

# New Zealand Law Society

## SUBMISSION ON CHILDREN, YOUNG PERSONS, AND THEIR FAMILIES (YOUTH COURTS JURISDICTION AND ORDERS) AMENDMENT BILL

### INTRODUCTION

1. The bill has two purposes. First, it increases the jurisdiction of the Youth Court by making 12- and 13-year-old offenders liable to prosecution in respect of serious offences other than murder and manslaughter. Secondly, it introduces a range of new Youth Court sentencing options and programmes.
2. The Society supports the second of the two purposes. It is accepted that the expanded sentencing options and programmes within the Youth Court jurisdiction are likely to increase effective intervention for young people and are more likely to reduce levels of recidivism.
3. However, the Society questions the proposal to increase the Youth Court jurisdiction in respect of 12- and 13-year-old offenders. The proposed amendments in this regard are a significant departure from the existing provisions and ought to be considered very carefully.
4. This submission addresses policy considerations in respect of the proposed increase to the Youth Court's jurisdiction, and also makes recommendations as to the drafting of the proposed clauses.

### POLICY CONSIDERATIONS

#### Clause 4 – Purpose of Part

5. The basis for the proposed increased jurisdiction of the Youth Court appears to arise from a review of New Zealand Police apprehension figures. At page 27 of the explanatory note to the Bill it is stated:

“New Zealand Police apprehension figures indicate that currently about 80 12- and 13-year-olds a year commit these types of serious and repeat crimes. For this group of young offenders, further options

should be available to the New Zealand Police and the Courts to address the offending.”

6. No other research, data, or literature is referred to to support the proposed increase of the Youth Court jurisdiction. Of the 80 children referred to, there is no further breakdown on how many of those children have in fact committed “serious” offences, as defined by the bill. It does not appear that any evaluation has been made of how those children have been dealt with under the existing regime, or any assessment of how effective the existing regime has been for those children. There is no assessment or information available on the developmental issues relating to each of those children and no information as to recidivism levels for that group of 80 children.
7. Equally, there does not appear to be any research as to how the proposed increased jurisdiction of the Youth Court would benefit that group of 80 children, or improve their position beyond the existing regime.
8. More research should be undertaken before embarking on a significant change. New Zealand is a party to the United Nations Convention On The Rights Of The Child. The following articles of that Convention are relevant:

“Article 1:

For the purposes of the present Convention, a child means every human being **below the age of eighteen years** unless, under the law applicable to the child, majority is attained earlier.”

“Article 3 paragraph 1:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

“Article 40 paragraph 1:

States Parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity

and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."

9. In the light of the above articles of the Convention and, in particular, that the best interests of a child shall be the primary consideration, there is a clear obligation for a proper assessment of the current position to be undertaken before changing the legislation.
  
10. In addition to the Convention on the Rights of the Child, section 22 of the Crimes Act 1961 should also be born in mind. Section 22 of that Act provides:
 

“22 Children between 10 and 14

  - (1) No person shall be convicted of an offence by reason of any act done or omitted by him when of the age of 10 but under the age of 14 years, unless he knew either that the act or omission was wrong or that it was contrary to law.
  - (2) The fact that by virtue of this section any person has not been or is not liable to be convicted of an offence shall not affect the question whether any other person who is alleged to be a party to that offence is guilty of that offence.”
  
11. Section 22 of the Crimes Act places an onus on the prosecution to prove that an accused (child) knew that the act or omission was wrong or contrary to law. In other words, there must be an assessment of the child's perception of their behaviour. The prosecution must prove beyond reasonable doubt that a child knew that their actions constituted the offence, not merely that he or she acted voluntarily or intentionally, knew of right or wrong in a general way, or knew that his or her actions were generally disapproved of.
  
12. Under the current regime the additional burden of proof on the prosecution of children aged 10-14 relates to murder and manslaughter. It is clear that the purpose of this extra

requirement on the prosecution is to take into account psychological developmental issues for children. Before extending this provision to other offences consideration needs to be given to and, perhaps, research conducted into psychological developmental issues for 12- and 13-year-olds. For example, what is an average 12-year-old's perception of what amounts to "unlawful". Is this perception altered by their cultural background, or educational delays (perhaps absenteeism from school). A more significant question may be to ask whether the current system has more flexibility to respond to an individual child's level of development and understanding.

13. In addition to the above concerns, there are many risks for children becoming subject to the Youth Court jurisdiction, for example:
- arrested children associating with older offenders in the Youth Court and facilities;
  - children being arrested and kept in the Police cells (sometimes for lengthy periods);
  - arrested children being held in court cells with, or in close proximity to, adult offenders;
  - children being remanded to residences with older offenders where they are at greater risk of sexual predation, physical assaults, bullying and psychological abuse;
  - girls being at risk of being placed with older boys ;
  - exposure to drugs and alcohol through contact with older offenders;
  - possible sentencing to boot camps;
  - criminalising children at a younger age, rather than working through the issues that have led to the offending.
14. Given the above risks, very careful consideration should be given to changing the existing framework.
15. As the Convention on the Rights of the Child states that the best interests of children shall be a primary consideration, very careful consideration ought be given to any proposed amendments to increase the Youth Court's jurisdiction.

### ***Recommendation***

16. That more research be undertaken to:
- Quantify serious offending and repeat crimes for the age group 12-13;
  - Evaluate the current system and its effectiveness in addressing the needs of those children;

- Review developmental issues arising in children aged 12 and 13 and what specialist needs they may have due to their age;
- Assess how the proposed new extended jurisdiction of the Youth Court may impact on children aged 12 and 13.

## **CLAUSE BY CLAUSE ANALYSIS**

### **Clause 5 – Principles**

17. This clause amends s208 and inserts new paragraph (ff) which provides a new, additional guiding principle, "... that any measures for dealing with offending by a child or young person should so far as it is practicable to do so address the causes underlying the child's or young person's offending."
18. To achieve consistency, such a provision should also be included in Part 2 of the Act regarding child offenders who are still dealt with by the Family Court, as this is a useful mandatory consideration.

### ***Recommendation***

19. That s13 (Part 2 of the Act) be amended to include the new principle proposed in s208(ff). This should be either by way of amendment to the existing s13(i), or by inserting a new s13(j).

### **Clause 6 – New section 255 substituted**

20. This clause repeals the current s255 and requires a youth justice co-ordinator to ensure that relevant information and advice are made available to a family group conference (FGC). There is an interrelationship between s261 and the proposed new s255. To align these two sections it is suggested that s261(1) be amended to reflect the new wording of the proposed new s255.

### ***Recommendation***

21. That s261(1) be amended by inserting "*(including information and advice relating to the health and education needs of every child or young person in respect of whom the conference is convened)*" after the words "care and protection" as they first appear in s261(1).

**Clause 8 – New section 259A inserted**

22. This clause inserts a new s259A, which requires a FGC convened under Part 4, in compliance with the proposed new s208(ff), to consider whether the young person should be required to attend all or certain programmes, and whether the parent(s) should attend a parenting education programme.
23. This requirement should be added to the armoury of the Family Court and be considered at a conference convened to discuss s14(1)(e) issues and care and protection issues generally. These considerations should be subject to s6 of the Act, which states that the welfare and interests of the child or young person are paramount. In addition, the bill should clarify what would happen in a situation where there is a conflict between the welfare and interests of the child and the interests of the parent. This will require amendment to s6 of the principal Act as that currently prevents application of the best interests principle to proceedings under Part 4 of the Act. The nature and extent of the application of s6 to Part 4 will need to be considered carefully.
24. If a parent/guardian or caregiver does not agree to undertaking a programme, as may be otherwise required by a FGC, it is unclear whether this would result in a “non-agreement” and the abandonment of the conference or, whether the conference can record the balance of the agreement reached. In the High Court decision of *W v Hohaia* (High Court, Auckland, M793/02, 3 October 2002, Randerson J) the Court accepted that while a written record of a partial agreement is permissible, it can only be placed before the Court where the entitled members of the conference all consent to the agreed matters being reported to the Court. Where there is no such agreement then the proper course of action is to record a non-agreement.
25. Concern is expressed about the implications of “enforcement” should a parent not undertake a programme recommended by the FGC and which may be a matter before the Family Court, in the case of a s14(1)(e) matter, or the Youth Court. It is possible that a child or young person's proceedings could be prejudiced or delayed by a parent or guardian's refusal to undertake a programme.

***Recommendations***

26. That the proposed new s259A be amended to clarify what the result would be of a parent/guardian or caregiver not agreeing to attend a parenting education course and how an order would be enforced against a parent who does not agree to attend a parenting education programme.
27. That the proposed new s259A be amended to clarify how an order will be enforced by the Court, or whether the order only applies to FGC plans that are not before the Court.

**Clause 9 – Family group conference may make decisions, recommendations, and plans relating to care or protection of child or young person**

28. Information sharing between the Youth Court and the Family Court needs a formal interface, particularly from the Family Court to the Youth Court. For example, the Lawyer for Child should be notified when a Youth Advocate has been appointed.

***Recommendation***

29. That a formal interface be created to facilitate information sharing between the Family Court and the Youth Court.

**Clause 13 – New section 280A inserted**

30. The proposed new s280A enables the Youth Court to consider referring a matter to the Family Court and refers to the making of an application for a declaration under s67 on a ground specified under s14(1)(e) in respect of the child and the offence in question. This is on the basis that the Family Court proceedings “would serve the public interest better than the continuation of the proceedings under this Part”. It is unclear what factors should be taken into account in any referral to the Family Court in order to “serve the public interest better”.
31. It is unclear whether the power to refer the matter to the Family Court occurs on application (by the informant, the Youth Advocate or the Court of its own initiative). The proposed new section would suggest that the responsibility is on the Youth Advocate to advance the submission.

32. The proposed new section does not refer to the child or young person's welfare and best interests, which is the paramount consideration by virtue of s6. It is implicit that any referral to the Family Court and an application for declaration being made involves such considerations.

***Recommendations***

33. That it be clarified what factors should be taken into account in any referral to the Family Court in order to "serve the public interest better".
34. That it be clarified whether the power to refer the matter to the Family Court occurs on application by the informant, the Youth Advocate or the Court of its own initiative.
35. That consideration be given to amending s6 of the Act, having regard to the decision being taken by the Youth Court to refer proceedings to the Family Court.

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