ChildProtectionPeak

Queensland Aboriginal and Torres Strait Islander Child Protection Peak Limited

Response to Youth Justice and Other Legislation Amendment Bill 2021

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Who we are

The Queensland Aboriginal and Torres Strait Islander Child Protection Peak (QATSICPP) welcomes the opportunity to provide a response to the Youth Justice and Other Legislation Amendment Bill 2021 (the Bill) on behalf of our members. Our membership includes 35 Aboriginal and Torres Strait Islander community controlled organisations across Queensland. At the community level, our members provide services, advice and support relating to the safety and wellbeing of Aboriginal and Torres Strait Islander children. Our members are committed to our overarching purpose and vision and dedicate their time to ensure that Aboriginal and Torres Strait Islander families, children and young people in Queensland are respected, given and have access to culturally safe and secure service provision.

Our Commitment

We welcome working with Queensland Government and other respected Aboriginal and Torres Strait Islander leaders and experts on youth justice and child wellbeing to strengthen youth justice responses that address underlying causes of offending and embed evidence-based, trauma-aware and culturally-informed responses. We are one of many Aboriginal and Torres Strait Islander representative groups (inclusive of our legal, health and education counterparts) that are ready and willing to co-create transformational change that empowers us to address the complex issues facing our families that impact on our wellbeing and the safety of the broader community.

We want to strengthen responses to our young peoples concerning trauma based behaviours that lead to impulsive and unsafe responses including unsafe driving and other criminal behaviour that place their lives and those of bystanders at risk. However, should the government move ahead with the changes proposed in the Bill without consideration of trauma informed, culturally and cognitively based evidence based responses, we know that our Aboriginal and Torres Strait Islander children will be significantly disproportionately impacted by the proposed measures.

Factors driving the criminalisation of our young people

One of the key findings of the landmark 1991 Royal Commission into Aboriginal Deaths in Custody (Vol. 1, p. 1.7.1) was that:

> The more fundamental causes of over-representation of Aboriginal people in custody are not to be found in the criminal justice system but those factors which bring Aboriginal people into conflict with the criminal justice system in the first place ... [and] the most significant contributing factor is the **disadvantaged and unequal position** in which Aboriginal people find themselves in society - **socially, economically and culturally.**

20 years on from this report, the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs published the report *Doing Time – Time for Doing* in which they presented an overview of Indigenous youth in the criminal justice system as being due to broader social and economic disadvantage faced

by many Indigenous people that has led to problems of domestic violence, alcohol and drug abuse, inadequate housing, poor health and school attendance, a lack of job skills and employment opportunities, and a loss of cultural knowledge which has disrupted traditional values and norms of appropriate social behaviour from being transferred from one generation to the next.[1] There is extensive research detailing the devastating impacts of colonisation that have resulted in intergenerational trauma, felt most acutely by our young people.

These issues have been present, increasing and analysed for decades now, without change to the fundamental response. Aboriginal and Torres Strait Islander evidence and leadership has repeatedly outlined the need for funding of Aboriginal-led solutions that address the range of underlying social and economic issues impacting on our young people and key drivers of their offending behaviour.

The Bill claims to amend the Youth Justice Act 1999 to respond to the *characteristics* of the offending behaviours of serious recidivist youth offenders and *strengthen* the youth justice bail framework. Whilst we support these objectives, we believe that any response requires an understanding of intergenerational trauma and its far reaching impacts on our young people including how they think, act and behave. Responses also need to show a genuine commitment to strengths based and evidence proven approaches that work in reducing youth offending.

In Queensland, our rate of 10-17 year olds on youth justice supervision has risen to 61% (in 2018-2019, up from 54.8% in 2015-16) despite only making up 8% of the general population. Worse yet, 71.1% of children living in detention are Aboriginal and Torres Strait Islander (a rate of 28 times the non-Indigenous rate).

The characteristics of these young people include:

- being impacted by intergenerational trauma, which has been proven to affect their neurological, psychological and even physical development [2]
- high rates of exposure to domestic violence, sexual abuse and neglect [3]
- high rates of intellectual disability and cognitive impairment, which research links to being more likely to have police contact, be charged, be imprisoned and receive longer sentences [4]
- frequent out-of-home care placements which disrupts or prevents access to treatment and support, resulting in placement breakdown and sometimes homelessness (and consequently extended periods of time in youth detention)[5]
- a high prevalence of diagnosable trauma related mental illness [6]
- high rates of substance misuse with research suggesting drug use and crime can both develop in response to a range of other factors such as poverty, trauma, mental health issues and a lack of engagement with education and employment [7]

Given these characteristics, it is not surprising then that research by the Australian Institute of Health and Welfare (2020) shows ***that 63.1% of Aboriginal and Torres Strait Islander children and young people under youth justice supervision in Queensland received a child protection service in the five years prior.***

Evidence demonstrates that these issues are best responded to through early intervention responses including codesigning responses with the insights from our Aboriginal and Torres Strait Islander leadership about the most

[1] Doing time – Time for doing Chapter 2
[2] van der Kolk, 2007

[3] Atkinson, 2018

[4] Victorian Legal Aid 2011 in Baldry et al 2015

[5] AIHW 2020; Sentencing Advisory Council, 2020
[6] NT Commission, Healing Foundation, 2013; NSW Law Reform Commission, 2010

[7] Goldstein 1985 in Forsythe and Adams, 2009

appropriated ways to address the underlying issues leading to criminal behaviour for young offenders and to support positive pathways that support building strong cultural identities for our children that are grounded in connection to family, community, and culture.

Any response to Aboriginal and Torres Strait Islander children should take into consideration their characteristics and our nation's obligation to uphold the rights of children and their families, and in Queensland to abide by the Human Rights Act 2019.

Our responses

1. We are opposed to the use of electronic monitoring devices as a breach of the Qld Human Rights Act 2019

It is QATSICPP's view is that the proposed measures in the Bill regarding electronic monitoring of represent a breach their human rights, will fail to improve community safety and are a response to offending behaviour that has a high risk of causing further harm to Aboriginal and Torres Strait Islander children and young people. It is our position that any response to Aboriginal and Torres Strait Islander children should take into consideration their characteristics and our nation's obligation to uphold the rights of children and their families, and in Queensland to abide by the Human Rights Act 2019. As identified in the 'Statement of Compatibility' accompanying the amendments, the Queensland Government itself recognises that the Bill would impact on rights protected under Queensland's Human Rights Act 2019, including

- The right to privacy
- Right to protection of families and children
- Right to freedom of movement
- Right freedom of association
- Cultural rights of Aboriginal and Torres Strait Islander peoples
- Right to equality and non-discrimination

While the Human Rights Act does not protect these rights absolutely, the government is only permitted to limit human rights in a way is that proportionate and reasonably justifiable (QHRC, 2019). This involves ensuring that legislative measures introduced aim to achieve a legitimate purpose, represent the least restrictive way of achieving that purpose, and that the measures introduced are an effective way of achieving it (QHRC, 2019). QATSICPP does not believe that the measures in the Bill meet these requirements, given the lack of evidence available that electronic monitoring improves community safety or lowers recidivism.

The Bill's Statement of Compatibility claims that "studies have shown electronic tracking may help to reduce rates of reoffending on bail', but QATSICPP is unable to find any evidence that electronic monitoring is effective when used with young offenders. In a meta-analysis of 18 studies found that 'electronic monitoring is shown to have little appreciative effect on recidivism rates' [8]There is also the question of whether these devices would work in Queensland's remote locations where a number of Aboriginal and Torres Strait Islander communities are situated.

Furthermore QATSICPP is seriously concerned that the measures being put forward in the Bill contradict a trauma-informed approach to responding to Aboriginal and Torres Strait Islander children, young people and families. As outlined in our introduction, Aboriginal and Torres Strait Islander children and young

[8] Belur et al, 2020

people in contact with the youth justice system are highly likely to have experienced a range of trauma and be living with a disability, mental illness, and impacts on cognition. Research suggests that due to a range of factors, including a lack of or insufficiently resourced culturally appropriate services, Aboriginal and Torres Strait Islander children with mental illness and disability do not have their needs met by community services, and are 'increasingly dealt with by systems of control rather than systems of care and support' [9]

QATSICPP is seriously concerned that the introduction of ankle bracelets will compound the trauma our children involved with the Youth Justice system have experienced. There is a range of evidence to suggest that contact with the criminal justice system can result in further traumatisation and social isolation for Aboriginal and Torres Strait Islander people. [10] Highly visible ankle bracelets which not only resemble colonial shackles but which are commonly understood to be used for dangerous sex offenders have the obvious potential for creating stigma and shame for children subject to their use. These devices represent a traumatic symbol for older Aboriginal and Torres Strait Islander community members of past colonial practices used to subjugate our people who are likely to be sharing households with the children affected.

It is difficult to see how shackling our youth will address the complex social issues and systems failures that are evident in the characteristics of our children committing offences. There are less restrictive ways to achieve the objective of reducing recidivism as outlined in section 3 below.

2. Any decisions regarding bail for Aboriginal and Torres Strait Islander young people must protect their cultural rights as outlined in the Qld Human Rights Act and the national Aboriginal and Torres Strait Islander Child Placement Principle embedded in the Qld Child Protection Act

QATSCIPP is concerned by the amendments pertaining to bail as they appear to be written without cultural consideration for the large number of Aboriginal and Torres Strait Islander this will apply to. These amendments are:

- Explicitly permitting the court or a police officer to take into consideration, when determining whether to grant bail, whether a parent, guardian or other person has indicated a willingness to do one or more of the following: support the young person to comply with their bail conditions, advise of any changes in circumstances that may impact the offender's ability to comply with the bail conditions, or advise of any breaches of bail

- Creating a limited presumption against bail, requiring certain young offenders charged with 'prescribed indictable offences' to 'show cause' why bail should be granted

Specifically, it is concerning that the proposed amendments create a presumption against bail, sit solely at the discretion of police and court without requirements for family participation in decision making and set unrealistic

[9] Baldry et al 2015:19

[10] Healing Foundation, 2016; Commonwealth of Australia, Federal Senate Inquiry into Aboriginal and Torres Strait Islander experience of law enforcement and justice services (2016)

expectations for Aboriginal and Torres Strait Islander families to meet conditions of bail, which will predictably result in more Aboriginal and Torres Strait Islander children being detained by the state.

Two of the three factors court or police will require of a parent, guardian or other person place the individual in a position of needing to notify authorities regarding a young person, without considering the risk to family for doing so. Such risks include the potential for creating divide within families, contributing to domestic and family violence including the use of intimidation and coercive control, and implications for failing to uphold this obligation. The decision appears to be solely at the discretion of the court or police, without the safeguards of family participation in decision making.

This contravenes the principles and intent of Family Led Decision Making currently being trialled in Queensland youth justice and having long since been evidenced as a culturally appropriate justice response internationally and in other parts of Australia, as well as for child protection decisions.

One of the foundations of Family Led Decision Making in Australia is upholding all five elements of the national *Aboriginal and Torres Strait Islander Child Placement Principle* (endorsed at the federal level in 1984 and embedded in section 5C of the Queensland Child Protection Act). The five elements include prevention, partnership, participation, placement and connection. As with child protection decision making, judicial decisions regarding offending must uphold the rights of Aboriginal and Torres Strait Islander children to their cultural identity as well as their right to participate and have their family participate in decisions.

This is reinforced by the United Nations Committee on the rights of the child which within in its general comment noted:

> *"When state authorities...seek to assess the best interests of an indigenous child, they should consider the cultural rights of the indigenous child and his or her need to exercise such rights collectively with members of their group...the indigenous community should be consulted and given an opportunity to participate in the process on how the best interests of indigenous children in general can be decided in a culturally sensitive way."*

It is unclear what timeframes will apply in finding a parent, guardian or other person willing to put themselves in this position, or what approach will be taken. At risk is the young person's connection to family as well as family and community wellbeing due to adding additional trauma and distress by criminalising children who have already suffered separation from family or who's family are unable to comply for a range of reasons.

Many young people with severe mental disabilities in juvenile detention are there because of their disability and related behavioural issues resulting in multiple placements with carers that are not able to provide adequate support which places these young people at higher risk of police interaction.

Similarly, enforcing punitive responses to issues of poverty which many families will be impacted by in relation to their ability to uphold the proposed bail arrangements does not uphold the Qld Human Rights Act protection of families as the fundamental group unit in society or the cultural rights specific to Aboriginal and Torres Strait Islander children and families. In such cases, situations that result from intergenerational trauma such as homelessness, overcrowding and living in poverty will impact on family's ability to provide a safe place for a child. There is a risk these bail amendments will punish the child regardless of their circumstance not being a failure on the child or the child's family, but of the service system that is meant to protect them equally to protecting non-offending members of the public.

It is clear that police and courts will face difficulties in engaging parents and family members with such bail conditions if processes are not culturally safe and respectful, which requires development by Aboriginal people themselves.

Drawing upon a range of national and international evidence, the Australian Institute of Criminology's National Crime Prevention Framework states that effective interventions "should be Indigenous-specific where possible,

involve Indigenous communities in the program's design and delivery, be culturally appropriate and foster a genuine sense of community ownership and accountability".[11]

Aboriginal young offenders will be disadvantaged in being required to 'show cause' for bail, as researched conducted by Griffith University found that that few Indigenous youth received legal advice in their experiences with the justice system. [12]Further to this, evidence shows that the Aboriginal and Torres Strait Islander experience of law enforcement and justice services is that a lack of culturally appropriate services present a barrier to accessing legal services[13].In its submission to the Federal Senate Inquiry on Aboriginal and Torres Strait Islander experience of law enforcement and justice services (2016), the National Aboriginal and Torres Strait Islander Legal Service observed across Australia, an increasingly rigid approach to bail which has had a particularly discriminatory effect on Aboriginal and Torres Strait Islander young people, causing an increase in the number of Aboriginal and Torres Strait Islander young people on remand.

It should also be noted that the measures proposed in the Bill appear to contradict one of the Four Key pillars suggested by the Aktinson Report to be adopted for Youth Justice policy in Queensland; namely – Keep Kids out of Custody.

There is evidence of amendments to justice systems to fit the cultural values and protocols of Indigenous people both nationally and internationally. Such models include the Murri Court in Queensland, Maranguka Justice Reinvestment in NSW, the Yiriman Diversionary Project in Western Australia, the Youth Justice Family Led Decision making trail in Queensland and the Iwi panels in New Zealand.[14]

While some researchers found Indigenous court models provide a culturally appropriate approach to sentencing because they involve the family and the community, it was also found that if they are only an adaption of Western justice models and do not address the underlying trauma associated with offending they will not effectively impact recidivism.[15]

In his review of the Queensland juvenile justice system, Atkinson (2018) found sound evidence to support cultural healing approaches from both Australia and Canada. The Atkinson report recommended cultural healing approaches to be explored in conjunction with On Country service models as alternative justice programs for Aboriginal and Torres Strait Islander children at a variety of points in the system, including for children sentenced to detention, those transitioning out of detention and those on community supervision orders.

Atkinson (2018) outlines some practical ways in which culture could be better incorporated into decision making in the youth justice system including; more recognition of Aboriginal and Torres Strait Islander family structures and child rearing practices in bail decision making and cultural programs in detention settings that focus on the strengthening culture connections.

3.Our commitment to community safety

It is QATSICPP's view that there are more effective and less harmful approaches than the proposed amendments in the Bill we have discussed above; these alternative approaches involve enabling the Aboriginal and Torres Strait Islander community to lead youth justice interventions and solutions, achieving better resourced and more effective ways of meeting our children's needs than through supervision and incarceration.

[11] AIC 2012

[12] Allard et al, 2010

[13] Commonwealth of Australia, Federal Senate Inquiry into Aboriginal and Torres Strait Islander experience of law enforcement and justice services (2016)

[14] Morgan and Lewis, 2010; KPMG 2018; Palmer, 2013; Akroyd et al 2016

[15] Healing Foundation, 2016.

Aboriginal and Torres Strait Islander peoples have been raising and nurturing their children in safe environments for over 60 thousands of years, a tradition which survived to present day, despite the impacts of colonisation.

Aboriginal and Torres Strait Islander leaders, organisations and communities have been calling out for years for more decision making responsibility and more resources to address the challenges their communities face and heal our people from the intergenerational trauma they experience.

Evidence supports this call, with research suggesting that youth justice services better suited to the needs of Aboriginal and Torres Strait Islander people can be shaped through ensuring Indigenous communities, leaders and young people are given sufficient decision-making input on the development of legislation, policies and services for this cohort.[16] Yet in terms of diversionary practices, the Healing Foundation (2016) found that across Australia there was "little evidence of criminal justice diversions that recognise and seek to address the trauma associated with the behaviours that lead to Indigenous incarceration and a continued reliance on incarceration as a response".

A variety of information currently available also suggests of a lack of correlation between the growing population of Aboriginal and Torres Strait Islander children and young people in the Queensland juvenile justice system and the community more broadly, and investment in services particularly targeted at addressing the needs of this cohort.

2016 Census data reveals that:

- From 2006 to 2016 the population of Aboriginal and Torres Strait Islander peoples grew from 3.3 percent of the state's population to 4 percent, and that First Nations children and young people made up 7.7 percent of the state's total population children and young people.
- In 2016 children and young people made up 46 in every 100 Aboriginal and Torres Strait Islander peoples in Queensland.[17]

Despite their relatively high proportion of Queensland's child and young people, and the previously stated array of trauma related challenges faced by this cohort, Aboriginal and Torres Strait Islander children and young people are provided youth services primarily by non-Indigenous organisations, with a very small number of community run Aboriginal and Torres Strait Islander services providing youth support.

Evidence on youth service funding more generally in Queensland points to a lack of resourcing, with the 2017 YANQ Sector survey finding a sector under strain due to lack of resourcing and funding constraints. According to the Youth Affairs Network of Queensland (YANQ) 2018/2019 budget submission:

- *There will need to be substantial reinvestment in young Queenslanders to offset cuts made in the past 6 years if we are to halt, let alone reverse concerning trends such as the increase in young people (especially young Aboriginal and Torres Strait Islanders) being kept in care or detention, and the number of young people who have disengaged from education and training and who are unemployed. The youth portfolio is the only portfolio that not only has had no increase in funding but actually has sustained significant cuts in recent years.*[18]

The proposed amendments to the Youth Justice Act miss an opportunity to embed in legislation a commitment to:

- **Trauma informed responses to children and young people and to youth offending**.

[16] Atkinson 2019, ALRC, 2018, Higgins and Davis, 2014
[17] ABS 2016
[18] YANQ,2018

In its far reaching report into cross over between child protection and youth justice, Cross Over Kids, the Victorian Sentencing Advisory Council recommended legislative principles to better reflect and address the unique circumstances of trauma as primary driver for Aboriginal and Torres Strait Islander's children and young people contact with the justice system.[19]

- **Enshrining a role for the Aboriginal and Torres Strait Islander elders and community in the administration of youth justice in Queensland**.

  Research shows that western measures to the issue have proven to be ineffective. A number of government inquires at a state and national level over the past decade have concluded that effective solutions to preventing or reducing the recidivism of First Nations children and young people in the youth justice system need to be developed and delivered locally, preferably by, or at least in conjunction with, the local Aboriginal and Torres Strait Islander community[20]

There are also a range of measures that QATSICPP recommend be introduced to create a positive impact for Aboriginal and Torres Strait Islander children and young people:

- **Implementation of the currently trialled Youth Justice Family Led Decision Making pilot**.

  An evaluation of this program by Inside Policy[21] found the program's delivery by Aboriginal controlled organisations, access to cultural advisors, engagement with cultural programs and empowerment in decision making were all considered enabling factors for cultural safety and healing (Lisa do we have a ref). Furthermore, models such as NZ's Iwi Panels should be examined for their applicability to the Queensland setting; An iwi panel is a youth justice process at which a panel of community members, an offender, victim and their family discuss the offence committed, address harm caused and develop a plan that addresses factors related to the offending and help get the young person on a more positive life trajectory. Evaluations of the program shown they are effective in meeting their objectives.[22]

- **Implement a range of preventative initiatives that address the core factors for youth offending and increase safety for the whole community.**

  This includes increasing investment in Aboriginal and Torres Strait Islander healing, family wellbeing, youth leadership, and youth services. The Lighthouse model operated by the Townsville Aboriginal and Islander Health Service (TAIHS) is an example of an innovative, community led approach to youth offending that has been successful in engaging children and young people.[23]

- **Investigate the implementation of a Justice Reinvestment approach to juvenile justice issues in Queensland**.

  Key features of the Justice reinvestment model include its focus on early intervention and community-led, place-based approaches, which has been identified as particular relevant in terms of reducing the over-imprisonment of Aboriginal and Torres Strait Islander peoples[24]
  An KPMG impact assessment on the Maranguka Justice Reinvestment project in Bourke found that the project had resulted in significant improvements in community safety, including a 38 percent reduction across the top five juvenile offence categories[25].

[19] Sentencing Advisory Council, 2020
[20] ALRC, 2018; Royal Commission into the Protection and Detention of Children in the Northern Territory, 2017; Atkinson, 2018
[21] Inside Policy, 2020
[22] https://www.justice.govt.nz/assets/Documents/Publications/iwi-panels-evaluation-report.pdf and https://www.tandfonline.com/doi/full/10.1080/1177083X.2019.1642921?scroll=top&needAccess=true

[23] O'Reilly et al, 2019
[24] ALRC, 2018; Dodson, 1996.
[25] KPMG, 2018

KPMG estimates that the Maranguka Justice Reinvestment project's operation in 2017 had a financial impact of around $3.1 million in savings to the justice system and benefits to the broader local economy; this amount was five times the amount of money invested in the program in the same year.[26]

In QLD communities, a project initiated in Cherbourg in April 2017 by the Department of Justice and Attorney General (DJAG) (Youth Justice) represents the first time there has been an attempt to implement all stages of JR model in QLD. A community consultation report found that nearly three quarters of community members indicated support for introduction of justice reinvestment in Cherbourg; key to the model's appeal was its focus on improving the lives of younger community members and the benefit it would bring to the community as a whole[27]

There were no special provisions outlined for how Aboriginal and Torres Strait Islander leadership would be involved to ensure that a cultural lens is applied to the measures outlined in the Bill.

Thus, to ensure appropriate safeguards are implemented to protect against this we recommend that:

A *statutory report should be delivered by Queensland Family and Child Commission annually on departmental implementation of these amendments. This should include provision by the Department of Children, Youth Justice and Multicultural affairs for independent access to departmental data. To ensure objectivity and accountability this report should be presented to directly to the Parliamentary Speaker and tabled in parliament.*

It is clear that without sufficient investment in culturally sound, community based responses to intergenerational trauma impacts Aboriginal and Torres Strait Islander children and young people are failing their way into youth justice as their mental health and trauma needs escalate due limited culturally appropriate early interventions available to them, their families and communities.

Conclusion

It is unjust that the devastating outcomes of colonisation and the resulting disconnection, trauma and disadvantage for on Aboriginal and Torres Strait Islander peoples as evidenced by poor social and economic outcomes is made the responsibility of individual children and families through punitive judicial responses.

Such responses have led to Aboriginal and Torres Strait Islander people experience significant levels of ongoing trauma that has a cumulative effect across communities. Forced removal of children from their families, culture and country continues to be a significant driver of this, yet we still do not have a sufficiently resourced service system that is both culturally safe and accessible for our people to get the support and healing they need to break the cycle of trauma.

We need a greater focus on healing and preventing further trauma, not the introduction of measures that risk further disconnection, grief and loss result in retraumatization. In this context, the measures in the Bill are not consistent with the Queensland Government commitments in the Our Way Strategy to work in partnership with Aboriginal and Torres Strait Islander leadership to create a community where our children will thrive not survive. The continued failure to fund effectively much of the evidence based responses we have outlined in this submission is equally at fault for the continued challenges in behaviour our children and young people face.

[26] KPMG, 2018
[27] Allison, 2018

Unfortunately, the bill's main strategies pander to the broader community call for a quick fix, lack evidence and pay little regard for the rights of Aboriginal and Torres Strait Islander people generally and children specifically. This is a continued policy failure in the area of youth justice nationally.

In this submission we have outlined a number of measures that will provide healing for families, support Aboriginal and Torres Strait Islander services to develop our own responses and ultimately create strong families and communities for our children to be raised within culture.

There is an urgent need to provide systemic reform across education, employment, health, mental health, and justice to address these factors and uphold Aboriginal and Torres Strait Islander children and young peoples' human rights.

Contact Details

Please contact Mr Garth Morgan, CEO, about this submission on 0411 983 558 or via email garthmorgan@gatsicpp.com.au

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