



Youth Justice and Other Legislation Amendment Bill 2019

Submission to the Legal Affairs and Community Safety Committee

July 2019

About the Office of the Public Guardian

The Office of the Public Guardian (OPG) is an independent statutory office which promotes and protects the rights and interests of children and young people in out-of-home care or staying at a visitable site, and adults with impaired decision-making capacity. The purpose of the OPG is to advocate for the human rights of our clients.

The OPG provides individual advocacy for children and young people through the following two programs:

- the child community visitor program, which monitors and advocates for the rights of children and young people in the child protection system including out-of-home care (foster and kinship care), or at a visitable site (residential facilities, youth detention centres, authorised mental health services, and disability funded facilities), and
- the child advocacy program, which offers person-centred and legal advocacy for children and young people in the child protection system.

The OPG provides an independent voice for children and young people to raise concerns and express their views and wishes. The OPG's child community visitor program independently monitors and advocates for children and young people staying at visitable locations and facilitates the identification, escalation and resolution of issues by and on behalf of children and young people. The OPG's child advocacy program elevates the voice and participation of children and young people in the child protection system in decisions that affect them. When performing these functions, the OPG is required to seek and take into account the views and wishes of the child to the greatest practicable extent.

The OPG also promotes and protects the rights and interests of adults with impaired decision-making capacity for a matter through its guardianship, investigations and adult community visitor programs:

- The guardianship program undertakes both supported and substituted decision-making in relation to legal, personal and health care matters, supporting adults to participate in decisions about their life and acknowledging their right to live as a valued member of society.
- The investigations program investigates complaints and allegations that an adult with impaired decision-making capacity is being neglected, exploited or abused or has inappropriate or inadequate decision-making arrangements in place.
- The adult community visitor program independently monitors visitable sites (authorised mental health services, community care units, government forensic facilities, disability services and locations where people are receiving NDIS supports, and level 3 accredited residential services), to inquire into the appropriateness of the site and facilitate the identification, escalation and resolution of complaints by or on behalf of adults with impaired decision-making capacity staying at those sites.

When providing services and performing functions in relation to people with impaired decision-making capacity, the OPG will support the person to participate and make decisions where possible, and consult with the person and take into account their views and wishes to the greatest practicable extent.

The *Public Guardian Act 2014* and *Guardianship and Administration Act 2000* provide for the OPG's legislative functions, obligations and powers. The *Powers of Attorney Act 1998* regulates the authority for adults to appoint substitute decision makers under an advance health directive or an enduring power of attorney.

Submission on the *Youth Justice and Other Legislation Amendment Bill 2019*

Position of the Public Guardian

The Office of the Public Guardian (OPG) appreciates the opportunity to provide a submission to the Legal Affairs and Community Safety Committee in relation to the *Youth Justice and Other Legislation Amendment Bill 2019* (the Bill).

The OPG strongly supports and congratulates the Queensland Government on introducing legislation to reduce the period in which proceedings in the youth justice system are finalised; remove legislative barriers to enable young people to be appropriately released, including on bail; and ensure that appropriate conditions are attached to grants of release. We particularly support the legislative proposals to enable the OPG to exercise child community visitor functions in residential facilities funded by the new Department of Youth Justice. OPG supports the Government's 'commitment not to detain children in watch-houses other than for normal processing' (Explanatory Speech, 14 June 2019), however the OPG is concerned that under the current Bill, this goal is unlikely to be realised.

Therefore, OPG has taken the opportunity to propose some additional amendments for inclusion in the Bill that would be more likely to see this become a reality, and to strengthen the Bill's existing proposals. The OPG has made these recommendations in the spirit of supporting the Government's desire to lead lasting change that will build an appropriate and effective youth justice system, where only the very few should end up in detention.

Summary of recommendations

Recommendation 1:

The OPG recommends raising the minimum age of detention to 14 years, except in the case of utmost criminal seriousness, in line with that proposed by the recent Northern Territory Royal Commission.

Recommendation 2:

The OPG recommends that:

- a) the Charter of Youth Justice Principles in the *Youth Justice Act 1992* be amended to include a principle that children remanded in custody in watch-houses should be for 'as short a time as is practicable'; and
- b) The *Youth Justice Act 1992* be amended to include a provision mandating that a child should not be held in a watch-house for more than 72 consecutive hours, without the authority of a court. The commencement of this provision could be delayed to enable the procurement of the relevant services to ensure children and young people without a home can be accommodated in non-secure accommodation.

Recommendation 3:

The OPG recommends that section 392 of the *Police Powers and Responsibilities Act 2000* be amended to include the requirement that police also engage with relevant disability and/or health

services when a young person is suspected to have impaired capacity due to intellectual or cognitive disability, or mental illness, and keep a record of when a specified person or organisation has not been contacted.

Recommendation 4:

The OPG recommends clarification of matters to be considered under the *Youth Justice Act 1992* in releasing, or bailing a child, including:

- a) insertion of an explanatory note under new section 48AA(5)(b) of the *Youth Justice Act 1992* to clarify how this provision might be applied, and that it must never be used to justify refusal of bail or release from custody.
- b) amend new section 48AA(7)(b) of the *Youth Justice Act 1992* to insert the words 'or safe home environment' after the words 'no apparent family'.

Recommendation 5:

The OPG recommends clarification and amending of matters that must be considered under the *Youth Justice Act 1992* in releasing a child from custody, including:

- a) amending the wording in the heading of new s 48AD of the *Youth Justice Act 1992*, and under s 48AD(2) from 'may' to 'must', and
- b) Inserting the word 'one' in s 48AD(2) before the words 'of the following matters'.

Recommendation 6:

The OPG recommends strengthening the provisions in relation to bail and accommodation by:

- a) Amending the YJA to include an equivalent provision to section 28(4) of the *Bail Act 2013 (NSW)*, mandating a timeframe for provision of accommodation, and re-listing of matters until resolved.
- b) Amending the YJA to include an equivalent provision to section 28(5) of the *Bail Act 2013 (NSW)*, to empower the court to direct a relevant government service (e.g. Child Safety) to provide information about the action being taken to secure suitable arrangements for accommodation of an accused child.
- c) Amending the *Youth Justice Act 1992* to mandate police and the courts take into consideration specific vulnerabilities and needs of relinquished, homeless, or children in care in considering a lower threshold for bail; and obligate the government to provide children with access to appropriate services, support and care while on bail.

Submission

1. Age of detention raised to 14 years

This Bill provides a unique opportunity for Queensland to lead lasting reform of the youth justice system. It is strongly recommended that to strengthen the Government's commitments under the *Working Together Changing the Story: Youth Justice Strategy 2019-2023* and ensure that the offending of children and young people is dealt with swiftly and according to their age and development state, the minimum age of detention in Queensland should be raised to 14 years. This recommendation aligns with findings of the *Royal Commission into the Protection and Detention of Children in the Northern Territory* following its review of the significant evidence that children are damaged by entry into detention, and the Commission's recommendation that no child under the age of 14 years should be sentenced to detention except in cases of the utmost criminal seriousness.

Recommendation 1: The OPG recommends raising the minimum age of detention to 14 years except in the case of utmost criminal seriousness.

2. Strict time limitations upon custody of children in watch-houses

The OPG strongly supports the proposed amendments to the Charter of Youth Justice Principles (the Charter) in the *Youth Justice Act 1992* (YJA) to emphasise the need to finalise all youth justice matters as soon as practicable, and to treat young people who are in custody as a priority.

However, the Bill lacks the appropriate safeguards to ensure the Bill's aspirations of ensuring that children are not held in watch-houses 'other than for normal arrest and processing (per the Minister's Explanatory Speech, 14 June 2019)'. Watch houses are not a place a child should be accommodated. The human rights principles under the YJA clearly articulate the minimum human rights to which a child should be entitled when detained. These rights cannot be achieved in a watch house. Indeed, the introduction of these amendments provides a unique opportunity to further strengthen the Charter principles and lead national standards that demonstrate best practice in youth justice matters. Amendments should be made to the YJA that reflect those made in the United Kingdom (UK) to ensure children and young people not only have their proceedings finalised as soon as practicable, but that remanding of children in custody in watch-houses should be 'for as short a time as is practicable' and at the most, no longer than 72 consecutive hours. At the very least, any child required to be detained longer than a period of 72 consecutive hours should only be with the authority of a court, and only for a maximum period of a further 72 consecutive hours. This approach aligns with that of the UK, which provides that a child cannot be kept in secure accommodation (such as a watch-house) without the authority of a court for longer than an aggregate of 72 consecutive hours in any period of 28 consecutive days.¹

¹ Regulation 10 of *The Children (Secure Accommodation) Regulations 1991* (UK)

Establishing these best practice principles could be achieved by expressly inserting this as a principle in the Charter, and providing a legislative requirement within the YJA that mandates children and young people be held in watch-houses for no more than 72 consecutive hours. These provisions would align with international best practice, community expectations, rights recognised under the new *Human Rights Act 2019*, and the Queensland Government's commitment to ensure that children and young people will not be detained on remand in Queensland Police Service watch houses, other than for normal arrest and processing.

In the alternative, for every 72 consecutive hours a child stays in a watch house, the legislation could provide that they must be presented to Court again for consideration of bail. That way, the court would need to weigh up all the same considerations against the undesirability of the child staying in the watch house.

The commencement of these provisions could be delayed for a short period so that immediate procurement could take place to ensure (non-secure) accommodation is available for children who may be homeless, or without an able or willing guardian. This should be accompanied by the availability of therapeutic, mental health and/or disability service support for those children.

Recommendation 2:

- a) *the Charter of Youth Justice Principles in the Youth Justice Act 1992 be amended to include a principle that children remanded in custody in watch-houses should be for 'as short a time as is practicable'; and*
- b) *The Youth Justice Act 1992 be amended to include a provision mandating that a child should not be held in a watch-house for more than 72 consecutive hours, without the authority of the court.*

3. Obligations to engage with services for children with intellectual disability or mental illness

Under the Bill, amendments have been made to sections 392 and 421 the *Police Powers and Responsibilities Act 2000* (PPRA). The OPG supports these amendments and notes that they positively provide for greater police accountability when a young person is arrested, and brought into custody. In particular:

- Police officers must make all reasonable attempts to contact a parent of the child, youth justice services and child safety services (if relevant) promptly.
- Where a child is arrested and detained in police custody, police must make all reasonable attempts to promptly contact a service that can arrange a lawyer or a lawyer the child nominates.
- Require police to keep a record of circumstances when a specified person or organisation has not been contacted.

However, there remain significant gaps in relation to addressing the specific support needs of children and young people with intellectual disability or mental health issues. The 2018 Western Australian study of children in youth detention, *The Banksia Hill Project*, found that 89% had at least

one form of severe neurodevelopmental impairment, while 36% were found to have Foetal Alcohol Spectrum Disorder. The NSW study, *National Data on the Health of Justice-involved Young People: A feasibility study 2016-17* found that almost half (46% of young people) in detention had 'borderline' or lower intellectual functioning. However, despite the predominance of children and young people within the youth justice system with intellectual, cognitive or psychosocial disability, there is no legislative requirement for police officers to identify these children, and ensure that their support needs are met.

This cohort is particularly at risk, and often their alleged offending is directly as a result of, or exacerbated by, their disability. Children and young people in custody are particularly vulnerable to issues associated with disability and mental health, and present significantly different symptoms when acutely unwell when compared to adults. For example, behavioural demonstrations of frustration, intolerance and irritability in young people can be a symptom of depression, whereas adults may demonstrate behaviours of sadness and withdrawal. In practice, most mental health professionals who work with adults will not provide opinions on the mental health of children given the differences. This in turn places a significant burden upon police officers to identify mental health needs of children when they are arrested and brought into custody. It is well-established that custodial settings indeed worsen these conditions.

Given that a significant proportion of young people who end up in the youth justice system have mental health issues; intellectual disability (including foetal alcohol spectrum disorder), substance misuse; and a history of trauma, the OPG recommends that the PPRA be amended to require police to engage with disability and/or Queensland Health services in relation to children and young people who appear to have impaired capacity to ensure that their needs are met, and appropriate supports provided.

Recommendation 3:

The OPG recommends that section 392 of the PPRA be amended to include the requirement that police also engage with relevant disability and/or health services when a young person is suspected of having impaired capacity due to intellectual or cognitive disability, or mental illness, and keep a record of when a specified person or organisation has not been contacted.

4. Provisions under the *Youth Justice Act 1992*

4.1 Matters to be considered in making decisions about release and bail.

The Bill introduces new section 48AA into the YJA regarding matters to be considered in making decisions about release and bail. One of the factors that the court or police officers must consider in deciding whether to release or bail a child in custody is the child's 'home environment' (s 48AA(5)(b)). However, it is not clear how this provision is to be applied in practice. For example, the lack of clarity regarding the application of these provisions, increases the risk that an inability to demonstrate a child has a *safe* home environment could be used as justification for refusal of bail, or release from custody.

Therefore, it is recommended that a note be included in this section to clarify the intent of how this provision is to be applied, and that the section must never be used to justify refusal of bail, or release from custody. Alternatively, an amendment could be made to section 48AA(7)(b) to clarify that the court or police officer must not decide it is satisfied there is a risk or unacceptable risk, simply on the basis that 'the child has no apparent family support or safe home environment'.

Recommendation 4:

- a) *Insertion of an explanatory note under section 48AA(5)(b) of the YJA to clarify how this provision might be applied, and that it must never be used to justify refusal of bail or release from custody, or*
- b) *Amend section 48AA(7)(b) to insert the words 'or safe home environment' after the words 'no apparent family support'.*

4.2 Matters to be considered in releasing a child from custody

The Bill introduces new section 48AD into to the YJA which provides for when children may be released from custody despite 'unacceptable risk'. The OPG strongly supports the introduction of this provision. The requirements of section 48AD upon police and the courts in making decisions to release from custody should be mandatory, rather than discretionary. This would be in keeping with the intent of the legislation to ensure that children and young people have barriers removed that lead to them being refused bail, breaching bail conditions, or remaining in detention on remand for extended periods. Therefore, it is recommended that the wording in both the heading of s 48AD, and under s 48AD(2) be amended from 'may' to 'must'.

Section 48AD(2) provides a list of matters to be taken into consideration by the court or police officers in determining whether to release a child from custody. However, the wording of the provision lacks clarity, and it is not expressly clear whether one, or several of these matters should be considered. Therefore, it is recommended that the word 'one' be inserted in s 48AD(2) before the words 'of the following matters', to clarify that any one of the matters in s 48AD(2) may be taken into consideration in determining the child's release from custody, rather than several (or all) matters being required to be considered. This will clarify that only one of the matters needs to be met to enable the child to be released, rather than a misinterpretation that all matters must be met concurrently to enable release. Clarifying this provision will also ensure that the court and/or police officers in making such a decision will be obligated to turn their minds separately to all matters listed under the section, to determine whether one of the matters applies.

Recommendation 5:

- a) *Amend the wording in the heading of s 48AD, and in s 48AD(2) from 'may' to 'must'.*
- b) *Insert the word 'one' in s 48AD(2) before the words 'of the following matters'*

4.3 Accommodation

The OPG strongly supports the positive obligations the Bill places upon the courts and police officers to ensure that the lack of accommodation is not used as an exclusive reason to refuse to release a child from custody (ss 48AA(7), 48AE(3)).

However, while the Bill proposes that the lack of accommodation should not be the sole reason to satisfy 'unacceptable risk', there is a risk that the need for accommodation could be *one of several* factors that may satisfy the courts and police officers that there is 'an unacceptable risk'. The OPG has observed the practice that while a court may not refuse bail on the basis of accommodation, the bail application may be 'part-heard' and adjourned to a future date, for the purpose of enabling Child Safety time to address the issue of accommodation and source a placement for a young person in care. In the experience of the OPG, the young person is invariably remanded in custody during the period of adjournment, which can be for periods of up to a week or longer. Being homeless is not a crime and should not be punishable by detention, particularly for children who often have zero control or influence over their residential status. Detaining children in custody for lack of accommodation options is effectively punishing the individual child for a system failure.

It is therefore recommended that these legislative proposals are strengthened by inserting equivalent provisions in the YJA, as those provided for under the *Bail Act 2013* (NSW) sections 28(4) and 28(5). The former provision requires 'the court responsible for hearing bail proceedings must ensure that, if an accommodation requirement is imposed in respect of a child, the matter is re-listed for further hearing at least every two days until the accommodation requirement is complied with'. This provision mandates a timeframe for provision of accommodation, and re-listing of matters until resolved, so that children have access to a system of bail that recognises their particular needs and vulnerabilities. The latter of the provisions (s28(5)) empowers the court to 'direct any officer of a Division of the Government Service to provide information about the action being taken to secure suitable arrangements for accommodation of an accused person'.

This can act as a critical tool for the courts to ensure that young people are not kept on significant periods of remand due to the inability of a Government services to source appropriate accommodation for the child. A legislated period of 48 hours reporting requirement could significantly reduce the period (which can be from three weeks to a month) during which children are currently detained in Queensland, particularly for those children who would otherwise have received bail but for lack of a child protection placement.

The introduction of this Bill also provides a timely opportunity to ensure that provisions are included within the YJA to ensure that children with heightened vulnerability should be afforded a lower threshold for bail, with obligations placed upon the State to find them appropriate care. Heightened vulnerability for these children is frequently driven by matters outside the child's control, including those who have been effectively 'relinquished' by their parents; are homeless; or have not been found a child protection placement within the community. Through OPG's individual child advocacy function, OPG has advocated for many highly vulnerable children who find themselves in such a situation, but are effectively 'trapped' within the criminal justice system, without access to appropriate supports or care options. Acknowledging and addressing the specific vulnerabilities of these children also requires investment in services and supports, in order to address and reduce

recidivism of this cohort. Therefore, it is also recommended that the YJA include provisions that mandate courts and police to take into consideration specific vulnerabilities and needs of relinquished, homeless, or children in care and lower the threshold for bail; while correspondingly obligating the government to provide these children with access to appropriate services, support and care.

Recommendation 6:

- a) Amend the YJA to include an equivalent provision to section 28(4) of the Bail Act 2013 (NSW), mandating a timeframe for provision of accommodation, and re-listing of matters until resolved.**
- b) Amend the YJA to include an equivalent provision to section 28(5) of the Bail Act 2013 (NSW), to empower the court to direct a relevant government service (e.g. Child Safety) to provide information about the action being taken to secure suitable arrangements for accommodation of an accused child.**
- c) Amend the YJA to mandate police and the courts take into consideration specific vulnerabilities and needs of relinquished, homeless, or children in care in considering a lower threshold for bail; and obligate the government to provide children with access to appropriate services, support and care while on bail.**

Concluding remarks

The OPG strongly supports the initiatives proposed under this Bill, however it is concerned that the Government's 'commitment not to detain children in watch-houses other than for normal processing' (Explanatory Speech, 14 June 2019), will struggle to be realised under the Bill in its current form.

The OPG would be pleased to lend any additional support as required.

Should clarification be required regarding any of the issues raised, the OPG would be happy to make representatives available for further discussions.