LAWPUBL 422 Contemporary Tiriti Issues 2024

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To what extent does the Oranga Tamariki (Responding to Serious Youth Offending) Amendment Bill comply with te Tiriti o Waitangi and its principles?

I: Introduction

Oranga Tamariki describes youth justice as providing rangatahi with a "genuine opportunity to change their lives for the better".[1] However, Aotearoa's youth justice system appears to fall short in fulfilling this statement. In 2019, a quarter of young people reoffended within one month of a sentence commencement or Supervision orders, and half reoffended within three months.[2] Māori rangatahi represented 70% of all youth justice orders.[3] Youth justice indicators have shown a 26% spike in the number of serious young offenders who continue to offend in 2024.[4] Thus, many young people may be falling through the cracks in Aotearoa's youth justice system.

In line with its "tough on crime" approach, the National Coalition has set a target of reducing youth offending by 15 per cent. In achieving this, the Government claims it will "hold young

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[1] Oranga Tamariki "Youth Justice" Oranga Tamariki https://www.orangatamariki.govt.nz/youth-justice/.

[2] Oranga Tamariki Evidence Centre *Reoffending Following High-End Youth Court Orders* (Wellington, October 2019) at 5.

[3] At 6.

[4] Derek Cheng "Youth justice: Big spike in serious repeat young offenders. Where are they, and what offences do they commit most?" (5 June 2024) NZ Herald https://www.nzherald.co.nz/nz/politics/revealed-big-spike-in-serious-repeat-young-offenders-where-are-they-and-what-offences-do-they-commit-most/UCR2VRDIDVAEDO2TFB7B4LRHOA/.

people who offend to account."[5]. The Oranga Tamariki (Responding to Serious Youth Offending) Amendment Bill is a key initiative that has been implemented to achieve this target. Central to this Bill is the unlocking of more punitive powers for the Police and the Youth Court for serious youth offending. Given their prominent overrepresentation in the youth justice system, Māori rangatahi are set to be the most affected by this initiative. Thus, it is particularly vital that te Tiriti o Waitangi is complied with.

This essay argues that the Serious Youth Offending Bill does not respect and comply with te Tiriti. Part II provides a brief overview of Aotearoa's current youth justice framework. Part III explores the Bill and its implementation. Part IV highlights its implications for Māori rangatahi. Finally, Part V analyses its te Tiriti compliance, ultimately finding that it breaches the Government's duties of active protection, partnership and upholding Māori tino rangatiratanga.

II: Youth Justice in Aotearoa

Currently, Aotearoa has various approaches to youth justice for young people aged 12 to 17 years old. Seventy-eighty per cent of rangatahi are dealt with by Police in the community when they offend, such as receiving a warning or being referred to "Alternative Action".[6] For more serious young offenders, family group conferencing is utilised. These involve a meeting between the young person, their whanau, and the victim, which may happen before or after the young person has been charged with a crime.[7] If the individual is charged, they will appear at the Youth Court. The judge can make various decisions in these hearings, such as completing a family group conference plan, community work or supervision. For serious

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[5] Oranga Tamariki "Youth Offending Amendment Bill – introduction approval" Oranga Tamariki https://www.orangatamariki.govt.nz/about-us/information-releases/cabinet-papers/youth-offending-amendment-bill-introduction-approval/.

[6] Ministry of Justice, "Youth Court/Te Koti Taiohi o Aotearoa" (2019) Ministry of Justice https://www.youthcourt.govt.nz/assets/Youth-Court-Factsheet.

[7] Ministry of Justice, above n 6.

offending, the judge may transfer the young person's case to the District Court for sentencing.[8]

Alongside Aotearoa's generic youth justice framework is its specific context influenced by te Tiriti. Like the criminal justice system, Māori rangatahi are overrepresented in Aotearoa's youth justice system, comprising approximately 63% of serious youth offenders before the courts, and 68% of all youth justice residence admissions.[9] Moana Jackson's 1988 report cited the inability to address the causes of criminal offending amongst Māori men without examining the cultural, social and economic pressures upon Māori in contemporary Aotearoa - specifically, the long-lasting impacts of colonisation on Māori. [10] Offending behaviours are a "by-product" of the history of colonisation, dispossession, suppression of culture, under-education and poverty that can be traced to the signing of te Tiriti. Thus, the intersection of colonisation and its effects persist and shape Aotearoa's criminal justice system today and have infused into the youth justice system. [11]

Aotearoa currently has special courts for Māori young offenders, Te Kōti Rangatahi, which have the same powers and responsibilities as the Youth Court but utilise "the Māori language and protocols as part of the process".[12] The context of colonisation and its effects provides

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[8] Ministry of Justice, above n 6.

[9] Oranga Tamariki "Oranga Tamariki quarterly performance report March 2023" (2023) https://www.orangatamariki.govt.nz/assets/Uploads/About-us/Performance-and-monitoring/Quarterly-report/March-2023/2022-23-Quarter-3-Performance-Report_Pub-Accessibility-passed.pdf; Stats NZ "Children and young people with finalised charges in court – most serious offence fiscal year" (2024) https://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7382&_ga=2.208974930.1936239105.1710302262-1382260290.1708312313.

[10] Moana Jackson "He Whaipaanga Hou – Maori and the Criminal Justice System: A New Perspective, Part 2" Wellington, Policy and Research Division, Department of Justice, 1988.

[11] Kyhlee Quince "Rangatahi Courts" in Antje Deckert, Rich Sarre (eds) The Palgrave Handbook of Australian and New Zealand Criminology, Crime and Justice (Springer International Publishing, Switzerland, 2017) 711 at 713.

[12] Judge Heemi Taumaunu "Rangatahi Courts of New Zealand: Kua Takoto te Manuka, Aue Tu Ake Ra!" in Veronica Tawhai and Katrina Gray-Sharp (eds) Always Speaking: The Treaty of Waitangi and Public Policy (Huia Publishers, 2013) 222 at 223.

the "backdrop to the development of the Rangatahi Courts".[13] The Courts are not premised as the sole solution to Māori rangatahi offending. As Judge Heemi Taumanu highlights, it is "unrealistic to expect the… Rangatahi Court to quickly fix the problem of disproportionate over-representation of Māori offenders". However, they serve as part of the solution.[14] As Khylee Quince suggests, Article Two of te Tiriti, providing for tino rangatiratanga, and Article Three, granting Māori full rights and protections by the state, are engaged by Te Koti Rangatahi. Again, these courts should not be cited as a sole solution, particularly given the difficulty of self-determination in an unequal society.[15] However, they provide a mechanism for addressing the overrepresentation of rangatahi Māori in the youth justice system by offering a targeted, culturally specific forum for young offenders.

III: Implementation of the Bill

The Amendment Bill seeks to uphold the government's promise to restore law and order by "addressing serious and persistent offending" amongst young people. The Bill claims to hold young people who offend accountable and provide support to address the issues contributing to their offending.[16] It enables young people aged 14-17 who offend to be declared a Young Serious Offender (YSO) where they have committed two offences punishable by imprisonment of 10 years and are deemed likely to reoffend. On meeting eligibility criteria, the Police may apply to the Youth Court to consider making a YSO declaration.[17] A YSO declaration empowers the Police and Youth Court to enforce more rigorous measures for young offenders, including intensive monitoring, longer supervision and orders to attend a "Military-Style academy".[18] Further, Police are granted powers to arrest these rangatahi without a warrant for non-compliance with conditions.[19]

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[13] Quince, above n 11, at 714.

[14] Judge Heemi Taumanu, above n 10, at 223.

[15] Quince, above n 9, at 716.

[16] Oranga Tamariki (Responding to Serious Youth Offending) Amendment Bill 2024 (99-1), explanatory note.

[17] Explanatory note.

[18] Explanatory note.

[19] Cl 5.

A primary feature of the Bill is its authorisation of punitive approaches to youth offenders. Firstly, the Bill promotes heightened supervision of rangatahi deemed YSOs. While s 311 of the Oranga Tamariki Act authorises the Youth Court to make a Supervision with Residence Order for no longer than six months, the Bill amends this section to provide for the power to make a supervision order for a young person deemed a YSO for a period of between six and 18 months.[20] Further, the Bill increases the capacity of the Police to arrest rangatahi. Clause 5 amends s 214(2A) of the Oranga Tamariki Act, stating that a constable may arrest a young serious offender without a warrant.[21] A constable may also arrest a young serious offender believed to have breached a condition of their bail.[22] Absconding under a military-style academy order will be classified as a criminal offence under s 120 of the Crimes Act 1961.[23]

Given the high reoffending rates for youth, there is certainly an argument that the current framework is falling short, particularly considering the increase in young people committing serious offences. However, extensive literature has highlighted that responses such as boot camps are one of the least effective responses. Victoria's serious youth offence categorisation regime was found to be a "blunt tool", and both New Zealand and international evidence have indicated their limited effectiveness in reducing offending.[24] A New Zealand initiative between 2010 and 2016 found that a military activity camp programme showed no better results for re-offending than Supervision with Residence orders.[25] Generally, evidence does not support increased punitive approaches, posing lasting damage to the wellbeing of rangatahi.[26] Thus, the proposed framework under the OT(RSYO) Amendment Bill provides little inspiration for rangatahi in the future. Simultaneously, the Bill heralds an increasingly

[20] Oranga Tamariki Act 1989, s 311; Oranga Tamariki (Responding to Serious Youth Offending) Amendment Bill, above n 14, cl 27.

[21] Oranga Tamariki (Responding to Serious Youth Offending) Amendment Bill, above n 14, cl 5.

[22] Cl 6.

[23] Cl 63.

[24] Oranga Tamariki *Regulatory Impact Statement* (Oranga Tamariki, June 2024) at 12.

[25] At 13.

[26] At 14.

harsh approach to young offenders. This calls for heightened scrutiny, particularly considering the overrepresentation of Māori rangatahi.

IV: Implications for Māori rangatahi

Given Māori are overrepresented in the youth justice system, they are the demographic set to be the most impacted by the Bill's proposals. The Bill's regulatory impact statement estimated that Māori will make up 80-85 per cent of the young people eligible to be declared young serious offenders.[27] In 2017, Māori rangatahi comprised 72% of young offenders with Supervision with Residence orders. Seven out of ten young people in youth justice residences are Māori.[28] Thus, expanding supervision for youth deemed YSOs will disproportionately impact Māori rangatahi. Vitally, the Bill in its current form neglects any recognition of the overrepresentation of Māori rangatahi or the underlying cultural considerations in addressing youth offending. No reference to te Tiriti or Māori rangatahi is made in the Bill, despite the reality that increased punitive measures will impact this demographic the most.

V: Te Tiriti Compliance

It is well-established in Aotearoa that the Crown must recognise and fulfil its obligations contained in te Tiriti, as well as adhere to the principles of the treaty that have developed. Reference to Te Tiriti is included in the principal Act. One of its purposes is to provide a practical commitment to the principles of te Tiriti o Waitangi.[29] The chief executive formerly had duties in relation to the Treaty contained in s 7AA, which was repealed in April 2025.[30] Thus, treaty compliance is a primary issue that must be assessed both generally and within the principal Act, but this has also been undermined by recent amendments. However,

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[27] At 13.

[28] Oranga Tamariki Evidence Centre, above n 2, at 22.

[29] Oranga Tamariki Act, above n 16, s 4(1)(f).

[30] Section 7AA.

compliance is even more vital given the overrepresentation of Māori rangatahi in the youth justice system.

A. Rangatiratanga

The Waitangi Tribunal carried out an inquiry into Oranga Tamariki, *He Paaharakeke, He Rito Whakakiikiinga Whaaruarua*. Whilst the report focuses on tamariki Māori in State care and not within the youth justice system, the report notes that the structural factors linked to colonisation similarly lead to the disproportionate rates of Māori rangatahi in the youth justice system.[31] The Tribunal found that Māori have tino rangatiratanga over kāinga. It noted that kāinga captures a range of meanings, including a village or a home, and continuity of chiefly authority over land, resources and people is guaranteed by te Tiriti under Article Two. This confirms a guarantee of the right to "continue to organise and live as Māori", and "fundamental to that is the right to care for and raise the next generation".[32] The Tribunal notes that the vast disparity in Māori and non-Māori Tamariki entering into state care persists in part due to a failure by the Crown to "honour the guarantee to Māori of the right of cultural continuity embodied in the guarantee of tino rangatiratanga over their kāinga".[33]

The expansion of the authority given to the State by the Bill to enact harsh supervision orders and impose restrictive responses such as military-style bootcamps on Māori rangatahi is an overt breach of the guarantee of tino rangatiratanga over kāinga. Te Tiriti guarantees the right of Māori communities to govern their own affairs. Whilst youth offending is not solely a Māori affair, overlapping interests require "mutually acceptable solutions". [34] By vesting these increased punitive measures into the State, it removes the right of Māori to exercise their rangatiratanga over their rangatahi. It goes well beyond the balance of the Crown's

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[31] Waitangi Tribunal, *He Paaharakeke, He Rito Whakakiikiinga Whaaruarua* (Wai 2915. 2021) at 218.

[32] At 12.

[33] At 12.

[34] Te Uepū Hāpai i Te Ora *Turuki! Turuki! Move Together! Transforming our Criminal Justice System* (Ministry of Justice, 2019) at 25.

kāwanatanga with the ability of Māori to exercise their rangatiratanga.[35] This is particularly vital given Māori rangatahi are overrepresented in the youth justice system and will be the most affected by the Bill and its expansion of State powers.

B. Active Protection

The Waitangi Tribunal has found that the Crown must actively protect Māori rights and interests guaranteed under te Tiriti. This includes the active protection of tino rangatiratanga. The Tribunal further found that active protection requires the Crown to focus specific attention on inequities experienced by Māori.[36] As mentioned above, the Bill does not reference te Tiriti or Māori rangatahi in the youth justice system, despite the regulatory impact statement recognising that 80-85% of youth deemed YSOs will be Māori.[37] In its current form, it provides no guidance as to how this disparity will be managed, external to the duties in relation to te Tiriti contained in s 7AA. Thus, the Bill continuing, despite the knowledge of the Crown that it will disproportionately impact Māori, is a breach of their duty of active protection of Māori rangatahi.

Not only does the Bill fail to take active steps to address the disparity between Māori and non-Māori, but it also exposes Māori rangatahi to potential harm. As discussed previously, the Bill has proceeded despite the extensive research showing that punitive responses to youth who offend are ineffective. Of further concern is the potentially harmful psychological effects boot camps can have on rangatahi. Many young people who offend have been exposed to family harm and childhood trauma. The harsh discipline used in boot camps may cause young people to associate this treatment with previous trauma and heighten disruptive

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[35] Waitangi Tribunal *Tu Mai Te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 60.

[36] Wai Report 2915, above n 26, at 19.

[37] Oranga Tamariki, above n 20, at 13.

behaviour such as aggression.[38] Most young people with serious or persistent offending have had a mental health or disability-related diagnosis and have significant learning difficulties. For youth with disabilities, research has shown that military-style training will not be effective.

The Cabinet Minute of Decision acknowledges that the Bill may not be consistent with Aotearoa's obligations under the Convention on the Rights of Persons with Disabilities (CRPD) because of the overrepresentation of young people with disabilities and the need for specific accommodations.[39] A proportion of young people with persistent offending had attempted to end their lives, and had been physically harmed more than three times in the previous year.[40] 97 per cent of young people in Youth Justice Residences in October 2021 had a Care or Protection history, and the majority of their history included "significant and chronic physical abuse, exposure to family violence, neglect, sexual abuse, and exposure to adults with mental health issues and substance misuse". Thus, trauma-informed approaches are recommended.[41] Continuing the military-style boot camp initiative in the face of this evidence not only fails to take active steps to protect Māori rangatahi; it further endangers these vulnerable young people and exposes them to continued trauma. This breaches the Crown's obligations under te Tiriti to actively protect Māori.

C. Partnership

Te Tiriti did not give the Crown a supreme and unilateral right to make and enforce laws over Māori.[42] Rather, the Crown and Māori have respective authorities, and their relationship is to

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[38] Simon Davis and others, "Bootcamps for young offenders are back – the evidence they don't work never went away" (11 June 2024) Victoria University of Wellington https://www.wgtn.ac.nz/news/2024/06/boot-camps-for-young-offenders-are-backthe-psychological-evidence-they-dont-work-never-went-away.

[39] Cabinet Legislation Committee "Oranga Tamariki (Responding to Serious Youth Offending) Amendment Bill: Approval for Introduction" (14 November 2024) LEG-24-MIN-0231 at 6.

[40] Oranga Tamariki *Briefing: Advice on the Introduction of Military Academies* (Oranga Tamariki, 19 December 2023) at 5.

[41] At 8.

[42] Wai 2916 Report, above n 26, at 16.

be conducted "honestly, fairly, and in good faith in the spirit of cooperation and partnership".[43] The Waitangi Tribunal noted that partnership recognises the right of Māori to choose how they express their tino rangatiratanga, which is heightened where there are disparities. However, the Tribunal highlighted little evidence of Tiriti/Treaty partnership in the design or implementation of Crown policy on the care and protection of children, despite it intruding into the "most intimate aspects of whanau life".[44]

Māori have not been consulted in the development of the Bill. It was developed at pace without a full policy development process, and was undertaken with limited consultation, which did not include any engagement with Māori or strategic iwi partners.[45] The Legislation Guidelines state that Māori interests arise where Māori are likely disproportionately affected by legislation, and early engagement with Māori should occur in these circumstances.[46] This is also in breach of te Tiriti and the obligation of partnership and consultation and is particularly concerning given Māori rangatahi will be heavily impacted. The Regulatory Impact Statement acknowledges the need to fulfil Parliament's obligations of good faith and partnership in working closely with Māori.[47] In simultaneously failing to engage in this partnership and consultation, the Crown knowingly is in breach of te Tiriti o Waitangi.

VI: Conclusion

Aotearoa's current youth justice framework is not faultless. The overrepresentation of Māori rangatahi is perhaps the most striking confirmation of this. Current approaches to Māori rangatahi in the youth justice system, such as Te Kōti Rangatahi, are not a conclusive solution. However, they offer a targeted option that attempts to fulfil the Crown's obligations under te Tiriti o Waitangi. While the rate of young people committing serious offences is increasing, the Oranga Tamariki (Responding to Serious Young Offenders) Bill not only acts

[43] At 17.

[44] At 18.

[45] Oranga Tamariki, above n 20, at 2.

[46] Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021) at 28.

[47] Oranga Tamariki, above n 20, at 8.

against evidence showing the negative impacts of punitive initiatives; it also directly breaches the Crown's obligations under te Tiriti, despite impacting Māori rangatahi the most. The Government's repeated acknowledgement of the potential harms of the Bill indicates a disregard for their duties of active protection, partnership and upholding tino rangatiratanga. Thus, while Minister for Children Karen Chhour cites these new initiatives as providing rangatahi with "hope", it is difficult to recognise how this Bill will achieve this.[48] To continue the implementation of the Bill is a blatant contravention of the rights and duties contained in te Tiriti, and the best interests of both Māori rangatahi and youth in Aotearoa generally.

[48] Julia Gabel and Katie Harris "Prime Minister Chrisopher Luxon, ministers announce new measures to combat youth crime" (23 June 2024) NZ Herald https://www.nzherald.co.nz/nz/politics/prime-minister-christopher-luxon-ministers-set-to-make-law-order-announcement/MFGXOJOEVJG6RD7GGQ4TDG3XGE/.