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Office of the President

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Our ref: BDS-CrLC

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

**Criminal Code and Other Legislation Amendment Bill 2019 (Government Bill) and
Criminal Code and Other Legislation (Mason Jett Lee) Amendment Bill 2019 (Private
Member's Bill)**

Thank you for the opportunity to provide comments on the Criminal Code and Other Legislation Amendment Bill 2019 (Government Bill) and Criminal Code and Other Legislation (Mason Jett Lee) Amendment Bill 2019 (Private Member's Bill) and for granting a two day extension to provide our submissions. The Queensland Law Society (QLS) appreciates being consulted on these important bills and appreciates the opportunity to provide our views.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

1. Introductory remarks

The death of any child is a tragedy. The death of a child at the hands of another is an even greater tragedy. This is a highly emotional circumstance, when parents and family have lost a part of their future and the community has lost one of its most vulnerable.

It is understandable in these terrible circumstances we look for explanations for what may be inexplicable. It is understandable that we all want to know the cause of the tragedy and assign blame as a part of making sense of what may appear senseless and wanton. Sadly the criminal justice system is all too often required to deal with these situations. Heartbreaking stories of human cruelty and frailty are the daily grist of the criminal courts and judging fellow humans publicly is the often thankless task of our judicial officers. A job they do with great distinction and sometimes at great personal cost to health and public reputation.

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The justified emotion of the community surrounding sentencing in cases of child homicide can even test the rule of law and our commitment to it. The rule of law means that a just society has laws which apply to everybody, equally. It also means everybody is judged without fear or favour by a court, independently and objectively. This is regardless of how reprehensible or heinous the defendant may be or how terrible their alleged crime. Indeed the greatest strength of our Australian liberal democracy is that the independent court stands between the citizen and the state that brings the charges, and administers justice according to the law. Judges must not judge according to the emotion and revulsion surrounding the circumstances of the crime. They are naturally influenced by the standards of our community, of which they are an integral part, but they must, however, apply the law dispassionately. Sometimes we can lose sight of the proper role of the court in our grief and our need to deal with the terrible thing that has happened. While the court has a power to apply the law, no verdict or sentence can change the past, no matter how much we might wish it.

This response has been compiled by the QLS Criminal Law Committee who have substantial expertise in this area. We have divided our analysis of the Government and Private Member's Bill below and our commentary on the Bills follow.

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2. Key concerns – Government Bill

With respect to the Government Bill, we raise the following key concerns:

- Clause 3 – widening the definition of murder to include if death is caused by an act done, or omission made, with reckless indifference to human life.
- Clause 4 – amendment of section 324 of the Criminal Code to increase the maximum penalty for failure to provide the necessaries of life from three to seven years.
- Clause 8 – the inclusion of section 324 of the Criminal Code (failure to provide the necessaries of life) in schedule 1 of the *Penalties and Sentences Act 1992*, thereby including bringing this offence within the serious violent offence regime.

3. Clause 3 – amendment of s 302 (definition of murder)

Clause 3 of the Government Bill seeks to insert a new element in to the definition of murder in section 302 of the *Criminal Code Act 1899* (Criminal Code).

Proposed section 302(1)(aa) states:

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

This provision has the effect of widening the definition of murder. We note that widening the definition of murder was not specifically recommended by the Queensland Sentencing Advisory Council (QSAC) in its final report on sentencing for criminal offences arising from the

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death of a child (QSAC Final Report). As QSAC have not recommended a widening of the definition of murder and the inherent complexity of the proposal, we consider that the most appropriate course of action is to refer the matter to the Queensland Law Reform Commission for comprehensive review.

However, in the absence of cogent evidence and data indicating that the current definition of murder is not appropriately adapted to achieving its objectives, the Society not in a position to support clause 3.

The Society's view is that intention and recklessness should not be treated as equivalent concepts. We concede there might be categories of reckless killing which are as morally blameworthy as intentional killing. This is acknowledged by the High Court of Australia in *R v Crabbe* (1985) 58 ALR 417, which held:

"the conduct of a person who does an act, knowing that death or grievous bodily harm is a probable consequence, can naturally be regarded for the purposes of the criminal law as just as blameworthy as the conduct of one who does an act intended to kill or to do grievous bodily harm."

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

In 1991, the Victorian Law Reform Commission recommended that recklessness be retained as an element of murder. However, this recommendation was made in the context of their other recommendations that a) grievous bodily harm should not form part of the definition of murder at all and b) recklessness as to grievous bodily harm should be excluded from the definition of murder. In our view, consideration should be given to whether murder with intent to commit grievous bodily harm (section 302(1)(a) of the Criminal Code) and felony murder (section 302(1)(b) of the Criminal Code) should be renamed.

The Society considers that the potential problems with the proposed reform to widen the definition of murder include:

a. Lack of need

It is unclear to what extent the current murder/manslaughter provisions fail to meet criminal law objectives. We assume that this proposal is a response to community expectations about child homicide. However, given that manslaughter also has a maximum penalty of life imprisonment this rationale is not cogent. Furthermore, 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). As stated by the Law Reform Commission of Western Australia, awareness of risk does not necessarily capture those unintentional killings, which can be equated to intentional killings. Again, the maximum life sentence is available, when appropriate, for truly depraved manslaughter.

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b. Overlap with manslaughter

There is no sensible “bright line test” to distinguish cases of ordinary manslaughter from depraved recklessness. It is not clear what level of recklessness would be suitable for a murder versus a manslaughter charge, and how that assessment should be made. Hopefully, the assumption is that recklessness for murder would be reserved for the worst category of cases where there is evidence of knowledge of a high probability of death. Knowledge of and assessment of risk is the critical subjective aspect that must be established for recklessness versus intention. However, awareness and foresight of a consequence does not necessarily equate to either intention or recklessness. Consider the example of Jehovah’s Witness parents who refuse a blood transfusion for their child over the advice of doctors that failure to provide such treatment will condemn their child to death.

c. Unduly complicated legal concepts/trial directions

On a reckless murder charge, the jury must consider the accused’s subjective awareness of the risk of death, whereas for reckless manslaughter the assessment is objective; that is, what a reasonable person should have foreseen. This naturally involves a consideration of the degree of risk of death or, using the language of the High Court in *Crabbe*, the extent of the accused’s “[knowledge] that death or grievous bodily harm is a probable consequence.”

Assessments of probability, particularly in the context of serious criminal charges, do not necessarily offer a clear or consistent pathway for determining whether one is guilty or not guilty. This is particularly so given that a jury will often be considering the exact same matter for both manslaughter and murder charges.

There is a related issue identified by the Law Reform Commission of Western Australia, and that is that degree and awareness of risk is not always the best indicator of the degree of moral culpability associated with recklessness. Consider the Jehovah’s Witness example above. The Commission also used the example of a “Russian roulette” case where the accused fired a gun three times aware that there was a bullet in one of the five chambers, or a “probable” 60% chance the gun would fire. It was noted, however, that if there had only been a 20% chance of gunfire (that is, the person had only fired once) the degree of risk of death would only have been 20% and therefore might be seen only as “possible”. The question could then be asked whether the situation be morally different if the gun had nine empty chambers instead of five?

4. Clause 4 – amendment of s 324 (failure to supply the necessaries)

Clause 4 of the Government Bill seeks to amend section 324 of the Criminal Code to increase the maximum penalty for failure to provide the necessaries of life from three to seven years, thereby changing the classification of this offence from a misdemeanor to a crime. While we understand the policy rationale behind the proposed amendment, it is the view of the Society that increases to current maximum penalties should be grounded in cogent evidence based

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research and data. The Society would be pleased to discuss the issue of increasing the penalty for section 324 (failure to supply the necessaries) when we are provided with data substantiating the need for the increase.

5. Clause 9 – amendment of s 9 (Sentencing guidelines)

Clause 9 of the Government Bill seeks to insert a new subsection into section 9 of the *Penalties and Sentences Act 1992*. The provision reads:

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

We note that QSAC in its Final Report recommended the inclusion of this provision within the sentencing guidelines. We also understand that these considerations are part of the sentencing court's usual considerations. As such, we are supportive of clause 9 of the Government Bill.

6. Clause 10 – amendment of sch 1 (serious violent offence)

Clause 10 of the Government Bill seeks to insert a new section 30A into the Criminal Code. The effect of the section is to include section 324 of the Criminal Code (failure to provide the necessaries of life) in schedule 1 of the *Penalties and Sentences Act 1992*, thereby including the offence within the serious violent offence regime. The Society does not support clause 10 of the Government Bill.

Schedule 1 of the *Penalties and Sentences Act 1992* lists the offences that come within the serious violent offence regime. All the listed offences require positive action while the offence of failure to provide the necessaries of life is omission based conduct. As such, in the absence of persuasive evidence based data suggesting that this offence requires specific legislative amendment, our view is that the current regime and sentencing discretion process adopted by courts is capable of dealing with defendants.

As stated above, clause 4 of the Government Bill seeks to increase the maximum penalty for failure to provide the necessaries of life from three to seven years. If clause 10 of the Government Bill is also passed, would cause the penalty maximum to fall within the lesser of the two possible causes of a serious violent declaration being made (less than 10 years imposed but more than 5 and discretionary). Such a departure, if both clauses 4 and 10 of the Government Bill were adopted, could cause significant reduction in cooperation of defendants, admissions of guilt and use of informants. In this regard, we note that cases which often include this offence involve factual circumstances (such as the death of a child) which can rely heavily on assistance from defendants which are charged as parties or later are subject to this charge.

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7. Key concerns – Private Member's Bill

With respect to the Private Member's Bill, we raise the following key concerns:

- Clause 5 - amendment of section 181 of the *Corrective Services Act 2006* (parole eligibility date for prisoner serving term of imprisonment for life) to provide for standard non-parole periods.
- Clause 10 - insertion of new section 302A in the Criminal Code to create the new offence of child homicide.
- Clause 17 - insertion of new section 309A in the Criminal Code (punishment of child homicide) to provide mandatory sentencing for those who commit child homicide.

8. Clause 3 - Amendment of sch 1 (Prescribed offences)

Clause 3 of the Private Member's Bill seeks to include the words child homicide in item 9, schedule 1 following the words (unlawful homicide) in circumstances that amount to murder. While the age and vulnerability of children are important considerations in sentencing for child homicide, we do not consider that a distinction need be made between adult and child homicide in this schedule. That is, child homicide should be treated as an unlawful homicide as defined in section 300 of the Criminal Code.

9. Clause 5 - Amendment of s 181 (Parole eligibility date for prisoner serving term of imprisonment for life)

Clause 5 of the Private Member's Bill seeks to impose a standard non-parole period of 25 years for the murder of a child and 15 years for child homicide.

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.

In this regard, we note the comments of the former Queensland Sentencing Advisory Council, which discouraged the adoption of standard non-parole periods. In particular, the Council reported:

"After closely examining the issues, a majority of the Council does not support the introduction of a SNPP scheme in Queensland. In particular, a majority of the Council is concerned there is limited evidence of the effectiveness of SNPP schemes in meeting their objectives, beyond making sentencing more punitive and the sentencing process more complex, costly and time consuming. It also risks having a disproportionate impact

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on vulnerable offenders, including Aboriginal and Torres Strait Islander offenders and offenders with a mental illness or intellectual impairment.”¹

The Society has long expressed its opposition to mandatory sentencing regimes. The practical reality of the implementation of a standard non-parole period scheme is that, in some cases at least, there will be an erosion of judicial discretion and a mandatory component of sentencing to be applied. The Society does not support such an approach. We also point to the fact that the SNPP schemes 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.

10. Clause 8 - Amendment of s 286 (Duty of person who has care of child)

Clause 8 of the Private Member's Bill seeks to amend section 286 of the Criminal Code, which deals with the duty of a person who has care of a child. Section 286(1) of the Criminal Code reads:

286 Duty of person who has care of child

- (1) It is the duty of every person who has care of a child under 16 years to—
- (a) provide the necessities of life for the child; and
 - (b) take the precautions that are reasonable in all the circumstances to avoid danger to the child's life, health or safety; and
 - (c) take the action that is reasonable in all the circumstances to remove the child from any such danger;

and he or she is held to have caused any consequences that result to the life and health of the child because of any omission to perform that duty, whether the child is helpless or not.

The explanatory notes to the draft Bill state, '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.' In our view, it would be more prudent to replace the words '16 years' with '18 years' to ensure consistency with section 8 of the *Child Protection Act 1999*.

11. Clause 10 - Insertion of new s 302A

Clause 10 of the Private Member's Bill proposes the creation of a new offence of child homicide to be contained within new section 302A of the *Criminal Code*.

The Society acknowledges that there are reports of public concern about the perceived leniency of sentences for persons convicted of unlawful homicide of a child. In response, QSAC recommended the introduction of a new aggravating factor for child homicide offences. QSAC in its Final Report suggested that section 9 of the *Penalties and Sentences Act 1992* should be amended to include a requirement that, in sentencing an offender for an offence resulting in the death of a child under 12 years, courts must treat the defencelessness of the victim and their vulnerability as an aggravating factor.

QSAC in its Final Report (advice 3) also noted the downward pressure on head sentences for child manslaughter in Queensland. This section of the Final Report states:

¹ Sentencing Advisory Council, Minimum standard non-parole periods final report, September 2011, page 20.

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Advice 3: Impact of the serious violent offence scheme on sentencing. The Council is concerned that the operation of Part 9A of the *Penalties and Sentences Act 1992* (Qld) is exerting downward pressure on head sentences for child manslaughter in Queensland. A court is required, as a form of mandatory sentencing, to declare an offender convicted of a serious violent offence when imposing a sentence of 10 years or more for listed offences (including manslaughter). This unintended impact highlights the importance of fully considering all potential implications of reforms to sentencing law and practice. To respond to these concerns, the Council suggests the Queensland Government consider initiating a review of the serious violent offence (SVO) scheme both in relation to its operation for child manslaughter and more generally. This review should identify how sentencing levels have been impacted by the introduction of the SVO scheme, and any reforms required to ensure any existing barriers to achieving higher head sentences in Queensland for child manslaughter and other offences listed in Schedule 1 of the Act are removed.

We note that the SVO is a particularly complex area of sentencing law. The SVO scheme applies to a wide range of offences. As such, it would be useful to undertake a review of the SVO regime as recommended in advice 3 of QSAC's Final Report.

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 other segments of the community that 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.

12. Clause 17 - insertion of new s 309A (punishment of child homicide)

Clause 17 of the Private Member's Bill seeks to create a new section 309A of the Criminal Code, which deals 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.² In line with our opposition to mandatory sentencing, we called for a commitment to refrain from the creation of new mandatory sentencing regimes and to take steps to repeal current mandatory sentencing regimes in our 2015 and 2017 Call to Parties Statements.

It is in line with this position that the Society re-emphasises the need to maintain flexibility in the sentencing process when sentencing an offender for an offence arising from the death of a child. This requires the preservation of judicial discretion in sentencing for these offences.

² Accessible at:

http://www.qjs.com.au/Knowledge_centre/Areas_of_law/Criminal_law/Mandatory_sentencing_policy_paper.

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Mandatory sentencing regimes undermine 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.

As noted in our policy position, the public perception of the appropriateness of a sentence changes as additional information about a matter is provided. A study published by Her Excellency Professor the Honourable Kate Warner AC from the University of Tasmania asked jurors to assess the appropriateness of the judge's sentence for the case in which they were involved. The jurors, who were not informed of the sentence imposed by the judge in the case, were asked what sentence they would impose. More than half of the jurors surveyed indicated they would have imposed a more lenient sentence than the trial judge imposed. When subsequently informed of the actual sentence imposed, 90% said the judge's sentence was (very or fairly) appropriate.

It is with this research in mind that we propose that there be support for the implementation of a campaign to provide the Queensland community with data and information on sentencing decisions. The Society considers that informing the public 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.

13. Conclusion

We have raised several issues with both the Government Bill and the Private Member's Bill. We hope that these concerns are addressed during the Committee's examination and Parliament's consideration of these Bills. Whilst maintaining our objection to certain aspects of both Bills, if Parliament is minded, it is our view that the Government Bill be passed.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team, by phone on [REDACTED] or by email to [REDACTED].

Yours faithfully



Bill Potts
President