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

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Mr. S. Armitage
Assistant Director-General
Department of Justice and Attorney-General
BY EMAIL: youthjustice@justice.qld.gov.au

Dear Colleagues,

RE: POLICY INITIATIATIVES TO STRENGTHEN RESPONSES TO YOUTH OFFENDING

We thank you for the opportunity to provide a submission in regard to the initiatives relating to the above. We do however note that due to time constraints (relating to the very minimal amount of time afforded within which to provide feedback), that it is entirely possible that important considerations might have gone unidentified (or insufficiently fleshed-out). We also apologise for missing the stipulated deadline for a response - but such was brought about due to staff leave on the one hand and inter-state obligations on the other.

Background – preliminary consideration

The Aboriginal and Torres Strait Islander Legal Service (QLD) Ltd ("ATSILS") provides legal services to Aboriginal and Torres Strait Islander peoples throughout 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: Law and Social Justice Reform; Community Legal Education and Monitoring Indigenous Australian Deaths in Custody. As an organisation which, for almost four decades has practiced 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.

Before commenting specifically on the four initiatives we would like to make some general comments on the need to treat young people differently from adults in the criminal justice field. We also think it important to acknowledge the position of Aboriginal and Torres Strait Islander young people in the youth justice system. To this end we note that 101.61 per 1000 Aboriginal and/or Torres Strait Islander young people compared to 12.82 per 1000 non-Aboriginal and/or Torres Strait Islander young people were found guilty in the Children's Court in Queensland in 2010 to 2011.[1] The disproportionality of this rate is alarming, indicating that existing policies are not working for Aboriginal and Torres Strait Islander young people. We assert that different approaches are required and they must be holistic, culturally appropriate and flexible to meet the differing needs of young people. Preventative and supportive measures must also be implemented with the assistance of communities, families and support services to strengthen the future of vulnerable young people.

It has been shown that offending rates usually reach their peak when a person is in their late teenage years and that most people grow out of offending behaviour in their early adult years.[2] A recent longitudinal study found that 14% of all persons born in Queensland in 1990, had one or more formal contacts[3] with the criminal justice system by the time they were 17 years. It was also found that Aboriginal and Torres Strait Islander young people were 4.5 times more likely to have contact with the criminal justice system than non-Aboriginal and Torres Strait Islander young people. It was reported that 63% of Aboriginal and Torres Strait Islander males and

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1 Australian Government, Australian Institute of Health and Welfare, Table S4**:** *Young people aged 10–17 proven guilty in the Children's Court by sex and Indigenous status, selected states and territories, 2010–11.*
http://www.aihw.gov.au/publication-detail/?id=60129542246&tab=3

2 Richards, K., February 2011, *What makes juvenile offenders different from adult offenders, Trends & Issues in crime and Criminal Justice* no. 409 Canberra: Australian Institute of Criminology, p. 2. http://www.aic.gov.au/documents/4/2/2/%7b4227C0AD-AD0A-47E6-88AF-399535916190%7dtandi409.pdf

3 This included a caution, a youth justice conference or a court appearance.

28% of Aboriginal and Torres Strait Islander females experienced contact with the criminal justice system as a juvenile. The comparative percentages for non-Aboriginal and Torres Strait Islander males was 13% and for non-Aboriginal and Torres Strait Islander females, 7%.[4] Clearly these figures are too high, reflecting the broader disadvantage of Aboriginal and Torres Strait Islander peoples.

Gardiner points to research which examines brain development of young people, showing that in the second decade of life rapid change occurs in the brain areas associated with response inhibition, risk and reward calibration and regulation of emotions. Also, peers can have a heavy impact on young people engaging in risk taking behaviour. Young people are more susceptible to peer pressure, mental health problems and addictions. It has also been found that alcohol and drugs have a stronger effect on young people than adults.[5]

Young people in custody are also more likely than adult prisoners to have intellectual disabilities. A study found that a high percentage (88%) of young people in custody reported symptoms suggestive of a mild or moderate psychiatric disorder.[6]

Young people have not completed their development, have limited life experience and have not had the time to become entrenched within the criminal justice system. Policy initiatives can have strong effects on young people, from supporting them to cease offending behaviour, to entrenching them in the system.[7] Clearly the first approach is preferable.

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4 Allard, T., Stewart, A., Chrzanowski, A., Ogilvie, J., Birks, D., and Little, S. Police diversion of young offenders and Indigenous over-representation. *Trends & Issues in Crime and Criminal Justice* no. 390. Canberra: Australian Institute of Criminology. http://www.aic.gov.au/en/publications/current%20series/tandi/381-400/tandi390.aspx

5 Richards, K., February 2011, *What makes juvenile offenders different from adult offenders, Trends & Issues in crime and Criminal Justice* no. 409 Canberra: Australian Institute of Criminology, p. 4. http://www.aic.gov.au/documents/4/2/2/%7b4227C0AD-AD0A-47E6-88AF-399535916190%7dtandi409.pdf

6 17% of young people in custody in Australia have an IQ under 70.

7 Richards, K., February 2011, *What makes juvenile offenders different from adult offenders, Trends & Issues in crime and Criminal Justice* no. 409 Canberra: Australian Institute of Criminology, p. 5. http://www.aic.gov.au/documents/4/2/2/%7b4227C0AD-AD0A-47E6-88AF-399535916190%7dtandi409.pdf

Naming and Shaming

The United Nations Convention on the Rights of the Child (CROC)[8] requires the protection of a young person's privacy. Article 16.1 of CROC requires that young people not be subject to arbitrary or unlawful interference with their privacy"… Article 16.2 of CROC states that a young person "has the right to the protection of the law against such interference or attacks."

There are further terms in CROC which are protective of young people's treatment and privacy once they come into contact with the criminal justice system. Article 40.1 of CROC requires that when a young person has been found guilty of an offence they "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." Also, Article 40(2)(b)(vii)[9] of CROC refers to the specific need to have respect for the privacy of a child accused or found guilty of a criminal offence. Article 14.1 of the International Covenant on Civil and Political Rights (ICCPR)[10] states that … "and judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons …" Also, Article 14.4 of ICCPR requires the procedure in regard to young offenders to "take account of their age and the desirability of promoting their rehabilitation."

Blanket punitive approaches are incapable of meeting the above requirements. Also, if the above initiative was introduced, not only would the young person be subject to such interference, clearly they would not receive the required protection from domestic law. Both of these instruments apply in Australia and the State of Queensland is of course bound to abide by them.

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[8] Signed and ratified by Australia in December 1990, p. 2

[9] To have his or her privacy fully respected at all stages of the proceedings.

[10] The ICCPR was signed by Australia in 1972 and ratified 8 years later.

Rule 8 of the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ("The Beijing Rules")[11] stresses the importance of respecting a young person's right to privacy. This is to prevent harm caused by unnecessary publicity or labelling. This includes a prohibition on publishing information that may lead to the identification of a young person. In the commentary to rule 8 it is stated that young people are susceptible to stigmatisation and that research into labelling processes has evidenced different kinds of detrimental effects on young people. Although not binding on Australia at international law, these rules represent internationally accepted minimum standards and are important reference points in developing policy.

Further to the above, labelling theory suggests that labelling a young person "criminal" increases their chances of becoming a career criminal, decreasing their chances of growing out of crime, as would normally occur. The stigmatisation experienced by young people through their contact with the criminal justice system would only act to be enhanced by labelling young people through publically informing of their crimes. It is said that avoidance of labelling and stigmatisation of young people is a key principle of youth justice intervention in Australia.[12]

Rule 21.1 of the The Beijing Rules[13] is concerned with keeping criminal records of young people confidential and accessible only to those working on the case or other authorised people. This indicates the importance placed on not releasing a young person's name.

Similar to the *Youth Justice Act* 1992 in its present form, the Queensland's Child Protection legislation[14] acknowledges the sensitivity in regard to publishing information pertaining to the identity of a young person when that young person has

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[11] 29 November 1985, 96th plenary meeting.

[12] Richards, K., February 2011, *What makes juvenile offenders different from adult offenders, Trends & Issues in crime and Criminal Justice* no. 409 Canberra: Australian Institute of Criminology, p. 6. http://www.aic.gov.au/documents/4/2/2/%7b4227C0AD-AD0A-47E6-88AF-399535916190%7dtandi409.pdf

[13] 29 November 1985, 96th plenary meeting.

[14] s 189 of the *Child Protection Act* 1999.

been harmed, is at risk of harm, is in the care of the Chief Executive or is under an order. This is particularly relevant for Aboriginal and Torres Strait Islander young people, as many who come into contact with the criminal justice system will be in the care of the Chief Executive, under an order, or the reverse, because of their contact with the criminal justice system they will come to the notice of Child Safety.

There is no evidence to support the notion that naming and shaming reduces offending rates. It could act to further isolate, stigmatise and ostracise young people who are often already disengaged from community networks and school. As mentioned above, publicising the young person's offence/s are likely to further exclude young people from re-engaging in education and trying to gain training and employment. Similarly, the family of the young person are likely to become the focus of attention and blame for their child's actions. We also acknowledge the point made in terms of victims being identifiable in some instances if a young person's name is publicised.

It also needs to be considered that publicising a young person's name in today's world is not limited to print and television, but can be relayed by a number of methods and easily accessed into the future. This has the potential to have long lasting effects on young people as they mature and look for work.

We note that there is an absence of information in regard to the time period after which a young person is found guilty that their name and details of the offence will be publicised. We view this as an issue in the event that an appeal is made in regard to a finding of guilt or sentence severity. Therefore if a young person's name was to be publicised we view that the timing should be after the time for an appeal to be filed and if an appeal is filed, once the matter is finalised, continuing to consider the opportunity for further appeal.

We also wish to point out that young people who come before the criminal justice system, especially those who continue to commit offences are often victims of abuse and neglect, are likely to have experienced family violence, are likely to have unsafe family environments and are likely to have experienced homelessness. These issues

and the resultant behaviours of drug and alcohol addiction, mental and physical illness, poverty and unemployment and low educational level are acknowledged in the recent Queensland Government document titled "Safer Streets Crime Action Plan – Youth Justice: Have Your Say".[15]

A report by the Australian Institute of Health and Welfare confirms that Aboriginal and Torres Strait Islander young people are over-represented in the juvenile justice system due to the above mentioned disadvantage which is widespread in Aboriginal and Torres Strait Islander communities.[16]

Clearly we disagree with any publication of a young person's name for the purposes of publicising their criminal offences, and view such as contrary to the intent of CROC.

Breach of Bail to be an offence.

It was previously stated by the Government that making a breach of bail condition an offence of itself, would reduce the number of repeat young offenders[17]. This could only act to unnecessarily bring young people back into contact with the criminal justice system. Making a breach of bail condition an offence fails to consider the age and often lack of maturity of young people, including the impulsive responses they might have and their lack of ability to foresee consequences. A supportive approach with young people is preferable to a compliance based model.

Article 3.1 of CROC requires that all action pertaining to children, including those by public social welfare institutions, courts, administrative authorities or legislative bodies, include the best interests of the child as a primary consideration. It is our view that this initiative would be in breach of this article as it cannot be said that the

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15 At p. 9.

16 Australian Institute of Health and Welfare, 2012, *Indigenous young people in the juvenile justice system 2010-2011*, Bulletin 109, p. 21.

17 Queensland Government, 2013, "Safer Streets Crime Action Plan – Youth Justice: Have Your Say", p. 7.

"best" interests of the child are in any way being considered, let alone as "a primary consideration."

Rule 24.1 of The Beijing Rules states that "efforts shall be made to provide juveniles, at all stages of the proceedings, with necessary assistance such as lodging, education or vocational training, employment or any other assistance, helpful and practical, in order to facilitate the rehabilitative process." The commentary on this rule states that promotion of the well-being of young people is the paramount consideration.

Currently, breaching a bail condition by a juvenile affords the police with an opportunity to arrest the child, bring them before the court, and argue that bail should be revoked. The current system in our view suffices.

The example provided in option two regarding multiple breaches of bail conditions (being in a shopping centre and breaking a curfew) fails to consider the reality of most young people, whether or not they have offended in the past. A natural part of being young is to push boundaries and to rebel against authority, with most young people practising these elements to varying extents. Also, by breaching these bail conditions no criminal activity has occurred.

Bail conditions are in a sense intended to be supportive of a young person to enhance their ability to be law abiding and to prevent them from being placed in a situation where they may commit further offences. We acknowledge that a breach of bail is not ideal, however breaches of bail on their own (without a related offence) should not be a criminal law issue. The real reasons behind bail must be considered. For many young people bail conditions are different in nature (curfews, attend school, etc.) and more onerous (due to maturity levels and understanding) than those for adults and do not always take into consideration the young person's circumstances.

Young people who come into contact with the criminal justice system are often the most marginalised in the community, lack family and community support, at times do not have safe places to reside and are often disengaged from school and the

community. As mentioned above, a reasonable percentage who end up in youth detention have an intellectual impairment.

A far more preferable approach would be one where young people are supported to comply with their bail conditions. There is evidence that intervening early with diversionary programs to support young people reduces repeat offending. However, there is no evidence to support monitoring and coercive methods such as arresting and detaining young people for breaching bail conditions as acting to reduce re-offending by young people.[18]

Formal intervention by police and courts for breaching bail conditions, rather than offending fails to take into account the notion that young people should be diverted away from the criminal justice system wherever possible so as to reduce re-offending. We note that this is becoming increasingly difficult as diversionary options decrease in Queensland.

If a young person can be found guilty of the offence breach of bail, an absurd result may arise where a young person on bail is found not guilty of an offence, however ends up with a breach of bail condition on their criminal record. This must be considered if breach of bail is to be made an offence. We suggest that a young person should not be capable of being found guilty for breach of bail if they are not found guilty of the offence causing them to be on bail.

Also the consequences of having a breach of bail offence recorded on a criminal record will make it more difficult for the young person to gain bail in the future, increasing the number of young people in custody. This is of particular concern to our organisation give the number of young Aboriginal and Torres Strait islander young people in custody, including and in particular on remand. Article 37(b) of CROC states that:

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[18] Sumitra Vignaendra, Steve Moffatt, Don Weatherburn & Eric Heller, *Recent Trends in Legal Proceedings for Breach of Bail, Juvenile Remand and Crime*, BOCSAR Bulletin 128 (May 2009).

> No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

Childhood findings of guilt to be admissible in adult sentencing.

The proposed change fails to acknowledge the limited life experience of young people, their lack of foresight and impulsive behaviour, which can span beyond 17 years of age. It also disproportionately affects vulnerable people who have not had adequate support and guidance during their formative years. Support may be found in rule 21.2 of The Beijing Rules states that a person's juvenile criminal record "shall not be used in adult proceedings in subsequent cases involving the same offender."

We cannot see how this policy can address young repeat offenders and view its level of assistance to sentencing Courts as minimal, given that they will need to consider that the previous convictions occurred when the person was a juvenile. We also predict that it will require a great deal of administrative time, unless it is restricted to more serious offences.

It is our view that if the above was introduced then it needs to be focussed. Therefore we disagree with option 4. We agree that "old" convictions should not be released, as per option 3, which includes a period of five years where no finding of guilt has occurred. We also view that the offence type on the juvenile record should be the same as the present offence. By including "similar" offences arguments are likely to ensue as to what is or isn't similar. Essentially this would be an administrative decision which should be open to review. It is our view that juvenile criminal history, if provided, should only occur where there has been a serious violent offence or sexual offence. The penalty of seven years or more would cover this, but would also open up a number of other offences. It is our view that all of these elements are required before certain convictions on a juvenile record can be considered when sentencing an adult.

Automatic transfer of young people from youth detention to adult prisons when they turn 18 years.

We again refer the reader to Article 37(c) of CROC as set out above. We are aware that Australia has made a reservation to Article 37(c) of CROC:

> Australia accepts the general principles of Article 37. In relation to the second sentence of paragraph (c), the obligation to separate children from adults in prison is accepted only to the extent that such imprisonment is considered by the responsible authorities to be feasible and consistent with the obligation that children be able to maintain contact with their families, having regard to the geography and demography of Australia. Australia, therefore, ratifies the Convention to the extent that it is unable to comply with the obligation imposed by Article 37(c).[19]

We agree with the above concerns but also add that considerations should be made of the young person's maturity level, their ability to cope in an adult prison and the effect they have on other inmates in a youth detention setting. Young people who have had limited life experience, especially because of long term institutional care (whether in detention or through foster care) and are unlikely to have developed the interactive skills and coping mechanisms required to care for themselves in an adult setting. Bringing certain young people into contact with more hardened criminals is also likely to work against any rehabilitative efforts made in a youth detention setting. Also, as we understand, a transfer to an adult prison will mean that the young person will receive a high classification and will therefore be in contact with a broad range of people.

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[19] Attorney-General's Department, 1995, *Australia's Report under the Convention on the Rights of the Child* Canberra, p. 345.

It is or view that s 267B(1) of the *Youth Justice Act* should remain and a court be in charge of making the ultimate decision after considering the requisite factors listed in s 267(D) of the *Youth Justice Act*. We also note that the yearly figures (three in 2010-2011) are extremely low. We also acknowledge the figures provided in relation to the Chief Executive applying to the court to transfer a young person to an adult prison. The limited information in regard to the 19 applications made between 2002 and 2010 with only 6 not being successful, is far from indicative of an approach that requires review. It clearly indicates that the court was of the view that a high percentage of the applications put forward should be approved. It is difficult to analyse this information to a deeper level, without further information, including how many young people were eligible to apply to be transferred and the reasons as to why the court refused the 6 applications.

We reiterate that chronological age does not always correlate well with social, emotional and cognitive maturity, especially when young people have not received the relevant level of care and support to provide them with the skills to reach their age based levels of maturity. We would argue that most young people in youth detention have not reached a level of functioning capable of providing them with the skills to cope in an adult prison. It is likely that these young people will suffer further harm from this process and possibly be further criminalised, if the present safeguards are removed.

Given the above we cannot agree to either of the options provided. We strongly consider it necessary that a decision making process is required. We view the present judicial decision making process as adequate and fair, based on its independence. An administrative decision making process could be considered; however ultimately the result should be the same and the level of resources required should not change. A right of review should always be available in regard to the decision and given the nature of the decision, an option should be available for it to be stayed pending the review outcome.

Again, we thank you for the opportunity to provide submissions. We wish you well in your deliberations and trust that our submissions are of assistance.

Yours faithfully,

Shane Duffy

Chief Executive Officer