Queensland Human Rights Commission

Youth Justice and Other Legislation Amendment Bill

Submission to Legal Affairs and Safety Committee

Queensland Parliament

12 March 2021

Contents

Introduction

1. Thank you for the opportunity to make a submission to the Committee's consideration of the Youth Justice and Other Legislation Amendment Bill 2021.

2. The Queensland Human Rights Commission (the Commission) has functions under the *Anti-Discrimination Act 1991* and the *Human Rights Act 2019* to promote understanding, acceptance and discussion of human rights in Queensland, and to provide information and education about human rights.

Summary of this submission

In summary, this submission contends that:

- Electronic monitoring of children on bail is a serious incursion into the rights of children and families, is not evidence-based, and may create more harm than good;
- A presumption against bail is likely to add complication and inconsistency in the short-term and may actually undermine community safety in the longer term;
- Consideration of the availability of family "support" in assessing suitability for bail may further stress family relationships and lead to more children being remanded in custody;
- Increasing police powers to conduct arbitrary wand searches may unfairly impact children and other minority groups;
- Further justification is necessary for the limits on human rights by amendments aimed at addressing "hooning", particularly regarding the legal burden placed on a defendant to prove they were not driving;
- The Statement of Compatibility for the Bill wrongly suggests that the law is settled in Queensland about whether place of residence or geographic location is a ground for discrimination under the *Human Rights Act 2019*; and
- The likely consequence of the Bill is an increase of children in custody, in circumstances where the limited capacity of Queensland's youth detention centres may result in children detained for prolonged periods in police watch houses.

Recommendations

The Commission recommends that:

i. **Electronic monitoring:** Children not should be electronically monitored on bail, and the 2-year trial should not proceed as proposed, or at a minimum:

   a. The court should be directed only to impose a tracking device condition for a child who:

- Is not attending school, vocational education or training or a place of employment; or
- Does not have any caring responsibilities for other children including siblings; or
- Does not have a physical, psychological or behavioural condition, or disability that would prevent them from complying with the condition.

b. The government should consider the addition of a section such as section 30O of the *Bail Act 2000* (NZ) which limits the use of data obtained through electronic monitoring.

c. The government should incorporate safeguards modelled on those contained in the *Bail Act 2000* (NZ) into an amended Bill, including:

- Section 30G requiring all occupants at a residence to consent to electronic monitoring on bail;
- Section 30F(3)(d) consideration of consent of other occupants in report about suitability;
- Section 30O limiting use of information obtained from electronic monitoring.

ii. **Presumption against bail:** The presumption against bail for children is removed from the Bill, and the government instead implement more effective (and less restrictive options) which address the underlying causes of offending and re-offending on bail.

iii. If the Bill proceeds to introduce a presumption against bail, the government provide further justification about why the prescribed indictable offences for that presumption have been selected, based on criteria that is rationally connected to the purpose of community safety.

iv. The government reconsider the insertion of parental or other support for bail in court considerations for release on bail, or at a minimum address the legal and other implications for parents or other supporters who do not report breaches of bail to police or the court.

v. **Hand held scanners:** The Queensland Police Service exercise due caution and implement clear policies and procedures for the trial period to ensure that children and other minority groups are not unfairly targeted for scanning with hand held scanners.

vi. **Hooning offences:** The Bill be amended to remove any burden on an accused to prove they were not the driver of a vehicle involved in a type 1 offence, or at most such a burden is evidential (not legal).

vii. The Bill is further amended to ensure an accused can lead evidence at any time with the leave of the court for all type 1 offences.

viii. **Place of residence discrimination:** The government provide justification for the Bill discriminating against people based on their place of residence.

Background

3. The Commission appreciates the serious community concern in response to the recent high profile and tragic events involving alleged offending by children. The risks of motor vehicle theft and dangerous driving are apparent. Data provided in the Explanatory Note to the Bill regarding 10 per cent of all youth offenders accounting for 48 per cent of all youth crime is also troubling.[1]

4. However, the weight of evidence-informed expertise suggests that punitive 'tough on crime' programs and measures are not effective in rehabilitating offenders and reducing recidivism. Rather, as the Report on Youth Justice by Bob Atkinson[2] (Atkinson Report) makes clear, the best outcomes for victims, young offenders and the broader community will be achieved by initiatives that reduce offending and incarceration, by tackling the causes and consequences of youth crime.

5. To this end, many amendments in the Bill threaten to undermine the promising progress made under the government's *Working Together, Changing the Story* strategy,[3] which acknowledges that prevention works – and the underlying factors that lead to offending must be addressed to achieve long-lasting systemic changes.

6. The process in developing this Bill was inconsistent with other recommended changes to the criminal justice system. For example, the Queensland Productivity Commission's *Inquiry into imprisonment and recidivism* recommended the introduction of a 'justice impact test' to make more informed policy decisions. This Bill would have benefited from being tested by such a process, to assess the costs and benefits—including any unintended consequences—of the changes. This assessment would include consideration of any alternative options after stakeholder consultation,[4] and examine the impacts on Indigenous communities in remote and regional areas. That recommendation was informed by concerns about the overrepresentation of Aboriginal and Torres Strait Islander peoples in the criminal justice system.[5]

7. In the Commission's view, insufficient consideration has been given to whether the amendments are the safest response to a cohort of children with complex needs. Children in the youth justice system are some of the most vulnerable people in Queensland, many of whom are known to child safety and are disproportionately

[1] Childrens Court of Queensland, *Annual Report 2019-20* (Report, 2020) 1, 19 (figure 5). It is unclear if the description in the explanatory material of such children as "serious recidivist youth offenders" is accurate. These statistics relate to all proven offences and so it does not necessarily follow that the identified 10 per cent of child offenders are responsible for committing multiple serious offences.
[2] B Atkinson, *Report on Youth Justice from Bob Atkinson AO, APM, Special Advisor to Di Farmer MP, Minister for Child Safety, Youth and Women and Minister for Prevention of Domestic and Family Violence* (2018).
[3] Queensland Government, *Working Together, Changing the Sentence*, Youth Justice Strategy 2019-23 <https://www.youthjustice.qld.gov.au/resources/youthjustice/reform/strategy.pdf>
[4] Queensland Productivity Commission, *Inquiry into imprisonment and recidivism: final report* (August 2019), xivii. (QPC Inquiry into Recidivism)
[5] In its response to the Inquiry, the government suggested it would consider this proposal as part of a new whole of system decision-making architecture for Queensland's criminal justice system.

of Aboriginal or Torres Strait Islander descent. Closing the Gap targets include reducing the rates of incarceration of Aboriginal and Torres Strait Islander young people in detention by 30%,[6] and these amendments are steering Queensland away from this goal.

8. A key component of human rights compatibility is whether proposed measures will achieve their goal. The protection of community safety is certainly a legitimate purpose, but the proposed actions appear unlikely to achieve this goal and in some instances may increase risks to public safety; for example, previous research has indicated tracking might encourage some young people to commit even more offences.[7]

9. As explained in the Working Together, Changing the Story strategy:

- Detention is costly at a rate of $1500 per day per child;
- The Australian Institute of Health and Welfare found that 82% of children leaving detention returned within 12 months, while only 50% of children leaving a supervised community order returned within 12 months; and
- Most offences committed by children (including the latest spate of car thefts) in Queensland are property offences, but research shows that detention has no impact on property crime.[8]

10. The amendments made under this Bill are contrary to the 4 pillars of the Atkinson Report, and are likely to find more children in court (contrary to Pillar 2), more children in custody (contrary to Pillar 3) and increase rather than decrease reoffending (Pillar 4).

11. The government's inconsistent and at times contradictory approach makes it impossible to properly evaluate changes made to the youth justice system in recent years. This inconsistent approach is reflected in this Bill altering the fundamental principles in the *Youth Justice Act 1992*, which underpin the entire system.[9] Community safety requires sustained, consistent investment and a commitment to a shared goal from all stakeholders.[10]

Electronic monitoring as a condition of bail

12. Clause 26 of the Bill amends the *Youth Justice Act 1992* to allow a court to impose electronic monitoring (EM) for young people on bail under proposed section 52AA.

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[6] Commonwealth Government, 'Closing the Gap in Partnership', target no. 11. <https://www.closingthegap.gov.au/targets>

[7] D Cassidy, G Harper and S Brown, *Understanding electronic monitoring of juveniles on bail or remand to local authority accommodation: Report for the Home Office* (2005), 16.

[8] Queensland Government, *Working Together, Changing the Story*, Youth Justice Strategy 2019-23, 8. <https://www.youthjustice.qld.gov.au/resources/youthjustice/reform/strategy.pdf>

[9] Clause 33 amends schedule 1 of the Youth Justice Act, the charter of youth justice principles, to clarify that principle 1, which states that the community should be protected from offences, includes, in particular, recidivist high-risk offenders.

[10] As reflected in several recent reviews including the QPC Inquiry into Recidivism and the Atkinson Report.

The reason cited for the amendment is to "provide an appropriate level of monitoring while the young person is on bail, deterring them from committing further alleged offences."[11]

13. The court will only be able to impose a tracking device condition on a child:

- Over 16 years
- For prescribed offence
- Where a child has previously been found guilty of at least one indictable offence
- Where child is in a discrete geographical area
- Where the court is satisfied of a number of factors including:
- Capacity to understand the tracking advice condition
- Whether the child is likely to comply with the condition
- Whether a parent or another person has indicated a willingness to support their compliance
- Any other relevant matter the court considers relevant.
- After the chief executive (Queensland Corrective Services) has provided the court with a suitability assessment report containing their opinion about the suitability for a tracking device condition having had regard to the above factors.

14. Examples of relevant personal circumstances of a child that a court may consider relevant to determining likeliness of complying with the electronic monitoring condition are set out in proposed section 52AA(f)(ii) as follows:

- Whether the child has stable accommodation
- Whether the child has the support of a parent or another person to assist with compliance with the conditions
- Whether the child has access to a mobile phone to facilitate contact with any tracking device monitoring service
- Whether the child has access to an electricity supply

Human rights impacts

15. As noted in the Statement of Compatibility, this provision would impact on several rights protected under the HRA including:

- The right to privacy [section 25(a)]
- Right to protection of families [section 26(1)]
- Right to treatment in best interests of a child [section 26(2)]

[11] Explanatory Notes, Youth Justice and Other Legislation Amendment Bill 2021, 9.

- Right to freedom of movement (section 19)
- Right to freedom of association (section 22)
- Right of Indigenous peoples to maintain kinship ties [section 28(2)(c)]
- Right to equality and non-discrimination (section 15)

16. As well as the rights noted in the Statement of Compatibility, this amendment also engages s 32(3) as it fails to take account of the child's age and the desirability of promoting the child's rehabilitation. In addition, given the proposed amendment would result in children being treated less favourably than adults who are charged with the same prescribed offences, section 15 of the HRA (right to equality and non-discrimination) is also engaged. Age is a protected attribute under the *Anti-Discrimination Act 1991* (Qld) and is therefore also covered under the meaning of discrimination under the HRA.[12] As discussed further in the section *Discrimination based on place of residence* below, the Commission also considers that section 15 is engaged by virtue of geographic discrimination.

Purpose not achieved by electronic monitoring

17. The Bill acknowledges the significant incursion into human rights by including a Note under proposed section 52AA(1) referencing four sections of the *Human Rights Act 2019* to clarify that certain rights are relevant to the court's decision to impose an electronic tracking condition.[13]

18. The legitimate purpose put forward for the significant limitation on the rights of children is:

- To deter the child from committing further offences on bail, knowing they are being monitored, and thereby keeping the community safe;
- To allow police to investigate whether the child has or has not complied with their bail conditions and/or committed a crime, if an alert is reported to them; and
- Overall, to lower rates of reoffending of children while on bail.[14]

19. Undoubtedly, seeking to prevent or reduce crime to protect community safety is a legitimate purpose to be achieved. However, the Commission is unconvinced that the evidence-base is established to demonstrate that use of trackers will either deter crime or decrease offending. On the contrary, the Commission is concerned that the trial of electronic monitoring for a 2 year period may undermine efforts under the government's *Working Together, Changing the Story* strategy for youth justice and in some instances even increase risks to public safety.

20. Overall, the Commission is particularly concerned that:

[12] Discrimination, in relation to a person, includes direct discrimination or indirect discrimination, within the meaning of the *Anti-Discrimination Act 1991*, on the basis of an attribute stated in section 7 of that Act.
[13] Statement of Compatibility, Youth Justice and Other Legislation Amendment Bill 2021, 9.
[14] Statement of Compatibility, Youth Justice and Other Legislation Amendment Bill 2021, 8.

- The criterion for imposing this condition fails to include consideration of the stigma for a child who is in school, training, work or caring for others, and the practical difficulties of complying for those with a disability;
- Insufficient and misleading evidence has been provided to substantiate how the trackers will achieve the goal of improving community safety;
- Vigilantes may be incited to commit crimes when encountering young people wearing highly visible ankle monitors;
- There is a lack of clarity about what purposes data obtained from electronic trackers may be lawfully used for; and
- The trackers will unreasonably intrude into the privacy of people associated with the child such as other residents in their home.

Stigma and ability to comply for children subject to electronic monitoring on bail

21. The circumstances in which a court can impose a device and the list of 'relevant personal circumstances' seem to be partly drawn from the Atkinson Report. However, the Atkinson Report warned that "caution must be exercised in extending this technology for children". It found that, rather than using EM to deter children offending while on bail:

> The most suitable timing would perhaps be towards the end of a long sentence if behaviour in detention indicates that early release subject to electronic monitoring would be successful if the child were supported in the community with case management.[15]

22. The Atkinson Report warned against the prohibitive costs, challenges with practicalities such as recharging and internet access, and the elevated risk of stigma for children.[16]

23. However, the criterion included in the Bill for when the court can impose this condition fails to include consideration of the stigma that would be experienced by the child. The Atkinson Report anticipated it would only be suitable for "older children who are no longer attending school" particularly because the "current technology used by QCS is a fairly prominent ankle bracelet that would be visible on a child attending school".[17]

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[15] B Atkinson, *Report on Youth Justice from Bob Atkinson AO, APM, Special Advisor to Di Farmer MP, Minister for Child Safety, Youth and Women and Minister for Prevention of Domestic and Family Violence*, 2018, 66.
[16] B Atkinson, *Report on Youth Justice from Bob Atkinson AO, APM, Special Advisor to Di Farmer MP, Minister for Child Safety, Youth and Women and Minister for Prevention of Domestic and Family Violence*, 2018, 66.
[17] B Atkinson, *Report on Youth Justice from Bob Atkinson AO, APM, Special Advisor to Di Farmer MP, Minister for Child Safety, Youth and Women and Minister for Prevention of Domestic and Family Violence*, 2018, 66.

24. While the Statement of Compatibility acknowledges that electronic monitoring is a "large intrusion into privacy, especially for children" and notes that it is a "source of stigma and shame for children when at school, work or in the community",[18] these factors have not been added as mandatory considerations for courts.

25. In New Zealand, which is referenced in the Statement of Compatibility as a jurisdiction where monitoring has been used on children, a suitability assessment for electronic monitoring on bail must consider:

> the defendant's personal circumstances, including employment, training, and childcare commitments.[19]

26. Further, while the court must consider the capacity of a child to understand the condition, the list of factors does not currently include consideration of whether a child is unable to comply with the condition because of a disability. This consideration should extend to whether a child has a physical, psychological or behavioural condition that will prevent them from wearing an ankle-monitor.

27. The Commission considers that the use of highly visible ankle trackers is extremely inappropriate for any children engaged in school, vocational education, training or work. Young people who are themselves parents or caregivers should not be monitored in circumstances that it will also cause stigma for a child in their care. Some young people will be unable to comply with a condition because of a disability. Therefore, at a minimum the court should be directed only to impose a tracking device condition for a child who:

- Is not attending school, vocational education or training or a place of employment.
- Does not have any caring responsibilities for other children including siblings.
- Does not have a physical, psychological or behavioural condition or disability that would prevent them from complying with the condition.

Misleading and insufficient evidence of the effectiveness of EM bail

28. For legislation to be compatible with human rights, there must be a rational connection between the legitimate purpose and the limitation on rights; in other words, the limitation must help to achieve the purpose.

29. Publicly available information suggest that the only adults currently subjected to electronic monitoring are those falling under the *Dangerous Prisoners (Sexual Offenders) Act 2003*. Monitoring has been previously recommended for

[18] Statement of Compatibility, Youth Justice and Other Legislation Amendment Bill 2021, 9.
[19] *Bail Act 2000* (NZ) section 30F(4).

perpetrators of domestic and family violence and Queensland Police Service has also trialled monitoring technology for this cohort.[20]

30. A meta-analysis of 18 studies from around the world about electronic monitoring published in May 2020[21] found that GPS trackers do not have a statistically significant effect on crime, except when used for sex offenders placed on electronic monitoring post-trial. The study found that there were 'sobering results'[22] and that:

> Overall, our findings indicate that EM has been shown to produce positive effects for certain offenders (such as sex offenders), at certain points in the criminal justice process (post-trial instead of prison), and perhaps in combination with other conditions attached (such as geographic restrictions) and therapeutic components. The evidence suggests it is less effective at reducing recidivism for other offender sub-groups and under different conditions.[23]

31. Conversely, the Statement of Compatibility provides a misleading claim that "studies have shown that electronic tracking may help to reduce rates of reoffending on bail"[24] and cites three dated sources:

- A 2005 report from the Home Office in the UK[25] – which considered tagging young people on bail with mixed results (further explained in following section);
- A 1994 article from Detroit[26] – which does not consider tracking of children on bail nor considers effectiveness at all, instead focussing on the human rights, costs and impacts on structure and routine for young people in home detention where it is used as an alternative to detention;
- A 2005 article from Florida[27] – which does not consider tracking of children at all and argues that the use of electronic monitoring should only be targeted to the most dangerous adults.

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[20] Queensland Police Service, 'About Electronic Monitoring' <https://www.police.qld.gov.au/initiatives/electronic-monitoring-gps-tracking-of-bailees/about-electronic-monitoring>
[21] J Belur et al, 'A Systematic Review of the Effectiveness of the Electronic Monitoring of Offenders', *Journal of Criminal Justice,* vol. 68, May-June 2020.
[22] J Belur et al, 'A Systematic Review of the Effectiveness of the Electronic Monitoring of Offenders', *Journal of Criminal Justice,* vol. 68, May-June 2020, 34.
[23] J Belur et al, 'A Systematic Review of the Effectiveness of the Electronic Monitoring of Offenders', *Journal of Criminal Justice,* vol. 68, May-June 2020, 34.
[24] Statement of Compatibility, Youth Justice and Other Legislation Amendment Bill 2021, 8.
[25] D Cassidy, G Harper and S Brown, Understanding electronic monitoring of juveniles on bail or remand to local authority accommodation: Report for the Home Office (2005)
[26] M Raider, 'Juvenile Electronic Monitoring: A Community Based Program to Augment Residential Treatment' (1994) 12(2) Residential Treatment of Children and Youth 37, 42
[27] Office of Program Policy Analysis & Government Accountability (an office of the Florida Legislature), Electronic monitoring should be better targeted to the most dangerous offenders (Report No 05-19, April 2005)

EM bail in New Zealand

32. The Statement of Compatibility refers to the fact that tracking on bail is an *option* for children in New Zealand, and cites a New Zealand Department of Corrections' evaluation of electronic monitoring quoting a 19% re-conviction rate for those on home detention compared with 42% for those imprisoned. "Home detention" in New Zealand is a broad category that includes mostly "front-end" (sentencing option) and post-release (post-prison release order) with a small number on EM bail.

33. However, this evaluation is largely irrelevant because:

- At no point does the evaluation refer to the use of trackers on young people, including on EM bail. While the article draws on statistical data from the New Zealand Department of Corrections there is no breakdown of how many children are represented in this data sample, if any.[28]
- The article generalises the positive outcomes in terms of reducing recidivism and expenses with reference to *all* sentences or orders served under EM in New Zealand, despite the fact that under 10% in the sample were on EM bail (as opposed to being sentenced to home detention). [29]

34. The Commission was able to locate statistics from the New Zealand government only on the number of people *under 19* who were placed on EM bail. For example, 336 of 2595 people on EM bail in 2018/19 were 19 or under.[30] However, the numbers of children 12-17 on EM bail and recidivism rates for young people do not appear to be available to the public, nor has the effectiveness of EM bail on this particular cohort been scrutinised by independent research.

35. There are likely to be significant differences in the levels of capacity and compliance amongst 16 and 17 year olds compared with adult offenders. Comparing successes of EM across an range of circumstances amongst adults in New Zealand, where it is mostly used in as a sentencing option as an *alternative* to prison, does not assist the government to assess the likely effectiveness in the context of a Queensland trial amongst children only on bail.

UK Home Office study

36. The only source cited in the Statement of Compatibility that actually evaluated the success of electronic monitoring for young people on bail is a 2005 report from the Home Office in the UK. The report studied 315 young people in 2002-3 who had been electronically "tagged" over a 21-month period. The report acknowledges that courts rarely imposed trackers and when they did it was along with a bail

[28] The Oranga Tamariki (Ministry for Children) appears to administer youth justice (children 12-17) in New Zealand rather than the Department of Corrections, and it is unclear whether the data cited in the report includes any 16 or 17 year olds.
[29] In the year noted in the evaluation, 2016, the vast majority (1613) were on home detention sentences or on community detention orders (1603), with only 512 being on EM bail. Refer to Department of Corrections, '2016/17 Annual Report', 87.
[30] Justice.gov.nz, Data tables – 'People remanded on bail or at large and offending while on bail or at large' <https://www.justice.govt.nz/justice-sector-policy/research-data/justice-statistics/data-tables/#cyp>

support package. The study found mixed results with the effect of tagging on compliance, summarising that:

> Fewer juveniles breached after they were tagged, but those who continued to breach after they were tagged breached more often.[31]

37. While some of the young people interviewed for the study indicated that tagging helped them "stay out of trouble," others commented the tagging was restricting time in the community and with family members outside of the GPS area. Some young people commented on the negative effects of stigma when going to places such as swimming pools.[32]

38. The proportion of juveniles who had "responded positively" to tagging was around 7 percent of juveniles in the sample.[33] Of great concern to the Commission, the most recidivist offenders' behaviours were worsened by tracking.

39. In summary, evidence from a recent meta-analysis of the effectiveness of EM as a crime reduction strategy over the last 20 years and across many jurisdictions shows that electronic monitoring has been trialled extensively and in almost all cases it has failed to live up to the promise of reducing crime and improving community safety.[34] Not only is there scant or no evidence that tracking young people on bail is effective, to the contrary it may make the behaviour of the very individuals that the Bill purports to deal with (the 10% committing 48% of crimes)[35] worse.

Increasing crime in regional areas

40. Considering media reports of rising vigilantism in some regional centres such as Townsville, the Commission is concerned that highly visible ankle monitors may increase violent offending and reduce community safety by making young people on bail an obvious and visible target for vigilantes. Reports of vigilantes intentionally targeting people based on race, including with physical violence, are deeply concerning, and ankle monitors may ignite further tensions in communities.[36]

[31] D Cassidy, G Harper and S Brown, Understanding electronic monitoring of juveniles on bail or remand to local authority accommodation: Report for the Home Office (2005), 16.
[32] D Cassidy, G Harper and S Brown, Understanding electronic monitoring of juveniles on bail or remand to local authority accommodation: Report for the Home Office (2005), 12-13.
[33] D Cassidy, G Harper and S Brown, Understanding electronic monitoring of juveniles on bail or remand to local authority accommodation: Report for the Home Office (2005), 11.
[34] J Belur et al, 'A Systematic Review of the Effectiveness of the Electronic Monitoring of Offenders', *Journal of Criminal Justice,* vol. 68, May-June 2020.
[35] Explanatory Notes, Youth Justice and Other Legislation Amendment Bill 2021, 1.
[36] ABC News, 'Why the growing number of vigilantes in response to youth crime in Townsville is worrying the Indigenous community' (2 March 2021) <https://www.abc.net.au/news/2021-03-02/townsville-youth-crime-vigilantes-worry-indigenous-community/13192838>

Use of information obtained from electronic monitoring

41. The Bill currently contains no safeguards to prevent the data captured during electronic monitoring being used for another purpose aside from monitoring a child on bail.

42. The government should consider addition of a section such as section 30O of the *Bail Act 2000* (NZ) which requires that information obtained during the course of monitoring can only be used to verify compliance with bail conditions, detecting an offence and providing evidence of that offence, and verifying that the person has not tampered with or otherwise interfered with the equipment. This would clarify how authorities can use the information, and prevent uses which might constitute an unreasonable limitation on rights – for example, if the data can be used not only to investigate offences involving the child on bail, but also as evidence against other third parties.

Rights of other occupants in child's home

43. A further concern is that monitoring equipment will need to be installed and maintained in the child's residence, which will impact on the rights to privacy and home (s 25 HRA) of other occupants, including family members (s 26 HRA). A resource from New Zealand Department of Corrections for other occupants in the home of a person being monitored cites the common concerns for family members including:

> …lack of privacy with random visits being conducted by Police personnel and field officers to make sure EM conditions are being complied with.[37]

44. In New Zealand, an occupant has the right to refuse to provide consent to the defendant being electronically monitored at their address ((section 30G) *Bail Act 2000* (NZ). The court must consider, under section 30F of the *Bail Act 2000* (NZ):

> whether every relevant occupant of the premises at the proposed EM address has consented, in accordance with section 30G(2), to the defendant remaining at the address while on bail with an EM condition.

45. However, neither this Bill nor the Statement of Compatibility has anticipated the need to obtain consent from other household members, nor has properly contemplated how the privacy of occupants in the child's home can be safeguarded in the event a child is being monitored.

46. The Commission is strongly opposed to electronic monitoring of children on bail. At a minimum, the Commission urges the government to incorporate safeguards modelled on those contained in the *Bail Act 2000* (NZ) into an amended Bill, including:

[37] Corrections NZ, 'Electronic monitoring: important information for family, whanau and occupants' <https://www.corrections.govt.nz/resources/newsletters_and_brochures/electronic_monitoring_important_information_for_family_whanau_and_occupants>

- Section 30G requiring all occupants at a residence to consent to electronic monitoring on bail
- Section 30F(3)(d) consideration of consent of other occupants in report about suitability
- Section 30O limiting use of information obtained from electronic monitoring

Presumption against bail

47. Clause 24 of the Bill inserts proposed s 48AF into the *Youth Justice Act 1992,* which states that a court or police officer must refuse to release a child from custody unless the child shows cause why the child's detention in custody is not justified. The section applies in relation to a child in custody in connection with a charge of a 'prescribed indictable offence' if the offence is allegedly committed while the child was at large or was released awaiting trial or sentence for another indictable offence.

48. These amendments follow closely after those made to the *Youth Justice Act* last year, which were declared urgent and passed without parliamentary committee scrutiny ('2020 amendments').[38] The 2020 amendments mean a child must be refused bail if judged to be an unacceptable risk to the safety of the community. That amendment came less than a year after changes were introduced to remove legislative barriers to bail.[39] The Commission previously noted that the Statement of Compatibility for the 2020 amendments failed to consider and justify limitations on several rights.[40] As it is too early to understand the full impact (and compatibility) of the 2020 amendments, we suggest it will be challenging for the government to justify any further changes to bail laws so soon after these earlier changes. The interaction of the various provisions of the *Youth Justice Act* and *Bail Act 1980* after these changes will create an even more complex set of principles, presumptions and considerations for police and courts to apply.

Human rights impacts

49. As the Statement of Compatibility notes, a presumption against bail limits several human rights under the HRA including the right to liberty (s 29) and protection of children (s 26) and is 'at odds' with international standards that depriving children of their liberty must be reserved as a last resort and limited to exceptional cases. The statement also notes that the right to be presumed innocent under s 32(1) is also limited for similar reasons.

50. The Statement of Compatibility is silent on several other applicable rights that should have been considered. Section 32(3) in particular provides that "a child

[38] Via the *Community Services Industry (Portable Long Service Leave) Act 2020*
[39] *Youth Justice and Other Legislation Amendment Act 2019*
[40] See Queensland Human Rights Commission, Submission No 44 to Legal Affairs and Community Safety Committee, Parliament of Queensland, *Inquiry into the Queensland Government's health response to COVID-19* (6 July 2020), [93] and Queensland Human Rights Commission, *Putting people first: The first annual report on the operation of Queensland's Human Rights Act 2019-20* (Report, 2020), 36.

charged with a criminal offence has the right to a procedure that takes account of the child's age and the desirability of promoting the child's rehabilitation." Despite not discussing this right, the Statement acknowledges that these changes are contrary to efforts to rehabilitate children in the criminal justice system.

51. Further, in light of the likelihood that these changes will increase the number of children in detention, thereby risking the prolonged detention of all children (remand and sentenced) in adult watch houses, the laws are also likely to limit s 33 of the HRA which requires that children must be segregated from detained adults and that a child who has been convicted of an offence must be treated in a way that is appropriate for the child's age.

Selection of prescribed offences

52. The Commission welcomes that the government has considered the ACT Supreme Court decision in *Re application for bail by Islam* (2010) 175 ACTR 30 ('*Re Islam*'), by applying the normal bail criteria in s 48AA(4) to the consideration as to whether a child has shown cause for bail. *Re Islam* is particularly significant to these amendments, as it is a declaration of incompatibility under human rights law in Australia concerning a presumption against bail (involving an adult).

53. In deciding whether a limit on a human rights is reasonable and justified, s 13 of the HRA lists several relevant factors to be considered. The Commission is concerned the Statement of Compatibility does not provide sufficient detail to satisfy these requirements.

54. In particular, the provisions cannot be said to be demonstrably reasonable and proportionate without further justification about why the 'prescribed indictable offences' have been selected, based on some criteria that is rationally connected to the purpose. Without that justification, these offences may fall foul to the same concerns that the court raised in *Re Islam.*

55. As already discussed, for legislation to be compatible with human rights, any limitation on rights must help to achieve the purpose. The purpose of the amendments appear to repeat the general purpose of bail and remand, which are arguably already satisfied under the existing provisions of the *Youth Justice Act*:

    - To ensure the accused's presence at trial, as those charged with serious offences are a greater flight risk.[41]

[41] The Queensland Court of Appeal suggested the strength of the crown's case was an important factor in *Lacey v DPP* [2007] QCA 413 at [13]. In assessing flight risk in the USA, Associate Professor Lauryn Gouldin notes that: "Defendants charged with more serious offenses like murder or rape do not, in fact, fail to appear at higher rates than those with lesser charges. These studies conclude that other factors, such as employment, family ties, community reputation, and prior record of appearances, are better predictors of nonappearance" Lauryn P Gouldin, 'Defining Flight Risk', *The University of Chicago Law Review* [85: 2018] 677, 705.

- "Reversing the onus for bail means that the child will more likely be detained where they present an unacceptable risk to the community. Accordingly, reversing the onus helps to achieve its purpose of ensuring community safety".

56. The Statement of Compatibility does not discuss that one of the factors that led the court to making a declaration of incomparability in *Re Islam* was the lack of an identifiable and rational reason why certain offences were subject to the presumption against bail. The court did not find that presumptions against bail per se will always be incompatible with the right to liberty,[42] but that:

- The need for community protection may have more weight in relation some of the offences covered by the presumption than others. It was not clear that the presumption was confined sufficiently to ensure that whatever justification could be proposed applied to all the classes of offenders.
- The court accepted the general relationship between the seriousness of a charge (as indicated by its penalty) and the risks of granting bail. However, the fact that there is such a relationship, and the fact that the penalties for offences can be placed on a continuum of severity, did not provide an obvious basis for adding a further restriction at any point, or any particular point, on that continuum.
- Further restrictions being imposed might once have been explained by the application of the death penalty, however the sentence of life imprisonment does not have quite the same impact.
- The presumption against bail did not apply to all offences carrying penalties of life imprisonment. Nor did it apply to a range of other serious offences carrying maximum penalties of 25 years imprisonment, or to a person charged with multiple serious offences where there is scope for an extremely long total period of imprisonment.[43]

57. The court concluded:

> 357. Thus, there is a real question in this case whether the limitation imposed by s 9C is rationally connected to the purposes of the section…There may be a logical connection between the relevant purpose of the section and some of the cases that are caught by the section, but the scope and operation of the section are both too wide and too narrow, in different respects, for the section to be accepted as "narrowly tailored to fit its purpose".

58. The Bill does address some these concerns as the 'prescribed indictable offences' include 'a life offence'. However, other offences are also included, including offences that if committed by an adult, would make the adult liable to imprisonment for 14 years or more, and various offences under the criminal code:

- s 315A: choking, suffocation or strangulation in a domestic setting (maximum penalty 7 years imprisonment).

[42] *Re Islam* [333]. The court observed: "I do not need to express the view that a presumption against bail in any form and for any class of offences would be objectionable by reference to s 18(5) of the Human Rights Act, and I am not currently convinced that such a view would be correct."
[43] *Re Islam* [353] – [356]

- s 323: wounding (maximum penalty 7 years imprisonment).
- s 328A: dangerous operation of a vehicle (maximum penalty depending on circumstances up to 14 years imprisonment).
- s 339: assaults occasioning bodily harm (10 years imprisonment).
- s 408A(1), unlawful use of a motor vehicle and the child is the driver (7 years imprisonment).
- s 408A(1A) or (1B) unlawful use of a motor vehicle, aircraft or vessel involving destruction, damage or interference (10 years imprisonment).
- s 412: attempted robbery. (up to life imprisonment, else 7 or 14 years imprisonment).

59. Some of these offences relate to recent high profile and tragic events in Queensland. There may be sound evidence for why refusing bail in such cases is reasonable. However, such evidence is not provided in the Statement of Compatibility, and the Commission suggests that it would be not reasonable to introduce a presumption against bail merely based on the level of media attention around a particular offence at a point in time. Such an approach could eventually see all offences subject to such a presumption.

60. The Commission appreciates the community and government concern about offences being committed by children while on bail. It is helpful that the government has provided relevant data on this issue as part of the justification for these changes. However, this information does include the seriousness and nature of offences currently committed while on bail, nor if there is some correlation between this offending and the offences chosen for the presumption against bail. The court stated in *Re Islam:*

> 360. …It has to be said that no attempt was made to identify "the problem confronted" by s 9C as distinct from the general purposes of bail legislation.

Alternative options

61. The Statement of Compatibility only briefly discusses some less restrictive options, such as having no presumption for or against bail in certain limited circumstances (noting that under s 48 of the *Youth Justice Act* currently there is a presumption that a child should be released from custody).[44] There are also other less restrictive options not discussed in the statement. For example proposed s 404 states that the presumption against bail will apply even if the prior charge of an indictable offence was allegedly committed before commencement of the bill. There is no consideration in the Statement of Compatibility for why the presumption could not apply only prospectively to alleged indictable offences committed after commencement.

62. However, even with minor changes, it remains questionable that a presumption against bail for children will ever make our community safer.[45] The Statement of

[44] In *Re Islam* at [376] the court observed that 'a less restrictive means of achieving the purposes already canvassed is available, namely to "leave the entire question of bail as a discretionary matter for the courts" and to leave the courts to administer bail "in the absence of legislative guidance".'

Compatibility concludes that the presumption against bail is contrary to the objectives and principles of the *Youth Justice Act 1992.* Those objectives and principles include recognising the importance of family and communities in the provision of services designed to rehabilitate children,[46] that the youth justice system should uphold the rights of children and keep them safe and treat children in a way that allows them to be reintegrated into the community.[47] Further, research indicates that even short-term, pre-trial detention contributes to future offending.[48] Yet the Statement of Compatibility states (in quoting many relevant international human rights standards):

> It is also acknowledged that increasing the risk of detention represents a serious incursion into the right of children to protection in their best interests, given that 'the use of deprivation of liberty has very negative consequences for the child's harmonious development and seriously hampers his/her reintegration into society'.[49]

63. In light of this, the Commission is opposed to the amendments concerning a presumption against bail as they are inconsistent with the rights of children and the purposes of the *Youth Justice Act*. By the Government's own admission, they are unlikely to reintegrate children into our community and are therefore unlikely to achieve their purpose of making the community safer. This is particularly so when an Australian court has previously found that a presumption against bail for an adult was incompatible with human rights.

64. A more effective strategy is likely to be one in which the underlying causes of offending and reoffending (particularly reoffending while on bail) are addressed. In this respect, we disagree with the Government's conclusion that 'the final alternative of allocating more resources to prevention and diversion is not a true alternative because this can be undertaken alongside a presumption against bail'. Less restrictive options available to government are not confined to legislative amendment. Not only are such measures a less restrictive alternative to these provisions, but such measures are also more likely to achieve the purpose of making the community safer.

Parental or other support for youth bail

65. Clause 21(3) of the Bill inserts section 48AA(4)(a)(va) in addition to the existing factors courts may have regard to when considering release on bail. Under this amendment, the court may consider amongst many other factors, whether a parent of the child, or another person has indicated a willingness to:

- Support the child to comply;
- Notify the chief executive or a police officer of a change in circumstances;

[46] Section 2(e).
[47] Principles 2, 5 and 21.
[48] M McMahon, 'No bail, more jail?' (Research Paper, Department of Parliamentary Services, Parliament of Victoria (Research Paper No 3, August 2019), 24:"Paradoxically, the protective benefits of short-term, pre-trial incapacitation may ultimately compromise community safety"
[49] Statement of Compatibility, Youth Justice and Other Legislation Amendment Bill 2021, 14.

- Notify the chief executive or a police officer of a breach of bail conditions.

66. The Statement of Compatibility notes that this amendment may impact on the right to non-interference with family [s 25(a)], right to protection of family [s 26(1)], the right to protection of best interests of the child [s 26(2)], and right to maintain kinship ties for Aboriginal and Torres Strait Islander people [s28(2)(c)].

67. The stated purpose for this amendment is to reduce offending by increasing:

> ...involvement of parents, guardians, or other persons in the child's life to support the youth on bail, assist the court or police in bail decision-making and compliance with bail conditions.[50]

68. The Statement of Compatibility cites the risk factor of family dysfunction for encouraging youth offending and refers to a 2018 survey where young people indicated they wanted more support including "emotional support" from case workers and family.

69. It is disingenuous to suggest that requiring a parent, family member or other supporter of a child to report their actions on bail to police will lead to improved family connections or better "emotional support". It is also unclear what the implications are for the person undertaking to support the child in the event that the child breaches bail and the person discharged with the duty to inform the police or court fails to do so.[51] Legal certainty, which requires "that criminal offences much be defined with sufficient precision to enable individuals to foresee" the consequences of their actions, is a feature of the common law and many different human rights standards including the right to liberty.[52]

70. Even if there are no legal consequences, this amendment may deter rather than encourage ongoing support. Rather than re-engaging children with their families, the Commission is concerned that this may lead to young people being ostracised where their supporters are fearful to "vouch" for them lest they be placed in an uncomfortable situation of having to inform on them to police. Consequently, the inclusion of this consideration for courts may lead to more children being remanded in custody rather than released on bail to the family home.

Police powers to use hand held scanners without reasonable suspicion

71. Clause 5 amends section 30(1) of the *Police Powers and Responsibilities Act 2000* (PPRA) by providing for an additional prescribe circumstance for searching a

[50] Statement of Compatibility, Youth Justice and Other Legislation Amendment Bill 2021, 10.
[51] Evidence before the recent Public Briefing suggests there is no penalty. Evidence to Legal Affairs and Safety Committee, Parliament of Queensland, Brisbane, 8 March 2021, 6 (Kate Connors, Department of Children, Youth Justice and Multicultural Affairs).
[52] See for example United Kingdom Parliament, Joint Committee on Human Rights, *Fourteenth Report* (25 May 2005) [2.6] to [2.7]

person without warrant, and Clause 6 allows for police to use hand held scanners without warrant in public places in the Broadbeach and Surfers Paradise CBDs.

72. The effect of the amendment is that that police can use a hand held scanner to detect a knife on any person in the prescribed area where authorised by a senior police officer. As noted in the Statement of Compatibility, this is a limitation of freedom of movement (s 19) and the right to dignity and bodily integrity under the right to privacy [s 25(a)], as well as right to equality before the law [s 15] since the scan can occur without any reasonable suspicion[53]. The Statement of Compatibility anticipates that it will "increase the risk that children will have interactions with police" and therefore engages s 26(2).

73. The Commission shares the view that protecting the community from knife crime may outweigh the impact on individual human rights.[54] Compared with the alternatives such as strip and pat down searches, a wand search is the least intrusive and likely to achieve the purpose of detecting knives. A further safeguard is that the provision requires that police exercise the power in the least intrusive way practicable in the circumstances.[55]

74. However, the Commission remains concerned that an arbitrary police power to stop and scan a person in the absence of any reason may have negative implications in practice. Arbitrary search powers tend to be disproportionately applied to minority racial groups and children.

75. For example, the UN Human Rights Committee considered a situation where Spanish police routinely checked identification and immigration papers but only for people of colour. While there was a legitimate purpose to be achieved in ensuring immigration laws are upheld, the Human Rights Committee found that an approach that racially profiled people was disproportionate and unlawful.[56]

76. In circumstances that it has been acknowledged publicly that the intention of the Bill is to reduce offending including knife crime amongst young people it is difficult to see how in practice this would not lead to police profiling and targeting children,[57] which may be incompatible with the human right to equality before the law (section 15 HRA). However, if a system like a roadside random breath test was set up where every person was required to be scanned prior to entering a particular zone regardless of age then this practice may be more likely to be compatible with human rights.

Changes to 'hooning' offences

77. The Bill amends the PPRA to expand existing powers to compel information to all 'type 1 vehicle related offences' (so-called hooning offences involving speed trial,

[53] Statement of Compatibility, Youth Justice and Other Legislation Amendment Bill 2021, 5.
[54] Statement of Compatibility, Youth Justice and Other Legislation Amendment Bill 2021, 17.
[55] Clause 6, Youth Justice and Other Legislation Amendment Bill 2021
[56] *Lecraft v Spain* (1493/06)
[57] Minister for Police and Corrective Services and Minister for Fire and Emergency Services, 'Tough new Youth Justice reforms introduced to Parliament' (Media Release, 25 February 2021) <https://statements.qld.gov.au/statements/91549>

races and burn outs). The amended provisions will apply to allow police to issue a notice to a car owner requiring the owner to provide certain information.

78. The Statement of Compatibility notes that by requiring the provision of information via such a notice, the proposed amendments limit the right to privacy (s 25 of the HRA) and the right not to be compelled to testify against oneself or coffee guilt (s 32(2)(k)). Additionally, a failure to respond to the notice results in the person being deemed to have been the driver of the vehicle involved in offence and so they may be prosecuted, and must then overcome a 'legal burden' that they were not the driver. Such deeming and reverse onus limits the right to be presumed innocent until proven guilty (s 32(1) of the HR Act).

79. In applying s 13 of the HRA to these amendments, the Commission is again concerned about whether these amendments will achieve their purpose and are the least restrictive way of doing so. Chapter 22 of the Act set out specific powers aimed at addressing a very particular type of offence. These amendments would extend those powers to a much broader range of alleged conduct not apparently directly relevant to the original evasion offence.

Human rights impacts

80. One justification for the changes provided in the Statement of Compatibility is that "the proposed amendments will be useful in circumstances where vehicles are being taken from family members or other persons who may wish to protect juvenile offenders or where registered owners were passengers in the vehicle". If so, the Statement of Compatibility should justify how the amendments reasonably limit the right to family in s 26 of the HRA.

81. The Statement suggests that the purpose of this amendment is that it will assist police investigate offences leading to the reduction of crime and improve community safety. Such justification could be applicable to any amendment involving enhanced police powers. We suggest that to justify the limitation on rights, the Statement of Compatibility must set out how the specific powers in chapter 22 relate directly to each of the offences defined as 'type 1 vehicle related offences'.

82. This is particularly so given the lack of evidence in the explanatory material about:

- The prevalence of type 1 vehicle related offences, particularly among the so-called 'serious recidivist young offenders' (The Bill's primary objective is addressing offending by this group).[58]
- The statement itself recognises that "the connection between the reversal of the onus of proof and the legitimate purpose of community safety is less clear".[59]

[58] Explanatory Notes, Youth Justice and Other Legislation Amendment Bill 2021 (Qld) 1.
[59] Statement of Compatibility, Youth Justice and Other Legislation Amendment Bill 2021 (Qld) 19.

- The statement suggests that the "fact that the person is the owner of the vehicle involved in the offence gives rise to a logical inference that the person was involved in the type 1 vehicle related offence, because most vehicles are usually driven by their owners."[60]

83. More relevant evidence would be the number of type 1 vehicle related offences that are currently committed by the owner of the vehicle.

84. Further, and perhaps of most importance, is how broadening the powers in chapter 22 to further offences is consistent with the original justification for these powers. The purpose of Chapter 22 of the PPRA was previously explained as being to enhance safety by avoiding police pursuits:

> The evade police provisions in Chapter 22…aim to improve community safety by reducing the need for police to pursue fleeing drivers. When police allow a vehicle to flee, and in doing so avoid a potentially dangerous pursuit, the police may not know, or be able to positively identify, the driver at the time of the incident. The evade police provisions therefore provide police with investigative powers and tools to identify the driver of a fleeing/offending vehicle without the need to engage in a pursuit. These include the power to serve an evasion offence notice (EON) on the registered owner of the vehicle that requires the owner to provide certain information to investigating police.[61]

Legal vs evidential burdens

85. If a person does not respond to a type 1 vehicle related offence notice, they will not be able to rely upon the information that would have been provided in such a notice in their defence, unless they provide 21 business days' notice to the prosecuting authority and the court grants the person leave to rely on the evidence (existing s 756(5) of the PPR Act). Additionally, a person who does not respond to a type 1 vehicle related offence notice is taken to have been the driver of the vehicle involved in the type 1 vehicle related offence and may be prosecuted for the offence even though the actual offender may have been someone else. The person must satisfy a legal burden (on the balance of probabilities) that they were not the driver of the motor vehicle involved.

86. The Statement of Compatibility notes that these additional hurdles increase the risk that a person will be found guilty of an offence notwithstanding a reasonable doubt or the existence of exculpatory evidence, an additional limit on the right to be presumed innocent until proven guilty according to law (s 32(1) of the HR Act).

87. Of particular concern is the legal burden placed upon the defendant in these circumstances to prove they were not the driver. Usually, the prosecution bears both the legal and evidential burden of proof, as it is for the crown to prove an offence. The legal burden generally means the burden of proving the existence of the matter while the evidential burden means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not

[60] Statement of Compatibility, Youth Justice and Other Legislation Amendment Bill 2021 (Qld) 19.
[61] Explanatory Notes ,Police Powers and Responsibilities and Other Legislation Amendment Bill 2018, 5.

exist.[62] The Commonwealth Parliamentary Joint Committee on Human Rights has observed:

> Reverse burden offences will be likely to be compatible with the presumption of innocence where they are shown by legislation proponents to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.[63]

88. The Australian Law Reform Commission has also said that

> Reversal of the legal burden of proof on an issue essential to culpability in an offence arguably provides the greatest interference with the presumption of innocence, and its necessity requires the strongest justification.[64]

89. The Guide to Framing Commonwealth Offences similarly suggests:

> The fact that it is difficult for the prosecution to prove a particular matter has not traditionally been considered in itself to be a sound justification for placing the burden of proof on a defendant. If an element of the offence is difficult for the prosecution to prove, imposing a burden of proof on the defendant in respect of that element may place the defendant in a position in which he or she would also find it difficult to produce the information needed to avoid conviction. This would generally be unjust.[65]

90. The Commonwealth guide also states that placing (a generally evidential) burden of proof on the defendant by creating a defence is more readily justified if the matter in question is not central to the question of culpability for the offence, the matter is peculiarly within the defendant's knowledge, the penalty is relatively low and the conduct poses a grave danger to public health and safety.[66]

91. In justifying the human rights limitations, the Statement of Compatibility cites various cases from Canada and the United Kingdom, without discussion.[67] We note they all generally relate to various reverse onus provisions placing a burden on the defendant. In at least one, *R v Lambert* [2002] 2 AC 545 a majority of the House of Lords found the imposition of a legal burden on the accused to prove he

[62] See for example *Criminal Code Act 1995* (Cth) Division 13.
[63] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Guidance Note 2: Offence provisions, civil penalties and human rights,* (December 2014), 2.
[64] Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (Report No 129, December 2015), [9.123]
[65] Commonwealth Government (Attorney-General's Department), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 50.
[66] Commonwealth Government (Attorney-General's Department), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 50-51.
[67] There appears to be a typographic error in the footnoting. The citation of *R v Keegan* [1990] 3 SCR 697 should instead be *R v Keegstra.*

did not know that a package in his possession contained drugs was not a proportionate response (and an evidential burden should apply instead).[68]

92. While these cases may provide general guidance on the application of legal burdens on an accused, we suggest that assessing if such provisions are reasonable and proportionate requires an "examination of all the facts and circumstances of the particular provision as applied in the particular case".[69]

93. The Statement of Compatibility suggests that the government considered reversing the evidential burden only, however elected not to for essentially two reasons. Firstly, due to the importance of preventing the harm associated with type 1 vehicle related offences, noting the rising number of road fatalities. The Commission submits that for the number of road fatalities to be a legitimate justification for these changes, further information is needed on the connection between road fatalities and type 1 offences.

94. The second justification is that an evidential burden would "undermine the purpose of investigating" and lead to owners electing to provide testimony in a proceeding, the veracity of which the police will not have had an opportunity to investigate, and which will be impracticable and impossibly onerous for the prosecuting authorities to disprove:

> For these reasons, a reverse legal burden is necessary to achieve the purpose of allowing the effective investigation and prosecution of type 1 vehicle related offences.

95. This reason, of itself, has been found insufficient to warrant a limitation on the right to be presumed innocent, particularly as in this case the defendant is asked to disprove an issue essential to culpability, and the relevant offences include penalties of imprisonment. The Commission appreciates investigating type 1 vehicle related offences is difficult as they are often committed in large groups or involve dangerous driving behaviour at very high speeds, so intercepting and identifying the driver of the vehicle involved is challenging. Therefore, given the risk to public safety, we accept the discussion in the Statement of Compatibility is sufficient to satisfy an evidential, rather than legal burden on the defendant.

96. As well as not placing a legal burden on a defendant, other less restrictive options would include allowing the person to lead evidence at any time for all the type 1 offences (with or without the need to seek leave of the court). The statement suggests that the "the requirement to give notice to the prosecuting authority is to allow sufficient time to investigate the new information". The Commission suggests this discussion is not sufficient to justify the limitation on rights by the amendment.

[68] Noting that the House of Lords found relevant provisions of the UK *Human Rights Act 1998* were not yet in force and so did not apply to the proceedings. See also *Webster v R* [2010] EWCA Crim 2819 in which the HRA was applied.
[69] As observed by Lord Bingham in *Attorney General's Reference No 4 of 2002; Sheldrake v DPP* [2005] 1 AC 264 [21]. Of particular relevance to these provisions, relevant factors identified by the court included the "retention by the court of a power to assess the evidence".

Discrimination based on place of residence

97. Two amendments in the Bill arguably engage the protection against discrimination under the right to equality in s 15, and the right, without discrimination, to protection needed by the child under s 26 of the HRA. These are the provisions regarding electronic monitoring (clause 26), and the providing powers for police to stop and use a hand held scanner (clauses 5 and 6), which will only apply in specific locations.

98. The definition of discrimination does not confine the personal attributes protected to only those in the *Anti-Discrimination Act 1991* or under the *International Covenant on Civil and Political Rights* (ICCPR). Section 15(2) of the HRA (the right to enjoy human rights without discrimination) is modelled on Article 26 of ICCPR which lists grounds of discrimination, but does not define the word 'discrimination'.

99. Based on the United Nations Human Rights Committee's *General Comment 18: Non-discrimination,* discrimination is:

- any distinction, exclusion, restriction or preference;
- based on a non-exhaustive list of grounds;
- that has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. [70]

100. However, there is nothing in the *Human Rights Act 2019* to suggest that individuals should be protected from discrimination only according to attributes identified under the ICCPR or as defined in other human rights jurisdictions.

101. In relation to the use of hand held scanners, the Statement of Compatibility discusses the right to equality and discrimination briefly, but this does not include a justification for the proposed powers applying only to people in specific 'safe night precincts'. The statement acknowledges that electronic monitoring applying as a bail condition in only certain areas may discriminate because of a person's place of residence. However, the statement cites a number of cases from human rights jurisdictions to support the conclusion that the right is not engaged 'because residency in a particular area is not a ground of discrimination'.

102. The Commission does not agree that such a definitive statement can be made. Caution must be taken when relying on the judgements of foreign courts.[71] Nonetheless, the Commonwealth Attorney General's Department and the Parliamentary Joint Committee on Human Rights have noted that 'place of

[70] Human Rights Committee, *General Comment 18: Non-discrimination*, 37th sess, UN Doc HRII/GEN/1/Rev.9 (Vol. I) (10 November 1989) [7].
[71] See *Momcilovic v The Queen* (2011) 245 CLR 1, in which French CJ at [18] - [19] and Gummow J at [155] - [161] noted that courts should use cases from other jurisdictions with discrimination and care noting that they are drawn from a variety of legal systems and constitutional settings.

residence within a country' has been held as a prohibited ground under international law.[72]

103. The Statement of Compatibility cites the European Court of Human Rights decision in *Magee v United Kingdom* (2000) 31 EHRR 822, in which the court found the status was not protected for an applicant who claimed if he had been arrested in England and Wales he would have been detained with greater rights, compared to the legislation which applied in Northern Ireland.

104. However, the European Court reconsidered the status of place of residence as a ground of discrimination in *Carson and others v United Kingdom,* involving the application of the same (pension) legislation to people living in different areas and observed:[73]

> It is true that regional differences of treatment, resulting from the application of different legislation depending on the geographical location of an applicant, have been held not to be explained in terms of personal characteristics (see, for example, *Magee v. the United Kingdom*). However… these cases are not comparable to the present case, which involves the different application of the same pensions legislation to persons depending on their residence and presence abroad…In conclusion, the Court considers that place of residence constitutes an aspect of personal status for the purposes of Article 14.

105. The court reached a similar conclusion in *Baralija v Bosnia and Herzegovia*, concerning a person residing in a particular city (Mostar) being treated differently, under the same legislation, to a person residing in another part of Bosnia and Herzegovina.[74]

106. The Statement of Compatibility also cites the Canadian case of *R v Turpin* [1989] 1 SCR 1296, which involved residents of one province claiming they were treated differently under the criminal law in comparison with accused persons in other provinces. Place of residence was found not to be a personal characteristic, although the court left open the question as to whether province of residence could ever be such a ground.[75]

107. Human rights jurisdictions have developed their own jurisprudence in determining when a personal characteristic will be a ground of discrimination, and caution must be taken in simply applying this jurisprudence to Queensland.

108. Until resolved by Queensland courts, it remains uncertain how many further attributes beyond those recognised in the *Anti-Discrimination Act 1991* will be

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[72] Australian Government, *Rights of equality and non-discrimination – Public sector guidance sheet* <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/rights-equality-and-non-discrimination>. Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Short guide to human rights* (June 2015) [4.43]. See also *Lindgren et al v Sweden* (298-9/88).

[73] *Carson and others v United Kingdom* (European Court of Human Rights, Grand Chamber Application, no 42184/05, 16 March 2010) [70] - [71]

[74] *Baralija v Bosnia and Herzegovia* (European Court of Human Rights, Chamber, Application no 30100/18, 29 October 2019

[75] *R v Turpin* [1989] 1 SCR 1296, 1333,

considered discrimination under the *Human Right Act 2019*. Yet, even considering the decisions of the European Court of Human Rights, place of residence has been identified as a ground of discrimination. We suggest that trialling the use of GPS monitoring in only certain areas of the state, and giving police new powers in specific areas, arguably discriminates based on a place of residence and this should be justified in the statement of compatibility. Information provided to the committee during the recent public hearing suggests this may be a reasonable measure, in light of the prevalence of knife crime in the Gold Coast area, but more information is required.[76]

Prolonged watch house detention

109. The inevitable increase of children in detention that will result from these changes is particularly troubling in light of the use of watch houses to detain children in Queensland. The right of children to humane treatment when deprived of their liberty is now protected under Queensland law under the HRA. It is disappointing that the government did not, before introducing these changes, assess their effects on the number of additional young people that will be detained.[77]

110. There is a strong argument that it is an unreasonable and disproportionate limitation on the rights of at-risk children to detain them in police watch houses, particularly when this results from poor planning. The Public Guardian has previously observed that watch house detention undermines the physiological wellbeing of children.[78]

111. In *Certain Children v Minister for Families and Children & Ors (No 2)* [2017] VSC 251 the Victorian Supreme Court found the detention of children in an adult prison was incompatible with human rights. The government claimed the use of the prison was necessary due to a lack of beds in the state's youth detention centres. The court stressed that the lack of consideration about the impact on the detainees' mental health, coupled with a lack of planning and consideration of less restrictive measures demonstrated why those measures were unreasonable. In failing to think extensively or creatively about other options, "the defendants fell well short in demonstrating that resources were inadequate for the provision of less restrictive measures".[79]

112. Thank you for the opportunity to comment on these amendments.

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[76] Deputy Commissioner Smith stated there had been a 53 per cent increase in the number of persons charged over the last four years with offences of unlawful possession of a knife in the Gold Coast police district, as well as two stabbing deaths in Surfers Paradise in the last 18 months. Evidence to Legal Affairs and Safety Committee, Parliament of Queensland, Brisbane, 8 March 2021, 2 (Deputy Commissioner Doug Smith, Queensland Police Service)

[77] Evidence to Legal Affairs and Safety Committee, Parliament of Queensland, Brisbane, 8 March 2021, 5 (Michael Drane, Department of Children, Youth Justice and Multicultural Affairs): When asked about the number of children potentially detained in watch houses, Mr Drane replied "The department is currently working to model the potential effects that may have".

[78] Office of the Public Guardian, 'There are immediate solutions available to remove children from watch houses' (Media Release, 14 May 2019).

[79] *Certain Children v Minister for Families and Children & Ors (No 2)* [2017] VSC 251