Parliamentary Committees



Youth Justice and Other Legislation Amendment Bill 2021

Report No. 7, 57th Parliament
Legal Affairs and Safety Committee
April 2021

Legal Affairs and Safety Committee

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All web address references are current at the time of publishing.

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1 On 9 March 2021, the Leader of the Opposition appointed the Member for Theodore, Mark Boothman MP, as substitute member of the committee for the Member for Currumbin, Laura Gerber MP, to attend the committee's hearing on 16 March 2021.

2 On 26 March 2021, the Leader of the Opposition appointed the Member for Mermaid Beach, Ray Stevens MP, as substitute member of the committee for the Member for Noosa, Sandy Bolton MP, to attend the committee's hearing on 26 March 2021.

3 On 3 March 2021, the Leader of the House appointed the Member for Redlands, Kim Richards MP, as substitute member of the committee for the Member for Caloundra, Jason Hunt MP, to attend the committee's meetings and hearings on its regional trip to Mount Isa, Cairns and Townsville from 16 March to 19 March 2021.

4 On 22 March 2021, the Leader of the Opposition appointed the Member for Scenic Rim, Jon Krause MP, as substitute member of the committee for the Member for Glass House, Andrew Powell MP, to attend the committee's hearing on 22 March 2021.

Contents

Abbreviations

AASW	Australian Association of Social Workers
ALA	Australian Lawyers Alliance
Atkinson Report	Report on Youth Justice by Bob Atkinson AO
ATSICHS	Aboriginal and Torres Strait Islander Community Health Service
ATSIWLSNQ	Aboriginal and Torres Strait Islander Women's Legal Service North Queensland
Bail Act	*Bail Act 1980*
BAQ	Bar Association of Queensland
Bill	Youth Justice and Other Legislation Amendment Bill 2021
Chief executive	Chief executive of the Department of Children, Youth Justice and Multicultural Affairs
committee	Legal Affairs and Safety Committee
CRC	Convention on the Rights of the Child
DCYJMA	Department of Children, Youth Justice and Multicultural Affairs
departments	Queensland Police Service and the Department of Children, Youth Justice and Multicultural Affairs
DYJ	Department of Youth Justice
EM	electronic monitoring
EMSU	Electronic Monitoring and Surveillance Unit
FASD	Fetal alcohol spectrum disorder
GPS	global positioning system
Hooning offences	type 1 vehicle offences
HRA	*Human Rights Act 2019*
ICCPR	International Convent on Civil and Political Rights
ICCR	Institute for Collaborative Race Research
IYMC	Indigenous Youth Murri Court
LAQ	Legal Aid Queensland

LSA	*Legislative Standards Act 1992*
NAAJA	North Australian Aboriginal Justice Agency
NDIS	National Disability Insurance Scheme
OPG	Office of the Public Guardian
PPRA	*Police Powers and Responsibilities Act 2000*
QATSICPP	Queensland Aboriginal and Torres Strait Islander Child Protection Peak
QCCL	Queensland Council for Civil Liberties
QCOSS	Queensland Council of Social Service
QCS	Queensland Corrective Services
QFCC	Queensland Family and Child Commission
QHRC	Queensland Human Rights Commission
QLS	Queensland Law Society
QPS	Queensland Police Service
SNPs	Safe Night Precincts
SPER	State Penalties Enforcement Registry
TCJG	Townsville Community Justice Group
Tracking device condition	A condition to a grant of bail imposed on certain 16 or 17 year old children that the child must wear a tracking device while released on bail
UNCRC	United Nations Committee on the Rights of the Child
YAC	Youth Advocacy Centre
YANQ	Youth Affairs Network of Queensland
youth justice strategy	Working Together Changing the Story: 'Youth Justice Strategy 2019-2023'
YJA	*Youth Justice Act 1999*

Chair's foreword

This report presents a summary of the Legal Affairs and Safety Committee's examination of the Youth Justice and Other Legislation Amendment Bill 2021. The committee's task was to consider the policy to be achieved by the legislation and whether the Bill has sufficient regard to the rights and liberties of individuals and to the institution of Parliament. The committee also examined the Bill for compatibility with human rights in accordance with the *Human Rights Act 2019*.

The committee visited a number of regions during its inquiry into the Bill, with public hearings held in Mount Isa, Cairns, Townsville, Brisbane and the Gold Coast. I am grateful to the Member for Traeger, Mr Robbie Katter MP, and Father Michael Lowcock for spreading the word in Mount Isa which resulted in our Mount Isa hearing being the best attended hearing during our regional visits. I would also like to give a big shout out to Barbara Sam, a Kalkadoon woman, for her Welcome to Country and participation at the Mount Isa hearing.

All of the participants in the hearings, whether they participated as witnesses, observers or as political or community representatives, showed a passion for improving their local communities that was heartening to see.

The committee heard many different points of view and suggestions for how to tackle the problem of youth involvement in criminal activity. I appreciate that there were aspects of the Bill that were not popular with some stakeholders who argued that they would marginalise youth offenders. Other stakeholders thought that the Bill did not go far enough and called for a three-strike rule, mandatory sentencing and harsher penalties for youth offenders.

The Queensland Labor government is committed to keeping the community safe and this legislation recognises that the more contact that a juvenile has with detention the harder it becomes for them to be rehabilitated. Harsher penalties alone do not lead to better outcomes for the community in the long term.

The problem of youth crime is a multifaceted and complex issue, with the reasons why youths become entangled with the criminal justice system as varied and diverse as the solutions proffered to deal with them once they have set out on a path of criminal conduct.

The one key message that came out in the submissions and at the committee's multiple public hearings is that there is no one simple solution. I hope that the evidence the committee heard continues to inform the way forward.

On behalf of the committee, I thank those who made written submissions on the Bill and who attended and participated in our hearings in Mount Isa, Cairns, Townsville, Brisbane and the Gold Coast.

A big thank you also to Renee Easten and Melissa Salisbury from the secretariat for looking after the committee while we were away on our regional trips, Marjorie Elworthy for her assistance with witnesses, and Bonnie Phillips and Janine Hurley, our Hansard reporters. Also, Lorraine Bowden, Margaret Telford and Kelli Longworth for keeping the office running while we were away. To all of those in the committee office who helped with the report and travel arrangements, I give my thanks.

I wish to also thank the following Members of Parliament who participated in our hearings: Michael Berkman MP, Mark Boothman MP, Nick Dametto MP, Aaron Harper MP, Robbie Katter MP, Shane Knuth MP, Jon Krause MP, Dale Last MP, Sam O'Connor MP, Kim Richards MP and Ray Stevens MP.

I commend this report to the House.

Peter Russo MP

Chair

Recommendations

1 Introduction

1.1 Role of the committee

The Legal Affairs and Safety Committee (committee) is a portfolio committee of the Legislative Assembly which commenced on 26 November 2020 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.[5]

The committee's primary areas of responsibility include:

- Justice and Attorney-General
- Women and the Prevention of Domestic and Family Violence
- Police and Corrective Services
- Fire and Emergency Services.

The functions of a portfolio committee include the examination of bills and subordinate legislation in its portfolio area to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles
- matters arising under the Human Rights Act 2019
- for subordinate legislation – its lawfulness.[6]

The Youth Justice and Other Legislation Amendment Bill 2021 (Bill) was introduced into the Legislative Assembly and referred to the committee on 25 February 2021. The committee is to report to the Legislative Assembly by 16 April 2021.

1.2 Inquiry process

On 26 February 2021, the committee invited stakeholders and subscribers to make written submissions on the Bill. 83 submissions were received. See Appendix A for a list of submitters.

The committee received a public briefing about the Bill from the Queensland Police Service (QPS) and the Department of Children, Youth Justice, and Multicultural Affairs (DCYJMA) on 8 March 2021. A transcript is published on the committee's web page; see Appendix B for a list of officials.

The committee received written advice from the department in response to matters raised in submissions.

The committee held 7 public hearings (see Appendix C for a list of witnesses):

- Mount Isa on 16 March 2021
- Cairns on 17 and 18 March 2021
- Townsville on 18 and 19 March 2021
- Brisbane on 22 March 2021
- Gold Coast on 26 March 2021

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

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

6 *Parliament of Queensland Act 2001*, s 93; and *Human Rights Act 2019* (HRA), ss 39, 40, 41 and 57.

Committee comment

The committee is grateful to the many individuals and organisations who took time to make a submission to the committee or to appear before the committee at one of its public hearings. This evidence was invaluable to the committee in its examination of the Bill. It helped the committee understand the issues facing many communities, communities' frustration with recidivist offenders, and the likely impacts of the Bill on youth offenders, youth justice, knife crime and hooning offences.

Refer to section 2.4 in regards to issues raised during public hearings by location.

1.3 Policy objectives of the Bill

The Bill amends the *Youth Justice Act 1999* (YJA) to respond to the characteristics of the offending behaviours of serious recidivist youth offenders and strengthen the youth justice bail framework.[7]

The Bill also enacts a range of amendments to the *Police Powers and Responsibilities Act 2000* (PPRA) in relation to knife crime and hooning offences. The primary policy objective of the amendments relating to knife crime is to minimise the risk of physical harm caused by knife crime in Safe Night Precincts (SNPs). The Bill includes amendments to minimise risks of harm associated with the unlawful possession of knives in the Surfers Paradise CBD and Broadbeach CBD SNPs.[8]

The objectives of the amendments relating to hooning laws are to protect the community and road users from the risk of a range of antisocial and unsafe driving behaviours, known as hooning. The proposed amendments relating to hooning offences will strengthen owner onus provisions by expanding the evasion offence notice scheme outlined in the PPRA to apply to all type 1 vehicle related offences listed in the PPRA. This amendment will require owners of motor vehicles involved in these offences to make declarations and provide information that may be used to assist the investigation of hooning offences.[9]

The Bill aims to achieve its policy objectives by amending the YJA and PPRA to:

- strengthen the youth justice bail framework through:
  - providing the legislative framework required to trial the use of electronic monitoring devices as a condition of bail for some offenders aged 16 and 17 years old who have committed a prescribed indictable offence and have been previously found guilty of one or more indictable offences (with a review after 12 months)
  - explicitly permitting the court or a police officer to take into consideration, when determining whether to grant bail, whether a parent, guardian or other person has indicated a willingness to do one or more of the following: support the young person to comply with their bail conditions, advise of any changes in circumstances that may impact the offender's ability to comply with the bail conditions, or advise of any breaches of bail
  - creating a limited presumption against bail, requiring certain young offenders charged with 'prescribed indictable offences' to 'show cause' why bail should be granted
  - clarifying that although a lack of accommodation and/or family support is a consideration that bail decision makers can take into account when determining whether to grant bail, it cannot be the sole reason for keeping a child in custody
- codify the sentencing principle, currently found in common law, that the fact that an offence was committed while subject to bail is an aggravating factor when determining the appropriate sentence

[7] Explanatory notes, p 1.

[8] Explanatory notes, pp 1, 2.

[9] Explanatory notes, pp 1, 2.

- amend the Charter of Youth Justice Principles to include a reference to the community being protected from recidivist youth offenders
- provide for a trial of powers for police to stop a person and use a hand held scanner to scan for knives in SNPs on the Gold Coast
- enhance the enforcement regime against dangerous hooning behaviour by strengthening existing owner onus deeming provisions for hooning offences.[10]

It is intended that former QPS Commissioner Bob Atkinson will 'undertake an independent evaluation on the efficacy of the full suite of reforms over a six-month period', and report to the new Youth Justice Cabinet Committee.[11]

The committee also notes comments from QPS Deputy Commissioner Smith during the public briefing regarding the impact of the Bill's amendments on the functions of QPS:

> The prevention of crime and the very real harm crime causes in our community is pivotal to the functions of the Queensland Police Service. The Queensland Police Service welcomes this bill and sees these amendments as an opportunity to enhance the service's capacity to respond to serious recidivist youth offenders in a preventive way. This commitment to prevention is the primary means of achieving community safety and that is why the QPS invests significant resources in our response to youth offenders.
>
> Our interactions with young people are the most important interactions that we have from a preventive perspective. Of the thousands of youths that police deal with annually, the majority are diverted from the youth justice system and/or they never come to the attention of police again. Diversion can involve a range of interventions including taking no action, cautioning or restorative justice processes. Our data shows the number of unique young offenders coming to the attention of police has decreased by 35 per cent from 2010 to 2020 and by five per cent from 2019 to 2020. However, at the same time as the number of unique young offenders is decreasing, the number of reported offences overall has increased by six per cent from 2010 to 2020 and five per cent from 2019 to 2020.
>
> The most recent Childrens Court of Queensland annual report for 2019-20 reveals that 10 per cent of all youth offenders, in the order of about 390 individuals, account for 48 per cent of all youth crime, which is up four per cent from the previous 12-month period. This cohort of serious recidivist youth offenders engaging in persistent and high-risk offending places them and the community at risk of harm.
>
> …
>
> Finally, I want to close by saying something with respect to coordination. The amendments contained in this bill will be of great assistance in our efforts to prevent youth recidivism, but they are only part of the solution. The other part of the solution is the coordination of our operational and cross-agency efforts. As the government has announced, Assistant Commissioner Scanlon, who appears with me today, will be leading the Youth Justice Taskforce, and in that capacity she will be providing the leadership and oversight necessary to ensure our efforts to address youth recidivism are effective.[12]

1.4 Consultation on the Bill

As set out in the explanatory notes, the following consultation was undertaken on the Bill:

> A stakeholder meeting was held with respect to the youth justice proposals ahead of the development of this Bill, which included representatives from Sisters Inside Inc, Aboriginal and Torres Strait Islander Legal Service, Legal Aid Queensland, Queensland Law Society, Bar Association of Queensland, Youth Advocacy Centre, PeakCare, Micah Projects, Aboriginal and Torres Strait Islander Community Health

[10] Explanatory notes, pp 2-3.

[11] QPS and DCYJMA, Joint departmental brief on the Youth Justice and Other Legislation Amendment Bill 2021 to the Legal Affairs and Safety Committee, p 13.

[12] Deputy Commissioner Doug Smith, Strategy, Policy and Performance, Queensland Police Service, public briefing transcript, Brisbane, 8 March 2021, pp 2,3.

Service (ATSICHS) Brisbane, Act for Kids, Queensland Aboriginal and Torres Strait Islander Child Protection Peak Ltd (QATSICPP), Your Town, the Queensland Family and Child Commission, the Queensland Mental Health Commission and the Queensland Human Rights Commission.

Due to the nature of the PPRA amendments, no external consultation was undertaken ahead of the development of this Bill.

Key members of the judiciary were also consulted with respect to some aspects of the youth justice proposals, ahead of the development of this Bill, including the Chief Magistrate, Deputy Chief Magistrate, Chief Judge and the President of the Childrens Court of Queensland. They were not consulted with respect to a draft of the Bill.[13]

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 1

The committee recommends the Youth Justice and Other Legislation Amendment Bill 2021 be passed.

[13] Explanatory notes, p 12.

2 Examination of the Bill

This section discusses issues raised during the committee's examination of the Bill.

2.1 Amendments to the *Youth Justice Act 1992*

The aim of the proposed amendments to the youth justice bail framework is to promote and support bail compliance.[14]

The Bill aims to achieve this objective by:

- using electronic monitoring devices as a condition of bail for offenders aged 16 and 17 years old in certain circumstances (clause 26)
- inserting an additional consideration for court or a police officer in regards to whether there is parental or other support available to the child in regards to youth bail (clause 21(3))
- providing a presumption against bail for a limited class of youth offenders (clause 24)
- clarifying section 48AA(7) of the YJA so that although a lack of accommodation and/or family support is a consideration that bail decision makers can take into account for determining whether to grant bail, it cannot be the sole reason for keeping a child in custody (clause 21(6))
- requiring courts to consider the presence of any aggravating or mitigating factor concerning the child and, without limiting this requirement, to consider as an aggravating factor whether the child committed the offence while released into the custody of a parent, or at large with or without bail, for another offence (clause 29)
- amending the Charter of Youth Justice Principles to highlight the importance of protecting the community from harm (clause 33).

In his introductory speech for the Bill, the Minister for Police and Corrective Services and Minister for Fire and Emergency Services explained the background to the provisions:

> The data shows that around 90 per cent of youth offenders do not repeatedly offend, with many not reoffending after their first interaction with police. While this data is encouraging, the data also shows that there is a cohort of serious recidivist youth offenders, outliers, who are causing significant harm to the community. This cohort of recidivist offenders, representing just 10 per cent of all youth offenders, account for 48 per cent of all youth offending. Combined with the government's five-point action plan, which has already helped facilitate a 23 per cent drop in the number of young offenders in 2019-20 and a nine per cent reduction in the number of charges, this bill will form an all-around strategy to tackle this cohort of persistent youth offenders.
>
> …
>
> Amendments are being made to the *Youth Justice Act 1992* to increase the involvement of a young person's parent, guardian or other appropriate and responsible person to assist the court or a police officer when making a decision about bail and to support the youth to comply with their bail conditions. The bill will provide for a presumption against bail for youths charged with certain offences while on bail for an indictable offence. In other words, the offender will have to prove to the bail decision-maker that they do not represent a threat to community safety.
>
> The bill will establish bail conditions that can incorporate the use of GPS electronic monitoring as a condition of bail for recidivist youth offenders. This means the court can require an offender aged 16 or 17 to wear a GPS tracker. To strengthen laws in and the principles of the *Youth Justice Act 1992* relating to bail, the bill will explicitly state that community safety comes first and must be protected from recidivist high-risk offenders. The bill will also put into statute the principle that offending while on bail

[14] QPS and DCYJMA, Joint departmental brief on the Youth Justice and Other Legislation Amendment Bill 2021 to the Legal Affairs and Safety Committee, p 2.

> aggravates the conduct to be considered by a court when imposing a sentence. The youth justice minister will speak further in the second reading debate on these amendments.
>
> It is also important to highlight that a new youth justice committee will provide oversight of the implementation of proposed reforms and constantly monitor the government's efforts to reduce youth offending. By meeting regularly, this cabinet committee will scrutinise the efforts of government agencies working to enhance community safety and hold youth offenders accountable for the crimes that they commit. This is in addition to the youth justice task force, led by Queensland Police Service Assistant Commissioner Cheryl Scanlon, which I previously announced alongside the Premier.[15]

Stakeholder comments on these proposed amendments are detailed below.

2.1.1 General stakeholder views

Stakeholders held a range of views on the proposed amendments to the YJA.

A number of submitters did not support the Bill and the provisions relating to the YJA, including, for example, the Australian Lawyers Alliance (ALA), Amnesty International Townsville Action Group, North Australian Aboriginal Justice Agency (NAAJA), Queensland Council of Social Service (QCOSS), Youth Affairs Network of Queensland (YANQ), Community Living Association, CREATE Foundation, the Australian Association of Social Workers (AASW), the Queensland Indigenous Labor Network, the Aboriginal & Torres Strait Islander Women's Legal Service North Queensland, and the Bar Association of Queensland (BAQ).[16]

QCOSS argued that the children who are targeted by the Bill should not be treated as hardened criminals. Rather, 'they should be provided with specific, targeted, intense and sustained services and supports to help to address the underlying causes of their behaviour'.[17] The organisation submitted:

> … Research consistently shows that these children experience profound social disadvantage including extreme poverty, histories of familial offending, exposure to family violence, unstable accommodation or homelessness, alcohol and substance misuse and disrupted education. Many are 'cross-over kids' who enter the youth justice system after first having contact with the child protection system. A disproportionate number are Indigenous. These are *the most vulnerable* of all Queensland children caught up in the juvenile justice system.[18]

NAAJA noted that the Royal Commission into the Protection and Detention of Children in the Northern Territory 'recognised the need for integrated, sustained, well-funded and community-based responses to children and young people' and that the Bill would 'do nothing to address the root causes of youth crime in Queensland'.[19] NAAJA continued:

> It follows that NAAJA is concerned that there is no provision in the amendments proposed by this Bill for support programs to assist Aboriginal and Torres Strait Islander children and families with their obligations regarding bail. These type of inadequate responses to Aboriginal and Torres Strait Islander children and young people results in their entrenchment in the criminal justice system.[20]

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15 Queensland Parliament, Record of Proceedings, 25 February 2021, p 242.

16 Submission 9, p 9; submission 15, p 1, submission 16, p 3; submission 26, p 1; submission 36, p 2; submission 37, p 4; submission 39, p 1; submission 77, p 3; Submission 33, p 1; Submission 79, p 2.

17 Submission 15, p 2. NB: Supporting these young people in other ways was a consistent theme for many stakeholders and, while outside the scope of the Bill, is considered further in section 2.3.3.

18 Submission 15, p 2. Italics in original. Footnote in original omitted.

19 Submission 20, p 1.

20 Submission 20, p 1.

Anglicare Southern Queensland also pointed to the importance of addressing the reasons why these young people were offending:

> Being really tough on crime is about addressing the reasons for offending—not sending the police or ambulance to the bottom of the cliff once the damage is done.[21]

YANQ submitted that any approach to considering and addressing why children offend should be evidence based:

> The proposed amendments to the Youth Justice Act further separate the Act from what is in children's best interest. Children who offend must be treated as children first and foremost. The Act and the proposed amendments clearly fail our children and more broadly our community. Both the Act and the proposed amendments are not based on contemporary evidence and progressive approaches to how children should be understood, treated and supported after experiencing problems that have led them to commit a crime.[22]

Albert Abdul Rahman considered that the Bill is inadequate and is only 'band-aiding the problem' as it 'does not take into account the socio-psychological issues with offending youth.' Albert Abdul Rahman continued, stating that the Bill also does not 'deal with vigilantes who take the law into their own hands'.[23] Mr Rahman submitted:

> This needs to change. It needs to include the following:
>
> a. That all children who come before the courts are assessed for FASD [fetal alcohol spectrum disorder] and psychological and other health related issues so that sentencing is appropriate;
>
> b. That funding be available for rehabilitation services provided by professionals, for these young people. This includes working with their families or carers;
>
> c. That the Murri Court be introduced for young offenders.[24]

Also concerned about the role of fetal alcohol spectrum disorder (FASD) in contributing to anti-social behaviour in young people was Professor Sue McGinty, adjunct professor of education at James Cook University, who told the committee:

> My work in this area has led me to believe that fetal alcohol spectrum disorder, FASD, is an underacknowledged condition that is really staring us in the face. Firstly let me say that FASD is not just an Aboriginal problem. It is caused by mothers drinking during pregnancy. The symptoms along the spectrum are poor impulse control, cognitive impairment, the inability to see right from wrong, aggressive behaviours as sometimes exhibited in ADHD et cetera. I believe that all children who come before the justice system need to be assessed for their level of FASD before they are sentenced so that appropriate services or sentencing are provided.
>
> ….
>
> The Koori Children's Court in Parramatta has a healthcare clinic involved to do this sort of assessment. It is a good model and from all I have heard it is a success.
>
> …
>
> The assessment process involves multiple people. There is also sometimes difficulty getting the young people to participate. However, when the research was done in Western Australia—it was sponsored by the telethon over there—they found that up to 47 per cent of Indigenous children had some form of the spectrum and that about 36 per cent of all incarcerated youth had some form of FASD or some cognitive

[21] Public hearing transcript, Brisbane, 22 March 2021, p 2.

[22] Submission 16, p 2.

[23] Submission 17, p 1.

[24] Submission 17, p 1.

> impairment. The assessment involves a paediatrician, a clinical psychologist, a speech therapist and so on. Once a child is diagnosed, there are programs that those specialists run.[25]

The research findings referenced by Professor McGinty, on the correlation between the pathology of FASD and conduct that brings young people into contact with the youth justice system, were also raised in the evidence of Jenny Brown of Amnesty International Townsville Action Group. Ms Brown noted that research conducted at the Banksia Hill detention centre in Western Australia:

> …documented a high prevalence of FASD and severe neurological impairment in young people in that detention centre and recommended the need for improved diagnosis to identify their strengths and difficulties to guide and improve their rehabilitation.[26]

Steven Daw welcomed the Bill but considered that it was insufficient to address the crime problems in regional Queensland.[27]

The committee also heard from many witnesses during public hearings in Mount Isa, Cairns, Townsville, and the Gold Coast about the impacts of youth crime on their lives, including property damage, fearing going out at night, cars being driven on the wrong side of the road, etc.[28]

In regards to youth crime in Mount Isa, Commerce North West stated:

> Young recidivist offenders are responsible for a large percentage of property crime in Mount Isa. Local business people and residents are frustrated by this growing problem and the failures in the systems that are preventing meaningful long term solutions.[29]

Some stakeholders submitted that repeat offenders and those who commit serious offences should not be granted bail.[30]

Other general comments in relation to amendments to the YJA include:

- assistance should be tailored to the needs of the particular individual as per the National Disability Insurance Scheme (NDIS) rather than use detention, incarceration and monitoring as a response to youth crime.[31]
- given the potential harm done to children in prison, children should not be subject to policies that result in increased rates of imprisonment.[32]
- the government should identify and implement evidence-based measures that are demonstrated to reduce offending.[33]
- the proposed amendments are 'not appropriately adapted to the aim of reducing youth offending'.[34]

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25 Public hearing transcript, Townsville, 19 March 2021, pp 23-24.

26 Public hearing transcript, Townsville, 19 March 2021, p 30.

27 Submission 6, p 1. See Part 2.3.3 of this report for Steven Daw's recommendation to address the issue of recidivist youth crime.

28 Refer to public hearing transcripts in Mount Isa, Cairns, and Townsville published on the committee's inquiry webpage. Also see, for example, submissions 4, 8, 13, 14, 23, 28, 29, 32.

29 Submission 72, p 1.

30 Submission 13, p 2; submission 14, p 1; submission 23, p 2; submission 30, p 2; submission 31, p 2.

31 Submission 2.

32 Submission 44, p 10.

33 Submission 61, p 3.

34 Submission 75, p 1.

- the Bill's statement of compatibility excludes reference to some human rights and some amendments in the Bill breach human rights.[35]
- all provisions of the Bill should be reviewed in 12 months.[36]
- reforms may increase the need for legal representation and bail support services.[37]
- independent inspection could help strengthen public trust in the youth justice system and provide safeguards for children's rights while in detention.[38]
- restorative approaches to justice should be taken with a focus on repairing harm and building resilient, safer communities.[39]
- all criminal history should be considered during bail decisions.[40]
- home invasion should be a serious offence and homeowners should be able to use reasonable force to defend themselves.[41]

Some of these concerns are addressed in more detail in other sections of this report.

2.1.2 Departmental response to general stakeholder views

In response to concerns that the Bill does not go far enough to address youth crime and will not be a deterrent, QPS and DCYJMA (the departments) advised that the 'Bill gives effect to Government policy' and that the 'parliamentary committee process enables thorough analysis of all legislative proposals and all views to be heard'.[42] The departments continued:

> Ultimately, the passage of the Bill, including any amendments, will be determined by democratically elected representatives in the Queensland Parliament.[43]

The departments also advised that 'amendments have been carefully targeted to the offending behaviour of serious recidivist offenders' and will be reviewed.[44] Further, the amendments 'are not intended to detract from the holistic four pillars approach of the Youth Justice Strategy, including diverting children from custody, except where it is necessary for community safety'.[45]

In response to concerns that the youth justice amendments may increase demand for legal representation, the departments advised that they did not consider this likely but that the situation will be monitored.[46]

In regards to the suggestion for independent inspection in this area of reform from the Queensland Family and Child Commission (QFCC), the departments advised that the Queensland Government

35 Refer to submissions 15, 16, 25, 26, 33, 34, 36, 38, 41, 44, 48.

36 Submission 46.

37 Submission 66, p 4.

38 Submission 66, p 4.

39 Submission 55, p 3.

40 Submission 67.

41 Submission 67.

42 QPS and DCYJMA, correspondence, 19 March 2021, p 3.

43 QPS and DCYJMA, correspondence, 19 March 2021, p 3.

44 QPS and DCYJMA, correspondence, 26 March 2021, p 4.

45 QPS and DCYJMA, correspondence, 26 March 2021, p 5.

46 QPS and DCYJMA, correspondence, 26 March 2021, p 34.

supports the establishment of a new independent inspector but that this is outside the scope of the Bill.[47]

The departments advised that restorative justice conferences are available as a diversionary measure and sentencing option.[48]

The departments noted that past offending behaviour is currently considered in making bail decisions.[49]

The departments also noted that home invasion is already a serious offence and included in the list of prescribed offences, and that it is already lawful to use reasonable force to defend yourself, your family and your property.[50]

2.1.3 Impact on human rights

The committee notes two distinct and contradictory views in relation to this Bill – one opinion is that it does not go far enough in addressing youth crime, and the other opinion is that the Bill primarily contradicts the recommendations and work in the *Report on Youth Justice* by Bob Atkinson (Atkinson report) and that some features of the Bill may not be in accordance with Queensland's *Human Rights Act 2019* (HRA).

A number of stakeholders commented on the impact of the Bill's provisions on the human rights of the child, particularly those provisions relating to electronic monitoring and the imposition of bail conditions.[51]

YANQ submitted, for example:

> Further erosion of basic principles of democracy is evident in the proposed Amendment Bill... These proposed amendments are neither reasonable nor justifiable.[52]

The Queensland Human Rights Commission (QHRC) stated:

> The weight of evidence-informed expertise suggests that punitive 'tough on crime' programs and measures are not effective in rehabilitating offenders and reducing recidivism. Rather, as the Report on Youth Justice by Bob Atkinson (Atkinson Report) makes clear, the best outcomes for victims, young offenders and the broader community will be achieved by initiatives that reduce offending and incarceration, by tackling the causes and consequences of youth crime.
>
> To this end, many amendments in the Bill threaten to undermine the promising progress made under the government's *Working Together, Changing the Story strategy,* which acknowledges that prevention works – and the underlying factors that lead to offending must be addressed to achieve long-lasting systemic changes.[53]

The departments advised the following in relation to concerns about the impact of the Bill on human rights:

> The Bill is accompanied by a Human Rights Statement of Compatibility as required by the *Human Rights Act 2019.*

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47 QPS and DCYJMA, correspondence, 26 March 2021, p 34.

48 QPS and DCYJMA, correspondence, 26 March 2021, p 35.

49 QPS and DCYJMA, correspondence, 26 March 2021, p 33.

50 QPS and DCYJMA, correspondence, 26 March 2021, p 33.

51 See, for example, evidence provided during the public hearing in Brisbane, 26 March 2021 from Queensland Aboriginal and Torres Strait Islander Child Protection Peak Ltd, p 17; Community Living Association, p 11; QCOSS, p 22; Amnesty International, p 26; Queensland Human Rights Commission, p 36.

52 Submission 16, p 2.

53 Submission 48, p 5. NB: in-text references have been removed.

> A human right may be subject under law to reasonable limits as can be justified in a free and democratic society based on human dignity, equality and freedom (section 13 Human Rights Act).[54]

The departments noted the recommendation for reviewing the Bill's provisions, stating that Bob Atkinson AO will review the amendments and that both GPS monitoring and hand held scanner trials will be reviewed after 12 months. The departments advised that 'all youth justice legislation, policies, funding priorities and programs will continue to be monitored as a matter of course'.[55]

2.1.4 Disproportionate effect on Aboriginal and Torres Strait Islander young people

A number of stakeholders submitted that the proposed amendments to the YJA would disproportionately affect Aboriginal and Torres Strait Islander young people.[56] The ALA noted:

> … that currently Aboriginal and Torres Strait Islander young people are disproportionately represented in the total number of young people in detention in Queensland. According to statistics from the Queensland Youth Justice annual survey, over 70 per cent of young people in detention in Queensland are Aboriginal or Torres Strait Islander. An Aboriginal/Torres Strait Islander young person was 32 times more likely to be in detention than a non-Aboriginal/Torres Strait Islander young person.
>
> There are reports that 80 per cent of criminalised young people in Townsville are Aboriginal or Torres Strait Islander. This would suggest that the proposals in the Bill will disproportionately affect Aboriginal and Torres Strait Islander young people, further increasing their incarceration.[57]

The ALA added that the proposed presumption against bail in the Bill will particularly disadvantage Aboriginal and Torres Strait Islander young people who make up a disproportionate number of young people under child protection orders, for whom the state is the parent.[58]

Queensland Aboriginal and Torres Strait Islander Child Protection Peak (QATSICPP) stated:

> We want to strengthen responses to our young peoples concerning trauma based behaviours that lead to impulsive and unsafe responses including unsafe driving and other criminal behaviour that place their lives and those of bystanders at risk. However, should the government move ahead with the changes proposed in the Bill without consideration of trauma informed, culturally and cognitively based evidence based responses, we know that our Aboriginal and Torres Strait Islander children will be significantly disproportionately impacted by the proposed measures.[59]

Maggie Munn from Amnesty International stated:

> Amnesty International is gravely concerned about the impact these amendments will have specifically on Aboriginal and Torres Strait Islander kids. As a Gungarri woman I know firsthand the impact of the criminal justice system on my people and, more specifically, on our kids. It is no secret that Indigenous kids are likely to interact with the criminal justice system and police at some point. What we are concerned about is that this bill will make that more and more likely and as a result will funnel kids into detention and imprisonment. Once they are there, it is so hard for them to get out. What works in addressing youth crime is community and Indigenous-led programs.[60]

In response to concerns about the Bill's impact on Aboriginal and Torres Strait Islander young people, the departments advised:

> It is acknowledged that young Aboriginal and Torres Strait Islander people are over-represented in the youth justice system.

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54 QPS and DCYJMA, correspondence, 19 March 2021, p 3.

55 QPS and DCYJMA, correspondence, 19 March 2021, p 26.

56 Refer to submissions 9, 20, 21, 36, 39, 44, 45, 48, 49, 50, 51, 53.

57 Submission 9, pp 8-9.

58 Submission 9, p 9.

59 Submission 53, p 3.

60 Public hearing transcript, Brisbane, 22 March 2021, p 26.

The *Working Together Changing the Story: Youth Justice Strategy 2019-23* includes a priority to reduce the over-representation of Aboriginal and Torres Strait Islander children in the youth justice system.

> The DCYJMA provides and funds a range of culturally appropriate services to address young Aboriginal and Torres Strait Islander people's criminogenic needs, including many provided by community-controlled organisations.[61]

2.1.5 Electronic monitoring devices (clause 26)

At present, the YJA prohibits a court or police officer imposing on a grant of bail to a child a condition that the child must wear a tracking device while released on bail.[62]

The Bill would provide for a 2-year trial of the use of an electronic monitoring device (a global positioning system (GPS) ankle bracelet[63]) as a condition of bail for some offenders.[64] The government proposed a trial because 'evidence of the efficacy and cost effectiveness of the use of tracking devices on children in other jurisdictions is inconsistent'.[65] The statement of compatibility advises that in the first 12 months, it is intended that only Townsville, North Brisbane/Moreton and Logan/Gold Coast will be prescribed in order to trial electronic monitoring.[66] A review would be conducted after 12 months.[67]

The Bill proposes to permit certain courts to impose on a grant of bail to certain 16 or 17 year old children a condition that the child must wear a tracking device while released on bail (a *tracking device condition*) in the following circumstances:

- the child has previously been found guilty of at least one indictable offence
- the offence in relation to which bail is being granted is a prescribed indictable offence (prescribed indictable offences 'are serious in nature'[68])
- the court is satisfied that imposing the tracking device condition is appropriate having regard to specified matters.[69]

The departments stated that this threshold that must be met 'ensures the tracking device conditions are only imposed for bail granted with respect to serious and repeat offending behaviour'.[70]

Before a court imposes on a grant of a bail a tracking device condition, it must order, and consider, a report containing the opinion of the chief executive of DCYJMA (chief executive) about the child's suitability for a tracking device condition.[71] This report would assist the court to consider:

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61 QPS and DCYJMA, correspondence, 19 March 2021, pp 2-3.

62 YJA, s 52A(5).

63 QPS and DCYJMA, Joint departmental brief on the Youth Justice and Other Legislation Amendment Bill 2021 to the Legal Affairs and Safety Committee, p 2.

64 YJA, s 52AA(10).

65 QPS and DCYJMA, Joint departmental brief on the Youth Justice and Other Legislation Amendment Bill 2021 to the Legal Affairs and Safety Committee, p 3.

66 Statement of compatibility, p 3.

67 Explanatory notes, p 3.

68 QPS and DCYJMA, Joint departmental brief on the Youth Justice and Other Legislation Amendment Bill 2021 to the Legal Affairs and Safety Committee, p 2. *Prescribed indictable offence* is defined in clause 34. See also, QPS and DCYJMA, Joint departmental brief on the Youth Justice and Other Legislation Amendment Bill 2021 to the Legal Affairs and Safety Committee, p 5.

69 Clause 26, proposed new s 52AA(1); explanatory notes, pp 18-19.

70 QPS and DCYJMA, Joint departmental brief on the Youth Justice and Other Legislation Amendment Bill 2021 to the Legal Affairs and Safety Committee, p 2.

71 Clause 26, proposed new s 52AA(3)-(5); explanatory notes, p 19.

> … whether the youth has access to a mobile phone (to answer calls from the monitoring centre), reliable access to electricity in order to charge the monitoring device and their phone, capacity to understand the requirements of wearing a monitoring device (such as charging requirements) as well as whether the youth has support, if necessary, to assist with compliance.[72]

Only some courts would be able to impose a tracking device condition. This is to ensure 'trained DCYJMA and QPS staff are available to support the court's decision-making and to fit the devices when ordered'.[73]

To be part of the trial, a child must live in a prescribed geographical area so that there are support services available.[74]

If the court imposes a tracking device condition on a grant of bail, the DCYJMA must make all of the arrangements to impose the condition. QPS will fit and remove the tracking device. Queensland Corrective Services (QCS) will monitor the device, contact the child by mobile telephone in relation to an alert or notification from the device, and give information relating to alerts and notifications from the tracking device to the departments.[75]

With respect to the alerts and notifications, the departments advised:

> Examples of alerts QCS will contact the young person about include reminding the young person to charge the device and reminding them of their order conditions if they are outside the geographical location requirements of the court order.
>
> For higher level alerts, such as where a device has been removed, or where low-level alerts cannot be resolved, QCS will immediately escalate the matter to the DCYJMA and the QPS who will decide how to respond.
>
> A detailed response model for responding to all different system alerts and notifications will be included in operational protocols.[76]

A new team would be established within the existing Electronic Monitoring and Surveillance Unit (EMSU) to monitor children on bail. The departments advised that 'active monitoring involves at least two EMSU officers rostered on 24 hours per day actively reviewing the alerts generated by the system'.[77]

The policy objective of the proposed electronic monitoring of recidivist children is to '… deter the youth from committing further offences on bail, facilitate police investigations of breaches of bail conditions, and lower rates of reoffending while on bail to protect the community'.[78]

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72 QPS and DCYJMA, Joint departmental brief on the Youth Justice and Other Legislation Amendment Bill 2021 to the Legal Affairs and Safety Committee, p 3.

73 QPS and DCYJMA, Joint departmental brief on the Youth Justice and Other Legislation Amendment Bill 2021 to the Legal Affairs and Safety Committee, p 3.

74 QPS and DCYJMA, Joint departmental brief on the Youth Justice and Other Legislation Amendment Bill 2021 to the Legal Affairs and Safety Committee, p 3.

75 Clause 26, proposed new s 52AA(6)-(9); explanatory notes, p 20; QPS and DCYJMA, Joint departmental brief on the Youth Justice and Other Legislation Amendment Bill 2021 to the Legal Affairs and Safety Committee, p 2.

76 QPS and DCYJMA, Joint departmental brief on the Youth Justice and Other Legislation Amendment Bill 2021 to the Legal Affairs and Safety Committee, p 2. See also, QPS and DCYJMA, Joint departmental brief on the Youth Justice and Other Legislation Amendment Bill 2021 to the Legal Affairs and Safety Committee, p 3.

77 QPS and DCYJMA, Joint departmental brief on the Youth Justice and Other Legislation Amendment Bill 2021 to the Legal Affairs and Safety Committee, p 3.

78 QPS and DCYJMA, Joint departmental brief on the Youth Justice and Other Legislation Amendment Bill 2021 to the Legal Affairs and Safety Committee, p 3.

The Minister further explained the role of QCS and how electronic monitoring would work:

> Queensland Corrective Services will support the model by remotely monitoring tracking devices 24 hours a day, seven days a week. The bill includes a clear authority for Queensland Corrective Services, at the request of the department of youth justice, to remotely monitor the tracking device, contact the young person by mobile phone and give the department of youth justice and the Queensland Police Service information relating to alerts and notifications from the tracking device. To minimise contact between the adult correctional system and young people, the bill supports a role for Queensland Corrective Services that is limited to remotely monitoring tracking devices and only contacting the young person through phone, including SMS, to verify a notification and/or resolve a minor alert.
>
> Examples of resolving minor alerts include reminding the young person to charge the device and reminding them of their order conditions if they are outside the geographical location requirements of the court order. For higher level alerts, or where low-level alerts cannot be resolved, Queensland Corrective Services will immediately escalate the matter to the department of youth justice and the Queensland Police Service who will decide how to respond. The bill also limits Queensland Corrective Services' disclosure of information to the department of youth justice and Queensland Police Service. This has been included to protect the confidentiality of young people's personal information.[79]

2.1.5.1 Stakeholder views and departmental response

Some stakeholders expressed support for the trial of electronic monitoring devices on 16 and 17 year olds under certain conditions.[80] The reasons for this support included:

- alleviating the need for late night/early morning bail curfew checks which can be disruptive to families[81]
- potentially giving young people a way out of submitting to peer group pressure because they can use the ankle bracelet as an excuse not to participate in criminal activities[82]
- potentially saving police resources by giving young people an alibi.[83]

Other stakeholders did not support the proposed trial outlined in the Bill because it is limited to 16 and 17 year olds, and was therefore perceived to be ineffective given recidivist offenders are often younger than this age group. These stakeholders also felt the age group covered by the trial should be expanded to include younger offenders,[84] and a wider range of offences.[85]

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79 Queensland Parliament, Record of Proceedings, 25 February 2021, p 244.

80 Lyn White, public hearing, Mount Isa, 16 March 2021, p 11; Snr Sgt Gary Hunter, public hearing, Cairns, 18 March 2021, p 3; Luke Jenkins, public hearing, Townsville, 18 March 2021, 10; Clynton Hawks, public hearing, Townsville, 18 March 2021, p 18; Mayor Jenny Hill, public hearing, Townsville, 19 March 2021, p 26.

81 Snr Sgt Gary Hunter, Cairns, 18 March 2021, p 3.

82 Lyn White, public hearing, Mount Isa, 16 March 2021, p 11.

83 Lyn White, public hearing, Mount Isa, 16 March 2021, p 11.

84 Erin Robino, submission 3, p 1; Janice Bradley, submission 12, p 2; Peter Nixon, submission 22, p 1; Commerce North West, public hearing, Mount Isa, 16 March 2021, p 22; Len Harris, public hearing, Cairns, 17 March, p 20; David Prowse, public hearing, Cairns, 17 March 2021, p 7; Sam Constanzo, public hearing, Townsville, 19 March 2021, p 20; David McCrindle, submission 67, p 1; Justin Thompson, submission 78, p 1; Jeff Phillips, public hearing, Townsville, 18 March 2021, p 2; Lyn White, public hearing, Mount Isa, 16 March 2021, p 11; Snr Sgt Gary Hunter, public hearing, Cairns, 18 March 2021, p 3; Luke Jenkins, public hearing, Townsville, 18 March 2021, 10; Clynton Hawks, public hearing, Townsville, 18 March 2021, p 18; Mayor Jenny Hill, public hearing, Townsville, 19 March 2021, p 26; Kimberley Hoad, submission 59, p 1.

85 Jeff Phillips, public hearing, Townsville, 18 March 2021, p 2.

In response to the requests for an expansion of the trial, the departments advised:

> The Bill limits electronic monitoring to young people aged 16 or 17, for the reasons discussed in Mr Bob Atkinson's *Report on Youth Justice* (see page 66). Given the lack of evidence of the efficacy of electronic monitoring for children on bail, a trial in specified locations has been considered appropriate. The selection of the trial locations is a matter for Government. It is proposed to nominate geographical locations which have a certain level of bail support services to support the youth on bail.
>
> The provision 'sunsets' after two years (subclause (10)). The trial will be reviewed after 12 months and the Government will make decisions about any future application of electronic monitoring after considering the findings of the review.[86]

A large number of stakeholders opposed the trial of electronic monitoring devices, questioning its capacity to improve community safety and/or reduce offending.

Some stakeholders expressed their belief that young offenders would show a disregard for complying with the conditions relating to the electronic monitoring device, such as charging the device, and may remove, or at least attempt to 'fool', the tracking device.[87] One of these stakeholders recommended that unauthorised removal of the tracking device should result in a mandatory detention of the maximum penalty available, because removal of the device proves their lack of regard.[88]

In response to the proposal of mandatory detention for removal of the monitoring device, the departments advised:

> Mandatory penalties prevent courts from making decisions that respond to the individual circumstances of the young person and the behaviour, including any relevant changes in the time between the offence and the sentencing.[89]

A large number of stakeholders questioned the evidence base for the trial, stating there is a lack of evidence to indicate electronic monitoring lowers incarceration rates, that it is a good fit for young people, or that it is cost-effective or rehabilitative in the long term. Stakeholders advised that:

- there is limited research on electronic monitoring in relation to youth/juvenile justice systems
- research results are either inconclusive or insufficient to warrant the trial, or indicate in some instances it may even increase the risk to public safety
- some research suggests tracking devices may reduce recidivism on certain types of offenders, such as sex offenders, but when extended to broader offenders of all ages, there is no significant positive effect compared to non-monitoring
- the New Zealand evaluation of electronic monitoring referred to in the statement of compatibility compares home detention generally against the outcomes of detention in custody and does not distinguish outcomes across different age brackets; therefore, it does not provide conclusive evidence demonstrating that electronic monitoring is effective for youth offenders in particular.[90]

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86 QPS and DCYJMA, correspondence, 19 March 2021, pp 12-13.

87 PeakCare, submission 63, p 5; Corina James, public hearing, Mount Isa, 16 March 2021, p 20; Sue Withers, public hearing, Townsville, 18 March 2021, p 15; Family Inclusion Network, public hearing, 19 March 2021, p 12; Erin Robino, public hearing, Townsville, 19 March 2021, p 13; Sam Costanzo, public hearing, Townsville, 19 March 2021, p 22.

88 Justin Thompson, submission 78, p 1.

89 QPS and DCYJMA, correspondence, 26 March 2021, p 23.

90 ALA, submission 9, p 6; Amnesty International Townsville Action Group, public hearing, Townsville, 19 March 2021, p 29; Amnesty International (Toowoomba Group), submission 25, p 1; Community Living Association, submission 26, p 2; Jenny Brown, submission 34, p 1; Anglicare Southern Queensland, submission 38, p 4; QHRC, submission 48, p 8; ICCR, submission 50, p 2; QATSICPP, submission 53, p 5;

For example, QCOSS cited a 2015 American study that found that electronic monitoring:

- Risks hyper-criminalisation
- Fails to achieve the goal of reducing the rate of reoffending
- Can amplify stress and anxiety in homes where children live in poverty
- Leads to increased stigma, shame and marginalisation.
- Presents a profound cognitive and psychological burden for children with mental health disorders and impairments.[91]

QCOSS also advised that a 2019 pilot electronic monitoring program for 16 to 18 year olds by the Center for Court Innovation (New York City) was labelled a failure.[92]

In response to concerns about a lack of evidence to support the trial, the departments advised:

> The departments recognise there is limited research available on the use of electronic monitoring for children on bail. That is why the intention is to trial the technology for 12 months, with a 'sunset clause' of two years (subclause (10)), to allow a review after 12 months with the Government to consider any future application of electronic monitoring in light of the findings of the review.
>
> … if a police officer reasonably suspects a youth has contravened or is contravening a condition of their bail, the police officer must consider alternatives to arrest (section 59A, Youth Justice Act).[93]
>
> The shortage of evidence in relation to children on bail is acknowledged. That is why the provisions have been introduced with a sunset clause. This will allow a trial to be undertaken and allow the efficacy of electronic monitoring to be reviewed before further decisions are made.[94]

Stakeholders indicated that measures that effectively deter adults may have different outcomes when applied to youth offenders, particularly because of cognitive maturity. Developmental concerns in relation to using electronic monitoring as part of a child's bail conditions included:

- a lesser capacity to assess risk and consider possible consequences of their actions (compared with adults)[95]
- being less likely to be deterred by the potential adverse consequences of the electronic monitoring, particularly children with disability or mental illness[96]
- a lack of impulse control, which is likely to be exacerbated in the case of young offenders with mental health or intellectual disabilities[97]
- children being unlikely to exercise the same levels of self-responsibility.[98]

Stakeholders also raised the potential for stringent and detailed conditions to apply to the use of a tracking device, including technical requirements such as the need to charge it, need for a mobile

Zillmere Young Peoples Support Service, submission 54, p 2; Jesuit Social Services, submission 55, p 2; ATSILS, submission 56, p 4; QCCL, submission 57, p 4; Youth Advocacy Centre, submission 64, p 15; YFS Legal, submission 71, p 4; QLS, submission 75, p4; ATSIWLSNQ Inc, submission 77, p 9.

91 Submission 15, p 3.

92 Submission 15, p 4.

93 QPS and DCYJMA, correspondence, 19 March 2021, p 14.

94 QPS and DCYJMA, correspondence, 19 March 2021, p 15.

95 Sisters Inside Inc, submission 74, p 7.

96 QCCL, submission 57, p 2; QFCC, submission 66, p 3; Sisters Inside Inc, submission 74, p 7.

97 QCCL, submission 57, pp 4-5.

98 QLS, submission 75, p 4.

phone so that the wearer can be contacted, and installation of a monitor within the home,[99] as well as possible 'onerous and disproportionate' curfew conditions and restrictions on movement, such as 'approval 48 hours prior or virtual home detention'.[100]

As a result of a child's potential inability to consider the consequences of their actions, problem-solve or regulate their behaviour, particularly those with a disability or mental illness, some stakeholders advised that it would be difficult for them to fulfil their bail conditions associated with the electronic monitoring device itself, such as keeping the equipment charged and in good working order, as well as planning their day in advance, such as where they'll go and by which routes, how they'll make it home in time for curfew.[101]

In response to concerns that children may be less responsive to this type of deterrence measure, especially those with disability or mental illness, the departments advised:

> The provisions require the court to consider whether the child is likely to comply with the condition, and any associated conditions, having regard to the personal circumstances of the child.
>
> The trial will be reviewed after 12 months.[102]

In addition to developmental and individual factors that may impact on compliance with the conditions of electronic monitoring, stakeholders also advised that use of this technology is based on the premise that a child has a stable home environment with parental or caregiver support to meet the bail demands. Stakeholders submitted that children in the high risk recidivist offending group are less likely to have a stable home environment because:

- repeat offenders potentially live in an environment where the family situation (domestic or family violence, child safety issues), or family members (mental health, substance misuse, parent in prison) or peer groups are a significant contributor to the offending behaviour and not likely to support the child's bail conditions[103]
- youth offenders are sometimes subject to care and protection orders which see the State as their parent, or they experience unstable or transient living arrangements or homelessness, or live in poverty and may have inconsistent access to a mobile phone, charging facilities and support.[104]

It was therefore submitted that, because most of the targeted cohort of repeat youth offenders who come before a court do not have stable accommodation, support of a parent, ongoing access to a mobile phone and a power supply for the period required to recharge the devices, it is unlikely that many children will be released with the condition of having a tracking device fitted and the utility of GPS tracking for youth offenders will therefore be limited.[105]

The departments advised the following in response to the above:

> Electronic monitoring is reserved for a small cohort of serious recidivist offenders in restricted circumstances for a limited trial period.

99 ATSIWLSNQ Inc, submission 77, p 9.

100 ATSIWLSNQ Inc, submission 77, p 9.

101 Human Rights Law Centre, submission 44, p 12; QHRC, submission 48, p 9; Zillmere Young Peoples Support Service, submission 54, p 2; YAC, submission 64, p 16; Sisters Inside Inc, submission 74, p 10.

102 QPS and DCYJMA, correspondence, 26 March 2021, p 23.

103 Youth Advocacy Centre, submission 64, p 14; QLS, submission 75, p 6.

104 Hub Community Legal, submission 73, p 12; QLS, submission 75, p 6; ALA, submission 9, p 6.

105 Legal Aid Queensland, submission 62, p 4; Sisters Inside Inc, submission 74, p 10; QLS, submission 75, p 6.

> The condition is subject to the court being satisfied that it would be appropriate, having regard to a range of matters. The court's attention is expressly drawn to the child's privacy and cultural rights, amongst others, by the note under proposed s 52AA(1).[106]
>
> The court when considering whether to impose an electronic monitoring condition will be required to consider the youth's capacity to comply with the condition and a suitability assessment report.
>
> As part of this process, the court would consider if the youth has stable accommodation, access to regular supply of electricity and an ability to understand the requirements of maintaining a monitoring bracelet.
>
> It is highly unlikely that a court would impose an electronic monitoring condition on a homeless youth as the youth would not be able to comply with the condition.[107]

For those who are released on bail with an electronic monitoring device, stakeholders raised concerns that wearing an electronic monitoring device won't reduce reoffending or stop any type of behaviour, but might instead set children up to fail and potentially increase risks to public safety.[108] By not fulfilling their bail conditions, there were concerns this would lead to further criminalisation of the child and escalated engagement with the youth justice system[109] through:

- mistakes, such as walking to school using an unauthorised route when wearing an ankle bracelet, losing track of time when visiting friends and on a curfew, or losing their mobile phone[110]
- being charged with additional offences such as wilful damage if they try to remove the electronic monitoring device.[111]

For example, the Aboriginal and Torres Strait Islander Women's Legal Service North Queensland (ATSIWLSNQ) Inc submitted:

> The *Youth Justice Strategy 2019-23* rejects the "historical approach to youth crime" which has been to
>
> > *...treat children and young people as adults by responding with harsher penalties leading to incarceration rather than addressing the causes of offending behaviour.*
>
> It is ironic, therefore, that the proposed tracking device laws adopt exactly this approach, where tracking devices have been demonstrated to be ineffective in reducing recidivism and to be unsuitable for children due to their age, brain development and maturity. The Queensland government is well aware that adolescents' "ability to make clear logical planned decisions and consider consequences is still developing". These are the skills needed to effectively manage tracking devices and make tracking devices an effective deterrent by considering consequences. This presumes a level of maturity more typical of adults but unsuitable for children/young people. On the basis of evidence from other jurisdictions the proposed law sets children up to fail.[112]

Similarly, the Queensland Law Society (QLS) submitted:

> Trauma, socioeconomic disadvantage and conflictual home and neighbourhood environments compound this issue, further limiting children's cognitive, social, emotional and behavioural development. Consequently, youth offenders are more likely to engage in risk taking behaviour and have a more limited

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106 QPS and DCYJMA, correspondence, 26 March 2021, p 16.

107 QPS and DCYJMA, correspondence, 26 March 2021, pp 16, 21-22.

108 QCOSS, submission 15, p 4; Human Rights Law Centre, submission 44, p 12; Human Rights Law Centre, submission 44, p 12; Change the Record, submission 45, p 6; QHRC, submission 48; Sisters Inside Inc, submission 74, p 10; ATSIWLS, submission 77, p 8.

109 PeakCare, submission 63, p 5; Amnesty International Townsville Action Group, public hearing, Townsville, 19 March 2021, p 29.

110 Sisters Inside Inc, submission 74, pp 7, 10; ATSIWLSNQ Inc, submission 77, p 9.

111 YAC, submission 64, p 16.

112 ATSIWLSNQ Inc, submission 77, pp 8-9.

> capacity to comprehend and abide by stringent conditions of bail, including maintaining and not tampering with tracking devices. GPS tracking in this context risks further criminalising young offenders.[113]

In response to concerns that there is evidence of a significant positive effect in terms of crime reduction and the risk that requiring a youth to wear a device will set them up to fail, the departments advised:

> It is true that GPS tracking may identify relatively minor breaches of conditions, not accompanied by offending, that currently go undetected (for example, arriving home 5 minutes after curfew time). If a police officer reasonably suspects a youth has contravened or is contravening a condition of their bail, the police officer must consider alternatives to arrest, including taking no action (section 59A, YJA), depending on a range of factors including the seriousness of the contravention. A number of the youth justice principles in schedule 1 of the YJA would apply to make arrest inappropriate and possibly unlawful in such circumstances.[114]

Some stakeholders identified the visibility of electronic monitoring devices as a concern, leading to potential exclusion from activities that may support and enhance the child's resilience and rehabilitation, and further criminalisation of children, impacting community safety. These negative impacts included:

- shame/stigma associated with wearing the ankle bracelet, potentially estranging them from their communities, particularly for Aboriginal and Torres Strait Islander young people in regional/rural communities[115]
- electronic monitoring devices being associated with sex offenders, potentially contributing to that stigma[116]
- a child's attendance at school, ability to play sport, access accommodation, gain or keep employment or workplace training opportunities, as well as potentially creating or exacerbating tensions within families[117]
- assisting vigilantes to identify these children, and potentially making children the targets of vigilante action.[118]

There were also concerns the ankle bracelet may be used as a trophy or badge of honour or seen as a rite of passage,[119] or at least give the impression that young people are wearing the device as a 'badge of attainment' thereby further criminalising them and making their constructive engagement in pro-social behaviours, activities and networks more difficult.[120]

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113 QLS, submission 75, pp 5-6.

114 QPS and DCYJMA, correspondence, 26 March 2021, p 18.

115 ALA, submission 9, p 6; QCOSS, submission 15, p 4; AASW, submission 37, p 4; Save the Children, public hearing, Mount Isa, 16 March 2021, p 7; Anglicare Southern Queensland, submission 38, p 4; QHRC, submission 48, p 9; ICCR, submission 50, p 3; QATSICPP, submission 53, p 6; ATSILS, submission 56, p 4; QCCL, submission 57, p 5; PeakCare, submission 63, p 5; YAC, submission 64, p 16; QFCC, submission 66, p 2; Hub Community Legal, submission 73, pp 11-12; Sisters Inside Inc, submission p 10; QLS, submission 75, p 5; ATSIWLSNQ Inc, submission 77, p 8, 11.

116 YAC, submission 64, p 14; YFS Legal, submission 71, p 4; Sisters Inside Inc, submission 74, p 10.

117 ALA, submission 9, p 6; AASW, submission 37, p 5; YAC, submission 64, p 17; ATSIWLSNQ Inc, submission 77, p 11.

118 QHRC, submission 48, p 9; Sisters Inside Inc, submission 74, p 10.ATSIWLSNQ Inc, submission 77, p 10; ALA, submission 37, p 6.

119 David Prowse, Cairns, 17 March 2021, p 7; Townsville Community Justice Group, public hearing, Townsville, 19 March 2021, p 5.

120 AASW, submission 37, p 5; PeakCare, submission 63, p 5.

Stakeholders raised concerns that regardless of whether the device led to stigmatisation or a badge of honour, the consequences included the potential for ongoing offending as children live up to the label they have been given which they cannot either shed or which they feel supports their behaviour.[121]

In response to concerns about stigma and a child's ability to attend school, find employment and secure safe accommodation, the departments advised:

> Electronic monitoring will be subject to the court being satisfied that it would be appropriate, having regard to a range of matters, including familial support.
>
> The court's attention is expressly drawn to the child's rights in relation to privacy, freedom of movement, and culture amongst others, by the note under subclause (1).[122]

In relation to vigilante action, these departments responded by advising 'any perceived or actual concerns about vigilante behaviour by members of the community will be responded to by the QPS'.[123]

Particular concerns were raised that Aboriginal children and Torres Strait Islander children, who are overrepresented in the justice system, may be disproportionately impacted by amendments in the Bill, with the potential for:

- further targeting, stigmatising and criminalising Aboriginal and Torres Strait Islander young people and other highly racialised communities who live in the designated geographical areas identified for the trial[124]
- potential damage to family relationships and the cultural ties between members of Aboriginal and Torres Strait Islander families due to the requirement for a child's carer to support formal compliance, monitor compliance and could potentially place a parent in an untenable position.[125]

In response to concerns that the Bill will likely have a disproportionate impact on Aboriginal and Torres Strait Islander youth, the response from the departments acknowledged that young Aboriginal and Torres Strait Islander people are over-represented in the youth justice system and that the *Working Together Changing the Story: Youth Justice Strategy 2019-23* includes a priority to reduce the over-representation of Aboriginal and Torres Strait Islander children in the youth justice system. The departments also pointed to the funding of 'a range of culturally appropriate services to address young Aboriginal and Torres Strait Islander people's criminogenic needs, including many provided by community-controlled organisations'.[126]

A number of stakeholders raised concerns that the trial breaches rights contained within the HRA. Stakeholders indicated that the trial will enliven a number of human rights without there being evidence that the trial will improve community safety or reduce recidivism, meaning the breaches aren't justifiable or proportionate. The list of rights raised as a concern included:

- privacy (of the child and people associated with the child)
- freedom of movement
- protection of families and young children

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121 YAC, submission 64, p 16; QLS, submission 75, p 4.

122 QPS and DCYJMA, correspondence, 19 March 2021, p 13.

123 QPS and DCYJMA, correspondence, 19 March 2021, p 14.

124 AASW, submission 37, p 5; Change the Record, submission 45, p 7; ICRR, submission 50, p 2; QFCC, submission 66, p 3; Sisters Inside Inc, submission 74, p 9.

125 ATSIWLSNQ Inc, submission 77, pp 10, 11.

126 QPS and DCYJMA, correspondence, 19 March 2021, pp 2-3.

- freedom of association
- rights relating to equality and non-discrimination
- protection from cruel, inhuman or degrading treatment or punishment
- rights relating to criminal procedures, including a child's right to a procedure that takes account of their age and the desirability of promoting their rehabilitation
- children in the criminal process who have been convicted of an offence must be treated in a way that is age appropriate.
- maintaining Aboriginal peoples and Torres Strait Islander peoples connection with their ancestral land.[127]

In regards to concerns about human rights, the departments stated that the Bill is accompanied by a Human Rights statement of compatibility as required by the HRA. Further:

> In introducing the Bill, the Government is of the view that the limits placed on human rights by the Bill are reasonable and justified in a free and democratic society based on human dignity, equality and freedom, having regard to the purpose of the limitation and the related factors set out in section 13 of the *Human Rights Act 2019*.
>
> The use of electronic monitoring is restricted to young people aged 16 and 17.[128]

In relation to a child's right to privacy, the departments advised:

> The Court's attention is expressly drawn to the child's rights to privacy and freedom of movement, amongst others, by the note under subclause (1).
>
> In introducing the Bill, the Government is of the view that the limits placed on human rights by the Bill are reasonable and justified in a free and democratic society based on human dignity, equality and freedom, having regard to the purpose of the limitation and the related factors set out in section 13 of the *Human Rights Act 2019.*[129]

In relation to maintaining connections to ancestral land, the departments stated:

> An electronic monitoring condition will not prevent a young person from moving. Courts are already able to make residence and curfew conditions that restrict travel to places a child could get to and return from in one day, but the child can apply to vary these conditions.[130]

Other concerns raised regarding the implementation of the Bill included:

- concerns that electronic monitoring under the Bill undermines the principle of the YJA which currently provides for the anonymity of children engaged in the youth justice system because the device would identify a child as someone in the system, potentially creating serous safety issues for those children [131]

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127 Amnesty International Townsville Action Group, public hearing, Townsville, 19 March 2021, p 29; Amnesty International (Toowoomba Group), submission 25, p 1; Community Living Association, submission 26, p 3; AASW, submission 37, p 5; Anglicare Southern Queensland, submission 38, p 4; Community Legal Centres, submission41, p 2; Human Rights Law Centre, submission 44, p 11; QHRC, submission 48, p 9; QATSICPP, submission 53, p 1; QCCL, submission 57, p 5; QCOSS, submission 60, p 2; QFCC, submission 66, p 3; YAC, submission 64, p 18; Sisters Inside Inc, submission 74, p 9; QLS, submission 75, p 4,5; ATSIWLSNQ Inc, submission 77, p 10.

128 QPS and DCYJMA, correspondence, 19 March 2021, p 15.

129 QPS and DCYJMA, correspondence, 19 March 2021, p 17.

130 QPS and DCYJMA, correspondence, 26 March 2021, p 23.

131 Together Union, submission 49, p 3; YAC, submission 64, p 16; QLS, submission 75, p 4.

- the lack of clarity from the Bill and explanatory materials whether monitoring will be conducted exclusively by QCS, or whether it may also involve third parties, as there is the potential for misuse of sensitive data and information by third parties[132]
- the police will be entitled to know every movement of the young offender despite them being entitled to bail and being presumed innocent[133]
- it is not clear how the risk, that monitoring will be applied to people who would not ordinarily be detained on far less intrusive conditions, is to be addressed[134]
- lack of clarity about the data that the devices will collect, and how the data will be stored, accessed and used[135]
- the lack of clarity about what purposes data obtained from electronic trackers may be lawfully used for[136]
- lack of clarity with regards to the age of the child — while the Bill states that a child is at least 16 years old, it does not explicitly suggest whether this is the age of first offence or the age of court attendance[137]
- taking into account the large number of charges that are reduced on submission in the Childrens Court, there is a risk that children will be charged with a "prescribed indictable offence" even if there is insufficient evidence to support it, and so enliven the show cause provision[138]
- indictable offences cover a range of lower-level offences which cannot justify being a catalyst for use of electronic monitoring[139]
- being charged with a prescribed indictable offence while released pending resolution of only one indictable matter is far too low a threshold[140]
- it is likely that if the child has only one previous indictable offence on their history, when being sentenced for a prescribed offence, they would be unlikely to receive a custodial sentence, and therefore the imposition of electronic monitoring as a bail condition could be quite disproportionate[141]
- it may encourage delays in the resolution of indictable offences as resolution may trigger eligibility for a tracking device, which conflicts with the principle of the YJA which encourages matters being dealt with as expeditiously as possible — however, legal representatives are compromised if the alternative is detrimental to their clients[142]

132 QLS, submission 75, p 5.

133 QCCL, submission 57, p 4.

134 QCCL, submission 57, p 5.

135 QFCC, submission 66, p 3.

136 QHRC, submission 48, p 9.

137 AASW, submission 37, p 5.

138 YAC, submission 64, p 16.

139 YAC, submission 64, p 16.

140 YAC, submission 64, p 16.

141 YAC, submission 64, p 16.

142 YAC, submission 64, p 16.

- there is no provision in the amendment to provide that a child's compliance with an electronic monitoring condition has any weight in sentencing which might be some impetus for a child to try to work with the imposition of electronic monitoring[143]
- that electronic monitoring will be used as a punitive sanction rather than a measure to protect the community[144]
- tracking comprises surveillance, but does not necessarily involve the guidance or supervision that is normally provided with community supervision, and therefore the relationship with parole officers is likely to be undermined by the dynamic of monitoring rather than support or supervision[145]
- increased workload and lack of clarity about the role of 'youth justice' staff in determining suitability for a tracker and the role of staff in relation to any breaches[146]
- situations where matters have been discontinued because of the evidentiary proof of such devices not always being accurate enough and also with the ability of youth to take them off or slip through them.[147]

Stakeholders also raised concerns about the practical issue of whether electronic monitoring devices would work in Queensland's remote/regional areas.[148]

The departments provided the following responses in relation to the concerns listed about the implementation of the Bill.

In relation to the lack of clarity about the data that the devices will collect, and how the data will be stored, accessed and used:

> It will only be lawful for data from electronic monitoring to be recorded, used or disclosed for certain specified purposes (see YJA part 9). There is no authority in the Bill to use data obtained from electronic monitoring for any other purposes.[149]

In relation to the lack of clarity about age:

> The Bill requires the child to be at least 16 years old at the time the condition is imposed.[150]

In relation to a lack of clarity about what purposes data obtained from electronic monitoring may be lawfully used for:

> Data from electronic monitoring can be used for electronic monitoring purposes only (see YJA part 9, and clause 26, new section 52AA(7) of the Bill).[151]

In relation to the impact on privacy of the household where the child resides:

> Clause 26, new section 52AA(1)(f)(iii) provides the court have regard to whether a parent of the child or other person has indicated a willingness to support the child. The court must also, when considering whether to impose a bail condition consider whether the child has stable accommodation.[152]

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143 YAC, submission 64, p 17.

144 YFS Legal, submission 71, p 4.

145 ATSIWLSNQ Inc, submission 77, p 10.

146 Together Union, submission 49, p 3.

147 ATSILSNQ, public hearing, Cairns, 18 March 2021, p 13.

148 QATSICPP, submission 53, p 5; Aaron McLeod, public hearing, Cairns, 17 March 2021, p 2.

149 QPS and DCYJMA, correspondence, 26 March 2021, p 20.

150 QPS and DCYJMA, correspondence, 19 March 2021, p 16.

151 QPS and DCYJMA, correspondence, 19 March 2021, p 16.

152 QPS and DCYJMA, correspondence, 19 March 2021, p 16.

In relation to the time needed to prepare a suitability assessment report:

> Undertaking suitability assessments will ensure that EM is applied to suitable young people. It is not intended that the process for preparing a suitability assessment report be overly onerous or delay court proceedings beyond a reasonable time. It is not intended, for example, to refer the child to a psychologist for a full assessment of capacity to understand the condition(s) – rather, the court officer will in most cases conduct a brief assessment of capacity based on interactions with the child on the day. It is anticipated that in most cases, the assessment report will be completed on the same day.[153]

In relation to the threshold for eligibility for an electronic monitoring device being considered too low:

> The use of electronic monitoring is restricted to young people aged 16 and 17, charged with a prescribed indictable offence, and previously convicted of an indictable offence. The provisions will be trialled in limited locations and these criteria will be considered in the review of the trial.[154]

Stakeholders made a range of suggestions and recommendations to address their concerns about the provisions in the Bill, including:

- providing support to address a child's underlying trauma and the behaviours and experiences that lead to offending to assist with rehabilitation, including supported accommodation, health and mental health support, and assistance with education or training to help with future employment, similar to the New Zealand program [155]
- the proposed 12-month trial must be fully and independently evaluated, including an assessment of the effectiveness as a deterrent to offending, as well as impacts and experiences by the children involved in the trial, and be made public[156]
- determine the kinds of data that the electronic monitoring devices will collect, how the data will be stored, who will have access and how it will be used prior to these amendments coming into effect,[157] with protections around the use of data to be inserted into the Bill and monitoring of youth offenders not to be conducted by third party organisations[158]
- provide additional resourcing to community-led organisations and local communities to help them to manage an increase in demand for services to Aboriginal children and Torres Strait Islander children[159]
- amend the Bill so that if electronic monitoring is to be applied to youth offenders at all, it should only be used as an alternative to detention for offenders who would ordinarily be detained and not those who would otherwise be granted bail[160]
- amend the Bill to include which geographic areas the amendments apply to, so as to maintain transparency and reduce the risk of the area extending via regulation[161]

153 QPS and DCYJMA, correspondence, 26 March 2021, p 20.

154 QPS and DCYJMA, correspondence, 26 March 2021, p 22.

155 QFCC, submission 66, p 2; QLS, submission 75, p 4, 7.

156 QFCC, submission 66, p 3; QLS, submission 75, p 7.

157 QFCC, submission 66, p 3.

158 QLS, submission 75, p 1.

159 QFCC, submission 66, p 4.

160 QLS, submission 75, p 5.

161 QLS, submission 75, p 3.

- QCS should establish a risk management strategy in the context of these new responsibilities, including making sure staff in contact with children have the appropriate training to work safely with vulnerable children in trauma-informed ways[162]
- the suitability assessment report must be provided that day; otherwise, bail should be granted pending the report.[163]

The departments provided the following responses to the trial being externally evaluated:

> The trial will be reviewed after 12 months and the Government will make decisions about any future application of electronic monitoring after considering the findings of the review.[164]

In relation to QCS needing a risk management strategy, the departments advised:

> QCS will respond to low-seriousness alerts such as a low battery level with a phone call direct to the child. QCS will refer situations requiring ongoing interaction with young people to police and/or youth justice.[165]

In response to the risk that monitoring will be applied to people who would not ordinarily be detained or would be detained on less intrusive conditions, the departments stated:

> The provisions do not facilitate electronic monitoring as an alternative to detention. A monitoring condition is to be treated the same as other conditions of release on bail under YJA s.52A (see proposed s.52AA(1)).
>
> The trial will be reviewed after 12 months.[166]

Some stakeholders expressed the view that Queensland should adopt the New Zealand model for electronic monitoring.[167] For example, the QHRC expanded on this, stating that at a minimum:

a) The court should be directed only to impose a tracking device condition for a child who:
   - Is not attending school, vocational education or training or a place of employment; or
   - Does not have any caring responsibilities for other children including siblings; or
   - Does not have a physical, psychological or behavioural condition, or disability that would prevent them from complying with the condition.
b) The government should consider the addition of a section such as section 300 of the *Bail Act 2000* (NZ) which limits the use of data obtained through electronic monitoring.
c) The government should incorporate safeguards modelled on those contained in the *Bail Act 2000* (NZ) into an amended Bill, including:
   - Section 30G requiring all occupants at a residence to consent to electronic monitoring on bail;
   - Section 30F(3)(d) consideration of consent of other occupants in report about suitability;
   - Section 300 limiting use of information obtained from electronic monitoring.[168]

[162] QFCC, submission 66, p 3.

[163] YAC, submission 64, p 16.

[164] QPS and DCYJMA, correspondence, 26 March 2021, pp 23-24.

[165] QPS and DCYJMA, correspondence, 26 March 2021, p 24.

[166] QPS and DCYJMA, correspondence, 26 March 2021, p 24.

[167] Submission 13, p 2; submission 23, p 2; submission 30, p 1; submission 31, p 1.

[168] Submission 48, pp 3-4.

Similarly, the QLS submitted that, while it does not support the introduction of GPS tracking 'due to the absence of definitive and compelling evidence that GPS tracking will in fact deter young people from reoffending', if it is introduced it must be strictly limited, including by:

- Supplementing GPS tracking with substantial investment in support programs and rehabilitative services designed to address underlying drivers of youth offending
- Applying GPS tracking only to children supported by stable accommodation and caregiver support to assist the child with compliance (noting that the lack of stable accommodation and caregiver support should not be considered a reason to avoid releasing a child from detention)
- Limiting GPS tracking to children who:
  - Are not attending school, vocational education or training, or work
  - Do not have physical, psychological or behavioural disabilities
  - Demonstrate sufficient capability and maturity to comply' with the conditions of GPS tracking.
- Ensuring monitoring of children is not conducted by third party organisations
- Including a definition of 'geographic area' in the Act itself, so it is transparent and cannot be broadened by regulation.[169]

A number of stakeholders argued that electronic monitoring does not address the root cause of offending. Instead, it is simply a means of surveillance and an investigative tool for police unless additional support to change the lives or personal circumstances of the child is introduced. Stakeholders were concerned that without the additional support, it is likely the young offender will return to the same situation and environment and will likely offend again, and therefore there has been no improvement to community safety.[170]

In response to these concerns, the departments stated that 'young people will have access to bail support services that can provide direct support and refer young people to other specialist services'.[171]

Many stakeholders suggested that the provision of well-funded, targeted primary prevention services that provide care, support and rehabilitation, and programs that assist children when they are charged with an offence and support families when they need it, will be more beneficial and a better use of funding for reducing crime and ensuring a safer community, than electronic monitoring.[172] There was also a call for a continued focus on the current Youth Justice strategy, *Working Together: Changing the Story*, to reduce the overrepresentation of Aboriginal children and Torres Strait Islander children in the youth justice system, including maintaining diversionary and restorative practices that address the underlying drivers of offending.[173]

For example, ATSIWLSNQ submitted:

> As to the Compatibility Statement's denial that there is a less restrictive way to achieve a reduction of re-offending on bail and promote community safety, this contradicts the Queensland government's own research. The Youth Justice Strategy 2019-23 is very clear in stating that, based on a review of international research, prevention programs are more effective and more cost efficient. The research

169 QLS, submission 75, p 7.

170 Legal Aid Queensland, submission 62, p 4; Youth Advocacy Centre, submission 64, p 14.

171 QPS and DCYJMA, correspondence, 26 March 2021, p 23.

172 QCOSS, submission 15, p 4; Community Living Association, submission 26, p 2; AASW, submission 37, p 4; Anglicare Southern Queensland, submission 38, p 4; Community Legal Centres, submission 41, p 2; Human Rights Law Centre, submission 44, p 12; Together Union, submission 49, p 4; QATSICPP, submission 53, p 6; ZIPPS, submission 54, p 2; Jesuit Social Services, submission 55, pp 2,3; Hub Community Legal, submission 73, p 11; Sisters Inside Inc, submission 74, p 10.

173 QFCC, submission 66, p 4.

> also found that when communities and families are engaged from the start and when agencies and services work together to support them, it boosts protective factors and reduces risk factors.[174]

Similarly, the AASW advocated for:

> …a focus on prevention and early intervention in line with the four pillars model advocated, and indeed accepted, by the Queensland Government: intervene early, keep children out of court, keep children out of custody and reduce offending.[175]

2.1.6 Parental or other support associated with youth bail (clause 21(3))

Section 48AA of the YJA sets out the matters to be considered in making particular decisions about a child's release and bail. The Bill proposes to add another matter to which the court or police officer may have regard in making the decisions. That is, whether a parent of the child, or another person, has indicated a willingness that they will do any of the following things:

- support the child to comply with the conditions imposed on a grant of bail
- notify the chief executive or a police officer of a change in the child's personal circumstances that may affect the child's ability to comply with the conditions imposed on a grant of bail
- notify the chief executive or a police officer of a breach of the conditions imposed on a grant of bail.[176]

'Parent' is defined in the YJA but 'another person' is not defined. The explanatory notes advise that another person could be, for example, 'immediate or extended family, a relative, kin, other community member, neighbour, employer or a staff member or volunteer from a support service'.[177] The explanatory notes further state:

> … It will be for the bail decision maker to determine what weight to put on the person's indication of willingness, which will depend on the circumstances of the case.
>
> For example, the bail decision maker may have no concern about reoffending but may consider there to be a risk of failing to appear at the next court date because neither the child nor the parent is likely to remember the date. In these circumstances, 'another person' may be a next-door neighbour who is close to or friends with the child and/or their family who has indicated a willingness to remind them of the next court date. By way of further example, in these circumstances it may also be a staff member from a 'wraparound' support service, or a person who is not an adult, such as a 17-year-old sibling. Whatever the circumstances may be, it will be for the bail decision maker to determine the credibility and weight of the indication of willingness, and in any event would be considered alongside all other relevant factors (subject to section 48AA(7)).[178]

The explanatory notes added:

> The consideration is intended to operate flexibly, to recognise the operational and practical reality that the nature of the support a bail decision maker may take into consideration will vary depending on the circumstances of each case. For example, the bail decision maker may have wide-ranging concerns, or may only have a specific concern about the ability of a child to comply with one of the conditions of bail (such as attending the next court date). The indication of willingness could be given orally or in writing.[179]

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174 ATSIWLSNQ Inc, submission 77, p 12.

175 AASW, submission 37, p 6.

176 Clause 21; explanatory notes, p 4. The assurance could be given in writing or orally, at the discretion of the decision maker: QPS and DCYJMA, Joint departmental brief on the Youth Justice and Other Legislation Amendment Bill 2021 to the Legal Affairs and Safety Committee, p 4.

177 Explanatory notes, p 4.

178 Explanatory notes, p 17.

179 Explanatory notes, p 4. See also, QPS and DCYJMA, Joint departmental brief on the Youth Justice and Other Legislation Amendment Bill 2021 to the Legal Affairs and Safety Committee, p 4.

The departments advised that the intent of the amendment is to increase the involvement of disengaged parents or guardians and to support the child on bail.[180]

2.1.6.1 Stakeholder views

The key concerns and comments in relation to this provision include:

- What happens to the child if parental support is not available or the person who is providing support lacks capacity:
  - Many of these children do not have adequate parental support, and it would be unjust for a child's lack of parental support to be used against their best interests in an application for bail.[181]
  - It is unclear what timeframes will apply in finding a parent, guardian or other person willing to put themselves in this position, or what approach will be taken.[182]
  - It is unclear how this would work where the State is responsible for the child in accordance with the *Child Protection Act 1999.*[183]
  - The 'another person' may be unable to indicate a willingness to support a young person to comply with bail conditions or advise of breach of bail conditions in circumstances where they are aware that there is no permanent accommodation available for the young person.[184]
  - A willing support agent to the child should have to demonstrate their capacity.[185]
  - A range of reasons may exist why a parent or other person is unable to support the young person with bail conditions, including not living in the same place as where the offence occurred or offender lives.[186]
  - The provision may stress family relationships and lead to more children being remanded in custody.[187]
- Police and courts may face difficulties in engaging parents and family members with such bail conditions if processes are not culturally safe and respectful, which requires development by Aboriginal and Torres Strait Islander people themselves.[188]
- The provision will disproportionately impact already vulnerable children:
  - The provision may disproportionately impact children and young people who are under both child protection orders and youth justice supervision as these children often do not have ready access to the required supports.[189]

180 QPS and DCYJMA, Joint departmental brief on the Youth Justice and Other Legislation Amendment Bill 2021 to the Legal Affairs and Safety Committee, p 4.

181 See, for example, submission 21, p 4; submission 25, pp 1-2; submission 45, p 6; submission 46, p 1.

182 Submission 53, p 7.

183 Submission 64, p 12.

184 Submission 46, p 1.

185 Submissions 13 and 23.

186 Submission 37, p 6; submission 53, p 7.

187 Submission 48, p 3; submission 64, p 12; submission 79, p 2.

188 Submission 53, p 7.

189 Submission 46, p 1.

  - Requiring the Court to consider the support of a child and young person as a reason to refuse bail will likely create a further disproportionate amount of youths without parents or other supports being unjustly remanded.[190]

- The focus should be on initiatives that support families and provide safe accommodation:
  - Consider alternatives, including initiatives that improve resourcing and support for all service delivery agencies to engage in culturally safe policy development and practice, supportive housing for families with children at risk of entering statutory services, and integrative housing, bail support, legal advocacy and family support services.[191]
  - More education should be made available to parents in relation to dealing with disengaged young people, including enforcing court ordered formal training for parents of recidivist youth offenders.[192]
  - QATSICPP recommended a range of measures to create a positive impact for Aboriginal and Torres Strait Islander children and young people.[193]
- Putting a child into youth detention could entrench them in the youth justice system.
  - Child removal into out of home care and youth detention contribute to adult incarceration.[194]
  - This amendment may contribute to a young person's involvement with the youth justice system if a parent or other person is unable to support them with bail conditions.[195]
- The amendment won't work for those young offenders who do not have respect for their parents or guardians.[196]

The amendment is likely to highlight problems when parents have not been notified their child has been arrested.[197]

Legal Aid Queensland (LAQ) did not support the proposed amendment 'in the absence of clear language within the amendments that this is a consideration only for the court and not a prerequisite to the granting of bail'.[198]

The Youth Advocacy Centre (YAC) was concerned the amendments may exacerbate disengagement:

> … a proposal that either a family member, friend or worker would commit to advising the police of a breach of bail would have a significant risk of (further) break down in family relationships or a breach of trust in terms of a worker, both of which would result in a high risk of disengagement from family or any support services and future engagement with such services and therefore an increased risk of ongoing involvement with the youth justice system.
>
> …

190 Submission 71, p 4.

191 Submission 21, p 5; submission 45, p 6; submission 72, p 2.

192 Submission 42, p 5.

193 Submission 53, p 10.

194 Submission 44, p 10.

195 Submission 37, p 6.

196 Submission 11, p 2.

197 Submission 56, p 4.

198 Submission 62, p 3.

> If a parent or another person is not prepared to indicate to the court their willingness to support a child, this may create or add to tensions in their relationship with the child if the child views this as some form of rejection.[199]

The ATSIWLSNQ was also concerned that the amendments would strain family relationships by imposing reporting obligations on parents.[200] Similarly, Sisters Inside stated that 'bail should not serve to escalate family tensions', 'parents shouldn't be prison officers', and that 'it is unfair for children without parental support to have reduced access to bail'.[201]

While PeakCare supported, in principle, the proposed amendment, it sought clarification about the process for 'parental involvement' if the young person is under the care of the state.[202] The DCYJMA advised that it would attend court and, if possible, provide the court the assurances that it might be seeking around bail and risk.[203] The departments also stated:

> If a child is in DCYJMA care under the *Child Protection Act 1999*, a Child Safety officer will attend court and could provide the Court the assurances, where appropriate, that it might be seeking on the issue of bail compliance or risk.
>
> The new subsection is intended to operate flexibly to recognise the operational and practical reality that the nature of the support a bail decision maker may take into consideration will vary depending on the circumstances of each case. For example, a staff member from a funded service provider providing support to the young person and their family may be in the best position to indicate a willingness to continue providing support with issues such as accommodation, mental health, or engagement with education or vocational training. If this is the case, DCYJMA will facilitate the attendance at court of the relevant person.[204]

The Human Rights Law Centre stated that 'not all children have the benefit of parental support, and to discriminate against children on this basis, which is completely outside their control, is unfair'.[205]

BAQ was opposed to the proposed amendment to the YJA and commented:

> A disproportionate number of children in the youth justice system are also part of the child protection system. Many of these children either do not have parents or other adults who could assume these obligations or are the subject of orders whereby the chief executive of the Department of Child Safety is their guardian. It is the Association's fear that these children will simply not be able to propose any person who meets the requirements of the proposed amendment.[206]

In relation to the disproportionate impact of the Bill on children under 'dual orders', the Office of the Public Guardian (OPG) stated:

> I am particularly concerned that the changes to the youth justice bail framework outlined in the Bill will have a disproportionate impact on children and young people under both child protection orders and youth justice supervision. Notably, the amendments that will permit the court or a police officer to take into consideration whether a parent, guardian or another person has indicated a willingness to support a child or young person to comply with bail conditions. Based largely on their inherent disadvantage from early in life, many of these "dual order" children do not have ready access to the required supports. For children in these circumstances, the lack of suitable accommodation and care arrangements could be

199 Submission 64, p 12.

200 Submission 77, p 4.

201 Submission 74, p 9.

202 Submission 63, p 6.

203 Department of Children, Youth Justice and Multicultural Affairs, public briefing transcript, Brisbane, 8 March 2021, p 5.

204 QPS and DCYJMA, correspondence, 26 March 2021, pp 6-7.

205 Submission 44, p 9.

206 Submission 79, p 2.

> perceived by a court as significant risk factors relevant to decision-making regarding bail. This is notably so where the circumstances of the charges leading to the child/young person's remand in detention include unstable accommodation and care arrangements, as is the case for many of the children and young people in these matters.[207]

The QHRC recommended that 'the government reconsider the insertion of parental or other support for bail in court considerations for release on bail, or at a minimum address the legal and other implications for parents or other supporters who do not report breaches of bail to police or the court'.[208]

LAQ said it was unclear whether the amendment would apply only to parents of children or whether it would extend to care givers 'who are in a *loco parentis* position with the child'.[209] In relation to these amendments to the YJA, LAQ also stated:

> It is our experience that many children who offend are often in the care of Child Safety, or have parents who have their own issues around drugs, alcohol, domestic violence and intergenerational trauma. The proposed amendment will normalise the seeking of a parent's or caregiver's undertaking to monitor and report on a child's bail compliance before a child is released. Absence (whether by choice or not) of a parent or a Child Safety officer at a bail hearing will create circumstances where courts may remand children in detention if an undertaking is not provided by the parent or care giver. This includes cases where the offending is not of such seriousness that the child would be liable to a term of detention once sentenced.[210]

QLS recommended that, if the additional considerations in section 48AA are inserted in the YJA, that the Bill is amended to 'clarify the obligations and implications for persons who undertake to provide support and inform police or courts of breaches of bail'. Additionally, QLS advised it did not support the retrospective application of the proposed sections 48AA and 48AF and recommended that these provisions be amended to only apply prospectively.[211]

2.1.6.2 Departmental response

In response to concerns that a lack of respect by young offenders will mean the amendment will not achieve its purpose, the departments acknowledged that some youth may be disengaged from their primary caregivers but 'an indication of support can be provided by another person'.[212]

In regard to comments that a support person for the child must demonstrate their capacity to support, the departments advised that 'it will be up to the bail decision-maker to determine whether the person making representations to support the child has sufficient capacity to do this'.[213]

In regards to concerns that disadvantaged children are more likely not to have parents or other family who can support them, and this will adversely impact them, the departments advised that:

> … the Bill (clause 21(3)) provides that "another person" can provide an indication of support. This could be a child protection officer or a funded service provider if no suitable family member is willing or able.[214]

In regard to concerns about who can support the child and that without support a young person might become further entrenched in the youth justice system, the departments stated 'another person could

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207 Submission 46, p 1.

208 Submission 48, p 6.

209 Submission 62, pp 2-3.

210 Submission 62, p 3.

211 Submission 75, p 2.

212 QPS and DCYJMA, correspondence, 19 March 2021, p 4.

213 QPS and DCYJMA, correspondence, 19 March 2021, pp 4-5.

214 QPS and DCYJMA, correspondence, 19 March 2021, p 5.

be a child protection officer or a staff member from a funded service provider, including a bail support service'.[215]

In response to concerns that the Bill's provisions could negatively impact families, the departments stated that 'the amendment is intended to operate flexibly, allowing the bail decision maker to address risks appropriately in the particular circumstances of the case'.[216]

In respect of the implications if the responsible person fails to inform the police or the court of a breach, the departments stated:

> The Bill does not provide for any direct consequence for failing to provide information about a breach. The policy objective is to facilitate greater parental engagement. Where the policy objective is not achieved through the application of this provision, other services and interventions will continue to be available.[217]

In relation to concerns that the amendment is likely to highlight problems when parents have not been notified their child has been arrested, the departments advised:

> Section 392 of the *Police Powers and Responsibilities Act 2000* requires a police officer who arrests a child to promptly advise a parent or guardian and the chief executive of DCYJMA of the arrest and whereabouts of the child.
>
> The QPS Operational Procedures Manual section 5.9.6 provides where a child comes to the adverse attention of an officer, the officer should, as soon as practicable, make all reasonable inquiries to contact a parent, guardian or another adult who can take responsibility for the child.
>
> Also, section 420 of the *Police Powers and Responsibilities Act 2000* requires a police officer to contact the Aboriginal and Torres Strait Islander Legal Service before questioning an Aboriginal or Torres Strait Islander person in relation to an indictable offence.[218]

In response to LAQ's query about whether the amendment extends to caregivers who are in *loco parentis* position with the child, the departments advised:

> The YJA (schedule 4) defines parent to mean a parent or guardian of a child; a person who has lawful custody of the child (other than because of the child's detention for an offence or pending a proceeding for an offence) or person who has the day-to-day care and control of the child.
>
> The amendment also includes reference to "another person". This could be, for example, a child protection officer or a funded service provider if no suitable family member is willing or able.[219]

In regards to LAQ's comments regarding the lack of clarity in the amendment that this provision is a consideration only for the court, not a prerequisite to the granting of bail, the departments advised:

> The amendment will be inserted into existing section 48AA(4)(a) of the YJA, which has the introduction:
>
> *…the court or police officer may have regard to any of the following matters of which the court or police officer is aware—*
>
> It will clearly be one of a range of factors that a bail decision maker may have regard to, and not a prerequisite. However, in an individual case it may have the effect of being a prerequisite if the court or police officer considers it is the missing protective factor that would overcome the apparent risks.[220]

[215] QPS and DCYJMA, correspondence, 19 March 2021, p 5.

[216] QPS and DCYJMA, correspondence, 19 March 2021, p 5.

[217] QPS and DCYJMA, correspondence, 19 March 2021, pp 6-7.

[218] QPS and DCYJMA, correspondence, 26 March 2021, p 5.

[219] QPS and DCYJMA, correspondence, 26 March 2021, p 6.

[220] QPS and DCYJMA, correspondence, 26 March 2021, pp 7-8.

2.1.7 Presumption against bail (clause 24)

Currently, there is a presumption in the YJA that a child charged with an offence should be released from custody.[221] There are, however, some circumstances in which the court or police officer must keep a child in custody.[222] The Bill (in proposed new section 48AF) would add to these circumstances.[223]

Proposed new section 48AF applies to a child in custody in connection with a charge of a prescribed indictable offence if the offence is alleged to have been committed while the child was released into the custody of a parent, or at large with or without bail, or while the child was awaiting trial, or sentencing, for another indictable offence. The provision states that a court or police officer must refuse to release a child from custody unless the child shows cause why the child's detention in custody is not justified.

The departments advised that the Bill:

> … explicitly allows the bail decision maker to consider the normal bail criteria in determining whether the youth has shown cause. Existing case law will also be relied upon, subject to the provisions of the YJA. In Queensland the standard of 'show cause' under the Bail Act has been held to require a varying level of onus depending on the seriousness of the circumstance.[224]

If a court or police officer releases the child, they must record reasons.[225]

2.1.7.1 Stakeholder views

The committee heard a range of views regarding the presumption against bail provision from it not being sufficient to deter recidivist offenders to it being 'contrary to protecting the rights of children'.

The key concerns and comments of those who were opposed to amendments relating to presumption against bail include:

- That a presumption against bail is contrary to human rights and diverges from usual criminal law procedure:
  - The provision is contrary to Australia's obligations under international human rights conventions and contradicts effective youth justice principles that promote diversion away from detention and the criminal justice system and will not reduce youth offending on bail.[226]
  - Presumption against bail and deprivation of liberty will have negative consequences for a child's development and reintegration into society.[227]
  - The provision engages the human right to a procedure that takes into account a child's age and the desirability of promoting their rehabilitation, as well as the right to be treated in a

221 YJA, s 48; explanatory notes, p 5.

222 See YJA, ss 48, 48AAA(2), 48AE and 48A

223 See clauses 20, 24; explanatory notes, p 5. A corresponding amendment would be made to section 48AA of the YJA: cl 21.

224 QPS and DCYJMA, Joint departmental brief on the Youth Justice and Other Legislation Amendment Bill 2021 to the Legal Affairs and Safety Committee, p 6.

225 Clause 24; explanatory notes, p 5.

226 See, for example, submission 9, pp 5, 7-8; submission 15, p 4; submission 16, p 2; submission 21; submission 25; submission 51; submission 54; submission 55; submission 57; submission 60; submission 64; submission 70, submission 73, p 6; submission 77, p 11.

227 See, for example, submissions 9, 25, 44, 46.

way that is age appropriate, and that these rights were not addressed in the statement of compatibility.[228]

- Reversing the onus for bail for children in certain circumstances is a significant departure from usual criminal law procedure, and a successful bail application would rely on willingness, capacity, ability and access to suitable resources for those involved.[229]

- The *Bail Act 1980* (Bail Act) specifically excludes application of 'show cause' to a child defendant because there was a recognition that children should be treated differently to adults as they commit offences for different reasons and are not able to control their lives and life situations to the same extent as adults.[230]
- The application of show cause will create an administrative burden on police to document reasons for granting bail that may result in additional bail refusal and more children in police watch houses.[231]
- That it will increase the number of children in detention, stretching the youth detention system[232] and contribute to a child becoming further entrenched in the criminal justice system:
  - The provision may increase delays in court processes[233] and increase the number of children who spend time in detention, including in watch houses, which may contribute to their continued involvement in the criminal justice system.[234]
  - Any increase in the detention of youths must be supported by appropriate and effective reporting and monitoring systems.[235]
- A previous prescribed indictable offence is not necessarily a reliable indicator of risk unless it is a similar offending or similar recent offending which is already taken into account.[236]
- The current bail laws are strong enough, work well for the majority of the children who commit a criminal offence, and will apply if there is considered to be an unacceptable risk.[237]
- Youth crime has decreased in Queensland, likely as the result of reforms that include detention of young people as a last resort and keeping children out of watch houses.[238]

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228 See, for example, submission 15, p 4; submission 33, p 1; submission 34, p 1; submission 36, p 23; submission 38, p 4; submission 41, p 2.

229 Submission 15, p 4; submission 37, p 7.

230 Submission 64, p 13.

231 Submission 64, p 13.

232 Maria Leebeek, Gold Coast Youth Service, public hearing transcript, Gold Coast, 26 March 2021, p 14.

233 Submission 75, p 1.

234 See, for example, submission 24, pp 2, 3; submission 37, p 7; submission 44, p 1; submission 48, p 3; submission 49, p 2; submission 51, p 9; submission 57, p 3; submission 58, p 1; submission 62, p 5; submission 64, p 13; submission 71, p 1; submission 73, p 4; submission 74, p 2; submission 79, p 2.

235 Submission 24.

236 Submission 56, p 5.

237 Submission 73, p 3. Also refer to submission 64.

238 Submission 35, p 1; submission 39, p 1; submission 73, p 2.

- The proposed amendments would have a disproportionate effect on vulnerable children:
  - The amendments would have a disproportionate effect on Aboriginal and Torres Strait Islander people and set unrealistic expectations for Aboriginal and Torres Strait Islander families to meet conditions of bail, which will result in more children being detained.[239]
  - The Bill targets the most vulnerable children in Queensland and does not address the causes of youth crime and why the offending behaviour is happening, including diagnosis of fetal alcohol spectrum disorders, other intellectual or cognitive disabilities, and past trauma.[240]
  - Any decisions regarding bail for Aboriginal and Torres Strait Islander young people must protect their cultural rights as outlined in the Queensland Human Rights Act and the national Aboriginal and Torres Strait Islander Child Placement Principle embedded in the Queensland *Child Protection Act 1999*.[241]
  - The provision will target children who are unable to show cause due to a number of factors such as a lack of a stable home environment; a parent or caregiver who declines support; having been excluded from school; are in the care of Child Safety; who suffer from mental illness, trauma and/or neurological conditions, or substance misuse issues.[242]
- Detention is no place for a child, and there are alternatives to this approach:
  - The detention environment is not equipped to appropriately respond to the causes of youth crime, including trauma.[243]
  - Youth workers have the skill set to work with the cohort of young people which this Bill is aimed at, and they should be used.[244]
  - An evidence based approach should be used to address youth offending.[245]
  - There are effective alternatives to a 'presumption against bail' legislative amendment, including referral to diversionary programs, bail support programs, early intervention and primary prevention, trauma informed and relationship centred approaches, intensive and integrated case management, access to specialist services, strong collaboration across services, and culturally safe responses.[246] Suggestions for alternatives, while outside the scope of the Bill, are expanded on in section 2.3.3.
  - Engage schools as part of the solution to youth recidivism as an overwhelming majority of young people who reoffend are not participating in education or work.[247]
  - Introduce relocation sentencing as a third option for magistrates and judges when dealing with recidivist offenders, including relocation sentencing and on-country initiatives, as a

[239] See, for example, submission 9, p 5; submission 20, p 1; submission 45, p 2; submission 49, p 1; submission 50, p 1; submission 51, p 5; submission 53, pp 6-7; submission 74, pp 3, 4; submission 76, p 2; submission 77, p 3.

[240] See, for example, submissions 5, 17, 20, 26, 34, 38, 40, 41, 44, 54, 55, 60, 70, 71, 77.

[241] Submission 53, p 2.

[242] Submission 62, p 4.

[243] See, for example, submission 46, pp 1-2; submission 74, p 8.

[244] Submission 16, p 2.

[245] See, for example, submission 16, p 2; submission 41, p 2; submission 76, p 1.

[246] See, for example, submission 9, pp 5, 7-8; submission 15, p 4; submission 16, p 2; submission 26, pp 2, 3, 4; submission 35; submission 36; submission 39; submission 40, p 1; submission 41, pp 2-3; submission 49, p 2; submission 58; submission 60; submission 61; submission 64; submission 70; submission 73.

[247] Submission 61, p 5.

deterrent and to facilitate rehabilitation.[248] Suggestions for relocation sentencing and on-country initiatives are expanded on in section 2.3.3.

- Several submitters pointed to the Townsville Stronger Communities Action Group and Logan Together as examples of coordinated local approaches to early intervention.[249]

In relation to concerns about the amendment and the rights of the child, ALA stated:

> A presumption in favour of depriving children of their liberty, without reference to their individual circumstances is contrary to Australia's obligations under international human rights conventions, which emphasise that depriving children of their liberty must be reserved as a 'last resort', and 'limited to exceptional cases'.[250]

BAQ commented:

> The Bill also proposes to amend the YJA to put some alleged offenders in a "show cause" position when applying for bail. The Association submits that this requirement stands at direct odds with Principle 18 of the Charter, that "a child should be detained in custody for an offence, whether on arrest, remand or sentence, only as a last resort and for the least time that is justified in the circumstances". A presumption against release amounts to a presumption that the point of last resort has been reached.[251]

During the public hearing in Brisbane, Laura Reece from BAQ also commented:

> The association has always opposed measures which fetter the discretion of individual judicial officers who consider an individual case. This is because mandatory approaches, both to sentencing and in this case to bail, fundamentally have the potential to create injustice.[252]

When asked whether the Bill will likely make communities more safe, Inspire Youth and Family Service stated it would not because 'more children are being held in custody for things they have done, or in watch houses, so we are exposing them to that because there is a fear of knowing where the line starts in terms of putting children back into custody'.[253]

Inspire Youth and Family Service continued:

> We are seeing an increase in them being in that system, so we are exposing them to other young people and to the whole system that children can be traumatised by in itself and it becomes normalised to them. They are then exposed to other young people who are committing offences that are of a higher nature and, again, it becomes the same thing of a competition. We are not addressing the underlying issues. I feel that the community becomes more unsafe because they are then with a peer group that is committing further offences. That is my perspective.[254]

In relation to the impact on Aboriginal and Torres Strait Islander young people, the Institute for Collaborate Race Research (ICRR) expressed the view that 'no serious assessment of these impacts and their likely consequences appears to have been undertaken'.[255]

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248 Submission 47, p 3; submission 78.

249 See, for example, submission 44, p 9.

250 Submission 9, p 7. NB: in-text references have been removed.

251 Submission 79, p 2.

252 Public hearing transcript, Brisbane, 22 March 2021, p 31.

253 Public hearing transcript, Brisbane, 22 March 2021, p 4.

254 Public hearing transcript, Brisbane, 22 March 2021, p 4.

255 Submission 50, p 1.

LAQ provided the following examples to demonstrate that the section as drafted is 'very broad in scope', a view shared by YAC:[256]

> For example, a child who is on bail for a stealing offence who subsequently is charged as a result of a fight with another child would be placed in a "show cause" situation when applying for bail. This new provision will ensure that children who are outside the cohort of "hardcore offenders" (who are the target of the amendments) will be refused bail and remanded in detention unless they can show cause why they should be released on bail. A child's ability to show cause will be a subjective exercise and will be interpreted differently by different magistrates and police.
>
> Through these amendments, a child can be placed in a show cause situation by a police officer if the child is charged with an offence of enter premises and committing an indictable offence rather than an offence of unlawfully taking away shop goods. Both charges would cover the circumstances of a child entering a store and stealing an item below the value of $150 but only the offence under the Criminal Code would reverse the onus in relation to bail. A police officer could decide to charge the child with a more serious offence thus bringing the child into the operation of this section… The introduction of this new section will affect children who are not deemed to be a high risk to the community and create pressure on the ability of the state to have enough beds within detention centres to safely accommodate children who are remanded.[257]

QLS also stated the effect of the youth justice amendments were broad and would not strike a balance between protecting the community and protecting children:

> Youth justice is obviously a complex area. I think the view, as clearly set out in the submission, is that this bill does not strike the appropriate balance. It does seek to address a small number of recidivist offenders, yet it has very widespread implications in terms of how it is drafted. That is a significant problem. Its effect is far more broad. In relation to the definition of prescribed offences, for which the show cause provision applies, I counted over 100 offences within that definition so already we see a very large number.[258]

The QHRC expressed the view that the presumption against bail amendment would likely 'add complication and inconsistency in the short-term and may actually undermine community safety in the longer term' and recommended that the provision be removed from the Bill and the government instead implement 'more effective (and less restrictive options) which address the underlying causes of offending and re-offending on bail'.[259]

In regards to comments about the impact of detention on children and ultimately the community, the OPG stated:

> Further to this, in the OPG's experience, a significant proportion of children and young people within youth detention have a range of prejudicial circumstances that impact on their behaviour. The behaviours of children and young people that lead to incarceration are often a manifestation of childhood abuse and neglect. This is further exacerbated for children with cognitive or intellectual disability who have often experienced multiple system failures to identify and appropriately intervene before the child or young person enters detention. The detention environment is ill-equipped to appropriately respond to their trauma, and in fact may often exacerbate or retrigger the trauma for the child or young person, leading to escalating behaviours of concern. The trauma based behavioural patterns displayed by children and young people require specialised therapeutic responses, not punitive responses from a policing and justice system. I fear that the Bill as it stands will have the perverse effect of compromising the safety of the community by further entrenching those most vulnerable in a criminal justice system that doesn't provide the tools needed to address the root causes of their offending behaviour.[260]

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256 Submission 64, p 13.

257 Submission 62, pp 3, 4.

258 Public hearing transcript, Brisbane, 22 March 2021, p 32.

259 Submission 48, pp 3, 6.

260 Submission 46, pp 1-2.

In regards to the ongoing well-being of young people who offend and are remanded in custody, the Queensland Mental Health Commission stated:

> Where remand and detention must be applied, developmentally and culturally appropriate therapeutic programs must be provided to ameliorate negative effects and maximise the development of skills and strategies for positive life outcomes. While under remand young people will experience disruptions to schooling, training, employment, and social and familial connections. The continuation of social, educational, and vocational engagement and participation are important protective and rehabilitative factors which should not be undervalued.
>
> Targeted, specialist and multi-agency interventions are required that respond to individual needs if the significant individual, social and system impacts are to be reduced. Interventions must be available to respond to trauma and mental health challenges, problematic alcohol and other drug use, neuro-developmental challenges, learning and other educational difficulties, family problems, and economic hardships.[261]

QLS recommended removing the presumption against bail in the Bill, but that if enacted, it should be limited to a very narrow category of offences and only applied to offences involving actual violence and weapons.[262]

While not explicitly opposed to the provision, other stakeholders and submitters expressed the view that the presumption against bail provision would not adequately address youth crime, commenting:

- Breach of bail should be an offence for recidivist offenders.[263] This suggestion is expanded on in section 2.3.2.
- Bail should not be offered to recidivist offenders.[264]
- The provision will not be a deterrent, is too limited, and should apply to all young offenders with any indictable offence who have been granted bail or breached bail whether a conviction has been recorded or not.[265]
- Inaccessibility of youth services outside of business hours is contributing to the problems associated with youth crime.[266]
- Juvenile detention centres should be considered to address youth crime issues.[267]
- For driving crime offenders, attitudinal workshops should run in the community.[268]

Tammy Lloyd of Anglicare Southern Queensland supported the view that more services need to be provided, particularly after hours:

> We need to look at what we have for young people to engage in after-hours, because that is when often it is not safe to be at home.[269]

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261 Submission 76, p 2.

262 Submission 75, p 9.

263 See, for example, submissions 8, 10, 12, 22, 28, 29, 30, 31, 32, 47, 52, 78.

264 Submission 42, p 5.

265 See, for example, submissions 10, 11, 12, 13, 29, 43, 47, 59.

266 Submission 42, p 4.

267 Submission 42, p 4.

268 Submission 52, pp 1-2.

269 Public hearing transcript, Brisbane, 22 March 2021, p 3.

Mount Isa City Council made the following comment in relation to youth detention centres:

> Council also believes that a Youth Detention Centre could also be potentially linked to employment opportunities for the young people, providing them with a "home" base to transition into employment.[270]

2.1.7.2 Departmental response

In response to concerns that the amendments regarding presumption against bail will result in an increase in children detained in custody, the departments stated:

> The amendments are only intended to target high risk recidivist offenders.
>
> DCYJMA provides and funds a range of services to address young people's criminogenic needs.
>
> The Departments note the Government continues to invest in programs and services that deliver long-term, sustainable reductions in youth crime.[271]

The departments advised the following in relation to comments that the amendments contradict youth justice principles that promote diversion away from detention and the youth justice system:

> The presumption against bail is limited and has safeguards surrounding it to protect the human rights of youth offenders.
>
> In determining whether a child has shown cause why their detention is not justified, the Bill requires the court or police officer to take into consideration the matters in s48AA of the YJA.
>
> Police officers and courts must give reasons for keeping the child in custody, in line with existing section 48B of the YJA.[272]

In response to concerns that the show cause provisions would disproportionately impact Aboriginal and Torres Strait Islander young people, the departments advised:

> DCYJMA provides and funds a range of culturally appropriate services to address young Aboriginal and Torres Strait Islander people's criminogenic needs, including many provided by community-controlled organisations. This provides bail decision-makers with options to address identified risks, rather than simply refusing bail.[273]

In regard to comments that the amendment should apply to all juveniles charged with an indictable offence who have been granted bail before and breached bail regardless of whether they have been convicted or not, the departments advised:

> The policy objectives of the Bill are to address the cohort of serious recidivist youth offenders. Expansion of the provision to apply to all youth charged with any offence who breach bail would be beyond the scope of the policy objective.
>
> The *Working Together Changing the Story: Youth Justice Strategy 2019-23*, with its four pillars, remains the Government's primary youth justice policy. The Strategy is proving effective, with the number of young offenders coming to police attention continuing to decline.[274]

In regards to the suggestion that young offenders should not be granted bail and allowing 'juvenile delinquents' to dictate the terms of bail is not in the interest of the community,[275] the departments advised:

> A blanket rule against bail would be a significant human rights issue and lead to perverse outcomes and likely result in the youth being further entrenched in the youth justice system. For example, where in the

[270] Submission 42, p 4.

[271] QPS and DCYJMA, correspondence, 19 March 2021, pp 3-4.

[272] QPS and DCYJMA, correspondence, 19 March 2021, p 7.

[273] QPS and DCYJMA, correspondence, 19 March 2021, pp 7-8.

[274] QPS and DCYJMA, correspondence, 19 March 2021, pp 8-9.

[275] Submissions 13, 30, 31.

> time between the offence and being arrested, the child has stopped associating with his offending peers, reconciled with his family and moved back home, and re-engaged with education.
>
> The decision to grant bail is made by prescribed police officers or the courts. This amendment requires the child to show cause why they should be granted bail. If cause is shown, the decision to grant bail still remains with the prescribed police officer or the court, who take into account the existing bail decision making framework in the YJA. The amendment does not allow children to dictate their own terms of bail.[276]

The departments added:

> Bail decision-makers must have the discretion to decide whether to grant bail and the most appropriate bail conditions based on the full range of factors of the young person's situation, their offending history, and the alleged offence.
>
> Young offenders are complex and require a balance of welfare and justice responses. A child should not be held in custody solely because of family complexity if alternative arrangements to mitigate risks can be implemented. This accords with the premise underpinning section 48AA(7) of the Youth Justice Act (YJA).[277]

The departments advised the following in relation to the comment that a previous prescribed indictable offence is not necessarily a reliable indicator of risk unless it is similar offending or similar recent offending:

> A young person will have the opportunity to show cause why their detention is not justified. It is not an impossible hurdle; under the long-standing adult show cause regime, accused persons regularly show cause by demonstrating that the risks are sufficiently mitigated.[278]

In response to comments that the proposed amendments set children up to fail and that an alternative would be to implement bail support programs, the departments stated that these programs are already in place and will continue to assist young people to adhere to bail conditions.[279]

In response to concerns that the amendment departs from 2019 youth justice reforms to keep youths out of detention and does not support the treatment of children as children, the departments stated:

> The Bill does not abrogate the intent of previous reforms to keep young people out of custody except when necessary to protect community safety.
>
> This provision targets the offending behaviours of serious recidivist youth offenders that place themselves and the community at risk.[280]

The departments did not agree with the assertion that the amendment will increase delays in court processes and have resource implications, but noted that any issues will be explored by Bob Atkinson AO during the review of the amendments.[281]

In response to LAQ's comment that the amendment is very broad in scope and the example provided, the departments advised:

> The threshold to fall within the show cause is that the child is on bail for an indictable offence and is charged with a prescribed indictable offence. A prescribed indictable offence is defined in clause 34.

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276 QPS and DCYJMA, correspondence, 19 March 2021, pp 9-10.

277 QPS and DCYJMA, correspondence, 19 March 2021, p 4.

278 QPS and DCYJMA, correspondence, 26 March 2021, p 14.

279 QPS and DCYJMA, correspondence, 19 March 2021, p 10.

280 QPS and DCYJMA, correspondence, 19 March 2021, p 10; QPS and DCYJMA, correspondence, 26 March 2021, p 4.

281 QPS and DCYJMA, correspondence, 26 March 2021, p 14.

> In the example referred the child would fall into the show cause framework, if the stealing conduct is charged as an indictable stealing offence under section 398 of the Criminal Code and if as a result of a fight, the child is charged with an offence against section 339 (assault occasioning bodily harm) of the Criminal Code.[282]

In response to concerns the amendment would create additional administrative burden on police and may lead to bail refusal and more children in police watch houses, the departments advised:

> The amendment accords with existing obligations in the *Youth Justice Act* to record reasons for keeping or remanding a child in custody (s 48B) and recording reasons for imposing particular conditions (s 52B). The amendments have been crafted to target serious recidivist youth offenders. Any determination of bail will be on a case by case basis.[283]

In regards to comments from the QHRC that the statement of compatibility does not provide sufficient detail to justify the selection of prescribed indictable offences that the presumption of bail applies to[284], the departments advised:

> The Government, in introducing the Bill, is of the view that the limits placed on human rights by the Bill are reasonable and justified in a free and democratic society based on human dignity, equality and freedom, having regard to the purpose of the limitation and the related factors set out in section 13 of the *Human Rights Act 2019*.[285]

QLS and the QHRC also queried the retrospective application of clause 32 that the presumption against bail will apply to indictable offences committed before the commencement of the show cause provision, and the departments provided the following advice:

> Notwithstanding that the provision will apply in relation to offences committed in the past, it will only apply to future bail decisions. This is considered appropriate given the need to protect the community from harm.[286]

In regards to support for other types of intervention and support for young people, the departments stated that in addition to a range of culturally appropriate services to address young Aboriginal and Torres Strait Islander people's needs:

> The Queensland Government has made a record investment of more than $500 million in youth justice reforms since 2017, and the number of individual child offenders continues to decline.
>
> Case management for children with multiple complex needs takes a holistic approach addressing education, health, housing, disability and other needs.
>
> DCYJMA provides and funds a range of services to address young people's criminogenic needs. This provides bail decision-makers with options to address identified risks, rather than simply refusing bail.
>
> More specifically, the Government has introduced support services in the community and in youth detention centres to assist in identifying and supporting young people with a range of cognitive and physical disabilities, including fetal alcohol spectrum disorder (FASD). Since 2017, speech and language pathologists have provided assessments to identify FASD and other disability, and to inform decision-making in NDIS applications.
>
> In June 2020, the then Department of Youth Justice reviewed and updated its Disability Service plan to, amongst other things, support the strategic direction of All Abilities Queensland and deliver Government

[282] QPS and DCYJMA, correspondence, 26 March 2021, pp 9-10.

[283] QPS and DCYJMA, correspondence, 26 March 2021, p 15.

[284] Submission 48, p 16.

[285] QPS and DCYJMA, correspondence, 19 March 2021, p 11.

[286] QPS and DCYJMA, correspondence, 19 March 2021, p 12.

> commitments under the National Disability Strategy 2010-20 and the NDIS. This plan will be reviewed again this year.[287]

In response to a suggestion from QCOSS[288] that when making new laws to address young people's behaviours, neuroscience should be considered to ensure legislative amendments are age appropriate, the departments advised that 'the development of youth justice policy and legislation take neurological, psychological, and social considerations into account'.[289] Further:

> Young people are provided with supports to address developmental and cognitive issues, including for example those associated with exposure to domestic and family violence, other trauma, or fetal alcohol spectrum disorders (FASD).[290]

In relation to concerns about children being held in watch houses overnight, the departments advised:

> It is standard operational policing practice for a child who has been arrested and who is not suitable for release to spend time in a police watch house before appearing in court, if distance to the nearest detention centre makes transport to the centre and back again for court impracticable. The QPS aims to hold the child for the shortest possible time before moving them to a youth detention centre. The QPS works closely with DCYJMA.[291]

In regards to comments that any increase in the detention of youths must be supported by appropriate and effective reporting and monitoring systems, the departments advised that Bob Atkinson AO would review the amendments in the Bill and that 'all youth justice legislation, policies, funding priorities and programs will continue to be monitored as a matter of course'.[292]

The departments noted the comments that the inaccessibility of youth services outside of hours contributes to youth crime in Mount Isa and the proposal for a youth detention centre.[293]

The departments noted the suggestion that attitudinal workshops be re-introduced in communities to reduce driving and drug offences, stating that 'QPS works closely with the Department of Transport and Main Roads to promote road safety and protect lives'.[294]

The departments also noted that police and emergency services are available to all members of the public 24 hours a day and that the Child Safety After Hours Service provides 24/7 child protection advice.[295]

2.1.8 Clarification of existing provision (clause 21(6))

The explanatory notes advise that certain stakeholders consider current section 48AA(7) to be unclear. The Bill proposes to clarify the provision, without altering its policy intent.

> … The intent of the provision remains that although a lack of accommodation and/or family support is a consideration that bail decision makers can take into account when determining whether to grant bail ('home environment' is referred to in section 48AA(4)(a)(ii), and 'any other relevant matter' in section 48AA(4)(a)(vii)), it cannot be the sole reason for keeping a child in custody.[296]

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287 QPS and DCYJMA, correspondence, 19 March 2021, pp 21-22.

288 Submission 15, p 2.

289 QPS and DCYJMA, correspondence, 19 March 2021, p 24.

290 QPS and DCYJMA, correspondence, 19 March 2021, p 25.

291 QPS and DCYJMA, correspondence, 19 March 2021, p 28.

292 QPS and DCYJMA, correspondence, 19 March 2021, p 25.

293 QPS and DCYJMA, correspondence, 19 March 2021, p 26.

294 QPS and DCYJMA, correspondence, 19 March 2021, p 28.

295 QPS and DCYJMA, correspondence, 19 March 2021, p 33.

296 Explanatory notes, p 5. See also, cl 21(6); QPS and DCYJMA, Joint departmental brief on the Youth Justice and Other Legislation Amendment Bill 2021 to the Legal Affairs and Safety Committee, p 6.

2.1.8.1 Stakeholder views

The QLS noted that under the Bill, the fact that a child has no apparent family support or will not have adequate accommodation on release from custody cannot be the sole reason for denying bail.[297]

Together advised that while it appreciated 'the improved wording in relation to ensuring bail is not refused simply due to the housing status of a young person', it was of the view that there is 'no supporting evidence that this will do anything to relieve the pressure of remand on the system'.[298]

PeakCare supported the amendment and noted:

> … it is 'not the job' of the youth justice system to address issues of concern such as a young person's homelessness or lack of safe accommodation within their family home or other living arrangement, nor is it the responsibility of the youth justice system to ensure young people are receiving appropriate support and assistance in relation to other aspects of their safety and well-being.[299]

LAQ remained concerned:

> Children are vulnerable in their dealings with the criminal justice system. That vulnerability extends to a lack of choice or influence over where they are able to live and with whom. We acknowledge the inclusion of the provision that states that a child cannot be remanded in custody solely on the basis of not having accommodation or adequate accommodation. In practice this proviso has not stopped children being remanded in detention because they are homeless due to a parent repartnering and subsequently the child not being welcome to return to the family home or having a parent in jail. We have also experienced children being remanded who are in the care of Child Safety due to the inability of a suitable residential placement being able to be located.[300]

2.1.8.2 Departmental response

In regards to comments that recidivist offenders should stay in custody irrespective of availability of accommodation or family support to them,[301] the departments stated:

> The provision prevents a young person from being remanded in custody where lack of accommodation or family support is the **only** identified risk factor. If a child is a recidivist high risk offender, there will likely be other indicators that the bail decision-maker will consider.[302] [Emphasis in original]

In regard to comments that further options for finding accommodation should be made available, the departments stated:

> A comprehensive range of programs and services are delivered by DCYJMA and the Department of Communities, Housing and Digital Economy.
>
> These include both the direct provision of accommodation, and the provision of services to assist young people and their families to find and maintain accommodation.[303]

2.1.9 Aggravating factor when determining the appropriate sentence (clause 29)

Section 150 of the YJA sets out the factors to which a court must have regard in sentencing a child for an offence.

The Bill proposes to amend section 150 to require the court to have regard to the presence of any aggravating or mitigating factors concerning the child and, without limiting this requirement, whether the child committed the offence while released into the custody of a parent, or at large with or without

297 Submission 75, p 9.

298 Submission 49, p 2.

299 Submission 63, p 6.

300 Submission 62, p 3.

301 Submission 11.

302 QPS and DCYJMA, correspondence, 19 March 2021, pp 5-6.

303 QPS and DCYJMA, correspondence, 19 March 2021, p 6.

bail, for another offence, or after being committed for trial, or awaiting trial or sentencing, for another offence.[304]

The explanatory notes provide the following rationale for the proposed amendment:

> The Bill amends section 150 of the YJA to codify existing judicial practice when determining an appropriate sentence for a young offender; this is intended to make the operation of the law more accessible.[305]
>
> …
>
> The policy intent of this provision is to embed in legislation the existing common law principle that the fact the offence was committed while subject to bail is an aggravating factor when determining the appropriate sentence. The reference to 'any aggravating or mitigating factor' is to make clear that the inclusion of this new provision does not inadvertently imply that other common law aggravating or mitigating factors are excluded.[306]

2.1.9.1 Stakeholder views

Key stakeholder comments in relation to amendments to section 150 of the YJA include:

- The proposed amendments should be explored further with full external community consultation.[307]
- The amendment is unnecessary as the common law principle is clear, and there is no case law referred to that would require remedying.[308]
- The common law position should not be entrenched into the law as it is inappropriate for a young person — they are still developing their ability to make clear and logical decisions and understand the consequences of their actions.[309]
- The provision limits the right to liberty as it may increase the likelihood that children will be subject to stricter sentencing.[310]
- The aggravating factor test will disproportionately affect marginalised children[311] and criminalise mistakes and youthful behaviour.[312]
- The principle of detention as a last resort should be repealed, and there should be a three strikes policy.[313] While outside the scope of the Bill, the suggested three strikes policy is addressed in more detail in section 2.3.4.

LAQ indicated its support for the amendment as it would be recognising the common law principle that offending while on bail is an aggravating circumstance when the court is imposing a sentence.[314] PeakCare also supported the proposed amendment but expressed concern about onerous and

304 Clause 29; explanatory notes, p 5.

305 Explanatory notes, p 5.

306 Explanatory notes, pp 20-21.

307 Submission 13, p 3; submission 23, p 3; submission 31, p 2.

308 Submission 56, p 5.

309 Submission 44, p 10; submission 45, p 6; submission 77, p 15.

310 Submission 44, p 11.

311 Submission 44, p 11.

312 Submission 45, p 6

313 Submissions 10, 12, 22.

314 Submission 62, p 4.

unsustainable bail conditions which are often not specific to the individual circumstances of a young person's alleged offending and can lead to a higher likelihood of them breaching bail conditions.[315]

2.1.9.2 Departmental response

In regards to conducting further community consultation, the departments advised that the parliamentary 'committee process provides the community with the opportunity to contribute'.[316]

In regards to the view that the amendment is unnecessary as the common law is clear, the departments stated, 'the inclusion of the common law principle into legislation makes the law more accessible and understandable for the general public'.[317]

In regards to comments that children should not be subject to a policy that increases the rates of imprisonment, the departments advised:

> The policy intent of this provision is to embed in legislation an existing common law principle that courts already apply.
>
> …
>
> There should be no increased detention as a result of this provision.[318]

In regards to suggestions that the principle of last resort should be repealed and there should be a three strikes policy, the departments advised:

> Detention as a last resort is consistent with human rights standards and supports community safety, as young people sentenced to detention are more likely to reoffend.
>
> The introduction of any mandatory sentencing is a matter for Government to determine. The departments note that mandatory sentence provisions prevent courts from ordering sentences that respond to the individual circumstances of the youth and the offence, including the harm caused to a victim.
>
> Research indicates that mandatory sentences are not a deterrent to the cohort of children inclined to commit offences.[319]

2.1.10 Amending the Charter of Youth Justice Principles (clause 33)

The Bill proposes to amend the Charter of Youth Justice Principles to include that the community should be protected from recidivist high-risk offenders, as well as offences more generally.[320] According to the explanatory notes, this is 'to underscore the importance of protecting the community from harm'.[321]

2.1.10.1 Stakeholder views

Key stakeholder comments in relation to proposed amendments to the Charter of Youth Justice Principles include:

- The wording of Principle 1 is clear, so the amendment adds nothing.[322]

315 Submission 63, p 6.

316 QPS and DCYJMA, correspondence, 19 March 2021, p 18.

317 QPS and DCYJMA, correspondence, 26 March 2021, p 25.

318 QPS and DCYJMA, correspondence, 19 March 2021, pp 18-19.

319 QPS and DCYJMA, correspondence, 19 March 2021, p 18.

320 Clause 33; explanatory notes, p 5.

321 Explanatory notes, p 5.

322 Submission 56, p 6.

- The amendment is unnecessary because Principle 5 already refers to recidivism in an appropriate manner, and the charter should be aspirational, positive, and signal the type of youth justice system and community that the government wants to build.[323]
- Children should not be subjected to policies that are punitive and will result in a higher likelihood of being detained in custody and placed in a watch house.[324]
- Amending the principles in this way provides no benefit to the children who are meant to be protected by these principles[325] and could lead to further criminalisation and disengagement of the child or young person.[326]

YFS Legal stated:

> Creating a principle that the community should be protected from recidivist offenders will result in more young people being refused bail and sentences becoming harsher. This will be compounded when the legislation is amended to make committing an offence on bail an aggravating factor.[327]

2.1.10.2Departmental response

In response to comments that the amendment is unnecessary, the departments advised that it clarifies the scope of the existing Principle 1. The departments do not agree that the amendment would be detrimental to the clarity of the existing principle.[328]

In regard to comments about subjecting children to policies that are punitive and will result in a higher likelihood of being detained, the departments advised that the 'amendment is simply a clarification of the existing principle that the community should be protected from offences'. DCYJMA reiterated that it funds a range of services to address young people's criminogenic needs, and that the government is committed to 'programs and services that deliver long-term, sustainable reductions in youth crime'.[329]

In regards to the view that the amendment is unnecessary and that the Charter should be aspirational and positive, including that detention should be a last resort, the departments advised:

> Principle 18 clearly outlines the principle that detention is a last resort and should be for the least time that is justified in the circumstances. Principle 5 provides a child should be treated in a way that diverts the child from the courts' criminal justice system. Principle 14 provides, if practicable, a child of Aboriginal or Torres Strait Islander background should be dealt with in a way that involves the child's community. Principle 15 provides programs and services should be, among other things, culturally appropriate.[330]

2.2 Amendments to the *Police Powers and Responsibilities Act 2000*

In summary, the Bill proposes to amend the PPRA to:

- strengthen existing owner onus deeming provisions for hooning offences by holding the registered owner of the vehicle responsible in circumstances where the hooning offence is dealt with other than by issuing an infringement notice

323 Submission 51, p 13.

324 Submission 44, p 11.

325 Submission 44, p 11.

326 Submission 63, p 7.

327 Submission 71, p 4.

328 QPS and DCYJMA, correspondence, 26 March 2021, p 25.

329 QPS and DCYJMA, correspondence, 19 March 2021, p 19.

330 QPS and DCYJMA, correspondence, 19 March 2021, pp 19-20.

- enable police, within the existing boundaries of declared SNPs on the Gold Coast, to use hand held scanners to detect knives on a person.[331]

2.2.1 Use of hand held scanners – knife crime

The Bill proposes introducing a two-year trial of hand held scanners in the Broadbeach CBD SNP and the Surfers Paradise CBD SNP,[332] with the objective of minimising the risk of physical harm caused by knife crime in SNPs.[333] Data from the trial will be recorded to inform a twelve-month review of the operation of the policy to determine whether additional areas should be included in the scheme.[334]

The Minister explained the background to the provisions:

> In the last two years, police have seen an increase in the number of people charged with unlawful possession of a knife in a public place. This has corresponded with a general increase in knife related crime statewide. The Queensland Police Service advises that youths as young as 10 years of age coming to the attention of police are found in possession of a knife and that this behaviour peaks in the 15- to 16-year-old age cohort. This is supported by research from other jurisdictions. We know there is a tendency for some young people to carry knives in public spaces. This places the community and the youths themselves at risk of serious harm or death. Enabling police to quickly identify and seize these knives not only prevents them being used to cause harm but also creates a strong disincentive for people to carry them in the first place.
>
> …
>
> Safe night precincts are entertainment and socialising hubs where many, particularly young people, like to gather. The high concentration of people in these areas makes any unlawful carrying of knives a particular risk to safety. A trial of these new powers, procedures and overarching safeguards will help the police and the cabinet committee to identify and address any unforeseen impacts.[335]

Under the trial, if a senior police officer has authorised it, a police officer may, without a warrant, in a public place in the Broadbeach CBD SNP or Surfers Paradise CBD SNP, require a person to stop and submit to the use of a hand held scanner to ascertain whether the person has a knife.[336]

If the hand held scanner indicates the presence or likely presence of metal, the police officer may require the person to:

- produce the thing that may be causing the hand held scanner to indicate the presence or likely presence of metal
- resubmit to the use of a hand held scanner.[337]

The explanatory notes advise that these provisions 'allow for the likely scenario that a person may possess keys and other harmless metal objects on their person or belongings'.[338]

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331 QPS and DCYJMA, correspondence, 4 March 2021, pp 6, 8.

332 The boundaries of the SNPs are prescribed under the *Liquor Act 1992*: clause 6, proposed new s 39A.

333 Explanatory notes, p 1.

334 Explanatory notes, pp 5, 6.

335 Hon MT Ryan, Minister for Police and Corrective Services and Minister for Fire and Emergency Services, Record of Proceedings, Queensland Parliament, 25 February 2021, p 238.

336 Clause 6.

337 Clause 6, proposed new s 39D; explanatory notes, p 6.

338 Explanatory notes, p 6.

If the person does not submit to a scan, or if they do not comply with a police requirement to produce the item that has caused the scanner to activate, the police officer has power to search the person, without a warrant, for a knife.[339]

If the person produces an item detected during an initial scan, and the person is re-scanned, and the scanner activates again, the police officer may form a reasonable suspicion to search the person without a warrant using the powers under the PPRA.[340]

The explanatory notes state in relation to the ability to search a person without a warrant under section 29 of the PPRA that it 'ensures that a person cannot evade the detection of a knife in their possession merely by refusing to co-operate with police'.[341]

The explanatory notes set out the benefits of using hand held scanners in the SNPs:

> Use of a hand held scanner to detect the presence of metal on a person is a quick and effective means of police identifying when a person is in possession of a knife. Police can then seize knives before they can be used to cause harm. In this way, the policy will help reduce the risk of harm being caused by knives in the prescribed areas as well as creating a disincentive from any persons carrying them unlawfully.[342]

The Minister identified some of the safeguards relating to the hand held scanners:

> Only an approved senior sergeant, or an officer of at least the rank of inspector, can authorise a wanding period of 12 hours within a public place in a safe night precinct for the purposes of the trial. Any subsequent 12-hour period will require another authorisation. Police will be able to conduct scanning randomly on anyone who is in the designated public place in the prescribed area. They will not need a reasonable suspicion that a person is carrying a knife or doing anything wrong in order to scan them. This way, the scheme provides a deterrent for anyone in these areas to unlawfully carry a knife as they will know there is an increased likelihood of detection and charge. All other people who are scanned will experience very little inconvenience before they are on their way again.[343]

Other safeguards in the Bill include that the police officer:

- must exercise the power in the least invasive way that is practicable in the circumstances
- may detain the person for so long as is reasonably necessary to exercise the power
- if not in uniform, must produce their identity card for inspection
- if requested by the person, must inform the person of their name, rank and station (in writing, if requested)
- inform the person that the person is required to submit to the use of a hand held scanner
- offer to give the person a notice that states:
    - the person is in a public place in the Broadbeach CBD SNP or the Surfers Paradise CBD SNP
    - a police officer is empowered to require the person to:
        - stop and submit, or resubmit, to the use of a hand held scanner in relation to the person

339 Clause 5; PPRA, ss 29; Hon Mark Ryan MP, Minister for Police and Corrective Services and Minister for Fire and Emergency Services, Queensland Parliament, record of proceedings, 25 February 2021, p 239; explanatory note, p 6.

340 Hon Mark Ryan MP, Minister for Police and Corrective Services and Minister for Fire and Emergency Services, Queensland Parliament, record of proceedings, 25 February 2021, p 239; explanatory notes, p 6.

341 Explanatory notes, p 6.

342 Explanatory notes, pp 5-6.

343 Queensland Parliament, record of proceedings, 25 February 2021, p 239. See also, explanatory notes, p 6.

- produce a thing that may be causing a hand held scanner to indicate the presence or likely presence of metal
- it is an offence for the person not to comply with the requirement unless the person has a reasonable excuse.

In addition, if reasonably practicable, the police officer must be of the same sex as the person.[344]

It is intended that the Commissioner 'will provide written instructions to officers articulating how the new powers are to be conducted, including any additional safeguards and reporting requirements' and that police body worn cameras will record the use of hand held scanners.[345]

The Minister advised that the impact of scanning on most people will be minimal:

> The provisions allow police to use handheld metal-detecting scanners to scan over the exterior of a person's clothing and belongings to search for the presence of a knife. The scanning is fast and causes very little inconvenience. …
>
> We are all used to these types of procedures conducted in airports, at some sporting events and even when we enter courts and government buildings. We are regularly subjected to metal detecting and the X-raying of our possessions to ensure the safety of the greater community.[346]

The explanatory notes similarly advise that 'the scanning process takes little time, does not require a person be moved to a different location, and does not involve the application of force'.[347]

2.2.1.1 Stakeholder views and department response

Some submitters expressed support for the trial,[348] and in addition some held the view that the power to scan people for knives should be available to police Queensland wide,[349] or the trial should at least be extended to other areas.[350]

For example, Kelvin Bunyan expressed support for the trial of hand held scanners to check for knives, submitting:

> There should be no need for anyone to carry a knife in the General community of Queensland and Police need to have the ability to use a detection device to ensure no one carries such weapon. People carrying weapons should immediately be detained and be inconvenienced.[351]

In response to the request for electronic scanning to be rolled out state-wide, not just in the Gold Coast Safe Night Precincts, the QPS and DCYJMA advised:

> Trialling the use of electronic scanning for knives in Safe Night Precincts located at the Gold Coast allows an evaluation of the efficacy of these powers to be undertaken prior to their implementation in other areas of the State.[352]

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344 Clause 6, proposed new s 39F; explanatory notes, p 7.

345 QPS and DCYJMA, Joint departmental brief on the Youth Justice and Other Legislation Amendment Bill 2021 to the Legal Affairs and Safety Committee, p 10.

346 Queensland Parliament, record of proceedings, 25 February 2021, p 239. See also, explanatory notes, p 6.

347 Explanatory notes, p 6.

348 Kelvin Bunyan, submission 11, pp 2-3; Lynette Freeman, submission 13, p 3; Nikki Nunnari, submission 23, p 4; Salvatore Costanzo, submission 30, p 2; Lynette Knox, submission 31, p 2.

349 Lynette Freeman, submission 13, p 3; Nikki Nunnari, submission 23, p 4; Salvatore Costanzo, submission 30, p 2; Lynette Knox, submission 31, p 2.

350 Scott Sheard, public hearing transcript, Mount Isa, 16 March 2021, p 39.

351 Submission 11, pp 2-3.

352 QPS and DCYJMA, correspondence, 19 March 2021, p 30.

Michael Warren of Potts Lawyers responded to the question of whether the provisions would achieve their intended purpose, stating:

> The intention behind the legislation obviously is to reduce reoffending and young people coming to the court system in general. It is a positive starting point that we are searching young people for knives, because obviously knife crime is such a prevalent thing on the Gold Coast as well specifically. As Mr Potts said, there needs to be a balance in relation to the young person's privacy and their rights in terms of those aspects.[353]

In relation to what would decrease the likelihood of young people carrying knives in public, Bill Potts of Potts Lawyers expressed the following view:

> Firstly, I have always been a firm believer in good policing. If we thought that higher penalties were going to cure things there would be no drink-driving. The reality is that most people commit offences if they do not believe they are going to be caught, or they will get away with it, or whatever. If we have policing that is present, that is visible and that is directed at an issue, then I think it will have an effect. To that extent, I think a trial—even though I am not sure about the figures, whether it is justified or not—at least will determine whether there is some help there. It will protect the police officers who are doing it and it is minimally invasive to the children who are subject to it. As to whether it will have any effect whatsoever—because it is only limited to two little areas on the Gold Coast—is, I think, entirely debatable. There are other places in other parts of Queensland where this legislation will be better run out and tested.[354]

Other submitters expressed concerns about, or opposition to, the trial giving police officers the power to stop and electronically scan people (if authorised by a senior police officer).

Some submitters raised concerns about the lack of appropriate safeguards applying to the powers being given to police officers, including:

- there being no criteria that must be satisfied (such as reasonable suspicion) before a senior police officer can exercise their power to authorise the use of handheld scanners[355]
- there being no criteria that must be satisfied (such as a warrant or reasonable suspicion that a crime has been or will be committed or the person is carrying a knife), other than a senior police officer authorising the use of scanners, before a police officer exercises the power to stop and scan a person in a safe night precinct — which is in contrast to the safeguards in place for similar existing searches[356]
- a warrant not being required before police officers exercise the power to require the production of objects which many contain metal[357]
- police officers are only required to provide the information outlined in proposed section 39F (Safeguards for exercise of power) if requested by the person.[358]

353 Public hearing transcript, Gold Coast, 26 March 2021, p 5.

354 Public hearing transcript, Gold Coast, 26 March 2021, p 7.

355 Australian Association of Social Workers, submission 37, p 8; Human Rights Law Centre, submission 44, p 12; Legal Aid Queensland, submission 62, p 5; Hub Community Legal, submission 73, p 12; Queensland Law Society (QLS), submission 75, p 10; Aboriginal and Torres Strait Islander Women's Legal Service NQ Inc (ATSIWLSNQ), submission 77, p 6.

356 Human Rights Law Centre, submission 44, p 12; Change the Record, submission 45, p 7; Queensland Council for Civil Liberties (QCCL), submission 57, p 2; Legal Aid Queensland, submission 62, p 5; Sisters Inside Inc, submission 74, p 11; QLS, submission 75, p 10; ATSIWLSNQ, submission 77, p 6.

357 QLS, submission 75, p 10.

358 Legal Aid Queensland, submission 62, p 5, Hub Community Legal, submission 73, p 12.

Submitters were concerned that without safeguards or criteria, there may be an unjustified and arbitrary application of the power,[359] creating a risk of:

- bias and profiling in its application, potentially seeing it disproportionately targeted at young people, Aboriginal and Torres Strait Islander people and other minority groups,[360] with no special provisions to protect children who may be subject to additional or unwarranted surveillance by police[361]
- heightening tension between police and young people,[362] potentially leading to children forming bigger groups in response to feeling insecure, and leading to children asserting their right to privacy and ending up with further charges related to their interaction with police.[363]

In terms of the Bill providing a safeguard in that only an approved senior sergeant, or an officer of at least the rank of inspector, can authorise a wanding period of 12 hours within a public place in a SNP for the purposes of the trial, Bill Potts stated:

> It sounds good, because we are told that that is to be some kind of guideline that will ensure public safety. When you read that in detail, it simply consists of an inspector handing out jobs at the beginning of the shift. There is no requirement that the inspector be there. There is no guarantee necessarily of privacy issues. Whilst I applaud public safety, I am concerned with the processes that are in place, that there is a lack of real guidelines.[364]

In this regard, Bill Potts submitted that an experienced senior officer be present at the site, not at the police station, to assist junior police officers who 'are often working in high-risk, high-impact environments often with people who are grossly affected by alcohol, particularly in the SNPs on the Gold Coast'.[365]

Other concerns about the provision included that:

- the trial is based on a perceived threat of harm from young people using knives in public places rather than an evidence-based threat[366]
- the trial is not based on evidence that hand-held scanners will reduce knife crime, with a 2012 report by the Victorian Office of Police Integrity using research from the United Kingdom in relation to the effectiveness of such powers showing no relationship between increased searches and a decrease in knife crime[367]
- most people carry metal objects, and therefore there is the potential for a high proportion of people to be subject to more invasive searches, particularly children.[368]

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359 Legal Aid Queensland, submission 62, p 5; QLS, submission 75, p 10; Bill Potts, Potts Lawyers, public hearing transcript, Gold Coast, 26 March 2021, p 3.

360 Change the Record, submission 45, p 7; Queensland Human Rights Commission (QHRC), submission 48, p 21; ICRR, submission 50, p 4; QCCL, submission 57, p 2; Sisters Inside Inc, submission 74, p 11; QLS, submission 75, p 10; ATSIWLSNQ, submission 77, p 6, 8.

361 ICRR, submission 50, pp 4-5.

362 Change the Record, submission 45, p 7; Sisters Inside Inc, submission 74, p 11; ATSIWLSNQ, submission 77, p 6.

363 Sisters Inside Inc, submission74, p 11.

364 Public hearing transcript, Gold Coast, 26 March 2021, p 3.

365 Public hearing transcript, Gold Coast, 26 March 2021, p 8.

366 ICRR, submission 50, p 4.

367 QCCL, submission 57, p 2.

368 QCCL, submission 57, p 2; Sisters Inside Inc, submission 74, p 11.

In response to concerns about more invasive searches, the departments advised:

> Should the scan of a person indicate the presence, or likely presence, of metal on the person or their belongings, the police officer may require the person to produce the thing that may be causing the hand held scanner to indicate the suspected presence of metal and resubmit to another scan, such as car keys.
>
> Should the police officer form a reasonable suspicion at any time that a person may unlawfully have a knife, then the person may be lawfully searched (see the proposed s 39G of the PPRA).
>
> The existing legislative safeguards around searching adults and children will then be engaged.[369]

Consequently, concerns were expressed that the changes to the PPRA to enable the trial breach human rights principles, and the rights of young people in particular, and are incompatible with the HRA,[370] including:

- section 25 (right not to have the person's privacy arbitrarily interfered with)[371]
- section 19 (freedom of movement)[372]
- section 15 (right to equality before the law) [373]
- section 26(2) (children's right, without discrimination, to protection needed by the child in their best interests)[374]
- section 29 (right to liberty and security of person).[375]

It was also suggested that the application of the proposed amendments to the two named SNPs discriminates on the basis of geographical area, which is not currently a protected attribute under the *Anti-discrimination Act 1991* (Qld), and that the application of the provision to specific geographic areas is contrary to the right to equality before the law and the right of the person to enjoy their human rights without discrimination.[376]

Given these concerns, the ATSIWLSNQ submitted:

> The Statement of Compatibility justifies the interference with individual rights and freedoms in general terms by stating that the "need to protect the community from knife crime in safe night precincts outweighs the impacts on an individual's human rights"...
>
> The proposed amendments are an expansion of general police powers and it is submitted that the general justification for the proposed amendments does not sufficiently address the incompatibilities with individual rights and freedoms or justify the incursion into individual human rights in the absence of a targeted approach to the use of the proposed police powers.[377]

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369 QPS and DCYJMA, correspondence, 26 March 2021, p 45.

370 Australian Association of Social Workers, submission 37, p 8; ICRR, submission 50, pp 4-5; submission; submission 77, p 7.

371 Australian Association of Social Workers, submission 37, p 8; Change the Record, submission 45, p 7; QHRC, submission 48, p 12; QCCL, submission 57; p 2.submission 77, p 6.

372 Change the Record, submission 45, p 7; QHRC, submission 48, p 12; QCCL, submission 57, p 2.

373 QHRC, submission 48, p 12; ATSIWLSNQ, submission 77, p 7.

374 Australian Association of Social Workers, submission 37, p 8; QHRC, submission 48, p 12; ATSIWLSNQ, submission 77, p 7.

375 ATSIWLSNQ, submission 77, p 7.

376 ATSIWLSNQ, submission 77, p 7.

377 Submission 77, p 7.

In addition to concerns about rights and freedoms, LAQ argued the trial won't reduce knife carrying, submitting:

> The problem of knife carrying is both a child and young adult concern. YAC clients will often advise that they carry a knife because others are carrying knives and they fear for their safety. This, of course, becomes a self-perpetuating situation. It would almost never be the situation that children were carrying a knife for the explicit aim of injuring or killing another person.
>
> However, simply enabling police to undertake searches will not prevent this. Children do not consider consequences in the same way as adults. They also have an unfounded sense of invincibility ("it won't happen to me"). Particularly for children, consideration needs to be given to finding opportunities to discuss carrying and use of knives and how easy it is to seriously injure or kill someone.[378]

In response to concerns about there being no evidence that scanning will reduce knife crime, that scanning won't stop children carrying knives and the impact on individual rights and freedoms, the departments advised:

> Of concern is the number of persons, both adult and young people, coming under police attention for unlawfully possessing a knife. Table 2 of the Joint QPS-DCYJMA Departmental Brief provides statistical evidence of persons charged with unlawfully possessing a knife.
>
> The intent of this policy is to detect and deter the unlawful carriage of knives in public places in the two Gold Coast safe night precincts. The deterrent effect relies on those persons who may intend to carry a knife believing that they are likely to be stopped by police, scanned and charged with carrying a knife if they were to do so.
>
> The legislative safeguards provided in the proposed new section 39F of the PPRA and the requirement that the use of the scanning powers be captured on police body worn video provide sufficient protections to all persons who may be stopped and scanned for knives.
>
> While police currently have a power to search a person that they reasonably suspect may possess a knife, often no such suspicion will exist until after the person has committed a knife-related offence. The ability for police to pre-emptively scan a person, in a prescribed safe night precinct, will allow a more proactive approach to be taken to detecting the unlawful possession of a knife and preventing these offences occurring.
>
> Legislation permitting the use of electronic scanning in airports, watchhouses and State Buildings has been in place in Queensland for many years. This practice is widely accepted by the community and has proven to be an effective means of preventing the carriage of knives and other prohibited items at these locations.
>
> Trialling the use of electronic scanning for knives in Safe Night Precincts located on the Gold Coast allows an evaluation of the efficacy of these powers.[379]

To address these concerns, submitters proposed the following:

- everyone in, or walking past, a particular zone gets scanned regardless of age or appearance[380]
- inserting safeguards containing clear, prescribed criteria, including a requirement that:
  - there be a reasonable suspicion of possession of a knife before someone is scanned to prevent arbitrary searches or searches based on bias[381]
  - the police officer verbally expresses the safeguards outlined in proposed clause 39F (Safeguards for exercise of powers) prior to scanning, not on request[382]

[378] Submission 64, p 11.

[379] QPS and DCYJMA, correspondence, 26 March 2021, p 41.

[380] QHRC, submission 48, p 12; Hub Community Legal, submission 73, p 12.

[381] Legal Aid Queensland, submission 62, p 5, QLS, submission 75, p 2.

[382] Legal Aid Queensland, submission 62, p 5; Hub Community Legal, submission 73, p 12.

- the Queensland government develop a multi-media campaign for all members of the community similar to the 'One punch can kill' campaign[383]
- consider management of the sale of knives at point of sale as has happened with spray paints.[384]

For example, the QHRC submitted:

> The Commission shares the view that protecting the community from knife crime may outweigh the impact on individual human rights. Compared with the alternatives such as strip and pat down searches, a wand search is the least intrusive and likely to achieve the purpose of detecting knives. A further safeguard is that the provision requires that police exercise the power in the least intrusive way practicable in the circumstances.
>
> However, the Commission remains concerned that an arbitrary police power to stop and scan a person in the absence of any reason may have negative implications in practice. Arbitrary search powers tend to be disproportionately applied to minority racial groups and children.
>
> …
>
> In circumstances that it has been acknowledged publicly that the intention of the Bill is to reduce offending including knife crime amongst young people it is difficult to see how in practice this would not lead to police profiling and targeting children, which may be incompatible with the human right to equality before the law (section 15 HRA). However, if a system like a roadside random breath test was set up where every person was required to be scanned prior to entering a particular zone regardless of age then this practice may be more likely to be compatible with human rights.[385]

The departments' response to submissions addressed a number of these concerns. In response to the concerns raised that the Bill contains a lack of sufficient criteria on which senior police officers can base decisions authorising electronic scanning operations to detect knives, the departments advised:

> Of concern is the number of persons, both adult and young people, coming under police attention for unlawfully possessing a knife. Table 2 of the Joint QPS-DCYJMA Departmental Brief provides statistical evidence of persons charged with unlawfully possessing a knife. The intent of this policy is to detect and deter the unlawful carriage of knives in public places in the two Gold Coast safe night precincts. The deterrent effect relies on those persons who may intend to carry a knife believing that they are likely to be stopped by police, scanned and charged with carrying a knife if they were to do so.
>
> The legislative safeguards provided in the proposed new section 39F of the PPRA and the requirement that the use of the scanning powers be captured on police body worn video provide sufficient protections to all persons who may be stopped and scanned for knives.
>
> While police currently have a power to search a person that they reasonably suspect may possess a knife, often no such suspicion will exist until after the person has committed a knife-related offence. The ability for police to pre-emptively scan a person, in a prescribed safe night precinct, will allow a more proactive approach to be taken to detecting the unlawful possession of a knife and preventing these offences occurring.
>
> Legislation permitting the use of electronic scanning in airports, watchhouses and State Buildings has been in place in Queensland for many years. This practice is widely accepted by the community and has proven to be an effective means of preventing the carriage of knives and other prohibited items at these locations.[386]

In response to the concern regarding there being no criteria of reasonable suspicion required prior to scanning individuals for knives, the departments reiterated the points above regarding not often

383 Submission, 64, p 11.

384 Submission, 64, p 11.

385 Submission 48, p 21.

386 QPS and DCYJMA, correspondence, 19 March 2021, pp 31-33.

having a suspicion until after a knife-related offence has been reported and the use of community-accepted scanning in airports, watch houses and State buildings.

In addition, the departments provided the following comments in response to the concerns of there being no criteria regarding reasonable suspicion required prior to scanning, arbitrary search powers tending to be disproportionately applied to minority racial groups and children, and the proposal that a system like roadside random breath testing be set up where every person was required to be scanned prior to entering a particular zone regardless of age:

> The electronic scanning of a person is a fast, non-intrusive activity that does not require a person or their belongings to be touched and causes only minimal delay or inconvenience. The only persons likely to be delayed for longer, or be subjected to greater searches will be those that either do no co-operate with police or for whom the scanner continues to detect the presence of metal after having produced items on request. As such, and considering the intent of the scheme, it is not anticipated that any negative community relations will arise.
>
> The QPS recognises that young people, and other vulnerable groups frequent safe night precincts alongside the wider community to enjoy social interactions, entertainment and the commerce that these public spaces provide. The new powers are not intended to be used to target these or any other groups. The fair and measured use of the new hand held scanning powers will be subject of a 12 month review to be overseen by the Youth Justice Senior Officers Reference Group.
>
> The proposition to scan every person for knives in a similar fashion to random breath testing every driver on a road does not account for the different flows of pedestrian traffic in precincts that have multiple entry points, including from residential dwellings.[387]

The departments provided the following response in relation to concerns that electronic scanning for knives will be used to racially profile or otherwise target young people and/or minority groups and heighten tensions between young people and police:

> The proposed amendment will be applied equally to all members of the community. Electronic scanning will initially be limited to the Surfers Paradise CBD and Broadbeach CBD Safe Night Precincts located at the Gold Coast. The use of a hand held detector may be authorised by a senior police officer and is subject to safeguards inserted by this Bill as well as those which already exist within the Police Powers and Responsibilities Act 2000 generally. These measures ensure that the use of hand held detectors will be conducted appropriately.[388]
>
> Additionally, the use of the scanning powers will be captured on police body worn video to provide another layer of protection to all persons who may be stopped and scanned for knives.
>
> It is not anticipated that the appropriate use of hand held scanners will lead to any tensions between police and youths.
>
> The use of the new hand held scanning powers will be subject of a 12 month evaluation to be overseen by the Youth Justice Senior Officers Reference Group. The outcome of the review will provide guidance as to their continued use.[389]

In response to concerns regarding either inadequate safeguards or the suggestion the safeguards in clause 39F should be expressed verbally, the department stated:

> The new s.39F(4)(d) and (e) safeguards require that the police officer must inform the person that the person is required to submit to the use of a hand held scanner and offer to give them a notice advising the person of the police powers and that it is an offence for the person not to comply with the requirement unless they have a reasonable excuse.

[387] QPS and DCYJMA, correspondence, 19 March 2021, pp 33-34.

[388] QPS and DCYJMA, correspondence, 19 March 2021, p 30.

[389] QPS and DCYJMA, correspondence, 26 March 2021, pp 39-40.

> Police will be complying with the s.39F(4)(d) and (e) safeguards prior to scanning a person for knives. Should a reasonable suspicion be formed that the person has a knife, then they may be searched.[390]

In relation to concerns the Bill isn't based on an evidence-based threat of knife crime and that it doesn't provide any special provisions to protect children, the departments advised:

> The proposed electronic scanning amendments acknowledge the community's concerns arising from recent deaths involving a knife on the Gold Coast.
>
> Of concern is the number of persons, both adult and youths that are coming under police attention for unlawfully possessing a knife. Table 2 of the Joint Departmental Brief outlines the statistical evidence of persons charged with unlawfully possessing a knife. The intent of this policy is to detect and deter the unlawful carriage of knives in public places in the two Gold Coast safe night precincts.
>
> The legislative safeguards provided in the proposed new section 39F of the PPRA and the requirement that the use of the scanning powers be captured on police body worn video provide sufficient protections to all persons who may be stopped and scanned for knives.[391]

In response to suggestions of a multi-media campaign and controlling knives at the sale point, the departments stated:

> Communication with the broader Gold Coast community will primarily be delivered through engagement with local media coordinated through the QPS Media and Public Affairs Group.
>
> It is acknowledged that the management of the sale of knives is difficult where the knife being sold can be lawfully possessed in a private place, for example a kitchen knife. It is anticipated that one of the outcomes of the trial will be the collection of data as to where a person obtained a knife that was unlawfully in their possession.[392]

One witness at the public hearing on the Gold Coast recalled the following exchange:

> I spoke to a young man yesterday because his parent was concerned that he had pulled out a knife. He is not from a broken family. He is not from a poor family. I asked him why he was carrying the knife. That is exactly what he said: 'Everyone else carries one. It is for me to protect myself. I would never pull it out to attack someone.' We know from instances that have happened that that is simply not true of all of those offenders. The fact that they are carrying one means that when they are cornered they are likely to use it. I asked him where he got the knife from. I did not see the knife. He said that he took it off a 13-year-old who had threatened him with it and that is why he carried it. He did not purchase it. He had not found it. He was only 15 but he had taken it off a 13-year-old who had threatened him with it.[393]

That same witness also noted that:

> Having worked in Surfers Paradise for a long time, I can say that police officers are exceptionally skilled in dealing with intoxicated persons who are not known for their impulse control. As long as there is training that reflects that and there is a way to approach that, the incidents where wanding actually occurs can cause less trouble than it might otherwise.[394]

2.2.2 Hooning offences

The Bill proposes to 'strengthen existing owner onus deeming provisions for hooning offences by holding the registered owner of the vehicle responsible in circumstances where the hooning offence is dealt with other than by issuing an infringement notice'.[395]

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390 QPS and DCYJMA, correspondence, 26 March 2021, p 46.

391 QPS and DCYJMA, correspondence, 19 March 2021, p 35.

392 QPS and DCYJMA, correspondence, 26 March 2021, pp 38-39.

393 Angela Driscoll, public hearing transcript, Gold Coast, 26 March 2021, p 10.

394 Angela Driscoll, public hearing transcript, Gold Coast, 26 March 2021, p 10.

395 QPS and DCYJMA, Joint departmental brief on the Youth Justice and Other Legislation Amendment Bill 2021 to the Legal Affairs and Safety Committee, p 6.

The Minister explained the background to the amendments:

> Hooning is targeted by the Queensland Police Service because it places both the offending drivers and all Queensland road users at significant risk. It is also a category of offence that commonly features in the offending behaviour of recidivist youth offenders. In Queensland, hooning is not a single offence. It is a term that describes a category of offences listed in chapter 4 of the Police Powers and Responsibilities Act as type 1 vehicle related offences. Type 1 offences include evading police as well as the following offences where they are committed in the context of a race, speed trial or burnout: dangerous operation of a vehicle; careless driving; taking part in a race or a speed trial; and wilfully driving a motor vehicle to make unnecessary smoke or noise.
>
> We know that hooning is an issue of concern for the community. The number of hooning related traffic complaints received by police has increased by 132 per cent over the last five years. We also know that there are particular problems associated with the enforcement of hooning offences. Hooning offences occur in the context of mass gatherings. It can be a challenge for police to identify individual drivers in those circumstances. …[396]
>
> These amendments will give police the legislative powers they need to enforce the law applicable to these offences that pose a clear risk to the safety of Queensland road users. They will also allow police to take better advantage of the high-tech cameras that the government has provided them.[397]

At present under the PPRA, a police officer may give an evasion offence notice to the owner of a motor vehicle involved in an evasion offence. It must be personally served by police officers on the owner. The notice requires the owner to provide certain information about the motor vehicle in a statutory declaration.[398] The information assists police to identify the driver of the vehicle or alert them to the fact that the vehicle was sold or stolen before the offence was committed, or purchased after the offence was committed. The information includes:

a) where the owner was when the evasion offence happened;

b) the usual location of the vehicle when it is not being used;

c) the name and address of each person (a potential driver) known by the owner to have access to drive the vehicle when the evasion offence happened; and

d) the way each potential driver has access to drive the vehicle.[399]

If the owner does not provide the statutory declaration within 14 business days, the person is taken to have been the driver of the motor vehicle involved in the relevant evasion offence.[400] The owner also faces a maximum penalty of 100 penalty units ($13,345[401]) for failing to comply with the requirements relating to the notice, unless the owner has a reasonable excuse.[402] In addition, if the owner fails to comply with the notice scheme, the owner must seek the leave of the court to rely on this evidence.[403]

396 Queensland Parliament, record of proceedings, 25 February 2021, p 239.

397 Queensland Parliament, record of proceedings, 25 February 2021, p 240.

398 PPRA, ss 754, 755, 755A.

399 QPS and DCYJMA, Joint departmental brief on the Youth Justice and Other Legislation Amendment Bill 2021 to the Legal Affairs and Safety Committee, p 7.

400 PPRA, ss 755, 756.

401 The value of a penalty unit is $133.45. See Penalties and Sentences Regulation 2015, s 3; *Penalties and Sentences Act 1992*, s 5A.

402 PPRA, s 755(5).

403 Queensland Police Service, public briefing, Brisbane, 8 March 2021, p 3. See also, PPRA, s 756.

The Bill would extend the evasion offence notice scheme to apply to all type 1 vehicle related offences. Under the proposed changes, *evasion offence notice* would become *type 1 vehicle related offence notice*.

A *Type 1 vehicle related offence* means an evasion offence, or any of the following offences committed in circumstances that involve a speed trial, a race between motor vehicles, or a burn out:

- dangerous operation of a motor vehicle
- careless driving of a motor vehicle
- organising, promoting or taking part in a race, speed trial or record on roads
- wilfully starting or driving a motor vehicle in a way that makes unnecessary noise or smoke.[404]

The Minister advised that the amendments 'will give police the power to serve a type 1 offence notice on the owner of a vehicle that has been identified through footage or through some other means as being involved in a type 1 offence'.[405]

In addition the explanatory notes provide:

> If the owner does not provide a declaration as required, the owner will be deemed to be the driver of the vehicle at the time the type 1 vehicle related offence occurred. Conviction of the owner for the new offence of failing to make a declaration does not prevent a proceeding for the hooning offence being started against the owner or another person.[406]

2.2.2.1 Stakeholder views and department response

Bianca Dimont was very concerned about repeated hooning in her local area. She advised that incidents occur more than once a week and that the hoons dump rubbish, including tyres, and leave tyre marks and graffiti.[407] She sought 'signage, cameras, anti hooning asphalt and regular removal of rubbish in this area'.[408]

Some other stakeholders including Ms Freeman, Nikki Nunnari, Lynette Knox, Luke Jenkins and PeakCare supported the proposal to strengthen the existing owner onus deeming provisions for hooning offences.[409]

Kelvin Bunyan suggested that hooning could be controlled through vehicle computers.[410]

The Aboriginal and Torres Strait Islander Legal Service submitted that the owner deeming provisions in relation to hooning are arbitrary and unfair and should be omitted from the Bill.[411] It further stated:

> The notes anticipate that a person will be found guilty of an offence notwithstanding a reasonable doubt or the existence of exculpatory evidence. That is antipathetic to all notions of fair trial and protection from arbitrary treatment.[412]

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404 PPRA, s 69A. See also, QPS and DCYJMA, Joint departmental brief on the Youth Justice and Other Legislation Amendment Bill 2021 to the Legal Affairs and Safety Committee, p 7.

405 Queensland Parliament, record of proceedings, 25 February 2021, p 239.

406 Explanatory notes, p 8.

407 Submission 7.

408 Submission 7, p 2.

409 Submission 13, p 3; submission 23, p 4; submission 31, p 2, Public hearing transcript, Townsville, 18 March 2021, p 10, submission 63, p 7.

410 Submission 11, p 3.

411 Submission 56, p 7.

412 Submission 56, p 7.

Similarly, the QLS expressed concerns about owner deeming provisions and reversal of the onus of proof:

> Perhaps most problematically, the deeming provisions and reversal of onus interferes with the right to be presumed innocent until proven guilty. The Statement of Compatibility states that the amendment will assist police investigate offences leading to the reduction of crime and improving community safety. However, the Statement does not provide evidence to demonstrate how the expansion of the 'evasion offences notice' schemes will in fact impact unsafe driving behaviours. Rather, the reversal of onus risks increasing the probability that a person will be found guilty of an offence, notwithstanding that there may be exculpatory evidence.[413]

Bill Potts also raised concerns about owner deeming provisions:

> Where we find the difficulties which this legislation in fact deals with is where, for example, a vehicle is identified by way of either make, model or registration number but the driver cannot be identified, so the legislation places the responsibility on the owner of the vehicle to identify, if they can, the person.[414]

At the public briefing, Assistant Commissioner, Road Policing and Regional Support Command, Queensland Police Service outlined the resources dedicated to road policing in Queensland:

> Within our districts we have about 550 staff solely dedicated to road policing activities. We also have a road policing task force based here in Brisbane that is deployable across the state. We have also recently rolled out cameras specifically targeting hooning offences. The cameras are sufficient to see registration numbers in ultra-low light which is another tactic that we have.[415]

The departmental response to submissions explained that the Bill gives effect to government policy and outlined the parliamentary committee process for the examinations of Bills. It stated:

> Ultimately, the passage of the Bill, including any amendments, will be determined by democratically elected representatives in the Queensland Parliament.[416]

In relation to the new owner onus deeming provisions, the departments explained:

> The proposed new owner onus deeming provision does not operate to remove the onus on the prosecution to prove all elements of an offence beyond reasonable doubt. In a proceeding for a type 1 vehicle-related offence started against the person, as a result of these amendments, it is a defence for the person to prove on the balance of probabilities that the person was not the driver of the motor vehicle involved in the offence when the offence happened.[417]

The departments provided the following justification for the legislation.

> Hooning on our roads places the community at significant risk of harm. Over the last five years public complaints about hooning have increased 132%, and there has been a 19% increase across all type 1 offences.
>
> Robust legislation that addresses this issue is warranted. These amendments place a strong emphasis on the owner of a vehicle used to commit a type 1 vehicle-related offence to cooperate with police and to be accountable for the use of his or her vehicle whilst simultaneously limiting the opportunity for defendants to waste valuable court time and resources.[418]

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413 Submission 75, p 11.

414 Public hearing transcript, Gold Coast, 26 March 2021, p 3.

415 Queensland Police Service, public briefing, Brisbane, 8 March 2021, p 4.

416 QPS and DCYJMA, correspondence, 19 March 2021, p 30.

417 QPS and DCYJMA, correspondence, 26 March 2021, pp 36-37.

418 QPS and DCYJMA, correspondence, 26 March 2021, p 38.

2.3 Suggestions outside the scope of the Bill

Many stakeholders made suggestions that were outside the scope of the Bill. Some of those suggestions are outlined below.

2.3.1 Indigenous Youth Murri Court in Townsville

The Townsville Community Justice Group (TCJG) sought, in consultation with the Aboriginal and Torres Strait Islander community and broader community of Townsville, the introduction of an Indigenous Youth Murri Court (IYMC) in the Townsville district for a 2-year trial. Townsville Youth Crossroads also supported the implementation of an IYMC in Townsville.[419]

The TCJG advised that the introduction of an IYMC would be in line with recommendation 15 of the *Townsville's Voice: Local Solutions to Address Youth Crime* report, and would support other recommendations of that report and the outcomes of the *Working Together Changing the Story Youth Justice Strategy 2019-2023*.[420] The TCJG further advised that it has presented the proposed IYMC model to community groups and agencies and received 'enthusiastic support as part of the broader solution to youth crime in Townsville'.[421]

The TCJG was of the view that the proposed IYMC 'would best suit entry level youth offenders who are attending court for minor offences, summary offences, and youth offenders that both the police and/or youth lawyer believe will benefit from the IYMC program'.[422] The aim of the court would be to:

> … make suitable orders for the young offender to attend and engage in appropriate programs including Youth Justice Restorative Justice program, school-based programs etc, and to encourage parents to attend relevant parenting programs with progress reports given to the court to track the young offenders progress. This will be done in an effective culturally sensitive model.[423]

The child would be sentenced by the IYMC on the successful completion of the ordered programs.

If, however, the child decided not to engage with the programs, they would be returned to the higher court.

The TCJG acknowledged that there were some impediments to the establishment of an IYMC in the Townsville District, but it was of the view that these were not insurmountable. The impediments identified by TCJG – and TCJG's proposed solutions – are:

- the Justices of the Peace (Qualified) would need to upgrade to Justice of the Peace (Magistrates Court) – TCJG advised that this would require a short upgrade program which could be delivered in Townsville
- the upgrade and the proposed IYMC can only take place in specially zoned Indigenous remote communities – TCJG considers that either the Palm Island Remote Zone as a close neighbour to

[419] Submission 65, p 1.

[420] The *Townsville's Voice: Local Solutions to Address Youth Crime* report is available at https://townsvillecommunities.premiers.qld.gov.au/assets/docs/tsv-voice.pdf. Recommendation 15 provides: Investigate and trial the involvement of Elders (such as a Murri Youth Court) in the Townsville local government area to support diversionary justice procedures for the High Risk Youth Court from 2019 onwards.

[421] Submission 1, p 2. The TCJG advised that the proposed IYMC model has in principle support from the Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd, Nth Qld Legal Aid, Townsville Police Prosecutions, Magistrates Court Senior Registrar, Townsville Youth Justice, and the broader Indigenous and Non-Indigenous community: submission 1, p 2.

[422] Submission 1, p 1.

[423] Submission 1, p 1.

Townsville could be extended for the trial and evaluation period, or an exemption be provided for the trial

- the *Justices of the Peace and Commissioners for Declarations Act 1991* does not allow 2 Justices of the Peace to hear youth matters – TCJG submits that this could be exempted for the trial.[424]

The TCJG advised that the QCAT Courtroom 6 Level D of the Townville courthouse is available twice a month and could be suitable for the proposed IYMC.[425]

In relation to an IYMC, Albert Abdul Rahman submitted:

> … We used to have the Murri Court in Townsville for adult offenders. This was a group of elders who worked with the magistrates, lawyers, prosecutors and probation officers to determine the sentence. This was a referral to a 12-week rehabilitation program with various agencies. The outcomes were excellent and any person who failed to complete the course was brought back to the courts for re sentencing. It saved a lot of money for everyone. It brought the responsibility back to the person who had offended. We need to have a children's version of the Murri Court which would involve families or carers.[426]

The Amaroo Aboriginal and Torres Strait Islander Elders Justice Group also outlined the benefits of the adult Murri Court:

> If any one of you have been in a Murri Court, it is quite amazing. It is absolutely amazing. There are five elders in there. Everyone who has come in has committed a crime and comes into the arrest court and comes before the magistrate with an ATSIL lawyer beside them, and the ATSIL lawyer has seen the benefit of this defendant. Instead of going up to Lotus Glen for six months, two years or whatever, they are diverted into us and he or she then spends anywhere from four months to a year with us. Our recidivism rate is about five per cent. We have taken 1,100 men and women through, and they are still friends of ours. We encourage them to keep coming, so we have built up an enormous community and it is a family community. The Attorney-General's office recognised that and asked us to use that influence to come into the families which would not allow any bureaucrats or others to come in because the whole language is different and the formality is foreign.[427]

Departmental response

The departments noted the support for an IYMC in Townsville and that it was beyond the scope of the Bill.[428]

Committee comment

The committee notes that the Queensland Government agreed in principle to all 23 recommendations in the *Townsville's Voice: local solutions to address youth crime* report. The committee heard from people at its regional hearings who advocated for the establishment of an IYMC in their areas. The committee acknowledges that there may be some merit in trialling IYMCs in select regional centres to assist in addressing the problems of youth crime in regional areas.

2.3.2 Breach of bail as an offence

Currently, if a child is released on bail with conditions and the child breaches a condition, their bail may be revoked but breaching the condition is not in itself a further offence.[429] Some stakeholders

[424] Submission 1, p 2.

[425] Submission 1, p 2.

[426] Submission 17, p 1.

[427] Public hearing transcript, Cairns, 18 March 2021, p 17.

[428] QPS and DCYJMA, correspondence, 19 March 2021, p 21.

[429] 'Children and court bail', *Queensland Law Handbook Online*, last updated 8 January 2018, https://queenslandlawhandbook.org.au/the-queensland-law-handbook/offenders-and-victims/children-and-the-criminal-law/children-and-court-bail/.

were of the view that breach of bail should be an offence. Lynette Freeman and Brett Geiszler submitted that breach of bail conditions should be reinstated as a serious criminal offence.[430] Julene Verkooijen submitted:

> As a first step, PLEASE, PLEASE, PLEASE make breach of bail an offence as we are seeing the same offenders do more and more dangerous crime again and again. It is just a revolving door. Some police have picked up the same offenders 33 times for the same offence who were always let out on bail which was breached. No consequences.
>
> …
>
> PLEASE, PLEASE make breach of bail an offence so that these young offenders do not think they are invincible and can do whatever they like. The people of Townsville say they have had enough. What the Government is proposing with the bail laws will only work if the young offenders have a stable family environment, but a great percentage of these young ones are the way they are because they have no stable family who are accountable.[431]

At the Gold Coast public hearing, Bill Robinson also called for a youth offender to be returned to custody if they broke the conditions of their bail.[432]

Janice Bradley made the following comments in respect of breach of bail as a criminal offence:

- A fundamental principle of law is that bail is a privilege, NOT a right.
- Without a deterrent, the child is not learning that their bad behaviour has to stop.
- Can be arrested without a warrant.
- Minimum period of detention 6 months (Include rehabilitation/On Country programs to address the root causes of their criminal behaviour).[433]

The departments noted that it is not the case that a child can breach bail with impunity, advising that the following arrangements ensure consequences for breaching bail and the protection of the community:

> The introduction of a specific offence of breach of bail for young offenders is a matter for Government to determine.
>
> It is not the case that a child can breach bail with impunity.
>
> Breaching bail by failing to appear in court is an offence in Queensland.
>
> Committing a further offence whilst on bail is an exacerbating factor in sentencing for the new offence – in other words, it would likely result in a higher penalty. This is the existing common law principle that is being embedded in legislation by clause 29.
>
> Section 367(3)(a) of the *Police Powers and Responsibilities Act 2000* provides that a police officer may arrest a person, including a child, without a warrant, if the police officer reasonably suspects the person is likely to contravene, is contravening, or has contravened a condition of their bail. The child is then taken to court, where bail can be varied or revoked.

These arrangements ensure consequences for breaching bail and protection for the community.[434]

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430 Submission 13, p 2; submission 10, p 2.

431 Submission 8, p 1. Brett Geiszler (submission 10) made a similar comment about the current system being a revolving door for certain children.

432 Public hearing transcript, Gold Coast, 26 March 2021, p 25.

433 Submission 12, p 2.

434 QPS and DCYJMA, correspondence, 19 March 2021, pp 20-21.

2.3.3 Early and community-level intervention, relocation sentencing, and on-country programs

A number of stakeholders called for more investment in prevention and early intervention programs, including Damian Bartholomew for the QLS who stated:

> While the society appreciates that protection of the community is of vital importance, evidence indicates that youth offending is best addressed by investing in prevention and early intervention initiatives that provide a systemic response to the drivers of crime.[435]

QATSICPP stated that there was 'a critical need for the department to engage with communities'.[436] QATSCIPP recommended enshrining a role for the Aboriginal and Torres Strait Islander elders and community in the administration of youth justice in Queensland.[437] It provided the following reason:

> Research shows that western measures to the issue have proven to be ineffective. A number of government inquires at a state and national level over the past decade have concluded that effective solutions to preventing or reducing the recidivism of First Nations children and young people in the youth justice system need to be developed and delivered locally, preferably by, or at least in conjunction with, the local Aboriginal and Torres Strait Islander community.[438]

Similarly, the ALA submitted that early, community-level intervention and restorative justice techniques would offer a more effective, long-term strategy for addressing offending by children than the proposals in the Bill.[439]

Inspire Youth and Family Service also supported early intervention strategies:

> We believe that at a broader level a focus on more long-term early intervention strategies and offering more opportunities for positive activities increases the likelihood for better outcomes. Our experience specifically of what works with those who are in contact with youth justice are programs that are firstly trauma informed and include things like assertive outreach; are culturally safe; offer court support, group programs, prosocial activities, therapeutic interventions, individual and group diversionary activities; and offer a holistic package of support for young people and their families. Most of all, it relies on forming meaningful relationships and supporting young people and families to form alternative narratives and to increase a sense of inclusion in society.[440]

Damian Bartholomew, on behalf of the QLS, raised for consideration what could be done to review the success, or not, of programs:

> I think what we need to look at is why those evidence based programs are not working—these are essentially those programs that are in place and those processes that we talk about, such as diversion, and the programs that are being run in the community by Youth Justice—and what has gone wrong. That, of course, is very important. We do not see consistent programs that are being operated from within the detention centres and into the community. How is that transition working when young people are exiting detention? Why is it that young people who are subject to supervision by Youth Justice are reoffending? What has gone wrong with that program? We do not have any analysis of that.
>
> We see in other states that when a young person reoffends of course there is a review that is taken internally to review those issues and to find out why that young person has not responded. What we do know is that providing intensive support to enable young people to effectively participate in programs in the community is more likely to get results, and that is what we are seeing at an international level. We are providing some support for young people to participate; it is not simply identifying the program they

435 Public hearing transcript, Brisbane, 22 March 2021, p 31.

436 Public hearing transcript, Brisbane, 22 March 2021, p 17.

437 Submission 53, p 10.

438 Submission 53, p 10.

439 Submission 10, p 9.

440 Public hearing transcript, Brisbane, 22 March 2021, pp 1-2.

> need to go to but also looking at how they get there and how they maintain in that program. Looking at all of those issues is very important.[441]

Janet Wight from YAC expressed the following view in regards to what needs to be done for children if opportunities for early intervention and prevention are missed:

> …if we have missed the early intervention and prevention—which we have done for these children—because the services are not there, what are we doing in a diversionary space to address that? That includes making sure that probation and community service orders operate appropriately and as well as they can, so that when young people are in detention they get the services they need by way of mental health and substance use, and there is a transmission back to the community that involves their family or some adult that they can rely on who will help them get their lives into order.[442]

Erin Robino advocated for more government run prisoner rehabilitation programs.

> The use of a former school camp facility at Mackay is a positive initiative jointly operated and administered by the Queensland and Federal Governments. Here returned soldiers will train and work as mentors for troubled youth. Respected Elders may wish to be employed to provide their valuable cultural knowledge, skills and talents. Study, behavioural management and technical training will benefit young offenders and prepare them for entry into the workforce.[443]

Steven Daw suggested an option to send recidivist children to a low security facility in a remote location for the term of their sentence (relocation sentencing). This, he contended, would have benefits including assisting the children to break their cycle of repeated criminal actions and to gain skills and life education, and it would be cheaper and a more effective way to reform the recidivist children than sending them to a Queensland detention centre.[444]

Kim Hoad, Trish Jordan, Kim-Maree Burton, Commerce North West, Father Michael Lowcock and Duncan McInnes also suggested that on-country programs would benefit young Indigenous offenders.[445]

At the Townsville public hearing, Kristy Clancy explained that while there is local support for on-country programs, funding for these programs has been limited:

> We have seen on country proposals put forward and we do have people in this region—I cannot speak for others and I do not wish to speak for them—who are able to immediately roll out those sorts of programs out of town with supports. Locally we have elders who want to be able to do that work with First Nations youth or others. There are connections with our armed forces here and there are all sorts of people who want to be involved in developing the skills of young people as a circuit-breaker—to get them out of this environment, to spend time getting a good night's sleep, to get good nutrition and to have good people around them to help them look for a different kind of future.
>
> What we have had funded here locally has been so small and has been limited to such a degree that we have not seen it reach its potential. We would definitely like to see—as I indicated earlier, we are desperate to see this—a whole lot more done in that early intervention space and the rehabilitation space with a whole lot more put towards it. I do think that those sorts of proposals should be well implemented with a whole lot of support over a long term. There were three-day camps, but it needs to be a very long-

441 Public hearing transcript, Brisbane, 22 March 2021, p 32.

442 Public hearing transcript, Brisbane, 22 March 2021, p 6.

443 Submission 3, p 1. Erin Robino also sought more support for victims of crime and the police. She also suggested establishing additional government operated youth correctional facilities throughout regional Queensland.

444 Submission 6, p 1.

445 Submission 59, p 1; Public hearing transcripts: Townsville 18 March 2021, p 13, Mount Isa, 16 March 2021, pp 13, 22, 36, Cairns 17 March 2021, p 4. See also submission 12, p 2.

> term approach with ongoing support that helps transition young people back to their community with ongoing supports that help them on the right track.[446]

Similarly, Danielle Jennings called for more support for on-country programs:

> The problem is they are not getting the children long enough. It needs to be increased and it needs more backing from all sectors of the community, be it businesses or the Indigenous community. It should not just be Indigenous children. There are a lot of white children out there who are in the same situation who need the support that they get from this and they are not getting it.[447]

Jerome Pang of the Queensland Indigenous Labor Network expressed the following view in relation to on-country programs:

> I think with those alternative sentencing regimes and the on-country programs, we really have to find in these communities elders and culturally appropriate people to run those programs. You cannot have someone from Brisbane running a program in Mount Isa. It is that sort of cultural appropriateness that we need in these programs, for these children to learn and to recharge their batteries on country with elders and with the inclusion of their parents, because I think we find too much in these situations the parents have not been allowed to parent their children. It is either government agencies stepping in or there is intergenerational trauma which has disallowed the grandparents from parenting the parents and the parents from parenting the grandchildren. There are a lot of these situations where if elders in the community or culturally appropriate people could actually teach the children, the parents and the grandparents how to engage as a family unit in some aspects as well, that would be a very good addition.[448]

Amnesty acknowledged the trials already underway for on-country programs and advised:

> More appropriate bail alternatives to electronic monitoring exist. Primarily, Indigenous and community-led diversion programs that focus on addressing the underlying causes of crime … These programmes need to be evaluated and replicated across the state.[449]

In response to calls for relocation sentencing for recidivist offenders, the departments acknowledged:

> Whilst relocation sentencing would also be a matter for Government policy, the departments note that the evidence indicates the most effective interventions for reducing youth offending are those that place the young person and their family at the centre of treatment, in addition to eliciting support from the young person's community. Removing a young person from their community to deliver programs in a remote location can have some positive outcomes, but hinders the strengthening of family support and community involvement which are key factors in a young person's rehabilitation.[450]

In regards to proposals from communities across north Queensland for on-country services, the departments advised that 'government is piloting On Country programs in Cairns, Mt Isa and Townsville to focus on 10 to 17-year-old repeat offenders and those with high and complex needs'.[451] The departments continued:

> International and domestic literature suggests that Aboriginal and Torres Strait Islander designed and led justice programs consistently outperform those that are externally developed. They can significantly reduce the rate of offending.[452]

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446 Public hearing transcript, Townsville, 18 March 2021, p 7.

447 Public hearing transcript, Mount Isa, 16 March 2021, p 26.

448 Public hearing transcript, 22 March 2021, pp 18-19.

449 Submission 51, p 10.

450 QPS and DCYJMA, correspondence, 19 March 2021, p 27.

451 QPS and DCYJMA, correspondence, 19 March 2021, p 28.

452 QPS and DCYJMA, correspondence, 19 March 2021, pp 28-29.

2.3.3.1 Current youth justice programs

The committee notes the departments' advice that the Queensland Government has invested more than $500 million in youth justice reforms since 2017 and that the number of individual child offenders is declining.[453]

The committee also notes the following advice from the departments in relation to the government's current programs and approaches to addressing youth crime in Queensland:

- case management for children with multiple complex needs.
- introduction of support services in the community and in youth detention centres, including speech and language pathologists, to assist in identifying and supporting young people with a range of cognitive and physical disabilities, including fetal alcohol spectrum disorder (FASD).
- a range of culturally appropriate services to address young Aboriginal and Torres Strait Islander people's criminogenic needs, including many provided by community-controlled organisations.[454]

According to the DCYJMA, current programs that aim to reduce reoffending include:

- Transition to Success - provides young people in, or at risk of entering into, the youth justice system, a 10-16 week program where they complete vocational training certificates and work experience with local organisations.
- Specialised Multi-Agency Response Teams (SMART) - specialist staff and case workers provide a coordinated assessment of the underlying factors that contributed to a young person's offence and advise the courts which support programs will best address their behaviours to prevent re-offending.
- Blitz on Bail - additional police and youth justice specialist court positions that work collaboratively to improve bail compliance and reduce reoffending by high-risk young people on bail.
- Tougher action on bail - This police operation targets high-risk offenders and aims to improve bail compliance, change offending behaviours, and address the underlying causes of offending.
- On Country trial - all young people engaged in the trial are provided with one-on-one support and supervision by On Country Elders and community leaders, who facilitate connection with culture and country while on camps, in the community, and while engaging with education and training.
- Integrated case management - this program provides specialised case managers who deliver intensive support for a small number of high-risk young offenders and their families to reduce reoffending and limit the number of young people on remand.
- Our Child information sharing platform - this is a system that allows instantaneous information sharing between agencies to support timely decision-making for vulnerable children who are subject to a supervised community order or bail program.
- Bail support services (NGO partners) - this program delivered by community organisations assists young people at risk of being remanded in custody, providing support to ensure they

[453] QPS and DCYJMA, correspondence, 19 March 2021, p 21.

[454] QPS and DCYJMA, correspondence, 19 March 2021, pp 21, 22.

meet their bail conditions. Organisations provide basic needs and connect young people to housing, education, health and family support to reduce offending.[455]

According to the DCYJMA, current programs that aim to keep children out of court and custody include:

- Family Wellbeing Services - this program provides family focused support to Aboriginal and Torres Strait Islander peoples and their families to help young people re-engage with kin, schools and communities and prevent contact with the youth justice system.
- Community Youth Response and Diversion - this initiative provides diversionary responses after hours to keep young people out of courts and custody, programs to assist young people to overcome barriers around accessing education, as well as mentoring and integrated case management to prevent reoffending. Each response looks different depending on the needs of the specific community.
- Additional court sitting days - an additional 110 Childrens Court sitting days provide greater capacity to deal with court matters for children and young people accused of offences. These extra days help to speed up bail applications, bail decision-making and other court processes to keep children out of court and custody and help reduce the length of their stay.
- Restorative justice conferencing - restorative justice conferencing is an inclusive process that establishes a meeting between a child or young person who has committed a crime and the people who were affected to discuss what happened, the impact of the crime and what can be done to start making things right.
- Family led decision making trial - this program gives Aboriginal and Torres Strait Islander families, whose children are in contact with the youth justice system, a stronger voice in decisions about their children. It involves a conference between a young person, their family, community organisations and youth justice staff to reduce offending.
- Conditional Bail Program - this program provides support for at-risk young people to increase their ability to remain in the community while before the courts. It addresses young people's educational and vocational needs, mental health issues, family intervention and accommodation. The program shows the court that children will receive individualised and intensive supervision while they are on bail.
- Co-responder teams - co-responder teams of police and youth justice workers provide coordinated responses to high-risk offenders and link them with community supports, including after-hours.[456]

DCYJMA states that investment in the following is aimed at keeping communities safe:

- West Moreton Youth Detention Centre - a new 32-bed youth detention centre.
- Brisbane Youth Detention Centre – a new 16-bed youth detention building has been constructed at the existing centre.

[455] DCYJMA, 'Services in the youth justice system / Youth justice investment package', https://www.youthjustice.qld.gov.au/resources/youthjustice/resources/services-youth-justice-system.pdf.

[456] DCYJMA, 'Services in the youth justice system / Youth justice investment package', https://www.youthjustice.qld.gov.au/resources/youthjustice/resources/services-youth-justice-system.pdf.

- Empowering local communities - Community-Based Crime Action Committees are being established with the aim of improving collaboration and joint action to prevent and respond to youth crime.[457]

The following programs are aimed at intervening early in the crime cycle:

- Queensland Youth Partnerships - this program provides alternative opportunities and activities for at-risk young people with a focus on youth development, training, employment and engagement. Designed by young people for young people, the program is specifically targeted to keep communities safe by preventing young people engaging in anti-social behaviour or crime in busy shopping centres.
- Navigate Your Health - uses nurse navigators to provide health and development assessments and connect young people with health and support services. By addressing and improving some of the underlying health factors that contribute to offending, the program aims to prevent offending and reduce re-offending.
- Framing the Future - this program provides mentoring and support to Project Booyah graduates for up to six months after completion, to better connect at-risk young people with further education and training, and create alternative pathways and opportunities to empower them to live better lives.[458]

2.3.4 Three strikes policy

Some submitters recommended a three strikes policy for young offenders.[459]

In response, the departments noted that 'mandatory sentence provisions prevent courts from ordering sentences that respond to the individual circumstances of the youth and the offence, including the harm caused to a victim'. Further, the departments stated, 'research indicates that mandatory sentences are not a deterrent to the cohort of children inclined to commit offences'.[460]

2.3.5 Review of the State Penalties Enforcement Registry and support for victims of crime

Erin Robino contended that a review of the State Penalties Enforcement Registry (SPER) is required 'to ensure crime victims receive Court ordered compensation in a just and timely manner',[461] stating:

> These innocent crime victims have suffered anguish, substantial loss of money and time. Court orders need to be enforced by SPER. Offenders, regardless of age, have potential to earn or receive future income. Their monies can be used to pay off their crime debts on a payment plan. Victims of Crime have a right to justice which must be upheld by Courts and not ignored by offenders.[462]

Debra Green suggested that the 'public have some recourse in the capacity of victims of crime'.[463]

The departments noted this but advised it was beyond the scope of the Bill.[464]

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457 DCYJMA, 'Services in the youth justice system / Youth justice investment package', https://www.youthjustice.qld.gov.au/resources/youthjustice/resources/services-youth-justice-system.pdf.

458 DCYJMA, 'Services in the youth justice system / Youth justice investment package', https://www.youthjustice.qld.gov.au/resources/youthjustice/resources/services-youth-justice-system.pdf.

459 Submission 10, p 3; Submission 12, p 2.

460 QPS and DCYJMA, correspondence, 19 March 2021, p 18.

461 Submission 3, p 2.

462 Submission 3, p 2.

463 Submission 68.

464 QPS and DCYJMA, correspondence, 26 March 2021, p 29.

Debra Green also called for support for the emotional and mental wellbeing of the victims of crime.[465]

The departments advised:

> Victim Assist provides support for victims of violent crime.
>
> Restorative justice conferences bring young people face-to-face with the victims of their offending, and supports them to begin to make amends for the impact of their behaviour. Importantly, a victim is never compelled to attend a conference, and the conference convenor works with the victim to ensure the victim is ready and willing to participate before the conference proceeds.
>
> Surveys show a high degree of victim satisfaction with the process, with benefits that cannot be achieved through normal court processes.[466]

2.3.6 Curfew for children 16 years and under

Janice Bradley recommended a curfew for children 16 years and under to help stop youth offending.[467] In response, the departments advised:

> A bail decision-maker can impose a curfew condition as a requirement of a youth's bail. A failure to comply with a curfew condition would result in further action and may lead to the youth being remanded in custody.
>
> There is research that shows universal curfews applied to all young people are ineffective at reducing crime and victimisation.[468]

2.3.7 Raise the minimum age of criminal responsibility

Several submitters advocated to raise the minimum age of criminal responsibility.[469] The departments responded:

> A national working group is reviewing the matter of the minimum age of criminal responsibility.
>
> The Queensland Government has publicly indicated it has no current plans to raise the age of criminal responsibility but is monitoring the progress of the national working group.[470]

2.4 Key issues raised during regional public hearings

Below are the key issues and suggestions witnesses raised during regional public hearings, many of which have been considered in more detail elsewhere in this report. For more information, refer to the public hearing transcripts available on the committee's inquiry webpage.

2.4.1 Mount Isa – 16 March 2021

- Parenting – requires more education, development of skills and accountability for their children. This is a generational and complex issue.
- Teen pregnancy – education in community and access to contraception. Young women are having children at ages as young as 13 onwards, and they are ill-equipped to parent.
- Drugs, alcohol, and FASD are major issues that contribute to youth crime. Need targeted investment in programs and increased capacity within health care system to support young people.

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[465] Submission 68.

[466] QPS and DCYJMA, correspondence, 26 March 2021, pp 32-33.

[467] Submission 12, p 2.

[468] QPS and DCYJMA, correspondence, 19 March 2021, pp 23-24.

[469] Refer submissions 39, 49, 51.

[470] QPS and DCYJMA, correspondence, 19 March 2021, p 26.

- The implementation of the Federal Government's welfare card in the Northern Territory is causing Indigenous communities to relocate to Mount Isa and putting enormous pressure on housing, policing, and health services.
- Relocation sentencing – more programs needed on country, but models that are therapeutic in nature, working with the family or kin where possible to create change within the family.
- Restorative justice – should be at the request of the victim, not a choice of the offender.
- Services (including child safety) are not available in the hours when crime is at its peak (10pm-6am).
- A lot of money is being invested in programs across many departments; however, there is no inter-agency coordination or measurement of program success.
- Need Indigenous Elder involvement in the judicial process.
- Housing and rental issues – creating environments that young people are trying to escape from.
- Comprehensive health screening (disability and other) whilst in custody (ideally much earlier) with youth workers to support any diagnosis with application to NDIS etc.
- Victims are not referenced in the proposed Bill.
- The Cleveland Youth Detention Centre is already overcrowded, and there are concerns that young people will end up in regional watch-houses.
- Too much red tape for community services to apply for grants funding.
- Need more scrutiny of agencies who are receiving funding.
- Questions raised about whether all crime is being reported; the Mount Isa Chamber of Commerce said that business owners have stopped reporting as insurance has stopped paying after multiple episodes.
- Suggestions that police do not report back to victims about what they are doing to investigate and reduce crime.
- Questions about staff retention and organisational capability to provide services.

2.4.2 Cairns – 17 and 18 March 2021

- Parenting – requires more education, development of skills and accountability for their children. This is a generational and complex issue.
- Parental consequence for youth crimes.
- Better training of Youth Justice staff, including on cultural heritage.
- Teen pregnancy – education in community and access to contraception. Young women are having children at ages as young as 13 onwards, and they are ill-equipped to parent.
- Drugs, alcohol, and FASD are major issues that contribute to youth crime. Need targeted investment in programs and increased capacity within health care system to support young people.
- Relocation sentencing – more programs needed on-country, but models that are therapeutic in nature, working with the family or kin where possible to create change within the family.
- Restorative justice – should be at the request of the victim, not a choice of the offender.
- Services (including child safety) are not available in the hours when crime is at its peak (10pm-6am).

- Earlier intervention with first offenders.
- Youth activation – access to sports and activities – increase in value of Fairplay Vouchers to assist as currently these do not go far enough to cover the costs
- Role of social media, media and technology – enabling, inciting and increasing impacts of youth crime by providing a platform.
- Need Indigenous Elder involvement in the judicial process.
- Housing and rental issues.
- Cairns Safe Nights precinct could be expanded to have a focus on under 18-year-olds with services coordinated in the CBD.
- Questions regarding under or over reporting of crimes.
- A number of witnesses said parents need more powers to discipline their children. They can't lock the doors or physically restrain them, for example, to stop them going out. Parents need more support to discipline their children in ways that are not physical.
- Youth Justice co-responder model (with police) would be beneficial (QPS statement).

2.4.3 Townsville – 18 and 19 March 2021

- Implementation of a criminal offence for social media activity that incites youth crime.
- Role of social media, media and technology – enabling, inciting and increasing impacts of youth crime by providing a platform.
- Implement an Indigenous Youth Murri Court (IYMC) in the Townsville district for a 2-year trial in line with recommendation 15 of the 'Townsville's Voice: Local Solutions to Address Youth Crime' report to address the high incidence of Indigenous youth crime. Working in conjunction with Townsville Youth Crossroads – to provide age and culture appropriate mentoring.
- Parenting – requires more education, development of skills and accountability for their children.
- Parental consequence for youth crimes.
- Empowering parent/carer/guardian to be able to discipline – the impediment that Child Safety Services can create for parents when young people can use this agency as a tool to avoid reasonable parental discipline and guidance.
- Teen pregnancy – education in community and access to contraception. Young women are having children at ages as young as 13 onwards, and they are ill-equipped to parent.
- Drugs, alcohol, and FASD are major issues that contribute to youth crime. Need targeted investment in programs and increased capacity within health care system to support young people. Targeted focus on this issue by QPS. Targeted investment in programs. Capacity within health care system to support fair assessment of youth is inadequate.
- Is the investment in programs to support drug and alcohol rehabilitation adequate?
- NDIS funding needed to assist in assessment of FASD diagnosis to inform the judicial process and ensure determinations and support for youths suffering from this disability are captured. Noted the success of Parramatta – Koori Health Program.
- Relocation sentencing – more programs on-country.
- Restorative justice – should be at the request of the victim not a choice of the offender.

- Housing and rental issues – similar issues to Mount Isa and Cairns with Alcohol Management Plans and Federal Government Welfare Card driving people to relocate to areas where they can access alcohol.

As noted above, during consultation on the Bill, the committee read many submissions and heard much oral evidence about youth crime concerns, particularly from residents of Townsville. Craig Marsterson's evidence was representative of much of the evidence the committee received:

> … we are an elderly retired couple in Townsville. We have had to change the way we live because of all the crime. Our house now is a fortress, we have purchased another guard-dog, My wife rarely drives alone anymore and never at night. ... These kids need to be locked up and taught respect. Townsville Court-house is a revolving door and they abuse the judges and get bail & steal another car.[471]

Kerry Roberts described a similar situation:

> I'm a 57 yo woman, living in fear, in Townsville, because of the out of control juvenile repeat offenders. … We have very high security measures installed in our home and I'm still scared in my own home and I shouldn't have to live like this if these juveniles were properly punished for the adult crimes they are committing over and over every day in Townsville.
>
> I start work at 7am Mon to Friday and I fear driving to work that early as these criminals are still out and about in stolen cars ramming innocent people going about their business. We should be able to travel on the roads without fear of being rammed or run off the roads.
>
> These juvenile criminals have started targeting older people, a category which I fall into. As there's no consequences for these offenders and they know that. They know they'll get bail and be allowed out to do it all over again. It's nonsense that they don't know what they're doing, they do and they don't care.[472]

Julene Verkooijen similarly submitted:

> I am a life time resident of Townsville (over 66 years). All of my family (husband, children and grandchildren as well as sibling, cousins etc) and all of my lifetime friends also live here. Over the past 6 years I have experienced the youth crime progressively getting worse and the good people of Townsville are now afraid both inside their homes and having to drive on our streets. We lock up our houses and possessions every night, and lock our doors when we are in the car. … The current activity we are putting up with at the moment is young offenders stealing cars, ramming cars, burning cars, and deliberately driving on the wrong side of the road at high speed. We have already seen deaths in this regard and do not want to see any more innocent people harmed.[473]

When asked about her views on how to balance the right of the community to feel safe and the right of the child, Ms Lloyd of Anglicare Southern Queensland stated:

> That is a hard one. There is not an answer. The community has a right to feel safe. As a parent whose own child was in the house on her own when it was broken into, I know what it feels like to be a victim and to see your own child go through years of being terrified to be left in the house again. Then I work with children who do this and so it is a really hard balance. I think Townsville is also really hard because it is a very small community, so when something happens it impacts on so many and then you have people talking and that just rolls on. When you are looking at places like Brisbane that are really big, you get exactly the same and probably the same amount of crime occurring in both places, but one is a smaller community and one is a larger one so it is kind of not in the public's eye as much. I do not know the answer. People have a right to be safe and feel that they can walk around their community safely, but I think the point is that for these children at one point in their life they were not kept safe. The system, the community, failed them when they were little children and now we are expecting them to trust adults and comply when no-one protected them or we did not protect them well enough.[474]

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471 Submission 4, p 1.

472 Submission 14, p 1.

473 Submission 8, p 1.

474 Public hearing transcript, Brisbane, 22 March 2021, p 5.

2.4.4 Brisbane – 22 March 2021

- disproportionate impact of Bill on vulnerable children
- broader level of focus on more long-term early intervention strategies and offering more opportunities for positive activities increases the likelihood for better outcomes
- youth detention settings are a particularly high risk for child sexual abuse
- address the reasons for offending
- electronic monitoring devices will be used like trophies
- need more services available after hours
- youth workers are uniquely qualified to work with youth offenders
- support in a youth homelessness shelter assisted a child in breaking a cycle of crime
- more funding for services is required
- a coordinated case management approach would help youth offenders
- outsourcing of child protection programs and services is not working for the benefit of the children or community
- raise the age of criminal responsibility for which a child can be charged, arrested and detained
- community elders and culturally appropriate people should run on-country programs
- the current bail laws are workable and fit for purpose
- lack of sufficient youth drug rehabilitation services
- concern that the bill contravenes several international human rights laws and several United Nations and international guidelines
- community and Indigenous-led programs can be used to address youth crime
- concern about impact on Aboriginal and Torres Strait Islander children and how the Bill may increase the likelihood of them interacting with police and the youth justice system
- concern that GPS tracking for young offenders and the presumption against bail provisions of the Bill may increase the number of children held in watch houses and youth detention facilities
- concern about introduction of a show cause requirement for children into the legislation
- in regards to tracking device, important to focus on reintegration into society and not stigmatising young people
- meeting accommodation requirements for bail conditions are a concern
- concerns that the evidence cited in support of the effectiveness of the electronic monitoring of children is misleading and contradictory
- presumption against bail provisions will result in an increase in the numbers of children in youth detention

2.4.5 Gold Coast – 26 March 2021

- concern about the exercise of a power without reasonable cause in regards to hand held scanners for knives – safeguards and privacy
- concern that there not be an abrogation of the rights to silence or at least self-incrimination in relation to hooning offences

- electronic monitoring devices will be used as trophies or will stigmatise the young person
- need to address the reasons why young people are offending
- bail and electronic monitoring provisions will increase numbers of young people on remand and being incarcerated
- poverty and breakdown of family contribute to circumstances that may lead to young people offending
- an experienced senior officer should be present at the site, not at the police station, to assist junior police officers in regards to the use of hand held scanners
- parents care about their children even in circumstances where they do not have the capacity or the skills to have outcomes that they want from their parenting
- acknowledge victims of crime and the importance of feeling safe in your home and town
- electronic monitoring devices may be positive if they prevent youth offenders from having to enter detention
- the only way for youth offenders to be rehabilitated is to be fully integrated both into their family systems and into their community systems which becomes very hard when the community is so deeply affected by juvenile crime
- need integrated services and evidence based planning to address youth crime
- suggestions that young people are carrying knives to protect themselves as 'everyone else is carrying one'
- electronic monitoring might not address recidivism but it might address community concern
- multi-systemic therapy, which has significant outcomes in terms of working with young people and their families
- need more support, including appropriate housing, for youth offenders when they come out of detention
- bail conditions need to be more directive, saying that young people must engage with support services
- there is a funding barrier preventing Gold Coast services from operating more after hours
- the trial for detecting knives should be in more places on the Gold Coast, including Helensvale and Coomera
- acknowledgement that range of measures to be introduced in the Bill in relation to youth justice may have some effect on strengthening the bail framework for young offenders
- support for the PCYC on the Gold Coast and the work being done there with young people
- make team sports more accessible
- individual stories of being impacted by crime on the Gold Coast were shared

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.

Clauses 5, 6, 13 - 16, 21, 24 and 26 raise issues of fundamental legislative principle.

A number of provisions giving rise to issues of fundamental legislative principle also give rise to human rights issues, and are considered in section 4 of this report on the human rights aspects of the Bills.

The following table provides a summary of the breaches of fundamental legislative principle in the Bill, which are then discussed in detail later in this brief.

SUMMARY TABLE OF ISSUES OF FUNDAMENTAL LEGISLATIVE PRINCIPLE

CLAUSES	ISSUES OF FUNDAMENTAL LEGISLATIVE PRINCIPLE
Clauses 5 and 6 amend the PPRA and provide the police the power, without suspicion or warrant, to scan individuals (and their belongings) for knives. This power may be applied in the specified safe night entertainment precincts of Broadbeach and Surfers Paradise.	**Rights and liberties of individuals** – rights and liberties of individuals – right to privacy, right to freedom of movement, right to equal treatment Legislation should be reasonable and fair in its treatment of individuals. The committee considers these breaches of the rights and liberties of individuals are justified in the circumstances.
Clause 26 introduces section 52A of the YJA to allow a court, in granting bail to a child in certain circumstances, to impose a condition that the child must wear a tracking device while on bail. The power is available where: • there is a prescribed indictable offence • the child is at least 16 years old • the child has previously been found guilty of an indictable offence; and • the child lives in, and the court is in, a geographical area prescribed by regulation.	**Rights and liberties of individuals –** rights and liberties of individuals – right to privacy and confidentiality, right to freedom of movement, right to equality of treatment A child required to wear a tracking device will have their privacy impacted by having their location and whereabouts monitored. This will also affect their freedom of movement. The wearing of a tracking device could affect a child's equality of treatment, by creating a stigma or bias by wearing the device. There are conflicting views on the impacts of tracking devices on children, and whether they will reduce recidivism and non-compliance with conditions of bail. The committee considers the impacts on a child's rights are justified by the aim of enhancing compliance with bail conditions.
Clauses 13 and 14 require the owner of a vehicle involved in a hooning offence to make a statutory declaration stating who	**Rights and liberties of individuals** – rights and liberties of individuals – right to privacy and confidentiality

was driving the vehicle at the time of the offence. If the owner does not know who was driving the vehicle, the statutory declaration must contain information about where the owner was when the offence happened, the usual location of the vehicle and any potential drivers that have access to the vehicle.	A person has a right to privacy, particularly in relation to their personal information. The requirement for a person to provide a statutory declaration including information about their whereabouts and how they use their vehicle, and information about how others may use their vehicle, impacts on their right to privacy (and that of others). The committee considers the impacts on a person's right to privacy are justified by the need to enhance community safety and assist police officers in their investigations.
Clauses 15 and 16 provide the prosecuting procedures and evidentiary provisions that will apply to hooning offences. If an owner of a vehicle involved in a hooning offence does not provide a statutory declaration as required, they are presumed to have been the driver of the vehicle when the offence happened. It will be a defence for the person to prove, on the balance of probabilities, that they were not driving the vehicle. However, they will not be able rely in their defence on information that they were required to have included in a statutory declaration (unless they give notice to the prosecuting authority and the court grants leave).	**Natural justice** – legislation should be consistent with the principles of natural justice. Procedural fairness should be afforded to a person and persons who are entitled to be heard must be given a reasonable opportunity to present their case. These clauses prevent a person relying on certain material in their defence (unless they give notice and the court grants leave) which may impact on the person's right to natural justice, in particular their right to answer allegations against them. The committee considers the breaches of fundamental legislative principle are justified in the circumstances.
Clause 24 inserts proposed section 48AF of the YJA to create a presumption against bail for children charged with a prescribed indictable offence committed while on release for another indictable offence.	**Reversal of onus of proof** – the onus of proof should only be reversed with adequate justification. The requirement for a child to show cause why they should not be detained in custody is a reversal of the onus of proof and impacts on a child's rights and liberties. A number of submissions do not agree with the inclusion of the show cause provision, opposing the view in the explanatory notes that the policy is warranted to ensure the community's safety from serious offending behaviour. The committee considers the reversal of the onus of proof is justified in the circumstances.
Clause 13 provides that the failure to provide a statutory declaration when issued with a type 1 vehicle related offence notice will result in the commission of a summary offence, unless a person can provide 'a reasonable excuse'. Clause 15 provides that the failure to provide a statutory declaration will result in the owner of a vehicle being presumed to	**Reversal of onus of proof –** the onus of proof should only be reversed with adequate justification. These clauses raise issues concerning the appropriateness of reversal of the onus of proof in criminal proceedings by expanding existing owner onus deeming provisions in the PPRA to apply to hooning offences. The supporting material to the Bill justifies this on the basis that it will allow for effective investigation and prosecution of hooning offences.

have been the driver of the vehicle when it was involved in the hooning offence.	The committee considers the reversing of the onus of proof is justified in the circumstances.
Clause 13 provides that a police officer may issue a type 1 vehicle related offence notice to the owner of a motor vehicle involved in a hooning offence. The notice requires the owner to provide a statutory declaration stating who was driving the vehicle at the time of the offence. The owner must give a statutory declaration unless they have a reasonable excuse (maximum penalty – 100 penalty units).	**Protection against self-incrimination** – a person should not be obliged to incriminate themselves. As a result of the requirement to provide a statutory declaration, a person may have to incriminate themselves in a hooning offence by admitting they were the driver of the vehicle when the offence happened. If they choose not to provide a declaration (i.e. remain silent), they will commit an offence of failing to provide a statutory declaration. The committee considers any breach of fundamental legislative principle concerning the protection against self-incrimination in the circumstances is justified.
Clause 26 inserts proposed section 52AA into the YJA, which relates to electronic monitoring conditions. **Clause 21** amends section 48AA of the YJA, which contains matters a court or police officer considers in making particular decisions about release and bail. **Clause 24** introduces proposed section 48AF into the YJA, which relates to the presumption against bail for certain children.	**Retrospectivity** – a Bill should not adversely affect rights and liberties, or impose obligations, retrospectively. Strong argument is required to justify an adverse effect on rights and liberties, or imposition of obligations, retrospectively. The committee considers any breach of fundamental legislative principle concerning retrospectivity in the circumstances is justified.
Clause 26 introduces proposed section 52AA into the YJA to provide for a tracking device condition. The explanatory notes state that Townsville, North Brisbane/Moreton and Logan/Gold Coast will be the prescribed areas for the 12 month trial.	**Appropriate delegation of legislative power** – a Bill should allow the delegation of legislative power only in appropriate cases and to appropriate persons. Generally, a justification for having matters prescribed by regulation will centre on the need for flexibility. The Bill provides for a 2 year sunset clause to cover a 12 month trial and the geographical locations intended to be prescribed have already been identified. This raises the question of the need for flexibility. The committee considers the delegation of legislative power is justified in the circumstances.

3.2 Rights and liberties of individuals

3.2.1 LSA, section 4(2)(a) – rights and liberties of individuals (Clauses 5 and 6)

3.2.1.1 Clauses 5 and 6 – PPRA powers to scan for knives

Does the Bill have sufficient regard to the rights and liberties of individuals?

- right to privacy regarding personal information

- right to freedom of movement
- right to equal treatment

3.2.1.2 Summary of provisions

Currently, Queensland police have the power to stop and search a person they *reasonably suspect* to be carrying a knife.

Clauses 5 and 6 amend the PPRA to give police the power, without suspicion or a warrant, to, at random, scan individuals (and their belongings) for knives. The powers will apply in two specified safe night entertainment precincts – Broadbeach and Surfers Paradise. The aim is for there to be a twelve month trial of this power, followed by evaluation.

If a person does not submit to scanning or fails to produce an item that has 'activated' the scanner, police will be able to then search that person (again, without a warrant or suspicion).

3.2.1.3 Issue of fundamental legislative principle

The grant of this power raises issues of fundamental legislative principle regarding the rights and liberties of individuals, in relation to the right to privacy, the right to freedom of movement, and the right to equality of treatment.[475] Legislation should be reasonable and fair in its treatment of individuals. It should not be discriminatory.

3.2.1.4 Comment

The rights and liberties concerns that arise from these provisions are heightened by the fact that the proposed power will allow police to stop and scan any person in a designated area without any reason (such as a reasonable suspicion) or other basis (or a warrant) and on an entirely random basis. Further, there are no criteria that the senior police officer must be satisfied of before giving the necessary authorisation for use of a scanner (required by proposed section 39E).

In other words (as noted in the statement of compatibility) both the authorisation and the stopping and scanning of a person are arbitrary and may be absent any reason.[476]

The explanatory notes suggest:

> This engagement of the rights and liberties of individuals is safeguarded by the requirement for authorisation to be given by a senior police officer prior to scanning activities being undertaken.[477]

The difficulty with categorising this as a safeguard is that, as noted, there are no prescribed criteria for the issue of the authorisation, and thus the authorisation itself can be entirely arbitrary. In that light, this cannot be seen as a safeguard.

The explanatory notes, after stating that since scanning is brief and relatively non-invasive, the amount of inconvenience to a person scanned 'will be minimal', give this brief justification:

> While a person's liberty may be impacted by scanning activities it is considered warranted in order to achieve the policy intent of minimising the risk of harm being caused by knives in public places in the prescribed areas.[478]

[475] See *Legislative Standards Act 1992*, s 4(2)(a).

[476] Statement of compatibility, p 17.

[477] Explanatory notes, p 11.

[478] Explanatory notes, p 11.

Regarding the ability to search (*without* a warrant or suspicion) a person who does not submit to scanning or fails to produce items, the explanatory notes state briefly:

> While this may be considered to further impact on the rights and liberties of the individual, such a search is again considered necessary when weighed against the risks presented by [a] person potentially possessing a knife in a public place.[479]

Reducing knife crime and enhancing the safety of the community are legitimate policy aims, however in dealing with these issues of fundamental legislative principle, the explanatory notes do not contain any material regarding the question of minimising the risk of harm caused by knives.[480]

The Queensland Council for Civil Liberties (QCCL) in its submission expressed its strong opposition to suspicion-less searches:

> The requirement for the search only to be carried out when there is a reasonable suspicion is a fundamental protection of basic liberties. Any departure from that principle in our view will lead to further erosion of that principle.[481]

The QCCL submitted:

> … there is no evidence these types of powers will reduce knife crime.
>
> In 2012, the Victorian Office of Police Integrity produced a report on Victorian "stop and search" powers which were also introduced to reduced knife crime. That report entitled "Review of Victoria Police use of "stop and search" powers" reviewed research from the United Kingdom in relation to the effectiveness of such powers. At page 40 of the report, the Office stated that the research "found the relationship between incidence of knife crime and the rates of "stop and search" is at best unclear." Whilst some research indicated that stopping members of the public, with or without searching, deterred crime, there was "no significant and consistent correlation between searches and crime levels a month later". The report said, "a review of the "stop and search" reporting data over six months compared to crime statistics for the same period showed no relationship between increased searches and a decrease in knife crime."[482]

It is noted that in the statement of compatibility, the Minister notes that clauses 5 and 6 'may not be compatible' with the human rights protected by the HRA.[483]

The QHRC stated:

> The Commission shares the view *[expressed at page 17 of the statement of compatibility]* that protecting the community from knife crime may outweigh the impact on individual human rights. Compared with the alternatives such as strip and pat down searches, a wand search is the least intrusive and likely to achieve the purpose of detecting knives. A further safeguard is that the provision requires that police exercise the power in the least intrusive way practicable in the circumstances.
>
> However, the Commission remains concerned that an arbitrary police power to stop and scan a person in the absence of any reason may have negative implications in practice. Arbitrary search powers tend to be disproportionately applied to minority racial groups and children.
>
> For example, the UN Human Rights Committee considered a situation where Spanish police routinely checked identification and immigration papers but only for people of colour. While there was a legitimate purpose to be achieved in ensuring immigration laws are upheld, the Human Rights Committee found that an approach that racially profiled people was disproportionate and unlawful.

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479 Explanatory notes, p 11.

480 Elsewhere reference is made to two recent murders involving knives in the Surfers Paradise designated area. See explanatory notes, p 2.

481 Submission 57, p 5.

482 Submission 57, p 2.

483 Statement of compatibility, p 20.

> In circumstances that it has been acknowledged publicly that the intention of the Bill is to reduce offending including knife crime amongst young people it is difficult to see how in practice this would not lead to police profiling and targeting children, which may be incompatible with the human right to equality before the law (section 15 HRA). However, if a system like a roadside random breath test was set up where every person was required to be scanned prior to entering a particular zone regardless of age then this practice may be more likely to be compatible with human rights.[484]

The submission from the Institute for Collaborative Race Research also expressed concern at what it saw as the 'racialised impacts that will flow from this radical expansion of police powers'.[485]

3.2.1.5 Committee conclusion

The committee considers the incursion on the rights and liberties of individuals is justified in the circumstances.

3.2.2 LSA, section 4(2)(a) – rights and liberties of individuals (Clause 26)

Clause 26 (proposed section 52AA of the YJA) – tracking devices

Does the Bill have sufficient regard to the rights and liberties of individuals?

- right to privacy and confidentiality
- right to freedom of movement
- right to equality of treatment

3.2.2.1 Summary of provisions

The proposed power to impose tracking device conditions also impacts on a number of rights under the HRA. Indeed, the Bill includes a note under proposed section 52AA(1) making reference to sections 19, 22, and 25-28 of the HRA.

Rights in the HRA that are impacted include the right to freedom of movement (section 19), the right to freedom of association (section 22), the right to privacy (section 25(a)), the right to protection of families (section 26(1)), the right of a child to treatment in their best interests (section 26(2)), rights of Indigenous peoples to maintain kinship ties (section 28(2)(c)), right to equality and non-discrimination (section 15), and right of a defendant child to certain procedures (section 32(3).

The power is considered in the context of these issues in section 4 of this report on the human rights aspects of the Bill.

Clause 26 inserts proposed section 52AA in the YJA. This provision will allow a court, in granting bail to a child in certain circumstances, to impose a condition that the child must wear a tracking device while on bail ('a tracking device condition'). The power is available to the court in these circumstances:

- the offence in relation to which bail is being granted must be a 'prescribed indictable offence'
- the child must be at least 16 years old
- the child must have previously been found guilty of at least one indictable offence
- the child must live in, and the court must be in, a geographical area prescribed by regulation.[486]

Additionally, the court must be satisfied of various matters including:

- the child's capacity to understand any tracking advice conditions

[484] Submission 48, p 21.

[485] Submission 50, p 5.

[486] Proposed s 52AA(1), YJA.

- whether the child is likely to comply with any tracking advice conditions, having regard to their personal circumstances[487]
- whether a parent or another person has indicated a willingness to support compliance by the child
- any other matter the court considers relevant.[488]

A tracking device condition can only be imposed after the court has considered a suitability assessment report provided by the chief executive of QCS containing their opinion about the suitability of the child for a tracking device condition.[489]

Clause 34 amends the dictionary in schedule 4 of the YJA, to define 'prescribed indictable offence'. It includes offences that attract a life sentence, serious drug offences, serious violent offences such as choking, wounding and assaults, and dangerous operation of a vehicle and unlawful use or possession of a vehicle.

QCS can:

- undertake the monitoring functions for the tracking devices
- contact the child on a mobile phone in relation to an alert or notification from the tracking device, and
- give to the chief executive of DCYJMA and to the commissioner of police, information relating to alerts and notifications from the tracking device.[490]

The provision is subject to a sunset clause, with the section to expire two years after commencement.[491]

3.2.2.2 Issue of fundamental legislative principle

These provisions raise issues of fundamental legislative principle relating to the rights and liberties of individuals, in relation to the right to privacy, the right to freedom of movement, and the right to equal treatment.

A person required to wear a tracking device will have their privacy impacted, by having their location and whereabouts monitored and being subject to contact by QCS staff in relation to certain alerts or notifications. Further, the information disclosed by QCS to the chief executive of DCYJMA and the commissioner of police, while relating to alerts and notifications, could contain personal information of the child.

3.2.2.3 Comment

The question for consideration is whether the breach of fundamental legislative principle can be justified, in terms of the aims of the provisions. In turn, it is also relevant to consider whether available research and evidence supports the effectiveness of tracking devices in acting as a deterrent and in reducing repeat offending. There are conflicting views on these aspects.

The explanatory notes for the Bill address the breach of fundamental legislative principle and issues of rights and liberties regarding tracking devices only in the context of the right to privacy, and do so

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487 Examples of personal circumstances include whether the child has the following: stable accommodation, the support of a parent or another person to assist with compliance with the conditions, access to a mobile phone to facilitate contact with any tracking device monitoring service, access to an electricity supply. See the note to proposed s 52AA(f)(ii), YJA.

488 Proposed s 52AA(1)(f), YJA.

489 Proposed s 52AA(3) to (5), YJA.

490 Proposed s 52AA(7)(b), YJA.

491 Proposed s 52AA(10), YJA.

only briefly.[492] The explanatory notes set out the limited circumstances in which the power can be exercised (as set out in proposed section 52AA) and make general reference to existing safeguards in the YJA and the sunset clause in the Bill.

In terms of justification, the explanatory notes state:

> This amendment is necessary to provide an appropriate level of monitoring while the young person is on bail, deterring them from committing further alleged offences. …
>
> The impact on the young person's privacy is considered necessary in light of this objective of promoting compliance with bail conditions, which ultimately is aimed at protecting the community.[493]

These statements can be contrasted with statements made at the time of introduction of the Youth Justice and Other Legislation Amendment Bill 2019 (the 2019 Bill). Before setting out those statements, it is useful to briefly outline some history and context for the 2019 Bill.

The *Bail (Domestic Violence) and Another Act Amendment Act 2017* amended the Bail Act to allow the use of electronic tracking devices as a condition of bail. Concerns subsequently arose that it was unclear whether these provisions applied to children, such that a court could order the use of electronic monitoring devices as a condition of a grant of bail for a child.

The 2019 Bill had, as one of its objectives, the objective of making it clear these provisions could *not* apply to a child.[494] The 2019 Bill provided that a requirement to use a tracking device could not be imposed on a child, as a condition of a grant of bail or a community based order or early release from detention.[495]

In introducing that 2019 Bill, the responsible Minister stated:

> There are a number of practical and human rights concerns relating to imposing conditions of this type on children. For example, a child that wears a tracking device may be stigmatised and isolated by their peers or community, reducing their prospects of rehabilitation. That is why this bill provides that a condition requiring the use of a tracking device cannot be imposed as a condition of a grant of bail to a child, a community based order or early release from detention.[496]

The explanatory notes for the 2019 Bill expanded on the reasons for this opposition to the use of tracking devices on children, referring to adverse impacts on the child:

> There are a number of concerns relating to the application of conditions of this nature to children. For example, wearing an electronic tracking device is likely to identify a child as an offender to their community and lead to stigma and isolation. This is likely to be counterproductive to attempts to reintegrate a child into activities such as school, sport or employment. Electronic tracking may also have a specific cultural impact for Aboriginal young people and Torres Strait Islander young people in that it may be symbolic of the historical control and subjugation imposed on those peoples and may be a cause of shame in their community. There is also limited evidence in Australia and internationally to show that this technology is effective at managing young people on bail and reducing risks of reoffending.
>
> There are also issues related to the use of electronic tracking for young people that are different to its use for adults, due to their stage of brain development. Young people are less likely to consider the consequences of their actions and more likely to engage in dangerous or risky behaviour. This is even more prevalent for young people who have experienced trauma, or have alcohol or drug issues. The use

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492 This and similar issues arising in the context of various human rights in the HRA are canvassed in more detail in the statement of compatibility.

493 Explanatory notes, p 9.

494 The 2019 Bill, explanatory notes, p 1.

495 See cls 16, 21, 22, 23, 24 and 26, respectively inserting in the YJA new ss 52A, 193(4)(c), 204(4)(c), 221(4)(c), 228(6) and 269(4).

496 Hon DE Farmer, then Minister for Child Safety, Youth and Women and Minister for the Prevention of Domestic and Family Violence, record of proceedings, 14 June 2019, p 2123.

> of electronic tracking devices on young people is unlikely to be particularly effective at deterring them from breaching their bail conditions.
>
> There is a risk that the use of electronic tracking would result in more breaches of bail conditions coming to the attention of police, including minor breaches, with the consequence that more young people are returned to or placed in custody. This may be as a result of the intensity of supervision and the ongoing and intensive contact with police. Research suggests that among young people in particular, the longer the period they spend under electronic tracking, the more likely they are to breach their conditions. This would be counterproductive to the intention of reducing the number of young people held in custody on remand.[497]

Returning to the current Bill, the explanatory notes make reference to, but do not set out, 'existing safeguards' in the YJA 'that must be satisfied before an electronic monitoring condition can be imposed on a young offender.'[498]

Section 52A(2) of the YJA relates to other conditions of release on bail. The court, in relation to imposing another condition and the stated period for a condition, must be satisfied of factors such as the child's age, maturity level, cognitive ability and development needs, as well as the child's home environment and ability to comply with the condition. Further, in deciding the stated period for a condition, the court must also ensure that the period is no longer than is necessary to mitigate the risk of the child committing other offences.

The charter of youth justice principles in Schedule 1 of the YJA would also provide a measure of protection to children subject to an electronic monitoring condition, in the following ways:

- Principle 13 – A person making a decision relating to a child under this Act should consider the child's age, maturity and, where appropriate, cultural and religious beliefs and practices.
- Principle 17 – A child should be dealt with under this Act in a way that allows the child –
  - (a) to be reintegrated into the community; and
  - (b) to continue the child's education, training or employment without interruption or disturbance, if practicable; and
  - (c) to continue to reside in the child's home, if practicable.[499]

As for the proposed sunset clause of 2 years, the explanatory notes state that the trial of electronic monitoring devices is only for a 12 month period. The explanatory notes state, 'This is to provide enough time for Government to conduct an evaluation and consider its findings'.[500]

A number of submissions considered the question of tracking devices. While the submissions considered the issue largely in the context of human rights impacts, comments made are also relevant in considering issues of fundamental legislative principles regarding rights and liberties.

The QHRC stated it was particularly concerned that:

- The criterion for imposing this condition fails to include consideration of the stigma for a child who is in school, training, work or caring for others, and the practical difficulties of complying for those with a disability;
- Insufficient and misleading evidence has been provided to substantiate how the trackers will achieve the goal of improving community safety;

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497 The 2019 Bill, explanatory notes, pp 11-12.

498 Explanatory notes, p 9.

499 YJA, schedule 1, items 13, 17.

500 Explanatory notes, p 3.

- Vigilantes may be incited to commit crimes when encountering young people wearing highly visible ankle monitors;
- There is a lack of clarity about what purposes data obtained from electronic trackers may be lawfully used for; and
- The trackers will unreasonably intrude into the privacy of people associated with the child such as other residents in their home.[501]

The Youth Advocacy Centre (YAC) addressed the evidence, stating:

> EM [electronic monitoring] was discussed in the Atkinson Report. It did not, as has been reported, recommend that it be implemented. Rather, it recommended that the issue be further examined but was generally of the view that its use would be very limited. It did not envisage the use of electronic monitoring in the circumstances described in the Bill.[502]

In considering the provision for a tracking device condition in the context of the right to privacy, the QCCL said this:

> The provision clearly contemplates the person has established they are entitled to bail. Whilst of course, a tracking device is preferable to being detained, the fact remains that the person is presumed to be innocent.
>
> In a context where the person is presumed innocent the police are to be entitled to know every movement of that person, which constitutes on any view a substantial violation of the right to privacy of an innocent person.[503]

The QCCL also queried the deterrent effect of tracking devices:

> The problems of the underdeveloped adolescent brain also have implications for the use of electronic monitoring. Children remain less likely to be deterred by the potential adverse consequences of the electronic monitoring come in the same way as their behaviour in all other circumstances. Lacking impulse control, in moments of excitement or stress a child is still likely to try to disconnect the monitor or to ignore it. These problems will be exacerbated in the case of young offenders with mental health or intellectual disabilities. A significant percentage of juvenile offenders have such disabilities or illnesses.[504]

Amnesty International also expressed concerns, referring to the immaturity and limited understanding of children:

> Electronic monitoring devices should only be used in limited circumstances and are more suited for adults who understand the seriousness of the situation at hand. Such devices are not age appropriate for 16 and 17 year olds, thus violating Article 40(3)(b) of the CRC [Convention on the Rights of the Child].
>
> Young people's misunderstanding of the seriousness of bail conditions and the electronic monitoring device will result in a high rate of bail breaches. This, combined with the new bail provisions in the bill, will see a sharp increase in children breaching bail and thus being detained in watch houses and detention centres.[505]

3.2.2.4 Committee conclusion

There are conflicting views on the impacts of tracking devices on children, and whether they will reduce recidivism and non-compliance with conditions of bail. The committee considers the impacts on a child's rights to privacy, freedom of movement and equality of treatment are, however, justified by the aim of enhancing compliance with bail conditions.

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501 Submission 48, p 9.

502 Submission 64, p 14.

503 Submission 57, p 4.

504 Submission 57, pp 4-5.

505 Submission 51, p 10.

3.2.3 LSA, section 4(2)(a) – rights and liberties of individuals (Clause 21)

Clause 21 – parental or other support regarding bail

Does the Bill have sufficient regard to the rights and liberties of individuals?

- right to privacy and confidentiality

3.2.3.1 Summary of provisions

Clause 21 amends section 48AA of the YJA. This provision permits a court or police officer to take into consideration whether a parent, guardian or another person has indicated a willingness to support the child on bail, or advise of any change of circumstances which might impact on a child's ability to comply with bail conditions, or any breaches of bail.

3.2.3.2 Issue of fundamental legislative principle

These provisions raise an issue of fundamental legislative principle relating to the rights and liberties of individuals.

The right to privacy is relevant to a consideration of whether legislation has sufficient regard to the rights and liberties of the individual.

Under this provision, a parent of the child, or another person indicates their willingness to support the child to comply with the bail conditions, notify of any changes in the child's circumstances that may affect the child's ability to comply with the bail conditions and/or notify of a breach of the bail conditions. This disclosure of a child's personal information would impact on their right to privacy and confidentiality.

The explanatory notes remark:

> Any impact is considered minimal. This amendment merely adds another consideration to the myriad of existing considerations police and judicial officers take into consideration when determining whether to grant bail. The amendments aim to promote a young offender's need to be supported while on bail.[506]

3.2.3.3 Committee conclusion

The committee considers the impacts on a person's right to privacy and confidentiality are justified in the circumstances.

3.2.4 LSA, section 4(2)(a) – rights and liberties of individuals (Clauses 13 and 14)

Clauses 13 and 14 – owner deeming provisions for hooning offences

Does the Bill have sufficient regard to the rights and liberties of individuals?

- right to privacy and confidentiality

3.2.4.1 Summary of provisions

Clauses 7 to 16 of the Bill amend provisions in chapter 22 of the PPRA to expand the current evasion offence notice scheme to all 'type 1 vehicle related offences' ('hooning offences'). These offences are listed in section 69A of the PPRA and include evasion offences and any of the following committed in circumstances involving a speed trial, a race between motor vehicles or a burn out:

- dangerous operation of a motor vehicle
- careless driving of a motor vehicle
- organising, promoting or taking part in a race between vehicles
- speed trials or speed record attempts, and
- wilfully starting or driving a motor vehicle in a way that makes unnecessary noise or smoke.

[506] Explanatory notes, p 9.

Clause 13 will allow a police officer to issue a 'type 1 vehicle related offence notice' to the owner of a motor vehicle involved in a hooning offence. The notice will require the owner to provide a statutory declaration stating who was driving the vehicle at the time of the offence. Under **clause 14**, if the owner does not know who was driving the vehicle, they must state all of the following information:

- where the owner was when the hooning offence happened
- the usual location of the vehicle when it is not being used
- the name and address of each person (a potential driver) known by the owner to have access to drive the vehicle when the hooning offence happened
- the way each potential driver has access to drive the vehicle
- how frequently each potential driver normally uses the vehicle and for how long each potential driver normally uses the vehicle
- whether each potential driver uses the vehicle in connection with a business or for private use
- whether the vehicle was reported as stolen, or otherwise being used without consent, when the hooning offence happened
- the nature of the inquiries made by the owner to find out who was driving the vehicle when the hooning offence happened.[507]

3.2.4.2 Issue of fundamental legislative principle

These provisions raise issues of fundamental legislative principle relating to the general rights and liberties of individuals.

The right to privacy is relevant to a consideration of whether legislation has sufficient regard to the rights and liberties of the individual.

The requirement for a person to provide a statutory declaration including the information mentioned above will impact on that person's privacy, through the provision of information about their whereabouts and use of the motor vehicle in question. It will also impact on the privacy of other potential drivers, through their identification and the provision of their personal information, including details surrounding their access and use of the motor vehicle.

3.2.4.3 Comment

In addressing the requirement to provide a statutory declaration, the explanatory notes state:

> … the amount of information sought is minimal, is necessary to effectively investigate and solve type 1 vehicle related offences, and is information expected to be readily within the knowledge of every responsible vehicle owner.[508]

More generally, the explanatory notes suggest that this information 'may be used to assist the investigation of hooning offences'.[509] This is reflected in clause 9 of the Bill, which amends the purpose of chapter 22 of the PPRA to 'enhance community safety by- … helping police officers investigate type 1 vehicle related offences'.[510]

Note that the requirement to provide a statutory declaration containing the information listed above already exists in the PPRA in relation to evasion offences (the offence of failing to stop a motor vehicle after being directed to by police).[511] The original policy intent of the scheme was to provide police

[507] Explanatory notes, p 7. See also the Bill, cl 14 and PPRA, s 755A.

[508] Explanatory notes, p 11.

[509] Explanatory notes, p 2

[510] The Bill, cl 9.

[511] For the definition of evasion offence see: PPRA, s 754.

with an investigative tool to identify drivers of vehicles involved in evasion offences, without the need to engage in a vehicle pursuit.[512]

3.2.4.4 Committee conclusion

The committee considers the impacts on a person's right to privacy are justified in the circumstances by the need to enhance community safety and assist police officers in their investigations.

3.2.5 LSA, section 4(3)(b) – natural justice

Clauses 15 and 16 – owner deeming provisions for hooning offences

Is the Bill consistent with the principles of natural justice?

3.2.5.1 Summary of provisions

Clauses 15 and 16 of the Bill provide that prosecuting procedures and evidentiary provisions that currently apply to evasion notice offences will apply to hooning offences.

In effect, this means that if a person does not provide a statutory declaration as required after receiving a type 1 vehicle related offence notice, then they are presumed to have been the driver of the motor vehicle involved in the relevant hooning offence.

It will be a defence for the person to prove, on the balance of probabilities, that the person was not driving the vehicle when the offence happened.[513] However, a person will not be able rely in their defence on information that they were required to have included in a statutory declaration unless:

- the person gives the prosecuting authority a notice of their intention to seek leave to rely on the evidence at least 21 business days before the day the hearing of the proceeding starts, and
- the court grants the person leave to rely on the evidence.[514]

A defendant is also required to give the prosecuting authority notice, 10 days before the proceeding starts, of any intention to challenge matters that are set out in any commissioner's certificate of evidence related to the proceeding.[515]

3.2.5.2 Issue of fundamental legislative principle

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is consistent with principles of natural justice.[516]

These principles have been developed by the common law and include the following:

- Nothing should be done to a person that will deprive them of a right, interest, or legitimate expectation of a benefit without the person being given an adequate opportunity to present their case to the decision-maker.
- The decision maker must be unbiased.
- Procedural fairness should be afforded to the person, including fair procedures that are appropriate and adapted to the circumstances of the particular case.[517]

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512 QPS and DCYJMA, Joint departmental brief on the Youth Justice and Other Legislation Amendment Bill 2021 to the Legal Affairs and Safety Committee, p 7.

513 The Bill, cl 15 and PPRA, s 756.

514 PPRA, s 756. See also explanatory notes, p 11.

515 These matters are set out in s 757(1)(b) and (c) of the PPRA.

516 *Legislative Standards Act 1992*, s 4(3)(b).

517 Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p 25.

The amendments that prevent a person relying on certain material in their defence may impact on the person's right to natural justice, in particular their right to answer allegations against them. Persons who are entitled to be heard must be given a reasonable opportunity to present their case.[518] Essentially these provisions of the Bill operate to fetter the scope of evidence able to be led in a defence to a charge (by requiring notice to be provided and leave to be granted).

3.2.5.3 Comment

In addressing this issue, the explanatory notes focus on the circumstances under which a court can grant leave and allow evidence:

> Concerns about this issue are minimised through maintaining the discretion of the courts to allow evidence in appropriate circumstances. The court may grant leave if the court is satisfied that the person had a reasonable excuse for not giving the statutory declaration as required or the evidence came to the person's knowledge more than 14 business days after the person was given the type 1 vehicle related offence notice or the interests of justice require that the person be able to rely on the evidence.
>
> Additionally, if the type 1 vehicle related offence is an offence against sections 328A of the Criminal Code [Dangerous operation of a motor vehicle], the court may grant leave to the person to rely on evidence that is information the person was required to include in the statutory declaration in his or her defence even if the person has not complied with the notice requirements relating to an intention to seek leave, if it is in the interests of justice that the person should be able to rely on the evidence.[519]

According to the explanatory notes, the amendments 'reach an appropriate balance between the rights of the accused and the interests of the community'.[520]

Though not set out explicitly in the explanatory notes, the statement of compatibility explains that the reason for the requirement to give notice 'is to allow sufficient time to investigate the new information.'[521] Presumably this could operate to allow police officers to investigate and charge another person with driving the vehicle, depending on the information provided.

The Legal Affairs and Community Safety Committee of the 56th Parliament considered similar evidentiary provisions in its report on the Police Powers and Responsibilities and Other Legislation Amendment Bill 2018 in relation to evasion notice offences. That committee stated:

> To determine whether a potential FLP breach was warranted, the committee considered the objective of the provision (to assist in identifying alleged offenders without resorting to police pursuits, which are potentially dangerous for the offender, police and the public), and the safeguard in the amendment (the court has discretion to allow the evidence in certain circumstances). On balance, the committee concluded that any potential FLP breach is justified.[522]

3.2.5.4 Committee conclusion

The committee considers the breaches of fundamental legislative principle are justified in the circumstances.

3.2.6 LSA, section 4(3)(d) – onus of proof

Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?

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518 Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p 28.

519 Explanatory notes, pp 11-12.

520 Explanatory notes, p 12.

521 Statement of compatibility, p 18.

522 Legal Affairs and Community Safety Committee, Report No. 17, 56th Parliament – *Report on the Police Powers and Responsibilities and Other Legislation Amendment Bill 2018*, August 2018, p 28. Available at: https://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2018/5618T979.pdf

Clause 24 - presumption against bail

3.2.6.1 Summary of provisions

Section 48 of the YJA currently operates to provide a presumption that a youth charged with an offence should be released from custody. Clause 24 of the Bill inserts proposed section 48AF, creating a presumption against bail for children charged with a prescribed indictable offence committed while on release for another indictable offence.

In such circumstances, a police officer or court must refuse to release the child from custody unless the child shows cause why their detention in custody is not justified.

3.2.6.2 Issue of fundamental legislative principle

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not reverse the onus of proof in criminal proceedings without adequate justification.[523]

Legislation should not reverse the onus of proof in criminal matters, and it should not provide that it is the responsibility of an alleged offender in court proceedings to prove innocence:

> For a reversal to be justified, the relevant fact must be something inherently impractical to test by alternative evidential means and the defendant would be particularly well positioned to disprove guilt.[524]

The requirement for a child to show cause why they should not be detained in custody is a reversal of the onus of proof and impacts on a child's rights and liberties.

3.2.6.3 Comment

The Human Rights Law Centre submitted:

> Children should never be subject to reverse-onus bail provisions that entrench children in the criminal legal system. Reverse onus provisions flip the usual process for granting bail on its head; instead of children being afforded a presumption in favour of bail, the reverse onus provisions mandate a presumption that children, in certain circumstances, will not be granted bail unless they satisfy the court otherwise.[525]

YAC stated in its submission:

> YAC's view is that this amendment is not necessary and no justification is provided for it. The Queensland Parliament amended the YJ Act as recently as last December to require that the court or a police officer **must** keep a child in custody *if there is an unacceptable risk that the child will commit an offence that endangers the safety of the community or the safety or welfare of a person* which cannot be adequately mitigated by imposing appropriate conditions (s 48AAA). As such, there are no grounds, only a few months later and with no critique of the provision, to justify now inserting a requirement on the child to "show cause". An amendment which reverses the onus of proof is a serious step which is likely to have the greatest impact on the most disadvantaged and/or vulnerable children – those in care and Aboriginal and/or Torres Strait Islander children.[526]

The explanatory notes state:

> It is … safeguarded by providing clear guidance on the considerations which are to be taken into account in determining whether cause has been shown and the requirement to give reasons for releasing the child or keeping the child in custody. This policy is also regarded as warranted to ensure the community's

[523] *Legislative Standards Act 1992*, s 4(3)(d).

[524] Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p 36.

[525] Submission 44, p 8.

[526] Submission 64, p 13.

> safety from serious offending behaviour, as well as to ensure the accused's presence at trial and prevent interferences with the course of justice.[527]

However, this justification does not explore how the reversal of onus of proof, where the provision makes a presumption against bail, is something that is inherently impractical to test or would see the child be in a position to be able to overturn the presumption.

The explanatory notes also provide this justification:

> Any impacts on this principle is safeguarded by the specific cohort of youth offenders to which the show cause provisions apply.[528]

This justification merely refers to the category of offenders to which it applies, and does not explain the reasoning behind (and thus the justification for) the breach of fundamental legislative principle.

3.2.6.4 Committee conclusion

The committee considers the reversal of the onus of proof involved in the presumption against bail is justified in the circumstances.

Clauses 13 and 15 – owner deeming provisions for hooning offences

3.2.6.5 Summary of provisions

Clauses 13 and 15 of the Bill amend sections 755 and 756 of the PPRA respectively, both of which relate to circumstances where the owner of a vehicle fails to provide a statutory declaration within 14 days after receiving a type 1 vehicle related offence notice. An owner who fails to provide a statutory declaration will:

- commit a summary offence of failing to provide a statutory declaration unless they have a reasonable excuse (maximum penalty 100 penalty units)[529]
- be presumed to be the driver of the vehicle involved in the hooning offence even if the actual offender may have been someone else.[530] It will be a defence for the owner to prove, on the balance of probabilities, that the owner was not the driver of the vehicle when the hooning offence happened.[531]

3.2.6.6 Issue of fundamental legislative principle

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not reverse the onus of proof in criminal proceedings without adequate justification.[532]

Legislation should not reverse the onus of proof in criminal matters, and it should not provide that it is the responsibility of an alleged offender in court proceedings to prove innocence:

> For a reversal to be justified, the relevant fact must be something inherently impractical to test by alternative evidential means and the defendant would be particularly well positioned to disprove guilt.[533]

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527 Explanatory notes, p 10.

528 Explanatory notes, p 10.

529 PPRA, s 755(5). A penalty unit is currently $133.45 – Penalties and Sentences Regulation 2015, s 3.

530 PPRA, s 756(2).

531 PPRA, s 756(4).

532 *Legislative Standards Act 1992*, s 4(3)(d).

533 Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p 36.

Generally, in criminal proceedings:

- the legal onus of proof lies with the prosecution to prove the elements of the relevant offence beyond reasonable doubt, and
- the accused person must satisfy the evidential onus of proof for any defence or excuse he or she raises and, if the accused person does satisfy the evidential onus, the prosecution then bears the onus of negativing the excuse or defence beyond reasonable doubt.[534]

These amendments raise issues concerning the appropriateness of reversal of the onus of proof in criminal proceedings. Failing to provide a statutory declaration will result in the commission of a summary offence, unless a person can provide 'a reasonable excuse'. Further, failing to provide a statutory declaration will result in the person being presumed to have been the driver of the vehicle when it was involved in the hooning offence.

These provisions also give rise to human rights issues regarding rights in criminal proceedings under section 32 of the HRA, and are considered in that light in section 4 of this report on the human rights aspects of the Bill.

3.2.6.7 Comment

The explanatory notes do not explicitly raise the issue of reversal of onus of proof in relation to these particular amendments. The explanatory notes do include this general statement:

> … The commission of type 1 vehicle related offences may endanger the community and the prevalence of these offences is a legitimate community concern. Robust legislation that addresses this issue is warranted. These amendments place a strong emphasis on the owner of a vehicle used to commit a type 1 vehicle related offence to cooperate with police and to be accountable for the use of his or her vehicle.[535]

In relation to the offence of failing to provide a statutory declaration without a 'reasonable excuse' the explanatory notes state:

> Concerns that this new offence may impact upon a person's rights or liberties are minimised as the defendant may avoid liability if the person can substantiate a reasonable excuse for failing to comply with the requirement.
>
> This new offence incentivises owners to provide declarations which is reflective of the importance of ensuring that police have the necessary tools to properly investigate type 1 vehicle related offences and to bring to justice offenders who represent a clear risk to other road users and members of the community.[536]

Such 'reasonable excuse' provisions are discussed in some detail in the Office of the Queensland Parliamentary Counsel, *Principles of good legislation: Reversal of onus of proof*. That discussion starts with the following:

> If legislation prohibits a person from doing something 'without reasonable excuse' it would seem in many cases appropriate for the accused person to provide the necessary evidence of the reasonable excuse. While there is no Queensland case law directly on point, the Northern Territory Supreme Court has held that the onus of proving the existence of a reasonable excuse rested with the defendant on the basis that the reasonable excuse was a statutory exception that existed as a separate matter to the general prohibition… That approach is consistent with the principles used to determine whether a provision contains an exception to the offence or whether negativing the existence of the reasonable excuse is a matter to be proved by the prosecution once the excuse has been properly raised …

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534 See Office of the Queensland Parliamentary Counsel, *Principles of good legislation: Reversal of onus of proof*, p 3, at legislation.qld.gov.au/file/Leg_Info_publications_FLP_Reversal_of_Onus1.pdf.

535 Explanatory notes, p 11.

536 Explanatory notes, p 12.

> … [It] is understood that in Queensland, 'reasonable excuse provisions' are drafted on the assumption that the *Justices Act 1886*, section 76 will apply and place both the evidential and legal onus on the defendant to raise and prove the existence of a reasonable excuse. On the other hand, … departments have often taken the view in their Explanatory Notes that a provision containing an exemption where a reasonable excuse exists is an excuse for which only the evidential onus lies with the accused.[537]

There follows some examples where departments have disagreed with the view (expressed by the former Scrutiny of Legislation Committee) that reasonable excuse provisions involve a reversal of the onus of proof.

The OQPC discussion concludes:

> It seems likely that in most cases a reasonable excuse will constitute a statutory exception to be proved by the defendant. However, in the absence of an express statement as to the allocation of the onus, the question will ultimately need to be determined by a court having regard to the established rules of statutory interpretation.[538]

Elsewhere, the OQPC has noted:

> Generally, for a reversal to be justified, the relevant fact must be something inherently impractical to test by alternative evidential means and the defendant would be particularly well positioned to disprove guilt.
>
> For example, if legislation prohibits a person from doing something 'without reasonable excuse', it is generally appropriate for a defendant to provide the necessary evidence of the reasonable excuse if evidence of the reasonable excuse does not appear in the case for the prosecution.[539]

As mentioned, in the present case, the explanatory notes for the Bill are silent on this issue. In considering the issue regarding similar provisions in other Bills, explanatory notes justify the reversal of the onus of proof on the basis that establishing the defence would involve matters which would be within the defendant's knowledge or on which evidence would be available to them.[540] It can reasonably be anticipated that matters pertinent to why a statutory declaration was not provided (as required under clause 13) would be peculiarly within the knowledge of a person charged with the offence, and would likely be difficult for a prosecuting authority to establish.

The result of clause 15 is a presumption that an owner of a vehicle is taken to have been the driver of that vehicle if it involved in a hooning offence, even though the actual offender may have been someone else. It will be a defence for a vehicle owner to prove, on the balance of probabilities, that they were not driving the vehicle when the offence took place.

The statement of compatibility indirectly raised this issue in the context of its analysis on the impact of these provisions on the right to be presumed innocent until proven guilty under section 32(1) of the HRA. The statement of compatibility noted:

> Section 755 of the [PPRA], as amended, will only allow the police officer to give notice to the owner of the vehicle involved in the offence. The fact that the person is the owner of the vehicle involved in the offence gives rise to a logical inference that the person was involved in the type 1 vehicle related offence, because most vehicles are usually driven by their owners.[541]

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537 See Office of the Queensland Parliamentary Counsel, *Principles of good legislation: Reversal of onus of* proof, p 25, at legislation.qld.gov.au/file/Leg_Info_publications_FLP_Reversal_of_Onus1.pdf.

538 Office of the Queensland Parliamentary Counsel, *Principles of good legislation: Reversal of onus of proof*, p 26.

539 See the Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: the OQPC Notebook,* p 36.

540 For a recent example, see Fisheries (Sustainable Fisheries Strategy) Amendment Bill 2018, explanatory notes, p 17.

541 Statement of compatibility, p 19.

Further, that '… a reverse legal burden is necessary to achieve the purpose of allowing the effective investigation and prosecution of type 1 vehicle related offences.'[542]

Whilst the supporting material to the Bill suggests that a reversal is needed to ensure effective investigation and prosecution of hooning offences, and it will be a defence for the owner of a vehicle to prove on the balance of probabilities that they were not driving their motor vehicle at the time of the offence, it is likely that this provision breaches the principle that legislation has sufficient regard to the rights and liberties of individuals under section 4(3)(d) of the LSA.

Previous committees have acknowledged that reversals of onus of proof, of varying degrees of severity, are often employed in legislation regulating traffic and motor vehicles. For example, an infringing vehicle detected by speed cameras is taken to have been driven by the registered owner unless that person claims otherwise.[543] More specifically, sections 755 and 756 of the PPRA already operate in this manner in the context of evasion notice offences.

The QHRC raised the issue of reversal of onus of proof in its submission. Whilst it considered the issue largely in the context of human rights impacts, comments made apply also in the context of fundamental legislative principles regarding rights and liberties. For example:

> Of particular concern is the legal burden placed upon the defendant in these circumstances to prove they were not the driver. Usually, the prosecution bears both the legal and evidential burden of proof, as it is for the crown to prove an offence.[544]

In addressing the purpose given in the statement of compatibility for the reverse legal burden (to allow for the effective investigation and prosecution of hooning offences), the QHRC states:

> This reason, of itself, has been found insufficient to warrant a limitation on the right to be presumed innocent, particularly as in this case the defendant is asked to disprove an issue essential to culpability, and the relevant offences include penalties of imprisonment.[545]

3.2.6.8 Committee conclusion

The amendment in clause 13 may be seen to reverse the onus of proof, in providing that a person does not commit an offence (of failing to provide a statutory declaration) if the person has a reasonable excuse. The person bears the onus of proof to show that they had a reasonable excuse.

The amendment in clause 15 may also be seen to reverse the onus of proof, in creating a presumption that an owner of a vehicle is taken to have been the driver of a motor vehicle involved in a hooning offence.

The committee considers that reversing the onus of proof is justified in these instances.

3.2.7 LSA, section 4(3)(f) – protection against self-incrimination

Does the Bill provide appropriate protection against self-incrimination?

Clause 13

3.2.7.1 Summary of provisions

Clause 13 of the Bill expands the criteria in section 755 of the PPRA for issuing what were previously called 'evasion offence notices' to 'type 1 vehicle related offence notice' to capture hooning offences. If it appears to a police officer that it may help the investigation, a police officer may issue a 'type 1 vehicle related offence notice' to the owner of a motor vehicle involved in a hooning offence. The notice will require the owner to provide a statutory declaration stating who was driving the vehicle at

542 Statement of compatibility, p 20.

543 See, for example, Scrutiny of Legislation Committee, *Alert Digest No. 5 of 2002*, p 17.

544 Submission 48, p 23.

545 Submission 48, p 25.

the time of the offence. The owner must comply with the requirement to give a statutory declaration unless they have a reasonable excuse (maximum penalty – 100 penalty units).[546]

3.2.7.2 Issue of fundamental legislative principle

Whether legislation has sufficient regard to the rights and liberties of the individual depends on whether, for example, it provides appropriate protection against self-incrimination.[547]

The principle that legislation should provide appropriate protection against self- incrimination:

> … has as its source the long established and strong principle of common law that an individual accused of a criminal offence should not be obliged to incriminate himself or herself.[548]
>
> Provisions denying the privilege [against self-incrimination] are rarely essential to the operation of legislation, although there is a perception that they are essential.[549]

Denial of the protection afforded by the privilege against self-incrimination is only potentially justifiable if:

- the questions posed concern matters that are peculiarly within the knowledge of the persons to whom they are directed and that would be difficult or impossible to establish by any alternative evidential means
- the legislation prohibits use of the information obtained in prosecutions against the person
- in order to secure this restriction on the use of the information obtained, the person should not be required to fulfil any conditions (such as formally claiming a right).[550]

This amendment raises issues regarding appropriate protection from self-incrimination, as it may require a person to admit that they were the driver of a vehicle at the time it was involved in a hooning offence. This is exacerbated by the fact that it is an offence to fail to comply with a requirement to provide a statutory declaration (without a reasonable excuse). A person may, in essence, have to choose between incriminating themselves in a hooning offence by making a statutory declaration admitting to being the driver, or committing an offence by failing to provide a statutory declaration to that effect.

3.2.7.3 Comment

Whilst the explanatory notes highlight that the statutory declaration provisions may be seen to adversely affect the right of individuals to be provided appropriate protection against self-incrimination, there is limited analysis provided as to the justification. Commenting more generally on the amendments, the explanatory notes state:

> …the amount of information sought is minimal, is necessary to effectively investigate and solve type 1 vehicle related offences, and is information expected to be readily within the knowledge of every responsible vehicle owner.[551]

Whilst the questions posed in the statutory declaration requirements do concern matters that may be peculiarly within the knowledge of the owner of the motor vehicle, it may not necessarily be difficult

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546 A penalty unit is currently $133.45 – Penalties and Sentences Regulation 2015, s 3.

547 LSA, s 4(3)(f).

548 Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p 52.

549 Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles:* The *OQPC Notebook*, p 52.

550 Scrutiny of Legislation Committee, *Alert Digest 1 of 2000*, p 7, para 57; *Alert Digest 13 of 1999*, p 31; and *Alert Digest 4 of 1999*, p 9, para 1.60.

551 Explanatory notes, p 11.

or impossible to establish these matters by alternative evidential means (eg through advanced camera technology) which could provide adequate protection against self-incrimination.

It is noted that section 755 of the PPRA already operates in regard to evasion notice offences and similar statutory declaration provisions exist for other traffic and motor vehicle offences.

3.2.7.4 Committee conclusion

The committee considers any breach of fundamental legislative principle in these circumstances is justified.

3.2.8 LSA, section 4(3)(g) – rights and liberties

Clauses 21, 24, 26

Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?

3.2.8.1 Summary of provisions

Some provisions in the Bill will have retrospective effect.

Clause 26 inserts proposed section 52AA into the YJA, relating to electronic monitoring conditions.

An electronic monitoring condition will be able to be applied to a child charged with an offence, whether the offence was allegedly committed, or the child was charged, before or after the commencement.

Clause 21 amends section 48AA of the YJA, which contains the matters a court or police officer considers in making particular decisions about release and bail, and adds the consideration of whether a parent, guardian or another person has indicated a willingness to support the young offender on bail.

This consideration will arise in relation to a child charged with an offence, whether the offence was allegedly committed, or the child was charged, before or after the commencement.

Clause 24 introduces proposed section 48AF into the YJA, to require a court or police officer to refuse to release from custody, a child who has been charged with a prescribed indictable offence which was committed while at large or awaiting trial or sentencing, unless the child can show cause why their detention in custody is not justified.

This provision will apply to a child charged with a prescribed indictable offence, regardless of whether that prescribed indictable offence, or the other indictable offence the child was already charged with when allegedly committing the prescribed indictable offence, was allegedly committed before or after the commencement.

3.2.8.2 Issue of fundamental legislative principle

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not adversely affect the rights and liberties, or impose obligations retrospectively.

Strong argument is required to justify an adverse effect on rights and liberties, or imposition of obligations, retrospectively.[552]

3.2.8.3 Comment

The explanatory notes state:

- in relation to the electronic monitoring provisions:

[552] LSA, s 4(3)(g).

> … any [retrospective] impact is considered warranted, given electronic monitoring is aimed at promoting compliance with bail conditions [and] community safety as well as the safety of the young person.[553]

- in relation to the provisions relating to parental or other support associated with bail conditions:

  … any impact is considered warranted, given the intent is to promote compliance with bail conditions and community safety.[554]

- in relation to the presumption against bail:

  It is considered any departure from this principle is outweighed by the need to protect the community from harm.[555]

3.2.8.4 Conclusion

The committee considers any breach of fundamental legislative principle in these circumstances is justified.

3.3 Institution of parliament

3.3.1 LSA, section 4(4)(a) – delegation of legislative power

Clause 26 –areas for tracking device conditions being prescribed by regulation

Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?

3.3.1.1 Summary of provisions

Clause 26 introduces proposed section 52AA into the YJA to provide for a tracking device condition (discussed above). A tracking device condition can only be imposed by a court on a child where both the court and the child are in a geographical area prescribed by regulation.[556]

It is intended that Townsville, North Brisbane/Moreton and Logan/Gold Coast will be prescribed areas for the first 12 months to trial electronic monitoring.[557]

3.3.1.2 Issue of fundamental legislative principle

Whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, the Bill allows the delegation of legislative power only in appropriate cases and to appropriate persons.[558]

In providing for the areas to be prescribed by regulation, these provisions raise the issue whether this is an appropriate delegation of legislative power.

3.3.1.3 Comment

The explanatory notes do not canvas this issue. It could be noted that generally, a justification for having matters prescribed by regulation will centre on a need for flexibility.

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553 Explanatory notes, p 9.

554 Explanatory notes, p 9.

555 Explanatory notes, p 10.

556 Proposed ss 52AA(1)(d) and (e), YJA.

557 Statement of compatibility, p 3.

558 LSA, s 4(4)(a).

Here it might be noted:

- The provisions relating to a tracking device condition are only expected to operate as a 12 month trial, and the Bill includes a sunset clause whereby the provisions expire 2 years after commencement.[559]
- The geographical locations intended to be prescribed have already been identified (as referenced above).

Arguably, for a 12 month trial in announced locations, there is no need for flexibility in prescribing such matters, which could instead be dealt with in primary legislation, perhaps in the bill itself.

Indeed, this approach is adopted in the provisions in the Bill regarding scanning of persons in two precincts in what is also described and intended as a 12 month trial.[560] Those precincts – the Surfers Paradise and Broadbeach Safe Night Precincts - are prescribed in the Bill itself.[561]

3.3.1.4 Committee conclusion

The committee considers the delegation of legislative power to prescribe trial areas by regulation is justified in the circumstances.

3.4 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 should contain.

Explanatory notes were tabled with the introduction of the Bill. Generally, the notes are fairly detailed and 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.

However, some observations can be made.

Under the heading *Consistency with fundamental legislative principles* this statement appears:

> The Bill has been drafted with due regard to the fundamental legislative principles (FLPs) outlined in the *Legislative Standards Act 1992* (LSA) by achieving an appropriate balance between individual rights and liberties and the protection of the broader Queensland community. There are, however, a number of FLPs that may be perceived to be impacted by these amendments.[562]

This statement falls short of meeting the statutory requirement that explanatory notes for a Bill are to include (in clear and precise language):

> [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. [563]

In particular, the statement that a number of fundamental legislative principles 'may be perceived to be impacted' by the amendments considerably understates the reality that various amendments contain numerous clear instances of breaches of fundamental legislative principle by impacting on rights and liberties of the individual.

Whilst the explanatory notes do then proceed to address many of the impacts that the Bill will have on the rights and liberties of individuals, there were instances where the explanatory notes could have

559 Proposed s 52AA(10), YJA.

560 See p 3 of the explanatory notes, and in the explanatory speech, Hon MT Ryan, Minister for Police and Corrective Services and Minister for Fire and Emergency Services, Record of Proceedings, 25 February 2021, p 238.

561 Clause 6, inserting proposed s 39A of the PPRA.

562 Explanatory notes, p 8.

563 LSA, s 23(1)(f).

provided further information addressing reasons for any inconsistency with fundamental legislative principles.

Under the heading *Consultation*, the explanatory notes state:

> Due to the nature of the PPRA amendments, no external consultation was undertaken ahead of the development of this Bill.[564]

It is not clear why those amendments did not warrant being the subject of consultation. However, the explanatory notes do not provide any further information to explain this statement.

Bearing in mind the desirable outcome of better informing the community about proposed legislation, best practice is for explanatory notes to:

- clearly identify each specific issue of fundamental legislative principle that arises and the specific clause giving rise to the issue
- set out the reasons for any inconsistency with the fundamental legislative principles
- provide any justification for that inconsistency.

3.4.1.1 *Committee conclusion*

The committee notes that the explanatory notes otherwise generally comply with the requirements set out in part 4.

[564] Explanatory notes, p 12.

4 Compliance with the *Human Rights Act 2019*

The portfolio committee responsible for examining a Bill must consider and report to the Legislative Assembly about whether the Bill is not compatible with human rights, and consider and report to the Legislative Assembly about the statement of compatibility tabled for the Bill.[565]

A Bill is compatible with human rights if the Bill:

(a) does not limit a human right, or

(b) limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the HRA.[566]

The HRA protects fundamental human rights drawn from international human rights law.[567] Section 13 of the HRA provides that a human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

The committee has examined the Bill for human rights compatibility. The committee brings the following to the attention of the Legislative Assembly.

4.1 Human rights compatibility

4.1.1 Electronic monitoring devices as a condition of bail for offenders aged 16 and 17 years old in certain circumstances – clause 26

Clause 26 inserts a new provision (s 52AA) into the YJA and are designed to permit the imposition of electronic monitoring as a condition of bail for young offenders, subject to certain criteria being met.

4.1.1.1 The nature of the human rights

The statement of compatibility explained that clause 26 (and related clauses) engages the following human rights:

- The right to equality and non-discrimination (HRA, s15)
- The right to privacy and non-interference with family (HRA, s25(a))
- The right to protection of families (HRA, s26(1))
- The best interests of the child (HRA, s26(2))
- Freedom of movement (HRA, s19)
- Freedom of association (HRA, s22)
- The right of Indigenous peoples to maintain kinship ties (HRA, s28(2)(c))
- The right to equality and non-discrimination (HRA, s15)

The changes proposed to be introduced by clause 26 would sit alongside the reforms introduced by clause 24, that seek to reverse the presumption of bail with respect to a certain category of young offenders. In addition, the changes proposed in this clause may have retrospective effect, contrary to

565 HRA, s 39.

566 HRA, s 8.

567 The human rights protected by the HRA are set out in sections 15 to 37 of the Act. A right or freedom not included in the Act that arises or is recognised under another law must not be taken to be abrogated or limited only because the right or freedom is not included in this Act or is only partly included; HRA, s 12.

section 35(1) of the HRA, because they apply 'whether the offence was allegedly committed, or the child was charged before or after the commencement' of the Bill.[568]

Some of the key human rights which arise in respect of clauses 25 and 26 are discussed below.

Right to equality and discrimination – HRA, s15

Section 15 of the HRA protects the right of 'recognition and equality before the law'. This right includes the right to enjoy human rights without discrimination, with equal protection of the law and equal and effective protection against discrimination.[569] The right to equal and effective protection against discrimination is particularly relevant to clause 26 which seeks to treat people differently depending on their age (for example whether they are between 16-18 years old) and their place of residence (for example whether they reside in a prescribed area).[570]

Right to privacy – HRA, s25(a)

Section 25 of the HRA protects the right of a person not to have his or her 'privacy, family, home or correspondence unlawfully or arbitrarily interfered with'[571] and not to have their personal reputation unlawfully attacked.[572]

The rights protected in section 25 can be subject to justifiable limitations when reasonably necessary to do so in a free and democratic society based on human dignity, equality and freedom.

Relationship between child and parents and the best interests of the child – HRA, s26

The rights protected in section 26 of the HRA are based on those protected in Article 3 of the *Convention of the Rights of the Child* (CRC) and Article 24(1) of the International Covenant on Civil and Political Rights (ICCPR). Central to each of these rights is the principle of the 'best interests of the child'. The child's 'best interests' must also be considered according to the specific situation of the child or children affected and consider their personal context and needs.

4.1.1.2 Nature of the purpose of the limitation

The overall objectives of the amendments have been described as 'responding to the characteristics of the offending behaviours of serious recidivist youth offenders and strengthening the youth justice bail framework'.[573]

The introduction of electronic monitoring as a bail condition for a certain category of young offenders has been described as forming part of the Queensland Government's broader response to 'the continued risk posed to our community by a cohort of serious and persistent youth offenders'.[574] The Statement further notes that '[s]eeking to prevent or reduce crime is a proper purpose consistent with the values of our society'.[575]

The more specific purposes of this part of the Bill that are articulated in the statement of compatibility are as follows:

a) to deter the child from committing further offences on bail, knowing they are being monitored, and thereby keep the community safe

568 Explanatory notes p. 9.

569 HRA, s 15(1)-(5).

570 Statement of compatibility p 3.

571 HRA, s 25(a).

572 HRA, s 25(b).

573 Explanatory notes, p 1.

574 Explanatory notes, p 1.

575 Statement of compatibility, p 8.

b) to allow police to investigate whether the child has or has not complied with their bail conditions and/or committed a crime, if an alert is reported to them, and

c) overall, to lower rates of reoffending of children while on bail.[576]

The proportionality of the specific provisions must be considered, having regard to their impact on protected rights, and having regard to any alternative measures reasonably available. Stakeholder views on electronic monitoring devices are discussed above.

Relevantly in the human rights context, as noted by the QHRC, the proposed provisions leave open the possibility that information collected as a result of electronic monitoring could be used not only to investigate offences involving the child on bail, but also as evidence against other third parties.[577] The QHRC has also noted the potential for the proposed provisions to negatively impact on the privacy rights of bail applicants and their families because of the need to install and maintain monitoring equipment in the child's residence.[578] The QHRC pointed to the need to include safeguards, such as those contained in the *Bail Act 2000* (NZ), that empower an occupant to refuse to provide consent to a person being electronically monitored at their address.[579]

4.1.1.3 Relationship between the limitation and its purpose

In order to describe the relationship between the limitation being imposed by the Bill and its purpose, it is necessary to consider whether imposing electronic monitoring as a condition of bail for certain categories of young offenders has been shown to be an effective means of deterring those on bail from reoffending and assisting in the investigation of compliance with bail conditions.

Considerable academic research and evaluative analysis is noted in the statement of compatibility that suggests that electronic monitoring as a condition of bail is effective at deterring further offending on bail, improving the efficiency of police investigations into compliance with bail conditions and lowering rates of reoffending.[580]

Other studies of the effectiveness of electronic monitoring as a tool to decrease crime have presented mixed results.[581] There are also collateral consequences outside the home associated with bracelet effects in the use of electronic monitoring: while some offenders may feel ashamed about wearing the tag, others may view it as a badge of honour.[582]

Taken together, this suggests that the effectiveness of electronic monitoring at reducing the rate of reoffending on bail is far less clear than the position reflected in the statement of compatibility, and that effectiveness may be highly dependent on other contextual considerations, including rehabilitation and support services available to the person subject to electronic monitoring. It also suggests that great care must be taken to ensure that adequate safeguards existing to protect the rights of young people who are subject to electronic monitoring conditions, given the potentially inconclusive nature of the effectiveness of this particular tool at achieving the legitimate purposes described above.

576 Statement of compatibility, p 8.

577 Submission 48, p 14.

578 Submission 48, p 14.

579 Submission 48, p 14.

580 Statement of compatibility, p 8.

581 Samuelson Law, Technology & Public Policy Clinic, *Electronic Monitoring of Youth in the California Juvenile Justice System* (U.C. Berkeley School of Law, Berkeley, CA), 2017, p 2.

582 Hunter M, *The trouble with tagging*, Community Care 30 (November–6 December). See also submission 9, pp 6-7, submission 64, p 16 and submission 75, p 4.

It is noted, however, that the changes proposed in clause 26 will only apply to certain locations and will be subject to an evaluation after being in force for 12 months. This provides some limitations on the rights-intrusive impacts of the proposed changes.

4.1.1.4 Whether there are less restrictive and reasonably available ways to achieve the purpose

The Queensland Youth Justice Strategy *Working Together Changing the Story: Youth Justice Strategy 2019-2023* (Youth Justice Strategy) and the Atkinson Report upon which it is based, suggests that there are a range of alternative measures for lowering rates of reoffending in children, including approaches that are rehabilitative and diversionary in nature.[583] The Four Pillars contained in the Youth Justice Strategy adopt this focus on diversion and rehabilitation and contain a range of reasonably available ways to address youth offending, with less coercive and less rights-intrusive means to those contemplated in the Bill.[584]

The Atkinson Report specifically considered the use of electronic monitoring devices 'together with community or home detention as an alternative to detention in a youth detention centre'.[585] The Atkinson Report also noted that 'the literature on programs that work to prevent offending is unequivocal; that is, programs that are therapeutic rather than control oriented have the best chance of success with young offenders' and that other factors strongly related to reductions in recidivism that were consistently identified in this research included the need for implementation of quality services and programs including clear protocols, staff training, monitoring and quality assurance, and improvement and the correct amount of services, delivered for a suitable time and with sufficient frequency.[586]

The statement of compatibility states that some of these alternatives were considered when developing the Bill but they were determined to be:

> … not be as effective in achieving the purposes of deterrence, facilitating investigations by police and reducing reoffending rates, because it would only achieve those purposes for children charged with a smaller range of offences (that is, fewer categories of crime will be deterred).[587]

The statement of compatibility also provides that:

> In any event, there is no reason why additional supports cannot be provided alongside electronic monitoring.
>
> It is important to emphasise that the power to impose a tracking device condition is subject to the court's discretion if it is satisfied that the condition would be appropriate in the circumstances.[588]

4.1.1.5 Balancing the importance of the purpose of the limitation and the importance of preserving the human rights

The statement of compatibility acknowledges:

> … that electronic monitoring represents a large intrusion into privacy, especially for children. Monitoring devices may also be visible and therefore a source of stigma and shame for children when at school, work or in the community.[589]

Given the uncertainty as to whether electronic monitoring is an effective tool to achieve the aims sought by this clause, the need to take a cautious approach is particularly critical. It is noted that

583 Atkinson Report, p 16.

584 Atkinson Report, p 9.

585 Atkinson Report. p 10.

586 Atkinson Report. p 26.

587 Statement of compatibility, p 8.

588 Statement of compatibility, p 9.

589 Statement of compatibility, p 10.

legislative safeguards have been included by way of notes contained in the proposed new section 52AA which refer to rights considerations. If these safeguards are adhered to, it is considered possible for clause 26 to achieve an appropriate balance between the legitimate goals sought in the Bill, and the impact on the rights of young people subject to these provisions.

It is also noted that the changes proposed in clause 26 will only apply to certain locations and will be subject to an evaluation after being in force for 12 months. This also provides some limitations on the rights-intrusive impacts of the proposed changes.

Accordingly, on balance, the committee concludes that clause 26 constitutes a justifiable limitation on the rights described above.

4.1.2 Parental or other support associated with youth bail – clause 21

As noted above, section 48AA of the YJA contains the matters a court or police officer considers in making particular decisions about release and bail, including whether there is an unacceptable risk that the child will commit an offence that endangers the safety of the community or the safety or welfare of a person; not surrender into custody in accordance with a condition imposed on the release or a grant of bail to the child; or the child will commit an offence; or the child will interfere with a witness or otherwise obstruct the course of justice, whether for the child or another person.[590] Section 48AA(4)(a) contains a list of considerations courts and police officers may have regard to when making a decision about these types of risks.

Clause 21 of the Bill amends section 48AA(1) to insert a new subsection (s 48AA(1)(d)) which ensures section 48AA applies to situations where a court or police officer is deciding whether a child has shown cause under new section 48AF(2) as to why their detention is not justified.[591]

This clause also inserts an additional matter into section 48AA(4) that the court may have regard to when making a decision mentioned in section 48AA(1), namely whether a parent of the child, or another person, has indicated a willingness to the court or police officer that the parent or other person will do any of the following things:

- support the child to comply with the conditions imposed on a grant of bail
- notify the chief executive or a police officer of a change in the child's personal circumstances that may affect the child's ability to comply with the conditions imposed on a grant of bail
- notify the chief executive or a police officer of a breach of the conditions imposed on a grant of bail. [592]

Clause 21 also inserts a new subsection 48AA(7) which would provide that a bail authority must not decide there is an unacceptable risk or refuse to release a child from custody *solely* because the child has no family support and/or will not have accommodation or adequate accommodation on release from custody.

4.1.2.1 Nature of the human rights

The statement of compatibility explained that clause 21 (and related clauses) engages the following human rights:

- Right to privacy – HRA, s25(a)
- Relationship between child and parents – HRA, s25(a)
- Best interests of the child – HRA, s26(1)

590 See also YJA, s48AAA.

591 Explanatory notes, p 17.

592 Explanatory notes, p 17.

- Cultural rights and in particular, kinship ties – HRA, s28(2)(c)

This clause also engages section 15 of the HRA which protects the right to equality, as the proposed changes have the potential to discriminate against certain children on the basis of parental status, social origin and/or race.

4.1.2.2 Nature of the purpose of limitation

The explanatory speech accompanying the Bill explains that the amendments contained in clause 21 are designed to 'increase the involvement of a young person's parent, guardian or other appropriate and responsible person to assist the court or a police officer when making a decision about bail and to support the youth to comply with their bail conditions.[593] This is designed to complement the existing requirement that parents, guardians or support persons be notified when a young person is involved in an alleged criminal offence and the court's ability to require a parent to attend court.[594]

The amendments proposed in this clause are also designed to respond to the findings of the Atkinson Report and the corresponding Four Pillars of the *Youth Justice Strategy* which posit that greater participation by parents, guardians or other persons will lead to greater compliance by the child with their bail conditions.[595]

This purpose appears rights-enhancing in nature, and reflects principles set out by the UN Committee on the Rights of the Child in its General Comment 24 on the rights of children in the juvenile justice system to have access to the support of their parents or other care givers.

However, care must be taken to ensure that the implementation of these provisions does not have any unintended rights-abrogating impacts, including discriminatory impacts on children who may not enjoy a stable home environment or positive relationship with their parents. This risk is recognised to some degree by the insertion of a new subsection 48AA(7) which would provide that a bail authority must not decide there is an unacceptable risk or refuse to release a child from custody solely because the child has no family support and/or will not have accommodation or adequate accommodation on release from custody. However, the wording of the provision means that these matters can be taken into account by the bail authority, including as reasons *not* to grant release on bail, as long as there are other factors relevant to the overall decision to grant bail.

4.1.2.3 The relationship between the limitation and its purpose

The changes proposed in this clause will allow the bail authority to consider whether a parent of the child, or another person, has indicated a willingness to the court or police officer that the parent or other person will support the child to comply with the conditions imposed on a grant of bail and notify the chief executive or a police officer of a change in the child's personal circumstances that may affect the child's ability to comply with the conditions imposed on a grant of bail.

As noted above, the purpose of these changes is to promote greater participation by parents, guardians or other persons in the hope that this will lead to greater compliance by the child with their bail conditions.

In addition, as currently drafted, the changes may have the effect of discriminating against a young person who does not have access to parental or other forms of adult support if they can be interpreted as *disadvantaging* a child who would otherwise be eligible for release on bail.

This potential for discrimination is also acknowledged in the statement of compatibility which provides:

> … adding an additional consideration bail decision-makers may choose to take into account may increase the risk that children will be detained, which is a serious limit on the rights of children to their liberty and

[593] Queensland Parliament, record of proceedings, 25 February 2021, pp 238-240.

[594] See PPRA, ss 392 and 421. See also Statement of compatibility, p 10.

[595] Statement of compatibility, p 11.

to protection in their best interests. In some circumstances, it may compound the disadvantage faced by a child with a dysfunctional family or home environment.[596]

4.1.2.4 Whether there are any less restrictive and reasonably available ways to achieve the purpose

It is not clear within the explanatory material accompanying the Bill why it is necessary to include specific reference to the presence of a parent or other person who would assist the child to comply with bail conditions, when the existing provision already provides for consideration to be given to the child's 'home environment', 'developmental needs' and 'any other matter' (along with specific considerations of cultural relationships and kinship ties with respect to Aboriginal and Torres Strait Islander children). If the intention was to respond to those aspects of the *Youth Justice Strategy* that aim to improve the capacity of families to divert young offenders away from criminal activity or support their rehabilitation and compliance with bail, then a range of other less rights restrictive mechanisms are reasonably available (and set out above with respect to clause 26).

Some of these alternatives are noted in the statement of compatibility and include:

- relying upon existing non-coercive ways of engaging family, such as notice requirements under ss 392 and 421 of the PPRA
- relying upon the existing power of the court under s 70 of the YJA to require a parent to attend court, which carries criminal sanctions for non-compliance
- relying upon restorative justice programmes
- providing additional supports to children who do not have family supports.[597]

Each of these alternatives would more closely align with the findings of the Atkinson Report and the Four Pillars of the Youth Justice Strategy.

Despite this, the statement of compatibility appears to reject the availability of these alternatives on the basis that they would not be effective for 'parents who remain disengaged despite being notified by police or required to attend by court' and by parents who are 'choosing not to engage' with family support services.[598]

4.1.2.5 Balancing the importance of the purpose of the limitation and the importance of preserving the human rights

Clause 21 has the potential to give rise to discrimination against vulnerable children on the basis of their family environment and parental status. Although the potential for this rights infringement is limited to some degree, including by proposed new section 47AA(7), it remains a significant limitation on the right to equality protected by section 15 of the HRA and the rights of the child protected by section 26 of the HRA.

In addition, while the purpose of the provision (to improve compliance with bail conditions by young offenders and reduce reoffending) is legitimate, it remains unclear whether the changes proposed in clause 21 will be effective at achieving this purpose. In particular, it remains unclear as to whether these changes would motivate otherwise disengaged parents and caregivers to support their child (or a child they know) to comply with bail conditions.

However, on balance the committee is satisfied that any limitation on human rights is reasonable and demonstrably justified in the circumstances.

596 Statement of compatibility, p 12.

597 Statement of compatibility, p 12.

598 Statement of compatibility, p 12.

4.1.3 Presumption against bail for certain youth offenders – clause 24

Under the current provisions of the YJA, a child charged with an offence is required to be released from custody (section 48) and a presumption of bail in favour of the child generally exists. This Bill inserts a new provision, section 48AF, to create a presumption against bail for a limited class of youth offenders, that must be applied by both police and the courts, requiring the child to 'show cause' for their release.

In other words, under the proposed new provision, a child that meets the prescribed criteria must be refused bail without any consideration of the matters listed in s 48AA. The child must then 'show cause' why their detention is not justified. It is only when considering the child's claim that the standard factors relevant to bail – including the personal circumstances of the child – are considered by the bail authority.

A 'prescribed indicatable offence' is defined in clause 34 as including offences that attract a life sentence, serious drug offences, serious violent offences such as choking, wounding and assaults, dangerous operation of a vehicle and unlawful use or possession of a vehicle.

4.1.3.1 Nature of the human rights

The statement of compatibility explained that clause 24 of the Bill (and related clauses) engages the following human rights:

- Right to liberty and security of person- HRA, s 29(6)
- Rights of the child – HRA, s 26(2)

These rights primarily arise from the fact that the proposed new provision reverses the presumption in favour of bail for certain children and removes the discretion of the bail authority to have regard to the individual circumstances of the child unless and until the child discharges the 'show cause' burden.

The following additional rights are engaged or potentially engaged by the changes introduced by clause 24:

- Rights in criminal proceedings – HRA, s 32

The nature of these rights, which are also relevant to the consideration of other clauses within the Bill, are set out briefly below. There is also a concern that clause 24 may have retrospective effect, contrary to section 31 of the HRA, by virtue of clause 32 which provides that the 'show cause' provision applies in relation to a child in custody in connection with a charge of a prescribed indictable offence whether the offence was allegedly committed, or the child was charged, or any step in the proceeding for the offence was taken, before or after the commencement of the provision.

Right to liberty and security of person - HRA, s 29

Section 29 of the *HRA* provides that every person in Queensland has the right to liberty and security, which is set out in the form of the following restrictions on how a person can be treated when suspected of or apprehended for breaching the law.

These provisions are based on Articles 9 and 11 of the ICCPR and are complementary to:

- the right to freedom of movement, protected in section 19
- the right to humane treatment when deprived of liberty, protected in section 30
- protection from medical or scientific experimentation or treatment without consent, protected in section 17.[599]

Article 9 of the ICCPR and the equivalent section 29 in the HRA recognise that sometimes deprivation of liberty is justified, for example, in the enforcement of criminal laws, and where the limitation is

[599] Queensland Human Rights Commission, Fact Sheet on s 29 of the HRA.

reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

Particularly relevant to this Bill is the scope of the right to liberty and security of person in circumstances where a child is deprived of their liberty while awaiting trial. It is important to note that the rights listed above apply any time a person is not free to leave a place by their own choice (for example because they are subject to electronic monitoring), not just when a person is detained in custody.

At the heart of this right is the concept of 'arbitrary detention' which requires a focus on the legal process used to authorise the person's deprivation of liberty. As the QHRC has explained, a process of depriving someone's liberty can be both lawful and arbitrary.[600]

The UN Human Rights Committee has also explained that detention that initially complies with this standard, can become arbitrary if it continues without being justified or if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence.

The Victorian Human Rights Commission has explained that for detention to avoid being characterised as 'arbitrary':

- it should not continue beyond the period for which a state party can provide appropriate justification
- where a person is initially detained for a limited period for a specific purpose, there must be an appropriate justification to continue to detain him or her after this purpose no longer applies
- where there are less intrusive measures that can achieve the same end they should be used, for example, the imposition of reporting obligations, sureties or other conditions.

The VHRC has also noted that an individual should not be kept in detention as a matter of convenience, or when the detaining officer may not genuinely or reasonably hold the belief that a crime is imminent.

In the case of *Re application for bail by Islam* which was cited in the statement of compatibility, the ACT Supreme Court found that provisions that required (adult) bail applicants to show 'exceptional circumstances' before having a normal assessment for bail undertaken were inconsistent with the right to liberty under s 18 of the ACT *Human Rights Act 2004.*[601]

Rights in criminal proceedings – HRA, s 32

Section 32 of the *HRA* protects the rights of those charged with a criminal offence, including the right to be presumed innocent until proved guilty according to law (s 32(1)) and the right to a range of minimum guarantees (listed in s 32(2)) including the right to be tried without unreasonable delay (s 32(2)(c)). Section 32 of the HRA also provides special protection for children charged with criminal offences to be treated in a way that 'takes account of the child's age and the desirability of promoting the child's rehabilitation' (s 32(3)) and ensures that persons convicted of a criminal offence have the right to have their conviction and any sentence imposed reviewed by a higher court (s 32(4)).

This section is based on Article 14 of the ICCPR and the rights contained in section 32 are complementary to the rights contained in section 31 of the HRA, which protects the right to a fair hearing.[602] Like all rights under the HRA, the rights listed in section 32 of the HRA can be limited where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

600 Queensland Human Rights Commission, Fact Sheet on s 29 of the HRA.

601 *Re application for bail by Islam* (2010) 175 ACTR 30, 94 [341].

602 Queensland Human Rights Commission, Fact Sheet on s 32 of the HRA.

The right to be presumed innocent is particularly relevant to this Bill, and in particular to clause 24, and as the QHRC has explained:

> This right has significance for bail applications. Bail should only be refused where there is a genuine reason, rather than as punishment.[603]

The presumption of innocence is also closely connected with other fair trial and fair hearing rights (including those protected in section 31 of the HRA) because it provides the basis for the realisation of other fair trial rights, including the right to silence, the right to equality before the law and the right to be tried without undue delay.[604] As Cussen J stated in *Sefton*, the presumption of innocence is also intrinsically linked with the right to liberty because an accused is presumed innocent until proven guilty, and therefore the accused 'should have his [or her] liberty...unless the public interest requires the contrary'.[605]

In the leading decision of *Salabiaku v France*, European courts have recognised that the presumption of innocence is not absolute.[606] The Strasbourg Court accepted that reversals of the onus of proof may be justified and compatible with the presumption of innocence if they are proportionate and 'confined within reasonable limits'.[607] Some of the common justifications for reversals of the onus of proof include the degree of seriousness of an offence, difficulties of proof and whether it applies to the 'gravamen' of an offence or to an incidental matter.[608]

The changes proposed in clause 24 - which would reverse the presumption of bail and require certain child offenders to 'show cause' as to why exceptional circumstances exist so as to justify bail engage both aspects of the presumption of innocence protected by section 32(1) of the HRA, and effectively impose a 'reverse burden' on certain child offenders when applying for bail. The right to be presumed innocent, and its relationship with the presumption in favour of bail has also been specifically considered by the United Nations Committee on the Rights of the Child (UNCRC).[609]

Children in the criminal process – HRA, s 33

Section 33 of the HRA provides specific protections for the rights of children in the criminal process, including that children must be segregated from all detained adults when detained prior to or following trial, that an accused child must be brought to trial as quickly as possible and that a child who has been convicted of an offence must be treated in a way that is appropriate for the child's age.

There is a general principle that all children within the criminal justice system should be entitled to a presumption in favour of bail, and that pre-trial detention should only be used in exceptional circumstances as a matter of last resort.[610]

4.1.3.2 Nature of the purpose of the limitation

The purposes of clause 24 and proposed presumption against bail, as described in the statement of compatibility, are to:

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603 Queensland Human Rights Commission, Fact Sheet on s 32 of the HRA.

604 Jeremy Gans et al, *Criminal Process and Human Rights* (The Federation Press, 2011) 379.

605 *R v Sefton* [1917] VR 259, 262-3, see also Ong, Kuan Chung, 'Statutory Reversals of Proof: Justifying Reversals and the Impact of Human Rights' (2013) 32(2) *University of Tasmania Law Review* 247.

606 (1988) 13 EHRR 379; see also *R v Lambert* [2001] UKHL 37.

607 (1988) 13 EHRR 379; see also *R v Lambert* [2001] UKHL 37.

608 (1988) 13 EHRR 379; see also *R v Lambert* [2001] UKHL 37.

609 United Nations, Committee on the Rights of the Child, *General comment No 24* (2019) on children's rights in the child justice system, UN Doc CRC/C/GC/24 (18 September 2019) 2 [3].

610 Queensland Human Rights Commission, Fact Sheet on s 33, HRA.

- ensure the accused's presence at trial (recognising that the flight risk is greater for serious offences carrying severe penalties),
- ensure that witnesses are not threatened or interfered with, and
- protect the community as a whole from further offending.[611]

As the statement of compatibility notes, these purposes are 'consistent with a free and democratic society' and have the potential to align with the circumstances described by the UN CRC as justifying pre-trial detention of children.[612] However, it is important to note that the UN CRC has also stated that 'pretrial detention should not be used except in the most serious cases, and even then only after community placement has been carefully considered.' The UN CRC has also warned against reversing the onus of proof or the presumption of bail with respect to child offenders. For this reason, it is important to consider whether the measures proposed in clause 24 are likely to (a) be effective at achieving the purposes described above and (b) proportionate means of achieving those purposes, having regard to their significant rights impacts for those children subject to these provisions.

4.1.3.3 The relationship between the limitation and its purpose

As the statement of compatibility notes, 'reversing the onus for bail means that the child will more likely be detained where they present an unacceptable risk to the community'.[613] In fact, reversing the onus for bail means that more children will be likely to be detained regardless of whether they present an unacceptable risk to the community, because the provisions burden the accused child with the task of 'showing cause' as to why they should not be detained on bail. This burden will be particularly difficult for certain children to discharge, including those from dysfunctional family backgrounds or children with a complex range of psychological, social and health-related needs. Aboriginal and Torres Strait Islander children, who are already disproportionately overrepresented in the youth justice system, may face particular barriers to discharging the burden imposed by clause 24, further increasing the likelihood that they will be refused release on bail. This constitutes a significant infringement on the child's right to liberty, and to be presumed innocent and contravenes many of the standards set out in the United Nations Convention on the Rights of the Child. The prospect of pre-trial custodial detention also impacts the child's rights in a range of other ways, including limiting their capacity to prepare a defence against the charge, and removing access to the child's support networks or educational or health care service providers. As the statement of compatibility observes:

> … increasing the risk of detention represents a serious incursion into the right of children to protection in their best interests, given that 'the use of deprivation of liberty has very negative consequences for the child's harmonious development and seriously hampers his/her reintegration into society.[614]

While the statement of compatibility claims that the increased prospect of pre-trial detention for recidivist child offenders will inevitably improve community safety, this assumption has been challenged in numerous studies and reports, including the Atkinson Report and the Youth Justice Strategy, which acknowledge that increased rates of pre-trial incarceration of young offenders increases the likelihood of re-offending, particularly when compared with other alternative strategies such as diversion programs and intensive rehabilitation programs.

In addition, the way clause 24 is currently drafted, it fails to meet the minimum standards prescribed by the UN CRC relating to pre-trial detention of children because it does not allow for consideration

611 Statement of compatibility, p 13.

612 Statement of compatibility, p 13.

613 Statement of compatibility, p 13.

614 Statement of compatibility, p 13.

of the individual circumstances of the child and extends beyond the most serious forms of criminal offending to include, for example, unlawful use of vehicle offences.[615]

In *Islam,*[616] the court considered the operation of ACT provisions that were similar in nature to that proposed by clause 26. The ACT provisions were found to be incompatible with human rights because they imposed a clear 'threshold' test that effectively precluded the bail authority from considering the full range of circumstances relevant to the grant of bail, including the seriousness of the offence and the individual circumstances of the child.[617]

The changes proposed in this Bill attempt to respond to this decision by making it clear that in determining whether a child has 'shown cause' why their detention or custody is not justified, the bail authority is to have regard to the matters contained in section 48AA of the YJA (including seriousness of the offence and individual circumstances of the child). This means that although the proposed changes in clause 24 contain a similar 'show cause' threshold test to the provisions considered in *Islam*, they are arguably more 'rights compatible' because they allow the bail authority to have regard to a broader range of circumstances when determining the 'show cause' question.

However, the QHRC stated in its submission that the changes proposed in clause 24 fail to fully address the rights concerns discussed by Penfold J in *Islam.*[618] These include the requirement that the proponents of the provision clearly establish an identifiable and rational reason why certain offences are subject to a presumption against bail.[619]

In the case of this Bill, many of the offences subject to the presumption against bail are serious violent offences, for example, choking, suffocation or strangulation offences. It may be justifiable to attach a presumption against bail with respect to these offences, having regard to the specific risks this type of offending poses to the community, and the fact that they allegedly took place while the child was on bail or awaiting sentence for another indictable offence. However, other offences, such as those contained in s 408A (unlawful use of a motor vehicle and the child is the driver) may not always pose the same level of risk to the community. As the QHRC noted:

> Some of [the prescribed indictable] offences relate to recent high profile and tragic events in Queensland. There may be sound evidence for why refusing bail in such cases is reasonable. However, such evidence is not provided in the Statement of Compatibility, and the Commission suggests that it would be not reasonable to introduce a presumption against bail merely based on the level of media attention around a particular offence at a point in time. Such an approach could eventually see all offences subject to such a presumption.[620]

4.1.3.4 Whether there are any less restrictive and reasonably available ways to achieve the purpose

As noted above, both the Atkinson Report and the Youth Justice Strategy provide a range of evidence-based, practical alternatives to pre-trial detention of child offenders that are designed to achieve the same legitimate purposes as those articulated in respect of clause 24.[621]

The statement of compatibility also lists a range of less rights restrictive alternatives that could be used to achieve the same purposes as clause 24, including:

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615 The range of offences that fall within the definition of 'prescribed indictable offence' are set out in clause 35 of the Bill. It includes the offence of 'Unlawful use or possession of motor vehicles, aircraft or vessels" contained in s408A of the *Criminal Code.*

616 *Re application for bail by Islam* (2010) 175 ACTR 30.

617 *Re application for bail by Islam* (2010) 175 ACTR 30 [329].

618 Submission 48, pp 16-17.

619 *Re application for bail by Islam* (2010) 175 ACTR 30 [353] – [356].

620 Submission 48, pp 17.

621 Atkinson Report, p 10.

- continuing to allow the courts to determine whether bail is appropriate in the circumstances of individual cases taking into account all relevant factors in s 48AA(4) of the YJA, including that the person is charged with a serious indictable offence while on bail
- inserting into s 48AA(4) of the Youth Justice Act a more specific consideration regarding whether the child is charged with having committed a serious offence while on bail, and
- allocating more resources to prevention and early intervention.[622]

However, the statement of compatibility also provides that:

> The existing bail regime has not prevented the small cohort of serious recidivist youth offenders from engaging in persistent and serious offending and from driving much of the youth offending incidents. The overall number of unique offenders committing new offences whilst on bail decreased for the period 1 January 2018 to 31 December 2020. However, the number of unique young offenders committing more than 20 new offences whilst on bail increased from 133 in 2018 to 194 in 2020. Further, from 1 January 2018 to 31 December 2020, 40,948 distinct reported offences were allegedly committed by young people whilst they were already on bail for other alleged offences.
>
> The number of offences committed each year has increased steadily from 2018 to 2020, up 17 percent. This shows that the existing regime of allowing the court to take into account relevant factors under s 48AA(4) of the Youth Justice Act has not been effective in reducing reoffending among this cohort of children.[623]

4.1.3.5 Balancing the importance of the purpose of the limitation and the importance of preserving the human rights

Although the statement of compatibility suggests that 'careful consideration was given to alternatives to a reverse onus for bail put forward in the ACT case of *Re application for bail by Islam*', it ultimately rejects these alternatives on the grounds that such an approach would 'do no more than formalise the existing operation of s 48AA(4) in practice'. The statement of compatibility states that it has reflected on the Court's finding in *Islam* by making the 'normal bail criteria in s 48AA(4) relevant to whether a child has shown cause'.[624] The statement of compatibility also suggests that there are 'no other reasonable alternatives that would limit human rights to a lesser extent' and therefore 'reversing the onus for bail is the least restrictive way of achieving its purpose of protecting the community'.[625]

On balance, in relation to the reforms contained in clause 24, the committee is satisfied that any limitation on human rights is reasonable and demonstrably justified in the circumstances.

4.1.4 Aggravating factor when determining the appropriate sentence – clause 29

Part 7 of the YJA deals with the sentencing of children who have been convicted of criminal offending. Section 150 contains the sentencing principles that should be applied when determining an appropriate sentence for a young offender, and other factors that should be taken into account by the decision maker. These considerations include:

- the youth justice principles
- the nature and seriousness of the offence
- the child's previous offending history
- whether the child is an Aboriginal or Torres Strait Islander person
- any impact of the offence on a victim,

622 Statement of compatibility, p 13.

623 Statement of compatibility, pp 13-14.

624 Statement of compatibility, p 14.

625 Statement of compatibility, p 14.

- a sentence imposed on the child that has not been completed
- the child's age
- the child's family
- opportunities to engage in educational programs and employment
- whether the child has family support.[626]

Section 150 also codifies the principle that a detention order should be imposed only as a last resort and for the shortest appropriate period.

Clause 29 seeks to amend section 150 to require courts to take into consideration the presence of any aggravating or mitigating factor concerning the child and, without limiting this requirement, to consider as an aggravating factor whether the child committed the offence whilst released into the custody of a parent, or at large (with or without bail) for another offence.[627]

4.1.4.1 Nature of the human right

The statement of compatibility notes that the changes proposed by clause 29 have the potential to engage and unjustifiability limit the right to liberty protected by section 29(3) of the HRA. It is arguable that the proposed changes would also limit rights of the child as contained in sections 26(2) and 33 of the HRA (described above). This is because the proposed changes are introduced in the context of the existing principles which already include a requirement to have regard to the child's previous offending history and accompanied by the language 'aggravating factor'. This gives rise to the potential for children who have offended whilst released on bail receiving disproportionately harsher sentences then would have otherwise been the case without the introduction of the provision, in direct contravention of the relevant principles contained in sections 26(1), 29(3), 32 and 33 of the HRA. Given the over-representation of Aboriginal and Torres Strait Islander children in the youth justice system, the proposed changes also engage section 15 of the HRA (right to equality) as they may increase the likelihood that Aboriginal and Torres Strait Islander children will face custodial sentences, including for minor offences.

4.1.4.2 Nature of the purpose of the limitation

The explanatory notes provide:

> The policy intent of this provision is to embed in legislation the existing common law principle that the fact the offence was committed while subject to bail is an aggravating factor when determining the appropriate sentence. The reference to 'any aggravating or mitigating factor' is to make clear that the inclusion of this new provision does not inadvertently imply that other common law aggravating or mitigating factors are excluded.[628]

The explanatory notes refer to a number of cases to support the claim that the new provision seeks to 'clarify' the common law position.[629]

4.1.4.3 The relationship between the limitation and its purpose

It would appear that the purpose relates to deterring recidivism among juvenile offenders in addition to clarifying the common law position. It is therefore necessary to consider whether the prospect of a harsher custodial sentence for children who offend while on bail would be effective at combatting reoffending, and whether there are any less restrictive means of achieving that purpose. Many recent

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626 YJA, s 150.

627 Explanatory notes, p 5.

628 Explanatory notes, pp 20-21.

629 See, for example, *R v Gray* [1977] VR 225; *R v Basso* (1999) 108 A Crim R 392; *R v AD* (2008) 191 A Crim R 409 ; *Porter v The Queen* [*2008*] *NSWCCA 145*.

studies have raised serious questions about the assumption that custodial sentences reduce re-offending rates in young offenders and children.[630]

The Australian Law Reform Commission's 1997 report *Seen and heard: priority for children in the legal process* (ALRC Report), considers, among many other topics, how Australian sentencing practice could become more consistent with the requirements of the United Nations Convention on the Rights of the Child.[631] The ALRC Report emphasises the need to adopt a contextual approach to sentencing in which all relevant factors are taken into account, including social factors such as homelessness, family circumstances and educational needs. The ALRC reported that:

> Particular attention needs to be given to the situation of repeat young offenders. These young people often have serious family or other problems. Programs that involve continuing support aimed at re-directing the young person's behaviour into more socially accepted forms are more likely to succeed in preventing recidivism.[632]

In addition, the Youth Justice Strategy reports that Aboriginal and Torres Strait Islander children and young people are 31 times more likely to be held in custody compared with their non-Indigenous peers. This highlights the need to take great care when amending the existing sentencing principles contained in Part 7 of the YJA, which currently provide scope for at least some of these factors to be explicitly considered during sentence, but which if amended in line with clause 29, may render these considerations less weighty than the aggravating factor of offending whilst on bail. The Youth Justice Strategy also notes that:

> Evidence shows that, for the majority of offenders, detention is not the best way to stop offending behaviour. Where custody is required, the best outcomes are achieved when pre- and post-release therapy are applied to reduce recidivism. Children and young people who have been through detention are at more risk of committing offences when they return to the community. [633]

4.1.4.4 Whether there are any less restrictive and reasonably available ways to achieve the purpose

The changes proposed in clause 29 include the phrase 'presence of any aggravating or mitigating factor concerning the child'. This is a positive feature of the proposed change as it preserves to the discretion of the sentencing authority to have regard to the child's personal circumstances, including their parental circumstances and past offending, to reduce, as well as increase, the child's sentence.

The reference to offending on bail as 'an aggravating factor' that should be taken into account in clause 29 may work to curtail the sentencing authority's discretion and gives rise to the potential for the Bill to increase the likelihood of children experiencing the types of disadvantages and vulnerabilities described above to receive harsher sentences.

The scope of clause 29 is also very broad. This change will apply to all child offenders for all offences within the ambit of the YJA. It is not a principle that is limited to violent offending, or even to serious offending, and could impact children who have been convicted of 'victimless' offences or minor property offences.

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630 See, for example, Northern Territory Royal Commission, Royal Commission into the Protection and Detention of Children in the Northern Territory, (2017) Volume , Volume 2B, p 209; Australian Institute of Health and Welfare, Young people returning to sentenced youth justice supervision 2018-2019, (2019) p 15; Queensland Productivity Commission, Inquiry into imprisonment and recidivism, (2019), p 90; Sentencing Advisory Council, Children Held on Remand in Victoria: A Report on Sentencing Outcomes (September 2020), [1.5].

631 Australian Human Rights Commission, Sentencing Juveniles consistently with the UN Convention on the Rights of the Child.

632 Australian Law Reform Commission, *Seen And Heard: Priority For Children In The Legal Process* (ALRC Report 84) Chapter 19, 19.16-19.27, Recommendation 239, 'Principles of sentencing'.

633 Youth Justice Strategy, p 8.

4.1.4.5 Balancing the importance of the purpose of the limitation and the importance of preserving the human rights

Based on the evidence before the committee, it is noted that clause 29 does have the potential to pose an unjustifiable limitation on the rights of the child (section 26(1) of the HRA) and the rights of the child in the criminal process (section 33 of the HRA). However, the committee concludes that the necessity for and purpose of the changes proposed in clause 29 has been established. Accordingly, on balance, in relation to the reforms contained in clause 24, the committee is satisfied that any limitation on human rights is reasonable and demonstrably justified in the circumstances.

4.1.5 Amending the Charter of Youth Justice Principles – clause 33

Clause 33 amends schedule 1 of the YJA, which contains the Charter of Youth Justice Principles to provide that 'the community should be protected from recidivist high-risk offenders, as well as from offences generally', to underscore the importance of protecting the community from harm.[634]

4.1.5.1 Nature of the human rights

The statement of compatibility does not address this aspect of the Bill, however, the changes proposed by clause 33 have the potential to engage and limit the rights of the child as contained in sections 26(2), 32(3) and 33 of the HRA (described above). Additionally, it is arguable that this principle detracts from the standards prescribed by the UN CRC with respect to the treatment of children in the criminal justice system, by elevating community safety concerns at the expense of the principle that children should be detained only as a matter of last resort.

4.1.5.2 Nature of the purpose of the limitation

The purpose of the changes contained in clause 33 are to protect the community from recidivist high-risk offenders. The need to protect the community from recidivist high-risk offenders is a legitimate and rights-protecting purpose, supported by Articles 6 and 9 of the ICCPR. However, it is its positioning of this new principle with a set of existing principles that are designed to promote and protect the rights of children in the criminal justice system that gave rise to concern by a number of stakeholders.[635]

4.1.5.3 The relationship between the limitation and its purpose

As discussed above, there is a strong body of evidence to suggest that detaining children in custody (either before or after trial) is not an effective strategy for addressing recidivism and protecting the community from the harm caused by youth offending.[636] In fact, as noted above, alternative strategies that are designed to protect and promote the rights of children (including their right to a stable home environment and to access rehabilitation and educational services) appear to be more effective at achieving this aim.[637] The committee also received evidence questioning why it is necessary to include this proposed new principle within the existing Charter, particularly when separate provisions already exist within the YJA that empower decision makers to have regard to the risks to community posed by recidivist offenders when determining eligibility for bail and when imposing sentence.[638]

4.1.5.4 Whether there are any less restrictive and reasonably available ways to achieve the purpose

As currently drafted, the Charter of Youth Justice Principles promotes the use of appropriate non-custodial options for dealing with child offenders, as well as preserving the right of the courts to impose custodial sentences in exceptional cases if necessary to protect the community from the risk

634 Explanatory notes, p 5; Statement of compatibility, p 4.

635 See, for example, submissions 44 and 63.

636 See, for example, submissions 44 and 63.

637 See also Australian Human Rights Commission, Human Rights Brief No.5 - Best practice principles for the diversion of juvenile offenders (2001).

638 See, for example, submissions 44, 51 and 56.

of harm. In addition, as noted above, a range of substantive provisions within the YJA specifically empower bail and sentencing authorities to have regard to matters including the child's history of offending, the seriousness of the offence, the risk of reoffending and the impact on any victim. In this context, the committee received evidence that it is unclear why the change proposed in clause 33 is necessary.[639]

4.1.5.5 Balancing the importance of the purpose of the limitation and the importance of preserving the human rights

While the necessity for and purpose of the changes proposed in clause 33 have been challenged by stakeholders and evidence has been proposed that there appears to exist a range of reasonably available alternatives to achieve the legitimate objective of reducing recidivism and protecting the community from harm caused by young offenders, the committee is satisfied that clause 33 clarifies the scope of the existing principles in the Charter of Youth Justice and that any limitation on human rights is reasonable and demonstrably justified in the circumstances.

4.1.6 Providing powers for police to stop a person and use a handheld scanner to scan for knives – clauses 5 and 6

Since 1990, Queensland law makers have been increasing the range of powers available to police to prevent and prosecute the use of knives and other weapons in criminal offending. These include powers under the *Weapons Act 1990* (Qld) and the PPRA. These laws already provide Queensland police with the power to stop and search a person they reasonably suspect to be carrying a knife. The PPRA also authorises the use of handheld scanners and other electronic screening equipment, for example when screening on any person entering into Queensland watch-houses and State buildings.[640]

Clause 6 proposes to increase the scope of these powers by authorising a senior police officer to use handheld scanners to scan over the exterior of a person's clothing and belongings to search for the presence of a knife. These powers can be used in a public place in a prescribed area (defined as the Surfers Paradise CBD and Broadbeach CBD Safe Night Precinct (SNPs). It will do this by inserting a new Part 3A into the PPRA. The amendments also provide that if a person does not submit to a scan, or if they do not comply with a police requirement to produce the item that has caused the scanner to activate, police will then have the power, without a warrant, to search the person for a knife under existing section 29. A sunset clause is included to state that the provisions will cease to have effect after 2 years.

4.1.6.1 Nature of the human rights

As the statement of compatibility notes:

> The use of hand held scanners in safe night precincts would limit a number of human rights, and in particular the right to equality before the law, freedom of movement and the right to privacy. The real gravamen of the impact on human rights is that police can arbitrarily stop and scan a person, in the absence of any reason, provided only that a senior police officer has provided authorisation, which again may be given arbitrarily, in the absence of any reason. Without further safeguards, the impact of these provisions may not be compatible with human rights.[641]

Many of the rights described above have already been discussed in detail earlier in this brief including the right to privacy (section 25(a) of the HRA), freedom of movement (section 19 of the HRA), deprivation of liberty (section 29 of the HRA), and the right to equality before the law (section 15 of the HRA). Clauses 5 and 6 also increase the risk that children will have interactions with police, limiting the right of children to protection in their best interests under section 26(2) of the HRA. In addition to

639 See, for example, submissions 44, 51 and 56.

640 Explanatory notes, p 5.

641 Statement of compatibility, p 17.

these rights impacts, the changes proposed in clauses 5 and 6 also have the potential to engage the right to freedom of thought, conscience, religion and belief (section 20 of the HRA) and the right to property (section 24 of the HRA). These rights are described below.

Right to freedom of thought, conscience, religion and belief – HRA, s 20

Section 20 of the HRA provides that 'every person has the right to freedom of thought, conscience, religion and belief, including … the freedom to demonstrate the person's religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.'

This right is based on Article 18 of the ICCPR, and has two distinct components: a freedom to think and believe whatever you choose, and a freedom to demonstrate your thoughts or beliefs publicly.[642] The changes proposed in clauses 5 and 6 would impose very broad stop and search powers on police to scan individuals to determine whether they are carrying a knife. The statement of compatibility notes that the offence of possessing a knife in a public place in section 51 of the *Weapons Act 1990* (Qld) (Weapons Act) has a 'carve out for people who 'possess a knife for genuine religious purposes' (in section 51(4))' and that 'police would take that into account when considering whether to charge a person with an offence under section 51 of the Weapons Act following use of a hand held scanner.[643] However, as noted below, this potential safeguard may not be sufficient to guard against an unjustifiable intrusion on the right to express a religion, particularly if it is dependent upon the exercise of police discretion and only available after a search has been conducted.

Property Rights- HRA, s 24

Because the scan may lead to the detection of a metal object, and potentially the confiscation of a knife, the proposal may limit the right to property protected in section 24 of the HRA. Section 24 protects the right of all persons to own property (alone or with others) and prohibits the arbitrary deprivation of a person's property. The property rights protected in section 24 of the HRA are based on Article 17 of the *Universal Declaration of Human Rights*.[644] The right to property is conventionally understood as a 'negative' obligation that protects individuals against arbitrary expropriation and regulation of private property, rather than a positive right to property.[645]

Property rights can be limited where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.[646] This suggests that where a valid law seeks to limit or restrict the use, acquisition or disposal of property, it will not constitute an arbitrary interference with the right to property under section 24 of the HRA.

4.1.6.2 Nature of the purpose of the limitation

The purpose of the stop and search powers proposed in clauses 5 and 6 is to (a) minimise the risk of physical harm caused by knife crime in Safe Night Precincts by removing knives from individuals in these areas; and (b) ensuring the safety of others in the community by reducing knife crime.

As noted above, the clauses will introduce a trial scheme that will involve the use of a hand held scanner to detect the presence of metal on a person, which will then trigger a police search to determine whether the item is a knife. The Explanatory Notes provide that this will enable police to

642 Queensland Human Rights Commission website, Fact Sheet on HRA, s 24.

643 Statement of compatibility, p 5.

644 Queensland Human Rights Commission Website, Fact Sheet on HRA, s 24.

645 Queensland Human Rights Commission Website, Fact Sheet on HRA, s 24.

646 See *Swancom Pty Ltd v* Yarra *CC [2009] VCAT 923.*

'seize knives before they can be used to cause harm', reducing 'the risk of harm being caused by knives in the prescribed areas as well as creating a disincentive from any persons carrying them unlawfully'.[647]

4.1.6.3 The relationship between the limitation and its purpose

As noted above, clauses 5 and 6 have the potential to have significant impacts on a wide range of human rights protected under the HRA. This is because the scheme proposed is designed to be a preventative regime of police searching that is not dependent on the need to establish any suspicion or reasonable belief on behalf of the police that any specific person being scanned may be in possession of a knife. This gives the proposed changes an arbitrary quality that removes any opportunity for the individual circumstances of the person being stopped and searched (such as their age, race, disability status, religion, mental or physical health) to be considered prior to the search being undertaken. It also directly abrogates the right to be presumed innocent protected by section 32 of the HRA by removing any requirement for the police to establish a reasonable basis for conducting the search and triggering a range of offence provisions for those who fail to comply with a police request under these and related provisions.

These provisions can also engage the right to equality protected by section 15 of the HRA, particularly when there are no legal tests or prescribed criteria to assist police officers when applying the proposed stop and search powers, and little by way of reporting and accountability mechanisms to ensure that such powers are not overused or used in a discriminatory way. The committee received evidence that research in Australia has found that both 'community policing' and intelligence-led or 'risk-based' policing (for example in the form of broad stop and search powers) can result in discriminatory targeting of young people, and in particular, young people of colour.[648] Additionally, the committee received evidence that statistics released by the UK Home Office in 2021 for police use of stop and search during the year ending March 2020 showed overall use of stop and search has risen – with racial disproportionality shown to be enduringly high.[649] There were 6 stop and searches for every 1,000 white people, compared with 54 for every 1,000 black people.[650]

The statement of compatibility claims that the proposed action of screening individuals for knives in areas which have been identified as having an increased rate of knife crime will operate to both remove knives from the environment and dissuade individuals from entering these areas while carrying a knife. This will, it is claimed, in turn reduce the prevalence of knife crime in these areas and consequently ensure the safety of other individuals in the community.[651]

The committee received evidence that there is no rational connection between the scope of the stop and search powers proposed in clauses 5 and 6 and the legitimate purpose of reducing the incidence of knife crime in Queensland. A 2012 review of similar laws in Victoria found that:

> In Victoria, the gradual increase in police powers to search was justified on the premise that these powers would reduce knife-carrying in particular. Unfortunately, the data that informs the debate about 'stop and search' legislation is problematic. Problems with definitions and statistical data collection make it difficult to establish how effective 'stop and search' powers have been at reducing knife-related crime in Victoria.

A further analysis of Victorian crime statistics, taken from 2011-2017 showed 'no discernible impact 'of stop and search legislation and operations on the rates of armed robbery, or the type of weapon

647 Explanatory notes, p 5.

648 Leanne Weber, '*Police are good for some people, but not for us*' Community perspectives on young people, policing and belonging in Greater Dandenong and Casey, Monash Migration and Inclusion Centre (December 2018).

649 UK Home Office, Stop and search: Ethnicity Facts and Figures (published 22 February 2021).

650 UK Home Office, Stop and search: Ethnicity Facts and Figures (published 22 February 2021).

651 Statement of compatibility, p 16.

used in armed robberies'.[652] Similar powers granted to the police in the United Kingdom have not proven to be effective in reducing crime rates. In fact, a 1999 review of 'stop and search' reporting data in the UK showed 'no relationship' between increased searches and a decrease in knife-crime.[653]

4.1.6.4 Whether there are any less restrictive and reasonably available ways to achieve the purpose

As noted above, a range of other jurisdictions, including Victoria and the UK, have experimented with stop and search powers in an attempt to reduce the incidence of knife-related crime. While many of these laws have been found to be ineffective at addressing the range of complex factors that appear to have a bearing on the rates of knife-related crime (including behavioural and mental health problems, socio-economic disadvantage and substance abuse issues), they also contain features that are less rights intrusive than the model proposed in clauses 5 and 6. This is because, unlike the changes proposed in this Bill, the Victorian and UK laws set out a range of criteria that need to be satisfied before stop and search powers can be activated, in addition to prescribing minimum standards around the conduct of searches.

Many of these features of the Victorian and UK laws are identified in the statement of compatibility as potential alternative options. They include:

- requiring a police officer to hold a suspicion or reasonable suspicion before stopping and scanning a person
- requiring a police officer to be satisfied of some lower state of satisfaction before stopping and scanning a person
- requiring a police officer to seek a person's consent before scanning a person
- excluding children from the persons who may be subject to use of a hand held scanner, and
- requiring a senior police officer to reasonably believe that serious violence may take place in a safe night precinct, or that persons are carrying knives in a safe night precinct, before giving an authorisation.[654]

These alternatives are rejected in the statement of compatibility on the basis that they would 'increase the risk that knives will not be detected until they have placed the community at risk'.[655] This helps to clarify the intention behind the proposed changes and emphasises the preventative nature of the stop and search regime envisaged in this Bill. In other words, this Bill aims to empower police to stop and search anyone within a certain area for a knife, without consideration of their individual circumstances and regardless of the risk they might pose to community safety. Individuals within the SNPs will effectively be presumed to be dangerous and then subjected to restrictions on their liberty and movement, and potentially subject to discrimination if targeted on the basis of their race or ethnicity, or if the search has a particularly intrusive impact due to their religion, disability or physical or mental health. From a rights perspective, it is arguably a disproportionate way to achieve the legitimate goal of reducing knife crime in Queensland. Whilst safeguards exist to provide some protection for individuals during the search, these provisions do not empower the individual to refuse to submit to a search and may not be able to be enforced by those persons particularly vulnerable to rights infringements under these laws.

The committee received evidence that broader stop and search powers initially introduced in the UK in response to terrorist activity were found to be illegal on human rights grounds by the European

652 Statement of compatibility, p 7.

653 Fitzgerald M, (1999) *Report into* Stop *and Search,* London, Metropolitan Police service.

654 Statement of compatibility, p 16.

655 Statement of compatibility, p 16.

Court of Human Rights.[656] The court said the stop and search powers were 'not sufficiently circumscribed' and there were not 'adequate legal safeguards against abuse'.[657]

4.1.6.5 Balancing the importance of the purpose of the limitation and the importance of preserving the human rights

The changes proposed enable the police to stop and scan a person in a safe night precinct without any basis, such as a reasonable suspicion' and 'there are no criteria that the senior police officer must be satisfied of before giving that authorisation'**.** This amounts to the arbitrary use of police power. The committee agrees with the conclusion reached by the Minister in the statement of compatibility accompanying this Bill that clauses 5 and 6 'may not be compatible with the human rights protected by the *Human Rights Act 2019*'.[658]

As the intention behind the change is related to the legitimate purpose of reducing knife crime and protecting the community, it is arguable that the means chosen and their impact on human rights are proportionate. Accordingly, on balance, in relation to the reforms contained in clauses 5 and 6, the committee is satisfied that any limitation on human rights is reasonable and demonstrably justified in the circumstances.

4.1.7 Enhancing the existing owner onus deeming provisions for hooning offences - clauses 7-16

Clauses 7-16 of the Bill amend the PPRA by expanding the scope of the definition of an 'evasion offence' to include certain 'hooning' offences. These clauses also make corresponding changes to 'deeming' provisions that set out who may be prosecuted for an evasion offence, to extend criminal liability for 'hooning' offences to the owner(s) of the relevant motor vehicle in certain circumstances.

4.1.7.1 Nature of the human rights

The changes propose to make one person liable for the wrongful act of another on the basis of their relationship with respect to a motor vehicle rather than on a finding of criminal guilt. By requiring the provision of information when a notice is given, the proposed amendment may limit the right to privacy, (under section 25 of the HRA) discussed above, and significantly limit the right to be presumed innocent until proven guilty according to law (under section 32(1) of the HRA), along with other rights protected under section 32 of the HRA. The changes proposed may also work to have a disproportionate impact on certain groups in the community, including Aboriginal families and caregivers, who are already overrepresented in the criminal justice system (section 15 of the HRA). The nature of each of these rights has been described above.

Additionally, the Commonwealth's Parliamentary Joint Committee on Human Rights has said that:

> Reverse burden offences will be likely to be compatible with the presumption of innocence where they are shown by legislation proponents to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.[659]

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656 See, for example, Ben Bowling and Coretta Phillips, (2007) 'Disproportionate and Discriminatory: Reviewing the Evidence on Police Stop and Search' *Modern Law Review* and Northern Ireland Policing Board, 'Human Rights Thematic Review on the use of police powers to stop and search and stop and question under the Terrorism Act 2000 and the Justice and Security (NI) Act 2007'.

657 BBC News 'Stop-and-search powers ruled illegal by European court', *Online,* 12 January 2010.

658 Statement of compatibility, p 20.

659 Parliamentary Joint Committee on Human Rights, Parliament of Australia, Guidance Note 2: Offence provisions, civil penalties and human rights, (December 2014), 2.

4.1.7.2 Nature of the purpose of the limitation

The changes proposed in clauses 7-16 are designed to respond to 'recent tragic events [that] underscore the consequences that result from unsafe driving behaviour'.[660] As noted in the Explanatory Speech accompanying the Bill:

> There were 287 fatalities on Queensland roads in the 12 months to the end of January this year. Shockingly, 73 more fatalities occurred in that 12-month period than in the preceding 12 months. Each one of those deaths is a heartbreaking and senseless waste of human potential. Each one of those deaths leaves behind a devastated family and community. These tragedies, and the ripples of devastation that flow from them, should not occur. Many are the result of reckless and unlawful behaviour of individuals.[661]

'Hooning' offences are also described as a 'category of offence that commonly features in the offending behaviour of recidivist youth offenders' and a category of offending that presents particularly acute problems of enforcement for police. The Minister introducing the Bill explained that:

> These amendments will give police the legislative powers they need to enforce the law applicable to these offences that pose a clear risk to the safety of Queensland road users. They will also allow police to take better advantage of the high-tech cameras that the government has provided them. The government makes no apologies for holding to account the small group in our community that puts all Queensland road users and pedestrians at risk by their reckless and unlawful actions. These amendments will provide a strong and targeted response to these individuals and, by doing so, reduce the risk that innocent Queenslanders will be affected by the tragedy of road trauma as a consequence of their actions.

As noted in the statement of compatibility, 'investigating crime and improving community safety are proper purposes under section 13(2)(b)' of the HRA.[662] These purposes, derived from the Explanatory Speech and related notes, may be articulated as follows:

- issuing type 1 vehicle related offence notices as an investigatory tool, allowing police to identify and charge offenders, in the same way that evasion offence notices are currently issued under Chapter 22, Part 2 of the PPRA
- providing prosecutorial authorities with sufficient time to investigate information provided in response to evasion offence notices, and
- extending liability to motor vehicle owners via a statutory process that streamlines the process of obtaining a conviction for certain type 1 vehicle related offences, leading to the reduction of hooning offences and improving community safety.

It is these more specific purposes that raise questions about the proportionality and justifiability of the changes proposed in clauses 7-16.

4.1.7.3 The relationship between the limitation and its purpose

As noted above, the changes proposed in these clauses effectively transfer criminal liability from one person to another, removing the element of criminal fault. The statement of compatibility suggests that this 'will be useful in circumstances where vehicles are being taken from family members or other persons who may wish to protect juvenile offenders or where registered owners were passengers in the vehicle.' [663] The statement of compatibility also states that the deemed liability provisions are rationally connected to their purpose because 'the person is the owner of the vehicle involved in the offence gives rise to a logical inference that the person was involved in the type 1 vehicle related

660 Queensland Parliament, record of proceedings, 25 February 2021, pp 238-240.

661 Queensland Parliament, record of proceedings, 25 February 2021, pp 238-240.

662 Statement of compatibility, p 19.

663 Statement of compatibility, p 19.

offence, because most vehicles are usually driven by their owners'.[664] However this assumption ignores the fact that unlike conventional criminal offences, or provisions that uphold the standards of criminal procedure protected in sections 31 and 32 of the HRA, these clauses apportion criminal liability on the basis of an assumption or inference rather than through a process of ascertaining criminal fault.

While the committee received evidence supporting the introduction of these provisions,[665] evidence was also received to the effect that these provisions would result in an infringement on the rights of those subject to evasion offence notices, and a reversal in the onus of proof and presumption of innocence.[666]

While it is noted that the changes proposed in clauses 7-16 do provide a person subject to an evasion offence notice the opportunity to provide an explanation in response to the notice, there are a range of other features of the existing deeming liability regime which work to limit the capacity of a person to bring evidence in their defence. For example, if the owner of the vehicle does not respond to an evasion offence notice, he or she may be prohibited from relying on information in their defence. An owner will also be liable to a penalty of up to 100 penalty units if he or she does not comply with a requirement to provide a statutory declaration in response to a type 1 vehicle related offence notice. This renders the right to silence effectively meaningless under these laws. It is clear, through the design of these provisions and their purpose that the intent of these clauses is to shift the evidential and legal burden from the prosecution to the owner of the motor vehicle, in direct contravention of the principles described above.

4.1.7.4 Whether there are any less restrictive and reasonably available ways to achieve the purpose

As noted above, the deemed liability provisions contained in this Bill constitute a rights-intrusive response to the challenges faces by investigatory and prosecutorial authorities tasked with combatting 'hooning' offences in Queensland. Many other reasonably available investigative tools exist to improve the efficiency of investigating and prosecuting this form of criminal activity, including the existing provisions described above and those identified in the statement of compatibility:

- reversing the evidentiary burden, and not the legal burden of proof (that is, allowing the owner of the vehicle to displace the presumption by pointing to sufficient evidence that he or she was not involved in the offence rather than being required to prove this on the balance of probabilities)
- not placing any impediments on the owner of the vehicle relying on evidence in their defence in the event that they do not include that information in the statutory declaration (that is, also amending the existing s 756(5)-(7) of the PPR Act), and
- making the requirements in s 756(5) of the PPR Act alternative requirements rather than cumulative requirements in all cases (that is, allowing the owner to rely on exculpatory evidence they did not provide in a response to the notice if they give notice to the prosecuting authority without also requiring the court's leave).[667]

Each of these alternatives are rejected in the statement of compatibility on the grounds that they would continue to create an impracticable and onerous burden on prosecuting authorities, for example by requiring them to test the veracity of accounts given by the owner of the vehicle that they were not driving the vehicle at the time of the offence. However, this impractical and onerous burden constitutes the conventional burden of proof in criminal offences around Australia. It is arguable that many of the alternatives provided above go a long way to easing this burden, for example, by

664 Statement of compatibility, p 19.

665 See submission 13, p 3; submission 23, p 4; submission 31, p 2, Public hearing transcript, Townsville, 18 March 2021, p 10, submission 63, p 7.

666 See, for example, submission 75, p 11.

667 Statement of compatibility, p 19.

transferring evidential obligations of proof to the vehicle owner or defendant. This would provide a less-rights intrusive, effective means of addressing the difficulties faced by investigative and prosecutorial authorities when investigating this type of offending, particularly when accompanied by existing technologies deployed to capture the identity of drivers, including those engaging in dangerous high-speed driving.[668]

4.1.7.5 Balancing the importance of the purpose of the limitation and the importance of preserving the human rights

When attempting to evaluate whether the reversal of burden or onus of proof is disproportionate and therefore an unjustifiable limitation on human rights, it is helpful to consider whether:

> (a) it permits action by courts and state agents (in good faith) which substantially damages a defendant's interest in fair treatment by the state,
>
> (b) such damage exceeds the benefit conferred by the restriction on other citizens participating in the process, who also have claims to fair treatment, and/or
>
> (c) such damage exceeds the benefit conferred by the restriction on other community interests, including the interest in the enforcement of the criminal law.[669]

Appling these criteria to the changes proposed in clauses 7-16, it is arguable that the defendant's interests under these deeming provisions will be damaged. However, it is also possible to argue that this damage does not exceed the benefit conferred by the efficiencies that might be gained by those investigating or prosecuting 'hooning offences'.

As the intention behind the changes in clauses 7-16 is related to the legitimate purpose of reducing hooning offences and protecting the community, it is arguable that the means chosen and their impact on human rights are proportionate. Accordingly, on balance, in relation to the reforms contained in clauses 7-16, the committee is satisfied that any limitation on human rights is reasonable and demonstrably justified in the circumstances.

Despite this conclusion, the committee encourages continued reliance on the existing range of reasonably available alternatives (including the Queensland Government's existing traffic camera monitoring system) to improve the investigation and prosecution of 'hooning offences' that have far less rights-intrusive impacts and may be equally or more effective at deterring this type of activity, particularly among young offenders.[670]

4.2 Statement of compatibility

Section 38 of the HRA requires that a member who introduces a Bill in the Legislative Assembly must prepare and table a statement of the Bill's compatibility with human rights.

Committee conclusion

In general, a sufficient level of information was provided to facilitate an understanding of the purpose of the Bill. However, insufficient evidence was provided to enable a robust analysis of the extent to which the measures proposed in the Bill would be effective at achieving their stated aims, and the extent to which alternative (less rights restrictive) options had been fully explored. The analysis above also details the areas where information in the statement of compatibility was insufficient or absent.

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668 Statement of compatibility, pp 19-20.

669 Andrew Stumer, *The Presumption of Innocence: Evidential and Human Rights Perspectives,* (2020, Oxford and Portland, ISBN 978-1-84946-036-1).

670 See, for example, Australian Institute of Health and Welfare, *Young people returning to sentenced youth justice supervision 2018-2019,* (2019) p 15; Queensland Productivity Commission, *Inquiry into imprisonment and recidivism*, (2019), p 90.

In addition, although the statement of compatibility notes that targeted consultation was undertaken with a range of selected organisations (including Aboriginal and Torres Strait Islander organisations)[671] there is no discussion of the views of those organisations, and whether they supported or opposed the changes proposed in the Bill, and whether they made any suggestions as to reasonably available alternatives. There is no evidence of any consultation with young people, despite the strong focus of this Bill on youth offending. The committee considers that it would be of great benefit for the statement of compatibility in the future to include further details of the outcomes of stakeholder consultation, as well as listing those that were consulted.

[671] Explanatory notes, p 12.

Appendix A – Submitters

Sub #	Submitter
001	Townsville Community Justice Group
002	John Chirgwin
003	Erin Robino
004	Craig Marsterson
005	Professor Suzanne McGinty
006	Steven Daw
007	Bianca Dimont
008	Julene Verkooijen
009	Australian Lawyers Alliance
010	Brett Geiszler
011	Kelvin Bunyan
012	Janice Bradley
013	Lynette Freeman
014	Kerry Roberts
015	Queensland Council of Social Service Ltd (QCOSS)
016	Youth Affairs Network of Queensland
017	Albert Abdul Rahman
018	Confidential
019	Robert Heron
020	North Australian Aboriginal Justice Agency
021	School of Public Health and Social Work, Queensland University of Technology (QUT)
022	Peter Nixon
023	Nikki Nunnari
024	knowmore
025	Amnesty International (Toowoomba Group)
026	Community Living Association
027	George Dickson
028	Mitchell Daveson
029	Deborah Szanto
030	Salvatore Costanzo
031	Lynette Knox
032	David South
033	Amnesty International Townsville Action Group

034	Jennifer Brown
035	Ruth Gould
036	CREATE Foundation
037	Australian Association of Social Workers
038	Anglicare Southern Queensland
039	Queensland Indigenous Labor Network
040	Dr Sarah Lythgoe
041	Community Legal Centres Queensland Inc.
042	Mount Isa City Council
043	Luke Jenkins
044	Human Rights Law Centre
045	Change the Record
046	Office of the Public Guardian
047	Katter's Australian Party
048	Queensland Human Rights Commission
049	Together
050	Institute for Collaborative Race Research Pty Ltd
051	Amnesty International
052	Judy Lindsay
053	Queensland Aboriginal and Torres Strait Islander Child Protection Peak Limited
054	Zillmere Young Peoples Support Service, North East Community Support Group Inc.
055	Jesuit Social Services
056	Aboriginal and Torres Strait Islander Legal Service (QLD) Ltd
057	Queensland Council for Civil Liberties
058	Linda Davis
059	Kim Hoad
060	Save the Children
061	Life Without Barriers
062	Legal Aid Queensland
063	PeakCare Queensland Incorporated
064	Youth Advocacy Centre Inc
065	Townsville Youth Crossroads
066	Queensland Family and Child Commission
067	David McCrindle
068	Debra Green

069	Sue Withers
070	Inspire Youth and Family Service Inc
071	YFS Legal
072	Commerce North West
073	Hub Community Legal
074	Sisters Inside Inc
075	Queensland Law Society
076	Queensland Mental Health Commission
077	Aboriginal & Torres Strait Islander Women's Legal Service NQ Inc
078	Justin Thompson
079	Bar Association of Queensland
080	Loretta Woolston
081	Michael Lowcock
082	David Fletcher
083	Glenn Haitana

Appendix B – Officials at public departmental briefing

Department of Children, Youth Justice and Multicultural Affairs

- Kate Connors, Deputy Director-General, Strategy
- Michael Drane, Senior Executive Director, Youth Detention Operations and Reform
- Lisa Pollard, Senior Executive Director, Strategy and Performance

Queensland Police Service

- Cheryl Scanlon, Assistant Commissioner, Youth Justice Task Force
- Doug Smith, Deputy Commissioner, Strategy, Policy and Performance
- Mark Wheeler, Assistant Commissioner, Northern Region

Appendix C – Witnesses at public hearings

Mount Isa – 16 March 2021

Mount Isa City Council

- David Keenan, Chief Executive Officer
- Cr Danielle Slade, Mayor

Save the Children

- Anne Hodge

Commerce North West

- Emma Harman
- Jessica James

Registered speakers

- Gordon Sparks
- Heiner Schulz
- Pastor Keith Christie
- Gary Osman
- Kim-Maree Burton
- Lyn White
- David Fletcher
- Danielle Jennings
- Father Michael Lowcock
- Scott Sheard
- Robbie Katter MP, Member for Traeger

Elders in the Community

- Christine Doyle
- Jimmy Hill
- Corina James
- Joan Marshall

Cairns – 17 March 2021

Grass Roots Advisory Service

- Edward Sailor

Registered Speakers

- Aaron McLeod
- Len Harris
- Duncan McInnes
- David Prowse
- Geoff Guest
- Roderick Burke

Cairns – 18 March 2021

Cairns Street Chaplains

- Stuart Wider

ATSILS NQ

- Vincent Knox

Queensland Police Service

- Snr Sgt Gary Hunter

Amaroo Aboriginal and Torres Strait Islander Elders Justice Group

- Mike Adam

Harbrow Mentoring

- Marc Harbrow

Registered speakers

- Jessica Roe
- Patrick O'Shane
- Andrew James
- Genevieve Sinclair

Townsville – 18 March 2021

North Queensland First

- Clynton Hawks

Registered speakers

- Julian Gallimore
- David Cassells

- Brett Geiszler
- David South
- Gina Garrod
- Jeff Phillips
- Kristy Clancy
- Lit Chien Cheah
- Graham Robson
- Luke Jenkins
- Trish Jordon
- Geoff Rath
- Sue Withers

Townsville – 19 March 2021

Townsville Community Justice Group

- Karl McKenzie

Townsville Youth Crossroads

- Dr Bruno van Aaken
- Jacinda Warland

Gr8Motive

- Cherrie Stewart
- Malcolm Congoo

Family Inclusion Network

- Bobbi Robertson

Amnesty International

- Peter Hanley
- Jenny Brown
- Ian Frazer

Brisbane – 22 March 2021

Anglicare Southern Queensland

- Tammy Lloyd, Group Manager, Children & Families

Inspire Youth and Family Service

- Amy Wilson, Program Manager

knowmore

- Warren Strange, Chief Executive Officer

Youth Advocacy Centre

- Janet Wight, Chief Executive Officer

PeakCare Queensland Inc

- Lindsay Wegener, Executive Director

Youth Affairs Network Queensland

- Siyavash Doostkhah, Director

Community Living Association

- Gemma Carter, Social Worker – ARROS Place Project Worker

Create Foundation

- Rachael Donovan, State Coordinator
- Aimee Miller, Young Consultant

Queensland Indigenous Labor Network

- Naraja Clay, Committee Member
- Jerome Pang, Chairperson

Queensland Aboriginal and Torres Strait Islander Child Protection Peak Limited

- Garth Morgan, Chief Executive Officer

Life Without Barriers

- Brad Swan, Executive Director, Strategy & Engagement

Aboriginal and Torres Strait Islander Legal Service (QLD) Ltd

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

Queensland Council of Social Service

- Amie McVeigh, Chief Executive Officer

Sisters Inside

- Debbie Kilroy, Chief Executive Officer
- Boneta-Marie Mabo, Youth Programs Manager

Amnesty International

- Maggie Munn, Indigenous Rights Associate
- Joel Mackay, Strategic Campaigns Lead

Queensland Law Society

- Damian Bartholomew, Chair – QLS Children's Law Committee

- Kristy Bell, Committee Member – QLS Criminal Law Committee

Bar Association of Queensland

- Laura Reece, Barrister

Queensland Human Rights Commission

- Scott McDougall, Commissioner

Queensland Family and Child Commission

- Natalie Lewis, Commissioner

Gold Coast – 26 March 2021

Potts Lawyers

- Bill Potts, Founding Director
- Michael Warren, Solicitor

Gold Coast Youth Service

- Will Aufai, Team Leader
- Ricardo Parata, Youth Support and Advocacy Worker

Gold Coast Youth Service

- Maria Leebeek, Chief Executive Officer

Jack Beasley Foundation

- Belinda Beasley, Founder
- Leanne Watt, Treasurer

Registered speakers

- Angela Driscoll
- Stewart Brooker
- Bill Robinson
- Michael Malone
- Sue Cubbin

Statement of Reservation

Youth Justice and Other Legislation Amendment Bill 2021

Statement of Reservation Sandy Bolton MP – Member for Noosa

Over 80 submissions were made on this Bill with more than 100 witnesses appearing at public hearings in Mt Isa, Townsville, Cairns, the Gold Coast and Brisbane. This demonstrated how very deeply this matter, and questions of respect, responsibility, and accountability, run in our State. They also threw into sharp relief the two equally valid arguments at its core:

1. Queensland communities want and have every right to feel and be safe.
2. Our current efforts are not reaching a small, persistent cohort of young offenders.

Regardless of which views submitters presented before the Committee, the people of Queensland know that both sides of the youth justice argument are valid.

Communities understand that detention and jail create increased criminalization, as well as overcrowding of watch houses and other facilities. They were also very clear that the measures outlined in this Bill do not go far enough to deliver the increased safety they seek, and that it was in effect a 'band aid'. For example, setting age brackets for GPS trackers that are too limited in practice, and may have little effect when a determined young person with access to basic household tools can cut them off.

From those who see the solution to youth justice with rehabilitation at its source, the measures in this Bill are equally unacceptable, stigmatising young people who already see themselves as outsiders to society, without achieving the intent of reducing re-offending.

The reality is that there is little support for the *Youth Justice Act 1992* elements of the Bill in its current form from either side. However, the provisions with respect to the *Police Powers and Responsibilities Act 2000* offer purposeful, focussed action on specific issues, and were well supported. They will enable police to increase safety in Safe Night Precincts by authorising use of hand-held scanners and prevent hooning behaviour by refining enforcement options.

There were some glaring gaps revealed during the inquiry, including where an 'intervention' does not happen until the 5th or 6th court appearance, which is far too late.

The second 'gap' is the lack of funded services available at the most critical and at-risk time of after 5pm, which is not acceptable for our youth and their families, nor for frontline delivery staff or for our communities.

The youth justice components of this Bill in its current form are seen as a short-term resolution that may keep individual repeat offenders off the streets for the duration of their sentence, but in no way addresses the likelihood of them re-offending.

There are questions on terminology; for example, an adult who is 'willing' to support the child to comply with bail conditions does not necessarily mean they have the capability to do so.

Witnesses also spoke of the use of social media by adults to encourage or incite youngsters to commit offences, and the need to consider creating offences in the Criminal Code for these actions.

Yes, we must get recidivist youth offenders off the streets and out of the community. But merely getting these offenders off the streets is not enough. If a child has been criminalised, 6-8 weeks in custody is not long enough to undo this reality. Nor can we continue to believe that successful rehabilitation of this cohort of approximately 400 young people across the State is possible on an "office hours" basis.

There were many arguments put both for and against relocation sentencing whether it is termed boot camp, rehabilitation centre or remote facility. Terminology aside, what is clear is that to rehabilitate a child, their entire environment must be assessed and addressed. Returning them to the environments that nurtured criminality makes no sense, whether it is overnight during a multi-day program or on release at the end of a relocation period.

While I will support the passage of this Bill in efforts for greater safety, that support is not endorsing it as a solution that will deliver, to either side of the debate, the outcomes sought. If anything, the inquiry into this Bill highlights the need for informed action to take place as a matter of urgency, including investigations on behalf of Queenslanders into the following:

- Low-security, remote live-in facilities with holistic community programs and components that are accessible by families so they can participate. Re-purposing existing facilities such as the example out of Mackay.
- Further supporting Youth Murri Courts at Townsville, Cairns and Mt Isa, and identify each as a pilot to gather benchmark data.
- Reviewing the minimum age with respect to provisions regarding GPS tracking.
- A trial to the effectiveness of re-introducing an offence for breach of bail.
- Implementation of remote engine immobilisers as an enforcement option with respect to "hooning" incidents.

There are two issues brought forward that need to be addressed in the immediate future:

1. Youth services to be reviewed and funded, where required, for delivery after 5pm.
2. Assess offenders and their family environment at the first court appearance.

It **does** take a village to raise a child, and that village incorporates responsibilities to be acknowledged by parents, caregivers and elders in all cultures, and the broader communities' responsibility to enable, and support that.

To the Department, agencies, submitters, and those who attended the five public hearings, thank you for your efforts and your ongoing commitment to this complex, and very stressful situation impacting our communities. To my fellow Committee members and Chair, my appreciation. This inquiry may have completed, and the Report submitted. However, it is nowhere near a resolution.

Sandy Bolton MP
Member for Noosa

Date: 15 April 2021