Youth Justice and Other Legislation Amendment Bill 2014
Submission 22

BAR ASSOCIATION OF QUEENSLAND

26 February 2014

The Hon Ian Berry MP
Chair
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane Qld 4000

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

Dear Mr Berry

***Re: Youth Justice and other Legislation Amendment Bill 2014***

Thank you for the invitation to make submissions regarding the *Youth Justice and other Legislation Amendment Bill* 2014.

The Explanatory Notes for the Bill outline the principal objectives of the Bill which represents the next stage of Government reform to the youth justice system following the *Safer Streets Crime Action Plan – Youth Justice* Discussion Paper released last year. This initiative introduced a comprehensive and broad review of Queensland's youth justice system aimed at promoting the rehabilitation and accountability of young offenders while better protecting the community from recidivism.

It appears from the Explanatory Notes that the legislative changes contained in the Bill are intended to *"better equip the youth justice system to deter future offending, hold offenders accountable for their actions and respond appropriately to recidivist young offenders."*

There are seven key areas of amendment created by the Bill (and one technical amendment), those being:

- Publication of identifying information about repeat offenders;
- Opening the Childrens Court;
- Finding guilt while on bail (by the creation of a new offence of breach of bail);
- Admissibility of childhood findings of guilt in adult proceedings;
- Removing the common law principle of detention as a last resort for both juveniles and adults in sentencing;
- The automatic transfer of 17 year olds from juvenile detention to adult correctional facilities; and
- Creating the power to arrest juveniles who abscond from Sentenced Youth Boot Camps.

Each of these key areas are addressed herein.

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**Publication of identifying information about repeat offenders**

The Bill seeks to amend Part 9 of the *Youth Justice Act* 1992 to limit, to first-time offenders only, application of the existing prohibition on publishing identifying information about a child the subject of proceedings. Thus, juveniles who are not first-time offenders will be liable to have their identity and their details of proceedings published during and after proceedings.

It is understood that this reform is part of the Government's proposed naming and shaming regime intended to deter juveniles from future offending, to hold them accountable and to provide them with an opportunity to recognize the long term consequences of criminal behaviour.

The Association has two concerns regarding this proposed amendment: Firstly, it is in our view unlikely that publicly naming children who repeatedly engage in criminal behaviour will serve as a deterrent to committing further crimes. Secondly, the experience of other jurisdictions implementing similar changes shows that such provisions are detrimental to the young person in terms of future rehabilitation and reintegration into society.

Research conducted by the Australian Institute of Criminology (an initiative of the Australian Government) indicates that the characteristics of juvenile offending are different from those of adults in a variety of ways. In a paper issued by the Australian Institute of Criminology entitled Trends & Issues in Crime and Criminal Justice, number 409, February 2011, the following was observed:

> *"Research on adolescent brain development demonstrates that the second decade of life is a period of rapid change, particularly in the areas of the brain associated with response inhibition, the calibrations of risks and rewards and the regulation of emotions (Steinberg). Two key findings have emerged from this body of research that highlight difference between juvenile and adult offenders. First, these changes often occur before juveniles develop competence in decision making:*
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> > *Changes in arousal and motivation brought on by pubertal maturation precede the development of regulatory competence in a manner that creates a disjunction between the adolescent's affective experience and his or her ability to regulate arousal and motivation (Steinberg 2005: 69-70).*
>
> *This disjuncture, it has been argued, is akin to 'starting the engine without yet having a skilled driver behind the wheel' (Steinberg 2005: 70; see also Romer & Hennessy 2007)."*[1]

It was also observed by the Institute in this paper that peer influences impact heavily on young people's risk-taking behaviour. It was noted that not only does sensation-seeking encourage attraction to exciting experiences but it leads adolescents to seek friends with similar interests who further encourage risk-taking behaviour.[2]

This Association submits that it would be difficult to conceive of a situation whereby being publicly named during and following a criminal proceeding in the

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[1] See page 3 & 4
[2] See page 4

Childrens Court would actually deter a juvenile offender from committing further crimes. Furthermore it may well encourage further offending in circumstances where the offender is part of a peer group which views this type of delinquent behaviour as admirable or the resultant publicity as a 'badge of honour'.

The Association understands that research in the Northern Territory, where similar provisions have already been implemented, shows that the public naming of children is detrimental to the young person in that it may result in harassment and/or disruption to their educational prospects. Further, that reporting of juvenile matters in the media was occurring in a haphazard manner.[3]

Additionally it was noted by the NSW Standing Committee on Law and Justice in 2008, following a review of the NSW provisions concerning the prohibition of publishing names of juvenile offenders, that public naming of youthful offenders would have a detrimental impact on their rehabilitation, victims of crime and their families[4]. The Chair of that committee noted specifically that the importance of rehabilitation was all the greater when a juvenile offender was involved, since the benefits flowing to the offender and the community will continue for the rest of their lives. Furthermore she noted:

> *"... the weight of evidence presented to the Committee clearly indicates support for the current prohibition, and in fact warrants its extension to cover the period prior to the official commencement of criminal proceedings and the inclusion of any child with a reasonable likelihood of becoming involved in criminal proceedings."*[5]

It is submitted by this Association that the amendments proposed to the *Youth Justice Act* 1992 allowing the publication of identifying information of repeat juvenile offenders is not supported by any evidence which suggests that such changes will in fact deter juvenile offenders from committing future crimes. Further, it may be detrimental to the long-term rehabilitation of juveniles as they

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[3] Duncan Chappell and Robyn Lincoln, *Naming and Shaming of Indigenous Youth in the Justice System: An Exploratory Study of the Impact in the Northern Territory*: project report.

[4] This was a bipartisan committee which was formed with the following terms of reference: That the Standing Committee on Law and Justice inquire into and report on the current prohibition on the publication and broadcasting of names under section 11 of the *Children (Criminal Proceedings) Act 1987* (the Act), in particular:

1. The extent to which the policy objectives of the prohibition remain valid, including to:
   (a) reduce the community stigma associated with a child's involvement in a crime, thereby allowing the child to be reintegrated into the community with a view to full rehabilitation;
   (b) protect victims from the stigma associated with crimes; and
   (c) reduce the stigma for siblings of the offender and victim, allowing them to participate in community life.
2. The extent to which section 11 of the Act is achieving these objectives.
3. Whether the prohibition on the publication and broadcasting of names under section 11 of the Act should cover:
   (a) Children who have been arrested, but who have not yet been charged;
   (b) Children, other than the accused, who are reasonably likely to be involved in proceedings; and/or
   (c) Any other circumstance.

[5] The prohibition of the publication of names of children involved in criminal proceedings / Standing Committee on Law and Justice. [Sydney, N.S.W.] : the Committee, 2006. – 122 p. ; 30 cm. (Report ; no. 35) at page ix.

move into adulthood "Naming and Shaming" is likely to further isolate the child from mainstream society and disadvantage them even further.

It is noted that the proposed amendment will provide the Court with the discretion to make an order at any time during a proceeding prohibiting publication of a repeat offender's identifying information where it considers this to be in the interests of justice. This power may be exercised at the court's own discretion or on application by a specified party. It is clear, however, that this is not intended to be exercised in the majority of cases such that each time a disadvantaged youth is brought before the court, an application will be entertained. The likelihood is that those juveniles whose parents can afford to engage their own lawyer are likely to pursue such an order, but other disadvantaged juveniles will not.

**Opening the Childrens Court**

The Bill introduces amendments to part 4, division 2 of the *Childrens Court Act* 2000 which will see the Childrens Court being open to the public when hearing matters in relation to repeat juvenile offenders under the *Youth Justice Act* 1992. The Court will remain closed for such proceedings relating to first-time offenders.

The Court will have the discretion to hold some or all of a proceedings in relation to a repeat offender in closed court where it considers this to be in the interests of justice.

The Association notes that the Court retains a discretion as to the conduct of proceedings. Our comments above apply with equal force to this proposed change.

**Finding guilt while on bail (by the creation of a new offence of breach of bail)**

The Bill inserts a new division 2 into part 5 of the *Youth Justice Act* 1992 making it an offence for a child to commit a further offence while on bail. This new offence will be taken to have been committed where a finding of guilt is made against the young person in relation to that further offence.

It is understood from the Explanatory Notes to the Bill that this new offence is intended to create a disincentive to children offending while on bail, rather than to substantially multiply the penalties to which these children are liable.

The Association notes the research outlined above regarding the brain development of juveniles and the impact of peer approval in risk-taking behaviour and again submits that it is unlikely that the creation of a new offence of breach of bail will effectively deter adolescents from committing further offences whilst on bail.

The Association also notes that currently the Courts when sentencing any offender, already take into account whether the offender has committed offences whilst on bail and this is viewed generally as an aggravating feature of the offending and is thus reflected in the ultimate penalty imposed for the substantive offence. It is suggested that should a new offence of this nature be created, it is unlikely that this will result in an additional punishment being imposed but rather it will be taken into account when determining the overall criminality of the juvenile's offending.

The Courts are properly equipped to deal with offending whilst on bail currently and the utility of such a new offence provision in the *Youth Justice Act* 1992 is likely to have no practical effect.

**Admissibility of childhood findings of guilt in adult proceedings**

The Bill seeks to amend section 148 of the *Youth Justice Act* 1992 to provide that a childhood finding of guilt for which no conviction was recorded is admissible where a person is being sentenced during a proceeding for an offence committed as an adult. It is understood that this provision does not affect the circumstances in which a conviction may or must not be recorded and does not affect the range of matters already included in an offender's criminal history.

The Association wishes to point out in the strongest terms that this proposed amendment relates to prior juvenile offending of such a minor nature that the earlier sentencing court saw fit not a record of a conviction.

For a subsequent court to be able to take it into account achieves nothing and undermines the rehabilitative potential of the first "no conviction recorded" order. The proposed amendment will advance the interests of justice not one jot.

**Removing the common law principle of detention as a last resort for both juveniles and adults in sentencing**

The Bill plans to omit and oust the sentencing principle that prison or detention should only be imposed when there is no other less onerous sanction appropriate in all of the circumstances of the offence and the offender. Such principles are contained in both the *Youth Justice Act* 1992 and the *Penalties and Sentences Act* 1992.

Currently the *Penalties and Sentences Act* 1992 provides as follows:

> *"9(2) In sentencing an offender the court must have regard to:*
> *(a) Principles that –*
> *(i) A sentence of imprisonment should only be imposed as a sentence of last resort; and*
> *(ii) A sentence that allows an offender to stay in the community is preferable."*

This provision is also replicated in similar terms in sections 150 and 208 of the *Youth Justice Act* 1992.

The inclusion of such provisions in the Acts noted above displayed some intention to induce changes in the approach of the courts in identifying the most suitable sentences for imposition in particular cases or at least to ensure the universal approach of what were previously widely accepted principles in sentencing founded in the Common Law.

The Court of Appeal in Queensland considered the effect of this provision in *R v Ozdemir* [1993] QCA 463 after it was first introduced into the *Penalties and Sentences Act* 1992. The Court considered that this provision may be viewed as encouraging the adoption of a more lenient approach in appropriate cases but it

cannot mean that, where formerly a type of offence was regarded as ordinarily meriting a term of imprisonment, that was now not necessarily so.

It must be kept in mind the fundamental purposes of sentencing an offender for a criminal offence are to punish the offender and effect retribution by the community for the wrong-doing, to deter offending in the future in respect of both the individual and generally the community at large and to also effect rehabilitation if possible.

The reasoning behind the sentencing principle 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. Under the *Penalties and Sentences Act* 1992 there are a range of sentencing options available to the court to address both the punishment aspect of sentencing and also the rehabilitation of an offender. The same can be said for the *Youth Justice Act* 1992.

The inclusion of section 9(2)(a) in the *Penalties and Sentences Act* 1992 and its equivalent provisions in the *Youth Justice Act* 1992 does not mean that the court is to ignore the imposition of a term of imprisonment or detention as an appropriate sentence but rather to encourage the court to consider other options that might promote rehabilitation if appropriate in the circumstances of the case.

This Association notes that the Action Plan upon which these amendments are based, provided statistics and information as to the exhorbitant costs of youth detention and discussed at length the importance of early intervention, diversion and responding to causes of crime. It is submitted that removing the principle of detention as a last resort will be counter-productive to all of these stated goals.

The Explanatory Notes to the Bill suggest that the amendments will give the courts greater scope to impose sentences which properly reflect the gravity of the offending for which the sentences are being imposed. It is submitted that the current inclusion of such a principle in the Acts noted above does not in reality inhibit the courts from imposing the appropriate sentence in all the circumstances of each case, as observed by the Court of Appeal in *Ozdemir*. Importantly, already the *Penalties and Sentences Act 1992* excludes the application of this principle in relation to violent and sexual offending such that the category of offences which are likely to attract a level of seriousness contemplated by the amendments are already captured.

This Association commends to you the research outlined above regarding the way in which adolescents engage in risk taking behaviour and the drivers for this. Detention is not effective in reducing recidivism among young people. Incarceration disengages young people from society.[6] Furthermore, the proposed amendment that detention should no longer be a sentence of last resort is inconsistent with the *Convention on the Rights of the Child*, article 37(b) and the *Beijing Rules*, rule 19.1.

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[6] See the Submission in response to the Safer Streets Crime Action Plan – Youth Justice by the Youth Justice Research Division for the Centre for Law, Governance and Public Policy, Faculty of Law, Bond University, 28 June 2013 at page 8.

The amendments thus are considered by the Association to be unnecessary and undesirable amendments to the current sentencing regime imposed by the *Penalties and Sentences Act* and the *Youth Justice Act.* The Association strongly urges the committee to reject this proposed amendment.

**The automatic transfer of 17 year olds to adult correctional facilities**

Currently part 8, division 2A of the *Youth Justice Act 1992* provides for the transfer of 18 year olds being held in detention to an adult correctional facility upon the Court ordering so in certain circumstances.

The Bill seeks to replace Division 2A with a new division which provides that all offenders sentenced to a period of detention must be automatically transferred to an adult correctional facility upon them turning 17 years old, if at that time they have at least 6 months left to serve in detention.

The proposed Division 2A expressly prohibits any merit-based review or appeal of the Chief Executive's decision to make a prison transfer direction (which is mandatory under the new provisions upon the prisoner turning 17 years old – see the new section 276C).

The new section 276E specifically restricts the operation of the *Judicial Review Act* 1991 such that part 4 of that Act does not apply to a decision of the Chief Executive under section 276C, but part 5 may apply to the extent that the decision is affected by jurisdictional error.

The Association is implacably opposed to any proposed provision which makes such transfers automatic without any consideration of the circumstances of the prisoner the subject of the order. The transfer of a young person to an adult prison may undermine the progress made by a young person in relation to youth-focused programs provided whilst serving a term of juvenile detention, may expose young people to a greater class of hardened adult prisoner and in some cases may jeopardize their physical safety.

The Association considers that these decisions may be best made by the Chief Executive on a case-by-case basis upon a consideration of the factors set out in the current section 276D of the *Youth Justice Act* 1992, once a young person currently serving a period of detention turns 17 years old.

It is submitted that such an approach would allow for the transfers to occur if considered appropriate but would also provide scope for such a transfer to not occur in situations whereby it would not be in the best interests of the young person. Furthermore, leaving the decision to the Chief Executive or a delegate would remove the process from the Court system thus not tying up resources in that regard. It is submitted that the Chief Executive would be best placed to make such a decision.

It is also considered important that there be scope for a merits-based review of such decisions, perhaps to the Queensland Civil and Administrative Tribunal. The Association considers that an automatic transfer of child offenders upon them attaining the age of 17 without any consideration of the circumstances of each young person and without any rights of review is likely to lead to injustice.

**Creating the power to arrest juveniles who abscond from Sentenced Youth Boot Camps**

The Bill amends the *Youth Justice Act* 1992 to allow authorities to respond to situations where the child offender has absconded from a Sentenced Youth Boot Camp by applying for a warrant for the arrest of the child and without having to warn the child first as is currently required by section 237 of the Act.

A boot camp order is an alternative sentencing option which is only available where a young offender is otherwise liable to a period of detention and represents a final opportunity for that young person to avoid serving a period of detention.

The proposed amendments would allow for a child offender who has absconded from a boot camp to be brought before a Magistrates Court to be dealt with for a breach of the order and apply for bail in the interim as would be the case in respect of any other breach of a court order.

The Association has no specific submissions in respect of these amendments.

Yours faithfully

Peter J Davis QC
President