



QUEENSLAND POLICE SERVICE

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Our Ref:

Your Ref:

21 August 2018

Ms Victoria Moore
Policy Manager
Queensland Sentencing Advisory Council
GPO Box 2360
BRISBANE QLD 4001

Dear Ms Moore

Queensland Police Service submission in response to the Consultation Paper regarding sentencing for child homicide offences

In May 2018, you released a Consultation Paper in relation to the above subject, in accordance with a request from the Attorney-General and Minister for Justice to review the adequacy of penalties imposed on sentence for offences arising from the death of a child.

The Queensland Police Service (QPS), as the primary agency responsible for the investigation of crimes committed upon children, is committed to continuing to collaborate with key stakeholders on this important issue.

Please find attached the QPS submission for consideration. The QPS submission provides responses to specific terms of reference of the current inquiry, and does not seek to re-prosecute matters already identified in the Consultation Paper.

We look forward to participating in future consultation with you regarding the key issues. Should you require any further information, please contact

Yours sincerely

IAN STEWART
COMMISSIONER

Queensland Police Service submission

Queensland Sentencing Advisory Council Sentencing for criminal offences arising from the death of a child

Background

The Queensland Police Service (QPS) aims to deliver quality policing services to the people of Queensland with an overarching focus on stopping crime and making the community safer.

The QPS is the primary law enforcement agency for the state of Queensland. Officers predominantly exercise powers under the provisions of the *Police Powers and Responsibilities Act 2000* (PPRA) and are guided by policy contained in the Operational Procedures Manual (OPM). Officers also administer functions and exercise powers under a broad range of State and Commonwealth legislation.

General duties police officers provide the first response to the community with regional services supported by specialist units including Child Protection and Investigation Units (CPIU) that investigate crimes against children and Criminal Investigation Branches (CIB) that investigate criminal offences. Both first response general duties officers and specialist investigation units (CPIU and CIB) provide a decentralised law enforcement response across the State.

The QPS has a long history of commitment to the protection of children within our communities. From the creation of the Juvenile Aid Bureau (JAB) in 1963 to the present response capability of the CPIU, the QPS has continued to develop specialist staff capable not only of providing a forensic response to child protection issues, but also of contributing to the prevention and intelligence led targeting of activities which pose risk to children.

Just as child protection policing forms one part of a larger organisational responsibility, so too child protection issues form part of a larger social system, linked to health, education, housing, infrastructure, and employment. Many of these issues, along with factors such as substance abuse, family violence and mental health, are contributors to, or precipitators of, child harm.

The QPS' primary contribution to the child protection system is the provision of investigative expertise, and where necessary placing matters before the criminal courts.

The Child Abuse and Sexual Crime Group (CASCg), State Crime Command, is led by a Detective Superintendent who is also the QPS Child Safety Director. The Group provides statewide coordination of CPIUs in relation to policy and practice. The Group also provides specialist expertise and support in relation to a range of child protection investigations, including child trauma, technology facilitated child sexual abuse, multi-agency responses to child harm, and management of registered child sex offenders.

The Child Trauma Unit, CASCg, provides high-level specialist investigative and operational assistance to regional investigators on sudden, unexplained deaths of children, and serious injuries and deaths resulting from suspected child abuse and neglect.

This group of highly trained investigators is experienced in child abuse and suspicious death investigations. The unit is often deployed across the state to assist regional and metropolitan investigations. The unit uses diverse investigative techniques and has developed networks with a range of government and non-government experts in the field of child trauma to provide additional capability to these often complex investigations.

The unit provides specialist training to regional investigators associated with child death investigations, and actively participates in the facilitation of lectures to tertiary education establishments and external government departments on child homicide.

The QPS appreciates the opportunity to provide this submission to the Queensland Sentencing Advisory Council as a vehicle by which to contribute to the enhancement of the criminal justice system.

Child Death Investigations

Police officers are required to treat all child deaths as major investigations until enquiries indicate there are no suspicious circumstances surrounding the death.

Preliminary investigative responses may include, but are not limited to, the following:

- Obtaining from parent/s or care provider/s (conducted separately / recorded on audio/video device) a full account of the circumstances leading up to and including the event. Consideration is also given to conducting a video re-enactment.
- Obtaining medical history of the victim child.
- Consultation with the Department of Child Safety, Youth and Women:
 - Notification and consideration of conducting a joint investigation.
 - Addressing other existing child protection issues that may be present.
 - Obtaining relevant child protection history.
- Identification, preservation and forensic processing of crime scene/s
- Obtaining witness statements from significant witnesses.
- Obtaining witness statements from treating Queensland Ambulance Service members, including review of triple zero call.
- Overt investigative strategies, including door knocks; CCTV footage review; media strategies.
- Reviewing internet capable devices for evidence.
- Covert investigative strategies, where necessary.
- Obtaining preliminary medical information about the victim child. Relevant information will be obtained from treating medical practitioners and emergency doctors/paediatric specialists:
 - Details of injuries
 - Timing/Dating
 - Mechanism of injuries
 - Tests completed and scheduled
 - History provided by parents/care-givers
- Formal records of interviews of persons of interest / suspects.

There are several factors which make child death investigations more complex than other homicide investigations. These include:

Medical evidence

In many cases, the cause of the child's death is not immediately apparent. The child's death may be attributable to natural causes, including sudden unexplained death of an infant (SUDI); accident; or intentional or non-intentional injury.

Medical and pathology investigations can be lengthy, and are often more complex in that some signs of trauma may be attributable to natural causes. Further tests and examinations are often required before natural causes can be definitively ruled in or out.

The impact of these delays on a non-offending family member, particularly where the final determination is that the cause of death was natural, must be taken into account during the course of an investigation.

It is also difficult to establish a definitive cause of death, particularly in those investigations where multiple injuries of different ages are identified. This creates complexity from an investigative perspective, as it becomes difficult to determine a clear time or date in which the injury that caused the death is likely to have occurred. The ability to identify the possible perpetrator of the injury by identifying who might have been with the child at the time of infliction of the injury is therefore impacted.

Culpability

In many cases, there are no witnesses to the act/s of violence, so a clear time and place of death cannot be established, let alone evidence of who perpetrated the act of violence.

A significant factor for investigations is determining who is responsible for the injuries. In many instances, the parents or parent equivalents (step-parent or de facto partners, for example) all have access to the child at relevant times. Often, if one parent is the offender, the other parent may refuse to provide information to the police, possibly through fear or loyalty. Current legislative restrictions limit the ability for police to charge both parents where it is unclear who caused the fatal blow. This in turn leads to situations where nobody can be charged with offences against the child.

Often, where there is evidence of injuries being incurred over a sustained period of time, and the child is pre-verbal and therefore unable to articulate the pain or the perpetrator, investigators try to obtain evidence from witnesses about their observations of the child over the time period.

Admissions to offending are rarely made in child death investigations, possibly due to the public perception of child abuse and the fear of being stigmatised as a child killer. Similarly, offenders are likely to deny or minimise their role in the child's eventual death.

Motive and intent

As evidenced in the research conducted by the Queensland Sentencing Advisory Council (QSAC), many child homicides result in charges of manslaughter, primarily as the element of intent required for a murder charge is not supported by available evidence.

There is often no evidence of planning or preparation which could suggest intent to kill or cause grievous bodily harm. As also identified in the QSAC report, the level of force required to cause significant injury is lower than that required to cause harm to a more physically able person. Investigators are therefore required to consider the level of force required to inflict the injury and the expectation of the consequences of that force upon the person upon whom it is inflicted.

Similarly, the motive or reason for the infliction of injury can be more difficult to determine than in many homicides involving adult victims. The QSAC report refers to heightened stress and inability to cope as some factors for consideration. Other factors could include post-natal depression, frustration or anxiety, momentary anger or inattention. The circumstances of a child's death are often significantly broader than those for the death of an adult, and therefore more complex to investigate and prosecute.

Emotional Impact

There is a significant emotional impact on the family of the child, as well as on the service providers from all agencies who provide a response to the child and their family.

From a policing perspective, it is critical to balance the need to conduct an impartial investigation to ascertain the circumstances of the child's death, and to provide information and support to the family. This is particularly difficult when it is not clear whether a criminal offence has occurred, and if so, who may have committed the offence. Police officers maintain involvement with the family for the course of an investigation, and must balance their involvement carefully to ensure a proper investigation is conducted. This often creates a level of tension, particularly when certain aspects of the investigation are unable to be disclosed to the family.

Queensland Sentencing Advisory Council (QSAC)

On 25 October 2017, the Attorney-General requested the Queensland Sentencing Advisory Council (QSAC) to review penalties imposed on sentence for criminal offences arising from the death of a child. The QSAC is required to release its report on 31 October 2018. The remainder of this document will address the QPS position in relation to the terms of reference for this review.

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?

Section 9 of *Penalties and Sentences Act (1992)(Qld)(PSA)* limits the purposes of sentencing to five factors: punishment; rehabilitation; deterrence (detering the offender and deterring potential offenders); denunciation and community protection. In relation to sentencing purposes for child homicide offences, the QPS considers punishment and denunciation to be the most important factors.

As previously discussed, the range of reasons for the death of a child, including the apparent lack of intent in many of the deaths, make deterrence somewhat less applicable. There is similarly limited data to suggest a person responsible for the death of a child is likely to commit further similar acts, so consideration of community protection must also be less relevant than punishment and denunciation. There is a community expectation that crimes against children should be punished severely, and the denunciation of this conduct publicly validates these expectations.

The QPS considers the vulnerability of the victim to be a matter for consideration on sentence. For example, very young children are entirely dependent on their care providers to meet their safety and human needs. They are unable to articulate pain or fear (except through crying) and cannot independently seek safety from attack. Similar arguments can be used for other vulnerable members of the community, including the elderly, and people with physical or intellectual disabilities.

The nature and extent of the victim child's injuries should also be considered, including the presence of historical or healing injuries that may not be related to the cause of death, but demonstrate an abusive course of conduct within that domestic environment and the victim child.

The actions of the accused following the event should be considered, including consideration of factors which would provide evidence of remorse. These factors include whether the offender:

- admitted to their role in the commission of the offence at the time of the offence (not after the collection of all of the evidence);

- sought medical treatment for the child and informed treating medical experts of the nature and mechanisms on how the injuries were inflicted or occurred, or did they perpetuate a lie motivated out of self-preservation and avoidance of detection by law enforcement and/or child protection services;
- attempted to intimidate witnesses; or
- disposed of evidence.

As noted previously, child homicide investigations are complex and lengthy. It is considered that attempts by the offender or other parties to the offence to provide assistance to investigators, medical personnel and other key stakeholders should be taken into consideration when imposing sentence.

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?

While all factors within section 9(3) of the *Penalties and Sentences Act 1992* (the PSA) are relevant in their own regard, the QPS considers the following factors to be more pertinent in considering sentences arising from the death of a child:

(b) *the need to protect others from a risk of physical harm.* The QPS considers this particularly relevant if there are other children or vulnerable people in the care of the offender.

(c) *the personal circumstances of any victim.* This should also include those members of the family who have been impacted by the death of the child.

(d) *the circumstances of the offence, including death or injury to a member of the public or any loss or damage resulting from the offence.* This links to subsection (e) below, and requires consideration of the number, age and types of injuries inflicted on the child.

(e) *the nature or extent of the violence used, or intended to be used, in the commission of the offence.* Consideration should be given to not only the nature or extent of the violence, but also the significantly lesser amount of violence required to inflict injury on a young child and whether the injuries were foreseeable by the actions of the offender.

(g) *the past record of the offender, including any attempted rehabilitation and the number of previous offences of any type committed.*

(i) *any remorse or lack of remorse of the offender.* The aspect of remorse has been discussed in response to question 1 above, but it is worth reinforcing the need to consider evidence of genuine remorse at the time or shortly after the incident which caused the death of the child.

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.

While subsection (c) above is broadly considerate of all aspects of the victim's circumstances, the QPS considers the short and long term impact this form of offending and the associated

loss of a child on the family is an important consideration, particularly in those instances where another family member or trusted associate is the offender.

This subsection may also benefit from more explicit consideration of the vulnerability of the victim. It is noted in the QSAC discussion paper, and also from discussions at forums about this topic, that there is a risk that the value of a person's life needs to be counted by their age, or their contribution to society. The QPS acknowledges this concern and is therefore proposing rather that consideration be given to the vulnerability of the victim. This broad definition can apply to those members of the community who could be at greater risk of harm through age (very old or very young), ability (physical or mental impairment), background (culturally and linguistically diverse), or life circumstances (homeless, isolated, etc.).

The circumstances of the offence, as discussed in subsection (d), need to take into account whether the offender was in a position of trust, particularly when the person convicted of killing a child is a family member, a child care worker, or another person entrusted by the family to look after their child. There are circumstances of aggravation applicable to sexual offences, particularly child sexual offences, where the offender is a person in a position of trust. Similar considerations should apply in child homicide offences.

The actions of the offender after they caused the death and how this impacted on the victim's family should also be considered, particularly in regard to ascertaining the offender's level of remorse, per subsection (i).

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

Many of the factors have been discussed in previous responses, however below is a summary of the key points for consideration.

Aggravating Factors:

- Victim vulnerability due to age or disability;
- Significant and/or prolonged mental or physical suffering of the deceased child;
- Lack of remorse of the offender;
- Persistence / level of violence;
- Abuse of a position of trust;
- Relationship between the victim and the deceased;
- Impact on family of the deceased.

Mitigating Factors:

- Rehabilitation efforts post-offence;
- Assistance to law enforcement authorities;
- Sought medical treatment for victim;
- Remorse.

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 QPS considers that flexibility must be maintained within the sentencing process. As mentioned previously, due to the vast array of circumstances in which a child death may occur, there is a clear need to ensure the ability of the courts to impose a sentence that considers all these factors.

The QPS notes that Queensland courts consider case law and precedent when imposing sentences for offences committed in Queensland. It is also noted that sentences can and do deviate from precedent when societal values change, often without the need for legislation to amend the maximum penalties for offences.

The courts have the power to make a declaration that an offender is a Serious Violent Offender. However, consideration may need to be given to the purpose for the imposition of such a declaration. It is noted the Explanatory Notes, when the amendments were introduced in 1997, state *"the court must have regard primarily to the risk of physical harm to any members of the community if a custodial sentence were not imposed, the need to protect any members of the community from that risk and a number of other specified factors"*. However, as mentioned previously in this paper, key considerations for sentencing particular offenders who have killed a child should be punishment and denunciation. It is arguable that, if a judge takes into consideration these factors, along with the considerations in section 9(3) of the PSA that have been highlighted as primary considerations, more use may be made of this power.

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?

Children under the age of 12 months form the largest demographic with respect to child homicide victims. Children aged from birth to the age of four years comprise over half of all child homicide victims.

Children falling into the aforementioned demographic are completely dependent on an adult for survival and protection and are completely or largely defenceless. They are unable to independently advise another of pain, limiting any opportunity to get help/treatment through a third party.

Children over the age of four, while able to articulate pain, are not sufficiently self-aware or cognisant of threats or danger and are still reliant on responsible adults to ensure their ongoing safety and protection.

The level of violence required to cause significant injury to a child is less than that required to cause the same type of injury to a less vulnerable person. This should not necessarily be considered a mitigating factor.

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?

Prosecutors often emphasise these particular factors when making sentencing submissions. Witness statements, particularly those from medical professionals, can provide invaluable

information about these vulnerabilities. Victim impact statements will also provide significant assistance in relation to the family circumstances both before and after the child's death.

During sentencing, the judge often provides information in their sentencing remarks about the vulnerabilities of the victim child and provides a clear link to a specific aspect of the end sentence. It is recommended this practice continue, and that greater weight be placed on these factors at sentence.

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?

This paper has already identified issues for consideration, including:

- Greater use of the Serious Violent Offender (SVO) declaration.
- Consideration for increase of non-parole periods, to reinforce the need for punishment and denunciation.
- Consideration by courts and the Court of Appeal to changing precedents to reflect societal changes.

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?

This question raised complex issues and can only be responded to in the broadest terms from a policing perspective. Having noted previously the vast range of circumstances in which a child death may occur, there may be some occasions where a restorative justice approach can provide a level of comfort to the family. It is expected these approaches may be valuable when the offender is a member of the family and will be returning to the family following the completion of their punishment. However, each case will by necessity be different, and flexibility in approaches is critical to ensuring positive outcomes.

What might be some of the advantages and disadvantages of such approaches?

The primary advantage for use of restorative justice approaches would likely be a greater level of involvement by the family in the sentencing process. It is clear from the research and community forums that family members feel somewhat disempowered through the investigation, prosecution and court processes, except through the ability to make a victim impact statement. Any reform to offer the family a greater say in aspects of the process may also improve community perceptions of the process and outcomes.

Question 7: Community Awareness

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

As mentioned previously, the level of violence that is required to cause injury to a child is low. A key prevention campaign highlighting this low level of force, like the One Punch Can Kill campaign, may reduce the number of injuries and deaths to children and also raise awareness about court considerations on sentence.

Media coverage associated with Court processes can be sensationalist. The death of a child at the hands of another is tragic and causes pain to many in the immediate family and their

broader community. Media 'sound bites' focus on some key points, but often due to short times given for the story, the context of the key points may be missed or ignored. It is therefore difficult to fully comprehend the circumstances of the offending, and all of the reasons for the imposition of a sentence.

There is often a miscomprehension that offenders are being dealt with for lesser offences after murder charges are 'dropped' with offenders being allowed to enter a plea to a lesser charge of manslaughter (media reporting also validates these thoughts). The downgrading of charges creates a perception around leniency towards the accused. Some of the reasoning for this is the inherent misunderstanding or lack of knowledge of the law and how legal provisions are applied to these scenarios.

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

It is often difficult in a 24-hour news cycle to get messages out to the community about issues which raise significant emotional responses. The media cannot be expected to speak on behalf of the criminal justice system, so it is incumbent on others to find opportunities to educate the community.

It is noted the courts are open for members of the public, and technology is allowing for streaming and immediate reporting of sentences to those interested. Judicial sentencing remarks are often made available to the public, but it may be that these remarks are confusing to those who have not been exposed to the system. Perhaps more detailed explanations by presiding Judges on how sentences are reached during the delivery of their decisions and sentencing remarks may provide some assistance, along with greater accessibility to the remarks by members of the community.

While it has been mentioned that a prevention campaign may provide guidance to the community, more general education on judicial processes and the criminal justice system may also provide for a greater level of community understanding of the system.

The work of victim support agencies, including the Queensland Homicide Victims Support Group, must be acknowledged as not only a great source of support to families, but also a source of information for families going through this traumatic process.

Victim Liaison Officers within the Office of the Director of Public Prosecutions also provide a vital service to those victims and families going through the criminal justice system. However, consideration may need to be given to having family liaison officers within courts to help people through the system, and also provide education to those members of the public that are keen to know more about the system.

Conclusion

The QPS acknowledges the role it plays within the criminal justice system, along with the important roles of prosecution and court authorities and is committed to continued collaboration to ensure the shared goal of bringing offenders to justice is met.

The QPS also acknowledges the complex and difficult task faced by all members of the criminal justice system when investigating, prosecuting and presiding over child death offences. The commentary in this submission identifies issues from a policing perspective only, and acknowledges other stakeholders will hold different perceptions and views.