STRENGTHENING COMMUNITY SAFETY BILL 2023

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Committee Secretary
Economics and Governance Committee
Parliament House
George Street
Brisbane QLD 4000

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Dear Committee

Strengthening Community Safety Bill 2023

Thank you for the opportunity to comment on the Strengthening Community Safety Bill 2023 ("the Bill").

I am a solicitor who has practised for over five years in the criminal law jurisdiction. I am currently working exclusively in the Childrens Court, and therefore have opportunity to engage with a wide variety of children who come into contact with the criminal justice system.

I would condemn the Bill in strongest possible terms.

Generally

The Youth Justice Act is drafted to acknowledge that children, with their developing brains, are unable to access the same level of consequential thinking that is available to an adult. The proposed changes to the law are ultimately unlikely to have any deterrent effect on the targeted youth offenders, because these individuals commit offences spontaneously, without pausing to consider the consequences of their actions against the framework of possible legal outcomes.

Instead, the changes are likely to result in a glut of young people held in detention on remand. Many of these young people will not be part of the 'serious repeat offender' cohort that is targeted, but these relatively uninvolved children will become increasingly institutionalised, form bonds with other offenders, and become inducted into an escalated level of criminal offending through their time in detention.

Throughout 2023, youth detention centres have been occupied at capacity, with a steep increase in the number of children held in detention in police watchhouses. The detention centres and watchhouses are already at a point of crisis and severe overcrowding; the proposed legislative changes will deeply aggravate this situation by creating a further influx of children to be held in detention.

It is widely acknowledged that detention is primarily a punitive measure rather than a rehabilitative one. In particular, when detention centres are overfilled and understaffed (as they have regularly been over the past several years), fewer rehabilitative programs and services are offered, and

children spend more time “locked down” in isolation. These conditions are traumatising, and detrimental to wellbeing and rehabilitation. Even more detrimental are the conditions experienced by children in watchhouses, which are not fit to accommodate children. The solution to this is not the construction of further youth detention centres; it is redirecting effort into rehabilitating children within their families and communities.

It is acknowledged that there is an increasing level of community concern about the activities of young offenders. It is submitted that this is an appropriate opportunity for community education about the principles and reasoning underpinning our youth justice system, and increased investment into rehabilitative and diversionary programs, rather than reactive legislative change that is not adapted to the realities of young people involved in the criminal justice system.

The Human Rights Statement of Compatibility published clearly sets out that the proposed changes will significantly affect the human rights of children, and will disproportionately effect Aboriginal and Torres Strait Islander people. The Statement acknowledges that many of the proposed changes are inconsistent with our State’s human rights obligations, and that less restrictive alternatives are available.

It is an expectation - at the levels of both the local and international community - that the State is able to execute laws and protect the community without infringing upon the human rights of its citizens.

Bail

Clause 5 (offence for child to breach bail)

The return of breach of bail as a criminal offence for children is not supported. It has not been demonstrated that children’s bail compliance and engagement has decreased since this offence was removed, and the reasons for removing the offence have not diminished.

Rather, it is apparent that children are less likely to engage and communicate openly with the providers of bail supports (including Youth Justice as facilitator of Conditional Bail Programs) when they apprehend that those providers will report them to police for any breaches. At present, it appears that there is an increased level of trust between children and their bail support providers because the children can communicate honestly about any difficulties they are experiencing complying with their bail conditions. Non-compliance still has consequences (for example, the provision of letters of non-compliance to police and prosecution authorities where children fail to engage with their conditions over an extended period of time), but the relationship of trust and positive communication is not eroded by the threat of criminal charge.

It is also noted that children are necessarily dependent on their parents, guardians, and other adults in their lives to substantially comply with conditions. Children typically do not get to choose where they reside, nor are they primarily responsible for arranging their own transport. Bail conditions regularly require the bailed person to reside at a particular address, to report to either police or Youth Justice, and (for children) to engage in programs that are hosted at a variety of sites. Children’s ability to comply with these responsibilities will be bolstered or limited by the support they are afforded by the adults they rely on. It is unjust to hold children criminally responsible for failures that are not always within their own control.

Further, I note that this addition will make children criminally liable for omissions that adults are not held to be liable when granted bail under the Drug and Alcohol Referral provisions.

It is anticipated that the return of this offence for children will add significant burden to the Courts, prosecuting authorities, and legal services (including legal aid services).

This provision's inconsistency with our human rights legislation has already been noted in the Statement of compatibility.

Clause 41

It is proposed that the definition of a "prescribed indictable offence" be expanded to include any offence under section 408A of the Criminal Code that involves a motor vehicle. In five years of practice, I have not once seen an offence charged under section 408A that did *not* relate to a motor vehicle. As a result of the proposed amendment, essentially all unlawful use offences will become prescribed indictable offences, which places children in the "show cause" position with a presumption against bail.

It is noted that the modal age of offenders charged with unlawful use offences is 17, with these offences being disproportionately charged against children.[1]

This will without doubt result in a blow-out of numbers of children who are refused bail by the watchhouse and by the Court, leading to greater numbers of children held on remand. This will add to the crisis of detention centres at capacity, watchhouse overcrowding, and children spending increasingly lengthy periods of time incarcerated in watchhouses.

Further, it is noted that passengers in (stolen) vehicles are often much younger than the principal offender who may be driving the vehicle. Passengers are frequently unable to verify whether a vehicle is lawfully used. The expansion of the prescribed indictable offence provision to include any user of a motor vehicle will likely capture a great number of young passengers who are unaware of the origins of the vehicle they have accepted passage in. Young passengers are also frequently below the age of presumed criminal responsibility. This provision is therefore of even greater concern in its potential to infringe on the operation of subsection 29(2) of the Criminal Code.

Generally speaking, the expansion of "show cause" provisions for children also erodes the presumption of innocence, a cornerstone of our legal system, and is incompatible with the Convention on the Rights of the Child's requirement that the detention of a child ahead of trial must only be a last resort. The proposed amendments also limits judicial officers' ability to exercise discretion to consider factors relevant to an individual child in making decisions about bail.

Increased penalties

Clause 8

The increase of maximum penalties for certain vehicle offences is unable to have any significant effect on Court outcomes.

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1 Queensland Sentencing Advisory Council, *Sentencing Spotlight on unlawful use of a motor vehicle* (December 2020) 4 <https://www.sentencingcouncil.qld.gov.au/__data/assets/pdf_file/0009/661428/sentencing-spotlight-unlawful-use-of-a-motor-vehicle.pdf>

Where offenders steal and use a vehicle, they are usually charged with either enter dwelling and commit indictable offence or enter premises and commit indictable offence for the entry of the place where the vehicle was located – both offences carrying a maximum penalty of 14 years imprisonment. Increasing the maximum penalty relating to the *use* of the vehicle is unlikely to have any effect on the sentence imposed in these matters.

For offenders who are not involved in the stealing of the vehicle, but are passengers or drivers of the vehicle after the fact, the Courts are required to consider the criminality of the offending and sentence proportionately according to the particular facts of the offending and the offender's history and circumstances. A person who is charged with use of a vehicle but was not involved in the stealing of the vehicle will usually be seen to have significantly lesser culpability than those involved in the theft. The increase of the maximum penalty for these offenders will have a negligible effect on the sentencing proceedings in these matters.

It is further noted that the maximum term of imprisonment that can be imposed by the Magistrates Court is three years. The maximum term of detention that can be imposed by the Childrens Court is one year. It is rare for offences of unlawful use of motor vehicle to be committed to a higher jurisdiction because the Court perceives that the penalty available in the lower jurisdiction is insufficient. It is anticipated that the amendment to maximum penalties for this offending will not have any meaningful effect.

New circumstances of aggravation

Clause 8

The addition of new circumstances of aggravation in the offence of unlawful use of a motor vehicle are by turns disproportionate to the nature of the offending, and duplicitous with existing offences.

The vast majority of unlawful use offences occur with passengers in a vehicle (that is, involve more than one person). The majority occur at night. The addition of circumstances of aggravation under subsections 408A(1C)(a) and (b)(iii) will therefore categorise almost all unlawful use offences as aggravated offending, with the maximum penalty set at 14 years imprisonment.

The proposed subsections 408A(1C)(b)(i) and (iii) make it an aggravated offence to unlawfully use a vehicle while armed, or while using or threatening violence. In circumstances where a car is stolen from its rightful owner, and the offender is armed or uses or threatens violence, it should be expected that the offender would be charged with robbery. The addition of these circumstances of aggravation then must pertain to situations in which a person uses a vehicle subsequent to its theft, while armed, or uses or threaten violence against some person other than the owner of the vehicle. It is submitted that these proposed amendments largely duplicate offences that are already described in the Code.

With respect to the circumstance of aggravation proposed as the new subsection 408A(1B) (relating to publishing evidence of offending), it is accepted that this may a reasonable addition. However, in practice, many children access each other's social media accounts, or use their social media accounts without security, often resulting in the publication of images and videos by one child to another's account. This will undoubtedly result in aggravated charges being brought against the incorrect person on a regular basis.

Clause 9

This proposed amendment would require unlawful use offences to proceed on indictment if they carry the following circumstances of aggravation: involves use or threat of violence (408A(1C)(b)(i)), offender is armed or pretends to be so (408A(1C)(b)(ii)), or the offender damages or attempts to damage property valued in excess of $30,000 (408A(1C)(b)(iv)). Offences charged under these sections will be required to proceed on committal to the District Court for adults, or the Childrens Court of Queensland for children.

As noted above, the first two proposed circumstances of aggravation either duplicate existing offences or do not reflect proportionately serious offending.

The process of committal is one that regularly takes several months. It represents a significant delay in proceedings. As a result, it is reserved for the most serious of offences in the youth jurisdiction; even offences such as wounding are not required to proceed on indictment. The requirement that children charged with being in a vehicle (even as a passenger) with a weapon - even days or weeks after it has been stolen - must now go through committal proceedings is not in line with the current practices and principles governing the Childrens Court.

Further, it is submitted that where children spend increasing periods of time on remand ahead of sentence (such as when they are awaiting committal proceedings), it becomes more likely that they will be sentenced to a period of detention already served by way of the pre-sentence detention; this means that community-based orders (which can more readily achieve the sentencing objectives set out in the Act) which might have been imposed are less likely to be ordered.

Alternatives to arrest

Clauses 15 and 16

As noted above, the change proposed by clause 41 above will cause almost all unlawful use offences to be categorised as prescribed indictable offences. The proposed addition of subsection 59A(1)(c)(i) and addition to 59A(2) of the Youth Justice Act will therefore result in the wider section having severely limited effect.

Section 59A is a very important tool that requires police to exercise discretion and flexibility to respond appropriately and proportionately to the circumstances they perceive. It allows police to make decisions and reduce negative interactions between children and the criminal justice system where appropriate.

The addition of section 59AA does allow police to consider alternatives to arrest, but by making this an additional and optional step, it is likely to be overlooked and not acted on.

Removal of 18 year-olds to adult correctional centres

Clauses 18

This measure is strongly opposed.

It is inconsistent with human rights principles. I note that a young person may be held in detention for many months after committing an offence as a child (or being alleged to have done so), while the police prepare a brief of evidence, legal processes such as case conferencing and committal

procedures occur, and the prosecuting authorities prepare and present an indictment. This process regularly sees young people who are charged well before they are an adult remain in detention until after their eighteenth birthday. The experience of adult custody is markedly different from youth detention. It is not appropriate that some young people should be exposed to adult custody environments as a result of delays, when they are held only in relation to offences alleged to have been committed as a child.

It is evident that young detainees who are transferred into the adult correctional centres will be highly vulnerable to abuse. Undoubtedly, many vulnerable, institutionalised young people that are transferred to adult custody under this proposed legislation would be preyed upon by older and more sophisticated prisoners. This is an unacceptable proposal.

Further, the transfer of child detainees directly into adult correctional centres would strongly cement the pathway to adult offending in those individuals. Young people in this position will be necessarily exposed to a new population of adult offenders, and become familiar with an escalated level of offending that they will be likely to seek to emulate in future.

If the Bill is passed, however, the addition to 136(2) is highly supported. It is necessary to allow the Courts discretion to make such an order. I do hold concerns that the proposed subsections 136(3)(a) and (b) requires the Court to satisfy itself of matters that will be very difficult for the Court to be adequately informed about.

Clauses 29-35

The shortening of the 6-month period referred to in section 276B is not supported.

If the changes made by clause 18 come into effect, then the right to apply for delay under the proposed section 276AD (and review of the decision under 276DB) is necessary. It is anticipated that these amendments will result in significant pressure being placed on legal services (including legal aid services) and the resources of the Chief Executive.

Clause 36

The proposed addition of this subdivision is not supported for the reasons outlined in relation to clause 18 above.

Consideration of bail history at sentence

Clause 20

This change is not supported. It is not in line with the sentencing principles that are in place for adult offenders, and it is not appropriate to include these considerations for children in particular.

"Serious repeat offenders"

Clauses 17, 21

This proposal is strongly opposed. The labelling of a child in this manner is extremely unhelpful. Some children will see it as desirable, and will pursue the title by committing more extreme offences.

Others will see it as a sign of hopelessness, and will consign themselves to returning to the cycle of offending after their release from detention.

Further, the proposed criteria for imposing such a label is legally impermissible. The proposed subsection (2)(d) requires the Court to determine whether there is a probability that the child will in future commit a prescribed indictable offence.

Following the making of such an order, subsection (3) causes the sentencing principles set out in section 150 of the Act to be subsumed by other primary considerations, including the need to protect the community.

These clauses, read together, require the Court to determine what a child is likely to do in future and punish them on that basis. It is a flagrant deviation from the rule of law and the principle that punishment should be condign on the offending committed. It represents a significant breach of human rights and the overarching principles of our criminal justice system.

Changes to CROs

Clauses 22-28

The Conditional Release Order (CRO) is an extremely intensive order requiring an extremely high level of participation from children placed on the orders. In my observation , when a Court imposes a CRO, it is usually imposed for the maximum term (currently 3 months). The increase in the maximum period of a CRO to six months may reduce children's willingness and ability to engage in these orders, as the requirement to continue engaging at such a high level for this period will be overwhelming to some. It is noted that the Youth Justice Principles acknowledge that particular efforts must be made to ensure matters are progressed in a timeframe appropriate to a child's sense of time. Six months of high-intensity intervention will be incomprehensible to many children.

It is acknowledged that there are some rare cases in which a child is capable of, and stands to benefit from, participating in such intensive supervision over an extended period. For this reason, it is submitted that the extension of the period of a CRO could be legislated for, but it should be fashioned in such a way that this is not the default or first choice for the length of the order. It is suggested that a provision could instead permit a CRO to be extended for three months, for reasons other than non-compliance, and where the order of detention was of six months or more, upon application of Youth Justice.

The change to procedure upon breach of a CRO imposed for a prescribed indictable offence is not supported. As noted above, the proposed amendments to section 408A of the Code will result in a very large increase to the number of children who are dealt with in relation to a prescribed indictable offence. As such, it is likely that the majority of CROs would be made in respect of offences including a prescribed indictable offence. The requirement that the Court must revoke the order upon a breach (except where special circumstances apply) is incompatible with the Youth Justice Principles.

Conclusion

Again, I thank the Committee for the opportunity to comment upon these very important matters.

The proposed amendments are not adapted to genuinely addressing the causes or realities of youth offending. They are contrary to the human rights framework recognised both internationally and in our State's own legislation. The author strongly opposes the proposed amendments.

These submissions have been prepared with all possible care and attention in the context of the extraordinarily truncated consultation period. I would urge the Committee to extend the consultation period to facilitate the input of further stakeholders.

I would request that my name and contact details be withheld if this submission is published to the Committee's webpage and report.

Kind regards

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