

17 April 2009

Social Services Select Committee
Parliament House
WELLINGTON

Attention: Committee Secretariat

By email

Submission of YouthLaw Tino Rangatiratanga Taitamariki and Action for Children and Youth Aotearoa Inc on Children, Young Person and Their Families (Youth Court Jurisdiction and Orders) Amendment Bill

Introduction

1. YouthLaw Tino Rangatiratanga Taitamariki ('YouthLaw') is a community law centre vested under the Legal Services Act 2000. We provide a free, national legal service for children and young people aged below 25 years.
2. Our service includes the provision of free legal advice and advocacy, law-related education and outreach work, development and publication of legal resources (including books, flick-cards and a website) and law reform and policy work.
3. We also make this submission on behalf of Action for Children and Youth Aotearoa (ACYA) is a coalition of NGOs and individual's with an interest in children's rights issues with a primary focus on the implementation of the UN Convention on the Rights of the Child (UNCROC) in New Zealand. ACYA is the NGO that submitted the NGO Report on New Zealand's compliance with UNCROC, *Children and Youth in Aotearoa 2003*, to the UN Committee on the Rights of the Child in June 2003.

4. The writer is the Senior Solicitor at YouthLaw, ACYA Committee Member and a Youth Advocate at the Auckland Youth Court.

Our Position on the Bill

5. The Children and Young Persons (Youth Courts Jurisdiction and Orders) Amendment Bill ('the Bill') intends to expand the scope of the Youth Court's sentencing jurisdiction through a number of new measures, including:
 - (a) lowering the age of criminal prosecution to 12 for certain offences
 - (b) lengthening the residential and activity components of supervision orders and introducing compulsion in respect of activity orders
 - (c) Expanding the scope under which the Youth Court can transfer a young person to the District Court for sentencing
 - (d) Expanding the scope of judicial monitoring and response where orders are breached
6. To put it more bluntly, the Bill intends to make the youth justice system more punitive than it currently is by increasing the strength and range of the punishments available to the Youth Court.
7. The Bill follows two previous Bills submitted to the preceding Parliament, the Young Offenders (Serious Crimes) Bill and the Children, Young Persons and their Families Amendment Bill No. 6, both of which proposed changes to the youth justice system and the jurisdiction of the Youth Court. The Bill adapts aspects of both these previous Bills insofar that it proposes a lowering of the age of criminal prosecution and adopts the No 6 Bill's proposal to expand the duration of supervision orders and introduce compulsion to activity orders.

Lowering the age of criminal prosecution to 12

8. We strongly oppose the Bill's proposed lowering of the age of criminal prosecution to 12 for certain offences. This will also have the effect of 12 and 13 year olds potentially being subject to custodial sentences and remands in youth justice residences (proposed s365). We set out our reasons for our position below.

Breach of human rights obligations

9. Lowering the age of criminal prosecution to 12 would be contrary to New Zealand's obligations as a ratified signatory to the UN Convention on the Rights of the Child ('UNCROC'). Article 40 of UNCROC establishes a set of minimum international juvenile justice standards, including:

- That children and young people shall be treated in a manner which takes into account their age and the desirability of promoting their reintegration and their assuming a constructive role in society (Article 40.1)
- That State Parties shall establish a minimum age below which children shall be presumed not to have the capacity to infringe the penal law (Article 40.3(a))

10. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) expands on these international norms, stating at clause 4.1:

"In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity"

11. The Commentary to clause 4.1 of the Beijing Rules provides further context, stating:

“The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility...if the age of criminal responsibility is set too low or if there is no lower age limit at all, the notion of responsibility becomes meaningless...Efforts should therefore be made to agree on a reasonable lowest age limit that is applicable internationally.”

12. New Zealand’s age of criminal responsibility was considered by the UN in 2003, as part of the New Zealand Government’s reporting obligations under UNCROC. Rather than finding that New Zealand’s current laws conformed with international juvenile justice norms, the UN Committee on the Rights of the Child instead expressed its concern at New Zealand’s low age of criminal responsibility¹ and recommended that the Government:

“raise the age of criminal responsibility to an internationally acceptable age and ensure that it applies to all criminal offences²; and

extend the Children, Young Persons and Their Families Act of 1989 to all persons under the age of 18”³

13. In its 2007 General Comment on Children’s Rights in Juvenile Justice, the UN Committee on the Rights of the Child strongly recommended that the lowest age for criminal responsibility be set at 14 or 16 years and expressly urged States Parties against lowering the age of criminal responsibility to 12:

“Rule 4 of the Beijing Rules recommends that the beginning of Minimum Age of Criminal Responsibility (MACR) shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity. In line with this rule the Committee has recommended States parties not to set a MACR at a too low level and to increase the existing low MACR to an internationally

¹ CRC/C/15/Add.216 paragraph 20

² Ibid para 21(a)

³ Ibid para 21(b)

acceptable level...the Committee urges States parties not to lower their MACR to the age of 12. A higher MACR, for instance 14 or 16 years of age, contributes to a juvenile justice system which, in accordance with article 40 (3) (b) of CRC, deals with children in conflict with the law without resorting to judicial proceedings, providing that the child's human rights and legal safeguards are fully respected".⁴ [emphasis added]

14. It follows that, by seeking to lower the age of criminal prosecution, the Bill moves in an opposite direction from the international youth justice standards and principles that the New Zealand Government has pledged to implement. We are concerned that, if enacted, the Bill may bring New Zealand a degree of international disrepute and damage our reputation as a nation which takes its international human rights obligations seriously and offers a progressive stance in human rights matters.

15. We note that the Children, Young Person and their Families Amendment Bill No 6 sought to implement the recommendations of the UN by raising the care and protection and youth justice systems to incorporate 17 year olds, thereby ensuring that our Government is meeting its international human rights commitments in respect of all persons aged below 18. This was largely supported by the youth justice sector, including the Principal Youth Court Judge⁵ and the New Zealand Law Society⁶.

16. In addition, we refer to section 25(i) of the New Zealand Bill of Rights Act 1990 (NZBORA), which states:

Everyone who has been charged with an offence has, in relation to the determination of the charge, the following minimum rights:

⁴ CRC/C/GC/10, 2007, paragraphs 32 and 33

⁵ Court in the Act, Issue 32, page 8, 6 December 2007

⁶ Submission of the New Zealand Law Society on Children Young Persons and their Families Bill No 6, paragraph 2, 28 April 2008
http://www.lawsociety.org.nz/_data/assets/pdf_file/0008/1151/CYPFBillNo6.pdf

(i) The right, in the case of a child, to be dealt with in a manner that takes into account the child's age.

17. We note that the advice of Crown Law to the Attorney-General, regarding the Bill, concludes that the “specialised and highly responsive” nature of the youth justice scheme, together with the overarching principles of the Act under ss 4 and 208, provides that the Bill’s lowering of the age of criminal prosecution is not inconsistent with NZBORA.
18. We respectfully disagree with this conclusion. We consider that, notwithstanding the special protections contained in the youth justice system, lowering the age of criminal prosecution runs contrary to principles of law and scientific findings regarding the capacity of children to form the requisite intent to justify criminal responsibility for their actions.

Capacity for criminal responsibility

19. The Crimes Act 1961 currently establishes that children aged under 14 have diminished capacity in respect of criminal responsibility. Section 21 of the Crimes Act 1961 provides that children aged under 10 cannot be held criminally responsible. Accordingly, no criminal prosecution can be brought against children in this age bracket.
20. Section 22(1) of the Crimes Act 1961 also states that children aged from 10 to 13 cannot be held criminally responsible unless it is proved that the child knew what they did was wrong or contrary to law. The common law onus is on the prosecution to prove the child’s “guilty knowledge” and, in doing so, the prosecution must show that the child knew that their actions were “seriously wrong” rather than just “naughty”. Any presumptions as to the nature of the offence itself will not suffice to prove knowledge.⁷

⁷ *C v DPP* [1995] House of Lords.

21. It is also well established that the cognitive functions of children and young people are not fully developed, an issue of direct relevance to any measure of criminal responsibility. In *R v Slade & Ors*⁸ the Court of Appeal cited in its judgment the following report by a registered psychologist on the developmental characteristics of young people:

“It is widely accepted that adolescents do not possess either the same developmental level of cognitive or psychological maturity as adults (Steinberg & Scott, 2003). Adolescents have difficulty regulating their moods, impulses and behaviours (Spear, 2001). Immediate and concrete rewards, along with the reward of peer approval, weigh more heavily in their decisions and hence they are less likely than adults to think through the consequences of their actions. Adolescents’ decision-making capacities are immature and their autonomy constrained. Their ability to make good decisions is mitigated by stressful, unstructured settings and the influence of others. They are more vulnerable than adults to the influence of coercive circumstances such as provocation, duress and threat and are more likely to make riskier decisions when in groups. Adolescents’ desire for peer approval, and fear of rejection, affects their choices even without clear coercion (Moffitt, 1993). Also, because adolescents are more impulsive than adults, it may take less of a threat to provoke an aggressive response from an adolescent.”⁹

22. The law in New Zealand has developed over the years to reflect both the scientific evidence around the criminal culpability of children and young people¹⁰ and to address the root causes of their offending, through processes designed to provide greater preventative measures¹¹, support¹² and, in many respects, accountability¹³. It follows that lowering the age of criminal prosecution, even taking into account the thresholds and provisos contained in the Bill, is a retrograde and devolutionary measure the essence of which runs contrary to legal, social and scientific developments.

⁸ [2005] 2 NZLR 526

⁹ [2005] 2 NZLR 526, p 533, para 43

¹⁰ Crimes Act 1961 s 22, CYPF Act 1989 s208(e) and (h)

¹¹ CYPF Act s208 (a), (c)(ii) and (f)(i)

¹² CYPF Act s208 (c)(i) and (ii)

¹³ CYPF Act s208(g)

23. In addition, there appears to be little evidence that could reasonably justify lowering the age of criminal prosecution, taking into account the issues covered above.
24. The number of 12 and 13 year olds committing the threshold offences are very low. The Bill's Explanatory Note states that Police apprehension statistics indicate that around 80 12- and 13- year- olds are apprehended in respect of these offences. These figures do not disaggregate those apprehensions where the offence was admitted or proved. Given that Police apprehensions across age groups total over 200,000¹⁴, these children constitute a tiny segment of the total population apprehended by police. In addition, there does not appear to be any evidence that points to a significant rise in criminal offending by 12 and 13 year olds. The Bill's Explanatory Note does not refer to any data in evidence of such a trend.
25. We also consider that the current measures available to the Family Court are sufficient and appropriate for addressing serious offending by children aged under 14. In many respects, the Family Court has a broader set of options than the Youth Court in addressing serious offending by a child, including custody or guardianship orders that can result in a child being placed in secure residential care facilities for extended durations.
26. In addition, children who are committing serious offences are invariably going to give rise to care and protection concerns and we are accordingly concerned that the Bill shifts the procedural focus away from these matters. We are also concerned at proposed section 272(1A) which seeks to treat children who have previously been subject to a care and protection declaration in respect of a threshold offence, or have admitted to such an offence at a Family Group Conference, as "previous offenders". This blurs the important distinction between care and protection and youth justice proceedings.

¹⁴ Ministry of Justice 2007 Youth Justice Statistics in New Zealand, para 3.2 – total 2006 police apprehensions 203,484

27. In summary, we consider that any lowering of the age of criminal prosecution would represent a major public policy failure for reasons that we have set out in the paragraphs above. We strongly recommend that the current age thresholds for criminal prosecution are maintained, with a view to the future implementation of the recommendations of the UN Committee on the Rights of the Child through enactment of the CYPF No 6 Bill or amendment to this Bill.

Supervision with Residence/Transfer to District Court

28. In addition to lowering the age of criminal prosecution, the Bill introduces more punitive outcomes to the Youth Court jurisdiction. Of particular mention are:

- (a) proposed new section 283(o), which extends the scope under which a young person can be transferred to the District Court for sentencing; and
- (b) proposed new section 311, which extends the duration of the custodial component of a supervision with residence order to a maximum of six months.

29. Proposed section 283(o)(i) replicates the CYPF No 6 Bill in that it lowers the age that a young person can be transferred to the District Court for sentencing in respect of a purely indictable offence from 15 to 14.

30. Section 283(o)(ii) goes further in providing that the Youth Court can have effect such a transfer in respect of a 15 or 16 year old without reference to any offence threshold. The Bill's proposed new section 290 does not refer to any criteria for this transfer, unlike the incumbent section 290.

31. Section 283(o) still holds the most potentially punitive custodial outcome for a young person under the youth justice system. It is a statutory portal to the adult criminal justice system and can lead to young people being subject to terms of

imprisonment that are much longer than the custodial orders available to the Youth Court.

32. There is no specific qualifying criteria in respect of proposed section 283(o)(ii) other than the generalist consideration under proposed section 289. This provides that the Youth Court assess the hierarchy of sentences available under section 283 and impose the least restrictive outcome adequate in the circumstances.
33. However, the Bill also provides that the Youth Court can effect a transfer of a young person to the District Court for sentencing without taking into account section 289 if the young person is concurrently serving a community work order or is imprisoned and the Court would have otherwise made a community work, supervision with activity or supervision with residence order.
34. The proposed new section 311 is similarly replicated from the CYPF No 6 Bill in that it extends the period of residential custody that a Youth Court can sentence a young person from three months to six months. As in the No 6 Bill, the timeframe for early release under an extended residential order is also increased from two months to four months (proposed new sections 311(2)(a) and 314).
35. We consider that these amendments will likely result in greater numbers of children and young people being subjected to custodial sentences, for the simple reason that the amendments both broaden the criteria for transfer to the District Court for sentence and introduce longer sentences in youth justice residences.
36. In our view, this will inevitably require more beds in youth justice residences, which in turn would necessitate significant costs to the sector, which would in our view be better invested in developing support services and programmes for activity orders. There is no evidence to suggest that increasing the duration of incarceration will enhance a young person's rehabilitative prospects.

37. In addition, increasing the scope for custodial outcomes will also have the likely effect of increasing the number of children and young people in custody in police cells. This practice has been subject to strong criticism from the Children's Commissioner, the Courts and the UN Committee on the Rights of the Child. Whilst the practice is primarily due to a lack of availability of beds in CYF youth justice residences, it is nonetheless deeply concerning. The 2006 MSD Review and Analysis of Youth Justice Custody Placements (the Saxon Report) evidenced that police custody of young people is on the rise, with an average yearly increase between 2002 and mid 2006 of 18% and an overall variance of 56.2% between 2002 and 2005 of 450 to 703 admissions over that period.

Military-Style Activity Camps

38. Much has been made to date of the planned introduction of military-style "boot camps" for the most serious, recidivist young offenders. The contents of the Bill do not incorporate a specific sentence relating to this type of programme. Instead, the Explanatory Note sets out the policy objective in implementing these programmes.

39. Given that the camps are purported to be aimed at the most serious group of young offenders, we would assume that these planned programmes would correspond to supervision with activity orders under s283(m), given that this sentence is third 'heaviest' penalty in the proposed grouped hierarchy of offences under s283 – a "Group 5 response".

40. The Bill extends the duration of supervision with activity orders to extend the activity component to six months and makes these orders compulsory, further adaptations from the CYPF No 6 Bill. It is therefore feasible that the "military-style" camps will involve the detention of young offenders for up to six months – a significant period of time.

41. This planned policy again underlines the intention of the Bill to make the youth justice system more punitive, with tougher, harsher, outcomes for young offenders.
42. There has been much debate about the effectiveness of boot camps in rehabilitating young offenders and reducing recidivism. It is well known that the former sentence of corrective training, a boot-camp sentence for young male offenders, was responsible for disastrous recidivism rates that approached the vicinity of 90%. The corrective training sentence was finally abolished in 2002 by the introduction of the Sentencing Act 2002.
43. We refer to paragraphs 32-38 of Robert Ludbrook's submission on this Bill for a first-hand account of youth justice boot camps in England, Australia and New Zealand. In reference to these boot camps, Mr Ludbrook observed that:
- "In every case, the programmes were abandoned on the grounds that they were degrading both to staff who ran the programmes and to the young detainees. In each case, it was readily apparent that the boot camps did not discourage offenders but that detainees had a higher rate of recidivism than young persons dealt with in other ways."*
44. Like the lowering of the age of criminal responsibility, the introduction of military-style camps appears a retrograde step without any evidential basis to justify its introduction or point to its effectiveness.
45. However, there is certainly merit in investing in developing activity programmes that address underlying causes of offending, provide counselling and mentoring, address drug and alcohol issues and enhance educational and vocational skills and prospects. It is our view that these rehabilitative functions need to be at the centre of an activity programme, rather than a military regime, which will not be appropriate for many young offenders at the serious end of the spectrum, particularly those with psychiatric or psychological problems or disorders.

46. We support the view of Rethinking Crime and Punishment that a course based upon the successful “Outward Bound” programme would be a better model upon which to deliver rehabilitative services to young people than a military-style boot camp. In any event, the evidence appears clear that schemes that are predicated upon a therapeutic basis are much more likely to be successful than a boot-camp with therapeutic add-ons.¹⁵
47. The 2006 Saxon Report illustrated that a lack of suitable activity programmes led to supervision with residence orders well outnumbering activity orders, an outcome fundamentally at odds with the principles of our youth justice system. It is therefore vitally important to get these activity programmes right. They require considerable investment and co-ordination, but have the potential to produce a much more positive social dividend than incarceration.

Judicial Monitoring – Intensive Supervision

48. The Bill also seeks to provide the Youth Court with enhanced powers to respond to non-compliance with mentoring and drug/alcohol programme orders, community work orders and supervision with activity orders. It also introduces a new “intensive supervision order”, applicable to supervision orders, which can entail electronic monitoring and highly restrictive curfew conditions.
49. We consider that there is a case to provide the Youth Court with a more robust set of procedures for monitoring a child or young person’s progress or compliance with such requirements. However, it is important to ensure that these additional powers are balanced against achievable outcomes and expectations.

¹⁵ ReThinking Crime and Punishment, Newsletter No 33, 2009

Summary

50. In summary, we submit that whilst the Bill does not seek to dismantle the foundations of the youth justice system, it certainly shifts it towards a more punitive model that sits uneasily alongside our international youth justice obligations.

51. Further to this, as a closing point, we reiterate our strong opposition to any lowering of the age of criminal prosecution and urge the Committee's careful consideration of this matter. This is unlikely to prove to be a panacea in respect of child offending and will ultimately reflect poorly upon New Zealand's international reputation in the field of juvenile justice.

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