North Australian Aboriginal Justice Agency

Submission to the Social Policy Scrutiny Committee

YOUTH JUSTICE AND RELATED LEGISLATION AMENDMENT BILL 2019

10 April 2019

1. Introduction

Thankyou for the opportunity for the North Australian Aboriginal Justice Agency Ltd ('NAAJA') to comment on the Youth Justice and Related Legislation Amendment Bill 2019 ('the Bill').

2. About NAAJA

NAAJA provides high quality, culturally appropriate legal aid services to Aboriginal and Torres Strait Islander people throughout the Northern Territory. NAAJA and its earlier bodies have been advocating for the rights of Aboriginal people in the Northern Territory since 1974.

NAAJA is an Aboriginal organisation governed by a Board that is representative of the Northern Territory Aboriginal and Torres Strait Islander community including a strong focus and representation from regional and remote areas.

NAAJA serves a positive role contributing to Aboriginal people's legal rights and access to justice. NAAJA travels to remote communities across the Northern Territory to provide legal representation for adults and children, deliver community legal education and work with local elder groups.

3. NAAJA's services for Youth

NAAJA has well-recognised expertise in the legal representation of Aboriginal children and young people in the Northern Territory. NAAJA played a major role in the advocacy, evidence and support and submissions to the Royal Commission into Child Protection and Detention Systems of the Northern Territory ('Royal Commission') that underpins the reforms of the Bill.

NAAJA has a multi-disciplinary team that provides legal and support services for Aboriginal youth by lawyers, client service officers, social workers and caseworkers. NAAJA provides intensive casework support for Aboriginal youth during the court processes, whilst in detention and post release through care support programs.

Post the Royal Commission has seen increasing numbers of Aboriginal youth in Detention Centres, in 2018 and 2019 reaching to one hundred percent of children. During this period, there has been increasing numbers in Central Australia of Aboriginal youth involved in the criminal justice system.

Our legal service has raised issues and complaints on behalf of Aboriginal youth concerning their treatment and conditions in Police custody, restriction of access to youth in Police custody, individual and systemic issues in relation to Bail, curfew checks and policing practices.

NAAJA has consulted internally as much with legal practitioners and Aboriginal staff working directly with Aboriginal youth and from perspectives across the Northern Territory that has led to this submission.

4. Youth Justice and related Legislation Amendment Bill 2019

The Youth Justice and related Legislation Amendment Bill 2019 is an opportunity for the Legislative Assembly to consider important and significant legislative reforms for the future of children and young persons in the Northern Territory. It is a Bill of importance to all Territorians but also nationally as a statement of the Northern Territory's progress since the handing down of the Final Report of the Royal Commission on 17 November 2017.

4.1 Raising the minimum age of criminal responsibility

NAAJA with other Legal, Aboriginal Health Organisations and non-government youth services have been engaging with the Legal Assistance Advisory Committee of Territory Families for over a period of 16 months concerning drafts of this Bill.

Until very recently, the central pillar of this Bill was the implementation of the Royal Commission recommendation 27.01[1] of raising the minimum age of criminal responsibility to 12 years or more. The decision in removing from this Bill this key recommendation is at odds with the Northern Territory Government's commitment for its introduction.

NAAJA is alarmed that this Bill presently does not address raising the minimum age as the continued lack of action will result in another 'generation' of Aboriginal youth who will be lost to the criminal justice system and a trajectory of poverty, abuse and institutionalism.

The justification of this decision was announced in the need to review the support services for those children. The statistical data[2] reveals that consistently since 2010/2011 Court lodgements for children aged 10 and 11 have been very low numbers[3].

Public criticism by the Law Council of Australia and the Law Society of the Northern Territory has highlighted the lack of urgency as unjustifiable[4]. NAAJA called in November 2017 for a moratorium on police arrests of children under the age of 12 and addressing their issues as a public health approach.

It is necessary that the minimum age of criminal responsibility is included in this Bill for consideration by the Legislative Assembly.

Recommendation

The Assembly should defer passage of the Bill to enable the inclusion of provision of raising the minimum age of criminal responsibility to 12 years or more, or;

The Assembly should enable appropriate amendments to the Bill to ensure the safeguards of youth under the age of 12 who will be impacted by this Bill.

[1] Final Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, November 2017, volume 2B 420.
[2] Department of the Attorney-General and Justice, Youth Justice Court Lodgements 2010-2018.
[3] Concerning children aged 11, there were prosecution court lodgements in 2015/2016 of 22, 2016/2017 of 8 and in 2017/2018 of 1. The last prosecution court lodgements for children aged 10 occurred in 2013/2014.
[4] Outstanding Recommendations: Royal Commission into the Protection and Detention of Children in the Norther Territory, 21 March 2019.

4.2 No Detention under the age of 14 years

It is NAAJA's view that the Royal Commission recommendation 27.01 of the non-detention of a youth under the age of 14 years should also included in this Bill for consideration by the Legislative Assembly.

Establishing in the Northern Territory a minimum age eligibility for detention to 14 years of age reflects international practice of other western countries. In Scotland no child can be incarcerated under the age of 16,[5] similarly in England and Wales only in exceptional circumstances a child under 16 have a custodial element to their care plan[6].

NAAJA agrees that responses to offending of youths of 14 years and under should be an intervention around the youth and their family. We acknowledge that there will be exceptions where the circumstances of the offending will be to serious, or pose a serious risk to the community.

Recommendation

The Assembly should defer passage of the Bill to enable the inclusion of provision for the non-detention of youths under the age of 14 years.

5. Concerns particular to this Bill

i) Repeal of the offence of breach of bail conditions Clause 13

We are concerned that the Bill repeals only the offence of breach of bail conditions under section 37B of the Bail Act and not also breach of bail undertakings that is contrary to the Royal Commission recommendation 25.19(4).

The Royal Commission recommended that youth be wholly excluded from the operation of section 37B of the Bail Act.

The Royal Commission held very good reasons why this was necessary, as:

- The introduction of the offence of breach of bail has contributed to the high numbers of children and young people held on remand.
- Criminalising breach of bail can lead to the entrenchment of children and young people in the youth justice system and can lead to the detention of young people who otherwise would not be detained.
- The consequences of criminalising breach of bail can be counterproductive.

Data presented to the Royal Commission clearly demonstrated the disproportionate impact of the offence of breach of bail on Aboriginal children and young people. Since 2011 with the commencement of section 37B as an offence, 91% of young people charged with breach of bail have been Aboriginal[7].

[5] Final Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, November 2017, volume 2B, 419.
[6] Ibid, 419.
[7] Final Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, November 2017, volume 2B, 278, 293.

The situation has worsened post Royal Commission that between 1 July 2018 and 31 December 2018 97% of new breach of bail offences related to Aboriginal young people[8].

The present Bill amendment to section 37B will not address the disproportionate impact and underlying issues that effect Aboriginal youth on bail.

It is necessary with regard to proposed Bill amendment to section 37B (4) to include the repeal of the offence of breach of bail undertaking for youth.

Recommendation

That the Assembly seek that the Bill is amended in order that the offence of section 37B is repealed for youth.

ii) Regulation 2A Prescribed Offences – Clause 17

NAAJA does not support that the prescribed offences are prescribed in the Bail Regulations and seek that they are instead legislated within the Bail Act.

By including the prescribed offences in Regulations, the Executive can easily amend these regulations at any point in the future, without the scrutiny of the Parliament. This affords no protection for youth against the Executive expanding the grounds for which youth will be denied the presumption in favour of bail and provides little certainty and continuity in the law.

This is again a perverse outcome given that presumptions with respect to adults are contained within primary legislation, which ensures that it has been scrutinised by the Parliament and provides certainty and continuity in the law.

Recommendation

That the Assembly seek that the Bill is amended so that the prescribed offences are contained within the Bail Act.

iii) Section 137 Time for bringing person before court generally – Clause 21

NAAJA does not support the Bill amendment to section 137 of the Police Administration Act, as it is inconsistent with the Royal Commission recommendation 25.3 of providing the necessary safeguards for children and young persons held in police custody.

The Royal Commission recommended that a youth may only be held in police custody without charge for no longer than four hours and any further extensions of time may only be granted by a Judge.

The Bill is not compatible with Royal Commission recommendation 25.3 as it does not provide the recommended safeguard limitation of 4 hours before seeking a Judge's review, but rather now after the expiry of an initial 24-hour period.

[8] Department of Attorney General and Justice, Court Statistics, January 2019.

We note that the Bill amendment does not expressly require a police member to seek the review by a Judge after the expiration of the 24-hour period but is at the discretion of the member: section 137(4)(b)(i)(ii). There is also no sufficient protection of any consequence for the non-compliance by police with this amendment, 'that any failure is not unlawful': section 137(5).

The Bill amendment is more attuned to the operational needs of police custody procedures and does not adequately balance the needs and vulnerabilities of children held in custody.

The Bill does not address the Royal Commission concerns about the length of time children are held in police custody, finding that children were held in police custody for unreasonably long periods of time, such as children being held in the Alice Springs Watch house for 30 hours[9]. NAAJA has raised with NT Police its concerns of inappropriate periods of time that Aboriginal children held in police custody without charge in one instance of a 12 year old who was held for 36 hours and without access to a lawyer or social support services.

Recommendation

The Assembly should not pass this part of the Bill; or

The Assembly should defer passage of the Bill to enable appropriate amendments to ensure the safeguards of youth who will be impacted by this Bill.

iv) Section 15 Explanations by Police officers – Clause 24

NAAJA broadly supports this amendment but seeks also that that a child is always asked if they want an interpreter, and that reasonable efforts must be made if the youth indicates they require an interpreter. Currently, this clause only requires a Police officer to make a decision on a youth's apparent ability to communicate in English.

Amending this clause would mitigate the risk that a Police officer incorrectly determines whether a youth requires an interpreter.

Recommendation

That this clause is amended to add that the youth is also asked whether or not an interpreter is required and a Police officer should then make reasonable effects to obtain a qualified interpreter for the explanation.

v) Section 27 Youth to be brought before Court promptly – Clause 27

NAAJA favours the repeal of the previous section 27 of the Youth Justice Act that currently sees that youths in custody are to be brought before a 'Court within 7 days'. NAAJA has had many concerns with section 27 over the years as Aboriginal children were often held in remote police station custody cells for long periods until transportation was available.

[9] Final Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, November 2017, volume 2B, 237.

This Bill does bring many improvements that our service has called for such as that an Aboriginal youth need not be removed from their community and can appear through audio-visual means or telephone to the Court section 27(2).

However we do note a concern relating to delaying a youth being brought before the court under section 27(5)(6)(7), there is no final time limit in which an extension of time can be granted and to this extent this is a lessening of the current provision.

Recommendation

The Assembly should defer passage of the Bill to enable appropriate amendments to ensure the safeguards of youth who will be impacted by this Bill.

vi) Section 215B amended (Civil Proceedings) – Clause 41

While clause 41 is a significant improvement on current section 215B of the *Youth Justice Act 2005*, we seek that the Northern Territory should emulate best practice and increase the limitation period to 6 years. This would be with the limitation period for commencing a tort claim under the *Limitations Act 1969* (NSW).

Proposed subsection 215B(1A) is strongly supported.

Recommendation

The Assembly amend proposed subsection 215B(1) so that the limitation period is increased to 6 years so as to be consistent with best practice.

iv) 3A Prescribed offences for Youth Diversion – Clause 44

NAAJA does not support the addition of traffic offences as 'Prescribed offences' (g) from exclusion of youth diversion programs under section 38 of the Youth Justice Act. The Bill continues the present exclusion of offences under Part V and Part VI of the Traffic Act that is inconsistent with the Royal Commission recommendation 25.9 of 'removing from preclusion from diversion less serious offending'[10].

We note that as early as 2011, the Carney Report recommended the lifting of the exclusion of motor vehicle and traffic offences from diversion. The Royal Commission heard from legal practitioners and Judges that the non-inclusion of traffic offences can often complicate diversion processes and that many offenders were often minor and non-habitual offenders[11].

Youth being presented with greater opportunities for participation in diversionary programs has resulted low recidivism rates in the Northern Territory where 76% of participants did not reoffend within 12 months[12].

Recommendation

That the Assembly seek that the Bill is amended in order that traffic offences are not

[10] Final Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, November 2017, volume 2B, 276.
[11] Ibid at 268.
[12] Australian Institute of Criminology, Diverting Indigenous offenders from the criminal justice system, December 2013, 9.

included as prescribed offences under 3A (g).

6. Support for this Bill

i) Presumption in favour of bail for youths – Clause 9

NAAJA supports this provision of the Bill.

Recommendation

The Assembly should pass this part of the Bill.

ii) Criteria to be considered in bail applications for youths – Clause 11

NAAJA supports this provision of the Bill.

Recommendation

The Assembly should pass this part of the Bill.

iii) Section 28 amended (imposition of bail conditions) – Clause 12

NAAJA supports this provision of the Bill.

Recommendation

The Assembly should pass this part of the Bill.

iv) Section 38 amended (Arrest for absconding or breach of condition) – Clause 14

NAAJA supports this provision of the Bill.

This a positive outcome for inclusion in the Bill as it provides that a youth breach of a bail condition will not result in the revocation of their bail. This will remedy situations of minor breaches of bail conditions will not see the arrest of youths and being held in police custody or on remand.

Recommendation

The Assembly should pass this part of the Bill.

v) Regulations 2A and 2 B inserted – Clause 17

Bail support services

NAAJA supports this provision of the Bill.

The provision of Bail support services are a very welcomed inclusion in seeking to support youth on bail and in addressing their needs and tackling the underlying issues of offending. In order that Bail support services are to succeed that there needs to be adequate funding allocated and that such services are available in remote locations and Aboriginal communities.

Recommendation

The Assembly should pass this part of the Bill.

vi) Section 16 replaced – Clause 25

Arrest as a last resort

NAAJA supports this provision of the Bill.

We view that it is necessary that police powers of arrest are legislated and not remain a practice of procedure under issued General Orders of the Commissioner of Police of the Northern Territory.

NAAJA has continued to advocate and raise concerns with NT Police on the inappropriate arrest of Aboriginal youth and non-compliance of General Orders in this respect.

Recommendation

The Assembly should pass this part of the Bill.

vii) Section 18 amended (interview of youth) – Clause 26

NAAJA supports this provision of the Bill.

We view that it is necessary that police procedures in the interrogation and interview of youths are legislated and not remain a practice of procedure under issued General Orders of the Commissioner of Police of the Northern Territory.

Aboriginal youth when interviewed by police are vulnerable by reason of their age, background, language, health and reasons of disability, intellectual disability disorders. NAAJA has continued to advocate and raise concerns with NT Police on the inappropriate questioning of Aboriginal youth and non-compliance of General Orders in this respect.

Recommendation

The Assembly should pass this part of the Bill.

viii) Sections 49 and 50 replaced – Clause 33

Proceedings to be in a Closed Court

NAAJA supports this provision of the Bill.

One of the stated intentions of this Bill is to bring about a therapeutic Court system in the Northern Territory where previously open proceedings and publication of youth details have been described as stigmatising, socially isolating and 'anti-therapeutic'[13].

[13] Final Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, November 2017, volume 2B, 308.

It is necessary that all proceedings in the Youth Court be closed. This Bill will bring the Northern Territory in line with other Australian jurisdictions that focuses on the rehabilitative aims of the Court.

Courts of the Northern Territory should reflect current community standards that proceedings are closed to the public where by reason of their age or vulnerable status. In many Youth Court proceedings issues of a youth's or their family's history of trauma, neglect, abuse and sensitive medical and psychological material is often raised. It is not appropriate that such material is ventilated in open Court proceedings.

Recommendation

The Assembly should pass this part of the Bill

Restriction of Publication

NAAJA supports this provision of the Bill.

It is necessary that the current section 50 of the Youth Justice Act be repealed. The Northern Territory is the only Australian jurisdiction to allow prima facie publication of Youth Court proceedings. The Royal Commission heard evidence from practitioners[14] that the publication and identification of youth by the media had an effect of the 'demonisation of children…with a corrosive effect on their self esteem and on their sense of identity, and their sense of engagement in the community'.

Recommendation

The Assembly should pass this part of the Bill.

[14] Testimony of Russell Goldflam to the Royal Commission, 14 December 2016.