QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

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Watching Them While They're Watching You

Committee Secretary
Legal Affairs and Community Safety Committee
Email: LACSC@parliament.qld.gov.au

Dear Madam

Youth Justice and Other Legislation Amendment Bill 2021

Please accept this submission on behalf of the Qccl in relation to the above bill.

We start off by expressing our dismay at the government's policy reversal since the position that it took when in opposition in 2014 in opposing legislation introduced by the Newman government which followed similar erroneous principles.

1. Basic Principle

Since the end of the 1800's there has been a shift from the punishment of children to the treatment of children and a clear acknowledgement that their age should be considered. This is because children are morally different from adults as a result of the fact that they do not have the same judgment skills, self-control and ability to know right from wrong. Children take more risks, pay less attention to negative consequences, are impulsive and look at short term outcomes and not a long-term perspective. They also suffer more from peer pressure.

Because children are impulsive and do not plan for the future, the concept of deterrence has a particularly limited application to them.

These views of the differences between adults and children have recently been profoundly reinforced by modern neuro-scientific research.

2. A Crime Wave?

Underlying this Bill is the proposition that there is some sort of youth crime wave affecting the community. The Australian Bureau of Statistics Paper 45190DO03 – Recorded Crime – Offenders 2008-09 - 2018-19 released 6 February 2020 shows a consistent decline in young offending in this state during that period.

Long-standing research shows that some 70% of juvenile offenders appear in Court only once with another 14.9% appearing in Court only twice.

These reforms appear to be directed at dealing with specific problems in a specific region. It might be suggested, that the appropriate response to that situation is to focus on how to deploy the police and other resources in that area to deal with that specific problem, rather than making changes to the law that applies generally.

3. Submissions

There are three aspects of the Bill upon which we wish to comment:

(a) Suspicion less searches

(b) Bail - show causeBail - electronic monitoring

4. Suspicion less searches

Under these provisions a senior police officer may authorise police officers to search members of the public in certain prescribed areas of the Gold Coast with a handheld metal detector, for the purpose of ascertaining whether the person has a knife. There will be no need for a police officer to suspect the person of having committed an offence or of carrying a knife. The officer may then require a person to produce anything that is detected by the metal detector.

These provisions expire, under the current legislation, after two years.

This legislation authorises mass, suspicion less, warrantless magnetometer searches.

We oppose this proposal.

The traditional requirement that before a search can proceed there must be a reasonable suspicion that a crime has been committed or a weapon found is a bulwark protection of our liberty. Such a requirement is essential to being able to prevent arbitrary searches or searches based on bias. The granting of such powers will inevitably result in unwarranted invasions of privacy.

The fact that the search takes place in public does not make it any less an invasion of privacy.

Even a once over with a metal detector in the context of a night out with friends or family has the capacity to cause an individual a deal of embarrassment. Further, given that most people carry metal objects a high proportion of people are likely to be subjected to further more invasive searches.

It is quite possible that we would be safer if police were permitted to stop and search anyone they wanted, at any time, for no reason at all. Insisting on a requirement that there be a reasonable suspicion before a search can occur will hopefully prevent us from gradually trading ever-increasing amounts of freedom and privacy for extra security.

There is no analogy with walking through a metal detector in an airport. At the airport everyone must walk through a metal detector and there is no reason for a person to wonder why they have been asked to do so[1].

Finally, there is no evidence these types of powers will reduce knife crime.

In 2012, the Victorian Office of Police Integrity produced a report on Victorian "stop and search" powers which were also introduced to reduced knife crime. That report entitled "Review of Victoria Police use of "stop and search" powers" reviewed research from the United Kingdom in relation to the effectiveness of such powers. At page 40 of the report, the Office stated that the research "found the relationship between incidence of knife crime and the rates of "stop and search" is at best unclear." Whilst some research indicated that stopping members of the public, with or without searching, deterred crime, there was "no significant and consistent correlation between searches and crime levels a month later". The report said, "a review of the "stop and search" reporting data over six months compared to crime statistics for the same period showed no relationship between increased searches and a decrease in knife crime."

5. Bail - show cause

We note that 80% of children in youth detention in Queensland are on remand. We also know that only about 16% of those people go on to receive a custodial sentence. Therefore, the vast majority of them are spending

[1] In this regard, we note that the American Supreme Court has accepted that in certain very narrow circumstances a suspicion less search may not violate the fourth amendment to the American Constitution. However, none of those exceptions would apply in the circumstances being considered under this Bill *Vernonia Sch. Dist. 47J v. Acton*, 115 S Ct 2386 at 2391. See also *Bourgeois v. Peters*, 387 F. 3d 1303 for a law similar to this, which was struck down

an unnecessary amount of time in detention. This law will result in more people on remand in what are universally acknowledged to be universities of crime, which have long term adverse impacts on children detained in them.

Under the proposed law a juvenile charged with committing one of the following offences, whilst on bail, will be required to show cause as to why they should not be detained in custody:

(a) Offences which would render an adult liable to imprisonment for 14 or more years, other than certain drug offences,

(b) Choking, suffocation of strangulation in a domestic setting,

(c) wounding,

(d) female genital mutilation,

(e) assault occasioning bodily harm

(f) unlawful use of a motor vehicle where the child was actually in charge of the vehicle

(g) attempted robbery.

(h) offences which would render an adult liable to life imprisonment.

These provisions bear some resemblance to those in the *Bail Act* which apply to adults, which place an accused person in a show cause position in the following situations:

- The accused committed an offence while on bail (not including simple offences).
- The accused committed an offence against the *Bail Act* 1980
- The accused committed an offence while armed with a weapon (including a firearm or explosive).
- The accused committed certain offences relating to organised crime.
- The accused committed an offence punishable by mandatory life imprisonment.

In our society every person has a right to liberty. Additionally, every person is presumed innocent. We would also argue that a proper principle in a society committed to liberty, is that everyone ought to be presumed to be harmless.

The presumption of innocence dictates that the State has no higher duty to protect its citizens from the risk a person charged might commit an offence than it must protect them from the risk other people walking the street might commit one.

None of the statistics indicate that if bail is allowed further offending is more probable than not, even where the person has previous convictions[2].

A British study found that about 75 per cent of people granted bail against police objections completed their remand period without a new offence being recorded.

The research on the rate at which those who are on bail commit offences has been summarised as follows:

> there is a recurring finding that the rate of offending increases as the age of the offender decreases, with the highest offending occurring in the younger age cohorts. Morgan and Henderson found that 29 per cent of defendants under the age of 18 committed offences whilst on bail compared to 13 per cent of those aged over 21 (Morgan & Henderson (1998) cited in Hucklesby & Marshall 2000:154). Similar results were found by Lash in the study of offending on bail in New Zealand in 1994. She found the age cohorts with the highest rate of offending on bail were the 17 to 19-year-olds, of whom over 27 per cent offended whilst on bail. By comparison

[2] Ashworth and Zedner *Preventive Justice* Oxford University Press, 2014 page 69

approximately 16 per cent of offenders aged between 30 and 34 offended whilst on bail (Lash 1998: Table 4.2). [3]

These statistics combined with serious considerations of principle[4] call into serious question the decision to refuse bail to a person on the basis that they might commit further offences.

The situation might be different if the person has previously committed offences whilst on bail. It might also be different where the person is charged with a serious offence and has a previous conviction for a similar serious offence. However, we do not see those situations as justifying the reversal of the onus of proof. The same comments apply in relation to the provisions the subject of this Bill, which of course fall short of establishing those circumstances as a predicate for refusing bail.

In short, we oppose the reversal of the presumption in favour of bail.

6. Bail - Tracking devices

Finally, we turn to the provisions allowing for the tracking of young persons on bail.

Under the proposed law the court may require a young person, as a condition of bail, to wear an electronic monitoring device, if certain conditions are fulfilled:

(a) The child must be over 16 years old.

(b) The offence must be a prescribed offence, being those listed in relation to where a child is required to show cause as listed above.

(c) The Child has previously committed one indictable offence and

(d) The child and the Court must be in a geographical area to be prescribed.

Factors to be taken into account in deciding to make the order include whether the child can understand the conditions and whether a parent of a child or other adult is willing to support the child, and notify authorities of any change of circumstances or of a breach of a bail condition.

The provision clearly contemplates the person has established they are entitled to bail. Whilst of course, a tracking device is preferable to being detained, the fact remains that the person is presumed to be innocent.

In a context where the person is presumed innocent the police are to be entitled to know every movement of that person, which constitutes on any view a substantial violation of the right to privacy of an innocent person

There are serious questions about the effectiveness of electronic monitoring of young people as measured by not being re-arrested. Questions remain about the treatment benefits of electronic monitoring of young people. The assumption is that electronic monitoring will only apply to those who would ordinarily have been detained. However, the opposite might be the case.

The technology in fact allows for the possibility of increased monitoring of an increased number of people. In the United States, young people who would ordinarily not be detained are regularly placed on Electronic monitoring.[5]

The problems of the underdeveloped adolescent brain also have implications for the use of electronic monitoring. Children remain less likely to be deterred by the potential adverse consequences of the electronic monitoring come in the same way as their behaviour in all other circumstances. Lacking impulse control, in moments of excitement or stress a child is still likely to try to disconnect the monitor or to ignore it. These

[3] S King, D Bamford and R Sarre, *The Remand Strategy; Assessing Outcomes'*, (2008) 19(3) Current Issues in Criminal Justice 327 at 339

[4] Ashworth and Zedner opcit pages 64-72 c.f the Irish Supreme Court *People v Callaghan* 1966 IR 501 and *Ryan v DPP* 1989 IR 399

[5] *Monitoring youth* 101 Iowa L. Rev. 297 page 324

problems will be exacerbated in the case of young offenders with mental health or intellectual disabilities. A significant percentage of juvenile offenders have such disabilities or illnesses[6]

No doubt it will be said that wearing a device is better than being incarcerated, given the well-established adverse impact of detention on young people.However, wearing the device will no doubt result in stigmatization and social ostracization, particularly considering that the wearing of such devices is associated in our community with serious sex offenders.

Whilst acknowledging the attractiveness of an alternative to detention with its incumbent adverse consequences and risk of harm, we cannot support this measure having regard to the following factors:

(a) It involves a substantial violation of the person's privacy

(b) There is no evidence that it is effective in preventing rearrests and hence preventing reoffending

(c) it is not clear how the risk that monitoring will be applied to people who would not ordinarily be detained or would be detained on far less intrusive conditions is to be addressed

(d) the substantial stigmatisation which is likely to accompany the wearing of the device

7. Summary

It is fair enough to say that the changes proposed by this Bill do not go as far as one expected from the commentary in the media.

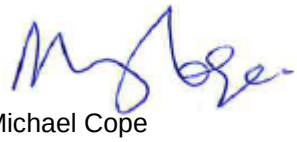
The show cause provisions in relation to bail are in our opinion objectionable as a matter of principle.

Whilst the proposed electronic tracking arrangements seem at first blush to be an advance, on closer examination that proposition has not been justified.

We strongly oppose the provisions for suspicion less searches. The requirement for the search only to be carried out when there is a reasonable suspicion is a fundamental protection of basic liberties. Any departure from that principle in our view will lead to further erosion of that principle.

We trust this is of assistance to you in your deliberations.

Yours faithfully



Michael Cope
President
For and on behalf of the
Queensland Council for Civil Liberties
12 March 2021

[6] ibid