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Re: Oranga Tamariki (Responding to Serious Youth Offending) Amendment Bill - Select Committee Submission

The Criminal Bar Association (“CBA”), which represents both prosecution and defence lawyers in the criminal courts, opposes the Oranga Tamariki (Responding to Serious Youth Offending) Amendment Bill (the Bill), its creation of Young Serious Offender (YSO) designations, and the establishment of a military style academy for young offenders, colloquially known as “boot camps” (under what is called a Military-style academy order, MSAO). Put simply the Bill and the rationale driving it directly ignores the scientific and empirical research into young offenders and how to effectively reduce crime rates amongst our youth. The CBA has repeatedly called for evidence-based approaches to criminal justice and this Bill is the antithesis of that.

Boot camps resonate with many people due to the popular conception that the military is where young people learn discipline, responsibility, and self-initiative. However, the criminal justice system deals with a relatively small section of society who transgress against societal norms. The political rationale for boot camps is that young offenders need a “short sharp shock” to act as a deterrent to future criminal behaviour. If it was as simple as that, then every previous effort at boot camps and similar scare tactics would have worked. However, the empirical evidence is that such camps do not work and indeed have negative impacts on recidivism and undermine the wellbeing of our youth.

Further, and more significantly, it diverts attention from the scientific data and what we know about the make-up of the young person’s brain and diverts funding from what we know works. In particular, it fails to acknowledge the success of problem-solving approaches to criminal justice which (i) look to the causes of criminal behaviour – which is often linked to neurological problems or the consequences of an impoverished upbringing that represents a failure by society to protect the interests of the child – and (ii) recognises that the plasticity of the developing adolescent brain allows rehabilitation through therapeutic and evidence-based approaches.

Military style basic training was developed to teach soldiers how to carry out their duties. It was not designed to address or target the causes of problem delinquent behaviour in young people. That is no doubt why the military has declined to be involved in the boot camps. Finally, we are concerned that such camps risk the phenomenon of “net widening” whereby youth will be sentenced to detention (for up to 12 months) when ordinarily a supervisory sentence would have been imposed.

Brain development – What science tells us

The young person's brain is literally being rewired during adolescence, continuing up until the age of 25 years. There is a known lack of maturity in the frontal lobe – the area of the brain that controls rational thinking and critical decision making. The young person's brain is therefore more prone to impulsivity and poor decision making: this applies to all young people, and the more so to those whose brains are compromised by medical conditions that society has become better at diagnosing, including Foetal Alcohol Spectrum Disorder and ADHD, and the traumatic brain injuries that can so often occur in the course of exposure to violence. During this period of their life young people are highly sensitive to influence – both positive and negative. This proven neurological difference between young people and mature adults has been recognised as reducing criminal responsibility and culpability for many years. Young people are in a process of testing boundaries and experimenting with how to relate to their peers, adults and the world around them. By the very nature of how their brain is functioning they are unable to properly consider consequences and control impulsive response.

Accordingly, the utilisation of a “short sharp shock” approach with the potential use of physical force from those in authority will have little positive long-lasting impact on the maturing adolescent brain. It risks instead a negative response that will have enduring impacts on their development and ability to rehabilitate. It is the sensitivity of young people to positive influences that should be the focus of criminal justice policy.

Previous conclusions in the area of youth justice

The then Chief Science Advisor to the Justice Sector, Dr Ian Lambie, published a useful report in 2018 regarding preventing youth offending. The report concluded, when trying to understand youth offenders:

“Scientific evidence is showing that adolescent development extends into the mid-20s. As a result, factors such as peer influence (heightened by the use of social media), impulsive risk-taking, lack of self-regulation, lack of awareness of the consequences of one's actions and psychosocial immaturity all contribute to this bulge. And for young offenders, these issues are compounded by their experiences of abuse, trauma, victimisation and disadvantage. Responses different from those required for pre-pubertal children or mature adults are needed, as this age-group can be particularly hard for many state agencies to work with....

Early, positive engagement can stop intergenerational cycles of trauma, offending and prison involvement. The effects of abuse, neglect and maltreatment on children's development and behaviour can be successfully addressed at home, at school, in the community and in targeted mental health and other services, for a fraction of the cost of imprisonment. **Pre-school programmes and providing age-appropriate**

interventions based on cognitive- behavioural therapy (CBT), are the most cost-effective developmental crime prevention approaches.

Specifically in relation to Boot Camps the report concluded

Harsh punishments have little deterrent effect on young people. Boot camps do not work and “scared straight” programmes have been shown to *increase* crime. Young offenders can find the “thrill”, or emotional “high” of violent offending, and the social rewards (such as admiration from their peers), more important to them than concerns about being caught or facing social disapproval. Youth need alternative, prosocial ways to achieve engagement and social approval.

The misguided approach to peer esteem noted here is one reason why the YSO designation is destined to cause more harm than good: it will be a target. But then it will be a label that will follow the young person when they have matured and be a barrier to their integration into society.

Current approach in sentencing young people / youth as a mitigating factor

The judges of New Zealand have relied upon the sound research that has developed in this area when dealing with young people when understanding how they may have come to offend and the presence of youth as a mitigating factor¹. Now commonly referred to as the “*Churchward* principles”, and repeatedly endorsed by the senior courts² and accepted by the Crown, the following findings are recognised by sentencing court:

- a) The ability to make wise judgments is the last part of the brain to develop;
- b) Adolescents are prone to react with gut instincts and impulsive and aggressive behaviour;
- c) The potential for the cognitive, emotional and/or psychological immaturity of a young person to contribute to their breach of the law;
- d) From a moral standpoint, it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed;
- e) Children’s crimes may stem from immature judgment, from youthful vulnerability to error, impulse and to influence;
- f) The effect of imprisonment on youth differs from the effect of imprisonment on adults in that adolescents experience high

¹ *Churchward v R* [2011] NZCA 531

² See *Dickey v R* [2023] NZCA 2, [2023] 2 NZLR 405 at [76]-[87]: the Crown accepted the validity of the evidence on which the Court of Appeal acted.

levels of depression, anxiety, suicidal ideation and self-injury behaviour, and victimisation from other inmates whilst incarcerated;

- g) The gravity of a young offender's offending has necessarily to be balanced against the need to consider his rehabilitation and reintegration into society.

These thoughtful and evidence-based principles have been developed in the context of adversarial argument: this is a preferable process for securing better outcomes for society.

Prospects of rehabilitation

By the very nature of the young person's brain still developing until the age of 25 years they have higher prospects of rehabilitation if given the opportunity and if met with an individualised approach addressing the core drivers of the specific young persons offending.

The CBA is very concerned that the Bill fails to recognise that fact. Rather than focusing on individualised rehabilitation programmes tailored to each specific young person that have the ability to actually work, the Bill seeks to simply jump on the public band wagon of needing to be "tough on young offenders" ignoring proven scientific research and risking more damage being done. Harsh physical exertion, rigid military style training and an authoritative response driven by humiliation and fear adversely impacts our youth's mental health and risks retraumatising many who are already disadvantaged. The experience of our members is that young people who appear in the criminal justice system often have many problems, including neurological deficits that are often untreated or the consequences of a harsh upbringing. If the "justice" system operating on behalf society brings additional humiliation and trauma, it is going to compound rather than solve the reasons for criminal activity. Put briefly, it will expand and entrench the criminal justice pipeline.

Other concerns

In addition to our concerns about the very idea of YSOs and the MSAO, we have some additional discrete concerns.

i) Specified offence

A specified offence, which is a prerequisite to a YSO and, with limited exceptions, to a MSAO, is one that is punishable by 10 or more years' imprisonment.

This will potentially incentivise the overcharging of young people – for example where a theft of a supermarket item could properly be dealt with by way of shoplifting (3 month maximum) if charged as a burglary (10 year maximum) then the young offender would become eligible under the Bill for a YSO and then a MSAO. If this is to be limited to those who commit the worst offences, then a serious offence should be one that carries 14 years’ imprisonment or more: that is a commonly accepted way of designating the most serious offences.

ii) Two offences

The qualification for a YSO includes not only those who are charged with a serious offence and have a previous finding against them but also those charged with 2 or more serious offences that are unrelated. The second limb of this is problematic because it will allow the designation when by definition the young person will not have been tested for how they respond to the attempts of the courts to restrain their poor behaviour. The second limb should be removed.

iii) Duration

A YSO may last for 2 years, and an MSAO may be made for any period not less than three months but no more than 12 months. It should be remembered that the group involved are so young that a year or two will represent a significant period in their frame of reference. Whilst our main concern is the lack of evidence that these orders will work in any sense, we also note that there is no evidence for more efficacy for longer orders: and the risks of deleterious side-effects will be increased.

iv) Reasonable Physical force

The Bill proposes to authorise the use of reasonable physical force by the chief executive of Oranga Tamariki (including a delegate or subdelegate, or independent contractors working in the military style academies) – but this will turn on them having “reasonable grounds for believing” that such force is “reasonably necessary”. This is a standard that gives a lot of discretion to people who are exercising coercive powers over a group of young people, many of whom will be “in trouble” because of medical problems or past trauma, often involving violence against them by adults. It should not be lost on the Government that the proposed Bill and the introduction of the pilot group of young people participating in the MSAO came only weeks after the public apology for how many were treated in State Care.

The general criminal law provides for situations when force may be used without the normal consequence of it being an assault. There is no reason for a wider power to be given. It runs the risk of breaching the NZBORA and the risk of cruel or

disproportionate treatment because we know from history that this is what might happen.

Conclusion

The Bill is a direct attempt to “win votes” by being seen to being “tough on crime” without utilising what we know about young offenders, their brain development and how to positively influence change in their behaviour. The Bill is unlikely to bring about any reduction in crime and instead risks adverse consequences on vulnerable young people at a crucial stage of their maturity. We should be solving the problems that have led them into the criminal justice system not adding to the risks of them becoming entrenched within the system.