Parliamentary Committees



Criminal Code and Other Legislation (Mason Jett Lee) Amendment Bill 2019

Report No. 36, 56th Parliament
Legal Affairs and Community Safety Committee
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Legal Affairs and Community Safety Committee

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Acknowledgements

The committee acknowledges the assistance provided by Mr David Janetzki MP, Shadow Attorney-General and Shadow Minister for Justice.

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Abbreviations

BAQ/Association	Bar Association of Queensland
Bill	Criminal Code and Other Legislation (Mason Jett Lee) Amendment Bill 2019
Bravehearts	Bravehearts Foundation Ltd
CCC	Crime and Corruption Commission
committee	Legal Affairs and Community Safety Committee
Government Bill	Criminal Code and Other Legislation Amendment Bill 2019
LSA	*Legislative Standards Act 1992*
OQPC	Office of the Queensland Parliamentary Counsel
PACT	Protect All Children Today Inc.
PeakCare	PeakCare Queensland Inc
POQA	*Parliament of Queensland Act 2001*
PSA	*Penalties and Sentences Act 1992*
QLS/Society	Queensland Law Society
QSAC	Queensland Sentencing Advisory Council
YJA	*Youth Justice Act 1992*

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 (Mason Jett Lee) 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. I also thank Mr David Janetzki MP, Shadow Attorney-General and Shadow Minister for Justice, and our Parliamentary Service staff.

I commend this report to the House.

Peter Russo MP

Chair

Recommendations

Recommendation **2**

The committee recommends the Criminal Code and Other Legislation (Mason Jett Lee) Amendment Bill 2019 not 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 13 February 2019, the Criminal Code and Other Legislation (Mason Jett Lee) Amendment Bill 2019 (Bill) was introduced into the Legislative Assembly by Mr David Janetzki MP, Shadow Attorney-General and Shadow 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 both the Bill and the Criminal Code and Other Legislation Amendment Bill 2019 (Government Bill), a bill introduced by Hon Yvette D'Ath, Attorney-General and Minister for Justice, on 12 February 2019.[2] Fourteen submissions were received by the committee in respect of the bills. See Appendix A for a list of the submitters. The committee received written advice from Mr Janetzki dated 21 March 2019 in response to matters raised in submissions.

The committee received a public briefing about the Bill from Mr Janetzki on 25 February 2019.

On 25 March 2019, the committee held a public hearing on the Bill and the Government Bill. See Appendix B for a list of witnesses. The public hearing was held in relation to both the Bill and the Government Bill.

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

1.3 Policy objectives of the Bill

It is intended that the Bill would:

- strengthen the sentencing framework in relation to offences involving the unlawful killing of a child under 18 years of age[3]
- align Queensland with those Australian jurisdictions that impose a standard non-parole period of 25 years for the offence of murder where the victim was a child under 18 years of age[4]

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

2 The committee is reporting separately on the Government Bill.

3 Explanatory notes, p 1.

4 Explanatory notes, p 1.

- 'ensure sentencing for homicide offences involving children reflects broader community expectations.'[5]

Mr Janetzki advised that the average sentence for child manslaughter is 6.8 years.[6] He contended:

> … *These light punishments do not reflect the value of the child's life but have unfortunately formed strong precedent making it almost impossible for courts to deviate from them and apply a punishment that fits the crime—our bill will.*[7]

The Bill proposes to achieve its policy objectives by introducing:

- a mandatory minimum non-parole period of 25 years imprisonment for the murder of a child under 18 years
- a new offence of child homicide which will include a mandatory minimum non-parole period of 15 years imprisonment.[8]

1.4 Private Member Consultation on the Bill

The explanatory notes advise that consultation on the draft Bill was undertaken with external legal stakeholders and the Queensland Law Society (QLS).[9]

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 (Mason Jett Lee) Amendment Bill 2019 not be passed.

5 Explanatory notes, p 1.

6 Mr Janetzki, Queensland Parliament, Record of Proceedings, 13 February 2019, p 146.

7 Mr Janetzki, Queensland Parliament, Record of Proceedings, 13 February 2019, p 146.

8 Explanatory notes, p 1.

9 Explanatory notes, p 2.

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. As noted above, the Bill introduces a mandatory minimum non-parole period of 25 years imprisonment for the murder of a child under 18 years and a new offence of child homicide which will include a mandatory minimum non-parole period of 15 years imprisonment.

2.1 Punishment for murder

Queensland's Criminal Code sets out the punishment for murder. The maximum penalty is imprisonment for life, or an indefinite sentence under the *Penalties and Sentences Act 1992* (PSA).[10] A mandatory minimum period that must be served (non-parole period) is applied if the person is being sentenced for:

- multiple murders – 30 years
- murder of a police officer – 25 years[11]
- other cases – 20 years.[12]

The Bill proposes to amend the Criminal Code so that a court sentencing a person who has killed a child under the age of 18 years must make an order that the person must not be released from imprisonment until the person has served a minimum of 25 or more specified years of imprisonment, unless released sooner under exceptional circumstances parole.[13]

Mr Janetzki advised that this proposal 'follows in the footsteps of other Australian jurisdictions, including New South Wales and the Northern Territory'.[14]

2.2 Child homicide offence

The Bill proposes to insert a new offence of child homicide in the Criminal Code.[15] The offence would apply if a person unlawfully kills another person under such circumstances as to not constitute murder but under all of the following circumstances:

(a) the person killed was a child at the time the act or omission that caused the person's death was done or made;

(b) the person did the act or made the omission that caused the person's death when the person knew or ought reasonably to have known that the person killed was a child;

(c) the act or omission that caused the person's death—

(i) involved violence; or

Examples, which are not exclusive examples, of acts involving violence—
vigorous shaking, punching, kicking, stamping, throwing, squeezing, suffocating or strangling

(ii) was an offence of a sexual nature; or

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10 Criminal Code, s 305(1).

11 Criminal Code, s 305(2)-(4); *Corrective Services Act 2006*, s 181(2)(a), (b).

12 *Corrective Services Act 2006*, s 181(2)(c).

13 Clause 15 and Clause 5.

14 Mr Janetzki, public briefing transcript, Brisbane, 25 February 2019, p 1.

15 See clause 10 (insertion of new s 302A – Definition of child homicide).

(iii) was a breach of a duty stated in section 285 or 286.[16]

The explanatory notes advise that the offence would include acts or omissions which occur in isolation or repeatedly over a short or prolonged amount of time.[17]

Under the Bill, any person who commits the crime of child homicide is liable to imprisonment for life, which cannot be mitigated or varied under any law or is liable to an indefinite sentence under the PSA. The court sentencing the person must make an order that the person must not be released from imprisonment until the person has served a minimum of 15 or more specified years of imprisonment, unless released sooner under exceptional circumstances parole under the *Corrective Services Act 2006*.[18]

Mr Janetzki stressed that:

> *… people who have the misfortune of being involved in an accidental death will not be caught by the new child homicide offence. Section 23 of the Criminal Code provides that a person is not criminally responsible for an event that occurs by accident. This section is relied upon to absolve a person from criminal responsibility where an act or omission has occurred independently of the exercise of the person's will or an event that the person does not intend or foresee as a possible consequence.*
>
> *Therefore, an unfortunate event such as where a parent accidentally runs over a child will not be caught under the new child homicide offence. The parents of a child who makes his or her way to a dam and accidentally drowns will not be caught under this new offence. As always, the prosecution still has the discretion to charge a person with the offence of manslaughter if they reach the conclusion that that is appropriate. This bill is deliberately targeted towards those who act violently towards a child or who neglect a child for whom they have a duty of care.*[19]

Mr Janetzki noted:

> *… Unlike Victoria's child homicide offence, it is open for the prosecution to charge a person with manslaughter. The purpose of this is to provide prosecutors with discretion to charge a person with the offence of manslaughter if the act or omission does not constitute an element stated in the child homicide offence. This amendment also recognises that there may be unique circumstances in which manslaughter is the preferred charge.*[20]

For any person charged with the child homicide offence, the Bill includes three defences that will operate as a partial defence, in which a successful defence will result in a manslaughter conviction instead of child homicide. The defences include:

- diminished responsibility
- killing on provocation
- killing for preservation in an abusive domestic violence relationship.[21]

2.3 Stakeholder views on mandatory sentencing

In regard to the mandatory nature of the proposed punishment for child murder, the QLS stated that it has long maintained a strong stance against any form of mandatory sentencing:

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16 Clause 10. Section 285 (Duty to provide necessaries). Section 286 (Duty of person who has care of a child).

17 Explanatory notes, p 3.

18 Clause 17. See also clause 5, inserting s 181(2)(e).

19 Queensland Parliament, Record of Proceedings, 13 February 2019, pp 147-148.

20 Public briefing transcript, Brisbane, 25 February 2019, p 2.

21 Mr Janetzki MP, correspondence dated 21 March 2019, p 2.

> *The Society maintains its objection to the introduction of standard non-parole period schemes. The Society's long-held position is that the current sentencing regime in Queensland, having at its core a system of judicial discretion exercised within the bounds of precedent, is the most appropriate means by which justice can be attained on a case-by-case basis.*[22]

The Bar Association of Queensland (BAQ) advised that it continues to oppose mandatory sentencing:

> *The Association has strongly, and consistently, opposed mandatory sentencing. There are many reasons … why the Association considers that mandatory sentencing is not an appropriate restriction to impose upon the criminal justice system. These range from the inefficiencies it produces in the criminal justice system to the long-term negative consequences that follow from the erosion of judicial independence that results from eliminating or restricting judicial discretion. Mandatory sentencing also carries with it the risk that community confidence in the criminal justice system will be undermined by the imposition of unjust and disproportionate sentences.*[23]

The BAQ acknowledged the heinousness of killing children but submitted that there are other groups of vulnerable people who are identifiable, including those with severe disabilities, the elderly and people living with chronic or terminal illness.[24] BAQ opposed the creation of a separate mandatory minimum non-parole period specifically for offences of murder of a child under the age of 18 years.[25]

The BAQ warned against establishing a statutory hierarchy of penalties in unlawful killing.

> *… If that must occur because of political imperatives, great care must be taken to not fall prey to simplistic notions of liability. The vulnerability of the victim along with the subjective heinousness of a particular killing can be, and invariably is, taken into account in the exercise of the sentencing discretion. In the case of murder this is done in setting non-parole periods that exceed the statutory minimum. It is particularly relevant in cases of manslaughter, an offence which embraces a very wide range of conduct. Those matters are reflected in the length of sentences imposed in these cases, as well as the period an individual is ordered to serve prior to eligibility on parole.*[26]

Protect All Children Today Inc. (PACT) also expressed deep concern over the proposal to introduce mandatory sentences in the Bill:

> *Generally, Australian criminal laws set a maximum penalty to allow for judicial discretion as to an appropriate sentence length. However, mandatory sentences can have the effect of curtailing a Judge's discretionary power to take into account a case's particular circumstances, including any evidence of premeditation or intent. There is such a broad range of child related homicides (unintentional negligence, accidental deaths to severe physical abuse) and the varying aspects need to be taken into careful consideration by the presiding Judge who is constrained by the law, has the expertise and experience to make an informed judgement based on the evidence available.*
>
> *Whilst PACT believes perpetrators of child deaths should be punished accordingly, PACT is concerned that mandatory sentencing can result in the reduction of appropriate and necessary judicial discretion. Moreover, mandatory sentences can potentially affect the more vulnerable members of the community negatively. This would include children and young people, homeless people, people with a mental illness or drug addiction and Indigenous people.*

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22 Submission 14, p 6.

23 Submission 7, p 5.

24 Submission 7, p 5.

25 Submission 7, p 5.

26 Submission 7, p 6.

> *Lastly, if you have a mandatory minimum there is no incentive (such as a reduced sentence) for the accused to enter a pleas at an early stage or cooperate with authorities. Therefore, Defendants are more likely to proceed to trial rather than plead guilty, which will serve to increase the workload of courts and negatively affect witnesses who must give evidence.*[27]

PeakCare Queensland Inc (PeakCare) also did not support the proposals in the Bill because of the Bill's focus on mandatory sentencing:

> *Mandatory sentencing removes judicial discretion, and all the various factors and circumstances of a particular matter cannot be taken into account during sentencing, which is at the least unfair and may bring about serious injustice in individual cases.*
>
> *The Queensland Sentencing Advisory Council's* Sentencing for criminal offences arising from the death of a child: Final report *noted that all legal and justice stakeholders strongly argued for the need to retain judicial discretion to enable judges to sentence on a case-by-case basis (p 111). These stakeholders argued that the empirical evidence against mandatory sentencing was well documented and that these schemes have failed in their stated objectives of deterrence and crime reduction in a number of jurisdictions.*[28]

The Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd raised concerns about the mandatory sentencing aspects of the Bill:

> *We note the proposed measures include the imposition of a mandatory non-parole period of 25 years imprisonment for the murder of a child and the imposition of a mandatory non-parole period of 15 years imprisonment for the new offence of child homicide.*
>
> *There are difficulties comparing life sentences imposed in Queensland with those imposed in other states as Queensland's sentencing laws impose a mandatory life sentence for murder with no discretion for the sentence to be mitigated or varied, and there are also differences between states in how parole eligibility periods are set.*
>
> *…*
>
> *It is an important principle of sentencing that the offender is punished to the extent that is just in all the circumstances. In any sentencing process there is a great variety of factual circumstances surrounding the circumstances of the offence and a great variety of personal circumstances surrounding the offender(s). One example would be that an offender suffers from an intellectual disability or an impairment such as Foetal Alcohol Syndrome. For the punishment to fit the crime, it is important to confer on judges a sufficient level of discretion in the imposition of sentences to avoid perverse or unduly harsh outcomes. It is for such reasons that our Organisation has long opposed 'mandatory sentencing', or perhaps, more properly put, opposed the erosion of judicial discretion.*
>
> *Such an erosion means that judicial officers will not be placed to ensure that the punishment matches the crime. There will inevitably be cases where offenders receive excessively harsh sentences – coupled with the increased impost upon the public purse, via prison costs.*
>
> *Further, there is ample evidence reinforcing the view that increasing penalties via the introduction of mandatory sentencing does not deter people from committing crime. Indeed, many such offences are committed irrationally or on the spur of the moment and such sentencing will on occasions attach to individuals who will never again reoffend.*

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[27] Submission 6, p 3.

[28] Submission 11, p 2. See also PeakCare, public hearing transcript, Brisbane, 25 March 2019, p 13.

Mandatory sentences can also lead to a greater inclination for an accused to test a matter at trial - rather than enter an early plea of guilty. This of itself can lead to an injustice should a 'not guilty' verdict be returned for someone who was in fact culpable.

We would support the imposition of a high head sentence and a lengthy non-parole period through the exercise of the discretion of a judge taking into account all the relevant circumstances of the case rather than an automatic sentence set by statute. The objective of a 'just' sentencing outcome can also be achieved via other mechanisms – including 'presumptive' sentencing laws. At the end of the day, those who have been appointed to the judiciary, should be considered worthy of exercising a discretion – such that fairness in all of the circumstances can be achieved. In the event of perceived over-leniency, an appeal process is of course still an option for the Crown.[29]

Bravehearts Foundation Ltd (Bravehearts) supported the consideration of a mandatory standard non-parole period for serious offences such as manslaughter and the new proposed offence of child homicide. However, it had concerns about introducing mandatory minimum sentences for a group of offences where circumstances can vary greatly.[30]

By way of example, Bravehearts cited the following:

… two parents being charged with the same offence (manslaughter) on the death of their child, where a father pled guilty to manslaughter of the child as a result of violent assault and abuse over a period of time; the mother also pled guilty on the basis of not providing medical assistance for the child, within the context of domestic violence and manipulation and threats from the father. Should the LNP Bill be passed, it would suggest that both are equally culpable and both would be subject to the same minimum sentence. The Bill does not adequately address different circumstances under which an offence may be committed.[31]

2.4 Stakeholder views on other aspects of the proposed amendments and Mr Janetzki's response

PACT supported the inclusion of proposed new s 302A(1) and also supported a number of the necessary consequential amendments to other legislation to include 'child homicide'.[32] However, in relation to cl 17 which inserts proposed new s 309A dealing with the punishment of child homicide, PACT believed 'judicial discretion is required in sentencing to ensure all mitigating circumstances are taken into consideration'.[33]

The QLS did not support the introduction of a new offence of child homicide:

We acknowledge the vulnerabilities of children and young people. However, we do not consider that a separate offence for child homicide is required. In our view, the current offences of murder and manslaughter contained within the Criminal Code are sufficient. We emphasise that the maximum life sentence is available, when appropriate, for truly depraved manslaughter. We also note that there are older segments of the community may also be considered vulnerable – for example, older persons. Therefore, we do not consider that the offence of unlawful homicide of a child needs to be distinguished from unlawful homicide of an adult.[34]

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29 Submission 12, pp 2-3.

30 Submission 5, pp 1-2.

31 Submission 5, p 2.

32 Submission 6, pp 2-3.

33 Submission 6, p 3.

34 Submission 14, p 8.

The QLS also had significant concerns about cl 17 which involves the proposed insertion of new s 309A dealing with the punishment of child homicide:

> *… The effect of the proposed amendment would be to impose a mandatory sentence for child homicide. The Society opposes the proposal.*
>
> *The view of the Society in relation to mandatory sentencing is well-established. In accordance with this view, the Society has been a long-standing advocate for judicial discretion. The reasons for our support for judicial discretion are based on cogent evidence and are clearly detailed in our mandatory sentencing policy paper. … In line with our opposition to mandatory sentencing regimes and to take steps to repeal current mandatory sentencing regimes in our 2015 and 2017 Call to Parties Statements.*
>
> *…*
>
> *Mandatory sentencing regimes undermined sentencing guidelines as set out in section 9 of the* Penalties and Sentences Act 1992 *(the Act). The Act states that sentences may be imposed on an offender to an extent or in a way that is just in all the circumstances. In circumstances where judicial discretion is fettered by the mandating of a sentence, the court is unable to impose a sentence that is just in all the circumstances and is transparent.*
>
> *It is essential that judicial discretion be maintained for sentencing in all criminal matters, including those arising from the death of a child. A mandatory sentence, by definition, prevents a court from fashioning a sentence appropriate to the facts of the case.*[35]

The Crime and Corruption Commission (CCC) also raised concerns about the proposed new offence of child homicide in the Bill:

> *The CCC notes the objective of Clause 10 in proposing a new offence of child homicide, punishable by mandatory life imprisonment, in circumstances that might otherwise constitute manslaughter. The range of conduct captured by Clause 10 is quite broad but there has not been any detailed evaluation of its scope. The Explanatory Notes to the Bill compare similarities between Clause 10 and aspects of the New South Wales and Northern Territory legislation providing in each case for a standard 25 year non-parole period where the victim of a murder was a child, however the New South Wales and Northern Territory provisions sit within a very different legislative context: the Northern Territory does not have a separate child homicide offence and New South Wales does not have mandatory life imprisonment for the murder of a child. These differences have significant practical effect for comparing the potential application of Clause 10 in the Queensland context.*[36]

Mr Janetzki responded to these comments from the CCC as follows:

> *I appreciate the submission made by the Crime and Corruption Commission, however I would like to address a comment raised about the child homicide offence. In particular, the submission incorrectly asserted that the Explanatory Notes to the Bill compare similarities between the child homicide offence (clause 10) and aspects of the New South Wales and Northern Territory legislation. The Explanatory Notes unequivocally provide discussion about two distinct aspects of the Bill; the non-parole period for the murder of a child (clauses 5 and 15) and the child homicide offence (clause 10).*
>
> *Specifically, the Explanatory Notes state:*
>
> > *The Bill provides for a mandatory minimum non-parole period of 25 years for the murder of a child, which is consistent with other Australian jurisdictions. In New South Wales and the Northern Territory, a standard non-parole period of 25 years applies for murder where the*

[35] Submission 14, pp 8-9.

[36] Submission 2, p 2.

> *victim was a child under 18 years of age. The Bill provides for a new offence of child homicide. In 2008, Victoria introduced a separate offence of child homicide into the Crimes Act 1958 with the intent to encourage the courts to impose sentences that are closer to the maximum term.*
>
> *As such, no comparison has been drawn between clause 10 and New South Wales and Northern Territory legislation. The only reference to New South Wales and Northern Territory is in relation to the standard non-parole periods for the murder of a child only (clause 5).*[37]

The CCC also made the following observations about the proposed new cl 10 in its submission:

> *While conceptually Clause 10 is consistent with the Victorian model in providing a separate offence of child homicide, this is the only similarity between the two pieces of legislation. The Victorian offence found in section 5A of the Crimes Act 1958, applies only where the victim is under 6 years of age, provides for a maximum penalty of 20 years imprisonment, and perhaps more importantly, the Victorian offence is an alternative to manslaughter, not murder. Additionally, consideration of the Victorian stand-alone offence by the QSAC in its Report, revealed the existence of the offence has not resulted in greatly dissimilar sentencing outcomes for child homicide offenders in comparison to Queensland ...*[38]

Mr Janetzki rejected these comments made by the CCC in his response to submissions:

> *The CCC also noted that consideration of the Victorian child homicide offence by the Queensland Sentencing Advisory Council in its report*, Sentencing for Criminal Offences Arising from the Death of a Child, *revealed the existence of the offence has not resulted in greatly dissimilar sentencing outcomes for child homicide offenders in comparison to Queensland. While the Victorian child homicide offence does not impose mandatory sentencing, the Attorney-General explained in his second reading speech that its intent is to "encourage courts to impose sentences that are closer to the maximum term". However, if legislation aimed at recognising the vulnerability of the victim does not strengthen sentencing, then other means to achieve this must be considered. Accordingly, these factors were taken into consideration when determining whether there was a need to impose mandatory sentencing.* [39]

The BAQ also opposed the introduction of the new offence of child homicide which would include a mandatory sentence of life imprisonment and a mandatory minimum non-parole period of 15 years imprisonment:

> *The proposed child homicide offence applies only to cases of unlawful homicide of a child that do not constitute murder, such as conduct constituting manslaughter. … the Association is of the view that the [current] sentencing range for manslaughter is suitable for offences of child homicide not amounting to murder ...*[40]

The BAQ illustrated their concern about the mandatory nature of the new provisions with the case of a lady who left her child alone in the bath while she made some telephone calls, and returned to find her child drowned. The judge considered all the factors involved in the case and imposed a sentence of 18 months imprisonment, release on immediate parole.[41] The BAQ concluded:

> *Had this Bill been in force at the time, because Ms Farah's conduct involved a breach of section 286 of the Code, her offence would have been one of "child homicide'', and the only*

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37 Mr Janetzki MP, correspondence dated 21 March 2019, pp 1-2.

38 Submission 2, p 2.

39 Mr Janetzki MP, correspondence dated 21 March 2019, p 2.

40 Submission 7, p 6.

41 Submission 7, p 6.

available sentence would have been one of life imprisonment with a mandatory minimum non-parole period of 15 years. The injustice of such an outcome is manifest.[42]

Mr Janetzki responded to the BAQ submission as follows:

The Bar Association of Queensland (BAQ) submitted that a breach of section 286 of the Criminal Code will subject an offender to the child homicide offence, in circumstances such as where a child accidentally drowns while a parent leaves the child to make a phone call. While a breach of section 286 is an element of the child homicide offence, it does not mean that all breaches will result in a charge of child homicide. As discussed, the offence of 'manslaughter' may be the preferred charge in cases that present exceptional circumstances and in which the injustice of a mandatory sentence would be manifest. This will enable the court to impose a discretionary sentence which the court considers is appropriate.[43]

The BAQ stated that its position is 'that it should not be left up to the discretion of the Director of Public Prosecutions to prevent an injustice. … Whilst of course the association has faith in the director's exercise of discretion, something as significant as this should not be left up to the discretion of the director.'[44]

Bravehearts noted that the Bill did not address many of the issues and recommendations made by the Queensland Sentencing Advisory Council (QSAC) review, and is not supported by the findings of the review.[45] In relation to the proposed new offence under the Bill, Bravehearts commented:

Establishing a brand new offence, as proposed under this Bill, does not address many of the issues that lead to the charge of manslaughter rather than murder. Amending the current definition of murder to address the issues as raised within the QSAC review (specifically to expand the definition of murder to include 'reckless indifference to human life' and incorporate the 'defencelessness and vulnerability' of victims under the age of 12 as an aggravating factor) would bring Queensland in line with other jurisdictions.[46]

Mr Janetzki responded to the concerns raised by Bravehearts stating that the submission incorrectly asserted that all offenders who unlawfully kill a child, which does not amount to murder, would be subject to the child homicide offence which imposes a mandatory minimum non-parole period of 15 years imprisonment.

… While I appreciate the concerns raised by Bravehearts, this assertion is incorrect.

Clause 11 of the Bill amends section 303 of the Criminal Code to provide that a person who unlawfully kills another under such circumstances as not to constitute murder or child homicide is guilty of manslaughter. In addition, the Explanatory Notes to the Bill also articulate that the purpose of this clause is to provide prosecutors with the discretion to charge a person with the offence of manslaughter in circumstances where the act or omission does not constitute an element stated in the child homicide offence or because the unique circumstances of the case warrant the lesser charge.[47]

Lyn Burke submitted that most of the reasons against mandatory sentencing 'can be rebuffed'. Ms Burke referred to the fact that judges are ruled by law and cannot step outside those guidelines.

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42 Submission 7, p 7.

43 Mr Janetzki MP, correspondence dated 21 March 2019, p 2.

44 Public hearing transcript, Brisbane, 25 March 2019, p 2. See also, Public hearing transcript, Brisbane, 25 March 2019, p 6.

45 Submission 5, p 1.

46 Submission 5, p 1.

47 Mr Janetzki MP, correspondence dated 21 March 2019, p 2.

Further, the defence lawyer will ensure this is the case by citing various precedents 'until the judge's hands are tied'.[48]

2.5 Amendment of the Corrective Services Act 2006

2.5.1 Proposed amendments

The proposed amendments to the Criminal Code regarding punishment of murder and the definition of child homicide are reflected in the proposed amendment to s 181 of the *Corrective Services Act 2006* which provides for the parole eligibility date for prisoners serving terms of imprisonment for life. Clause 5 of the Bill seeks to impose a standard non-parole period of 25 years for the murder of a child and 15 years for child homicide.[49]

2.5.2 Stakeholder views

The QLS did not support these amendments for similar reasons noted above in the context of mandatory sentencing:

> *The Society maintains its objection to the introduction of standard non-parole period schemes. The Society's long-held position is that the current sentencing regime in Queensland, having at its core a system of judicial discretion exercised within the bounds of precedent, is the most appropriate means by which justice can be attained on a case-by-case basis.*[50]

The QLS noted that the QSAC also discouraged the adoption of standard non-parole periods.[51]

The QLS also pointed to the fact that standard non-parole periods 'that have been introduced in other states could not be said, on any objective measure, to have been successful in terms of deterring offending and reducing rates of crime'.[52]

2.6 Amendment of Youth Justice Act 1992

2.6.1 Proposed amendment

Section 176 of the *Youth Justice Act 1992* (YJA) specifies the sentence order a court may make if a child is found guilty of a life offence,[53] or an offence of a type that, if committed by an adult, would make the adult liable to imprisonment for 14 years or more, but does not include certain burglary and housebreaking offences. For a life offence, the court may order that the child be detained for:

(a) a period not more than 10 years; or

(b) a period up to and including the maximum of life, if—

(i) the offence involves the commission of violence against a person; and

(ii) the court considers the offence to be a particularly heinous offence having regard to all the circumstances.

Subsection 6 of s 176 provides that specified subsections of s 305 (Punishment of murder) of the Criminal Code apply to a court sentencing a child to detention for life on a conviction of murder. The Bill proposes to amend s 176 to include new subsection 4A of s 305 of the Criminal Code as a provision

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48 Submission 13, p 1.

49 Explanatory notes, p 3.

50 Submission 14, p 6.

51 Submission 14, p 6.

52 Submission 14, p 7.

53 A life offence means an offence for which a person sentenced as an adult would be liable to life imprisonment: *Youth Justice Act 1992*, schedule 4.

that applies to a court sentencing a child to detention for life on a conviction of murder.[54] This would mean that if a child kills another child, the court must make an order that the child offender must not be released from imprisonment until the child offender has served a minimum of 25 or more specified years of imprisonment, unless released sooner under exceptional circumstances parole.

The Bill also provides that proposed new s 309A(2) would apply to a court sentencing a child to detention for life on a conviction of child homicide.[55] This would mean that if a child commits the crime of child homicide, the court sentencing the child offender must make an order that the child offender must not be released from imprisonment until the child offender has served a minimum of 15 or more specified years of imprisonment, unless released sooner under exceptional circumstances parole.

2.6.2 Stakeholder views

PACT noted its disagreement with the proposed amendments to the YJA:

> *PACT philosophically disagrees with the proposed amendment … in relation to the court sentencing a child to detention for life on a conviction of child homicide. PACT does not believe children and young people have the emotional maturity to recognise the potential impacts of their inappropriate or ill intended behaviour and that they can act due to peer pressure and poor decision making. Young offenders need to have access to rehabilitative support services to ensure they have the opportunity to atone for their past negative behaviours to turn their life around. Further, as mentioned previously, PACT does not believe that mandatory sentences should be introduced ...*[56]

PeakCare also did not support the proposed amendments to the YJA, submitting:

> *… Those young people subject to statutory child protection intervention as well as youth justice intervention may have particularly complex needs compounded by psychosocial immaturity and other problems such as mental health and alcohol and other drug problems. In the rare instances of child homicide offences committed by other children or young people, it is important to maintain discretion in sentencing so all the complex circumstances of a particular situation can be considered.*[57]

2.7 Additional issues

2.7.1 Title of the Bill

One submitter, PACT, raised concerns about the title of the Bill:

> *… PACT believes that the Queensland Government should show caution including the name of a specific person ie. Mason Jett Lee in the Legislation. This could potentially be perceived as narrowing the intended purpose. It also maintains an ongoing link to a single victim which may impact negatively on a family's ability to fully recover and could lead to other victim families feeling disregarded. Therefore, PACT is of the view that the legislation needs to be easily recognisable and broad enough to cover a range of different child-related offences*.[58]

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54 Subsection 4A of s 305 of the Criminal Code provides that if a person kills a child, the court must make an order that the person must not be released from imprisonment until the person has served a minimum of 25 or more specified years of imprisonment, unless released sooner under exceptional circumstances parole.

55 Clause 56, proposed new s 176(6A) of the *Youth Justice Act 1992*.

56 Submission 6, p 3.

57 Submission 11, p 2. See also, PeakCare, public hearing transcript, Brisbane, 25 March 2019, p 13.

58 Submission 6, p 2.

2.7.2 Clause 8 – Amendment of s 286 (Duty of person who has care of a child)

Clause 8 of the Bill proposes to amend s 286 of the Criminal Code by omitting the words 'under 16 years' to provide that it is a duty of every person who has care of a child under 18 years.

The QLS submitted that 'it would be more prudent to replace the words '16 years' with '18 years' to ensure consistency with s 8 of the *Child Protection Act 1999*'.[59]

2.7.3 Need for community education and greater public awareness

The QLS considered that informing the Queensland community is the most appropriate method of managing the perception that sentences for filicide and child homicide are inadequate:

> *The research suggests that if the community had access to comprehensive evidence on criminal justice sentencing and trends and were fully and properly informed, they would be generally satisfied with sentencing outcomes. As such, the Society supports increased efforts to ensure public awareness and understanding of sentencing decision processes.*[60]

[59] Submission 14, p 7.

[60] Submission 14, p 9. See also Bar Association of Queensland, public hearing transcript, Brisbane, 25 March 2019, p 3.

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. The committee brings the following to the attention of the Legislative Assembly.

3.1.1 Rights and liberties of individuals

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. Various provisions in the Bill can be seen as impacting on rights and liberties. Often there are rights of both potential defendants and potential victims to be considered. The provisions are considered below.

New offence of child homicide

Summary of provision

As noted above, **Clause 10** creates a new offence of child homicide. Child homicide is committed where there is an unlawful killing that does not amount to murder, and:

- the person killed was a child at the time the act or omission that caused the person's death was done or made
- the person did the act or made the omission when the person knew or ought reasonably to have known that the person killed was a child
- the act or omission that caused the person's death involved violence, or was an offence of a sexual nature, or a breach of duty stated in section 285 or 286 of the Criminal Code.

Potential issue of fundamental legislative principle

Fairness and reasonableness

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 creation of a new offence affects the rights and liberties of individuals.

Comment

The explanatory notes do not address the potential breach of fundamental legislative principles. The committee considered this clause and the nature and extent of any potential breach in the context of the objectives of the Bill, and the content of the clause including the acts or omissions and other elements of the offence. The explanatory notes state:

> *The intent of the Bill is to recognise and protect vulnerable and defenceless children, whether it is their age or capacity that increases their vulnerability.*[61]

In his briefing to the committee, Mr Janetzki expanded on the objectives of the clause:

[61] Explanatory notes, p 2.

The intent of the child homicide offence is to recognise and protect vulnerable and defenceless children, whether it is their age or capacity that increases their vulnerability. Unlike Victoria's child homicide offence, it is open for the prosecution to charge a person with manslaughter. The purpose of this is to provide prosecutors with discretion to charge a person with the offence of manslaughter if the act or omission does not constitute an element stated in the child homicide offence. This amendment also recognises that there may be unique circumstances in which manslaughter is the preferred charge.[62]

Penalties and parole

Summary of provisions

Various clauses have the effect of establishing or increasing penalties for offences, or increasing the time to be served under sentences.

Clause 15 inserts section 305(4A) in the Criminal Code to provide the punishment for murder where the person killed was a child at the time the act or omission that caused the person's death was done or made (and the person being sentenced did the act or made the omission that caused the person's death when the person knew or ought reasonably to have known that the person killed was a child).

The court must make an order that the person not be released from prison until a minimum of 25 years has been served (unless released sooner under exceptional circumstances parole, as provided for under the *Corrective Services Act 2006.*)

Clause 17 sets out the punishment for the new child homicide offence. A person found to commit the offence is liable to imprisonment for life, which can not be mitigated or varied under law or is liable to an indefinite sentence under the *Penalties and Sentences Act 1992*. The court is also required to order that the person must not be released from imprisonment until the person has served a minimum of 15 or more specified years in prison (unless released sooner under exceptional circumstances parole, as provided for under the *Corrective Services Act 2006.*)

Clause 5 amends parole eligibility dates, such that the parole eligibility date for a prisoner:

- serving life imprisonment for the murder of a child is the day after the prisoner has served 25 years
- serving life imprisonment for the crime of child homicide is the day after the prisoner has served 15 years.

Clause 41 adds the offence of child homicide to the serious violent offences schedule in the PSA and thus provides the court with a discretion to make a declaration of a serious violent offence. Any offender declared to be convicted of a serious violent offence must serve either 15 years' imprisonment or 80 per cent of their head sentence (whichever is less) before they can apply for release on parole.[63]

Potential issues of fundamental legislative principle

Two aspects of fundamental legislative principle arise here:

- rights and liberties – proportionality and relevance of penalties
- judicial independence and integrity of the courts.

Comment

The explanatory notes are silent on issues of fundamental legislative principles in this context.

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62 Inquiry into the Criminal Code and Other Legislation (Mason Jett Lee) Amendment Bill 2019, public briefing, 25 February 2019, transcript, p 2.

63 Explanatory notes, p 5.

Proportion and relevance

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.*[64]

The introduction of the new penalties and non-parole periods would affect rights and liberties of individuals by imposing harsher penalties and longer periods of imprisonment without parole.

Judicial independence and integrity of the courts

Judicial independence is not specifically mentioned as a matter of fundamental legislative principle in section 4 of the LSA. Nonetheless, the former Scrutiny of Legislation Committee considered it to be one of the fundamental legislative principles on the basis that:

> *Section 4(1) of the* Legislative Standards Act 1992 *provides that fundamental legislative principles are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law. The independence of the judiciary, including security of tenure and remuneration, underlie a parliamentary democracy based on the rule of law.*[65]

As noted by the Office of the Queensland Parliamentary Counsel:

> *Perhaps the most commonly encountered issues arising in connection with the general issue of judicial independence are those relating to sentencing of offenders, especially the imposition of mandatory sentences.*[66]

The Scrutiny of Legislation Committee and successor parliamentary committees have commented on a variety of Bills that raise questions about potential interference with various aspects of the principle of judicial independence. The Scrutiny of Legislation Committee expressed concern about various Bills which set minimum penalties, on the ground that doing so offended principles of judicial independence and the courts' traditional role of ensuring individualised criminal justice.

3.2 Explanatory notes

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

Explanatory notes were tabled with the introduction of the Bill. Section 23(1)(f) of the LSA requires the explanatory notes to provide a brief assessment of the consistency of the Bill with fundamental legislative principles and, if it is inconsistent with fundamental legislative principles, the reasons for the inconsistency.

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

65 See for example Scrutiny of Legislation Committee *Alert Digest No 4 of 2008*, at p 28.

66 Office of the Queensland Parliamentary Counsel, *Principles of good legislation: OQPC guide to FLPs - Institutional integrity of courts and judicial independence* para 52 accessible at www.legislation.qld.gov.au/file/Leg_Info_publications_FLP_Institutional_integrity_of_courts.pdf

Here, the explanatory notes state, 'The Bill is generally consistent with fundamental legislative principles…'.[67] A statement that a Bill is 'generally' consistent implies a degree of inconsistency, but the explanatory notes do not detail any inconsistency nor provide any reasons for any inconsistency.

The notes otherwise contain the information required by Part 4 and a sufficient level of background information and commentary to facilitate understanding of the Bill's aims and origins.

[67] Explanatory notes, p 2.

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 Government Bill.

Appendix B – Witnesses at public briefing and public hearing

Public briefing held on 25 February 2019

- **Mr David Janetzki MP, Member for Toowoomba South, Shadow Attorney-General and Shadow Minister for Justice**

Public hearing held on 25 March 2019

- **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