

LAW & JUSTICE INSTITUTE (QLD) Inc
Level 19, 179 Turbot Street Brisbane Q 4000

Patron: The Honourable James Thomas AM QC

10 May 2016

The Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane QLD 4000

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

Dear Research Director,

YOUTH JUSTICE AND OTHER LEGISLATION AMENDMENT BILL 2016

The Law & Justice Institute (Qld) Inc. ('the Institute') appreciates the opportunity to comment on the Youth Justice and Other Legislation Amendment Bill 2016 ('the 2016 Bill'). The Institute is an association committed to raising the level of public debate on law and justice issues in Queensland. The Institute's objects include, inter alia, to:

- consider and respond to changes, or proposed changes, that might or will affect the administration of justice in Queensland; and
- foster and advocate law reform consistent with the rule of law, the common law, independent and principled reasoning, empirical data and the separation of powers, in particular, the preservation of judicial independence and discretion.

The Institute made submissions opposing the Youth Justice and Other Legislation Amendment Bill 2014 ('the 2014 Bill') and was invited to appear at the Legal Affairs and Community Safety Committee ('LACSC') hearing regarding that Bill. The Institute subsequently made submissions supporting the Youth Justice and Other Legislation Amendment Bill 2015 ('the 2015 Bill'). The aim of the 2015 Bill was to reverse many of the provisions from the 2014 Bill that had been enacted despite being contrary to the evidence as to best practice in youth justice. The Institute was again invited to appear before the LACSC. The Institute was disappointed to read that the LACSC was not able to reach majority on the 2015 Bill, especially given that 18 of 24 submitters supported the objectives and policy intent of that Bill.

For the LACSC's reference, copies of the Institute's submissions on the 2014 Bill, dated 26 February 2014, are annexed as Annexure A. This submission will reiterate some of the relevant material from the Institute's 22 January 2016 submissions on the 2015 Bill. Overall, the Institute welcomes the 2016 Bill and supports the policy objectives underlying the same.

Closing the Childrens Magistrates Court

The Institute supports the proposal to close the Childrens Magistrates Court ('the Court') to the general public. Those who advocated for the opening of the Court pursuant to the 2014 Bill stressed the importance of transparency. The Institute voiced concern that the 2014 amendments:

- were unnecessary to achieve that goal; and
- would be potentially detrimental to the rehabilitative goals of youth justice.

The institute understands that some Childrens Courts' Magistrates faced an increased workload due to the number of applications to close the Court following the 2014 amendments. The system was complicated by the exclusion of first-time offenders from proceedings in open courts and given the need to close the courts if a young person would be identified as a child in care. This has led to inconsistent procedures and outcomes throughout the State. Members have also expressed concern that the opening of the Court may have impacted young people in regional areas to a greater extent than young people in urban centres.

The Institute submits that the proposed 2016 amendments strike an appropriate balance between the need for open justice and protecting children.

The Institute notes that the amendments only propose closing the Court at the Magistrates level. Young offenders facing the most serious charges have their matters finalised in the Childrens Court of Queensland, which is, and always has been, open.

For the less serious matters dealt with at Magistrates court level, the Institute supports the proposed list of persons who will be permitted to sit in the Court. The Institute particularly notes the proposal in s 20(1)(c) permitting 'a victim, or a person who is a representative of the victim, of the offence alleged to have been committed by the child' to attend unless their 'presence would be prejudicial to the interests of the child.' As such, those who are directly affected by an offending child's behaviour can generally attend. Further, representatives of the media can apply for permission to attend. Prior to the 2014 amendments, the Institute is aware that members of the media did, on occasion, apply and were granted permission to attend in certain matters.

The combination of these proposed amendments and the openness of the Childrens Court of Queensland balance the necessary transparency with the need in youth justice to avoid further stigmatising young offenders, hampering their chances at rehabilitation.

Increasing the age for transfer from detention to adult correctional facilities

The Institute,¹ its members,² the judiciary,³ and other stakeholders,⁴ have time and again highlighted that the inclusion of 17 year olds in the adult criminal justice system displays a continuing disregard for Australia's international obligations.

The 2014 amendments, which provided for the automatic transfer of 17-year-olds in detention to prison in particular circumstances, without judicial review, potentially meant that children could be detained with adults. Although some might be detained in the 'boy's yard', 17 year old females and those outside of South East Queensland may not be segregated at all from the general adult population. Even for those who are segregated, access to youth-focused programs and contact with family can be further limited, impeding rehabilitative ideals.

The Institute supports the proposed increase in the age of transfer from 17 to 18 years of age. It is noted that this is not a simple reversion to the previous position. Similarly to the 2014 amendments, the transfer is automatic, but, importantly:

- the age at which this occurs is 18, instead of 17; and
- there is an ability for the Childrens Court to delay a transfer, upon application, if it is in the interests of justice and would not prejudice the security and good order of the detention centre or the safety or wellbeing of any detainee and would not cause the person to be detained after they turn 18 years and 6 months.

The considerations articulated for determining whether to grant a temporary delay, in s 276D(5), of the applicant's vulnerability and the interventionist and rehabilitative activities being undertaken by the applicant and the availability of those activities if transferred are appropriate. The Institute supports the due process rights provided to the young people in these instances.

Reinstatement of a Court-Referred Youth Justice Conferencing Program and Expansion of Diversionary Options

The Institute has previously remarked on the benefits of Youth Justice Conferencing and supports the reinstatement of the Court's ability to refer young people to conferencing. While there have been nuanced findings, 'international evidence suggests that restorative justice techniques such as conferencing and Victim Offender Mediation tend to result in reductions in reoffending among general

¹ See eg, Submission of the Law and Justice Institute (Qld) on the Youth Justice and Other Legislation Amendment Bill 2015 (22 January 2016) 3.

² See eg, Jodie O'Leary, 'Out of Step and Out of Touch: Queensland's 2014 Youth Justice Amendments' (2014) 26(2) *Current Issues in Criminal Justice* 159, 159.

³ See eg, *R v Loveridge* (2011) 220 A Crim R 82, 83-84 *R v Lovi* [2012] QCA 24 (24 February 2012) [47]; President Michael Shanahan, Childrens Court of Queensland Annual Report 2014-2015, 8.

⁴ See eg, United Nations Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention – Concluding Observations: Australia* (2012) UN Doc CRC/C/AUS/CO/4 (28 August 2012); and Commission for Children and Young People and Child Guardian, *Seventeen Year Olds in Queensland's Adult Correctional Facilities* (December 2012).

populations. Additionally, evidence suggests that conferencing may result in a range of more positive outcomes when compared to traditional justice system approaches, including the potential to result in cost-savings, higher levels of victim satisfaction and compliance rates for restitution agreements, as well as reduced rates of post-traumatic stress among victims and reduced desire for revenge.⁵ The Institute supports reinstatement of court-referred conferencing as it will provide more young people with the opportunity to attend conferences, which generally appears beneficial.

As to the minutiae of the provisions, the Institute appreciates the intent of s 31(3) that provides for an 'alternative diversion program' where, in certain circumstances, a conference can not be convened. The Institute notes the explanatory memorandum, which states that '[t]his allows a further opportunity for police and court diversion referrals, which would have otherwise been frustrated, to be effectively discharged.'⁶ However, the Institute is concerned with the lack of due process afforded to the young person in coming to an agreement with the chief executive (or more likely a delegate) as to the nature of an alternative diversion program. While s 38 does outline some detail of the nature of such programs, the Institute is concerned that the young person is not represented in discussions with the Department as to the program, and will be subject to a clear imbalance of power in reaching agreement. This may be of particular concern where the child has offended whilst in care. The Institute suggests that due process guarantees, similar to those provided with respect to conferences, are also provided in relation to alternative diversion programs.



⁵ Simon Little, Troy Allard, April Chrzanowski and Anna Stewart, *Diverting Young Indigenous People from the Queensland Youth Justice System: The use and impact of police diversionary practices and alternatives for reducing Indigenous over-representation* (February 2011) iii-iv citing Drake, Aos and Miller, *Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs: Implications in Washington State* (2009); Latimer, Dowden and Muise, 'The Effectiveness of Restorative Justice Practices: A Meta-Analysis' (2005) 85 *The Prison Journal* 127; Nugent, Williams and Umbreit, 'Participation in Victim-Offender Mediation and the Prevalence and Severity of Subsequent Delinquent Behaviour: A Meta-Analysis' (2003) 137 *Utah Law Review* 137; Sherman and Strang, *Restorative Justice: The Evidence* (2007).

⁶ Youth Justice and Other Legislation Amendment Bill 2016, Explanatory Notes, 12.

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26 February 2014

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

Dear Research Director,

YOUTH JUSTICE AND OTHER LEGISLATION AMENDMENT BILL 2014

The Law & Justice Institute (Qld) Inc. ('the Institute') appreciates the opportunity to comment on the Youth Justice and Other Legislation Amendment Bill 2014 ('the Bill'). The Institute is an association committed to raising the level of public debate on law and justice issues in Queensland. The Institute's objects include, *inter alia*, to:

- consider and respond to changes, or proposed changes, that might or will affect the administration of justice in Queensland; and
- foster and advocate law reform consistent with the rule of law, the Common Law, independent and principled reasoning, empirical data and the separation of powers, in particular, the preservation of judicial independence and discretion.

Overall, the Institute is concerned that this Bill is unnecessary and at odds with the empirical evidence as to what works in youth justice. Specifically, the Institute:

1. Submits that detention should continue to be a last resort for young offenders [Clauses 9, 12 and 25], and imprisonment should generally remain an option of last resort for adults [Clause 34];
2. Opposes the proposed amendments that significantly expand the circumstances in which the identification of young offenders ('naming') is permissible [Clauses 13 and 21];
3. Opposes the proposed amendments to open the Children's Court in a wider variety of circumstances [Clauses 30-32];
4. Opposes the introduction of an additional offence for young offenders who reoffend whilst on bail [Clause 5];
5. Submits that childhood findings of guilt for which no conviction was recorded should not be admissible in court when sentencing a person for an adult offence [Clause 8]; and
6. Opposes the automatic transfer of 17-year-old children from detention to adult prison, in circumstances where they have six months or more left to serve in detention [Clause 20].

Further Proposed Amendment to the Bill

The Institute notes that the Attorney-General has foreshadowed an intention to amend the

Bill during the consideration in detail stage to introduce a mandatory sentencing regime for young recidivist motor vehicle offenders. At present, it appears that regime will be limited to young recidivist motor vehicle offenders in Townsville.

The Institute expresses concern that the proposed amendment was not included in the Bill from the outset, to allow the amendment to be considered by the public, and to allow the Committee to receive submissions in relation to it. Given the Attorney-General has foreshadowed that the amendment will introduce a mandatory sentencing regime, it is particularly important that the public is given an opportunity to comment on the changes.

The Institute notes that in introducing this Bill to the house the Attorney-General expressed the view that courts should have the flexibility to craft appropriate sentences.¹ Mandatory sentencing regimes, in any form, necessarily limit the ability of the courts to do just that, and to ensure that each sentence is decided on a case-by-case basis, taking into account all the relevant factors.

Mandatory sentencing involves the legislature intruding into an area that is within the province of the judicial arm of government. Every new mandatory sentencing initiative represents an attack on judicial independence.

Background

The evidence suggests that:

1. Numbers of young offenders before the Courts are decreasing;
2. Rehabilitation is an appropriate goal for an effective youth justice system and is the best way to protect the community; and
3. Deterrence is not effective, especially for young people whose brains are still developing.

The Institute provided a response to the Safer Streets Crime Action Plan ('the Action Plan'), which we have attached to this submission.² The Institute was disappointed that its response, and the written responses of other persons and organisations, were not made public. The publication of those responses would have informed public debate on this issue. It would have clarified some potential misconceptions regarding young offenders. Specifically, it would have confirmed that the numbers of young offenders disposed of in the Children's Court has decreased over the past ten years.³ There has been a nine percent reduction in the past three years.⁴ Young offenders represent between 4-4.5% of all

¹ Queensland, *Youth Justice and Other Legislation Amendment Bill, Introduction*, (11 February 2014) 47 (The Hon. JP Bleijie – Attorney-General and Minister for Justice).

² See Annexure A.

³ President Shanahan J, 'Children's Court of Queensland Annual Report 2012-2013' (2013) 13.

⁴ Youth Justice Performance and Reporting, 'Youth Justice Pocket Stats – 2012-2013'. There is a contradiction between the statistics presented in the Annual Report of the Children's Court and those by Youth Justice Performance and Reporting that relates to the method of counting used. The Children's Court counting method counts a defendant more than once if they appear in court on different dates even for the same offence. The Youth Justice Performance and Reporting figures count actual individuals and should be preferred.

'Proportionally fewer young people are offending.'

offenders who appear before the Queensland Courts.⁵ This is less than the national average, which is between 5.5-6%.⁶

The Explanatory Notes recognise accurately that 'proportionally fewer young people are offending'.⁷ The majority of offences committed by young people are committed by a small group of young offenders.⁸ These young people are some of the most vulnerable members of our community. Many of them are known to the child protection system, have intellectual disabilities, other cognitive impairments, or mental illness, and have low levels of education. Assisting these young people to become contributing members of the community is the most effective way to help them avoid reoffending. This would have added benefit of providing protection for the community over the long-term.⁹

The goal of finding an effective system of youth justice is certainly admirable. The problem is in defining by what criteria a more effective system is achieved. The Queensland Government has articulated its criteria as holding young offenders accountable for their actions; promoting the rehabilitation of young offenders; and deterring young offenders from future offending. The ultimate aim is said to be protection of the community from recidivism.¹⁰

Rehabilitation of these young people is the best way to protect the community. This proposition accords with the responses to the survey accompanying the Action Plan. The largest percentage of respondents indicated that early intervention and prevention and employment programs would be the most effective reforms to prevent youth crime and make Queensland Safer.¹¹

"Deterrence" is not effective. This is particularly so for young people due to the ongoing

'[T]he same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.'

development in an adolescent brain. This is not an unsubstantiated assertion. The Supreme

⁵ See the last available figures from the Government Statistician, Queensland Treasury and Trade, 'Criminal Courts Queensland: 2011-2012' available <http://www.oesr.qld.gov.au/products/briefs/criminal-courts-queensland/criminal-courts-queensland-2011-12.pdf>.

⁶ Ibid. However, it must be noted that part of the difference would be accounted for by the fact that 17 year olds are dealt with as adults in the Queensland system but not elsewhere.

⁷ Explanatory Notes, Youth Justice and Other Legislation Amendment Bill 2014 (Qld) 1.

⁸ President Shanahan J, 'Children's Court of Queensland Annual Report 2011-2012' (2012) 6.

⁹ Australian Institute of Criminology, 'What Works in Reducing Young People's Involvement in Crime?' (2002); Carrington K and Pereira M, *Offending Youth: Crime, Sex and Justice* (Federation Press, 2009) Chapter 9.

¹⁰ Explanatory Notes, Youth Justice and Other Legislation Amendment Bill 2014 (Qld) 1 and 2.

¹¹ 'Crime Survey Outcomes' Safer Streets Crime Action Plan – Youth Justice, available at <http://www.justice.qld.gov.au/corporate/community-consultation/community-consultation-activities/past-activities/safer-streets-crime-action-plan-youth-justice>

Court of the United States has acknowledged that ‘the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.’¹²

Young people are not mini adults. Their brains are not fully developed. They do not have the same ability as adults to regulate their behavior. ‘This may create a situation in which one is starting an engine without yet having a skilled driver behind the wheel.’¹³ They are more vulnerable to risky and reckless behavior as they have little capacity for forethought about consequences, a necessary component for deterrence to work. Such unique circumstances underlie many of the provisions in international instruments providing for a separate and different justice system for young offenders. These instruments prefer rehabilitation to punitive approaches such as detention.

‘Young people are not mini adults. Their brains are not fully developed.’

Detention as a Last Resort

Removing the principle that detention should be a last resort:

1. Is inconsistent with Australia’s obligations at international law; and
2. May result in quicker resort to detention on sentence and remand, which would:
 - be contrary to the objective of protecting the community, as it would further entrench young offenders in the criminal justice system;
 - impede rehabilitation;
 - increase the risk of recidivism both as a young person and as an adult; and
 - add to an already overburdened and costly juvenile detention system.

The Bill intends to remove the principle of detention as a last resort by omitting section 150 from the sentencing principles of the *Youth Justice Act 1992* (Qld) (‘the YJA’) and from the charter of youth justice principles in Schedule 1 of the YJA, and by omitting section 208 of the YJA, which permits a court to impose a detention order only if satisfied no other sentence is appropriate in the circumstances.

The same principle is to be omitted from section 9 of the *Penalties and Sentences Act 1992* (Qld) (‘the PSA’). It is of concern that this amendment, in particular, is discussed only very briefly in the extraneous material and is referred to as a ‘consequential amendment’ – despite the enormous ramifications it will have for the adult criminal justice system. This submission is focused on the effect of the Bill on juveniles – however, many of the concerns expressed are also relevant to the proposed change to section 9 of the PSA. Further, it is

¹² *Roper v Simmons* 543 US 551 (2005) at 571.

¹³ Steinberg L, ‘Cognitive and Affective Development in Adolescence’ (2005) 9(2) *Trends in Cognitive Science* 69.

noted that in Queensland the changes to the PSA will affect 17-year-old children, who are subject to the adult sentencing regime.¹⁴

In addition, in order to ensure currently applicable principles are fully displaced, the Bill will insert express provisions into both the YJA and the PSA overriding any other Act or law to which a Court may have regard when sentencing offenders.

The Explanatory Notes correctly identify that it is a principle of the common law that a sentence of imprisonment should only be imposed when no other sentence is appropriate and that, where imprisonment is warranted, the shortest possible sentence should be imposed.¹⁵

It is also a principle enshrined in the United Nations *Convention on the Rights of the Child* ('the CRC'), which Australia ratified in 1990, as well as a principle that, for the purposes of sentencing juveniles, exists in every other jurisdiction in Australia.

The Explanatory Notes rightly state that whether legislation has sufficient regard to the rights and liberties of individuals can involve a consideration of whether the law will infringe principles from the general law and international law. This amendment will involve, at the very least, a breach of Australia's international obligation. The Institute is aware of no mandate that would authorise such action.

The Explanatory Notes state that the removal of this principle is justified on the following basis:

That it otherwise unduly inhibits courts in making sentencing orders which appropriately reflect the severity of offending, hold offenders properly to account for their offending behaviour and reflect the community's denunciation of serious offending. Its removal is intended to empower courts to use sentencing more effectively for the purposes of punishing, denouncing and deterring offending and protecting the community.¹⁶

No evidence has been provided to prove that the courts are currently unable, effectively to sentence young offenders. No evidence has been provided to show that these changes will achieve the intended outcomes. Even if there was a mandate for change, the removal of such a fundamental legal principle should not be undertaken unless strong and credible evidence is available as justification.

By way of contrast, there is a large body of evidence to support the argument that sentences that allow young offenders to remain in the community are more likely to provide long-term protection for the community. They promote rehabilitation and decrease the chances of recidivism amongst young offenders.

Detention can have significant and detrimental effects on children. Detention removes children from their families, schools and community. This can result in marginalisation of an

¹⁴ While not the subject of this submission, the objections to Queensland's treatment of 17-year-olds as adults are well documented, and have been the subject of comment by the Court of Appeal in cases such as *R v Loveridge* [2011] QCA 032 and *R v GAM* [2011] QCA 288.

¹⁵ Explanatory Notes, Youth Justice and Other Legislation Amendment Bill 2014 (Qld) 12 – referencing *R v James* (1985) 14 A Crim R 364 and *R v O'Connor* [1987] VR 496.

¹⁶ *Ibid.*

'[D]etention can further entrench criminal offending by placing impressionable young people into a criminogenic environment.'

already vulnerable group.¹⁷ Several studies have shown that rather than prevent recidivism, detention can further entrench criminal offending by placing impressionable young people into a criminogenic environment.¹⁸

In its response to the Action Plan the Institute provided details of a number of recent studies that emphasised detention should be a last resort for children who offend.¹⁹ These studies are generally consistent in finding that diversionary programs are far more successful in preventing re-offending by young people.

In the U.S.A, a country with an incredibly high rate of juvenile incarceration – in 2002, 336 of 100,000 youths were in custody, nearly five times more than the next country²⁰ – a recent study has provided significant evidence to support the proposition that incarceration of children leads to higher rates of recidivism as adults.²¹ The study examined over 35,000 former Chicago public school students over a period of ten years. The study compared groups of children who committed offences and were sentenced to detention, with groups who committed similar offences but did not receive detention orders. The study controlled for factors like race and sex, and then compared the adult incarceration rates of the two groups. The clear result was that young offenders who had received detention orders were more likely to be imprisoned again by the age of 25, than similar young offenders who had not been detained.²² In fact, the detained children were 67% more likely to be imprisoned as adults. A similar pattern emerged for serious crimes. Those children incarcerated as juveniles were more likely to commit 'homicide, violent crime, property crime and drug crimes' than juveniles who had not been detained.

The Institute submits it is clear that the body of existing evidence supports the sentencing principle that currently operates in Queensland, whereby detention is imposed on children only as a last resort.

The Explanatory Notes recognise that:

several of the amendments made by the bill may increase the likelihood that some children who come in contact with the youth justice system will spend time in detention.²³

¹⁷ Austin J, Dedel Johnson K, and Weitzer R 'Alternatives to the Secure Detention and Confinement of Juvenile Offenders' (2005) *Juvenile Justice Bulletin* (September) (<https://www.ncjrs.gov/pdffiles1/ojjdp/208804.pdf>).

¹⁸ Richards K, 'What Makes Juvenile Offenders Different from Adult Offenders?' (2011) 409 *Trends & Issues in Crime and Criminal Justice* 1.

¹⁹ See Annexure A attached.

²⁰ Mendel, R 'No Place for Kids: The Case for Reducing Juvenile Incarceration' (2011) available at http://www.aecf.org/~media/Pubs/Topics/Juvenile%20Justice/Detention%20Reform/NoPlaceForKids/JJ_NoPlaceForKids_Full.pdf

²¹ Aizer A and Doyle Jr. J 'Juvenile Incarceration, Human Capital and Future Crime: Evidence from Randomly Assigned Judges' (2013) NBER Working Paper No. 19102 (June).

²² Ibid.

²³ Explanatory Notes, Youth Justice and Other Legislation Amendment Bill 2014 (Qld) 8.

The Institute agrees this will be the effect of these amendments. Further, the Institute notes that any costs incurred in relation to the amendments are intended to be met through the allocation of existing resources.²⁴ The Institute submits that as a result of these changes there will be an increase in the number of youths detained, as well as an increase in the number of adults imprisoned, the costs of which will be unable to be met through existing resources. Therefore, the amendments will place a greater burden on criminal justice resourcing in Queensland. This will leave little room for any effective early intervention reforms.

'Naming' and Opening the Children's Court

The proposed expansion in naming young offenders is problematic as:

1. It will have disproportionate and inconsistent effects;
2. It will not be an effective deterrent;
3. It will potentially impede rehabilitation of young offenders; and
4. It is inconsistent with Australia's obligations at international law.

These problems are compounded by the proposal to expand the instances in which Children's Courts will be open.

The proposed amendment to naming shifts the presumption from one prohibiting naming, apart from when authorised by a Judge in exceptional circumstances for heinous offences,²⁵ to one generally permitting naming, apart from first-time offenders or where the Court determines it would not be in the interests of justice.²⁶ The justification for this amendment is rooted in a need for accountability and, arguably, deterrence.²⁷ It is targeted largely at those few who commit the bulk of, and more serious, offences.²⁸ However, the impact of this amendment will be much wider and will be detrimental. To illustrate the effect of these amendments take the example of a 10 year old charged and convicted for shoplifting a chocolate bar. The child then appears before the Court a month later for not paying for a train fare. For that child, the presumption is in favour of permitting publication of their details. The question of publication should be resolved by reference to the offence. To do otherwise leads to disproportionate and inconsistent results.²⁹

The Institute anticipates problems with the interplay between the protection from publication required of young people in care and the proposed ability to name in the youth justice system. It is appropriate and necessary to retain the position under the *Child Protection Act 1999* that young people should not be identified as being in care. It would be against the best interests of the child to do otherwise and may risk the child being exposed to further harm. The proposed amendments would then be likely to create the untenable, inequitable position that only children not in care would be named. However, as mentioned previously, the minority group of young offenders committing the bulk of offences is likely to

²⁴ Ibid.

²⁵ *Youth Justice Act 1992* (Qld) s 234.

²⁶ Youth Justice and Other Legislation Amendment Bill 2014 (Qld) cl 21.

²⁷ Explanatory Notes, Youth Justice and Other Legislation Amendment Bill 2014 (Qld) 3 and 13.

²⁸ Explanatory Notes, Youth Justice and Other Legislation Amendment Bill 2014 (Qld) 13.

²⁹ O'Leary J, 'Naming Young Offenders: Implications of Research for Reform' (2013) 37 *Criminal Law Journal* 377, 381.

'[T]he ultimate arbiter of which young offender will be named will be media organisations.'

have child protection history. As such, the point of naming – to hold accountable and deter those who are jeopardising the safety of the community – would not be achieved.

In addition, inequality before the law will occur because the ultimate arbiter of which young offender will be named will be media organisations. The experience of the Northern Territory is instructive. Research there indicates that media reporting was 'exemplified by peaks and troughs' depending on the presence of journalists, newsworthiness and the competition from other news of the day.³⁰

Inequality of impact will also be a problem for indigenous young people and young people with intellectual or other cognitive impairments. Such young people are overrepresented in the youth justice system (particularly among those young people whose offending has progressed to the point where they are detained).³¹ As such, those groups will be further disadvantaged due to the likelihood of their members being named. This will be particularly problematic as children with mental illness or other impairments are often less culpable for their actions, and are less likely than other children to understand the consequences of their actions. The implications for indigenous children who are named may also be more severe because of the shame that may be perceived to have been brought upon their communities.

The majority of young people grow out of offending.³² As they mature and their brain develops executive functioning processes, these people often desist from criminal behaviour.³³ Naming the young person stigmatises that young person. This can further entrench them in the justice system. Young offenders who feel stigmatised are more likely to reoffend.³⁴ As discussed in the Institute's submission to the Action Plan,³⁵ naming impedes their rehabilitation. 'For example, they may experience interruptions to their schooling due to published information regarding their offending, which may in turn impact on their

'Young offenders who feel stigmatised are more likely to reoffend.'

³⁰ Chappell D and Lincoln R, *Naming and Shaming of Indigenous Youth in the Justice System: An Exploratory Study of the Impact in the Northern Territory*, Australian Institute of Aboriginal and Torres Strait Islander Studies Project Report (21 May 2012) 75.

³¹ See references in Annexure A, 2.

³² Richards, above n 18, 6; Fagan A and Western J, 'Escalation and Deceleration of Offending Behaviours from Adolescence to Early Adulthood' (2005) 38 *Australian and New Zealand Journal of Criminology* 59, 59.

³³ See also, Mulvey EP et al, 'Trajectories of Desistance and Continuity in Anti-Social Behavior Following Court Adjudication among Serious Adolescent Offenders' (2010) 22(2) *Developmental Psychopathology* 453 and Piquero AR et al, 'Assessing the Impact of Exposure of Time and Incapacitation on Longitudinal Trajectories of Criminal Offending' (2001) 16(1) *Journal of Adolescent Research* 54.

³⁴ McGrath A, 'Offenders' Perceptions of the Sentencing Process: A Study of Deterrence and Stigmatisation in the New South Wales Children's Court' (2009) 42(1) *Australian and New Zealand Journal of Criminology* 24.

³⁵ See Annexure A attached.

employment opportunities.³⁶ The Northern Territory experience provides examples of the negative effects of naming, including on education and employment.³⁷ Rehabilitation is the best way to protect the community in the future. This has been recognised in the Courts in this State,³⁸ in other parts of Australia,³⁹ and internationally.⁴⁰

The proposed shift of presumption would put Queensland second only to the Northern Territory in terms of expansiveness of naming.⁴¹ In that jurisdiction all offenders can be potentially named unless 'the court orders otherwise.'⁴² Yet that jurisdiction has the highest rates of juvenile imprisonment. This provides support for an argument that naming does not deter young offenders. Further, once a young person is named (potentially on the second occasion they appear before the Court according to the proposed amendments) it is illogical to think that the threat of further naming would be a deterrent. 'A juvenile who has already been named arguably has little to lose; his or her reputation has already been tarnished.'⁴³ Further, as previously mentioned, evidence suggests that young people engage in dangerous or risky behavior despite knowing the risks.⁴⁴ There is little rational thought occurring at the time of offending, particularly not rational thought directed towards the long term consequences of whether they may be named if they are caught and convicted.⁴⁵

Currently, proceedings regarding young offenders heard in Queensland's superior courts, including the Children's Court of Queensland, are open.⁴⁶ The expanding of the occasions during which the Children's Court can be opened to those at Magistrates' Court level, involving all but first-time offenders, will exacerbate the problems associated with the potential publication provisions noted above. Media representatives and other persons with a proper interest in the proceeding, or who may be able to assist the court, can already apply to attend any Children's Court hearing.⁴⁷ It is unnecessary to change this position. The proposed amendment will be a complicated and costly exercise for courts and will likely result only in the young person's friends or other young offenders sitting in on a young offender's matter, potentially further undermining any deterrence objective. The currency of social media will further complicate matters, as anyone present in court could publicise matters, potentially breaching any remaining protections that prohibit publication.

The Explanatory Notes recognize that the changes to these provisions are arguably inconsistent with the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('the Beijing Rules') and the CRC.⁴⁸ However, the Notes articulate that such

³⁶ O'Leary, above n 29, 383, citing Bernburg JG and Kohn MD, 'Labelling, Life Chances, and Adult Crime: The Direct and Indirect Effects of Official Intervention in Adolescence on Crime in Adulthood' (2003) 41 *Criminology* 1287.

³⁷ Chappell and Lincoln, above n 30, 91.

³⁸ *R v SBU* [2012] 1 Qd R 250.

³⁹ *MCT v McKinney* (2006) 18 NTLR 222; *HWT v AB* [2008] V Ch C 3; *R v MJM* (2000) 24 SR (WA) 253.

⁴⁰ *R v Lee* (1993) 1 WLR 103.

⁴¹ For a comparison of the provisions in all Australian jurisdictions see O'Leary, above n 29.

⁴² *Youth Justice Act 2005* (NT) s 50(1).

⁴³ O'Leary, above n 29.

⁴⁴ Cauffman E and Steinberg L, 'The Cognitive and Affective Influences on Adolescent Decision-Making' (1995) 68 *Temple Law Review* 1763.

⁴⁵ See Steinberg L, 'Adolescent Development and Juvenile Justice' (2009) 5 *Annual Review of Clinical Psychology*

⁴⁶ *Children's Court Act 1992* (Qld) s 20(5).

⁴⁷ *Children's Court Act 1992* (Qld) s 20(2).

⁴⁸ Explanatory Notes, Youth Justice and Other Legislation Amendment Bill 2014 (Qld) 13.

inconsistency is balanced against the need for proper accountability and the benefit to society of deterring persistent young offenders.⁴⁹ As outlined above, naming young people will not provide a deterrent and will be disadvantageous to the community as it will impede the young person's rehabilitation prospects.

An Offence of Reoffending whilst on Bail

Disregarding the penalty provisions, which incorrectly provide imprisonment rather than detention as a maximum penalty, (20 penalty units or one year imprisonment),⁵⁰ the amendment that creates an offence to reoffend whilst on bail:

1. Has the potential to operate retrospectively;
2. Is unnecessary, as offending on bail is already taken into account on sentence as an aggravating feature;
3. Will potentially create practical difficulties and court delays;
4. Has the potential for double punishment, contrary to existing legislative provisions;⁵¹
5. Fails to further the stated objectives of reducing or preventing youth crime;
6. Ignores children's developmental issues and differences;
7. Increases the likelihood of detention and the entrenchment of children within the criminal justice system; and
8. Provides a more severe penalty for a child than an adult.

The Bill proposes a new offence that will be taken to have been committed where a finding of guilt is made against a child for an offence committed whilst on bail. The Explanatory Notes state that the intention behind the new penalty is that it will act as a disincentive to children offending whilst on bail, rather than as a multiplication of penalty.⁵²

As the new offence is triggered by a finding of guilt for an offence committed whilst on bail, it has the potential to operate retrospectively where the offence for which bail was granted is alleged to have occurred before the amendments. This offends legislative standards. The Explanatory Notes claim a uniform application of this provision will provide fairness and equity to offenders, as well as simplifying the roll out of the legislation.⁵³ Retrospective legislation is neither fair nor equitable. It offends the rule of law by imposing criminal liability retroactively and denying participants in the system certainty in relation to their obligations under the law. In this instance, children who have already been granted bail will now face different and additional consequences should they commit an offence while on bail. Again, the Bill invokes a notion that is repugnant to international standards.

In practice, a finding of guilt will occur when the child is before the sentencing court, at which time delay in resolution, contrary to youth justice principles,⁵⁴ is probable, because as a further charge must then be preferred. The new charge sheet cannot be prepared nor presented until the plea is entered or a finding of guilt is made by the Court. Further

⁴⁹ Ibid.

⁵⁰ Youth Justice and Other Legislation Amendment Bill 2014 (Qld) cl 5.

⁵¹ *Acts Interpretation Act 1954* (Qld) s 45; *Criminal Code* (Qld) s 16.

⁵² Explanatory Notes, Youth Justice and Other Legislation Amendment Bill 2014 (Qld), 4.

⁵³ Explanatory Notes, Youth Justice and Other Legislation Amendment Bill 2014 (Qld), 10.

⁵⁴ *Youth Justice Act 1992* (Qld) sch 1: Charter of Youth Justice Principles – eg, 5, 11.

adjournments requiring a consideration of bail may be necessary, undermining the intent of the legislation and operating contrary to the interests of justice.

A separate penalty for the new offence will be precluded by operation of the prohibition against double punishment for the same act or omission (assuming the new offence satisfies the definition of offence under section 2 of the *Criminal Code*). Thus, the new provision will operate only to add to criminal histories and adversely affect future grants of bail, regardless of personal circumstances and legal considerations. The effect of this is likely to operate particularly harshly on juveniles, especially in light of the removal of the principle of detention as a last resort and the fact that children are (or should be) dependent on adults for support and guidance. The provision takes no account of the unique challenges to children arising from a lack of independent resources. Nor does it allow for their psychological immaturity particularly in relation to foreseeing consequences of their actions.

The commission of an offence whilst on bail is regularly and appropriately taken into account by sentencing courts as an aggravating feature. The creation of this new offence is unwarranted and prejudicial to the rehabilitation of the offender, which has repeatedly been held to be in the best interests of the community and which is in keeping with the stated aims of the legislation:

It is fallacious to regard the rehabilitation of an individual offender as a consideration separate and apart from, and somehow inimical to the protection of the public. The two things are intrinsically connected. The criminal justice system aims to rehabilitate offenders (particularly young offenders), because rehabilitation removes the danger to the public from one of its (previously) errant members.⁵⁵

Ultimately, the Institute submits that the introduction of a new offence of breaching bail is unnecessary, overly punitive and contrary to the stated aims of the legislation. It is contrary to international instruments, to which Australia is a party. It is inappropriate to subject children to offences not known to the system for mature Queenslanders. Perhaps it was the real intention of the legislature to hold both young people and their parents accountable, particularly where the home environment (or care environment for children in care) is deficient. Crime prevention is not achieved by the imposition of more punitive provisions.

Admissibility of Childhood Findings of Guilt

Non-recorded findings of guilt should not be admissible in adult proceedings. Making all childhood findings of guilt admissible in adult proceedings will:

1. Further stigmatise young offenders;
2. Provide no real assistance to the court in sentencing offenders; and
3. Defeat the Bill's aims.

When sentencing an adult a court is presently prohibited from receiving evidence of that adult's childhood findings of guilt, if no conviction was recorded when the finding was

⁵⁵ *B (a child)* (1995) 82 A Crim R 234 at 244.

made.⁵⁶ The proposed amendment will permit a court that is sentencing an adult to receive evidence about childhood findings of guilt for which no conviction was recorded.⁵⁷

It is widely acknowledged that young offenders should be subject to a system that recognises their inexperience and immaturity and is designed to meet their varying needs.⁵⁸

'Young people should not be branded in adulthood by mistakes made as a child.'

Young people should not be branded in adulthood by mistakes made as a child.⁵⁹ However, this proposed amendment will create a rule that means adults and children will be treated identically, with no regard for the separate needs of children.

As submitted above, young people become stigmatised by the criminal justice system when they are labelled a 'criminal.' This labelling has a negative impact on a young person's offending trajectory; they are less likely to 'grow out' of criminal behaviour and more likely to live up to that label through further offending.⁶⁰ Therefore, stigmatisation results in increased recidivism and has detrimental impacts upon a young person's rehabilitation prospects.⁶¹

To address this issue in the youth justice system convictions are often not recorded. The non-recording of a conviction helps to avoid the negative consequences associated with stigmatisation.⁶² However, if all unrecorded childhood convictions are admitted against an adult during sentencing, then even unrecorded convictions may stigmatise youths. This will defeat the purpose of not recording a conviction against children.

Further, one of the purposes behind not recording convictions against children is to promote their chances of rehabilitation, by ensuring that offences they committed while a child do not follow them into adulthood. Permitting the disclosure of unrecorded convictions against adults will mean these details are admissible in open court. There is generally no restriction on publishing the details of adult sentences. Therefore, unrecorded convictions discussed during the sentence proceedings of adults could be reported and published. This creates a 'back door' method for unrecorded convictions to follow a person into all aspects of their adult life, not just the sentence hearing. The proposed amendment does not adequately address this risk.

In addition, the Institute submits that this amendment will not greatly assist courts in the sentencing of adults. The sentences imposed on adults must take into account a number of sentencing principles, such as deterrence, rehabilitation and the protection of the

⁵⁶ *Youth Justice Act 1992* (Qld) s 148 (1).

⁵⁷ Youth Justice and Other Legislation Amendment Bill 2014 (Qld) cl 8.

⁵⁸ Richards, above n 18, 1; Richards K, 'Trends in Juvenile Detention in Australia' (2011) 416 *Trends & issues in Crime and Criminal Justice* 1, 1; United Nations, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing rules)*, adopted by General Assembly Resolution 40/33 of 29 November 1985.

⁵⁹ Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997), 302 [19.118].

⁶⁰ Richards, above n 18, 5-6.

⁶¹ McGrath, above n 34, 40.

⁶² Richards, above n 18, 5.

community.⁶³ An appropriate sentence is one crafted to balance all relevant sentencing principles. Understanding why a person has committed an offence often reveals the most relevant sentencing principles that should be taken into account.

The characteristics of juvenile offending, including the rationale for such offending, differs from adult offending in various ways.⁶⁴

For example, the disjuncture between affective experiences and regulatory competence, and the influence of peer networks, are strong influences on a juvenile's behaviour, including their likelihood of offending.⁶⁵ As such, childhood findings of guilt are unlikely to assist a sentencing court in understanding the

'[C]hildhood findings of guilt are unlikely to assist a sentencing court in understanding the rationale behind an adult's offending.'

rationale behind an adult's offending. Further, the amendment places no constraints on which findings of guilt will be admissible. All findings of guilt, regardless of the nature of the offence, how long ago it occurred, and whether it has any connection or relevance to the present offence, will be admissible. Accordingly, allowing these findings to be admissible is likely to be more prejudicial than probative to the exercise of the sentencing discretion.

Ultimately, this Bill is intended to deter further juvenile offending.⁶⁶ It is particularly focused on responding appropriately to, and preventing, recidivism amongst young offenders.⁶⁷ However, as already noted, permitting unrecorded childhood findings of guilt to follow a child into adulthood stigmatises that child and increases the likelihood of re-offending.⁶⁸ Therefore, rather than acting as a deterrent to further offending and preventing recidivism, this amendment increases the prospect of further offending.

Further, it is unlikely that at the time of committing an offence, young offenders would have in mind this potential consequence (that an unrecorded finding of guilt will be admissible against them if they are sentenced as an adult). This makes the deterrent value of this amendment even more questionable.

Transfer of 17-Year-Olds to Prison

The amendment proposing the automatic transfer of 17-year-old children:

1. Exacerbates Queensland's non-compliance with international obligations in treating 17-year-olds as adults for criminal justice purposes;
2. Further impedes any chance at rehabilitation; and

⁶³ *Penalties and Sentences Act 1992* (Qld) s 9 (1).

⁶⁴ Richards, above n 18, 3.

⁶⁵ Steinberg, above n 13, 69-70; Romer D and Hennessy M, 'A Biosocial-Affect Model of Adolescent Sensation Seeking: The Role of Affect Evaluation and Peer-Group Influence in Adolescent Drug Use' (2007) 8 *Prevention Science* 89, 98-99; Gatti U, Tremblay R and Vitaro F, 'Latrogenic Effect of Juvenile Justice' (2009) 50 *Journal of Child Psychology and Psychiatry* 991; Richards, above n 18, 4.

⁶⁶ Explanatory Notes, Youth Justice and Other Legislation Amendment Bill 2014 (Qld) 2.

⁶⁷ Explanatory Notes, Youth Justice and Other Legislation Amendment Bill 2014 (Qld) 2; Queensland, *Youth Justice and Other Legislation Amendment Bill, Introduction*, (11 February 2014) 46-47 (The Hon. JP Bleijie – Attorney-General and Minister for Justice).

⁶⁸ Richards, above n 18, 3.

3. Will not, in combination with the other suggested amendments above, adequately address the overpopulation of detention centres.

The Institute again notes the continuing disregard by the Queensland Government of Australia's obligations under international instruments, particularly in relation to the treatment of underage persons as adults for the purpose of the criminal law.

The original thrust of the automatic transfer provisions was centred on managing demand for places at the detention centres by considering automatic transfers to adult prisons for 18-year-olds, not 17-year-olds.⁶⁹ The Bill now proposes automatic transfers for 17-year-olds facing further detention,⁷⁰ a proposal upon which no community response has been sought and in respect of which the public reaction would, it is suggested, be unfavourable. The Institute does not support the proposal, either as an effective means of achieving policy ends nor as an appropriate means of treating children.

Transfer orders are currently available upon application to the Court at the time of sentence, or by the Chief Executive during the detention period, upon due consideration of all relevant factors.⁷¹ Consideration of factors such as age, unserved period of detention, availability of programs, good order and management and the impact on the child's mental health remain essential. It is difficult, if not impossible, to argue that an administrative, unreviewable,

'It is difficult, if not impossible, to argue that an administrative, unreviewable decision made by someone other than a judicial officer is sound policy given the real difficulties that exist in transitioning from detention to imprisonment.'

decision made by someone other than a judicial officer is sound policy given the real difficulties which exist in transitioning from detention to imprisonment.

Rehabilitative programs are essential in addressing criminogenic needs and providing a foundation for reducing recidivism. Smooth transition between centres is problematic for a number of reasons including administration, classification and protection policies and differences between child and adult facilities. 17-year-olds in adult prisons are often disadvantaged in terms of program access due to protective needs and are likely to retain the security classification given upon entry due to classification review periods equalling or exceeding the unserved period of imprisonment.

The fact that the transfer of 17-year-olds to adult prisons has not been fairly placed before the community for discussion is of concern. This concern is compounded by the movement away from the initial argument about 'demand on detention centres' to one centred on alignment with the current age limit.⁷² This seems facile. Queensland is already in breach of

⁶⁹ Safer Streets Crime Action Plan – Youth Justice (March 2013) 10.

⁷⁰ Youth Justice and Other Legislation Amendment Bill 2014 (Qld) cl 20.

⁷¹ Youth Justice Act 1992 (Qld) s 276B(3).

⁷² Explanatory Notes, Youth Justice and Other Legislation Amendment Bill 2014 (Qld) 14.

international obligations by subjecting 17-year-olds to an adult criminal justice system. It will be subject to further adverse comment internationally following this amendment.

To assert that 17-year-olds being held in detention with 13 and 14-year-olds is 'detrimental'⁷³ is to ignore the realities that operate within any education system – private or public, day school or boarding school. Year 7 students aged as young as 11 and 12 will be entering into education placements with 17, and sometimes 18 year olds, in 2015 in this State. Detention centres currently have to be able to take a young person from the age of 10. It must be the case that the system has been able to appropriately house and manage young people of mixed ages in detention for many years and it is unclear why this has only now become problematic. Neuroscientific evidence does not support the suggestion that 17 year olds are of significantly greater maturity than other children. In fact, the proposal is likely to be entirely counterproductive in terms of rehabilitation and crime prevention if children's natural modelling of adult criminal behaviour and thought is thereby facilitated.

On any view, the real issue is how best to reduce the demand on detention centres. A focus on reducing remand rates, homelessness, mental health issues, overrepresentation of indigenous young people and providing adequate resourcing for child protection and diversion programs will address the 'demand on detention centres' far more effectively than locking children up in adult prisons. Shifting demand does not address underlying factors.

In conclusion, the Institute recommends the research and findings of the Australian Institute of Criminology and urges the Government to consider all the available evidence before enacting unfounded policy.⁷⁴

This submission was authored by Jodie O'Leary, Jann Taylor, Rachael Taylor, Tim Alexander, Janet Wight, Damian Bartholomew and James Benjamin on behalf of the Youth Justice subcommittee of the Law and Justice Institute. Please contact the co-chairs of the Youth Justice subcommittee, Jodie O'Leary at [REDACTED] and Jann Taylor at [REDACTED], for further information.

[REDACTED]

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President

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⁷³ Queensland, *Youth Justice and Other Legislation Amendment Bill, Introduction*, (11 February 2014) 47 (The Hon. JP Bleijie – Attorney-General and Minister for Justice).

⁷⁴ Troy Allard, April Chrzanowski and Anna Stewart, *Targeting Crime Prevention to Reduce Offending: Identifying Communities that Generate Chronic and Costly Offenders*, Australian Institute of Criminology Trends and Issues Paper No. 445 (September 2012).

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28 June 2013

Dear Sir / Madam,

Submission in response to the paper 'Safer Street Crime Action Plan- Youth Justice'.

The Law and Justice Institute (Qld) Inc. submits that:

1. Detention should continue to be a last resort for children being sentenced for a criminal offence.
2. Children should be named by courts only in exceptional circumstances.
3. Breach of bail should not be a criminal offence for children.
4. Courts should not be able to access a person's juvenile criminal history when sentencing that person as an adult.

These issues are discussed further below.

Background

This submission has taken into account a number of matters as background information. Most importantly it is important to remember that human brains are not fully developed until adulthood. The frontal lobe is one of the last parts of the brain to mature. It is the 'executive' part of the brain that regulates decision-making, planning, judgment, expression of emotions, and impulse control. This part of the brain may not fully mature until the mid-20s.¹ Children who confront the justice system do not have fully developed capacity to take responsibility / understand their actions. Childrens' Courts were established in recognition of this and were based on the notion of *parens patriae* which has come to be understood to

¹ 'Using Adolescent Brain Research to Inform Policy': fact Sheet, 2012, http://www.nijn.org/uploads/digital-library/Brain-Development-Policy-Paper_Updated_FINAL-9-27-12.pdf

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refer to the responsibility of the childrens' courts, their associated processes and the state to act in the best interests of the child and this principle has also justified courts that deal with children exercising a wide discretion in relation to penalty.²

Some further matters we have considered in writing this submission are:

- a) In all Australian jurisdictions currently key elements of juvenile justice include diversion of children from court where appropriate and a principle of detention as a last resort.³
- b) 'Around 700 young people are detained in Queensland's youth detention centres each year. Around half of these young people are of Aboriginal or Torres Strait Islander descent, making Indigenous young people more than 15 times more likely to be detained than their non-Indigenous peers. Around two-thirds of those detained on an average day are on remand and around a third are serving a sentence.'⁴
- c) In Australia 17 per cent of juveniles in detention have an IQ below 70 and mental illness is also over represented among juveniles in detention.⁵
- d) Queensland has the highest rates of stock (children in state care) and flow (children going into state care) in Australia.⁶
- e) Queensland children achieved below national average results in Naplan tests in 2012.⁷
- f) Queensland is the only state in Australia where 17 year olds are considered to be adults,⁸ the United Nations Convention on the Rights of the Child defines a child as a person under the age of 18 years old.⁹

² Cunneen C and White R 2007 *Juvenile Justice: Youth and Crime in Australia* Oxford University Press, pp13-14.

³ Australian Bureau of Statistics, 'Juvenile Justice'

<http://www.abs.gov.au/ausstats/abs@.nsf/0/694C4FA5A02E10D4CA2574390014D093?opendocument>

⁴ Commission for Children and young people and Child Guardian, 'Views of Young people in detention centres Queensland 2011', at 6, http://www.ccyipc.qld.gov.au/pdf/publications/reports/Views-of-Young-People-in-Detention-Centres-Queensland_2011/Full-Report.pdf

⁵ Richards, K 2011 'What Makes Juvenile Offenders Different from Adult Offenders?' Trends and Issues in Crime and Criminal Justice.

⁶ Tilbury, C 2009 'A "stock and flow" analysis of Australian child protection data' 4 (2) *Communities, Children and Families Australia* 9-17 at 12, 14.

⁷ National Assessment Program: Literacy and Numeracy, national Report for 2012.

http://www.nap.edu.au/verve/resources/NAPLAN_2012_National_Report.pdf

⁸ Australian Bureau of Statistics, 'Juvenile Justice'

<http://www.abs.gov.au/ausstats/abs@.nsf/0/694C4FA5A02E10D4CA2574390014D093?opendocument>

⁹ Article 1, United Nations Convention on the Rights of the Child

<http://childrensrightsportal.org/convention/text/>

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1. Detention should continue to be a last resort:

Every state and territory in Australia currently includes a provision stating that detention is a last resort for children. The *United Nations Convention on the Rights of the Child* (UNCROC) observes:

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.¹⁰

Detention may exacerbate the criminal offending of the child because they are removed from their families, educational institutions and friendship groups and this marginalises them from their communities.¹¹

Further, it is well known that detention fosters further criminality- thus incarceration ultimately leads to a more unsafe community.¹² Studies have shown that incarceration within a juvenile detention centre does not prevent recidivism. Some have referred to this as the 'contamination' theory where impressionable young offenders mix with other young offenders and learn criminal behaviours from a 'pro-criminal' peer-group.¹³

Recent studies consistently emphasise that detention should be a last resort for children who offend. In 2009 Victoria undertook a major inquiry into strategies to prevent high volume offending and recidivism by young people. The final report of the inquiry recommended incarceration for young people should only be used as a last resort and that generally alternative strategies such as diversionary programs are more likely to be successful. The report of the Victorian Inquiry found that engaging young people in

¹⁰ Article 37 (b) *Convention on the Rights of the Child*: <http://childrensrightsportal.org/convention/text/>. The principle has been followed by the Queensland Court of Appeal: *R v Taylor & Napatali; ex parte A-G (Qld)* [1999] QCA 323; (1999) 106 A Crim R 578; *Lovell v The Queen* [1998] QCA 36; [1999] 2 Qd R 79; *R v Dullroy & Yates; ex parte A-G (Qld)* [2005] QCA 219;

¹¹ Austin J, Dedel Johnson K, and Weitzer R 2005, 'Alternatives to the Secure Detention and Confinement of Juvenile Offenders', *Juvenile Justice Bulletin* (September) (<https://www.ncjrs.gov/pdffiles1/ojjdp/208804.pdf>)

¹² Richards K, 2011 'What Makes Juvenile Offenders Different from Adult Offenders?' *Trends and Issues in Crime and Criminal Justice*, February .

¹³ Richards K, 2011 'What Makes Juvenile Offenders Different from Adult Offenders?' *Trends and Issues in Crime and Criminal Justice*, February.

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education, training, constructive leisure activities and/or meaningful employment 'empowers young people and assists in preventing youth offending'.¹⁴

In 2000 New Zealand undertook a thorough review of the response to juvenile crime. Drawing on available reports and literature they prepared a list of 'what doesn't work'. First on the list was:

Shock tactics, punitive, deterrent and 'punishing smarter' approaches, including scared straight, boot camps, corrective training and shock parole probation. These are interventions where the primary focus is on punishment, inducing fear of prison, and harsher treatment, with little or no emphasis on teaching new skills or reducing risk factors.¹⁵

2. Children should be named only in exceptional circumstances.

Routine naming of children in criminal cases should not be introduced and it would be contrary to the approach taken in most of Australia. Currently in Queensland as well as most Australian jurisdictions, New Zealand, England and Wales, a child who is convicted of criminal offences cannot, as a general rule, be named in public forums such as court reports and the media.¹⁶ In Australia, the only State or Territory that has the jurisdiction to publish the names of any juvenile offenders is the Northern Territory.¹⁷ All other states and the ACT restrict the publication of the names of juveniles, unless there are exceptional circumstances that justify publication.¹⁸ A significant recent review of legislation in New

¹⁴ Drugs and Crime Prevention Committee, Inquiry into Strategies to Prevent High Volume Offending and Recidivism by Young People – Final Report (parliament of Victoria, Melbourne, 2009) at v http://www.parliament.vic.gov.au/images/stories/committees/dcpc/high_volume_crime/DCPC-Report_HighVolumeCrime_2009-07-22.pdf

¹⁵ Kaye McLaren, 'Tough is not enough- Getting smart about youth crime' Ministry of Youth Crime, New Zealand, 2000, <http://www.myd.govt.nz/documents/resources-and-reports/publications/tough-is-not-enough-2000-nz-.pdf> p89.

¹⁶ Thomas Crofts and Normann Witzleb. "'Naming and shaming" in Western Australia: Prohibited behaviour orders, publicity and the decline of youth anonymity." *Criminal Law Journal* 35 (2011): 34 – 35; Bichel, Kerry. "Naming and Shaming: Is it in anyone's best interest?." *The Verdict* 3 (2008): 12 - 16.

¹⁷ *MCT v McKinney & Ors; McGarvie v MCT* (2006) NTSC 35; *Youth Justice Act (NT)* (Section 3).

¹⁸ Chappell D and Lincoln R 2009 "'Shhh ... We can't tell you': An update on the naming prohibition of young offenders." 20 *Current issues in criminal justice* 477 - 484.

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South Wales examined the evidence and concluded that naming should only ever occur in exceptional circumstances.¹⁹

There is already an exception to the general rule that children can not be named in Queensland and this was developed to protect the public: in Queensland in exceptional circumstances a child can be named (Section 234, *Youth Justice Act, 1992* (Qld)). To date judges have rarely named children, suggesting that their current powers are sufficient.

There is a real concern that naming convicted children may diminish the named child's prospects of rehabilitation, i.e. reducing their chances of becoming productive members of society because they will be excluded from their communities.²⁰ Research suggests that naming may lead to exclusion from educational opportunities²¹ and offenders may find it more difficult to find employment.²²

Experts contend the protection of children's anonymity, once they are convicted of a criminal offence, recognises their limited maturity.²³

There is no evidence that naming juveniles deters them from committing further crimes.²⁴

While some victims and their families might benefit from the naming of juvenile offenders alternative ways currently exist which can ensure their interests are served. For example via mediation, compensation schemes and community service orders the voice of victims can be listened to without requiring public identification of the juvenile offender.²⁵ Youth justice mediation is already available in cases of juvenile offending in Queensland and this provides

¹⁹ Robertson C 2008 "Final Report, The prohibition on the publication of names of children involved in criminal proceedings." *Standing Committee on Law and Justice* 231, XIV.

²⁰ Bichel K 2007 "Naming + shaming = ?." 61 *Legal Aid Queensland* 22 - 24. *Legal Aid Queensland*.

²¹ O'Leary J and Lincoln R 2012 'Look Before Leaping Into A Human Rights Quagmire' *Centre for Law, Governance and Public Policy*. 25 July . <<http://lawgovpolicy.com/2012/07/17/look-before-leaping-into-a-human-rights-quagmire/>>.

²² *MCT v McKinney & Ors; McGarvie v MCT* (2006) NTSC 35.

²³ Richards K 2011 "What makes juvenile offenders different from adult offenders?." *Trends & Issues* 409 *Australian Institute of Criminology*.

²⁴ Crofts T and Witzleb N 2011 ""Naming and shaming" in Western Australia: Prohibited behaviour orders, publicity and the decline of youth anonymity." 35 *Criminal Law Journal* 34 – 35;

²⁵ Robertson C 2008 "Final Report, The prohibition on the publication of names of children involved in criminal proceedings." 231 *Standing Committee on Law and Justice* XIV.

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an opportunity for victims to explain the effects of the crime to the offender and for the offender to apologize.

3. Breach of bail should not be a criminal offence for children

Recent research on juveniles breaching bail in NSW found that generally breaches of bail by juveniles related to breach of conditions, such as curfew or being without their parent present, rather than reoffending.²⁶ Creating an offence of breach of bail for children would widen the net of criminalisation, potentially creating unnecessary further contact for the child with the justice system, increasing the chance of the child being placed on remand and reducing their opportunity for diversion from the criminal justice system.

A new offence of breach of bail may also create further delays in processing cases.

Because Indigenous young people are more likely to be arrested they are more likely to be placed on bail.²⁷ Criminalisation of breach of bail will have the greatest impact on Indigenous offenders who are already over-represented in the detention population.

In the ACT a key factor in considering bail conditions for young people was found to be safe and secure housing.²⁸ Those children who have limited access to safe and secure housing maybe the children most likely to breach bail and thus also most in need of social support rather than further criminalisation.

Already significant numbers of children are held in remand for breaching bail. Remand is already over utilised. A 2010 NSW report found that 60% of young people were in custody for breaching bail conditions, of those in custody for breaching bail 56% had committed no

²⁶ Vignaendra, S., Moffatt, S., Weatherburn, D. and Heller, E, *Recent trends in legal proceedings for breach of bail, juvenile remand and crime*, New South Wales Bureau of Crime Statistics and Research, Crime and Justice Bulletin Number 128.25. See also Bargen J 2008, 'Juvenile justice: Responding to Australia's Children and Young People in Trouble with the Law' 92 *Reform* 28

²⁷ Chris Cunneen and Rob White, 'Juvenile Justice: Youth and Crime in Australia' Oxford University Press, 2007, p157.

²⁸ Explanatory Notes, Bail Act Amendment Bill, 2012 ACT, http://www.austlii.edu.au/au/legis/act/bill_es/bab2012131/bab2012131.html#fnB1;

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further offence and 60% of young people in custody for breaching bail were granted bail again.²⁹ The main result was extra work for the courts.

Further diversion is the approach to breach of bail most consistent with worlds best practice approaches and with the principle of detention as a last resort.³⁰

4. Courts should not be able to access a person's juvenile criminal history when sentencing them as an adult.

Submissions to the Australian Law Reform Commission's (ALRC) 1997 inquiry generally agreed that it was appropriate that a child's criminal history lapsed on attaining adult status.³¹ This approach recognises that most children 'grow out' of criminal behaviours and that adults should not be stigmatised and disadvantaged by a criminal record that they obtained as a result of mistakes made as a child. For example a young adult may find it more difficult to obtain work if s/he has to disclose a criminal record they obtained as an immature child.

We submit that the current provisions of the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) are appropriate and generally that convictions for offences committed as a child should lapse after five years.

5. Suggested changes to the criminal justice system

a. Sentencing

A major review on youth justice strategies conducted by the Australian Institute of Criminology in 2002 (AIC, 2002), concluded that programs that: addressed numerous risk factors associated with young people entering the criminal justice system; worked across a variety of social settings; targeted a young person's individual needs (particularly through case management approaches); altered the way a young person thinks and acts through a

²⁹ Katrina Wong, Brenda Bailey, Diana Kenny, 'Bail me out', Youth Justice Coalition, NSW. <http://www.yjconline.net/BailMeOut.pdf>

³⁰ See *Effective Practice In Juvenile Justice; Review of Effective Practice in Juvenile Justice*, Report for the New South Wales Minister for Juvenile Justice, Noetic Solutions Pty Limited (2010).

³¹ Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal process* Report no. 84 at chapter 19 (1997).

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variety of therapies and were culturally specific had the best chance of producing effective outcomes to prevent offending or reduce re-offending.³²

The AIC 2002 report provides a list and an analysis of options that 'work' or show promising results for young offenders (and therefore for the community). These include:³³

- Social competence and (cognitive behavioural) training programs in schools– such programs were found to be help prevent violence and substance misuse.
- Mediation- Family group conferencing showed promising results, peer mediation was found to be ineffective but offender-victim mediation has been found to be promising.
- Probation- Intensive supervision in community when combined with other services and when agencies work co-operatively is promising. (Probation is less effective when it simply means frequent contact with a probation officer).
- Drug Courts show promising results. Although the Drug Court no longer operates in Queensland, a good model has already been developed and trialled in Queensland and has shown some good outcomes.³⁴
- Education –type programs based in schools may be promising these programs target at risk youth with differently structured teaching techniques/ rules.
- Employment focussed responses that provide vocational training and job placements have seen some success.
- Multidimensional approaches with therapeutic component may help. It must be emphasised Bootcamps have generally been found to be ineffective although if they have a therapeutic approach there have been better results. Similarly wilderness programs have been found to be ineffective- although better results if they include a therapeutic component.

³² Australian Institute of Criminology, 'What works in reducing young people's involvement in crime?' (2002), <http://www.aic.gov.au/documents/E/1/2/%7bE12C7388-6983-45A3-9D25-05B8D2855764%7d2002-12-whatworks.pdf>

³³ Australian Institute of Criminology, 'What works in reducing young people's involvement in crime?' (2002), <http://www.aic.gov.au/documents/E/1/2/%7bE12C7388-6983-45A3-9D25-05B8D2855764%7d2002-12-whatworks.pdf> p42.

³⁴ Jason Payne, *The Queensland Drug Court: a recidivism study of the first 100 graduates* (2008) Australian Institute of Criminology <http://www.aic.gov.au/documents/7/C/C/%7B7CCCCFD2-FFF6-4DAB-B17F-49700902BC1D%7Drpp83.pdf>

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Research shows that a diversionary or therapeutic approach to children's offending is the best way to reduce recidivism.³⁵

b. Bail

We make the following suggestions in relation to bail:

- Police should be required to first consider alternatives to arrest in relation to failures to comply with bail conditions. This should be a legislative requirement.
- The Queensland Government should develop and fund a residential bail program to assist young people to meet bail conditions associated with residence conditions.
- The Queensland Government should commit to reducing the numbers of children on remand and adhere to the UNCROC (detention should be a last resort).

6. Addressing the causes of crime for children already in the justice system:

a. Literacy and numeracy should be a core component of continuing support in detention. A recent program developed in Victoria is already demonstrating significant success.³⁶ Many children in detention will have experienced:

- Frequent absentee periods from school
- Difficulties with language³⁷
- Difficulties in basic numeracy and literacy
- Behavioural and emotional problems
- Mental health issues
- Under achievement at school due to marginalisation and disengagement.

Generally a stronger focus on literacy and numeracy in Queensland schools would benefit all Queensland children, not just potential offenders.

³⁵ See Carrington K 2009 *Offending Youth: Sex Crime and Justice* Federation Press, chapter 9.

³⁶ ABC 7.30, 20 February 2013, <http://www.abc.net.au/7.30/content/2013/s3694873.htm>

³⁷ Snow, P.C., Sanger, D.D., 2011, Listening to adolescents with speech, language and communication needs who are in contact with the youth justice system, in *Listening to Children and Young People with Speech, Language and Communication Needs*, eds Sue Roulstone and Sharynn McLeod, J&R Press, UK, pp. 111-120

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b. Better recognition and support of children and young people with fetal alcohol spectrum disorder (FASD) and other cognitive disabilities.

While cognitive disabilities are often hidden and are often undiagnosed. FASD is particularly invisible as people with FASD often have a normal IQ. Under the umbrella of FASD there are several types of diagnoses which are associated with various cognitive and physical impairments.³⁸ People with FASD are at high risk of criminal behaviour: a 1996 study found that 60% of those with a FASD came into contact with the criminal justice system.³⁹

Red flags for FASD (and also for other cognitive disabilities) include:

- a repeated history of 'fail to comply',
- lacking empathy, poor school experiences,
- unable to connect actions with consequences,
- does not seem to be affected by past punishments,
- opportunity crimes rather than planned crimes
- crimes that involve risky behaviour for little gain gang involvement
- superficial relationships / friends.

It is no surprise that children with an FASD or other cognitive disabilities are at particular risk of coming into contact with the criminal justice system.

It is important that those working in the criminal justice and child protection systems and in education have an understanding of these disabilities as they have implications for developing appropriate conditions for bail and sentencing and for identifying appropriate programs and responses. Mainstream education and cognitive behaviour programs, for example, may not be effective.⁴⁰

³⁸ Lyons Jones K and Streissguth A 2010, 'Fetal alcohol syndrome and fetal alcohol spectrum disorders: A brief history' 38(4) *Journal of Psychiatry and Law* 373, at 379.

³⁹ Streissguth A, Barr H, Kogan J, Bookstein FL 1996 Understanding the occurrence of secondary disabilities in clients with fetal alcohol syndrome (FAS) and fetal alcohol effects (FAE) Final report to the centers for disease control and prevention, Seattle, WA University of Washington School of Medicine.

⁴⁰ Douglas H 2010 'The Sentencing Response to Defendants with Foetal Alcohol Spectrum Disorder' 34 *Criminal Law Journal* 221-239

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c. Detention programs and transition back to community

We agree with the recent report of the Commission for Children and Young People and Child Guardian:

The collaborative efforts of the Department of Communities, Department of Education and Training, and Queensland Health to improve the programming in detention centres over the last decade are commendable. It should, however, be noted that any gains young people make through their participation in detention programs are likely to be short lived unless they are reinforced in the community. As such, it is important that young people be provided with appropriate opportunities and support to continue the types of programs they commence in detention once they return to the community.⁴¹

And:

In line with best practice literature, it would be desirable that all young people be involved in transition planning immediately after their admission to detention. It is also desirable that young people and their families be encouraged to take an active role in the planning process to maximise the chance of a positive outcome.⁴²

We agree with the Action Plan suggestion that children in detention should to be granted a leave of absence, or in some cases early release, i.e. to attend work programs or educational or vocational programs. Appropriate support will be pivotal to ensure that this can work effectively, including appropriate housing and transport arrangements.

7. Government and non-government services need to deliver a more coordinated response to children and their offending:

We agree that the response to youth justice requires a whole of government response. A study of chronic offenders by the Australian Institute of Criminology (AIC, 2005) noted that chronic young offenders were more likely to have: grown up with drug using parents and siblings, experienced physical abuse from parents when growing up, experienced problems

⁴¹ Commission for Children and young people and Child Guardian, 'Views of Young people in detention centres Queensland 2011', at 3, http://www.ccypcg.qld.gov.au/pdf/publications/reports/Views-of-Young-People-in-Detention-Centres-Queensland_2011/Full-Report.pdf

⁴² Commission for Children and young people and Child Guardian, 2011 'Views of Young people in detention centres Queensland', at 60, http://www.ccypcg.qld.gov.au/pdf/publications/reports/Views-of-Young-People-in-Detention-Centres-Queensland_2011/Full-Report.pdf (notes omitted).

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at school and started their offending at a younger age. The key factor was the early age of first offence.⁴³ The AIC 2005 study recommended that strategies that delay the onset of the age of first offending could reduce criminal offending overall. Thus targeting early intervention – ie in child protection intervention, education settings and responses to domestic violence may be pivotal.

a. Better resourcing of Child safety

Children caught up in the justice system are often involved with child protection services from an early age. The expected reforms to Child Safety will have great relevance to keeping kids out of the justice system. At the moment child safety workers usually work for an extremely short period with Child Safety. Child Safety workers are often very young and very inexperienced and, because they often do not have the opportunity to develop a relationship with particular families, they are more likely to operate in a highly risk averse way.⁴⁴ Child protection interventions often result in children being removed from the family and entering the revolving door of the foster care system. Better resourcing of the child protection system is needed, including better wages and better conditions – so workers stay in their positions and enjoy the rewards that would result from longer term work with families in a better resourced and supervised environment. Child safety workers should not be understood as ‘tertiary interveners’ rather they should be involved in assisting families to build on their strengths and help play a key role in early intervention and support.⁴⁵

b. Improved responses to domestic and family violence

It is now accepted that a child who witnesses or is exposed to domestic violence is likely to experience negative psychological, behavioural, health and socio-economic impacts.⁴⁶ It is

⁴³ Makkai T and Payne J 2005 ‘Risk factors for early Initiation into Crime’ Australian Institute of Criminology, http://www.ocsar.sa.gov.au/docs/other_publications/papers/TM.pdf

⁴⁴ See generally: Walsh T and Douglas H 2012 ‘Lawyers’ Views of Decision-making in Child Protection Matters: the Tension Between Adversarialism and Collaborative Approaches’ 38 (2) Monash University Law Review 181-211

⁴⁵ See generally: Healy, K. and Olstedal, S. (2010). Child protection systems in Australia and Norway: An institutional comparison focused on workforce retention. *Journal of Social Policy*, 39(2), 255-274.

⁴⁶ Humphreys C, 2008. Problems in the system of mandatory reporting of children living with domestic violence. *Journal of Family Studies* 14(2/3): 228–239

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likely that many children who come into contact with the criminal justice system as a result of their anti-social behaviour are living in a violent household.⁴⁷

Police should be better trained in responding to family violence and encouraged to take domestic violence seriously. Recent surveys of Queensland Police attitudes presented by Paul Mazerolle demonstrate that Queensland police are more reluctant than ever to engage with domestic violence and take it seriously.⁴⁸ Children are the losers as a result of this attitude. Police need to remove violent male perpetrators from the home and where appropriate provide referral or initiate criminal charges. Resources should be made available so that appropriate responses are accessible to perpetrators. In some cases this may be perpetrator programs.

c. More and better accommodation options for families leaving violence.

In this regard we need better resources for women's shelters that are able to accommodate families in need of protection. Homelessness is a serious problem for women and children who have lived with domestic violence and homelessness often contributes to child protection removals of children into the foster care revolving door system⁴⁹ – and thence those in foster care often graduate into crime. Homelessness also reduces options and complicates bail and sentencing decisions where a young person is charged with a criminal offence.

Yours sincerely

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⁴⁷ Herrenkohl T, Sousa C, Tajima E, Herrenkohl R & Moylan C 2008. Intersection of child abuse and children's exposure to domestic violence. *Trauma, Violence & Abuse* 9(2): 84–99.

⁴⁸ Griffith, Domestic Violence Symposium, 3 May, 2012, <http://www.griffith.edu.au/criminology-law/violence-research-prevention-program/news-events/domestic-violence-symposium/speakers>

⁴⁹ Walsh T and Douglas H 2008 'Homelessness and Legal Needs: A South Australia and Western Australia Case Study' 29 (2) *Adelaide Law Review* 359-380