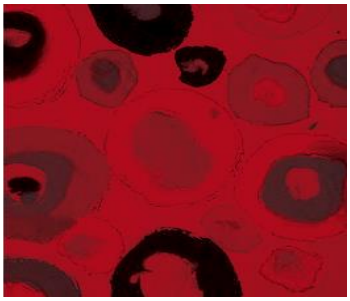
# Submission from the Office of the Children's Commissioner to the Social Services and Community Committee: Oranga Tamariki (Youth Justice Demerit Points) Amendment Bill



1. The Commissioner has a statutory responsibility to advocate for children's interests, rights and welfare, as well as advancing and monitoring the application of the United Nations Convention on the Rights of the Child (the Children's Convention) by departments of State and Crown instruments. The Children's Commissioner's powers, functions and responsibilities are contained in the Children's Commissioner Act 2003.
2. The Office of the Children's Commissioner (the OCC) welcomes this opportunity to submit on the *Oranga Tamariki (Youth Justice Demerit Points) Amendment Bill* (the Bill).
3. The Bill aims to "simplify the administrative processes" and "introduce structured interventions intended to improve behaviours and increase accountability and transparency within the youth justice system".
4. The OCC does not support the Bill and opposes it in the strongest possible terms.
5. We recommend that the Select Committee reject it entirely and focus instead on reducing inequities and further expanding the youth justice age jurisdiction.

The OCC represents **1.1 million** people in Aotearoa New Zealand under the age of 18, who make up 23 per cent of the total population.

We advocate for their interests, ensure their rights are upheld, and help them have a say on issues that affect them.

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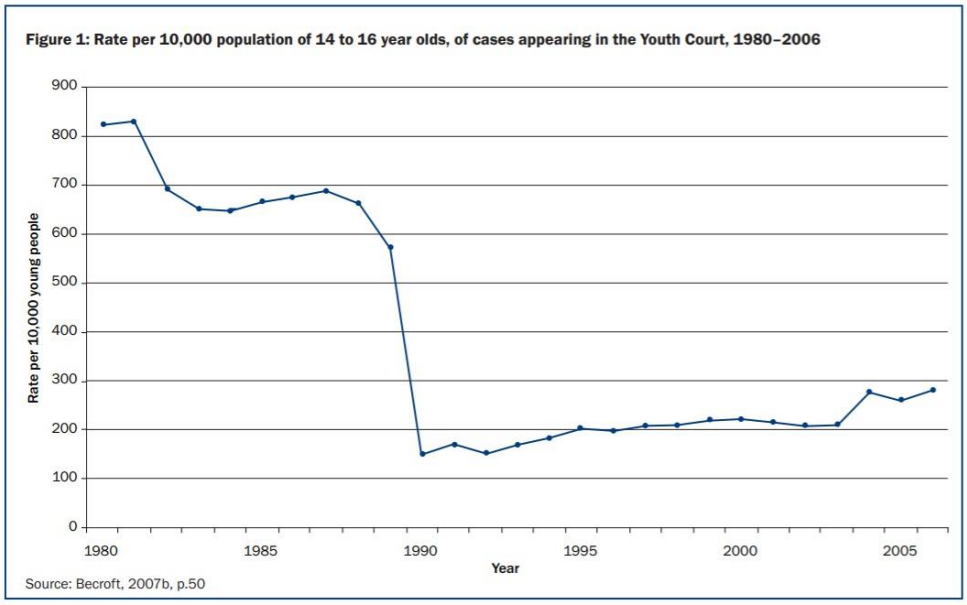
## Summary

a. The Bill is a solution in search of a problem
b. The Bill constitutes a retrograde step for our youth justice system under the guise of administrative rationalisation
c. The Bill is inconsistent with the evidence and will likely have the opposite effect to the one intended
d. The Bill proposes changes that would undermine the principles and practice of the youth justice system and the broader direction of government policy
e. The one-size-fits-all approach that the Bill proposes will criminalise more care-experienced, Māori and disabled young people
    i. Most young people referred for a Youth Justice Family Group Conference (FGC) have had concerns raised about their own care and protection.
    ii. The Bill will compound institutional racism within our justice system for rangatahi Māori
    iii. The Bill is harmful to disabled children and young people
f. These changes would increase the numbers of young people in adult courts and in the 'pipeline to prison' and reduce involvement of whānau and those victimised
g. Instead, we should be reducing inequities, addressing the underlying drivers of harm and upwardly expanding the jurisdiction of the youth justice system
h. The Bill has a number of profound technical flaws and internal legal inconsistencies.

## The Bill is a solution in search of a problem

6. An entirely new paradigm for youth justice came into effect in 1989 with the revolutionary Child, Young Persons and their Families Act, which prioritised diversion, community-based sanctions, family decision-making, cultural flexibility, de-institutionalisation and a restorative approach involving those victimised.
7. The 'Twin Pillars' of this highly effective new model were:
    a. Diversion from the Youth Court so that the Police were directed not to charge if alternatives were available, and
    b. For serious cases, using the Family Group Conference (FGC) as the prime decision-making tool for the Youth Court.
8. The introduction of this legislative change decreased the rate of young people in front of the Youth Court by approximately 75 percent in a single year.[1]




9. Youth offending has been steadily decreasing in New Zealand, and internationally, over the past two decades. In the last 10 years, 2009/10 to 2019/20[2]:
    a. The offending rates (which measure the proportion who offend relative to the population) for children and young people declined by 63% and 64% respectively
    b. The number of children and young people whose offending was serious enough to lead to an FGC or court action decreased by 46% and 59% respectively
    c. The rate of Youth Court appearances reduced by 68%.
10. The characterisation of youth offending in the Bill, and its problem definition, is therefore misleading. There is absolutely nothing given the current data context of youth offending that

[1] Becroft, A. (2009) *Are there lessons to be learned from the youth justice system?* Policy Quarterly**,** [S.l.], v. 5, n. 2, https://ojs.victoria.ac.nz/pq/article/view/4297

[2] Ministry of Justice, *Youth Justice Indicators Summary Report December 2020*: https://www.justice.govt.nz/assets/Documents/Publications/Youth-Justice-Indicators-Summary-Report-December-2020-FINAL.pdf, page 5

justifies or necessitates any fundamental change to the system in this direction, least of all the change proposed by this legislation.

## The Bill presents a retrograde step for our youth justice system under the guise of administrative rationalisation

11. The Bill is overly focused on administrative convenience at the expense of the wellbeing of young people, whānau and communities. We are in danger of undoing the benefits which make our youth justice system the envy of the world by applying within it, an arbitrary system reminiscent of 'three strikes' and other failed rigid numerical approaches to sentencing.
12. The Bill proposes that youth justice demerit points accumulate until the young person turns 17, or completes a course. If a young person commits a crime, even years apart, they could still find themselves in the District Court. For example, if a young person smokes cannabis and then shoplifts years later (between $500-$1,000), formal charges could be brought before the District Court with no power for Police to use their powers of discretion. Cannabis use and shoplifting are two common offences committed by young people.

> *"Some staff see us as criminals. They don't see us for who we are or look past what we've done."*
>
> (15-year-old boy, interviewed as a part of the OCC's routine monitoring work in youth justice residences)

13. There is no regard in the Bill for the young person's individual circumstances to be taken into account; for example: their age, their family and whānau dynamics, disability, geographic location, education or their socio-economic situation. None of the complex factors in the young person's life are considered; only numbers within a scale.
14. This is completely contrary to a range of principles and sections within the Oranga Tamariki Act 1989 (the Act). This includes, but is not limited to:
    a. the principle of proportionality, which is revered in youth justice systems worldwide;
    b. that decisions should be made and implemented promptly and in a time frame appropriate to the age and development of the child or young person (section 5(1)(v));
    c. that criminal proceedings should not be instituted against a young person in favour of alternative action (section 208(2)(a));
    d. that the young person should be kept in the community i.e. not in an adult court (section 208(2)(d));
    e. that a young person's age is a mitigating factor in determining a judicial response (section 208(2)(e));
    f. that any sanctions imposed should take the least restrictive form that is appropriate (section 208(2)(f)(ii)); and
    g. that measures for dealing with offending behaviour should as far as practicable, address the causes underlying the young person's offending (section 208(2)(fa)).
15. The Police and the Judiciary will no longer be able to use their powers of judgement and discretion but will instead be processing young people according to an arbitrary seriousness scale. This scale was developed as a statistical weighting tool within the adult justice sector and was neither designed for, nor is it appropriate or useful for, assessing child/youth offending.

16. In truth, the proposed Bill, if adopted, will virtually destroy the Youth Court because a high number of alleged offences will bypass the Youth Court altogether and be required to be heard in the adult District Court.

## The Bill is inconsistent with the evidence and will likely have the opposite effect than the one intended

17. Impulsive, risk-taking behaviour often occurs in the lives of young people. As young people's brains develop, so does their impulse control. Essentially, the vast majority of young people mature out of risk-taking behaviour in their early twenties as their brains develop.[3]
18. When young people are thinking about moral dilemmas, or hypothetical situations, (such as voting) they rely on logical information and make more rational decisions than they do when making immediate personal decisions.[4] As such, young people can make informed choices about their future while at the same time they do not have full capacity to override impulses in emotionally charged situations (such as driving or consuming alcohol) that require decisions in the heat of the moment, and may be exacerbated by peer presence.
19. Applying an approach to risk-taking behaviour that was designed for matured, adult brains (i.e. the justice seriousness score scale and the District Court) is not supported by scientific evidence.
20. The evidence is clear that young people have better outcomes and cause less further harm if they are kept away from formal courts and the justice system, and instead have access to services and supports that address the reasons for their offending.
21. The programmes available to a young person who has accumulated between 81-99 youth justice demerit points were not designed for the purpose or the cohorts of young people who would be criminalised.
    a. The Limited Service Volunteer programme, offered via the Bill, is not appropriate for those aged 13-17 or those with complex needs. Nor is it a kaupapa Māori programme. This programme targets 17/18 to 25-year olds with the aim to increase the number of young people entering employment or training by taking them out of their communities and doing a "six-week training course".
    b. The Limited Service Volunteer programme has been evaluated as having a "likely negative" impact on welfare.[5] It has many elements of the 'boot camp' style initiatives that have been thoroughly debunked and at best, have no impact on offending.
22. The Bill will achieve the very thing it is purporting to prevent by causing more and more young people to be trapped in the justice system. In principle, the earlier a young person is placed into the youth justice system, the harder it is for them to get out, and the more harm we will see in our communities as a result.

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[3] Office of the Prime Minister's Chief Science Advisor (2018) *It's never too early, never too late: A discussion paper on preventing youth offending in New Zealand.* https://www.pmcsa.org.nz/wp-content/uploads/Discussion-paper-on-preventing-youth-offending-in-NZ.pdf

[4] Icenogle, G., Steinberg, L., Duell, N., et. al., (2019). *Adolescents' cognitive capacity reaches adult levels prior to their psychosocial maturity: Evidence for a "maturity gap" in a multinational, cross-sectional sample.* Law and human behavior, 43(1), 69–85 https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6551607/.

[5] Ministry of Social Development (2019) *Effectiveness of MSD employment assistance: Summary report for 2016/2017 financial year.* https://www.msd.govt.nz/documents/about-msd-and-our-work/ publications-resources/research/employment-assistance-effectiveness/ea-effectivenes-report-07022019.docx

23. Instead, resource and support is needed to address what is driving offending in the young person's life. Community-based programmes uphold legislative responsibilities and are twice as likely to be effective than residential programmes, even when both use the most effective available approaches.[6]

## The Bill proposes changes that would undermine the principles and practice of the youth justice system and the broader direction of government policy

24. The youth justice system is founded on Police and judicial discretion and individualised approaches. We need individual tailored plans for individuals as part of their whānau and community, and this is a core part of the specialised training that Youth Aid officers undertake.
25. The desire for administrative consistency is mis-leading. Without discretion and individualised approaches, we will lose the benefits of the youth justice system which is internationally revered.
26. The Bill would significantly reduce and constrain the power and discretion of Police and Judges to act in ways that are effective. The Bill will overly restrict the options available to hold young people to account for their actions under Police Alternative Action, FGC plans and Youth Court sentences.
27. The changes proposed in the Bill are contrary to the principles of the Act. In particular, s208(2)(a) opened the door to the 80% diversion rate, which the Bill discusses in its introduction.
    a. Section 208(2)(a) states that, unless the public interest requires otherwise, criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter.
28. Research supports this principle and shows that young people who offend and are dealt with at a lower level are less likely to be convicted as an adult and have better life outcomes.[7]
29. The Bill also does not uphold the intent of the Government's Child and Youth Wellbeing Strategy or its principles, namely:
    a. that Māori are tangata whenua and the Māori-Crown relationship is foundational (principle 2)
    b. that children and young people's rights need to be respected and upheld (principle 3)
    c. that wellbeing needs holistic and comprehensive approaches (principle 5) and
    d. that children and young people's wellbeing is interwoven with family and whānau wellbeing (principle 6).

> *"I have 3 wishes: 1) I wana be free of the systems, of everything, 2) have money and 3) be with my aunty and her family forever."*
>
> (13-year-old girl, interviewed as a part of the OCC's routine monitoring work in youth justice residences)

[6] McLaren, K. (2010). *Alternative Actions that Work: A review of the research on Police Warnings and Alternative Action. Police Youth Services Group,* New Zealand Police: Wellington. Pages 55-56.
[7] Maxwell et. al., 2004, p.25 in: Becroft, A. (2009) *Are there lessons to be learned from the youth justice system?* Policy Quarterly**,** [S.l.], v. 5, n. 2, https://ojs.victoria.ac.nz/pq/article/view/4297

## The one-size-fits-all approach that the Bill proposes will criminalise more care-experienced, Māori and disabled young people

Most young people referred for a Youth Justice Family Group Conference (FGC) have had concerns raised about their own care and protection.

30. Since 2014/15, almost all (97%) of *children aged 10-13 years* and most (88%) *young people aged 14-17 (14-18 from 1 July 2019)* referred for a youth justice FGC had previously been the subject of a report of concern to Oranga Tamariki about their care and protection.[8]
31. For those children aged 10-13 years it was 100% of all females, and 95% of all males, who were referred for a youth justice FGC had previously been a subject of a report of concern to Oranga Tamariki about their care and protection. For young people aged 14-17/18, it was 91% of all females, and 88% of all males.[9]
32. At the OCC we often hear about complex situations of young people's lives through no fault of their own. These situations are a result of systemic failure to provide for the young person and their family, whānau and community.
33. The oversimplified response proposed in the Bill ignores these young people's complex history of trauma in favour of a 'one-size-fits-all' approach. This will not work as no two circumstances are the same and ignoring the intersecting needs of young people only serves to punish and penalise trauma. It is imperative that a holistic approach is taken, not a punitive, harmful reaction.

This Bill will compound institutional racism within our justice system for rangatahi Māori

34. Māori are significantly more affected by the justice system than any other group of people within Aotearoa.[10] Māori are more likely to have contact with the Police due to disproportionate policing and institutional racism. By allowing demerit points to accumulate so that subsequent offending is brought to the District Court, a higher number of rangatahi Māori are guaranteed to be trapped in the 'justice' system, and an adult system at that.
35. The Bill is contrary to section 7AA of the Act, which outlines the duties of the Chief Executive in relation to Tiriti o Waitangi (The Treaty of Waitangi). Section 7AA(2)(a) states that policies and practices of Oranga Tamariki which impact on the well-being of children and young persons have the objective of reducing disparities by setting measurable outcomes for tamariki and rangatahi Māori who come to the attention of the department.
36. In addition, section 7AA(2)(b) states that the policies, practices, and services of the department have regard to mana tamaiti (tamariki) and the whakapapa of Māori children and young persons and the whanaungatanga responsibilities of their whānau, hapū, and iwi.
37. This Bill proposes yet another change within the 'justice' system without engagement with, or leadership by, Māori. As a result, the Bill will continue proliferating inequities and contribute to the gross over-representation of Māori in the criminal justice system, including within the Youth Justice system.

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[8] Ministry of Justice, *Youth Justice Indicators Summary Report December 2020,* https://www.justice.govt.nz/assets/Documents/Publications/Youth-Justice-Indicators-Summary-Report-December-2020-FINAL.pdf

[9] Ibid.

[10] *Hui Māori: Ināia Tonu Nei,* Hāpaitia Te Oranga Tangata - Safe and Effective Justice: https://www.justice.govt.nz/assets/Documents/Publications/d8s653-Inaia-Tonu-Nei-Hui-Maori-English-version.pdf

38. Instead, there needs to be collective support and resources for Māori-led solutions.

### This Bill is harmful to disabled children and young people

39. This Bill will further criminalise young people with disabilities. "One-size-fits-all" programmes are particularly inadequate for the high proportion of young people in the justice system with neuro-diversities, cognitive impairments, and other disabilities such as autism spectrum disorder, Deafness or ADHD.[11]
40. Young people in the criminal justice system have higher rates of traumatic brain injury, fetal alcohol spectrum disorder (FASD), communication disorders and intellectual disabilities.[12] There are estimates that FASD affects about 50% of children and young people in the care and custody of Oranga Tamariki.[13]
41. Disability awareness and increased training for those working within the justice system is urgently needed to help prevent this disproportionate representation and to uphold the United Nations Convention on the Rights of Persons with Disabilities, which New Zealand ratified in 2008.

## These changes would increase the numbers of young people in adult courts and in the 'pipeline to prison' and will reduce involvement of whānau and those victimised

42. The intention of the Bill appears to be to increase the number of young people escalated to adult court and adult punishments through the accumulation of demerit points. As previously noted, this will decimate the Youth Court.
43. There is no evidence that these changes will work for those harmed. Rates of satisfaction amongst those victimised who participate in restorative justice practices in the youth justice system are high. Paradoxically, going to the District Court would reduce opportunities for victims to have their say.
44. "Both young offenders and victims tend to be more satisfied with restorative justice approaches than traditional justice processing through courts".[14]
45. The Bill takes away the chance for victims to be involved, which is contrary to sections 208(g)(i) and 208(g)(ii) of the Act.

## Instead, we should be reducing inequities, addressing the underlying drivers of harm and upwardly expanding the jurisdiction of the youth justice system

46. The numbers of young people who have appeared in the Youth Court, have a proven Youth Court case or have been remanded into custody have all decreased. There are substantial recent positive changes for these indicators, with improvements for Māori generally greater than for non-Māori.[15]

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[11] 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

[12] Ibid.

[13] Ibid, page 23.

[14] McLaren, K. (2010). Alternative Actions that Work: A review of the research on Police Warnings and Alternative Action. Police Youth Services Group, New Zealand Police: Wellington. Pages 26-27.

[15] Ministry of Justice, *Youth Justice Indicators Summary Report December 2020*: https://www.justice.govt.nz/assets/Documents/Publications/Youth-Justice-Indicators-Summary-Report-December-2020-FINAL.pdf, page 5.

While numbers have fallen, the number of tamariki and rangatahi Māori who are not well served by the justice system remains highly disproportionate.

47. In 2017 the Waitangi Tribunal highlighted the Crown's failure to live up to its Tiriti o Waitangi obligations in the area of criminal justice.[16] The Tribunal found the Crown has a Treaty responsibility to reduce inequities between Māori and non-Māori reoffending rates in order to protect Māori interests. They concluded that it was not good enough to have a generic strategy for all prisoners, but that the Department of Corrections must prioritise reducing inequities for Māori. This sets clear expectations for future legislation, policy and practice, including the Bill.
48. The Bill is not in the best interest of rangatahi Māori. Rather, this Bill will be in breach of Te Tiriti o Waitangi as its implementation will have a disproportionate impact on Māori. It focuses on punishing young people with no regard for a context of decades of Crown failure to invest and support their communities and whānau.
49. Including most 17-year olds in our youth justice system brought New Zealand closer to our international obligations under the United Nations Convention on the Rights of the Child (the Children's Convention). This move was a positive one. There have been fewer young people in court and we have not seen an increase in crime. The fears of increased numbers and expensive resourcing were unfounded. This signals the direction for Aotearoa New Zealand to move forward.
50. Aotearoa New Zealand has the opportunity to continue to improve and transform our youth justice system. To do so, the OCC recommends that we:
    a. Increase the minimum age of criminal responsibility from 10 to 14 years[17]
    b. Include all 17-year olds in youth justice system, for any offence[18]
    c. Explore extending the youth justice system up to the age of 21[19]
    d. End the use of police cells for young people on remand after first youth court appearance[20]
    e. Radically reduce the use of youth justice residences in favour of community alternatives
    f. Ensure that young people have a say in any changes to the youth justice system so that it is designed to work for them. Article 12 of the Children's Convention states that children and young people have the right to have their views heard and taken seriously when decisions are being made that affect them. In addition, section 5(1)(a) of the Act states that any court

> *"The big message is give kids a choice."*
>
> (Young person from Dunedin interviewed for the 2018 *What Makes a Good Life?* engagement)

[16] *Tū Mai Te Rangi: Report on the Crown and Disproportionate Reoffending Rates,* Waitangi Tribunal: https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_121273708/Tu%20Mai%20Te%20Rangi%20W.pdf

[17] For more information, see: https://www.occ.org.nz/assets/Uploads/CriminalAgeofResponsibility-OnePager-FINAL.pdf

[18] Including murder and manslaughter.

[19] In particular, there are be some 18, 19 and 20-year-olds who, because of limited intellectual development, neurodevelopmental disorder (such as autism) or other circumstance, are much more appropriately dealt with by the more specialised processes and resources of the Youth Court.

[20] Police cells are not an appropriate option for young people. We need to remove the use of Police cells as a custodial remand option for young people following an appearance in the Youth Court to bring New Zealand in line with the Children's Convention (article 37). For more information, see: https://www.occ.org.nz/publications/submissions/oranga-tamariki-act-1989-limiting-the-use-of-police-cells/

that, or person who, exercises power under the Act must be guided by the principles that children and young people must be encouraged, and assisted, to share their views.

51. The youth justice system should continue to focus on alternative action and diversion, addressing the underlying drivers of crime and prioritising keeping children and young people out of the justice system, away from court, and keeping them within their families, whānau, communities, hapū and iwi.

## This Bill also has a number of profound technical flaws and internal legal inconsistencies

52. We are concerned that the Bill contains a number of technical flaws. Some of these are included, below, for illustrative purposes. We include two clear flaws and one internal legal inconsistency.
53. The concept of demerit points relies on the 'justice seriousness sector scoring system'. This is an internal Ministry of Justice statistical/weighting tool designed for adult offenders. It has no standing as a tool for assessing youth offending, much less as a means for determining a nuanced response to individual offenders. It is breathtakingly unfit for the purpose put to it in this proposed legislation.
54. The second technical flaw is that it is only possible to use one of two options to wipe the demerit points applied to a young person (the Limited Service Volunteer programme or the Youth Employment Training and Education Programme). As this submission has outlined, this is inappropriate for many young people. Many young people will instead find themselves in District Court. This is contrary to research evidence about what is effective for young people and the principles of the Act.
55. Section 208(2)(a) of the Act is a powerful statement of principle which is inconsistent with the legal provisions set out in the Bill.
    a. Section 208(2)(a) of the Act states that the court may be guided by the principle that, unless the public interest requires otherwise, criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter.
    b. Proposing to send young people straight to the District Court for certain offences or a certain number of 'demerit points' is contrary to section 208(2)(a) of the Act.