Queensland Law Society

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Office of the President

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Our ref: FNLP/ChLC-BDS

The Honourable Di Farmer
Minister for Child Safety, Youth and Women
Minister for the Prevention of Domestic and Family Violence

By email: [redacted]

Dear Minister

New bail laws to target repeat youth offenders

We write in response to amendments recently passed to the *Youth Justice Act 1992* as part of the Community Services Industry (Portable Long Service Leave) Bill 2019.

The Society is disappointed at the lack of consultation in relation to the amendments. This is particularly so given the amendments mean if a young person is judged an unacceptable risk to the safety of the community, they must be refused bail. We understand that Parliament has the ability to pass urgent legislation without the benefit of Parliamentary Committee review, however this option should only be used in the most exceptional circumstances. These are not exceptional circumstances. The need for committee review is even greater where significant amendments are made in the final stages of debate and the Bill passed shortly thereafter. This provides very limited parliamentary scrutiny. In our view, substantial legislative change which will have significant impacts on human rights and detention of children and young people should have had the benefit of targeted stakeholder consultation and Parliamentary Committee scrutiny. The QLS has and will continue to provide our views, often within exceptionally short timeframes at all stages of the legislative process.

Our concerns on the substance of the amendments are outlined below.

First, the Society is deeply concerned at the disproportionate impact that the amendments will have on Aboriginal and Torres Strait Islander children and young people. The Australia Law Reform Commission Report, "Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples" states:

> Up to one third of Aboriginal and Torres Strait Islander people in prison are held on remand awaiting trial or sentence. A large proportion of Aboriginal and Torres Strait Islander people held on remand do not receive a custodial sentence upon conviction,

> or may be sentenced to time served while on remand. This particularly affects female Aboriginal and Torres Strait Islander prisoners, and suggests that many Aboriginal and Torres Strait Islander prisoners may be held on remand for otherwise low-level offending.

The situation described has been exacerbated by the lack of progress on the Closing the Gap justice targets, although we note the Closing the Gap Refresh process is currently underway.

Almost 30 years ago the Royal Commission into Aboriginal Deaths in Custody provided a plan for reducing the number of Aboriginal and Torres Strait Islander Peoples coming into contact with the criminal justice system. Disappointingly, most of the recommendations are yet to be implemented. In our view against that background, it is unacceptable to continue to pass legislation that will have an indirect discriminatory impact on Aboriginal and Torres Strait Islander children and young people.

Second, we are concerned that this legislation is going to increase the number of young people on remand who are spending unnecessary time in custody. The research demonstrates that time in custody and time on remand compounds disadvantage and increases risks of reoffending. The more time children and young people spend in custodial settings, even youth detention facilities, the increased likelihood that they will come into further contact with the youth justice system. Children in the youth justice system disproportionately come from disadvantaged backgrounds and are known to child protection services. Many children who are deemed an unacceptable risk under these amendments will be so because of lack of supports or services in their particular community.

Third, the Society made public submissions to the Parliamentary Legal Affairs and Community Safety Committee in response to the consultation on the Youth Justice and Other Legislation Amendment Bill 2019. These submissions included, *inter alia*, support for the removal of legislative barriers to enable more young people to be granted bail and to ensure appropriate conditions are attached to grants of bail. The current amendments, made less than a year after the 2019 amendments, reverse the earlier change against a background where submissions on the 2019 amendments expressed overwhelming support. We also note the sentiments expressed in your Introductory Speech on the Youth Justice and Other Legislation Amendment Bill 2019 made on 14 June 2019 that supported the removal of the legislative barriers to bail, which are now being reimposed.

Fourth, we are concerned that there is no strategy to address the issue of children being remanded in watch houses and youth prisons, the number of which are likely to increase under these changes. In this regard, we note Schedule 1 Charter of youth justice principles of the *Youth Justice Act 1992*, paragraph 18 which states, 'a child detained in custody should only be held in a facility suitable for children.'

Fifth, we do not support the removal of discretion from magistrates and judges. Decisions on whether a child is granted bail should rest with these highly trained judicial officers. These judicial officers are in the best position to administer justice through judicial reasoning and comprehensive understanding of the offence and the circumstances surrounding its

commission. Judicial discretion is an essential characteristic of proper and effective administration of justice, the court, and forms part of the court's independence and impartiality. It should not be qualified.

The amendments are simply not necessary. The utility of the amendments are limited. "The risk to the community" was already one of the considerations that the court had to cogitate when determining risk (that is, risk of committing further offences and risk of interfering with witnesses, etcetera).

Finally, the changes limit several human rights protected under the *Human Rights Act 2019*.

Human rights considerations

QLS welcomes the inclusion of a compatibility statement with the amendments, but consider it does not provide adequate justification for the limitations imposed.

The compatibility statement discusses freedom of movement, right to liberty and security and rights in criminal proceedings, however limits imposed on other rights are not justified in the statement. For example, the right to bail arises from the presumption of innocence included in section 31(1) *Human Rights Act 2020* (HRA). This is not addressed. Children in the criminal process is specifically dealt with at section 33 of the HRA. This section is modelled on article 10(2)(b) and 10(3) of the International Covenant on Civil and Political Rights, recognising that children are especially vulnerable due to their age and require special protections. It is also not addressed.

Any law that impacts on bail especially for children ought to have been subjected to significant parliamentary scrutiny, consultation and debate. These amendments have not been. As a result, they remain unjustified and missing the following critical safeguards:

1. Section 33 of the HRA requires that children detained must be segregated from all detained adults, and s 32(3) requires that a child charged with a criminal offence has the right to a procedure that takes account of the child's age and the desirability of promoting the child's rehabilitation. These HRA provisions not only acknowledge children's greater needs than adults, but also that children imprisoned with adults have a higher risk of violent victimisation, exposure to illicit substances and escalating criminality (Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (29 July 2010). Under these amendments, there is significant risk that Queensland Watch Houses will again become defacto remand centres for young people.

2. When accused, children must be brought to trial as quickly as possible. In the Australian Capital Territory, it has been found that positive steps to expeditious completion have been required to fulfil its section 33 equivalent. (*LM v Childrens Court of the Australian Capital Territory and the Director of Public Prosecutions for the Australian Capital Territory* [2014] ACTSC 3, [54]). This obligation is a more onerous requirement than the 'without unreasonable delay' provision in sections 29(5), 29(7) and 32(2)(c) contained in the amendments.

3. When convicted, children must be treated in a manner appropriate for their age. The *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* discusses that children should have access to:
    - education or vocational training,
    - engage in recreational activities,
    - receive adequate medical care and treatment,
    - have adequate communication with the outside world,
    - receive frequent visits, and
    - never be placed in solitary confinement.

QLS is concerned that the amendments attempt to band aid the issues relating to youth crime, without giving appropriate consideration to the systemic issues that lead to such offending.

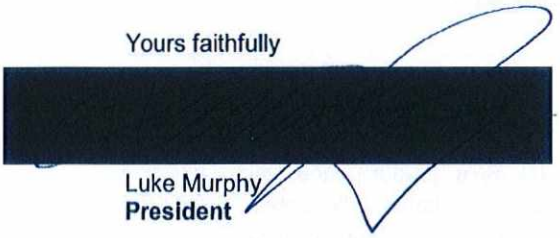
The breadth of the issues raised and the significance of the amendments demonstrate the need for far greater and more comprehensive stakeholder consultation and justify Parliamentary Committee scrutiny.

Also enclosed is a copy of our letter of 24 April 2020 to the Attorney-General addressing the issue of the raising of the minimum age of criminal responsibility, which is relevant to the substance of this correspondence.

We would be pleased to meet with you to discuss these matters further.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team, by phone on (07) 3842 5930 or by email to policy@qls.com.au.

Yours faithfully



Luke Murphy
President