



10 July 2019

Mr Peter Russo MP
Chair
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane Qld 4000

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

Dear Sir

Youth Justice and Other Legislation Amendment Bill 2019

I welcome the opportunity to provide this submission to the Legal Affairs and Community Safety Committee (the Committee).

Introduction

1. The Queensland Human Rights Commission (the Commission) is a statutory authority established under the *Queensland Anti-Discrimination Act 1991*.
2. The functions of the Commission include promoting an understanding, acceptance, and public discussion of human rights in Queensland.
3. The Youth Justice and Other Legislation Amendment Bill 2019 (the Bill) was introduced into Parliament by the Minister for Child Safety, Youth and Women and Minister for the Prevention of Domestic and Family Violence on 14 June 2019.
4. The objectives of the priority amendments in the Bill are to:
 - reduce the period in which proceedings in the youth justice system are finalised, to encourage the timely finalisation of proceedings for young people and reduce demand pressures on youth detention centres and watch houses;
 - remove legislative barriers to enable more young people to be granted bail, so that wherever appropriate young people can be released rather than remanded in custody; and

- ensure appropriate conditions are attached to grants of bail, to reduce the likelihood of a young person breaching their conditions, coming to the attention of police and being remanded in detention.
5. The Commission was consulted during the drafting of the Bill, and provided feedback. The Commissioner visited the Brisbane Watch house on 3 April 2019 and the Brisbane Youth Detention Centre on 9 July 2019.
 6. It is noted that on 11 December 2018, the Queensland Government released the *Working Together Changing the Story: Youth Justice Strategy 2019-2023* (the Youth Justice Strategy), and that the fourth pillar of the Youth Justice Strategy, reduce reoffending, commits to a review of the *Youth Justice Act 1992* (YJ Act). The Minister when introducing this Bill in Parliament stated this Bill is the first stage of this review.
 7. The Commission is of the view that the urgent legislative reform proposed by this Bill should be followed with a more comprehensive and considered review of youth justice laws and programs, with evidence based considerations that fully embrace the ‘Four Pillars’ for youth justice reform: intervene early; keep children out of court; keep children out of custody; reduce reoffending.¹
 8. In light of the gross over-representation of Indigenous children in youth detention, it is also critical that the Queensland Government engage with Aboriginal and Torres Strait Islander communities, not only in consultation, but in the deliberation and implementation of proposed reforms.
 9. This submission briefly covers:
 - statistics about the cohort of youth offenders in incarceration
 - the complexity of young offenders
 - the human rights of children in the justice system
 - when those human rights may be limited
 - some immediate suggestions for reducing current incarceration rates in watch houses.
 10. The Commission supports the Bill, however considers that additional measures are required to adequately safeguard the human rights of children brought into contact with Queensland’s youth justice system. In particular, in addition to a number of suggestions in relation to the proposed amendments, the Commission recommends:
 - The age of criminal responsibility be increased to 12 years of age and a minimum age for detention of 14 years;² and
 - The introduction of a statutory prohibition on prolonged detention in watch houses.

¹ The Four Pillars were recommended by Mr Robert (Bob) Atkinson AO, APM in the 2018 *Report on Youth Justice*.

² The NT Royal Commission recommended that that the age of criminal responsibility be raised from 10 to 12; and that no child under 14 should be sentenced to detention, except in the most serious cases, Royal Commission into the Detention and Protection of Children in the Northern Territory, 17 November 2017.



Context

11. In Queensland on an average day in 2017–18, 1,623 young people aged 10 and over were under youth justice supervision and spent an average of 30 weeks under supervision during the year.³
12. Indigenous young people are 17 times as likely as non-Indigenous young people to be under supervision⁴ and comprise approximately 70% of the youth detention population.
13. Of those young people in detention, 87% were unsentenced and awaiting the outcome of their court matter or sentencing. The remainder were serving a sentence.
14. On an average day, 88% were supervised in the community, and 13% in detention.
15. Recently, publicity has been given to the numbers of children, as young as 10, being held for extended periods in watch house holding cells.⁵ Tony Keim writing for the Queensland Law Society's journal *Proctor* described the situation as 'warehousing'.⁶
16. For the period between March 2018 and January 2019, the time spent in custody in a watch house, averaged over a month, ranged between:
 - a. For those aged 10 to 13, between 1 and 5 days
 - b. For those aged 14 to 16, between 2 and 10 days, and
 - c. For those aged 17, between 1 and 14 days.⁷
17. The Youth Advocacy Centre has raised a number of concerns about the harsh conditions in which children are detained in watch houses including:
 - proximity to adult alleged offenders
 - limited access to fresh air and adequate natural light
 - limited access to family visits
 - limited access to physical exercise
 - limited access to adequate health services
 - limited access to education and
 - incidents of personal injury.⁸
18. As at 3 July 2019, there were 34 children remaining in Queensland's watch houses, of which 27 were on remand.⁹

³ Australian Institute of Health and Welfare, *Youth justice in Queensland 2017-18* [fact sheet] AIHW, 2019.

⁴ Ibid

⁵ 4 Corners, *The Watch House Files*, 13 May 2019.

⁶ Tony Keim, 'Saving a generation lost in the youth justice crisis', *Proctor*, July 2019, 30.

⁷ Department of Premier and Cabinet briefing, 22 February 2019.

⁸ Youth Advocacy Centre Orange Paper, *The use of Queensland watch houses to hold children*, 15 March 2019.

⁹ 2019.07.04 Letter to S. McDougall from Rob Seiler Department of Child Safety.



Complexity of young people in justice system

19. Young people who come into contact with the justice system are often multiply disadvantaged. They have often experienced family dysfunction, abuse, neglect, have poor educational attainments, mental health problems and neurological disabilities.
20. A 2018 snapshot that shows the extent and depth of disadvantage experienced by young offenders follows:

Complexity of young offenders, Youth Justice Census, June 2018

- 52%** Disengaged from education, training and employment
- 18%** Homeless or in unsuitable accommodation
- 80%** Used at least one substance
- 33%** Young people in detention have used Ice or other Methamphetamines¹⁰
- 58%** Mental health and/or behavioural disorder (diagnosed or suspected)
- 17%** Disability (assessed or suspected)
- 5%** Were parents of young children
- 31%** At least one parent of young offenders spent time in adult custody¹¹

21. Former District Court and Children's Court judge, and currently the Chair of the Queensland Sentencing Advisory Council, John Robertson, recently wrote:

'The Forde Inquiry, and others that have followed, also refers to the research that establishes that in every one of these cases, when a child commits a violent crime, he or she has come from a background of severe family dysfunctionality, including sexual and/or physical and psychological abuse, and consequential drug and alcohol abuse, and, fundamentally, a lack of love and nurturing in their very early childhood.'¹²

Human Rights of Children in the Justice System

22. The *Human Rights Act 2019 (HR Act)* identifies 23 human rights that Parliament has stated it specifically seeks to protect and promote.¹³ Those rights will be activated in Queensland on 1 January 2020 and include specific rights about children in the criminal process, in particular:

33 Children in the criminal process

- (1) *An accused child who is detained, or a child detained without charge, must be segregated from all detained adults.*

¹⁰ Anecdotal information obtained by the Commission suggests this figure is inaccurate and results from under-reporting of methamphetamine use.

¹¹ Queensland Department of Child Safety, Youth and Women, *Youth Justice Pocket Stats 2017-18*, Queensland Government.

¹² John Robertson, 'The times change, the suffering remains', *Proctor*, July 2019, 31.

¹³ s4 HRA



- (2) *An accused child must be brought to trial as quickly as possible.*
- (3) *A child who has been convicted of an offence must be treated in a way that is appropriate for the child's age.*

32 Rights in criminal proceedings

- (3) *A child charged with a criminal offence has the right to a procedure that takes account of the child's age and the desirability of promoting the child's rehabilitation.*

23. The HR Act also contains provisions that pertain to all persons when deprived of liberty:

30 Humane treatment when deprived of liberty

- (1) *All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.*
- (2) *An accused person who is detained or a person detained without charge must be segregated from persons who have been convicted of offences, unless reasonably necessary.¹⁴*
- (3) *An accused person who is detained or a person detained without charge must be treated in a way that is appropriate for a person who has not been convicted.*

17 Protection from torture and cruel, inhuman or degrading treatment

A person must not be—

- (a) *subjected to torture; or*
- (b) *treated or punished in a cruel, inhuman or degrading way; or*
- (c) *subjected to medical or scientific experimentation or treatment without the person's full, free and informed consent.*

24. Additionally, 'Human Rights' are defined under the *Anti-Discrimination Act 1992* (AD Act) to include the Convention on the Rights of the Child. Articles 37 and 40 of the Convention include the following (emphasis added):

Article 37

States Parties shall ensure that:

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
- (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be

¹⁴ See s 182 of the HR Act which amends s263 of the Youth Justice Act 1992 in relation to this right.

used **only as a measure of last resort and for the shortest appropriate period of time;**

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law **to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.**

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

...

(iii) **To have the matter determined without delay** by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

...

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) **To have his or her privacy fully respected at all stages of the proceedings.**

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. 4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.



25. Other potentially engaged human rights protected by the HR Act include:

- recognition and equality before the law (s15)
- privacy (s25)
- protection of families and children (s26)
- cultural rights (s28)
- liberty and security of person (s29).

When can those Human Rights be limited?

26. After 1 January 2020, the human rights of children in the justice system protected by the HR Act may be subject only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.¹⁵

27. Under the HR Act, in deciding whether a limit on a human right is reasonable and justifiable the following factors may be relevant—

- (a) the nature of the human right;
- (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;
- (c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;
- (d) whether there are any less restrictive and reasonably available ways to achieve the purpose;
- (e) the importance of the purpose of the limitation;
- (f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;
- (g) the balance between the matters mentioned in paragraphs (e) and (f).

28. Youth justice and the detention of children in custody are complex and long-term challenges facing the Queensland government. From 1 January 2020, if children remain in detention in watch houses for prolonged periods, a critical question will be whether that detention and the detention conditions existing at that time, are compatible with the human rights articulated in the HR Act. If there is a limit on a human right, the question then is whether the particular limitation is reasonable and demonstrably justifiable. All the factors above may be relevant, including whether there are any reasonably available, less restrictive ways to achieve the purpose of the limitation, and whether the limitation helps achieve the purpose.

¹⁵ s13 HR Act



29. In Victoria, the Supreme Court has held that the material conditions associated with detaining children in Barwon adult prison constituted a breach of the children's right to humane treatment whilst deprived of liberty.¹⁶

Reducing current incarceration rates of children in watch houses

30. The Commission understands that in August 2019 the completion of upgrades will result in 36 beds coming back on line. Whilst this would accommodate the 34 children held in watch houses as of 4 July, past seasonal fluctuations would suggest that in the absence of further measures, there will be continuing pressure to accommodate children in watch houses for prolonged periods. The Queensland Government has ruled out the option of constructing temporary accommodation at the BYDC. The Commission therefore urges the Queensland Government to take further short term measures in addition to passing this Bill, to alleviate the current and anticipated crisis in detention overcrowding for children.

31. To this end, the Commission broadly supports the eight point plan suggested by the Queensland Law Society, as follows:

- An increase of the age of criminal responsibility to 12 years for all offences, or at least summary offences.
- An assurance that no children under 14 years of age will be housed in watch houses.
- Strict adherence to the Queensland Family & Child Commission Joint agency protocol to reduce preventable police call-outs to residential care services.
- That the security upgrade at the YDCs be completed as a matter of absolute urgency and that the 36 beds become available as a matter of priority.
- The provision of more funding to the Office of the Public Guardian to allow community visitors to work with youth detention facility staff to identify rooms that are fit for sharing and habitation within the particular youth detention facility.
- A commitment to review bail for children and young people, especially for those children and young people who are denied bail on welfare grounds.¹⁷
- An assurance from child safety that accommodation placement will be made available for all children and young people in care within 48 hours of arrest.
- Children who are appearing by video link from the watch house continue to have access to all of the supports offered through the pilot programs offered at Brisbane Children's Court (education and mental health) as would be available as if they were present at court.¹⁸

32. The Commission also suggests there is merit in the proposal made by Amnesty International to the Queensland Productivity Commission Inquiry into Imprisonment and

¹⁶ See *Certain Children (No 1)* [2016] VSC 796, and *(Certain Children (No 2))* [2017] VSC 251

¹⁷ This point is addressed by the Bill.

¹⁸ Tony Keim, 'Saving a generation lost in the youth justice crisis', *Proctor*, July 2019, 30.



Recidivism that the government urgently develop a plan to fund culturally appropriate, Indigenous community controlled bail accommodation and support services with the intention to significantly reduce the number of children on remand.¹⁹

Comments about specific provisions within the Bill

33. The Commission has been provided with a copy of the submissions made on behalf of the Office of the Information Commissioner (OIC) and the Public Guardian in relation to the Bill and generally endorses the recommendations made within both submissions.

34. In addition to those matters, the Commission recommends:

Taking into account Aboriginal and Torres Strait Islander cultural considerations

There is an opportunity to improve the way in which police and courts take into account cultural considerations when making bail determinations for Aboriginal and Torres Strait Islander people. The proposed s48AA(4)(e) is limited to submissions made by community justice groups. In light of the disproportionate numbers of Indigenous children in youth justice detention, a stronger legislative and operational approach to ensuring Aboriginal cultural considerations is justified. The Commission notes and endorses the Australian Law Reform Commission's *Pathways to Justice Report* recommendations:²⁰

Recommendation 5–1

State and territory bail laws should be amended to include standalone provisions that require bail authorities to consider any issues that arise due to a person's Aboriginality, including cultural background, ties to family and place, and cultural obligations. These would particularly facilitate release on bail with effective conditions for Aboriginal and Torres Strait Islander people who are accused of low-level offending. The Bail Act 1977 (Vic) incorporates such a provision. As with all other bail considerations, the requirement to consider issues that arise due to a person's Aboriginality would not supersede considerations of community safety.

Recommendation 5–2

State and territory governments should work with relevant Aboriginal and Torres Strait Islander organisations to:

- develop guidelines on the application of bail provisions requiring bail authorities to consider any issues that arise due to a person's Aboriginality, in collaboration with peak legal bodies; and*
- identify gaps in the provision of culturally appropriate bail support programs and diversion options, and develop and implement relevant bail support and diversion options.*

35. In light of resource constraints and logistical barriers, limiting the consideration of cultural issues to submissions made by community justice groups may, in practice, lead

¹⁹ Amnesty International Australia, Submission to the Queensland Productivity Commission Inquiry into Imprisonment and Recidivism 2 November 2018.

²⁰ See Chapter 5 of the ALRC *Pathways to Justice Report* 2018 (ALRC Report 133) for useful background discussion on this issue.

to relevant cultural considerations not being taken into account by police when considering bail.

Body worn cameras and capture of audio recordings

36. The Commission concurs with the views of the OIC in particular:

*“it is imperative that robust guidelines which seek to enhance transparency and accountability are implemented to mitigate risks and minimise the privacy invasive nature of these technologies”.*²¹

37. In light of the heightened potential risks to the privacy of this vulnerable cohort of children, in addition to the OICs recommendation regarding guidelines, the Commission recommends the inclusion of a statutory review of the efficacy of the use of these technologies within a reasonable timeframe that will enable an effective evaluation.

Conclusion

38. Community safety is served by upholding the human rights of children who are accused of crimes.

39. The Commission commends the objective of the Bill in addressing the very high percentage of children detained in Queensland’s youth justice system who are remanded in custody. However the Commission considers there is a need for legislative safeguards to uphold the human rights of young people including by:

- Increasing the age of criminal responsibility, and
- Prohibiting prolonged detention of children in watch houses.

40. A second tranche of reform is required to comprehensively develop and implement the recommendations of the *Four Pillars* recommended by Mr Robert (Bob) Atkinson AO, APM in the 2018 *Report on Youth Justice*, and in particular to consider evidence-based options for reducing recidivism rates and incentivising police and magistrates to divert young people from arrest and detention.

41. It is critically important that Aboriginal and Torres Strait Islander communities and representative organisations are integrally involved in the process of developing the next round of reforms.

42. The Commission would be pleased to provide any further assistance to the Committee.

Yours sincerely



Scott McDougall
Queensland Human Rights Commissioner

²¹ OIC Submission, 9 July 2019, p3.