



Criminal Code and Other Legislation Amendment Bill 2019

**Report No. 35, 56th Parliament
Legal Affairs and Community Safety Committee
April 2019**

Legal Affairs and Community Safety Committee

| | |
|---------------------|-----------------------------------------------|
| Chair | Mr Peter Russo MP, Member for Toohey |
| Deputy Chair | Mr James Lister MP, Member for Southern Downs |
| Members | Mr Stephen Andrew MP, Member for Mirani |
| | Mr Jim McDonald MP, Member for Lockyer |
| | Mrs Melissa McMahon MP, Member for Macalister |
| | Ms Corrine McMillan MP, Member for Mansfield |

Committee Secretariat

| | |
|---------------------------------------|--------------------------------------------------------------------------------------|
| Telephone | +61 7 3553 6641 |
| Fax | +61 7 3553 6699 |
| Email | lacsc@parliament.qld.gov.au |
| Technical Scrutiny Secretariat | +61 7 3553 6601 |
| Committee Web Page | www.parliament.qld.gov.au/lacsc |

Acknowledgements

The committee acknowledges the assistance provided by the Department of Justice and Attorney-General.

Contents

| | |
|-----------------------------------------------------------------------------------|------------|
| Abbreviations | ii |
| Chair’s foreword | iii |
| Recommendations | iv |
| 1 Introduction | 1 |
| 1.1 Role of the committee | 1 |
| 1.2 Inquiry process | 1 |
| 1.3 Policy objectives of the Bill | 1 |
| 1.4 Government consultation on the Bill | 2 |
| 1.5 Should the Bill be passed? | 2 |
| 2 Examination of the Bill | 3 |
| 2.1 New aggravating factor | 3 |
| 2.1.1 Background | 3 |
| 2.1.2 Sentencing guidelines | 4 |
| 2.1.3 Stakeholder views and department response | 5 |
| 2.2 Expanding definition of murder to include reckless indifference to human life | 5 |
| 2.2.1 The offence of murder | 5 |
| 2.2.2 Stakeholder views and department response | 7 |
| 2.2.3 Penalties for murder | 9 |
| 2.2.4 Stakeholder views and department response | 10 |
| 2.3 Evidence at murder trial | 12 |
| 2.3.1 Stakeholder views and department response | 12 |
| 2.4 Failure to supply necessaries | 13 |
| 2.4.1 Serious Violent Offence declaration | 14 |
| 2.4.2 Stakeholder views and department response | 14 |
| 2.5 Commencement | 15 |
| 3 Compliance with the <i>Legislative Standards Act 1992</i> | 16 |
| 3.1 Fundamental legislative principles | 16 |
| 3.1.1 Rights and liberties of individuals | 16 |
| 3.1.2 Natural justice | 18 |
| 3.2 Explanatory notes | 18 |
| Appendix A – Submitters | 19 |
| Appendix B – Officials at public departmental briefing | 20 |
| Appendix C – Witnesses at public hearing | 21 |
| Statement of Reservation | 22 |

Abbreviations

| | |
|-----------------------|------------------------------------------------------------------------------------------------------------------------------------------------|
| ACT | Australian Capital Territory |
| ATSILS | Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd |
| BAQ/Association | Bar Association of Queensland |
| Bravehearts | Bravehearts Foundation Ltd |
| Bill | Criminal Code and Other Legislation Amendment Bill 2019 |
| department | Department of Justice and Attorney-General |
| CCC | Crime and Corruption Commission Queensland |
| committee | Legal Affairs and Community Safety Committee |
| Evidence Act | <i>Evidence Act 1977</i> |
| LAQ | Legal Aid Queensland |
| LSA | <i>Legislative Standards Act 1992</i> |
| NSW | New South Wales |
| OQPC | Office of the Queensland Parliamentary Counsel |
| PACT | Protect All Children Today Inc. |
| Peakcare | Peakcare Queensland Inc |
| POQA | <i>Parliament of Queensland Act 2001</i> |
| Private Member's Bill | Criminal Code and Other Legislation (Mason Jett Lee) Amendment Bill 2019 |
| PSA | <i>Penalties and Sentences Act 1992</i> |
| QCCL | Queensland Council of Civil Liberties |
| QLS | Queensland Law Society |
| QSAC | Queensland Sentencing Advisory Council |
| QSAC Report | Queensland Sentencing Advisory Council, <i>Sentencing for criminal offences arising from the death of a child – Final report, October 2018</i> |
| SVO | serious violent offence |
| WLSQ | Women's Legal Service Qld |

Chair's foreword

This report presents a summary of the Legal Affairs and Community Safety Committee's examination of the Criminal Code and Other Legislation Amendment Bill 2019.

The committee's task was to consider the policy to be achieved by the legislation and the application of fundamental legislative principles – that is, to consider whether the Bill has sufficient regard to the rights and liberties of individuals, and to the institution of Parliament.

On behalf of the committee, I thank those individuals and organisations who made written submissions on the Bill, and those who gave evidence at the public hearing. I also thank our Parliamentary Service staff and the Department of Justice and Attorney-General.

I commend this report to the House.



Peter Russo MP

Chair

Recommendations

Recommendation

2

The committee recommends the Criminal Code and Other Legislation Amendment Bill 2019 be passed.

1 Introduction

1.1 Role of the committee

The Legal Affairs and Community Safety Committee (committee) is a portfolio committee of the Legislative Assembly which commenced on 15 February 2018 under the *Parliament of Queensland Act 2001* (POQA) and the Standing Rules and Orders of the Legislative Assembly.¹

The committee's primary areas of responsibility are:

- Justice and Attorney-General
- Police and Corrective Services
- Fire and Emergency Services.

The POQA provides that a portfolio committee is responsible for examining each Bill in its portfolio areas to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles to the legislation.

On 12 February 2019, the Criminal Code and Other Legislation Amendment Bill 2019 (the Bill) was introduced into the Legislative Assembly by Hon Yvette D'Ath MP, Attorney-General and Minister for Justice, and referred to the committee. The committee is to report to the Legislative Assembly by 16 April 2019.

1.2 Inquiry process

On 19 February 2019, the committee invited written submissions on the Bill and on the Criminal Code and Other Legislation (Mason Jett Lee) Amendment Bill 2018 (Private Member's Bill), a Private Member's Bill introduced by Mr David Janetzki MP, Shadow Attorney-General and Shadow Minister for Justice. Fourteen submissions were received. See Appendix A for a list of submitters.

The committee received written advice from the Department of Justice and Attorney-General (department) in response to matters raised in submissions.

The department briefed the committee on the Bill at a public briefing on 25 February 2019. See Appendix B for a list of officials. The department also provided the committee with a written briefing note.

On 25 March 2019, the committee held a public hearing on the Bill and the Private Member's Bill. See Appendix C for a list of witnesses.

The submissions, correspondence from the department and transcripts of the briefing and hearing are available on the committee's webpage.

1.3 Policy objectives of the Bill

On 25 October 2017, the Attorney-General issued terms of reference to the Queensland Sentencing Advisory Council (QSAC) to review the adequacy of penalties imposed on sentence for criminal offences arising from the death of a child in response to ongoing community concern about whether sentences for criminal offences arising from the death of a child are meeting expectations.² The QSAC released its report on 21 November 2018.

¹ *Parliament of Queensland Act 2001*, s 88 and Standing Order 194.

² Department of Justice and Attorney-General, correspondence dated 22 February 2019, attachment, p 1.

The Bill proposes to implement Recommendation 1 of QSAC's report, *Sentencing for criminal offences arising from the death of a child – Final report* (QSAC Report).³ The Bill would amend the *Penalties and Sentences Act 1992* (PSA) to provide that in sentencing an adult offender convicted of the manslaughter of a child under 12 years, the court must treat the child's defencelessness and vulnerability, having regard to the child's age, as an aggravating factor.

The Bill would also amend the *Criminal Code Act 1899* (Criminal Code) to:

- expand the definition of murder to include reckless indifference to human life
- increase the maximum penalty for failure to supply necessaries from three years imprisonment to seven years imprisonment and reclassify the offence as a crime.

1.4 Government consultation on the Bill

The explanatory notes advise that 'wide-ranging and extensive'⁴ consultation was undertaken by the QSAC during its inquiry into the penalties imposed on sentence for criminal offences arising from the death of a child.⁵

The explanatory notes further provide that a consultation draft of the Bill was provided to key stakeholders and that their feedback was taken into account in finalising the Bill.⁶ The key stakeholders consulted included:

*... the Crime and Corruption Commission; Director of Public Prosecutions; Bar Association of Queensland; Queensland Law Society; Legal Aid Queensland; Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd; Aboriginal and Torres Strait Islander Women's Legal Services NQ Inc; Sisters Inside Inc; Protect All Children Today Inc; Queensland Homicide Victims' Support Group; Queensland Council for Civil Liberties; Women's Legal Service Qld; Caxton Legal Centre Inc; Community Legal Centres Queensland; Commonwealth Director of Public Prosecutions; Bravehearts and Prisoner's Legal Service Inc.*⁷

1.5 Should the Bill be passed?

Standing Order 132(1) requires the committee to determine whether or not to recommend that the Bill be passed.

Recommendation

The committee recommends the Criminal Code and Other Legislation Amendment Bill 2019 be passed.

³ QSAC is an independent body established by the *Penalties and Sentences Act 1992*, Part 12. The Council reports to the Attorney-General and is supported by a small secretariat administered by the Department of Justice and Attorney-General; QSAC, 'About us', <https://www.sentencingcouncil.qld.gov.au/about-us>

⁴ Criminal Code and Other Legislation Amendment Bill 2019, explanatory notes, p 5.

⁵ Criminal Code and Other Legislation Amendment Bill 2019, explanatory notes, pp 5-6.

⁶ Criminal Code and Other Legislation Amendment Bill 2019, explanatory notes, p 6. See also public briefing transcript, Brisbane, 25 February 2019, p 6.

⁷ Criminal Code and Other Legislation Amendment Bill 2019, explanatory notes, p 6. See also public briefing transcript, Brisbane, 25 February 2019, p 6.

2 Examination of the Bill

This section of the report outlines the Bill's proposed amendments and discusses issues raised during the committee's examination of the Bill.

2.1 New aggravating factor

The Bill proposes to implement Recommendation 1 of the QSAC Report⁸ by inserting new subsection 9B into s 9 of the PSA:

*(9B) In determining the appropriate sentence for an offender convicted of the manslaughter of a child under 12 years, the court must treat the child's defencelessness and vulnerability, having regard for the child's age, as an aggravating factor.*⁹

2.1.1 Background

Based on the evidence the QSAC received during its inquiry into child homicide, the QSAC reached the view that '[p]enalties imposed on sentence for manslaughter offences committed against children under 12 years – in particular, those offences involving the direct use of violence – do not adequately reflect the unique and significant vulnerabilities of child victims.'¹⁰

After noting that the range of sentences imposed for manslaughter against young children has remained stable since at least the 1990s, and with the majority of sentences between 7 and 9 years imprisonment, the QSAC commented:

*Given improved understanding of the significant long-term impacts of child abuse and neglect, and changes in community attitudes about the use of physical punishment against children, higher sentences for these offences, particularly those involving the direct use of violence, in the Council's view are warranted.*¹¹

The QSAC considered various means of supporting courts to better reflect children's vulnerability in sentencing before determining that creating a new aggravating factor in s 9 of the PSA was the best means of achieving the goal.¹²

The QSAC Report identified the benefits of the introduction of a new aggravating factor:

... Importantly, this approach will retain sentencing flexibility, taking into account the diverse circumstances in which these offences occur, while emphasising the factors that make these offences more serious.

The reform recommended has the advantage of applying not just to the setting of the non-parole period, but also to the setting of the head sentence. The Council considers this is a distinct advantage of this approach over other potential changes contemplated to the operation of the SVO scheme.

...

The proposed aggravating factor will serve two primary purposes. First, it will support courts' treatment of these offences as more serious and therefore deserving of more severe punishment. Secondly, it will meet the sentencing purpose of deterrence and denunciation — sending a clear

⁸ QSAC Report, p xxxix.

⁹ Clause 9.

¹⁰ QSAC Report, pp xxxiii, 154; explanatory notes, p 5.

¹¹ QSAC Report, p xxxiii.

¹² QSAC Report, p 155.

*message to the community that violence against children of any kind is wrong and will not be tolerated.*¹³

The department considered the introduction of the aggravating factor was justified on the basis of the findings of the QSAC that sentencing for manslaughter offences committed against young children, particularly in cases involving the direct use of violence against a young child, is 'not viewed by the community as adequate and does not adequately reflect the unique and significant vulnerabilities of child victims'.¹⁴

2.1.2 Sentencing guidelines

The QSAC identified the function of s 9 of the PSA in its report:

*Section 9 of the PSA sets out statutory sentencing guidelines for courts to apply in sentencing, including the purposes for which a sentence may be imposed, and other factors a court must take into account, such as the maximum and any minimum penalty prescribed, the nature of the offence and how serious it was (including harm to a victim), the extent to which the offender is to blame, any damage, loss or injury and the presence of any aggravating or mitigating factor relevant to the offender, and many other factors that may or may not arise in the individual case, including 'any other relevant circumstance' by which the parliament recognises the infinite variation in circumstances that may face a sentencing court.*¹⁵

Under the proposed amendments, the aggravating factor would be taken into account by the sentencing court.¹⁶ According to the department:

*That increases the penalty that they impose for that offender, having regard to all of the circumstances up to the maximum penalty that applies to that offence. In the case of manslaughter that is a maximum penalty of life imprisonment.*¹⁷

The explanatory notes state that the new aggravating factor 'is intended to support the court in setting a higher sentence', and 'is not intended to restrict the ability of the courts to take into account other factors listed in section 9 of the PSA'.¹⁸

The QSAC recommended that the new aggravating factor 'should apply where the court is sentencing an offender for an offence resulting in the death of a child under the age of 12 years, aligning with the existing age criterion for the making of a serious violent offence (SVO) declaration in s 161B of the PSA and when children are at highest risk of homicide due to abuse or neglect.'¹⁹

The new aggravating factor would not apply to other offences that may result in the death of a child, such as dangerous driving causing death, driving without due care and attention, and unlawful striking causing death.²⁰

The new aggravating factor would also not apply to youth offenders because the *Youth Justice Act 1992*, rather than the PSA, contains the sentencing laws for youth offenders.²¹

¹³ QSAC Report, p 155.

¹⁴ Explanatory notes, p 5.

¹⁵ QSAC Report, p xxviii.

¹⁶ Public briefing transcript, Brisbane, 25 February 2019, p 3.

¹⁷ Public briefing transcript, Brisbane, 25 February 2019, p 3.

¹⁸ Explanatory notes, pp 2-3.

¹⁹ QSAC Report, p 155.

²⁰ Department of Justice and Attorney-General, correspondence dated 22 February 2019, attachment, p 3.

²¹ Department of Justice and Attorney-General, correspondence dated 22 February 2019, attachment, p 3.

2.1.3 Stakeholder views and department response

A number of stakeholders were supportive of the proposed inclusion of new subsection 9B in s 9 of the PSA.²²

Bravehearts Foundation Ltd (Bravehearts) submitted:

*It is clear, through the work of the Queensland Sentencing Advisory Council, that current penalties for the death of a child do not meet community expectations nor do they properly reflect the nature of these crimes and the defencelessness and vulnerability of the child victim.*²³

The Queensland Law Society (QLS) supported amendment to s 9 of the PSA, noting the QSAC Report recommended the inclusion of the provision within the sentencing guidelines.²⁴

PeakCare Queensland (PeakCare) submitted that the Bill recognises the ‘special vulnerability’ of children as an aggravating factor in child homicide cases.²⁵

In contrast, the Bar Association of Queensland (BAQ) submitted:

... It is the experience of our members that sentencing judges are acutely aware of these self-evident matters and give them appropriately significant weight in the sentencing process.

*The Association does not support the proposed circumstance of aggravation.*²⁶

In response to BAQ in regards introducing an aggravating factor, the department cited the QSAC Report, noting that data from the Council’s review of all child manslaughter cases indicated that a child’s vulnerability was not an explicit factor in a majority of cases.²⁷ The QSAC stated:

*Giving statutory recognition to children’s vulnerability as an aggravating factor in these cases will encourage courts to make express reference to this in sentencing and, by referring to this factor, express strong condemnation of the use of violence against children and serious neglect. It will also make clear parliament’s intention for child homicide cases with these features to be treated as objectively more serious for the purposes of sentencing, thereby justifying a higher sentence.*²⁸

The department also noted the QSAC’s findings that there was ‘a need for additional guidance’ to be provided to courts to ensure the community can be confident that the courts are reflecting appropriate penalties in sentencing.²⁹

2.2 Expanding definition of murder to include reckless indifference to human life

2.2.1 The offence of murder

The Bill proposes to amend s 302 of the Criminal Code to expand the definition of murder by inserting a new subsection into s 302(1) after paragraph (a):

*(aa) if death is caused by an act done, or omission made, with reckless indifference to human life.*³⁰

²² Submissions 1, 4, 6, 9, 11, 14.

²³ Submission 4, p 1.

²⁴ Submission 14, p 5.

²⁵ Submission 11, p 2.

²⁶ Submission 7, p 5.

²⁷ Department of Justice and Attorney-General, correspondence dated 21 March 2019, attachment, p 17.

²⁸ QSAC Report, p 156.

²⁹ Department of Justice and Attorney-General, correspondence dated 21 March 2019, attachment, p 17.

³⁰ Clause 3.

Section 302 of the Criminal Code defines the offence of murder. The provision provides for five different circumstances under which a person can be found guilty of murder. Circumstances include an element of intent to kill or cause grievous bodily harm.³¹ As noted by the QSAC, murder generally requires proof of intent to kill or to cause grievous bodily harm and the prosecution must prove to a jury beyond reasonable doubt that the offender had this intent.³² The department cited the QSAC report, advising that under the Criminal Code, foreseeability, likelihood and probability are not relevant to proving intent and a person's awareness of the probable consequences of their actions is not necessarily considered legal intent.³³

The explanatory notes set out the reasons for the amendment:

*Many unlawful child killings in Queensland result in an offender being convicted of manslaughter rather than murder for a range of reasons, including difficulty in establishing intent even where the death is due to physical abuse. The issue of the legal elements required to establish the offence of murder was frequently raised with the Council throughout its review.*³⁴

The proposed amendment does not arise from the QSAC report's recommendations, rather it was described in the explanatory notes as a commitment made by the Queensland Government 'to expanding the definition of murder to include reckless indifference to human life'.³⁵

According to the explanatory notes, the proposed amendment is not limited to child homicide cases:

*Including recklessness as an element of murder in section 302 of the Criminal Code will capture a wider range of offending as murder in Queensland. Reckless murder exists in a number of other Australian jurisdictions reflecting that intention and foresight of probable consequences are morally equivalent – that is a person who foresees the probability of death is just as blameworthy as the person who intends to kill. This change, depending on the circumstances of the particular case, will apply across the board to not just include recklessness in relation to the deaths of children but will be applicable to any person, including other categories of vulnerable persons such as the disabled and the elderly.*³⁶

The new provision is based on the New South Wales *Crimes Act 1900* which includes reckless indifference to human life under s 18 as a separate basis for establishing the offence of murder.³⁷

In response to a question from the committee about the type of conduct that may fall under the new definition of murder, the department advised:

*... ultimately whether the offence is charged will be based on police and prosecutorial discretion; however, we can refer to a case in New South Wales where the definition of reckless murder under section 18 of the Crimes Act has been used. That included the death of a seven-year-old girl as a result of negligence and starvation over a 20-month period. That is the case of *SW v R [2013]* in the New South Wales Court of Criminal Appeal at 103. There is also the deliberate lighting of fires in a nursing home killing elderly residents in *Dean v R [2015]* New South Wales Court of Criminal Appeal at 307.*³⁸

³¹ Criminal Code, s 302(1)(a).

³² QSAC Report, p xxvi.

³³ Public briefing transcript, Brisbane, 25 February 2019, p 3.

³⁴ Explanatory notes, p 2.

³⁵ Explanatory notes, p 2.

³⁶ Explanatory notes, p 2.

³⁷ Department of Justice and Attorney-General, correspondence dated 22 February 2019, attachment, p 6. See also public briefing transcript, 25 February 2019, Brisbane, p 3; explanatory notes, p 3.

³⁸ Public briefing transcript, Brisbane, 25 February 2019, p 4.

2.2.2 Stakeholder views and department response

Responses from stakeholders to the proposed expansion of the definition of murder were varied.

Bravehearts and Protect All Children Today (PACT) supported the amendment.³⁹ PACT was pleased the proposed change would include crimes against other vulnerable people such as the disabled or elderly.⁴⁰

PeakCare strongly commended the Bill for its intention to address the injustice identified in the QSAC Report of the situation where ‘sentencing has not reflected the unique vulnerabilities of children, nor has it met community expectations about punishments that fit the crime’.⁴¹

Justice for Hemi was supportive of the expanded definition of murder, stating that it would address a gap in the justice system.⁴²

The Queensland Council for Civil Liberties (QCCL) submitted that there was no need to change the current law. The QCCL stated: ‘It is our view, that the highest level of punishment available must be reserved for the state of mind with the greatest moral culpability namely that the person intended the result’.⁴³ The QCCL submitted that ‘the Criminal Code correctly delineates the range of conduct that should fall within the definition of murder’.⁴⁴

The QCCL also expressed concern over the lack of definition provided for ‘reckless indifference’, submitting that a lack of certainty ‘will no doubt result in unnecessary and harmful uncertainty in the law’.⁴⁵ The concern was shared by the BAQ who described the term ‘reckless’ as holding an ‘almost protean concept in the sense that what it means depends on the context in which it is used.’ A lack of definition accompanying the proposed amendment in the Bill was, according to BAQ, likely to trouble the courts.⁴⁶

The Crime and Corruption Commission (CCC) submitted that there is ‘no direct equivalency’⁴⁷ between the requirements of the proposed extension of the definition of murder and the requirements of s 18 of the New South Wales *Crimes Act 1900*.⁴⁸ The CCC recommended a ‘careful and detailed consideration’ of the proposed amendment, particularly to its potential unintended consequences.⁴⁹

Taking a similar stance, the Women’s Legal Service Queensland (WLSQ) and the QLS noted the QSAC Report did not recommend widening the definition of murder. Both stakeholders recommended the matter be referred to the Queensland Law Reform Commission for review.⁵⁰

The QLS further explored the issue of culpability, and submitted that:

... intention and recklessness should not be treated as equivalent concepts. We concede there might be categories of reckless killing which are as morally blameworthy as intentional killing.

...

³⁹ Submission 4, p 1; submission 6, p 2.

⁴⁰ Submission 6, p 2.

⁴¹ Public hearing transcript, Brisbane, 25 March 2019, p 13.

⁴² Public hearing transcript, Brisbane, 25 March 2019, pp 18-19.

⁴³ Submission 3, pp 1- 2.

⁴⁴ Submission 3, p 2.

⁴⁵ Submission 3, p 2.

⁴⁶ Public hearing transcript, Brisbane, 25 March 2019, p 2.

⁴⁷ Submission 2, p 2.

⁴⁸ Submission 2, p 2.

⁴⁹ Submission 2, p 1.

⁵⁰ Submission 8, p 4; submission 14, p 3.

However, the difficulty is where to draw the line. In our view, the common law position does not fit easily because recklessness as to grievous bodily harm forms part of the definition of murder. This means that a person could conceivably be convicted of murder (instead of manslaughter) without intending to kill, if they foresaw grievous bodily harm (not death) as a probable consequence of their actions. Therefore, the effect of this amendment is to impose a mandatory life sentence in cases of reckless killing. In many such cases, the justice of the case will not require a life sentence and it is our view that murder should be reserved for intentional killings.⁵¹

The BAQ had serious concerns about the expansion of the definition of murder.⁵² The BAQ submitted that the Bill would capture conduct at a lower culpability and would unjustly punish those people who are less culpable.⁵³ BAQ was of the view:

... that murder resulting from reckless indifference - in the majority of cases - will be inherently less culpable. The ... Bill will therefore lower the threshold of culpability for murder and this will have sweeping and severe repercussions.⁵⁴

The BAQ identified some situations it asserted could fall within the new definition of murder:

... parents being charged for leaving pool gates open or reversing over their own children on the driveway. There are other examples such as driving offences (the cases of extreme dangerous driving causing death which have been charged as manslaughter), gun accidents and various kinds of behaviour affected by alcohol or drugs ...⁵⁵

The proposed amendment, according to the BAQ, would not treat offenders equally. The BAQ stated:

Many reckless offenders—that is, offenders who merely foresaw an outcome—will be less morally criminally culpable than offenders who actually intended a particular outcome, yet they will be treated the same. Someone who acts recklessly will be treated in the same way as someone who intentionally kills somebody.⁵⁶

The BAQ was of the view that the Bill would ‘create unnecessary legal complexities.’⁵⁷ The BAQ commented that these scenarios ‘have never previously been envisaged as murder in Queensland statute law.’⁵⁸

... It will therefore be incredibly difficult to identify the circumstances that will be captured and, in any event, the criminal calendar already contains adequate offence provisions. Virtually all of the scenarios outlined above, are now being appropriately charged, and disposed of, under the current provisions.⁵⁹

BAQ contended that ‘the proposed change will unduly (and improperly) affect jury deliberations. This could have adverse effects on the efficient running of the administration of criminal justice.’⁶⁰

⁵¹ Submission 14, p 3.

⁵² Submission 7, p 1.

⁵³ Submission 7, pp 1-5.

⁵⁴ Submission 7, p 2.

⁵⁵ Submission 7, p 2.

⁵⁶ Public hearing transcript, Brisbane, 25 March 2019, p 1.

⁵⁷ Submission 7, p 2.

⁵⁸ Submission 7, p 2.

⁵⁹ Submission 7, p 2.

⁶⁰ Submission 7, p 3.

The BAQ referred to two examples provided by the High Court⁶¹ that would require more than a 'mere possibility of harm' because of considerable 'social utility':

*" ... the act of driving a motor car will be foreseen by everyone who drives to be productive of a possibility that it could result in death or bodily injury. But, because driving is considered to be an activity of considerable social utility, a killing or injury which results from driving is not judged to be reckless by reason only of foresight of the mere possibility of injury. So also, anyone who plays a contact sport is likely to foresee the possibility that another player could be seriously injured in the course of the game. But, because of the social utility of the activity, the infliction of such injury is not judged to be reckless by reason only of the foresight of the mere possibility of it ..."*⁶²

The BAQ considered it likely that the prosecution would have to prove a higher standard of recklessness for cases under the Bill. Further:

*... the scenarios most likely to be caught by the ... Bill (some of which are outlined above) are acts of considerable social utility and acts that jurors do themselves every day. Jurors may have difficulties in grappling with those associated issues during deliberations.*⁶³

Taking a broader view, the QLS and PeakCare submitted that there was a need to address the problems in society that lead people to the kind of behaviours that cause the death of a child.⁶⁴

In response to submissions concerning the definition of 'reckless indifference', the department advised that the amendment in the Bill is based on s 18 of the *Crimes Act 1900* (NSW). The department stated:

*While ultimately the application of the amendment will be a matter for the courts, DJAG expects that NSW jurisprudence will be of some assistance. Further, DJAG notes that the amendment in the Bill does not change the current meaning of 'intent' (which is not defined in the Criminal Code) for the purposes of section 302 of the Criminal Code.*⁶⁵

The department also stated:

*It will be a matter for the judiciary as whether to include a direction regarding reckless indifference to human life in the Supreme and District Courts Criminal Directions Bench Book if the Bill passes.*⁶⁶

2.2.3 Penalties for murder

Murder is the most serious offence against a person in Queensland and for adult offenders carries a mandatory life sentence or indefinite sentence under Part 10 of the PSA.

2.2.3.1 Mandatory sentencing

A mandatory sentence is defined by the QSAC as a sentence that is a fixed penalty prescribed by Parliament for committing a criminal offence, allowing no discretion for the court to impose a different sentence. Similarly, a mandatory non-parole period is defined as a fixed time a person must serve in prison before being released on parole or becoming eligible to apply for release on parole.⁶⁷

Section 181 of the *Corrective Services Act 2006* and s 305 of the Criminal Code deal with parole eligibility for prisoners serving terms of imprisonment for murder. The minimum non-parole period for

⁶¹ *Aubrey v The Queen* (2017) HCA 18 at [49].

⁶² Submission 7, p 3.

⁶³ Submission 7, p 3.

⁶⁴ Public hearing transcript, Brisbane, 25 March 2019, pp 4-5 and 14.

⁶⁵ Department of Justice and Attorney-General, correspondence dated 21 March 2019, attachment, pp 6-7.

⁶⁶ Department of Justice and Attorney-General, correspondence dated 21 March 2019, attachment, p 11.

⁶⁷ QSAC, *Sentencing A-Z*, <https://www.sentencingcouncil.qld.gov.au/about-sentencing/sentencing-az>

murder is 20 years in most cases (25 years if the person killed was a police officer in defined circumstances, and 30 years if the person is being sentenced for more than one murder or has a previous conviction for murder). A sentencing court can increase, but not decrease, the mandatory non-parole period.⁶⁸

A mandatory minimum non-parole period of 15 years applies to other life sentences, including life sentences imposed for manslaughter. Queensland is one of only two Australian jurisdictions (the other being the Northern Territory) where murder attracts both a mandatory life sentence and mandatory minimum non-parole periods.⁶⁹

An unlawful killing that is not murder is manslaughter.⁷⁰ Manslaughter carries a maximum penalty of life imprisonment and can involve a broad range of factual circumstances, from cases where the offender did not intend to cause any physical harm, to circumstances where the offender intended to kill or cause grievous bodily harm but is found guilty of manslaughter because of a partial defence, such as provocation.⁷¹

2.2.4 Stakeholder views and department response

The Bill received a mixed response from stakeholders in regards to the measures that may lead to higher penalties for the death of a person.

PeakCare supported 'the government's focus on ensuring sentencing meets community expectations in relation to child murder and manslaughter cases'.⁷²

The BAQ disputed that reference to equivalent jurisdictions was justification for expanding the definition of murder.

*... Unlike the interstate equivalent provisions, the ... Bill will operate bluntly by force of the mandatory life imprisonment and mandatory non-parole period. The sentences to be fashioned under this mandatory regime will be plainly unjust and disproportionate particularly when the culpability of the offending is lower. The ends do not justify the means.*⁷³

The BAQ submitted that sentencing discretion in relation to manslaughter currently adequately satisfies reckless indifference to human life, and noted:

... the potential miscarriages of justices can be effortlessly and immediately avoided. Manslaughter carries a maximum sentence of life imprisonment. The sentencing discretion is wide and for very good reason because of the range of different circumstances that constitute manslaughter. A particularly heinous example of death resulting (unintentionally) from a reckless disregard for human life can be easily and appropriately dealt with by the sentencing discretion available in the case of a conviction for manslaughter.

The Association is of the view that the sentencing range for manslaughter is therefore suitable for this kind of perceived conduct.

Therefore, the Association believes that if the ... Bill is passed, the decisional freedom of sentencing judges should not be restricted to mandatory life sentences for offences without actual intent. This is particularly so when the current proposal represents the prospect of

⁶⁸ Department of Justice and Attorney-General, correspondence dated 22 February 2019, attachment, p 4.

⁶⁹ Department of Justice and Attorney-General, correspondence dated 22 February 2019, attachment, p 4.

⁷⁰ Criminal Code, s 303(1).

⁷¹ Department of Justice and Attorney-General, correspondence dated 22 February 2019, attachment, pp 4-5.

⁷² Submission 11, p 2.

⁷³ Submission 7, p 4.

*mandatory life imprisonment with a possible 20 year non-parole period for an offence that has the prospect of capturing offenders with greatly reduced culpability.*⁷⁴

The question of need was also explored by the QLS, who stated:

*It is unclear to what extent the current murder/manslaughter provisions fail to meet criminal law objectives. We assume that this proposal is a response to community expectations about child homicide. However, given that manslaughter also has a maximum penalty of life imprisonment this rationale is not cogent.*⁷⁵

On mandatory sentencing the BAQ commented that it 'does not cater for the exceptional case', and submitted that:

*Whilst the community may well have expectations about what sentence should be imposed in many cases, mandatory sentencing has the potential to do significant injustice in a small number of cases, and the association's view is that the community would also expect that those sorts of injustices would not occur.*⁷⁶

The QLS was also strongly opposed to mandatory sentencing, because 'it can lead to injustice, that the courts should, being aware of all of the facts and all of the circumstances, not have their position, or powers at least, fettered'.⁷⁷

The WLSQ speculated on the effect of the Bill's intent with regard to domestic abuse cases:

*The new definition of 'murder' may also make it difficult for victims of violence to plea-bargain under the current section 304B, which is a partial defence and reduces murder to manslaughter in domestic abuse cases, as the prosecution may be more confident of securing a murder conviction under the proposed definition and pursue the matter to trial. If the prosecution is successful in securing a murder conviction, there is no discretion to take into account different levels of culpability, intent and fact scenarios in sentencing as there are mandatory life and mandatory minimum parole periods in Queensland ...*⁷⁸

In response to submissions, the department stated that 'the application of the extended definition of murder will ultimately depend on the particular facts of the case and the circumstances of the case.'⁷⁹

The Attorney-General stated:

The decision to include recklessness as to death in the definition of murder was the result of thorough consideration this government undertook via QSAC into how we can better protect our most vulnerable Queenslanders. It reflects that intention and foresight of probable consequences are morally equivalent - that is, a person who acts recklessly knowing that death is probable and with callous disregard is just as culpable as the person who intends to kill another person.

These amendments will provide police and prosecutors in the future with broader scope to charge killers with murder in circumstances where a child killer shows callous disregard causing a death. If convicted, such offenders will face mandatory life imprisonment or an indefinite sentence and will not be eligible to apply for parole for at least 20 years.

...

⁷⁴ Submission 7, pp 4-5.

⁷⁵ Submission 14, p 3.

⁷⁶ Public hearing transcript, Brisbane, 25 March 2019, p 3.

⁷⁷ Public hearing transcript, Brisbane, 25 March 2019, p 4.

⁷⁸ Public hearing transcript, Brisbane, 25 March 2019, p 7.

⁷⁹ Department of Justice and Attorney-General, correspondence dated 21 March 2019, attachment, p 7.

*The expansion is not designed to capture tragic accidents, such as a parent or guardian backing out of their driveway and tragically hitting their child or a parent who forgets to secure the pool fence and a child drowns. The expansion is not designed to capture conduct that today would not result in a manslaughter prosecution. Ultimately, what charge is preferred will be a matter for the prosecution and the verdict is a matter entirely for a jury.*⁸⁰

2.3 Evidence at murder trial

The Bill proposed to insert new section 575A (Evidence at murder trial) to the Criminal Code:

575A Evidence at murder trial

- (1) This section applies in relation to the trial of a person charged with murder under a paragraph of section 302(1).*
- (2) The person may be convicted of murder if the evidence at the trial establishes that the person is guilty of murder under any other paragraph of section 302(1).*⁸¹

The Bill intends that if a person is charged with murder under a paragraph of s 302(1), that person may be convicted of murder if the evidence at the trial establishes that the person is guilty of murder under any other paragraph of s 302(1).⁸² The explanatory notes provide the following example:

*... a jury may return a verdict on a charge of murder under the new section 302(1)(aa) of the Bill if the person is charged under section 302(1)(a) provided this charge is established by the evidence at the trial.*⁸³

The department provided additional explanation:

*That provision is intended to clarify that, irrespective of the basis on which a person is charged under the definition of murder—there are a range of different limbs under the definition which can constitute murder—the person may be convicted under another limb if this can be established on the evidence at trial. For example, a jury may return a verdict on a charge of murder under the new section of reckless indifference to human life if the person is charged under an alternative limb of the definition of murder that relates to the intention to cause death or grievous bodily harm. It allows the prosecution to charge that offence but an alternative verdict to be returned in relation to reckless indifference to human life if the evidence can establish that.*⁸⁴

2.3.1 Stakeholder views and department response

Legal Aid Queensland (LAQ) expressed concern over the proposed new section 575A, submitting that 'it is not entirely clear to us how [it] would play out in practice'. Two risks were identified: that the wording of the new section will require judges to direct juries about every subsection of current section 302, 'complicating their task as well as the task of the jury'; and that there will be a 'blurring of understanding' of what is a killing involving reckless indifference under proposed section 301(1)(aa) and a killing involving reckless indifference under section 303, the current manslaughter offence. This second risk, according to LAQ, may have the unintended consequence of 'cancelling out the option of manslaughter as a natural alternative verdict'.⁸⁵

⁸⁰ Queensland Parliament, Record of Proceedings, 12 February 2019, p 38.

⁸¹ Clause 5.

⁸² Clause 5.

⁸³ Explanatory notes, p 7.

⁸⁴ Public briefing transcript, Brisbane, 25 February 2019, pp 7-8.

⁸⁵ Submission 10, p 1.

In response, the department noted that how a charge is particularised is a matter for the prosecution and the Bill does not alter the requirements of the prosecution to provide adequate particulars.

On an alternative verdict of manslaughter, the department responded that the court and the jury are governed by the provisions of s 576 of the Criminal Code, which would not be subject to amendment by the Bill, in that upon an indictment containing a count of murder or manslaughter, a person may be convicted on the count of manslaughter if the crime is established by evidence.⁸⁶

2.4 Failure to supply necessities

The Bill proposes to amend s 324 of the Criminal Code:

Section 324, from 'misdemeanour'—

omit, insert—

crime.

*Maximum penalty—7 years imprisonment.*⁸⁷

The Bill proposes to increase the maximum penalty from the current three years imprisonment to seven years imprisonment for failing to supply necessities to a person who cannot provide for himself or herself. The Bill would make failing to supply necessities a crime rather than, as it is currently, a misdemeanour.⁸⁸

Failure to supply necessities is an 'associated offence', that is, an offence that may be charged when the victim is injured but not killed, or charged alongside murder or manslaughter if the facts warrant it.⁸⁹ Reclassifying the offence as a crime rather than a misdemeanour, by proposed amendment to s 324 of the Criminal Code, would mean that an offender may be arrested without a warrant.⁹⁰ Additionally, the duty to provide necessities of life under s 285 of the Criminal Code is not limited to children.⁹¹

The Bill proposes consequential amendments to the *Evidence Act 1977* (Evidence Act) and the PSA.

Clause 7 of the Bill amends s 21M (Meaning of protected witness) of the Evidence Act:

Section 21M(3), definition prescribed special offence, after '323B,'—

insert—

*324,*⁹²

The Bill would amend the definition of *prescribed special offence* in the definition of *protected witness* in the Evidence Act to include the crime of failing to supply necessities.⁹³ The effect of this amendment would prevent an accused person from potentially cross-examining a victim in person.⁹⁴

⁸⁶ Department of Justice and Attorney-General, correspondence dated 21 March 2019, attachment, p 15.

⁸⁷ Clause 4.

⁸⁸ Explanatory notes, p 3.

⁸⁹ QSAC Report, pp 33-34.

⁹⁰ Clause 4; Department of Justice and Attorney-General, correspondence dated 22 February 2019, attachment, p 7.

⁹¹ Department of Justice and Attorney-General, public briefing transcript, Brisbane, 25 February 2019, p 3.

⁹² Clause 7.

⁹³ Clause 7.

⁹⁴ Queensland Parliament, Record of Proceedings, 12 February 2019, p 38. See also, Department of Justice and Attorney-General, correspondence dated 22 February 2019, attachment, p 7.

2.4.1 Serious Violent Offence declaration

Offenders can be declared convicted of a serious violent offence (SVO) under s 9A of the PSA. This declaration is automatic where an offender has been sentenced to 10 years imprisonment or more for an offence listed under Schedule 1 of the PSA. Under a declaration, the offender's parole eligibility date is the lesser of 80% of the term of imprisonment or 15 years. The sentencing court has the discretion to make a declaration when sentencing offenders to between five and ten years imprisonment.⁹⁵

The Bill would amend Schedule 1 of the PSA to include the crime of failing to supply necessities,⁹⁶ meaning that a SVO declaration could apply.⁹⁷ Inclusion of the offence in schedule 1 of the PSA would allow the court the discretion to make a SVO declaration in relation to a conviction for the offence of failure to provide necessities if the offender is sentenced to five years imprisonment or more, but less than ten years imprisonment.⁹⁸

The explanatory notes state that the increased penalty for failing to supply necessities will:

- make the penalty for the offence consistent with similar offences in the Criminal Code, such as cruelty to children under 16 (s 364) and endangering life of children by exposure (s 326), both offences have a maximum penalty of seven years imprisonment
- appropriately reflect the seriousness of the offence and the community's abhorrence of such conduct.⁹⁹

2.4.2 Stakeholder views and department response

Submissions to the Bill were largely supportive of the proposal to increase the maximum penalty for failure to provide necessities.¹⁰⁰

PACT strongly supported the proposed amendment to the Evidence Act, stating that no self-represented defendant should be able to cross-examine a protected witness.¹⁰¹

The QLS understood the policy rationale behind the penalty increase in the Criminal Code, but was of the view that 'increases to current maximum penalties should be grounded in cogent evidence based research and data'.¹⁰² The QLS was opposed to the proposed amendment to Schedule 1 of the PSA, submitting that, in the absence of persuasive evidence based data, the current regime and sentencing discretion process in the courts is satisfactorily capable of dealing with defendants.¹⁰³ Further, the QLS noted that if both amendments are made to the Criminal Code and the PSA, the penalty maximum would fall within the lesser of the two possible causes of a SVO declaration being made – between five and ten years, and therefore at the discretion of the sentencing judge. According to the QLS, this would result in a 'significant reduction in cooperation of defendants, admissions of guilt and use of informants'.¹⁰⁴

In response to QLS' concerns, the department stated that the inclusion of the offence of failure to provide necessities in the SVO schedule in the PSA reflects the seriousness of the offence. The

⁹⁵ Caxton Legal Centre Inc, *Queensland Law Handbook*, updated 8 January 2019.

⁹⁶ Clause 10.

⁹⁷ Explanatory notes, p 3.

⁹⁸ Department of Justice and Attorney-General, correspondence dated 22 February 2019, attachment, p 7.

⁹⁹ Explanatory notes, p 4.

¹⁰⁰ Submissions 1, 6.

¹⁰¹ Submission 6, p 2.

¹⁰² Submission 14, pp 4-5.

¹⁰³ Submission 14, p 5.

¹⁰⁴ Submission 14, p 5.

department noted that the sentencing court will retain discretion in relation to the setting of the sentence.¹⁰⁵

The department further explained:

If an offender is sentenced to between five and 10 years imprisonment, for offences listed in Schedule 1 of the PSA, the sentencing court has the discretion under section 161B of the PSA to make a SVO declaration. The court also has discretion under section 161B of the PSA to make a SVO declaration where an offender is sentenced to imprisonment and the offence has involved serious violence against another person or the offence resulted in serious harm to another person, even if the offence is not listed in Schedule 1.

...

Under section 161B(5) of the PSA, where the court has discretion whether or not to make a SVO declaration, if the offence involved violence to, or the death of, a child under the age of 12 years, the child's age must be treated as an aggravating factor by the sentencing court when deciding whether to declare the offence to be a serious violent offence.¹⁰⁶

2.5 Commencement

If passed, the Bill will commence on assent.¹⁰⁷ The amendment introducing the new aggravating factor will apply to sentencing after the amendment, even if the offence or conviction occurred before the commencement.¹⁰⁸ The amendments to the definition of murder and the offence of failing to supply necessaries will apply prospectively to offences committed after the commencement.¹⁰⁹

The department advised that if the Bill is passed, the new aggravating factor will be reviewed post-commencement to ensure it achieves its legislative intention.¹¹⁰

¹⁰⁵ Department of Justice and Attorney-General, correspondence dated 21 March 2019, attachment, pp 18-19.

¹⁰⁶ Department of Justice and Attorney-General, correspondence dated 21 March 2019, attachment, pp 18-19.

¹⁰⁷ *Acts Interpretation Act 1954*, s 15A.

¹⁰⁸ Explanatory notes, p 5. See also, Department of Justice and Attorney-General, correspondence dated 22 February 2019, attachment, p 7.

¹⁰⁹ *Acts Interpretation Act 1954*, s 20C; *Criminal Code*, s 11; *Penalties and Sentences Act 1992*, s 180. See also Department of Justice and Attorney-General, correspondence dated 22 February 2019, attachment, p 8.

¹¹⁰ Department of Justice and Attorney-General, correspondence dated 22 February 2019, attachment, p 8.

3 Compliance with the *Legislative Standards Act 1992*

3.1 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* (LSA) states that ‘fundamental legislative principles’ are the ‘principles relating to legislation that underlie a parliamentary democracy based on the rule of law’. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals
- the institution of Parliament.

The committee has examined the application of the fundamental legislative principles to the Bill and brings the following to the attention of the Legislative Assembly.

3.1.1 Rights and liberties of individuals

Section 4(2)(a) of the LSA requires that legislation has sufficient regard to the rights and liberties of individuals.

In its examination of the Bill, the committee considered that clauses 3, 4, 7, 9 and 10 raise issues of fundamental legislative principle.

3.1.1.1 *Expansion of the definition of murder*

Clause 3 expands the definition of murder in the Criminal Code to cover circumstances involving ‘reckless indifference to human life’.

Section 4(2) of the LSA provides that the fundamental legislative principles include requiring that legislation has sufficient regard to rights and liberties of individuals. The reasonableness and fairness of treatment of individuals is relevant in deciding whether legislation has sufficient regard to rights and liberties of individuals.

The expanded definition of murder could affect the rights and liberties of a person who has caused death through reckless indifference, as this situation previously would not come within the definition of murder. Any conviction for murder carries a penalty of a life term of imprisonment.

The explanatory notes provide the rationale for the new provision:

Including recklessness as an element of murder in section 302 of the Criminal Code will capture a wider range of offending as murder in Queensland. Reckless murder exists in a number of other Australian jurisdictions reflecting that intention and foresight of probable consequences are morally equivalent – that is a person who foresees the probability of death is just as blameworthy as the person who intends to kill.¹¹¹

The explanatory notes recognise the breach of fundamental legislative principle and state the new subsection:

... will require the prosecution to prove the accused person knew that it was probable that death would result from their act or omission. The proposed amendment reflects that a person who acts knowing that death is a probable consequence is just as culpable as a person who intends to kill or do grievous bodily harm and that reckless indifference to human life should be sufficient to establish the offence of murder.¹¹²

The committee considers that the proposed amendment is justified such that there has been sufficient regard to rights and liberties of individuals.

¹¹¹ Explanatory notes, p 2.

¹¹² Explanatory notes, p 4.

3.1.1.2 Increase in maximum penalty for failure to supply necessities

Clauses 4 and 10 increase the maximum penalty for failure to supply necessities (from three years to seven years imprisonment) and add that offence to the SVO schedule.

Consequences imposed by legislation should be proportionate and relevant to the actions to which the consequences are applied by the legislation. A penalty should be proportionate to the offence.

In relation to the proportionality of penalties, the OQPC Notebook states:

In the context of supporting fundamental legislative principles, the desirable attitude should be to maximise the reasonableness, appropriateness and proportionality of the legislative provisions devised to give effect to policy.

*... Legislation should provide a higher penalty for an offence of greater seriousness than for a lesser offence. Penalties within legislation should be consistent with each other.*¹¹³

These clauses effectively introduce greater penalties and a minimum amount of time before parole may be granted. This could affect the rights and liberties of an offender who would previously not be subject to the greater penalty and non-parole period.

In relation to the increase in the maximum penalty effected by cl 4, the explanatory notes state:

*The increase ... is justified to provide consistency with similar offences in the Criminal Code, such as cruelty to children under 16 (section 364) and endangering life of children by exposure (section 326), which both carry a maximum penalty of seven years imprisonment, and to appropriately reflect the seriousness of the offence and the community's abhorrence of such conduct.*¹¹⁴

In relation to cl 10, the explanatory notes state that availability of a SVO declaration for an offence of failure to supply necessities:

*... reflects the seriousness of this offence and is consistent with the current inclusion of other offences such as endangering life of children by exposure (section 326 of the Criminal Code) and cruelty to children under 16 (section 364 of the Criminal Code). Further, the sentencing court will retain discretion in relation to the setting of the head sentence and also whether to make a serious violent offence declaration ...*¹¹⁵

The committee considers that, on balance, the proposed increase in maximum penalty for this offence is justified and that the penalty is proportionate to the offence.

3.1.1.3 New aggravating factor

When sentencing an offender convicted of manslaughter of a child under 12, cl 9 proposes that the court must treat the child's defencelessness and vulnerability as an aggravating factor.

The introduction of this aggravating factor would affect the rights and liberties of an offender, where previously sentencing upon conviction for this offence would not have to take into consideration this aggravating factor.

The explanatory notes see the change as justified, as better reflecting community views:

The introduction of the aggravating factor is considered justified on the basis of the findings of the [Queensland Sentencing Advisory Council] that sentencing for manslaughter offences committed against young children, particularly in cases involving the direct use of violence

¹¹³ Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p 120.

¹¹⁴ Explanatory notes, p 4.

¹¹⁵ Explanatory notes, p 5.

*against a young child, are not viewed by the community as adequate and does not adequately reflect the unique and significant vulnerabilities of child victims.*¹¹⁶

The committee considers that the Bill's amendments with regards sentencing is adequately justified in the circumstances and with regard to community expectations.

3.1.2 Natural justice

Section 4(3)(b) of the LSA provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is consistent with the principles of natural justice.

Clause 7 of the Bill amends the meaning of 'prescribed special offence' in s 21M of the *Evidence Act 1977*, to include a reference to the offence of failure to supply necessities. This will prevent a self-represented accused, charged with that offence, from directly cross-examining a protected witness.¹¹⁷

The introduction of this provision denies a person charged with the offence of failure to supply necessities, and who is self-represented, from directly cross-examining a protected witness. This could be seen as affecting that person's rights to a fair trial, as they are unable to conduct their defence in as unfettered a manner as was previously available.

The explanatory notes recognise the breach of fundamental legislative principle:

This amendment could be seen as impacting on the defendant's right to a fair trial and therefore the rights and liberties of individuals. However, this potential breach is justified as it does not remove the ability for the witness to be cross-examined.

*... this potential breach is justified as it does not remove the ability for the witness to be cross-examined.*¹¹⁸

The explanatory notes advise that any disadvantage to a defendant is tempered in the following way:

*... the court will arrange for the person charged to be given free legal assistance unless the person arranges for legal representation or does not want the protected witness to be cross-examined. In addition, as the purpose of the amendment is to protect a vulnerable witness it is considered that any potential breach is justified.*¹¹⁹

Given that the protected witness can still be cross-examined by a legal representative provided free of charge to the defendant, the committee is satisfied that sufficient allowance is made for cross-examination, and that accordingly the clause has sufficient regard for natural justice.

3.2 Explanatory notes

Part 4 of the LSA relates to explanatory notes. It requires that an explanatory note be circulated when a Bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the Bill. The notes are fairly detailed and contain the information required by Part 4 and a reasonable level of background information and commentary to facilitate understanding of the Bill's aims and origins.

¹¹⁶ Explanatory notes, p 5.

¹¹⁷ Explanatory notes, p 4.

¹¹⁸ Explanatory notes, p 4.

¹¹⁹ Explanatory notes, p 5.

Appendix A – Submitters

| Sub # | Submitter |
|--------------|-----------------------------------------------------------|
| 001 | Stacey Brakenridge |
| 002 | Crime and Corruption Commission |
| 003 | Queensland Council for Civil Liberties |
| 004 | Bravehearts |
| 005 | Bravehearts |
| 006 | Protect All Children Today Inc. |
| 007 | Bar Association of Queensland |
| 008 | Women’s Legal Service Qld |
| 009 | Shane Burke & Kerri-Ann Goodwin |
| 010 | Legal Aid Queensland |
| 011 | PeakCare Queensland Inc. |
| 012 | Aboriginal & Torres Strait Island Legal Service (Qld) Ltd |
| 013 | Lyn Burke |
| 014 | Queensland Law Society |

NB: This list comprises submissions for both the Bill and the Private Member’s Bill.

Appendix B – Officials at public departmental briefing

Department of Justice and Attorney-General

- Mrs Leanne Robertson, Assistant Director-General, Strategic Policy and Legal Services
- Ms Julie Rylko, Director, Strategic Policy
- Ms Deena Dalton, Senior Legal Officer, Strategic Policy
- Ms Jessica Condon, Legal Officer, Strategic Policy

Appendix C – Witnesses at public hearing

Bar Association of Queensland

- Mr Jeff Hunter QC, Chair, Criminal Law Committee
- Ms Laura Reece, Committee Member, Criminal Law Committee

Queensland Law Society

- Mr Bill Potts, President
- Mr Ken Mackenzie, Accredited Specialist in Criminal Law, Committee Member, Criminal Law Committee
- Ms Binny De Saram, Legal Policy Manager

Women’s Legal Service Qld

- Ms Angela Lynch, CEO

Aboriginal & Torres Strait Islander Legal Service (QLD) Ltd

- Ms Kate Greenwood, Barrister, Policy, Early Intervention and Community Legal Education Officer

PeakCare Queensland Inc.

- Mr Lindsay Wegener, Executive Director

Justice for Hemi

- Ms Kerri-Ann Goodwin
- Ms Kris Goodwin
- Mr Shane Burke
- Mr Richard Goodwin

Statement of Reservation

The LNP members of the Legal Affairs and Community Safety Committee believe that this bill should be passed, so long that it is in conjunction with the Criminal Code and Other Legislation (Mason Jett Lee) Amendment Bill 2019, introduced by the Member for Toowoomba South.

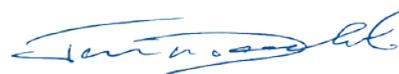
The amendments in this Bill, including expanding the definition of murder to include reckless indifference to human life, the new aggravating factor, and the changes to the offence 'failure to supply necessities' should strengthen the existing legal framework and may lead to increased sentences for child killers.

While we are not opposed to expanding the definition of murder to include reckless indifference to human life, we are concerned that this will not always result in a murder conviction, even when the killing includes acts of violence or gross negligence. These concerns stem from New South Wales case law, in which numerous offenders who committed acts of violence and/or gross negligence against children entered into guilty pleas of the lesser charge of manslaughter. We believe the same will occur in Queensland.

Unless this Bill is passed in conjunction with the Criminal Code and Other Legislation (Mason Jett Lee) Amendment Bill 2019, than we believe there is no guarantee that sentences for child killers (convicted of murder or manslaughter) will increase.



James Lister MP
Deputy Chair
Member for Southern Downs



James (Jim) McDonald MP
Member for Lockyer