Parliamentary Committees

Youth Justice and Other Legislation Amendment Bill 2016

Report No. 29, 55th Parliament
Legal Affairs and Community Safety Committee
June 2016

Legal Affairs and Community Safety Committee

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Acknowledgements

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Abbreviations

2014 Bill	Youth Justice and Other Legislation Amendment Bill 2014
2015 Bill	Youth Justice and Other Legislation Amendment Bill 2015
AIA	Amnesty International Australia
AIBG	Amnesty International Brisbane Group
ANTaR	Australians for Native Title and Reconciliation (Queensland) Inc.
Attorney-General	The Honourable Yvette D'Ath MP, Attorney-General and Minister for Justice and Minister for Training and Skills
Bill	Youth Justice and Other Legislation Amendment Bill 2016
CC Act	*Childrens Court Act 1992*
committee	Legal Affairs and Community Safety Committee
CS Act	*Corrective Services Act 2006*
department	Department of Justice and Attorney-General
FLP	fundamental legislative principle
LJI	Law & Justice Institute (QLD) Inc.
prior committee	The Legal Affairs and Community Safety Committee of the 54th Parliament, which commenced on 18 May 2012
QAI	Queensland Advocacy Incorporated
QCCL	Queensland Council for Civil Liberties
QFCC	Queensland and Family Child Commission
QLS	Queensland Law Society
YAC	Youth Advocacy Centre Inc.
YJ Act	*Youth Justice Act 1992*

Chair's foreword

This report details the examination by the Legal Affairs and Community Safety Committee of the Youth Justice and Other Legislation Amendment Bill 2016.

The committee's task was to consider the policy outcomes to be achieved by the legislation, as well as the application of fundamental legislative principles – that is, to consider whether the Bill had sufficient regard to the rights and liberties of individuals, and to the institution of Parliament in accordance with section 4 of the *Legislative Standards Act 1991*.

The committee was unable to reach agreement on whether or not the Bill should be passed.

On behalf of the committee, I thank those who lodged written submissions on this Bill. I also thank the Department of Justice and Attorney-General for the support it has provided the committee during this inquiry.

In particular, I thank all members of the committee for their efforts during this inquiry and committee office staff for the support they have provided us.

I commend this report to the House.

Mark Furner MP
Chair

1 Introduction

1.1 Role of the committee

The Legal Affairs and Community Safety Committee (the committee) is a portfolio committee of the Legislative Assembly which commenced on 27 March 2015 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.[1]

The committee's primary areas of responsibility include:

- Justice and Attorney-General
- Police Service
- Fire and Emergency Services
- Training and Skills.

Section 93(1) of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for examining each bill and item of subordinate legislation in its portfolio areas to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles
- for subordinate legislation – its lawfulness.

1.2 Inquiry process

On 21 April 2016, the Attorney-General and Minister for Justice and Minister for Training and Skills, the Hon Yvette D'Ath MP, introduced the Youth Justice and Other Legislation Amendment Bill 2016 (Bill) into the Queensland Parliament. In accordance with Standing Order 131 of the Standing Rules and Orders of the Legislative Assembly, the Bill was referred to the committee for detailed consideration. By motion of the Legislative Assembly the committee was required to report to the Parliament by 6 June 2016.

The committee invited written submissions from the public and from identified stakeholders, to be received by 9 May 2016.

The committee received 13 submissions, one of which was accepted by the committee on a confidential basis (see **Appendix A** for a list of submitters).[2]

The committee received a written briefing on the Bill and subsequent advice on issues raised in submissions from the Department of Justice and Attorney-General (the department) on 6 May 2016 and 20 May 2016, respectively.

The department also provided an oral briefing during public committee proceedings at Parliament House in Brisbane on 11 May 2016. See **Appendix B** for a list of the departmental representatives who contributed to the public briefing.

1 *Parliament of Queensland Act 2001* (Qld), section 88 and Standing Order 194.

2 View Submission: http://www.parliament.qld.gov.au/work-of-committees/committees/LACSC/inquiries/current-inquiries/18-YouthJusticeAB16

1.3 Policy objectives of the Youth Justice and Other Legislation Amendment Bill 2016

1.3.1 Objectives of the Bill

The key objectives of the bill as set out in the Explanatory Notes are to:

- close the Childrens Magistrates Court when hearing all youth justice matters under the *Childrens Court Act 1992* (CC Act) and provide for victims or their representatives to be present in closed court
- increase the age at which children and young people subject to periods of detention under the *Youth Justice Act 1992* (YJ Act) are to be transferred to adult corrections from 17 to 18 years of age, and empower a court on application to delay a young person's transfer for up to six months
- re-instate a court-referred youth justice conferencing program and expand the program to allow for increased flexibility in the delivery of restorative justice interventions as part of police-referred and court-referred conferencing.

The bill also proposes a consequential amendment to the *Corrective Services Act 2006* (CS Act) to provide statutory recognition of the Supreme Court decision in *Coolwell v Chief Executive, Department of Justice and Attorney-General* (No. 2) [2015] QSC 261.

1.3.2 Reasons for the Bill

In introducing the Bill, the Attorney-General advised that:

> *Reducing youth crime in Queensland is a priority for this government. That is why we are… adopting an evidence based approach to reducing youth offending. Evidence clearly shows that increasing the severity of punishment does not reduce offending nor does it reduce reoffending… This bill reflects evidence on what works to reduce youth offending.*[3]

The Explanatory Notes assert that the likelihood of being apprehended and punished for an offence, rather than the severity of that punishment, exhibits the greatest deterrent effect on offending behaviour:

> *This is particularly the case with children and young people, whose neurological and cognitive development remains incomplete while they are within the age range to which the YJ Act applies. Children and young people's cognitive immaturity significantly impedes their capacity to rationally consider the long term consequences of their actions, meaning their behaviour is likely to be more impulsive and marked by poorer decision making and greater risk taking than that of adults. This places children and young people at a heightened risk of opportunistic offending, notwithstanding increases in applicable tariffs and more onerous forms of accountability for that offending.*[4]

1.3.3 Implementation

The Explanatory Notes provide advice on the implementation of aspects of the Bill:

> *As part of the 2015/16 State Budget, funding amounting to $23.6 million over four years was allocated by Government for the reinstatement and enhancement of court referrals to youth justice conferencing. This funding will enable an increase in the number of conferences performed from the current level of 870 per annum to an estimated 3000 per annum.*

[3] Hansard transcript, 21 April 2016 (explanatory speech) p 1331.

[4] Explanatory Notes, p 2.

> *Any implementation costs to close the Childrens Magistrates Court and increase the age at which children and young people are transferred to adult corrections will be met from within existing agency resources.*[5]

1.4 Policy background

There have been numerous amendments and proposed amendments to Queensland's youth justice laws in recent years.

1.4.1 Youth Justice and Other Legislation Amendment Act 2014

On 11 February 2014, the Youth Justice and Other Legislation Amendment Bill 2014 (2014 Bill) was introduced into the Queensland Parliament and referred to the then Legal Affairs and Community Safety Committee (prior committee).

Two of the six main policy objectives of the 2014 Bill were:

- to permit repeat offenders' identifying information to be published and open the Childrens Court for youth justice matters involving repeat offenders
- to provide for the automatic transfer from detention to adult corrective services facilities of 17 year olds who have six months or more left to serve in detention.

In implementing its policy objectives, the Bill amended various legislation, including the CC Act and the YJ Act.

The prior committee reported to Queensland Parliament on the 12 March 2014. The 2014 Bill was passed, with amendment, by the Legislative Assembly on 18 March 2014.

1.4.2 Youth Justice and Other Legislation Amendment Bill 2015

On 1 December 2015, the Attorney-General introduced the Youth Justice and Other Legislation Amendment Bill 2015 (2015 Bill) into the Queensland Parliament and referred it to the committee for detailed consideration.

The committee tabled its report in Parliament on 1 March 2016, which included the following content, under the heading, '*Staged amendments to Youth Justice Act*':

> *Introducing the Bill, the Attorney-General described it as the first stage of amendments to the Act to repeal amendments made by the former government. The Attorney-General said that a second stage of amendments required further consultation on enhancements and implementation, and would be brought to the Legislative Assembly in early 2016. Those further amendments relate to: open proceedings of the Childrens Court; automatic transfer to adult correctional facilities of 17 year olds with at least six months left to serve in detention; and reinstatement of court referred youth justice conferencing…*
>
> *The department advised the committee that the Bill and the next stage of legislative amendments emphasise an early intervention and rehabilitation approach to reducing youth offending.*[6]

The committee's report on the 2015 Bill included a section entitled, '*Development of a Youth Justice Policy*', which included the following statements:

> *A number of submitters noted that the Bill did not include amendments on a range of other youth justice matters. Other submitters advocated for further reform, for collaborative*

[5] Explanatory Notes, p 3.

[6] Legal Affairs and Community Safety Committee, Youth Justice and Other Legislation Amendment Bill 2015, Report No 22, 55th Parliament, March 2016, p 3.

> *policy development, a restorative justice approach, and other changes including the reinstatement of youth conferencing.*
>
> *The committee notes that the Attorney-General and Minister for Justice and the department have outlined plans for further legislative amendments and the development of a youth justice policy in 2016. The committee anticipates that some of the issues raised by stakeholders that are outside the scope of the committee's inquiry into this Bill may be addressed in the next Bill, or in the proposed youth justice policy.*
>
> *To assist in that further policy and legislative development, some of the evidence provided to the committee about youth justice issues that are outside the scope of the Bill is summarised in chapter 4 of this report.*[7]

In light of this, where relevant to the Bill, this report will include excerpts of material from the committee's report on the 2015 Bill, as some of the content of the earlier report is of greater relevance to the policy objectives of the Bill.

At the time of writing this report, the 2015 Bill is yet to have proceeded through the second reading process in Parliament. It remains listed on the Legislative Assembly's Notice Paper as pending Government Business.

1.5 Other jurisdictions

The Explanatory Notes advise that:

> *Provisions contained in the Bill which allow for the transfer of young people to adult correctional facilities, are specific to the State of Queensland.*
>
> *The Bill's emphasis on victim participation in youth justice proceedings is reflective of other jurisdictional practices.*
>
> *Core aspects of the restorative justice provisions contained within the Bill are consistent with other Australian jurisdictions and international practices, with diversionary and sentenced provisions, specific to the State of Queensland.*[8]

1.6 Consultation on the Bill

The Explanatory Notes state that the Bill was developed through the release of an issues paper, in January 2016 to targeted stakeholders, which identified issues and legislative options for consideration under the Bill:

> *Submissions were received from 24 respondents from legal, academic, community and youth groups and government agencies. Analysis of responses showed that 81% supported the measures in full and only 3% were opposed to one or more of the proposed measures.*
>
> *In particular, of those respondents who expressed a view on the individual measures:*
>
> - *92% supported permitting victims or their representatives to be present in a closed court;*
> - *77% of respondents who expressed a view support the transfer of children and young people subject to lengthy periods of detention from youth detention centres to corrective services facilities on turning 18; and*

[7] Legal Affairs and Community Safety Committee, Youth Justice and Other Legislation Amendment Bill 2015, Report No 22, 55th Parliament, March 2016, pp 3-4.

[8] Explanatory Notes, pp 5-6.

- *86% supported the reintroduction of court referrals to youth justice conferencing, with no stakeholders raising unequivocal opposition to proposed measures.*[9]

According to the Explanatory Notes, the Bill is:

> *…reflective of both community and stakeholder feedback received in response to the former government's Safer Streets Crime Action Plan—Youth Justice publically released survey and the Legal Affairs and Community Safety Parliamentary Committee… inquiry into the 2014 Bill.*[10]

In finalising the Bill, the government '*…approved the release of an exposure draft to targeted stakeholders, with stakeholder feedback considered and proposed changes adopted where appropriate*'.[11] The department advised that a consultation draft Bill was released on 22 March 2016 to the following stakeholders:

> *President of the Childrens Court of Queensland, Judge Shanahan; Chief Magistrate Judge Rinaudo; Deputy Chief Magistrate O'Shea; Queensland Law Society; Bar Association of Queensland; Legal Aid Queensland; Aboriginal and Torres Strait Islander Legal Service (Qld); Queensland Family and Child Commission; Queensland Association of Independent Legal Services; and Youth Advocacy Centre.*[12]

1.7 Outcome of committee considerations

Standing Order 132(1)(a) requires the committee to determine whether or not to recommend that the Bill be passed.

The committee was unable to reach agreement on whether or not the Bill should be passed.

9 Explanatory Notes, p 5.

10 Explanatory Notes, p 5.

11 Explanatory Notes, p 5.

12 Letter from the department, 6 May 2016, p 8.

2 Examination of the Youth Justice and Other Legislation Amendment Bill 2016

The Bill would amend the CC Act, YJ Act and CS Act; and would make minor and consequential amendments to those Acts listed in Schedule 1.

2.1 Childrens Magistrates Court

The Bill proposes to close the Childrens Magistrates Court when hearing all youth justice matters under the CC Act and to provide for victims or their representatives to be present in closed court.[13]

2.1.1 Closing the court when hearing youth justice matters

The Bill repeals Part 4, Division 2 of the CC Act, which gave effect to youth justice proceedings being open in relation to a child who was not a first time offender. In introducing the Bill, the Attorney-General advised that: '*In closing the lower courts, the bill reinstates the former section 20 to the* Childrens Court Act 1992'.[14]

She clarified that:

> *The proposed amendments provide for the closure of youth justice proceedings in the lower Childrens Court only, with the longstanding practice for more serious indictable offences, as presided over by a judge in the higher Childrens Court of Queensland, district or supreme courts, to continue to be held in an open court.*[15]

According to the Department:

> *Discretion for these higher courts to be closed in relation to matters whereby a special witness gives evidence in a proceeding including complainants in a sexual offence matter will continue to exist by virtue of section 21A of the Evidence Act 1977. Permission or prohibition to publish identifying information on offenders, in both higher and lower court proceedings, will continue to be subject to powers and discretion of the court.*[16]

2.1.1.1 Submissions

In supporting the proposed changes, Amnesty International Australia (AIA) asserted that:

> *The identification of the child has the potential to lead to stigmatisation, and impact access to education, work, housing or safety.*[17]

Queensland Advocacy Incorporated (QAI) also supported the proposal to close the court, asserting that closed proceedings maintain the anonymity of suspects and victims alike:

> *'Naming and shaming' simply reinforces the pathway into the criminal justice system and reinforces an offender's criminal identity. Some young recidivist offenders may not think twice about committing offences for no other reason than seeing their names 'up in lights' on the front pages of various newspapers.*[18]

The department was asked how important it is to maintain the anonymity of suspects, particularly youth, to ensure they do not become a 'martyr in our society'. Dr Mark Lynch of the department replied:

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13 Part 2 of the Bill (being clauses 2-6), amends the *Childrens Court Act 1992*, including by inserting a new s 20 'Who may be present at a proceeding'.

14 Hansard transcript, 21 April 2016 (explanatory speech) p 1331.

15 Hansard transcript, 21 April 2016 (explanatory speech) p 1331.

16 Letter from the department, 6 May 2016, p 2.

17 Submission No 11, p 3.

18 Submission No 2, p 1.

> *I think what is needed is a very balanced approach, so what is being carried forward is obviously in the lower courts that anonymity is provided for, which is not the case in the higher courts, and I think that represents the best possible balance between the fact that we know—the research is very clear—that the naming and undue publicising of young people when they go through the process in the lower courts does have disadvantage consequences. It does stigmatise them... In the higher courts where there are more serious matters then the balance I think shifts. In cases of very serious offending it is in the public interest to understand what has occurred and what the response of the courts is to that very serious offending. In the lower courts the research is very clear that there is really nothing to be gained and there are real costs in terms of the impacts of stigmatising those young people…*[19]

2.1.2 Providing for victims or their representatives to be present in closed court

The Attorney-General stated that:

> *…to make court processes transparent and to ensure victims can be involved if they choose, the bill includes a new provision for victims or their representatives to be present in closed court. This bill builds on the fundamental principles of justice for victims as enshrined under the Victims of Crime Assistance Act 2009, which requires victims to be kept properly informed of the progress of matters in which they have an interest.*[20]

The Department noted that victims and their representatives will not be able to be excluded from a youth justice proceeding '*…unless a court considers their presence would be prejudicial to the interests of the child*'.[21]

2.1.2.1 Submissions

Despite supporting the Bill's proposed changes to the CC Act, believing they balance the ability of the victim to know what is happening in relation to the case, Youth Advocacy Centre Inc. (YAC) acknowledged there may be occasions where, until certain facts are ascertained or matters resolved, it could be prejudicial to the defendant for the victim to attend at particular points in the process:

> *…there is a problem where the victim or witness may also be considered to be the support person for a child. This happens not uncommonly when the police advise parents to charge their children for behaviour which parents should be managing, but particularly where children on care and protection orders are living in out-of-home care and are charged with offences which, again, should be managed outside of the criminal justice system – which is not, and should not be regarded as, a behaviour management tool. This usually relates to allegations of minor damage or assault but in more recent times also includes children under 16 being prosecuted for possession and/or making and/or distributing child exploitation material because they have taken a picture of themselves and sent it to a boyfriend/girlfriend of similar age.*
>
> *In these situations, the parents or carers who call the police may be the alleged victim or a witness – for example, because they saw or found the image on a phone (in a recent case, this was the grandmother who was a trusted adult until she reportedly found the image, called statutory services for advice and was advised to call the police – the child was 12 years old). In these situations, the requirement for a support person must ensure*

[19] Hansard transcript, public briefing, 11 May 2016, p 3.

[20] Hansard transcript, 21 April 2016 (explanatory speech) p 1331.

[21] Letter from the department, 6 May 2016, p 2.

> *that it is someone the child has, or continues to have, trust in for this role to be meaningful.*[22]

In response, the department noted that participation of family in youth justice proceedings is a key tenet of the youth justice system and advised that:

> *Inclusion of the young person's parent (or other adult family member) is consistent with the Charter of Youth Justice Principles (given statutory recognition by Schedule 1 of the YJ Act) specifically, that a parent of a child should be encouraged to fulfil the parent's responsibility for the care and supervision of the child, and supported in the parent's efforts to fulfil this responsibility.*
>
> *Inclusion of the provision (section 20(1)(b) of the Childrens Court Act 1992) is consistent with existing section 69 of the YJ Act, which states that a parent is generally required to be present and allows a court to adjourn a proceeding to enable a parent who is not present when a child appears before a court to be present. Further, section 70 of the YJ Act empowers a court to order a parent of the child to attend the proceeding.*
>
> *Any provisions which would therefore serve to exclude parents or other adult members of the child's family from court would be a deviation from current Government policy and is therefore not supported.*[23]

While agreeing with the proposal to close the Childrens Magistrates Court, the Queensland Law Society (QLS) argued that the provisions relating to a victim's support person need revision:

> *…the definition of "support person" for the victim needs to be clearly defined so that it has a narrow rather than broad definition, either in the relevant legislative instruments or in a practice direction.*[24]

The department noted that the proposed provisions do not refer specifically to a 'support person' for a victim:

> *However, Clause 5, section 20 (1) (e) states that a person who provides emotional support to a witness who is the complainant within the meaning of the Criminal Law (Sexual Offences) Act 1978 (therefore, a 'victim') may be present.*
>
> *This exact provision was in place prior to the 2014 amendments and there were no known issues during its operation.*
>
> *In practice, any person present in court in a role as a support to a witness, would only be present during the delivery of evidence by the witness, therefore their exposure to any child defendant would be limited.*
>
> *The department does not consider that the narrowing of this provision is warranted.*
>
> *In relation to section 20 (1)(c), the court has discretion to exclude a victim and the representative of the victim if their presence is prejudicial to the interest of the child. Therefore, narrowing the definition of representative is not necessary as there is a protection in place.*[25]

Australians for Native Title and Reconciliation (Queensland) Inc. (ANTaR) appreciated both of the proposed measures, asserting:

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22 Submission No 9, pp 1-2.

23 Department's response to submissions, 20 May 2016, pp 2-3.

24 Submission No 5, p 2.

25 Department's response to submissions, 20 May 2016, p 2.

> *…they will be effective when both defendant and victim have the constructive presence of persons able to give them personal, social and (where appropriate), cultural support. It is critical that officers of the court are realistically resourced to give real effect to such measures.*[26]

AIA supported the proposed changes to the CC Act, commenting favourably upon their reflection of the United Nations Committee on the Rights of the Child's instruction that the protection of the best interests of the child means that the '*…traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives*'.[27]

Although supporting the Bill, the Queensland Council for Civil Liberties (QCCL) recommended the following amendment to the proposed new section 20 of the CC Act:

> *Subsection (3)(c)(i) a representative of the media should only be allowed [access to the court room] provided this will not have a detrimental effect on the child.*[28]

In response, the department stated:

> *The proposed section provides that a representative of mass media can be present in closed court if, in the court's opinion, the person's presence would not be prejudicial to the interests of the child. The department considers that this current provision extends to concerns about the person's presence having a detrimental effect on the child.*
>
> *It is also noted that despite a court's granting of a representative of mass media being in attendance at court, they will, under proposed amendments included under the Youth Justice and Other Legislative Amendment Bill 2015, not be able to publish identifying details of a child without an order of the court. This will further ensure that there is no unintended detriment to the child.*[29]

Law & Justice Institute (QLD) Inc. (LJI) supported the proposed changes to the CC Act, specifically approving '*…the proposed list of persons who will be permitted to sit in the Court*'.[30]

LJI concluded that:

> *…those who are directly affected by an offending child's behaviour can generally attend. Further, representatives of the media can apply for permission to attend.*
>
> *The combination of these proposed amendments and the openness of the Childrens Court of Queensland balance the necessary transparency with the need in youth justice to avoid further stigmatising young offenders, hampering their chances at rehabilitation.*[31]

2.2 Transfer of children and young people to adult corrections

The Bill proposes to amend parts of the YJ Act that provide for the transfer of children and young people to adult correctional facilities.[32]

The Attorney-General explained the proposed changes as follows:

> *The government has also committed to moving away over time from treating 17-year-olds as adults for the purposes of the criminal justice system. As a significant initial step in this*

[26] Submission No 10, p 2.

[27] Submission No 11, p 2, quoting Committee on the Rights of the Child, General Comment No 10: Children's Rights in Juvenile Justice, 42nd session, UN Doc CRC/C/GC/10 (25 April 2007) [6566].

[28] Submission No 12, p 1.

[29] Department's response to submissions, 20 May 2016, p 3.

[30] Submission No 13, p 2.

[31] Submission No 13, p 2.

[32] Part 4 of the Bill amends the *Youth Justice Act 1992*.

process, the bill will increase from 17 to 18 the age at which young people, who have at least six months to serve in detention, are to be transferred to an adult correctional facility. Furthermore, to ensure the developmental and rehabilitative needs of young people are taken appropriately into account, the bill will empower a court to delay a young person's transfer for up to six months. However, to maintain the safety of youth detention centres, the bill provides a statutory age cap for detention of 18 years and six months. Under the proposed provisions, a person who is 18 years and six months will not be able to enter a detention centre to begin serving or return to complete a period of detention.[33]

2.2.1 Increasing the age of transfer

The Bill replaces part 8, division 2A of the YJ Act to increase from 17 to 18 the age at which young people who have at least six months to serve in detention are to be automatically transferred to adult correctional facilities.

The department advised:

…this applies to all young people irrespective of whether they turn 18 years during the period of detention, or are 18 years or older when beginning detention, and applies equally to those who are returned to detention following breach of a supervised release'.[34]

2.2.1.1 Submissions

In supporting the Bill's proposals, QAI noted that:

Early incarceration ensures that young people become accustomed to prison culture and low social expectations. Incarceration, especially for young people, has been found to compound anti-social behaviour through secondary labelling and the association with more serious, potential future offenders.[35]

Amnesty International Brisbane Group (AIBG) also expressed support, commenting that:

The Government has a human rights obligation to hold children and young people in facilities appropriate to their age, separate from adults, and with programs for their rehabilitation.

This is just a start – chronological age should not be the main determinant of whether a youthful offender is further harmed by incarceration in an ordinary adult prison…[36]

In expressing its support, the QLS submitted that:

It is the firm view of the Society that there should be no transfer of 17 year olds to adult facilities, or in the alternative that the transfer of 17 year olds to adult facilities should be by court order under the discretionary power of the Court.[37]

In its submission, YAC welcomed the raising of the age in relation to the automatic transfer of a person to adult prison, however expressed certain reservations about the treatment of detainee privileges:

… [the Bill] *confirms the appropriateness of 17 year olds being dealt with in the youth justice rather than the adult criminal justice system…*

However, it is disappointing that that any privileges and similar which a detainee may have acquired through good behaviour and hard work, are not carried over to the prison system. No satisfactory explanation has ever been given for this and one wonders why a

33 Hansard transcript, 21 April 2016 (explanatory speech) p 1331.

34 Letter from the department, 6 May 2016, p 2.

35 Submission No 2, p 2.

36 Submission No 4, p 1.

37 Submission 5, p 1.

> *detainee would have any interest in trying to do the right thing if any rights they have earned are effectively arbitrarily removed. This would seem to undermine the purpose of imposing the sentence.*[38]

In response to these reservations, the department advised:

> *The young person being subject to the Corrective Services Act 2006 from the date of transfer is justifiable given the distinct separation between the youth and adult justice systems.*
>
> *The current provision allows for a person transferred to the adult system to be appropriately assessed for risk within the new context, with information made available by the department to assist in this process. It also allows for appropriate consideration of environmental risks relating to fellow detainees, noting that detainees who transfer under this provision, will transition from being one of the older to one of the younger persons within detention/ prison. Further, this provision further serves to allow a reassessment and potential lessening of any redundant, high risk supervision/ practices that may have been in place for the person while in a youth detention setting.*[39]

ANTaR commended the Bill's proposals as:

> *…a recognition that the emotional and intellectual maturity of offenders is no fixed and predictable matter; that levels of maturity, insight and judgment are not uniform at each stage of adolescence and young adulthood.*[40]

2.2.2 Empowering a court to delay transfer

The Bill, through the proposed new section 276D of the YJ Act, provides a mechanism for a court to delay a young person's transfer for up to six months. Under this section, an eligible young person may apply to the court for a delay of transfer for a period up to 6 months, either at the time of sentence or after being given a copy of a prison transfer direction under section 276C(3).

The department provided the committee with the following explanation of the proposed provisions:

> *In considering any application for delay in transfer, the Bill, as per new section 276D(4), requires that a court may grant an application to delay transfer only when it is satisfied that granting an application to delay would be:*
>
> - *in the interests of justice; and*
> - *would not prejudice the security requirements of an affected detention centre or the safety and wellbeing of any other detainee.*
>
> *The Bill creates new section 276D(5) which specifies that, in making a decision to delay a transfer and without limiting the matters the court may have regard to, the court must have regard to:*
>
> - *any particular issues relating to the vulnerability of the young person known at the time of the decision; and*
> - *the programs and interventions the young person is currently engaged in, and the availability of relevant services and programs if transferred.*

[38] Submission No 9, p 4.

[39] Department's response to submissions, 20 May 2016, pp 4-5.

[40] Submission No 10, p 2.

> *The Bill provides that an application for delay, whether made at sentence or in response to the issuing of a prison transfer direction may, under section 276D(6)(b), be granted by the court's proper officer if the chief executive agrees to the application.*
>
> *The Bill also provides, under section 276C(4) for the chief executive to issue a further prison transfer direction in relation to a detainee if the chief executive considers the circumstances relevant to the person previously obtaining a delay no longer exist e.g. a person's engagement in a program or intervention ceases, or if the person poses a risk to the safety or wellbeing of a detainee at the detention centre.*
>
> *In this circumstance, the person would receive a renewed notice of their right to apply to a court for a delay of transfer, with any subsequent consideration by a court of a delay, having regard to the new circumstances for which the chief executive issued the transfer direction.*[41]

2.2.2.1 Submissions

LJI contended that:

> *The considerations articulated for determining whether to grant a temporary delay, in s 276D(5), of the applicant's vulnerability and the interventionist and rehabilitative activities being undertaken by the applicant and the availability of those activities if transferred are appropriate. The Institute supports the due process rights provided to the young people in these instances.*[42]

While supporting the proposed delay of a young person's transfer to adult corrections to 6 months beyond their 18th birthday (where appropriate), the Queensland and Family Child Commission (QFCC) suggested this will require the review of policy and procedures and that the provision '*…may have potential to effect security requirements and require robust planning and case review, particularly for younger children*'.[43]

The department advised it is currently reviewing all relevant policies and procedures impacted by the proposed amendments. It further noted that:

> *…current detention centre practices ensure the appropriate separation and accommodation of younger children aged 10 to 14, from older detainees.*
>
> *Current security arrangements ensure there are no opportunities for this younger group to have any contact with older detainees. Further, the department operated detention centres, operate on a high staff to detainee ratio of 1:4, resulting in close supervision of children at all time.*
>
> *Young people are accommodated in accordance with their involvement in the youth justice system – they are separated into short term remand, long term remand and sentenced groups.*
>
> *These strategies minimise the risk of children and young people being adversely affected by more criminalised cohorts.*[44]

2.2.3 Statutory age cap for detention

Proposed section 276F (Division 2A, Subdivision 2) of the Bill provides a statutory age cap for detention of 18 years and six months. Under the proposed provisions, a person who is 18 years and six months

41 Letter from the department, 6 May 2016, p 3.

42 Submission No 13, p 3.

43 Submission no 6, p 2.

44 Department's response to submissions, 20 May 2016, p 4.

will not be able to enter a detention centre to begin serving, or return to complete, a period of detention.

2.3 Court-referred youth justice conferencing program

The Bill proposes to amend parts of the YJ Act to provide for restorative justice processes.[45]

In her explanatory speech, the Attorney-General stated that the Bill provides for the delivery of an enhanced court referred conferencing program:

> *Evidence supports reintroducing youth justice conferencing. Conferencing is a restorative justice process and an effective diversionary strategy. Evidence shows that conferencing can have a positive impact on a young person's likelihood of reoffending. Evidence also strongly shows there are direct benefits to victims who are involved in a restorative justice process. These include a reduction in post-traumatic stress symptoms, a reduction in the desire for violent revenge and a heightened level of satisfaction. Research also suggests that restorative justice is most effective when it is legislated as a required consideration, rather than on an optional basis.*
>
> *Amendments to youth justice conferencing reinstate and enhance the pathways for the court to refer matters to conferences and provide greater flexibility to deliver diversionary restorative justice interventions. Those diversionary interventions and conferences are not soft options for young offenders. Young people are required to accept responsibly for their behaviours, confront their victims and undertake a restorative process, which can include community reparations of one sort or another.*[46]

2.3.1 Reinstating and enhancing conferencing program

The Bill proposes to amend the YJ Act, by replacing the current Part 3 'Youth justice conferences generally' with a new Part 3 'Restorative justice processes' - to provide for the undertaking of a youth justice conference or, in certain circumstances, an alternative diversion program.[47]

2.3.1.1 Youth justice conference

Youth justice conferencing is a way that victims of crime can participate in the consequences of offending. The Bill proposes to insert a new section 31 in the YJ Act, which specifies that when a police officer or court refers an offence to youth justice for a restorative justice process under sections 22, 24A or 163, the restorative justice process must be a conference.

2.3.1.2 Alternative diversion program

If a conference cannot be convened for any reason, other than the child being uncontactable or unwilling to participate in the conference, an alternative diversion program can be undertaken.

Proposed section 38 of the Bill defines an alternative diversion program as a program to address the child's behaviour that involves the child participating in any of the following:

- remedial actions
- activities intended to strengthen the child's relationship with the child's family and community
- educational programs.

The alternative diversion program must:

- be designed to assist the child to understand the harm caused by their behaviour

[45] Part 4 of the Bill amends the *Youth Justice Act 1992*.

[46] Hansard transcript, 21 April 2016 (explanatory speech) p 1332.

[47] Clause 16 of the Bill.

- allow the child an opportunity to take responsibility for the offence committed
- not impose more severe treatment for the offence than if sentenced by a court
- be agreed to by Youth Justice and the child.

The department advised:

> *The introduction of alternative diversion programs ensures that Youth Justice can provide children and young people with an evidence based restorative justice intervention when, through no fault of the child or young person, a conference cannot be convened. An alternative diversion program may be applied for example, when a victim or another person representing the victim's perspective, is unavailable to participate in a conference.*[48]

2.3.1.3 Relationship between restorative justice processes

According to the department:

> *The option to consider an alternative diversion program instead of a conference is only available through courts or polices' exercise of discretional diversionary powers. Such referrals are made where police or courts consider the matters are best dealt with through diversionary powers rather than through prosecution or court sentencing.*
>
> *The alternative diversion program is not available for pre-sentence or sentence based referrals. In those cases, the restorative justice process must be a conference. If a conference cannot be convened, the matter is returned to court.*[49]

Clause 36 of the Bill proposes to insert various new defined terms into the YJ Act, including two umbrella terms:

- 'restorative justice process' which reflects the expansion of referrals to include both a conference and in limited circumstances, an alternative diversion program
- 'restorative justice agreement' which is a document that records the conference or alternative diversion program obligations.

2.3.1.4 Referral framework

The department stated that the referral framework is further enhanced by:

> *…providing for children and young people whom courts are considering referring to a restorative justice process to be screened by Youth Justice before a referral is made, allowing for correct targeting of offenders and offences which are most appropriate for conferencing; and requiring that a child or young person must consent before a court may refer an offence to a restorative justice process. This brings conferencing into line with community based sentence orders, all of which require the young person to consent, and excludes children and young people who are not prepared to engage in a way that is respectful of the victims of their offending.*[50]

The Bill provides for the following referrals to a restorative justice process:

- Police diversion referral
- Court referral to a police diversion referral

[48] Letter from the department, 6 May 2016, p 4.
[49] Letter from the department, 6 May 2016, p 4.
[50] Letter from the department, 6 May 2016, p 5.

- Court diversion referral
- Pre-sentence referral
- Sentence-based referral
- Post-sentence referrals.

The department advised the committee on how the Bill provides for these referrals to a restorative justice process and how the differing referral mechanisms compare. This advice is at in **Attachments C and D**, respectively.

2.3.1.5 Submissions – youth justice conferencing

QAI supported youth justice conferencing, describing it as an effective diversionary tool and an appropriate mechanism to address young people's accountability for offending behaviour:

> *Restorative justice measures such as youth justice conferencing have numerous benefits: it addresses victims' needs, includes communities in the criminal justice process, and fosters trust in criminal justice processes. These are all vital aims of the criminal justice system. In particular, the evidence that victims prefer restorative justice to traditional criminal justice measures is unequivocal.*[51]

QAI saw these benefits of conferencing for offenders:

> *Conferencing provides an opportunity for the young person to admit the offence and accept responsibility for their offending behaviour, to understand in a tangible way the effects of their actions on others, to repair some of the harm caused by their offending behaviour, and to feel proud of their efforts to put things right. It also provides an opportunity for the young person's family and community to be heard and to be involved in decision-making about the offending behaviour.*[52]

QAI also put forward these benefits of conferencing for victims:

> *Conferencing provides an opportunity for the victim to participate in the process of working out how the young person should make up for causing the harm and damage, and to negotiate an agreement to repair the harm through an apology, by replacing or paying for the damage, or by performing voluntary work for the victim or wider community. It gives the victim an opportunity to tell their story directly to the person who caused them harm, and to seek answers to the questions that they may have about the crime and why they were the subject of the offence.*[53]

Further, QAI claimed that youth justice conferencing helps to strengthen and empower families through their involvement in the decision-making about a young person's offending behaviour:

> *The conferencing process allows families to take an active role in deciding an appropriate response to offending behaviour and support them to implement that response, to support a young person's compliance with an agreement, which serves to encourage the development of positive relationships within the family, to find out how the young person is feeling about issues associated with the young person's offending behaviour, and to gain greater insight into the impact of the young person's behaviour.*[54]

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51 Submission No 2, p 2.

52 Submission No 2, p 2.

53 Submission No 2, p 2.

54 Submission No 2, pp 2-3.

LJI and ANTaR also offered support for youth justice conferencing. LJI said the proposed provisions '*…will provide more young people with the opportunity to attend conferences, which generally appears beneficial*'.[55]

The QLS contended that '*…the conferencing provisions outlined in the Bill are unclear in how they will operate in practice and that these provisions may need clarification*'.[56]

The department responded:

> *Policies and procedures outlining how the new provisions will be operationalised have been developed. Communication material will also be made available to stakeholders as requested and as part of intended communication activities by the department.*[57]

YAC welcomed the reintroduction of court ordered conferencing, submitting that: '*The conference may well be a useful way to assist young people's development where their life experience to date has not been one which enables them to be empathetic or otherwise understand the consequences of their behaviour*'.[58]

YAC argued there should be an opportunity for casework staff to provide or arrange for therapeutic supports which the young person identifies would assist them in preventing re-offending:

> *Punishment alone will not work – indeed, the research and evidence shows that too authoritarian [a] response to children's behaviour is as problematic in its outcomes as providing no framework for behaviour. Court ordered conferencing therefore needs a case management approach.*[59]

With respect to any perceived lack of therapeutic and interventionist approaches adopted in the Bill, the department commented that:

> *Opportunities for therapeutic and interventionist approaches, which compliment restorative justice responses, will be better explored through the whole of government Youth Justice Policy that is currently under development.*[60]

AIBG largely supported the proposed changes in the Bill. However, in order '*…to be equitable and to avoid discrimination…*' it suggested the following amendment to proposed section 34(3) of the YJ Act (Part 4, Division 2 'Conferences'):

> *...the words "the convenor must consider inviting to attend the conference" should be changed to "the convenor must invite to attend the conference".'*[61]

The department did not respond to this suggestion.

For reasons of cultural appropriateness, AIBG sought:

> *…strengthened services to targeted geographic areas of origin of offences and targeted demographic cohorts, especially those over-represented in the justice system, such as Aboriginal and Torres Strait Islander and disadvantaged youth.*[62]

In response, the department advised:

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55 Submission No 13, p 4.

56 Submission No 5, p 1.

57 Department's response to submissions, 20 May 2016, p 6.

58 Submission No 9, p 3.

59 Submission No 9, p 3.

60 Department's response to submissions, 20 May 2016, pp 6-7.

61 Submission No 4, p 2.

62 Submission No 4, p 2.

> *Amendments to youth justice conferencing reinstate and enhance the pathways for the court to refer matters to conferences and provide greater flexibility to deliver diversionary restorative justice interventions.*
>
> *One of the overarching objectives guiding the implementation of restorative justice interventions is to increase Aboriginal and Torres Strait Islander participation in restorative justice processes. This will include active and ongoing local community engagement with Aboriginal and Torres Strait Islander groups and a commitment to recruit Aboriginal and Torres Strait Islander people in service delivery roles.*[63]

QCCL recommended the proposed Bill be amended to insert the following new section 37 'Amendment of conference agreement by chief executive' into the YJ Act:

> *(2) The chief executive may, if the child agrees amend the conference agreement to the extent to make the agreement workable, provided the new agreement is in no way harsher than the original.*[64]

In reply, the department stated:

> *Section 37 provides for conference agreements that would otherwise be frustrated, to be preserved through amendment. It is not necessary to legislate that the amended agreement cannot be harsher than the original agreement because the following safeguards ensure that the young person's interests are protected:*
>
> 1. *The amendment is by consent of the young person; and*
> 2. *The agreement cannot provide for the child to be treated more severely for the offence than if the child were sentenced by a court;*
>
> *Introduction of a requirement as proposed by the submitter would in fact be problematic, because the obligations agreed to in the amended agreement may not be directly comparable to those agreed to under the original agreement. For example, under an amendment the volunteer work may be less laborious but longer in duration.*[65]

Janet Robinson did not support the Bill's proposals and opposed youth justice conferencing:

> *The explanatory notes for the Bill talk about youth offenders being more likely to commit crime because their minds are not fully developed but then uses this as a justification to reduce the punishment of all crimes committed by all youth offenders, even the violent, sexual and repeat offenders. Why should diversion from prison or serious punishment be available to anyone other than first time offenders? No justification is given for limiting the changes by the Bill to first time offenders. Why on earth should youth justice conferences be available instead of punishment for violent and sexual offences? It makes no difference to the victim of a violent or sexual crime that the offender was a teenager or an adult. Expecting the victim of a serious or sexual crime to attend a conference and see their attacker get off without proper punishment simply creates more victims without faith in our society and justice.*[66]

The department responded:

> *The new court referral pathways are in addition to the sentencing options currently available to courts. In deciding whether a referral is appropriate, a court must have regard to the nature of the offence, the harm suffered by anyone because of the offence and*

63 Department's response to submissions, 20 May 2016, p 5.

64 Submission No 12, p 2.

65 Department's response to submissions, 20 May 2016, p 8.

66 Submission No 8, p 1.

> *whether the interests of the community and the child would be served by having the offence dealt with under a restorative justice process.*
>
> *The department considers these current provisions combined with judicial discretion will ensure that appropriate referrals are made. Referral to a restorative justice process can be combined with other sentencing options available to a court, in which case, the restorative justice approach would complement, not replace, the retributive sentence imposed by a court.*
>
> *The needs of victims of violent and sexual offences, as is the case with all victims, can be met through the delivery of effective conferences. In recognition of the particular vulnerabilities of victims of sexual offending, the department currently (and will continue to) ex*[er]*cise a practice whereby Regional Director approval is required for acceptance of a referral concerning a sexual offence.*[67]

Ms Robinson expressed concerns that punishment is being taken away from the courts and '*…given to public servants who are not psychologists or lawyers*'.[68] She argued that the Bill conflicted with the doctrine of separation of powers and that: '*The Bill inappropriately removes judicial oversight for punishment of youth offenders*'.[69]

The department stated:

> *Separation of powers between the judiciary and executive will not be affected by the proposed model. Courts will continue to have complete and independent autonomy to determine how a young person is dealt with in the youth justice system. If a court decides to refer a young person for a restorative justice process, the department will endeavour to convene a youth justice conference. The Bill openly and transparently details what the chief executive will do if a conference cannot be convened and a court, in making a referral, is authorising that action.*[70]

In response to the observation that the requirement of victim participation can be met by sources other than attendance by the direct victim[71], the department stated:

> *The submitter correctly identifies that, under new section 35, the victim's perspective can be communicated in a number of ways. This enhancement has been designed to best meet the needs of victims, who may have a desire to participate but not be willing or able to confront the young person face to face. The victim may nominate a person to represent them, for example, a parent may attend instead of a child victim, or they may communicate the impacts of an offence to the young person via pre-recorded communication. As a last resort and only if it would deliver a meaningful victim perspective, an organisation such as the Queensland Police Service or Victim Assist Queensland may be invited to share insight with the young person from a victim perspective. If a victim perspective cannot be achieved, the referral is returned as unsuccessful or, if the referral is made as either a court or police diversionary referral, the alternative diversion program is triggered.*[72]

[67] Department's response to submissions, 20 May 2016, pp 8-9.

[68] Submission No 8, p 1.

[69] Submission No 8, p 1.

[70] Department's response to submissions, 20 May 2016, p 9.

[71] Submission No 8, p 2.

[72] Department's response to submissions, 20 May 2016, pp 11-12.

Janet Robinson claimed that: '*First time offenders deserve a chance, and they are the best candidates for help and changing their ways*'.[73] She queried why the Bill does '*…not limit the new options to first time offenders?*'[74]

The department advised:

> *The submitter's perspective that first time offenders are more deserving and are best candidates for change is not supported by the literature. Young people in the youth justice system are generally vulnerable, disadvantaged children who present with complex underlying risk factors for offending behaviour. The best candidates for change are those who are supported to address the reasons for their offending behaviours. Restorative justice approaches in combination with the department's wider commitment to develop a whole of government youth justice policy will ensure effective responses to children and young people, including those who have committed a first or subsequent offences.*[75]

2.3.1.6 Other evidence – youth justice conferencing

The effectiveness of youth justice conferencing was raised at the committee's Townsville and Brisbane public hearings for the 2015 Bill. The committee heard evidence both supporting and opposing the effectiveness of youth justice conferencing.

Below is an excerpt from the committee's report on the 2015 Bill:[76]

> *Councillor Eddiehausen told the committee that youth conferencing was 'a waste of time' that achieved something 'on the odd occasion', and that the recidivist offenders he was working with thought conferencing 'was a bit of a joke really. Mind you, that could have been bravado … but I can only take them at their word'.*
>
> *Professor Dawes appeared before the committee as an advocate of youth justice conferencing, but conceded under questioning that the policy would not actually reduce the rate of recidivism.*
>
> > **MR KRAUSE:** There seems to be an impression in the community, I think borne out by statistics – I do not have them to hand – that recidivism and youth crime continued to grow during the time of youth sentencing, so what makes you think that it being reinstated now will actually decrease recidivism?
> >
> > **Prof. Dawes:** Well it is not going to decrease. You have a tertiary group of people who continue to do crime and will lead to prison. There is no doubt about that. You cannot turn some of these young people around. They are on a line. They are either going to give it up or something is going to happen to them, or there is something that is going to turn them off crime. Otherwise they are going to continue into the system. The adult system has a fair proportion of former juvenile offenders. What we need to do now, in my opinion, is look at the next generation coming through, around prevention and intervention. One of the things to stop the next wave of recidivism is to actually put in place these sorts of programs and initiatives such as conferencing, which is an excellent example.
>
> *Prior to removal of youth conferences from the Act in 2012, a participant satisfaction rating of 98 per cent was achieved. Dr Richards advised that the research is clear that*

[73] Submission No 8, p 2.

[74] Submission No 8, p 2.

[75] Department's response to submissions, 20 May 2016, p 12.

[76] Committee's report on Youth Justice and Other Legislation Amendment Bill 2015, pp20-21.

victims are satisfied with youth justice conferencing, as they get to have their say, and to meet the young offender.

Mr Law from Legal Aid Queensland advised that the Act referred to making a child responsible for their offending:

> …and there is no more powerful tough-on-crime measure than making a child sit opposite their victim and apologise. I have been to hundreds of conferences and they can be very powerful ways for a child to make amends to the community in general. There are some children who do have a poor attitude. There [are] always going to be those children, it is just part of nature.

The Queensland Law Society agreed and advised the committee that youth conferencing 'is often a very beneficial thing for the victim as well to be able to meet the offender and develop a bit of a broader understanding about some of the reasons why that young person has committee that offence'.

2.3.1.7 Recidivism and youth justice conferencing

In the public briefing the following exchange regarding recidivism occurred:

Mr KRAUSE: *…When the committee examined the other youth justice bill earlier this year there were a range of views given to the committee about youth justice conferencing in particular. It is fair enough to say that some of those views were diametrically opposed to the views that you have put to the committee this morning. In particular, reference was made to the fact that in a former government when youth justice conferencing was in operation, the rate of recidivism amongst young offenders remained for a number of years stubbornly high. What can you say to those submitters who reject the idea that youth justice conferencing is going to make any difference, and what can you tell the committee to convince us that reinstating it now is going to make any difference at all to the rate of youth recidivism? We had it before and the statistics show that it really made no difference at all, so what is different now?*

Dr Lynch: *I think one of the things that we need to keep in mind is that what we are carrying forward here is in fact an enhanced or an expanded version of community conferencing. I think that what we are offering is a much broader range of responses than was previously the case. I think we need to see it as—and I alluded to this earlier on—very much a part of a broader approach with youth justice. When I talk about things about the Transition to Success program, youth justice as a whole is accepting responsibility to work in new ways that were not previously the case. The expanded and enhanced version of community conferencing is just one part of this broader approach.*

In terms of the specific issue of reducing recidivism I think there are two points to make: reducing recidivism is everywhere and historically an extraordinarily difficult thing to budge. It is just remarkably resistant to change. Keeping that in mind, when we look at the expanded programs we are offering and the new options like Transition to Success, which are showing really remarkable promise in terms of changing behaviour and reducing offending, I think that we can be optimistic. I think that some things looks promising. I do not think we need be so pessimistic.

I think also that the data can at times hide certain really important realities. Recidivism levels may remain reasonably constant, and we would like that to go down, but if the nature of the offending changes so that a person's offending goes from very serious to very minor, we have actually made a real difference. That is one of the things that is buried

> *in the data. If we look at those figures we really need to look at what are the offending behaviours pre conferencing and what are the offending behaviours post conferencing.*[77]

As a result of committee questioning, the department provided information on pre- and post-recidivism rates for youth justice conferencing. This information is included in **Appendix E**.

2.3.1.8 Submissions - alternative diversion program

As discussed earlier, where a conference is unable to be convened, the Bill proposes to introduce the ability to refer to an alternative diversion program.

While welcoming this proposal, asserting it would ensure that some children do not miss an opportunity provided to others, YAC did not consider the provision adequate:

> *Proposed new section 38 ['Alternative diversion program'] provides that "an alternative diversion program is a program, agreed to by the chief executive and the child…." and "The program must be in writing and be signed by the child." No processes are detailed as to how agreement should be reached and no provision is made for the attendance of a support person and/or a legal representative to address the clear imbalance of power where a departmental officer is "negotiating" with a child. This should be compared to the detailed requirements in relation to a conference. There is a significant risk that the departmental officer who will be tasked with making the agreement (as it will be delegated by the Chief Executive to someone in a casework role in Youth Justice Services) will effectively have a quasi-judicial role without appropriate processes and safeguards being in place.*[78]

To address these perceived issues, YAC submitted that appropriate processes and safeguards:

> *…must be part of the legislation and not simply a matter of policy and procedure.*
>
> *…if a conference cannot happen, then a conference convenor should act as a facilitator in relation to the development of an alternative diversion program and the child should be assisted to obtain legal advice prior to signing if a legal representative does not attend the discussion. There should be a requirement for the attendance of a support person during the negotiation in any event for the agreement to be effective.*
>
> *It is also important that there is some monitoring of such agreements and comparison with conference outcomes to ensure consistency between the two*.[79]

LJI made a similar submission. While appreciating the intent of proposed section 31(3) ['The restorative justice process'] and its provision for an alternative diversion program, LJI expressed concern:

> *…with the lack of due process afforded to the young person in coming to an agreement with the chief executive (or more likely a delegate) as to the nature of an alternative diversion program. While s 38 does outline some detail of the nature of such programs, the Institute is concerned that the young person is not represented in discussions with the Department as to the program, and will be subject to a clear imbalance of power in reaching agreement. This may be of particular concern where the child has offended whilst in care. The Institute suggests that due process guarantees, similar to those provided with respect to conferences, are also provided in relation to alternative diversion programs.*[80]

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77 Hansard transcript, public briefing, 11 May 2016, p 4.

78 Submission No 9, p 3.

79 Submission No 9, pp 3-4.

80 Submission No 13, p 4.

The department responded to claims the Bill potentially facilitated the quasi-judicial treatment of children:

> *The alternative diversion program is a secondary option to be exercised when a (police or court) diversionary referral is made however a conference cannot be convened and the young person remains willing to participate. The department is not adopting a quasi-judicial role without appropriate processes because the child must agree to the obligations. This is distinctly different to the role of a court.*
>
> *The chief executive is under an obligation to ensure that restorative justice agreements, whether they relate to a conference or the alternative diversion program, do not provide for the child to be treated more severely for the offence than if the child were sentenced by a court or in a way that contravenes the sentencing principles in the Act.* [81]

In response to issues raised by YAC and LJI regarding access to a support person or legal representative, the department stated:

> *While there is no requirement that a support person or legal representative attend a conference, there is provision to allow their presence. The submitters are correct in identifying that similar provisions do not exist for alternative diversion programs. That is largely due to the differing nature of the process; a conference is a scheduled event attended by various people and the young person is expected to commit to their obligations without the benefit of time to seek further support and/or independent legal advice. Discussion and agreement between the chief executive and the young person regarding the alternative diversion program and its obligations is a more dynamic process without the same time limitations associated with conferencing. The flexibility of that discussion will ensure that a young person can access legal or other support services if desired and their right to do so is given effect by the Charter of youth justice principles (section 10, Schedule 1 of the YJ Act). The department therefore does not consider there to be any requirement to further legislate for this matter.*[82]

Ms Robinson contended that it did not seem that the chief executive's powers under the proposed Bill were limited to convening conferences and that there appears no limit as to how lenient the chief executive can be to the offender.[83]

The department responded:

> *The submitter has correctly identified that the chief executive is not limited to convening a conference. It is important to recognise that the alternative diversion program is limited in its availability to (police and court) diversionary referrals. If a court determines that an offence is serious enough to warrant sentencing of the young person, then the referral pathway (be it either a presentence referral or sentence based referral) is not one that allows for utilisation of the alternative diversion program. In those cases, if a conference can not be convened, the referral would simply be returned to the court as unsuccessful and the court would further consider the matter. The department is developing a comprehensive procedure to guide decisions relating to the alternative diversion program to ensure a consistent and fair application. Under the procedure, which is based on international best practice, the young person's offence type, together with an evaluation of their risk for reoffending, will direct that a certain minimum level of response be achieved. The young person's obligations under the alternative diversion program are communicated back to the referring body (police or court), ensuring transparency and*

[81] Department's response to submissions, 20 May 2016, p 7.

[82] Department's response to submissions, 20 May 2016, pp 7-8.

[83] Submission No 8, p 1.

> *importantly rigour of process; because police and courts will not continue to make such referrals if they are not satisfied with the outcomes being delivered by the department.*[84]

In response to these concerns, the department stated that:

> *There is no requirement for victim participation in the alternative diversion program because it has been designed as an option for when a conference cannot be convened. In practice, that will most likely be due to lack of victim willingness to participate. The central focus of the alternative diversion program is to help the young person understand the consequences of their actions and Youth Justice is well placed to implement programs achieving that objective.*[85]

2.4 Consequential amendment

The Bill proposes a consequential amendment to the CS Act to provide statutory recognition of the Supreme Court decision in *Coolwell v Chief Executive, Department of Justice and Attorney-General* (No. 2) [2015] QSC 261, that a parole order issued in relation to a prisoner in adult corrections who was sentenced under the YJ Act is a parole order for the purposes of the CS Act.

The Explanatory Notes clarify that:

> *This includes provision that, the day the person would otherwise have been released on a supervised release order under the YJ Act is instead the person's parole release date for the person's term of imprisonment, subject to the CS Act.*[86]

The department advised that:

> *This amendment provides certainty for a young person who is transferred to adult corrections that, from the date of their transfer, the person is taken to be a prisoner subject to the CSA and any rights, liberties or immunities of the person as a detention centre detainee end and are not preserved or transferred.*[87]

84 Department's response to submissions, 20 May 2016, pp 10-11.

85 Department's response to submissions, 20 May 2016, pp 12.

86 Explanatory Notes, p 3.

87 Letter from the department, 6 May 2016, p 1.

3 Compliance with the Legislative Standards Act 1992

3.1 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* states that 'fundamental legislative principles' (FLPs) are the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals[88]
- the institution of parliament.[89]

3.1.1 Clause 16 – restorative justice process

Proposed clause 16 of the Bill inserts section 31(1) which provides that the part applies if a police officer or a court (each a referring authority) refers an offence to the chief executive for a restorative justice process. By way of clause 31(2) the restorative justice process is to be a conference.

Pursuant to clause 31(3) the restorative justice process is to be an alternative diversion program if:

(a) the referral is made by a police officer under section 22 or made by a court under sections 24A or 164; and

(b) a conference cannot be convened for any reason other than:

(i) the chief executive being unable to contact the child after reasonable inquiries; or

(ii) the child being unwilling to participate in the conference.

The Explanatory Notes provide further information in relation to clause 16:

> *Subsection 31(3) provides that the restorative justice process is to be an alternative diversion program if the referral is made by a police officer under section 22 or made by a court under section 24A or 164 and a conference cannot be convened for any reason other than (a) the chief executive being unable to contact the child after reasonable enquires or (b) the child being unwilling to participate in the conference. This allows a further opportunity for police and court diversion referrals, which would have otherwise been frustrated, to be effectively discharged. The primary reason for a conference not being convened (excluding unwillingness to participate by the child) is unavailability of a primary victim, or a person who is able to represent the victim's perspective in a meaningful way. The alternative diversion program will alleviate this limitation.*[90]

Pursuant to section 38(1), an alternative diversion program is a program, agreed to by the chief executive and the child, that involves the child participating in any of the following to address the child's behaviour:

(a) remedial actions

(b) activities intended to strengthen the child's relationship with the child's family and community

(c) educational programs.

Section 38(2) provides that the program must be designed to:

(a) help the child to understand the harm caused by his or her behaviour; and

(b) allow the child an opportunity to take responsibility for the offence committed by the child.

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88 *Legislative Standards Act 1992*, s 4(2)(a).

89 *Legislative Standards Act 1992*, s 4(2)(b).

90 Explanatory Notes, p 5.

3.1.1.1 Potential FLP issues

Section 4(3)(b) of the *Legislative Standards Act 1992* provides that a bill be consistent with principles of natural justice, being that:

(1) something should not be done to a person that will deprive them of some right, interest, or legitimate expectation of a benefit without the person being given an adequate opportunity to present their case to the decision-maker

(2) the decision maker must be unbiased

(3) procedural fairness should be afforded to the person, meaning fair procedures that are appropriate and adapted to the circumstances of the particular case.[91]

In its submission, LJI raised a potential issue of procedural fairness in relation to the alternative diversion program:

> *The Institute is concerned with the lack of due process afforded to the young person in coming to an agreement with the chief executive (or more likely a delegate) as to the nature of an alternative diversion program. While s 38 does outline some detail of the nature of such programs, the Institute is concerned that the young person is not represented in discussions with the Department as to the program, and will be subject to a clear imbalance of power in reaching agreement. This may be of particular concern where the child has offended whilst in care. The Institute suggests that due process guarantees, similar to those provided with respect to conferences, are also provided in relation to alternative diversion programs.*[92]

3.1.1.2 Comment

The committee notes the potential FLP, but is satisfied with the department's response to the issues raised by LJI, which are set out earlier in this report.

3.2 Explanatory notes

Part 4 of the *Legislative Standards Act 1992* relates to Explanatory Notes. It requires that an Explanatory Note be circulated when a bill is introduced into the Legislative Assembly, and sets out the information an Explanatory Note should contain.

Explanatory Notes were tabled with the introduction of the Bill. The Notes are fairly detailed and contain the information required by Part 4 and a reasonable level of background information and commentary to facilitate understanding of the Bill's aims and origins.

[91] Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: *The OQPC Notebook*, page 25.

[92] Submission No 13, p 4.

Appendix A – List of Submissions

01	Pearl Tabart
02	Queensland Advocacy Incorporated
03	Anglican Church of Southern Queensland
04	Amnesty International Brisbane Group
05	Queensland Law Society
06	Queensland and Family Child Commission
07	CONFIDENTIAL
08	Janet Robinson
09	Youth Advocacy Centre Inc.
10	Australians for Native Title and Reconciliation (Queensland) Inc.
11	Amnesty International Australia
12	Queensland Council for Civil Liberties
13	Law & Justice Institute (QLD) Inc.

Appendix B – List of Witnesses

In order of appearance before the committee:

Public Briefing – Brisbane, 11 May 2016

Department of Justice and Attorney-General:

Dr Mark Lynch, Director, Youth Justice Policy, Research and Partnerships, Youth Justice Services

Mr Brad Van Der Ryken, Manager, Policy, Youth Justice Services

Ms Kirsten Gudzinski, Senior Policy Officer, Youth Justice Services

Appendix C – Department's advice on the Bill's proposed referrals process

The below material is sourced from the department's initial written briefing to the committee on the proposals in the Bill.[93]

Police diversion referral

To ensure consistency between existing and new provisions, the Bill replaces section 22 to incorporate the new terminology and the availability of an alternative diversion program if a conference cannot be convened.

The Bill inserts a new provision in section 22(3)(a) that a police officer may only make a referral if the child indicates willingness to comply with the referral, ensuring consistency with the diversionary nature of the referral.

The Bill also inserts a new section 22(5) that requires police to inform the child of the restorative justice process and potential consequences for the child if he or she fails to properly participate in the process. The new obligations outlined in section 22(5) ensure procedural fairness and reflect current police operational practices.

Court referral to a police diversion referral

The Bill proposes insertion of a new section 24A to allow a court to dismiss a charge brought forward by police if the offence should have been referred to a restorative justice process. Under new section 24A, the court can dismiss the charge and refer the matter to Youth Justice for a restorative justice process on behalf of police, where it considers this a more appropriate means of disposing of the matter. This is a suitable option where the court considers a young person should be given an opportunity to be diverted from a judicial response, but their refusal to be interviewed by police or failure or refusal to admit guilt during the interview, prevents police making a diversionary referral. This referral requires a child to enter a plea of guilty.

A referral of this type would operate in the same way as a police referral, with failure by the young person to engage in the restorative justice process resulting in the matter being returned to police to exercise their discretion whether to again institute charges. The Bill provides for the return of referrals to police under new section 32.

This referral pathway enables a young person to avoid formal contact with the youth justice system, a known risk factor for re-offending, in circumstances where a court is of the opinion that the matter does not warrant a prosecution or sentence based response.

This provision ensures that young people, particularly those from Aboriginal and Torres Strait Islander backgrounds, have appropriate access to diversionary measures to address their offending behaviour without risk of unintended involvement with the court or further progression into the criminal justice system. It serves as a key strategy to reduce the over- representation of Aboriginal and Torres Strait Islander children in the justice system.

Court diversion referral

A court diversion referral pathway is available under new section 163, which allows a court to refer a child or young person to the chief executive for a restorative justice process instead of sentencing the person. This pathway is an option for the court if the child pleads guilty and the referral would allow the offence to be appropriately dealt with without making a sentence order.

The Bill inserts section 164, which allows for a court diversion referral to bring the proceeding against the child or young person to a close. If following a referral, a child or young person fails to engage in a

[93] Letter from the department, 6 May 2016, pp 5-7.

restorative justice process, or if a restorative justice agreement is not achieved, powers exist for the matter to be returned to court for sentencing.

Pre-sentence referral

The Bill provides under section 165 for a court which has made a finding of guilt against a child or young person and which considers the offence serious enough to warrant a supervised order (either a community based or detention order) to adjourn the proceeding while the child or young person participates in a restorative justice process. It is noted that the alternative diversion program is not available under this referral pathway and that the process must involve a youth justice conference.

The Bill reinstates this pathway as a means of enabling a court to require that a child or young person engage in a youth justice conference as part of their sentence and to take that engagement into account in sentence mitigation.

To reflect its intended application to more serious and entrenched offending, the Bill provides that a referral of this sort involves a finding of guilt and sentencing outcome appearing on a young person's criminal history. This is a key difference between pre-sentence and sentence based referrals, and diversionary referrals which do not result in a criminal history by virtue of section 154 for a court diversionary referral and because a charge is dismissed for a section 24A referral.

Sentence-based referral

The Bill provides for a court, which has made a finding of guilt against a child or young person, and considers the offence serious enough to warrant a supervised order (either community based or detention order) to order that the child or young person participate in a restorative justice process as part of their sentence. Again, the alternative diversion program is not available for this referral pathway and the process must be a youth justice conference.

This pathway enables a court to impose a referral at sentencing, without first adjourning the proceeding while a conference occurs.

In both pre-sentence and sentence referrals, the Bill creates a Restorative Justice Order (RJO) to reduce the need for ongoing court supervision and to make the performance of restorative justice agreements enforceable.

The Bill enables the making and/or performance of a restorative justice agreement to be ordered as a condition of an RJO - with a breach process to be available where a child or young person fails to properly engage in the conferencing process or give timely effect to the agreement.

The Bill further enables the court to make an RJO either alone or in conjunction with a supervised order such as a probation order, community service order or detention order.

Post-sentence referrals

The Bill allows for Victim Assist Queensland, on request from Youth Justice and subject to victims' consent, to provide Youth Justice with details of the victims of offending by children and young people subject to supervised youth justice orders.

This provision, new section 302A, would apply where, subject to a victim's informed consent, Youth Justice considers that the victim's participation would make the activities to be completed as part of the sentence more meaningful or would aid a child's or young person's transition out of the youth justice system.

This option provides the opportunity for victims who may not have initially been willing or ready to participate in a pre-sentence or sentence based process and who subsequently, with regard to passage of time and revised readiness, express a willingness to participate and obtain benefits of a restorative justice process.

Appendix D – Department's 'Referral Pathways Comparison Table'

Referral Pathways Comparison Table

Referral type	YJOLAB reference	Child must admit to committing offence	Child must agree to referral	Alternative diversion program available	Impact on child's criminal history	Consequence if – Referral is unsuccessful, or Child contravenes agreement
Police diversionary referral	Section 22	Yes	Yes	Yes	Child has no formal contact with the judicial system	Referral returned to police, who may: 1. Take no action; 2. Administer a caution; 3. Refer for another RJ process; or 4. Start proceedings against the child
Court referral to police diversionary referral	Section 24A	Yes	Yes	Yes	Charge is dismissed. There is no record of the child having formal contact with the judicial system	Same as above
Court diversionary referral	Section 163	Yes	Yes	Yes	1. Guilty plea is accepted 2. Court makes referral instead of sentencing the child 3. By virtue of section 154, the finding of guilt does not form part of the child's criminal history	If referral unsuccessful – matter returned to court for sentencing. Court must not have regard to referral being unsuccessful If child contravenes agreement – matter returned to court for sentencing. Court may: 1. Take no action; 2. Allow the child a further opportunity to comply with the agreement; or 3. Sentence the child
Presentence referral	Section 165	No	Yes	No	1. Finding of guilt forms part of the child's criminal history 2. Participation in process may mitigate sentence imposed	Matter is returned to court for sentencing irrespective of whether referral was successful or not. Court can take child's participation into account in sentencing If court makes RJO and child contravenes agreement, child is dealt with under breach provisions
Sentence based referral	Section 175(2A)	No	Yes	No	1. Finding of guilt forms part of the child's criminal history 2. Agreement to participate in process may mitigate sentence imposed	If court makes RJO and child does not participate in restorative justice process or contravenes agreement, child is dealt with under breach provisions

Note: a further non-statutory referral pathway is available post sentence. New section 302A will facilitate provision of information for this referral – see page 7 of brief

Appendix E – Department's information on pre and post recidivism rates for youth justice conferencing

DEPARTMENT OF JUSTICE AND ATTORNEY-GENERAL

2. Question on notice

Legal Affairs and Community Safety Committee inquiry into the Youth Justice and Other Legislation Amendment Bill 2016

As at 16 May 2016

Pre and post recidivism rates for conferencing

A recently completed longitudinal study of young Queensland offenders found that those who appeared in court were 1.65 times more likely to reoffend than young people who were conferenced (Little, 2015).

There is also growing evidence to suggest that restorative justice may be more effective for particular types of offenders and offences (Larsen, 2010). For example, restorative justice approaches may be more effective than traditional criminal justice responses in reducing reoffending among prolific offenders (Larsen, 2010) and in the event of serious offending (Strang et al., 2013).

The model proposed under the restorative justice project provides both early intervention options, and opportunities for recidivist offenders and those who have committed serious offences to engage in the restorative justice process. Under the model:

- Young people referred to a restorative justice process by police or the court may participate in a restorative justice conference or alternative diversion program;
- Young people whose matter is before the court and for whom the court is considering imposing a supervised order have the opportunity to participate in a restorative justice referral (either as a pre-sentence or sentence based referral); and
- The creation of a Restorative Justice Order that may stand alone or be used in combination with other orders will facilitate a young person's participation in a restorative justice conference post sentence.

The model also supports improved decision making regarding the appropriateness of a referral to the restorative justice process. For example, young people referred by police who are not considered appropriate for a restorative justice referral may be returned by the Chief Executive to police. Furthermore, the court is required to consider advice from the Chief Executive in relation to the appropriateness of a restorative justice referral.

In providing multiple referral pathways that are responsive to the type of offender, and by supporting improved decision making, it is not unreasonable to expect the expanded and enhanced restorative justice process proposed for Queensland may return benefits in terms of reductions re-offending and reductions in the seriousness of any subsequent re-offending.

Finally, consideration of re-offending should not detract from the range of other benefits achieved for both victims and offenders through a restorative justice approach. These include improved perceptions of fairness, feelings of safety, and willingness to take responsibility for behaviour (Weatherburn et al., 2012; Larsen, 2014; Little, 2015).

The restorative justice project will be evaluated to test whether it was implemented and operates as planned, to identify any challenges or strengths that inhibit or promote the project goals, and determine the extent to which the project goals were realised. This includes the extent to which the restorative justice process reduced offending among young people who participated, and achieved improvements in psycho-social goals for both young people and victims.

Statement of Reservation by non-government members

The Attorney-General advised in her explanatory speech that:

"Reducing youth crime in Queensland is a priority for this government. That is why we are … adopting an evidence based approach to reducing youth offending."

The non-government members of the committee find this statement hard to believe, given that Labor have no policy to reduce youth crime other than unwinding reforms implemented by the former LNP Government, that were only introduced in 2014 and which have not been given a chance to work.

Going soft on youth crime is not the answer.

Returning to the failed policies of the past is not the answer.

We know that Labor is soft on crime. Rather than implementing a system which maintains the right balance between rehabilitation and strong deterrents that reinforce the authority established by the Courts and the Queensland Police Service, Labor is simply returning to failed policies of the past. The Labor Government has not conducted a proper review of the effectiveness of the 2014 amendments and is simply undoing them for the sake of political payback.

The latest Queensland specific data is available in the 2014/15 Children's Court Annual Report, which was published in November 2015. The President's overview provides the following analysis, which is important in the context of this debate:

> *The trend line in relation to the ten year comparison of the number of juvenile defendants disposed of in all Queensland courts shows a slight increase, although in 2014/15, there was a 8.7% decrease from the previous year. The trend line in relation to the ten year comparison of the number of charges against juvenile defendants continues to rise, although in 2014/15 there was a 4.9% decrease from the previous year.*

The 2014 amendments implemented by the former LNP Government seemed to be making an impact, however they were not given a proper chance to be tested.

The issue is the existence of a cohort of arrogant repeat juvenile offenders in Queensland, and the measures implemented by Labor will not reduce this issue. Going soft and returning to failed policies of the past is not a way to ensure the law is enforced and justice is dispensed.

Again, we turn to the comments from President Michael Shanahan in the 2014/15 Children's Court Annual Report.

> *In 2014/15, ten percent of juvenile offenders were responsible for 45% of all proven offences. These figures demonstrate the comments I have made in previous Annual Reports that there are a number of persistent offenders who commit multiple offences.*

The Palaszczuk Labor Government has no plan to address this issue.

Recent comments from local police in Townsville attest to these figures.

It was reported in the Townsville Bulletin on 17 May 2016 from Townsville District Office, Superintendent Glenn Kachel that:

> *We have a hardcore group of recidivist offenders who we constantly deal with … 43 per cent of our top 100 property crime offenders are aged 11 to 16.*

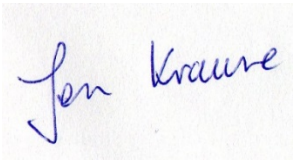
The committee's report on the 2015 Bill contains evidence from then Councillor Eddiehausen, a former police officer of 39 years with a great deal of experience in youth justice issues in Townsville, which indicated that youth justice conferencing was unlikely to make any significant difference to the rate of recidivism among serial youth offenders. Professor Dawes conceded in his evidence that, although he supported youth justice conferencing, it was not going to reduce the rate of recidivism because there was a "*tertiary group of people who continue to do crime and will lead to prison. There is no*

doubt about that. You cannot turn some of these young people around." Even supporters of the Government's Bill concede it will not address the issue the community is facing, to quote Superintendant Kachel, with "*a hardcore group of recidivist offenders who we constantly deal with.*" This Bill is only about the Labor Government winding back LNP policies before they have been given a proper period of operation and any rigorous review of outcomes.

There is an over-representation of young indigenous offenders in our court system and this issue has not been specifically addressed by any of the reforms implemented by Labor.

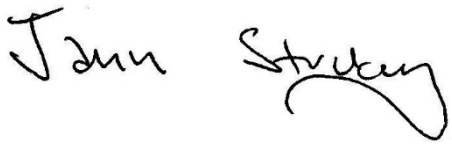
For the second consecutive youth justice bill, the Attorney-General has failed to mention this issue in her explanatory speech or explanatory notes.

There has been no proper review of the 2014 amendments and for that reason and the ones listed above, the non-government members do not agree that the bill be passed, in its current form, or with amendment.



Jon Krause MP
Member for Beaudesert

Michael Crandon MP
Member for Coomera



Jann Stuckey MP
Member for Currumbin