

19 March 2021

Committee Secretary
Legal Affairs and Safety Committee
Parliament House
George Street
Brisbane Qld 4000

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

Dear Secretary,

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

On behalf of the Bar Association of Queensland (**the Association**), I thank you for the opportunity to make submissions on the *Youth Justice and Other Legislation Amendment Bill 2021* (the **Bill**). We understand the closing date for written submissions was 12 noon on Friday 12 March 2021 and we apologise for the lateness of this submission. We hope it can still be accepted.

The following submissions have been prepared by the Association's Criminal Law Committee, chaired by Jeff Hunter QC.

1. The Association notes that the Bill proposes to amend three existing pieces of legislation:
 - a. the *Penalties and Sentences Act 1992* (the **PSA**);
 - b. the *Police Powers and Responsibilities Act 2000* (the **PPRA**); and
 - c. the *Youth Justice Act 1992* (the **YJA**).
2. The Association has no submissions directly related to the proposed amendment to the *PSA*, noting that this amendment is simply a renumbering in consequence of a proposed amendment to the *YJA*.
3. The proposed amendments to the *PPRA* fall into two categories. The Association has no submissions to make in relation to the proposed amendments relating to the investigation and prosecution of evasion offences, other than to reiterate the Association's continuing opposition to the use of mandatory minimum sentences which necessarily impede the proper exercise of sound judicial sentencing discretion.
4. As to the proposed amendments related to the use of metal detectors without warrants in particular locations, the Association is opposed to the arbitrary use of police search powers on people without the requirement for any degree of suspicion of wrongdoing. Such a search power impinges on the basic right to privacy enshrined in s.25 of the *Human Rights Act 2019*. Given the proposed locations to which these new powers will apply, the Association also submits that they are at risk of being discriminatory

against young people given the greater propensity of young people to visit those locations. In short, the Association does not support the amendments.

5. The proposed amendments to the *YJA* are also opposed. These amendments relate to decisions about bail relating to children and amend the sentencing principles applicable to child offenders found in s.150.
6. The Bill proposes to amend s.48AA to permit a court considering granting bail to have regard to whether the child has a parent, or some other person willing to monitor their compliance with bail conditions and to notify either the chief executive or the police of any changes in circumstances which might affect their compliance with those conditions and of any actual breaches of those conditions.
7. A disproportionate number of children in the youth justice system are also part of the child protection system. Many of these children either do not have parents or other adults who could assume these obligations or are the subject of orders whereby the chief executive of the Department of Child Safety is their guardian. It is the Association's fear that these children will simply not be able to propose any person who meets the requirements of the proposed amendment.
8. Further, to require a parent (or some other adult who is supporting a child) to maintain a watching brief of the child's compliance with bail conditions and notify the authorities of any breaches or changes in the child's circumstances, would serve only to undermine the relationship involved - which relationship is recognised by the *YJA* as being of central importance to children's prospects of rehabilitation (see Principle 9(c) in Schedule 1).
9. The Bill also proposes to amend the *YJA* to put some alleged offenders in a "show cause" position when applying for bail. The Association submits that this requirement stands at direct odds with Principle 18 of the Charter, that "a child should be detained in custody for an offence, whether on arrest, remand or sentence, only as a last resort and for the least time that is justified in the circumstances". A presumption against release amounts to a presumption that the point of last resort has been reached.
10. A presumption against release will also result in higher numbers of children being detained on remand who will not, ultimately, be sentenced to detention. This is likely to put increased pressure on already stretched youth detention facilities.
11. The proposed bail amendments also allow for the use of tracking devices using GPS technology on children accused of particular offences. This represents a complete reversal of the *YJA* as it currently stands which provides, in s.52A(5) that courts and police officers must not impose such a condition on a child's bail undertaking.
12. When s.52A was introduced to the *YJA* in 2019, the Explanatory Note to the relevant Bill contained the following observation:

"There are a number of concerns relating to the application of conditions of this nature to children. For example, wearing an electronic tracking device is likely to identify a child as an offender to their community and lead to stigma and isolation. This is likely to be counterproductive to attempts to reintegrate a child into activities such as school, sport or employment."

Electronic tracking may also have a specific cultural impact for Aboriginal young people and Torres Strait Islander young people in that it may be symbolic of the historical control and subjugation imposed on those peoples and may be a cause of shame in their community. There is also limited evidence in Australia and internationally to show that this technology is effective at managing young people on bail and reducing risks of reoffending.

There are also issues related to the use of electronic tracking for young people that are different to its use for adults, due to their stage of brain development. Young people are less likely to consider the consequences of their actions and more likely to engage in dangerous or risky behaviour. This is even more prevalent for young people who have experienced trauma, or have alcohol or drug issues. The use of electronic tracking devices on young people is unlikely to be particularly effective at deterring them from breaching their bail conditions.

There is a risk that the use of electronic tracking would result in more breaches of bail conditions coming to the attention of police, including minor breaches, with the consequence that more young people are returned to or placed in custody. This may be as a result of the intensity of supervision and the ongoing and intensive contact with police. Research suggests that among young people in particular, the longer the period they spend under electronic tracking, the more likely they are to breach their conditions. This would be counterproductive to the intention of reducing the number of young people held in custody on remand.

To resolve the above issues, the Bill clarifies that a condition requiring the use of an electronic tracking device cannot be imposed on a child.”

13. In the experience of the Association’s members, these devices are conspicuous and easily identifiable.
14. Under s.301 of the YJA, it is an offence for any person to publish identifying information about a child without the authority of a court or of the chief executive. The obvious purpose of this is to protect child offenders from being identified.
15. Further, Principle 17 of the Charter of Youth Justice Principles found in Schedule 1 of the YJA reads;

17 A child should be dealt with under this Act in a way that allows the child—

- (a) to be reintegrated into the community; and*
- (b) to continue the child’s education, training or employment without interruption or disturbance, if practicable; and*
- (c) to continue to reside in the child’s home, if practicable.*

16. The Association submits that requiring a child to wear a conspicuous tracking device will allow for the identification of child offenders and the negative consequences identified in the above Explanatory Note will occur. There is no evidence that the

Association is aware of which supports the contention that requiring children to wear tracking devices will have any effect on recidivism or the commission of serious offences.

17. Finally, the Bill proposes to add two new sentencing principles to s.150 of the *YJA*. The Association submits that this amendment is unnecessary. The very first sentencing principle contained in s.150(1) requires a sentencing court to have regard to, “subject to this Act, the general sentencing principles applying to the sentencing of all persons.” In *R v W; ex parte A-G* [2000] 1 Qd R 460 the Court of Appeal held that this principle referred “merely to such principles as had, prior to the *Penalties and Sentences Act*, been worked out by the judges”. The two principles to be inserted have long been relevant in the sentencing of all offenders, not only children. What is more, it is the experience of members of the Association practising in this jurisdiction, that these principles are already applied on a daily basis without any need for specific inclusion in s.150.

The Association would be pleased to provide further feedback or answer any questions you may have arising from this submission.

Yours faithfully



Tom Sullivan QC
President