

Our ref: 337 - 16

26 February 2014

The Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street
BRISBANE QLD 4000

By Post and Email to: [REDACTED]

Dear Research Director

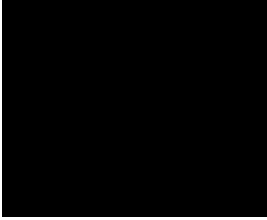
Youth Justice and other Legislation Amendment Bill 2014

Thank you for the opportunity to provide our views on the *Youth Justice and other Legislation Amendment Bill 2014*. We have focussed our submission on the policy objectives which are detailed in the Explanatory Notes to the Bill. The policy objectives of the Bill are to:

1. Permit repeat offenders' identifying information to be published and open the Childrens Court for youth justice matters involving repeat offenders;
2. Create a new offence where a child commits a further offence while on bail;
3. Permit childhood findings of guilt for which no conviction was recorded to be admissible in court when sentencing a person for an adult offence;
4. Provide for the automatic transfer from detention to adult corrective services facilities of 17 year olds who have six months or more left to serve in detention;
5. Provide that, in sentencing any adult or child for an offence punishable by imprisonment, the court must not have regard to any principle, whether under statute or at law, that a sentence of imprisonment (in the case of an adult) or detention (in the case of a child) should only be imposed as a last resort;
6. Allow children who have absconded from Sentenced Youth Boot Camps to be arrested and brought before a court for resentencing without first being given a warning; and
7. Make a technical amendment to the *Youth Justice Act 1992*.

We provide our views in relation to specific clauses in the submission below. If you require clarification of any of the issues of raised in this submission, please do not hesitate to contact our policy solicitors.

Yours faithfully



Ian Brown
President

Submission

Youth Justice and other Legislation Amendment Bill 2014

*A Submission of the
Queensland Law Society*

[26 February 2014]

General comments regarding differences between adult and youth offending

The Society supports protection for young people from the full force of the criminal law due to their inherent vulnerabilities and differences between adult and child cognitive development. We consider that a focus on prevention of crime and rehabilitation of young offenders will lead to better protection of the community. We also consider that, in the long term, it is beneficial to ensure that young people are supported to refrain from committing further crimes and become productive citizens of the community.

Many of our positions are based on the premise that the offending of young people must be viewed and addressed differently than adult offending behaviour.

We note that there have been media reports suggesting that there are increases in youth crime. The recent comments of the President of the Children's Court of Queensland in the Annual Report 2011/2012 sheds light on youth justice trends in Queensland:

Youth Justice Trends Summary

Again there was an overall decrease in the number of juveniles whose cases were disposed of in all Queensland courts in 2011-2012. The decrease was 6.9%, following a decrease of 8.6% in 2010-2011. However, the number of charges heard increased. There was a 9.7% increase in the number of charges heard.

Of the 5,906 juveniles whose cases were finalised, 84.9% (5,012) were either found guilty or pleaded guilty.

The number of detention orders imposed decreased by 38.3% and the use of Immediate or Condition Release Orders increased by 12.2%.

Cautions administered by the Queensland Police Service decreased by 9.1% from 2010-2011, with 12,238 juveniles being cautioned.

The Childrens Court of Queensland dealt with 1,762 charges against 358 defendants. This was a decrease of 15.2% from the previous year, although there was an increase of 5.3% in the number of charges dealt with. The Magistrates Court dealt with 5,840 juvenile defendants. Of these, 313 were committed to a higher court and 5,527 were finalised. There was a 6.3% decrease in the number of juvenile defendants before the Magistrates Court. However, there was an 8.6% increase in the number of charges being dealt with.

The statistics seem to demonstrate that there are a small number of persistent offenders who are charged with multiple offences. Whilst the number of juveniles appearing before the courts is decreasing, the number of offences alleged to be committed has increased.¹ [emphasis added]

Further, from the figures presented in the Youth Justice Action Plan, less than 1% of the total population of young people aged 10-16 had an offence proven in court.

In our view, this suggests that, in order to address youth crime, there needs to be a concerted focus on persistent offenders charged with multiple offences. The most appropriate and effective way to do this would not be to radically reform youth justice legislation which is aimed at *all* children and young people, but to focus targeted intervention strategies on this small group of young people. The Society submits that careful consideration of targeted initiatives will assist the government in achieving its stated policy objectives.

¹ Childrens Court of Queensland Annual Report 2011/2012 at page 6:
http://www.courts.qld.gov.au/_data/assets/pdf_file/0019/168202/cc-ar-2011-2012.pdf

We note that a number of the proposals in the Bill will have significant cost implications, particularly in terms of potentially increasing the rates of remand and sentenced detention.

Clause 5

The Society does not support the creation of the new offence of breach of bail. This new offence, in effect, will create two charges from a single offence. This is especially concerning as a young person only needs to be *charged* with the original offence, as opposed to being found guilty of the original offence. If the Government is minded to implement this policy, we suggest that the young person should only be subject to the penalty if they are also convicted for the original offence. This is essential as if the young person was not found guilty of the original offence, it would be unjust to further penalise the young person (noting that they would be separately penalised for the conviction of the subsequent offence).

We suggest that the committee might investigate whether the Government's objective may be achieved without creating a new offence. For example, this could occur through a process whereby an entry is created on a person's criminal history where the court has made a finding that re-offending has occurred whilst on bail. The entry could potentially read 'breach of bail (by re-offending)-name/date of offence-breach proved.' In this way, breach of bail information is available to the judiciary but further offences are not created. This would also ensure that a young person is not subject to an additional penalty out of the same offending behaviour. The Society would be pleased to receive confirmation of whether the offence would still be subject to the current laws allowing for judicial discretion to record or not record a conviction. We also kindly request that legal representation must be available to ensure that a young person is supported in any court process involving breach of bail, particularly considering the serious impact this offence could have on their criminal history.

We consider that the most cost effective and targeted method to address breach of bail would be to increase the number of bail assistance support programs in Queensland, particularly for repeat offenders. These programs should be able to link in and assist a young person to comply with bail conditions, such as providing accommodation and support to remain engaged with education.

The Society also notes the cost issues associated with this proposed amendment. The Society considers that making breach of bail an offence may have a direct impact on remand and detention rates. Consequently, there would also be an increase in the costs associated with detention. We note that 137 young people were in detention each day on average from 2011-12.² The proportion on remand for an average night in the June 2012 quarter was 70%, compared to 52% nationally,³ amounting to approximately 96 children in custody awaiting sentence on an average night.⁴ Further, the Action Plan states that it costs \$660 per day to house a person in a youth detention centre. Based on these figures, Queensland spends approximately \$63,360 a day on children on remand, or \$23,126,400 annually. The Society also notes that we have received reports from our members of a recent increase in the number of young people in detention.

A report by the Australian Institute of Health and Welfare indicated that nationally, in 2010-11, the median length of completed periods of detention was three days for children on remand.⁵ The Action Plan indicated that of the 70% of young people in detention who are held there on remand, waiting to be sentenced, only 10% ever receive a sentence of detention.⁶ Given there may be limited value in such short periods of detention, and the associated cost implications,

² Action Plan, page 13

³ AIHW 2012. Juvenile detention population in Australia 2012. Juvenile justice series no. 11. Cat. no. JUV 11. Canberra

⁴ Ibid (AIHW 2012.) Juvenile detention population in Australia 2012. Juvenile justice series no. 11. Cat. no. JUV 11. Canberra

⁵ AIHW 2012. Juvenile detention population in Australia 2012. Juvenile justice series no. 11. Cat. no. JUV 11. Canberra

⁶ Action Plan, page 10.

we consider the needs of the community regarding children on remand could be met using alternative programs.

Other associated costs include costs of watch-house custody and transporting defendants, as well as the potential for over-crowding of detention centres. We note that the discussion paper indicates that Queensland's youth detention centres are currently operating at approximately 80% capacity. Further long term costs may also arise from these changes, as research suggests that detaining young people is the most significant factor that could result in recidivism.⁷ We consider the financial cost of remand and recidivist offending would be substantial, as would the social and financial cost of victimisation.

Clause 8

Proposed section 148 (3) allows a court to access youth criminal history in adult sentencing matters and states:

(3) This section does not prevent a court that is sentencing an adult from—

- (a) admitting evidence that the adult was found guilty as a child of an offence even if a conviction was not recorded; or*
- (b) receiving information about any other sentence to which the adult is subject if that is necessary to mitigate the effect of the court's sentence.*

This means that a childhood finding of guilt for which no conviction has been recorded is admissible where a person is being sentenced during a proceeding for an offence committed as an adult. Currently, an adult sentencing court has the ability to access youth criminal histories when a conviction has been recorded. That is, youth convictions are admissible in adult criminal proceedings if a judge with relevant facts determines that this is an appropriate consequence. The Society does not support a change to this framework and advocates that the current position be maintained.

If the government proceeds with this proposal, we request clarification that these provisions will not operate retrospectively and apply to offences committed before the implementation of the Act. We note that this would be inappropriate and contravene fundamental legislative principles. On a practical basis, we note that many negotiations have taken place and pleas have been made on the understanding that a young person's criminal history will not be made available.

If the government is minded to allow youth criminal histories to be available in adult sentencing matters, we consider the following protections should be put in place:

- Only the findings of guilt for the same offences (not similar) should be relevant;
- The scheme should be restricted to only the most serious of offences. A court could potentially access previous findings of guilt for the same offence, where the offence committed by the adult in question is a serious offence. We note that section 8, *Youth Justice Act 1992* defines 'serious offence' as a life offence or one that would make an adult liable to 14 years imprisonment or more (subject to certain exemptions). Using this definition would be consistent; and
- A protection should be included to ensure that the time lapse of 5 years between committing an offence as a child and as an adult, is accounted for, in line with the *Criminal Law (Rehabilitation of Offenders) Act 1986*.

⁷ Holman and Ziedenberg 2006, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, Justice Policy Institute, USA, p.4

We consider that this option will best protect the rehabilitation prospects of the young person, and will also ensure that the court has access to the relevant, serious findings of guilt.

Clause 18

This provision seeks to remove the court's power in relation to the breach of a boot camp order. We consider that this provision should be maintained, and allow the continuation of a boot camp order until a proceeding is heard and decided by a court.

Clause 21

Clause 21 seeks to insert a new section 299A which removes the prohibition of publication of identifying information about a child who is not a first-time offender. In our view, the current regime should be retained. That is, general prohibition on the publication of names must be maintained, with the courts having the discretion to allow the publishing of the names of children and young people. The Society does not support this provision and does not consider that it will fulfil the policy objectives of the Bill.

The Society does not consider that publicly naming children will be an effective deterrent for committing further crimes. This is supported by the New South Wales Standing Committee on Law and Justice who state:

Naming juvenile offenders would stigmatise them and have a negative impact on their rehabilitation, potentially leading to increased recidivism by strengthening a juvenile's bonds with criminal subcultures and their self-identity as a 'criminal' or 'deviant,' and undermining attempts to address the underlying causes of offending.⁸

In fact, research has shown that the Northern Territory provisions allowing the public naming of children have had the following outcomes:

- *Naming is detrimental to the young person. It may result in harassment and/or disruption to their educational prospects; and*
- *Identification of young people in that jurisdiction translated to reporting in the media in a haphazard manner.⁹*

We agree with the New South Wales Standing Committee on Law and Justice that public naming for youth offenders would have a detrimental impact on youth offenders and their rehabilitation, victims of crime and their families.¹⁰ The Chair's foreword states:

Juvenile offenders can be punished and encouraged to take responsibility for their actions without being publicly named. Judicial sentences for juveniles can and do reflect community outrage, denouncement of the crime and acknowledgement of the harm caused to victims. There are confidential processes such as juvenile youth conferences, in which the offender must often face their family and the victim of their crime, that utilise shame constructively and supportively to help the offender

⁸ Standing Committee on Law and Justice, The prohibition on the publication of names of children involved in criminal proceedings

⁹ <http://lawgovpolicy.com/2012/07/17/look-before-leaping-into-a-human-rights-quagmire/>, referencing Duncan Chappell and Robyn Lincoln, Naming and Shaming of Indigenous Youth in the Justice System: An Exploratory Study of the Impact in the Northern Territory : Project Report

¹⁰ NSW Standing Committee on Law and Justice, The prohibition on the publication of names of children involved in criminal proceedings, 2008 found at:

[http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/a6e0bf2fbb2c4cc5ca25743900104238/\\$FILE/FINAL%20REPO RT.pdf](http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/a6e0bf2fbb2c4cc5ca25743900104238/$FILE/FINAL%20REPO RT.pdf)

*reintegrate into the community. The importance of rehabilitation is all the greater when a juvenile offender is involved, since the benefits flowing to the offender and the community will continue for the rest of their life. The prohibition impacts not just on juvenile offenders, but also victims, their families and the media.*¹¹

The Society is concerned with the practical consequences of this proposal, particularly:

- this proposal could significantly affect the ability of these children to find employment. Being “known” as a child offender will be a mark against a child and deter potential employers. Fewer job opportunities will mean fewer opportunities for children to become income earners and productive citizens of the economy in the long term;
- this proposal could also significantly affect victims of crime, who may be more easily identified through naming offenders to a crime;
- the families of these young people will also suffer as a result, as their communities may ostracise and blame them for the actions of their children; and
- it is unclear how this provision will impact on young people in the child protection system who cannot be identified under the provisions of the *Child Protection Act 1999*.

Clause 20

Proposed section 276B provides for the automatic transfer of 17 year olds to adult correctional centres. The Society does not support this proposed change and considers that the current scheme should be retained. The Society foresees that an automatic transfer process will result in unintended consequences as a judicial officer will be unable to consider the appropriateness of the transfer. We consider that, if any changes are to be made to the legislation, it should not be an automatic process. Instead, this should be a reviewable administrative decision required to be made by the chief executive to transfer an 18-year old, where there is 6 months remaining to be served on the detention order after turning 18.

The Society supports the maintenance of judicial discretion in these matters. There will be situations where the costs of transfer, compared to the amount of time left for a young person’s sentence, will be disproportionate. The Society also considers that maintenance of programs, such as access to educational support, is instrumental for a young person held in State custody. Transfer of a young person to an adult prison may undermine not only the progress made by a young person and remove the structure and discipline provided to them, but also undermine the investment made by these programs. The ability for continued access to these programs must be assessed by the courts on the facts of each particular case. Young people, many of whom will go on to be productive citizens of the community, will be exposed to hardened criminals unnecessarily if judicial discretion is not maintained. The exercise of judicial discretion in these matters will ensure that a young person will be transferred to an adult prison in appropriate circumstances.

Clear legislative criteria must be imposed on the chief executive making the decision to transfer a young person. The criteria must be similar to that which is currently considered by the court under section 276D, *Youth Justice Act 1992*, including:

- a) *the length of the period of detention;*
- b) *the earliest day the person may be released from detention and the person's age at the time;*
- c) *the length of any period of community supervision after release from detention and the person's age at the end of the supervision period;*

¹¹ NSW Standing Committee on Law and Justice, The prohibition on the publication of names of children involved in criminal proceedings, 2008 found at: [http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/a6e0bf2fbb2c4cc5ca25743900104238/\\$FILE/FINAL%20REPO RT.pdf](http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/a6e0bf2fbb2c4cc5ca25743900104238/$FILE/FINAL%20REPO RT.pdf)

- (d) *any particular issues relating to the vulnerability or maturity of the person known at the time of the decision;*
- (e) *the availability of relevant services and programs during a term of imprisonment;*
- (f) *any time the person has spent serving any term of imprisonment;*
- (g) *the likely impact on a detention centre if a transfer order is not made;*
- (h) *any other relevant matter.*

The young person must be given timely notice of the decision, the ability to make submissions to the chief executive (with the assistance of legal representation) and be provided with a right to appeal this decision to a court. The Society's preference is for these appeals to be made to the Childrens Court of Queensland, which has specialist knowledge in this area of the law.

We also note that, if a judge makes a specific finding on sentencing that transfer should not occur, the Department should be required to bring an application before the court to show that the circumstances have changed.

Also, we note that there has been judicial comment in relation to the failure of Corrective Services to transfer the classification of security level upon transfer to adult prison. Our members have reported cases where, even if a young person is on detention on the lowest security, they are put into adult prison as a new admission with higher security levels. We consider that the appropriate transfer of security level must occur.

With regard to judicial review, we also note objection to proposed section 276E. This provision removes judicial review of the chief executive's decision, except in the narrow case of jurisdictional error. The Society is concerned with any action which denies a person the right to seek a review of decisions made. We note the fundamental legislative principles in section 4(3)(a), *Legislative Standards Act 1992* which demand that legislation should make, "rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review." As a matter of principle it is concerning for any decision-maker to be provided with an unreviewable discretion as this can promote poor internal processes, poor decision-making practices and also may lead to inappropriate conduct of officials. Ideally, both internal and external review of the decision through the courts should be available.

The Explanatory notes to the Bill do not provide a reason for automatic transfer of 17 year olds from youth detention to adult correctional facilities. From an economic perspective, the Society considers that the automatic transfer of 17 year olds will not result in significant cost savings. Youth remand rates, as opposed to the automatic transfer of 17 year olds from youth detention to adult correctional facilities needs to be addressed. The Society considers targeting the **remand** numbers in the detention centres, as opposed to those who are there on sentenced detention. At best, the option of automatic transfer to adult prison would only be able to focus on less than 10% of the detention population. The focus should be shifted to address the high remand figures. This is the only way that the demand on youth justice centres can sustainably be addressed.

Clause 31

The Society does not support proposed section 21C. This provision has the effect of removing the prohibition on Children's Court proceedings for youth justice matters being held in closed court, for repeat offenders and deems:

- (1) *A proceeding before the court for a youth justice matter in relation to a child who is not a first-time offender must be held in open court, other than if the court*
 - (a) *orders the court be closed; or*
 - (b) *excludes a person under section 21E.*

The Society does not support open proceedings in Childrens Court. First, we consider that current section 20, *Childrens Court Act* is sufficiently broad enough for a judge to make the appropriate determination regarding the presence of a media representative and/or other persons.

Secondly, this provision is unlikely to have a deterrent effect and fulfil the government's stated policy objectives. This lack of deterrent effect is supported by the New South Wales Standing Committee on Law and Justice who state:

Impulsivity amongst juveniles and their reduced ability to foresee the consequences of their actions reduces the deterrent effect of criminal justice outcomes in relation to juveniles. The Committee found that naming juvenile offenders was unlikely to act as a significant deterrent to either the named offender or would-be juvenile offenders.¹²

This report also notes that, 'previous reports from the NSW Law Reform Commission and the Human Rights and Equal Opportunity Commission express support for the current prohibition against naming children involved in criminal proceedings.'¹³ The Society also supports this view.

Thirdly, from a practical perspective, young people may be less likely to provide information in a full and frank manner when faced with the prospect of open court. This would have the undesirable effect of restricting disclosure of the young person's circumstances to the court. Relevant information, such as sensitive family information might not be readily disclosed and the magistrate might be faced with prospect of crafting orders without the benefit of all the facts and comprehensive knowledge of the circumstances of the accused. This will mean that justice will not be done and the punishment will not be appropriately adapted to the crime. This will negatively impact on the deterrent effect which the government hopes to create with this provision.

We also emphasise the cost implications of the provisions in proposed section 299A. There are likely to be significant numbers of applications for non-publication of names in court processes. Contested applications may require additional court time and may lead to delay. This will affect the court resources that need to be dedicated to each matter. These costs to the community need to be factored in for any proposed reform to the current naming provisions in the Act.

Clause 34

The Explanatory notes to the Bill state that clause 25 omits principle 17— that a child should be remanded or detained only as a last resort and for the least time justified in the circumstances—from the charter of youth justice principles in schedule 1 of the *Youth Justice Act 1992*. Clause 34 states:

(13) This section overrides any other Act or law to the extent that, in sentencing a child for an offence, the court must not have regard to any principle that a detention order should be imposed only as a last resort.

The Society does not support this provision. We consider that this important sentencing principle should be retained and we urge the government to consider the negative impact of this proposal on the rehabilitation prospects of young offenders.

¹² Standing Committee on Law and Justice, The prohibition on the publication of names of children involved in criminal proceedings

¹³ Standing Committee on Law and Justice, The prohibition on the publication of names of children involved in criminal proceedings

The above provision states that the court must not have regard to any principle that a detention order should be imposed only as a last resort. This fetter on judicial discretion is inappropriate and undermines the ability of the judiciary to make sentencing orders that are proportional and appropriate. We do not consider that the legislation should prohibit the judiciary from having regard to this principle. In this regard we note the importance of early intervention, diversion and responding to causes of crime as appropriate mechanisms to address youth crime.

From an economic perspective, the significant cost implications of implementing this proposal should be carefully considered. Based on NSW data, community based service orders cost the state approximately \$20 a day.¹⁴ As indicated in the Action Plan, 137 young people are in detention each day, at a cost of \$660 per child, per day. If the effect of a breach of bail offence and the removal of detention as a last resort was to increase the detention population by 10% this would amount to an additional \$9240 a day or \$3.37 million a year. If the additional 10% of children (14 children) were put on community based service orders instead, costing the state approximately \$20 a day per child¹⁵ this would save \$8960 a day, or \$3.27million a year.

The removal may also directly impact on the rates of sentenced detention. Increases to sentenced detention rates will increase demand on youth detention centres. We consider that the law should continue to encourage a focus on community-based supervision and rehabilitation.

Recidivist motor vehicle offenders

The Society notes that on 11 February 2014, the Attorney-General, The Hon. Mr Jarrod Bleijie MP, introduced the *Youth Justice and Other Legislation Amendment Bill 2014* (the Bill). This Bill has been referred to the Committee for scrutiny and reporting by 12 March 2014.

In the Explanatory Speech for the Bill the Attorney-General stated:

Finally, in response to the disproportionate rates of vehicle related crime caused by young offenders in Townsville, I foreshadow to the House that it is intended to move amendments during the consideration in detail stage of the bill that will hold these young offenders accountable and redirect them from further offending. This will be achieved through an amendment to the Youth Justice Act that will ensure that recidivist motor vehicle offenders who have been found guilty of two or more motor vehicle offences in the previous 12 months will be sent to the sentenced youth boot camp on a finding of guilt for a further unlawful use of a motor vehicle. For the next few weeks we want to engage with the Townsville community, recognising they have a serious problem of vehicular thefts, to come up with a proposal during the committee process. We will be writing to the committee about a proposal which essentially is that if there is a recidivist motor vehicle offender in the Townsville area they will have a mandatory sentence imposed and that will be a boot camp order. It is to get these young people to turn their lives around, get them an education and a job and out of a life of crime. I commend the bill to the House.¹⁶

In line with the Society's well documented position against mandatory sentencing, the Society does not support this mandatory sentencing regime. If the government is minded to implement

¹⁶ Found at: <http://www.parliament.qld.gov.au/documents/tableOffice/BillMaterial/140211/Youth.pdf>

this proposal, we urge that public consultation on the wording of the legislation be conducted and that stakeholders be provided with an opportunity to comment.

The Society kindly requests that, in the course of the Committee's consideration of the proposal outlined above, the following steps be undertaken:

- The proposal, including any suggested amendment to the Bill, be made public during the Committee's process; and
- Stakeholders be provided with sufficient time to be able to review the proposal (including suggested legislative wording) and to provide feedback.

We also note that it might not be prudent practice to prescribe the areas in which people reside, for example Townsville, by regulation. Regulations are not subject to the same level of scrutiny and as such, the Society is concerned with this approach.

Thank you for considering these requests. We would be most grateful to receive information on the Committee's intended process for dealing with this issue.

Child Guardian Summary Investigation Report - The use of separation at a Queensland Youth Detention Centre

We note that the Commission for Children and Young People and Child Guardian recently released a report entitled, 'The use of separation at a Queensland Youth Detention Centre'.¹⁷ Contained in this report are a number of recommendations about proposed amendments to the *Youth Justice Act 1992* and *Youth Justice Regulation 2003*. We would appreciate the opportunity of working with the Government in relation to these proposals.

¹⁷ Found at: http://www.ccydpcg.qld.gov.au/pdf/publications/reports/YDC_summary_report.pdf