

To respond to these concerns, the Council suggests the Queensland Government consider initiating a review of the serious violent offence (SVO) scheme both in relation to its operation for child manslaughter and more generally. This review should identify how sentencing levels have been impacted by the introduction of the SVO scheme, and any reforms required to ensure any existing barriers to achieving higher head sentences in Queensland for child manslaughter and other offences listed in Schedule 1 of the Act are removed.

Advice 4: Operation of section 13A of the *Penalties and Sentences Act 1992* (Qld)

The Council notes stakeholder concern that sentences imposed under section 13A of the *Penalties and Sentences Act 1992* (Qld) ultimately undermine public confidence in the justice system. This is because the way this section operates does not allow the community access to all the information that informed the court in imposing the sentence — in particular, the assistance offered in the investigation and prosecution of co-offenders, and the sentence that would have been imposed without this assistance. Given the broader implications of any potential reforms, and the fact that such reforms are beyond the scope of these Terms of Reference, the Council suggests the Queensland Government consider identifying this as an area for future investigation to enable more detailed consideration to be given to this issue.

Recommendations

Recommendation 1: Introduction of new aggravating factor for child homicide offences

Section 9 of the *Penalties and Sentences Act 1992* (Qld) should be amended to include a requirement that, in sentencing an offender for an offence resulting in the death of a child under 12 years, courts must treat the defencelessness of the victim and their vulnerability as an aggravating factor.

Recommendation 2: Review of treatment of new aggravating factor for sentencing purposes

The Queensland Government should review the effectiveness of the proposed reforms to section 9 of the *Penalties and Sentences Act 1992* (Qld) post-commencement.

Recommendation 3: Queensland Police Service — Allocation of Family Liaison Officers and handover processes

3.1 The Queensland Police Service (QPS) should review and enhance its current practice of allocating a dedicated Family Liaison Officer supporting bereaved family members throughout the entirety of their contact with the criminal justice process, including any appeal processes, by providing information and facilitating care. As part of that review, consideration should be given to developing a guideline for appointed Family Liaison Officers on their roles and responsibilities.

3.2 The QPS should ensure that processes are in place to formalise appropriate handovers between allocated Family Liaison Officers where a change in staffing occurs whilst the case is still active.

Recommendation 4: Office of the Director of Public Prosecutions — communication with family members of victims of child homicide

The Office of the Director of Public Prosecutions (ODPP) should continue to review current communication practices, processes and training, as required (including the requirements of the Charter of Victims' Rights) to ensure regular and effective communication occurs with family members of victims of child homicide in all cases to keep them informed of key events (unless they have asked not to be kept informed) and to offer conferences prior to and following sentencing and appeal hearings to prepare families and enhance their understanding of the sentencing and appeal processes.

Recommendation 5: Director of Public Prosecution's Guidelines

The section of the ODPP's *Director's Guidelines* (as at 30 June 2017) dealing with 'Information for Victims' should be amended to reflect the wording of the Charter of Victims' Rights to provide that victims (including family members of victims of child homicide) are to be informed of each major decision (including the reasons for the decision) made about the prosecution of a person accused of committing an offence (unless they have asked not to be kept informed), rather than this information only being provided on request.

Recommendation 6: Information for courts about responding to needs of family members of victims of child homicide

The Department of Justice and Attorney-General, in consultation with the Heads of Jurisdiction, and with reference to work being led by the Judicial College of Victoria, should support the development and provision of practical information for courts about responding to the needs and interests of family members of victims of child homicide, including preferred approaches to acknowledging family members in the courtroom and referring to deceased victims.

Recommendation 7: Timeliness of and publication of sentencing remarks

The Department of Justice and Attorney-General, in consultation with the Heads of Jurisdiction, should consider strategies to increase the timeliness of providing sentencing remarks for child homicide matters heard in the Supreme Court of Queensland to the Supreme Court Library Queensland and their subsequent publication. Wherever reasonably possible, these should be made available and published the day the sentence is handed down, or early the following day.

Recommendation 8: Identification of child homicide offences for research and reporting purposes

The Queensland Government should consider ways to provide for child homicide offences being 'flagged' for the purposes of enabling ongoing monitoring and publication of information in support of enhancing understanding about these cases, including sentencing outcomes — for example, by:

- allowing these offences to be flagged as committed against a child for the purposes of being recorded in the Queensland-Wide Interlinked Courts (QWIC) database and other relevant databases; and/or
- enhancing current linkages between databases maintained by the Queensland Police Service, Court Services Queensland and Queensland Corrective Services to enable the age of the victim, relationship between the victim and offender, and the potential contribution of substance misuse, family breakdown and mental health to be more readily identified.

Chapter 1 — Introduction

On 26 October 2017, the Attorney-General and Minister for Justice, the Honourable Yvette D'Ath MP, issued Terms of Reference to the Sentencing Advisory Council (Council) asking it to review penalties imposed on sentences for criminal offences arising from the death of a child (child homicide offences). The impetus for this review was the Queensland Government's recognition of apparent community concern about sentencing for child homicide offences in Queensland and that sentences may not always meet with community expectations.

As the Council's work on the review has highlighted, child homicide offences occur in a diverse range of circumstances. A number of features of these cases make them particularly challenging to investigate and prosecute — namely, they usually occur in private with no or very few witnesses and, due to the physical vulnerability of children, it is often difficult to establish what injury or injuries were the substantial cause of the child's death, when these injuries occurred, and who was responsible for perpetrating them.

The same features of child homicide that make securing a successful prosecution in these cases so challenging also make them among the most challenging from a sentencing perspective.

The Council adopted an evidence-based approach to the review, drawing from a range of data sources and consultations to develop an informed view and to understand the perspectives of all involved in responding to these offences. This included broad consultation, including with family members directly affected by child homicide and members of the Queensland community.

1.1 Terms of Reference

The Attorney-General asked the Council to provide advice about whether sentencing practices for child homicide offences in Queensland were adequate or were in need of reform. The Terms of Reference asked the Council to consider, in particular:

- current penalties 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 was asked to have regard to relevant research and reports, examine the approach in other jurisdictions, and to consult with the community and key stakeholders — including but not limited to the judiciary, legal profession, victims of crime groups, child protection advocacy groups or any relevant government department or agencies.

The Terms of Reference are at Appendix 1. The Council was required to report to the Attorney-General by 31 October 2018.

1.2 The Council's approach to the Terms of Reference

1.2.1 Methodology

The Council conducted the review over five key stages (summarised in Figure 1 below).

Figure 1: Council's approach to review of sentencing for criminal offences arising from the death of a child

Stage 1 — Project initiation

Stage 1 involved establishing the governance framework to guide the Council's work. A project board was appointed to oversee the Terms of Reference to ensure all timeframes were met and quality standards achieved. The project board for this review comprised two Council members (Kathleen Payne and Dan Rogers) and the Secretariat Director to monitor the review. The Council also appointed two Council members as project assurance to the review (Warren Strange and Tracy Linford — the latter resigned from the Council in May 2018) to ensure the special interest needs of the community and victims groups were observed throughout the review.

Stage 2 — Preliminary research and consultation

On 26 October 2017, the Council released a call for preliminary submissions, which closed on 24 December 2017. The Council received 10 submissions from legal stakeholders, child protection advocacy groups, homicide support services, family members of victims of child homicide, and the public. Public submissions are available on the Council's website.

The Council also met with key stakeholders including victims of crime advocacy groups, legal professionals, death review bodies, researchers, and police. A list of submissions received and meetings held during the preliminary research and consultation stage is set out in Appendix 2.

In addition, all research and legal policy activities planned for the review commenced, including:

- undertaking a literature review to understand the social science literature of child homicide;
- preliminary analysis of administrative data and development of the methodology for research to be undertaken in stages 3 and 4 of the review;
- a cross-jurisdictional analysis of relevant legislation and a review of case law.

Research bodies and academics consulted are listed at Appendix 3.

Stage 3 — Development of consultation and research papers

Stage 3 focused on developing the key tools to assist the Council consult with the community and key stakeholders about their views on sentencing for child homicide offences. Stage 3 included:

- drafting of a public consultation paper;
- development of a statistical research report;
- development of a focus group research methodology to test community views on sentencing for child homicide, and securing of ethics approval for this research; and
- preparation for stage 4 consultation activities.

The Council also commenced consultation, including consulting with state, interstate, national and international government and non-government organisations and research bodies and with victims of crime support and advocacy bodies.

An associated research project undertaken through stages 1–4 was a detailed analysis of sentencing remarks for the offence of manslaughter committed against both child and adult victims. The primary purpose of this research was to examine — at the micro level — the purposes and factors that sentencing judges treated as relevant for the purpose of sentencing, and the relative weight accorded to those factors. A full description of the methodology and limitations of this research approach is at Appendix 3.

Stage 4: Consultation

The Council undertook consultation activities during stage 4 to invite community and stakeholder views about issues relevant to the Terms of Reference. They were as follows:

- Release of a public consultation paper, *Sentencing for Criminal Offences Arising from the Death of a Child,* on 17 May 2018. The paper provided an overview of the child homicide offences in Queensland, including sentencing outcomes for these offences from the past 12 years, the sentencing framework and process for child homicide offences, and the key challenges in sentencing these offences. The Council sought community and stakeholder feedback through seven key questions.
- A call for submissions on the release of the consultation paper inviting submissions via email or completion of an online form. Submissions were also invited from participants who attended the community summits. The Council received 29 submissions. Public submissions are available on the Council's website. A list of submissions received during the consultation stage is set out in Appendix 2.
- Release of a statistical research report, *Child Homicide Offences in Queensland: A Descriptive Analysis of Offences Finalised by Queensland Criminal Courts, 2005–06 to 2016–07*, on 19 July 2018. This report provided detailed statistical information about offence characteristics, offenders, victims, and sentencing outcomes associated with child homicide offences finalised by Queensland criminal courts over the period 1 July 2005 to 30 June 2017.
- Conduct of 10 focus groups in six regions — Brisbane, the Sunshine Coast, Cairns, the Gold Coast, Mount Isa, and Longreach — using a random selection process with 103 general members of the community to gauge community awareness of murder and manslaughter and perceptions of 'appropriateness' of sentencing outcomes for these offences. (A description of the research methodology and limitations of this approach is at Appendix 4.)
- Holding of two community summits, one in Logan (16 July 2018) and the other in Townsville (19 July 2018), as an opportunity for the general public to share their views on sentencing for child homicide offences. Attendees heard from keynote speakers and a panel of experts with knowledge of different aspects of the criminal justice system and process on the complexities of investigating, prosecuting, sentencing and reporting on these offences.
- Hosting of six community information sessions — in Brisbane, Sunshine Coast, Cairns, Gold Coast, Mount Isa, and Longreach — as an opportunity for community members to ask questions of the Council about the review and to provide input.
- Hosting of two meetings with the Subject Matter Expert (SME) and Victims of Crime (VOC) roundtable groups in August 2018 to discuss key issues relating to the review and reform options. SME and VOC roundtable membership is set out in Appendix 2.
- Meeting with individual agencies to discuss specific issues that arose during the consultation phase. A list of meetings held during the consultation stage is set out in Appendix 2.

Stage 5: Development of the final report

The final stage of the review was to draw together and analyse all strands of work undertaken in response to the Terms of Reference and to develop the final report. The report presents the Council's analysis and recommendations for reform, and details key findings and recommendations for consideration by the Attorney-General.

1.3 Scope and terminology

The terms 'child homicide' and 'child homicide offences' used throughout this report refer to the child death offences that are the subject of this review. The Council has defined 'child' to mean a person who is under the age of 18 years.[4]

The Council determined early in the review that the focus should be on sentencing for the criminal offences of murder and manslaughter, rather than other offences that might potentially involve the death of a child victim. For this reason, this report does not specifically examine sentencing outcomes or issues relating to the offences of dangerous driving causing death,[5] driving without due care and attention,[6] or unlawful striking causing death.[7]

The Council decided that, unlike many other crimes that result in the death of a child, most cases of driving-related death arise from motor vehicle accidents where the offender has no prior association with the victims and no knowledge 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 were not highlighted under the Terms of Reference, or by stakeholders or community members who made submissions, as warranting specific examination.

Cases concerning child homicide offenders where the Mental Health Court (MHC) found that the person was of unsound mind at the time of the offence were also excluded from this review. Those persons are not criminally responsible for their actions and, therefore, there are not sentencing decisions from these cases.

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 did not consider 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 excluded any case that was the subject of current investigation or before the courts to prevent current investigations or legal processes being prejudiced.

As required under the Terms of Reference, the review included 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 was not undertaken due to the unique legislative and penalty frameworks and sentencing approaches in each jurisdiction, which limit the value of these comparisons.

1.4 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 Secretariat worked with relevant agencies that hold information about child

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4 The definition of a child as an individual who is under the age of 18 is consistent with the definition of a 'child' under schedule 1 of the *Acts Interpretation Act 1954* (Qld) and with international instruments to which Australia is a signatory — see article 1, Convention on the Rights of the Child (adopted and opened for signature, ratification and accession by the United Nations General Assembly resolution 44/25 of 20 November 1989, entered into force 2 September 1990, in accordance with article 49).

5 *Criminal Code Act 1899* (Qld) sch 1 ('*Criminal Code*' (Qld) s 328A(4).

6 *Transport Operations (Road Use Management) Act 1995* (Qld) s 83.

7 *Criminal Code* (Qld) s 314A.

homicide offences and offending over the period 2005–06 to 2016–17 to construct a dataset that integrated all relevant data into a single resource.

To provide a national perspective, the Council secured data from the National Homicide Monitoring Project (NHMP) 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. NHMP data used in this report are set out in Appendix 5.

1.5 Report structure

Part 1 Setting the scene

- Chapter 2 provides a comprehensive review of the research literature relating to child homicide and contextualises child homicide offending in Queensland within this broader literature.
- Chapter 3 outlines the legal framework relating to child homicide offences.

Part 2 Sentencing for child homicide

- Chapter 4 describes the sentencing process and framework for sentencing these offences.
- Chapter 5 sets out the sentencing practices for homicide in Queensland.
- Chapter 6 compares sentencing outcomes for manslaughter offences with those of other serious offences committed against children.
- Chapter 7 considers how Queensland judges assess seriousness in sentencing for child homicide offences.
- Chapter 8 turns to look at the issue of public opinion and sentencing for child homicide, looking particularly at the findings of the focus group research.
- Chapter 9 presents the Council's assessment of the appropriateness of current sentencing for manslaughter of a child.

Part 3 Reform and other matters

- Chapter 10 explores the experiences of family members who have lost a child to a homicide offence.
- Chapter 11 discusses how communication with the broader community about sentencing outcomes for these offences can be improved.
- Chapter 12 considers other areas of reform or future investigation to improve system responses to child homicide.

Chapter 2 — The nature and extent of child homicide

2.1 Introduction

This chapter examines national and international research about child homicide and considers its implications for the Council's Terms of Reference. The chapter begins by examining how earlier research into child homicide has been conducted and for what purpose. Building on this introductory discussion, research findings about child homicide are specifically examined. This chapter also provides a brief overview of child homicide offences, offenders and victims in Queensland from 2005–06 to 2016–17.

An overview of the sentencing outcomes for child homicide offences in Queensland over the 12-year period is in Chapter 5.

2.2 National and international research findings

The Council reviewed research, agency reports and academic publications on child homicide with a particular focus on:

- what research into child homicide existed;
- how the studies were conducted; and
- their findings and how well those findings translate to Queensland.

While the review of research formed an important part of assessing what is currently known about child homicide, it also served to inform the Council's approach for its own empirical work, assisting to develop the associated research design and drive targeted statistical analyses. More detailed research resulting from the Council's preliminary empirical research — as well as the associated technical aspects of the data used and analyses conducted — can be located in the complementary research report, *Child Homicide in Queensland: A Descriptive Analysis of Offences Finalised by Queensland Criminal Courts, 2005–06 to 2016–17*.[8]

The Council used a 'snowball'[9] approach combined with key search criteria for its literature review, initially using major Australian publications and work produced by the Australian Institute of Criminology's National Homicide Monitoring Program (NHMP). While the Council acknowledges that such an approach is not as comprehensive as a systematic review, it delivered an appreciation of research available within this discrete area and informed the Council's overall research effort in response to the Terms of Reference, while also accommodating the Council's resource constraints.

2.3 Child homicide research

The Council's literature review revealed a growing body of research evidence about child homicide originating from various jurisdictions. Importantly, the increase in quality criminal justice data over extended periods and the emergence of various jurisdictional homicide monitoring programs have improved research into homicide generally as well as child homicide as a discrete category. As with most crime-related research, it is difficult to directly translate research findings for child homicide from one jurisdiction to another due to differences in research design, targeted areas of focus, and jurisdictional and research definitions. In this respect, general limitations of child homicide and filicide research include:

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8 Available at: <https://www.sentencingcouncil.qld.gov.au/__data/assets/pdf_file/0006/576510/sentencing-for-child-homicide-offences-research-report-july-2018.pdf>.

9 Snowball sampling is a technique for gathering research through the identification of an initial report which is used to provide the references for other relevant research.

- the differences in scope of individual research studies — for example, some studies may focus on particular perpetrators or victim groups over various timeframes in different, individual jurisdictions;[10]
- categorisation and definitional differences — for example, there is no standard definition of filicide (some studies exclude 'infanticide'), nor is there a broadly accepted common age group that defines a 'child' victim;[11]
- small sample sizes — in all examined jurisdictions, child homicide (and filicide) occurs less frequently than adult homicide;[12]
- varied research designs and data sources,[13] including a reliance on secondary data sources such as police records and coronial findings, 'which offer limited contextualised information'.[14]

However, irrespective of differences, the body of research evidence provides a critical insight into child homicide and, importantly, how it compares to trends associated with homicide involving adult victims. The utility of national and international findings was also confirmed by the degree of consistency in key findings across studies and jurisdictions, despite differences in approaches and policy/legislative frameworks.

Globally, the Council's research review reveals that while children are less likely to become victims of homicide than adults, '[h]omicide is a leading cause of childhood death in the developed world'.[15] In addition, patterns identifiable in child homicide persist irrespective of jurisdiction, including research that indicates children under one year record the highest risk of homicide across all age categories.[16] Research also clearly communicates a universal denunciation of child homicide, and also the difficulty many people experience with trying to understand the unlawful killing of a child. The reviewed research evidence established that child homicide is diverse and complex, posing significant challenges for research, as well as any formal preventative or criminal justice responses.

Within the literature, the predominance of filicide studies as a sub-group of child homicide research is apparent. *Filicide* refers to the unlawful killing of a child by a parent or parent equivalent,[17] which 'appears to be a global phenomenon'.[18] Filicide is the area of child homicide that provides the clearest trends in terms of who commits the offence and the causes of death. In addition to the term filicide, the Council's review of research revealed a number of child homicide categories typically classified according to definable child victims and/or relationships between offenders and victims, including:

- *neonaticide*: the unlawful killing of a child within the first day of birth;
- *infanticide*: the unlawful killing of a child over one day old but before 12 months of age;
- *sibilicide*: the unlawful killing of a sibling by another sibling;
- *familicide*: the unlawful killing of a child and the other parent by one parent;

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10 Domestic Violence Resource Centre Victoria, '*Just Say Goodbye': Parents Who Kill their Children in the Context of Separation* (Discussion Paper No 8, 2012) 6.

11 Ibid; Myrna Dawson, 'Canadian Trends in Filicide by Gender of the Accused, 1961–2011' (2015) 47 *Child Abuse and Neglect* 162.

12 Dominique Bourget, Jennifer Grace and Laurie Whitehurst, 'A Review of Maternal and Paternal Filicide' (2007) 35(1) *The Journal of the American Academy of Psychiatry and Law* 74.

13 Domestic Violence Resource Centre Victoria, above n 10, 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* (8); Dawson, above n 11, 162.

14 Eriksson et al, above n 13.

15 Sandra M Flynn, Jenny L Shaw and Kathryn M Abel, 'Filicide: Mental Illness in Those Who Kill Their Children' (2013) 8 (4) *PLOS ONE* e58981.

16 Christine Alder and Ken Polk, *Child Victims of Homicide* (Cambridge University Press, 2001) ch 7.

17 Crime and Misconduct Commission, 'Vulnerable Victims: Child Homicide by Parents' (Research and Issues No 10, 2013) 2.

18 Domestic Violence Resource Centre Victoria, above n 10, 14, citing Adinkrah (2003).

- *maternal filicide*: the unlawful killing of a child by the mother or a mother equivalent;
- *paternal filicide*: the unlawful killing of a child by the father or a father equivalent.[19]

The majority of child homicide research has focused on filicide, in particular maternal filicide, and targeted the motives and/or pathological explanations for such offences. More recently, however, research efforts have shifted from pursuing motives to examining the situational and contextual factors correlated with child homicide in an effort to identify plausible points of intervention and/or early warning indicators. This shift followed recognition of the need to redirect research efforts to inform practice both in terms of prevention and criminal justice responses.

More specifically, the Council's review revealed a number of catalysts urging a shift in focus, namely:

- incompatibility and overlap between categories or typologies[20] based on differing perspectives for analysing motive/cause and/or other characteristics such as perpetrator gender or actions;[21]
- difficulties associated with confirming motive, given the nature of data sources,[22] variability in an offender's capacity to articulate one motive or a combination of motives,[23] and the incidence of suicide among offenders;[24]
- a focus on the psychiatric status of offenders neglects the social context of filicide;[25]
- a lack of systematic comparisons across maternal and paternal filicide cases;[26] and
- the limited research into cases that occur in the context of parental separation and family violence.[27]

Collectively, research is increasingly acknowledging the importance of examining situational and contextual factors in order to inform effective intervention and prevention strategies. At a practical level, this focus has culminated in an increase in research examining situations and periods of risk associated with child homicide cases, for example:

- family separation;
- the prevalence of prior family/intimate partner violence; and
- multidimensional indicators of social, familial and structural marginalisation.[28]

Within the Australian context, homicide research — including more recently child homicide — has evolved as a result of the NHMP. This national dataset has collected homicide data from all Australian policing jurisdictions since July 1989 and incorporates a range of situational, offender, victim and offence variables. Though the NHMP acknowledges limitations — such as a reliance on police records[29] — the longitudinal aspect of the dataset has increased its potency for examining patterns and trends over time in homicide offences including child homicide and filicide. The Australian Institute of Criminology uses

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19 Crime and Misconduct Commission, above n 17, 2.

20 For further information about typologies/classifications of filicide refer to Bourget et al (2007); Liem and Koenraadt (2008); Debowska et al (2015); and Eriksson et al, above n 13.

21 Bourget, Grace and Whitehurst, above n 12, 74–75.

22 Eriksson et al, above n 13; Alder and Polk, above n 16, 18.

23 Peter Sidebotham, 'Rethinking Filicide' (2013) 22(5) *Child Abuse Review* 305.

24 Domestic Violence Resource Centre Victoria, above n 10, 19.

25 Eriksson et al, above n 13, citing Wilczynski (1997).

26 Dawson, n 11, 163; Domestic Violence Resource Centre Victoria, above n 10, 6, citing Liem and Koenraadt (2008).

27 Domestic Violence Resource Centre Victoria, above n 10, 7, 88.

28 See for example Domestic Violence Resource Centre Victoria, above n 10; Jennifer Martin and Rhonda Pritchard, *Learning from Tragedy: Homicide within Families in New Zealand 2002–2006* (New Zealand Ministry of Social Development, 2010). 47, 51–52.

29 For a discussion of the NHMP data collection see Domestic Violence Resource Centre Victoria, above n 10, 88–89.

this dataset to report on homicide data[30] and specific topics such as homicide in the context of domestic violence.[31]

Canada's annual national Homicide Survey has also contributed to jurisdictional and international knowledge about homicide. This survey has collected data on homicide incidents, victims and perpetrators for nearly 60 years, including information on homicides and filicides of children aged under 18 years.[32]

The following sections provide detail about specific findings extracted from national and international research on child homicide. Interestingly, the following sections confirm that child homicide — as a defined category of homicide — is characterised by clear and persistent patterns that are relatively stable over time and location, but is also complex, diverse and associated with a broad range of circumstances.

2.4 Child homicide offences

This section focuses attention on what existing research reveals about child homicide as an offence. It considers the extent of child homicide as a proportion of homicide, of the population, and of known causes of death among children. In addition to considering the extent of child homicide, this section begins to examine the nature of this offence category and the issues such crimes pose for criminal justice systems.

2.4.1 Extent of child homicide

International research reveals that throughout the Western world, the rates of child homicide and filicide have declined over the past two centuries.[33] While estimates of child homicide vary across jurisdictions, one clear pattern emerges — children as a social cohort display a definable, persistent and 'significant risk of homicide'.[34]

Australia records a relatively high incidence compared to several other nations.[35] Recent Australian research revealed that approximately 10 per cent of homicides in Australia involve child victims.[36] NHMP data show that in the nine-year period 1 July 2005 to 30 June 2014, police recorded 61 child homicide incidents for Queensland — representing 13.7 per cent of all police-recorded homicides in Queensland over the period.[37] The Queensland child homicide incidents represent a quarter of all such incidents in Australia.[38] According to the same NHMP data, Queensland recorded the second-highest number of child homicide and filicide incidents within Australia, behind New South Wales with 79 child homicides — including 50 filicides.[39] Of the Queensland child homicide incidents over the same period, 43 were filicides, comprising just over a quarter of the national filicide total.[40] Of the Australian states, on a per capita basis over the nine-year period, Queensland recorded the second-highest rate of child homicide and filicide incidents — slightly below that for South Australia.[41]

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30 See, for example, Willow Bryant and Samantha Bricknell, *Homicide in Australia 2012–13 to 2013–14: National Homicide Monitoring Program Report* (Statistical Report 02, Australian Institute of Criminology, 2017).

31 See, for example, Tracey Cussen and Willow Bryant, 'Domestic/Family Homicide in Australia' (Research in Practice Number 38, Australian Institute of Criminology, 2015).

32 Dawson, above n 11, 165.

33 Ibid 162 citing Sturup and Granath (2014).

34 Alder and Polk, above n 16, 118.

35 Monash University Filicide Project, Submission No 0167.001.0001 to Royal Commission on Family Violence (Victoria), May 2015, 4, citing Pritchard et al (2013).

36 Domestic Violence Resource Centre Victoria, above n 10, 6.

37 Appendix 5, NHMP Tables 1 and 2.

38 Ibid NHMP Table 1.

39 Ibid NHMP Tables 3 and 4.

40 Ibid NHMP Table 3.

41 Calculated using data from NHMP Tables 3 and 4 and Australian Bureau of Statistics 3101.0 Australian Demographic Statistics 2017.

2.4.2 Nature of child homicide

International research confirms consistencies in identifiable patterns, particularly for filicide incidents.[42] However, the same body of research evidence also confirms that 'the causes and context of filicide are complex and not amenable to simple explanations'.[43] In addition, while clear and consistent patterns emerge:

> [f]ilicide is not a uniform social problem. Rather it 'encompasses and overlaps with a heterogeneity of circumstances, characteristics and motives that result in fatal harm to children'.[44]

The majority of child homicides occur within the child's home,[45] confirmed by recent national homicide data that show the child's home as the primary offence location for child homicide cases[46] with filicides even more likely to occur in the child's home.[47] 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 are, of course, explained by very young children typically spending more time at home in the care of their parents, while teenage children are more likely to spend time in public places socialising with friends.[48]

An additional defining aspect is the gendered nature of child homicide.[49] Males account for the majority of homicide and child homicide offenders;[50] however, within the child homicide category, women assume a higher proportion of offenders than they do for any other category of homicide.[51] The proportion of female offenders increases when the subgroup of filicide is considered.[52]

2.4.3 Community attitudes toward child homicide

Gauging community attitudes toward child homicide was an important yet challenging aspect of the Council's broader review. As with collective knowledge about child homicide offences, the extent of research into community attitudes towards homicide is limited yet growing, particularly within the Australian context. For example, building on previous work examining 'perceptions of crime seriousness',[53] the Queensland Police Service (QPS), in collaboration with Griffith University's Griffith Criminology Institute (GCI), commenced work on the Queensland Crime Harm Index (QCHI) in 2016.[54] This process, which required Queenslanders to rank crimes according to their perceptions of the associated harm for victims, families and the community, used a representative community sample to assess perceptions of harm, as well as comparable surveys of police as a proxy measure of official views. Inclusion of police views recognised that, unlike some international jurisdictions, Queensland's lack of sentencing guidelines inhibits other 'official views on crime harm'.[55] The resulting, evidence-informed index contributes to our understanding of community attitudes to crime and associated harm. The joint QPS–GCI collaboration reveals that crimes against children, murder, and crime within the family context are highly ranked. Specifically, the QCHI identifies that child sexual abuse, murder, child physical abuse

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42 Domestic Violence Resource Centre Victoria, above n 10, 14.

43 Thea Brown and Danielle Tyson 'Filicide: Recasting Research and Intervention' (2014) 23 *Child Abuse Review* 75, 77.

44 Ibid, citing Sidebotham (2013).

45 Cussen and Bryant, above n 31, 3–4; Alder and Polk, above n 16, 8, 116, citing Silverman and Kennedy (1993).

46 Appendix 5, NHMP Table 5.

47 Appendix 5, NHMP Table 6.

48 Alder and Polk, above n 16, Ch 7.

49 See for example Dawson, above n 11, 163.

50 Alder and Polk, above n 16, 14.

51 Dawson, above n 13, 163.

52 Domestic Violence Resource Centre Victoria, above n 10, 16.

53 Janet Ransley et al, 'Developing and Applying a Queensland Crime Harm Index – Implications for Policing Serious and Organised Crime' in Russell Smith (editor), *Organised Crime Research in Australia 2018* (Australian Institute of Criminology Research Reports 10 Canberra) 106.

54 Ibid 110–11.

55 Ibid 110.

and domestic violence assume four of the top five harms identified by all Queenslanders, with rape occupying the remaining ranking.[56]

Additional research is also emerging about media portrayals of homicide. For example, recent Australian research, recognising that '[n]ews is a social construction' capable of shaping community perceptions of crime and safety and influencing policy and legislative decision-making, examined homicide reporting in the print media.[57] The 2017 study compared print newspaper reports on homicide over a five-year period against official NHMP data and confirmed distortions between facts as represented by the data and selective reporting in commercial newspapers. Notably, this research revealed differences between facts and reporting on certain homicide victims and situational aspects, yet accuracy in reporting on homicide offenders. The study suggests that biased depictions of homicide stem from explicit industry decisions about '*newsworthiness*' and the '*ideal victim*'.[58] In particular, this study echoed comparable international research, revealing that incidents involving young homicide victims aged 0–9 years — and cases associated with gunshot wounds and/or multiple victims and/or an offender classification of '*stranger*' — were more likely to be reported than other homicide incidents, despite these cases being relatively rare.[59] Conversely, the study found under-reporting of more common homicide offenders and victims. While the Council's empirical work reveals that electronic media outlets retain a stronger influence (refer to Chapter 8), the study's recognition that '[w]hat the public conceives to be true about crime is strongly influenced by information provided by the media'[60] represents an important consideration, especially given the requirement for the Council to consider community education about sentencing. This research is also directly relevant to the Council's work, as the research indicated that reporting does not always reflect reality about key victim and situational characteristics such as age, victim–offender relationship, and mode of death.

Another recent Australian study examining the reporting of several high-profile filicide cases revealed that media commentary typically describes such cases as 'inexplicable'.[61] In addition, this study indicated that attempts to explain filicide result in 'oversimplification and cultural stereotyping', including common stereotypes of both maternal and paternal perpetrators or suspects, which includes the 'cultural assumption that filicide (is) a "female" crime'.[62]

2.5 Child homicide victims

The following information has been distilled from available research, reinforcing that clear patterns exist for the child victims of homicide. These patterns persist irrespective of jurisdiction or the study being examined. NHMP data reveal that 11.6 per cent of homicide victims over the nine-year period to 30 June 2014 were children.[63] While, overall, adults are more likely to become victims of homicide, 'when death occurs in children, it is five times more likely to be due to homicide than is the case with a death in the adult population'.[64]

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56 Email from Strategic Policy Branch, Policy and Performance, Queensland Police Service, to Marni Manning, Manager – Research and Statistics, Queensland Sentencing Advisory Council, 26 April 2018.

57 Emily Waters, Christine Bond and Li Eriksson 'Examining the Accuracy of Print Media Representations of Homicide In Australia' (2017) 29(2) *Current Issues in Criminal Justice* 137–139.

58 Ibid 141, 150.

59 Ibid 147.

60 Ibid 149, citing Chermak and Chapman (2007).

61 Janine Little and Danielle Tyson 'Filicide in Australian Media and Culture' (2017) *Oxford Research Encyclopedia of Criminology and Criminal Justice*, also citing Domestic Violence Resource Centre Victoria (2012).

62 Ibid, also citing Domestic Violence Resource Centre Victoria (2012).

63 Calculated using data from Appendix 5, NHMP Tables 8 and 9.

64 Crime and Misconduct Commission, above n 17, 2.

2.5.1 Age of child homicide victims

NHMP data reveal that almost one-quarter of child homicide victims in Australia are aged under one year.[65] Other research also identifies a child is at greatest risk of homicide in their first year of life,[66] with risk significantly decreasing overall as a child matures. The school-age period of 5–14 years reflects the lowest homicide risk level across all age groups.[67] Ageing, research suggests, represents a 'protective factor but not an absolute one'.[68] For example, research suggests that as children age, they remain vulnerable to homicide, particularly when they reside in stepfamily environments.[69]

As a child ages into the later teenage years, the risk of homicide increases,[70] compared to the school-age years. Research suggests changes in risk over the child's life results from shifts in a child's everyday activities. For example, as a child matures their capacity to socialise outside the family home and independently with peers increases.[71] These age-related homicide risks are generally reflective of broader age-related child abuse trends.[72]

2.5.2 Gender of child homicide victims

While national and international studies examine different aspects of child homicide and/or filicide, most research reveals relatively equal numbers of male and female victims.[73] It is worth noting, however, that some studies report higher rates of male victims, although gender differences are not as pronounced as for adult homicide victims.[74] Australian child homicide data reveal males are more likely to be a victim of child homicide than females,[75] with a similar pattern for filicide victims.[76] The same national data also document gender differences observed within the child homicide category are less than those observed within the aggregate homicide category, which records two-thirds male versus one-third female victims.[77] The international research on filicide reveals male and female children are relatively equal victims within this sub-set of child homicide, although this finding is not always consistent across research.[78] However, drawing any conclusions from the research findings that a child's gender may affect homicide risk would require closer examination of familial composition, in particular the gender breakdown of children within the family.[79]

2.5.3 Aboriginal and Torres Strait Islander status of child homicide victims

Australian data from 2005–06 to 2013–14 reveals that 11.8 per cent of all child homicide victims identified as Aboriginal and/or Torres Strait Islander (a total of 33 victims). More of these victims[80] are

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65 Appendix 5, NHMP Table 9.

66 Bourget, Grace and Whitehurst, above n 12, 75; Alder and Polk, above n 16, 118.

67 Appendix 5, NHMP Table 9. See also Alder and Polk, above n 16, 118–123.

68 Thea Brown, Danielle Tyson and Paula Fernandez Arias, 'Filicide and Parental Separation and Divorce' (2014) 23 *Child Abuse Review* 79, 82.

69 Crime and Misconduct Commission, above n 17, 3.

70 Appendix 5, NHMP Table 9; Alder and Polk, above n 16, 118.

71 Alder and Polk, above n 16, ch 7.

72 Brown, Tyson and Arias, above n 68, citing Australian Institute of Health and Welfare (2012); Australian Institute of Family Studies, 'Child Deaths from Abuse and Neglect' (Child Family Community Australia Resource Sheet – 2017) 2 <https://aifs.gov.au/cfca/publications/child-deaths-abuse-and-neglect>.

73 Domestic Violence Resource Centre Victoria, above n 10, 17–18, citing Mouzos and Rushforth (2003); Dawson, above n 11, 163, citing several studies.

74 Domestic Violence Resource Centre Victoria, above n 10, 17; Brown, Tyson and Arias, above n 68; Dawson, above n 11, 163, citing several studies.

75 Appendix 5, NHMP Table 7.

76 Ibid NHMP Table 10.

77 Ibid NHMP Table 8.

78 See for example Bourget, Grace and Whitehurst, above n 12, 75–76.

79 Domestic Violence Resource Centre Victoria, above n 10, 17 – footnote 27.

80 Gender is 'not stated' for one victim.

boys (20 boys) than girls (12 girls), reflecting the pattern for child homicides in Australia noted above.[81] Fifteen of the boys and seven of the girls were victims of filicide,[82] a finding not consistent with other Australian or international filicide research (again, the Australian data involve a small sample size). Additional Australian research indicates that over the period 1997–2008, 24 child homicide incidents involved Aboriginal and/or Torres Strait Islander children.[83] In a New Zealand review examining homicides within the family over the period 2002–2006, Maori children, who comprised about 25 per cent of New Zealand's child population, accounted for 50 per cent of child homicide victims;[84] the over-representation of New Zealand's Maori population in child homicide was also noted by earlier research.[85]

2.5.4 History of child abuse

A Victorian filicide study identified a surprisingly 'low incidence' of victims had suffered or were likely to have suffered child abuse prior to their deaths.[86] In contrast, *child punishment* is recorded as a precipitating factor for just under half of the fatal assaults examined by a major New Zealand study, although both studies involve relatively small sample sizes.[87] UK research also reports that evidence of domestic violence was present in a majority of child homicide cases involving neglect or abuse.[88]

Other research notes that in maternal filicide cases about half of fatally abused children had previously been victims of abuse;[89] however, in paternal filicide cases, a history of abuse of the victim is more prevalent.[90] Additional research specifically comparing maternal and paternal filicide acknowledges that:

> Previous family violence is often a cofactor in cases of fatal abuse and in other paternal filicides. Perpetrators are likely to have a personal history of abuse in childhood, particularly (those perpetrators of) paternal filicides, involving infants under one year of age.[91]

Within the category of *fatal abuse* paternal filicide, a history of violence within the family — including against the mother — is more common.[92] In addition, research into f*atal abuse* maternal filicide reveals intra-familial violence targeting the female perpetrator of filicide was also evident, reinforcing the well-documented complex interplay between intra-familial violence and incidents of child homicide.[93] While these studies provide important qualitative insights into the situational and contextual aspects of child homicide cases, associated research also recognises the *hidden* aspect of child abuse as this crime remains under-reported. Collectively, child homicide research extends existing warnings about the current and future impacts of exposing children to violence.[94]

2.5.5 Child protection history

While there is limited research in this area, previous contact with child protection services is associated with child deaths in Australia, and there is often an inter-generational family history of such contact.[95] Collectively, the body of research has established links between child abuse, domestic violence and

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81 Appendix 5, NHMP Table 11.

82 Ibid, NHMP Table 12.

83 Domestic Violence Resource Centre Victoria, above n 10, 18.

84 Martin and Pritchard, above n 28, 46.

85 Ibid 2, 55.

86 Brown, Tyson and Arias, above n 68, 85.

87 Martin and Pritchard, above n 28, 52.

88 Domestic Violence Resource Centre Victoria, above n 10, 24.

89 Crime and Misconduct Commission, above n 17, 6, citing Bourget et al (2007).

90 Ibid, citing Cavanagh, Dobash and Dobash (2007).

91 Bourget, Grace and Whitehurst, above n 12, 78, citing several studies.

92 Domestic Violence Resource Centre Victoria, above n 10, 23–24.

93 Ibid, citing Oberman and Meyer (2008).

94 Domestic Violence Resource Centre Victoria, above n 10; Eriksson et al, above n 13, 19.

95 Australian Institute of Family Studies, above n 72, 9.

economic and social stressors.[96] Systematic reviews also reveal that families in which child homicide occur have had prior contact with child protection services.[97] Other Australian research has noted, '[m]any fatal abuse cases involve a history of abusive behaviour towards the child and have therefore come to the attention of the child protection system before the death.'[98]

An analysis by the Ombudsman of New South Wales identified children with child protection histories had a mortality rate 1.4 times higher than those without.[99] The mortality rate was far higher when the death was due to 'external (unnatural) causes' (2.8 times the mortality rate), especially assault (6.3 times).[100] These findings should not, however, be interpreted as implying that involvement with child protection services precipitates homicide.

2.5.6 Offender–victim relationship and age of child victim

Research confirms clear age-specific patterns in the offender–victim relationship, noting that as a child develops, the potential for a family member to be the perpetrator of the homicide significantly reduces.[101] As noted earlier, age-related patterns reflect shifts in a child's routine activities as they develop and mature, including increased independence from the home. Collectively, research emphasises both patterns, and diversity and complexity associated with this category of homicide.[102]

For filicide, research confirms that biological parents are the most common perpetrators.[103] New Zealand research noted that '[c]hildren in their first year of life were most likely to be killed by a natural parent, with the mother being the most likely perpetrator in the first four weeks of life and the father for the 1–11 months age group.'[104] When non-biological children are the victims of filicide, stepfathers are overwhelmingly the main perpetrators.[105] Some studies confirm the dominance of mothers in filicide, while other research reveals a greater role of fathers as opposed to mothers.[106] While inconsistencies between research findings may in part be linked to definitional differences, it is apparent that women — in particular, mothers — assume a greater role in child homicide and filicide than in any other type of homicide.[107]

Filicide research has also found that victim age varies by offender gender, a situation hypothesised as being linked to parental roles and responsibilities.[108] Mothers are more commonly filicide perpetrators of younger children, including homicide of newborn children up to one-day-old (neonaticide);[109] however, fathers are the more prevalent perpetrators for older children, with the difference between mothers and fathers increasing as a child's age increases.[110] Extending comparisons of parental status,

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96 Domestic Violence Resource Centre Victoria, above n 10, 22, 30-32; Martin and Pritchard, above n 28, 51–54, 71–72.

97 Domestic Violence Resource Centre Victoria, above n 10, 23.

98 Ibid.

99 Ombudsman New South Wales, *Report of Reviewable Deaths in 2014 and 2015, Volume 1: Child Deaths* (2017) 8.

100 Ibid; NSW Child Death Review Team, Ombudsman New South Wales, *Causes of Death of Children with a Child Protection History 2002–2011* (2014) 3.

101 Alder and Polk, above n 16, 117.

102 Ibid 64–67.

103 Dawson, above n 11, 167.

104 Martin and Pritchard, above n 28, 49.

105 Dawson, above n 11, 167–168; Crime and Misconduct Commission, above n 17, 3; Brown, Tyson and Arias, above n 68, 82–83; Eriksson et al, above n 13, 19.

106 Domestic Violence Resource Centre Victoria, above n 10, 16–17.

107 Ibid 16–17; Alder and Polk, above n 16, 3; Martin and Pritchard, above n 28, 49.

108 Dawson, above n 11, 163.

109 Domestic Violence Resource Centre Victoria, above n 10, 17; see also Alder and Polk, above n 16, Ch 3, 46; Crime and Misconduct Commission, above n 17, 3.

110 Dawson, above n 11, 163.

research has found that, while the majority of filicidal parents are in legal or common-law unions,[111] single mothers are more 'at risk of perpetrating filicide than single fathers'.[112]

National homicide data, in particular the national filicide data, provide a further insight into offender–victim relationships.[113] While by definition perpetrators of filicide are parents or parent equivalents, the primary offenders are custodial mothers, followed by custodial fathers and a similar proportion of stepfathers, then non-custodial fathers. Non-custodial mothers and stepmothers record substantially lower or non-existent roles in filicide.[114]

2.6 Child homicide offenders

National data recorded 2,646 homicide offenders over the nine-year period to 30 June 2014. Of these, one-in-ten offenders were associated with child homicide offences.[115] Just under two-thirds of the child homicide offenders were classified as filicide offenders.[116]

The preceding section provided an insight into research findings about child homicide victims. A key victim-focused message from the research relates to clear patterns in victim–offender relationships — namely, that intra-familial perpetrators, particularly parents or parent equivalents, reduce as a child ages. For children in their mid-to-late teenage years, offender profiles reflect adult homicide patterns more broadly. This trend has remained relatively stable over time.

This section explores research about offenders of child homicide. Traditionally, research evidence about child homicide perpetrators has focused on offender characteristics at the time of the offence as opposed to examining their backgrounds and/or the precipitating factors — although contextually and situationally focused research is increasing.[117] For example, the prevalence of domestic violence, mental health conditions, substance misuse, and family separation is increasingly acknowledged in more recent studies.[118] Notably, research about offenders reveals patterns within — yet differences across — offender types. Areas of difference relate to offender motivations, modes of homicide, and victim group.[119]

2.6.1 Age of homicide offenders

In Australia, most child homicide offences are committed by adults aged between 18 and 49 years, with substantially lower proportions committed by children and those over 50.[120] This pattern reflects trends evident for homicide more generally.[121] The higher representation of offenders in the 18–49 year age bracket in national homicide and child homicide cases is more pronounced within the filicide subgroup,[122] most likely because this is the most common age range during which parents are involved with the care of their children.

Within the offender category *parent*, most research identifies that female perpetrators are typically younger than male perpetrators.[123] Filicide longitudinal research undertaken in Canada revealed

111 Ibid 167.

112 Ibid 163.

113 Appendix 5, NHMP Table 13.

114 Ibid NHMP Table 13.

115 Ibid NHMP Tables 14 and 15.

116 Ibid NHMP Table 16.

117 Brown, Tyson and Arias, above n 68, 79– 81.

118 Brown, Tyson and Arias, above n 68; Eriksson et al, above n 13; Alder and Polk, above n 16.

119 Dawson, above n 11, 163–165.

120 Appendix 5, NHMP Table 17.

121 Ibid NHMP Table 18.

122 Ibid NHMP Table 19.

123 Marieke Liem and Frans Koenraadt, 'Filicide: A Comparative Study of Maternal versus Paternal Child Homicide' (2008) *Criminal Behaviour and Mental Health* (2008) 18, 170.

significant differences in the age profile of female and male perpetrators, noting 'younger mothers and older fathers appeared to be the most common filicidal perpetrators in Canada'.[124]

2.6.2 Gender of homicide offenders

An offender's gender is explained in the research 'as a significant category in and of itself when explaining filicides'.[125] National data reveal the majority of all homicide offenders in Australia are male.[126] Child homicide perpetrators are also predominantly male,[127] but female filicide perpetrators comprise just under half of all offenders within the filicide category.[128] The high proportion of female filicide offenders contrasts sharply with substantially lower proportions within the aggregate homicide category.[129] These data support broader national and international research that confirms 'the proportion of female and male perpetrators of filicide is much closer than in any other type of homicide'.[130] Research further explores this greater involvement of women in child homicide, noting 'when women do kill, the victim is often their child',[131] while male perpetrators have a greater involvement in homicides of non-biological children.[132] Research suggests that the greater involvement of women — particularly mothers — in child homicide challenges established social constructs of motherhood/parenthood and femininity, and may contribute to the high levels of community concern.[133]

Female perpetrators of child homicide are more likely to kill younger victims, but for victims aged in the mid-teens there is a marked reduction in the involvement of women as perpetrators.[134] For filicide victims in later childhood, fathers are more often the perpetrator.[135] Canadian filicide research explored potential explanations for identifiable differences in offender gender noting:

> traditional parenting cycles for men and women have been examined to aid in understanding research that has shown the age of filicide victims varies by offender gender. … As children age, fathers may begin to spend more time with their children, becoming more involved in their care and discipline. … Although parenting traditions have changed over time, this gender patterning in childcare largely remains true today in most countries, including Canada.[136]

Research indicates parental gender also affects the type and extent of stressors experienced before the fatal event.[137] For mothers, identified stress factors include 'being the primary caregiver for children, unemployment or financial problems, being in an ongoing abusive intimate relationship and having limited social support'.[138] For fathers, identified stressors include 'financial difficulties, pending or actual separation, and a partner having an affair'.[139]

Notably, Canadian longitudinal research detected an 'increasing gender gap' in filicide over time, while broader gender-related trends in homicide remain stable.[140] Specifically, men are becoming increasingly prevalent as filicide offenders. A number of explanations are proposed to explain this emerging trend,

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124 Dawson, above n 11, 165.

125 Ibid 164.

126 Appendix 5, NHMP Table 15.

127 Ibid NHMP Table 14.

128 Ibid NHMP Table 16.

129 Ibid NHMP Table 15.

130 Domestic Violence Resource Centre Victoria, above n 10, 16. See also Bourget, Grace and Whitehurst, above n 12, 75; Dawson, above n 11, 163.

131 Domestic Violence Resource Centre Victoria, above n 10, 16 citing Kirkwood (2003).

132 Eriksson et al, above n 13; Alder and Polk, above n 16, 19.

133 Eriksson et al, above n 13; Alder and Polk, above n 16, 4–5.

134 Domestic Violence Resource Centre Victoria, above n 10, 17; Alder and Polk, above n 16, 125.

135 Dawson, above n 11, 163.

136 Ibid, 164.

137 Domestic Violence Resource Centre Victoria, above n 10, 32, 34.

138 Ibid 32, citing Bourget et al (2007).

139 Ibid.

140 Dawson, above n 11, 170.

including arguments about increasing involvement of men in earlier parental responsibilities even though traditional roles remain, and improvements in the socio-economic status of women over time.[141] Given the influence of gender on filicide and by extension child homicide, research also suggests differences should be acknowledged as part of any effective intervention or prevention efforts.

Victorian research developed the following summary of the differences between mothers and fathers who commit filicide:

Filicidal mothers, when compared to filicidal fathers, were more likely to:

- perpetrate neonaticide;
- act for *altruistic* reasons;
- be diagnosed with a mental illness;
- be the primary carer for the child;
- be a victim of domestic violence.

Filicidal fathers, when compared to filicidal mothers, were more likely to:

- perpetrate fatal child abuse;
- have previously been violent towards their partner;
- act in *retaliation* towards their partner;
- kill their partner as well as the children.[142]

2.6.3 Aboriginal and Torres Strait Islander status of homicide offenders

National data reveal that 16 per cent of homicide offenders are Aboriginal or Torres Strait Islander people.[143] However, in the categories of child homicide and filicide, the proportions of offenders who are Aboriginal or Torres Strait Islander are lower than those for the aggregate category of homicide — at 11.7 per cent for child homicide and 9.8 per cent for filicide.[144] In contrast to findings about the profile of victims, the New Zealand study recorded fewer Maori perpetrators of child homicide over the data period, with the primary category of offenders recording an ethnicity of *New Zealand European*.[145] Maori offenders represented the second-largest category, with the greatest proportion of Maori offenders falling into the youngest age cohort (under 24 years of age).[146]

2.6.4 Number of victims per homicide offender

The vast majority of the 2,286 homicide events recorded nationally involve a single victim,[147] and single-victim events in Queensland recorded a similar pattern.[148] Nationally, few homicide events involve two victims (3.8%), and events involving three or more victims were very uncommon (0.7%).[149] These patterns are generally reflective of the Queensland experience.[150]

Australian data also provide an insight into child homicide and filicide as a definable cohort within child homicide. The data reveal that most child homicide incidents (88.1%) and filicide incidents (83.5%) involve

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141 Ibid.

142 Domestic Violence Resource Centre Victoria, above n 10, 35.

143 Appendix 5, NHMP Table 20.

144 Ibid NHMP Tables 21 and 22.

145 Martin and Pritchard, above n 28, 49.

146 Ibid 49–50.

147 Appendix 5, NHMP Table 23.

148 See Queensland Sentencing Advisory Council, *Child Homicide in Queensland: A Descriptive Analysis of Offences Finalised by Queensland Criminal Courts, 2005–06 to 2016–17* (Research Report, 2018), 27.

149 Appendix 5, NHMP Table 23.

150 See Queensland Sentencing Advisory Council, above n 148.

a single victim.[151] While the proportions of child homicide (11.9%) and filicide events (16.4%) involving two or three victims are low,[152] the data suggest that — compared to all homicides — filicides appear more likely to involve multiple victims.

A 2015 research report using NHMP data for the period 1989–90 to 2011–12 revealed that three-quarters of filicide events are both single-offender and single-victim events.[153] This research documents that 15 per cent of the recorded filicide events involve multiple victims, while 9 per cent involve multiple offenders. The remaining 1 per cent involve both multiple victims and offenders.[154]

International research shows that male filicide perpetrators are more likely to kill multiple victims, usually their spouse and/or other children, but it is rare for women to kill more than one victim.[155]

2.6.5 Method of homicide

Research demonstrates that offender gender also affects how perpetrators commit child homicide.[156] For example, a Victorian study using NHMP data revealed male perpetrators of child homicide were more likely than female perpetrators to use direct physical violence such as beating, while strangulation/suffocation was the method most often associated with female perpetrators.[157]

International research supports this finding (though differing classifications for cause of death are used).[158] For example, Canadian research found 'fathers are more likely to use what are argued to be more violent methods'.[159] Also, New Zealand research — in which the majority of homicide perpetrators were male — revealed that 'the majority of child homicide victims … died from injuries inflicted through physical assault'[160] and the injuries that caused the child's death 'were not the only injuries they had sustained'.[161] The deaths of very young child victims (first day of life — neonates) are most often the result of asphyxiation, suffocation, smothering or drowning, and mothers are usually the perpetrator.[162]

2.6.6 Relationship between homicide offenders and victims

As already noted, Queensland findings align with national and international research on offender–victim relationships. Family members are identified as primary perpetrators of child homicide, with parents or parent equivalents assuming the highest proportions within this group.[163] This reflects research findings on child abuse (excluding sexual abuse) and neglect, which shows that the perpetrators are most often the child's parents or another caregiver.[164] Filicide cases expose three main perpetrator groups — mothers, fathers, and stepfathers,[165] with clear patterns emerging about their specific role when age of child victim and cause of death are also considered.[166] For example, biological mothers and fathers are

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151 Appendix 5, NHMP Tables 24 and 25.

152 Calculated using data from Appendix 5, NHMP Tables 24 and 25.

153 Cussen and Bryant, above n 31, 6.

154 Ibid.

155 Dawson, above n 11, 163.

156 Crime and Misconduct Commission, above n 17, 6–7; Alder and Polk, above n 16, ch 7; Monash University Filicide Project, above n 35, 5.

157 Domestic Violence Resource Centre Victoria, above n 10, 18.

158 Dawson, above n 11, 163, citing several studies.

159 Ibid.

160 Martin and Pritchard, above n 28, 48, 54.

161 Ibid 53.

162 Alder and Polk, above n 16, ch 7; Domestic Violence Resource Centre Victoria, above n 10, 34–36; Crime and Misconduct Commission, above n 17, 4, citing Shelton et al (2011).

163 Crime and Misconduct Commission, above n 17, 2.

164 Australian Institute of Family Studies, 'Who Abuses Children?' (Child Family Community Australia Resource Sheet – September 2014) 2, citing Australian Bureau of Statistics (2005), May-Chahal and Cawson (2005), and Sedlak et al (2010).

165 Eriksson et al, above n 13; Alder and Polk, above n 16, 19; Monash University Filicide Project, above n 35, 5.

166 Brown, Tyson and Arias, above n 68, 82–83; Alder and Polk, above n 16, 123.

more likely than stepfathers to be involved in the deaths of very young children.[167] For older children in their mid-to-late teens, the involvement of women as perpetrators of child homicide substantially reduces.[168]

2.6.7 Prior offending

According to international research, male filicide perpetrators are more likely than female perpetrators to have prior convictions.[169] According to New South Wales research (involving a relatively small sample size), male child homicide offenders were more likely than female offenders to have prior convictions (over three-quarters of male offenders compared to just under one-quarter of female offenders) and much more likely to have convictions for violent offences.[170] Most sentenced child homicide offenders in New South Wales, however, did not have prior convictions (half of men and two-thirds of women).[171] Almost one-third of New South Wales offenders had prior convictions for non-violent offences and one-in-six male offenders had prior convictions for violent offences. Only one woman in the New South Wales study had a prior conviction for a violent offence.[172]

A New Zealand study found that over half of homicide perpetrators in their sample did not have any previous police record, and that of those who did, only a small proportion had a previous violence offence.[173] Canadian research, discussing a broader research base, noted that male filicide perpetrators were more likely to have a criminal record.[174]

2.6.8 Motive, precipitating and explanatory factors

A significant amount of child homicide research, particularly in relation to mothers who kill their children, has focused on *pathological explanations*.[175] Research has now shifted from focusing on such explanations or motives to examining situational and contextual factors associated with offenders, victims and events. Varied precipitating factors have been linked to child homicide; however, these are typically case specific. It is also clear there is limited knowledge about how, when, in what combination and to what extent various precipitating factors interact and contribute to child homicide.[176]

> It is clear… that these deaths are, for the most part, a result of complex interacting factors. Each event occurs in a context where predisposing factors in the perpetrator's life interact with immediate stressors ... child homicide is an extremely rare event and for each of the risk factors there are many more individuals with the same risk factors who never harm their children.[177]

Situational and contextual factors associated with child homicide and filicide include a history of domestic or other violence, substance misuse, and mental illness.[178] Child protection history, parental separation, and parenting very young children are among other factors that may increase the risk of filicide occurring.[179] For example, a study of paternal filicides in Canada found that 'a rupture of the marital

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167 Ibid; Domestic Violence Resource Centre Victoria, above n 10, 15–17; Alder and Polk, above n 16, 25.

168 Domestic Violence Resource Centre Victoria, above n 10, 17; Alder and Polk, above n 16, 125.

169 Eriksson et al, above n 13, 19 citing Benities-Borrigo et al (2013), and Wilczynski (1997); Dawson, above n 13, 163, citing several studies.

170 Judicial Commission of New South Wales, *Sentenced Homicides in New South Wales 1994–2001* (Research Monograph 23, 2004) 37.

171 Ibid.

172 Ibid.

173 Martin and Pritchard, above n 28, 51.

174 Dawson, above n 11, 163.

175 Alder and Polk, above n 16, 9.

176 Brown, Tyson and Arias, above n 68, 87.

177 Martin and Pritchard, above n 28, 57–58.

178 Ombudsman New South Wales, above n 99, 34; Dawson, above n 11, 170.

179 Brown, Tyson and Arias, above n 68, 86; Domestic Violence Resource Centre Victoria, above n 10, 32, citing several studies.

relationship had recently occurred in 40 per cent of the cases'.[180] A Victorian filicide study found just over half the perpetrators in the study were separated and/or divorced or in the process of doing so.[181] In cases of abuse-related child deaths in New South Wales, about two-thirds of the families of victims had experienced separation or family breakdown prior to the child's death.[182] However, it is also apparent that the identified factors are not unique to child homicide or filicide. In addition, the presence of such factors does not precipitate child homicide; rather, the research discusses correlation as opposed to causation.

Retaliation as a motive for filicide also features in research.[183] Referred to as *retaliatory* or *revenge* filicide, these child homicides are committed predominantly by men — although women are also perpetrators.[184] These cases involve a child killed intentionally to hurt the other parent,[185] often due to separation or impending separation.[186] Some retaliatory cases involve the death of both the child and the intimate partner:

> There has been limited research into retaliatory filicides. This may partly be due to the apparently high number of such cases that involve the suicide of the perpetrator.[187]

Altruistic filicide refers to cases in which a parent, usually the child's mother, believes that homicide will free the child from some type of real or perceived suffering.[188] Filicide motived by altruism, also referred to in research as *misguided love* or *mercy killing*, represents one of the most cited reasons for female-perpetrated filicide.[189] These are cases where a mother perceives that any other course of action is not in the child's best interests. Such perceptions include 'anticipated suffering caused by the parent's suicide'.[190]

Filicide-suicide cases relate to a parent who kills their child/children and themselves. While the proportion varies across studies, between 6 and 17 per cent of Australian filicides are filicide-suicides.[191] The overwhelming majority of cases involve custodial parents, and a significant proportion are the biological mothers. In contrast, some studies have found that fathers are more likely to commit suicide after filicide, while others reveal an overall decline in filicide-suicide incidents over time.[192] Of note, step-parents are rarely involved in filicide-suicide cases.[193] Motives for filicide-suicide vary, with one study of clinical records finding women tended to show a (prior) pattern of 'hopelessness and helplessness' while men tended to reflect 'anger and desperation'.[194] No specific sociodemographic differences are observable between filicide-suicide and filicide cases.[195]

About a quarter of filicides involve neonaticide:[196] the killing of a baby within 24 hours of its birth. Perpetrators are almost always the child's mother.[197] The primary motivation for neonaticide appears

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180 Domestic Violence Resource Centre Victoria, above n 10, 33, citing Bourget and Gagne (2005).

181 Brown, Tyson and Arias, above n 68, 84.

182 Ombudsman New South Wales, above n 99, 34.

183 Domestic Violence Resource Centre Victoria, above n 10, 27–29.

184 Dawson, above n 11, 164.

185 Bourget, Grace and Whitehurst, above n 12, 75.

186 Dawson, above n 11, 164, citing Harris et al (2007).

187 Domestic Violence Resource Centre Victoria, above n 10, 28.

188 Ibid 26, citing Stanton and Simpson (2002).

189 Ibid, citing Resnick (1969), and several other sources.

190 Ibid, citing McKee (2006).

191 Ibid 27.

192 Bourget, Grace and Whitehurst, above n 12, 79. Dawson, above n 11, 163.

193 Domestic Violence Resource Centre Victoria, above n 10, 19.

194 Liem and Koenraadt, above n 123, 172.

195 Eriksson et al, above n 13, 28, citing Benitez-Borrego et al (2013).

196 Domestic Violence Resource Centre Victoria, above n 10, 25, citing Alder and Polk (2001), Putkonen et al (2011), and Kauppi et al (2010).

197 Ibid 25–26, citing Resnick (1969), and Meyer and Oberman (2001).

to be that the child was unwanted, with fear of repercussions an important factor.[198] Perpetrators, typically mothers, deny and conceal the pregnancy in these circumstances.[199]

2.6.9 Substance misuse

Alcohol or drug misuse by perpetrators is often cited in research as present in child homicide and filicide cases.[200] However, drawing an inference that substance misuse is a precursor to child homicide or filicide is problematic.[201] Increasingly, research cites substance misuse as one of a range of economic, personal and social stressors child homicide perpetrators experience.[202] Differences associated with how individual studies assess the role of substance misuse in child homicide cases are also evident. Various studies 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.[203] Collectively, it is difficult to construct a clear assessment about the role of substance misuse in child homicide.

2.6.10 Mental health

It is not uncommon for perpetrators of filicide to record mental illnesses or disorders, with depression the most common condition followed by psychosis.[204] There are apparent differences, however, in how various studies assess, measure and report mental illness and its potential contribution in cases of child homicide and filicide.[205] In addition, mothers who commit filicide were more likely to be diagnosed as having a mental illness than were filicidal fathers.[206] However, as with substance misuse, inferring that mental illness precipitates child homicide would fail to acknowledge the multidimensional aspect of child homicide, the gendered profile of this crime type, and the fact that many people with a mental illness do not harm children.[207]

2.6.11 Previous or current trauma

Having witnessed parental violence or experienced physical, sexual or emotional abuse as a child are also factors associated with perpetrators of filicide.[208] International research shows that similar proportions of male and female perpetrators suffered childhood abuse.[209]

Australian research reveals that while domestic/family or intimate-partner violence is commonly associated with filicide cases, it is not always present. Less than a quarter of filicide incidents in Australia are linked to a history of domestic violence recorded by police.[210] A Victorian filicide study found a relatively low incidence of prior domestic violence or child abuse,[211] leading to suggestions of under-reporting of prior domestic violence in official records of filicide cases.[212] Domestic and/or other violence is reported as common in New South Wales families where child abuse ultimately resulted in the child's

198 Ibid 76.

199 Domestic Violence Resource Centre Victoria, above n 10, 25–26, citing Liem and Koenraadt (2008); Crime and Misconduct Commission, above n 17, 4, citing Shelton et al (2011).

200 Eriksson et al, above n 13, 19; Alder and Polk, above n 16, 18–19.

201 Alder and Polk, above n 16, ch 4, 70, 154, 157, 171.

202 Ibid 117.

203 Eriksson et al, above n 13, 18–20, 24; Alder and Polk, above n 16, ch 7 and ch 8.

204 Domestic Violence Resource Centre Victoria, above n 10, 24–25, citing several studies; Bourget, Grace and Whitehurst, above n 12, 76.

205 Ombudsman New South Wales, above n 99, 41; Brown, Tyson and Arias, above n 68, 85.

206 Domestic Violence Resource Centre Victoria, above n 10, 6; 19; Eriksson et al, above n 13, 24–25.

207 Alder and Polk, above n 16, ch 4.

208 Eriksson et al, above n 13, 19, citing Wilczynski (1997), and several other sources; Domestic Violence Resource Centre Victoria, above n 10, 32, citing Kauppi et al (2010).

209 Ibid, citing Bourget et al (2007).

210 Cussen and Bryant, above n 31, 7.

211 Brown, Tyson and Arias, above n 68, 85.

212 Domestic Violence Resource Centre Victoria, above n 10, 31.

death. Many of the suspected perpetrators were known to police for prior assaults and domestic violence.[213]

However, fatal abuse also occurs in families with no known history of risk or previous evidence of abuse.[214] In fatal abuse cases, the death of the child often results from excessive physical discipline or maltreatment, and typically in response to the child's perceived poor or bad behaviour, particularly crying,[215] being disobedient/misbehaving, soiling, or wetting.[216]

2.6.12 Socio-economic disadvantage, employment type and status, education level

The circumstances of filicide perpetrators and their families are characterised by socio-economic disadvantage, unemployment and low education:

- Child homicide victims and their families typically live in areas of greatest socio-economic disadvantage.[217]
- Most child homicide or filicide perpetrators were not in paid employment at the time of the killing and those who were employed had unskilled, low-paid occupations.[218]
- Low educational attainment was another common characteristic of child homicide/filicide perpetrators.[219]

2.7 Child homicide in Queensland

As noted above, the Council published a comprehensive research report in July 2018 outlining its findings on 12 years of data relating to the offences, victims, offenders and sentencing outcomes associated with child homicide in Queensland.[220] This section provides a summary of key points from the research report to contextualise the Queensland findings for child homicide offences, victims and offenders within the research literature. Findings on sentencing outcomes for child homicide offences are set out in Chapter 5.

2.7.1 Offences

Over the 12-year period, Queensland courts finalised 513 homicide offences — an average of 43 offences per year.[221] Of these offences, 72 offences (14%) involved 62 unique child victims. The majority of these offences were finalised as manslaughter offences (58.3%) with the balance (41.7%) finalised as murder offences.

Similar to national trends, the majority of Queensland child homicide offences occur in a private location — usually the victim's home. Children under 10 years are more likely to be killed in their own home; after the age of 14 years, offence locations are more likely to be a public place.

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213 Ombudsman New South Wales, above n 99, 38.

214 Ibid 34.

215 Domestic Violence Resource Centre Victoria, above n 10, 22, citing Liem and Koenraadt (2008), and Alder and Polk (2001).

216 Martin and Pritchard, above n 28, 52.

217 Ombudsman New South Wales, above n 99, 33; Martin and Pritchard, above n 28, 47; Bourget, Grace and Whitehurst, above n 12, 78.

218 Martin and Pritchard, above n 28, 51; Ombudsman New South Wales, above n 99, 36; Bourget, Grace and Whitehurst, above n 12, 78, citing several studies.

219 Judicial Commission of New South Wales, above n 170, 36; Bourget, Grace and Whitehurst, above n 12, 78, citing several studies.

220 Queensland Sentencing Advisory Council, above n 148.

221 This count is of the sentenced offences over the 12-year dataset. There may be multiple sentences per offender and multiple sentences given regarding one victim.

Child homicide cases take significantly longer to progress from offence to sentencing than adult homicide cases (4.3 years on average versus 2.7 years). However, multiple historical cases within Queensland's 12-year child homicide dataset, specifically child murder, increased the average timeframes for all child homicide cases.

2.7.2 Victims

In the Council's 12-year Queensland dataset (offences finalised by the courts), child victims of homicide represent 14.4 per cent of all homicide victims over the period (of a total of 430 homicide victims, 62 victims were children). This compares as slightly higher than the national figure of 11.6 per cent over a slightly shorter period (based on police offence reports).

A child in Queensland is much less likely to be a victim of homicide than an adult — 10 adults per 100,000 were victims of homicide in Queensland over the 12-year period, compared to 5.7 children per 100,000 Queensland children.

Of the 62 child victims of homicide over the 12-year Queensland dataset, most (29%) were aged under one year, reflecting the findings in the broader research that very young children are at greatest risk. Teenage children are the second-highest age category, with 25.8 per cent of child victims aged 15 to17 years. Younger children aged 5 to14 years are proportionally at lowest risk of homicide — while this age group represents 56.5 per cent of children in the general population, they comprise 22.6 per cent of child homicide victims.

In Queensland, the gender of child homicide victims is almost equally male (48.4%) and female (51.6%). This contrasts with the gender pattern for all Australian child victims, where male victims (58.4%) outnumber female victims (41.2%).

Of all Australian child homicide victims, 11.8 per cent (33 victims) are Aboriginal or Torres Strait Islander. That proportion is almost identical to that reflected in the Queensland cohort, where 11.3 per cent (7 victims) identified as Aboriginal or Torres Strait Islander.

The most common method of homicide of children in Queensland, as it is nationally, is physical striking (21.0%). National data ranked stabbing as the second most common method of child homicide. In Queensland, stabbing and strangulation or suffocation are equally ranked as the second most common methods. These patterns differ across age groups, with younger children more likely to die from shaking or neglect (failing to provide necessaries).

2.7.3 Offenders

Queensland mirrors the national profile of perpetrators of child homicide — parents or parent equivalents represent the largest offender group over the 12-year period (43.1%). Also similar to the national data, females comprise a higher proportion of perpetrators in the child homicide category than in any other category of homicide.

The age profile of child homicide offenders is very similar in Queensland to that at the national level — 79.2 per cent of offenders in the Australian dataset are aged 18–49, and 82.1 per cent of offenders in the Queensland dataset are aged 20–49 years. In Queensland, the average age of a child homicide offender is younger — at 28.8 years — than adult homicide offenders, whose average age is 33.6 years.

Queensland again mirrors the national pattern of perpetrator gender, with most homicide offenders being male (87.9%), although the proportion of female offenders is significantly higher for child homicide (24.2%) than for adult homicide (10.3%).

The proportion of child homicide offenders who are Aboriginal or Torres Strait Islander is also similar in Queensland (14.5%) to nationally (11.7%).

2.8 Conclusion

This chapter provided an overview of child homicide offences at a national and state level, as well as the domestic and international research about these offences. The Council's analysis of child homicide in Queensland found similar results to national research for these offences, in particular that offenders were most likely to be parents or parent-equivalents and male.

The research also showed that a child in Queensland is much less likely to be the victim of homicide than an adult — 10 adults per 100,000 were victims of homicide in Queensland over the 12-year period, compared to 5.7 children per 100,000 Queensland children. Further, the NHMP research found that over the 25-year data collection period of the project, the homicide incident rate nationally has continued to decline. The most recent data (2013–14) showed the incident rate was the lowest since data collection began in 1989.

Finally, the Council's examination of available research on child homicide made three global observations:

1. Dedicated research examining child homicide is still relatively new but growing considerably at national and international levels.
2. Differences in research designs and definitions restrict the direct translation of research into the Queensland context, but the findings provide critical insights into child homicide as a discrete focus within the broader offence of homicide.
3. There are clear and persistent patterns in terms of child homicide offenders, victims, causes of death, and offence locations, irrespective of jurisdiction or research design. Collectively, these observations confirm the importance of considering extant child homicide research for informing the Council's research design in response to these Terms of Reference, as well as for providing context for the Queensland findings.

Potential implications for future research directions are discussed in Chapter 12.

Chapter 3 — Child homicide offences

3.1 Introduction

The Terms of Reference asked the Council to advise the Attorney-General on a range of matters relating to sentencing for criminal offences arising from the death of a child.

For reasons explained in Chapter 1 of the report, the Council's focus has been on examining sentencing practices, legislation and outcomes for the criminal offences of murder and manslaughter that involve the death of a child under 18 years.

This chapter reviews:

- homicide laws in Queensland;
- how criminal responsibility is determined;
- the concept of 'intent', which is relevant to establishing murder; and
- available defences and partial excuses.

3.2 Murder and manslaughter

Under Queensland law, killing a person[222] is either murder or manslaughter, depending on the circumstances of the case,[223] unless the killing is 'authorised or justified or excused by law'[224] 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'.[225]

Killing means causing 'the death of another, directly or indirectly, by any means whatever'.[226] A person causes someone else's death if what they did (an 'act')[227] or did not do (an 'omission')[228] 'is a substantial or significant cause of death, or substantially contributed to the death'.[229] It does not have to be the only cause.[230] 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,[231] or where the death

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222 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: *Criminal Code* (Qld) s 292.

223 *Criminal Code* (Qld) s 300.

224 Ibid s 291.

225 Ibid s 1.

226 Ibid s 293.

227 The act constituting the offence refers to some physical action, apart from its consequences: *Kaporonovski v The Queen* (1973) 133 CLR 209, 231, cited in *Pickering v The Queen* (2017) 260 CLR 151, 159–160 [22] (Kiefel CJ and Nettle J) and 164 [39] (Gageler, Gordon and Edelman JJ).

228 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.

229 *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).

230 *R v Pagett* (1983) 76 Cr App R 279 cited in Shanahan, Ryan and Rafter, above n 229 [s 293.10] Scope of the provision (July 2013 update).

231 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.

was ultimately caused by 'reasonably proper' medical treatment, administered because of the injury and delivered in good faith.[232]

3.2.1 Basis for criminal responsibility

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 the child with a fatal blow). But culpability for child homicide offences extends beyond the principal offender.[233]

Other people who are parties to an offence can also be guilty of an offence if they:[234]

- do or do not do something to enable or aid (assist, help or encourage)[235] someone else in committing the offence;
- counsel (urge or advise)[236] another person in committing the offence; or
- procure (bring about, cause to be done, prevail on, persuade, try to induce)[237] any other person to offend.[238]

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.[239] The same maximum penalties that apply to the principal offender will apply to any party to an offence.

Also, where two or more people are part of a joint criminal enterprise — that is, plan to do something unlawful together and commit an offence when carrying out the plan[240] — each person is taken to have committed that offence, provided the offence ultimately committed is likely to have resulted from the plan.

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232 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.

233 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 229, [s 8.55] Extent of liability of a party (June 2017 update).

234 *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.

235 Queensland Supreme and District Courts, *Criminal Directions Benchbook* (October 2017 amendments) 74.1–5.

236 Ibid.

237 Ibid.

238 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.

239 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 235, 74.2, 6; see also Shanahan, Ryan and Rafter, above n 229 [s 7.40] Knowledge required (June 2017 update) and cases therein.

240 Queensland Supreme and District Courts, above n 235, 74.7.

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 229 [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 235, 74.8, 74.9. See also Shanahan, Ryan and Rafter, above n 229, [s 8.30] Offence committed in the prosecution of the common purpose (June 2017 update).

Based on the Council's data over a 12-year period**,** 459 adult defendants were convicted of a homicide offence (either murder or manslaughter), including on the basis of either being a party to the offence or having committed the offence as a result of the prosecution of a common and unlawful purpose.

The Council analysed sentencing remarks for manslaughter[241] and found convictions on the basis of being a party to the offence, rather than the principal offender, were far less common where the victim of the homicide was a child. Of the 33 offenders sentenced for child manslaughter, only two were convicted on the basis of the operation of the party provisions (representing 6.1% of the total). In that instance, the offence involved offenders aged 18 and 20 who committed the offence against a teenage victim — one was the principal offender who killed the victim, and the other was a party to the offence. This compares with 56 out of 201 offenders convicted of manslaughter involving an adult victim being convicted on the basis of being a party as opposed to the principal offender (27.9% of the total).

3.2.2 Murder

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

a) 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,[242] nor whether medical treatment is or could have been available.[243] Grievous bodily harm means:

   i. the loss of a distinct part or organ of the body;

   ii. serious disfigurement or any bodily injury of such a nature that, if left untreated, would endanger (or be likely to endanger) life; or

   iii. cause (or be likely to cause) permanent injury to health.

b) Felony murder — where the death is caused by an act '*done in the prosecution of an unlawful purpose*' that was likely to endanger human life. It does not matter that the offender did not intend to hurt any person.[244]

c) 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[245] in circumstances where the offender intends to cause grievous bodily harm to 'some person';[246] or

d) The death is caused by administering any stupefying or overpowering thing for either of the purposes mentioned in paragraph (c); or[247]

e) The death is caused by wilfully stopping the breath of any person for either of such purposes.[248]

For (c), (d) or (e), it does not matter that the offender did not intend to cause death or did not know death was likely to result.[249]

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241 Sentencing remarks from 1 July 2005 to 30 June 2017 for offenders sentenced as adults and where sentence was not changed on appeal were coded as part of this review. For more details see Appendix 3.

242 See *Criminal Code* (Qld) ss 302(1)(a), 302(2) regarding intention to harm the person killed.

243 Grievous bodily harm is defined in *Criminal Code* (Qld) s 1. There are separate offences under ss 317, 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).

244 *Criminal Code* (Qld) s 302(1)(b).

245 Ibid 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*).

246 Ibid s 302(1)(c).

247 Ibid s 302(1)(d).

248 Ibid s 302(1)(e).

249 Ibid s 302(4).

3.2.3 Intent

Throughout the review, the issue of the legal elements required to establish the offence of murder was raised frequently as an area of confusion and some people were of the view that any death involving the unlawful killing of a child, in particular, should be treated for legal purposes as a 'murder'.

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 and manslaughter are both very serious offences. However, murder requires proof of intent. Manslaughter does not.[250]

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.[251] Accordingly:

> 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 beyond a reasonable doubt that the accused meant to produce that result by his or her conduct.[252]

The word *intends* means to have in mind, to have a purpose or design. It involves premeditation. The prosecution has to prove the defendant 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 the intent in a matter of seconds — for instance, in a sudden flash of temper.[253]

Unless the defendant gives direct (and credible) evidence as to his or her intention, the intention of a defendant at the relevant time will generally be a matter of inference by the jury from other facts proved.[254]

There are a number of appeals against conviction for child homicide where the Queensland Court of Appeal has affirmed it is open to a jury to infer the existence of intent to kill or cause grievous bodily harm and to convict an accused person of murder on the basis of the extent of the injuries caused.[255] Evidence of prior acts of violence by the defendant against the victim can also be relied upon to assist a jury in reaching this conclusion.[256]

Foreseeability, likelihood, and probability are not relevant to proving intent in an offence under the Code.[257] 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.

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250 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'.

251 See *Criminal Code* (Qld) s 23(2).

252 *Zaburoni 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) 71 ALJR 638, 647; 143 ALR 498, 509–510 (Kirby J).

253 This discussion is based on Queensland Supreme and District Courts, above n 235, 59.1. 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 (25 October 2002) and *R v Reid* [2007] 1 Qd R 64.

254 *Knight v The Queen* (1992) 175 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).

255 See, for example, *R v Reed* [2014] QCA 207 (26 August 2014) 8 [33], 17 [80] (Henry J, McMurdo P and Gotterson JA agreeing); and *R v Self* [2001] QCA 338 (24 August 2001) 9 [31] (Thomas JA, McMurdo P and Philippides J agreeing).

256 See *R v Self* [2001] QCA 338 (24 August 2001) 9 [31] (Thomas JA, McMurdo P and Philippides J agreeing); and *R v Reed* [2014] QCA 207 (26 August 2014) (Henry J, McMurdo P and Gotterson JA agreeing). This can either be on the basis of evidencing a violent pre-disposition or propensity towards inflicting violence upon the child (and excluding a hypothesis that fatal injuries occurred accidentally) and as evidence of the domestic relationship between the defendant and the deceased child as permitted under s 132B of the *Evidence Act 1977* (Qld) to provide a context for the jury's consideration of the fatal injuries.

257 *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

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.[258]

Even where the recklessness is so strong that the person knows it is a *virtual certainty* their conduct will produce that 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.[259]

3.2.4 Manslaughter

An unlawful killing in Queensland that is not murder is manslaughter.[260] Manslaughter is a very serious offence, which carries a maximum penalty of life imprisonment. It can involve a broad range of factual circumstances from cases where the offender did not intend to cause any physical harm, let alone causing death,[261] 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 (e.g. the duty of a parent to seek medical care for their child if the child is 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.

3.2.5 Defences and excuses

Partial defences and excuses

There are three partial defences that result in a person being found guilty of manslaughter where they would otherwise be guilty of murder: provocation, diminished responsibility, and killing for preservation in an abusive domestic relationship.[262]

Based on the Council's analysis of cases over the previous 12 years, the most commonly arising partial defence in child homicide cases reducing murder to manslaughter was diminished responsibility.[263] This partial defence is based on the person being in a state of abnormality of mind that substantially impairs that person's capacity to understand, to control, or to know the action is wrong.[264]

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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].

258 *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].

259 *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).

260 *Criminal Code* (Qld) s 303(1).

261 *R v Skondin* [2015] QCA 138 (24 July 2015) 21 [80] (Holmes JA).

262 Regarding provocation, see *Criminal Code* (Qld) s 304 and Queensland Supreme and District Courts, above n 235, 98.3. Regarding diminished responsibility, see *Criminal Code* (Qld) s 304A and Queensland Supreme and District Courts, above n 235, 100.1. Regarding killing for preservation in an abusive domestic relationship, see s 304B and Queensland Supreme and District Courts, above n 235, 99.2, 99.3.

263 Over the 12-year data period, there were two cases falling into this category out of 35 cases examined. By comparison, provocation was the most common partial excuse raised in the case of unlawful killings where the victim was an adult (n=19/215). See further Table 17, page 82.

264 The three capacities that 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'. This is different from being found of unsound mind and being dealt with under the *Mental Health Act 2016* (Qld).

The determination that the person had diminished responsibility at the time of the offence was allegedly committed can be made by the Mental Health Court (MHC). On making this finding, the prosecution for murder is discontinued, but proceedings for another offence (for instance, manslaughter) can progress.[265]

Provocation was also successfully argued in one instance. This involved a 16-year-old girl who was killed by an offender in his late twenties with whom she had been in a relationship.[266] Like diminished responsibility, this partial excuse reduces murder to manslaughter in circumstances where the person intended to kill the victim or cause them grievous bodily harm. Provocation operates this way in circumstances where a jury is satisfied that the defendant was deprived of self-control and killed in the heat of passion, caused by sudden provocation which could provoke an ordinary person, before there was time for that passion to cool.[267]

A separate partial defence of killing for preservation in an abusive domestic relationship[268] also exists, covering circumstances 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[269] something occurring independently of their will (like a reflex defensive action, or sleepwalking)[270] or death[271] 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.[272] 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 'eggshell skull' rule. Put another way, the criminal law requires that an offender takes their victim as they find them.[273] Inherent weaknesses can include an aneurism[274] or enlarged spleen,[275]

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265 *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.

266 *R v Sebo; Ex parte A-G (Qld)* [2007] QCA 426 (30 November 2007). This case, in addition to several others, generated significant community concern around the operation of the provocation defence resulting in a referral to the Queensland Law Reform Commission. The Commission's report led to legislative reform in 2011 to include a provision to the effect that, other than in circumstances of an extreme and exceptional character, the defence cannot be based on words alone; to include a provision that has the effect that, other than in circumstances of an extreme and exceptional character, provocation cannot be based upon the deceased's choice about a relationship; and to place the onus of proof upon a defendant seeking to rely on the partial defence: *Criminal Code and Other Legislation Amendment Act 2011* (Qld) s 5 amending s 304 *Criminal Code* (Qld).

267 See Queensland Supreme and District Courts, above n 235, 98.3; and Shanahan, Ryan and Rafter, above n 229 [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 235, 98.6; *Censori v R* [1983] WAR 89; (1982) 13 A Crim R 263 cited in Shanahan, Ryan and Rafter, above n 229, [s 304.15] The ordinary person (September 2012 update).

268 *Criminal Code* (Qld) s 304B.

269 Ibid s 23(1) and see Queensland Supreme and District Courts, above n 235, 77.1 citing *R v Falconer* (1990) 171 CLR 30, 63. Section 23 does not apply to ss 285–290 of the *Criminal Code* (Qld): s 23(1) and *R v Hodgetts and Jackson* [1990] 1 Qd R 456 as discussed in Shanahan, Ryan and Rafter, above n 229, [s 23.40] Subject to the express provisions relating to negligent acts and omissions (January 2017 update).

270 John Devereux and Meredith Blake, *Kenny Criminal Law in Queensland and Western Australia* (LexisNexis Butterworths 9th ed, 2016) 150–151 [8.56].

271 *R v Taiters* [1997] 1 Qd R 333, 335 (Macrossan CJ, Pincus JA, Lee J).

272 *Criminal Code* (Qld) s 23(1A).

273 Devereux and Blake, above n 270, 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.

274 Queensland Supreme and District Courts, above n 235, 78.3.

275 Devereux and Blake, above n 270, 157 [8.69] citing *Mamote-Kulang v R* (1964) 111 CLR 62.

or defects, weaknesses, or abnormalities caused by artificial or foreign objects such as implants or artificial joints.[276]

Other excuses and defences

Insanity is a complete defence to murder and manslaughter. An accused person is presumed to be of sound mind.[277] The accused person must raise the defence of insanity,[278] 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 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 or to control their actions — or know they should not do what they did.[279] A mental disease is a condition that affects the functions of the mind: the ability to reason, remember and understand.[280]

If a person does not satisfy the requirements for the defence of insanity, but their mind was affected by delusions, they remain criminally responsible; however, only to the same extent as if what they had wrongly believed was real.[281]

The MHC will usually determine whether a person was of unsound mind ('insanity') at the time of the offence,[282] although a jury can also make decisions where there are concerns about the defendant's mental state in a *regular* court. This can lead to the person's admission to an authorised mental health service.[283]

There are other excuses and defences that can be relied upon in relation to unlawful killings but are unlikely to feature in child homicide cases, including extraordinary emergency and self-defence.[284]

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276 See *R v Steindl* [2002] 2 Qd R 542, 549 [29] (McMurdo P), 551 [40] (Davies JA), 554 [57] (Thomas JA).

277 *Criminal Code* (Qld) s 26. Insanity is covered by *Criminal Code* (Qld) ss 26, 27, 28(1).

278 On the less stringent civil standard test — was it more probable than not that the person was insane?

279 *Criminal Code* (Qld) s 27(1).

280 Ibid s 28(1) and Queensland Supreme and District Courts, above n 235, 82.1, 82.3.

281 *Criminal Code* (Qld) s 27(2).

282 Unsound mind is matched to the definition of insanity in the *Criminal Code* (Qld) ss 27(1), 28(1) by its definition in s 109 of the *Mental Health Act 2016* (Qld).

283 This can occur when: (1) It is uncertain whether an 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.

284 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, 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.

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).[285]

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.[286] It cannot be a mitigating factor on sentence.[287]

However, any intoxication can be considered in deciding whether the defendant 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.[288]

The 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.[289] 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.

3.3 Associated offences

3.3.1 Overview

As set out in Table 1, there are a range of other offences under the Code that a person may be charged with when a child is injured but not killed.[290] Some may also be charged alongside murder or manslaughter if the alleged facts warrant it.

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285 *Criminal Code* (Qld) s 28(2). See *R v Clough* [2011] 2 Qd R 222, discussed in Shanahan, Ryan and Rafter, above n 229, [s 28.10] The defence and intentional intoxication (May 2012 update); *Mental Health Act 2016* (Qld) s 109(2).

286 Queensland Supreme and District Courts, above n 235, 84.1; see also Shanahan, Ryan and Rafter, above n 229, [s 28.10] The defence and intentional intoxication (May 2012 update) discussing *R v Kusu* [1981] Qd R 136.

287 *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 229, [s 28.25] Relevance of intoxication to penalty (May 2012 update) citing *R v Hammond* [1997] 2 Qd R 195.

288 *Criminal Code* (Qld) s 28(3).

289 Queensland Supreme and District Courts, above n 235, 84.1, 84.2; see also *Viro v R* (1978) 141 CLR 88, 112 (Gibbs J) reproduced in Shanahan, Ryan and Rafter, above n 229, [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].

290 This analysis does not purport to list all possible offences that could be charged, or to warrant that the offences listed have been or are used frequently in respect of child homicide prosecutions.

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

Offence	Criminal Code	Maximum Penalty	Is intention 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)[291]	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.
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: • to maim, disfigure or disable, or • to do grievous bodily harm or transmit a serious disease, or • to resist or prevent lawful arrest or detention, or • to resist or prevent a public officer from acting in lawful authority.
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 necessaries	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.

[291] See *Criminal Code* (Qld) s 1 'domestic relationship' and *Domestic and Family Violence Protection Act 2012* (Qld) ss 9, 13, 16, 19.

Attempted murder — s 306

Attempted murder is established where a person attempts to unlawfully kill another or does an act or omits to perform a duty, with intent to unlawfully kill, being of a nature likely to endanger human life. The maximum penalty is imprisonment for life. Unlike murder, intent to cause grievous bodily harm is not enough. There must be an intent to kill.[292]

Over the 12-year data period, 62 people were sentenced for attempted murder as their Most Serious Offence (MSO). Of these people, seven (11.3%) were sentenced for attempted murder of a child victim. All sentences imposed for attempted murder involving child victims were custodial, ranging from 4 to 20 years.

Only one offender was sentenced for attempted murder at the same sentencing event as a child homicide offence. For this offender, attempted murder was not their MSO at this sentencing event.

Disabling in order to commit an indictable offence — s 315

This offence relates to a person making or attempting to make another incapable of resistance, by any means calculated to choke, suffocate or strangle. There must also be intent to commit or facilitate an indictable offence or to facilitate the flight of an offender after committing or attempting to commit an indictable offence. The maximum penalty is imprisonment for life.

Over the data period, three people were sentenced for disabling in order to commit an indictable offence as their MSO. None of these sentences related to an offence involving a child victim.

Choking, suffocation or strangulation in a domestic setting — s 315A

Section 315A applies where a person unlawfully chokes, suffocates or strangles another without consent and both people are in a domestic relationship or the act is associated with domestic violence. This can include children.[293] The maximum penalty is 7 years' imprisonment. The defence of provocation cannot be relied on.

Over the data period, 25 people were sentenced for choking, suffocation or strangulation in a domestic setting as their MSO.[294] None of these sentences related to an offence involving a child victim.

Stupefying in order to commit an indictable offence — s 316

This offence occurs where a person administers, or attempts to administer, any stupefying or overpowering drug or thing to any person. There must also be intent to commit or facilitate an indictable offence or to facilitate the flight of an offender after committing or attempting to commit an indictable offence. The maximum penalty is imprisonment for life.

Over the data period, four people were sentenced for stupefying in order to commit an indictable offence as their MSO. None of these sentences related to an offence involving a child victim.

Acts intended to cause grievous bodily harm and other malicious acts — s 317

This offence requires proof of one of four intents: to maim; to disfigure or disable; to do grievous bodily harm; or to transmit a serious disease. The person must do one of the following acts with one of those intents:

- unlawfully wound, do grievous bodily harm, transmit a serious disease, strike/attempt to strike with a projectile or other thing capable of achieving the intention;
- cause an explosive substance to explode, send or deliver any explosive substance or other dangerous or noxious thing to another person, cause any such substance or thing to be taken or received by any person, put any corrosive fluid or any destructive or explosive substance in any place or unlawfully cast, throw or apply any such fluid or substance at or upon someone.

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292 Supreme and District Courts of Queensland, above n 235, 186.2.

293 See *Criminal Code* (Qld) s 1 'domestic relationship' and ss 9, 13, 16, 19 of the *Domestic and Family Violence Protection Act 2012* (Qld).

294 This offence was introduced in 2016.

The maximum penalty is imprisonment for life.

Over the data period, 282 people were sentenced for acts intended to cause grievous bodily harm as their MSO. Of these people, 15 (5.3%) were sentenced for the offence involving a child victim. All sentences imposed for acts intended to cause grievous bodily harm involving child victims were custodial, ranging from 2 to 15 years.

One offender was sentenced for acts intended to cause grievous bodily harm at the same sentencing event as their child homicide MSO.

Grievous bodily harm — s 320

Unlawfully doing grievous bodily harm to another has as a maximum penalty of 14 years' imprisonment.

Over the data period, 2,238 people were sentenced for grievous bodily harm as their MSO. Of these people, 182 (8.1%) were sentenced for the offence involving a child victim. Almost all (97.8%) sentences imposed for grievous bodily harm involving child victims were custodial, ranging from 121 days to 7 years.

Torture — s 320A

Torture is the intentional infliction of severe pain or suffering on a person by an act or series of acts done on one or more than one occasion. 'Pain or suffering' includes physical, mental, psychological or emotional pain or suffering, whether temporary or permanent. The maximum penalty is 14 years' imprisonment.

Over the data period, 97 people were sentenced for torture as their MSO. Of these offenders, 24 (24.7%) were sentenced for the offence involving a child victim. All sentences imposed for torture involving child victims were custodial, ranging from 2 to 10 years. Two offenders were sentenced for torture at the same sentencing event as their child homicide MSO.

Failure to supply necessaries — s 324

This offence applies where a person charged with the duty of providing the necessaries of life for another fails to do so without lawful excuse, and the other person's life is, or is likely to be, endangered, or their health is, or is likely to be, endangered. The maximum penalty is 3 years' imprisonment.

Over the data period, 24 people were sentenced for failure to supply necessaries as their MSO. Of these people, at least 13 (54.2%) were sentenced for an offence known to involve a child victim. Almost half of sentences imposed for failure to supply necessaries involving child victims (46.2%) were custodial, ranging from 121 days to 1.5 years.

Endangering life of children by exposure — s 326

This offence applies where a person unlawfully abandons or exposes a child aged under 7 years and the child's life is, or is likely to be, endangered, or the child's health is, or is likely to be, permanently injured. The maximum penalty is 7 years' imprisonment.

Over the data period, 22 people were sentenced for endangering life of children by exposure as their MSO. Just under a third (27.3%) of sentences imposed for this offence were custodial, ranging from 163 days to 2.5 years.

Negligent acts causing harm — s 328

This offence applies where a person unlawfully does an act or omits to do an act that they have a duty to do, and thereby causes bodily harm to someone else. The maximum penalty is 2 years' imprisonment.

Over the data period, at 67 people were sentenced for negligent acts causing harm as their MSO. Of these people, at least 17 (25.4%) were sentenced for an offence known to involve a child victim. Of the sentences imposed for negligent acts causing harm involving child victims, 11.8 per cent were custodial, ranging from 182 days to 1.5 years.

Cruelty to children under 16 — s 364

Section 364 applies where a person who has lawful care or charge of a child under 16 years causes the child harm by 'prescribed conduct'. The person must have known, or ought reasonably to have known, that the conduct would be likely to cause the child harm. 'Harm' means any temporary or permanent detrimental effect of a significant nature on the child's physical, psychological or emotional wellbeing. 'Prescribed conduct' means:

(a) failing to provide adequate food, clothing, medical treatment, accommodation or care when it is available to the person from his or her own resources; or

(b) failing to take all lawful steps to obtain adequate food, clothing, medical treatment, accommodation or care when it is not available to the person from his or her own resources; or

(c) deserting the child; or

(d) leaving the child without means of support.

The maximum penalty is 7 years' imprisonment.

Over the data period, 67 people were sentenced for cruelty to children under 16 as their MSO. Of these sentences, 53.7 per cent were custodial, ranging from 64 days to 5 years.

Leaving a child under 12 unattended — s 364A

This will apply where a person with the lawful care or charge of a child under 12 years leaves the child for an unreasonable time without making reasonable provision for the child's supervision and care during that time. The maximum penalty is 3 years' imprisonment.

Over the data period, 415 people were sentenced for leaving a child under 12 unattended as their MSO. Of the sentences imposed, 3.6 per cent were custodial, ranging from 23 days to 1.5 years.

3.3.2 Associated offences as a measure of appropriateness of sentencing outcomes for child homicide

The Council has analysed the sentencing outcomes for offences sometimes charged alongside child homicide offences with a view to identifying common sentencing trends and how these align with, or differ from, sentencing trends for child homicide.

The Council's analysis includes, for those offences that can be committed against either children or adults:

- consideration of any observable differences in the median or average sentence lengths based on victim status (whether the victim is a child or an adult);
- statistical measures of sentencing consistency; and
- where the majority of sentences are set relative to the maximum penalties that apply to these offences.

For the purposes of this analysis, the Council refers to these offences as *comparator offences*. The analysis of sentencing outcomes for comparator offences can be found in Chapter 9 of this report.

3.4 Conclusion

This chapter set out the homicide laws in Queensland, how criminal responsibility is determined, the relevancy of intent to establishing murder, and the available defences and partial excuses.

In Queensland, the unlawful killing of a person is either murder or manslaughter. Murder and manslaughter are both very serious offences; however, murder requires proof of intent — that is, that the offender intended to cause someone death or grievous bodily harm. Manslaughter does not.

This chapter also provided an overview of the associated offences that the Council's research found a person may be charged with when a child is injured but not killed. Some of these associated offences are charged alongside murder or manslaughter, if the alleged facts warrant it. Further analysis of how some of these offences (*comparator offences*) compare to sentencing for child homicide is set out in Chapter 9.

Chapter 4 — Sentencing process and framework

4.1 Introduction

This chapter sets out the current approach to sentencing in Queensland with a focus on sentencing for child homicide offences and other offences involving the use of violence resulting in death or serious injury. It outlines the sentencing process, statutory sentencing purposes and factors, treatment of these purposes and factors by Queensland courts, and the views expressed in submissions and during consultation.

4.2 Sentencing hearing

The same approach to sentencing applies to child homicide offences as it does to other offences dealt with by Queensland courts.

At a sentencing hearing, the prosecution and defence make oral and/or written submissions which can be supplemented by other documents, such as specialist reports, references, other relevant documents and case law highlighting relevant principles and comparative decisions. This provides the court with a summary of the facts of the case, the impact of the crime on identified victims, detail of 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 (VIS), which they can read aloud in the courtroom.[295]

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. 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).[296] 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.

4.3 Sentencing process

Sentencing in Queensland, as in other Australian states and territories, is not a mechanical or mathematical exercise.[297] Queensland courts sentence by applying an 'instinctive synthesis' approach:

> 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.[298]

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295 See *Penalties and Sentences Act 1992* (Qld) ss 179I–179N and *Victims of Crime Assistance Act 2009* (Qld) s 5.

296 *Evidence Act 1977* (Qld) s 132C.

297 *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 Dalgliesh (a Pseudonym)* (2017) 349 ALR 37, 46 [45] (Kiefel CJ, Bell and Keane JJ). See also *Barbaro v The Queen* (2014) 253 CLR 58, 72 [34] (French CJ, Hayne, Kiefel and Bell JJ).

298 *Director of Public Prosecutions v Dalgliesh (a Pseudonym)* (2017) 349 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).

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 is in keeping with consistency of approach and applicable legislation.[299]

Unless legislation fixes a mandatory penalty (as it does with murder), 'the discretionary nature of the judgment required means that there is no single sentence that is just in all the circumstances'.[300] Sentencing courts have a wide discretion yet must take into account all relevant considerations (and only relevant considerations) including legislation and case law.[301]

The discretion can 'miscarry' when the sentence is clearly unjust — either being 'manifestly excessive' or 'manifestly inadequate'.[302] 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'.[303]

Consistency in sentencing requires like cases to be treated alike and different cases, differently.[304] 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'.[305]

> 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.[306]

However, if cases show a range of sentences for similar offending that are 'demonstrably contrary to principle', they do not have to be followed in future.[307]

'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.[308] The so-called range is 'merely a summary of the effect of a series of previous decisions'; it reflects parliament's recognition that 'the range of circumstances surrounding each offence will also be great'.[309] The history of a range of sentences for similar offending does not guarantee the range, including its upper and lower limits, is correct.[310] Previous sentences have been described as a guide only,[311] and stating them as a 'range' does not establish a sentencing pattern.[312] It is 'consistency in the application of

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299 *Markarian v The Queen* (2005) 228 CLR 357, 371 [27] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

300 *Director of Public Prosecutions v Dalgliesh (a Pseudonym)* (2017) 349 ALR 37, 40 [7] (Kiefel CJ, Bell and Keane JJ).

301 *Markarian v The Queen* (2005) 228 CLR 357, 371 [27] (Gleeson CJ, Gummow, Hayne and Callinan JJ) and *Barbaro v The Queen* (2014) 253 CLR 58, 70 [25] (French CJ, Hayne, Kiefel and Bell JJ).

302 *Director of Public Prosecutions v Dalgliesh (a Pseudonym)* (2017) 349 ALR 37, 40 [7] (Kiefel CJ, Bell and Keane JJ).

303 *Barbaro v The Queen* (2014) 253 CLR 58, 70 [26]–[27] (French CJ, Hayne, Kiefel and Bell JJ).

304 *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).

305 *R v Jones* [2011] QCA 147 (24 June 2011) 8 [27] (Daubney J, Muir and White JJA agreeing).

306 *Wong v The Queen* (2001) 207 CLR 584, 591 [6] (Gleeson CJ).

307 *Director of Public Prosecutions v Dalgliesh (a Pseudonym)* (2017) 349 ALR 37, 48 [50] (Kiefel CJ, Bell and Keane JJ).

308 *R v Streatfield* (1991) 53 A Crim R 320, 325 (Thomas J, Cooper J agreeing).

309 R v Ryan and Vosmaer; Ex parte Attorney-General [1989] 1 Qd R 188, 192–193 (Dowsett J).

310 *Hili v The Queen* (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).

311 *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).

312 *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).

relevant legal principles' that is sought, 'not numerical equivalence'.[313] 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'.[314]

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[315] and it is important to properly characterise the offending conduct.[316] 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'.[317] Seeking absolute precision and supposed conformity is difficult and inadvisable — there is 'an inherent lack of exactitude' characterising manslaughter sentences.[318] The 'infinitely varying circumstances'[319] in which manslaughter can be committed are discussed further in Chapter 5, in the context of identifying a sentencing 'range' for manslaughter.

4.4 Sentencing purposes

The Terms of Reference asked the Council to:

> assess whether the current sentencing consideration of deterrence, denunciation, rehabilitation, punishment and the protection of the community are adequate for the purposes of sentencing this cohort of offenders, and identify if specific legislative guidance is required.

This section considers the current statutory sentencing purposes in Queensland, how these are applied in cases of child homicide, and views on the need for reform.

4.4.1 Legislative 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 (and combinations of them):

- to punish the offender to an extent or in a way that is just in all the circumstances;
- to provide conditions to support the offender to be rehabilitated;
- to deter the offender or other persons from committing the same or a similar offence;
- to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved; and
- to protect the Queensland community from the offender.[320]

The Act does not suggest that one purpose should be more, or less, important than any other purpose, and in practice, their relative weight must be assessed taking into account the individual circumstances involved. The purposes overlap and none of them can be considered in isolation; they are guideposts to the appropriate sentence, sometimes pointing in different directions.[321]

The concept of 'just punishment' reflects the principle of proportionality — a fundamental principle of sentencing in Australia. Sentencers must not impose a sentence 'exceeding that which is commensurate

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313 *Barbaro 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).

314 *R v Bush (No 2)* [2018] QCA 46 (23 March 2018) 12 [76]–[77] (Sofronoff P, Morrison JA and Douglas J).

315 *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).

316 *R v Bush (No 2)* [2018] QCA 46 (23 March 2018) 12 [77] (Sofronoff P, Morrison JA and Douglas J).

317 *R v Dwyer* [2008] QCA 117 (16 May 2008) 8 [37] (Keane JA).

318 *R v WAW* [2013] QCA 22 (22 February 2013) 7 [37] (de Jersey CJ).

319 Ibid 6 [32] (de Jersey CJ).

320 *Penalties and Sentences Act 1992* (Qld) s 9(1).

321 *Veen v The Queen (No 2)* (1988) 164 CLR 465, 476 (Mason CJ, Brennan, Dawson, Toohey JJ).

to the gravity of the offence for which the offender has been convicted'.[322] This principle is discussed further in section 4.7 below.

Deterrence has a forward-looking, crime prevention focus and aims, as a consequence of the penalty imposed, to discourage the offender and other potential offenders from committing the same or a similar offence.[323]

Denunciation in a sentencing context is concerned with communicating 'society's condemnation of the particular offender's conduct'.[324] 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'.[325]

4.4.2 Application of sentencing purposes by Queensland courts

Queensland courts have recognised deterrence and denunciation as being primary sentencing considerations when sentencing for offences of violence involving child victims:

> 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.[326]

The need for just punishment has also been expressly recognised by courts as a separate and important sentencing purpose in this context.[327] The *Queensland Parole System Review Final Report* (2016) noted:

> 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.[328]

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.[329]

> *R v Potter; Ex parte Attorney-General (Qld)* (2008) 183 A Crim R 497; [2008] QCA 91 (18 April 2008):
>
> P, a mother, 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.

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322 Kate Warner, *Sentencing in Tasmania* (Federation Press, 2nd ed, 2002) 76.

323 Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Law Book Co., 3rd ed, 2014) 251.

324 *Ryan v The Queen* (2001) 206 CLR 267, 302 [118] (Kirby J).

325 Ibid, citing *R v M (CA)* [1996] 1 SCR 500, 558 (Lamer CJ).

326 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). See also *R v Riseley; Ex parte A-G (Qld)* [2009] QCA 285 (22 September 2009) 12 [47] (Keane JA; Holmes JA and McMurdo P agreeing).

327 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, 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 Ditford* (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.

328 Queensland Parole System Review, *Queensland Parole System Review Final Report* (2016) 5 [35].

329 *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.

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 8 years' imprisonment with parole eligibility after 3 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 further in Chapter 5.

R v Green & Haliday; Ex parte Attorney-General (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 H's 18-month-old child, S, whom they had physically restrained at night to ensure she slept, causing her to suffocate. 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 problems 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.

4.4.3 Findings from sentencing remarks on sentencing purposes

The Council undertook analysis of sentencing remarks for the offence of manslaughter to compare the sentencing practices applied by Queensland courts where the victim is a child or an adult. The Council was interested in knowing whether the same factors were relevant to offenders convicted of killing a child as for offenders convicted of killing an adult. This included analysing how the judges applied the sentencing purposes to sentencing for manslaughter offences between 2005–06 and 2016–17.

The Council acknowledges the limitations of this approach, which are detailed in Appendix 3 of this report.

As discussed above, there are five purposes judges are required to apply when sentencing an offender. The analysis considered whether judges, in delivering their sentencing remarks for cases involving the offence of manslaughter, either expressly stated a sentencing purpose that was relevant to sentencing or made a statement from which this purpose could be implied.

The findings of the Council's research are summarised in Table 2 below.

Table 2: Summary of sentencing purposes mentioned in sentencing remarks for manslaughter by victim type

Purpose	Child victims		Adult victims	
	Count (N=33)	%	Count (N=201)	%
Punishment	10	30.3	79	39.3
Deterrence (general or personal)	13	39.3	82	40.7
Rehabilitation	12	36.3	62	30.8
Denunciation	11	33.3	58	28.8
Community protection	8	24.2	50	24.8
No purposes	16	48.5	109	54.2
All five mentioned	2	6.1	19	9.5

These findings show that, generally, the same types of sentencing purposes are raised in manslaughter, regardless of whether the victim was a child or an adult. Deterrence is the most commonly stated or implied purpose for both victim cohorts, suggesting that courts consider this the most important purpose when sentencing for this offence. Deterrence comprised both general and specific deterrence.

Rehabilitation was raised in 36.3 per cent of cases with a child victim, compared to 30.8 per cent in cases with an adult victim, and punishment was raised in 30.3 per cent of cases with a child victim, compared to 39.3 per cent of adult victim cases. Community protection was raised as a relevant purpose in almost a quarter of cases in both cohorts.

In two cases with a child victim (6.1%) and 19 cases with an adult victim (9.5%) the sentencing judge stated all five sentencing purposes. In these cases the judge provided an overview statement about sentencing and the purposes along the lines of:

> In coming to an appropriate penalty, I must also have regard to the purpose for which I am sentencing you, which is to punish you in a way or to an extent that is just in all the circumstances, to provide conditions which I consider will help you to be rehabilitated, to deter you or other persons from committing the same or a similar offence, to make it clear that the community, acting through the Court, denounces the sort of conduct in which you were involved, and to protect the Queensland community from you.

These findings also show that in over half of the cases with adult victims (54.2%), and just under half of the cases with child victims (48.5%), judges did not state or imply a single sentencing purpose.[330] This does not mean that judges did not take these purposes into account — just that these purposes were not stated by the sentencing judge in delivering their reasons.

While judges are required to provide reasons for sentence, as a similar study conducted in Victoria concluded, 'the extent to which this requires them to refer explicitly to the rationale or the purpose of the sentence is unclear'.[331]

Under the Queensland *Sentencing Benchbook*, judges are advised to:

> briefly summarise the offence(s) and the defendant's role. The Judge should refer specifically to matters taken into account which impact on the sentence imposed. The Judge must state in open court the reasons for the sentence, and should state whether or not recording a conviction and give reasons for that decision. The sentencing remarks should contain a summary of all matters taken into account.[332]

This approach appears to place the primary focus on identifying the factual basis for the sentence and relevant mitigating and aggravating factors, although assuming the sentencing purposes are one of the 'matters taken into account', they may also come within the scope of this guidance.

For a discussion of the role of sentencing remarks, see Chapter 11 of this report.

4.4.4 Findings from submissions and consultation

The Council's consultation paper invited feedback on 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.

Generally, legal stakeholders were of the view that to ensure sentencing is just in all the circumstances, no individual sentencing purpose should be given greater weight in sentencing for child homicide offences. The Queensland Law Society cautioned that 'to attempt to prioritise personal deterrence, general deterrence, denunciation, rehabilitation or other factors would allow overtly subjective influences and cause disproportionate sentence outcomes'.[333]

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330 Cf Warner, Davis and Cockburn, above n 327. In this Victorian study examining 122 sentencing remarks very few (n=8) did not express any sentencing purposes.

331 Warner, Davis and Cockburn, above n 327, 73.

332 Judge M J Shanahan, *Sentencing Benchbook*, Sentencing Procedure (April 2017) [14].

333 Submission 35 (Queensland Law Society).

The Aboriginal & Torres Strait Islander Women's Legal Services NQ believes the governing principles and sentencing guidelines in the PSA already provide 'an appropriate range of considerations for sentencing'.[334]

Legal Aid Queensland expressed the view that:

> Section 9(1) of the PSA in its current form provides sufficient guidelines for a sentencing court. In cases where anything less than mandatory life can be imposed, the purpose of each sentence should be left to be determined by the judicial officer informed of all the circumstances in the case. We do not support the creation of a subset of purposes mandated for particular offences which removes flexibility of the sentencing court to determine the purpose on a case by case basis.[335]

A similar view was shared by the Bar Association of Queensland:

> The only purposes for which sentences may be imposed in Queensland appear in s.9(1) of the PSA. At the outset, it is important to acknowledge that the purposes for which sentences may be imposed are of equal relevance to an offender who kills a child as to an offender who kills any one person. No one purpose assumes high prominence simply because the victim was a child.[336]

The Bar Association of Queensland noted that 'general and personal deterrence are of little importance in murder sentencing'. This is because: 'Most murderers are not considered to be at high risk of re-offending and people who commit murder are in the main, not susceptible to general deterrence'.[337]

The Queensland Police Service (QPS) and Sisters Inside suggested that the purposes of punishment and denunciation were the most important sentencing purposes for child homicide offences.[338] The QPS supported this view on the basis that, 'there is a community expectation that crimes against children should be punished severely, and the denunciation of this conduct publicly validates these expectations'.[339]

The QPS considered that deterrence and community protection were less relevant than punishment and denunciation for these offences due to the range of reasons for the death of a child and the lack of intention in many of the deaths.[340] The QPS felt that community protection was more relevant than deterrence for these offences, due to the lack of intention to kill or cause grievous bodily harm in many child deaths.

Sisters Inside thought rehabilitation should be a 'more prominent' purpose of sentencing, while accepting:

> — to the extent that it allows for a sentence other than imprisonment (actual or ongoing), recognising the circumstances of the offence, and the personal circumstances and trauma of women sentenced for the death of a child.[341]

At the community summits in Logan and Townsville, the Council asked participants in a group activity to rank their top two most important and their least important sentencing purposes in relation to sentencing for child homicide offences. Each purpose was explained to participants at the start of the activity; 28 people participated in Logan and 23 in Townsville.

In Logan, 17 people selected punishment as the most important sentencing purpose, for the following reasons: being held to account; consequences; and sentences do not reflect the impact on victims' families/friends. The second most important purpose (selected by 8 people) was denunciation. However, it was closely followed by punishment (5), general deterrence (6) and community protection (5). The least important sentencing purpose was personal deterrence, identified by 11 people. It was unclear why participants felt this purpose had the least relevance to sentencing for child homicide offences.

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334 Submission 32 (Aboriginal & Torres Strait Islander Women's Legal Service NQ).

335 Submission 33 (Legal Aid Queensland).

336 Submission 30 (Bar Association of Queensland).

337 Ibid.

338 Submission 36 (Queensland Police Service) and Submission 31 (Sisters Inside).

339 Submission 36 (Queensland Police Service).

340 Ibid.

341 Submission 31 (Sisters Inside).

In Townsville, punishment was seen as both the most important (by 14 people) and the second most important sentencing purpose (by 8 people). Participants chose punishment for similar reasons to those at Logan — to hold offenders accountable and believing that if judges get punishment right, all the other purposes will be satisfied. The least important sentencing purpose was rehabilitation, selected by 11 people. When asked for their reasons, some participants stated that rehabilitation does not work, rehabilitation programs in prisons are not adequate, and rehabilitation is not possible where there is intent to harm/kill.

4.4.5 Findings from focus groups

The Council convened 10 focus groups to explore community views on the adequacy of sentencing for child homicide offences. The approach taken to these focus groups is discussed in more detail in Appendix 4. The Council intends to publish the results of the focus group analysis in more detail at a later date.

For the Council's analysis of the focus group results, participants were categorised into sociodemographic subgroups: age cohorts (18–39 years, 40–59 years and 60+ years), sex, education level (secondary, post-secondary, tertiary), employment status (formally employed, not formally employment), location of residence (urban, regional/remote), marital status (partnered, not partnered), whether they reported having children or grandchildren (any age), and having children or grandchildren currently under 18 years.[342]

As part of the Council's research, focus group participants were specifically asked to consider the purposes of sentencing.[343] To ensure clarity and support informed responses, the purposes were explained in detail and supporting hard-copy reference material was disseminated for retention during the focus group. Both types of deterrence — general and personal — were explained to participants as well.

Participants were asked to rank the importance of individual purposes of sentencing according to: crime generally (non-violent), violent crime, and child homicide. Separation of the ranking exercise by nature of offending was adopted to examine if nuanced responses were provided based on the type of crime. Research shows that targeted approaches to gauging public perceptions, as opposed to using abstract questions, consistently deliver more comprehensive insights.[344] This is particularly important for questions relating to the functions and operations of courts, as people typically report a lack of understanding of this area of criminal justice.[345]

Differences in how participant subgroups ranked sentencing purposes across the three types of offending were observed, most noticeably when rankings for general crime were compared with those for violent crime and child homicide. Across all subgroups, fewer differences in rankings were observed when the focus shifted to considering violent crime and child homicide. Any differences tended to focus on lower-level rankings and typically the purposes of denunciation and rehabilitation. Interestingly, the Council's focus group findings support earlier research that revealed 'public support for sentencing purposes changes according to the nature of the crime being considered'.[346] Ensuing discussions with participants revealed that these differences were associated with their assessments of victim type and violence as an indicator of offence seriousness — aspects of crime previously identified in international research as influencing public perceptions of crime seriousness and sentencing responses.[347]

Overall, punishment was seen by focus group participants as the most important purpose of sentencing, across all three crime types, and generally by most participant subgroups. The extent of agreement about

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342 Further information about the sub-groupings used for the purpose of this analysis is contained in Appendix 4.

343 The Council's focus groups are explained in detail in Appendix 3.

344 See for example, Julian V. Roberts and Michael J. Hough, *Understanding Public Attitudes to Criminal Justice* (Open University Press, 2005) ch 4.

345 Ibid 69–72.

346 Ibid 75.

347 Barry Mitchell, 'Public Perceptions of Homicide and Criminal Justice' (1998) 38(3) *British Journal of Criminology* 453, 458 and 463.

ranking punishment as the most important purpose increased according to crime type. Child homicide registered the greatest support for ranking punishment as the most important purpose.

Studies suggest that participants in focus groups tend to increase the severity of the punishment as the seriousness of the offence increases, 'but their sentences were not affected by variations in the likelihood of committing future offences, suggesting that just deserts was the primary sentencing motive'.[348]

For each crime type, denunciation was generally ranked as the least important sentencing purpose. When participants were asked to consider whether any purposes should be removed, responses varied, but many indicated that denunciation was not a useful purpose and could be removed. Across the three crime types, specific deterrence was consistently ranked highly by participants, usually placed second behind punishment. Community protection generally received a lower ranking.

Rehabilitation received varied rankings across the three crime types, with some subgroups ranking it as high as the second most important purpose, while others considered it least important. For example, across each crime type, rehabilitation was ranked higher by the youngest cohort (18–39 years) than by older age groups, while participants who reported having had children/grandchildren ranked it lower than those who had not had children/grandchildren.

Participants were also specifically asked to self-report if they had individually changed their rankings of the purposes according to the nature of crime being considered. When asked if rankings of the purposes of sentencing differed when participants considered general crime as opposed to child homicide, 92 per cent (92 of 100 responses for this question) responded 'yes'. All participant subgroups reflected the same response profile. The reasons underpinning the strong response to this question relate to two key considerations: the vulnerability of a child and the perceived seriousness of the offence of child homicide. These considerations are also reflected in earlier comparable research about homicide: 'The reasons most commonly given for choosing child victims as representing the worst homicides were the innocence or defencelessness of the deceased'.[349]

The following direct quotations from the focus groups are provided for illustrative purposes:

> 'Child crime is much more serious than crime generally.' – A01
>
> 'Children cannot defend themselves; they are vulnerable.' – B09
>
> 'Child homicide is the worst crime that can be committed in my opinion and my ratings reflect this.' – C03
>
> 'For the obvious, one needs protection and the lesser crime needs rehab.' – F09
>
> 'Killing a child is very different to doing drugs.' – J01

In addition, participants were asked to reflect on and compare their rankings of the purposes of sentencing for violent crime and child homicide. When asked the direct question whether their rankings differed between violent crime and child homicide, overall the participants responded 'yes' (74%, representing 74 of 100 responses to this question), although not to the same extent as with the previous question comparing general crime and child homicide. This finding complements previous research about public perceptions of homicide.[350]

Participant comments show an appreciation of the diversity of circumstances associated with offenders and their offending behaviour:

> 'Crimes are not committed to a script. Judges should not be limited to a script.' – A02
>
> 'Definitely, as every case is different.' – B07
>
> 'Yes as every crime has so many different aspects and some may be more relevant than others.' – D01

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348 Roberts and Hough, above n 344, 76, citing Darley et al (2000).

349 Mitchell, above n 347, 463.

350 Ibid 462.

'Why on earth wouldn't it? They are mutually exclusive!' – D09

'Depends on [the] crime.' – E12

'There are always multiple reasons why people do horrific crimes as well as small crimes, so judges must take everything into account from punishment to rehabilitation.' – G05

'There are rarely identical circumstances involved when two incidents occur.' – H14

Again, these responses reflect broader research findings:

> It would be wrong to assume that people are ignorant of some of the important dynamics which affect sentencing tariffs and the deliberations of sentencing judges. For example, participants acknowledged the need for [the] specific circumstances of offences to be considered when sentencing.[351]

Lastly, participants were asked to focus on their perceptions of the adequacy of the current purposes of sentencing specifically for child homicide. Respondents were fairly evenly split — with about a third of the 91 participants who answered this question responding 'no' (38%), 'yes' (32%) and 'unsure' (30%). Participant responses appeared to acknowledge that child homicide represents a particularly serious crime type. It further revealed that while most thought the current purposes should be able to accommodate these serious cases, the focus had to be on how judges applied the purposes in response to each case, suggesting overall the need for a stronger emphasis on punishment.

'Yes, rehabilitation and punishment are sufficient purposes for sentencing, especially regarding child crime.' – A05

'Perhaps a second version of protection (as deterrence has two) re: protection of most vulnerable, i.e. children, aged, disabled.' – B10

'Heavy penalties are needed for offenders. Children cannot stand up for themselves.' – C12

'Is it taken into account the fact that the child is defenceless in all areas and then the person could be given a lesser sentence because they cooperate or have an amazing legal team? I don't know if it is fair. The child doesn't get a voice.' – F03

'It is able to provide a fair balanced judgment from accidental to intentional deaths.' – F07

'Yes, if applied well. There should be less tolerance if crime inflicted on a child or innocent party.' – G09

4.4.6 Approach in other jurisdictions

Most other Australian jurisdictions adopt similar sentencing purposes to those in Queensland. These general purposes are listed, with courts determining which of these purposes are relevant and the weight to be given to them. These are summarised in Table 3 below.

Table 3: Statutory purposes of sentencing by state and territory

Purposes	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Punishment	✓	✓	✓	×	✓	×	✓	✓
Rehabilitation	✓	✓	✓	×	✓	✓	✓	✓
Deterrence	✓	✓	✓	×	✓	✓	✓	✓
Denunciation	✓	✓	✓	×	x	✓	✓	✓
Community protection	✓	✓	✓	×	✓	✓	✓	✓
Harm recognition	✓	×	×	×	×	×	✓	×
Accountability	✓	×	×	×	×	×	✓	×

Source: Reproduced from Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report (2017) Parts VII–X and Appendices, 280, Table 34.3.

351 Nigel Stobbs, Geraldine Mackenzie and Karen Gelb, 'Sentencing and Public Confidence in Australia: The Dynamics and Foci of Small Group Deliberations' (2014) 48(2) *Australian and New Zealand Journal of Criminology* 219, 229.

In contrast to Queensland, in the Australian Capital Territory and New South Wales, two additional sentencing purposes are listed:

- to recognise the harm done to the victim of the crime and the community; and
- to make the offender accountable for his or her actions.[352]

Some jurisdictions have identified in legislation specific sentencing purposes and factors a court must apply in sentencing different types of offenders. For example, under section 6D of the Victorian *Sentencing Act 1991*, in sentencing a 'serious offender' for a 'relevant offence' (as defined under this Act), the court, in determining the length of that sentence, is required to treat the protection of the community from the offender as the principal purpose for which the sentence is imposed.

In Queensland, while community protection is identified under section 9(3) of the PSA as a factor to which courts must have primary regard in sentencing an offender for an offence involving the use of violence, or resulting in physical harm to another person, this is expressed in the context of considering the risk of physical harm to any members of the community if a custodial sentence were not imposed, and the need to protect the community from that risk.

Greater specificity is required, however, under section 9(6) of the Act, which relates to the sentencing of offenders for an offence of a sexual nature committed in relation to a child under 16 years. This requires courts to have primary regard to such factors as:

- the need to protect the child, or other children, from the risk of the offender reoffending (community protection);
- the need to deter similar behaviour by other offenders to protect children (general deterrence); and
- the offender's prospects of rehabilitation.

In Canada, courts are required under the Canadian *Criminal Code* to 'give primary consideration to the objectives of denunciation and deterrence of such conduct' when sentencing for an offence involving the abuse of a person under 18 years.[353] This provision would therefore extend beyond sexual abuse to include the physical abuse of a child leading to their death.

4.4.7 The Council's view

The Council's research and consultation findings suggest that the most important sentencing purposes in sentencing for child homicide from the community's perspective are:

- punishment
- deterrence (in particular, general deterrence), and
- denunciation.

This generally reflects views expressed that, due to the seriousness of the conduct involved and the vulnerability of child victims of these offences, a substantial penalty is warranted that reflects the seriousness of the offence, communicates through that penalty the community's abhorrence for this conduct, and deters others from committing such offences in future.

The Council notes that this aligns with principles articulated by the Queensland Court of Appeal and by other courts of criminal appeal in sentencing in these cases.

The Terms of Reference requested that the Council assess whether current sentencing purposes are adequate for sentencing this cohort of offenders and if specific legislative guidance is required.

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352 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(e); *Crimes (Sentencing) Act 2005* (ACT) ss 7(1)(e), 7(1)(g).

353 *Criminal Code*, RSC 1985, c C-46, s 718.01. Unlike Queensland, punishment is not an express sentencing purpose in Canada, although the need for a sentence to be proportionate to the gravity of the offence and degree of responsibility of the offender is identified as a fundamental sentencing principle: s 718.1.

The potential advantages to the listing of specific purposes as primary purposes of sentencing for child homicide offences include:

- providing clear direction for courts in legislation about the most important sentencing purposes for child homicide offences; and
- encouraging express reference to be made to these purposes in sentencing, thereby promoting public confidence in sentencing.

The Council considers these reasons alone are inadequate to justify the prioritising of specific sentencing purposes in legislation and may simply contribute to the complexity of the sentencing process. It would also create a specialist approach to sentencing for child homicide, when the same sorts of purposes equally apply to other offences involving violence, and to homicide offences committed against adult victims.

Equally, it considers there is no need to add additional sentencing purposes to the current set of listed purposes to support the imposition of appropriate sentences for these offences.

Based on the Council's analysis, when sentencing purposes are referred to by courts in sentencing, deterrence and denunciation are already those purposes identified by courts as the most relevant. While punishment is less frequently referenced, this is most likely due to reasons suggested by a similar study of sentencing remarks:

> In many decisions it seems to be a description of an appropriate sentence rather than being identified as a purpose in its own right: a just punishment is one that is necessary in order to denounce the seriousness of the offence or to deter potential offenders.[354]

Legislating to require consideration of punishment and other sentencing purposes, and for these purposes to be prioritised, is therefore considered by the Council to be unnecessary.

The Council, however, considers there is some benefit to be gained in the sentencing remarks in these cases articulating the purpose or purposes of sentencing. Sentencing remarks are an important means of communicating to the offender, and broader community, the purposes for which the sentence is being imposed to promote public confidence and understanding of sentencing. In a significant proportion of cases examined by the Council (48.5%), no sentencing purposes were referenced either in an explicit or implied way.

The role of sentencing remarks is explored further in Chapter 11 of this report.

Advice 1: Legislative sentencing purposes for child homicide

The current sentencing purposes as listed in section 9(1) of the *Penalties and Sentences Act 1992* (Qld) are appropriate. Further statutory guidance on the application of these purposes to the sentencing of offenders for child homicide — such as to list specific purposes as the primary sentencing purposes — is not required to ensure children's vulnerability is reflected in sentencing or to achieve higher sentences.

4.5 Sentencing factors

In addition to sentencing purposes, other forms of statutory sentencing guidance exist within the PSA in the form of principles and factors to be applied in sentencing. This section considers what existing sentencing factors guide courts in sentencing in these cases, and the views expressed in submissions and consultation.

354 Warner, Davis and Cockburn, above n 327, 75.

4.5.1 Sentencing guidelines for violent offences

Section 9 of the PSA has specific rules about sentencing for offences involving violence against, or physical harm to, another person. For these offences, the general principles that make imprisonment the sentence of last resort, and prefer a sentence allowing an offender to stay in the community, do not apply.[355]

When sentencing for offences involving violence against, or physical harm to, another person, the sentencing court must have 'primary regard to' factors that 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).[356] The general factors courts must have regard to when sentencing offenders still apply.[357] See Table 4 below for more detail.

4.5.2 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, the offence) and its prevalence (how common the offence is).

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

- the extent to which he or she is to blame (culpability, which refers to the factors of intent, motive, and circumstances that determine how much the offender should be held accountable for his/her act);[358]
- 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 that 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. Both 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.[359]

The fact an offence is a domestic violence offence must be treated as an aggravating factor, unless the court considers it is not reasonable to do so because of the exceptional circumstances of the case.[360] The definition of a 'domestic violence offence' under section 1 of the *Criminal Code* (Qld) would extend to circumstances in which a child's death is caused by a family member and the offender's conduct is also

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355 See *Penalties and Sentences Act 1992* (Qld) s 9(2A).

356 Ibid s 9(3).

357 Ibid ss 9(2)(b)–(r)).

358 Andrew von Hirsch, *Doing Justice: The Choice of Punishments* (Northeastern University Press, 1986) 64–65, cited in Freiberg, above n 323, 280.

359 *Penalties and Sentences Act 1992* (Qld) s 9(10).

360 Ibid s 9(10A). 'Domestic violence offence' is defined by s 1 of the *Criminal Code* (Qld).

domestic violence or associated domestic violence under the *Domestic and Family Violence Protection Act 2012* (Qld). See Table 4 below for more detail.

Table 4: Statutory sentencing factors set out in section 9 of the PSA

Sentencing guidelines for violent offences	
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
General sentencing factors	
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

4.5.3 Findings from submissions and consultation

The Council's consultation paper invited feedback in relation to the sentencing factors that must be taken into account by Queensland courts when sentencing for child homicide offences. The Council asked whether some factors were more important when sentencing for child homicide offences and why.

Submissions from legal and child advocacy stakeholders and community members identified several sentencing factors set out in sections 9(2) and 9(3) of the PSA that are particularly relevant to sentencing child homicide offenders. There was consensus that the sentencing factors for violent offences set out in section 9(3) were the most relevant, with the following factors highlighted in several submissions: [361]

- personal circumstances of any victim;
- circumstances of the offence;
- nature or extent of the violence used, or intended to be used;
- criminal history of the offender;
- any remorse or lack of remorse of the offender.

Regarding the personal circumstances of the victim, the vulnerability of child victims was raised in the submissions of the Fighters Against Child Abuse Australia (FACAA), Protect All Children Today Inc (PACT), the Bar Association of Queensland and the QPS. The Bar Association of Queensland also identified additional characteristics of victim vulnerability — namely, 'the victim was young, old, living with a disability or in some other way was a vulnerable person'.[362]

Legal Aid Queensland suggested that, as with the sentencing purposes, no particular factor or factors should be considered the most important for these types of homicides:[363]

> Given the diverse circumstances in which these types of cases occur in our view it is not suitable to apply a formulaic hierarchy to the sentencing process.

Legal stakeholders also identified sentencing factors relevant to the offender. In its submission, the Bar Association of Queensland regarded the offender's antecedents, age and character, and any medical, psychiatric, prison or other relevant reports on the offender as being relevant to sentencing for child homicide offences, noting in relation to the antecedents, age and character of the offender:

> Personal details about an offender may reveal that causing the death was out of character or explain a uniquely personal response in the circumstances. Capacity and matters personal to the offender also inform the sentencing Judge about prospects for rehabilitation and risks to the community.

The use of medical, psychiatric, prison or other relevant reports was viewed by the Bar Association as important as:

> on many occasions the moral culpability of an offender is reduced (although not excused) because of a medical or psychiatric condition the offender was suffering at the time of the offence. This is a proper and relevant matter to be taken into consideration by a sentencing Judge. When a person's moral culpability for an offence is reduced or their responsibility for the offence is diminished because of medical/psychiatric evidence, that person's case is not a proper vehicle for general deterrence. There is a body of evidence that a large percentage of parents who are guilty of killing their children suffer from mental illness. The type of mental condition is more likely to be a mood disorder like depression or a personality disorder rather than psychosis. Tragic examples of mothers killing their children while deeply depressed are recorded in the literature.[364]

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361 Submission 16 (Fighters Against Child Abuse Australia), Submission 29 (PACT), Submission 30 (Bar Association of Queensland), Submission 31 (Sisters Inside), Submission 36 (Queensland Police Service).

362 Submission 30 (Bar Association of Queensland).

363 Submission 33 (Legal Aid Queensland).

364 Submission 30 (Bar Association of Queensland).

Legal Aid Queensland used examples to illustrate the same points made by the Bar Association of Queensland:

> The factors important in a case in which a part-time carer with limited criminal history culpable through criminal negligence but whose testimony is crucial to the prosecution of a parent deliberately harming their child will be different to a case in which a severely postnatally depressed young mother neglects her children, underfeeding them unintentionally and unknowingly killing them. A woman who leaves her young child in a bath for a brief period to answer her phone will enliven different factors to a father who internally ruptures a child while sexually abusing that child causing death through irreparable internal injuries. An 18 year old man who kills a 17 year old outside of a party through a single punch is likely to enliven different factors to a shaking baby case. The sentencing process should be an assessment of all relevant factors, whichever factors are enlivened by the particular case.[365]

The Council also asked whether there were any sentencing factors not expressly listed in legislation or referred to in a general way that were important to sentencing for these offences.

In its submission, PACT suggested the age of the child is particularly relevant, noting 'the younger the child, the more vulnerable they are to homicide due to their lack of physical and emotional maturity'. PACT reiterated this point at a meeting with the Council, suggesting specific legislation was needed to ensure judges consider this factor when sentencing.[366]

The QPS suggested that the subsection regarding personal circumstances of the victim, 'may also benefit from more explicit consideration of the vulnerability of the victim'.[367] The QPS acknowledged that such a broad definition of vulnerable would apply to others in the community 'who could be at greater risk of harm through age (very old or very young), ability (physical or mental impairment), background (culturally and linguistically diverse), or life circumstances (homeless, isolated, etc.).'[368]

The QPS further noted that, although the victim's circumstances are taken into consideration in section 9(3)(c) of the PSA, a missing consideration may be 'the short and long term impact this form of offending and the associated loss of a child on the family … particularly in those instances where another family member or trusted associate is the offender'.[369]

In its submission, Sisters Inside voiced concern that there is:

> a lack of legislative and judicial recognition of systemic, institutional and intergenerational violence, poverty and trauma in sentencing. Relatedly, there is also no legislative recognition of extra-judicial or extra-curial punishment as a mitigating factor (although it is recognised as a relevant and appropriate sentencing factor in certain circumstances at common law).[370]

Extra-curial punishment cannot be defined with precision and whether it exists in a case is a separate consideration from the weight to be given to it, if it does. It is punishment imposed otherwise than by a sentencing court; 'suffered by the offender at the hands of the community, either by way of immediate response to the commission of the offence or by way of subsequent retribution'.[371] It involves 'serious loss or detriment as a result of having committed the offence', which partly achieves deterrence or retribution because it provides a reminder of the unhappy consequence of the criminal activity, or leaves the offender with a disability or some affliction because of it.[372] Some academics suggest that extra-curial

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365 Ibid.

366 Victims of Crime Roundtable Meeting, 16 August 2018.

367 Submission 36 (Queensland Police Service).

368 Ibid.

369 Ibid.

370 Submission 31 (Sisters Inside).

371 *Einfeld v The Queen* (2010) 266 ALR 598, 618 (Basten JA).

372 *R v Hannigan* [2009] 2 Qd R 331, 337 [25], Chesterman JA (de Jersey CJ agreeing) regarding the unhappy consequence, and citing, at 334–335 [15]–[16], *R v Daetz; R v Wilson* (2003) 139 A Crim R 398, 410–411 [62], James J regarding 'serious loss or detriment'. Therefore, an offender who allegedly received minor injuries through being assaulted by police during his arrest, but was too intoxicated to remember the event, could receive no sentencing benefit. See also *R v Hook* [2006] QCA 458 (10 November 2006) 4–5 [14] (Jerrard JA, P McMurdo J agreeing). In *R v*

punishment could potentially extend to situations where a perpetrator suffers psychological detriment due to their own actions in causing the death of their child.[373]

4.5.4 Conclusion

The approach taken in other jurisdictions to the setting out of specific sentencing factors relevant to sentencing in these cases in legislation, such as victim vulnerability, is discussed in Chapter 7 of this report.

4.6 Aggravating and mitigating factors

4.6.1 General factors

As discussed above, under section 9 of the PSA, a sentencing judge is required to take any aggravating or mitigating factors into account when determining a sentence. Aggravating factors are details about the offence, the victim and the offender that tend to increase the person's culpability and the sentence they receive. Mitigating factors are details about the offender and their offence that tend to reduce the severity of their sentence.

In sentencing, the Queensland Court of Appeal has identified the following features as important aggravating considerations in homicide sentencing:

- victim particularly vulnerable due to age or disability;[374]
- offender's relevant criminal history;[375]
- offence involved use of a weapon;[376]
- abuse of position of trust;[377]
- significant and/or prolonged mental or physical suffering of the deceased;[378]
- lack of remorse;[379]
- persistence/level of violence;[380]
- failure to seek medical attention;[381] and

Daetz; R v Wilson (2003) 139 A Crim R 398, the fractured skull inflicted by an associate of a robbery victim was extra-curial punishment. In *R v Davidson, Ex parte A-G (Qld)* [2009] QCA 283 (18 September 2009) 4–5 (Holmes JA, Keane and Chesterman JJA agreeing), a beating administered by a molested child's father (and the consequent lifelong disability and economic disadvantage) was extra-curial punishment. It can also include an enduring psychiatric injury caused at least in part by a violent arrest, which would make time in prison more difficult: *R v Galeano* [2013] 2 Qd R 464, 481–482 [46]–[50] (Gotterson JA, McMurdo P agreeing). It is possible that public shaming can also constitute extra-curial punishment, although such an application 'gives rise to considerable difficulties': *R v Nuttall* [2011] 2 Qd R 328, 346 [65] (Muir JA, Fraser and Chesterman JJA agreeing) and see *Einfeld v The Queen* (2010) 266 ALR 598, 618–623 [86]–[111] (Basten JA, Hulme and Latham JJ agreeing) and *R v Jones* [2011] QCA 147 (24 June 2011) 7–8 [21]–[22] (Daubney J, Muir and White JJA agreeing).

373 James Douglas Fellows and Mark David Chong, 'Extra-curial Punishment in Criminal Law Sentencing: A Principles-Based Approach' (2016) 18 *Southern Cross University Law Review* 55, 56.

374 *The Queen v Irvine* [[1997] QCA 138 (8 May 1997) (Macrossan CJ, Fitzgerald P, McPherson JA agreeing).

375 *R v Hall* [2002] QCA 125 (5 April 2002) [8] (Williams JA).

376 *R v Sebo; Ex parte A-G (Qld)* [2007] 426 (30 November 2007) 2 [4] (Holmes JA, Keane JA and Daubney J agreeing).

377 *R v Potter; Ex parte A-G (Qld)* (2008) 183 A Crim R 497, 503 [24] (Mackenzie AJA, Keane JA agreeing).

378 'The respondent's cruel treatment of this child was repeated, continuing over a period, unlike the isolated conduct in *Hall*': *R v Green & Haliday; Ex parte A-G (Qld)* [2003] QCA 259 (19 June 2003) 5 (de Jersey CJ, Davies and Williams JJA agreeing).

379 *R v Sica* [2013] QCA 247 (2 September 2013) 33 [142].

380 *The Queen v Walsh* CA No 85 of 1986 (12 June 1986) (Connolly J, Williams J and Ambrose JJ).

381 *R v Riseley; Ex parte A-G (Qld)* [2009] QCA 285 (22 September 2009) 11 [44] (Keane JA, McMurdo P and Holmes JA agreeing).

- concealing involvement by blaming others.[382]

The Queensland Court of Appeal has identified the following features as important mitigating considerations in child homicide sentencing:

- guilty plea;[383]
- previous good character/lack of criminal history, or no relevant/recent convictions;[384]
- significant physical or mental health issues or low intellectual capacity;[385]
- age of offender (young offender);[386]
- rehabilitation efforts after offence;[387]
- assistance to law enforcement authorities;
- remorse;[388] and
- sought medical treatment for victim.

4.6.2 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).[389] 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.[390]

There are three reasons why a guilty plea is generally accepted as justifying a lower sentence than would otherwise be imposed. 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.[391]

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.[392]

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382 *R v Chard; Ex parte A-G (Qld)* [2004] QCA 372 (8 October 2004) 4 [18] (Williams JA, de Jersey CJ and Jones J agreeing).

383 *R v Ross* [1996] QCA 411 (25 October 1996) 3; *R v Clark* [2009] QCA 361 (27 November 2009) 7 [25] (Keane JA, Holmes JA and Atkinson J agreeing).

384 *R v Sebo; Ex parte A-G (Qld)* [2007] 426 (30 November 2007) 6 [18] (Holmes JA, Keane JA and Daubney J agreeing).

385 *R v Green & Haliday; Ex parte A-G (Qld)* [2003] QCA 259 (19 June 2003) 4 (de Jersey CJ, Davies and Williams JJA).

386 *R v Riseley ; Ex parte A-G (Qld)* [2009] QCA 285 (22 September 2009) 11 [44] (Keane JA, McMurdo P and Holmes JA agreeing).

387 Ibid 12 [45] (Keane JA, McMurdo P and Holmes JA agreeing).

388 *R v Green & Haliday; Ex parte A-G (Qld)* [2003] QCA 259 (19 June 2003) (de Jersey CJ, Davies and Williams JJA agreeing).

389 *Penalties and Sentences Act 1992* (Qld) s 13.

390 See for example, *R v Bates; R v Baker* [2002] QCA 174 (17 May 2002) 11–12 [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: 9 [38]; and that it involved 'an horrendous crime calling for severe punishment': 10 [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.

391 *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) 14 [76] (Atkinson J).

392 *Cameron v The Queen* (2002) 209 CLR 339, 343 [11], [13]–[14] (Gaudron, Gummow and Callinan JJ); and *McQuire & Porter (*2000) 110 A Crim R 348, 358 (de Jersey CJ), 362 and 366 (Byrne J).

As to the utilitarian value of a plea, courts have recognised that the public interest is served by an accused person who accepts guilt and pleads guilty to an offence charged,[393] even if there is a high likelihood of conviction had the case proceeded to trial.[394] This is because, unless there is some incentive for a defendant to plead guilty, there is always a risk they will proceed to trial if they consider there is nothing to be lost by doing so:[395]

> 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.[396]

The person's motive for pleading guilty is not a basis for not taking the plea into account.[397]

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,[398] 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 was not prepared to plead guilty are withdrawn, it cannot automatically be assumed the person has not pleaded guilty at the earliest opportunity.[399]

As discussed further in Chapter 5, 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.[400]

However, in circumstances in which the court determines it appropriate for the offender to be declared convicted of a serious violent offence (SVO), an offender must serve 80 per cent of their sentence before being eligible for parole even if they have entered a guilty plea. The SVO scheme is discussed further at Chapter 5 of this report.

During consultation, some family members of child victims of homicide expressed particular concern over reliance on a guilty plea as a basis for reducing the sentence when rationalised by those in the justice system as justified on the basis that it facilitates the administration of justice and saves time and money. This was considered by some whom the Council consulted as particularly confronting — leading to concerns that efficiency and cost savings are being prioritised over recognition of the loss of a child's life.

The views of family members of child victims of homicide on improvements that could be made to the criminal justice system process, including in relation to pleas, are discussed in Chapter 10 of this report.

4.6.3 Court of Appeal guidance

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.

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393 *R v Harman* [1989] 1 Qd R 414; *Cameron v The Queen* (2002) 209 CLR 339, 360–61 [66]–[68] (Kirby J).

394 *R v Bulger* [1990] 2 Qd R 559, 564 (Byrne J).

395 *R v Bulger* [1990] 2 Qd R 559, 564 (Byrne J).

396 *R v Ellis* (1986) 6 NSWLR 603, 604 (Street CJ).

397 *R v Morton* [1986] VR 863, 867 cited with approval in *R v Bates; R v Baker* [2002] QCA 174 (17 May 2002) 16 [83] (Atkinson J).

398 *R v Bates; R v Baker* [2002] QCA 174 (17 May 2002) 15 [79] (Atkinson J).

399 *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) 15 [80] (Atkinson J).

400 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 A-G (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].

R v Chard; Ex parte Attorney-General (Qld) [2004] QCA 372:

> 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'.[401] The Court allowed an Attorney-General's appeal against a sentence of 6 years substituting the initial sentence with a sentence of 7 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 8 years' imprisonment with an 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'.[402] 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.[403]

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

> The Queensland Court of Appeal dismissed an appeal against a sentence of 8 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 8 years for each count with the sentences ordered to be served concurrently. JV was ordered to be eligible to apply for parole after serving 3 years and 9 months. For the last 6 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'.[404] The Court of Appeal agreed, finding: '[t]he departure from reasonable community standards exhibited 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.[405]

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401 *R v Chard; Ex parte A-G (Qld)* [2004] QCA 372 (8 October 2004) 5 [23] (Williams JA, de Jersey CJ and Jones J agreeing).

402 *R v Riseley; Ex parte A-G* (Qld) [2009] QCA 285 (22 September 2009) 8 [35] (Keane JA, McMurdo P and Holmes JA agreeing).

403 See *R v JV* [2014] QCA 351 (19 December 2014) 7 [31]–[32] (Gotterson JA, Morrison JA and McMeekin J agreeing).

404 Cited in *R v JV* [2014] QCA 351 (19 December 2014) 5 [20] (Gotterson JA).

405 *R v JV* [2014] QCA 351 (19 December 2014) 7 [32] (Gotterson JA; Morrison JA and McMeekin J agreeing).

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

A woman, C, pleaded guilty to the manslaughter of her 3-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 5 years' imprisonment. A parole eligibility date of 18 months was set taking into account her personal difficulties, that C sought some assistance from her neighbours and her plea of guilty.

4.6.4 Views in submissions and consultation

The Council's consultation paper invited feedback in relation to the most important aggravating and mitigating factors to be taken into account by Queensland courts when sentencing for child homicide offences. A list of example aggravating and mitigating factors was provided.

Generally, stakeholders agreed with the aggravating factors that were outlined, with some emphasis on particular factors such as vulnerability of the victim and breach of trust. However, some submissions disagreed with mitigating factors being relevant at all when sentencing for child homicide offences.

Several submissions felt that victim vulnerability, in particular that of a child, was an aggravating factor and should warrant a higher penalty. FACAA expressed the view that 'the victim's status as a vulnerable and innocent child should be a major consideration in sentencing'. A similar view was also held by the Queensland Homicide Victims Support Group (QHVSG), when it noted that a child's vulnerability is due to their dependency on a primary carer for all basic needs and 'a child's greater physical vulnerability to the impact of violence.'[406] Vulnerability, and how to better recognise this sentencing factor is discussed in greater detail in Chapter 7.

FACAA and PACT submitted that a person who was in a position of trust to the child, such as a parent, step-parent or caregiver, should receive higher penalties.[407] However, the Bar Association of Queensland cautioned in its submission that, 'great care should be taken before attributing a higher level of culpability or a heavier penalty to individual parents or others in positions of trust in the death of a child.'[408]

The Queensland Law Society highlighted four factors that it felt may be particularly aggravating in child homicide matters:

Abuse of Trust
No child's life should be viewed as more important than another however when there is an abuse of trust particularly as it relates to the parental/guardian relationship this is an aggravating factor. This is important for general deterrence purposes and to reflect the community's expectations.

Significant and/or prolonged mental or physical suffering of the deceased child persistence/level of violence
Any significant violence inflicted on a child or behaviour that results in the prolonged physical and/or mental suffering of a child is seen as an aggravating factor. The reason being that it is not a case of momentary reaction or inadvertence.

Lack of Remorse
Similarly for all homicide matters a lack of remorse is usually seen as an aggravating factor due to the significant impact on family members having to endure a trial as well as the cost to the community of an often lengthy trial. An exception would be where a trial is undertaken on the basis of a question of cause of death. The lack of remorse as in all offences of violence suggests rehabilitation is more unlikely than for an offender who has insight and is remorseful.

406 Submission 27 (QHVSG).

407 Submission 16 (FACAA); Submission 29 (PACT).

408 Submission 30 (Bar Association of Queensland).

Motive
A motive might be considered an aggravating feature for child homicide. The motive would include committing the offence of child homicide to cover other misconduct or in retaliation for family court proceedings or orders.[409]

The QPS agreed with the factors listed, but also cited 'impact on family of the deceased' as a relevant aggravating factor.[410]

As noted earlier, some submissions disagreed with a child homicide offender receiving any reduction in his or her sentence due to mitigating factors. FACAA's submission noted that factors such as no criminal history or rehabilitation efforts after the offence should receive low consideration by the judge.[411] Further, the submission also noted that only 'extreme evidenced mental health issues should be given any consideration at all and there can be no acceptable excuses for the murder of a child'. However, FACAA agreed that 'if the offender did not mean to cause the death of the child and tried to remedy the damage done by seeking immediate professional assistance, for example they called emergency services without delay and tried to administer first aid', there should be some weight given to mitigation.[412]

The Bar Association of Queensland stated, 'a young offender ought to be dealt with more leniently than a mature offender because of immaturity or lack of judgment.'[413]

The Queensland Law Society identified four factors that were relevant mitigating factors in child homicide matters:

Significant physical or mental health issues or low intellectual capacity
This is already seen as one of the most important mitigating factors in the *Penalties and Sentences Act 1992* (Qld). There is a considerable line of authority from all courts in various jurisdictions that mental illness that does not amount to a defence reduces a person's moral culpability therefore general deterrence is not as relevant in sentencing.

Plea/Remorse
Remorse should be seen as a mitigating factor due as family members do not have to endure a lengthy trial as well as the savings of costs to the community. Remorse as in all offences of violence suggests rehabilitation is more likely than for an offender who has no insight or remorse. On the basis of the material contained in the research paper the fact that the investigations in relation to these matters are often protracted, difficult (given they are often committed in private) and involve multi-disciplinary specialists the plea is perhaps more relevant in these types of matters.

Rehabilitation
Rehabilitation is always a factor taken into account in mitigation on a limited basis. This should depend on the role and the type of offending. It may be more relevant particularly if the offender is not the principal offender or is guilty on a criminally negligent basis/failure of duty and the substance abuse issue was relevant to the offending.

Sought medical treatment
Again this is a factor which would only be considered in mitigation on a limited basis particularly if the offence is brutal and there is limited prospect that the intervention of medical treatment will be of any assistance.[414]

409 Submission 35 (Queensland Law Society).

410 Submission 36 (Queensland Police Service).

411 Submission 16 (FACAA).

412 Ibid.

413 Submission 30 (Bar Association of Queensland).

414 Submission 35 (Queensland Law Society).

The QPS identified relevant mitigating factors from those listed in the consultation paper as: rehabilitation efforts post offence; assistance to law enforcement authorities; sought medical treatment for victim; and remorse.[415]

Sisters Inside do not support 'otherwise good character' as a mitigating factor on the basis that it 'tends to reinforce the already privileged position of individuals who are sentenced for serious offences and who can commit offences by virtue of their position in relation to children.'[416] Sisters Inside referred to Recommendation 74 of the Royal Commission into Institutionalised Responses to Child Sexual Abuse, 'that all state and territory governments should introduce legislation to exclude good character as a mitigating factor for child sexual offences, where the good character "facilitated the offending"'.[417] Sisters Inside suggests this factor is 'relevant for carers or other individuals with an institutional position to care for children'.[418]

At the community summits in Logan and Townsville, the Council asked participants in a group activity to rank their top three most important aggravating and mitigating factors in relation to sentencing for child homicide offences. Participants were provided with the list of factors set out in the consultation paper. They could add extra factors not included on the list.

Generally, participants struggled to select just three factors, and many often ranked more or gave all factors equal scores. Where a person gave multiple factors the same value (i.e. 1: most important factor), these were all counted. This means results are not representative of participant numbers.

The Council observed that participants found it more challenging to identify mitigating factors than aggravating factors, with some people at both community summits unable to identify any mitigating factors for people convicted for child homicide.

In Logan, the same three factors were consistently identified in both overall figures and ranking by importance. Overall, the top three aggravating factors were:

1. Victim's vulnerability due to age or disability
2. Persistent/level of violence (used against the victim)
3. Significant and/or prolonged mental or physical suffering of the deceased child.

While results varied slightly between overall figures and ranking by importance, the same three mitigating factors were consistently identified. Overall, the top three mitigating factors were:

1. The offender had significant physical or mental health problems or low intellectual capacity.
2. The offender sought medical treatment for the victim.
3. The offender was young.

When participants ranked the factors, the most important mitigating factor identified across the three groups was if the offender sought medical treatment for the victim.

The second most important mitigating factor was the age of the offender (young offender). Two factors were selected as the third most important factors, being the offender provides assistance to law enforcement authorities and the offender has significant physical or mental health problems or low intellectual capacity. None of the participants in Logan across all three activity groups identified any additional mitigating factors.

In Townsville, results were almost identical to Logan. Again, while results varied slightly between overall figures and ranking by importance, the same three factors were consistently identified. Overall, the top three aggravating factors selected were:

1. Significant and/or prolonged mental or physical suffering of the deceased child

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415 Submission 36 (Queensland Police Service).

416 Submission 31 (Sisters Inside).

417 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) Parts VII–X and Appendices 299.

418 Submission 31 (Sisters Inside).

2. Victim's vulnerability due to age or disability
3. Persistent/level of violence (used against the victim).

Two participants suggested additional aggravating factors; however, only one person actually weighted their additional aggravating factor. Additional factors suggested were:

- lack of assistance to law enforcement;
- no evidence of plea or intent to plead; and
- effect on community as a whole.

Results varied between overall figures and ranking by importance. Overall, the top three mitigating factors were:

1. The offender provided assistance to law enforcement.
2. The offender had significant physical or mental health problems or low intellectual capacity.
3. The offender was young.

Three participants identified additional mitigating factors; however, only one person actually weighted their additional mitigating factors. Additional factors suggested were:

- wealth of an offender (thereby obtaining the best legal defence);
- an offender's cultural background, particularly where a minority (however, the author felt this was used to excuse offending, thereby reducing a sentence);
- addressing the court or victims, if permitted;
- degree of blame — whether a party to the offence;
- family situation; and
- having foetal alcohol syndrome.

The findings from the community summits indicate that the community regards the death of a child as a very serious offence, and aggravating factors such as relevant criminal history or committing the offence while subject to a court order or on bail were not as relevant to these offences. Similarly, general mitigating factors such as the guilty plea and no criminal history were given little weight by participants, compared with factors specific to the offender.

4.6.5 Findings from sentencing remarks analysis of aggravating and mitigating factors

As part of the analysis into whether the same factors were relevant in cases involving child victims, as adult victims, the Council also considered how the judges applied aggravating and mitigating factors to sentencing for manslaughter offences between 2005–06 and 2016–17.

Aggravating factors

As shown in Table 5 and Table 6, for both manslaughter involving a child victim and manslaughter involving an adult victim, the aggravating factor most commonly stated or implied by the judge was that the offence involved violence (n=21; n=114). In cases of child manslaughter, the second most commonly stated or implied aggravating factor was the victim was under the care of the offender (60.6%), whereas in cases of adult manslaughter the second most commonly stated or implied aggravating factor was that the offender had a relevant criminal history (33.8%).

In its analysis of the aggravating factors most commonly stated or implied by judges, the Council observed that while some factors were consistently raised in both child and adult homicide cases, there were important differences. Significantly, the aggravating factors more commonly being raised in cases of child manslaughter primarily related to the victim — namely, that the victim was under the care of the offender (60.6%); was vulnerable (39.3%); persistent/repeated violence was used (39.3%); and the victim suffered (24.2%). These findings align with the aggravating factors identified as the most important in submissions

and during consultation (see section 4.6.4). This suggests that Queensland judges are already taking into account factors that community members consider to be the most relevant aggravating factors when sentencing offenders for child manslaughter.

These findings contrast with the aggravating factors taken into account for offenders who killed an adult. In the case of adult manslaughter, the courts more commonly identify aggravating factors relating to the offender, such as a relevant criminal history (i.e. for prior violent offences: 33.8%); use of a weapon (32.8%); that the offence was committed during a planned or organised criminal activity (18.4%); or the offence breached a current criminal and/or court order (i.e. parole or a suspended sentence).

These results will likely be due in part to differences between the profiles of the two groups of offenders and the context in which these homicides occur. For example, the presence of relevant criminal history is much more common in adult manslaughter cases than in child manslaughter cases. The absence of relevant criminal history is generally regarded by courts as a factor in mitigation.[419]

Table 5: Ten most frequently stated or implied aggravating factors in child manslaughter 2005–06 to 2016–17

Factor	Count	% of total
Offence involved violence	21	63.6
Victim was under the care of the offender	20	60.6
Victim vulnerability	13	39.4
Persistent/repeated violence to victim	13	39.4
Fatal injury was deliberate	13	39.4
Offender did not seek, or delayed seeking, medical help	12	36.4
Victim Impact Statement — harm caused to the family	12	36.4
Victim's suffering identified	8	24.2
Offender lied and/or misled third parties about injuries prior to the death	7	21.2
Offender [did not] report fatal injury to official system/services	6	18.2

Source: QSIS
Note: In relation to percentage of the total, some of these variables were not applicable to cases.

Table 6: Ten most frequently stated or implied aggravating factors in adult manslaughter 2005–06 to 2016–17

Factor	Count	% of total
Offence involved violence	114	56.7
Criminal history	69	34.3
Weapon used	66	32.8
Persistent/repeated violence to victim identified	42	20.9
Fatal injury was deliberate	42	20.9
Offence committed during a planned or organised criminal activity	37	18.4
Offence breached current criminal and/or court order	30	14.9
Concealment efforts	24	11.9
Offender did not seek, or delayed seeking, medical help	19	9.5
Offender was voluntarily intoxicated at the time of offence	18	9.0

Source: QSIS

[419] *R v Sebo; Ex parte A-G* (Qld) [2007] 426 (30 November 2007) 6 [18] (Holmes JA, Keane JA and Daubney J agreeing).

Note: In relation to percentage of the total, some of these variables were not applicable to cases.

Mitigating factors

As shown in Table 7 and Table 8 for both manslaughter of a child (93.9 %) and manslaughter of an adult (75.6%), the most common stated or implied mitigating factor was the offender pleaded guilty. This is to be expected given courts are required under section 13 of the PSA, when imposing sentence, to take the guilty plea into account and must also state in open court that it took account of the guilty plea in determining the sentence imposed (although a reduction of the sentence on this basis is not stated as being mandatory).

The second most common mitigating factor listed was the offender expressed remorse and this was accepted by the court as genuine (child 54.4% and adult 40.3%).

With two exceptions, the same mitigating factors have been stated or implied in cases of manslaughter, irrespective of whether the victim was a child or an adult. Although the order varies between the two groups, almost all factors relate to personal mitigation, such as that the offender had mental health problems, or mitigation relating to post-offence conduct, such as confessing to police or rehabilitation efforts.

The two exceptions relate to mitigating factors more commonly identified in child manslaughter cases. These are that the fatal injury was not deliberate (n=10 cases) and that the offender was under stress at the time of the offence, such as financial or relationship stress (n=15). This shows that in some cases the court has accepted in mitigation that the offender did not intend the fatal outcome, and/or was under stress at the time. Both factors were identified in a few adult manslaughter cases as mitigating factors, but at a far lower rate.

Table 7: The most frequently stated or implied mitigating factors in child manslaughter 2005–06 to 2016–17

Factor	Count	% of total
Guilty plea	31	93.9
Expressed remorse	18	54.5
Under stress at time of offence (e.g. financial)	15	45.5
Rehabilitation effort/focus [post offence]	14	42.4
Circumstance improvement [post offence]	11	33.3
Offender had experienced childhood dysfunction	10	30.3
Fatal injury was [not] deliberate	10	30.3
Offender had mental health problems	10	30.3
[Good] Employment history	9	27.3
Offender was young at time of offence	8	24.2
Offender confessed to police	8	24.2
Offender cooperated with police	8	24.2
Offender had a history of being abused	8	24.2

Source: QSIS
Note: In relation to percentage of the total, some of these variables were not applicable to cases.

Table 8: Ten most frequently stated or implied mitigating factors in adult manslaughter 2005–06 to 2016–17

Factor	Count	% of total
Guilty plea	152	75.6
Expressed remorse	81	40.3
Offender cooperated with police	64	31.8
Offender confessed to police	61	30.3
Rehabilitation effort/focus [post offence]	40	19.9
Circumstance improvement [post offence]	40	19.9
Offender was young at time of offence	34	16.9
[Good] Employment history	29	14.4
Offender had mental health problems	28	13.9
Offender had experienced childhood dysfunction	25	12.4

Source: QSIS
Note: In relation to percentage of the total, some of these variables were not applicable to cases.

Neutral factors

The Council also recorded where the treatment of sentencing factors was neutral. This variable was applied where the factor was present but the coder was unable to determine from the remarks if the judge placed any weight on this factor, if it was just a general contextual factor, or if the factor was relevant to the offence in relation to a co-offender.

Table 9 and Table 10 show that neutral factors for manslaughter were a mix of factors generally regarded as aggravating and mitigating. For manslaughter of a child, five cases involved persistent or repeated violence to the victim prior to death, but this was not expressly stated or implied as aggravating within the context referred to in the sentencing remarks. Similarly, in 20 cases the victim was fatally assaulted in their home; however, it was not clear from the sentencing remarks that the court treated this as aggravating. In NSW, this is a separate aggravating factor under section 21A(2)(eb) of the *Crimes (Sentencing and Procedure) Act 1999* (NSW).

In cases of adult manslaughter, there were also several factors that would generally be considered aggravating, but the court did not state or imply this clearly. For example, in 89 cases the offender was voluntarily intoxicated at the time of the offence; in 85 cases the fatal assault was deliberate; and in 67 cases the offence involved violence. All three factors contrast with the findings in Table 6, as each was in the 10 most commonly stated or implied aggravating factors. In particular, that the offence involved violence was the most commonly stated or implied aggravating factor. Combining those results suggests that 90 per cent (n=181) of adult manslaughter cases involved violence; however, in 67 of those cases (37%) this was not clearly identified in the sentencing remarks as aggravating. This may be because the use of violence causing the victim's death is more usual in the case of manslaughter involving an adult victim, so the need to expressly refer to this is not considered necessary. In contrast, a significant proportion of child homicide manslaughter cases are established on the basis of criminal negligence/neglect, such as a caregiver's failure to seek medical or other assistance for an injured child.

These findings suggest that judges are not always clear in their remarks as to what factors are weighted as aggravating or mitigating. The Council recognises that in some matters the mere presence of a factor may not warrant that factor being taken into account as an aggravating or mitigating factor and a neutral assessment may be an accurate reflection of this. The sentencing remarks analysis reveals that in some cases, the remarks lacked sufficient detail for the coders to clearly understand the circumstances of the offence, and the judge's reasons for his or her decision.

As noted in a similar study, determining whether a factor had actually arisen (and was therefore relevant) is not always straightforward and is likely to be affected by varying levels of subjectivity.[420]

The role of sentencing remarks is discussed in Chapter 11 of this report.

Table 9: Ten most frequently recorded neutral factors in child manslaughter 2005–06 to 2016–17

Factor	Count	% of total
Offence committed in the home of the victim	20	60.6
Offender had a history of substance misuse	9	27.3
Employment history	7	21.2
Remorse	6	18.2
Victim Impact Statement — harm caused to the family	6	18.2
Offender is responsible for dependents (e.g. children)	5	15.2
Offender reported fatal injury to official system/services	5	15.2
Persistent/repeated violence to victim identified	5	15.2
Fatal injury was deliberate	5	15.2
Otherwise good character	5	15.2

Source: QSISNote: In relation to percentage of the total, some of these variables were not applicable to cases.

Table 10: Ten most frequently recorded neutral factors in adult manslaughter 2005–06 to 2016–17

Factor	Count	% of total
Victim Impact Statement — harm caused to the family	93	46.3
Offender was voluntarily intoxicated at the time of offence	89	44.3
Fatal injury was deliberate	85	42.3
History of substance misuse	75	37.3
Criminal history consideration	73	36.3
Offence involved violence	67	33.3
Victim was impaired at the time of the offence	65	32.3
Offender is responsible for dependents (e.g. children)	61	30.3
Offence committed in the home of the victim	51	25.4
Employment history	46	22.9

Source: QSIS
Note: In relation to percentage of the total, some of these variables were not applicable to cases.

4.7 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.

420 Kate Warner et al, 'Aggravating and Mitigating Factors in Sentencing: Comparing the Views of Judges and Jurors', (2018) 92(5) *Australian Law Journal* 374, 376.

A sentence must always be proportionate to the objective seriousness of the offending.[421] Proportionality, in the form adopted by Australian courts, sets the outer limits (both upper and lower) of punishment.[422]

> 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.[423]

In determining whether a sentence is proportionate, courts consider factors such as the maximum penalty for the offence and the circumstances of the offence, including the degree of harm caused and the offender's culpability.[424]

The parity principle guards 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 that 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'.[425]

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 'adequately and fairly represents the totality of criminality involved in all of the offences to which that total period is attributable'.[426] It can achieve this by making the sentences concurrent, so they run together, instead of making the sentences cumulative (i.e. to be served one after the other).[427]

A sentencing judge can generally consider all of an offender's conduct, including conduct that would make the offence more or less serious — but cannot take into account circumstances of aggravation that would have warranted a conviction for a more serious offence.[428]

The acts, omissions and matters constituting the offence (and accompanying circumstances) for sentencing purposes are determined by applying common sense and fairness. Something that might technically constitute a separate offence is not necessarily excluded from consideration for that reason.[429] However, such things cannot be taken into account if they would establish:[430]

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

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421 *Markarian v The Queen* (2005) 228 CLR 357, 385 [69] (McHugh J); *Veen v The Queen (No 2)* (1988) 164 CLR 465, 473–474 (Mason CJ, Brennan, Dawson, Toohey JJ). *Penalties and Sentences Act 1992* (Qld) s 9(11) expressly applies this principle to previous convictions.

422 Freiberg, above n 323, 237.

423 *Veen v The Queen (No 2)* (1988) 164 CLR 465, 491 (Deane J).

424 Royal Commission into Institutional Child Sexual Abuse, above n 417, 280.

425 *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).

426 *R v Beattie; Ex parte A-G* (Qld) (2014) 244 A Crim R 177, 181 [19] (McMurdo J) cited in *R v DBQ* [2018] QCA 210 (11 September 2018) 7–8 [27] (Philipiddes JA, Boddice and Bond JJ agreeing).

427 *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).

108 *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.

429 *R v D* [1996] 1 Qd R 363, 403.

430 Ibid.

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 that their isolated offence formed part of a pattern of conduct for which the person has not been charged or convicted.[431]

4.8 Conclusion

In this chapter, we have considered a range of information about current purposes, principles and factors taken into account in sentencing for child homicide and adult homicide offences — with a particular focus on the offence of manslaughter.

The issue of vulnerability, including approaches available to ensure this is appropriately reflected in sentencing, is discussed further in Chapter 7.

The Council's views on the need for, or additional guidance in, sentencing to ensure the imposition of appropriate sentences for child homicide offences, including greater specificity about specific aggravating factors for the purposes of sentencing, are discussed in Chapter 9.

[431] Ibid 403–404.

Chapter 5 — Current sentencing practices for homicide in Queensland

5.1 Introduction

This chapter discusses the sentencing framework for child homicide, the operation of parole, and sentencing trends and practices — with a particular focus on sentences imposed for murder and manslaughter involving a child victim. For comparative purposes, sentencing outcomes for homicides involving adult victims are also explored.

5.2 Methodology

The Council examined the sentencing outcomes for murder and manslaughter where the victim was a child and manslaughter where the victim was an adult for cases sentenced between 1 July 2005 and 30 June 2017.

The Council's analysis is based on assessment of sentencing outcomes for the most serious offence (MSO). The MSO is defined as the offence receiving the most serious penalty, as ranked by the classification scheme used by the Australian Bureau of Statistics. As murder and manslaughter are considered the most serious offences in the criminal calendar, attracting considerable terms of imprisonment, these counts are usually the MSOs for an offender. In a small number of cases where offenders were sentenced for both murder and manslaughter, the MSO was recorded as the offence of murder.

5.3 Maximum penalties

5.3.1 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).[432] Even if parole is granted later, 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.[433]

The law sets mandatory minimum non-parole periods for convicted murderers.[434] This means the offender cannot apply for parole until they have served their non-parole period (unless they are granted 'exceptional circumstances' parole).

The non-parole period for murder is generally 20 years (increased from 15 years in 2012).[435] It is 25 years if the person killed was a police officer in defined circumstances,[436] and 30 years if the person is being sentenced for more than one murder or has a previous conviction for murder.[437] A sentencing court can increase, but not decrease, the mandatory non-parole period.[438]

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432 *Criminal Code* (Qld) s 305(1). On the operation of indefinite sentences, see *Penalties and Sentences Act 1992* (Qld) pt 10, 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, 176.

433 *Corrective Services Act 2006* (Qld) s 205; see *R v Appleton* [2017] QCA 290 (24 November 2017) 8 [38] (Sofronoff P).

434 *Criminal Code* (Qld) s 305(2) and *Corrective Services Act 2006* (Qld) ss 176–177.

435 *Corrective Services Act 2006* (Qld) s 181(2)(c) as amended by *Criminal Law Amendment Act 2012* (Qld) s 7.

436 *Criminal Code* (Qld) s 305(4) and *Corrective Services Act 2006* (Qld) s 181(2)(b).

437 *Criminal Code* (Qld) s 305(2) and *Corrective Services Act 2006* (Qld) s 181(2)(a).

438 *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).

5.3.2 Manslaughter

The maximum penalty for manslaughter is life imprisonment.[439] 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 a higher non-parole period is set by the court or release is via 'exceptional circumstances' parole).[440] If the head sentence is less than life, the general discretion with parole applies, meaning the court can set the parole eligibility date or choose not to set a specific date. In this case, the offender is eligible to apply for parole after serving 50 per cent of their sentence.[441]

5.4 Penalties and parole

5.4.1 Penalty options

Penalties available to Queensland courts are:

- non-custodial options such as fines and good behaviour bonds;
- community-based orders such as community service and probation;
- various forms of custodial penalties.

Custodial penalties can involve a combined prison and probation order, a term of imprisonment with parole, or a suspended sentence of imprisonment (either wholly or partially).

Release from imprisonment on parole 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.[442]

A person sentenced for the unlawful killing of another person will usually be sentenced to imprisonment or other form of detention (see Chapter 5).

As explained in section 5.3.1 of this report, in the case of murder, a mandatory life sentence applies to offenders sentenced as adults. Mandatory minimum non-parole periods also apply, the length of which can vary depending upon the circumstances of the case and the victim.

In the case of manslaughter, courts have discretion to sentence a person up to the maximum penalty of life imprisonment, but it is more usual for courts to sentence a person to a defined term of imprisonment.

5.4.2 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 period of their head sentence is served.[443]

Queensland courts can set a parole release date only for sentences of 3 years or less (and not for sexual or serious violent offences).[444] They can impose suspended sentences only for head sentences of 5 years

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439 *Criminal Code* (Qld) s 310(1).

440 *Corrective Services Act 2006* (Qld) ss 181(2)(d), 181(2A) (parole eligibility for prisoner serving term of imprisonment for life) and ss 176–177 (exceptional circumstances parole). 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 Parole System Review, above n 328, 72 [322].

441 *Corrective Services Act 2006* (Qld) s 184(2). This is the general statutory rule, which a sentencing court can generally override.

442 See *Penalties and Sentences Act 1992* (Qld) ss 160A(4), (5), 160G.

443 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>.

444 *Penalties and Sentences Act 1992* (Qld) s 160B.

or less[445] and will generally prefer parole rather than suspension when supervision is required.[446] 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 for release on parole. The actual date of their release is at the discretion of the Parole Board and can vary greatly depending on the circumstances of the case and of the offender. In some cases, offenders serve their full term or head sentence.

5.4.3 Release on parole during 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.[447] A prisoner released on parole is still serving their sentence.[448]

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'.[449] The ministerial guidelines that set out the criteria for the Parole Board to use when considering applications provide that the overriding consideration for the board's decision-making process is community safety.[450] This is the case whether or not the prisoner is a homicide offender.

The Queensland Parole System Review in its final report, which recognised parole as being primarily a 'method that has been developed in an attempt to prevent reoffending,'[451] found evidence suggesting that parole does 'have a beneficial impact on recidivism', at least in the short term and perhaps modestly.[452] Paroled prisoners are less likely to reoffend than prisoners released without parole.[453] The Parole System Review also found 'it is more risky to have a short period of parole' than a longer one.[454]

Parole places support, supervision and control over sentenced offenders.[455] There is a benefit to the community of having an offender rehabilitated rather than remaining for extended periods in prison.[456]

For homicide offenders sentenced to life imprisonment, the key focus for the Parole Board is whether there is an unacceptable risk to the community if they were to be released on parole.[457]

When assessing a prisoner's suitability for parole release (whether or not the prisoner is a homicide offender), the Parole Board must take into account a range of factors.[458] These factors include:

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445 *Penalties and Sentences Act 1992* (Qld) s 144. The limit is three 3 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.

446 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).

447 See <https://www.qld.gov.au/law/sentencing-prisons-and-probation/sentencing-probation-and-parole/applying-for-parole>.

448 *Corrective Services Act 2006* (Qld) s 214.

449 Queensland Parole System Review, above n 328, 1 [3] [emphasis in original].

450 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].

451 Queensland Parole System Review, above n 328, 2 [8].

452 Ibid 38 [140] and see 2 [11] and 38 [139].

453 Ibid 1 [7].

454 Ibid 7 [46].

455 *R v Clark* [2016] QCA 173 (24 June 2016) 3–4 [5]–[6] (McMurdo P).

456 Ibid 13 [52] (Morrison JA). See also *R v Riseley; Ex parte A-G (Qld)* [2009] QCA 285 (22 September 2009) 12 [48] (Keane JA, McMurdo P and Holmes JA agreeing).

457 Letter from Michael Byrne QC, President, Parole Board Queensland, to Judge John Robertson (retired), Chair, Queensland Sentencing Advisory Council, 17 August 2018, 1.

458 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 [2.1].

- the prisoner's criminal history and pattern of offending;
- whether there are any circumstances likely to increase the risk the prisoner presents to the community;
- the parole recommendation of the sentencing court or statutory minimum non-parole period, and any comments made by the judge during the sentence hearing;
- any medical, psychological or psychiatric risk assessment reports relating to the prisoner —— tendered at sentence or obtained while the prisoner has been in prison; and
- the prisoner's behaviour in prison.[459]

The Parole Board will also consider:

- whether the prisoner has access to support or services in the community that may reduce the risk they present to the community;
- whether they have suitable accommodation upon release;
- the prisoner's progress; and
- compliance in undertaking any recommended rehabilitation programs and interventions while in prison.[460]

5.4.4 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 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.[461] A sentencing court cannot make a recommendation for an offender's release on parole.[462]

The types of conditions that can be made on a parole order, whether a homicide offender or otherwise, are wide and varied.[463] 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.[464]

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).[465] Leaving Queensland requires approval.[466]

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.[467]

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459 Ibid.

460 Letter from Michael Byrne QC, above n 457, 1.

461 *Corrective Services Act 2006* (Qld) s 192.

462 *Penalties and Sentences Act 1992* (Qld) s 160A(3). See also *Corrective Services Act 2006* (Qld) s 192.

463 Letter from Michael Byrne QC, above n 457, 2.

464 *Corrective Services Act 2006* (Qld) s 200.

465 Ibid ss 200, 205(1).

466 Ibid ss 212, 213.

467 Ibid s 200A.

The combination of these conditions, and the capacity for parole authorities to return someone to prison for any breach, makes parole a very strict form of supervision.

QCS can make a written order, effective for no more than 28 days, amending a parole order on stated legislative grounds.[468] It can request an immediate suspension from the Parole Board.[469] Separately, the Parole Board may amend, suspend or cancel a parole order[470] 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.[471] Suspension or cancellation means a return to custody and a warrant can be issued for the prisoner's arrest.[472]

5.4.5 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.[473] 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.[474]

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 serious violent offence (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 would be the case'.[475]

5.4.6 Serious violent offence (SVO) declarations

If a person is declared convicted of a serious violent offence, special provisions apply. If an 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.[476] This can apply to a list of serious offences, including manslaughter, attempted murder, grievous bodily harm, and torture.[477] It does not apply to murder, although the mandatory non-parole laws for murder work in the same way.

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468 Ibid s 201. The amendment can be cancelled by the Parole Board at any time: s 202.

469 Ibid ss 208A–208C.

470 Ibid ss 205, 208.

471 Ibid s 205(2)(c).

472 Ibid s 206.

473 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].

474 *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) pt 9A) and the serious and organised crime circumstance of aggravation provisions (*Penalties and Sentences Act 1992* (Qld) pt 9D).

475 *R v Tahir; Ex parte A-G (Qld)* [2013] QCA 294 (4 October 2013) 9 [20] (Fraser JA, Holmes JA and Douglas J agreeing).

476 See *Penalties and Sentences Act 1992* (Qld), Part 9A and *Corrective Services Act 2006* (Qld) s 182(2).

477 *Penalties and Sentences Act 1992* (Qld) sch 1.

There are three ways an SVO declaration can be made, as follows:

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.[478]
2. Where the person is similarly convicted on indictment of a listed offence (or of counselling, procuring, attempting or conspiring to commit it) but the head sentence is 5 or more years, and less than 10 years, the court 'may' make the declaration.[479]
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.[480]

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.[481] This change to the law came into effect on 26 November 2010.[482]

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.[483] 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.[484]

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. This reflects 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'.[485]

Based on the Council's analysis of data for 2005–06 to 2016–17, of the 35 adults sentenced for manslaughter with a child victim who received a custodial sentence, only four offenders were convicted of a serious violent offence. A further two offenders had been declared convicted of a serious violent offence, but the declaration of these offences as serious violent offences was overturned on appeal.[486]

The Council's views on the operation of the SVO scheme and its potential impact on sentencing are discussed in Chapter 9 of this report.

5.4.7 Remand

When a person charged with an offence is not granted bail after being charged or they decide not to apply for bail (in expectation of a lengthy sentence), they will be held in custody on remand. If the person

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478 Ibid ss 161A(a), 161B(1).

479 Ibid ss 161A(b), 161B(3).

480 Ibid ss 161A(b), 161B(4). The *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.

481 Ibid s 161B(5).

482 *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld) ss 2, 7. These provisions were proclaimed into force on 26 November 2010 (2010 SL No 330).

483 *R v Riseley; Ex parte A-G (Qld)* [2009] QCA 285 (22 September 2009) 12 [48] (Keane JA, McMurdo P and Holmes JA agreeing).

484 *R v McDougall and Collas* [2007] 2 Qd R 87, 95–97 [18]–[19].

485 Ibid 2 Qd R 87, 97 [21] citations omitted.

486 *R v Riseley; Ex parte A-G (Qld)* [2009] QCA 285 (22 September 2009); *R v Clark* [2009] QCA 361 (27 November 2009). In *Clark*, the original sentence of 10 years' imprisonment was set aside and a sentence of 9 years substituted, in addition to setting aside the SVO declaration.

is later sentenced to imprisonment, any time they 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.[487] This is often 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. There is good reason for their time served to be taken into account or actually declared. Such time constitutes imprisonment.

5.5 Sentencing outcomes for homicide offenders

All offenders sentenced between 2005–06 and 2016–17 for homicide offences as their MSO (N=479) received custodial sentences.

5.5.1 Homicide offenders sentenced as children

Young offenders sentenced as children to actual detention must serve the period of detention in a detention centre.[488] Sentencing laws are different for children, and the *Youth Justice Act 1992* (Qld) applies rather than the PSA, which relates to the sentencing of offenders sentenced as adults.

The mandatory sentence requirements of life imprisonment or an indefinite sentence do not apply to young offenders. If the young person is found guilty of murder, the court may order they are detained for a period of no more than 10 years, or up to the maximum penalty of life imprisonment if the court considers the offence to be a 'particularly heinous offence'[489] — such as being excessively violent or brutal. It is also possible for a judge to exercise discretion and sentence a young person as an adult in the Supreme Court.[490]

Twenty offenders were aged under 17 years when they committed their homicide offence — see Table 11. These young offenders were sentenced as children under the *Youth Justice Act 1992* (Qld). Eleven (55.0%) of the young offenders were sentenced for murder, of whom five received a life sentence. Three of these life sentences were imposed for murder of an adult victim and two for the murder of a child victim.

Nine young offenders were sentenced for manslaughter. One in five (22.2%) victims of these offences were children.

Table 11: Homicide offence (MSO) and victim type for young offenders convicted of homicide, Queensland 2005–06 to 2016–17

	Homicide offence type					
	Murder		Manslaughter		Total	
Victim type	n	%	n	%	N	%
Child victims	2	18.2	2	22.2	4	20.0
Adult victims	9	81.8	7	77.8	16	80.0
TOTAL	**11**	**100.0**	**9**	**100.0**	**20**	**100.0**

Source: QGSO; QFCC Cautionary note: The sample sizes for this analysis are small.

Nearly half (45%; n=9) of all young offenders sentenced for either murder or manslaughter as their MSO were sentenced to imprisonment (see Table 12). For those offenders sentenced to imprisonment who did not receive a life sentence (n=4; 44.4%), the median sentence length was 8.5 years. An additional 35 per cent (n=7) of young homicide offenders were sentenced to youth detention, with a median sentence length of 5 years.

487 *Penalties and Sentences Act 1992* (Qld) s 159A.

488 *Youth Justice Act 1992* (Qld) s 210.

489 Ibid s 176.

490 For example, Ibid s 111, ss 140–144.

Table 12: Sentence outcomes for young offenders convicted of homicide (MSO), Queensland, 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
TOTAL	**20**	**100.0**

Source: QGSO
Cautionary note: The sample size for this analysis is small.

5.5.2 Homicide offenders sentenced as adults

All subsequent analyses in this chapter relate only to adult offenders sentenced for homicide in Queensland over the relevant period (N=459). The 20 young homicide offenders sentenced as children under the *Youth Justice Act 1992* (Qld) discussed above are excluded from analyses in this section.

All homicide offences (MSO)

All homicide offenders sentenced as an adult received a custodial sentence (imprisonment with parole eligibility or release date, a partially suspended sentence of imprisonment or a wholly suspended sentence), with the vast majority (95.6%) receiving a term of imprisonment. Five offenders (1.1%) received a wholly suspended sentence for manslaughter, with a median sentence length of 3.3 years. The median sentence length for a wholly suspended sentence is higher for those manslaughter offences — see Table 13.

Fifteen adult offenders received a partially suspended sentence for manslaughter (meaning they were required to serve part of their sentence in prison), with a median sentence of 5 years for offences committed against both adult (n=10) and child (n=5) victims. On average, offenders who received a partially suspended sentence were required to serve 1.3 years before release.

Table 13: Penalty outcomes for adult offenders sentenced for homicide (MSO), Queensland, 2005–06 to 2016–17

	All custodial sentences	Imprisonment sentence		Partially suspended sentence		Wholly suspended sentence	
	N	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	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

All offenders sentenced for murder received a mandatory sentence of life imprisonment. For offenders sentenced for manslaughter, the average custodial sentence was 8.3 years. Offenders sentenced for adult manslaughter received significantly longer average sentences (8.5 years) than offenders sentenced for child manslaughter (6.8 years). However, the median values (the mid-point above and below which 50% of the sentences fell) were not as different (8.0 and 7.5 years, respectively). The median is generally considered the better measure of central tendency as it is less susceptible to extreme (or outlier) values.

Table 14: Summary of sentence lengths (years) for adult offenders sentenced for homicide (MSO), by penalty type and victim type, Queensland, 2005–06 to 2016–17

		Adult offenders sentenced for homicide	Adult offenders sentenced for homicide with child victims	Adult offenders sentenced for homicide with adult victims
MANSLAUGHTER				
All custodial	**N**	**250**	**35**	**215**
	Average (years)	8.3	6.8	8.5
	Median (years)	8.0	7.5	8.0
	Minimum (years)	1.5	1.5	3.0
	Maximum (years)	18	10	18
Imprisonment	**n**	**230**	**27**	**203**
	Average (years)	8.6	7.6	8.8
	Median (years)	8.5	8.0	8.5
	Minimum (years)	1.5	1.5	3.0
	Maximum (years)	18	10	18.0
Partially suspended sentence	**n**	**15**	**5**	**10**
	Average (years)	4.8	4.8	4.8
	Median (years)	5.0	5.0	5.0
	Minimum (years)	3.0	4.0	3.0
	Maximum (years)	5.0	5.0	5.0

Wholly suspended sentence	**n**	**5**	**3**	**2**
	Average (years)	3.3	2.8	3.9
	Median (years)	3.3	2.0	3.9
	Minimum (years)	1.5	1.5	3.3
	Maximum (years)	5.0	5.0	4.5
MURDER				
All custodial	**N**	**209**	**23**	**186**
	Average (years)	Life	Life	Life
	Median (years)	Life	Life	Life
	Minimum (years)	Life	Life	Life
	Maximum (years)	Life	Life	Life

Source: QGSO, QFCC Cautionary note: Some small sample sizes used in this analysis.

Considering only imprisonment penalties (i.e. excluding wholly or partially suspended sentences), the average sentence for manslaughter is 8.6 years — see Table 14. The average is significantly longer for those sentenced for the manslaughter of an adult (8.8 years) compared with those sentenced for child manslaughter (7.6 years), though again, the medians are closer (8.5 and 8.0 years, respectively).

5.5.3 Manslaughter (MSO)

As murder carries a mandatory life sentence in Queensland, the following sections analyse adult offenders sentenced for manslaughter as their MSO from 2005–06 to 2016–17 (n=250). This cohort represents 54.5 per cent of the total adult homicide offenders (N=459) sentenced over the 12-year period in Queensland.

Manslaughter (MSO) by victim type

Table 15 details average, median, minimum and maximum (range) periods, and the interquartile range for manslaughter custodial sentences over the 12-year period.

The average custodial sentence for adult offenders sentenced for manslaughter (MSO) was 8.3 years — see Table 15. The average custodial sentence was significantly higher for offenders sentenced for adult manslaughter (8.5 years) than offenders sentenced for child manslaughter (6.8 years).

The interquartile range provides information about the middle 50 per cent of custodial sentence length data for offenders sentenced for manslaughter. The interquartile range is a more useful measure of the dispersion of associated sentencing outcomes, as it provides a clearer picture of the variability of sentencing outcomes for selected offences by removing outliers or extreme sentencing outcome values.[491] The interquartile range for child manslaughter was 3.5 years (5.0 years to 8.5 years) — a wider

[491] University of Leicester, *Measures of Variability: The Range, Inter-Quartile Range and Standard Deviation* <https://www2.le.ac.uk/offices/ld/resources/numerical-data/variability>.

range than the interquartile range of 1.5 years for offenders sentenced for adult manslaughter (7.5 years to 9.0 years).

Table 15 shows that for custodial sentences, child manslaughter ranges from 1.5 years (minimum) to 10 years (maximum) while adult manslaughter ranges from 3 years (minimum) to 18 years (maximum).

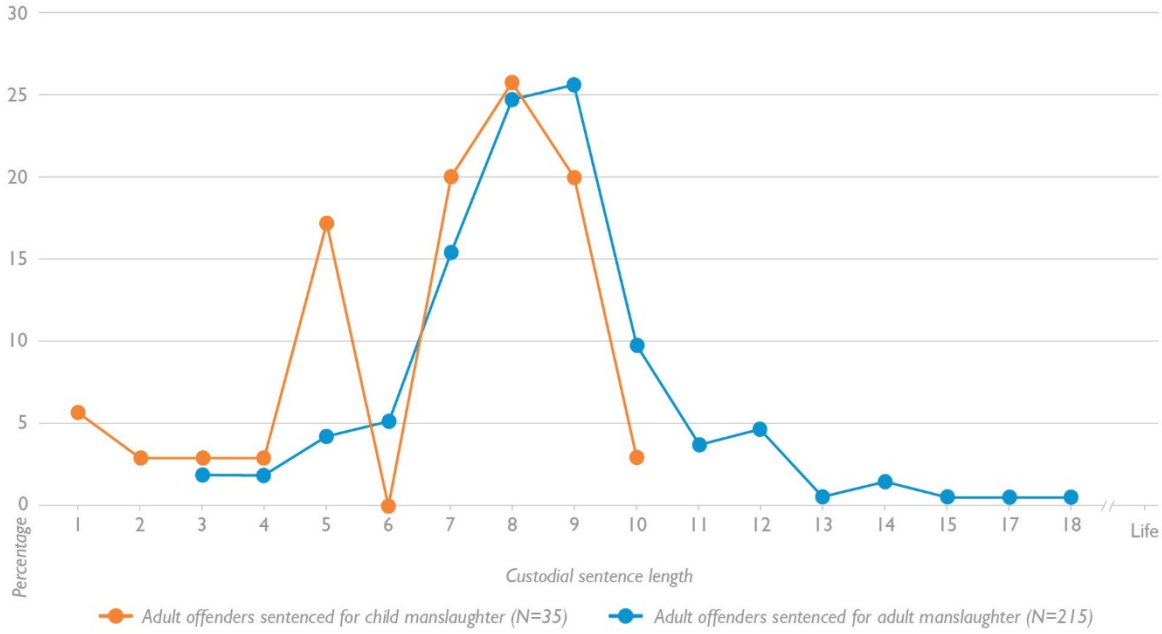
Table 15: Summary of adult custodial sentence lengths for adult offenders sentenced for manslaughter (MSO) by victim type, Queensland, 2005–06 to 2016–17

	N	Average (years)	Median (years)	Minimum (years)	Maximum (years)	Lower quartile (years)	Upper quartile (years)	Interquartile range (years)
Adult offenders sentenced for child manslaughter	35	6.8	7.5	1.5	10	5.0	8.5	3.5
Adult offenders sentenced for adult manslaughter	215	8.5	8.0	3.0	18	7.5	9.0	1.5
TOTAL	**250**	**8.3**	**8.0**	**1.5**	**18.0**	**7.5**	**9.0**	**1.5**

Source: QGSO, QFCC

As shown in Figure 2 below, the majority (75.3%) of offenders sentenced for adult manslaughter received between 7 and 10 years with a peak at 9 years. For offenders sentenced for child manslaughter, the distribution peaks at 8 years, and the majority (65.7%) of sentences are between 7 and 9 years. For child manslaughter sentences, there is also a clear spike at 5 years (17.1%).

Figure 2: Custodial sentence lengths for adult offenders sentenced for manslaughter (MSO) by victim type, Queensland, 2005–06 to 2016–17



Source: QGSO, QFCC
Note: Each year indicated on the above graph includes all periods between that year and the next year. For example, the indicator for six years includes any sentence greater than or equal to 6 years but less than 7 years.

Manslaughter (MSO) sentence by offender gender

Sentences for manslaughter differed by gender, as shown in Table 16. The average custodial sentence for female offenders was 6.5 years, significantly lower than the average of 8.6 years for male offenders.

Female offenders record a wider interquartile range (3.0 years) than male offenders (1.5 years). The upper quartile for female offenders (the 75th percentile) matches the lower quartile (the 25th percentile) for male offenders, of 8 years.

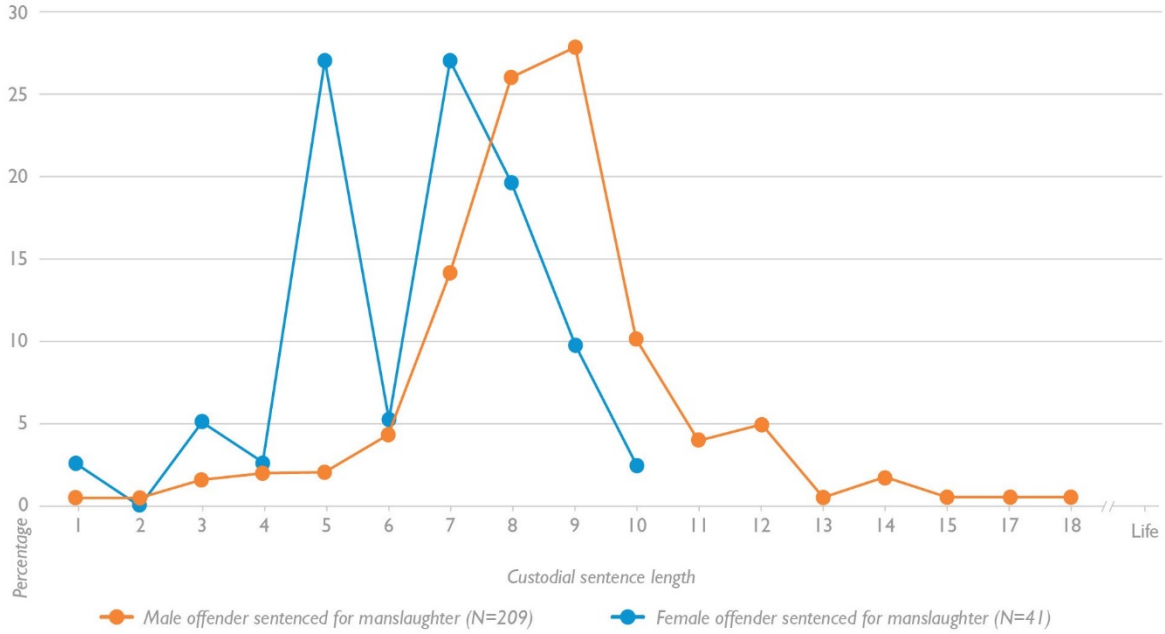
Table 16: Summary of custodial sentence lengths for adult offenders sentenced for manslaughter (MSO) by offender gender, Queensland, 2005–06 to 2016–17

	N	Average (years)	Median (years)	Minimum (years)	Maximum (years)	Lower quartile (years	Upper quartile (years)	Interquartile range (years)
Female	41	6.5	7.0	1.5	10.0	5.0	8.0	3.0
Male	209	8.6	8.5	1.5	18.0	8.0	9.5	1.5
TOTAL	**250**	**8.3**	**8.0**	**1.5**	**18.0**	**7.5**	**9.0**	**1.5**

Source: QGSO, QFCC

Figure 3 shows two spikes in sentence lengths for female offenders: one at 5 years and the other at 7 years (both 26.8%). The vast majority of female offender sentences (87.8%) fall between 5 and 9 years. Figure 3 also shows a peak at 9 years for male offenders, with 77.5 per cent of sentences between 7 and 10 years.

Figure 3: Custodial sentences for adult offenders sentenced for manslaughter (MSO) by offender gender, Queensland, 2005–06 to 2016–17



Source: QGSO, QFCC
Note: Each year indicated on the above graph includes all periods between that year and the next year. For example, the indicator for 6 years includes any sentence greater than or equal to 6 years but less than 7 years.

Findings from the Council's analysis of sentencing remarks for child manslaughter by type of conduct and the gender of the offender are at Table 17 below. This analysis helps to explain the differences in sentencing outcomes by gender for manslaughter where the victim was a child.

Sentencing outcomes for manslaughter (MSO) by type of conduct

As noted in section 3.2.4 of Chapter 3, 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 ('by violent or unlawful act').
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 (e.g. the duty of a parent to seek medical care for their child if the child is sick or seriously injured).

The Council's analysis of sentencing remarks included collecting information on the category of manslaughter that the offender's conduct fell within. Criminal negligence was divided into two categories:

- criminal negligence manslaughter involving a vehicle; and
- criminal negligence involving neglect, i.e. failure to seek medical treatment.

The identified difference in median sentence length for manslaughter may be explained by the different types of offending conduct and offending profiles across the offences involving adult and child victims.

Table 17 below presents sentencing outcomes for manslaughter based on broad categories of conduct falling within this offence. The reasons for the differences in sentencing outcomes for manslaughter are largely attributable to the very different factual circumstances and conduct that forms the basis for these offences — for example, a far greater proportion of child manslaughter offences involved offenders sentenced on the basis of criminal negligence or neglect (such as a failure to seek medical attention for an injured or unwell child, or leaving a child unattended in a bath or a vehicle) than adult manslaughter offences (32.4% compared to 2.7% for adult manslaughter cases). In contrast, a higher number of adult homicide offences involved a dangerous or unlawful act, such as the use of violence (78.4% compared to 54.1% of child manslaughters).

Table 17 shows the highest sentences for manslaughter involving both adult and child victims were for intentional killing, reduced to manslaughter by reason of the partial defence of provocation or diminished responsibility. The highest sentence imposed for manslaughter of a child where this was the MSO was 10 years (n=1) involving manslaughter by provocation.[492] In contrast, the highest sentence for manslaughter of an adult was 18 years (n=12), which was an intentional killing reduced to manslaughter by reason of diminished responsibility.

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 was not considered a 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 his MSO and used for analytical purposes.

As a result, the child manslaughter case attracting the highest penalty is analysed for the purposes of the Council's current review under the offence category of murder, not manslaughter. This case, *R v Maygar; Ex parte Attorney-General; R v WT; Ex parte Attorney-General (Qld)*,[493] has been included in the analysis below in section 5.5.4 Manslaughter (MSO and non-MSO).

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492 The offender was automatically declared convicted of a serious violent offence.

493 [2007] QCA 310 (28 September 2007).

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

- 8 years for manslaughter by violent or unlawful act involving either an adult or child victim; and
- 5 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.

Neglect cases received the shortest average sentences across all manslaughter categories of conduct, irrespective of whether the manslaughter victim was a child or an adult (4.4 years and 5.0 years, respectively).

Where the victim was an adult, manslaughter by criminal negligence with a vehicle had the longest average sentence of 9.5 years (n=10). The Council notes that for an offender to be convicted of manslaughter involving a vehicle — rather than the lesser offence of dangerous operation of a vehicle causing death[494] — a very high degree of criminal negligence has to be proved, meaning these offences are generally at the high end of offence seriousness involving a high degree of offender culpability/criminality. In these cases, the offender's dangerous driving behaviour may have resulted in multiple deaths and placed a number of people's lives at risk.

Due to the small sample sizes associated with individual manslaughter categories, significance testing has not been undertaken. However, clear differences in sentencing by manslaughter category can be observed.

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

Manslaughter type	N	Average (years)	Median (years)	Minimum (years)	Maximum (years)	Lower quartile (years)	Upper quartile (years)	Interquartile range (years)
Adult offenders sentenced for the manslaughter of a child by								
Violent or unlawful act	18*	8.1	8.0	7.0	9.5	7.0	9.0	2.0
Provocation	1*	10.0	10.0	10.0	10.0	10	10	0
Diminished responsibility	2*	7.7	7.7	7.5	8.0	7.5	8.0	0.5
Criminal negligence: neglect	12*	4.4	5.0	1.5	8.0	2.5	5.0	2.5
Criminal negligence: vehicle	1*	9.0	9.0	9.0	9.0	9.0	9.0	0.0
Type not known	1*	5.0	5.0	5.0	5.0	5.0	5.0.	0.0
TOTAL	**35**	**6.8**	**7.5**	**1.5**	**10.0**	**5.0**	**8.5**	**3.5**

494 *Criminal Code* (Qld) s 328A.

Adult offenders sentenced for the manslaughter of an adult by								
Violent or unlawful act	167	8.5	8.0	3.0	17.5	7.5	9.0	1.5
Provocation	19*	9.2	9.0	7.0	12.0	8.0	10.0	2.0
Diminished responsibility	12*	9.2	8.5	3.0	18.0	8.0	10.5	2.5
Killing for preservation in an abusive domestic relationship	1*	7.0	7.0	7.0	7.0	7.0	7.0	0.0
Criminal negligence: neglect	6*	5.0	4.8	3.0	7.0	4.5	6.0	1.5
Criminal negligence: vehicle	10*	9.5	9.0	6.5	12.0	9.0	11.0	2.0
TOTAL	**215**	**8.5**	**8.0**	**3.0**	**18.0**	**7.5**	**9.0**	**1.5**

Source: QGSO, QSIS, QFCC. Cautionary note: some small sample sizes are included in this analysis (*).

The analysis of sentencing factors in Chapter 4 also helps to explain how different factual circumstances and offender-related characteristics may result in different sentencing outcomes.

Child manslaughter (MSO) by type of conduct and the gender of the offender

As discussed earlier in this chapter, the Council analysed sentencing remarks for offenders sentenced as an adult for manslaughter between 2005–06 and 2016–17. Sentencing remarks relating to 33 offenders sentenced for manslaughter of a child were coded (three cases were not coded due to remarks being unavailable, a sentence being changed on appeal, and one offender being sentenced as a young offender).

Of the 23 male adult offenders convicted of manslaughter where the victim was a child, the majority (70%) were sentenced on the basis of manslaughter by violent or unlawful act. Of the 10 female adult offenders, the majority (70%) were sentenced on the basis of manslaughter by criminal neglect. In contrast, just over one-fifth of male offenders (21.7%) were sentenced on the basis of manslaughter by criminal neglect.

These findings show that male and female offenders are being convicted of manslaughter on the basis of different types of conduct — with male offenders being far more likely to commit violent acts against children, and female offenders being more likely to commit negligent acts, such as failing to seek medical care or provide necessaries. This analysis broadly supports the findings in Table 18 showing differing sentencing outcomes by gender.

Table 18: Child manslaughter (MSO) by type of conduct and the gender of the offender, 2005–06 to 2016–17

Manslaughter type by	Offender gender			
	Female		Male	
	N	%	N	%
Violent or unlawful act	2	20.0	16	69.6
Provocation	0	0.0	1	4.3
Diminished responsibility	1	10.0	1	4.3
Criminal negligence: neglect	7	70.0	5	21.7
TOTAL	10	100.0	23	100.0

Source: QSIS

Note: Three cases were not coded for the remarks and not included in this analysis — two adult female offenders (one had sentence changed on appeal, the other's remarks were unavailable) and a male juvenile offender (excluded because sentenced as a child).

5.5.4 Manslaughter (MSO and non-MSO)

The following analysis is for all adult offenders convicted of manslaughter where the victim was a child — including non-MSO counts of manslaughter — over the 12-year period. The inclusion of the non-MSO numbers enables all information pertaining to each victim — namely, cause of death, age of the child, and the offender — to be fully analysed.

Two child manslaughter victims of offenders who had an MSO of murder are included in this analysis, and three offenders with a child manslaughter MSO have had their second child victim of manslaughter included (each of the three offenders killed two child victims). (Note that as a result, the sentencing outcomes differ from those for the MSO-based data above in section 5.5.3.)

Manslaughter sentence by cause of death of child victim

Table 19 shows that offenders sentenced for the manslaughter of a child — where cause of death was due to using a blunt instrument — received the longest average sentence of 10.7 years. This finding suggests sentencing judges regard the use of a blunt instrument against a child as an aggravating factor.

The shortest average sentence of 5.6 years was found where the cause of death was due to the failure to provide necessaries (i.e. a failure to seek medical treatment). As discussed in Chapter 7 of this report, these lower average sentences align with views expressed by focus group participants that these forms of homicide (described in some cases as 'accidental' deaths) are less serious.

The 'striking' subgroup recorded the narrowest interquartile range (0.7 years), which means the majority of sentences fell within a narrow range of sentencing outcomes (7 and 9 years, respectively). However, this range also overlaps with other subgroups of manslaughter by cause of death (use of a blunt instrument, other, shaking, stabbing and suffocation/strangling).

Table 19: Summary of custodial sentence lengths for adult offenders sentenced for manslaughter by cause of death of each child victim (N=40), Queensland, 2005–06 to 2016–17

	N	Average (years)	Median (years)	Minimum (years)	Maximum (years)	Lower quartile (years)	Upper quartile (years)	Interquartile range (years)
Failure to provide necessaries	12*	5.6	5.0	2.0	8.0	5.0	8.0	3.0
Striking	8*	8.2	8.2	7.0	9.0	8.0	8.7	0.7
Other	7*	5.9	7.5	1.5	9.0	1.5	9.0	7.5
Shaking	5*	7.5	7.5	7.0	8.0	7.0	8.0	1.0
Stabbing	3*	8.5	9.0	7.0	9.5	7.0	9.5	2.5
Blunt instrument	3*	10.7	10.0	7.0	15.0	7.0	15.0	8.0
Suffocation/ Strangulation	2*	8.5	8.5	8.0	9.0	8.0	9.0	1.0
TOTAL	**40**	**7.2**	**8.0**	**1.5**	**15.0**	**5.0**	**8.7**	**3.7**

Source: QGSO, QFCC
Cautionary notes:
1) This analysis is based on the sentence given to an offender for the manslaughter of a child. Manslaughter offenders with multiple child victims or a child victim who had multiple offenders were included, to include all offender-victim sentencing combinations.
2) 'Other' includes vehicle (n=4), drowning (n=2), other neglect (n=1).
3) This analysis involves small sample sizes (*).

Manslaughter sentence by age of child victim

Table 20 shows that offenders sentenced for the manslaughter of child victims aged 15 to 17 years receive the longest average sentences (9.6 years), with the manslaughter against a child aged 17 years attracting the highest sentence (15 years) over the 12-year period. Sentences for offences involving

victims aged 15 to 17 years also recorded the narrowest interquartile range (0.5 years) — a range that does not overlap with any other subgroup. This means the majority of sentences fell within a very narrow range of sentencing outcomes (9.0 and 9.5, respectively). Sentences for offences committed against older children were higher than those of the other subgroups. This is likely to be due to the different circumstances in which manslaughter involving older children aged 15–17 years as victims and those involving children aged under 10 years occur, with offences involving older child victims mirroring offending involving adult victims (e.g. use of weapons).

Few differences were found in average sentences for offences committed against child victims in the younger age groups. All interquartile ranges overlap for these three age-specific cohorts (under one year of age, 1–4 years and 5–9 years). However, the median sentence across all cohorts is closer, ranging from 7 years for children under one year and aged 5–9 years, and 9 years for children aged 15–17 years.

Offenders sentenced for manslaughter committed against victims aged under one year recorded the widest interquartile range of 3.0 years. This finding may be a product of the greater diversity of conduct forming the basis for conviction within this category where the victim is a very young child. For example, the treatment for sentencing purposes of an offender convicted of manslaughter on the basis of leaving a baby in a bath unattended for a period resulting in the baby drowning is very different from a person convicted of manslaughter who kills a young child by use of deliberate and sustained violence.

Table 20 also shows that over the 12-year period there were no offenders sentenced for manslaughter where the victim was aged 10–14 years.

Table 20: Summary of custodial sentence lengths for adult offenders sentenced for manslaughter by age of child victim (N=40), Queensland, 2005–06 to 2016–17

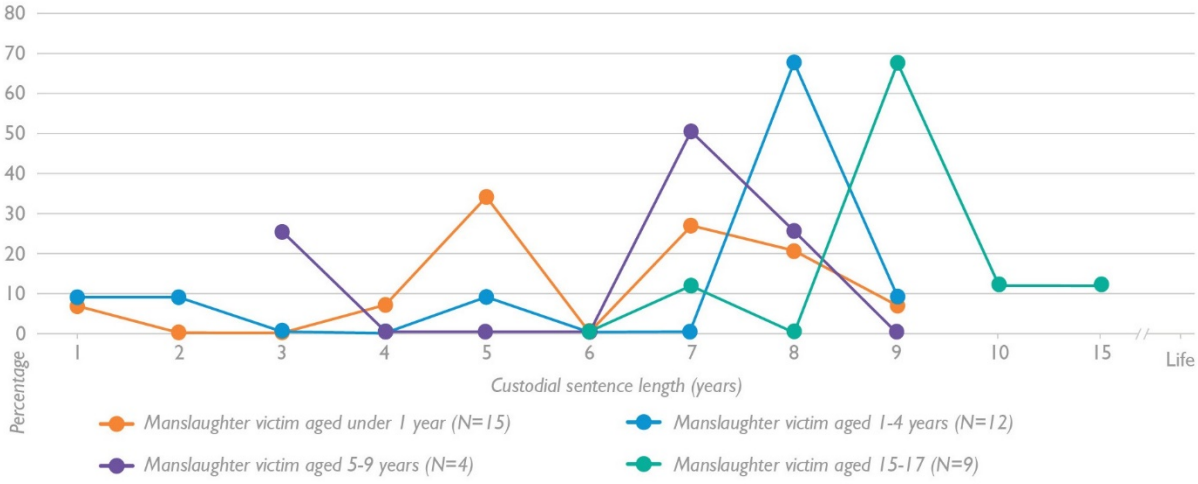
Child age	N	Average (years)	Median (years)	Minimum (years)	Maximum (years)	Lower quartile (years)	Upper quartile (years)	Interquartile range (years)
Under 1 year	15*	6.2	7.0	1.5	9.0	5.0	8.0	3.0
1-4 years	12*	6.9	8.0	1.5	9.0	6.5	8.2	1.7
5-9 years	4*	6.3	7.0	3.0	8.0	5.0	7.5	2.5
10- 14 years	0	-	-	-	-	-	-	-
15-17 years	9*	9.6	9.0	7.0	15.0	9.0	9.5	0.5
TOTAL	**40**	**7.2**	**8.0**	**1.5**	**15.0**	**5.0**	**8.7**	**3.7**

Source: QGSO, QFCC
Cautionary notes:
1) This analysis is based on the sentence given to an offender for the manslaughter of a child. Manslaughter offenders with multiple child victims or a child victim who had multiple offenders were included, to include all offender-victim sentencing combinations.
2) This analysis involves small sample sizes (*)

As shown in Figure 4, two-thirds of offenders with victims aged 15–17 years were sentenced to 9 years' imprisonment (66.7%) over the 12-year period. Those offenders with victims aged 1–4 years recorded a similar distribution, with 66.7 per cent of offenders sentenced to 8 years' imprisonment.

While acknowledging the small sample size (n=4) associated with offenders with victims aged 5–9 years, half (50%) were sentenced to 7 years.

Figure 4: Sentence for adult offenders sentenced for manslaughter by age of child victim (N=40), Queensland, 2005–06 to 2016–17



Source: QGSO, QFCC
Notes:
1) *Each year indicated on the above graph includes all periods between that year and the next year. For example, the indicator for 6 years includes any sentence greater than or equal to 6 years but less than 7 years.*
2) *This analysis is based on the sentence given to an offender for the manslaughter of a child. Manslaughter offenders with multiple child victims or a child victim who had multiple offenders were included, to include all offender-victim sentencing combinations.*

Cautionary note: This analysis involves small sample sizes.

5.5.5 Parole eligibility for homicide

As discussed in section 5.4.3, 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. The grant of parole where an offender has a parole eligibility date is not automatic, but subject to determination by the Parole Board.

Murder has mandatory minimum non-parole periods, which were amended in 2012. Manslaughter, unlike murder, does not have mandatory non-parole periods. However, there are different ways for courts to determine when to set a parole eligibility date. In circumstances where an offender is declared to have been convicted of a serious violent offence, the offender must serve 80 per cent or 15 years of their head sentence (whichever is less) before they can apply for parole.[495]

QCS provided data to the Council about parole eligibility only for offenders sentenced for child homicide over the 12-year period. This means that no comparison with parole eligibility of offenders sentenced for adult homicide was possible.

For offenders sentenced for child homicide within the 12-year period, the minimum time they were required to serve in prison before becoming eligible for release or to apply for parole ranged from 1.5 years to 34.8 years (see Table 21 below).

This range is to be expected, given that parole periods differ substantially between the offences of murder and manslaughter. Unlike murder, a mandatory 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.

For offenders sentenced for child murder, the median minimum time to be served before becoming eligible for parole was 15 years. For child manslaughter offenders, the median minimum time served before parole eligibility was 3.9 years.

495 See *Penalties and Sentences Act 1992* (Qld) pt 9A and *Corrective Services Act 2006* (Qld) s 182(2).

Table 21: Summary of minimum time served for offenders sentenced as an adult for a child homicide offence and sentenced to imprisonment, Queensland, 2005–06 to 2016–17

	N	Average (years)	Median (years)	Minimum (years)	Maximum (years)
Offenders sentenced for the homicide of a child	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
Notes: The following were excluded from this analysis:

- *Parole eligibility dates were unknown for three offenders.*
- *Two offenders received court-ordered parole dates. One offender received court-ordered parole on date of sentence; the second offender received court-ordered parole nine months post-sentence.*

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 22 below).

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 22: Summary of minimum time served for offenders sentenced as an adult for a child homicide offence and sentenced to imprisonment, by victim type and number of victims, 2005–06 to 2016–17

	Minimum time served (in years) for offenders sentenced as an adult for a child homicide offence				
	N	Average	Median	Minimum	Maximum
Child homicide	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
Child murder	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
Child manslaughter	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
Cautionary note: The sample sizes for this analysis are small (*).
Note: Victim count reflects the total number of victims per offender. For child homicide and child murder, victim count includes at least one victim aged under 18 years; however, additional victims may be aged over 18 years.

5.5.6 Time in custody for child homicide offenders

All offenders given a parole eligibility date by the court were assessed by the Parole Board to determine whether parole should be granted.

At the time of the QCS February 2018 data extraction, 23 of the 62 offenders sentenced for child homicide within the 12-year period were no longer in prison. All 23 released offenders were child manslaughter offenders and had served an average period of approximately 4.1 years (1506.8 days) in custody, with a median of 4 years (1444.0 days), minimum period of 6 months and a maximum period of 7.4 years.

The overwhelming majority (90.3%; n=56) of offenders sentenced for child homicide (N=62) spent time in the custody of QCS, either in pre-sentence custody (remand) or post-sentence custody, or both.

Of the 23 child manslaughter offenders no longer in prison:

- one offender was released on court-ordered parole on the date specified;
- three offenders served the non-suspended imprisonment period of their partially suspended sentences, and were released after serving between 12.5 per cent and 50 per cent of their head sentences;
- nine offenders were released within one week of reaching the parole eligibility date set by the court;
- 10 offenders served beyond their parole eligibility date including:
  - two offenders who served up to one month longer;
  - two offenders who served between one and six months longer;
  - two offenders who served between six months and one year longer;
  - three offenders who served more than one year longer; and
  - one offender who served the full period of their sentence in custody (8 years), five years beyond their parole eligibility date.

These findings are important because the media reporting of release dates tends to focus on the parole eligibility date where the impression created is that the person is released at that time. Of the 23 released offenders, three had been given a partially suspended sentence and 20 had received a sentence of imprisonment with parole. The 20 offenders that served a term of imprisonment spent an average of 56.1 per cent of their head sentence in prison, prior to release (with a median of 54%, a minimum of 24.9% and a maximum of 100%).

While an additional five child-manslaughter offenders who received suspended sentences did not spend time in post-sentence custody, they served an average of 711.2 days (approximately 2 years) in pre-sentence custody (with a median of 581.0 days, a minimum of 306.0 days and a maximum of 1276.0 days).

Caution, however, is advised, in relying on these data for two reasons. First, this analysis involves small sample sizes and, secondly, this analysis reflects results at a *point-in-time* (extraction as at February 2018).The latter consideration means that some offenders are yet to reach their parole release or parole eligibility dates after their homicide MSO sentence.

5.6 Sentencing approach for manslaughter

As shown in Table 13 in section 5.5.2 above, of the 58 offenders sentenced for a child homicide offence, more than half (60.3%) were convicted of manslaughter rather than murder (39.7%). 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 that manslaughter attracts the widest range of possible sentences of all serious offences[496] 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.[497]

There is even further variation among cases where a violent assault caused death — there can be 'comparatively minor force' (such as 'a modest single blow with unusual and fatal physiological consequences'[498]) ranging up to a sustained beating over a prolonged period, with gratuitous cruelty.[499] 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'.[500] The use of a weapon also makes the offence more serious.[501]

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 especially to manslaughter offences committed against children where the overall number of cases involved is relatively small. The NSW Court of Criminal Appeal has commented, in considering this challenge:

> 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.[502]

All these factors serve to make sentencing for offenders convicted of manslaughter challenging. It is likely that 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.

5.6.1 Court of Appeal decisions

As murder carries a mandatory life sentence in Queensland, the focus of this discussion is on statements made by the Queensland Court of Appeal about the adequacy of sentences imposed for manslaughter where the death of a child is involved.

Manslaughter involving fatal child abuse

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

In 1986, in *R v Walsh*,[503] the Court of Appeal upheld the sentence of 9 years' imprisonment in circumstances where the offender lost control when bathing an 18-month-old child whom he could not

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496 *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 Blacklidge* (unreported, Court of Criminal Appeal, NSW, No 60510 of 1995, 12 December 1995, Gleeson CJ). Blacklidge 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).

497 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 J); *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 J).

498 *R v Skondin* [2015] QCA 138 (24 July 2015) 21 [80] (Holmes JA).

499 *R v Hoerler* (2004) 147 A Crim R 520, 531 [43] (Spigelman CJ).

500 Ibid.

501 *R v Skondin* [2015] QCA 138 (24 July 2015) 21 [80] (Holmes JA).

502 *R v Hoerler* (2004) 147 A Crim R 520, 530 [41] (Spigelman CJ).

503 *R v Walsh* (Unreported, Court of Criminal Appeal, Qld, CA No 85 of 1986, Connolly, Williams and Ambrose JJ,12 June 1986).

stop crying; he shook her in a manner that caused her head to hit a door causing severe injuries. The Court accepted this was at the upper end of the range for offences of this nature but justified in the circumstances because 'the death of this child was an offence committed against a helpless human being by a person in whose care she was'.[504] The Court accepted that the tariff for manslaughter was 5 to 10 years, and that the sentence of 9 years was within range. This sentence was imposed before the serious violent offence scheme came into effect in 1997.

In 2002, the Court of Appeal found in the case of *R v Hall; Ex parte Attorney-General (Qld)*[505] that 'given the circumstances of the offence and the respondent's criminal history a head sentence in the range of 8 to 9 years would ordinarily be called for'.[506] The offender in this case violently shook his 19-day-old son, leading to severe brain damage and the child's considerable suffering before his death 10 months later. The respondent had a significant prior criminal history for violence, including against a baby around 20 years previously. The appeal was allowed against the 4-year sentence and a sentence of 6 years' imprisonment was substituted. However, the Court declined to make a serious violent offence declaration.

The Court of Appeal in the 2004 decision of *R v Chard; Ex parte Attorney-General (Qld)*[507] allowed an appeal against a sentence of 6 years' imprisonment. It substituted the initial sentence with a sentence of 7 years' imprisonment, ordered to be served cumulatively with 12-months' imprisonment activated under an earlier suspended sentence for unrelated offences. This case 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 baby suffered acute brain damage and medical evidence demonstrated the child experienced severe blunt trauma. In allowing the appeal, the Court of Appeal found that, '[t]he prolonged abuse of a baby of this age would call for a head sentence at least in the range of eight to 10 years; the offence is far more serious than the isolated instance of shaking in *Hall*'.[508] 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 pursue the charge of murder. The offender was 21-years-old at the time of the offence, had no prior convictions for violent offending and a low IQ. No recommendation for early parole or a serious violent offence declaration was made.

In the 2009 decision of *R v Risely; Ex parte Attorney-General (Qld)*, the Court of Appeal dismissed an Attorney-General's appeal in circumstances where the Attorney-General had argued that:

> for unlawful killings of this type, a sentence of less than 10 years' imprisonment, which mandates a declaration that the offence is a serious violent offence, is manifestly inadequate.[509]

This case involved a 21-year-old offender sentenced to 8 years' imprisonment with an SVO declaration for the manslaughter of the 19-day-old child of his de facto partner. The child had suffered head injuries, suggesting the baby was subject to 'severe shaking, one or two severe blows to the head, and … other blows to the head'. The Court found that the absence of prolonged abuse suggested that the respondent's criminality was 'no greater than that involved in *Chard*, even though the fact that the victim in this case suffered serious head injuries, considered alone, might suggest otherwise'.[510] The Court of Appeal allowed the respondent's appeal to the extent of removing the SVO declaration made by the sentencing judge and setting a parole eligibility date of 3.5 years.

The Court commented:

> Reference to this Court's decisions in *Chard* and *Hall* suggests that a sentence of eight years imprisonment, even without a serious violent offence declaration is a distinctly heavy sentence for this category of offence once mitigating factors such as the plea of guilty and the respondent's

504 Ibid 5 (Connolly J).

505 *R v Hall; Ex parte A-G (Qld)* [2002] QCA 125 (5 April 2002).

506 Ibid 5 [17] (Williams JA, White and Philippides JJ agreeing).

507 [2004] QCA 372 (8 October 2004).

508 Ibid 5 [23] (Williams JA).

509 *R v Risely; Ex parte A-G (Qld)* [2009] QCA 285 (22 September 2009) 7 [29] (Keane JA, Holmes JA and McMurdo P agreeing).

510 Ibid 8 [35] (Keane JA, Holmes JA and McMurdo P agreeing).

> rehabilitation are taken into account. It is to be noted that no submission was made to this Court on the appeal that *Chard* and *Hall* should be regarded as out of step with other decisions of this Court or of other intermediate courts of appeal in Australia. There is, therefore, no reason why this Court should not continue to regard *Chard* and *Hall* as affording authoritative guidance in relation to this category of case.[511]

The Court of Appeal in the later 2014 decision of *R v JV,*[512] citing the earlier decisions of *Cramp, Streatfield, Green & Haliday* (discussed below)*, Webb, Hall, Potter* (also discussed below) *and Chard,* remarked:

> These sentences do reveal a pattern in which the extent of departure from reasonable community standards is reflected in the severity of the sentence. They also indicate 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.[513]

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.[514] As discussed in section 5.5.3 of this report, 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.[515] That case involved an offender convicted of two counts of murder and one count of manslaughter committed against a 17-year-old victim, as well as four counts of rape committed against a separate victim.[516] The Court of Appeal in this case 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.[517]

The Court further found, in relation to the offences of murder committed against separate victims for which a life sentence was imposed:

> The circumstances of this case are such that the murders committed by *Maygar* are in the category of the worst imaginable examples of murder.[518]

Manslaughter by reason of diminished responsibility

There were only two cases of manslaughter by reason of diminished responsibility over the 12-year period where the victim was a child (see Table 17 of this report).

In the 2008 decision of *R v Potter; Ex parte Attorney-General (Qld)*, the Court of Appeal recognised that the distinct nature of these offences were perpetrated by the child's mother, observing: 'The killing of a child by a mother whose capacity to understand or control her actions is diminished has long been recognised as a human tragedy of an extraordinary kind'.[519]

A conviction for manslaughter by reason of diminished responsibility will ordinarily operate to reduce the sentence to be imposed due to reduction in the offender's culpability as a consequence of their reduced mental functioning at the time of the offence. This is unless the offender poses a serious future risk to the community.[520] The Court observed that because of the relatively low level of criminality involved in child homicides committed in circumstances of diminished responsibility, sentences for

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511 Ibid 8–9 [36] (Keane JA, Holmes JA and McMurdo P agreeing).

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

513 Ibid 7 [31] (Gotterson JA, Morrison JA and McMeekin J agreeing).

514 *R v Bates; R v Baker* [2002] QCA 174 (17 May 2002), cited in *R v Corry* [2006] QCA 203 (9 June 2006) 7 [25]–[27] (Keane JA).

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

516 Ibid.

517 Ibid 11 [64] (Keane JA, Williams JA and Mullins J agreeing, but Mullins J dissenting as to the non-parole period).

518 Ibid 11 [65] (Keane JA, Williams JA and Mullins J agreeing).

519 *R v Potter; Ex parte A-G (Qld)* (2008) 183 A Crim R 497, 3 [6] (Keane JA).

520 See, for example, Ibid 13 [45] Mackenzie AJA.

manslaughter on the basis of diminished responsibility involving adult victims do not offer a useful comparator.[521] In some cases involving adults, different sentencing considerations may also apply, given the need to take into account in sentencing the risk that the offender's mental abnormality may lead them to kill again and, consequently, the need for community protection.[522]

In *Potter,* the Court of Appeal (by a majority, Chesterman J dissenting) dismissed an Attorney-General's appeal against a sentence of 8 years' imprisonment with parole eligibility after 3 years of the respondent who pleaded guilty on the basis she was of diminished responsibility at the time of the offence. The Crown argued that the sentence failed to reflect adequately the gravity of the offence generally in this case, and that the sentencing judge gave too much weight to factors going to mitigation. The respondent had killed her 5-year-old daughter by putting tape over her mouth and then putting a pillow over her face and holding her down for approximately 20 minutes until the child died from asphyxiation. She admitted to the offence and gave as her reason that her daughter would not do what she was told and kept doing the wrong thing and being naughty and she had just snapped. She was found by the Mental Health Court 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 he had sexually interfered with her daughter and termination of a planned pregnancy).[523]

The Court of Appeal in *Potter* acknowledged that the parole date set was an eligibility date only and that 'the progress of the offender's illness and rehabilitation will be a major factor in deciding, within the corrections system, the actual date of release'.[524]

Chesterman J (dissenting) was of the view that the sentence did not reflect the seriousness of the offence or the manner in which the child was killed. Chesterman J argued the sentence was at the bottom end of the indicated range (9 to 12 years) for manslaughter by reason of diminished responsibility ameliorated by the early parole eligibility date and was therefore outside the sentencing range indicating a sentencing error.[525] In suggesting a sentence of between 10 and 12 years was the appropriate sentence in the circumstances, Chesterman J made the following remarks:

> The respondent killed her own child who was dependent on her for protection and who was vulnerable by reason of the sexual abuse she had experienced. She died slowly and her death must have been accompanied by agony and terror. The crinkling of the tape indicates her desperate struggle to breathe. The respondent had ample time, 20 minutes, to desist and spare her child's life. Instead she persisted with terrible determination to end that life.[526]

In a subsequent 2015 unreported decision,[527] the judge identified the sentencing range for manslaughter by reason of diminished responsibility where the victim was a child to be ordinarily 8 to 10 years, but that sentences as low as 7.5 years had been imposed where there was an SVO declaration, citing *Potter* in support. In this case, the offender had pleaded guilty to manslaughter of his six-month old son by reason of diminished responsibility. The offender had taken his son for a walk along the Logan River, and he decided to enter the water and intentionally release his son into the river. The Mental Health Court had found that at the time of the offence, the offender was suffering from a significant psychotic episode caused, in part, from his paranoid schizophrenia and consumption of drugs and therefore had diminished responsibility for his actions.[528]

In sentencing, the judge took into account the vulnerability of the child and his complete reliance on his father for safety, the offender's decision to consume drugs knowing their impact on his behaviour and — while not premeditated — the intentional act of releasing his son into the water. This was balanced

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521 Ibid 3–4 [7] (Keane JA).

522 Ibid 9 [29]–[30] (Mackenzie AJA) referring with approval to comments made by Jerrard JA in *R v Beacham* (2006) 163 A Crim R 348.

523 *Re AMP* [2007] QMHC 22 (1 October 2007).

524 *R v Potter; Ex parte A-G (Qld)* (2008) 183 A Crim R 497, 13 [46] (Mackenzie AJA).

525 Ibid 22 [98] (Chesterman J).

526 Ibid 22 [97] (Chesterman J).

527 *R v Fisher* (Unreported, Supreme Court of Queensland, 2 November 2015).

528 *Re Fisher* [2015] QMHC 4 (20 March 2015).

with mitigating factors including his substantial impairment at the time, his significant remorse and his wife's victim impact statement regarding not only the loss of her child, but also of her partner of 16 years and father to their other four children. The offender was sentenced to 7.5 years, with a parole eligibility date of 3.5 years.

Even in cases where diminished responsibility has not formed a basis for a manslaughter plea, some concessions have been made for the existence of mental health problems. For example, in *R v Green & Haliday; Ex parte Attorney-General (Qld)*, Davies JA noted that the mother had a post-traumatic stress disorder, a major depressive illness with psychotic features, a borderline personality disorder, and a depressive personality disorder — the interaction of which, combined with other factors, significantly impaired her ability to make decisions concerning the child who died.[529] In this case, the 18-month-old child's death was caused by asphyxiation resulting from being restrained in circumstances where she also had pneumonia (and where she had been restrained in this way to sleep over some weeks). The appeals against the 6-year sentences imposed on both the mother and her de facto (with no order for early parole eligibility) were dismissed. This case is discussed in greater detail below.

Manslaughter involving criminal negligence/child neglect

In the case of criminal negligence manslaughter cases, the extent of departure of the person's actions from reasonable community standards is a major consideration. This includes those involving the death of children due to a failure by caregivers to provide the necessaries of life (such as food and medical care) or to take reasonable precautions to avoid danger to the child's life, health or safety.[530] There have been few Court of Appeal decisions regarding child manslaughter involving criminal negligence.

In 2003, the Court of Appeal dismissed both the Attorney-General and respondents' appeal on the 6-year sentence imposed (with no order for early parole eligibility) for two co-offenders in *R v Green & Haliday; Ex parte Attorney-General (Qld)*.[531] The Crown argued the sentence was manifestly inadequate and sought a sentence at the top of the range of 5 to 10 years, with an SVO declaration.

In this case, the respondents pleaded guilty to the manslaughter of female respondent Haliday's 18-month-old daughter. Green was not the father of the child but had been living with Haliday at the time of the child's death. Green was 23-years-old and Haliday was 20, and neither had any prior criminal history. In addition to the manslaughter charges, the respondents also pleaded guilty to 10 counts of common assault in respect of their treatment of the child prior to her death. The respondents would restrain the child while she slept, wrapping her in a doona with a knotted sheet around the doona before placing her in bed. She died from asphyxiation, exacerbated by suffering from pneumonia. Both offenders were found by the Court of Appeal to be 'of deficient intellect and personality',[532] and Haliday was found to have suffered from multiple mental health disorders. Chief Justice de Jersey found the Court would not interfere with the sentence, as 'the essence of this offending conduct was grossly bad parenting on the part of grossly immature people, and not associated with any particular intent to do serious harm to the child'.[533]

Davies JA agreed with the Chief Justice, acknowledging that although the offending conduct was shocking:

> I don't think that the circumstances of this case demonstrated a need to protect the community from these offenders by deferring their eligibility to seek post-prison community based release at the mid-term of their sentence … without diminishing in any way the seriousness of the conduct on the part of each of the offenders, their engagement in that conduct, in each case, can be explained to some extent, but by no means excused, by the reduced capacity of each of them to cope with the ordinary stresses of life.[534]

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

530 *R v JV* [2014] QCA 351(19 December 2014) 5 [20] (Gotterson JA) referring to comments made at first instance and citing *R v Pesnak & Anor* (2000) 112 A Crim R 410.

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

532 Ibid 4 (de Jersey CJ).

533 Ibid 7 (de Jersey CJ.

534 Ibid 8 (Davies JA).

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. Examples include causing the death by drowning of a child by leaving a young child unattended in a bath[535] or leaving a young child in a car resulting in death due to dehydration.[536]

For example, in one unreported case in 2008, the female offender was sentenced to 18 months' imprisonment with immediate release on parole for the death of her young daughter through criminal negligence.[537] The child was left unattended in the bath and drowned. The sentencing judge accepted that the offender had been suffering from diagnosed mental health disorders, was socially isolated in Australia with limited English, and on the day of the offence had been attempting to cope with moving the family to yet another accommodation. The offender had immediately sought medical help for her child, had made rehabilitation efforts post the offence, including seeing a psychiatrist and working with a child safety officer, and had pleaded guilty.

Other examples that fall within this category of offending often involve a failure to seek medical attention for a child. These vary in assessed seriousness — often based on factors such as the offender's knowledge or belief (albeit unreasonable) about how seriously the child's illness or injury was, and the period the child had been unwell.

In an unreported decision in 2012, a female offender who pleaded guilty to manslaughter of her newborn baby on the basis of not seeking medical attention immediately after the child was born was sentenced to 5 years' imprisonment, suspended after 12 months, with an operational period of 5 years.[538] The offender was diagnosed with a major depressive episode at the time of the offence, and gave birth alone in the bathroom. It was accepted that the offender had believed, though unreasonably, that the child was already dead and she had not intended to harm the baby.

In several cases of manslaughter by criminal negligence sentenced within the previous five years, the offender was sentenced for failing to seek medical treatment when a co-offender (usually a parent or step-parent) had violently assaulted the child. In each case, the offender had observed a decline in the child's health and had not sought medical care.[539] In these types of cases, generally an offender's assessed level of culpability will vary, depending on their knowledge of the fatal assault having occurred and their reasons for not seeking medical assistance. For example, in one case the female offender had been subjected to domestic violence by her male co-offender, who had fatally assaulted her baby, and he actively discouraged her from seeking assistance every time she suggested calling an ambulance.[540] When she did take the baby to hospital, it was too late. In this case, and others, the offender provided substantial assistance to investigators and provided evidence against the co-offender.[541]

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535 See Case Study 5 in the Council's Consultation Paper.

536 See Case Study 8 in Council's Consultation Paper — *R v Reynolds* (Unreported, Supreme Court of Queensland, 13 April 2011).

537 *R v Farah* (Unreported, Supreme Court of Queensland, 10 March 2008). This case was one of the three child homicide case studies used for the purposes of the Council's focus group research (see further Chapter 8).

538 *R v Munro* (Unreported, Supreme Court of Queensland, 9 March 2012).

539 *R v Webb and Leaso* (Unreported, Supreme Court of Queensland, 27 August 2013); *R v Kent* (Unreported, Supreme Court of Queensland, 15 March 2016); *R v Leask* (Unreported, Supreme Court of Queensland, 4 April 2017); *R v Scown* (Unreported, Supreme Court of Queensland, 11 October 2017).

540 *R v Leask* (Unreported, Supreme Court of Queensland, 4 April 2017).

541 *R v Kent* (Unreported, Supreme Court of Queensland, 15 March 2016); *R v Leask* (Unreported, Supreme Court of Queensland, 4 April 2017); *R v Scown* (Unreported, Supreme Court of Queensland, 11 October 2017).

In the 2014 case of *R v JV*,[542] the Court of Appeal dismissed an appeal against a sentence of 8 years' imprisonment imposed on the applicant for the death of his 18-month-old twins (a son and a daughter). The co-offender in this case was the twins' mother and the applicant's de facto partner.[543] The applicant, who was 28-years-old at the time of the offending with no relevant prior criminal history, was sentenced to 8 years' imprisonment for each count with the sentences ordered to be served concurrently. The offender was eligible to apply for parole after serving 3 years and 9 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 in *JV* found in this case 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'.[544] The Court of Appeal agreed, finding '[t]he departure from reasonable community standards exhibited by him was both profound and inexcusable' and agreed with the sentencing judge's earlier finding that the respective culpabilities of the applicant and his de facto partner 'were of a similar order'.[545]

The sentence was described as 'an appropriate exercise of the sentencing discretion' and 'in line with sentences imposed for broadly comparable offending allowing for differences in personal circumstances'.[546]

5.7 Conclusion

In this chapter the Council provided an overview of the sentencing framework for child homicide, the operation of parole and sentencing trends and practices in Queensland. The analysis of sentencing outcomes focused on sentences imposed for the murder and manslaughter of a child and included comparative sentencing outcomes imposed for homicides with adult victims.

The Council's analysis found that the median sentences were relatively consistent within the categories of manslaughter by violent or unlawful act or criminal negligence:

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

It is important to be mindful that differences in sentencing outcomes may be explained by different types of offending conduct and offending profiles between the offences involving adult and child victims. For example, how courts assessed offence seriousness and victim vulnerability is discussed further in Chapter 7.

The chapter also provided a summary of Court of Appeal decisions for different categories of conduct for the offence of manslaughter, where the victim was a child.

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

543 The mother in this case was also sentenced to 8 years per count of manslaughter on the basis of criminal negligence. Her case had been referred to the Mental Health Court on the basis of diminished responsibility; however, that court found that her capacities at the time of the offence were not substantially impaired: *MBS v DPP (Qld) & Anor* [2012] QCA 326 (27 November 2012) 39 [192] (Applegarth J). Despite not being found to be of diminished responsibility, the sentencing judge did accept that she was suffering from a major depressive episode at the time of the offence.

544 Cited in *R v JV* [2014] QCA 351 (19 December 2014) 5 [20]. *R v Pesnak & Anor* (2000) 112 A Crim R 410 is identified as the authority for the earlier proposition.

545 *R v JV* [2014] QCA 351 (19 December 2014) 7 [32], [34] (Gotterson JA, Morrison JA and McMeekin J agreeing).

546 Ibid 7 [33] (Gotterson JA, with whom Morrison JA and McMeekin J agreeing).

Chapter 6 — Approach to sentencing in other jurisdictions

The previous chapters of this report explored the legal framework that guides sentencing in Queensland, how courts approach sentencing for child homicide, and sentencing outcomes for these offences over a 12-year period (2005–06 to 2016–17).

This chapter considers approaches to sentencing for child homicide in other jurisdictions and different forms of sentencing guidance that exist in Australian and select overseas jurisdictions.

6.1 Approach to sentencing for child homicide offences in other jurisdictions

6.1.1 Child homicide offences

The laws of homicide across Australia are broadly consistent, although differences apply in terms of:

- the availability of partial excuses and defences to homicide;
- the legislating of sub-categories of homicide, such as the introduction in Victoria of the offence of 'child homicide' (manslaughter of a child who is under the age of 6 years);[547] and
- the fault element to establish these offence — for example, some jurisdictions include reckless indifference to the probability of causing death as a separate basis for establishing the offence of murder, although this still requires that the accused foresaw or realised that this act would probably cause the death of the deceased.[548]

Some specialist offences, such as the offence of infanticide, have formed part of the criminal law of other jurisdictions for many years;[549] others, such as the Victorian offence of child homicide, have been introduced more recently to respond to specific concerns about sentencing in child homicide cases or, in the case of the South Australian offence of criminal neglect, evidentiary challenges in establishing who is responsible for the fatal act or omission in circumstances where more than one person lived with the child.

Infanticide

A number of jurisdictions have a separate offence of infanticide. This is not a separate offence in Queensland and was repealed by Western Australia in 2008 following a Law Reform Commission review of the law of homicide. At the same time, Western Australia introduced a number of other legislative reforms, including replacing the mandatory life sentence for murder with a presumptive penalty.[550]

Infanticide as an offence typically is framed in terms of the killing of a young child (often under 2 years), by its mother on the basis that her mind was disturbed either because she had not fully recovered from the effect of giving birth to that child or because of a disorder consequent of her giving birth to that child within the legislated timeframes.[551] It is considered a separate category of homicide, which is not dependent on the intention of the mother.

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547 *Crimes Act 1958* (Vic) s 5A.

548 See, for example, *Crimes Act 1900* (ACT) s 12(1)(b); *Crimes Act 1900* (NSW) s 18; *Criminal Code* (Tas) s 157. In Victoria and South Australia, which adopt the common law definition of murder, it is enough if the person knew it was probable either that death or really serious injury would result.

549 Infanticide was first established as a separate non-capital offence under the *Infanticide Act 1922* (UK). On the history of infanticide, see Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report*, No 97 (2007) ch 3.

550 *Criminal Law Amendment (Homicide) Act 2008* (WA); Law Reform Commission of Western Australia, above n 549, Recommendation 13.

551 *Crimes Act 1958* (Vic), s 6; *Criminal Code* (WA) s 281A (repealed).

The form of the offence, the maximum penalties that apply, and what age of victim it applies to, vary by jurisdiction.

- in Victoria, the offence applies up to two years post a child's birth and carries a 5-year maximum penalty;[552]
- in NSW, the offence applies if the child is killed while under 12 months and carries a maximum penalty of 25 years (the same maximum penalty as manslaughter);[553]
- in New Zealand the offence applies to circumstances where a mother has killed a child of her own under the age of 10 years and carries a maximum penalty of 3 years' imprisonment.[554]

Victoria and New Zealand, unlike Queensland, do not have a separate partial defence of diminished responsibility, which, if established, reduces murder to manslaughter.

Sentences imposed for infanticide are generally below that for manslaughter and can range from a non-custodial order[555] to a sentence of imprisonment.[556]

Child homicide offence (Victoria)

A stand-alone offence of child homicide was introduced into the Victorian *Crimes Act 1958* in 2008.[557] Section 5A provides:

> A person who, by his or her conduct, kills a child who is under the age of 6 years in circumstances that, but for this section, would constitute manslaughter is guilty of child homicide, and not of manslaughter, and liable to level 3 imprisonment (20 years maximum).

The offence has the same elements as manslaughter, with one additional element: involving the unlawful death of a child under the age of 6 years. It is an alternative verdict on a charge of murder.[558]

In introducing this new offence, the then Attorney-General, Rob Hulls, said the new provision had been developed in order to meet perceived concerns regarding the adequacy of sentences of the manslaughter of very young children and referred to a number of new cases where people dealt with for manslaughter had received sentences that were considered unduly lenient.[559] He referred to most sentences for child manslaughter falling within the 7–9 year range, with the highest sentence being a sentence of 10 years with a non-parole period of 7 years.

The stated intention of introducing the new offence was to encourage courts to impose sentences that were closer to the maximum penalty of 20 years' imprisonment for these offences and, by focusing on the age and vulnerability of the victim as key elements of the offence, it highlighted to courts in sentencing the importance of these matters as aggravating circumstances.[560] Mr Hulls went on to suggest that while previous sentences imposed for manslaughter would continue to be relevant as a general guide, the new

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552 *Crimes Act 1958* (Vic), s 6.

553 *Crimes Act 1900* (NSW) ss 22A, 24 (punishment for manslaughter).

554 *Crimes Act 1968* (NZ) s 178.

555 See, for example *R v Nikat* [2017] VSC 713 (23 November 2017) where the Court imposed a 12-month community corrections order on a mother who killed her 14-month-old child by suffocation, taking into account that the offender had already served 529 days of pre-sentence detention; *R v Cooper* [2001] NSWSC 769 (31 August 2001) where a 4-year good behaviour bond was imposed on a mother who suffocated her 7-month old baby; and *R v Pope* [2002] NSWSC 397 (7 May 2002) where the Court imposed a 3-year good behaviour bond on a mother who was suffering a post-natal condition and drowned her 12-week-old daughter in the bath.

556 See, for example, *R v Guode* [2017] VSC 285 (30 May 2017) in which a 12-month term of imprisonment was imposed on an offender who had killed her 17-month-old child together with being sentenced for the murder of two of her other children and attempted murder of a fourth child by driving into a lake. An appeal against her sentence (26 years and 6 months with a non-parole period of 20 years) on the basis it was manifestly excessive was allowed. A sentence of 18 years' imprisonment with a non-parole period of 14 years was substituted, although the original sentence of 12 months for infanticide was not disturbed: *Guode v The Queen* [2018] VSCA 205 (16 August 2018).

557 Inserted by the *Crimes Amendment (Child Homicide) Act 2008* (Vic), which came into operation on 19 March 2008.

558 *Crimes Act 1958* (Vic), s 421(1)(ab).

559 Victoria, *Parliamentary Debates*, Legislative Assembly, 6 December 2007, 4413 (Rob Hulls, Attorney-General).

560 Ibid, also referencing a statement made by the Premier of Victoria on 17 August 2007 to this effect.

offence would give scope to the courts to develop a new sentencing practice, which may be less constraining than in the past.[561]

In considering the application of child homicide and its intended operation, the Victorian Court of Appeal, in the recent decision of *Director of Public Prosecutions v Woodford*,[562] referred to earlier High Court authorities[563] in observing that 'extrinsic materials cannot displace the meaning of the statutory text'.[564] The Court concluded:

> Had the legislature used language that, read fairly, directed courts to impose heavier sentences for child homicide than had been the case for the manslaughter of young children, the Director's submissions regarding the sentence under appeal [being manifestly inadequate] would have greater force. It would be contrary to authority, and wrong in principle, to interpret s 5A as containing such a direction, based solely upon the statements made by the Attorney-General in the Second Reading Speech.[565]

Since its introduction in 2008, only three people have been sentenced for this offence.[566] The sentences imposed are discussed below and range from 9.0 to 9.5 years.

Causing or allowing the death of a child or vulnerable adult

The United Kingdom, New Zealand and South Australia have introduced specific offences intended to apply in circumstances where a child or vulnerable adult has died or has been seriously injured and it is unclear which person in the same household has caused the death. In such circumstances, there may not be enough evidence to support a conviction for murder or manslaughter.

In the United Kingdom, the offence applies to circumstances in which death or serious physical harm has been caused to a child or vulnerable adult and carries a maximum penalty of 14 years' imprisonment for death and 10 years' imprisonment for serious physical harm.[567] It applies only to members of a victim's household who have had frequent contact with the victim, who could reasonably be expected to have been aware of a risk of serious physical harm to the victim, and who failed to protect the victim from such harm. The household member must either have caused the victim's death (or the serious physical harm) or failed to take reasonable steps to protect the victim in circumstances where the person foresaw, or should have foreseen, that death or serious harm would occur.[568]

In New Zealand, the offence involves failing to protect a child or vulnerable adult from the risk of death, grievous bodily harm or sexual assault if they are a member of the same household or a staff member at an institution where the victim lives.[569] The maximum penalty for this offence is 10 years' imprisonment.

In South Australia, the offence applies to circumstances in which a child or vulnerable adult dies or suffers harm[570] where the person had a duty of care to the victim, was, or ought to have been, aware there was an appreciable risk that harm would be caused to the victim by the act, and failed to take steps they

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561 Ibid 4414.

562 [2017] VSCA 312 (31 October 2017).

563 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2003) 239 CLR 27, 46 [47]; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252; and *Commissioner of State Revenue v EHL Burgess Properties Pty Ltd* (2015) LGERA 314, 331–334 [64]–[69].

564 *Thiess v Collector of Customs* (2014) 250 CLR 664, 671 [22].

565 *DPP v Woodford* [2017] VSCA 312 (31 October 2017) 17 [79] (Weinberg, Osborn and Priest JJA).

566 *R v Hughes* [2015] VSC 312 (26 June 2015); *DPP v Woodford* [2017] VSCA 312 (31 October 2017); *R v Rowe* (Unreported, Supreme Court of Victoria, 31 August 2018).

567 *Domestic Violence and Crime Act 2004* (UK) s 5.

568 Ibid s 5(1)(d).

569 *Crimes Act 1961* (NZ) s 195A.

570 Formerly this offence applied only to cases involving 'serious harm'. The section was amended in 2018 by the *Criminal Law Consolidation (Children and Vulnerable Adults) Amendment Act 2018* (SA) to replace the words 'serious harm' with 'harm': s 6(1). The reason for this change was identified as being 'to better reflect the impact of injuries inflicted on children in instances of child abuse, cruelty and neglect' given children's generally superior ability to heal from injuries compared to adults: Government of South Australia, Attorney-General's Department, 'Changes to child protection laws' <https://www.agd.sa.gov.au/justice-system/changes-law/changes-child-protection-laws> at 2 October 2018.

could reasonably have been expected to in order to protect the victim from harm.[571] The maximum penalty is life imprisonment where the victim dies, and 15 years' imprisonment for serious harm.[572]

The New Zealand offence applies only to offenders aged 18 years or over at the time of the offence.[573] The UK version does not apply in circumstances where the person concerned was not the victim's mother or father, was aged under 16 years at the time, and could not have been expected to take any steps to protect the victim from the risk of death or serious physical harm.[574] The South Australian offence applies to a person who had a duty of care to a victim, being a parent, guardian or other person who has assumed responsibility for the victim's care and who was, or ought have been aware, of the risk to the victim but failed to take steps to protect the victim.[575]

In Queensland, a person who has care of a child under 16 years has a duty to provide the necessaries of life, take reasonable precautions to avoid danger and reasonable action to remove the child from danger.[576] Harm to the child or death is a breach of this duty. A person who has care of a child is defined to include a parent, step-parent, guardian or other adult in charge of the child, whether or not the person has lawful custody of the child.[577]

6.1.2 Maximum penalties and non-parole periods for child homicide offences

Current maximum penalties in Queensland for the offences of murder and manslaughter are broadly in line with other Australian jurisdictions, although there are some differences. For example:

- Queensland, South Australia and the Northern Territory are the only jurisdictions with a mandatory (as distinct from a presumptive) life sentence for murder;[578]
- in the ACT, NSW, Tasmania and Victoria, manslaughter carries a defined-term maximum penalty, rather than a maximum penalty, of life imprisonment ranging from 20 to 25 years.[579]

Maximum penalties, minimum non-parole periods, standard sentences and standard non-parole periods (SNPPs) for murder and manslaughter for select jurisdictions are summarised at Appendix 6 of this report.

Of the jurisdictions reviewed, none distinguish between homicide offences committed against adults and those committed against children in terms of the maximum (or minimum) penalties that apply to those offences, although some set a higher standard or minimum non-parole period where the victim is a child or in other circumstances.

NSW has introduced an SNPP[580] of 25 years for murder where the victim is a child under 18 years, which also applies if the victim is a police officer, emergency services worker, correctional officer, judicial officer, council law enforcement officer, health worker, teacher, community worker or other public official and the offence occurred because of the victim's occupation or voluntary work.[581] Where the victim was a police officer, a mandatory life sentence also applies (but this is not the case for child victims)

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571 *Criminal Law Consolidation Act 1935* (SA) s 14.

572 Ibid s 14(1). The maximum penalties were increased from 15 years and 5 years, respectively in 2018: *Criminal Law Consolidation (Children and Vulnerable Adults) Amendment Act 2018* (SA) s 6(3).

573 *Crimes Act 1961* (NZ) s 195A(3).

574 *Domestic Violence and Crime Act 2004* (UK) s 5(3).

575 *Criminal Law Consolidation Act 1935* (SA) ss 13A(4), 14(1)(b)–(d).

576 *Criminal Code* (Qld) s 286. See also s 364 (Cruelty to children under 16), which refers to a person 'having the lawful care or charge of a child under 16 years.

577 Ibid s 286(2) (definition of 'person who has care of a child').

578 Ibid s 305(1); *Criminal Law Consolidation Act 1935* (SA) s 11; *Criminal Code* (NT) s 157.

579 *Crimes Act 1900* (ACT) s 15; *Crimes Act 1900* (NSW) s 24; *Criminal Code* (Tas) ss 159 (Manslaughter), 389 (Sentences); *Crimes Act 1958* (Vic) s 5. In the ACT, the maximum penalty for manslaughter in its aggravated form is 28 years (e.g. offences against pregnant women — *Crimes Act 1900* (ACT) s 48A).

580 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).

581 Ibid div 1A, Table–Standard non-parole periods, items 1A and 1B.

and this mandatory penalty does not apply to young offenders or people who had 'a significant cognitive impairment' at the time of the offence (excluding a temporary self-induced impairment).

In the Northern Territory, a minimum non-parole period of 25 years applies to murders involving a victim under 18 years, or where the victim is a police officer or emergency services worker.[582] This also applies to murders involving a course of conduct that would have constituted a sexual offence and circumstances where the offender has been convicted of multiple homicides (including previous offences).

Where adopted, SNPPs are not mandatory minimum penalties, but rather a form of statutory sentencing guidance courts must follow in sentencing. Their operation is discussed further below.

In New Zealand, a presumptive life sentence applies to the offence of murder, which carries a minimum non-parole period of 17 years where particular circumstances apply (including where the victim was particularly vulnerable because of age, health or any other factor), unless the sentencing court determines it is manifestly unjust to impose such a sentence.[583]

6.1.3 Sentencing practices for child homicide offences in select jurisdictions

Due to the different offence and sentencing regimes in other jurisdictions, a decision was made early in the review not to compare sentencing outcomes in Queensland with those in other jurisdictions (for more information see Chapter 1). Further, in order to undertake this type of analysis, the Council would have needed access to both available data and associated sentencing remarks in order to identify victim age. The data were not available to undertake such a task, nor could the task have been completed within the timeframes of the Terms of Reference.

With these limitations in mind, the Council identified recent interstate cases (within the previous two years) through court websites linking to Supreme Court judgments, schedules of cases maintained by interstate Offices of the Director of Public Prosecutions (ODPPs), and media reports to gain a better understanding of the approach to sentencing for these offences in other jurisdictions.[584] A review of these cases, although not exhaustive, suggests sentences are broadly consistent with those imposed in Queensland, although in a number of cases involving child murder, the non-parole period set by the court has been higher than non-parole periods set for child murder in Queensland. There was one particularly serious New Zealand manslaughter case which attracted a 17-year sentence with a 9-year non-parole period (some seven years above the highest sentence imposed for child manslaughter in Queensland where this was the most serious offence sentenced). The relevance of this in the context of the current review is discussed in Chapter 9 of this report.

In Victoria, where a stand-alone offence of child homicide has been introduced, the sentences imposed for this offence are higher than the average sentence in Queensland for child manslaughter over the 12-year data period (sentences of between 9.0 and 9.5 years).[585] However, when examining sentences imposed for child manslaughter over the previous financial year (2017–18) — which was outside the Council's data period — the outcomes are similar.[586]

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582 *Sentencing Act 1995* (NT) s 53A(3)(a), (c).

583 *Sentencing Act 2002* (NZ) s 102.

584 A number of jurisdictions do not routinely publish sentencing remarks and this analysis is therefore not comprehensive. Details about recent murder and manslaughter sentences is based on information contained in media reports.

585 See *R v Hughes* [2015] VSC 312 (26 June 2015) — sentence of 9 years' imprisonment imposed for the offence of child homicide, with a total effective sentence of 9 years 6 months' imprisonment with a non-parole period of 6 years 3 months; *DPP v Woodford* [2017] VSCA 312 (31 October 2017) — appeal dismissed in relation to a sentence of 9 years 6 months' imprisonment with a non-parole period of 6 years 6 months; *R v Rowe* [2018] VSC 490 (31 August 2018) — sentence of 9 years' imprisonment with non-parole period of 6 years.

586 See Appendix 6, Table 42.

Sentences imposed for murder in other jurisdictions not carrying a mandatory life sentence, such as NSW and Victoria, also demonstrate that in the absence of such a penalty, significant sentences are imposed in cases involving the murder of a child, including life sentences and substantial defined terms.[587]

Although a comprehensive review of UK cases has not been possible due to an inability to access sentencing remarks, cases located for the previous two years suggest the sentences imposed over this period are also largely in line with those in Queensland. However, there have been circumstances in which higher sentences have been ordered (e.g. a sentence of 15 years' imprisonment (reduced on appeal in 2015 from 18 years) for the torture and manslaughter of an 8-year-old girl by a woman's female partner, for which the child's mother also received a 10-year sentence (reduced on appeal from 13 years).[588] This case is also discussed in Chapter 9.

6.2 Forms of sentencing guidance

Sentencing guidance refers to the principled considerations that a sentencing court may be directed or required to have regard to when exercising its judicial discretion. Sentencing guidance can 'range from broad, generalised guidance, such as the way a maximum penalty indicates parliament's assessment of the seriousness of an offence, to more specific and prescriptive guidance, such as guidelines contained in a guideline judgement'.[589]

The forms of sentencing guidance and requirements that exist in Queensland in sentencing for child homicide include:

- the maximum (and in the case of murder, mandatory) penalty that applies (for both murder and manslaughter, life imprisonment);
- the general purposes and sentencing factors set out under section 9 of the PSA, including factors that a court must apply in sentencing an offender for an offence involving violence against another person or that resulted in physical harm to another person;
- minimum non-parole periods that establish the lower limit for courts in setting dates for parole eligibility, including the SVO provisions that set a parole eligibility date at 80 per cent of the sentence or 15 years, whichever is less, for offenders declared convicted of a serious violent offence;
- appellate court decisions setting out principles and factors that apply in sentencing for offences involving the death of a child, which expand on and reinforce the principles and factors expressly stated under the PSA (such as that the offence involved a breach of trust or involved a victim that was particularly vulnerable due to their age);
- sentencing outcomes for other cases with similar characteristics involving the death of a child and, more generally, for homicide offences (also referred to as 'case comparators').

This section sets out other forms of sentencing guidance and approaches adopted in some other jurisdictions.

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587 The offender was sentenced to 30 years' imprisonment with a non-parole period of 26 years, *R v Noy* (Unreported, Supreme Court of Victoria, 25 July 2018, Coghlan J); The offender was sentenced to 37.5 years imprisonment (stated reduction from 42 years' imprisonment due to 10% discount for guilty plea) with non-parole period of 28 years, *R v JK* [2018] NSWSC 250 (5 March 2018); LN was sentenced to 44 years with a non-parole period of 33 years and AW was sentenced to 40 years with a non-parole period of 30 years, *R v LN; AW (No 10)* [2017] NSWSC 1387; the offender was sentenced to 36 years' imprisonment with a non-parole period of 27 years, *R v Lock* [2017] NSWSC 715 (5 June 2017).

588 See Appendix 6, Table 41.

589 Sentencing Advisory Council (Victoria), *Sentencing Guidance in Victoria*, Report (2016) 22.

6.2.1 Statutory aggravating factors for sentencing purposes

The age of the child is a statutory aggravating factor in Queensland for offences that cause the death of a child under 12 years, but only for the purposes of deciding whether to declare the offender convicted of a serious violent offence where this is not mandatory.[590]

The New Zealand *Sentencing Act 2002* lists additional aggravating factors that apply in sentencing for offences involving violence against, or neglect of, a child under the age of 14 years, including the defencelessness of the victim, and the magnitude of the breach of any relationship of trust between the victim and the offender.[591] These factors are discussed in more detail in Chapter 7.

Section 21A of the NSW *Crimes (Sentencing Procedure) Act 1999*, which sets out aggravating and mitigating factors in sentencing, also identifies as general aggravating factors that the offender abused a position of trust or authority in relation to the victim and that the victim was vulnerable. The issue of vulnerability is not confined to children but extends to other vulnerable groups and occupations or circumstances that may place a person at particular risk.

As discussed in Chapter 4, section 9 of the PSA already sets out in some detail the relevant sentencing purposes and factors that apply, including specific factors to which a court must have primary regard when sentencing for offences of violence. For example, factors set out under section 9(3) of the PSA relevantly include the personal circumstances of the victim of the offence (encompassing issues of age and vulnerability), the circumstances of the offence (including where committed by a parent or caregiver, the breach of trust involved and the death of the child), and the nature or extent of the violence used, or intended to be used, in the commission of the offence. Although not set out as aggravating factors, these factors are commonly identified by the Queensland Court of Appeal as important aggravating considerations in sentencing for child homicide (see Chapter 4, section 4.6).

In addition to these factors, under section 9(10A) of the PSA, in determining the appropriate sentence for an offender convicted of a domestic violence offence, the court must treat that fact as an aggravating factor, unless it is not reasonable because of the exceptional circumstances of the case (e.g. the offender is a victim of serious or repeated domestic violence perpetrated by the victim). A 'domestic violence offence' is defined under section 1 of the *Criminal Code* (Qld) to mean an offence against an Act, other than the *Domestic and Family Violence Protection Act 2012*, committed by a person where the act or omission which constitutes the offence is also domestic violence or associated domestic violence under that Act, or contravention of a domestic violence order. Because most child homicides are perpetrated by parents, they will meet the definition of a domestic violence offence for the purposes of sentencing and therefore fall within scope of this new provision. As the new provision only came into effect from 5 May 2016,[592] it is too early for the Council to tell what impact it is having on sentencing outcomes.

The issue of vulnerability and approaches taken in Queensland and other jurisdictions to ensure it is recognised in sentencing is discussed in Chapter 7 of this report. The Council's view about the need for additional legislative guidance is set out in Chapter 9.

6.2.2 Aggravated forms of offences

Aggravated forms of offences can operate in place of, or in addition to, specific legislative guidance on sentencing factors that a court must apply in sentencing for certain kinds of offences. Higher maximum penalties apply to aggravated forms of offending.

The most obvious example in Queensland of this approach is sexual offences committed against children, which often distinguishes between the maximum penalty that applies based on the victim's age.[593]

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590 *Penalties and Sentences Act 1992* (Qld) s 161B(5).

591 *Sentencing Act 2002* (NZ) s 9A(2).

592 See *R v Hutchinson* [2018] QCA 29 (9 March 2018) in which the Court of Appeal held that s 9(10A) applied to sentencing from the date of commencement of the section, regardless of when the offence occurred.

593 See, for example, ss 218A (Using internet etc. to procure children under 16), 218B (Grooming children under 16), 210 (Indecent treatment of children under 16), 213 (Owner etc. permitting abuse of children on premises), 215 (Carnal knowledge with or of children under 16) which all have higher maximum penalties for offences committed

In South Australia, aggravated forms of offences also apply to non-sexual offences including where:

- the offender committed the offence in the course of deliberately and systematically inflicting severe pain on the victim;
- the offender used, or threatened to use, an offensive weapon to commit, or when committing, the offence;
- the offender committed the offence knowing that the victim of the offence was a child (under 18 years of age) of whom the offender, a spouse or former spouse, or domestic partner or former partner of the offender has custody as a parent or guardian, or is a child who normally or regularly lives with the offender, their spouse or former spouse or a domestic partner or former partner;
- the offender abused a position of authority, or a position of trust, in committing the offence.[594]

The existence of these forms of aggravated offences does not prevent a court from taking into account the circumstances surrounding the commission of an offence where the offence in its aggravated form is not charged.[595]

The maximum penalties that apply for the aggravated forms of offences vary by offence. For example, the maximum penalty for assault that causes harm to another person is 3 years and 4 years in its aggravated form (or 5 years if the offence is aggravated by the use of, or threat to use, an offensive weapon).[596] The offence of causing serious harm with intent carries a 20-year maximum penalty, although this increases to 25 years with a circumstance of aggravation.[597]

A distinction between aggravated and non-aggravated forms of the offence does not apply in setting a different maximum penalty for the offences of murder and manslaughter, because these offences both carry a maximum penalty of life imprisonment.

There are examples in Queensland and elsewhere of other statutory circumstances of aggravation that attract mandatory minimum non-parole periods, but these generally only apply in very limited circumstances. For example, a court in Queensland in sentencing an offender for an organised crime offence where that person is a participant in a criminal organisation[598] must impose on the offender a term of imprisonment consisting of:

(a) a sentence of imprisonment for the offence imposed under the law (without considering the operation of this part) (the ***base component***); and

(b) other than circumstances in which a sentence of life imprisonment is imposed or the offender is already serving a life sentence, a sentence of imprisonment for the lesser of seven years or the maximum penalty for the offence (the ***mandatory component***), which must be ordered to be served cumulatively with the base component and any other sentence of imprisonment and ordered to be served wholly in a corrective services facility.[599]

Sections 13A and 13B of the PSA, which provide for a sentence to be reduced due to cooperation provided or undertaken to be provided by an offender in another proceeding, are the only circumstances in which the penalty can be mitigated or varied.[600]

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against children under 12 years. In the case of s 210, if the child was a lineal descendent or under the care of the offender, the maximum penalty is 20 years.

594 *Criminal Law Consolidation Act 1935* (SA) ss 5AA(1)(a), (b), (g)(iii)–(iv), (i).

595 Ibid s 5AA(6).

596 Ibid s 20(4).

597 Ibid s 23(1). A court may also, on application by the Director of Public Prosecutions, impose a penalty exceeding the prescribed maximum if the victim in a particular case suffers such serious harm that a penalty exceeding the maximum prescribed is warranted: *Criminal Law Consolidation Act 1935* (SA) s 23(2).

598 *Penalties and Sentences Act 1992* (Qld) s 161Q.

599 Ibid s 161R. A control order must also be made: s 161V, unless ss 13A or 13B applies.

600 Ibid s 161S.

Other examples of aggravated forms of offences for sentencing purposes include:

- 'manslaughter by gross violence' in Victoria, which attracts a minimum non-parole period of 10 years, unless special reasons exist to depart from this;[601] and
- manslaughter committed by an adult offender in the course of an aggravated home burglary in Western Australia, which requires a court to impose a sentence of at least 15 years or, if it is committed by a juvenile offender, a period of imprisonment or detention of at least 3 years that must not be suspended.[602]

6.2.3 Defined-term standard non-parole period and standard sentencing schemes

Standard non-parole period schemes establish a 'legislated non-parole period intended to provide guidance to the courts on the minimum length of time an offender found guilty of an offence should spend in prison before being eligible to apply for release on parole'.[603]

The mandatory minimum non-parole periods that apply to murder and offenders sentenced to life imprisonment in Queensland are an example of defined-term minimum non-parole periods. The SVO provisions under Part 9A of the PSA constitute a defined percentage scheme, specifying the proportion of the sentence that must be served before an offender is eligible to apply for release on parole if declared convicted of a serious violent offence (in this case, 80%). As these are mandatory provisions, they are not sentencing 'guidance' in a true sense as the court has no ability to depart from the period specified (other than in the case of minimum non-parole periods, to set a later parole eligibility date).

NSW introduced its standard non-parole period scheme in 2003. In NSW, standard non-parole periods are set out under legislation expressed as a period of years for over 20 criminal offences.[604] The standard non-parole period represents the non-parole period for an offence 'that, taking into account the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness'.[605]

There are three standard non-parole periods prescribed for murder in NSW:[606]

- 20 years for murder (general) committed on or after 1 February 2003;
- 25 years for the murder of a person falling within a category of occupation committed on or after 1 February 2003; and
- 25 years for the murder of a child under 18 years, whenever committed.

The same definition of a standard non-parole period that applies in NSW has been adopted in the Northern Territory where a standard non-parole period of 20 years representing the non-parole period for an offence in the middle of the range of objective seriousness applies to murder other than an offence committed in stated circumstances of aggravation.[607] This provision is qualified by a requirement that a

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601 *Sentencing Act 1991* (Vic) s 9B. For this section to apply, the prosecution must have filed a notice of its intention to seek a statutory minimum sentence for manslaughter, and the court must be satisfied beyond reasonable doubt that: the offender was in company with two or more other persons when they caused the victim's death; or the offender entered into an agreement, arrangement or understanding with two or more other persons to engage in conduct resulting in the victim's death; and that (i) the offender planned in advance to have with them and to use an offensive weapon or firearm that caused the victim's death; (ii) the offender planned in advance to engage in the conduct that resulted in the victim's death and at the time of the planning a reasonable person would have foreseen that the conduct would be likely to result in death; or (iii) the offender caused two or more serious injuries to the victim during a sustained or prolonged attack on the victim.

602 *Criminal Code* (WA) ss 280(2)–(3).

603 Sentencing Advisory Council (Queensland), *Minimum Standard Non-Parole Periods: Final Report* (2011) xiv.

604 *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4, div 1A Table – Standard non-parole periods.

605 Ibid s 54A(2).

606 Ibid s 54A and Table to div 1A, Items 1A, 1B and 1.

607 *Sentencing Act 1995* (NT) s 53A (Non-parole periods for offence of murder).

shorter non-parole period be fixed only if the court is satisfied there are exceptional circumstances that justify this.[608]

Victoria, which does not have either a mandatory sentence or mandatory minimum non-parole period for murder, has adopted a standard sentencing scheme for murder. While this also represents an offence in the mid-range of objective seriousness, the standard sentence applies to the setting of the head sentence rather than to the fixing of the non-parole period.[609] The standard sentence in Victoria is 30 years if the murder is of a custodial officer or emergency services worker (which includes police officers and ambulance officers) and 25 years in any other case.[610]

No jurisdictions with standard sentencing or non-parole schemes have sought to extend these to the offence of manslaughter. The offence of child homicide is also excluded from the Victorian scheme.

The High Court, with reference to the NSW scheme, has identified that the standard non-parole period, together with the maximum penalty for an offence, are legislative 'guideposts' only; they do not have determinative significance.[611] The NSW legislation has since been amended to give effect to this intention,[612] with the relevant section now providing:

> 54B(2) The standard non-parole period for an offence is a matter to be taken into account by a court in determining the appropriate sentence for an offender, without limiting the matters that are otherwise required or permitted to be taken into account in determining the appropriate sentence for an offender.[613]

The stated intention of introducing a standard non-parole period (SNPP) and standard sentencing schemes has been to make sentencing more consistent and transparent.[614] But while these schemes have their proponents, equally they have their critics. Criticisms of the NSW scheme have included:

- SNPPs add unnecessary complexity to the sentencing process and are time consuming to apply, resulting in problems such as confusion, delays in the finalisation of matters, unnecessary restrictions placed on judicial sentencing discretion, and an increased risk of error by each of the parties as well as the court;
- SNPPs provide an inappropriate incentive to offenders to plead guilty, as a plea of guilty can provide courts with a reason to depart from the nominated SNPP;
- determining where an offence lies with reference to the mid-point of objective seriousness is difficult, particularly in the case of offences that can be committed in a wide range of circumstances.[615]

Other potential problems identified by the Sentencing Advisory Council of Victoria include difficulties in applying standard sentences to co-offenders whose role may be very different from the principal offender, and in applying standard sentences in the case of rolled-up or representative charges.[616]

A 2010 evaluation by the Judicial Commission of NSW found both the severity of penalties and their duration had increased since SNPPs were introduced into NSW in 2003; sentences had become more

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608 Ibid s 53A(6). For there to be exceptional circumstances to justify fixing a shorter non-parole period, the sentencing court must be satisfied that: (a) the offender is: (i) otherwise a person of good character; and (ii) unlikely to re-offend; and (b) the victim's conduct, or conduct and condition, substantially mitigates the conduct of the offender: s 53A(7).

609 *Sentencing Act 1991* (Vic) s 5A

610 *Crimes Act 1958* (Vic) s 3; *Sentencing Act 1991*(Vic) s 87C.

611 *Muldrock v The Queen* (2011) 244 CLR 120, 131–132 [26].

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

613 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54B(2).

614 See, for example, comments made in introducing the SNPP scheme by the then Attorney-General, RJ Debus: New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5813 (R J Debus, Attorney-General).

615 New South Wales Law Reform Commission, *Sentencing: Interim Report on Standard Minimum Non-Parole Periods,* Report No 34 (2012) 21–27 [2.2]–[2.29]. See also Sentencing Advisory Council (Victoria) above n 589, 175–178 [7.115]–[7.140].

616 Sentencing Advisory Council (Victoria) above n 589, 177, 177–178 [7.133]–[7.137].

consistent; and the guilty plea rate for SNPP offences had also increased.[617] In relation to consistency in sentencing, the study concluded that it was not possible to tell whether dissimilar cases were being treated uniformly in order to comply with the statutory scheme, thus giving an impression of consistency in sentencing.[618] The higher guilty plea rate may also suggest that concerns about the impact on guilty pleas raised by critics of the scheme may be well founded.

A majority of the former Queensland Sentencing Advisory Council recommended against the adoption of such a scheme in Queensland suggesting:

> there is limited evidence of the effectiveness of [standard non-parole period] schemes in meeting their objectives, beyond making sentencing more punitive and the sentencing process more complex, costly and time consuming. It also risks having a disproportionate impact on vulnerable offenders, including Aboriginal and Torres Strait Islander offenders and offenders with a mental illness or intellectual impairment.[619]

6.2.4 Sentencing guidelines

The United Kingdom has introduced a formal scheme of sentencing guidelines for the judiciary, developed by the Sentencing Council for England and Wales through a formal consultation process. Courts are bound to follow guidelines developed by the Sentencing Council unless satisfied it would be contrary to the interests of justice to do so.[620]

The current Sentencing Council was established in 2010 under the *Coroners and Justice Act 2009* as an independent body. The President of the Sentencing Council is the Lord Chief Justice of England and Wales and the Council has both judicial and non-judicial members.

Scotland has also established a Scottish Sentencing Council comprising judicial and non-judicial members.[621] The Council's role is similar to the Sentencing Council for England and Wales, although any guidelines the latter develops must be submitted to the High Court for approval.[622] For this reason, the Scottish Council performs more of an advisory role. There is also more flexibility under the Scottish model than under the England and Wales model to depart from the guidelines, as courts in Scotland are only required to 'have regard to any sentencing guidelines which are applicable in relation to the case' and, if they decide not to follow the guidelines or to depart from them, to state the reasons for doing so.[623]

In May 2017, the Victorian Government announced its intention to establish a Sentencing Guidelines Council in Victoria with a similar role to the UK Council.[624] This followed the delivery of the Victorian Sentencing Advisory Council's report on *Sentencing Guidance in Victoria,* which suggested that guidelines developed by a judicially led sentencing council could address all of the sentencing problems identified in its report, and also resolve issues with other forms of sentencing guidance.[625]

The Victorian Attorney-General asked the Victorian Sentencing Advisory Council's advice on what form this council should take. The Victorian Sentencing Advisory Council released its report earlier this year; the report made 22 recommendations about the most appropriate features of a Sentencing Guidelines Council for Victoria and the sentencing guidelines such a council would create.[626] Under the model recommended, the council would consist of up to four retired judicial officers, up to seven community

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617 Judicial Commission of New South Wales, *The Impact of the Standard Non-Parole Period Sentencing Scheme on Sentencing Patterns in New South Wales* (Monograph 33, 2010) Summary of findings and conclusions, 55–61.

618 Ibid 60–1.

619 Sentencing Advisory Council (Queensland), above n 603, xiv.

620 *Coroners and Justice Act 2009* (UK) s 125(1).

621 *Criminal Justice and Licensing (Scotland) Act 2010* (Scot).

622 Ibid s 2.

623 Ibid ss 6(1)–(2).

624 Premier of Victoria, 'Victorian Community To Have Its Say on Sentencing' (Media Release, 25 May 2017) <https://www.premier.vic.gov.au/victorian-community-to-have-its-say-on-sentencing/>.

625 Sentencing Advisory Council (Victoria), above n 589, *Sentencing Guidance in Victoria*, Report (2016) xxxiii.

626 Sentencing Advisory Council (Victoria), *A Sentencing Guidelines Council for Victoria*, Report (2018).

members, a person with experience in policing, and a prosecution and defence lawyer.[627] The development of sentencing guidelines would be on the council's own motion or at the request of the Attorney-General.[628] In many respects, the guidelines model proposed is similar to that operating in the UK.

UK Sentencing Guideline for Manslaughter

The UK Sentencing Council has released a new guideline for manslaughter, effective from 1 November 2018. The 'starting points' and sentencing ranges under these guidelines are outlined in Table 23 below.

Table 23: Definitive guideline issued by the Sentencing Council for England and Wales — Sentencing of manslaughter: Definitive guideline (2018)

Manslaughter type	Culpability (factors indicating level)			
	A – Very high	B – High	C – Medium	D – Lower
Unlawful act	**Starting point** 18 years' custody **Category range** 11–24 years' custody	**Starting point** 12 years' custody **Category range** 8–16 years' custody	**Starting point** 6 years' custody **Category range** 3–9 years' custody	**Starting point** 2 years' custody **Category range** 1–4 years' custody
Gross negligence	**Starting point** 12 years' custody **Category range** 10–8 years' custody	**Starting point** 8 years' custody **Category range** 6–12 years' custody	**Starting point** 4 years' custody **Category range** 3–7 years' custody	**Starting point** 2 years' custody **Category range** 1–4 years' custody
Loss of control (Provocation)	**Starting point** 14 years' custody **Category range** 10–20 years' custody	**Starting point** 8 years' custody **Category range** 5–12 years' custody	**Starting point** 5 years' custody **Category range** 3–6 years' custody	N/A
	Level of responsibility retained			
	High	**Medium**	**Lower**	
Diminished responsibility	**Starting point** 24 years' custody **Category range** 15–40 years' custody	**Starting point** 15 years' custody **Category range** 10–25 years' custody	**Starting point** 7 years' custody **Category range** 3–12 years' custody	

627 Ibid Recommendation 3.

628 Ibid Recommendation 5.

Examples of factors indicating the offender's level of culpability for 'unlawful act' manslaughter are summarised in Table 24 below.

Table 24: Assessing culpability for unlawful act manslaughter under definitive guideline issued by the Sentencing Council for England and Wales

A – Factors indicating very high culpability	Very high culpability **may** be indicated by: • the extreme character of one or more culpability B factors and/or a combination of culpability B factors.
B – Factors indicating high culpability	Death was caused in the course of an unlawful act that involved an intention to cause harm falling just short of GBH.
	Death was caused in the course of an unlawful act that carried a high risk of death or GBH, which was or ought to have been obvious to the offender.
	Death was caused in the course of committing or escaping from a serious offence in which the offender played more than a minor role.
	Concealment, destruction, defilement or dismemberment of the body (where not separately charged).
C – Factors indicating medium culpability	Cases falling between high and lower **including but not limited to:** • where death was caused in the course of an unlawful act that involved an intention to cause harm (or recklessness as to whether harm would be caused) that falls between high and lower culpability • where death was caused in the course of committing or escaping from a less serious offence but in which the offender played more than a minor role.
D – Factors indicating lower culpability	Death was caused in the course of an unlawful act: • that was in defence of self or other(s) (where not amounting to a defence), or • where there was no intention to cause any harm **and** no obvious risk of anything more than minor harm, or • in which the offender played a minor role.
	The offender's responsibility was substantially reduced by mental disorder, learning disability or lack of maturity.

Starting points apply to all offenders regardless of plea or previous convictions. An upward adjustment may be made taking into account the presence of aggravating factors. Relevant to the assessment of manslaughter involving a child victim, listed aggravating factors include:

- relevant prior offences;
- a history of violence or abuse towards the victim by the offender;
- the victim was particularly vulnerable due to age or disability;
- significant mental or physical suffering was caused to the deceased;
- the offence was committed while under the influence of alcohol or drugs;
- the offence involved persistent use of violence;
- blame was wrongly placed on others;
- abuse of a position of trust;
- the offence was committed in the presence of children.

Factors reducing seriousness reflecting personal mitigation include lack of previous convictions or relevant/recent convictions, remorse, attempts to assist the victim, lack of premeditation, good character, age and/or lack of maturity, and sole or primary carer for dependent relatives.

Once these factors are taken into account, a court must take into consideration any assistance to the prosecution or support of the investigation and any potential reduction for a guilty plea. Other factors

then taken into account include issues of dangerousness, the application of the totality principle, whether compensation and/or other ancillary orders should be made, and whether to give credit for time spent on bail.

6.2.5 Guideline judgments

Guideline judgments are another form of guidance for sentencing purposes used in some jurisdictions. Guideline judgments 'are a mechanism for the courts to provide broad sentencing guidance beyond the specific facts of a particular case.'[629] Generally, they are seen as an alternative mechanism to increase sentencing outcomes, to forms of mandatory sentencing schemes, as they allow the court to retain discretion.[630]

In Queensland, Part 2A of the PSA provides the Court of Appeal with the power to give a guideline judgment on its own initiative or on application by the Attorney-General, the Director of Public Prosecutions or the Chief Executive of Legal Aid Queensland. In deciding whether to give a guideline judgment the Court must consider:

(a) the need to promote consistency of approach in sentencing offenders; and

(b) the need to promote public confidence in the criminal justice system.[631]

The Council has the ability, if asked to do so by the Court of Appeal, to give the Court the Council's views about the giving or reviewing of a guideline judgment.[632]

NSW, which was the first jurisdiction to introduce this form of statutory guideline judgment scheme, issued seven guideline judgments over the period 1998–2004, one of which was overturned by the High Court on appeal.[633] The NSW Court of Appeal has identified that a guideline is simply a matter 'to be "taken into account only as a "check" or "sounding board" or "guide" but not as a "rule" or "presumption"'.[634]

Since 2004, no new guideline judgments have been issued in NSW. Commentators have attributed the absence of new guideline judgments to a series of High Court decisions that have cautioned against numerical guidelines and emphasised that sentencing 'is an instinctive and individualistic exercise', and to the introduction of SNPPs in NSW.[635]

The Victorian Court of Appeal issued its first (and only) guideline in 2014, which relates to the use of a new order introduced in Victoria to replace other forms of intermediate sentencing orders — the community corrections order.[636]

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629 Sentencing Advisory Council (Victoria), above n 589, 130.

630 Sentencing Advisory Council (Tasmania), *Sentencing of Driving Offences that Result in Death or Injury: Final Report No 8* (2017) 124.

631 *Penalties and Sentences Act 1992* (Qld) s 15AH.

632 Ibid s 199(1)(a).

633 High Range PCA, *Road Transport (Safety and Traffic Management) Act 1999* (NSW) s 9(4): *Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Content of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002)* (2004) 61 NSWLR 305 [146]; Form 1: *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146 [9]; Guilty plea (*Crimes (Sentencing Procedure) Act 1999* (NSW) s 22): *R v Thomson & Houlton* (2000) 49 NSWLR 383 [160]; Break, enter and steal (*Crimes Act 1900*, s 112(1)): *Attorney-General's Application (No 1), R v Ponfield* (1999) 48 NSWLR 327, 337–338 [48]; Armed robbery (*Crimes Act 1900* (NSW) s 97): *R v Henry and Ors* (1999) 46 NSWLR 346. Dangerous driving (*Crimes Act 1900* (NSW), s 52A): *R v Jurisic* (1998) 45 NSWLR 209, as reformulated in *R v Whyte* (2002) 55 NSWLR 252 [252]. The High Court overruled the guideline for drug importation (*Customs Act* 1901 (Cth), s 233B): *Wong v The Queen* (2001) 207 CLR 584 overruling *R v Wong & Leung* (1999) 48 NSWLR 340.

634 *R v Whyte* (2002) 55 NSWLR 252 [113] (Spigelman CJ).

635 Sarah Kransnostein, 'Boulton v the Queen: the Resurrection of Guideline Judgments in Australia' (2015) 27(1) *Current Issues in Criminal Justice* 41 citing Freiberg, above n 323, 971. The relevant High Court decisions are: *Barbaro v The Queen* 2014] HCA 2 (12 February 2014) [27];*Wong v The Queen* (2001) 207 CLR 584 ; *Hili v The Queen* 242 CLR 520, 544–5; *Markarian v The Queen* (2005) 228 CLR 357, 371.

636 *Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen* (2014) 46 VR 308.

The Queensland Court of Appeal is yet to exercise its statutory power to issue a guideline judgment.

The Victorian Court of Appeal in *Boulton v the Queen*, *Clements v The Queen,* and *Fitzgerald v The Queen*[637] noted that while the development of case law had the advantage of the development of legal principles informed by the practical realities of individual cases, equally the 'great advantage of a guideline judgment is that it enables [the Court of Appeal] to deal systematically and comprehensively with a particular topic or topics relevant to sentencing, rather than being confined to the questions raised by particular appeals' while not fettering the discretion of the sentencing court in any way.[638]

Apart from the power to give a guideline judgment, from time to time the Queensland Court of Appeal has issued guidance of a general nature, drawing on principles set down in earlier cases. For example, in *R v SAG,*[639] in referring to a number of previous cases, Jerrard JA identified 'significant matters substantially increasing a sentence for an offence of maintaining a sexual relationship' as including:

- a young age of the child when the relationship thereafter maintained first began;
- a lengthy period for which that relationship continued;
- if penile rape occurred during the course of that relationship;
- if there was unlawful carnal knowledge of the victim;
- if so, whether that was over a prolonged period;
- if the victim bore a child to the offender;
- if there had been a parental or protective relationship;
- if the offender was being dealt with for offences against more than one child victim;
- if there had been actual physical violence used by the offender; and, if not, whether there was evidence of emotional blackmail or other manipulation of the victims.[640]

One of the difficulties of child manslaughter cases for courts of appeal in setting out this form of guidance is the significant diversity of matters falling within this category of cases, which includes cases involving an apparently one-off incident or use of violence; cases where the child's death occurs following sustained and persistent abuse over a period of weeks or months; death due to a caregiver's failure to provide adequate supervision or to seek medical assistance for an illness or injury; and intentional killings where the perpetrator is of diminished responsibility due to the existence of a substantial mental impairment.

6.3 Views from submissions and consultation

The Council's consultation paper invited community and stakeholder views about whether further guidance was required for sentencing in relation to child homicide offences. Although there was no specific question regarding the sentencing guidance, the Council sought input as to the advantages and disadvantages of maintaining sentencing flexibility when sentencing for criminal offences arising from the death of a child.

Primarily, responses to this question focused on mandatory sentencing options. Some community members and child advocacy submissions focused on the need for mandatory penalties or the removal

637 Ibid.

638 Ibid 316 [26].

639 (2004) 147 A Crim R 301.

640 Ibid 306–307 [19].

of parole,[641] whereas all legal and justice stakeholders strongly argued for the need to retain judicial discretion to enable judges to sentence on a case-by-case basis.[642]

Generally, legal stakeholders[643] were of the view that the governing principles and sentencing guidelines set out in the PSA already provide 'an appropriate range of considerations for sentencing'.[644]

In its submission, PACT noted that 'precedents in sentencing set clear guidelines and benchmarks for the judiciary' and that 'judicial discretion is paramount to take into consideration the range of factors in each individual case'.[645] PACT also identified sentencing guidelines as one way to improve community awareness of sentencing for child homicide offences.

Legal Aid Queensland was concerned that legislative changes in sentencing for child homicide cases may be problematic and encouraged the Council to 'avoid the creating of a hierarchy of victims through such special categories of offences and sentencing guidelines/factors'.[646]

The QPS suggested there needs to be 'consideration by courts and the Court of Appeal to changing precedents to reflect societal changes'.[647]

6.4 Conclusion

In this chapter, the Council considered the current sentencing approaches for child and adult homicide offences in other select jurisdictions — with a particular focus on the offence of manslaughter.

The Council's views on the need for additional guidance in sentencing to ensure the imposition of appropriate sentences for child homicide offences, including greater specificity about specific aggravating factors for the purposes of sentencing, are discussed in Chapter 9.

641 Submission 1 (J & S Sandeman); Submission 12 (Kevin Richards); Submission 22 (Name withheld); Submission 25 (Name withheld); Submission 29 (PACT).

642 Submission 16 (FACAA); Submission 30 (Bar Association of Queensland); Submission 31 (Sisters Inside); Submission 32 (Aboriginal & Torres Strait Islander Women's Legal Services NQ); Submission 33 (Legal Aid Queensland); Submission 35 (Queensland Law Society); Submission 36 (Queensland Police Service).

643 Submission 32 (Aboriginal & Torres Strait Islander Women's Legal Services NQ); Submission 33 (Legal Aid Queensland); Submission 35 (Queensland Law Society).

644 Submission 32 (Aboriginal & Torres Strait Islander Women's Legal Services NQ).

645 Submission 29 (PACT).

646 Submission 33 (Legal Aid Queensland).

647 Submission 36 (Queensland Police Service).

Chapter 7 — Court and community assessment of offence seriousness

7.1 Introduction

The Terms of Reference asked the Council to:

- 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 with their autonomy;
- identify any trends or anomalies that occur in such sentencing, for example the nature of the criminal culpability that forms the basis of a manslaughter charge which may affect any sentence imposed.

This chapter sets out the Council's analysis of offence seriousness to inform the Council findings as to whether penalties currently imposed on sentences for child homicide adequately reflect the particular vulnerabilities of children. It also considers how the nature of criminal culpability may affect the assessment of offence seriousness, views from submissions and consultations, and alternative approaches in other select jurisdictions.

7.2 Offence seriousness

The *Penalties and Sentences Act 1992* (Qld) (PSA) requires a judge to assess the seriousness of the offence when determining an appropriate sentence.[648]

Offence seriousness is generally viewed as comprising two key components:

(1) the harm caused, and

(2) the culpability of the offender.[649]

Harm is defined as 'the degree of injury done or risked by the act'.[650] Under the PSA, harm includes 'any physical, mental or emotional harm done to the victim'.[651]

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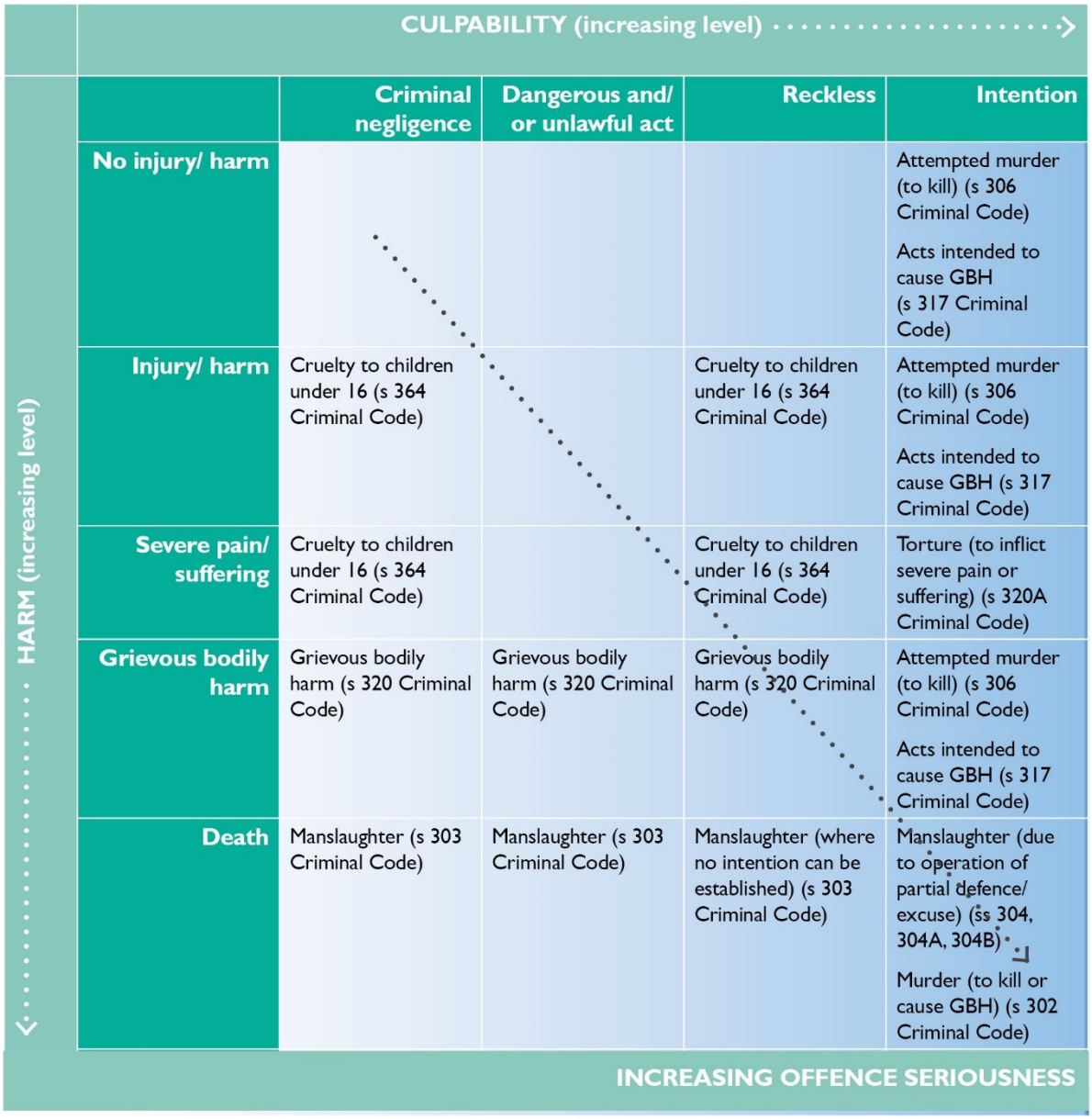
[648] *Penalties and Sentences Act 1992* (Qld) s 9(2)(c).

[649] Sentencing Advisory Council (Tasmania), *Sentencing of Driving Offences That Result in Death or Injury: Final Report* No 8, (2017) 16 citing Andrew von Hirsch, 'Commensurability and Crime Prevention: Evaluating Formal Sentencing Structures and their Rationale' (1983) 74(1) *Journal of Criminal Law and Criminology* 209, 214; Sentencing Advisory Council (Victoria), *Maximum Penalty for Negligently Causing Serious Injury, Report* (2007); Ari Freiberg, above n 323, 112.

[650] von Hirsch, above n 649, 214.

[651] *Penalties and Sentences Act 1992* (Qld) s 9(2)(c)(i).

Figure 5: Culpability and harm matrix for select offences causing injury or death



	Criminal negligence	Dangerous and/ or unlawful act	Reckless	Intention
No injury/ harm				Attempted murder (to kill) (s 306 Criminal Code) Acts intended to cause GBH (s 317 Criminal Code)
Injury/ harm	Cruelty to children under 16 (s 364 Criminal Code)		Cruelty to children under 16 (s 364 Criminal Code)	Attempted murder (to kill) (s 306 Criminal Code) Acts intended to cause GBH (s 317 Criminal Code)
Severe pain/ suffering	Cruelty to children under 16 (s 364 Criminal Code)		Cruelty to children under 16 (s 364 Criminal Code)	Torture (to inflict severe pain or suffering) (s 320A Criminal Code)
Grievous bodily harm	Grievous bodily harm (s 320 Criminal Code)	Grievous bodily harm (s 320 Criminal Code)	Grievous bodily harm (s 320 Criminal Code)	Attempted murder (to kill) (s 306 Criminal Code) Acts intended to cause GBH (s 317 Criminal Code)
Death	Manslaughter (s 303 Criminal Code)	Manslaughter (s 303 Criminal Code)	Manslaughter (where no intention can be established) (s 303 Criminal Code)	Manslaughter (due to operation of partial defence/ excuse) (ss 304, 304A, 304B) Murder (to kill or cause GBH) (s 302 Criminal Code)

Note: Adapted from Sentencing Advisory Council (Tasmania), Sentencing of Driving Offences that Result in Death or Serious Injury: Final Report No 8 (2017) Figure 3-4.

In the case of homicide offences, the very highest level of harm has been caused — the loss of a person's life. As a general rule, offence seriousness is considered to increase with the level of harm caused.

Culpability is the 'extent to which the offender is to blame for the offence'.[652] Culpability refers to 'the factors of intent, motive and circumstance that bear on the actor's blameworthiness'.[653] Offence seriousness tends to increase with the increased culpability of an offender.

In the case of homicide offences, this means that 'an action performed with knowledge of its consequences is considered more serious than one performed with a criminally negligent disregard for its consequences'.[654] That is why, despite the consequence of murder and manslaughter being the same (the death of the victim), the culpability for murder is higher because the outcome was intended (or

652 Ibid s 9(2)(12).

653 von Hirsch, above n 649, 214.

654 Sentencing Advisory Council (Victoria), *Community Attitudes to Offence Seriousness* (2012) 5.

foreseen as probable) by the offender. Figure 5 (above) illustrates the culpability and harm hierarchy for select offences for this review.

The framework within which offence seriousness is considered highlights the complexity of the criminal law and sentencing in child homicide cases, particularly where there is a high level of culpability involved — for example, where a child's death has been caused by deliberate acts of violence against a vulnerable victim but these acts do not result in a murder conviction due to the challenges in establishing to a criminal standard of proof (beyond reasonable doubt) that the offender committed those acts with the intention of killing or causing grievous bodily harm to the victim.

Discussed in Chapter 2, the Queensland Crime Harm Index found that Queenslanders ranked crimes against children, murder, child physical abuse, domestic violence, and rape as constituting the top five harms. This suggests that Queenslanders regard crimes against children to be more serious than murder.

A 1998 United Kingdom research project examining public opinion on a range of specific homicide scenarios found that when asked to consider their idea of the worst possible homicide, 71 per cent of respondents focused on the type of victim.[655] The most commonly cited example of the worst homicide concerned a child victim, with respondents' reasons including the 'innocence or defencelessness of the deceased and the fact that children were deprived of a long life expectancy'.[656] The research also found that, although the majority of factors identified by respondents as affecting their assessment of *seriousness* concerned culpability, there were some occasions where people referred to aspects of *harmfulness*. A number of people identified homicides involving young victims as:

> relatively serious because there is a considerable loss of life expectancy. The significance of harm variations was reinforced here by the further response that homicides in which the victim is tortured or endures lengthy suffering are particularly serious.[657]

The Council found similar views were expressed both in the focus groups and in submissions and consultation (both are discussed in detail below).

7.2.1 Findings from submissions and consultation

The Council's consultation paper invited feedback on how a child victim's age and particular vulnerabilities impact on the seriousness of a homicide offence.

A number of submissions made to the Council described the particular vulnerability of children in terms of their:

- innocence and vulnerability in society;[658]
- reliance on their parents for survival;[659]
- lack of physical and emotional maturity;[660]
- inability to protect themselves;[661] and
- age, in that the younger a child is, the more vulnerable they are.[662]

In its submission, Fighters Against Child Abuse Australia (FACAA) felt that an offender's level of culpability was higher in circumstances where they had attacked a vulnerable child, and that penalties should be higher to reflect the seriousness of the offence:

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655 Mitchell, above n 347, 462.

656 Ibid 463.

657 Ibid 467.

658 Submission 16 (FACAA).

659 Submission 1 (J and S Sandeman); Submission 2 (PACT); Submission 16 (FACAA); Submission 29 (PACT); Submission 36 (Queensland Police Service).

660 Submissions 2 and 29 (PACT); Submission 36 (Queensland Police Service).

661 Submissions 2 and 29 (PACT); Submission 16 (FACAA); Submission 29 (PACT).

662 Submission 16 (FACAA); Submission 29 (PACT); Submission 35 (Queensland Law Society) and Submission 36 (Queensland Police Service).

> Violating that trust and taking the life of a person unable to protect or defend themselves is the most serious crime that anyone can commit as it shows true callousness and lack of human regard for the sanctity of life. To take the life or even to harm one that is so entirely unable to defend themselves as is such with infants is a truly despicable and abhorrent crime. The vulnerable nature of the victim must add to the severity of the crime and therefore the sentence.[663]

The QPS emphasised the vulnerability of children according to their age, observing:

> Children under the age of 12 months form the largest demographic with respect to child homicide victims. Children aged from birth to the age of four years comprise over half of all child homicide victims.
>
> Children falling into the aforementioned demographic are completely dependent on an adult for survival and protection and are completely or largely defenceless. They are unable to independently advise another of pain, limiting any opportunity to get help/treatment through a third party.
>
> Children over the age of four, while able to articulate pain, are not sufficiently self-aware or cognisant of threats or danger and are still reliant on responsible adults to ensure their ongoing safety and protection.[664]

The Queensland Law Society (QLS) submitted that due to the operation of section 9(3) of the PSA, a child victim's age and the particular vulnerabilities associated with a child's age are 'already aggravating factors which must be taken into account by the court in the sentencing of an offender for a homicide offence'.[665] The QLS identified the following factors from section 9(2) of the PSA, which are relevant in sentencing for child homicide offences:

- 9(2)(e) any damage, injury or loss caused by the offender; and
- 9(2)(g) the presence of any aggravating or mitigating factor concerning the offender; and
- 9(2)(r) any other relevant circumstance.

The Bar Association of Queensland voiced concern that child homicide was being regarded as 'a more serious sub-category of homicide because of the vulnerability of the victim child'.[666] It acknowledged that child homicide is 'heinous' but submitted that 'every human life is equally worthy' and vulnerability should not be restricted to children only. It encouraged the Council to consider other vulnerable people 'such as, people living with severe disability, the elderly, and people living with chronic and terminal forms of illness. Women are also disproportionately vulnerable, particularly in the domestic setting.'

Several submissions expressed the view that if the courts placed greater emphasis on the vulnerabilities of children, it would result in harsher penalties for child homicide offences.[667]

> Sentencing should reflect that vulnerability and also the level of betrayal of trust in the crime itself. For example the younger and more vulnerable the victim and the greater the level of trust placed in the perpetrator, the more severe the crime and therefore the sentence.[668]

At the community summits in Logan and Townsville, the Council used an activity to explore participants' views of seriousness, offender culpability and how post-offence conduct should affect the sentence in relation to child homicide offences. In this activity, participants were informed that courts assess offence seriousness by considering the harm caused and the offender's culpability. Given the most serious harm has occurred in these crimes (i.e. loss of life), the assessment of an offender's culpability is critical to determining an appropriate sentence.

When asked what things made a person's actions or omissions *more* serious where the death of a child has occurred, participants at the Logan summit identified the following:

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663 Submission 16 (FACAA).

664 Submission 36 (Queensland Police Service).

665 Submission 35 (Queensland Law Society).

666 Submission 30 (Bar Association of Queensland).

667 Submission 16 (FACAA); Submission 26 (Richard Goodwin); Submission 29 (PACT).

668 Submission 16 (FACAA).

- vulnerability of the victim — specifically, a child's limited or lack of autonomy and language, young age, inability to take steps to protect themselves, and high level of reliance on parents;
- the offender's actions prior to the fatal assault (especially prior physical violence and/or sustained, protracted violence);
- breach of trust — with a view that being in a caring role or relationship of trust made the person more culpable and the offending more serious than if the offence was committed by a stranger;
- intention to cause harm;
- premeditation/planning;
- cruelty/callous disregard — which should 'cancel out' any sentencing benefit for remorse;
- motive — specifically, revenge in circumstances of domestic and family violence; and
- serious neglect.

When asked what things made a person's actions or omissions *less* serious where the death of a child has occurred, participants at the Logan summit identified the following:

- the offender was suffering from a severe mental illness;
- lack of intent (e.g. as evidenced by seeking medical treatment at an early stage where the child was injured);
- 'accidental' deaths (e.g. young child left in a car or unattended in a bath).

Generally, participants found it more challenging to identify factors reducing the seriousness in cases of child homicide, mirroring the difficulty summit participants had in a separate activity asking them to identify mitigating factors (see Chapter 4). However, many participants agreed that sentencing should be tailored to the facts of an individual case.

When Townsville summit participants were asked what things made a person's actions or omissions *more* serious where the death of a child has occurred, similar issues were identified:

- vulnerability of the victim — specifically age, lack of language, health, defencelessness, lack of capacity, inability to take steps to protect themselves and physical differences between adult and child;
- use of protracted/persistent violence;
- history of violence against the victim;
- level of force used;
- intention to harm/injure, inflict violence;
- offender owed a duty of care to the child/was in a position of trust or responsibility — meaning the child was reliant on them (view that a trusted person is more culpable, and the act/omission involves a higher level of betrayal);
- community condemnation;
- omission can be as serious as perpetrating violence.

When asked what things made a person's actions or omissions *less* serious where the death of a child has occurred, Townsville participants identified the following:

- 'accidental' deaths/negligence — e.g. young child left in a car or unattended in a bath (often seen by participants as a different type of offending/offence from those involving use of violence);
- involved a momentary loss of control;
- offender had a diagnosed serious mental illness.

There was agreement across the three workshop groups at this summit that when a child's death resulted from an 'accident' it was less serious than when it was caused through the use of violence.

The community summit findings echo the United Kingdom research noted above, with participants focusing primarily on characteristics of the victim to assess seriousness and, to a lesser degree, the nature of the conduct involved (e.g. prior or sustained violence perpetrated on the child).

Many participants found it difficult to identify considerations that may reduce an offender's culpability, and people at both summits struggled with the concept of manslaughter, including such a broad range of actions and omissions. For example, many people thought negligent or 'accidental' deaths should be regarded as a separate offence. People also agreed that negligent or accidental deaths were less serious than those involving the use of violence or other unlawful acts. Where mental illness was raised as potentially reducing culpability, participants emphasised that it should be diagnosed as there was concern that mental health disorders can be 'faked' to avoid or minimise punishment.

7.2.2 Findings from focus groups

The Council's findings from the focus groups about offence seriousness and influencing factors reinforce previous sentencing and homicide research conducted both nationally and internationally.[669] For example, through various measures of these findings, general crime was assessed as less serious than violent crime. And when asked to consider child homicide, it was considered by participants to be more serious than both general crime and violent crime.

While assessments of offence seriousness based on crime type translated into calls for stronger, typically more punitive responses, participants also demonstrated distinctions in offence seriousness within a crime type. These nuanced differentiations within a crime type also affected opinions about the adequacy of sentences imposed. Comments demonstrated that when participants were provided with additional information about cases, they were more inclined to consider and discuss all specific circumstances associated with cases while assessing offence seriousness and the adequacy of sentences imposed.

Vignette ranking exercises

A ranking exercise with vignettes were conducted, involving de-identified homicide cases sentenced by Queensland courts during the 12-year dataset. All focus group participants undertook the ranking exercises (N=98).[670] Table 25 provides a brief description of each of the 10 vignettes presented at the focus groups.

The first exercise required participants to rank 10 vignettes involving both adult and child homicide scenarios. Participants were provided with limited yet comparable information for each case within the vignette. Participants were not told whether the case had resulted in a sentence for murder or manslaughter.

669 Sentencing Advisory Council (Victoria), *More Myths and Misconceptions* (2008); Mitchell, above n 347.

670 Although 103 people participated in the focus groups, five people's responses were excluded from the vignette-ranking analysis due to data issues.

Table 25: Brief description of focus group homicide vignettes involving child and adult victims

Vignette Name	Victim type	Key characteristics
Jane	Child	3-month-old biological daughter unlawfully killed. No violence involved. Offender sought immediate assistance. Diagnosed mental illness. No criminal history.
Frank	Child	8-year-old stepdaughter unlawfully killed by co-offender (her biological mother). Offender did not intervene to protect victim and failed to seek medical assistance. No criminal history.
Katia	Adult	76-year-old mother unlawfully killed. Offender failed to provide medical assistance. No violence involved. Diagnosed mental illness. No criminal history.
Errol	Adult	Former son-in-law unlawfully killed. Weapon used. Pre-planning involved. Offender did not seek assistance for victim.
Carla	Child	Two biological children (10 years and 6 years old) unlawfully killed and attempted to kill third biological child (16 years) but desisted. No violence involved. Offender did not dispute responsibility but had a diagnosed mental illness.
Andrew	Adult	Former wife unlawfully killed. Violence involved. History of domestic violence. Offender sought immediate assistance. No criminal history.
Matt	Adult	De facto partner unlawfully killed. Alcohol misuse involved. Offender denied involvement. Extensive criminal history for violent offences, including prior domestic violence against the victim.
Tom	Adult	Adult man unlawfully killed. Home invasion with two weapons. Violence involved. Substance misuse involved. Offender sought to blame others. Criminal history for non-violent offences.
Alan	Child	Biological son aged 2 years and 8 months unlawfully killed. Previous violence involved; violence involved. Offender failed to assist investigation. No criminal history.
Doug	Adult	81-year-old wife unlawfully killed. Violence and blunt instrument involved. Offender failed to seek assistance for victim. Offender admitted inflicting the injuries. Old and not relevant criminal history.

A second exercise involved providing additional information about three vignettes ('Jane', 'Frank' and 'Alan') to participants to provoke more detailed discussion about those specific factors participants consider when assessing the seriousness of a homicide case and their perceptions of 'appropriateness' of the sentence imposed. Each vignette had additional case-specific information, including more detail about the homicide event itself, the offender, and the sentence imposed. These findings are discussed below.

Participants ranked the 10 vignettes from 1 (least serious) to 10 (most serious) for this exercise. Overall, 'Jane' was considered the least serious homicide case and was ranked 1 in 54.1 per cent of responses or ranked within the top three least serious rankings (i.e. 1, 2 or 3) in 85.7 per cent of responses with an average ranking of 2.2 (median=1.0). In contrast, 'Alan' was considered the most serious, ranked in the three highest rankings (8, 9, 10) in 62.2 per cent of cases with an average ranking of 7.7 (median=8.0).

As discussed in Chapter 4, focus group rankings were profiled using standard sociodemographic characteristics. While differences were observed, overall patterns were relatively consistent across all subgroups. However, two subgroups displayed statistically significant differences among their cohorts — sex and employment status. For example, female participants ranked 'Katia' as their least-serious scenario, with 'Jane' occupying the second least-serious position, and male participants ranked 'Jane' as their least serious, with 'Katia' as the second least serious. Female participants ranked 'Alan' as their most serious and ranked both 'Tom' and 'Doug' as their second least serious, while male participants ranked 'Tom' as their most serious and 'Errol' as their second most serious.

When comparing female and male participants, statistically significant differences were observed. Based on average ranked scores, the following cases were ranked differently by male and female participants:

- women ranked 'Alan' as more serious.
- women ranked 'Doug' as more serious.
- men ranked 'Andrew' as more serious.

Throughout the associated discussions, female participants consistently emphasised vulnerability and level of violence as clear influencing factors. Comparatively, male participants focused on the offender, emphasising premeditation and pre-planning, use of weapons, and the offender's actions after the offence.

Employment status also displayed statistically significant differences among its cohort participants. This difference related to the case of 'Frank'. Participants who were not formally employed ranked 'Frank' as more serious than participants recording a formal employment status. Participants' written comments about 'Frank' centred on his knowledge of the violence against the child victim and his failure to remove the child from harm.

The following factors were uniformly identified as making a scenario more serious:

1. Victim type. Participants regarded children as vulnerable and therefore homicides involving a child victim were seen as inherently more serious. While participants also recognised the vulnerability of some adult victims in the other homicide vignettes, in particular the two elderly and frail female victims of 'Katia' and 'Doug', they considered children as inherently vulnerable and defenceless. Therefore, for focus group participants, violent crimes against children were viewed as more serious than those involving adult victims as a direct consequence of the victim being a child. The identification by participants of children as being more vulnerable also reflects international research, which points to community members' perceptions of higher harm and offence seriousness being linked to those offences that deprive children of their right to live a full life, resulting in a loss of their 'life expectancy'.[671]

2. Level of violence. The level of harm was also discussed as participants considered the suffering of a child from violence inflicted by an adult.

In ranking different homicide types, participants escalated cases involving the use of direct violence in terms of offence seriousness. This finding was particularly apparent in relation to cases where there was a documented history of prior violence against the child victim, or direct violence culminating in the child's death at the homicide event. Similar views were expressed at the community summits in Logan and Townsville, which are discussed below.

People also considered the use of a weapon as a factor that increased the seriousness of homicide offences. For example, the vignette of 'Tom' involved the offender taking a weapon to the homicide location and using it to kill the adult victim. This vignette was considered to be more serious than cases that did not share this feature.

Conversely, one vignette involving a child victim was consistently regarded as being the least serious on the basis that it did not involve the use of violence or an intention on the part of the offender to cause harm. The scenario involving 'Jane' was commonly described by participants as being a 'tragic accident', typically invoking more empathetic responses. The perception of lower offence seriousness in 'Jane's' case aligns with sentencing practices for manslaughter over the 12-year period, which found criminal negligence cases involving child victims were at the lower end of the sentencing range, compared to cases involving the use of violence.

671 Mitchell, above n 347, 467.

3. Culpability of offender. Participants considered the actions of the offender prior to, during, and following the homicide event to determine the offender's level of culpability or blameworthiness. Activities that were viewed as increasing the offender's culpability because they suggested a conscious and deliberate course of conduct were: taking a weapon to the homicide event; inflicting direct, sustained or previous incidents of violence on the victim; failing to seek medical assistance; taking steps to conceal their actions; or frustrating criminal justice efforts.

Factors that provoked significant debate among participants and involved dissenting views across the groups because these factors may reduce the seriousness of an offence were:

1. Mental illness. The vignettes of 'Jane', 'Katia', and 'Carla' all involved offenders who had a diagnosed mental illness. Some participants thought mental illness helped to explain why an offence had occurred and therefore considered it should be taken into account for an offender. However, other participants were sceptical of mental illness and saw it as no 'excuse' for the offence. Some participants indicated a belief that mental illness could be faked for self-serving purposes.

2. Substance misuse. Almost all participants agreed that alcohol and/or substance misuse was not an excuse for a homicide offence occurring. Participants generally discussed whether people who choose to misuse substances have a right to ask the court to consider the impact of these substances on their behaviour when sentencing. As discussed in Chapter 4, intentional intoxication is not a mitigating factor and is not to be taken into account by a court in sentencing.672 Some participants suggested that substance-affected offenders should have access to treatment services during the period of their sentence.

3. Remorse. Remorse was hotly debated across all 10 focus groups. Participants expressed concern about how judges can determine whether remorse is genuine and therefore accept it as a sentencing consideration. Similar to mental illness, some respondents believed remorse could be faked for self-serving purposes. Others believed that causing the death of their own child would represent the worst punishment for any offender, and that in those cases remorse may be real. There was also discussion in some groups that offenders who pleaded guilty at an early or timely stage may have done so on the basis of legal advice rather than genuine remorse.

Ranking of offence seriousness

A final observation from the Council's focus groups relates to the capacity of participants to assess offence seriousness and their views about the adequacy of sentences imposed. Across all of the focus groups, participants consistently struggled with ranking offences in order of seriousness. This difficulty was primarily due to the diversity of the 10 cases presented as part of the first ranking exercise, and the number of vignettes presented.

Although the Council found that two vignettes were consistently ranked the most serious ('Alan') and least serious ('Jane'), the ranking of other homicide vignettes proved more challenging.

The vignettes were a mix of manslaughter and murder cases with different victim ages and different levels of offender culpability, ranging from criminal negligence to intentional killing. Generally, participants ranked cases on the basis of victim type, rather than criminal culpability, which is first and foremost how the criminal justice system assesses the seriousness of different forms of homicide. As noted in Chapter 3, it is the offender's intention to cause death or grievous bodily harm that supports a conviction for murder rather than manslaughter, making this form of offending objectively more serious.

The focus group ranking exercise illustrated the challenges for the legal system in assessing seriousness due to the numerous different factors and circumstances that can be present in one case but not another. The relative seriousness of a homicide offence is determined by courts on a case-by-case basis and involves comparing the individual circumstances of one case with other cases that share some, but not all, of the same characteristics.

672 *Penalties and Sentences Act 1992* (Qld) s 9(9A).

7.2.3 Findings from sentencing remarks analysis on offence seriousness

As part of the sentencing remarks analysis for offenders sentenced as adults for manslaughter over the 12-year period, the Council was interested in how the courts described offence seriousness. Under the access arrangements with the Queensland Sentencing Information Service (QSIS), the Council is precluded from using direct quotations from the sentencing remarks in publications. This means the following discussion of findings is presented as an analysis of factors referred to only, not in the form of a textual analysis.

In manslaughter cases where the victim was a child, sentencing judges identified the following factors when describing the seriousness of the offence in their remarks:

- the dependency of the child on the offending parent, compounded if the child was reliant for care provided by the offending parent only;
- the defencelessness of the child, particularly where the victim was a baby or toddler;
- prior abuse (physical and/or sexual) perpetrated on the child by the offender;
- the prolonged and painful nature of the death, particularly where the child was suffering from the fatal injury for hours or days;
- the severity of the injuries inflicted;
- intention — whether to cause death or grievous bodily harm (where murder reduced to manslaughter on the basis of operation of a partial defence), or to cause serious harm.

Comparatively, in manslaughter cases where the victim was an adult, sentencing judges identified the following factors when describing offence seriousness:

- the use of a weapon, usually a firearm or a knife;
- indiscriminate violent attack on an unknown victim in a public place;
- the offence occurred during a home invasion;
- the severity of injuries inflicted, particularly where perpetrated over a sustained period and involving repeated blows and stomping;
- premeditation and/or deliberate use of violence to inflict serious harm;
- continuing to violently assault a victim after already helpless or unconscious on the ground;
- the vulnerability of the victim due to age, infirmity or already suffering from an injury;
- actions after the death to conceal offender's actions, such as dismembering the body or seeking to destroy it.

As a methodology, the sentencing remarks analysis has acknowledged limitations (see Appendix 4). However, these high-level findings indicate that while there are some similar factors taken into account in assessing offence seriousness between child manslaughter and adult manslaughter, there are also some distinct differences. The differences identified reflect earlier sentencing-remark findings (see Chapter 4) — that is, that the factual circumstances for offences involving adult victims are quite different from those involving child victims. For example, offenders in adult manslaughter cases are far more likely to use a weapon, actively conceal their crimes by hiding or destroying the body, or to commit the crime during a home invasion.

Comparatively, in the child manslaughter cases, sentencing judges are primarily focused on the victim and the nature of the offence. And while in some cases those offenders do seek to conceal their crimes, this is often through lying about their involvement or blaming others rather than concealing the child's body. In many cases of child manslaughter, the offender sought medical assistance for the child — albeit often too late to save the child but bringing the matter to the attention of authorities.

7.3 Recognising vulnerability of child victims in sentencing

As discussed above, 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, such as due to age or disability, was raised frequently in consultations and submissions as a specific consideration the courts should consider when determining offence seriousness and therefore an appropriate sentence for an offender. It is also a relevant aggravating factor Queensland courts consider in sentencing.[673]

7.3.1 Current approach

In Queensland, in addition to the sentencing purposes and factors courts must apply in all cases (as discussed in Chapter 4 of this report), a circumstance of aggravation for the serious violent offence (SVO) regime was introduced in 2010.[674] This 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 who are 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 (see Chapter 5 for more information).

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'.[675] The Explanatory Notes to the Bill introducing these changes explain that 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'.[676]

7.3.2 Approach in other jurisdictions

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

As discussed in Chapter 6, in 2008, Victoria introduced a separate stand-alone offence of child homicide into the *Crimes Act 1958*.[677] The new offence was introduced 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).[678] Since its introduction in 2008, only three people have been dealt with under this provision.[679]

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.[680]

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673 *R v Irvine R v Irvine* [1997] QCA 138 (8 May 1997) 3 (Macrossan CJ, Fitzgerald P, McPherson JA agreeing). This was mentioned in the context of the need for 'appropriate deterrence to be maintained against causing the death of vulnerable infants'.

674 *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld) s 7.

675 Queensland, *Parliamentary Debates*, Second Reading — Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2010, 3 August 2010, 2308 (Cameron Dick, Attorney-General).

676 *Explanatory Notes,* Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2010, 5.

677 Inserted by the *Crimes Amendment (Child Homicide) Act 2008* (Vic) which came into operation on 19 March 2008.

678 Victoria, *Parliamentary Debates*, Legislative Assembly, 6 December 2007, 4413 (Rob Hulls, Attorney-General).

679 See *R v Hughes* [2015] VSC 312 (26 June 2015) and *DPP v Woodford* [2017] VSCA 312 (31 October 2017); *R v Rowe* [2018] VSC 490 (31 August 2018).

680 See Chapter 6 – section 6.2.1of this paper.

In NSW, this factor is identified in a list of (non-exhaustive) aggravating factors that can be taken into account in sentencing and is not limited to children. Section 21A(2)(l) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) states:

> the victim was vulnerable, for example, because the victim was very young or very old or had a disability, because of the geographical isolation of the victim or because of the victim's occupation (such as a person working at a hospital (other than a health worker), taxi driver, bus driver or other public transport worker, bank teller or service station attendant).

In 2008, New Zealand inserted additional aggravating factors in cases involving violence against, or neglect of, a child under 14 years through the insertion of section 9A of the *Sentencing Act 2002* (NZ):

> **9A Cases involving violence against, or neglect of, child under 14 years**
>
> (1) This section applies if the court is sentencing or otherwise dealing with an offender in a case involving violence against, or neglect of, a child under the age of 14 years.
>
> (2) The court must take into account the following aggravating factors to the extent that they are applicable in the case:
>
> - the defencelessness of the victim:
> - in relation to any harm resulting from the offence, any serious or long-term physical or psychological effect on the victim:
> - the magnitude of the breach of any relationship of trust between the victim and the offender:
> - threats by the offender to prevent the victim reporting the offending:
> - deliberate concealment of the offending from authorities.
>
> (3) The factors in subsection (2) are in addition to any factors the court might take into account under section 9 [the equivalent to s 9 of the PSA].
>
> (4) Nothing in this section implies that a factor referred to in subsection (2) must be given greater weight than any other factor that the court might take into account.

The objective of this amendment was explained as being to ensure people convicted of offences against children that involve violence or neglect are 'sentenced appropriately' and to 'indicate society's denunciation' for these types of offences.[681] The Explanatory Note included additional explanation, that:

> 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 this must be considered an aggravating factor when sentencing.[682]

The New Zealand Court of Appeal has acknowledged that the amendment 'reflects widespread public concern about violence against and neglect of children' and that 'if anything, it signals tougher sentences might be required'.[683] However, the Court has not definitively determined that section 9A is intended to increase sentencing levels for this type of offending.[684]

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681 *Explanatory Note*, Sentencing (Offences Against Children) Amendment Bill 2008 (NZ) 4.

682 Ibid 1–2.

683 *The Queen v Pene* [2010] NZCA 387 (20 August 2010) [13] (Chambers, Rodney Hansen and Health JJ).

684 *The Queen v Shailer and Haerewa* [2016] NZHC 1414 (27 June 2016) [47] (Katz J).

In an earlier 2001 decision of *The Queen v Leuta*,[685] handed down a number of years before these new provisions came into effect, the New Zealand Court of Appeal was clear that children are especially vulnerable and sentencing should reflect this:

> [77] Violence inflicted upon a child is worse than that directed at another adult. Defencelessness and vulnerability are significant features, as is abuse of power and responsibility. The fragility of young children, particularly infants, is frequently referred to, and too often overlooked. The lethal consequences of shaking and striking babies is often publicised. There can be little reduction in criminality these days for a claim that the danger was not realised.
>
> [79] There is a further relevant aspect of violence against children. Perpetrators in order to avoid exposure of their insidious behaviour, do not ensure proper care and treatment for their victims. That considerably aggravates their culpability. Physical abuse of a lower order is made greatly worse by failure to alleviate pain or discomfort. Failure to get competent help is not readily to be excused.
>
> [80] Of course child homicides often occur in complex relational and domestic situations. They bear upon the offender frequently to evoke sympathy and mitigate the offending. They are to be taken into account for sentencing. But they should not cloud the essential fact that the violent, cruel and brutal treatment of a defenceless and vulnerable child, to whom there are duties of trust and responsibility, constitutes conduct of grave criminality and, where death ensues, the sentencing task is in respect of a very serious crime.[686]

In Western Australia, the principles of sentencing in section 6(2)(b) of the *Sentencing Act 1995* (WA) require courts to determine the seriousness of an offence by taking into account — amongst other things — the circumstances of the commission of the offence. This includes the vulnerability of any victim of the offence but does not single out children as a particularly vulnerable group.

7.3.3 Findings from submissions and consultation

The Council's consultation paper invited feedback on how the particular vulnerabilities of child victims could best be taken into account in sentencing for child homicide offences.

The QPS noted that under current sentencing practice, prosecutors emphasise the particular vulnerabilities of a child victim during the sentencing submission and that judges often provide information in their sentencing remarks about the vulnerabilities of the victim child and link this to their sentencing decisions. The police recommended 'this practice continue and that greater weight be placed on these factors at sentence'.[687]

The Queensland Homicide Victims' Support Group (QHVSG) recommended new legislation be introduced which sets out 'a specific set of criteria that would apply when the victim is a child', similar to the approach of New Zealand. The QHVSG suggested:[688]

> This new criteria would carry more weight from an aggravating perspective and be reflected in the severity of the sentence handed down. QHVSG is currently assisting one family who would ultimately like to see this new set of criteria formalised and termed 'Hemi's Law' in memory of their late son, who lost his life to homicide.

Legal stakeholders generally supported the current approach to sentencing for child homicide offences and were of the view that further legislative amendments were not required.[689] Legal Aid Queensland advised that the advantage of the existing broad range of factors under section 9 of the PSA is that it allows judges full discretion according to the facts of the case. This means sentencing outcomes respond to 'the huge diversity in factors relevant to child victims aged from infancy through to late teens'.[690]

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685 *The Queen v Leuta* [2001] NZCA 283 (19 September 2001).

686 Ibid 23–24 [77], [79] and [80] (Elias CJ, Gault, Blanchard and McGrath JJ agreeing).

687 Submission 36 (Queensland Police Service).

688 Submission 27 (QHVSG).

689 Submission 30 (Bar Association of Queensland); Submission 33 (Legal Aid Queensland); Submission 35 (Queensland Law Society).

690 Submission 33 (Legal Aid Queensland).

Both the QLS and Sisters Inside acknowledged the 2010 amendments to the SVO regime to make the death of a child aged under 12 years an aggravating consideration when deciding whether to make a serious violent offence declaration.[691] Sisters Inside noted that introducing a stand-alone aggravating feature, such as a new offence or harsher penalties, was not warranted given this amendment to the SVO regime.

The Aboriginal & Torres Strait Islander Women's Legal Services NQ noted the legislative amendments in NSW and New Zealand expressly recognising the vulnerability of a child victim but disagreed with any reforms to increase minimum penalties. It held this view on the basis that such reform 'would detract from judicial discretion and potentially lead to a serious miscarriage of justice in some cases'.[692]

At the community summits in Logan and Townsville, two of the group activities generated discussion about the vulnerability of child victims. Findings from the aggravating and mitigating factors activity are discussed at section 4.6.4. The vulnerability of the victim was identified in the top three most important aggravating factors relevant to these types of offences at both summits. As also noted in section 7.2.1, a child's vulnerability and defencelessness were identified consistently as factors increasing the seriousness of the offence.

7.3.4 Findings from focus groups

As presented above in section 7.2.2, focus group participants consistently identified the vulnerability of children as a key, if not the primary, consideration when assessing the seriousness of an offence.

This research also explored participant perceptions of vulnerability — specifically, how people see the vulnerability of children compared with adults who are vulnerable due to a disability, being elderly, or some other circumstance. While participants acknowledged the vulnerability of particular adult cohorts, such as the elderly and people with a disability, children as an entire population were considered the most inherently vulnerable. Determined from group discussions, this finding was reinforced through the more objective (and individual) measures associated with the vignette-ranking exercises.[693]

When considering violent crime in child homicide offences, participants remarked:

> 'Because when it comes to children above all they need to be protected.' – A03
>
> 'Violent crime is not as harsh as child homicide, because the victim children are vulnerable.' – D02
>
> 'Because children are always (well, almost always — rare exceptions do exist) vulnerable, weaker, smaller, unprotected members of our communities and it is our responsibility to be very aware of the deadly seriousness of crime perpetrated against them.' – F10
>
> 'Children are innocent. Some violent crime is possibly amongst equals (in terms of power).' – G09
>
> 'Adults can fight back, children can't.' – H11.

Participants were also asked to consider the vulnerability of children when discussing the three child manslaughter vignettes of 'Jane', 'Frank' and 'Alan' (see Table 25 for case details). These vignettes provided an opportunity to measure participant perceptions of seriousness for child manslaughter, as well as the adequacy of the sentence imposed in these cases. The Council found that participants were more inclined to assess sentences as 'adequate' where: the case involved little or no violence (by the offender); there were lower levels of offender culpability; and the offender cooperated after the offence.

These findings were best illustrated by the consistent dissatisfaction across all focus groups with the sentence for 'Alan'. This vignette involved a history of violence by the offender against his son, the use of direct and persistent violence during the fatal assault, and a failure to assist the medical and criminal justice responses. As noted above, this case was regarded as the most serious offence by a majority of participants in the first vignette-ranking exercise due to the same factors.

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691 Submission 31 (Sisters Inside) and Submission 35 (Queensland Law Society).

692 Submission 32 (Aboriginal & Torres Strait Islander Women's Legal Services NQ).

693 Appendix 4 provides additional information about the methodology for the focus groups.

Assessments of the 'Frank' vignette provoked considerable discussion in all focus groups. This case, while still considered relatively serious due to the involvement of a child victim, was deemed to have a lower level of offender culpability (and therefore offence seriousness). This is because the offender did not inflict the injuries that caused the child's death — these were inflicted by his partner, the child's mother. Due to these considerations, participants were also divided over whether the sentence imposed by the court was 'adequate'. However, despite this division, responses consistently reinforced that, due to the child's vulnerability, the offence was still serious and the offender should have acted protectively and removed the child from harm. Participants commenting on this case example noted:

> 'Frank has the duty of care to protect a child who he is aware is being abused repeatedly. His "good character" and work history should not be taken into account. To be allowed parole after only 9 months is extremely inadequate.' – A08

> 'Frank didn't hurt Ella directly, but at the same time didn't stop his wife doing it, so he is half as guilty as Lisa (but not the same). I think Frank deserved imprisonment but maybe for less time.' – B09

> 'He was negligent in the care of Ella but he should have done something to remove Ella from danger.' – C07

> 'He failed to protect a vulnerable child when he should have stepped in earlier as the abuse was lengthy. He sounds like he is a good person. It is hard to understand why he didn't act.' – D01

> 'Frank failed to provide duty of care for Ella and denunciation plays a very relevant factor here. Opportunity for rehab.' – H09

Overall, this research into Queenslanders' views about sentencing for child homicide offences suggests that people consider the vulnerability of children makes an offence inherently more serious than offences involving other victim types. When assessing the vignettes, participants focused primarily on the circumstances of the offence and the victim and, to a lesser extent, on those of the offender. For example, the 'Alan' vignette was considered the worst example of homicide; however, 'Alan' had no prior criminal history and expressed remorse for his actions. Comparatively, 'Matt' had a lifelong history of violence and criminal offences, including multiple episodes of domestic violence against the homicide victim (his intimate partner), and he used persistent, direct violence in the fatal assault. Despite this, 'Matt' (who killed an adult) was consistently ranked as less serious than 'Alan' (who killed a child).

The research also found that participants focused on considerations like the type of victim, rather than the intention of the offender. At law, all victims of homicide are considered equal, in that no life is worth more than another; however, when assessing the culpability of the offender, the court will consider the personal circumstances of any victim, such as whether they were a child and in the offender's care. The focus group findings, along with other consultation activities undertaken by the Council, indicate that, although both the community and the courts assess offences involving young victims as objectively very serious, they are describing the features that make it so in a different way.

The Council's focus groups reinforce earlier research at state, national and international levels which reveals that the community attaches a greater level of seriousness to offences involving child victims.

7.3.5 Findings from analysis of sentencing remarks

As part of the analysis into the weighting of aggravating and mitigating factors (see Chapter 4), the Council also examined whether the judge identified the victim's vulnerability and how judges regarded this factor when sentencing for manslaughter offences between 2005–06 and 2016–17. Vulnerability, or an accepted interchangeable term, had to be expressly identified by the judge for this factor to be coded (see Appendix 3 for more information). The type of vulnerability (e.g. victim's age or victim was reliant on the offender) identified by the judge was also coded, and in some cases more than one type of vulnerability was identified by the judge.

As discussed in Appendix 3, a sentencing judge may not always expressly refer to a specific sentencing factor in sentencing. This does not mean this factor was not considered — just that it was not referred

to in delivering the reasons for sentence. It may be that this factor was so clearly apparent that making mention of it was not viewed as necessary.[694]

In manslaughter cases where a child has died, the victim's vulnerability was identified in the sentencing remarks for 13 offenders (39.4%), and where an adult has died for 23 offenders (11.4%) — see Table 26. This means that in the majority of cases where a child or an adult was killed, the vulnerability of a victim was not referred to as a factor in sentencing (n=20, 60.6% and n=147, 73.3%).

It is expected that some adult victims would not be regarded as vulnerable in any way (e.g. the victim was a healthy adult man who got into a fight with the offender and was killed in the course of the fight). However, it could be expected that children by virtue of not being fully developed physically, emotionally or mentally would be regarded in most, if not all cases, as being vulnerable.

Table 26: Breakdown of victim vulnerability in sentencing remarks for manslaughter (MSO), 2005–06 to 2016–17

Coded Response	Adult manslaughter		Child manslaughter	
	n	%	n	%
Yes	23	11.4	13	39.4
No	31	15.4	0	0.0
Not stated	147	73.1	20	60.6
TOTAL	**201**	**100.0**	**33**	**100.0**

Source: QSIS

Note: This is based on coding of sentencing remarks for offenders sentenced as an adult convicted of manslaughter (MSO) of which 33 were accessible, not a juvenile offender and not varied on appeal.

Where vulnerability was identified in cases of child manslaughter, it was always regarded as an aggravating factor. However, in the majority of those cases it was implied (n=10, 76.7%) and in only three cases did the judge expressly state it was an aggravating factor — see Table 27.

Results were more diverse in the cases of adult manslaughter, with judges stating the victim's vulnerability as an aggravating factor in only two cases (8.7%) and in the majority it was implied (n=13, 56.6%). In seven cases (30.4%) this factor was neutral and in one case it was regarded as a mitigating factor by the court.

In the two cases where the judge stated the adult victim was vulnerable, one involved an elderly victim suffering from osteoporosis who was under the offender's care, and the other involved the offender continuing to violently kick and stomp on the victim while he was lying defenceless on the ground.

Table 27: How sentencing judges viewed victim vulnerability where it was identified in manslaughter (MSO), 2005–06 to 2016–17

Coded Response	Adult manslaughter		Child manslaughter	
	n	%	n	%
Aggravating stated	2	8.7	3	23.1
Aggravating implied	13	56.5	10	76.7
Mitigating implied	1	4.4	0	0.0
Neutral	7	30.4	0	0.0
Not stated	0	0	0	0.0
TOTAL	**23**	**100.0**	**13**	**100.0**

When sentencing for child manslaughter, courts described vulnerability resulting from the age of the victim (n=9) and/or the victim's reliance on an offender (n=9). In cases of adult manslaughter the courts described victim age in four cases (n=4), and disability in three cases (n=3). In the remaining cases the courts described vulnerability differently, including:

694 See, for example, comments made in *R v O'Sullivan* (Unreported, Supreme Court of Queensland, 30 August 2018) to the effect that the fact an offence involved the killing of a small child was both a statutory aggravating factor (for the purposes of the SVO scheme) and an obvious aggravating factor.

- that the victim was heavily intoxicated and unable to defend themselves;
- the victim was lured into a shower so that when attacked he was in a vulnerable state;
- the offender had assaulted the victim earlier on the same night and knew she was injured.

7.4 Conclusion

This chapter considered the complex process undertaken by sentencing judges to assess offence seriousness when determining an appropriate sentence. It entailed an assessment of the harm to the victim — in the case of homicide, the highest level of harm possible, being the loss of life — and the offender's culpability.

From the focus group research and consultation activities, it is clear that community members generally regard child homicide offences as inherently more serious where the victim was a child and was therefore vulnerable, whereas legal and justice stakeholders consider the victim's status as a child as just one, albeit significant, consideration to be taken into account when determining the appropriate sentence.

The chapter also considered the factor of victim vulnerability and approaches in Queensland and other jurisdictions to provide legislative guidance to courts in how this should be taken into account in sentencing. This issue is considered further in Chapter 9.

Chapter 8 — Public opinion and sentencing for child homicide

8.1 Introduction

Public opinion about sentencing outcomes for cases arising from the death of a child represents a key catalyst for the Council's Terms of Reference. In particular, the Terms of Reference asked the Council to:

> 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 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.

The Terms of Reference also noted:

- the Queensland Government and public expectation that penalties imposed on offenders convicted of child homicide offences will appropriately reflect community views that sentencing must punish the offender, protect children and denounce the offending; and
- the significance of supporting and promoting public confidence in the criminal justice system to the overall administration of justice.

This chapter considers research into public opinion about offence seriousness, sentencing and factors influencing community opinions, as well as findings from the Council's focus group research. The latter was a crucial part of the Council's work to examine community views about sentencing outcomes for child homicide and the factors people consider when assessing sentencing outcomes for these offences.

8.2 Public opinion on sentencing

There has been increasing domestic and international research into public opinion about sentencing and the role public opinion should play.[695] Australian-based work has also increased due to the establishment of sentencing councils in Victoria, Tasmania, South Australia and NSW.[696] Consistent growth in this body of research is also linked to the high visibility of sentencing outcomes, typically as a result of media reporting and subsequent community commentary.[697] Researchers have confirmed the relevance of public opinion to sentencing decisions, noting:

> courts have acknowledged that concern with maintaining public confidence in the administration of justice means that courts cannot dismiss public opinion as having no relevance.[698]

Research has also found that public opinion can influence laws enacted in democratic jurisdictions, as well as influence sentencing decisions.[699] For example, judges may refer to public opinion and community expectations when denouncing aberrant behaviour and reaffirming community standards in their sentencing remarks. The role of public responses to sentencing was acknowledged by the High Court in *Markarian v The Queen*, when recognising the importance of public confidence in the criminal justice system:

> Public responses to sentencing, although not entitled to influence any particular case, have a legitimate impact on the democratic legislative process. Judges are aware that, if they consistently

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695 Kate Warner, 'Sentencing review 2009-2010' (2010) 34 *Criminal Law Journal* 385, 395; Roberts and Hough, above n 344, 68–69; Stobbs, MacKenzie and Gelb, above n 351, 219-220.

696 Warner, above n 695, 397–399.

697 Roberts and Hough, above n 344, 68–69.

698 Warner, above n 695, 34 *Criminal Law Journal* 385, 395. See also Kate Warner et al, 'Why Sentence? Comparing the Views of Jurors, Judges and the Legislature on the Purposes of Sentencing in Victoria, Australia' (2017) *Criminology and Criminal Justice* 1, 1–2.

699 Kate Warner et al, 'Measuring Jurors' Views on Sentencing: Results from the Second Australian Jury Sentencing Study' (2017) 19(2) *Punishment and Society* 181.

> impose sentences that are too lenient or too severe, they risk undermining public confidence in the administration of justice and invite legislative interference in the exercise of judicial discretion. For the sake of criminal justice generally, judges attempt to impose sentences that accord with legitimate community expectations.[700]

Echoing the High Court's remarks concerning legitimate community expectations, researchers have also emphasised the importance of ensuring *informed* opinion influences policy debates.[701]

Research has identified three important factors when considering how much, or in what ways, public opinion should influence sentencing.

First, while public opinion is relevant to sentencing, it should not determine sentencing outcomes for individual cases.

Secondly, maintaining judicial discretion is critical to enabling the imposition of a just and appropriate sentence in any individual case. Every case is different and courts should sentence on the basis of the facts associated with an individual case.

Thirdly, only informed public opinion should influence sentencing. This is particularly important as research generally suggests that people's perceptions of seriousness and sentencing is often based on incorrect information or misconceptions.[702] For example, public perceptions that sentencing is 'lenient' are typically associated with misunderstandings of the sentencing process and with limited information about specific cases. Research has observed that the penalty options that can be imposed for particular offences and the role sentencing can realistically assume in reducing or controlling overall crime often differ from what communities assume or expect.[703] This is particularly so with cases subject to extensive media coverage and which evoke public outrage.[704] This aligns with the Council's research for this report, which is that the media is a key mechanism for acquiring information about sentencing.[705] The role of the media and ways to improve communication about sentencing are discussed further in Chapter 11.

Collectively, research has found that inviting the public 'in' and promoting positive and informed public opinion represents an important priority worthy of investment.[706] Criminal justice systems without public confidence lack legitimacy and can be functionally compromised by persistent misconceptions, under-reporting of offences, limited cooperation, and distorted perceptions of crime and criminal justice.[707]

8.2.1 Key themes from public opinion research

National and international research into public opinions on sentencing has identified three clear themes. These themes are prominent when people are asked to respond to abstract questions about their perceptions of sentencing and the courts, without any associated information.[708]

First, multiple studies have found that when responding to a general opinion poll the overwhelming majority of people consider sentences are too lenient and that judges are out of touch — factors that influence perceptions of sentencing and the criminal justice system more broadly.[709]

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700 *Markarian v The Queen* (2005) 228 CLR 357, 389 [82] (McHugh J).

701 Kate Warner et al, above n 699, 181.

702 Stobbs, MacKenzie and Gelb, above n 351, 221–222; Roberts and Hough, above n 344, 74

703 Roberts and Hough, above n 344, 69.

704 Sentencing Advisory Council (Tasmania), above n 649, 78; Kate Warner, above n 695, 397.

705 Mitchell, above n 347, 453–4; Sentencing Advisory Council (Victoria), above n 669, 2, 5.

706 Warner et al, above n 699, 180; Kate Warner, et al, 'Are Judges Out of Touch?' (2014) 25(3) *Current Issues in Criminal Justice* 729, 730.

707 Sentencing Advisory Council (Victoria), above n 669, 2, 5-6; Kate Warner, et al, above n 706, 738–739.

708 Sentencing Advisory Council (Victoria), above n 669, 1 – 2, 4; Stobbs, MacKenzie and Gelb, above n 351, 219–221; Kate Warner, et al, above n 699, 181; Kate Warner et al, above n 706, 730.

709 Sentencing Advisory Council (Victoria), above n 669, 2, 4; Stobbs, MacKenzie and Gelb, above n 351, 221; Kate Warner, et al, above n 706, 729.

Secondly, as noted above, there are misconceptions about the criminal justice system which affect opinions of sentencing, the courts and judicial officers. The Victorian Sentencing Advisory Council (VSAC) found that public perceptions about crime and criminal justice that are underpinned by incorrect information represent the 'strongest predictors of punitiveness'.[710] Representative research in the UK revealed, 'a rather negative public image of judges'[711] compared to other professions. This research also found that 'relative to other branches of the criminal justice system, such as police, the courts do not fare well in terms of public performance ratings'.[712] This study also confirmed that the vast majority of respondents believed courts respect the rights of an accused (a factor they rated as the least important function), yet were not as effective in securing convictions (rated the most important function) or imposing the right sentence (rated the second most important function).[713] This research finding has been replicated in other jurisdictions. As was noted by VSAC:

> confidence in the courts has immediate relevance to perceptions of sentencing severity … people who report that sentences are too lenient have significantly less positive views of sentencers.[714]

Thirdly, research has also identified that public awareness of courts and sentencing is limited.[715] A lack of awareness of, together with less positive opinions about, crime, courts, sentencing, criminal justice systems and judicial officers, has been detected in Australian, American, and Canadian research.[716] Research reveals that as people become more informed, they report less punitive views on crime, sentencing and offenders.[717] VSAC has noted:

> [t]here is now a significant body of research that shows that, when the public is provided more information on a given case (similar to the kind of information available to a judge in court), judicial sentences and public sentences are very similar.[718]

The second Australian jury study found that when informed of the situational and contextual factors of individual cases the 'views of judges and jurors are much more closely aligned than mass public opinion surveys would suggest'.[719] Targeted and multidimensional research has also attempted to redress the limitations associated with previous 'spur-of-the-moment' polling questions for gauging public opinion and the factors that influence these opinions.[720] At an aggregate level, research is now revealing that, 'although public attitudes can be complex, contradictory and dependent upon question wording, people are generally much less punitive than is often thought.'[721] This shows the importance of informed public opinion in developing responsive public policy.[722]

The Victorian Jury Sentencing Study used a mixed-methods approach[723] to support previous juror-focused research conducted in Tasmania. The study found that the majority of jurors indicated that sentences were appropriate when provided with more detailed information about the facts of the case, and that people will consider the individual circumstances of cases when provided with sufficient information.[724] In addition, the jury studies confirm that as knowledge about the criminal justice system

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710 Sentencing Advisory Council (Victoria), above n 669, 5.

711 Roberts and Hough, above n 344, 72.

712 Ibid 70.

713 Ibid 70–71.

714 Sentencing Advisory Council (Victoria), above n 669, 3.

715 Roberts and Hough, above n 344, 69–70.

716 Sentencing Advisory Council (Victoria), above n 669, 3, 4–6.

717 Stobbs, MacKenzie and Gelb, above n 351, 219–222; 229; Sentencing Advisory Council (Victoria), above n 669, 6–8.

718 Sentencing Advisory Council (Victoria), above n 669, 7.

719 Warner, et al, above n 706, 180.

720 Sentencing Advisory Council (Victoria), above n 669, 4; Stobbs, MacKenzie and Gelb, above n 351, 222–224; Warner et al, above n 699, 198.

721 Sentencing Advisory Council (Victoria), above n 669, 8.

722 Warner, et al, above n 699, 193–194.

723 Ibid, 183–185.

724 Ibid, 181; Kate Warner et al, above n 698, 2.

and the individual facts of a case increases, people self-report less punitive attitudes about sentencing and reflect more supportive opinions of judges and the courts.

Sentencing for driving offences were the focus of studies conducted within Australia, the UK, the United States and Canada.[725] Overall this research also confirms that when people are provided information about the situational and contextual aspects associated with cases, they are more inclined to sentence less harshly than judicial officers. Perceptions of offender culpability, history and victim/community harm, as well as respondent type (i.e. victim, victim family member, or juror) affected assessments of sentencing appropriateness, allocations of an adequate sentence, and overall measures of 'punitiveness'.

8.2.2 Public opinion and offence seriousness

Studies into public opinion about sentencing of offenders has also considered community perceptions about crime seriousness.[726] VSAC examined public perception of offence seriousness, in a study involving 244 participants, called the Victorian Jury Sentencing Study.[727] The study found that participants applied different approaches to assessing offence seriousness, with some predominately influenced by either harm or culpability and others who balanced a number of factors including harm, culpability and the level of risk involved in the behaviour.[728] The study also examined the category of fatal offences and found that participants 'tended to make differentiations in seriousness based on distinct levels of harm and culpability that produced a sliding scale based on these different levels'.[729] Participants ranked fatal offences as follows:

- intentional (intentional murder);
- recklessness combined with knowledge (reckless murder);
- reckless and culpable behaviour (manslaughter, culpable driving causing death);
- negligence (arson causing death); and
- dangerousness (dangerous driving causing death).[730]

However, other studies have found seriousness is assessed differently. A UK study examining public opinion on homicide found that participants identified 'specific aspects' of the homicide itself as influencing their perceptions of seriousness, the most common aspect being victim type.[731] Over half the survey respondents indicated that any homicide involving a child victim was more serious, claiming inherent victim defencelessness as justifying such cases as the worst homicides.[732] Motive and method of killing were also rated by respondents as contributing to their perceptions of homicide seriousness.[733]

When considering what factors made a homicide more serious, participants identified the vulnerability of the victim (especially killing a child), premeditation and bad motive (including the apparent lack of a motive) and torture or lengthy suffering of the victim. Homicides where the killing was committed on the basis of compassion (e.g. euthanasia or mercy killing), accident (i.e. where the killer bears no moral blame for causing death) or self-preservation were seen as the least serious kinds of homicide.

The Victorian Jury Sentencing Study also explored juror perceptions of seriousness in relation to sentencing and found that seriousness appeared to be influenced by the type of crime committed.[734] While researchers found there was not a large gap in punitiveness between juror and judicial opinion on

725 Sentencing Advisory Council (Tasmania), above n 649, 78–82.

726 Warner, et al, above n 699, 194–195.

727 Sentencing Advisory Council (Victoria), above n 654 (2012).

728 Ibid 65.

729 Ibid 33.

730 Ibid 33.

731 Mitchell, above n 347, 462.

732 Ibid 463.

733 Ibid.

734 Warner, et al, above n 699, 188–191.

sentence length for most offence types, there was a significant exception in relation to sexual assault of children under 12. Almost two-thirds (63%) of jurors that had been involved in a child sex offence trial suggested a more severe sentence than the one imposed by the judge.[735] Sexual assault of children aged under 12 years of age demonstrated the most significant difference between jurors and judges on sentence length:

> The fact that jurors in Victoria were dissatisfied with the sentences in cases of children under 12 provided evidence that there is a punitiveness gap between judges and the public with respect to this offence that cannot be dismissed as a methodological artefact or a product of a lack of information. It supplements earlier research on public perceptions of offence seriousness in Victoria which found that sexual offences against young children were of utmost concern to participants.[736]

8.3 Findings from the focus group research

As part of the Council's research, 10 focus groups were convened across Queensland to consider, amongst other things, whether sentencing for child homicide offences is adequate. Details about the methodology for this research are in Appendix 3. Chapters 4 and 7 also provide findings from the focus groups in relation to the purposes of sentencing and offence seriousness.

While the Council again acknowledges that the focus groups are not representative of Queensland's population, the aim of this research, as part of the overall mixed-methods approach, was to gain a deeper appreciation of opinions about a key aspect of the Terms of Reference — adequacy of sentencing.

8.3.1 Respondent profile

Table 28, Table 29 and Table 30 show that focus groups comprised participants who were predominantly urbanised, balanced in relation to gender, and aged 50 years or older. The majority of participants (68.9%) recorded post-secondary education levels and were primarily Australian-born (79.6%). Most participants were married (61.2%) and were engaged in formal employment (60.2%) or were retired (26.2%).

Table 28: Focus group participants by residential location

Location	Frequency	%
Brisbane	16	15.5
Cairns	22	21.4
Gold Coast	22	21.4
Longreach	10	9.7
Mount Isa	10	9.7
Sunshine Coast	23	22.3
TOTAL	**103**	**100.00**

Table 29: Focus group gender breakdown

Gender	Frequency	%
Female	54	52.4
Male	49	47.7
TOTAL	**103**	**100.00**

735 Ibid, 194.

736 Ibid, 195.

Table 30: Focus group age-bracket breakdown

Age	Frequency	%
18–29 years	12	11.7
30–39 years	15	14.6
40–49 years	16	15.5
50–59 years	25	24.3
60–69 years	18	17.5
70 or over	17	16.5
TOTAL	**103**	**100.00**

The overwhelming majority of participants acquired information about sentencing and sentencing outcomes from television (85.4%), while newspapers were recorded as the second-highest category, although age did exert some influence on the medium recorded by participants (see also Chapter 11).

8.3.2 General perceptions about crime

Participants were asked initially to provide responses to 11 non-specific questions about crime and sentencing. These questions were structured to ascertain baseline measures of public perceptions prior to participants being provided more detailed information about child homicide in the lead up to in-depth questioning. The Council's analysis reveals that respondents differentiated their responses based on the nature of the crime being examined. This finding supports national and international research (see above).

The analysis of responses to six questions is set out below. These responses were selected on the basis that they represent key measures of perceptions about the justice system.

People deserve a second chance

Overall, the majority of participants (72.8%) believe that people sometimes deserve a second chance after committing general crime. However, this majority perception shifted when participants were asked to consider violent crime. Only 36.9 per cent of participants thought that people who commit violent crime sometimes deserve a second chance, with 35.0 per cent stating people who commit violent crime rarely deserve a second chance and 20.4 per cent stating people who commit violent crime should never get a second chance. Only 2.9 per cent (3 people) thought people who commit violent crime should always get a second chance.

Prison as a last resort

Over half of respondents (56.3%) indicated that sometimes prison should be considered as a last resort for people who commit general crime. In contrast, 41.8 per cent of participants believe that prison should never be considered as a last resort for people who commit violent crime. These findings suggest that differences in punitiveness depend on the nature of the crime committed, with punishment considered more appropriate for violent crimes than general crime.

People choose to commit crime

In response to questions about offenders 'owning the responsibility for their actions', 61.2 per cent believed that people sometimes choose to commit general crime. However, relatively equal proportions of respondents registered a belief that people either sometimes (44.7%) or always (42.7%) choose to commit violent crime.

People can be rehabilitated after committing crime

When asked to consider rehabilitation, participants again reflected a different response profile based on the type of crime committed. For general crime, most respondents (76.7%) believe that sometimes people can be rehabilitated, with female respondents and the youngest cohort (18–29 years) demonstrating even stronger support for rehabilitation under this crime type. However, only 55.3 per cent of respondents believe that sometimes violent crime offenders can be rehabilitated. Gender and age differences were not evident when considering violent crime.

People should be able to serve their sentence in the community

When asked about community-based sentencing options, the gap between general crime and violent crime was again evident. Almost two-thirds of respondents (65.1%) suggest that people who commit general crime can sometimes serve their sentences in the community. In contrast, over half (53.4%) suggest that people who commit violent crime should never serve their sentences in the community.

Tough sentences stop people committing crime

The final survey question focused on participant perceptions about the capacity of tough sentences to stop crime. Overall, 60.2 per cent of respondents suggest that sometimes tough sentences can prevent crime. The only statistically significant difference was within the education level subgroup. Respondents who report a post-secondary education level register a stronger 'sometimes' response (76.5%) to the question, while people reporting a tertiary education level register a stronger negative response (37.8% 'rarely' compared to 11.8% and 15.6%, respectively, for those with a post-secondary and secondary education).

8.3.3 Adequacy of sentencing for child homicide offences

The primary purpose of the focus group research was to gain a better understanding of community views of the appropriateness of sentences imposed for child homicide, and what factors informed participant views. To test this issue, participants were asked to consider three child manslaughter cases and whether the sentence imposed in each case was 'appropriate'. The vignettes of 'Jane', 'Frank' and 'Alan' that were used in the first ranking exercise were used again; however, additional information about the cases and the sentences imposed was provided to participants for discussion. These cases had been selected by the Council because they represented different categories of manslaughter, offence circumstances, and levels of offender culpability. For example, 'Jane' was sentenced on the basis of criminal negligence, while 'Frank' was sentenced on the basis of failing to seek medical treatment as a co-offender (the principal offender against the child was his wife, the victim's mother), and 'Alan' was sentenced on the basis of a violent act and was the sole offender against the child.

'Jane'

Over half of respondents (56.4%, N=101) believed that the sentence imposed for 'Jane' of 18 months with immediate release on parole was 'adequate', while about a third (34.7%) believed the sentence was 'somewhat inadequate'. Female respondents were more inclined than male respondents to rate the associated sentence as 'somewhat inadequate' (47.2% versus 20.8%) and less inclined to rate the sentence as 'adequate' (43.4% versus 70.8%). These differences were statistically significant.

Participants who thought the sentence was 'adequate' made the following observations about the offence:

> 'For her non-violent, accidental crime, Jane's sentence of 18 months was adequate. She should not serve prison time, however. The implications of the whole case and her sentencing are more than enough to rehabilitate her and ensure it doesn't happen again.' – A05

> 'Her manslaughter of her daughter was not intentional and she was remorseful. Based on the fact that she specifically sought out assistance based on her mental health before the incident, showed good intent and consideration to care for Kate.' – C04

> 'Accident — not intentional — who would it benefit if she went to jail? Other children need to be considered. She should be monitored during this period.' – G09

> 'Jane sought immediate assistance for Kate. It wasn't intentional. Jane showed remorse. Jane was mentally unwell. Jane had limited assistance/help/was isolated.' – J14

Participants who thought the sentence was 'somewhat inadequate' emphasised the importance of remembering the loss of a child's life and that protection of 'Jane's' remaining children needed to be considered:

> 'There is no punishment for her negligence and her baby died under her supervision. No deterrence for this to happen again in the future for the individual or general.' – D07

'I'm not sure why you would sentence someone to prison and then release on parole. Jane should have gone to some sort of medical facility to help with her illness.' – E03

'Somewhere between extremely and somewhat inadequate. On one side, she has more children who need her care. But I believe she shouldn't have been eligible for parole so early.' – F02

'A child has died and it was Jane's fault. She did not mean for the child to die but did not look after the child well enough. She claimed the "usual" mental problems to get out of trouble but has had two more children in the meantime. I hope she doesn't make the same mistake again but she should not have gotten off so lightly.' – I07

'She needs follow-up visits to make sure she is still being supported and hasn't fallen through the cracks. The biological father could have moved away and she is back on her own. Someone needs to check on Jane to make sure the children are OK.' – J06

'Frank'

'Frank' routinely divided participants and provoked the most debate, as participants found the case particularly challenging to assess. The central issue with 'Frank' was the 'appropriateness' of the actual sentence imposed as opposed to disagreement over factors that influenced individual participants when determining their ratings about this case. Overall, just over a third of participants (37.4%, N=102) rated the sentence of 3 years, with parole release fixed at 9 months, as 'somewhat inadequate' and a third (34.3%) rated the sentence as 'adequate'. Discussions about 'Frank' tended to focus on his failure to intervene and failure to seek assistance for the child victim. Based on a numeric scale of 'adequateness', two participant subgroups — sex and age — displayed statistically significant differences in their responses to this case. On average, more female respondents believed the sentence was inadequate than male participants. The 40–59-year-old cohort was far more inclined to rate the sentence as inadequate, registering higher responses of 'somewhat inadequate' (58.5%), as compared to the 18–39-year-old cohort (29.6%) and the 60+-year-old group (17.7%).

Participants identified a range of factors when considering what influenced their rating of the sentence's adequacy.

Adequate

'I feel that the sentence is adequate. Frank should have reported the continual abuse of Ella. Stepdaughter relationship is a factor, but the father still has a duty of care.' – A09

'Frank was guilty of bad judgment in not getting help in time, but he was not responsible for the death of Ella who was not his biological child.' – B03

'Frank asked Lisa to stop but didn't follow it through. He should've informed the authorities.' – CO5

'Punishment was appropriate. Frank's inaction was unacceptable.' – E08

'He was of good character and was remorseful, but he did not protect the 8-year-old child when he should have done more. He should also have sought medical assistance.' – I04

Somewhat inadequate

'Frank watched and did nothing. He'd witnessed the violence and was aware it was happening when he was at work but did nothing.' – B05

'Because he was aware of his daughter's situation beforehand but did nothing to prevent it. There should be a stronger deterrent for such criminal negligence.' – C04

Extremely inadequate

'Whilst he did not inflict the injuries, he has the same level of responsibility in Ella's death. By not stopping the abuse, not removing the child, by not contacting authorities, did not provide or seek any medical assistance whatsoever. He is an adult, intelligent [enough] to know right from wrong.' – J14

'He had every duty to protect that child. Obviously, he did not try hard enough because it was not his biological child. He was the adult and needed to stand up for that child as well. Too little too late.' – I11

'I feel that you would have to be blind not to see the body abuse. When he told Lisa to STOP, he should have made it happen.' – G04

'Frank could have intervened at any time and saved this child's life. He chose not to. His sentence should have been much longer. Parole was too lenient — he should serve nearly all of his sentence.' – F04

'Alan'

There was a strong reaction by participants in response to 'Alan'. Almost half of the participants (48.0%; N=102) rated the sentence of eight-and-a-half years with no parole eligibility date set as 'extremely inadequate', and 38.2 per cent rated the sentence 'somewhat inadequate'. Only one profiled subgroup — people who reported currently having children or grandchildren under 18 years — displayed any statistical differences within its responses. While participants who did not have current responsibility for children or grandchildren under 18 years, on average, gave a lower 'inadequate' rating for 'Alan' than those who reported having children or grandchildren under 18 years, they still rated the sentence as inadequate. Overall, reasons why the sentence was regarded as inadequate included the child's young age, the extent of violence culminating in the child's death, the history of violence by the offender against the victim, and the offender's failure to act in the interests of his son.

During group discussions, participants expressed their dissatisfaction with the sentence imposed on 'Alan'. At times participant language and engagement in the discussion became quite emotional. The case also raised questions about the difference between murder and manslaughter, as the vast majority of participants suggested this case, as opposed to the 'Frank' and 'Jane' cases, should have been considered murder not manslaughter. Parole was discussed, with a majority of participants indicating they believed it weakened and undermined the overall sentence.

Participants made the following remarks about 'Alan's' sentence.

Somewhat inadequate

'Such extensive abuse of a young child by a parent is deserving of a much harsher sentence than eight-and-a-half years, especially if he qualifies for parole after only half of his sentence.' – A05

'Alan was in control of the child and should've protected him and ended the child's life so he should've got a lot more without parole.' – B06

'I found the sentence somewhat inadequate as he knew what he was doing and by blaming his partner [he] shows a conscious decision. I would have liked the full sentence with no possibility of parole.' – E05

'Alan's actions had been sustained and planned and he had neglected to organise medical support in a timely way. His negligence was compounded by lying. I do think John should not have been returned to his biological parents given his history of abuse.' – G02

'Alan was violently abusive to a defenceless child.' – J08

Extremely inadequate

'Violent crime to a child, lied, history of violence, did plead guilty. Parole to me is like that is the sentence, and 4 years is totally inadequate for this crime. Minimum of 8 years before parole.' – E04

'Serious violent child bashers do not deserve parole. Society needs to be protected from Alan. There is insufficient deterrence and denunciation.' – F09

Alan is a dick, who the **** hits a kid with a power cord in the head. 4.25 years for killing a kid. Should be 20 years.' – I05

'He intended on hurting the baby. He should have been sentenced for life.' – J01

'Life for life against children. Violence to a child or anyone helpless is to be treated with maximum penalty. Sentences are too light.' – J07

These findings show that when participants considered three vignettes involving the manslaughter of a child, 'Alan' was considered the most serious offence and the vast majority of respondents thought the sentence imposed was inadequate. The sentence was regarded as inadequate because the offence involved a very young child, persistent violence culminating in the child's death, a history of prior violence by the offender against the victim, and 'Alan' had failed to act in the interests of his son.

These findings echo discussions at the community summits in Logan and Townsville, where participants regarded the vulnerability of a child, the persistent use of violence, and significant or prolonged mental or physical suffering of the deceased child as making an offence more serious, warranting a higher penalty.

Similarly, the focus groups show that people regard criminal negligence homicides as less serious, and that such incidents can be tragic accidents, even where a child has died. Over half of respondents thought that 'Jane's' sentence was adequate.

8.4 Conclusion

This chapter considered findings from domestic and international research on public opinion and sentencing, and public perception and offence seriousness. These findings show that, when informed about the criminal justice system and specific details about a case, the public has greater support for sentencing outcomes. Further, offences are regarded as more serious when the victim is a child.

The chapter also examined the findings from the Council's focus group research to better understand community views on whether sentences for child homicide offences in Queensland are 'adequate'. While not representative of all Queenslanders, the Council's findings from the focus groups reveal important insights into public perceptions of the adequacy of sentences for child homicide offences. The results support previous research about sentencing and homicide and reinforce the utility of focus group techniques as an avenue for securing informed public opinion about typically complex and sensitive criminal justice issues.

Chapter 9 focuses on the Council's assessment of appropriateness of sentencing for manslaughter of a child.

Chapter 9 — Assessing the appropriateness of sentencing for manslaughter of a child

9.1 Introduction

In responding to the Terms of Reference, the Council was asked to:

- determine whether the penalties currently imposed on sentence for criminal offences arising from the death of a child adequately reflect the particular vulnerability of child victims;
- assess whether existing statutory sentencing considerations are adequate for the purposes of sentencing for these offences and whether specific additional legislative guidance is required; and
- 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.

The adequacy of sentences in responding to child homicide offences and changes required to ensure the appropriateness of sentences imposed were key issues for the Council in responding to this reference.

This chapter sets out the Council's approach to assessing the adequacy of sentencing for child homicide and presents the Council's recommendations to support the imposition of appropriate sentences.

9.2 Approach to assessing adequacy and appropriateness

Identifying criteria against which the adequacy or appropriateness of sentences for child homicide can be assessed is particularly challenging.

As discussed in Chapter 4, unless legislation fixes a mandatory penalty (as it does with murder), 'the discretionary nature of the judgment required means that there is no single sentence that is just in all the circumstances,'[737] or an 'objectively correct sentence'.[738] As the High Court recognised in *Wong*:

> there are many conflicting and contradictory elements which bear upon sentencing an offender … 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.[739]

Courts in exercising discretionary judgment in setting the sentence do not approach the task in an overly structured or mathematical way:

> At best, experienced judges will agree on a range of sentences that reasonably fit *all* the circumstances of the case. There is no magic number for any particular crime when a discretionary sentence has to be imposed.[740]

Even an agreement to accept a plea to a lesser charge (e.g. manslaughter rather than murder) 'cannot affect the duty of either the sentencing judge or a court of criminal appeal to impose a sentence which appears to the court, acting solely in the public interest, to be just in all of the circumstances'.[741]

Sentencing courts have a wide discretion, yet 'must take into account all relevant considerations (and only relevant considerations)'[742] including legislation and case law.

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737 *DPP v Dalgliesh (a Pseudonym)* (2017) 349 ALR 37, 40 [7] (Kiefel CJ, Bell and Keane JJ).

738 *Markarian v The Queen* (2005) 228 CLR 357, 384 [66].

739 [2001] HCA 64; (2001) 207 CLR 584 at 611–612 [74]–[76] (Gaudron, Gummow and Hayne JJ) (footnotes omitted).

740 *Markarian v The Queen (2005)* 228 CLR 357, 383 [65] (McHugh J).

741 *DPP v Dalgliesh (a pseudonym)* (2017) 349 ALR 37, 51 [66] (Kiefel CJ, Bell and Keane JJ) citing *Malvaso v The Queen* (1989) 168 CLR 227, 233; *Barbaro v The Queen* (2014) 253 CLR 58, 72-74 [34]–[39] (French CJ, Hayne, Kiefel and Bell JJ).

742 *Markarian v The Queen* (2005) 228 CLR 357, 371 [27] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

It can be inferred that the sentencing discretion has 'miscarried' when the sentence is clearly unjust, being 'manifestly excessive' or 'manifestly inadequate'.[743] Such sentences, which an appeal court can set aside, are those falling 'outside the *range* of sentences which could have been imposed if proper principles had been applied'.[744]

It is evident that the intention of the Attorney-General in referring this matter to the Council was that the Council should look beyond the question of legal inadequacy. In particular, the Terms of Reference refer to the concerns that penalties imposed on sentence for these offences may not always meet with the Queensland community's expectations and ask the Council to determine whether penalties adequately reflect the vulnerabilities of child victims.

The Council has the benefit of being able to draw on the experience of sentencing councils in other Australian jurisdictions faced with a similar task of determining 'appropriateness' for specific offences or across offence types.[745] Consistent with the approach taken by these other bodies, the Council has adopted a mixed-methods approach, applying both quantitative and qualitative criteria to assessing appropriateness and adequacy against a number of measures. The measures used to assess appropriateness and adequacy are summarised in Table 31 and discussed below.

Table 31: Criteria for assessing 'appropriateness' and 'adequacy' of sentencing for child homicide

Measure	Method of assessment
Lack of public confidence in sentencing	
1. Evidence from informed and structured consultation of community views on sentencing/seriousness of different types of homicide offences, with a focus on manslaughter	Qualitative • Focus groups • Community summits • Consultation paper
2. Parliament's views on the seriousness of homicide offences, including those committed against children	Quantitative • Maximum penalty
3. Disparity between sentencing outcomes and the community's and Parliament's views of offence seriousness	Qualitative • Focus groups • Community summits • Consultation paper
4. Court of Appeal statements or questioning that current sentencing levels for child homicide are adequate	Qualitative • Textual analysis
5. No evidence of change in current sentencing practices following Court of Appeal's statements or questioning	Qualitative • Textual analysis
Evidence of inconsistency of approach	
6. Treatment of child homicide offenders within the offence categories of murder and manslaughter versus offenders who offend against adults, and comparison with other offence types	Quantitative • Data analysis Qualitative • Textual analysis
7. Weight given to aggravating and mitigating factors	Qualitative • Textual analysis
8. Categorisation of the objective seriousness of child homicide offences	Qualitative • Textual analysis
Evidence of inconsistency of approach with other jurisdictions	
9. Approach taken in other jurisdictions to sentencing for child homicide	Qualitative • Analysis of appeal decisions and recent cases

743 *DPP v Dalgliesh (a Pseudonym)* (2017) 349 ALR 37, 40 [7] (Kiefel CJ, Bell and Keane JJ).

744 *Barbaro v The Queen* (2014) 253 CLR 58, 70 [26] (French CJ, Hayne, Kiefel and Bell JJ) (emphasis in original).

745 See Sentencing Advisory Council (Victoria), above n 589; and Sentencing Advisory Council (Tasmania), above n 649.

9.3 Application of framework to child homicide in Queensland

9.3.1 Criterion 1: Evidence from informed and structured consultation of community views

Of fundamental importance in responding to the reference was considering the extent to which community views should influence sentencing law and policy, and how community views were to be identified. It is well understood that community expectations alone should not drive sentencing outcomes.

The Terms of Reference issued to the Council expressly refer 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 significance of supporting and promoting public confidence in the criminal justice system to the overall administration of justice.

As one legal commentator has observed: 'The role of public opinion in sentencing has been the subject of extensive debate, research and consideration by law reform inquiries and academic commentators for at least two decades'.[746]

Parliament, representing the interests of the broader community, plays a central role in setting maximum (and minimum) penalties and enacting sentencing laws. The views of the community are frequently cited in support of the introduction of sentencing and other legislative reforms.[747]

The High Court in *R v Kilic* referenced the need under the Victorian *Sentencing Act 1991* to refer to current (rather than historical) sentencing practices recognising that:

> sentencing practices for a particular offence or type of offence may change over time reflecting changes in community attitudes to some forms of offending. For example, current sentencing practices with respect to sexual offences may be seen to depart from past practices by reason, inter alia, of changes in understanding of the long-term harm done to the victim. So, too, may current sentencing practices for offences involving domestic violence depart from past sentencing practices for this category of offence [intentionally causing serious injury] because of changes in societal attitudes to domestic relations.[748]

Community views about the seriousness of particular forms of offending also have a role in ensuring the sentencing purposes of just punishment and denunciation are met. A sentence that seeks to denounce the offender's actions 'represents a symbolic, collective statement of society's disapproval of the criminal behaviour'.[749] To this extent, the sentence takes into account and reflects informed community attitudes about such behaviour.

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746 Warner, above n 695, 395.

747 See, for example: Introductory Speech for the Criminal Law (Two Strike Child Sex Offenders) Amendment Bill 2012 (Qld) in Queensland, *Parliamentary Debates,* Legislative Assembly, 20 June 2012, 819 (Jarrod Bleijie); and Explanatory Notes, Criminal Law (Domestic Violence) Amendment Bill (No 2) 2015 (Qld) 2.

748 (2016) 259 CLR 256, 267 [21] (Bell, Gageler, Keane, Nettle and Gordon JJ).

749 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) 138 [4.18] citing Nigel Walker, *Why Punish?* (Oxford University Press, 1991).

Sofronoff P in *R v Appleton* recently considered the nature of the sentencing purpose of denunciation as this applies under section 9(1) of the PSA:

> In making denunciation one of the purposes of punishment, the Act recognises that an important purpose of punishment may be to satisfy the human need for an authoritative condemnation of a particular crime or of a particular criminal by the imposition of a punishment that is regarded as just because it is proportionate to the moral gravity of the crime. As Lawton LJ said in *R v Sargeant*:
>
> 'The courts do not have to reflect public opinion. On the other hand the courts must not disregard it. Perhaps the main duty of the court is to lead public opinion.'
>
> A definitive, authoritative and public condemnation is apt to, and is intended to assuage people's indignation at the commission of a particularly bad crime and to reinforce their confidence in a system of government that is capable of expressing communal denunciation through just punishment.[750]

In the more recent decision of *R v RAZ; Ex parte Attorney-General (Qld)*, citing *Everett v The Queen*,[751] Sofronoff P refers to a relevant principle informing Crown appeals against sentence being that 'inadequate sentences are likely to undermine public confidence in the ability of the Courts to play their part in deterring the commission of crimes'.[752] In this instance, he found that the sentence imposed was inadequate, taking into account the need for:

> a sentence that properly reflects the respondent's offending, the circumstances of that offending and of his character and which properly reflects the community's expectation that the Court denounce such crimes ...[753]

The importance of taking 'legitimate community expectations' into account so as not to undermine public confidence was also referred to by McHugh J in *Markarian v The Queen*, who noted that a failure to do so may lead to legislative changes interfering with the exercise of judicial discretion.[754]

The cases tend to highlight that, while community views are relevant, it is informed public opinion that matters, not community outrage about a sentencing outcome in a particular case.[755]

Focus group findings

The Council's focus group research aimed to assist the Council in gaining a richer understanding of community views about what makes particular homicides more serious, and community views about whether sentencing outcomes for different types of child homicides are adequate.

The findings of this focus group research, discussed in Chapters 4 and 8 of this report, suggest that community members, when presented with limited information about a range of different homicide scenarios, identify unlawful killings involving children as the most serious. These findings also indicate that community members' level of satisfaction with the sentences imposed for child homicide varies significantly based on the nature of the offender's assessed level of culpability and criminal responsibility.

Of those who participated in the focus groups, punishment was identified as the most relevant purpose of sentencing when sentencing for general and violent crime (54.0%). A greater proportion identified punishment as the most relevant purpose when consideration was given to child homicide offences (62.0%).

While participants found the vignette-ranking exercise challenging, they generally ranked the manslaughter cases, often described as 'accidental' deaths, as less serious than those described as involving the use of physical violence and 'planning'. For example, 'Jane' (leaving-a-baby-in-the-bath scenario) was considered the least serious, ranked 1 (least serious) in 54.1 per cent of responses, or ranked within the three least-serious rankings (1, 2 or 3) in 85.7 per cent of responses, with an average

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750 [2017] QCA 290 (24 November 2017) 9 [41]–[42] (citations omitted).

751 (1994) 181 CLR 295 at 300, 306–307.

752 *R v RAZ; Ex parte A-G (Qld)* [2018] QCA 178 (14 June 2018) 6 [29].

753 Ibid 6 [30].

754 (2005) 228 CLR 357, 389.

755 Warner, above n 695, 395.

ranking of 2.2 (median=1.0). In contrast, 'Alan' was considered the most serious, ranked in the three highest rankings (8, 9, 10) in 62.2 per cent of cases, with an average ranking of 7.7 (median=8.0). The case vignettes used for these focus groups are at Appendix 4 of this report.

As discussed in Chapter 4, consistent themes were identifiable from the subsequent discussion in relation to what participants were considering when they were ranking the scenarios. Factors identified as making a scenario **more** serious were:

- a child's age and vulnerability — consistent finding;
- 'premeditation' or planning — consistent finding;
- failure to seek assistance or assist medical professionals or police — highly rated.

Overwhelmingly, participants expressed concern that sentencing in some cases did not reflect the vulnerability of children. Many participants also raised the vulnerability of elderly victims, but generally, children were rated as inherently vulnerable and, therefore, crimes against children were considered to be more serious.

Of all scenarios presented, that of 'Alan' was most likely to elicit a view that the sentence (8.5 years in this case, with no recommendation for early parole eligibility) was inadequate — with the overwhelming majority of participants viewing it as 'extremely inadequate' (48.0%) or 'somewhat inadequate' (38.2%). The use of violence — persistent and at the time of the child's death — featured in these discussions as well as his lack of assistance to medical and law enforcement professionals. Many participants were also angry that the child was returned from out of home care and that there was evidence of previous abuse. The age and vulnerability of the child victim, and 'Alan's' role as the child's father were also emphasised in the discussion as factors increasing the seriousness of this offence.

Community summits (Logan 16/7 and Townsville 19/7)

Discussions at the community summits also suggest that people are less tolerant of offences involving the use of physical violence against children, and even less so where the use of violence is prolonged, involves extended suffering of the child, and there is evidence of prior abuse.

The vulnerability of children (lack of agency, low language skills or being pre-verbal, reliance on parents, and inability to protect themselves or escape the situation) was mentioned across all groups as indicating a higher level of offence seriousness. The use of physical violence, evidence of prior violence, and persistence of that abuse were also identified across all groups. Some groups declared that a breach of trust made the offence and the offender's actions more serious than if committed by a stranger. The intention to cause harm, premeditation, and using a child as a means of 'revenge' (to get back at a partner) were also referred to as increasing the seriousness of the offence.

The presence of a severe mental illness and lack of intent to harm/'accidental' harm (criminal negligence scenarios) were raised as making an offence less serious, although there were some concerns about how mental illness would be established.

Factors such as remorse (where genuine and early admissions made), seeking medical assistance for the victim, and cooperation with authorities were mentioned as post-offence conduct that should be taken into account in personal mitigation.

Conclusion

Although not necessarily representative of the views of the broader community, the Council's focus group research and consultation with members of the community and victims of crime substantiate the view that there is concern about current sentencing levels in Queensland for child homicide where this involves the use of physical violence against a child — particularly where the violence involved is prolonged, is perpetrated by a parent or other caregiver, and/or there is a history of prior abuse.

Views in relation to other forms of child homicide — such as those involving neglect or a failure to act — are more diverse and vary depending on the individual circumstances involved. Such variation supports the retention of judicial discretion.

9.3.2 Criterion 2: Parliament's views on offence seriousness

Maximum penalties and mandatory minimum non-parole periods for murder

Murder is one of only a few Queensland criminal offences to carry a mandatory life sentence,[756] indicating the high level of seriousness with which this offence is viewed. In addition to a mandatory sentence, murder also carries substantial minimum mandatory non-parole periods, ranging from 20 years for a single offence to 30 years where the person is being sentenced for more than one murder or has previously been sentenced for murder.[757]

Manslaughter also carries a maximum (although in this case, not mandatory) penalty of life imprisonment, indicating that parliament considers this offence among the most serious of offences, but of generally lower seriousness than murder.

Through the introduction of a mandatory minimum non-parole period of 25 years for murder of a police officer, the Queensland Parliament has signalled that the murder of a police officer warrants a higher minimum sentence than where the victim does not share this status. At the time these reforms were introduced, the then Attorney-General, Jarrod Bleijie, justified the introduction of these changes in the following terms:

> The Bill delivers on this government's commitment to provide strengthened protection to police officers acting in the performance of their duties, in particular our pledge to deal specifically with the murder of a police officer. Police officers perform a vital role in protecting our community and in maintaining civil authority. These men and women perform their duties each day in the face of inherent dangers and high-risk situations. Criminals who murder police officers must face tough punishments.[758]

As discussed in Chapter 7, differing levels of offence seriousness are generally determined under the criminal law by reference to the level of harm caused (in the case of both murder and manslaughter, the death of the victim) and/or the culpability of the person who caused (or risked) causing that harm. In the case of manslaughter, the level of *harm* caused to the victim (death) is consistent with that of murder, but the level of *culpability* differs based on the nature of the offender's actions and the associated mental element involved.

A higher level of punishment may be based on a perceived higher level of offence seriousness (in this case, based on the offender's culpability in targeting police as public officers performing an important public duty), and/or a view that higher sentences may act as an effective deterrent against this form of offending.

Serious violent offence (SVO) scheme

Evidence of an intended differential approach by the legislature to manslaughter and other serious violent offences involving child victims can be found in section 161B of the PSA. This section directs that, in circumstances where an offender is convicted on indictment of an offence that involves the use of violence, counselling or procuring the use of violence, or conspiring or attempting to use violence against a child under 12 years, or that caused the death of a child under 12 years, the sentencing court is to treat the age of the child as an aggravating factor. This factor specifically relates to the decision by the court, where this is discretionary, about whether to declare an offender to be convicted of a serious violent offence (SVO).

A declaration that an offender is convicted of a serious violent offence means that the offender must serve a minimum non-parole period of 80 per cent of his or her sentence for that offence, or 15 years

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756 See s 305(1) *Criminal Code* (Qld). See also 'Demands with menaces upon agencies of government' in circumstances of aggravation: s 54A(4).

757 Ibid s 305(2).

758 Queensland, Legislative Assembly, *Parliamentary Debates*, 20 June 2012, , Introduction – Criminal Law Amendment Bill 2012, 818 (Jarrod Bleijie, Attorney-General).

(whichever is less).[759] The declaration is mandatory in circumstances where the sentence imposed is 10 years or greater.[760]

The intention behind treating the age of the victim as an aggravating factor for the purposes of the SVO regime was explained by the then Attorney-General, Cameron Dick, at the time these changes were introduced in 2010, 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'.[761] The Explanatory Notes to the Bill explain that 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'.[762]

The sentencing remarks analysis undertaken by the Council suggests that subsection 161(5) of the PSA is not often directly referenced in sentencing remarks as a statutory aggravating factor in deciding whether to make a discretionary SVO declaration.[763] However, it may well be mentioned by the Crown in making submissions as to the appropriateness of making such a declaration. It is also possible that the sentencing judge may have independently considered this issue but does not specifically refer to it in his or her sentencing remarks.

As there has been no direct Court of Appeal consideration of the death of a child as an aggravating factor for these purposes, it is unclear whether the introduction of this provision has had an effect on the frequency with which these declarations are made by courts.

As discussed in Chapter 5, the Council's data show that over the 12-year period, 27 child manslaughter offenders were sentenced to imprisonment, excluding those offenders sentenced to wholly or partially suspended sentences, of whom six (22.2%) were declared to have been convicted of a serious violent offence. In two of these cases, the Court of Appeal set aside the SVO declaration on appeal.[764] Of the four remaining cases, one was a 10-year sentence with a mandatory declaration,[765] two involved a conviction for torture against the child victim in addition to the manslaughter offence,[766] and the fourth involved prolonged physical and emotional abuse, alleged sexual abuse and a failure to seek medical attention.[767]

In the most recent financial year (2017–18), of six identified child manslaughter cases involving the death of a child under 12 years, only one case involved the making of an SVO declaration (see Table 42 summary in Appendix 6 of this report). In this case, an appeal against sentence has been lodged.

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759 *Corrective Services Act 2006* (Qld) s 182. Different criteria apply to offenders sentenced under Part 9D of the PSA – offenders convicted of prescribed offences with a serious organised crime circumstance of aggravation.

760 *Penalties and Sentences Act 1992* (Qld) ss 161A and 161B(1).

761 Queensland, Legislative Assembly, *Parliamentary Debates*, 3 August 2010, Second Reading – Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2010, 2309 (Cameron Dick, Attorney-General).

762 *Explanatory Notes*, Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2010 (Qld) 5.

763 Although outside of the data period for the purposes of the sentencing remarks analysis, this subsection was referred to in the recent decision of *R v O'Sullivan* (Unreported, Supreme Court of Queensland, 30 August 2018).

764 *R v Risely; Ex parte A-G (Qld)* [2009] QCA 285 (22 September 2009); *R v Clark* [2009] QCA 361 (27 November 2009). In *Clark*, the Court also reduced the sentence from 10 years to 9 years.

765 *R v Sebo; Ex parte A-G (Qld)* [2007] QCA 426 (30 November 2007).

766 *R v Bligh* (Unreported, Supreme Court of Queensland, 26 May 2016) and *R v Humphreys* (Unreported, Supreme Court of Queensland, 27 January 2017).

767 *R v Williamson* (Unreported, Supreme Court of Queensland, 6 April 2017).

Conclusion

It seems clear that it was parliament's intention that in circumstances where the death of a child under 12 years is caused, the child's age should be treated as an aggravating factor for the purposes of making an SVO declaration.

The extent to which courts are applying this principle is difficult to assess, although in the recent decision of *R v O'Sullivan*, notwithstanding that the court did not impose an SVO, the court described the fact that the offence involved the killing of a young child as a legislative factor, as well as a clear aggravating factor.[768]

9.3.3 Criterion 3: Disparity between sentencing outcomes and the community's and parliament's views of offence seriousness

Chapter 5 of this report details current sentencing practices of the courts in sentencing for child homicide. Of relevance to the assessment of adequacy and appropriateness of sentencing outcomes, it shows:

- Of all sentenced homicide offences involving child victims over the 12-year period reviewed (2005–06 to 2016–17), 30 (41.7%) were murder and 42 (58.3%) were manslaughter offences.
- All adult offenders sentenced for murder received a mandatory sentence of life imprisonment.
- All offenders sentenced by Queensland criminal courts for child homicide over the 12-year period received custodial sentences.
- Adult offenders sentenced for child manslaughter were more likely to have pleaded guilty than those sentenced for child murder.
- Of sentenced homicide offences for adult offenders, child homicide is more likely than adult homicide to result in a conviction and sentence for manslaughter rather than murder.
- For adult offenders sentenced for manslaughter, the average custodial sentence was 8.3 years. Offenders sentenced for adult manslaughter received significantly longer average sentences (8.5 years) than offenders sentenced for child manslaughter (6.8 years).

An analysis of known child manslaughter cases sentenced in the most recent financial year (2017–18), summarised in

Table 42 in Appendix 6, reveals the most common sentence imposed on offenders convicted of child manslaughter in 2017–18 was a sentence of 9 years' imprisonment, with or without an SVO declaration. However, in a number of these cases an appeal against sentence or conviction has been lodged.

Based on the Council's research and community consultation, current sentencing practices for child homicide offences involving the use of sustained physical violence against a child are not viewed as adequate to meet the purposes of sentencing — in particular, to punish the offender for the loss of a child's life and to reflect the seriousness of the offending against a young vulnerable victim.

Sentences for child manslaughter are, on average, below sentences for manslaughter of adult victims, although the median sentence for manslaughter when categorised by the conduct or manslaughter type is similar (e.g. 8.0 years for manslaughter by violent or unlawful act, regardless of whether the victim was an adult or a child) and, in some instances, higher (e.g. 8.5 years for manslaughter by reason of diminished responsibility where the victim was a child, versus 7.7 years where the victim was an adult). This disparity is, in part, because child manslaughter cases more frequently consist of neglect or negligence, which attracts lesser penalties.

Conclusion

While the law is being implemented consistently with current sentencing principles and case authorities, current sentencing levels appear to be out of step with community views of offence seriousness and appropriate sentencing levels where offences involve the death of a child and the use of direct violence

768 (Unreported, Supreme Court of Queensland, 30 August 2018) 7.

against a child are concerned. While the community views manslaughter offences against children as more serious (because of the vulnerability of children), sentencing outcomes for manslaughter, when sub-categories of conduct forming the basis of the offence of manslaughter are considered, are broadly the same. If children's higher level of vulnerability was accorded the same weight in sentencing as the community considers is appropriate, higher sentences might have been expected to be imposed for manslaughter involving child victims.

There are limitations with the Council's research that need to be acknowledged; in particular that the focus groups are not necessarily representative of broader community views. Only limited information was provided to participants and, to this extent, may not reflect a detailed understanding of all the issues taken into account by the court in sentencing.[769]

9.3.4 Criterion 4: Court of Appeal statements or questioning that current sentencing levels are adequate

In Chapter 5 of this report, we reviewed relevant Court of Appeal decisions commonly referred to by sentencing courts in sentencing for child homicide — and more specifically, manslaughter, given murder carries a mandatory life sentence in Queensland.

On the basis of these decisions, it is clear that sentencing practices for child homicide have been relatively well settled in Queensland for at least the previous 30 years.[770] There have been few successful appeals on the basis of manifest inadequacy. Appeals allowed on this basis include:

- *R v Hall; Ex parte Attorney-General (Qld)*,[771] in which the appeal was allowed against a 4-year sentence, with a sentence of 6 years' imprisonment substituted. This case involved the violent shaking of a 19-day-old baby, leading to severe brain damage and the child's death 10 months later, in circumstances where the respondent had a significant prior criminal history for violence, including against children; and
- *R v Chard; Ex parte Attorney-General* (Qld), in which the court allowed an appeal against a sentence of 6 years' imprisonment, substituting the initial sentence with a sentence of 7 years' imprisonment ordered to be served cumulatively with 12 months' imprisonment activated under an earlier suspended sentence for unrelated offences. The Court of Appeal in allowing the appeal found that: 'The prolonged abuse of a baby of this age would call for a head sentence *at least in the range of eight to 10 years*' [emphasis added].[772]

In the 2009 decision of *R v Risely; Ex parte Attorney-General (Qld)*,[773] the Court of Appeal dismissed an Attorney-General's appeal in circumstances where the Attorney-General had argued that 'for unlawful killings of this type, a sentence of less than 10 years' imprisonment, which mandates a declaration that the offence is a serious violent offence, is manifestly inadequate'.[774] This decision and the circumstances involved in this case are discussed in more detail in Chapter 5.

The Court of Appeal in the later 2014 decision of *R v JV* (citing the earlier decisions of *Cramp, Streatfield, Green & Haliday, Webb, Hall, Potter* and *Chard*) commented that sentences imposed 'indicate 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'.[775] The appropriateness of these sentencing practices was not brought into question.

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769 There are studies that seek to address these limitations, see 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).

770 See *R v Walsh* (Unreported, Court of Criminal Appeal, Qld, CA No 85 of 1986, 12 June 1986).

771 *R v Hall; Ex parte A-G (Qld)* [2002] QCA 125 (5 April 2002).

772 *R v Chard; Ex parte A-G (Qld)* [2004] QCA 372 [23] (Williams JA, de Jersey CJ and Jones J agreeing).

773 *R v Risely; Ex parte A-G (Qld)* [2009] QCA 285 (22 September 2009).

774 Ibid 7 [29].

775 *R v JV* [2014] QCA 351 (19 December 2014) [31] (Gotterson JA, Morrison JA and McMeekin J agreeing).

There have, on occasion, however, been dissenting views expressed suggesting higher sentences may be warranted. For example, in the 2008 decision of *R v Potter; Ex parte Attorney-General (Qld)*,[776] Chesterman J (dissenting) found a sentence of 8 years' imprisonment with parole eligibility after 3 years for the respondent, who pleaded guilty on the basis that she was of diminished responsibility at the time of the offence, was manifestly inadequate. As noted in Chapter 5, Chesterman J (dissenting) was of the view that the sentence did not reflect the seriousness of the offence or the manner in which the child was killed, was at the bottom end of the indicated range (9 to 12 years) for manslaughter by reason of diminished responsibility ameliorated by the early parole eligibility date, and was outside the sentencing range, thereby indicating a sentencing error.[777] He suggested that a sentence of between 10 and 12 years was the appropriate sentence in the circumstances.[778]

Conclusion

There has been no indication given by the Queensland Court of Appeal, apart from in very limited circumstances, that sentencing for manslaughter involving children as victims does not provide a proportionate response to the objective gravity of child manslaughter.

On this criterion alone, there is not a strong case for reforms to current sentencing practices. However, as discussed above, this is only one of a number of criteria the Council has considered in suggesting a need for reform.

9.3.5 Criterion 5: No evidence of change in current sentencing practices following Court of Appeal's statements or questioning

This criterion does not apply based on the finding above that the Queensland Court of Appeal has not identified a need for reform. Therefore, this criterion has not formed a basis for the conclusions reached by the Council.

9.3.6 Criterion 6: Treatment of a category of offenders within an offence category

As discussed in Chapter 6 of this report, the treatment of manslaughter offences involving child victims at an aggregate statistical level involves the setting of lower sentences on average than for manslaughter offences involving adults. However, when sub-categories of offending are identified within this broader offence category, these differences largely disappear. It is apparent that more cases of negligence or neglect fall within child manslaughter cases, which necessarily results in lower average or median sentences.

As discussed in section 9.3.3 of this chapter, there may be some evidence of a shift in sentencing levels in the most recent financial year, with the most common sentence imposed for child manslaughter involving a young child being a sentence of 9 years' imprisonment. However, as noted above, a number of these sentences are subject to appeal.

While average sentences need to be treated with caution, given that extreme (both high and low) values will affect these averages, similar caution needs to be exercised in considering the use of median sentences, which may be influenced in a given year by the number of sentences imposed, and whether the offences captured within it fall at the more serious or less serious end of offending.

Conclusion

Assuming that sentencing practices for manslaughter involving child victims largely reflect those involving the same type of conduct but with adult victims, then in order to find that current sentencing levels are inadequate on this basis, there would need to be evidence that insufficient weight is placed on factors that warrant a higher sentence — such as the vulnerability of the child and/or particular sentencing purposes, such as punishment.

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776 (2008) 183 A Crim R 497.

777 Ibid 22 [95]–[98].

778 Ibid 23 [100].

Evidence that the same sub-categories of manslaughter attract the same (or similar) sentences regardless of whether the offence is committed against a child or an adult suggests that the vulnerability of child victims is not weighted in a way that results in higher sentences being imposed. For example, for the sub-category of manslaughter by violent or unlawful act — those offences of most concern to community members with whom the Council consulted, the median sentence was the same for offences committed against children and adults (8.0 years), although the average sentence for child manslaughter was slightly lower (8.1 years for child manslaughter, compared to 8.5 years for adult manslaughter).

9.3.7 Criterion 7: Weight given to aggravating and mitigating factors

As discussed in Chapter 4, section 9 of the PSA includes a non-exhaustive list of factors a court must take into account in sentencing an offender. This list includes broad considerations such as 'the presence of any aggravating or mitigating factor concerning the offender' and 'any other relevant circumstance' not otherwise listed.

Section 9(3) of the PSA also requires that for offences involving personal violence or resulting in physical harm to another person, a court must have primary regard to certain factors. These factors include the risk of physical harm to any members of the community if a custodial sentence were not imposed and the need to protect the community from that risk, the personal circumstances of any victim, the circumstances of the offence, the nature and extent of the violence used, the past record of the offender, the antecedents, age and character of the offender, any remorse or lack of remorse of the offender, any medical, psychiatric, prison or other relevant report in relation to the offender, and anything else about the safety of the community the sentencing court considers relevant.

A key issue the Council has been asked to advise on is whether 'existing sentencing considerations of deterrence, denunciation, rehabilitation, punishment and the protection of the community [and other sentencing factors listed under the PSA] are adequate for the sentencing of this cohort of offenders' and 'if specific additional legislative guidance is required'.

The question of whether additional legislative guidance is needed is of relevance to the appropriateness of sentencing outcomes on the basis of whether courts are giving, for example, too much weight to sentencing purposes or factors that do not align with community views about relevant purposes and factors in sentencing for child homicide or, conversely, are not placing sufficient weight on sentencing purposes and factors the community considers important in sentencing for these offences.

The analysis of sentencing remarks of adult (N=201) and child (N=33) manslaughter offences discussed in Chapter 4 shows that the most commonly stated or implied aggravating factor in both manslaughter involving a child victim and manslaughter involving an adult victim was that the offence involved violence (n=21; n=114). However, when analysing the aggravating factors most commonly stated or implied, there were differences between child and adult manslaughter cases.

The Council found that when sentencing for child manslaughter, judges stated or implied aggravating factors that related to the victim, such as the victim was under the care of the offender (60.6%), was vulnerable (39.3%), and suffered (39.3%). Comparatively, when sentencing for adult manslaughter, aggravating factors were primarily related to the offender, such as a relevant criminal history (i.e. for prior violent offences – 33.8%), use of a weapon (32.8%), and that the offence breached a current criminal and/or court order (i.e. parole or suspended sentence – 14.9%).

Results were different when reviewing mitigating factors because, with two exceptions,[779] the same mitigating factors were stated or implied in cases of manslaughter, regardless of whether the victim was a child or an adult. Although the order varies between the two groups, almost all factors related to personal mitigation, such as that the offender had mental health problems, or mitigation relating to post-offence conduct, such as confessing to police or rehabilitation efforts. The most commonly stated or implied mitigating factor for both cohorts was that the offender pleaded guilty, with the second being the offender expressed remorse and this was accepted by the court as genuine.

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[779] The two exceptions relate to mitigating factors more commonly identified in child manslaughter cases. These are that the fatal injury was not deliberate (n=10 cases) and that the offender was under stress at the time of the offence, such as financial or relationship stress (n=15). See also Chapter 4, section 4.6.5, Table 7.

Conclusion

The Council's sentencing remarks analysis supports the view that judges already treat as aggravating factors that the child victim was under the care of the offender, was vulnerable, and suffered in the period prior to death. The impact on sentencing outcomes in terms of the length of sentences imposed is difficult to quantify, although, as discussed above, the treatment of these factors as aggravating does not translate to higher sentences, on average, for offences committed against children than those committed against adults.

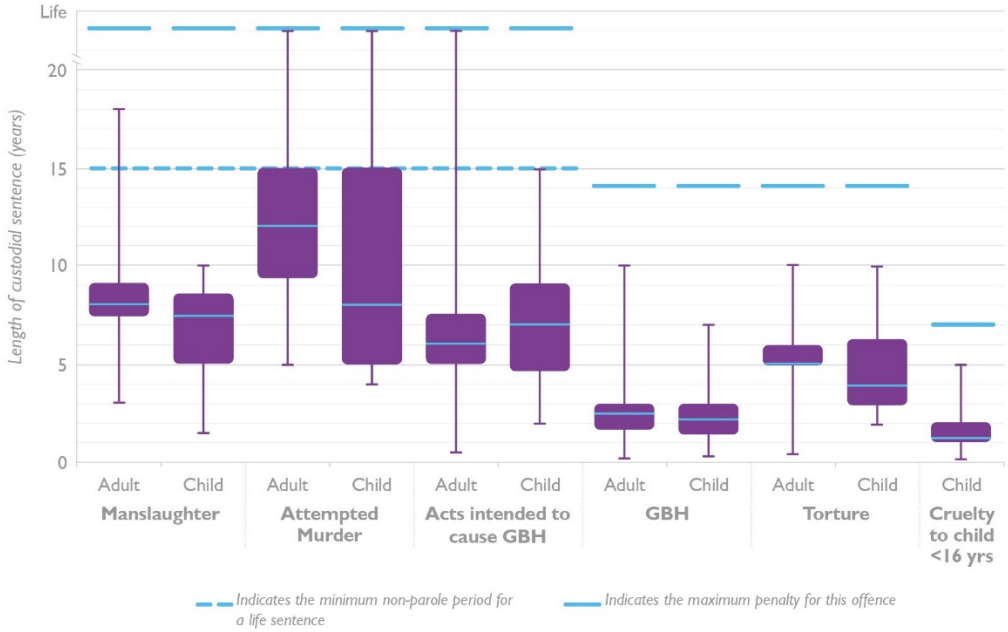
9.3.8 Criterion 8: Categorisation of the objective seriousness of child homicide offences

The categorisation of the objective seriousness of child homicide offences concerns the extent to which there is consistency between the assessed level of objective seriousness and the higher end of permissible sentences within the category of manslaughter, as well as whether there is consistency when assessing the objective seriousness of an offence in comparison with another offence with similar levels of harm and culpability.

Consistency in assessing objective offence seriousness and sentencing levels is difficult to determine in the current circumstances as the harm is not comparable to any other offence involving child victims given it involves a child's death. Other offences, such as acts intended to cause grievous bodily harm (GBH) (*Criminal Code* (Qld), s 317) and GBH (*Criminal Code* (Qld), s 320) may provide proxy measures because, while the extent of injury caused is less serious than death, the mental element is the same or similar (intention, as for murder in the case of acts intended to cause GBH, and, in the case of GBH, an absence of intention, nevertheless bringing about this outcome). Cruelty to children under 16 years also provides a potential comparator for manslaughter involving a failure to act. Given the vastly different levels of harm involved, and applicable maximum penalties, these offences provide an imperfect comparison. The Council, therefore, was constrained in analysing sentencing outcomes within these offence categories and the way they do or do not differ based on whether the victim is an adult or a child. The Council also considered differences in both the median and average sentence lengths by offence categories.

Figure 6 provides graphical representation of manslaughter and the selected comparator offences by victim type. Appendix 3 provides information about interpreting a box plot.

Figure 6: Custodial sentencing outcomes for manslaughter and comparator offences (MSO) by victim type, 2005–6 – 2016–17



Source: QGSO

The Council's analyses of comparator offences reveal over the 12-year dataset:

- the average sentences for attempted murder of an adult or child were higher than for manslaughter of an adult or child (12.1 years and 9.4 years, respectively, for attempted murder, compared to 8.5 years and 6.8 years for manslaughter);
- the average sentence for manslaughter of a child (6.8 years) was slightly below the average sentence for acts intended to cause GBH committed against a child victim (7.0 years). In contrast, for offences involving adult victims the average sentence for manslaughter was 8.5 years compared to 6.2 years for acts intended to cause GBH (adult victim);
- the average sentence for torture of an adult, which has a lower maximum penalty of 14 years, was 5.4 years, compared to 5.0 years for offences committed against children;
- cruelty to a child under 16 years, which has a maximum penalty of 7 years, recorded the lowest average sentence across the principal and comparator offences (1.5 years);
- grievous bodily harm (without intent), which carries a 14-year maximum penalty, recorded the second-lowest average sentences across examined offences (2.7 years for GBH involving adult victims, and 2.6 years for offences committed against a child).

The Council also found differences in the average sentence lengths for comparator offences committed against adults and children; but, in contrast to sentences for manslaughter, these differences were not statistically significant. In most cases, sentences involving adult victims were higher, with the exception of the offence of acts intended to cause GBH, which recorded higher average sentences for offences involving child victims.

Within these categories of offences, the average sentences imposed align with the objective seriousness of these offences, leaving aside factors that apply in individual cases, which make these more or less serious examples of offending. Those offences at the higher end of objective seriousness (based on the level of harm caused or risked and offender culpability) attracted the highest average sentences, while those at the lower end attracted the lowest average sentences. For an explanation of how objective seriousness was assessed for these purposes, see Chapter 7.

Conclusion

In contrast to manslaughter, no statistically significant differences were found in the sentences imposed for other offences used as comparators in terms of victim type (i.e. whether the victim was an adult or a child). In the case of manslaughter, the differences found can be explained by the higher proportion of child manslaughter cases based on criminal negligence or neglect (e.g. failure to seek medical assistance for an injured child), which generally results in lower average sentences than cases involving the direct use of violence against the victim.

Analysis of comparator offences also suggests that courts are more heavily weighting factors that suggest a high level of culpability or blameworthiness when assessing offence seriousness in the case of offences resulting in harm to a child, rather than the level of harm caused in assessing objective seriousness. For example, attempted murder, which requires an intention to kill to be established, results in a higher average sentence than manslaughter, even though the harm caused is lower — although in these cases the level of harm caused can also be very high.

The findings are generally consistent for offences involving an adult victim, although some different trends are evident (e.g. the lower average sentence for acts intended to cause grievous bodily harm committed against an adult).

9.3.9 Criterion 9: Approach to sentencing for child homicide in other jurisdictions

As discussed in Chapter 6, the laws of homicide across Australia are broadly consistent, although differences apply in terms of:

- the availability of partial excuses and defences to homicide;

- the legislating of sub-categories of homicide, such as in Victoria, which has introduced the offence of 'child homicide' (manslaughter of a child under the age of 6 years);[780] and
- the fault element to establish these offences — for example, some jurisdictions include reckless indifference to the probability of causing death as a separate basis for establishing the offence of murder, although this still requires that the accused foresaw or realised that the act or failure to act would probably cause the death of the deceased.[781]

Of the jurisdictions reviewed, none distinguish between homicide offences committed against adults and those committed against children in terms of the maximum (or minimum) penalties that apply to those offences, although some set a higher standard or minimum non-parole period where the victim is a child or in other circumstances. Some, such as New Zealand, also have specific aggravating factors that apply to offences involving child victims.

Due to the different offence and sentencing regimes in other jurisdictions, this review has not sought to compare sentencing outcomes in Queensland with those in other jurisdictions. Comparison of sentencing outcomes for child homicide would have required the Council to obtain data from other jurisdictions in addition to the associated sentencing remarks to enable it to manually code homicide offences and sentencing outcomes by age of the victim. Such data were not available, nor could an analysis have been completed within the timeframes of the Terms of Reference.

A high-level review of recent interstate cases (within the previous two financial years) undertaken by the Council[782] does, however, suggest that sentences for child manslaughter and child murder are not inconsistent with those imposed in Queensland. However, in a number of cases involving child murder, the non-parole period set by the court in other jurisdictions is higher than non-parole periods set for child murder in Queensland.

As discussed in Chapter 6, in Victoria, while there is a separate offence of child homicide of a child under 6 years, only three people have been convicted of this offence. Sentences imposed for this offence range from 9.0 to 9.5 years, with non-parole periods of between 6.0 and 6.5 years.[783]

The Council also considered high-profile child homicide cases in New Zealand and the United Kingdom and found higher sentences had been imposed for child homicide in some cases.[784]

For example, there was a particularly serious New Zealand manslaughter case involving a 3-year-old victim, which attracted a 17-year sentence with a 9-year non-parole period (some 8 years above the highest head sentence imposed for child manslaughter in Queensland where this was the most serious offence sentenced over the data period).[785] The High Court in imposing this sentence noted this was the highest sentence to its knowledge ever imposed in New Zealand for the manslaughter of a child.[786] The sentence was upheld on appeal.[787] In sentencing, the court cited two earlier cases, *R v Witika*[788] and

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780 *Crimes Act 1958* (Vic) s 5A.

781 See, for example, *Crimes Act 1900* (ACT) s 12(1)(b); *Crimes Act 1900* (NSW) s 18; *Criminal Code* (Tas) s 157. Also, in Victoria and South Australia, which adopt the common law definition of murder, it is enough if the person knew it was probable that either death or really serious injury would result.

782 A number of jurisdictions do not routinely publish sentencing remarks and this analysis is therefore not comprehensive. Details about recent murder and manslaughter sentences is therefore based on information contained in media reports. The cases identified are set out in Appendix 6.

783 See *R v Hughes* [2015] VSC 312 (26 June 2015) — sentence of 9 years' imprisonment imposed for the offence of child homicide, with a total effective sentence of 9 years 6 months' imprisonment with a non-parole period of 6 years 3 months; *DPP v Woodford* [2017] VSCA 312 (31 October 2017) — appeal dismissed in relation to a sentence of 9 years 6 months' imprisonment with a non-parole period of 6 years 6 months; *R v Rowe* [2018] VSC 490 (31 August 2018) — sentence of 9 years' imprisonment with non-parole period of 6 years.

784 See Appendix 6, Table 39 (NSW, NZ and Vic) and Table 41 (UK).

785 *R v Shailer and Haerewa* [2016] NZHC 1414 (27 June 2016).

786 Ibid [64] (Katz J).

787 *Shailer v The Queen; Haerewa v The Queen* [2017] NZCA 38 (3 March 2017).

788 *R v Witika* [1993] 2 NZLR 424 (CA).

R v Haerewa,[789] which also involved the use of violence resulting in a young child's death. In *R v Witika*, a sentence of 16 years' imprisonment was upheld on appeal for the killing of a 2-year-old child by her mother and stepfather, who had both been subjected to extreme abuse in custody following a jury trial (with the court suggesting a life sentence would have been appropriate if a principal offender could have been identified). In *R v Haerewa*, a 12-year sentence was imposed for the killing of a 4-year-old child by his 21-year-old stepfather. Other child manslaughter cases to which the court was referred were said to have involved 'starting points ranging from 10 years' to 12 and half years' imprisonment'.[790]

In Queensland, due to the operation of the SVO scheme, a 17-year sentence would attract a significantly longer non-parole period than applies in New Zealand of just over 13 years and 7 months. Because of the operation of the SVO regime in Queensland, in order to achieve the same non-parole period of 9 years in Queensland, the Court would have to set the head sentence substantially below 17 years, at 11 years and 3 months.

There are also examples in the United Kingdom in which higher head sentences have been ordered (e.g. a sentence of 18 years' imprisonment imposed in 2015 for the torture and manslaughter of an 8-year-old girl by a woman's female partner, for which the child's mother also received a 13-year sentence).[791]

Conclusion

It was not possible as part of the review for the Council to test in a rigorous way whether sentences in Queensland for child homicide were higher or lower than those in other Australian and overseas jurisdictions. In any event, the Council was cognisant of the different statutory regimes for offence type and sentencing frameworks in each jurisdiction that would limit such analysis.

However, the broad approach to sentencing for child homicide would seem to be largely consistent across Australia — with the exception of sentencing for child murder, given a number of jurisdictions no longer have a mandatory life sentence for murder. There are also differences in the way parole eligibility periods are set.

9.4 Council views

9.4.1 Adequacy of sentences for child homicide

Based on submissions made to the review, and the outcomes of the Council's consultations and focus group findings, sentencing for manslaughter cases involving direct use of violence against a young child is not viewed by the community as adequate.

After considering these views and other evidence gathered over the course of the review, the Council is of the view that sentencing for manslaughter offences committed against young children — particularly in cases involving the direct use of violence against a young child — does not adequately reflect the unique and significant vulnerability of child victims.

As the Council's research shows, the sentences for manslaughter analysed by manslaughter type are the same, or largely similar, regardless of whether committed against a child or an adult victim. For example, the median sentence for manslaughter by violent or unlawful act was 8.0 years regardless of whether the victim involved was a child or an adult, while the average sentence for child manslaughters of this type was slightly lower at 8.1 years compared to 8.5 years for those involving adult victims.

While the factual circumstances establishing manslaughter are diverse, the Council would have expected, on average, sentences for offences committed against children to be higher than those committed against adults had their high level of vulnerability been accorded significant weight in sentencing.

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789 *R v Haerewa* (Unreported, High Court Napier, S5/99, 18 August 1999); appeal dismissed Ex parte in *Haerewa v R* (Unreported, New Zealand Court of Appeal, CA431/99, 3 February 2000).

790 *R v Shailer and Haerewa* [2016] NZHC 1414 (27 June 2016) [45] (Katz J).

791 Refer to Appendix 6, Table 41.

In the Council's view, child manslaughter cases — particularly those involving the deliberate and direct use of violence against a child — demonstrate a high level of culpability on the part of offenders, taking into account:

- the high level of physical vulnerability of children, which makes them particularly susceptible to serious injury resulting in death by use of even a low level of force;
- the high degree of dependency of children on caregivers to nurture and care for them, children's right to feel safe and secure when in their care, and the significant breach of trust involved when a child's carer fails in this duty;
- children's low level of psychosocial maturity, which may make it difficult for them to understand what is occurring and to seek help from others, or to remove themselves from a situation where they are being abused or neglected.

All other factors being equal, the targeting of a defenceless and vulnerable child makes these offences more serious than the same offence committed against an adult victim (as opposed to the level of harm caused, which in all cases of homicide is at the highest level of harm — the loss of a person's life).

In reaching this conclusion, the Council recognises differences in child homicide cases when compared to adult homicide cases, which reflect inherent differences in the physical and psychological vulnerability of children. In particular, the level of violence required to cause a child's death is far below that generally required to bring about the death of an adult victim. The use of any form of violence against a child, who is helpless at the hands of an adult, is what makes these offences inherently more serious — not just the type and extent of violence used. The fact a lower level of force can bring about a child's death should not in itself be a barrier to higher sentences being imposed.

The Council also has taken into account that the range of sentences imposed for manslaughter committed against young children has remained relatively stable for at least the last 30 years, with the majority of sentences falling within a relatively narrow band of sentences. Given improved understanding of the significant long-term impacts of child abuse and neglect, and changes in community attitudes towards the use of physical punishment against children, higher sentences for these offences (particularly those involving the direct use of violence) in the Council's view are warranted.

Three in four sentences imposed for adult manslaughter over the 12-year data period examined by the Council (75.3%) fell between 7.0 and 10.0 years, in contrast to sentences for child manslaughter where a smaller percentage (close to two in three, or 65.7%) fell within the range of 7.0 to 9.0 years.

No sentences of over 9 years were imposed for child manslaughter in circumstances where the child was under 12 years, even where the level of violence used and which caused the child's death was described as 'cruel and brutal' and involving the use of 'systematic and persistent use of gratuitous violence' against a very young child.[792]

Advice 2: Adequacy of penalties imposed on sentence for child homicide offences — manslaughter of a child under 12 years

Penalties imposed on sentence for manslaughter offences committed against children under 12 years — in particular, those offences involving the direct use of violence — do not adequately reflect the unique and significant vulnerabilities of child victims. Additional legislative guidance to respond to this issue is required (see Recommendation 1).

792 *R v Humphreys* (Unreported, Supreme Court of Queensland, 27 January 2017). In this case, the sentencing judge took into account a number of factors in mitigation including the offender's guilty plea, indicating cooperation and remorse, his prospects of rehabilitation, and that he suffered from a head injury that may have affected his ability to cope with financial and other pressures.

9.4.2 Recommendations for reform

The Council considered various means of supporting courts to better reflect children's vulnerability in sentencing, including:

- creating a presumption in favour of an SVO declaration being made (or considered) in all cases of child manslaughter where the head sentence is to be set under the 10-year threshold for the automatic making of such a declaration;
- clarifying the criteria to be used by courts in determining whether to make such a declaration; and
- adopting more directive forms of sentencing guidance, such as the introduction of defined-term standard non-parole periods or standard sentences, which have been adopted in some jurisdictions, such as NSW and Victoria, to signal the sentence or non-parole period that is appropriate for cases falling within the mid-range of objective seriousness.

The Council has determined the best means of achieving greater recognition of children's vulnerabilities in sentencing is to create a new aggravating factor in section 9 of the PSA. Importantly, this approach will retain sentencing flexibility, taking into account the diverse circumstances in which these offences occur, while emphasising the factors that make these offences more serious.

The reform recommended has the advantage of applying not just to the setting of the non-parole period, but also to the setting of the head sentence. The Council considers this is a distinct advantage of this approach over other potential changes contemplated to the operation of the SVO scheme.

The Council has significant and broader reservations about the operation of the SVO scheme and its impact on sentencing levels for these offences, which are discussed below.

The Council is also conscious there is a current case subject to appeal that may provide further clarification to courts about how the current aggravating factor of age is to be applied by courts where the making of a declaration is discretionary.[793] The need for further statutory guidance, the Council suggests, is best assessed when the outcome of this appeal is known.

The proposed aggravating factor will serve two primary purposes. First, it will support courts' treatment of these offences as more serious and therefore deserving of more severe punishment. Secondly, it will meet the sentencing purpose of deterrence and denunciation — sending a clear message to the community that violence against children of any kind is wrong and will not be tolerated.[794]

The issue of vulnerability will introduce an added statutory dimension to the assessment of offence seriousness. It will be additional and separate to the existing requirement under Part 9A of the PSA for courts — when deciding whether to make an SVO declaration in circumstances in which the making of this declaration is discretionary — to treat the age of the child as aggravating where the offence caused the death of a child under 12 years.

The Council recommends:

- the new aggravating factor should apply where the court is sentencing an offender for an offence resulting in the death of a child under the age of 12 years, aligning with the existing age criterion for the making of an SVO declaration in s 161B of the PSA and when children are at highest risk of homicide due to abuse or neglect;
- the aggravating factor should be limited to the defencelessness of the child victim and their vulnerability, taking into account that other specific aggravating features (such as the extent of violence used) are already captured within the scope of section 9(3), and that children's defencelessness and vulnerability are at the essence of what makes these offences more serious. The Council is concerned that listing a number of factors, as is the approach in New Zealand,

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793 *R v O'Sullivan* (Unreported, Supreme Court of Queensland, 30 August 2018).

794 This same point is made by Kate Warner in her review of hate crime sentencing provisions, while also noting empirical evidence suggests there is little support for the hypothesis that increasing the severity of sentences (marginal deterrence) is effective in reducing crime: Warner, above n 695, 392.

may imply that child homicides that do not share all the listed features are somehow less serious or deserving of appropriate punishment; in the Council's view, any potential for this to occur through the creation of sub-categories of child homicide should be minimised;

- the new aggravating factor should support the court in setting a higher sentence than might previously have been the case through its former treatment as a general aggravating feature;
- the new provision should not restrict the ability of courts to take into account other factors listed in section 9 of the PSA, including specific factors of relevance when sentencing for offences involving violence under section 9(3) of the Act, and the treatment of the fact an offence is a domestic violence offence as an aggravating factor.

Other jurisdictions that have introduced similar statutory aggravating factors for sentencing purposes for offences against children, such as New Zealand, have included the magnitude of the breach of trust between the child victim and offender as a separate aggravating factor. While an important sentencing consideration, the Council determined that it is unnecessary to separately identify breach of trust as an aggravating feature on the basis it is already encompassed within the concept of vulnerability. Many submissions made to the Council and participants at the community summits described the particular vulnerabilities of children in terms of their:

- innocence and vulnerability in society;
- dependence on, and trust in, their parents (or other carer) for survival;
- lack of physical and emotional maturity; and
- inability to protect themselves.

The Council considers that all of these elements fall within the scope of the defencelessness of the victim and their vulnerability. What makes a child vulnerable to abuse and neglect resulting in their death is that, in many cases, they are in the care of, and reliant upon, caregivers (most often a parent or step-parent), who not only have failed in this duty but have done so to such an extent that it has resulted in the child's death.

The Council is aware there is potential for arguments to be made that the factors of vulnerability and defencelessness should apply equally to other vulnerable groups, such as adults with a significant mental disability or the elderly. The Council's view is that children as a class of victim are in a uniquely vulnerable position and it is appropriate, on this basis, to accord them special recognition. The identification of specific aggravating factors applying to children will not prevent the courts from taking similar factors of vulnerability into account in other circumstances as is appropriate in the individual circumstances of the case.

The Council also notes comments made by legal practitioners that these sorts of reforms are unnecessary as there is sufficient guidance provided under section 9(3) of the PSA, and courts routinely take issues of vulnerability and other matters that commonly arise in child homicide cases into account in sentencing. While the Council takes no issue with this, as discussed in Chapter 7 of this report, in close to two-thirds of all child manslaughter cases reviewed as part of the Council's sentencing remarks analysis (n=20; 60.6%), the victim's vulnerability was not referred to. The Council accepts this does not necessarily mean the child's vulnerability did not factor into the court's decision, or that substantial weight was not placed on it, but it does suggest a need for additional guidance to be provided to courts to ensure the community can be confident that the courts are reflecting this in sentencing.

Giving statutory recognition to children's vulnerability as an aggravating factor in these cases will encourage courts to make express reference to this in sentencing and, by referring to this factor, express strong condemnation of the use of violence against children and serious neglect. It will also make clear parliament's intention for child homicide cases with these features to be treated as objectively more serious for the purposes of sentencing, thereby justifying a higher sentence.

Recommendation 1: Introduction of new aggravating factor for child homicide offences

Section 9 of the *Penalties and Sentences Act 1992* (Qld) should be amended to include a requirement that, in sentencing an offender for an offence resulting in the death of a child under 12 years, courts must treat the defencelessness of the victim and their vulnerability as an aggravating factor.

9.4.3 Review of new aggravating factor for sentencing of child homicide offences

The Council's intention in recommending the introduction of statutory aggravating factors for the purposes of sentencing is to shift sentencing practices for child manslaughter over time. The Council is particularly concerned that this outcome is achieved in the case of child manslaughter cases falling at the more serious end, involving conduct just falling short of murder (e.g. where there has been intentional violence used, but without an established intention to cause grievous bodily harm or the child's death).

The Council accepts there is some risk that sentences might not increase based on the suggested reforms. The Council notes comments made by the Court of Appeal in the recent case in March 2018 of *R v Hutchinson*, in which Mullins J said about the introduction of the domestic violence circumstance of aggravation:

> The enactment of subsection (10A) of s 9 of the Act reflects the implementation of the policy of the Legislature that the fact the offender has been convicted of a domestic violence offence is an aggravating factor, when the sentencing judge takes account of all the relevant factors on the sentencing. That is likely to have an effect over time on the sentencing for offenders convicted of offences that are also domestic violence offences, but the effect in any particular case will depend on the balancing of all the relevant factors related to that offending and offender.[795]

In *Hutchinson*, the Court of Appeal refused an application for leave to appeal against sentence of 15 years and 6 months' imprisonment with an SVO declaration imposed at first instance (increased from 14 years to take into account the overall criminality involved with a separate fraud charge). The sentencing judge in setting the sentence stated he proposed to give effect to the policy objectives of subsection 10A and to reflect the serious criminal behaviour of the offender 'violently causing [his] wife's death' by imposing a sentence of 14 years' imprisonment at the upper end of the range suggested by the comparable cases.

This judgment appears to indicate that, in circumstances confined to where there are comparable cases that suggest the upper end of the sentencing range is appropriate, a legislative change of the nature of section 9(10A) may lead to courts imposing sentences towards the upper end of the range, over time.

To ensure the amendments achieve their legislative intention, if ultimately enacted by parliament, the Council recommends the amendment be reviewed post-introduction. The Council envisages this will involve:

- a process review 12 months post-commencement to assess how successfully this change has been implemented;
- a two-year outcome review to assess at an early stage the impact on sentence lengths and treatment of relevant sentencing factors; and
- a five-year full evaluation, with the Council signalling that if the amendments are having their desired impact to inform whether there might be a need to consider further reforms.

795 *R v Hutchinson* [2018] QCA 29 (9 March 2018) 10 [40].

Recommendation 2: Review of treatment of new aggravating factor for sentencing purposes

The Queensland Government should review the effectiveness of the proposed reforms post-commencement.

9.4.4 Impact of SVO scheme

In presenting its recommendations, the Council is conscious that the SVO scheme may have had the unintended consequence of placing downward pressure on head sentences for child manslaughter — including due to courts' consideration of the impact on the non-parole period should a sentence of 10 years or more be imposed. When setting a sentence of 9 years, the court still has the ability to take an offender's plea and other mitigating factors into account in setting the appropriate parole eligibility date; however, once the sentence is set at 10 years or higher, the court's discretion to set the date for parole eligibility is removed.

The Council is also aware that the impact of the SVO scheme will not be avoided through the introduction of a new aggravating factor. The reforms recommended may lead to higher sentences being imposed than are currently imposed and more offenders being subject to an automatic SVO declaration. However, even with the introduction of this new aggravating factor, the SVO scheme may result in head sentences being set at a lower level than they otherwise might should courts have full sentencing discretion in relation to setting the parole eligibility date because of the need to take mitigating factors (such as a guilty plea) into account in a meaningful way.

The New Zealand case example discussed above in section 9.3.9 highlights this issue.

The Council does not consider it appropriate to make recommendations about potential reforms to the SVO scheme, given the wide range of offences to which the SVO scheme applies and the specific and narrow Terms of Reference. However, given the potential impact of the SVO scheme on sentencing levels in Queensland, the Council suggests that this is an important area for future investigation.

Any future review should identify how sentencing levels have been impacted by the introduction of the SVO scheme, and any reforms required to ensure any existing barriers to achieving higher head sentences in Queensland for child manslaughter and other offences listed in Schedule 1 of the PSA are removed.

Advice 3: Impact of the serious violent offence scheme on sentencing

The Council is concerned that the operation of Part 9A of the *Penalties and Sentences Act 1992* (Qld) is exerting downward pressure on head sentences for child manslaughter in Queensland. A court is required, as a form of mandatory sentencing, to declare an offender convicted of a serious violent offence when imposing a sentence of 10 years or more for listed offences (including manslaughter). This unintended impact highlights the importance of fully considering all potential implications of reforms to sentencing law and practice.

To respond to these concerns, the Council suggests the Queensland Government consider initiating a review of the serious violent offence (SVO) scheme both in relation to its operation for child manslaughter and more generally. This review should identify how sentencing levels have been impacted by the introduction of the SVO scheme, and any reforms required to ensure any existing barriers to achieving higher head sentences in Queensland for child manslaughter and other offences listed in Schedule 1 of the Act are removed.

9.4.5 Minimum non-parole period for murder

Another aspect of the appropriateness of sentences for child homicide is the minimum non-parole period that applies to murder. As discussed in Chapter 5, 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).[796]

While the non-parole period for murder is generally 20 years (increased from 15 years in 2012),[797] it is 25 years if the person killed was a police officer in defined circumstances,[798] and 30 years if the person is being sentenced for more than one murder or has a previous conviction for murder.[799] A sentencing court can increase, but not decrease, the mandatory non-parole period.[800]

The Council acknowledges views submitted by some that the same minimum non-parole period should apply to the murder of children as currently applies to the murder of police officers, who, unlike children, are adults willingly engaged in a potentially risky occupation. While the Council is sympathetic to these views, it is not supportive of mandatory minimum penalties of this kind generally, on the basis they may result in injustice in individual cases and, in the case of child homicide, may, in combination with the current life sentence that applies to murder, discourage the possibility of offenders entering a guilty plea.

Taking the above matters into account, the Council makes no recommendation to increase the current mandatory minimum non-parole periods that apply to the murder of a child. Where a higher non-parole period is warranted, the court retains discretion to set the non-parole period above the minimum non-parole period mandated by law.[801]

The Council further notes that the release of offenders is not automatic. When considering whether a prisoner should be granted a parole order, the overriding consideration for the Parole Board Queensland is community safety. The Council has been advised by the Parole Board that community safety 'is the highest priority for the Board in its decision-making process'.[802] As discussed in Chapter 5, in assessing a prisoner's suitability for parole release, the Parole Board takes into account a range of factors, as set out in the Ministerial Guidelines. These factors include:

- the prisoner's criminal history and pattern of offending;
- whether there are any circumstances likely to increase the risk the prisoner presents to the community;
- the parole recommendation of the sentencing court or statutory minimum non-parole period, and any comments made by the judge during the sentence hearing;
- any medical, psychological or psychiatric risk assessment reports relating to the prisoners — tendered at sentence or obtained while the prisoner has been in prison; and
- the prisoner's behaviour in prison.

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796 *Criminal Code* (Qld) s 305(1). In relation to indefinite sentences, see *Penalties and Sentences Act 1992* (Qld) pt 10, 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, 176(3)(b).

797 *Corrective Services Act 2006* (Qld) s 181(2)(c) as amended by *Criminal Law Amendment Act 2012* (Qld) s 7.

798 *Criminal Code* (Qld) s 305(4) and *Corrective Services Act 2006* (Qld) s 181(2)(b).

799 *Criminal Code* (Qld) s 305(2) and *Corrective Services Act 2006* (Qld) s 181(2)(a).

800 *Penalties and Sentences Act 1992* (Qld) ss 160C(5) and 160D(3); *Criminal Code (Qld)* ss 305(2) and 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).

801 See, for example, *R v Cowan; R v Cowan; Ex parte A-G (Qld)* [2015] QCA 87 (21 May 2015) where a 20-year non-parole period was set — five years above the minimum non-parole period that applied to the offence taking into account when it was committed. However, the Council notes this power is exercised rarely, with *Cowan* being the first instance in Queensland where the parole eligibility date for a single murder has been postponed beyond 20 years. For a more recent example, see *R v Appleton* [2017] QCA 290 (24 November 2017). This involved an adult rather than a child victim.

802 Letter from Michael Byrne, above n 457.

The Council also acknowledges a suggestion made that there should be an option for offenders sentenced for murder in Queensland to serve the full period of their sentence in custody without the possibility of parole.[803] The Council does not consider it appropriate to comment on this proposal, given it was asked to review the appropriateness of sentencing for child homicide only, not the adequacy of sentencing practices for murder or other homicide offences (including non-parole periods) more generally.

The Council further notes that in jurisdictions where this option exists, such as NSW, South Australia, Tasmania, Victoria and Western Australia, the making of such an order is discretionary.[804] In NSW, in circumstances where a life sentence is ordered, this must be served for the term of an offender's natural life; however, the majority of sentences imposed for murder are for a defined term rather than the maximum penalty of life imprisonment.[805] A life sentence can only be imposed if certain criteria are met.[806] This is distinctly different from the Queensland sentencing regime for murder, which requires a life sentence be imposed on adult offenders in all cases, with no discretion for this to be mitigated or varied.

9.5 Conclusion

This chapter set out the Council's response to key aspects of the Terms of Reference, namely:

- determine whether the penalties currently imposed on sentence for criminal offences arising from the death of a child adequately reflect the particular vulnerability of child victims;
- assess whether existing statutory sentencing considerations are adequate for the purposes of sentencing for these offences and whether specific additional legislative guidance is required; and
- 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.

To respond to the Terms of Reference, the Council developed criteria to make an evidence-based assessment as to whether sentences for child homicide offences in Queensland are adequate. This chapter set out the research, consultation findings and other evidence addressing the criteria that formed the basis of the Council's views.

The Council has concluded that sentences for manslaughter offences committed against children under 12 years — particularly in cases involving the direct use of violence — do not adequately reflect the unique and significant vulnerabilities of child victims. The Council has recommended amending the PSA to introduce a new aggravating factor to apply when a court is sentencing an offender for an offence resulting in the death of a child under the age of 12 years. The Council has also recommended that the proposed amendment be monitored to assess its effectiveness, post-commencement.

- Recommendation 1: Introduction of new aggravating factor for child homicide offences
- Recommendation 2: Review of treatment of new aggravating factor for sentencing purposes

This chapter also set out why the Council did not make recommendations in relation to the SVO scheme or changes to the minimum non-parole period for murder.

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803 Submission 14 (Name withheld).

804 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 61(1); *Sentencing Act 2017* (SA) s 47(5)(e); *Sentencing Act 1997* (Tas) s 18; *Sentencing Act 1991* (Vic) s 11(1); *Sentencing Act 1995* (WA) s 90(1)(b).

805 For a schedule of recent cases, see the NSW Public Defenders website: <https://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/Sentencing%20Tables/Public_Defenders_Sentencing_Tables.aspx>.

806 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 61. This requires the court to be satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence. For a discussion of how these provisions are to be applied in practice, see R *v Farhad Quami, Mumtaz Quami & Jamil Qaumi (Sentence)* [2017] NSWSC 774 (16 June 2017) [182]–[193] (Hamill J).

Chapter 10 — How victims' families experience the criminal justice system

10.1 Introduction

For families, homicide is the most extreme, destructive and distressing form of violence that can occur. It results in long-lasting trauma not only to families, but to their friends and the wider community — and even more so when the person killed is a child.

Courts have expressly acknowledged the challenges in sentencing for these offences in light of the significant loss that has been experienced.[807] 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.[808]

The sentencing of an offender for child homicide comes at the end of a lengthy legal process including the reporting of the death, subsequent investigation, the decision to charge and prosecute, the committal and — where contested — the trial process. As the Council's research confirmed, the time from when a charge is laid through to the sentencing of an offender can extend over many months, and more usually years.

In consulting with family members of victims of child homicide, it has become clear to the Council that their treatment throughout the process can have a significant impact on their overall satisfaction with the criminal justice system process.

Positive engagement and support of family members of victims of child homicide can also promote their understanding of the sentencing outcome. This, in turn, can improve the community's understanding of the sentencing process.

Drawing on the experiences of victims' families and advice from victims of crime support services, this chapter explores the:

- experiences of family members of victims of child homicide;
- support currently provided;
- ways in which the criminal justice system might seek to improve its engagement and response to victims, particularly following the death of a child.

10.2 Impact of child homicide

A recurring theme in the Council's research, and one that was identified throughout the consultation process, was the significant and long-term harm caused to family members when a child has been unlawfully killed. The impact of an individual homicide is broad and deep, affecting not only the surviving family but many other people. This includes neighbours, friends, children and others who might have come into contact with the child, including through their childcare arrangements and the broader community.

A survey of over 400 bereaved families in the United Kingdom by the Commissioner for Victims and Witnesses, found that:[809]

- the vast majority (80%+) had suffered trauma-related symptoms;

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807 See, for example, *R v Earel* (Unreported, Supreme Court of Queensland, 11 February 2014).

808 *R v Appleton* [2017] QCA 290 (24 November 2017) 6 [27] (Sofronoff P, McMurdo JA and Brown J agreeing).

809 Louise Casey CB, *Review into the Needs of Families Bereaved by Homicide* (July 2011) 5–6 (note: 417 responses were received, with a response rate of 27%).

- three-quarters suffered depression;
- one in five became addicted to alcohol;
- all respondents reported their health was affected in some way, with over 80 per cent reporting impacts to their physical health;
- one in four respondents had stopped working permanently;
- one in four respondents had to move home;
- three-quarters reported impacts to their other relationships;
- 44 per cent who experienced relationship problems with a spouse said it led to divorce or separation;
- 59 per cent had difficulties managing their finances; and
- almost a quarter (23%) gained sudden responsibility for children as a result of the killing.

The same study found bereaved families were disproportionately in receipt of means-tested benefits (35% compared to the national average of 14%) and twice as likely to be living in social housing (37% were living in social housing, compared to 18% nationally). This suggests that those victims bereaved by homicide disproportionately fall within the less advantaged, poorer sections of society.

The authors of the UK study noted homicide places significant financial burdens on families. It found such families will be less able to cope with increased costs and the loss of earnings that flow from a traumatic bereavement 'and are therefore more reliant on public services such as housing, welfare benefits and criminal injuries compensation to help them deal with costs arising from homicide'.[810]

In July 2018 the UK Home Office released a research report on the economic and social costs of crime, which considered three main cost areas:[811]

- costs in anticipation of crime victimisation (e.g. cost of home-security systems)
- costs as a consequence of crime (e.g. cost of property stolen or damaged)
- costs in response to crime (e.g. costs to the police and criminal justice system).

This research found the offence with the highest estimated unit cost was homicide at £3.2m, of which the highest proportion was due to the consequences of crime — primarily, physical and emotional harm.[812] In terms of response to crime costs, the vast majority of costs for homicide related to other criminal justice system costs, rather than police. And most of those criminal justice system costs were for non-legal aid defence and Legal Aid.

Australian research has also found that the circumstances of filicide perpetrators and their families are characterised by socio-economic disadvantage, unemployment and low education:[813]

- Child homicide victims and their families typically live in areas of greatest socio-economic disadvantage.
- Most child homicide or filicide perpetrators were not in paid employment at the time of the killing and those who were employed had unskilled, low-paid occupations.
- Low educational attainment was another common characteristic of child homicide/filicide perpetrators.

The Council's research report found that the most and second-most disadvantaged categories of Queensland postcodes were home to a disproportionately high percentage of child homicide and

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810 Ibid 10.

811 Matthew Heeks et al, Home Office (UK), 'The Economic and Social Costs of Crime: Second Edition' (Research Report 99, 2018) 6.

812 Ibid 6, 15.

813 Queensland Sentencing Advisory Council, above n 148, 52.

attempted child homicide offenders over the 12-year period. For example, one group of postcodes contained almost half of all child murder offenders but only 15.9 per cent of Queensland's general population.[814]

These findings suggest Queensland follows a similar pattern to that documented in the United Kingdom — that homicide disproportionally affects families in poorer locations. Notably, research conducted in New Zealand also found twice as many child homicides occurred in the most deprived neighbourhoods, with no child homicides recorded in neighbourhoods described as the least deprived over the five-year review period.[815]

10.3 Rights of victims of crime

The Queensland Charter of Victims' Rights (the Charter) sets out the rights and entitlement of victims of crime in Queensland.[816] In summary, these rights include:

- to be treated with courtesy, compassion, respect and dignity, taking into account each victim's needs;
- to have their personal information protected from unauthorised disclosure, and to be protected against unnecessary contact with the accused, or violence or intimidation during court proceedings by the accused, defence witnesses and family members and supporters of the accused;
- to be informed at the earliest practicable opportunity about services (including support services) and remedies available to them;
- to be informed about the progress of the criminal justice process, including progress of the investigations, charges brought against the defendant and substantial changes to these charges or acceptance of a plea of guilty to a lesser charge, and details of court proceedings.

Under the Charter and the provisions of the PSA, victims also have a right to make a Victim Impact Statement (VIS), the nature and content of which is discussed below.

The rights of victims as outlined in the Charter reflect different aspects of procedural justice. Adherence to these principles is important to victims feeling heard and part of the process. In contrast, a lack of engagement with and involvement of bereaved family members may have a number of negative impacts, including compounding or exacerbating their existing trauma, disrupting the natural grieving process and, at certain key stages, re-traumatising these families.[817]

10.4 Information and support for family members

10.4.1 Agency obligations under the *Victims of Crime Assistance Act 2009* (Qld)

Family members of victims of child homicide receive information and support via a number of channels during the investigation and court process.

Criminal justice agencies are required to meet certain minimum standards in providing support and assistance to victims. These standards are set out under the *Victims of Crime Assistance Act 2009* (Qld) or VOCAA.

814 Ibid 52–53.

815 Martin and Pritchard, above n 28, 47.

816 *Victims of Crime Assistance Act 2009* (Qld) sch 1AA, pt 1, div 2.

817 Marilyn Armour and Mark S. Umbreit, 'The Ultimate Penal Sanction and "Closure" for Survivors of Homicide Victims, (2007) 91 *Marquette Law Review* 381 cited in Casey, above n 809, 32.

Significant changes were introduced to VOCAA on 1 July 2017 following a review of the legislation.[818] The objective of these changes was to ensure the legislation 'continues to provide an effective response to assist victims of crime'.[819]

Changes made included replacing the former *Fundamental Principles of Justice for Victims Of Crime* in the Act with the current Charter.[820] The Charter informs victims about what they can expect from government departments and non-government agencies that support crime victims. It also places an onus on relevant agencies to provide information to victims proactively, if appropriate and practical to do so. The Charter applies to the Queensland Police Service (QPS) and the Office of the Director of Public Prosecutions (ODPP) — 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:[821]

- 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 outcome 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, but the Charter does not create enforceable legal rights. Victim Assist Queensland (VAQ) can receive complaints about breaches of the Charter relating to any agency, although complaints can also be made directly to the agency concerned.

10.4.2 Queensland Police Service

It is the practice of the QPS to assign a Family Liaison Officer (FLO) to a victim's family in every homicide investigation. The FLO provides information and support to the family throughout the investigation and court process. Generally, a FLO, along with the arresting officer, will stay connected with the family through the whole criminal justice process.

The QPS has also 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'.[822] The CTU, which comprises officers experienced in child abuse and suspicious death investigation, can be deployed across Queensland to assist regional and metropolitan investigations.[823]

As noted earlier, unlike most homicides involving adult victims, child homicide investigations are often protracted as a result of their complexity.[824] Forensic pathology results often take a long time because some processes require time to undertake, and reports may take 15 to 24 months to complete.

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818 These amendments were made by the *Victims of Crime Assistance and Other Legislation Amendment Act* 2017 (Qld).

819 *Explanatory Notes*, Victims of Crime Assistance and Other Legislation Amendment Bill 2016 (Qld) 1.

820 *Victims of Crime Assistance Act 2009* (Qld) ch 2 and sch 1AA.

821 Ibid sch 1AA, pt 1, div 2.

822 Queensland Police Service, *Annual Report 2016–17* (2017) 37.

823 Ibid 36–37.

824 Preliminary meeting with Queensland Police Service (Homicide and Child Trauma Unit) on 20 December 2017.

10.4.3 Office of the Director of Public Prosecutions

In most cases of child homicide, once a case has progressed through the committal stage it will transfer from the QPS to the ODPP. In some cases the ODPP becomes involved at the committal stage; this is the case for matters listed in the Brisbane and Ipswich Magistrates Courts and in other court locations at the request of police.

The *Director's Guidelines* set out the requirements for ODPP staff for consulting with victims of crime.[825] Responsibilities include consulting with families during the court process and about changes to charges against the defendant. The *Director's Guidelines* also outline the obligations of ODPP staff regarding the *Fundamental Principles of Justice for Victims of Violent Crime* (now the Charter). These include treating victims in a way that is responsive to their age, sex or gender identity, race or indigenous background, cultural or linguistic identity, sexuality, relevant disability, or religious belief.[826]

On receiving a case, the ODPP will immediately allocate the matter to a Consultant or Principal Crown Prosecutor together with a Senior Legal Officer and a Victim Liaison Officer (VLO).[827] The VLO is the first point of contact the family establishes with the ODPP.[828] A VLO is required to make contact with a victim's family within two business days.[829] The VLOs are part of the ODPP's Victim Liaison Service, and they are located around the state. Their role is to ensure victims' families receive timely information about the prosecution of an offender, the trial process, and their role as potential prosecution witnesses. VLOs also provide information of a general nature, such as brochures on the court process and support services available.[830]

In its annual report, the ODPP notes that, 'a significant part of the Victim Liaison Officer's role is to refer victims to support agencies, including Victim Assist Queensland'.[831] In the initial letter sent to families, the VLO is to include:

- a consent form to be completed by the victim's family (this allows the victim to consent to other parties being kept updated in relation to the matter, e.g. QHVSG);
- brochures about the ODPP, the court process and the QHVSG;
- information about financial assistance and VAQ.[832]

At the completion of a prosecution, the Crown Prosecutor and/or the VLO will also provide the family with the details of the outcome of the matter and explain the outcome to the family. The ODPP has advised that the VLO at this stage will also provide families with a brochure explaining sentences imposed, along with information and an application in relation to the Victims Register if the offender is sentenced to a period of imprisonment.[833]

A VLO's role reflects the ODPP's obligations under the Charter's requirements that victims be kept informed about matters including:

- details of relevant court processes, including when the victim may attend a court proceeding and the date and place of a hearing of a charge against the accused;
- the outcome of a criminal proceeding against the accused, including the sentence imposed and the outcome of an appeal; and
- if they are a witness at the accused's trial, the trial process and their role as a witness.

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825 Office of the Director of Public Prosecutions, *Director's Guidelines* (as at 30 June 2017) (2018) 27–28 ('22 – Consultation with Victims').

826 Office of the Director of Public Prosecutions *Annual Report 2016–17* (2018) 22.

827 Submission 39 (Office of the Director of Public Prosecutions).

828 Ibid.

829 Ibid.

830 Ibid.

831 Ibid.

832 Ibid.

833 Ibid.

The workload of VLOs is significant. In 2016–17, VLOs (representing 14 full-time equivalent positions) recorded 31,184 instances of contact with victims of crime, their family members or support persons to provide timely information about court events via telephone, correspondence, in person, or via SMS messaging.[834] VLOs are employed as administrative officers and are not required to carry any mandatory qualifications. The average length of services, as reported in the ODPP's *2016–17 Annual Report*, is 9.43 years.[835]

In 2017, the ODPP released a survey to victims and their families regarding the service provided by the ODPP and their VLO. The survey was distributed to several key groups of victims and their families, including next of kin and relatives of deceased victims. While the response rate for 2016–17 was very low,[836] the ODPP has continued with the survey for 2017–18 and the outcomes will be reported in the next annual report. The ODPP notes that critical feedback provided by some respondents has been noted and addressed to provide a more effective and appropriate service to victims and the community generally.[837]

The prosecutor allocated to the child homicide will make contact with the family close to significant court events — such as committal hearings, trial, and the sentence hearing — to discuss the process and various legal issues with them and to allow the family the opportunity to discuss issues and concerns.

These meetings are held close to a court event because:

- all available information about the case can be provided to the family;
- the court event timeline will likely be known or finalised, so families can be informed when particular information may be presented in court, i.e. autopsy or crime scene photos, and therefore choose whether they would like to attend during those sessions;
- the prosecutor can better prepare any family members who are also witnesses to the proceedings; and
- the prosecutor can go through the sentencing submission to help prepare families on the potential outcome.

The Council heard that prosecuting child homicide matters is extremely complex and there are only eight to nine prosecutors with the experience and expertise in Queensland to prosecute these matters. The prosecution of child homicide matters is, therefore, treated in practice as an area of specialisation.

The ODPP, in its submission to the review, acknowledges that victims' families are a diverse group requiring differing levels of information and contact.[838] It notes that the ODPP aims to consider the unique needs of each family, or individual family members, as much as it is able to when prosecuting these matters.[839]

10.4.4 Support services

The Queensland Government provides funding to a range of support services for victims of crime. The Queensland Homicide Victims' Support Group (QHVSG) is funded to provide long-term assistance with the coping and recovery process for homicide victim families and witnesses. Under current funding arrangements, the QHVSG is provided with $530,000 annually to deliver:[840]

- general service availability information, advice and referral;

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834 Ibid.

835 Ibid 25.

836 As of 30 June 2017, the ODPP had received 10 responses. While this number was insufficient to appropriately gauge the ODPP's compliance with the fundamental principles of justice, the responses indicated an overall satisfaction with the services provided: Office of the Director of Public Prosecutions, above n 826, 22.

837 Ibid.

838 Submission 39 (Office of the Director of Public Prosecutions).

839 Ibid.

840 Email from Victim Assist Queensland to Victoria Moore, Manager – Policy, 29 August 2018 based on QHVSG's funding agreement.

- needs assessment and management of case/service plans;
- mutual support and self-help;
- volunteer resource development and/or placement;
- provision of training and training resources; and
- community education.

The QHVSG service model is based on peer support in which bereaved family members offer support to other victims in the process of coping with, and recovering from, a homicide event.[841] In the early or crisis phase following the loss of a family member to homicide, QHVSG's trained Family Support Coordinators provide practical and emotional assistance. This may include general information about police, forensic and justice procedures, assistance with funeral arrangements, and assistance in accessing financial assistance through VAQ. Continuing support is delivered using a case-management framework that may include in-house support, referral to specialist agencies, or referral to local peer support networks. Case-management plans remain open for extended periods due to the nature of the impact of homicide on bereaved family members, with access to crisis and peer support available at all times. The funding it receives does not include funding to negotiate with, and advocate for, criminal justice agencies to provide information to family members impacted by homicide.

VAQ has also established the Local Victim Coordination Program with Victim Coordination Officers, who provide victims with information about the court process and refer victims to specialist agencies that provide court support and assistance with writing a VIS.[842] Officers are located in South Brisbane, as well as the Cairns, Ipswich, Rockhampton and Townsville courthouses.[843]

In addition to support provided by these agencies, court support is available in some locations (Brisbane, Cairns and Townsville). This support is provided by the volunteer-based organisation, Court Network. Court Network also develops resources to assist in their support role. It recently released a guide to supporting victims of crime through the court process.[844]

10.4.5 Financial assistance and support provided to families

Family members of child victims of homicide (including not just parents, but other family members who had a genuine personal relationship with the child at the time of the child's death)[845] can apply for financial assistance under the VOCAA. 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).[846] 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.[847] Up to $8,000 is also available for funeral assistance.[848]

The issue of facilitating access of extended family members to attend relevant court hearings — including the sentencing hearing — is of relevance to the issues raised in the Terms of Reference. Facilitating access to court supports a better understanding of the basis upon which the person has been convicted and the sentence imposed by enabling family members to attend these hearings in person, rather than just having access to transcripts after the hearings have occurred.

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841 Ibid.

842 See <https://www.qld.gov.au/law/court/victim-coordination-program>.

843 Ibid.

844 Court Network Queensland, *A Guide to Supporting Victims of Crime Through the Court Process* (2018).

845 See *Victims of Crime Assistance Act 2009* (Qld) s 26 (definition of 'related victim').

846 *Victims of Crime Assistance Act 2009* (Qld) ss 47–49.

847 Ibid s 49(f).

848 Ibid 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).

The ODPP is only funded to cover the costs of travel for witnesses (including those who are also family members of victims of child homicide) who are required to attend a trial.

VAQ can pay for expenses to travel to attend a trial in other cases; however, this is limited to eligible victims. The changes to the VOCAA in 2017 removed shared pools, but did not change the definition of a 'related victim' of an act of violence being 'a person who is a close family member, or a dependent, of a primary victim of the act who has died as a result of the act'.[849] The VOCAA defines a 'family member' as being the person's spouse, child, sibling (brother, sister, stepbrother or stepsister), parent or step-parent, or a person defined as being in one of these roles as defined under Aboriginal tradition or Island custom.[850] Grandparents would only be eligible for assistance as a related victim if they were considered the carer of the deceased child at the time of the death.

The Queensland position is consistent with many, including New South Wales and Victoria, although some other jurisdictions do provide for grandparents to make a claim for financial compensation. For example, in South Australia an 'immediate victim' of an offence where the victim has died is defined as 'a member of the immediate family of the deceased' who may make a claim for compensation for injury caused by an offence if the offence caused death or physical injury.[851] 'Immediate family' of a person is defined further to include a grandparent.[852] The claim for compensation is confined to circumstances where an injury has been caused to a person making this claim, as compensation for grief is dealt with separately under the Act and does not include a grandparent.[853]

10.4.6 Financial assistance and support provided to families

The Council's consultation paper invited feedback on ways communication with victims of crime about sentencing for child homicide offences could be enhanced. The Council also consulted with a range of stakeholders, including victims' families about support services and whether there were opportunities for improvement.

Generally, submissions and information provided during consultations expressed the view that improving the current level of information and support would significantly benefit victim families and has potential to improve their level of satisfaction with the criminal justice system.

The Council heard directly from family members of child homicide about the profound impact the loss of their child or grandchild has had on them. Submissions received by the Council from family members directly affected by the death of a child caused by homicide expressed the view that they had a sense of justice denied and questioned what a life was worth. Speaking from their recent personal experience, the grandparents of a child victim of homicide submitted:

> 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 wellbeing, 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.[854]

The same family also shared with the Council the financial burden the loss of their grandchild has resulted in, including attending the offender's trial held in a different city.[855]

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849 *Victims of Crime Assistance Act 2009* (Qld) s 26(5). However, this definition does not apply if the person is also the person who committed the act: s 26(6).

850 *Victims of Crime Assistance Act 2009* (Qld) sch 3.

851 *Victims of Crime Act 2001* (SA) ss 4, 17(1)(a).

852 Ibid s 4.

853 Ibid s 17(2). 'Injury' is defined to mean 'physical or mental injury, including pregnancy, mental shock and nervous shock': s 4.

854 Submission 1 (J and S Sandeman).

855 Meeting 18 July 2018, Townsville.

The Queensland Law Society acknowledged the significant loss to a family and the community when a child dies:

> The death of any child is a tragedy. The death of a child at the hands of another is an even greater tragedy. This is a highly emotional circumstance, when parents and family have lost a part of their future and the community has lost one of its most vulnerable.[856]

PACT (Protect All Children Today) noted from its clients' experiences that the criminal justice system 'is very traumatic, confusing, complex, confronting, sterile, formal and is a process that cannot be avoided or altered and takes far too long for matters to be finalised with the effect that lives are put on hold which causes additional stress and trauma'. Many victim families 'feel disrespected and ignored by the bureaucracy'.[857]

Drawing on the experiences of its Family Support Coordinators, the QHVSG raised concerns that 'this complex journey can impact negatively on the overall wellbeing of these individuals and groups, both in the short and longer term'.[858] In this context, it emphasised the importance of 'simple, appropriate and respectful' communication from the time a death occurs through to the offender's release back into the community on parole or following sentence and submitted:

> Families need to understand the process more clearly and to be provided with opportunity to have questions answered thoroughly and in a manner which is understood. Stakeholders in the system need to be approachable and available for this to occur.[859]

To inform its submissions to the Council, the QHVSG reviewed child homicide cases referred to the group for support over the most recent six years. The QHVSG reported most families in contact with it reported feeling supported by the QPS and that communication in circumstances where there was an arrest was adequate.[860] In cases where no arrest had been made, it was suggested that regular contact from first responders and QPS liaison officers would help support the family at this early stage, even if no information could be provided for operational reasons.

The QHVSG also advised that it is currently engaging with the QPS with respect to the referral processes for support to be provided to families of victims of child homicide where there is no early arrest, or where circumstances may prevent early referral to provide for the availability of support at an earlier stage in the investigation.

The court process from committal onwards was identified by both the QHVSG and PACT as being poorly understood by family members.[861] The QHVSG reported limited communication from the ODPP in more than half of cases and limited understanding of this part of the process.[862]

The ODPP advised it briefs families close to court proceedings, when as much information as possible is available. Although the ODPP is not responsible for providing information to the general community about court processes, its VLO service does provide basic information about court processes and will refer legal questions to the relevant prosecutor for response.

In its submission, the QPS also recognised the vital service provided by the VLOs at the ODPP in providing support to victims and families going through the criminal justice system. The police suggested that another option that might be considered to enhance support for families might be to introduce 'family liaison officers within courts to help people through the system, and also provide education to those members of the public that are keen to know more about the system'.[863]

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856 Submission 35 (Queensland Law Society).

857 Submission 29 (PACT).

858 Submission 28 (QHVSG).

859 Ibid.

860 Ibid.

861 Ibid and Submission 29 (PACT).

862 Submission 28 (QHVSG).

863 Submission 36 (Queensland Police Service).

PACT in its submission suggests some of the issues experienced by families in terms of adequate provision of information could be addressed by ensuring the Charter is enforced for all secondary victims impacted by a crime.[864] PACT also recommended that families should be asked 'what they wish to achieve from the criminal justice process', and ensure their voice is 'heard and considered at every stage of the proceedings'.[865]

A community member who made a submission suggested that the experience of victims' families might be improved by enhanced communication, proposing there be 'one point of contact who stays with them and explains the process and can explain the outcome, the sentence and why it is what it is'.[866]

At the Subject Matter Expert Roundtable hosted by the Council in early August, a similar suggestion was made to provide victims with a consistent point of contact for information. Participants thought this would remove some of the burden currently placed on the QHVSG and non-government support agencies to fill this information gap and seek information on the family members' behalf that is not otherwise being offered. Such a role may include explaining in simple terms the legal process as it applies to a case's individual circumstances and proactively making contact with family members. It would also assist the Coroners Court, which is sometimes incorrectly called upon as an information service for those families seeking support or assistance.

10.4.7 The Council's views

The Council recognises that the loss of a loved one, whether a child or an adult, is a trauma carried for life and the way in which the criminal justice system responds to that loss can either help or hinder a bereaved family in moving forward with their lives.

The Council heard from victims of crime and the services that support them that the legal process is protracted, complex and confusing; and that communication and the provision of information and support provided through the process could be improved. The Council notes that there have been important changes in the criminal justice system — such as the introduction of the Charter — that attempt to accommodate the interests of victims and improve the experiences of victims in terms of procedural and distributive justice.

The Council considers the following are essential elements for ensuring family members of victims of child homicide receive the support and assistance they need throughout the criminal justice system process:

- a coordinated model of support for bereaved family members that involves criminal justice agencies and funded non-government service providers working closely together, but with clear delineation of responsibilities between these agencies;
- ensuring police allocate a dedicated family liaison officer to each bereaved family member who requires dedicated support, and whose role is to provide information and facilitate care and the provision of support from the time a death occurs throughout the entirety of the person's contact with the criminal justice process, including any appeal processes;
- ensuring that processes are in place to formalise and ensure appropriate handovers occur between allocated family liaison officers where a change in staffing occurs while the case is still active;
- proactive provision of information throughout the process, including offers by prosecutors to meet with the family at key stages of the process (e.g. pre-committal, about decisions to substantially alter or discontinue charges; pre- and post-trial — including where the accused has been acquitted; pre- and post-sentence; and when an appeal has been initiated);

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864 Submission 29 (PACT). This issue was also discussed by participants at the Victims of Crime Roundtable meeting 16 August 2018).

865 Submission 29 (PACT).

866 Submission 19 (Name withheld).

- the provision of simple information at each meeting about the progress of the case, the purpose of each hearing, processes for family members who are witnesses, and possible sentences available for the offences charged;
- ongoing training for all those involved across the system about communicating effectively with bereaved persons and use of sensitive language;
- training and information for support agencies and those offering peer support to bereaved family members on understanding key stages of the criminal justice process and what victims can expect.

In addition to highlighting the above best practice elements, the Council has made specific recommendations to ensure effective communication with family members of victims of child homicide occurs once responsibility for a child homicide prosecution transfers from the police to the ODPP. It is this aspect of the criminal justice system response that — on the basis of submissions made — generated the highest level of focus in terms of system responses that could be improved.

As a specific recommendation, the Council further recommends that the QPS should review current processes to formalise and ensure appropriate handovers occur between allocated family liaison officers where a change in staffing occurs while the case is still active.

In addition to the reforms recommended, the Council considers there would be benefits in having all child homicide prosecutorial processes managed by the ODPP, including greater continuity of management of these cases. While Brisbane and Ipswich committal hearings for child homicide offences are led by the ODPP, the ODPP manages committals in other court locations only at the request of the QPS.

The Council recognises that transferring responsibility for committal hearings for child homicide matters across the state to the ODPP would have resourcing implications to be considered before a commitment could be made to adopting such a model.

Recommendation 3: Queensland Police Service — Allocation of Family Liaison Officers and handover processes

3.1 The Queensland Police Service (QPS) should review and enhance its current practice of allocating a dedicated Family Liaison Officer supporting bereaved family members throughout the entirety of their contact with the criminal justice process, including any appeal processes, by providing information and facilitating care. As part of that review, consideration should be given to developing a guideline for appointed Family Liaison Officers on their roles and responsibilities.

3.2 The QPS should ensure that processes are in place to formalise appropriate handovers between allocated Family Liaison Officers where a change in staffing occurs whilst the case is still active.

Recommendation 4: Office of the Director of Public Prosecutions — communication with family members of victims of child homicide

The Office of the Director of Public Prosecutions (ODPP) should continue to review current communication practices, processes and training, as required (including the requirements of the Charter of Victims' Rights) to ensure regular and effective communication occurs with family members of victims of child homicide in all cases to keep them informed of key events (unless they have asked not to be kept informed) and to offer conferences prior to and following sentencing and appeal hearings to prepare families and enhance their understanding of the sentencing and appeal processes.

Recommendation 5: Director of Public Prosecution's Guidelines

The section of the ODPP's *Director's Guidelines* (as at 30 June 2017) dealing with 'Information for Victims' should be amended to reflect the wording of the Charter of Victims' Rights to provide that victims (including family members of victims of child homicide) are to be informed of each major decision (including the reasons for the decision) made about the prosecution of a person accused of committing an offence (unless they have asked not to be kept informed), rather than this information only being provided on request.

10.5 Victim recognition and the sentencing process

10.5.1 Current approach

Victims of crime have a legitimate expectation that they will be involved throughout the criminal justice process, including at sentencing. For family members of victims of child homicide, it is also important the loss of their child is appropriately acknowledged and — like all victims — they are treated with respect.

The primary means by which family members are involved in the sentencing process is through the making of a VIS, which a family member can read aloud in the courtroom.[867] A VIS may have attached to it documents supporting information contained in it (such as medical reports), as well as photographs, drawings or other images.[868]

Under the PSA, the purpose of the victim reading the VIS aloud 'is to provide a therapeutic benefit to the victim'.[869] The sentencing court must have regard to the harm done to, or impact of the offence on, the victim mentioned in such a statement.[870] However, the Queensland Court of Appeal has cautioned that 'sentencing judges should be very careful before acting on assertions of fact' therein, and 'material damaging to the accused which is neither self-evidently correct nor known by the accused to be correct … should not be acted on'.[871]

The VIS also plays a part in homicide-related proceedings in the mental health system if the Mental Health Court (MHC) decides a person was of unsound mind at the time the offence was allegedly committed or is unfit for trial.[872] 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

867 *Penalties and Sentences Act 1992* (Qld) s 179M. In some other jurisdictions, which treat photographs or drawings as part of the VIS, the VIS may be 'displayed' rather than just read aloud: see *Sentencing Act 1991* (Vic) s 8Q.

868 *Penalties and Sentences Act 1992* (Qld) s 179I (definition of 'victim impact statement').

869 Ibid s 179M(4)(a). See also *R v Singh* [2006] QCA 71 (15 March 2006) 8 (Fryberg J).

870 See *Penalties and Sentence Act 1992* (Qld) ss 9(2)(c)(i) and pt 10B and *Victims of Crime Assistance Act 2009* (Qld) s 5 (definition of 'victim').

871 *R v Singh* [2006] QCA 71 (15 March 2006) 8 (Fryberg J).

872 *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.

victim context.[873] The definition of a VIS for a MHC 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.[874] 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.[875]

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. In the case of homicide offences, the very highest level of harm has been caused — the loss of a person's life. Subject to this position being altered through legislative amendments,[876] the law has long recognised the sanctity of human life and the equal value ascribed to all lives under the law.[877]

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,[878] 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.[879]

For family victims of homicide, the use of VISs can also 'be important devices through which to make the deceased visible to the court'.[880]

10.5.2 Findings from submissions and consultation

The QHVSG 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 affected by such offending. In supporting this approach, the QHVSG 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.[881]

The QHVSG also reported families expressing frustration not only at what they considered to be lenient sentences, but also 'limited scope for the victim's voice to be heard and to have respect and meaning'. It referred to the potentially significant difference that 'raising the profile of the victim within the system' would have on the experience of families.

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873 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 to 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.

874 Ibid s 162.

875 Ibid ss 163, 164.

876 The varied mandatory non-parole periods for murder are discussed in section 5 of the Council's consultation 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.

877 See, for example, *R v Previtera* (1997) 94 A Crim R 76, 86–87 (Hunt CJ at CL).

878 *R v Kellisar* [1999] VSC 357 (2 September 1999) [27] (Vincent J).

879 Julian V Roberts, 'Victim Impact Statements and the Sentencing Process: Recent Developments and Research Findings' (2003) 47 *Criminal Law Quarterly* 365, 372.

880 Tracey Booth, *Accommodating Justice: Victim Impact Statements in the Sentencing Process* (Federation Press, 2016) 64 as cited in NSW Sentencing Council, *Victims' Involvement in Sentencing: Consultation Paper* (2017) 15 [2.9].

881 Submission 5 (QHVSG).

Other changes recommended by the QHVSG relating to the sentencing process include:

- use of the victim's name in court proceedings, rather than the terms 'the victim' or 'the deceased';
- providing victims with choice about when the VIS is read; and
- allowing a photograph of the child victim to be displayed when the impact statement is read, at the family's request.

Participants of the Subject Matter Expert Roundtable suggested that allowing families to show photographs of their deceased loved one during the sentence hearing would need to be tested with the courts in terms of any procedural concerns.[882] There was less concern about when in the process the VIS was read, with a suggestion made that this would likely be a matter for individual judges to determine in terms of its appropriateness.[883] Some participants noted that the VIS is primarily a therapeutic process, allowing the victim's family to be heard in court.

10.5.3 Reviews in other jurisdictions

A number of inquiries and reviews exploring the role of victims have recommended changes to improve recognition of victims during the criminal trial process, including at sentencing.

Victorian Law Reform Commission Inquiry into Victims of Crime in the Criminal Trial Process

In 2016, the Victorian Law Reform Commission (VLRC) completed a review of the role of victims of crime in the criminal trial process, including the sentencing process. The review was initiated in response to terms of reference issued by the Victorian Attorney-General.

In its final report, the VLRC highlighted the importance of respectful treatment above other factors, including the provision of information and participation, in influencing whether victims are satisfied with their experience of the criminal justice system,[884] noting also that their experiences in the courtroom 'contribute significantly to their overall experience'.[885]

The VLRC found:

> 5.25 Respecting a victim's dignity requires judicial officers and lawyers to conduct themselves in a way that recognises that court is not a workplace for victims, and that coming to court may be a momentous and highly distressing experience. This means demonstrating some empathy for victims' emotions. Victims consulted by the Commission described being discouraged from or reprimanded for showing emotion in the courtroom. They considered this to be disrespectful of the harm they have suffered.
>
> 5.26 For the family of victims who have been killed, disrespect was also manifested in hearing their loved one described as 'the deceased' by the judge, prosecutor and defence lawyer. Repeated references to a loved one as 'the deceased' is distressing and rendered them invisible. Family victims emphasised to the Commission the importance of their loved one being acknowledged in the courtroom.

The VLRC's final report was released in 2016 and made 51 recommendations to improve the experience of victims in the legal process. This included a recommendation that the Judicial College of Victoria, in consultation with the heads of jurisdictions, should include in its practical guides for judicial officers

882 Subject Matter Expert Roundtable, 6 August 2018.

883 Ibid.

884 Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process: Report* (2016) 86 [5.1] citing Malini Laxminarayan et al, 'Victim Satisfaction with Criminal Justice: A Systematic Review' (2013) 8(2) *Victims and Offenders* 119, 121, 131.

885 Ibid 86 [5.3].

information and guidance about responding to the needs and interests of victims in the courtroom.[886] Matters for potential guidance identified included:[887]

- How to refer appropriately to victims who have been killed as a result of a crime, and specifically, avoiding the practice of referring to them as 'the deceased'.
- Acknowledging the presence of the victim, or victim's family members, in the courtroom.
- Explicitly ensuring victims are aware of what is happening in the proceedings.
- Using sensitive and compassionate language.
- Allowing victims to express emotions in the courtroom (where doing so does not prejudice the jury against the accused).
- In the context of sentencing proceedings, courts confirming that victims understand the full circumstances of the offending and taking the time to clarify the principles of sentencing.
- In the context of appeals, an explanation by the court to victims that appellate proceedings focus on matters of law rather than a review of the evidence.

In response to this recommendation, the Judicial College of Victoria has advised it is developing a new guide for judicial officers in relation to victims of crime, based on consultations with judicial officers, victims' representatives, legal practitioners, and support workers.[888]

Review of Victims' Role in Sentencing (NSW Sentencing Council)

In June 2017, the New South Wales Attorney-General issued terms of reference to the NSW Sentencing Council requesting a review of victims' input into the sentencing of offenders to examine whether they can have a stronger voice or be given more support. The NSW Sentencing Council was asked to consider:

- the principles courts apply when receiving and addressing a VIS;
- who can make a VIS;
- procedural issues with the making of and reception in court of a VIS; and
- the level of support available to victims.

The NSW Sentencing Council was also asked to examine how the current sentencing process affects victims and research positive developments in other Australian and overseas jurisdictions.

The NSW Sentencing Council received 17 preliminary submissions and 23 submissions in response to its consultation paper seeking views on victims' involvement in sentencing.

The submission of the New South Wales Homicide Victims' Support Group to the NSW Sentencing Council addresses a range of issues, including the potential to introduce community impact statements.[889] The potential use of such statements was also raised as an option for consideration by the QHVSG. South Australia, which is the only jurisdiction to introduce such statements, provides for the making of two forms of a statement: a 'neighbourhood impact statement' and a 'social impact statement'.[890] The NSW Homicide Victims' Support Group suggests this form of statement could be particularly beneficial in cases where there may be no family victim available to give a VIS on behalf of

886 Ibid 92, Recommendation 17.

887 Ibid [5.33].

888 Email from Mary Kozlovski, Research Officer, Judicial College of Victoria, to Victoria Moore, Manager – Policy, Queensland Sentencing Advisory Council 22 August 2018.

889 Submission VI20 by the Homicide Victims' Support Group to the NSW Sentencing Council Inquiry into Victims' Involvement in the Sentencing Process, 22 November 2017, 7–8.

890 *Sentencing Act 2017* (SA) s 15.

the deceased person.[891] This recommendation ultimately was not supported by the NSW Sentencing Council in its report.[892]

Other recommendations made by the New South Wales Homicide Victims' Support Group include:[893]

- ensuring that decisions to allow or disallow content of a VIS are made consistently;
- a requirement for judges to explain to family victims the way in which their VIS was considered;
- appropriate etiquette being followed at all times when an oral VIS is given, with the suggestion that some present — including defence counsel and judges — have been known to engage in distracting behaviour while the VIS is being read.

The NSW Sentencing Council submitted its final report to the New South Wales Attorney-General on 1 March 2018. It recommended, among other recommendations made, that the Judicial Commission of New South Wales, Law Society and Bar Association should offer and promote relevant training for judicial officers and the legal profession and that the Judicial Commission should include advice in bench books on how to receive and acknowledge VISs.[894] The NSW Government's response is available on the NSW Sentencing Council's website.[895]

Royal Commission into Institutional Responses to Child Sexual Abuse

The Royal Commission into Institutional Responses to Child Sexual Abuse, in its 2017 report on criminal justice, referenced similar issues identified by the VLRC and documented significant levels of dissatisfaction with the current approach to victims' involvement in the criminal justice process in the context of its inquiry.[896]

Although most of these issues related to the criminal trial, rather than sentencing process, they reflect issues raised with the Council during its current review. In their submission in response to the Commission's consultation paper, Dr Robyn Holder, a former victims' commissioner, and Ms Suzanne Whiting, observed that:

> To understand the importance of inclusion and participation is to understand and acknowledge that people as victims of abuse and violence, whether adult or child, have interests that are different to the state in the form of the public prosecutor. Of course these overlap but they are different. Indeed, people who have been victims also have interests that are distinct from those of the community as a whole …
>
> … In our experience, it is realising that the prosecutor does not act for them, and indeed may act in ways that they see as against their interests, that shocks people as victims. 'Who acts for me?' is a query that we have heard countless times over our public service careers.[897]

The QHVSG similarly informed the Council of families being told by prosecutors that they were not there to represent their views, but to act on behalf of the State. The QHVSG reported that while this might in fact be the case, this type of language when used with families can be very upsetting. Families feel left out of the process and that their views do not really matter.

10.5.4 The Council's views

The treatment of secondary victims of homicide in the courtroom and having their loss appropriately acknowledged and valued during the sentencing process is important both in terms of their levels of satisfaction with the criminal justice process and to assist with their recovery process.

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891 Homicide Victims' Support Group, above n 889, 8.

892 NSW Sentencing Council, *Victims' Involvement in Sentencing: Report* (2018) 27 [2.66].

893 Homicide Victims' Support Group, above n 889, 11–12.

894 NSW Sentencing Council, above n 892, xvii, Recommendation 5.3.

895 See <http://www.sentencingcouncil.justice.nsw.gov.au/Pages/Current-projects/VIS/Victims.aspx>.

896 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, above n 417, 211 [3.4.2].

897 Ibid 211–212, citing Dr Robyn Holder and Ms Suzanne Whiting, Submission 25 to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation paper: Criminal justice*, (17 October 2016), 6.

At a minimum, the Council considers the criminal justice system should seek to operate in a way that does not contribute to the trauma already being experienced by family members through the loss of a child. This is not to suggest the system does not already aim to operate in a way that is respectful of victims' experiences and their sense of loss, but to emphasise the importance of good practice being recognised, shared and embedded across the system.

Similar concerns about the need for respectful treatment and acknowledgment of the victim identified by other recent interstate and national reviews were expressed to the Council over the course of the current review. Some bereaved family members reported feeling disempowered and marginalised by the process and, in some cases, as if the life of their child had not been properly acknowledged and recognised during the sentencing process.

Impersonal references to the child victim as 'the deceased' or 'infant', in particular, raised concerns that the value of their child's life was not appropriately acknowledged and their child's death was just another homicide.

In the Council's view, it is important that the sentencing process operates in a way that supports the involvement of family members of child victims, including through the VIS process, and gives appropriate recognition to the fact that a child's life has been lost to ensure the value of this life is not diminished. The involvement of families in sentencing proceedings and acknowledgment of the identity of the victim in a way that personalises the loss and humanises the victim is particularly important in the case of child homicide — given the victim does not have a direct voice in the courtroom.

To support best practice approaches, the Council suggests it would be beneficial for similar resources to those being developed in Victoria to be developed for Queensland, or for courts to consider making use of all or part of the Judicial College of Victoria's guide for possible adoption in Queensland.

While the Council's Terms of Reference are restricted to the experience of victims of child homicide, it is likely such resources could be of broader use and application in support of best practice approaches being adopted by judges and magistrates.

The Council notes another proposal made to ensure the harm caused by child homicide is appropriately recognised and taken into account in sentencing, which is the introduction of community impact statements, as provided for in South Australia. This proposal is beyond the scope of the current review and likely to have broader implications. For this reason, the Council has not considered the merits of this proposal beyond noting its potential to ensure the broader impacts of homicide can be taken into account in sentencing.

Recommendation 6: Information for courts about responding to needs of family members of victims of child homicide

The Department of Justice and Attorney-General, in partnership with the Heads of Jurisdiction, and with reference to work being led by the Judicial College of Victoria, should support the development and provision of practical information for courts about responding to the needs and interests of family members of victims of child homicide, including preferred approaches to acknowledging family members in the courtroom and referring to deceased victims.

10.6 Charging practices and plea negotiations

10.6.1 Introduction

A concern consistently raised with the Council by family members of victims of child homicide as a source of particular distress was why certain charges had proceeded as they had. In particular, this is where the initial charge had been one of murder (and the offender committed for trial on this basis) and a plea to manslaughter accepted and the reasons this had occurred. These victims were the most vocal in voicing their dissatisfaction with the process, with concerns about these decisions made *behind closed doors* without them feeling they were involved in the process.

Based on the Council's research findings, a greater proportion of child homicide cases involving child manslaughter are resolved by way of a guilty plea (89.2%) than for manslaughter cases involving adult

victims (73.9%).[898] The same trend is evident when plea rates are examined for all homicide offences, with a greater proportion of offenders sentenced for child homicide pleading guilty when compared to offenders sentenced for adult homicide (62.9% and 52.0%, respectively); however, this difference is not statistically significant.[899]

Charging practices are relevant to satisfaction of family members with the process as they may create an unrealistic expectation that a defendant will be convicted of murder — rather than manslaughter — even where the evidence may not support a reasonable prospect of conviction. This in turn may lead to a sense of injustice when an offer by the defendant to plead guilty to manslaughter rather than murder is accepted by the prosecution in circumstances where the family does not support this or feels pressured to agree.

10.6.2 The current approach and issues

In most cases, the police practice is to charge those suspected of being involved in the child's death with murder, leading to an expectation by the victim's family that a murder conviction will be secured. The Council notes that prosecution can increase a police charge from manslaughter to murder, or decrease it from murder to manslaughter, depending on the circumstances of the case and the state of the evidence.

The UK has adopted a model that requires police to consult with the Crown Solicitor's office at the initial point of charge. While it was reported in Queensland that consultation with the ODPP does occur on some occasions, particularly where it is unclear whether the evidence at the time the charge is laid can reasonably support a charge of murder, consultation occurs on a relatively ad hoc basis.

The ODPP's *Director's Guidelines* set out the process to be followed once the police have charged a person for an offence and are seeking advice about whether the prosecution should proceed.[900] The guidelines make clear that advice will not be given without a full brief of evidence. The guidelines also make clear that the decision as to charges is a matter for police to determine. ODPP advice must be provided by the DPP.

As highlighted in the Council's consultation paper, child death cases are among the most challenging to investigate, often requiring specialist expertise. This is particularly true for very young children. For example, diagnosing cause of death in cases of Sudden Unexpected Infant Death (SUID) becomes a process of exclusion, and often requires a multidisciplinary and multi-agency approach involving a range of specialists in paediatrics and forensic pathology. 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 the most, if not the most, controversial areas for these specialists. 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.

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. These reports are critical to determining the nature and extent of the injuries, what injury or injuries caused the child's death, and the relevant window of time within which they occurred.

In practice, waiting until a full brief of evidence has been prepared before seeking advice from the ODPP as to the appropriate charges is likely to be unrealistic given evidentiary issues. There is also a need in many cases to ensure the person charged does not obstruct the course of justice — such as by interfering with witnesses, endangering other people or committing other offences — which can best be achieved by charging the person. This means the court can either make them subject to conditions while on bail or order them to be remanded in custody. In Queensland, a person charged with an indictable offence

898 Queensland Sentencing Advisory Council, above n 148, 41, Figure 26.

899 Ibid 40, Figure 25.

900 Office of the Director of Public Prosecutions, above n 825, 36 ('26 – Advice to police').

can only be held without charge for questioning for a period of up to eight hours (which can be extended on application to a magistrate).[901]

10.6.3 Findings from submissions and consultation

In its submission, the QHVSG indicated that the percentage of families who have lost a child to homicide who report being dissatisfied with the charge that the offender is convicted of and the sentencing outcome is 'exceptionally high' and 'significantly higher than those who endure homicide of an adult'.[902]

Based on its review of child homicide cases referred for support over the previous six years, the QHVSG reported:

> All families when [charge substitution] occurred reported limited involvement or communication from ODPP, or poor understanding of the reasons behind the plea or the [substitution of lesser charges]. All families who had this phase as part of their process reported significant re-traumatisation from feeling that the child victim was 'worthless' or 'a statistic'. Some families reported having no input into decisions made at this time, and no recourse if they disagreed.[903]

The QHVSG submits the substitution of the original charge with a lesser charge (most commonly, manslaughter substituted for murder), the plea negotiation process, and reductions given on sentence for a guilty plea 'has a direct negative impact on surviving family members and friends, who place their trust in the justice system to deliver an appropriate outcome'.[904]

Consistent views were reflected by some family members of victims of child homicide whom the Council consulted. When contacted by prosecutors, these family members reported feeling rushed or pressured into supporting the acceptance of a plea and — when consultation did occur — as feeling that their views did not really matter.

A suggestion made by some child homicide victims' family members and subject matter experts was that, in these cases, consideration should be given to reviewing the decision to accept a plea to a lesser charge. Steps would be required to ensure this would only happen after a victim has had a proper opportunity to consider the offer and to communicate their views.

Some of the consulted referred to the UK Crown Prosecution Service's (CPS) *Victims' Right to Review Scheme* as providing a potential model for Queensland to consider. However, this right to request a review only applies if the CPS decides not to bring charges or to terminate all proceedings; it does not apply to decisions to proceed on a lesser or different charge. In these cases, however, the victim still has a right to make a complaint in relation to the way in which the CPS conducted itself.

10.6.4 Obligation to consult with victims and decisions on plea

In Queensland, a victim is entitled under the Charter (under schedule 1AA of the VOCAA) to be informed of each major decision (including the reasons for the decision) made about the prosecution of a person — including to substantially change the charges or accept a plea of guilty to a lesser or different charge. A victim who is not satisfied with a decision to proceed with a guilty plea to a lesser charge or charges does not have any right to have the decision reviewed by the ODPP.

The ODPP's *Director's Guidelines* (as at 30 June 2017) state the views of the victim or their relatives should be sought before any decision to accept a plea is made. The *Director's Guidelines* note that, while these views must be considered, they may not be determinative: 'It is the public, rather than an individual interest, that must be served'.[905]

In the case of homicide and attempted murder of special sensitivity, notoriety or complexity, the *Director's Guidelines* provide that an offer should not be accepted without consultation with the Director

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901 *Police Powers and Responsibilities Act 2000* (Qld) ss 403, 405.

902 Submission 27 (QHVSG).

903 Submission 28 (QHVSG).

904 Submission 27 (QHVSG).

905 Office of the Director of Public Prosecutions (2018), above n 825, 25 ('17 — Charge negotiations').

or Deputy Director. In practice, this means that plea offers for child homicide in all cases are reviewed by the most senior prosecutors before such an offer is accepted.

10.6.5 Options for reform

The same concerns raised with the Council about plea negotiations arose during the VLRC's review of the role of victims of crime in the criminal trial process and during the Royal Commission into Institutional Responses to Child Sexual Abuse. This suggests that these issues are not restricted to prosecutions of child homicide matters, but rather reflect views of victims more generally about how the criminal justice system responds to victims of serious forms of offending against the person.

The VLRC in the context of its review recommended that decisions made by the Victorian DPP to discontinue a prosecution or accept a guilty plea to lesser charges should be open to internal review at the victim's request,[906] noting: 'These decisions are of particular significance to victims'.[907] The VLRC observed that a decision to accept a guilty plea to lesser charges 'can appear to trivialise the impact of the crime by enabling the offender to minimise their offending' and 'also limits the victim's ability to have a voice at sentencing as the victim impact statement will be confined to the offence or offences to which the offender has pleaded guilty'.[908] A review process in this context would 'help the victim understand the rationale for these decisions and provide a means of having them reconsidered'.[909]

In an effort to improve communication with victims, and ensure complaints and review mechanisms are in place, the Royal Commission into Institutional Abuse made a number of relevant recommendations in relation to decision-making, consultation with victims, and complaints and review mechanisms, including that each Australian Director of Public Prosecutions should:

- have comprehensive written policies for decision-making and consultation with victims and police, which are published online and made publicly available, and provide a right for victims to seek written reasons for key decisions;
- establish a robust and effective formalised complaints mechanism to allow victims to seek an internal merits review of key decisions;
- establish robust and effective internal audit processes to audit their compliance with policies for decision-making and consultation with victims and police;
- publish the existence of their complaints mechanism and internal audit processes and data on their use and outcomes online and in their annual reports.[910]

Other recommendations made by the Royal Commission about prosecution and charging practices to improve victim satisfaction with the process included a recommendation that all Australian Directors of Public Prosecutions should ensure that prosecution charging and plea decisions in prosecutions for child sexual abuse offences are guided by best practice principles including:

- the importance to complainants of the correct charges being laid as early as possible so that charges are not significantly downgraded or withdrawn at or close to trial, with prosecutors to provide early advice to police on appropriate charges to lay when such advice is sought;
- regardless of whether such advice has been sought, prosecutors should confirm the appropriateness of the charges as early as possible once they are allocated the prosecution to ensure that the correct charges have been laid and to minimise the risk that charges will have to be downgraded or withdrawn closer to the trial date;

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906 Victorian Law Reform Commission, above n 884, 74, Recommendation 10.

907 Ibid 67 [4.149].

908 Ibid 67 [4.150].

909 Ibid [4.150].

910 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, above n 417, 65, Recommendations 40, 41, 42, 43.

- prosecution agencies recognising the importance to victims — and to the criminal justice system — that the charges for which a guilty plea is accepted reasonably reflect the true criminality of the abuse they suffered;
- prosecutors endeavouring to ensure that they allow adequate time to consult the victim and the police in relation to any proposal to downgrade or withdraw charges or to accept a negotiated plea; and that the victim is given the opportunity to obtain assistance from relevant witness assistance officers or other advocacy and support service before they give their opinion on the proposal.[911]

The Queensland Government released its response to the Royal Commission's *Criminal Justice Report* in June 2018, accepting in principle recommendation 40 and identifying its response to recommendations 39, 41, 42 and 43 as a matter for further consideration.

Although many of these principles could potentially be applied to bereaved family members of victims of child homicide, it is acknowledged there are distinct differences between these offence types, as the child victim in sexual abuse cases is able to give evidence of what occurred and the forensic evidence involved is unlikely to be as complicated.

10.7 Restorative justice

Restorative justice approaches may provide another opportunity for family members of a child homicide victim to communicate the impacts of the crime to the offender, which may assist the family members 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.[912]

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'.[913]

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.[914]

Studies into the use of restorative justice have consistently reported high levels of satisfaction among victims who choose to participate.[915] This includes the post-sentencing restorative justice program run by Corrective Services NSW, which has been found to satisfy the unmet interests of victims of serious crimes, including murder and manslaughter.[916]

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

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911 Ibid 62, Recommendation 39.

912 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, above n 417, 183.

913 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.

914 Ibid.

915 Victorian Law Reform Commission, above n 884, [7.238].

916 Jane Bolitho, 'Putting Justice Needs First: A Case Study of Best Practice in Restorative Justice' (2015) 3(2) *Restorative Justice* 256. See also Susan Miller and Kristen Hefner, 'Procedural Justice for Victims and Offenders? Exploring Restorative Justice Processes in Australia and the US' (2015) 32(1) *Justice Quarterly* 142, 163, suggesting that participation in restorative justice after conviction and sentencing can ameliorate victims' confusion and scepticism of the formal court process.

needs of the victim, take many months to prepare and use advanced facilitators'.[917] An example of this approach is Victim Offender Conferencing in NSW.

10.7.1 Adult Restorative Justice Conferencing in Queensland

The Dispute Resolution Branch (DRB) within the Queensland Department of Justice and Attorney-General (DJAG) operates an Adult Restorative Justice Conferencing (ARJC) 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.

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.

All restorative justice processes led by the DRB are conducted under the *Dispute Resolution Centres Act 1990* (Qld) (DRCA). The DRCA sets out a range of aspects relating to the provision of dispute resolution services, including secrecy and privilege, which attaches to mediations. The DRB policy also guides all ARJC processes and the conduct of restorative justice processes in the post-sentence context. A key principle of this policy is that matters should only be initiated by the victim (or secondary victim) of the offence.

10.7.2 Findings from submissions and consultation

The Council's consultation paper invited feedback on whether restorative justice approaches have any place in the sentencing process and, if so, at what stage should they be considered.

Views on restorative justice and its suitability for child homicide offences were mixed in the submissions and consultation received by the Council. Generally, legal stakeholders noted there were potential benefits for such an approach, if funded appropriately, whereas victims of crime and their advocates were concerned about risks to victims' families.

Legal and criminal justice stakeholders suggested it should take place prior to sentencing; however, victims were strongly of the view that such a process should be post-sentence and have no bearing on the sentencing outcome.

In its submission, Legal Aid Queensland saw 'merit in greater restorative justice options in this arena'.[918] However, Legal Aid noted these are 'highly emotionally charged cases in which mediation could expose all sides of the case to significant vulnerabilities'.[919] Should such a process be introduced it would need to be managed and resourced properly, and ensure meditators are trained and qualified. Legal Aid suggested a restorative justice process should take place as a pre-sentence option, while the offender is on remand.

The Queensland Law Society was also of the view that:

> all sentencing options should be open to a sentencing court and that, subject to qualified and independent oversight, alternative measures such as 'restorative justice approaches' should be considered ... [and that] It may be of some benefit to be used in child homicide matters, but only in particular circumstances.[920]

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917 Ibid 28.

918 Submission 33 (Legal Aid Queensland)

919 Ibid.

920 Submission 35 (Queensland Law Society).

PACT noted that any restorative justice approach should be instigated by victim families, and it would be vital to clarify with people what they hoped to achieve from such a process, thereby minimising re-traumatisation from the process.[921]

The QPS noted the potential for such a process to 'provide a level of comfort to the family' and that such approaches 'may be valuable when the offender is a member of the family and will be returning to the family following the completion of their punishment'.[922]

The DRB in DJAG outlined the ARJC process in Queensland, noting it:

> is mostly conducted for more minor matters, either prior to a charge being laid or before the matter is heard and a finding entered by the Court. ARJC has received comparatively few requests for post-sentence restorative justice processes. This may be attributable to a number of factors, including lack of awareness of its availability.[923]

Understandably, there were concerns expressed by some community members and victims' families that the sole beneficiary of a restorative justice process would be the offender. There was a strong view that the offender should receive no benefit, either in their sentence or parole decision, should a restorative justice approach be undertaken.

At the Victims of Crime Roundtable meeting on 16 August 2018, participants were of the view that any restorative justice approach should be post-sentence and should only be initiated at the request of the victim's family.[924] Support provided to victims going through this process would need to be paramount.

The DRB acknowledged this tension in its submission, and the ways it aims to manage these concerns.[925] The submission set out for the Council the policies and principles designed to reduce the risk of an offender using a restorative justice process for their own ends and to support the choice and agency of victims of crime. These principles are applied to both parties and include:

- informed consent;
- assessment of suitability;
- party support;
- confidentiality; and
- process flexibility.

The DRB emphasised that it is critical to any restorative justice process that participation by both parties is voluntary and there is informed consent.

10.7.3 The Council's views

While there were mixed views about the potential benefits of restorative justice in cases of child homicide, the Council suggests opportunities to extend restorative justice conferencing processes in this context could be an area for further investigation. Restorative justice conferences may be beneficial, in particular, in intra-familial child homicide cases where it is likely the offender and other family members of the child victim will continue to have some level of ongoing contact.

The Council acknowledges references made during consultation to pre-release planning by QCS for offenders as another important means of managing these relationships. For example, through a process of engaging with family members of the child victim and the offender to plan for circumstances in which they may encounter each other and their ongoing level of contact, if any.

The extent to which a formal restorative justice program may be beneficial for family members, the Council suggests, is best assessed on a case-by-case basis. The Council does not consider it appropriate

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921 Submission 29 (PACT).

922 Submission 36 (Queensland Police Service).

923 Submission 37 (Dispute Resolution Branch).

924 Victims of Crime Roundtable, 16 August 2018.

925 Submission 37 (Dispute Resolution Branch).

to make any specific recommendations in this regard, given the limited scope of the Council's Terms of Reference. However, should such a process be requested by a victim's family, the Council suggests the same principles should be applied as set out by the DRB in its submission and guidelines developed to support the management of this process.

In child homicide cases, the Council suggests that a thorough assessment of suitability, extensive preparation and debriefing of participants, and the presence of an impartial, skilled and professional facilitator would be particularly critical — as would be ensuring this option is only offered where offenders fully accept responsibility for committing the offence.[926] The Council also supports comments made by the VLRC that, in the case of indictable crime, any restorative justice process:

- should be supplementary to the criminal justice process;
- should only ever proceed with the informed consent of any victims involved; and
- should be tailored to respond to the interests and needs of victims, rather than focusing on the rehabilitation of the offender.[927]

10.8 Conclusion

This chapter considered the experiences of the criminal justice system by the families of child homicide victims, ways to improve victim recognition and the sentencing process, charging practices and plea negotiations, and the suitability of restorative justice approaches for child homicide offences.

The chapter provided an overview of the rights and information and support available to families as they move through the criminal justice system, and the consultation findings on ways to improve these experiences. A consistent message the Council heard was the importance of the provision of information and effective communication by key agencies to families.

The Council has made three recommendations in relation the ODPP and the QPS with the aim of improving the communication and support provided to the families of victims during the criminal justice process:

- Recommendation 3: Queensland Police Service — allocation of Family Liaison Officers and handover processes
- Recommendation 4: Office of the Director of Public Prosecutions — communication with family members of victims of child homicide
- Recommendation 5: Director of Public Prosecution's Guidelines.

When considering the treatment of secondary victims in the courtroom, the Council looked to recent reviews in Victoria and NSW, as well as suggestions from stakeholders and victims' families. The Council was of the view that the sentencing process should operate in a way that supports the involvement of family members, including through the use of a VIS, and appropriate acknowledgment of the identity of the victim and their loss to friends and family. The Council also recommended enhancing the ability of courts to respond to the needs of family members.

- Recommendation 6: Information for courts about responding to needs of family members of child homicide victim

Then the chapter considered charging practices and plea negotiations, which are often relevant to the satisfaction of family members with the criminal justice system. Finally, the chapter considered the suitability of restorative justice for child homicide offences. The Council sought advice from stakeholders as to whether such approaches have any place in the sentencing process. Given the mixed views from stakeholders, the Council did not make a recommendation; however, it did recognise the potential benefits of such approaches, if they were appropriately resourced and managed.

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926 These are existing principles under the United Nations Social and Economic Council, *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, ESC Res 2002/12, 37th plen mtg, E/RES/2002/12 (24 July 2002).

927 Victorian Law Reform Commission, above n 884, 183 [7.278].

Chapter 11 — Improving community understanding

11.1 Introduction

The Council has been tasked under its Terms of Reference to identify ways to enhance knowledge and understanding of the community in relation to sentencing for child homicide offences — such as strategies to develop better communication with the community about these sentences.

This chapter explores:

- the role community engagement, the media and sentencing remarks play in enhancing knowledge and understanding of the community in relation to child homicide offences; and
- strategies to develop better communication relating to these sentences.

The importance of enhancing knowledge for public confidence in the courts and sentencing, and the disproportionate role the media plays in shaping public attitudes and opinions, are discussed in Chapters 2 and 8.

The chapter also considers how current barriers to the media reporting the full circumstances of the case may affect the public's view of the adequacy of sentences imposed. This is particularly true where a child homicide offender's sentence is substantially reduced on the basis of assistance given to law enforcement agencies in other court proceedings.

11.2 Media reporting of homicide

As discussed in Chapters 2 and 8, the way the media portrays homicide influences community views about this offence, and the criminal justice system more broadly.

Recent Australian research into newspaper print media reporting on homicide highlights the capacity of the media to influence community perceptions of safety and crime.[928] This research identified a clear disconnection between the reality of homicide — as established by official national data — and the cases selectively reported by commercial print newspapers. While homicide of any kind is *newsworthy*, homicides involving children, the elderly, female victims and strangers are more likely to be reported in the media.[929] A survey of tabloid newspaper journalists in the UK found 80 per cent of those surveyed considered homicides involving children to be among the most newsworthy.[930] Recent Australian research has confirmed these findings, with homicides involving children — and particularly those involving child victims aged under 9 years — being over-reported in newspapers, taking into account the proportion of all victims of homicide who fell within this age range.[931]

Through selective reporting, media reports can shape community views to overestimate the prevalence of crime — and in particular certain types of homicide — that does not align with trends in the actual homicide crime rate.

Radio, television, online and print media are all under increasing pressure to produce short news packages with sensationalised headlines to attract the attention of the audience. As media organisations are operating with limited resources, stories prioritised by editors tend to be ones that audiences will read and share.[932] The 24-hour news cycle and proliferation of social media outlets add to this pressure.

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

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928 Waters, Bond and Eriksson, above n 57, 137.

929 Ibid, citing several studies.

930 Ibid, citing Anna Gekoski, Jacqueline M. Gray and Joanna R. Adler, 'What Makes a Homicide Newsworthy? UK National Tabloid Newspaper Journalists Tell All' (2012) 52(6) *British Journal of Criminology* 1212.

931 Waters, Bond and Eriksson, above n 57. While children aged 0–9 years represent approximately 4.2% of all child victims nationally, child victims of this age are represented in 17.0% of newspaper articles on homicide.

932 ABC News, 'The Murders We Don't Hear About — and Why', *The Signal,* 10 July 2018 (Stephen Smiley and Angela Lavoipierre) citing comments made by Paul Bibby, a freelance journalist and lecturer at Griffith University.

determine an appropriate sentence. These issues are compounded by the fact that the word count available to a journalist is usually limited. This often means complex cases have only some elements reported — such as the unusual, dramatic or violent elements.[933] In some instances, legislative restrictions mean key sentencing information that influenced 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 future proceeding (PSA section 13A); or
- in recognition of prior significant cooperation with a law enforcement agency (PSA section 13B).

These barriers are discussed further in section 11.6 below.

11.2.1 How does the community access information about sentencing?

Numerous studies have found the primary way the public is informed about sentencing is via the media.[934] Research undertaken by the Victorian Sentencing Advisory Council (VSAC) found that 'people tend to learn about crime and the criminal justice system through the mass media, in particular via newspapers'.[935] This research found that 'the ubiquity and popularity of the mass media (tabloid newspapers in particular)' help the media play 'an integral role in the construction of both public opinion and the public 'reality' of crime'.[936]

Findings from focus groups

As discussed earlier in this report, to gain a better understanding of community views to sentencing for child homicide, the Council held focus groups with 103 Queenslanders in Brisbane, the Sunshine Coast, Cairns, the Gold Coast, Mount Isa, and Longreach. As part of these focus groups, the Council also explored how community members access information about sentencing.

Focus group findings reinforced the dominance of the media as the community's primary source of information about sentencing. Television was the most important source of information across the focus groups' three age cohorts: 18–39 years (77.8%); 40–59 years (82.9%); and 60+ years (94.3%). Social media displayed a statistical significance according to age. More than two-thirds (70.4%) of participants in the 18–30 age group registered social media as one of their greatest information sources, compared to 43.9 per cent in the 40–59 age group and 14.3 per cent in the 60+ age group. Conversely, newspapers were significantly the most important information source for the 60+ age group (71.4%) compared to the 40–59 age group (43.9%) or the 18–39 age group (37.0%). However, newspapers rated equally as the second most important source alongside social media (both 43.9%) for the 40–59 age group. Interestingly, the youngest age group, 18–39 years (48.2%), also reported a statistically significant reliance on 'friends' as an information source — compared to the 40–59 cohort (14.6%) and the 60+ cohort (17.1%).

Based on these findings, overall friends and family are the lowest-rated sources of information. This suggests that media reporting has significant scope to influence community perceptions. These findings are consistent with research that the media represents the primary source of information for the public about the courts and sentencing. Due to the visibility of sentencing outcomes, this aspect of the criminal justice system receives significant media attention and culminates in widespread public discourse. However, the associated media reporting is piecemeal and subjective, often evoking emotive responses rather than aiming to enhance public knowledge. Critically, this research, as discussed in Chapters 2 and 8 of this report, also acknowledges that media reporting exerts a strong influence on people's perceptions of the criminal justice system, the courts and sentencing, and their perceptions of seriousness and overall punitiveness.

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933 Sentencing Advisory Council (Victoria), above n 669, 6.

934 Ibid.

935 Ibid.

936 Ibid 6.

As part of the focus groups, the Council also explored the ways people consume information. When asked, 'What prompts you to investigate a case that has been sentenced in Queensland courts?' participants reported a range of motivations. A thematic analysis of all reported motivations revealed seven discrete *nodes*:

- *Passive transfer*: people receive information as part of routine activities of watching television — reporting no conscious intention to seek out information:

  > 'I don't — and it seems unlikely that I would be interested. I would passively encounter sentencing.' – D09

- *General interest motivation*: an aspect of the case/reporting triggered a general interest:

  > 'I would google a case if there was one I was interested in knowing the outcome.' – J10

- *Personal motivation*: people prompted to investigate a case after initial reporting triggered interest on a more personal level:

  > 'Relatability — location, people involved, i.e. families, work, education.' – F11

- *Subject/content motivation*: people seek information as a result of the subject matter:

  > 'If it involves children.' – I04.

- *Emotional motivation*: discontent triggers people to seek additional information:

  > 'Perceived incongruence between crime and sentence.' – B10.

- *Clarification motivation*: people seek information to clarify certain cases:

  > 'Sometimes a feeling that the news item just glossed over the sentence and I had a feeling that it had missed something.' – A06

- *Knowledge motivation*: people report a need to understand the system and how and why sentences were imposed:

  > 'Sometimes the rationale for sentencing is not obvious. It would be interesting to understand this.' – E08

The focus group findings suggest that the media is an important source of information about sentencing, and that people engage with information accessed in various ways. The primary sources of information also vary by age — with social media playing a more prominent role for those in the 18–30 age group, and newspapers being dominant for the 60+ age group. Overall (across all age groups), television is the most important source of information for community members about sentencing.

11.3 Improving community understanding

The Council's consultation paper asked for advice on ways to enhance community understanding about sentencing. The Council sought feedback on the issues that contribute to, or detract from, the community's understanding of sentencing for child homicide offences.

Community and legal stakeholders identified a range of issues that detract from community understanding of sentencing for child homicide offences, including:

- complexity of the sentencing process;
- limited understanding of how the criminal justice system works;
- lack of understanding of why certain facts cannot be made public;
- misconceptions about why charges are downgraded;
- lack of understanding of why an appeal was or was not launched;
- selective and/or media coverage of sentencing hearings;
- judiciary not being permitted to comment on court matters; and

- lack of restrictions on social media — anything can be published whether it is accurate or not.

A common theme in several submissions was the lack of general understanding by members of the community about the criminal justice system.[937] For example, the Fighters Against Child Abuse Australia (FACAA) submitted:

> Greater awareness of how the system works and why would be beneficial and may also then assist future families who find themselves in the position of having to go through the legal process following the death of a child.[938]

The Queensland Police Service (QPS) added:

> There is often a miscomprehension that offenders are being dealt with for lesser offences after murder charges are 'dropped' with offenders being allowed to enter a plea to a lesser charge of manslaughter (media reporting also validates these thoughts). The downgrading of charges creates a perception around leniency towards the accused. Some of the reasoning for this is the inherent misunderstanding or lack of knowledge of the law and how legal provisions are applied to these scenarios.[939]

In its submission, PACT observed that 'community concerns are magnified when a child is a victim of homicide and that education is paramount to build community confidence'.[940]

Several submissions from the child protection sector and legal and justice sectors voiced concerns about the important role the media plays in shaping community perceptions of the criminal justice system. In its submission, the Queensland Law Society noted:

> Media reporting on sentences imposed by the courts has been the subject of criticism by the Society and other organisations for the selective manner in which reporting frequently occurs. Sensationalised news stories also have a greater tendency to be the ones which are circulated more widely on social media platforms, contributing to a misconception by some members of the public that such stories are an accurate representation of (a) the matter the subject of the particular report; and (b) the work of the courts generally.[941]

A similar view was shared by Legal Aid Queensland:

> [t]he disturbing nature of the facts of some of the crimes being reported upon can result in the proceedings being reported upon in a sensationalist style — which in turn can impact on the community's understanding of the sentencing process and outcomes. Discussion of these types of crimes in social media may also focus on the more sensational aspects of the crimes. Strategies designed to improve community awareness of sentencing for these offences need to recognise the influence and reach of traditional media and social media outlets.[942]

PACT also noted in its submission that:

> People who have not been exposed to a criminal court process do not understand how complex sentencing is and form opinions based on 'urban myths', hearsay and inaccurate media coverage. Misinformation is also gained through television programs which often do not depict what actually occurs in a criminal trial in Australian jurisdictions. Therefore, it is important that the information provision be accurate, timely and provided in a way that is easily understood by a general member of the public.[943]

The Bar Association of Queensland referred to multiple Australian studies into community perceptions of sentencing and the criminal justice system that have found:

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937 Submission 19 (Name withheld).

938 Submission 16 (FACAA).

939 Submission 36 (Queensland Police Service).

940 Submission 29 (PACT).

941 Submission 35 (Queensland Law Society).

942 Submission 33 (Legal Aid Queensland).

943 Submission 29 (PACT).

> community outrage at lenient sentencing is able to be corrected with education as to the relevant factors considered at sentence [and that] when members of the community are properly informed about the facts of the case, they invariably either agree with the sentence imposed by the court or take a more lenient view.[944]

Some family members were concerned that their views be treated as equally valid, despite not working within the criminal justice system or having a detailed understanding of the system's complexities.[945]

The Council also sought advice as part of its consultation process on how communication with community members and victims of crime about sentencing for child homicide offences could be enhanced.

Suggested methods to enhance communication about sentencing for child homicide, included:

- consistent information sharing with victims' families as their case moves through the criminal justice system;[946]
- developing resources on court and sentencing processes for victims' families;[947]
- timely publication of sentencing remarks and sentencing summaries, and a public awareness campaign to promote how to access these publications;[948]
- media providing a link to sentencing remarks when reporting on a sentence;[949]
- the development of fact sheets;[950]
- school and community education programs on the court and sentencing process, relevant sentencing considerations and factors, and the low level of force required to cause injury to a child;[951]
- improved community access to sentencing information and trends.[952]

Expanding on ideas to enhance community understanding about sentencing for child homicide offences, one suggestion by the Queensland Law Society is to establish a dedicated, independent resource based at the courts to respond to concerns about sentencing in specific cases:

> Having an independent entity able to answer media and public queries or concerns around sentencing might also be somewhat productive, communications officers employed by the courts both to author the summaries of sentences (as noted above) and potentially having some scope to respond to media coverage or public attention to particular matters to ensure the conversation on them is at least based on accurate information.[953]

There was general agreement that community education was required to enhance understanding of sentencing of child homicide offences. PACT noted in its submission that:

> Through open and honest communications, media releases, sentencing guidelines and 'Judge for Yourself' scenarios, including a child death or child related matter. It is only through improved

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944 Submission 30 (Bar Association of Queensland).

945 Submission 24 (Lyn Burke) and Submission 25 (Name withheld).

946 Submission 19 (Name withheld); Submission 25 (Name withheld); and Submission 28 (QHVSG).

947 Submission 35 (Queensland Law Society).

948 Submission 21 (Name withheld), Submission 29 (PACT), Submission 31 (Sisters Inside) and Submission 36 (Queensland Police Service).

949 Submission 35 (Queensland Law Society).

950 Submission 16 (FACAA).

951 Submission 21(Name withheld), Submission 29 (PACT), Submission 31 (Sisters Inside), Submission 32 (Aboriginal & Torres Strait Islander Women's Legal Service NQ), Submission 35 (Queensland Law Society) and Submission 36 (Queensland Police Service).

952 Submission 19 (Name withheld), Submission 21 (Name withheld), Submission 35 (Queensland Law Society) and Submission 36 (Queensland Police Service).

953 Submission 35 (Queensland Law Society).

> communication that community awareness will be enhanced, which will lead to a greater understanding and acceptance of the sentences imposed.[954]

Sisters Inside agreed with other legal stakeholders regarding the benefits of:

> Community education programs to increase community understanding of the sentencing process and improve community access to sentencing information and trends.[955]

The Aboriginal and Torres Strait Islander Women's Legal Services NQ supports 'school education that promotes an understanding of human rights, legal processes (both domestic and international) including sentencing and legal studies'.[956]

In his submission, Richard Goodwin believed the ultimate community messaging lay in the sentencing outcome itself:

> The best communication that can be sent is action via meaningfully longer sentences. The message will be: you do this crime you will do serious time. The children of Australia deserve no less.[957]

The publication of sentencing remarks is explored below.

11.4 Sentencing hearings and the principle of open justice

Open justice is one of the fundamental aspects underpinning the Australian criminal justice system. The *ordinary rule* that proceedings are conducted in open court[958] means that court proceedings are subject to public scrutiny — thereby ensuring that justice is not only done but is seen to be done.[959] Open justice is important as it serves to promote and maintain public confidence in the courts and the justice system.[960]

The vast majority of cases in Queensland — including sentencing hearings — are open to the public and can also be reported on by the media, which acts as the 'eyes and ears' of the general public.[961] The media has a significant influence on community 'understanding of sentencing policy and the appropriateness of sentences given to offenders'.[962]

While most sentencing hearings are held in open court, in certain circumstances some parts of the sentencing process by law must be held in closed court.[963]

The operation of sections 13A and 13B of the PSA are discussed below.

11.5 Sentencing remarks

11.5.1 Queensland courts' approach to delivering sentencing remarks

The sentencing process in Queensland, and in particular how judges determine an appropriate sentence, is discussed in Chapter 4 of this report.

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954 Submission 29 (PACT).

955 Submission 31 (Sisters Inside).

956 Submission 32 (Aboriginal & Torres Strait Islander Women's Legal Service NQ).

957 Submission 26 (Richard Goodwin).

958 *Russell v Russell* (1976) 134 CLR 495, 520, Gibbs J cited in Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws,* Interim Report 127 (2015) 285 [10.44].

959 *R v O'Dempsey (No 3)* [2017] QSC 338, [2]-[6] (Applegarth J), footnotes omitted. See also *R v McGrath* [2002] 1 Qd R 520, 523–524 [8]–[9].

960 See *Hogan v Hinch* (2011) 243 CLR 506, [20], French CJ cited in Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, Interim Report 127 (2015) 286 fnote [58].

961 Supreme Court of Queensland, *Electronic Publication of Court Proceedings: Issues Paper* (2015) 4 [11]–[13].

962 Mike Berry et al, 'Media Coverage and Public Understanding of Sentencing Policy in Relation to Crimes Against Children' (2012) 12(5) *Criminology & Criminal Justice* 567, 568.

963 *Penalties and Sentences Act 1992* (Qld) ss 13A, 13B.

In Queensland, the usual practice for judges and magistrates is to deliver *ex tempore* sentencing remarks. This means the majority of sentencing remarks are delivered orally, very shortly after submissions conclude at the end of the sentence hearing. Comparatively, in Victoria and NSW, there is typically a delay between the sentence hearing and the delivery of remarks to — among other things — enable a judge to produce written reasons.

Legal stakeholders have observed 'that the Queensland practice of *ex tempore* sentencing remarks is very efficient'[964] because it enables a swift resolution to a criminal matter, often after many months or years progressing through the criminal justice system.

While efficient disposal of criminal cases is important, the practice of *ex tempore* remarks does mean that in many cases details about the offence, the offender and/or the victim are not fully articulated by the judge in his or her remarks because they had just been fully ventilated in the sentencing hearing. This may affect the experiences of both the victims' families and the offender in understanding what matters were considered relevant and taken into account by the judge in sentencing, and to fully understand the judge's reasons for the sentencing outcome.

11.5.2 Publication of sentencing remarks by the Supreme Court of Queensland

All Queensland Court of Appeal judgments are available on the Supreme Court Library Queensland's (SCLQ) website, as well as on the website AustLII (Australasian Legal Information Institute). A selection of sentencing remarks of the Supreme and District Courts — as well as specialised courts and tribunals such as the Mental Health Court — are also available on the SCLQ website. As a result of the renewed commitment by the judiciary in July 2017 to improving public access to sentencing remarks, an increased number of sentencing remarks are being published.

Sentencing remarks published on the SCLQ website will remain there for varying lengths of time. Some remarks are there in perpetuity — such as Court of Appeal and Mental Health Court decisions and select Supreme Court judgments — while others will remain on the website for approximately three months. Recently, in two high-profile cases (criminal and civil) individual judges of the Queensland Supreme Court produced judgment summaries that were released with the full remarks on the SCLQ website.[965]

Sentencing remarks for the District and Supreme Courts are published on the Queensland Sentencing Information Service (QSIS) database. The QSIS database is only accessible to people working in the criminal justice system, and not the general public.[966] Publication on the QSIS database takes up to 10 working days. For matters dealt with by the Supreme Court, the judge or their associate has to order the sentencing remarks from Auscript, an external provider of recording and transcription services. Once an audio recording has been transcribed by Auscript, the transcript of the sentencing remarks is provided to the judge for revision. If the revised transcript is not available within 10 working days, an 'Issued Subject To Correction' (ISTC) transcript is then generated and provided to QSIS for publication. When the revised transcript becomes available, that transcript is sent to QSIS for publication to replace the ISTC edition.

11.5.3 Publication of sentencing remarks by Supreme Courts of Australia

A desktop analysis of Supreme Court publication processes across all Australian jurisdictions for their approaches to releasing sentencing remark was undertaken. All jurisdictions make some or all Supreme Court decisions publicly available on the court's — or an affiliated — website. In some circumstances, a judge may decide the judgment should not be published.

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964 Supreme Court of Queensland, *Electronic Publication of Court Proceedings, Report* (2016) 37 [200], 35.

965 *R v Strbak* [2017] QSC 299 (18 December 2017) — summary available at <https://www.sclqld.org.au/caselaw/QSC/2017/299>; and *Wagner & Ors v Harbour Radio Pty Ltd & Ors* [2018] QSC 201 (12 September 2018) — summary available at <https://www.sclqld.org.au/caselaw/QSC/2018/201>.

966 Section 19 of the *Supreme Court Library Act 1968* (Qld) governs access to restricted information held in QSIS and who may be granted access.

As shown in Table 32 below, the shortest turnaround time between delivery and publication was publishing on the same day that the sentence was imposed. The Northern Territory, NSW and Tasmanian Supreme Courts release sentencing remarks on the day or within 24 hours of a sentence being passed. Generally, other Supreme Courts publish sentencing remarks within a few days following delivery, with remarks remaining online for varying periods. Some jurisdictions appear to have no time limitations (Australian Capital Territory, NSW, Tasmania and Victoria) whereas others only remain online for a set period in some cases (Northern Territory, South Australia, Western Australia, and selected Queensland judgments).

Table 32: Publication of sentencing remarks in Supreme Courts by state/territory

Jurisdiction	Publication types	Timing	Duration online
ACT	Full-text judgments	Usually within a few days	No limitation indicated
NSW	Full-text judgments Summary judgments	Usually within 24 hours	No limitation indicated
Northern Territory	Full-text judgments	Usually day sentence imposed	4 months
Queensland	Full-text judgments Summary judgments	Varies, but usually between 1 to 7 days	Varies – usually 3 months
South Australia	Full-text judgments	Usually within 1 to 2 days	4 weeks
Tasmania	Full-text judgments	Usually day sentence imposed	No limitation indicated
Victoria	Full-text judgments Summary judgments Audio recording of the sentence	Usually within a few days	No limitation indicated
Western Australia	Full-text judgments	Usually within 48 hours	28 days

Source: Supreme Court websites and personal communication with Supreme Court Library Queensland

Since February 2001 the Northern Territory Supreme Court has made all sentencing remarks available on its website: 'This is done to ensure ease of public access to those decisions and to supplement media reporting'.[967]

The Supreme Court of Western Australia has been publishing sentencing remarks since June 2008. At the time of the decision to make these public, Chief Justice Wayne Martin said:

> Public access to proceedings in our courts is a fundamental element of open justice … In the past, the courts and judicial officers have been the subject of attacks over the perceived inadequacy of sentencing in particular cases. It is my view that much of that criticism comes from a lack of information concerning the pertinent facts. We believe that by providing the full details on sentencing, people will gain a better appreciation of how that sentence was reached.[968]

The Supreme Court of NSW publishes decisions via the website, NSW Caselaw. In 2015, the NSW Supreme Court also established a social media presence via Twitter and Facebook, and regularly posts links to sentencing remarks and summary judgments. When announcing this new approach the Chief Justice of NSW, the Honourable Tom Bathurst AC, said of judgment summaries:

> The court's judgment summaries essentially condense a full judgment into a 1–2 page document that is easy to read and understand, and from all accounts are very appreciated and valued by the media and the community at large.[969]

Judgment summaries do not replace the court's full judgment — which is released with the summary — but rather aim to help increase community understanding of a judge's reasoning in any particular matter.

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967 Supreme Court of the Northern Territory, *Publication Policy* <http://www.supremecourt.nt.gov.au/remarks/>.

968 Supreme Court of Western Australia, Judges' Sentencing Remarks Available Online (Media release, 10 June 2008).

969 Supreme Court of New South Wales, 'Increasing Access, Transparency and Understanding Via Social Media, Court Filming and Judgment Summaries' (Media Release, 27 December 2015).

Judgment summaries often accompany sentencing remarks for high-profile cases, such as child homicide offences.

The Supreme Court of Victoria also produces judgment summaries, which are available on its website, with full judgments found on the AustLII website. The Supreme Court of Victoria also makes the audio of the sentence available on its website, as well as regularly posting links to remarks on its Twitter and Facebook accounts. The Law Library of Victoria also produces a fortnightly *Judgments Bulletin* of recent judgments of the Victorian Court of Appeal and the Supreme Court of Victoria. Bulletins remain on the court's website for a couple of months but remain accessible on the Law Library's catalogue.[970]

11.5.4 Broadcasting and audio recording of sentencing remarks

Another means of supporting more accurate and timely reporting is to enable the broadcasting of sentencing remarks. In 2016, both the Supreme and District Courts of Queensland agreed to a pilot program allowing media organisations to apply to record delivery of sentencing remarks.[971] Under the program's guidelines, the media can apply to film and record the delivery of a judgment. However, it is at the discretion of the sentencing judge whether to allow the application.

When consulting on ways to improve communication by the Supreme Court as part of a review of the electronic publication of court proceedings led by the court, several legal stakeholders voiced concerns that filming of *ex tempore* remarks may result in procedural delays, noting:

> Televising *ex tempore* sentencing remarks may place an unnecessary burden upon judges and, in order to compensate, may prompt judges to adopt the practice presently used in New South Wales. This would delay the prompt imposition of sentences. Such a delay may not be in the interests of justice, the interests of the person being sentenced or the interests of victims.[972]

In Queensland, it is usual practice of the television media for one outlet to film the hearing and share the coverage across the other networks. The Council understands there is no provision in courtrooms to provide an independent broadcast service.

The Supreme Court of Queensland also allows accredited media to make an audio recording of proceedings using a hand-held recording device to 'maintain accuracy in the reporting of proceedings'.[973] Accredited media can also use electronic text-based communications and social media in the Supreme Court of Queensland to report proceedings 'provided it does not interrupt the proceedings'.[974]

In Victoria, the Supreme Court has implemented a system whereby audio recordings of sentencing remarks are uploaded to the court's website and made available to the media and others. Audio-broadcasts are also conducted via the court's web-streaming services and can be accessed by the general public.[975]

11.5.5 Role of sentencing remarks

Sentencing remarks provide an important record of what happened during the offence, the reasons for the judge's sentencing outcome and anything relevant for future assessments of the offender. This is true for the offender, the victim's family, and other parts of the criminal justice system — including Corrective Services Queensland and the Parole Board Queensland. Remarks may also be relevant for appeal purposes — should an appeal be lodged — and sentencing for similar cases in future.

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970 Supreme Court of Victoria, *Judgments Bulletins* <https://www.supremecourt.vic.gov.au/court-decisions/judgments-and-sentences/judgments-bulletin>.

971 Supreme Court of Queensland, above n 964, 39 [215]–[216].

972 Ibid 37 [202].

973 Supreme Court of Queensland, *Amended Practice Direction Number 8 of 2014 — Electronic Devices in Courtrooms*, 27 June 2018, 2 [14].

974 Ibid 2 [8].

975 Supreme Court of Queensland, above n 961, 35.

Accepting that denunciation is also a key sentencing purpose, sentencing reasons are also of importance to child homicide offenders in understanding the seriousness of their offending and the community's strong disapproval and abhorrence of the offender's actions.

Sentencing remarks allow family members of victims of child homicide to see the seriousness of the offending behaviour recognised through the sentencing process, and the loss of a child's life appropriately acknowledged. This can also be important to support them coming to terms with the substantial loss they have experienced and feel that justice has been done.

Sentencing remarks can perform an important communicative function for family members of victims of homicide. A report produced by the UK Victims' Commissioner in 2011 into the needs of families bereaved by homicide, commenting on findings of a survey of victims, observed:

> [W]e have found that the passing of sentence is perhaps one of the most important moments for the bereaved family in homicide cases. However, it can be particularly difficult to absorb the judge's sentencing remarks, which can be fairly complicated, and understand how s/he has come to the decision on the sentence. Yet in the weeks, months and years following, it may come to preoccupy families, particularly if there are issues that they do not understand, or lack of clarity. Given what is at stake both for the family of the victim and the offender, the decision-making process should be as transparent as possible; sentencing remarks in these cases should be put in writing and made available to the victims' family automatically.[976]

A family member of a victim of homicide, who is also a Director of VSAC, reports a similar experience of needing time before she could appreciate the meaning of what was said and the importance of the remarks in recognising the harm caused:

> When you read sentencing comments, they are really profound and they tell a story that you don't take or you don't absorb in court. I remember sitting through the sentencing comments of Rod and Gary, and I just wanted to get to the end, I just wanted to hear … they had been found guilty, so I wanted to know what it was. I hadn't taken or absorbed what was said. It wasn't until some years later that I read and I was in a position to read the sentencing comments and thought, well, the judge absolutely considered me and considered the harm that was caused not only to me but was caused to the Silk family as well. And they are really profound; it's really important.[977]

Sentencing remarks also perform an important potential role of enhancing community understanding by encouraging accurate media reporting and enabling interested members of the public to directly access the detailed reasons for sentence. However, to enable this to occur, publication of the remarks needs to be timely (on the same day of the sentence being passed). Delayed publication of remarks is likely to mean that the news cycle has passed, with the community only given a snapshot of the proceedings — more often than not without an explanation of the sentencing factors. If remarks were made accessible in a timely way, journalists could fact-check their story and link to the sentencing remarks in subsequent updates. Broadcasters could read the remarks on air, reaching a wide audience. The community could also read the judge's reasons for sentence — rather than the select points chosen by the media — providing the full context for the offence and the reasons for imposing a particular sentence.

11.5.6 Findings from sentencing remarks analysis

Chapter 4 considered in detail the findings of the Council's analysis of sentencing remarks for manslaughter over the 12-year period. This analysis explores how sentencing judges refer to sentencing purposes and factors when determining a sentence for a child homicide offence.

The Council's analysis of sentencing remarks observed a high degree of variability between the length of, and detail in, judgments. This was more pronounced for manslaughter where the victim was an adult, with a proportion of remarks not including the victim's name or age and often having limited information about the factual circumstances of the offending. Generally, sentencing remarks for child victims tended to be more thorough — for example, almost all victims were named and their age given.

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976 Casey, above n 809, 44.

977 ABC Radio National, 'The Complexities of Sentencing', *The Law Report*, 28 November 2017 (Carmel Arthur) <http://www.abc.net.au/radionational/programs/lawreport/sentencing-models/9195748#transcript>.

While the approach taken by individual judges to sentencing is one likely reason for these differences, another contributing factor may be whether judgments were delivered *ex tempore* — very shortly after submissions conclude — or involved the preparation of written remarks prepared in advance of the sentence being delivered.

More detailed remarks tended to relate to cases in which the facts upon which the offender was to be sentenced were contested, and findings needed to be made in relation to what occurred and the offender's role in the child's death prior to sentencing. In these circumstances, evidence is generally required to be called, detailed submissions are made over a number of days, and the matter is often adjourned prior to sentence.

While the matter might not be adjourned for sentencing in other circumstances, it is a common practice in Queensland for the sentencing judge to be provided with the Crown schedule of facts, defence material and comparable cases in advance of the hearing date, which enables him or her scope to prepare sentencing reasons in advance.

11.5.7 Findings from submissions and consultation

A consistent message from a range of stakeholders was the importance of making sentencing remarks available to the public.

In its submission, Sisters Inside emphasised that the publication of written sentencing remarks is 'essential' to ensure the community has accurate information about what factors a judge has taken into account when sentencing.[978]

The QPS observed in its submission:

> Judicial sentencing remarks are often made available to the public, but it may be that these remarks are confusing to those who have not been exposed to the system. Perhaps more detailed explanations by presiding Judges on how sentences are reached during the delivery of their decisions and sentencing remarks may provide some assistance, along with greater accessibility to the remarks by members of the community.[979]

PACT suggested that publishing 'de-identified sentencing remarks may enhance community awareness and understanding about sentencing processes and outcomes'.[980]

A community member who attended a community summit suggested that courts could consider whether to:

> Publish sentencing remarks without fees. Publish explanations of sentencing in layperson's language and perhaps include a link with online publication of sentencing remarks … There should be better publication and explanation of sentencing factors, reasoning and comments.[981]

11.5.8 The Council's views

While acknowledging the very busy environment in which judicial officers must operate, the Council considers there is a strong case for ensuring that sentencing remarks in child homicide cases are published and that this occurs at the time — or shortly following — the sentence.

Sentencing remarks communicate the underlying reasons for sentence and factors taken into account. Ensuring sentencing remarks are published at the time of — or shortly following — the handing down of a sentence (provided no suppression order is in place or publication would be contrary to the public interest) is an important means by which courts can support more accurate media reporting and promote community understanding of the reasons for sentence.

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978 Submission 31 (Sisters Inside).

979 Submission 36 (Queensland Police Service).

980 Submission 29 (PACT).

981 Submission 21 (Name withheld).

As recognised by VSAC, sentencing remarks 'are one of the key, primary sources of transparency in the criminal justice system.'[982] The Council agrees with VSAC's observations that these remarks are 'a fundamental resource for community education about sentencing, and a prerequisite to informed community debate and discussion on sentencing issues', particularly given judicial officers cannot provide comment about individual cases.[983]

However, for sentencing remarks to perform an educative role and support accurate reporting, they need to be made public and published at — or as close as possible following — the handing down of the sentence. The Council considers the best means of achieving this outcome is to ensure the timely provision of the transcript of the remarks to judges for revision, which is particularly important where written remarks have not been prepared in advance of sentence.

The Council further notes that the Supreme Court of Queensland has already implemented various strategies designed to increase public access to sentencing decisions, including:

- increasing the timely publication of sentencing remarks on the SCLQ's website and publication of an increased number of sentencing remarks;
- the streaming or broadcasting of sentencing remarks;
- the preparation of summaries of sentencing decisions and accessible commentaries on judgments published online.

As discussed above, some other Australian jurisdictions have implemented similar schemes as well as webcasting court proceedings, producing online court newsletters of recent judgments and employing a court spokesperson to speak with the media. The Council will continue to consult with Heads of Jurisdiction and other interested stakeholders on ways to enhance community understanding of the sentencing process as part of its ongoing work program.

The Council also considers it important to recognise the vital communicative function sentencing remarks play in setting out the reasons for sentence and — in the case of child homicide offences — acknowledging the significant harm caused, as well as denouncing the offender's conduct on behalf of the community. While the form sentencing remarks take and the level of detail provided are a matter for individual judicial officers to determine, the Council suggests that, in order to support community confidence and understanding, there are benefits in these sentencing remarks clearly identifying the relevant sentencing considerations and how the child's vulnerability has factored into the sentencing decision. For the victim's family, the factual basis for sentencing being clearly set out in the sentencing remarks is also important to aid their understanding of the events leading to the child's death and the court's views on the offender's culpability for the offence.

Recommendation 7: Timeliness of and publication of sentencing remarks

The Department of Justice and Attorney-General in consultation with Heads of Jurisdiction should consider strategies to increase the timeliness of providing sentencing remarks for child homicide matters heard in the Supreme Court of Queensland to the Supreme Court Library Queensland and their subsequent publication. Wherever reasonably possible, these should be made available and published the day the sentence is handed down, or early the following day.

11.6 Sections 13A and 13B: Cooperation and sentencing in closed court

The following section outlines how a defendant's cooperation is taken into account in sentencing, the procedures that must be followed by a court, and how the operation of these sections may affect the community's understanding of sentencing decisions.

982 Sentencing Advisory Council (Victoria), above n 589, 247–248.

983 Ibid 247–248.

Section 3 of the PSA lists as one of its 10 statutory purposes: 'encouraging particular offenders to cooperate with law enforcement agencies in proceedings or investigations about major criminal offences'. Cooperation with authorities is an important aspect of sentencing and can include at least three relevant matters:

- self-incrimination;
- incrimination of others up to the time of sentence; and
- a promise or undertaking to provide further cooperation in other proceedings.[984]

Queensland's general sentencing laws require a judge to consider how much assistance the sentenced person gave to law enforcement agencies in the investigation of the offence or other offences.[985] This covers issues such as the person making admissions to the offence and agreeing to participate in an interview with police (and how truthful they were).

When an offender pleads guilty, the court *must* take the guilty plea into account. It *may* reduce the sentence it would have imposed had the offender not pleaded guilty — regard can be had to when the person pleaded guilty or when they informed law enforcement of their intention to do so.[986]

But there are two other sections in the PSA, which relate to a sentenced person promising to help the prosecution later (section 13A) and recognising *significant cooperation* already given to law enforcement (section 13B).

Section 13A in particular is a tool that has been used in child abuse cases, including manslaughter (parliament created section 13A in 1997;[987] section 13B was not introduced into the Act until 2014).[988] Use of these legislative tools means a reduction in sentence for an offender, but is different from immunity from prosecution altogether.[989]

11.6.1 Section 13A sentences

A '13A sentence' involves the offender giving an undertaking that they will cooperate with law enforcement agencies in future proceedings about an offence, including a confiscation proceeding. This means the person agrees to give evidence in a court case after their sentence.

In child homicide cases, it will usually involve the person who has accepted their role in contributing to the death of the child giving a statement — and evidence in court if required — against their co-offender (usually an intimate partner) who committed the more serious offending.

A section 13A sentence involves parts that are open to the public and held in open court, and parts that are not (held instead, in *closed court*). The person's written undertaking to cooperate is handed up to the judge. The actual penalty imposed is stated in open court.[990] But other parts of the sentence must be heard in closed court, and the judge has no choice about 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 about the reduction of the sentence can only be done in closed court.[991]

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984 *R v Gladkowski* (2000) 115 A Crim R 446, 449 [12].

985 *Penalties and Sentences Act 1992* (Qld) ss 9(2)(i), 9(2)(r).

986 Ibid s 13.

987 Amended by section 122 and Schedule 2 of the *Criminal Law Amendment Act 1997* (Qld).

988 Section 13B *Penalties and Sentences Act 1992* (Qld) inserted by s 66 of the *Criminal Law Amendment Act 2014* (Qld).

989 An immunity means the person is not prosecuted for offending that they admit to. It can only be granted by the Attorney-General, is dependent on the witness giving truthful evidence and is 'a last resort only to be pursued when the interests of justice require it': Office of the Director of Public Prosecutions, above n 825, 46–48 ('35 – Immunities'). See *Attorney-General Act 1999* (Qld) ss 7(1)(c), 7(1)(d).

990 *Penalties and Sentences Act 1992* (Qld) s 13A(6).

991 Ibid s 13A(5).

- The sentencing judge or magistrate must close the court after imposing the penalty.[992]
- The judge or magistrate must then state that the sentence is being reduced under section 13A and state the sentence that would otherwise have been imposed but for the undertaking to cooperate (the 'indicative' sentence).[993]
- The undertaking 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.

The section also gives a court discretion to make a non-publication order for all or part of the (open court) proceeding, or the name and address of any witness[994] (although this could already be done before these amendments were made to section 13A, with courts also having an ability to make pseudonym orders restricting the disclosure of the identity of a witness or party but allowing the court to remain open and for proceedings to be reported).

If the sentenced person later — without reasonable excuse — does not cooperate under the undertaking, the court can reopen their sentence.[995] If the offender has completely failed to cooperate, the court must resentence the offender having regard to the sentence that would otherwise have been imposed if an undertaking under section 13A had not been given.[996]

If the offender partly failed to cooperate, the court may substitute for the reduced sentence the sentence it considers appropriate, not greater than the sentence that would have been imposed if the undertaking had not been given (being the indicative sentence).[997]

A section 13A sentence, then, involves *two sentence*s, with the *indicative* sentence containing 'the additional period of imprisonment that the offender will have to serve if the promised co-operation is not forthcoming'.[998]

11.6.2 Section 13B sentences

Section 13B is a relatively recent inclusion in the PSA and is very similar to section 13A; however, it does not have the second *indicative* sentence aspect because it:

- relates to a sentence being reduced because the offender has *already* 'significantly cooperated with a law enforcement agency in its investigations about an offence or a confiscation proceeding' (admitting guilt alone is not enough); and
- applies where section 13A does not.

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. It must be sealed.999 The penalty imposed must be stated in open court.[1000]

The Explanatory Notes to the Bill introducing the amendments noted that:

> [Section 13B] was aimed at ensuring the protection and confidentiality of informants who significantly assist law enforcement agencies with their investigations [but are] not willing to give the type of undertaking required under section 13A (for example, a person whose cooperation is reflected in an affidavit by a law enforcement agency — colloquially known as a 'letter of comfort').[1001]

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992 Ibid ss 13A(6), 13A(7).

993 The 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 Attorney-General (Qld) (*2015) 253 A Crim R 201, 204 [4] (Holmes JA).

994 *Penalties and Sentences Act 1992* (Qld) ss 13A(6), 13A(8), 13A(9).

995 Ibid ss 188(2), (3).

996 Ibid s 188(4)(a).

997 Ibid s 188(4)(b) and see *R v FAF* (2014) 247 A Crim R 572, 574 [9] (P Lyons J, Muir JA and P McMurdo J agreeing).

998 *R v McGrath* [2002] 1 Qd R 520, 524 [13].

999 *Penalties and Sentences Act 1992* (Qld) ss 13B(4), (5), (8).

1000 Ibid s 13B(7).

1001 *Explanatory Notes*, Criminal Law Amendment Bill 2014, 4.

> Protecting the safety of an informant and the confidentiality of the information provided is vitally important to encourage others to cooperate with law enforcement agencies (even if the informant is not prepared to testify against another) and to avoid jeopardising ongoing investigations. This type of informant is very important to law enforcement agencies in combating serious crime.[1002]

11.6.3 Extent of the discount

The extent of the discount will vary. Section 13A deals with a promise to cooperate in the future; it does not say anything about the extent to which discounts should be given or whether such cooperation is to be treated more or less favourably than other kinds. Actual, completed cooperation might earn a greater discount than a mere promise to do so. A difficulty with such cases is that no detailed explanation of the nature and extent of the cooperation can be given.[1003]

The Queensland Court of Appeal has stated that proven cooperation in the past, and an undertaking to cooperate against others in future, can entitle an offender to a substantial informer's discount, which should take into account the substantial 'risk of incidental retributive violence' if the person is in custody. A very substantial discount is called for and required as an inducement, especially where society benefits from it, and it places the informer in a position of danger. Discounts of one-third or even one-half of an otherwise appropriate sentence are not uncommon — even discounts exceeding 50 per cent are possible.[1004]

However, the court must ensure the reduction does not result in a sentence that is an affront to community standards.[1005] The discount must be discernible and worthwhile, but still reflect the seriousness of the offence — competing demands that may be difficult to balance.[1006] Further, it should not 'be so great as to over-reach the need for sufficient punishment or to encourage false allegations'.[1007]

The overall discount to be applied under section 13A must not be such as to become 'disproportionate to the objective gravity of the offending and the circumstances of a particular offender'.[1008] Rather, the courts apply the principle discussed in *R v SBI*, where it was stated by McMurdo P that:

> This Court has long recognised that the effective operation of the criminal justice system requires sentencing courts to give substantial discounts to offenders who have pleaded guilty and assisted with the administration of justice. This is particularly so where they have implicated others and put themselves at risk of violent retribution whilst incarcerated.[1009]

1002 Ibid 10.

1003 *R v Ianculescu* [2000] 2 Qd R 521, 522 [4]–[5] (Pincus JA).

1004 *R v Gladkowski* (2000) 115 A Crim R 446, 447–448, and see *R v Webber* (2000) 114 A Crim R 381, 382 [4] (McMurdo P and Chesterman J) and 384 [16] (Pincus JA); *R v Gilles, Ex parte A-G* [2002] 1 Qd R 404, 409 [23] (Thomas JA); *Malvaso v The Queen* (1989) 168 CLR 227, 239 (Deane and McHugh JJ) cited in *R v KAQ; Ex parte A-G (Qld)* (2015) 253 A Crim R 201, 208 [16] (Holmes JA) and in *R v Ianculescu* [2000] 2 Qd R 521, 522-523 [4]–[5] (Pincus JA).

1005 *R v KAQ; Ex parte A-G (Qld)* (2015) 253 A Crim R 201, 213 [47] (Dalton J) and see *R v D* [1995] QCA 332 (4 August 1995) 5.

1006 *R v Webber* (2000) 114 A Crim R 381, 382 [5] (McMurdo P and Chesterman J).

1007 *R v KAQ; Ex parte A-G (Qld)* (2015) 253 A Crim R 201, 213 [47] (Dalton J, citing *R v D* (unreported, Court of Appeal, Qld, 4 August 1995); cited in *R v Ianculescu* [2000] 2 Qd R 521, 522–523 [1], [5], [6] (Pincus JA) as C.A. No 13 of 1995, 4 August 1995; [1995] QCA 332.

1008 *R v Sukkar* (2006) 172 A Crim R 151 (Latham J, McClellan CJ and Howie J) cited in *R v KAK* [2013] QCA 310 (18 October 2013) 12 [48].

1009 *R v SBI* [2009] QCA 73 (3 April 2009) 3 [6] (McMurdo P dissenting in part as to the result, footnotes omitted).

Kirby P (as his Honour then was) in *R v Salameh* offered insight into the operation of this principle. His Honour reflected that:

> It would be highly undesirable to harness the discount by reference to fixed formulae. The circumstances of each case are sufficiently special to warrant a high degree of flexibility in the discount provided for cooperation.[1010]

His Honour then set out the relevant considerations that govern the discretion and warrant some form of discount. They are particularly apposite to drug offenders, and each of the matters identified by his Honour has resonance in this case. They are:

a) 'The assistance which is given to the prosecuting authorities to bring home to those responsible their criminal offences … especially in, but not limited to, cases involving drug dealing';
b) 'Such assistance may lead to the vindication of the criminal process by the clearing up of crime in a public way';
c) 'The cooperation may evidence contrition on the part of the offender and signal his or her commitment to break the criminal pattern and to start life afresh accepting the law and its institutions'; and
d) 'The burdens and dangers which are faced by the offenders and their families once the offender has assisted authorities' including risk after release from custody.[1011]

The particular importance in drug-related matters of police being aided in identifying and investigating those higher up in the chain of supply or production is well established.

The appropriate discount for cooperation in any case will always vary according to the circumstances; there is no fixed formula or method for calculating a percentage or other rate of discount.[1012] The discount is 'quite apart from the discount obtained by persons who plead guilty'[1013] and is to be 'identified separately, rather than forming an undifferentiated part of the synthesis involved in fixing a just sentence'.[1014]

For example, in one case, a person pleaded guilty to manslaughter (of an adult) and interfering with a corpse. She helped organise a plan, was present for the beating, helped transport the corpse and mutilated it. Two other co-offenders physically carried out the beating, and the Crown would not have been able to proceed against one of them without the woman's evidence and undertaking. She received an actual section 13A sentence of 9 years, with an indicative sentence of 12 years. This meant that, with 9 years, she was not automatically subject to a serious violent offence declaration — the difference in non-parole periods was 4.5 years as opposed to 9.6. The court made this public in its judgment (albeit anonymised).[1015]

By contrast, one of the male offenders — her co-accused on the same charges — who hit the deceased with a baseball bat and had a greater role in disposing of the corpse, which was not found, also had a section 13A sentence. However, the sentencing judge was informed that the prosecutor had decided that the man was not a reliable witness and would not be called to give evidence at the trial of the third offender.[1016] His indicative sentence was 14 years. His ultimate sentence was 9 years 9 months, which would have been 12 years if not for pre-sentence custody, which could not be declared. A serious violent offence declaration was made. His assistance was 'relatively insignificant ... his attempt to provide s 13A co-operation has proved of no worth'.[1017] Instead, the reduction was made:

1010 *R v Salameh* (1991) 55 A Crim R 384, 388.

1011 Ibid [393].

1012 *R v X* [2001] QCA 498 (9 November 2001) 8–9 (McMurdo P), 10 (McPherson JA, Mackenzie J).

1013 *R v Webber* (2000) 114 A Crim R 381, 384 [16] (Pincus JA).

1014 *R v KAQ; Ex parte Attorney-General (Qld)* (2015) 253 A Crim R 201, 213 [48] (Dalton J, citations omitted).

1015 *R v WAW* [2013] QCA 22 (22 February 2013). See [1], [3], [21], [23], [24] and [31] (de Jersey CJ).

1016 *R v NQ* [2013] QCA 402 (20 December 2013)10–11 [30].

1017 Ibid 23 [99] (Morrison JA).

> Not for the value of the undertaking to give evidence, which was worthless, but because of the exposure by reason of the applicant's s 13A co-operation, to threats within the prison environment and the necessity to serve his period of imprisonment in protective custody.[1018]

The reward should be granted whatever the offender's motive — full and frank cooperation is the goal, whether it stems from remorse or self-interest (but remorse will mean a greater discount, on the general sentencing principles). There will be no discount where disclosure is deliberately tailored to reveal only what the authorities already know, and certainly not when the information is false. The discount will rarely be substantial unless the offender discloses everything he or she knows. If there has been genuine cooperation, it does not matter whether or not the information supplied actually proves to be effective; the authorities may receive even better information from another source, or the other offender may plead guilty.[1019]

11.6.4 Policy rationale for these provisions

Encouraging people to provide cooperation 'has been described as a matter of "high public policy" justifying substantial inducement by way of a reduction of sentence'.[1020] It saves agency time and public money, encourages pleas of guilty from the participating offender, and may ensure a conviction of other offenders where there would not otherwise be enough evidence.[1021]

As the Council's research shows, many child homicides occur in private homes where there are no witnesses except the adults in the household caring for the child. It can be very difficult for police to build a case against alleged perpetrators when the only evidence is medical evidence regarding injuries, versions of events given by the caregivers (who have a right to silence and are presumed innocent), and, perhaps, observations of neighbours and any medical or childcare/schooling history of the child.

Even where the section 13A restrictions do not apply, the Queensland Court of Appeal has found that maintaining these protections may be required to maintain the safety of those who have provided this cooperation. For example, in the 2002 case of *R v McGrath*,[1022] the Queensland Court of Appeal recognised the need to censor its own judgments in section 13A cases for specific reasons, and it has also done so since that judgment.[1023] Section 13A does not require the Court of Appeal to adhere to the same procedures about publication secrecy that bind sentencing courts. However, unless the Court of Appeal observed similar restraints, procedures under section 13A: 'would sometimes be rendered nugatory and [a sentenced person] could be exposed to danger'.

In 'some'[1024] cases, it would be necessary for the Court of Appeal to protect people who would be endangered by releasing information revealing the nature of their cooperation with law enforcement, just as there was a need to protect informers from criminal retribution: 'Whether it is necessary to do so will of course depend upon the extent of the co-operation, the perceived level of danger and the circumstances of the case'.[1025]

1018 Ibid 21 [89] (Morrison JA).

1019 This paragraph is a summary of a passage from *R v Cartwright* (1989) 17 NSWLR 243, 252–253 (Hunt and Badgery Parker JJ), reproduced in *R v de Figueiredo* (2013) 235 A Crim R 511, 519–520 and discussed in *R v FAF* [2014] 247 A Crim R 572, 574–575 [12]–[15].

1020 *R v FAF* (2014) 247 A Crim R 572, 574 [10] (P Lyons J, Muir JA and P McMurdo J agreeing), see also *R v Gladkowski* (2000) 115 A Crim R 446, 447.

1021 See, for example, *R v SBI* [2009] QCA 73, 6–7 [27]–[28], [31]. There, an armed robber's evidence would lead to the prosecution of his co-offenders who otherwise would have escaped punishment. However, SBI was a mature adult with a terrible criminal history who organised a robbery and led younger men in it. His evidence related only to the offending he participated in.

1022 *R v McGrath* [2002] 1 Qd R 520, 522–523 [7].

1023 For instance, *R v KAQ; Ex parte A-G (Qld)* (2015) 253 A Crim R 201 and *R v Harbas* [2013] QCA 159 (21 June 2013) 6 [16].

1024 *R v McGrath* [2002] 1 Qd R 520, 524 [9]. For further examples, see *R v Gilles, Ex parte A-G* [2002] 1 Qd R 404, 409 [23] (Thomas JA) and *R v Webber* (2000) 114 A Crim R 381, 384 [16] (Pincus JA).

1025 *R v McGrath* [2002] 1 Qd R 520, 524 [10].

In *McGrath,* it was suggested:

> Knowledge of the precise extent to which an offender has benefited by a promise of cooperation is the kind of knowledge that is likely to inflame persons who resent the giving of such co-operation. An indicative sentence would not be published in the trial court, and generally speaking we do not think that it should be published in the Court of Appeal if it decides to vary the indicative sentence. Accordingly, in the present matter it is sufficient to indicate that the indicative sentence has been altered and that the terms of the alteration and the reasons therefore are contained in the separate sealed reasons for judgment.[1026]

Discussing the lawyers' submissions in detail would involve disclosing the nature and extent of the person's cooperation from the time of initial apprehension, and the reasoning process leading to the court's conclusion involved consideration of the nature and extent of the cooperation.[1027]

There are also sound public policy reasons for making some proceedings confidential. There are often risks to the safety of offenders and their families if they cooperate with law enforcement, and this is compounded if the person is in — or may go into — custody. If all such offenders were publicly named, the threat to safety may overwhelm the incentive of a discounted sentence:

> The countervailing risk is that discounts which are thought too niggardly will encourage offenders, and their advisers, to think that the reward for co-operation is not enough to justify the risk which co-operation is said to entail.[1028]

It may be that a sentence is so lenient, with references made to the person's exceptional cooperation, that it appears — or can be deduced — that a section 13A sentence occurred.[1029]

11.6.5 Concerns about the operation of these sections

In respect to ensuring confidentiality of witness identity and material given to the court, sections 13A and 13B set out powers and procedures. While the power to prohibit publication of the name or address of any witness is discretionary, both sections stipulate rigid procedures designed to ensure that information about a reduction in sentence due to offender cooperation is not publicly available without a further court order.

The reasons why a sentence may be lenient can be hidden, and this is the case regardless of the actual risk to the person giving the cooperation. For instance, a mother who gives evidence against a father regarding the alleged manslaughter of their child might be at very little risk, while in another case, there may be very serious domestic violence that places the mother at extreme risk from the father. These examples are different again from a drug trafficker who will give evidence against a 'kingpin' alleged to have run a drug empire and to have ordered physical assaults on subordinates.

Further, the point of keeping an informant's identity secret is to protect their safety, and the chief threat to that safety would usually (but not always)[1030] be the other person or people implicated by the sentenced offender's evidence. But an accused person has a fundamental right to know the case against them; and this usually means knowing the identity of witnesses against them — especially if that witness is a co-accused (as opposed to, for instance, a covert police operative or drug informer).[1031] A person

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1026 Ibid 525 [16]–[17] and see 524 [11](b), (c).

1027 Ibid 522–523 [7], 525 [17].

1028 *R v Ianculescu* [2000] 2 Qd R 521, 523 [6] (Pincus JA).

1029 See, for example, Queensland Department of Justice and Attorney-General, *Taskforce on Organised Crime Legislation* (2016) 80, 217.

1030 For instance, the physical safety of a person who is in custody, or is at risk of going into custody, will be significantly threatened if it is known to the prison population that the person cooperated with the police against another person. Such a person would likely have to spend their time in protective custody. See, for example, *R v OS* [2016] QCA 278 (1 November 2016) 6 [31] (Atkinson J).

1031 Police and Crime and Corruption Commission operatives are people who are not offenders, but officers acting lawfully and can be granted special anonymising protection as witnesses, such as witness identity protection certificates. See, for example, Part 2, Division 5 of the *Evidence Act 1977* (Qld). The identification of drug informers is also protected by legislation: sections 119–122 of the *Drugs Misuse Act 1986* (Qld). For a more detailed list of

who is implicated by evidence from a section 13A sentenced person could expect to have a good argument for a court order allowing them access to the sealed file from the sentenced person's proceedings. The implicated person's lawyers could then use this material when cross examining the sentenced person in court as a witness. Such sentenced persons are usually reminded of the discount they received on their sentence, with the suggestion that it was in their interest to lie,[1032] shift blame, or embellish their evidence.

This point is also relevant to parity (regarding sentencing consistency and equal justice) between section 13A sentences where co-offenders charged from the same criminal enterprise and give undertakings to cooperate. This could require assessment of the sealed statements of both. In *R v OS*,[1033] a related offender's indicative sentence was 16 years, reduced to an effective sentence of 10 years (to serve 80% of 7 of those 10 years, regarding one particular count) because of the section 13A cooperation.[1034] The offender, OS, retained his indicative sentence of 12 years, with a substituted actual sentence of 9 years' imprisonment (down from 10 years' imprisonment) without a declaration that the applicant had been convicted of a serious violent offence, on the basis that, while 'it could not be considered, the applicant's co-operation was of nearly the same value as the related offender's or merited nearly the same discount on sentence' and the 'extremely marked disparity in discount for co-operation' was sufficient to 'give rise to an objectively justifiable sense of grievance'.[1035]

In *R v Ta*,[1036] an offender who pleaded guilty but did not cooperate on a section 13A basis, relied (unsuccessfully) upon the co-accused's section 13A indicative sentences imposed in closed court, which took into account all relevant sentencing considerations other than the undertakings of future cooperation. He did this to seek to show that the co-accused's indicative sentence revealed that his sentence was manifestly excessive. However, the differences in sentences between the co-offenders could be explained by differences in offence and personal circumstances.

Another section 13A appeal case that had unusual features, making it difficult to find assistance in comparable cases, was *R v KAQ; Ex parte Attorney-General (Qld)*.[1037] One of the helpful comparable cases was another (unrelated) section 13A case, *R v Harbas*,[1038] but accessing and using it was not without its difficulties:

> Using *Harbas* as a comparator introduces another significant difficulty. Because that case concerned a discount for s 13A co-operation, much of the reasons are not published, but contained in an annexure private to the parties. The parties to this appeal did not have the unpublished reasons. Nor apparently did the sentencing judge.[1039] Those unpublished reasons were only produced on the hearing of this appeal because of commonality between the bench in this case and in *Harbas*.[1040] Although it is the most relevant comparator in a difficult case, it cannot be fully discussed in these reasons.[1041]

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legislation (being the law at 2001) which prohibits, or allows prohibition, of publication of proceedings or identities, see *R v McGrath* [2002] 1 Qd R 520, 523, fn 10.

1032 See, for instance, *R v OS* [2016] QCA 278, 7 [39] (Atkinson J).

1033 See *R v OS* [2016] QCA 278 (1 November 2016) 4–5 [21], [26], 6 [34], 7 [35], [39], 8, [41], [43]–[45], 12 [56], [57], 14 [68]–[69] (Atkinson J). Here, the Crown conceded on appeal that the parity principle may apply where both offenders have given section 13A cooperation: 9 [46].

1034 *R v OS* [2016] QCA 278 (1 November 2016) 13–14 [67]–[68] (Atkinson J).

1035 Ibid 14 [73]–[74] (Atkinson J, McMurdo and Morrison JJA agreeing).

1036 *R v Ta* [2016] QCA 305 (18 November 2016)2 [2], [3], 11 [28], 12 [31] (Fraser JA, P McMurdo JA and P Lyons J agreeing). The judgment referred to an assumption that the parity principle is potentially applicable in a comparison between a sentence and an indicative sentence pronounced in closed court, although the comparative analysis was made.

1037 *R v KAQ; Ex parte A-G (Qld)* (2015) 253 A Crim R 201, see 205 [7] (Holmes JA) and 214 [54] (Dalton J).

1038 *R v Harbas* [2013] QCA 159 (21 June 2013).

1039 *R v KAQ; Ex parte A-G (Qld)* (2015) 253 A Crim R 201, 215 [55] (Dalton J) fn 39: 'The sentencing judge was a member of this Court in *R v Harbas* [2013] QCA 159, but no reference was made to the case below'.

1040 Holmes and Fraser JJA both sat on *Harbas* in 2013 and *KAQ* in 2014/2015.

1041 *R v KAQ; Ex parte Attorney-General (Qld)* (2015) 253 A Crim R 201, 215 [55] (Dalton J).

A later portion of *KAQ* demonstrates the point succinctly, 'It is difficult to compare the value of the s 13A co-operation as between the cases [redacted].'[1042]

The blanket application of sections 13A and 13B may risk masking the full circumstances of such sentences from public knowledge, while (appropriately and necessarily) allowing the ultimate alleged offender — and perhaps the greatest threat to the sentenced witness where there is a threat — to access the sealed documents (in the interests of a fair trial, and dependent upon a court order allowing this to occur).

If the omission of information gives the impression of being lenient beyond reason, it also risks compromising general deterrence in sentencing — one of the five statutory purposes of sentencing.[1043]

Immediately prior to the Council receiving its current reference, on 11 October 2017, Matthew Scown was sentenced for the manslaughter of Tyrell Cobb, aged 4 years. The basis for Scown's plea of guilty was criminal negligence, in that he failed in his duty of care to the child by not seeking timely medical assistance for him until one night after observing the child ill throughout the day and into the night. The prosecution did not allege that he knew or suspected the cause of the injury, nor that he caused it. He had spent 987 days in pre-sentence custody after having initially been charged with murder. He was sentenced to 4 years' imprisonment, with the 987 days declared as time served. The sentence was suspended after 987 days, with the remainder suspended for 4 years from the day of his sentence. This meant that he could leave court on the day of his sentence. There was intense media interest in his sentence and his perceived demeanour outside of court.

In a December 2017 address, Chief Justice Holmes commented on media criticism that year:

> But this year some of the harshest condemnation concerned cases in which because of legislative prohibitions, the full details of the sentencing could not be made known to the public. There is perhaps not much to be done in those cases but to ask the public to accept that there may be more to a sentence sparking media outrage than meets the eye; and to ask our parliamentarians to act with restraint in their comments so as not to damage public confidence in the judicial system, when the court is constrained by legislation and cannot with any propriety defend itself.[1044]

In a judgment delivered days later in December 2017,[1045] Justice Applegarth sentenced Heidi Strbak, Tyrell Cobb's mother for the manslaughter of her son. She had been co-accused with Matthew Scown, who gave evidence for the prosecution at her contested sentence hearing. His Honour referred to the Chief Justice's speech and made the following observations:[1046]

> [57] These [comparative] cases of neglect bring me to the case of *Scown*, which like the case of *Kent*,[1047] has been misunderstood publicly because of the s 13A element.
>
> [58] I should say something about one source of public misunderstanding of sentences that arise because of s 13A ...
>
> [59] What I am about to say is not intended as a criticism of the law, which is a matter for the Parliament to make and amend. It is simply a description of how the law works in cases like *Kent* and *Scown*. In such cases, the non-discretionary confidential component of the sentence means that the publicly-pronounced sentence and reasons will tend to mislead, rather than enhance, community knowledge and understanding of penalties that are imposed in such cases. The procedure adopted in s 13A is designed to make confidential the undertaking to provide co-operation and the sentence which would have been passed had there not been co-operation. But that creates problems. The

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1042 Ibid 219 [72] (Dalton J).

1043 *Penalties and Sentences Act 1992* (Qld) s 9(1)(c).

1044 Chief Justice Catherine Holmes, 'Presentation of Queen's Counsel; recognition of newly admitted barristers; and traditional exchange of Christmas Greetings' (Speech delivered at the Banco Court, Wednesday 13 December 2017) 5 <https://archive.sclqld.org.au/judgepub/2017/holmes131217.pdf> .

1045 *R v Strbak* [2017] QSC 317 (18 December 2017). This sentence is under appeal. Therefore it is not discussed here. Applegarth J's comments about section 13A reproduced here are separate obiter comments regarding criminal procedure.

1046 Ibid 9 (Applegarth J).

1047 A man sentenced, along with another man, for the manslaughter of a girl named Kyhesha-Lee Tamika Marie Joughin.

> mitigating circumstance of the defendant having undertaken to co-operate in future criminal proceedings is only revealed in closed court. The publicly-pronounced reasons for the sentence, which is discounted by reason of that mitigating circumstance, does not reveal that the sentence was discounted for that reason. To the public, the sentence may appear inexplicably lenient, and undermine the interest in general deterrence and undermine public confidence in the criminal justice system.
>
> [60] But that is the law that was applied in *Scown*. The four year sentence he received in open court was less than the indicated sentence in closed court, being the sentence he would have received had he not undertaken to give evidence against [Strbak].

11.6.6 Findings from submissions and consultation

The Council sought feedback in its consultation paper regarding sections 13A and 13B. Submissions responded to two questions — namely, whether any legislative amendments were required for sentencing child homicide offences, and how communication with community members and victims of crime about sentencing for child homicide offences could be enhanced.

Most legal stakeholders who made submissions on this issue do not support changes being made to sections 13A and 13B on the basis that promoting community understanding of sentencing outcomes is an insufficient rationale for reforming the operation of these provisions and pointing to important policy reasons why the protections afforded by these sections were originally put in place.

In its submission, the Bar Association of Queensland cautioned:

> Notwithstanding that media reporting is often inaccurate it is submitted that great care should be taken before any change to the current s. 13A practice of closed hearings in respect of such proceedings is adopted. It seems trite to say that co-operation in the administration of justice comes at high risk to the individual. It is often necessary to accept s. 13A undertakings in order to successfully prosecute other offenders.
>
> The fact that the community is unable to be fully informed about the s. 13A process is not a sufficient rationale to adopt a different approach to such sentencing factors.[1048]

The Bar Association recommended, instead, that:

> Media reporting of sentence proceedings involving the application of s. 13A could adopt a more balanced approach by including a standard statement that part of the sentencing hearing took place in a closed court environment and that the sentencing Judge was fully aware of all the aspects relevant to the sentence, thereby expressing a level of trust in Judges rather than criticising Judges for lenient sentences when all of the facts are not in the public domain.[1049]

The Queensland Law Society was similarly cautious about such reforms, noting: 'the effectivity of closed section 13A hearings might be compromised if they were made open to the public.'[1050] A similar view was shared by Legal Aid Queensland, which submitted:

> In our view, particularly with regard to section 13B, these barriers are put in place for very good reasons. Removal of these barriers will in many cases significantly increase risk to defendants and interfere with police investigations by interfering with a defendant's ability and preparedness to cooperate.[1051]

Amendments to sections 13A and 13B, however, were supported by Sisters Inside:

> to allow for judicial discretion to open court and/or publish detailed written reasons to ensure accurate information is publicly available in appropriate cases.[1052]

1048 Submission 30 (Bar Association of Queensland).

1049 Ibid.

1050 Submission 35 (Queensland Law Society).

1051 Submissions 33 (Legal Aid Queensland).

1052 Submissions 31 (Sisters Inside).

11.6.7 The Council's views

The Council is aware some sentences for child homicide that have attracted media criticism are most likely sentences reduced in circumstances where the reason for this could not be made public. In particular, the operation of sections 13A and 13B may result in an apparently lenient sentence being imposed when a reduction has been made on the basis of substantial cooperation by that party with the investigation and prosecution of another person.

There are important and legitimate reasons why the current legislative protections are in place for those who provide cooperation with law enforcement agencies with their investigations. These reasons include ensuring the protection and confidentiality of those individuals who otherwise might be at risk of being subjected to violence and intimidation.

However, in the case of many child homicide investigations, the Council does not consider the same protections are necessarily required in all cases, given the parties involved are usually well known to each other (often being current or former intimate partners) and it is often apparent what cooperation has been offered or given. Further, the same types of concerns about the safety of the person providing cooperation, while still potentially present, do not loom as large in these cases as in, for example, those cases where some form of organised criminal activity is involved.

The current provisions offer courts very little scope (in circumstances where the protection of the person providing the cooperation is not required) to make the basis of the sentence known. This has potential to erode community confidence in the sentences imposed, as the fact the sentence has been reduced for a particular reason is not apparent.

The Council is minded to recommend that courts be provided with greater discretion to consider whether disclosing that the sentence has been reduced on the basis of cooperation is in the public interest, provided the safety of the person providing cooperation is not compromised. However, it recognises such a change holds broader practical and policy implications than have been considered as part of this review. For this reason, the Council suggests the Queensland Government may wish to consider identifying this as an area of potential future reform to enable more detailed consideration to be given to this issue.

The Council also notes suggestions made about ways to ensure the reasons for sentence are better explained by the media, but without making specific reference to the fact that cooperation has been given.

The Council has committed as part of its business plan to the development of a media kit on reporting sentencing. The aim of this project is to provide an information resource for media professionals on aspects of sentencing. As part of the development of this resource, the Council will consider the potential to provide the media with greater guidance about how to report on sentences imposed as a result of these provisions, such as through the inclusion of suggested standard wording in reporting on these cases.

Advice 4: Operation of section 13A of the *Penalties and Sentences Act 1992* (Qld)

The Council notes stakeholder concern that sentences imposed under section 13A of the *Penalties and Sentences Act 1992* (Qld) ultimately undermine public confidence in the justice system. This is because the way this section operates does not allow the community access to all the information that informed the court in imposing the sentence — in particular, the assistance offered in the investigation and prosecution of co-offenders, and the sentence that would have been imposed without this assistance.

Given the broader implications of any potential reforms, and the fact that such reforms are beyond the scope of these Terms of Reference, the Council suggests the Queensland Government consider identifying this as an area for future investigation to enable more detailed consideration to be given to this issue.

Chapter 12 — Improving system responses

12.1 Introduction

The previous chapters of this report set out the Council's response to the Terms of Reference. In particular, the Council's recommended reforms to provide additional guidance to courts to ensure the vulnerability of child victims is reflected in sentencing, improve responses to family members of victims of child homicide, and enhance community understanding of sentencing outcomes.

During the review, other issues were raised about potential system improvements, enhancements to Queensland's capacity to respond to child homicide, and the management of child homicide offenders. These issues are discussed in this chapter.

12.2 Enhancing information and system responses to child homicide

12.2.1 Supporting high quality data and multidisciplinary research

Throughout this review, the Council experienced difficulties with securing and synthesising data about child homicide offences — including details about offenders, victims, and sentencing outcomes. The Council sourced this information from a number of administrative datasets owned by different data custodians. While the Council received exceptional levels of support from each of these agencies, the task of linking the various aspects of child homicide offences across different datasets, characterised by different data conventions, was complex and resource intensive. Substantial manual verification of data and coding of specific variables was also required.

For the purposes of the Terms of Reference, baseline information about child deaths in Queensland was first obtained from the Queensland Child Death Register maintained by the Queensland Family and Child Commission (QFCC). The baseline data were then integrated with courts' data from the period 1 July 2005 to 30 June 2017. Additional quality checks using Queensland Police Service (QPS) data (offence-focused) and sentencing remarks from the Queensland Sentencing Information Service (QSIS) (penalty-focused) revealed additional child homicide cases outside the baseline. QPS data provided victim age, gender and relationship for homicide offences, as well as time between the offence incident and police charge. QSIS remarks were manually coded including quality checks. Queensland Corrective Services (QCS) data were then integrated to examine pre- and post-sentence management of offenders sentenced for child homicide over the data period.

Further information about how the Council approached data management and analysis is located in its research report and Appendix 3 of this report.

These challenges are not unique to Queensland. The lack of quality and timely data is cited as a significant limitation by the research literature on child homicide, precluding more definitive conclusions about the contribution of specific situational and contextual factors and adversely affecting the capacity of research to inform prevention and intervention efforts. The Council identified a range of differences associated with definitions, and data collection, analysis and reporting standards.

The Council acknowledges the National Homicide Monitoring Program has played an important role in improving the quality and amount of research undertaken into homicide and specific sub-categories such as child homicide and filicide. Such initiatives are critical as they enable accurate monitoring of trends over time and inform public policy debates and decision-making.

Establishing a solid and valid data foundation is important to support a mixed-methods approach as recommended by research evidence, including informing prevention and intervention strategies and identifying key periods of risk. Research increasingly recognises that administrative datasets cannot capture sufficiently detailed information about the situational and contextual factors that are critical for building evidence and driving sound public policy. Increasingly, the value of cross-discipline research in which criminal justice, human services, medical and legal researchers are collaborating to address gaps in knowledge about child homicide is being recognised. Promoting multidisciplinary collaboration would

greatly help address these gaps and build comprehensive evidence for prevention and intervention efforts.

While the Council appreciates that the incidence of child homicide is lower than other categories of homicide, it considers that it is an important area of future inquiry for the following reasons:

- Building the evidence base may assist in developing early warning indicators for child homicide.
- The mortality rate for children from fatal assault and neglect who are known to the child protection system is 'more than four times higher' than for children not known to the child protection system.[1053]
- Identified links to broader family violence and periods of risk, such as parental separation and multidimensional structural, social and emotional stress, indicate that the risks to children must be considered as part of integrated responses to domestic and family violence.
- It may help identify gaps in knowledge about emerging and under-researched areas, including blended families and the involvement of step-parents in child homicide.
- Speculation that reported homicide ideation and psychiatric disorders precede some child homicide events with future perpetrators and/or victims coming to the attention of various official and unofficial services or people, suggesting such circumstances should be amenable to integrated prevention efforts.[1054]

12.2.2 The Council's views

The Council's review suggests there are opportunities for research to inform practice, and for practice to inform research. This requires an ongoing commitment by professionals, researchers, criminal justice agencies, and other agencies tasked with the protection and support of Queensland children and their families to collect and report high quality information at both an individual and system level. This supports informed and responsive policy decision-making and system responses.

While the Council is conscious that data are maintained by individual agencies to support their own functions and administrative requirements, system-level priorities are also important. To a certain extent, some problems encountered by the Council could be addressed by a stronger, system-wide commitment to the integrity of the Single Person Identifier — a unique number allocated by the QPS to individuals, which should, in practice, flow through all interactions that a person has with the criminal justice system.

At a minimum, the Council recommends that the Queensland Government give consideration to mechanisms that would allow for offences committed against children, victim–offender relationship, and risk factors to be more easily identified without a requirement for manual coding. The Council recognises further detailed consideration and consultation is required to find the best means to achieve this outcome and to support the analysis of these data.

Establishing processes that will support the analysis of high-quality data about homicide, including child homicide, will enhance the state's capacity to monitor both a category of offence (homicide) and a defined population (children) that the Queensland community has identified as being of concern.

Improving the availability of data on victim age and associated variables will also support the proposed evaluation of changes recommended by the Council to the PSA (Recommendation 2).

1053 Queensland Family and Child Commission, *Child Death Register Key Findings 2016–17: Children Known to the Child Protection System* (2017).

1054 Dawson, above n 1113; Domestic Violence Resource Centre Victoria, above n 10.

Recommendation 8: Identification of child homicide offences for research and reporting purposes

The Queensland Government should consider ways to provide for child homicide offences being 'flagged' for the purposes of enabling ongoing monitoring and publication of information in support of enhancing understanding about these cases, including sentencing outcomes — for example, by:

- allowing these offences to be flagged as committed against a child for the purposes of being recorded in the Queensland-Wide Interlinked Courts (QWIC) database and other relevant databases; and/or
- enhancing current linkages between databases maintained by the Queensland Police Service, Court Services Queensland, and Queensland Corrective Services to enable the age of the victim, relationship between the victim and offender, and the potential contribution of substance misuse, family breakdown and mental health to be more readily identified.

12.2.3 Enhancing the operation of the system

Homicide represents one of the most, if not the most, complex and serious crimes the criminal justice sector responds to. In practice, this complexity leads to additional time requirements to ensure the system fulfils its role to detect, prosecute, defend and sentence people charged with these serious offences.

During initial consultation for the review, operational police and senior forensic pathologists acknowledged the considerable time and resource investments associated with child homicide cases. Experts classify child homicide cases as one of the most complicated and protracted investigative and forensic undertakings they encounter, often due to the developmental life stage of the victims. Both groups of experts agreed that their respective challenges are compounded when very young child victims are involved.[1055] The QPS, in its submission, highlights a number of factors that make child death investigations more complex than other homicide investigations including:

- *Medical evidence*: in many cases, the cause of the child's death will not be immediately apparent, and may be attributable to natural causes, including sudden unexplained death of an infant (SUDI), accident, or intentional or non-intentional injury. Medical and pathology investigations can be lengthy and complex. Further tests and examinations may be required before natural causes of death can be ruled out. It may be difficult to establish a definitive cause of death, particularly where multiple injuries of different ages are identified — which makes it difficult to determine a clear time or date in which the injury that caused the death is likely to have occurred.
- *Culpability*: there are often no witnesses to the act/s of violence, which makes identifying a clear time and place of death difficult. The child may also have been in the care of multiple people around the time of the injuries, which may make it difficult to determine who is responsible. Admissions to offending are rarely made in child death investigations, and offenders may deny or minimise their role in the child's death.
- *Motive and intent*: There is often no evidence of planning or preparation which could suggest an intention to kill or cause grievous bodily harm (necessary to establish murder, rather than manslaughter). Motives or the reasons for the infliction of injury can be more difficult to determine than for homicides involving adult victims. Potential factors may include heightened

[1055] 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. See also Ling Li, 'Sudden Unexpected Infant Deaths' in Juan C. Troncoso, Ana Rubio and David Fowler (eds), *Essential Forensic Neuropathology* (Lippincott Williams & Wilkins, 2010) 173; LJ Dragovic, 'Neuropathology of Brain Trauma in Infants and Children' in Troncoso, Rubio and Fowler (eds), *Essential Forensic Neuropathology* (Lippincott Williams & Wilkins, 2010) 181.

stress, inability to cope, postnatal depression, frustration or anxiety, momentary anger or inattention.

- *Emotional impact*: A child's death has a significant emotional impact on the family of the child and for service providers supporting the family. Balancing the need to conduct an impartial investigation, and to provide information and support to the family can be challenging — particularly when it is not clear whether a criminal offence has occurred and, if it has, who may be involved.[1056]

The Council acknowledges the work being led by justice and health agencies in the complex areas of child abuse, neglect and child deaths, and it endorses the continued use of multidisciplinary meetings as an important mechanism for promoting collaboration, practice improvement, and discipline-centric information exchange. The Council understands from its discussions with police and forensic pathology services that these types of meetings are already occurring, albeit such meetings are being convened on an informal and ad hoc basis. The Council supports an ongoing commitment to these initiatives, given the significant practice and information sharing benefits that may result. Through its review, the Council learnt that forensic evidence represents an essential and critical part of the investigative process, while investigative activities influence forensic processes, particularly for these typically protracted and complicated investigations. As a result, the Council suggests that the QPS and Queensland Health consider the value of a more structured approach for these multidisciplinary meetings.

The Council further acknowledges the importance of state-based death review processes in response to child deaths and family violence. Such review processes are effective in identifying service failures for individual cases but can also provide important insights into linkages between and, potentially, disconnects across individual fields of practice within both the criminal justice and human services sectors.

The Council recognises that examining system-wide issues can lead to improved practices, particularly over the longer term,[1057] and strongly supports extending the scope of current reviews to all child death cases to consider systemic issues, at both individual and aggregated levels. An authentic commitment to considering whether the entire system tasked with protecting children and families requires improvement, aimed at reducing further deaths, represents a positive result following the death of a child.[1058] While the Council appreciates that certain child death cases are already reviewed (e.g. the Queensland Child Death Case Review Panels review all child deaths where the child was known to the child protection system within the 12 months prior to death), extending the review process to all child victims of homicide, irrespective of the situational or contextual circumstances, may help to reduce future child homicides. Reviewing all child homicide cases may identify missed opportunities for intervention, as well as prevention mechanisms for different situations and families.[1059] The Council recognises further detailed consideration and consultation is required to identify the best means to achieve this outcome, as well as the resourcing implications.

12.3 Management of offenders post-sentence

12.3.1 Issues relating to sentence administration

A number of issues were raised with the Council relating to the post-sentence management of child homicide offenders including:

- the availability of appropriate programs to offenders convicted of child homicide — such as anger management and parenting programs — the time required to complete these programs prior to an offender reaching their parole eligibility date, and when these programs are offered (e.g. rehabilitation programs are not delivered to prisoners on remand who have not yet been

1056 Submission 36 (Queensland Police Service).

1057 Australian Institute of Family Studies, above n 72.

1058 Brown and Tyson, above n 43.

1059 Queensland Family and Child Commission, above n 1053.

convicted of an offence — a person may be on remand for a number of years, which generally will be recognised as time served);[1060]

- the operation of the QCS Victims Register, with a suggestion by some family members of child victims that completing the application form can be daunting, and a suggestion made that the register should operate as an 'opt out' rather than 'opt in' service in these cases;[1061]
- ensuring conditions and resourcing of Queensland's correctional system are adequate, with the point made that 'offenders are sentenced *as* punishment, not *for* punishment'.[1062]

Sisters Inside supported a greater focus on rehabilitation as a sentencing purpose, and suggested that grief counselling, parenting skills and other relevant services for women could be considered as part of the sentencing process, especially in situations where women have other children.[1063]

With the exception of community-based sentencing orders such as probation, which provide for the court to order participation in programs as a condition of the order,[1064] decisions about program engagement are generally left to be managed by QCS.

In its submission QCS advised that it assesses offenders sentenced to custody for child homicide offences on their risk and rehabilitation needs.[1065] Programs offered to promote rehabilitation are:

- substance abuse and maintenance programs;
- parenting programs;
- sexual offending programs;
- the Positive Futures Program for Aboriginal and Torres Strait Islander men, which is focused on addressing issues relating to family violence and substance misuse;
- the Cognitive Self Change Program for moderate to high-risk offenders with a history of violent offending; and
- the Resilience Program, which aims to provide resilience skills to offenders.[1066]

On their release, QCS Probation and Parole officers manage and supervise offenders in the community, including liaising with key stakeholders such as child safety officers, police, the parole board, the court, and community services to respond to offender issues.[1067] As part of this management and supervision, there is a strong focus on community protection and reducing the risk of further offending.[1068]

The management of offenders on parole is discussed in Chapter 5 of this report.

As discussed in Chapter 1 of this report, the Council has not addressed issues relating to the post-sentence management of offenders on the basis that these issues go beyond the scope of the Terms of Reference. To the extent matters raised may be relevant to the sentencing process, they are dealt with elsewhere in this report.

1060 Victims of Crime Roundtable (5 June 2018).

1061 Ibid. The Victims Register is established under the *Corrective Services Act 2006* (Qld) s 320. For more information, see Queensland Government, 'About the victims register' <https://www.qld.gov.au/law/your-rights/victim-rights-and-complaints/victims-registers/about>.

1062 Submission 30 (Bar Association of Queensland).

1063 Submission 31 (Sisters Inside).

1064 See *Penalties and Sentences Act 1992* (Qld) ss 93(1)(d), 94.

1065 Submission 38 (Queensland Corrective Services).

1066 Ibid.

1067 Ibid.

1068 Ibid.

12.3.2 Child Protection Offender Register

During early consultations on the review, some stakeholders indicated support for investigating preventative measures that might reduce the risks posed to children by offenders convicted of offences involving violence against children.[1069] Under existing Queensland legislation, offenders convicted of certain serious offences against children can be, or for some offences are automatically, included on the Child Protection Offender Register (CPOR).[1070] 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'[1071] and are subject to reporting obligations under the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) (CPOROPO 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. Those placed on the register are subject to a wide range of obligations to allow police to monitor their behaviour and to investigate potential offenders when a complaint is made.

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.[1072] 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 of children generally'.[1073] A court may make an offender reporting order on its own initiative or on application by the prosecution.[1074] Prosecutors may make an application within six months of an offender being sentenced.[1075]

Reporting obligations range from a period of five years to life, if the person has previously been found guilty of a reportable offence, has been given notice of their reporting obligations, and has subsequently committed and been found guilty of a further reportable offence or offences.[1076] The reporting period commences at the time the offender is sentenced for the offence, when an order is imposed under section 19 of the *Criminal Law Amendment Act 1945* (Qld), or when the offender stops being in government detention for the offence (whichever is later).[1077]

A failure to comply with the offender's reporting obligations without a reasonable excuse is a criminal offence punishable by up to 300 penalty units or 5 years' imprisonment.[1078] The provision of false or misleading information is also a criminal offence and is also punishable by up to 5 years in prison.[1079]

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 CPOROPO Act with a view to broadening the scope to other violent offences against children, such as manslaughter and torture.[1080] The board further recommended guidelines and educational resources should be developed to ensure prosecutors have the necessary knowledge to make applications for an offender reporting

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1069 For example, this was raised at the Subject Matter Expert Roundtable hosted by the Council on 9 April 2018.

1070 *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld).

1071 Ibid s 5.

1072 Ibid sch 1, item 9 — s 300 *Criminal Code* (Qld).

1073 Ibid ss 13(1)–(2).

1074 Ibid s 13(5).

1075 Ibid s 13(5A).

1076 Ibid s 36.

1077 Ibid s 36(5).

1078 Ibid s 50.

1079 Ibid s 51.

1080 Domestic and Family Violence Death Review and Advisory Board, *2016–17 Annual Report* (2017) 88, Recommendation 17.

order as a matter of course for serious offences against children where these offences are not prescribed.[1081]

The Council received only a few submissions commenting on the merits of extending the scope of the CPOROPO Act to include manslaughter offences committed against children in response to this issue. Sisters Inside cautioned that 'any extension of the scope of the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) must be subject to more detailed review, especially its possible gendered impacts'.[1082] It further questioned the relevance or usefulness of concepts of 'risk assessment', given the context in which most offences involving the death of a child occur (particularly where committed by women), further pointing to issues with risk assessment tools, frameworks and principles.[1083] These tools, Sisters Inside submitted, are typically not gendered, or if they are, do not account for systemic factors that bring women into contact with the criminal legal system.[1084]

The Council understands that the CPOROPO Act is subject to periodic review and suggests any reforms, such as to expand prescribed offences for the purposes of the Act, should be investigated as part of any future planned review.

In response to the Domestic and Family Violence Death Review and Advisory Board's recommendations, the Office of the Director of Public Prosecutions (ODPP) has delivered online training developed in partnership with the QPS to better inform staff of how to make applications for reporting orders under the Act.[1085] This training was rolled out to all ODPP staff across the state on 31 May 2018.[1086]

The ODPP was unable to advise the Council of how many applications had been made as it does not currently record statistics on applications made under this Act.[1087] The Council suggests the ODPP may wish to consider collecting data in future on how frequently such applications are made with a view to identifying any issues with the current criteria under the CPOROPO Act and for reporting purposes. If there is unexplained variance in the cases for which an application is made, the Council suggests the ODPP include the provision of these applications in its training.

1081 Ibid Recommendation 18.

1082 Submission 31 (Sisters Inside).

1083 Ibid.

1084 Ibid.

1085 Email from Stacy Cristaldi, Practice Manager, ODPP to Victoria Moore, Manager – Policy, Queensland Sentencing Advisory Council, 20 September 2018.

1086 Ibid.

1087 Ibid.

Appendix 1: Terms of Reference

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

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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 25th day of OCTOBER 2017

Yvette D'Ath

YVETTE D'ATH
Attorney-General and Minister for Justice and Minister for Training and Skills

Appendix 2: Consultation

1. Submissions

No.	Person/organisation
1	J and S Sandeman (Preliminary)
2	Protect All Children Today Inc. (PACT) (Preliminary)
3	Name withheld (Preliminary)
4	Name withheld (Preliminary)
5	Queensland Homicide Victims' Support Group (Preliminary)
6	M Airoldi (Preliminary)
7	Queensland Law Society (Preliminary)
8	Justice for Hemi (Preliminary)
9	Bar Association of Queensland (Preliminary)
10	Confidential
11	Confidential
12	Kevin Richards
13	Confidential
14	Name withheld
15	Queensland Homicide Victims' Support Group re: Delay in support around the death of a child
16	Fighters Against Child Abuse Australia
17	Lyn Burke (Community Summit)
18	Richard Goodwin (Community Summit)
19	Name withheld (Community Summit)
20	Name withheld (Community Summit)
21	Name withheld (Community Summit)
22	Name withheld (Community Summit)
23	Confidential (Community Summit)
24	Lyn Burke
25	Name withheld (Community Summit)
26	Richard Goodwin
27	Queensland Homicide Victims' Support Group re: Comparing child homicide to adult homicide in the criminal justice system
28	Queensland Homicide Victims' Support Group re: Phases of homicide victims' journey and recommendations
29	Protect All Children Today Inc. (PACT)
30	Bar Association of Queensland
31	Sisters Inside Inc.
32	Aboriginal & Torres Strait Islander Women's Legal Service NQ
33	Legal Aid Queensland
34	Name withheld
35	Queensland Law Society
36	Queensland Police Service
37	Dispute Resolution Branch, Department of Justice and Attorney-General
38	Queensland Corrective Services

2. Meetings/forums

Date	Meeting
21 November 2017	Preliminary meeting with the Office of the Director of Public Prosecutions
27 November 2017	Lunchbox session with the Chief Magistrate of the Magistrates Court of Queensland
5 December 2017	Meeting with the Aboriginal and Torres Strait Islander Legal Service
6 December 2017	Meeting with the Director of Child Protection Litigation
11 December 2017	Meeting with the Victim Liaison Service, Office of the Director of Public Prosecutions
13 December 2017	Meeting with the Chief Forensic Pathologist, Forensic and Scientific Services, Queensland
13 December 2017	Preliminary meeting with John Allen QC, Public Defender
18 December 2017	Preliminary meeting with Legal Aid Queensland
19 December 2017	Meeting with the Department of Communities, Child Safety and Disability Services (following Machinery of Government changes, now Department of Child Safety, Youth and Women)
20 December 2017	Preliminary meeting with Queensland Police Service (Homicide and Child Trauma Unit)
8 January 2018	Preliminary meeting with the Queensland Law Society
24 January 2018	Meeting with General Manager, Queensland Homicide Victims' Support Group
30 January 2018	Briefing of the Chief Justice of the Supreme Court
6 February 2018	Meeting with Queensland Police Service (Social Impact Statements)
2 March 2018	Attended the Coroners' monthly meeting
9 March 2018	Meeting with Clinton Schulz, Aboriginal member of the Queensland Child Death Review Panel
20 March 2018	Preliminary meeting with Justice for Hemi
9 April 2018	Meeting of the Subject Matter Expert Roundtable
24 May 2018	Information Session, Brisbane
30 May 2018	Information Session, Cairns
5 June 2018	Meeting of the Victims of Crime Roundtable
6 June 2018	Information Session, Sunshine Coast
13 June 2018	Information Session, Mount Isa
19 June 2018	Information Session, Gold Coast
10 July 2018	Meeting with Family Support Counsellors, Queensland Homicide Victims' Support Group
16 July 2018	Community Summit in Logan
18 July 2018	Meeting with J and S Sandeman, Townsville
19 July 2018	Community Summit in Townsville
25 July 2018	Information Session, Longreach
6 August 2018	Meeting of the Subject Matter Expert Roundtable
16 August 2018	Meeting of the Victims of Crime Roundtable
13 September 2018	Meeting with Deputy Director, Office of the Department of Public Prosecutions

3. Subject Matter Expert Roundtable membership

Name	Position and organisation
Associate Professor John Allan	Executive Director, Mental Health, Alcohol and Other Drugs Branch, Department of Health
Bob Atkinson AO APM	Special Advisor to Minister Farmer, Youth Justice Taskforce, Department of Child Safety, Youth and Women
Phillip Brooks	Commissioner, Queensland Family and Child Commission
Professor Emeritus Thea Brown	Department of Social Work, Faculty of Medicine, Nursing and Health Sciences, Monash University
Detective Superintendent Denzil Clark	Child Safety Director, Child Abuse & Sexual Crime Group, Queensland Police Service
Nicola Doumany PSM	Executive Director, Community Justice Services, Department of Justice and Attorney-General
Todd Fuller QC	Deputy Director, Office of the Director of Public Prosecutions
Professor Paul Mazerolle	Pro Vice Chancellor Arts, Education and Law, Griffith University
Detective Chief Superintendent Cheryl Scanlon APM (Council Member – appointed June 2018)	Operations Commander, Crime and Corruption Commission Queensland
The Honourable Margaret Wilson QC	Former Judge, Supreme Court of Queensland and Part-time Member of the Queensland Law Reform Commission

4. Victims of Crime Roundtable membership

Name	Position and organisation
Jo Bryant (Council Member – appointed June 2018)	Chief Executive Officer, Protect All Children Today Inc. (PACT)
Shane Burke and Kerri-Ann Goodwin	Justice for Hemi
Dean Corless	Director, Victim Assist Queensland, Department of Justice and Attorney-General
Richard Dening	Manager, Dispute Resolution Branch, Department of Justice and Attorney-General
Detective Senior Sergeant Scott Furlong	Deputy Chair, Queensland Homicide Victims' Support Group
Elaine Henderson	Family Support Coordinator (Southern Region), Queensland Homicide Victims' Support Group
Hetty Johnson OAM	Founder and Executive Chair, Bravehearts
Andrew Robinson	Justice Mediation Officer, Dispute Resolution Branch, Department of Justice and Attorney-General
Brett Thompson	Chief Executive Officer, Queensland Homicide Victims' Support Group

Appendix 3: Research methodology

The Council adopted a mixed-methods approach for its review incorporating several research activities to operationalise key aspects of the Terms of Reference. Research activities considered:

- what is known about the nature and extent of child homicide according to the research literature and official state and national statistics;
- sentencing outcomes, including the penalties imposed and resulting sentence durations;
- community views/expectations about the 'adequacy' and 'appropriateness' of sentencing;[1088] and
- the reasons for sentences imposed on offenders convicted of adult and child homicide offences.

The mixed-methods research design involved:

- reviews of national and international research and academic examinations of child homicide and filicide;
- analyses of official statistics, including national homicide data from the National Homicide Monitoring Program (NHMP) managed by the Australian Institute of Criminology and administrative data from various Queensland agencies (see Table 33 below for a full description of all data sources used for this reference);
- analyses of sentences imposed by Queensland courts on conviction for adult and child homicide offences;
- focus groups seeking specific insights into public perceptions of sentencing and vulnerability;
- advice from experts in relevant areas and from stakeholder agencies, including internal documents;
- analyses of judges' sentencing remarks on penalties imposed for homicide offences in Queensland courts over the 12-year period; and
- comparisons of custodial sentences for adult and child manslaughter offences with those given for other serious offence types ('comparator offences').

The research activities were conducted concurrently across all stages of the Council's review.

Literature analysis

The Council undertook a review of research and academic examinations of child homicide, including filicide as a discrete subgroup of child homicide. As with most crime-related research, it can be difficult to translate research findings from one jurisdiction to another. These limitations stem from a range of factors, including the scope of individual research, definitional and categorisation differences across jurisdictions; small sample sizes; and varied research designs, data sources and topics under review. Despite these limitations, national and international research provided an important contribution to the Council's review, in particular moving beyond the data to examine the situational and contextual dimensions of child homicide.

The review of the literature sought to examine relevant national and international research and identify findings linked to the areas of interest for the data analysis. This latter aim enabled the Council to compare and contrast Queensland's results and the findings of complementary work. While systematic reviews are more comprehensive than the work undertaken by the Council, the resulting literature review delivered an appreciation of the research available within this discrete area, while accommodating the Council's resource constraints. Also, while much of the research literature addresses filicide, that research provided valuable insights into child homicide more generally.

[1088] 'Adequacy' – whether the current purposes of sentencing are adequate and whether current penalties imposed adequately reflect the vulnerabilities of child victims.
'Appropriateness' – whether changes are needed to ensure to ensure the imposition of appropriate sentences.

Analyses of sentences, and offence and case characteristics

Quantitative analyses sought to achieve two aims:

1) To analyse penalties imposed on sentence for child homicide over the 12-year period of the Council's dataset, examining a range of issues including parole eligibility, time served in custody, outcomes of appeals, and duration of cases from the offence date to finalisation by the court.
2) To analyse all cases in the Council's dataset, examining the characteristics of offences, victims and offenders, including comparisons between adult homicides and child homicides in Queensland, broad examinations of Queensland child homicides against the national child homicide data, and examinations of comparator offences (discussed below).

Data were sourced from several agencies to build a comprehensive picture of homicide offences sentenced by Queensland courts over the 12-year period and to ensure all potential cases were incorporated in the resulting Council dataset. Table 33 lists relevant agencies and their datasets, as well as the associated timeframes.

Table 33: Agency datasets used in this review

Agency	Dataset (and period)
Queensland Government Statistician's Office (QGSO)	Courts database (1 July 2005–30 June 2017)
Queensland Family and Child Commission (QFCC)	Queensland Child Death Register (1 January 2004–30 June 2017)
Queensland Corrective Services (QCS)	Integrated Offender Management System (IOMS) (1 July 2005–30 June /2017)
Queensland Police Service (QPS)	Queensland Police Records and Information Management Exchange (QPRIME) (1 January 2002–31 December 2017)
Queensland Sentencing Information Service (QSIS)	Sentencing remarks (1 July 2005–30 June 2017)
Australian Institute of Criminology (AIC)	National Homicide Monitoring Program (NHMP) (1 July 2005–30 June 2017)
Australian Bureau of Statistics (ABS)	2016 Census

The purpose of each dataset is described in Table 34 below.

Table 34: Data purposes

Source	Period	Offence scope	Data purpose
QGSO	Sentence date 1 July 2005 – 30 June 2017	Murder, manslaughter, attempted murder, GBH, torture, child cruelty	Provide offender demographics, offence details and sentence details.
QFCC	Registered with Births, Deaths and Marriages from 1 July 2005 – 30 June 2017	Murder or manslaughter	• Identify all homicide cases with a victim aged under 18 years. • Provide victim demographic data.
QCS	Sentence date 1 July 2005 – 30 June 2017 Note: pre-sentence custody dates may be prior to 1 July 2005.	Murder or manslaughter	• Provide offenders' actual time in prison (including pre-sentence custody). • Identify parole eligibility dates. • Provide offender demographics and information about offender behaviour in custody.
QPS	Occurrence registered from 1 January 2002 – 31 December 2017	Murder, manslaughter, attempted murder, GBH, torture	Identify: • comparator offence cases with a victim under 18 years of age • offence and charge dates for offences. • offender and victim demographics • offence information.
QSIS	Sentence date 1 July 2005 – 30 June 2017	Murder, manslaughter, attempted murder, GBH, torture	• Provide offence information – location, relationship, cause of death. • Provide length of pre-sentence custody.
AIC – NHMP	Offence date 1 July 2005 – 30 June 2017	Murder or manslaughter	Provide national-level information on child homicide.

The QFCC's Queensland Child Death Register provided baseline data, which the Council combined with courts data (QGSO) so that it could identify which cases resulted in people sentenced for murder or manslaughter of a child. Quality checks were applied by using QPS data and sentencing remarks from QSIS to identify additional cases outside the baseline data, including historical or 'cold' cases sentenced within the Council's data period. The QCS data were used to examine post-sentence issues. All data were linked to form the Council's master dataset, which was used for all homicide analyses.

Comparator offences analysis

Over the Council's 12-year data period, custodial sentence outcomes for adult and child manslaughter convictions were examined against those imposed for other types of violent crimes, referred to as comparator offences.

The Council selected the following comparator offences incorporating both adult and child victims: attempted murder, grievous bodily harm (intended or not) and torture, and the offence of cruelty to a child. For each of the offence and victim types, the mean, median, maximum/minimum range and interquartile range of sentence duration were calculated. The mean durations for each offence/victim type (except cruelty to a child) were tested for statistical differences in sentencing outcomes.

Focus groups

The focus groups methodology is described in Appendix 4.

Sentencing remarks analysis

The Council analysed all sentencing remarks for child murder and manslaughter cases and all adult manslaughter cases over the 12-year period. The Council established a coding framework to structure the analysis and reporting of sentencing remarks. A pre-test of the framework was conducted across a number of cases, resulting in minor adjustments. Quality assurance of the coding assessment involved a second assessor independently analysing all child homicide cases and comparing the results. This analysis examined factors discussed as part of the cases, including static contextual and situational factors such as location of offence and cause of death, the offenders, including their relationship to the victim, and characteristics of victims. How judicial officers articulated the purposes of sentencing was also examined.

As with its previous work, the Council acknowledges the limitations associated with analysing sentencing remarks — most notably, that sentencing remarks do not contain a comprehensive list of factors taken into account by sentencing judicial officers. However, as part of a mixed-methods research design, sentencing remarks supplement purely data-driven analyses, providing a rich source of additional information about the offences under consideration.

The following information from individual sentencing remarks was collected during the textual analysis:

- the sentencing order type and parole orders;
- the type of charge and any changes to the most serious offence (MSO);
- the involvement of co-offenders regarding the same homicide victim;
- Crown submissions on the sentencing range;
- defence submissions on sentence;
- plea;
- prior criminal history;
- the factual context of the offending;
- details about the offender;
- details about the victim;
- mitigating factors;
- aggravating factors;
- sentencing purposes and principles referred to;
- reasons for imposing the order; and
- reasons for the length of the order.

Appendix 4: Methodology for focus groups

Focus group are a well-established method in social science research for facilitating contextual and situational insights into issues of important social inquiry. For this project, focus groups were selected to complement the other components of the research, specifically as a way to obtain in-depth insights into the issues already raised by the community via early submissions to the Council about sentencing generally, and about sentencing for child homicide offences in particular. The notions of 'appropriateness' and 'vulnerability' were able to be examined in a way that other aspects of the research methodology were unable to deliver. These are concepts referred to by the Attorney-General in the Terms of Reference but could not be clearly examined without direct and targeted discussion with Queensland's community.

The proposed methodology was tested with critical friends at Griffith University, who agreed that focus groups represented an effective mechanism for gaining a detailed understanding of the context and nature of public perceptions obtained from the Council's broader research. While not representative of Queensland's broader community, the aim of the focus groups was to explore particular issues with a group of community members recruited in a randomised way as opposed to generalising the resulting findings as reflective of the broader Queensland community.[1089] Other research was also used to complement the Council's focus group methodology.

This aspect of the broader project also supports the Council's commitment to engage with the community and consider community opinion.

The focus group technique addressed the following research questions as part of the Council's broader research design:

- What do community members think about penalties imposed on sentence for offences arising from the death of a child?
- What influences community perceptions about penalties imposed on sentence for these offences?
- What factors do community members consider important when assessing penalties imposed on sentence for these offences?

The Council's focus group approach was approved by the Griffith University Human Research Ethics Committee (GU Ref No: 2018/442) on 23 May 2018.

Participant recruitment

Ten focus groups were held across Queensland:

- Two in Brisbane
- Two in Cairns
- Two in the Sunshine Coast
- Two in the Gold Coast
- One in Mount Isa
- One in Longreach.

An independent recruitment company — Q&A Market Research Pty Ltd — recruited 10 to 12 participants for each focus group on behalf of the Council. To manage any potential risk of stress or harm to participants, given the content area under consideration, all participants were aged 18 years or over and had not been a direct victim of violent crime. The recruitment company initially screened participants using these criteria. Secretariat researchers conducting the focus groups also reaffirmed participant eligibility using these criteria prior to each focus group being held. The Council also adopted

[1089] While participant selection was not strictly random, the recruitment agency undertook a process to randomly generate a list of potential participants from their larger database.

an informed consent process as a precondition for participation in the focus groups. During this process, potential members were advised about the focus groups, including the voluntary and anonymous nature of their involvement, and how individual and collective results would be reported. The recruitment company allocated unique personal identification numbers (PIN) to all participants and provided the Council with de-identified reports detailing participant demographic information to assist with analysis and reporting. Materials designed to capture participant responses for analytical purposes used the PINs. These numbers were then used to link, discriminate, analyse and report responses. No other personal identifying information of any participant was collected or provided to researchers or reported.

Structure of focus groups

Participants attended a structured two-hour focus group, incorporating survey instruments, practical exercises and group discussions. Each session began with a briefing about the research and expectations of participants. Each participant was provided with a hard-copy information sheet for retention, outlining:

- the purpose of the focus group;
- an outline of what the participant would be asked to do;
- the eligibility criteria for participation in the focus group;
- the expected benefits of the research to the government and the community;
- any risks of participating in the research;
- how the Council would be protecting the confidentiality of participants;
- the fact that participation was entirely anonymous and voluntary, and that participants could withdraw at any time without adverse consequence (participants were paid for their involvement whether or not they chose to withdraw); and
- the contact details for each of the investigators and of the Griffith University Human Research Ethics Committee in case of any concerns or grievances.

Participants signed a consent form acknowledging their understanding of the terms of their involvement, and that they voluntarily agreed to participate. They were provided with copies of their consent form to retain for their reference. This was the only form that included a personal signature of any participant for transparency reasons. This form is not associated with any analytical or reporting processes.

The same three Secretariat staff conducted each focus group across all locations. One staff member assumed the role of facilitator of the focus group while the second staff member was available to de-brief with any participants who felt the need to withdraw from the discussion and to assist with any questions from participants. The third staff member assumed the role of dedicated scribe for each focus group, ensuring comprehensive and accurate written records were maintained. Focus groups were also audio recorded with the permission and consent of all participants. While focus group content and discussions did not involve any explicit information or images, reflecting instead content typically reported publicly via print or electronic media, the Council recognised the potential sensitivities associated with this content area. Accordingly, contact information for *Lifeline* was provided to all participants to address any potential risk they could experience delayed effects from the discussions.

Participants were asked to complete three short surveys, rank 10 vignettes based on real, de-identified homicide (manslaughter and murder) cases involving both child and adult victims in terms of perceived seriousness, and then comment on the perceived appropriateness of sentencing outcomes for three of the child homicide vignettes. No graphic information was presented to participants and all identifying information of the cases associated with the focus group vignettes was removed. There were two structured opportunities for the groups to discuss their perceptions and opinions of the cases and the factors that influence them.

Each participant received a laminated copy of the vignettes for use in the focus group. Vignettes were also read aloud to all participants at the beginning of the task. The vignettes were presented in the same order to all participants (both written and orally).

Participants were remunerated $80.00 ($100.00 for participants in Mount Isa and Longreach due to additional travel costs for participants and following advice from Q&A Marketing Pty Ltd regarding the difficulty of recruiting individuals in these locations) for their time. Remuneration was coordinated by the recruitment agency.

Participants were assured they were able to leave at any point during the focus group if they became distressed by the discussion topic and would still receive their remuneration. None of the 103 participants withdrew from the focus groups.

Information storage

All hard copy material collected during the focus groups was stored in a secure container and transported back to secure, key-controlled premises at the Queensland Sentencing Advisory Council office in Brisbane, Queensland. Only nominated staff had access to original hard copy information. Audio recordings and the associated transcripts were uploaded onto the Secretariat's secure file server for analytical purposes. Stored data were ordered by participant PIN. The demographic information provided by the recruitment agency was also uploaded onto the Secretariat's secure file server.

Limitations

The Council recognises the limitations associated with the focus group approach, as with any research methodology. Key among these is the generalisability of the findings. This limitation links specifically to the non-representative nature of the Council's focus group population. In addition, to assure confidentiality and anonymity and in recognition of the Council's resource restraints, Q&A Market Research's existing client list was used to recruit all potential participants in line with the specified criteria. However, as the primary intention was to gain a deeper insight into issues raised by other research and consultation techniques, the Council was confident these limitations did not restrict the potential benefits associated with the focus groups.

Other limitations reflect those generally associated with social inquiry, particularly into sensitive and potentially emotive issues. These include:

- Participants may not feel comfortable presenting their honest views in front of other people, particularly in regional and remote locations.
- One or more participants may dominate discussions, even when facilitators moderate the discussions.

Data analysis

Responses from the focus groups were coded and analysed by the Secretariat's Research and Statistics team. Quantitative analyses were undertaken using the statistical software SAS. Quantitative analyses were conducted for survey responses and ranking exercises.

Qualitative analyses were also undertaken to identify discussion themes and supplement the quantitative analyses. Individual comments, attributed to a participant's PIN as the only identifier, were incorporated to support the findings and themes presented. The demographic information for participants provided by the recruitment company were categorised for analytical purposes. For some fields, categories were combined to provide usable sample sizes.

See Table 35 below for further detail.

Table 35: Demographic information subgroups for focus groups

Variable	Combined categories used for analyses	Original category
Age	18 to 39 years	18–29 years
		30–39 years
	40 to 59 years	40–49 years
		50–59 years
	60 and over	60–69 years
		70 or over
Sex	Female	Female
	Male	Male
Location of residence	Urban	Brisbane
		Gold Coast
		Sunshine Coast
	Regional/remote	Cairns
		Longreach
		Mount Isa
Education level	Secondary	Finished year 10
		Finished year 12
	Post-secondary	Professional qualification
		TAFE/college
	Tertiary	University – Postgraduate
		University – Undergraduate
Employment status	Formally employed	Full Time
		Part Time
		Self Employed
	Not formally employed	Home Duties
		Student
		Pensioner/Retired
		Unemployed
Marital status	Partnered	Married
		De facto
	Not partnered	Divorced

		Separated
		Single
		Widowed
Any children/grandchildren	Has children/grandchildren (If at least one of these original categories was selected.)	Yes, child/ren under 18 years
		Yes, child/ren over 18 years
		Yes, grandchild/ren under 18 years
		Yes, grandchild/ren over 18 years
	No child/ren or grandchild/ren	No child/ren or grandchild/ren
Any children/grandchildren currently under 18 years	Has children/grandchildren under 18 years (If at least one of these original category were selected)	Yes, child/ren under 18 years
		Yes, grandchild/ren under 18 years
	Does not have children/grandchildren under 18 years (If only these original categories were selected)	Yes, child/ren over 18 years
		Yes, grandchild/ren over 18 years
		No child/ren or grandchild/ren

Appendix 5: National Homicide Monitoring Program tables

The National Homicide Monitoring Program (NHMP) provided the Council with the following methodological notes relevant to the data tables that follow below.

Methodology

The NHMP draws on two key sources of data:

- offence records obtained from each Australian state and territory police service and supplemented, where necessary, with information provided directly by investigating police officers and/or associated staff; and
- state coronial records such as toxicology and post-mortem reports. The National Coronial Information System (NCIS) has allowed coronial findings, including toxicology and autopsy reports, to be accessed online since 1 July 2001. Prior to 2001, the AIC accessed paper-based coronial files for the period 1 July 1996 to 30 June 2001 (Mouzos 2000).

Where appropriate, the data are further supplemented by media reports, which are monitored daily by staff at the Australian Institute of Criminology (AIC).

Data provided by the NHMP is compiled from police offence reports provided directly to the AIC. The NHMP dataset is based on 77 distinct variables. For each homicide incident, information relevant to these variables is extracted and entered into the NHMP database.

The information is organised into three files:

- an incident file, which describes the case and its circumstances (for instance, location, date, and time of the incident; status of investigation; and whether the incident occurred during the course of another crime);
- a victim file (or files) containing sociodemographic information relating to the victim(s), details of the cause of death and the type of weapon used, and any alcohol and/or illicit drug use; and
- an offender file containing information on those who have been charged, including data on their sociodemographic characteristics, their previous criminal history, any alcohol and/or illicit drug use, their mental health status, and their relationship to the victim. Offender refers to suspected offenders only rather than convicted persons.

The accuracy of NHMP data is ensured through a quality-control process that involves crosschecking the information contained in police offence records with other data sources.

These supplementary sources may include post-mortem coronial reports, information provided by other divisions of the police services (such as statistical services, homicide squads or major crime units and firearms registries) and media reports. Should there be any discrepancies between the information provided in the police offence report and one of the additional sources, the circumstances are verified with the police source. Depending on the reliability of the additional source, and the information provided in response to the NHMP query, the NHMP data relating to the homicide incident may be updated.

Table notes and limitations

Data up to 30 June 2014 (latest collection).

Filicide data refer to incidents in which one or more offender was charged with the murder or manslaughter of a child between 1 July 2005 and 30 June 2014. Data include child (0–17 years; n=172) and adult (18 years and older; n=10) victims of filicide.

Victim–offender relationship is generally presented as the relationship between the victim and the primary offender (i.e. offender with the closest relationship to the victim). Data presented in Table 13 refer to the relationship between the primary offender and victim(s) in the filicide incident. There were

158 primary offenders and 16 secondary offenders charged with murder or manslaughter for filicide incidents recorded between 1 July 2005 and 30 June 2014.

See individual tables for notes and limitations.

Table 1: Child homicide incidents by jurisdiction, 1 July 2005 to 30 June 2014

	N	%
NSW	79	32.4
Vic	37	15.2
Qld	61	25.0
WA	28	11.5
SA	22	9.0
Tas	5	2.0
ACT	4	1.6
NT	8	3.3
Total	**244**	**100**

Source: AIC NHMP 1989–90 to 2013–14 [computer file] [unpublished data]

Table 2: Homicide incidents by jurisdiction, 1 July 2005 to 30 June 2014

	N	%
NSW	716	31.3
Vic	468	20.5
Qld	446	19.5
WA	273	11.9
SA	170	7.4
Tas	54	2.4
ACT	26	1.1
NT	133	5.8
Total	**2,286**	**100**

Source: AIC NHMP 1989–90 to 2013–14 [computer file] [unpublished data]

Table 3: Filicide incidents by jurisdiction, 1 July 2005 to 30 June 2014

	N	%
NSW	50	31.6
Vic	27	17.1
Qld	43	27.2
WA	14	8.9
SA	16	10.1
Tas	2	1.3
ACT	2	1.3
NT	4	2.5
Total	**158**	**100**

Source: AIC NHMP 1989–90 to 2013–14 [computer file] [unpublished data]

Table 4: Child homicide incidents by jurisdiction, 1 July 2005 to 30 June 2014

	N	%
NSW	79	32.4
Vic	37	15.2
Qld	61	25.0
WA	28	11.5
SA	22	9.0
Tas	5	2.0
ACT	4	1.6
NT	8	3.3
Total	**244**	**100**

Source: AIC NHMP 1989–90 to 2013–14 [computer file] [unpublished data]

Table 5: Child homicide incidents by location, 1 July 2005 to 30 June 2014

	N	%
Victim's home	147	60.2
Offender's home	13	5.3
Other home	11	4.5
Street or open area	47	19.3
Other	24	9.8
Unknown	2	0.8
Total	**244**	**100**

Source: AIC NHMP 1989–90 to 2013–14 [computer file] [unpublished data]

Table 6: Filicide incidents by location, 1 July 2005 to 30 June 2014

	N	%
Victim's home	126	79.7
Offender's home	6	3.8
Other home	1	0.6
Street or open area	14	8.9
Other	9	5.7
Unknown	2	1.3
Total	**158**	**100**

Source: AIC NHMP 1989–90 to 2013–14 [computer file] [unpublished data]

Table 7: Child homicide victims by sex, 1 July 2005 to 30 June 2014

	N	%
Male	163	58.4
Female	115	41.2
Unknown	1	0.4
Total	**279**	**100**

Source: AIC NHMP 1989–90 to 2013–14 [computer file] [unpublished data]

Table 8: Homicide victims by sex, 1 July 2005 to 30 June 2014

	N	%
Male	1559	64.6
Female	853	35.4
Unknown	1	0.0
Total	**2,413**	**100**

Source: AIC NHMP 1989–90 to 2013–14 [computer file] [unpublished data]

Table 9: Child homicide victims by age group, 1 July 2005 to 30 June 2014

	N	%
Less than one year	66	23.7
1–4	80	28.7
5–9	35	12.5
10–14	35	12.5
15–17	60	21.5
Not stated/unknown	3	1.1
Total	**279**	**100.0**

Source: AIC NHMP 1989–90 to 2013–14 [computer file] [unpublished data]

Table 10: Filicide victims by sex, 1 July 2005 to 30 June 2014

	N	%
Male	103	56.6
Female	79	43.4
Total	**182**	**100**

Source: AIC NHMP 1989–90 to 2013–14 [computer file] [unpublished data]

Table 18: Homicide offenders by age group, 1 July 2005 to 30 June 2014

	N	%
10–14	20	0.8
15–17	140	5.3
18–24	630	23.8
25–34	710	26.8
35–49	770	29.1
50–64	235	8.9
65 years and older	63	2.4
Not stated/unknown	78	2.9
Total	**2,646**	**100**

Source: AIC NHMP 1989–90 to 2013–14 [computer file] [unpublished data]

Table 19: Filicide offenders by age group, 1 July 2005 to 30 June 2014

	N	%
15–17	2	1.1
18–24	38	21.8
25–34	62	35.6
35–49	58	33.3
50–64	9	5.2
Not stated/unknown	5	2.9
Total	**174**	**100**

Source: AIC NHMP 1989–90 to 2013–14 [computer file] [unpublished data]

Table 20: Homicide offenders by Indigenous status, 1 July 2005 to 30 June 2014

	N	%
Indigenous	423	16.0
Non-Indigenous	2223	84.0
Total	**2,646**	**100**

Source: AIC NHMP 1989–90 to 2013–14 [computer file] [unpublished data]

Table 21: Filicide offenders by Indigenous status, 1 July 2005 to 30 June 2014

	N	%
Indigenous	17	9.8
Non-Indigenous	157	90.2
Total	**174**	**100**

Source: AIC NHMP 1989–90 to 2013–14 [computer file] [unpublished data]

Table 22: Child homicide offenders by Indigenous status, 1 July 2005 to 30 June 2014

	N	%
Indigenous	32	11.7
Non-Indigenous	242	88.3
Total	**274**	**100**

Source: AIC NHMP 1989–90 to 2013–14 [computer file] [unpublished data]

Table 23: Homicide incidents by number of victims, 1 July 2005 to 30 June 2014

	N	%
One victim	2,183	95.5
Two victims	88	3.8
Three victims	13	0.6
Four or more	2	0.1
Total	**2,286**	**100**

Source: AIC NHMP 1989–90 to 2013–14 [computer file] [unpublished data]

Table 24: Filicide incidents by number of victims, 1 July 2005 to 30 June 2014

	N	%
One victim	132	83.5
Two victims	19	12.0
Three victims	7	4.4
Total	**158**	**100**

Note: Includes non-filicide victims
Source: AIC NHMP 1989–90 to 2013–14 [computer file] [unpublished data]

Table 25: Child homicide incidents by number of victims, 1 July 2005 to 30 June 2014

	N	%
One victim	215	88.1
Two victims	22	9.0
Three victims	7	2.9
Total	**244**	**100**

Source: AIC NHMP 1989–90 to 2013–14 [computer file] [unpublished data]

Appendix 6: Cross-jurisdictional tables

Table 36: Murder — mandatory sentences, minimum non-parole periods and standard non-parole periods (or standard sentences) by jurisdiction for adult offenders

Jurisdiction	Mandatory sentence for murder	Mandatory minimum period that must be served (non-parole period (NPP)	Standard NPP (SNPP) [1090] or standard sentence[1091] for murder
Australian Capital Territory	No	No minimum term	No
New South Wales	Yes – Life imprisonment, but only if victim is a police officer (does not apply if offender under 18 years or has a significant cognitive impairment)	No minimum term	Yes – SNPP • 25 years where victim: - child under 18 years; - a police officer, emergency services worker etc.; • 20 years in any other case.
Northern Territory	Yes – Life imprisonment or indefinite sentence	Yes – 25 years in the following circumstances: • victim was police officer, emergency services worker etc; • involved course of conduct that would have constituted a sexual offence; • victim under 18 years of age; • multiple homicides (including previous offences).	Yes – SNPP Murder (other than in circumstances of aggravation) – 20 years
Queensland	Yes – Life imprisonment or indefinite sentence	Yes • multiple murders – 30 years; • murder of a police officer – 25 years; • otherwise – 20 years.	No, as mandatory minimum NPP applies
South Australia	Yes – Life imprisonment	Yes – 20 years, unless special reasons exist for fixing a shorter period	No
Tasmania	No	No minimum term	No

1090 The standard non-parole period in NSW represents the non-parole 'that, taking into account only 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). The same definition has been adopted in the Northern Territory: *Sentencing Act 1995* (NT) s 53A(2) (Non-parole periods for offence of murder).

1091 The standard sentence in Victoria, like NSW and NT, also represents an offence in the mid-range of objective seriousness, but unlike these jurisdictions, this applies to the setting of the head sentence rather than to the fixing of the non-parole period: *Sentencing Act 1991* (Vic) s 5A.

Jurisdiction	Mandatory sentence for murder	Mandatory minimum period that must be served (non-parole period (NPP)	Standard NPP (SNPP) [1090] or standard sentence[1091] for murder
Victoria	No (term of imprisonment must be imposed)	No minimum term	Yes – Standard sentence (does not apply if offender under 18 years at time of offence) • 30 years if murder of a custodial officer or emergency services worker; • 25 years in any other case.
Western Australia	No – but presumptive sentence (person *must* be sentenced to life imprisonment unless certain criteria are satisfied)	Yes — if life imprisonment imposed: • murder committed in the course of an aggravated home burglary — 15 years; • otherwise — 10 years.	No
New Zealand	No — but presumptive sentence (person *must* be sentenced to life imprisonment unless, given circumstances of offence and offender, sentence would be manifestly unjust) Also, an offender must be sentenced to life imprisonment where the offence was committed by an offender when had a prior warning for committing a serious violent offence.	If offender sentenced to life imprisonment, 10 years' imprisonment, but subject to the following: • where offence committed when prior warning for committing a serious violent offence, court must sentence to life without parole, unless satisfied it would be manifestly unjust to do so, in which case: - if there is a record of final warning for committing other serious violent offences, minimum NPP is 20 years (unless it would be manifestly unjust to do so); or - 10 years if the offender had a record of first warning only, or unjust to impose 20-year NPP. • where particular circumstances apply, minimum NPP is 17 years, unless manifestly unjust to do so, including: - high level of brutality, cruelty, depravity or callousness;	No

Jurisdiction	Mandatory sentence for murder	Mandatory minimum period that must be served (non-parole period (NPP)	Standard NPP (SNPP) [1090] or standard sentence[1091] for murder
		- victim was particularly vulnerable because of age, health, or any other factor; - offender has been convicted of two or more counts of murder; - any other exceptional circumstances.	
Canada	Yes – Life imprisonment	Yes • first-degree murder or second-degree murder by adult offender previously convicted of murder — 25 years • second-degree murder by adult offender (no additional circumstances) — 10–25 years	No
United Kingdom	Yes – Life imprisonment	No	Yes — in the form of a 'starting point'. Varies from a 'whole life' order (under which offenders must be detained for the whole of their natural life), to 30 years where the seriousness of the offence is particularly high; 25 years if does not meet other definitions but offender took a knife or weapon to the scene; otherwise, 15 years where offender is aged over 18 years. The murder of a child if involving the abduction of the child or sexual or sadistic motivation carries a starting point of a whole life order.

Source:

1. ACT: *Crimes Act 1900* (ACT) s 12(2).
2. NSW: *Crimes Act 1900* (NSW) ss 18, 19A, 19B; *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4, div 1A. The SNPPs are set out in the Table to pt 4, div 1A. These provisions do not apply in certain circumstances, including if the offender was under 18 years at the time or the offence or sentenced to life imprisonment: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D.
3. NT: *Criminal Code* (NT) ss 157(1)–(2); *Sentencing Act 1995* (NT) s 53A. A court may fix a non-parole period that is shorter than the SNPP of 20 years if satisfied there are exceptional circumstances justifying this. For there to be exceptional circumstances, the sentencing court must be satisfied that: (1) the offender is: (i) otherwise a person of good character; and (ii) unlikely to reoffend; (b) the victim's conduct, or conduct and condition, substantially mitigate the conduct of the offender. In considering whether the offender is likely to reoffend, relevant factors include: (a) whether the offender has a significant record of prior convictions; (b) any expressions of remorse; (c) any other relevant matters listed in s 5(2) of the Act: *Sentencing Act 1995* (NT) ss 53A(6)–(8).
4. Qld: *Criminal Code* (Qld) s 305; *Corrective Services Act 2006* (Qld) s 181(2)(a)–(c).
5. SA: *Criminal Law Consolidation Act 1935* (SA) s 11; *Sentencing Act 2017* (SA) ss 47(5) and 48(2)(b). In considering if special reasons exist that support the fixing of a shorter non-parole period, the court must have regard only to the following matters: (a) the offence was committed in circumstances in which the victim's conduct or condition substantially mitigated the offender's conduct; (b) if the offender pleaded guilty to

the offence, that fact and the circumstances surrounding the plea; (c) the degree to which the offender has cooperated in the investigation or prosecution of that or any other offence and the circumstances surrounding, and likely consequences of, any such cooperation: *Sentencing Act 2017* (SA) s 48(3). The minimum non-parole period also applies in circumstances where a person convicted of an offence of conspiracy to murder or aiding, abetting, counselling or procuring the commission of murder who is sentenced to life imprisonment: see definition of 'offence of murder' in *Sentencing Act 2017* (SA) s 47(12)(c).

6. Tas: *Criminal Code* (Tas) s 158. The non-parole period for a sentence of imprisonment is one half the period of the operative sentence, but does not apply if the sentence is for the term of the offender's natural life or if the offender is declared to be a dangerous criminal, in which case the person is not eligible for release until the declaration is discharged: *Corrections Act 1997* (Tas) s 68; *Sentencing Act 1997* (Tas) pt 3, div 3;
7. Vic: *Crimes Act 1958* (Vic) s 3; *Sentencing Act 1991* s 5(2G).
8. WA: *Criminal Code* (WA) s 279. A life sentence must be imposed on an adult unless: (a) the sentence would be clearly unjust given the circumstances of the offence and the person; and (b) the person is unlikely to be a threat to the safety of the community when released, in which case the person is liable to imprisonment for 20 years. If committed by an adult offender in the course of conduct that would constitute an aggravated home burglary, the court must, if does not impose a life sentence, impose a term of imprisonment of at least 15 years: *Criminal Code* (WA) s 279(5A). Minimum non-parole periods for murder are set under s 90 of the *Sentencing Act 1995* (WA). Special provisions also apply to sentencing where declared criminal organisations are involved: see *Sentencing Act 1995* (WA) pt 2, div 2A.
9. NZ: *Sentencing Act 2002* (NZ) ss 86E, 102, 103, 104.
10. Canada: *Criminal Code*, RSC 1985, c C-46, ss 235, 745, 745.1, 745.4 and 745.5, 745.51. The court can also impose consecutive non-parole periods for first- or second-degree murders committed as part of the same series of offences: *Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act,* SC 2011, c 5.

UK: *Murder (Abolition of the Death Penalty) Act 1965* (UK) s 1(1); *Criminal Justice Act 2003* (UK) ch 7 and sch 21.

Table 37: Manslaughter — maximum penalties, mandatory minimum sentences and non-parole periods by jurisdiction

Jurisdiction	Maximum penalty	Mandatory minimum sentence	Mandatory minimum NPP
Australian Capital Territory	20 years, or 28 years if aggravated form (against a pregnant woman)	No minimum sentence	No mandatory minimum NPP
New South Wales	25 years	No minimum sentence	No mandatory minimum NPP
Northern Territory	Life imprisonment	No minimum sentence	No mandatory minimum NPP
Queensland	Life imprisonment	No minimum sentence	Yes • if life sentence imposed – 15 years' imprisonment; • if declared convicted of a serious violent offence, 80 per cent of sentence or 15 years (whichever is less); • if organised crime offence, 7 years, which must be served before (and in addition to) the sentence imposed.
South Australia	Life imprisonment	No minimum sentence	Yes – if sentenced to imprisonment for a serious offence against the person, four-fifths (80%) of sentence length, unless special reasons exist

Jurisdiction	Maximum penalty	Mandatory minimum sentence	Mandatory minimum NPP
Tasmania	21 years	No minimum sentence	No mandatory minimum NPP, but if person declared to be a dangerous criminal and is not eligible to be released until this declaration is discharged.
Victoria	20 years	No minimum sentence	Yes – where manslaughter has occurred in circumstances of gross violence, minimum NPP of 10 years, unless the court finds that special reasons exist.
Western Australia	Life imprisonment	Yes – if committed in the context of an aggravated home burglary, 15 years (or at least 3 years' imprisonment or detention if committed by a juvenile).	Yes, if declared criminal organisation involved – 15 years.
New Zealand	Life imprisonment	Yes – but only if repeated serious violent offending. If offender is convicted of one or more offences after prior final warnings, qualifying as 'stage-3 offences', the court must sentence the offender to maximum term of imprisonment.	Yes – for life sentence, if other period not set, 10 years' imprisonment and, in other cases, one-third of the sentence length. If offender has received prior warnings for commission of other serious violent offences, requirement in some cases to serve full sentence without parole.
Canada	Life imprisonment	Yes – if a firearm is used in the commission of the offence, minimum penalty is four years' imprisonment.	No – eligibility for parole if sentenced to prison for two years or more after serving one-third of the sentence, unless court orders parole eligibility after person has served lesser of one-half of the sentence imposed or 10 years (whichever is the lesser).
United Kingdom	Life imprisonment	No	Other than life sentence, 50% of sentence.

Source:

1. ACT: *Crimes Act 1901* (ACT) ss 15 and 48A.
2. NSW: *Crimes Act 1900* (NSW) s 24.

3. NT: *Criminal Code* (NT) s 161.
4. Qld: *Criminal Code* (Qld) s 310; *Corrective Services Act 2006* (Qld) s 181(2)(d); *Penalties and Sentences Act* (Qld) pts 9A, 9D.
5. SA: *Criminal Law Consolidation Act 1935* (SA) s 13(1); *Sentencing Act 2017* (SA) ss 47(5)(d), 48(2)(b). A 'serious offence against the person' is defined to mean: (i) a major indictable offence (other than murder) that results in the death of the victim or the victim suffering total incapacity; (ii) a conspiracy to commit such offence; or (iii) aiding, abetting, counselling or procuring the commission of such an offence: *Sentencing Act 2017* (SA) s 47(12)(e). For what constitutes 'special reasons' for setting a shorter non-parole period, see *Sentencing Act 2017* (SA) s 48(3).
6. Vic: *Crimes Act 1958* (Vic) s 5. A term of imprisonment must be imposed unless specific circumstances apply: *Sentencing Act 1991* (Vic) s 5(2H).
7. WA: *Criminal Code* (WA) s 280 (Manslaughter); *Sentencing Act 1995* (WA) s 9D (Mandatory minimum sentences where declared criminal organisation involved). The mandatory minimum sentence does not apply to an offender who was under 18 years at the time of the offence: *Sentencing Act 1995* (WA) s 9E.
8. New Zealand: *Crimes Act 1961* (NZ) s 177 (Punishment for manslaughter) *Parole Act 2002* (NZ) s 84(3) (Non-parole period for life); for details on minimum periods of imprisonment and Stage 3 offence details see *Sentencing Act 2002* (NZ) ss 86, 86D.
9. Canada: *Criminal Code*, RSC 1985, c C-46, s 236.
10. UK: *Criminal Justice Act 2003* (UK) s 44 (3) (for requisite custodial punishment).

Table 38: Penalties imposed for murder of a child NSW, SA, Vic and NZ — select cases 1 January 2017 to 25 July 2018

Citation	Brief facts	Sentence
R v Noy [2018] VSC 466 (25 July 2018)	Noy was convicted of the unlawful killing of the 11-month-old son of his partner. A jury found that Noy had broken the boy's spine causing significant internal bleeding that led to death within minutes. A life sentence was not imposed on the basis that the child's killing was not premeditated.	30 years' imprisonment with NPP of 26 years
R v Peet (Unreported South Australia Supreme Court, 6 April 2018)	Peet, aged 32 years, was convicted of the murder of his partner aged 28 years and her children aged 6 and 5 on a plea of guilty. The victims were all found with cable ties around their necks. One of the children had adhesive tape around her head with a sock stuffed in her mouth and arms tied behind her back. The other child was wrapped in tape with his hands and feet tied behind his back.	Life sentence (mandatory) with NPP of 30 years
R v JK [2018] NSWSC 250 (5 March 2018)	JK, aged 31 years at the time of the offence, pleaded guilty to the murder of his 12-year-old stepdaughter, CN, whom he had been physically abusing, along with her sister and mother, for a number of years on a weekly basis, involving beatings. He did not have an extensive criminal record. The victim suffered serious physical assaults on at least 15 occasions. CN and her sister were kept out of school for extended periods to allow their injuries to heal. CN had multiple injuries, including trauma to her head, torso and limbs and evidence of kicks or blows to the abdomen.	37.5 years' imprisonment (stated reduction from 42 years' imprisonment due to 10% discount for guilty plea) with NPP of 28 years
R v Davies [2017] VSC 800 (21 December 2017)	Davies, aged 75 years at the date of sentence, pleaded guilty to one charge of murder and one count of rape of a 6-year-old child selected at random as she walked from a local shop to her home. The child was taken by car, drugged with Valium, raped and strangled, and then dropped in a gutter where she was found. Davies denied his involvement but was identified via DNA evidence and convicted some 32 years after the offence. He indicated his intention to plead at an early stage (committal hearing). He had earlier convictions for attempted murder and wounding with intent to cause GBH of a 14-year-old girl with a low IQ. He was acquitted of these charges on grounds of insanity and detained at the Governor's pleasure (released after 8 years). Subsequent offending included indecent assault and gross indecency charges.	Life sentence for murder with 28-year NPP [but for plea, would have declined to fix NPP], 8 years for rape
R v Cooper [2017] NZHC 2498 (12 October 2017)	Cooper, a 62-year-old woman, was found guilty following trial for the murder of her grandson. She assaulted her grandson by throwing him down the hallway of her home. He was aged 2 years and 7 months at the time and died several days later as a result of a catastrophic brain injury. Cooper was the primary carer for her four young grandchildren. The victim suffered significant physical and developmental delays due to a genetic disorder. She was under considerable stress in caring for her grandchildren and meeting their needs. There was evidence of prior bruising, although no evidence of any broken bones (often indication of more serious or prolonged abuse). Bruising had also been noticed on her other grandchildren. She was a regular drug user of methamphetamine. She admitted to assaulting her grandson shortly before trial (she had previously blamed her 4-year-old granddaughter).	Life imprisonment with NPP of 14 years and 6 months

Citation	Brief facts	Sentence
R v LN; AW (No 10) [2017] NSWSC 1387 (12 October 2017)	LN (mother) AW (stepfather) were found guilty following a trial of the murder of 3-year old Joseph (his real name). Joseph spent most of his life in the care of extended family; however, LN and SW proactively assumed a duty of care, removing him from the extended family and around 54 days later he was dead. LN assaulted Joseph in a serious way with an intention to kill him or inflict serious bodily harm on him. LN admitted to police that she wanted to kill him at times because he 'pushed her buttons' and 'looked like his father'. AW was found guilty of murder because he had participated in an agreement with LN to assault Joseph and continued to participate in that agreement despite contemplating the possibility that LN would inflict really serious bodily harm on him. Prior to the fatal assault, both offenders demonstrated an abusive and intolerant attitude towards Joseph and each abused him in different ways. The abuse was physical, psychological and verbal, and would have had a terrifying effect upon the child. LN, 43 years old, had been diagnosed with having a 'highly disturbed personality construct' and AW, 48 years old, was assaulted in prison following the jury's verdict.	For LN 44 years with NPP of 33 years For AW 40 years with NPP of 30 years
R v Lock [2017] NSWSC 715 (5 June 2017)	Lock was convicted at trial of the murder of TM, the daughter of his partner, then 2.5 years old. The court found there was a deliberate course of conduct involving intentional assaults on TM, including punches to the face, intentionally exposing the child to scalding hot water resulting in third-degree burns. The fatal injury involved a blow to the abdomen leading to vomiting and loss of consciousness. Lock was 27 years old at the date of sentence and a summary criminal history consisting of driving and property offences.	36 years' imprisonment with NPP of 27 years
R v Guode [2017] VSC 285 (30 May 2017) **Appeal allowed** *Guode v The Queen* [2018] VSCA 205 (16 August 2018)	Guode, 37 years of age, pleaded guilty to two charges of murder, one charge of attempted murder and one charge of infanticide. The three children who died were aged 17 months, and twins aged 4 years. A fourth child who survived was aged 5. Guode had moved to Australia from Sudan some 10 years prior when her husband had been murdered in the civil war. She was experiencing financial and relationship difficulties at the time and deliberately drove her car into a lake with the children in the car. She escaped but stood by as other witnesses attempted to get the children out of the car. On appeal, the sentence was reduced to 18 years' imprisonment with a non-parole period of 14 years. But for her guilty pleas, the Court of Appeal declared it would have sentenced her to 33 years' imprisonment with a non-parole period of 27 years.	TES of 26 years' and 6 months' imprisonment with NPP of 20 years (22 years' imprisonment for each for two murders, six years' imprisonment for attempted murder, and 12 months' imprisonment for infanticide)

Table 39: Penalties imposed for manslaughter a child (unlawful and dangerous act) NSW and NZ and child homicide in Vic — select cases 1 January 2017 to 25 July 2018

Case	Brief facts	Sentence
R v Sami [2017] NZHC 3159 (15 December 2017)	Sami, who had moved to New Zealand from Fiji shortly before the incident occurred, was found guilty of the manslaughter of the one-year-old child of her husband's work colleague whom she was caring for during the day. She was aged 18 at the time. The child died after sustaining two fractures to the skull and two subdural haematomas (indicating multiple impacts to the head), extensive retinal haemorrhaging to both eyes and bruising to the face. There was evidence the cause of death was at least one blunt-force trauma to the back of the head. Sami sought medical assistance when realising how serious the injuries were. It was unclear how the injuries were caused and what led to the offender causing these injuries. She had no prior criminal history. The court in sentencing accepted the offending was out of character, involved a momentary loss of control and no serious injury was intended. The court took into account her youth, otherwise good character, and the hardship of being imprisoned in a foreign country where English was her second language.	5 years' imprisonment (reduced 1.5 years for youth and good character, and 6 months for 3 years spent on bail)
Shailer v The Queen; Haerewa v The Queen [2017] NZCA 38 (3 March 2017)	The appellants were convicted of manslaughter on a plea of guilty involving the killing of a 3-year-old boy placed by his mother in their care for a temporary period so she could take care of her elder child who was ill and in hospital. Both began to assault the child, with the degree and severity of their assaults escalating and each encouraging and supporting the other in their behaviour (which included punching, kicking, biting and slapping the child). He was repeatedly assaulted over the four days leading up to his death. The main event causing his death was inflicted by the female appellant stomping on the child's abdomen and stomach. Both were aware he was seriously ill and continued to assault him. No medical attention was obtained. They eventually called an ambulance, but he died later that night from his injuries. Had medical attention been obtained earlier, he would not have died. The appellants had four children of their own ranging in age from 2 to 7 years. Both suffered from mental illness (the male appellant from schizophrenia and the female appellant from PTSD self-medicated by substance abuse). There were a number of aggravating factors: extreme, prolonged and gratuitous violence, attacks to the head, the child's vulnerability, cruelty and callousness, the fact that the victim's sister and the other four children witnessed the brutal assaults, and breach of trust. These were all at the highest levels of seriousness. They brought the case into the category of 'most serious' of all manslaughter cases. The appeal was dismissed, with the Court of Appeal finding the appellants 'were fortunate that they were not sentenced to life imprisonment'.	17 years' imprisonment with NPP of 9 years (but for the guilty plea, the sentencing judge indicated a life sentence would have been warranted)

Case	Brief facts	Sentence
R v Mitchell [2017] NZHC 1391 (22 June 2017)	Mitchell, 44-years-old at the time of sentence, pleaded guilty to the manslaughter of his son aged 11 weeks at the time of his death. He called for an ambulance claiming his son had fallen off the couch and was not breathing. The child died that evening and was found to have subdural haemorrhaging to the brain and severe retinal haemorrhaging in both eyes. Mitchell initially denied shaking the child or being violent to his son, but later, when confronted with the medical evidence, admitted to having shaken him. He had no relevant history of violence or relevant criminal record.	4 years and 9 months with NPP of 2 years and 6 months
R v Toohey (No 2) [2017] NSWSC 1217 (8 September 2017)	The appellant, who was 25-years-old at the time of the offence, was tried for the murder of an 11-month-old child — the daughter of his then partner — and convicted of manslaughter. The appellant and the child's mother had been in a relationship for about four months before the child was killed. The child was left in the appellant's care while her mother was in hospital. The next morning the appellant drove to the Emergency Department of the hospital with the child in the back seat unconscious. The child had significant internal head injuries among other injuries and could not be revived. There were no skull fractures. The injuries suggested the child had suffered blows to the head. The appellant claimed the injuries had occurred when the baby had fallen off a trampoline that he had put her on while retrieving washing from a nearby clothesline. He claimed he tried to catch her as she fell, but her head had hit a septic tank below and some 8 or 9 minutes later he commenced to drive to the hospital. His account of the fall was found to be 'equally contradictory and lacking in credibility'. The sentencing judge found that the offender struck the child's head (probably with his fist) and/or struck her head against something (such as a floor covered with carpeting). There was no evidence the defendant had previously been violent or cruel to the deceased or her two older half-sisters. He was said to appear as exhibiting genuine distress about the child's death. He was accepted as being under stress at the time of the child's death with a terminally ill mother and providing financial support for his new partner and her three children.	7 years and 6 months with NPP 4 years and 6 months
DPP v Woodford [2017] VSCA 312 (31 October 2017)	Woodford pleaded guilty to the offence of child homicide and voluntarily confessed his involvement in harming his partner's 3-year-old daughter by deliberately standing on her abdomen with his full weight. He was 20 at the time of the offence, which occurred after he tripped over Bella playing in the lounge room. Shortly after, the offender told the child's mother she had gone to bed after not feeling well. The following day her condition deteriorated and her mother called him to take them to the hospital. Bella subsequently died. Death was found to be due to complications of blunt force trauma. The offender had no criminal history. He was diagnosed as having severe cannabis-use disorder with heavy daily usage at the time of the offence and as having a dysfunctional personality. The judge accepted he had good prospects of rehabilitation warranting a shorter non-parole period than might otherwise be appropriate. The appeal against sentence was dismissed.	9 years with NPP of 6 years and 6 months

Table 40: Penalties imposed for manslaughter of a child (criminal negligence) NSW — select cases 1 January 2017 to 25 July 2018

Case	Brief facts	Sentence
R v TP [2018] NSWSC 369 (23 March 2018)	TP pleaded guilty to the manslaughter of her 12-year-old daughter, CN, as a result of criminal neglect consisting of her failure to remove her daughter from a situation that she knew to be dangerous and her failure to obtain medical treatment for her after she was subject to years of violent and brutal abuse by TP's partner, JK. Evidence that TP was also subject to domestic violence perpetrated by her partner, with an acceptance that she suffered from 'battered woman syndrome' – with symptoms of PTSD and depression.	4 years with NPP of 18 months
R v MB [2017] NSWSC 619 (19 May 2017)	MB pleaded guilty to manslaughter on the basis of either drowning or failing to retrieve her 6-month-old daughter from water. She was suffering a schizoaffective disorder and become obsessed that her daughter had a genetic disorder, despite testing showing no abnormality. She was initially found unfit to plead. She spent just under 2 years in custody before stabilising and entering a plea for manslaughter.	4-year good behaviour bond (taking into account little under 2 years' spent in custody)

Table 41: Penalties imposed for murder, manslaughter and other homicide offences involving the death of a child — select cases, England and Wales, 1 January 2017 to 25 July 2018

Case	Brief facts	Sentence
R v Tunstill [2018] EWCA Crim 1696 (19 July 2018) **Appeal allowed and retrial ordered**	The appellant was convicted of murder and sentenced to life imprisonment with a minimum term of 20 years, less time spent on remand. She had given birth to a daughter in the bathroom of her home. Shortly thereafter, she had killed the baby, who had been alive at birth and was of approximately 37 weeks' gestation. The child was killed by 14 separate stab wounds, mainly to the neck and chest, inflicted using a pair of scissors. Having killed the baby, the appellant put her body into a plastic carrier bag, which she then put into a kitchen bin. She presented to the hospital the next day claiming she had suffered a miscarriage. She claimed by reason of a mental illness, she lacked the requisite intention for murder or, in the alternative, was of diminished responsibility. The medical experts agreed that she suffered from a mental illness but disagreed as to her condition. On appeal, it was found the judge should not have withdrawn infanticide from the jury and a re-trial was ordered.	Life imprisonment with NPP of 20 years
Wiltshire and Baker v R [2017] EWCA Crim 1686 (27 October 2017)	The applicants were acquitted of murder but convicted of the offence of causing or allowing the death of a child contrary to section 5 of the *Domestic Violence, Crime and Victims Act 2004* (UK), which carries a maximum penalty of 14 years. They were sentenced to 11 years' imprisonment. The offence was committed against their 3-month-old daughter who was born premature and was developmentally only four to five weeks old when she died. There was evidence of serious physical violence sustained on at least three occasions including at least 40 rib fractures, a fractured skull and underlying brain injury. The head injuries were the cause of death, caused by her being thrown. Each was sentenced on the basis that he or she allowed the death of the child, rather than caused it. The sentence was reduced to 10 years on appeal.	10 years' imprisonment (sentence substituted for initial sentence of 11 years)
Lee Anthony Sweet (June 2018)*	The offender, aged 26 years, was convicted and sentenced of manslaughter for killing his 6-month-old son after shaking or throwing him when he wouldn't stop crying. He initially denied responsibility but pleaded guilty a year after the death. The child suffered what was described as a 'catastrophic brain injury' and had several rib fractures.	5 years and 4 months' imprisonment
Pedro Rubim (March 2018)*	The offender, aged 43 years, was convicted of manslaughter for causing the death of his 45-day-old newborn son by shaking him. He claimed his son had slipped out of his bouncer and fallen onto the wooden floor, and later claimed he had shaken him in an attempt to revive him after the fall.	8.5 years' imprisonment

* Facts based on media reports.

In another high-profile case from 2015, Polly Chowdhury and Kiki Muddar were sentenced to 13 years' and 18 years' imprisonment, respectively, for the manslaughter of Chowdhury's 8-year-old daughter. The child's death was caused by a head injury, but she had suffered more than 40 injuries, including a bite mark and carpet burns. Both were convicted at trial after being charged with murder. Both had their sentences reduced on appeal to 10 years and 15 years, respectively.

Table 42: Sentencing outcomes for child manslaughter offences sentenced in 2017–18 in Queensland involving victims aged under 12 years

Citation	Brief facts	Sentence
R v Randall [2018] QSC 100 (11 May 2018) **Appeal against sentence lodged**	The 41-year-old defendant, a police officer at the time of the offence, was charged with murder but pleaded guilty to manslaughter for causing the death of his 10-week-old son when left alone with him. The child's death was caused by a forceful punch to his stomach causing massive internal injuries. The defendant called triple 0 only after notifying his wife of their son's condition, reporting him as being pale and lifeless. The cause of this condition was not disclosed and Randall suggested the injuries had been caused by him and possibly others in attempting to do CPR. He had no prior convictions and it was accepted that he would serve his sentence in protection in solitary confinement. The plea was accepted as being a late plea, made the week before the trial was due to commence. The offence was accepted as meeting the definition of being a domestic violence offence and therefore as constituting an aggravating factor under s 9(10A) of the PSA.	9 years' imprisonment with parole eligibility after 5 years
R v Smith (Unreported, Supreme Court of Queensland, 19 January 2018) **Appeal against sentence lodged**	The offender, aged 21 years, was convicted of the manslaughter of his son aged 17 weeks. He had a limited criminal history of little relevance but subsequently was convicted of contravention of a domestic violence order (DVO). He was progressively more aggressive towards his son in the lead up to the event, slapping him, head-butting him and pinching his nose causing bruising, as well as punching him in the stomach. He explained these as actions to 'toughen him up'. The fatal brain injuries were concluded to be caused by severe and prolonged shaking, which occurred at or about the same time as several blows to his head. He was initially charged with murder but entered a plea of manslaughter following committal and prior to trial. He had consumed alcohol and drugs when the offences occurred. In addition to manslaughter, he was convicted of failing to seek medical treatment for which he was sentenced to 18 months' imprisonment (to be served concurrently).	9 years' imprisonment with SVO declaration
R v Strbak [2017] QSC 317 (18 December 2017) **Appeal against sentence lodged**	The offender, who was 26-years-old at the date of the offence, pleaded guilty to manslaughter of her 4-year-old son, but contested the Crown's alleged facts of the offending. There was no prolonged neglect or violence. It was found she had punched her child out of frustration causing peritonitis, with a second punch hastening his death. The offender did not seek treatment for his injuries. She had no previous convictions, was accepted to be otherwise a good mother. However, her mood was affected by drug use. The court also accepted she was remorseful for failing to seek medical attention.	9 years' imprisonment with parole eligibility after serving 4 years
R v Baxter (Unreported, Supreme Court of Queensland, 21 November 2017)	The offender was charged with murder and convicted at trial of manslaughter of his infant son who was less than two months old at the time of his death. He was 24 years of age at the time of the offence, which involved subjecting the child to violent and prolonged shaking causing a fatal brain injury. There was evidence that the offender had perpetrated violence on the child at least twice prior to the fatal shaking causing rib	9 years' imprisonment, with no recommendation for early release on parole

Citation	Brief facts	Sentence
Appeal against conviction lodged	fractures. It was accepted the shaking occurred in circumstances where the offender was tired and frustrated. The offender had no prior criminal history.	
R v Scown (Unreported, Supreme Court of Queensland 11 October 2017)	The offender pleaded guilty to the manslaughter of the son of his then girlfriend, who was aged 4 years and 3 months at the time of his death, which was accepted as being an early plea of guilty. The basis of the conviction was the failure to seek medical attention for him. Left alone with the child, within 30–45 minutes of his mother leaving the house, the offender called triple 0 and tried to resuscitate him. On the day of the child's death, the offender had suggested that his mother seek medical treatment for him, but she had refused. The cause of death was blunt force trauma and the injuries were subsequently found to have been caused by his mother, Ms Strbak. He had no previous relevant criminal history. Assistance was offered with the prosecution of Ms Strbak.	4 years' imprisonment suspended after serving 2 years and 8.5 months (time served) with a 4-year operational period
R v Cataldo (Unreported, Supreme Court of Queensland, 4 December 2017)	The offender, aged 24 years at the time of the offence, pleaded guilty to one count of manslaughter involving his infant daughter aged less than two months. The child died of a severe head injury with multiple skull fractures. There was evidence of other fractures, including rib fractures and fracture of the right arm sustained at the same time, some 7 to 10 days prior to the death. The child's mother (convicted of manslaughter and sentenced in April 2017) repeatedly suggested taking the child to hospital, but the offender refused. With medical intervention, her daughter's life could have been saved. The offender had no prior criminal history although some offences were committed subsequently. He indicated his intention to plead at the conclusion of the committal. He was receiving treatment for anxiety and a depressive order associated with drug dependency but stopped treatment prior to the offence.	8 years' imprisonment with parole eligibility date of approximately 3 years and 9.5 months (date of sentence)

Bibliography

ABC Radio National, 'The Complexities of Sentencing', *The Law Report*, 28 November 2017 (Carmel Arthur) <http://www.abc.net.au/radionational/programs/lawreport/sentencing-models/9195748#transcript>.

Alder, Christine and Ken Polk, *Child Victims of Homicide* (Cambridge University Press, 2001).

Armour, Marilyn and Mark S Umbreit, 'The Ultimate Penal Sanction and "Closure" for Survivors of Homicide Victims, (2007) 91 *Marquette Law Review* 381.

Australian Institute of Family Studies, 'Child Deaths from Abuse and Neglect', (Child Family Community Australia Resource Sheet – 2017) <https://aifs.gov.au/cfca/publications/child-deaths-abuse-and-neglect>.

Australian Institute of Family Studies, 'Who Abuses Children?' (Child Family Community Australia Resource Sheet, 2014).

Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006).

Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws,* Interim Report 127 (2015).

Barter, Christine and Emma Renold, 'The Use of Vignettes in Qualitative Research' (1999) 25 *Social Research Update* <http://sru.soc.surrey.ac.uk/SRU25.html>.

Berry, Mike, Greg Philo, Giuliana Tiripelli, Stevie Docherty, Colin Macpherson, 'Media Coverage and Public Understanding of Sentencing Policy in Relation to Crimes Against Children' (2012) 12(5) *Criminology & Criminal Justice* 567.

Bolitho, Jane 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).

Bolitho, Jane 'Putting Justice Needs First: A Case Study of Best Practice in Restorative Justice' (2015) 3(2) *Restorative Justice* 256.

Booth, Tracey, *Accommodating Justice: Victim Impact Statements in the Sentencing Process* (Federation Press, 2016).

Bourget, Dominique, Jennifer Grace and Laurie Whitehurst, 'A review of maternal and paternal filicide' (2007) 35(1) *The Journal of the American Academy of Psychiatry and Law* 74.

Brown, Thea and Danielle Tyson, 'Filicide: Recasting Research and Intervention' (2014) 23 *Child Abuse Review* 75.

Brown, Thea, Danielle Tyson and Paula Fernandez Arias, 'Filicide and Parental Separation and Divorce' (2014) 23 *Child Abuse Review*, 79.

Bryant, Willow and Samantha Bricknell, *Homicide in Australia 2012–13 to 2013–14: National Homicide Monitoring Program Report*, Statistical Report No 2 (Australian Institute of Criminology 2017) <https://aic.gov.au/publications/sr/sr002>.

Casey CB, Louise, *Review of the Needs of Families Bereaved by Homicide* (July 2011).

Commission for Children and Young People, *Fatal Assault of Children and Young People* (2002) <https://www.parliament.nsw.gov.au/la/papers/DBAssets/tabledpaper/webAttachments/44931/fatalassault_full.pdf>.

Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice* (2016).

Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017).

Court Network Queensland, *A Guide to Supporting Victims of Crime Through the Court Process* (2018).

Crime and Misconduct Commission (Qld), 'Vulnerable Victims: Child Homicide by Parents', Research and Issues No 10 (Crime and Misconduct Commission, 2013).

Cussen, Tracey and Willow Bryant, 'Domestic/Family Homicide in Australia', Research in Practice No 38 (Australian Institute of Criminology, 2015) <https://aic.gov.au/publications/rip/rip38>

Dawson, Myrna, 'Canadian Trends in Filicide by Gender of the Accused, 1961–2011' (2015) 47 *Child Abuse and Neglect* 162.

Department of Justice and Attorney-General (Qld), *Taskforce on Organised Crime Legislation* (2016).

Devereux, John and Meredith Blake, *Kenny Criminal Law in Queensland and Western Australia* (LexisNexis Butterworths 9th ed, 2016).

Debowska, Agata, Daniel Boduszek and Katie Dhingra 'Victim, Perpetrator, and Offence Characteristics In Filicide and Filicide-Suicide' (2015) 21 *Aggression and Violent Behavior* 113.

Dolan, Mairead, Olivia Guly, Peter Woods and Rachael Fullam, 'Child Homicide' (2003) 43(2) *Medicine, Science and the Law*, 153.

Domestic and Family Violence Death Review and Advisory Board (Qld), *2016–17 Annual Report* (2017).

Domestic Violence Resource Centre Victoria, *'Just Say Goodbye': Parents Who Kill their Children in the Context of Separation*, Discussion Paper No 8 (Domestic Violence Resource Centre Victoria, 2012).

Duncanson, Mavis, Don Smith and Emma Davies, *Death and Serious Injury from Assault of Children Aged Under 5 years in Aotearoa New Zealand: A Review of International Literature and Recent Findings* (Office of the Children's Commissioner, New Zealand, 2009).

Eriksson, Li, Paul Mazerolle, Richard Wortley and Holly Johnson, 'Maternal and Paternal Filicide: Case Studies from the Australian Homicide Project' (2016) 25 *Child Abuse Review* 17.

Fellows, James Douglas and Mark David Chong, 'Extra-curial Punishment in Criminal Law Sentencing: A Principles-Based Approach' (2016) 18 *Southern Cross University Law Review* 55.

Freiberg, Arie, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Law Book Co., 3rd ed, 2014).

Flynn, Sandra M Jenny L. Shaw and Kathryn M Abel, 'Filicide: Mental Illness in Those Who Kill Their Children' (2013) 8 (4) *PLOS ONE* 1 <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0058981>.

Gekoski, Anna, Jacqueline M Gray and Joanna R Adler, 'What Makes a Homicide Newsworthy? UK National Tabloid Newspaper Journalists Tell All' (2012) 52(6) *British Journal of Criminology*, 1212.

Hall, Guy, Marion Whittle and Courtney Field, 'Themes in Judges' Sentencing Remarks for Male and Female Domestic Murderers' (2016) 23(3) *Psychiatry, Psychology and the Law* 395.

Heeks, Matthew, Sasha Reed, Mariam Tafsiri and Stuart Prince, Home Office (UK), 'The Economic and Social Costs of Crime: Second Edition', Research Report 99 (2018).

Holder, Dr Robyn and Ms Suzanne Whiting, Submission 25 to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal justice*, (17 October 2016).

Holmes, Chief Justice Catherine, 'Presentation of Queen's Counsel; recognition of newly-admitted barristers; and traditional exchange of Christmas Greetings' (Speech delivered at the Banco Court, Wednesday 13 December 2017) 5 <https://archive.sclqld.org.au/judgepub/2017/holmes131217.pdf>.

Homicide Victims Support Group, Submission No VI20 to the NSW Sentencing Council, *Inquiry into Victims' Involvement in the Sentencing Process*, 22 November 2017.

Hughes, Rhidian and Meg Huby, 'The application of vignettes in social and nursing research' (2002) 37(4) *Journal of Advanced Nursing* 382.

Judicial Commission of New South Wales, *Sentenced Homicides in New South Wales 1994–2001* (Monograph 23, 2004).

Judicial Commission of New South Wales, *The Impact of the Standard Non-Parole Period Sentencing Scheme on Sentencing Patterns in New South Wales* (Monograph 33, 2010).

Kransnostein, Sarah, '*Boulton v the Queen*: the Resurrection of Guideline Judgments in Australia' (2015) 27(1) *Current Issues in Criminal Justice* 41.

Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report* (2007).

Laxminarayan, Malini, Mark Bosmans, Robert Parter and Lorena Sosa, 'Victim Satisfaction with Criminal Justice: A Systematic Review' (2013) 8(2) *Victims and Offenders* 119.

Ling Li, 'Sudden Unexpected Infant Deaths' in Juan C. Troncoso, Ana Rubio and David Fowler (eds), *Essential Forensic Neuropathology* (Lippincott Williams & Wilkins, 2010).

Liem, Marieke and Frans Koenraadt, 'Filicide: A Comparative Study of Maternal versus Paternal Child Homicide' (2008) *Criminal Behaviour and Mental Health* 18 166 <https://core.ac.uk/download/pdf/15603328.pdf>.

Little, Janine and Danielle Tyson, 'Filicide in Australian Media and Culture', *Oxford Research Encyclopedia of Criminology and Criminal Justice* (Oxford University Press, 2017).

Mackenzie, Geraldine, Nigel Stobbs, Claire Ferguson and Karen Gelb, 'Measuring the Effects of Small Group Deliberation on Public Attitudes towards Sentencing: Benefits and Challenges' (2014) 25(3) *Current Issues in Criminal Justice*, 745.

Maguire, Niamh, Kristel Beyens, Miranda Boone, Alfredas Laurinavicius and Andres Persson, 'Using vignette methodology to research the process of breach comparatively' (2015) 7(3) *European Journal of Probation,* 241.

Martin, Jennifer and Rhonda Pritchard, New Zealand Ministry of Social Development, *Learning from tragedy: homicide within families in New Zealand 2002–2006* (New Zealand Ministry of Social Development, 2010).

Maxfield, Michael G and Earl R Babbie, *Basics of Research Methods* (Wadsworth Cengage Learning, 3rd ed, 2012).

Miller, Susan and Kristen Hefner, 'Procedural Justice for Victims and Offenders? Exploring Restorative Justice Processes in Australia and the US' (2015) 32(1) *Justice Quarterly* 142.

Mitchell, Barry, 'Public Perceptions of Homicide and Criminal Justice' (1998) 38(3) *British Journal of Criminology*, 453.

Mitchell, Barry, 'Further Evidence of the Relationship Between Legal and Public Opinion on the Law of Homicide' (2000) *Criminal Law Review*, 814.

Mouzos, Jenny and Catherine Rushforth, 'Family Homicide in Australia', Trends and Issues in Crime and Criminal Justice No 255 (Australian Institute of Criminology, 2003). <https://aic.gov.au/publications/tandi255>

Monash University Filicide Project, Submission No 0167.001.0001 to Royal Commission on Family Violence (Victoria), May 2015.

NSW Child Death Review Team, Ombudsman New South Wales, *Causes of Death of Children with a Child Protection History 2002–2011* (2014).

NSW Child Death Review Team, Ombudsman New South Wales, Child Death Review Report 2015 (2016).

New South Wales Law Reform Commission, *Sentencing: Interim Report on Standard Minimum Non-Parole Periods,* Report No 34 (2012).

NSW Sentencing Council, *Victims' Involvement in Sentencing: Consultation Paper* (2017).

NSW Sentencing Council, *Victims' Involvement in Sentencing: Report* (2018).

Office of the Director of Public Prosecutions (Qld), *Annual Report 2016–17* (2018).

Office of the Director of Public Prosecutions (Qld), *Director's Guidelines* (as at 30 June 2017).

Ombudsman New South Wales, *Report of Reviewable Deaths 2014 and 2015: Child Deaths*, Volume 1 (Ombudsman New South Wales, 2017).

Premier of Victoria, 'Victorian Community to Have Its Say on Sentencing' (Media Release, 25 May 2017) <https://www.premier.vic.gov.au/victorian-community-to-have-its-say-on-sentencing/>.

Pritchard, Colin, Jill Davey and Richard Williams, 'Who Kills Children? Re-examining the Evidence' (2013) 43 *British Journal of Social Work*, 1403 <https://academic.oup. com/bjsw/article-abstract/43/7/1403/1631436>.

Queensland Family and Child Commission, *Child Death Register Key Findings 2016–17: Children Known to the Child Protection System* (2017).

Queensland Family and Child Commission, *Annual Report: Deaths of Children and Young People Queensland 2016–17* (2017).

Queensland Parole System Review, *Queensland Parole System Review Final Report* (2016).

Queensland Police Service, *Annual Report 2016–17* (2017).

Queensland Sentencing Advisory Council, *Child Homicide in Queensland: A Descriptive Analysis of Offences Finalised by Queensland Criminal Courts, 2005–06 to 2016–17*, Research Report (2018).

Queensland Courts, *Supreme and District Court Benchbook* (at October 2017) <https://www.courts.qld.gov.au/__data/assets/pdf_file/0004/517405/sd-bb-full-copy.pdf>.

Ransley, Janet, Kristina Murphy, Susanne Karstedt, David Bartlett, Lucy Forrester and Maurice Carless, 'Developing and Applying a Queensland Crime Harm Index – Implications for Policing Serious and Organised Crime' in Russell Smith (ed), *Organised Crime Research in Australia*, Research Report No 10 (Australian Institute of Criminology, 2018) 105.

Roberts, Julian V, 'Victim Impact Statements and the Sentencing Process: Recent Developments and Research Findings' (2003) 47 *Criminal Law Quarterly* 365.

Roberts, Julian V and Michael J Hough, *Understanding Public Attitudes to Criminal Justice* (Open University Press, 2005).

Sentencing Advisory Council (Queensland), *Minimum Standard Non-Parole Periods: Final Report* (2011).

Sentencing Advisory Council (Tasmania), *Sentencing of Driving Offences That Result in Death or Injury: Final Report No 8* (2017).

Sentencing Advisory Council (Victoria), *Maximum Penalty for Negligently Causing Serious Injury, Report* (2007).

Sentencing Advisory Council (Victoria), *More Myths and Misconceptions* (2008).

Sentencing Advisory Council (Victoria), *Community Attitudes to Offence Seriousness* (2012).

Sentencing Advisory Council (Victoria), *Sentencing Guidance in Victoria*, Report (2016).

Sentencing Advisory Council (Victoria), *A Sentencing Guidelines Council for Victoria*, Report (2018).

Shanahan, Judge Michael, Soraya Ryan QC and Judge Anthony Rafter SC, *Carter's Criminal Law of Queensland*, LexisNexis (June 2017 update).

Sidebotham, Peter 'Rethinking Filicide' (2013) 22(5) *Child Abuse Review* 305.

Smiley, Stephen and Angela Lavoipierre, 'The Murders We Don't Hear About – And Why', *The Signal,* ABC News, 10 July 2018.

Stobbs, Nigel, Geraldine Mackenzie and Karen Gelb, 'Sentencing and public confidence in Australia: The Dynamics and Foci of Small Group Deliberations' (2015) 48(2) *Australian and New Zealand Journal of Criminology* 219.

Supreme Court of New South Wales, 'Increasing Access, Transparency and Understanding Via Social Media, Court Filming and Judgment Summaries' (Media Release, 27 December 2015) <https://mobile.twitter.com/NSWSupCt/status/670081415409762304/photo/1>.

Supreme Court of the Northern Territory, *Publication Policy* <http://www.supremecourt.nt.gov.au/remarks/>.

Supreme Court of Queensland, *Electronic Publication of Court Proceedings: Issues paper* (2015).

Supreme Court of Queensland, *Electronic Publication of Court Proceedings, Report* (2016).

Supreme Court of Victoria, *Judgments Bulletins* <https://www.supremecourt.vic.gov.au/court-decisions/judgments-and-sentences/judgments-bulletin>.

Supreme Court of Western Australia, Judges' sentencing remarks available online (Media release, 10 June 2008) <https://www.supremecourt.wa.gov.au/_files/Sentencing_Remarks_10062008.pdfhttps://www.supremecourt.wa.gov.au/_files/Sentencing_Remarks_10062008.pdf>.

United Nations Social and Economic Council, *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, ESC Res 2002/12, 37th plen mtg, E/RES/2002/12 (24 July 2002).

University of Leicester, *Measures of Variability: The Range, Inter-Quartile Range and Standard Deviation* <https://www2.le.ac.uk/offices/ld/resources/numerical-data/variability>.

Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process: Report* (2016).

von Hirsch, Andrew, 'Commensurability and Crime Prevention: Evaluating Formal Sentencing Structures and their Rationale' (1983) 74(1) *Journal of Criminal Law and Criminology* 209.

von Hirsch, Andrew, *Doing Justice: The Choice of Punishments* (Northeastern University Press, 1986).

Warner, Kate, *Sentencing in Tasmania* (Federation Press, 2nd ed, 2002).

Warner, Kate, 'Sentencing Review 2009–2010' (2010) 34 *Criminal Law Journal* 385.

Warner, Kate, Julie Davis, Maggie Walter, Rebecca Bradfield and Rachel Vermey, '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).

Warner, Kate, Julia Davis, Maggie Walter and Caroline Spiranovic, 'Are Judges Out of Touch?' (2014) *25(3) Current Issues in Criminal Justice*, 729.

Warner, Kate, 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.

Warner, Kate, Julia Davis, Caroline Spiranovic and Helen Cockburn, and Arie Freiberg, 'Measuring Jurors' Views on Sentencing: Results from the Second Australian Jury Sentencing Study' (2017) 19(2) *Punishment and Society* 180.

Warner, Kate, Julia Davis, Caroline Spiranovic, Helen Cockburn and Arie Freiberg, 'Why Sentence? Comparing the Views of Jurors, Judges and the Legislature on the Purposes of Sentencing in Victoria, Australia' (2017) *Criminology and Criminal Justice* 1.

Warner, Kate, Julia Davis, Caroline Spiranovic, Helen Cockburn and Arie Freiberg, 'Aggravating and Mitigating Factors in Sentencing: Comparing the Views of Judges and Jurors', *(2018) 92(5) Australian Law Journal* 374.

Waters, Emily, Christine Bond and Li Eriksson 'Examining the Accuracy of Print Media Representations *of Homicide in Australia' (2017) 29(2) Current Issues in Criminal Justice,* 138–153.

West, Sara, Susan Hatters Friedman and Phillip Resnick, 'Fathers Who Kill Their Children: An Analysis of the Literature' (2008) 54(2) *Journal of Forensic Sciences* 463.

Wilczynski, Ania, 'Mad or Bad? Child-killers, Gender and the Courts' (1997) 37(3*) British Journal of Criminology* 419.

Case Law

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT) (2003) 239 CLR 27
Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Content of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002) (2004) 61 NSWLR 305
Atholwood v The Queen (1999) 109 A Crim R 465
Barbaro v The Queen (2014) 253 CLR 58
Boulton v The Queen [2014] VSCA 342 (22 December 2014)
Bugmy v The Queen (2013) 249 CLR 571
Cameron v The Queen (2002) 209 CLR 339
Censori v R [1983] WAR 89
Clements v The Queen 2014) 46 VR 308
Commissioner of State Revenue v EHL Burgess Properties Pty Ltd (2015) LGERA 314
Cutter v The Queen (1997) 71 ALJR 638
Director of Public Prosecutions v Dalgliesh (a Pseudonym) (2017) 349 ALR 37
Director of Public Prosecutions (Cth) v De La Rosa (2010) 243 FLR 28
Director of Public Prosecutions v Woodford [2017] VSCA 312 (31 October 2017)
Fitzgerald v The Queen (2014) 248 A Crim R 153
Guode v The Queen [2018] VSCA 205 (16 August 2018)
Haerewa v R CA431/99, 3 February 2000
Hogan v Hinch (2011) 243 CLR 506
Jefferies v Sturcke [1992] 2 Qd R 392
Kaporonovski v The Queen (1973) 133 CLR 209
Knight v The Queen (1992) 175 CLR 495
Malvaso v The Queen [1989] HCA 58; (1989) 168 CLR 227
Markarian v The Queen (2005) 228 CLR 357
Mamote-Kulang v R (1964) 111 CLR 62
MBS v DPP (Qld) & Anor [2012] QCA 326 (27 November 2012)
*McQuire & Porter (*2000) 110 A Crim R 348
Muldrock v The Queen (2011) 244 CLR 120
Hili v The Queen (2010) 242 CLR 520
Lowe v The Queen (1984) 154 CLR 606
Mill v The Queen (1988) 166 CLR 59
Nguyen v The Queen (2016) 256 CLR 656
Pickering v The Queen (2017) 260 CLR 151
Postiglione v The Queen (1997) 189 CLR 295
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355
R v Appleton [2017] QCA 290 (24 November 2017)
R v Auberson [1996] QCA 321 (3 September 1996)
R v Bates; R v Baker [2002] QCA 174 (17 May 2002)
R v Baxter (Unreported, Supreme Court of Queensland, 21 November 2017)
R v Beacham (2006) 163 A Crim R 348
R v Beattie; Ex parte Attorney-General (Qld) (2014) 244 A Crim R 177
R v Beck [1990] 1 Qd R 30
R v Blacklidge (unreported, Court of Criminal Appeal, NSW, No 60510 of 1995, 12 December 1995, Gleeson CJ)
R v Bligh (Unreported, Supreme Court of Queensland, 26 May 2016)
R v Boyer (1981) 3 Crim App R (S) 35
R v Bulger [1990] 2 Qd R 559
R v Bush (No 2) [2018] QCA 46 (23 March 2018)
R v Crouch; R v Carlisle [2016] QCA 81 (5 April 2016)
R v Cartwright (1989) 17 NSWLR 243
R v Cataldo (Unreported, Supreme Court of Queensland, 4 December 2017)
R v Chard; Ex parte A-G (Qld) [2004] QCA 372 (8 October 2004)

R v Clark [2009] QCA 361 (27 November 2009) *R v Clark* [2016] QCA 173 (24 June 2016)
R v Cooper [2001] NSWSC 769 (31 August 2001)
R v Cooper [2017] NZHC 2498
R v Cowan; R v Cowan; Ex parte Attorney-General (Qld) [2015] QCA 87
R v Cramp (Unreported, Supreme Court of Queensland, 30 January 2008)
R v D [1996] 1 Qd R 363
R v Dalton [2005] NSWCCA 156 (26 April 2005)
R v Davies [2017] VSC 800 (21 December 2017)
R v DBQ [2018] QCA 210 (11 September 2018)
R v de Figueiredo (2013) 235 A Crim R 511
R v Ditford (Unreported, NSW Supreme Court, 17 March 1992, Hunt CJ)
R v Dunn [1994] QCA 147 (13 May 1994)
R v Duong, Nguyen, Bui and Quoc [2002] QCA 151 (30 April 2002)
R v Dwyer [2008] QCA 117 (16 May 2008)
R v Earel (Unreported, Supreme Court of Queensland, 11 February 2014)
R v Elliott [2000] QCA 267 (11 July 2000)
R v Ellis (1986) 6 NSWLR 603
R v FAF (2014) QCA 360
R v Farah (Unreported, Supreme Court of Queensland, 10 March 2008)
R *v Farhad Quami, Mumtaz Quami & Jamil Qaumi (Sentence)* [2017]_NSWSC 774
R v Farr [2018] QCA 41 (20 March 2018)
R v Fisher (Unreported, Supreme Court of Queensland, 2 November 2015).
R v Glebow [2002] QCA 44
R v Gilles, Ex parte Attorney-General [2002] 1 Qd R 404
R v Gladkowski (2000) 115 A Crim R 446
R v Glenbar (2013) 240 A Crim R 22
R v Green [1999] NSWCCA 97 (18 May 1999)
R v Green & Haliday; Ex parte Attorney-General (Qld) [2003] QCA 259 (19 June 2003)
R v Guode [2017] VSC 285 (30 May 2017)
R v Haerewa (Unreported, High Court Napier S5/99, 18 August 1999)
R v Hall [2002] QCA 125 (5 April 2002)
R v Hammond [1997] 2 Qd R 195
R v Harbas [2013] QCA 159
R v Harman [1989] 1 Qd R 414
R v Henry (1999) 46 NSWLR 346
R v Hill [2017] QCA 177 (22 August 2017)
R v Hoerler (2004) 147 A Crim R 520
R v Thomson; R v Houlton (2000) 49 NSWLR 383
R v Howard [2001] NSWCCA 309 (23 August 2001)
R v Hughes [2015] VSC 312 (26 June 2015)
R v Humphreys (Unreported, Supreme Court of Queensland, 27 January 2017)
R v Hutchinson [2018] QCA 29
R v Ianculescu [2000] 2 Qd R 521
R v Irvine [1997] QCA 138 (8 May 1997)
R v JK [2018] NSWSC 250 (5 March 2018)
R v Jones [2011] QCA 147 (24 June 2011)
R v Jurisic (1998) 45 NSWLR 209
R v JV [2014] QCA 351(19 December 2014)
*R v KAQ; Ex parte Attorney-General (Qld) (*2015) 253 A Crim R 201
R v Kellisar [1999] VSC 357 (2 September 1999)
R v Kent (Unreported, Supreme Court of Queensland, 15 March 2016)
R v Kilic (2016) 259 CLR 256
R v Kusu [1981] Qd R 136
R v Lafaele [2018] QCA 42 (23 March 2018)

R v Lam Quoc Ta [2016] QCA 305
R v Lavender (2005) 222 CLR 6
R v Leask (Unreported, Supreme Court of Queensland, 4 April 2017)
R v LN; AW (No 10) [2017] NSWSC 1387
R v Lock [2017] NSWSC 715 (5 June 2017)
R v M (CA) [1996] 1 SCR 500
R v Martyr [1962] Qd R 398
R v Maygar; Ex parte Attorney-General (Qld); *R v WT; Ex parte Attorney-General (Qld)* [2007] QCA 310 (28 September 2007)
R v MB [2017] NSWSC 619
R v McDougall and Collas [2007] 2 Qd R 87
R v McGrath [2002] 1 Qd R 520
R v Mitchell [2017] NZHC 1391
R v Mooka [2007] QCA 36 (9 February 2007)
R v Morton [1986] VR 863
R v Munro (Unreported, Supreme Court of Queensland, 9 March 2012)
R *v Neumann; Ex parte Attorney-General (Qld)* [2007] 1 Qd R 53
R v Nikat [2017] VSC 713 (23 November 2017)
R v Noy (Unreported, Supreme Court of Victoria, 25 July 2018, Coghlan J)
R v NQ [2013] QCA 402
R v O'Dempsey (No 3) [2017] QSC 338
R v O'Sullivan (unreported, Supreme Court of Queensland, 30 August 2018)
R v OS [2016] QCA 278
R v Pagett (1983) 76 Cr App R 279
R v Peet (Unreported South Australia Supreme Court, 6 April 2018)
R v Pesnak & Anor (2000) 112 A Crim R 410
R v Pham (2015) 256 CLR 550
R v Ponfield (1999) 48 NSWLR 327
R v Pope [2002] NSWSC 397 (7 May 2002)
R v Potter; Ex parte Attorney-General (Qld) (2008) 183 A Crim R 497; *R v Potter; Ex parte Attorney-General (Qld)* [2008] QCA 91 (18 April 2008)
R v Previtera (1997) 94 A Crim R 76
R v Prow [1990] 1 Qd R 64
R v Randall [2018] QSC 100 (11 May 2018)
R v RAZ; Ex parte Attorney-General (Qld) [2018] QCA 178 (14 June 2018)
R v Reed [2014] QCA 207 (26 August 2014)
R v Reid [2007] 1 Qd R 64
R v Reynolds (Unreported, Supreme Court of Queensland, 13 April 2011)
R v Riseley; Ex parte Attorney-General (Qld) [2009] QCA 285 (22 September 2009)
R v Robertson (2010) 56 MVR 53
R v Rooney; R v Gehringer [2016] QCA 48 (4 March 2016)
R v Ross [1996] QCA 411 (25 October 1996)
R v Rowe (Unreported, Supreme Court of Victoria, 31 August 2018)
R v Ryan and Vosmaer; Ex parte Attorney-General (Qld) [1989] 1 Qd R 188
R v SAG (2004) 147 A Crim R 301; [2004] QCA 286
R v Sami [2017] NZHC 3159
R v SBI [2009] QCA 73
R v Scown (Unreported, Supreme Court of Queensland, 11 October 2017)
R v Sebo; Ex parte Attorney-General (Qld) [2007] 426 (30 November 2007)
R v Self [2011] QCA 338 (24 August 2001)
R v Sherrington & Kuchler [2001] QCA 105 (6 April 2001)
R v Sica [2013] QCA 247 (2 September 2013)
R v Singh [2006] QCA 71 (15 March 2006)
R v Skondin [2015] QCA 138 (24 July 2015)

R v Smith (Unreported, Supreme Court of Queensland, 19 January 2018)
R v Streatfield (1991) 53 A Crim R 320
R v Steindl [2002] 2 Qd R 542
R v Strbak [2017] QSC 299 (18 December 2017) (Summary Findings)
R v Strbak [2017] QSC 317 (18 December 2017)
R v Suda (Unreported, Supreme Court of Queensland, 4 March 2014)
R v Tahir; Ex parte Attorney-General (Qld) [2013] QCA 294 (4 October 2013)
R v Taiters [1997] 1 Qd R 333
R v Thomson & Houlton (2000) 49 NSWLR 383
R v Toohey (No 2) [2017] NSWSC 1217 (8 September 2017)
R v TP [2018] NSWSC 369 (23 March 2018)
R v Tran; Ex parte Attorney–General (Qld) [2018] QCA 22 (6 March 2018)
R v Tunstill [2018] EWCA Crim 1696 (19 July 2018)
R v Van Den Bemd (1994) 179 CLR 137
R v WAW [2013] QCA 22 (22 February 2013)
R v Webb and Leaso (Unreported, Supreme Court of Queensland, 27 August 2013)
R v Webber (2000) 114 A Crim R 381
R v Weinman (1987) 49 SASR 248
R v Whiting; Ex parte Attorney-General (Qld) [1995] 2 Qd R 199
R v Whyte (2002) 55 NSWLR 252
R v Williamson (Unreported, Supreme Court of Queensland, 6 April 2017)
R v Willmot (No 2) [1985] 2 Qd R 413
R v Witika [1993] 2 NZLR 424
R v Wong & Leung (1999) 48 NSWLR 340
R v X [2001] QCA 498
Re AMP [2007] QMHC 22
Royall v R (1991) 172 CLR 378
Russell v Russell (1976) 134 CLR 495
Ryan v The Queen (2001) 206 CLR 267
Saeed v Minister for Immigration and Citizenship (2010) 241 CLR 252
Salameh v R (1991) 55 A Crim R 384
Shailer v The Queen; Haerewa v The Queen [2017] NZCA 38 (3 March 2017)
The Queen v De Simoni (1981) 147 CLR 383
The Queen v Kiltie (1974) 9 SASR 453
The Queen v Leuta [2001] NZCA 283 (19 September 2001)
The Queen v Pene [2010] NZCA 387 (20 August 2010)
The Queen v Ross CA No 347 of 1996 (25 October 1996)
The Queen v Shailer and Haerewa [2016] NZHC 1414 (27 June 2016)
The Queen v Walsh (unreported C.A. No 85 of 1986, judgment delivered 12 June 1986)
Veen v The Queen (No 2) (1988) 164 CLR 465
Viro v R (1978) 141 CLR 88
Wagner & Ors v Harbour Radio Pty Ltd & Ors [2018] QSC 201
Wiltshire and Baker v R [2017] EWCA Crim 1686 (27 October 2017)
Wong v The Queen (2001) 207 CLR 584
Zaburoni *v The Queen* (2016) 256 CLR 482

Legislation and Bills

Queensland

Acts Interpretation Act 1954 (Qld)
Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004 (Qld)
Corrective Services Act 2006 (Qld)
Criminal Code (Qld)
Criminal Code and Other Legislation Amendment Act 2011 (Qld)
Criminal Law Amendment Act 1997 (Qld)
Criminal Law Amendment Act 2012 (Qld)
Criminal Law Amendment Act 2014 (Qld).
District Court of Queensland Act 1967 (Qld)
Domestic and Family Violence Protection Act 2012 (Qld)
Drugs Misuse Act 1986 (Qld).
Evidence Act 1977 (Qld)
Mental Health Act 2016 (Qld)
Penalties and Sentences Act 1992 (Qld)
Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010 (Qld)
Supreme Court Library Act 1968 (Qld)
Transport Operations (Road Use Management) Act 1995 (Qld)
Victims of Crime Assistance Act 2009 (Qld)
Youth Justice Act 1992 (Qld)

Commonwealth

Criminal Code Act 1995 (Cth)
Customs Act 1901 (Cth)

Australian Capital Territory

Crimes Act 1900 (ACT)
Crimes (Sentencing) Act 2005 (ACT)

New South Wales

Children (Criminal Proceedings) Act 1987.
Crimes Act 1900 (NSW)
Crimes (Sentencing Procedure) Act 1999 (NSW)
Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Act 2013 (NSW).
Road Transport (Safety and Traffic Management) Act 1999 (NSW)

Northern Territory

Criminal Code (NT)
Sentencing Act 1995 (NT)

South Australia

Criminal Law Consolidation Act 1935 (SA)
Criminal Law Consolidation (Children and Vulnerable Adults) Amendment Act 2018 (SA)
Sentencing Act 2017 (SA)
Victims of Crime Act 2001 (SA)

Tasmania

Corrections Act 1997 (Tas)
Criminal Code (Tas)
Sentencing Act 1997 (Tas)

Victoria

Crimes Act 1958 (Vic)
Crimes Amendment (Child Homicide) Act 2008 (Vic)
Sentencing Act 1991 (Vic)

Western Australia

Criminal Code (WA)
Criminal Law Amendment (Homicide) Act 2008 (WA)
Sentencing Act 1995 (WA)

International

Convention on the Rights of the Child
Coroners and Justice Act 2009 (UK)
Crimes Act 1961 (NZ)
Criminal Code, RSC 1985 (Canada)
Criminal Justice Act 2003 (UK)
Criminal Justice and Licensing (Scotland) Act 2010 (Scot)
Domestic Violence and Crime Act 2004 (UK)
Infanticide Act 1922 (UK)
Murder (Abolition of the Death Penalty) Act 1965 (UK)
Parole Act 2002 (NZ)
Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act, SC 2011 (Canada)
Sentencing Act 2002 (NZ)

Quasi-legislative materials

Explanatory Notes, Criminal Law Amendment Bill 2014 (Qld).

Explanatory Notes, Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2010 (Qld).

Explanatory Note, Sentencing (Offences Against Children) Amendment Bill, Supplementary Order Paper 2008 (NZ).

Explanatory Notes, Victims of Crime Assistance and Other Legislation Amendment Bill 2016 (Qld).

Mark Ryan MP, Minister for Police, Fire and Emergency Services and Minister for Corrective Services, *Ministerial Guidelines to Parole Board Queensland*, 3 July 2017.

New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5815 (R J Debus, Attorney-General).

Queensland, *Parliamentary Debates*, Legislative Assembly, 3 August 2010, Second Reading – Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2010, 2309 (Cameron Dick, Attorney-General).

Queensland, *Parliamentary Debates*, Legislative Assembly, 20 June 2012, Introduction – Criminal Law Amendment Bill 2012, 818 (Jarrod Bleijie, Attorney-General).

Victoria, *Parliamentary Debates*, Legislative Assembly, 6 December 2017, 4413 (Rob Hulls, Attorney-General).

Victoria, *Parliamentary Debates*, Legislative Assembly, 6 December 2017, 4414 (Rob Hulls, Attorney-General).