

Submission to the Legal Affairs and Safety Committee:

Youth Justice & Other Legislation Amendment Bill 2021

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Introduction

CREATE welcomes the opportunity to comment on the *Youth Justice and Other Legislation Amendment Bill 2021* (the Bill). CREATE advocates for an ongoing commitment to the reduction in the overrepresentation of children and young people with a care experience in the youth justice system, and that young people who do come into contact with the justice system have their rights upheld and their well-being cared for.

Young people in out-of-home care are 16 times more likely to have contact with the youth justice system than their peers in the general population (Australian Institute of Health and Welfare, 2018). Several factors increase the likelihood of a young person in out-of-home care offending including placement instability (Ryan & Testa, 2005); being placed in a residential facility (Ryan et al., 2008); and the criminalising of behaviours that would be tolerated in a family home but result in utilisation of police in a care environment when caregivers lack training in how to de-escalate behaviour (Shaw, 2016; Victoria Legal Aid, 2016). Criminalisation processes can result in young people in care having increased contact with police, in turn increasing their risk of being charged and taken into custody, and potentially being exposed to more criminogenic behaviours of serious offenders (McFarlane, 2018).

CREATE believes the over-representation of young people with a care experience in the youth justice system is unacceptable (CREATE, 2018a). Cross-over youth experience greater disadvantage than the general youth justice population, and often present with more complex needs as a result of trauma (Mendes et al., 2014). To ensure the needs of these young people are met, there needs to be a prioritisation of prevention strategies across state and territory governments, increased collaboration between youth justice and child protection systems, and the adoption of a trauma-informed youth justice system (CREATE, 2018a). Such reform will assist young people to achieve their best outcomes, but also lead to reduced recidivism and increased safety for communities.

CREATE supports reforms which are consistent with upholding the United Nation's *Convention on the Rights of the Child* (1989) and the *Queensland Human Rights Act* (2019). To understand issues that impact children and young people with a care experience in the justice system, CREATE facilitated interviews with 148 children and young people throughout Australia in 2018¹. Based on the key findings from CREATE's *Youth Justice Report* (2018b), broader information gathered through our work with young people (McDowall, 2020), and additional research, CREATE does not support the Bill for the reasons listed below.

The Bill is not compatible with the Queensland Human Rights Act (2019)

According to the *Queensland Human Rights Act* (2019), in order to demonstrate that a limitation on human rights is justifiable, a rational connection must be made between the law or action causing the limitation and a legitimate purpose. This purpose must also be reasonable and justifiable with the benefits outweighing any harm.

This Bill creates significant limitations on the human rights of children, some as young as 10 years old.

The submitted *Statement of Compatibility* (Queensland Parliament, 2021) does not identify all of the protected human rights of children engaged by the Bill. A number of key human rights have been overlooked. These include:

1. Protection from cruel, inhuman or degrading treatment or punishment;

¹ In this study, a total of 148 children and young people were interviewed. Three had contact with police through their self-harming behaviour, while another nine went to court on routine child protection matters.

2. Children charged with a criminal offence have the right to a procedure that takes account of their age and the desirability of promoting their rehabilitation;
3. Children in the criminal process who have been convicted of an offence must be treated in a way that is age appropriate.

CREATE believes that the proposed amendments are not the least restrictive way of achieving the stated purpose of the bill (i.e., increased community safety) and that the benefits do not outweigh the potential harm to children. While evidence may show that electronic monitoring is one way to limit a person's actions, particularly in the case of child sex offenders, and that presumption against bail may decrease reoffending (Atkinson, 2018), there are other alternatives better suited to children and young people that reduce the impact of harm on the individual. CREATE argues for the expansion of existing programs that address the causes of youth crime such as bail support and youth offender programs provided by the Youth Advocacy Centre (2021) and CatholicCare Social Services (2021) across Queensland, and early intervention and prevention services as a less restrictive and evidence-based method to reducing crime and increasing community safety. CREATE also argues for the adoption of a trauma-informed youth justice system which promotes policy and practice that better manages challenging behaviours, develops young people's resilience and strength, and leads to reduced recidivism (CREATE, 2018a; Elwyn et al., 2014).

Presumption Against Bail

CREATE advocates for the presumption in favour of release, with detaining young people as a last resort. CREATE further asserts that detainment in custody must not occur simply because the young person is lacking accommodation or family support.

Research, such as that by Cashmore (2011), has identified that young people in care are often denied bail due to insecure accommodation, which is often the result of placement instability or inappropriate matching of placements. However, if young people are denied bail on the grounds that they do not have adequate accommodation, there needs to be a concerted effort to improve the range and number of appropriate accommodation options available. This includes carers with the capacity to provide care and protection for young people newly placed in out-of-home care, or where carers have responsibility for multiple young people and bail conditions prohibit contact with other young people who may have been involved in similar circumstances. This also includes an assurance from the Department of Children, Youth Justice and Multicultural Affairs that accommodation placements will be made available for all children and young people in care within 48 hours of arrest, or when their court matters are finalised (whichever happens first).

Clarification of matters to be considered when making decisions about bail should support police to make decisions aligned with the best interests of the young person such as considering their age, maturity level, developmental needs, and Aboriginal and Torres Strait Islander status. CREATE would argue that the young person's out-of-home care experience and status should also be taken into account by police. This is because young people in care may disproportionately have developmental delays, mental health concerns, and have experienced past trauma, all of which can affect their cognitive capacity (Baidawi et al., 2014; Minnis et al., 2006; Tarren-Sweeney, 2008).

If I had the right carer and didn't get kicked out, I wouldn't commit crime. I did it to survive, eat and sleep. Child Safety Officers may not have kids [of their own]. It's my 9th time in here [youth detention]. I haven't been in resi care since 13, I have been living on the street. It's up to the kid. If he needs support he should be able to come back [to the Department].

(Male, 17)

In CREATE's *Youth Justice Report* (2018b), young people expressed that they felt unsupported and discriminated against during their contact with the justice system. They often felt that they were

treated unfairly and reported that staff were unaware of the impact of trauma and other causal factors on their behaviours. CREATE recommends additional training for staff and more resourcing for early intervention strategies, for example the Youth Empowering Strength program (Young People Ahead, 2021), as articulated in Atkinson's *Report on Youth Justice* (2018). Additionally, if and when bail is granted, there must be support for the young person to ensure adequate accommodation, financial assistance and emotional support. They should not be released and expected to fend for themselves.

They made me feel like a bad person, I don't know why someone didn't just sit down and talk to me about what was going on and why. I had no support, no one cared. If they had asked me why [I was offending] I could have told them why I was doing it and it might have been able to be fixed earlier. (Male, 24) (CREATE, 2018b).

Electronic Monitoring Devices

CREATE believes there needs to be better collaboration between child protection and youth justice systems (CREATE, 2018a). CREATE also recommends that a human rights and child rights framework is adopted whenever working with children in the youth justice system, and that children and young people are supported to be aware of their rights.

While there is evidence that the use of electronic monitoring devices may play a role in reducing offending, for example with sex offenders, caution should be used when applying the use of electronic monitoring devices for children (Atkinson, 2018). This is because they can be stigmatising and do not offer protection from degrading treatment which may impact or further exacerbate any trauma or mental health issues that a child or young person may have. It is important to focus on alternative options such as rehabilitation, trauma-informed approaches and investing in areas that can help address the underlying causes that lead to offending in children including unresolved trauma and grief, disengagement from education or employment, mental health, substance abuse, unstable housing or placements and poverty.

Young people shouldn't have ankle bracelets on because some of the young people have mental health issues and they are just kids. Instead we should be educating and rehabilitating the young people. (Male, 16)

If a child is committing crimes like this and haven't had the opportunity to explore all resources (counselling etc.), then I think that there should be a chance for rehabilitation in the community before taking such a drastic measure as this could cause mental distress and illness. And feelings of worthlessness in the community. (Female, 16)

Children taken into care due to abuse or neglect often present with difficult and challenging behaviours as a result of their life circumstances, and therefore may require support to overcome effects of trauma. It is important to recognise these as symptoms and use early intervention and prevention measures to help manage the underlying issues if the aim of the action is to break the cycle of offending.

Early intervention for children and young people in care who are exhibiting trauma based behavioural issues has the potential to minimise involvement in the youth and adult justice systems (Atkinson, 2018). This could include ensuring young people have appropriate social support, possibly from positive peers. However, another effective early intervention would be to respond to the United Nation's recommendations of raising the minimum age of criminal responsibility for all offences. Currently, in Australia the minimum age of criminal responsibility is still 10 years old, which is out of step with the 31 UN member states who have increased the age to 14 years since the recommendation was made in 2019 (Human Rights Law Centre, 2021).

Conclusion

CREATE recommends that a human rights and child rights framework is adopted when working with children in the youth justice system, and that children and young people are supported to be aware of their rights. There is insufficient evidence that the use of electronic monitoring and instigating the presumption against bail for children will make the community safer (i.e., the purpose of the proposed Bill). Instead, there is evidence that investing in services to assist children when they are charged with an offence and supporting families when they need it will reduce crime and result in a safer community.

CREATE supports the Queensland Government moving towards a trauma-informed and restorative justice practice framework. This includes introducing reforms that are evidence-based and represent genuine efforts to lessen the over-representation of Aboriginal and Torres Strait Islander children and young people coming into contact with both the care and youth justice systems. The touchstones of this approach must be inclusivity, respect for culture, and meaningful participation that engages children.

Effective communication and collaboration between youth justice and child protection is particularly relevant when a young person is taken into detention. Government departments and community service providers need to work together to ensure that a young person has access to support services to address risk behaviours. Importantly, these young people should have a stable place to live. A lack of appropriate support or a stable home environment may result in a young person reoffending.

Youth justice is a complex field that requires integrated, sustained, well-funded, community-based services that are evidence-based. The Bill does nothing to address the root causes of youth crime in Queensland. For this reason, CREATE asks that the Legal Affairs and Safety Committee rejects the Bill.

Thank you again for the opportunity to provide comment on the proposed amendments. Please contact Rachael Donovan, QLD State Coordinator on [REDACTED] if you require any additional information.

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About CREATE Foundation

CREATE Foundation is the national consumer body representing the voices of almost 45,800 children and young people in the out-of-home care system, as well as those who have transitioned from care up to the age of 25.

Our vision is that all children and young people with a care experience reach their full potential, in line with our mission to:

CONNECT children and young people to each other, CREATE and their community; to

EMPOWER children and young people to build self-confidence, self-esteem, and skills that enable them to have a voice and be heard; to

CHANGE the care system, in consultation with children and young people, through advocacy to improve policies, practices and services and increase community awareness.

We run programs and services across all Australian states and territories for children and young people in foster care, kinship care, and residential care. Our research reports and articles, submissions and policy development allow us to advocate for a better care system.

At CREATE, we believe that to improve the care system, we need to listen to the people who have experienced the system firsthand. This is why youth participation is the foundation of our advocacy. Everything we do is shaped by the voices of children and young people with a care experience.