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11 March 2019

Committee Secretary
Legal Affairs and Community
Safety Committee
Parliament House
George Street
Brisbane Qld 4000

By email: lacsc@parliament.qld.gov.au

Dear Committee Secretary

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

The Bar Association of Queensland ('the Association') appreciates the opportunity to provide its submissions on the *Criminal Code and Other Legislation Amendment Bill 2019* ('the first Bill') and the *Criminal Code and Other Legislation (Mason Jett Lee) Amendment Bill 2019* ('the second Bill').

Criminal Code and Other Legislation Amendment Bill 2019

At the outset, the Association considers the first Bill to be a significant amendment to the existing law on homicide in this state.

In short, the Association has serious concerns about the expansion of s 302 of the *Criminal Code Act 1899* ('the Code'). The Association believes the first Bill will have profound and undesirable impacts at both ends of the Queensland criminal justice system, viz., when charges are laid and sentences imposed. The following submission addresses the concerns the Association has at both junctures, and then deals with the proposed circumstance of aggravation for child homicide offences.

The Bill will capture conduct of a lower culpability

In the view of the Association's members who practise in criminal law, the first Bill will cover conduct that was not previously envisaged to be (a) charged as murder and (b) punished as murder. The Association's concern stems from the abstruse but far-reaching statutory language of 'reckless indifference to human life'.

It has been said that "whilst each case has to be considered on its own facts, there is no *prima facie* presumption that murder resulting from reckless indifference is less culpable than murder involving one of the other categories of malice referred to in the statutory definition of murder".[1] That statement of principle has been accepted[2]

[1] *R v Ainsworth* (1994) (1994) 76 A Crim R 127 at [139] per Gleeson CJ.
[2] *R v Holton* [2004] NSWCCA 214; 41 MVR 89 at [59] per Groves J.

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and its implications drawn out[3] with a subsequent decision adding that "so to say inheres recognition that murder by reckless indifference is not necessarily as culpable as other forms. Each case must be considered on its own facts".[4]

Whilst those observations concerned a different statutory regime and are effectively neutral, the Association is of the view that murder resulting from reckless indifference – in the majority of cases – will be inherently less culpable. The first Bill will therefore lower the threshold of culpability for murder and this will have sweeping and severe repercussions.

Members of the Association can easily imagine a number of domestic scenarios being caught by the first Bill, for example, parents being charged for leaving pool gates open or reversing over their own children on the driveway. There are other examples such as driving offences (the cases of extreme dangerous driving causing death which have been charged as manslaughter), gun accidents and various kinds of behaviour affected by alcohol or drugs, which could now be charged as murder.

The Association is also of the view that the first Bill will create unnecessary legal complexities. The majority of the High Court has recently laid down a test for 'recklessness'.[5] In so doing, the Court also made comments importing a concept of 'social utility'. In the Association's view, there is no doubt that the standard of 'recklessness' and the concept of 'social utility' will be heavily debated in the Courts.

However, this debate is dangerous and unnecessary because the scenarios outlined above have never previously been envisaged as murder in Queensland statute law. It will therefore be incredibly difficult to identify the circumstances that will be captured and, in any event, the criminal calendar already contains adequate offence provisions. Virtually all of the scenarios outlined above, are now being appropriately charged, and disposed of, under the current provisions.

A recent decision that illustrates the current operation of the law is *Koani v The Queen*.[6] There, the High Court referred to some observations made in an earlier decision where Gaudron J[7] compared s 302 of the Code (murder) to an equivalent interstate provision noting that:

> "Unlike s 18(1) of the Crimes Act 1900 (NSW), as it stood at the time of the decision in *Ryan*, the definition of murder in s 302(1) of the Code contains no provision permitting a person to be convicted of murder simply for an act done with reckless indifference to human life or done in an attempt to commit or during or immediately after the commission of an act obviously dangerous to human life. Thus, if the act causing death in this case were to be identified as simply presenting the loaded shotgun, that might constitute manslaughter by negligent act, but it would not constitute murder."

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[3] Those observations were made in *SW v R* [2013] NSWCCA 103 at [109] per Hall JA.
[4] *R v Holton* [2004] NSWCCA 214; 41 MVR 89 at [59] per Groves J.
[5] *Aubrey v The Queen* (2017) 260 CLR 305 at [49]-[51] namely the 'foresight of possibility' and not a test of 'foresight of probability' per Kiefel CJ, Keane, Nettle and Edelman JJ; with Bell J in dissent ('Aubrey').
[6] (2017) 91 ALJR 1079 at [35] ('Koani').
[7] In *Murray v The Queen* (2002) 211 CLR 193 at [15].

The Association believes those comments constitute a particular example of the functionality of the current provisions and their ability to capture conduct that the first Bill is aimed at.

In addition to the definitional issues, the experience of the Association's members is that the proposed change will unduly (and improperly) affect jury deliberations. This could have adverse effects on the efficient running of the administration of criminal justice. The majority of the High Court in *R v Aubrey* referred to the ability of the jury, because of its 'common sense and experience', to 'take the *social utility* of an act into account' without the need for 'particular directions' when determining whether an act was reckless.[8]

The High Court provided two classical examples that would require more than a 'mere possibility of harm' because of considerable 'social utility':

> "…the act of driving a motor car will be foreseen by everyone who drives to be productive of a possibility that it could result in death or bodily injury. But, because driving is considered to be an activity of considerable social utility, a killing or injury which results from driving is not judged to be reckless by reason only of foresight of the mere possibility of injury. So also, anyone who plays a contact sport is likely to foresee the possibility that another player could be seriously injured in the course of the game. But, because of the social utility of the activity, the infliction of such injury is not judged to be reckless by reason only of the foresight of the mere possibility of it…."[9]

It is therefore likely that the prosecution will have to prove a higher standard of 'recklessness' for cases under the first Bill. In addition to this, the scenarios most likely to be caught by the first Bill (some of which are outlined above) are acts of considerable social utility and acts that jurors do themselves every day. Jurors may have difficulties in grappling with those associated issues during deliberations.

<u>The Bill will unjustly punish those people who are less culpable</u>

The Association is fundamentally concerned about the scope of the first Bill, but the proposed penalty is compounding.

The reference to equivalent interstate regimes[10] is, with respect, no justification. A review of the relevant interstate provisions reveals that in each of the equivalent states New South Wales,[11] Tasmania[12] and the Australian Capital Territory,[13] there is no provision for mandatory life imprisonment for murder, as there is here in Queensland.[14] Significantly, there is no mandatory non-parole period for murder in

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[8] *Aubrey* at 331 [50].
[9] *Aubrey* at [49].
[10] *Crimes Act 1900* (ACT) s 12(1)(b); *Crimes Act 1900* (NSW) s 18; *Criminal Code* (Tas) s 157.
[11] *Crimes Act 1900* (NSW) s 19A; except if the victim is a police officer: s 19B.
[12] *Criminal Code* (Tas) s 158.
[13] *Crimes Act 1900* (ACT) s 12.
[14] For a recent national comparison see: Lawson, Megan, *The Provoking Operation of Provocation: Stage 2* (*Homicide Sentencing Background Research Paper)* (South Australian Law Reform Institute, Adelaide, 2018) at page 18 (table one).

New South Wales, Tasmania and the Australian Capital Territory.[15] There are also no standard non-parole periods in Tasmania and the Australian Capital Territory[16] such that a discretion exists.[17]

In New South Wales, the standard non-parole period is 20 or 25 years in certain circumstances,[18] but a discretion nonetheless remains.[19] In New South Wales, 10 years non-parole is a standard non-parole guideline.[20] However, the mandatory non-parole period in Queensland is 20 years.[21] The distinctions are therefore real and cause significant concerns for the Association. Unlike the interstate equivalent provisions, the first Bill will operate bluntly by force of the mandatory life imprisonment and mandatory non-parole period. The sentences to be fashioned under this mandatory regime will be plainly unjust and disproportionate particularly when the culpability of the offending is lower. The ends do not justify the means.

In the Association's view, the discretion of sentencing judges and the parole authorities in this State for sentences of murder are already too severely shackled.[22] The inappropriateness of mandatory sentencing applies to serious offences including murder. There are a number of cases where a person has killed another person in severe extenuating circumstances but where the very limited defences of provocation and self-defence are not available (or not sufficiently evidenced). These offences should be able to be dealt with according to their actual subjective seriousness. Indeed, some offences amounting to murder involve more extenuating circumstances than some killings which only amount to manslaughter.

The addition of factual scenarios captured by the first Bill will distort the sentencing calculus because the majority of cases under the new provision will involve factual circumstances involving less culpability than in most cases of murder where death or grievous bodily harm *was actually intended*. However, the potential miscarriages of justices can be effortlessly and immediately avoided. Manslaughter carries a maximum sentence of life imprisonment.[23] The sentencing discretion is wide and for very good reason because of the range of different circumstances that constitute manslaughter. A particularly heinous example of death resulting (unintentionally) from a reckless disregard for human life can be easily and appropriately dealt with by the sentencing discretion available in the case of a conviction for manslaughter.

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[15] Queensland Sentencing Advisory Council's, *Sentencing for Criminal Offences Arising from the Death of a Child: Final Report,* page 232 [appendix 6].
[16] Ibid.
[17] *Sentencing Act* 1997 (Tas) ss 17 and 18; *Crimes (Sentencing) Act 2005* (ACT) s 10.
[18] For the murder of a person falling within a category of occupation committed on or after 1 February 2003 and for the murder of a child, whenever committed.
[19] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21(1) and s 54B(2) and (3).
[20] Andrew Hemming, 'Provocation: A Totally Flawed Defence That Has No Place In Australian Criminal Law Irrespective Of Sentencing Regime' (2010) 14 *University of Western Sydney Law Review* 1, 25. The High Court held that standard non-parole periods are not presumptive and courts must 'take into account the full range of factors in determining the appropriate sentence for the offence': *Muldrock v The Queen* (2011) 244 CLR 120, 132.
[21] *Corrective Services Act 2006* (Qld) s 181(2)(c); *Code* s 305(1); Queensland Sentencing Advisory Council's, *Sentencing for Criminal Offences Arising from the Death of a Child: Final Report,* page 68 [5.3.1].
[22] A minimum of 20, 25 and 30 years imprisonment must effectively be imposed for murder: *Code* s 305 and *Corrective Services Act 2006* (Qld) s 181(2).
[23] *Code* s 310.

The Association is of the view that the sentencing range for manslaughter is therefore suitable for this kind of perceived conduct. It is also very difficult to predict the array of conduct that the first Bill could possibly capture. Therefore, the Association believes that if the first Bill is passed, the decisional freedom of sentencing judges should not be restricted to mandatory life sentences for offences *without actual intent*. This is particularly so when the current proposal represents the prospect of mandatory life imprisonment with a possible 20 year non-parole period for an offence that has the prospect of capturing offenders with greatly reduced culpability.

The proposed circumstance of aggravation for manslaughter of a child under 12

The proposed circumstance of aggravation requires the court to treat the vulnerability and defencelessness of a child under 12 as an aggravating factor in determining the appropriate sentence. It is the experience of our members that sentencing judges are acutely aware of these self-evident matters and give them appropriately significant weight in the sentencing process.

The Association does not support the proposed circumstance of aggravation.

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

The second Bill proposes two measures – the first a change to the minimum non-parole period for the murder of a child under the age of 18 years, and the second a new offence of child homicide. Both of these involve mandatory sentencing.

The Association has strongly, and consistently, opposed mandatory sentencing. There are many reasons, some of which have been outlined above in relation to the first Bill, 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.

The proposed amendments appear to be based on the premise that child homicide is a more serious sub-category of homicide because of the vulnerability of the victim child. The Association accepts that child killing is heinous and is viewed as particularly shocking in our community. Public outrage generally follows reports of child killing, whether by deliberate means or neglect. Sentiments relating to the need for tougher penalties for such offenders often follow.

However, the Association considers that every human life has equal worth. There are many other identifiable groups of individuals within our community who are in similar positions of vulnerability, such as people living with severe disability, the elderly, and people living with chronic or terminal forms of illness. Women are also disproportionately vulnerable, particularly in the domestic setting.

The Association therefore opposes the creation of a separate mandatory minimum non-parole period specifically for offences of murder of a child under the age of 18 years.

The Association cautions against any statutory hierarchy of penalty 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.

The Association also opposes the introduction of a 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. As such, many of the considerations and issues outlined above under the heading 'The Bill will unjustly punish those who are less culpable' in relation to the first Bill have application to this proposal. In particular, as for the conduct contemplated by the proposed amendments addressed in that section, the Association is of the view that the sentencing range for manslaughter is suitable for offences of child homicide not amounting to murder, for the reasons there explained.

The potential for injustice posed by mandatory sentencing is starkly demonstrated by the case of Adila Farah, who pleaded guilty to the manslaughter of her baby daughter. Ms Farah was born and educated in Pakistan. When she married her husband against her family's wishes, she was imprisoned in her parents' home for three years and subjected to repeated beatings. She managed to escape to Australia with her husband, but suffered significant mental illness as a result of her parents' mistreatment of her. Although she was a qualified engineer, she did not speak English, did not have paid employment, and spent much of her time alone raising her two children.

The death occurred when she left her youngest child alone in the bath whilst she made some telephone calls. This was in the context of arranging to move the family to new accommodation for the third time in 10 months. When she returned, the child had drowned. She did what she could to save her, but nothing could be done.

Psychiatric opinion was to the effect that her mental illness was "sufficiently severe as to have significantly impaired her concentration, attention and memory."

In sentencing Ms Farah on 10 March 2008 Byrne J said:

> In a case where criminal negligence causes the death of a baby a custodial sentence to mark the community's disapproval of the conduct, is inevitable. But what is not inevitable in an extraordinary case such as this is that you be required actually to serve time in custody.

The sentence imposed was one of 18 months imprisonment – release on immediate parole.

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 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.

Conclusion

Thank you for the opportunity for the Association to provide early input into these Bills. The Association would be pleased to provide further feedback or answer any queries you may have on this matter.

Yours faithfully

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President