Territory Families

Youth Justice and Related Legislation Amendment Bill 2019

Territory Families would like to take this opportunity to advise the Committee that based on information that has arisen during the scrutiny process, we are currently considering amending the Bill to:

1. replace *'and'* with *'or'* in clause 9, proposed subsection 8A(1)(a) of the *Bail Act 1982,* so that the presumption in favour of bail applies unless the offence the youth has been accused of, is a prescribed offence, <u>or</u> the youth presents an ongoing and serious risk to the community;
2. amend clause 11, proposed subsection 24A(2) of the *Bail Act 1982*, so that an authorised member '*may'* and a court '*must'*, to the extent practicable, take into consideration the list of criteria to be considered in bail applications for youth; and
3. remove clause 25, and not amending section 16 of the *Youth Justice Act 2005;* and
4. amend clause 33, the proposed sections 49 and 50 of the *Youth Justice Act (2005)* with the intent to align the amendments with the *Open Courts and Other Acts Amendment Act 2019 (Vic)* to enable a reporter (member of the media) to be permitted to attend closed Court proceedings.

1. <u>Amendment of the Bail Act 1982</u>

Proposed section 37B provides that the offence of breach of bail conditions will no longer apply to young people. However, 15 submitters expressed significant concern that the Bill does not also repeal the offence of breach of bail undertaking. Given that the Government supported Royal Commission Recommendation 25.19(4) which called for children and young people to be excluded from the operation of section 37B in its entirety, can you please clarify for the Committee:

a. ***What consideration was given to the repeal of the offence of breach of bail undertaking in the development of the Bill****?*

Repealing the offence of breach of bail undertaking was given due consideration as part of the amendments to the *Bail Act 1972.* Members of the Legislative Amendment Advisory Committee external to Government consistently raised their preference to remove breach of bail undertaking as an offence.

b. On what grounds was it determined not to repeal this offence?

On balance, it was considered that consequences for failing to appear at court needed to remain as part of the current system.

c. How would it impact on the operation of the proposed legislation if this offence was repealed?

Repealing this offence in the absence of any new policy response would create significant operational challenges for Police and courts to effectively manage young people through the current youth justice system.

2. Amendment of the Bail Regulations 1983

With regards to proposed regulation 2A, the Committee understands that the list of 'prescribed offences' includes all relevant offences listed in Schedules 2 and 3 of the Sentencing Act 1995 (NT) which carry a maximum penalty of ten or more years that can apply to a youth.

a. ***The North Australian Aboriginal Justice Agency expressed the view that, to provide certainty and continuity in the law, it would be preferable if these offences were legislated in the Bail Act rather than the Bail Regulations. Can you clarify for the Committee why it was determined to include the 'prescribed offences' in the Regulations rather than the Act?***

This enables greater flexibility to reflect amendments across the statute books and for the prescribed offences to remain current. For example as the *Sentencing Act* is amended the Bail Regulations can be more easily updated. The general approach to the structure of legislation means that legal policy requirements are included in an Act, with more detail and guidance about how the legal policy or requirement is implemented contained in Regulations.

b. ***Danila Dilba Health Service and the Northern Territory Legal Aid Commission questioned whether it was appropriate to include a number of the offences noting that depending on the circumstances of the defendant and the alleged offence, it is not necessarily probable that a sentence of detention would be imposed on conviction. In determining which offences should be 'prescribed', what consideration was given to the probability that a sentence of detention would be imposed if convicted?***

The probability of a sentence of detention is currently a factor for consideration in a bail application under section 24(1)(iii) of the *Bail Act 1982*. This section will still apply to children and young people.

c. ***The Committee notes that while section 130(3B) relating to sexual intercourse or gross indecency by a provider of services to a mentally ill or handicapped child under 10 years has been prescribed, section 130(3A) which relates to the same offence regarding a person under the age of 16 years is not included. Given that this offence carries a penalty of 20 years imprisonment, why is it not included as a 'prescribed offence'?***

There is complexity in these offences because they relate to a disability service provider. If a young person were to commit these offences they would need to be employed as a service provider. Based on the submissions received we are reviewing the list of 'prescribed offences' and intend to include section 130(3A) as a prescribed offence.

3. Amendment of Police Administration Act 1978

Royal Commission recommendation 25.03(2) proposed that provision be made that children and young people may be held in custody without charge for no longer than four hours and any extension up to a further four hours may only be granted by a Judge. Considerable concern was raised by 18 submitters regarding the proposed amendments to section 137, 'Time for bringing person before court generally,' noting that it fails to implement this recommendation and is out of step with equivalent provisions in all other Australian jurisdictions.

a. Can you clarify why the Bill fails to comply with Royal Commission recommendation 25.03(2)

The *Police Administration Act 1978* currently contains no specified limits on the time a young person can spend in custody whereas the current Bill introduces defined time limits that implement the intent of this recommendation. The proposed amendment has been workshopped at length and takes into account the unique operational realities of the Northern Territory.

b. As drafted, it is suggested that section 137 also fails to support Principle 4(c) of the Youth Justice Act 2005, Article 37(b) of the Convention of the Rights of the Child, Rule 10.2 of the Beijing Rules, and Article 9(3) of the International Covenant on Civil and Political Rights. What justification is there for the Bill's failure to support these provisions?

This Bill does not fail to meet international standards. This Bill improves the current youth justice system with respect to those standards. This Bill introduces time limits and external accountability through judicial oversight in relation to the time young people are able to be held in custody.

c. Can you clarify why, in contrast to equivalent legislation in all other *jurisdictions* with the exception of Victoria and the ACT, the Bill fails to specify an upper limit on the period of time a youth may be held in custody without charge?

This Bill proposes judicial oversight of the time a young person may spend in police custody. Any decision to extend the time a young person may be held in custody beyond 24 hours will only be made by a Judge. This is appropriate given the current and unique service delivery complexities in the Northern Territory compared to other jurisdictions such as Victoria and ACT.

d. In other jurisdictions, extensions beyond the initial period, which range from 2 to 8 hours, can typically only be granted by judicial officers. Why does the Bill authorise police to detain children and young people for up to 24 hours without judicial oversight and approval?

As above, and in addition noting that other jurisdictions with upper time limits include 'carve out periods' specifying when the time limit does not apply.

e. The Children's Commissioner noted that there is potential for a conflict of interest and insufficient oversight or accountability if those responsible for investigating the alleged offence and those responsible for approving continued custody are the same person, which is likely to commonly be the case if Senior Sergeants are able to approve the continued custody of young people. In the absence of judicial oversight and approval, was any consideration given to providing that extensions of time must be reviewed and may only be approved by a commissioned officer as is the case in Tasmania?

Due consideration was given to the appropriate rank of the police officer reviewing the decision to keep a young person in custody for the purpose of an investigation without charge. The Bill will significantly increase police accountability and oversight through the creation of the written decision every four hours.

f. How would it impact on the operation of the proposed legislation if the Bill was amended to provide that extensions of time require oversight and approval by judicial officers or, where a judicial officer is unavailable, by a commissioned officer such as the relevant Superintendent?

This would directly impact on Police and judicial resources and could create inconsistency and ambiguity.

4. Amendments to Youth Justice Act 2005

While generally supportive of amendments to section 15, 'Explanations by police officers', submissions 2, 3, 4 and 17 suggested that the Bill does not go far enough to ensure young people are provided access to an interpreter.

a. To mitigate the risk that a Police Officer incorrectly determines whether a youth requires an interpreter, what consideration was given to inclusion of a provision requiring that Police Officers should always ask the child or young person if they want an interpreter rather than leaving it up to the Police Officer to make the decision as to the youth's apparent ability to communicate in English?

This provision has been drafted so that Police are responsible for providing an interpreter when a young person does not have sufficient English. It does not prevent a Police officer from asking a young person whether they want or need an interpreter. Stipulating in legislation what question a Police Officer must ask a youth in every occasion would introduce a level of procedural compliance that is not necessary. Furthermore it could create opportunity for legal challenge of non-compliance with procedural matters and therefore creates unnecessary administrative burden.

The proposed amendments encourage Police to make further enquiries if they have any doubt about a young person's level of understanding, which is guided by the case of *R v Anunga* (1976) 11 ALR 412 (The Anunga Rules).

b. Where a youth indicates that they want an interpreter, or the Police Officer determines that an interpreter is required, why does the Bill not require that a Police Officer must provide an interpreter rather than merely requiring that they make reasonable efforts to obtain one?

Including reference to the use of interpreters by Police is a new and important improvement in the legislation. The wording for this provision was developed in consultation with appropriate agencies to make sure that it would work in practice. For example this takes into account the availability of interpreters and also recognises the significant progress of Government to record explanations of police cautions in languages that can be played to people in custody.

5. Proposed section 18 provides that before interviewing a youth in respect of an offence a Police Officer must inform the youth of their ability to access legal advice and assistance. Danila Dilba Health Service and the Northern Territory Legal Aid Commission raised concern that this provision fails to fully implement Royal Commission recommendation 25.06(1) which was supported by the Government.

a. Why does the Bill not provide that a youth may not be interviewed unless they have 'sought and obtained legal advice or assistance', rather than merely requiring that they be informed of their rights in this regard?

Clause 26, section 18(1A(b) provides that before interviewing a youth a Police Officer must inform the youth of their ability to access legal advice and representation, and provide them with access to legal advice and representation. Proposed sub-section (1B) provides that if a youth exercises their right to silence, they must not be interviewed. This means that Police can proceed to interview a young person after they have been provided access to legal assistance.

6. Proposed section 27(1) provides that if a youth is charged with an offence and is not released from custody, they must be brought before the Court as soon as practicable and within 24 hours after the charge, or on the next business day after the charge. However, proposed subsection (6) further provides that upon application, a Judge may grant an extension of time if satisfied that circumstances beyond the control of the person in whose custody the youth is being held prevent them from bringing the youth before Court in accordance with subsection (1).

Taken together with proposed section 137 of the *Police Administration Act 1978* (NT), it has been suggested to the Committee that the Bill effectively erodes existing provisions which require that a young person must be brought before the Court within 7 days after arrest and if they are not they must be immediately released.

a. Given the above, can you clarify for the Committee why the Bill does not specify a limit on the extension of time that can be granted by a Judge?

This level of oversight does not currently exist. The proposed amendment introduces a new limit to holding a young person in custody after charge to "as soon as practicable and within 24 hours or the next business day." The extension of time may only be granted by a Judge and the "24 hour or the next business day" test would be a relevant consideration by the Judge in allowing any extension of time.

b. What impact would it have on the operation of the proposed legislation if the Bill was amended to specify a limit on the extension of time that can be granted by a Judge?

The operational impact of proposing an upper time limit could place impracticable limits on the circumstances outside the control of the Police, as listed in the Bill. The Bill in its current form has been designed to achieve operational requirements that allows some flexibility around complex circumstances that cannot be prescribed in legislation.

7. While proposed section 49 gives effect to Royal Commission recommendation 25.25 which called for proceedings under the *Youth Justice Act 2005* (NT) to be heard in closed court, concern has been raised regarding the extent to which the proposed amendment supports accountability and transparency of the youth justice system.

a. In developing the Bill, what consideration was given to equivalent provisions elsewhere in Australia?

The provisions in this Bill around closed court proceedings have been developed after consideration of the provisions in all other Australian jurisdictions. The provisions to close youth justice proceedings are similar to section 24 of the *Youth Court Act 1993* (South

Australia). The provision in the Bill relating to publication of information that could identify a youth are modelled on section 534 of the *Children, youth and Families Act 2005* (Victoria).

b. While section 49(3) provides that any person not listed in section 49(2) can make application to the Court to be present for proceedings, the Bill does not provide any detail as to the process for making such an application. Can you clarify how it is anticipated this provision will be operationalised?

These processes will be developed through practice directions or forms created by the Court. There are current processes for seeking leave to be present in closed courts, like the Family Matters Court, already in use in the Northern Territory. This currently involves an oral application to the Judge.

c. It has been suggested that it is onerous for media representatives to make application on each occasion to be present in youth court proceedings. Was any consideration given to the inclusion of a specific provision permitting an accredited representative of the mass media to be present in the courtroom similar to that provided for in NSW, the ACT, QLD, and SA where youth justice proceedings are also closed to the public? If not, why

Yes, this was considered. Territory Families can advise that we have been asked to prepare possible amendments to the Bill to enable an accredited member of the press to be listed in the proposed subsection 49(2) without the need to seek leave to be present.

8. The Committee understands that proposed section 50, 'Restriction of publication', is modelled on section 534 of the *Children, Youth and Families Act 2005* (Vic). While all submissions supported implementation of a statutory non-publication regime regarding information that may lead to the identification of a youth that is brought before Court, a number of concerns were raised with the drafting of subsection 50(1) which provides that it is an offence to publish information which is likely to lead to the identification of (a) the particular venue of the Court in which the proceeding was heard; (b) the youth or other party to the proceeding; or (c) a witness in the proceeding.

a. Submissions 1, 7, 13, 19 and 21 expressed the view that subsection 50(1)(a) should be removed from the Bill, noting that it is unnecessary, not in the public interest and was not recommended by the Royal Commission. Can you clarify for the Committee why this provision was included in the Bill?

This provision is modelled on Victorian legislation stated above. The provision was included to minimise the likelihood of young people being identified. The Northern Territory has a small population and in particular where Youth Court proceedings are held in remote communities the identification of a court venue can inadvertently lead to the identification of a young person.

b. The Human Rights Law Centre expressed the view that subsections 50(1)(b) and (c) may be too broad. Given that the Royal Commission was concerned with protecting the identity of children and young people involved in court proceedings, can you explain why these provisions are not limited to vulnerable persons such as 'victim' and/or 'child' or 'young person' as is the case in equivalent legislation elsewhere in Australia?

This provision is modelled on Victorian legislation and subsections 50(1)(b) and (c) will help protect the privacy of young people and witnesses in proceedings. The Court can allow information to be published if the youth consents to it, or if there is a safety concern.

9. Subsection 50(7) replicates section 534(4) of the Victorian legislation and provides a list of particulars that are deemed likely to lead to the identification of a youth. Submissions 1 and 7 expressed the view that this list is overly prescriptive and may prevent publication of information which would not be objectively likely to lead to the identification of a person.

The Committee notes that on 2 May, the Victorian Parliament passed the Open Courts and Other Acts Amendment Bill 2019 which amends section 534(4). Acknowledging that this section was broader than analogous provisions in other jurisdictions and unduly limited reporting on cases by preventing the publication of matters which may not actually identify a person in a particular case, section 534(4) has been amended to narrow the list of matters deemed likely to lead to the identification of a youth to include: the name of the person or their relatives and the name, address, and locality of their school, home or place of work or training. If the young person is Aboriginal a relative is defined to include a member of the person's Aboriginal community.

a. In light of this recent amendment, and noting that the Bill is now out of step with equivalent legislation elsewhere in Australia, can you clarify whether section 50(7) will be reviewed to bring it into line with the Victorian legislation as amended?

Yes. Territory Families has been asked to provide advice to Government on amending the current Bill to be consistent with the *Open Courts and Other Acts Amendment Act 2019* (Vic).

b. What impact would it have on the operation of the proposed legislation if the Bill was amended to more closely reflect equivalent provisions elsewhere in Australia?

These provisions intend to protect the privacy and identity of children and young people in the context of the Northern Territory. The need to include the prohibition of identifying particulars of a young person are important in the context of the Northern Territory which is a smaller jurisdiction. The *Open Courts and Other Acts Amendment Act 2019* (Vic) is being considered to determine whether and how the proposed provisions can achieve these outcomes.

10. The Committee has been advised that since the Royal Commission, the Northern Territory Legal Aid Commission and other relevant legal service providers have been denied access to unredacted copies of daily court lists which has impeded delivery of effective services to parties in child protection proceedings under the *Care and Protection of Children Act 2007* (NT).

a. Given that it would be a concern if the proposed amendments to section 50 were to unintentionally lead to the same result in youth justice proceedings, was any consideration given to the inclusion of a provision expressly permitting identifying information in relation to Youth Justice Court matters to be provided to legal service providers? If not, why?

It is not the intention of the Bill to restrict information currently provided to legal representatives to enable young people to access legal assistance.

11. 19 of the submissions received by the Committee expressed significant concern and disappointment that the Bill does not implement Royal Commission recommendation 27.01 regarding raising the age of criminal responsibility. While beyond the scope of the Bill as introduced, the Committee understands that the initial draft of the Bill did include provisions to give effect to this recommendation. The Committee also heard that detailed information was compiled to ascertain that sufficient programs and services are available to respond to children under 12 years of age who come into contact with police, in order to establish that these reforms could be operationalised.

a. Can you clarify for the Committee why it was decided to omit provisions regarding raising the age of criminal responsibility from the Bill?

This Bill is part of a staged approach to reforming the youth justice and child protection systems. This Bill, and the process to develop it, has involved detailed consideration of the operational environment to support effective implementation of the legislative changes. It was determined that the change to age limits is not achievable at this time and needs to be considered as part of the overall system reform for children which will be reflected through the creation of the Single Act for Children by 2021.

b. What is the expected timeframe for the introduction of these provisions?

In accordance with Government's commitments in 'Safe, Thriving and Connected' the Single Act for children is planned to be developed by 2021. The Single Act is intended to reflect the significant reforms implemented and still in design throughout the child protection, out-of-home care and youth justice systems.

12. Amendment of Youth Justice Regulations 2006

Royal Commission recommendation 25.11 provided that references to offences against Parts (V) and (VI) of the *Traffic Act 1987* (NT) be reviewed with a view to enabling children and young people charged with offences under these provisions to be eligible for diversion under section 39 of the *Youth Justice Act 2005* (NT). However, pursuant to Regulation 3A(g), the Committee notes that the majority of offences against these Parts have been classified as 'prescribed offences' for the purposes of section 39. To give full effect to the Royal Commission's recommendation, a number of submissions have called for all Traffic Offences to be removed from the list of 'prescribed offences'.

a. On what basis was it determined which Traffic Act offences should or should not be classified as 'prescribed offences'?

Currently all offences in the *Traffic Act 1987* are not eligible for diversion. This produces significant inconsistencies and impedes good outcomes. The offences that have been included in the 'prescribed offences' are the more serious offences in the *Traffic Act 1987.*