Aboriginal & Torres Strait Islander
Legal Service (Qld) Ltd

www.atsils.org.au

Level 5, 183 North Quay Brisbane Qld 4000
PO Box 13035, George Street Brisbane Qld 4003
T: 07 3025 3888 | F: 07 3025 3800
Freecall: 1800 012 255
ABN: 116 314 562

Youth Justice Policy, Research and Partnerships

Department of Justice and Attorney-General

George Street

BRISBANE QLD 4000

By email: YJConsultation@justice.qld.gov.au

5 February 2016

Dear Colleague,

Proposed reforms to the *Youth Justice Act 1992* and *Childrens Court Act 1992*

We welcome and appreciate the opportunity to make a submission on the *Proposed reforms to the Youth Justice Act 1992 and Childrens Court Act 1992* issues paper ("the Issues Paper").

PRELIMINARY CONSIDERATION: OUR BACKGROUND TO COMMENT

The Aboriginal and Torres Strait Islander Legal Service (QLD) Ltd ("ATSILS") provides legal services to Aboriginal and Torres Strait Islander peoples throughout mainland Queensland. Our primary role is to provide criminal, civil and family law representation. We are also funded by the Commonwealth to perform a State-wide role in the key areas of Community Legal Education and Early Intervention and Prevention initiatives (which includes related law reform activities and monitoring Indigenous Australian deaths in custody). As an organisation which for over four decades, has practised at the coalface of the justice arena, we believe we are well placed to provide meaningful comment. Not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences. We trust that our submission is of assistance.

Court accessibility

We welcome the proposal to close the lower Children's Court by default when hearing and determining youth justice matters. The successful rehabilitation of young offenders requires special laws which recognise their developmental and cognitive characteristics compared to adults. It is for this reason that current practices nationally and internationally grant children an exceptional right to privacy (or protection from external scrutiny) compared to adults. Article's 16 and 40 of the *Convention of the Rights of the Child* state:

> "[16] Children have the right to privacy. The law should protect them from attacks against their way of life, their good name, their family and their home.
>
> [40] 1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and 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.
> 2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
>
> …..
>
> (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
>
> …..
>
> (vii) To have his or her privacy fully respected at all stages of the proceedings"[1].

[1] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) <https://www.unicef.org.au/Discover/What-we-do/Convention-on-the-Rights-of-the-Child/childfriendlycrc.aspx>.

In addition, the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ('The Beijing Rules') includes a statement on the protection of privacy:

> 8.1 The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling.
> 8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published.[2]

Proposal 1 in the Issues Paper allows victims or their representatives access to the lower Children's Court, and proposal 2 empowers a Magistrate in a lower Children's Court to open the court in the interests of justice. We note these proposals are not in line with the *Convention of the Rights of the Child* or the Beijing Rules.

Furthermore, we see the proposals potentially giving rise to further challenges for practitioners in the Children's Court, in terms of advising and obtaining instructions from young people. As it stands, even in closed court many of our practitioners have reported the following challenges in relation to their clients:-

- distrustful of authority;
- unwillingness to seek assistance because it is perceived as showing weakness;
- dealing with issues arising from a difficult upbringing that are extremely personal;
- resentful of persons in authority;
- ignorance of the legal processes; and
- suffering from substance misuse or mental health issues (including the largely undiagnosed and untreated cohort of youth people suffering Foetal Alcohol Syndrome Disorder, which is something we address in greater detail in our submission on the Youth Justice Reform discussion paper ['the Discussion Paper']).

[2] *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ('The Beijing Rules') GA Res 40/33, 96th mtg, , UN Doc A/40/53 (29 November 1985).

Given the inherent challenges that already exist with rehabilitating young offenders, we have concerns that either of the proposals to increase court accessibility would only exacerbate this issue.

It is worth expanding particularly on the above point in relation to the difficult upbringing that so many young people who appear before the Children's Court have had. The link between childhood neglect or abuse and juvenile offending is overwhelmingly strong. Sadly, it is not uncommon for there to be allegations of sexual abuse or serious domestic violence. An alarmingly high percentage of Aboriginal and Torres Strait Islander young people who appear before the Children's Court are also subject to Child Protection Orders. The highly sensitive material that the Children's Court is commonly presented with should not be open for public disclosure, and that would be one of our concerns if measures were taken to increase court 'transparency', as contemplated in the Issues Paper.

However in the alternative, should it ultimately be decided to couch the legislation in a manner which provides the presiding judicial officer with a discretion, upon application, to open a lower Children's Court "in the interests of justice" then we have concerns about the potential for such to be framed in a manner which has a significant focus upon "greater transparency" of court processes. Prima facie, the opening of a court would mean greater transparency (in the strict sense), and thus an interpretation of "in the interests of justice" which is linked to "transparency" will by default potentially enshrine an unintended bias. Conversely, we submit that the legislation, in this area of judicial discretion, should by its wording make it plain that the starting premise upon such an application is that the interests of justice ordinarily dictate that the court should remain closed – and that the onus rests squarely upon an applicant to demonstrate compelling reasons as to why such should be overturned.

Transfer of young people

We strongly support bringing 17 year olds into the youth justice system over time. Treating 17 year olds in the criminal justice system as adults has been out of step with both national and international practices for the past two decades. However we note the Issues Paper

does not seek feedback on this matter at this point in time therefore we will not address this further in our submission.

We support the first proposal in the Issues Paper (increase to 18 the age at which young people who have at least six months to serve in detention are transferred to an adult correctional facility). Furthermore, we would encourage the enshrinement (in legislation or regulation), that where feasible, any rehabilitative, education or other developmental programs that a young person was completing in a detention centre, be carried over to the adult correctional facility.

We also support the second proposal (allowing the court a discretion to delay a transfer for up to 6 months if satisfied a delay would be in the interests of justice and would not unduly prejudice the security requirement of an affected detention centre).

Court- referred youth justice conferencing

We welcome the Government's proposal to reinstate court-referred youth justice conferencing and introduce amendments to enhance the range of court referral pathways and post-sentence restorative justice interventions, including the amendments to court-referred conferences. We support the amendments for consideration in Attachment 2 of the Issues Paper, and wish to only expand on one point regarding the amendment to require a child to consent before the police or a court may make a referral to conferencing. We agree that this is the best practice and highlight the importance of allowing young people a certain degree of 'ownership' over their outcome in the judicial process. This fosters accountability and responsibility on the part of the young person. This amendment is also in line with Article 12 on the UN *Convention on the Rights of the Child*:

> " [12]1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either

directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."[3]

We thank the Department for this opportunity to provide feedback, and wish it well with reforming the youth justice system.

Yours sincerely,

Shane Duffy
Chief Executive Officer

[3] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) <https://www.unicef.org.au/Discover/What-we-do/Convention-on-the-Rights-of-the-Child/childfriendlycrc.aspx>.