Making Queensland Safer Bill 2024

Statement of Compatibility

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 38 of the *Human Rights Act 2019*, I, Deb Frecklington MP, Attorney-General and Minister for Justice and Minister for Integrity, make this statement of compatibility with respect to the Making Queensland Safer Bill 2024.

In my opinion, part of the Making Queensland Safer Bill 2024 is not compatible with the human rights protected by the *Human Rights Act 2019*. The nature and extent of the incompatibility is outlined in this statement. In my further opinion, the remainder of the Bill is compatible with the rights protected by the *Human Rights Act 2019* for the reasons outlined in this statement.

Overview of the Bill

The Making Queensland Safer Bill 2024 (the Bill) will amend the *Youth Justice Act 1992* (YJ Act) to:

- introduce 'adult crime, adult time';
- remove the principle of detention as a last resort and that a non-custodial order is better than detention in promoting a child's ability to reintegrate into the community;
- promote the consideration of the impacts of offending on victims in the Charter of Youth Justice Principles and when sentencing a child;
- ensure a child's criminal history reflects their full history;
- enable a person's child criminal history to be admitted when sentenced as an adult;
- default to an 'opt out' mechanism for victims on the victim information register; and
- alter the process relating to the transfer of 18-year-old detainees from youth detention centres to adult correctional centres.

The Bill will also amend the *Childrens Court Act 1992* (CC Act) to:

- ensure the victim or a member of the victim's family can be present during criminal proceedings; and
- enable the media to be present during criminal proceedings by omitting the ability of a court to make an exclusion order under section 20(2).

The amendments in the Bill are intended to hold young offenders who commit offences (particularly serious offences) to account by ensuring that courts are considering the impacts of offending on victims and can impose appropriate penalties that meet community expectations. The amendments in the Bill further a range of purposes to achieve this – including, for example, punishment, denunciation, putting the rights of victims 'front and centre' in the youth justice process and promoting open justice and public confidence in the justice system. The Government is committed to implementing a range of measures to deter young people from committing serious crimes in the community, and reducing the number of victims that are caused harm by these young offenders.

The Department of Youth Justice and Victim Support (DYJVS) advises that there were 46,130 finalised proven offences by young people in 2023-24, committed by a smaller number of young people. Of significant concern is the increase in the rate and volume of violent offending committed by young offenders. The rate of violent offending has increased by 8.3% since 2019, with the number of proven violent offences increasing by 553 or 21% from 2,616 to 3,169. This violent offending includes murder, manslaughter, serious assault, and robbery. While the rate per population of young people offending since 2019 has decreased, there has been an increase in victims with the average number of proven offences per young person rising to 14.1 in 2023-24, compared with 7.8 in 2019.

According to DYJVS data, in 2023-24 there was a 12% increase in proven offences over the previous 12 months (an additional 4,975 offences), a 51% increase over the last 5 years (+15,649 offences), and a 98% increase over the last 10 years (an additional 22,866 offences). Contributing to the overall increase in proven offences were increases in unlawful use of a motor vehicle offences (an additional 3,672 offences over 5 years).

This data highlights that youth crime continues to be a serious issue for Queensland.

These amendments will demonstrate to the community that youth offending is treated seriously, and will increase community confidence in the justice system.

Human Rights Issues

At the outset I acknowledge that the amendments in the Bill which implement 'adult crime, adult time' and abolish the principle of detention as a last resort for children are incompatible with human rights. However, I consider that the current situation with respect to youth crime in Queensland is exceptional and therefore the *Human Rights Act 2019* (HR Act) will be overridden in respect of these amendments.

Adult crime, adult time

Currently, a child who pleads guilty or is found guilty of an offence is sentenced to an order under sections 175, 176 and 176A of the *Youth Justice Act 1992* (YJ Act). These sections place limits on the maximum periods of probation and detention orders that a Childrens Court Magistrate, a Childrens Court judge and a Supreme Court judge can impose with respect to different offences.

Where this offence relates to a 'life offence', that is an offence for which an adult would be subject to life imprisonment, the court may only order that a child be detained for a period up to and including the maximum of life imprisonment if the offence involves the commission of violence against a person, and the court considers the offence to be particularly heinous in all the circumstances.

Offences which have a maximum penalty of life imprisonment and involve the commission of violence against a person include manslaughter, unlawful striking causing death, malicious act with intent and aggravated robbery. Murder carries mandatory life imprisonment.

However, section 155 of the YJ Act renders any mandatory sentencing inapplicable when sentencing children. This means that a child found guilty of murder is not subject to the mandatory sentence of life imprisonment and a non-parole period of 20 years under section

305 of the Criminal Code. Rather, as set out above, the court can sentence the child to a detention order for a period up to 10 years unless the offence is considered particularly heinous, in which case the court can sentence up to life detention.

If a child is sentenced to life detention, then the provisions of the YJ Act and the *Corrective Services Act 2006* (CS Act) operate together to provide that if the child is convicted of murder they will be eligible for release after 20 years (or 25 years for murder of a police officer or 30 years for murder of more than one person or by a person with a previous murder conviction); or if the child is convicted of an offence and sentenced to life detention for another 'life offence' (for example, for manslaughter, unlawful striking causing death, malicious act with intent or armed robbery), the child will be eligible for release after 15 years.

The Bill will amend the YJ Act to remove the current restrictions on minimum or mandatory sentences for children for the following offences under the *Criminal Code Act 1899* (the Criminal Code):

- murder (section 302, 305);
- manslaughter (section 303, 310);
- unlawful striking causing death (section 314A);
- acts intended to cause grievous bodily harm and other malicious acts (section 317);
- grievous bodily harm (section 320);
- wounding (section 323);
- dangerous operation of a vehicle (section 328A);
- serious assault (section 340);
- unlawful use or possession of motor vehicles, aircraft or vessels (section 408A);
- robbery (section 409, 411);
- burglary (section 419);
- entering or being in premises and committing indictable offences (section 421);
- unlawful entry of vehicle for committing indictable offence (section 427).

These amendments will mean that children who are found guilty of these serious offences will be subject to the same minimum, mandatory and maximum sentences which currently apply to adult offenders in the Criminal Code. The provisions related to sentencing in the *Penalties and Sentences Act 1992* will not necessarily apply, so that, for example, children convicted of murder will not be liable to indefinite sentences under part 10 of that Act.

Applying the same penalties that apply to adults under the Criminal Code will expose children to mandatory sentences for a number of offences, namely:

- mandatory life detention with a minimum non parole period of 20 years for murder (or 25 years for murder of a police officer or 30 years for murder of more than one person or by a person with a previous murder conviction);
- if a child is sentenced to life detention (other than for murder), the child will be eligible for release after serving 15 years;
- if a child is sentenced to serve a period of detention for unlawful striking causing death, the child must serve the lesser of 80% or 15 years;
- detention must form whole or part of the punishment, for dangerous operation of a vehicle with a previous conviction; and

- if a child is sentenced for an offence of grievous bodily harm, serious assault or wounding committed in a public place while adversely affected by an intoxicating substance, they must be sentenced to a community service order.

This will result in more children who are found guilty of these serious crimes being sentenced to, and spending more time in, detention. Increasing the prospects of detention and increasing the length of detention limit the rights of a child to protection in their best interest (section 26(2) of the HR Act) and the right to liberty (section 29(1) of the HR Act).

I accept that the amendments are in conflict with international standards regarding the best interests of the child with respect to children in the justice system, and are therefore incompatible with human rights.

Relevantly, the United Nations (UN) *Convention on the Rights of the Child* (CROC) provides that:

- the best interests of the child shall be a primary consideration (article 3(1));
- detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time (article 37(b)); and
- a child recognised as having infringed penal law is to be treated in a manner …which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society (article 40(1)).

The UN *Standard Minimum Rules for the Administration of Juvenile Justice* ('Beijing Rules') provides that:

- the reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of the society (rule 17.1(a));
- deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response (rule 17.1(c)); and
- the well-being of the juvenile shall be the guiding factor in the consideration of her or his case (rule 17.1(d)).

The amendments will expose some young offenders to mandatory minimum sentences of life detention, meaning the considerations of a child's best interest will not form part of the court's consideration of an appropriate sentence. In doing so, the amendments impose clear and deep limitations on the right to liberty (section 29(1) of the HR Act) and the right of children to protection in their best interests (section 26(2) of the HR Act). In addition, it is likely at least in the short term that the increase in custodial sentences will further strain capacity in youth detention centres in Queensland, and may result in children being held in watchhouses for extended periods of time. This impact results in limitations to the protection from cruel, inhuman or degrading treatment (section 17(b) of the HR Act) and the right to humane treatment when deprived of liberty (section 30 of the HR Act), having regard to the fact that it is widely accepted that watchhouses are not appropriate or humane places in which to detain children (particularly for any lengthy period of time).

The amendments are expected to have a greater impact on Aboriginal and Torres Strait Islander children, who are already disproportionately represented in the criminal justice system. The

amendments could result in more Aboriginal and Torres Strait Islander children being imprisoned for periods of time. However, I am of the view that the amendments do not limit the right to equal protection of the law without discrimination in section 15(3) or the right to equal and effective protection against discrimination in section 15(4) of the HR Act. I am of the view that the amendments do not directly or indirectly discriminate based on race. The increased sentences will be applied equally to all children who are convicted of an offence. Additionally, the court will retain the ability to take into account that a child is Aboriginal or Torres Strait Islander, as provided in sections 150(1)(ha) and (i) of the YJ Act, during sentencing.

The purposes of the amendments are punishment and denunciation. Those purposes are, in general, legitimate aims. The Government is committed to ensuring that young offenders who commit serious criminal offences are liable to be held accountable for their actions and the harm that they cause to others, to the same extent as an adult offender, and that courts are properly considering the impacts of offending on victims and can impose appropriate penalties that meet community expectations.

I recognise that there may be less restrictive options available to achieve the stated purpose, such as by increasing maximum penalties for specific offences to mirror the maximum penalties for adult offences, without also exposing children to mandatory minimum sentences, or by providing courts with sufficient discretion to impose a sentence that fits the crime and circumstances of the offender.

I also recognise that, according to international human rights standards, the negative impact on the rights of children likely outweighs the legitimate aims of punishment and denunciation. The amendments will lead to sentences for children that are more punitive than necessary to achieve community safety. This is in direct conflict with international law standards, set out above, which provides that sentences for a child should always be proportionate to the circumstances of both the child and the offence – mandatory sentencing prevents the application of this principle.

While I acknowledge that these amendments are not compatible with human rights, these measures and the purposes to which they are directed are clearly supported by Queenslanders and are a direct response to growing community concern and outrage over crimes perpetrated by young offenders. For this reason, the amendments include an override declaration which provides that they have effect despite being incompatible with human rights, and despite anything else in the HR Act.

Removal of detention as a last resort

In addition to the ‘adult crime, adult time’ amendments, the Bill also amends the YJ Act to remove the requirement for a court to have regard to the principle that a sentence of detention or imprisonment should only be imposed as a last resort when determining the appropriate sentence for a young offender. Section 208 of the YJ Act currently requires that a court may make a detention order against a child only if, after considering all other available sentences and taking into account the desirability of not holding a child in detention, the court is satisfied that no other sentence is appropriate in the circumstances.

The amendments will remove all provisions in the YJ Act that reflect the principle of detention as a last resort. This will mean that the principle of detention as a last resort will not apply to any offence committed by a child. The amendments also remove the principle that a sentence which allows the child to stay in the community is preferable, and provides that the impact of the offending on victims is prioritised.

The rights limited by these amendments are with the same as those identified above in relation to implementation of 'adult crime, adult time'. As set out above, the CROC and Beijing Rules recognise that the best interests of a child, protected under section 26(2) of the HR Act, encompasses the concept of 'detention as a last resort' for children who commit offences, and the importance of promoting the rehabilitation and reintegration of young offenders into society.

The amendments will specifically remove that 'detention as a last resort' consideration for children, thereby exposing children to an increased risk of being deprived of their liberty, imposing clear and deep limitations on the right to liberty (section 29(1) of the HR Act) and the right of children to protection in their best interests (section 26(2) of the HR Act). The amendments will also limit the right to equality under section 15 of the HR Act, to the extent that the principle of detention as a last resort is removed only for children but not for adults (noting the principle is currently provided for under the *Penalties and Sentences Act 1992* for non-violent offending).

The amendments will treat children less favourably than adults in the same circumstances and therefore directly discriminate on the basis of age, limiting their right to enjoy their right to liberty without discrimination (section 15(2) of the HR Act), their right to equal protection of the law without discrimination (section 15(3) of the HR Act), and their right to equal and effective protection against discrimination (section 15(4) of the HR Act). This will, in essence, create a sentencing system where adults are better protected from arbitrary detention than children.

Although the amendment will likely have a greater impact on Aboriginal and Torres Strait Islander children, for the reasons given above, I am of the view that removing the last resort principle would not directly or indirectly discriminate on the basis of race. Accordingly, the rights to equality and non-discrimination in section 15 of the HR Act will not be engaged on the basis of race.

The purpose of these amendments is to make child offenders more accountable for their offending. This is a legitimate purpose.

I recognise that there may be less restrictive options available to achieve the stated purpose, such as only removing the principle for certain cohorts of children, rather than all children regardless of the circumstances.

I also acknowledge that, according to international human rights standards, the negative impact on the rights of children likely outweighs the legitimate aim of making children more accountable for their crimes. That is particularly because the principle that children should only be detained as a last resort is deeply ingrained in the common law as well as international law.

I therefore acknowledge that the amendments are incompatible with human rights.

Nonetheless, in order to combat youth crime, the Queensland Government is committed to removing the principle that detention should be an option of last resort for children. Queensland has spoken clearly about the need for clear and strong action to combat youth crime. For this reason, the amendments will include an override declaration which provides that they have effect despite being incompatible with human rights, and despite anything else in the HR Act.

Contents and admissibility of child's criminal history

The Bill amends the YJ Act to provide for the inclusion of cautions, restorative justice agreements and contraventions of supervised release orders on a child's criminal history. It also ensures that a child's criminal history is admissible where a person is being sentenced for an offence committed as an adult.

The amendments are limited to allowing consideration of youth records only in relation to sentencing, and will continue the current prohibition from disclosure for the purposes of the criminal trial and a determination of criminal guilt.

The Bill also amends the YJ Act and the Criminal Code to enable childhood findings of guilt for relevant offences made within five years of a person who is an adult committing a further offence of dangerous operation of a vehicle to be treated as previous convictions for the purpose of the circumstances of aggravation under section 328A(2)(c) and (3).

The amendments will limit the following rights under the HR Act:

- the right to enjoy liberty without discrimination (section 15(2)), the right to equal protection of the law without discrimination (section 15(3)) and the right to equal and effective protection against discrimination (section 15(4));
- the right to privacy (section 25(a));
- the rights of a child to protection in their best interests (section 26(2));
- the right to liberty (section 29(1)).

(a) the nature of the right

The rights to equal protection of the law without discrimination and to equal and effective protection against discrimination (section 15(3) and (4) of the HR Act) embody the notion that all laws and policies should be applied equally, and must not result in discriminatory treatment or effects. The definition of discrimination under the HR Act includes discrimination as defined under the AD Act (but it is not exhaustive). In line with recent amendments to the definition of discrimination and the introduction of the protected attribute of 'irrelevant criminal record' in AD Act, this right is limited by allowing a greater scope for a person to be treated unfavourably on the basis of an irrelevant criminal record.

It is also likely that Aboriginal and Torres Strait Islander children, who represent a significant proportion of children in the youth justice system, will be impacted to a greater extent by the changes to the contents and admissibility of child criminal histories. However, I am of the view that the amendments will not directly or indirectly discriminate on the basis of race and therefore that the rights to equality and non-discrimination in section 15 will not be engaged on that basis.

The scope of the right to privacy (section 25(a) of the HR Act) is wide, but is engaged here in the sense of protection of private and personal information and data collection. As the

amendments will result in the recording of information regarding police cautions, which will be provided to courts when sentencing, this right is interfered with. According to human rights cases from overseas, disclosure of cautions interferes with a person's privacy because cautions take place in private (compared to convictions that take place in public in a courtroom). However, the right to privacy only protects against unlawful or arbitrary interferences, and an interference with privacy will not be unlawful or arbitrary if it is a proportionate response to the achievement of a legitimate purpose.

The right of a child to protection in their best interests (section 26(2) of the HR Act) is set out above. Determining what is in a child's best interests is a complex matter that depends on the individual circumstances of the child. For children in the justice system, the Beijing Rules offer guidance on what may be considered in a child's best interest. Of particular relevance are rules 21.1 and 21.2, which relate to records of juvenile offenders:

> *21.1 Records of juvenile offenders shall be kept strictly confidential and closed to third parties. Access to such records shall be limited to persons directly concerned with the disposition of the case at hand or other duly authorized persons.*
>
> *21.2 Records of juvenile offenders shall not be used in adult proceedings in subsequent cases involving the same offender.*

As the proposed amendments will make child records available to be considered in the sentencing of adults, this right will be limited.

The right to liberty (section 29(1) of the HR Act) protects individuals from interferences with their physical liberty, including when a person is detained. The proposed amendments may increase the chance that a person will be subject to higher sentences as a result of the court being aware of the full extent of their interaction with the justice system.

(b) <u>the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom</u>

The purpose of the amendments to the contents and admissibility of child criminal histories are to enable a court sentencing children and adults to have a more complete picture of the offender and be better placed to frame more appropriate sentences.

The purpose of the amendments to allow for the admissibility of childhood findings of guilt as previous convictions for the offence of dangerous operation of a vehicle is to ensure that the conduct of young adults who have recently committed dangerous vehicular offences as a child and continue to commit dangerous vehicular offending are subject to the same penalties as older repeat adult offenders. These penalties reflect the seriousness of this type of repeat offending.

These are legitimate aims.

(c) <u>the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose</u>

By providing for the recording, and consideration, of a police caution, restorative justice agreements and contraventions of supervised release orders in a child's criminal history,

sentencing courts will be provided all relevant information about an offender's interaction with the justice system or previous history of offending. This will assist the court in determining an appropriate sentence as these factors might potentially be of some relevance to that determination. The court will be able to determine what weight to give to this information.

By allowing for the admissibility of relevant childhood findings of guilt, a young adult who continues to commit dangerous vehicular offending will be liable to a higher maximum penalty, and potentially mandatory imprisonment (as part or whole of the punishment), by exposing them to the circumstance of aggravation under section 328A(2)(c) and (3) of the Criminal Code. These are the penalties that would otherwise apply to adult offenders after a history of repeat dangerous vehicular offending as an adult.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

Not recording these previous interactions with the justice system as is currently the case, means they are not able to be considered by a court when determining an appropriate sentence. While this imposes less of a limit on the rights identified, it does not achieve the important purpose of supporting the court to impose the most appropriate sentence. The current practice does not achieve the purpose as effectively and is not fit for fully achieving the purpose because the court does not have a complete picture of all the offender's interactions with the justice system as a young person.

The amendments with respect to the contents and admissibility of the child criminal history are specifically tied to achieving the purpose and go no further than is necessary to achieve it. The limits placed on rights only arise after a person has been found guilty of an offence and are designed only to inform the sentencing judge (not to constrain or interfere with their general sentencing discretion). The court will still be able to determine what weight to give to the information. When the court is sentencing an adult for offence, the person's child criminal history is only admissible for a period of five years from the date of the outcome for the last childhood offence. When issuing a caution or making a restorative justice referral, the amendments require the police officer to explain to the child that the caution and any restorative justice agreement will appear on the criminal history.

Current prohibitions on the publication of identifying information about a child will continue to apply, as will the relevant provisions of the *Criminal Law (Rehabilitation of Offenders) Act 1986*. Finally, the information merely informs the consideration of the ordinary sentencing principles under the *Penalties and Sentences Act 1992*, rather than dictates any particular outcome.

The amendments which allow childhood findings of guilt to be considered previous convictions for the purpose of a circumstance of aggravation under dangerous operation of a vehicle are considered necessary to ensure that young adults who continue to place the community at risk through repeat vehicular offending are subject to the same penalties as older repeat adult offenders. The alternative is for these childhood findings of guilt to be considered as an aggravating sentencing factor, but not relied upon as a circumstance of aggravation. This would not achieve the purpose because it would mean that repeat young adult offenders will not be exposed to the same penalties as older repeat offenders.

The period to which childhood findings of guilt for relevant offences are admissible for this purpose is limited to five years; that is, the person must commit a new dangerous operation of a vehicle offence within five years of the relevant childhood finding of guilt being made. This limits the extent of the impact of the amendments on human rights.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

Ensuring that courts are fully informed when sentencing is of critical importance to ensuring that sentences are appropriate and proportionate. While it is acknowledged that these amendments will impose limitations on human rights, the nature of the limitations are minor in scope, and arise within a broader exercise of judicial discretion. Critically, the information cannot be used for any purpose other than sentencing. For these reasons, the amendments represent a fair balance between the limitations identified and the achievement of the purpose.

Parliament has already reflected the seriousness of repeat dangerous vehicular offending by the creation of circumstances of aggravation for the offence of dangerous operation of a vehicle. There is a small cohort of young adults who, under the amendments, come before the courts with a history of repeat dangerous vehicular offending but cannot be subject to a circumstance of aggravation and the more serious penalties that apply to repeat older adults. The importance of ensuring consistent treatment for all adult repeat offenders outweighs the limitations on rights.

(f) any other relevant factors

Nil.

Prioritising the consideration of victims in the Charter of Youth Justice principles

Currently, the Charter of Youth Justice (the Charter) contains principles relating to: the community being protected from offences and, in particular, recidivist high-risk offenders (Principle 1); the child being held accountable and encouraged to accept responsibility for the offending behaviour (Principle 9(a)); and a victim of an offence should be given the opportunity to participate in the process of dealing with the child for the offence in a way allowed by the law (Principle 10). The Bill will amend the Charter to specifically recognise the impact of offending on a victim as the second Principle.

This amendment does not limit human rights. Merely including principles that recognise the impact on victims does not limit the human rights of any child offender. As noted below, other operative provisions that change the weight to be given to those principles do engage and limit human rights.

Prioritising the consideration of victims at sentence

Currently, the YJ Act provides that the impact of an offence on a victim, including the harm done, is one of many factors to be considered when sentencing a child. The YJ Act does not, however, require a court to weigh the impact of a child’s offending on a victim as a greater factor (aggravating or otherwise) than any other sentencing factor or principle.

The amendments will therefore amend the sentencing principles in the YJ Act to signal that a court sentencing a child is to give greater weight to the impact of the offence on the victim (including any physical, mental or emotional harm done to the victim) during sentencing. Courts will be required to have primary regard to recognising the impact of the child's offending on any victim of that offending.

By making this a primary consideration, rather than currently one of many considerations, it is foreseeable that children who commit offences that cause considerable harm, will be subject to more punitive sentences, including longer periods of detention. More importantly, it is an aspect of the right of children to protection in their best interests that they be sentenced having primary regard to their wellbeing and rehabilitation. As rule 17.1(d) of the Beijing Rules states, 'The well-being of the juvenile shall be the guiding factor in the consideration of her or his case'. Prioritising the consideration of the impact on victims over the best interests of the child and their reintegration into society will therefore limit the following rights under the HR Act:

- the rights of a child to protection in their best interests (section 26(2)); and
- the right to liberty (section 29(1)).

(a) the nature of the right

As discussed above, the right of a child to protection in their best interests (section 26(2) of the HR Act) encompasses the principle that detention of a child should be imposed as a measure of last resort, and for the shortest period of time. When dealing with children in the justice system, the best interests of the child should be the primary consideration, including when considering sentencing. This amendment will elevate the impacts on the victim of the crime above the best interest of the child offender, and in this way will limit the right.

The right to liberty (section 29(1) of the HR Act) protects individuals from interferences with their physical liberty, including when a person is detained. The proposed amendments may increase the chance that a child is sentenced to detention or longer periods therein.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the amendments is to ensure that the rights of victims of young offenders are put 'front and centre' in the youth justice process, and in that way promotes their human rights to life (section 16 of the HR Act), security of the person (section 29(1) of the HR Act) and property (section 24 of the HR Act).

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

Creating a primary consideration for sentencing which focusses on the harm caused to the victim helps to achieve the purpose of placing victims 'front and centre'.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

The current practice, or indeed any alternative in which consideration of the victim is not given primacy over other considerations, could not be as effective in achieving the purpose of putting victims at the heart of the youth justice process or promoting the rights of victims.

The extent of the limitations is tailored to achieving the purpose, as it does not completely displace ordinary sentencing principles which allow for a fulsome consideration by a court of all relevant circumstances, and which allow for the proper exercise of judicial discretion about what is a just and fair sentence.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

The circumstances in which the limitations on the rights of the offender will be most acutely felt will be where the offending has resulted in considerable harm to the victim. It is my view that, in those circumstances, these limitations are necessary, appropriate and ultimately balanced in order to ensure that the rights of victims are protected by the justice system by placing them at the 'front and centre' of sentencing considerations.

(f) any other relevant factors

Nil.

Opening up the Childrens Court

Criminal proceedings against children are open to the public when they are heard by a Childrens Court judge on indictment or by a Supreme Court judge. Where criminal proceedings are not heard on indictment, access to proceedings can be limited by the court under section 20 of the CC Act. Matters which are not heard on indictment include proceedings where a magistrate constitutes the court and would include proceedings such as sentences and trials where the charges can be heard summarily, committal proceedings and bail applications. Administrative mentions or reviews of criminal charges also fall into this category.

The Bill will amend section 20 of the CC Act to remove the ability of the court to make an exclusion order for a victim's representative (which may include relatives of a victim), a person who, in the court's opinion, has a proper interest in the proceeding or a person who holds media accreditation from the proceeding. The amendments will remove the ability for the Childrens Court to make an exclusion order even in circumstances where there may be a risk to the safety of a person or where it may prejudice the proper administration of justice. The amendments will not interfere with the power of the Court to exclude persons under other laws, or their inherent ability to exclude persons for contempt of court.

The amendments will limit:

- right to equality before the law and equal protection of the law and equality before the law (section 15);
- right to life (section 16);
- right to privacy and reputation (section 25);
- rights of a child to protection in their best interests is protected (section 26(2)); and
- right to security of person (section 29(1)); and

- a child's right to a procedure that takes account of the child's age and the desirability of promoting the child's rehabilitation (section 32(3)).

I consider that the rights to equality and non-discrimination in section 15 of the HR Act are not limited. While Aboriginal and Torres Strait Islander children are likely to be disproportionately impacted by the amendments, I am of the view that opening up the Childrens Court would not directly or indirectly discriminate based on race and therefore that the rights to equality and non-discrimination in section 15 will not be engaged on that basis.

(a) the nature of the right

The right to life (section 16 of the HR Act) is regarded in international law as 'the supreme right from which no derogation is permitted, even in time of public emergency which threatens the life of the nation'.[1] Without robust and effective protection of the right to life, all other human rights lack meaning. At its heart, the right to life underscores the sanctity of human existence. The right to security of person (section 29(1) of the HR Act) requires all reasonable measures to be taken to protect individuals from physical harm and ensure their safety. In practice, it is conceivable that there may be an extreme situation that arises where these amendments will mean that the court will not be able to make an exclusion order to exclude media from a Childrens Court proceeding even where it is aware of credible information that their presence would cause a risk to the safety of any person (including the child, their family, witnesses, the victim, relatives of the victim, or other persons). While there will remain offences which prohibit the publication of certain identifying information that may be heard by the media during the proceeding, it is conceivable that there will be instances where the media are able to publish *enough* information that could give rise to, or increase, a risk to the safety of a person (particularly, for example, in small communities). Such a situation would limit the right to life and security of the person (or persons) who may be at risk of harm, without any discretion for the court to take steps to ameliorate that risk through the exclusion of the media from the proceeding to prevent them from hearing (and thus publishing) certain information under section 20 of the CC Act.

The scope of the right to privacy and reputation (section 25 of the HR Act) is wide, and includes personal information, as well as unlawful attacks on a person's reputation. The amendments interfere with this aspect of the right by increasing the number of people who have a right to be in the court and hear personal information about a child offender.

The rights of a child to protection in their best interests and the right to an age-appropriate procedure that promotes the child's rehabilitation are representative of the core value that children should be treated with dignity, particularly due to their inherent vulnerability. As set out above, the CROC and Beijing Rules recognise this, and the desirability of promoting the reintegration and rehabilitation of children. The UN CROC provides that child offenders should be 'treated in a manner consistent with the promotion of the child's sense of dignity and worth' and that their privacy be 'fully respected at all stage of the proceedings' (article 40(2)(b)(vii)). The Beijing Rules provides that no information that could lead to the identification of a child offender should be published, in order to 'avoid harm being caused to them by undue publicity or by the process of labelling' (rules 8.1 and 8.2). The amendments interfere with these rights

[1] Human Rights Committee, *General Comment No 36: the right to life (Article 6 of the International Covenant on Civil and Political Rights)*, 124th sess, UN Doc CCPR/C/GC/36 (30 October 2018) [3].

by increasing the number of persons who have a right to be in the court and hear personal information about a child offender, which is not in the best interests of the child or supportive of their rehabilitation.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the amendments is to support the rights of victims of crime and their families to access to, and understanding of, the criminal justice system, as well as to support open justice and transparency.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

Allowing for relatives of victims of crime to be present in the court, along with the victim, ensures that the victim is able to be supported by their relatives during the hearing process, and also recognises the impact that crime can have beyond the primary victim. It further recognises the Government's commitment to ensure that victims are placed at the centre of court processes, as well as to ensure that victims, their families and their representatives are assisted to understand court processes.

The presence of media will promote open justice and enhance accurate and fair reporting on youth justice matters, such as the granting of bail and sentencing. These in turn can promote public confidence in the justice system and informed scrutiny of existing laws.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

A less restrictive alternative would be to retain the current laws, which enables the court to exclude accredited media organisations in situations where there is a risk to the safety of a person, or where there may be prejudice to the proper administration of justice. Another less restrictive alternative may be to provide a discretion to the Childrens Court to exclude people where necessary. While less restrictive, these alternatives would not be as effective in achieving the purposes because there would still be some limited scope of the Court to make an exclusion order. For completeness, the existing general power of the court to exclude persons for contempt of court will remain.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

The importance of protecting and promoting the rights of victims in the process, along with the benefits of informed and transparent reporting on court processes involving children, outweighs the limitations imposed by the amendments, especially taking into account that the court will still have power to remove people from the courtroom where necessary if the person commits a contempt in the face of the court.

(f) any other relevant factors

Nil.

Transfer of 18-year-olds from youth detention centres to adult correctional centres

The Bill amends the YJ Act to establish a default position that all youth detention centre detainees would be transferred to adult custody within 1 month after they turn 18, subject only to an exclusive chief executive discretion, with no appeal or review (except judicial review).

The amendments will limit:

- right to humane treatment when deprived of liberty (section 30); and
- the right to have access to vocational education and training (section 36(2)).

I consider that the rights to equality and non-discrimination in section 15 of the HR Act are not limited. While Aboriginal and Torres Strait Islander children are likely to be disproportionately impacted by the amendments noting they are overrepresented in youth detention, I am of the view that the amendments will not directly or indirectly discriminate based on race and therefore that the rights to equality and non-discrimination in section 15 will not be engaged on that basis.

(a) the nature of the right

The right to humane treatment when deprived of liberty (section 30 of the HR Act) requires that all detained persons must be treated with humanity and respect for their inherent dignity, acknowledging their heightened vulnerability when detained. The right ensures that individuals who are detained are not subjected to any additional hardship or restrictions beyond those that are inherently linked to their deprivation of their liberty. In other words, detained individuals retain all their human rights, except for limitations that are unavoidable in a custodial setting.

The UN Standard Minimum Rules for the Treatment of Prisoners outlines fundamental standards, including for appropriate accommodation, sufficient food, personal hygiene, clothing and bedding, physical exercise, medical care, and fair disciplinary procedures. Upholding these basic standards, and the application of the right to humane treatment when deprived of liberty, must not depend on government resources and must be implemented without discrimination.

This right is limited by the amendments because the automatic transfer does not take into account circumstances conducive to their rehabilitation – including that, for example, they may lose access to beneficial programs, therapeutic supports and services, and rehabilitative interventions that they were accessing in the YDC that are either not available, or not available to the same extent, in an adult correctional facility.

The amendments will also limit the right to access vocational education and training (section 36(2) of the HR Act), having regard to the restricted availability of these services in adult correctional facilities.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose is to enable the chief executive to protect the safe custody and wellbeing of the children detained within youth detention centres. This is a proper purpose. Ensuring as far as possible that children are detained separately from adults is reflected in a number of human rights, including the right of children to protection in their best interests (section 26(2) of the

HR Act), the right to humane treatment when deprived of liberty (section 30 of the HR Act) and right of child detainees who have not been convicted to be segregated from adult detainees (section 33(1) of the HR Act). The Beijing Rules also reflect that children in detention pending trial shall be kept separate from adults (rule 13.4).

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The prompt transfer of 18-year-olds out of youth detention centres will minimise, as far as possible, the extent to which adult detainees (i.e., detainees who have turned 18) and children are housed together in youth detention centres. This will achieve the purpose of protecting the safe custody and wellbeing of those children.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

The current practice provides for a longer timeframe within which to transfer adult detainees out of youth detention centres. Another alternative may be to provide an initial review right to enable the 18 year old detainee to review or appeal and thus stay their transfer to an adult correctional facility pending the outcome of that review. Neither of these alternatives would achieve the purpose of minimising as far as possible the length of time that adult detainees and children may be housed together as effectively as the amendments, because they would both result in adults and children being detained together in youth detention centres for a longer period of time.

Ordinary judicial review avenues remain open, and there is also the discretion for the Chief Executive to delay or stay a transfer from youth detention to adult custody in appropriate situations (such as, for example, where the detainee is to be released in the near future, or where their unique needs are being met in the youth detention centre environment and would be unable to be met in the adult custodial environment which may increase the risk of reoffending post-release).

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

The importance of protecting and promoting the safe custody and wellbeing of children in youth detention centres, consistent with their rights to protection in their best interests, the right to humane treatment when deprived of liberty, and the right of child detainees who have not been convicted to be segregated from adult detainees, outweighs the limitations imposed by the amendments.

(f) any other relevant factors

Nil.

‘Opt out’ victim impact register

Part 8, division 7 of the YJ Act establishes the ‘eligible persons register’ (the register). Under section 282A(1), victims of violent or sexual offences committed by a young person are currently able to be kept informed about the offender’s custody movements, including for

example any leave of absence, transfers between facilities, and release dates, by applying to be added to the register. Specified other persons are also able to apply to receive information.

The amendments in the Bill will provide for entry on the register by default for victims and immediate family members of deceased victims who do not opt out, upon receipt of the person's contact details.

These amendments will result in a further limitation on the rights to privacy and reputation of the offender (section 25 of the HR Act) and the right of a child to protection in their best interest (section 26(2) of the HR Act) by removing the requirement to apply for entry to the register for eligible persons.

The additional limitations are considered to be minor, however, as they still require the eligible person to provide their details along with a non-disclosure declaration, allows them to 'opt out', and retains the need for the parents of victims who have a legal incapacity or another person who satisfied the chief executive that their life or physical safety could be endangered to make an application to enter the register. These protective factors, along with the minor nature of any additional limitation, represent a fair balance between the purpose of the register to promote the rights of victims and the limitations to privacy and the best interests of the child.

Conclusion

In my opinion, part of the Making Queensland Safer Bill 2024 is not compatible with the human rights protected by the *Human Rights Act 2019*.

In my further opinion, the remainder of the Bill is compatible with protected human rights because it limits human rights only to the extent that is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

Deb Frecklington MP
Attorney-General and Minister for Justice and
Minister for Integrity

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Making Queensland Safer Bill 2024

Statement about exceptional circumstances

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 44 of the *Human Rights Act 2019*, I, Deb Frecklington MP, Attorney-General and Minister for Justice and Minister for Integrity, make this statement about exceptional circumstances with respect to the Making Queensland Safer Bill 2024.

In the Bill, the following provisions include subsections which provides that the HR Act does not apply:

- amended section 150 of the *Youth Justice Act 1992*
- new section 175A of the *Youth Justice Act 1992*

The Government accepts that these provisions are incompatible with human rights. Therefore, in this exceptional case, the HR Act is being overridden and its application is entirely excluded from the operation of these new provisions to create a safer community by holding child offenders accountable.

The Government is committed to ensuring that young offenders who commit serious criminal offences are held accountable for their actions and the harm that they cause to others, and that courts are properly considering the impacts of offending on victims and can impose appropriate penalties that meet community expectations. The amendments in the Bill further a range of purposes to achieve this – including, for example, punishment, denunciation, putting the rights of victims ‘front and centre’ in the youth justice process and promoting open justice and public confidence in the justice system. The Government is committed to implementing a range of measures to deter young people from committing serious crimes in the community, and reducing the number of victims that are caused harm by these young offenders.

In the Government’s view, the current situation with respect to youth crime in Queensland presents an exceptional crisis situation constituting a threat to public safety such that amendments being made to amended section 150 of the *Youth Justice Act 1992* and new section 175A of the *Youth Justice Act 1992* must contain override declarations.

The Department of Youth Justice and Victim Support (DYJVS) advises that there were 46,130 finalised proven offences by young people in 2023-24, committed by a smaller number of young people. Of significant concern is the increase in the rate and volume of violent offending committed by young offenders. The rate of violent offending has increased by 8.3% since 2019, with the number of proven violent offences increasing by 553 or 21% from 2,616 to 3,169. This violent offending includes murder, manslaughter, serious assault, and robbery. While the rate per population of young people offending since 2019 has decreased, there has been an increase in victims with the average number of proven offences per young person rising to 14.1 in 2023-24, compared with 7.8 in 2019.

According to DYJVS data, in 2023-24 there was a 12% increase in proven offences over the previous 12 months (an additional 4,975 offences), a 51% increase over the last 5 years

(+15,649 offences), and a 98% increase over the last 10 years (an additional 22,866 offences). Contributing to the overall increase in proven offences were increases in unlawful use of a motor vehicle offences (an additional 3,672 offences over 5 years).

This data highlights that youth crime continues to be a serious issue for Queensland.

These provisions (outlined above) are intended to serve as the override declaration envisaged by sections 43 and 45 of the HR Act. They make clear that the HR Act has no application to these provisions and, a body performing functions or exercising powers under these provisions of the YJ Act is not a public entity within the meaning of the HR Act in respect of its performance of those functions or exercise of those powers.

Deb Frecklington MP
Attorney-General and Minister for Justice and
Minister for Integrity

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