

Inquiry into the Youth Justice and Other Legislation Amendment Bill 2019

Submission to the Legal Affairs and Community Safety
Committee

11 July 2019

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au

Introduction

1. The ALA welcomes the opportunity to have input into the inquiry being undertaken by the Legal Affairs and Community Safety Committee into the *Youth Justice and Other Legislation Amendment Bill 2019* ('the Bill').
2. This submission will address the following:
 - (a) General support for key measures in the Bill;
 - (b) The need to address the over-representation of Aboriginal and Torres Strait Islander young people in detention;
 - (c) The need to reduce the high numbers of young people being detained in police watch houses;
 - (d) The need to raise the age of criminal responsibility in Queensland; and
 - (e) The importance of facilitating earlier access to legal assistance for young people in police custody.

General support for key measures to reduce the rate of incarceration of young people

3. The ALA supports the key changes in the Bill, which aim to reduce the rate of incarceration of young people in Queensland. These include:
 - Making youth diversion more accessible to young people by removing legislative barriers to its use;
 - Confirming arrest as a measure of last resort;
 - Reducing the time young people spend in police custody;
 - Ensuring that appropriate youth-specific consideration is given to bail options;
 - Decriminalising breach of bail conditions as an offence;
 - Facilitating earlier access to legal assistance for young people in police custody.

Over-representation of Aboriginal and Torres Strait Islander young people in detention

4. Approximately 65% of young people in youth detention facilities in Queensland are Aboriginal or Torres Strait Islander. As noted by the Human Rights Law Centre in its 2016 submission to the Queensland Youth Detention and Young Prisoner Review,² this statistic has attracted criticism from the Committee on the Rights of the Child,³ the Committee against Torture,⁴ numerous Special Rapporteurs and, most recently, by the Human Rights Council when Australia was subject to its Universal Periodic Review.⁵
5. The ALA submits that the key objective of the Bill must be to reduce the over-representation of Aboriginal or Torres Strait Islander young people in youth detention facilities and police watch houses in Queensland.

The need to reduce the high numbers of young people detained in police watch houses

6. According to Amnesty International, as of 10 May 2019, there were 89 children in the Brisbane City Watch House, a facility designed to hold adults. At least half of these children are Aboriginal or Torres Strait Islander and at least three were just ten years of age. One of the boys had been there for 43 days, despite Queensland law stating no child may stay even one night in the Brisbane watch house. Four young girls were being held in isolation to protect them from other inmates.⁶
7. Watch houses are built to hold adults for short periods of time after they are arrested, while they wait for their court hearing. They are staffed by police officers, and are generally attached

² Human Rights Law Centre (2016), *Submission to the Youth Detention and Young Prisoner Review, Queensland*, 7 November 2016.

³ Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention, Concluding observations: Australia*, UN Doc CRC/C/AUS/CO/4 (28 August 2012).

⁴ Committee against Torture, *Report of the Committee against Torture*, UN Doc CAT A/56/44 (1 Jan 2001), para 52.

⁵ Human Rights Council, *Report of the Working Group on the Universal Periodic Review*, UN Doc A/HRC/31/14 (13 January 2016).

⁶ <https://www.amnesty.org.au/watch-houses/>

to and run by police stations. Watch houses are not properly resourced or regulated to care for children. They are not places where children were ever meant to be held in detention.

8. The ALA considers it unacceptable that it appears that watch houses are being used as a stop-gap to compensate for an at-capacity youth detention system and Queensland's backlogged Children's Court. The ALA submits that the Bill could be improved in relation to decisions about release and bail for children which reduce the high numbers of children remanded in watch houses and youth detention facilities. Moreover, the ALA agrees with Sisters Inside that the Bill does not provide a clear legislative framework that will reduce these high numbers.
9. The ALA is concerned that the Bill does make any amendments to s11 of the *Youth Justice Act 1992* ('YJ Act') regarding the decisions to charge children or the consideration of alternatives to charging.
10. The ALA supports the introduction of a requirement for police officers to consider alternatives to arrest for contraventions of bail conditions (clause 18, introducing a new s59A). However, the ALA agrees with Sisters Inside that the new s59A should explicitly reflect children's unique circumstances as defendants and that arresting children for welfare related reasons should not occur.
11. The ALA supports the general principles as outlined in the new s48AD(2) that guide decisions relating to when a child may be released from custody despite unacceptable risk. However the ALA submits that the it should be mandatory for a court or police officer to release a child despite unacceptable risk if satisfied that the child's release is consistent with community safety, having regard to the matters outlined in s48AD(2)(a)–(j). This would require the word 'may' to be changed to 'must' in s48AD(2).

Age of Criminal Responsibility

12. The United Nations Convention on the Rights of the Child requires parties to establish a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.⁷ The internationally accepted minimum age of criminal responsibility is 12 years

⁷ Article 40(3)(a), *Convention on the Rights of the Child*, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49.

and both the Committee on the Rights of the Child and, more recently, the Special Rapporteur on Torture have recommended that the minimum age must be set at no lower than 12 years.⁸ Currently, the age of criminal responsibility in all Australian states and territories, including in Queensland, is 10 years, subject to the *doli incapax* principle.⁹

13. Importantly, Australia is now out of step with comparative jurisdictions such as Canada, where the age of criminal responsibility is 12 years and New Zealand, where the age is staggered depending on the severity of the crime, but is 13 years for the majority of criminal offences.
14. The ALA considers that raising the age of criminal responsibility is a key measure in reducing the rate of incarceration of young people, who should be detained only as a last resort. The ALA submits that no child under the age of 14 should be sentenced to detention, except in the most serious cases.
15. The ALA agrees with the Australian Medical Association that the age of criminal responsibility should be raised to 14 years of age, in accordance with the recommendations of the United Nations Committee on the Rights of the Child.
16. The ALA submits that the Committee should support the principle of raising the minimum age of criminal responsibility to at least 14 years of age, recognising it as a key strategy to reduce the numbers of young people in detention.

Facilitating earlier access to legal assistance for young people in police custody

17. The ALA strongly supports the amendment to s421 of the *Police Powers and Responsibilities Act 2000*, which places an obligation on police to inform a child that a representative of a legal aid organisation will be notified that the child is in custody for the offence. The ALA submits that for this obligation to be effective in ensuring a young person in custody has access to legal assistance, it is essential that Queensland Legal Aid and Queensland community legal centres

⁸ Committee on the Rights of the Child, *Concluding observations of the Committee on Rights of the Child: Australia*, UN Doc CRC/C/15/Add.79 (1997); Juan E. Mendez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/HRC/28/68 (5 March 2015), para 85(g).

⁹ *Criminal Code Act 1899* (Qld), s29(1).

are provided with additional funding to employ additional criminal law legal practitioners with a specialisation in the delivery of legal services to children and young people.

Other matters

18. The ALA agrees with Sisters Inside that the rollout of body worn cameras and audio recordings of CCTV in detention centres, as authorised by clause 5 of the Bill, should be deferred until there are clear published guidelines governing the recording of images and sounds, and the use of body worn cameras, as required by the new s263B(1) of the YJ Act.
19. In relation to the new s151(3A) of the YJ Act regarding pre-sentence reports, the ALA submits that it should be required for the court to ask that the pre-sentence report be given to the court within a stated period that is reasonable. This means that in sub-section (3A) the word 'may' should be changed to 'must'.

Conclusion

20. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the Committee's consideration of the *Youth Justice and Related Legislation Amendment Bill 2019*. The ALA is available to provide further assistance to the Committee in further developing the legislation to implement these reforms.

Greg Spinda



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Australian Lawyers Alliance