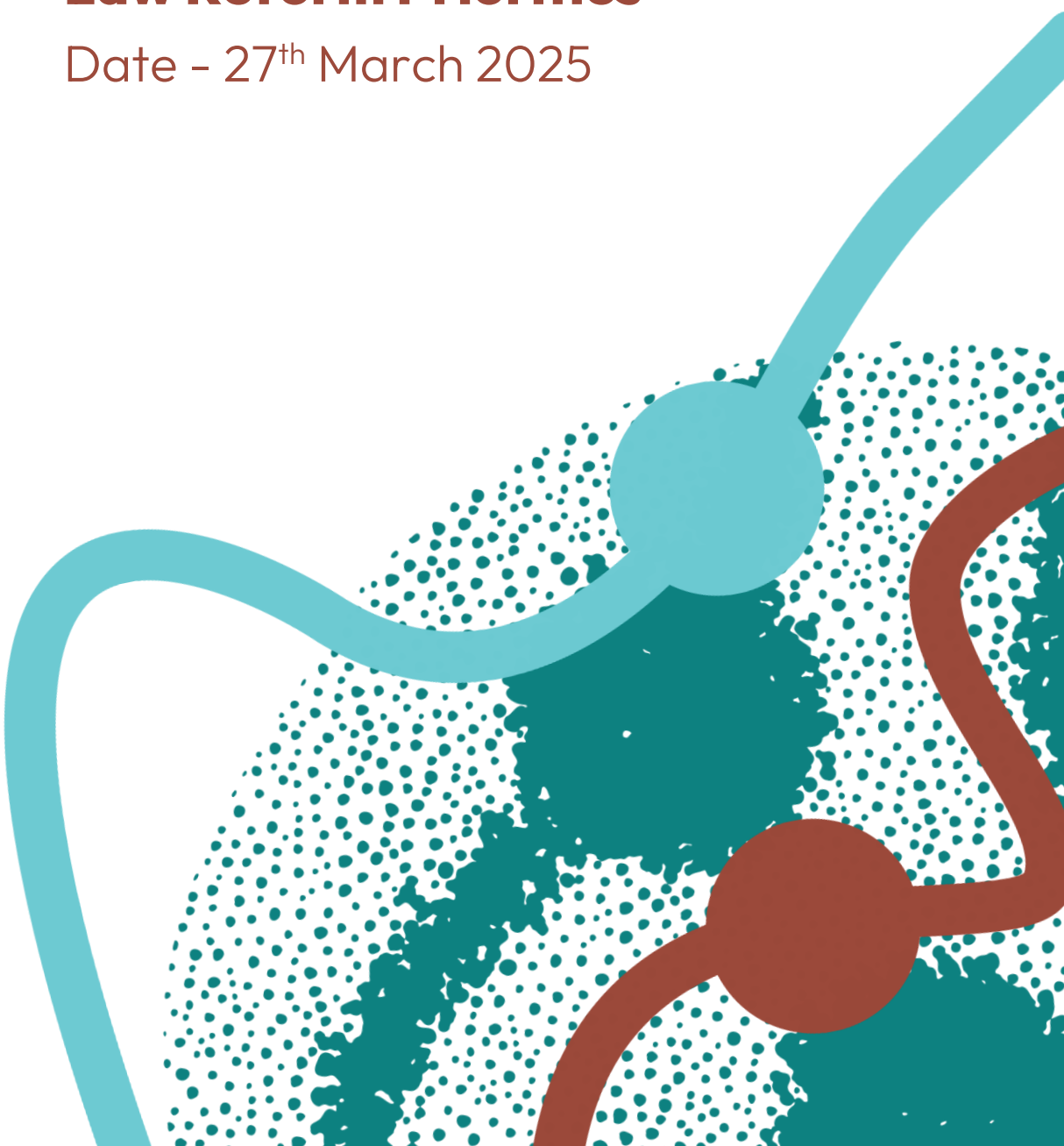
ATSILS
Aboriginal and
Torres Strait Islander
Legal Service (Qld) Ltd

Law Reform Priorities

Date - 27th March 2025



Child Protection Law Reform Priorities

Child Protection Act 1999 (Qld)

We recommend that the following amendments be made to the Child Protection Litigation framework.

1.0 Strongly recommend: There must be more, and clearer, discretionary powers for the court to make any orders in the best interests of a child

The current legislative framework contains a very complex range of provisions conferring an assortment of powers to the court to make orders. For example, the court has more powers in relation to interim orders than on final orders and has different powers depending on the orders being applied for. In our view this creates confusion and has resulted in the legislation getting in the way of efficient resolution of matters. Additionally, in our experience, the *Child Protection Act 1999* (**CP Act**) appears to have been drafted in a manner to maximise the power of the administrative and minimise the powers of the judiciary. We would like to see such matters in the jurisdiction of the courts to resolve issues, rather than QCAT, for a variety of reasons (long delays in listing matters due to under-resourcing being a particularly important one). In our view, similar to the legislative framework governing Family Law, the court should be given broad overarching discretion to make any orders on such terms and conditions as the court deems fit, provided such is in the best interests of the child. This broad discretion would enable the court to, for example, make an order to enforce the application of section 5C in any given child protection matter. In that regard, we refer to section 101(2) of the *Oranga Tamariki Act 1989 Children's and Young People's Well-being Act 1989* (NZ) be considered as a cross-jurisdictional example of a provision that could be imported into the Queensland legislative framework. This provision is extracted for your convenience below:

101 Custody orders

(1) If a court, on application under section 68, is satisfied that a child or young person is in need of care or protection, it may make an order placing that child or young person in the custody of any of the following persons for such period as may be specified in the order:

(a) *the chief executive:*
(b) *an iwi social service:*
(c) *a cultural social service:*
(d) *the director of a child and family support service:*
(e) *any other person.*

(2) *Any such order may be made on such terms and conditions as the court thinks fit.*

2.0 In relation to a child subject to a Child Protection Order Application who is of an age capable of expressing their views and wishes, early consideration must be given (at minimum, before the first mention) to referring the child to a child advocate or direct representative, particularly in circumstances where the reported views of the child conflict with the application before the court

In our view, this will avoid scenarios where Child Safety poses questions to very young children as to where they wish to stay. We are aware of circumstances where Child Safety Officers (**CSOs**) will ask this question of children as young as 5 years old. To place this pressure on a young child, especially in the highly stressful scenario where CSOs have had contact with the family, is wholly inappropriate. Furthermore, a child, in answering such a question, might not have a full understanding or appreciation of what disconnection from their kin, community and culture might mean for them in the longer term, in the event that the child is ultimately removed from the same. The younger the child, the less likely this is to be the case. Children are particularly susceptible to gratuitous concurrence, leading questions and providing answers to adults the child believes the adult wants to hear.

3.0 For a child that is 15 years or older, applications for Child Protection Orders are not to be brought without first seeking the consent of the child

Currently the views of children are sought. Anecdotally, we have found that children of this age tend to 'vote with their feet' regardless of orders made choosing to live with whomever they like. An exception to this may be where there is immediate risk of significant harm to the child or where the child has a cognitive impairment or vulnerability that compromises their ability to provide fully informed consent. Of note, the immediate risk of significant harm should be a fairly high standard and include consideration that a child of this age would not be able to self-protect or self-report issues.

4.0 Strongly recommend: Prior to a child being removed, consideration must be given to mandating Alternative Dispute Resolution (ADR) as an alternative to contested litigation, similar to the approach in Family Law

In the proposed model, parents should have a right to legal representation and if agreement is reached, the matter can be formalised in a written agreement or, if necessary, via consent orders (directive/supervision order by consent). Legal practitioners from Community Legal Centres, including ATSILS, could provide ADR representation services in the child protection

space. Provision of such services is contingent upon adequate funding being provided to meet this legal need (we note that resolving matters at ADR, rather than in court, will represent a significant saving of taxpayer dollars). Whilst we acknowledge that court-ordered conferences form is part of the current mediation model, this is at the back end of the process, not prior to a child being removed. There are numerous benefits to mandating ADR at the outset including, notably, that it would avoid contested litigation, it would allow parents/caregivers to quickly and efficiently deal with issues, it would enable their voices to be heard and for them to have more of a say in outcomes, it would reduce the stress associated with court appearances, parents and care givers will be better informed of the current concerns, how to address these concerns, and it would ultimately lead to better outcomes for children and families. In the event that the Queensland government is not minded to introduce mandatory ADR at the front end of the child protection process, then at minimum, where an assessment process has been completed and the outcome is that the child is in need of protection, there must be a requirement to hold a stakeholders' conference where parents are given the opportunity to have legal representation, family members and social workers, etc. present. Discussions can be formalised by way of a written agreement or consent order. This process would be appropriate where Child Safety has engaged with the parents and the Department is willing to work with the parents to address any relevant issues. Currently, families are experiencing their child being removed without any notice and no opportunity to discuss the situation. It is important to weigh up the emotional and psychological trauma caused to the child being removed from a parent as opposed to the risk of remaining with that parent.

5.0 **We recommend that the *Child Protection Act 1999* be amended to embed a robust monitoring regime to ensure compliance with obligations to apply the section 5 principles, including section 5C principles for Aboriginal and/or Torres Strait Islander children (Aboriginal and Torres Strait Islander Child Placement Principle), and ensure that monitoring processes are in place throughout the process including after final orders are made**

This recommendation is based upon a concern that there is limited, if any, real accountability when it comes to the Aboriginal and Torres Strait Islander Child Placement Principle not being applied which then diminishes the purpose of having it in the legislative framework.

6.0 The CP Act fails to take into account the primary carer of the child when that person is not a parent under section 11. The primary carer should be given consideration as a respondent to Application for CP Orders.

In our view, the CP Act needs to be amended such that if a child is in the primary care of a person that is not a parent, that proper consideration be given for that carer to be listed a respondent to proceedings, similar to the current approach in Family Law matters.

When Child Safety removes a child, only the parents of the child or person who has responsibility under court order for the child (such as a guardian under a court order) are listed as respondents. Anyone else, including those that might have been caring for the child, are not listed as a respondent. This can become very restrictive. Those individuals who do not meet the section 11 definition of a parent, would then have to rely upon an application made under section 113 of the CP Act. If such an application is granted, then the level of participation of the applicant is at the court's discretion. This potential lack of inclusion in proceedings results in the views of the primary carer of the child not being taken into account which may not be in the best interests of the child.

A recent client example illustrates this issue. We had a matter involving twin children. When the twins were born, the mother had placed them in the care of their maternal grandparents. Child Safety made an Application for a Child Protection Order stating that there was no parent willing and able to take care of the children. This was despite the maternal grandparents taking care of the children since birth. We brought proceedings to add the maternal grandmother as a party to the proceedings which resulted in said grandparent being declared a parent under section 11, ultimately resulting in the substantive application being withdrawn. While ATSILS was able to assist in this particular case, for the most part non-parent carers do not have access to legal assistance to make an application under section 113, or to be considered as a potential respondent by child safety.

7.0 Ex-parte orders for Temporary Assessment Orders (TAO) and Temporary Custody Orders (TCO) should not be made unless sufficient reasons are given

Currently, under section 26 and 51AD of the CP Act, a Magistrate may decide an application for a temporary assessment or custody order without notifying the child's parents of the application or hearing them on the application. The current approach by the Court is to exercise this power in almost all TAO and TCO Applications. Given the significance and consequences of an ex-parte custody order, this discretion should be used sparingly rather than it being standard process currently utilised in almost all child protection matters. The CP Act should be amended such

that the order should only be made ex-parte in circumstances where, on the balance of probabilities, a failure to do so would place the child at an unacceptable risk of harm.

Interlinked to this item is the item directly below entitled 'The legislation needs to be clear on what occurs with respect to unborn children' on the basis of our continued significant concerns about Child Safety removing babies from hospital birthing suites without notice or due process and not in particularly extreme circumstances.

8.0 The legislation needs to be clear on what occurs with respect to unborn children

We continue to hold significant concerns about the welfare of children upon birth where the parents are the subject of a notification whilst the mother is pregnant. In our experience, Chid Safety does not act until the baby is born on the basis that, once born, there exists a legal person but before then, there is no legal person. In our view, this is setting parents and the child up for failure.

We recently represented a client at an investigation and assessment meeting involving a pregnant mother. In that meeting, we asked Child Safety to advise us if there were any issues, so that such might be addressed proactively. We were not advised of any issues, and the next time we heard about the matter was when mother phoned us from the hospital to advise us that Child Safety had removed the child. A simple conversation with the mother whilst in hospital would have given Child Safety relevant and current information about the mother's arrangements for the care of the child.

Given the intergenerational trauma associated with the history of child removal from Aboriginal and/or Torres Strait Islander families, it is abhorrent that this be allowed to continue to occur and that issues are not more proactively addressed. We strongly recommend that ADR must be considered or, at minimum a mandatory stakeholders' conference, once a mother is 6 months pregnant to allow for proactively addressing issues relating to unborn children with the aim of avoiding the removal of children in this manner.

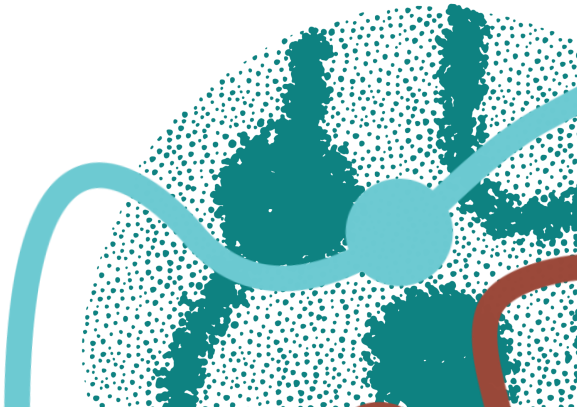
9.0 Applications should be based on 'unacceptable risk of significant harm/significant harm experienced' rather than 'concerns'

Currently Applications are overlaid with issues that Child Safety refers to as 'concerns' rather than risks. These concerns are more in the category of best practice parenting, but by including them in the Application, this means that parents have to deal with a significantly longer list of concerns (common examples being, that the child have their own room, that the child sleeps in a bed and not on the floor, that the child have shoes, that the child is not playing in the street), rather than a list that addresses the critical issues. In our view the best practice parenting considerations in the view of the department are not synonymous with unacceptable risk

issues, hence Child Safety should consider unacceptable risk issues only, rather than matters that fall into the 'concerns' category. In our experience, this approach by the department makes reunification much more challenging.

10.0 Strengthening of decision-making framework supported by policies and procedures and training and Child Safety staff to improve assessment of risk by offices and/or teams within Child Safety.

We have observed that assessment of risk varies starkly between offices and/or teams within Child Safety. For example, whilst one team within Child Safety will not reunify a child whist a parent is using prescription cannabis, another team will reunify and safety plan around the prescription cannabis use issue. It appears that differing approaches are influenced by the inherently subjective aspects of the risk management tools used, coupled with the particular approach of the relevant Team Leaders within Child Safety and the sensitivity to risk that informs the culture of the office in relation to particular risk factors. We strongly recommend that risk assessments need to be less subjective and based upon provable probative evidence and culturally validated risk assessment tools, rather than speculation, lack of understanding of cultural parenting practices and hearsay.



Criminal Law Reform Priorities

Youth Justice Act 1992 (Qld)

1.0 Repeal all suspensions of the *Human Rights Act 2019* (HR Act) in relation to amendments made to the *Youth Justice Act 1992* (YJ Act).

2.0 Repeal the 'Adult Crime, Adult Time' laws enacted by the *Making Queensland Safer Act 2024* (Qld)

In our view, the 'Adult Crime, Adult Time' regime should be repealed for the following reasons:

2.1 the combined effect of bail law changes introduced in 2020 by the *Youth Justice and Other Legislation Amendment Act 2021* (Qld) and the amendments in the *Making Queensland Safer Act 2024* (Qld) is that the increase in custodial sentences is further straining capacity in youth detention centres in Queensland, and is resulting in children being held in watchhouses for extended periods of time;

2.2 this impact results in limitations to the protection from cruel, inhuman or degrading treatment, pursuant to section 17(b) of the *Human Rights Act 2019* (Qld) (**HR Act**), and the right to humane treatment when deprived of liberty, pursuant to section 30 of the HR Act, having regard to the fact that it is widely accepted that watch houses are not appropriate or humane places in which to detain children (particularly for any lengthy period of time;

2.3 the Statement of Compatibility for the Making Queensland Safer Bill 2024 itself states, at page 5:

*"I also recognise that, according to international human rights standards, the negative impact on the rights of children likely outweighs the legitimate aims of punishment and denunciation. **The amendments will lead to sentences for children that are more punitive than necessary to achieve community safety.** This is in direct conflict with international law standards, set out above, which provides that sentences for a child should always be proportionate to the circumstances of both the child and the offence – mandatory sentencing prevents the application of this principle."*;

2.4 it goes against the long-established evidence base which demonstrates that incarceration of children simply does not work in preventing, reducing or deterring offending;

2.5 the effect of the amendments disproportionately impacts Aboriginal and Torres Strait Islander children who are significantly overrepresented in the numbers of children in contact with, or at risk of being in contact with, the criminal justice system;

2.6 the amendments are contrary to the government's human rights obligations to children and, as such, the amendments included express overrides of the HR Act which we strongly oppose; and

2.7 the amendments are at odds with the National Agreement on Closing the Gap (**NACTG**), in particular, relating to the targets to reduce overrepresentation of young people in the criminal justice system.

3.0 Wind back the following 4 x suites of legislative amendments which have caused numbers of children on remand to significantly increase, and which have been key contributors to youth detention centres being at capacity and children being held in adult police watch house as an overflow solution for durations up to and exceeding 20 consecutive days in contravention of their human rights:

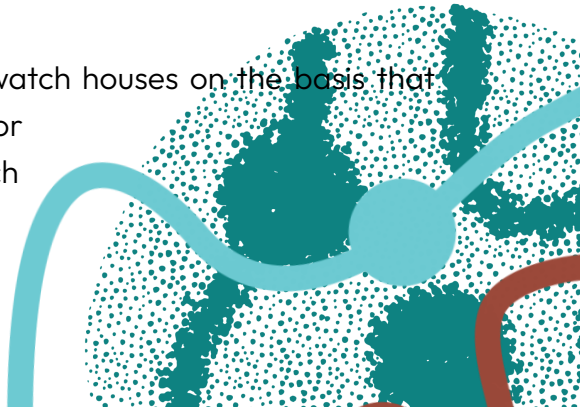
3.1 2020 amendments made to YJ Act which had the effect that a child/young person who is an 'unacceptable risk to the safety of the community' must be denied bail and must be kept in custody;

3.2 2021 amendments to the YJ Act to strengthen the regime against serious repeat youth offenders to:

- introduce a limited presumption against bail for a child/young person that is charged with particular offences, including assault, attempted robbery, unauthorised use of a motor vehicle where the child is a driver, and dangerous driving, where the child or young person was on bail for an indictable offence; and
- legislate that offences committed on bail should be considered as an aggravating factor during sentencing; and

3.3 2023 amendments to the YJ Act with little to no consultation to:

- retrospectively validate the unlawful detention of children in police custody where a remanding or sentencing court did not make an order under section 56(4) or section 210(2) of the YJ Act;
- legitimise the detention of children in police watch houses on the basis that youth detention centres in Queensland are at, or nearing, capacity and holding children in watch

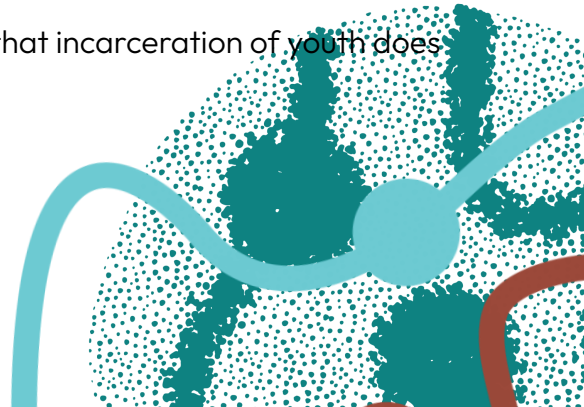


houses is Queensland Government's preferred interim solution until the two new youth detention centres in Woodford and Cairns are operational which was proposed to happen in 2026, but has been delayed (the Department of Youth Justice and Victim Support website now states that Stage 1 of Woodford is expected to be constructed in Quarter 1, 2027, and Cairns is now expected to open in 2027);

- expressly override the HR Act (pursuant to section 43 of the HR Act) for decisions about holding children in watch houses when youth detention centres are at or over capacity;
- enable the Governor in Council to, by regulation, establish detention centres and other places for purposes of the YJ Act;
- expressly override the HR Act (pursuant to section 43 of that Act) so that a regulation may be made to establish a place as a youth detention centre (which could include a police watch house) even if this would not be compatible with human rights;
- insert an express provision (section 262A) stating that section 58 of the HR Act does not apply to acts and decisions relating to a child in a relevant detention centre or the placing of a child in a relevant detention centre (the examples provided in this provision include acts and decisions relating to the transportation of a child to a relevant detention centre, the chief executive's carrying out of their responsibilities relating to the wellbeing of the child detained in a relevant detention centre and the chief executive's carrying out of their responsibility to establish programs and services for a child detained in a relevant detention centre); and
- amend section 640 of the *Police Powers and Responsibilities Act 2000* (Qld) to declare that the HR Act does not apply to decisions made by QPS to transfer a child between watch houses or to holding cells.

3.3.1 2023 amendments to the YJ Act via the *Strengthening Community Safety Act 2023* (**SCS Act**) that had the effect of making the breach conditions of bail offence (s29, *Bail Act 1980* (Qld)) apply to children/young persons despite fervent advocacy by many organisations, including ATSILS Qld, on the basis that:

- there is no evidence to justify the re-introduction of this offence;
- there is a multitude of evidence to establish that incarceration of youth does not reduce recidivism;



- breach of bail was already dealt with as part of the criminal justice process (therefore, no need for an additional discrete offence);
- there are significant concerns about how the offence might impact Aboriginal and Torres Strait Islander youth including entrenching disadvantage; and
- there are significant concerns about how the offence would increase the amount of children and young people held on remand and, therefore, detained in QPS watch houses which are completely unsuitable places for a child/young person to be detained (we note that as May 2024, according to QPS statistics, over 1144 children and young people had been arrested and charged with alleged breach of bail offences[1]. That figure is undoubtedly higher now).

3.4 **Alternative Recommendation -** In the event that the government is not minded to wind back the amendments which make the 'breach conditions of bail' offence (s29, *Bail Act 1980* (Qld) apply to children/young persons, we strongly recommend that section 29 be amended to allow for a 'reasonable excuse' which should apply to both children/young persons and adults, noting that the following jurisdictions already have this model:

3.4.1 New South Wales – section 79(1) and (2), *Bail Act 2013* (NSW);

3.4.2 South Australia – section 17(1), *Bail Act 1985* (SA);

3.4.3 Western Australia – section 51, *Bail Act 1982* (WA).

4.0 Amendments to create an explicit obligation that a child in detention, whether held in isolation or not and whether held in a watch house or not, can have access to, at minimum, 4 teaching hours comprised of 2 hours for reading recovery (tailored remedial reading) and 2 hours for numeracy per day

The YJ Act contains obligations that a child should be dealt with in a way that allows the child to continue their education without interruption or disturbance if practicable (YJ Principle 18). Despite this, staffing shortages and overcrowding has meant that children

[1] Yashee Sharma, 'Queensland youth offenders caught breaching bail 8400 times as crime rates drop', *Channel 9 News* (online at 6 March 2025 <https://www.9news.com.au/national/queensland-youth-offenders-caught-breachingbail-8400-times-as-crime-rates-drop/d8222e05-c664-4c5f-ab4d-9f7f88d0540>.

are often not able to continue their education without interruption or disturbance and this hinders their ability to successfully reintegrate into society once released from detention. The obligations with respect to provision of education, unfortunately, do not apply to children detained in watch houses. Children detained in watch houses are being held for increasingly longer periods of time including, at the date of writing, up to and over 20 consecutive days. Accordingly, obligations with respect to access to uninterrupted education should equally apply to these children.

5.0 Redraft of section 48AAA of the YJ Act (Releasing children in custody – risk assessment), which is exceptionally confusing and ambiguous, and far too broad in scope

We have extracted the current wording of section 48AAA below and put in underline the particular language that we feel is confusing and creates uncertainty in interpretation and application.

s 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.

(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.

We note:

(a) section 4(3)(k) of the *Legislative Standards Act 1992* (Fundamental Legislative Principles) which states that legislation should be unambiguous and drafted in a sufficiently clear and precise way, to ensure legal certainty; and

(b) the Queensland Legislation Handbook Governing Queensland which includes simplicity and precision, consistency and the avoidance of ambiguity as key drafting principles to ensure that laws are structured logically and can be understood by the public, judiciary and legal professionals.

In our view, s48AAA does not meet these principles and guidelines and is drafted so broadly, particularly s48AAA2(b) and subsections (4) and (5), that it goes too far and unjustifiably so. Th effect of this provision is that more children that should be granted bail are being/will be detained in watch houses and youth detention centres, putting a system that is already on the brink under further pressure.

Accordingly, we strongly recommend that s48AAA be redrafted to create a simple process wherein risk is reasonably assessed by the Bail Sergeant or Magistrate. We would be happy to work with government with respect to what we consider is reasonable assessment of risk.

6.0 Amendments to the YJ Act to raise the age of criminal responsibility to 14 years of age without exception in accordance with International Human Rights standards

Raising the age of criminal responsibility to 14 years of age would align Queensland with international human rights standards for children and would allowing a crucial window to provide at-risk children with supports to get them on the right track. It has the potential to reduce youth reoffending and improve community safety (by instead supporting a cohort of very young children that would otherwise be at risk of being entrenched in the criminal justice system). It also has the potential to reduce the overrepresentation of Aboriginal and/or Torres Strait Islander children in the criminal justice system.

6.1 Alternative recommendation - If the government is not minded to raise the age of criminal responsibility to 14 years of age without exception, there should be, at minimum, a legislative amendment to relevant legislation, policies and procedures where charging a child that is 14 years requires special sign-off by the Director of Public Prosecutions taking into account: (a) whether the child understands the consequences of their actions; and (b) whether the child has a capacity to understand what actions are criminally wrong as opposed to 'naughty'.

7.0 Amendments to designate alternative forms of accommodation to detention centres

We strongly recommend that the law designates alternative forms of accommodation (i.e., therapeutic settings, farms, etc.) as being equivalent places of detention as a youth detention centre. Amendments should also be made to ensure that children are not detained in adult police watch houses, which are not appropriate places to detain children.

Children's Court Act 1992 (Qld)

8.0 Repeal of the recent amendments to the *Children's Court Act 1992* (Qld) via the *Queensland Community Safety Act 2024* (Qld) which:

8.1 allow a victim/victim's representatives and an accredited media entity to be present during Children's Court criminal proceedings, which we oppose in consideration of the special vulnerability of children in the criminal justice system, which is well-established, the right to privacy of the child and the potential for media to publish details regarding a relevant child's offences; and

8.2 entirely remove the court's discretionary power to exclude certain prescribed persons from the courtroom, which we consider to be highly inappropriate and unnecessary considering the special vulnerability of children.

9.0 We strongly recommend that a criminal offence be introduced for the publication of a child's address or living circumstances

We are significantly concerned about potential risks to the safety of children including vigilante attacks/threats as a consequence of the publishing of a child's personal information. Noting the special vulnerability of children, which is well established at law, the purpose of this proposed offence is to protect a child from such risk of harm. Furthermore, a publisher of the child's address should be criminally responsible as a party to a vigilante attack. We note that concerns relating to vigilante threats/attacks are not unfounded and this has been widely reported upon in the media[2].

[2] Warren Barnsley, 'Youth crime protesters prompt police warning against vigilante justice', *Channel 7*, (8 May 2023) <https://7news.com.au/news/qld/youth-crime-protesters-prompt-police-warning-against-vigilante-justice-c-10582924>; Dominique, Tassell, 'Queensland vigilantes announce they will enforce their own curfew to combat youth crime in Mackay's Northern Beaches Area', *Channel 7*, (17 May 2023) < https://7news.com.au/news/qld/queensland-vigilantes-announce-they-will-enforce-their-own-curfew-to-combat-youth-crime-in-mackays-northern-beaches-area-c-

Summary Offences Act 2005 (Qld)

10.0 Repeal of the recent amendments to the *Summary Offences Act 2005* (Qld) via the *Queensland Community Safety Act 2024* which expanded the section 19C hooning offence

Prior to these amendments being enacted, a person was prohibited from willingly participating in a group activity involving a motor vehicle being used to commit racing, burn out or other hooning offence. The words 'willingly participate' required that positive action needed to have been undertaken by the person in order for their conduct to fall within the scope of the offence. The amendments now prohibit a person from spectating a hooning group activity without a reasonable excuse. Reasonable excuse is extrapolated upon in subsection (3) of the provision and express protection is provided to journalists gathering information for the purpose of journalism or individuals gathering information for the purpose of reporting the information to the police. The Explanatory Notes and Statement of Compatibility for these amendments appeared to suggest that the expansion of section 19C was merely to clarify the original intent of existing section 19C, however, the effect the change is markedly different from the former provision. The former provision required positive action to be taken in order to fall foul of the offence and the proposed expansion would broaden the scope to individuals that are merely passively watching the conduct occur. In our view, these amendments have cast the net far too wide and should be wound back.

Penalties and Sentences Act 1992 (Qld)

11.0 Amendment of section 188 of the *Penalties and Sentences Act 1992* (Qld) to include a right to re-open a sentence if the legislation upon which the sentence was predicated is subsequently struck down

Section 188, as currently drafted, creates unnecessary burden on the courts (Magistrates and District Courts, and their respective Registries) along with Police and legal services, amounting to a waste of resources. Embedding the right to re-open a sentence if the legislation upon which the sentence was predicated is struck down is a logical and more efficient mechanism for correcting unlawful sentences. Furthermore, the purpose of

10670448>; Peter McCutcheon, 'Why the growing number of vigilantes in response to youth crime in Townsville is worrying the Indigenous community', *ABC News,* (2 Mar 2021) <https://www.abc.net.au/news/2021-03-02/townsville-youth-crime-vigilantes-worry-indigenous-community/13192838>.

section 188 should be to protect those who have been sentenced from absurdities in the law or procedural unfairness.

By way of demonstration of the waste of resources that this legislative anomaly creates, we offer the following example. In 2012/13, ATSILS lodged 580 appeals on behalf of our Palm Island clients in the District Court at Townsville to protect their rights to appeal their sentences, noting the 28 day deadline for the same, in the event that the High Court challenge of Queensland's Alcohol Management Plans (**AMP**) legislation on the basis that the restrictions violated the *Racial Discrimination Act 1975* (Cth) was successful.

Whilst that did not come to pass, the reason for these multiple appeals being lodged was that the 're-opening' provision under section 188 of the *Penalties and Sentences Act 1992* is drafted in such a way that, provided the sentence handed down for a matter was in accordance with the law at the material time (see subsection (1)(a)), then there is no basis to seek a re-opening of the sentence. In other words, if the High Court had subsequently struck down the Queensland AMP legislation, related sentences couldn't be re-opened.

In our view, a simple amendment to section 188, for example, by including a subsection where there is a right to re-open a sentence if the legislation upon which the sentences was predicated is subsequently struck down, would have obviated against the need to lodge 580 appeals. This would have avoided a considerable amount of work for our organisation and avoided significant inconvenience for the District Court and the Registry in addition to the Magistrates Court and Prosecutions, as to protect our clients, pleas of 'not guilty' were entered, albeit with a 'paper' hearing, on the basis that we accepted that under the current law the offences were made out. Such occurred because the courts were only prepared to adjourn the matters for so long.

12.0 Amendment of the *Penalties and Sentences Act 1992* (Qld) to further extrapolate upon section 9(oa) and (p) in the context of what can be included in a cultural report in relation to the sentencing of a person who identifies as Aboriginal and Torres Strait Islander person

Cultural reports are an excellent means by which community and cultural considerations can be taken into account when sentencing Aboriginal and Torres Strait Islander individuals, and those of other cultural backgrounds. In particular, we acknowledge the important role that cultural reports play in assisting judicial officers to consider the factors relating to an individual's connection to community, kin and culture, the participation of the individual in relevant cultural programs to address underlying causes for offending behaviour along with the impact of matters such as marginalisation, intergenerational trauma, and systemic disadvantage on the individual being sentenced and other relevant cultural considerations. We recommend that the *Penalties and Sentences Act 1992* expressly extrapolates upon what can

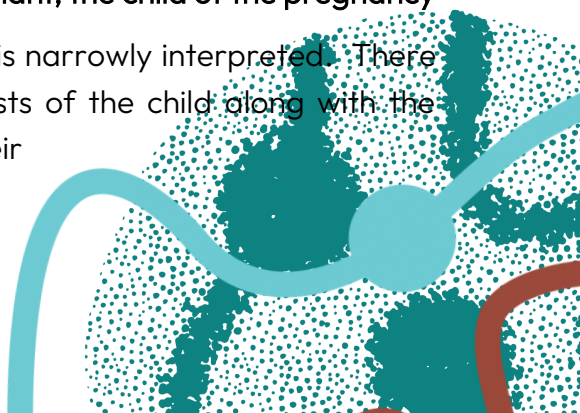
be included in a cultural report to provide further guidance to community justice groups in preparing such reports and to enhance the quality and content of the same, for example:

- the protective factors of the individual's connection to community, kin and culture including spiritual wellbeing;
- the protective factors of the individual participating in relevant programs run by local community-controlled organisations to address root causes for offending behaviour including, for example, programs that address underlying trauma via healing programs;
- the:
    - impacts of intergenerational trauma, child removal, dispossession from lands and systemic racism and the role of such in contributing marginalisation of at-risk individuals;
    - social and economic disadvantage including in relation to housing, employment and education;
    - impacts of trauma that the individual has experienced in their life, for example, if they were the victim of sexual assault or rape prior to the offending including as a child;
    - impacts of physical health and mental health issues that might have been brought on or exacerbated by the aforementioned factors;
    - impacts of substance abuse/misuse that might have been brought on or exacerbated by the aforementioned factors; and
    - impacts on cultural and family obligations (in the broader definition of family for Aboriginal and Torres Strait Islander individuals),

  to identify underlying drivers of the individual's offending; and
- the protective factors of diverting the individual into a community-led programs/initiatives as an alternative to incarceration.

13.0 Amendment of section 9(2)(fb)(iii) of the *Penalties and Sentences Act 1992* (Qld) to expand on the sentencing consideration relating to the probable effect that any sentence imposed would have on, if the offender is pregnant, the child of the pregnancy

We have observed that, in practice, this consideration is narrowly interpreted. There needs to be broader consideration of the best interests of the child along with the offender's particular vulnerability, being pregnant, their



need for rehabilitation (given their impending responsibilities to care for the child) and their needs for medical care, support and other services relating to their health and well-being. Accordingly, in our view, section 9(2)(fb)(iii) should be broadened to include consideration of these matters.

14.0 Legislating the principle expounded in the High Court case of *Bugmy v The Queen* [2013] HCA 27 (Bugmy Case)

The Bugmy Case is authority that the effects upon an offender of profound deprivation do not diminish over time and should be given full weight when sentencing the offender. We strongly recommend that this principle be enshrined in legislation. The impact of the Bugmy decision in the context of sentencing Aboriginal and Torres Strait Islander individuals was aptly described by Jackson L (2013) as follows:

> '*the effect of the decision is that Aboriginal offenders will be able to rely upon evidence of systemic social deprivation as a relevant factor in the determination of an appropriate sentence on an individual basis. What is particularly important about this decision is the recognition that the effects of a background of profound social deprivation do not diminish over time or with repeat offending. If sentencing courts are to give full weight to the effects of social deprivation, this may affect the numbers of Aboriginal people entering the prison population and the over-representation of Aboriginal people in the prison system*.'[3]

15.0 Amendments to abolish short sentences with court ordered parole

The factors of conduct in prison and completion of programs are relied upon heavily to assess suitability for parole. These factors are largely absent for prisoners serving short terms of imprisonment as they don't have realistic access to programs, and even if they did, they are unlikely to have enough time in custody to show progress with rehabilitation. This makes the imposition of parole on prisoners serving short sentences is illogical, unfair and impractical.

We strongly recommend that the *Penalties and Sentences Act* be amended to reflect the provisions contained in section 86 and section 89(2) of the *Sentencing Act 1995* (WA) so that terms of imprisonment of 6 months or less are not to be imposed, and nothing prevents a court from imposing a parole eligibility order for sentences which run for less than 6 months.

[3] L Jackson, 'Casenote: *Bugmy v R* (2013) 302 ALR 192' (2014) 8(10) *Indigenous Law Bulletin* 29.

16.0 **Other recommended sentencing reforms**

We further recommend the following additional sentencing reforms which we consider are crucial to meeting relevant targets in the National Agreement on Closing the Gap:

(a) explicit recognition of the impact of attachment disorders on a child arising from their removal from family/kin which can manifest in difficult behaviours such as aggression, defiance or social withdrawal (in our observations we have seen this to be often punished as lack of remorse), which could lead to more appropriate therapeutic interventions rather than punitive measures;

(b) improvement in the types of interventions for those with a disability, e.g., a clearer mandate for disability-specific assessments, an expanded range of tailored interventions, alternative sentencing options for those with disabilities focussing on the individual needs of the person, etc.;

(c) explicit recognition in the matters to be taken into account by Magistrates and Judges of the impact of trauma and disability (e.g. FASD) on the brain development in children;

(d) creation of a new intervention point for children affected by trauma and disability whereby a comprehensive mental health assessment should be obtained to identify the issues faced by the child and to identify what interventions and programs could be tailored to them that are more effective in rehabilitating the child;

(e) recognition of curfew conditions as a form of punishment that can be taken into account towards a sentence;

(f) explicit recognition that each day spent in the watch house for detention purposes counts as the equivalent of a week in a detention unit.

Bail Act 1980 (Qld)

17.0 **Amendment of the breach of bail offence by differentiating between deliberate non-attendance (a contempt of court for which imprisonment remains an option) and a 'simpliciter' offence which is not punishable by imprisonment** that would be more suitable for:

17.1 homeless persons (i.e. challenges associated with time keeping);

17.2 those that have mental health challenges and/or cognitive impairments including Foetal Alcohol Spectrum Disorder which impacts an individual's ability to remember dates and recall details;

17.3 Those who genuinely overlooked or mistook the court date (i.e. did not seek to actively evade the court); and

17.4 those that were late or absent to court due to cultural factors (e.g., Sorry Business) or due to travel arrangements falling through, etc.

Criminal Code Act 1899 (Qld)

18.0 Amendment of sections 7 (Principal offenders) and 8 (Offences committed in prosecution of common purpose) of the Criminal Code so that mere presence or association is not enough when the accused is a child

We have observed that police tend to overuse the Criminal Code party (accomplice) provisions when dealing with children. Take the example of a child that takes a sip out of a stolen can of coke being charged as an accomplice to the crime of stealing or a child that is riding in a stolen car, but not stealing it, who is charged as if they committed the motor vehicle steal offence. A child's capacity to understand responsibility for an act, comprehend causation and consequences and exercise impulse control cannot be equated with that of an adult.

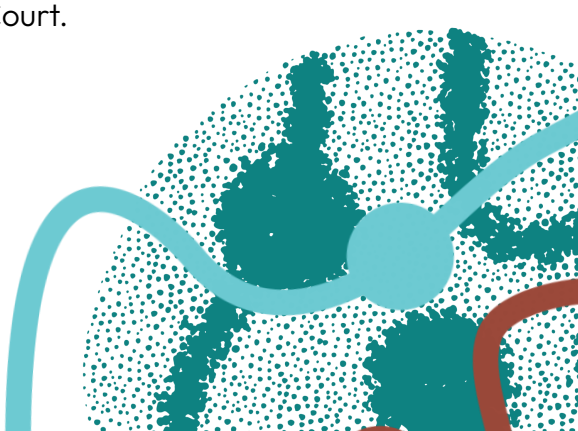
We strongly recommend that there be a discrete subsection that applies to children which provides that mere presence is not sufficient and there needs to be an overt act to assist or encourage the crime.

Reforming these provisions will contribute to preventing unfair overcharging, while still holding genuinely culpable individuals accountable. It will also reduce the strain on the resources of police, watch houses and the courts.

Governing legislation for the Murri Court

19.0 Enacting a Murri Court Act

Currently, the Murri Court is not established by legislation. Accordingly, it is vulnerable to political shift, or marked operational differences. Enacting governing legislation for the Murri Court would have numerous benefits including: strengthening its legal recognition and stability; stronger justification for resourcing and potential expansion; and the provision of certainty in its operations. That said, any potential Murri Court Act should avoid loss of flexibility in its operations (as distinct from a clear framework), excessive government control/bureaucracy over its operations which might impede on its effectiveness and should steer away from introducing strict eligibility criteria which might exclude individuals who could benefit from Murri Court.



Corrective Services Act 2006

20.0 Repeal of the recent amendments to the *Corrective Services Act 2006* (Qld) via the *Police Powers and Responsibilities and Other Legislation Amendment Bill 2024* which broadened the discretion of the Parole Board to set a longer period during which a prisoner cannot reapply for parole after having an application refused

Aboriginal and Torres Strait Islander prisoners already face numerous barriers and challenges in accessing parole including, but not limited to, the multifarious impacts of socio-economic disadvantage, the significant difficulties in securing a favourable decision on suitable accommodation as part of the parole process, the lack of properly resourced, widely and readily available culturally safe and trauma-informed rehabilitation programs and supports to help address the root causes of offending and complex health needs including the high prevalence of cognitive impairment and/or mental illness and poor literacy levels amongst those incarcerated which make it very difficult to navigate the parole system process. Pushing reapplication periods out so far that prisoners might reach their fulltime date prior to being able to reapply for parole is of particular concern, especially for those who have been incarcerated for long periods of time. Prisoners should be offered a fair pathway to obtaining parole such that they might access the benefits of community-based supervision in transitioning out of custody and back into the community to give them the best chance of not reoffending. This promotes community safety and is also consistent with preserving the human rights of the prisoner.

The Explanatory Notes relating to the relevant amendments that we would like to see wound back stated as follows:

> *Under the current parole framework, prisoners are able to frequently reapply for parole after their parole application is refused. This occurs even though the risk they pose to the community has not diminished, or they have not demonstrated remorse for their actions, or meaningfully engaged in rehabilitative activities.*[4]

[4] Explanatory Notes to the Police Powers and Responsibilities and Other Legislation Amendment Bill 2024, page 8.

In our submissions on the amendment Bill, we disagreed with this statement on the basis that it did not appear to acknowledge or address:

(a) the realities of access to rehabilitation programs in the context of the parole process; and

(a) the fact that many parole applications are refused for reasons that a prisoner should not be punished for, including any disability, literacy issues and/or mental impairment/s that they might have.

Rehabilitation programs

Prisoners, particularly those serving longer sentences, should already have been offered and completed rehabilitation programs by the time that they are eligible for parole.

In our coalface experience, we have seen several instances where prisoners are assessed by Queensland Corrective Services (**QCS**) as not being required to complete programs and are, therefore, not waitlisted for any. Once they apply for parole, the Parole Board has a different view, and either defers their application or refuses their application on the basis that there are outstanding treatment needs. Furthermore, the wait lists for most of these programs are very lengthy and QCS often cannot say when a prisoner will be able to participate in the relevant program.

We have also seen instances where the Parole Board will refuse a client's application and require them to undertake specific programs, however, the client is unable to meet this requirement for reasons that are outside of their control, for example: the program is not offered at the correctional centre in which they are detained; the client cannot participate because of safety concerns or their security classification; or that the client is assessed as not being suitable for the program by QCS.

Parole refusals in the context of prisoners with literacy issues and/or mental impairment/s

We note the challenges that prisoners that have literacy issues or intellectual impairment/s experience, which often result in them not being able to lodge comprehensive applications the first time around and applications being refused as a result. There is limited legal support available for clients applying for parole. There is also limited legal support available to clients whose applications are refused. We receive weekly calls from clients who are illiterate and not able to complete their own applications. We have even seen blank applications being sent to the Parole Board only containing the client's name and signature. Unfortunately, we do not have the resources to assist the majority of these individuals, and they have to rely on other prisoners to assist them in completing their parole applications. We are very

concerned that these proposed amendments will only compound the disadvantage that such prisoners already experience and will, in effect, punish them for their inability to sufficiently read/comprehend what is required of them.

Notably, there are limited avenues available for prisoners once their parole application is refused. Whilst they are able to challenge a refusal by applying for Judicial Review (**JR**), provided they have grounds for doing so, we are not funded to provide such services (i.e., to represent a client in a JR of a decision to refuse parole) and, therefore, clients would need to rely on barristers to assist them on a pro-bono basis or they would have to represent themselves. Accordingly, access to a fair review is out of reach for many. Additionally, it is foreseeable, in our view, that the proposed amendments might increase the number of self-represented JR matters, leading to an increase in the workload of the Supreme Court.

<u>Additional concerns</u>

1. When parole applications are refused, reasons provided for the refusal are often meagre and unhelpful, which makes addressing the same with the hopes of obtaining a favourable decision upon re-application very challenging. We also note that in instances where we have requested a Statement of Reasons from the Parole Board for a refusal, it has taken longer than the required 28 days to obtain the same and the Statement of Reasons provided appears to merely re-state previous correspondence without providing actual reasons for the decision.

2. The amendments did not appear to take into account the legislated timeframes pursuant to section 193 of the *Corrective Services Act* which provides that the Parole Board has 120 days, or if a matter is deferred—150 days, before they have to make a final determination on a parole application. If a prisoner seeking parole is prohibited from applying for 12 months, the actual effect is that they can be in custody for several months after that 12-month period before the Parole Board needs to make a decision.

3. There is a very real risk that prisoners will end up serving their fulltime dates and will, therefore, be released into the community without any support or rehabilitation. Where such prisoners are not supported, there is real potential that those individuals will re-offend and/or, for example, fall into a drug relapse. We refer to 1.3 of the Guiding Principles for the Parole Board in the Ministerial Guidelines to the Parole Board Queensland which relevantly states:

   'As noted by Mr Walter Sofronoff QC in the Queensland Parole System Review "*the only purpose of parole is to reintegrate a prisoner into the community before the end of a prison sentence to decrease the chance that the prisoner will ever*

reoffend. The only rationale for parole is to keep the community safe from crime."'

With due regard to this, Parole Board Queensland should consider whether there is an unacceptable risk to the community if the prisoner is released to parole; and whether the risk to the community would be greater if the prisoner does not spend a period of time on parole under supervision prior to the fulltime completion of their prison sentence.'[5]

In our view, these recent amendments are at odds with this guiding principle.

21.0 Amendments to the *Corrective Services Act* to expressly mandate oral hearings for all parole decisions and/or introduces a system which provides prisoners with access to legal representation for parole decisions

Lawyers representing individuals that are seeking parole are not permitted to attend parole hearings. The recent amendments to the *Corrective Services Act* as outlined above have placed yet another obstacle in the way of those seeking parole, with the reasoning for doing so not being sufficient justification, in our view. In the interests of procedural fairness, we recommend that the legislation expressly mandates oral hearings for all parole decisions and/or introducing a system which provides prisoners with access to legal representation for parole decisions. We are aware that, in the New Zealand jurisdiction, parole hearings are able to be undertaken in person by way of submissions and oral hearings. Lawyers are able to attend these hearings and represent their client. In our view, this is essential, to help guide the client through the hearing, especially in circumstances where they might have literacy challenges and/or mental impairment/s.

22.0 Repeal of amendments to the *Corrective Services Act* brought in via the *Corrective Services (Promoting Safety) and Other Legislation Amendment Act 2024* that enable victims to be able to make oral submissions at parole hearings

In our view, these amendments are significantly prejudicial to those seeking parole as they create an imbalance between the rights of a victim and the rights of an individual seeking parole noting, in particular, that lawyers that are representing those seeking parole are not allowed to be present at parole hearings. The principle of 'equality of arms' is a fundamental component of procedural fairness and the right to a fair hearing,

[5] Minister for Police and Corrective Services, *Ministerial Guidelines to the Parole Board Queensland* (31 December 2021), page 1.

as protected under international human rights law and the HR Act (section 31). This principle ensures that both parties have a reasonable opportunity to present their case under conditions that do not place one party at a substantial disadvantage when compared with the other. In the context of parole hearings, the absence of legal representation for the prisoner creates a significant imbalance, particularly in light of the ability of non-legally qualified victims to present material that might be irrelevant, impermissible or unsubstantiated without any effective safeguards against consideration of such material.

23.0 Embedding of shared decision-making framework for consideration for admission to parole

We strongly recommend, in accordance with the government's commitments under the National Agreement on Closing the Gap, that a shared decision-making framework, with cultural input, be embedded into the legislative framework which facilitates better consideration of individuals for admission to parole for return to community.

24.0 Amendments to the *Corrective Services Act* to increase the scope of prisoners that are eligible for automatic release, i.e. without needing to be considered by the Parole Board

Given the current overcrowding concerns within prisons, and well-documented workload issues for the Parole Board, we strongly recommend amendments be made to the *Corrective Services Act* to increase the scope of prisoners that are eligible for automatic early release from prison without having to go through the Parole Board. This could be achieved by expanding the threshold for automatic parole and streamlining low-risk parole applications.

25.0 Repeal of the recent amendments to the *Corrective Services Act* via the *Police Powers and Responsibilities and Other Legislation Amendment Bill 2024* which expanded the range of suitably qualified professionals that can be appointed by QCS to assess prisoners at risk of self-harm or suicide for the purpose of a safety order from 'doctors' and 'psychologists' to social workers, speech pathologists, occupational therapists and appropriately qualified registered nurses

The justification provided in the Explanatory Notes for these amendments stated that there is an increasing number of prisoners presenting with complex needs coupled with a national shortage of psychologists. The intent behind the amendment was to broaden the types of practitioners that can make this type of assessment for the purpose of informing a decision about managing the prisoner on a safety order.

The effect of a safety order is that prisoners are removed from the general population and held in separate confinement where they often have no interaction with other prisoners and have restrictions placed on when and for how long they can leave their cells. Generally, safety orders can only be made for a

month at a time, but it is not uncommon for consecutive safety orders to be made where clients are kept on these orders for several months. In effect, safety orders can end up constituting a form of solitary confinement. There is a vast body of evidence that shows the harmful effects of solitary confinement on an individual including that solitary confinement, even for short periods of time, can result in serious psychological harm.[6] Individuals that have complex health needs and might be at risk of self-harm or suicide often have already experienced significant trauma in their lives. The use of solitary confinement exponentially compounds that trauma, with the effect that, once released, there is potential for the individual to pose a heightened risk to members of the community if they are placed in a scenario where a trauma response is triggered.[7]

Social workers, occupational therapists, nurses and speech pathologists are <u>not</u> suitably qualified to make assessments about a person's mental health, suicide risk or self-harm risk. As mentioned, these prisoners are often individuals that have very complex mental health conditions and significant trauma which a speech pathologist, occupational therapist or social worker are simply not trained to deal with.

To suggest that an individual that is not suitably qualified to make such assessments can subject a prisoner to these types of conditions when they are in their most vulnerable state is an egregious breach of their human rights including, in particular, the right to humane treatment when deprived of liberty and the right to protection from torture and cruel, inhuman or degrading treatment.[8] International human rights standards provide that solitary confinement should only be used in very exceptional cases, for as short a time as possible and only as a last resort[9]. These amendments have created a real risk that prisoners will spend more time than what is necessary on safety orders. Furthermore, there is limited scope to oppose a safety order or a consecutive safety order, which is particularly concerning for vulnerable clients with mental health conditions. Accordingly, we strongly recommend that these amendments be wound back, or, at minimum, we recommend that:

(a) the regime be amended to ensure that any *consecutive* safety orders must only be made on the advice of a doctor or psychologist; and

[6] T Walsh & H Blaber, 'Solitary Confinement and Prisoners' Human Rights' (2023) 49(1), *Monash University Law Review*, 1.
[7] Note 6.
[8] See section 30 and 17 of the HR Act.
[9] Note 1, 2; Symposium, 'The Istanbul Statement on the Use and Effects of Solitary Confinement' (2008) 18(1) *Journal on Rehabilitation of Torture Victims and Prevention of Torture* 63, 66; *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules),* GA Res 70/175, UN Doc A/RES/70/175 (8 January 2016, adopted 17 December 2015) r44.

(b) section 305C (Authorised practitioner policy) be removed from the *Corrective Services Act* on the basis that it essentially gives QCS the ability to decide who they can deem an 'authorised practitioner' and what training such practitioners require, which is wholly inappropriate.

Evidence Act 1977

26.0 Amendment of the *Evidence Act 1977* in the context of sexual assault counselling privilege (SACP) to make it fairer on both parties

In our view, the current SACP regime prejudices the defendant and defence and does not achieve an 'equality of arms' (in the context of preserving and/or justifiably limiting two competing rights of opposing parties, being the right to privacy of an alleged victim so as to prevent disclosure of their otherwise confidential counselling records and the accused's right to a fair hearing). The practical issues that we have seen with this are outlined below:

26.1 SACP has the effect of restricting the defence's ability to access crucial counselling records that have potential to contain information that is relevant to the case including relevantly, inconsistencies in a complainant's accounts or other evidence of an exculpatory nature.

26.2 In order to obtain such information, defence lawyers must apply to the court to demonstrate 'substantive probative value' which is particularly challenging without being able to see the records themselves.

26.3 There is a certain amount of legal uncertainty surrounding the meaning of the term 'substantive probative value' and such has led to inconsistent judicial decisions, thus adding further challenges for defence lawyers representing an accused.

26.4 There are delays associated with applying for access to such privileged records, which prolongs resolution of a matter.

26.5 Geographical and socio-economic barriers are particularly relevant for sexual assault matters that involve one or more members of the Aboriginal and/or Torres Strait Islander communities, in particular, that access to culturally appropriate legal representation (and counselling services) are limited in remote or rural areas. This makes access to justice for an accused, for example, very difficult which is exacerbated where an accused seeks to obtain key counselling records for potential use as exculpatory evidence.

26.6 To the extent that there is any proposed expansion of alternative pathways to report sexual assault, we are particularly concerned about how such would sit with SACP. If there is intent to expand the current ability

for alternative pathways for reporting sexual assault, it is essential that, in order to preserve the rights of the accused to a fair trial, there are also reforms to the current legal framework to remove the complexity associated with the defence obtaining access to such records for the purposes of building a defence.

Police Powers and Responsibilities Act 2000 (Qld)

27.0 Amend the *Police Powers and Responsibilities Act 2000* and other relevant legislation, policies and procedures to mandate the use of body worn cameras by police and have legal consequences for failure to comply with this mandatory requirement.

We are aware of incidents in the past where police officers have not turned on their body worn cameras (**BWCs**). We make particular note of the March 2023 Mareeba shooting incident where specialist police officers fatally shot an Aboriginal man in Mareeba, with the Acting Deputy Commissioner of QPS confirming that police did not turn on their BWCs. This makes it very difficult after the fact to investigate, in an objective way, what occurred and does not promote transparency and accountability. We have long advocated for a mandatory legislative requirement on police officers to turn on their BWCs when undertaking their duties and legal consequences for failure to comply with the same.

Inspector of Detention Services Act 2022 (Qld)

28.0 Amend the *Inspector of Detention Services Act 2022* and/or Inspector of Detention Services Regulation 2023 to stipulate more regular inspections of all watch houses throughout the State

Pursuant to the *Inspector of Detention Services Act 2022* and Inspector of Detention Services Regulation 2023, the Inspector of Detention Services must inspect each Youth Detention Centre every year, each prison that is a secure facility at least once every 5 years, with currently 14 prisons to be inspected, and other places of detention prescribed by regulation at least once every 5 years (currently this includes, by Regulation, the Brisbane City, Southport and Cairns watch houses).

Given the current crisis with respect to children being detained in police watch houses and the legislative override of the HR Act in relation to the detention of children in watch houses which was brought in by the *Child Protection (Offender Reporting and Offender Prohibition Order) and Other Legislation Amendment Act 2022*, we strongly recommend that the *Inspector of Detention Services Act 2022* and/or the Inspector of Detention Services Regulation 2023 be amended to stipulate inspections of watch houses state-wide on a regular schedule to promote transparency, accountability and oversight.

Cross-Border legislation

29.0 Enactment of legislation to address cross-border issues in relation to the processing offenders, including the sentencing of individuals, that have, in one course of action, committed a series of offences across State lines

We provide the example of a young man who commits a serious of offences in one course of action across the New South Wales/Queensland border. As New South Wales and Queensland have different sentencing laws, judicial procedures and court backlogs, this can lead to delays in processing offenders who commit crimes in both States. Currently these offences have to be sentenced separately in each jurisdiction. If an offender is arrested in one State, but has outstanding charges in the other State, extradition or transfer procedures can delay sentencing. Further, time spent in custody might not always be counted to a sentence imposed in the other, which could result in longer periods incarceration. Cross-border issues also flow onto parole and probation. We strongly recommend that cross-border legislation be passed facilitate more efficient processing of offenders that fall into this category.

Mental Health Act 2016 (Qld)

30.0 We strongly recommend legislative amendments to the *Mental Health Act 2016* that would embed a legal mechanism to enforce time limits for the provision of psychiatric reports.

A psychiatric report under the *Mental Health Act 2016* plays a crucial role in criminal trials by assessing the mental state of an accused in the context of their legal responsibility and fitness to stand trial. The reports serve an important role in guiding the court when determining whether the person should be tried, diverted to mental health treatment or deemed not criminally responsible for their alleged actions. Currently, there is a 21-day deadline for psychiatric reports. Despite this, delays continue to occur. We are aware that the process of obtaining a psychiatric report is extremely slow. In a recent matter for one of our clients, the psychiatric report was outstanding for over one year. Delays with respect to the finalisation of psychiatric reports can result in a number of negative implications including: extended periods in custody for an accused while awaiting reports (consider those that are ultimately found to have lacked criminal responsibility due to their mental state), impingement on an accused's right to a fair and speedy trial and the potential to further exacerbate an individual's mental health issues. We strongly recommend that there be a legal mechanism to enforce time limits on the provision of psychiatric reports.

Civil Law Reform Priorities

Working With Children (Risk Management and Screening) Act 2000 (Qld) (WWC Act) and associated legislation

31.0 We strongly recommend that QLRC examines closely the proposed second wave of legislative reform post the *Working with Children (Risk Management and Screening) and Other Legislation Amendment Act 2024* to create a new screening regime for kinship carers so that it does not duplicate processes and/or create the same or different barriers for Aboriginal and Torres Strait Islander individuals seeking to become kinship carers

We broadly supported the passage of the *Working with Children (Risk Management and Screening) and Other Legislation Amendment Act 2024* (**WWC Amendment Act**), the operative provisions of which are yet to commence. In particular, we strongly supported the removal of the requirement for kinship carers to have a Blue Card and, thereby, increase the scope for Aboriginal and Torres Strait Islander children to remain in the safety of kin, community and culture where staying with their parents has been assessed as not being an option. We are aware that the Department of Families, Seniors, Disability Services and Child Safety is currently in the process of establishing a new screening test for kinship carers in lieu of the repealed requirement for kinship carers to have a Blue Card which will involve a second wave of legislative reforms to embed the new screening requirement. It is essential that this second wave of legislative reforms do not recreate the same or other barriers which make it unduly or unreasonably difficult for kinship carers to be able to care for their kin in the context of child protection. We strongly recommend that QLRC examines closely any Bill introduced by the government, as intended, as the second wave of legislative reforms post the WWC Amendment Act to ensure that the spirit and objectives of this Act, which included addressing this well-known issue, are fully realised.

In particular, it is fundamental that any potential screening regime that is created out of this process does not sit within Blue Card Services at all, noting the well-known criticisms of the fact that taking care of one's family is not employment and should not be regulated as such.

We note that the Queensland Families and Children Commission (QFCC) has expressly called for this when they stated the following upon the launch of their report 'A thematic analysis of provisionally approved kinship carers who receive a subsequent Blue Card negative notice' (October 2023):

> *'We are calling for the requirement for Aboriginal and Torres Strait Islander kinship carers to hold a Blue Card to be removed, allowing more children to be raised safely with family and retain their connection to Country and culture.*
>
> *This report found the Blue Card scheme's focus on employment suitability, rather than suitability to care for kin, gave limited consideration to the child's best interests. Removing the Working with Children screening process (Blue cards) would not put the safety of children at risk.*
>
> *With significant numbers of Aboriginal children of all ages in residential care and foster care placements this change would increase the number of Aboriginal and Torres Strait Islander children being placed with Aboriginal and Torres Strait Islander family and lead to improved outcomes for Aboriginal and Torres Strait Islander children.'*[10]

32.0 Repeal of:

- **the new offence provision contained within the WWC Amendment Act which provides that failure to disclose whether a disclosable matter exists is an offence attracting a maximum penalty of 10 penalty units (s188); and**
- **the new offence provisions contained within the WWC Amendment Act where an applicant, card holder or a negative notice holder who has applied to cancel the notice has failed to notify Blue Card Services of relevant changes to information (changes to their name, business information or contact details) which attract a maximum penalty of 10 penalty units (see ss328B and 328C).**

The Explanatory Notes to the WWC Amendment Act justified the creation of these new offences as follows: 'The new offences are intended to facilitate the disclosure of information, or the notification of changes in information, relevant to the assessment or reassessment of a person's eligibility to hold a blue card. The offences are considered justified because the effective and timely disclosure of information is crucial to the

[10] https://www.qfcc.qld.gov.au/sector/monitoring-and-reviewing-systems/Blue-card-negative-notices-for-Kinship-carers-analysis.

operation of the blue card system and its objective of promoting and protecting the rights, interests, and wellbeing of children.'[11]. The Explanatory Notes go on to state that the intention is not to punish[12]. In our view, a fine of $1613.00, at the time of writing, is not an insignificant penalty especially for those individuals that might be living on or under the poverty line. Whist we appreciate, as stated in the Explanatory Notes, that 'the intention is for the offence to operate on a discretionary basis, where applicants who fail to disclose a disclosable matter by way of honest mistake will not be penalised.'[13], we are still concerned about individuals that might fall foul of this requirement. Accordingly, we do not support the creation of these new offences.

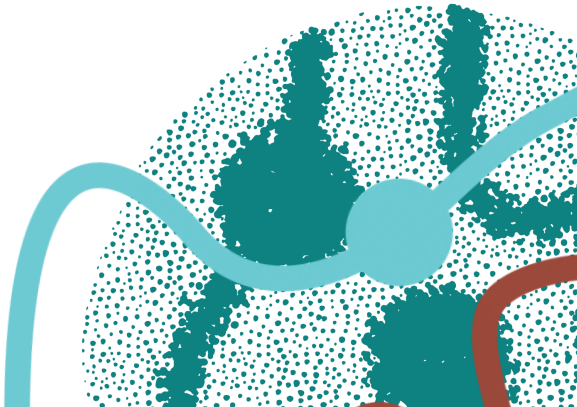
33.0 Repeal of the new offence contained within the WWC Amendment Act for failing to disclose police information as part of a Blue Card application which attracts a maximum penalty of 100 penalty units.

We cannot understand why this offence is needed when the police check that is undertaken as part of the assessment process of an application includes the broader spectrum of criminal history of the individual. Obtaining the police check and assessing the same is the responsibility of Blue Card Services and part of its administrative duties as regulator of, and decision-maker under, the WWC Act. Imposing a disclosure obligation on the applicant to disclose police information coupled with the creation of a new offence for failure to disclose the same, with a maximum penalty of 100 penalty units is severe and punitive, in our view.

34.0 With respect to proposed sections 235 and 236 of the WWC Act, in particular, relating to the part of the decision-making process that involves inviting the person to make submissions to the chief executive about why the person does not pose a risk to the safety of children and why the chief executive should issue a working with children authority to the person, we recommend that the approach in Victoria be imported into Queensland wherein upon inviting a person to make submissions, the invitation will contain specific questions that the decision-maker needs answers to and/or specific concerns that the decision-maker requires to be addressed.

In Queensland, we understand that applicants are merely invited to make submissions without any specific direction on the particular concerns that need to be addressed by the applicant in their submissions. This can result in a lot of time-wasting with the

[11] Explanatory Notes to the Bill, page 20.
[12] Ibid.
[13] Ibid.



potential for submissions to be made that entirely miss the mark (especially for unrepresented individuals or those that require extra support in making submissions).

35.0 Repeal of amendments to the WWC Act contained within the WWC Amendment Act that extend the duration of a negative notice from 2 years to 3 years and will require a negative notice holder to wait until 3 years have elapsed after the negative notice was issued before the individual the subject of the negative notice can apply for the negative notice to be cancelled.

The current sit-out period is 2 years. According to the Explanatory Notes, the reason for this approach is to increase operational/administrative efficiencies for Blue Card Services. This is concerning, given the serious negative implications of having a negative notice imposed on an individual. As a legal service provider, we rely upon those that have been issued with a negative notice to promptly come to us so that we can represent the applicant in a review of the decision within 28 days after the applicant received the negative notice. This, unfortunately, does not always occur. The prior 2 year sit-out period had already been the subject of criticism, especially in the context of the demonstrated negative impacts of the Blue Card regime on Aboriginal and Torres Strait Islander communities. In our view, improving administrative and operational efficiencies for Blue Card Services is not a justifiable or proportionate reason for increasing an already lengthy period of time for being able to apply to cancel a negative notice.

36.0 Repeal of amendments to the WWC Act contained within the WWC Amendment Act which removed the exemption on practising lawyers from needing a Blue Card, effectively imposing a new obligation on lawyers that provide legal support services to a child to obtain a Blue Card.

We understand that the policy objectives behind these amendments, as described in the supporting material to the WWC Amendment Act, were to create a consistent approach to exemptions across jurisdictions; however, in our view, consistency alone is not sufficient justification for these amendments. Barristers and solicitors are already subject to strict ethical and professional obligations, the supervision of which is undertaken by the Bar Association of Queensland and the Queensland Law Society respectively, along with the Legal Services Commission. Upon being admitted to practice, lawyers are subject to a 'fit and proper person' test and once admitted, have an ongoing obligation to disclose changes to relevant 'suitability matters' including, for example, relating to a person's good fame and character, whether the person has been convicted of an offence and whether the person is subject to an unresolved complaint, investigation, charge or order under relevant law. Removal of the exemption will unnecessarily increase the administrative burden placed on already heavily regulated lawyers. Further, we are concerned that by removing the

exemption, a child might be posed with the risk of having their choice of legal practitioner potentially be interfered with by 'the administrative'. This is especially a concern for rural, remote and regional areas where access to legal representation is limited. **Accordingly, we recommend that the exemption for lawyers be reinstated, or alternatively recommend:**

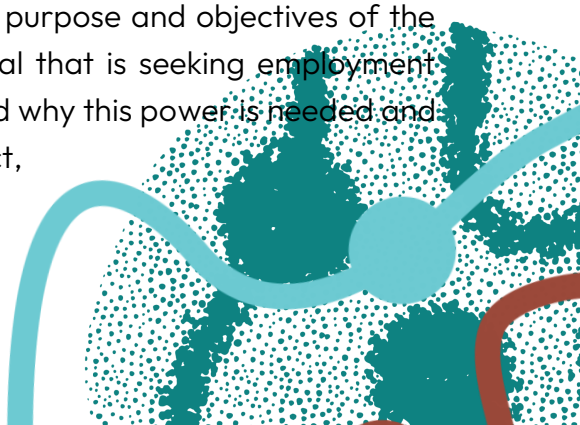
- **that the exemption is also removed for other categories, i.e., police officers and teachers (e.g. if uniformity is indeed the aim);**
- **that a lawyer can practice once an application for a Blue Card is lodged (i.e., prior to approval) as, in the absence of this, we could see months of delays with children not being able to be legally represented. We offer the example of a newly recruited lawyer in a remote region who does not currently have a Blue Card and who is the only lawyer in the region. Further, such an initial right to practice (upon lodgement of an application) would be provisional, subject to the eventual outcome of the application.**

37.0 We strongly recommend the repeal of new section 246J (Public sector entity to be given particular advice) inserted by the WWC Amendment Act.

This provision:

- enables the chief executive to advise a chief executive of another public sector entity (the 'other chief executive') that proposes to start employing, or continue employing, the person in regulated employment, that the other chief executive may need to undertake a further assessment of the person under the *Public Sector Act 2022* (Chapter 3, Part 5, Division 4) to decide whether the other public sector entity should employ, or continue employing, the person Proposed new section 246J; and
- further provides that the chief executive may only give such advice if the chief executive is aware that the person has a criminal history; and
- states that if the chief executive goes on to provide this advice to the other chief executive, that the advice must be accompanied by a written notice that states that no adverse inference about the person's criminal history or suitability for employment, or continued employment, by the other public sector entity should be made because the advice was given.

We hold significant concerns about section 246J on the basis that, in our view, it confers powers that appear to extend beyond the purpose and objectives of the WWC Act and unjustifiably prejudices the individual that is seeking employment from the public sector entity. We do not understand why this power is needed and the Explanatory Notes to the WWC Amendment Act,



unfortunately, do not shed any light on this matter. Providing a written notice that states that no adverse inference about the person's criminal history or suitability for employment, or continued employment, is to be made by the public sector entity because the advice was given, is not a sufficient safeguard for the individual. It is inevitable that such information could be highly prejudicial to the applicant in their prospects of success in employment/continued employment.

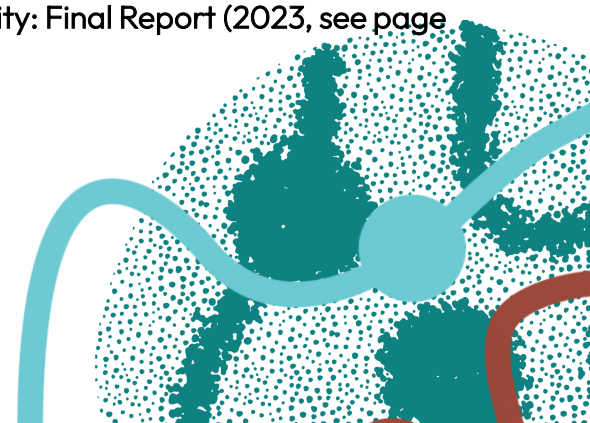
Enactment of a new and modernised Anti-Discrimination framework

36.0 **We recommend that the *Anti-Discrimination Act 1991* be replaced with a new Anti-Discrimination Act containing a modernised framework to ensure that it remains effective in addressing contemporary issues of discrimination, harassment and vilification**

We were extremely disappointed that despite the extensive work that had been undertaken and progress made over the last 3 years to replace the existing *Anti-Discrimination Act 1991* (**A-D Act**) with an improved and modernised Act, including completing consultation on the Anti-Discrimination Bill 2024 (**A-D Bill**), the A-D Bill was not enacted by the former government, despite their commitments to do so within their term of government. Whilst the *Respect at Work and Other Matters Amendment Act 2024* contained important reforms and we broadly supported those reforms to be made, it implemented only 14 of the 46 recommendations contained in the Queensland Human Rights Commission's Report, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (**Building Belonging**). Furthermore, the current State government has recently announced that the commencement of the amendments contained in the *Respect at Work and Other Matters Amendment Act 2024*, which were due to commence this year, will be postponed. This leaves critical reforms, including many which will assist Aboriginal and Torres Strait Islander communities, up in the air. We strongly recommend that the A-D Act be replaced with a new modernised Act which implements key recommendations contained in the Building Belonging Report. If this does not occur, this will mean that crucial progress will be lost and that would be a shame given how close we are to comprehensive reform.

Education (General Provisions) Act 2006

11.0 **Amendments be made to the *Education (General Provisions) Act 2006* to legislate that exclusionary discipline on students with a disability must be avoided unless it is necessary as a last resort, as recommended in the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: Final Report (2023, see page 96)**



12.0 Amendments be made to the *Education (General Provisions) Act 2006* to improve the rigour, transparency and review rights relating to the decision-making process for imposing suspensions and/or exclusions on students, otherwise known as student disciplinary absences (SDAs), in Queensland state schools and to strengthen the framework relating to student support plans

Children that are engaged in school and that feel safe at school have better outcomes. Prevention and early intervention measures include measures that support students, especially vulnerable students, to feel safe, remain engaged and promote participation in school from Prep all the way to year 12.

Research undertaken by Queensland Advocacy for Inclusion (**QAI**) and the Centre for Inclusive Education (**C4IE**) in 2023 evidenced disproportionate and excessive suspensions for Aboriginal and Torres Strait Islander students, students with disability and students in out of home care. In particular, whilst students with a disability constituted a mere 18.9% of enrolments in 2020, they received 49.2% of all short suspensions (1-10 days).[14]

Statistics obtained via the Right to Information applications made to the Queensland Department of Education revealed that between 2015-2019, students identifying as Aboriginal and/or Torres Strait Islander students received approximately one quarter of all recorded SDAs despite only representing 10.6% of all Queensland full-time state school enrolments in August 2020. Aboriginal and Torres Strait Islander children that have a disability and/or are in out-of-home care were found to be at an even greater risk of receiving an SDA. These children are, without doubt, amongst the most marginalised and vulnerable children in the State and Australia more broadly.

We want to see our children and young people engaged in education, feeling supported and safe and becoming thriving members of our community. To this end, for over two years, we have been engaged in targeted advocacy in partnership with Queensland Advocacy for Inclusion (**QAI**), PeakCare, Youth Advocacy Centre (**YAC**) and Youth Affairs Network Qld, calling for the Queensland government to make changes to address this issue via our joint-campaign entitled 'A Right to Learn'. We note that the Education (General Provisions) and Other Legislation Amendment Bill 2024 which was introduced

[14] Graham, L.J., Callula Killingly, Alexander, M. and Wiggans, S. (2023). Suspensions in QLD state schools, 2016–2020: overrepresentation, intersectionality and disproportionate risk. Australian Educational Researcher. doi:https://doi.org/10.1007/s13384-023-00652-6.

during the term of the former government contained a number of progressive reforms which we supported, however, unfortunately this Bill lapsed before the recent election and much progress was lost. We are hopeful that this important issue can be picked up again by the current government and we, along with our joint-partners, are very interested in working with government in this regard.

Queensland Civil and Administrative Tribunal Act 2009 (Qld)

13.0 Amendments to embed shared-decision making with the Aboriginal and Torres Strait Islander community-controlled sector

We recommend that, consistent with the government's obligations under the National Agreement on Closing the Gap with respect to establishing formal partnerships and shared decision-making, a framework for a joint enquiry model at QCAT be embedded within the legislative framework to facilitate the involvement of the community-controlled health sector' in decision making for public trustee and guardianship orders.

Reform of the handling of complaints by members of the public about police

14.0 Legislative reform to overhaul how complaints about police officers' conduct is handled

Evidence led at the Independent Commission of Inquiry into Queensland Police Service Responses to Domestic and Family Violence (**QPS DFV Inquiry**) highlighted the problems caused by Local Management Resolution to bury complaints about inappropriate police action or misconduct. Unaddressed misbehaviour is corrosive of community trust in policing responses.

We refer to Recommendation 68 of the *A Call for Change* Report (2022) which came out of the QPS DFV Inquiry which recommended the creation of a Police Integrity Unit as an independent and separate unit of the Crime and Corruption Commission to deal with all complaints in relation to police. Recommendation 68 stated that the Police Integrity Unit should be established within 18 months of the Report being published. Despite consultations being undertaken in relation to the implementation of this recommendation, we understand that the creation of a Police Integrity Unit has still not occurred[15].

[15] https://www.abc.net.au/news/2024-07-19/qps-police-integrity-unit-working-group-domestic-violence/104116804.

We strongly recommend that a separate and discrete Police Operations Ombudsman Role be established for the handling of low-level complaints against inappropriate police action or misconduct, with the following key features:

(a) referral pathways exist for the Police Ombudsman to refer more serious complaints to the Ethical Standards Unit or the Crime and Corruption Commission;

(b) complaints that are deemed to not fall within the remit of those two organisations are to be referred back to the Police Operations Ombudsman;

(c) the Police Operations Ombudsman is given powers to initiate investigations and to receive complaints from a variety of sources including the Director of Public Prosecutions, Legal Aid Queensland, ATSILS and community legal centres; and

(d) whistleblower protections are to be enacted in the legislation.

We further recommend that there be a structured thematic review process, similar to the approach of His Majesty's Inspectorate of Constabulary (**HMIC**) in the United Kingdom wherein thematic inspections would measure police operations against the Rule of Law, Human Rights standards and reasonable expectations of the community.

Succession Act 1981 (Qld)

15.0 Explicit recognition in the *Succession Act 1981* (Qld) for Aboriginal custodians of the body

The *Succession Act 1981* (Qld) does not currently contain explicit provisions recognising Aboriginal custodianship or Aboriginal and Torres Strait Islander cultural practices concerning a deceased individual's body. The lack of explicit recognition can result in disputes, particularly when such is not clearly addressed in a will or when an individual dies intestate.

In our practice, we have seen numerous body disputes which could have been avoided by:

(a) explicit provision in the will (unfortunately, this does not always occur);

(b) explicit recognition in the *Succession Act 1981*.

Accordingly, we strongly recommend legislative amendments as outlined in this item to clarify this matter.

Domestic Violence Law Reform Priorities

Domestic and Family Violence Protection Act 2012 (Qld)

16.0 Review of statutory provisions in view of the current punitive tendency for Domestic Violence Orders to be sought and made precluding a respondent from a geographical area including the respondent's country or traditional lands, for example prohibiting a respondent from entering the entirety of Stradbroke Island, an entire regional council area or entire suburb.

The *Domestic and Family Violence Protection Act 2012* is intended to be protective not punitive. We submit that in the making of Domestic Violence Orders the courts should not go beyond that what is necessary to protect the aggrieved. Additionally, precluding an Aboriginal or Torres Strait Islander person from traditional lands and country deprives the party from exercising their cultural rights and maintaining their cultural connections as well as family and housing. We refer to sections 15, 28 and 48 of the HR Act in that regard.

We have observed a recent tendency for excessively punitive conditions to be imposed in Domestic Violence Orders. One particularly punitive example involved a condition precluding the respondent from being within 10klm of the aggrieved. However, the respondent has been detained in a correctional facility within the prohibited 10klm radius. Technically, this is in breach of the conditions of the order, which is an outcome.

Whilst this issue might not be one that could be easily solved via amendments to the law, we feel that it is of such importance that it needs to be raised to the Commission for consideration.

17.0 A better approach to the imposition of Domestic Violence orders against those aged between 18 – 25 years of age

There is a significant need for more appropriate interventions for individuals aged between 18 and 25 years of age, particularly those that are exiting Child Safety Orders as adults. In our view, it is imperative that there is better recognition of the impact of attachment disorders arising from removals and particular challenges for the child.

We note that the Queensland Aboriginal and Torres Strait Islander Child Protection Peak Body (**QATSICPP**) has already undertaken extensive research with its members on

this issue[16]. We particularly draw your attention to QATSICPP's 'Healing our children and young people' framework to address the impacts of domestic and family violence, which was established out of this research[17].

We also strongly recommend that there be shorter timeframes for orders against 18 to 25-year-olds and better options for both members of the couple to participate in programs. We offer the example of a relationship that we typically see where each member of a young couple has recently exited child safety orders and, without any positive modelling of relationships, promptly embark on one together. Participation in programs is the best pathway for this young couple to learn about healthy relationships. Early application of criminal laws is an inappropriate response.

[16] Morgan, G., Butler, C., French, R., Creamer, T., Hillan, L., Ruggiero, E., Parsons, J., Prior, G., Idagi, L., Bruce, R., Gray, T., Jia, T., Hostalek, M., Gibson, J., Mitchell, B., Lea, T., Clancy, K., Barber, U., Higgins, D., … Trew, S. (2022). *New Ways for Our Families: Designing an Aboriginal and Torres Strait Islander cultural practice framework and system responses to address the impacts of domestic and family violence on children and young people* (Research report, 06/2022). ANROWS.
[17] Morgan, G., Butler, C., French, R., Creamer, T., Hillan, L., Ruggiero, E., Parsons, J., Prior, G., Idagi, L., Bruce, R., Twist, A., Gray, T., Hostalek, M., Gibson, J., Mitchell, B., Lea, T., Miller, C., Lemson, F., Bogdanek, S., … Cahill, A. (2023). *Healing our children and young people: A framework to address the impacts of domestic and family violence* (ANROWS Insights, 01/2023). ANROWS.