NEW ZEALAND LAW SOCIETY

NZLS EST 1869

Oranga Tamariki (Youth Justice Demerit Points) Amendment Bill

03/02/2021

Submission on the Oranga Tamariki (Youth Justice Demerit Points) Amendment Bill

Introduction and overview

1. The New Zealand Law Society | Te Kāhui Ture o Aotearoa (Law Society) welcomes the opportunity to make a submission on the Oranga Tamariki (Youth Justice Demerit Points) Amendment Bill (the Bill). This is a member's bill in the name of NZ First MP, Darroch Ball.

The Bill's objective

2. The aim of the Bill, set out in the explanatory note, is to introduce "structured interventions for youth offending intended to improve behaviours and increase accountability and transparency within the youth justice system". The Bill proposes to amend the Oranga Tamariki Act 1989 (the Act) by introducing a youth justice demerit points system for youth offenders, based on the justice sector seriousness scale that is used as a tool to measure the relative seriousness of offending by adult offenders.[1]

3. The explanatory note states that "A youth justice demerit points system will deal with a pervasive lack of responsibility whereby many youth continue to re-offend knowing they can avoid serious sentences or a criminal record", and refers to rates of reoffending under existing diversion practices in the Youth Court jurisdiction.

4. The Law Society considers that the improvement of interventions for youth offending is a worthwhile objective, and the Bill presents an opportunity to consider whether the current system is delivering appropriate consequences for youth offending and reoffending.

The evidence

5. However, as a member's Bill, the proposed legislation is not backed up by policy work from officials and a regulatory impact analysis has not been carried out. In the Law Society's submission, there is insufficient evidence for the Bill's premise that the introduction of a demerit points regime will be effective in penalising and deterring repeat offending.

6. The comment in the explanatory note that there is a "pervasive lack of responsibility" by youth offenders is also not supported by the latest Youth Justice Indicators Summary Report released in December 2020,[2] which shows a continuing drop in the rate of youth offending. The Justice Minister Hon Kris Faafoi concluded that "[t]hese latest results are encouraging and show the youth justice system has performed well over the last 10 years", and that the information in the report "contributes to discussion and action around how best to hold young offenders to account, while also recognising their needs and vulnerability so that positive differences can be made in their lives".[3]

7. Experienced youth advocates on the Law Society's Youth Justice Committee are concerned that in its current form the Bill:

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1 https://www.justice.govt.nz/assets/Documents/Publications/2016-FAQs-Seriousness-Scores2.pdf

2 Ministry of Justice, Youth Justice Indicators Summary Report, December 2020, available at: https://www.justice.govt.nz/assets/Documents/Publications/Youth-Justice-Indicators-Summary-Report-December-2020-FINAL.pdf

3 *Youth Justice Indicators reveal continued fall in youth offending rates – Faafoi*, 22 December 2020, available at https://news.fuseworksmedia.com/1a278135-9074-42c7-a678-dd74df2d9a2a. (See appendix to this submission for the full text of the news item).

a. is inconsistent with the purposes and principles of the Act, which promote the rights and best interests of the child or young person and ensures their well-being is at the centre of any decision-making that affects that them,

b. is inconsistent with Aotearoa New Zealand's obligations under the United Nations Convention on the Rights of the Child (UNCROC) and other international conventions,

c. does not address the factors – such as mental health problems, neuro-disabilities and traumatic brain injury, physical/sexual abuse, drug and alcohol addiction, housing and education problems – that can be significant contributors to repeat offending, and

d. runs the risk that youth offenders will not understand the process and consequences of accumulating demerit points.

8. The Law Society therefore recommends that the Bill as currently drafted should not proceed. If the select committee considers there is merit in considering the introduction of a demerit points system in the Youth Court (or an alternative intervention designed to reduce youth offending), the preferable course would be for the necessary policy work and regulatory impact analysis to be done and a government bill introduced.

9. If the Bill were to proceed, the Law Society recommends that significant changes to various provisions be considered. These are discussed below.

10. The Law Society wishes to be heard.

Youth justice offending – recent statistics

11. As already noted, the statements in the explanatory note to the Bill are not supported by the recent findings of the 2020 Youth Justice Indicators Summary Report. That report shows a continuing drop in the rate of youth offending and follows similar key findings of the 2018 Youth Justice Indicators Summary Report. Key findings in the 2020 report include the following:[4]

> "Some very positive longer-term findings (between 2009/10 and 2019/20) include:
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> - The offending rates (which measure the proportion who offend relative to the population) for children and young people declined by 63% and 64% respectively (YJI 1.1).
> - The number of children and young people whose offending was serious enough to lead to an FGC or court action decreased by 46% and 59% respectively (YJI 1.2).
> - The rate of Youth Court appearances reduced by 68% (YJI 2.2)."

12. The latest figures also suggest a reduction in reoffending following alternative action, with 26% of young people reoffending within 12 months who had received alternative actions/warnings. This represents a reduction since 2015/16 when 29% reoffended within 12 months.[5]

13. Notwithstanding these reductions, however, the rates of appearance in Youth Court by Māori and to a lesser extent Pasifika children and young people remain disproportionately high

4 Note 2 above, at p 5.

5 Ibid at p 27.

compared to population rates. As Minister Faafoi recently commented, "despite encouraging findings for rangatahi Māori, the numbers of young Māori appearing before the Youth Court in 2019/20 were 8.3 times higher than the numbers of European/Other."[6] Further statistics highlight that in 2019/2020 Māori comprised 63% of children and young people (aged 10 – 17 years) with charges disposed of in the Youth Court, while Pasifika were 9% of the same bracket.[7]

The Bill's provisions

14. The Law Society has serious concerns about a number of provisions in the Bill. The Law Society recommends that advice be obtained from officials and others with experience and expertise in the youth justice jurisdiction, if the Bill were to proceed.

Section 210B – allocation of youth justice demerit points

15. Clause 8 sets out the proposed youth justice demerit points system. Proposed section 210B provides that the allocation of youth justice demerit points to a young person must be made by an "enforcement officer", where the young person has accepted full responsibility for committing an offence or has been convicted of an offence.

16. An enforcement officer is defined in section 2 of the Act as:

    (a) any constable:

    (b) an enforcement officer (as defined in section 2(1) of the Land Transport Act 1998):

    (c) any person acting in the course of their official duties (being duties that consist of or include the detection, investigation, or prosecution of offences) as an officer or employee of –

        i. the public service as defined in section 5 of the Public Service Act 2020 … ; or

        ii. a local authority.

17. A focus of the Act as it currently stands is the ability of whānau, hapū, iwi, victims and the community to come together via the Family Group Conference (FGC) process to reach agreement about the necessary steps to be taken for the purposes of accountability and rehabilitation. This is an important process for decision-making in response to alleged offending by children and young people. Placing the decision-making ability solely in the hands of an enforcement officer is likely to disempower the FGC process and undermine a significant feature of the current legislation.[8]

18. The process for allocating demerit points according to specified bands also raises concerns. Proposed section 210B(3) states the enforcement officer must allocate demerit points within one of five bands, ranging on a spectrum from "low offending" through "low-medium offending" to "high offending". The bands are defined in section 210B(4) – for instance, "low offending" means an offence with a score of 14 or below on the justice sector seriousness

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6 Above n 3.

7 See the 2020 results of charges finalised in the Youth Court: https://www.justice.govt.nz/justice-sector-policy/research-data/justice-statistics/data-tables/#cyp.

8 For example, Oranga Tamariki Act 1989, sections 4(1)(i) and 5(1)(b) and (c) which ensure a response to alleged offending and offending by children and young persons in a way that promotes their rights and best interests and ensures the well-being of a child or young person is at the centre of decision-making that affects that child or young person.

score scale, "low-medium offending" scores between 15 and 30, and so on. This mathematical approach to considering the young person's offending is at odds with legislative and common law provisions that require personal and cultural background, family circumstances and underlying causes of youth offending, to be taken into account in assessing culpability and appropriate responses to alleged offending by young people.[9]

19. The experience of youth advocates and others who work in the youth jurisdiction is that children and young people who offend often come from complex backgrounds, and typically present with a range of cognitive, communication, learning, and other difficulties (for example, communication disorders, post-traumatic stress disorder, foetal alcohol spectrum disorder, anxiety, substance disorders). The proposed regime does not reflect the reality of children and young people with such difficulties. It also assumes they will be capable of keeping a tally of their demerit points and factor that into their future decision-making. There is significant research to indicate this is not how the adolescent brain works, leaving aside the additional difficulties affecting some children and young people which can compound the challenges they face.

20. In light of these concerns noted above, the Law Society considers section 210B is inconsistent with the Act's purposes and principles and the rights of young people under UNCROC.[10]

Section 210C – Actions required if youth justice demerit points are accumulated

21. Proposed section 210C sets out the actions an enforcement officer must take, depending on the number of demerit points accumulated as a result of the enforcement officer allocation process in section 210B. There is no discretion in the type of action an enforcement officer can take.

22. The enforcement officer allocating the demerit points must also provide notice to the young person. Difficulties with the notice provisions are discussed in more detail below at paragraphs [33]-[36].

23. Proposed subsections 210C(2)(d) and 210C(2)(e) raise significant concerns. Section 210C(2)(d) requires an enforcement officer to bypass the FGC process and lay charges directly in the Youth Court where a young person has accumulated between 81 and 99 demerit points. Section 210C(2)(e) goes further and would give Police the power to lay formal charges against a young person (as young as 14 years old) directly in the District Court where a young person has accumulated 100 or more demerit points.

24. These subsections are a fundamental departure from the diversionary emphasis of the Act, and the legal basis upon which a charging document can be laid. According to the Act as it currently stands, an FGC must be held before a charging document can be laid in Court.[11]

25. The effectiveness and success of the FGC process is in devising and supervising a plan specifically tailored to support the particular circumstances of both the young person and any complainants. Such a process can provide the young person with an opportunity to fully

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9 For example, see section 5 and then specific sentencing principles in sections 284, 284(1)(b), 284(1)(d) such as taking into the personal history, social circumstances, and personal characteristics of the young person. By analogy to those two section 284 principles is section 8(i) and section 27 of the Sentencing Act 2002.

10 UNCROC, Article 12 the right of the young person to express their views in matters affecting them and for those views to be given due weight.

11 Oranga Tamariki Act 1989, ss 245 and 272.

understand their offending and its consequences, and can encourage the young person to adjust their behaviour through the supports provided in an FGC plan or alternative action plan. The Bill's provisions would bypass the FGC process, and the jurisdictional provisions in the Act.

26. Section 210C would also undermine the legislative changes made on 1 July 2019 to increase the Youth Court jurisdiction to the age of 18 years (except for those charged with Schedule 1A offences). In the Law Society's submission, this would be a significant backward step for the youth justice system. It would also be contrary to Aotearoa New Zealand's obligations under international conventions such as UNCROC and the recent UN General Comment no 24 (2019) on children's rights in the child justice system[12] which promote a diversionary approach and the wellbeing and best interests of the child/young person.

27. The UN General Comment no 24 has recently been cited by the Youth Court,[13] which noted there is a "strong emphasis on avoiding criminalising the behaviour of children and also an emphasis on diverting them wherever possible from criminal law processes".[14] The Court also highlighted the point that children accused of a crime "need to be treated in a manner consistent with their sense of dignity and worth and that the evidence shows the prevalence of crime committed by children decreases after the adoption of systems in line with those principles."[15]

28. Finally, we note there is no provision for funded out-of-court legal advice for young people who fall into these higher categories of youth justice demerit points. By way of analogy, as of 1 July 2019, for all pre-Youth Court FGCs relating to charges involving an offence carrying a maximum penalty of 10 years or more, Oranga Tamariki must arrange for a Youth Advocate to attend the FGC. Further, article 12 of UNCROC provides for the right of children to express their views in matters affecting them and for those views to be given due weight. These provisions recognise the seriousness of the offending and ensure legal protection to the young person.

29. The youth justice demerit point framework established by the Bill therefore does not adequately provide protections to a young person and undermines the basic rights and principles that underpin the youth justice system.

Section 210D – Programme available where a young person has accumulated between 1 and 80 youth justice demerit points

30. Further to the actions an enforcement officer must take in section 210C, section 210D states that if a young person accumulates between 1 and 80 youth justice demerit points, the enforcement officer must offer a young person an opportunity to participate in the Limited Services Volunteer Programme.

31. However, by only offering the option of the Limited Services Volunteer programme, the Bill limits the effectiveness of other alternative interventions, and does away with the ability to create a bespoke plan for the young person which would ordinarily occur in an FGC process.

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12 UN General Comment no 24 (2019 see: paragraphs 6(c)(ii), 8 and 13, 15, 16, 72.

13 *NZ Police/Oranga Tamariki v YR* [2020] NZYC 1515.

14 Ibid at [78].

15 Ibid at [79].

32. This further demonstrates a disempowering of the FGC process, the removal of bespoke solutions tailored to the young person, and the failure to meet the particular needs of the individual and their whānau.

Section 210F and G– Notice provisions

33. Proposed sections 210F and 210G set out the procedure to give notice of the number of youth justice demerit points to a young person and their parent/guardian, depending on the number of points accumulated. The notice must refer to certain things, including the actions that will be taken as a consequence of the number of demerit points allocated and the consequences of further demerit points being allocated to the young person. The Bill does not specify the form this notice should take.

34. The notice provisions are not alive to the complexities of young people who offend. Many young people will be unable to process and understand a notice of the sort described here. There is also a lack of funded legal advice for the young person.

35. Although section 210I requires an enforcement officer to take all reasonable steps to visit the young person in order to orally inform them (and their parent/guardian) of the matters specified in the notice, there is no recognition that the notice must be explained to the young person in a manner and language that is appropriate to the age and level of understanding of that young person (for example see section 221(2) of the Act).[16]

36. Further, by only requiring the enforcement officer to take "reasonable steps" to visit the young person, there is a risk that a visit will not be made at all. Where notice has been validly sent (as discussed below) and the enforcement officer can document the "reasonable steps" taken to visit the young person, there is no guarantee the notice or explanation will actually have been received.

Section 210H – Validity of notice

37. Proposed section 210H states that notice sent by ordinary post (under sections 210F and G) will be deemed to have been provided when it would have been delivered in the ordinary course of post. The allocation of youth justice demerit points is not invalidated simply because a young person or their parent/guardian did not receive the notice. All that is required is proof that the notice was properly addressed and posted.

38. The proposed youth justice demerit point system is based on an increasing level of obligation and penalty on the young person. There is no certainty that the young person will have received notice of the accumulated demerit points made against them. The explanatory note to the Bill states this system is "intended to improve behaviours and increase accountability". This objective will not be achieved if the young person (and/or their parent/guardian) does not actually receive this notice.

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[16] Section 221(2) relevantly states: "Subject to sections 223 to 225 and sections 233 and 244, no oral or written statement made or given to any enforcement officer by a child or young person to whom this section applies is admissible in evidence in any proceedings against that child or young person for an offence unless—
(a) before the statement was made or given, the enforcement officer *has explained in a manner and in language that is appropriate to the age and level of understanding of the child or young person* …" (emphasis added).

39. Further, even if a notice is received, as noted above significant concerns remain about the ability of many young people to understand the terms of the notice and its consequences.

40. The Law Society recommends that the Bill is amended to ensure the enforcement officer has an obligation to explain the contents of the notice in a manner and language that is appropriate to the age and level of understanding of the young person, as well as allowing the young person access to funded legal advice.

Tiana Epati
President

3 February 2021

Appendix: news release 22 December 2020

https://news.fuseworksmedia.com/1a278135-9074-42c7-a678-dd74df2d9a2a

Youth Justice Indicators reveal continued fall in youth offending rates – Faafoi

5:02PM, 22 December 2020

The latest Youth Justice Indicators Summary Report shows a continuing drop in the rate of youth offending, Justice Minister Kris Faafoi says.

The result follows the substantial drop in youth offending which was identified in the first Youth Justice Indicators Summary Report two years ago.

"This latest report shows that between 2009/10 and 2019/20, offending rates among children aged 10 to 13 dropped by 63 percent. Over the same period, offending rates among young people aged 14 to 16 dropped by 65 percent," Minister Faafoi said.

"Significantly, the Youth Court appearance rate nearly halved (decreased by 47 percent) between 2016/17 and 2019/20 for Māori, compared with a 27 percent reduction for European/Other."

The report shows the flow of children and young people through the youth justice system from 2009/2010 to 2019/2020.

Oranga Tamariki, Police, and the Ministry of Justice each capture data about the performance of the youth justice system which is then analysed to produce the report.

"These reports help those involved in the youth justice system better understand the issues and trends that arise. These latest results are encouraging and show the youth justice system has performed well over the last 10 years," Kris Faafoi said.

The number of Pasifika young people whose offending is serious enough to lead to a family group conference or court action decreased by 63 percent between 2009/10 and 2019/20. This compared with a 54 percent reduction for Māori and 69 percent decrease for European/Other.

"Recent trends are particularly positive for rangatahi Māori and build on progress noted in previous reports. The number of young Māori aged 14 to 16 who appeared in the Youth Court reduced by 41 percent from 2016/17 to 2019/20, from 1,375 to 810. The Youth Court appearance rate for Māori decreased by 47 percent over the same period.

"While the results are encouraging, this report also shows that there are opportunities in the youth justice system to further reduce youth offending. For example, despite encouraging findings for rangatahi Māori, the numbers of young Māori appearing before the Youth Court in 2019/20 were 8.3 times higher than the numbers of European/Other.

"The information in these reports contributes to discussion and action around how best to hold young offenders to account, while also recognising their needs and vulnerability so that positive differences can be made in their lives," Kris Faafoi said.

The report can be found here > https://www.justice.govt.nz/justice-sector-policy/research-data/justice-statistics/youth-justice-indicators/