Queensland Sentencing Advisory Council

Child Homicide Sentencing Review

Submission by Legal Aid Queensland

Legal Aid QUEENSLAND

TRIM no 2018/0638528

Child Homicide Sentencing Review

Introduction

Legal Aid Queensland (LAQ) has had the opportunity to review the consultation paper recently published by the Queensland Sentencing Advisory Council (QSAC) on the sentencing for criminal offences arising from the death of a child.

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997*, LAQ is established for the purpose of "giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way" and is required to give this "legal assistance at a reasonable cost to the community and on an equitable basis throughout the State". Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ's services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ seeks to offer policy input that is constructive and based on the extensive experience of LAQ's lawyers in the day to day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

Our Criminal Law Services across Queensland form the largest criminal law practice in the state. We represent some of the most disadvantaged individuals charged with serious offences in complex cases, including child homicides. Those prosecuted and convicted of the murder of a child, that is those sentenced for the killing of a child in circumstances where the defendant either intended to kill the child or intended to cause that child grievous bodily harm, are sentenced to life imprisonment. No flexibility or sentencing discretion is afforded in those cases.

The consultation paper does not contemplate the removal of this mandatory life sentence for murder. The law recognises a difference in penalty and should continue to recognise such difference between murder and offences other than murder.

It is our understanding therefore that the paper contemplates the sentencing regime appropriate for killings in which it is decided by the Office of the Director of Public Prosecutions not to prosecute the charge of murder or murder is not made out. In our experience the charge of murder is not prosecuted or made out usually due to an inability to prove an intent to kill or an intent to cause grievous bodily harm. In those cases criminality is based on a range of circumstances including:

- death arising from an accident/injury not caused by the defendant but where a breach of a duty of care gives rise to criminal negligence,
- death caused by the defendant at a time when the defendant is suffering from a diminished mental capacity,
- death arising from the actions of a defendant without the intent to kill/cause GBH.

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As highlighted in your paper, the circumstances of manslaughter including the killing of a child, are diverse. This diversity requires a sentencing regime that enables the exercise of broad sentencing discretions.

In our view, the sentencing judge, who has had the benefit of being presented with all the facts in the case, is in the best position to determine the most appropriate sentence. There are a range of legislative tools currently available to the sentencing court to craft adequate punishment. If the tools are not utilised appropriately there are avenues within the current legislative infrastructure to correct the error through appeal processes. Further, the Court of Appeal can be called upon to set the bar by giving guideline judgments under Part 2A of the *Penalties and Sentences Act 1992*.

At the risk of repeating ourselves, this position underlies our specific responses to most of the questions posed in your consultation paper.

Question 1: Sentencing purposes

Section 9(1) of the PSA in its current form provides sufficient guidelines for a sentencing court. In cases where anything less than mandatory life can be imposed, the purpose of each sentence should be left to be determined by the judicial officer informed of all the circumstances in the case. We do not support the creation of a subset of purposes mandated for particular offences which removes flexibility of the sentencing court to determine the purpose on a case by case basis.

Question 2: Sentencing factors

2.1 (most important factors) As with Question 1, in sentence proceedings courts presently in our experience assess the most important and relevant factors having regard to the extensive list of options set out in section 9(2) and (3) of the PSA. Given the diverse circumstances in which these types of cases occur in our view it is not suitable to apply a formulaic hierarchy to the sentencing process. The factors important in a case in which a part time carer with limited criminal history culpable through criminal negligence but whose testimony is crucial to the prosecution of a parent deliberately harming their child will be different to a case in which a severely post natally depressed young mother neglects her children, underfeeding them unintentionally and unknowingly killing them. A woman who leaves her young child in a bath for a brief period of time to answer a phone will enliven different factors to a father who internally ruptures a child while sexually abusing that child causing death through irreparable internal injuries. An 18 year old man who kills a 17 year old outside of a party through a single punch is likely to enliven different factors to a shaking baby case. The sentencing process should be an assessment of all relevant factors, which ever factors are enlivened by the particular case.

2.2 (any other factors) We note in Question 6.2 a reference to potential restorative justice approaches to these types of sentences. If such reforms were to be adopted, it may be helpful to reflect an offender's participation in these processes within the factors to be taken into account under s.9(2).

Question 3: Sentencing factors (aggravating and mitigating)

As outlined above, LAQ supports maintaining judicial discretion and the determination of punishment on a case by case basis without the need to fetter the exercising of the sentencing court's discretion. Done properly, a court can currently reflect the most aggravating and mitigating factors of each case considering

matters afresh on their merits. Where this is not done properly, or a particular factor is given too much weight such that an error in sentencing occurs, there is a right of appeal to correct the error.

Question 4: Sentencing process

Maintaining judicial discretion and not fettering the exercise of such discretion through mandatory sentences allows each case to be assessed on its individual merits. This ensures fairness in sentencing and the administration of justice. In our view, judicial officers hearing the whole of the case are in the best position to best reflect the most relevant factors and determine the most appropriate punishment. In recent years there has been a shift towards increasing penalties, introducing mandatory minimum penalties and significant erosion of the effects of factors relevant to defendants. In our view, continual swinging of the pendulum in one particular direction could have unintended consequences. For example, many cases involving the death of a child occur behind closed doors. Often the only witnesses to the offence are those culpable but to a lesser degree. There is clearly a strong public interest in prosecuting the offender who is the principle offender in each circumstance. However, to do so in many cases it is necessary for the prosecution to rely upon the evidence of a coaccused. If judicial discretion is fettered to the point where factors relevant to the defendant are minimised in favour of factors traditionally associated with punishment and deterrence, the system may experience unintended consequences such as a lack of incentive to cooperate. This could undermine investigations and prosecutions. That is, if a defendant's cooperation is always to be outweighed by factors consistent with greater sentencing, there will be little incentive to cooperate with authorities.

Question 5: Reflecting particular vulnerabilities of children in sentencing

5.1 In our view this question is better answered by other agencies.

5.2 Currently s.9 of the PSA provides a broad range of factors related to a child victim to be taken into account by a sentencing court. Which factors apply will vary on a case by case basis not only having regard to the diversity in the circumstances of these type of offences, but also the huge diversity in factors relevant to child victims aged from infancy through to late teens.

Question 6: Reforms

6.1 But for our response in 6.2, LAQ does not wish to suggest any legislative changes in the sentencing for child homicide cases. The existing legislation and infrastructure appropriately gives the sentencing court a broad range of tools to adequately punish. In our view, little is to be gained by introducing a parallel sentencing or prosecuting regime for child deaths. In fact we are of the view there is a need to avoid the creating of a hierarchy of victims through such special categories of offences and sentencing guidelines/factors.

6.2 Given our experience with pre-sentence youth justice conferencing in the Youth Justice jurisdiction and with the mediation referrals to the Alternative Dispute Resolution division of DJAG in limited criminal matters, LAQ sees merit in greater restorative justice options in this arena. Having said that, these are highly emotionally charged cases in which mediation could expose all sides of the case to significant vulnerabilities. This is not a simple process that should be initiated without detailed consideration being given to properly

resourcing the agency identified to conduct the mediations. Mediators would need to be properly trained and qualified, participating parties should be adequately prepared (including multiple pre and post counselling, grief counselling and debriefing sessions for all participants), and flexibility should be built into any processes (for example it may be that multiple sessions are required, some in which participants are separated and some in which they are joined). Managed properly, this could be a really worthwhile experience for all participants and have fundamental impacts on those on both sides of the case moving forward. Managed and resourced poorly, this could add to the significant trauma already experienced by victims' families and often the defendant. There would also need to be legislative reform built into the PSA to recognise this as a presentence option, set out the process, and address issues regarding voluntariness, confidentiality, who can be present and reporting back to the sentencing court. Many defendants in these matters are remanded in custody and so consideration would need to be given to where and how such processes could be facilitated.

LAQ looks forward to participating in any future discussions with QSAC or Strategic Policy Unit at DJAG on any proposed legislative reform stemming from this review.

Question 7: Community Awareness

7.1 The media plays an important role in informing the community about criminal proceedings. However the disturbing nature of the facts of some of the crimes being reported upon can result in the proceedings being reported upon in a sensationalist style – which in turn can impact on the community's understanding of the sentencing process and outcomes. Discussion of these types of crimes in social media may also focus on the more sensational aspects of the crimes. Strategies designed to improve community awareness of sentencing for these offences need to recognise the influence and reach of traditional media and social media outlets. We look forward to considering any proposals that come from this aspect of your consultation paper.

We note comments in your paper regarding barriers put in place through s.13A and 13B of the PSA. The Explanatory Notes to the *Criminal Law Amendment Bill 2014* identified the following purpose to the introduction of section 13B:

> *insert new section 13B to provide a regime aimed at ensuring the protection and confidentiality of informants who significantly assist law enforcement agencies with their investigations but fall outside the ambit of the existing section 13A as the informant is not willing to give the type of undertaking required under section 13A (for example, a person whose co-operation is reflected in an affidavit by a law enforcement agency; colloquially known as a 'letter of comfort');*

In our view, particularly with regard to section 13B, these barriers are put in place for very good reasons. Removal of these barriers will in many cases significantly increase risk to defendants and interfere with police investigations by interfering with a defendant's ability and preparedness to cooperate.

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