Making Queensland Safer Bill 2024

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Submission
Justice, Integrity and Community Safety Committee Inquiry
Making Queensland Safer Bill 2024 ('Bill')

1. Summary of Submission

1.1. The Bill should be withdrawn because:

1.1.1. It is patently incompatible with the government's responsibilities to protect vulnerable communities, including children, potentially exposing government to liability.

1.1.2. It is incompatible with the tenor of rights that are given expression throughout Queensland and Commonwealth legislation, and common law, generating incoherence in the Bill's operation that will result in legal challenge and lack of confidence in the criminal justice system.

1.1.3. Acknowledgement of the likely harms to children outweighing the benefits may render the State liable for damage to children who are harmed by the Bill's scheme.

1.1.4. It is manifestly unjust in its operation given the intention to mete out excessive punishment to children.

1.1.5. It poses interpretive challenges given the framing of the purpose in its explanatory documents that may interfere with the intended purpose.

1.2. Given the Bill's substantial derogation of children's protections under the Bill, the time for community consultation must be extended for a reasonable time, accounting for the Christmas period, to allow adequate public consultation in accordance with good governance.

1.3. The government must develop a properly formulated analysis of adherence to legislative standards that accommodate the specific context and subject matter of the Bill as that of a fundamental interference with the rights of children – instead of comparing them to adults. This will expose flaws in the Bill's approach, generating a better legislative response.

1.4. The Bill's Explanatory Note and Statement of Compatibility should be reconsidered to avoid circularity in the means of achieving the purpose, and deeper analysis of assertions about the discriminatory implications of the Bill. This will generate a more coherent account and expose the Bill's failure to adhere to legal norms.

1.5. If the Bill is retained, further time should be afforded for the proposed measures to be scrutinised by experts in criminal justice to formulate an alternative, viable, sustainable response to the pain of victims of crime that is otherwise compliant with human rights and the rule of law, and that embeds safeguards for children as vulnerable people.

2. Background

2.1. I am a professor of law with a special interest in social justice. I am an affiliate member of the Castan Centre for Human Rights Law and adjunct research fellow at Griffith University. You can find my publications here. I write this submission on my own account.

2.2. I acknowledge the pain experienced by victims of crime, and the sympathetic public sentiment that has led to these measures. This submission in no way seeks to diminish the suffering experienced and expressed by those harmed by criminal acts, and respectfully offers recommendations that are more likely to lead to sound and sustainable responses to crime.

2.3. This submission does not engage with specific provisions in the Bill, but rather analyses the broader scheme in the Bill through the lens of good government, focusing on two key issues:

2.3.1. The absence of principles of good governance in the introduction of the Bill; and

2.3.2. The adverse human rights implications inherent in the Bill's scheme.

3. Legislative Process

3.1. Public Consultation

3.1.1. The process adopted for review of this Bill fails to adhere to recognised principles of good governance. The Explanatory Notes acknowledge that there has been no consultation.[1]

3.1.2. Commissioner Fitzgerald found that:

> No Government will have all the ideas, expertise and insight on any particular topic. As well, Governments are not the only bodies which have these attributes… The best result will be produced from rational debate by those with opposing views. The community is entitled to such a result.
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> … The community is entitled to be fully and properly' informed about what laws and policies are needed, their object, cost, purpose and effectiveness. *The community must also be told the consequences of applying the laws*.
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> … The legislative process *should allow sufficient time* for the involvement of Parliamentary Committees, having regard particularly to members' general Parliamentary duties, including attending to their constituencies. [2]

3.1.3. In a further analysis, Copley observes that

> The Democratic Audit of Australia adopts as one of its four performance standards 'structures for public deliberation'. In respect of parliamentary performance, this standard relates to 'parliament's ability to model (or at least set an example for) political deliberation and to strengthen wider public deliberation'.[3]

3.1.4. Affording only 2 ½ business days for public comment on significant changes to criminal law affecting a vulnerable population fails to adhere to recognised principles of good governance.

3.1.5. The period for submissions be extended for a reasonable time, allowing for the Christmas period, to ensure adequate opportunity for the committee to receive expert evidence about the proposal, its likely efficacy, and the consequences of its introduction, as a feature of good governance including public accountability.

3.2. Adherence to Legislative Standards

3.2.1. The Explanatory Notes claim, in consideration of 'alternative ways of achieving policy objectives', that 'a legislative response is the most effective way to achieve the policy objectives'.[4] This fails to articulate alternative legislative approaches to dealing with a problem as should be expected in an Explanatory Note and a diligent application of policy.

3.2.2. In the Bill's Statement of Compatibility with Human Rights, the Minister 'recognise[s] that there may be less restrictive options available to achieve the stated purpose', that 'the negative impact on the rights of children likely outweighs the legitimate aims of punishment and denunciation' and that 'the

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[1] Making Queensland Safer Bill 2024, Explanatory Notes, 11.

[2] G E Fitzgerald, *Report of a Commission of Inquiry Pursuant to Orders in Council: Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (1989) 125 (emphasis added).

[3] Julie Copley, 'Public Deliberation on Legislation: From Fitzgerald to Facebook and Beyond'. Paper presented at Australia-New Zealand Scrutiny of Legislation Conference 'Scrutiny and Accountability in the 21st Century', 6–8 July 2009, Parliament House, Canberra, Australia. https://www.aph.gov.au/About_Parliament/Senate/Whats_On/Conferences/sl_conference/papers/copley

[4] Making Queensland Safer Bill 2024, Explanatory Notes, 8.

sentences for children …are more punitive than necessary to achieve community safety.'[5]

3.2.3. The provisions are directly contrary to well settled principles of proportionality in sentencing and fail to represent evidence-based approaches to dealing with the problem cited.

3.2.4. The government should develop a properly formulated analysis of alternative ways of achieving the policy objectives, with consideration to alternative legislative approaches based on evidence of efficacy and adherence to recognised legal principle.

3.2.5. The Explanatory Notes assert that the principles in the Bill accord with fundamental legislative principles. These statements fail to comprehend the impact on children as vulnerable people, and in doing so, fail to exhibit consistency of the Bill with fundamental legislative principles.

3.2.6. In all cases, justification is provided on the basis that the relevant amendments are '[meet] the policy objectives in the Bill'. This is a circular argument that fails properly to engage with legislative standards, representing a lapse in good process.

3.2.7. The government should properly analyse adherence to legislative standards that accommodate the specific context and subject matter of the Bill as that of a fundamental interference with the rights of children.

3.3. Statutory Interpretation—Purpose

3.3.1. The interpretation of the legislation is problematic, given the Explanatory Note and Compatibility Statement's assertion of the Bill as a 'direct response to community concern and outrage'. While it purports to direct judges to adhere to 'community standards', the frequent assertion of the Bill's purpose as assuaging community *outrage* might represent a standard different to what the law understands as a community standard. By way of example, this is the difference between a measured criminal justice initiative and a lynch mob mentality that is suggested by the term 'outrage'.

3.3.2. Difficulty in statutory interpretation arising from the drafting of the explanatory materials may result in the legislation failing to meet the government's objectives.

4. Human Rights

4.1. Human rights afford a framework within which to attend to the fundamental imbalance between the power of government, and the dignity and flourishing of the individual. The framework assumes the role of government as including the responsibility for supporting and upholding the principle of human dignity.

4.2. While Queensland laws are subject to the *Human Rights Act 2019* (Qld), it is acknowledged that even without enacted human rights guardrails, parliaments should as general proposition attend to human rights in their broadest sense regardless of human rights legislation:

> [A] large part of what legislative scrutiny committees do is to safeguard human rights and to manage the relationship between governments and their citizens, insofar as those rights and relationships are expressed through and affected by legislation.[6]

4.3. The Bill expressly overrides the *Human Rights Act 2019* (Qld).[7] The Bill's Statement of Compatibility acknowledges:

4.3.1. Fundamental incompatibility with:

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[5] Making Queensland Safer Bill 2024 (Qld) Statement of Compatibility with Human Rights, 5.

[6] Ibid, citing Stephen Argument, 'Straddling a barbed wire fence: reflections of a gamekeeper, turned poacher, turned gamekeeping poacher' (October 2007) *The Loophole* 66, 74.

[7] Making Queensland Safer Bill 2024 (Qld), clause 15(7); Making Queensland Safer Bill 2024 (Qld) Statement of Compatibility with Human Rights, 2.

- the *Human Rights act 2019* (Qld); and
- *UN Convention on the Rights of the Child;* and

4.3.2. Disproportionate effect on Aboriginal and Torres Strait Islander children.[8]

4.4. However, given the absence of evidence or other justification for the measures apart from 'responding to community outrage',[9] the extent to which the Bill interferes with human rights is not justified on its face. Asserting that the Bill 'does not directly or indirectly discriminate' does not make it so.

4.5. To satisfy governmental responsibility when it seeks to strip rights, including when it does so in a way acknowledged to disproportionately affect a particular protected group, there are a number of ways in which the Bill must be re-examined and adjusted.

4.6. Vulnerability—Children

4.6.1. Children are recognised as the bearers of human rights simply because of their being a child. This is the case both in Queensland law and at international law.[10]

4.6.2. The Bill seeks to amend the *Youth Justice Act 1992* (Qld) ('Act').

4.6.3. In contrast to the Bill, the Charter of Youth Justice Principles in the Act recognise the vulnerability of children.[11]

4.6.4. Children's rights at international law are reflected in the Charter of Youth Justice Principles and the Objectives of the Act, namely:

> (e) to recognise the importance of families of children and communities, in particular Aboriginal and Torres Strait Islander communities, in the provision of services designed to—
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> > (i) rehabilitate children who commit offences; and
> >
> > (ii) reintegrate children who commit offences into the community.[12]

4.6.5. The principle behind the scheme in the Bill directly contradicts the rights of the child in both international and Queensland law. The Explanatory Notes acknowledge that passing the Bill removes Queensland from internationally accepted standards of treatment of children as vulnerable people. This represents a dangerous precedent for other vulnerable groups that can be avoided by withdrawing the Bill or at least reconsidering proportionate approaches.

4.6.6. The proposal generates incoherence in the law. The consequences of passing the Bill include likely legal challenge on bases of international human rights, national and state human rights instruments, common law human rights principles, and principles of proportionality. These principles exist throughout Queensland and Australian law (including, unamended, within the *Youth Justice Act*), and the Bill is unlikely to have captured (and overturned) all of these fundamental standards leaving the State open to legal challenge.

4.6.7. Additionally, given the Minister's admission of the harms likely to flow from the implementation of the Bill, there is a real risk of liability to the State for breach of its duty of care to children under its control.

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[8] Statement of Compatibility 4-5.

[9] Statement of Compatibility 5.

[10] *Human Rights Act 2019* (Qld), s26(2); *Convention* on the *Rights* of the *Child*, opened for signature 20 November 1989, 1577 *UNTS* 3 (entered into force 2 September 1990; entered into force for Australia 16 January 1991) ('Convention'). Note in particular state responsibilities in Article 3.

[11] *Youth Justice Act 1992* (Qld), Schedule 1, principle 4.

[12] *Youth Justice Act 1992* (Qld), s2.

4.6.8. Given the extent of the incursion into established principle, the likely challenge to the Bill once enacted will generate uncertainty as to the application of Queensland's legislative framework and erode confidence in government and in the criminal justice system.

4.7. Vulnerability—Indigeneity

4.7.1. In addition to rights afforded to children per se, additional vulnerability is experienced by Aboriginal and Torres Strait Islander children.

4.7.2. Aboriginal and Torres Strait Islander children are disproportionately incarcerated, relative to non-Indigenous children.

> The ALRC draws attention to research showing the early disproportionate incarceration of Aboriginal children in the juvenile justice system. The Australian Institute of Health and Welfare reported in 2015 that 'Indigenous young people aged 10-17 were 26 times as likely as non-Indigenous young people to be in detention on an average night in the June quarter of 2015… This was an increase from 19 times as likely in the June quarter of 2011'.
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> Dr Don Weatherburn has noted the progression of young Aboriginal and Torres Strait Islander peoples through the criminal justice system in New South Wales: By the age of 23, more than three quarters (75.6%) of the NSW Indigenous population had been cautioned by police, referred to a youth justice conference or convicted of an offence in a NSW Criminal Court. The corresponding figure for the non-Indigenous population of NSW was just 16.9%. By the same age, 24.5% of the Indigenous population, but just 1.3% of the non-Indigenous population had been refused bail or given a custodial sentence (control order or sentence of imprisonment).[13]

4.7.3. When such data is considered in conjunction with the prevalence of Aboriginal and Torres Strait Islander children in out-of-home care, increasing incarceration of Indigenous women, ongoing family violence in Indigenous communities, and the omnipresence of intergenerational trauma[14] it is inevitable that the Bill's regime will disproportionately affect Aboriginal and Torres Strait Islander children *as well as communities*.

4.7.4. Of note, the effect on Indigenous people is a structural feature of a system known to discriminate and is not a feature an individual's inherent criminality. Proposals designed simply for the purpose of sentencing that is 'more punitive than necessary to achieve community safety'[15] are therefore misguided and manifestly unjust.

4.7.5. Understanding the distinct vulnerability of Indigenous children and the inevitably disproportionate effect on them, generates a contradiction with the *Human Rights Act 2019* (Qld), under which Aboriginal and Torres Strait Islander peoples must not be denied the right to 'enjoy, maintain, control, protect and develop their kinship ties'.[16] While these are individual rights, they operate to support culture and community. Denial of these rights tears at the fabric of community in a well-rehearsed method of oppression of Aboriginal and Torres Strait Islander people.

4.7.6. It also represents a possible breach of governmental duty, where the Minister has admitted to knowledge of a law's likely disproportionate impact on a particular population, and that the punishment under the Bill is excessive.

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[13] Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, December 2017) Paragraphs 1.26-1.27. https://www.alrc.gov.au/wp-content/uploads/2019/08/final_report_133_amended1.pdf

[14] All of these factors are recognised in ALRC Report 133, ibid.

[15] Statement of Compatibility, 5.

[16] Section 28(2)(c).

4.7.7. The Minister acknowledges that the provisions will disproportionately affect Indigenous children but seeks to proceed nonetheless.[17]

4.7.8. Despite an assertion that the Bill does not indirectly discriminate on the basis of race, it is at least arguable that the measures may fall foul of the *Racial Discrimination Act 1975* (Cth)—in particular given the Minister's own admission that the measures will disproportionately affect Aboriginal and Torres Strait Islander children. Under s109 of the *Australian Constitution*, to the extent of any inconsistency between state and Commonwealth laws, Commonwealth laws (in this case the *Racial Discrimination Act*) will apply. On that basis, the Bill as drafted would be struck down.

4.7.9. Finally, the provisions are incompatible with other measures to 'close the gap' and achieve positive social and economic outcomes for First Nations again generating incoherence in policy and law at both State and Commonwealth levels.

4.8. Vulnerability—Health and Disability

4.8.1. The ALRC cites Australian Medical Association recognition of the link between incarceration and high rates of poor mental health, physical disability, cognitive disability and substance abuse.[18] Further, Aboriginal and Torres Strait Islander peoples, including children, experience health related risk factors at higher rates than the general population.

4.8.2. At a population level, these factors contribute to additional vulnerability of children likely to be the subject of the regime proposed in the Bill.

4.8.3. To this extent, the Bill represents an incursion on the rights of such children to rehabilitation and care, again raising the liability of the State for breaching its duty of care in circumstances where it had already acknowledged the likely harm.

5. Conclusion

The Minister's own overview of the incompatibility of the Bill with human rights and the acknowledgement of the failure to adhere to recognised standards of proportionality in sentencing reveal the untenable foundation for the Bill and its manifestly unjust operation.

Although its goal of 'punishment and denunciation' may well be met, the Bill represents the breakdown of the norms of good governance and abnegation of the recognised guardrails in legislating for the public good.

The Bill as drafted leaves the State open to legal challenge under various heads, interfering with the ability of the government to achieve its stated aims.

A better considered, evidence-based approach to youth crime that incorporates safeguards for young people generally, and Aboriginal and Torres Strait Islander children in particular, represents a significantly preferable approach to the Bill—and a better likelihood of addressing community concern.

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2 December 2024

[17] Statement of Compatibility, 13.
[18] ALRC Report 133, paragraph 2.36.