

Looking after kids *is* looking after the community

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1. Summary

Change the Record is Australia's only national First Nations - led justice coalition of legal, health and family violence prevention experts. Our mission is to end the mass-incarceration of, and disproportionate rates of family violence against, Aboriginal and Torres Strait Islander people.

We have been working with service providers, Aboriginal and Torres Strait Islander legal services and organisations, human rights experts and communities in Queensland on the campaign to raise the minimum age of criminal responsibility and invest in supporting children - and the community - to stay safe and connected. It is our view, supported by almost thirty years of expert evidence, that knee-jerk political reactions¹ like the *Youth Justice and Other Legislation Amendment Bill 2021* (**the proposed laws**) will not keep children, or the community, safe.

Looking after kids *is* looking after the community. Pushing children away who need the help of adults, criminalising and incarcerating children, only harms those children and hurts the community in both the short and the long term - as children are trapped in cycles of reoffending and incarceration.

The proposed laws will disproportionately impact Aboriginal and Torres Strait Islander children who are already grossly overrepresented in the Queensland criminal legal system - being incarcerated at 28 times the rate of their non-Indigenous peers.² They are unlikely to achieve their purported goal of keeping the community safe, but will rather drive the cycle of incarceration and offending, trapping children in a criminal legal system which makes it more likely that they will continue to offend as adults, become homeless, suffer mental ill health and ultimately die an early death.³

¹ Stephanie Zilman, Former royal commissioner into youth justice slams Queensland's 'knee-jerk' measures as police welcome new powers, 10 February 2021, accessible: <https://www.abc.net.au/news/2021-02-10/qld-youth-crime-crackdown-taskforce-advocates/13137768>

² Australian Institute of Health and Welfare, Queensland Factsheet, accessible: <https://www.aihw.gov.au/getmedia/7a8dc8c1-7a56-49cd-be29-403445910c0f/aihw-juv-132-factsheet-Qld.pdf.aspx>

³ Law Council of Australia & Australian Medical Association (2019) Minimum age of criminal responsibility: Policy statement, p. 3, <https://www.lawcouncil.asn.au/media/media-releases/lca-and-ama-call-on-australian-governments-to-raise-the-age-of-criminal-responsibility-to-14>

2. Supporting children *and* the community

Everyone wants, and deserves, to live in a safe and secure community. The recent events in Queensland are devastating. But the Queensland Government's knee-jerk political reaction is taking us back to an outdated 'tough on crime' approach that has already been proven to fail.

Prisons are not part of the solution to young people who are getting in trouble. In fact, what the copious amounts of evidence dating right back to the 1991 Royal Commission into Aboriginal Deaths in Custody shows us is that prisons actually increase criminal activity. For young people in particular, we know that the earlier a child has contact with the criminal justice system, the more likely they are to reoffend.

There is significant evidence that programs which keep kids connected to their families and their culture strengthen young people, their sense of identity and purpose in the community. When young people are in trouble we need to be bringing them in, not pushing them away.

In our view, the real work is for the Queensland Government to look at the drivers of this behaviour - why are so many children being failed by the Child Protection System? Only 30% of kids in the youth justice system are regularly attending school. Why are so many kids who get in trouble disengaging from school? Why are youth prisons filled with kids who have unmet health, disability and mental health needs?

These are the unanswered questions that the Queensland Government should be finding answers to, not knee-jerk political law changes that will hurt kids and the community.

3. The proposed law changes

The proposed law changes are not evidence-based, not human rights compliant and are likely to fail both the children they affect and the broader community they purport to protect.

a. Presumption against bail

The proposed law changes reverse the presumption to grant bail to a child with respect to a number of offences.⁴ Change the Record has grave concerns that the insertion of this provision flies in the face of the well established principle that detention should only ever be a measure of last resort,⁵ and that everyone should be afforded the presumption of innocence until proven guilty.

The Explanatory Memorandum⁶ introducing this bill references the Four Pillars in the 2018 Report on Youth Justice by former Police Commissioner Mr Bob Atkinson AO APM. Of particular note are his recommendations:

22. That further measures be put in place to ensure bail conditions do not place unrealistic expectations on children in light of their circumstances, whilst ensuring community safety.

23. That, to the greatest extent possible, bail support services are available to keep children in the community, instead of remanded in custody.

The proposed law changes fly in the face of both these recommendations. Currently 87% of young people in detention in Queensland are on remand.⁷ These are children who have not faced court, been found guilty of any crime, and are often held in far harsher conditions than those in the general youth detention population and are denied access to programs and therapeutic support when held on remand.

The insertion of s48AAA(2) requires that a Court or police officer **must** keep a child in custody if:

(a) if the child is released, there is an unacceptable risk that the child will commit an offence that endangers the safety of the community or the safety or welfare of a person; and

(b) it is not practicable to adequately mitigate that risk by imposing particular conditions of release on bail

This removal of discretion will drive children into the criminal legal system rather than creating pathways out. Instead of closing down alternatives, the Queensland Government

⁴ See section 48AAA(2) of the proposed laws

⁵ Northern Territory Royal Commission, *Royal Commission into the Protection and Detention of Children in the Northern Territory*, (2017) Volume 1, p 53

⁶ Explanatory memorandum to the *Youth Justice and Other Legislation Amendment Bill 2021*

⁷ Australian Institute of Health and Welfare, *Youth Justice in Australia 2018-2019*, (May 2020), p 16, access ble: <https://www.aihw.gov.au/getmedia/a5a364b9-fe69-4d02-9c93-1965a69a3d93/aihw-juv-132.pdf.aspx?inline=true>

should be taking active steps to put programs and supports in place to mitigate any of the risks identified under s48AAA(2)(b). This is in keeping with the Atkinson Review's recommendation and the large body of evidence that supports providing programs and supports to children in community rather than in custody. This would be a better and more effective investment of the Queensland Government's resources than law changes which will result in the costly and ineffective detention of children.

b. Punishing instead of supporting children and their families

The proposed laws are focused on punishing rather than supporting children and their families. This is despite repeated mentions to the types of difficulties children and families may be experiencing that have contributed to children coming into contact with the criminal legal system.

For example, the Explanatory Memorandum explicitly refers to the cohort of young people targeted by the proposed laws as often coming from "tough and often traumatic family backgrounds."⁸ The Queensland Youth Justice Strategy cites the following evidence of the children coming into contact with the criminal legal system:

- 31% have a parent that has been held in adult custody;
- 58% had a diagnosed or suspected mental health or behavioural disorder;
- 52% were totally disengaged from education;
- Almost 20% were homeless or had unsuitable accommodation;
- 51% had some involvement with child protection agencies and
- 17% had a diagnosed or suspected disability⁹

These are the young people who the Queensland Police Commissioner has referred to as "hardcore youth criminals"¹⁰ who are in fact extremely vulnerable young people facing considerable hardship and disadvantage. It is our view that the Queensland Government has a proactive duty to provide the housing, disability support, health care, services and support that these children and their families need. The scale of mental health issues, disability, homelessness, involvement with child protection services and disengagement from formal education is clear evidence of the failure of Queensland state government institutions.

Given this, particular caution should be taken with respect to the proposed insertion of s 48AA(4)(a) which inserts the requirement that consideration be given when determining bail to:

⁸ Queensland Government, Youth Justice Strategy 2019–2023, access ble: <https://www.youthjustice.qld.gov.au/resources/youthjustice/reform/strategy.pdf>

⁹ Queensland Government, Youth Justice Strategy 2019–2023, access ble: <https://www.youthjustice.qld.gov.au/resources/youthjustice/reform/strategy.pdf>

¹⁰ Queensland Government, Media Release, 'Tough new action to target repeat youth offend' 9 February 2021 <https://statements.qld.gov.au/statements/91439>

“whether a parent, guardian or other person has indicated a willingness to do one or more of the following: support the young person to comply with their bail conditions, advise of any changes in circumstances that may impact the offender’s ability to comply with the bail conditions, or advise of any breaches of bail.”

This consideration should only be taken into account in support of a child’s release on bail. It would be manifestly unjust for a child’s vulnerabilities and lack of parental support to be used against their best interests in an application for bail. Instead, the Queensland Government should prioritise the provision of safe bail accommodation, family supports and services and housing.

c. Aggravating factors

The proposed law changes amend the Youth Justice Act to make the commission of an offence while on bail an aggravating factor. This is not consistent with principles of individuated justice and proportionality, and it disregards the extensive evidence regarding the inability of children to assess risk, consequences and engage in logical future planning.

Applying an aggravating factor test to children will criminalise basic mistakes and youthful behaviour (e.g. visiting a girlfriend in breach of bail curfew conditions or taking the wrong route home in breach of conditions to remain in a certain area).

Children should not be further criminalised for youthful, childlike behaviour that poses no threat to the community.

d. GPS tracking devices on children

Legal and human rights experts have spoken out vocally against the use of GPS tracking devices on children, condemning them as ineffective and setting children up to fail.¹¹ Currently, courts and police officers are not permitted to impose on a grant of bail to a young offender a condition that the offender wear a tracking device when released on bail for young people over the age of 16 years old. The proposed laws seek to change this. We echo the concerns of legal and human rights experts and rely on the extensive medical evidence that children and young people are still undergoing significant neurological development between the ages of 16 and 25 years old that can impede consequential, logical decision making.

¹¹ Kate McKenna, ‘GPS trackers set young criminals up for failure, Human Rights Commissioner says’ ABC 5 February 2021

We have further concerns regarding the ways in which use of GPS tracking devices, and the designation of certain geographical areas in which these devices are to be trialled, may further target and criminalise Aboriginal and Torres Strait Islander young people who live in certain areas. At every stage of contact with the criminal justice system Aboriginal children are overrepresented. Aboriginal children are significantly more likely than their non-Indigenous peers to be referred to court rather than receive a caution and be arrested rather than issued with a caution or diversion.¹² These proposed laws threaten to worsen this existing discrimination.

We note that there are a number of proposed “safeguards” under 52(A)(2)(f) which the Court must have consideration of when determining whether to impose a GPS tracking device on a child. These criteria include considerations such as a child’s ability to understand the conditions and comply, family support, stability of accommodation etc.

The evidence makes it clear that these safeguards are unlikely to be sufficient to protect the interests of these children. Given the Queensland Government’s own evidence that of the children targeted by these laws 58% had a diagnosed or suspected mental health or behavioural disorder, almost 20% were homeless or had unsuitable accommodation and 17% had a diagnosed or suspected disability¹³ it is highly likely that children and young people coming into contact with the criminal legal system are going to have significant vulnerabilities that make GPS tracking devices inappropriate and harmful.

e. Police powers to stop and scan children and young people

Finally, Change the Record is extremely concerned by the proposed laws introducing powers for police to randomly scan members of the public, without any reasonable suspicion that a crime has been, or will be, committed.

In addition to this representing an unjustified, arbitrary invasion of the privacy and freedom of movement of individuals, these police powers create a serious risk of police harassment and targeting of young people who are already overpoliced and over surveilled.¹⁴ They further risk worsening community relations between police and young people and therefore heightening and exacerbating tension and the criminalisation of young people in targeted regions.

¹² Sophie Trevitt and Bill Browne, ‘Raising the Age of Criminal Responsibility’ The Australia Institute, p7

¹³ Queensland Government, Youth Justice Strategy 2019–2023, access ble:
<https://www.youthjustice.qld.gov.au/resources/youthjustice/reform/strategy.pdf>

¹⁴ Sophie Trevitt and Bill Browne, ‘Raising the Age of Criminal Responsibility’ The Australia Institute, p7

4. Recommendations

Change the Record strongly recommends that the Queensland Parliament *reject* the proposed laws *in full*. The proposed laws are a step backwards. They are contrary to the reports commissioned previously by the Queensland Government, medical and legal expert evidence and the copious amounts of research that shows criminalising and incarcerating children only increases the likelihood of offending and ultimately fails both the child and the community.

For further information:

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