

29 January 2016

Ms Julie Kinross  
Assistant Director General  
Youth Justice  
Department of Justice and Attorney General  
GPO Box 149  
BRISBANE 4001

Dear Ms Kinross

## YOUTH JUSTICE REFORMS

Thank you for your letter of 5 January 2016 inviting the Commission's involvement in targeted consultation on proposed reforms to Queensland's youth justice system.

The Anti-Discrimination Commission (Commission) endorses the commitment of the Queensland Government to building a youth justice system that adopts a balanced evidence based approach to reducing youth offending.

The Commission confines its comments on the issue of the automatic transfer of 17 year olds who have six months or more to serve from detention to adult correction facilities. The government has committed to ceasing the automatic transfer to adult correctional facilities of 17-year-olds subject to lengthy periods of detention, but has still to determine which transfer mechanism is to replace the current one.

The Commission starts from the premise that 17-year-olds should not be treated as adults in the criminal justice system.

### 17-year-olds in adult prisons

Queensland is the only jurisdiction in Australia where 17-year-olds are treated as adults in the criminal justice system. This is contrary to the *Convention on the Rights of the Child*, which requires that children in detention are separated from adults, unless it is considered in the child's best interest not to do so.<sup>1</sup> Australia's reservation to the article is limited to maintaining contact with families, having regard to the geography and demography of Australia.

When the Juvenile Justice Bill 1992 (now the *Youth Justice Act 1992*) was introduced in 1992, the government of the day intended that 17-year-old children would be dealt with in the juvenile, rather than the adult, justice system in accordance with the 1988 Kennedy report into prisons. In the second reading speech the then Minister for Family Services and Aboriginal and Islander Affairs, Mrs Anne Warner, said:

...This is consistent with the age of majority and avoids such children being exposed to the effects of adults in prisons, thereby increasing their chances of remaining in the system and becoming recidivists. This change will occur at an appropriate time in the future.

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<sup>1</sup> Article 37(c).

That intention is evident in the drafting of section 6, and in the definition of ‘child’ in the *Youth Justice Act 1992*. These provisions have not been changed and still contemplate the removal of 17-year-olds from the adult criminal justice system to the youth justice system.<sup>2</sup>

Twenty-two years after commencement of the *Youth Justice Act 1992*, 17-year-olds remain subject to the adult criminal justice system. Queensland has been criticised by the United Nations Committee on the Rights of the Child in this regard. In the 2012 Concluding Observations, the United Nations Committee noted with regret that previous recommendations had not been accepted, and again expressed concern that in Queensland 17-year-old child offenders continue to be tried under the criminal justice system.<sup>3</sup>

### **Transfer of young people**

The Commission notes that the Queensland Government’s policy platform involves bringing 17-year-olds into the youth justice system over time, and that the Issues paper deals with the immediate issue of the transfer of young people from youth detention centres to adult correctional facilities.

### **Current provisions**

Part 8, division 2A of the *Youth Justice Act 1992*, ‘Period of detention to be served as period of imprisonment’, provides the only mechanism under which young people subject to periods of detention may be transferred to adult correctional facilities.

This division provides that a young person who turns 17 while in detention and has six months left to serve in actual detention from that date (that is, not including the period of supervised release) must be transferred to adult corrections on or as soon as practicable after their 17<sup>th</sup> birthday. Transfer in this case is under a prison transfer direction issued by the chief executive (or appropriate delegate).

The division also provides that a person who is 17 at the time of being found guilty or sentenced for an offence committed as a child and who receives a custodial sentence of more than six months in actual detention must also be transferred to adult corrections. Transfer in this case is automatic, with a sentence of detention taken to be a sentence of imprisonment.

In both cases, a person who is transferred becomes subject to the *Corrective Services Act 2006* and cannot apply for their transfer to be reviewed or appealed other than on the grounds of jurisdictional error.

### **Amendments for consideration**

The Issues paper outlines a possible proposal to consider increasing to 18 the age at which young people who have at least six months to serve in detention are transferred to adult correctional facilities.

It is proposed to allow the court some discretion, when imposing a sentence which will involve a young person being transferred, to delay the young person’s transfer by up to six months if satisfied, having regard to the following, that a delay would be in the interests of

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<sup>2</sup> Section 6 was amended in 1993, shortly after the Act commenced, by adding subsection (6) to clarify that subsections (2) to (5) (transitional provisions) only apply to person under 18 years of age who is sentenced after the commencement of the regulation.

<sup>3</sup> *UN Committee on the Rights of the Child: Concluding Observations, Australia*, 28 August 2012, CRC/C/AUS/CO/4.

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justice and would not unduly prejudice the security requirement of an affected detention centre:

- the length of the period of detention
- the earliest day the person may be released from detention and the person's age at the time
- the length of any period of community supervision after release from detention and the person's age at the end of the supervision period
- any particular issues relating to the vulnerability or maturity of the person known at the time of the decision
- the programs or interventions the young person is currently engaged in
- any time the person has spent serving any term of imprisonment
- the likely impact on a detention centre if a transfer order is not made
- any other relevant matter.

It is suggested the discretion would be available on application by a young person's legal representative or legal guardian, with the onus on the applicant to show the court that the young person's circumstances satisfy these statutory conditions.

### **Commission's submissions**

From the Issues paper, it seems there are two situations proposed where consideration is given to transferring a young person from juvenile detention into an adult prison.

The first is when a young person who is already in juvenile detention reaches the age or 18 years. If they have more than 6 months still to serve on their term, it appears the proposal is that they may be automatically transferred into an adult prison.

The second situation is where a court is imposing a sentence which will involve a young person being transferred. The proposal is to give the Court the discretion to delay the young person's transfer by up to 6 month when satisfied certain circumstances exist.

The Commission supports the proposal of increasing the age from 17 to 18 which before consideration is given to transferring a young person from juvenile to adult detention.

While it is understood that a timely and cost effective transfer mechanism needs to be established, there are some situations where it may not be appropriate for a young person to be automatically transferred from juvenile to adult detention when they turn 18 and still have more than 6 months to serve (e.g. if there is 7 months still to be served on the young person's term or if other relevant factors indicate it would not be an appropriate decision to transfer the young person). Removing a young person from juvenile detention, where they may influence other children, to an environment where they can potentially be influenced by older adults is not always appropriate, especially when research conducted by Queensland Corrective Services confirms that those who enter prison at 17 or 18 have the greatest likelihood of high recidivism and lengthy custodial careers in the future.<sup>4</sup> Any rehabilitation

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<sup>4</sup> de Andrade D (2013), 'The Criminal Careers of a Prisoner Cohort', Queensland Corrective Services Research Brief No 22

potentially offered by the programs in detention will be undermined by the subsequent imprisonment in an adult centre.


The Commission is of the view that any transfer of a young person from youth detention into an adult correctional facility should not be automatic, and only proceed where there has been scrutiny of all the relevant circumstances by an entity independent of both the juvenile and adult correctional authorities. This could be by a relevant court (e.g. Childrens Court or QCAT) or other relevant independent entity (e.g. a parole board.) The entity should have the role of looking at all relevant circumstances, including the particular circumstances of the young person concerned. One important consideration for the decision-maker should be how best to reduce recidivism and rehabilitate the young person who is now considered an adult.

In the situation where a court is imposing a sentence which will involve a young person being transferred, the Commission agrees with the proposal to give the court the discretion to delay the young person's transfer. However the Commission suggests the court should not be limited to a delay of up to 6 month when satisfied certain circumstances exist, rather, the court should have the discretion to order the delay for a period it considers appropriate, if satisfied the appropriate circumstances exist.

In every situation where transfer is being contemplated, the young person should be provided with independent legal representation.

The Commission thanks the Department for the opportunity to comment on the proposed reforms to Queensland's youth justice system.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'K. Cocks', written in a cursive style.

**KEVIN COCKS AM**  
**Anti-Discrimination Commissioner Queensland**