

Queensland Family and Child Commission

Submission

To: Legal Affairs and Community Safety Committee

Date: 10/07/2019

Topic: Youth Justice and Other Legislation Amendment Bill 2019

Submission summary:

The Queensland Family and Child Commission (QFCC) is pleased to provide a submission to the Legal Affairs and Community Safety Committee on the Youth Justice and Other Legislation Amendment Bill 2019.

The QFCC supports measures in the Bill to improve safeguards for children in contact with the youth justice system.

An operational focus on education for police and courts may help to make sure these amendments are given full effect in practice. The QFCC also recommends further amendment to allow the Youth Detention Inspectorate to inspect watch houses where children are held, in advance of the introduction of independent inspections to comply with the United Nations *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (OPCAT)*.

To further protect the rights of children in contact with youth justice, Queensland should also consider raising the minimum age of criminal responsibility. In the interim, consideration should be given to restricting the number of offences that apply to children under 12 years of age.

The QFCC is collaborating with the Department of Youth Justice to oversight the youth justice reforms. This will ensure government investment decisions are implemented and continuously improved to support the best outcomes for children, young people and the community.

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Timeliness of decision-making and reduction of barriers to bail

Recommendation

The QFCC recommends

- an operational focus on education to make sure amendments to reduce remand are given full effect, and the rights of children in contact with youth justice are protected
- provisions to give responsibility to the Chief Executives of the Department of Child Safety, Youth and Women and the Department of Youth Justice to find accommodation for children who receive bail while living in out of home care.

The QFCC supports measures in the Youth Justice and Other Legislation Amendment Bill 2019 (the Bill) to improve safeguards for children in contact with the youth justice system. Of particular note are measures to:

- emphasise the importance of timeliness
- clarify the principle of ‘detention as a last resort’ applies to bail decision making
- incorporate an explicit presumption in favour of release
- provide that police officers and courts may release a young person if satisfied release is not inconsistent with ensuring community safety, even where there is risk of certain conduct by the young person
- confirm the police officer or court must not detain a child in custody solely because the child lacks accommodation or has no apparent family support
- amend requirements around bail conditions and require police officers to consider alternatives to arrest when responding to young people who breach conditions of bail.

A period in detention makes it challenging for young people to return to education and find future employment opportunities.¹ The *Report on Youth Justice* advises once a child is placed in a youth detention centre, whether sentenced or on remand, there is a high rate of recidivism and return. For many children, youth detention is a pathway to adult prison.²

The measures established in this Bill make a positive contribution by providing alternatives to detention, particularly for children who would otherwise be remanded in custody. These measures will need to be supported by strong practice frameworks and appropriate resources to build the capacity of courts and police to respond in ways that protect children’s rights.

The QFCC recommends an operational focus on education for police officers and court officials regarding exercising the discretion introduced in the Bill. The QFCC recently led a project to develop a *Joint agency protocol to reduce preventable police call-outs to residential care services* in response to the number of children living in out of home care being charged for minor incidents.³ A critical component of the protocol is to provide education to residential care workers on exercising

¹ Queensland Government 2019, *Working Together: Changing the Story – Youth Justice Strategy 2019-2023*, <https://www.csyw.qld.gov.au/resources/dcsyw/youth-justice/youth-justice-report-strategy/strategy.pdf>, accessed 3 July 2019, p. 8.

² Atkinson, B 2018, *Report on Youth Justice*, <https://www.csyw.qld.gov.au/resources/dcsyw/youth-justice/youth-justice-report-strategy/youth-justice-report.pdf>, accessed 3 July 2019, p. 67.

³ Queensland Family and Child Commission 2018, *Joint agency protocol to reduce preventable police call-outs to residential care services*, <https://www.qfcc.qld.gov.au/kids/young-people-living-care>, accessed 3 July 2019.

discretion and implementing responses proportionate to a child's actions and situation at the time of the incident.

A similar focus on education and resources for police and courts would help make sure the Bill has the desired effect of providing additional safeguards for children experiencing vulnerability. The Bill provides that a police officer or court cannot be satisfied there is a threat to the child's safety solely because the child lacks accommodation or has no apparent family support. This is a positive move to make sure detention truly is a 'last resort' and not seen as a placement option. It reflects the findings of the *Report on Youth Justice*, where stakeholders expressed concern that children are in youth detention centres due to a lack of suitable accommodation options.⁴

Additional support for children may be required, including through Supervised Community Accommodation, to give effect to the Bill's intention to remove barriers that contribute refusal of bail.

Children who live in out of home care are more likely to be refused bail due to a lack of appropriate accommodation. In addition, children in the child protection system are many times more likely than the general population to be under youth justice supervision.⁵ There may be benefit in giving the Chief Executives of the Department of Child Safety, Youth and Women and the Department of Youth Justice specific responsibilities to find appropriate accommodation for children who receive bail while living in out of home care.

This could be modelled in part on s. 28 of the *Bail Act 2013* (NSW), which requires hearings every two days when a child is held on remand due to a lack of accommodation. While this provides some safeguards for children, it has been criticised for not giving magistrates the power to require government departments to find accommodation.⁶ A strong provision along these lines could help to reduce the number of children experiencing vulnerability being remanded in custody.

Youth detention inspectorate oversight of watch houses

Recommendation

The QFCC recommends further amendment to the *Youth Justice Act 1992* to allow the Youth Detention Inspectorate to inspect watch houses where children are held.

The Brisbane watch house is currently listed as a visitable site, which allows community visitors from the Office of the Public Guardian to visit children being held. However, the *Youth Justice Act 1992* does not currently permit the Youth Detention Inspectorate to inspect watch houses.

The QFCC recommends amendment to s. 263 (4) of the *Youth Justice Act 1992* to require the chief executive to monitor the operation of and inspect watch houses as well as detention centres, to

⁴ Atkinson, B 2018, *Report on Youth Justice*, <https://www.csyw.qld.gov.au/resources/dcsyw/youth-justice/youth-justice-report-strategy/youth-justice-report.pdf>, accessed 3 July 2019, p. 50.

⁵ Queensland Family and Child Commission 2018, *The criminalisation of children living in out of home care in Queensland*, <https://www.qfcc.qld.gov.au/kids/young-people-living-care>, accessed 5 July 2019, p. 7.

⁶ Yfoundations 2019, *Section 28: Criminalising the young and homeless*, <https://assets.2ser.com/wp-content/uploads/2019/05/04202932/Yfoundations-Bail-Policy-Position-Paper.pdf>, accessed 5 July 2019, p. 15.

make sure children’s rights are protected while in custody. The Youth Detention Inspectorate would be able to apply a youth justice lens to monitoring watch houses.

This would also be an important interim step while Queensland considers its requirements under OPCAT, which was ratified by the Commonwealth on 15 December 2017. OPCAT requires independent monitoring of places of detention, including youth detention.⁷ The Queensland Government has also accepted in principle a recommendation by the Royal Commission into Institutional Responses to Child Sexual Abuse to implement an independent oversight body to provide oversight of youth detention.⁸

In New Zealand, where OPCAT was ratified in 2007, police custodial services are considered places of detention for OPCAT inspection.⁹ Allowing the Youth Detention Inspectorate to monitor watch houses immediately would support Queensland’s transition to OPCAT compliance, while helping to protect the rights of children and young people held in custody.

In response to the findings of an independent review into Queensland’s youth detention centres, the Department of Justice and Attorney-General asked the QFCC to deliver a paper identifying options for a new youth detention oversight model. In March 2018, following an extensive review of existing models, the QFCC has provided *the Options for youth detention oversight—A model for inspecting places of detention in Queensland* paper to relevant Directors-General.

Minimum age of criminal responsibility

Recommendation

The QFCC continues to recommend the Queensland Government consider raising the minimum age of criminal responsibility (MACR) to at least 12 years. In the interim, consideration should be given to reducing the number of offences that apply to children aged 10 and 11.

The QFCC continues to advocate for raising the MACR in Queensland to at least 12 years. At present, the MACR across Australia is 10 years. The United Nations Committee on the Rights of the Child has argued any MACR below 12 years is ‘internationally unacceptable’ and has specifically expressed concern about Australia on that basis.¹⁰

⁷ Australian Human Rights Commission, *Australia ratifies major anti-torture treaty OPCAT*, <https://www.humanrights.gov.au/about/news/media-releases/australia-ratifies-major-anti-torture-treaty-opcat>, accessed 3 July 2019.

⁸ Queensland Government, *Queensland Government Response to the Royal Commission into Institutional Responses to Child Sexual Abuse*, <https://www.premiers.qld.gov.au/publications/categories/reports/assets/gov-response-royal-commission-child-abuse.pdf>, accessed 3 July 2019, p. 56.

⁹ NZ Human Rights Commission 2017, *2016-17 Monitoring places of detention: annual report of activities under the Optional Protocol to the Convention against Torture (OPCAT)*, http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/3068/original/201617_opcat_annual_report_-_final_1_-_hrc.pdf?1550532888, accessed 4 July 2019.

¹⁰ United Nations Committee on the Rights of the Child 2005, *Consideration of reports submitted by States Parties under article 44 of the Convention: Convention on the Rights of the Child*, <https://digitallibrary.un.org/record/569889>, accessed 4 July 2019, p. 15.

The Australian Human Rights Commission,¹¹ Amnesty International¹² and Australian Medical Association¹³ have also recommended raising MACR in Australia. The Australia and New Zealand Children's Commissioners and Guardians have recommended MACR be no lower than 12 years, and ultimately raised to at least 14 years.¹⁴

The QFCC acknowledges the *Working Together: Changing the Story – Youth Justice Strategy 2019-2023* (the Youth Justice Strategy) commits the Queensland Government to participate in a national review of MACR.¹⁵

As an immediate step while this review takes place, consideration should be given to reducing the number of offences children aged 10 and 11 can be charged with. In New Zealand, children aged 10 and 11 can only be charged with murder or manslaughter. In Ireland, children aged 10 and 11 can be prosecuted for murder, manslaughter, rape, or aggravated sexual assault with the approval of the Director of Public Prosecutions.¹⁶

Restricting the offences that apply to children under 12 years of age would keep them out of the youth justice system, shifting the focus toward support to help deal with their underlying behaviours and any trauma they have experienced. This should be accompanied by diversionary programs, prevention and early intervention models, as outlined in the Youth Justice Strategy.¹⁷

¹¹ Australian Human Rights Commission 2016, *Children's rights report 2016: National Children's Commissioner*, https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC_CRR_2016.pdf, accessed 3 July 2019.

¹² Amnesty International 2018, *The sky is the limit: keeping young children out of prison by raising the age of criminal responsibility*, <https://www.amnesty.org.au/wp-content/uploads/2018/09/The-Sky-is-the-Limit-FINAL-1.pdf>, accessed 3 July 2019.

¹³ Australian Medical Association 2019, *AMA calls for age of criminal responsibility to be raised to 14 years of age*, <https://ama.com.au/media/ama-calls-age-criminal-responsibility-be-raised-14-years-age>, accessed 3 July 2019.

¹⁴ Australia and New Zealand Children's Commissioners and Guardians, *Communique – November 2018*, <http://accg.org.au/wp-content/uploads/2018/11/Communique-2018-November.pdf>, accessed 4 July 2019.

¹⁵ Queensland Government 2019, *Working Together: Changing the Story – Youth Justice Strategy 2019-2023*, <https://www.csyw.qld.gov.au/resources/dcsyw/youth-justice/youth-justice-report-strategy/strategy.pdf>, accessed 3 July 2019, p. 17.

¹⁶ Queensland Family and Child Commission 2017, *The Age of Criminal Responsibility in Queensland*, <https://www.qfcc.qld.gov.au/kids/justice-system>, accessed 3 July 2019.

¹⁷ Queensland Government 2019, *Working Together: Changing the Story – Youth Justice Strategy 2019-2023*, <https://www.csyw.qld.gov.au/resources/dcsyw/youth-justice/youth-justice-report-strategy/strategy.pdf>, accessed 3 July 2019.