New Zealand Law Society
Te Kāhui Ture o Aotearoa

Oranga Tamariki (Responding to Serious Youth Offending) Amendment Bill

Submission of the New Zealand Law Society Te Kāhui Ture o Aotearoa

8 January 2025

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Oranga Tamariki (Responding to Serious Youth Offending) Amendment Bill (**Bill**).

1.2 This submission has been prepared with input from the Law Society's Youth Justice Committee.[1] The Law Society recommends that the Bill does not proceed. If the Bill is to proceed, there are several drafting and practical workability issues that need to be addressed. Where possible, this submission proposes amendments to address these issues.

1.3 The submission is structured as follows:

(a) Key concerns;

(b) Analysis of the Young Serious Offender (**YSO**) declaration

(c) Analysis of the suite of additional responses and powers

(d) Analysis of the Military Style Academy orders (**MSA orders**)

1.4 The Law Society **wishes to be heard** on this submission.

2 Key Concerns

Restricted policy development process

2.1 The Regulatory Impact Statement (**RIS**) notes that the policy work done to develop the Bill was:[2]

(a) constrained in scope by pre-existing ministerial direction;

(b) developed at pace; and

(c) undertaken with only limited consultation, which did not include any engagement with Māori or strategic iwi partners.

2.2 The Law Society reiterates its concern – also noted in our recent submission on Amendment Paper 216 on the Victims of Sexual Violence (Strengthening Legal Protections) Legislation Bill – that this is part of a developing pattern in the area of criminal justice reform. A recent analysis by Newsroom highlighted the significant number and breadth of process and evidence concerns relating to policy and legislative development over the past year.[3] Criminal justice reforms stand out as an outlier with *all* such reforms occurring at pace and without a full policy development process. As a result, none of the Regulatory Impact Statements generated for those reforms fully met quality assurance criteria. The Law Society considers a full and considered policy development process is a necessary feature of high-quality legislative design – particularly so where

1 More information on the Law Society's Youth Justice Committee can be found here: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/youth-justice-committee/

2 RIS at page 2.

3 Fox Meyer and Laura Walters "Official concerns about haste and dearth of evidence in Govt's first year" (27 November 2024) Newsroom < https://newsroom.co.nz/2024/11/27/official-advice-finds-time-and-evidence-in-short-supply-in-govts-first-year/ >

legislative proposals pertain to the use of coercive powers and punishment by the state. Such a process helps to ensure that proposals are evidence-based and effective, and have been through full public consultation processes involving all affected parties.[4]

Lack of consultation with Māori

2.3 As identified in the RIS, tamariki and rangatahi Māori are overrepresented in the youth justice system.[5] Rangatahi Māori make up nearly two-thirds of all young people in the Youth Court, despite being one-quarter of the total youth population.[6]

2.4 The RIS also sets out that:

(a) "these objectives will come at a cost to Māori communities in particular as the proposal for a YSO declaration and MSA order are highly likely to have a disproportionate effect on rangitahi Māori and their whanau;"[7] and

(b) "modelling suggests that Māori will make up 80-85 percent of the young people eligible to be declared YSOs."[8]

2.5 Māori have not been consulted in the development of the Bill, despite the Legislation Guidelines clearly stating that Māori interests arise where Māori are likely to be disproportionately affected by legislation, and that early engagement should take place in such instances.[9] The Law Society agrees with officials that consultation may have assisted in identifying mitigations to avoid the likely disproportionate impact of the proposals.[10]

Lack of evidence supporting need for and effectiveness of the proposals

2.6 The restricted policy development process means that there is neither an established need for these proposals, nor evidence to support their likely efficacy.

2.7 The Youth Justice Indicators Summary Report of December 2024 shows that:

(a) Overall, the rate and nature of offending for children and young people is similar to that of the previous year.

(b) Relative to population, the rate of serious and persistent offending behaviour amongst children and young people decreased (by 10% and 3% respectively).

(c) Despite some challenges following COVID-19 – potentially due to the disruption in youth justice support – overall there has been a marked decrease in youth offending.

(d) Importantly, most children and young people who offend have complex needs. Of the children and young people referred for a youth justice Family Group

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4 See Legislation Design and Advisory Committee Legislation Guidelines (2021), chapter 1.
5 RIS, paras 13-17.
6 Ministry of Justice, Youth Justice Indicators (December 2024). It is important to note that the vast majority of tamariki and rangatahi Māori do not have any contact with the youth justice system. Over 98% of tamariki Māori and 95% of rangatahi Māori had no police proceedings against them in 2021/22.
7 RIS, para 43.
8 RIS, para 44.
9 See Legislation Design and Advisory Committee Legislation Guidelines (2021), chapter 5.
10 RIS, page 2.

> Conference, 98% and 88%, respectively, have had a previous child protection report of concern.

2.8 Overall, many of the youth justice indicators are now improving following the modest impacts of COVID-19 and its aftermath. The Law Society is concerned that these proposed interventions are a reaction to increased media reporting and associated public concern, rather than based on an assessment of actual trends and the interventions that might be address current patterns of offending and offenders.

2.9 To that end, academic research and data from previous iterations of the proposal to implement a military academy call into question the likely effectiveness of the proposals in achieving the stated objective. The RIS highlights this where it clearly states:[11]

> Evidence of effectiveness of YSO regimes in other jurisdictions is limited…while New Zealand and international evidence indicates military academies have limited effectiveness in reducing offending.

2.10 It goes on to state that military-style academies are "one of the least effective interventions when it comes to reducing offending and antisocial behaviour by young people."[12] New Zealand's own previous attempt at a military-style boot camp reportedly produced no better results in terms of re-offending than a standard supervision with residence order.[13] The Law Society considers it inappropriate that the legislative implementation of MSA orders is proceeding while a trial of voluntary participation is ongoing and mid-to-long term effects are unknown.

2.11 Further, a report looking at factors behind children who offend in New Zealand highlights the practical reality that investing in responding to youth offending after it has occurred should be the last resort. It notes that failures in the early intervention schemes strongly contribute to the reasons why children and young people engage in criminal behaviour. To effectively reduce youth offending, addressing risk factors at the front end is essential. This includes focusing on effectively addressing and supporting youth through experiences such as family violence, being in state or faith-based care, and having learning disabilities, ideally before any offending occurs.[14] To respond after the offending has occurred is too little, too late in many cases.

2.12 It is also necessary to account for accepted science on the developing adolescent brain. Academic research, which has been widely recognized by the courts, shows that there are age-related neurological differences between young people and adults. Specifically, young people may be more vulnerable to negative influences and external pressures, such as peer pressure, and tend to be more impulsive than adults.[15]

2.13 The act of creating a separate youth justice system and implementing the Oranga Tamariki Act 1989 demonstrates Parliament's recognition of the need to deal with youth

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11 RIS, page 12.
12 RIS, para 39.
13 Ministry of Social Development *Evaluation Report for the military-style activity camp (MAC) programme* (2013).
14 Prof Ian Lambie, Dr Jerome Reil, Judge Andrew Becroft, Dr Ruth Allen *How we fail children who offend and what to do about it: 'A breakdown across the whole system'* (Michael and Suzanne Borrin Foundation, March 2022).
15 *Churchwood v R* [2011] NZCA 531 at [77].

and adolescent offenders in a way that reflects their developmental stage and to ensure the protection of their rights as vulnerable members of society. This therapeutic approach has largely been successful in reducing youth offending, as evidenced by the Youth Justice Indicators Summary Report noted above at 2.7(b).

2.14 The Law Society encourages the analysis and use of robust evidence when developing proposals to address serious and persistent youth offending, in particular evidence that takes account of the youth of the offender.[16] Such an approach is not reflected in the Bill, likely as a consequence of the constraints of the policy development process and ministerial direction as to the required outcome.

3 YSO declaration

3.1 The RIS identifies that labelling a young person a YSO may have the opposite of the intended effect and be regarded as a title of honour (thereby encouraging increased offending) or result in stigmatising and trapping a young person in the YSO process (reducing the likelihood of rehabilitation). The RIS states that neither of these likely outcomes serves to achieve the intended purpose of the Bill.[17] The Law Society shares these concerns. Designating a young person in this way seems both unnecessary and detrimental to achieving the desired outcomes.

Eligibility criteria

3.2 The eligibility criteria for a YSO declaration are set out in clause 4 at proposed new section 320B. An application for a declaration can be made regarding a young person who currently faces a charge for a specified offence that has either been proven or admitted, provided that a response has not yet been issued. Additionally, the young person must have one or more prior specified offences that have been proven or resulted in a conviction between the ages of 14 and 17. Alternatively, an application can be made in respect of a young person who is currently charged with two or more unrelated specified offences that have been proven or admitted, where a response has not yet been made.

3.3 The Youth Court must be satisfied on reasonable grounds that the young person is likely to re-offend and that previous interventions have been unsuccessful.[18] Whilst this qualifier provides a safeguard against the application of a declaration to a young person who is not a serious and persistent offender, the Law Society considers that the eligibility criteria provided by new section 320B(1)(b) may be overly broad and has the potential to capture young offenders who are not 'serious and persistent offenders' and may do so in situations where options under other interventions have not been so exhausted that they can be considered 'unsuccessful'. This is because, on the current drafting, potentially eligible young persons could include those who are before the Youth Court for the first time (in the case of new section 320B(1)(b)) or who have only committed one previous offence (in the case of new section 320B(1)(a)). In neither case could that accurately be described as 'persistent' offending. Even if not ultimately granted, the application for a

16 As affirmed by the New Zealand Bill of Rights 1990, section 25(i).
17 RIS, paras 120 – 122.
18 Clause 4, proposed new section 320J.

YSO in such circumstances would initiate court processes that may impact on both court resources and the wellbeing of the young person.

3.4 The greatest risk in this regard is around proposed section 320(1)(b). We concur with the RIS, which states that:[19]

> Providing such an escalated response at the young person's early and potentially first interaction with the youth justice system is inconsistent with the youth justice principles in current legislation.

3.5 The Law Society recommends removing new section 320(1)(b) to ensure that the YSO eligibility criteria applies only to young persons who properly meet the described parameters in the explanatory note, DDS,[20] and RIS.[21]

4 Additional Youth Court responses available in respect of YSO declaration

4.1 The Bill proposes to implement 'faster, stronger and more targeted' responses to serious and persistent offending by young people where previous interventions have been unsuccessful. The Law Society has significant concerns about the potential for some of the proposed responses to infringe young people's rights in such a way that would be inconsistent with the New Zealand Bill of Rights Act 1990 (**Bill of Rights**), the United Nations Convention on the Rights of the Child (**UNCROC**), the Beijing Rules, and the purpose and principles of the Act. Our concerns are set out below.

Faster responses

Warrantless arrest powers

4.2 Clauses 6 and 37 provide Police with additional powers of arrest without warrant where a young person is subject to a YSO order. In relation to clause 6, the constable must believe on reasonable grounds that the young person has breached a bail condition.[22]In relation to clause 37, the constable must believe on reasonable grounds that a YSO has failed to comply with a specified condition.[23] Those conditions include conditions relating to the supervision component of an MSA order (discussed below at 6).

4.3 Crown Law's advice to the Attorney-General on the consistency of the Bill with the Bill of Rights (**BORA advice**) considers the limitations of a young person's rights in relation to the use of warrantless arrest powers are justified:[24]

(a) by the requirement for a reasonable belief in the breach or non-compliance; and

(b) the fact that an officer's actions will be scrutinised for reasonableness of using the discretion.

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19 At para 85.
20 Departmental Disclosure Statement (**DDS**), at 3.
21 At page 1, "Problem definition" section.
22 Proposed new section 214AAA.
23 Proposed new section 296FG.
24 Crown Law *Oranga Tamariki (Responding to Serious Youth Offending) Amendment Bill [PCO 26233/11.0] – Consistency with the New Zealand Bill of Rights Act 1990* (**BORA advice**) (31 October 2024) at paras 30 and 34.

4.4 However, we consider that aspects of the BORA advice overstate the justification for the potential infringement of a young person's rights. It is the Law Society's view that oversight of Police actions *after* the fact of a warrantless arrest is not a protection of those rights as the infringement will have already occurred.

4.5 Further, the BORA advice notes that the Bill does not infringe upon the right to be free from discrimination, affirmed by section 19 of the Bill of Rights. It considers that because the Bill is neutral on its face and applies equally to both Māori and non-Māori, then it is not discriminatory on the mere fact that Māori will be overrepresented.[25] However, the RIS identifies that Māori will comprise a disproportionate share of the YSO-declared young persons.[26] Given this prediction and the evidence that racial bias exists in Policing,[27] we consider it important to consider whether the Bill may be *applied* in a way that treats groups differently, with disproportionate effect. The Law Society is concerned there is a risk that the operational discretion may result in discriminatory enforcement.

Family Group Conferences

4.6 FGCs are a cornerstone of the youth justice system and enable a young person to take account of their actions and provide a forum where the affected community can come together to jointly decide on the best way to deal with the young person's offending. Parties include the young person and their whānau, Police, Oranga Tamariki, and the victim.[28] These conferences have led to New Zealand's youth justice system being held out as an example of restorative justice in practice.[29] It is set up to empower families to have direct input and take responsibility for dealing with the offending by their young people. FGCs provide the best approach to decision-making in the youth justice sphere by ensuring that the community has a voice in the accountability and rehabilitation plan for the youth involved.[30]

4.7 Clause 15 amends section 247 of the Act by stating that the requirement for an FGC does not apply to a charge proved against a young person if they are a YSO. Section 247 sets where a youth justice co-ordinator is required to convene an FGC. This includes an intention to charge FGC, a court-referred FGC, and a pre-sentencing FGC.

4.8 The Law Society considers that amending the mandatory nature of FGCs undermines the therapeutic foundations of the youth justice system and the principles of the Act, and has the potential to infringe a young person's right to be treated in accordance with their

25 BORA advice at paras 64 – 66.

26 At para 44; identifying that modelling indicates rangitahi Māori will make up 80-85% of YSO young persons.

27 Khylee Quince and Kim Workman *Understanding Policing Delivery: Independent Panel Report 1* (UPD Independent Panel, August 2024).

28 Nessa Lynch *Youth Justice in New Zealand* (3rd ed, Thomson Reuters, online, 2019) at Chapter 6.

29 Allison Morris and Gabrielle Maxwell "Restorative Justice in New Zealand: Family Group Conferences as a Case Study" 1(1) Western Criminology Review 1; Joe Hudson and others *Family Group Conferences: Perspectives on Policy and Practice* (Federation Press, New South Wales, 1996).

30 Lynch, above n 28 at 6.5.3 and 6.1.

age.[31] Further, by removing the requirement for an FGC in relation to a YSO the proposal acts counter to the primary objective of the Bill to reduce youth offending.

4.9 The Law Society recommends clause 15 be removed. We further recommend the Committee adopt the proposal outlined in Option 4A of the RIS which goes some way towards achieving a speedier response to serious and persistent youth offending and strikes a more nuanced balance between the objectives of public safety and rights of the young person.[32]

Stronger responses

Early release

4.10 Clause 27 proposes to amend section 311 of the Act, including a change to subsection (2A) which effectively removes eligibility for a YSO to be considered for early release from a section 311 order. In conjunction with the potentially extended period of a section 311 order for a YSO, the Law Society is concerned that this response may unfairly infringe upon a young person's rights, and may be contrary to the purpose and principles of the Act. We note that the BORA advice does not consider the impact of this response in its advice.

4.11 Evidence is clear that the impact of imprisonment or detention on a young person in a youth justice facility is significant, and should always be a last resort. Incarceration results in negative behavioural and mental health outcomes for youth, feeding into criminogenic actions rather than improving them. It is additionally noted that the incarceration of young people limits the ability for appropriate and timely rehabilitative interventions.[33]

4.12 Further, the Act recognises that young people experience time differently to adults. It is generally accepted that the perception of time speeds up as you get older.[34] As a result, the youth justice system requires that decisions should be made and implemented in a 'time frame appropriate to the age and development of the child or young person'.[35] The logical reality of this is that the longer a young person is kept in custody, the more punitive and harsher the punishment. The result may be that if the proposed amendment is progressed as is, in some cases, the right not to be subjected to disproportionately severe punishment could be infringed.[36]

4.13 The Law Society considers that the proposed changes to section 311(2A) also have the potential to infringe upon the right to be dealt with in a manner that takes account of the young person's age[37] and it may breach New Zealand's obligations as a signatory to the UNCROC and the Beijing Rules. The Act requires that a young person's rights under the

31 New Zealand Bill of Rights Act 1990, section 25(i).
32 RIS at para 139.
33 Ian Lambie, Isabel Randell "The impact of incarceration on juvenile offenders" (2013) 33(3) Clinical Psychology Review.
34 Marc Wittmann and Sandra Lehnhoff "Age effects in perception of time" (2005) 97(3) Psychological Reports 921.
35 Oranga Tamariki Act 1989, section 5(1)(b)(v).
36 New Zealand Bill of Rights Act 1990, section 9.
37 New Zealand Bill of Rights Act 1990, section 25(i).

UNCROC must be respected and upheld.[38] The rights relevant to the proposed amendment in clause 11 include (but are not limited to):

(a) Article 3: which requires the young person's best interests be a primary consideration;

(b) Article 37(b): which requires that custody only be used as a measure of last resort and for the shortest period of time;

(c) Article 40(1): which requires that sanctions and outcomes should be consistent with the promotion of a young person's sense of dignity and worth and the desirability of promoting reintegration and assuming a constructive role in society.

4.14 Failing to meet these obligations jeopardises New Zealand's reputation and may lead to concerns being noted by the UN Committee on the Rights of the Child during their periodic review of New Zealand's work to implement the UNCROC.[39]

4.15 The Law Society recommends that clause 27(2) is removed from the Bill. We consider that maintenance of the possibility of early release is essential to ensuring that the overall objective of reducing youth offending is more likely to be achieved, ensures tailored intervention and appropriate protection of young people's rights, and aligns with the purpose and principles of the Act.

5 MSA orders

5.1 An MSA order requires a YSO to undertake a military-style academy programme of between 3 to 12 months duration.[40] To be eligible for an MSA order a young person must be declared a YSO, and be between 15 and 18 years old at the time the offence was committed.[41] The Youth Court may make an MSA order at the same time as they are declared a YSO.[42]

5.2 The Law Society reiterates its earlier concerns (at 2.6 – 2.14) that military-style academies, or "boot camps," have not been found to be effective at reducing youth offending, and the current pilot remains ongoing. There appears no good reason for the MSA orders to proceed in advance of the pilot's conclusion and longer-term assessment of impact, noting again that data does not support the view that there is an increasing volume and/or seriousness of youth crime. Further, it is not clear why intensive interventions need to be delivered in this way.

5.3 The Law Society recommends that clause 40 is removed. However, understanding that there may not be the appetite to remove this clause, we note below, concerns with the regime as currently proposed.

38 Oranga Tamariki Act 1989, section 5.
39 By way of example: Committee on the Rights of the Child *Concluding observations on the sixth periodic report of New Zealand* (CRC/C/NZL/CO/6, 28 February 2023).
40 Clause 40, proposed new section 320S(1).
41 Clause 40, proposed new section 320S(5).
42 Clause 40, proposed new section 320S(4).

Authority to use reasonable force

5.4 Proposed section 320W sets out that the chief executive or an approved worker of a qualifying provider has the authority to use reasonable force against a YSO subject to an MSA order.

5.5 We acknowledge that it is appropriate and a positive step that the proposed section qualifies not only the *amount* of force but also *when* the force may be used. However, we consider that the proposed section should contain further safeguards to protect a young person from harm or abuse of power where the use of force against a young person has the potential to cause greater physical or emotional harm than to an adult prisoner.

5.6 Further, the provision will enable the use of force by third-party providers who are not under the effective control or employment of the state, or subject to continuous oversight (such as in a prison or youth justice facility). As drafted, this provision lacks the safeguards that could be expected following the findings of the Royal Commission of Inquiry into Abuse in Care. We draw the Select Committee's attention to the Commission's case study of Hokio Beach School and Kohitere Boys' Training Centre in *Whanaketia*, the final report of the Commission, and the relevant recommendations of the Commission.[43]

5.7 The Select Committee may wish to consider section 83 of the Corrections Act 2004, which requires that a prisoner is examined by a registered health professional after a use of force incident (unless the use of force is limited to the application of handcuffs). We note that there is not a similar safeguard proposed by the Bill and invite the Select Committee to consider this discrepancy.

5.8 Additionally, proposed subsection (6), mandates that a record of the details of a use of force incident be documented if required by regulations. This is also a positive development. However, we consider that the phrase "if the regulations require it" should be removed. The use of force should always be documented and subsequently reviewed, regardless of whether documentation is mandated by regulations.

David Campbell
Vice-President

43 Including, but not limited to, Recommendations 39 and 71.