

13 August 2018

Your ref: Criminal Law Committee
Our ref: BDS-CrLC

Queensland Sentencing Advisory Council (QSAC)
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Dear Advisory Council

Consultation paper: Sentencing for criminal offences arising from the death of a child

Thank you for meeting with representatives of our Criminal Law Committee and for the opportunity to provide comments on the terms of reference on the review of the penalties imposed on sentence for criminal offences arising from the death of a child. Queensland Law Society appreciates being consulted on this important issue.

The Queensland Law Society (QLS) is the peak professional body for the State's legal practitioners. We lead a profession of over 13,000 members throughout Queensland. The QLS is comprised of several specialist committees who provide policy advice to the QLS Council on law reform and areas of concern to the profession. This response has been compiled with the assistance of the Criminal Law Committee who have considerable expertise in this area.

We reiterate the matters noted in our letter on the terms of reference dated 17 January 2018.

Introductory comments

The death of any child is a tragedy. The death of a child at the hands of another is an even greater tragedy. This is a highly emotional circumstance, when parents and family have lost a part of their future and the community has lost one of its most vulnerable.

It is understandable in these terrible circumstances we look for explanations for what may be inexplicable. It is understandable that we all want to know the cause of the tragedy and assign blame as a part of making sense of what may appear senseless and wanton. Sadly the criminal justice system is all too often required to deal with these situations. Heartbreaking stories of human cruelty and frailty are the daily grist of the criminal courts and judging fellow humans publicly is the often thankless task of our judicial officers. A job they do with great distinction and sometimes at great personal cost to health and public reputation.

The justified emotion of the community surrounding sentencing in cases of child homicide can even test the rule of law and our commitment to it. The rule of law means that a just society has laws which apply to everybody, equally. It also means everybody is judged without fear or

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favour by a court, independently and objectively. This is regardless of how reprehensible or heinous the defendant may be or how terrible their alleged crime. Indeed the greatest strength of our Australian liberal democracy is that the independent court stands between the citizen and the state that brings the charges, and administers justice according to the law. Judges must not judge according to the emotion and revulsion surrounding the circumstances of the crime. They are naturally influenced by the standards of our community, of which they are an integral part, but they must, however, apply the law dispassionately. Sometimes we can lose sight of the proper role of the court in our grief and our need to deal with the terrible thing that has happened. While the court has a power to apply the law, no verdict or sentence can change the past, no matter how much we might wish it.

Question 1: Sentencing purposes

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?

The *Penalties and Sentences Act 1992 (Qld)* provides a list of factors (sentencing factors) that a court must take into account when determining a sentence that should be imposed for any offence that is committed which causes a defendant to be sentenced.

That legislation and its principles are drafted in a way that certain offences and allegations will draw on certain factors at various times.

The overriding principle in that legislation is that a defendant must receive a sentence that is just in all of the circumstances. That principle causes a court to understandably take into account the serious and devastating effects of an offence that involves the death of a child but also requires proportionate weight to be placed on the individual defendant and their particular circumstances.

The Society recognises that such an exercise by a judicial officer can at times cause a sentence, when looked at in isolation, to be viewed as abstract by society. However, this fundamental principle is the keystone for a criminal justice system to ensure that all stakeholders, including the community, are ensured that there is an attempt to balance all competing interests.

To attempt to prioritise personal deterrence, general deterrence, denunciation, rehabilitation or other factors would allow overtly subjective influences and cause disproportionate sentence outcomes.

Question 2: Sentencing factors

The list of statutory sentencing factors sets out a selection of factors courts must take into account under the *Penalties and Sentences Act 1992 (Qld)* when sentencing a person for an offence that involved violence or resulted in physical harm to another person, including child homicide offences.

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?

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As referred to above, the Society is of the view that each factor referred to in the *Penalties and Sentences Act 1992 (Qld)* is significant.

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 statutory sentencing factors.

There are no other sentencing factors not expressly listed in legislation, or referred to only in a general way.

Question 3: Sentencing factors (aggravating and mitigating)

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? Examples of aggravating factors and examples of mitigating factors.

Aggravating factors

The Society considers the following matters to be aggravating factors.

Abuse of Trust

No child's life should be viewed as more important than another however when there is an abuse of trust particularly as it relates to the parental/guardian relationship this is an aggravating factor. This is important for general deterrence purposes and to reflect the community's expectations.

Significant and/or prolonged mental or physical suffering of the deceased child / persistence / level of violence

Any significant violence inflicted on a child or behaviour that results in the prolonged physical and/or mental suffering of a child is seen as an aggravating factor. The reason being that it is not a case of momentary reaction or inadvertence.

Lack of Remorse

Similarly for all homicide matters a lack of remorse is usually seen as an aggravating factor due to the significant impact on family members having to endure a trial as well as the cost to the community of an often lengthy trial. An exception would be where a trial is undertaken on the basis of a question of cause of death. The lack of remorse as in all offences of violence suggests rehabilitation is more unlikely than for an offender who has insight and is remorseful.

Motive

A motive might be considered an aggravating feature for child homicide. The motive would include committing the offence of child homicide to cover other misconduct or in retaliation for family court proceedings or orders.

Mitigating factors

The Society considers the following matters to be mitigating factors.

Significant physical or mental health issues or low intellectual capacity

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This is already seen as one of the most important mitigating factors in the *Penalties and Sentences Act 1992* (Qld). There is a considerable line of authority from all courts in various jurisdictions that mental illness that does not amount to a defence reduces a person's moral culpability therefore general deterrence is not as relevant in sentencing.

Plea / Remorse

Remorse should be seen as a mitigating factor due as family members do not have to endure a lengthy trial as well as the savings of costs to the community. Remorse as in all offences of violence suggests rehabilitation is more likely than for an offender who has no insight or remorse. On the basis of the material contained in the research paper the fact that the investigations in relation to these matters are often protracted, difficult (given they are often committed in private) and involve multi-disciplinary specialists the plea is perhaps more relevant in these types of matters.

Rehabilitation

Rehabilitation is always a factor taken into account in mitigation on a limited basis. This should depend on the role and the type of offending. It may be more relevant particularly if the offender is not the principal offender or is guilty on a criminally negligent basis/ failure of duty and the substance abuse issue was relevant to the offending.

Sought medical treatment

Again this is a factor which would only be considered in mitigation on a limited basis particularly if the offence is brutal and there is limited prospect that the intervention of medical treatment will be of any assistance.

Question 4: Sentencing process

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?

The view of the Society in relation to mandatory sentencing is well-established. In accordance with this view, the Society has been a long-standing advocate for judicial discretion. The reasons for our support for judicial discretion are based on cogent evidence and are clearly detailed in our mandatory sentencing policy paper.¹ In line with our opposition to mandatory sentencing, we called for a commitment to refrain from the creation of new mandatory sentencing regimes and to take steps to repeal current mandatory sentencing regimes in our 2015 and 2017 Call to Parties Statements.

It is in line with this position that the Society re-emphasises the need to maintain flexibility in the sentencing process when sentencing an offender for an offence arising from the death of a child. This requires the preservation of judicial discretion in sentencing for these offences.

Mandatory sentencing regimes undermine sentencing guidelines as set out in section 9 of the *Penalties and Sentences Act 1992* (the Act). The Act states that sentences may be imposed

¹ Accessible at:

http://www.qls.com.au/Knowledge_centre/Areas_of_law/Criminal_law/Mandatory_sentencing_policy_paper.

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on an offender to an extent or in a way that is just in all the circumstances. In circumstances where judicial discretion is fettered by the mandating of a sentence, the court is unable to impose a sentence that is just in all the circumstances and is transparent.

It is essential that judicial discretion be maintained for sentencing in all criminal matters, including those arising from the death of a child. A mandatory sentence, by definition, prevents a court from fashioning a sentence appropriate to the facts of the case.

As noted in our policy position, the public perception of the appropriateness of a sentence changes as additional information about a matter is provided. A study published by Her Excellency Professor the Honourable Kate Warner AC from the University of Tasmania asked jurors to assess the appropriateness of the judge's sentence for the case in which they were involved. The jurors, who were not informed of the sentence imposed by the judge in the case, were asked what sentence they would impose. More than half of the jurors surveyed indicated they would have imposed a more lenient sentence than the trial judge imposed. When subsequently informed of the actual sentence imposed, 90% said the judge's sentence was (very or fairly) appropriate.

It is with this research in mind that we propose that the government consider implementing a campaign to provide the Queensland community with data and information on sentencing decisions. The Society considers that informing the public is the most appropriate method of managing the perception that sentences for filicide are inadequate. The research suggests that if the community had access to comprehensive evidence on criminal justice sentencing and trends and were fully and properly informed, they would be generally satisfied with sentencing outcomes. As such, the Society supports increased efforts to ensure public awareness and understanding of sentencing decision processes.

Question 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?

A child victim's age and the particular vulnerabilities associated with a child victim's age are already aggravating factors which must be taken into account by the court in the sentencing of an offender for a homicide offence.

In particular, section 9(2) of the *Penalties and Sentences Act 1992* lists the following matters which a court must have regard to in sentencing a defendant or a homicide (or other) offence:

9(2)(c) *the nature of the offence and how serious the offence was, including—*

(i) any physical, mental or emotional harm done to a victim, including harm mentioned in information relating to the victim given to the court under section 179K; and

(ii) the effect of the offence on any child under 16 years who may have been directly exposed to, or a witness to, the offence...

Emphasis added

The following further matters are matters listed under section 9(2) of the *Penalties and Sentences Act 1992* which the Court must have regard to which are relevant for the consideration of a sentence to be imposed on a defendant for a child homicide offence:

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9(2)(e) any damage, injury or loss caused by the offender; and

9(2)(g) the presence of any aggravating or mitigating factor concerning the offender; and

9(2)(r) any other relevant circumstance.

Further, with respect to offences of violence, section 9(3)(c) of the *Penalties and Sentences Act 1992* also states that the Court must have regard to the personal circumstances of any victim of the offence. The victim's age and associated particular vulnerabilities would be such personal circumstances the Court is mandated to have regard to under this provision.

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?

The particular vulnerabilities of child victims are already taken into account in sentencing for an offence arising from the death of a child both under the provisions of section 9 of the *Penalties and Sentences Act* discussed above, and also through the 2010 amendments of the SVO scheme to take into account violence against and the death of victims of offending who are under the age of 12 years.

In 2010, the regime for the declaration of SVOs (Serious Violent Offender) provisions was amended to include a circumstance of aggravation applying to a serious violent offence (including a homicide offence), where the victim was under 12 years. This was introduced in section 7 of the *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld).

This means that in addition to the factors outlined above in section 9 of the *Penalties and Sentences Act 1992*, in relation to offences of violence against a child of 12 years or offences relating to causing the death of a child under 12 years, a sentencing Court must also treat the age of a child as an aggravating factor in deciding whether to declare the offender to be convicted of a serious violent offence: see section 161B(5) of the *Penalties and Sentences Act 1992*.

Should an SVO be declared in these circumstances, a defendant must serve 80 percent of the sentence, or 15 years in prison before being eligible for parole (whichever is the lesser).

For the reasons outlined above, the particular age and vulnerabilities of child victims of homicide offences are already adequately mandated by statute to be taken into account by Queensland Courts in the sentencing process. The Society would not be in support of further legislative amendments which could impose mandatory sentencing regimes in relation to offences of this nature.

Question 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?

It is the view of the Society that no legislative changes are required for sentencing in child homicide offences for the following reasons -

Queensland already has but one penalty available for murder – life imprisonment which cannot be mitigated, with a lengthy parole eligibility date.

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However, there are frequent media reports with respect to child homicide matters where people have been convicted of manslaughter, which of course gives rise to a very different set of considerations. The maximum penalty for manslaughter is still life imprisonment but any sentence under that is still open to be imposed.

It remains possible to impose substantial penalties for child homicide offences.

The Society understands that media reporting of certain matters can, due to a multitude of reasons, be imprecise in some respects. However, despite the lack of nuanced media reporting of matters, the Society is reluctant to recommend amendment to the current section 13A hearing practice. In our view, the effectivity of closed section 13A hearings might be compromised if they were made open to the public.

The issues that surround periods of imprisonment not being able to be declared as pre-sentence custody could be addressed to avoid situations where a defendant's head sentence or release appears unreasonably low. This situation can lead to media reporting and a misunderstanding by the community that a defendant is serving a period of imprisonment much less than that which is required.

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?

The Society is of the view that all sentencing options should be open to a sentencing court and that, subject to qualified and independent oversight, alternative measures such as 'restorative justice approaches' should be considered.

Restorative justice as part of the sentencing process is a complex area. It may be appropriate in some cases and wholly inappropriate in others.

It is an approach used with great success for juveniles as a way to have them face the person(s) they have wronged, and to assist them to fully understand the difficulties they have caused when they may not otherwise have the cognitive capacity to do so.

It may be of some benefit to be used in child homicide matters, but only in particular circumstances.

For example, where a person has harmed their own child or a family member's child, taking part in restorative justice may or may not assist the victims to have a voice and the accused to be heard to express their remorse. However, it may be completely apparent to the accused of the harm and destruction caused by their actions given that they are family members.

It should be a process at the discretion of the victim's family/current guardians, with appropriate safeguards. Caution against early use is important as it may result in evidence or information being elicited from the accused which may be later used. It should be done where a plea of guilty is indicated or has been entered to an appropriate offence, and the Court could be required to take it into account when fashioning a sentence.

The public safeguard would be stakeholders dealing with and accepting the decision of the Office of the Director of Public Prosecutions whether such a process is used.

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Greater publication and dissemination of sentencing remarks should be encouraged. Relationships with media outlets by those in the know should also be fostered to help correct any misunderstandings.

Question 7: Community awareness

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

The community's understanding of sentencing is driven largely by media coverage of the judicial system. Media in this context now incorporates both conventional media outlets and the various platforms on which they publish their content coupled with social media, where content is provided both from individuals or groups as well as conventional media outlets.

Media reporting on sentences imposed by the courts has been the subject of criticism by the Society and other organisations for the selective manner in which reporting frequently occurs. Sensationalised news stories also have a greater tendency to be the ones which are circulated more widely on social media platforms, contributing to a misconception by some members of the public that such stories are an accurate representation of (a) the matter the subject of the particular report; and (b) the work of the courts generally.

Social media itself is also subject to almost no restrictions on the content that is circulated on it. For those for whom these are their main sources of news information, this can readily lead to significant misunderstandings around the courts process and sentences the courts impose.

Political interests, particularly around certain periods of the electoral cycle, also frequently lead to politicians inflaming these misconceptions further by statements made with the intention of representing the courts and other stakeholders in the criminal justice system as ineffective at upholding purported community expectations around sentencing, particularly over sensitive matters such as child homicide offences.

Another facet of this is that attacks on judicial officers typically go unanswered, largely due to the rule that judicial officers are not permitted to comment on court matters whilst they are in office. Whilst the Attorney-General is charged with the defence of the courts, such a practice is a limited protection because the AG is the decision maker charged with determining in particular cases whether the state will appeal against sentences imposed.

Initiatives such as QSAC's 'Judge for yourself' are no doubt effective in addressing some of these misconceptions but they are necessarily limited by the audience who actively participate in them. Integrating that more widely into education programs, starting at school age as the current program does, would also be desirable.

Communication being proffered by the courts themselves might be one way to also address this. The Governor of Tasmania, Professor Kate Warner AO, has worked in this area, as QSAC is aware, and her proposal around wider use of sentencing summaries in an accessible form for the community is supported by the Society.

The Society would also support consideration of further regulation around the manner of reporting on court proceedings. Making it a requirement to provide a link to the courts summary of a decision might be productive if that is implemented.

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

Victims Assist is the most suitable entity to be able to effectively communicate with victims of crime in a sensitive manner concerning sentencing for child homicide offences. A standardised information pack might perhaps be put together and provided to people in these circumstances so that they may be provided with some basic understanding of both the court and sentencing process but also of some of the factors the courts assess in determining penalty in such cases.

Having an independent entity able to answer media and public queries or concerns around sentencing might also be somewhat productive, communications officers employed by the courts both to author the summaries of sentences (as noted above) and potentially having some scope to respond to media coverage or public attention to particular matters to ensure the conversation on them is at least based on accurate information. This would also alleviate some of the conflict noted above concerning the AG's role in this regard.

The Queensland Law Society would be pleased to provide further comment or be consulted throughout the policy development and legislative process. If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy Manager [REDACTED]

Yours faithfully

Ken Taylor
President