Aboriginal & Torres Strait Islander Women's Legal Services NQ Inc

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19 March 2021

Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane Q 4000

By email: lasc@parliament.qld.gov.au

Dear Sir/Madam

RE: **Youth Justice and Other Legislation Amendment Bill 2021**

The Aboriginal and Torres Strait Islander Women's Legal Services NQ Inc. ("ATSIWLSNQ") welcomes the opportunity to provide a submission in relation to the current Youth Justice and other Legislation Amendment Bill 2021.

We enclose our submission for the Committee's consideration, made in accordance with the extension of time granted to 19 March 2021.

Yours sincerely,

Cathy Pereira
Principal Solicitor
ATSIWLSNQ

Aboriginal & Torres Strait Islander Women's Legal Services NQ Inc.

Youth Justice and Other Legislation Amendment Bill 2021

Submission to:

Legal affairs and Safety Committee Queensland Parliament

Introduction

The Aboriginal and Torres Strait Islander Women's Legal Services NQ Inc. ("ATSIWLSNQ") welcomes the opportunity to provide a submission to the Youth Justice and other Legislation Amendment Bill 2021 ("the Bill"). Due to the timeframes and limitations on our capacity, our submission is brief and addresses the following issues:

1. Use of handheld scanners without warrant in public places in prescribed areas;
2. Section 52AA *Youth Justice Act 1992* Use of electronic monitoring device;
3. Amendment of section 48AA *Youth Justice Act 1992* (Matters to be considered in making particular decisions about release and bail)
4. Section 48AF *Youth Justice Act 1992* Releasing children charged with prescribed indictable offence committed while on release
5. Amendment of section 150 *Youth Justice Act 1992* (Sentencing principles)

About the Aboriginal and Torres Strait Islander Women's Legal Services NQ Inc.

ATSIWLSNQ is a not for profit Community Legal Centre developed by Aboriginal and Torres Strait Islander women, managed by a committee of Aboriginal and Torres Strait Islander women and providing legal services for Aboriginal and Torres Strait Islander women in North Queensland. Based in Townsville, ATSIWLSNQ provides free legal services, including court representation, legal advice, community legal education and advocacy for Aboriginal and Torres Strait Islander women in North Queensland. We provide telephone and electronic advice to a wide area of North Queensland from Sarina to the Torres Strait and from the western towns to Palm Island in the East. Our other legal services and court representation are predominantly focused in Townsville and Palm Island, including community development and fortnightly domestic violence duty lawyer and casework service to Palm Island. We also provide outreach services to other regional towns in North Queensland.

Our areas of legal practice include child protection, domestic and family violence, family law, discrimination and victim compensation. We do not practice in criminal law or provide representation to children in youth justice matters. We do, however, provide legal representation in child protection matters to parents of children in the juvenile justice system.

Child protection work forms a significant part of the practice and casework undertaken by ATSIWLSNQ.

Our Mission Statement includes advocacy for issues affecting Aboriginal and Torres Strait Islander women.

We oppose the proposed amendments in the *Youth Justice and Other Legislation Amendment Bill* ("the amendments"). The proposed amendments are contrary to a number of human rights enjoyed by Aboriginal and Torres Strait Islander children and their families. We are deeply concerned about the negative impacts that the proposed amendments are likely to have on Aboriginal and Torres Strait Islander children and families and communities.

Summary of submissions

The proposed amendments under the Bill are ill-considered and will be counter-productive to achieving the stated policy objectives and reasons referred to in the Explanatory Notes, which state that

> *The Queensland government remains committed to community safety, reducing youth offending and reducing crime victimisation.*

The proposed amendments contradict the research referred to in the fundamental principles, strategies and directions contained in the Queensland government's Youth Justice Report[1], and Youth Justice Strategy[2] and other reports and recommendations such as the *Pathways to Justice Report*[3] and the Queensland government commissioned *Townsville's Voice: local solutions to address youth crime*[4].

The amendments, if implemented, will:

1. Disproportionately affect Aboriginal and Torres Strait Islander children and their families;

[1] Youth Justice Taskforce, Queensland government Department of Child Safety Youth and Women, *Report on Youth Justice,* 2018 accessible at https://www.youthjustice.qld.gov.au/resources/youthjustice/reform/youth-justice-report.pdf

[2] Queensland government's Youth Justice Strategy 2019-23 *Working Together to Change the Story* p.6, accessible at: https://www.youthjustice.qld.gov.au/reform/youth-justice-strategy

[3] ALRC Report 133, *Pathways to Justice- An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Summary Report,* December 2017 accessible at https://www.alrc.gov.au/wp-content/uploads/2019/08/summary_report_133_amended.pdf

[44] Smith, Stuart Major General (Rtd) AO,DSC, Townsville Community Champion "Townsville's Voice: local solutions to youth crime", 5 December 2018, an independent report on the Townsville community's views on youth crime accessible at https://townsvillecommunities.premiers.qld.gov.au/assets/docs/tsv-voice.pdf

2. Exacerbate the existing over-representation of Aboriginal and Torres Strait Islander children in youth detention;
3. Contribute to increasing over-representation of Aboriginal and Torres Strait Islander adults incarcerated;
4. Disproportionately cause further distress and disadvantage to Aboriginal and Torres Strait Islander children and families who are already experiencing vulnerabilities including poverty and social disadvantage;
5. Traumatise and re-traumatise the most vulnerable children, including many who have already been traumatised by domestic and family violence, placement in out of home care, marginalisation due to disability and children with mental health issues;
6. Strain family relationships and in particular parent/child relations through imposition of reporting obligations on parents;

Background

There has been a long history of Aboriginal and Torres Strait Islander over-representation in the criminal justice system,[5] with Aboriginal and Torres Strait Islander adult males representing approximately 27% and adult women 34% of the male and female prison population respectively in 2016 with a widening gap between Aboriginal and Torres Strait Islander and non-indigenous numbers.[6]

The reasons for the high incarceration rates are well documented and include such indicators of disadvantage as the dispossession of Aboriginal and Torres Strait Islander land without treaty or compensation, inter-generational trauma, economic disadvantage, lack of appropriate housing, employment and educational disadvantage.[7]

More significantly, Aboriginal and Torres Strait Islander children made up 58% of the children in youth detention in Australia in 2018-19.[8] The high rates of Aboriginal and Torres Strait Islander children in custody is indicative of a system that has failed its most vulnerable children, particularly at the intersection of the Child Protection system, youth justice system and juvenile detention.

[5] E.g. *Royal Commission into Aboriginal Deaths in Custody* 1998, accessible at http://www.austlii.edu.au/au/other/IndigLRes/rciadic/
[6] ALRC Report 133, *Pathways to Justice- An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Summary Report,* December 2017 *pp 22-23* accessible at https://www.alrc.gov.au/wp-content/uploads/2019/08/summary_report_133_amended.pdf
[7] Ibid.
[8] Australian Institute of Health and Welfare, *Youth Justice in Australia 2018-19,* 2020, p.9

The *Pathways to Justice Report* referred to research which showed that the relationship between the child protection system, juvenile justice and adult incarceration is so strong that

> ..*child removal into out of home care and juvenile detention could be considered to be key drivers of adult incarceration.*[9]

The Queensland government is aware of the vulnerabilities of children entering the juvenile justice system and the relationship with the child protection system. Its *Youth Justice Strategy 2019-23*[10], records some of the vulnerabilities of children in the youth justice system, including:

- 58% with a diagnosed or suspected mental health or behavioural disorder
- 1 in 5 homeless or lacking suitable accommodation
- 51% having had some involvement with the child protection system
- 17% with a diagnosed or suspected disability
- 52% completely disengaged from education, employment or training
- 50% using 2 or more substances

Further, the Queensland government understands the importance of prevention and community intervention to support vulnerable children and families. Its *Report on Youth Justice* (the Atkinson Report)[11], recommended, based on its key finding, that the Queensland government adopt as its policy position for youth justice, four objectives "the Four Pillars", namely to:

1. Intervene early
2. Keep Children out of court
3. Keep Children out of custody
4. Reduce offending

The importance of early intervention is reinforced by the *Youth Justice Strategy 2019-23*, which draws a clear distinction between "What Works" and "What Doesn't Work". The Strategy refers to substantial evidence from a review of international evidence, that prevention programs to address parenting, mental illness, education, substance abuse, disability and

[9] Op cit. p.34
[10] Queensland government's Youth Justice Strategy 2019-23 *Working Together to Change the Story* p.6, accessible at: https://www.youthjustice.qld.gov.au/reform/youth-justice-strategy
[11] Youth Justice Taskforce, Queensland government Department of Child Safety Youth and Women, *Report on Youth Justice,* 8 June 2018, p6, accessible at https://www.youthjustice.qld.gov.au/resources/youthjustice/reform/youth-justice-report.pdf

childhood delay are "not only effective but extremely cost effective"[12] in addressing youth offending.

The Youth Justice Strategy refers to long term savings by reducing pressure on detention centres, police and justice systems.[13] At an estimated cost of $1500 per day per child in juvenile detention[14] or a total cost of Aboriginal and Torres Strait Islander incarceration of between $3.9bn - $7.9bn[15], a community focused/ preventative and restorative justice approach, is not only supported by the research to be more effective than incarceration, by addressing underlying causes of youth offending, but it is also clearly cost effective.

Proposed Amendments

1. Amendments to *Police Powers and Responsibilities Act 2000:* Use of handheld scanners without warrant in public places in prescribed areas

The Bill proposes amendments to the *Police Powers and Responsibilities Act 2000* (PPRA) by the insertion of sections 39A-39H, which enable police to stop and electronically scan people in Safe Night Precincts ("SNP's") without reason or warrant if authorised by a senior police officer to use scanners. The Statement of Compatibility acknowledges that there are no criteria on which to base the authorisation of scanners by a senior police officer.[16]

The proposed amendments represent an expansion of police powers unrestrained by "reasonable suspicion" or any other reason to justify the use of the scanner. The unrestrained right to stop and scan individuals is intrusive and an incursion on individual privacy. It is a significant increase in police powers to interfere with the privacy of individuals without the requirement to provide a reason.

Given a police culture in Queensland, which continues to disproportionately target Aboriginal and Torres Strait Islander people and youth in particular, the proposed amendments risk misuse by racial profiling and exacerbating racial tensions between the Qld Police (QPS) and Aboriginal and Torres Strait Islander people. The impact on individual Aboriginal and Torres Strait Islander youth is likely to increase feelings of trauma and victimisation by the police, particularly where the police are not required to justify their actions with reasons.

[12] Ibid, p8
[13] Ibid
[14] Ibid – cost estimate from 2018
[15] Pathways to Justice Op Cit, p25
[16] Statement of Compatibility p.5

The proposed amendments are contrary to the main objects of the *Human Rights Act 2019* (HRA), which aims to *protect and promote human rights* and to *build a culture in the Queensland public sector that respects and protects human rights.*[17]

The proposed amendments activate a number of rights within the HRA, including in particular s.25 (right not to have the person's privacy arbitrarily interfered with); s.19 (freedom of movement); s.15 (right to equality before the law); s.26(2) (children's right, without discrimination, to protection needed by the child in their best interests) and; s.29 (right to liberty and security of person).

The application of the proposed amendments only to the named Safe Night Precincts discriminates on the basis of geographical area, which is not currently a protected attribute under the *Anti-discrimination Act 1991* (Qld).[18] The application of the provision to specific geographic areas is, however, contrary to the right to equality before the law[19] and the right of the person to enjoy their human rights without discrimination.[20]

The Statement of Compatibility specifically acknowledges that there are no criteria of which a senior police officer must be satisfied in order to authorise the use of a scanner and acknowledges that the power therefore engages s.15(3).[21]

The Statement of Compatibility justifies the interference with individual rights and freedoms in general terms by stating that the "need to protect the community from knife crime in safe night precincts outweighs the impacts on an individual's human rights".[22] Essentially, the proposed amendments leave the issue of exceptions and incursions on individual rights and freedoms, including, for example religious or cultural rights in certain cases, to the prosecution process and exceptions contained in other legislation.[23]

The proposed amendments are an expansion of general police powers and it is submitted that the general justification for the proposed amendments does not sufficiently address the incompatibilities with individual rights and freedoms or justify the incursion into individual human rights in the absence of a targeted approach to the use of the proposed police powers.

[17] Section 3, *Human Rights Act 2019* (Qld)
[18] Section 7 *Anti-Discrimination Act 1991* (Qld)
[19] Section 15, HRA
[20] Section 15(3) HRA
[21] Statement of Compatibility, p.5
[22] Statement of Compatibility, p.1
[23] Ibid.

It is further submitted that police should not be given the use of unrestrained police powers which may result in police profiling and targeting of youth and Aboriginal and Torres Strait Islander children.

2. Clause 26: Section 52AA *Youth Justice Act 1992* Use of electronic monitoring device

The proposed s.52AA of the *Youth Justice Act 1992* (YJA) provides that a court may impose a condition on a grant of bail that the child must wear a tracking device. The proposed section is experimental, with a sunset clause after 2 years and has specific requirements including: that the child must be at least 16 years old; bail is being granted for a *prescribed* indictable offence; the child has previously been convicted of an indictable offence; the court is in a *prescribed geographical area*; the willingness of the child's parent or another person to support compliance of the child with the terms of bail, and monitor and report on their children.

ATSIWLSNQ is opposed to the use of tracking devices on children. Evidence from other jurisdictions indicates the detrimental impacts on children, the stigmatisation and the fact that tracking devices are not only unlikely to achieve the purpose of reducing recidivism, but that it is likely to increase incarceration rates for children due to the potential for infringements, often due to children's age and maturity.

The *Youth Justice Strategy 2019-23* rejects the "historical approach to youth crime" which has been to

..treat children and young people as adults by responding with harsher penalties leading to incarceration rather than addressing the causes of offending behaviour[24]

It is ironic, therefore, that the proposed tracking device laws adopt exactly this approach, where tracking devices have been demonstrated to be ineffective in reducing recidivism and to be unsuitable for children due to their age, brain development and maturity. The Queensland government is well aware that adolescents' "ability to make clear logical planned decisions and consider consequences is still developing"[25]. These are the skills needed to effectively manage tracking devices and make tracking devices an effective deterrent by considering consequences. This presumes a level of maturity more typical of adults but

[24] Youth Justice Strategy 2019-23 *Working Together to Change the Story* p.4, accessible at: https://www.youthjustice.qld.gov.au/reform/youth-justice-strategy
[25] Ibid, p.6

unsuitable for children/ young people. On the basis of evidence from other jurisdictions the proposed law sets children up to fail.[26]

Some studies suggest that tracking devices may reduce recidivism on certain types of offenders (e,g, sex offenders) at some point within the criminal justice system[27]. The overwhelming majority of crime committed by children in Queensland is property crime[28], for which neither electronic monitoring[29] nor imprisonment have been demonstrated to be effective at reducing recidivism[30].

Practical considerations

Evidence of the detrimental impacts of monitoring and the implications for negative outcomes for Aboriginal and Torres Strait Islander children show clear indications as to why this proposed law should not be introduced. Further, there is no evidence that it lowers incarceration rates or that it is a good fit for young people or that it is cost-effective in the long-run. Some of the negative impacts include:

a) There are often stringent and detailed conditions that apply to the use of a tracking device, including technical requirements such as the need to charge it, need for a mobile phone so that the child can be contacted and may require a monitor within the home[31]. In our experience, loss of mobile phones are a frequent occurrence, which could potentially result in a breach of conditions;
b) The restrictions of movement on the child are onerous and disproportionate. The devices may include curfew conditions and restrictions on movement such as approval 48 hours prior or virtual home detention. Imposing such conditions set children up to fail in circumstances where the adolescent brain including capacity to plan vs spontaneity, are still developing. At a time when the imposition of long periods of confinement due to COVID19 related health restrictions have proven challenging for many adults, it defies belief that such restrictions are being proposed for children.
c) There is no evidence of rehabilitative effect.[32]

[26] Kate Weisburd, "Monitoring Youth: The collision of Rights and Rehabilitation" *Iowa Law Review* Vol 101:297
[27] J Belur et al, "A systematic Review of the Effectiveness of Electronic Monitoring of Offenders, *Journal of Criminal Justice,* Vol 68, 2020, 101686
[28] *Youth Justice Strategy 2019-23,* p.4 (63% of offending relates to property offences)
[29] J Belur Op Cit
[30] *Youth Justice Strategy 2019-23,* p.8
[31] Kate Weisburd, Op Cit, p.303
[32] Ibid, p.305

d) Tracking comprises surveillance, but does not necessarily involve the guidance or supervision that is normally provided with community supervision. The relationship with parole officers is likely to be undermined by the dynamic of monitoring rather than support or supervision.[33]
e) The proposed amendment imposes an additional burden on families and parents or carers, where there are likely to be existing challenges and vulnerabilities within the family due to the known vulnerabilities of children entering the juvenile justice system.[34]
f) The requirement for a parent / another person to support formal compliance, monitor compliance and report on the child to authorities is likely to damage the nature of the relationships between parent and child and potentially places a parent in an untenable position vis a vis their caring, nurturing, mentoring and supporting role in the child's life.
g) The stigma of the very visible device on the child's ankle is likely to inhibit the child's capacity to participate in positive and potentially resilience-building activities such as school, employment, sport, training and social activities.
h) The visibility of the device is likely to place the child at risk of discrimination or victimization, as well as increased exposure to vigilantes. Aboriginal and Torres Strait Islander children in Townsville are already experiencing exposure to vigilantes and wearing a tracking device, will raise their visibility to such people, making them vulnerable targets.

Human rights of Aboriginal and Torres Strait Islander children

The proposed amendment is contrary to the main objects of the HRA.[35] It fails to either promote or protect the rights of children. The proposal is to treat some children differently, activating s.15(2), the right to enjoy human rights without discrimination and s,15(3) and (4), the right to protection of the law without discrimination and the equal right to protection from discrimination respectively. The exposure of children to stigmatisation and discrimination and the restrictions imposed by a tracking device are unreasonable and disproportionate. They cannot be justified by the goal of the amendment, to enhance community safety, since there is no or insufficient evidence to support their achieving this objective.

[33] Ibid p.329
[34] *Youth Justice Strategy 2019-23,* p.6
[35] HRA, s.3

The tracking device amendment violates ss.19, 17, 29, 30 and 25 HRA through the disproportionate restriction on movement and the degrading effect of exposure of children to stigmatisation and the violation of their privacy and reputation. Since the policy's purpose of protecting the community is not demonstrably likely to be achieved on the basis of existing empirical evidence, there is no justification for the use of the device. In fact, given the other factors, it is likely to make the community less safe, by inhibiting a child's rehabilitation by exclusion from activities that may support and enhance the child's resilience and rehabilitation.

The impact on children and their families[36], and the kinship ties in Aboriginal and Torres Strait Islander families[37] are unreasonable and is likely to damage family relationships and the cultural ties between members of Aboriginal and Torres Strait Islander families.

The Statement of Compatibility acknowledges the interference with the human rights of children but argues that the interference with rights is proportionate to the goal of reducing re-offending while on bail, that the electronic monitoring is intended as a deterrence to re-offending and that there is no viable less restrictive way to achieve a reduction in re-offending on bail and protecting the community.

The risk of incurring breaches and potential incarceration due to tracking device infringements have not been considered and it is not clear from the study cited in the Compatibility Statement that this was considered in the stated results of the study. The competing outcomes of short term alleged reduction in re-offending on bail over a 12 month period and longer term impacts of incarceration for tracking device offences, may not become clear over a 12 month period.

As to the deterrence effect, this is not borne out by the studies referred to in this submission, which found no relationship between electronic monitoring and reduction in recidivism with possible exceptions with some cohorts such as sex offenders. It is known, however, that deterrence is unlikely to be effective in adolescents, given that their brains are not fully matured and their capacity for decision making, planning and understanding consequences is still developing.[38]

Evaluations of the restrictions on social and learning activities and the interference with family life have not been referred to in the study relied on in the Compatibility Statement.

[36] S.25, 26 HRA
[37] S.28(2) HRA
[38] *Youth Justice Strategy 2019-23,* p6

As to the Compatibility Statement's denial that there is a less restrictive way to achieve a reduction of re-offending on bail and promote community safety, this contradicts the Queensland government's own research. The *Youth Justice Strategy 2019-23* is very clear in stating that, based on a review of international research, prevention programs are more effective and more cost efficient. The research also found that when communities and families are engaged from the start and when agencies and services work together to support them, it boosts protective factors and reduces risk factors.[39]

In conclusion, the ATSIWLSNQ opposes the imposition of electronic tracking devices for children and maintains that the negative impacts and risks outweigh the purpose, which has not been adequately demonstrated to be achievable through electronic monitoring. Proper consideration and weight needs to be given to the negative factors including but not exclusively that:

a) Impacts will fall disproportionately on Aboriginal and Torres Strait Islander children who make up the majority of children on community supervision (54%)[40];
b) Impacts are likely to have multiple negative impacts on the safety and wellbeing of Aboriginal and Torres Strait Islander children including but not limited to stigma, discrimination and victimisation;
c) There is a high likelihood of device infringements given that the use of the devices is not a good fit for adolescent children, which is likely to result in further penalties being imposed or incarceration;
d) In the longer term it is likely that there will be increased criminalisation of youth, Aboriginal and Torres Strait Islander youth in particular, with no long term reduction in recidivism.

3. Amendment of section 48AA *Youth Justice Act 1992* (Matters to be considered in making particular decisions about release and bail)

The proposed amendment inserts a requirement for a court or police officer to consider whether a parent of the child or another person has indicated a willingness to:

a) Support the child to comply with bail conditions;
b) Notify the chief executive or a police officer of a change in the child's ability to comply with the conditions; and

[39] Ibid p.8
[40] *Youth Justice Strategy 2019-23* p.4

c) Notify the chief executive or a police officer of a breach of the conditions.

While it is reasonable for the court or a police officer to enquire into the parent or other person's willingness to support bail conditions, we are opposed to imposing an expectation on parents to report a child's breaches. This places a parent in the position of having to police their children whilst the children are on bail.

Such an imposition is likely to undermine the parent/child relationship and be counter-productive to the child having the benefit of a supportive parent. This is not to suggest that the parent's role is to condone breaches of bail conditions, but that the parent is in a position to be aware of the pressures and circumstances in which their child has not complied with bail conditions. The role of policing children and reporting on children is inconsistent with the role of a loving and supportive parent.

It is submitted that it is unrealistic and an unreasonable interference in the child's family life to require a parent to set aside her or his knowledge of mitigating circumstances and to report on a child who may be vulnerable or struggling with challenging circumstances.

In practical terms, requiring or expecting a parent to report on a child's breaches of bail conditions may strain existing family tensions and to this extent may be counter-productive to the child's compliance and/or rehabilitation.

We recommend that the proposed amendments in s.48AA(4)(a)(va)(B) and (C) be removed.

4. Clause 24 Insertion of 48AF *Youth Justice Act 1992* Releasing children charged with prescribed indictable offence committed while on release

The Clause 24 insertion of s.48AF in the *Youth Justice Act 1992* reverses the onus of proof in a child's bail application in relation to certain prescribed offences. Police officers and courts currently have a discretion to grant or withhold bail depending on individual circumstances.

ATSIWLSNQ does not support a reversal of the onus of proof for children in relation to prescribed or any offences. Children should be granted a presumption of bail. Placing the burden of proof onto the child and maintaining imprisonment as the default position will inevitably lead to more children being detained in police watch houses and prisons.

The reversal of the onus of proof is contrary to the Queensland government's own *Youth Justice Strategy 2019-23* which specifically takes the position that, based on its research, imprisonment of children does not "work" to reduce re-offending or to make the community safer.[41] In support of its position, the *Youth Justice Strategy* cites the following evidence:

- 82% of children and young people who leave detention return within 12 months
- By contrast, 50% of children and young people leaving supervised community orders return within 12 months.
- 59% of children who completed youth justice conferencing since 2015 *did not* re-offend within 6 months.[42]

The evidence as presented demonstrates a very high recidivism rate for children detained in custody[43] contrasted with community supervision, which demonstrated a considerably lower rate of recidivism and youth justice conferencing that was more successful in terms of lowering recidivism rates.

Due to the high proportion of Aboriginal and Torres Strait Islander children in youth detention (70% on remand and 78% sentenced in 2018)[44], the proposed reversal of bail will exacerbate the current over-representation of Aboriginal and Torres Strait Islander children in custody and place them at risk of remaining in a cycle of re-offending and imprisonment into adulthood. It has been found that the younger children are when they enter the criminal justice system, the more likely they are to continue to re-offend.[45] It is critical that this is not allowed to occur as it will have a devastating effect on families and communities. The Queensland government's own research demonstrates that there are viable less restrictive alternatives to keeping children in custody.

Given the known over-representation of Aboriginal and Torres Strait Islander children in custody, the reversal of the burden of proof is consistent with indirect discrimination on the basis of race.

The reversal of the burden of proof is inconsistent with the rights of Aboriginal and Torres Strait Islander children with particular reference to the following:

[41] *Youth Justice Strategy 2019-23,* op cit, p.8
[42] *Youth Justice Strategy 2019-23,* p.8
[43] Ibid p.13
[44] Ibid, p.4
[45] Ibid, p.13

a) The application of the amendment is inconsistent with s.15(2) and (3) HRA, the right to enjoy human rights without discrimination and the right to equal protection from discrimination. The laws apply only to specific offences and it is known that the amendments will impact disproportionately on Aboriginal and Torres Strait Islander children;
b) The proposed amendment is inconsistent with the right of a child charged with a criminal offence to *a procedure that takes account of the child's age and the desirability of promoting the child's rehabilitation.* The Queensland government's own research clearly demonstrates that imprisonment of children is counter-productive to rehabilitation and is likely to result in the child re-offending.[46]
c) The right to be presumed innocent until proved guilty (s.32(1) HRA). Although the presumption of innocence remains, the practical consequences are that punishment is incurred by the child, irrespective of whether they are found guilty. Further, if the child is found guilty, pre-sentence detention may impose a heavier penalty than the sentence for the offence, particularly if a non-custodial sentence such as a supervised community order is an option or if a court would have otherwise imposed a suspended or partly suspended sentence on the child.
d) The amendment is inconsistent with the right to liberty and security of person (s29HRA) in so far as the reversal of the onus of proof is arbitrarily applicable to prescribed offences and not to others.
e) Section 26 HRA, protection of families and children, which provides that "Every child has the right, without discrimination, to the protection that is needed by the child, and is in their best interests, because of being a child";
f) The amendment interferes with the right of Aboriginal and Torres Strait Islander children to enjoy, maintain, control, protect and develop their kinship ties;[47]
g) Section 19 HRA, restriction on freedom of movement. The proposed amendment imposes an unreasonable restriction on freedom of movement if the child would have been granted bail but for the amendment.

5. Amendment of section 150 *Youth Justice Act 1992* (Sentencing principles)

Section 150 imposes as an aggravating factor, when considering whether a child should be granted bail, consideration of whether the child committed the offence while on bail or after being committed for trial.

[46] Ibid
[47] S.28(2)(c) HRA

ATSIWLSNQ does not support entrenching as an aggravating factor, such considerations. It is acknowledged that the court may consider these factors and also any mitigating factors relevant to the offence. The rationale for the proposed amendment appears to be that the child was not remorseful for their offending behaviour while already on bail or committed for trial.

It is submitted that the proposed amendment does not take into consideration the child's age and level of neurobiological development. The Queensland government has acknowledged that adolescents have not fully developed their ability to make planned decisions or consider the consequences of their actions.[48] Further, the proposed amendment does not take account of a child's mental health or abilities. This is particularly concerning in light of the fact that 58% of children in the juvenile justice system are known or suspected to have a mental illness or behavioural disorder and 17% have a diagnosed or suspected disability.[49]

The proposed amendment is contrary to the child's right, in criminal law proceedings to consideration of the child's age (s.32(2) HRA and s.15(2) HRA, in so far as it applies to substantive equality for children with a disability.[50]

Conclusion

ATSIWLSNQ does not support the punitive measures proposed by the *Youth Justice and Other Legislation Amendment Bill 2021.* We rely on our reasons provided in this submission, which are evidence based, largely from the Queensland government's own research.

We urge the Queensland government to continue the goals and principles of its *Youth Justice Strategy 2019-23* and to evaluate the outcomes of the existing strategies and its strategic plans before proposing other measures to address youth justice issues.

ATSIWLSNQ

[48] *Youth Justice Strategy* p.6
[49] Ibid.
[50] *Gerhardy v Brown [1985] 159 CLR 70 at 128* in relation to substantive equality