

Consultation  
Paper

# Homicide

New South Wales  
**Sentencing Council**

**OCTOBER 2019**



## **NSW Sentencing Council**

October 2019

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## Terms of reference

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The Sentencing Council is to review the sentencing for the offences of murder and manslaughter under sections 19A, 19B and 24 of the *Crimes Act 1900* (NSW), in particular:

- the standard non-parole periods for murder and whether they should be increased; and
- the sentences imposed for domestic and family violence related homicides.

In undertaking this review, the Sentencing Council should consider:

- Sentences imposed for homicides and how these sentencing decisions compare with sentencing decisions in other Australian states and territories;
- The impact of sentencing decisions on the family members of homicide victims;
- The devastating impact of domestic and family violence on our community;
- The application of section 61 of the *Crimes (Sentencing Procedure) Act 1999* in the context of life sentences imposed for murder;
- The principles that courts apply when sentencing for these offences, including the sentencing principles applied in cases involving domestic and family violence; and
- Any other matter the Council considers relevant.

[Received 23 November 2018]



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## Glossary

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Term	Meaning
<b>Aggregate sentence</b>	An “aggregate sentence” occurs where a person is sentenced for more than one offence, and the court imposes a single sentence for all the offences.
<b>Apprehended Domestic Violence Order</b>	An apprehended domestic violence order is a court order that restricts a person’s behaviour towards someone they have, or have had, a domestic relationship with (for example, prohibiting them from assaulting or threatening the other person). It is an offence to breach an apprehended domestic violence order.
<b>Bond</b>	The term “bond” is generally used to refer to a non-custodial sentencing option that requires the offender to be of good behaviour and to comply with such other conditions as may be necessary for a fixed period.
<b>Community correction order</b>	A community correction order is a non-custodial, community-based sentencing option. Conditions may include requirements that the offender be supervised, complete community service work, or participate in rehabilitation programs.
<b>Concurrent sentences</b>	Concurrent sentences occur where an offender is sentenced for multiple offences, and each sentence commences and runs at the same time. <i>See also</i> <b>cumulative sentences</b> .
<b>Conditional release order</b>	A conditional release order is a non-custodial, community-based sentencing option. It can be imposed with or without a conviction being recorded. Conditions may include requirements that the offender be supervised, complete community service work, or participate in rehabilitation programs.
<b>Continuing detention order</b>	The NSW Supreme Court may make a continuing detention order against someone if they are deemed to be a “high risk offender”. Under a continuing detention order, the offender is detained in a prison for a specified period after their sentence has ended.
<b>Court of Criminal Appeal</b>	The Court of Criminal Appeal is the highest court in NSW for criminal matters. A person who has been sentenced by the District Court or Supreme Court may appeal their sentence to the Court of Criminal Appeal.
<b>Cumulative sentences</b>	Cumulative sentences occur where an offender is sentenced for more than one offence, and each sentence runs consecutively (one after another). Partly cumulative sentences are more common than fully cumulative sentences. <i>See also</i> <b>concurrent sentences</b> .
<b>Extended supervision order</b>	The NSW Supreme Court may make an extended supervision order against someone if they are deemed to be a “high risk offender”. Under an extended supervision order, the offender must submit to supervision and comply with reporting and monitoring conditions, even though their sentence has ended.
<b>Head sentence</b>	A head sentence is the total sentence that a court imposes for an offence, consisting of the <b>non-parole period</b> and the period of <b>parole</b> eligibility.
<b>Indefinite sentence</b>	An indefinite sentence is a sentence of imprisonment with no specified end-point, but that may be subject to review.
<b>Indicative sentence</b>	An indicative sentence is the term of sentence that a court states that it would have imposed for a single offence had it not been one of a number of offences that were subject to an <b>aggregate sentence</b> .

<b>Intensive correction order</b>	An intensive correction order is a community-based sentencing option that a court can impose as an alternative to imprisonment in certain cases. Conditions may include requirements that the offender not leave their home (home detention), or wear an electronic monitoring device.
<b>Leniency appeal</b>	A leniency appeal (also known as a Crown appeal) is brought by the prosecution if it believes that a sentence is too low. The <b>Court of Criminal Appeal</b> determines leniency appeals. If the appeal is successful, the Court can increase the sentence.
<b>Mandatory minimum sentence</b>	If an offence carries a mandatory minimum sentence, a court must impose a penalty that is not less than that sentence.
<b>Mandatory sentence</b>	If an offence carries a mandatory sentence, a court must impose that precise sentence.
<b>Maximum penalty</b>	The maximum penalty for an offence is the highest penalty that the court can impose for that offence.
<b>Natural life / whole of life sentence</b>	A sentence imposed for an offender's "natural life" or "whole of life" is a sentence of imprisonment that lasts until the offender dies, with release only in exceptional circumstances.
<b>Non-parole period</b>	A non-parole period is the minimum period of time that an offender must serve in prison before being eligible for release on <b>parole</b> .
<b>Parole</b>	Parole is the period during which an offender is released from prison before their sentence is complete, subject to conditions. An offender on parole serves the rest of their sentence in the community, but may return to prison if they breach their conditions.
<b>Partial defence</b>	A partial defence to murder results in an offender being convicted of manslaughter instead of murder.  In NSW, there are three partial defences to murder: provocation, excessive self-defence, and "substantial impairment by abnormality of the mind".
<b>Principal offence</b>	In analysing sentencing data, when an offender is sentenced for more than one offence, "principal offence" is used to refer to the offence that is subject to the highest potential penalty.
<b>Proportionality</b>	Proportionality is a principle of sentencing that requires courts to impose a sentence that is proportional to the offence committed.
<b>Protective custody</b>	Protective custody is a type of imprisonment designed to protect a prison inmate from harm. It usually involves the inmate being segregated from some or all of the other inmates.
<b>Redetermination</b>	A redetermination of a sentence occurs when a court reviews and changes a sentence that was imposed on an offender previously.
<b>Standard non-parole period</b>	A standard non-parole period is a <b>non-parole period</b> for an offence that is set out in legislation. It represents a non-parole period in the middle of the range of seriousness for that offence.
<b>State Parole Authority</b>	In NSW, the State Parole Authority is the body charged with determining a prisoner's eligibility for release on <b>parole</b> .
<b>Suspended sentence</b>	A suspended sentence involves a court imposing a sentence of imprisonment that is immediately suspended. The offender only enters custody if they fail to comply with the conditions of the sentence, including that they not commit further offences. Suspended sentences were abolished in NSW in 2018.

## CP Homicide

<b>Totality</b>	Totality is a principle of sentencing that applies when an offender is sentenced for multiple offences. It requires the judge to set a sentence that is proportional to the total offending, and is not disproportionate to the punishment required.
<b>Victim impact statement</b>	In the case of homicide, a victim impact statement is made by or on behalf of a person impacted by the death. It informs the sentencing court about the harm, suffering or distress the person suffered because of the offence.

## Questions

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### 3. Sentencing principles that apply in cases of murder and manslaughter

#### Question 3.1: Life sentences for murder

- (1) Are the existing principles that relate to imposing life sentences for murder appropriate? Why or why not?
- (2) If not, what should change?

#### Question 3.2: Particular categories of murder victim

- (1) Are the existing principles and provisions that relate to sentencing for the killing of particular categories of victim appropriate? Why or why not?
- (2) If not, what should change?

#### Question 3.3: Victim impact statements

- (1) Do the current provisions relating to victim impact statements in sentencing for homicide appropriately recognise the harms caused by murder and manslaughter? Why or why not?
- (2) If not, what should change?

#### Question 3.4: Factors going to objective seriousness

- (1) Are the existing factors considered relevant to the objective seriousness of an offence of murder or manslaughter appropriate? Why or why not?
- (2) If not, what should change?
- (3) Should any other factors be taken into account when assessing the objective seriousness of a particular murder or manslaughter offence?

#### Question 3.5: Manslaughter

- (1) Are existing laws and principles that apply to sentencing for manslaughter appropriate for dealing with the range of circumstances that can give rise to a conviction for manslaughter? Why or why not?
- (2) If not, what should change?

#### Question 3.6: Industrial manslaughter

What principles should apply when sentencing for a workplace death that amounts to manslaughter under the current law?

### 4. Sentencing for domestic violence related homicide

#### Question 4.1: Sentencing for domestic violence related homicide

- (1) Are the sentences imposed for homicide in the context of domestic or family violence adequate? Why or why not?
- (2) What changes, if any, should be made to penalty provisions that relate to homicide in the context of domestic or family violence?

- (3) Are the current sentencing principles relating to sentencing for domestic violence homicides appropriate? Why or why not?
- (4) How could the current sentencing principles relating to sentencing for domestic violence homicides be changed?
- (5) Should additional aggravating factors be legislated? Why or why not?
- (6) What changes, if any, should be made to the law to allow domestic violence context evidence to be admitted to sentencing proceedings?

## 5. Sentencing for child homicide

### Question 5.1: Sentencing for child homicide

- (1) Are the sentences imposed for the killing of children adequate? Why or why not?
- (2) What changes, if any, should be made to penalty provisions that relate to the killing of children?
- (3) Are the current sentencing principles relating to sentencing for the murder or manslaughter of children appropriate? Why or why not?
- (4) How could the current sentencing principles relating to sentencing for the murder or manslaughter of children be changed?
- (5) What other changes could be made to the law to deal more appropriately with cases involving the murder or manslaughter of a child?

## 6. Penalties for murder and manslaughter – options for reform

### Question 6.1: Maximum penalty for manslaughter

What changes, if any, should be made to the maximum penalty provisions that relate to manslaughter?

### Question 6.2: Mandatory minimum penalties

- (1) For what types of homicide, if any, should mandatory minimum penalties be introduced?
- (2) What should the duration of any mandatory minimum penalties be?

### Question 6.3: Mandatory life imprisonment

- (1) Should a sentence of mandatory life imprisonment apply to any other categories of murder? If yes, which ones?
- (2) What changes, if any, should be made to the existing provisions relating to mandatory life imprisonment for the murder of a police officer?

### Question 6.4: Discretionary life imprisonment with a non-parole period

Should it be possible (without removing the possibility of a life sentence without parole) to impose a life sentence with a non-parole period? Why or why not?

**Question 6.5: Mandatory life imprisonment with a non-parole period**

Should there be a mandatory sentence of life imprisonment for murder with a minimum non-parole period? Why or why not?

**Question 6.6: Existing standard non-parole periods**

- (1) Should murder offences continue to attract a standard non-parole period? Why or why not?
- (2) Should the existing standard non-parole periods for murder be changed? Why or why not?
- (3) If yes, what should they be?

**Question 6.7: New standard non-parole periods**

- (1) Should any new standard non-parole periods be introduced for murder? Why or why not?
- (2) If yes, what should they be and in what circumstances should they operate?

**Question 6.8: Concurrent serious offences**

What new provisions, if any, should apply where a homicide offender has committed one or more additional serious offences?

**Question 6.9: Redetermining natural life sentences**

In what circumstances, if any, would it be appropriate to have a scheme of judicial redetermination of natural life sentences for murder?

**Question 6.10: Managing high risk offenders**

What provision, if any, should be made for the management of high risk of offenders in relation to murder or manslaughter?

**Question 6.11: Alternatives to imprisonment for manslaughter**

What alternatives to imprisonment should be available for manslaughter offenders?





# 1. Introduction

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## In brief

We have been asked to review the sentencing of murder and manslaughter, including the penalties imposed for domestic violence homicides and the standard non-parole periods for murder. Homicide has a devastating impact on our community. There is public concern that sentences imposed on homicide offenders in NSW are inadequate.

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## Terms of reference

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- 1.1 The Attorney General has asked us to review the sentencing for the offences of murder and manslaughter, including penalties imposed for domestic and family violence homicides and the standard non-parole periods for murder. The terms of reference for this review state:

The Sentencing Council is to review the sentencing for the offences of murder and manslaughter under sections 19A, 19B and 24 of the Crimes Act 1900 (NSW), in particular:

- the standard non-parole periods for murder and whether they should be increased; and
- the sentences imposed for domestic and family violence related homicides.

In undertaking this review, the Sentencing Council should consider:

- Sentences imposed for homicides and how these sentencing decisions compare with sentencing decisions in other Australian states and territories;
- The impact of sentencing decisions on the family members of homicide victims;
- The devastating impact of domestic and family violence on our community;
- The application of section 61 of the Crimes (Sentencing Procedure) Act 1999 in the context of life sentences imposed for murder;

- The principles that courts apply when sentencing for these offences, including the sentencing principles applied in cases involving domestic and family violence; and
- Any other matter the Council considers relevant.

## Background to this review

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### The impact of homicide

- 1.2 Homicide and personal violence have devastating consequences for all parts of society, including the victims themselves, their children, other family members, friends, colleagues and the community.<sup>1</sup> Estimations of the economic impact of homicide are often made, but the emotional and personal costs of such offending are too great to be measured.<sup>2</sup>
- 1.3 Homicide in a domestic violence context has disastrous impacts. One study has found that intimate partner violence is the leading contributor to illness, disability and premature death for women aged 15 to 44 years.<sup>3</sup> The World Health Organisation has said that violence against women is “a global public health problem of epidemic proportions, requiring urgent action”.<sup>4</sup>
- 1.4 Domestic and family violence is the most common reason people seek help from government-funded homelessness services, especially for women<sup>5</sup> and Indigenous people.<sup>6</sup> It affects the psychological, emotional and physical wellbeing of children, as well as their social and cognitive development.<sup>7</sup> Domestic violence is a significant risk factor for child abuse and neglect.<sup>8</sup>

- 
1. Australia, *The National Plan to Reduce Violence against Women: Immediate Government Actions* (2009) 2; Australia, *The National Plan to Reduce Violence against Women and Their Children: Including the first Three-Year Action Plan* (2011) 1; S Riger, S Raja and J Camacho, “The Radiating Impact of Intimate Partner Violence” (2002) 17 *Journal of Interpersonal Violence* 184; S Meyer, “When Mothers are Killed by Their Partners, Children often Become “Forgotten” Victims. It’s Time They Were Given a Voice” *The Conversation* (7 October 2019) <[www.theconversation.com](http://www.theconversation.com)>.
  2. Australia, *The National Plan to Reduce Violence against Women: Immediate Government Actions* (2009) 2; Australia, *The National Plan to Reduce Violence against Women and Their Children: Including the first Three-Year Action Plan* (2011) 1.
  3. VicHealth, *The Health Costs of Violence: Measuring the Burden of Disease Caused by Intimate Partner Violence*, (Victorian Health Promotion Foundation, 2004) 10.
  4. World Health Organisation, *Global and Regional Estimates of Violence against Women: Prevalence and Health Effects of Intimate Partner Violence and Non-Partner Sexual Violence* (2013) 3.
  5. Australia, *National Plan to Reduce Violence against Women and Their Children: Including the first Three-Year Action Plan* (2011) 7.
  6. Australian Institute of Health and Welfare, *Specialist Homelessness Services 2013–14* (2014) 25.
  7. K Richards, *Children’s Exposure to Domestic Violence in Australia*, Trends and Issues in Crime and Criminal Justice no 419 (Australian Institute of Criminology, 2011).
  8. Australia, *National Plan to Reduce Violence against Women and Their Children: Including the first Three-Year Action Plan* (2011) 7.

## Public concern with sentencing of homicide

- 1.5 This review exists in the context of concerns in the media that the sentences imposed on homicide offenders are inadequate. The following views have been recorded in the media in the past 12 months:
- Serious homicide offenders should be sentenced to life imprisonment, and retribution and community protection should be emphasised.<sup>9</sup> For example, Matthew De Gruchy, who was convicted of the homicide of three family members, and Michael Guider, who was convicted of various sex offences and the homicide of a child, should be serving sentences of life imprisonment.<sup>10</sup>
  - Domestic violence perpetrators who commit homicides against intimate partners or family members are sentenced too leniently,<sup>11</sup> or should be sentenced to life imprisonment.<sup>12</sup>
  - People convicted of domestic violence homicides over the past few decades have not been sentenced to life imprisonment.<sup>13</sup>
  - Recent NSW Supreme Court sentencing remarks may have diminished the seriousness of the domestic violence homicide.<sup>14</sup> One example is the use of the term “worst category”, which sometimes leads members of the public to think the judge has underestimated the seriousness of the homicide.<sup>15</sup>
  - Mandatory sentences of life imprisonment should be imposed on people convicted of homicide against children.<sup>16</sup>
  - Sentences of life imprisonment are especially appropriate where the homicide victim is a police officer,<sup>17</sup> or where the offender refuses to reveal the location of a victim’s body.<sup>18</sup>

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9. C Mardon, “Family Killer to Walk Free”, *The Illawarra Mercury* (27 July 2019) 6; J Carroll, “No Parole: Mandurama Baby Killer Loses Bid for Freedom, Appeal Date Set”, *Western Advocate* (Bathurst, 7 May 2019) 1–2; C Urquhart, “Why are so Many Violent Criminals on the Loose in our Suburbs?” (14 April 2019) <www.news.com.au>; “There’ll be Anger, Tears and Fears until we Put a Full Stop to These Short Sentences”, *The Australian* (5 September 2019) 13.
  10. J Fife-Yeomans and E Barr “Paltry Prison Terms Slammed with Murderers up for Parole”, *The Daily Telegraph* (Sydney, 16 August 2019) 16–17; C Mardon, “Family Killer to Walk Free” *The Illawarra Mercury* (27 July 2019) 6.
  11. A Hennessy, “Grim State of Affairs: Qld Tougher on Partner Killers”, *The Daily Telegraph* (Sydney, 14 November 2018) 8; A Hennessy, “Stats Lay Bare Soft Wife Killer Sentences”, *The Daily Telegraph* (Sydney, 15 November 2018) 9; M O’Neill, “Fury Builds over Ristevski Sentence”, (27 April 2019) <www.news.com.au>.
  12. “Jail Domestic Killers for Life, Top Cop Says”, *The Sydney Morning Herald* (24 November 2018) 15.
  13. A Hennessy, “Sentence Reviews for Evil DV Killers”, *The Daily Telegraph* (Sydney, 23 November 2018) 5; A Hennessy, “Grim State of Affairs: Qld Tougher on Partner Killers”, *The Daily Telegraph* (Sydney, 15 November 2018) 8.
  14. A Hennessy, “Grim State of Affairs: Qld Tougher on Partner Killers”, *The Daily Telegraph* (Sydney, 15 November 2018) 8. See *R v AKB (No 8)* [2018]NSWSC 1628 [30].
  15. A Hennessy, “Grim State of Affairs: Qld Tougher on Partner Killers”, *The Daily Telegraph* (Sydney, 15 November 2018) 8. See *R v AKB (No 8)* [2018]NSWSC 1628 [37]. See also *R v Kilic* [2016]HCA 48, 259 CLR 256 [18]–[20].
  16. T Chamberlain, “Punish the Mongrels Properly: Grandfather Wants Mandatory Penalties for Child Killers”, *The Courier Mail* (Brisbane, 14 February 2019) 21.
  17. M Carr, “Killer Blow”, *Newcastle Herald* (15 August 2019) 1.
  18. D Gusmaroli, “Kid Killers Should Stay in Jail”, *The Daily Telegraph* (Sydney, 25 May 2019) 14.

- Homicide offenders should serve multiple sentences consecutively instead of concurrently, especially where serious sex offences or multiple victims are involved.<sup>19</sup>
- Non-parole periods for homicide offenders should be longer,<sup>20</sup> particularly where homicide offenders may commit further offences while on parole.<sup>21</sup>
- Many domestic violence perpetrators who commit homicide against partners or family members are inappropriately sentenced to non-parole periods that are less than the standard non-parole period.<sup>22</sup>
- Continuing detention orders or continuing supervision orders should be imposed on homicide offenders more frequently and with stricter conditions.<sup>23</sup>

### Domestic violence and child homicide

- 1.6 This review has a particular focus on examining sentencing for domestic violence homicides.<sup>24</sup> In this Consultation Paper, we use the expression “domestic violence” to refer to what the terms of reference call “domestic and family violence”.
- 1.7 The Minister for the Prevention of Domestic Violence and Sexual Assault has emphasised the need to grant courts powers to impose appropriate sentences for domestic violence, including to “lock up the worst for life”.<sup>25</sup> Reducing domestic violence reoffending by 25% by 2021 is one of the Premier’s Priorities.<sup>26</sup>
- 1.8 While not expressly mentioned in the terms of reference, we have decided to include a separate chapter in this Consultation Paper discussing child homicide. This is because the killing of children, particularly young children, raises some special considerations. Our research has also identified it as a potential area of sentencing inadequacy, and we are aware of some community dissatisfaction about sentencing trends. Such dissatisfaction has led other jurisdictions to enact or propose specific provisions for child homicide cases, which we consider in chapter 5.

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19. T Barlass, “Victims’ Mother Fears Freed Paedophile Will Offend Again”, *The Sydney Morning Herald* (5 September 2019) 3; M Morri and J Fife-Yeomans, “Lock Sicko up for Life”, *The Daily Telegraph* (Sydney, 5 September 2019) 4.

20. C Urquhart, “Why are so Many Violent Criminals on the Loose in our Suburbs?” (14 April 2019) <[www.news.com.au](http://www.news.com.au)>.

21. B Hills, “Paroled Killer on Rape Charges”, *The Sunday Telegraph* (Sydney, 16 December 2018) 3; N Bielby, “Reform Needed to Keep Women Safe”, *Newcastle Herald* (16 March 2019) 8.

22. A Hennessy, “Stats Lay Bare Soft Wife Killer Sentences”, *The Daily Telegraph* (Sydney, 15 November 2018) 9.

23. P Duffin, “Vile Serial Predator in Bid to Exit Prison”, *The Daily Telegraph* (Sydney, 5 September 2019) 5; D Oliver, “Locked up: Rapist Involved in Wagga Woman’s Abduction Denied Release”, *Daily Advertiser* (Wagga Wagga, 25 September 2019) 1; D Cornwall, “Balding Case Predator: Bid to Stop Release”, *The Australian* (5 September 2019) 3.

24. See chapter 4.

25. M Speakman and P Goward, “Review of Domestic Violence and other Homicide Sentencing” (Media Release, NSW Government, 23 November 2018).

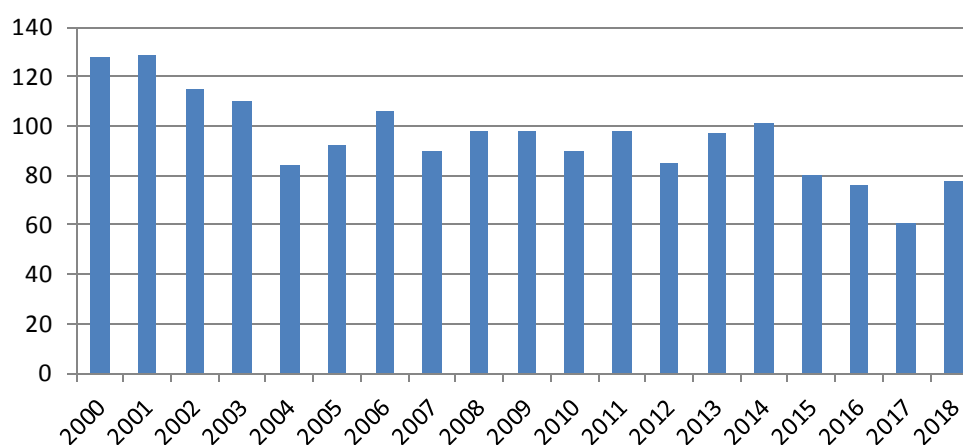
26. M Speakman and P Goward, “Review of Domestic Violence and other Homicide Sentencing” (Media Release, NSW Government, 23 November 2018).

## Homicide in NSW

### Prevalence

- 1.9 The NSW police recorded 78 incidents of murder or manslaughter in 2018, which was a 39% reduction, and one of the lowest number of incidents, since 2000. Figure 1.1 shows the downward trend in homicide incidents over the past 18 years.

**Figure 1.1: Number of incidents of murder and manslaughter recorded by police in NSW, 2000-2018**



Source: NSW Bureau of Crime Statistics and Research.

### Sentences imposed for domestic violence homicide

- 1.10 There has been a concern, historically, that domestic and family violence is not viewed and treated in the criminal justice system as seriously as it should be.
- 1.11 Despite this, the statistics available to us show little difference in the head sentences and non-parole periods between homicides that do and do not involve domestic violence or intimate partner violence.<sup>27</sup> However, child murder, which often involves domestic violence, is subject to a special, higher standard non-parole period. Therefore, it is sentenced at a higher level than most other cases of murder.<sup>28</sup>
- 1.12 As part of this review, we looked at 27 domestic violence murder cases sentenced in NSW between April 2015 and March 2018. An offender was sentenced to life imprisonment in one case.<sup>29</sup> Of these 27 cases, 17 involved intimate partner violence and none of the offenders were sentenced to life imprisonment. For comparison, we also looked at 58 murder cases in the same period that did *not* involve domestic violence. Of these cases, 4 offenders were given a life sentence.<sup>30</sup>

27. See [4.18]–[4.19].

28. See [5.33], Table 5.1.

29. *R v Xie* [2017] NSWSC 63.

30. See [2.26].

## CP Homicide

- 1.13 We are aware of at least two offences involving domestic violence, outside of the time range we looked at, in which the offender was sentenced to life imprisonment.<sup>31</sup> One of these cases involved intimate partner violence.<sup>32</sup>
- 1.14 The sentences handed down in these cases depend on how the court applied the many sentencing principles set out in this paper, and particularly, the principles relating to sentencing for offences in the “worst case” category.<sup>33</sup>

## Homicide in other Australian jurisdictions

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- 1.15 Murder and manslaughter are offences in every Australian jurisdiction, but there is variation between the jurisdictions in the elements of the offences, the maximum penalties, and sentencing procedures, among other things.
- 1.16 The law on murder and manslaughter in Australian jurisdictions other than NSW is set out in Appendices B and C to this Consultation Paper. We also draw attention to significant differences between murder and manslaughter in NSW and other Australian jurisdictions when we set out general reform options in Chapter 6 and more specific reform options in relation to domestic violence and child homicide in chapters 4 and 5.
- 1.17 These differences present a challenge for comparison. It is unclear whether these differences are the reason for the disparity in sentencing for homicide across Australian jurisdictions, or whether the disparity is caused by more general differences in approaches to sentencing in each place.

## Murder

- 1.18 When considering the statistics relating to murder, it is worth considering the different victimisation rates for murder around Australia. The victimisation rate is the number of murder victims relative to their population. We set out the victimisation rates in Table 1.1.

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31. *R v O'Connor* [2018] NSWSC 1734; *R v Gonzales* [2004] NSWSC 822.

32. *R v O'Connor* [2018] NSWSC 1734.

33. See [3.13]–[3.22].

Table 1.1: Victimisation rates for murder per 100,000 people, 2018

Jurisdiction	Rate per 100,000
Victoria	0.8
Queensland	0.8
South Australia	0.8
NSW	0.9
Australian Capital Territory	1.2
Western Australia	1.5
Tasmania*	1.5
Northern Territory	2.0

Source: ABS 45100DO002\_2018 Recorded Crime - Victims, Australia, 2018

\* Numbers for 2016. 2018 numbers not available.

- 1.19 We have obtained sufficient data for meaningful comparison with four other Australian jurisdictions. Three of these allow determinate sentences for murder, with parole available – the Australian Capital Territory, Tasmania and Victoria. One of these – the Northern Territory – has mandatory life sentences for murder, with parole available. Table 1.2 gives an overview of this data, together with the data for NSW.

Table 1.2: Average sentences for murder

Jurisdiction	Head sentence (years)		Non-parole period (years)	
	Mean	Median	Mean	Median
<b>Northern Territory</b> [Jan 2010 – Dec 2018]	Life	Life	20.8	20
<b>NSW</b> [Apr 2015 – Mar 2018]	25.6	24	18.9	18
<b>Tasmania</b> [Jul 2007 – Jun 2017]	25.5	21.5	14.4	12.25
<b>Victoria</b> [Jan 2016 – Dec 2018]	22.3	22	17.8	17.5
<b>Australian Capital Territory</b> [Jul 2012 – Dec 2018]	20.3	21.2	18.2	18

Source: Table 2.1; Table B.1; Table B.2; Table B.3; Table B.4.

- 1.20 Table 1.2 shows that the mean and median head sentences in NSW are longer than in the other jurisdictions that have determinate sentences. Table 1.2 also shows that the mean and median non-parole periods in NSW are longer than in the other jurisdictions.

- 1.21 The NSW data in this comparison, unlike the other jurisdictions, relates to murder involving victims who were not in a special standard non-parole period category. If murders involving victims in a special standard non-parole period category were also taken into account, the NSW averages would be even longer.<sup>34</sup>

### Manslaughter

- 1.22 While manslaughter is largely governed by common law,<sup>35</sup> each jurisdiction has different partial defences that give rise to manslaughter, as well as other statutory variations.<sup>36</sup>
- 1.23 Some jurisdictions also have offences covering actions that, depending on the circumstances, might otherwise have been prosecuted as manslaughter. This includes, for example:
- child homicide in Victoria<sup>37</sup>
  - industrial manslaughter in the ACT and Queensland<sup>38</sup>
  - infanticide in Tasmania and Victoria<sup>39</sup>
  - criminal neglect where the victim dies in South Australia,<sup>40</sup> and
  - assault causing death offences (or “one punch” offences) in NSW, Western Australia, Queensland and the Northern Territory.<sup>41</sup>
- 1.24 We obtained sufficient data for meaningful comparison of manslaughter sentences with four other Australian jurisdictions – Northern Territory, Queensland, Tasmania and Victoria. Table 1.3 summarises this data together with the data for NSW.

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34. See Table 5.1.

35. See [2.41]–[2.44].

36. See Appendix C.

37. See [5.75]–[5.81].

38. *Crimes Act 1900* (ACT) pt 2A; *Work Health and Safety Act 2011* (Qld) pt 2A.

39. *Criminal Code* (Tas) s 165A; *Crimes Act 1958* (Vic) s 6.

40. *Criminal Law Consolidation Act 1935* (SA) s 14.

41. *Crimes Act 1900* (NSW) s 25A; *Criminal Code* (WA) s 281; *Criminal Code* (Qld) s 314A; *Criminal Code* (NT) s 161A.



Table 1.3: Average sentences for manslaughter

	Head sentence (years)		Non-parole period (years)	
	Mean	Median	Mean	Median
<b>Victoria</b> [Jan 2016-Dec 2018]	9	9	6.3	6
<b>Queensland</b> [Dec 2015-Feb 2018]	8.5	8.75	4.7	4
<b>NSW</b> [Apr 2013-Mar 2018]	8	8	5.3	5
<b>Northern Territory</b> [Jan 2010- Dec 2018]	7.8	7	4.5	3.9
<b>Tasmania</b> [Jul 2007-Jun 2017]	6.4	7	4.2	4

Source: Table 2.3; Table C.1; Table C.3; Table C.4; Table C.5.

- 1.25 Table 1.3 shows that the mean and median head sentence and non-parole period for NSW is in the middle of the range of the mean and median head sentence and non-parole period for the other jurisdictions that we were able to analyse. The 3 cases occurring in the Australian Capital Territory, which are not included in the table, involved a much higher range with head sentences, ranging from 9.7 to 12 years' imprisonment and non-parole periods ranging from 5 to 6.8 years.<sup>42</sup>

## Other approaches to domestic violence homicide

- 1.26 Addressing domestic violence homicide requires a holistic approach that goes beyond reforms to criminal sentencing. The NSW Domestic Violence Death Review Team has developed a series of recommendations aimed at addressing domestic violence homicide in a wide range of areas.<sup>43</sup> These recommendations include:
- reforms addressing structural inequality and disadvantage that contributes to domestic violence homicide
  - shifting cultures that permit domestic violence, including by improving how domestic violence is reported and dealt with in the media and legal system
  - further use of research into the prevention of domestic violence homicide, for example, identifying risk factors such as non-fatal strangulation and reproductive coercion<sup>44</sup>
  - building capacity for friends, family, healthcare professionals and police to help prevent domestic violence homicide

42. [C.5]–[C.6].

43. NSW Domestic Violence Death Review Team, *Report 2015–2017* (2017) xiii–xiv, 77–129.

44. See, for example, J Price, “The Eight-Step Road Map to Murder that Might Save Women’s Lives”, (13 September 2019) <www.watoday.com.au>.

- enhancing the effectiveness of apprehended violence orders, and examining the potential of developing domestic violence specialist court practices
- providing support that addresses the unique vulnerabilities of particular groups to domestic violence homicide, including Aboriginal people, LGBTI people, people from culturally and linguistically diverse backgrounds, older people, people who reside in remote NSW, people with disabilities, and people with impermanent visa status, and
- ensuring that primary and secondary victims of domestic violence, especially children survivors of domestic violence homicide, are supported in the short and long terms.<sup>45</sup>

1.27 The Review Team's recommendations about improving the language used in the criminal justice system to describe domestic violence are also relevant. The use of certain language has been identified as disadvantaging victims and supporting offenders in various ways.<sup>46</sup> Problematic legal discourse is often repeated in the media and may contribute to distorted social understandings of domestic and family violence more generally.<sup>47</sup> Examples of problematic language used in the criminal justice system include:

- attributing violence to a relationship rather than to individuals
- excusing violence by attributing it to uncontrollable emotions (such as jealousy or rage) or other events
- using assumptions and stereotypes about a "proper victim", and
- failing to recognise that domestic violence involves more than physical violence.<sup>48</sup>

## Outline of this Consultation Paper

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1.28 **Chapter 2** sets out the offences and penalties of murder and manslaughter in NSW, and provides statistics relating to the number and length of sentences imposed for these offences.

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45. NSW Domestic Violence Death Review Team, *Report 2015–2017* (2017) xiii–xiv, 77–129.

46. E Buxton-Namisnyk and A Butler, "What's Language Got to Do with it? Learning from Discourse, Language and Stereotyping in Domestic Violence Homicide Cases" (2017) 29 *Judicial Officers' Bulletin* 49; S Cusack, "Eliminating Judicial Stereotyping: Equal Access to Justice for Women in Gender-Based Violence Cases", Submitted to the Office of the High Commissioner for Human Rights (9 June 2014) 18.

47. R Hunter and D Tyson, "Justice Betty King: A Study of Feminist Judging in Action" (2017) 40 *UNSW Law Journal* 778; R Hunter, "Analyzing Judgments from a Feminist Perspective" (2015) 15 *Legal Information Management* 8; R Hunter, "Narratives of Domestic Violence" (2006) 28 *Sydney Law Review* 733.

48. E Buxton-Namisnyk and A Butler, "What's Language Got to Do with it? Learning from Discourse, Language and Stereotyping in Domestic Violence Homicide Cases" (2017) 29 *Judicial Officers' Bulletin* 49; M Minow, "Words and the Door to the Land of Change: Law, Language, and Family Violence" (1990) 43 *Vanderbilt Law Review* 1665, 1668, 1673–1674; S Cusack, "Eliminating Judicial Stereotyping: Equal Access to Justice for Women in Gender-Based Violence Cases", Submitted to the Office of the High Commissioner for Human Rights (9 June 2014) 18. See also J Gilmore, *Fixed It: Violence and the Representation of Women in the Media* (Viking, 2019).

- 1.29 **Chapter 3** sets out the principles that NSW courts apply when sentencing for murder and manslaughter. We ask whether any changes should be made to these principles.
- 1.30 **Chapters 4 and 5** set out the approaches NSW courts take when sentencing for murder and manslaughter in a domestic violence context, and in relation to the killing of young children, respectively. We ask whether any changes should be made to these approaches.
- 1.31 **Chapter 6** sets out options for reforming the current penalty schemes for murder and manslaughter in NSW. We ask whether these reform options are appropriate.
- 1.32 **Appendix A** lists the preliminary submissions we received.
- 1.33 **Appendices B and C** set out the law about sentencing murder and manslaughter in other Australian jurisdictions respectively. These appendices also provide statistics about the number and length of sentences imposed where available.



## 2. The offences of murder and manslaughter in NSW

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### In brief

We define the offences of murder and manslaughter, set out the penalties that apply, and examine sentencing trends in NSW.

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- 2.1 In NSW, as in the other Australian jurisdictions, unlawful homicide is broadly divided into the categories of murder and manslaughter. Other offences where death results, such as dangerous or negligent driving causing death,<sup>1</sup> assault causing death,<sup>2</sup> and drug supply causing death,<sup>3</sup> are not part of this review.
- 2.2 This chapter sets out the definitions of murder and manslaughter in NSW and the penalties that apply. It also examines the general sentencing trends for these offences.

## Murder

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### Definition

- 2.3 In NSW, a person commits murder if they kill another person and:
- they acted with reckless indifference to the person’s life, or
  - they intended to kill the person, or
  - they intended to cause “grievous bodily harm” to the person, or

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1. *Crimes Act 1900* (NSW) s 52A; *Road Transport Act 2013* (NSW) s 117(1)(a). See NSW Sentencing Council, *Repeat Traffic Offenders*, Consultation Paper (2018) [2.14]–[2.16].

2. *Crimes Act 1900* (NSW) s 25A and s 25B.

3. *Crimes Act 1900* (NSW) s 25C.

- they killed the person while attempting to commit, or during or after actually committing, a “crime punishable by imprisonment for life or for 25 years”.<sup>4</sup>
- 2.4 “Crimes punishable by imprisonment for life or for 25 years” include, for example:
- wounding or grievous bodily harm with intent<sup>5</sup>
  - discharging a firearm with intent<sup>6</sup>
  - using an intoxicating substance to commit an indictable offence,<sup>7</sup> and
  - using an explosive substance or corrosive fluid with intent.<sup>8</sup>
- 2.5 “Grievous bodily harm” is defined in the *Crimes Act 1900* (NSW) (“*Crimes Act*”) as including:
- (a) the destruction (other than in the course of a medical procedure) of the foetus of a pregnant woman, whether or not the woman suffers any other harm, and
  - (b) any permanent or serious disfiguring of the person, and
  - (c) any grievous bodily disease (in which case a reference to the infliction of grievous bodily harm includes a reference to causing a person to contract a grievous bodily disease).<sup>9</sup>

### Maximum penalty

- 2.6 The maximum penalty for murder is life imprisonment.<sup>10</sup>
- 2.7 Before 1955, the sentence for murder was death. On 14 May 1955, this was replaced with a mandatory sentence of life imprisonment.<sup>11</sup>
- 2.8 On 14 May 1982, an exception to this mandatory sentence was introduced. This allowed a court to impose a sentence less than life imprisonment if it believed the offender’s culpability was reduced because of mitigating circumstances.<sup>12</sup>
- 2.9 On 12 January 1990, a number of sentencing reforms came into force. These reforms introduced the current law, which sets a maximum (non-mandatory) penalty of life imprisonment for murder.<sup>13</sup> The current law also says that a life sentence, if

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4. *Crimes Act 1900* (NSW) s 18(1)(a).

5. *Crimes Act 1900* (NSW) s 33.

6. *Crimes Act 1900* (NSW) s 33A.

7. *Crimes Act 1900* (NSW) s 38.

8. *Crimes Act 1900* (NSW) s 47.

9. *Crimes Act 1900* (NSW) s 4(1) definition of “grievous bodily harm”.

10. *Crimes Act 1900* (NSW) s 19A(1).

11. *Crimes Act 1900* (NSW) s 19, amended by *Crimes (Amendment) Act 1955* (NSW) s 5(b).

12. *Crimes Act 1900* (NSW) s 19, amended by *Crimes (Homicide) Amendment Act 1982* (NSW) sch 1 cl 1.

13. *Crimes Act 1900* (NSW) s 19A, inserted by *Crimes (Life Sentences) Amendment Act 1989* (NSW) sch 1 cl 3–4.

imposed, is to be served for the term of the offender's natural life, with no possibility of parole.<sup>14</sup>

- 2.10 Before these reforms, offenders sentenced to life imprisonment could be released from prison on licence and serve the remainder of their sentence in the community.<sup>15</sup> The 1990 reforms were introduced in part as a response to concerns that many offenders sentenced to life imprisonment were being released on licence and thus were not serving a "true" life sentence.<sup>16</sup>
- 2.11 As part of these reforms, a redetermination scheme was established for offenders who were sentenced to mandatory life imprisonment before 12 January 1990. These offenders may, once certain conditions are met, apply to the Supreme Court for the determination of a sentence with a non-parole period.<sup>17</sup> A number of amendments have been made to these redetermination provisions, since 1990, that have progressively limited the scheme's application.<sup>18</sup> The effect of the provisions, as they currently stand, is that:
- the Supreme Court may redetermine a mandatory life sentence and impose a sentence (including a life sentence) with or without a non-parole period, and
  - in the case of offenders who were subject to a non-release recommendation from the original sentencing judge, the Supreme Court may only impose a life sentence with or without a non-parole period.<sup>19</sup>
- 2.12 These are the only circumstances (barring exceptional circumstances) where an offender may serve a life sentence with the possibility of release on parole.

### Non-parole periods and release to parole

- 2.13 When sentencing an offenders to a term of imprisonment (besides life imprisonment),<sup>20</sup> a court is usually required to set a non-parole period.<sup>21</sup> However, the court can decide not to set a non-parole period. The court may decide not to because of the nature of the offence and any other penalty previously imposed on the offender.<sup>22</sup>
- 2.14 When imposing a sentence with a non-parole period, the non-parole period should be at least 75% of the head sentence unless there are special circumstances.<sup>23</sup>

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14. *Crimes (Life Sentences) Amendment Act 1989* (NSW) sch 1 cl 4; *R v Harris* [2000] NSWCCA 469, 50 NSWLR 409 [122].

15. Decisions to release a prisoner on licence were made initially by the Parole Board, then from 1981–1982 by the Indeterminate Sentence Committee, then from 1983–1989 by the Release on Licence Board. See R Simpson, *Parole: An Overview*, Briefing Paper No 20/99 (NSW Parliamentary Library Research Service, 1999) 11–14.

16. NSW, *Parliamentary Debates*, Legislative Council, 7 December 1989, 14528–14529.

17. *Crimes (Sentencing Procedure) Act 1999* (NSW) sch 1; originally under *Sentencing Act 1989* (NSW) s 13A.

18. See NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [8.12]–[8.24].

19. *Crimes (Sentencing Procedure) Act 1999* (NSW) sch 1 cl 4.

20. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54(a).

21. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44(1).

22. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 45(1).

23. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44(2).

- 2.15 When an offender is serving a sentence of more than 3 years' imprisonment, the State Parole Authority must not make a parole order directing an offender's release "unless it is satisfied that it is in the interests of the safety of the community".<sup>24</sup>
- 2.16 There are two key issues in relation to parole for offenders convicted of murder:
- the availability of standard non-parole periods, and
  - the involvement of the Serious Offenders Review Council in the decision to release an offender to parole.

### **Standard non-parole periods**

- 2.17 A standard non-parole period applies to all cases of murder except where an offender is sentenced to life imprisonment and, therefore, is not eligible for parole.<sup>25</sup> A standard non-parole period represents the non-parole period for an offence that, "taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness".<sup>26</sup>
- 2.18 A sentencing court uses the standard non-parole period as a guidepost in sentencing, along with the maximum penalty of the offence. When sentencing for an offence to which a standard non-parole period applies, the court also has to consider other legislated and common law considerations, as it would for any other offence.<sup>27</sup>
- 2.19 The standard non-parole period for murder is 20 years.<sup>28</sup> However, the standard non-parole period is 25 years if the victim was:
- a child under 18 years old, or
  - a public official exercising public or community functions and the murder was due to their occupation or voluntary work.<sup>29</sup>

### **Serious Offenders Review Council and release to parole**

- 2.20 Offenders serving a sentence for murder with a non-parole period are subject to the serious offenders regime when the State Parole Authority considers them for release on parole.<sup>30</sup>
- 2.21 Under this regime, the Serious Offenders Review Council<sup>31</sup> advises the parole authority about the release on parole of those serving a sentence for murder. In recommending whether to release an offender on parole, the Council must consider a number of factors, including the public interest.<sup>32</sup>

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24. *Crimes (Administration of Sentences) Act 1999* (NSW) s 135(1).

25. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D(1)(a).

26. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54A(2).

27. NSW Sentencing Council, *Standard Non-parole Periods* (2013) 2–6.

28. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A, table, item 1.

29. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A, table, item 1A, 1B.

30. *Crimes (Administration of Sentences) Act 1999* (NSW) s 3 definition of "serious offender".

31. *Crimes (Administration of Sentences) Act 1999* (NSW) s 195.

32. *Crimes (Administration of Sentences) Act 1999* (NSW) s 197, s 198.



- 2.22 The Parole Authority can only order release on parole if the Serious Offenders Review Council recommends it, unless there are exceptional circumstances.<sup>33</sup> If the Parole Authority rejects the Council's advice about release, it must state its reasons in writing and give the Council the opportunity to respond.<sup>34</sup>

### Data on NSW sentencing for murder

- 2.23 We set out below some data for the offence of murder in NSW. This does not include data where the victim was in a special standard non-parole period category (that is, where the victim was under 18 years old or in a specified category of public official).

#### *Number of murders sentenced*

- 2.24 We reviewed all cases of murder where a NSW court imposed a sentence in the three-year period between 1 April 2015 and 31 March 2018. There were a total of 100 cases; 96 were committed by an adult offender and 4 were committed by a juvenile offender.

- 2.25 Of the 96 offences committed by an adult offender:

- 85 offences involved victims who were not in a special standard non-parole period category<sup>35</sup>
- 7 offences involved a victim under the age of 18 years<sup>36</sup>
- 1 offence involved a victim who was a public official exercising public or community functions,<sup>37</sup> and
- 3 offences were committed before the introduction of standard non-parole periods.

#### *Sentences*

- 2.26 Of the 85 adult offenders who committed offences involving victims who are not in a special standard non-parole period category, 5 (5.9%) were sentenced to life imprisonment.

- 2.27 Table 2.1 sets out the sentencing data for the remaining 80 offenders whose victims were not in a special standard non-parole period category. All 80 offenders were sentenced to a determinate term of imprisonment.

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33. *Crimes (Administration of Sentences) Act 1999* (NSW) s 135(5).

34. *Crimes (Administration of Sentences) Act 1999* (NSW) s 152.

35. *Crimes (Sentencing Procedure) Act 1999* (NSW) div 1A pt 4, table, item 1.

36. *Crimes (Sentencing Procedure) Act 1999* (NSW) div 1A pt 4, table, item 1B.

37. *Crimes (Sentencing Procedure) Act 1999* (NSW) div 1A pt 4, table, item 1A.

**Table 2.1: Sentences for murder (victims not in a special SNPP category), Supreme Court of NSW, April 2015 – March 2018**

	Head sentence (years)	Non-parole period (years)
Distribution	13 – 45	8.5 – 33.7
Middle 50% range	21 – 30	15 – 22.5
Inter-quartile range	9 yrs	7.5
Mean	25.6	18.9
Median	24	18
Mode	24	18

*Note: Life sentences are not included in this data.*

- 2.28 Table 2.1 shows that (unlike other offences with standard non-parole periods<sup>38</sup>) the mean non-parole period (18.9 years' imprisonment) is close to the standard non-parole period (20 years' imprisonment).
- 2.29 Table 2.1 also shows an increase in mean and median head sentences and non-parole periods compared with those recorded in our 2013 report on standard non-parole periods.<sup>39</sup> The figures from 2013 are set out in Table 2.2.

**Table 2.2: Sentences for murder (victim not in special SNPP category), Supreme Court of NSW, 2000 – 2013**

	Pre-SNPP		SNPP		SNPP	
	3 Apr 2000-31 Jan 2003		5 Oct 2008-4 Oct 2011		5 Oct 2011-31 Mar 2013	
Number of cases	82		48		58	
	Head sentence (years)	NPP (years)	Head sentence (years)	NPP (years)	Head sentence (years)	NPP (years)
Mean	19.25	14.1	21.8	16.1	22.9	16.8
Median	18	13.5	22	16	23	16.75

*Source: Sentencing Council, Standard Non-Parole Periods, Report (2013) Table B3.*

*Note: Life sentences are not included in this data.*

### Murder of a police officer

- 2.30 On 23 June 2011, a new penalty provision was inserted into the *Crimes Act*, imposing a life sentence for the murder of a police officer in certain circumstances.<sup>40</sup>

38. See, eg, Sentencing Council, *Standard Non-Parole Periods*, Report (2013) appendix B.

39. Sentencing Council, *Standard Non-Parole Periods*, Report (2013) table B3.

40. *Crimes Act 1900* (NSW) s 19B, inserted by *Crimes Amendment (Murder of Police Officers) Act 2011* (NSW) s 3.

- 2.31 The mandatory penalty applies if:
- the offender murders a police officer
  - the police officer was executing their duty or the murder occurred as a reaction to a police officer executing their duty
  - the offender knew or ought to have known that the victim was a police officer, and
  - the offender intended to kill the police officer or was engaged in criminal activity that risked harm to police officers.<sup>41</sup>
- 2.32 A life sentence imposed under this provision, as with all life sentences in NSW, is to be served for the term of the offender's natural life, with no possibility of parole.<sup>42</sup>
- 2.33 However, the mandatory life sentence under this section does not apply if the offender:
- was under 18 years old when the offence was committed, or
  - had a significant cognitive impairment when the offence was committed.<sup>43</sup>
- 2.34 The significant cognitive impairment cannot be a temporary, self-induced impairment.<sup>44</sup> However, there has been no judicial interpretation on the meaning of "significant cognitive impairment".<sup>45</sup>
- 2.35 Since the introduction of the mandatory penalty provision in 2011, there has been only one case where an offender has been sentenced to life imprisonment for the murder of a police officer.<sup>46</sup> However, it is possible that there may be cases where an offender kills a police officer but the circumstances fall outside the terms of the provision.<sup>47</sup>

## Manslaughter

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- 2.36 In NSW, a person may be found guilty of manslaughter in three ways:
- as the result of an alternative verdict to a charge of murder
  - as the result of a guilty verdict on a charge of manslaughter, or
  - following a plea of guilty to a charge of manslaughter.

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41. *Crimes Act 1900* (NSW) s 19B(1).

42. *Crimes Act 1900* (NSW) s 19B(2).

43. *Crimes Act 1900* (NSW) s 19B(3)(a).

44. *Crimes Act 1900* (NSW) s 19B(3)(b).

45. The exception was applied to reduce the offender's sentence in *R v Barbieri* [2014] NSWSC 1808, but through agreement between the Crown and the defence, thereby eliminating the need for a judicial finding.

46. *R v Jacobs (No 9)* [2013] NSWSC 1470.

47. See, eg, *Barbieri v R* [2016] NSWCCA 295; N Cowdery, "Mandatory Life for Cop Deaths" (2011 Winter) *Bar News* 43, 43.

### Maximum penalty

- 2.37 The maximum penalty for manslaughter is imprisonment for 25 years.<sup>48</sup> This is shorter than the maximum sentence of life imprisonment that applies to murder.
- 2.38 Previously, the maximum penalty for manslaughter was imprisonment for life.<sup>49</sup>
- 2.39 From 12 January 1990, all offences in the *Crimes Act* that previously had a maximum sentence of life imprisonment – except murder – were amended to have a maximum sentence of 25 years imprisonment.<sup>50</sup> This included manslaughter.<sup>51</sup>

### Definition

- 2.40 In the *Crimes Act*, manslaughter is defined as “every other punishable homicide” that is not murder.<sup>52</sup>
- 2.41 The elements of the offence of manslaughter are set out in the common law. There are two types of manslaughter:
- **Voluntary manslaughter.** This is where the elements of murder are otherwise made out, but a mitigating factor such as substantial impairment by abnormality of mind, provocation or excessive self-defence reduces the offence to manslaughter.<sup>53</sup>
  - **Involuntary manslaughter.** This is where the offender has caused the death of another person, but they have a lower level of mental culpability than that required for murder.<sup>54</sup>
- 2.42 There are two sub-types of involuntary manslaughter: manslaughter by unlawful and dangerous act and manslaughter by gross negligence.
- 2.43 Manslaughter by unlawful and dangerous act occurs when:
- the offender was engaged in an unlawful act
  - the act was dangerous, and
  - the act caused the death of another person.<sup>55</sup>

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48. *Crimes Act 1900* (NSW) s 24.

49. *Crimes Act 1900* (NSW) s 24 amended by *Crimes (Life Sentences) Amendment Act 1989* (NSW) sch 1 cl 5.

50. NSW, *Parliamentary Debates*, Legislative Council, 7 December 1989, 14529.

51. *Crimes (Life Sentences) Amendment Act 1989* (NSW) sch 1 cl 5.

52. *Crimes Act 1900* (NSW) s 18(1)(b).

53. *R v Lavender* [2005] HCA 37, 222 CLR 67 [2]. See also *Crimes Act 1900* (NSW) s 23(1), s 23A(1), s 421.

54. *R v Lavender* [2005] HCA 37, 222 CLR 67 [2].

55. *R v Larkin* (1943) 1 All ER 217 [219].

- 2.45 Manslaughter by gross negligence occurs when:
- the offender was under a duty of care to another person
  - the offender failed to foresee the possibility of causing serious harm or death or that person, or failed to avoid taking the risk of causing serious harm or death to that person
  - that failure was a gross departure from the standard of care expected of a reasonable person in the position of the offender, and
  - that failure caused the death of that person.<sup>56</sup>

### Non-parole periods and release to parole

- 2.46 The general provisions that govern the setting of non-parole periods and release on parole apply to manslaughter. Standard non-parole periods do not apply in sentencing for manslaughter.
- 2.47 Unlike with murder, the Serious Offenders Review Council is generally not required to deal with manslaughter offenders unless they:
- have been sentenced to a total effective non-parole period of at least 12 years<sup>57</sup> (which rarely occurs),<sup>58</sup> or
  - are required to be managed as a serious offender in accordance with a decision of the sentencing court, the State Parole Authority or the Commissioner for Corrective Services.<sup>59</sup>

### Data on NSW sentencing for manslaughter

- 2.48 We have reviewed all manslaughter offences for which a sentence was handed down in NSW in the five-year period from 1 April 2013 to 31 March 2018.

#### *Number of manslaughter cases sentenced*

- 2.49 There are a total of 92 manslaughter cases; 89 were committed by adult offenders and 3 were committed by juvenile offenders.
- 2.50 We were able to access case information (either from sentencing remarks or media reports) for 77 of the 89 offences committed by an adult offender. Of these 77 offences:
- 49 involved involuntary manslaughter (45 by unlawful and dangerous act and 4 by gross negligence), and
  - 27 involved voluntary manslaughter (14 by excessive self-defence, 11 by substantial impairment by abnormality of mind, and 2 by provocation).

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56. *Nydam v R* [1977] VR 430, 445.

57. *Crimes (Administration of Sentences) Act 1999* (NSW) s 3(1) definition of “serious offender” (c).

58. Table 2.3; [3.102].

59. *Crimes (Administration of Sentences) Act 1999* (NSW) s 3(1) definition of “serious offender” (d).

***Sentences for principal offence***

- 2.51 Of the 89 offences committed by an adult offender, the court imposed a term of imprisonment in 85 cases. Of the remaining 4 cases, in 2 the offender was given a suspended sentence, and in 2 the offender was given a bond with supervision.
- 2.52 Of the 85 offences committed by adult offenders where a term of imprisonment was imposed, a total or indicative sentence for the manslaughter offence (where it was the principal offence) was given for 80 offences. Table 2.3 provides sentencing data for these 80 offences.

**Table 2.3: Sentences for manslaughter, NSW higher courts, April 2013 – March 2018**

	Head sentence (years)	Non-parole period (years)
Distribution	3 – 16	1.5 – 12
Middle 50% range	6.5 – 10	3.75 – 6.8
Inter-quartile range	3.5	3.1
Mean	8	5.3
Median	8	5
Mode	8	4 / 5 / 6 (equal)

### 3. Sentencing principles that apply in cases of murder and manslaughter

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#### **In brief**

In addition to the general principles of sentencing that apply to all offences in NSW, there are certain principles that apply in cases of homicide. These include principles about when a life sentence should be imposed, provisions about special categories of victim and the use of victim impact statements, and factors relevant to the objective seriousness of a homicide offence. The wide range of circumstances that can give rise to a manslaughter conviction means that courts impose a wide range of sentences.

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- 3.1 This chapter considers the sentencing principles that apply when a court sentences an offender for murder or manslaughter.
- 3.2 In chapter 4, we explain the specific principles relating to homicides committed in the context of domestic violence. In chapter 5, we explain the special sentencing principles relating to the killing of children.

## General principles of sentencing that apply in NSW

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- 3.3 When sentencing an offender for murder or manslaughter, a NSW court must take into account the sentencing principles that are applicable to all offences committed in NSW, which are:
- the purposes of sentencing (that is, adequate punishment, deterrence, protecting the community, promoting rehabilitation, making the offender accountable, denunciation, and recognising the harm to the victim and the community)<sup>1</sup>
  - the principles of sentencing (key principles include that a sentence must be proportional to the offence,<sup>2</sup> that there should parity between the sentences of co-offenders,<sup>3</sup> that offenders should be sentenced only for the offence of which they are convicted,<sup>4</sup> and that, where the offender is being sentenced for more than one offence, the sentence must be just and appropriate to the totality of the offending behaviour<sup>5</sup>)
  - the requirement that a sentence of imprisonment should be a penalty of last resort<sup>6</sup>
  - the factors that courts should take into account, including any relevant aggravating and mitigating circumstances from the lists set out in the *Crimes (Sentencing Procedure) Act 1999* (NSW) (“*Crimes (Sentencing Procedure) Act*”)<sup>7</sup>
  - the “guideposts” of the maximum penalty for the offence and, where relevant, the standard non-parole period, and
  - the provisions that allow the court to “discount” sentences in cases where the offender has pleaded guilty, co-operated before and during a trial, or provided assistance to the authorities.<sup>8</sup>
- 3.4 The sentence imposed is the result of the court taking into account all of the relevant considerations through a process of “instinctive synthesis”.<sup>9</sup> In doing so, the court has a wide discretion.

## General approach to unlawful taking of life

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- 3.5 The courts treat the unlawful taking of life very seriously. The NSW Court of Criminal Appeal has observed that:

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1. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A.
  2. *Veen v R* [No 1] (1979) 143 CLR 458; *Veen v R* [No 2] (1988) 164 CLR 465.
  3. *Lowe v R* (1984) 154 CLR 606; *Green v R* [2011] HCA 49, 244 CLR 462 [28].
  4. *R v De Simoni* (1981) 147 CLR 383, 389.
  5. *Mill v R* (1988) 166 CLR 59, 63 citing D A Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (2nd ed, Heinemann, 1979) 56–57.
  6. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(1).
  7. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A.
  8. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22–23.
  9. *Muldock v R* [2011] HCA 39, 244 CLR 120 [26]; *Markarian v R* [2005] HCA 25, 228 CLR 357 [51].



it is the responsibility of the courts to protect and preserve human life and to punish those who unlawfully take it. All human life is to be protected including that of the disabled, the handicapped, the criminal, the derelict and the friendless.<sup>10</sup>

- 3.6 The courts have regularly observed that sentencing can never adequately respond to the taking of a human life.<sup>11</sup> They have also recognised that not all offences resulting in the death of the victim should be treated the same way:

[E]xperience shows that there are large differences between offences of murder. Premeditation, the infliction of suffering going beyond that necessarily involved in the offence and whether there was an intent to kill rather than merely inflict grievous bodily harm are but three of the myriad of factors that go to differentiate one case of murder from another.<sup>12</sup>

### Imposition of life sentences

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- 3.7 The law and principles relating to the imposition of life sentences have a particular relevance for murder since murder is one of the principal offences for which courts may impose life imprisonment.

- 3.8 A life sentence in NSW is imposed for the term of the offender's natural life.<sup>13</sup> Sentencing law in NSW does not permit courts to set a non-parole period when imposing a sentence of life imprisonment.

- 3.9 Since the abolition of the death penalty, life imprisonment is the most severe penalty available in NSW. At common law, the maximum penalty for an offence is reserved for the worst category of case.<sup>14</sup>

- 3.10 The courts have long observed the negative impact of life sentences on offenders.<sup>15</sup> This is one of the reasons that a life sentence is reserved for the most extreme cases.<sup>16</sup> As one Supreme Court judge observed in sentencing remarks in 2017, a whole of life sentence:

has a capacity to crush hope and kill any motivation an offender may have to reform. It is considered by some societies and some tribunals to be inhumane and contrary to human rights. However, it is part of the law of New South Wales and must be imposed in extreme cases.<sup>17</sup>

- 3.11 It is for the prosecution to satisfy the court beyond reasonable doubt that a particular case calls for a life sentence.<sup>18</sup>

- 3.12 There are two sources of law through which a court may impose a life sentence for murder:

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10. *R v Dawes* [2004] NSWCCA 363 [31].

11. See *R v Da-Pra* [2012] NSWSC 607 [69]; *R v Zaro* [2007] NSWSC 756 [50].

12. *R v Da-Pra* [2012] NSWSC 607 [68].

13. *R v Harris* [2000] NSWCCA 469, 50 NSWLR 409 [109]–[122].

14. *Ibbs v R* (1987) 163 CLR 447, 451–452; *Veen v R (No 2)* (1988) 164 CLR 465, 478, 489, 498; *R v Harris* [2000] NSWCCA 469; 50 NSWLR 409 [79]–[90].

15. See, eg, *R v Petroff* (Unreported, NSWSC, Hunt J, 12 November 1991) 1–2.

16. *R v Garforth* (Unreported, NSWCCA, 23 May 1994) 11.

17. *R v Qaumi* [2017] NSWSC 774 [182].

18. *R v Merritt* [2004] NSWCCA 19, 59 NSWLR 557 [35]; *R v Olbrich* [1999] HCA 54, 199 CLR 270.

- the common law, and
- s 61(1) of the *Crimes (Sentencing Procedure) Act*.

### Imposing a life sentence under common law

3.13 Under common law, a court may impose a life sentence where the case is considered to be in the “worst case” category. A case is in the worst case category if:

- it has features “which are of very great heinousness”, and
- there is “an absence of facts mitigating the seriousness of the crime (as distinct from the subjective features mitigating the penalty)”.<sup>19</sup>

Some offences may be so heinous that the subjective features “should be disregarded either wholly or substantially”.<sup>20</sup>

3.14 Reserving life sentences for cases in the worst case category does not mean that the court must impose a lesser sentence if it can envisage a worse case.<sup>21</sup>

3.15 For example, the Court of Criminal Appeal in 1994 observed that, despite factors that might justify a lesser sentence, such as a guilty plea or the possibility of rehabilitation:

[t]here are some cases where the level of culpability is so extreme that the community interest in retribution and punishment can only be met through the imposition of the maximum penalty.<sup>22</sup>

3.16 The use of the term “worst category” in sentencing requires some care, as the High Court has recently observed.<sup>23</sup>

### Section 61 “mandatory” life

3.17 Section 61(1) of the *Crimes (Sentencing Procedure) Act* provides:

A court is to impose a sentence of imprisonment for life on a person who is convicted of murder if the court is 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.

3.18 This provision was first introduced in 1996,<sup>24</sup> and was based on the Court of Criminal Appeal’s statement in 1994, quoted above.<sup>25</sup> It adds the words “community protection and deterrence” to the original statement.

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19. *R v Twala* (Unreported, NSWCCA, 4 November 1994) 6 (Badgery-Parker J).

20. *R v Harris* [2000] NSWCCA 469, 50 NSWLR 409 [103]–[105].

21. *Veen v R* (No 2) (1988) 164 CLR 465, 478; *R v Twala* (Unreported, NSWCCA, 4 November 1994) 2 (Badgery-Parker J).

22. *R v Garforth* (Unreported, NSWCCA, 23 May 1994) 13.

23. *R v Kilic* [2016] HCA 48, 259 CLR 256 [18]–[20].

24. *Crimes Act 1900* (NSW) s 431B, inserted by *Crimes Amendment (Mandatory Life Sentences) Act 1996* (NSW) sch 1.

- 3.19 The Court of Criminal Appeal has considered whether the court must be satisfied of each of the four elements – retribution, punishment, community protection and deterrence – before imposing a life sentence.<sup>26</sup> It has concluded that a life sentence is required if the offender’s culpability:
- is so extreme that the community interest, in the *combined effect* of such of the four indicia as are applicable, could only be met by such a sentence (a construction which would embrace a circumstance where any one or more of those factors may be of itself insufficient, or inapplicable).<sup>27</sup>
- 3.20 Under this provision, a court must assess an offender’s culpability by:
- looking at the “circumstances surrounding or causally connected with the offence”, and
  - “leaving aside matters such as remorse, pleas of guilty, prospects of rehabilitation and the like”.<sup>28</sup>
- 3.21 The provision expressly preserves the court’s ability to impose a “sentence of imprisonment for a specified term” instead of a life sentence.<sup>29</sup> As a result, the court must first assess the offender’s culpability. Then, if it determines that a life sentence is called for, the court must exercise its discretion as to whether to reduce the sentence because of the offender’s subjective circumstances.<sup>30</sup> In exercising this discretion, it is open to the court to conclude that an offender’s culpability is so extreme that the offender’s subjective features do not displace the need for the life sentence.<sup>31</sup>
- 3.22 The Court of Criminal Appeal has held that the common law continues to apply along with s 61(1). The Court has also noted that it is possible the common law principles could justify a life sentence outside of the circumstances envisaged by s 61(1).<sup>32</sup>

### Some relevant general principles

- 3.23 A court may impose a life sentence even though the offender:
- has pleaded guilty (because the law acknowledges that some crimes can “so offend the public interest” that the maximum sentence without any discount for a guilty plea is appropriate)<sup>33</sup>
  - has no previous criminal history (consistent with the principle that an offence can be so heinous as to justify disregarding subjective circumstances wholly or substantially)<sup>34</sup>

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25. *R v Garforth* (Unreported, NSWCCA, 23 May 1994) 13; *R v Koloamatangi* (No 6) [2017] NSWSC 1631 [112].

26. *R v Merritt* [2004] NSWCCA 19, 59 NSWLR 557 [41]–[54].

27. *R v Merritt* [2004] NSWCCA 19, 59 NSWLR 557 [42] (emphasis in original), [54].

28. *R v Harris* [2000] NSWCCA 469, 50 NSWLR 409 [60].

29. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21(1), s 61(3).

30. *R v Harris* [2000] NSWCCA 469, 50 NSWLR 409 [94]; *R v Miles* [2002] NSWCCA 276 [204]; *SW v R* [2013] NSWCCA 103 [114]; *R v Terkmani* (No 2) [2017] NSWSC 1567 [42].

31. *SW v R* [2013] NSWCCA 103 [135].

32. *R v Harris* [2000] NSWCCA 469, 50 NSWLR 409 [90].

33. *R v Miles* [2002] NSWCCA 276 [213]; *Knight v R* [2006] NSWCCA 292 [37].

- is a young adult,<sup>35</sup> or
  - has some prospect of rehabilitation.<sup>36</sup>
- 3.24 An offender's future dangerousness alone is not sufficient to bring a murder into the "worst case" category.<sup>37</sup> However, the courts have identified it as being highly relevant when considering a life sentence.<sup>38</sup>
- 3.25 Future dangerousness cannot be given such weight as to result in a penalty that is disproportionate to the gravity of the offence. However, the Court of Criminal Appeal has observed that it can be used "to offset a potentially mitigating feature of the case, such as the offender's mental condition, which might otherwise have led to a reduction of penalty". The Court has also considered the possibility that "in the case of homicides involving a high degree of culpability", a life sentence might be justified if the offender will likely remain a danger to the community for the rest of their life.<sup>39</sup>

### "De facto" life sentence

- 3.26 A court can impose a determinate sentence that may effectively become a life sentence because the offender will reach an extreme age before they are released on parole or released at the end of the whole term. Such issues potentially arise for all offenders, but especially so for older offenders, whose convictions for murder regularly (and statistically) attract lengthy sentences.
- 3.27 It has sometimes been argued (and occasionally accepted by the courts)<sup>40</sup> that a court, having decided not to impose a whole of life sentence, should not impose a determinate sentence that is effectively a life sentence because of the offender's life expectancy. However, the Court of Criminal Appeal has rejected these arguments. The Court has said they involve flawed reasoning and are contrary to the fundamental principle that a sentence must reflect the seriousness of the offence.<sup>41</sup>
- 3.28 In one case, the Court of Criminal Appeal observed that a court may consider the age of the offender upon likely release to parole, and that this might justify a finding of special circumstances to adjust the length of the non-parole period. However, the Court added that:
- the final sentence and non-parole period must not be reduced to a point where they are disproportionate to the gravity of the offence and must reflect the purposes of sentencing.<sup>42</sup>
- 3.29 The Court has accepted that, in some cases, complying with this principle may "have the practical effect of a life sentence".<sup>43</sup>

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34. *Adanguidi v R* [2006] NSWCCA 404 [34]; *R v Valera* [2002] NSWCCA 50 [6].

35. *R v Valera* [2002] NSWCCA 50 [6]; *Gonzales v R* [2007] NSWCCA 321 [164]–[165], [175].

36. *R v Leonard* (Unreported, NSWCCA, 7 December 1998) 13, 19–20; *Gonzales v R* [2007] NSWCCA 321 [163]–[165]; *Knight v R* [2006] NSWCCA 292 [23]; *R v Garforth* (Unreported, NSWCCA, 23 May 1994) 13.

37. *R v Hillsley* [2006] NSWCCA 312 [24].

38. *R v Standford* [2016] NSWSC 1434 [124].

39. *R v Garforth* (Unreported, NSWCCA, 23 May 1994) 11.

40. *R v Chen* [2003] NSWCCA 326 [67]; *R v Folbigg* [2005] NSWCCA 23 [189]–[190].

41. *Barton v R* [2009] NSWCCA 164 [16]–[27]; *R v McLean* [2001] NSWCCA 58 [45].

42. *Cameron v R* [2017] NSWCCA 229 [106].

### Question 3.1: Life sentences for murder

- (1) Are the existing principles that relate to imposing life sentences for murder appropriate? Why or why not?
- (2) If not, what should change?

## Using past sentences for guidance

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- 3.30 During a sentencing hearing, the prosecution and defence counsel will often refer to a number of previous cases to guide the court as to an appropriate sentence. In 2001, Chief Justice Spigelman acknowledged the relative usefulness of prior cases at sentencing, but observed:

murder is a crime which can be committed in a wide range of gravity and objective circumstances. There is also a significant range of differences in the subjective circumstances. This is a context where the maximum penalty is life and, accordingly, the range over which the sentencing discretion can be exercised is the largest open to a judge in our justice system.<sup>44</sup>

- 3.31 The courts in recent years have emphasised that each case depends upon its own facts.<sup>45</sup> In 2015, the Court of Criminal Appeal said:

Murder, like manslaughter, has been aptly described as a protean offence. Each case, to a large extent, depends upon its own facts. Axiomatically, differences in facts and circumstances will often lead to differences in the resulting sentence.<sup>46</sup>

## Special provisions for certain categories of murder victim

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- 3.32 In cases where the murder victim falls within a particular category, special sentencing provisions and principles may apply.

### Higher standard non-parole periods for certain categories of victim

- 3.33 The standard non-parole period for murder (20 years' imprisonment) is increased to 25 years where the victim is:
- a specified type of public official; namely a “police officer, emergency services worker, correctional officer, judicial officer, council law enforcement officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim’s occupation or voluntary work”,<sup>47</sup> or
  - a child under 18 years of age.<sup>48</sup>

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43. *Barton v R* [2009] NSWCCA 164 [22]. See also *R v LN (No 10)* [2017] NSWSC 1387 [140].

44. *R v Slater* [2001] NSWCCA 65 [52].

45. *Perkins v R* [2018] NSWCCA 62 [63]–[64]; *R v Martin* [2018] NSWSC 84 [67].

46. *King v R* [2015] NSWCCA 99 [80]. See also *Perkins v R* [2018] NSWCCA 62 [63].

47. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A, table, item 1A.

48. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A, table, item 1B.

- 3.34 There is uncertainty around how these special provisions interact with other similarly expressed sentencing considerations. Specifically, if the higher standard non-parole period applies because the murder victim is either a child or a specified public official, it is unclear to what extent that victim's identity can also be taken into account when assessing the objective seriousness of a murder. It is also unclear to what extent the fact that the victim was a specified public official, or was vulnerable because they were very young can be separately taken into account as an aggravating circumstance.<sup>49</sup>
- 3.35 The courts have said that these considerations should not be applied in a way that results in double or even triple counting.<sup>50</sup> For example, the Supreme Court has suggested that if the victim of the murder is a child, this should be taken into account in the sentence by:
- considering the higher standard non-parole period, and
  - *not* considering the aggravating factor that the victim was vulnerable because they were very young.<sup>51</sup>
- 3.36 However, the Court of Criminal Appeal has said that if the victim was a police officer acting in the execution of their duty, this can be taken into account in the sentence by considering *both*:
- the higher standard non-parole period, and
  - the aggravating factor that the victim was a public official exercising their duties.<sup>52</sup>

### Mandatory life sentence when the victim is a police officer

- 3.37 The murder of a police officer has its own separate provision that carries a mandatory life sentence.<sup>53</sup> However, the mandatory provision only applies in particular circumstances, as outlined in chapter 2.<sup>54</sup>
- 3.38 In cases where the mandatory provision does not apply, two other sentencing considerations may apply where the victim was a police officer and the offence arose because of their occupation. These are:
- the relevant aggravating factor for the court to take into account in deciding the appropriate sentence,<sup>55</sup> and
  - the standard non-parole period of 25 years.<sup>56</sup>
- 3.39 Even before the mandatory life imprisonment provision was enacted, courts accepted that the fact that the victim was a police officer is something that

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49. See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(a), s 21A(2)(l).

50. See, eg, *R v Ross* [2014] NSWSC 707 [53]; *R v Abrahams* [2013] NSWSC 952 [63].

51. See, eg, *R v Dennis* [2009] NSWSC 1357 [16]; *R v Cliff (No 6)* [2018] NSWSC 587 [94].

52. *Barbieri v R* [2016] NSWCCA 295 [81]–[82]. See also *R v Ross* [2014] NSWSC 707 [55]–[56].

53. *Crimes Act 1900* (NSW) s 19B.

54. [2.31]–[2.35]; *Crimes Act 1900* (NSW) s 19B; See, eg, *Barbieri v R* [2016] NSWCCA 295 [2].

55. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(a).

56. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A, table, item 1A. See *Barbieri v R* [2016] NSWCCA 295 [81]–[83].

substantially aggravates the seriousness of an offence.<sup>57</sup> This is because police, in the course of their duties, “are called upon to place themselves in danger and do so for the benefit of the community at large”.<sup>58</sup>

### The fact that a victim is a specified public official is an aggravating factor

3.40 As mentioned above, it is an aggravating factor to be taken into account in deciding the appropriate sentence when:

- the victim was an emergency services worker, correctional officer, judicial officer, council law enforcement officer, health worker, teacher, community worker, or other public official, exercising public or community functions, and
- the offence arose because of the victim’s occupation or voluntary work.<sup>59</sup>

3.41 When this circumstance of aggravation arises, a standard non-parole period of 25 years also applies.<sup>60</sup>

3.42 Even before these provisions existed, the law regarded the murder of “a public person or public official, because of that person’s occupation, as being especially serious”.<sup>61</sup>

3.43 In one recent case, the Supreme Court said that to murder a public official in the context of pending criminal proceedings makes the offence an especially serious one.<sup>62</sup> In that particular case, the offender was awaiting prosecution in the Land and Environment Court. The victim, a compliance officer with the Office of Environment and Heritage, was to give evidence in the case. The Court said:

the law must emphasise the importance of protecting public officials discharging these functions, even more so where the laws which they are required to apply are not popular in the community.<sup>63</sup>

3.44 The statutory list of public officials is not exhaustive. For example, it has been held that murder is “greatly aggravated” when it involves the killing of a member of parliament for political ends. Such an offence is considered not only an offence against the victim, but also a “direct attack on our system of democratic representative government” and a strike at “the very fabric of our public institutions”.<sup>64</sup>

In particular our system of parliamentary elections and pre-selection of parliamentary candidates operates without physical violence or intimidation, and a clear message must be sent that there is no room in this country for killings, violence or intimidation as part of the political process.<sup>65</sup>

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57. *R v Penisini* [2004] NSWCCA 339 [20]; *Barbieri v R* [2016] NSWCCA 295 [124].

58. *R v Penisini* [2004] NSWCCA 339 [20]. See also *R v Barbieri* [2014] NSWSC 1808 [144]–[145]; *Attorney General’s Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 2 of 2002* [2002] NSWCCA 515 [22], [26].

59. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(a).

60. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A, table, item 1A.

61. *R v Turnbull (No 26)* [2016] NSWSC 847 [77].

62. *R v Turnbull (No 26)* [2016] NSWSC 847 [78].

63. *R v Turnbull (No 26)* [2016] NSWSC 847 [110].

64. *R v Ngo (No 3)* [2001] NSWSC 1021 [23].

65. *R v Ngo (No 3)* [2001] NSWSC 1021 [25].

**Question 3.2: Particular categories of murder victim**

- (1) Are the existing principles and provisions that relate to sentencing for the killing of particular categories of victim appropriate? Why or why not?
- (2) If not, what should change?

**Victim impact statements**

- 3.45 A court sentencing an offender for a homicide may, where appropriate, and on application by the prosecution, take into account a statement from a family member of the victim about the harmful impact of the victim's death on family victims. This is done on the basis that the harmful impact on the victim's family is an aspect of harm done to the community.<sup>66</sup> Recognising the harm done to the community is one of the purposes of sentencing identified in the *Crimes (Sentencing Procedure) Act*.<sup>67</sup>
- 3.46 The courts have responded to this provision in a variety of ways. Some judges have emphasised that a victim impact statement supports the proposition that every unlawful taking of life harms the community in some way.<sup>68</sup> Other judges have rejected prosecution applications in particular cases on the basis that taking victim impact statements into account amounts to "double counting" of the factors going to sentence.<sup>69</sup>
- 3.47 The legislation does not provide guidance on how a court should use or apply a victim impact statement once it is received. There is also no consensus in the common law.<sup>70</sup> The Court of Criminal Appeal has observed that a victim impact statement can be "material upon which the sentencing judge can rely in determining the appropriate sentence".<sup>71</sup>
- 3.48 In our report on victims' involvement in sentencing, we recognised the importance of judicial discretion in sentencing – particularly a court's ability to take into account the individual circumstances of each case. In light of this, we preferred to allow the common law to develop guidance around how a court may use a victim impact statement, rather than constrain the court's discretion through legislation.<sup>72</sup>
- 3.49 Since we dealt with this question in the context of a more general review of victim impact statements, we now welcome submissions on the question of the role of victim impact statements in the more specific context of homicide.

66. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30E(3).

67. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(g).

68. *Sumpton v R* [2016] NSWCCA 162 [153]–[155]; *R v Qaumi* [2017] NSWSC 774 [116]; *R v Turnbull (No 26)* [2016] NSWSC 847 [159]–[161]; *R v Crickitt (No 2)* [2017] NSWSC 542 [40]; *R v Do (No 4)* [2015] NSWSC 512 [50]; *R v Pluis* [2015] NSWSC 320 [103]; *R v Halloun* [2014] NSWSC 1705 [46].

69. *R v Anderson* [2016] NSWSC 399 [105]. See also NSW Sentencing Council, *Victims' Involvement in Sentencing*, Consultation Paper (2017) [4.32]–[4.40] for a discussion of the different approaches taken in relation to this provision.

70. See *R v Tuala* [2015] NSWCCA 8 [51]. See also *R v Thomas* [2007] NSWCCA 269 [36].

71. *R v Thomas* [2007] NSWCCA 269 [36]. See also *R v Slack* [2004] NSWCCA 128 [60]–[61]; *R v MJB* [2014] NSWCCA 195 [52]–[53].

72. NSW Sentencing Council, *Victims' Involvement in Sentencing*, Report (2018) [4.19].



### Question 3.3: Victim impact statements

- (1) Do the current provisions relating to victim impact statements in sentencing for homicide appropriately recognise the harms caused by murder and manslaughter? Why or why not?
- (2) If not, what should change?

## Factors relevant to the objective seriousness of the offence

- 3.50 Assessing the objective seriousness of an offence is important to determining the non-parole period for murder, since in cases where the offence falls within the middle of the range of seriousness, a standard non-parole period of 20 years applies.
- 3.51 As discussed above, the courts must be careful to avoid double counting where factors relevant to the seriousness of the offence are also circumstances of aggravation specified in the law.<sup>73</sup>
- 3.52 One question is whether other factors, in addition to those listed below, should be introduced in NSW. For example, in Queensland, the fact that an offence took place in the context of serious organised crime is a prescribed aggravating circumstance for manslaughter.<sup>74</sup>

## Conduct surrounding the offence

- 3.53 One question that arises in sentencing for murder cases is whether the court can take into account the offender's surrounding conduct when assessing the seriousness of the offence.
- 3.54 The courts have made it clear that conduct surrounding an offence can be taken into account as going to objective seriousness, even though aspects of the conduct could have been charged as separate offences, but were not. This can be done so long as the acts could be established beyond reasonable doubt.<sup>75</sup>
- 3.55 The Court of Criminal Appeal has observed that, while surrounding conduct cannot give rise to a more serious offence, "it can demonstrate the degree of seriousness with which the charged offence should be viewed".<sup>76</sup> In one case, for example, a murder also involved the abduction and sexual assault of the victim and this was taken into account in assessing the seriousness of the offence.<sup>77</sup>

## Multiple murders

- 3.56 Where an offender is being sentenced for more than one murder, the courts have held that it may be appropriate to take into account the whole of the offender's

73. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2).

74. *Criminal Code* (Qld) s 310(2); *Penalties and Sentences Act 1992* (Qld) s 161Q.

75. *Baines v R* [2016] NSWCCA 132 [5]; *R v Garforth* (Unreported, NSWCCA, 23 May 1994) 7–9.

76. *Einfeld v R* [2010] NSWCCA 87 [146].

77. *R v Garforth* (Unreported, NSWCCA, 23 May 1994) 7–9.

conduct when deciding the offender's culpability for each offence.<sup>78</sup> This principle applies especially where the murders occur as part of one episode of criminality,<sup>79</sup> whether the killings occur in quick proximity,<sup>80</sup> or over a relatively longer period, such as 12 weeks.<sup>81</sup>

- 3.57 This principle has also been used by courts in deciding whether an offence qualifies for a life sentence.<sup>82</sup>
- 3.58 The Supreme Court has held that the fact that multiple deaths have arisen from an offender's reckless indifference, rather than an intention to kill or inflict grievous bodily harm, does not detract from this principle.<sup>83</sup>

### *Treatment of victim's body after death*

- 3.59 The treatment of the victim's body after death is one example of conduct in the context of a killing that is relevant to the seriousness of the offence.<sup>84</sup> For example, it will be relevant that the offender dismembered or mutilated the victim's body.<sup>85</sup> Other instances of mistreatment have included dumping the victim's body in bushland,<sup>86</sup> burying the body,<sup>87</sup> setting fire to the body,<sup>88</sup> and dragging the body down a hallway and leaving it to be found in the bath.<sup>89</sup>

### **Previous record of violence**

- 3.60 Prior convictions are an aggravating factor, particularly where the offender is being sentenced for a serious personal violence offence and has a record of previous convictions for serious personal violence offences.<sup>90</sup>
- 3.61 Prior convictions also disqualify an offender from the leniency they might otherwise be entitled to if they were a person of good character without prior convictions.<sup>91</sup>
- 3.62 Uncharged acts, as well as prior convictions, can be relevant to assessing the objective seriousness of an offence.<sup>92</sup> The sentencing court can consider them if they are established beyond reasonable doubt. They can enter evidence in a

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78. *R v Villa* [2005] NSWCCA 4 [93]; *R v Xie* [2017] NSWSC 63 [37].

79. *Adanguidi v R* [2006] NSWCCA 404 [32]; *R v Dean* [2013] NSWSC 1027 [108]; *R v Villa* [2005] NSWCCA 4 [93].

80. *R v Harris* [2000] NSWCCA 469, 50 NSWLR 409 [94]–[96].

81. *R v Street* (Unreported, NSWCCA 17 December 1996) 38.

82. *R v Villa* [2005] NSWCCA 4 [93]–[94]; *R v Harris* [2000] NSWCCA 469, 50 NSWLR 409 [94]; *R v Baker* (Unreported, NSWCCA, 20 September 1995) 7 (Gleeson CJ).

83. *R v Dean* [2013] NSWSC 1027 [108].

84. *R v Wilkinson (No 5)* [2009] NSWSC 432 [61].

85. *R v Yeo* [2003] NSWSC 315 [36]; *Knight v R* [2006] NSWCCA 292 [28]; *Richardson v R* [2013] NSWCCA 218 [81]–[89].

86. *R v Goundar* [2010] NSWSC 1170 [68]–[69]; *R v Stocco* [2017] NSWSC 304 [42], [86].

87. *R v Purtill* [2012] NSWSC 1475 [13], [24]–[26]; *Panetta v R* [2016] NSWCCA 85 [64].

88. *Sumpton v R* [2016] NSWCCA 162 [129], [152].

89. *R v Dong* [2010] NSWSC 1242 [46].

90. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(d).

91. *R v Siale* [2017] NSWSC 1298 [72].

92. *Lago v R* [2015] NSWCCA 296 [49]; *Einfeld v R* [2010] NSWCCA 87 [146]; *Baines v R* [2016] NSWCCA 132 [127].

number of ways, including, for example, as tendency evidence at trial, to prove a joint criminal enterprise,<sup>93</sup> or even as a plea of guilty to a statute-barred offence.<sup>94</sup>

- 3.63 Depending on the case, uncharged acts of violence that are established beyond reasonable doubt can be used to assess the seriousness of a murder where, for example, the violent acts culminate in the offence in question.<sup>95</sup> They can also be used to counteract a claim that an offence was an isolated one,<sup>96</sup> and can disentitle an offender to leniency on the grounds of good character.<sup>97</sup>
- 3.64 These patterns of behaviour often arise in the context of relationships involving domestic violence.<sup>98</sup>

### Remote location

- 3.65 The fact that the attack took place in a remote location, where police or medical assistance was not readily available, can add to the objective seriousness of a murder.<sup>99</sup>

### Motiveless crime and lack of premeditation

- 3.66 It is generally accepted that an unpremeditated murder is not as serious as one that is planned.<sup>100</sup> However, in some cases, courts have indicated that the fact an offender has no apparent motive may increase the need for community protection:

in many ways a motiveless and inexplicable murder ... is as serious as one which was pre planned and motivated, for example by revenge or greed, at least so far as it might be an indicator of future dangerousness.<sup>101</sup>

### Use of a weapon

- 3.67 The fact that an offence involved the actual or threatened use of a weapon aggravates the offence.<sup>102</sup> Particular questions arise about the operation of this aggravating factor in cases of murder.
- 3.68 The Court of Criminal Appeal has said that, while a court cannot take something into account as an aggravating factor if it is an element of the offence or an inherent characteristic of the class of offence, “use of a weapon is neither an element nor an inherent characteristic of the offence of murder”. However, as a commonly

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93. See, eg, *R v LN (No 10)* [2017] NSWSC 1387 [98]–[100]; *R v Lock* [2017] NSWSC 715 [25].

94. See, eg, *R v JCW* [2000] NSWCCA 209 [5].

95. *R v LN (No 10)* [2017] NSWSC 1387 [98]–[103].

96. *R v Lock* [2017] NSWSC 715 [25].

97. *Baines v R* [2016] NSWCCA 132 [6]; *R v Hill* [2014] NSWSC 1010 [12]; *R v Villaluna* [2017] NSWSC 1390 [67].

98. See [4.39]–[4.63].

99. *R v Turnbull (No 26)* [2016] NSWSC 847 [80].

100. *Versluys v R* [2008] NSWCCA 76 [33]–[34]; *R v Penisini* [2004] NSWCCA 339 [18]; *R v Toki* [2003] NSWCCA 125 [36]; *R v Miles* [2002] NSWCCA 276 [54].

101. *R v SLD* [2002] NSWSC 758 [17]. See also *R v Terkmani (No 2)* [2017] NSWSC 1567 [46].

102. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(c).

encountered feature in murder cases, use of a weapon will “often reduce, or perhaps even eliminate” its significance as an aggravating factor.<sup>103</sup>

- 3.69 So, while a court will generally give little or no weight to the use of a weapon in murder cases, there are circumstances where it is appropriate to have regard to the use of a weapon as an aggravating factor. For example, in one case, the weapon was “a particularly fearsome, long-handled, almost medieval-style object and would have ... heightened the terror of the deceased significantly”.<sup>104</sup> In another case, while the court was careful not to give undue weight to the use of a weapon as an aggravating factor, it noted that, in assessing the totality of criminality involved:

one of the most significant factors is the number of guns used, their ready availability and the offender’s willingness to engage others to use them to carry out crimes of extreme violence.<sup>105</sup>

### Degree of violence

- 3.70 The degree of violence (shown in measures such as time and ferocity) is relevant to the objective seriousness of an offence of murder.
- 3.71 For example, it is relevant to the objective gravity of an offence that the murder resulted from an attack that took place over an extended period of time. In one case, the court observed that repeated wounding over about 20 minutes “undoubtedly heightened” the victim’s “distress and terror which otherwise arose from the event”.<sup>106</sup>
- 3.72 The ferocity of the violence that accompanies a victim’s death can also go to the seriousness of the offence.<sup>107</sup> In one case, the excessive violence was in the form of repeated stabbing.<sup>108</sup> This is potentially so, even in cases of manslaughter on the grounds of excessive provocation.<sup>109</sup>

### Drug-induced offending

- 3.73 Under the *Crimes (Sentencing Procedure) Act*, the court may not take into account, as a mitigating factor, the self-induced intoxication of the offender at the time the offence was committed.<sup>110</sup> Self-induced intoxication can be from the influence of alcohol, drug or other substance.<sup>111</sup> This reflects the common law position that self-induced intoxication should not mitigate penalty.<sup>112</sup>

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103. *Milat v R* [2014] NSWCCA 29 [95]. See also *R v Martinez* [2017] NSWSC 1659 [24]; *R v Villaluna* [2017] NSWSC 1390 [48]; *R v Kaddour* [2017] NSWSC 586 [24]; *R v Siale* [2017] NSWSC 1298 [64].

104. *Milat v R* [2014] NSWCCA 29 [96].

105. *R v Qaumi* [2017] NSWSC 774 [121].

106. *R v Turnbull (No 26)* [2016] NSWSC 847 [79].

107. See, eg, *R v Dong* [2010] NSWSC 1242 [45].

108. *R v Bolt* [2001] NSWCCA 487 [1], [44].

109. *R v Bolt* [2001] NSWCCA 487 [35]–[36].

110. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5AA).

111. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(6); *Crimes Act 1900* (NSW) s 428A definition of “self-induced intoxication”.

112. *R v Loveridge* [2014] NSWCCA 120 [220]; *R v Fang (No 4)* [2017] NSWSC 323 [73].

- 3.74 The courts have held that it is a matter of serious aggravation if an offender realises that one of the effects of using drugs (amphetamines, for example) might be that they would act violently toward another person, and they use the drug anyway.<sup>113</sup>
- 3.75 Though drug addiction cannot be taken into account as a mitigating factor,<sup>114</sup> it may, like other aspects of a person's background, be relevant to an offender's subjective circumstances. For example, it may be relevant that the offender had commenced using prohibited drugs in circumstances of personal stress.<sup>115</sup>
- 3.76 The relevance of drug use will very much depend upon the facts of the case. In one case, a sentencing judge found that general deterrence was still a relevant factor where the offender committed an offence under the influence of drugs:

The sentence in this case should serve as a warning to the general community, if a further warning was really needed, of the disastrous consequences flowing from the use of ice and the serious acts of violence which may be undertaken by persons while under its influence including, in this case, murder.<sup>116</sup>

### Contract killing

- 3.77 A deliberate killing for money (or "contract killing") is a category of murder that, on its face, puts a murder into the worst case category and justifies a life sentence.<sup>117</sup>
- 3.78 In sentencing for a contract killing, particular weight will be given to retribution and general deterrence. In relation to retribution, Justice Hulme has observed:
- there is something entirely alien to the most basic standards of humanity when murder is premeditated and committed just for monetary reward.
- 3.79 In relation to general deterrence, he observed that, since contract killers consider rewards, risks and consequences of their actions, it is necessary for "courts to ensure that, if such a killer is caught, those consequences are very high".<sup>118</sup>
- 3.80 However, not every contract killing attracts the maximum penalty.<sup>119</sup>

### Concealing location of the body

- 3.81 Disclosing the location of the victim's body after a homicide can amount to assisting the authorities and, therefore, attract a discount at sentencing.<sup>120</sup> Considerable leniency may be available to an offender who, for example, reports a murder and their involvement in it as well as disclosing the location of the body.<sup>121</sup> This is

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113. *R v Gagalowicz* [2005] NSWCCA 452 [36]; *R v Fang (No 4)* [2017] NSWSC 323 [78].

114. *R v Henry* [1999] NSWCCA 111, 46 NSWLR 346 [171]–[208].

115. *R v Fang (No 4)* [2017] NSWSC 323 [80], [85]–[86].

116. *R v Fang (No 4)* [2017] NSWSC 323 [81].

117. *R v Koloamatangi (No 6)* [2017] NSWSC 1631 [123]; *King v R* (1998) 99 A Crim R 288, 292; *R v Brooks* [2012] NSWSC 505 [29]; *R v Crofts* (Unreported, NSWSC, 6 December 1996) 9.

118. *R v Koloamatangi* [2014] NSWSC 1725 [148]–[149]; *R v Koloamatangi (No 6)* [2017] NSWSC 1631 [133].

119. *R v Qaumi* [2017] NSWSC 774 [195]; *R v NK (No 3)* [2015] NSWSC 1257 [46]–[50]; *R v Brooks* [2012] NSWSC 505 [29].

120. *R v Purtill* [2012] NSWSC 1475 [49].

121. *R v Panetta* [2014] NSWSC 27 [80]; *Cameron v R* [2017] NSWCCA 229 [57].

consistent with the policy of the criminal law to encourage voluntary disclosure of crimes, particularly where they might otherwise not be discovered.<sup>122</sup>

- 3.82 Disclosing the location of the body is important both:
- as a matter of evidence (particularly where the likelihood of establishing guilt is otherwise low), and
  - as allowing bereaved loved ones to obtain whatever “closure” may be possible in such circumstances.<sup>123</sup>
- 3.83 While disclosing the location of the body can give rise to some leniency in sentencing, failure to disclose the location of the body, when consistent with a plea of not guilty, cannot increase a sentence.<sup>124</sup> This approach aligns with the High Court’s position that:
- a person charged with a criminal offence is entitled to plead not guilty, and defend himself or herself, without thereby attracting the risk of the imposition of a penalty more serious than would otherwise have been imposed.<sup>125</sup>
- 3.84 In one case, the Supreme Court held that the offender’s false statements about the location of the body and his failure to disclose its location could not be taken into account when assessing the objective seriousness of the murder itself.<sup>126</sup> However, the Court noted that such post-offence conduct could bear upon the offender’s lack of remorse and contrition and prospects of rehabilitation.<sup>127</sup>
- 3.85 NSW and some other jurisdictions<sup>128</sup> have chosen to deal with this issue through the parole system. In NSW, the State Parole Authority must, when considering whether it is in the interests of the safety of the community to release an offender, have regard to “whether the offender has failed to disclose the location of the remains of a victim”.<sup>129</sup> However, this provision does not prevent the release of an offender at the end of a determinate sentence.
- 3.86 Western Australia and South Australia each have provisions that aim to ensure offenders, who have been sentenced to life imprisonment, cooperate in the investigation of their offence (including disclosing the location of the body) before they can be released to parole.<sup>130</sup> This would not be an option in NSW at present, since release on parole is not possible for those serving life sentences.<sup>131</sup>

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122. *R v Ellis* (1986) 6 NSWLR 603, 604.

123. *Cameron v R* [2017] NSWCCA 229 [57].

124. *Roff v R* [2017] NSWCCA 208 [19]–[20].

125. *Siganto v R* (1998) 194 CLR 656, 663. See also *R v Thomson* [2000] NSWCCA 309, 49 NSWLR 383 [4]–[5].

126. *R v Wilkinson (No 5)* [2009] NSWSC 432 [61]–[62]. See also *R v Cavkic (No 2)* [2009] VSCA 43, 28 VR 341 [134].

127. *R v Wilkinson (No 5)* [2009] NSWSC 432 [62]. See also *Douar v R* [2005] NSWCCA 455 [131]; *R v Gavare* [2012] SASCFC 52 [111]–[114].

128. Queensland, the Northern Territory, Western Australia and South Australia.

129. *Crimes (Administration of Sentences) Act 1999* (NSW) s 135(3)(e).

130. *Correctional Services Act 1982* (SA) s 67(6); *Sentence Administration Act 2003* (WA) s 12B(2).

131. See [2.9].

### Absence of intention to kill

- 3.87 As noted, a crucial element of the offence of murder is the state of mind that the offender had when killing their victim. In order for an offence to qualify as murder rather than a lesser offence like manslaughter, the prosecution must prove that the person killed the victim:
- with intent to kill
  - with intent to inflict grievous bodily harm
  - with reckless indifference to human life, or
  - during or immediately after the person (or an accomplice with them) committed a crime punishable by imprisonment for life or for 25 years (often referred to as “constructive murder”).<sup>132</sup>
- 3.88 This has led to questions about whether the list above effectively operates as a hierarchy of “states of mind”. In other words, is an offence more serious because, for example, the offender had an intent to kill rather than simply an intent to inflict grievous bodily harm? This is particularly important because murder has a standard non-parole period that must be applied if the offence falls within the middle of the range of objective seriousness.<sup>133</sup>
- 3.89 There is some authority for treating the states of mind in descending order of seriousness – intention to kill, intention to inflict grievous bodily harm and reckless indifference.<sup>134</sup> However, while the courts look to intention to kill as important to establishing objective seriousness,<sup>135</sup> it is accepted that this is not determinative in all cases.<sup>136</sup> For example, the Court of Criminal Appeal has said:
- Although it will generally be the case that an intention to cause grievous bodily harm is less culpable to a greater or lesser degree than an intention to kill in a case of murder, that is not always so and there may be circumstances where an intention to inflict grievous bodily harm could reflect similar criminality to other cases involving an intention to kill.<sup>137</sup>
- 3.90 Courts have made similar remarks in relation to murder by reckless indifference.<sup>138</sup>
- 3.91 There will always be a range of objective seriousness within each category.<sup>139</sup> For example, in a recent murder case, the Supreme Court found that the offender had inflicted repeated and persistent physical assaults on his partner’s 12 year old daughter, but did not intend to kill her. The child’s death was the result of acute

132. *Crimes Act 1900* (NSW) s 18(1)(a).

133. *Tran v R* [2011] NSWCCA 116 [31], [39], [45].

134. *Apps v R* [2006] NSWCCA 290 [49]. See also *R v Crickitt (No 2)* [2017] NSWSC 542 [24]; *R v Biles (No 2)* [2017] NSWSC 525 [31].

135. See, eg, *R v Kaddour* [2017] NSWSC 586 [34].

136. *Tran v R* [2011] NSWCCA 116 [39]; *Perkins v R* [2018] NSWCCA 62 [64]; *Versluys v R* [2014] NSWCCA 98 [21]; *R v Holton* [2004] NSWCCA 214 [59].

137. *Tran v R* [2011] NSWCCA 116 [44]. See also *R v Latu (No 3)* [2019] NSWSC 951 [57]–[58]; *R v Nelson* (Unreported, NSWCCA, 25 June 1996) 6 (McInerney J); *R v Hearne* [2001] NSWCCA 37 [34]; *R v Hillsley* [2006] NSWCCA 312 [16].

138. *R v Ainsworth* (1994) 76 A Crim R 127, 139; *SW v R* [2013] NSWCCA 103 [110].

139. *R v Biles (No 2)* [2017] NSWSC 525 [31].

blunt force trauma. This was “a rare case where the absence of an intention to kill does little, if anything, to mitigate the objective seriousness of the offence”.<sup>140</sup>

- 3.92 Similar observations have been made about constructive murder, where the victim’s death is the result of other serious criminal activity the offender engaged in. The Court of Criminal Appeal has said:

there are degrees of seriousness of constructive murder, and the determination of the appropriate sentence for any individual offence depends upon the nature of the offender’s conduct and the part which he or she played in the events giving rise to death.<sup>141</sup>

- 3.93 There is no blanket rule precluding murders where the offender intended only to inflict grievous bodily harm from falling into the worst case category and, therefore, deserving life imprisonment.<sup>142</sup> However, there have been cases where an intention to inflict grievous bodily harm has been a circumstance justifying less than a life sentence.<sup>143</sup>

- 3.94 In one case, the Supreme Court said that even though an intention to kill is generally more serious than an intention to inflict grievous bodily harm, it does not follow that the objective seriousness of a case involving intention to inflict grievous bodily harm will fall below mid-range.<sup>144</sup>

### Question 3.4: Factors going to objective seriousness

- (1) Are the existing factors considered relevant to the objective seriousness of an offence of murder or manslaughter appropriate? Why or why not?
- (2) If not, what should change?
- (3) Should any other factors be taken into account when assessing the objective seriousness of a particular murder or manslaughter offence?

## Questions specific to manslaughter

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### A wide range of circumstances

- 3.95 It is generally accepted that the offence of manslaughter is almost unique in its variety,<sup>145</sup> incorporating a wide range of circumstances and degrees of culpability.<sup>146</sup> The objective seriousness of the offence ranges broadly, for example, “from a joke gone wrong to facts just short of murder”.<sup>147</sup>

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140. *R v JK* [2018] NSWSC 250 [20].

141. *R v Jacobs* [2004] NSWCCA 462 [332]. See also *R v Mills* (Unreported, NSWCCA, 3 April 1995) 4 (Gleeson CJ); *R v JB* [1999] NSWCCA 93 [33].

142. *Tan v R* [2010] NSWCCA 207 [55]–[63].

143. *R v Weston (No 3)* [2017] NSWSC 1385 [83].

144. *R v Ruttlely (No 7)* [2017] NSWSC 1582 [23].

145. *R v Forbes* [2005] NSWCCA 377 [133]; *Anderson v R* [2018] NSWCCA 49 [47].

146. *R v Blacklidge* (Unreported, NSWCCA, 12 December 1995) 4 (Gleeson CJ).

147. *R v Forbes* [2005] NSWCCA 377 [133].



- 3.96 The Court of Criminal Appeal has said that, while there is a hierarchy of seriousness between murder with a maximum penalty of life imprisonment, and manslaughter with a maximum penalty of 25 years' imprisonment:

the existence of such a hierarchy does not lead to the situation that, where sentences of less than twenty-five years have been imposed for murder, sentences for manslaughter must generally be imposed for a significantly lesser period.<sup>148</sup>

- 3.97 However, there are cases requiring more lenient sentences. The Court observed this in 1981, in relation to the case of a woman who shot her de facto spouse as a sudden response to his provocative and intolerable conduct over a lengthy period of time:

In a case ... where there is material justifying a degree of understanding and of sympathy towards the appellant, the task of sentencing is particularly difficult. It is necessary to evaluate the demands of the criminal justice system, the expectations of the community at large, the subjective circumstances of the person coming forward for criminal judgment and the interest of society in protecting itself and its members from criminal activity amounting, as in the present case, to the taking of a life.<sup>149</sup>

- 3.98 The wide range of circumstances means a wide range of applicable sentences.<sup>150</sup> This is so even within single categories of manslaughter,<sup>151</sup> such as those involving diminished responsibility<sup>152</sup> or excessive self defence.<sup>153</sup>

- 3.99 Therefore, sentences imposed in other cases are of limited assistance.<sup>154</sup> Even when it is possible to identify, for example, a number of cases where a parent or carer kills a child, it may not be possible to establish a sentencing pattern. This is because the number of cases may be too few to establish a pattern, and the relevant circumstances may vary too greatly.<sup>155</sup>

- 3.100 It is also not possible to establish a hierarchy of seriousness between voluntary and involuntary manslaughter.<sup>156</sup> As one Supreme Court judge noted:

An attempt to graduate the very many categories of conduct that can constitute manslaughter into descending orders of objective severity, and then to attempt to place a specific offence at any particular point either in the range for the relevant category or overall, would in my view be a fruitless exercise, by reason of the wide range of circumstances, objective and subjective, which this offence encompasses.<sup>157</sup>

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148. *R v Hoerler* [2004] NSWCCA 184 [28].

149. *R v Hill* (1981) 3 A Crim R 397, 402 (Street CJ, Nagle CJ at CL and Lee J agreeing).

150. *Pitt v R* [2014] NSWCCA 70 [52]; *Hamzy v R* [2018] NSWCCA 53 [175]; *R v BW (No 3)* [2009] NSWSC 1043 [177].

151. *R v Forbes* [2005] NSWCCA 377 [134]; *Stephens v R* [2009] NSWCCA 240 [28].

152. *R v Forbes* [2005] NSWCCA 377 [135].

153. *Vuni v R* [2006] NSWCCA 171 [29]–[31].

154. *Hamzy v R* [2018] NSWCCA 53 [175]; *Goundar v R* [2012] NSWCCA 87 [44]–[45]; *Misepo v R* [2017] NSWCCA 210 [58]; *Anderson v R* [2018] NSWCCA 49 [47]; *R v Guider* [2002] NSWSC 756 [44]–[45]; *R v Blacklidge* (Unreported, NSWCCA, 12 December 1995) 4–5 (Gleeson CJ).

155. *R v Forbes* [2005] NSWCCA 377 [135].

156. *Anderson v R* [2018] NSWCCA 49 [47].

157. *R v Guider* [2002] NSWSC 756 [43].

- 3.101 These observations raise the question of whether, for example, a standard non-parole period would ever be appropriate for particular categories of manslaughter, let alone manslaughter generally. The statistics in Chapter 2<sup>158</sup> and Appendix C show that sentences for manslaughter in NSW are broadly consistent with sentences in other Australian jurisdictions.
- 3.102 Despite the wide range of sentences, the statistics suggest that, in the period from January 2008 to 23 September 2018, no head sentence was imposed in the range of 20–25 years' imprisonment.<sup>159</sup> The longest head sentence imposed was 19 years' imprisonment, with a non-parole period of 13 years. This was a case that involved a guilty plea to manslaughter by unlawful and dangerous act where the offender's vehicle, while evading police, struck and killed an 18 month old child in a backyard.<sup>160</sup> The next longest sentence was a sentence of 18 years' imprisonment for manslaughter by unlawful and dangerous act, involving the aggravated sexual assault of the victim.<sup>161</sup>

### Question 3.5: Manslaughter

- (1) Are existing laws and principles that apply to sentencing for manslaughter appropriate for dealing with the range of circumstances that can give rise to a conviction for manslaughter? Why or why not?
- (2) If not, what should change?

## Industrial manslaughter

- 3.103 Cases where death occurs in a work context, as the result of a failure by the business or enterprise (often referred to as “industrial manslaughter”), are uncommon in NSW.<sup>162</sup> In a rare case in the NSW District Court, the judge, while noting the difficulty of taking the purpose of general deterrence into account in a crime of “omission”, observed:
- there will be classes of “industrial manslaughter”, or the killing of consumers by industrial processes, where general deterrence may loom very large indeed.<sup>163</sup>
- 3.104 Some jurisdictions now have a separate industrial manslaughter offence. For example, in the Australian Capital Territory, the *Crimes Act 1900* (ACT) establishes offences by an employer or senior officer where:
- a worker dies, and
  - an employer or senior officer is reckless about causing a worker serious harm, or is negligent about causing a worker's death.
- 3.105 The maximum penalty in each case is \$320,00 (2000 penalty units) and/or 20 years' imprisonment.<sup>164</sup> These offences are in addition to the general offence of manslaughter.

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158. Table 2.3.

159. Judicial Commission of NSW, *Sentencing Statistics* (Judicial Information Research System).

160. *R v Chandler (No 2)* [2017] NSWSC 1758.

161. *R v Attwater* [2017] NSWSC 1710.

162. *R v Cittadini* [2009] NSWDC 179 [25].

163. *R v Cittadini* [2009] NSWDC 179 [49].

- 3.106 A recent national review of work health and safety laws has recommended a separate industrial manslaughter offence where a business engages in gross negligence that leads to a workplace death.<sup>165</sup>
- 3.107 These provisions and proposals raise questions of establishing liability for corporations and officers when workplace deaths occur and the penalties that may be imposed on corporations in such cases. These questions, so far as they relate to liability alone, are outside the scope of this review. However, the question of what principles should apply when sentencing for a workplace death that amounts to manslaughter under the current law is relevant to this review.
- 3.108 In NSW, if a corporation's liability for manslaughter is established, the *Crimes (Sentencing Procedure) Act* allows for a maximum fine of \$220,000 (2000 penalty units), which would apply to corporations that cannot be sentenced to imprisonment.<sup>166</sup>

### Question 3.6: Industrial manslaughter

What principles should apply when sentencing for a workplace death that amounts to manslaughter under the current law?

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164. *Crimes Act 1900* (ACT) s 49C, s 49D.

165. M Boland, *Review of the Model Work Health and Safety Laws*, Final Report (2018) rec 23b.

166. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 16.



## 4. Sentencing for domestic violence related homicide

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### In brief

A significant number of homicides in NSW involve domestic violence. Such offences appear to attract a slightly lower average sentence than other homicides. There are a number of principles that the courts apply when sentencing for domestic violence related homicides. Issues they may need to address include taking into account past incidents of domestic violence, and adequately dealing with situations where the offender was the primary victim of domestic violence. Examples of other approaches to sentencing for domestic violence homicide include introducing specific aggravating factors, and developing specific sentencing guidelines.

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- 4.1 This chapter deals with domestic violence related homicide generally and the killing of intimate partners in particular. Chapter 5 deals with specific issues relating to the killing of children.
- 4.2 One of the concerns of this chapter is to investigate how the sentencing patterns for domestic and family violence related homicide compare to those for homicides that do not have a domestic or family violence element. We do this to test the theory that courts treat homicides occurring in domestic violence related contexts less seriously.

## Terminology

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### Domestic violence

- 4.3 In this Consultation Paper, we have adopted the expression “domestic violence” to refer to what the terms of reference call “domestic and family violence”. Such terms have different legal meanings in different states and territories and also depend on context.
- 4.4 In NSW, the principal statutory definitions relating to domestic violence are contained in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (“*Crimes (Domestic and Personal Violence) Act*”). This identifies domestic violence (in relation to a relevant personal violence offence) by reference to the “domestic relationship” between the perpetrator and victim:

a person has a *domestic relationship* with another person if the person:

- (a) is or has been married to the other person, or
- (b) is or has been a de facto partner of that other person, or
- (c) has or has had an intimate personal relationship with the other person, whether or not the intimate relationship involves or has involved a relationship of a sexual nature, or
- (d) is living or has lived in the same household as the other person, or
- (e) is living or has lived as a long-term resident in the same residential facility as the other person and at the same time as the other person (not being a facility that is a correctional centre within the meaning of the *Crimes (Administration of Sentences) Act 1999* or a detention centre within the meaning of the *Children (Detention Centres) Act 1987*), or
- (f) has or has had a relationship involving his or her dependence on the ongoing paid or unpaid care of the other person (subject to section 5A), or
- (g) is or has been a relative of the other person, or
- (h) in the case of an Aboriginal person or a Torres Strait Islander, is or has been part of the extended family or kin of the other person according to the Indigenous kinship system of the person’s culture.

...

- (2) Two persons also have a *domestic relationship* with each other for the purposes of this Act if they have both had a domestic relationship of a kind set out in subsection (1) (a), (b) or (c) with the same person.

**Note.** A woman's ex-partner and current partner would therefore have a domestic relationship<sup>1</sup> with each other for the purposes of this Act even if they had never met.

- 4.5 While this definition largely identifies people who are or have been part of a household or other communal living arrangement, it also identifies a very broad range of relationships by kinship, marriage and de facto relationship.<sup>2</sup> This establishes a very broad category – beyond the offender's intimate partner or dependent children.
- 4.6 The focus on the relationship, rather than the nature of the violence, can create definitional problems in particular contexts, especially where an offence results in death but there are no incidents of domestic violence in a relationship. An example of such a situation is where the victim is related to the offender and is killed as a passenger in a car crash resulting from the offender's dangerous driving, which was not part of any domestic violence context. In this type of situation, the domestic relationship between the victim and offender should not be a relevant factor.
- 4.7 For this reason, when examining "domestic violence deaths", the NSW Domestic Violence Death Review Team focuses on the domestic violence context rather than the presence of violence and also the presence of a domestic relationship. The Death Review Team has identified three categories of homicide that occur within a domestic violence context:
- **intimate partner homicide:** where a person is killed by a current or former intimate partner
  - **relative/kin homicide:** where a person is killed by a non-intimate family member, and
  - **"other" domestic violence homicide:** where the person killed does not have an intimate or familial relationship with the offender (for example, where a bystander is killed intervening in domestic violence, or where a new intimate partner is killed by a domestic violence victim's former partner).<sup>3</sup>
- 4.8 Despite some of the difficulties outlined above, we will use the definition of "domestic relationship" in the *Crimes (Domestic and Personal Violence) Act*, when referring to domestic violence related homicides. This is largely because the criminal justice system statistics in NSW rely on this definition, and we may not have sufficient information in some cases to identify "domestic violence deaths" according to the context approach of the Domestic Violence Death Review Team.
- 4.9 For the sake of comparing NSW homicide data with that of other states and territories, we have applied the *Crimes (Domestic and Personal Violence) Act* definition of domestic relationship where possible.

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1. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 5.

2. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 6.

3. NSW Domestic Violence Death Review Team, *Report 2015–2017* (2017) 5.

### Intimate partners

- 4.10 The term “intimate partner” is not defined in NSW legislation. In using this term, we have taken the approach of the Domestic Violence Death Review Team and limited the definition of “intimate partners” to current and former intimate partners. This does not include current partners of former partners, or former partners of current partners.
- 4.11 For the purposes of presenting data in this Consultation Paper, current partners of former partners, and former partners of current partners, are included in the broader category of victims of domestic violence related homicide.

### NSW data on domestic violence related homicide

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- 4.12 Not all unlawful killings in a domestic violence context result in conviction and sentencing. Apart from matters where the prosecution does not make it to trial or where the alleged offender is acquitted, another significant cause is that some people kill themselves after killing their intimate partner. Data compiled by the NSW Domestic Violence Death Review Team shows that, in the period from July 2000 to June 2014, 41 (24%) of the 168 men who killed their current or former intimate partner, also killed themselves. One of the 35 women who killed their intimate partners suicided after the killing.<sup>4</sup> For these reasons (among others), the court data does not incorporate all instances of domestic violence related homicide that occur in NSW.

### Murder

- 4.13 As noted in chapter 2, we reviewed all murder offences for which a sentence was handed down in NSW in the three-year period from April 2015 to March 2018.<sup>5</sup> There are 100 cases in total, and 96 were committed by an adult offender. Of these 96 offences, 85 involved victims who are not in a special standard non-parole period category (that is, victims who are not children under the age of 18 years or in a specified category of public official).<sup>6</sup> The statistics relating to cases where the victim was under 18 years of age are set out in chapter 5.<sup>7</sup>

### Number and gender of offenders and victims

- 4.14 Of the 85 sentenced offences committed by adult offenders involving victims who are not in a special standard non-parole period category, 17 (20%) involved intimate partner violence and a further 10 involved other forms of domestic violence. This makes a total of 27 (31.8%) that involved some form of domestic violence.
- 4.15 Table 4.1 shows the gender distribution of offenders and victims<sup>8</sup> for offences involving domestic violence and offences involving intimate partner violence. For comparison, we have also provided the figures for cases that do not involve domestic violence.

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4. NSW Domestic Violence Death Review Team, *Report 2015–2017* (2017) 9–10.

5. Note this period is wholly after the decision in *Muldrock v R* [2011] HCA 39, 244 CLR 120.

6. Contained in *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4, div 1A.

7. [5.26]–[5.35].

8. Note the total number of victims exceeds the total number of offenders as some offences involve multiple victims.



**Table 4.1: Number and gender of offenders and victims in relation to murder (victims not in a special category) in NSW, April 2015 – March 2018**

	Offender		Victim	
	Male	Female	Male	Female
Offences involving domestic violence	26 (96.3%)	1 (3.7%)	7 (24.1%)	22 (75.9%)
Offences involving intimate partner violence	17 (100%)	0 (0%)	0 (0%)	17 (100%)
Offences not involving domestic violence	54 (93.1%)	4 (6.9%)	51 (86.4%)	8 (13.6%)

*Note: Where there were multiple victims of both genders, each gender was counted once.*

- 4.16 Of the 7 male victims whose murder involved domestic violence, 4 of them were the current or former partner of the offender's current or former partner. The Domestic Violence Death Review Team report identified 32 homicide victims in this category between 1 July 2000 and 30 June 2014. The majority of victims in this category (20, 63%) were killed by their partner's former abusive male partner. The report observed:

In a high proportion of these cases, the male homicide perpetrator's coercive and controlling behaviours against his former female partner continued after the dissolution of the relationship and the abuser's behaviour intensified after his former partner started a new relationship.<sup>9</sup>

- 4.17 Of the 33 perpetrators in the relevant period, 31 were dealt with in criminal proceedings, resulting in convictions for murder in 15 cases (48%) and convictions for manslaughter in 13 cases (42%).<sup>10</sup>

### ***Comparing sentences for domestic violence related murder and other types of murder***

- 4.18 The following table compares sentencing data for offences based on the presence of domestic violence and/or intimate partner violence. As above, this table includes only the 85 offences committed by adult offenders involving victims who are not in a special standard non-parole period category, where the offender was sentenced to a determinate term of imprisonment. Of the 27 cases involving domestic violence, one offender was sentenced to life imprisonment.<sup>11</sup> No offender was sentenced to life imprisonment in any of the 17 cases involving intimate partner violence.
- 4.19 Table 4.2 shows little or no difference between the average head sentences for domestic violence and non-domestic violence murders and the average non-parole

9. NSW Domestic Violence Death Review Team, *Report 2015–2017* (2017) 17.

10. NSW Domestic Violence Death Review Team, *Report 2015–2017* (2017) 17.

11. *R v Xie* [2017] NSWSC 63.

periods for the two categories. However, while the median head sentence and median non-parole period for the murder of a current or former intimate partner align with both sets of figures, the mean head sentence and mean non-parole period are around 2 years shorter. We also note that the inter-quartile range for murder of an intimate partner is tighter than that for the more general categories of domestic violence and non-domestic violence murder.

**Table 4.2: Sentences for murder by domestic violence category, Supreme Court of NSW, April 2015 – March 2018**

	Head sentence			Non-parole period		
	Non-DV	Domestic violence	Intimate partner violence	Non-DV	Domestic violence	Intimate partner violence
Number	54	26	17	54	26	17
Distribution	13 yrs – 45 yrs	18 – 44 yrs	18 – 30 yrs	8.5 yrs – 33.7 yrs	13 yrs – 33 yrs	13 – 22.5 yrs
Middle 50% range	21 – 30 yrs	21 - 30 yrs	20.5 – 25.2 yrs	15 – 22.5 yrs	15.75 – 22.5 yrs	15.4 - 19 yrs
Inter-quartile range	9 yrs	9 yrs	4.7 yrs	7.5 yrs	6.75 yrs	3.6 yrs
Mean	25.6 yrs	25.5 yrs	23.4 yrs	18.9 yrs	19.85 yrs	17.4 yrs
Median	24 yrs	24 yrs	24 yrs	18 yrs	18.35 yrs	18 yrs
Mode	24 yrs	24 yrs	24 yrs	15 yrs	18 yrs	18 yrs

4.20 Appendix B sets out the data for murders in other Australian jurisdictions. When compared with non-domestic violence murders:

- in the Australian Capital Territory, domestic violence murders received significantly higher average sentences overall (the average sentences for domestic violence murder in the ACT were also substantially higher than the average sentences for domestic violence murder in NSW)<sup>12</sup>
- in Tasmania, domestic violence murders received slightly higher average sentences overall, (the average non-parole period for domestic violence murder in Tasmania is, however, significantly less than the average non-parole period for domestic violence murder in NSW)<sup>13</sup>
- in Victoria, domestic violence murders received slightly higher sentences overall (however, the average sentences for domestic violence murder in Victoria were

12. Table B.1.

13. Table B.3.

slightly lower than the average sentences for domestic violence murder in NSW),<sup>14</sup> and

- in the Northern Territory, domestic violence murders received a slightly lower average non-parole period.<sup>15</sup>

## Manslaughter

### *Number and gender of victims and offenders*

- 4.21 Of the 83 offences committed by an adult offender for which we have case information, 27 (32.5%) involved domestic violence and, of those, 8 (9.6%) involved intimate partner violence. The proportion of offences involving domestic violence is comparable to murder (31.8%), but the proportion of offences involving intimate partner violence is notably lower than that for murder (20%).
- 4.22 Table 4.3 shows the gender distribution of offenders and victims for all offences for which we have case information, for offences involving domestic violence generally, and for offences involving intimate partner violence more specifically.

**Table 4.3: Number and gender of offenders and victims in relation to manslaughter in NSW, April 2013 – March 2018**

	Offender		Victim	
	Male	Female	Male	Female
All	70 (84%)	13 (16%)	68 (82%)	15 (18%)
Offences involving domestic violence	16 (59%)	11 (41%)	14 (52%)	13 (48%)
Offences involving intimate partner violence	5 (62%)	3 (38%)	3 (37%)	5 (63%)
Offences not involving domestic violence	54 (96%)	2 (4%)	54 (96%)	2 (4%)

- 4.23 We note there were three cases where a female offender killed her male intimate partner. We discuss some of the issues relating to intimate partner homicides below.<sup>16</sup>

### *Comparing sentences for domestic violence related manslaughter and other types of manslaughter*

- 4.24 Table 4.4 compares sentencing data for offences on the basis of the presence of domestic violence and/or intimate partner violence. This table only includes the

14. Table B.4.

15. Table B.2.

16. [4.55]–[4.63].

71 offences committed by adult offenders (for which we have case information) where a term of imprisonment was imposed, and a total or indicative sentence for the manslaughter offence was given. Any differences between the various categories are attributable to the individual circumstances of each case. This is particularly noticeable in the wider sentence range that applies to cases involving intimate partner manslaughter.

**Table 4.4: Sentences for manslaughter by domestic violence category, Supreme Court of NSW, April 2013 – March 2018**

	Head sentence			Non-parole period		
	Non-DV	Domestic violence	Intimate partner violence	Non-DV	Domestic violence	Intimate partner violence
Number	52	23	7	52	23	7
Distribution	3.5 – 14 yrs	3 – 12 yrs	4 – 12 yrs	2 – 10 yrs	1.5 – 9 yrs	2 – 9 yrs
Middle 50% range	6.8 – 10 yrs	5.25 – 9 yrs	4.5 – 11 yrs	3.9 – 6.9 yrs	3 – 6.3 yrs	2 – 8.25 yrs
Inter-quartile range	3.2 yrs	3.75 yrs	6.5 yrs	3 yrs	3.3 yrs	6.25 yrs
Mean	8.2 yrs	7.4 yrs	8 yrs	5.5 yrs	4.8 yrs	5.2 yrs
Median	8 yrs	7.5 yrs	8 yrs	5.4 yrs	4.5 yrs	5 yrs
Mode	8 yrs	8 yrs	None	6 yrs	4 yrs	2 yrs

### Intimate partner homicide – further analysis

4.25 The Domestic Violence Death Review Team has provided in-depth reviews of the 78 intimate partner homicides in NSW that occurred between 10 March 2008 and 30 June 2014 and were classified as having occurred in a domestic violence context. The Team framed the data primarily in terms of the abuser/victim relationship rather than in terms of the homicide perpetrator/victim relationship to allow:

a more accurate framing of the gendered patterns of these behaviours: highlighting that most men who killed an intimate partner, and most men who were killed by an intimate partner, were the primary domestic violence abuser within the relationship.<sup>17</sup>

17. NSW Domestic Violence Death Review Team, *Report 2015–2017* (2017) 131.

- 4.27 Of the 78 homicides:
- 68 men killed 66 female and 2 male current or former intimate partners, and
  - 10 women killed 10 male current intimate partners.<sup>18</sup>
- 4.28 The Death Review Team found that for 77 of the 78 intimate partner homicides, there was a clear primary domestic violence victim and a primary domestic violence abuser (based on an assessment of the offence and prior episodes). Of the 78 cases:
- 67 (86%) involved homicides where male and female primary domestic violence victims were killed by their male intimate partner, the primary domestic violence abuser;
  - 10 (13%) involved homicides where a male primary domestic violence abuser was killed by a female primary domestic violence victim; and
  - 1 (1%) involved a homicide perpetrated by a female who was both a domestic violence victim and abuser, against her male intimate partner, who was also a domestic violence victim and abuser, ie the violence went both ways.<sup>19</sup>
- 4.29 The Death Review Team's report further notes that of the 35 men killed by their female intimate partner in the period from 1 July 2000 to 30 June 2014, 31 (89%) had been the primary domestic violence aggressor in the relationship. There were no cases where a woman was a primary domestic violence aggressor and killed a male primary violence victim.<sup>20</sup>

## Sentencing principles

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- 4.30 Apart from the general sentencing principles and practices that apply in cases of homicide, the courts have identified, and are developing, some special considerations that apply in a domestic violence context. In 2016, the High Court suggested that current sentencing practices do not need to be constrained by past societal attitudes to domestic relations.<sup>21</sup>

## General approach to sentencing for domestic violence related homicide

### *Purposes of sentencing*

- 4.31 The courts have emphasised denunciation, retribution, general deterrence, and community protection as being particularly important considerations in sentencing for murder where domestic or family violence is an element.<sup>22</sup> Such considerations also apply more generally to other domestic violence related offences.<sup>23</sup>

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18. NSW Domestic Violence Death Review Team, *Report 2015–2017* (2017) 131.

19. NSW Domestic Violence Death Review Team, *Report 2015–2017* (2017) 132.

20. NSW Domestic Violence Death Review Team, *Report 2015–2017* (2017) 9.

21. *R v Kilic* [2016] HCA 48, 259 CLR 256 [21]. See also *Quinn v R* [2018] NSWCCA 297 [245]. See also The Public Defenders, *Preliminary Submission PMU13*, 9.

22. *Biddle v R* [2017] NSWCCA 128 [105]; *R v Hamid* [2006] NSWCCA 302, 164 A Crim R 179 [86]; *R v Johnson* [2015] NSWSC 31 [61]–[62]; *R v Biles (No 2)* [2017] NSWSC 525 [60]; *R v Villaluna*

4.32 In one case where the offender killed his de facto spouse, the High Court said:

A just sentence must accord due recognition to the human dignity of the victim of domestic violence and the legitimate interest of the general community in the denunciation and punishment of a brutal, alcohol-fuelled destruction of a woman by her partner. A failure on the part of the state to mete out a just punishment of violent offending may be seen as a failure by the state to vindicate the human dignity of the victim; and to impose a lesser punishment by reason of the identity of the victim is to create a group of second-class citizens, a state of affairs entirely at odds with the fundamental idea of equality before the law.<sup>24</sup>

4.33 Courts have identified a heightened need for deterrence where the murder (either of an ex-partner or a new partner of an ex-partner) takes place in the context of a relationship breakdown.<sup>25</sup> This is consistent with the general approach to domestic violence related offences where courts have emphasised that domestic violence cannot be “accepted as a more or less natural incident” to a relationship breakdown.<sup>26</sup> The Court of Criminal Appeal has said:

domestic violence offences not infrequently conform to the following pattern ... a male attacks (or kills) a woman with whom he is, or has been, in an intimate relationship when she expresses a wish to leave that relationship. Typically, the male is physically stronger than the female. The male is thus generally in a position to inflict considerable harm to the female and there is no real prospect of spontaneous physical retaliation because of the disparity between their respective strengths.<sup>27</sup>

4.34 A recent Supreme Court case also emphasised the need for deterrence:

Like too many women before her, [the victim] died because the man with whom she had been involved could not accept her right to autonomy. The offender acted from a profound sense of entitlement, clearly believing that [she] had to conform to his wishes rather than pursue her own...

Whilst there are men in the community, and it is mostly men, who view women as second class citizens who must bend to their will, when that attitude results in the commission of crime, and particularly violent crime, the courts will impose heavy punishment. Such conduct is never acceptable and it will be strongly repudiated by the courts.<sup>28</sup>

4.35 The Supreme Court has also highlighted the importance of retribution:

There is an uncontroversial and recognized need to emphasise clearly that violent and controlling men who commit such crimes against women will be punished severely.<sup>29</sup>

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[2017] NSWSC 1390 [85]; *R v Mahon* [2015] NSWSC 25 [101]–[103]; *R v Archer* [2015] NSWSC 1487 [174]–[175].

23. See, eg, *DPP (NSW) v Darcy-Shillingsworth* [2017] NSWCCA 224 [82]–[85], [106]; *Cherry v R* [2017] NSWCCA 150 [78]; *R v Dunn* [2004] NSWCCA 41 [47].

24. *Munda v Western Australia* [2013] HCA 38, 249 CLR 600 [55].

25. *R v Thompson* [2017] NSWSC 628 [56]–[57]. See also *Quinn v R* [2018] NSWCCA 297 [246]; and *Kaderavek v R* [2018] NSWCCA 92 [12].

26. *Walker v R* [2006] NSWCCA 347 [7].

27. *Patsan v R* [2018] NSWCCA 129 [39].

28. *R v Seo* [2019] NSWSC 639 [79], [82].

29. *R v Cullen* [2015] NSWSC 768 [32].

**Mitigation on the basis of domestic setting is generally not available**

4.36 The courts have also rejected the idea that murder in cases of domestic or family violence should be sentenced more leniently as a distinct category of offence.<sup>30</sup>

4.37 In one case, the Court of Criminal Appeal stated:

That a violent and pre-planned attack occurred in what might be classified as a domestic setting is not a matter of mitigation. This Court has repeatedly stressed that it is a circumstance of significant seriousness.<sup>31</sup>

**Presumption of full time detention or supervision**

4.38 A provision, added to the *Crimes (Sentencing Procedure) Act 1999* (NSW) (“*Crimes (Sentencing Procedure) Act*”) in 2017, requires a court sentencing a person found guilty of a domestic violence related offence to impose either:

- a sentence of full-time detention, or
- an intensive correction order, community correction order or conditional release order that is subject to a supervision condition.<sup>32</sup>

4.39 A court may only impose a different type of sentence if satisfied that it is more appropriate, and the court must give reasons for reaching that view.<sup>33</sup> This “presumption” in favour of imprisonment or a supervised order was introduced to reflect and support “the Premier’s priority to tackle domestic violence reoffending”.<sup>34</sup>

**Where there are past incidents of domestic violence**

4.40 Where past incidents of domestic violence by the offender are a part of the context for the killing of a family member, it is unclear whether a court can take this into account. The issue is complicated when the offender’s past conduct is unproved or uncharged.

4.41 The past conduct can involve a variety of acts, some that amount to criminal offences and others that do not. Prosecutors may sometimes charge only the most serious or most recent conduct. The NSW Law Reform Commission and the Australian Law Reform Commission family violence review, completed in 2010 (“the 2010 family violence review”), observed:

Where a course of violent behaviour is reduced to a small number of charges, it is said that the criminal law fails to punish adequately the harm done to the victim, and does not publicly recognise and condemn the seriousness of family violence.<sup>35</sup>

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30. *Gonzales v R* [2007] NSWCCA 321 [175]; *R v Whitmore* [1999] NSWCCA 75 [16].  
 31. *Raczkowski v R* [2008] NSWCCA 152 [46]. See also *R v Edigarov* [2001] NSWCCA 436 [41]; *R v Burton* [2008] NSWCCA 128 [96], [107], [119].  
 32. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 4A(1), s 4A(3).  
 33. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 4A(2).  
 34. NSW, *Parliamentary Debates*, Legislative Assembly, 11 October 2017, 2.  
 35. NSW Law Reform Commission, *Family Violence – A National Legal Response*, Report 128 (2010) [13.8] referring to V Tadros, “The Distinctiveness of Domestic Abuse: A Freedom Based Account” (2005) 65 *Louisiana Law Review* 989, 995–996.

- 4.42 At other times, however, the conduct involves behaviour that does not amount to an offence, as the Court of Criminal Appeal has observed:

An adequate account of domestic violence should recognise that it typically involves the exercise of power and control over the victim, is commonly recurrent, may escalate over time, may affect a number of people beyond the primary target (including children, other family members and supporters of the victim) and that it contributes to the subordination of women; domestic violence typically involves the violation of trust by someone with whom the victim shares, or has shared, an intimate relationship; the offender may no longer need to resort to violence in order to instil fear and control.<sup>36</sup>

- 4.43 One submission to our review observes that, while a history of convictions is a relevant consideration and provides some scope for courts to acknowledge the context of an offence:

this evaluation does not adequately reflect that the history of domestic or family violence is a defining feature of the homicide. This is a tension that is likely to endure without thoughtful consideration of how to better balance conflicting imperatives of fairness to the offender and reflecting community understandings of the nature and seriousness of homicides committed in the context of domestic and family violence.<sup>37</sup>

- 4.44 A context of domestic violence, where known, can strongly support a finding that the offence is a serious one. For example, in one Supreme Court case, the judge observed:

there is no escaping the fact that the deceased was murdered in an atmosphere of serious domestic violence. It follows that the gravity of the offending must be assessed in the context of the relationship which existed between the offender and the deceased.<sup>38</sup>

- 4.45 Different questions arise where the offender was the *victim* of past domestic violence, and this has had an impact on their offending. In such cases, the past history of domestic violence may mitigate the offender's culpability.

### **Past convictions**

- 4.46 A record of previous convictions is an aggravating factor at sentencing, "particularly if the offender is being sentenced for a serious personal violence offence and has a record of previous convictions for serious personal violence offences".<sup>39</sup>

- 4.47 The *Crimes (Domestic and Personal Violence) Act* allows the prosecution to apply to have further offences recorded as domestic violence offences.<sup>40</sup> Parliament's intention was to ensure that having a conviction for domestic violence "would leave a permanent stain on a person's record and would be readily identifiable by a sentencing court".<sup>41</sup>

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36. *R v Hamid* [2006] NSWCCA 302 [77] quoting J Stubbs, *Restorative Justice, Domestic Violence and Family Violence*, Issues Paper 9 (Australian Domestic and Family Violence Clearinghouse, 2004) 6–7.

37. L Findlay, J Stubbs, A Steel, L McNamara, *Preliminary Submission PMU09*, 7.

38. *R v Wood* [2018] NSWSC 1855 [89].

39. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(d).

40. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 12(3).

41. NSW, *Parliamentary Debates*, Legislative Assembly, 16 November 2007, 4328.



- 4.48 While an offender cannot be punished again for past violence, past violence and prior convictions can demonstrate that an offender is “not entitled to lenience on the basis of past conduct”.<sup>42</sup> An offender’s history of domestic violence can also justify giving significant weight to the principle of personal or specific deterrence.<sup>43</sup>

### *Past uncharged conduct*

- 4.49 As we have already noted, not all past offending is subject to a previous conviction (or even a concurrent charge). Sometimes, the past or concurrent offences that have not been charged can be very serious offences, such as sexual assault.
- 4.50 Whether past uncharged conduct is taken into account depends on the nature and quality of the evidence. In one recent case, the Supreme Court found that, although there was no evidence that the offender had been previously convicted, and he had a good work record and contributed to the community, his admitted acts of domestic violence and abuse towards the victim over a sustained period meant that he could not be sentenced on the basis that he was a person of prior good character.<sup>44</sup>
- 4.51 There are a number of potential sources of evidence about past domestic violence that could be introduced at a sentencing hearing. This evidence either supplements evidence received at trial, or supplements an agreed statement of facts in cases where the offender pleads guilty. Such sources include family court papers, counsellor’s notes and Family and Community Services files.
- 4.52 Recent amendments to surveillance legislation allow the use of footage from police body-worn video in court.<sup>45</sup> This may prove useful where footage has been obtained during call-outs to domestic violence incidents where charges do not proceed. At present, under Police Standard Operating Procedures, footage that is not tagged as having “evidentiary value” will be automatically deleted after six months.<sup>46</sup>
- 4.53 The Secretariat for the Domestic Violence Death Review Team has noted cases where past instances of domestic violence did not meet the threshold to be brought into evidence at trial. These cases result in the homicide being viewed as something anomalous or unexpected, rather than occurring against a pattern of behaviour.<sup>47</sup> For example, in one case involving “decades of possessiveness, control and abuse”,<sup>48</sup> there was no such evidence before the court. This meant the sentencing remarks gave the impression that:

the final fatal attack was an isolated event attributable to some kind of abnormality in the perpetrator’s state of mind, albeit one that resisted definitive

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42. *R v Biles (No 2)* [2017] NSWSC 525 [59].

43. *R v Johnson* [2015] NSWSC 31 [62].

44. *R v Villaluna* [2017] NSWSC 1390 [67].

45. *Surveillance Devices Act 2007* (NSW) s 50A, s 40(4A) and *Surveillance Devices Regulation 2014* (NSW) cl 4.

46. NSW Police Force, Education and Training Command, *Body-Worn Video Camera Standard Operating Procedure*, Version 2.2 (2018) [2.7].

47. E Buxton-Namisnyk and A Butler, “Judicial Discourse Versus Domestic Violence Death Review: An Australian Case Study” in A Howe and D Alaattinoglu (ed) *Contesting Femicide: Feminism and the Power of Law Revisited* (Taylor and Francis, 2018) 95, 97.

48. E Buxton-Namisnyk and A Butler, “Judicial Discourse Versus Domestic Violence Death Review: An Australian Case Study” in A Howe and D Alaattinoglu (ed) *Contesting Femicide: Feminism and the Power of Law Revisited* (Taylor and Francis, 2018) 95, 97.

diagnosis. The judge commented that a “disturbing feature of this case is the absence of any explanation for the offences”.<sup>49</sup>

- 4.54 Similar issues have been identified in a study conducted by the Domestic Violence Resource Centre Victoria. Of the 27 cases they identified between 23 November 2005 and 31 December 2014, where the offender had a history of committing family violence, most had never been charged or subjected to an intervention order.<sup>50</sup> The Resource Centre also found that the ways in which the legal professionals involved understood family violence played an important role in whether it was considered relevant to sentencing:

If the offender had no prior convictions for family violence, the defence frequently submitted that the offence was “out of character”. This was supported by character evidence provided by the offender’s work colleagues, friends, family, or other associates. Additionally, in these cases, the offender’s prior family violence was often seen to be caused by his drug or alcohol problems or a mental illness, and therefore was not perceived to reflect his character overall. In 10 cases in our study in which there was evidence that the offender had previously been abusive or violent towards the deceased, the judge accepted the argument that the offender was “otherwise of good character”.<sup>51</sup>

- 4.55 The NSW Domestic Violence Death Review Team has said that remarks on sentence should “accurately reflect the dynamics of domestic violence” where relevant.<sup>52</sup> While some remarks on sentencing demonstrate “a sophisticated understanding of the dynamics of domestic violence” and appropriately condemn and name domestic violence behaviours, this is not always the case. It is for this reason that the Death Review Team has endeavoured to consult with the NSW Judicial Commission to explore ways to “further enhance the way in which judges and magistrates discuss domestic violence, particularly in the context of remarks on sentence”.<sup>53</sup>

### ***Culpability of offender reduced because they are a victim of domestic violence***

- 4.56 Cases sometimes arise where the offender’s culpability is affected by domestic violence inflicted on them. In many cases, the victim has inflicted the domestic violence. There are also cases where the domestic violence has been inflicted by a co-offender; for example, where the victim is an infant.<sup>54</sup> These cases often involve evidence of a broader context of domestic violence that comes up when the offender argues for a verdict of manslaughter, for example, on the grounds of partial defences of provocation or substantial impairment, or seeks an acquittal on the grounds of, for example, duress. Separate evidence can also be received at the sentencing hearing.
- 4.57 Courts have often discussed the extent to which an offender’s prolonged exposure to domestic violence (often previously referred to as “battered wife syndrome”) can

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49. E Buxton-Namisnyk and A Butler, “Judicial Discourse Versus Domestic Violence Death Review: An Australian Case Study” in A Howe and D Alaattinoglu (ed) *Contesting Femicide: Feminism and the Power of Law Revisited* (Taylor and Francis, 2018) 95, 97, quoting *R v Walsh* [2009] NSWSC 764 [22].

50. Domestic Violence Resource Centre Victoria, *Out of Character? Legal Responses to Intimate Partner Homicides by Men in Victoria 2005-2014*, Discussion Paper No 10 (2016) 105.

51. Domestic Violence Resource Centre Victoria, *Out of Character? Legal Responses to Intimate Partner Homicides by Men in Victoria 2005-2014*, Discussion Paper No 10 (2016) 105-106.

52. NSW Domestic Violence Death Review Team, *Annual Report 2013–2015* (2015) 53.

53. NSW Domestic Violence Death Review Team, *Annual Report 2013–2015* (2015) 54.

54. See, eg, *R v TP* [2018] NSWSC 369; *R v O'Brien* [2003] NSWCCA 121.

provide a defence or partial defence to murder. The courts have approached such questions with caution.<sup>55</sup> Justice Kirby, for example, has observed:

It is not a universally accepted and empirically established scientific phenomenon. Least of all does the mere raising of it, in evidence or argument, cast a protective cloak over an accused, charged with homicide, who alleges subjection to a long-term battering or other abusive relationship. No civilised society removes its protection to human life simply because of the existence of a history of long-term physical or psychological abuse. If it were so, it would expose to unsanctioned homicide a large number of persons who, in the nature of things, would not be able to give their version of the facts. The law expects a greater measure of self-control in unwanted situations where human life is at stake. It reserves cases of provocation and self-defence to truly exceptional circumstances. Whilst these circumstances may be affected by contemporary conditions and attitudes, there is no real legal *carte blanche*, including for people in abusive relationships, to engage in premeditated homicide. Nor in my view should there be.<sup>56</sup>

- 4.58 In the sentencing context, such caution does not preclude a court from considering an offender's exposure to domestic violence when assessing their objective criminality.<sup>57</sup> Courts must take particular care to ensure that, where a partial defence (such as substantial impairment) results in a charge of murder being reduced to manslaughter (resulting in a lesser maximum penalty), they do not double count (in the offender's favour) a mental condition that was critical to that partial defence.<sup>58</sup>
- 4.59 However, it is only in exceptional cases that the fact an offender has been subjected to domestic violence will justify a sentence other than imprisonment. This is illustrated in cases where a court must consider, when sentencing an offender, whether the victim provoked the offender to commit the offence.
- 4.60 Under the *Crimes (Sentencing Procedure) Act*, one of the mitigating factors to be taken into account in determining the appropriate sentence for an offence is that the victim provoked the offender.<sup>59</sup> The question becomes one of the degree of provocation in the circumstances. Provocation in this sense, which applies as a sentencing consideration for any offence, needs to be distinguished from provocation that operates as a partial defence to make what would otherwise be murder, manslaughter. The interaction between the mitigating factor of provocative conduct and the partial defence of provocation is particularly relevant to this review.
- 4.61 In some domestic violence related manslaughter cases, courts have said that, in exceptional cases, a non-custodial sentence may be appropriate where:
- provocation has been found as a partial defence to murder, and
  - there is a history of domestic violence perpetrated against the offender by the deceased.

55. *R v Peters* [2002] NSWSC 1234 [74]; *R v Tarrant* [2018] NSWSC 774 [43]–[44].

56. *Osland v R* [1998] HCA 75; 197 CLR 316 [165].

57. *R v Peters* [2002] NSWSC 1234 [76].

58. *R v Cahill (No 4)* [2018] NSWSC 1896 [204]; *R v Tarrant* [2018] NSWSC 774 [162].

59. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(c).

- 4.63 The case of *R v Whiting* exemplifies the general approach of the courts to domestic violence related manslaughter in the context of long-term provocation:

The circumstances inevitably attract a very considerable degree of sympathy towards the appellant but she has taken a human life, and this is one of the most dreadful crimes known to the law. Whilst one can understand the circumstances and the trauma which led up to her committing this crime, it would nevertheless be a failure on the part of the criminal law to take too lenient a view of the matter. [The sentencing judge] quite understandably found himself bound to mark the seriousness of the crime of taking a human life. His Honour was properly concerned to ensure that there could be no impression gained from what had taken place that matrimonial discord, indeed extreme matrimonial discord such as one sees in this case, can ever be an excuse for the victimised party to take the life of the aggressor. It has always been the policy of the criminal law to emphasise that a victimised person cannot be permitted, even in such circumstances as the present, to take the law into his or her own hands by killing the aggressor. .... It is necessary to ensure that there be an adequate element of deterrence to the community at large against crimes such as the present ...<sup>60</sup>

- 4.64 In a later case, the Court of Criminal Appeal observed that “[t]he one principle to be extracted from the authorities is that it is only in the most exceptional cases a court will impose a non-custodial sentence”.<sup>61</sup> In that case, the circumstances did warrant such a finding:

For a period of some thirteen years the deceased indulged in extreme brutality of a physical and mental kind towards his wife and elder child and as the other children were born they received like treatment. The deceased's persistent conduct can only be described as brutal, callous and inhuman. At the very least a very strong case is made out for manslaughter on the basis of provocation and even without the presence of diminished responsibility the effect is that there must be a very considerable diminution in criminal responsibility. ...

Finally, I am unable to find any valid reason for the imposition of a custodial sentence. I am quite satisfied that the deceased's persistent ill treatment and abuse of the prisoner, and her knowledge of his assaults upon his sons, were such as to render this a special case in which a non-custodial penalty should be imposed.<sup>62</sup>

- 4.65 In another case, the Court summarised the considerations that apply in such cases:

Such sentences, it seems to me, reflect more the undeniable fact that those prisoners had been subjected to both mental and physical dominance by the deceased over a substantial period of time.<sup>63</sup>

### Other aggravating factors

- 4.66 The *Crimes (Sentencing Procedure) Act* lists a number of other aggravating factors that a court may take into account in deciding the appropriate sentence for an offence. While these apply to offences generally, the following are particularly relevant to offences committed in a domestic violence context:

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60. *R v Whiting* (Unreported, NSWCCA, 27 September 1979) 5 (Street CJ).

61. *R v Bogunovich* (1985) 16 A Crim R 456, 461. See also *R v Russell* [2006] NSWSC 722 [85]–[88]; *R v Jukes* [2006] NSWSC 1065 [49]–[54]; *R v Silva* [2015] NSWSC 148 [54]–[63].

62. *R v Bogunovich* (1985) 16 A Crim R 456, 462.

63. *R v Alexander* (1994) 78 A Crim R 141, 145-146.

- the offender abused a position of trust or authority in relation to the victim
  - the offence was committed in the victim’s home, and
  - the offence was committed in the presence of a child under 18 years of age.<sup>64</sup>
- 4.67 In a case involving an abuse of trust, the Supreme Court said that domestic violence offences are “particularly abhorred” because they are “committed by the very people who should be interested in protecting, rather than harming, those who they have injured”.<sup>65</sup> Domestic violence against an estranged spouse also constitutes a breach of trust.<sup>66</sup>
- 4.68 The 2010 family violence review considered whether to introduce the existence of a family relationship between offender and victim as an aggravating factor. However, the review did not recommend this as this could duplicate these and other similar aggravating factors already in legislation.<sup>67</sup>

### **Breach of ADVO or conditional liberty**

- 4.69 Under the *Crimes (Sentencing Procedure) Act*, an offence is aggravated if it “was committed while the offender was on conditional liberty in relation to an offence or alleged offence”.<sup>68</sup> This includes bail, parole and sentencing orders that involve release to the community upon conditions, including orders to be of good behaviour. It is also an aggravating factor at common law if an offence is committed in breach of an apprehended domestic violence order (“ADVO”).<sup>69</sup>
- 4.70 The Supreme Court has remarked on the particular importance of deterring people from disregarding the terms of apprehended violence orders or bail conditions forbidding them from approaching former partners, or new partners of former partners.<sup>70</sup> This would also extend to breaching the terms of parole orders forbidding contact with victims.
- 4.71 Breaching an ADVO is more serious than breaching a simple requirement to be of good behaviour, because it involves breaching an order “designed to protect the same victim from further attacks”.<sup>71</sup>
- 4.72 The aggravation can be compounded where offenders, who have breached an ADVO, then commit a further offence in breach of bail conditions or conditions set as part of the sentence imposed for the ADVO breach.<sup>72</sup> Similarly, it is generally considered to be more aggravating when the offence that breaches a bond involves conduct that is similar to the conduct to which the bond related.<sup>73</sup>

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64. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(ea)-(eb), s 21A(2)(k).

65. *R v Murray* [2015] NSWSC 1034 [4].

66. *R v Goodbun* [2018] NSWSC 1025 [147]–[149].

67. NSW Law Reform Commission, *Family Violence – A National Legal Response*, Report 128 (2010) [13.199].

68. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(j).

69. *R v Macadam-Kellie* [2001] NSWCCA 170 [37]–[38]; *Wilmot v R* [2007] NSWCCA 278 [33]; *R v Edigarov* [2001] NSWCCA 436, 125 A Crim R 551 [50]; *Kaiser v R* [2009] NSWCCA 130 [28].

70. *R v Thompson* [2017] NSWSC 628 [56].

71. *Cherry v R* [2017] NSWCCA 150 [80]. See also *R v Archer* [2015] NSWSC 1487 [114].

72. *Browning v R* [2015] NSWCCA 147 [8]; *R v Thompson* [2017] NSWSC 628 [35].

73. *Frigiani v R* [2007] NSWCCA 81 [24].

- 4.73 The breach of an ADVO raises some additional issues, since it is a separate offence.<sup>74</sup> Where the breach of an ADVO is an act of personal violence, the court must generally sentence the offender to a term of imprisonment.<sup>75</sup>
- 4.74 Where the breach of the ADVO is specifically charged, the sentence for that offence deals with the gravity of the breach and an offender cannot be penalised further by adding to the length of sentence imposed for other offences.<sup>76</sup> The Court of Criminal Appeal has recently observed:

Conduct which involves deliberate disobedience of a court order must be treated as serious, and should ordinarily be separately punished from any offence that occurs at the same time, always having regard to the requirements of the totality principle.<sup>77</sup>

### Mitigating factors

- 4.75 Mitigating factors will generally apply to homicide in a domestic violence context as they would to all offences. These will have minimal impact on a sentence for homicide in the context of domestic violence, given the need to emphasise denunciation, retribution, general deterrence, and community protection. However, one particular question is the role that provocation of a domestic abuser by the victim should play as a mitigating factor in sentencing homicides that involve domestic violence.

### *Provocation mitigating domestic violence*

- 4.76 Where the provocation provides a partial defence to a charge of murder, and thus establishes manslaughter, no further weight is given to it at sentencing.<sup>78</sup> Where the provocation falls short of providing a partial defence to murder, it may still be taken into account at sentencing.<sup>79</sup>
- 4.77 In general, it is a mitigating factor that the offender was provoked by the victim.<sup>80</sup> In relation to murder, the Court of Criminal Appeal has observed that “there cannot be a realistic assessment of the objective seriousness of the offence unless the provocation is taken into account”.<sup>81</sup>
- 4.78 In the context of domestic violence, a question arises as to what constitutes provocation. The Court of Criminal Appeal has observed that “relationship tension and general tension” in the context of domestic violence offences does not amount to provocation for the purposes of mitigation.<sup>82</sup>
- 4.79 In Victoria, the defence of provocation has been abolished. This was recommended by the Victorian Law Reform Commission because it believed that such matters

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74. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14(1).

75. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14(4).

76. *R v Goodbun* [2018] NSWSC 1025 [180].

77. *Suksa-Ngacharoen v R* [2018] NSWCCA 142 [132].

78. *R v Hassan* [2014] NSWSC 280 [62].

79. *R v Peters* [2002] NSWSC 1234 [79]; *R v Bell* (1985) 2 NSWLR 466, 485.

80. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(c).

81. *Williams v R* [2012] NSWCCA 172 [42].

82. *Shaw v R* [2008] NSWCCA 58 [26]; *R v Biddle* [2011] NSWSC 1262 [85].

were better dealt with at sentencing.<sup>83</sup> Since the defence was abolished, some have observed that there has been little direct reference to provocation at sentencing.<sup>84</sup>

- 4.80 The Victorian Court of Appeal has stated that even in circumstances of provocation or great emotional stress, the principles of general deterrence, denunciation and just punishment “will ordinarily be given primacy in sentencing for the murder of a partner in a domestic setting”.<sup>85</sup> For example, in a 2013 case, the court accepted the offender had been provoked by the deceased and his wife conducting an affair, and that the infidelity and consequent breakdown of his marriage had “to some extent compromised” the offender’s mental state, thereby reducing his moral culpability. However, the court concluded that:

the reduction is not large. There is no longer much scope for the recognition of a reduction in moral culpability in crimes resulting from idiosyncratic (even if, in some quarters, still entrenched) psycho-social attitudes to the rights and roles of women.<sup>86</sup>

## Other approaches and proposals

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- 4.81 In this section, we set out some alternative approaches to ensuring courts take a context of domestic and family violence into account appropriately when sentencing homicide offenders. These approaches include:

- introducing express statements in law about factors that do not mitigate a sentence
- introducing new factors that will aggravate a homicide
- developing sentencing guidelines specific to domestic and family violence related homicides, and
- allowing a course of previous domestic violence related conduct to be taken into account by a sentencing court.

These ideas come in part from different approaches either taken or proposed in other jurisdictions, and in part from suggestions made in submissions to this review.

### Express statements in law about factors that do not mitigate an offence

- 4.82 As we have noted, in NSW, the fact that a homicide has taken place in a domestic context is not a mitigating factor.<sup>87</sup> One question is whether this should be expressly stated in legislation.

- 4.83 The *Crimes (Sentencing) Act 2005* (ACT) provides:

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83. Victorian Law Reform Commission, *Defences to Homicide*, Final Report (2004) [2.31]–[2.33].

84. Domestic Violence Resource Centre Victoria, *Out of Character? Legal Responses to Intimate Partner Homicides by Men in Victoria 2005-2014*, Discussion Paper No 10 (2016) 108.

85. *Felicite v R* [2011] VSCA 274, 37 VR 329 [20].

86. *R v Budimir* [2013] VSC 149 [41], [56].

87. [4.35]–[4.36].



In deciding how an offender should be sentenced for an offence, a court must not reduce the severity of a sentence it would otherwise have imposed because—

- (a) the offence is a family violence offence; or
- (b) a family violence order under the *Family Violence Act 2016* or a protection order under the *Domestic Violence and Protection Orders Act 2008* (repealed) is in force against the offender in relation to the family violence offence.<sup>88</sup>

4.84 The Australian Capital Territory has a considerably larger mean sentence for murder where there is a domestic relationship between the victim and offender.<sup>89</sup> However, this data mostly predates the amendments set out above, which suggests that the courts were already taking this consideration into account.

### Aggravating factors specific to domestic violence related homicide

4.85 Different jurisdictions have different factors that will aggravate a domestic violence related offence. Some are based on relationship status and others are based on considerations of gender.

#### Aggravation based on relationship status

4.86 In **Queensland**, courts must treat the fact that an offence is domestic violence related as an aggravating factor unless to do so “is not reasonable because of the exceptional circumstances of the case”.<sup>90</sup>

4.87 The examples the law gives of “exceptional circumstances” are:

- 1 the victim of the offence has previously committed an act of serious domestic violence, or several acts of domestic violence, against the offender
- 2 the offence is manslaughter under the *Criminal Code*, section 304B [killing for preservation in an abusive domestic relationship].<sup>91</sup>

4.88 Another option which was considered in Queensland, but not enacted, is to apply a higher maximum penalty to offences committed in domestic and family violence circumstances. This was intended to ensure that the seriousness of such violence is acknowledged and that perpetrators are held to account.<sup>92</sup>

4.89 In **South Australia**, the fact that the offender was in a relationship with the victim, or formerly in a relationship with the victim, aggravates certain types of offences and attracts a harsher penalty.<sup>93</sup>

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88. *Crimes (Sentencing) Act 2005* (ACT) s 34(2), inserted by *Family Violence Act 2016* (ACT) sch 2 [2.3].

89. [B.6]; Table B.1.

90. *Penalties and Sentences Act 1992* (Qld) s 9(10A), inserted by *Criminal Law (Domestic Violence) Amendment Act 2016* (Qld) s 5.

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

92. Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland*, Report (2015) 304–305.

93. *Criminal Law Consolidation Act 1935* (SA) s 5AA(1)(g).



- 4.90 “Relationship” is broadly defined to include intimate relationships as well as other relationships based on blood relationship, legal obligation or kinship.<sup>94</sup> However, aggravated offences are not available for murder or manslaughter.
- 4.91 In **Western Australia**, when a person is guilty of certain violent personal offences including manslaughter or murder, the sentencing court must decide the seriousness of the offence by reference to whether:
- the offender was in a family relationship with the victim
  - a child was present when the offence was committed, or
  - the offender’s conduct was in breach of a restraining order.<sup>95</sup>
- 4.92 “Family relationship” is quite limited and only includes where:
- two people were or are in an intimate personal relationship (married, de facto or otherwise)
  - one person is a child who regularly or ordinarily resides with the other, or
  - one person is or was a guardian of the other.<sup>96</sup>
- 4.93 In its review of Family and Domestic Violence Laws, the Law Reform Commission of Western Australia did not recommend any relevant changes to these laws.<sup>97</sup>
- 4.94 In **New Zealand**, common assault attracts a maximum penalty of one year’s imprisonment,<sup>98</sup> but a maximum penalty of two years applies where a person assaults another person and they are, or have been, in a family relationship with that person.<sup>99</sup> A person is in a family relationship with another person if they:
- are the other person’s spouse or partner
  - ordinarily share a household with the person,
  - are a family member, or
  - have a close personal relationship with the person.<sup>100</sup>
- 4.95 A “family member” is anybody related by blood, marriage or adoption or who is part of a culturally recognised family group.<sup>101</sup>
- 4.96 In **Canada**, the fact that the offender, in committing the offence, abused their spouse or common-law partner aggravates the offence.<sup>102</sup>

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94. *Criminal Law Consolidation Act 1935* (SA) s 5AA(4a).

95. *Restraining Orders Act 1997* (WA) s 63B(2) inserted by *Restraining Orders and Related Legislation Amendment (Family Violence) Act 2016* (WA) s 71.

96. *Criminal Code* (WA) s 221(2); *Restraining Orders Act 1997* (WA) s 4(1).

97. Law Reform Commission of Western Australia, *Enhancing Family and Domestic Violence Laws*, Final Report, Project No 104 (2014) 128–130.

98. *Crimes Act 1961* (NZ) s 196.

99. *Crimes Act 1961* (NZ) s 194A, inserted by *Family Violence (Amendments) Act 2018* (NZ) s 25(1).

100. *Crimes Act 1961* (NZ) s 194A(2); *Family Violence Act 2018* (NZ) s 12–14.

101. *Family Violence Act 2018* (NZ) s 8 definition of “family member”.

102. *Criminal Code 1985* (Canada) s 718.2(a)(ii).

4.97 The 2010 family violence review rejected this legislative approach. The review found that it:

- would potentially remove judicial discretion and result in higher penalties in cases where it was not just or appropriate, and
- was too blunt an instrument to recognise the nature and dynamics of family violence, and could result in higher penalties in cases with family victims (as opposed to stranger victims), even where the relevant conduct may be identical.<sup>103</sup>

4.98 In **Ireland**, when sentencing for violent and sexual offences (including for murder and manslaughter), courts take into account, as an aggravating factor, the fact that the offence was carried out against a spouse, civil partner, or person with whom they are in an intimate relationship.<sup>104</sup>

### *Aggravation based on considerations of gender*

4.99 The laws in the Northern Territory and New Zealand, in some limited circumstances, treat gender as an aggravating circumstance in cases involving a female victim and male offender.

4.100 In the Northern Territory an increased penalty applies where a male offender assaults a female victim.<sup>105</sup>

4.101 In New Zealand, common assault attracts a maximum penalty of one year's imprisonment,<sup>106</sup> but a maximum penalty of two years applies where the offender:

- assaults a child under 14 years of age, or
- is a man and assaults a woman.<sup>107</sup>

4.102 One submission we received says “there is limited evidence to suggest that this is an effective approach in revealing the additional harms present in cases of domestic and family homicide”.<sup>108</sup> The same submission says it may also present problems for dealing adequately with intimate partner homicides in LGBTIQ communities and homicides of children within families.<sup>109</sup>

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103. NSW Law Reform Commission, *Family Violence – A National Legal Response*, Report 128 (2010) [13.197]–[13.198].

104. *Domestic Violence Act 2018* (Ireland) s 40.

105. *Criminal Code* (NT) s 188(2)(b).

106. *Crimes Act 1961* (NZ) s 196.

107. *Crimes Act 1961* (NZ) s 194.

108. K Fitz-Gibbon, J McCulloch, J Maher, *Preliminary Submission PMU17*, 6.

109. K Fitz-Gibbon, J McCulloch, J Maher, *Preliminary Submission PMU17*, 6.

## Sentencing guidelines about the domestic violence context of an offence

4.103 The Sentencing Council for England and Wales has a guideline on sentencing in the context of domestic abuse, which the courts are required to consider.<sup>110</sup> The guideline states that:

the domestic context of the offending behaviour makes the offending more serious because it represents a violation of the trust and security that normally exists between people in an intimate or family relationship.<sup>111</sup>

4.104 The guideline provides a non-exhaustive list of aggravating factors that are of “particular relevance to offences committed in a domestic context”:

- Abuse of trust and abuse of power
- Victim is particularly vulnerable (*all victims of domestic abuse are potentially vulnerable due to the nature of the abuse, but some victims of domestic abuse may be more vulnerable than others, and not all vulnerabilities are immediately apparent*)
- Steps taken to prevent the victim reporting an incident
- Steps taken to prevent the victim obtaining assistance
- Victim forced to leave home, or steps have to be taken to exclude the offender from the home to ensure the victim’s safety
- Impact on children (*children can be adversely impacted by both direct and indirect exposure to domestic abuse*)
- Using contact arrangements with a child to instigate an offence
- A proven history of violence or threats by the offender in a domestic context
- A history of disobedience to court orders (*such as, but not limited to, Domestic Violence Protection Orders, non-molestation orders, restraining orders*).<sup>112</sup>

## Acknowledging a course of conduct that involves domestic violence

4.105 Another option is to allow evidence to be presented to the court about a course of conduct that involves domestic violence.

4.106 For example, South Australian law allows the prosecutor to furnish the court with particulars of injury or loss resulting from “a course of conduct consisting of a series of criminal acts of the same or a similar character of which the offence for which sentence is to be imposed forms part”.<sup>113</sup>

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110. *Coroners and Justice Act 2009* (UK) s 125(1).

111. England and Wales, Sentencing Council, *Overarching Principles: Domestic Abuse*, Definitive Guideline (2018) [7].

112. England and Wales, Sentencing Council, *Overarching Principles: Domestic Abuse*, Definitive Guideline (2018) 3.

113. *Sentencing Act 2017* (SA) s 13(1)(b)(ii), formerly *Criminal Law (Sentencing) Act 1988* (SA) s 7(1)(b)(ii).

- 4.107 The ACT and Commonwealth both list “course of conduct consisting of a series of criminal acts of the same or a similar character” as matters that a court should consider in sentencing an offender.<sup>114</sup>
- 4.108 The intention behind such provisions is unclear.<sup>115</sup> One High Court judge has suggested that this type of provision was an attempt to express the totality principle as it applies where a court is sentencing multiple offences, rather than allowing courts to take into account uncharged criminal acts.<sup>116</sup> However, another judge considered that it left open the possibility that the conduct might involve uncharged criminal acts.<sup>117</sup>
- 4.109 In 2006, the Australian Law Reform Commission (“ALRC”) recommended greater clarity around this consideration. The ALRC’s recommendation would essentially limit the court’s consideration to proven or admitted offences, either as part of a course of conduct, representative charges or similar or lesser offences.<sup>118</sup>
- 4.110 A number of submissions to the 2010 family violence review raised concerns that allowing courts to consider a course of conduct in domestic violence matters generally could lead to evidentiary disputes and complicate and delay proceedings.<sup>119</sup> One submission, in particular, noted that allowing courts to consider a course of conduct might impact on an offender’s willingness to plead guilty or to agree to a statement of facts.<sup>120</sup> However, some of the consequences of delay, such as the victim withdrawing the complaint,<sup>121</sup> would not apply in homicide cases.

### Dealing appropriately with offenders who are victims of domestic violence

- 4.111 As we have noted, there are limited ways in which offenders who have been victims of domestic violence can use this to mitigate their sentence for homicide. Some people have expressed concerns that some of the factors and considerations that increase culpability for an offence may operate unfairly against these offenders.
- 4.112 For example, the New Zealand Law Commission, in 2016, recommended changes to the criminal law that would better serve victims of family violence who kill their abusers.
- 4.113 The Commission found that fair treatment of such cases requires a “broader understanding of the general nature and dynamics of family violence”.<sup>122</sup> The Commission therefore proposed education to support an improved understanding of

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114. *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(c); *Crimes Act 1914* (Cth) s 16A(2)(c).

115. NSW Law Reform Commission, *Family Violence – A National Legal Response*, Report 128 (2010)[13.117]–[13.121].

116. *Weininger v R* [2003]HCA 14, 212 CLR 629 [55]–[57]. (Kirby J)

117. *Weininger v R* [2003]HCA 14, 212 CLR 629 [111]–[112] (Callinan J)

118. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) [6.65]–[6.66], rec 6–1.

119. NSW Law Reform Commission, *Family Violence – A National Legal Response*, Report 128 (2010)[13.167]–[13.168].

120. NSW Law Reform Commission, *Family Violence – A National Legal Response*, Report 128 (2010)[13.168].

121. See, eg, NSW Law Reform Commission, *Family Violence – A National Legal Response*, Report 128 (2010)[13.167].

122. New Zealand, Law Commission, *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide*, Report 139 (2016) [2.1].

family violence among key participants in the criminal justice system, including judges, criminal lawyers and police.<sup>123</sup>

- 4.114 The Commission also proposed changes to the *Sentencing Act 2002* (NZ) to give greater recognition of reduced culpability, particularly in cases of significant mitigating factors such as a lengthy and severe history of abuse. These included clarifying that:<sup>124</sup>
- the mitigating factor of “conduct of the victim”<sup>125</sup> includes prior family violence by the deceased against the offender, and
  - the mitigating factor of “diminished intellectual capacity or understanding”<sup>126</sup> includes a condition that results from being subjected to family violence.

### Including information about family and domestic violence in a bench book

- 4.115 The NSW *Sentencing Bench Book* generally deals with the question of domestic violence by considering the operation of sentencing principles in relation to offences committed in the context of domestic violence.<sup>127</sup> Apart from reference to some judicial statements that mention the “special dynamics of domestic violence”,<sup>128</sup> the bench book does not provide detailed advice on what might constitute domestic violence in different contexts.

- 4.116 Following a recommendation from the 2010 family violence review, a *National Domestic and Family Violence Bench Book* (“National Bench Book”) was developed.<sup>129</sup> The aim of the National Bench Book is to help educate and train judicial officers so as to:

promote best practice and improve consistency in judicial decision-making and court experiences for victims in cases involving domestic and family violence across Australia.<sup>130</sup>

- 4.117 The National Bench Book includes advice on the dynamics of domestic and family violence, with sections on:
- myths and misunderstandings, including that victims can leave abusive relationships and that abuse will stop at separation, and that both parties are responsible for violence
  - factors affecting risk
  - typological approaches (identifying patterns of behaviour), and

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123. New Zealand, Law Commission, *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide*, Report 139 (2016) [2.54]–[2.66], rec R1–R4.

124. New Zealand, Law Commission, *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide*, Report 139 (2016) [11.14]–[11.51], rec R10.

125. *Sentencing Act 2002* (NZ) s 9(2)(c).

126. *Sentencing Act 2002* (NZ) s 9(2)(e).

127. See especially Judicial Commission of NSW, *Sentencing Bench Book* (2006) [63-510].

128. Judicial Commission of NSW, *Sentencing Bench Book* (2006) 31203.

129. NSW Law Reform Commission, *Family Violence – A National Legal Response*, Report 128 (2010) rec 31-2.

130. Australian Institute of Judicial Administration, “Purpose and Limitations” (2019) *National Domestic and Family Violence Bench Book* <<https://dfvbenchbook.aija.org.au/prupose-and-limitations>> (retrieved 31 August 2019).

- vulnerable groups, including women, people with children, children, young people, older people, pregnant people, people with disability and impairment, people with mental illness, people from culturally and linguistically diverse backgrounds, Aboriginal and Torres Strait Islander people, people living in regional, rural and remote communities, people affected by substance misuse, LGBTIQ people, and people with poor literacy skills.<sup>131</sup>
- 4.118 Finally, the National Bench Book provides some limited advice on sentencing in the context of domestic violence, for example, sentencing considerations for breach of a protection order.<sup>132</sup>

### Question 4.1: Sentencing for domestic violence related homicide

- (1) Are the sentences imposed for homicide in the context of domestic or family violence adequate? Why or why not?
- (2) What changes, if any, should be made to penalty provisions that relate to homicide in the context of domestic or family violence?
- (3) Are the current sentencing principles relating to sentencing for domestic violence homicides appropriate? Why or why not?
- (4) How could the current sentencing principles relating to sentencing for domestic violence homicides be changed?
- (5) Should additional aggravating factors be legislated? Why or why not?
- (6) What changes, if any, should be made to the law to allow domestic violence context evidence to be admitted to sentencing proceedings?
- (7) What changes, if any, should be made to bench books to assist courts in sentencing for domestic violence related homicide?

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131. Australian Institute of Judicial Administration, "Dynamics of Domestic and Family Violence" (2019) *National Domestic and Family Violence Bench Book* <<https://dfvbenchbook.aija.org.au/dynamics-of-domestic-and-family-violence/>> (retrieved 31 August 2019).

132. Australian Institute of Judicial Administration "Sentencing Considerations: Breaches of Protection Orders" (2019) *National Domestic and Family Violence Bench Book* <<https://dfvbenchbook.aija.org.au/sentencing/sentencing-considerations-breaches-of-protection-orders/>> (retrieved 31 August 2019).

## 5. Sentencing for child homicide

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### In brief

The unlawful killing of children is treated as a particularly serious crime. This is reflected in a special standard non-parole period that applies when the murder victim is under 18. When sentencing for child homicide, the courts have emphasised the purposes of retribution and deterrence. Abuse of trust or authority is often a relevant aggravating factor. Possible reforms include introducing a statement of sentencing purposes for child homicide, new aggravating factors, and new offences such as child homicide and child neglect causing death.

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- 5.1 Existing laws in NSW and elsewhere treat the unlawful killing of children as a particularly serious crime. In NSW, a special standard non-parole period of 25 years' imprisonment applies where the victim of a murder is under 18 years of age. The fact that a victim was vulnerable because they were very young aggravates the offence.
- 5.2 This chapter outlines current sentencing provisions and practices for offences that involve the murder or manslaughter of children. We seek your views on what reform options, if any, are needed to improve their adequacy.
- 5.3 We consider possible reform options, including introducing:
- new aggravating circumstances

- a statement of sentencing purposes specifically for child homicide
- a specific offence of child homicide, and
- a specific offence of child death caused by neglect.

### Child death: NSW offences and prevalence

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#### The prevalence of child death by abuse or neglect

- 5.4 The NSW Ombudsman has the power to review the death of a child under the age of 18 years caused by abuse or neglect, or that occurs in suspicious circumstances.<sup>1</sup> In 2016 and 2017, 20 children under the age of 18 years died in such circumstances (at a rate of 0.58 per 100,000 children).<sup>2</sup>
- 5.5 “Abuse” refers to a direct act of violence against a child. A death occurs by neglect if “a reasonable person would conclude that the actions or inactions of a carer exposed the child to a high risk of death or serious injury”. A death is “suspicious” if “there is some evidence that the child’s death may have been the result of abuse or neglect, but the evidence is insufficient for this to be reasonably determined”.<sup>3</sup>
- 5.6 Of the 20 children:
- 11 (55%) died as a result of abuse
  - 2 (10%) died as a result of carer neglect, and
  - 7 (35%) died in suspicious circumstances.
- 5.7 Of the 20 children, 17 (85%) died in the context of actual or suspected familial abuse or neglect. No charges were laid in relation to the deaths of 5 children (25%) because the people identified as responsible also died in relevant incidents. At the time of reporting, 4 cases (20%) were open police investigations, while one was closed without charge because the carer’s actions did not reach the threshold of criminal negligence.<sup>4</sup>
- 5.8 The NSW Child Death Review Team has found that, of the 152 children subjected to fatal abuse in the 15 years to 2015, over half (80) of them were under 5 years of age. Deaths involving children aged 5 to 14 years were less frequent and the proportion of deaths increased for those aged 15–17 years. These late adolescent deaths were “generally associated with peer assault”.<sup>5</sup> The Team has also observed that:

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1. *Community Services (Complaints, Review and Monitoring) Act 1993* (NSW) pt 6.

2. NSW Ombudsman, Child Death Review Team, *Biennial Report of the Deaths of Children in New South Wales: 2016 and 2017* (2019) 128.

3. NSW Ombudsman, Child Death Review Team, *Biennial Report of the Deaths of Children in New South Wales: 2016 and 2017* (2019) 128.

4. NSW Ombudsman, Child Death Review Team, *Biennial Report of the Deaths of Children in New South Wales: 2016 and 2017* (2019) 128-129.

5. NSW Ombudsman, Child Death Review Team, *Child Death Review Report 2015* (2016) 104.



Peer-related homicide generally relates to young people in a context of confrontational violence between friends, acquaintances and strangers. Peers are generally close in age and social status.<sup>6</sup>

### Offences of child abuse or neglect

- 5.9 Under the *Crimes Act 1900* (NSW) (“*Crimes Act*”), a person who has parental responsibility for a child under 16 commits an offence if they, without reasonable excuse, intentionally or recklessly fail to provide the child with the necessities of life, if the failure causes a danger of death or of serious injury to the child. The maximum penalty for the offence is 5 years’ imprisonment.<sup>7</sup>
- 5.10 Between 2015 and 2018, 12 cases were sentenced for this offence as the principal offence in the NSW Local Court.<sup>8</sup> Of these, 4 resulted in a sentence of imprisonment.<sup>9</sup>
- 5.11 In the period 1 January 2008 to 23 September 2018, only 5 cases were sentenced for this offence as the principal offence in the higher courts. Of these, 3 resulted in a sentence of imprisonment.<sup>10</sup>
- 5.12 Other relevant offences in the *Crimes Act* include:
- inflicting grievous bodily harm on a child during or after birth (maximum penalty: 14 years’ imprisonment),<sup>11</sup> and
  - abandoning or exposing a child under 7 years, if it causes a danger of death or serious injury (maximum penalty: 5 years’ imprisonment).<sup>12</sup>
- 5.13 In the four years from January 2015, the Local Court has sentenced 4 cases of abandoning or exposing a child as a principal offence and the higher courts have sentenced 2 cases in the 10 years from January 2008.
- 5.14 We have not found any convictions for the offence of injuring a child at birth that were not overturned on appeal.<sup>13</sup>
- 5.15 Under the *Children and Young Persons (Care and Protection) Act 1998* (NSW), a person, whether or not they are the parent of the child or young person, is guilty of an offence if they, without reasonable excuse, neglect to provide adequate and proper food, nursing, clothing, medical aid or lodging for a child or young person in their care. The maximum penalty for this offence is 2 years’ imprisonment.<sup>14</sup> In the 4 years from 2015 to 2018, the Local Court dealt with 35 cases where this offence was the principal offence. None resulted in a sentence of imprisonment.

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6. NSW Ombudsman, Child Death Review Team, *Child Death Review Report 2015* (2016) 105.

7. *Crimes Act 1900* (NSW) s 43A.

8. Judicial Commission of NSW, *Sentencing Statistics* (Judicial Information Research System).

9. Judicial Commission of NSW, *Sentencing Statistics* (Judicial Information Research System).

10. Judicial Commission of NSW, *Sentencing Statistics* (Judicial Information Research System).

11. *Crimes Act 1900* (NSW) s 42.

12. *Crimes Act 1900* (NSW) s 43.

13. See *R v Lubienski* (1893) 14 LR(NSW) 55 in relation to the previous version of the offence in *Criminal Law Amendment Act 1883* (NSW) s 58.

14. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 228.

- 5.16 Notably, while NSW child neglect offences either expressly state or infer a danger or risk of death, they do not cover situations where death results. By contrast, some other jurisdictions have provisions that cover situations where death results from child neglect. We discuss these below.<sup>15</sup>

### Infanticide

- 5.17 The offence of infanticide is outside of the scope of this review. While it is rarely used, we include details about it here to show how it interacts with manslaughter.
- 5.18 Infanticide is a criminal offence in its own right<sup>16</sup> as well as an alternative conviction to murder.<sup>17</sup> The infanticide provision was introduced in 1951.<sup>18</sup> Infanticide has been more frequently used as an alternative conviction to murder, generally obtained by guilty plea, rather than as a substantive offence.<sup>19</sup>
- 5.19 A woman may be convicted of infanticide instead of murder if she kills her child aged less than 12 months, by wilful act or omission, while suffering from a mental disturbance resulting from the effect of lactation consequent upon the victim's birth.<sup>20</sup> The woman convicted of infanticide is dealt with and punished as if she had been guilty of the offence of manslaughter of her child.<sup>21</sup>
- 5.20 The infanticide provisions are rarely used in NSW. In the last ten years, there has been only one infanticide case, sentenced in 2008, which resulted in a suspended sentence. Other convictions recorded between 1990 and 2008 also led to non-custodial sentences.<sup>22</sup> This is consistent with sentencing patterns in other jurisdictions.<sup>23</sup>
- 5.21 In 1997, the NSW Law Reform Commission reviewed infanticide.<sup>24</sup> It noted that the infanticide provisions are based on unsound social and medical bases of mental disturbance,<sup>25</sup> and recommended they be repealed.<sup>26</sup> It anticipated that a revised defence of diminished responsibility would cover cases previously falling within the infanticide provisions.<sup>27</sup> Parliament has not implemented the recommendation to repeal infanticide.

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15. [5.86]–[5.89].

16. *Crimes Act 1900* (NSW) s 22A(1).

17. *Crimes Act 1900* (NSW) s 22A(2).

18. *Crimes Act 1900* (NSW) s 22A, inserted by *Crimes (Amendment) Act 1951* (NSW) s 2(d).

19. NSW Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report 83 (1997) [3.13].

20. *Crimes Act 1900* (NSW) s 22A(1)–(2).

21. *Crimes Act 1900* (NSW) s 22A(1)–(2); NSW, *Parliamentary Debates*, Legislative Assembly, 26 September 1951, 3225.

22. NSW Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report 83 (1997) [3.45]; *R v Cooper* [2001] NSWSC 769; *R v Pope* [2002] NSWSC 397.

23. NSW Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report 83 (1997) [3.45].

24. NSW Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report 83 (1997) v.

25. NSW Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report 83 (1997) [3.16].

26. NSW Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report 83 (1997) [1.17].

27. NSW Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report 83 (1997) [1.17].

- 5.22 NSW also has an older provision, originally enacted in 1883<sup>28</sup> and still in force, that was aimed at dealing with “the difficulties attending cases of child murder”.<sup>29</sup> It provides that a woman “delivered of a child” who is acquitted of murder may be found guilty of an offence if she has “in any manner wilfully contributed to the death of such child, whether during delivery, or at or after its birth, or has wilfully caused any violence, the mark of which has been found on its body”. The maximum penalty for such an offence is 10 years’ imprisonment.<sup>30</sup> We have found no evidence that the provision has been used.

## Penalties and statistics

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- 5.23 There is a relatively small number of offences in our samples for murder and manslaughter of children. This is to be expected, as the victimisation rate for deaths of children caused by abuse, neglect or arising in suspicious circumstances (0.58 per 100,000 children) is lower than the victimisation rate for murder in NSW generally (0.9 per 100,000).

## Murder

### Penalty

- 5.24 The maximum penalty for murder in all cases (except for the murder of a police officer, where it is the mandatory penalty<sup>31</sup>) is imprisonment for life.
- 5.25 Since 1 January 2008, the standard non-parole period for murder where the victim was a child under 18 years old has been 25 years’ imprisonment.<sup>32</sup> Similar provisions have been enacted or proposed elsewhere in Australia. The Northern Territory has a minimum non-parole period of 25 years for murders involving a victim under 18 years.<sup>33</sup> A private members bill currently before the Queensland parliament has proposed a mandatory minimum non-parole period for the murder of a child under 18.<sup>34</sup> The bill has not been passed.

### Statistics

- 5.26 Between April 2012 and March 2018, NSW courts imposed 21 sentences for murder involving a victim under the age of 18. Of these, 17 were committed by adult offenders and 4 were committed by juvenile offenders.
- 5.27 Of the 17 offences committed by adult offenders:
- 9 victims were the offender’s child (3) or step-child (6)
  - 1 victim was the offender’s nephew

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28. *Criminal Law Amendment Act 1883* (NSW) s 58; *Crimes Act 1900* (NSW) s 21.

29. A Stephen and A Oliver, *Criminal Law Manual* (Government Printer, 1883) 26.

30. *Crimes Act 1900* (NSW) s 21.

31. *Crimes Act 1900* (NSW) s 19B.

32. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A, table, item 1B. Between 20 December 2002 and 31 December 2007 the standard non-parole period was 20 years.

33. *Sentencing Act* (NT) s 53A(1)(b), s 53A(3)(c).

34. Criminal Code and Other Legislation (Mason JettLee) Amendment Bill 2019 (Qld) cl 15.

## CP Homicide

- 4 victims were a friend (1), neighbour (1) or acquaintance (2) of the offender, and
  - 3 victims were strangers to the offender.
- 5.28 The 10 offences in which the victim was the offender's child, step-child or nephew, by definition, involved domestic violence.
- 5.29 The age range of the victims across all the offences was 2 to 17 years old.
- 5.30 The victims of the offences involving domestic violence were aged between 2 and 12 years old.
- 5.31 The 7 victims of the offences not involving domestic violence were aged between 12 and 17 years old. In these cases, 2 of the adult offenders were aged 18–20 years and 3 were aged 21–25 years.
- 5.32 In all 4 cases involving juvenile offenders, the victims were 17 years of age. This appears to be broadly consistent with the observations of the NSW Child Death Review Team about the prevalence of peer-related homicide.<sup>35</sup>
- 5.33 Table 5.1 provides NSW sentencing data for the 17 murders involving an adult offender killing a child under 18 years of age in the 6 year period from April 2012 to March 2018. The table compares relevant offences involving domestic violence with offences that do not involve domestic violence. For comparison, the table also includes data for the murder of victims aged 18 years or over. It shows a general trend of longer sentences for the murder of children and particularly lengthy sentences where the child victim is killed in the context of domestic violence.

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35. [5.8].

**Table 5.1: Sentences for murder for adult offenders where the victim was aged under 18 years, Supreme Court of NSW, April 2015 – March 2018**

	Head Sentence			Non-parole period		
	Child victim	Child victim	Other victim	Child victim	Child victim	Other victim
	Domestic violence	Non-DV		Domestic violence	Non-DV	
Number	10	7	80	10	7	80
Distribution	21.5 – 44 yrs	20 – 45 yrs	13 – 45 yrs	15 – 33 yrs	13 - 30 yrs	8.5 – 33.75 yrs
Middle 50% range	28.2 – 39.5 yrs	25.25 – 33.5 yrs	21 – 30 yrs	21 – 29.7 yrs	18.4 – 25 yrs	15 – 22.5 yrs
Inter-quartile range	11.3 yrs	8.25 yrs	9 yrs	8.7 yrs	6.6 yrs	7.5 yrs
Mean	32.2 yrs	32.2 yrs	25.6 yrs	23.9 yrs	23.6 yrs	18.9 yrs
Median	36.75 yrs	26 yrs	24 yrs	27.5 yrs	19 yrs	18 yrs
Mode	40 yrs	None	24 yrs	30 yrs	30 yrs	18 yrs

- 5.34 No life sentences were recorded in this sample. Life sentences for the murder of a child appear to be rare.<sup>36</sup>
- 5.35 One domestic violence related matter involved sexual offences against the child victim, including the production of child abuse material. The indicative sentence for the murder in this case was 38 years' imprisonment with a non-parole period of 28.5 years. The aggregate sentence was 42 years' imprisonment with a non-parole period of 31.5 years.<sup>37</sup>

## Manslaughter

- 5.36 The maximum penalty for manslaughter in all cases in NSW, including where the victim is a child, is 25 years' imprisonment. There is no standard non-parole period for manslaughter.
- 5.37 In the 5 years from April 2013 to March 2018, of the 83 manslaughter cases for which we have data, 10 (12%) involved a victim who was under 18 years old. All but one case involved domestic violence; the victim being either the child or step-child of the offender.
- 5.38 Of the 10 offenders, half were women. These 5 offenders represent a significant proportion of the 13 female offenders for all manslaughter offences in the same period. One of the female offenders received a bond with supervision (broadly

36. [5.51].

37. *R v Maybir (No 8)* [2016] NSWSC 166.

equivalent to what is now a conditional release order). All of the other offenders received a sentence of imprisonment.

- 5.39 The case that received a bond with supervision involved a mother who drowned her infant daughter in the bath. She entered a plea of guilty to manslaughter on the basis of substantial impairment. The offender had anxiety and showed symptoms of schizophrenia at the time of the offence and was acting under a delusion. She had previously been found unfit to be tried and had served time in custody. Her mental illness made her “a completely unsuitable example of someone who should receive a custodial sentence to reflect denunciation, general deterrence or punishment”.<sup>38</sup>
- 5.40 The longest sentence of imprisonment (12 years) was imposed on a mother who entered a plea of guilty to the manslaughter by gross criminal negligence of her 7 year old son who had a moderate intellectual disability. The negligence was the failure to seek medical attention. The child had been subjected to abuse and violence over an extended period by the offender and her partner. The offender was also sentenced for 10 related offences, including assault, failure to provide the necessities of life, and the production of child abuse material.<sup>39</sup>
- 5.41 Table 5.2 sets out the sentences of imprisonment for the manslaughter of children under 18 years of age.
- 5.42 The mean head sentence of 8 years for these offences is approximately the same as that for all 80 manslaughter offences we reviewed that received a sentence of imprisonment.<sup>40</sup> Although the numbers are small, there appears to be a wider range of culpability for female offenders in the case of manslaughter of children, with women receiving both the shortest and longest sentences of imprisonment.

**Table 5.2: Sentences of imprisonment for manslaughter where the victim was aged under 18 years, NSW higher courts, April 2013 – March 2018**

	All		Male offender		Female offender	
	Head sentence	Non-parole period	Head sentence	Non-parole period	Head sentence	Non-parole period
Number	9	8	5	5	4	3
Distribution	4 – 12 yrs	1.5 – 9 yrs	5.2 – 10.7 yrs	3 – 8 yrs	4 – 12 yrs	1.5 – 9 yrs
Mean	8 yrs	4.9 yrs	7.9 yrs	5.3 yrs	8.1 yrs	3.2 yrs
Median	8 yrs	4.7 yrs	8 yrs	5 yrs	8.25	1.9 yrs
Mode	8 yrs	-	8 yrs	-	12 yrs	-

38. *R v MB* [2017]NSWSC 619 [74].

39. *R v KJ* [2015]NSWSC 767.

40. Table 2.3.

- 5.43 In a 2001 case, the sentencing judge considered as helpful a number of cases involving the unlawful killing of very young children by parents or carers. In these cases, the offender pleaded not guilty to murder but guilty to manslaughter, and the sentences imposed ranged from 5 to 10 years' imprisonment.<sup>41</sup> However, the judge acknowledged "the caution which needs to be exercised in seeking guidance from other cases of manslaughter".<sup>42</sup>
- 5.44 In 2004, Chief Justice Spigelman observed that "[c]hild killing by a parent or carer does not occur so frequently to make it possible to deduce a sentencing pattern from past cases".<sup>43</sup>

## Sentencing principles relevant to child homicide

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- 5.45 Cases involving the manslaughter of children present a broadly similar sentencing profile to other manslaughter sentences. However, the courts have observed that manslaughter involving children is particularly serious, especially when the child is killed by a parent or family member.<sup>44</sup>

### Purposes of sentencing

- 5.46 When sentencing offenders for the manslaughter of children, the courts have emphasised the purposes of retribution and deterrence.

#### *Retribution*

- 5.47 In a Court of Criminal Appeal case involving the manslaughter of a 7 month old child by her mother's partner, Chief Justice Spigelman observed that "[t]he sense of outrage in the community ... is so strong that the element of retribution must play a prominent part in the exercise of the sentencing discretion".<sup>45</sup>

#### *Deterrence*

- 5.48 The courts have commented on the special need for deterrent sentences where young children are killed.<sup>46</sup> This is especially so given their vulnerability to ill treatment and the fact that they depend on their carers for their safety and well-being.<sup>47</sup> The difficulty of detecting neglect or abuse that takes place in the privacy of the home is another reason for emphasising deterrence.<sup>48</sup> In this context, the courts have said that the protection of infants is "of fundamental importance to society".<sup>49</sup>

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41. *R v Woodland* [2001] NSWSC 416 [27]–[30]. See also *R v Hoerler* [2004] NSWCCA 184 [18].

42. *R v Woodland* [2001] NSWSC 416 [28]. See also *R v Hoerler* [2004] NSWCCA 184 [37]–[38], [41].

43. *R v Hoerler* [2004] NSWCCA 184 [41].

44. *R v Byrne* [2001] NSWSC 1164 [39]. See also *R v Howard* [2001] NSWCCA 309 [20].

45. *R v Hoerler* [2004] NSWCCA 184 [42]. See also *R v BW (No 3)* [2009] NSWSC 1043 [181].

46. *R v Diftort* (Unreported, NSWCCA, 17 March 1992) 4-5; *R v Howard* [2000] NSWSC 876 [35].

47. *R v Howard* [2000] NSWSC 876 [35]; *R v Wilkinson* [1999] NSWCCA 248 [26]. See also *R v Pitcher* (Unreported, NSWCCA, 19 February 1996) 5.

48. *R v Wilkinson* (Unreported, NSWSC, 9 April 1998) 21 (Wood CJ at CL).

49. *R v Howard* [2001] NSWCCA 309 [19]; *R v Howard* [2000] NSWSC 876 [35].

- 5.49 The courts have highlighted the obligations of parents and other carers in a variety of circumstances that can result in the death of a child. For example, in one case it was observed:

the courts, whilst recognising that frustration and anger can often arise in a parent because of a child crying or engaging in otherwise normal conduct for a child, cannot be seen to be encouraging violent physical assaults on little children, and, indeed, must seek to deter such action.<sup>50</sup>

- 5.50 In a case involving manslaughter of the offender's daughter by criminal negligence, the Supreme Court observed:

The message which needs to be given ... to any other parent or carer who stands by and allows an infant to be seriously hurt, or who ... ignores obvious signs demanding immediate attention or other intervention for the protection of the child, is that such conduct is not accepted by the community and it will attract significant punishment under the law.

Carers and parents carry a very heavy responsibility to ensure, when children are hurt or sick that they are taken promptly for medical attention, or that other steps are taken to remove them from risk. Parents ... are also expected to maintain the degree of fortitude of mind and will of reasonable persons in their shoes in fulfilling that duty.<sup>51</sup>

### Appropriateness of life imprisonment

- 5.51 While it appears that no parent in NSW has ever been imprisoned for life for murdering their child,<sup>52</sup> there is at least one case where life imprisonment was imposed on an offender for the murder of his young grandchildren.<sup>53</sup>
- 5.52 Sentences of life imprisonment for parents who murder their children is more common in Victoria, where a court may impose a life sentence with or without a parole period.<sup>54</sup> In NSW, a life sentence may not have a non-parole period.
- 5.53 On occasion, Victorian courts have said that those who intentionally kill young children, in the absence of a significant mitigating factor (such as mental illness), ordinarily deserve a life sentence.<sup>55</sup> In particular, Victorian courts have imposed life sentences where the offender killed the child to hurt the other parent.<sup>56</sup>

### Aggravating factors: abuse of trust or authority, and youth of victim

- 5.54 The *Crimes (Sentencing Procedure) Act 1999* (NSW) includes two aggravating factors that are particularly relevant where the homicide victim is a young child:

(k) the offender abused a position of trust or authority in relation to the victim,

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50. *R v Vaughan* (1991) 56 A Crim R 355, 359.

51. *R v Wilkinson* (Unreported, NSWSC, 9 April 1998) 21 (Wood CJ at CL).

52. *R v Merritt* [2004] NSWCCA 19, 59 NSWLR 557 [65]; *SW v R* [2013] NSWCCA 103 [119].

53. *R v Walsh* [2009] NSWSC 764 [40]–[44], [55].

54. [B.43].

55. *DPP v Williamson* [2000] VSC 115 [25]; *R v Quarry* [2005] VSCA 65 [39].

56. *Freeman v R* [2011] VSCA 349 [15]; *R v Farquharson* [2010] VSC 462 [10]–[11], [43]; *Acar v R* [2012] VSCA 8 [47].



- (l) the victim was vulnerable, for example, because the victim was very young ...<sup>57</sup>

- 5.55 A death that occurs in breach of the relationship of trust that exists between a parent or carer and a child is a matter of significant aggravation.<sup>58</sup> The aggravation is more acute where the child is especially vulnerable due to prior mistreatment, for example malnourishment or physical violence.<sup>59</sup>
- 5.56 The Court of Criminal Appeal has said that manslaughter cases involving “a violent attack ... by a person in a position of trust and responsibility upon a defenceless young child” could “be regarded as some form of separate category”.<sup>60</sup>
- 5.57 The aggravating factor relating to the victim’s youth is rarely invoked expressly.<sup>61</sup> This may be because of the danger of “double counting”, given that the individual vulnerability of the victim will affect the objective seriousness of the crime in any case.<sup>62</sup>
- 5.58 These factors apply in addition to the aggravating factors already discussed that may apply if the child is killed in a domestic violence context. These include the fact that:
- the offender has committed crimes in the past
  - the offence was committed in the victim’s home
  - the offence was committed in the presence of a child, and
  - the offence was committed in breach of an apprehended domestic violence order (ADVO) or conditional liberty.<sup>63</sup>

### Mitigating factors: offender themselves a victim of domestic violence, and the conditions of custody

- 5.59 As in the case of domestic violence generally (see above), there are few specific mitigating factors that relate specifically to the killing of young children.

#### *Offender was a victim of domestic violence*

- 5.60 There is some very limited scope for mitigation where the offender was a victim of domestic violence.
- 5.61 In one case, the offender and the 7 week old child she killed had both been subjected to a pattern of domestic abuse, and the offender had tried to leave the relationship on several occasions. The sentencing judge decided a range of factors reduced her moral culpability, including “her subordinate and repressed role in her relationship with [her partner]”.<sup>64</sup> However, these were minor considerations. More

57. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(k)-(l).

58. *R v NLH* [2010] NSWSC 662 [96]; *R v Hoerler* [2004] NSWCCA 184 [42].

59. *R v NLH* [2010] NSWSC 662 [96].

60. *R v Hoerler* [2004] NSWCCA 184 [42].

61. *R v MB* [2017] NSWSC 619 [50].

62. *Drew v R* [2016] NSWCCA 310 [8], [75]–[78].

63. [4.39]–[4.72].

64. *R v NLH* [2010] NSWSC 662 [100].

importantly, the judge decided that the offender's age and mental health meant a deterrent sentence was inappropriate, and imposed a sentence of 4.2 years imprisonment with a non-parole period of 2.5 years.<sup>65</sup>

- 5.62 In another manslaughter case, where the jury had rejected the claim that the offence was committed under duress, the sentencing judge took into account a variety of factors, including that the offender was subject to "battered woman syndrome" and that she was "to a degree under the domination of her husband". However, the judge also found that she failed to seek treatment for her child, despite knowing that she was very ill and her condition was deteriorating. It was also relevant that she helped her husband leave the state and the jurisdiction of the Department of Community Services. Other factors, including that she had agreed to give evidence against her husband and the possibility that she might serve her sentence on protection, resulted in a finding of special circumstances, and a sentence of 5 years' imprisonment with a non-parole period of 2 years.<sup>66</sup>

### *Protective or strict custody*

- 5.63 Courts have traditionally recognised, as a mitigating factor, the hardship that offenders who kill young children endure while in custody.<sup>67</sup> This is because of the fear of reprisals and the need to keep such offenders in protective custody.<sup>68</sup> For example, judges have observed that "every year in protective custody is equivalent to a significantly longer loss of liberty under the ordinary conditions of prison",<sup>69</sup> and that protective custody "can deny to a prisoner the full opportunities for programs and courses available to mainstream prisoners".<sup>70</sup>
- 5.64 The hardship does not arise in all cases, and the courts do not automatically assume that being in protective custody will impose more onerous conditions on an offender.<sup>71</sup> A court will decide the question of hardship based on the available information.<sup>72</sup>

## Possible reform approaches

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- 5.65 The statistics for child murder suggest that such cases tend to attract significantly longer sentences than many other cases of murder. This is perhaps due, at least in part, to the special standard non-parole period for child murder.
- 5.66 On the other hand, even taking into account the wide range of culpability involved in different cases of manslaughter, it seems that sentence lengths for child manslaughter may not adequately reflect the seriousness of these cases. This is especially so in light of the comments that courts have made about the seriousness of such offending in certain circumstances.<sup>73</sup>

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65. *R v NLH* [2010] NSWSC 662 [104], [107].

66. *R v O'Brien* [2003] NSWCCA 121 [71].

67. *R v Thurlow* [2007] NSWSC 1203 [23]; *R v BW (No 3)* [2009] NSWSC 1043 [190]; *R v Marshall* [2003] NSWSC 448 [16].

68. *R v Marshall* [2003] NSWSC 448 [16]; *R v Howard* [2001] NSWCCA 309 [18].

69. *AB v R* [1999] HCA 46, 198 CLR 111 [105].

70. *R v Howard* [2001] NSWCCA 309 [18].

71. *Clinton v R* [2009] NSWCCA 276 [24]; *R v Jarrold* [2010] NSWCCA 69 [27]–[29].

72. *R v Jarrold* [2010] NSWCCA 69 [27].

73. [5.45]–[5.50].

- 5.67 Other jurisdictions have expressed similar concerns about the sentencing patterns for child manslaughter. For example, the Queensland Sentencing Advisory Council found that sentencing patterns for such matters were inadequate, and did not reflect the unique and significant vulnerability of victims who are young children.<sup>74</sup> The Council noted that “[w]hile the factual circumstances establishing manslaughter are diverse”, it:

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.<sup>75</sup>

### Sentencing practice and procedure

- 5.68 Two possible changes to sentencing law, which may ensure sentences reflect the crime of child homicide more appropriately, are to introduce:
- a statutory statement of purposes of child homicide, and
  - new aggravating factors.

#### *Statutory statement of sentencing purposes for child homicide*

- 5.69 The Canadian *Criminal Code* requires a court, when sentencing for an offence involving child abuse, to give “primary consideration to the objectives of denunciation and deterrence of such conduct”.<sup>76</sup> NSW could consider introducing a similar statement of principle.
- 5.70 However, we note that, when sentencing for the manslaughter of children, NSW courts already tend to emphasise retribution and deterrence. Therefore, such a statement might have a limited effect.

#### *New aggravating factors*

- 5.71 Another option is to introduce new statutory aggravating factors in addition to the ones NSW already has. The Canadian *Criminal Code* lists aggravating circumstances that relate to young victims in general, including:

(ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,

(iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation.<sup>77</sup>

- 5.72 In Queensland, the following new aggravating factor was introduced into the *Penalties and Sentences Act 1992* (Qld) in 2019:

In determining the appropriate sentence for an offender convicted of the manslaughter of a child under 12 years, the court must treat the child’s

74. Queensland Sentencing Advisory Council, *Sentencing for Criminal Offences Arising from the Death of a Child*, Final Report (2018) 153.

75. Queensland Sentencing Advisory Council, *Sentencing for Criminal Offences Arising from the Death of a Child*, Final Report (2018) 153.

76. *Criminal Code 1985* (Canada) s 718.01.

77. *Criminal Code 1985* (Canada) s 718.2.

defencelessness and vulnerability, having regard to the child's age, as an aggravating factor.<sup>78</sup>

- 5.73 This reflected a recommendation by the Queensland Sentencing Advisory Council in October 2018.<sup>79</sup>

### New offences

- 5.74 Some jurisdictions have introduced or proposed new offences to achieve a more appropriate sentencing regime and, in some cases, to achieve a greater conviction rate.

#### *Introduction of a child homicide offence*

- 5.75 A specific child homicide offence was introduced in Victoria in 2008:

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.<sup>80</sup>

- 5.76 The offence has a maximum penalty of 20 years' imprisonment (the same as that for manslaughter).
- 5.77 The offence appears to exclude the possibility of manslaughter once its elements are established. That is, behaviour that would otherwise amount to the manslaughter of a child under the age of 6 years must be charged as child homicide, and not as manslaughter.<sup>81</sup> It would also appear, however, that a jury may still return a verdict of manslaughter in cases where murder is charged.<sup>82</sup>
- 5.78 The offence was intended to encourage courts to impose sentences of imprisonment that were closer to 20 years than those typically imposed for manslaughter where a young child is the victim.<sup>83</sup> The new offence would focus on age and vulnerability as key elements, and allow the courts to develop a new approach to such offences, unconstrained by existing practices that apply for manslaughter.<sup>84</sup>
- 5.79 The offence was introduced in response to public dissatisfaction with some sentences imposed for the manslaughter of young children, and to comments by the Victorian Court of Appeal in a 2007 leniency appeal against a sentence imposed for the manslaughter of a 5 month old child. The Court said:

for a long time it has remained common for courts to impose sentences in cases of this kind in the order of something less than half the statutory maximum and thereby to create a situation in which current sentencing practices appear to ill

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78. *Penalties and Sentences Act 1992* (Qld) s 9(9B), inserted by *Criminal Code and Other Legislation Amendment Act 2019* (Qld) s 9.

79. Queensland Sentencing Advisory Council's *Sentencing for Criminal Offences Arising from the Death of a Child*, Final Report (2018) rec 1.

80. *Crimes Act 1958* (Vic) s 5A, inserted by the *Crimes Amendment (Child Homicide) Act 2008* (Vic).

81. *R v Hughes* [2015] VSC 312 [19]–[26].

82. *R v Debresay* [2016] VSC 804, acquitted on appeal on the grounds that the verdict was unsafe and unsatisfactory: *Debresay v R* [2017] VSCA 263.

83. Victoria, *Parliamentary Debates*, Legislative Assembly, 6 December 2007, 4413.

84. Victoria, *Parliamentary Debates*, Legislative Assembly, 6 December 2007, 4413–4414. See also *DPP v Woodford* [2017] VSCA 312 [5]–[6]; *R v Hughes* [2015] VSC 312 [14]–[15].

accord with the requirements of just punishment and specific and general deterrence. It has resulted in sentences which fail to represent the seriousness of the individual circumstances of the cases that come before the court.<sup>85</sup>

- 5.80 The Victorian Court of Appeal has since observed that the new offence retains all the elements of manslaughter with the added requirement that the victim must be less than 6 years old. In one sense, the creation of the new offence was unnecessary, since the age and vulnerability of a victim has always been treated as a significant aggravating factor.<sup>86</sup> However, the Court also said the offence had “one clear legislative purpose”:

By changing the name of the offence from manslaughter to child homicide (and by adding the element of the age of the child), it “uncoupled” sentences for this new offence from any constraints that may have existed with regard to “current sentencing practices” for manslaughter.<sup>87</sup>

- 5.81 In the 10 years since the offence was introduced, there have been only three successful convictions. These convictions resulted in sentences of 9 to 9.5 years’ imprisonment, with non-parole periods of 6 to 6.5 years.<sup>88</sup> In light of the small number of cases, it is impossible to form any view about whether the new offence has changed sentencing patterns.
- 5.82 In Queensland, a private members bill was introduced in 2019, as a response to the Queensland Sentencing Advisory Council’s finding that sentencing for child manslaughter is inadequate.<sup>89</sup> This bill proposed a new offence of child homicide with a mandatory penalty of life imprisonment and a minimum non-parole period of 15 years’ imprisonment. The bill was referred to the Parliamentary Legal Affairs and Community Safety Committee, which recommended the bill not be passed.<sup>90</sup> Submissions were overwhelmingly opposed to the bill, mainly because they opposed mandatory sentencing. The bill ultimately did not pass.

### *Introduction of child neglect offences*

- 5.83 Child neglect offences exist in other jurisdictions to deal with the difficulty of proving child homicide in family violence contexts, for example, where multiple caregivers are involved.
- 5.84 In **Queensland**, a person is guilty of “failure to supply necessities” if they fail in their duty to provide another person with the necessities of life in a way likely to endanger their life or permanently injure their health.<sup>91</sup> Recently, the maximum penalty of the offence was increased from 3 to 7 years’ imprisonment,<sup>92</sup> and the offence was incorporated into the serious violence regime.<sup>93</sup> This means that if a court imposes a sentence of imprisonment between 5 and 7 years, then it has the

85. *DPP v Arney* [2007] VSCA 126 [15]. See also *DPP v Woodford* [2017] VSCA 312 [47].

86. *DPP v Woodford* [2017] VSCA 312 [71]–[72].

87. *DPP v Woodford* [2017] VSCA 312 [73].

88. *DPP v Woodford* [2017] VSC 108; *R v Hughes* [2015] VSC 312; *R v Rowe* [2018] VSC 490.

89. *Criminal Code and Other Legislation (Mason Jett Lee) Amendment Bill 2019* (Qld).

90. Queensland, Legal Affairs and Community Safety Committee, *Criminal Code and Other Legislation (Mason Jett Lee) Amendment Bill 2019*, Report No 36, (2019) 2.

91. *Criminal Code* (Qld) s 324.

92. *Criminal Code and Other Legislation Amendment Act 2019* (Qld).

93. *Criminal Code* (Qld) sch 1 as amended by *Criminal Code and Other Legislation Amendment Act 2019* (Qld) s 30A.

- discretion to declare the person convicted of a “serious violent offence”.<sup>94</sup> Under such a declaration, the offender is only eligible for parole once they have served 80% of the term of imprisonment.<sup>95</sup>
- 5.85 The rationale for increasing this penalty was to reflect the seriousness of the offence, and the community’s abhorrence of such conduct.<sup>96</sup> It was also to achieve consistency with the offences of cruelty to children under the age of 16,<sup>97</sup> and endangering life of children by exposure<sup>98</sup> – both of which have a maximum penalty of 7 years’ imprisonment.<sup>99</sup>
- 5.86 In the **United Kingdom**, a person is guilty of “causing or allowing the death of a child or vulnerable adult” if they:
- are a “member of the same household” as the child, and
  - have frequent contact with the child,  
and they:
  - cause the child’s death, or
  - fail to take reasonable steps to protect the child from the risks of another person’s act that leads to the child’s death, where the first person ought to be aware of and foresee that risk.<sup>100</sup>
- 5.87 The maximum penalty for the offence is 14 years’ imprisonment and a fine.<sup>101</sup> The Sentencing Council for England and Wales has published sentencing guidelines for people convicted of the offence.<sup>102</sup>
- 5.88 One question this offence has raised is how to accommodate situations where the defendant was a victim of domestic abuse, and that abuse affected their ability to respond to the situation. It has been argued that it is not necessary to legislate a “domestic violence defence” to this offence because:
- any evaluation of whether a defendant failed to take steps “requires close analysis of the defendant’s personal position”,<sup>103</sup> which would include the impact of any domestic violence<sup>104</sup>

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94. Queensland Parliament, Legal Affairs and Community Safety Committee, *Criminal Code and Other Legislation Amendment Bill 2019*, Report No 35 (2019) [2.4.1].

95. Queensland Parliament, Legal Affairs and Community Safety Committee, *Criminal Code and Other Legislation Amendment Bill 2019*, Report No 35 (2019) [2.4.1].

96. Queensland, Parliament, *Criminal Code and Other Legislation Amendment Bill 2019*, Report No 35, 56th Parliament, Legal Affairs and Community Safety Committee (2019) [2.4.1].

97. *Criminal Code* (Qld) s 364.

98. *Criminal Code* (Qld) s 326.

99. *Criminal Code* (Qld) s 364, s 326.

100. *Domestic Violence, Crime and Victims Act 2004* (UK) s 5.

101. *Domestic Violence, Crime and Victims Act 2004* (UK) s 5(7).

102. Sentencing Council for England and Wales, *Child Cruelty: Definitive Guideline* (2018) 9–14.

103. *R v Khan* [2009] EWCA Crim 2 [33].

104. S Morrison, “Should there be a Domestic Violence Defence to the Offence of Familial Homicide?” [2013] *Criminal Law Review* 826, 831.

- such a defence would unjustly benefit people who have a history of suffering domestic violence but who are nevertheless culpable for causing or allowing the death of a child,<sup>105</sup> and
- such a defence could imply other equally vulnerable defendants (for example, those with mental illness) are not deserving of a defence specifically designed for them.<sup>106</sup>

5.89 In **South Australia**, a person is guilty of the offence of “criminal neglect” if:

- a child or vulnerable adult (the victim) dies or suffers harm as a result of an act that the defendant committed (or may have committed)
- at the time of the act, the defendant had a duty of care to the victim
- the defendant was, or ought to have been, aware that there was an appreciable risk that harm would be caused to the victim by the act (or course of conduct, where awareness of the details of each act part of the course of conduct is not required)
- the defendant failed to take steps that they could reasonably be expected to have taken in the circumstances to protect the victim from harm, and
- such a failure in the circumstances was so serious that criminal penalty is warranted.<sup>107</sup>

The offence has a maximum penalty of imprisonment for life if the victim dies, and 15 years’ imprisonment in any other case.<sup>108</sup>

5.90 In **New Zealand**, a person is guilty of an offence of “failure to protect child or vulnerable adult” if they:

- are a member of a household or a staff member of a hospital, institution or residence where the victim resides
- have frequent contact with the victim
- know the victim is at risk of death, serious injury or sexual assault as a result of an unlawful act by another person or an omission by another person to perform a legal duty, and
- fail to take reasonable steps to protect the victim from that risk.<sup>109</sup>

5.91 The offence has a maximum penalty of 10 years’ imprisonment.<sup>110</sup>

5.92 In **Hong Kong**, the Law Reform Commission has recommended a new offence of “failure to protect a child or vulnerable person where the child’s or vulnerable

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105. S Morrison, “Should there be a Domestic Violence Defence to the Offence of Familial Homicide?” [2013] *Criminal Law Review* 826, 832–833.

106. S Morrison, “Should there be a Domestic Violence Defence to the Offence of Familial Homicide?” [2013] *Criminal Law Review* 826, 836–837.

107. *Criminal Law Consolidation Act 1935* (SA) s 14.

108. *Criminal Law Consolidation Act 1935* (SA) s 14.

109. *Crimes Act 1961* (NZ) s 195A.

110. *Crimes Act 1961* (NZ) s 195A.

person's death or serious harm results from an unlawful act or neglect".<sup>111</sup> A person would be guilty of the offence if:

- a child under 16 years of age dies or suffers serious harm as a result of an unlawful act or neglect
- the person owed a duty of care to the child, or, was a member of the same household as the child and in frequent contact with the child
- the person ought to have been aware of the risk of serious harm caused to the child by the unlawful act or neglect, and
- the person failed to take reasonable steps in the circumstances to protect the victim from such harm, and such failure in the circumstances was so serious that criminal penalty is warranted.

5.93 The proposed offence would have a maximum penalty of 20 years' imprisonment if the victim dies, and 15 years' imprisonment if the victim suffers serious harm.

### **Question 5.1: Sentencing for child homicide**

- (1) Are the sentences imposed for the killing of children adequate? Why or why not?
- (2) What changes, if any, should be made to penalty provisions that relate to the killing of children?
- (3) Are the current sentencing principles relating to sentencing for the murder or manslaughter of children appropriate? Why or why not?
- (4) How could the current sentencing principles relating to sentencing for the murder or manslaughter of children be changed?
- (5) What other changes could be made to the law to deal more appropriately with cases involving the murder or manslaughter of a child?

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111. Law Reform Commission of Hong Kong, *Causing or Allowing the Death or Serious Harm of a Child or Vulnerable Adult*, Consultation Paper (2019) rec 1.



## 6. Penalties for murder and manslaughter – options for reform

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### In brief

We seek your views on options for reforming the current penalty schemes for murder and manslaughter. Options include adjusting maximum penalties, introducing mandatory minimum penalties, expanding the use of mandatory life imprisonment, and making parole available for some life sentences. Options for non-parole periods include adjusting the standard non-parole periods and applying them to other circumstances. NSW might also want to encourage the accumulation of sentences for serious concurrent offences, develop further ways of assessing risk before offenders are released, and make intensive correction orders available in appropriate cases of manslaughter.

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6.1 This Consultation Paper has so far sought your views on the existing law, and sentencing principles that apply to the offences of murder and manslaughter. In this chapter, we seek your views on specific options for reforming the current penalty schemes. These reform options broadly involve investigating possible:

- penalty types –sentences of imprisonment, non-parole periods (including standard non-parole periods) and alternatives to imprisonment
- durations – minimum or maximum durations, and duration ranges, for each penalty type
- extents of discretion – decision-making about penalty types and durations that is mandatory or discretionary to varying extents, and
- levels of generality – whether they should apply to homicide generally, or to particular kinds of homicide (for example, involving certain victims or other serious offending).

6.2 Throughout this chapter, we compare these reform options to the current penalty schemes in NSW and in other jurisdictions.

## Maximum penalties

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- 6.3 We set out the penalties that apply for the offences of murder and manslaughter in chapter 2. In the case of murder, with a maximum penalty of life imprisonment, there is little room to increase penalties further. We consider questions of mandatory sentences, in particular mandatory life imprisonment, below.
- 6.4 There is more scope to increase penalties in relation to manslaughter, which has a current maximum penalty of 25 years' imprisonment. For example, in the Australian Capital Territory, the maximum penalty for manslaughter has been increased from 20 to 28 years' imprisonment where the victim was pregnant.<sup>1</sup>

### Question 6.1: Maximum penalty for manslaughter

What changes, if any, should be made to the maximum penalty provisions that relate to manslaughter?

## Mandatory minimum penalties

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- 6.5 One reform option could be to introduce mandatory minimum penalties for some circumstances. For example, in Western Australia, murder, when committed in circumstances that constitute aggravated home burglary, attracts a minimum penalty of 15 years' imprisonment.<sup>2</sup>

### Question 6.2: Mandatory minimum penalties

- (1) For what types of homicide, if any, should mandatory minimum penalties be introduced?
- (2) What should the duration of any mandatory minimum penalties be?

## Mandatory life imprisonment

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- 6.6 In NSW, a mandatory sentence of life imprisonment (without parole) is available only for the murder of a police officer in particular circumstances.<sup>3</sup> Before 14 May 1982, a mandatory life sentence was imposed for murder, without exception.<sup>4</sup>
- 6.7 One reform option is to expand mandatory life sentences to cases of murder of other particular victims. For example, mandatory sentencing could be expanded to the categories of murder to which special standard non parole periods attach, such as where the victim is a child, or where the victim is a certain kind of public official, while exercising public or community functions, and where the offence arose because of the victim's occupation or voluntary work.<sup>5</sup>

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1. *Crimes Act 1900* (ACT) s 15, s 48A(1)(a).  
2. *Criminal Code* (WA) s 279(5A).  
3. [2.30]–[2.35]; *Crimes Act 1900* (NSW) s 19B.  
4. [2.6]–[2.10].  
5. See [2.19], [3.33].

- 6.8 An important issue when it comes to mandatory life imprisonment is the availability of parole. We consider the question of parole in the case of mandatory life sentences below.<sup>6</sup>
- 6.9 In 1996, the NSW Law Reform Commission (“NSWLRC”) recommended the repeal of mandatory sentences of life imprisonment for people convicted of certain offences.<sup>7</sup> All but one of the submissions to that review that considered the issue supported the recommendation.<sup>8</sup> The NSWLRC’s reasons for recommending the repeal of these sentences of mandatory life imprisonment were that they:
- apply without regard to relevant circumstances, leading to arbitrary and capricious results
  - remove judicial discretion and interfere with judicial independence, and
  - have a negative effect on the efficiency of the criminal justice system, because offenders are less willing to plead guilty to offences carrying a sentence of mandatory life imprisonment.<sup>9</sup>
- 6.10 As we noted in chapter 2, the existing mandatory sentence for the murder of a police officer is subject to exceptions, including that the offender had a significant cognitive impairment.<sup>10</sup> We welcome submissions on the operation of these exceptions.

### Question 6.3: Mandatory life imprisonment

- (1) Should a sentence of mandatory life imprisonment apply to any other categories of murder? If yes, which ones?
- (2) What changes, if any, should be made to the existing provisions relating to mandatory life imprisonment for the murder of a police officer?

## Life imprisonment with a non-parole period

- 6.11 In NSW, a court exercises discretion to impose a sentence of life imprisonment (without the possibility of parole) for murder in cases of:
- the “worst category” at common law, or
  - extreme culpability, where a life sentence is the only way to meet the community interest in retribution, punishment, protection and deterrence.<sup>11</sup>
- 6.12 Before the reforms on 12 January 1990, it was possible to receive a life sentence with a non-parole period.<sup>12</sup> Since those reforms, there is no possibility of parole

6. [6.29]–[6.33].

7. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) rec 48, [9.7]–[9.17].

8. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [9.16].

9. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [9.11].

10. [2.33]–[2.34].

11. See [3.13]–[3.22]; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 61(1).

12. [2.6]–[2.10]. See also *Crimes (Life Sentences) Amendment Act 1989* (NSW) sch 1 cl 4; *R v Harris* [2000] NSWCCA 469, 50 NSWLR 409 [122].

from sentences of life imprisonment, except by redetermination of mandatory life imprisonment sentences made before 12 January 1990.<sup>13</sup>

- 6.13 NSW is the only Australian jurisdiction where parole is not available for life sentences.<sup>14</sup> Elsewhere in Australia, life sentences are either discretionary or mandatory. We examine each of these options below.

### Discretionary life imprisonment with a non-parole period

- 6.14 In the Australian Capital Territory, Tasmania, Victoria and Western Australia, there is a discretionary sentence of life imprisonment for murder with parole or release on licence available in some form.<sup>15</sup> In Commonwealth criminal law, a sentence of life imprisonment with a non-parole period is also available.<sup>16</sup>
- 6.15 One submission to this review supports maintaining the discretionary determination of life sentences for murder, and making parole available for sentences of life imprisonment.<sup>17</sup>
- 6.16 We note that, in NSW, parole is unavailable for all sentences of life imprisonment, including sentences of life imprisonment for a range of serious sexual offences and drug offences.<sup>18</sup> Because of our terms of reference for this review, we can only consider whether parole should be available for life imprisonment sentences for murder.
- 6.17 If parole were to be available for life imprisonment sentences for murder in NSW, this would raise further questions about:
- what the duration (minimum, maximum or range) of the non-parole period should be (including any standard non-parole period), and
  - whether aspects of the non-parole periods should be mandatory or discretionary.
- 6.18 Previous reviews by the NSW Sentencing Council and the NSWLRC have called for the possibility of a non-parole period with a sentence of life imprisonment.<sup>19</sup> However, the government has not adopted these recommendations.
- 6.19 In 2012, the NSW Sentencing Council recommended that it should be possible for a court to impose a life sentence with a non-parole period, subject to the continuing availability of life sentences without parole where required by existing laws.<sup>20</sup> In

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13. [2.9]–[2.10].

14. See Appendix B.

15. See [B.2], [B.31], [B.43] and [B.57].

16. *Crimes Act 1914* (Cth) s 19AB.

17. The Public Defenders, *Submission PMU13*, 8.

18. *R v Harris* [2000] NSWCCA 469, 50 NSWLR 409 [126]. See, eg, *Drug Misuse and Trafficking Act 1985* (NSW) s 33(1)(a), s 33(3)(a) and *Crimes Act 1900* (NSW) s 61JA, s 66A(1).

19. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) rec 47; NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options*, Report (2012) rec 7; NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [8.33]–[8.37], rec 8.1.

20. NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options*, Report (2012) rec 7.

2013, the NSWLRC adopted the NSW Sentencing Council's recommendation.<sup>21</sup> It considered that such an amendment:

- would bring this aspect of NSW law more into line with other Australian jurisdictions, and
- could potentially result in more life sentences for murder being imposed, especially where the future dangerousness of the offender was unpredictable at the time of sentencing (this assessment of dangerousness could be revisited by the Serious Offenders Review Council and the State Parole Authority at a later time).<sup>22</sup>

6.20 The NSWLRC did not consider that such an amendment should have retrospective effect. It noted it would not prevent parliament from specifying individual offences or circumstances for which the only available sentence is life imprisonment without parole.<sup>23</sup>

6.21 Some of the criticisms of the current natural life provisions in NSW centre around concerns that offenders who are sentenced to life imprisonment are denied the opportunity of release on parole.<sup>24</sup> One submission to this review questions the appropriateness of natural life sentences that disregard the possibility of future rehabilitation.<sup>25</sup>

6.22 The courts have noted the harsh nature of natural life sentences, including the difficulty in predicting the impact of incarceration, and of any rehabilitation programs available in custody, on an offender's future dangerousness.<sup>26</sup> The experience of the courts in redetermining sentences after the 1989 reforms illustrates the unpredictability of rehabilitative outcomes.<sup>27</sup>

6.23 Others have focused on the effect of imprisonment for an indefinite period on an offender's morale, and the difficulty this may pose for their management while in custody.<sup>28</sup> The Canadian Sentencing Commission has argued that parole should be available for long sentences of imprisonment because:

- it would be inhumane to give offenders no opportunity to mitigate their sentences, and
- removing the availability of parole would give them no incentive to conform to institutional rules.<sup>29</sup>

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21. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [8.33]–[8.37], rec 8.1. See also NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options*, Report (2012) [5.148].

22. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [8.34].

23. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [8.36]–[8.37].

24. NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options*, Report (2012) [5.136]–[5.143].

25. NSW Bar Association, *Preliminary Submission PMU06*, 1.

26. *R v Harris* [2000] NSWCCA 469, 50 NSWLR 409 [126].

27. See, eg, *R v Harris* [2000] NSWCCA 469, 50 NSWLR 409 [127]; *R v Crump* (Unreported, NSWCCA, 30 May 1994) 38.

28. *R v Petroff* (Unreported, NSWSC, Hunt J, 12 November 1991) 1–2; Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (1987) 262.

29. Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (1987) 262.

- 6.24 Despite these observations, the NSWLRC and NSW Sentencing Council recommendations accept the availability of life sentences without parole for cases where the law currently requires them. In 2013, the NSWLRC observed that there are cases where a natural life sentence is appropriate.<sup>30</sup>
- 6.25 One submission to this review, in supporting the availability of parole in cases of life imprisonment, observes that, if a life prisoner does not rehabilitate while in custody, they will never be considered suitable for parole and, therefore, will never be released.<sup>31</sup>
- 6.26 The availability of parole for some life sentences would ensure that relevant offenders would be subject to supervision on release and the possibility of return to custody for breach. At present, offenders who are subject to a lengthy term of imprisonment (for example, 30 years' imprisonment or more) can simply wait out their non-parole period and be released without supervision at the end of their term. Such cases currently must then be dealt with through the high risk offender regime.<sup>32</sup>
- 6.27 On the other hand, the availability of parole in some cases of life imprisonment would create further uncertainty for family victims. However, we note that there is already uncertainty involved in parole applications for current determinate sentences and in applications for extended supervision and detention orders that may be made at the end of a sentence. It may be worth considering limitations on the frequency of repeat applications for release on parole if life sentences with parole were to be available.
- 6.28 A reform in this area could be framed not to intrude on existing “life means life” scenarios. Such a proposal could enable life sentences to be imposed in some cases where a lengthy determinate sentence with a non-parole period is already imposed. Such an option would provide for clear denunciation, but would acknowledge cases where there is a chance of rehabilitation.

### **Question 6.4: Discretionary life imprisonment with a non-parole period**

Should it be possible (without removing the possibility of a life sentence without parole) to impose a life sentence with a non-parole period? Why or why not?

### **Mandatory life imprisonment with a non-parole period**

- 6.29 One reform option would be to introduce mandatory life sentencing with discretionary non-parole periods.<sup>33</sup>
- 6.30 In Queensland, South Australia and the Northern Territory, a mandatory sentence of life imprisonment for murder may be imposed with a non-parole period. In these jurisdictions, the form of the non-parole period may differ:

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30. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [8.29].

31. University of Newcastle Legal Centre, *Preliminary Submission PMU11*, 4, citing R Simpson, *Parole: An Overview*, Briefing Paper no 20/99 (NSW Parliamentary Library Research Service, 1999) 6.

32. See [6.62]–[6.63].

33. Homicide Victims Support Group, *Preliminary Submission PMU18*, 6.

- In Queensland, murder sentences attract a mandatory minimum non-parole period of at least 20 years' imprisonment.<sup>34</sup>
  - In South Australia, murder sentences attract “mandatory” minimum non-parole periods of 20 years' imprisonment, but the court can set a longer or shorter non-parole period in certain circumstances.<sup>35</sup>
  - In Northern Territory, a court must set a specified non-parole period (or longer) where the victim is a child, a specified official, or a sexual offence was committed against the victim.<sup>36</sup>
- 6.31 One submission to this review considers that introducing mandatory life sentences for murder with parole available after a mandatory minimum non-parole period is the preferable model. This is because “it allows a full assessment of the perpetrator to ensure that they are fit and able to return to the community, and have undergone an appropriate level of rehabilitation”. The current system means that, where the court imposes a determinate term, an offender may be released at the end of the term, without even attempting rehabilitation.<sup>37</sup>
- 6.32 These reform options raise questions about what the duration (minimum, maximum, range) of the non-parole period should be. One suggestion is that the duration of the mandatory minimum non-parole periods should just be the duration of the relevant current standard non-parole periods.
- 6.33 Another submission to this review expressly opposes mandatory sentences of life imprisonment.<sup>38</sup>

#### **Question 6.5: Mandatory life imprisonment with a non-parole period**

Should there be a mandatory sentence of life imprisonment for murder with a minimum non-parole period? Why or why not?

### **Standard non-parole periods**

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- 6.34 We set out the standard non parole periods that apply to various categories of murder in chapter 2.<sup>39</sup>

### **Adjust existing standard non-parole periods**

- 6.35 One reform option is to change the standard non-parole period for some or all of the categories of murder.
- 6.36 Some submissions to this review do not support an increase to the standard non-parole periods for murder,<sup>40</sup> or suggest there should be no increase unless justified by evidence.<sup>41</sup>

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34. See [B.18]-[B.19].

35. See [B.28].

36. See [B.8].

37. Homicide Victims Support Group, *Preliminary Submission PMU18*, 8–10.

38. K Fitz-Gibbon, J McCulloch, J Maher, *Preliminary Submission PMU17*, 4–5.

39. [2.19].

6.37 Some submissions questioned the value of standard non-parole periods altogether.<sup>42</sup> Another reform option, therefore, would be to remove standard non-parole periods for murder entirely.

6.38 In 2013, the NSW Sentencing Council produced a report on standard non-parole periods and recommended guidelines for setting a standard non-parole period for an offence:

The process for specifying [a standard non-parole period] for [a standard non-parole period] offence should assume as a starting point a non parole period that is 37.5% of the maximum penalty for the offence. The resulting figure can then be reduced or increased (to no more than 50% of the maximum penalty for the offence) as is appropriate, having regard to the following matters:

- (a) the special need for deterrence
- (b) the need to recognise the exceptional harm which the offence may cause
- (c) the potential vulnerability of those who may be victims
- (d) the extent to which the offence may involve a breach of trust or abuse of authority, and
- (e) sentencing statistics and practice, including relevant appellate guidance as to appropriate levels of sentencing for the offence.<sup>43</sup>

6.39 While the percentage range cannot apply for murder (since the maximum penalty is life imprisonment), we support this list of matters that should be considered in deciding whether to increase a standard non-parole period.

### Question 6.6: Existing standard non-parole periods

- (1) Should murder offences continue to attract a standard non parole period? Why or why not?
- (2) Should the existing standard non parole periods for murder be changed? Why or why not?
- (3) If yes, what should they be?

## Standard non-parole periods for other aggravating circumstances

6.40 One reform option is to impose higher standard non-parole periods for murder in particular circumstances, perhaps (as one submission has suggested) “based on a set of scalable or aggravating factors”.<sup>44</sup> For example, the circumstances in which a higher standard non-parole period is available could include when the offender kills a domestic partner or young child.<sup>45</sup>

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40. The Public Defenders, *Preliminary Submission PMU13*, 1.

41. Legal Aid NSW, *Preliminary Submission PMU15*, 1–2.

42. K Fitz-Gibbon, J McCulloch, J Maher, *Preliminary Submission PMU17*, 4.

43. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) rec 4.1.

44. NSW Police Force and Office for Police, *Preliminary Submission PMU10*, 1. See also University of Newcastle Legal Centre, *Preliminary Submission PMU11*, 6.

45. Fighters Against Child Abuse Australia, *Preliminary Submission PMU07*, 9.



- 6.41 One submission to this review suggests murder should attract a life sentence with the possibility of parole, including a maximum standard non-parole period of 35 years for the most serious cases.<sup>46</sup>
- 6.42 Another reform option is to have a higher standard non-parole period for murder committed together with sexual assault or other serious offences. In Western Australia, for example, a court imposing a life sentence for murder must impose a non-parole period of at least 15 years' imprisonment if the murder was committed in the course of an aggravated home burglary.<sup>47</sup> We consider further options for sentencing where a murder is committed together with other serious offences below.<sup>48</sup>

#### Question 6.7: New standard non-parole periods

- (1) Should any new standard non-parole periods be introduced for murder? Why or why not?
- (2) If yes, what should they be and in what circumstances should they operate?

### Other limits on non-parole periods: No body, no parole

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- 6.43 One submission to our review suggests that a person sentenced to prison for murder or manslaughter should be required to reveal the location of the victim's body to be eligible for parole.<sup>49</sup> This principle is often referred to as "no body, no parole".
- 6.44 While the principle is associated with the granting of parole, rather than the setting of a sentence, it may be possible to incorporate the idea into a court's existing discretion to decline to set a non-parole period.<sup>50</sup> Of course, this incentive would only be effective for offenders whose sentence includes a potential period of parole. It also raises the question (which we also raise in chapter 3 in relation to offenders who conceal the location of the body) of whether it is appropriate to apply such a principle to convicted offenders who have pleaded not guilty.<sup>51</sup>

### Dealing with concurrent serious offences

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- 6.45 Sometimes courts must deal with concurrent offending, for example, sexual assault or terrorism, against the victim who they have also killed.
- 6.46 The totality principle becomes an important consideration in such cases. When the court is sentencing an offender for two or more offences, the court is required to impose a sentence reflecting the totality of the criminality arising from those offences.<sup>52</sup> The totality principle operates to prevent an accumulation of sentences

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46. University of Newcastle Legal Centre, *Preliminary Submission PMU11*, 3.

47. *Sentencing Act 1995* (WA) s 90(1)(a)(i).

48. [6.45]–[6.53].

49. NSW Police Force and Office for Police, *Preliminary Submission PMU10*, 1.

50. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 45.

51. [3.81]–[3.86].

52. See, eg, *Nguyen v R* [2016] HCA 17, 256 CLR 656 [64].

resulting in a harsh, disproportionate or “crushing” overall sentence.<sup>53</sup> The courts are also careful to avoid accumulating sentences in a way that would amount to double punishment for the one course of conduct.<sup>54</sup>

- 6.47 The totality principle requires that the overall sentence is a just and appropriate measure of the total criminality involved, while ensuring that it meets the different objectives of sentencing.<sup>55</sup> A court, when sentencing for murder, should not entirely disregard the sentences for the other offences, otherwise the offender would, “in effect only be punished for the murder and not the other offences”.<sup>56</sup> Where several individual sentences, of low severity, are imposed, this may call for a greater degree of accumulation in the total sentence, in order to reflect the offender’s total criminality.<sup>57</sup>
- 6.48 In a recent leniency appeal, the Court of Criminal Appeal considered a case where an offender was sentenced for sexual intercourse with an 11 month old child, having already been convicted of the manslaughter of that child. The sentencing judge had said that the intercourse was “one discrete infliction of harm within the one transaction”<sup>58</sup> resulting in the manslaughter, and considered that a wholly concurrent sentence would have been appropriate, but for the nature of the insult to the child’s body and the community’s abhorrence of such behaviour. The Court of Criminal Appeal said that “the two crimes, in their nature and in the particular way they were committed, were not only very serious, they were also different”. Therefore, it was not appropriate to characterise the criminality of the child sex offence as substantially reflected in the manslaughter offence just because they occurred in the same episode and both involved the infliction of harm to the child.<sup>59</sup>
- 6.49 In another case, an offender was convicted for the murder of a seven year old child and for other offences committed against the victim in the months before the murder (including act of indecency, assault, produce child abuse material and reckless wounding in company). The court imposed an aggregate sentence of 42 years’ imprisonment, with a non-parole period of 31 years and 6 months. It observed that the murder did not warrant the maximum penalty because it was not premeditated and the offender’s intention was limited to causing really serious bodily injury.<sup>60</sup>
- 6.50 One way of dealing with concerns about the inadequacy of sentencing in such cases could be to increase the standard non-parole period or maximum penalty where the murder (or manslaughter) involves the commission of another serious offence against the victim. We considered variations of this sentencing option above.<sup>61</sup>
- 6.51 Another option is to impose minimum non-parole periods for murder committed together with other serious offences. In the Northern Territory, for example, a court must set a minimum non-parole period of 25 years’ imprisonment where the act or omission that caused the victim’s death was part of a course of conduct by the

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53. *R v Holder* [1983] 3 NSWLR 245; *R v MMK* [2006] NSWCCA 272 [12]; *R v Aslett* [2004] NSWSC 1228 [188]; *Azzopardi v R*; [2011] VSCA 372, 35 VR 43 [69]; *R v Yates* [1985] VR 41, 48.

54. *R v Terkmani (No 2)* [2017] NSWSC 1567 [72]–[73].

55. *Postiglione v R* (1997) 189 CLR 295, 306 (McHugh J); *R v KM* [2004] NSWCCA 65 [55]–[56].

56. *R v Maiden* [2000] NSWCCA 519 [10]. See also *R v Purdey* (1993) 31 NSWLR 668, 680.

57. *Nguyen v R* [2016] HCA 17, 256 CLR 656 [64].

58. *R v Toohey* [2019] NSWCCA 182 [34].

59. *R v Toohey* [2019] NSWCCA 182 [58].

60. *R v Maybir (No 8)* [2016] NSWSC 166 [114], [122], [125].

61. [6.40]–[6.42].

offender that included conduct, either before or after the victim’s death, that would have constituted a sexual offence against the victim.<sup>62</sup>

- 6.52 One submission to this review proposes mandatory life with no parole for crimes that involve both sexual assault and murder, observing that “strong sentencing for the crime of rape and murder will send a strong message in society and help to reduce all violent crimes against women”.<sup>63</sup> This submission says that parole should not be available in such cases because rehabilitation cannot be guaranteed and any risk of re-offending is too great.<sup>64</sup> The submission also argues that allowing consideration of parole may retraumatise family members of the victim, especially where some family victims feel it is their responsibility to prevent more offences.<sup>65</sup>
- 6.53 Another reform option is to require sentences for multiple serious offences to be served cumulatively, rather than concurrently. Arguably, when courts reduce the total sentence for multiple serious offences due to the principle of totality and concurrency, this conflicts with judicial statements about the seriousness of offences involving death.<sup>66</sup> Some think that people who commit very serious offences (for example, sex offenders who also murder) should never be released.<sup>67</sup> Others think these types of offenders may have prospects of rehabilitation.<sup>68</sup>

#### Question 6.8: Concurrent serious offences

What new provisions, if any, should apply where a homicide offender has committed one or more additional serious offences?

### Redetermining natural life sentences

- 6.54 Another idea is to make natural life sentences subject to incremental judicial review after a specified period of time.<sup>69</sup> Such an arrangement is arguably consistent with human rights law and principles.<sup>70</sup>
- 6.55 Currently in NSW, the Supreme Court may redetermine a natural life sentence imposed before 1990 and impose another sentence (including a life sentence) with or without a non-parole period.<sup>71</sup>
- 6.56 This scheme could be the model for a scheme to redetermine particular whole of life sentences imposed in future.

62. *Sentencing Act* (NT) s 53A(1)(b), s 53A(3)(b).

63. E Culleton, *Preliminary Submission, PMU14*, 3.

64. E Culleton, *Preliminary Submission, PMU14*, 11, 22, 23.

65. E Culleton, *Preliminary Submission, PMU14*, 4, 27.

66. [3.5].

67. E Culleton, *Preliminary Submission, PMU14*, 4. See also M Morri and J Fife-Yeomans, “Lock Sicko Up for Life” *Daily Telegraph* (Sydney, 5 September 2019) 4; P Duffin, “Vile Serial Predator in Bid to Exit Prison” *Daily Telegraph* (Sydney, 5 September 2019) 5.

68. University of Newcastle Legal Centre, *Preliminary Submission PMU11*.

69. University of Newcastle Legal Centre, *Preliminary Submission PMU11*, 3 referring to J Anderson, “‘Indefinite, Inhumane, Inequitable’ – the Principle of Equal Application of the Law and the Natural Life Sentence for Murder: A Reform Agenda” (2006) 29 *UNSW Law Journal* 139, 163.

70. University of Newcastle Legal Centre, *Preliminary Submission PMU11*, 6.

71. [2.11]; See also *Crimes Act 1900* (NSW) s 19A; *R v Harris* [2000] NSWCCA 469, 50 NSWLR 409 [122].

- 6.57 A similar reform option is provisional sentencing, which would involve imposing a notional sentence initially and finalising it later, according to information collected about the offender while in custody. In 2009, we proposed such a scheme for young offenders.<sup>72</sup> The information might include the offender's prospects of rehabilitation, or a better understanding of the offender's mental health.<sup>73</sup> Such a scheme aims to address the situation where, from the information available at sentencing, the court cannot properly assess the presence or likely development of a mental health issue, or propensity for future dangerousness.<sup>74</sup>
- 6.58 A provisional sentencing scheme has been introduced for young offenders in NSW, but has not yet been used.<sup>75</sup>
- 6.59 It is important to consider family victims of homicide in any proposed scheme for redetermining natural life sentences, especially since applications for redetermination can retraumatise family members.
- 6.60 It is arguable that any scheme introduced, involving reviews of whole of life sentences, should not be applied retrospectively, since it would undermine the settled expectations of the victim's family.<sup>76</sup>

### Question 6.9: Redetermining natural life sentences

In what circumstances, if any, would it be appropriate to have a scheme of judicial redetermination of natural life sentences for murder?

## Managing high risk offenders

- 6.61 A regime for the continuing detention of high risk offenders, after their sentence is complete, provides a possible alternative to life sentences for managing some offenders. In many cases, it may be more desirable to assess risk at the time of potential release, rather than at sentencing.<sup>77</sup>

## Continuing detention or supervision

- 6.62 Since at least the mid-2000s, legislation in NSW, Queensland, Western Australia and Victoria has allowed courts to make continued detention orders or extended supervision orders for serious sex offenders who are a "serious danger" and an "unacceptable risk" to the community.<sup>78</sup> The purposes of these orders are to protect the community, to rehabilitate the offender, or both.<sup>79</sup>

72. NSW Sentencing Council, *Provisional Sentencing for Children*, Report (2009) 9–10.

73. NSW Sentencing Council, *Provisional Sentencing for Children*, Report (2009) 9–10.

74. NSW Sentencing Council, *Provisional Sentencing for Children*, Report (2009) 9–10.

75. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 2A. See also NSW Sentencing Council, *Provisional Sentencing for Children*, Report (2009) 50–62; NSW Law Reform Commission, *Young Offenders*, Report (2005) [11.12]–[11.15].

76. E Culleton, *Preliminary Submission*, PMU14, 17, 24, 29.

77. Legal Aid NSW, *Preliminary Submission* PMU15, 3.

78. NSW Sentencing Council, *High Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012) [4.139]–[4.186].

79. NSW Sentencing Council, *High Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012) [4.141]–[4.142].

- 6.63 Since 2013, it has been possible for the NSW Supreme Court to make a continuing detention order or an extended supervision order for serious violence offenders at the end of their sentence. The Court may make such orders where it is “satisfied to a high degree of probability that the person poses an unacceptable risk of committing another serious offence” if not kept in detention or under supervision.<sup>80</sup>

### Indefinite sentences

- 6.64 An indefinite sentence is a sentence of imprisonment with no specified end-point.<sup>81</sup> Schemes allowing for indefinite sentences generally involve an assessment of the ongoing dangerousness of an offender at the time of initial sentencing, and sometimes require ongoing review of an offender’s risk, only permitting continued detention for as long as an offender remains a danger to the community.<sup>82</sup>
- 6.65 NSW has no scheme for indefinite reviewable detention. Indefinite sentences are available in all other Australian jurisdictions, except for the Australian Capital Territory.<sup>83</sup>
- 6.66 The main reason given in support of indefinite sentencing is that it contributes to community safety by preventing an offender from being released into the community, and thereby preventing their reoffending.<sup>84</sup>
- 6.67 In 1996, the NSWLRC recommended that indefinite sentences should not be introduced. It considered the arguments against indefinite sentences compelling, and in line with stakeholder support.<sup>85</sup> The NSWLRC affirmed its opposition to indefinite sentences in 2005 and in 2013.<sup>86</sup>
- 6.68 Arguments against indefinite sentencing include that:
- Predicting an offender’s dangerousness (a prerequisite for imposing many indefinite sentences) is extremely difficult, and procedural safeguards generally do not properly protect against predictive error. This means that indefinite sentences can be disproportionate, arbitrary and a violation of human rights.
  - Such a regime disproportionately affects some groups of people (for example people that are young, poor, or of a certain racial minority) who are less able to show that they will not re-offend.

80. *Crimes (High Risk Offenders) Act 2006* (NSW) s 5C, s 5D.

81. NSW Sentencing Council, NSW Sentencing Council, *High Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012) [4.5].

82. NSW Sentencing Council, NSW Sentencing Council, *High Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012) [4.6].

83. For example: *Sentencing Act 1991* (Vic) s 18A–18P; *Penalties and Sentences Act 1992* (Qld) 162–179; *Sentencing Act* (NT) s 65–78; *Sentencing Act 2017* (SA) pt 3 div 5; *Sentencing Act 1997* (Tas) s 19–23; *Sentencing Act 1995* (WA) s 98–101; *Criminal Justice Act 2003* (UK) s 224–236; *Criminal Procedure (Scotland) Act 1995* (UK) s 210A–210G; *Sentencing Act 2002* (NZ) s 87–90; *Criminal Code* (Canada) s 752–753. See also NSW Sentencing Council, *High Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012) [4.17]–[4.120].

84. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [10.4]. See also Queensland, *Parliamentary Debates*, Legislative Assembly, 5 November 1992, 150–151; South Australia, *Parliamentary Debates*, Legislative Assembly, 29 May 2018, 581–585; Victoria, *Parliamentary Debates*, Legislative Assembly, 29 April 1993, 1355–1356; *R v Carr* [1996] 1 VR 585; *Chester v R* (1988) 165 CLR 611, 618.

85. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [10.8].

86. NSW Law Reform Commission, *Young Offenders*, Report 104 (2005) [11.11]; NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [4.153].

- Indefinitely detaining a person imposes significant financial costs on the state.
  - Juries may be reluctant to convict a person subject to the potentially harsh punishment of indefinite detention.<sup>87</sup>
- 6.69 In 2012, however, a minority of the NSW Sentencing Council recommended indefinite sentencing for high-risk violent offenders, with appropriate procedural safeguards.<sup>88</sup> Under the proposed scheme, the court would periodically review an indefinite sentence and decide whether it should remain in place, or whether the offender should be discharged to a community reintegration program or parole.<sup>89</sup> This decision would be based mainly on whether the offender continued to pose a risk to the community.<sup>90</sup> If an offender successfully completed a program or parole, they would cease to be subject to any order.<sup>91</sup> The main argument advanced in favour of the proposed indefinite sentencing scheme was that the periodic review mechanism encouraged the offender to engage in appropriate treatment and violence management plans (therefore having a similar effect to parole).<sup>92</sup>
- 6.70 Ultimately, the majority recommendation of the NSW Sentencing Council (a scheme of continuing detention and extended supervision) was implemented, instead of indefinite sentencing.<sup>93</sup> The majority of the Council preferred continuing detention and extended supervision because indefinite sentencing:
- could capture a larger group of offenders, which would make implementation less attractive if a risk averse approach was taken
  - could make offenders less likely to plead guilty if an indefinite sentence was possible, and
  - required inaccurate predictions of an offender's risk to the community at the time of initial sentencing, which could be more accurately assessed closer to their release.<sup>94</sup>
- 6.71 We note that the Supreme Court of Victoria<sup>95</sup> and the United Nations Human Rights Committee<sup>96</sup> have accepted the validity of indefinite sentences with particular restrictions.<sup>97</sup> These restrictions include:

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87. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [10.4]–[10.8].

88. NSW Sentencing Council, *High Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012) [5.49]–[5.56].

89. NSW Sentencing Council, *High Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012) [5.51].

90. NSW Sentencing Council, *High Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012) [5.51].

91. NSW Sentencing Council, *High Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012) [5.51].

92. NSW Sentencing Council, *High Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012) [5.54].

93. NSW, *Parliamentary Debates*, Legislative Assembly, 20 February 2013, 17680–17682. See *Crimes (Serious Sex Offenders) Amendment Act 2013* (NSW).

94. NSW Sentencing Council, *High Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012) [5.84].

95. *R v Moffat* [1998] 2 VR 229.

96. *Rameka v New Zealand*, the Human Rights Committee, UN Doc CCPR/C/79/D/1090/2002 (6 November 2003).

97. NSW Sentencing Council, *High Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012) [4.8]–[4.12].

- regular reviews of indefinite sentences, commencing at least from the end of the finite sentence that would have been imposed
  - an independent body that can conduct the reviews in a judicial fashion, and
  - the continued existence of compelling reasons for detention beyond the date the finite sentence would have ended.<sup>98</sup>
- 6.72 The High Court of Australia has also emphasised the importance of imposing indefinite sentences sparingly and only where there is good reason. The Court has said that an indefinite sentence should be imposed:
- only in exceptional circumstances, since indefinite sentences depart from the principle of proportionality<sup>99</sup>
  - “sparingly” and “then only in clear cases”<sup>100</sup>
  - where a finite term would not fulfil the purpose of community protection,<sup>101</sup> and
  - only where there is comprehensive evidence to support the need for a preventive element to the sentence,<sup>102</sup> in circumstances where there has been “a most careful hearing” in which all relevant material is before the court.<sup>103</sup>
- 6.73 In the jurisdictions where indefinite detention is available, courts have generally been reluctant to impose them, and have done so in only a handful of cases.<sup>104</sup>

#### Question 6.10: Managing high risk offenders

What provision, if any, should be made for the management of high risk of offenders in relation to murder or manslaughter?

### Availability of alternatives to imprisonment for manslaughter

- 6.74 In NSW, intensive correction orders are not available as a sentencing option in manslaughter cases.<sup>105</sup> Since suspended sentences were abolished in 2018,<sup>106</sup> this leaves only lesser non-custodial penalties, such as community correction orders and conditional release orders, to deal with manslaughter cases at the lower end of the scale of criminality.

98. NSW Sentencing Council, *High Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012) [4.9]–[4.14].

99. See *Buckley v R* [2006] HCA 7 [42]; *Fardon v Attorney-General (Qld)* [2004] HCA 46, 223 CLR 575 [215]–[217]; *R v Moffatt* [1998] 2 VR 229, 235.

100. *R v Moffatt* [1998] 2 VR 229, 234, 255.

101. *Buckley v R* [2006] HCA 7 [42].

102. *McGarry v R* [2001] HCA 62, 207 CLR 121 [60]–[67].

103. *Thompson v R* [1999] HCA 43 [19].

104. P Keyzer and B McSherry, “The Preventive Detention of Sex Offenders: Law and Practice” (2015) 38 *UNSW Law Journal* 792, 799–801.

105. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 67(1)(a).

106. *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW) sch 1 cl 14.

- 6.75 In the past 5 years, there have been 2 manslaughter cases where courts have imposed a bond with supervision and 2 cases where courts have imposed suspended sentences.<sup>107</sup>
- 6.76 This raises the question of whether intensive correction orders should be available for less serious cases of manslaughter.<sup>108</sup>

### **Question 6.11: Alternatives to imprisonment for manslaughter**

What alternatives to imprisonment should be available for manslaughter offenders?

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107. [2.50].

108. Legal Aid NSW, *Preliminary Submission PMU15*, 4.



## Appendix A: Preliminary submissions

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- PMU01** Rape and Domestic Violence Services Australia, 22 January 2019
- PMU02** Amani Haydar, 8 February 2019
- PMU03** Sex Workers Outreach Project, 6 March 2019
- PMU04** NSW Department of Family and Community Services, 7 March 2019
- PMU05** Women's Legal Service NSW, 7 March 2019
- PMU06** NSW Bar Association, 7 March 2019
- PMU07** Fighters Against Child Abuse Australia, 8 March 2019
- PMU08** Domenic Pezzano, 8 March 2019
- PMU09** Leah Findlay, Professor Julie Stubbs, Professor Alex Steel and Professor Luke McNamara, 8 March 2019
- PMU10** NSW Police Force and Office for Police, 8 March 2019
- PMU11** University of Newcastle Legal Centre, 8 March 2019
- PMU12** Australia's National Research Organisation for Women's Safety (ANROWS), 8 March 2019
- PMU13** The Public Defenders, 9 March 2019
- PMU14** Eileen Culleton, 10 March 2019
- PMU15** Legal Aid NSW, 14 March 2019
- PMU16** Domestic Violence NSW, 15 March 2019
- PMU17** Dr Kate Fitz-Gibbon, Professor Jude McCulloch and Professor JaneMaree Maher, 15 March 2019
- PMU18** Homicide Victims' Support Group (Aust) Inc, 28 March 2019
- PMU19** Office of the Director of Public Prosecutions, 14 May 2019



## Appendix B: Other Australian jurisdictions - Murder

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### Australian Capital Territory

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#### Definition

- B.1 In the Australian Capital Territory, a person commits murder if they cause the death of another person:
- intending to cause the death of any person, or
  - with reckless indifference to the probability of causing the death of any person, or
  - intending to cause serious harm to any person.<sup>1</sup>

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1. *Crimes Act 1900* (ACT) s 12(1).

## Relevant sentencing provisions

- B.2 A court sentencing for murder has the discretion to impose a sentence of life imprisonment or a lesser sentence.<sup>2</sup> There is no parole available for a life sentence,<sup>3</sup> but release on licence is possible after 10 years.<sup>4</sup>
- B.3 A court must set a non-parole period for any stated term of more than 1 year, unless it is not appropriate because of nature of the offence or the offender’s antecedents.<sup>5</sup>

## Statistics

- B.4 We analysed the 11 adult offenders sentenced for murder in the Australian Capital Territory Supreme Court in the 6.5 years from July 2012 to December 2018.
- B.5 In 3 cases (28%), the victim was the intimate partner (or former partner) of the offender. In a further 2 cases (18%), the victim was in another domestic or family relationship.
- B.6 Overall, domestic violence related murders received a higher average sentence.

**Table B.1: Sentences for murder, Australian Capital Territory, July 2012-December 2018**

	Type of sentence (Number)			Determinate sentence length (Years)			
	Total	Natural life sentence	Determinate sentence with parole	Head sentence		Non-parole period	
				Mean	Median	Mean	Median
DV	6	1	5	26.2	30	21	21
Non-DV	5	0	5	20.3	21.2	15.4	17.5
All	11	1	10	23.2	22	18.2	18

Source: Australian Capital Territory Sentencing Database

Note: A number of non-parole periods were aggregated with sentences for other offences. The head sentences relate only to the murder offence.

## Northern Territory

### Definition

- B.7 In the Northern Territory, a person commits murder if they engage in conduct that causes the death of another person with intent to cause death or serious harm to a person.<sup>6</sup>

2. Crimes Act 1900 (ACT) s 12(2); Crimes (Sentencing) Act 2005 (ACT) s 32(1)–(2).

3. Crimes (Sentencing) Act 2005 (ACT) s 65(5).

4. Crimes (Sentence Administration) Act 2005 (ACT) s 288, s 290.

5. Crimes (Sentencing) Act 2005 (ACT) s 65(1)–(4).

6. Criminal Code (NT) s 156(1).

## Relevant sentencing provisions

- B.8 The penalty for murder is mandatory life imprisonment.<sup>7</sup> A court may set a non-parole period,<sup>8</sup> but may refuse to set one (amounting to a natural life sentence) if satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, protection and deterrence can only be met by not doing so.<sup>9</sup>
- B.9 The court must set a non-parole period of 25 years where:
- the victim is a specified official
  - the victim is a child under 18 years, or
  - a sexual offence was committed against the victim.<sup>10</sup>
- B.10 The court may set a non-parole period of more than 25 years if satisfied of objective or subjective factors affecting the relative seriousness of the offence.<sup>11</sup>
- B.11 For all other cases, there is a standard non-parole period of 20 years that applies to an offence in the middle of the range of objective seriousness.<sup>12</sup> The court may fix:
- **a longer non-parole period** if satisfied that it is warranted because of any objective or subjective factors affecting the relative seriousness of the offence; or
  - **a shorter non-parole period** if satisfied there are exceptional circumstances that justify it.<sup>13</sup>
- B.12 In any case, the court may refuse to set a non-parole period if to do so would be inappropriate because of the nature of the offence, the offender's past history or the circumstances of the particular case.<sup>14</sup>
- B.13 Even where they set a non-parole period, judges appear to have the practice of recommending that offenders be released on parole after a lesser period if they are of good behaviour in prison.<sup>15</sup>

## Statistics

- B.14 We analysed the 18 adult offenders sentenced for murder in the Northern Territory in the 9 years from 1 January 2010 to 31 December 2018.
- B.15 In 9 cases (50%), the victim was the female intimate partner (or former partner) of a male offender. In one other case, the victim was a sister of the offender.

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7. *Criminal Code* (NT) s 157(1)–(2).

8. *Sentencing Act* (NT) s 53(1).

9. *Sentencing Act* (NT) s 53A(5).

10. *Sentencing Act* (NT) s 53A(1)(b), s 53A(3).

11. *Sentencing Act* (NT) s 53A(4).

12. *Sentencing Act* (NT) s 53A(1)(a), s 53A(2).

13. *Sentencing Act* (NT) s 53A(4), s 53A(6).

14. *Sentencing Act* (NT) s 53A(5).

15. *Grieve v R* [2014] NTCCA 2 [36]–[37]; *Sentencing Act* (NT) s 115(1)–(2).

## CP Homicide

- B.16 Overall, domestic violence related murders received a slightly lower average sentence – although all categories had a median non-parole period of 20 years' imprisonment.

**Table B.2: Sentences for murder, Northern Territory, January 2010-December 2018**

	Type of sentence (Number)			Non-parole period length (Years)	
	Total	Natural life sentence	Life sentence with parole	Non-parole period	
				Mean	Median
DV	10	0	10	20.4	20
Non-DV	8	0	8	21.4	20
All	18	0	18	20.8	20

Source: Northern Territory, Department of Attorney General and Justice, Courts Library

## Queensland

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### Definition

- B.17 In Queensland, a person is guilty of murder if they unlawfully kill another person and:
- they intend to cause the death of a person
  - they intend to inflict grievous bodily harm on a person
  - the death is caused by an act for an unlawful purpose that is likely to endanger human life
  - they intend to cause grievous bodily harm to facilitate a crime for which the person may be arrested without warrant or to facilitate the flight of such an offender
  - the death is caused by administering any stupefying or overpowering thing to facilitate a crime for which the person may be arrested without warrant or to facilitate the flight of such an offender, or
  - the death is caused by stopping the person's breath to facilitate a crime for which the person may be arrested without warrant or to facilitate the flight of such an offender.<sup>16</sup>

### Relevant sentencing provisions

- B.18 The penalty for murder is mandatory life imprisonment.<sup>17</sup>

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16. *Criminal Code* (Qld) s 302(1).

17. *Criminal Code* (Qld) s 305(1).

B.19 No whole of life sentence is available in Queensland. The court must set a minimum non-parole period of:

- 30 years if the offender has previously been convicted of another murder,<sup>18</sup> or
- 25 years if the victim is a police officer.<sup>19</sup>

B.20 A parole eligibility date of 20 years applies in any other case.<sup>20</sup> General provisions allow the court to fix a parole eligibility date that is longer than 20 years.<sup>21</sup> Such an increase in the parole eligibility date is rarely ordered.<sup>22</sup> The Queensland Court of Appeal has observed that:

because the mandatory sentence for murder is life imprisonment, a murderer who is released on parole will nevertheless remain a prisoner for life. Further, because the mandatory non-parole period of 20 years is so long, it would be a rare case in which a judge would be able to predict that no process of rehabilitation would render a prisoner suitable for consideration for parole until after a lengthier period. Nor can the additional period of imprisonment sensibly serve the purpose of deterrence if 20 years imprisonment does not.

But the purpose of punishment is not just to prevent further criminal acts by deterrence or rehabilitation. After all, many convicted murderers have killed despite having the actual penalty in mind. Most have killed impetuously and are extremely unlikely ever to kill again or, indeed, even to reoffend. Yet the punishment for murder is still mandatory life imprisonment in all cases.

...

In cases of murder, the element of denunciation is usually fully served by the imposition of a mandatory term of imprisonment for life with a minimum parole eligibility date of 20 years. However, cases may arise when more is required.<sup>23</sup>

B.21 When imposing a life sentence for a relevant murder, sentencing judges generally do not refer to the parole eligibility date. However, they do state the number of days already served in custody, since this is necessary for calculating the first possible release date.

B.22 All offences are subject to exceptional circumstances parole.<sup>24</sup> Exceptional circumstances parole, however, appears intended for cases of terminal illness in an offender or a person dependent on the offender for care.<sup>25</sup>

B.23 Instead of imposing a determinate term, the court may instead, on its own motion or on application by the prosecution, impose an indefinite sentence.<sup>26</sup> It has been observed that courts impose an indefinite sentence only in exceptional cases.<sup>27</sup>

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18. *Criminal Code* (Qld) s 305(2); *Corrective Services Act 2006* (Qld) s 181(2)(a).

19. *Criminal Code* (Qld) s 305(4); *Corrective Services Act 2006* (Qld) s 181(2)(b).

20. *Corrective Services Act 2006* (Qld) s 181(2)(c).

21. *Penalties and Sentences Act 1992* (Qld) s 160D(3)–(4); *R v Appleton* [2017] QCA 290 [7].

22. *R v Maygar* [2007] QCA 310 [65]; *R v Sica* [2013] QCA 247, [2014] 2 Qd R 168 [162]; *R v Cowan* [2015] QCA 87, [2016] 1 Qd R 433 [128]; *R v Taylor* (Unreported, QSC, Burns J, 24 May 2016); *R v Abell* (Unreported, QSC, Douglas J, 8 October 2013).

23. *R v Appleton* [2017] QCA 290 [38]–[39], [43].

24. *Corrective Services Act 2006* (Qld) s 176(1).

25. See, eg, *Attorney-General (Queensland) v Friend* [2011] QCA 357 [56]; Explanatory Note, *Corrective Services Bill 2006* (Qld) 141.

### Statistics

- B.24 In 2005–06 to 2015–16, 195 offenders were sentenced for murder as the most serious offence.<sup>28</sup>
- B.25 In this period, 57 victims (29.2%) were former or current intimate partners, and a further 17 victims (8.7%) were family members.<sup>29</sup>
- B.26 We have not further analysed the data for sentences for murder given the mandatory life sentence and the near mandatory non-parole period of 20 years.

## South Australia

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### Definition

- B.27 In South Australia, murder is defined by common law. A person is guilty of murder if they cause<sup>30</sup> the death of another person with:
- an intention to kill<sup>31</sup>
  - an intention to inflict grievous bodily harm,<sup>32</sup> or
  - knowledge that their conduct would probably cause death (or grievous bodily harm).<sup>33</sup>

### Relevant sentencing provisions

- B.28 The penalty for murder is a mandatory life sentence.<sup>34</sup> The court may also set a non-parole period.<sup>35</sup> However, it may decline to set a non-parole period for a life sentence or a lesser term if setting one would be inappropriate because of:
- the gravity of the offence or its circumstances
  - the offender's criminal record
  - the offender's behaviour during a previous period of supervision, or
  - any other circumstance.<sup>36</sup>
- B.29 A sentence of life imprisonment for murder is subject to a mandatory minimum non-parole period of 20 years.<sup>37</sup> A mandatory minimum non-parole period is the non-

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26. *Criminal Code* (Qld) s 305(1); *Penalties and Sentences Act 1992* (Qld) s 163(1).

27. *R v Hatten* [2007] QCA 46 [14]; *R v Hatten* [2008] QSC 320 [31].

28. Queensland Sentencing Advisory Council, *Sentencing Spotlight on Murder* (v 1.1, 2017) 4.

29. Queensland Sentencing Advisory Council, *Sentencing Spotlight on Murder* (v 1.1, 2017) 5.

30. *Royall v R* (1991) 172 CLR 378, 398.

31. *R v Gardiner* [2013] SASCFC 53, 117 SASR 143 [47].

32. *R v Perks* (1986) 41 SASR 335.

33. *Pemble v R* (1971) 124 CLR 107, 119; *Wilson v R* (1992) 174 CLR 313.

34. *Criminal Law Consolidation Act 1935* (SA) s 11.

35. *Sentencing Act 2017* (SA) s 47(1)(a).

36. *Sentencing Act 2017* (SA) s 47(5)(e).



parole period for an offence at the lower end of the range of objective seriousness.<sup>38</sup> A court may depart from the mandatory minimum non-parole period in certain cases. It may impose:

- **a longer non-parole period** if satisfied it is warranted because of any objective or subjective factors affecting the relative seriousness of the offence<sup>39</sup>
- **a shorter non-parole period** if satisfied particular special reasons exist for doing so, having regard to the following matters:
  - the fact that the conduct or condition of the victim substantially mitigated offender’s conduct
  - the fact that there was a guilty plea, and circumstances surrounding that plea, and
  - the degree to which the offender cooperated with authorities, and the circumstances surrounding, and likely consequences of, any such cooperation.<sup>40</sup>

## Tasmania

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### Definition

B.30 In Tasmania, culpable homicide is murder if the offender carries it out:

- with an intention to cause the death of any person
- with an intention to cause “bodily harm which the offender knew to be likely to cause death in the circumstances”
- by any unlawful act or omission which the offender knew or ought to have known to be likely to cause death in the circumstances
- with an intention to inflict grievous bodily harm, or by administering any stupefying thing, or by wilfully stopping any person’s breath, to facilitate the commission of, or flight after, piracy; murder; escape or rescue from prison or lawful custody; resisting lawful apprehension; rape; forcible abduction; robbery with violence; robbery; burglary; or arson.<sup>41</sup>

### Relevant sentencing provisions

B.31 The penalty for murder is a discretionary life sentence or such other term as the court determines.<sup>42</sup> In either case, the court may set a non-parole period.<sup>43</sup>

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37. *Sentencing Act 2017* (SA) s 47(5)(b).

38. *Sentencing Act 2017* (SA) s 48(1).

39. *Sentencing Act 2017* (SA) s 48(2)(a).

40. *Sentencing Act 2017* (SA) s 48(2)(b), s 48(3).

41. *Criminal Code* (Tas) s 157(1)(2).

42. *Criminal Code* (Tas) s 158.

43. *Sentencing Act 1997* (Tas) s 17(2), s 18(1).

## CP Homicide

- B.32 The court may also order that an offender is not eligible for parole, having regard to such matters as it considers necessary or appropriate, including:
- the nature and circumstances of the offence
  - the offender's antecedents or character, and
  - any other sentence to which the offender is subject.<sup>44</sup>
- B.33 If the court imposes a term less than life, the non-parole period must be not less than half the sentence.<sup>45</sup>

## Statistics

- B.34 We analysed the 26 murder cases sentenced in Tasmania in the 10 years from July 2007 to June 2017.

**Table B.3: Sentences for murder, Tasmania, July 2007-June 2017**

	Type of sentence (Number)				Determinate sentence length (Years)			
	Total	Natural life sentence	Life sentence with parole	Determinate sentence with parole	Head sentence		Non-parole period	
					Mean	Median	Mean	Median
DV	10	0	1	9	25.8	23	14.5	13.5
Non-DV	16	1	2	13	25.4	21	14.3	12
All	26	1	3	22	25.5	21.5	14.4	12.25

- B.35 In 6 cases (23%), the victim was an intimate partner, a former partner or a current partner of a former partner. In a further 3 cases (12%), the victim was in some other form of domestic or family relationship.
- B.36 Only 3 of the 22 determinate sentences received the minimum non-parole period of 50% of the head sentence. The 19 other determinate sentences received non-parole periods ranging from 52.4% to 62.9% of the head sentence.
- B.37 Overall, domestic violence related murders received a slightly higher average sentence.
- B.38 By comparison, the Tasmanian Supreme Court's published sentencing statistics covering the period from 2001 to 2014 are divided according to whether the murder was sentenced as a single count or as part of multiple offence count.
- B.39 In 2001–2014, there were 32 cases where murder was sentenced in Tasmania as a single count. All were sentenced to a term of imprisonment. The head sentences (excluding life) ranged from 15 years to 35 years with a mean of 20.7 years and a median of 20 years. In 31 cases, a non-parole period was also imposed. The non-

44. *Sentencing Act 1997* (Tas) s 17(4), s 18(2).

45. *Sentencing Act 1997* (Tas) s 17(3). See also *Corrections Act 1997* (Tas) s 68.

parole periods ranged from 7.5 years to 25 years, with a mean of 12.6 years and median of 11.5 years.<sup>46</sup>

- B.40 In the same period, 15 cases of murder were sentenced as part of multiple offence counts. All were sentenced to a term of imprisonment. The head sentences ranged from 6 years to 48 years with a mean of 30.5 years and a median of 32 years. All received a non-parole period. The non-parole periods ranged from 12 months to 28 years, with a mean of 16.4 years and a median of 17 years.<sup>47</sup>

## Victoria

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### Definition

- B.41 In Victoria, murder is defined by common law. A person is guilty of murder if they voluntarily<sup>48</sup> cause, by act<sup>49</sup> or omission,<sup>50</sup> the death of another person, with an intention to:
- kill<sup>51</sup>
  - inflict really serious injury,<sup>52</sup> or
  - perform an act they foresee will probably result in death or really serious injury.<sup>53</sup>
- B.42 There is also a provision for statutory murder, which states that a person is liable to be convicted of murder, as though they had killed the victim intentionally, if they unintentionally cause the death of the victim by “an act of violence done in the course or furtherance of a crime the necessary elements of which include violence for which a person upon first conviction may ... be sentenced to level 1 imprisonment (life) or to imprisonment for a term of 10 years or more”.<sup>54</sup>

### Relevant sentencing provisions

- B.43 The penalty for murder is a discretionary life sentence or such other term as the court fixes.<sup>55</sup> In either case, the court may set a non-parole period.<sup>56</sup> A court may not fix a non-parole period if it considers it inappropriate because of the nature of the offence or the offender’s past history.<sup>57</sup>

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46. Tasmania, Supreme Court Sentencing Statistics: Murder <<http://www.sentencingcouncil.tas.gov.au/statistics/supremecourt>> (accessed 21 August 2019).

47. Tasmania, Supreme Court Sentencing Statistics: Murder <<http://www.sentencingcouncil.tas.gov.au/statistics/supremecourt>> (accessed 21 August 2019).

48. *R v AJS* [2005] VSCA 288, 12 VR 563 [23].

49. *R v Pagett* (1983) 76 Cr App R 279, 288; *Royall v R* (1990) 172 CLR 378, 398.

50. *R v Taber* [2002] NSWSC 1239, 56 NSWLR 443.

51. *Pemble v R* (1971) 124 CLR 107, 128–129; *R v Crabbe* (1985) 156 CLR 464.

52. *R v Schaeffer* [2005] VSCA 306, 13 VR 337; *R v Crabbe* (1985) 156 CLR 464.

53. *Nydam v R* [1977] VR 430, 437.

54. *Crimes Act 1958* (Vic) s 3A(1).

55. *Crimes Act 1958* (Vic) s 3(1).

56. *Sentencing Act 1991* (Vic) s 11(1).

57. *Sentencing Act 1991* (Vic) s 11(1).

- B.44 When imposing a life sentence with a non-parole period, a court must impose a non-parole period of at least 30 years unless it considers that it is in the interests of justice not to do so.<sup>58</sup>
- B.45 For a term other than life, standard sentences apply, which are:
- 30 years' imprisonment if the victim was a custodial officer or emergency worker on duty,<sup>59</sup> and
  - 25 years' imprisonment in any other case.<sup>60</sup>
- B.46 A standard sentence represents a sentence for an offence that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness.<sup>61</sup>
- B.47 Once the term is set, the non-parole period must be:
- at least 70% of a term of 20 years or more, or
  - at least 60% of a term of less than 20 years.<sup>62</sup>
- B.48 The standard sentence provisions replace the baseline offence provisions that were introduced in 2014.<sup>63</sup>
- B.49 Finally, in certain exceptional circumstances, the court may decide not to impose a determinate sentence but rather impose an indefinite sentence. This may occur if the court is satisfied, to a high degree of probability (the onus being on the prosecution), that the offender is a serious danger to the community because of:
- their character, past history, age, health or mental condition, and
  - the nature and gravity of the serious offence, and
  - any special circumstances.<sup>64</sup>

## Statistics

- B.50 We analysed the 70 murder cases sentenced in Victoria in the 3 years from January 2016 to December 2018.

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58. *Sentencing Act 1991* (Vic) s 11A(4)(a).

59. *Crimes Act 1958* (Vic) s 3(2)(a).

60. *Crimes Act 1958* (Vic) s 3(2)(b).

61. *Sentencing Act 1991* (Vic) s 5A(1).

62. *Sentencing Act 1991* (Vic) s 11A(4)(b)–(c).

63. *Sentencing Act 1991* (Vic) s 11A, inserted by *Sentencing Amendment (Sentencing Standards) Act 2017* (Vic) s 22.

64. *Sentencing Act 1991* (Vic) s 18A–18B.

Table B.4: Sentences for murder, Victoria, January 2016-December 2018

	Type of sentence (Number)				Determinate sentence length (Years)			
	Total	Natural life sentence	Life sentence with parole	Determinate sentence with parole	Head sentence		Non-parole period	
					Mean	Median	Mean	Median
DV	21	0	2	19	24	23	19.2	18
Non-DV	49	1	5	43	21.5	21	17.2	17
All	70	1	7	62	22.3	22	17.8	17.5

- B.51 In 13 cases (19%), the victim was an intimate partner or former partner of the offender. In another 8 cases (11%), the victim was in another domestic or family relationship with the offender. Overall, domestic violence related murders received a slightly higher average head sentence and non-parole.
- B.52 Data published by the Victorian Sentencing Advisory Council shows that, in the 5 years from 1 July 2011 to 30 June 2016, 106 offenders were sentenced where murder was the principal offence. All of these offenders received a sentence of imprisonment. 11 received a life sentence.
- B.53 The head sentences ranged from 10.75 years to 35 years, with a median term of 21 years. Of the 106 offenders sentenced to imprisonment, 101 received a non-parole period. The non-parole periods ranged from 8 years to 38 years, with a median term of 17 years.<sup>65</sup>

## Western Australia

### Definition

- B.54 In Western Australia, a person is guilty of murder if they unlawfully kill another person and:
- they intend to cause a person's death (referred to in WA as "wilful murder")
  - they intend to cause a person "a bodily injury of such a nature as to endanger, or be likely to endanger", a person's life (referred to in WA as "murder"), or
  - the death is caused by an act done for an unlawful purpose and which is likely to endanger human life.<sup>66</sup>

65. Victoria, Sentencing Advisory Council, SACStat Offence Summary: Murder (1 July 2011 – 30 June 2016).

66. *Criminal Code (WA)* s 279(1).

## Relevant sentencing provisions

- B.55 The penalty for murder is life imprisonment, unless criteria for a lesser sentence (maximum 20 years' imprisonment) are met.<sup>67</sup>
- B.56 If imposing a life sentence, the court may order that the offender never be released if it is necessary to do so to meet the community's interest in punishment and deterrence, taking into account only:
- the circumstances of the commission of the offence, and
  - any aggravating factors.<sup>68</sup>
- B.57 If the court sets a non-parole period when imposing a life sentence, the court must impose a non-parole period of at least:
- 15 years, if the murder was committed in the course of an aggravated home burglary, or
  - 10 years, in any other case.<sup>69</sup>
- B.58 The court may impose a maximum term of imprisonment of 20 years if:
- life imprisonment would be clearly unjust, given the circumstances of the offence and the person, and
  - the person is unlikely to be a threat to the safety of the community when released from imprisonment.<sup>70</sup>
- B.59 The sentence must be at least 15 years' imprisonment in the case of aggravated home burglary.<sup>71</sup>
- B.60 In setting a sentence of imprisonment other than life imprisonment, the court may order that the offender not be eligible for parole because of at least one of the following four factors:
- the offence is serious
  - the offender has a significant criminal record
  - the offender, when released from custody under a release order made previously, did not comply with the order, or
  - any other reason the court considers relevant.<sup>72</sup>
- B.61 If the court decides that an offender should be eligible for parole, eligibility for consideration arises automatically:
- for sentences of 4 years' imprisonment or less, when the offender has served half the term, and

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67. *Criminal Code* (WA) s 279(4).

68. *Sentencing Act 1995* (WA) s 90(1)(b), s 90(3)–(4).

69. *Sentencing Act 1995* (WA) s 90(1)(a).

70. *Criminal Code* (WA) s 279(4).

71. *Criminal Code* (WA) s 279(5A).

72. *Sentencing Act 1995* (WA) s 89(4).

- for sentences of more than 4 years' imprisonment, when the offender has served 2 years less than the term.<sup>73</sup>
- B.62 If the court decides not to make a parole eligibility order, the court may also decide that the offender is to be imprisoned indefinitely. The court must not order indefinite imprisonment unless it is satisfied on the balance of probabilities that the offender, if released from custody, would be a danger to society, or a part of it, for at least one of the following reasons:
- the exceptional seriousness of the offence
  - the risk that the offender will commit other indictable offences
  - the character of the offender, and in particular:
    - any psychological, psychiatric or medical condition, and
    - the number and seriousness of the offender's past convictions, and
  - any other exceptional circumstances.<sup>74</sup>
- B.63 In the case of both life sentences and indefinite sentences, the Governor may only make a parole order if the Prisoners Review Board has made the requisite reports.<sup>75</sup>

### Statistics

- B.64 In Western Australia, in the period from 2010–11 to 2016–17, 64 offenders were sentenced for murder as their most serious offence.<sup>76</sup> No other data is available.

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73. *Sentencing Act 1995* (WA) s 93(1).

74. *Sentencing Act 1995* (WA) s 98.

75. *Sentence Administration Act 2003* (WA) s 25(1A), s 27(1).

76. Western Australia, Department of the Attorney General, *Report on Criminal Cases in the Supreme Court of Western Australia 2006/07 to 2010/11* (2013) 4.





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### Australian Capital Territory

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#### Definition

- c.1 In the Australian Capital Territory, an unlawful homicide that is not murder shall be taken to be manslaughter.<sup>1</sup>
- c.2 Partial defences to murder that are available in the Australian Capital Territory include provocation<sup>2</sup> and diminished responsibility.<sup>3</sup>

#### Relevant sentencing provisions

- c.3 The maximum penalties for manslaughter are:

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1. *Crimes Act 1900* (ACT) s 15(1).
  2. *Crimes Act 1900* (ACT) s 13(1).
  3. *Crimes Act 1900* (ACT) s 14(1)-(3).

- 28 years' imprisonment where the victim is pregnant and harm is caused to the pregnancy; and
  - 20 years' imprisonment in all other cases.<sup>4</sup>
- C.4 A court must set a non-parole period for terms of imprisonment of one year or longer, unless it would be inappropriate to set a non-parole period because of the nature of the offence or offences and the offender's antecedents.<sup>5</sup>

### Statistics

- C.5 In the 6.5 years from 1 July 2012 to 31 December 2018, only 3 offenders were sentenced in the ACT Supreme Court for manslaughter.<sup>6</sup> In 2 cases, the manslaughter was on the basis of diminished responsibility and in the third case, unlawful and dangerous act. Two offenders were in a domestic relationship with their victims. None were intimate partners.
- C.6 The head sentences imposed ranged from 9.7 years to 12 years' imprisonment, and the non-parole periods from 5 years to 6.8 years.

## Northern Territory

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### Definition

- C.7 In the Northern Territory, a person commits manslaughter if the person:
- engages in conduct that causes death, and
  - is reckless or negligent as to causing death.<sup>7</sup>
- C.8 Partial defences to murder that are available in the NT include provocation<sup>8</sup> and diminished responsibility.<sup>9</sup>

### Relevant sentencing provisions

- C.9 The maximum penalty for manslaughter is life imprisonment.<sup>10</sup>
- C.10 When imposing a life sentence or any lesser sentence of imprisonment of one year or longer, a court must impose a non-parole period, unless it would be inappropriate because of the:
- nature of the offence
  - past history of the offender, or

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4. *Crimes Act 1900* (ACT) s 15(2)-(3).

5. *Crimes (Sentencing) Act 2005* (ACT) s 65(1)-(4).

6. *R v Woutersz* [2018] ACTSC 44; *R v Ulrich* [2018] ACTSC 345; *R v Navin* [2016] ACTSC 109.

7. *Criminal Code* (NT) s 160.

8. *Criminal Code* (NT) s 158.

9. *Criminal Code* (NT) s 159.

10. *Criminal Code* (NT) s 161.

- circumstances of the particular case.<sup>11</sup>
- C.11 The non-parole period, if imposed, must be 8 months or more and not less than 50% of the term of imprisonment.<sup>12</sup>

## Statistics

- C.12 We analysed the 50 adult offenders sentenced for manslaughter in the Northern Territory in the 9 years from 1 January 2010 to 31 December 2018.<sup>13</sup> Table C.1 shows the relevant data.
- C.13 In 16 cases (32%), the victim was an intimate partner, former partner, or partner of a former partner of the offender. In a further 8 cases (16%), the victim was in another domestic or family relationship with the offender. Domestic violence related manslaughter received a higher average sentence, overall.

**Table C.1: Sentences for manslaughter, Northern Territory, January 2010 – December 2018**

	Type of sentence (Number)					Determinate sentence length (Years)			
	Total	Natural life sentence	Life sentence with parole	Determinate sentence with parole	Suspended sentence	Head sentence		Non-parole period*	
						Mean	Median	Mean	Median
Intimate partner	16	0	0	16	0	9.1	9	5.3	4.5
DV	24	0	0	23	1	8.3	7.5	4.6	4.1
Non-DV	26	0	0	26	0	7.3	6.7	4.0	3.6
All	50	0	0	49	1	7.8	7	4.5	3.9

Source: Northern Territory, Department of the Attorney-General and Justice, Courts Library

\* In 7 cases (all non-DV) a non-parole period was not given for the manslaughter offence.

## Queensland

### Definition

- C.14 In Queensland, a person is guilty of manslaughter if they unlawfully kill another “under such circumstances as not to constitute murder”.<sup>14</sup>
- C.15 Partial defences to murder that are available include provocation,<sup>15</sup> diminished responsibility,<sup>16</sup> and preservation in an abusive domestic relationship.<sup>17</sup>

11. *Sentencing Act* (NT) s 53(1).

12. *Sentencing Act* (NT) s 54.

13. Compare Northern Territory Correctional Services, *Annual Statistics 2016-2017* (2018) 27.

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

15. *Criminal Code* (Qld) s 304.

- C.16 The partial defence of killing for preservation in an abusive domestic relationship was introduced in 2010.<sup>18</sup> Since the introduction of domestic violence as an aggravating factor in 2016,<sup>19</sup> the circumstances giving rise to this partial defence may amount to “exceptional circumstances” for not taking domestic violence into account as an aggravating factor.<sup>20</sup> We have located only one case where the Queensland Supreme Court has sentenced manslaughter arising from this partial defence, and this was in 2015 before the aggravating factor (and the “exceptional circumstance” exception) was introduced.<sup>21</sup>

### Relevant sentencing provisions

- C.17 The maximum penalty for manslaughter is life imprisonment.<sup>22</sup>
- C.18 If a court imposes a sentence of life imprisonment, it must set a non-parole period of at least 15 years.<sup>23</sup>
- C.19 If a court imposes a term of imprisonment other than life for the basic offence of manslaughter (that is, where the offence is treated as a “serious violent offence”),<sup>24</sup> the court must impose a non-parole period of at least 80% of the term of imprisonment, or 15 years, whichever is shorter.<sup>25</sup>
- C.20 If a court imposes a term of imprisonment of more than 3 years for a manslaughter conviction on the basis of a partial defence to murder, the court must set a non-parole period of half the term of imprisonment, unless the court fixes another date.<sup>26</sup>
- C.21 If a court imposes a term of imprisonment of 3 years or less for a manslaughter conviction on the basis of a partial defence, the court must fix a date for the offender to be released on parole.<sup>27</sup>
- C.22 Instead of imposing a determinate term, the court may instead, on its own motion or on application by the prosecution, impose an indefinite sentence for at least some forms of manslaughter.<sup>28</sup> Indefinite sentences are exceptional and their necessity must be “considered in the light of the protective effect of a finite sentence”.<sup>29</sup>

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16. *Criminal Code* (Qld) s 304A.

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

18. *Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Act 2010* (Qld)

19. *Penalties and Sentences Act 1992* (Qld) s 9(10A), inserted by *Criminal Law (Domestic Violence) Amendment Act 2016* (Qld) s 5.

20. See [4.86]-[4.87].

21. *R v Sweeney* (unreported, Supreme Court of Queensland, Henry J, 3 March 2015).

22. *Criminal Code* (Qld) s 310(1).

23. *Corrective Services Act 2006* (Qld) s 181(1), s 181(2)(d), s 181(3); *Penalties and Sentences Act 1992* (Qld) pt 9 div 3.

24. Under *Criminal Code* (Qld) s 303: See *Penalties and Sentences Act 1992* (Qld) sch 1 item 15.

25. *Corrective Services Act 2006* (Qld) s 182(1)-(2), s 182(3); *Penalties and Sentences Act 1992* (Qld) s 160D.

26. *Corrective Services Act 2006* (Qld) s 184(2)-(3)(a); *Penalties and Sentences Act 1992* (Qld) s 160C.

27. *Penalties and Sentences Act 1992* (Qld) s 160B(3).

28. *Penalties and Sentences Act 1992* (Qld) s 162 definition of “qualifying offence”, s 163(1), sch 2. This includes manslaughter under *Criminal Code* (Qld) s 303. However, it appears that provocation, diminished responsibility and killing for preservation in an abusive domestic

- C.23 “A serious organised crime circumstance of aggravation” is expressly prescribed as a circumstance of aggravation for manslaughter.<sup>30</sup>

### Statistics

- C.24 In the 11 years from 2005–06 to 2015–16, 224 offenders were sentenced for manslaughter as the most serious offence. Approximately 92% of these offenders were sentenced to imprisonment. Only 14 (6%) received a partially suspended sentence and 4 (1.8%) received a wholly suspended sentence.<sup>31</sup>
- C.25 No offender received a sentence of life imprisonment in the relevant period. The length of custodial sentence ranged from 1.5 years to 15 years, and the median sentence length was 8 years.<sup>32</sup>
- C.26 In this period, 38 victims were intimate partners, including ex-spouses. 89.5% of offenders in these cases received a sentence of imprisonment, and 10.5% received a partially suspended sentence.
- C.27 A further 30 victims were family members. 83.3% of offenders in these cases received a partially suspended sentence and 3.3% received a wholly suspended sentence.<sup>33</sup>
- C.28 The sentence lengths and the victim’s relationship to the offender are set out in Table C.2. The median sentence was slightly higher where the victim was unknown to the offender. Both the shortest sentence (1.5 years) and longest sentence (15 years) were imposed where the victim was a family member.<sup>34</sup>

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relationship: *Criminal Code* (Qld) s 304A, s 304B and s 304B, do not qualify for an indefinite sentence.

29. *Buckley v R* [2006] HCA 7 [7]; *R v Keenan* [2009] QCA 236 [69]–[70].

30. *Criminal Code* (Qld) s 310(2); *Penalties and Sentences Act 1992* (Qld) s 161Q.

31. Queensland Sentencing Advisory Council, *Sentencing Spotlight on Manslaughter* (v 1.1, 2017) 8.

32. Queensland Sentencing Advisory Council, *Sentencing Spotlight on Manslaughter* (v 1.1, 2017) 9.

33. Queensland Sentencing Advisory Council, *Sentencing Spotlight on Manslaughter* (v 1.1, 2017) 8–9.

34. Queensland Sentencing Advisory Council, *Sentencing Spotlight on Manslaughter* (v 1.1, 2017) 10.

**Table C.2: Sentences for manslaughter according to victim's relationship to offender, Queensland, 2005-06 to 2015-16**

Relationship to victim	No.	Median (years)	Minimum sentence (years)	Maximum sentence (years)
Family member	30	8.0	1.5	15.0
Intimate partner, including ex-spouse	38	8.0	3.0	12.0
Unknown to victim	56	8.2	3.0	14.0
Non-family member, known to victim	90	8.0	3.3	14.0
Not available	10	5.0	4.0	8.0
<b>Total</b>	<b>224</b>	<b>8.0</b>	<b>1.5</b>	<b>15.0</b>

Source: Queensland Sentencing Advisory Council, Sentencing Spotlight on Manslaughter (v 1.1, 2017) Table 7.

- C.29 The data we have collected for 58 cases, covering the period from December 2015 to February 2018, shows only a slight increase in the penalties for all categories.

**Table C.3: Sentences for manslaughter, Queensland, December 2015 – February 2018**

	Type of sentence (Number)				Determinate sentence length (Years)			
	Total	Life sentence	Determinate sentence with parole	Suspended sentence	Head sentence		Non-parole period	
					Mean	Median	Mean	Median
DV	24	0	23	1	8	8	4.7	4
Non-DV	34	0	34	0	9	9	4.8	4
<b>All</b>	<b>58</b>	<b>0</b>	<b>57</b>	<b>1</b>	<b>8.5</b>	<b>8.75</b>	<b>4.7</b>	<b>4</b>
<i>Infant</i>	11	0	10	1	7.5	8	4.7	4.25

Source: Queensland Sentencing Information Service.

## South Australia

### Definition

- C.30 Manslaughter is not defined in South Australian legislation. Partial defences to murder that are available, include self-defence,<sup>35</sup> defence of property,<sup>36</sup> and self-induced intoxication.<sup>37</sup>

35. *Criminal Law Consolidation Act 1935 (SA)* s 15(2)-(3).

36. *Criminal Law Consolidation Act 1935 (SA)* s 15A(2).

37. *Criminal Law Consolidation Act 1935 (SA)* s 268(4).

## Relevant sentencing provisions

- C.31 The maximum penalty for manslaughter is life imprisonment.<sup>38</sup>
- C.32 A determinate sentence of imprisonment for manslaughter is subject to a mandatory minimum non-parole period that is four-fifths (80%) of the term of imprisonment.<sup>39</sup> A mandatory minimum non-parole period represents the non-parole period “at the lower end of the range of objective seriousness” for the offence.<sup>40</sup>
- C.33 A court may depart from the mandatory minimum non-parole period in certain cases. It may impose:
- a **longer non-parole period** if satisfied it is warranted because of any objective or subjective factors affecting the relative seriousness of the offence
  - a **shorter non-parole** if satisfied particular special reasons exist for doing so, having regard to the following matters:
    - the conduct or condition of the victim substantially mitigated offender’s conduct
    - the fact the offender pleaded guilty, and the circumstances surrounding that plea, and
    - the degree of cooperation with authorities, and the circumstances surrounding, and likely consequences of, any such cooperation.<sup>41</sup>
- C.34 The court may, however, decline to set a non-parole period if setting one would be inappropriate because of:
- the gravity of the offence or its circumstances
  - the offender’s criminal record
  - the offender’s behaviour during a previous period of supervision, or
  - any other circumstance.<sup>42</sup>
- C.35 It is not clear how a court is to determine a non-parole period for a life sentence for manslaughter. There is no provision like the one that applies when a court imposes a life sentence for murder.<sup>43</sup>

## Statistics

- C.36 No relevant data is available for manslaughter in South Australia.

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38. *Criminal Law Consolidation Act 1935* (SA) s 13(1), s 5(1) definition of “liable to be imprisoned for life”.

39. *Sentencing Act 2017* (SA) s 47(5)(d).

40. *Sentencing Act 2017* (SA) s 48(1).

41. *Sentencing Act 2017* (SA) s 48(2)-(4).

42. *Sentencing Act 2017* (SA) s 47(5)(e).

43. *Sentencing Act 2017* (SA) s 47(5)(b). See [B.29].

## Tasmania

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### Definition

- C.37 In Tasmania, culpable homicide not amounting to murder is manslaughter.<sup>44</sup>
- C.38 In accordance with the *Criminal Code* (Tas), the following homicides will amount to manslaughter when committed without sufficient intent to amount to murder but when caused:
- (a) by an act intended to cause death or bodily harm, or which is commonly known to be likely to cause death or bodily harm, and which is not justified under the provisions of the Code;
  - (b) by an omission amounting to culpable negligence to perform a duty tending to the preservation of human life, although there may be no intention to cause death or bodily harm; or
  - (c) by any unlawful act.<sup>45</sup>
- C.39 This results in, for example, courts referring to manslaughter “by act intended to cause bodily harm” or “by act commonly known to cause death”.

### Relevant sentencing provisions

- C.40 The maximum penalty for manslaughter is 21 years’ imprisonment.<sup>46</sup>
- C.41 A court may set a non-parole period that is not less than one half of the sentence of imprisonment.<sup>47</sup>
- C.42 In deciding whether or not to set a non-parole period, the court may have regard to “such matters as it considers necessary or appropriate”, including:
- the nature and circumstances of the offence
  - the offender’s antecedents or character, and
  - any other sentence to which the offender is subject.<sup>48</sup>

### Statistics

- C.43 We analysed the 20 manslaughter cases sentenced in Tasmania in the 10 years from 1 July 2007 to 30 June 2017.

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44. *Criminal Code* (Tas) s 159.

45. *Criminal Code* (Tas) s 156(2).

46. *Criminal Code* (Tas) s 389.

47. *Sentencing Act 1997* (Tas) s 17(2)(b), s 17(3).

48. *Sentencing Act 1997* (Tas) s 17(4).



Table C.4: Sentences for manslaughter, Tasmania, July 2007 – June 2017

	Type of sentence (Number)			Determinate sentence length (Years)			
	Total	Suspended sentence	Determinate sentence with parole	Head sentence		Non-parole period	
				Mean	Median	Mean	Median
DV	2	2	0	-	-	-	-
Non-DV	18	0	18	6.4	7	4.2	4

- C.44 Only 5 of the 18 determinate sentences received the minimum non-parole period of 50% of the head sentence. The 19 other received non-parole periods ranging from 55% to 86% of the head sentence.
- C.45 Only two offenders were sentenced for manslaughter involving domestic violence, in relation to the neglect of the same elderly person. They each received 2-year suspended sentences. Seven of the 20 cases examined involved motor accidents.
- C.46 By comparison, the Tasmanian Supreme Court's published sentencing statistics cover the period from 2001 to 2014, and are divided according to whether the manslaughter was sentenced as a single count or as part of multiple offence count.
- C.47 In Tasmania, between 2001–2014, there were 20 cases where manslaughter was sentenced as a single count. All were sentenced to a term of imprisonment. The head sentences ranged from 9 months to 10 years, with a mean of 5.5 years and a median of 5.8 years. In 19 cases, a non-parole period was also imposed. The non-parole periods ranged from 9 months to 7 years with a mean of 3.6 years and median of 3.3 years.<sup>49</sup>
- C.48 In the same period, 8 cases of manslaughter were sentenced as part of multiple offence counts. All were sentenced to a term of imprisonment. The head sentences ranged from 18 months to 8 years, with a mean of 4.8 years and a median of 4.5 years. All received a non-parole period. The non-parole periods ranged from 9 months to 6 years, with a mean of 3.1 years and a median of 3.3 years.<sup>50</sup>

## Victoria

### Definition

- C.49 In Victoria, manslaughter is mentioned sparingly in legislation. There is only one partial defence to murder in the *Crimes Act 1958* (Vic), which is being a survivor of a suicide pact.<sup>51</sup> Provocation as a partial defence has been abolished.<sup>52</sup>

49. Tasmania, Supreme Court Sentencing Statistics: Manslaughter <<https://www.sentencingcouncil.tas.gov.au/statistics/supremecourt>> (accessed 21 January 2019).

50. Tasmania, Supreme Court Sentencing Statistics: Manslaughter <<https://www.sentencingcouncil.tas.gov.au/statistics/supremecourt>> (accessed 21 January 2019).

51. *Crimes Act 1958* (Vic) s 6B.

C.50 “Child homicide” is also an alternative to murder and is intended to cover offending that would have included the manslaughter of children.<sup>53</sup>

### Relevant sentencing provisions

C.51 The maximum penalty for manslaughter as part of a suicide pact is 10 years’ imprisonment.<sup>54</sup>

C.52 The maximum penalty for all other manslaughter is 20 years’ imprisonment.<sup>55</sup> In such cases, the court must impose a term of imprisonment unless:

- the offender has assisted or offered to assist law enforcement authorities
- the offender proves that they have impaired mental functioning that reduces culpability or that contributes to a “substantially and materially greater than the ordinary burden or risks of imprisonment”
- the court proposes to make a Court Secure Treatment Order or a residential treatment order, or
- there are substantial and compelling circumstances that are exceptional and rare and that justify not making an order.<sup>56</sup>

C.53 For sentences of 2 years or more, the court must set a non-parole period, unless it is inappropriate because of the:

- nature of the offence, or
- past history of the offender.<sup>57</sup>

C.54 If the court sets a non-parole period, it must be at least:

- 60% of the term of imprisonment for sentences less than 20 years, and
- 70% of the term of imprisonment for sentences of 20 years, unless “it is in the interests of justice not to do so”.<sup>58</sup>

C.55 In any case, the non-parole period must be at least six months less than the term of imprisonment.<sup>59</sup>

C.56 However, where the offender has committed the manslaughter in certain cases, the court must, if notice has been given, impose a custodial sentence and a minimum non-parole period of 10 years, unless there are special reasons not to (these reasons are the same as those outlined above for not imposing a term of imprisonment at all). These cases are where the manslaughter has been committed:

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52. *Crimes Act 1958* (Vic) s 3B.

53. *Crimes Act 1958* (Vic) s 421(1)(ab). See [5.75]-[5.81].

54. *Crimes Act 1958* (Vic) s 6B(1A).

55. *Crimes Act 1958* (Vic) s 5.

56. *Sentencing Act 1991* (Vic) s 5(2H).

57. *Sentencing Act 1991* (Vic) s 11(1).

58. *Sentencing Act 1991* (Vic) s 11A(4).

59. *Sentencing Act 1991* (Vic) s 11(3).

- in circumstances of “gross violence”,<sup>60</sup> or
- by a single punch or strike.<sup>61</sup>

In each case, the non-parole period must also be at least six months less than the term of imprisonment.<sup>62</sup>

C.57 Finally, the court may decide not to impose a determinate sentence, but rather impose an indefinite sentence. This may occur if the court is satisfied, to a high degree of probability (the onus being on the prosecution), that the offender is a serious danger to the community because of:

- their character, past history, age, health or mental condition
- the nature and gravity of the serious offence, and
- any special circumstances.<sup>63</sup>

## Statistics

C.58 We collected data on the 43 offenders sentenced for manslaughter in Victoria in the 3 years from 2016 to 2018.

**Table C.5: Sentences for manslaughter, Victoria, 2016 – 2018**

	Total	Determinate sentence length (Years)			
		Head sentence		Non-parole period	
		Mean	Median	Mean	Median
DV	14	8.9	9.1	6.4	6.5
Non-DV	29	9.1	9	6.2	6
All	43	9	9	6.3	6

C.59 By comparison, in the 5 years from July 2011 to June 2016, 73 offenders were sentenced where manslaughter was the principal offence. Of these offenders, 70 (96%) received a sentence of imprisonment. The head sentences ranged from 1.47 years to 12 years’ imprisonment, with a median term of 8 years. Of the 70 offenders sentenced to imprisonment, 69 received a non-parole period. The non-parole periods ranged from 9 months to 9 years, with a median term of 5.5 years.<sup>64</sup>

60. *Sentencing Act 1991* (Vic) s 9B.

61. *Sentencing Act 1991* (Vic) s 9C.

62. *Sentencing Act 1991* (Vic) s 11(3).

63. *Sentencing Act 1991* (Vic) s 18B.

64. Victoria, Sentencing Advisory Council, SACStat Offence Summary: Manslaughter (1 July 2011 – 30 June 2016).

## Western Australia

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### Definition

- C.60 In Western Australia, a person who unlawfully kills another person under such circumstances as not to constitute murder is guilty of manslaughter.<sup>65</sup>
- C.61 Self-defence is available as a partial defence to murder.<sup>66</sup>

### Relevant sentencing provisions

- C.62 The maximum penalty for manslaughter is life imprisonment.<sup>67</sup>
- C.63 If the offence is committed by an adult during an aggravated home burglary, the minimum term of imprisonment is 15 years.<sup>68</sup>
- C.64 The court may make a parole eligibility order for a sentence of imprisonment of 6 months or more, unless the court decides the offender should not be eligible for at least one of the following reasons:
- the offence is serious
  - the offender has a serious criminal record
  - the offender did not comply with a previous release order, and
  - any other relevant reason.<sup>69</sup>
- C.65 An offender serving a life sentence must serve 7 years before they can be released.<sup>70</sup>
- C.66 An offender serving a sentence of imprisonment is eligible to be released when they have served:
- half of the term, if the term served is 4 years or less, or
  - 2 years less than the term, if the term served is more than 4 years.<sup>71</sup>

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65. *Criminal Code (WA)* s 280(1).

66. *Criminal Code (WA)* s 248(3).

67. *Criminal Code (WA)* s 280(1).

68. *Criminal Code (WA)* s 280(2).

69. *Sentencing Act 1995 (WA)* s 89(4).

70. *Sentencing Act 1995 (WA)* s 96(1).

71. *Sentencing Act 1995 (WA)* s 93(1).

- C.68 If the court decides not to make a parole eligibility order, the court may also decide that the offender is to be imprisoned indefinitely. The court must not order indefinite imprisonment unless it is satisfied on the balance of probabilities that the offender, if released from custody, would be a danger to society, or a part of it, for at least one of the following reasons:
- the exceptional seriousness of the offence
  - the risk that the offender will commit other indictable offences
  - the character of the offender and in particular:
    - any psychological, psychiatric or medical condition, and
    - the number and seriousness of the offender's past convictions, and
  - any other exceptional circumstances.<sup>72</sup>
- C.69 In the case of both life sentences and indefinite sentences, the Governor may only make a parole order if the Prisoners Review Board has made the requisite reports.<sup>73</sup>

### Statistics

- C.70 In the period from 2006–07 to 2010–11, in Western Australia, 32 offenders were sentenced for manslaughter as their most serious offence.<sup>74</sup> No other data is available.

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72. *Sentencing Act 1995* (WA) s 98.

73. *Sentence Administration Act 2003* (WA) s 25(1A), s 27(1).

74. Western Australia, Department of the Attorney General, *Report on Criminal Cases in the Supreme Court of Western Australia 2006/07 to 2010/11*, 4.



