Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd

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Committee Secretary
Community Support and Services Committee
Parliament House
George Street
Brisbane QLD 4000
By email: cssc@parliament.qld.gov.au

Dear Secretary,

RE: SUBMISSION ON THE CHILD PROTECTION (OFFENDER REPORTING AND OFFENDER PROHIBITION ORDER) AND OTHER LEGISLATION AMENDMENT BILL 2022

Thank you for the opportunity to provide comments on the Child Protection (Offender Reporting and Offender Prohibition Order and Other Legislation Amendment Bill 2022 (**Bill**) which seeks to make amendments to the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) (**CPOROPO Act**), the *Child Protection (Offender Reporting and Offender Prohibition Order) Regulation 2015* (Qld) (**CPOROPOR**) and the *Police Powers and Responsibilities Act 2000* (Qld) (**PPR Act**). We strongly support measures that are based upon protecting the human rights of children including measures which promote and preserve the safety of children and protect children from harm including sexual harm. However, upon reviewing the Bill, we have identified some implications that perhaps may not have been contemplated in the drafting of this Bill which we foresee will, in practice, negatively impact Aboriginal and Torres Strait Islander peoples and which have the potential to further exacerbate existing challenges regarding compliance with offender reporting obligations. In this submission, we have sought to outline our concerns regarding these proposed amendments.

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 24 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 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 nearly five 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.

Proposed amendments to the CPOROPO Act

Clause 3 – Replacement of Part 3 (Offender reporting orders)

Under the CPOROPO Act, where an individual is sentenced for an offence that is prescribed in Schedule 1 of the Act, the individual is a reportable offender for the purposes of the Act and required to comply with certain reporting obligations as set out in the Act. There also is scope under the Act for a court to make a declaration with respect to an individual that the court has found guilty of a non-prescribed offence, which has the effect of treating that individual as a reportable offender under the Act where the court is satisfied that the facts and circumstances surrounding the offence constitute elements of a reportable offence[1].

The proposed new Part 3 (Offender reporting orders) appears to create a more detailed framework relating to the making of OROs.

Under the CPOROPO Act, for a court to be able to make an ORO, it needs to be satisfied that:

- the person poses a risk to the lives or the sexual safety of one or more children, or of children generally, or
- for a person convicted of a child abduction offence, that having regard to the circumstances of the case, the context in which the offence was committed was not familial and it is appropriate in the circumstances to make the order.

It appears that the Bill seeks to clarify what constitutes the standard of "satisfaction" that a court must have regarding the matters outlined above, which is expressed in the proposed amendments to be the civil standard (the balance of probabilities).

Concerns regarding the impact of cultural biases in the assessment of risk

There have been long-standing concerns regarding how susceptible risk assessment tools may be to

[1] See section 5A of the CPOROPO Act.

cultural biases[2]. In our experience, we have seen firsthand that where actors in the justice system are required to assess the risk posed by an individual, there is a tendency to inflate the risk posed when the individual involved is an Aboriginal and/or Torres Strait Islander person. We strongly recommend that if the Queensland government decides to legislate these amendments, that it also facilitate the provision of cross-cultural training for judicial officers regarding fair assessment of risk and avoidance of cultural bias.

As stated in the 2016 University of Wollongong Research Paper, *Judicial indigenous cross-cultural training: What is available, how good is it and can it be improved?*, short courses in cultural awareness are not adequate to address the gap:

> *…while the majority of Australians have strong opinions regarding Indigenous Australians, far fewer of them have had any meaningful engagement with Indigenous Australians, leaving their opinions open to the risk of being based on stereotypes and dominant (negative) discourse, rather than lived experiences and sound education[3]. This in turn presents a real challenge for any short course in cross-cultural professional development to unsettle the embedded assumptions individuals have of Indigenous Peoples.[4]*

Furthermore, with specific reference to cross-cultural training of judicial officers, the Wallace framework on Australian Indigenous Peoples which was developed by Dr Anne Wallace, a member of the National Judicial College of Australia's National Indigenous Justice Committee, expressed the importance of cultural awareness training within the Australian judiciary as follows:

> *Judges in a modern and culturally diverse society can be expected to know that there is a possibility that there are cultural issues that they are unaware of. They can also be expected to be aware that lack of information or awareness about cultural factors could affect their ability to perform their role in situations where they are dealing with people who come before their court from those cultural backgrounds.[5]*

<u>Assessment of criminal history as a matter a court must consider before making an ORO</u>

Proposed new section 12D sets out a broadly drafted list of matters that a court must consider before making an ORO. One of the matters that a court must consider is the criminal history of the individual[6]. While we appreciate that assessment of criminal history is a relevant matter, we wish to assert that overrepresentation of Aboriginal and Torres Strait Islander peoples in the criminal justice system, the causes of which include systemic discrimination, means that there is a higher likelihood that Aboriginal and Torres Strait Islander offenders will have criminal history and this may, in turn, increase the likelihood

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[2] Andrew Day, Armon J. Tamatea, Sharon Casey & Lynore Geia, 'Assessing violence risk with Aboriginal and Torres Strait Islander offenders: considerations for forensic practice' *Psychiatry, Psychology and Law*, 25:3 (2018), 452-464.

[3] Marcelle Burns, 'Towards Growing Indigenous Culturally Competent Legal Professionals' *The International Education Journal: Comparative Perspectives* 12(1) (2013), 226, 238.

[4] Vanessa I. Cavanagh and Elena Marchetti, *Judicial indigenous cross-cultural training: What is available, how good is it and can it be improved?* (2016) Faculty of Social Sciences – Papers in University of Wollongong <https://ro.uow.edu.au/sspapers/3683> [16 November 2022].

[5] Anne Wallace, 'Australia's Indigenous People—A Curriculum Framework for Professional Development Programs for Australian Judicial Officers' (Report, National Judicial College of Australia, no date).

[6] Section 12D(d) of the Bill.

of an ORO being imposed on Aboriginal and Torres Strait Islander offenders. We raise this point not only to highlight how overrepresentation continues to have negative flow-on effects which often results in the continued binding of an Aboriginal and/or Torres Strait Islander individual to the criminal justice system, but also to reiterate the critical importance of communicating reporting obligations to Aboriginal and Torres Strait Islander offenders in culturally appropriate terms.

Reporting obligations need to be communicated in a culturally appropriate way

The rationale for this Bill, as expressed in the explanatory speech and supporting documentation, is child safety. Increasing compliance by offenders with their reporting obligations is at the very heart of this objective. Prescriptive frameworks which require timely reporting are concepts which are not naturally congruent with the culture of Aboriginal and Torres Strait Islander peoples, for example, where family and kin responsibilities may be prioritised. Accordingly, any reporting obligations imposed upon an Aboriginal and/or Torres Strait Islander person must be framed and communicated to that individual in a culturally appropriate manner, to limit cultural and literacy barriers and promote the best chance of compliance. Furthermore, cultural competency training must be provided to all relevant persons framed in strategies to improve the effectiveness and cultural capabilities of administrating offender reporting if compliance is to be achievable.

Clause 9 - Amendment of section 15 (Provision of personal details by corrective services)

Under the proposed amendments to section 15 of the CPOROPO Act, the chief executive of corrective services (**QCS**) has the power to ask an offender to hand over details of the address of the premises where the offender intends to reside when the offender is released or if the offender does not intend to reside at a particular premises when released, each locality where the offender intends to be generally found. While an offender is not required to comply with such a request (i.e., compliance is not mandatory), we are concerned that once QCS is in the custody of this further information, there appears to be no sufficient safeguards in the proposed drafting that will ensure this information is only used by QCS for the purpose of provision to QPS with respect to the offender's reporting obligations under CPOROPO Act and not for any other purpose. Furthermore, there appears to be no sufficient legislative safeguards to ensure that once QPS has this information, it will only be used in relation to the offender's reporting obligations under the CPOROPO Act and not for any other purpose.

In particular, we hold the following specific concerns:

- Once in the possession of QCS, address details contained in the "system" could potentially be used in future parole deliberations for that individual, for example, if the address is considered unsuitable for any reason, it may result in suspension of parole for that individual[7]. Accordingly, use of the address for this additional purpose may unfairly disadvantage the offender.
- Once in the possession of QCS, the address details contained on the "system" could be used in future bail deliberations for that individual, for example, if the address may be considered unsuitable for any reason, it may result in denial of bail. Accordingly, use of the address for this additional purpose may unfairly disadvantage the offender.

[7] We note the effect of Foster v Shaddock [2016] QCA 36 in which the court held that a decision by QCS to suspend parole of an individual was lawful, despite the court having ordered a parole release date for that individual.

Clause 28 - Insertion of new section 54A (Reporting obligations notice) and Clause 37 – Amendment of Section 77 (Evidentiary provisions)

Under this proposed new provision, where a triggering event in section 54(2) of the CPOROPO Act occurs, the police commissioner *must* give the offender a written notice called a *reporting obligations* notice and an *initial reporting obligations notice* setting out certain details regarding the offenders reporting obligations. Under the proposed new section 77(3)(e), in a proceeding under the CPOROPO Act, a statement by the prosecution about that an individual was given the reporting obligations notice by a stated police officer is evidence of that matter.

Taking into consideration:

- the importance of overcoming cultural and literacy barriers when imposing prescriptive reporting obligations on an Aboriginal and/or Torres Strait Islander offender (as discussed earlier in this submission); and
- that a high proportion of child sex offenders suffer from cognitive impairment issues,

we cannot see how the mere serving of these notices on an offender by a police officer could be considered to be sufficient notice.

In our view, the proposed amendments should also contain:

- amendments to proposed section 54A to insert a positive obligation on QPS to:
    - engage with an individual whom they intend to serve a section 54A notice on with a view to understanding the individual's cultural, literacy and/or cognitive barriers; and
    - make a written record of the police officer's observations regarding the individual's cultural, literacy and/or cognitive barriers; and
    - explain the content of each notice to the individual upon which they have served the notice in a manner which considers the offender's cultural, literacy and/or cognitive barriers; and
- amendments to proposed section 77(3)(e) such that a police officer is also required to provide evidence that they sufficiently explained the contents of each notice served upon the individual upon whom it was served considering the individual's cultural, literacy and/or cognitive barriers.

Clause 48 – Amendment of section 21A of the PPR Act

While we appreciate the strong policy impetus behind ensuring that registered offenders do not reoffend, we do not support the proposed expansion of police powers under the PPR Act which allow police to enter and inspect all digital devices owned by a registered offender in the absence of a search warrant. Pursuant to section 25 of the *Human Rights Act 2019* (Qld), a person has the right not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with. We consider this proposed expansion of power to be within the realms of arbitrary invasion of privacy, especially noting that there appears to be no threshold for a police officer to have reasonable suspicion of new wrongdoing by the offender before they can exercise this power.

CONCLUSION

We strongly support measures contained in this Bill to the extent that they seek to protect children from harm. However, as outlined in this submission, in reviewing this Bill we identified some proposed

amendments which we foresee, in practice, will have negative consequences for Aboriginal and Torres Strait Islander individuals. Considering the overrepresentation of Aboriginal and Torres Strait Islander individuals in the criminal justice system, we are concerned to ensure that any proposed legislative amendments are carefully considered so as to avoid unintended consequences which may exacerbate existing disadvantages that Aboriginal and Torres Strait Islander peoples experience. To that end, we have sought to make recommendations in this submission which, in our opinion, are critical to alleviate the negative implications identified in relation to this Bill.

We thank you for the opportunity to provide feedback on this proposed Bill.

Yours faithfully,

Shane Duffy

Chief Executive Officer