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Queensland Government

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21 MAR 2019

The Honourable Peter Russo MP
Chair
Legal Affairs and Community Safety Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Mr Russo

I write with reference to the Legal Affairs and Community Safety Committee's (LACSC) request dated 19 February 2019 that the Department of Justice and Attorney-General (DJAG) respond to written submissions received by the LACSC as part of its inquiry into the Criminal Code and Other Legislation Amendment Bill 2019 (the Bill).

Please find **enclosed** a table DJAG has prepared which summarises and responds to the key issues raised in the written submissions that the LACSC has accepted and approved for publication on the Bill. I trust this information will assist the LACSC in its consideration of the Bill.

Please note that, in accordance with the LACSC request, DJAG's response does not address submissions 5 and 12 relating to the Criminal Code and Other Legislation (Mason Jett Lee) Amendment Bill.

Should you have any queries regarding DJAG's response, please contact Ms Julie Rylko, Director, Strategic Policy, DJAG, on [redacted] or at: [redacted]

Yours sincerely

David Mackie
Director-General

Enc.

Criminal Code and Other Legislation Amendment Bill 2019

Department of Justice and Attorney-General's (DJAG) responses:
Issues raised in written submissions

The following submissions were received in relation to the Criminal Code and Other Legislation Amendment Bill 2019 (the Bill):

- 001 – Stacey Brakenridge
- 002 – Crime and Corruption Commission
- 003 – Queensland Council for Civil Liberties
- 004 – Bravehearts
- 006 – Protect All Children Today
- 007 – Bar Association of Queensland
- 008 – Women's Legal Service Queensland
- 009 – Shane Burke and Kerri-Ann Goodwin
- 010 – Legal Aid Queensland
- 011 – PeakCare Queensland Inc.
- 013 – Lyn Burke
- 014 – Queensland Law Society

Clause	Stakeholder comments	DJAG response
Amendment of the Criminal Code		
Clause 3 **Amendment of section 302 (Definition of murder)**	Stacey Brakenridge – 001 Ms Brakenridge supports the amendment.	Noted.
	Crime and Corruption Commission (CCC) – 002 The CCC notes that the amendment in clause 3 of the Bill is additional to the recommendation in the Queensland Sentencing Advisory Council report, *Sentencing for criminal offences arising from the death of a child*, October 2018 (QSAC Report) for a new aggravating factor. The CCC considers there is no direct equivalency between the requirements of section 18 of the *Crimes Act 1900* (NSW) and those proposed in the Bill and the implications for these differences require careful and detailed consideration, particularly as to unintended consequences. The CCC rejected the assertion there was any direct equivalency between section 18 of the *Crimes Act 1900* (NSW) (which defines murder) and the proposed amendment, given the *Crimes Act 1900* (NSW) is not a code and its provisions sit within a common law framework. The CCC also noted that section 18 of the *Crimes Act 1900* (NSW) is intended as a reformulation of the common law relating to murder, inclusive of the common law requirement of 'malice aforethought', and there is no direct equivalency between the New South Wales' (NSW) provision and the Bill. Further, the CCC noted that Queensland is one of only two Australian jurisdictions where murder attracts both a mandatory life sentence and a mandatory non-parole period.	Recommendations in the Queensland Sentencing Advisory Council (QSAC) Report The amendment in clause 3 of the Bill does not implement a specific recommendation in the QSAC Report. QSAC's Terms of Reference for the review of penalties imposed on sentence for criminal offences arising from the death of a child were limited to a review of penalties imposed on sentence for criminal offences arising from the death of a child (refer to Appendix 1 of the QSAC Report). The amended definition of murder implements the Government's commitment announced by the Attorney-General in a media release on 21 November 2018, to expand the definition of murder to include reckless indifference to human life. QSAC states at page 29 of the QSAC Report that: *Many unlawful child killings in Queensland result in an offender being convicted of manslaughter rather than murder for reasons including the nature of the conduct and the difficulty of establishing intent, even where the death is due to physical abuse.* Further, as noted at page 28 of the QSAC Report, throughout QSAC's review:

		… the issue of the legal elements required to establish the offence of murder was raised frequently as an area of confusion and some people were of the view that any death involving the unlawful killing of a child, in particular, should be treated for legal purposes as a 'murder'. As outlined by the Attorney-General in her Explanatory speech: *The decision to include recklessness as to death in the definition of murder was the result of the 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. ...* <u>Consistency of penalties with other jurisdictions</u> DJAG notes the following information provided at page 99 of the QSAC Report: *Current maximum penalties in Queensland for the offences of murder and manslaughter are broadly in line with other Australian jurisdictions, although there are some differences. For example:* • *Queensland, South Australia and the Northern Territory are the only jurisdictions with a mandatory (as distinct from a presumptive) life sentence for murder;*

		• *in the ACT, NSW, Tasmania and Victoria, manslaughter carries a defined-term maximum penalty, rather than a maximum penalty, of life imprisonment ranging from 20 to 25 years.* *Maximum penalties, minimum non-parole periods, standard sentences and standard non-parole periods (SNPPs) for murder and manslaughter for select jurisdictions are summarised at Appendix 6 of this report.* *Of the jurisdictions reviewed, none distinguish between homicide offences committed against adults and those committed against children in terms of the maximum (or minimum) penalties that apply to those offences, although some set a higher standard or minimum non-parole period where the victim is a child or in other circumstances.* *NSW has introduced an SNPP of 25 years for murder where the victim is a child under 18 years, which also applies if the victim is a police officer, emergency services worker, correctional officer, judicial officer, council law enforcement officer, health worker, teacher, community worker or other public official and the offence occurred because of the victim's occupation or voluntary work. Where the victim was a police officer, a mandatory life sentence also applies (but this is not the case for child victims) and this mandatory penalty does not apply to young offenders or people who had 'a significant cognitive impairment' at the time of the offence (excluding a temporary self-induced impairment).* *In the Northern Territory, a minimum non-parole period of 25 years applies to murders involving a victim under 18 years, or where the victim is a police officer or emergency services worker. This also applies to murders involving a course of conduct that would have constituted a sexual offence and circumstances where the offender has been convicted of multiple homicides (including previous offences).*

		Where adopted, SNPPs are not mandatory minimum penalties, but rather a form of statutory sentencing guidance courts must follow in sentencing. DJAG also notes that in South Australian and Victoria the definition of murder is governed by common law and the test for reckless murder is set out in the High Court case of *R v Crabbe* (1985) 156 CLR 464. This case provides that 'a person who, without lawful justification or excuse, does an act knowing that it is probable that death or grievous bodily harm will result, is guilty of murder if death in fact results'. It must be proved the accused knew that death or grievous bodily harm would probably result. However, unlike these jurisdictions, the amendment in the Bill only expands the definition of murder to include 'reckless indifference to human life' (see further detail below). <u>Alignment with NSW *Crimes Act 1900*</u> The amended definition of murder in the Bill is based on section 18 of the *Crimes Act 1900* in New South Wales (NSW), which provides that "murder shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person…". As outlined in DJAG's written briefing to the Legal Affairs and Community Safety Committee (Committee), reckless indifference to human life under section 18 of the *Crimes Act 1900* in NSW has been held to be the same as reckless indifference at common law (*Royall v R* (1991) 172 CLR 378), although (unlike common law) it is not sufficient, under the section, that only grievous bodily harm is foreseen by the accused as a probable consequence of his conduct (*R v Solomon* [1980] 1 NSWLR 321).

		The common law in relation to murder applies in South Australia and Victoria. As noted above, in relation to 'reckless murder', the High Court case of *R v Crabbe* (1985) 156 CLR 464 states that 'a person who, without lawful justification or excuse, does an act knowing that it is probable that death or grievous bodily harm will result, is guilty of murder if death in fact results'. The word "probable" means "likely to happen" and can be contrasted with something that is merely "possible"[1]. DJAG understands that the definition in section 18 of the *Crimes Act 1900* (NSW) was to overcome the common law concept of malice aforethought. In *IL v R* (2017) Bell and Nettle JJ considered the concept of malice in section 18 and applied the statement in *Aubrey v R* (2017) that *"the effect of s 18(1) is to replace the common law concept of malice aforethought with a list of matters that would previously have established malice aforethought; and, consequently, that in a case in which the Crown is able to prove an act of the kind described in s 18(1), s 18(2)(a) (which excludes from the definition in s 18(1) any act or omission which was not malicious) has no role to play".*[2]
	<u>Queensland Council for Civil Liberties (QCCL) – 003</u> QCCL submits that there is no need to change the law. QCCL supports a subjective approach whereby individuals can be considered culpable for harm only where they were at the material time aware of the risk of causing that harm and thus were able to avoid it. In QCCL's view, the highest level of punishment must be reserved for the state of mind with the greatest moral culpability and the Criminal Code correctly delineates the range of conduct that should fall within the definition of murder.	<u>Definition of 'reckless indifference'</u> As outlined above, the amendment in the Bill is based on section 18 of the *Crimes Act 1900* (NSW). While ultimately the application of the amendment will be a matter for the courts, DJAG expects that NSW jurisprudence will be of some guidance. 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

[1] Judicial College of Victoria, Bench Notes at 7.2.1.1.

[2] Criminal Practice & Procedure NSW (Commentary Last updated: January 2018), the Hon R N Howie QC BA LLM (Hons) and the Hon Justice P A Johnson BA LLM

	QCCL refers to the case of *Zaburoni v The Queen* (2016) 256 CLR 482 and notes the High Court's view that a person can be said to have intended a result if he or she realises that the result was virtually certain to follow from the behaviour in question. QCCL submitted that irrespective of its analysis of the morality of the Bill, the Bill does not define relevant terms, and is concerned particularly that the lack of a definition for the term 'reckless indifference' will result in unnecessary and harmful uncertainty in the law.	Criminal Code. Rather, the amendment expands the definition of murder to capture a new limb, namely 'reckless indifference to human life'. As outlined at page 28 of the QSAC Report, the word *intends* means to have in mind, to have a purpose or designed. Further information is provided below as to how this concept differs from 'recklessness'.
	<u>Bravehearts – 004</u> Bravehearts supports the amendment, which acknowledges that when reckless and callous acts result in the death of a child, when death is probable as a result of that act, the individual is just as culpable as a person who intends to kill a person.	Noted.
	<u>Protect all Children Today (PACT) – 006</u> PACT endorses the proposed expansion of the definition of murder to include reckless indifference to human life, and is pleased that this will apply to include other vulnerable people such as the disabled or elderly.	Noted.
	<u>Bar Association of Queensland (BAQ) – 007</u> BAQ has serious concerns about the expansion of section 302 of the Criminal Code and believes that the Bill will have profound and undesirable impacts. BAQ considers the amendment would capture conduct that was not previously envisaged to be a) charged as murder and b) punished as murder. BAQ's concerns, which stem from the "far-reaching statutory language of 'reckless indifference to human life'", is the amendments mean that in the majority of cases murder resulting from reckless indifference will be inherently less culpable and this will have "sweeping and	<u>Scope of the amendment</u> The application of the expanded definition of murder will ultimately depend on the particular facts and circumstances of the case. As the Attorney-General stated in her Explanatory Speech for the Bill: *The amendments will provide police and prosecutors in the future with broader scope to charge killers with murder in circumstances where a child killer shows callout disregard causing death.*

	severe repercussions." For example, it could result in parents being charged for leaving pool gates open. Further, BAQ was of view that the amendment will create unnecessary legal complexities and affect jury deliberations. BAQ considered that the penalty for murder compounds its concerns relating to the scope of the Bill and did not consider that greater consistency with other jurisdictions justification for making the amendment, particularly given murder carries a penalty of mandatory life imprisonment and a mandatory non-parole period in Queensland unlike other jurisdictions. BAQ was of the view that potential miscarriages of justice can be avoided through the existing offence of manslaughter, which carries a sentencing range appropriate for dealing with a particularly heinous example of death resulting (unintentionally) from a reckless disregard for human life. BAQ 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.	... *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.* DJAG notes the information above regarding the meaning of section 18 of the *Crimes Act 1900* (NSW) which the amendment in clause 3 of the Bill is based upon. DJAG also notes that a range of defences and excuses apply to the offence of murder. The QSAC Report provides information about these at pages 29-32. The BAQ submission refers to the case of *Aubrey v The Queen* (2017) 260 CLR 305 as providing a test for 'recklessness'. However, DJAG understands that this case concerned charges under sections 35 and 36 of the *Crimes Act 1900* (NSW), not reckless indifference to human life under the definition of murder in section 18. DJAG also notes comments made by Simpson J in the case of *Campbell v R* (312 ALR 129) at [305] and [310] that: *[305] The decision in Crabbe finally established that, in order to prove murder by reckless indifference to human life, it is not sufficient that the Crown prove that the accused adverted to the possibility that the act (or omission) would cause death. Nothing less than proof that the accused person was aware of the probability that the act (or omission) would cause the death would suffice. That issue was the focus of the decision. In the course of the judgment (Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ), the court recognised that there may be cases in which the Crown falls short of proving the act (or*

		omission) causing death is done with an actual intention to kill or to inflict grievous bodily harm, but nevertheless knows of the probability that it will cause death or grievous bodily harm *(That latter statement must be read in might of the judgment of Mason CJ in Royall, in which his Honour said:* *Section 18 departs from the common law in that it requires foresight of the probability of death; foresight of the probability of harm is not enough: Reg v Solomon [[1980] 1 NSWLR 321].)* .. *[310] Crabbe and Royall are important for present purposes because they contain indications that the state of mind necessary to establish murder by reckless indifference to human life is not co-extensive with the state of mind necessary to prove murder with intention to kill or inflict grievous bodily harm. As will be seen, however, the distinction may be marginal.* <u>Consistency of penalties with other jurisdictions</u> See above response to the CCC. <u>Effect on jury deliberations</u> DJAG notes that the Victorian Judicial Commission Bench Notes relating to reckless murder states at paragraph 42 that the word "reckless" should be avoided when charging the jury in murder trials, as it is liable to be confusing (*La Fontaine v R* (1976) 136 CLR 62). The NSW Criminal Trial Courts Bench Book prepared by the Judicial Commission of NSW provides a suggested direction for murder where the Crown alleges that the accused was recklessly indifferent to human life. The Foreword to the NSW Criminal Trial Courts Bench Book states that "summing-up to a trial jury is an exercise in communication between judge and jury, the principal object of which is to explain to the jury the legal principles relevant to the performance of their task and to

		relate those principles to the facts and circumstances of the particular case. For that reason, it is important for judges to employ easily understood, unambiguous and non-technical language. The authors of this Bench Book have striven to ensure that the directions they recommend are in accordance with this approach, even in circumstances where difficult concepts are involved". The suggested direction in NSW for reckless indifference to human life under section 18 of the *Crimes Act 1900* provides as follows: ***Reckless indifference*** *The third state of mind, which the Crown relies upon to prove murder, is known in legal terms as reckless indifference to human life. If, at the time [the accused] committed the act that caused the death of [the deceased], [he/she] foresaw or realised that this act would probably cause the death of [the deceased] but [the accused] continued to commit that act regardless of that consequence, then [the accused] would be guilty of murder.* *What is at the nub of this mental state is that [the accused] must foresee that death was a probable consequence, or the likely result, of what [he/she] was doing. If [the accused] did come to that realisation, but decided to go on and commit the act regardless of the likelihood of death resulting, and if death does in fact result, then [the accused] is guilty of murder. The conduct of a person who does an act that the person knows or foresees is likely to cause death is regarded, for the purposes of the criminal law, to be just as blameworthy as a person who commits an act with a specific intention to cause death.* *For this basis of murder, [the accused's] actual awareness of the likelihood of death occurring must be proved beyond reasonable doubt. It is not enough that [he/she] believed only that really serious bodily harm might result from [his/her]*

		conduct or that [the accused] merely thought that there was the possibility of death. Nothing less than a full realisation on the part of [the accused] that death was a probable consequence or the likely result of [his/her] conduct is sufficient to establish murder in this way. *Again, you are concerned with the state of mind that [the accused] had at the time [he/she] committed the act causing death. What you are concerned about when considering the mental element of the offence of murder is the actual state of mind of [the accused], that is, what [he/she] contemplated or intended when [the act causing death] was committed.*[3] 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.
	<u>Queensland Law Society (QLS) – 014</u> QLS noted QSAC's Report did not recommend widening the definition of murder and therefore considers the most appropriate course of action is to refer the matter to the Queensland Law Reform Commission (QLRC). In the absence of cogent evidence and data indicating that the current definition of murder is not appropriately adapted to achieving its objectives, QLS states is not in a position to support the amendment. QLS's view is that intention and recklessness should not be treated as equivalent concepts and murder should be reserved for intentional killings. QLS outlined the following problems with the amendment: • Lack of need; • Overlap with manslaughter; and • Unduly complicated legal concepts/trial directions.	<u>Amendment not recommended by QSAC</u> See above response to the CCC. <u>Recklessness already covered in definition of murder</u> The QLS in its submission states that many, if not all cases of recklessness are already covered by the element of murder involving an intention to do grievous bodily harm (especially the "endanger life" subsection in section 302(1)(b) of the Criminal Code. DJAG notes that at page 28 of the QSAC Report it states that: *There are a number of appeals against conviction for child homicide where the Queensland Court of Appeal has affirmed it is open to a jury to infer the existence of intent to kill or cause grievous bodily harm and to convict an accused person of murder on the basis of the extent of the injuries caused. Evidence of prior acts of violence by the defendant against the*

[3] https://www.judcom.nsw.gov.au/publications/benchbks/criminal/foreword.html.

		victim can also be relied upon to assist a jury in reaching this conclusion. *Foreseeability, likelihood, and probability are not relevant to proving intent in an offence under the Code. A person's awareness of the probable consequences of their actions is not necessarily legal intent, even when recklessly performing the action over an extended period.* *It is reckless to do something knowing it will probably produce a particular harm. This, combined with other evidence, can show intention to produce that harm — but it is distinct in law from that intention.* *Even where the recklessness is so strong that the person knows it is a virtual certainty their conduct will produce that result the jury must be satisfied the person meant to produce the particular result. However, virtual certainty would create a compelling, significant inference of intent.* DJAG also notes that at page 27 of the QSAC Report it sets out the five different ways in which a person can be found guilty of murder, and that some of these do not include an express element of intent. <u>Definition of 'reckless indifference'</u> See above response to the QCCL. <u>Overlap with manslaughter</u> See above response to BAQ. DJAG also notes that the QSAC Report states at page 29 that manslaughter "can involve a broad range of factual circumstances from cases where the offender did not intend to cause any physical harm, let alone causing death, to circumstances where the offender intended to kill or cause

		grievous bodily harm but is found guilty of manslaughter because of a partial defence of provocation". Effect on jury deliberations See above response to the BAQ.
	Women's Legal Service Queensland (WLSQ) – 008 WLSQ opposed the amendment at this time. WLSQ notes that this change was not part of the QSAC report and is concerned about adopting the change without a thorough consideration of all implications, including unintended consequences. WLSQ is also concerned about: • the current mandatory sentencing approach to murder in Queensland, which is different from NSW and other states where this provision currently exists does not allow a nuanced approach to sentencing for different fact scenarios involving different levels of intent; and • the detrimental impact the amendment may have on women who have killed their abusive partner in the context of serious and/or life threatening domestic violence. WLSQ notes that there are a range of well understood difficulties for women who kill their abusive spouse to access the full range of defences in Queensland, particularly in relation to self-defence under section 271 of the Criminal Code, and is concerned about the interface between the expanded definition of murder and section 304B (Killing on provocation) of the Criminal Code. WLSQ is particularly concerned about the impact this will have on Aboriginal and Torres Strait Islander women. WLSQ is of the view the amendment will reduce the willingness of the Director of Public Prosecution to enter into plea bargains. WLSQ recommends a review be undertaken by the QLRC into the inclusion of reckless indifference in the definition of murder, including consideration of all unintended	Defences As noted above, a range of defences and excuses apply to the offence of murder. The QSAC Report outlines these in detail at pages 29-32. The issues raised by WLSQ in relation to access to, and adequacy of, defences to murder for women who kill their abusive partners in a context of domestic violent are outside the scope of the Bill. Consultation As outlined in the Explanatory Notes to the Bill, a consultation draft of the Bill was provided key stakeholders including: the CCC; the Director of Public Prosecutions; BAQ; QLS; Legal Aid Queensland (LAQ); Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd; Aboriginal and Torres Strait Islander Women's Legal Services NQ Inc; Sisters Inside Inc; PACT; Queensland Homicide Victims' Support Group; QCCL; WLSQ; Caxton Legal Centre Inc; Community Legal Centres Queensland; Commonwealth Director of Public Prosecutions; Bravehearts and Prisoner's Legal Service Inc.

	consequences. WLSQ considers the review should consider the impact of the amendment on women who are victims of domestic and family violence. In addition, WLSQ considers there should be a separate review undertaken by the QLRC into access to and adequacy of defences to murder for women who kill their abusive partners in a context of domestic violence and consideration be given to whether a differentiated approach should be adopted in Queensland similar to other states to better reflect differing levels of intent and culpability. WLSQ has also raised a concern about a lack of adequate consultation.	
Clause 4 **Amendment of section 324 (Failure to supply necessaries)**	Stacey Brakenridge – 001 Ms Brakenridge supports the amendment.	Noted.
	PACT – 006 PACT endorses the amendment.	Noted.
	QLS – 014 While the QLS understands the policy rationale behind the proposed amendment, it is of the view that increases to current maximum penalties should be grounded in cogent, evidence-based research and data.	As noted in the Explanatory Notes to the Bill, the increase in maximum penalty is consistent 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. As outlined in DJAG's written briefing to the Committee, in NSW and the Northern Territory, the offence of failure to supply necessaries carries a maximum penalty of five and seven years' imprisonment, respectively.[4] In NSW, it is also an offence if a person who has parental responsibility for a child under 16 years of age intentionally or recklessly fails to provide the child

[4] *Crimes Act 1900* (NSW) s 44; *Criminal Code Act* (NT) s 183.

		with the necessities of life, and thereby causes a danger of death or of serious injury to the child (Failure of persons with parental responsibility to care for child). The maximum penalty for this offence is five years imprisonment.[5]
Clause 5 **Insertion of new section 575A (Evidence at murder trial)**	Stacey Brakenridge – 001 Ms Brakenridge supports the amendment.	Noted.
	LAQ – 010 LAQ considers this amendment raises the issue of how the Crown particularises its case and how the case is defended. While LAQ states that it is not clear how the proposed section 575A would play out in practice, it is concerned that it will have the effect that the Crown will simply have to establish that the accused was guilty beyond reasonable doubt of an unlawful killing to be convicted of murder. Particulars drafted this broadly will therefore be difficult for an accused to respond to and defend. LAQ states that the wording of section 575A will require judges to direct juries about every subsection of section 302 of the Criminal Code, complicating their task as well as the jury. LAQ's is of the view the amendment will blur the understanding of what is a killing involving reckless indifference under the new section 302(1)(aa) and a killing involving reckless indifference under section 303, the current manslaughter offence, such that it may have the unintended consequence of cancelling out the option of manslaughter as a natural alternative verdict. The amendment will also make it difficult for the ODPP to justify engaging in meaningful negotiations with the defence with a view to early resolution and have flow on consequences for the accused's willingness to cooperate and the running of a trial.	Charge particulars DJAG notes 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. DJAG also notes that under section 573 of the Criminal Code the court may direct particulars to be delivered to the accused person of any matter alleged in the indictment and may adjourn the trial for that purpose. Effect on jury deliberations See above response to BAQ. Alternative verdict of manslaughter Section 576 of the Criminal Code provides that upon an indictment against a person containing a count of the crime of murder, the person may be convicted on that count of the crime of manslaughter if that crime is established by the evidence but not on any other offence than that with which the person is charged except as otherwise expressly provided. The Bill does not amend section 576 of the Criminal Code. DJAG notes[6] that on a charge of murder, where the jury is satisfied of all elements of the offence of murder, it cannot properly return a verdict of manslaughter on merciful or compassionate grounds. Also, the right of a jury in Queensland to return a verdict of manslaughter in a murder

[5] *Crimes Act 1900* (NSW) s 43A.

[6] Paragraph [576.15] Carters Criminal law of Queenland.

		trial is completely governed by the provisions of section 576 of the Criminal Code. As outlined in the Explanatory Notes for the Bill, new section 575A inserted by the Bill is intended to (emphasis added): *..clarify that irrespective of the basis upon which a person is charged under the definition of murder, the person may be convicted under any other limb if this can be established by the evidence at trial. For 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.*
Amendment of the *Evidence Act 1977*		
Clause 7 **Amendment of section 21M (Meaning of *protected witness*)**	Stacey Brakenridge – 001 Ms Brakenridge supports the amendment.	Noted.
	PACT – 006 PACT strongly supports the amendment. PACT argues that no self-represented defendant should be able to cross-examine a protected witness, particularly a child.	Noted.
Amendment of the *Penalties and Sentences Act 1992* (PSA)		
Clause 9 **Amendment of section 9 (Sentencing guidelines)**	Stacey Brakenridge – 001 Ms Brakenridge supports the amendment.	Noted.
	Bravehearts – 004 Bravehearts supports the amendment, which acknowledges the defencelessness and vulnerability of child victims and addresses concerns that sentences are not meeting community expectations.	Noted.

	PACT – 006 PACT is supportive of the amendment and considers that all offences committed against a child should incur harsher penalties.	Noted.
	BAQ – 007 BAQ does not support the amendment. BAQ states that it is the experience of its members that sentencing judges are acutely aware of these self-evident matters and give them appropriately sufficient weight in the sentencing process.	The Bill implements Recommendation 1 of the QSAC Report by amending section 9 of the PSA to introduce a new statutory aggravating factor where an offender is convicted of the manslaughter of a child under 12 years. The QSAC Report notes at page 156 that: *…in close to two-thirds of all child manslaughter cases reviewed as part of the Council's sentencing remarks analysis (n=20; 60.6%), the victim's vulnerability was not referred to. The Council accepts this does not necessarily mean the child's vulnerability did not factor into the court's decision, or that substantial weight was not placed on it, but it does suggest a need for additional guidance to be provided to courts to ensure the community can be confident that the courts are reflecting this in sentencing.* At page 156 of the QSAC Report, QSAC suggested: *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.*
	Shane Burke and Kerri-Ann Goodwin – 009 Mr Burke and Ms Goodwin consider that if a defendant cooperates in the later stages of an investigation, this should be deemed as an aggravating factor. The obstruction of an	DJAG considers that this issue is outside the scope of the Bill.

	investigation should also be considered an aggravating factor and given 'heavy negative weighting' at sentencing. In their view, a mitigating factor should only be applied where the defendant has fully cooperated with the investigation.	
	PeakCare– 011 PeakCare supports the amendment.	Noted.
	QLS – 014 QLS supports the amendment.	Noted.
Clause 10 **Amendment of schedule 1 (Serious violent offences)**	QLS – 014 QLS opposes this amendment in the absence of cogent evidence. QLS notes that all of the other offences in the serious violent offences schedule require the commission of an act, whereas the offence of failure to supply necessaries is an omission-based offence. QLS also notes this amendment may reduce an offender's willingness to cooperate with authorities, which is problematic given prosecution of this offence is heavily reliant on offender cooperation.	DJAG notes that the amendment is consequential to the increased penalty for failure to supply necessaries in clause 4 of the Bill. As noted in the Explanatory Notes to the Bill, the amendment will provide the court with discretion to make a declaration of a serious violent offence (SVO). Under section 161A of the PSA, an SVO declaration is automatic where the offender is sentenced to 10 years imprisonment or more for an offence listed in Schedule 1 of the PSA. Offences listed in Schedule 1 include a range of violent and sex offences as well as bomb hoaxes, escaping from lawful custody, riot and dangerous operation of a vehicle. 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 182 of the *Corrective Services Act 2006*, where the court makes an SVO declaration, the offender's parole eligibility date is the lesser of 80% of the term of imprisonment or 15 years. The court may also fix a parole eligibility date, but

		it cannot be earlier than those operating under the SVO scheme. 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. The inclusion of the offence of failure to supply necessaries (section 324 of the Criminal Code) in the serious violent offences schedule in the PSA 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). Manslaughter (section 303), which also encompasses omission-based conduct such as a criminally negligent act or act done in breach of a duty, is also included in the serious violent offence schedule. 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 under section 161B(3) of the PSA. The QSAC Report notes at page 73 that: *The sentence with the SVO declaration must still be just in all the circumstances, and this may require that the head sentence imposed be toward the lower end of the otherwise available range of sentences.* *Case law has developed to help courts decide when SVO declarations should be made [where the court has discretion]. This will usually rest on aggravating circumstances, suggesting that protection of the public — or adequate punishment — requires a longer period in actual custody. This reflects that the*

		offence is 'a more than usually serious, or violent, example of the offence in question and, so, outside "the norm" for that type of offence'.
Other matters	PACT - 006 PACT is of the view that if the Charter of Victim's Rights was adequately enforced and embedded into the Policies and Procedures of all key stakeholders, many challenges faced by victim families would be addressed.	DJAG considers that this issue is outside the scope of the Bill but notes that the QSAC report makes a number of recommendations which aim to ensure family members of victims of child homicide receive the information and support they need throughout the criminal justice process. This includes, for example, recommendation 4 which provides that: *The Office of the Director of Public Prosecutions (ODPP) should continue to review current communication practices, processes and training, as required (including the requirements of the Charter of Victims' Rights) to ensure regular and effective communication occurs with family members of victims of child homicide in all cases to keep them informed of key events (unless they have asked not to be kept informed) and to offer conferences prior to and following sentencing and appeal hearings to prepare families and enhance their understanding of the sentencing and appeal processes.* The Attorney-General stated in her media release on 21 November 2018 that the Government will implement all recommendations from the QSAC Report.