Aboriginal & Torres Strait Islander
Legal Service (Qld) Ltd

www.atsils.org.au

Level 5, 183 North Quay Brisbane Qld 4000
PO Box 13035, George Street Brisbane Qld 4003
T: 07 3025 3888 | F: 07 3025 3800
Freecall: 1800 012 255
ABN: 116 314 562

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

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

12h March 2021

RE: Youth Justice and Other Legislation Amendment Bill 2021

We welcome and appreciate the opportunity to make a submission in relation to the *Youth Justice and Other Legislation Amendment Bill* 2021. We note the constraints imposed by the short time frame provided for submissions and to consider this bill. That has not left much time for much in depth analysis nor for solutions to be proffered and improved upon by groups most able to contribute to addressing this problem. Despite that we hope the bill will be improved through the committee process.

Preliminary Consideration: Our background to comment

The Aboriginal and Torres Strait Islander Legal Service (Qld) Limited (ATSILS), is a community-based public benevolent organisation, established to provide professional and culturally competent legal services for Aboriginal and Torres Strait Islander people across Queensland. The founding organisation was established in 1973. We now have 27 offices strategically located across the State. Our Vision is to be the leader of innovative and professional legal services. Our Mission is to deliver quality legal assistance services, community legal education, and early intervention and prevention initiatives which uphold and advance the legal and human rights of Aboriginal and Torres Strait Islander people.

ATSILS provides legal services to Aboriginal and Torres Strait Islander peoples throughout the entirety of Queensland. Whilst our primary role is to provide criminal, civil and family law representation, we are also funded by the Commonwealth to perform a State-wide role in the key areas of Community Legal Education, and Early Intervention and Prevention initiatives

(which include related law reform activities and monitoring Indigenous Australian deaths in custody). Our submission is informed by four and a half decades of legal practise at the coalface of the justice arena and we therefore believe we are well placed to provide meaningful comment. Not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences.

PRELIMINARY

The description on use of electronic monitoring below should be read against the background described in the Peak Care submission made to the Legal Affairs and Community Safety Committee in 2019:

> *The Australian Institute of Health and Welfare (AIHW) annual Youth Justice in Australia 2017-18 report, released in May 2019, shows that on an average day in 2017-18**, 87%** of young people in detention in Queensland were unsentenced (awaiting the outcome of their court matter or sentencing), which was **the highest in the nation**. Young people in Queensland also spent **the longest amount of time in unsentenced detention** at 63 days (almost double that of South Australia where young people spent the least amount of time in unsentenced detention). Compounding this concern is that completed periods of detention on remand were **more likely in Queensland than other jurisdictions, to be followed by a community based sentenc**e than by a detention sentence [emphasis added]*

From which it is fair to draw the conclusion that perception does not always match reality when it comes to when bail is and is not granted to youth offenders.

PROVISIONS CONCERNING USE OF ELECTRONIC MONITORING ON CHILDREN FOR BAIL

CLAUSE 26 :

Clause 26 of the Bill amends the Youth Justice Act by inserting a new s 52AA

> **Proposed section s 52AA** to allow a court, in certain circumstances, to impose on a grant of bail to a child who is at least 16 years, has committed a prescribed indictable offence and has been previously found guilty of at least one indictable offence, a condition that the child **must** wear a tracking device while released on bail.

First, all bail conditions should remain in the discretion of the Court. The attempt to create a set rule is too sweeping in its application. Police and Courts already have the powers they need for

granting or refusing bail. Intentionally removing discretions to grant bail and instead create a set and forget automatic refusal of bail will lead to bad decisions and poorer outcomes. While police and magistrates are not gifted with second sight and their decision making on whether to grant bail won't be perfect it will be a vast improvement on any rigid rule such as proposed in the bill.

A number of reasons exist why, starting with the most obvious concern being an arrests based on mistaken identity.

> *Police arrived in a family household, making the children and mother sit in a confined area for over an hour while they decided to arrest a child for unlawful use of motor vehicle. Wrong child, wrong family. While the child was detained at the watchhouse, the highly upset mother had a fair guess who the real culprit was. She brought in the real perpetrator from another family who readily admitted to what he had been doing and continued to argue for the release of her son. After an hour the innocent boy was finally released.*

The outcome would have been very different if the enterprising mother had not been able to identify the likely perpetrator.

Another reason will be the very large range of circumstances in which a child may have been earlier charged with an indictable offence.

> *A child in a large sub-tropical city goes into a seven-eleven and steals a sushi role. Police exercise their discretion to charge the child with a criminal code stealing.*

> *Two children in a small tropical town go to the back of a golf club. One reaches through the louvres at the back and steals a can of coke. The other drinks from the can. Police exercise their discretion to charge the child who drank from the can with a criminal code stealing.*

Those convictions are not indicators of risk. Common sense should prevail and the assessment of risk remain with the court or bail decision maker.

Second, we do have concerns about the proposed use of electronic monitoring for youthful

offenders, not least of which is that electronic monitoring was designed for adult offenders. In our warm climate, unlike many of the jurisdictions that EM is trialled or used in, the presence of the tag is very obvious and stigmatises the wearer, something that may not be explored adequately in the literature looking at their use in colder climates. There is very limited research available for the impact of use of electronic monitoring for youthful offenders on bail in Australia. What research does seem to point to is that electronic monitoring simply becomes a more restrictive measure of bail that would have been granted to a low risk offender in any event.

Information from the Northern Territory seems to point to the wearing of a tracking device identifying the child as an offender and leading to stigma and isolation. This is likely to be counterproductive to attempts to reintegrate a child into activities such as school, sport or employment. It has historic overtones in some communities and may be a cause of shame in the young person's community. Avoidant behaviours may lead to children wearing tags sleeping through the day to avoid stigmatisation and bullying only to emerge at night and in all likelihood commit minor breaches of bail.

PROVISIONS CONCERNING OTHER AMENDMENTS TO BAIL CONSIDERATIONS FOR YOUTH

CLAUSES 21, 24, 29, 33

• provide a discretion for a court or police officer to take into consideration any indication of willingness from a parent or another person to support a child on bail to comply with bail conditions and provide further guidance to the courts on existing bail laws;

Clause 21 amends s 48AA of the Youth Justice Act, and
Clause 26 inserts new section 52AA into the Youth Justice Act.

Implementation of these clauses is likely to highlight the problems when parents have not been notified that their child has been arrested. There are ample powers for the court or police to grant or not grant bail based on the perceived support for the child. We note the lack of consultation and time for adequate reflection on the effect of these provisions and warn of the likelihood of unanticipated consequences of these provisions.

• create a presumption against bail for youth offenders arrested for allegedly committing further 'prescribed indictable offences' while on bail, requiring the offender to demonstrate why their remand in custody is not justified;

> *Clause 24 inserts a new s 48AF into the Youth Justice Act. Section 48AF will apply in relation to a child in custody in connection with a charge of a prescribed indictable offence if the offence is alleged to have been committed while at large or awaiting trial or sentencing for an indictable offence. Where s 48AF applies, it will provide that a court or police officer* ***must*** *refuse to release a child from custody unless the child shows cause why the child's detention in custody is not justified.*

The grant of bail is always a discretionary exercise. Courts and police officers exercise this discretion with great care. No grant of bail is entirely risk free but the figures referred to in our preliminary comment show that the grants of bail are exercised extremely cautiously. A previous prescribed indictable offence, whatever that may be, is not necessarily any reliable indicator of risk unless it is similar offending or similar recent offending which is already taken into account.

In our view the measure is disproportionate and unnecessary.

• codify the common law position that committing an offence on bail is an aggravating factor taken into consideration when determining an appropriate sentence for offences committed;

> *Clause 29 amends s 150 of the Youth Justice Act to insert new principles to which a court must have regard in sentencing a child for an offence, being the presence of any aggravating or mitigating factor concerning the child and whether the child committed the offence while released into the custody of a parent, or at large without bail, after being committed for trial, or awaiting trial or sentencing, for another offence*

Clause 29 is unnecessary. The common law principle is clear. There is no caselaw referred to that would require remedying. It adds absolutely nothing and is unnecessary.

• include a reference to the community being protected from recidivist youth offenders in the charter of youth justice principles in the Youth Justice Act;

> *Clause 33 amends schedule 1 of the Youth Justice Act, the charter of youth justice principles, to clarify that principle 1, which states that the community should be protected from offences, includes, in particular, recidivist high-risk offenders*

Clause 33 adds absolutely nothing. The wording of Principle 1 is clear and unconfused. It should remain that way.

PROVISIONS CONCERNING DEEMING PROVISIONS

CLAUSES 7-17

• enhancing the enforcement regime against dangerous hooning behaviour by strengthening existing owner onus deeming provisions for hooning offences.

Clauses 7 to 17 of the Bill amend existing provisions in ch 22 of the PPR Act to expand existing powers to provide an evasion offence notice to apply to all 'type 1 vehicle related offences' (hooning offences). The amended provisions will apply to allow police to issue a 'type 1 vehicle related offence notice' to the owner of a motor vehicle requiring the owner to state certain information in a statutory declaration responding to the notice.

Additionally, a person who does not respond to a type 1 vehicle related offence notice is taken to have been the driver of the vehicle involved in the type 1 vehicle related offence and may be prosecuted for the offence even though the actual offender may have been someone else. However, it is a defence for the person to prove, on the balance of probabilities, that the person was not the driver of the motor vehicle involved in the offence when the offence happened.

Deeming that a person has committed an offence will limit the right to be presumed innocent until proven guilty according to law (s 32(1) of the HR Act). A further result of the amendments is that if a person does not respond to a type 1 vehicle related offence notice, they will not be able to rely upon the information that would have been STATEMENT OF COMPATIBILITY Youth Justice and Other Legislation Amendment Bill 2021 Page 6

provided in such a notice in their defence, unless they provide 21 business days' notice to the prosecuting authority and the court grants the person leave to rely on the evidence (existing s 756(5) of the PPR Act). If the person is defending a charge of dangerous operation of a vehicle contrary to s 328A of the Criminal Code, an amendment will allow the information to be used by a defendant in their defence without giving 21 business days' notice, provided the court grants leave on the basis that the interests of justice require that the person be able to rely on the evidence.

The proposed clauses reflect the lack of consultation. A conviction for a dangerous operation of a motor vehicle has very serious consequences for the ability to hold a licence for over five years. The notes anticipate that a person will be found guilty of an offence notwithstanding a reasonable doubt or the existence of exculpatory evidence. That is antipathetic to all notions of fair trial and protection from arbitrary treatment. It is ill considered and should not be passed in its present form.

Example: a father with grown up children who is working in an indigenous community lends his car to his pregnant daughter who is living on the outskirts of an urban area but has no reliable safe transport. Unknown to him, she has allowed her on again off again boyfriend to drive the car from time to time. She is away for a few days and when she comes mortgage back notices nothing different about the car.

Because the off again boyfriend actually used the car for hooning sometime in those few days, on the operation of these laws the innocent father not only loses his car but gains a criminal conviction, loses his licence, and in consequence loses his job and loses his mortgage.

The proposed clauses are arbitrary and unfair. In our submission they should be omitted from the bill.

ALTERNATIVES

Police and Courts already have the powers they need for granting or refusing bail. Above all, what police and courts are missing are an option for bail hostels and the ability to refer youth to drug and alcohol rehabilitation, But there is also a gaping hole in our criminal justice system for justice reinvestment and the protective measures that come out of prevention. Before those are implemented, there are low or no cost strategies available which include strategies to de-escalate1 and work with community.[2] An important recommendation to come out of the Atkinson report was the recommendation to work with Community Champions.

There have been highly successful initiatives such as the justice reinvestment initiative in Bourke.[3] In 2013, Bourke had topped the list of locations with high criminal offences in six out of eight major crime categories and around $4 million each year was said to have been spent in locking up young people in Bourke. A recent report, carried out by KPMG, was based on data collected over a 12 month period. The report4 showed a 31 per cent increase in year 12 retention rates, and a 38 per cent drop across the 5 top juvenile offences. The lessons from the Maranguka Justice Reinvestment Project is that sustainable outcomes and savings can be achieved by redirecting funding from crisis response, adult prison and youth detention towards preventative, diversionary and community development initiatives.5The Maranguka/Just

[1] D.C. Herz, Improving Police Encounters With Juveniles: Does Training Make a Difference? JUSTICE RESEARCH AND POLICY, Vol. 3, No. 2, Fall 2001https://de-escalate.org/wp-content/uploads/2015/10/Improving-Police-Encounters-with-Juveniles.pdf

[2] https://www.abc.net.au/news/2020-10-01/townsville-youth-crime-solutions/12714914

[3] https://www.sbs.com.au/nitv/article/2018/11/28/bourkes-maranguka-hub-keeping-kids-out-prison

[4] KPMG, *Maranguka Justice Reinvestment Project Impact Assessment*, 27 November 2018, available at http://www.justreinvest.org.au/wp-content/uploads/2018/11/Maranguka-Justice-Reinvestment-Project-KPMG-Impact-Assessment-FINAL-REPORT.pdf

Revinvest people are the first to say that there is no silver bullet to these problems, but their message to governments and communities is that there is a solution; a smarter approach that will reduce crime and create safer, stronger communities.5 Similar initiatives have been carried out with success in Scotland. The rethink in the United Kingdom has led to the Justice Secretary David Gauke in the United Kingdom commenting on the need for a "smart" justice system instead of the false dichotomy of "soft" vs "hard" justice.6

CONCLUSION

The more difficult and gnarly the problem the more it needs a proper understanding of what feeds it, what starves It, and what is likely to have a counter-productive effect. This problem needs input and consultation from all sides. The amount of time to respond to these provisions is plainly inadequate and a poor solution will be a band-aid at best or deepen the problem at worst. It needs bipartisan input, and it needs input from the problem solvers already operating in the field. An example of a fast track and effective consultation participation process was the Blue Card Indigenous Community consultation conducted in late 2019. We were impressed by how quickly the process mined stakeholders for insights and collaborative solutions. Anything less than proper investment into thinking through these problems with the necessary people around the table will add to the problems, not reduce them.

We thank you for the opportunity to provide feedback in this important bill.

Yours faithfully,

Shane Duffy

Chief Executive Officer

[5] https://www.alrc.gov.au/wp-content/uploads/2019/08/82._just_reinvest_nsw.pdf)

[6] Press Release *Justice Secretary David Gauke sets out long-term for justice*, available at https://www.gov.uk/governmetn/news/justice-secretary-david-gauke-sets-out-long-term-for-justice. See also, *Ministers consider ending jail terms of six months or less*, available at https://www.bbc.com/news/uk-46847162