

Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Bill 2016

Explanatory Notes

Short title

The short title of the Bill is the Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Bill 2016.

Policy objectives and the reasons for them

The objectives of the Bill are to:

- Increase the upper age of who is a child for the purposes of the *Youth Justice Act 1992*, from 16 years to 17 years; and
- Establish a regulation-making power to provide transitional arrangements for the transfer of 17-year-olds from the adult criminal justice system to the youth justice system.

The youth justice system in Queensland currently applies to young people aged between 10 and 16 years of age, with young people alleged to have committed offences as 17-year-olds treated as adults in the criminal justice system. Inclusion of 17-year-olds in the adult criminal justice system is inconsistent with the United Nations Convention on the Rights of the Child, and the law in all other Australian states and territories. It is also inconsistent with a substantial body of Queensland and Commonwealth law, which defines adulthood at 18 years.

When the *Juvenile Justice Bill 1992* (which was re-named the *Youth Justice Act 1992* (the YJ Act) in 2010) was introduced into Parliament in 1992, the Government was committed to increasing the upper age limit to the age of majority. Due to significant resource implications associated with the inclusion of 17-year-olds in the youth justice system, it was not possible to give effect to that intention immediately.

At the time of the 2015 election, the current Government's commitment was to transition individuals under the age of 18 into the youth justice system over time.

The benefits of including 17-year-olds in the youth justice system are nationally and internationally recognised. Children and young people's neurological and cognitive development is immature and incomplete to a degree, warranting a criminal justice system that responds to this group in a developmentally appropriate manner.

The youth justice system provides a number of special protections to children and young people that are not available to adults. These include: an increased ability to divert young people from the court system; reduced exposure to adult criminals; the provision of education and rehabilitation to young people through access to mandated specialised programs; and more intensive staff support and supervision in custody.

Sentencing principles under the YJ Act focus on supporting the young person within the community wherever practicable and appropriate.

Bringing 17-year-olds into the youth justice system will also allow them, and the victims of offences committed by them, to benefit from the reinstatement and expansion of the restorative justice program which took effect on 1 July 2016 with the commencement of the *Youth Justice and Other Legislation Amendment Act (No. 2) 2016*.

Achievement of policy objectives

The Bill will include 17-year-olds as ‘children’ for the purposes of the YJ Act. It will achieve this by omitting the definition of *child* at Schedule 4 of the YJ Act, with the effect that the definition in the *Acts Interpretation Act 1954* will apply and a child will be ‘an individual who is under 18.’

To give operational effect to the change, the Bill will establish regulation-making powers to direct the efficient and coordinated transfer of all 17-year-olds (both sentenced and not yet sentenced) from the adult criminal justice system to the youth justice system. This approach is necessary due to the complex operational issues associated with transitioning 17-year-olds into the youth justice system and the need for a whole of government, multi-faceted response. To ensure parliamentary oversight, the regulation making power, along with any regulation made under it, will expire two years after commencement of the Bill.

Alternative ways of achieving policy objectives

There are no alternative ways of achieving the policy objectives.

Section 6 of the YJ Act provides a regulation-making power to increase the age of a ‘child’ to a person who has not turned 18 years. The regulation would only apply prospectively, to 17-year-olds who commit offences after commencement of the regulation, and would not have the effect of transitioning 17-year-olds who are currently in the adult criminal justice system to the youth justice system. Activation of section 6 will not achieve the Government’s policy objective.

Estimated cost for government implementation

The cost of implementing the Bill would be substantial without accompanying reforms, such as diverting young people from the criminal justice system to effective alternative programs that reduce offending and reduce the numbers of young people in custody on remand. Without such reforms, a dedicated new youth detention centre would be required at an estimated cost of \$400 million.

Precise and complete identification of the costs associated with transferring 17-year-olds into the youth justice system and implementing the range of strategies identified as required, will be one of the responsibilities of a Key Agencies/Whole of Government panel that will be established to lead implementation of the Bill.

Day to day operational costs associated with inclusion of 17-year-olds to the Youth Justice system is estimated to cost Government in the order of \$44 million per annum. However, this figure does not include an estimate of the cost of any remand reduction strategies arising from the work of the Key Agencies/Whole of Government panel.

Consistency with fundamental legislative principles

Increasing the age of a child for the purposes of the YJ Act from 16 years to 17 years will have limited retrospective application and therefore raises potential fundamental legislative principles (FLP) issues.

However, the effect on rights and liabilities which have accrued prior to commencement is beneficial, and therefore justified.

Consultation

There has been no consultation with the community on this specific draft Bill, however there have been numerous meetings with advocates, unions and other stakeholders since coming to government 18 months ago about this issue. Recently this consultation has included the Premier meeting with a broad group of key stakeholders, including the Attorney-General and the Minister for Police and Corrective Services.

A joint media statement from the Premier and Minister for the Arts, the Attorney-General and Minister for Justice and Minister for Training and Skills, and the Minister for Police, Fire and Emergency Services and Minister for Corrective Services on 7 September 2016 informed the community that the Government would introduce legislation to Parliament in the week commencing 12 September 2016 to end the practice of treating 17-year-olds as adults in Queensland's justice system.

Relevant community stakeholders will continue to be consulted; many will be represented on a Stakeholder Advisory Group that will be established to provide advice to Government on the development of programs and practices, the regulation, and the implementation of the integration of 17-year-olds in the Youth Justice system.

Consistency with legislation of other jurisdictions

With the exception of Queensland, all Australian states and territories include 17-year-olds in their youth justice systems. The amendment to the YJ Act in this Bill brings Queensland into line with the approach consistently adopted elsewhere in Australia.

Notes on provisions

Part 1 – Preliminary

Clause 1 states that, when enacted, the Bill will be cited as the *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act 2016*.

Clause 2 provides that the Act will commence on a date to be fixed by proclamation. The Government intends for that date to be 12 months from the Bill being passed by Parliament, to give relevant government and non-government stakeholders sufficient time to develop transitional procedures, draft regulations and implement strategies to reduce the number of young people currently in youth detention.

Part 2 – Amendment of Youth Justice Act 1992

Clause 3 provides that part 2 amends the *Youth Justice Act 1992* (YJ Act).

Clause 4 omits section 6 (Child's age regulation). Section 6 provides a regulation-making power to increase the age of a 'child' for YJ Act purposes to a person who has not turned 18 years. The provision will be redundant as a result of amendments made under the Bill.

Clause 5 inserts new part 11, division 15 (Transitional provisions for Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act 2016, containing new sections 387 to 391.

Section 387 concerns offences committed by 17-year-olds before commencement if offence proceedings have not started.

Subsection 387(1) establishes that this section applies to a person who, as a 17-year-old, committed an offence before the commencement if a proceeding against the person for the offence has not been started before the commencement.

Subsection 387(2) declares that, for this Act or another Act, the person is taken to have committed the offence as a child. Other Acts include, for example, the *Police Powers and Responsibilities Act 2000*.

Part 6, division 11 (Child offenders who become adults) of the YJ Act will apply if the person has turned 18, or when the person turns 18.

Section 388 provides a time-limited regulation-making power.

Subsection 388(1) authorises the Governor in Council to make a regulation (a *transitional regulation*) under this division.

Subsection 388(2) provides that a transitional regulation must declare that it is a transitional regulation.

Subsection 388(3) declares that this section, sections 389 to 391 and any transitional regulation expire 2 years after the commencement. Providing for these matters to be dealt with by regulation facilitates the flexibility needed to realise the policy intent in an efficient, effective and fair way, but limiting the power in this way ensures future parliamentary oversight.

Section 389 deals with sentence orders currently in force.

Subsection 389(1) provides that this section applies in relation to a 17-year-old who, as a 17-year-old, committed an offence before the commencement, if a sentence for the offence was imposed before the commencement and is still operational at commencement. This group of individuals are the 17-year-olds who are subject to imprisonment or community based orders that are being managed by Queensland Corrective Services at the time of commencement.

Subsection 389(2) allows a transitional regulation to provide for the application of this Act or another Act to the person as if the sentence or a subsequent order about the sentence were a 'corresponding child sentence or order' (see subsection (6)). This provision preserves the independence of the judiciary by ensuring the original adult sentence or subsequent order (for example, an order made on appeal) by a court remains in place. A transitional regulation can however provide that the original sentence or order be administered as though it were a youth justice order. At subsection 389(6) a table provides a 'corresponding child sentence or order' for each possible adult sentence or order.

Subsection 389(3) states that the matters for which the transitional regulation may provide include: (a) the continued application of a provision of an Act to the sentence or subsequent order for particular purposes even though another provision of the same Act or another Act applies as if the sentence or subsequent order were a corresponding child sentence or order; (b) if the sentence includes a term of imprisonment, applying a provision of this Act about supervised release order to the term of imprisonment as if it were a period of detention; (c) if the person is serving a term of imprisonment in a corrective services facility at the commencement, (i) providing for the transfer of the person to a detention centre for detention as if the term of imprisonment were a period of detention; or (ii) applying a provision of this Act to the person as if the person were serving a period of detention in a detention centre.

An example of a transitional regulation under subsection 389(3)(a) might be one that preserves the applicability of appeal provisions to an adult sentence order, even though the order is being administered as a youth justice order; or the availability of section 73 of the *Penalties and Sentences Act 1992* (payment of a fine) in circumstances where a fine option order has converted a fine into community service and the community service is being administered in the youth justice system. In that circumstance, the person could still be given the option of paying out the order.

An example of a transitional regulation under subsection 389(3)(b) might be one that allows for a person serving a term of imprisonment, who is not yet on parole, to be released under a supervised release order as though they had served a period of detention within the youth justice system.

Paragraph 389(3)(c)(i) provides for a regulation to prescribe, for example, the operational arrangements and responsibilities necessary for effecting transfers from adult correctional facilities to youth detention centres.

The Government's clear policy intent is to transition all 17-year-olds to the youth justice system. However, paragraph 389(3)(c)(ii) has been included to provide flexibility should, during the transitional period, exceptional circumstances mean a young person's individual needs would be better met by the location or resources of a specific corrective services facility; for example, where the prison is a long distance from a youth detention centre and the person's release date is due soon after the commencement date, or where the person has special needs and the corrective services facility has developed a tailored program of services involving specialist providers that would not be transferrable to a detention centre in the short term. A transitional regulation could provide that a person who is not transferred in these types of circumstances still benefits from having the YJ Act apply to them, as though they were accommodated in a detention centre.

Subsection 389(4) authorises a court, on application by the person or the chief executive or on its own initiative, to (a) make an order or give directions it considers necessary to facilitate the application of this Act or another Act to the person under the transitional regulation; or (b) discharge the sentence or subsequent order and substitute it with a corresponding child sentence or order.

Paragraph (a) is intended to ensure judicial oversight of the transition of 17-year-olds into the youth justice system, allowing the courts to provide guidance and to resolve issues. The appropriate court to make an order or give a direction will depend on the circumstances and may be the court hearing a proceeding; sentencing court, either at the time of sentencing or at a later date; or the Childrens Court. The scope is deliberately broad, to allow the courts to resolve issues about any aspect of the transition – for example, in relation to when or how a 17-year-old is to be transported to a detention centre.

Paragraph (b) allows a court to vary a sentence or subsequent order, or discharge it and substitute a corresponding child sentence or order. It is anticipated this provision might be used where it is clear that for some reason the intention of the sentencing court will not be achieved following the transition of the 17-year-old to the youth justice system and cannot be achieved with an order or direction under paragraph (a). For example, a sentencing court may have attached a condition to a probation order that the 17-year-old participate in a program run by a non-government organisation with whom Corrective Services has a service agreement, but with whom Youth Justice does not have a service agreement and cannot secure one because the organisation does not have the capacity. A court might vary the order by substituting a different condition to address the concern apparently held by the sentencing court.

Subsection (5) clarifies that it is not intended that (4)(b) be used merely to get a better result for an offender. Sentence orders that have been validly made should stand, except as noted above.

Subsection 389(6) sets out the adult sentences or orders relevant for this section, and the *corresponding child sentence or order* for each.

Section 390 deals with proceedings that are on foot at commencement.

Subsection 390(1) provides that this section applies in relation to a person who, as a 17-year-old, committed an offence before the commencement, for which proceedings are on foot at commencement. This group of individuals will generally be 17-year-olds currently in the adult criminal justice system, whose court matters have not yet been finalised at the time of commencement.

Subsection 390(2) allows a transitional regulation to provide for the application of the YJ Act or another Act to the person as if the person committed the offence as a child. The main purpose of this provision is to facilitate the proceedings continuing under the YJ Act, but Acts other than the YJ Act that may be relevant include the *Childrens Court Act 1992* and the *Bail Act 1980*.

Subsection 390(3) states that the matters for which the transitional regulation may provide include: (a) removing an existing proceeding for the offence to the Childrens Court for hearing and determining under this Act; (b) for an existing proceeding for the offence that is not removed to the Childrens Court for hearing and determining under this Act—applying a provision of this Act about proceedings to the proceeding; (c) applying a provision about bail under part 5 to the person; (d) if the person is being held on remand, or otherwise being held in custody, in a corrective services facility at the commencement, (i) providing for the transfer of the person to a detention centre, or (ii) applying a provision of this Act to the person as if the person were being held on remand in the chief executive's custody, or otherwise held in custody in a detention centre; (e) applying a provision of this Act to any sentencing for the offence.

An example of a transitional regulation under subsection 390(3)(b) might be one that applies to a Supreme Court matter, or one that allows a part-heard matter to be finalised in the court that it started in, but with the court operating under the provisions of the YJ Act (for example, the court will be a closed court). Allowing this approach ensures efficiency of the courts and prevents witnesses having to give evidence a second time.

A transitional regulation under subsection 390(3)(c) may allow for decisions about bail to be made using the criteria set out at part 5 of the YJ Act. If a young person was denied bail when assessed as an adult, the decision could change after taking into account the youth justice system criteria.

Paragraph 390(3)(d) has the same policy rationale as paragraph 389(3)(c), explained above.

A transitional regulation under subsection 390(3)(e) may ensure that, although a young person pleaded guilty or was found guilty in a court exercising adult jurisdiction, a court that sentences that individual after commencement must sentence the person as a child under the YJ Act.

Subsection 390(4) authorises a court, on application by the person, the prosecution or the chief executive or on its own initiative, to make an order or give directions it considers necessary to facilitate the application of this Act or another Act to the person under the transitional regulation. This provision has the same policy rationale as subsection 389(4)(a) explained above, allowing the courts to provide guidance and to resolve issues.

Subsection 390(5) provides that, in this section *existing proceeding* means a proceeding started but not finally dealt with before the commencement.

Section 391 concerns administrative arrangements.

Subsection 391(1) allows a transitional regulation to provide for administrative arrangements to facilitate the operation of the regulation.

Subsection 391(2) states that the matters for which the transitional regulation may provide include: (a) the staged transfer to a detention centre of persons to whom the regulation applies who, at the commencement, are being held on remand, serving a term of imprisonment, or otherwise being held in custody, in a corrective services facility; (b) the chief executive (corrective services) giving to the chief executive information about a person to whom the regulation applies.

Paragraph (a) will facilitate a regulation to guide the sensible and safe management of the transfer of all relevant people from Corrective Services to Youth Justice.

Paragraph (b) will facilitate arrangements for the transfer of the relevant parts of the person's file, and any other relevant information, to detention centre management to assist in meeting the person's needs, and the good management of the centre.

Subsection 391(3) confirms that a transitional regulation providing for a matter mentioned at subsection (2)(a) applies to a person despite any provision of this Act providing that the person must be detained in a detention centre.

Subsection 391(4) confirms that a transitional regulation providing for a matter mentioned at subsection (2)(b) applies to information about a person despite any provision of an Act preventing the chief executive (corrective services) giving the information to the chief executive.

Clause 6 amends schedule 4 (Dictionary).

The definition of adult and the definition of child (first mention only) are omitted.

The definition of child in the *Acts Interpretation Act 1954* will then apply. That Act defines child as an individual who is under 18 years.

Part 3 – Amendment of other legislation

Division 1 – Amendment of Corrective Services Act 2006

Clause 7 provides that this division amends the *Corrective Services Act 2006*.

Clause 8 omits subsection 18(2). That subsection provides that a prisoner who is under 18 years must be kept apart from other prisoners who are 18 years or older, unless it is in the prisoner's best interests not to be kept apart. The provision will be redundant as a result of amendments made under the Bill.

Clause 9 inserts new chapter 7A, part 10 (Transitional provision for Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act 2016).

Section 490L provides for the continued application of repealed section 18(2) in certain circumstances. This provision has been inserted to preserve separation of 17-year-olds in adult facilities during the transitional phase of this Bill.

Subsection 490L(1) provides that repealed section 18(2) continues to apply to a person under 18 years who (a) is a prisoner in a corrective services facility on the commencement; or (b) becomes a prisoner in a corrective services facility after the commencement in relation to a proceeding for an offence (i) decided before the commencement; or (ii) started, but not finally dealt with, before the commencement.

The effect is that subsection 18(2) will continue to apply until the last 17-year-old leaves adult custody.

Subsection 490L(2) states that, in this section, repealed section 18(2) means section 18(2) as in force immediately before the commencement.

Division 2 – Other amendments

Clause 10 gives effect to Schedule 1, which makes minor or consequential amendments to various Acts, including for example updating cross references and terms, to reflect the amendments made to the YJ Act by the Bill. Most of the amendments simply omit definitions of 'child' which referenced the definition in the YJ Act, with the effect that the definition in the *Acts Interpretation Act 1954* will then apply as it does for the YJ Act.

Of note, however, is the third amendment to the *Transport Operations (Passenger Transport) Act 1994*.

The policy objective of this Bill is to treat 17-year-olds as children in the criminal justice system. For consistency, definitions in the *Transport Operations (Passenger Transport) Act 1994* referring to 17-year-olds that relate to driver disqualifying offences are replaced with reference to 18-year-olds. The effect of this amendment is that a person who is currently ineligible for driver authorisation due to having committed a Category A driver disqualifying offence when the person was 17 years old may, after commencement, become eligible for driver authorisation due to the Category A driver disqualifying offence being reclassified as a lesser Category B driver disqualifying offence.