

Submission to the Finance and Expenditure Select Committee: Inquiry into the operation of the COVID-19 Public Health Response Act 2020

1. The Children's Commissioner has a statutory role to uphold the rights of all children and young people up to the age of 18 in Aotearoa New Zealand. This submission provides an important child-centred perspective on the COVID-19 Public Health Response Act 2020 (the Act). A Child Impact Assessment process may not have been completed because of the swift passage of the Act. We have identified some risks to children and young people and their rights.

Public health requirements must recognise the rights and needs of children and young people

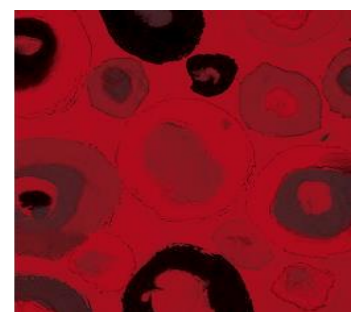
2. Specific rights that children and young people have are outlined in the United Nations Convention on the Rights of the Child (Children's Convention). Article 3 states that "*in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*".¹
3. Children and young people are not held to the same standards of legal liability as adults because they are still growing and developing the skills needed to take responsibility for their actions. In addition, the adolescent brain is biologically 're-wiring' in a way that makes young people take on challenges, try new things, test boundaries and sometimes break rules. Principles under section 208 of the Oranga Tamariki Act 1989 include that "*the vulnerability of children and young persons entitles a child or young person to special protection*".²
4. It is not appropriate to apply identical sanctions to children and young people as adults, for breaking the rules of the COVID-19 Public Health Response (Alert Level 2) Order 2020. In particular it does not align with the principles of our youth justice system or child rights more generally.
5. It is important that the Act be enforced in ways that are both appropriate for children and young people and uphold their rights. We recommend a change be made to prevent COVID-19 infringement notices being given to children and young people to reflect their rights in the Children's Convention, the Treaty of Waitangi and the Oranga Tamariki Act 1989.

Infringement notices should not be issued to children and young people under 18

6. The Act was passed to support public health measures during a pandemic and provide for their enforcement. One measure of enforcement is an infringement notice that requires payment of a fine of \$300 if someone is found to be breaking the public health rules. This is not appropriate for children under working age without access to their own money, nor is it appropriate to expect their families to cover this large fine.

¹ <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx> Art 3(1).

² <http://www.legislation.govt.nz/act/public/1989/0024/latest/DLM152193.html>



The OCC represents **1.1 million** people in Aotearoa New Zealand under the age of 18, who make up 23 per cent of the total population.

We advocate for their interests, ensure their rights are upheld, and help them have a say on issues that affect them.

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7. We recommend that infringement notices not be issued to children and young people. Instead the Police's 'engage, encourage, educate' approach is more appropriate and, if it is a more serious breach, a referral should be made to Youth Aid officers who have expertise in dealing with young people and their families.
8. We know that children and young people (especially in groups) become highly visible in society, and simple acts of gathering together and sharing friendship can often be misconstrued by Police and other community members. Young people are vulnerable to being targeted through enforcement.
9. Young people may end up being targeted by this increase of Police power to issue COVID-19 infringements. This will have a disproportionately negative impact on Māori children and young people. Recent research (published this year) shows that Māori who come into contact with the police for the first time are 1.8 times at risk of a Police proceeding and seven times more likely to be charged by Police, than Europeans.³
10. Māori have a right to equity under the law and its outcomes, under Article 3 of the Treaty of Waitangi. Recent guidance about working with Māori has been issued by Te Arawhiti, the Office of Māori Crown Relations. Given the significance of the powers that are issued under this Act and their possible implications, it may be appropriate to seek guidance from Māori and Te Arawhiti about the level of engagement that should be expected in the establishment of this Act.

Infringement notices should be dealt with in the youth justice system

11. If, contrary to our advice above, infringement notices are to remain a possibility for children and young people after this review of the Act, then they should be an absolute last resort following a Police Youth Aid process.
12. As in so many areas, the response required for Covid-19 has shone a light on parts of our systems that could work better. The infringement notice procedure is one such example. It is flawed in its application to children and young people.
13. We have long advocated for other infringement notices never to apply to those under 18, or else for them to be dealt with in the Youth Court for the reasons outlined above. Currently, any dispute with an infringement notice must go to a District Court, even if the notice was given to a child or young person under 18. For all other offences, except murder, children and young people would have access to the youth justice process, including specialist Youth Aid Officers - and the Youth Court if the case progressed that far, including youth advocates.
14. Infringements should not be excluded from the jurisdiction of the Youth Court. There is no reason in principle or logic that this should be the case.
15. We think 'consistency' with other areas where infringement notices are used, such as existing alcohol and psychoactive substance infringements, is a poor reason for a bad law. We recommend policy work is undertaken to fix this problem as infringement notices can result in inappropriate and harmful outcomes for children and young people.
16. Non-payment of the fine also results in automatic enforcement in the adult courts, which can have disproportionately negative effects on children and their families/whānau, and can result in significant inequities.

³ JustSpeak (2020) *IDI Research - A Justice System For Everyone*. Available at: <https://www.justspeak.org.nz/ourwork/justspeak-idi-research-a-justice-system-for-everyone>.

Entry to premises without a warrant may cause harm to children

17. Search and surveillance laws that enable unexpected home entry – including without warrants – can be detrimental to children. Witnessing entry by Police and potential violent responses can be traumatic for children, and this potential harm needs to be balanced against any potential benefits that public health measures are trying to achieve.
18. This Act has extended the bar to enabling search and surveillance without warrant, and its implementation needs to be done with utmost care to reduce risks to children and young people. We recommend that a child impact assessment⁴ is carried out and the findings reflected in the Act.

Recommendations

1. Design and implement the Act in ways that uphold children and young people's rights.
2. Prevent infringement notices being given to children and young people under 18.
3. Reform the current infringement notice system so that it is integrated into, and enforced within, the youth justice system.
4. Do child impact assessment processes on all Bills that are considered by Select Committees.

⁴ Officials can use the government's child impact assessment tool: <https://www.msd.govt.nz/about-msd-and-our-work/publications-resources/resources/child-impact-assessment.html>