Youth Justice and Other Legislation Amendment Bill 2021

Submission to Legal Affairs and Safety Committee
by Legal Aid Queensland

Legal Aid QUEENSLAND

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Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to provide a submission to the Legal Affairs and Community Safety Committee on the Youth Justice and Other Legislation Amendment Bill 2021.

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997,* LAQ is established for the purpose of "giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way" and is required to give this "legal assistance at a reasonable cost to the community and on an equitable basis throughout the State". Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ's services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ's lawyers in the day to day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

LAQ has the largest criminal law legal practice in Queensland and represents the most disadvantaged people charged with criminal offences. Youth Legal Aid (YLA), a division within that practice, is the largest practice in Queensland that solely focuses on representing children charged with offences. YLA provides representation, advice and duty lawyer services throughout the State. They are a key stakeholder within the Childrens Court jurisdiction and provide training and resources to lawyers (both defence and prosecutors), police, youth workers and Departmental staff around Youth Justice practice. In recent years YLA have been responsible for the development and delivery of the Youth Justice Certification program, a program overseeing the training and certification of specialist youth practitioners throughout the State. YLA are also the authors of the Youth Justice Practitioner Guide, published by LAQ, which is the pre-eminent publication in relation to Childrens Court practice in Queensland.

It is with a combination of knowledge from our general practice and YLA that the below feedback is provided.

Amendments to *Youth Justice Act 1992*

Amendments to section 48AA

This amendment will allow a court to seek an agreement from the child's parent that they will assist the child to comply with their bail undertaking and report any breaches to police or the Department of Child Safety ("Child Safety"). Although a breach of any undertaking given to a court would have no legal consequences for the parent, it is likely that such an undertaking will, in practice, become a pre-requisite of a child's release on bail. It is unclear whether the amendment applies only to

parents of children or whether it extends to care givers who are in a loco parentis position with the child.

It is our experience that many children who offend are often in the care of Child Safety, or have parents who have their own issues around drugs, alcohol, domestic violence and intergenerational trauma. The proposed amendment will normalise the seeking of a parents' or caregivers undertaking to monitor and report on a child's bail compliance before a child is released. Absence (whether by choice or not) of a parent or a Child Safety officer at a bail hearing will create circumstances where courts may remand children in detention if an undertaking is not provided by the parent or care giver. This includes cases where the offending is not of such seriousness that the child would be liable to a term of detention once sentenced.

Children are vulnerable in their dealings with the criminal justice system. That vulnerability extends to a lack of choice or influence over where they are able to live and with whom. We acknowledge the inclusion of the provision that states that a child cannot be remanded in custody solely on the basis of not having accommodation or adequate accommodation. In practice this proviso has not stopped children being remanded in detention because they are homeless due to a parent re-partnering and subsequently the child not being welcome to return to the family home or having a parent in jail. We have also experienced children being remanded who are in the care of Child Safety due to the inability of a suitable residential placement being able to be located. The proposed requirement will discriminate against our most vulnerable and complex cohort and potentially offends the right to recognition and equality before the law identified as a human right by virtue of section 15 of the *Human Rights Act 2019* (HRA).

LAQ does not support the proposed amendment in the absence of clear language within the amendments that this is a consideration only for the court and not a prerequisite to the granting of bail.

Amendments to section 48AF

The proposed introduction of section 48AF will place the onus on the child in relation to whether he or she is released on bail for a prescribed offence if they allegedly committed that offence whilst subject to a bail undertaking for an indictable offence. The section, as drafted, is very broad in scope. For example, a child who is on bail for a stealing offence who subsequently is charged as a result of a fight with another child would be placed in a "show cause" situation when applying for bail. This new provision will ensure that children who are outside the cohort of "hardcore offenders" (who are the target of the amendments) will be refused bail and remanded in detention unless they can show cause why they should be released on bail. A child's ability to show cause will be a subjective exercise and will be interpreted differently by different magistrates and police.

Through these amendments, a child can be placed in a show cause situation by a police officer if the child is charged with an offence of enter premises and committing an indictable offence rather than an offence of unlawfully taking away shop goods. Both charges would cover the circumstances of a child entering a store and stealing an item below the value of $150 but only the offence under the Criminal Code would reverse the onus in relation to bail. A police officer could decide to charge the child with a more serious offence thus bringing the child into the operation of this section. As discussed above in our response to the amendments to section 48AA, it is our experience that a combination of a child's homelessness and the application of this amendment will result in children who are not necessarily perceived to be a high risk being remanded in detention. The introduction of this new section will affect children who are not deemed to be a high

risk to the community and create pressure on the ability of the state to have enough beds within detention centres to safely accommodate children who are remanded.

The provision will unfairly target children who are unable to show cause due to a number of factors. In our experience those factors could be:

- a lack of a stable home environment,
- a parent or caregiver who declines to agree to support and monitor a child's bail undertaking,
- having been excluded from school,
- are in the care of Child Safety and
- who suffer from mental illness, trauma and/or neurodevelopment condition and substance abuse issues.

Again, as outlined above, section 48AF has the clear capacity to breach the human right of equality before the law.

It is our experience that there are currently significant gaps in Child Safety and the Department of Youth Justice's ability to provide targeted and individualised rehabilitation of children who fall within the highest risk categories. The most significant of these gaps are in remote communities, in the areas of drug interventions and rehabilitation (in particular, inpatient treatment options) and programs that address reoffending risk in intellectually disabled youth. These areas of concern should be prioritised so that judicial officers have confidence that Child Safety or the Department of Youth Justice have interventions that will address the risk of reoffending when considering a child's application for bail. This would also be in keeping with section 32(3) of the HRA which recognises that a child 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.

Tracking devices

LAQ does not support this amendment.

We note that the Bill allows a court to impose a condition on a child's bail that they wear a tracking device. It is unlikely that many children will be released with this condition due to the limitations on the technology and the pre-conditions outlined in the Bill for a child to have a tracking device fitted. Most 16 years old children who come before the court do not have stable accommodation, do not have the support of a parent and have only intermittent access to a mobile phone. Children who sleep rough or who couch surf may not have access to a power supply for the period required to recharge the devices. In our view, the proposed amendments relating to the tracking devices are unlikely to achieve the policy objective of strengthening the youth justice bail framework and will have limited purpose beyond an investigative tool for police.

Amendment to Sentencing Principles

The amendment to section 150 of the YJA recognises the common law principle that offending whilst on bail is an aggravating circumstance when the court is imposing a sentence. It would be legislating a well-established sentencing principle. LAQ has no issue with what is proposed nor the form of the amendment.

General comments regarding the amendments

In our view, many of the amendments to the *Youth Justice Act 1992* are likely to increase the number of young people being remanded in custody. This will have the flow on effect of children being remanded in watch houses as the State's detention centres reach capacity. This is an undesirable but real outcome of these reforms. This is not to be interpreted in any way as LAQ advocating for the building of more detention centres. We advocate for an increase in programs across the State to support young people, their families and carers and assist them to address the concerns that have brought about these reforms without resulting in an increase of young people in watch houses across Queensland.

In addition to the increased prospect of young people being held in watch houses for longer periods, the proposed amendments may lead to a practice by police of preferring more serious offences when charging to fit within the "show cause" requirements. This would be a detrimental outcome for children within the Youth Justice system and is inconsistent with the objectives and principles underlying the *Youth Justice Act 1992*.

Amendments to *Police Powers and Responsibilities Act 2000*

Scanning devices

LAQ is concerned about the proposed amendments to the *Police Powers and Responsibilities Act 2000* (PPRA) regarding the use of a scanner in identified areas (initially Broadbeach and Surfers Paradise CBDs). Unlike other similar existing search powers under the PPRA, the power to scan an individual is without any safeguards and the requirement of provision of information to the person the subject of the scanning is (in relation to most of the specified categories) by request only. These provisions leave open the opportunity for significant abuse with almost no checks and balances applied to the exercise of the power. Whilst LAQ acknowledges the safety considerations behind such amendments, we would strongly advocate for the insertion of safeguards such as a requirement of reasonable suspicion of the possession of a knife and a requirement for the provision of information regarding the process and officer involved rather than provision only upon request.