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Report of the

*ATTORNEY-GENERAL*

under the New Zealand Bill of Rights Act 1990 on the  
Oranga Tamariki (Youth Justice Demerit Points)  
Amendment Bill

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Presented to the House of Representatives pursuant to Section 7 of  
the New Zealand Bill of Rights Act 1990 and Standing Order 269  
of the Standing Orders of the House of Representatives

1. I have considered whether the Oranga Tamariki (Youth Justice Demerit Points) Amendment Bill (the Bill) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. I have concluded the Bill appears to be inconsistent with the right of a child to be treated in a manner taking account of their age, the right to natural justice and the right to freedom from discrimination. I have also concluded that the limitations on these rights cannot be justified under s 5 of the Bill of Rights Act.
3. As required by s 7 of the Bill of Rights Act and Standing Order 269, I draw this to the attention of the House of Representatives.

### **The Oranga Tamariki (Youth Justice Demerit Points) Amendment Bill**

4. The Bill amends the Oranga Tamariki Act 1989 (the Act) by applying a demerits points scheme to the existing youth justice scheme<sup>1</sup>. The explanatory note to the Bill states that it introduces structured interventions for youth offending intended to improve behaviours and increase accountability and transparency within the youth justice system.
5. The Bill states that the purpose of the youth justice demerit points scheme is to provide for a consistent system of intervention for young persons who have “accepted full responsibility for committing an offence” or who are “charged”<sup>2</sup> with committing an offence in order to identify, deter and penalise repeat offending by young persons; and increase accountability within the youth justice system.

#### *Allocation of demerit points*

6. Under the Bill an enforcement officer must allocate youth justice demerit points to a young person who has “accepted full responsibility for committing an offence” or has been convicted of an offence.
7. An enforcement officer must allocate points within specific bands. The bands are based on the (existing) justice sector seriousness score scale<sup>3</sup>. For example, “low offending” is defined as “an offence that has a score of 14 or below on the justice sector seriousness scale” and an enforcement officer must allocate between 1 and 40 youth justice demerit points for an offending within this band.

#### *Consequences of accumulation of demerit points and dealing with offending*

8. Specific actions need to be taken when a young person accumulates certain levels of demerit points. Broadly, the more demerit points a young person has, the less discretion there is to

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<sup>1</sup> Youth justice is dealt with in Part 4 of the Act.

<sup>2</sup> This appears to be a drafting error and that the clause should refer to “convicted”.

<sup>3</sup> This scale is a way of quantifying the relative seriousness of offences based on the sentences imposed for each offence and is based on adult patterns of offending.

deal with repeat offending by way of non-court processes. If a young person accumulates 81 to 99 demerit points, charges must be brought in the Youth Court the first time, and charges for any subsequent offending must be brought in the District Court. Once 100 or more demerit points are accumulated, charges must be brought in the District Court.

9. Clauses 5 – 7 amend ss 209 and 210 of the Act to delete references to “or young person” from those sections. The effect of this is to remove the discretion of enforcement officers to deal with alleged offending on the part of young people by way of a warning.

#### *Trigger for awarding demerit points*

10. An enforcement officer must allocate youth justice demerit points to a young person who has “accepted full responsibility for committing an offence” or has been “convicted of an offence”. These concepts are central to the operation of the demerit points scheme, but the use of these particular terms in the Bill raises issues in terms of understanding how the scheme applies in practice.
11. Where an offence has been established at a defended hearing in the Youth Court, that is referred to as a charge proved rather than as a conviction. However, a young person can be transferred to the District Court for conviction and sentence. In my view, the intention of the Bill is that having a charge proven in the Youth Court is also intended to be a trigger for awarding demerit points.

#### *Accepting full responsibility for committing an offence*

12. There is no guidance in the Bill as to the meaning of the phrase “accepting full responsibility”. The phrase “accepting full responsibility” is not used elsewhere in the Act, or in other legislation.<sup>4</sup>
13. In the absence of specific guidance in the Bill as to the meaning of “acceptance of full responsibility”, I consider that it is intended to apply in circumstances where the young person “admits” the offence, either at a Family Group Conference or as part of an informal process such as alternative action or Police caution. The “acceptance of full responsibility” must be in respect of a specific criminal offence, and that the young person will need to be notified of that offence and the specific facts that they are acknowledging responsibility for. A rights-consistent interpretation means that there should be enough evidence to justify a prosecution before a young person is asked to accept full responsibility for an offence.
14. The offence for which a young person accepts full responsibility will determine which band the offending falls into and will impact on the accumulation of demerit points and the actions that may be taken in respect of future offending.

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<sup>4</sup> The phrase is used in New Zealand Police’s Adult Diversion Scheme Policy. See: <https://www.police.govt.nz/sites/default/files/publications/adult-diversion-scheme-policy.pdf> Part of the diversion criteria is that “the offender must accept full responsibility for the offence by admitting that they committed the offence.”

## Consistency of the Bill with the Bill of Rights Act

### *Section 25(i) – Right of child to be treated in a manner taking account of age*

15. Section 25(i) of the Bill of Rights Act provides that everyone who is charged with an offence has, in relation to the determination of that charge, the right, in the case of a child, to be dealt with in a manner that takes account of the child’s age.

### *Meaning of “child” in s 25(i) of the Bill of Rights Act*

16. The Bill of Rights Act does not define the word “child”.<sup>5</sup> As the demerit points regime introduced by the Bill applies to “young persons” only, we need to consider whether s 25(i) is limited to those under the age of 14 years (that is, to those defined as a “child” under the Oranga Tamariki Act).
17. The White Paper on the Bill of Rights Act said the word “child” was not intended to be used in a specialised way such as the term “child” in the then Children and Young Persons Act 1974. Rather, it was a provision that “could cover any case and any circumstance where the youth of the person called for special protection”. The United Nations Convention on the Rights of the Child defines “child” as being under the age of 18.<sup>6</sup> The High Court has also held that it was unlikely that s 25(i) contemplated an upper age limit of 14 years.<sup>7</sup>
18. Therefore, I am of the view that the term “child” in s 25(i) applies to the age group of young people captured by the provisions of the Bill, namely those aged 14 to 17 years.
19. The next question is how the term “charged with an offence” should be interpreted in the context of New Zealand’s youth justice system. The High Court has held that:<sup>8</sup>

*...charged must refer to an intermediate step in the prosecutorial process when the prosecuting authority formally advises an arrested person that he is to be prosecuted and gives him particulars of the charges he will face.*

20. However, it has been suggested that the meaning of “charged with an offence” can vary depending on the criminal law context, and that the right may be triggered at an earlier stage than the formal prosecution process.

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<sup>5</sup> As compared to the Oranga Tamariki Act, which distinguishes between “children” (under 14 years) and “young persons” (of or over 14 years but under 18 years).

<sup>6</sup> Article 1 refers. It also provides, among other things, that every accused child is to be treated in a manner that takes account of the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society. See Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015).

<sup>7</sup> *R v Kaukasi* HC Auckland T014047, Ruling No 7, 4 July 2002, Fisher J.

<sup>8</sup> *R v Gibbons* [1997] 2 NZLR 585 at [2]. This case was in respect of s 23(2) of the Bill of Rights Act, which provides that everyone who is arrested for an offence has the right to be charged promptly or to be released.

21. I consider that the concept of “charged with an offence” should be read broadly in the youth justice context, in order to give full expression to the content of the rights protected by s 25(i).

*Conclusions on whether demerit points scheme engages s 25(i)*

22. Where a young person has been convicted of an offence (or had a charge “proved” in the Youth Court), then they have been charged with an offence and s 25(i) will apply in relation to the determination of that charge. This includes any sanctions, such as demerit points, that result.
23. I also consider that s 25(i) is engaged where demerit points are awarded to a young person who has accepted full responsibility for the offending but the matter has not gone through the formal prosecution process. The young person may have accepted full responsibility during participation in a Family Group Conference or as part of an alternative action process.
24. A purposive interpretation of s 25(i) means that the right should apply more broadly than just the formal prosecution process. I do not need to determine the exact scope of the right for the purposes of this advice; however, I am satisfied that s 25(i) applies to the demerit points regime created by the Bill.
25. Although the young person is not formally prosecuted, the acceptance of responsibility and the resulting allocation of the sanction of demerit points can be considered analogous to the prosecution of a charge in the adult criminal justice system. The acceptance of full responsibility must occur when a young person has been notified of and accepted responsibility for a specific offence based on a specific set of facts. Therefore, they will have been notified of the particulars of the applicable “charge”. It is arguable that the allocation of demerit points is more than a measure of a “preventative, curative, rehabilitative or welfare-promoting kind” and is analogous to a punishment because the Bill states that the purpose of the regime is “to identify, deter, and penalise repeat offending.” For these reasons, I consider that s 25(i) is engaged.
26. The regime proposed by the Bill means that the allocation of youth justice demerit points can result in charges being laid. At that point, s 25(i) of the Bill of Rights Act would also be engaged.

*Demerit points regime fails to deal with young people in a manner that takes account of their age*

27. I consider that the regime for allocating youth justice demerit points in the Bill limits the right of a young person under s 25(i) to be treated in a manner that takes account of their age.
28. The requirement in the Bill to bring charges in Court, and in some cases, in the District Court, without consideration of the circumstances of the alleged offending represents a significant departure from the current youth justice system in the Act, and the statutory principles that underpin decision making by those involved in youth justice matters. The prescriptive nature of the Bill removes the flexibility to consider the young person’s

background and the circumstances of the offence and also cuts across the diversionary nature of the current scheme. The narrowing of the application of the statutory principles in that Act by the regime proposed in the Bill is a prima facie limitation on the rights in s 25(i).

29. In my view, the use of seriousness scores<sup>9</sup> based on adult offending to award demerit points to youth offenders is not appropriate and does not take account of the age and maturity of the child, which is a prima facie limitation on s 25(i). This method of calculation does not try to address whether seriousness scores based on the sentencing of adults fairly reflect the scores that would be calculated for youth offenders.

*Removal of discretion to consider warning for young people*

30. I consider that the amendments to the Act that remove the ability of enforcement officers to consider and administer a warning to a young person as an alternative to prosecution does not take account of the age of the young person and is a prima facie limitation on s 25(i).

***Justification***

31. A limit on a right may nevertheless be consistent with the Bill of Rights Act if the limit is justified under s 5 of the Act. The s 5 inquiry asks:<sup>10</sup>
- a. does the provision serve an objective sufficiently important to justify some limitation on the right or freedom?
  - b. if so, then:
    - i. is the limit rationally connected with the objective?
    - ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
    - iii. is the limit in due proportion to the importance of the objective?

*Sufficiently important objective*

32. The explanatory note to the Bill states that it is intended to improve behaviours and increase accountability and transparency within the youth justice system.
33. Accountability and transparency are core components of any justice system, regardless of the age of an offender, and therefore, can be considered important objectives. Therefore, in

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<sup>9</sup> Seriousness scores are based on an average of prison days or an equivalent measure of community work or fines using sentences imposed (on adult offenders) by the courts. Seriousness scores are not used by the courts when sentencing adults but rather are used by the justice sector for policy and operational reasons.

<sup>10</sup> *R v Hansen* [2007] 3 NZLR 1 (SC).

the abstract, such objectives can justify limitations on rights protected under the Bill of Rights Act.

#### *Rational connection*

34. Previous reports under s 7 of the Bill of Rights Act have referred to the observations of the Supreme Court of Canada that effective answers to complex social problems may not be simple or evident.<sup>11</sup> There may be room for debate about what will work and what will not, and the outcome may not be scientifically measurable.
35. I note that while the explanatory note to the Bill sets out some information about rates of youth reoffending, it does not identify why these rates are evidence of a serious problem in the youth justice system, or point to any evidence that the regime set out in the Bill will address that problem or increase accountability and transparency in the youth justice system.
36. There is evidence that indicates a significant decrease in youth offending rates. Therefore, it is questionable that there is a rational connection between the provisions in the Bill and the important objectives of accountability and transparency in the youth justice system.

#### *Proportionality*

37. The remaining elements of the s 5 inquiry call for an assessment of whether the limits impair the rights under s 25(i) no more than is reasonably necessary for sufficient achievement of the objective, and whether the limits are in due proportion to the importance of the objective.
38. The justifiability of the limitations imposed by the Bill is constrained by the extent to which the evidence demonstrates a need for such measures. Evidence suggests that the number of offenders in the youth justice system is decreasing and there has been a significant decrease in youth offending in recent years.<sup>12</sup> In the absence of evidence of a problem that needs to be addressed by a demerit points regime, the argument for it being a proportionate response falls away.
39. I also note that enforcement agencies currently have the discretion to file charges in Court if that is justified. I have not been provided any evidence that this prosecutorial discretion is not being used appropriately.
40. I also do not consider that it is a proportionate response to apply the Justice Sector Seriousness Score Scale to determine the allocation of youth justice demerit points. This

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<sup>11</sup> Report of the Attorney General on the Smoke-free Environments Removing Tobacco Displays Amendment Bill (2010), citing *Canada v JTI-MacDonald* [2007] 2 SCR 610.

<sup>12</sup> See <https://www.justice.govt.nz/assets/Documents/Publications/E4NOUP-Youth-Justice-Indicators-Summary-Report-August-2019.pdf> and [http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7361&\\_ga=2.48140000.632059912.1592534862-1758505887.1498108541#http://archive.stats.govt.nz/infoshare/SelectVariables.aspx?pxID=1c48eb33-1e79-44ef-a886-6042560f613](http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7361&_ga=2.48140000.632059912.1592534862-1758505887.1498108541#http://archive.stats.govt.nz/infoshare/SelectVariables.aspx?pxID=1c48eb33-1e79-44ef-a886-6042560f613)

fails to take account of the age and maturity of young persons as it imposes a scale that is derived from adult patterns of offending and uses it in a way that it was not designed for.

41. I have not been provided with evidence that suggests there is an issue with transparency and accountability within the youth justice system that needs to be addressed. This aside, there is nothing to suggest that the approach set out in the Bill is the only response capable of achieving this.
42. Accordingly, I have concluded that these provisions are not justifiable in terms of s 5 of the Bill of Rights Act.

### **Section 27 – Natural justice**

43. Section 27(1) of the Bill of Rights Act affirms that everyone has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.
44. I consider that this right is engaged where enforcement officers are determining the allocation of demerit points.<sup>13</sup>

#### *Use of discretion to allocate demerit points may lead to inconsistent outcomes*

45. There is a lack of safeguards in the Bill to ensure fairness, transparency and consistency in respect of the exercise of the discretion by an enforcement officer to allocate youth justice demerit points to offenders.
46. The Bill does not contain any guiding principles about how demerit points should be allocated within a particular band and what factors should be taken into account. There is the risk that like offences will not be treated alike. This differs from the demerit point system under the Land Transport Act where the number of demerit points for a particular offence is set out in regulations. This means that all individuals are allocated the same number of demerit points for the same offence.

#### *Administration of the system by enforcement officers*

47. The Bill imposes the type of regime that would otherwise take place in a courtroom following conviction. This means that the young person does not receive the benefit of the usual safeguards where a penalty is imposed, such as the benefit of guiding principles as to factors to take into account when determining the appropriate penalty, nor does a young person receive the benefit of other rights and protections, such as the penalty being imposed in public or judicial independence.

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<sup>13</sup> Butler and Butler note that where the determination in question is criminal or quasi-criminal in nature, the minimum rights of criminal procedure set out in ss 23 – 25 of the Bill of Rights Act may inform the content of the procedural rights protected by s 27(1). See Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 25.2.17.



48. The Bill does not provide a right of appeal against the allocation of demerit points or against the number of demerit points.<sup>14</sup> A mechanism to review these decisions would provide a safeguard against some of the issues noted in this report.

### *Justification*

49. I accept that accountability and transparency are sufficiently important objectives and in the abstract, can justify limitations on rights protected under the Bill of Rights Act. However, given the lack of evidence pertaining to the need for demerit points, I do not consider that there is a rational connection between the objective and the limitations on natural justice rights. For similar reasons, I do not consider the limitations to be a proportionate response.
50. I have concluded that these provisions are not justifiable in terms of s 5 of the Bill of Rights Act.

### **Section 19 – freedom from discrimination**

51. Section 19 of the Bill of Rights Act affirms that everyone has the right to freedom from discrimination on the grounds of discrimination set out in the Human Rights Act 1993 (the Human Rights Act).
52. The key questions in assessing whether there is a limit on the right to freedom from discrimination are:
- 52.1 does the legislation draw a distinction on one of the prohibited grounds of discrimination under s 21 of the Human Rights Act and, if so:
- 52.2 does the distinction involve disadvantage to one or more classes of individuals?<sup>15</sup>
53. A distinction will arise if the legislation treats two comparable groups of people differently on one or more of the prohibited grounds of discrimination. Whether disadvantage arises is a factual determination.<sup>16</sup>
54. Under the Bill of Rights Act and the Human Rights Act, discrimination on the basis of age commences at the age of 16 years. While age limits of any kind are likely to involve a degree of arbitrariness, Parliament has chosen 16 as the starting point for discrimination on this basis.

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<sup>14</sup> This may be an oversight because s 210F(3)(f), which relates to matters covered in the notice given to a young person about allocation of demerit points, suggests that there is an intention to have a right of appeal “against any youth justice demerit points applied”.

<sup>15</sup> See, for example, *Atkinson v Minister of Health and others* [2010] NZHRRT 1; *McAlister v Air New Zealand* [2009] NZSC 78; and *Child Poverty Action Group v Attorney-General* [2008] NZHRRT 31.

<sup>16</sup> See, for example, *Child Poverty Action Group v Attorney-General* [2008] NZHRRT 31, at [179]; and *McAlister v Air New Zealand* [2009] NZSC 78 at [40] per Elias CJ, Blanchard and Wilson JJ.

55. This means that the provision in the Bill of Rights providing for freedom from discrimination on the grounds of age will apply only to those young persons aged 16 or 17 years old. However, s 25(i) provides protection for all young people captured by the provisions of the Bill.

*No discretion over whether to bring charges*

56. The Bill requires an enforcement officer to bring charges in court in certain circumstances – there is no discretion to address the offending in any other way. This departs from the usual practice in New Zealand, which provides that prosecutions ought to be initiated or continued only where the prosecutor is satisfied that the Test for Prosecution is met.<sup>17</sup>
57. This means that a young person could face a charge in the District Court when charges for that offence would not normally be brought, even for adult offending. This treats young people more disadvantageously than adults and is a prima facie limitation on the right under s 19.

*Youth justice demerit points are only allocated to young people*

58. The Bill imposes a regime that requires young people to receive demerit points in addition to whatever consequence(s) they may receive for the offence itself. There is no equivalent provision to allocate demerit points on top of other penalties for adult offenders.<sup>18</sup> For example, in circumstances where an adult offender and youth offender are both convicted, only the youth offender receives demerit points, which can have consequences in relation to how any future allegations of offending are dealt with.
59. These provisions are a prima facie breach of s 19 of the Bill of Rights Act, because young people who offend are allocated demerit points simply because they fall within the specified age bracket.

***Justification***

60. I accept that accountability and transparency are sufficiently important objectives and in the abstract, can justify limitations on rights protected under the Bill of Rights Act. However, given the lack of evidence pertaining to the need for removing the important principle of prosecutorial discretion in respect of young people, I do not consider that there is a rational connection, nor is it a proportionate response.

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<sup>17</sup> The Test for Prosecution comprises an evidential test and the public interest test.

<sup>18</sup> The demerit points system for driving offences is an exception.

**Conclusion**

61. For the above reasons, I have concluded the Bill appears to limit sections 25(i), 27(1) and 19 of the Bill of Rights Act and the limitations on these rights cannot be justified under s 5 of that Act.



Hon David Parker

**Attorney-General**

*21 December 2020*