HUB Community Legal

SUBMISSION FROM HUB COMMUNITY LEGAL

Re: Youth Justice and Other Legislation Amendment Bill 2021

To Legal Affairs and Community Safety Committee,

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EMPOWERING THE COMMUNITIES OF INALA AND SURROUNDING AREAS

"In the case of a young offender there can rarely be any conflict between his interests and the public's. The public have no greater interest than that he should become a good citizen" *(R v Smith*[1] as per Matthews J)

About us: HUB Community Legal

We are a Community Legal Centre situated in Inala, Brisbane, Queensland. Whilst we are primarily a generalist legal centre we have operated a specific youth legal service since 2006. Our youth legal service represents children and young people across a broad range of areas including criminal law and youth justice matters.

Youth crime is decreasing

Youth offending has fallen in the past decade both in Australia and internationally[2]. The Youth Justice Annual report for 2019-20 records that charged offences by young people aged 10-17 years have decreased by 9 percent compared with 2018-19. The number of young people charged with an offence has decreased 23 percent compared with 2018-19. Re-offending rates are down 3 percent. The number of young offenders aged 10-17 in the past ten years has decreased by over 30 percent. [3]

Presumption of innocence

Our legal system is based on a presumption that a person is innocent until proven guilty. It is important to note that not all children are found guilty of the offences for they have been charged. The Annual Report of the Childrens Court of Queensland for 2019-20 states for matters in the Magistrates Court (Childrens) jurisdiction 66.7 percent resulted in a conviction and 33.3 percent were discharged. It is important to note that this means that one out of every three charges was not proven[4].

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[1] *R v Smith* [1964] Crim LR 70 as quoted in R v GDP (1991) 53 A Crim R 112 at 116 per Matthews J

[2] Clancey G, Wang S & Lin B 2020. Youth justice in Australia: Themes from recent inquiries. *Trends & issues in crime and criminal justice* no. 605. Canberra: Australian Institute of Criminology. https://www.aic.gov.au/publications/tandi/tandi605

[3] Department of Youth Justice 2019-20 Annual Report @p10

[4] Childrens Court of Queensland Annual Report 2019-2020 (courts.qld.gov.au)

The majority of young people held in custody are on remand (82 percent).[5]

The current system

It is submitted that the current Youth Justice Act works well for the majority of the children who commit a criminal offence. We know that most children who commit offences do grow out of crime[6]

The current law on bail

The current bail laws are already strong enough. A child must be kept is custody if there is an unacceptable risk. It is as follows:

> YOUTH JUSTICE ACT 1992 - SECT 48AAA
> **Releasing children in custody—risk assessment**
>
> *48AAA Releasing children in custody—risk assessment*
> (1) This section applies if a court or police officer is deciding whether to release a child in custody in connection with a charge of an offence or keep the child in custody.
>
> (2) The court or police officer must decide to keep the child in custody if satisfied—
>
> (a) if the child is released, there is an unacceptable risk that the child will commit an offence that endangers the safety of the community or the safety or welfare of a person; and
>
> (b) it is not practicable to adequately mitigate that risk by imposing particular conditions of release on bail.
>
> (3) Also, the court or police officer may decide to keep the child in custody if satisfied that, if the child is released, there is an unacceptable risk that—
>
> (a) the child will not surrender into custody in accordance with a condition imposed on the release or a grant of bail to the child; or
>
> (b) the child will commit an offence, other than an offence mentioned in *subsection (2) (a)* ; or
>
> (c) the child will interfere with a witness or otherwise obstruct the course of justice, whether for the child or another person.

[5] Childrens Court of Queensland Annual Report 2019-2020 (courts.qld.gov.au)

[6] Richards, K: What makes juvenile offenders different from adult offenders? Trends and Issues in Crime and Criminal Justice no 49.

(4) *Subsection (5)* applies if—

(a) the child is before a court; and

(b) the court has information indicating there may be an unacceptable risk of a matter mentioned in *subsection (2)* or *(3)* , but does not have enough information to properly consider the matter.

(5) The court may remand the child in custody while further information about the matter is obtained.

Whilst no grant of bail will be "risk free" it is a balancing exercise to take all relevant factors into account. It should be remembered that locking up children is not "risk free" either if harm is done in placing them in a detention which is a criminogenic environment.

Current proposal to create a presumption against bail

The current proposal in the Bill will result in a large number of children in detention. The Bill states that if a child is on bail for an Indictable offence and is then charged with a prescribed offence there is a presumption that bail will be refused and the child will be held in custody. Common indictable offences that children are charged with include stealing, wilful damage, fraud, receiving stolen property, enter premises (which includes a car) and burglary.

Example 1
A child is on bail for stealing. He is on bail for a long time because the child has entered a plea of not guilty and the matter is set for a hearing date. If this child then pushes a child (who may have been bullying him) and then takes the child's phone (and is charged with the prescribed offences of robbery or attempted robbery) then there will be a presumption against bail.

Example 2
A child is living in a residential care group home. The child has a history of trauma. After a distressing incident the child is overcome by emotion and punches a hole in the wall. He is granted bail. The charge of wilful damage is an indictable offence. Some weeks later the child is again struggling to manage emotions due to the child's history of abuse and neglect. The child is overcome and tries to punch a wall but is physically restrained by a worker. He punches the worker causing a large bruise (prescribed offence of assault occasioning bodily harm). There will be a presumption against bail.

Example 3
A child is charged with enter premises and commit indictable offence. The child enters an unlocked car and steals a small amount of spare change. This is an indictable offence. (A car is included in the definition of 'premises').
A couple of weeks later a group of friends drive by in a stolen car and encourage him to get in. He then has a turn driving the car and is charged with the prescribed offence of being the driver in an unlawful use of motor vehicle. There will be a presumption against bail.

Example 4
A child with severe mental health issues is using a piece of glass to self-harm. A police officer intervenes to try and prevent her from harming herself. There is a struggle and the child is charged with a serious assault. Some weeks later the child is again in a distressed state and is self-harming with a sharp implement. A youth worker intervenes and in the struggle is wounded. The child is charged with unlawful wounding. In spite of a serious mental health issue the child will have a presumption against bail.

These children are real examples taken from our case files. None of them are in the category of the ten percent of high risk recidivist offenders. We know that our current Youth Justice Act and procedures works well for children such as these by encouraging them to meet victims in restorative justice programs and obtain the benefits of therapeutic programs such as probation.

Yet under the proposed changes to the law each of these children would be held in custody unless they can "show cause". It is the child who has the onus of proof to show that their detention is not justified. Should the Bill be passed we expect that a large number of children will be bail refused and held in detention. This will include a large number of children who are not in the high risk recidivist category of offenders.

Once you create a presumption against bail there is no longer a balancing exercise that takes into account all relevant factors but a default position. This will inevitably lead to a large increase in the remand population of children.

In our experience the current detention centres are already at or near full capacity despite recent increases in the number of beds in detention centres in Queensland (Detention Centre Capacity has increased from 230 beds in 2015 to an expected capacity of 306 beds in 2021)[7].

If the proposed bail changes are made we expect that a large number of children will be held in detention and that their remand periods will be longer. From a practical

[7] Department of Youth Justice 2019-20 Annual Report @p10

perspective there is not any room in the current detention centres to hold the number of children who will be detained under these new laws. In recent years children have been held in watch houses around the state for extended periods when detention centres were full. This caused trauma to the children being held in inadequate conditions and challenges to the police who were in charge of holding them in watch houses for extended periods. This cannot be allowed to happen again.

Detention

The United Nations Convention on the rights of the Child (1989) and the United Nations Standard Minimum rules for the Administration of Juvenile Justice ("The Beijing Rules" (1985) states that the detention of children should be used as a measure of last resort and for the shortest appropriate period of time[8]. Rule 17 of the Beijing Rules states that "*Juveniles who are detained under arrest or awaiting trial ("untried") are presumed innocent and shall be treated as such. Detention before trial shall be avoided to the extent possible and limited to exceptional circumstances. Therefore, all efforts shall be made to apply alternative measures.*"

It is submitted that the proposed amendments to the Youth Justice Act in creating a presumption against bail are in direct contravention to the provisions of United Nations Convention on the rights of the Child and The Beijing Rules.

The Bill is also not compatible with the Human Rights Act 2019. Having a presumption against bail is unduly restrictive and does not permit a proper balancing of the individual factors that should be taken into account. The least restrictive alternative is for decisions on bail to take account of all relevant factors and to not require a child to bear an onus of proof to show that detention is not justified in the circumstances. Further less restrictive alternatives are to ensure that more resources are allocated to the prevention of offending and rehabilitation in the community. Detention should remain a last resort option for the least amount of time.

Richards & Renshaw 2013 [9] detail the adverse impacts of a custodial remand on young people. Firstly, the child is separated from family and community and removed from social support structures at a time of vulnerability which increases the risk of physical and psychological harm. This is especially so for children transported far away from their homes. There is a disruption to education and employment. This is important as these have a strong protective role in preventing reoffending. There is a criminogenic effect that results in young people being detained with other young offenders and that

[8] United Nations Human Rights, Convention on the Rights of the Child (1989) Article 37

[9] Richards K & Renshaw L 2013. *Bail and remand for young people in Australia: A national research project*. Research and public policy series no. 125. Canberra: Australian Institute of Criminology. https://www.aic.gov.au/publications/rpp/rpp125

children are sometimes held inappropriately in police facilities not designed to meet the needs of young people (This is particularly pertinent in Qld given the time children have spent detained in watch houses over recent years). Young people held in remand are more likely to receive remand periods subsequently and are more likely to be given a sentence of incarceration than those who receive bail (even when other factors controlled for). [10] Detention has a high financial cost for the community[11]

Placing a child in detention entrenches a child in this environment where they are only with negative peer influences. In our experience of having clients in detention we know that a child in detention is introduced to a wider range of offending peers. In detention the child focuses on crime and other criminals. Information and experiences are transmitted from one child to another on how to commit crimes. Detention is a criminogenic environment.

Clancey, Wang & Lin 2020 conducted an examination of all states and territories who has undertaken reviews of their youth justice systems as well as other reviews and reports finding

> "*Young people who enter youth justice systems, especially those who serve some period in detention (either on remand while they await a court appearance or once sentenced), frequently present with an array of vulnerabilities and complex needs. These vulnerabilities might be exacerbated by spending time in custody, especially in segregation and isolation. This is particularly the case for Aboriginal young people, who continue to be massively over-represented in youth justice systems across Australia. Consequently, detention should be a last resort option*". [12]

> "*A key theme arising from many of these reviews is the need for youth justice detention to be a measure of last resort. Detention, especially for young people who have been victims of abuse and neglect or who have mental*

[10] Richards K & Renshaw L 2013. *Bail and remand for young people in Australia: A national research project*. Research and public policy series no. 125. Canberra: Australian Institute of Criminology. https://www.aic.gov.au/publications/rpp/rpp125
[11] Richards K & Renshaw L 2013. *Bail and remand for young people in Australia: A national research project*. Research and public policy series no. 125. Canberra: Australian Institute of Criminology. https://www.aic.gov.au/publications/rpp/rpp125
[12] Clancey G, Wang S & Lin B 2020. Youth justice in Australia: Themes from recent inquiries. *Trends & issues in crime and criminal justice* no. 605. Canberra: Australian Institute of Criminology. https://www.aic.gov.au/publications/tandi/tandi605

illness and intellectual disabilities, is often detrimental and has little benefit in reducing recidivism."[13]

Weatherburn, Vignaendra & McGrath 2009 found the costs associated with detention are very high but yet "*There is an absence of strong evidence that custodial penalties act as a specific deterrent for juvenile offending suggest that custodial penalties ought to be used very sparingly with juvenile offenders*"[14]

It is of particular concern that in Queensland has high rates of detention compared to the rest of Australia for children under the age of 14 years. In the 2015-16-year 6.7 percent of children in detention were aged 10-12 years and children aged 13-14 years made up 35.4 percent of children admitted to a detention centre.[15]

We know that a small number of children are responsible for a large numbers of offences[16]. The Annual report of the Childrens Court of Queensland for 2019-20[17] shows that ten percent of offenders were responsible for 48 percent of all proven offences. It is this group of children who are often the most disadvantaged who need to have targeted interventions. In our experience this group of offenders are already spending increasing periods of time in custody. The reasons for their offending are complex and require specific and targeted interventions not just more time in custody.

We agree with the four main conclusions reached in the Atkinson report[18] that we need to

1. Intervene Early
2. Keep children out of Court
3. Keep children out of Custody
4. Reduce re-offending

[13] Clancey G, Wang S & Lin B 2020. Youth justice in Australia: Themes from recent inquiries. *Trends & issues in crime and criminal justice* no. 605. Canberra: Australian Institute of Criminology. https://www.aic.gov.au/publications/tandi/tandi605

[14] Weatherburn D, Vignaendra S & McGrath A 2009.The specific deterrent effect of custodial penalties on juvenile reoffending. Technical and background paper series no.33. Canberra: Australian Institute of Criminology. https://www.aic.gov.au/publications/tbp/tbp33

[15] 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, Report on Youth Justice, 8 June 2018 @p105

[16] 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, Report on Youth Justice, 8 June 2018

[17] Childrens Court of Queensland Annual Report 2019-2020 (courts.qld.gov.au)

[18] 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, Report on Youth Justice, 8 June 2018

Our clients

The children we advise and represent in our Community Legal Centre present with issues consistent with that found in the research. In our experience it is not uncommon or unusual for children to have multiple and persistent disadvantages. Whilst their stories are all different, many have suffered from trauma including sexual and other abuse. Almost all have been a victim of serious offences themselves. Many grieve the loss of family and most of our clients are subject to child protection orders or known to Child Safety. Almost all come from impoverished backgrounds. Some are from refugee backgrounds and have spent much of their lives in refugee camps. Many have mental health conditions, substance abuse issues and self-harm behaviours. Almost all have had a poor experience with schooling and are disengaged from education. Many have one or more diagnosed impairments such as autism, intellectual disability, reactive attachment disorder, speech and language impairment, ADHD and others.

Child protection backgrounds

Members of the community who call for tougher penalties on children who commit offences are only aware of one side of the story and see the child as an offender only. The personal stories of offenders' histories are not (and should not be) in the public domain for privacy and other reasons. However we know that children from child protection backgrounds are over represented in the youth justice systems[19]. Most Queenslanders will remember news reports and can picture the faces of Mason Jet Lee and Tiahleigh Palmer. These are two children who are not offenders but their stories of abuse and neglect are in the public domain because they did not survive.

The Coroner's inquest into the death of 22 month old Mason Jet Lee found that Mason was admitted to hospital in the months before his death with an untreated broken leg, cellulitis of the leg, severe peri-anal fissures described by a paediatrician as the worst he had seen in 40 years of medical practice. The baby is said to have been in severe pain on admission. After treatment in hospital Mason was released back into the care of his parents. Months later he died from his injuries which were listed by the Coroner as a "displacement of large bowel and rectum. He also had a fracture to his coccyx, tibia, 46 bruises on his body, mouth and ear ulcers, scalp haemorrhages consistent with head trauma and hair pulling and severe bowel injuries which led to infection of the peritoneum and sepsis".[20]

[19] Baidawi S & Sheehan R 2019. 'Crossover kids': Offending by child protection-involved youth. *Trends & issues in crime and criminal justice* no. 582. Canberra: Australian Institute of Criminology. https://www.aic.gov.au/publications/tandi/tandi582

[20] Coroners Court of Queensland, Findings of Inquest into the death of Mason Jet Lee, delivered on 2 June 2021

Tiahleigh Palmer was a child in the care of Child Safety who was sexually assaulted by her foster brother and murdered by her foster father in 2015 in order to cover up the sexual assault[21].

Many of our clients who are in the category of recidivist offenders also have histories of child abuse, neglect and disadvantage. Every child's story is different. It is not suggested that either Mason or Tiahleigh would have become offenders had they survived. It is only to say that many of our clients who are offenders have themselves been the survivors of abuse and neglect. We cannot tell you their stories because of privacy reasons and the stories of Mason and Tiahleigh are placed here only to assist with an understanding of what it means when we read in research papers and Annual Reports of government agencies and in our submissions when we say that a disproportionate number of offenders come from child protection backgrounds. Research gives the statistics but not the personal stories.

The reality is that many of our clients and many of the offenders described as recidivist your offenders have histories of abuse and neglect and of being failed by their parents, multiple agencies, and multiple government Departments including Child Safety, Health, Education and others. Many children who are offenders have their own histories of abuse, neglect or other issues of parental substance abuse, criminality, and domestic violence. Without an understanding of the complex issues faced by children in the recidivist category it is easy to think that punitive options such as detention are the solution.

In addition, there are many children who have disabilities in the youth justice system. The Youth Justice Annual Report 2019-20 indicates that 16 percent of children involved with youth justice have at least one disability with most being a form of cognitive or intellectual disability[22]. However a study of Young People in detention in Western Australia found that 89 percent of children had at least one domain of severe neurological impairment and 36 percent were diagnosed with FASD[23]. Potentially there are other children in Queensland detention centres who have undiagnosed disabilities.

As a society we have failed these children and then seek to punish them when they act out and offend against the law because of factors that even they do not understand. Punitive measures do little to address the needs of these very vulnerable children.

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[21] Silva K, 26 May 2018 @abc.net.au

[22] Department of Youth Justice 2019-20 Annual Report @p10

[23] Bower C, Watkins RE, Mutch RC, et al. Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia. BMJ Open 2018;8:e019605. doi:10.1136/ bmjopen-2017-019605

Better solutions that an over reliance on detention

It takes a village to raise a child. [24] When parents (including the state as parent for children in the care of Child Safety) are not fulfilling their roles the village needs to be there. We need to strengthen and support families and communities where the children live. We support and encourage the government to increase resources available to local community agencies who work with youth as a way of preventing crime, preventing reoffending and providing bail support and other evidence based programs to youthful offenders. We are located in the same building as Inspire Youth and Family Services (formerly Inala Youth Service) and see first-hand the real difference achieved by programs such as the South West Advocacy and Pathways (SWAP) Bail Support Service. Other programs run by Youth Advocacy Centre and YFS make a real and significant difference to our clients as do a myriad of other strong community programs across the state.

Summary

In summary, we are opposed to any change in the law that creates a presumption against bail for children.

Electronic monitoring

Whilst it is appreciated that the imposition of a bail condition for 16 and 17 year old children may result in some children being released on bail instead of being held in detention, we are opposed to electronic monitoring for the following reasons:

1. The cost involved can be better spent on other programs that actually address the rehabilitation of the child.

2. The current technology involves the use of a device placed around the ankle. This makes it clearly visible to all. This will result in the stigmatization of the child. Most children commit offences with groups of other children. Having strong connections to negative peer group is a feature of most of the children in the recidivist category. Having a visible device identifies this child to all in the community as an offender which will restrict the opportunities for the child to achieve rehabilitation. Schools, non-offending peers and families, sport groups, employers and other positive opportunities that assist a child to move away from criminal offending are not likely to welcome children with

[24] Old African Proverb

such an obvious marker of criminality. Therefore the child is drawn back into the negative peer group of offending peers rather than being able to obtain opportunities to move beyond that. At the age of 16 and 17 years of age, in our experience some children are in a developmental stage of gaining more insight into their behaviours and a willingness to make positive changes. The more we identify a child as a criminal the more they identify themselves in this way and this impacts negatively and reducing the likelihood of rehabilitation as it entrenches the child in the idea that they will never be anything else when all of society identifies them in this way.

3. The use of this technology is based on the premise that a child has a stable home environment. Children in the high risk recidivist offending group are particular less likely to have a stable home environment. Sadly this is also the case for children subject to care and protection orders for whom The State is their parent. We have many clients who are subject to child safety orders who are homeless as Child Safety does not have a permanent placement for them. In addition some children become trapped in unsafe homes and feel unable to leave when subject to curfews and electronic monitoring.

Evasion offences

We do not wish to make any comments about these proposed amendments.

Trial for the use of hand held scanners to search for knives

Children and young people already report to us that they are often the subject of frequent police searches, often for no apparent reason. Some groups of young person's feel specifically targeted by police.

Whilst we are not opposed to a trial of the use of hand held scanners to detect knives as a trial in the Broadbeach/Southport areas it is submitted that there are inadequate safeguards in the current Bill. Section 39F Safeguards for the exercise of powers does provide that a notice in writing can be offered to a person. The safeguards expressed in s39F should be expressed verbally before any physical search of the person can procced. Those safeguards are listed in subsection (5). In addition the use of the scanners should be conducted in a non- discriminatory way. For example every person walking past a particular point is scanned rather than individuals being selected because of the way they look.

Thank you for the opportunity to make submissions in regards to the Youth Justice and Other Legislation Amendment Bill 2021.

Yours faithfully,

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