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Sisters Inside Inc. is an independent community organisation which exists to advocate for the human rights of women in the criminal justice system

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Queensland Sentencing Advisory Council

**By email only:** [submissions@sentencingcouncil.qld.gov.au](mailto:submissions@sentencingcouncil.qld.gov.au)

Dear Colleagues

## **Sentencing for criminal offences arising from the death of a child**

Thank you for the opportunity to respond to the Consultation Paper regarding the Queensland Sentencing Advisory Council's current review of sentencing for criminal offences arising from the death of a child.

### **About Sisters Inside and this submission**

Established in 1992, Sisters Inside is an independent community organisation that advocates for the collective human rights of women and girls in prison and their families, and works alongside criminalised women and girls to address their immediate, individual needs.

Our work is guided by our *Values* and *Vision*. We believe prisons are an irrational response to social problems that serve to further alienate socially marginalised groups in our communities. We also believe that prisons are inherently criminogenic and violent institutions, which repeat patterns of family violence, social control and sexual assault.

We believe all children are precious. The death of a child, in any circumstances, is absolutely devastating for families and communities. We acknowledge and share families' grief, anger and frustration with legal processes following the death of a child.

This brief submission is informed by our direct work with criminalised women and girls whose children have died, including circumstances where women have been charged in relation to the death. Based on our work, we believe that our current punishment systems and options do not and cannot provide accountability or 'justice' for the death of children.

Too often, we have observed that legal accountability processes treat certain children's lives as 'more important' than others; for example, there is no personal accountability for the preventable deaths of Aboriginal and Torres Strait Islander children in institutional care<sup>1</sup>.

We have also observed that the actions or inaction of Aboriginal and Torres Strait Islander mothers, criminalised mothers and mothers from non-white cultural backgrounds are judged very harshly, and in cases involving the death of children, institutional and community prejudices have serious, long-term consequences for women and their families (e.g. losing care of other children or the death of child in foster or institutional care<sup>2</sup>). Institutional racism and prejudice in policing practices, legal processes and non-criminal interventions (e.g. child protection system) adds to the grief (and punishment) of mothers and family members whose children have died.

### **Question 1: Sentencing purposes**

As this review itself demonstrates, the community expects people who cause or contribute to the death of children to be punished and for these offences to be treated seriously by courts. Therefore, just punishment and denunciation ought to be the most important sentencing purposes.

Writing from our position working with and for women, we also suggest that rehabilitation could be more prominent as a purpose of sentencing – to the extent that it allows for a sentence other than imprisonment (actual or ongoing), recognising the circumstances of the offence, and the personal circumstances and trauma of women sentenced for the death of a child.

Based on the case studies highlighted in the Consultation Paper, it is apparent that many women have difficult personal circumstances (e.g. domestic violence, serious mental illness, reduced intellectual capacity, history of criminalisation and child protection intervention) but also very limited support. Grief counselling, parenting skills and other relevant services for women could be considered as part of the sentencing process, especially in situations where women have other children.

As Meyer et al state in their book which considers maternal filicide in the United States.<sup>iii</sup>

Given the dismal conditions that prevail in U.S. prisons, it is difficult for anyone to make the argument that a woman who commits infanticide is likely to be rehabilitated for society by serving time in prison. Indeed, the sort of treatment that these women are likely to need – mental health services, parenting classes, substance abuse treatment – are much more readily accessible outside prison, and judges can require a woman to obtain any or all of these services as a condition for probation. This solution, probation with counseling [sic], is in essence what the British system requires of women who commit infanticide. Their experience of eighty years with this approach suggests that it is certainly as effective at preventing or deterring infanticide as is incarceration, while being considerably more efficient and cost-effective. (page 146)

We would argue that prison never serves a rehabilitative function for women sentenced for criminal offences arising from the death of a child.

Research identified by the Victorian Sentencing Advisory Council suggests that harsher sentences do not deter people from committing offences<sup>v</sup>. This research is significant because it does not support deterrence as the justification for harsher penalties of imprisonment, even in relation to offences that are considered very serious by the community.

Acquaintances and strangers represent only a small proportion of those individuals sentenced for the death of a child. This reflects the particular circumstances of offences against children, and suggests that community protection, and generic 'risk assessment' concepts/principles may not be useful or relevant for sentencing individuals for the death of children.

## **Question 2: Sentencing factors**

In our view, the circumstances of the offence; the nature and the extent of any violence involved; the culpability, age, character and intellectual capacity of the person being sentenced (based on formal reports or other relevant information); pre-sentence custody; and where relevant for Aboriginal and Torres Strait Islander people, submissions by a community justice group are the most important sentencing factors because they clearly relate to the purposes of just punishment and denunciation.

In sentencing women for offences involving the death of a child, contextual factors relevant to the woman, her life experiences and her community must be taken into account. There is a lack of legislative and judicial recognition of systemic, institutional and intergenerational violence, poverty and trauma in sentencing. Relatedly, there is also no legislative recognition of extra-judicial or extra-curial punishment as a mitigating factor (although it is recognised as a relevant and appropriate sentencing factor in certain circumstances at common law<sup>v</sup>).

In Australia, academic work on sentencing and systemic factors has focused on Aboriginal and Torres Strait Islander people, and the role of 'Aboriginality' as a sentencing consideration<sup>vi</sup>. Baldry and Cunneen note that 'concepts of race, gender and culture underpin sentencing in contemporary Australia'; further, they argue that sentencing judges often fail to 'recognise the specific gendered impacts of colonialism including systemic family disruption, child removal and sexual assault'.<sup>vii</sup>

We would also argue that for most criminalised women, who have experienced significant personal trauma, judicial officers may fail to give adequate weight to relevant contextual factors and extra-judicial consequences (e.g. involvement with child protection and/or removal of other children).

### **Question 3: Sentencing factors (aggravating and mitigating)**

We do not support 'otherwise good character' as a mitigating factor. This factor tends to reinforce the already privileged position of individuals who are sentenced for serious offences and who can commit offences by virtue of their position in relation to children.

We note the Royal Commission into Institutional Responses to Child Sexual Abuse recommended that all state and territory governments should introduce legislation to exclude good character as a mitigating factor for child sexual offences, where that good character 'facilitated the offending' (recommendation 74). In our view, this factor is particularly relevant for carers or other individuals with an institutional position to care for children. We further note that approved foster and kinship carers are excluded from the definition of a 'parent' under section 16 of the *Domestic and Family Violence Prevention Act 2012* (Qld).

### **Question 4: Sentencing process**

Sisters Inside supports flexibility in the sentencing process for **all** offences. We do not support mandatory or minimum sentences, minimum non-parole periods or related legislative prescriptions which limit judicial discretion or require particular sentencing outcomes.

Australian research has shown that members of the public asked to sentence individuals in a particular case may be more lenient than judges<sup>viii</sup>. These findings demonstrate the importance of discretion in the sentencing process. Sentencing must reflect the circumstances of the offence, and the legal and moral culpability of the person being sentenced.

This review by the Council provides an opportunity for the Council to comment on the operation and appropriateness of mandatory and minimum sentences in Queensland's law, particularly the mandatory life sentence for murder. In our view, all forms of mandatory and minimum sentences under Queensland's current law should be reviewed and removed.

### **Question 5: Reflecting particular vulnerabilities of children in sentencing**

We are cautious about the age of the child being a standalone aggravating factor for sentencing, either through a new offence or harsher penalties, in addition to the 'serious violent offence' (SVO) regime.

As identified in the Consultation Paper, the age of the victim as an aggravating factor was included in the SVO regime to recognise the special vulnerability of children.

According to the Consultation Paper, all but one case between 2005-06 and 2016-17 where a mother was sentenced for the death of a child involved children under 10 years old (p 41). Additionally, we note that 'failure to provide necessities' was the most common cause of death for children under 1 year old (alongside shaking), and the second most common cause of death of children aged between 1-4 years old. We suggest that there is a gendered element to these cases, and they are likely to involve women and children in poverty and situations of significant marginalisation.

New offences or harsher penalties for existing offences based on the age of the child may disproportionately affect women, especially in circumstances where no actual or persistent, serious violence is involved. More detailed analysis about situations involving women/mothers is required.

### **Question 6: Reforms**

We do not support the introduction of a new offence of criminal neglect, modelled on the South Australian provisions. The South Australian offence applies in circumstances of death or serious harm to a child and, based on our experience, this type of offence is likely to disproportionately affect women, especially Aboriginal and Torres Strait Islander women, women in poverty, women experiencing domestic violence and women in other marginalised situations.

We note that according to the Consultation Paper manslaughter by criminal negligence (neglect) accounts for 35% of all manslaughter convictions in Queensland between 2005-06 and 2016-17 (p 52). This suggests that the duty provisions applicable under Queensland law operate to ensure that individuals can be sentenced in situations where they owe a duty of care to children.


Any extension of the scope of the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) must be subject to more detailed review, especially its possible gendered impacts. As indicated above, given the nature of most offences involving the death of a child, concepts of 'risk assessment' may not be useful or relevant. In the prison context, risk assessment tools, frameworks and principles have also been criticised, including by Sisters Inside, on the basis that they are not gendered and, even if they are, do not adequately account for systemic factors that bring women into contact with the criminal legal system<sup>ix</sup>. Concerns have also been raised in Queensland and other jurisdictions about the discriminatory impact of risk assessment tools on First Nations people<sup>x</sup>.

## Question 7: Community awareness

Subject to exceptional circumstances and public interest considerations, we support legislative amendments and changes to processes and practices that would make sentencing more transparent to the general public. For example, publication of written sentencing remarks is also essential (for all matters) to ensure that non-government organisations and community members can have access to accurate information about the factors relevant to a sentence in particular cases (taking into account that media reporting may only portray a partial picture, as identified in the Consultation Paper).

We would support amendments to sections 13A and 13B of the *Penalties and Sentences Act 1992* (Qld) to allow for judicial discretion to open court and/or publish detailed written reasons to ensure accurate information is publicly available in appropriate cases.

We also agree with the Queensland Law Society and Bar Association of Queensland submission for community education programs to increase community understanding of the sentencing process, and improve community access to sentencing information and trends. We consider the Council is well-placed to undertake this work, which must be informed by a wide range of stakeholders.

If you would like to discuss this letter further or you require further information, please contact me 

Yours sincerely



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<sup>i</sup> Office of the State Coroner, Inquest into the death of a 13 year old girl (P) (File No: 2012/1251), Delivered on 9 October 2015. Available at: [https://www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0020/441344/cif-p-20151009.pdf](https://www.courts.qld.gov.au/_data/assets/pdf_file/0020/441344/cif-p-20151009.pdf). See also ABC Lateline, 'Child protection is failing children: research', 30 May 2012. Available at: <http://www.abc.net.au/lateline/child-protection-is-failing-children-report/4043130>.

<sup>ii</sup> For example, abuse experienced by Cindy Palmer, Tiahleigh Palmer's mother, because of Tiahleigh's murder in foster care: Ben Brennan, 'Keyboard warriors attack Tiahleigh Palmer's grief stricken mother', *Yahoo7 News (online)*, 27 September 2016. Available at: <https://au.news.yahoo.com/keyboard-warriors-attack-tiahleigh-palmers-grief-stricken-mother-32741819.html>.

<sup>iii</sup> Cheryl L. Meyer et al, *Mothers who kill their children: Understanding the acts of Moms from Susan Smith to the "Prom Mom"* (New York University Press, 2001), 146.

<sup>iv</sup> Donald Richie, 'Does imprisonment deter? A review of the evidence' (Victorian Sentencing Advisory Council, Sentencing Matters, April 2011). Available at: <https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Does%20Imprisonment%20Deter%20A%20Review%20of%20the%20Evidence.pdf>.

<sup>v</sup> See e.g. *R v Galeano* [2013] QCA 51 (reasons of Gotterson JA).

<sup>vi</sup> See, e.g. Carolyn Holdom, 'Sentencing Aboriginal offenders in Queensland: Toward recognising disadvantage and the intergenerational impacts of colonisation during the sentencing process' (2015) 15(2) *QUT Law Review* 50-17.

<sup>vii</sup> E Baldry and C Cunneen, 'Imprisoned Indigenous women and the shadow of colonial patriarchy' 2014 47(2) *Australian and New Zealand Journal of Criminology*, 276-298, 287-288.

<sup>viii</sup> Kate Warner et al, 'Public judgement on sentencing: Final results from the Tasmanian Jury Sentencing Study' (Australian Institute of Criminology, Trends and Issues in Criminal Justice No. 407, 2011).

<sup>ix</sup> See Kelly Hannah-Moffatt, 'Sacrosanct or Flawed: Risk, Accountability and Gender-Responsive Penal Politics' (2010) 22(2) *Current Issues in Criminal Justice* 193-215; Sisters Inside, Submission to the Anti Discrimination Commissioner for the Inquiry into the Discrimination on the Basis of Sex, Race and Disability Experienced by Women Prisoners In Queensland (2004), 16-22. Available at <http://sistersinside.com.au/media/adccsubmission.pdf>.

<sup>x</sup> See Anti-Discrimination Commission Queensland, Women in Prison Report (2006), 44-45; *Ewert v Canada* (2018) SCC (Canada) 30. Available at: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17133/index.do>.