Making Queensland Safer Bill 2024

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Office of the President

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Our ref: [MC]

Committee Secretary
Justice, Integrity and Community Safety Committee
Parliament House
George Street
Brisbane Qld 4000

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

Dear Committee Secretary

Making Queensland Safer Bill 2024

Introductory comments

The Queensland Law Society has significant and serious concerns about the Making Queensland Safer Bill 2024 (the Bill). We oppose the passage of the Bill.

The Bill overrides the *Human Rights Act 2019* (Qld) and significantly diverges from the tenor of the fundamental legal principles encapsulated in the *Legislative Standards Act 1992* (Qld), the *United Nations Convention on the Rights of the Child* and other instruments such as the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*.[1] It is out of step with national and international best practice approaches to child justice and the approach recommended by the National Children's Commissioner of Australia.

The Society believes that the Bill will have an inimical effect on community safety. The provisions will entrench children in the youth justice system. The punitive effects of the legislation will far outweigh attempts to address the underlying causes of crime. Our long-standing position is that community safety is best served by investment, and expansion of early intervention initiatives, diversionary options, restorative justice and rehabilitation programs. The legislation will have a disproportionate detrimental and devastating impact on Aboriginal and Torres Strait Islander children and children who are already disadvantaged. If passed into law, the Bill will further strain overpopulated prisons, youth detention centres and watchhouses.

The practical application of the Bill will impose further considerable demands on Court time and facilities. The Committee needs to consider the community impact of additional litigation on the Courts, and particularly, on the Children's Court, without any corresponding funding increase.

Consultation timeframes

The timeframe for us to consider this submission has been truncated. We did not receive a confidential consultation of the Bill before its introduction. It was introduced on Thursday, 28 November with a public hearing scheduled for Monday, 2 December. Written submissions are

[1] https://www.ohchr.org/en/instruments-mechanisms/instruments/united-nations-rules-protection-juveniles-deprived-their-liberty.

due on Tuesday, 3 December. Due to the limited time to review the legislation, there may be unintended consequences that we have not identified.

A fundamental tenet of our system of parliamentary democracy is that stakeholders have a meaningful opportunity to be involved in the consultative process. The above timeframes are not consistent with this.

Rule of law issues

The Society is alarmed by the reference to an "emergency" to justify the legislation's departure from long-standing legal and human rights norms. Statistics show very clearly that there were fewer young offender now than five years ago, and that the overall youth crime rate is decreasing. There is no proper justification for the failure to allow for a meanginful process for scrutiny of these new laws.

Adult Crime, Adult Time

The public interest is in addressing the risk factors that cause youth offending. Decades of unanimous expert evidence confirms that this will be achieved by early intervention, diversion and targeted investment to address the underlying social, health and economic causes.

We oppose the Bill for the following evidence-based reasons:

1. There is no evidence that lengthier custodial sentences deter young offenders

2. Retaining the principle of detention as a last resort does not inhibit the courts from imposing the appropriate sentence in all the circumstances of each case.

3. The new requirement for courts to have 'primary regard' to any impact on the victim undermines the long-standing principle of equality before the law. It will create unintended consequences and lead to irrationality in sentencing.

   It has been long accepted that the sentencing process be objective, balanced and free from emotion. The new provision will result in the perverse circumstance where, for example, a child might be sentenced to a higher penalty on a less serious offence than an offender who has committed a more serious offence because the victim was more engaged in the proceedings. It will lead to comparisions being made between victims, may compromise victim agency and result in them being cross-examined and otherwise being required to properly come to proof about the impact of the offence upon them.

4. It is well known and accepted that a consequence of mandatory sentence (as it applies to murder) is that there is little incentive for an accused person to plead guilty. This places an additional burden and strain on an already under resourced criminal justice system.

5. Reopening the Children's Court to allow victims and their families to be present, and enabling the provision of full criminal histories, undermines rehabilitation, a key principle of our youth justice system.

Removal of detention as a last resort

The Society's long standing position is that the principle of detention as a last resort should be retained for adult and juvenile offenders.

The scope of the legislation goes beyond merely removing the legislative principle of detention as a last resort for juvenile offenders. It also removes the Court's ability to take into account any provision stating that a sentence enabling a person to stay in the community is preferable. This is unprecedented in scope. A possible unintended consequence of the current drafting appears to be uncertainty about the extent to which a sentencing court may take into account evidence of rehabilitation.

Community safety is already a significant consideration when sentencing. The principle of detention as a last resort means that other sentencing options should be considered before imposing a custodial sentence. It does not mean that a custodial sentence cannot be imposed. Custodial sentences are and will continue to be imposed, as evidenced by the fact that watchhouses, youth detention centres and prisons are overcrowded.

We hold the strong view that detention should be reserved as a last resort for both adults and children. Removing this principle for children while retaining it for adults is vexed and inappropriate.

The practical effect of the proposed amendments to the sentencing principles in the Youth Justice Act will be that children will continue to be held in unsafe watchhouses for extended periods of time, impacting their mental health and exposing them to adult offenders. This will not enhance community safety or reduce youth crime in the long-term.

The reasoning behind the youth justice principle of detention as a last resort is to encourage courts to consider sentences which allow offenders to stay in the community where possible so that rehabilitation can be promoted with a view to addressing the underlying causes of criminal behaviour and therefore reduce rates of recidivism. The Society notes that the Making Community Safer plan upon which this change is proposed, includes discussion of the importance of early intervention, diversion and responding to causes of crime. Removing the principle of detention as a last resort will be counter-productive to these stated goals.

Proposed changes to youth justice sentencing principles

We recognise that youth offending has a broad impact on the community. However, it is important to acknowledge the existing legislative framework that sets out the rights of victims including general rights, and rights relating specifically to the criminal justice system. The responsibility to uphold these rights, within the context of the Youth Justice Act, primarily lies with the Office of the Department of Public Prosecutions (**ODPP**) and Queensland Police Service.

Conceptually, victims have a very limited role in criminal procedure in adversarial systems. Despite this, there have been significant recent legislative reforms that provide platforms for victims of crime to participate in a system that is designed to exclusively navigate the relationship between the offender and the state. These include the victim impact statement scheme and more recently, the swathe of legislative reforms that have been introduced to give

effect to the Women's Safety and Justice Taskforce recommendations directly addressing the role of victims in the criminal justice system.[2]

To amend the principles of the Youth Justice Act to make the impact of offending on the victim the primary sentencing principle and at the same time remove principles that detention should only be used as a last resort, would result in unintended consequences including impinging on the right to a fair trial and risk fundamentally altering the operation of the criminal justice system. Importantly, a fair hearing is considered a fair hearing to both prosecution and defence. It is the Society's view that the rights of victims of crime are better acknowledged and accommodated via legislative reforms that better enhance the protections of the pre-existing rights as identified above.

We note the Bill:

- amends section 150 of the Youth Justice Act to proscribe that a Court must have primary regard to any impact of the offence on a victim, including harm mentioned in information relating to the victim given to the court under section 179K of the *Penalties and Sentences Act 1992* (Qld)

- expressly provides that a Court must not have regard to any principle that a detention order should only be imposed as a last resort or any principle that a sentence allows the child to stay in the community is preferable

- amends the Charter of youth justice principles in Schedule 1 to include reference to a child who commits an offence should be held accountable in a way that recognises the impact of the child's offending on any victim of that offending

In effect, these proposed amendments will inevitably put the victim's experience, and therefore evidence, in centre focus in the context of the criminal trial.

The amendment will also therefore likely result in the following impacts on the court system:

- increased burden on court registries in regards to an increase in applications filed to cross examine victims;
- increase in court time to hear and determine these applications;
- increase need for ODPP to meet victim's expectations;
- further increase the need for legal representation including for victims.

The provisions will create a tiered system of justice, with victims who are more articulate, better resourced and better educated having more potential to influence the outcome than those who are not.

Accordingly, we urge the Government to reconsider these proposed amendments in light of the reasons set out above and whether they will actually serve to enhance the criminal justice system's capacity to deliver for victims, accused persons and the community.

Youth criminal histories

[2] Women's Safety and Justice Taskforce Report One: Hear Her Voice Report Two: *Hear Her Voice Report Two: Women and girls' experiences across the criminal justice system.*

The use of police cautioning is a valuable tool for early intervention, which is in line with the government's stated commitment to early intervention. Cautioning should be used where possible to remove first time offenders or minor offenders from the youth justice system.

The benefits are two-fold – the economic benefit obtained from diverting young people away from the justice and corrective systems and the reduction in a young person's rates of reoffending. The proposal to include cautions on youth criminal histories may results in the caution process not having the same positive and rehabilitative effect.

In our view, the amendment of section 15 of the Youth Justice Act will have uninitended consequences, such as:

- children having less of an incentive to admit to their offending (therefore undermining the Bill's stated purpose of increasing accountability);
- a greater number of court appearances and strain on the court system;
- increased stigmas associated with having a criminal history which will lead to broader mental health and economic and social impacts.

These unintended consequences will be significantly amplified by the proposed amendments to the principles in the Youth Justice Act. Accordingly, we recommend that the Bill should be amended to include a provision that a caution is expunged from a child's criminal history following a period of three months provided no other cautions or convictions have been recorded.

Justice impact

The removal of diversionary options and the introduction of mandatory offences will result in a greater number of matters coming before the Courts, stretching an already overburdened and inadequately resourced system.

Review

If the Bill is passed, we recommend an independent review be conducted within one year to assess the efficacy of the amendments in achieving the stated objectives. Due to the significant nature of these reforms and the derogation of human rights, objective evaluation of the effectiveness of this legislation should be undertaken. This should include comprehensive and public consultation on the legislative scheme and policy.

QLS urges the Government to reconsider the Bill having regard to the concerns noted above.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on [redacted]

Yours faithfully

[redacted]

Rebecca Fogerty
President