# Submission to the Legal Affairs and Community Safety Committee

# Youth Justice and Other Legislation Amendment Bill 2015

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**Introduction**

This submission addresses the Youth Justice and Other Legislation Amendment Bill 2015, the objectives of which are to:

- Remove boot camp (vehicle offences) orders and boot camp orders from the range of sentencing options for children;
- Prohibit the publication of identifying information about a child dealt with under the *Youth Justice Act 1992* (the YJ Act);
- Remove breach of bail as an offence for children;
- Make childhood findings of guilt for which no conviction was recorded inadmissible in court when sentencing a person for an adult offence;
- Reinstate the principle that a detention order should be imposed only as a last resort and for the shortest appropriate period when sentencing a child;
- Reinstate the Childrens Court of Queensland's (the CCQ's) sentence review jurisdiction and expand the jurisdiction to include Magistrates' decisions in relation to breaches of community based orders; and
- Reinstate into the *Penalties and Sentences Act 1992* (the PS Act) the principle that imprisonment is a sentence of last resort and a sentence that allows the offender to stay in the community is preferable.

As members of the Crime and Justice Research Centre in Queensland University of Technology's Faculty of Law, we welcome the invitation to participate in the discussion of these issues, which are critically important to the Queensland community at large, but especially to young people and their families. In summary, we **commend** this Bill for bringing Queensland's policy and legislation back into alignment with the United Nation Convention on the Rights of the Child[i], with one important exception. The age of juvenile criminal responsibility in Queensland remains 10-17, making it the only jurisdiction in Australia that sends 17 years olds to adult prisons. This not only adds to an over-crowded prison population, but contravenes the United Nations Convention on the Rights of the Child which stipulates 18 as the minimum age of adult imprisonment.

In the following section, we address each of the proposed amendments in turn.

**The proposed amendments:**

- **Remove boot camp (vehicle offences) orders and boot camp orders from the range of sentencing options for children;**

We **support** the removal of sentenced correctional boot camp orders for young offenders, and boot camp (vehicle offences) orders. Despite a large body of international research having been conducted on boot camps, there is no evidence that correctional-style boot camps can reduce youth offending (see Hutchinson & Richards 2013). Furthermore, the boot camps introduced under the Newman Government were exceptionally costly (Queensland Audit Office 2015) and failed to reduce youth offending or detention. We therefore support the removal of these orders and instead suggest that therapeutic interventions that are better supported by the evidence (such as Multisystemic therapy) are considered by the Government (Richards, Rosevear & Gilbert 2011).

- **Prohibit the publication of identifying information about a child dealt with under the *Youth Justice Act 1992* (the YJ Act);**

We **support** the prohibition of publication of identifying information about young offenders. There is no evidence that 'naming and shaming' young people reduces their likelihood of (re)offending (Chappell & Lincoln 2009). Furthermore, naming young offenders is likely to adversely impact on already struggling families, and undermine parental and familial attempts to support young people to develop into law-abiding adults (Carrington & Pereira, 2009; Cunneen, White & Richards 2015). This minimises the stigma and the potential negative impact on children, young people and their families (see Seymour, 1988: 86).

- **Remove breach of bail as an offence for children;**

We **support** removing breach of bail as an offence for young people. Young people are often subject to numerous and onerous bail conditions that are very difficult to meet, and as such are often 'set up to fail' by their bail conditions (Richards & Renshaw 2013). Furthermore, minimising bail breaches was identified by a national report on youth bail and remand as a critical strategy if youth remand populations are to be reduced: "Minimising breaches of bail by young people is an important strategy in minimising levels of young people on custodial remand, since a history of breached bail conditions can

influence the outcome of future bail decisions, thereby increasing the likelihood of a young person being remanded in custody" (Richards & Renshaw 2013, 80).

In addition in the recent Children's Court of Queensland case of *R v S; R v L* [2015] QChC 3, [17]-[22] the court held that the children could be convicted but not punished for the second offence based on the double punishment provision in s 16 of the Criminal Code (Qld) and the 'same punishable acts or omissions test' (*R v Gordon; ex parte Attorney-General*) (Hutchinson & Nobile 2015). This provision is unjust and should certainly be repealed.

We submit that the Government should also consider the way in which young people's bail breaches are responded to. As Richards and Renshaw's (2013) research found, 'technical' and 'criminal' breaches of bail should be responded to differently, as it is often the case that bail breaches cannot be responded to with the use of diversionary measures. This in turn drives up youth remand populations (Richards & Renshaw 2013).

- **Make childhood findings of guilt for which no conviction was recorded inadmissible in court when sentencing a person for an adult offence;**

One of the cornerstone foundations underscoring the separation of youth justice from adult justice that occurred in Australian jurisdictions in the early 1900s was to prevent young people from carrying the adverse stigma of criminality into adulthood (Seymour 1988). The main objectives of Children's Courts are to encourage preventive and corrective measures, not punitive measures. Many young people who have contact with the criminal justice system do not reoffend (Weatherburn, McGrath & Bartels 2012; Richards & Lee 2013). Consequently it is important to keep the findings of adult and youth jurisdictions distinct. Allowing findings of guilt from childhood to be admissible in court when being sentenced as an adult would otherwise have a disproportionately punitive impact on young offenders (Australian Institute of Health and Welfare [AIHW], 2015). This is inconsistent with the principle of youth justice, which is meant to be restorative, not punitive. We therefore strongly **support** the principle of making childhood findings of guilt for which no conviction was recorded inadmissible in court when sentencing a person for an adult offence. This principle is also commensurate with United Nations *Convention on the Rights of the Child*, which emphasizes the separation of youth from adult justice systems.

- **Reinstate the principle that a detention order should be imposed only as a last resort and for the shortest appropriate period when sentencing a child;**

We **support** the reinstatement of the principle of detention as a last resort for young people. This principle is enshrined in a number of international human rights instruments, including the *Convention on the Rights of the Child* (to which Australia is a signatory), which states in article 37 that: "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 used only as a measure of last resort and for the shortest appropriate period of time" (see also End Note i).

Furthermore, the existing evidence suggests that youth detention is highly criminogenic. For example, Gatti et al.'s (2009) 20-year study of young males in Montreal, Canada, found that intervention by the youth justice system greatly increased the likelihood of future involvement with the justice system, and that youth detention was the most profound predictor of future involvement. This research therefore suggests that detention itself is a major source of recidivism.

There have been media reports, based on a draft consultation paper, that the level of youth detention has been operating 'permanently over safe capacity' (ABC 17 September, 2014). In addition, published data for the period 2014–15 report that "64 per cent of children and young people in a detention centre on an average day were Aboriginal and Torres Strait Islander" (Childrens Court of Queensland, 2015:5). Detention on this scale can only lead to further marginalization of Indigenous youth in direct contravention of the federal government's *Closing the Gap* policy (Hutchinson 2015).

We therefore submit that it is in the best interests of Queensland's young people, as well as their families and communities, that youth detention (whether remanded or sentenced) be used as sparingly as possible, and reserved for cases in which it is necessary for the protection of the community.

- **Reinstate the Children's Court of Queensland's (the CCQ's) sentence review jurisdiction and expand the jurisdiction to include Magistrates' decisions in relation to breaches of community based orders;**

Sentence reviews are a cost-effective and timely method to ensure children throughout Queensland wherever they reside, receive equal treatment. These sentence reviews were abolished following submissions (dated 24 February 2014) to the Legal Affairs and Community Safety Committee in their consideration of the Youth Justice and other Legislation Amendment Bill 2014. Under the 2014

amendments, the appeal mechanism pursuant to s 222 *Justices Act 1889* was maintained but under this full process the appeals tend to be, according to Michael Shanahan, President of the Childrens Court of Queensland, 'cumbersome, formal matters requiring a number of administrative steps to be undertaken … and are thus more time consuming and costly' (Childrens Court of Queensland, 2015: 8). The proposed 2015 amendments require a review of sentence by way of rehearing on the merits, similar to the rules in place previously. We submit these expedited sentence reviews are in the best interests of the children involved. The sentences may be minor and the length of the formal review processes may not serve the best interests of justice for children involved. For this reason also it is sensible to include the expanded jurisdiction covering Magistrate's decisions in relation to breaches of community orders.

The administrative separation of decision making of Children's courts from adult Courts has been a fundamental feature of youth justice systems since the early 1900s (Carrington and Pereira 2009; Seymour 1988). We therefore **support** the reinstatement of the Children's Court of Queensland's (the CCQ's) sentence review jurisdiction as well as expanding its jurisdiction to Magistrates' decisions in relation to breaches of community based orders.

- **Reinstate into the *Penalties and Sentences Act 1992* (the PS Act) the principle that imprisonment is a sentence of last resort and a sentence that allows the offender to stay in the community is preferable.**

The reinstatement of the principle of imprisonment as a last resort is to be applauded. It is consistent with the UN *Convention on the Rights of the Child* (see Endnote i) and will reduce incarceration rates of young people. Worryingly, the 2014 amendments not only repealed the provision from the legislation but section 150(5) of the *Youth Justice Act* also had the effect that judges and magistrates could no longer apply prior case law where this principle had been used. This change represented a departure from a basic tenet of domestic and international youth justice. The courts were forced to use other less obvious principles to ensure justice. In *Nicholls v Commissioner of Police* [2014] QChC 5, an appeal by a 13-year-old Indigenous boy to determine whether a sentence was manifestly excessive, the court acknowledged that the principle of last resort was no longer part of the legislation, but needed to look to the remaining provisions in section 150 and the Principles in Schedule 1 in eventually deciding to allow the appeal on the facts (Hutchinson 2014). The courts must be allowed adequate discretion to

decide on just outcomes in specific cases involving young people, in conformity with accepted international and common law principles.

For reasons set out already, detention has been found to be criminogenic. It removes young people from their families and communities, and compounds anti-social behaviour through secondary labelling and the association with more serious, potential future offenders (Bargen 1997; Carrington and Pereira 2009; Gatti et al. 2009; Johns 2003). It also has a greater impact on Indigenous youth. From 2010 to 2014, the number and rate of young people in detention - 'increased in Queensland (from 136 to 191 young people, and from 2.9 to 3.9 per 10,000 aged 10–17), driven mainly by a rise in the number of Indigenous young people in unsentenced detention' (AIHW, 2014: 24). The over-representation of Indigenous youth in detention is a chronic problem for all youth justice systems in Australia (Carrington and Pereira, 2009; Snowball, 2008; Cunneen, White & Richards 2015, AIHW, 2015). That level of over-representation has increased from 26 to 29 times the rate for non-Indigenous youth (AIHW, 2014:27). As such, we strenuously **support** the reinstatement of the principle of imprisonment as a penalty of last resort.

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Professor Carrington is the Head of the School of Justice in the Law Faculty at QUT and Chief Editor for *The International Journal for Crime, Justice and Social Democracy*. Kerry is a leading expert in the field of youth justice in Australia. Her contributions spanning 26 years include *Offending Girls* (1993), (based on a PhD winner of the 1991 Jean Martin Award) and *Offending Youth* (with Margaret Pereira, 2009).

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Dr Hutchinson is an Associate Professor within the Law School. Her specialist areas are criminal law, youth justice and legal research methodologies. Dr Hutchinson is a former full time member of the Queensland Law Reform Commission, and serves on the Queensland Law Society's Children's Committee, Equalising Opportunities in the Law Committee, and the Law Council of Australia Equal Opportunity Committee.

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**Further contact:**

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[i] **We commend this Bill for bringing Queensland's policy and legislation back into alignment with the United Nation Convention on the Rights of the Child.**

This convention operates as a normative framework which fosters the special rights of children, and vulnerable children in particular, such as children in custody or before the courts. Signatory states are expected to harmonise their laws to bring them in alignment with these international instruments. Under that convention, youth justice systems are supposed to have at their core the best interests of the child, and not the punishment of the child. They enshrine a restorative justice approach to youth justice, rather than a neo-liberal approach to punishment (Muncie, 2013).

There are three specific UN conventions that embody this human rights approach. The UN *Standard Minimum Rules for the Administration of Juvenile Justice*, adopted by the UN in 1985, promotes the separation of youth justice systems from adults systems of punishment. The UN *Guidelines for the Prevention of Juvenile Delinquency*, adopted by the UN in 1990, encourages signature states to establish diversionary and non-punitive measures of invention to divert young people from harsh and degrading forms of punishment. Lastly the UN *Rules for the Protection of Juveniles Deprived of their Liberty* expect signature states to use detention and custodial sentencing as a last resort for all young people under the age of 18 (Olsson, 2012: 414).