

# Youth Justice Legislative Reform

(*Youth Justice Act 1992 and Youth Justice Regulation 2016*)

## December 2019

### Information for stakeholders

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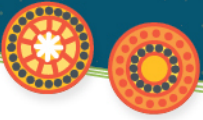
#### Purpose of this document

This document is intended to supplement the fact sheet *Youth Justice and Other Legislation Amendment Act 2019: Provisions commencing by proclamation*, available on the Department of Youth Justice [website](#). It gives stakeholders a more detailed overview of the provisions of the *Youth Justice and Other Legislation Amendment Act 2019* and the *Youth Justice and Other Legislation Amendment Regulation 2019* that commenced on 16 December 2019.

All section references are to the *Youth Justice Act 1992* unless otherwise specified.

#### Glossary

- **Amendment Act** means the *Youth Justice and Other Legislation Amendment Act 2019*
- **Bail Act** means the *Bail Act 1980*
- **Commencement** means 16 December 2019
- **DYJ** means the Department of Youth Justice
- **Amendment Regulation** means the *Youth Justice and Other Legislation Amendment Regulation 2019*
- **YJ Act** means the *Youth Justice Act 1992*
- **YJ Regulation** means the *Youth Justice Regulation 2016*
- **PPRA** means the *Police Powers and Responsibilities Act 2000*
- **PPR Regulation** means the *Police Powers and Responsibilities Regulation 2012*



## 1. Introduction

The Amendment Act was passed by Parliament on 22 August 2019 and received royal assent on 5 September 2019, at which time some provisions commenced. On 16 December 2019, the majority and remaining provisions of the Amendment Act commenced by proclamation.

Changes made by the Amendment Act on proclamation include:

- a child-focussed bail decision-making framework;
- an information sharing framework;
- changes to pre-sentence report requirements; and
- enhanced requirements for police when dealing with a child under the PPRA.

Also commencing on 16 December 2019 was the Amendment Regulation, which amends both the YJ Regulation and the PPR Regulation for the purposes of supporting the commencement of particular provisions in the Amendment Act. Those provisions relate to changes to pre-sentence report requirements and the introduction of the information sharing framework into the YJ Act.

## 2. Bail

The new bail decision-making framework is aimed at facilitating more grants of bail to appropriate children in order to reduce the number of children in detention on remand. However, it ensures police and courts are able to continue to exercise their discretion to detain a child in order to maintain community safety.

### ***2.1 Clarification that bail decisions regarding children are to be made under the YJ Act***

In order to make very clear that decisions about release on bail and conditions of bail regarding children are to be made entirely under the YJ Act, the subsections in sections 7 (Power of police officer to grant bail) and 16 (Refusal of bail generally) of the Bail Act stating that those sections do not apply to children have been moved to more prominent positions in the sections (Bail Act s.7(1)(d) & 16(1AA)), and a new subsection has been added to section 11 (Conditions of release on bail) with the same effect (s.11(1AA)).

Section 16A (Refusal of bail for defendants convicted of terrorism offences or subject to Commonwealth control orders) already did not apply to children (Bail Act s.16A(1)(b)).

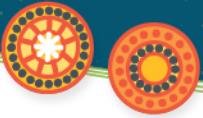
Clarifying that section 7 does not apply to children underscores that an officer-in-charge of a police station or police establishment or a watch house manager must use the new bail decision-making framework in the YJ Act in all circumstances for determining whether or not to grant bail to a child.

Clarifying that sections 11, 16 and 16A do not apply to children makes clearer that the new framework in the YJ Act is the sole source for courts and police to determine bail conditions for children.

### ***2.2 Decisions about bail and related matters***

The new YJ Act section 48 is the framework for courts and police to apply when deciding about release and bail for children. There is a clear presumption in favour of a grant of bail that is applicable in all circumstances (s.48(2)).

The presumption does not apply where there is a requirement under the YJ Act or another Act to keep the child in custody (s.48(3)). The presumption can also be rebutted if the court or police officer is satisfied that there is an unacceptable risk that the child would not surrender into custody, or would



commit an offence, endanger the safety or welfare of a person or interfere with a witness or otherwise obstruct the course of justice, whether for the child or another person, if released (s.48(4)).

When making certain bail decisions (see s.48AA(1)), courts and police officers may also have regard to a number of other factors, including the nature and seriousness of the alleged offence; the criminal history, associations and home environment of the child; and the history of a previous grant of bail to the child (s.48AA(5)).

When deciding whether there is an unacceptable risk of re-offending, endangering the safety or welfare of a person, or interfering with a witness, courts and police officers may also consider whether a condition could be imposed on a grant of bail to the child to mitigate the risk (s.48AA(6)).

A court or police officer must not be satisfied a risk or unacceptable risk exists solely because the child would not have accommodation if released, or has no apparent family support (s.48AA(7)). The inclusion of 'risk' as well as 'unacceptable risk' is relevant for the consideration of bail conditions (s.52A; see [2.7 Appropriate bail conditions](#) below).

### **2.3 Risk of re-offending**

If the assessment of risk relates to the child committing an offence while on release, the nature and seriousness of the offence that the child might commit and its likely impact on a victim or the community must also be considered. This aims to ensure that children are not refused bail purely on the grounds that they are likely to commit a minor offence (s.48AA(4)).

### **2.4 Threat to a child's safety and welfare concerns**

The amendments retain the provisions in previous section 48(10) of the YJ Act that require a court or police officer to keep a young person in custody if satisfied there is a threat to the child's safety because of the alleged offence (for example, a threat of retribution from a victim or a co-accused) and there is no reasonably practicable way of ensuring the child's safety other than by keeping them in custody (s.48AE). However, it is clarified that a court or police officer must not be satisfied that a child must be kept in custody for their own safety only because the child will not have any, or adequate, accommodation if released from custody, or has no apparent family support (s.48AE(3)).

### **2.5 Release where unacceptable risk exists**

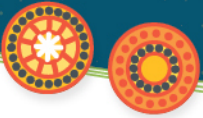
Where a court or police officer comes to the conclusion that the presumption of release can be rebutted and an unacceptable risk presented by the child cannot be mitigated by the imposition of reasonable conditions, the decision-maker must then have regard to new section 48AD. Under this section, the child may be released, despite the unacceptable risk, if the decision-maker is satisfied that the child's release is not inconsistent with ensuring community safety, and is otherwise appropriate, having regard to any of the additional factors listed. The factors reflect the complex needs of children involved in the youth justice system (s.48AD(2)).

### **2.6 Adjourment to obtain further information**

A court remanding a child in custody to obtain further information is now discretionary, rather than mandatory, as was previously the case under section 48(9) (s.48(5) and (6)).

### **2.7 Appropriate bail conditions**

Amendments aim to ensure that bail conditions are sustainable, appropriate and targeted to manage the actual risks for an individual child while they are on bail, and reduce the risk of the child breaching the conditions of their bail. Bail decision-makers must be satisfied under the new amendments that a condition they wish to impose on a child is relevant to mitigating an identified risk that the child will commit an offence; endanger anyone's safety or welfare; or interfere with a witness or otherwise obstruct the course of justice (s.52A(2)).



A risk cannot be present solely because the child would not have accommodation if released, or has no apparent family support (s.48AA(7); see [2.2 Decisions about bail and related matters](#) above).

Reasons also must be given by the court or police officer that justify how each bail condition imposed is intended to mitigate a particular risk for that child (s.52B).

Additionally, to ensure that bail conditions are not overly onerous or unfair, amendments provide that a condition must not involve undue management or supervision of the child, having regard to the child's age, maturity, cognitive ability and developmental needs, health and any disability (including the child's need for medical assessment, treatment and access to supports and services), as well as the child's home environment and ability to comply with the condition (s.52A(2)(c)).

### **2.8 Duration of bail conditions**

Amendments also provide that a court or police officer that imposes a bail condition must specify the duration that the condition applies (s.52A(3)). The condition will stop having effect at the end of the stated period. The duration a condition is in force must be no longer than is necessary to mitigate the identified risk it is imposed to address. If a condition lapses, the child's grant of bail will continue until they are sentenced or an application is made to vary or revoke the bail. The changes ensure that bail conditions will be appropriate, in nature and length, and address or reduce a real risk relating to bail under the YJ Act.

Amendments have also made it clear that a condition requiring the use of an electronic tracking device cannot be imposed on a child (s.52A(5)).

### **2.9 Breach of bail conditions**

While breach of a bail condition is not an offence for a child as it is for an adult (Bail Act s.29(2)(a)), a child can be arrested and returned to custody pending a reconsideration of bail (PPRA s.367(3)(a)(i)(B)).

A new provision has been inserted into the YJ Act that provides a child-focused, discretion-based framework to guide police in their response to a child who has breached, is breaching, or is likely to breach a bail condition (s.59A(1) & (2)). It requires police to consider the following options before proceeding to arrest: to take no action; issue a warning; or make an application to vary or revoke the child's bail.

If a police officer is considering an application to vary or revoke the child's bail, he or she must have regard to factors including: the seriousness of the contravention or likely contravention, whether the child has a reasonable excuse, the child's particular circumstances and any other relevant circumstances.

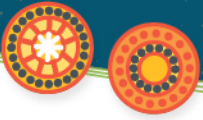
The amendments have retained the ability of police to arrest and detain the child if there is no appropriate alternative, in order to ensure community safety.

## **3. Information sharing framework**

A new information sharing framework has been inserted into the YJ Act. The framework does not affect the operation of the pre-existing confidentiality provisions in Part 9 of the YJ Act. Therefore, established practice in relation to information disclosures can continue.

### **3.1 Purpose**

The information sharing framework enables a coordinated response to the needs of children charged with offences. The new provisions provide for arrangements to be established under which services provided to children by 'prescribed entities' and 'service providers' are coordinated through the sharing of relevant information about a child, without compromising the confidentiality of a child's information (s.297B).



Prescribed entities and service providers are defined in section 297D.

### **3.2 Establishing arrangements**

The sharing of information can only occur under an arrangement established under section 297F. Importantly, the authority to establish an arrangement under that section is only provided to the chief executives of Queensland Government departments listed in the s.297D definition of prescribed entity (see *Acts Interpretation Act 1954* s.33(6) for the meaning of 'department').

Under the new framework, an arrangement can be established in order to coordinate the provision of services (including assessments and referrals) to meet the needs of children 'charged with offences' (see [Children in scope](#), below); to provide information that may be used by courts in making bail or sentencing decisions for children; and to share relevant information with each other for the aforementioned purposes (s.297F).

### **3.3 Children in scope**

'Child charged with an offence' is defined in section 297E and is not limited to a child facing a current charge. The definition requires the child to have been charged with an offence at some point in the past, and to be receiving, or the subject of, a service provided for the purpose of dealing with the child under the YJ Act for the offence, or helping rehabilitate the child.

'Helping rehabilitate the child' could be after the proceedings for the charge have been finalised, and could be during or after the period of any sentence order imposed. The example provided is counselling and rehabilitation programs provided for the purpose of meeting particular needs of the child relevant to the child's offending behaviour (s.297E(b)(ii)).

### **3.4 Transparency and public scrutiny of arrangements**

For transparency and public scrutiny of what information will be shared, an arrangement must be provided to the chief executive of DYJ who must publish the arrangement on the department's website (YJ Regulation s.44A).

### **3.5 Principles for sharing information**

The youth justice principles underlie the new information sharing framework (s.297C(1)).

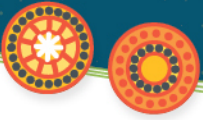
A further principle is that a person's consent should be obtained before disclosing confidential information whenever possible and practical (s.297C(1)).

However, not obtaining consent does not prevent the sharing of information (s.297C(2)). This recognises that while it is always preferable to obtain consent, in some circumstances it will not be practical or possible, and the relevant information should still be shared in order to achieve the best outcomes for a child in the youth justice system.

### **3.6 requirements for disclosure without consent**

To support the principle in section 297C, the YJ Regulation requires a prescribed entity or service provider that discloses information about a child without the child's consent to make all reasonable attempts to inform the child that their information has been disclosed and the purpose, from those listed in section 297G(2)(a) to (f), that the prescribed entity or service provider reasonably believed the information may help the recipient to do (YJ Regulation s.44C(2)).

However, advising a child of the disclosure need not occur when it is reasonably believed by the prescribed entity or service provider that delaying notification is appropriate in all the circumstances (YJ Regulation s.44C(3)). This can occur, for example, in instances where advising the child of the disclosure may create or increase a risk of harm to a person.



The YJ Regulation also requires records of the attempts that were made to obtain consent prior to the disclosure, as well as of the attempts made to advise the child of the disclosure afterwards (YJ Regulation s.44C(4)).

### ***3.7 Disclosing, recording or using information***

The new framework provides that a prescribed entity or service provider (holder) of confidential information relating to a child charged with an offence can disclose the information to another prescribed entity or service provider (recipient) under an arrangement if the holder reasonably believes the information may help the recipient to do one of the things listed in section 297G(2)(a) to (f). Section 297G(3) also enables a holder, under an arrangement, to record or use the information for a listed purpose.

### ***3.8 Limitations on disclosing***

Under the YJ Regulation, a prescribed entity or service provider (holder) who discloses information under an arrangement must provide a written notice to the recipient stating the purpose, from those listed in new section 297G(2)(a) to (f) of the YJ Act, that the holder reasonably believes the information may help the recipient to do (YJ Regulation s.44B(2)(a)).

The notice must be given before, or at the same time as, the information is disclosed to the recipient. It remains effective for a period of up to six months (YJ Regulation s.44B(3)).

These provisions are intended to ensure, and to give children and their families confidence, that holders will only disclose relevant information and only for the purposes authorised in the YJ Act.

The notice must also state that the recipient must not disclose the information to another entity under a different arrangement without obtaining the written consent of the holder (YJ Regulation s.44B(2)(b)).

The request for consent must state the purpose that the recipient believes the information may help the proposed new recipient, and the consent, if given, may include conditions (YJ Regulation s.44B(4)-(6)). Note that these provisions are drafted to apply at the time the consent is sought, and so describe the party with the information as the holder, the proposed new recipient as the recipient, and the original holder as 'another entity' that disclosed the information to the holder).

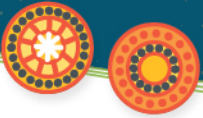
### ***3.9 Confidentiality***

Prescribed entities and service providers under the new information sharing framework are subject to the confidentiality obligations in the YJ Act (s.285(1)(i)). Recipients of information are prohibited from recording, using or disclosing confidential information except under part 9 of the YJ Act. Contraventions constitute an offence with applicable penalties of up to two years imprisonment or 100 penalty units (s.288).

### ***3.10 Interaction with other laws***

Section 297H stipulates that the provisions which make up the information sharing framework do not limit a power or obligation under another Act or law to give information. It also clarifies that laws other than those identified in subsection (2), which may restrict information sharing, will not prohibit or restrict to information sharing under the framework.

It is further confirmed that a privilege that a person may claim under another Act or law in relation to information is not affected only because the information may be, or is, disclosed under the framework. To remove any doubt, it is declared that nothing in the provisions requires an entity to disclose information. The framework does not compel the sharing of information, it only enables it in the circumstances and for the purposes provided. By way of example, noted both in the YJ Act (following s.297H(5)) and the explanatory notes to the Youth Justice and Other Legislation Amendment Bill 2019, a person may decide to withhold information that may be disclosed under the framework because the information is subject to legal professional privilege.



## 4. Pre-sentence report requirements

### 4.1 *Further material, to accompany a full report*

Previously, rather than preparing a full pre-sentence report, Youth Justice could provide 'further material' if another pre-sentence report has been prepared for another sentencing of the child on the same day. To make pre-sentence report requirements more flexible, amendments enable Youth Justice to provide further material with a pre-sentence report prepared within the six months leading up to the sentence (s.151(11)).

The intention of the amendments is to make pre-sentence report requirements more flexible ([explanatory notes](#)<sup>1</sup>, page 2). Previously, further material for additional offences as an addendum to an existing report was only available where the sentencing involving the existing report happened on the same day. The new provisions extend this so that further material for new offences can be added to an existing report prepared for another sentencing that happened or happens in the six months leading up to the sentence.

The court does not determine whether Youth Justice provides a full pre-sentence report or 'further material'. The court simply orders a pre-sentence report. Where the Act allows 'further material' together with a pre-existing report in place of a full new report, it is at the sole discretion of Youth Justice whether to provide a new full report or further material with an existing report (s.151(10)).

### 4.2 *Most beneficial and efficient method*

The YJ Act now also requires a court to consider, before ordering a pre-sentence report (other than when it is mandatory under sections 203 and 207), whether a pre-sentence report is the most beneficial and efficient method of obtaining relevant information (s.151(2) and (3)). There may be other practical ways that the court can obtain the information it is seeking, for example, directly from the child's legal representative or Youth Justice, which may take less time.

### 4.3 *Timeframe stated by the court*

The removal of the 15 working day minimum period to produce a pre-sentence report has been replaced with a requirement to provide the report within a reasonable timeframe stated by the court, with the court to have regard to the report's likely complexity. However, if no timeframe is set, the report needs to be produced as soon as practicable (s.151(6) and (12)).

#### 4.3.1 *Pre-sentence report likely complexity*

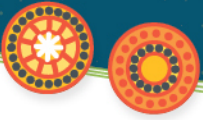
If the report is not expected to be complex, the reasonable time may be shorter than the previously stipulated 15 days. However, if it is expected to be more complex, the period stated for its production should reflect that complexity.

To better inform the court's determination of the likely complexity of a pre-sentence report, a new section has been inserted into the YJ Regulation (YJ Regulation s.5A). Section 5A provides factors the court may have regard to when considering the likely complexity of a report.

Section 5A(2)(a) and (b) list the number, nature, seriousness of the offence(s) and the circumstances in which they were committed. A report required for one simple offence could be required to be produced in a shorter period than a report which involves multiple offences committed in different circumstances involving varying levels of seriousness.

Section 5A(2)(c) of the YJ Regulation is a 'catch all' for any other matter that is considered relevant to the likely complexity of the report. This may include:

<sup>1</sup> The explanatory notes can be found at <https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2019-037>



- the number of other departments or service providers who may have relevant information which will need to be synthesised in the report;
- the anticipated complexity or a remand in custody report, where there are multiple offences with different arrest dates, and multiple periods of custody with bail refused or revoked for some offences but not others;
- the number of breached supervised orders that will need to be discussed in the report.

#### 4.3.2 Other factors influencing time frames

Nothing in the Act or Regulation prevents a court from taking into account factors other than the likely complexity of the report when setting a timeframe. Other factors which may affect a time frame include:

- Youth Justice will prioritise the speedy preparation of a pre-sentence report if a young person is remanded in custody awaiting sentence. However, if the report writer is located some distance from the detention centre, more time may be needed.
- Specialist reports can sometimes take considerable time.
- A pre-sentence restorative justice process can take a lengthy time.

#### 4.3.3 Shortest possible time frames

The objective of the legislative changes is to achieve the timely finalisation of youth justice matters. It is intended that Youth Justice will inform a court of factors that suggest a pre-sentence report of an appropriate standard may take longer to prepare, but also to proactively identify cases where a report – or further material, accompanied by another report – can be prepared more quickly.

## **5. Enhanced police requirements under the PPRA**

### ***5.1 Police contact with parents***

The previous section 392 of the PPRA required a police officer who arrests or serves a notice to appear on a child, to promptly advise a parent of the child about this. The new section 392 strengthens this provision by requiring a police officer to make all reasonable inquiries to promptly contact a parent and keep a record of inquiries made to do so when contact could not be made. This requirement aligns with existing operational requirements for police and will assist in demonstrating that 'all reasonable inquiries' have been made to notify a parent.

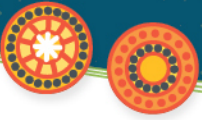
To accompany this amendment, the definition of parent in section 392(7) is expanded to incorporate the broader definition applicable under the YJ Act (Schedule 4). The YJ Act definition includes, in addition to a parent or guardian of a child, a person who has lawful custody of a child or a person who has the day-to-day care and control of a child.

### ***5.2 Police contact with legal aid organisations***

Section 421 of the PPRA requires that a police officer not question a child in relation to an alleged indictable offence unless the police officer has, if practicable, allowed the child to speak privately to a support person chosen by the child, and the support person is present while the child is being questioned. A support person might be a lawyer, but could also be a range of other people including an adult friend or relative, or a justice of the peace not known to the child (PPRA schedule 6, definition *support person*).

The new section 421(2) also requires police to notify, or attempt to notify, a representative of a legal aid organisation that the child is in custody for an alleged indictable offence, as soon as reasonably practicable. The obligation on police to contact a legal aid organisation will not arise if the police officer is aware that the child has already spoken to a lawyer acting for the child, or arranged for their lawyer to be present during questioning as a support person.





The new provision does not explicitly prohibit police from questioning the child if a representative of a legal aid organisation has not been contacted, but recognises that to do so is best practice, having regard to the serious consequences (including significant sentences of detention) that can result from indictable offences and the particular vulnerabilities of children.

YJ Act section 29 provides that a statement by a child is generally inadmissible in a proceeding for an indictable offence unless a support person had been present. The definition of support person (schedule 4) is linked to the PPRA definition. Section 29 does not refer to the new PPRA requirement to notify or attempt to notify a representative of the legal aid organisation, but section 29(4) clarifies that the common law about admissibility still applies.

#### ***5.2.1 Prescribed legal aid organisations***

The PPR Regulation prescribes legal aid organisations for the purposes of PPRA section 421: the Aboriginal and Torres Strait Islander Legal Service (ATSILS) and Legal Aid Queensland (LAQ). The intention of the amendment is for QPS officers to contact ATSILS for a child who identifies as Aboriginal or Torres Strait Islander, and LAQ for other children.

#### ***5.3 Court at which child to appear***

PPRA section 384 formerly provided simply that a notice to appear should require the person to appear before a court of summary jurisdiction in relation to the offence.

It now provides that a notice to appear for a child should require the child to appear at the court that a police officer is satisfied is most convenient for the child to attend, having regard to the child's individual circumstances. This is unless it would delay the ability of the child to appear before the court as soon as practicable after service of the notice to appear (PPRA s.384(3)(i)).

## **6. More information**

For further information or enquiries please contact Youth Justice: [YJStrategy@csyw.qld.gov.au](mailto:YJStrategy@csyw.qld.gov.au)