

Youth Justice and Other Legislation Amendment Bill 2021

Statement of Compatibility

FOR

Amendment during consideration in detail to be moved by the Honourable Mark Ryan MP, Minister for Police and Corrective Services and Minister for Fire and Emergency Services

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

In accordance with section 38 of the *Human Rights Act 2019*, I, Mark Ryan MP, Minister for Police and Corrective Services and Minister for Fire and Emergency Services, make this statement of compatibility with respect to amendments during consideration in detail to be moved to the Youth Justice and Other Legislation Amendment Bill 2021 (the Bill).

In my opinion, the amendments to be moved to the Bill are compatible with the human rights protected by the *Human Rights Act 2019*. I base my opinion on the reasons outlined in this statement.

Overview of the amendments

The amendments fall into three categories:

- Amendment 9 amends s 52AA(2) of the *Youth Justice Act 1992* (which is being inserted by cl 26 of the Bill). The effect of the amendment would be that where a court decides to grant bail on condition that the child wear a monitoring device, the court will be required to consider making an order that the child be detained until the monitoring device is fitted. This is accompanied by amendment 18, which inserts a safeguard into s 52AA(2A) of the *Youth Justice Act*, and by amendment 23 a consequential amendment reflecting clause renumbering.
- Amendment 20 amends s 52AA(3) of the *Youth Justice Act* (to be inserted by cl 26 of the Bill) so that ‘opinion about’ would read as ‘assessment of’.
- Amendments 1 to 8, 10 to 17, 19, 21 to 22, and 24 to 34 replace the terminology of ‘tracking device’ with ‘monitoring device’ in the *Bail Act 1980*, the Bill and the *Youth Justice Act 1992*.

Human Rights Issues

Human rights relevant to the Bill (Part 2, Division 2 and 3 *Human Rights Act 2019*)

Amendment 9 introduces a requirement that a court consider ordering that a child be detained in custody until they are fitted with a monitoring device, in circumstances where a court has granted bail on condition the child wear such a device. This amendment would limit:

- The right to equal protection of the law without discrimination (in s 15(3) of the *Human Rights Act*) given that an effect of the amendment will be that adults and children in the same circumstances will be treated differently. The court is not currently required under the *Bail Act* to consider ordering the detention of an adult in the same circumstances.¹
- The right of children to protection in their best interests (in s 26(2) of the *Human Rights Act*) given that the amendment may increase the possibility that children will lose their liberty. The scope of the right in s 26(2) may be informed by the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (known as the Beijing Rules).² According to the Beijing Rules, ‘Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time’ (r 13.1), and ‘Whenever possible, detention pending trial shall be replaced by alternative measures...’ (r 13.2).
- The right to liberty (s 29(1) and (2)) given that the amendment may increase the possibility that children will lose their liberty. The right in s 29(2) is internally limited by arbitrariness. In a human rights context, ‘arbitrary’ means capricious, unpredictable, unjust or unreasonable in the sense of not being proportionate to a legitimate aim sought.³ Because questions of lawfulness and proportionality arise when considering justification of limits on human rights under s 13, it is convenient to consider these questions below.⁴

Two other human rights are relevant but not limited. These are the right of accused persons to be segregated from people who have been convicted (s 30(2)), and the right of child detainees to be segregated from all detained adults (s 33(1)). Under s 56(7) of the *Youth Justice Act*, the Director-General of the Department of Children, Youth Justice and Multicultural Affairs is not permitted to detain a child in an adult prison pending the fitting of a monitoring device. To the extent the Director-General may keep the child in another place where there are convicted or adult detainees, the Director-General is required to take into account the rights in ss 30 and 33 of the *Human Rights Act*, and act compatibly with those rights. The Parliament is entitled to assume that the Director-General will do so.⁵ Accordingly, those rights are not limited by the amendment.

Amendment 20 changes ‘opinion about’ to ‘assessment of’ in s 52AA(3) of the *Youth Justice Act 1992* (to be inserted by cl 26 of the Bill). The effect of the amendment is that the suitability assessment report is to contain ‘the chief executive’s assessment about the child’s suitability for a monitoring device condition’, rather than the chief executive’s ‘opinion’ about those matters. This amendment does not limit any human rights and is therefore compatible with human rights under s 8(a) of the *Human Rights Act*.

¹ *Bail Act 1980*, s 11(9B) and (9C).

² *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, GA Res 40/33 (adopted 29 November 1985) (‘the Beijing Rules’). See *Certain Children v Minister for Families and Children* [No 1] (2016) 51 VR 473, 498 [154]; *Certain Children v Minister for Families and Children* [No 2] (2017) 52 VR 441, 521-2 [261]-[262], 523-4 [264]-[265].

³ Explanatory note, Human Rights Bill 2018 (Qld) 22; *PJB v Melbourne Health* (2011) 39 VR 373, 395 [85].

⁴ Following the approach in *Minogue v Thompson* [2021] VSC 56, [86], [140].

⁵ *Little Sisters Book and Art Emporium v Canada (Minister of Justice)* [2000] 2 SCR 1120, 1168 [71]; *R (Roberts) v Commissioner of Police of the Metropolis* [2015] UKSC 79; [2016] 1 WLR 210, 225 [42].

The final category of amendments replaces the terminology of ‘tracking device’ with ‘monitoring device’. The change arises from internal departmental advice and commentary in submissions to the Legal Affairs and Safety Committee inquiry into the Bill that the use of the term ‘tracker’ may cause offence to Indigenous people, given the historical use of Indigenous people to ‘track’ convicts and other people, combined with the association of ankle devices with ankle shackles used on Indigenous people during the colonial period.

The change would promote, rather than limit, human rights, including the right to equal protection of the law without discrimination (s 15), cultural rights generally (s 27) and cultural rights of Indigenous peoples more specifically (s 28). In particular, the change, in part, respects the right of Indigenous peoples to control their identity and cultural heritage, as well as traditional cultural expressions under s 28(2)(a) and (b) of the *Human Rights Act*.

As this amendment would not limit any human rights, it is compatible with human rights under s 8(a) of the HR Act.

If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 *Human Rights Act 2019*)

As only amendment 9 limits human rights, only this amendment needs to be considered further.

(a) the nature of the right

The right to equal protection of the law without discrimination (s 15(3)) – The value underlying equality is the dignity that all human beings have by virtue of being human. When we discriminate for no rational reason we fail to see people as fellow human beings.⁶

The best interests of the child (s 26(2)) – ‘The concept of the child’s best interests is aimed at ensuring both the full and effective enjoyment of all the [child’s human rights] and the holistic development of the child.’⁷

The right to liberty (s 29(1) and (2)) – The fundamental value that this right expresses is ‘freedom’, which is ‘a prerequisite for individual and social actuation and for equal and effective participation in democracy’. The right to liberty is about ‘protect[ing] people from unlawful and arbitrary interference with their physical liberty, that is, deprivation of liberty in the classic sense.’⁸ Those values are at stake even for very short deprivations of liberty.

(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

⁶ *Re Lifestyle Communities Ltd [No 3]* [2009] VCAT 1869; (2009) 31 VAR 286, 311 [109].

⁷ Committee on the Rights of the Child, *General Comment No 19 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)*, UN Doc CRC/C/GC/14 (29 May 2013) 2.

⁸ *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 140 [665]; *DPP (Vic) v Kaba* (2014) 44 VR 526, 558 [110].

The purpose of the amendment is to ensure that a child who is released under s 52AA of the *Youth Justice Act* wears a monitoring device while released on bail. This is ancillary to the overall purpose of preventing or reducing crime. That is a proper purpose consistent with the values of our society.⁹

- (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

Detaining a child until a monitoring device is attached to them will help to achieve that purpose.

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

Ultimately, whether a child is to be detained pending the fitting of a monitoring device is a matter for the court. The court is required to consider making such an order because it is the most effective way of ensuring that a child released under s 52AA of the *Youth Justice Act* will be wearing a monitoring device. However, the court is not required to make such an order, meaning that it can tailor the limits on human rights to those cases where it is needed to achieve the purpose. In appropriate cases the court can make other orders, including those listed as examples to s 52AA(2).

The amendment will be accompanied by a safeguard in s 52AA(2A) (introduced by amendment 18). This safeguard will require that the detention may only be for the purpose of fitting a monitoring device and must be for the least time that is justified in the circumstances.

As the court will be able to tailor the limit on human rights as required in each individual case, and any detention for that purpose will be accompanied by a safeguard, the amendment represents the least restriction on human rights necessary to achieve the purpose of ensuring that a child who is released under s 52AA of the *Youth Justice Act* wears a monitoring device while released on bail.

- (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

On one side of the scales, it is acknowledged that any risk of increasing detention of children is serious. The clear international standard is that a child should only be deprived of their liberty as a last resort and only if alternative measures are not available (r 13 of the Beijing Rules). This is because ‘the use of deprivation of liberty has very negative consequences for the child’s harmonious development and seriously hampers his/her reintegration into society.’¹⁰ While the deprivation of liberty is likely to be less than eight hours, that is still a significant period for a child. However, the amendment does not adopt a blanket rule of requiring all children to be detained pending the fitting of a monitoring device in all cases. Instead, the court will be able to tailor the orders to the circumstances of the case, meaning that the limit on human rights will be no more than necessary in each individual case.

⁹ *Re Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415, 449-50 [151]; *Tajjour v New South Wales* (2014) 254 CLR 508, 552 [41], 562 [77], 571 [111]-[112], 583 [160].

¹⁰ *Certain Children v Minister for Families and Children [No 2]* (2017) 52 VR 441, 522 [262](c), quoting UN Committee on the Rights of the Child, *General Comment No 10: Children’s rights in juvenile justice*, 44th sess, UN Doc No CRC/C/GC/10 (25 April 2007) 5 [11].

On the other side of the scales, the purpose of the amendment is critical to the proposal to allow bail on condition that a child wear a monitoring device. The scheme would be undermined if children were released on that condition, but were not in fact fitted with a monitoring device. The amendment strikes a fair balance between the need to ensure the scheme operates as intended and the impact on the human rights of children.

(f) any other relevant factors

There are no other relevant factors.

Conclusion

In my opinion, the amendments moved to the Youth Justice and Other Legislation Amendment Bill 2021 are compatible with human rights under the *Human Rights Act 2019* because they limit human rights only to the extent that is reasonable and demonstrably justifiable in accordance with s 13 of the Act.

Mark Ryan MP
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and Minister for Fire and Emergency Services

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