

Submission to the

Education, Tourism, Innovation and Small Business Committee

Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Bill 2016

October 2016

This submission was primarily researched and drafted by UQ law students **Jane Hall** and **Jessica Downing-Ide** under the academic supervision of **Professor Heather Douglas**. The submission was framed as a legal research project through the UQ Pro Bono Centre, with students undertaking this task on a *pro bono* basis - without any academic credit or reward - as part of their contribution to service as future members of the legal profession. Law school staff were invited to endorse the submission and their names and signatures are included at the back. The result is a collaborative piece of work between senior law students and UQ law academics.



4 October 2016

Research Director
Education, Tourism, Innovation and Small Business Committee
Parliament House
Brisbane Qld 4000

By email: etisbc@parliament.qld.gov.au

Dear Sir/Madam,

We write to support of the *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Bill 2016*.

1. Overview of position

We support all the changes proposed by the Bill.

We support the removal of the definition of 'child' from the *Youth Justice Act 1992* (Qld) (**'the YJ Act'**), and other Acts, to increase the upper age of childhood from 16 to 17 years.

We support the transitional provisions in Part 11, Division 5 of the YJ Act and Chapter 7A, Part 10 of the *Corrective Services Act 2006*, recognising the importance of ensuring that the transition is conducted with flexibility.

The proposed reforms to allow 17-year-olds to be treated as children are long overdue. They have already been implemented in all other states and territories. The changes will ensure Queensland's compliance with international human rights obligations and best practice nationally. Our submission outlines the harms caused by the current law, and identifies the reasons for and benefits of the proposed changes.

2. Current state of law

Currently, a 'child' is defined under the YJ Act as a person 'not yet turned 17 years.'¹ This definition applies to a number of other Acts relevant to the Queensland criminal justice system.²

¹ *Youth Justice Act 1992* sch 4 (definition of 'child').

² *Bail Act 1980* (Qld) s 6 (definition of "child"); *Criminal Law Amendment Act 1945* (Qld) s 17(3); *Criminal Code 1899* (Qld) s 119B (definition of "community justice group"); *Criminal Organisation Act 2009* (Qld) sch 2 (definition of "child"); *District Court of Queensland Act 1967* (Qld) s 61A(4); *Drugs Misuse Act 1986* (Qld) s 30(1)(c)(ii); *Mental Health Act 2000* (Qld); *Mental Health Act 2016* (Qld) ss 83(6)(c), 113(1)(f), 545(3)(c), 617(3)(c), 619(2)(c); *Penalties and Sentences Act 1992* (Qld) s 6(a); *Police Powers and Responsibilities Act 2000* (Qld) sch 6 (definition of "adult" and "child"); *South Bank Corporation Act 1989* (Qld) s 3; *State Penalties Enforcement Act 1999* (Qld) s 5; *Transport Operations (Passenger Transport) Act 1994* (Qld) ss 129W, 129ZA(1)(b), 129ZB(1)(a), sch 3.

2.1 Practical harms of current position

The adult criminal justice system is not suitable for 17-year-old offenders.

First, a significant number of adult prisons do not adequately provide for 17-year-olds' education and healthcare.³

Second, a substantial body of research indicates that most children's neurological development is incomplete until well after adolescence.⁴ This means that a typical 17-year-old's culpability is lower than an adult's, as their decision-making capacity is impaired, and they are more susceptible to suggestion by peers. Providing these protections enhances the ability of the justice system to treat offenders with proportionality with respect to their culpability.

Third, almost 30 years ago, the 1988 Kennedy Commission of Review into Corrective Services identified 17-year-old offenders as a vulnerable group in the prison population.⁵ The practice of isolating 17-year-olds from adults in prisons stigmatises 17-year-olds throughout their term of imprisonment,⁶ and they are subjected to physical and sexual violence when they enter the mainstream population.⁷ Including 17-year-olds in the youth justice system will improve safety for this vulnerable group.

3. Proposed changes

The proposed Bill increases the upper age of who is a child for the purposes of the YJ Act from 16 to 17 by omitting the definition of 'child' from Schedule 4 of the YJ Act, and amending other Acts accordingly.⁸ The effect is that the definition of 'child' in s 36 of the *Acts Interpretation Act 1954* (Qld) will apply, and 17-year-olds will be included as 'children'. The amendment will not only allow 17-year-olds to be tried, sentenced and detained as children under the *Youth Justice Act 1992*, but will also provide necessary protections under other Acts.⁹ For example, 17-year-olds will have the benefit of access to a support person while being questioned by police.¹⁰

³ Amnesty International Australia, 'Heads Held High: Keeping Queensland Kids Out of Detention, Strong in Culture and Community' (Report, 2016) 18-9 <http://www.amnesty.org.au/resources/activist/Heads_Held_High_-_Queensland_report_by_Amnesty_International.pdf>.

⁴ Laurence Steinberg and Elizabeth S. Scott, 'Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility and the Juvenile Death Penalty' (2003) 58(12) *American Psychologist* 1009.

⁵ Commission of Review into Corrective Services in Queensland 1988 - Final Report (Kennedy Report), 126 [20.2] <http://www.correctiveservices.qld.gov.au/Publications/Corporate_Publications/Reviews_and_Reports/CSReview_Final_5Future_Direction.pdf>.

⁶ Anti-Discrimination Commission Queensland, 'Women in Prison: A Report by the Anti-Discrimination Commission Queensland' (Report, March 2006)

<http://www.adcq.qld.gov.au/__data/assets/pdf_file/0018/5148/WIP_report.pdf>.

⁷ Tamara Walsh, 'Incorrections: Investigating prison release practice and policy in Queensland and its impact on community safety' November 2004, 130-131

<http://espace.library.uq.edu.au/view/UQ:398652/UQ398652_OA.pdf>.

⁸ See above n 2.

⁹ Terry Hutchinson, 'Being Seventeen in Queensland: A Human Rights Perspective on Sentencing in Queensland' (2007) 32(2) *Alternative Law Journal* 81, 84.

¹⁰ *Police Powers and Responsibilities Act 2000* s 421

A number of transitional provisions will be inserted to deal with three ‘cohorts’ of 17-year-old offenders: those who have not yet been charged (proposed s 387), those for whom proceedings are on foot (proposed s 390), and those who have a sentencing order currently in force (proposed s 389). The clear legislative intent is to transfer all 17-year-olds to the youth justice system. There is still a degree of flexibility allowed by the transitional provisions to accommodate different scenarios. Flexibility is desirable considering the complex logistical implications of the transition.

There is a regulation-making power under s 6(1) of the YJ Act and section 6 empowers the Government in Council to make a regulation to increase the age of a child to ‘a person who has not turned 18 years’. However, this power would only apply prospectively to 17-year-olds who commit offences after the commencement of the regulation and would be insufficient to achieve the current policy objectives. In contrast, the proposed provisions have limited, beneficial retrospective effect, and provide for the transitioning of 17-year-old offenders to the youth justice system. Therefore, we support the approach that has been taken.

4. Further comments

The Bill, and achievement of the policy objectives underpinning it, will rectify a situation which causes inconsistency with other jurisdictions, and has been subject to longstanding criticism by the United Nations and domestic stakeholders including the judiciary.

4.1 International criticism

The Queensland position has been criticised at an international level for more than a decade. Treating children as adults in the criminal justice system violates international instruments to which Australia is a signatory. The most relevant is the *Convention on the Rights of the Child*,¹¹ which defines the age of a child as under 18.¹² The overarching principle is that in all actions by the State concerning children, ‘the best interests of the child shall be a primary consideration.’¹³ More specifically, Articles 37, 39 and 40 provide for protections for children deprived of liberty. This includes the right to be treated in a way ‘which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.’¹⁴ The UN Committee on the Rights of the Child highlighted the conflict with the *Convention* in 2005,¹⁵ and again in 2012,¹⁶ ‘regretting’ that the

¹¹ Signed by Australia 22 August 1990, ratified 17 December 1990.

¹² *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 1.

¹³ *Ibid* art 3.

¹⁴ *Ibid* art 40.

¹⁵ United Nations Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention – Concluding Observations: Australia*, 40th sess, UN Doc CRC/C/15/Add.268 (20 October 2005) [74].

¹⁶ United Nations Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention – Concluding Observations: Australia*, 60th sess, UN Doc CRC/C/AUS/CO/4 (28 August 2012) [82]-[84].

Queensland juvenile justice system 'still requires substantial reform for it to conform to international standards.'¹⁷ The proposed reforms respond to this criticism entirely.

4.2 Domestic criticism

Queensland is the only Australian jurisdiction where 17-year-olds are dealt with by the adult criminal justice system.¹⁸ In 1997, the Australian Law Reform Commission (ALRC) recommended that the age of majority for the purposes of criminal law should be 18 in all Australian jurisdictions.¹⁹ This was already the position in New South Wales, South Australia, Western Australia, the ACT and under federal criminal law.²⁰ Following the ALRC report, all other non-complying jurisdictions implemented legislation to give effect to this recommendation,²¹ but to date Queensland has not complied.

This aberration has been subject to criticism since before the enactment of the *Juvenile Justice Act 1992* (Qld). In 1988, the Kennedy Review²² recommended that the definition of 'child' ought to be redefined to prevent people under 18 from entering adult prisons. It recommended that the segregation of persons under 18 from adults in prisons should continue, but that this was only a short-term solution.²³ It concluded that as 17-year-olds are treated as children in terms of law, and in terms of rights and responsibilities such as voting or drinking alcohol, they 'should not be in adult prisons.'²⁴ The inconsistency between states is particularly arbitrary and problematic, as it is difficult to justify children being granted fewer fundamental rights depending on where they reside.

The current definition of 'child' under the YJ Act is not only anomalous with other Australian jurisdictions, but contrasts with the definition under most other Queensland legislation.²⁵ Other statutes, such as the *Child Protection Act 1999* (Qld), define 'child' as a person under 18 years old.²⁶ The proposed reforms will remove inconsistency within Queensland law.

¹⁷ Ibid [82].

¹⁸ *Children (Criminal Proceedings) Act 1987* (NSW) s 3 (definition of "child"); *Children, Youth and Families Act 2005* (Vic), s 3 (definition of "child"); *Young Offenders Act 1993* (SA), s 4 (definition of "youth"); *Young Offenders Act 1994* (WA), s 3 (definition of "young person"); *Children and Young People Act 2008* (ACT) pt 1.3, ss 11 and s 12; *Legislation Act 2001* (ACT) dictionary, pt 1 (definition of "adult"); *Youth Justice Act 2005* (NT) s 6; *Youth Justice Act 1997* (Tas) s 3 (definition of "youth").

¹⁹ Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) [18.22].

²⁰ Ibid [18.21].

²¹ *Youth Justice Act 1997* (Tas); *Sentencing of Juveniles (Miscellaneous Provisions) Act 2000* (NT); *Children and Young Persons (Age Jurisdiction) Act 2004* (Vic).

²² Commission of Review into Corrective Services in Queensland 1988 - Final Report (Kennedy Report), 126 [20.2] <http://www.correctiveservices.qld.gov.au/Publications/Corporate_Publications/Reviews_and_Reports/CSReview_Final_5Future_Direction.pdf>.

²³ Ibid.

²⁴ Ibid.

²⁵ See, eg, *Acts Interpretation Act 1954* (Qld) s 36 (definition of "child"); *Child Protection Act 1999* (Qld) s 8.

²⁶ *Child Protection Act 1999* s 8.

4.3 Judicial criticism

Queensland courts have repeatedly criticised the inclusion of 17-year-old offenders in the adult criminal justice system. In *R v Loveridge*,²⁷ McMurdo P noted that the Queensland definition of ‘child’ is not only inconsistent with all other Australian jurisdictions, but also out of line with Queensland’s obligations under the *Convention on the Rights of the Child* and other related United Nations standards.²⁸ The same criticism was repeated in *R v Gordon*,²⁹ *R v Tietie and Wong-Kee*,³⁰ and *R v GAM*.³¹ In *R v Lovi*,³² Atkinson J stated that there is no justification in principle for the Queensland criminal justice regime which allows a 17-year-old offender in Coolangatta to be punished differently to a 17-year-old offender in Tweed Heads for the same offence against Commonwealth law.³³

5. Conclusion

Given the substantial infringement of children’s human rights occurring under the current law, we wholeheartedly support the proposed reforms. We commend the government for proposing these recommendations, and appreciate the opportunity to support them.

Yours faithfully,

Jane Hall and Jessica Downing-Ide
UQ law students

We commend the students on their diligent research and we endorse this submission:



Professor Heather Douglas



Professor Simon Bronitt



Associate Professor Tamara Walsh

Professor Graeme Orr

²⁷ [2011] QCA 32.

²⁸ *Ibid* [5]-[7].

²⁹ [2011] QCA 326, [26] (McMurdo P).

³⁰ [2011] QSC 166, [43] (Atkinson J).

³¹ [2011] QCA 288, [50]-[51] (McMurdo P).

³² [2012] QCA 24.

³³ *R v Lovi* [2012] QCA 24, [47] (Atkinson J); see Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) [18.22].

Associate Professor Peter Billings



Dr Paul Harpur



Dr Michael White OAM QC

Robert Mullins



Dr Rebecca Ananian-Welsh



Monica Taylor



Dr Francesca Bartlett



Matthew Watson

Dr Caitlin Goss



Dr Vicky Comino