1 August 2018

Queensland Sentencing Advisory Council
GPO Box 2360
Brisbane QLD 4001

By email: submissions@sentencingcouncil.qld.gov.au

Dear Council

Re: Child homicide sentencing review

Thank you, on behalf of the Bar Association of Queensland ('the Association'), for the invitation to make a submission in relation to Queensland Sentencing Advisory Council's ('QSAC') review of current penalties imposed in Queensland for child homicide, determination as to whether or not penalties adequately reflect the particular vulnerabilities of children, identification of trends and anomalies in sentencing and examination of the approach in other Australian jurisdictions.

The deadline for the provision of submissions is **Tuesday 31 July 2018**.

The Association notes that submissions may be published on the QSAC website.

The Association remains of the view that strong research data indicates that reported public perceptions of the criminal justice system in general and sentencing in particular too often draws upon poorly informed opinion driven by inaccurate and sensationalised media reporting.[1] The Association is comforted by the commitment of QSAC to base this review and any findings on the best available evidence including published local, national and international research.

Introduction

The consultation paper appears to promote the premise that child homicide is a more serious sub-category of homicide because of the vulnerability of the victim child. The Association accepts that child killing is heinous and is viewed as particularly shocking in our community. Public outrage generally follows reports of child killing whether by deliberate means or neglect. Sentiments relating to the need for tougher penalties for such offenders often follow.

However, the Association considers that every human life is equally worthy. In addition to children there are other identifiable groups within our community where individuals are in positions of vulnerability such as, people living with severe disability, the elderly, and people living with chronic and terminal forms of illness. Women are also disproportionately vulnerable, particularly in the domestic setting.

[1] See, e.g., Kate Warner, Julia Davis, Maggie Walter, Rebecca Bradfield and Rachel Vermey, 'Public judgement on sentencing: Final results from the Tasmanian Jury Sentencing Study' (Trends & issues in crime and criminal justice paper No 407, Australian Institute of Criminology, 2011), https://aic.gov.au/publications/tandi/tandi407 (accessed 24 July 2018). In this study of Tasmanian jurors across 138 trials it was found, *inter alia*, that more than half of the jurors surveyed suggested a more lenient sentence than the trial judge imposed, and 90 percent of jurors said that the judge's sentence was (very or fairly) appropriate.

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The Association cautions against any statutory hierarchy of penalty in unlawful killing. If that must occur because of political imperatives, great care must be taken to not fall prey to simplistic notions of liability. The subjective heinousness of a particular killing can and invariably is already taken into account in the broad sentencing discretion that attaches to the offences of murder (in setting non-parole periods) and manslaughter.

The consultation paper outlines seven broad topics with a number of related questions to guide submissions as follows:

1. **Sentencing purposes**

    1.1. What are the most important sentencing purposes that should be taken into account by a court when sentencing an offender for an offence arising from the death of a child, and why?

2. **Sentencing factors**

    2.1. Referring to this list, what are the most important factors that you consider should be taken into account when sentencing an offender for an offence arising from the death of a child, and why?

    2.2. Are there any other sentencing factors not expressly listed in legislation, or referred to only in a general way, that you think are important in sentencing for these offences? If so, describe the factor/s and explain why they are important.

3. **Sentencing factors (aggravating and mitigating)**

    3.1. Referring to the examples of aggravating and mitigating factors listed below, which factors in your view are the most important aggravating and mitigating factors to be taken into account by sentencing judges where a person is being sentenced for a criminal offence arising from the death of a child, and why?

4. **Sentencing process**

    4.1. What do you consider are the advantages and disadvantages of maintaining flexibility in the sentencing process when sentencing an offender for an offence arising from the death of a child?

5. **Reflecting particular vulnerabilities of children in sentencing**

    5.1. How does a child victim's age and particular vulnerabilities impact on the seriousness of a homicide offence?

    5.2. How can the particular vulnerabilities of child victims best be taken into account in sentencing for an offence arising from the death of a child?

6. **Reforms**

    6.1. Are any legislative or other changes needed in sentencing for child homicide offences? If so, what changes are needed and why? What would these changes add to the sentencing process?

6.2. Should any other reforms be considered to improve the sentencing process for child homicide offences? For example, should restorative justice approaches have any place in the sentencing process and if so, at what stage should they be considered? What might be some of the advantages and disadvantages of such approaches?

7. Community awareness

7.1. What issues contribute to or detract from the community's understanding of sentencing for child homicide offences?

7.2. How can communication with community members and victims of crime about sentencing for child homicide offences be enhanced?

Bar Association responses

Exclusions

The Association notes that this review is limited to child homicide offences and excludes sentencing outcomes in cases involving death by neglect or abuse unless the sentence was for the offence of murder or manslaughter. Other exclusions include death caused by motor vehicle offences, such as dangerous operation of a motor vehicle causing death. Mental Health Court decisions relating to a finding that a person was of unsound mind at the time of committing the offence leading to the death of a child are excluded from the review.

Legislation and penalties in Queensland

The *Criminal Code Act* 1899 ('the *Criminal Code*') establishes the provisions for criminal offences and sets the maximum penalties able to be imposed for those offences in Queensland.

Section 305 of the *Criminal Code*, as it was initially introduced, provided as follows; "Any person who commits the crime of wilful murder or murder is liable to the punishment of death."

In 1922, s. 2 of the *Criminal Code Amendment Act* abolished the death penalty in Queensland, subsequently amending s. 305 as follows, "Any person who commits the crime of wilful murder or murder is liable to imprisonment with hard labour for life, which cannot be mitigated or varied under section nineteen of this Code."

In Queensland, the defence of provocation to murder was available prior to the abolition of the death penalty. At that time, it could apply as a complete defence[2] or it could be applied to reduce a murder conviction to a conviction for manslaughter.[3] Provocation continues to apply in Queensland as a partial defence to murder although relatively recent amendments have altered the onus of proof in respect of provocation

[2] *R v Smeltzer* (1905) BC 25 May 1905: A single strike causing death case where the Judge directed the jury that the defence of provocation applied, the jury found the offender not guilty.
[3] *R v Smith* (1913) 7 QJPR 24: where the defendant pleaded guilty under provocation and was sentenced to death, where the judge then vacated the sentence and a *nolle prosequi* was entered on the murder charge, where a new indictment was presented for manslaughter to which the defendant then pleaded guilty.

so that the onus of establishing provocation now lies on the accused person.[4] If found to apply in a murder trial a defendant will be convicted of manslaughter.

Presently, in all cases of adults convicted of murder and repeat serious child sex offences, the sentencing Judge must sentence an offender to life imprisonment or an indefinite sentence. The minimum time an offender sentenced to life imprisonment must spend in prison before being eligible for parole is set by legislation. The *Corrective Services Act* 2006 (Qld)[5] establishes mandatory minimum non-parole periods as follows:

(a) 30 years — murder of more than one person or by an offender with a previous murder conviction;
(b) 25 years — murder of a police officer;
(c) 20 years — murder other than (a) or (b) above, or repeat serious child sex offences.

A Court can impose an indefinite sentence when an offender is considered a serious danger to the community. In such cases, the offender has no fixed date to apply for parole release. The court must consider whether the nature of the offence is exceptional; an offender's characteristics such as age and criminal history; any relevant medical, psychiatric, prison or other reports about the offender; any risk of serious harm to members of the community if an indefinite sentence is not imposed; and the need to protect the community from that risk. When imposing an indefinite sentence, the sentencing Judge must specify the nominal sentence that would have been imposed if an indefinite sentence had not been imposed.

The *Penalties and Sentences Act 1992* ('the PSA') provides the general powers of courts to sentence offenders:[6]

"Providing for a sufficient range of sentences for the appropriate punishment and rehabilitation of offenders, and, in appropriate circumstances, ensuring that protection of the Queensland community is a paramount consideration …"

Section 9(1) of the PSA then outlines that the only purposes for which sentences may be imposed are:

(a) to punish the offender to an extent or in a way that is just in all the circumstances; or
(b) to provide conditions in the court's order that the court considers will help the offender to be rehabilitated; or
(c) to deter the offender or other persons from committing the same or a similar offence; or
(d) to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved; or
(e) to protect the Queensland community from the offender; or
(f) a combination of 2 or more of the purposes mentioned in paragraphs (a) to (e).

Other relevant sentencing factors are outlined in ss. 9(2) – 9(11) of the PSA.

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[4] See *Criminal Code and Other Legislation Amendment Act* 2011 (Qld) s. 5, which amended s. 304 of the *Criminal Code Act* 1899 (Qld) (Killing on provocation) to insert, *inter alia*, "on a charge of murder, it is for the defence to prove that the person charged is, under this section, liable to be convicted of manslaughter only".
[5] *Corrective Services Act* 2006 (Qld) s. 181.
[6] *Penalties and Sentences Act* 1992 (Qld) s. 3(b).

Sentencing purposes

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

All child killings are naturally shocking and an affront to the thinking of right minded people. However, the shock and distress experienced by the general community in response to child killing is an insufficient rationale for placing greater value on the life of a child than that of any other murder victim. Nor should it be elevated as a relevant consideration in fixing the appropriate sentence.

General and personal deterrence are of little importance in murder sentencing. Most murderers are not considered to be at high risk of re-offending and people who commit murder are in the main, not susceptible to general deterrence. There are two reasons for that, either that the plan to kill is firmly fixed or because the conduct that results in the killing is unplanned.

Subject to what we say below about the undesirability of mandatory sentencing for murder or any other offence, it is submitted that proportionate punishment is achieved by the existing law's requirement for imposition of a mandatory life sentence. Rehabilitation is a factor that does not appear, presently, to be highly engaged in sentencing in murder cases. That is most likely because the prisoner will be held in custody for many years before being eligible to apply for parole.

It is of overarching importance in sentencing an offender who kills another human being (or for any other offence) that the offender is punished to an extent or in a way that is just in all the circumstances. That is the cornerstone of sentencing principle in Queensland. It will be a relevant factor at any sentence, in the proper application of s. 9 of the PSA, that the victim was a child. However, the fact an offender has killed a child should not affect the proper application of s. 9(1).

As stated above, sentencing for murder carries a mandatory sentence of life imprisonment. By that legislative provision, all murderers are subject to the same penalty. And by that mandatory provision, the community, by its legislators, has articulated in the strongest possible terms the denunciation of individuals who commit murder. The only discretion that is available to a sentencing Judge when imposing sentence is an extension of the non-parole period in circumstances that justify such a decision.

The Association has strongly, and consistently, opposed mandatory sentencing. Mandatory life and mandatory minimum parole periods, even for murder, take away the ability of the Courts to exercise their independent discretion to impose the correct sentence. They result in the criminal justice system being left with harsh, unjust and disproportionate sentences which undermine the community's confidence in the system.

The Association submits that a more effective method to denounce individuals who commit murder is to impose a high head sentence and a non-parole period through the exercise of judicial discretion, rather than simply by imposing the statutory maximum of life and a 20 year non-parole period.

Furthermore, there are a number of cases where a person has killed another person in extenuating circumstances but where the limited defences of provocation and self-defence are not available. These offences should be able to be dealt with according to their seriousness. It is submitted that some offences amounting to murder involve greater extenuating and mitigating circumstances than other killings which amount to manslaughter. The imposition of a high head sentence and a non-parole period through the exercise of judicial discretion would allow a lesser sentence to be imposed where the level of heinousness for an offence of murder, as determined, is significantly less.

A non-mandatory sentencing regime for murder would also allow, where the murder of a child does have a particular degree of heinousness arising from the facts of that case, that heinousness to be reflected in the sentence imposed; in the non-parole period; and in the sentencing remarks of the judge which are not limited to general statements but are directed to the particular sentence imposed.

Such a regime exists in other states, including in New South Wales.

Sentencing factors

There are a number of considerations that may be more relevant to offences that result in the death of a person. Those considerations are equally applicable to an offender who kills a child or an adult.

The considerations applicable to the death of a person, including a child, in s. 9(3) are:

(a) The personal circumstances of the victim – the victim was young, old, living with a disability or in some other way a vulnerable person;
(b) The circumstances of the offence – in some situations the offender has shown a heinous disposition. It is important to know in what context the person was killed in order to determine the criminality of the offender, prospects of rehabilitation and ongoing risk to the community. This includes consideration of the relationship of the offender to the victim;
(c) The nature and extent of the violence used, or intended to be used, in the commission of the offence and any prolonged violence or suffering endured by the victim;
(d) The criminal history of the offender – a history of violence or a history of offending against children will inform the Judge about prospects of rehabilitation and the risks the offender poses to the community including children;
(e) The antecedents, age and character of the offender – Personal details about an offender may reveal that causing the death was out of character or explain a uniquely personal response in the circumstances. Capacity and matters personal to the offender also inform the sentencing Judge about prospects for rehabilitation and risks to the community;
(f) Medical, psychiatric, prison or other relevant reports in relation to the offender – on many occasions the moral culpability of an offender is reduced (although not excused) because of a medical or psychiatric condition the offender was suffering at the time of the offence. This is a proper and relevant matter to be taken into consideration by a sentencing Judge. When a person's moral culpability for an offence is reduced or their responsibility for the offence is diminished because of medical/psychiatric evidence, that person's case is not a proper vehicle for general deterrence. There is a body of evidence that a large percentage of parents who are guilty of killing their

children suffer from mental illness. The type of mental condition is more likely to be a mood disorder like depression or a personality disorder rather than psychosis.[7] Tragic examples of mothers killing their children while deeply depressed are recorded in the literature.[8]

In this regard, the Association submits that it is important to recognise that some serious crimes are committed by offenders with psychiatric conditions, or intellectual disabilities, which do not provide a defence to the charge of murder. As well as being sentenced appropriately, taking into account the heinousness of the crime judged against their mental and psychiatric state, such persons need to be treated appropriately in prison, including with adequate understanding of their disabilities. The present state of our treatment of people with disabilities in prison militates completely against rehabilitation. For example, the Human Rights Watch report into *Abuse and Neglect of Prisoners with Disabilities*[9] indicates that Queensland prisons are completely failing the 50% of their population who suffer from disabilities. Harsh punishments, including solitary confinement, are being used in some circumstances. Accordingly, the Association submits that it is insufficient to limit consideration of shocking crimes to the context of sentencing law, but that we should also address the conditions and resourcing of our corrections system.

The Association urges the Council to highlight the importance of conditions within corrective institutions to the rationality of sentencing. The truism is that offenders are sentenced *as* punishment, not *for* punishment. If conditions within corrective institutions are such that wholly inadequate and inappropriate treatment is being received by offenders, then carefully articulated principles concerning rehabilitation based on false assumptions about such conditions become false and counterproductive.

A failure to address such matters when considering the principles on which sentences should be imposed result in policy making in a vacuum. Indeed, a failure to address the reality of prison conditions for prisoners with such disabilities is to dehumanise people who are already especially vulnerable.

Aggravating and mitigation factors

A young offender ought to be dealt with more leniently than a mature offender because of immaturity or a lack of judgment.

Great care should be taken before attributing a higher level of culpability or a heavier penalty to individual parents or others in positions of trust in the death of a child.

Reflecting particular vulnerabilities of children in sentencing

It is submitted that reflecting the particular vulnerabilities of child victims is a matter for submissions at sentence and not a matter that requires the proposed legislative amendment.

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[7] See https://psychcentral.com/news/2013/04/06/mental-illness-prevalent-in-parents-who-kill-their-children/53491.html (accessed 24 July 2018).
[8] See https://aifs.gov.au/cfca/pacra/mothers-who-kill (accessed 24 July 2018), and https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2174580/ (accessed 24 July 2018).
[9] See https://www.hrw.org/report/2018/02/06/i-needed-help-instead-i-was-punished/abuse-and-neglect-prisoners-disabilities and https://independentaustralia.net/life/life-display/disabilities-in-prison--a-horror-story-in-our-backyard,11667.

Reforms

Notwithstanding that media reporting is often inaccurate it is submitted that great care should be taken before any change to the current s. 13A practice of closed hearings in respect of such proceedings is adopted. It seems trite to say that co-operation in the administration of justice comes at high risk to the individual. It is often necessary to accept s. 13A undertakings in order to successfully prosecute other offenders.

The fact that the community is unable to be fully informed about the s. 13A process is not a sufficient rationale to adopt a different approach to such sentencing factors.

Media reporting of sentence proceedings involving the application of s. 13A could adopt a more balanced approach by including a standard statement that part of the sentencing hearing took place in a closed court environment and that the sentencing Judge was fully aware of all of the aspects relevant to the sentence, thereby expressing a level of trust in Judges rather than criticising Judges for lenient sentences when all of the facts are not in the public domain.

Community Awareness

Amendments which seek only to ensure that community views are taken into account in the sentencing process are misguided and have the potential to cause individual injustice.

Many studies have found that community outrage at lenient sentencing is able to be corrected with education as to the relevant factors considered at sentence. Research has also found that, when members of the community are properly informed about the facts of the case, they invariably either agree with the sentence imposed by the court or take a more lenient view. The Tasmanian Jury Sentencing Study, a methodical, intensive and well-resourced study, confirmed that this is the case.[10]

Focus groups may provide the Council with an opportunity to explore community views but they are likely to be of limited efficacy in informing considered views about this proposed legislative amendment.

Conclusion

Thank you for the opportunity to provide this submission for your consideration. The Association would be pleased to provide further feedback, or answer any queries you may have on this matter.

Yours faithfully

G A Thompson QC
President

[10] Kate Warner, Julia Davis, Maggie Walter, Rebecca Bradfield and Rachel Vermey, 'Public judgement on sentencing: Final results from the Tasmanian Jury Sentencing Study' (Trends & issues in crime and criminal justice paper No 407, Australian Institute of Criminology, 2011), https://aic.gov.au/publications/tandi/tandi407 (accessed 24 July 2018).