Ram Raid Offending and Related Measures Amendment Bill

Submission to the Justice Committee

31 October 2023

MANA MOKOPUNA

Mihi

Tuia te rangi e tū iho nei
Tuia te papa e takoto ake nei
Tuia ngā kōrero
Tuia ngā wānanga
Kia mau, kia ita, kia kuru pounamu te rongo
mō te oranga o ngā mokopuna
Haumi e, hui e! Tāiki e!

Kei aku kaitakitaki, kei aku kākākura, e mihi ana ki a koutou i ārahi i a mātou e rongo ai te kāwanatanga i ō koromāungaunga ka mutu ngā kōraruraru o te pire nei. Tēnā koutou katoa e ngā mokopuna, koutou kua mauherengia e te ture i roto i ngā tau. E mihi ana ki a koutou kua kōrero mai ki a mātou, kua whakapono ki a mātou hei reo whakapāoho. Ka kore aku mihi e mutu.

E ngā kaimahi e tiaki ana i ā tātou mokopuna, ka rewa te pōtae ki a koutou. E mārama ana ahau ki te mahi i mua i a tātou ki te whakatika i ngā hē me ngā ngoikoretanga i roto i te pūnaha ture. Mō te aha? Mō te oranga o ngā mokopuna te take. E kore e ārikarika te mihi ki a koutou katoa.

Nāku iti nei,

Kaikōmihana Matua mō ngā tamariki
Mana Mokopuna
Kaiwhakawā Frances Eivers

Acknowledgments

Weave together the sky
Weave together the earth
Weave together the thoughts
Weave together the knowledge
Hold firm, be committed and steadfast so that
all children can live their best lives
Be united, draw together! Affirm!

Mana Mokopuna would like to thank our esteemed leaders, thank you for collectively guiding us in everything we do to ensure the government hears your concerns, particularly in this bill. We acknowledge the children and young people trapped within the grasp of the justice system over the years. Our thanks to all of you who spoke to us, trusted us with your accounts and considered us as an advocate. Our deepest thanks to you all.

To those who take care of our children and young people, we salute you. We understand there is a lot of work ahead of us all to address the wrongs and failures of the justice system. What for? For our children and young people's well-being. To each and every one of you, our gratitude knows no end.

Yours humbly,

Chief Children's Commissioner
Children and Young People's Commission
Judge Frances Eivers

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Mana Mokopuna - Children and Young People's Commission

Mana Mokopuna - Children and Young People's Commission (Mana Mokopuna) is an Independent Crown Entity, established under the Children and Young People's Commission Act 2022. Mana Mokopuna is governed by a Board and led by the Chief Children's Commissioner. We advocate for the full participation, rights, interests, and well-being of all children and young people (mokopuna) under 18 years of age, and young people under 25 years old who are, or have been, in State care or custody in Aotearoa New Zealand. We view mokopuna within the context of their families, whānau, hapū, iwi and communities.

We are committed to:

- giving effect to our obligations under Te Tiriti o Waitangi (Te Tiriti) and the Treaty of Waitangi (Treaty), recognising and respecting Māori participation, leadership and te ao Māori approaches in the performance of our functions:
- advancing and monitoring the application of the United Nations Convention on the Rights of the Child (the Children's Convention), especially by Government.

The work of Mana Mokopuna is underpinned by:

- the Children's Convention:
- the child or young person within (without limitation) the context of their family, whānau, hapū, iwi, and communities:
- the diversity of children and young people in all its forms:
- the need for high aspirations for the well-being of all children and young people, including responsive systems and structures that support them:
- the need to give priority to the children and young people who are disadvantaged, and the issues affecting them:
- the need to hear from, and be informed by, children and young people:
- other international instruments relevant to, and that affect, children and young people.

Note the use of the word 'mokopuna'

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.

Executive Summary

Mana Mokopuna does not support the Ram Raid Offending and Related Measures Amendment Bill (the Bill) becoming law. We are unaware of any evidence that demonstrates the changes proposed by the Bill, which are intended to disincentivise ram raids, will prevent or respond effectively to this type of offending. On the contrary, evidence shows that responses to offending that safeguard and uphold the rights of the child are most likely to be effective in both addressing and preventing offending by children and young people.

We acknowledge the many people who are affected by the offending that gave rise to the Bill. We acknowledge those, including mokopuna, who go to work fearful of being subject to a ram raid, and we acknowledge their mokopuna, families, whānau, hapū, iwi and communities. For these people too, it is imperative that there is investment in effective solutions to offending by children and young people, including addressing the underlying causes of that offending. That is, restorative, holistic, and preventative solutions which focus on the long term and advance the rights, interests and well-being of mokopuna.

Committing to the rights, interests, and well-being of mokopuna puts them on the right track, minimising offending by children and young people and, instead, setting all mokopuna up to live their best lives; 'kia kuru pounamu te rongo.'[1]

Mana Mokopuna recommends:

1. The Crimes Act 1961 **is not amended** to specifically criminalise ram raiding.
2. **Investment** in responses to and prection of offending by children and young people that:
    a. uphold the rights of mokopuna and give effect to Te Tiriti o Waitangi and the Treaty of Waitangi;
    b. are evidence-based solutions;
    c. demonstrate full duty of care for mokopuna to provide holistic, developmental, restorative and wraparound support for mokopuna and their families, whānau, hapū, iwi and communities.
3. The Criminal Investigations (Bodily Samples) Act 1995 **is not amended** to allow the taking of bodily samples from 12- and 13-year-olds who are before the Youth Court for the new ram raiding offence.
4. Consistent with Aotearoa New Zealand's international obligations under the Children's Convention, the Oranga Tamariki Act 1989 **is not amended** to allow 12- and 13-year-olds to be prosecuted for the new ram raid offence.
5. The Oranga Tamariki Act 1989 **is not amended** to add a Youth Court sentencing factor if the young person livestreamed the offending, posted a copy of the

[1] Te moemoeā (vision) of Mana Mokopuna is kia kuru pounamu te rongo. All mokopuna live their best lives.

livestreaming online, or distruibuted a copy of the livestreaming by means of digital communication.

6. **Further careful consideration** is given to the proposed amendments to add aggravating sentencing factors under the Sentencing Act 2002, including the potential implications for care-experienced people aged up to 25.

Introduction

1. Mana Mokopuna does not support the Ram Raid Offending and Related Measures Amendment Bill (the Bill).

2. Committing to the rights, interests, and well-being of mokopuna puts them on the right track, setting all mokopuna up to live their best lives; 'kia kuru pounamu te rongo.'[2] The changes proposed in the Bill will, on the contrary, undermine the rights, interests, and well-being of mokopuna.

3. There is no evidence to suggest the Bill will be effective in either preventing or addressing offending by children and young people. The Bill represents a missed opportunity to strengthen the responses to offending by children and young people by focusing on the rights-based, early intervention and life course approaches that are known to work.

4. Instead of legislative change, Mana Mokopuna would like to see a focus, across Parliament, on alternative solutions; solutions that address the underlying causes of offending and uphold the rights, interests and well-being of mokopuna, within their families, whānau, hapū, iwi and communities. Mokopuna have said: "To help us, help our whānau and our support crew."[3]

5. There is a need to invest in and improve operational policies and practices to ensure justice and equity for all mokopuna, including specific groups of mokopuna who are currently underserved within the child and youth justice system. These groups include mokopuna Māori, neurodiverse and disabled mokopuna, and care-experienced mokopuna.

6. We call on the Government to meet its obligations to uphold the rights of all children, prioritise their best interests, and the needs of their families, whānau, hapū, iwi and communities, by:

    a. Developing responses to offending by children that are evidence-based and reflect the reality of offending by children and young people, including ram raids. This includes supporting alternative solutions such as Kotahi te Whakaaro, partnerships between iwi and Crown agencies (such as the agreement between Oranga Tamariki and Te Rūnanga-ā-iwi-o-Ngāpuhi to support the youth justice remand service, Mahuru), and Te Kooti Rangatahi and Pasifika Youth Courts as specialist courts.

[2] Te moemoeā (vision) of Mana Mokopuna is kia kuru pounamu te rongo. All mokopuna live their best lives.

[3] Office of Children's Commissioner. What Makes a Good Life? Refer here: What Makes a Good Life? | Mana Mokopuna (2019).

b. Adequately resourcing early intervention and prevention, particularly for mokopuna Māori, who are over-represented in both the care and protection, and child and youth justice sectors. This includes investment in the supports needed for mokopuna aged 12-14 who offend, care experienced mokopuna, and reasonable accommodations and support for disabled and neurodiverse mokopuna, as these mokopuna are also over-represented in the care and protection and child and youth justice sectors.

c. Aligning the child justice system with the priority recommendations from the United Nations Committee on the Rights of the Child (the UN Committee) that Aotearoa New Zealand raise the minimum age of criminal responsibility (MACR) and invest in the development of community-based residences and strengthen the availability and use of non-custodial measures.[4]

Applying children's rights

7. 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.[5]

8. A child 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.

9. Crown agencies charged with developing and administering the child and youth justice system play a critical 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.[6] There are four key principles to be consider when applying the Children's Convention:

    a. Non-discrimination – all children are entitled to experience their rights equally, without discrimination.

    b. The best interests of the child must be a primary consideration in all decisions impacting mokopuna.

    c. Every child has the rights to life, and maximum survival and development.

    d. Every child has the right to have a say and participate in their own lives and the things that are important to them.

10. Considering mokopuna within the context of their families, whānau, hapū, iwi and communities is consistent with Article 5 of the Children's Convention.

[4] CRC/C/NZL/CO/6 para 43.(b). (2023).

[5] S 21, Children and Young People's Commission Act 2022.

[6] United Nations. Article 4. "Convention on the Rights of the Child." Treaty Series 1577. (1989).

11. Article 40 of the Children's Convention 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."

12. In February 2023, following its 6th periodic review of New Zealand's progress on children's rights, the United Nations Committee on the Rights of the Child (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.

13. The UN Committee made a number of recommendations to bring the child justice system fully into line with the Children's Convention. These included recommendations that Aotearoa New Zealand:

    a. Raise the minimum age of criminal responsibility (MACR) to 14 years for all children, regardless of the offence.

    b. 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;

    c. 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.

14. Under our mandate to monitor the application of the Children's Convention by the departments and other instruments of the Crown, Mana Mokopuna draws the Select Committee's attention to the fact that the changes proposed by the Bill are in direct contradiction to the UN Committee's recommendations and inconsistent with Aotearoa New Zealand's international obligations.

Is criminalising 'ram raiding' likely to be effective?

> 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."[7]

15. Under the Bill a new section will be introduced into the Crimes Act 1961, 231B, to specifically criminalise ram raid offending. It is essential to consider this offending contextually and in comparison to broader trends in child and youth offending.

16. High visibility of some offending by children and young people (like ram raids) can cause social unrest and division in our communities. It can lead the public to believe the offending is higher than it is, when in fact it is in decline.[8]

17. From 1 December 2022 till the end of May 2023, there have been approximately 388 ram raid style events, 218 prosecutions against ram raid offenders and 86 youth referrals to Police Youth Services.[9] For the same time period, for mokopuna aged 10-14 years, 419 offences were before the court.[10] For mokopuna aged 15-19 years, 3,591 offences were before court.[11]

18. The Bill intends to amend the Oranga Tamariki Act 1989 to allow 12- and 13-year-olds to be prosecuted for a new ram raid offence without being a previous offender. Offending by mokopuna aged 10-13 years is so small that there is no need to specifically make them subject to this offence. The number of children aged 10 to 13 who offended and came to the attention of Police decreased by 61% between the 2010/11 and 2020/21 fiscal years (from 4,760 to 1,860).[12] There were only 169 children aged 10-13 formally proceeded against in 2019/2020.[13] While there is no clear data available to determine how many of these proceedings were for ram raid-type offences, it is clear that offending by mokopuna between these ages is small in scale.

19. Although the overall offending rates for tamariki and rangatahi Māori have respectively decreased by 62% and 61% since 2012, mokopuna Māori remain overrepresented in the youth justice system. Three quarters of the current youth justice residence population identify as Māori.[14] Overrepresentation of mokopuna Māori in the justice system is a

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[7] 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).

[8] Spier, P. (2022). Children arrested by Police in 2020/21. Wellington, New Zealand.

[9] Police maintain focus on retail crime | New Zealand Police

[10] Proceedings (offender demographics) | New Zealand Police

[11] Proceedings (offender demographics) | New Zealand Police

[12] Spier, P. Children arrested by Police in 2020/21 at p.3. Wellington, New Zealand: Oranga Tamariki | Ministry for Children. (2022).

[13] Spier, P. Children arrested by Police in 2020/21 at p.3. Wellington, New Zealand: Oranga Tamariki | Ministry for Children. (2022).

[14] Secure-residence-review.pdf (orangatamariki.govt.nz)

consequence related to the intergenerational impacts of Te Tiriti-breaches.[15] Government must consider the historical and constitutional context of Te Tiriti and the Treaty in its legislative and policy decision-making. This is crucial for the rights, interests, and well-being of mokopuna, especially mokopuna Māori, within their families, whānau, hapū, iwi, and communities.[16]

20. We therefore support considered and meaningful consultation with Māori about how to respond to and prevent young Māori entering the child and youth justice system as an expression of good governance by the Crown under article 1 of Te Tiriti. This approach also aligns with the Crown's obligation to "appropriately balance its kāwanatanga responsibility with the ability of Māori to exercise their rangatiratanga" under article 2 of Te Tiriti.[17] This Crown-Māori relationship is essential given Māori have a younger age profile through to 2050 and these differences in age structures across population groups may contribute to disparities in the justice system and rates of detention.[18]

21. The stated purpose of the Bill is to reduce youth-dominated offending by increasing accountability for those who participate in 'ram raiding'.[19] The changes proposed are described as a practical and meaningful way to disincentivise behaviour through greater interventions and consequences for criminal behaviour.[20]

22. However, 'ram raiding' is the emotive term used to refer to a range of offences that already exist. Most commonly, offences such as burglary (or aggravated burglary) cover ram raids.[21] The use of a motor vehicle in ram raiding offending falls within the use of 'any thing as a weapon' while committing burglary or having committed burglary.[22] Therefore the introduction of a new ram raid offence is not necessary. It will not lead to any meaningful legal change.

23. The Bill states that the measures it contains must be considered alongside other Government initiatives focused on breaking the cycle of offending, including the enhanced fast-track programmes to respond to the most prolific young offenders by intervening early and intensely to prevent further harm.[23]

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[15] 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*

[16] Children and Young People's Commission Act, s 6.

[17] Waitangi Tribunal, 2017. At para 5.1.1. Tū Mai te Rangi! Report on the Crown and Disproportionate Reoffending Rates (justice.govt.nz).

[18] Ministry of Justice, 2022. Imprisonment in Aotearoa, Long Term Insights Briefing (Extended Version) at page 107. Retrieved from: https://www.justice.govt.nz/justice-sector-policy/key-initiatives/justice-sector-long-term-insights-briefing/.

[19] Ram Raid Offending and Related Measures Amendment Bill 2023, at General Policy Statement.

[20] Ram Raid Offending and Related Measures Amendment Bill 2023, at General Policy Statement.

[21] Rt Hon Chris Hipkins and Hon Kiritapu Allan, 'New offence for ram raiding, young offenders to face more accountability', Press Release (19 July 2023) Available at: New offence for ram raiding, young offenders to face more accountability | Beehive.govt.nz.

[22] Crimes Act 1961, s 232(1)(a) or (b).

[23] Ram Raid Offending and Related Measures Amendment Bill 2023, at General Policy Statement.

24. The Bill is not necessary. The measures it would put in place do not add anything to options already available to address offending by mokopuna, including existing offences and "other Government initiatives focused on breaking the cycle of offending". There is not the evidence to support criminalisation as an effective crime reduction tool or policy.

25. We support the longstanding consensus by previous Children's Commissioners, researchers, practitioners, that a welfare approach is more suitable than a criminal law approach. This aligns with recommendations from the United Nations Committee on the Rights of the Child (the Committee), calling for the investment into community-based residences, strengthening access to non-custodial measures and strengthening the availability and use of non-custodial measures.[24]

26. In summary, media coverage of youth ram raid offending has distorted public perception of the prevalence, size and scope of this issue. While acknowledging the harm caused by this type of offending, we urge Parliament and Government to provide responses that are proportionate to the relatively small scale of ram raid offending by children and young. We submit that the Bill is a disproportionate and unnecessary response to the specific issue of ram raids.

27. Mana Mokopuna recommends the Crimes Act 1961 **is not amended** to specifically criminalise ram raiding because:

    a. There is no need. This type of offending, and justice responses to it, are already captured by existing offences, such as burglary or aggravated burglary. Criminalising "ram raiding" as a specific offence under the Crimes Act is a redundant legislative change.

    b. Criminalisation itself is unlikely to prevent this type of offending from occurring in the first instance. Rather, understanding and addressing the underlying causes of child offending is more likely to be effective.

Early-intervention and life course approaches are more effective

> "The justice system must support fairness and equity, accountability, and restoration. It must also address the socio-economic conditions that contribute to offending and re-offending. To that end, changes are also needed in New Zealand's health, education, housing and social services." [25]

28. The Bill aims to reduce criminal behaviour that is predominantly carried out by children and young people by increasing criminal accountability.[26] Deterrent and punitive measures for youth offending are ineffective. The solution lies in a blend of preventative and

[24] CRC/C/NZL/CO/6, paragraph 43(b).

[25] 'Turuki! Turuki! Move Together! Transforming our criminal justice system', Justice.govt.nz, pg 7

[26] Ram Raid Offending and Related Measures Amendment Bill 2023, at General Policy Statement.

restorative justice pathways. Current solutions, such as Kotahi te Whakaaro, are proving to work to stop offending, and reoffending, by mokopuna.[27] However alternative solutions such as this are limited in scale.[28]

29. Early-intervention and life course approaches are a more effective crime reduction tool and policy than more punitively focused approaches such as criminalisation. Investment in early-intervention and life course approaches have a greater likelihood of removing children from a trajectory towards prison (with greater long term returns on investment).[29]

30. The success of a holistic and responsive restorative justice system is dependent on providing flexible and adaptive services to support mokopuna, their whānau and their communities (including hapū and iwi) on an ongoing basis. Primary prevention is an evidence-led approach that is more effective than later intervention.[30]

31. The earliest form of intervention is ensuring that mokopuna have the basic necessities to survive and thrive.[31] The UN Committee on the Rights of the Child has raised poor standards of living and poverty as a concerning issue that disproportionately affects Māori and Pacific Peoples.[32] To address child and youth justice the State must address poverty as a significant root cause of offending.

32. Additionally, specific cohorts of mokopuna such as mokopuna Māori, Pacific Peoples and tangata whaikaha (disabled people) in the child and youth justice system are often disconnected from their culture, families, and extended families. This highlights again the need for rehabilitative, holistic and suitable approaches which meet their needs and address issues such as poverty, socio-economic challenges, educational underachievement, and trauma.

33. We are concerned that the Bill holds significant potential to exacerbate the inequities faced by children from minority or indigenous backgrounds, undermining their rights, interests and well-being.[33] It is imperative that careful consideration is given to the repercussions of criminalising mokopuna in these minority groups.

34. Early intervention and life course approaches need to recognise the diversity of mokopuna and childhood experiences in Aotearoa New Zealand, including the rights and needs of specific groups of mokopuna, in particular, mokopuna Māori, neurodiverse and disabled mokopuna, and care-experienced mokopuna.

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[27] Hon Sepuloni, Hon Davis and Hon Anderson, (2023). "Government Action on Youth Crime making a difference". Retrieved from: Government Action on Youth Crime making a difference | Beehive.govt.nz

[28] I, Lambie. It's never too early, never too late: A discussion paper on preventing youth offending in New Zealand (Office of the Prime Minister's Chief Science Advisor, Auckland, New Zealand). (2018) at 25.

[29] 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.26. Research and recommendations. Auckland, NZ: The Michael and Suzanne Borrin Foundation, the New Zealand Law Foundation & the University of Auckland. (2022).

[30] Lambie, I. (2022) The prison pipeline. Retrieved from: https://www.justice.govt.nz/assets/Preventing-the-prison-pipeline-Professor-Ian-Lambie-report.pdf at 26.

[31] United Nations Convention on the Rights of the Child, Articles 3 and 4.

[32] CRC/C/NZL/CO/6, paragraph 15.

[33] Article 39 of the Children's Convention.

Mokopuna Māori

35. There are unjust disparities in survival and development outcomes for Māori children, including the disproportionate number of Māori children within the State care system and involved in the child and youth justice system. Concentrated effort is required to rectify this. Mana Mokopuna submits that a holistic wraparound approach, rooted in the provisions of kāwanatanga and tino rangatiratanga under Te Tiriti and the Treaty, is crucial to ensuring positive survival and development outcomes for all mokopuna Māori.

36. Māori are overrepresented at every stage of the child welfare process and criminal justice processes, separately or sometimes jointly, including in disparities in outcomes whereby Māori have not benefited to the same degree as non-Māori.[34] As a result of being significantly overrepresented at all stages of the criminal justice system as a whole, this has contributed to successive generations falling victim to Te Tiriti-breaches.[35]

37. Reducing the overrepresentation of Māori children in offending and the youth justice system (and child welfare) is crucial to improving social justice and equity. This aligns with the provision of ōritetanga under article 3 of Te Tiriti which affirms and guarantees the right to equal opportunity and equitable outcomes.

38. Māori children and young people are **three times more likely** to become known to Police as an offender by age 14 offend compared to their non-Māori peers.[36] This is concerning given known intergenerational pipeline to prison issues for Māori.[37] The prolonged stays of young Māori in secure youth justice residences while awaiting court processes compound these concerns.

39. Mokopuna Māori disproportionately died by suicide in youth justice institutions.[38] Mokopuna have the right to life and the right to the highest standard of health and medical care attainable; any loss of life in any youth justice institution is totally unacceptable and needs to be addressed as a matter of urgency.[39]

40. As stated earlier, Māori have a younger age profile through to 2050 and these differences in age structures across population groups may contribute to disparities in the makeup of prison.[40] In the *Tū Mai te Rangi!* report, the Waitangi Tribunal provided a statistical breakdown of Māori in the prison population:[41]

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[34] Ministry of Justice. LONG-TERM INSIGHTS ON IMPRISONMENT, 1960 TO 2050. Refer here: 14.02.2023-LTIB_Report_extended_final_v5_Web.pdf (justice.govt.nz) at p.53. (2022).

[35] forms.justice.govt.nz/search/Documents/WT/wt_DOC_121273708/Tu Mai Te Rangi W.pdf

[36] Ministry of Social Development (2016). Offending by children in New Zealand. offending-by-children-in-new-zealand-sept-2016-publication.docx (live.com)

[37] Ministry of Justice (2023) "Hāpaitia te Oranga Tangata" (Ministry of Justice, Wellington). For example, despite comprising approximately 15% of the population, Māori account for 37% of those proceeded against by the police, 45% of people convicted, and 52% of the total prison population.

[38] CRC/C/NZL/CO/6, paragraph 42(d).

[39] United Nations Convention on the Rights of the Child, Article 6 and Article 24.

[40] Ministry of Justice, 2022. Imprisonment in Aotearoa, Long Term Insights Briefing (Extended Version) at page 107. Retrieved from: https://www.justice.govt.nz/justice-sector-policy/key-initiatives/justice-sector-long-term-insights-briefing/.

[41] Waitangi Tribunal, 2017. At para 2.3. Tū Mai te Rangi! Report on the Crown and Disproportionate Reoffending Rates (justice.govt.nz).

> The disproportionate number of Māori individuals incarcerated is a glaring and enduring issue that is expected to persist in the years ahead. This underscores the need to tackle the injustices inherent in the entire system, which persistently fails Māori, including mokopuna Māori, at various points in the criminal justice process.

41. The Crown needs to fulfil its promise under Te Tiriti and the Treaty, guided by the recommendations from the Waitangi Tribunal.[42] While Māori children are disproportionately represented in offending statistics, culturally appropriate approaches to meet their needs are lacking. There are initiatives targeting Māori overrepresentation throughout the criminal justice pipeline, and iwi-based, local, community, and Non-Governmental Organisation (NGO) solutions. However, these are limited in scale.[43] To effectively address this, a strategic partnership combining the strengths of both iwi and the Government is required, with an interdependent, kaupapa Māori approach leading the way.

Neurodiverse and disabled mokopuna

42. People with traumatic brain injury, Fetal Alcohol Spectrum Disorder (FASD), communication disorders, ADHD, intellectual disabilities, and Autism can present with brain-related behavioural issues in the justice system – both as victims and offenders.[44]

43. Neurodiversity does not lead to crime, however for many young offenders who are neurodiverse, differences in cognitive, sensory and social processing may impact social and family relationships, impair reasoning and judgement, and contribute to a lack of cause and effect thinking.[45]

44. There are many ways that the youth justice system fails disabled children. For example:[46]

> [T]here have been breaches of [HN]'s rights on account of his disability, both under the CRC and the CRPD. Three significant ways in particular in which that has happened, common to most cases of young people in the youth justice system who have a disability, are the lack of access to appropriate supports and services, the often long-term detention in youth justice facilities, as well as significant delays in resolving the proceedings.

45. Any proposed change to the child and youth justice system needs to consider the accommodations and supports needed to uphold the rights of disabled mokopuna under the Children's Convention and the UNCRPD to ensure access to the appropriate resources required to meet mokopuna needs.[47]

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[42] WAI 2915 (the urgent inquiry into the consistency of Oranga Tamariki policies and practice with Te Tiriti o Waitangi) and WAI 3060 (the inquiry into issues affecting Māori in the justice system).

[43] I, Lambie. *It's never too early, never too late: A discussion paper on preventing youth offending in New Zealand* (Office of the Prime Minister's Chief Science Advisor, Auckland, New Zealand). (2018).

[44] 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)

[45] 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)

[46] *New Zealand Police v HN* [2021] NZYC 364 at [83].

[47] See also Voyce Whakarongo Mai (August 2022) *Children in State Care: Thematic Report to the United Nations Committee on the Rights of the Child* (report, Voyce Whakarongo Mai) at 58; and Talking Trouble (2018) *Youth Voices about Youth Justice*.

'Crossover' and care-experienced mokopuna

46. The influence of child welfare on offending behaviour is significant. Child offending is generally preceded by significant child welfare concerns from care and protection needs not being met.[48]

47. Even if concerns regarding child welfare are recognised early on, the system often falls short in effectively dealing with them. Responses to child welfare concerns tend to concentrate on addressing the behavioural requirements of children rather than the underlying causes of that behaviour. This approach represents a 'watch and wait' stance, neglecting the benefits derived from early intervention for whānau.[49] [50]

48. Mokopuna who have been in the care and protection system and go on to offend (known as 'crossover mokopuna') are likely to be particularly impacted by the changes proposed in the Bill.

49. Individuals who have experienced periods in State residential care demonstrate a significant correlation with a heightened probability of imprisonment. Care-experienced mokopuna are generally **five to nine times** more prone to incarceration in comparison to those without such experience. Māori individuals who have a history of State care during their childhood exhibit an approximately **four to sevenfold increase** in the likelihood of receiving a custodial sentence compared to their counterparts in a matched cohort. Non-Māori individuals with a background in State care tend to face even steeper odds, with an elevated likelihood—**around 15 to 24 times greater**—of receiving a custodial sentence than their counterparts in the matched cohort.[51]

50. In some instances, further harm is perpetuated to the welfare of children and young people who enter the youth justice system.[52] The systems currently fail to keep all mokopuna protected and safe. Until this can be achieved, youth justice residences should be closed,[53] and a move to community-based care, which is more aligned to a rights-based, and life course approach to addressing drivers of offending.[54]

51. Proceedings to deal with offending by children and young people are marked by numerous missed opportunities, as stakeholders observe significant delays, limited collaboration, and inadequate oversight within child welfare and Family Court processes.[55] Despite the diverse

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48 Lambie, Ian. "It's never too early, never too late: A discussion paper on preventing youth offending in New Zealand." (2018).

49 Lambie, Ian. "How we fail children who offend and what to do about it: 'A breakdown across the whole system'" pg 91. (2022)

50 Oranga Tamariki Act 1989, s 208.

51 Royal Commission of Inquiry - Abuse in Care, 2022. *Care to Custody - Incarceration Rates*. Retrieved from: https://www.abuseincare.org.nz/our-progress/library/v/500/care-to-custody-incarceration-rates-research-report.

52 See Independent Children's Monitor | Aroturuki Tamariki (March 2023) *Experiences of Care in Aotearoa: Agency Compliance with the National Care Standards and Related Matters Regulations: Reporting Period 1 July 2021 – 30 June 2022*; and Oranga Tamariki (March 2023) *Safety of Children in Care Annual Report: July 2021 to June 2022*.

53 Children's Commissioner (21 June 2023) "New Oranga Tamariki investigation a time to make once in a generation change" (media release, Office of the Children's Commissioner); and Oranga Tamariki (13 May 2022) "Youth Justice Community Homes" (Oranga Tamariki — Ministry for Children, Wellington).

54 I Lambie (2002) *The prison pipeline: Why early intervention is the best solution* IJBPE Vol 3: Issue 9 at 33.

55 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*

needs of children spanning multiple services, agencies rarely exhibit coordinated efforts.[56] Furthermore, the provision of effective assistance to children and families often hinges on the dedication and availability of individual professionals involved in a case, rather than the existence of systemic processes to ensure consistent support.

52. The importance of addressing child offending, taking an early intervention and life-course approach, is underscored by the UN Committee's recommendation that the Government 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."[57]

53. Mana Mokopuna recommends **investment** in responses to and prevention of child offending that:

    a. uphold the rights of mokopuna and give effect to Te Tiriti o Waitangi and the Treaty of Waitangi;

    b. are evidence-based solutions;

    c. demonstrate full duty of care for mokopuna to provide holistic, developmental, restorative and wraparound support for mokopuna and their families, whānau, hapū, iwi and communities.

Protection from unreasonable search and seizure

54. Under the Bill, the Criminal Investigations (Bodily Samples) Act will be amended to permit a Judge to order a bodily sample (blood or saliva) to be taken from a suspect aged 12- or 13-years-old at the time they are alleged to have committed the new ram raid offence. This amendment will have the effect of extending the categories of cases in which mokopuna can have bodily samples taken coercively.[58]

55. All mokopuna have the right to be free from unreasonable search and seizure and the right to be treated in an age-appropriate manner under s 21 and s 25(i) of the NZBORA. The proposed amendment permitting the coercive taking of bodily samples from 12- and 13-year-olds is inconsistent with both of these rights.

56. Additionally, drawing a blood sample is an invasive medical procedure. Therefore, taking bodily samples coercively for non-medical reasons and without consent is inconsistent with Article 37 of the Children's Convention which protects children from being subjected to cruel, inhuman, or degrading treatment. Article 3 and article 40(2)(vii) of the Children's Convention are also relevant. These rights provide that the best interests of the child shall be a primary consideration in all decisions and actions relating to them and every child

[56] See Oranga Tamariki (2022) *Oranga Tamariki Action Plan* (Oranga Tamariki – Ministry for Children, Wellington).

[57] CRC/C/NZL/CO/6, paragraph 43(e).

[58] Memo to (justice.govt.nz)

alleged to have committed an offence shall have their privacy fully respected at all stages of a proceeding.[59]

57. The Law Commission identified that the current practices around the collection of bodily samples, informed consent, and retention of DNA information may be inconsistent with the NZBORA.[60] In respect of children and young people specifically, Mana Mokopuna submits current practices are likely to also be inconsistent with the Children's Convention and the Oranga Tamariki Act 1989. In 2021, the government accepted the Law Commission's finding that the Criminal Investigations (Bodily Samples) Act is no longer fit for purpose and its recommendation to repeal and replace the Act.[61] The work to reform the DNA regime is currently not prioritised, contrary to the guidance issued by the UN Committee regarding the application of the Children's Convention:[62]

> **State parties should enact legislation and ensure practices that safeguard children's rights** from the moment of contact with the [criminal justice] system, including the stopping, warning or arrest stage, while in custody of police or other law enforcement agencies, during transfers to and from police stations, places of detention and courts, and **during questioning, searches and the taking of evidentiary samples**. Records should be kept on the location and condition of the child in all phases and processes.

58. Mana Mokopuna is also concerned the proposed amendment to take bodily samples from 12- and 13-year-olds will result in inequitable treatment of mokopuna Māori, contrary to their right to ngā tikanga katoa rite tahi (equal enjoyment of all rights and privileges for all peoples) under article 3 of Te Tiriti. This legislative amendment also has the potential to conflict with the provision and right to tino rangatiratanga (self-determination and agency) of Māori over the treatment of their taonga, including the treatment of mokopuna and toto (blood) as taonga under article 2 of Te Tiriti.

59. The reason for drawing this conclusion is based on the fact that Māori are around **fives times more likely** to have a DNA sample taken on arrest or intention to charge than a person of European ethnicity.[63] This highlights the inconsistency in discretion exercised when taking bodily samples as part of criminal investigations and the need for respect and fairer treatment of Māori people, and also the taking of their toto (blood) as a taonga and carrier of whakapapa (genealogy).[64]

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[59] United Nations Convention on the Rights of the Child 1990, article 3 and article 40(2)(vii); Oranga Tamariki Act 1989, s 5(1)(b)(i). See also *S and Marper v United Kingdom* [2008] ECHR 1581 (Grand Chamber) at 124; and *R (on the application of RMC) v Metropolitan Police Commissioner* [2012] 4 All ER 510.

[60] Te Aka Matua o te Ture | Law Commission. The Use of DNA in Criminal Investigations, Report | Pūrongo 144, NZLC R144. Refer here: https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/Law%20Commission%20-%20DNA%20in%20Criminal%20Investigations%20-%20Report%20144.pdf (2020).

[61] Microsoft Word - DNA - Executive Summary and Recommendations - FINAL.docx (lawcom.govt.nz) (2020)

[62] Committee on the Rights of the Child General Comment No. 24 (2019) on children's rights in the child justice system UN Doc CRC/C/GC/24 (18 September 2019) at D.41; considered in NZ Police v FG [2020] NZYC 328; NZ Police v LV [2020] NZYC 117; NZ Police v JV [2021] NZYC 248.

[63] taken from pg. 80 of this Law Commission Report

[64] Law Commission Microsoft Word - DNA - FINAL REPORT 144 - FINAL - WEB PUBLISHING.docx (lawcom.govt.nz) at paragraph 10.

60. The Law Commission has called for the incorporation of a framework for Māori to articulate their rights and interests in the DNA regime and to participate in oversight.[65] For in-depth analysis and discussion of how tikanga Māori principles are engaged in the DNA regime, Mana Mokopuna recommends the Justice Committee refers to the Law Commisison's Report: *The Use of DNA in Criminal Investigations | Te Whakamahi i te Ira Tangata i ngā Mātai Taihara*.[66]

61. The compounding effect of potential breaches of all of these rights should be at the forefront of considerations for the Justice Committee when drafting legislative amendments that relate to, and affect, mokopuna.

62. Mana Mokopuna recommends that the Criminal Investigations (Bodily Samples) Act 1995 **is not amended** to allow the taking of bodily samples from 12- and 13-year-olds who are before the Youth Court for the new ram raiding offence.

Mana Mokopuna opposes lowering the minimum age of criminal responsibility and criminalising 12- and 13-year-olds

> It has long been recognised in New Zealand that there is a strong public policy against subjecting children under 14 years old to criminal proceedings".[67]

63. The proposals in the Bill, which would allow 12- and 13-year-olds that have committed a ram raid as first-time offenders to be prosecuted, are in direct contrast to the repeated recommendations from the UN Committee that New Zealand raise the Minimum Age of Criminal Responsibility (MACR) in line with international standards.[68] The international average minimum age of criminal responsibility is 14.[69]

64. We are deeply concerned this bill proposes changes contrary to our international obligations. The inconsistency between the proposed changes and international standards underscores the serious concern of the UN Committee that the administration of child justice in Aotearoa New Zealand is offence-based rather than child-centred.[70]

65. We are also deeply concerned the Bill contradict Te Tiriti and the express concerns the UN Committee has made regarding mokopuna Māori within the child justice system. These concerns include the disparities in the rates of Māori children sentenced and imprisoned, and their survival outcomes in detention. The UN Committee have highlighted an effective action plan aimed to eliminating those disparities must address 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.

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[65] Law Commission Microsoft Word - DNA - FINAL REPORT 144 - FINAL - WEB PUBLISHING.docx (lawcom.govt.nz) at paragraph 12.

[66] At 2.32-2.51.

[67] Memo to (justice.govt.nz)

68 CRC/C/NZL/CO/6. para 42.(a). (2023).

[69] CRC/C/GC/24* para. 21. General comment No. 24 on children's rights in the child justice system (2019).

[70] CRC/C/NZL/CO/6. para 42(a). (2023).

66. Because of disparities in outcomes for Māori children, the proposed lowering of the MACR is likely to have a disproportionate impact on mokopuna Māori. This is also concerning given the earlier observation that the Māori population have a younger age profile through to 2050, which is likely to compound the disproportionate impact for mokopuna Māori.[71] As discussed above, these concerns do not align with the provision of ōritetanga under article 3 of Te Tiriti.

67. Consistent with the UN Committee's recommendations, we advocate for the MACR to be raised to a minimum of 14 years of age. This is the position of previous Children's Commissioners, who have advocated for the MACR to be raised — see here for summary reasons in support of raising the MACR.[72]

68. In addition to the repeated calls by the UN Committee for Aotearoa New Zealand to raise the MACR, the proposed legislative amendments to lower the MACR are inconsistent with established principles in domestic law. The Oranga Tamariki Act 1989 also recognises the vulnerability of young people being investigated by Police in relation to alleged offending and that they should be dealt with in a manner that places paramount consideration to their well-being, best interests and is age-appropriate.[73] We note that the Oranga Tamariki Act also defines children of or over the age of 10 years and under the age of 14 years who have offended as being in "need of care or protection".[74] The amendments proposed by the bill risk creating internal inconsistencies within the Act.

69. There is significant consensus on the evidence of how life-course factors influence youth offending.[75] The most effective strategy for long-term reduction of serious crime rates involves adopting a life-course approach to crime prevention, emphasising developmental interventions targeting individuals up to the age of 25. Proactive measures with children and young adults have demonstrated tangible positive impacts on crime prevention, highlighting the significance of prioritising early stages of development and implementing intergenerational interventions in order to effectively combat the prison pipeline. [76]

70. Mana Mokopuna recommends that, consistent with Aotearoa New Zealand's international obligations under the Children's Convention, the Oranga Tamariki Act 1989 **is not amended** to allow 12- and 13-year-olds to be prosecuted for the new ram raid offence.

[71] Ministry of Justice, 2022. Imprisonment in Aotearoa, Long Term Insights Briefing (Extended Version) at page 107. Retrieved from: https://www.justice.govt.nz/justice-sector-policy/key-initiatives/justice-sector-long-term-insights-briefing/.

[72] www.manamokopuna.org.nz/documents/494/CriminalAgeofResponsibility-OnePager-FINAL.pdf.

[73] Oranga Tamariki Act 1989, s 4A and , s 5(1)(b)(v), s 11(2)(a) and (f), and s 218.

[74] Oranga Tamariki Act 1989, s 14(1)(e).

[75] [1] Preventing-the-prison-pipeline-Professor-Ian-Lambie-report.pdf (justice.govt.nz)

[76] Ian Lambie How we fail children; The prison pipeline: Why early intervention is the best solution; It's never too early, never too late: A discussion paper on preventing youth offending in New Zealand

Will introducing livestreaming of offending as an aggravating factor help reduce youth-dominated offending?

71. Under the Bill, there are three sentencing-related amendments which would introduce aggravating factors in the Youth Court and the District Court.

72. These amendments include the introduction of live streaming, posting or distributing a copy of a live streaming of offending as an aggravating factor for consideration at sentencing of young people under the Oranga Tamariki Act 1989 and at sentencing of an adult under the Sentencing Act 2002. Additionally, the Bill proposed to amend the Sentencing Act to introduce a general aggravating factor requiring a Judge to take into account whether an adult has aided, abetted, incited, counselled or procured a child to commit an offence. This is aimed at deterring adults from exploiting children and young people and leading them into a life of crime.

73. We are concerned at the potential for the proposed amendment to further criminalise young people, especially care experienced young people aged between 18 and 25 who fall outside of the youth justice system, by leading to longer, harsher sentences including the potential for increased numbers of mokopuna being detained. We note that in its advice to the Attorney-General, the Office of Legal Counsel observed that amendments under the Bill may limit the presumption of innocence.[77]

74. Attorney-General Parker also raised concerns that the Bill, as currently drafted, is inconsistent with the right to freedom of expression under s 14 of the NZBORA. We agree and believe the proposed amendment will limit children and young people's right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

75. The departmental disclosure statement on the Bill also draws attention to the State's other international commitments under the United Nations Declaration on the Rights of Indigenous People (UNDRIP) and the United Nations Convention on the Rights of People with Disabilities (UNCRPD). Criminalising ram raiding may raise issues regarding the State's alignment with these instruments, particularly as they are likely to disproportionately affect mokopuna Māori and disabled children and young people.

76. 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.[78]

[77] Memo to (justice.govt.nz)

[78] CRC/C/GC/25,

77. Mana Mokopuna recommends:

    a. The Oranga Tamariki Act 1989 is **not amended** to add a factor to be considered by the Youth Court where a young person is being sentenced for offending, if the young person livestreamed the offeding, posted a copy of the livestreaming online, or distruibuted a copy of the livestreaming by means of digital communication.

    b. **Further careful consideration** is given to the proposed amendments to add aggravating sentencing factors under the Sentencing Act 2002, especially as the factors will apply to all offending and not just ram raid offending. We also ask that the Committee give particular consideration to the potential implications for care-experienced people aged up to 25, including by seeking their views on the proposed amendments.

Conclusion

78. To conclude, Mana Mokopuna does not support the overall changes proposed in the Bill. We believe the amendments proposed in the Bill are punitive responses to offending by mokopuna and will be ineffective in addressing offending.

79. Instead we highlight alternatives, which with investment and commitment will effectively respond to mokopuna who offend. That is, restorative, holistic, and preventative solutions which focus on the long term and advance the rights, interests and well-being of mokopuna.[79] For example:
    - Kotahi te Whakaaro - the South Auckland multi-agency service which provides full wrap around care for young offenders and their whanau[80]
    - Oranga Tamariki's strategic partnership with Te Rūnanga-ā-iwi-o-Ngāpuhi, which has led to he development of the youth remand service, Mahuru[81]
    - Te Kooti Rangatahi
    - Pasifika Courts[82]

80. Lastly, we reiterate, the importance of committing to the rights, interests, and well-being of mokopuna puts them on the right track, setting all mokopuna up to live their best lives; 'kia kuru pounamu te rongo'.

81. We thank the Committee for this submission and advise that we would like to make an oral submission on the Bill.

82. We also urge the Committee to seek out the views of mokopuna on the proposed changes in the Bill, especially those most impacted. We are available to provide advice on this.

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[79] Lambie, *How we fail children; The prison pipeline: Why early intervention is the best solution; It's never too early, never too late: A discussion paper on preventing youth offending in New Zealand*.

[80] Government Action on Youth Crime making a difference | Beehive.govt.nz

[81] Oranga Tamariki (21 July 2021) "Strategic partnership with Te Rūnanga-ā-iwi-o-Ngāpuhi" (Oranga Tamariki, Wellington).

[82] For example, see Ministry of Social Development (1988) *Puao-te-Ata-tu* (Ministry of Social Development, Wellington); and Waitangi Tribunal (2017) *Tū Mai te Rangi! Report on the Crown and Disproportionate Offending Rates* (Waitangi Tribunal, Wellington).

MANA MOKOPUNA

Children & Young People's Commission