

Parliamentary Committee Briefing Note

Legal Affairs and Community Safety Committee

Criminal Code and Other Legislation Amendment Bill 2018

Background

On 25 October 2017, the Attorney-General issued terms of reference to the Queensland Sentencing Advisory Council (Council) to review the adequacy of penalties imposed on sentence for criminal offences arising from the death of a child following significant and ongoing community concern about whether sentences for criminal offences arising from the death of a child are meeting expectations.

The Council is an independent body established under Part 12 of the *Penalties and Sentences Act 1992* (PSA). The Council's role is to: inform the community about sentencing in Queensland through research and education; engage with Queenslanders to gather their views on sentencing; and advise on sentencing matters. The functions of the Council include, if asked by the Attorney-General, to advise the Attorney-General on matters relating to sentencing.¹

Following its year-long inquiry, involving extensive research and consultation, the Council released its report, *Sentencing for criminal offences arising from the death of a child: Final report* (Report) on 21 November 2018. The Report makes eight recommendations and presents four areas of advice 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. A copy of the report is available online at: <https://www.sentencingcouncil.qld.gov.au/research/sentencing-for-child-homicide>.

On 21 November 2018, the Attorney-General announced that the Queensland Government accepted all of the Report recommendations and committed to expanding the definition of murder to include reckless indifference to human life.²

Amendments in the Bill

The Criminal Code and Other Legislation Amendment Bill (Bill) implements Recommendation 1 of the Report by amending section 9 of the PSA to introduce a new statutory aggravating factor where an offender is convicted of the manslaughter of a child under 12 years.

The Bill also:

- amends the Criminal Code to give effect to the Government's commitment to widen the definition of murder; and
- increases the maximum penalty for the offence of failure to supply necessities under section 324 of the Criminal Code from three years imprisonment to seven years imprisonment, to bring Queensland into line with other jurisdictions and to reflect the seriousness of this offence, and makes related consequential amendments to the PSA and *Evidence Act 1977*.

¹ *Penalties and Sentences Act 1992* (Qld) s 199.

² Attorney-General and Minister for Justice, The Honourable Yvette D'Ath, 'Palaszczuk Government toughens punishment for child killers' (Media Statement, 21 November 2018) <http://statements.qld.gov.au/Statement/2018/11/21/palaszczuk-government-toughens-punishment-for-child-killers>.

As the amendments in the Bill are informed by the Report, this brief draws heavily on the Council's work and includes a number of references to the Report which are referenced.

New aggravating factor

The Council found that:

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' (Advice 2 of the Report).³

The Council further identified:

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.⁴

After considering a range of possible options to address this problem, including the approaches in other jurisdictions, the Council recommended introduction of 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 1 of the Report).⁵

As noted in the Report, the Council considered that giving statutory recognition to children's defencelessness and vulnerability as an aggravating factor in child manslaughter cases will:

..encourage courts to make express reference to this in sentencing, and, by referring to [these factors], express strong condemnation of the use of violence against children and serious neglect. It will also make clear Parliament's intention for child [manslaughter] cases with these features to be treated as objectively more serious for the purposes of sentencing, thereby justifying a higher sentence.⁶

The Council concluded 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.⁷

The Council suggested the recommended age of under 12 years aligns with 'the existing age criterion for the making of a serious violent offence declaration in section 161B in Part 9A of the PSA and when children are at highest risk of homicide due to abuse or neglect'.⁸ However, as noted in the

³ *Sentencing for criminal offences arising from the death of a child: Final report* (Report), Queensland Sentencing Advisory Council, October 2018, p 154.

⁴ Report p xxxiii.

⁵ Report p 157.

⁶ Report p 156.

⁷ Report p xxxiii.

⁸ Report p 155.

Report, the new statutory aggravating factor in section 9 will be additional and separate to the existing requirement in Part 9A of the PSA.⁹

Consistent with the Report, the new aggravating factor in section 9 also does ‘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’.¹⁰

The new aggravating factor is restricted to the offence of manslaughter given the only penalty which can be imposed for murder under section 305 of the Criminal Code is mandatory life imprisonment or an indefinite sentence under part 10 of the PSA. Other offences which may result in the death of a child, such as dangerous driving causing death, driving without due care and attention or unlawful striking causing death, are not captured and were outside the scope of the Council’s review.¹¹

The new aggravating factor does not apply to youth offenders. The *Youth Justice Act 1992*, rather than the PSA, contains the sentencing laws for youth offenders. The Council’s consultation did not focus on youth offenders and the Report does not contemplate amendments to the *Youth Justice Act 1992*.

Murder

Under the Criminal Code, 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.¹² The laws relating to defences and excuses applying to murder are explained in detail in the Report at pages 29-31.

Section 302 of the Criminal Code contains the definition of murder. This section currently sets out five different ways in which a person can be found guilty of murder. Some limbs of the definition include an element of intent to kill or cause grievous bodily harm. The Report explains:

*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.*¹³

Section 59 of the *Jury Act 1995* provides that for a trial on indictment for murder the verdict of the jury must be unanimous. Section 576 of the Criminal Code also sets out the verdicts available on murder and manslaughter.

The Council noted in the Report that:

Foreseeability, likelihood, and probability are not relevant to proving intent in an offence under the Criminal Code. A person’s awareness of the probable consequences of their actions is not necessarily legal intent, even when recklessly performing the action over an extended period.

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

⁹ Report p 155.

¹⁰ Report p 156.

¹¹ Report p 4.

¹² *Criminal Code* (Qld) s 300.

¹³ Report p xxvi.

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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.¹⁴

At page 96 of the Report, the Council notes that 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.

Murder is the most serious offence against the person in Queensland and, under section 305 of the Criminal Code for adult offenders, carries a mandatory penalty of life imprisonment or an indefinite sentence under part 10 of the PSA.

Section 181 of the *Corrective Services Act 2006* and section 305 of the Criminal Code deal with parole eligibility for prisoners serving terms of imprisonment murder. The minimum non-parole period for murder 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. Otherwise, the non-parole period for murder is 20 years.

A sentencing court can increase, but not decrease, the mandatory non-parole period.¹⁵ If parole is granted, a life prisoner remains subject to the conditions of parole (for example, to report, and receive visits, as directed by the chief executive and not to commit an offence¹⁶) until death and can be returned to prison if the Parole Board Queensland suspends or cancels parole.¹⁷

Under the *Youth Justice Act 1992*, if a child is found guilty of a life offence (such as murder), the court may order that the child be detained for a period not more than 10 years or a period up to and including the maximum of life if the offence involves the commission of violence against a person and the court considers the offence to be a particularly heinous offence having regard to all the circumstances.¹⁸ However, subsections 305(2), (3) and (4) of the Criminal Code apply to a court sentencing a child to detention for life on a conviction of murder so that the same mandatory minimum non-parole periods of 25 and 30 years (murder of a police officer and previous convictions respectively) that apply to adults also apply to youth offenders.¹⁹

The Council states in the Report that:

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.²⁰

An unlawful killing that is not murder is manslaughter.²¹ The definition of manslaughter does not include an element of intent. There are four broad categories of conduct that fall within the offence of

¹⁴ Report pp 28-29.

¹⁵ Report p 68.

¹⁶ *Corrective Services Act 2006* (Qld) s 200

¹⁷ *Corrective Services Act 2006* (Qld) s 205; Report p 68.

¹⁸ *Youth Justice Act 1992* (Qld) s 176.

¹⁹ *Youth Justice Act 1992* (Qld) ss 176, 233; *Corrective Services Act 2006* (Qld) s 181.

²⁰ Report p xxvi.

²¹ *Criminal Code* (Qld) s 303(1).

manslaughter, including a deliberate act without an intention to kill or do grievous bodily harm and a criminally negligent act.²² The maximum penalty for manslaughter is life imprisonment.²³

The Report notes that:

Many unlawful child killings in Queensland result in an offender being convicted of manslaughter rather than murder. Reasons for this include the difficulty of establishing intent, even where the death is due to physical abuse.²⁴

Further, the Report states at page 28:

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'.

The Director of Public Prosecution Guidelines deals with charge negotiations. The Guidelines are available online at <https://publications.qld.gov.au/dataset/office-of-the-director-of-public-prosecutions-annual-reports/resource/e3cf0dfc-7f74-46a7-a52c-e4258bbc5383> as part of the Office of the Director of Public Prosecutions Annual Report 2017-18.

The Guidelines provide that the public interest is in the conviction of the guilty. The most efficient conviction is a plea of guilty. Early notice of the plea of guilty maximises the benefits for the victim and the community. Early negotiations within the Guidelines are therefore encouraged. Negotiations may result in a reduction of the level or the number of charges. The Guidelines recognise this as a legitimate and important part of the criminal justice system throughout Australia. The purpose is to secure a just result. The Guidelines specifically state at page 24 that:

Each case will depend on its own facts but negotiation may be appropriate in the following cases:-

(a) where the prosecution has to choose between a number of appropriate alternative charges. This occurs when the one episode of criminal conduct may constitute a number of overlapping but alternative charges;

(b) where new reliable evidence reduces the Crown case; or

(c) where the accused offers to plead to a specific count or an alternative count in an indictment and to give evidence against a co-offender. The acceptability of this will depend upon the importance of such evidence to the Crown case, and more importantly, its credibility in light of corroboration and the level of culpability of the accused as against the co-offenders;

There is an obligation to avoid overcharging. A common example is a charge of attempted murder when there is no evidence of an intention to kill. In such a case there is insufficient evidence to justify attempted murder and the charge should be reduced independent of any negotiations.

In cases of homicide, attempted murder or special sensitivity, notoriety or complexity, the Guidelines provide that an offer should not be accepted without consultation with the Director or Deputy Director and in all cases, before any decision is made, the views of the investigating officer and the victim or the victim's relatives, should be sought.

²² Report p 29.

²³ Criminal Code (Qld) s 310.

²⁴ Report p 29.

The Guidelines also deal with a decision to discontinue a prosecution or to substantially reduce charges on the basis of insufficient evidence and state that where the charges involve homicide, attempted murder or matters of public notoriety or high sensitivity, there must be consultation with the Director or Deputy Director.²⁵

The Bill amends section 302 (Definition of murder) of the Criminal Code to expand the definition of murder to include reckless indifference to human life. The Criminal Code does not currently refer to the concept of recklessness. As noted above, the offence of murder refers to an intention to kill or an intention to do grievous bodily harm.

The expanded definition of murder in the Bill is based on reckless indifference to human life under section 18 of the *Crimes Act 1900* in New South Wales (NSW). Reckless indifference to human life under section 18 of the *Crimes Act 1900* has been held to be the same as reckless indifference at common law,²⁶ although (unlike common law) it is not sufficient, under the section, that only grievous bodily harm is foreseen by the accused as a probable consequence of his conduct.²⁷ The common law in relation to murder applies in South Australia and Victoria. In relation to ‘reckless murder’, the High Court case of *R v Crabbe* (1985) 156 CLR 464 states that ‘a person who, without lawful justification or excuse, does an act knowing that it is probable that death or grievous bodily harm will result, is guilty of murder if death in fact results’. The word “probable” means likely to happen” and can be contrasted with something that is merely “possible”.²⁸

Application of the expanded definition of murder in section 302 of the Criminal Code as amended by the Bill will depend on the particular facts and circumstances of a case, but is not limited to child homicide cases. The Attorney-General stated in her explanatory speech on 12 February 2019 when introducing the Bill that:

The decision to include recklessness as to death in the definition of murder was the result of the thorough consideration this government undertook via QSAC into how we can better protect our most vulnerable Queenslanders. It reflects that intention and foresight of probable consequences are morally equivalent, that is, a person who acts recklessly knowing that death is probable and with callous disregard is just as culpable as the person who intends to kill another person.

These amendments will provide police and prosecutors in the future with broader scope to charge killers with murder in circumstances where a child killer shows callous disregard causing a death. If convicted, such offenders will face mandatory life imprisonment or an indefinite sentence and will not be eligible to apply for parole for at least 20 years. ...

The expansion is not designed to capture tragic accidents, such as a parent or guardian backing out of their driveway and tragically killing their child or a parent who forgets to secure the pool fence and their child drowns. The expansion is not designed to capture conduct that today would not result in a manslaughter prosecution. Ultimately, what charge is preferred will be a matter for the prosecution and the verdict is a matter entirely for a jury.

²⁵ Office of the Director of Public Prosecutions, *Directors' Guidelines* (as at 30 June 2018), <https://publications.qld.gov.au/dataset/office-of-the-director-of-public-prosecutions-annual-reports/resource/e3cf0dfc-7f74-46a7-a52c-e4258bbc5383>

²⁶ Criminal Practice & Procedure NSW (the Hon R N Howie QC BA LLM (Hons) The Hon Justice P A Johnson BA LLM) at paragraph 18.5; *Royall v R* (1991) 172 CLR 378.

²⁷ Criminal Practice & Procedure NSW (the Hon R N Howie QC BA LLM (Hons) The Hon Justice P A Johnson BA LLM) at paragraph 18.5; *R v Solomon* [1980] 1 NSWLR 321.

²⁸ Judicial College of Victoria, Bench Notes at 7.2.1.1.

Failure to supply necessities

Section 285 (Duty to provide necessities) of the Criminal Code creates a duty to provide the necessities of life to a person who cannot provide himself or herself with the necessities of life.

Section 324 (Failure to supply necessities) of the Criminal Code currently provides that any person who, being charged with the duty of providing another person with the necessities of life and without lawful excuse, puts that person's life in danger or the person's health is likely to be permanently injured, is guilty of a misdemeanour and liable to imprisonment for three years.

In NSW and the Northern Territory, the offence of failure to supply necessities carries a maximum penalty of five and seven years' imprisonment, respectively.²⁹ In NSW, it is also an offence if a person who has parental responsibility for a child under 16 years of age intentionally or recklessly fails to provide the child with the necessities of life, and thereby causes a danger of death or of serious injury to the child (Failure of persons with parental responsibility to care for child). The maximum penalty for this offence is five years imprisonment.³⁰

Clause 4 of the Bill increases the maximum penalty for the offence of failure to supply necessities from three years imprisonment to seven years imprisonment to better reflect the seriousness of this offence.

The Bill also makes necessary consequential amendments flowing from the increased penalty including:

- re-classification of the offence as a crime rather than a misdemeanour - the effect of which will be that an offender may be arrested without a warrant (clause 4);
- inclusion of the offence in schedule 1 of the PSA which will allow the court to make a serious violent offence declaration in relation to a conviction for the offence if the offender is sentenced to five years imprisonment or more, but less than 10 years imprisonment (clause 10); and
- inclusion of the offence in the meaning of *protected witness* under the Evidence Act, which will prevent a self-represented accused from cross-examining a victim in person (clause 7).

Other Report recommendations

The Report made a number of other non-legislative recommendations to improve system responses to child homicide, including information and support provided to family members of child homicide victims. The Department of Justice and Attorney-General, the Queensland Police Service and the Office of the Director of Public Prosecutions are working to implement these recommendations.

Commencement

The Bill will commence on assent.

The new aggravating factor will apply to any sentences imposed after commencement of the Bill, irrespective of whether the offence or conviction for the manslaughter offence occurred before or after the time of commencement. This approach is consistent with the Court of Appeal decision of *R v*

²⁹ *Crimes Act 1900* (NSW) s 44; *Criminal Code Act* (NT) s 183.

³⁰ *Crimes Act 1900* (NSW) s 43A.

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Hutchinson [2018] QCA 29 which held the approach to the exercise of the discretion that is affected by the insertion of a similar aggravating factor in subsection 9(10A) of the PSA was a procedural amendment and therefore the common law presumption against retrospective operation did not apply.

Consistent with Recommendation 2 of the Report, the new statutory aggravating factor will be reviewed post-commencement to ensure it achieves its legislative intention.

The amendments to the definition of murder and failing to provide necessities in the Bill will operate prospectively to offences committed after commencement.³¹

³¹ *Acts Interpretation Act 1954* (Qld) s 20C; *Criminal Code* (Qld) s 11; *Penalties and Sentences Act 1992* (Qld) s 180.