New Zealand Law Society
Te Kāhui Ture o Aotearoa

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8 June 2023

Vanushi Walters
Chairperson, Justice Select Committee
Parliament Buildings
Wellington

By email: justice@parliament.govt.nz

Tēnā koe,

RE: Briefing into trends in Youth Crime – NZLS supplementary submission

1. Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) is grateful for the opportunity to address the Justice Select Committee on the Briefing into Trends in Youth Crime (**Briefing**). Following the Law Society's oral appearance on Thursday 1 June 2023, this supplementary submission sets out the Law Society's concerns with Schedule 1A of the Oranga Tamariki Act 1989 (**OT Act**) and invites the Commitee to consider reviewing this exception as part of the wider Briefing.

1.2 This submission also briefly addresses the minimum age of criminal responsiblity.

1.3 The Law Society is more than happy to discuss any of the issues raised in this submission, if that is of assistance to the Committee.

2. Background

2.1 New Zealand has a world class youth justice system prefaced on a solution-focused approach to address the underlying causes of offending. It relies on inter-agency cooperation using a multi-disciplinary approach and measures that are designed to respond to alleged offending in a way that promotes the child or young persons' rights and best interests; prevents or reduces offending or future offending; recognises the rights and interests of victims; and holds the child or young person accountable.[1]

2.2 However, our youth court jurisdiction is not universal. Following the youth court's jurisdiction being expanded to include 17-year-olds in 2019, an important exception remained in Schedule 1A of the OT Act. 17-year-olds charged with an offence listed in Schedule 1A must be automatically transferred from the Youth Court to the District or High Court at their first appearance. If the young person is facing additional charges, and the Youth Court determines they are related to a Schedule 1A offence, those charges will also be transferred to the adult jurisdiction.

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1 Oranga Tamariki Act 1989, s 4(1)(i).

2.3 Given extensive scientific research[2] and appellate discussion[3] on adolescent brain development, New Zealand's commitment to the United Nations Convention on the Rights of the Child (**UNCROC**), and the Justice Committee's current Briefing, the Law Society considers it is timely to revisit this exception.

2.4 We have raised this issue with then incoming Minister of Justice, Hon Kiritapu Allan, during the Law Society's initial briefing as well as via correspondence to Oranga Tamariki (**OT**)[4] and a submission on proposed changes to the OT Act during consultation in 2022.[5]

3. Schedule 1A

Overview

3.1 At the time the changes to the OT Act were going through the House, the Law Society, along with other submitters such as then Children's Commissioner Judge Andrew Becroft, opposed the inclusion of Schedule 1A in the Bill.[6] In our view, there was no evidential basis which suggested a need to treat some 17-year-olds differently to others, particularly given the background papers clearly recognised the neurological development of adolescents required a different response to adults. The automatic transfer of proceedings based on the seriousness of the offence was (in our view at the time) inconsistent with the purpose of, and rationale for, the Bill's underlying provisions to include 17-year-olds in the youth justice jurisdiction.

3.2 By separating out some 17-year-olds from their peers we are now left with a process which disproportionately impacts rangatahi Māori given their continued overrepresentation in the youth justice system, and wider criminal justice system. It is also contrary to the underlying provisions in the OT Act that are intended to recognise mana tamaiti, whanaungatanga, and whānau capacity building.

3.3 While the numbers of young people tried in the adult courts are few, more often than not they are the ones with the most complex needs and likely to be facing the greatest adversity. A tailored, more specialised youth court process is beneficial in those circumstances. This is discussed in more detail below.

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2 See for example Lambie, I. (2020). *What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand*. Auckland, NZ: Office of the Prime Minister's Chief Science Advisor. Available from www.pmcsa.ac.nz and Reil, J., Lambie, I., Becroft, A., & Allen, R. (2022). *How we fail children who offend and what to do about it: 'A breakdown across the whole system'. Research and recommendations*. Auckland, NZ: The Michael and Suzanne Borrin Foundation, the New Zealand Law Foundation & the University of Auckland.

3 See for example *Churchward v R* [2011] NZCA 531, the leading case on adolescent brain development as a potential mitigating factor to criminal offending. Subsequent cases have also held that a discount for youth can be appropriate for offenders into their early to mid-20's for example *Martin v R* [2016] NZCA 213, where the Court of Appeal noted that an appellant's age of 22 placed him at "the upper range where a youth discount would normally be available".

4 New Zealand Law Society, *Letter to Oranga Tamariki,* 8 December 2022, enclosed.

5 New Zealand Law Society submission, *Oranga Tamariki-Potential Changes to the Oranga Tamariki Act 1989*, 14 October 2022, enclosed.

6 New Zealand Law Society submission, *Children, Young Persons and Their Families (Oranga Tamariki) Legislation Bill*, 3 March 2017 at [250] and [275].

3.4 Further, we acknowledge the latest Youth Justice Indicators Summary Report shows a small increase in police proceedings against children in 2021/22 compared to 2020/21.[7] However, the report also highlights a continued decline in youth offending over the past decade which is evidence that our youth justice system on the whole is continuing to work as intended for most children and young people, and for the safety of New Zealanders.[8]

Issues

The need for a tailored criminal justice response

3.5 Research consistently indicates that the adolescent brain does not fully develop until at least their mid-twenties and has highlighted the complex needs faced by youth offenders,[9] and factors which increase the risk of offending behaviour are cumulative. Further, the experience of youth advocates and others who work in the youth justice jurisdiction is that children and young people who offend often come from very 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, brain injuries and substance disorders). The number of young people appearing in the youth court with a neurodiversity, for example, is increasing. More often than not, it is those young people who are highly over-represented in the criminal justice system.

3.6 Offending by children and young people does not occur in a vacuum and is also often symptomatic of wider care and protection issues,[10] which if dealt with through a traditionally adversarial criminal justice approach will most often be destructive. This is supported by the latest Youth Justice Indicators report which highlighted that in 2021/22, 92% of children and 88% of young people who were referred to a Family Group Conference (**FGC**) had previously been the subject of a report of concern to OT about their care and protection.[11]

3.7 Aotearoa's youth justice system recognises this and upholds the rights of children and young people as a distinct group by providing individual and tailored responses to the offending.

3.8 Youth Court procedures have also been specifically developed to make the criminal justice process more understandable and accessible for its participants. While existing provisions in the adult jurisdiction can assist participants to understand (such as the appointment of a communication assistant), there are many significant differences between the youth justice system and the adult justice system.[12] These include, for example:

a) A Youth Court with a principle focus on support for the well-being of children, young people and their families, whānau, hapū and iwi.

b) Youth Court Judges who have received specific training and support to communicate with children and young persons as well as a specialised court layout.

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7 Ministry of Justice. 2023. *Youth Justice Indicators Summary Report, April 2023.* Wellington: Ministry of Justice, at [YJI(1.4)].

8 Ibid, at [YJI(1.1)].

9 Above n 2.

10 Above n 7, at p 4.

11 Ibid, at [YJI(1.6)].

12 Lynch, N., Lambie, I., Becroft, A., Wilson-Tasi, T., (2021). *Four urgent law changes for the youth justice system*, Wellington, New Zealand.

c) An FGC process which is specifically designed to involve victims in decision-making.

d) Legislative requirements to explain the proceedings to the child or young person and others and encourage and assist the child or young person's participation and views including giving reasonable assistance.

e) Legislative requirements to uphold the rights of the child or young person under UNCROC and the United Nations Convention on the Rights of Persons with Disabilities.

3.9 When a child or young person is tried in the adult court, they are exposed to the full adversarial criminal process, without the benefits of this protective system and the measures identified above. Research has also highlighted the public interest in resolving a serious charge against a child or young person includes ensuring they provide the best possible evidence and are able to effectively participate.[13]

Compliance with international conventions

3.10 As a signatory to UNCROC, Aotearoa New Zealand has obligations to comply with that Convention. Following changes to the OT Act in 2019, the well-being of a child or young person must be at the centre of decision making that affects that child or young person, and the child's or young person's rights (including those rights under UNCROC) must be respected and upheld.[14]

3.11 The United Nations Committee on the Rights of the Child when examining New Zealand's compliance with the Convention in February this year, stressed the desirability that youth justice systems should fully apply to all persons aged under 18 at the time of the offence, and those who turn 18 during the trial or sentencing process.[15] The Committee remained concerned that different treatment of some 17-year-olds deprives them of the special protections for children.[16] In recalling their General Comment from 2019, the Committee urged New Zealand "to end the automatic transfer of 17-year-olds who are accused of serious offences to be tried by the adult courts and ensure that they are dealt with in the youth justice system".[17]

3.12 These comments are intended to guide State parties' interpretation and application of the Convention considering new evidence about child and adolescent development and have been cited in recent Youth Court decisions.[18]

3.13 The Youth Court has noted a "strong emphasis on avoiding criminalising the behaviour of children and also an emphasis on diverting them wherever possible from criminal law processes".[19] Further, 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

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13 Ibid, at [4.2].

14 Above n1, s 5(1)(b)(i).

15 United Nations Committee on the Rights of the Child, *Concluding Observations on the 6th periodic report of NZ,* February 2023, at 42(b) and 43(b).

16 Ibid, at 42(c).

17 Ibid.

18 See for example, *NZ Police/Oranga Tamariki v YR* [2020] NZYC 1515.

19 Ibid.

of crime committed by children decreases after the adoption of systems in line with those principles."[20]

3.14 Other learned academics, including the previous Children's Commissioner and former Principal Youth Court Judge Becroft, have conveyed similar views on the treatment of Schedule 1A offenders and recommended that all exceptions to the Youth Court jurisdiction be removed so that any child or young person who is charged with a criminal offence who have their case heard and finalised in the Youth Court (which should be a matter of last resort).[21]

3.15 Schedule 1A of the OT Act is therefore at odds with this position and undermines Aotearoa New Zealand's commitment to comply with UNCROC by creating a system which separates out some 17-year-olds from the rest of their age group.

Preferred Approach

3.16 The Law Society supports the conclusions of the United Nations Committee on the Rights of the Child and encourages the Justice Committee to examine the effect of Schedule 1A of the OT Act on those 17-year-olds who it pertains to. We also consider it is timely to closely examine whether the tailored youth justice responses should be made available to all 17-year-olds.

3.17 If all 17-year-olds were included in the youth justice jurisdiction, we note that extensive work would be required to consider the appropriate judicial procedure for serious offending. While the Law Society does not provide any views on what that procedure may look like, we note overseas models such as in Western Australia, may provide a useful starting point.

4. Minimum age of criminal responsibility

4.1 Finally, the Law Society acknowledges the joint appearance by OT, Police and Ministry of Justice officials before the Justice Committee in 2022, where they noted that Aotearoa New Zealand's acceptance of a recommendation from the United Nations Human Rights Council to increase our minimum age of criminal responsibility is yet to be actioned. In 2019 the UN Council indicated the minimum age of criminal responsibility should be raised to at least 14 years of age, but preferably 15 or 16 years of age.

4.2 This has since been recently endorsed by the United Nations Committee on the Rights of the Child where the Committee also indicated the minimum age of criminal responsibility should be raised to at least 14 years of age regardless of offence.[22]

4.3 We urge officials to continue working on options to achieve this compliance.

5. Conclusion

5.1 The Law Society considers it is timely to revisit the exception in Schedule 1A and we invite you to undertake a review as part of the Briefing into trends in Youth Crime.

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20 Ibid.

21 Above n 12.

22 Above n 14, at 43(a).

5.2 I trust this letter is helpful and if we can be of any further assistance, please feel free to contact me via the Law Society's Senior Law Reform and Advocacy Advisor, Amanda Frank (Amanda.Frank@lawsociety.org.nz).

Nāku iti noa, nā

Dale Lloyd
NZLS Youth Justice Committee Convenor

Encl.

Letter to Oranga Tamariki, 8.12.22

Submission on Potential Changes to Oranga Tamariki Act 1989, 14.10.22

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8 December 2022

Andre Anderson
Principal Policy Advisor
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By email c/o: Andre.Anderson@ot.govt.nz

Tēnā koe Andre,

Re: Oranga Tamariki Act 1989 – Schedule 1A offences and jurisdiction threshold

Introduction

I write on behalf of the New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society)** inviting officials to review the important exception in Schedule 1A of the Oranga Tamariki Act 1989 (**the Act**).

In the Law Society's recent briefing to the incoming Minister of Justice, we noted ongoing problems with Schedule 1A of the Act (discussed in more detail below) and welcomed consideration of this issue as part of the advice being provided by officials to the Minister on youth justice-related matters.

In light of extensive scientific research and appellate discussion on adolescent brain development,[1] New Zealand's commitment to the United Nations Convention on the Rights of the Child (**UNCRC**), the principles of te Tiriti o Waitangi, and recent public discussion on youth justice related issues, the Law Society considers it is now timely to revisit this exception.

Background

In 2017, the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017 was passed. As a result, from 1 July 2019, the youth justice jurisdiction was expanded to include 17-year-olds. Though this was announced with much fanfare, it included an important exception – 17-year-olds charged with an offence listed in Schedule 1A of the Act must be automatically transferred from the Youth Court to the District or High Court at their first appearance.[2] If the young person is facing additional charges, and the Youth Court determines they are related to a Schedule 1A offence, those charges will also be transferred to the adult jurisdiction.

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1 See for example *Churchward v R* [2011] NZCA 531, the leading case on adolescent brain development as a potential mitigating factor to criminal offending. Subsequent cases have also held that a discount for youth can be appropriate for offenders into their early to mid-20's for example *Martin v R* [2016] NZCA 213, where the Court of Appeal noted that an appellant's age of 22 placed him at "the upper range where a youth discount would normally be available".

2 Sections 272 – 273 amended, Schedule 1A inserted.

Issues with Schedule 1A

At the time Parliament were considering the amendment, the Law Society, along with other submitters including the Children's Commissioner, opposed the inclusion of Schedule 1A in the Bill.[3]

The background papers to the 2017 Bill acknowledged that young people have different neurological development at adolescence, with a resulting effect on behaviour, impulse control, understanding and consideration of consequences, and susceptibility to peer influence. In the Law Society's view, there appeared to be no basis for concluding that those factors required special consideration and treatment of some young persons, but not others.

The initial focus of the Regulatory Impact Statement[4] was for Schedule 1A to capture serious recidivist offenders. However, the current provision now captures first time offenders as well.

The result is a provision that disproportionately impacts rangatahi Māori, due to the overrepresentation of rangatahi in the youth justice system, and is contrary to the provisions in the Act that are intended to recognise mana tamaiti, whanaungatanga, and whānau capacity building.

Retaining the schedule 1A exceptions also undermines New Zealand's commitment to UNCRC and is a limitation on the right to be free from discrimination on the grounds of age. New Zealand's compliance with UNCRC was last considered by the United Nations Committee on the Rights of the Child in October 2016. Regarding the youth justice system, the Committee expressed regret that New Zealand "has not progressed in the area of juvenile justice",[5] in light of previous recommendations made by the Committee in 2003 and 2011. Among several other recommendations, the Committee urged New Zealand to raise the age of criminal majority to 18 years.[6]

Also of note, the Act specifically refers to the rights of children and young people set out in the UNCRC as part of the principles that should guide the use of any power under the Act.

Finally, while the Ministry of Justice concluded at the time that any limitation on the right to be free from discrimination (based on age) was justified and proportionate,[7] the Bill of Rights advice doubted whether the proposal would have the intended effects of deterrence or public confidence in the youth justice system.[8]

Preferred approach

At the time the Bill was before Parliament, the Law Society's preferred approach was for all 17-year-olds charged with a criminal offence (other than murder or manslaughter) to be included within the Youth Court jurisdiction. This position remains the same.

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3 New Zealand Law Society submission, *Children, Young Persons and Their Families (Oranga Tamariki) Legislation Bill*, 3 March 2017 at [250] and [275].

4 Ministry of Social Development, *Regulatory Impact Statement: Including 17-year-olds, and convictable traffic offences not punishable by imprisonment, in the youth justice system*, 8 December 2016.

5 United Nations, Committee on the Rights of the Child, Consideration of reports submitted by States parties under article 44 of the Convention: Concluding observations: New Zealand, CRC/C/NZL/CO/34, 11 April 2011, at [56(b)].

6 The Children's Rights Alliance recently drew this to the attention of the United Nations Committee on the Rights of the Child for the 93rd pre-session in their report *Comprehensive Alternative Report on Aotearoa New Zealand: Written Inputs to State Report (SRP)*, 15 August 2022 at pp102-103, 108.

7 Ministry of Justice, *Consistency with the New Zealand Bill of Rights Act 1990: Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill,* 5 December 2016 at [34].

8 Ibid, at [29]-[30].

In our view, the existing provisions of the Act, section 277 (where charged jointly with an adult) and section 283(o) transfer to District or High Court for sentencing, adequately cover the range of circumstances and provide sufficient judicial discretion, to ensure the interests of justice *and* the needs of the young person are met.

The Youth Court procedures have been developed to make the criminal justice process more understandable and accessible for its participants. While existing provisions in the adult jurisdiction can assist participants to understand (for example, the appointment of a communication assistant), it is preferable that the system as a whole is more accessible.

I also note that in our recent submission on the Residential Care and Other Matters Amendment Bill (options papers),[9] the Law Society agreed with the view of Māori subject matter experts that "*Schedule 1A offences should not be dealt with in the adult jurisdiction, as transferring these 17-year-olds from the youth court leads to inequitable outcomes when young people are subject to more severe penalties that are less effective at reducing offending*."[10]

Alternative options to Schedule 1A could include a hybrid approach, where any pretrial and trial matters are heard in the District Court, with the young person then transferred back to the Youth Court for disposition. Although the District or High Court may make arrangements to address a young person's needs, this can go only so far to mitigate the effects of adolescent neuro-development. It should be a last resort to place a young person in a District or High Court trial.

Issues with transferring to the District Court

I also wish to indicate that the Law Society will write to the Department of Corrections | Ara Poutama Aotearoa to raise concerns about the lack of youth-focussed rehabilitation programmes available for young offenders who are transferred to the District Court/High Court (whether as Schedule 1A defendants or transferred under section 283(o)), and subsequently convicted and sentenced to imprisonment in the adult jurisdiction.

This issue has been recently discussed by academics[11] as well as in Youth Court decisions. For example, in *New Zealand Police v AN,*[12] a case involving a 17-year-old female, Judge Fitzgerald commented on the lack of rehabilitative programmes/resources and/or facilities designed to keep young offenders separate from adult offenders with programmes tailored to their needs, and declined to transfer the young person to the District Court for sentencing. Considerations for keeping the young person in the youth court jurisdiction included what was in the best interests of the young person, the interests of the victim, public safety, and accountability. Judge Fitzgerald concluded that these considerations would be met by keeping the young person in the Youth Court's jurisdiction, particularly where Corrections had identified there would be no rehabilitative programmes available if she was detained in a Corrections facility.

Given your current work on the Residential Care and Other Matters Amendment Bill, which includes reviewing the options available where a young person is sentenced in the adult jurisdiction but detained in a youth justice facility, we consider it timely to mention this issue in this correspondence

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9 New Zealand Law Society submission, *OT – Potential Changes to the OT Act, options papers,* 14 October 2022, accessed here: https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/OT-Potential-changes-to-OT-Act-options-pa.pdf

10 Ibid, at [49].

11 See for example Lynch, Lambie, Becroft, Wilson-Tasi *Four Urgent Law Changes for the Youth Justice System,* October 2021.

12 *New Zealand Police v AN* [2020] NZYC 609.

as well. We welcome the opportunity to discuss this with you in more detail at a time that is convenient.

Conclusion

The Law Society considers it is timely to revisit the exception in Schedule 1A and I invite you to undertake a review as part of the advice being provided to the Minister of Justice on youth justice-related issues.

I trust this letter is helpful and welcome to the opportunity to discuss this issue with you in more detail. If that would be of assistance, contact can be made via the Law Society's Senior Law Reform and Advocacy Advisor, Amanda Frank (Amanda.Frank@lawsociety.org.nz).

Nāku iti noa, nā

Frazer Barton
NZLS President

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14 October 2022

Andre Anderson
Principal Policy Advisor
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By email: legislation@ot.govt.nz

Re: Potential changes to the Oranga Tamariki Act 1989 – Feedback on Options Papers

A. Introduction

1. The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to provide feedback on the first tranche of Oranga Tamariki's (**OT**) options papers as part of preliminary legislative work on the Residential Care and Other Matters Amendment Bill. The options papers currently available for comment include:
    a. Information sharing;
    b. Special Guardianship Orders; and
    c. Young people sentenced to imprisonment in the adult jurisdiction and detained in Oranga Tamariki residences.
2. The Law Society's submission supplements our earlier feedback provided on the issues papers[1] and sets out some additional brief comments in response to the proposed options in each paper identified above.
3. This submission has been prepared with the assistance of the Law Society's Family Law Section and Youth Justice Committee.[2]

B. Options papers for other matters topics

Information sharing

42. This options paper explores whether the right information is available to support young people in care and sets out a range of potential options, proposing cumulative amendments to the information sharing provisions in the Oranga Tamariki Act (sections 65A-66Q) (**OT Act**),

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1 New Zealand Law Society submission, Proposed changes to the Oranga Tamariki Act, 9 September 2022 accessed here: https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/OT-Potential-changes-to-the-OT-Act.pdf.

2 More information on the Law Society's Family Law Section and Youth Justice Committee can be accessed via the Law Society's website here https://www.lawsociety.org.nz/branches-sections-and-groups/family-law-section/ and here: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/youth-justice-committee/

plus a potential amendment to the duties of the chief executive in section 7AA. The Law Society makes the following brief comments.

43. The Law Society's Family Law Section consider option 4 is the appropriate option as it provides the most comprehensive information sharing arrangements. This option would amend the parties to and the purposes of the voluntary information sharing provisions, include a stronger duty on the Chief Executive to share information with iwi and Māori partners, and extend the information sharing framework.

42. As previously noted, the Law Society considers that the way information is currently exchanged often means there are significant gaps in the flow of information between relevant parties and risks creating "silos" of information. Option four would ensure those gaps are less likely to occur by creating one information sharing group and allowing information to flow freely between the parties. This option would also assist in removing the current OT/Iwi and other partnerships divide as noted in the options paper.

43. While there are inherent risks in creating one information sharing group (for example no limitations on the exchange of information, no consent of the tamariki/whānau is required, limitations on the child/young person's right to privacy), the proposed safeguards to ensure a collective decision is made on who can be added as a partner to the group, rather than resting with individual kaimahi, go some way to ameliorating those concerns. It is paramount that the wellbeing and bests interests of the child continue to take precedence over the duty of confidentiality.

44. Finally, this option aligns most closely with the objectives of the Oranga Tamariki Future Direction Plan and *Te Kahu Aroha* (as outlined in the options paper) for Oranga Tamariki to move towards a future state that allows information to flow freely between the appropriate agencies operating in this space.

44. We have not identified any additional/alternative options.

<u>Special guardianship orders</u>

45. As previously noted, the Law Society is pleased to see a review of the legislation governing special guardianship orders, particularly given the existing inconsistencies with the principles in the Act, the duties of the chief executive in relation to te Tiriti o Waitangi and recent Court decisions which have resulted in divergent views on how special guardianship orders apply to tamariki Māori.[3] In light of this, the Law Society's Family Law Section agrees that option three, amend the special guardianship provisions, is necessary to address the current problems identified in the options paper. However, we do not have a view at this stage on whether amendment to those provisions should be via the proposed adaptive package or the reform package.

46. If option three were to be considered in more detail, the Law Society's Family Law Section would welcome the opportunity to be involved in any further consultation.

[3] See for example *Re I* [2021] NZFC 210 (also referred to as *Chief Executive of Oranga Tamariki – Ministry for Children v BH*), Judge Otene, January 2021 and *Re WH* [2021] NZFC 4090, Judge Southwick, 5 May 2021.

Young people sentenced in the adult jurisdiction and detained in Oranga Tamariki residences

47. This options paper aims to address the current lack of clarity regarding the appropriate legislative framework that should apply to children and young people sentenced in the adult jurisdiction but held in a youth justice facility. As noted in our earlier submission, the Law Society agrees the current framework is not fit for purpose and that the focus should be on ensuring consistency with the principles of the OT Act first and foremost, alongside consistency with relevant international conventions and obligations (such as the Beijing Rules which provide guidance on how children should be treated in the criminal justice system).

48. Against this background, the Law Society considers the most appropriate option is a stand-alone model which would see OT take responsibility for all aspects of the young person's sentence, with flexibility retained to call on Corrections for assistance where necessary. The rationale for this preferred option is that OT are best placed to manage the young person given their primary roles and responsibilities, are obligated to act in their best interests and welfare under the OT Act, have access to appropriate tools and mechanisms to support the young person through their sentence, and allowing one agency to have responsibility would provide consistency for the young person. However, the Law Society recognises that some of the young offenders are serious and as such, it may be appropriate for some Corrections staff to train OT kaimahi around caring for serious offenders. The Law Society also notes this option would require significant investment and resourcing to implement, a matter which the option paper does not address in any detail.

49. Finally, we note the Māori subject matter expert view that "Schedule 1A offences should not be dealt with in the adult jurisdiction, as transferring these 17-year-olds from the youth court leads to inequitable outcomes when young people are subject to more severe penalties that are less effective at reducing offending".[4] The Law Society agrees with this view. At the time the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill was before the House, the Law Society raised concerns that the automatic transfer of proceedings where a 17-year-old is charged with serious offending (under Schedule 1A) undermined New Zealand's commitment to the United Nations Convention on the Rights of the Child and would disproportionately effect rangatahi Māori. [5]

50. While the options paper does not go on to discuss this issue in depth, we consider it is timely to review these provisions in light of the broader discussion on youth crime and the youth justice system as a whole, that is currently taking place.[6] The Law Society would be happy to discuss this issue further at a time that is convenient to OT.

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4 Oranga Tamariki, *Children and young people sentenced to imprisonment in the adult jurisdiction and detained in Oranga Tamariki residences*, Options Paper, at p 4.

5 New Zealand Law Society submission, *Children, Young Persons and Their Families (Oranga Tamariki) Legislation Bill*, 3 March 2017, at pp 43-45, accessed here: https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/0019-109108-CYPF-Oranga-Tamariki-Legislation-Bill-3-3-17.pdf

6 See for example the recent joint agency briefing to the Justice Select Committee, *Youth Crime and Community Wellbeing*, makes reference to the Minister of Justice and Cabinet "considering further options relating to legislative reforms to steer at-risk children and young people away from a lifetime of offending", at slide 10. Accessed here: https://www.parliament.nz/resource/en-NZ/53SCJU_EVI_125229_JU229640/6adff70412d0a4fadeadf3d527d9a33891b1dae7

C. Conclusion

51. We trust the above is helpful and look forward to the opportunity to be involved during the remaining stages of the consultation process and at the point when a Bill is before the House.

52. If you have any questions or comments concerning this submission, contact can be made via Senior Law Reform and Advocacy Advisor, Amanda Frank (Amanda.Frank@lawsociety.org.nz).

Nāku noa, nā

Ataga'i Esara
Vice-President