Queensland Community Safety Bill 2024

Submission No:	35
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Publication:	
Attachments:	
Submitter Comments:	

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14th May 2024

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

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

Dear Committee Secretary,

Re: Queensland Community Safety Bill 2024

Thank you for the opportunity to provide comments on the Queensland Community Safety Bill 2024 (**Bill**) which proposes to make a number of amendments to several pieces of legislation including the *Youth Justice Act 1992* (**YJ Act**), Criminal Code, *Police Powers and Responsibilities Act 2000* (**PPRA**), *Summary Offences Act 2005* and *Domestic and Family Violence Protection Act 2012* (**DFVP Act**) with the aim of promoting community safety. Notably, the Bill will remove from the Youth Justice Principles in the YJ Act that a child should be detained only as a last resort and for the least time that is justified in the circumstances and replace such with wording that provides that a child should be detained in custody, where necessary, including to ensure community safety, where other non-custodial measures of prevention and intervention would not be sufficient. We are strongly opposed to this proposed amendment on the basis that it will only provide more latitude for children to be incarcerated and, consistent with our long-standing advocacy on this point including that: incarceration of children does not work in reducing recidivism but early prevention and intervention programs developed by-community-for-community do; and that incarceration causes harm to children and can entrench criminality, which is at odds with the policy objective of making communities safer. We broadly welcome proposed amendments to the YJ Act to enable temporary transfers of children detained in watch houses to Youth Detention Centres to facilitate their participation in

programs and physical exercise and proposed amendments to the YJ Act that provide that where a person participates in a relevant program or service whilst on bail or remand or sentenced, anything said or done by the person in the course of participation in the same cannot be used in evidence in any proceedings. With respect to the balance of the proposed reforms in this Bill, we have sought to outline our position on those which we consider notable in this submission.

Preliminary consideration: Our background to comment

The Aboriginal and Torres Strait Islander Legal Service (Qld) Limited (ATSILS), is a community-based public benevolent organisation, established to provide professional and culturally competent legal services for Aboriginal and Torres Strait Islander peoples across Queensland. The founding organisation was established in 1973. We now have 25 offices strategically located across the State. Our Vision is to be the leader of innovative and professional legal services. Our Mission is to deliver quality legal assistance services, community legal education, and early intervention and prevention initiatives which uphold and advance the legal and human rights of Aboriginal and Torres Strait Islander peoples.

ATSILS provides legal services to Aboriginal and Torres Strait Islander peoples throughout Queensland. Whilst our primary role is to provide criminal, civil and family law representation, we are also funded by the Commonwealth to perform a State-wide role in the key areas of Community Legal Education, and Early Intervention and Prevention initiatives (which include related law reform activities and monitoring Indigenous Australian deaths in custody). Our submission is informed by over five decades of legal practise at the coalface of the justice arena and we, therefore, believe we are well placed to provide meaningful comment, not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences.

Introductory comments

As reported in the 2021-22 Queensland Childrens Court Annual Report, Aboriginal and Torres Strait Islander youth were reported to be over 21.4 times as likely as other young people to have been in youth detention in 2021-2022.[1] It goes without saying that Aboriginal and Torres Strait Islander children are grossly overrepresented in the numbers of children incarcerated in youth detention in Queensland, and Australia more broadly.

[1] Queensland Childrens Court Annual Report 2021-22.

But offending does not occur in a vacuum. It occurs in the context of an environment, and the environment for many of the children that are at high risk of having contact with the criminal justice system is one of significant vulnerability, often involving numerous compounding criminogenic factors.

Factors that influence a child's likelihood of having contact with the criminal justice system include, but are not limited to:

- intergenerational trauma[2], which has been proven to affect a child's DNA (i.e., trauma is passed down, including in utero) and that can manifest in the behaviour of a child[3];
- domestic and/or family violence, sexual abuse and/or neglect[4];
- exposure to alcohol and/or drugs in utero and the health effects thereof, including potentially Foetal Alcohol Spectrum Disorder (**FASD**) which impacts an individual's learning, memory attention span, communication, vision and hearing;
- disability and/or cognitive impairment[5];
- being removed from the child's family, kin and culture and placed in out-of-home care[6];
- identity confusion (not understanding where and how you fit in);
- trauma-related mental illness[7], risk of suicide or suicidal ideations[8];
- disengagement from education or interrupted engagement in education[9];
- ADHD, which has been linked to low birthweight (Aboriginal and Torres Strait Islander babies have a higher risk of having a low birthweight) [10];

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[2] Darwin L, Vervoort S, Vollert E and Blustein S, 2023. *Intergenerational trauma and mental health*. Catalogue number IMH 18, Australian Institute of Health and Welfare, Australian Government.

[3] R Yehuda, A Lehrner, 'Intergenerational transmission of trauma effects: putative role of epigenetic mechanisms' (2018) Oct 17 (3) *World Psychiatry* 243-257 <https://www.ncbi.nlm.nih.gov/pmc/articles/ PMC6127768/> .

[4] G Morgan, C Butler, R French, T Creamer, L Hillan, E Ruggiero, J Parsons, G Prior, L Idagi, R Bruce, T Gray, T Jia, M Hostalek, J Gibson, B Mitchell, T Lea, K Clancy, U Barber, D Higgins, A Cahill and S Trew, *'New Ways for Our Families: Designing an Aboriginal and Torres Strait Islander cultural practice framework and system responses to address the impacts of domestic and family violence on children and young people*' (ANROWS Research Report, June 2022) 9.

[5] Australian Institute of Health and Welfare, *Aboriginal and Torres Strait Islander Health Performance* Framework, Summary Report (2023), National Indigenous Australians Agency, Tier 1 – Health status and outcomes, 1.14 Disability, available at <https://www.indigenoushpf.gov.au/measures/1-14-disability>.

[6] SNAICC, *Family Matters Data Snapshot 2023,* <https://www.familymatters.org.au/wp-content/uploads/2022/11/1533_2022-F.M.-Snapshot-2pp_option-1.pdf>.

[7] Darwin L, Vervoort S, Vollert E and Blustein S, *Intergenerational Trauma and Mental Health,* Australian Institute of Health and Welfare Report (2023) vi.

[8] Closing the Gap Information Repository, Socioeconomic Outcome Area 14, available at <https://www.pc.gov.au/closing-the-gap-data/dashboard/socioeconomic/outcome-area14#:~:text=In%202021%2C%20the%20suicide%20age,25.1%20per%20100%20000%20people).>

[9] Queensland Advocacy Incorporated and Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd with support from Minter Ellison, *The Need for an Inquiry into School Disciplinary Absences in Queensland State Schools,* Submission to the Queensland Human Commissioner (Feb 2022) 4.

[10] Note 8.

- substance abuse/misuse[11];
- residing in over-crowded housing or homelessness[12];
- unemployment of parent/s including generational unemployment;
- complex health needs;
- literacy and numeracy challenges; and
- racial profiling in policing and the remnants of systemic racism.

Over many years we have seen the effects of short-sighted, knee-jerk tough-on-crime responses framed within one election cycle to the next including, but not limited to, unprecedented amendments to youth justice legislation to reverse the presumption of bail ('show cause' provisions), expansion of the offences to which the bail 'show cause' provisions apply and the introduction of an offence for breach of bail conditions. In our view, these measures have directly contributed to more and more children being incarcerated to the point where Queensland's youth detention centres are bursting at the seams and children are being held in police adult watch houses as an overflow solution in breach of their human rights.

The proposed amendments in the Bill, in particular, removing that detention of a child should be a measure of last resort from the Youth Justice Principles is yet another of such measures which prefers the flawed 'tough on youth crime' approach, with children ultimately being used as political footballs.

Comments on the Bill

Removal of 'detention as a last resort' from Youth Justice Principle 18 in the YJ Act

The Bill proposes to omit item 18 in the Charter of Youth Justice Principles in Schedule 1 to the YJ Act which provides that a child should be detained only as a last resort and for the least time that is justified in the circumstances and replace it with wording that provides that 'a child should be detained in custody', 'where necessary, including to ensure community safety, and where other non-custodial measures of prevention and intervention would not be sufficient' and 'for no longer than necessary to meet the purpose of detention' (Clause 132 of the Bill).

We are strongly opposed to this proposed amendment and recommend that Youth Justice Principle 18 remains unchanged. These amendments will inevitably result in the incarceration of more children and as Aboriginal and Torres Strait Islander children

[11] Note 7.
[12] Note 6.

are overrepresented in the numbers of children that have contact with the criminal justice system, this means incarceration of more Aboriginal and Torres Strait Islander children.

The evidence has shown time and time again that incarceration of children, especially of the kind with limited to no effective rehabilitation, does not work in reducing youth offending[13]. In fact, incarceration increases trauma to the child and enables the child to associate with other offenders whilst incarcerated, which only entrenches them in criminality. This does not make communities safer.

Whilst we acknowledge that there is a place for youth detention (provided there is a rehabilitative component), consistent with our advocacy position over many years, we reiterate that evidence-based, community-led prevention and early intervention initiatives that address the root causes of youth offending is the best way to address youth offending along with impactful investment in housing, employment, education and health to address the upstream drivers of offending behaviour and the related social and economic iniquities that Aboriginal and Torres Strait Islander families face. Prevention and early intervention programs need to be On Country and provided by community-for-community to give them the best chance of success.

Expansion of Electronic Monitoring Trial

We note that we have been consulted on this proposal in an earlier phase of consultation which preceded this Bill and lodged a written submission thereto. Our position remains unchanged. We do not support the expansion of the Electronic Monitoring (**EM**) trial as we do not support the use of EM as part of the youth justice system more broadly for a number of reasons including the following:

- the presence of an EM device on a child has the potential to stigmatise the child by making the child feel as though they are a criminal, despite the fact that they have not been found guilty of any relevant charge;
- EM devices also have the potential to isolate a child by undermining their anonymity which is inconsistent with the fundamental right of the child to be presumed innocent until proven guilty of any relevant charge;
- in some instances, in particular, for at-risk youth, EM devices might be seen as an initiation or a badge of honour; this is counterintuitive to reducing recidivism and instead has the potential to embed criminal pathways for a child; and

[13] Richard Mendel, Why Youth Incarceration Fails: An Updated Review of the Evidence, (2022) page 14, available at <https://www.sentencingproject.org/reports/why-youth-incarceration-fails-an-updated-review -of-the-evidence/>; Charles E. Loeffler and Daniel S. Nagin (2022) The Impact of Incarceration on Recidivism. Annual Review of Criminology 2022 5:1, 133-152.

- there is very little evidence to establish the efficacy of EM as a bail tool.

The materials supporting the Bill express that the justification for expansion of the EM trial is that, currently, EM has had low uptake and that expansion of the "sample size" will provide the Queensland Government with more data in order to make an assessment as to whether EM is effective or not.

This is seemingly an illogical basis on which to expand the trial, especially given the negative implications of EM on a child including the fact that it limits a child's human rights. If there has been a low uptake of EM, such might be attributed to a myriad of reasons including that courts seeing such as an unnecessary imposition on a child or where other options suffice - for example, where the court considers that the condition is not necessary to mitigate the risk, or that there are relevant factors relating to the child's age, maturity level, cognitive ability/developmental needs, disability, home environment, that would involve undue management or supervision of the child should the condition be imposed.

Low uptake does not give rise to a justification to net widen the cohort of youth to which these provisions might apply to merely create a larger sample size to determine if the trial works or not. In fact, low uptake itself might correlate with the fact that EM is <u>not</u> a preferred/useful mechanism. In this vein, we also take note of the Queensland Police Service Briefing Paper that was provided to the Youth Justice Reform Select Committee as part of the current Inquiry into Youth Justice Reform in Queensland, in which QPS stated that "Approximately one third of court ordered young people have breached their bail undertaking whilst the subject of an EMD [Electronic Monitoring Device]"[14]. This appears to demonstrate the point that EM is not an effective tool.

We oppose adding new prescribed indicatable offences under section 52AA of the YJ Act to include specified offences involving violence or threats of violence on the basis that we have significant concerns regarding potential negative implications when considering the show cause regime under the YJ Act, in particular, relating to the potential risk of police officers "charging up" for offences that would appropriately charged as a lessor offence (e.g., common assault, possess knife, public nuisance), but that arguably might meet the elements of one of the proposed to be included prescribed indictable offences, whereby officers would seek to charge the more serious offence with the intent of reversing the onus on bail.

[14] Queensland Police Service, *Youth Justice Reform Select Committee – The Queensland Police Service Departmental Briefing for the Inquiry into Youth Justice Reform in Queensland*, Submission, (2023) 19.

We also oppose expanding the criteria for EM to include children who have been charged with a prescribed indicatable offence in the preceding 12 month. We are concerned that including children/youth that have been charged in relation to one of the proposed expanded list of prescribed indictable offences, but where those charges were withdrawn or the child/youth was found not guilty, could create a scenario where a child/youth is on an EM condition, their charges are then subsequently withdrawn of they are found "not guilty" of the relevant offence and then are no longer "eligible" to have that condition – which creates a farcical scenario.

Accordingly, we recommend that either:

- a positive legislative obligation is imposed on the chief executive of Queensland Police Service to monitor every bail undertaking with an EM condition and to make application to have that condition removed the day that a person becomes ineligible to have that condition remain; or
- that the EM condition that is imposed must expressly state that it lapses on the withdrawal/finding of not guilty on the relevant offence(s).

We also take this opportunity to reiterate the urgent need for culturally appropriate bail support services across the board. For Aboriginal and Torres Strait Islander youth, it is essential that these services are delivered by Aboriginal and Torres Strait Islander community-controlled organisations to have their best chance of success and that such organisations are adequately funded to deliver these services.

Enabling the temporary transfer of children in watchhouses to nearby youth detention centres (YDCs) during the day for programs and physical exercise

We continue to hold significant concerns in relation to the welfare of children detained in police watch houses throughout the State, especially given the legislative override of the *Human Rights Act 2019* in relation to the same. We welcome proposed amendments in the Bill that would enable the temporary transfer of children in watch houses to nearby YDCs during the day to enable the child to participate in activities, programs or services. In our view, the proposed regime should be expanded to enable these children to be able to obtain leave more generally, for example, children detained in watch houses cannot obtain leave to attend a funeral, however, if they were detained in a YDC, there is scope for this to occur.

We are concerned about the impact of staff shortages that currently exist in YDCs and whether such might impact the ability, in practice, for children to be granted such leave. Given the unprecedented situation currently in place in relation to the detention of children in watch houses, it is imperative and urgent that any proposals to improve

conditions for these children are not symbolic and instead effect actual positive change.

Proposed amendments to the Childrens Court Act 1992 to allow a victim/victim's representatives and an accredited media entity to be present during Children's Court criminal proceedings

We strongly oppose these proposed amendments and recommend that they be removed from the Bill. The special vulnerability of children in the criminal justice system is well-established. We hold significant concerns about the impact of the proposed amendments in the context of the right to privacy of the child and the potential for media to publish details regarding a relevant child's offences.

Proposed amendments to provide that participation in a program or engagement in a service by children on bail or remand or sentenced children or anything said or done in the course of participation in a program or service cannot be used in evidence in any proceedings

We note that we have been consulted on this proposal in an earlier phase of consultation which preceded this Bill and lodged a written submission thereto. We broadly support the proposed amendments contained in the Bill with respect to this immunity and welcome the fact that the immunity as it appears in the Bill has broader application than what was originally contemplated. This is something that we had raised in our initial feedback.

We note, however, that proposed section 148A(2) of the Bill which provides that the proposed immunity does not apply to a proceeding for an offence committed or allegedly committed by the child while participating in a youth justice program. We are still concerned about what might occur, for example, in the event that a detainee participates in a relevant program and makes admissions about drug and alcohol use. It could get very murky to determine whether that information is under the umbrella of protection or could be used against the individual. Accordingly, we recommend that this carve-out be removed such that a blanket protection be provided, which would offer the best chance of fully realising the policy objectives of removing barriers to children participating in programs while on bail or remand or sentenced with the aim of addressing criminogenic factors.

We also offer the following additional feedback on this proposal:

- In our view, consistent with the policy objective of permitting open engagement by children in relevant programs without fear of consequence, the proposed legislative framework must also include:
  - a prohibition on derivative use of disclosures; and
  - an offence for records to be disclosed improperly.
- There will need to be consideration of the provisions of the *Evidence Act* to ensure that the objectives behind this recommendation are properly achieved, including, to ensure that such evidence does not (via another route) make its way into evidence in a way that could circumvent the spirit of the Women's Safety and Justice Taskforce recommendation.
- It is possible that consequential amendments might be required to the *Right to Information Act 2009* (**RTI Act**) (unless a relevant exemption already exists), to ensure that such information would not be disclosed in the context of an access application made pursuant to the RTI Act.

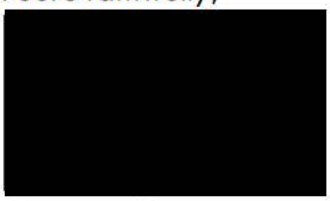
Finally, we take this opportunity to reiterate that there needs to be a significant focus on increasing the provision and availability of culturally safe rehabilitative programs.

Expansion of the hooning offence

Section 19C of the SO Act currently prohibits a person from willingly participating in a group activity involving a motor vehicle being used to commit racing, burn out or other hooning offence. The words 'willingly participate' require that positive action needs to have been undertaken by the person in order for their conduct to fall within the scope of the offence. The Bill proposes to replace section 19C of the SO Act (Unlawful conduct associated with commission of racing, burn out or other hooning offence) to prohibit a person from spectating a hooning group activity without a reasonable excuse. Reasonable excuse is extrapolated upon in subsection (3) and express protection is provided to journalists gathering information for the purpose of journalism or individuals gathering information for the purpose of reporting the information to the police. The Explanatory Notes and Statement of Compatibility appear to suggest that the proposed expansion of section 19C is merely to clarify the original intent of existing section 19C, **however, the effect the proposed change will have is markedly different from the existing provision**. The existing provision requires positive action to be taken in order to fall foul of the offence and the proposed expansion would broaden the scope to individuals that are merely passively watching the conduct occur. In our view, the proposed amendments cast the net far too wide and we are, therefore strongly opposed. **Innocent by-standers can be criminalised under the proposed wording.**

We thank you for the opportunity to provide feedback on the Bill.

Yours faithfully,



Shane Duffy
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