

STRENGTHENING COMMUNITY SAFETY BILL 2023

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Strengthening Community Safety Bill 2023

Submission to Economics and Governance Committee

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Summary

1. Thank you for the opportunity to comment on the Strengthening Community Safety Bill 2023 (**the Bill**).
2. The Commission considers this Bill should not be passed because of the significant and disproportionate limitations it places on the rights of children. The proposed override of the *Human Rights Act 2019* (**HR Act**) is not justified and it would have been preferable for the government to have instead provided detailed justification for compatibility and incompatibility with human rights. Many of the reforms proposed will fail to achieve their intended purpose.
3. The Commission appreciates the serious community concern that surrounds the issue of youth crime in Queensland, which has been intensified by recent tragic events, allegedly perpetrated by children.
4. However, as the Commission has noted in previous submissions, ‘tough on crime’ programs and measures, that are reactive to crimes already committed, are not effective in rehabilitating children and reducing recidivism. Rather, the best outcome for victims, young offenders and the broader community will be achieved by initiatives that reduce reoffending and incarceration – by tackling the causes and consequences of youth crime.¹
5. Insufficient consideration has been given to whether these youth justice reforms will actually contribute to reducing reoffending and protecting the community. Further, there have been no reforms proposed to address the ongoing human rights crisis of children being remanded for prolonged periods in adult watchhouses.
6. The Commission had sought to engage with the Government on developing responses to the current community concern about the operation of the youth justice system, and suggested the Government consult further with other key stakeholders before progressing this legislation.
7. It is therefore disappointing that this Bill has been introduced without any consultation with the Commission, particularly as it includes an override of the HR Act. The timeframe provided for consultation is entirely inadequate and has left little scope for the government to meaningfully engage with stakeholders.

Introduction

8. The Queensland Human Rights Commission (the Commission) is a statutory body established under the Queensland *Anti-Discrimination Act 1991* (**AD Act**).

¹ Bob Atkinson, *Report on Youth Justice from Bob Atkinson AO, APM, Special Advisor to Di Farmer MP, Minister for Child Safety, Youth and Women and Minister for Prevention of Domestic and Family Violence* (2018) 21.

9. The Commission deals with complaints of discrimination, sexual harassment, vilification, and other objectionable conduct under the AD Act.
10. The Commission also has functions under the AD Act and the HR Act to promote an understanding and public discussion of human rights in Queensland, and to provide information and education about human rights.
11. As contained in the HR Act, a decision, action or statutory provision is compatible with human rights if it either:
 - Does not limit a human right; or
 - Limits a human right only to the extent that it is reasonable and demonstrably justifiable in accordance with section 13.²
12. Section 13 of the HR Act sets out relevant factors to be considered when determining whether limitations on human rights can be justified. Of these factors, the most relevant to the introduction of these amendments are:
 - the nature of the human right being limited;³
 - the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;⁴ and
 - the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose.⁵
13. The more important the right, and the greater the incursion, the more important the purpose will need to be.⁶

The objectives of the Bill

14. The intention of the Bill appears to be improving community safety by reducing recidivism amongst young people and strengthening youth justice laws to respond to serious repeat offenders.⁷
15. The Commission, of course, supports improving community safety and crime prevention. However, the Commission holds serious concerns that the proposed reforms will fail to achieve their intended purpose and will increase pathways to criminalisation and incarceration for young people.

² *Human Rights Act 2019 (Qld)* s 8.

³ *Human Rights Act 2019 (Qld)* s 13(2)(a).

⁴ *Human Rights Act 2019 (Qld)* s 13(2)(b).

⁵ *Human Rights Act 2019 (Qld)* s 13(2)(c).

⁶ Explanatory Notes, *Human Rights Bill 2018 (Qld)*, 16-18.

⁷ Statement of Compatibility, *Strengthening Community Safety Bill 2023*, 1. A similar statement is included on page 1 of the Explanatory Notes.

16. The Commission agrees that governments have a duty to protect their citizens. The rights of victims of crime, particularly their right to life,⁸ is a critically important consideration for government and everyone in Queensland has the right to feel safe in their community.
17. However, there is little evidence that the amendments contained in the Bill will improve community safety in the immediate or longer term.
18. It is proposed that a number of provisions in the Bill be subject to an override declaration. This means that those provisions, and any statutory instruments made under those provisions, cannot be declared incompatible with human rights by the Supreme Court, are not subject to human rights compatible rules of statutory interpretation, and signals to public entities that they do not need to act compatibly with human rights when implementing these provisions.⁹ This declaration should only be made in exceptional circumstances.¹⁰

Victims' rights

19. A key consideration for human rights compatibility under s 13 of the HR Act is whether a limitation will achieve its purpose. An important purpose of this legislation is to improve community safety and uphold victims' rights, particularly rights to life, property and security.¹¹
20. However, the Government acknowledges in the Statement of Compatibility that there are less restrictive means to achieve the purpose of the Bill. In the Commission's view, it may be that those options are in fact the only way to achieve the purpose of the Bill.
21. The measures in the Bill are predicated on a flawed perception that recidivist children will respond positively to punitive measures. As countless reviews have found, including from former Police Commissioner Bob Atkinson,¹² such measures do not work to reduce crime and therefore do not protect the rights of victims.
22. While breach of bail is an offence in some other jurisdictions,¹³ many other jurisdictions recognise that a tough on crime response is failing to rehabilitate children and reduce recidivism.
23. The Commission notes the Government's own youth justice strategy, which provides a framework for strengthening the prevention, early intervention and

⁸ *Human Rights Act 2019* (Qld) s 16.

⁹ *Human Rights Act 2019* (Qld) ss 43, 45.

¹⁰ *Human Rights Act 2019* (Qld) s 43.

¹¹ *Human Rights Act 2019* (Qld) ss 16, 24 and 29.

¹² Bob Atkinson, *Report on Youth Justice from Bob Atkinson AO, APM, Special Advisor to Di Farmer MP, Minister for Child Safety, Youth and Women and Minister for Prevention of Domestic and Family Violence* (2018).

¹³ *Bail Act 1985* (SA) s 17(1); *Bail Act 1982* (WA) s 51; *Bail Act 1982* (NT) ss 37B and 38AA.

rehabilitation responses to youth crime in Queensland. This strategy is evidence based and underpinned by four key pillars.¹⁴

- a) Intervene early;
 - b) Keep children out of court;
 - c) Keep children out of custody;
 - d) Reduce re-offending.
24. The majority of reforms in the Bill do not advance these principles, and could be seen to be in direct contradiction with principles b) and c), as they are targeted at broadening the situations in which children will end up before the court and make it more likely they will be refused bail and remain in detention whilst waiting for their charges to be finalised.
25. Children involved in stealing cars or posting crimes on social media are unlikely to be thinking about the maximum penalties of an offence, particularly the cohort of 'serious recidivists' targeted in the Bill. Reforms such as increasing sentences and adding a circumstance of aggravation will do nothing to reduce offending or recidivism amongst children. Beyond this, the Government's own research shows that children and young people who have been through detention are more at risk of committing offences when they return to the community.¹⁵
26. In *Working Together, Changing the Story*, it was concluded¹⁶
- Most offences committed by children and young people are property offences, but research shows that detention has no impact on property crime.*
- Australian research shows detention separates children and young people from important relationships including families. It exposes them to negative peers and increases their risk of further custody. Detention makes it harder to return to education and limits future employment opportunities.*
27. If incarceration worked as an effective deterrent, there would not be recidivist offenders and youth detention centres would not be at capacity. The introduction of this Bill changes the focus of addressing youth crime in Queensland from a rehabilitative to a punitive approach.

¹⁴ Queensland Government, *Working Together: Changing the Story*, Youth Justice Strategy 2019 – 2023, 1.

¹⁵ Queensland Government, *Working Together, Changing the Story*, Youth Justice Strategy 2019-23, 8.

¹⁶ Queensland Government, *Working Together, Changing the Story*, Youth Justice Strategy 2019-23, 8.

28. A substantially punitive approach to youth crime is in direct contradiction of both Queensland and international human rights principles and is unlikely to have any positive impact on community safety.

Why children need protection

29. The Bill seeks to set aside well-established rights and protections of children, recognised and developed both in Australia and internationally. These rights are not merely theoretical principles, but protections based on the vulnerabilities of children. These rights acknowledge that children and young people require a higher duty of care and more intensive interventions in order to reach their potential.
30. Outside of the criminal justice system, countless Queensland Government strategies and commitments acknowledge these principles. For example, the Queensland Children's Wellbeing Framework recognises we all play a part in children's wellbeing and sets out the shared commitments of the government and the community to help achieve these aspirations. Our shared commitments are to provide children with fundamental rights and needs, love and nurturing, inclusion and opportunity, and enrichment and challenge.¹⁷ The Queensland Youth Strategy, *Building young Queenslanders for a global future*, states:
- A young person in Queensland today should be able to look to the future and see limitless possibilities. Being young is about exploring opportunities that come with increased independence and having the benefit of choice. Youth is about looking ahead with excitement and seeing potential, not obstacles.¹⁸
31. Setting aside these principles for children involved in the youth justice system is counter-productive.
32. Detention as a last resort is an evidence-based approach learnt the hard way by decades of punitive measures that didn't rehabilitate young people.¹⁹ The brains of children are different from those of adults and are not yet fully developed. Children have less developed psychological, social and biological maturity to help guide their decision-making behaviour. This makes children more prone to impulsive and risk-taking behaviours and more susceptible to peer pressure. A child is less able to assess the risk and consequences of their decisions and react appropriately to stressful situations.²⁰

¹⁷ Queensland Government, *Queensland Children's Wellbeing Framework Giving all our children a great start* (2023).

¹⁸ Queensland Government (Department of Communities, Child Safety and Disability services), *Queensland Youth Strategy: Building young Queenslanders for a global future* (2017) 2.

¹⁹ See also *United Nations Convention on the Rights of the Child*, GA Res 44/25, UN Doc A/RES/44/25 (20 November 1989) art 37; and *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules')* GA Res 40/33, UN Doc A/RES/40/33 (29 November 1985).

²⁰ Queensland Governments Statisticians Office, *Youth Offending* (Research Brief, April 2021), 7.

33. Children who come before the court are overwhelmingly from families where they have experienced abuse, trauma and neglect. Many have witnessed domestic violence, and many are under the care of child safety.²¹ The Bill disproportionately impacts on these children, including Aboriginal and Torres Strait Islander children, limiting their right to equality and other rights. The Bill is likely to significantly undermine the Government's commitment to Closing the Gap targets.
34. Ross Homel, Emeritus Professor in Criminology and Criminal Justice at Griffith University, cites research to demonstrate that incarceration does not deter or rehabilitate traumatised young people, but instead re-traumatises them by exposing them to further violence. It also limits opportunities for young people to gain a school qualification and acquire job skills. Pre-trial detention more than triples the likelihood that these young people will be imprisoned again, after their court adjudication.
- The fundamental problem with youth incarceration as a crime policy is that it impedes young people's ability to mature psychologically and participate in mainstream society.²²
35. The only way to meaningfully reduce youth crime is to invest and adequately fund intervention programs that address systemic inequalities faced by these children. The purpose of the Bill and the protection of victims rights can be achieved without having to override the rights of the child.

Override of the HR Act

36. Parliament may, under s 43 of the HR Act, in exceptional circumstances, expressly declare that a provision of an Act has effect despite being incompatible with human rights (**override declaration**). If an override declaration is made by parliament, the HR Act does not apply to the Act or provision to the extent of the declaration while the declaration is in force, which expires after 5 years (but may be re-enacted).
37. The Commission is concerned about the use of the override power in this Bill for three reasons:
- Insufficient evidence has been provided to demonstrate that an emergency of the kind necessary to invoke the declaration exists;

²¹ Queensland Governments Statisticians Office, *Youth Offending* (Research Brief, April 2021), 12; Laurence Steinberg, 'A Social Neuroscience Perspective on Adolescent Risk Taking' (2008) 28(1) National Library of Medicine 78; Queensland Government, Working Together, Changing the Story, Youth Justice Strategy 2019-23, 6.

²² Ross Homel, 'Why locking up youth offenders fails to reduce crime – and what we should be doing instead' *The Guardian* (online, 21 February 2023) <<https://www.theguardian.com/commentisfree/2023/feb/21/why-locking-up-youth-offenders-fails-to-reduce-and-what-we-should-be-doing-instead?>>.

- Some of the rights unreasonably limited by the Bill are specially protected under international law and should never be subject to such an override;
- A dangerous precedent will be established for future governments to override human rights as a result of a public controversy. It is at these times of heightened public anxiety that maintaining robust protections of human rights is of greatest importance.

Exceptional circumstances

38. Examples of exceptional circumstances are included in s 43 of the HR Act and include ‘war, a state of emergency or an exceptional crisis situation constituting a threat to public safety, health or order.’
39. In its report on the Human Rights Bill 2018, the Legal Affairs and Community Safety Committee noted that the override declaration framework is based on article 4 of the International Covenant on Civil and Political Rights (**ICCPR**).²³ The Commission accepts that the override mechanism of the HR Act does not accord with the requirements or text of the ICCPR. Also, the HR Act does not explicitly state that any rights are non-derogable.²⁴ Nonetheless, article 4 of the ICCPR and accompanying guidance provide context for how the relevant provisions should operate.
40. Article 4 of the ICCPR provides that a state party may only act incompatibly with human rights ‘in times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed.’²⁵
41. The UN High Commissioner for Human Rights provided specific guidance on the state of emergency presented by the COVID-19 pandemic. That advice noted that derogations from human rights obligations may be needed during the pandemic, however that:

Although derogation or suspension of certain rights is permitted when such emergencies are declared, measures suspending rights should be avoided when the situation can be adequately dealt with by establishing proportionate restrictions or limitations on certain rights.

...States must inform the affected population of the exact substantive, territorial and temporal scope of the application of the state of emergency and its related measures.²⁶

²³ Legal Affairs and Community Safety Committee, Parliament of Queensland, *Inquiry into Human Rights Bill 2018* (Report 26, February 2019) 65-67.

²⁴ For further discussion of these issues see Julie Debeljak, ‘Of Parole and Public Emergencies: Why the Victorian Charter Override Provision Should be Repealed’ (2022) 45(2) *University of New South Wales Law Journal* 1.

²⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, (entered into force 23 March 1976) art 4

²⁶ United Nations High Commissioner for Human Rights, *Emergency Measures and COVID-19: Guidance* (27 April 2020).

42. Queensland was able to respond to the COVID-19 pandemic, including imposing significant restrictions on people's freedom of movement and right to liberty, without resorting to the use of an override declaration. Those measures were in response to a worldwide pandemic that continues to affect many aspects of the community. The Government was able to justify such measures as necessary to fulfil its obligations under the right to life. The COVID-19 emergency was also officially proclaimed.²⁷ The safeguards in the HR Act applied to public entities performing functions under that legislation, for example police.
43. In contrast, as noted in the s 44 statement accompanying the Bill, 'a body performing functions or exercising powers' is not a public entity 'within the meaning of the HR Act in respect of its performance of those functions or exercise of those powers'. Removing human rights safeguards with regard to the treatment of children within the justice system in Queensland is an extraordinary and retrograde step for the Government and Parliament to take.

Nature of rights overridden

44. Article 4 of the ICCPR and accompanying guidance material explicitly prescribes that no derogation from certain rights may be made including to the prohibition of torture or cruel, inhuman or degrading treatment (protected in s 17 of the HR Act), the recognition of everyone as a person before the law (protected in s 15 of the HR Act), and the imposition of retrospective criminal laws or increased penalties (s 35). The rights protected in the United Nations Convention on the Rights of the Child are also intended to apply during emergencies.²⁸
45. These rights are arguably all limited by the relevant provisions of the Bill.
46. In Victoria, override declarations have been used three times by parliament, none involving limitations on the rights of children.²⁹

Justification for override

47. Under s 44, a member who introduces a Bill containing an override declaration, must make a statement explaining the exceptional circumstances that justify making the declaration. The statement accompanying the Bill suggests the justification for the override declaration is as follows:

There is an acute problem presented by a small cohort of serious repeat offenders who engage in persistent and high-risk offending; the latest Childrens Court Annual Report indicates 17 percent of all youth offenders account for 48 per cent of all youth crime. There is some evidence of growth

²⁷ *Public Health Act 2005* s 323 and accompanying regulations.

²⁸ See ICCPR article 4 and Human Rights Committee, *General Comment No 29: States of Emergency (article 4)*, UN Doc CCPR/C/21/Rev.1/Add.11 (2011) footnote 5 to [10].

²⁹ In 2018 the *Corrections Amendment (Parole) Act 2018* (Vic) made amendments to prevent the Adult Parole Board from granting parole in certain circumstances. The *Corrections Amendment (Parole) Act 2014*, amended the Corrections Act to restricting the Parole Board from granting parole to a particular prisoner; and the *Legal Profession Uniform Law Application Act 2014*, to implement a uniform legal professional conduct scheme. The *ACT Human Rights Act 2004* does not have an equivalent override declaration process.

in the number of this cohort and the intensity of their offending, up approximately seven percentage points from the previous 12-month period. The measures in this Bill are designed to address this serious problem. In the Government's view, this presents an exceptional crisis situation constituting a threat to public safety.

48. The Commission acknowledges the profound trauma that victims of crime experience, and the growing community expectations that more should be done to address youth crime. However, the information provided to justify the existence of 'exceptional circumstances' that show there is a current crisis is insufficient. The increase in offences involving serious repeat offenders is not necessarily supported by the data. The Children's Court Annual Report describes the latest data regarding serious repeat offenders as follows:

As already stated, there was a decrease in finalised appearances before the Court and a decrease in the numbers of distinct young people who are convicted of charges... Young people categorised as serious repeat offenders under the Serious Repeat Offender Index accounted for 17 percent of young people convicted and 48 percent of the charges. This represents a larger percentage of young people than in previous years, however, this is the first time those young people have been measured against the Serious Repeat Offender Index so that may account for the difference.³⁰

49. The Commission considers that it is too soon to obtain statistically relevant results from a new Serious Repeat Offender Index data set and, as acknowledged by the annual report itself, the 7 per cent 'increase' may be for a variety of reasons. The Serious Repeat Offender Index cannot even be compared across two financial years, as it was not included in the 2020-21 Children's Court annual report.
50. The Commission suggests that the use of an override in these circumstances is particularly problematic when the Government acknowledges in the Statement of Compatibility that there are less restrictive options to achieving the purpose of the Bill. In circumstances when the situation does not meet the threshold of a threat to national security or a state of emergency, and given the nature of the rights limited, the Commission submits an override is not the appropriate response. Instead, the government should seek to take the less restrictive measures open to it and properly justify any limitation on rights.
51. The 2011 review of the *Charter of Human Rights and Responsibility Act 2006* (Vic) (**the Charter**) recommended the override mechanism be repealed because of situations like the proposed use in this Bill:
- It is not necessary in a statutory model of human rights protection. The Charter does not permit the courts to strike down legislation for Charter

³⁰ Children's Court of Queensland, *Annual Report 2021-22* (Report, 2022) 4 [14]-[15]

incompatibility, and Parliament remains sovereign without use of the override declaration.

- Use of the override provision suppresses the judiciary's contribution to the dialogue model by preventing courts from commenting on the scope of protected rights, the justifiability of any limitation on rights, the interpretation of the law compatibly with the rights in the Charter and the need for a declaration on inconsistent interpretation.
- An override declaration can be made without meeting the exceptional circumstances threshold and without the five-year time limit, undermining the safeguards.³¹

52. The 2015 review of the Victorian Charter also recommended the override provision be repealed because 'it does not serve the policy purpose of acting as a brake on limitations of human rights; it is not necessary to preserve parliamentary sovereignty; and it fails to make clear to the public that Parliament can enact human rights incompatible legislation without an override declaration'.³² The Review suggested it would be far more preferable:

...to rely on statements of compatibility (noting any incompatibility), which provide a consistent, transparent and accountable process for the Government to identify how legislation may limit Charter rights or be incompatible with Charter rights.³³

53. Such statements are 'just as transparent and public as the override process' but 'preferable, because it keeps the courts involved in the human rights dialogue' without compromising parliamentary sovereignty.³⁴

Specific amendments of concern

54. In addition to the proposed use of the override declaration, the Commission is concerned with several specific amendments in the Bill.

Bail amendments

55. The Commission is concerned about two proposed amendments to Queensland bail laws in the Bill:

- the expansion of the offences subject to the 'show cause' requirement for bail; and

³¹ As summarised in Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Report, September 2015) 198

³² Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Report, September 2015) 198.

³³ Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Report, September 2015) 199.

³⁴ Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Report, September 2015) 199.

- extending the offence of breaching conditions of bail³⁵ to children, which the government has accepted is incompatible with human rights.
56. While high profile incidents have occurred where young people have committed further offences while on bail, these instances are exceptions to the rule, and the vast majority of youth offenders do not breach bail conditions or offend while on bail.
 57. Courts should be able to respond flexibly to the broad range of cases that come before the justice system. At their core, bail laws are a risk management strategy to ensure that offenders return to court and do not reoffend before being brought to justice. Bail laws should not be a proxy for guilt and punishment, as such an approach undermines the fundamental right to the presumption of innocence.
 58. As well as the ethical and human rights concerns, there are concerning economic, resource-implications of placing more and more children on remand in custody. The Justice Reform Initiative has noted that Queensland's:

...over-reliance on remand is even more apparent among children, with consequences that can shift the direction of a child's life. In the June quarter of 2021, 235 children (88%) were in detention without having been sentenced, with 32 children (12%) detained under sentence. Queensland has by far the highest number of young people (all ages) in unsentenced detention. On average, it takes 309 days – almost a year – to finalise a matter in the Queensland Children's Court. This means, that when sentenced, most children on remand have already served their sentence, or spent more time in prison than would have otherwise been ordered by the courts. Remand disconnects children from family, cultural and community supports, and increases the likelihood of reoffending.³⁶
 59. This trend continues. In the June quarter of 2022, 248 children (89%) were in detention without having been sentenced with 30 children (11%) detained under sentence.³⁷

Expansion of 'show cause' provision for bail

60. When a presumption against bail (also known as a 'reverse onus') for children was introduced in 2021, the Commission raised serious concerns and advised the government that the new laws may not be compatible with the HR Act.
61. The *Youth Justice and Other Legislation Amendment Act 2019* removed some legislative barriers to bail. In 2020, this position was quickly reversed through amendments to an unrelated Bill³⁸ which were declared 'urgent'. The 2020

³⁵ *Bail Act 1980* s 29.

³⁶ Justice Reform Initiative, 'Jailing is failing: insights into imprisonment in Queensland' (Paper, November 2022)
<https://assets.nationbuilder.com/justicereforminitiative/pages/318/attachments/original/1668450143/JRI_Insights_QLD.pdf?1668450143>

³⁷ Australian Institute of Health and Welfare, *Youth detention population in Australia 2022* (Catalogue No JUV 139, 13 December 2022)

³⁸ *Community Services Industry (Portable Long Service Leave) Act 2020*, division 8.

amendments meant a child will be refused bail if an ‘unacceptable risk’ to the safety of the community. The *Youth Justice and Other Legislation Amendment Bill 2021* (the 2021 amendments) made a further amendment to require that a court or police officer must refuse to release a child from custody in connection with a charge of a prescribed indictable offence, unless the child can show cause that they are not an unacceptable risk.

62. At the time, the Commission commented that it was too early to understand the full impact and human rights compatibility issues, but that it would be hard for the government to justify the changes to bail laws so soon after the earlier changes.
63. The Commission also noted the additional layer of complexity that would need to be navigated by police and courts. In relation to the human rights impacts the Commission considered that:

A presumption against bail limits several human rights under the HRA including the right to liberty (s 29) and protection of children (s 26) and is ‘at odds’ with international standards that depriving children of their liberty must be reserved as a last resort and limited to exceptional cases. The statement also notes that the right to be presumed innocent under s 32(1) is also limited for similar reasons.

64. The Commission was concerned at the time that other applicable rights were not considered in the development of the 2021 amendments, as follows:

Section 32(3) in particular provides that “a child charged with a criminal offence has the right to a procedure that takes account of the child’s age and the desirability of promoting the child’s rehabilitation.” Despite not discussing this right, the Statement acknowledges that these changes are contrary to efforts to rehabilitate children in the criminal justice system.

Further, in light of the likelihood that these changes will increase the number of children in detention, thereby risking the prolonged detention of all children (remand and sentenced) in adult watch houses, the laws are also likely to limit s 33 of the HRA which requires that children must be segregated from detained adults 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.

65. The Commission remains in serious doubt about the human rights compatibility of a presumption against bail for children. In submissions about the 2021 amendments, we noted that there was insufficient justification for why the ‘prescribed indictable offences’ had been selected based on some criteria that is rationally connected to the purpose.³⁹
66. The current Bill proposes to extend the prescribed offences to which the presumption against bail applies. These new offences are unlawful use of a

³⁹ See also *Re application for bail by Islam* (2010) 175 ACTR 30: the ACT Supreme Court issued a declaration of incompatibility in relation to a provision requiring a person to show exceptional circumstances for bail. The provision was found to be inconsistent with human rights as it was not proportionate to the purpose to be achieved.

motor vehicle where the child is a passenger and entering or being in premises with the intention to commit an indictable offence.

67. The Statement of Compatibility again does not justify the selection of offences, and the Commission remains of the view that the provision may be incompatible with human rights. The Statement has not provided any evidence to show that young people who commit these kinds of offences are more likely to breach bail conditions, reoffend on bail, or fail to appear in court, which may justify a reversal of the onus on bail. Instead, the Statement contains a generic statement that 'it is considered to be justified' on the basis of 'community safety' from 'serious repeat offenders.'⁴⁰

Recent Victorian coronial findings

68. The Committee should have due regard to the recent Victorian Coroner's Court findings on the inquest into the passing of Veronica Nelson. Following amendments in 2018 in Victoria, an accused person's entitlement to bail was qualified by provisions requiring bail decision makers to refuse bail. There is a presumption that bail will be refused if an accused is charged with a prescribed offence.
69. Ms Nelson was directly impacted by the high reverse onus threshold for bail. She was unable to meet an exceptional circumstances test, even though she was not presenting any risk to community safety, and then passed away in custody. The Coroner's Court noted that low-level, non-violent offending is frequently linked to social circumstances including homelessness, drug dependence or mental illness, and disproportionately affects Aboriginal peoples.⁴¹
70. On this basis, the Coroner found that the Bail Act provisions in Victoria have a discriminatory impact on First Nations people, resulting in 'grossly disproportionate' rates of remand in custody,⁴² recommending that the reverse onus on bail be repealed.⁴³ The Coroner further found that the reverse onus on bail is too broad and imposes an unreasonable limitation on the right not to be automatically detained in custody in the Charter, and is therefore incompatible with the Charter.⁴⁴
71. The situation in Queensland is clearly analogous. As around half of the children in youth justice detention in Queensland are Aboriginal or Torres Strait Islander (despite making up 5% of the population),⁴⁵ the presumption against bail will

⁴⁰ Explanatory Notes, Strengthening Community Safety Bill 2023, 12.

⁴¹ Victorian Courts (2023) Inquest into the death of Veronica Nelson (File No. COR 2020/0021), 368-374.

⁴² Victorian Courts (2023) Inquest into the death of Veronica Nelson (File No. COR 2020/0021), 375.

⁴³ Victorian Courts (2023) Inquest into the death of Veronica Nelson (File No. COR 2020/0021), 381.

⁴⁴ Victorian Courts (2023) Inquest into the death of Veronica Nelson (File No. COR 2020/0021), 390.

⁴⁵ Australian Institute of Health and Welfare, *Youth detention population in Australia 2022* (Catalogue No JUV 139, 13 December 2022) Supplementary Tables.

disproportionately affect First Nations children, including when they are engaging non-violent offending.

Breach of bail conditions offence

72. Clause 5 of the Bill amends section 29 of the *Bail Act 1980* so that it will apply to children. Under section 29 it is an offence punishable by a maximum of 40 penalty units or 2 years imprisonment to break any condition of the undertaking on which the defendant was granted bail requiring their appearance before court.

Legislative history

73. In 1988, the *Bail Act 1980* was amended to include an offence of breaching bail conditions, applying only to adults.⁴⁶ While being subject to minor amendments since, the provision has never before been applied to children.
74. In 2014, the government at the time introduced an offence to commit a further offence on bail.⁴⁷ This is not the same as what is proposed by the current Bill because it was not about breaching bail conditions but was confined to criminal activity while on bail. The Explanatory Notes stated the intention of the new offence introduced in 2014 was not to punish a child for multiple offences arising out of a single series of criminal acts committed by a young person while on bail. Rather, an offender should only be held liable for *one* breach of bail offence.⁴⁸
75. Submissions to the parliamentary inquiry at the time criticised this offence as being unnecessary and unlikely to have any practical effect, that it could amount to double-punishment and would be less effective than other alternatives.⁴⁹
76. The offence was removed in 2015⁵⁰ after a government commitment to repeal the 2014 changes on the basis of 'international evidence that increasing the severity of punishment is ineffective in reducing recidivism, particularly by children and young people.'⁵¹
77. The Premier commented in 2017 as follows:

Take the breach of bail offence for instance – the LNP introduced this while they were in Government but courts rarely heard these matters. In fact, less than 10 breaches of bail cases went before the court.

What's more is that it did nothing to reduce the rates of young people who offended while on bail; it clearly did not act as a deterrent.⁵²

78. The Commission is unaware of any updates in international evidence produced in the last 8 years to show that harsher penalties are effective in reducing

⁴⁶ *Bail Act and Another Act Amendment Act 1989* (Qld).

⁴⁷ *Youth Justice and Other Legislation Amendment Act 2014* (Qld).

⁴⁸ Explanatory Notes, Youth Justice and Other Legislation Amendment Bill 2014, 4.

⁴⁹ *Legal Affairs and Community Safety Committee*, Report no. 58 (March 2014), 10 - 12.

⁵⁰ *Youth Justice and Other Legislation Amendment Act 2015*.

⁵¹ Explanatory Notes, Youth Justice and Other Legislation Amendment Bill 2015, 1.

⁵² Queensland Government, 'Media statement: Palaszczuk Government committed to tackling youth crime' (2017) <<https://statements.qld.gov.au/statements/82326>>.

recidivism. While a breach of bail conditions offence may be popular with some sectors of the community, if there is no objective evidence that it will be a deterrent, then the law should not be amended.

79. The 2014 amendment was at least a more proportionate option as it focussed on *criminal* behaviour committed while on bail rather than criminalising behaviour which is otherwise not unlawful.

Human rights issues

80. The Bill and Statement of Compatibility for the current Bill acknowledges that the provision is not compatible with the HR Act, including because it directly contradicts the *Beijing Rules*⁵³ and the *Havana Rules*.⁵⁴
81. The Statement of Compatibility does not justify the change except to say that it is to 'ensure that young people comply with bail conditions.' The Statement fails to explain how making breach of bail conditions as an offence for children will achieve better compliance by young people. Taking this approach is directly contradictory to previous statements made by the current government about the value of a breach of bail conditions offence.

Proposed approach likely to be unfair and ineffective

82. Through a breach of bail offence, a person is criminalised for actions that are not in ordinary circumstances criminal actions. For example, if a young person stays out past their curfew or changes their place of residence, this behaviour is punished as a criminal offence in addition to receiving punishment for the initial offence for which they are on bail.
83. A breach of bail offence could be especially punitive for a young person who is substance-addicted and has a bail condition not to consume alcohol or drugs. Diverting the child to a treatment program may be a better course of action instead of further criminalising this behaviour.
84. The current, and more appropriate course of action is for the court to reconsider whether a person should be instead remanded in custody, or whether to place additional or different conditions on bail. As acknowledged by the Statement of Compatibility there are many alternative options including investing resources into bail support programs for children.⁵⁵
85. Bail support programs, which prioritise support over supervision are evidence-based. Such measures are much more likely to succeed than taking a punitive approach because the program can work with the young person on an individual

⁵³ *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules')* GA Res 40/33, UN Doc A/RES/40/33 (29 November 1985) rule 13 – detention pending trial must be a measure of last resort and for the shortest possible period of time; rule 11 – diversion from the criminal justice system.

⁵⁴ *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, pt III - detention before trial shall be avoided to the extent possible and limited to exceptional circumstances. All efforts shall be made to apply alternative measures.

⁵⁵ Statement of Compatibility, Strengthening Community Safety Bill 2023 3.

basis to understand and address why the child is struggling to meet their conditions.⁵⁶

86. The Atkinson report recommended that to the greatest extent possible, bail conditions should not place unrealistic expectations on children while ensuring community safety.⁵⁷ A potential perverse outcome of a breach of bail offence is that Magistrates may be more reticent to place conditions on bail because it may set children up to fail. Extending the breach of bail offence to minors may limit the use of risk mitigation achieved through setting reasonable conditions on bail, which ultimately fails to protect victims and the broader community.
87. The Commission does not agree that a breach of bail offence for children will improve community safety. At a minimum, the Commission recommends that the offence should not apply to all breaches of bail conditions, but be confined to only breaches that are serious in nature, and that are not trivial, technical or that occur where there are exceptional circumstances, such as where a young person has been unable to maintain their conditions because their safety is in jeopardy.
88. Other significantly less restrictive and reasonably available alternative options could include:
 - Increasing the number of bail assistance support programs in Queensland, particularly for youth offenders, including by providing accommodation and support to remain engaged in education.
 - Creating an entry on a person's criminal history where the court has made a finding that re-offending has occurred while on bail. This would allow breach of bail information to be available to the judiciary, but further offences are not created.⁵⁸
89. The Commission also questions whether breaches of bail offences will be included in the youth crime statistics recorded by the Children's Court. If breach of bail condition offences are recorded in the same way as initial offences, the data will likely show a misleading increase in offending overall in years to come.

New police powers of arrest

90. Proposed s 59AA of the Bill removes the requirement for police to consider alternatives to arrest if they reasonably suspect a child on bail for a prescribed indictable offence or certain domestic violence offences has contravened or is contravening a bail condition. Of particular concern is s 59AA(2) which states that the section applies if a police officer reasonably suspects a child **is likely** to

⁵⁶ Bob Atkinson, *Report on Youth Justice from Bob Atkinson AO, APM, Special Advisor to Di Farmer MP, Minister for Child Safety, Youth and Women and Minister for Prevention of Domestic and Family Violence* (2018) 49-50.

⁵⁷ Bob Atkinson, *Report on Youth Justice from Bob Atkinson AO, APM, Special Advisor to Di Farmer MP, Minister for Child Safety, Youth and Women and Minister for Prevention of Domestic and Family Violence* (2018) 51.

⁵⁸ This were recommendations of the Queensland Law Society in 2014 as reported by *Legal Affairs and Community Safety Committee*, Report no. 58 (March 2014), 12 - 13.

contravene a condition imposed on a grant of bail to the child for one of these offences

91. This appears a very low threshold, particularly when a bail condition may require a child to engage, or not engage, in a broad range of conduct. Many such conditions would cover behaviour that is not otherwise criminal in nature. This provision would permit arrest when a police officer merely suspects that a young person is likely to engage in that conduct at some future time. There are no criteria or safeguards in the provision to explain how a police officer is to form this opinion, and s 59AA(3) merely requires the officer to consider one of the actions mentioned in s 59A(3)(a) to (c).
92. The Statement of Compatibility does not discuss proposed s 59AA in detail, and merely asserts that the provision is compatible with human rights, primarily because of the obligations on a police officer as a public entity under s 58 of the HR Act. The statement does not discuss how a child arrested under this provision could assert the unlawfulness of the arrest, nor does it specifically discuss why proposed s 59AA(2) is necessary and proportionate. A less restrictive option, in relation to the rights to liberty (s 29 HR Act) and of children (s 26 HR Act), would be to remove s 59AA(2) entirely. At a minimum, the Commission suggests the potential use of this power requires greater justification.

Serious repeat offender declaration

93. While the principle of detention as a last resort remains in the *Youth Justice Act 1992 (YJ Act)*, this is incompatible with the introduction of 'serious repeat offender' declarations.
94. If made, this declaration requires the court to have primary consideration when sentencing to the factors set out in s 150A(3)(a)-(e), these being:
 - a) The need to protect members of the community; and
 - b) The nature and extent of violence, if any, used in the commission of the offence; and
 - c) The extent of disregard by the child in the commission of the offence for the interests of public safety; and
 - d) The impact of the offence on public safety; and
 - e) The child's previous offending and bail history.
95. On the face of it, this would displace the sentencing considerations contained in s 150 of the YJ Act, or at the very least require less weight to be placed upon them in favour of the factors in s 150A(a)-(e).
96. Sentencing considerations which would no longer be considered 'primary' would include the youth justice principles and the special considerations in s 150(2), including that detention should be imposed as a last resort.

97. The introduction of this new section is unnecessary. A court sentencing an offender will, under the current sentencing regime, consider all factors proposed in s 150A(3)(a)-(e) and weigh them with all other relevant factors to come to a sentence that is appropriate taking into account all circumstances in the matter.
98. By requiring a court to place primary regard to factors in s 150A(3)(a)-(e), this creates a hierarchy of sentencing principles and places constraints on the exercise of discretion by a sentencing court.
99. The serious repeat offender declaration may also be in contradiction with long established principles articulated in *Veen (No 2)*,⁵⁹ which state:

*'The antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence'*⁶⁰

100. The making of a serious repeat offender declaration is predicated on a child's criminal history. When made, it requires one of the primary considerations when sentencing to be a child's criminal history. This elevates the relevance of a child's history beyond '*one factor that may be taken into account*' and gives it weight which could result in the imposition of penalties disproportionate to the offence a child is being sentenced for.
101. Displacing the rehabilitation of a child as a primary sentencing consideration is in breach of the *Convention of the Rights of the Child*⁶¹ and rights in criminal proceedings, which provide that a child charged with a criminal offence has the right to a procedure that takes account of the child's age and the desirability of promoting the child's rehabilitation.⁶²
102. The Government is undoubtedly aware of this as the Bill proposes that s 150A be subject to an override declaration, acknowledging that it is fundamentally incompatible with human rights.

Introduction of s276A

103. The Bill proposes amending the YJ Act, to introduce a new s 276A.
104. This provision states that in the event a child breaches a conditional release order (**CRO**), the court must revoke the order and order the child serve the sentence of detention for which the conditional release order was made, unless there are special circumstances.

⁵⁹ (1988) 164 CLR 465.

⁶⁰ *Veen No 2* (1988) 164 CLR 465, 14.

⁶¹ *United Nations Convention on the Rights of the Child*, GA Res 44/25, UN Doc A/RES/44/25 (20 November 1989).

⁶² *Human Rights Act 2019* (Qld) s 32(3).

105. Unless special circumstances apply, courts will lose the option of revoking the conditional release order or allowing the order to continue for compliance.
106. A CRO is an intensive order, requiring large amounts of engagement from a child. It is worth noting that a breach of a CRO does not necessarily arise due to further offending but could be something as simple as not attending a program or reporting as required.
107. This section exposes children to potentially significant time in detention, for conduct that would not necessarily in itself be considered criminal.
108. This section will disproportionately impact already disadvantaged children, particularly those without stable accommodation or who lack family support, including children under the care of the Department of Child Safety.
109. By requiring that a court must take a certain action, the Government is curtailing the discretion of the courts and failing to acknowledge that every matter before a court should be determined on its individual facts.
110. This section is purely punitive and offers little scope for rehabilitation of a child and a child's best interests to be considered.
111. Again, the Commission highlights that the introduction of this provision unreasonably limits the rights of children,⁶³ and rights in criminal proceedings as it does not consider the desirability of promoting the child's rehabilitation.⁶⁴
112. The Bill proposes that s 246A be subject to an override declaration, acknowledging that it is incompatible with human rights.

Continued inhumane treatment of children

113. From the Commission's perspective, a crisis in the present youth justice system is the prolonged detention of children in police cells.
114. The Commission is deeply concerned about the lack of any plan to immediately cease the practice of prolonged watch house detention. The amendments proposed by this Bill will inevitably lead to greater pressure on detention centres and threaten to normalise the inhumane treatment of children by exposing them to an unacceptable risk of psychological and physical harm. Keeping children in watch houses for prolonged periods limits several human rights including humane treatment while in detention (s 30), cruel, inhuman and degrading treatment (s 17) and the special protection of children (s 26).

⁶³ *Human Rights Act 2019* (Qld) s 26 and *United Nations Convention on the Rights of the Child*, GA Res 44/25, UN Doc A/RES/44/25 (20 November 1989).

⁶⁴ *Human Rights Act 2019* (Qld) s 32(3).

115. The Commission has heard troubling accounts of up to 11 children held for long periods in a single cell with only one toilet. It is deeply concerning that this Bill will further exacerbate this issue.
116. In light of the high rates of remand detention in Queensland, it seems the youth justice system is warehousing children in cells originally designed for the very short-term detention of adults.

Positive use of multi-agency panels

117. The Commission supports one of the proposed amendments, being the establishment in clause 37 of statutory arrangements similar to the Suspected Child Abuse and Neglect (SCAN) system in the *Children Protection Act 1999*, to ensure the continuation of multi-agency collaborative panels (MACPs). The purpose of these panels is to provide intensive case management and holistic support for children identified as high risk or requiring a collaborative response through a multi-agency and multidisciplinary approach.
118. Proposed section 282W of the YJ Act will provide that the chief executive must decide, in consultation with the core members, the classes of children charged with offences, **or at risk of being charged with offences**, who may be referred to the MACP system, and that the members of the MACP system may refer a child within an eligible category.
119. The Commission particularly supports the ability for 'at risk' young people to be referred to what could be life-changing intervention and prevention programs. This has the potential to be a particularly effective intervention in situations where schools refer young people.
120. However, in order to be effective and proportionate limit the right to privacy and other rights of these children, identified in the Statement of Compatibility, sufficient resources should be provided to ensure these panels are able to engage in meaningful, preventative work for children at risk.
121. The Commission recommends the government should provide more information on how it will fund and implement these changes, including whether schools will receive greater resources to facilitate such referrals.

Conclusion

122. In the Commission's view, the Bill will not reduce recidivism, increase community safety or rehabilitate our children.
123. Overriding the human rights of children in the Queensland justice system has not been justified by the statement about exceptional circumstances, or the statement of compatibility.

124. The Commission suggests the only way to properly address youth justice reform is for the government to widely engage in meaningful consultation, and properly consider evidence-based solutions. That consultation must include engagement with victims of crime, young people, legal, criminology and sociology experts and community organisations such as those representing Aboriginal and Torres Strait Islander organisations and communities. The community is ready to be part of finding evidence-based solutions to these complex issues.
125. The Committee should recommend that the Bill not be passed. It does not demonstrate any limitations on human rights are proportionate, particularly when the Bill will not achieve its purpose.
126. The Commission recommends Parliament not apply the override declaration as this is not an example of exceptional circumstances, nor is it reasonable to limit the rights identified.
127. The Commission suggests the Committee recommend that the Government consult broadly to develop:
- An urgent plan to remove children from watchhouse detention and ensure compliance with international human rights standards; and
 - A whole of government plan to directly address the causes of youth offending, with particular emphasis on supporting children, teachers and parents to maintain engagement in education.
128. Without meaningful engagement to identify long lasting solutions, for victims, for children and for the wider community, nothing will change.