

Criminal Code and Other Legislation Amendment Bill 2019

Explanatory Notes

Short title

The short title of the Bill is the Criminal Code and Other Legislation Amendment Bill 2019 (the Bill).

Policy objectives and the reasons for them

On 25 October 2017, the Attorney-General and Minister for Justice referred an inquiry 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 such sentences are meeting expectations.

The Council adopted an evidence-based approach to its inquiry, drawing from a range of data sources, research and undertaking extensive consultation. Its focus was on sentencing for the criminal offences of murder and manslaughter.

Following its inquiry, the Council released its report, *Sentencing for Criminal Offences Arising from the Death of a Child: Final Report* (Report) on 21 November 2018. A copy of the Report can be accessed at <https://www.sentencingcouncil.qld.gov.au/research/sentencing-for-child-homicide>.

The Report makes eight recommendations and presents four areas of advice to improve sentencing practices and community understanding in relation to sentencing for child homicide.

Based on submissions made to the inquiry and the outcomes of the Council's consultations and focus group findings, the Council found that sentencing for manslaughter cases involving the direct use of violence against a young child is not viewed by the community as adequate. The Council concluded 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, and that additional legislative guidance to respond to this issue is required.

After considering a range of possible options to address this problem, 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).

This approach will retain sentencing flexibility, taking into account the diverse circumstances in which child homicide offences occur, while emphasising the factors that make these offences more serious.

The new aggravating factor will support the courts' treatment of these offences as more serious and therefore deserving of more punishment and send a clear message to the community that violence against children of any kind is wrong and will not be tolerated. The new aggravating factor is intended to support the court in setting a higher sentence.

At the same time as accepting all of the Report recommendations, the Queensland Government also committed to expanding the definition of murder to include reckless indifference to human life.

Many unlawful child killings in Queensland result in an offender being convicted of manslaughter rather than murder for a range of reasons, including difficulty in establishing intent even where the death is due to physical abuse. The issue of the legal elements required to establish the offence of murder was frequently raised with the Council throughout its review.

Including recklessness as an element of murder in section 302 of the Criminal Code will capture a wider range of offending as murder in Queensland. Reckless murder exists in a number of other Australian jurisdictions reflecting that intention and foresight of probable consequences are morally equivalent – that is a person who foresees the probability of death is just as blameworthy as the person who intends to kill. This change, depending on the circumstances of the particular case, will apply across the board to not just include recklessness in relation to the deaths of children but will be applicable to any person, including other categories of vulnerable persons such as the disabled and the elderly.

The Bill also contains an amendment to the Criminal Code to increase the maximum penalty for the offence of failure to supply necessaries from three years imprisonment to seven years imprisonment to adequately reflect the seriousness of this offence.

Achievement of policy objectives

The Bill implements recommendation 1 of the Report by amending the *Penalties and Sentences Act 1992* (PSA) to provide that in sentencing an adult offender convicted of the manslaughter of a child under 12 years, the court must treat the child's defencelessness and vulnerability, having regard to the child's age, as an aggravating factor.

The age of under 12 years aligns with the existing age criterion for the making of a serious violent offence declaration in section 161B of the PSA and when children are at highest risk of homicide due to abuse or neglect.

The new aggravating factor is limited to the defencelessness of the child victim and their vulnerability, having regard to the child's age, 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) of the PSA, and that children's

defencelessness and vulnerability, having regard to their age, are at the essence of what makes these offences more serious.

The new statutory aggravating factor introduced by the Bill is not intended to 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 and the treatment of the fact an offence is a domestic violence offence as an aggravating factor.

The Bill also contains amendments to the Criminal Code to expand the definition of murder to include reckless indifference to human life. This change to the definition of murder is consistent with New South Wales which includes reckless indifference to human life as a separate basis for establishing the offence of murder.

The proposed amendment to the definition of murder is intended to operate prospectively to offences committed after commencement.

The Bill also amends section 324 of the Criminal Code to increase the maximum penalty for failure to supply necessaries from three years imprisonment to seven years imprisonment and reclassify the offence as a crime.

As a consequence of the amendment to section 324 of the Criminal Code, the Bill amends section 21M (Meaning of *protected witness*) of the *Evidence Act 1977* (Evidence Act) to include a reference to section 324 (Failure to supply necessaries) of the Criminal Code in the definition of *prescribed special offence*. Part 2, Division 6 (Cross examination of protected witnesses) of the Evidence Act regulates the manner of cross-examination of protected witnesses. Pursuant to this division, a self-represented accused is prohibited from cross-examining a *protected witness*. A *protected witness* includes an alleged victim in a proceeding for an offence defined as a *prescribed special offence*. Inclusion of the reference to section 324 will ensure that an alleged victim of this offence is afforded appropriate protections in court proceedings.

A further consequential amendment is made to Schedule 1 (Serious violent offences) of the PSA to include a reference to section 324 of the Criminal Code. If a person is declared convicted of a serious violent offence, special provisions relating to parole apply.

Alternative ways of achieving policy objectives

The policy objectives are underpinned by the findings in the Report. The Council undertook extensive consultation in preparing its report. The Council determined the best means of achieving greater recognition of children's vulnerabilities in sentencing in Queensland is to create a new statutory aggravating factor in section 9 of the PSA.

There are no alternative ways to achieve the policy objectives to widen the definition of murder to include reckless indifference to human life or to increase the maximum penalty for failure to supply necessaries under section 324 of the Criminal Code.

Estimated cost for government implementation

Any costs arising from these legislative amendments will be dealt with as part of the normal budgetary process.

Consistency with fundamental legislative principles

Potential breaches of fundamental legislative principles are addressed below.

Clause 3 and 5 – expanded definition of murder

Clause 3 of the Bill potentially impacts on the rights and liberties of individuals by capturing a wider range of offending as murder. Section 305(1) of the Criminal Code provides that any person who committed the crime of murder is liable to imprisonment for life, which cannot be mitigated or varied, or is liable to an indefinite sentence under part 10 of the PSA. This new limb under section 302 will require the prosecution to prove the accused person knew that it was probable that death would result from their act or omission. The proposed amendment reflects that a person who acts knowing that death is a probable consequence is just as culpable as a person who intends to kill or do grievous bodily harm and that reckless indifference to human life should be sufficient to establish the offence of murder.

Section 20C of the *Acts Interpretation Act 1954*, section 11 of the Criminal Code and section 180 of the PSA will operate so that the expanded definition of murder in section 302 of the Criminal Code will apply prospectively to acts and omissions committed post commencement.

Clauses 4, 7 and 10 – increasing maximum penalty for failure to supply necessities

Clause 4 of the Bill potentially impacts on the rights and liberties of individuals by increasing the maximum penalty applying to the offence of failure to supply necessities under section 324 of the Criminal Code from three years imprisonment to seven years imprisonment. The increase in maximum penalty is justified to provide consistency with similar offences in the Criminal Code, such as cruelty to children under 16 (section 364) and endangering life of children by exposure (section 326), which both carry a maximum penalty of seven years imprisonment, and to appropriately reflect the seriousness of the offence and the community's abhorrence of such conduct.

Clause 7 of the Bill amends section 21M (Meaning of *protected witness*) of the Evidence Act to include a reference to section 324 (Failure to supply necessities) of the Criminal Code in the definition of *prescribed special offence*. The amendment will provide that a self-represented accused is prohibited from directly cross-examining a *protected witness*. This amendment could be seen as impacting on the defendant's right to a fair trial and therefore the rights and liberties of individuals. However, this potential breach is justified as it does not remove the ability for the witness to be cross-examined.

The existing section 21O (Procedure for cross-examination of protected witness if person charged has no legal representative) provides that the court will arrange for the person charged to be given free legal assistance unless the person arranges for legal representation or does not want the *protected witness* to be cross-examined. In addition, as the purpose of the amendment is to protect a vulnerable witness it is considered that any potential breach is justified.

The amendment in clause 10 will provide the court with discretion to make a declaration of a serious violence offence and therefore affect the rights and liberties of some individuals. 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 inclusion of the offence of failure to supply necessities (section 324 of the Criminal Code) in the serious violent offence schedule in the PSA reflects the seriousness of this offence and is consistent with the current inclusion of other offences such as endangering life of children by exposure (section 326 of the Criminal Code) and cruelty to children under 16 (section 364 of the Criminal Code). Further, the sentencing court will retain discretion in relation to the setting of the head sentence and also whether to make a serious violent offence declaration under section 161B(3) of the PSA.

Clause 9 – new aggravating factor

Clause 9 of the Bill potentially impacts on the rights and liberties of individuals by including a requirement that, in sentencing an offender convicted of manslaughter of a child under 12 years, the court must treat the defencelessness of the child and their vulnerability, having regard to the child's age, as an aggravating factor. The provision is intended to support the court in imposing higher sentences for child manslaughter offences while retaining judicial discretion.

The introduction of the aggravating factor is considered justified on the basis of the findings of the Council that sentencing for manslaughter offences committed against young children, particularly in cases involving the direct use of violence against a young child, are not viewed by the community as adequate and does not adequately reflect the unique and significant vulnerabilities of child victims.

The amendment to section 9 of the PSA will apply to sentencing only after commencement, whether or not the offence or conviction happened before or after the commencement. This approach is consistent with the Court of Appeal decision of *R v 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.

Consultation

The Council undertook wide-ranging and extensive consultation in preparing the Report including a call for submissions in response to a consultation paper, 10 focus groups with 103 members of the community across Queensland, six community information sessions, two community summits (one in Logan and a second in

Townsville) and meetings with people with specific expertise in relation to child homicide as well as victims of crime support agencies. This consultation informed the Report findings and recommendations.

A consultation draft of the Bill was provided key stakeholders including: the Crime and Corruption Commission; Director of Public Prosecutions; Bar Association of Queensland; Queensland Law Society; Legal Aid Queensland; Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd; Aboriginal and Torres Strait Islander Women's Legal Services NQ Inc; Sisters Inside Inc; Protect All Children Today Inc; Queensland Homicide Victims' Support Group; Queensland Council for Civil Liberties; Women's Legal Service Qld; Caxton Legal Centre Inc; Community Legal Centres Queensland; Commonwealth Director of Public Prosecutions; Bravehearts and Prisoner's Legal Service Inc.

Feedback received during consultation has been taken into account in finalising the Bill.

Consistency with legislation of other jurisdictions

The Bill is specific to the State of Queensland. However, the Australian Capital Territory, New South Wales and Tasmania include recklessness as a basis for establishing the offence of murder under statute. Reckless murder also exists under the common law.

The offence of failure to supply necessities carries a maximum penalty of seven years imprisonment in the Northern Territory.

Notes on provisions

Clause 1 states that when enacted the Bill will be cited as the *Criminal Code and Other Legislation Amendment Act 2019*.

Clause 2 provides that Part 2 amends the Criminal Code.

Clause 3 amends section 302 (Definition of *murder*) to insert a new paragraph (aa) into section 302(1) to provide that a person is guilty of murder if death is caused by an act done, or omission made, with reckless indifference to human life.

Clause 4 amends section 324 (Failure to supply necessities) to increase the maximum penalty for the offence of failure to supply necessities from three years imprisonment to seven years imprisonment and reclassify the offence as a crime.

Clause 5 inserts new section 575A (Evidence at murder trial) to clarify that irrespective of the basis upon which a person is charged under the definition of murder, the person may be convicted under any other limb if this can be established by the evidence at trial. For example, a jury may return a verdict on a charge of murder under the new section 302(1)(aa) of the Bill if the person is charged under section 302(1)(a) provided this charge is established by the evidence at the trial.

Clause 6 provides that Part 3 amends the Evidence Act.

Clause 7 amends section 21M (Meaning of *protected witness*) to include the offence of section 324 (Failure to supply necessities) of the Criminal Code.

Clause 8 provides that Part 4 amends the PSA.

Clause 9 amends section 9 (Sentencing guidelines) to provide that when determining the appropriate sentence for an offender convicted of the manslaughter of a child under 12 years, a court must treat the child's defencelessness and vulnerability, having regard to the child's age, as an aggravating factor.

Clause 10 amends schedule 1 (Serious violent offences) to add the offence of failure to supply necessities (section 324 of the Criminal Code) to the serious violent offences schedule.