YouthLaw Aotearoa

Oranga Tamariki Youth Justice Demerit Points Amendment Bill Submission

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Who we are

YouthLaw Aotearoa is a Community Law Centre vested under the Legal Services Act 2000. We are a charity and part of the nationwide network of twenty-four community law centres throughout Aotearoa. Our service provides free legal advice and advocacy specifically for children and young people under 25 years of age. We help children and young people facing issues with the police in a couple of ways:

- Our lawyers in the legal advice team support children and their families with information and advice to help them navigate criminal justice matters. In 2020 our legal advice team helped young people in 156 police prosecution cases.
- We run legal education workshops about criminal law for children and young people or those supporting them.
- We publish youth-friendly information resources, undertake research, and make submissions on law and policy affecting children and young people.

This submission is informed by YouthLaw Aotearoa's insights from working with children and young people across New Zealand for over thirty years.

The submission has been prepared by Sarah Butterfield, a solicitor on our legal team and our YouthLaw staff and board.

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YouthLaw Aotearoa Submission

YouthLaw Aotearoa has significant concerns about the Oranga Tamariki (Youth Justice Demerit Points) Amendment Bill. Our major concern is that the bill does not recognise the underlying causes of youth reoffending. We also have concerns about the inflexible and confusing nature of the proposed demerits points system, the undermining of the Oranga Tamariki Act 1989, and the lack of recognition of Te Tiriti o Waitangi and the United Nations Convention on the Rights of the Child ("UNCROC").

We recommend that the Social Services and Community Committee recognise the limitations of this bill and consider our proposals under the "What is Needed" section of this submission.

The current system

If a young person offends in New Zealand the police have significant discretion about how they should be treated. Police can choose to do nothing, issue a warning, undertake alternative action, undertake an Intention to Charge Family Group Conference ("FGC"), lay charges in the Youth Court, or most seriously, lay charges in the adult District Court. The current system requires decision-makers to consider a young person's background and history of offending before they make a judgment about the most appropriate accountability mechanisms for that individual.[1] This decision-making is also guided by the principles of the Oranga Tamariki Act 1989 under section 4A, section 5 and section 208. New Zealand is internationally recognised for this individualised and discretionary approach to youth justice. This approach has arguably also been successful, as there is a decreasing number of youth offenders in the youth justice system.[2]

We understand the purposes of the proposed bill are to reduce re-offending and increase accountability and transparency within the youth justice sector.[3] However, we do not agree that the bill will resolve these concerns.

Underlying causes of youth reoffending

The bill's current form ignores the underlying driving factors of youth reoffending. Instead, the bill wrongly oversimplifies reoffending as being a problem of a "pervasive lack of responsibility whereby many youth continue to re-offend knowing they can avoid serious sentences or a criminal record."[4] This statement reflects the harmful myth that young people reoffend because they lack discipline, and require harsher punishment to "set them straight". However, extensive research and evidence has told us that harsh punishments do little to deter young people from re-offending, and in some instances have increased offending.[5]

The bill also makes the mistake of assuming that young offenders are competent and rational "mini" adults who will consider the number of demerits earned and adjust their conduct accordingly to avoid punishment. This contradicts scientific consensus that children's brains are different to adults, and that brain development extends into the mid-

[1] Youth Justice decision-makers are required to ensure that any measures to address the offending of the child or young person should "so far as it is practicable" address the underlying causes of the offending under section 108 of the Oranga Tamariki Act 1989(2)(fa).
[2] Professor Sir Peter Gluckman *It's never too early, never too late: A discussion paper on preventing youth offending in New Zealand* (Office of the Prime Ministers Chief Science Advisor, 12 June 2018) at 6.
[3] Oranga Tamariki (Youth Justice Demerit Points) Amendment Bill 2020 (229-1) (explanatory note).
[4] Oranga Tamariki (Youth Justice Demerit Points) Amendment Bill 2020, (explanatory note).
[5] Gluckman, above n 2, at 7.

20s.[6] As a result of this difference in brain development, young people are more likely to take impulsive risks and lack awareness and insight into the consequences of their actions.

The other reality is that young people reoffend for multi-layered and complex reasons, not least of these being because they are facing tremendous challenges in their lives. We know this because in the Youth Justice Indicators Summary Report December 2020, it states that,

> *"From 2014/15 to 2019/20, for almost all of the children (97%) and 88% of the young people referred for a youth justice family group conference (FGC), someone had previously expressed concern that they or their family needed help. That is, Oranga Tamariki had recorded a prior report of concern relating to their care and protection."*[7]

We also know that many young people face challenges relating to poverty, disability, trauma, discrimination, and exclusion or expulsion from schooling. These factors were identified in the Office of the Prime Minister's Chief Science Advisor 2018 paper "It's never too early, never too late: A discussion paper on preventing youth offending in New Zealand," as underlying reasons for offending.[8] The principal Youth Court Judge, Judge John Walker, elaborated on these underlying causes in a speech to the Blue Light International Conference in 2019:

> *"It is a reality that the role of the Youth Court can at times feel to be a final attempt. A last chance to redirect life trajectories in a positive way. It is a setting in which we are often trying to play "catch up" on a lifetime of learned behaviours, exposure to family violence, sexual and physical trauma, dislocation from schooling, fetal alcohol spectrum disorder ("FASD"), acquired brain injury, and other neuro-disabilities. For many of our young people, all other interventions and programmes prior to this point have not been successful. The cases we have in the Youth Court are the high needs complex cases often with serious offending."*[9]

We also know from evidence, that there is a small group of young people who persistently and seriously reoffend throughout their lives.[10] A significant majority of these young people face complex problems in their lives which may serve as underlying reasons for their offending.[11] The government should be focusing on how to help this small group of young people through early intervention, rather than enacting punishment-driven legislation.

Flawed bill

This bill is deeply flawed because it creates an inflexible system of set punishments, it undermines the Oranga Tamariki Act 1989, it is confusing, and it contravenes Te Tiriti o Waitangi and international conventions about children's rights.

Inflexible system of set punishments

Clause 210C provides an inflexible punishment framework that enforcement officers must follow. YouthLaw Aotearoa is

[6] Zoey Henley "Brain gain for youth: Emerging trends in neuroscience" (2006) 4(1) Practice - The New Zealand Corrections Journal 21 at 22.
[7] Ministry of Justice *Youth Justice Indicators Summary Report* (December 2020) at 6.
[8] Gluckman *It's never too early, never too late: A discussion paper on preventing youth offending in New Zealand,* above n 2, at 8-9.
[9] John Walker, Principal Youth Court "Running Interference" (Blue Light International Conference, Queenstown, New Zealand, 18 October 2019).
[10] Above n 6, at 22.
[11] Gluckman *It's never too early, never too late: A discussion paper on preventing youth offending in New Zealand,* above n 2, at 8, and Ministry of Justice *Youth Justice Indicators Summary Report* at 16.

most concerned about the requirement that officers must lay charges in the Youth Court or District Court once a certain number of demerits are reached. Our concern is that the Youth Court and the District Court are very serious outcomes that may not necessarily be appropriate considering a young person's background and the severity of their offending. These courts are inappropriate because there are many factors underlying youth offending, and the current system of discretionary approaches based on the individual appear to be successful at reducing re-offending.[12]

The District Court is particularly inappropriate as it is not designed for youth offenders. Currently, only the most serious offences will be sent to the District Court. However, under the bill, less serious offenders could be sent to the District Court. This is counter to international evidence, which has indicated that formal processing and transferring young people to an adult court increases re-offending.[13] We will discuss below how this proposed amendment would also undermine many parts of the current youth justice system and the Oranga Tamariki Act 1989.

We are confused as to why the Limited Service Volunteer ("LSV") program and the Youth Employment Training and Education programme have been singled out as the only available alternative options for enforcement officers to offer, or for the court to consider.[14] This change is inappropriate as there are already a number of existing services that are providing successful wraparound support to youth. The bill disregards and devalues the important work of these services. There is also evidence that the best interventions for youth are those with an individualised approach and greater family involvement.[15] The LSV program also seems to be very similar to a "boot camp" as: it is run by the Defence Force, attendees are away from home for six weeks, are not allowed guests, cannot leave for family celebrations, do not have access to their devices, and live in a highly regimented way.[16] As stated above, the "bootcamps as punishment" model does not decrease re-offending and can actually increase crime.[17] The LSV is also currently only available for 18 – 24 year olds. These young people are outside of the youth justice jurisdiction because of their age. We question whether the LSV is the appropriate program for youth offenders considering that children up to the age of 16 need to be enrolled at a school, and the LSV program does not seem to be designed for school-age children.

The LSV appears to be an advantageous programme when it is truly voluntary for attendees. However, it is not appropriate in this context as it is not voluntary, individually tailored, or inclusive of family. This seems to have been acknowledged by Marama Edwards who oversees LSV, as she has said "We have had individuals where it's just not for them, so they've got on to the programme for whatever reason and there could've been some personal issues that have been going on outside of the programme too. There are many different reasons why and that's why the programme is voluntary."[18]

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[12] Gluckman, above n 2, at 6.

[13] Hahn, R., McGowan, A., Liberman, A., Crosby, A., Fullilove, M., Johnson, R., Moscicki, E., Price, I., Snyder, S., Tuma, F., Lowy, J., Briss, P., Cory, S. & Stone, G. (2007). Effects on violence of laws and policies facilitating the transfer of youth from the juvenile to the adult justice system. Centers for Disease Control and Drake, E. (2013). The Effectiveness of Declining Juvenile Court Jurisdiction of Youthful Offenders. Washington State Institute for Public Policy and Ministry of Justice *Informal processing of young offenders: Evidence Brief* (September 2016) at 3.

[14] Oranga Tamariki (Youth Justice Demerit Points) Amendment Bill at 210D and 210E.

[15] Ministry of Justice *Adolescent Sex Offender Treatment: Evidence Brief* (November 2017) at 2.

[16] "Limited Service Volunteer (LSV)" (2020) Work and Income New Zealand <www.workandincome.govt.nz/work/training-and-work-experience/limited-service-volunteer.html>

[17] Gluckman, above n 2, at 7.

[18] "Limited Service Volunteer programme: Boot camps for young people set to double in size" (18 July 2019) RNZ <https://www.rnz.co.nz/news/national/394649/limit

The Youth Employment Training and Education programme does not seem to be in existence, as the bill failed at the first reading.[19] However, if it were in existence, we would have many of the same concerns as those about the LSV, considering that it would be run by the Defence Force.

Oranga Tamariki Act 1989

The proposed clauses 210A to 210I contradict and undermine many parts of the Oranga Tamariki Act 1989.

Section 208 - Principles

The proposed clauses undermine the section 208 principles of:

- Principle 208(a): that criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter; and
- Principle 208(f)(ii) that actions imposed should take the least restrictive form appropriate in the circumstances.

YouthLaw Aotearoa submit that the proposed demerits system and listed "punishments" are arbitrary and do not reflect the principle of not instituting criminal proceedings if alternative means are available. We are concerned that if this proposed clause becomes law, it will result in enforcement officers being forced to impose measures that are unnecessarily harsh on young offenders. These measures may not adequately consider the background of that young person or the most appropriate way to hold that young person accountable.

Section 209

Section 209 provides that enforcement officers have discretion to decide to issue a warning instead of initiating criminal proceedings. In contrast, the proposed clause 210C provides that enforcement officers will be required to issue a warning if the young person is between 1 and 40 youth justice demerit points. The proposed clause would remove this very important discretion and result in significant injustices for young people.

Section 245

Under section 245 any person wishing to commence proceedings against a young person must believe that the proceedings are in the public interest, consult with a youth justice coordinator, and have the matter considered in an FGC first. FGC's pre-charge is not required in very limited situations.[20] In opposition to this, clause 210C(2)(d) requires the enforcement officer to initiate proceedings in the Youth Court if a certain number of demerit points are reached.

We are concerned that clause 210C(d) and (e) circumvent and invalidate intention to charge FGCs. Currently, intention to charge FGC's occur when the offending is more serious. At this FGC, it is possible that a plan will be created to address the offending and the matter may not need to progress to court (depending on whether the police believe it to be necessary). However, under clause 210C(d) or (e) there will be no motivation for a young person to attend an intention to charge FGC, as the charges must be laid in court regardless of whatever plan is reached at the FGC. This is contrary to principle 208(a) and 208(f)(ii).

Section 281

Section 281 provides that the Youth Court shall not make orders unless an FGC has been held (subject to section 248).

Clause 210E provides that if a young person has admitted guilt or been proven guilty then the court may offer the young person an option to "apply to participate" in the LSV or

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ed-service-volunteer-programme-boot-camps-for-young-people-set-to-double-in-size>.

[19] Youth Employment Training and Education Bill 2017 (246-1).

[20] For example, see Oranga Tamariki Act 1989, s 247A and 248.

the Youth Employment Training and Education programme. If the young person successfully completes the programme, then charges will be withdrawn. If the young person does not complete the programme, the charges will progress to a hearing and any subsequent offending will result in an enforcement officer initiating proceedings.

Clause 210E directly undermines section 281 as it removes the need for a FGC, or an FGC plan. It also undermines the section 208 principles of (c)(i) and (ii) which provide that any measures for dealing with offending by children or young people should be designed to strengthen the family, whānau, hapū, iwi, and family group of the child or young person concerned; and to foster the ability of families, whānau, hapū, iwi, and family groups to develop their own means of dealing with offending by their children and young persons. Whilst FGCs are not perfect, they will do a better job of meeting those principles through the inclusion of family in creating the plan, as opposed to a top-down approach of the judge offering the LSV or Education and Training program as options, without consulting or including the family/whānau.

YouthLaw Aotearoa partially supports clause 210E(4) in that the charges will be withdrawn if the programme is completed. However, we do not support the rest of the clause, particularly clause 210E(6) and (7) which provide that if a young person does not complete a program and then accumulates one or more demerit points, then those subsequent offences must be initiated in court. This is a punishment-driven approach that does not consider the underlying reasons for the offending or what is needed to deter the young person from re-offending.

The proposed bill is also counter to the purpose of the Oranga Tamariki Act 1989 to provide a practical commitment to the principles of te Tiriti o Waitangi ("te Tiriti").[21] Oranga Tamariki is required to give practical effect to the principles of te Tiriti in several ways outlined in section 7AA.

Confusing

YouthLaw Aotearoa is also concerned that the proposed clauses 210A – 210I will create more confusion for enforcement officers, youth justice professionals, children and young people and their families.

The clause 210B bands are particularly complicated and will cause confusion for young people and their families. At YouthLaw Aotearoa we regularly provide advice to young people about the youth justice process. Explaining these bands and their application to young people and their families will be fraught with difficulties.

International conventions

New Zealand ratified the United Nations Convention on the Rights of the Child on 6 April 1993 ("UNCROC"). The bill fails to meet New Zealand's article 12 and article 40 obligations.

Article12 provides that children have the right to be heard in matters that affect them, and particularly matters that are administrative or judicial in nature.[22] The bill fails to consider children and young people's voices, despite the importance and significance of youth justice in children and young people's lives.

Article 40 of that convention provides the basic rights that children have when they are accused of a crime.[23] YouthLaw Aotearoa submit that the bill infringes on Article 40(3)(b), which states, "Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected" and article 40(4), "A variety of dispositions, such as care, guidance and supervision orders; counselling; probation;

[21] Oranga Tamariki Act 1989, s4(f).
[22] United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 12.
[23] Art 40.

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 both to their circumstances and the offence."[24] Clause 210C is contrary to this article as enforcement officers must initiate proceedings if a certain number of demerits is reached regardless of whether proceedings are appropriate or desirable, or ensure that the child is dealt with in a way that is appropriate to their well-being and proportionate both to their circumstances and the offence. The proposed change reverses the current law, which is consistent with article 40, as enforcement officers decide whether to initiate proceedings based on the background and circumstances of the child and their offending.

The bill is also counter to paragraph 6(c) of the United Nations general comment on children's rights which states that state parties should "promote key strategies for reducing the especially harmful effects of contact with the criminal justice system, in line with increased knowledge about children's development" and 6(c)(ii) which directs that state parties endeavour to divert children and young people away from formal court processes.[25]

We also call the select committee's attention to paragraph 4 which specifies that "Those States having provisions that are more conducive to the rights of children than those contained in the Convention and the present general comment are commended, and reminded that, in accordance with article 41 of the Convention, they should not take any retrogressive steps."[26] YouthLaw Aotearoa submit that the bill is a retrogressive step from the current provisions of the Oranga Tamariki Act 1989, and as such, is in breach of UNCROC.

Te Tiriti o Waitangi

We must acknowledge that we are not experts in te Tiriti and should not be treated as such. However, we are committed as an organisation to holding the Crown to account in relation to te Tiriti obligations. If our views differ from the views of iwi and other Māori law experts, we submit that greater weight should be given to their views over ours.

Principle of active protection and equity

We are concerned that the bill fails to recognise the principle of active protection, which requires the Crown to take active and positive steps to ensure that Māori interests are protected, and to act fairly to lessen inequities between Māori and non-Māori.[27] There is a significant disparity between rangatahi Māori and other young people in the Youth Court and in re-offending rates. We know this from the 2020 Youth Justice Indicators Report.[28]

It is apparent from the evidence that there is significant disparity between Māori and non-Māori in the Youth Justice system. The reason for this disparity is complex, and outside of the scope of our submission to identify. However, the Crown still has an obligation to address this disparity regardless of the underlying causes.[29] If the bill becomes law, we are concerned that more proceedings would be taken against rangatahi Māori, which would further increase the disparity, and be counter to the principle of active protection and equity. We are also concerned that the bill could increase re-offending and the associated disparity between Māori and non-Māori.

[24] Art 40(3)(b) and (4).
[25] General comment No. 24 (2019) on children's rights in the child justice system CRC/C/GC24 (18 September 2019) at [6(c)] and [6(c)(ii)].
[26] At [4].

[27] Waitangi Tribunal *The principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal* (n.d.) at 27 and 93.
[28] Ministry of Justice *Youth Justice Indicators Summary Report* (December 2020) at 7.
[29] Waitangi Tribunal Te Urerewa (Wai 894, 2015) at 659.

Principle of partnership

The Crown is obligated to work in partnership with Māori to design changes to the Youth Justice system.[30] The proposed bill bypasses this obligation by failing to consult or meaningfully engage with Māori. The bill also fails to acknowlege the success of Māori-led initiatives in Youth Justice for rangatahi, such as te Kooti Rangatahi, and Mahuru, the youth remand service developed by Ngāpuhi Iwi Social Services.

What is needed?

1) This bill should fail and not pass the second reading.

2) We acknowledge the work of Te Uepū Hāpai i te Ora the Safe and Effective Justice Advisory Group but submit that more research and consultation must be undertaken on youth justice and youth reoffending. As such, we recommend that an independent taskforce should be created to consult with those who are involved with youth justice, including: past and present youth offenders, whānau, hapū and iwi, and youth justice professionals. The taskforce should be responsible for producing a report and recommendations about how to reduce youth reoffending.

3) Dedicated and resourced support needs to be provided to early intervention services.

4) The government should follow the recommendations and advice given by the Prime Ministers Chief Science Advisor in the 2018 report "It's never too early, never too late: A discussion paper on preventing youth offending in New Zealand".

[30] Waitangi Tribunal *Tū Mai Te Rangi: Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 62.

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