

7 March 2018

Attorney-General

**Re: Oranga Tamariki Legislation Bill 2019 (PCO 21107/4.0)**

**Our Ref: ATT395 / 290**

1. We have reviewed the Oranga Tamariki Legislation Bill 2019 and found it to be consistent with the New Zealand Bill of Rights Act 1990.

### **The Bill**

2. The purpose of the Bill is to enact consequential amendments to a range of statutes to give full effect to the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017, which modernised the legislation dealing with children and young persons who are in need of care and protection or who commit offences, now called the Oranga Tamariki Act 1989. Significantly, the Act extended the definition of young person to include 17 year olds, which required amendment to a number of enactments which make up the criminal justice system including the Criminal Procedure Act 2011, the Bail Act 2000 and the Criminal Investigations (Bodily Samples) Act 1995.
3. The Bill also corrects what are described in the explanatory note as drafting errors in the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017. A part of the Act not yet in force gave Family Courts the power to make various interim orders in respect of children or young persons in need of care and protection of its own motion, even where there were no other proceedings in respect of that child or young person. This Bill will make clear there was no intention to give the Court a power to make orders without a properly constituted proceeding being on foot. The proposed correction of this drafting error does not raise any inconsistency with the Bill of Rights Act.

### **The right to be free from discrimination is limited but not infringed by this Bill**

4. Any legislation prescribing age-limits invites consideration of s 19 of the Bill of Rights Act, which guarantees the right to be free from discrimination on any of the prohibited grounds of discrimination in the Human Rights Act 1993, one of which is age.
5. The test for discrimination in the present context is whether the Bill causes differential treatment on the basis of age between persons in comparable situations, causing a material disadvantage to one of those persons. An offender who is under 18 years of age will get the benefit of access to a less punitive and more therapeutic criminal justice regime. An offender who is otherwise comparable but over 18 is

excluded from that regime and that is a material disadvantage. Section 19 will not be infringed if the discrimination is demonstrably justified in a free and democratic society. Any civilised society that is free and democratic will recognise that young persons who offend require different treatment to adults, and any such regime must define what a young person is for this purpose. Parliament must be free to prescribe whether that threshold should be 17 or 18 years of age for the purpose of administering criminal justice. Section 19 is not infringed by this Bill.

### **Other guaranteed rights**

6. Maintaining a separate and effective criminal justice system for young persons will necessarily involve giving powers to the Court that will limit protected rights. For example the Court will need powers to make orders suppressing their name and the details of the offending (limiting s 14 - freedom of expression), authorising their detention in custody (potentially limiting s 22 – freedom from arbitrary detention) or imposing conditions on their release (limiting s 17 – freedom of association and s 18 - freedom of movement). These powers are discretionary and are conferred on courts which are themselves required to act consistently with the Bill of Rights Act when making those orders. This Bill will modify some of these powers to accommodate the change to the definition of young person but not alter the balance in such a way as to require reconsideration of their consistency with the Bill of Rights Act.
7. Altering the definition of young person for criminal justice purposes requires transitional provisions to accommodate those who are already subject to proceedings when the Bill becomes law. These changes are all procedural in nature and do not affect the penalties for any of the offences they might be charged with so s 25(g) – the right to the benefit of the lesser penalty where the penalty has changed between commission of the offence and sentencing – is not engaged by the transitional provisions.
8. This advice has been peer reviewed by Alison Todd (Crown Counsel).

**Noted**

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Austin Powell  
Senior Crown Counsel

Hon David Parker  
**Attorney-General**  
/ /2019