Sisters Inside Inc.
ABN 94 859 410 728

P.O. Box 3407
South Brisbane Qld 4101

Ph: (07) 3844 5066
Fax: (07) 3844 2788

Email: admin@sistersinside.com.au
Web: www.sistersinside.com.au

Sisters Inside Inc. is an independent community organisation which exists to advocate for the human rights of women in the criminal justice system

9 July 2019

Committee Secretary
Legal Affairs and Community Safety Committee
Parliament House
George Street
BRISBANE QLD 4000

By email only: lacsc@parliament.qld.gov.au

Dear Committee Secretary

Youth Justice and Other Legislation Amendment Bill 2019

Thank you for the opportunity to comment on the *Youth Justice and Other Legislation Amendment Bill 2019* (the **Bill**).

As you know, Sisters Inside is an independent community organisation that exists to advocate for the collective human rights of women and girls affected by the criminal legal system and to provide individual services to meet the needs of women, girls and their children. Sisters Inside is funded by the Department of Child Safety, Youth and Women to deliver the Yangah Program, a bail support program for girls under 18 years old in the Brisbane area.

Sisters Inside does not support the Bill in its current form. We have outlined our main concerns with the Bill below. Overall, we believe that the Bill will not address the significant social and legal issues that have resulted in rising numbers of children in Queensland being arrested and imprisoned. In our view, legislative amendments must recognise children's inherent vulnerability, through clear principles and decision-making processes that can be implemented to reduce children's contact with the legal system.

Sentencing principles

Sisters Inside strongly opposes the introduction of an aggravating factor for children convicted of manslaughter in the sentencing principles of the *Youth Justice Act 1992* (Qld) (the **YJ Act**) (clause 4 of the Bill).

We understand this amendment is proposed to align with recent amendments to section 9 of the *Penalties and Sentences Act 1992* (Qld), which implemented recommendation 1 of the Queensland Sentencing Advisory Council's report into sentencing for criminal offences arising from the death of a child. The Council's recommendation was limited to the *Penalties and Sentences Act 1992* (Qld), and it would be inappropriate to extend this principle to children via the Bill. It is apparent from the text of the Council's report that this recommendation was not intended to apply to children as defendants.

Further, it is absolutely appalling that the Queensland Government would introduce this amendment while the minimum age of criminal responsibility remains at 10 years old. The Queensland Government cannot purport to recognise the defencelessness and vulnerability of children under 12 years, at the same time as children under 12 years old continue to be criminalised and imprisoned.

Body-worn cameras and audio recordings of CCTV

The Bill introduces amendments to the YJ Act to authorise the use of body worn cameras by employees in youth prisons (clause 5 of the Bill). We understand these amendments are intended to implement the recommendations of the Independent Review of Youth Detention from 2016 and the Queensland Ombudsman's 2019 recommendation to implement body worn cameras that provide a visual and audio record for all operational staff in youth prisons.

We are concerned that this amendment is being prioritised without adequate consultation about the privacy issues and unintended consequences for children. CCTV and body worn camera footage will only offer greater accountability if the use and review of footage is governed by effective and transparent rules. We are not aware of the status of the guidelines referred to in new section 263B of the YJ Act (see clause 5 of the Bill). The widespread rollout of body worn cameras and audio recordings of CCTV in youth prisons ought to be deferred until guidelines are published.

Decisions about release and bail for children

We acknowledge the intention of the Bill is to clarify the decision-making processes and considerations for children arrested and charged with criminal offences. However, in our view, the Bill does not outline a clear legislative framework that is likely to reduce the extremely high numbers of children remanded in watch houses and youth prisons.

We believe there must be consistency in the principles and considerations that apply to children in relation to 1) decisions to charge (existing section 11 of the YJ Act), 2) decisions about release (clause 10 of the Bill), and 3) decisions to arrest children for contraventions of bail conditions (new section 59A, clause 18 of the Bill). The considerations that inform decisions are not easily separated or discrete. Once a child is charged with an offence, rather than being cautioned, it is more likely that the child will ultimately be remanded. In our experience, this is most likely for Aboriginal and Torres Strait Islander children and girls in the child protection system.

At present, the Bill is silent on decisions to charge children and does not propose to amend section 11 of the YJ Act. The Bill proposes significant amendments to guide bail decision-making but it maintains the concept of "unacceptable risk" and it does not sufficiently shift the obligation to adults and Government agencies to address the social issues that are the reason for high remand rates. The Bill introduces new section 59A, which outlines considerations for decisions by police to arrest children if the officer reasonably suspects a child has contravened or is contravening a bail condition (clause 18 of the Bill). In contrast to clause 10 of the Bill, the considerations in new section 59A do not adequately reflect children's unique circumstances as defendants and the undesirability of arresting children for social or welfare reasons.

The matters outlined in new section 48AD(2)(a)-(j) offer a good starting point for general principles that must apply to *all* decisions relating to children in the criminal legal system. In the Bill, these considerations only apply if the court or a police officer considers there is an unacceptable risk in relation to a child who is charged and being considered for release (see clause 10, new section 48(4) of the Bill). In our view, it would be better to dispense with the concept of 'unacceptable risk' altogether for children and, instead, outline specific matters that are consistent with community safety and children's inherent vulnerability. At the very least, the wording of section 48AD(2) should be changed from 'may' to 'must' to require courts and police officers to release children if satisfied that the child's release is consistent with community safety, and appropriate having regard to the matters outlined in the subsections.

We note new section 48AA(7) states that a court or police officer must not decide it is satisfied that there is a risk or unacceptable risk of a matter mentioned in section 48(4) only because a child will not have accommodation or adequate accommodation and/or the child has no apparent family support. In practice, this amendment is unlikely to stop children from spending long periods of time in watch houses or youth prisons. This is because lack of accommodation affects has a compounding effect for children in particularly marginalised situations. For example lack of an address affects children's ability to participate in programs or to be subject to a curfew.

In our experience, many of the girls we support experience homelessness due to failures in the child protection system, not in their families. To address this issue, there must be a positive legislative obligation on the Department of Child Safety, Youth and Women to find appropriate and safe accommodation for children who are on remand or at risk of being remanded. If a child is not subject to a child protection order, there must be an obligation on the Department of Youth Justice to identify accommodation, or to provide non-punitive, voluntary support to children's families, to allow children to be released as soon as possible.

We refer the Committee to section 29 of the *Youth Criminal Justice Act* in Canada. We have **attached** a copy of this section for the Committee's consideration. The Canadian approach is useful because it clearly states that children must not be imprisoned as a substitute for appropriate child protection, mental health or other social measures. It also clearly puts the onus on the state to justify the imprisonment of children, rather than on the child (or their lawyer) to show the desirability of children remaining in the community.

Sisters Inside is strongly opposed to legislative changes related to terrorism offences, which have progressively undermined fundamental legal principles relating to bail and parole for adults and children. We note the considerations in new section 48AA(2) (see clause 10 of the Bill) mirror the considerations in existing sections 48(f) and 48(g) of the YJ Act; therefore the Bill does not add new considerations. To the extent that provisions relating to terrorism remain in the YJ Act, these provisions must be contained at the end of relevant Parts or Divisions as these provisions are rarely likely to be relevant.

Pre-sentence reports

There appears to be a typographical error in clause 20(5) of the Bill. Clause 20(3) of the Bill inserts a new subsection (3A) into the YJ Act which provides discretion for the court to ask that a pre-sentence report is given to the court within a stated period. New subsection (9) in clause 20(5) of the Bill refers to 'the period stated by the court under subsection (6)'; we understand that it should refer to subsection (3A) instead.

In our view, it would be preferable for the court to be required to set a period for a pre-sentence report or further information to be provided – that is, the wording in new subsection (3A) should be changed from 'may' to 'must'. This would provide a clearer mechanism for delays to be addressed by the court and dispense with the need for new subsection (9).

Information sharing and services coordination

Sisters Inside has significant concerns about the proposed information sharing provisions in the Bill (clause 30). Children must maintain the right to consent to Government agencies and non-government organisations sharing or exchanging their confidential information.

As a non-government organisation, we are particularly concerned that these provisions may create a requirement that we must disclose children's information without their consent. Respecting children's decisions about their confidential information is essential to build a trusting support relationship. An aspirational principle to obtain consent wherever possible and practice before disclosing confidential information is not a sufficient safeguard against unnecessary disclosures.

If the Committee decides to support these amendments, we suggest adding a requirement for a person who discloses information without consent to tell the child that their information has been disclosed and the reasons for the disclosure. This would ensure that children have an awareness of which individuals and organisations hold confidential information about their circumstances. It would also provide an accountability mechanism to ensure disclosures are necessary and appropriate.

Other matters

The Bill includes a new obligation in the *Police Powers and Responsibilities Act 2000* (Qld) for police to inform a child that a representative of a legal aid organisation will be notified that the child is in custody for an offence, and to notify or attempt to notify a representative of the legal aid organisation that the child is in custody for an offence before questioning starts (clause 43). Sisters Inside supports these amendments. These amendments must be supported by adequate resourcing to allow children to access legal assistance and representation in interactions with police.

The Bill introduces new legislative requirements for police to keep records of particular decisions (see clause 12, new section 48B regarding reasons for decision to keep or remand children in custody and clause 16, new section 52B regarding reasons for decisions to impose particular conditions, clause 42, new section 392(3A) regarding police making all reasonable inquiries to contact a parent). Sisters Inside welcomes the requirement for police to keep records on their reasons for decision and their attempts to notify parents. The obligation to keep records can be an important accountability mechanism – at a systemic level – to ensure that decisions are made lawfully and consistently. To effectively guarantee accountability, records must be reviewed and, therefore, they must be maintained in a format that allows for review.

At the public briefing for this Bill, Assistant Commissioner Codd representing the Queensland Police Service stated:

> The problem for us is that [notification] is currently recorded in things such as our custody index on QP9s and in officers' notebooks. It is not currently recorded in a way that easily allows the aggregation and reporting, and to do so through our QPRIME system would be inordinately expensive and a difficult thing to change for something that we are yet to see the impetus for what it might achieve.

In our view, there is a significant public interest in ensuring that records kept by police and other Government agencies about decisions with serious human rights implications can be aggregated and reviewed at a systemic level. Otherwise, there is no effective mechanism to implement systemic accountability, as intended by the Queensland Government.

In addition to the measures proposed in the Bill, we urge the Committee to consider structural changes to support children in Queensland, specifically raising the minimum age of criminal responsibility to at least 14 years old. This amendment would be consistent with current international and national consensus. Most recently, the Law Council of Australia has unanimously resolved to change its policy to support 14 years old as the minimum age of criminal responsibility. In our view, raising the minimum age of criminal responsibility would be most likely to deliver safety for children and the community in the long term.

If you wish to discuss this submission further, please feel free to contact me on [redacted].

Yours faithfully

Debbie Kilroy
Chief Executive Officer
Sisters Inside Inc

Attachment

Section 29 – *Youth Criminal Justice Act* (Canada)

Detention as social measure prohibited
29 (1) A youth justice court judge or a justice shall not detain a young person in custody prior to being sentenced as a substitute for appropriate child protection, mental health or other social measures.

Justification for detention in custody
(2) A youth justice court judge or a justice may order that a young person be detained in custody only if
- **(a)** the young person has been charged with
  - **(i)** a serious offence, or
  - **(ii)** an offence other than a serious offence, if they have a history that indicates a pattern of either outstanding charges or findings of guilt;
- **(b)** the judge or justice is satisfied, on a balance of probabilities,
  - **(i)** that there is a substantial likelihood that, before being dealt with according to law, the young person will not appear in court when required by law to do so,
  - **(ii)** that detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, having regard to all the circumstances, including a substantial likelihood that the young person will, if released from custody, commit a serious offence, or
  - **(iii)** in the case where the young person has been charged with a serious offence and detention is not justified under subparagraph (i) or (ii), that there are exceptional circumstances that warrant detention and that detention is necessary to maintain confidence in the administration of justice, having regard to the principles set out in section 3 and to all the circumstances, including
    - **(A)** the apparent strength of the prosecution's case,
    - **(B)** the gravity of the offence,
    - **(C)** the circumstances surrounding the commission of the offence, including whether a firearm was used, and
    - **(D)** the fact that the young person is liable, on being found guilty, for a potentially lengthy custodial sentence; and
- **(c)** the judge or justice is satisfied, on a balance of probabilities, that no condition or combination of conditions of release would, depending on the justification on which the judge or justice relies under paragraph (b),
  - **(i)** reduce, to a level below substantial, the likelihood that the young person would not appear in court when required by law to do so,
  - **(ii)** offer adequate protection to the public from the risk that the young person might otherwise present, or
  - **(iii)** maintain confidence in the administration of justice.

Onus
(3) The onus of satisfying the youth justice court judge or the justice as to the matters referred to in subsection (2) is on the Attorney General.