

# Submission to the Justice Committee: Sentencing (Reform) Amendment Bill

## Introducing Mana Mokopuna – Children and Young People’s Commission

Mana Mokopuna - Children and Young People’s Commission is the independent Crown entity with the statutory responsibility to advocate for the rights, interests, participation and well-being of all children and young people (mokopuna) under 18 years old in Aotearoa New Zealand, including young persons aged over 18 but under 25 years old years if they are, or have been, in care or custody.

We independently advocate for and with mokopuna within the context of their families, whānau, hapū, iwi and communities, based on evidence, data and research, including direct mokopuna experiences and views.

Our work is grounded in the United Nations Convention on the Rights of the Child (the Children’s Convention), Te Tiriti o Waitangi and other international human rights instruments. We are also a National Preventative Mechanism under the Optional Protocol to the Convention Against Torture, meaning we monitor places where mokopuna are deprived of their liberty, including in the care and protection, youth justice, youth mental health and intellectual disability spaces.

We have a statutory mandate to promote the Children’s Convention and monitor the Government’s implementation of its duties under the Convention, and to work in ways that uphold the rights of mokopuna Māori including under Te Tiriti o Waitangi. We place a focus on advocating for and with mokopuna who are experiencing disadvantage, and we recognise and celebrate the diversity of mokopuna in all its forms.


Our moemoeā (vision) is *Kia kuru pounamu te rongō – All mokopuna live their best lives*, which we see as a collective vision and challenge for Aotearoa New Zealand.

## Executive Summary

Mana Mokopuna – Children and Young People’s Commission (Mana Mokopuna) thanks the Justice Committee (the Committee) for the opportunity to submit on the Sentencing (Reform) Amendment Bill (the Bill).

1. We acknowledge the people in our community who are impacted by offending by mokopuna, and we acknowledge that youth offending is an issue that we need to effectively address in Aotearoa New Zealand in order to prevent harm occurring.
2. Mana Mokopuna does not support the Bill due to the likely detrimental impact on the rights, interests, well-being and participation of mokopuna.<sup>1</sup>
3. This submission focuses on the specific proposed reforms which will, in our assessment, disproportionately impact mokopuna aged under 18, and/or those aged 18-25 who are care and/or custody-experienced.

<sup>1</sup> At Mana Mokopuna we have adopted the term ‘mokopuna’ to describe all children and young people we advocate for. ‘Mokopuna’ brings together ‘moko’ (imprint or tattoo) and ‘puna’ (spring of water). Mokopuna describes that we are descendants, and or grandchildren, and how we need to think across generations for a better present and future. We acknowledge the special status held by mokopuna in their families, whānau, hapū and iwi and reflect that in all we do. Referring to children and young people we advocate for as mokopuna draws them closer to us and reminds us that who they are, and where they come from, matters for their identity, belonging and well-being at every stage of their lives.



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## Introduction

“There must surely be a limit to how much longer society is prepared to watch very young children offend, tumble into that prison pipeline and end up in adult prison some 15 or so years later.”<sup>2</sup>

4. Under the circumstances set out in the Oranga Tamariki Act 1989,<sup>3</sup> mokopuna under 18 may have their charges transferred to the District or High Court, following which they become subject to the Sentencing Act 2002 and the proposed reforms in the Bill. Approximately **80 mokopuna under 18 years old are sentenced under the adult jurisdiction each year.**<sup>4</sup>
5. Last year, the United Nations Committee on the Rights of the Child (UN Committee) assessed Aotearoa New Zealand’s implementation of the UN Convention on the Rights of the Child (Children’s Convention) , raising **urgent** concerns and recommendations about our youth justice system.<sup>5</sup> The United Nations Committee Against Torture also assessed Aotearoa New Zealand last year,<sup>6</sup> and also issued recommendations to improve our youth justice system.<sup>7</sup>
6. The Bill fails to fulfil the recommendations made by the UN in respect of our obligations under both the Children’s Convention and the Convention Against Torture. In fact, the increasingly punitive measures proposed by the Bill are a further departure from a children’s rights based approach to justice which Aotearoa New Zealand is obligated to uphold.<sup>8</sup>
7. Punitive approaches to youth offending are not only in opposition to children’s rights, but evidence shows they are also unsuccessful at addressing offending and reoffending.<sup>9</sup> Mana Mokopuna continues to advocate for responses and approaches to reducing offending which are grounded in human rights-based, early intervention, evidence-based prevention – in particular, strategies aimed at addressing the root causes of offending, while safeguarding the rights, interests, and well-being of mokopuna, encompassing their families, whānau, hapū, iwi, and communities.
8. We support the longstanding consensus by previous Children’s Commissioners, researchers and practitioners, that making sustainable change in relation to youth offending is best enabled by a children’s rights approach (i.e., approaches that are grounded in prevention,

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<sup>2</sup> Reil, J., Lambie, I., Becroft, A., & Allen, R. How we fail children who offend and what to do about it: ‘A breakdown across the whole system’ at p.168. Research and recommendations. Auckland, NZ: The Michael and Suzanne Borrin Foundation, the New Zealand Law Foundation & the University of Auckland. (2022).

<sup>3</sup> Sections 273-275.

<sup>4</sup> Regulatory Impact Statement, para 121.

<sup>5</sup> CRC/C/NZL/CO/6

<sup>6</sup> Against the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Optional Protocol

<sup>7</sup> CAT/C/NZL/CO/7, at paras 37-38.

<sup>8</sup> United Nations Children’s Convention (1989) Art 40; United Nations Committee on the Rights of the Child (2019) General Comment 24 on children’s rights in the child justice system.

<sup>9</sup> Reil, J., Lambie, I., Becroft, A., & Allen, R. How we fail children who offend and what to do about it: ‘A breakdown across the whole system’ at p.168. Research and recommendations. Auckland, NZ: The Michael and Suzanne Borrin Foundation, the New Zealand Law Foundation & the University of Auckland. (2022).

holistic wraparound support for wellbeing, and best practice justice interventions).<sup>10</sup> This aligns with recommendations from the UN Committee, calling for investment into community-based residences, strengthening access to non-custodial measures and strengthening the availability and use of non-custodial measures.<sup>11</sup>

## An overview of mokopuna who offend

“They are always judging you. They just see you as paper. They don’t know who you are. If you actually get to know me I’m not that bad, just made some stupid choices.”

(Young person)<sup>12</sup>

9. On the most recently available data, there are 162 mokopuna in youth justice custody.<sup>13</sup> Of this figure, 85% of mokopuna are detained in secure residences, with the remainder in community remand homes.<sup>14</sup> A staggering 89% of mokopuna in youth justice custody are on remand, and the UN Committee urges Aotearoa New Zealand “reduce the proportion of children in secure youth justice residences who are on remand”.<sup>15,16</sup>

“Keep bringing up how we fail or all the bad things we do not the bad that they do to us or did to our people.”

(Mokopuna Māori, aged 14-16, remand home)<sup>17</sup>

10. Three quarters of the current youth justice residence population identify as Māori.<sup>18</sup> Overrepresentation of mokopuna Māori in the justice system is a consequence related to the intergenerational impacts of breaches of Te Tiriti o Waitangi and the ongoing impact of colonisation, given that we see this playing out with intergenerational effect.<sup>19</sup> Upholding Te Tiriti o Waitangi is essential in addressing these inequities.

11. Iwi-led and kaupapa Māori community remand homes provide an example of ways in which the rights of mokopuna Māori, under the Children’s Convention and Te Tiriti o Waitangi, can be given effect to within the youth justice system. For example, Mahuru Remand Services, operated by Ngāpuhi Iwi Social Services, provide community-based remand homes which support mokopuna through tikanga Māori to strengthen and broaden

<sup>10</sup> Such approaches will take account of best practice development in the following areas, as examples: health and wellbeing, centred on Te Whare Tapa Whā; neuroscience (REPORT: [What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand - January 2020 - Office of the Prime Minister's Chief Science Advisor \(dpmc.govt.nz\)](#)); culturally informed approaches (Culture-based-Interventions.pdf (justice.govt.nz); He Mātauranga Hāpine.pdf (cdn-website.com)); and justice interventions (20221811-AODTC-GoodMeasure-Report-DIGITAL.pdf (squarespace.com)).

<sup>11</sup> CRC/C/NZL/CO/6, paragraph 43(b).

<sup>12</sup> [Brain gain for youth: Emerging trends in neuroscience | Department of Corrections](#)

<sup>13</sup> \*Youth justice custody trends (orangatamariki.govt.nz)

<sup>14</sup> [orangatamariki.govt.nz/assets/Uploads/About-us/Performance-and-monitoring/safety-of-children-in-care/2022-23/J000093\\_SOCIC-Report-2023\\_v4.pdf](#)

<sup>15</sup> CRC/C/NZL/CO/6, paragraph 43(b).

<sup>16</sup> \*Youth justice custody trends (orangatamariki.govt.nz)

<sup>17</sup> [“Without racism Aotearoa would be better”: Mokopuna share their experiences of racism and solutions to end it | Mana Mokopuna](#)

<sup>18</sup> [Secure-residence-review.pdf \(orangatamariki.govt.nz\)](#)

<sup>19</sup> J Reil, I Lambie, A Becroft & R Allen (2022) How we fail children who offend and what to do about it: ‘A breakdown across the whole system’ Research and recommendations.

connections to whakapapa, engage in education, training or employment, reduce frequency and severity of offending, and contribute to improved life outcomes in the long term.<sup>20</sup>

12. Mana Mokopuna is a designated National Preventive Mechanism (NPM) under the Optional Protocol to the Convention Against Torture (OPCAT). As part of this role, we undertake monitoring of all places mokopuna are detained, including Oranga Tamariki youth justice residences and remand homes. In August 2022, Mana Mokopuna visited Te Whare Pumau Mana Community Remand Home, delivered by kaupapa Māori organisation Te Ikaroa Rangatahi Social Services.<sup>21</sup> We observed mokopuna being treated well by kaimahi (staff), and mokopuna told us they had good relationships with kaimahi. Kaimahi took care to create healthy boundaries and were caring towards mokopuna. Mokopuna told us that there was no use of secure care or physical restraints, a persistent issue in youth justice residences.<sup>22</sup> Further, te reo Māori is normalised and te ao Māori and mātauranga Māori was evident, and mokopuna are treated like whānau.
13. The UN Committee urges that Aotearoa New Zealand *“reduces the proportion of children in secure youth justice residences who are on remand, including by investing in the development of community-based residences and strengthening the availability and use of non-custodial measures, such as these community remand homes”*.<sup>23</sup>
14. Further, the UN Committee urges that Aotearoa New Zealand *“develop an effective action plan aimed at eliminating the disparity in the rates of sentencing, incarceration and survival in detention of Māori children by addressing the connections between offending and neuro-disability, alienation from whānau (family), school and community, substance abuse, family violence, removal into State care and intergenerational issues”*.<sup>24</sup>
15. Therefore, iwi-led and kaupapa Māori community remand homes are crucial to upholding a children’s rights approach within the justice system, and increased investment in these approaches will better give effect to our international obligations.

“Yeah, they were talking about my behaviour, they weren’t talking about what was going on with me. Like, mentally, they never used to sit down and talk to me, no nothing, not really, none of the officers would sit down and ask me what were going on.”

(Neurodivergent mokopuna)<sup>25</sup>

16. Mokopuna who are whaikaha, disabled (including neurodisabled), neurodiverse, and those who have experienced traumatic brain injuries, are overrepresented in youth offending.<sup>26</sup> Approximately 80% of mokopuna in youth justice residences have a disability and/or mental health diagnoses.<sup>27</sup>
17. Unfortunately the full scale of this overrepresentation is not clear due to lack of data collection and the potential for significant underreporting due to lack of diagnoses

<sup>20</sup> [Community-based remand homes \(ot.govt.nz\)](https://ot.govt.nz)

<sup>21</sup> [Te Whare Pumau Mana Community Remand Home - OPCAT Monitoring report | Mana Mokopuna](#)

<sup>22</sup> [Secure-care-use-of-seclusion.pdf \(orangatamariki.govt.nz\)](#)

<sup>23</sup> CRC/C/NZL/CO/6, paragraph 43(b).

<sup>24</sup> Above at para 43(e).

<sup>25</sup> [The experience of neurodivergent children in custody - Russell Webster](#)

<sup>26</sup> [REPORT: What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand - January 2020 - Office of the Prime Minister's Chief Science Advisor \(dpmc.govt.nz\)](#)

<sup>27</sup> [Secure-residence-review.pdf \(orangatamariki.govt.nz\)](#)

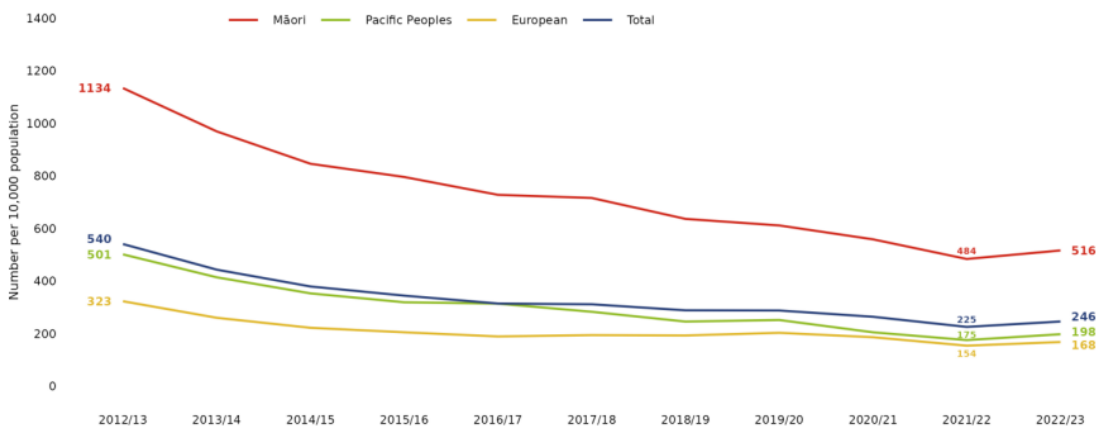
(including lack of accessible pathways to formal diagnosis). We welcome the fact that a study to understand the prevalence of Fetal Alcohol Spectrum Disorder (FASD), including within the Oranga Tamariki System, is planned by the Government, as this will provide much-needed data relating to mokopuna.<sup>28</sup>

18. While youth offending has generally decreased over the past decade,<sup>29</sup> there have been increases in the past year, with more children and young people having been proceeded against by Police for offending:

- a. The rate of children and young people proceeded against by Police increased, by 14% for children and 9% for young people relative to the population.<sup>30</sup>
- b. The number of children and young people with serious and persistent offending behaviour increased, by 4% for children and 26% for young people.<sup>31</sup>
- c. Finally, more children and young people entered the youth justice system for the first time. There was an increase in the proportion of children and young people who had no proceedings in the two years prior, from 74% to 76% for children and from 63% to 68% for young people.<sup>32</sup>

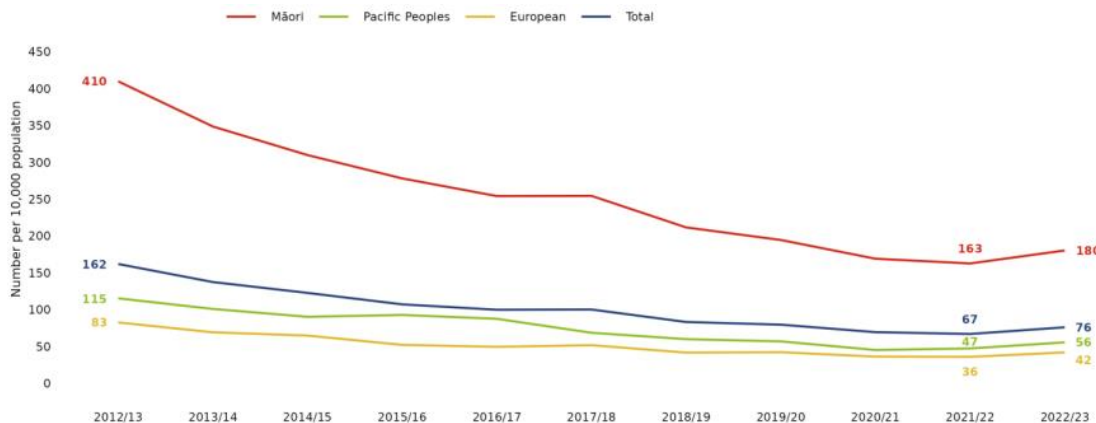
**Figure 1: Overall offending rate for young people per 10,000 population (across past decade)**

Source: [Youth-Justice-Indicators-Summary-Report-June-2024\\_v2.0.pdf](#) at p 11.



**Figure 2: Overall offending rate for children per 10,000 population (across past decade)**

Source: [Youth-Justice-Indicators-Summary-Report-June-2024\\_v2.0.pdf](#) at p 10.



<sup>28</sup> Greater investment in FASD support and prevention | Beehive.govt.nz

<sup>29</sup> Youth-Justice-Indicators-Summary-Report-June-2024\_v2.0.pdf

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.



“My family trying to survive but it’s the benefit or crime because the system is racist.”

(Mokopuna Māori, aged 14-16, remand home)<sup>33</sup>

19. In light of these statistics, it is even more important to recognise the underlying drivers and root causes that sit beneath youth offending. Evidence and research shows that entry into the youth justice system is almost always preceded by underlying drivers of offending and Adverse Childhood Experiences (ACEs) including poverty, food and housing insecurity, discrimination and racism, exposure to family violence and child abuse, exclusion from schools and multiple enrolments (school transience), unmet mental health needs and other child welfare and protection concerns.<sup>34</sup>
20. The fact that the overwhelming majority of mokopuna who offend have experienced harm, abuse and neglect cannot be ignored, and in fact forms a crucial data point that provides evidence as to where focus needs to be to address youth offending, which is on prevention and strengthening families and whānau, so that mokopuna do not experience the ACEs that can be a precursor to youth offending. In this regard we note the following evidence:
  - a. As at June 2024, **97% of children aged 10-13 years old , and 87% of young people aged 14-17 years old, who have interacted with Police had a previous care and protection report of concern to Oranga Tamariki relating to their welfare.**<sup>35</sup>
  - b. A child abused under the age of 5 is **six times more likely to offend** as a child and/or young person, than children who are not abused.<sup>36</sup>
  - c. A child experiencing neglect under the age of 5 is significantly more likely to engage in youth offending.<sup>37</sup>
  - d. Sexual abuse data show clear links between being sexually abused under age 14 and offending.<sup>38</sup>
  - e. Children who had an out-of-home placement before their 5th birthday were more likely to offend (across all age groups) compared to those who did not have a placement before their 5th birthday.<sup>39</sup>
21. There are 877 young people aged 18-25 in adult prison. We are unable to determine how many of these young people fall within our mandate of being care and/or custody experienced (before the age of 18) because this data is not collected. However, evidence suggests a significant proportion of these young people within the adult prison will have been care and/or custody experienced mokopuna.<sup>40</sup> We recommend that this data is officially collected, as it will provide important insights into the connection between care experience and custody experience, as well as fulfil a recommendation of the UN Committee in respect of the right to non-discrimination:

The UN Committee urged Aotearoa New Zealand to “*address the structural discrimination against children in situations of vulnerability [such as those who are care and/or custody*

<sup>33</sup> [Brain gain for youth:Emerging trends in neuroscience | Department of Corrections](#)

<sup>34</sup> [ACARA Annual Report 2015-16 \(borrinfoundation.nz\)](#)

<sup>35</sup> [MOJ Youth Justice Indicators Summary Report June 2024: Youth-Justice-Indicators-Summary-Report-June-2024\\_v2.0.pdf](#)

<sup>36</sup> [ACARA Annual Report 2015-16 \(borrinfoundation.nz\)](#)

<sup>37</sup> [ACARA Annual Report 2015-16 \(borrinfoundation.nz\)](#)

<sup>38</sup> [ACARA Annual Report 2015-16 \(borrinfoundation.nz\)](#)

<sup>39</sup> <https://www.borrinfoundation.nz/report-how-we-fail-children/>

<sup>40</sup> [Document library | Abuse in Care - Royal Commission of Inquiry](#)



experienced] by leveraging its mandate under the child and youth well-being strategy (2019) to prioritize action against racism and discrimination, including by collecting and analysing data on the disparities experienced by such children and developing a strategy to confront the barriers to and measure the progress achieved in respect of improving outcomes for them".<sup>41</sup>

22. In February of this year, the Auditor General issued a report titled "Meeting the mental health needs of young New Zealanders",<sup>42</sup> which recommended strengthened data collation between key agencies, Te Whatu Ora, the Ministry of Education, Oranga Tamariki and the Department of Corrections for all mental health and well-being services accessed by young people.<sup>43</sup> Giving effect to this recommendation may provide a pathway by which data concerning young people who have come under both Oranga Tamariki and the Department of Corrections can be collated and reported on.

## An overview of children's rights in the justice system



"Understanding kids in the system & not judging [judging] when done bad things."

(Mokopuna, aged 11-15, Care and Protection secure residence)<sup>44</sup>

23. Mana Mokopuna has specific responsibilities to promote and advance children's rights. These responsibilities include advocating for, and monitoring, the application of the Children's Convention by government departments and other instruments of the Crown, which are primary duty bearers under the Children's Convention.
24. A children's rights approach requires the Crown to prioritise the interests of mokopuna, improve their well-being, and enable and respect the participation of children and young people in their own lives and the things that are important to them.
25. Crown agencies charged with developing and administering the child and youth justice system, and Crown agencies within the broader children's system and justice system,<sup>45</sup> play a crucial role in ensuring Aotearoa New Zealand upholds children's rights, guided by its international obligations. This includes taking all appropriate legislative, administrative and other measures to implement children's rights.
26. There are four key principles to consider when applying the Children's Convention (which are also substantive children's rights under the articles of the Convention):
- a. Non-discrimination – all children are entitled to experience their rights equally, without discrimination (Article 2).
  - b. The best interests of the child must be a primary consideration in all decisions impacting mokopuna (Article 3).
  - c. Every child has the right to life, and maximum survival and development (Article 6).

<sup>41</sup> CRC/C/NZL/CO/6, at para 16.

<sup>42</sup> [Meeting the mental health needs of young New Zealanders](https://oag.parliament.nz) (oag.parliament.nz)

<sup>43</sup> Ibid, Recommendation 6, p 8.

<sup>44</sup> "Without racism Aotearoa would be better": Mokopuna share their experiences of racism and solutions to end it | [Mana Mokopuna](#)

<sup>45</sup> [Oranga Tamariki BIM 2023](#), p 5.

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- d. Every child has the right to have a say and participate in their own lives and the things that are important to them (Article 12).
27. Considering mokopuna within the context of their families, whānau, hapū, iwi and communities is consistent with Article 5 of the Children’s Convention.
28. Article 40 of the Children’s Convention specifically deals with child and youth justice. Article 40 (1) provides:
- “States Parties recognize 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.”
29. Last year, following its 6th periodic review of New Zealand’s progress on children’s rights, the UN Committee emphasised the indivisibility and interdependence of all the rights enshrined in the Convention, and identified child justice as an area requiring urgent action by the Government, to bring New Zealand’s laws, policies and practices in line with New Zealand’s obligations under the Children’s Convention.
30. The UN Committee made a number of recommendations to New Zealand in this regard. These included recommendations that Aotearoa New Zealand:
- Raise the minimum age of criminal responsibility (MACR) to 14 years for all children, regardless of the offence.
  - Repeal the practice of remanding children into police custody and reduce the proportion of children in secure youth justice residences who are on remand, including by investing in the development of community-based residences and strengthening the availability and use of non-custodial measures;
  - Develop an effective action plan aimed at eliminating the disparity in the rates of sentencing, incarceration and survival in detention of Māori children by addressing the connections between offending and neuro-disability, alienation from whanau (family), school and community, substance abuse, family violence, removal into State care and intergenerational issues.

## Better recognising the needs of victims

31. Mana Mokopuna is generally supportive of increased efforts to ensure the criminal justice system gives specific attention to the views and needs of victims of offending, particularly when the victim/survivor(s) are mokopuna. Depending on its design, this approach has the potential to strengthen a children’s rights approach within the justice system.
32. However, we note the analysis by the Ministry of Justice in the Regularly Impact Statement (RIS) and we are concerned that these reforms do not go to the heart of the issues that victim/survivors have raised about the criminal justice process, which relate to the way victim/survivors are treated during criminal procedures, and dissatisfaction with the outcomes that the system is capable of delivering.<sup>46</sup>

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<sup>46</sup> RIS at para 68.



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33. Furthermore, it is unclear whether, or what, practical changes to the sentencing process this amendment will actually lead to. The RIS also raised this issue, highlighting that the Sentencing Act already has strong reference to considering the needs of victim/survivors.<sup>47</sup>
34. As such, we strongly recommend strengthening the implementation of this section of the Bill by undertaking targeted engagement with mokopuna (as victims/survivors) to understand:
- What frameworks and mechanisms are necessary to design into the sentencing process, and justice system more broadly, to facilitate mokopuna sharing their views and needs to the court;
  - What training is required for court professionals including the judiciary and legal practitioners to ensure they have the skills required to enable mokopuna participation in the implementation of this proposed reform, including whether new roles are required to give effect to this participation; and
  - What barriers to mokopuna participation within the judicial system exist for victims/survivors of harm, to identify and inform measures to address these barriers.
35. This approach is consistent with a children’s rights approach by giving effect to Article 12 of the Children’s Convention which states that all children and young people have the right to be heard, considered and taken seriously, especially when it comes to decisions that affect them. This includes at the systemic level when decisions are being made – for example through proposed legislative change – that will impact on children’s rights.

## Aggravating factor – adult offender convicted as party to an offence committed by child or young person

“Whether neurobiological differences between adolescents and adults should inform how society treats young people is open for debate, but whether such differences are real is not.”<sup>48</sup>

36. This proposed aggravating factor was originally drafted into the Ram Raid Offending and Related Measures Amendment Bill, which Mana Mokopuna opposes.<sup>49</sup>
37. The Departmental Disclosure Statement, in respect of the Ram Raid Offending and Related Measures Amendment Bill, sets out the intended aim of this aggravating factor:
- “The first aggravating factor, to be included in the Sentencing Act 2002, will require the sentencing Judge to take into account that an adult has aided or abetted a young person to offend. This aggravating factor will apply to all offending, including ramraiding or, for example, drug offending. **If adults take advantage of the vulnerability of young people by encouraging them to offend, including on behalf of the adult, it is appropriate that**

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<sup>47</sup> Sentencing Act 2002, s83(d).

<sup>48</sup> Steinberg, L. (2011). Commentary: A behavioural scientist looks at the science of adolescent brain development. *Brain Cognition*, 72(1), 2–9.

<sup>49</sup> [Ram Raid Offending and Related Measures Amendment Bill | Mana Mokopuna](#)

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**this be considered as an aggravating factor at sentencing.** The aim is to deter adults from exploiting children and young people and leading them into a life of crime.”<sup>50</sup>

38. While Mana Mokopuna agrees that safeguarding mokopuna against exploitation by adults is important, there are likely to be unintended consequences if this aggravating factor is introduced. We are concerned that the more likely application of this aggravating factor will be to young people who offend in groups (where some mokopuna are over 18 years old and some under), rather than against adults “exploiting” mokopuna or orchestrating offending at arms’ length.
39. In practice, it will be much easier to prove the application of this aggravating factor in circumstances where young people offend together, and much more difficult to prove the complicity of adults who may be involved in offending in the background or at arms’ length.
40. This aggravating factor will result in harsher sentences where groups of mokopuna have offended together, and certain members of that group of offenders are “adults” i.e., over 18 years old – no matter how small the margin is.
41. This unintended consequence has not been subject to robust consideration, analysis and mitigation in the development of the Bill, and we are concerned about the over-criminalisation of mokopuna that could occur as a result.
42. Neuroscience does not support an arbitrary distinction being drawn between young people over 18 years and under 18 years who offend together as a means to justify harsher sentences for the older offenders of the group:
  - a. Brain development can continue into the mid 20s and ‘normal brain development’ has often been hindered among young people who offend due to factors such as trauma, or due to neurodisabilities as outlined above at para 10: “Neuroscience now suggests that many young people in the justice system have had interruptions to this normal healthy development, which further impacts on how they make decisions and suggests how their brain development can shape or drive their behaviour.”<sup>51</sup>
  - b. “The frontal lobe of a young person may not develop fully until around age 25, which may be linked with impulsive adolescent offending. In contrast, such development may never occur fully in people with some types of brain functioning or damage... these issues include traumatic brain injury (TBI), fetal alcohol spectrum disorder (FASD), cognitive impairment/intellectual disability, communication disorders, attention-deficit/hyperactivity disorder (ADHD), learning difficulties, dyslexia and autism spectrum disorder (ASD).”<sup>52</sup>
43. Further, this is a crucial point at which the justice system should be focused on interrupting offending by young people, preventing them from entering the prison pipeline, to prevent the negative lifecourse outcomes that are associated with imprisonment.<sup>53</sup> We strongly advocate for restorative, holistic, and preventative solutions which focus on the long term and advance the rights, interests and well-being of mokopuna.

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<sup>50</sup> [\\*bill\\_government\\_2023\\_283.pdf \(legislation.govt.nz\)](#), p 4.

<sup>51</sup> Ibid.

<sup>52</sup> [REPORT: What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand - January 2020 - Office of the Prime Minister's Chief Science Advisor \(dpmc.govt.nz\)](#) p 5.

<sup>53</sup> [Discussion-paper-on-preventing-youth-offending-in-NZ-1jhkfm4.pdf \(auckland.ac.nz\)](#)

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44. Mana Mokopuna recommends the unintended consequences of the proposed aggravating factor are considered and addressed in the continued development of the Bill. This may involve clarifying the circumstances in which the aggravating factor applies.

## Aggravating factor – offender livestreamed or posted their offending online

45. This proposed aggravating factor was originally drafted into the Ram Raid Offending and Related Measures Amendment Bill, which Mana Mokopuna opposes.
46. Mana Mokopuna has previously submitted in opposition to this proposed reform and our position has not changed.<sup>54</sup> It is clear that this aggravating factor is designed to disproportionately target young people with harsher sentences. We strongly caution the Government against any approach with such an effect, as it fails to uphold New Zealand’s international obligations under the Children’s Convention, and may have implications for New Zealand’s commitments under the the United Nations Convention on the Rights of Peoples with Disabilities and the United Nations Declaration on the Rights of Indigenous Peoples and, given the overrepresentation of disabled mokopuna and mokopuna Māori in youth offending.
47. The potential unintended consequences for mokopuna of imposing sentencing linked to their use of social media needs to be carefully thought through, and the views of mokopuna sought. There are implications for their rights to freedom of association and to participate in the digital world. For further guidance, we draw the Committee’s attention to the UN Committee’s General Comment No.25 (2021) on children’s rights in relation to the digital environment.<sup>55</sup>
48. We urge the Committee to give particular consideration to the potential implications for care and/or custody experienced young people aged up to 25, including by seeking their views on the proposed amendments.
49. Please refer to our submission under the Ram Raid Offending and Related Measures Bill for further detail.<sup>56</sup>

## Limiting discounts for youth

“Sticking us in jail ain’t gonna do nothing... you take us away from the community and then when we get out we don’t know what else to do... and we go back to doing what we did before... and when we come back [to prison], that’s okay, we know how it goes, we’ve been here before. They’re doing it all wrong – thinking why their jails are filling up. They send us to jail... jail just makes us worse. Why stick us in jail if there is nothing to help [in jail]?”

(Young female offender)<sup>57</sup>

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<sup>54</sup> [Ram Raid Offending and Related Measures Amendment Bill | Mana Mokopuna](#), paras 71-77.

<sup>55</sup> CRC/C/GC/25

<sup>56</sup> [Ram Raid Offending and Related Measures Amendment Bill | Mana Mokopuna](#), paras 71-77.

<sup>57</sup> 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” – refer here [Discussion-paper-on-preventing-youth-offending-in-NZ-1jhkfm4.pdf \(auckland.ac.nz\)](#)

50. The Bill proposes a new system for applying sentence discounts for youth, where a discount under the youth factor<sup>58</sup> can only be applied to a young person's sentence once. If the young person commits further offending, "the court must not reduce the sentence under the youth factor" unless such a reduction is required to avoid a manifestly unjust sentence.<sup>59</sup> Mana Mokopuna strongly opposes this measure for a number of reasons.

51. The Court of Appeal has commented on the relevance of youth to sentencing in the case of *Churchward v R*,<sup>60</sup> stating the following:

*"Youth has been held to be relevant to sentencing in the following ways: (a) There are age-related neurological differences between young people and adults, including that young people may be more vulnerable or susceptible to negative influences and outside pressures (including peer pressure) and may be more impulsive than adults. (b) The effect of imprisonment on young people, including the fact that long sentences may be crushing on young people. (c) Young people have a greater capacity for rehabilitation, particularly given that the character of a juvenile is not as well formed as that of an adult."*<sup>61</sup>; and

*"(a) Adolescent behaviour reflects the slow pace of the development of those parts of the brain that control higher-order executive functioning, such as impulse control, risk assessment and planning ability. Young people behave and react differently from adults due to biological rather than behavioural or personality factors. As Ms Brook for the Crown said, "[a]ll young people suffer from these cognitive deficits; and all will eventually develop fully to overcome them (assuming no cognitive impairment exists)".*

*(b) Neurological development may not be complete until the age of 25.*

*(c) Young persons who commit serious offences frequently exhibit other characteristics which also tend to mitigate culpability, notably intellectual deficits, mental illness and experiences of abuse or other childhood trauma.*

*(d) Young people are more receptive to treatment and therefore have better prospects of rehabilitation than adult offenders, who find it more difficult to alter entrenched behaviours."*<sup>62</sup>

52. In addition to neuroscientific and rehabilitative rationales for youth discounts, Article 40 of the Children's Convention also guarantees the right of mokopuna to be dealt with in a manner consistent with the promotion of the child's sense of dignity and worth and takes into account the child's age.

53. There may be circumstances where mokopuna aged under 18 could find themselves ineligible for a youth discount under this proposed provision, which in our view is deeply unjust. As set out above at paragraph 51, the youth factor discount is intended to ensure the sentencing of young offenders takes into account a range of factors that may reduce the culpability of young offenders and/or takes into account the opportunities for rehabilitation. Mokopuna aged under 18 are guaranteed the full range of their rights under the Children's Convention, including those under Article 40 (as set out above at para 21). It is clear that reducing the ability for mokopuna under 18 to access the youth factor, leading to harsher sentences, is inconsistent with their rights under Article 40 to be "treated in a manner consistent with the promotion of the child's sense of dignity and worth, which

<sup>58</sup> Sentencing Act 2002, s9(2)(a).

<sup>59</sup> Sentencing (Reform) Amendment Bill, s 7.

<sup>60</sup> *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446.

<sup>61</sup> *Ibid*, at [77].

<sup>62</sup> *Ibid*, at [86].

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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".

54. We are also concerned for care and/or custody-experienced young people aged up to 25 who will be impacted by this provision.
55. It is unjust for the Government to implement this provision without also investing significant resource into reducing and preventing youth offending by addressing the underlying drivers of that offending.
56. We strongly advocate for prevention efforts that urgently address the underlying drivers of youth offending, such as poverty, intergenerational trauma, disengagement with education, and unmet health and mental health needs. It is through a strong focus on prevention that youth offending has the best chance of being prevented, community safety upheld, and the rights of children advanced, so that all mokopuna are growing up loved, safe, well and flourishing.
57. Mokopuna who grow up safe and well, in thriving families and whānau with the financial and material means to undertake the important role of raising children, overwhelmingly do not offend. This is our vision for all mokopuna, *Kia kuru pounamu te rongo*, and is consistent with their rights under Te Tiriti o Waitangi and the Children's Convention. However we need to see sustained commitment and investment by Government to make this a reality for each and every mokopuna in Aotearoa New Zealand, and to respond to the calls from the community to make our society a safe one for all people at all times.

## Limit on imprisonment of person under 18 years

58. Section 18 of the Sentencing Act 2002 sets out a rule that no court may impose a sentence of imprisonment on an offender aged under 18, with an exception that applies in cases when the offence is a category 4 offence or category 3 offence with a maximum penalty of life imprisonment or at least 14 years imprisonment.
59. The Bill proposes an additional exception to the rule, stating that the rule does not apply if the mokopuna is already serving a sentence of imprisonment.<sup>63</sup>
60. Mana Mokopuna strongly opposes this measure, as sentences of imprisonment contravene the rights of mokopuna to the least restrictive response to offending as guaranteed under the Oranga Tamariki Act 1989 and the Children's Convention.<sup>64</sup> The establishment of further exceptions create increased opportunities for sentences of imprisonment against mokopuna.

## Further offences (offences committed on bail, in custody, or on parole)

61. Mana Mokopuna opposes cumulative sentences for offending by mokopuna that occurs in the circumstances set out in s 12 of the Bill.<sup>65</sup> We believe a contextual understanding of the youth justice system is essential to understand the risks of this proposal for mokopuna aged under 18.
62. Mana Mokopuna is a designated National Preventive Mechanism (NPM) under the Optional Protocol to the Convention Against Torture (OPCAT). As part of this role, we undertake

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<sup>63</sup> Sentencing (Reform) Amendment Bill, s 8.

<sup>64</sup> UN Convention on the Rights of the Child, Art 40; United Nations Committee on the Rights of the Child (2019), General Comment 24, paras 85-88; Oranga Tamariki Act s 208.

<sup>65</sup> [Sentencing \(Reform\) Amendment Bill 77-1 \(2024\), Government Bill – New Zealand Legislation](#)

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monitoring of all places mokopuna are detained, including Oranga Tamariki youth justice residences and remand homes.

63. High numbers of mokopuna are on remand within the youth justice system – 89% of mokopuna in youth justice custody – and high numbers of mokopuna in youth justice custody are held in secure residences (85%).<sup>66</sup> Unlike adults, mokopuna do not have their sentences reduced for the time they spend in custody on remand, which in our view is an injustice and fails to uphold the Children’s Convention, including the guidance within General Comment 24, where the UN Committee “notes with concern that, in many countries, children languish in pretrial detention [remand] for months or even years, which constitutes a grave violation of article 37(b) of the Convention”.<sup>67</sup>
64. Due to the information we gather and report on under our NPM function, Mana Mokopuna has significant concerns about the conditions and treatment of mokopuna within secure youth justice residences. We are concerned that, largely due to systemic failures within Oranga Tamariki, mokopuna are being ‘set up to fail’ by being exposed to and detained in prison-like environments that risk their safety and/or wellbeing, and therefore risk further offending while in secure detention (be it while on remand or while carrying out sentences).
65. For example, Mana Mokopuna undertook an unannounced visit to Korowai Manaaki secure youth justice residence in February 2024 due to concerns raised directly with us by members of the public.<sup>68</sup> As a result, Mana Mokopuna kaimahi found:<sup>69</sup>
- a. There are health and safety concerns for mokopuna due to the amount of contraband widely available, including cannabis and vapes;
  - b. Several mokopuna require a high level of mental health support which the residence kaimahi/staff are not trained or equipped to provide;
  - c. Inappropriate and concerning practice by some residence kaimahi including kaimahi allegedly bringing contraband into the residence, poking keys into the backs of mokopuna to move them along in physical spaces in the residence and allowing mokopuna to use their personal cell phones. Kaimahi were observed playfighting with mokopuna, swearing at them, and reminding them not to ‘snitch’ when talking to Mana Mokopuna during our visit; and
  - d. Most days during the visit, mokopuna were observed playing video games or watching YouTube with sexualised and drug-related content.
66. Mana Mokopuna conducted an unannounced visit of Whakatakapokai secure youth justice residence in February 2024. As a result of this visit, **Mana Mokopuna made five Reports of Concern to Oranga Tamariki**.<sup>70</sup> The key areas of concern resulting from the visit include:
- a. Allegations of inappropriate behaviour from staff, including physical harm, supplying mokopuna contraband, and inappropriate relationships between mokopuna and staff;

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<sup>66</sup> [orangatamariki.govt.nz/assets/Uploads/About-us/Performance-and-monitoring/safety-of-children-in-care/2022-23/J000093\\_SOCIC-Report-2023\\_v4.pdf](https://orangatamariki.govt.nz/assets/Uploads/About-us/Performance-and-monitoring/safety-of-children-in-care/2022-23/J000093_SOCIC-Report-2023_v4.pdf); \*Youth justice custody trends (orangatamariki.govt.nz)

<sup>67</sup> CRC/C/GC/24, para 86.

<sup>68</sup> [Korowai Manaaki monitoring report | Mana Mokopuna](#)

<sup>69</sup> Above, pp 5-6.

<sup>70</sup> [Whakatakapokai monitoring report | Mana Mokopuna](#)



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- b. Kaimahi are inexperienced and as a result their actions are reinforcing dangerous and unprofessional staff practice and relationships with mokopuna;
  - c. Contraband is readily accessible, and allegedly being supplied to mokopuna by kaimahi;
  - d. There are significant discrepancies in the recording of information and incidents pertaining to mokopuna harm, safety, and well-being;
  - e. Relationships between mokopuna are characterised by violence and a bullying culture that is intensifying within the facility; and
  - f. There is an increase in use of force and secure care is being used to manage mokopuna behaviour and dynamics.
67. The Independent, External Rapid Review of Oranga Tamariki Residences,<sup>71</sup> undertaken in 2023, also raised concerns about the lack of cohesive leadership, strategy and systems guiding the youth justice residences, resulting in a system within which “time in residence is now being driven by the needs of the system and staff first, with the needs and experience of young people coming second”.<sup>72</sup>
68. We urge the Committee to consider the contextual and environmental settings within which this reform will operate, and how this compounds the risks and harms against mokopuna that will result from imposing cumulative sentences.
69. We believe that s 9(c) of the Sentencing Act 2002, which sets out an aggravating factor for offending committed while the offender was on bail or subject to a sentence adequately covers these circumstances without imposing lengthier, cumulative sentences against mokopuna and young people.

## Conclusion

70. Mana Mokopuna is concerned about the lack of consideration of the specific rights, interests, well-being, and participation of mokopuna and care and/or custody experienced young people under the Bill.
71. As a result, the Bill contains several risks of disproportionate impacts and harm against mokopuna and young people, inconsistent with children’s rights. The development of the Bill has also failed to identify and mitigate potential unintended consequences against mokopuna and young people.
72. The RIS shows that 80 mokopuna aged under 18 have their proceedings transferred to the adult jurisdiction and therefore become subject to the Sentencing Act 2002. This is 50% of the (most recently available) number of mokopuna in youth justice custody – this is a significant number and it is unacceptable that there has been such a lack of consideration of and consultation with these mokopuna in the development of the Bill.
73. Mana Mokopuna strongly opposes increasingly punitive measures against mokopuna as they fail to uphold New Zealand’s international obligations and the rights of mokopuna as set out in the Children’s Convention, and the rights of mokopuna Māori under Te Tiriti o Waitangi.

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<sup>71</sup> [Secure-residence-review.pdf \(orangatamariki.govt.nz\)](https://www.orangatamariki.govt.nz/secure-residence-review.pdf)

<sup>72</sup> Ibid, p 7.

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74. As an alternative to the Bill, Mana Mokopuna strongly advocates for holistic, prevention-focused, early intervention approaches to preventing and responding to youth offending, which acknowledge and address the complexities of the drivers behind offending. We submit that this approach is consistent with children's rights, and the evidence which demonstrating the most effective ways to address youth offending in the short and long term.