**Submission**

**to**

**Department of**

**Justice and Attorney-General**

**Review of the *Youth Justice Act 1992***

**Introduction**

1. The Anti-Discrimination Commission Queensland (Commission) is an independent statutory authority established under the Queensland Anti-Discrimination Act 1991.
2. The functions of the Commission include promoting an understanding, acceptance and public discussion of human rights in Queensland, as well as inquiring into and where possible effecting conciliation of complaints of contraventions of the Anti-Discrimination Act 1991 and whistle-blower reprisal. ‘Human rights’ is defined by reference to the seven core international human rights instruments, which include the *Convention on the Rights of the Child*.
3. This submission is in response to the information paper released by the Queensland Government in March 2013, *Safer Streets Crime Action Plan – Youth Justice,* which incorporates the government’s review of the *Youth Justice Act 1992* as part of its second six-month action plan.
4. This submission focuses on aspects of the proposed reforms that potentially impact human rights principles.

**Recommendations**

1. In this submission, the Commission outlines and makes the following recommendations:
2. That the principle of detention as a last resort be retained in the *Youth Justice Act 1992*.
3. That the Department consult with researchers and practitioners with expertise in the field of juvenile justice and develop an evidence-based approach to policy and strategies, in order to intervene early and prevent young people offending in the first place, or to prevent them from continuing to offend.
4. That 17-year-olds be removed from adult prisons, and the regulation be made to change the definition of child to a person who has not turned 18 years.

**Human rights landscape in Queensland**

1. As a member of the United Nations, Australia has committed to promoting respect for and observance of human rights, and acting to achieve those ends. Australia has agreed to respect, protect and ensure the human rights recognised in the *Universal Declaration of Human Rights*, adopted by the United Nations in 1948.
2. Australia has also ratified seven core international human rights treaties, namely:
* the *International Covenant on Civil and Political Rights*;
* the *International Covenant on Economic, Social and Cultural Rights*;
* the *International Convention on the Elimination of All forms of Racial Discrimination*;
* the *Convention on the Elimination of All forms of Discrimination Against Women*;
* the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*;
* the *Convention on the Rights of the Child;* and
* the *Convention on the Rights of Persons with Disabilities*.
1. As part of its obligations under the international human rights treaties, the Australian Government has enacted five pieces of legislation, and established the Australian Human Rights Commission with various functions under the legislation. The five Acts are:
* the *Racial Discrimination Act 1975*;
* the *Sex Discrimination Act 1984*;
* the *Australian Human Rights Commission Act 1986*;
* the *Disability Discrimination Act 1992*; and
* the *Age Discrimination Act 2004*.
1. In Queensland, the *Anti-Discrimination Act 1991* was enacted to extend the Commonwealth human rights legislation. The Preamble states that the Parliament considers that:[[1]](#footnote-1)
* everyone should be equal before and under the law and have the right to equal protection and equal benefit of the law without discrimination; and
* the protection of fragile freedoms is best effected by legislation that reflects the aspirations and needs of contemporary society; and
* the quality of democratic life is improved by an educated community appreciative and respectful of the dignity and worth of everyone.
1. With the constitutional division of powers between the Commonwealth and the States, obligations under the international human rights instruments to incorporate the objectives and principles of the various rights and freedoms into legislation, will fall, to some extent, on the States. The *Anti-Discrimination Act 1991* only fulfils part of the human rights obligations. All Queensland legislation ought to be consistent with and reflect the human rights principles, rights and responsibilities under the international human rights instruments.
2. The international human rights instruments relevant to Queensland’s proposed reform of youth justice and review of the *Youth Justice Act 1992*, include:
* the *Universal Declaration of Human Rights* – where it is proclaimed that childhood is entitled to special care and assistance;
* the *International Covenant on Civil and Political Rights* – in particular articles 23 and 24 where it is provided that the family is the natural and fundamental group unit of society entitled to protection, and that every child shall have the right to such measures of protection as are required by his status as a minor;
* the *International Covenant on Economic, Social and Cultural Rights* – in particular article 10 where it is recognised that the widest possible protection and assistance should be accorded to the family, and that special measures of protection and assistance should be taken on behalf of all children and young persons; and
* the *Convention on the Rights of the Child* – where a child is defined to mean every human being below the age of 18 years, and where various rights and protections of the child are set out.

**Detention as a last resort**

1. For Australia, the *Convention on the Rights of the Child* (hereafter referred to as the Convention) entered into force in January 1991, following ratification subject to a reservation to article 37(c) regarding separate imprisonment.
2. It is appropriate to here set out article 37 of the *Convention*, (emphasis in paragraph (b) added):

***Article 37***

State Parties shall ensure that:

1. No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
2. No child shall be deprived of his or her liberty unlawfully or arbitrarily. **The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time**;
3. Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.
4. Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.
5. The current criminal justice system acknowledges that young offenders should receive different treatment from adults. The *Charter of youth justice principles* under the *Youth Justice Act 1992* include the requirement that ‘if a child commits an offence, the child should be treated in a way that diverts the child from the courts’ criminal justice system, unless the nature of the offence and the child’s criminal history indicate that a proceeding for the offence should be started’.[[2]](#footnote-2)
6. The sentencing principles set out in section 150 of the *Youth Justice Act 1992* include the special considerations that:

…..

(b) a non-custodial order is better than detention in promoting a child’s ability to reintegrate into the community; and

…..

1. a detention order should be imposed only as a last resort and for the shortest appropriate period.
2. The youth justice principles and sentencing principles in the *Youth Justice Act 1992* reflect the intent of the obligations under articles 37 and 40 of the *Convention*.
3. The High Court has said that ‘ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention’.[[3]](#footnote-3)
4. The principle of arrest and detention as a last resort has long been recognised as best practice policy. Over 20 years ago the recommendations of the Royal Commission into Aboriginal Deaths in Custody included:
* That governments which have not already done so should legislate to enforce the principled that imprisonment should be utilised only as a sanction of last resort (recommendation 92).
* That State and Territory Governments examine the range of non-custodial sentencing options available in each jurisdiction with a view to ensuring that an appropriate range of such options is available (recommendation 109).
* That in reviewing options for non-custodial sentences governments should consult with Aboriginal communities and groups, especially with representatives of Aboriginal Legal Services and with Aboriginal employees with relevant experience in government departments (recommendation 111).
* That adequate resources be made available to provide support by way of personnel and infrastructure so as to ensure that non-custodial sentencing options which are made available by legislation are capable of implementation in practice. It is particularly important that such support be provided in rural and remote areas of significant Aboriginal population (recommendation 112).
1. The work, findings and recommendations of the Royal Commission into Aboriginal Deaths in Custody remain relevant today.
2. The information paper states that the Queensland Government wants to make sure the courts have sentencing options that work to reduce further offending and reflect community expectations, and that removal of the principle of detention as a last resort may allow courts to consider a broader range of options when sentencing young offenders.[[4]](#footnote-4)
3. Research consistently shows that detention is the least effective option to reduce re-offending, and studies indicate that youth detention is an effective pathway to adult offending.[[5]](#footnote-5)
4. Detention is also a costly option. A higher rate of detention of youths would be a greater cost to the community, not just in dollar terms, but also in terms of recidivism.
5. Having a broader range of options for sentencing young offenders could best be achieved by implementing a range of diversionary options after carefully considering research and evidence based findings. Removing the principle of detention as a last resort would not only be inconsistent with our international human rights obligations under the *Convention*, it would also not achieve the objective of reducing further offending by youths.

**Recommendation I**: That the principle of detention as a last resort be retained in the *Youth Justice Act 1992*.

**Diversion and early intervention**

1. The *Convention* requires a range of options for dealing with young offenders. Article 40 recognises the rights of every child accused or convicted of infringing a penal law to be treated so as to promote their sense of dignity and worth, taking into account the child’s age, and to promote reintegration and the child assuming a constructive role in society. Article 40(3) & (4) provides:

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically to children alleged as, accused or, or recognised as having infringed the penal law, and, in particular:

1. The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
2. Whenever appropriate and desirable, measures for dealing with such children without resort to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate to their circumstances and the offence.

1. The ‘getting tough on crime’ approach of increasing imprisonment has proven not to work as a means of reducing crime. As we noted in our submission in 2011 about standard non-parole periods, Keith Hamburger AM describes this philosophy as ‘punishing crime away’, and exemplifies the futility of addressing long term crime prevention with an emphasis on punishment by reference to South Carolina in the USA. In 1993 the population of South Carolina was similar to that of Queensland at the time; however the prison population was 20,000 compared to Queensland’s prison population of 2,230. The South Carolina response to crime rates, sentencing and imprisonment was to ‘get tougher’, and by 2006 the American median imprisonment rate at risen by over 50 per cent without reduction in crime rates.[[6]](#footnote-6)
2. Current youth justice diversionary measures include conferencing systems, which are similar to the proposed introduction in Queensland of a community reparation model. This type of restorative justice approach can be effective in giving victims of crime a sense of justice being done. Also included are warning and cautions.
3. A recent article challenges the three assumptions on which current juvenile justice policy in Australia is premised: firstly, that contact with the court system increases the risk of re-offending; secondly, that restorative justice is more effective in reducing the risk of re-offending; and thirdly, that left to their own devices most juveniles grow out of crime.[[7]](#footnote-7) In discussing possible reforms, the authors say ‘it is important to remember that reducing juvenile re-offending is not a policy objective to be pursued at any cost’. They recommend assessing risk of re-offending to determine the level of intervention, such as warning, caution or conference where the offending is minor and no significant risk; and more substantial intervention such as placement on an appropriate rehabilitation program where the seriousness of the offending or the risk of re-offending is high. The authors say that in order to do this effectively there needs to be an effective screening or ‘triage’ tool, as well as a suite of effective and adequately resourced programs so that all those in need of treatment and support actually receive it.
4. Rehabilitation programs designed to address causes of offending are an example of a justice reinvestment approach which the authors above say have all been shown to be cost-effective responses to juvenile re-offending.
5. The research, and analysis of research, in the article *Three Dogmas of Juvenile Justice* highlight the need to address the underlying causes of juvenile offending in order to prevent or minimise offending occurring in the first place, before the juvenile comes into contact with the justice system.
6. The Attorney-General is reported to have identified that a smaller number of offenders are committing more offences.[[8]](#footnote-8) This observation is consistent with those of Professor Anna Stewart, who says research shows that a small number of young people are responsible for the majority of youth crime.[[9]](#footnote-9)
7. A study of individuals born in 1990 who had committed an offence in Queensland, identified postal areas which generated chronic offenders.[[10]](#footnote-10) This type of research can be valuable in assisting to determine the nature of diversionary programs and early intervention strategies, and in developing and targeting the implementation of those strategies.
8. Developing and implementing a range of both diversionary and early intervention strategies would be consistent with the principles of *Convention* that the best interests of the child should be of primary consideration in all actions by administrative or legislative bodies, including the police and the executive arms of government.

**Recommendation II**: That the Department consult with researchers and practitioners with expertise in the field of juvenile justice and develop an evidence-based approach to policy and strategies, in order to intervene early and prevent young people offending in the first place, or to prevent them from continuing to offend.

**17 year olds in adult prisons**

1. Queensland is the only State in Australia where 17-year-olds are treated as adults in the criminal justice system. In Queensland, a child is defined under the *Youth Justice Act 1992* as a person who has not turned 17 years of age.[[11]](#footnote-11) The Act contemplates that the age would be increased to 18 years as section 6 allows for this to happen by a regulation of the Governor in Council, and by virtue of the definition of ‘child’.
2. Article 37(c) of the *Convention* requires that children in detention are separated from adults unless it is considered in the child’s best interest not to do so. Australia’s reservation to article 37(c) does not envisage children being detained in adult prisons as a matter of legislative policy. The reservation is qualified in that it concerns the preservation of family contact and the geography and demography of Australia. The reservation states:

Australia accepts the general principles of article 37. In relation to the second sentence of paragraph (c), the obligation to separate children from adults in prison is accepted only to the extent that such imprisonment is considered by the responsible authorities to be feasible and consistent with the obligation that children be able to maintain contact with their families, having regard to the geography and demography of Australia. Australia, therefore, ratifies the Convention to the extent that it is unable to comply with the obligation imposed by article 37(c).[[12]](#footnote-12)

1. In a recent decision, the UK High Court has held that the treatment of 17-year-olds as adults when arrested and detained is inconsistent with the *Convention* and with the views of the United Nations Committee on the Rights of the Child. The laws that permitted police to treat a 17 year old as an adult whilst in custody were held to be incompatible with the *Convention* and international law.[[13]](#footnote-13) In the introductory part of the reasons, the Court said:

There is a leaden irony in the title to these proceedings. As a 17 year-old, the claimant …required the assistance of his mother or another adult to challenge [the code] which denied him the unqualified right to the assistance of his mother.

1. In the UK case referred to above, the Court noted that the failure of the UK to extend protection to 17-year-olds in detention had not escaped the attention of the United Nations Committee on the Rights of the Child, which had recommended that State Parties change their laws with a view to achieving a non-discriminatory full application of their Juvenile Justice Rules to all persons under the age of 18 years.
2. The same has been said of Queensland’s laws. In its Concluding Observations in 2005 the Committee expressed concern that in Queensland, children aged 17 in conflict with the law may be tried as adults in particular cases. The Committee recommended that the system of juvenile justice be brought fully into line with the *Convention*, in particular articles 37, 40 and 39, and other United Nations standards in the field of juvenile justice. In particular the Committee recommended the removal of children who are 17 years old from the adult justice system in Queensland, and that all necessary measures be taken ‘to ensure that persons under 18 who are in conflict with the law are only deprived of liberty as a last resort and detained separately from adults, unless it is considered in the children’s best interest not to do so’.[[14]](#footnote-14)
3. In the 2012 Concluding Observations the Committee noted with regret that the previous recommendations had not been accepted and again expressed concern that all 17 year-old child offenders continue to be tried under the criminal justice system in Queensland. The Committee again recommended that the juvenile justice system be brought fully in line with the *Convention* and other relevant standards, and reiterated its previous recommendation to remove children who are 17 years old from the adult justice system in Queensland.[[15]](#footnote-15)
4. The Commission urges the Queensland Government to remove 17 year-olds from adult prisons, and to make the regulation under the *Youth Justice Act 1992* to change the definition of child to a person who has not turned 18 years.

**Recommendation III**: That 17 year-olds be removed from adult prisons, and the regulation be made to change the definition of child to a person who has not turned 18 years.

**Concluding remarks**

1. The Commission thanks the Department for the opportunity to make this submission into the review of the youth justice system and the *Youth Justice Act 1992*.
2. The Commission welcomes open debate and consultation on such important issues for our community. Addressing juvenile offending is a challenge for any government. The Commission would urge that all relevant research and studies be made more accessible, to assist understanding and awareness of the general community and to contribute to evidence based policy-making.
1. *Anti-Discrimination Act 1991*, Preamble paragraph 6 [↑](#footnote-ref-1)
2. *Youth Justice Act 1992*, section 3, Schedule 1 Charter of youth justice principles, paragraph 5 [↑](#footnote-ref-2)
3. *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 291 [↑](#footnote-ref-3)
4. *Safer Streets Crime Action Plan – Youth Justice*, March 2013, page 8 [↑](#footnote-ref-4)
5. See for example the research and studies referred to in: Appendix A to the Australian Institute of Criminology 2007 report *Recidivism in Australian: findings and future*; Balanced Justice factsheet *Busting the myths – the facts about addressing youth offending – Part 2* [↑](#footnote-ref-5)
6. Keith Hamburger AM, *Restorative Justice: Victims and Offenders: In the Context of Developing a National Approach to a Best Practice Response to Social Breakdown and Crime in Australia* (September 2006) [↑](#footnote-ref-6)
7. *Three Dogmas of Juvenile Justice,* Don Weatherburn, Andrew McGrath and Lorana Bartels, 35 U.N.S.W.L.J. 780 2012 [↑](#footnote-ref-7)
8. The Courier Mail (and The Australian) 12 December 2012, *Judge Michael Shanahan says locking up juvenile criminals in detention doesn’t work* [↑](#footnote-ref-8)
9. Professor Anna Stewart, School of Criminology and Criminal Justice, Griffith University. See presentation to the Youth Advocacy Centre Public Forum, 29 May 2013, Youth Advocacy Centre Inc. <http://www.yac.net.au/youth-justice-a-balanced-approach/> [↑](#footnote-ref-9)
10. ‘Targeting crime prevention to reduce offending: Identifying communities that generate chronic and costly offenders*’,* Troy Allard, April Chrzanowski and Anna Stewart, *Trends & issues in crime and criminal justice*, No. 445 September 2012, Australian Institute of Criminology [↑](#footnote-ref-10)
11. Schedule 4 Dictionary [↑](#footnote-ref-11)
12. The UN Committee on the Rights of the Child has criticised the reservation, saying ‘it is unnecessary since there appears to be no contradiction between the logic behind it and the provisions of article 37(c)’. The Committees view (in both the 2005 and 2012 concluding remarks) is ‘that the concerns expressed in [the reservation] are well addressed by article 37(c), which provides that every child deprived of liberty shall be separated from adults unless it is considered in the best interests of the child not to do so, and that the child shall have the right to maintain contact with his or her family’. [↑](#footnote-ref-12)
13. *The Queen on the Application f HC (a child, by his litigation friend CC) v The Secretary of State for the Home Department & Ors* [2013] EWHC 982 (Admin) [↑](#footnote-ref-13)
14. *UN Committee on the Rights of the Child: Concluding Observations, Australia,* 20 October 2005, CRC/C/15Add.268 [↑](#footnote-ref-14)
15. *UN Committee on the Rights of the Child: Concluding Observations, Australia,* 28 August 2012, CRC/C/AUS/CO/4 [↑](#footnote-ref-15)