

**Residential Care and Other Matters Bill – Remand**

**Issues Paper #1**

**Review of provisions in the Oranga Tamariki Act for the remand of a Young Person by the Youth Court**

***Overview***

Current options for remanding a child or young person (YP) at section 238(1)(a)-(d) of the Oranga Tamariki Act (the Act) became law in 1989 and for all substantive purposes have been unchanged since then.<sup>1</sup> Recent and ongoing changes to the way Oranga Tamariki delivers remand services, our greater understanding of the needs of the remand cohort, and the introduction of new purposes and principles in the Act in 2019, mean that, as a unit, the options for remanding a child or young person under section 238 of the Act are no longer fit for purpose and are in need of review and reform.

Children and young people (YPs) appearing before the Youth Court will be subject to one of the remand options set out in section 238 of the Act when they are awaiting their hearing or sentencing. There are six options<sup>2</sup> available to the Youth Court. This paper focuses on four of the current options and excludes Court-ordered Police custody and transfer to youth units of a prison. Those issues are dealt with in a separate paper.

***Current Options***

Release (s.238(1)(a)): Release places no obligations on the child or YP or anyone else. It is used less than 10% of the time. Typically, this will reflect the minor nature of the alleged offending or the nature of the offender and their plea. This option represents the least restrictive option possible, enabling YP to remain in the community in appropriate circumstances. In light of the purposes and principles of the Act and guiding international protocols, change to this provision is unlikely.

Release on bail (s.238(1)(b)): Bail enables the court to either place limitations on the YP's freedom or place requirements on the YP to do some specific thing. Bail conditions can and are sometimes used to require a YP to reside with some person other than their usual caregivers. Bail (as with all the current options) cannot be imposed concurrently with any other option or options. Bail is imposed more than 70% of the time.

Delivered into custody of usual caregivers or some other person approved by the Chief Executive (s.238(1)(c)): This option is used less than 2% of the time. There are fundamental uncertainties about the status of the YP under this order and what powers and responsibilities are imposed on any person, agency or the YP.

Detention in the custody of the CE or other agency (s.238(1)(d)): Historically, these orders are made in favour of the CE almost exclusively. The CE is empowered to place a YP in a secure residence or, so long as the minimum threshold for detention can be achieved, in a community placement. Detention in a secure residence is, in practical terms, similar to imprisonment insofar as the young person is restrained

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<sup>1</sup> Amendments have been made to some of the details, but not to the substance.

<sup>2</sup> Release, bail, custody of parents or others, detention in the CE's custody, police custody, transfer to a youth unit of a prison.

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by locked doors and fences from leaving the residence. This order is applied to over 20% of YP appearing before the court.<sup>3</sup>

YP entering a youth justice residence or community-based remand home will either be subject to an order for detention under section 238(1)(d) or the Police will have arrested the child or young person and placed them in the custody of the CE under section 235 of the Act. Section 235(3) of the Act provides authority for the CE to detain a young person in these circumstances in a residence.<sup>4</sup>

### *Other Relevant Provisions*

Principles and purposes of the Act: the starting point for a Court or person exercising powers under the Act in relation to youth justice matters is Part 4, and principles contained at sections 4A, 5 and 208. Section 4A(2) contains four primary considerations in relation to the administration or applications of Parts 4 (Youth justice) and 5 (Provisions relating to procedure in Youth Court) and sections 351-360 (Appeals from decisions of Youth Court) of the Act:

- The well-being and best interests of the child or young person
- The public interest (which includes public safety)
- The interests of any victim
- The accountability of the child or young person for their behaviour.

Other particularly relevant purposes and principles at section 4 and 5 include:

- Recognising the mana tamaiti and having regard to the whakapapa of Māori children and young people and the whanaungatanga responsibilities of their whānau, hapū and iwi
- Acknowledging that the primary responsibility for caring for, and nurturing the well-being and development of the child or young person lies with their whānau, hapū and family group
- Assisting families, whānau, hapū and iwi at the earliest opportunity to prevent their children and young people from suffering harm, offending and re-offending
- Advancing the long-term outcomes for children and young people.

And at section 208(2):

- Any measures for dealing with offending by YP should be designed to strengthen the family, whānau, hapu, iwi, and family group of the YP concerned, and foster the ability of families, whānau, hapu, iwi, and family groups to develop their own means of dealing with offending by their YPs.
- A YP who commits an offence or is alleged to have committed an offence should be kept in the community so far as that is practicable and consonant with the need to ensure the safety of the public.

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<sup>3</sup> Section 239(1) sets the criteria for making an order under s.238(1)(d): the Court must be satisfied that the YP is likely to abscond, commit further offences or, that detention is necessary to prevent the YP from interfering with the investigation into the offending.

<sup>4</sup> There are also requirements in section 265(3) in relation to placement of a child in a youth justice residence that apply generally, and not just to those being placed following arrest.

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Residential Care framework: Oranga Tamariki operates five Youth Justice residences established under section 364 of the Act for the purpose of providing care and control of YP who are in the care and custody of the chief executive under the youth justice provisions of the Act, who have been remanded in the custody of the chief executive under section 173 or 175 of the Criminal Procedure Act (which can include 18 and 19 year olds) and children and young persons serving a sentence of imprisonment in an Oranga Tamariki residence under section 34A of the Corrections Act. Residences established under section 364 are the only environments regulated by the Oranga Tamariki (Residential Care) Regulations 1996 (Residential Care Regulations) which provide children and young persons with certain rights and which confers powers and responsibilities on staff in those residence environments.

Bail Act 2000: Part 3 (Court bail) of that Act (with some exceptions) applies to bail decisions made by the Youth Court. This part of that Act sets out the relevant factors decision-makers must weigh before granting bail and the conditions that may be attached to a bail order. Conditions may include electronic monitoring, curfews, and requirements to report to Police periodically throughout the bail period.

Section 24 of the New Zealand Bill of Rights Act 1990 states that everyone who is charged with an offence shall be released on reasonable terms and conditions unless there is just cause for continued detention.

### *International Guidance:*

Article 37(c) of the The United Nations Convention on the Rights of the Child (UNCROC) states that a person under the age of 18 shall be detained or imprisoned only as a measure of last resort and for the shortest appropriate period of time possible.

Article 40.1 requires governments to treat persons under the age of 18 who are alleged to have infringed the criminal law in a manner which takes into account their age and the desirability of their reintegration into society.

UN Committee on the Rights of the Child – General comment No. 24 (2019) on children’s rights in the youth justice system noted that YP with developmental delays or neurodevelopmental disorders or disabilities i.e. autism spectrum disorders, fetal alcohol, or acquired brain injuries should not be in the child justice system at all and YP should be individually assessed, if not automatically excluded.

The UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) 1985 state that detention pending trial shall only be used as a measure of last resort and for the shortest period of time possible. The commentary to this section of the Rules explains that: “the danger to juveniles of ‘criminal contamination’ while in detention pending trial must not be underestimated.”

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## ***Draft Objectives***

- There is a full suite of remand options (pending sentence) available to the Youth Court that enable a YP charged with an offence to be placed in the least restrictive environment for the shortest necessary time possible to address their risk to the public, victims, proceedings and investigations.
- There are appropriate and proportionate powers and safeguards for restricting the liberty of young people in community-based placements, when they pose a risk to the public, victims, proceedings and investigations.
- The remand framework supports the future operating model and working in partnership with iwi and mana whenua.
- Oranga Tamariki upholds its obligations and aspirations under section 7AA of the Act and Te Tiriti o Waitangi.
- YP can remain with their family, whānau, hapu or iwi on remand wherever possible.

*The review of these provisions and supporting provisions (eg, the YJ principles) aims to:*

- provide remand options that ensure that the detention of YPs, placement away from their parents, whanau, hapu and iwi, and any other limitation on their freedom and rights is in their best interests and is the minimum necessary to protect the interest of the public and victims of the alleged offending
- regardless of the remand option chosen by the Court, but with particular focus on remand orders that require YPs to be detained or live away from their family, whanau, hapu or iwi, ensure the length of remand in that environment is the minimum necessary to respond to the alleged offending and ensure the interests of the public, victims, proceedings and investigations.
- clarify and enhance the powers and responsibilities that are attached to each option and how options might be used concurrently thereby providing more effective options short of detention in custody
- enable Youth Court remand to be an opportunity to respond to the challenges facing the young person and their family, whanau, hapu, and iwi, especially when the young person is remanded elsewhere, acknowledging that extending remand times for these purposes is highly unsatisfactory.

This approach reflects the government's commitment to a more effective justice system, the obligation to provide a practical commitment to the principles of the Treaty of Waitangi (s.7AA) and the balance of interests in s.4A of the Act.

## ***Minimising the use of custodial remand***

### *Impact on young people*

YP on remand are presenting with multiple and complex needs including high rates of FASD, ADHD and intellectual disability, relative to the general population. Many YP enter the justice system having experienced significant trauma, family breakdown and neglect. For these YP, their ability to make responsible choices, or to navigate the justice system once involved, is often unavoidably much more difficult.

The harm caused to YP by custodial remand, and the impact this has on their prospects to successfully reintegrate into the community is significant and often re-traumatising. Custodial remand is also known to increase the likelihood that a YP will encounter the youth and adult criminal justice system in the future.

### *Detention in community-based remand homes*

Detention in a community-based remand home is given effect through close supervision, in a manner that the young person understands they are not free to leave. However, doors are not locked, and staff have limited powers to prevent YPs from absconding.

If a YP held in detention under s.238(1)(d) leaves a community-based remand home without authority, they may be charged with escaping from lawful custody under s.120 of the Crimes Act 1989. Since 2015, approximately 700 such charges have been filed by Police against YP.

### *Bail breaches are driving high rates of custodial remand*

Having a youth justice history of multiple bail breaches, absconding and re-offending contribute to stricter remand decisions. In 2020, there were 794 bail breaches. We have heard that:

- Bail conditions can be unrealistic having regard to the capability of the YP to adhere to those conditions
- Prolonged bail periods increase the likelihood that a young person will breach bail
- Bail periods are likely to be more successful when whānau are supported to help their YP through the bail stage.

### ***Minimising time on custodial remand***

#### *Custodial remand times are too long*

Young people ordered to be in detention or away from their family are spending longer times in custodial remand than was anticipated by the 1989 legislation. This is likely to be the product of a better understanding of the chronic nature of the needs presenting in the remand cohort and because of a lack of suitable alternative placements in the community.

An Evidence Centre study in 2018 observed that custodial detention is sometimes used as a short-term solution while suitable whānau placement options are investigated to assist bail applications. In cases where there is no suitable placement option, YP are remanded in custodial detention for longer periods.

We have heard that the remand process has potentially become the opportunity for the youth justice system to attempt to respond to complex and deep-seated issues that are likely to present in YP who cannot remain at home or with family on remand. Sometimes, unnecessarily lengthy remands in detention occur because the broader system provides no other means of addressing deep-seated issues in the life of the YP and it is perceived that there are no other viable solutions available.

An example of the correlation between need and extended remand times is when a YP opts to undertake assessments to establish their fitness to plead (FTP) in proceedings under s.333 of the Act and s.38 Criminal Procedure (Mentally impaired Persons) Act 2003. Determining FTP requires at least one independent psychological evaluation of the YP. This has been known to extend remand times by several months.

In the absence of any other response being available, this extended use of remand time is understandable; for the reasons noted on the previous page it is also inherently negative for both the young person and others.

#### *Lack of available placement options*

Young people may be remanded in youth justice residences or otherwise detained in the custody of the chief executive of Oranga Tamariki due to lack of alternative options. Such constraints include lack of options with whānau and community providers, insufficient staff numbers with high caseloads and limited funding for support services i.e. Supported Bail.

This impacts both the number of YP in detention and the length of time in detention.

### ***Enlarging the suite of remand options***

Current remand options are not providing the flexibility to place YP in the least restrictive environment that addresses their risk factors. The under-utilisation of s.238(1)(c) is particularly problematic. This is in part due to uncertainties around the powers and responsibilities of any person, agencies or YP, and because the order cannot be attached with any conditions, meaning Courts will be less assured that the YP will appear before the Court to face charges.

The only practicable mechanisms by which a YP can be temporarily placed (either with whanau or elsewhere) is through bail conditions or by the making of a detention order. As noted above, those options have negative and avoidable impacts on YPs.

We intend to explore the potential benefits of offering the Youth Court additional orders that, for example, might enable the placement of young people in the care or custody (as opposed to being detained in the custody) of the Chief Executive and/or partner organisations or iwi.

***Better opportunities to meet chronic and complex needs***

*Historic challenges*

The Act envisaged the care and protection system being an active participant where necessary for young people appearing before the Youth Court. It allowed Youth Justice FGCs to concurrently consider care or protection issues and empowered Youth Court Judges to refer a YP to a Care and Protection Co-ordinator to consider whether a CP FGC should be held for that young person.

Oranga Tamariki has experienced unprecedented rises in care and protection notifications for children up to the age of 13. For decades, the care and protection system has focussed its finite resources on children at critical risk. This is understandable.

However, this means that the care, protection and wellbeing needs of young people, especially those who appear before the Youth Court, are often unaddressed, or, if they are addressed, it is through prolonging the young person's youth justice experience. This is sub-optimal.

The government's commitment to empower communities and iwi to respond to the wellbeing and the needs of their young people and children is a significant change in the sector. As such, the review of remand offers an opportunity to consider how iwi and communities can be engaged in the support of their people at the earliest opportunity, and where necessary through and beyond the youth justice process. The historic challenges in responding effectively to the needs of this group of young people would suggest that some legislative sign-posting or obligation would be beneficial.