

9 January 2018

Our ref (BDS-ChLC)

Sean Harvey
Assistant Director-General
Youth Justice
State Law Building
50 Ann Street
Brisbane QLD 4000

By email: Phil.Hall@justice.qld.gov.au, Sean.harvey@justice.qld.gov.au,
Salote.mataitoga@justice.qld.gov.au and Rebecca.keys@justice.qld.gov.au

Dear Assistant Director-General

Youth Justice (Transitional) Regulation 2017

Thank you for your email dated 19 December 2017, inviting the Society to provide comments on the draft *Youth Justice (Transitional) Regulation 2017*. We appreciate being consulted on this important legislation. Thank you also for the short extension of time for the provision of our comments.

As there has been only a very brief opportunity to review the proposed amendments, an in-depth analysis of the draft regulation has not been conducted. It is possible that there are issues relating to fundamental legislative principles or unintended drafting consequences which we have not identified. We note that the comments made in this submission are not exhaustive and we reserve the right to make further comment on these proposals.

We affirm our positive view on this initiative and our support for the government's strong commitment to addressing this issue. The Society is very supportive of the policy intent of the amending legislation. As you might appreciate the Society and others have been advocating for the inclusion of 17 year olds in the youth justice system for many years.

This response has been compiled with the assistance of the Children's Law and Criminal Law Committee who have substantial expertise in this area.

Part 2

1. Section 5

Section 5 excludes persons 18 years old who are alleged to have committed offences whilst 17 years old from the transitional arrangements. It appears that the *Youth Justice Act 1992* (“YJA”) will apply to this cohort for proceedings commenced on or after 12 February 2018. Consequently those 18 year olds alleged to have committed offences whilst 17 years old and have had proceedings commenced prior to commencement will be required to be dealt with as an adult. Those persons who are 18 years old and are alleged to have committed offences whilst 17 years old but the proceedings are not yet commenced until after 12 February 2018 must be dealt with as a child (provided those matters are resolved before the young person turns 19 years of age). Should the government wish to maintain this anomaly it is recommended consideration be given to a provision that would allow 18-year-olds to transfer adult matters to the Childrens Court if:

1. those adult matters would have been dealt with in the Childrens Court if commenced after 12 February 2018; and
2. the person has been charged with an offence as a child subsequent to 12 February 2018.

Such a provision may have a number of benefits including allowing all matters committed in the same time period to be dealt with together and dissuading the commencement of dated charges.

2. Section 7

To avoid confusion and provide certainty it is recommended that the word “hearing” in section 7 (2)(a) be defined.

Pursuant to section 7(4)(a) a District Court Judge is to determine if a matter is to be transferred to the Childrens Court of Queensland or to the Childrens Court constituted by a magistrate. Section 83 of the YJA gives the right of election to the child allowing for the court to override this decision should a magistrate “*determine the proceeding may not be adequately dealt with summarily*”. Section 78 of the YJA confirms the right of election regardless of other legislative provisions. Should a judge determine that the matter is to proceed summarily and transfer the matter to a magistrate then the child would be entitled to elect to have the matter proceed on indictment and have the matter committed again. This would result in delay and may undermine the child’s view of the authority of the court. It may be more appropriate to preserve the young person’s right of election when the matter is mentioned before the judge and provide the judge with authority to override the election if in the view of the court is that the matter “*may not adequately be dealt with summarily*”.

There is no time provision specified when an adult matter transferred to a Childrens Court must be mentioned. Consistent with section 11 of the Charter of Youth Justice Principles (schedule 1 of the YJA) it is recommended a maximum time period in which the next mention date must occur should be specified. Whilst in cases it may be possible (and desirable) to constitute a Childrens Court on the day of the mention, in cases where the proceeding is transferred to a:

- fixed date (that date should be within 28 days of the transfer); or
- a date to be fixed by the Childrens Court (it is recommended the order be required to be in terms that mandates the matter be mentioned 28 days from the date of the order or such earlier date as determined by the Childrens Court).

The desire to avoid contempt of the court order should ensure a timely listing.

Section 7(7) provides that the court may make an order related “to bail” at the time of transfer. The transfer of a matter to the Childrens Court jurisdiction would require consideration of the additional considerations of the YJA. To alleviate any doubt it is recommended that the regulation provide that the transfer constitutes a change of circumstances that would entitle an application by the person for bail. To avoid any unintended consequences, it is further recommended that the regulation provide that if the transfer of the jurisdiction of itself (in the absence of any other change of circumstance) cannot be grounds for revocation of bail.

3. Section 9

Section 9 places the onus upon the legal representative for the person to apply for the proceedings to be re-opened and to request a matter be dealt with summarily should the person be charged with an indictable offence that is not required to proceed on indictment for a child. This must be done prior to the presentation of an indictment. As the legislation is to commence on 12 February 2018 the legal profession will have limited capacity to be abreast of this significant change and to have provided advice to their clients.

It is understood that additional resources were provided to the ODPP to accommodate this change in jurisdiction. It would seem desirable that the ODPP be required to notify all legal practitioners as soon as possible, and no later than fourteen (14) days prior to the proposed presentation of an indictment, of the application of this section to the proceeding. It is further recommended that prior to the presentation of any indictment to which this section may apply, the court should be made aware that the proceeding is one to which the section applies. The Judge should then, prior to the presentation of indictment, ensure the person is aware of the procedure. This would be consistent with section 72 of the YJA. In the event that the person is unaware of the right to re-open, the matter may then be adjourned to facilitate the requisite advice. This may also reduce the disadvantage of persons without legal representation.

QLS is aware of the limited capacity of seventeen year olds to afford legal representation and anticipates that there would need to be legal aid funding available to ensure that all persons to whom this section applies would be able to access appropriate advice. Practitioners will have already provided comprehensive advice in relation to the matter proceeding on indictment and are highly likely to require additional legal aid funding in order to be able to provide this additional advice and to conduct any reopening.

Taking into account that most of the persons to whom the section applies will be legally aided QLS recommends that user-friendly forms of the documentation referred to in section 9(5) be available by commencement. Some practitioners report that some court registries were unfamiliar with the necessary court processes associated with the introduction of Restorative Justice Processes. The early availability of forms and a practice direction as to the process to be adopted to reopen a relevant proceeding may avoid confusion and delay in relation to the application of this section.

4. Section 12

To ensure Youth Justice is familiar with all relevant information pertaining to the person by the next court date it is recommended section 12 provide the written notice to be sent within seven days.

5. Section 14

The current drafting of the section would require a person to be held in a prison if released on bail on or after 12 February 2018 and sometime later is remanded in custody (e.g. on a Notice of Exercise of Power) prior to the finalisation of the proceeding. As it is likely that the person would have some engagement with Youth Justice either on a Conditional Bail Program or on another youth justice order the mandatory re-admission to prison is not appropriate. Re-drafting section 14 (3)(b) to read "*the person is or has been released on bail or under section 55 of the Act subsequent to commencement*" may avoid this.

Part 3

Section 19 applies section 218 of YJA to any order transferred. Persons in adult custody may have spent time in presentence custody that may not be declared. To facilitate effective pre-release planning and to allow proper review QLS recommends notice in writing of any change of release date under this part (including under section 21 or 22) should be required to be provided to the person in writing within 14 days of commencement. Taking into account the relatively small numbers of young people to whom this Part may apply it is recommended that a written notice and appropriate explanation given to all persons to whom Part 3 Division 2 applies advising of their release date, any change thereof, and the calculations used for this change. It is recommended the notice should also include the person/s they may contact to discuss any concerns questions in relation to the calculations and of the availability legal advice if required. A copy of this notice should be forwarded to the parent and any legal representative nominated by the young person.

Furthermore, in relation to Part 3, could you please confirm whether the adult convictions would remain on a young person's criminal record.

Part 4

6. Section 42

QLS recognises the transition from adult prison to youth detention can be disruptive. Practitioners report that persons transferred from adult prison to youth detention against the expressed views have historically been very challenging. Persons that have settled into a custodial environment are disrupted by unwanted change, particularly from an adult environment to an environment with children. It is recommended that section 42(2) mandate consideration of the views and wishes of the person be considered by the Chief Executive.

In determining the safety of the transfer section 42(4)(a) permits the Chief Executive to consider a number of conditions at the detention centre and is silent to consideration of the conditions within the prison. To ensure balanced and informed decision, it is recommended that should the Chief Executive consider the conditions of the detention centre, that a requirement be made of the comparative conditions at the prison where the person is currently held.

7. Section 46

Section 46 deprives a person of any benefit obtained by positive behaviour during the period prior to transfer. The purpose of this legislation is to recognise the particular protections that should be provided to children. It is not appropriate that as result of the recognition of the person as a child that they be deprived of a right, liberty or immunity. The onus should be

placed upon the Chief Executive to preserve these rights and in the event that they are unable to be preserved that full details of any restriction be provided to the person in the information notice.

8. Section 47

For the notice under section 47 to be of any practical benefit the notice should be required to be provided to parents/guardian and legal representative at the time the notice is given to the person pursuant to section 44(2) (i.e. immediately). It is unclear how the Chief Executive will be aware of the legal representative for the person on remand to serve the requisite notice. QLS would appreciate details of the mechanism for practitioners to be able to confirm to the Chief Executive should they represent persons to whom this section applies.

Part 5

The Society is concerned that all orders will be transferred upon commencement date regardless of the length that remains and/or the views and wishes of the person. This will require a person to report to a Youth Justice Service Centre regardless of the length of the remaining order, the proximity of the service centre, any cultural considerations, the therapeutic relationship of the person with their corrective services worker or the meaningful work there might be undertaken as part of an adult community service order.

Whilst section 62 may permit Corrective Services to continue to supervise orders this is only likely to happen after assessment has been made by the Chief Executive and therefore after the working relationships have been disrupted. Placements on adult community service once disrupted are often quickly filled by others or workers are often reallocated other clients so the connections cannot be re-established. For vulnerable 17 year olds these positives are often difficult if not impossible to re-establish. It is recommended at least 14 days prior to any transfer that persons eligible to have their order transferred be required to be served with a notice consistent with section 61 with a further requirement that their current Corrective Services explain same. The notice should also indicate an ability to request that the order continue to be supervised by Corrective Services stipulating criteria that may be considered. Information in relation to the availability of services that may be able to assist in reviewing the decision should also be provided.

9. Section 51

It does not appear there is any mention of a corresponding child order for the adult order of “a suspended sentence”.

10. Section 58

Currently Youth Justice does not permit young people on a Conditional Release Order to undertake hours of any separate Community Service Order. It is understood community service is undertaken as part of a Conditional Release Order but these hours do not count towards the Community Service Order. Pursuant to section 58(6) a person that was on an intensive correction order will not be required to undertake any more than 12 hours per week on a Conditional Release Order it is recommended that this policy be reviewed to allow persons with both Conditional Release Order and Community Service Order to undertake those orders concurrently.

Part 7

11. Section 71

As indicated earlier, QLS is aware of the limited capacity of seventeen year olds to afford legal representation. Section 71 places an onus on the person to seek legal advice in relation to a review. QLS recommends the onus should be on the Chief Executive to advise a person of the availability of legal advice. It is recommended that the information notice should contain the availability of free legal advice to assist in any review and include copies of the approved form referred to in section 70(1)(a). QLS anticipates that there would need to be legal aid funding available to ensure that all persons to whom this section applies would be able to access appropriate advice.

12. Section 73

We recommended that (consistent with section 121 of the YJA) that section 73 should provide that if an original decision is subject to review the effect of the decision is stayed until the end of the review. The request for review may be based upon the benefits being accrued by being in the current placement. In our view, a transfer, even on a temporary basis may jeopardise placements in programs or worker relationships.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Acting Advocacy Manager, Ms Binny De Saram on b.desaram@qls.com.au or (07) 3842 5889.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Ken Taylor', with a long horizontal line extending to the right.

Ken Taylor
President

