Note - the analysis in the regulatory impact statement differs to the proposals in the final Cabinet paper due to further Ministerial consideration

Appendix Six: Regulatory Impact Statement

Young serious offender declaration and military-style academies

Coversheet

Purpose of Document	
Decision sought:	*To amend legislation to establish a Youth Serious Offender (YSO) declaration, and to establish future legislative settings for Military-Style Academies (MSAs)*
Advising agencies:	*Oranga Tamariki–Ministry for Children*
Proposing Ministers:	*Minister for Children*
Date finalised:	*1 May 2024*

Problem Definition

The youth justice system is working for most children and young people with offending behaviour. However, existing responses have not been sufficient for the small cohort of children and young people with serious and persistent offending behaviour who commit a large portion of the total serious offences and continue to reoffend despite interventions. As a result, the Government sought the creation of a new legislative Young Serious Offender (YSO) declaration regime, which includes a new Youth Court order directing a YSO to attend a military-style academy (MSA).

Executive Summary

As part of its 100 day plan, the Government committed to begin work exploring options to crack down on serious youth offending by establishing a Young Serious Offender category, and Young Offender Military Academies.

In December 2023, officials provided initial advice to the Minister for Children on options for developing a YSO declaration and MSA order. In that advice, officials recommended that if the Government were to progress with such proposals, then it should introduce:

- an operational definition of a YSO category
- an MSA as a programme that would be required to be completed as part of as part of the existing Supervision with Activity order.

In January 2024, the Minister for Children, in conjunction with the Ministers of Justice and Police (supported by the Ministers of Defence and Corrections), took initial decisions:

- to establish a legislative YSO declaration
- to establish a legislative MSA order that would be available as an additional sentencing option to the Youth Court following a young person being declared a YSO
- that the MSA would have a residential component (that is, it would not be delivered fully in the community)

- that the MSA would be a standalone order (that is, not delivered as part of an existing order, such as a Supervision with Residence order or a Supervision with Activity order).

Ministers also decided that legislative amendments to implement these decisions would be passed during 2024 (pending Parliamentary processes). Ministers also instructed officials to develop in the interim an operational pilot of the MSA, within current legislative parameters.

This document sets out the analysis undertaken to the possible parameters for a YSO declaration and its associated MSA order. The analysis in this document has been written by Oranga Tamariki, alongside the Ministry of Justice who wrote the responses section (paras 135-187), with support from other agencies, in particular New Zealand Police.

The analysis identifies officials' (Oranga Tamariki and Ministry of Justice unless otherwise specified) preferred design option, and indicates where this advice differs from decisions taken by Ministers. The Cabinet paper reflects the approach preferred by Ministers.

Limitations and Constraints on Analysis

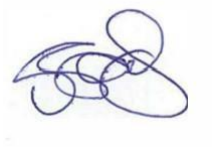
The analysis in this document has been limited by:

- **constrained timeframe:** The 100-day plan committed to "begin work to crack down on serious youth offending". While the YSO declaration and MSA orders were not fully developed within the 100-day plan timeframe, they were heavily influenced by that timeframe, and the direction for legislation to be designed, introduced and enacted before the end of 2024. This means that the policy was developed at pace with the scope heavily influenced by Ministers, and those constraints limited the options that officials were able to consider. This means that in some areas, alternative options were not considered. While we have not had time to draw deeply on other countries' experiences with similar regimes, we have looked at experiences of Australian states, as well as drawing from research on MSAs, including prior experience within New Zealand.

- **narrow scope:** option development was heavily influenced by Ministerial directions, statements and manifesto commitments, which all provided the framework for the design process for YSOs and MSA orders. Ministerial decisions in January 2024 also meant that non-legislative options for developing a YSO declaration regime were removed from consideration, as were other options such as operating a MSA programme as part of an existing Youth Court order. Design parameters were therefore limited. Officials have sought to develop a balanced design where possible for the YSO declaration regime, which includes providing the Youth Court with the ability to order a YSO to attend a MSA.

- **limited consultation:** timeframes did not allow for consultation beyond Government agencies involved in implementing proposals. These included New Zealand Police, Crown Law, New Zealand Defence Force, and the Department of Corrections. There was limited consultation with the Youth Court Judiciary as to the workability of proposals, and officials obtained information and experiences from three Australian states that have similar regimes to YSO declarations. There has been no engagement with young people and their families, who would be most affected by the proposals. In particular, there was no engagement with rangatahi and whānau Māori, or with strategic iwi Māori partners of Oranga Tamariki to understand the impacts on Māori and to identify mitigations. There has also been no consultation with other impacted populations, or

engagement with victims. The Select Committee process will provide an opportunity for input by members of the public.

Responsible Manager(s) (completed by relevant manager)
Phil Grady Deputy Chief Executive, System Leadership Oranga Tamariki  1 May 2024

Quality Assurance (completed by QA panel)	
Reviewing Agency:	A Quality Assurance Panel that included members from Oranga Tamariki and the Ministry of Justice
Panel Assessment & Comment:	The panel reviewed the attached RIS and concluded that the RIS partially meets the quality assurance criteria. The panel considers that the assessment is generally complete and convincing, but lacks sufficient consultation with stakeholders to test the accuracy of the analysis and does not fully address material issues of implementation, including more accurate financial costs. The panel considers that the analysis of high level options on whether to introduce a young serious offender declaration regime (Section 2.1) otherwise meets the quality assurance criteria, but considers that the analysis of design parameters for the YSO regime and associated military style academy order (Section 2.2), while providing comprehensive analysis of the issues, is not sufficiently clear and concise to meet the standard

Contents

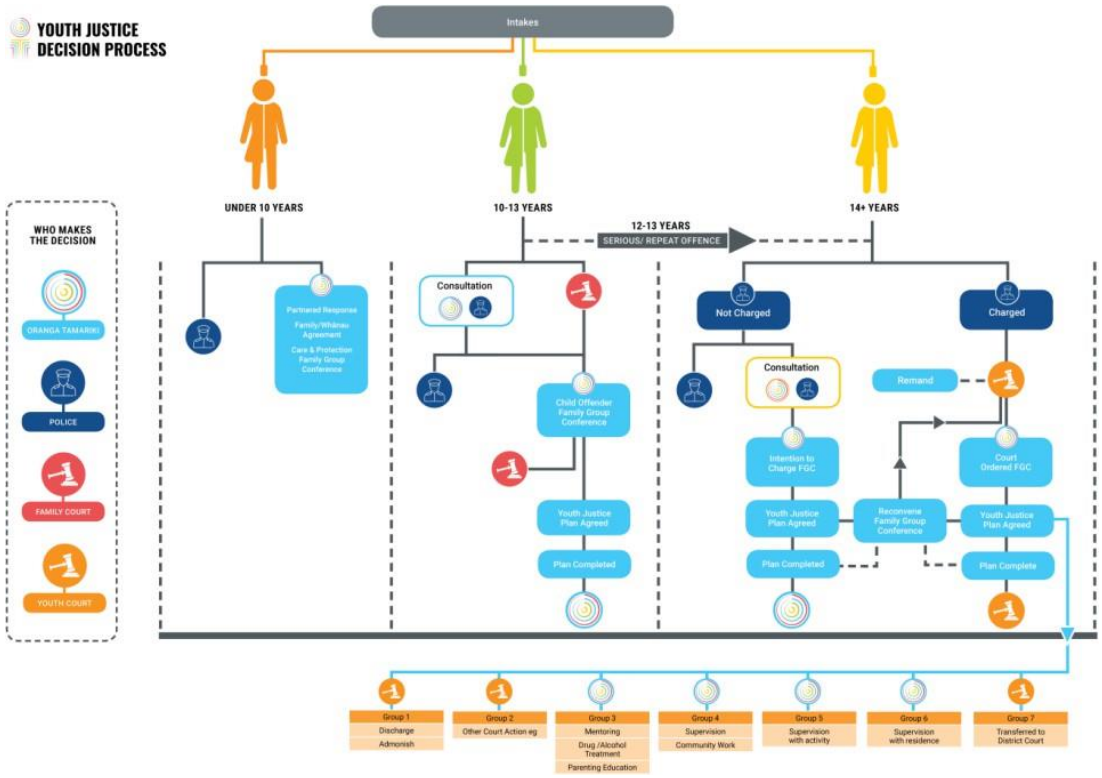
Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

New Zealand has a specialist youth justice system

1. New Zealand has a specialist youth justice system designed to respond to offending by children aged 10-13 and young people aged 14-17 at the time of the alleged offending.[1] Where offending by 10-13 year olds is serious or persistent enough to raise concern for the child's welfare, but not serious enough to meet the threshold for charges to be filed, it is dealt with in the Family Court as a care and protection issue (under section 14(1)(e)).

2. The following diagram sets out the Youth Justice decision process:



3. The youth justice system is designed to take into account the particular needs and rights of children and young people, while still providing public protection and reducing public harm caused by youth offending. When exercising powers under the youth justice provisions of the Oranga Tamariki Act 1989, the Youth Court and others (including New Zealand Police and Oranga Tamariki) must weigh up the following four primary considerations (see section 4A(2):

- the wellbeing and best interests of the child or young person
- the public interest (which includes public safety)

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1 Noting that children aged 10 and 11 can only be charged with murder / manslaughter and those charges will be transferred to High Court following pre-trial appearances in the Youth Court.

- the interests of any victim
- the accountability of the child or young person for their behaviour.

4. Regard must also be given to the principles set out in sections 5 and 208 of the Oranga Tamariki Act 1989. The youth justice principles guide decision-makers (including the Youth Court) when exercising powers:
   - take the least restrictive form of action that is appropriate in the circumstances
   - seek alternatives to prosecution
   - deal with a matter in the community where possible
   - empower the family / whānau and community to respond to offending behaviour
   - have proper regard to the interests of any victims of the offending.

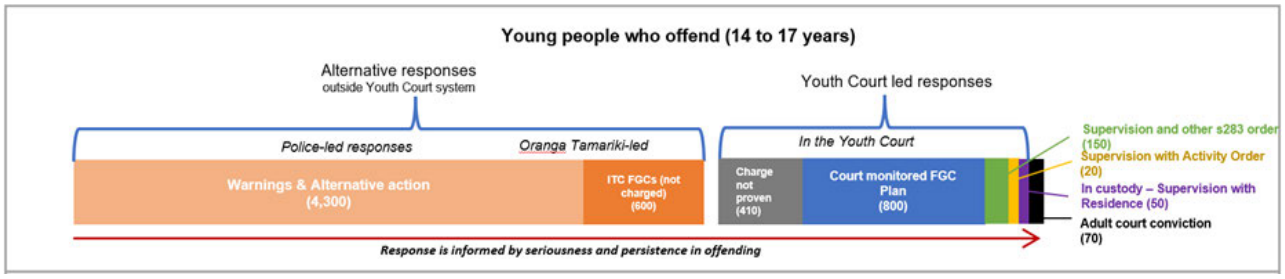
5. Children and young people are recognised as having particular rights due to their vulnerability. The New Zealand Bill of Rights Act 1990 (NZBORA) protects the right of children and young people charged with an offence to be treated in a manner that takes account of their age during criminal proceedings (section 25(i)). New Zealand is also a signatory to the United Nations Convention on the Rights of the Child (UNCROC), which provides special protections for children and young people, including in relation to arrest, detention, and imprisonment.

Existing youth justice interventions

6. Most children and young people in New Zealand do not offend. For those that do, the youth justice system provides a range of 'tiered' interventions. New Zealand Police use discretion to determine what response is most appropriate in the circumstances while the judiciary has discretion in determining the most appropriate response at disposition.

7. The majority of young people who offend receive a warning by New Zealand Police or undertake alternative action.[2] If offending is more serious, or if there is a pattern of offending, the issue may be escalated to the Youth Court or Family Court depending on the age of the offender, and the seriousness of the offending.

8. The Youth Court responds to the most serious and persistent offending behaviour. The graphic below shows 'escalating' youth justice interventions for young people and the proportion subject to each response in 2022/23.



2 Alternative action is action taken by New Zealand Police that responds to offending, but keeps the child or young person out of the formal youth justice system. Alternative action can include home visits from a police youth aid officer, written or face-to-face apologies, reparation and projects. The actions taken by the New Zealand police will depend on the seriousness of the offence, offending history, and number and type of offences.

9. There is good evidence of what works to address serious offending by children and young people. This includes focusing on training for parents, helping children and young people manage and change their behaviour and supporting families with evidence-based services, including those aimed at addressing the underlying causes of offending.

Children and young people who offend are likely to face and experience a broad range of issues

10. The behaviour of children and young people is influenced by their developmental needs, and life experiences. Adolescent development is characterised by heightened peer influence, impulsive risk-taking, lack of self-regulation, lack of awareness of the consequences of one's actions and social immaturity.[3] These factors affect the ability of children and young people to make sensible decisions, particularly in the heat of the moment.

11. In addition, children and young people who offend often come from highly disadvantaged backgrounds. They – and their families / whānau – are normally known to government agencies prior to the alleged offending. Research suggests that more than 80 percent have experienced family harm.[4]

12. Research[5] also suggests that children and young people in youth justice residences are more likely to have:

- a confirmed or suspected mental health or disability-related diagnosis
- self-harmed or attempted to end their life
- learning difficulties
- experience of physical harm
- witnessed violence between adults at home
- a psychiatric disorder
- experience of least two "traumatic events" in their lifetime including sexual abuse, being badly hurt or in danger of being badly hurt or killed, witnessing someone else being severely injured or killed, or experiencing an event they considered "terrifying".

Tamariki and rangatahi Māori are overrepresented in the youth justice system

13. Overall, Māori experience higher rates of unemployment, and are more likely to experience socio-economic disadvantage. Māori tend to experience lower educational achievement, employment levels, and higher rates of substandard housing conditions

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3 Gluckman, P (2018). It's never too early, never too late: A discussion paper on preventing youth offending in New Zealand. Retrieved from Discussion-paper-on-preventing-youth-offending-in-NZ-1jhkfm4.pdf (auckland.ac.nz). p. 6.

4 Lambie, I., Reil, J., Becroft, A., & Allen, R. (2022). *How we fail children who offend and what to do about it: 'A breakdown across the whole system'.*

5 Ibid.

or homelessness.[6] As these are known factors that contribute to offending generally, it means that tamariki and rangatahi Māori are more susceptible to entering the youth justice system.

14. In 2021/22, tamariki Māori accounted for 71 percent of children who offend, while rangatahi Māori accounted for 59 percent of young people who offend.[7] On average over the past ten years, tamariki and rangatahi Māori have made up 64 percent of those before the Youth Court (by contrast Pākehā made up 24 percent and Pacific Peoples made up 10 percent).[8]

15. In the criminal, youth, and family justice systems, Māori also experience a higher likelihood of victimisation.[9] These statistics illustrate that tamariki and rangatahi Māori and their whānau are already experiencing high rates of encounters with the youth justice system.

16. In 2017, the Waitangi Tribunal found that:

- the difference between Māori and non-Māori reoffending rates was substantial, undisputed and contributed the disproportionate number of Māori in prison
- the Crown has a Treaty of Waitangi obligation to reduce inequities between Māori and non-Māori reoffending rates in order to protect Māori interests, and
- the Crown must give urgent priority to this issue in clear and convincing ways.[10]

17. Policy design should be cognisant of and responsive to this data in order to reduce further inequity and to maintain trust and confidence in government. In order for us to fulfil our enduring commitments to good faith, partnership and active protection under the Treaty of Waitangi we will need to engage and work closely with our Māori partners going forward in the policy process.

What is the policy problem or opportunity?

18. New Zealand's youth justice system works well for most children and young people. In the ten years from 2011/12 to 2021/22 there was an overall reduction in the numbers of young people (aged 14 – 17 years). There was:[11]

- a 79 percent decrease in young people charged with offences carrying a maximum penalty of 10-years imprisonment ('a 10-year offence')
- a 27 percent decrease in young people charged with 14-year offences.

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6 See for instance, Ministry of Education (2022). *18-year-olds with NCEA Level 2 or above* (Education Indicator); Ministry of Education (2022). *School leaver destinations* (Education Indicator); Ministry of Housing and Urban Development. (2021). *MAIHI Ka Ora – National Māori housing strategy 2021-2025; Ministry of Business, Innovation and Employment. (2021). Māori employment plan.*

7 Ministry of Justice. (2023). *Youth Justice Indicators Summary Report. April 2023*. Wellington: Ministry of Justice.

8 Vote Justice, 2023 Briefing for the Incoming Minister, (24 November 2023).

9 Ibid.

10 Waitangi Tribunal. (2017). *Tū Mai Te Rangi: Report in the Crown and Disproportionate Reoffending Rates*. Wellington: Waitangi Tribunal. While the recommendations of the Waitangi Tribunal are non-binding, the underlying Treaty of Waitangi obligations remain.

11 Data is sourced from Ministry of Justice, live CMS data as at 31 July 2023.

19. The number of young people charged with 10-year offences steadily decreased over this period, from 1,116 young people in 2011/12 to 309 in 2021/22. A similar pattern was seen in the decrease in children (10 -13 years) who were proceeded against for 10-year plus offences.[12] A consistent pattern was also seen for offending by tamariki and rangatahi Māori.[13]

20. Reductions in offending and reoffending by young people in the youth justice system have contributed to large reductions in the numbers of young adults receiving prison sentences and community sentences since 2009. Overall, for every 100 young adults aged 17 to 19 in 2009 who were imprisoned, there are now only eight young adults imprisoned in 2022. The community sentence rate for 17- to 19-year-olds also decreased by 92 percent between 2009 and 2022.[14] This suggests that responding effectively to young offenders can deliver lifelong positive outcomes, preventing more serious adult offending.

21. However, following long-term reductions in youth crime there has been a spike in serious offending by young people since 2022. Provisional data from the Ministry of Justice shows that between 2021/22 and 2022/23 there was a 29 percent increase in young people appearing in court for offences with a 10-year maximum penalty, followed by eight percent more young people in July to December 2023/24 compared with the same six-month period in 2022/23.[15]

22. During 2021/22:[16]

- nine percent of children's offending was serious enough to lead to a Family Group Conference (FGC) or court action (proportion for Māori was 10 percent)
- 24 percent of young people with offending behaviour appeared in the Youth Court (proportion for Māori was 29 percent)
- 34 percent of young people who appeared in Youth Court reoffended within a year (offending rate for rangatahi Māori was 36 percent).[17]

23. Currently the law does not provide for a differentiated response for young people who seriously and persistently offend. There are some powers available for dealing with young people who do not comply with their Youth Court orders (for example, intensive supervision orders become available under section 296G), but those responses are more intensive and not specifically focused on addressing repeat, serious offending.

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12 Ibid.

13 Ministry of Justice. (2023). *Youth Justice Indicators Summary Report.* Retrieved from: https://www.justice.govt.nz/assets/Documents/Publications/Youth-Justice-Indicators-Summary-Report-April-2023.pdf.

14 Data sourced from Statistics NZ, prison (sentence, remand and post-prison), community-sentence and completed community work offender population statistics, as at 30 June 2023.

15 Provisional data from Ministry of Justice, court data as at 31 January 31 2024.

16 Ministry of Justice. (2023). *Youth Justice Indicators Summary Report 2023.*

17 Ministry of Justice. (2023). *Youth Justice Indicators Summary Report 2023.*

24. Operational responses are available for children who seriously or persistently offend (for instance, via Fast Track, which provides quick, wraparound support for children who offend and their whānau),[18] but responses are more limited for young people.

What scope will options be considered within?

25. The Government sought the creation of a new legislative Young Serious Offender (YSO) declaration regime, which includes the development of a new Youth Court order directing a YSO to attend a military-style academy (MSA).

26. Consideration of options for the YSO declaration regime were limited due to time restraints, and due to the need to reflect parameters in Ministerial decisions, public statements and manifesto commitments.[19]

27. Overall, the scope for design options were limited as they needed to reflect that:

- YSOs and MSAs would be expressly provided for in legislation, that is, not operational enhancements based on existing legislative settings
- a YSO declaration would last for two years, and a MSA order would be for up to 12 months in duration
- a MSA order would be available as a Youth Court sentencing option once a young person was declared a YSO – that is, the making of a YSO declaration unlocked the ability of the Youth Court to make a MSA order
- a MSA would be a standalone order (that is not part of an existing order such as a Supervision with Residence or a Supervision with Activity order)
- a MSA order would have a residential component (that is, it would not be a fully community-based order).

What objectives are sought in relation to the policy problem?

28. The overarching objective of the YSO declaration, and associated MSA order, is to promote law and order by reducing youth offending and ensuring that young people take responsibility for their offending behaviour, where previous interventions have proven unsuccessful.

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18 See for instance, Government expands Fast Track youth offending programme | Oranga Tamariki — Ministry for Children.

19 For instance, many of the parameters for the YSO regime were set out in the National Party's manifesto document, see New Zealand National Party. (2023). *Combatting Youth Offending*. Retrieved from: https://assets.nationbuilder.com/nationalparty/pages/17862/attachments/original/1684306248/CYO.pdf?1684306248

Section 2: Deciding upon an option to address the policy problem

29. This section is divided into two subsections:

- Section 2.1 considers the high-level options for a YSO declaration regime (which includes the ability to make MSA orders), and the costs-benefits analysis of officials and Ministers preferred options.
- Section 2.2 assesses the key design parameters of the YSO declaration regime, and MSA order that would be available as part of the responses to a young person who has been declared a YSO.

What criteria will be used to compare options to the status quo?

30. The criteria applied to options relating to the design and implementation of the YSO declaration regime, and associated MSA orders were:

Criteria	What this means
Public safety	• ability to deliver on public safety, and effectiveness in achieving that purpose. This includes rehabilitation, and effectiveness in reducing reoffending and / or seriousness of reoffending.
Human rights	• consistency with rights and freedoms contained in the New Zealand Bill of Rights Act 1990 (NZBORA), the principles of the Oranga Tamariki Act 1989 and key international conventions, in particular the United Nations Convention on the Rights of the Child (UNCROC) and United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules).
Efficiency	• ease (or complexity) of implementation. This includes matters including the fiscal costs of an option, impact on the integrity of the youth justice system (or the YSO regime / MSA order), or impact on court time and scheduling.
Treaty of Waitangi	• extent to which the proposals uphold the Crown's responsibilities under the Treaty of Waitangi.

31. Meeting any one of the criteria may involve trade-offs with another criterion. That is, a YSO declaration regime (including MSAs) may impact on the rights and freedoms contained in the NZBORA.

32. While criteria were not weighted, key trade-offs largely occurred between balancing the public safety objectives of the YSO declaration regime, with the rights and freedoms of children and young people. This meant that, where possible, the design of the regime would need to ensure the impairment on those rights and freedoms is the least-intrusive possible to achieve the public safety objectives of the YSO.

33. However, at the same time, there also needed to be consideration of the efficiency of the proposed regime – thus, trade-offs could also occur between the likely effectiveness of the regime overall, with the rights and freedoms of children and young people.

34. Given the overrepresentation of Māori within the youth justice system, many of the proposals would impact on the Crown's responsibilities under the Treaty of Waitangi, and therefore trade-offs would occur between these responsibilities and the other criteria.

Section 2.1: Analysis of high-level options for a YSO declaration regime

35. Ministers directed officials to develop a legislative YSO declaration and legislative MSA order. As a result, officials have not developed non-legislative options for inclusion in this document.[20]

Evidence of effectiveness of YSO regimes in other jurisdictions is limited …

36. Three Australian states (Queensland, Victoria and Western Australia) have adopted approaches that have similarities to the proposals for a YSO category (see Appendix Two for a summary of these models). These regimes are not directly comparable with each other.

37. A review of the Victorian regime found that Victoria's serious youth offence categorisation regime was "a blunt tool and not well tailored for the policy objectives it is designed to achieve" (p. 124).[21] The review noted that offence category provided the court with little information about the role an individual young person played in the offending, and had been used in only a small number of cases.

… while New Zealand and international evidence indicates military academies have limited effectiveness in reducing offending

38. Officials would be concerned that a legislative-only YSO regime, while it may improve public safety in the short-term, may not improve public safety in the long-term. It is not clear that the model will reduce reoffending / future offending behaviour.

39. International evidence indicates that military style academies (also known as 'boot camps') are one of the least effective interventions when it comes to reducing offending and antisocial behaviour by young people. However, "boot camps for young people with offending behaviour that included counselling, and boot camps with a primary focus on rehabilitation, were significantly more effective than other types of boot camps".[22] This research suggests that introducing the components that make up current best practice in a military academy programme would give the programme the greatest charge of success.

40. New Zealand ran a military activity camp programme between 2010 and 2016, aimed at the young people with the most serious and persistent offending behaviour. The programme consisted of two elements:

    - a nine-week residential component in a youth justice residence, and use of New Zealand Defence Force adventure-based learning facilities, which combined military-type activities and a residential programme to deliver therapeutic and educational interventions. This included a one-week wilderness camp.

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20 Note that Ministers directed that operational changes to provide targeted support and rehabilitation to YSOs and young people sentenced to attend MSAs were to be progressed as part of an overall YSO regime package.

21 Department of Justice and Community Safety. (2022). Review of the Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017. Retrieved from Youth Justice Reform Act Review Report (2022).pdf

22 Farrington, D., Gaffney, H., & White, H. (2022). *Effectiveness of 12 Types of Interventions in Reducing Juvenile Offending and Antisocial Behaviour*. Canadian Criminal Justice Association.

- a six-to-12 month supervision order to help the young person transition back to their community.

41. Eighty percent of participants successfully graduated from the residential programme. However, an evaluation of the programme considered that it was an expensive programme that showed some positive impact, but overall, it produced no better results in terms of re-offending that young people on Supervision with Residence orders who did not participate in the programme.[23] Officials also note that the previous attempt to run similar MSA programmes in New Zealand found that the majority of attendees reoffended within 12 months, and that there is limited evidence as to the effectiveness of such programmes internationally.

42. The lack of robust support (that addressed the causes of the young person's offending) meant improved outcomes were not realised. There was also a lack of support to young people transitioning from the military activity camp back into the community, as well as intervention with family and whānau, which may have limited long-term change in offending behaviour. However, the residential component of the academy was viewed as improving the attitude and motivation of young people to address their offending, and most young people respected the mix of structured and routine activities.

Rangatahi Māori are likely to be overrepresented in the YSO and MSA cohort…

43. The majority of young people in the Youth Justice custody of the Chief Executive of Oranga Tamariki are Māori (around 68 percent). Therefore, while the stated key policy objectives of the YSO declaration are to ensure public safety, accountability and reduce reoffending, these objectives will come at a cost to Māori communities in particular as the proposal for a YSO declaration and MSA order are highly likely to have a disproportionate effect on rangatahi Māori and their whānau.

44. Modelling suggests that Māori will make up 80-85 percent of the young people eligible to be declared YSOs, and therefore also eligible for MSA orders under the regime. The enhanced legislative powers "unlocked" by the YSO declaration may be seen as enhancing punitive elements of the youth justice system which would result in inequitable treatment of rangatahi Māori and may be seen as inconsistent with Article 3 of Treaty of Waitangi. On the other hand, this approach may also support reduced reoffending, and prevent Māori from entering the adult criminal jurisdiction.

45. However, it is also possible that options around YSO declaration and MSA order parameters will balance the disproportionate impact this regime will have on Māori. This in turn negatively impacts the ability of agencies to deliver on enduring commitments under the Treaty of Waitangi.

… while traditional approaches to military academies are unlikely to work for disabled young people or those who have experienced trauma

46. International and New Zealand-based research indicate that military style training may not be an effective intervention for disabled young people. Many young people, including those who are neurodivergent would likely struggle to succeed in these

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23 Ministry of Social Development. (2013). *Evaluation report for the military-style activity camp (MAC) programme*.

environments.[24] Common challenges associated with neurodivergent young people include memory and recall difficulties, impulsivity, confabulation and cognitive limitations.[25] Some may also experience sensory overload in these environments.[26]

47. Similarly, traditional military-style academies with models of strict compliance may be detrimental to young people with a history of abuse or family violence, particularly if they involve approaches that tend to be confrontational.

48. However, there will also be some disabled young people who would benefit from the structure normally associated with military style approaches, although the research indicates they cannot transfer these learnings afterwards unless they have access to lifelong supports.[27]

49. Given the evidence that disabled or traumatised young people are overrepresented in the youth justice population, it is likely that they will also be overrepresented in the YSO and MSA cohort.

What options are being considered?

50. We considered three options for implementing a YSO regime (noting that the regime also includes the ability for the Youth Court to order a YSO to attend a MSA):

- **Option 1 – Status quo (non-legislative response)**: No specific legislative differentiated response for young people who seriously and persistently offend. This would rely on existing legislative parameters, but could include improved operational responses.
- **Option 2 – Moderate legislative response**: Develop a legislative YSO declaration regime (including MSAs) that provides options to respond to young people who seriously and persistently offend. This option would apply only to young people, have a higher entry threshold, would not provide additional powers to New Zealand Police, and would change the name from a 'YSO declaration'.
- **Option 3 – Enhanced legislative response**: Develop a legislative YSO declaration regime (including MSAs) that includes enhanced powers for New Zealand Police. It would also retain the 'YSO declaration' title, and remove mandatory FGCs in relation to young people who have been declared to be YSOs.

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24 Riley, E., Clarren, S, Weinberg, J., & Jonsson, E. (2011). *Fetal Alcohol Spectrum Disorder management and policy perspectives of FASD*.

25 Lynch, N. (2016). *Neurodisability in the youth justice system in New Zealand: how vulnerability intersects with justice*. Victoria University of Wellington & Dyslexia Foundation of New Zealand (DFNZ). Neurodisabilities Forum: Wellington, New Zealand.

26 Miller, A. A., Therrien, W. J., & Romig, J. E. (2019). *Reducing recidivism: transition and re-entry practices for detained and adjudicated youth with disabilities*.

27 Ministry of Social Development. (2013). *Evaluation report for the military-style activity camp (MAC) programme*.

51. The table below sets out option 2 (moderate legislative response) and option 3 (enhanced legislative response). Differences between the two models are highlighted in light blue:

Key parameter	Option 2 – Moderate legislative response	Option 3 – Enhanced legislative response
Eligibility Criteria	• a young person is aged 14-17 years old at the time of offending	• young person is aged 14-17 years old at the time of offending
	• the young person has one previous Youth Court order made under the Oranga Tamariki Act 1989 s 283 (other than a Group 1 or 2 response under that section) relating to an eligible offence AND one separate additional charge proven before the Youth Court under s 283 relating to an eligible offence	• the young person has two eligible offences proven in court (either by a Judge alone trial or by a Judge recording the admitted offending at a Family Group Conference (FGC), but excluding discharges under s 282 of the Oranga Tamariki Act), where the offences are clearly two separate, unrelated incidents
	• eligible offending relates to offences punishable by imprisonment of 10 years or more	• eligible offending relates to offences punishable by imprisonment of 10 years or more
	• the Youth Court is satisfied on reasonable grounds that the young person is likely to re-offend and previous interventions have been unsuccessful	• the Youth Court is satisfied on reasonable grounds that the young person is likely to re-offend and previous interventions have been unsuccessful
Process	• A young person can only be declared a YSO within the Youth Court and only be based on Youth Court outcomes.	• The Youth Court only can make a YSO declaration, but convictions in the District Court or High Court can be recognised towards a YSO declaration if the young person appears before the Youth Court for further serious offending.
	• That the naming convention labelling a young person a “Young Serious Offender” should be changed.	• Young people will be declared a “Young Serious Offender”.
	• Police can apply to the Youth Court for a YSO declaration, with a report and plan from Oranga Tamariki, with other relevant individuals making submissions.	• Police can apply to the Youth Court for a YSO declaration, with a report and plan from Oranga Tamariki, with other relevant individuals making submissions.
	• A YSO declaration will expire on the earlier of the date that term of the declaration ends (which cannot exceed two years) from the date the YSO declaration is made by the Youth Court unless the YSO declaration is extended or at the time the young person turns 19 years old.	• A YSO declaration will expire on the earlier of the date that term of the declaration ends (which cannot exceed two years) from the date the YSO declaration is made by the Youth Court unless the YSO declaration is extended or at the time the young person turns 19 years old.
	• In the event a young person reoffends over the two-years at a similar level of seriousness as the initial offending that triggered the initial declaration, the Youth Court can at sentencing for the further offending, extend the YSO declaration for up to a further year.	• In the event a young person reoffends over the two-years at a similar level of seriousness as the initial offending that triggered the initial declaration, the Youth Court can at sentencing for the further offending, extend the YSO declaration for up to a further year.
	• The young person will have a right to appeal and a right to apply for a review on humanitarian grounds and	• The young person will have a right to appeal and a right to apply for a review on humanitarian grounds and

	after 12 and 18 months from the date the declaration is made, with the Youth Court having the power to vary or discharge the declaration.	after 12 and 18 months from the date the declaration is made, with the Youth Court having the power to vary or discharge the declaration.
	9(2)(f)(iv) [redacted]	• 9(2)(f)(iv) [redacted]
	• Declaration for non-compliance with order.	• Declaration for non-compliance with order.
	• The Youth Court be able to issue a warrant to arrest a young person declared to be a YSO, if reasonably satisfied the young person has failed to comply with any condition of their order, and it considers a warrant is necessary to compel the young person's attendance at the Youth Court.	• A constable may detain or arrest a young person declared to be a YSO without warrant where the constable reasonably believes that it is necessary to arrest that child or young person without warrant; and the young person declared to be a YSO is non-compliant with a condition relating to a Group 3-6 order, an Intensive Supervision Order, or a MSA order. • New Zealand Police can arrest a young person declared to be a YSO without warrant if the young person has been released on bail and New Zealand Police believe, on reasonable grounds, that the young person has breached a bail condition.
	• There would be no requirement for an intention to charge FGC to take place where a young person declared to be a YSO allegedly commits a further imprisonable offence while under 18 years old, however the Youth Court retain its power to direct that an FGC be convened.	• Remove mandatory FGCs for a YSO under the age of 18 years who reoffends and does not deny the offending. However, the Youth Court will have considerations when exercising its discretion to direct an FGC.
	• Create a new MSA order.	• Create a new MSA order.
	• Overnight stays with Supervision orders.	• Overnight stays with Supervision orders.
	• Greater use of electronic monitoring.	• Greater use of electronic monitoring.
	• Presumption against being released without conditions when charged with further offending.	• Presumption against being released without conditions when charged with further offending.
	• A new requirement for the Chief Executive of Oranga Tamariki to consider the risk of absconding and offending when making any placement decisions.	• A new requirement for the Chief Executive of Oranga Tamariki to consider the risk of absconding and offending when making any placement decisions
	• Longer Supervision and Supervision with Activity orders	• Longer Supervision and Supervision with Activity orders.
	• Judicial monitoring.	• Judicial monitoring.
	• No early release from Supervision with Residence or MSA orders.	• No early release from Supervision with Residence or MSA orders.

Assessment of YSO regime options against criteria

	Public Safety	Human Rights	Efficiency	Treaty of Waitangi	Overall assessment
Option 1 - Status Quo (non-legislative response) (preferred by officials)	0	0	0	0	0
Option 2 – Moderate legislative response (second preference by officials)	0 (would increase public safety in short-term however punitive powers may not improve public safety in long-term)	- (unlikely to align with youth justice principles; could raise NZBORA issues if seen as disproportionate or not age-appropriate)	- - (complexity and novelty of proposed legislative; will need time to implement and additional training required; funding implications across justice sector agencies)	- (likely to impact on Māori due to overrepresentation in cohort; may be inconsistent with Treaty of Waitangi principle of active protection however if done well, may prevent rangatahi Māori from entering adult system)	- / - -
Option 3 – Enhanced legislative response (Ministers preferred)	- (would result in higher numbers of YSOs being made; would increase public safety in short-term however increased punitive powers may not improve public safety in long-term)	- - (would not align with youth justice principles, especially when combined with removal of judicial discretion; could raise NZBORA issues if seen as disproportionate or not age-appropriate)	- - (complexity and novelty of proposed legislative; will need time to implement and additional training required; funding implications across justice sector agencies)	- - (likely to impact on Māori due to overrepresentation in cohort, particularly additional Police powers / responses to YSOs; may be inconsistent with Treaty of Waitangi principles of active protection and participation however if done well, may prevent rangatahi Māori from entering adult system)	- -

Analysis and preferred option

52. Officials' preferred option would be to retain the status quo (option 1), although officials note that the status quo is not providing sufficient responses to this small cohort, and that the status quo also risks future engagement with the criminal justice system as behaviour is not resolved. However, the status quo would support an operational response that focuses on addressing the behaviour of young people whose offending is serious and persistent, such as intensive case management or additional rehabilitative support for those young people who offend seriously and persistently. There would be costs associated with such operational improvements.

53. As noted, Ministers directed officials to develop a legislative YSO declaration regime, which would also include legislative parameters for the associated MSA order. The goal, however, remains of diverting the young person from the adult criminal justice system through more intensive responses when they are before the Youth Court.

54. Modelling indicates there would be a gradual increase in the numbers of young people who meet the eligibility criteria over time. The table below sets out modelling for options 2 and option 3, showing the forecast group of eligible young people by 2027/28:

Number and type of offences options - all 10 years or more imprisonment	**No. of YSOs (2027/28 estimate)**
	Age 14-17
One previous Youth Court order AND one separate additional charge proved before the Youth Court under section 283	47 (option 2)
Two offences proven in court	102 (option 3)

55. The actual number of YSO declarations that will be made would depend on a number of factors, including prosecutorial decisions, and judicial discretion. Similarly, the number of MSAs that would be made would also depend on judicial discretion. However, the larger the cohort of possible YSOs, the higher the likely number of MSA orders also being made.

56. Should a legislative response be implemented, then officials prefer option 2 (moderate legislative response), as this would help provide balance by ensuring it was more targeted at those serious and persistent offenders (thus better protecting the public). Ministers, however, preferred option 3.

57. Option 2 also provides more balance as it reduces the impact on the rights and freedoms of young people, but also in relation to the continuing of existing processes (such as FGC processes) that would be removed in Option 3. Option 2 also does not provide New Zealand Police with as many additional powers, for instance, the powers to arrest a non-compliant YSO who has breached their bail at the first instance, without waiting until the third breach, or seeking a warrant to arrest as is the existing (or status quo) requirement. (Offcials note that a police constable would continue to use their discretion when exercising any of these powers, which would need to be consistent with the purposes and principles of the Oranga Tamariki Act 1989).

58. The modelling indicates that, for both options 2 and 3, 80-85 percent of eligible young people would be Māori. Option 2 therefore helps to meet the Crown's obligations under the Treaty of Waitangi by retaining current processes that support the involvement of family and whānau in the process, such as FGCs.

Preferred options and marginal costs and benefits

59. While the differences between Options 2 and 3 may seem relatively minor, overall, they may increase public safety (at least in the short term), but the Ministers' preferred model (option 3) may not increase public safety in the long-term if a young person is likely to be brought deeper into the youth justice system due to these interventions. Bringing young people deeper into the system increases the risk of further reoffending, and of offending continuing into adulthood.

60. The changes also come at the risk of reducing human right protections, and increasing the disparities experienced by Māori within the youth and criminal justice systems. Modelling indicates that the impact of a YSO declaration regime would mostly fall onto Māori, and therefore the stronger powers will also fall disproportionately on Māori. This has implications for the protections in the Treaty of Waitangi, including active protection and participation, particularly in a context where the Waitangi Tribunal has already found that the Crown has a Treaty of Waitangi obligation to reduce inequities between Māori and non-Māori reoffending rates.[28]

What are the marginal costs and benefits of the option?

61. The table below largely sets out the impact of the two models, where these have been able to be assessed in the available timeframe.

Affected groups	Comment.	Impact (Option 2 - Moderate legislative response)	Impact (Option 3 - Enhanced legislative response)	Evidence Certainty
Additional costs of the preferred option compared to taking no action				
Young people declared a YSO and young people in receipt of an MSA order	Ongoing – costs associated with YSO declaration or MSA order. These costs may include additional legal fees associated with arguing against making of YSO declaration or MSA order, appeals, and / or reviews.	Medium-High	High	Medium
Family and whānau of young people declared a YSO or in an MSA order	Ongoing – indirect costs associated with having family member declared a YSO or in receipt of an MSA order. May also be costs associated with visiting family member while on MSA order.	Low (non-monetised)	Low (non-monetised)	Medium
Youth Courts	Ongoing – additional court time required and associated costs to consider making YSO or considering additional sentencing options under a YSO (including an MSA order). Increased costs	Medium	High (model likely to increase number of YSOs, therefore increased impact on Courts)	Medium

28 Waitangi Tribunal. (2017). *Tū Mai Te Rangi: Report in the Crown and Disproportionate Reoffending Rates*. Wellington: Waitangi Tribunal.

	also associated with increased Court monitoring, appeals and reviews.			
New Zealand Police	Ongoing – additional costs with monitoring compliance with bail and responding to breaches, additional costs in police prosecutors attending Youth Court and sourcing information to support YSO applications.	Low	Medium (model provides additional powers, therefore likely to be higher costs)	Medium
Ministry of Justice	Ongoing – additional costs associated with additional ICT or staffing requirements.	Low-Medium	Low-Medium	Medium
Oranga Tamariki	Ongoing – additional costs associated with cost of monitoring YSOs (including potentially, electronic monitoring) but also in managing YSOs in youth residences, managing those on an MSA order, and in preventing MSAs from absconding May be some reduced costs in relation to FGCs if mandatory FGCs no longer required in relation to some YSOs	Medium-High	High (model provides additional powers therefore likely to be higher costs)	Medium
Department of Corrections and / or Oranga Tamariki	Ongoing – costs associated with electronic monitoring of some YSOs	Medium	High (model likely to increase number of YSOs therefore increased impact)	Medium
Crown Solicitors (funded through Crown Law)	Ongoing – additional costs associated with applications (both individually and overall number of cases anticipated)	Low	Low-Medium	Medium
Broader community	Ongoing – potential costs associated with bringing some young people deeper into the justice system, and therefore result in more offending across young person's lifetime	Medium	Medium-High	Low
Non-monetised costs		*Medium*	*High*	*Medium*
Additional benefits of the preferred option compared to taking no action				
Young people declared a YSO and young people in receipt of an MSA order	Ongoing – benefits to some from experiences on MSA and additional rehabilitative and reintegration supports available on YSO declaration and MSA order; may help reduce future involvement in	Low-medium	Medium	Low

	justice system, but may also bring some deeper into the Justice system			
Family and whānau of young people declared a YSO or in an MSA order	Ongoing – may be some benefits associated with family member getting rehabilitation and reintegration supports needed; however may bring some young people deeper into the Justice system	Low	Medium	Low
Police	Ongoing – benefits as will have additional powers in relation to YSOs	Medium	High	Low
Broader community	Ongoing – benefits as there will be stronger penalties for YSOs, with caveat that it may bring some young people deeper into the Justice system	Medium	Medium-High	Medium
Non-monetised benefits		*Low-medium*	*Medium-High*	*Low-Medium*

62. Due to the timeframes, the costs for the final YSO declaration regime, including additional powers (such as the power to make a MSA order) have not been fully identified.

63. The estimated total cost for the moderate legislative response (option 2) is $29.169 million over four years, consisting of:
    - $16.544 million for an enhanced service response for young people declared a YSO
    - $3.291 million to deliver an intensive case management system
    - $0.112 million for provider costs
    - $0.350 million for whānau engagement

64. These financial costs would largely be borne by Oranga Tamariki, with additional costs also to New Zealand Police, Ministry of Justice (including through Vote Courts) and the Department of Corrections.

65. The Ministers' preferred option, option 3 (enhanced legislative approach) would substantially increase the number of young people eligible for a YSO declaration. Given this, officials expect the costs of the regime to be at least double; that is, to be up to $51.504 million operating and $1.966 capital over four years.

Section 2.2: Design parameters for the YSO declaration and associated MSA order

66. Given Ministers' decision to continue with a legislative option, the rest of this document explores the parameters that make up the YSO declaration regime (including MSAs).

67. This section is divided into two parts, with **Part A** setting out the design parameters for YSO declarations, and **Part B** setting out the design parameters for the MSA order that would be available as part of the YSO declaration regime.

Part A: Design parameters for the YSO declaration

68. Part A discusses three key parameters for the development of a YSO declaration:

- **Eligibility*:*** The eligibility criteria for a YSO declaration.
- **Declaration process:** The process for declaring a young person to be a YSO.
- **Responses:** The responses available in relation to a young person declared a YSO.

Eligibility

69. There were five elements identified for eligibility for a YSO declaration:

- **Age:** This included consideration of the age groups that would be eligible for a YSO declaration.
- **Offending:** This included consideration such as the number of offences and nature/seriousness of offending, and whether offending resulting in section 282 discharges should be within scope.
- **Jurisdiction:** This included consideration of whether a YSO declaration would be automatic upon meeting the eligibility criteria or have judicial discretion, and whether convictions in adult criminal courts would be considered as part of a YSO declaration.
- **Retrospectivity /timeframe for offences:** This included consideration of whether offences that occurred before the new law came into force would be included within scope of the YSO declaration regime.
- **Expiry:** This included consideration of when a YSO declaration would expire, and whether a YSO declaration could be extended.

Age of eligibility

70. There were three age group options considered:

- **Option 1 – 10 – 17 year olds**: This option reflects the manifesto commitment, and captures all children and young people who can be criminally responsible in New Zealand
- **Option 2 – 12 – 17 year olds:** This option recognises that children under the age of 12 can only be charged with murder or manslaughter (see section 272(1)(a) of the Oranga Tamariki Act 1989)
- **Option 3 – 14 – 17 year olds:** This option would apply YSO declarations only to 'young people'.

Assessment of age options against criteria

Age	Public Safety	Human Rights	Efficiency	Treaty of Waitangi	Overall assessment
Option 1 - 10-17 year olds	++ (may offer increased public safety responses although modelling indicates only a small number of 10-12 year olds would be captured by YSO declaration regime)	- - (introduces criminal justice elements into the Family Court processes; raises youth justice and human right issues, including the right to be dealt with in a manner that takes account of child's age)	- - (involving 10 and 11 year olds increases complexity of legislation and implementation)	- - (does not recognise mana tamaiti, and engages principles of active protection and duty to protect tamariki and rangatahi)	- -
Option 2 - 12-17 year olds	+ (may offer increased public safety responses, and would capture 12-13 year olds who engage in serious offending behaviour)	- (raises youth justice and human right issues, including the right to be dealt with in a manner that takes account of child's age)	- (while reflects some elements of existing legislative settings, still would involve complexity in implementation)	- (does not recognise mana tamaiti, and engages principles of active protection and duty to protect tamariki and rangatahi as taonga)	-
Option 3 - 14-17 year olds (preferred by officials)	+ (may offer increased public safety responses as captures young people who engage in serious offending behaviour)	+ (likely to be consistent with youth justice principles)	+ (reflects some elements of existing legislative settings; easiest option to implement)	- (engages principles of active protection and duty to protect rangatahi as taonga under Treaty of Waitangi)	+

Analysis and preferred option

71. The existing legislative frameworks for responding to offending vary based on the age of a child (10 to 13 years old) or young person (14 to 17 years old) at the time they commit an offence.

72. Officials preference was for the YSO declaration regime to only apply to young people (option 3). This is because the Oranga Tamariki Act 1989, the NZBORA[29], and our international obligations, all affirm that the government should provide special protection for children (under 18 years old) due to their vulnerability, particularly in criminal proceedings. Officials note that New Zealand has been criticised in relation to compliance with international obligations in respect of its age of criminality (10 years of age).[30]

73. In considering whether to include children (10 to 13 year olds) within the YSO declaration regime, a balance is needed between public safety, and youth justice and human rights principles. Modelling indicates that very few children (for instance, two children in 2022/23) would meet the criteria for a YSO declaration. Officials also considered that including children in the YSO declaration regime would likely to be inconsistent with international obligations, such as UNCROC, and may be inconsistent with section 25(i) of the NZBORA. Further, the imposition of a YSO declaration could deepen a child's involvement in the youth justice system. Deepening a child's involvement in the youth justice system is also likely to increase the public safety risk long-term as it increases the likelihood the child will continue offending into adulthood.

74. Modelling indicates the majority of children and young people who would be eligible for a YSO declaration would be Māori, thus engaging the principles of the Treaty of Waitangi, in particular active protection.

Offending

Seriousness of offending

75. The second element under eligibility relates to 'seriousness of offending', where the maximum penalty for an offence is used as the threshold for determining what offending is serious enough for a young person committing offending with that penalty to be eligible for a YSO declaration. There were three options considered:

- **Option 1 - 7 years maximum penalty**
- **Option 2 - 10 years maximum penalty**
- **Option 3 - 14 years maximum penalty**.

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29 For instance, section 25(i) of the NZBORA protects the right of children charged with an offence to be treated in a manner that takes account of their age during criminal proceedings.

30 United Nations Committee on the Rights of the Child (2023) *Concluding observations on the sixth periodic report of New Zealand* CRC/C/NZL/CO/6.

Assessment of seriousness of offending options against criteria

Seriousness of offending	Public Safety	Human Rights	Efficiency	Treaty of Waitangi	Overall assessment
Option 1 - 7 years	++ (captures a larger cohort of young people, which could improve perceived and actual public safety)	- - (would bring young people with lower levels of offending into YSO cohort; may raise proportionality of response issues)	- - (captures young people who have committed lower-level offences; may impact on overall efficacy of YSO declaration regime)	- - (negatively impact rangatahi Māori as overrepresented in cohort; engages Article 3 of Treaty of Waitangi and the principle of active protection)	- -
Option 2 - 10 years (preferred by officials)	+ (smaller cohort but targets serious offending such as burglary, aggravated burglary and robbery)	0 (may provide more balance with human rights although may still raise proportionality of response issues)	0 (may provide balance between implementation without impacting overall effectiveness of YSO declaration regime)	- (disproportionate impact on Māori as rangatahi Māori overrepresented in cohort; engages Article 3 of Treaty of Waitangi and the principle of active protection)	0
Option 3 - 14 years	- (would result in a much smaller cohort of young people eligible for a YSO declaration)	+ (lowest impact on human rights as geared towards most serious offending)	0 (easiest to implement but would result in lowest numbers of young people receiving a YSO declaration which may impact on overall effectiveness of the YSO declaration regime)	- (disproportionate impact on Māori as rangatahi Māori overrepresented in cohort; engages Article 3 of Treaty of Waitangi and the principle of active protection)	-

Analysis and preferred option

76. Officials preferred option is option 2 because setting the entry criteria for the YSO declaration at the 10 years' imprisonment level strikes a balance between public safety, efficiency, human rights and Treaty of Waitangi obligations.

77. The types of offending associated with different maximum penalties of imprisonment are summarised in the table below:

Examples of offence types with a 10- or 14-year maximum penalty (Crimes Act 1961)

7 year penalty	10-year penalty	14-year penalty
• Car theft (section 226) • Indecent assault (section 135)	• Burglary (section 231) • Attempted sexual violation (rape) (section 129) • Robbery (section 234) • Injuring with intent to cause grievous bodily harm (section 189(1))	• Aggravated burglary (section 232(1)) • Aggravated robbery (section 235) • Assault with intent to rob (section 236) • Grievous bodily harm with intent (section 188(1))

78. Ram-raids and 'smash and grabs' would be captured if the offence level was set at 10 years. Given concerns with offences such as ram-raids, this would support the option for the seriousness of offence to be set at 10-years or more. A 10-year offence also aligns with existing provisions in the Oranga Tamariki Act 1989, which require appointment of a youth advocate to represent a child or young person (subject to an FGC) if the offence is punishable by imprisonment of 10 years or more (section 248A).

79. In comparison, setting an eligibility criterion of offences with a 7-year maximum penalty would include theft and related offences that are the most commonly-charged offence types for children and young people (39 percent of all charges in the 2022/23 financial year). However, theft can be a broad offence, and can include relatively low-level offending (for example, stealing a mobile phone) as well as more serious offending like car theft. Setting a penalty at this level would broaden the YSO declaration eligibility beyond that of a small group of young people with serious and persistent offending behaviour, which officials consider to be a disproportionate response. It could also engage section 9 of the NZBORA, which protects against disproportionately severe treatment or punishment.

80. Finally, setting eligibility at a 14-year maximum penalty level would reduce the impact on public safety given the low numbers of children and young people who engage in this type of offending. While this higher level may better meet the Crown's obligations under the Treaty of Waitangi as it would provide more protection for young people, particularly rangatahi Māori (who are likely to be overrepresented in the eligible cohort), it may also negatively impact on the overall efficiency of the YSO declaration regime.

Number of offences

81. The number of offences at the agreed level of seriousness is a way of establishing who is a repeat offender for the purposes of being eligible for a YSO declaration.

82. There were three options considered:

- **Option 1**: One previous Youth Court order (other than a Group 1 or 2 response or a discharge made under section 282) made under section 283 of the Oranga Tamariki Act 1989 (the Act), relating to an eligible offence AND one

separate additional charge proven before the Youth Court under section 283 relating to an eligible offence

- **Option 2**: New Zealand Police can make an application for a YSO declaration after one Youth Court order for multiple proven eligible offences (other than Group 1 or Group 2 response under that section or a discharge under section 282) which the Youth Court deems reaches a number, nature and magnitude that mean the young person should be considered eligible for a YSO declaration and shows previous interventions have not been successful
- **Option 3**: Two eligible offences proven in court (either by a judge alone trial or admitted at an FGC, but excluding discharges under section 282), where the offences are clearly two separate unrelated incidents.

83. Officials also considered whether the following should also be included in scope:

- **Option 4**: offending not denied at an intention to charge FGC
- **Option 5**: offending resulting in a discharge (under section 282 of the Oranga Tamariki Act 1989).

Assessment of number of offences against criteria

Number of offending	Public Safety	Human Rights	Efficiency	Treaty of Waitangi	Overall assessment
Option 1 - One youth court (YC) order AND one separate additional charge proven in YC under section 283 (preferred by officials)	- (higher threshold results in a smaller cohort of YSOs, which may diminish public safety)	0 (provides balance approach although overall regime may still impact on youth justice principles, such as the proportionality of response)	++ (easier to implement and ensures those with a YSO declaration are those most in need of intensive intervention)	- (could disproportionately impact Māori as Māori would be overrepresented in cohort; could engage Article 3 of Treaty of Waitangi and the principle of active protection)	0
Option 2 - One YC order for multiple proven eligible offences	+ (would result in a larger group of eligible YSOs, which may increase public safety)	- (may impact on youth justice principles, in particular the proportionality of response)	- - (more complex to implement due to need for a more sophisticated assessment)	- - (Māori would be overrepresented in cohort; engages Article 3 of Treaty of Waitangi and the principle of active protection)	- -
Option 3 - Two eligible offences proven in court in two separate incidents (Ministers preferred)	++ (would result in the largest group of eligible YSOs, thus providing most public safety)	- - (removes requirement for previous Youth Court order, thus likely to impact on youth justice principles and the proportionality of response)	- - (low threshold for entry; would increase costs due to increased cohort size)	- - (lower threshold for entry would increase overrepresentation of Māori; engages Article 3 of Treaty of Waitangi and the principle of active protection)	- -
Option 4 - Include offending not denied at an intention to charge FGC	++ (includes offences admitted at FGC and would increase likely cohort size)	- - (raises significant human rights and youth justice principles issues as offending has not meet legal test of proven)	- - (would mean YSO eligibility not based on charges proved in Court impacting on integrity of overall youth justice system)	- - (increases disparity as Māori more likely to be progressed to intention to charge FGCs; engages Article 3 of Treaty of Waitangi and the principle of active protection)	- -
Option 5 - Include section 282 discharges	++ (would mean all eligible offending included within scope)	- - (raises issues with human rights and youth justice principles and would not recognise reasons for judicial decision	- - (potentially undermines youth justice system, and Youth Court's decision to order discharge)	- - (engages Article 3 of the Treaty of Waitangi and the principle of active protection given that Māori are overrepresented in system)	- -

Analysis and preferred option

84. Official's preferred approach is option 1 as it will enable a YSO declaration to offer a more intensive intervention, on the basis that previous lower-level interventions have not worked. This is consistent with the principles of the youth justice system, which provides that any sanctions imposed should take the least-restrictive form appropriate in the circumstances. It is also would ensure that a YSO declaration was only available for a more targeted group of young people, where previous interventions have not been successful.

85. Ministers preferred option 3. Option 3 sets a comparatively low threshold whereby the young person may not have experienced any previous interventions before they are eligible to be declared a YSO. Providing such an escalated response at the young person's early and potentially first interaction with the youth justice system is inconsistent with the youth justice principles in current legislation. This option is likely to create a significantly larger YSO cohort (as well as increased system and administrative costs).

86. Options one, two and three are all likely to engage the Crown's obligations under the Treaty of Waitangi, in particular the principle of active protection, due to the overrepresentation of Māori within the youth justice system, and the overrepresentation of tamariki and rangatahi Māori within the likely YSO cohort.

Including offending that has not been denied at an Intention to Charge FGC

87. Most offending by young people is admitted (not denied) at Intention to Charge FGCs. Officials' preferred approach is that only proven charges should be related to YSO eligibility given that everyone, including young people, have the right to be presumed innocent until proven guilty according to law.[31] The inclusion of those charges would have implications for the Crown's ability to meet its Treaty of Waitangi obligations, particularly active protection, given that rangatahi Māori are more likely to end up in Youth Justice FGCs than other ethnic groups.

Including offending that resulted in a discharge

88. A section 282 discharge signals the end of the youth justice process, and it is as if the charge against the child or young person was never filed. Where a discharge has been granted in relation to proven offending, this means the Youth Court is satisfied the young person has addressed their offending.

89. Including a section 282 discharge in scope would be a significant departure from youth justice (and criminal justice) principles. Including such offences could subvert the policy rationale underpinning a section 282 discharge. A section 282 discharge effectively operates as a clean slate and form of diversion out of the formal youth justice system, so to provide the young person with a second chance (where that offending would not remain on their youth justice record). Allowing previous offending that resulted in a section 282 discharge to be considered as part of the offences considered when making a YSO would be inconsistent with the notion of that charge being deemed to have never been filed.

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31 Section 25(c) of NZBORA.

Jurisdiction of offending

90. This parameter considers whether a YSO declaration would include only offending proven in the Youth Court, or also convictions in adult courts (District and High Courts). The following options were considered:

- **Option 1**: The Youth Court makes YSO declarations and is based on proven offending in the Youth Court
- **Option 2**: YSO declarations are made in the Youth Court, however convictions made previously in the District or High Court can be considered as part of the declaration process.

Assessment of jurisdiction of offending options against criteria

Jurisdiction of offending	Public Safety	Human Rights	Efficiency	Treaty of Waitangi	Overall assessment
Option 1 - Youth Court make declarations based on offending proven in the Youth Court (preferred by officials)	- - (would not count more serious offending referred to adult courts for conviction or sentencing)	0 (unlikely to give rise to any additional impacts on human rights or youth justice principles)	++ (easier to implement)	0 (rangatahi Māori are likely to be overrepresented in young people referred to adult courts; not including may better reflect active protection obligations under Article 3 of Treaty of Waitangi)	0
Option 2 - Youth Court make declarations, but convictions in the District Court or High Court must be considered (Ministers preferred)	++ (increases public safety as allows Youth Court to considers all convictions / orders when making decision)	- (may impact on human rights and youth justice principles)	- (increases complexity of implementation although modelling indicates including convictions in adult courts would not increase number of YSO declarations)	- (likely to impact on rangatahi Māori, who are likely to be overrepresented in young people referred to adult courts; may impact on Treaty of Waitangi obligations, such as principle of active protection)	-

Analysis and preferred option

91. Officials preference is option 1, that is, including only offences proven in the Youth Court be considered for YSO eligibility due to a number of considerations. Firstly, there may be complexity in capturing offences in different parts of the criminal justice system. Secondly, secondly, modelling provided by the Ministry of Justice indicates that including previous convictions from the adult jurisdiction would not increase the number of young people declared a YSO. Thirdly, this provides more protection for rangatahi Māori, who will be overrepresented in the YSO cohort, as well as the cohort referred to adult courts.

92. Ministers preferred to include previous offending in the adult jurisdiction if a young person comes back to the Youth Court for further offending. This is consistent with the current approach in section 272 of the Oranga Tamariki Act 1989 that enables a child to be prosecuted as a 'previous offender' where they have a conviction in either the District or High Court and recognises that this only happens for the most serious offending.

Retrospectivity

93. Retrospectivity refers to whether qualifying convictions / proven offences that occurred prior to the YSO regime came into force could be considered for eligibility for a YSO.

94. Two options were considered:

- **Option 1 – No retrospectivity**: only eligible offences committed after the YSO regime came into effect
- **Option 2 – Full retrospectivity**: retrospective application of law (previous offences would be considered).

Assessment of each retrospectivity option against criteria

Retrospective	Public Safety	Human Rights	Efficiency	Treaty of Waitangi	Overall assessment
Option 1 – No retrospectivity (preferred by officials)	- (reduces public safety as offending prior to legislation not included)	++ (recognises human rights and sentencing principles)	++ (upholds efficacy of youth justice system and sentencing processes)	+ (while Māori would still be overrepresented in cohort, would reduce impact on rangatahi Māori and their human rights)	++
Option 2 – Full retrospectivity	++ (would mean all relevant offending could be considered, improving public safety)	- - (raises significant concerns around fairness; likely to significantly breach section 26(1) of NZBORA)	- - (impacts on integrity of youth justice system)	- - (would impact rangatahi Māori given overrepresented in cohort)	- -

Analysis and preferred option

95. Officials and Ministers preferred option 1, that is, for there to be no retrospective application of the YSO declaration regime. This is because retrospective application of law has significant human rights impacts (section 26(1) of the NZBORA). The Legislation Design and Advisory Committee notes that legislation should not have retrospective effect,[32] while retrospective application of law is not generally favoured by the legislature or the judiciary. This would also provide a sense of fairness, ensuring that all the potential consequences of offending are known, and providing a warning before more significant consequences come into force.

96. Not including retrospective offences creates a longer lead in time for young people becoming eligible for a YSO declaration, impacting public safety. However, balancing this against human rights, the Crown's obligations of active protection under the Treaty of Waitangi, and the integrity of the youth justice system mean that only offences committed after the new law has been enacted should count towards eligibility for a YSO declaration.

32 See Legislation Design and Advisory Committee. (2021). *Legislation Guidelines*. Retrieved from 1. Does the legislation have direct retrospective effect? | The Legislation Design and Advisory Committee (ldac.org.nz)

Expiry of a YSO declaration

97. This question relates to when a YSO declaration should expire.

98. Currently, a young person aged 17 at the date of offending can still be subject to Youth Court orders until they turn 19 years old. A young person can still be proceeded against if they turn 18 but the offending occurred when they were 17, while offending that occurs when they turn 18 years old is dealt with in the adult criminal jurisdiction.

99. The question is whether this should also apply in relation to YSO declarations or whether a YSO declaration should continue until expiry (that is, may continue past their 19th birthday).

100. Two options were considered:

- **Option 1 – Status quo**: The YSO declaration would expire when the young person turns 19
- **Option 2 – YSO declaration would continue until expiry**.

Assessment of ageing out options against criteria

Ageing out	Public Safety	Human Rights	Efficiency	Treaty of Waitangi	Overall assessment
Option 1 - Status quo (preferred by officials)	- (reduces public safety as would mean that young people could not be held in breach of a YSO declaration once they turned 19)	+ (meets youth justice principles)	++ (accords with existing legislative parameters)	+ (reflects Treaty of Waitangi principle of active protection)	+/++
Option 2 - YSO declaration continues until expiry	+ (would mean YSO would be subject to YSO conditions until conditions ended)	- (inconsistent with youth justice principles)	- - (impacts on integrity of youth justice system; may result in adults being brought into youth justice system)	- - (would impact rangatahi Māori given overrepresented in cohort; has implications for active protection obligations)	- -

Analysis and preferred option

101. Officials considered that it was important to protect the integrity of the youth justice system by retaining the status quo where possible. This also embodies This would also mean that the young person does not begin their adult life with a YSO declaration hanging over them.

102. Offcials note that any further offending by the young person as an 18 or 19 year old would be addressed in the adult system.

Declaration process

103. There were five elements identified for the declaration process:

- **Declaration or Order***:* This involved consideration of whether the YSO would be a declaration or a stand-alone (new) order.
- **Initiating the declaration process**: This included consideration of the process that would apply to the making of a YSO declaration, and the matters that the Youth Court (as decision-maker) would need to consider in making a YSO declaration.
- **Decision-making process**: This included consideration of the timing on when a YSO declaration could be made.
- **Naming of new declaration**: This considers whether the name of the declaration should be 'young serious offender'.

Declaration or Order?

104. Consideration was given to what form a YSO should take, that is whether it should be a declaration or an order. The options were:

- **Option 1 – Declaration**: A declaration by the Youth Court which would enable the Youth Court to vary and enhance existing orders available at sentencing, alongside provisions that allow for escalated response for non-compliance or re-offending
- **Option 2 – Order**: The YSO would be a new, standalone Youth Court order.

Assessment of declaration or order options against criteria

Declaration or order	Public Safety	Human Rights	Efficiency	Treaty of Waitangi	Overall assessment
Option 1 - A Court declaration (preferred by officials)	++ (enables more immediate responses to anyone with a YSO declaration where there is non-compliance or breach of their conditions)	- (may impact more on human rights as allows longer intervention in life of young person and includes penalties for non-compliance)	0 (requires the creation of a new declaration process; would be more complex to develop and implement, however provides more flexibility in scope)	- - (likely to significantly impact Māori given overrepresentation of rangatahi Māori within likely cohort and longer intervention and additional penalties; engages Article 3 of Treaty of Waitangi and principle of active protection)	-
Option 2 - A Youth Court order	+ (would provide some public protection due to provisions of new order)	0 (may have some impacts on human rights, but some protection as would be an ordinary sentencing order)	- (would require creating the new order in legislation; while this is likely to use many of the same processes, the order would be likely to be more complex than existing orders)	- (likely to significantly impact Māori given overrepresentation of rangatahi Māori within likely cohort; likely to engage Article 3 of Treaty of Waitangi, and principle of active protection)	-

Analysis and preferred option

105. The preferred approach is for a 'declaration' (option 1), as opposed to a specific Court order (option 2). This option provides more flexibility to 'unlock' a range of additional powers throughout the Oranga Tamariki Act 1989 that will be available in response to non-compliance as well as any re-offending, thus also better promoting overall public safety.

Initiating the declaration process

Decision-making process

106. This parameter considers how the decision to make a YSO declaration would be made. The following options were considered:

- **Option 1 - Automatic**: a YSO declaration would be automatically made as soon as a young person meets the eligibility criteria;
- **Option 2 – Mandatory consideration**: Mandatory consideration by judges of whether to make a YSO declaration when a young person meets the eligibility;
- **Option 3 – Application process**: New Zealand Police make an application for a judge to consider whether to make a YSO declaration.

Assessment of decision-making process options against criteria

Decision-making process	Public Safety	Human Rights	Efficiency	Treaty of Waitangi	Overall assessment
Option 1 - Automatic YSO declaration	++ (would result in all eligible young people being declared YSOs)	- - (removes judicial discretion and impacts on the rights of the child and youth justice principles)	- (would result in faster process as automatic but could result in young people receiving a YSO declaration when not appropriate for them)	- - (significantly more likely to impact on rangatahi Māori as overrepresented in system; likely to engage Article 3 of Treaty of Waitangi and principle of active protection)	- / - -
Option 2 - Mandatory consideration by judges	+ (would require Judges to consider the making of a YSO declaration for all eligible young people)	0 (while mandatory consideration, provides for Judicial discretion in decision-making process)	0 (provides efficiency as Court required to consider, but could impact court timeliness as would need to consider even in cases where YSO clearly not appropriate	- (would impact rangatahi Māori due to overrepresentation in system; likely to engage Article 3 of Treaty of Waitangi and principle of active protection)	0
Option 3 - New Zealand Police application (preferred by officials)	- (would result in New Zealand Police having to make decision to apply for a YSO declaration which may decrease numbers applied for)	++ (provides more protections for rights of child and youth justice principles as requires two gate keepers before declaration could be made	+ (adds additional step into process but that allows for New Zealand Police filtering of applications to only those where YSO declaration more likely to be appropriate	0/- (may lead to more adverse outcomes for Māori due to overrepresentation in system, and potential unconscious bias; likely to engage Article 3 of Treaty of Waitangi and principle of active protection)	+

Analysis and preferred option

107. Officials considered that the application process should be the preferred option (option 3). This process would allow the New Zealand Police to provide an initial filtering process to exclude most situations where the making of a YSO declaration would be inappropriate, thus reducing the impact on both the rights of the young person, but also the impacts on the Youth Court (which compares with option 2, which would require the Youth Court to consider in all cases where the young person met the eligibility criteria).

108. Officials note that while option 3 is perceived as best meeting the Crown's active protection obligations under the Treaty of Waitangi, it still is likely to engage Article 3 of the Treaty of Waitangi due to the overrepresentation of rangatahi Māori within the cohort, and any potential unconscious biases in the decision-making processes – particularly given the likely overrepresentation of rangatahi Māori within the eligible cohort.

109. Officials also consider that judicial oversight to be a key factor in protecting the rights of the young person and providing balance between those rights and public safety. This is why officials did not support the automatic making of a YSO declaration (option 1) as this removed judicial discretion from the process, could result in the making of YSO declarations in contexts where they would be inappropriate, and increases the risk that the making of a YSO declaration could be viewed as a disproportionately severe punishment (section 9 of the NZBORA).

Decision-making process

When should a YSO declaration be made

110. This element considers when a YSO declaration could be made. The two options were:

- **Option 1 - Same time**: decision on YSO declaration would be made at the same hearing as part of disposition (sentencing) of an eligible offence
- **Option 2 - Any time**: decision on YSO declaration could be made at any time following the young person becoming eligible (that is, not following a relevant charge being proven).

Assessment of timing of making declaration options against criteria

Timing of declaration	Public Safety	Human Rights	Efficiency	Treaty of Waitangi	Overall assessment
Same time (preferred by officials)	+ (proven charges indicates proven risk to public safety)	+ (reduces impact on human rights, in particular, reduces possibility that the making of a YSO declaration would be seen as a second penalty)	- (while making order at same hearing as 'conviction' may provide some efficiencies, it has court scheduling implications, and requires Judges to have all information needed to make decision on a YSO declaration and disposition / sentence at the same hearing)	- (may increase risk of unconscious bias in decision-making processes if incomplete information provided to decision-maker; may engage principle of active protection under Treaty of Waitangi)	0
Any time	+ (this would mean YSO declaration could be made at any time, not just at time charges proven or disposition of proceedings)	- - (impact on rights and freedoms contained in NZBORA, such as the possibility of the making of the YSO declaration being seen as a second penalty)	0 (having separate hearings may have less impact on court scheduling than one long hearing covering both YSO declaration and disposition / sentence; however, would ensure Judges had information needed for relevant hearing)	0 (separate hearings may lengthen time waiting for disposition but could reduce risk of unconscious bias in decision-making process as decision-maker would be provided with full information)	-

Analysis and preferred option

111. Officials consider that the making of a YSO declaration should happen as part of the disposition of the proceedings (option 1), rather than a time potentially separate to the young person being sentenced by the Youth Court (option 2). The expectation is that the YSO declaration would be made as part of the Youth Court disposition of a charge once the Court had found that offence had been proven.

112. This preferred option is largely based on the possibility that separating the making of a YSO declaration from the disposition / sentencing of the young person could mean that the making of a YSO declaration would be seen as a 'second penalty', in breach of section 26 of the NZBORA. Officials note that this option would still provide for public safety, but is likely to have more impacts on the efficiency of the YSO declaration regime, as well as court operation. Having both matters heard together places some pressure on those providing information to the Court (for instance, the provision of reports to the Court would need to cover options if a YSO declaration was made, as well as options if no YSO declaration was made), and may have some operational implications for court scheduling as it would increase the time required for the disposition / sentencing process

113. Officials note there is a risk that option 1 would impact on the Crown's obligations under the Treaty of Waitangi. This is because of the risk that incomplete information may result in unconscious bias in the decision-making process. Such risks could be managed by ensuring that those providing information to the Court provide all the information that the Court would need to make decisions on both the YSO declaration as well as the final disposition or sentencing in relation to the proven offence.

Criteria for deciding whether to make a YSO declaration

114. Section 284 of the Oranga Tamariki Act 1989 currently sets out the factors that the Youth Court is to consider when sentencing a young person.

115. As there is no existing YSO declaration process, the question is whether the criteria set out in section 284 should apply or whether revised or new criteria are needed. Officials considered two options:

- **Option 1 - Status quo**: existing factors set out in section 284 (no new factors)
- **Option 2 - New factors**: these would replace those factors existing in section 284 for the YSO declaration. These factors would set out that the Youth Court may only make a YSO declaration if it was satisfied that it was necessary to (i) reduce the risk of further offending, and (ii) promote compliance with orders. As part of this, the Youth Court would need to consider:

    i. factors to be taken into account in sentencing in section 284 of the Oranga Tamariki Act 1989

    ii. the principles and purposes of the Oranga Tamariki Act 1989 (sections 4, 5 and 208), and

    iii. any other relevant information.

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Assessment of new criteria for consideration options against criteria

Criteria for consideration	Public Safety	Human Rights	Efficiency	Treaty of Waitangi	Overall assessment
Option 1- Status Quo	0	0	0	0	0
Option 2 - New factors (preferred by officials)	0 (including new factors may mean YSO declarations more targeted thereby increasing public safety in long-term, however may reduce public safety in short-term by reducing number of YSO declarations made)	+ (likely to better support human rights / children's rights as factors to be considered specific to rationale for making YSO declaration)	0 (creation of new factors would increase administrative complexity but would support overall efficacy of youth justice system)	0 (including criteria relevant to making of YSO declaration may help address any concerns around system bias thus reflecting the Crown's active protection obligations under Article 3 of the Treaty of Waitangi)	+

Analysis and preferred option

116. As there is no existing YSO declaration process in the Act, officials' preference is option 2. Under this option, the legislation would set out a clear set of factors for the Youth Court to consider when determining an application for a YSO declaration over and above the existing sentencing factors in the Act (option 2). These new factors would also support the overall efficacy and integrity of the youth justice system by enabling the Youth Court to consider the impact of previous interventions, alongside the risk of reoffending and the nature of previous offending.

117. Option 2 also reflects that the current sentencing factors in section 284 are not fully suitable for this purpose, as determining whether a young person is a YSO is not equivalent to sentencing decisions. Not including relevant considerations for the Court may have implications under the NZBORA, such as disproportionately severe punishment (section 9) or consideration of whether a young person is being treated appropriately for their age (section 25(i)). Further, setting out clear factors that the Court must consider may also better likely to meet the Crown's obligations under the Treaty of Waitangi (such as active protection), as they may help address or counter any system or unconscious biases in the decision-making process.

Naming of the declaration

118. Two options were considered:

- **Option 1**: Retain YSO declaration as a name
- **Option 2**: Use an alternative name to YSO declaration

Assessment of options against criteria

Name of the declaration	Public Safety	Human Rights	Efficiency	Treaty of Waitangi	Overall assessment
Option 1 - Alternative name to YSO (preferred by officials)	+ (while a name does not alter public safety, this would prevent some young people, who are motivated to receive a YSO declaration, from offending)	+ (an alternative name that was less stigmatising would be more in keeping with youth justice principles or children's rights)	+ (the Youth Court may be more likely to make a declaration if it is viewed as upholding the mana and dignity of the young person)	+ (an alternative name that is less stigmatising may better uphold the mana and dignity of rangatahi Māori, thus better reflecting the principle of active protection)	+
Option 2 - Keep YSO as name (Minister preferred)	- (while a name does not alter public safety, a YSO declaration may be seen as a badge of honour for some young people)	- (a YSO declaration could be stigmatising, which is not in keeping with youth justice principles or children's rights)	- (the Youth Court may be less likely to make a declaration if it is viewed as stigmatising or potentially alienating for some young people)	- (the YSO declaration may be viewed as reducing the mana and dignity of rangatahi Māori, and therefore likely to engage Treaty of Waitangi principles, such as active protection)	-

Analysis and preferred option

119. Officials preferred option is option 1. Ministers, however, preferred the title to retain the YSO title (option 2).

120. Officials consider that an alternative name that better reflects what the declaration can offer as a solution, is more in line with the principles of the Oranga Tamariki Act 1989, as well as UNCROC. Labelling a young person as a "Young Serious Offender" could have a range of outcomes; none of which result in improved public safety outcomes. For instance, some young people will see the label as a badge of honour and will offend with the aim of receiving the label. This has been the experience of Queensland, where a similar declaration, the Serious Repeat Offender declaration, was reported as being a badge of honour – a label young people could brag about – counter to the intent of the legislation.[33]

121. Secondly, some young people may feel trapped by the YSO label, feeling that as society expects them to behave in such a way, they will do so. This stigmatisation then becomes a self-fulfilling prophecy for these young people as they engage in further anti-social behaviour and offending. This would therefore result in increased offending, bringing the young person deeper into the youth and adult justice systems, thus reducing public safety in the long-term.

122. Thirdly, officials also note the importance of mana tamaiti – that is, the intrinsic value and inherent dignity derived from a child's or young person's whakapapa (genealogy) and their belonging to a whānau, hapū, iwi, or family group, in accordance with tikanga Māori or its equivalent in the culture of the child or young person. Placing the label of "Young Serious Offender" on a young person therefore labels and stigmatises both the young person and their wider family or whānau, which has further implications for preventing that young person from moving deeper into the criminal justice system.

Extending a YSO declaration

123. A key question is whether the Youth Court would be able to extend a YSO declaration following further serious offending committed while a young person is declared to be a YSO. Officials considered two options:

- **Option 1 – Extension**: The YSO declaration timeframe could be extended for up to a further year for further offending
- **Option 2 – No extension**: The YSO declaration timeline could not be extended

33 For example: Qld will name and shame child offenders - 9News and Strong opposition to Queensland's proposed juvenile naming and shaming laws - TimeBase

Assessment of options against criteria

Extending YSO declaration	Public Safety	Human Rights	Efficiency	Treaty of Waitangi	Overall assessment
Option 1 - Ability to extend timeframe (preferred by officials)	++ (improved public safety due to ability to extend YSO declaration where repeat, relevant offending)	0 (overall length of declaration may raise proportionality concerns, although protections as requires judicial oversight)	- (increases administrative complexity of regime)	- (rangatahi Māori likely to be overrepresented in YSO cohort and therefore more likely to be subject to longer declarations; engages Treaty of Waitangi principles, such as active protection)	0
Option 2 - No ability to extend timeframe	- - (not providing an extension to the YSO declaration timeframe would not result in improved public safety)	+ (reduces potential for longer declarations; more in keeping with youth justice principles or children's rights)	+ (easier to implement if no ability to extend timeframes)	0 (rangatahi Māori likely to be overrepresented in YSO cohort so not having the ability for timeframes to be extended is likely to better reflect the Crown's responsibilities under Treaty of Waitangi, such as active protection)	0

Analysis and preferred option

124. Option 1 reflects the preferred option. While this option may have implications for youth justice principles and human rights (such as proportionality of response) as well as implications for the efficiency of the youth justice system, it is preferred because it would allow the Court to continue monitoring the behaviour of the young person. Officials also note this option may disproportionately impact rangatahi Māori because they are likely to be overrepresented in the YSO cohort generally, and so are likely to be subjected to the extended YSO declaration.

125. To help mitigate against these issues, any extension of the duration of a YSO declaration would be limited only to cases where there was further serious offending (that is, offending that has a maximum penalty of at least 10 years' imprisonment), and the extension would only be for up a further year. Officials consider that other additional powers attached to the YSO (discussed later in this document) may provide appropriate mechanisms to respond to less serious offending

Rights of review

126. The period of two-years for a YSO declaration is longer than existing Youth Court orders under the Oranga Tamariki Act 1989. Given this, officials considered whether there should be rights of review in relation to the YSO declaration.

127. Three options were considered:

- **Option 1**: Right of review at any time on humanitarian reasons, for instance if the young person becomes seriously unwell
- **Option 2**: Right of review after 12 and 18 months on application by the young person
- **Option 3**: No rights of review

128. If a right of review is provided, the Youth Court would, as part of that review, have the power to vary or discharge the YSO declaration.

129. In this table, options 1 and 2 are not necessarily alternative options; that is, both options 1 and 2 could occur together.

Assessment of options against criteria

Right to review	Public Safety	Human Rights	Efficiency	Treaty of Waitangi	Overall assessment
Option 1 - Right of review at any time for humanitarian reasons (preferred by officials)	0 (may be decrease in public safety, provision of right of review unlikely to negatively impact on actual public safety)	++ (reflects the young person's rights and human rights, in particular proportionality and natural justice)	0 (increases administrative complexity of YSO declaration and may impact on overall timeliness of Youth Court processes but would uphold integrity of youth justice system)	+ (provides opportunity for Youth Court to consider young person's mana and dignity, and may better reflect Crown's active protection obligations under Article 3 of Treaty of Waitangi)	++
Option 2 - Right of review after 12 and 18 months on application by the young person (preferred by officials)	0 (may be decrease in public safety, provision of right of review unlikely to negatively impact on actual public safety)	+ (would better reflect human rights, particularly the rights of the child and proportionality and natural justice)	0 (increases administrative complexity of YSO declaration and may impact on overall timeliness of Youth Court processes but would uphold integrity of youth justice system)	+ (more likely to meet Crown's Treaty of Waitangi obligations as provides opportunity for Youth Court to consider how YSO declaration has impacted on young person's mana and dignity)	+
Option 3 - No right to review	+ (may promote public safety as young person would not be able to have YSO declaration would varied or cancelled as a result of review / appeal)	- (not having a right of review / appeal likely to raise concerns relating to rights of the child; may also raise concerns around proportionality and natural justice)	0 (simpler to implement and operate, but may impact on overall perceptions and integrity of the youth justice system	- (less likely to meet Treaty of Waitangi obligations, particularly active protection given rangatahi Māori likely to be overrepresented in YSO cohort)	-

Analysis and preferred option

130. Officials' and Ministers preferred option is for a right of review to be available for humanitarian reasons at any point for all young people with a YSO declaration in line with the adult justice system. This option recognises there may be circumstances where humanitarian reasons (for example, serious ill health of the young person) may require a discharge of the YSO declaration to be considered.

131. Officials also preferred that a right of review should be available for young people to apply for at two points in the two-year YSO declaration: after 12 months and after 18 months. Providing a right of review also means the Youth Court may have an opportunity to monitor progress the young person has made, any offending that may have occurred during that period, the cultural and spiritual needs of the young person, as well as any change in circumstances that may mean the YSO declaration should be varied or cancelled. As there will be a separate mechanism available to extend the duration of a YSO for future offending (see previous section), it is not intended that the review mechanism would be able to extend the duration of a YSO, but the Youth Court could decide, as part of the review, to reduce the duration of the YSO.

132. While providing a review may be perceived as reducing public safety, it could also provide a mechanism by which the Youth Court can motivate or incentivise a young person to comply with their obligations, or to praise the young person for their progress. This may, in the long-term increase public safety by helping to divert the young person from the youth justice system.

133. Officials note that providing rights of review are also more likely to reflect the Crown's obligations under the Treaty of Waitangi, including the principles of active protection and rangatiratanga. While providing rights of review may impact on the Courts (such as scheduling), they also provide opportunities for maintain the efficacy of court processes overall, including compliance with court orders.

134. Officials consider it likely that considerations of public safety would be amongst those considered by the Youth Court in any review.

Responses

135. Officials considered three broad elements for responses that would be available to young people declared to be YSOs:

- faster responses to young people declared to be YSOs
- stronger interventions for young people declared to be YSOs
- better holding to account young people declared to be YSOs.

136. Officials' preferred options and the subsequent analysis reflect Ministerial direction on scope and approach.

Faster responses to young people declared to be YSOs

137. The Oranga Tamariki Act 1989 (the Act) contains processes to respond to children and young people who offend in a way that balances their well-being, the public interest, victims' interests, and the child or young person's accountability for their behaviour. These processes include:

- *Declarations of non-compliance with an order and associated arrest powers:* New Zealand Police or Oranga Tamariki can apply to the Youth Court for a

declaration of non-compliance if they identify that a young person has not complied with an order or condition without reasonable excuse. New Zealand Police may only apply for such a declaration in relation to a breach of a curfew condition on an intensive supervision order. Oranga Tamariki may apply for a declaration in relation to any other breaches. There are requirements to serve the breach application on the young person as they have a right to respond to the allegations.[34] If service is not possible or the young person fails to appear, an application for a warrant to arrest can be made. Once a hearing has occurred, the court may make a declaration that the young person has, without reasonable excuse, failed to comply satisfactorily with a term, condition, or other requirement of an order. The court can then cancel or vary the order.

- *Arrest for breach of curfew or bail conditions without warrant:* New Zealand Police are empowered to arrest without warrant in response to two types of breaches: breach of curfew, attached to an intensive supervision order, or breach of bail. New Zealand Police do not have the power to arrest young people for other breaches of conditions, such as non-association conditions, unless the breach also constitutes an offence. Police have powers to arrest a young person for breach of bail without a warrant if the police officer believes, on reasonable grounds, that the young person is in breach of, or has recently breached, a bail condition and has breached a condition two previous times. [35] Police are also able to arrest a young person without warrant for breaching curfew conditions attached to an intensive supervision order, or to detain them in order to return them to their curfew address.[36] In all cases, a police officer must consider less restrictive alternatives to arrest or detention to resolve a breach.
- *Family Group Conferences (FGCs):* The purpose of FGCs is to enable the young person, their whānau and the victim to develop a plan that responds to the offending, taking account of any particular needs of the young person, and the interests of any victims and the community. The FGC is a way to inform court proceedings and decisions, as well as a forum to carry out the restorative and accountability functions of the court. Several FGCs are convened throughout the Youth Court process. Some are mandatory – for instance, to commence proceedings in the Youth Court, to establish custodial conditions pending hearing, and to inform sentencing.

138. One of the objectives of the new YSO regime is to respond more quickly to young people declared to be YSOs in order to prevent further harm and address the offending behaviour, thereby protecting public safety. This also reflects evidence that interventions should be within a child or young person's concept of time (that is, soon after an event). Officials assume that faster responses to breaches of orders and to reoffending will improve public safety by providing more effective orders, sooner.

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34 Section 296B of the Oranga Tamariki Act 1989.

35 see section 214A(1)(b) of the Oranga Tamariki Act 1989.

36 Note, an intensive supervision order is only available if a young person has failed to comply with a term, condition or other requirement of particular orders (such as parenting education programme, mentoring programme, alcohol or drug rehabilitation programme, supervision order, community work order, or supervision with activity order). In that case, the Youth Court may make an intensive supervision order, for a period of up to 12 months (see sections 296B and 296G).

139. Officials considered areas where changes could be made across the system to achieve this objective and identified eight options. Option 2 can be combined with other options. Mutually exclusive options are options 2A and 2B, 3A and 3B, and 4A and 4B:

- **Option 1 – Status Quo**
- **Option 2 – New Zealand Police may apply for a declaration of non-compliance for all orders:** New Zealand Police may apply for a non-compliance declaration in relation to a Group 3-6 order, an Intensive Supervision order, or an MSA order.
- **Option 2A – Requirements to gain an arrest warrant are lower:** New Zealand Police may apply for a warrant for arrest of a young person declared to be a YSO who has allegedly not complied with a condition of their Youth Court order without attempting to serve a breach application first. When deciding whether to issue a warrant, the Youth Court must be satisfied that it is necessary or desirable to compel the young person to come before the court.
- **Option 2B – Warrantless arrest for any suspected breach of conditions:** New Zealand Police may arrest or detain a young person declared to be a YSO without warrant if they believe, on reasonable grounds, that the young person with a YSO declaration is non-compliant with a condition relating to a Group 3-6 order, an Intensive Supervision order, or an MSA order.
- **Option 3A– Bail warrantless arrest following one previous breach**: New Zealand Police may arrest a young person declared to be a YSO without warrant if they believe, on reasonable grounds, that they are or have recently breached bail, and have breached their current bail conditions once before.
- **Option 3B – Bail warrantless arrest for any suspected breach:** New Zealand Police may arrest a young person declared to be a YSO without warrant if they believe, on reasonable grounds, that they have breached a bail condition.
- **Option 4A – Remove the requirement for an intention to charge FGC:** intention to charge FGCs are not required for a young person declared to be a YSO, but the Youth Court retains the discretion to order FGCs at any stage of proceedings.
- **Option 4B – All FGCs ordered at discretion of Court:** the Youth Court retains its discretionary power to refer to an FGC but all mandatory referrals to FGCs (intention to charge FGC, a court-referred FGC where the young person is arrested and brought before the court, or a pre-sentencing FGC) do not apply to young people declared to be YSOs.

Assessment of options for faster responses against criteria

	Public Safety	Human Rights	Efficiency	Treaty of Waitangi	Overall assessment
Option 1 - Status quo	0	0	0	0	0
Option 2 - New Zealand Police may apply for a declaration of non-compliance for all orders (preferred by officials and Ministers)	+ (allows Police to respond promptly to potentially serious breaches)	0 (may impact rights to privacy if two agencies monitoring in parallel, can be mitigated by agreed information sharing processes)	+ (non-compliance with a court order can be more readily responded to; may be resource pressure if two agencies monitoring and making applications in parallel)	0 (does not support whānau, hapū, iwi in decision-making processes which could engage Article 2 of Treaty of Waitangi, but no less than the status quo)	+
Option 2A - Requirements to gain a warrant are lower (preferred by officials)	+ (enables young person to be brought back to court for faster response, but still requires application for warrant which may cause some delay)	- (arrest as a first-instance response may breach least restrictive treatment and the avoidance of detention, but judicial oversight maintained)	+ (enables young person to be brought back to court for faster response; reduces pressure by removing requirement for separate hearing; judicial oversight is retained)	-/0 (the lower threshold may be a failure to actively protect rangatahi as taonga; maintaining warrant allows court to consider the interests of hapū, whānau, iwi)	0/+
Option 2B - Warrantless arrest for any suspected breach (Ministers preferred)	+ (enables young person to be brought back to court immediately for faster response)	- - (court oversight only retroactive; arrest as a first-instance response may breach least restrictive treatment, avoidance of detention)	+ (enables young person to be brought back to court immediately for faster response)	- - (rangatahi Māori likely to be overrepresented in cohort and therefore more likely to be subject to warrantless arrest engaging Article 3 of Treaty of Waitangi and may be a failure to actively protect rangatahi as taonga)[37]	- -
Option 3A - Bail warrantless arrest following one previous breach (preferred by officials)	+ (YSO is brought back to court more promptly to ensure safe, effective response to breach)	- (clear threshold and legal backstop for effective positive identification reduces risk of arbitrary arrest)	0 (threshold promotes arrests for more significant breaches, may mean more frequent arrests, may increase pressure)	- - (rangatahi Māori likely to be overrepresented in cohort therefore more likely to be subject to warrantless arrest which could be seen to engage Article 3 of Treaty of Waitangi and inequitable outcomes and may be a failure to	-

37 (HRMI, 2023; Privacy Commissioner, 2022; OHCHR, 2015).

	Public Safety	Human Rights	Efficiency	Treaty of Waitangi	Overall assessment
				actively protect rangatahi as taonga)[38]	
Option 3B - Bail warrantless arrest for any suspected breach (Minister preferred)	++ (improves public safety, at least in short-term, by allowing warrantless arrest for bail breaches)	- - (court oversight only retroactive; arrest as a first-instance response may breach least restrictive treatment, avoidance of detention; may breach age-based treatment	0 (more efficient process; may lead to more frequent arrests, may increase pressure)	- - (rangatahi Māori likely to be overrepresented in cohort and therefore more likely to be subject to more warrantless arrest which could be seen to engage Article 3 of Treaty of Waitangi and inequitable outcomes and may be a failure to actively protect rangatahi as taonga)[39]	- -
Option 4A - Remove the requirement for an intention to charge FGC (preferred by officials)	+ (provides faster Youth Court response to serious offending; but may restrict processes to promote accountability, rehabilitation, and to inform safe, effective court decisions)	- (removing fundamental aspect of system may be seen as not treating young person in light of their age; still subject to court's overall discretion to order FGC)	0 (reduces delay in progressing charges and provides for faster Court response; may restrict key source of information for Court from FGCs)	- - (likely to significantly impact rangatahi Māori given overrepresentation of rangatahi Māori within cohort; may conflict with rangatiratanga as whānau unable to contribute to plan at Intention to Charge FGC engaging Article 2 of Treaty of Waitangi)[40]	-
Option 4B - All FGCs ordered at court's discretion (Minister preferred)	+ (provides faster Youth Court response to serious offending; but may restrict processes to promote accountability, rehabilitation, and to inform safe, effective court decisions)	- - (removing fundamental aspect of system may be seen as not treating young person in light of their age; still subject to court's overall discretion to order FGC)	0 (reduces delay in progressing charges and provides for faster Court response; may restrict key source of information for court decisions)	- - (likely to significantly impact Māori given overrepresentation of rangatahi Māori within cohort; may conflict with rangatiratanga as whānau unable to contribute at FGC engaging Article 2 of Treaty of Waitangi)	- -

38 Ibid.

39 Ibid.

40 Wai 2915 Waitangi Tribunal Report (2021) He Pāharakeke, He Rito Whakakīkīnga Whāruarua- Oranga Tamariki Urgent Inquiry. Retrieved from: https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_171027305/He%20Paharakeke%20W.pdf (justice.govt.nz).

Analysis and preferred option

140. In relation to faster court responses, officials preferred option 2, 2A, 3A and 4A, while Ministers preferred options 2, 2B, 3B and 4B.

Declarations of non-compliance

141. Enabling the New Zealand Police to apply for a declaration of non-compliance could increase the speed at which the Youth Court can respond to breaches of conditions of court orders and make it easier for agencies to respond when breaches are identified.

142. As New Zealand Police is currently only empowered to apply for declarations on non-compliance with breaches of curfew conditions on intensive supervision orders, they will be required to set up processes to guide the applications for other orders, including how they inform Oranga Tamariki and interact with families and whānau. New Zealand Police has advised that the power will also need to be supported by improved capacity to monitor (nothing that this is not a role for New Zealand Police).

143. Expanding the responsibility of applying for a declaration of non-compliance to New Zealand Police may not directly impact NZBORA rights, however, more information on the operational approach is required to understand its full impact.

144. This option may impact rangatahi and whānau Māori as it removes Oranga Tamariki as the initial decision-maker and any protections that may provide. This may result in inequitable treatment as more rangatahi and whānau Māori may be brought before the Youth Court more quickly, for example in circumstances where the facts of the breach of the order are in dispute.[41]

Associated arrest powers

145. Option 2A allows for a faster response as it lowers the threshold to gain a warrant in relation to a declaration of non-compliance. Retaining judicial involvement is likely to be more compliant with NZBORA as there would be some independent oversight of arrests made by New Zealand Police, better providing protections for young people including that they are treated in a manner that takes account of their age.[42]

146. Allowing New Zealand Police to arrest young people without a warrant for any suspected breach of conditions (option 2B) may provide a faster response to a breach of a Youth Court order. However, it removes the independent oversight of the Youth Court and does not account for minor or unintentional breaches. Instead, oversight would be limited to reviewing arrests after the fact, in which case any harm or impacts on the rights of the young person would have already occurred. Police have advised that there is a large body of case law to prevent unlawful arrests and that courts' retroactive oversight is effective.

147. Enabling warrantless arrests may engage NZBORA rights including the right to be secure against unreasonable search or seizure (section 21), the right to not be

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41 Human Rights Measurement Initiative. 2023. New Zealand: Safety from the State [Online]. Available (accessed 5 April 2024): www.rightstracker.org/country/NZL?tab=report-physint; Privacy Commissioner; Independent Police Conduct Authority. (8 September 2022). Joint Inquiry by the Independent Police Conduct Authority and the Privacy Commissioner into Police conduct when photographing members of the public; OHCHR Working Group on Arbitrary Detention. (6 July 2015). Report of the Working Group on Arbitrary Detention: Mission to New Zealand.

42 Section 25(i) NZBORA.

arbitrarily arrested or detained (section 22), and the rights of person arrested or detained (section 23). Permitting a wider scope for warrantless arrests (that is, for any suspected breach) enables a more intrusive response for low-level breaches of conditions, including unintentional breaches. As New Zealand Police already have powers to arrest a young person without a warrant where their behaviour puts the public at risk, these additional warrantless arrest powers may be more difficult to justify.

148. Enabling New Zealand Police to make warrantless arrests of rangatahi Māori who are suspected of breaching conditions of an order may not align with the Crown's Treaty of Waitangi obligations to actively protect rangatahi as taonga as warrantless arrests remove a young person from their whānau. It may also result in inequitable treatment given the disproportionate representation of rangatahi Māori in the YSO cohort.[43]

Breach of Bail

149. Lowering the threshold for arrest without warrant for an alleged breach of bail (Option 3A) allows breaches of bail to be responded to promptly, while upholding the right of young people declared to be a YSO to be dealt with in a manner that takes account of their age and lowers the risk of arbitrary or unlawful arrest. This option allows New Zealand Police to respond faster to young people who seriously or intentionally breach bail,[44] while recognising that many breaches of bail may be minor or accidental.

150. Allowing New Zealand Police to arrest young people without warrant for an alleged breach of bail without requiring previous bail breaches (Option 3B) allows for an immediate response but does not provide for the possibility of minor or unintentional bail breaches. It may therefore be considered to not treat young people in a way that takes account of their age. Constables may still use their discretion to use a less intrusive or diversionary approach in line with the purpose and principles of the Oranga Tamariki Act 1989. However, there will be no oversight of that discretion until after the YSO is arrested and brought before the Youth Court. The Youth Court may be less likely to accept a single breach as sufficient evidence of an inappropriate bail condition, especially if the breach is minor or unintentional.

151. There is a risk that increasing warrantless arrest powers increase arbitrary and mistaken arrests, however, given this option will only impact the likely small number of serious and persistent young offenders who will be declared a YSO and the ability of the Youth Court to assess the arrest after the fact, this risk is likely to be minimal. This option could result in inequitable treatment for rangatahi Māori, as they are overrepresented in the YSO cohort, which would engage Article 3 of the Treaty of Waitangi.[45] Racial profiling and bias in arrests and the youth justice system may become more significant under these conditions as controls are relaxed.

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43 Wai 2915 Waitangi Tribunal Report (2021) He Pāharakeke, He Rito Whakakīkīnga Whāruarua- Oranga Tamariki Urgent Inquiry. Retrieved from: https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_171027305/He%20Paharakeke%20W.pdf (justice.govt.nz).

44 Hon Jacqui Dean. (2 July 2013). Bail Amendment Bill - Second Reading. Hansard, New Zealand Parliament. Available (accessed 5 April 2024): www.parliament.nz/en/pb/hansard-debates/rhr/combined/50HansD_20130703_00000016.

45 Wai 2915 Waitangi Tribunal Report (2021) He Pāharakeke, He Rito Whakakīkīnga Whāruarua- Oranga Tamariki Urgent Inquiry.

Discretionary Family Group Conferences

152. FGCs provide responses to offending and can be used to inform the court of safe and effective responses to the young person's offending. Making the Intention to Charge FGC discretionary (option 4A) may better protect public safety, as it will enable the young person declared to be a YSO who reoffends to be brought before the court more quickly. It also continues to largely uphold the principles of the youth justice system by retaining the remaining mandatory FGCs and ensuring the young person can be dealt with a manner that takes account of their age. Removing the mandatory Intention to Charge FGC may conflict with obligations under the Treaty of Waitangi, as it may rangatiratanga and whānau, hapū and iwi voice in decision-making processes. However, the court would retain the discretion to refer back to the FGC and all other mandatory FGCs would remain.

153. It is anticipated that making all FGCs discretionary (option 4B) could remove delays in the Youth Court and create faster responses from the Court. However, officials do not support this option as they consider it risks not dealing with the young person in a manner that takes account of their age (section 25(i) NZBORA). FGCs are also a fundamental part of the youth justice system and provide opportunity for collective discussion and decision-making with the young person and their whānau.

154. Removing all mandatory FGCs may be seen to be inconsistent with the Crown's Treaty of Waitangi obligations as it does not allow whānau, hapū and iwi to have a voice in making a plan to respond and deal with the young person's behaviour. However, whānau are likely to already be involved in a young person declared to be a YSO, and Oranga Tamariki may be able to convene a whānau hui in some cases.

Stronger interventions for young people declared to be YSOs

155. One objective of the YSO regime is to strengthen the Youth Court's response to young people declared to be a YSO, so that more intensive interventions can be used to better address offending behaviour.

156. The Oranga Tamariki Act 1989 sets out the interventions available for young people who offend:

- *Sentencing of young people:* A young person may be sentenced by the Youth Court under s 283 when a charge against them is proven. Section 284(1) sets out the factors to be considered when making an order under section 283, which must be considered alongside the primary considerations (section 4A(2)) and principles (sections 5 and 208) of the Oranga Tamariki Act 1989. The Youth Court must impose the *least*-restrictive outcome it considers adequate in the circumstances (section 289)

- *Electronic monitoring:* Electronic monitoring is used to deter or monitor breaches of conditions and can only be imposed in limited circumstances in the youth justice system: to monitor curfew conditions on intensive supervision orders or young people on electronically monitored bail.[46] Intensive supervision orders are available for young people who have not complied with a judicially monitored condition of a supervision or Supervision with Activity order (section 296B). A

46 Only a few people have been on the intensive supervision order with electronic monitoring conditions since 2020, but approximately 100 young people (aged 17 years or under) are on electronically monitored bail at any given time. This would likely include people who ultimately have YSO imposed under this proposal.

curfew condition requires the young person to remain at a specified address for a specified period of the day, including overnight, and any curfew period must not be for more than 84 hours per week. The Youth Court can make a further condition that the curfew condition be electronic monitored for up to six months. Suitability assessments are required to ensure that the address and fellow residents make it suitable for a person to be subject to an EM condition. Consent to the use of electronic monitoring (including by other occupants) is also required and is generally obtained through the FGC process prior to sentencing. It is not an offence to breach an electronically monitored curfew condition. Electronic monitoring of young people is rare, with only two young people having been subject to Intensive Supervision with a curfew and electronic monitoring conditions since 2020.

- *Remand / Release from custody pending a hearing:* A young person waiting for a hearing on a charge may be released unconditionally, released on bail, or detained in custody (section 238). Where a young person is unconditionally released, no conditions can be imposed. In comparison, release on bail can be made subject to certain conditions, such as curfew conditions (section 240). There is a rebuttable presumption against a young person being detained in custody, consistent with the principle of imposing the least restrictive sanction, as well as international youth justice standards (such as the Beijing Rules) that place importance on children and young people being placed with members of their family or extended family.

- *Placement consideration:* Young people may be placed in the custody of the Chief Executive of Oranga Tamariki if they have been arrested, are pending hearing of a charge, or if they have been sentenced to a Supervision with Activity or Supervision with Residence order. The Youth Court can order that a young person waiting for a hearing on a charge be detained in the custody of the chief executive, an iwi social service, or a cultural social service, or Police custody.[47] The Chief Executive (or their delegate) then decides where the young person should be placed (for instance, in the care of a person, organisation or in a youth justice residence[48]). The law does not specify what the Chief Executive must take into account when making a placement decision.[49]

157. In line with the objective to provide stronger interventions for young people declared a YSO, officials identified the following six options with options 2 to 6 able to operate independently from each other, or as a package of interventions:

- **Option 1 – Status Quo**

- **Option 2 – Strengthened sentencing considerations:** provide the following additional strengthened sentencing considerations for the Youth Court to consider when sentencing a young person declared to be a YSO alongside those in section 284(1): the seriousness of the offending, the criminal history of the

47 Section 238(1)(d) and (e) of the Oranga Tamariki Act 1989.

48 Noting that there are restrictions in the Oranga Tamariki Act 1989 around residence placements, for instance, placement in a residence for someone in the custody of Oranga Tamariki who is on a Supervision with Activity order - see section 307(4).

49 A young person aged 17 may also be detained in a youth unit of a prison, on application to the Court by the Chief Executives of Oranga Tamariki and Corrections (see sections 238(1)(f) and 239(2A) of the Oranga Tamariki Act 1989.

YSO, the interests of the victim, the risk posed by the YSO to other people and the community, and 9(2)(f)(iv) [redacted]

- **Option 3 – Electronic monitoring attached to a curfew condition on Supervision with Activity order:** young people declared to be YSOs are eligible for electronic monitoring of their compliance with any curfew conditions attached to a Supervision with Activity order (and any further Supervision with Activity orders) for up to six months if the Youth Court is satisfied that other conditions of the order are likely to be insufficient to secure the young person's compliance.
- **Option 4 – Custody orders pending hearing:** where a young person declared to be a YSO is charged with an imprisonable offence and is awaiting their hearing, there is a presumption against the young person being released without conditions.
- **Option 5 – Chief Executive placement considerations:** a new requirement for the Chief Executive to consider the risk of a young person declared to be a YSO absconding and offending when making a placement decision.
- **Option 6 – Military-style Academy orders**: once a young person is declared a YSO, then the MSA order would become unlocked as an additional Group 6 response (note MSA orders parameters are discussed later in this document).

Assessment of options for stronger interventions against criteria

	Public Safety	Human Rights	Efficiency	Treaty of Waitangi	Overall assessment
Option 1 - Status quo	0	0	0	0	0
Option 2 - Strengthened sentencing considerations (preferred by officials)	+ (enables YSO's criminal history and interests of victims to be taken into account which promotes public safety in short-term)	- (punitive approaches to offending behaviour may not align with youth justice and UNCROC principles; may conflict with United Nations Declaration on the Rights of Indigenous Peoples)	- (on their own, punitive approaches to offending behaviour, particularly for children and young people, are less likely to deter future offending; 9(2)(f)(iv) [redacted]	- (may result in more restrictive sentencing that would disproportionately impact rangatahi Māori overrepresented in YSO cohort resulting in inequitable treatment may be seen as inconsistent with Article 3)	-
Option 3 - Electronic monitoring attached to a curfew condition on Supervision with Activity order (preferred by officials)	+ (curfew introduces an intensive condition for people on SWA where other conditions do not adequately address public safety risks; effectiveness would depend on the individual and package of interventions available and the long-term impact on reoffending)	- (curfew is likely to engage section 18 of NZBORA; EM is likely to engage section 21 of NZBORA – though the time-limit of the curfew provides a safeguard; may not align with UNCROC and conflict with youth justice principles)	- (EM has relatively high fiscal costs compared with community sentences without EM and requires substantial human input, however, is likely to be more cost-effective than Supervision with Residence orders; young people may be less likely to comply than adults)	- (may raise concerns about over- monitoring of Māori contributing to inequitable treatment which could be seen to be inconsistent with Article 3; allows rangatahi Māori to remain in care of whānau; concerns that data collected will be used in ways that diminish mana, or may not recognise rangatiratanga)[50]	- / - -
Option 4 - Custody pending hearing	+ (consistent with public safety and victim's	- (may conflict with youth justice principles and international	0 (largely aligns with current practice)	- (disproportionately impacts rangatahi Māori due to overrepresentation	- / - -

50 Māori Data Sovereignty and Privacy, March 2023, Te Ngira Institute for Population Research.

(preferred by officials)	interests, at least in short-term)	commitments, though largely aligns with current practice)		in cohort which could be inconsistent with active protection of rangatahi as taonga[51] under Article 2 and inequitable treatment under Article 3)	
Option 5 - Chief Executive placement considerations (preferred by officials)	++ (likely to increase public safety, especially short-term)	0 (unlikely to conflict with NZBORA and international commitments).	+ (may increase administration for Oranga Tamariki but may reduce costs and lead to better placement decisions)	0 (may allow for a tailored approach which may better enable young person to be placed with whānau or more culturally suitable placement, but also potential for decisions to place them outside of whānau if deemed a risk)	+ / +
Option 6 - Military-Style Academy orders (preferred by officials)	+ (enhances public safety – at least in short-term)	- (may conflict with NZBORA, youth justice principles and international commitments)	- (increased administrative costs, need for rehabilitation and reintegration for MSA to be overall successful)	- - (disproportionately impacts rangatahi Māori due to overrepresentation in cohort which could result in inequitable treatment and engage Article 3 of Treaty of Waitangi;[52] could support rangatiratanga if run by hapū / iwi.)	- / - -

51 Wai 2915 Waitangi Tribunal Report (2021) He Pāharakeke, He Rito Whakakīkīnga Whāruarua- Oranga Tamariki Urgent Inquiry, p 60.

52 Ibid.

Preferred option and analysis

158. The above options align with Ministers' instructions to develop a legislative YSO regime for young people with persistent and serious offending behaviour, which unlock a range of orders, including MSAs. These options focus on addressing offending behaviour by delivering stronger, more immediate consequences while also improving public safety.

Strengthened sentencing considerations

159. Current sentencing considerations in section 284(1) are considered insufficient for the YSO regime as they do not adequately reflect the heightened risk posed by young people declared to be YSOs. This option would require judges to consider a broader range of factors that focus more on the offending and its impacts, which promotes greater accountability, may result in stronger sentences and therefore may better protect public safety. These considerations, 9(2)(f)(iv) [redacted] mirror those the Youth Court must consider when deciding whether to transfer a proceeding to the District Court or High Court.

160. This option is likely to disproportionately impact Māori due to the overrepresentation of Māori in the cohort of young people declared to be YSOs. 9(2)(f)(iv) [redacted]. This could lead to a disproportionate rate of rangatahi Māori spending more time in custody and away from their whānau, hapū and iwi and disconnected from their culture. This may therefore lead to inequitable outcomes for rangatahi Māori, which may be seen to be inconsistent with Article 3 of the Treaty of Waitangi, and may be seen as failing to actively protect rangatahi Māori who are considered to be taonga.[54]

161. Youth justice principles will influence how this option will be applied, for example, that the least-restrictive sentence possible in the circumstances should be used (section 289(2)), that detention should be used only as a last resort and that rehabilitation should be prioritised over punishment. Despite this, the option may be perceived to infringe on the right of a child to be dealt with in a manner that takes account of the child's age, affirmed by section 25(i) of the NZBORA and Article 40 of UNCROC. This option may also be perceived to infringe on the right to be free from discrimination, affirmed by section 19 of the NZBORA as it will disproportionately impact rangatahi Māori.

162. 9(2)(f)(iv) [redacted]

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53 9(2)(f)(iv) [redacted]

54 Wai 2915 Waitangi Tribunal Report (2021) He Pāharakeke, He Rito Whakakīkīnga Whāruarua- Oranga Tamariki Urgent Inquiry.

55 9(2)(f)(iv) [redacted]

Electronic monitoring attached to a curfew condition on Supervision with Activity order

163. This option enhances Supervision with Activity orders by making electronic monitoring available to attach to any curfew conditions imposed by the court for young people declared to be a YSO. Evidence on the effectiveness of electronic monitoring varies and findings often relate to the adult jurisdiction, however the advantages and disadvantages of electronic monitoring are generally considered to be:

Advantages of electronic monitoring	Disadvantages of electronic monitoring (EM)
• more freedom of movement when compared to detention[56] • emerging international evidence that it can reduce reoffending in the right conditions but sparse evidence about whether this applies to young people • enables a higher level of monitoring of restrictive conditions (such as curfews) than in-person checks, and other types of reporting • provides evidence of breaches and, in some cases, new offending • young person may remain at home with family, whānau or other caregivers[57] • enables participation in community-based rehabilitation, education, employment, and training[58] • provides opportunity for reflections, stabilisation and learning[59] • provides victims and public with reassurance that sentence conditions are monitored • enables accountability and opportunity for compliance with conditions	• benefits not guaranteed and depend on the individual[61] • not every address is suitable for EM, and other suitability assessments (for example, fellow occupants) need to be undertaken • does not physically restrain a monitored person and individuals may still offend[62] • can impact and add burdens to the individual, family and other occupants[63] • compliance often obtained through fear of punishment for non-compliance[64] • relies on young person understanding requirements, which may be challenging for those with neurocognitive conditions • may deteriorate relationships and be barrier to employment or training[65] • adolescents are characterised as impulsive and are more influenced by peers and social approval than adults[66]

56 Smith, R & Gibbs, A (2013). Extending the electronic net in Australia and New Zealand; Developments in electronic monitoring down-under. *In Electronically Monitored Punishment: International and critical perspectives.* Nellis, M & Beyens, K & Kaminski, D (eds). Oxon & New York: Routledge: 82 – 101. p. 95.

57 Ibid.

58 HM Prison and Probation Service (2018) The experience of electronic monitoring and implications for practice: A qualitative research synthesis. Retrieved from: Analytical Summary - The experience of Electronic Monitoring and implications for practice: A qualitative research synthesis (publishing.service.gov.uk), p.1.

59 Ibid.

61 Ibid.

62 Smith, R & Gibbs, A (2013), above n 56, p. 95.

63 Ibid; HM Prison and Probation Service (2018), above n 58, p. 4.

64 HM Prison and Probation Service (2018), above n 58, p. 4.

65 Ibid.

66 Gluckman, P (2018). It's never too early, never too late: A discussion paper on a youth offending in New Zealand. Retrieved from: Discussion-paper-on-preventing-youth-offending-in-NZ-1jhkfm4.pdf (auckland.ac.nz). p. 6.

• limited psychological distress for those monitored.[60]	• insufficient to achieve rehabilitative goals and has limited rehabilitative benefit[67][68] • need for effective sentence oversight and support services to accompany EM.

164. This option impacts NZBORA rights, including freedom of movement (section 18), as it enables the state to restrict and monitor the young person's movements and unreasonable search and seizure (section 21), as electronic monitoring will likely constitute a search.[69]

165. Enabling electronic monitoring effectively makes the Supervision with Activity order parallel to that of an intensive supervision order, which is higher in the sentencing hierarchy. However, for individuals at the higher end of the scale, electronic monitoring may be more consistent with youth justice principles of imposing the least restrictive sentence if the alternative is a supervision with residence order. Officials did not recommend extending electronic monitoring of conditions to supervision orders, which is consistent with the adult system.[70]

166. Implementation challenges need to be considered. Officials note in particular that Oranga Tamariki may need to transition to a 24-hour operating model to ensure that information provided from electronic monitoring can be effective and acted on in a timely way, particularly where the curfew applies overnight. Officials understand anecdotally that there is a higher level of complexity given young people are attending school and other appointments and these can show up as reported breaches if recorded incorrectly.

167. Consent is required for electronic monitoring, not just by the young person, but by the other occupants of the residence, alongside suitability assessments. The removal of the requirement for FGCs may reduce opportunities for whānau to consider and inform the court on whether or not electronic monitoring is viable (though alternative means for obtaining their views will be available), and legislative provisions mirroring the adult system are likely to be required to ensure consent is obtained.

168. This option could lead to inequitable outcomes for rangatahi Māori, as a disproportionately higher percentage of rangatahi declared to be YSOs may be electronically monitored, may be seen to conflict with Treaty of Waitangi obligations to actively protect rangatahi as taonga. Rangatiratanga over the electronic monitoring data collected about rangatahi Māori may also engage Article 2 of the Treaty of Waitangi.[71] However, electronic monitoring may enable rangatahi Māori to remain at

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60 Hawkes, A (2020). Under Surveillance: Does global position system (GPS) monitoring of offenders really work and what does the dynamic risk assessment offender re-entry (DROAR) really tell us? Retrieved from: 2 (otago.ac.nz). p 90.

67 HM Prison and Probation Service (2018), above n 58.

68 Department of Corrections (2016). Regulatory Impact Statement: Progressing the Electronic Monitoring of Offenders Legislation Bill. Retrieved from Electronic Monitoring of Offenders - 12 May 2015 - Regulatory Impact Statement - Department of Corrections (treasury.govt.nz) p. 6.

69 Attorney General report on the Electronic Monitoring of Offenders Legislation Bill. Retrieved from: BORA-Electronic-Monitoring-of-Offenders-Legislation-Bill.pdf (justice.govt.nz). p. 9.

70 Section 52 of the Sentencing Act 2002.

71 Principles of Māori Data Sovereignty (2018) *Te Mana Raraunga Māori Data Sovereignty Network*. Retrieved from: tmr-maori-data-sovereignty-principles-october-2018-832194.pdf (otago.ac.nz).

home with their whānau and access hapū or iwi rehabilitation providers, instead of being placed in a secure youth residence.

Custody pending hearing

169. Option 4 would create a presumption against a young person declared to be a YSO being able to be released without conditions pending their hearing. Coupled with existing law presumes young people will not be detained in custody, young people declared to be YSOs are likely to be released on bail with conditions. This option is likely to better protect public safety as it ensures the young person would be more likely to be released with conditions that can appropriately address any risks of reoffending or non-compliance. It prioritises the safety of victims and the community, recognising the heightened risk YSOs pose. However, the presumption is rebuttable, meaning the Youth Court retains discretion in every case.

170. The increased use of bail conditions could be seen to lead to inequitable outcomes for rangatahi Māori, as Māori are overrepresented the YSO cohort, who may face more punitive bail conditions which could then engage Article 3 of the Treaty of Waitangi.[72] However, the presumption largely aligns with current practice and most of the young people captured are already likely to be released with conditions due to the seriousness of the offending.

171. This option may be perceived to infringe on the right of a child to be dealt with in a manner that takes account of the child's age, affirmed by section 25(i) of the NZBORA, as well as in UNCROC. This option may also be perceived to infringe on the right to be free from discrimination, affirmed by section 19 of the NZBORA as it will disproportionately impact rangatahi Māori. However, as the presumption will be rebuttable and the Youth Court retains discretion, we consider any limitations are likely to be justifiable.

Chief Executive placement considerations

172. This option would require the Chief Executive of Oranga Tamariki to consider the young person's risk of absconding or reoffending when making placement decisions. In practice, the Chief Executive already takes those factors into account when making placement decisions. However, requiring it in legislation will mean it is appropriately considered in every case, which could increase public safety.

173. Requiring these specific considerations when placing a young person declared to be a YSO, would create a tailored assessment of where to place the young person, given their particular risk of offending (or reoffending, if previous charges are proven), and brings public safety from offending into the Chief Executive's decision-making process. This consideration would not be limited to placement decisions following sentencing.

174. This proposal is unlikely to raise significant NZBORA concerns or conflict with youth justice principles. It is also unlikely to conflict with the Treaty of Waitangi obligations, as this consideration must still be exercised in light of the other principles of the Oranga Tamariki Act 1989 including, for example, that the child's or young person's place within their family, whānau, hapū, iwi, and family group should be recognised.

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72 Wai 2915 Waitangi Tribunal Report (2021) He Pāharakeke, He Rito Whakakīkīnga Whāruarua- Oranga Tamariki Urgent Inquiry.

Better holding young people declared to be YSOs to account

175. The Oranga Tamariki Act 1989 sets out a range of orders to hold young people to account. These include:

- *Supervision orders*: A supervision order places the young person in the custody of the Chief Executive of Oranga Tamariki (or other specified person) for up to 12 months. Supervision orders may be standalone (up to six months), or they may follow a Supervision with Residence order (6-12 months), or may follow a Supervision with Activity order (up to six months). The intent of a supervision order is to reduce further offending through interventions and rehabilitation in the community. To support that intent, mandatory conditions attach to a supervision order relating to residence, employment and reporting to a social worker. Further conditions may also be imposed to reduce the likelihood of reoffending.

- *Supervision with Activity orders*: Supervision with Activity orders place the young person under the supervision of the Chief Executive of Oranga Tamariki (or other person or organisation) for up to six months. A Supervision with Activity order is an alternative to custody and placement in a residence, and is the highest non-custodial sentence available. Supervision with Activity orders may be subject to conditions, such as a requirement to attend and remain at any specified centre and take part in any specified activity at the centre and/or to undertake any specified programme or activity. Programmes aim to reduce serious and persistent re-offending, improve life outcomes for high-risk children or young people, and engage children and young people in education, training or work.[73] A Supervision with Activity order may only be followed by a supervision order.

- *Judicial monitoring*: Judicial monitoring allows the Youth Court to monitor a young person's compliance with any conditions of an order and to review their progress in achieving goals of their plan to comply with their order. Currently, judicial monitoring is only available where a young person does not comply with the conditions of their supervision order or Supervision with Activity order. Where a judicial monitoring direction is made, the young person has their compliance monitored at least once every three months after the making of the direction.

- *Early release for Supervision with Residence orders*: Section 314 requires a young person subject to a Supervision with Residence order to be released from custody after they have completed two thirds of their order if the Youth Court is satisfied that the young person has not absconded or committed further offences, has behaved and complied with any obligations in their implementation plan, and has complied with conditions of their order to undertake a programme or activity. Early release aligns with the principles that the court must impose the least restrictive outcome adequate in the circumstances, and that the young person should not be detained in custody for any longer than is necessary. It also aligns with parole in the adult system.

176. Enhancing the accountability of young people declared to be YSOs is a further objective of the YSO regime. In line with that objective, officials identified six options for enhancing the current system better hold young people to account for their offending

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73 Oranga Tamariki (2022) Service specifications: Supervision with Activity. Retrieved from: https://www.orangatamariki.govt.nz/assets/Uploads/Working-with-children/Information-for-providers/Service-Specifications/Supervision-with-activity.pdf.

behaviour; with options 2 to 6 able to operate independently from each other, or as a package:

- **Option 1 – Status Quo**
- **Option 2 – Longer supervision orders:** when sentencing a young person declared to be a YSO, the Youth Court is able to order a supervision order that may not exceed 12 months, with the option to extend for a further six months. The cumulative duration of any orders cannot exceed 24 months.
- **Option 3 – Overnight stays on supervision orders:** supervision orders made to follow a Supervision with Residence order or an MSA order should allow for overnight stays at any specified centre approved by Oranga Tamariki, but not for long-term residential placements.
- **Option 4 – Longer Supervision with Activity orders:** following a six-month Supervision with Activity order, the Youth Court may make a further Supervision with Activity order of up to six months. A further Supervision with Activity order must be made at the same time as sentencing of the young person declared to be a YSO or before expiry of the first Supervision with Activity order, and the cumulative duration of any orders cannot exceed 24 months.
- **Option 5 – Greater use of judicial monitoring:** enable the Youth Court to, when sentencing a young person declared to be a YSO, direct judicial monitoring of conditions relating to a parenting, education, mentoring, or alcohol or drug rehabilitation programme order (Group 3 response), supervision or community work order (Group 4 response), or Supervision with Activity order (Group 5 response). A direction would require the young person to appear before the Youth Court no later than three months after sentencing, and at least every three months after that (as per status quo).
- **Option 6 – Removing early release for Supervision with Residence or MSA orders:** young people declared to be YSOs would not be eligible for early release and must complete the full term of either their Supervision with Residence order or MSA order.

Assessment of options to better hold young people to account against criteria

	Public Safety	Human Rights	Efficiency	Treaty of Waitangi	Overall assessment
Option 1 - Status Quo	0	0	0	0	0
Option 2 - Longer supervision orders (preferred by officials)	+ (community-based interventions are more likely to produce long-term sustainable change and better hold young people to account[74])	+ (longer supervision orders balanced with community nature of order and support a therapeutic focus; consistent with other jurisdictions with comparable youth justice regimes,[75] allows young person to remain in the care of family / whānau)	0/- (requires legislative change however changes relatively straightforward although some costs associated with change)	0/- (disproportionate impact for Māori given overrepresentation in YSO cohort; may support further rehabilitation opportunities, and could provide for enhanced hapū and iwi led services noting there are few currently)	0/+
Option 3 - Supervision orders with overnight stays (preferred by officials)	+ (consistent with public safety and victims' interests)	- - (raises NZBORA concerns, especially freedom of movement and liberty of person; may not align with UNCROC)	0/+ (clarifies current policy intent so would be straight forward to implement)	- (allows rangatahi Māori to remain in care of whānau and community; will have a disproportionate effect on Māori given the overrepresentation in the YSO cohort which could engage Article 3)	0/-
Option 4 - Longer Supervision	+ (community-based interventions are more likely to produce long-term sustainable change[76])	- (significant shift in approach as order length doubled; could engage NZBORA rights and freedoms, such as freedom	- (increasing length of orders could impact service providers; would result in increased costs to system although longer orders may	- (disproportionate impact for Māori given overrepresentation in cohort; limited hapū, iwi rehabilitation	-

74 Ministry of Social Development. (2016). Reoffending patterns for recipients of Youth Court supervision orders apo-nid67632.docx (live.com).

75 For example see *Victoria Australia, Western Australia, United Kingdom*.

76 Ministry of Social Development (2016) Reoffending patterns for recipients of Youth Court supervision orders apo-nid67632.docx (live.com).

	Public Safety	Human Rights	Efficiency	Treaty of Waitangi	Overall assessment
with Activity orders (preferred by officials)		of association; would allow young person to remain in care of family/whānau and be connected to community)	be seen as alternative to custodial sentences)	providers therefore cultural considerations needed)	
Option 5 - Judicial monitoring (preferred by officials)	0/+ (mixed evidence as to whether judicial monitoring is effective, anecdotal evidence indicates young people respond well[77]. Allows judges to alter orders and intervene earlier)	0/+ (upholds youth justice principles however unclear what role family, whānau, hapū, iwi could play in judicial monitoring, which is important to judicial monitoring success)	- (increasing judicial monitoring could impact on court scheduling and timeliness, which is already an issue; additional resourcing may be needed)	- (disproportionate impact for Māori given overrepresentation in cohort, does not explicitly allow for whānau, hapū, iwi to participate in decision making which may not be seen to promote rangatiratanga)	0/-
Option 6 - Removing early release for Supervision with Residence or MSA orders (preferred by officials)	+ (increases public safety in short term; also provides greater accountability and is consistent with policy intent of new YSO regime)	- - (may be inconsistent with NZBORA (sections 25(i), 9 and 22) as well as adult jurisdiction and youth justice principles)	0/- (already systems in place; may impact on youth justice residences as already muster issues)	- - (disproportionate impact for Māori given overrepresentation in cohort; likely to further disconnect rangatahi Māori from whānau, culture and identity or recognise mana tamaiti)[78]	- / - -

77 Judicial monitoring provides reassurance for borderline cases | The District Court of New Zealand (districtcourts.govt.nz).

78 Wai 2915 Waitangi Tribunal Report (2021) He Pāharakeke, He Rito Whakakīkīnga Whāruarua- Oranga Tamariki Urgent Inquiry.

Analysis and preferred option

177. The above options will support an enhanced response that increases public safety while also focusing on more robust and longer rehabilitative support to improve accountability of young people whose offending is serious and persistent.

Longer supervision and Supervision with Activity orders, including overnight stays

178. Longer supervision orders may provide more opportunity for rehabilitation and addressing the underlying causes of offending which supports a stronger focus on public safety. Evidence suggests that community-based interventions, even for serious offenders, are more likely to produce long-term sustainable change.[79] Allowing overnight stays on Supervision with Activity orders may also promote greater rehabilitation.

179. Cultural considerations would need to be made in the implementation of enhanced services in order for them to be as effective as possible and to uphold obligations under the Treaty of Waitangi.[80] Currently there are few hapū and iwi rehabilitation providers which is disproportionate to the percentage of YSOs who would be rangatahi Māori. Supervision orders as an intervention for young people declared to be YSOs allow for them to remain in the care in of their family/whānau and connected to their community in line with the youth justice principles. Noho marae may be included as part of overnight stays which could promote cultural and whānau connection more generally however connection with their own whānau, hapū is not guaranteed as rangatahi will not necessarily be visiting marae that they whakapapa to.

180. This option is consistent with international jurisdictions, whose comparable youth supervision orders range between 12 and 18 months in length. As judicial discretion will remain when determining the length of the supervision order, it will enable consistency with the youth justice principles and the child to be dealt with in a manner that takes account of their age (section 25(i) NZBORA).

Judicial monitoring

181. Judicial monitoring allows the court to actively manage and monitor compliance with orders made, allowing an individual approach to be taken to review a YSOs progress in achieving their plan and comply with their order. Enabling judicial monitoring to be available earlier in the process may strengthen accountability by providing a check on a young person's behaviour. Anecdotal evidence indicates that young people tend to respond well to judicial monitoring as it provides an opportunity for them to be accountable to an authority figure, which they may not have experienced before.[81] Judicial monitoring may therefore enhance public safety.

182. Judicial monitoring is not likely to raise concerns in relation to consistency with human rights obligations or the youth justice system. Judicial monitoring is a discretionary tool already available in the youth justice system and, while it requires the young person to

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79 Ministry of Social Development (2016) Reoffending patterns for recipients of Youth Court supervision orders apo-nid67632.docx (live.com).

80 Wai 2915 Waitangi Tribunal Report (2021) He Pāharakeke, He Rito Whakakīkīnga Whāruarua- Oranga Tamariki Urgent Inquiry.

81 Judicial monitoring provides reassurance for borderline cases | The District Court of New Zealand (districtcourts.govt.nz).

appear before the court at certain times, does not significantly impact on freedom of movement. Judicial monitoring is already in place and operational, however any increase in judicial monitoring could impact on court scheduling and timeliness.

183. Given the disproportionate representation of rangatahi Māori as those who will likely be declared YSOs, rangatahi Māori are more likely to be impacted by judicial monitoring. Judicial monitoring does not specifically provide for the role of the young person's whānau, hapū or iwi to participate in decisions or provide their views which does not support hapori Māori to retain rangatiratanga over decision making and could be seen to be inconsistent with Article 2 of Treaty of Waitangi.[82]

Removing early release

184. Requiring young people declared to be YSOs to complete the full length of the order would be consistent with the policy intent for the YSO declaration to enhance accountability and provide for more intensive interventions.

185. However, this option may engage section 9 (right not to be subject to disproportionately severe treatment) and section 22 (liberty of the person) of NZBORA. Removing early release is also inconsistent with the adult jurisdiction and therefore may contribute to concerns that the young person is not being dealt with in a manner that takes account of their age (section 25(i)).

186. As with other options, rangatahi Māori will be disproportionately affected by this option. By detaining YSOs for the full term of their order rangatahi Māori could be disconnected from their whānau, culture and identity which could be seen to be a failure to honour the right of cultural continuity in the guarantee of rangatiratanga which could engage Article 2 of the Treaty of Waitangi.[83]

187. Operationally, consideration may need to be given to whether there would be any capacity issues in regard to the number of YSOs in residences due to this change and the fact that young people would be completing the full length of their order.

82 Wai 2915 Waitangi Tribunal Report (2021) He Pāharakeke, He Rito Whakakīkīnga Whāruarua- Oranga Tamariki Urgent Inquiry.

83 Ibid.

Part B: Design parameters for a MSA order

188. The making of a YSO declaration would unlock the ability of the Youth Court to direct attendance at an MSA. The underlying basis for the MSA is public safety, and reducing reoffending by young people with a YSO declaration.

189. This part considers parameters for the MSA order (see Appendix One for the full MSA model) where parameters have not been subject to prior Ministerial decisions, directions or guidance[84] (see para 27).

190. The parameters of a MSA order discussed in this part are:

- **Eligibility:** this involved considering the age group eligible for MSA.
- **Decision-making**: whether a supervision order would be available following an MSA, consistent with a Supervision with Residence order.
- **Conditions**: what the conditions of the MSA order would be, including length.
- **Powers**: what powers would be provided to Oranga Tamariki, youth justice residences, and (potentially) other providers as part of the MSA order.
- **Compliance**: how compliance with the MSA would be monitored and enforced.

191. The MSA order is still in the process of being designed and developed, with an operational pilot of a MSA programme under current legislative settings to be tested in July 2024. Initially, the legislative MSA order would be operated by Oranga Tamariki, out of existing youth justice residences, with support from other Government departments, Crown entities, or approved providers. It is not currently proposed that the New Zealand Defence Force would be involved in delivering the MSA order.

192. To support the making of a MSA order, a number of processes (including appeal processes) and mechanisms would be needed. Where possible, processes to support the MSA order would be based on existing processes and mechanisms, and are not discussed as part of this analysis. These processes include using existing appeal processes (section 351), and that a MSA order would expire once a young person turns 19 years of age, as occurs with existing Youth Court orders (see section 296).

Eligibility

193. The key element for consideration under eligibility was the age range of participants. This reflects the discussion earlier around the appropriate age group for a YSO declaration.

Age group

194. The MSA order would be available as a response under the YSO declaration regime. Officials considered the following age groups for eligibility for a MSA order:

- **Option 1** – 14 – 17 year olds (consistent with the making of YSO declarations)
- **Option 2** – 15 – 17 year olds (this option is consistent with the manifesto)

84 Including through manifesto documents and public statements.

Assessment of age options against criteria

Age Group	Public Safety	Human Rights	Efficiency	Treaty of Waitangi	Overall assessment
Option 1 - 14 – 17 year olds	+ (captures young people who have engaged in serious offending behaviour)	- (may impact on youth justice principles, such as proportionality of response)	+ (would reflect same age group for MSAs as YSOs; may reduce potential for confusion)	- (rangatahi Māori would be overrepresented in cohort; engages Article 3 of Treaty of Waitangi, and principles of active protection)	0
Option 2 - 15 – 17 year olds (preferred by officials)	+ (captures young people who have engaged in serious offending behaviour)	+ (more consistent with youth justice principles, such as proportionality)	0 (potential for confusion due to different age-range for YSOs and MSAs; however reflects that some different processes between this age cohort and 14-year-olds)	+ (while rangatahi Māori still overrepresented in cohort, this better recognises principle of active protection under Treaty of Waitangi)	+

Preferred option and analysis

195. Officials preferred option 3, that is, for MSA eligibility to be limited to young people who are 15 – 17 year olds at the time of offending. Officials consider this option reflects a more age appropriate (as per section 25(i) of the NZBORA) and proportionate (as per youth justice principles) response, given the MSA order may involve components that are physically or mentally challenging, and which therefore are not appropriate for younger young people (that is, 14 year olds).

196. Officials note that this may cause some confusion given that a young person would be eligible for a YSO declaration from the age of 14. However, there are some existing differences in how young people aged 14 are treated in the Youth Court compared to young people aged 15 to 17 years. For instance, young people aged 15 year and over can be referred to the District Court for sentencing or decision at any time, whereas additional criteria are applied to 14 year olds (such as the maximum penalty available is life imprisonment or at least 14 years' imprisonment).

197. In both options, rangatahi Māori would likely be overrepresented given the overrepresentation of Māori in the youth justice system. Limiting the age range ot MSAs to 15 to 17 years olds would help to limit the impact of this overrepresentation.

Decision-making

198. Decision-making primarily relates to how the decision to order a young person attend an MSA would be made. The key question is where in the hierarchy of Youth Court should the MSA order be.

Hierarchy of MSA

199. Section 283 sets out the hierarchy of the Youth Court's responses if a charge against a young person is proved. Consideration is needed as to the appropriate position for the MSA order. Three options were considered:

- **Option 1 – Group 6 response**: This would mean that MSA orders were in the same group as Supervision with Residence orders.
- **Option 2 – Group 7 response**: This would mean that MSA orders were in the same group as referral to the District Court for sentence or decision. This is the most serious / highest response option in the hierarchy.
- **Option 3 – New response group**: this proposes that there would be a new response group between the current Group 6 and Group 7 responses so that MSA orders sat as a higher response than Supervision with Residence orders, but lower than referral to the District Court.

Assessment of hierarchy options against criteria

Condition	Public Safety	Human Rights	Efficiency	Treaty of Waitangi	Overall assessment
Option 1 – Group 6 response (preferred by officials)	0 (provides some public safety but balanced with existing response options)	+ (less likely to have as many impacts on human rights, children's rights or youth justice principles)	++ (uses existing category, and enables links with existing Group 6 response processes)	0 (disproportionate impact on Māori given likely overrepresentation in cohort, may help meet principle of active protection)	++
Option 2 – Group 7 response	++ (would provide most public safety)	- (would change nature of youth court sentencing, and impact on youth justice principles)	- (link with adult court options would change nature of youth court sentencing options)	- (overrepresentation of rangatahi Māori in cohort means likely to engage principle of active protection under Treaty of Waitangi)	-
Option 3 – New response group between Groups 6 and 7	+ (would provide some good public safety)	0 (would have some impacts on human rights, and youth justice principles but relatively balanced)	0 (would need to create new response group, but would not change nature of youth court sentencing options)	- (may engage principle of active protection under Treaty of Waitangi given rangatahi Māori likely to be overrepresented in cohort)	0

Preferred option and analysis

200. On balance, officials' preferred response would be for the MSA to be a Group 6 response. This is because being a Group 6 response provides slightly better protection for human rights, and compliance with the youth justice principles of the Oranga Tamariki Act 1989. Moreover, it would be easier to implement using existing processes and mechanism than other options, where mechanisms would need to be developed (for a new response group) or significantly modified (for existing Group 7). Developing MSAs as a Group 7 response option would also significantly change the nature of Youth Court response options as it would put a Youth Court order at the same level as a referral to adult court for conviction or sentencing.

201. Making MSAs a Group 6 response also provided synergy with the Supervision with Residence order (Group 6 response), reflecting that some of the MSA order would likely be served within a youth justice residence.

Ability to vary MSA order plan

202. Consistent with other orders, the Youth Court would approve a plan setting out the expected programme or type of activity for the MSA order programme.

203. While the plan would be expected to highlight the type of activity that is likely to be undertaken as part of a MSA programme, it is possible that there may still be a need to review or vary this plan (for instance, if the plan, or a key component of it should the plan (or a key component of it) no longer be able to be delivered. Some existing orders under the Act enable plans to be varied to reflect that changes may occur, although not all orders do – including the Supervision with Residence order.

204. The options for consideration were:

- **Option 1**: No ability to vary MSA order plan
- **Option 2**: Ability to vary MSA order plan.

Assessment of options to vary MSA order plan against criteria

Condition	Public Safety	Human Rights	Efficiency	Treaty of Waitangi	Overall assessment
Option 1 – No ability to vary plan	0 (may promote public safety as means that key control or rehabilitation elements cannot be removed from plan; however also means plan cannot be changed if needed)	- (likely to impact on youth justice principles and rights of children, particularly if inability to vary plan means plan is not proportionate response to offending)	0 (easier legislatively and operationally but may impact on success of MSA order if plans becomes unworkable)	- (rangatahi Māori are overrepresented in youth justice system, likely to engage Treaty of Waitangi obligations, particularly principle of active protection)	-
Option 2 – Ability to vary plan (preferred by officials)	0 (may reduce public safety if some control or rehabilitation elements removed from plan; however allows changes to ensure plan remain suitable)	+ (better reflects youth justice principles, and ensure rights of children are considered in decision-making processes)	0 (complex legislatively and operationally, but would better support for operation of MSA order as whole)	+ (may help support processes that better reflect Treaty of Waitangi obligations, such as principle of active protection)	+

Preferred option and analysis

205. Officials' preferred option would be to permit the Youth Court to vary the plan if needed. Providing for such a variation would support the operation of the MSA order as it would allow Oranga Tamariki to seek a variation of the young person's MSA plan should the plan become unworkable for some reason – for instance, if a significant component of the plan was unable to be provided or was not suitable for the young person. This would also reflect the youth justice principles (such as proportionality), better met the Crown's obligations (such as active protection) under the Treaty of Waitangi, and protect the integrity of the youth justice system.

Conditions of order

206. This parameter refers to what conditions would be part of an MSA order. This section considers:

- the nature of the MSA order
- whether a supervision order could follow a MSA order (similar to what already happens with a Supervision with Residence order)

Nature of the MSA order

207. This element considers the nature of the MSA order. As noted earlier, international evidence indicates that key factors in the success of a MSA programme is the rehabilitative and reintegration component.

208. As Ministers took initial decisions that an MSA order would not be fully served in the community, the two options for consideration were:

- **Option 1**: Fully residential in nature
- **Option 2**: Modular in nature, including a residential component

209. Any residential component of a MSA order would initially be run within youth justice residences initially. This means that existing youth justice residence powers and protections would apply to young people on a MSA order.

Assessment of nature of MSA options against criteria

Length	Public Safety	Human Rights	Efficiency	Treaty of Waitangi	Overall assessment
Option 1 – Fully residential	0 (provides public safety in the short-term but may not meet rehabilitation and reintegration needs)	- (does not recognise importance of rehabilitation and reintegration in MSA orders	0 (easier to implement although potentially increased costs due to costs of keeping in custody for length of order	- (may impact on obligations of active protection under Treaty of Waitangi as likely to impact connection of rangatahi Māori to whānau, culture, hapori)	-
Option 2 – Modular in nature (preferred by officials)	0 (reduces public safety in short-term due to increased risk of absconding or future offending as some modules would not be in youth justice residence; improves public safety long-term as provides for rehabilitation and reintegration needs of young person)	+ (better reflects importance of rehabilitation and reintegration as part of MSA)	- (more complex to implement due to different modules, and how to ensure public safety and human rights protections during modules outside youth justice residence)	+ (would enable rangatahi Māori to remain connected to whānau, hapori and culture, therefore more likely to reflect obligations under Treaty of Waitangi such as obligation of active protection)	+

Preferred option and analysis

210. Officials preferred option 2. Officials do not consider that a fully residential MSA order (option 1) would result in reduced reoffending or improve public safety in the long-term. Nor is it likely that a fully residential MSA order would meet the needs of young people, particularly rangatahi Māori), or meet the Crown's obligations under the Treaty of Waitangi (such as the principle of active protection).

211. On the other hand, a modular MSA order, consisting of a core residential component, alongside community reintegration and intensive support, would help address and concerns around the intensity and length of an MSA order. Research also indicates that providing rehabilitation and reintegration components are key to the overall success of MSA programmes, and therefore the modular approach better reflects international (and New Zealand) experience of MSA programmes. Such an approach also better reflecting youth justice principles (such as proportionality), and is more likely to meet the Crown's obligations under the Treaty of Waitangi.

The making of a supervision order to follow an MSA order

212. Currently, a Youth Court can consider the making of a supervision order of up to 12 months in duration following a Supervision with Residence order. The question is whether a similar ability should apply to an MSA order, where a young person is not subject to another Youth Court order at the completion of the MSA. The maximum length of all orders under the YSO declaration regime is only 24 months, thus meaning that the supervision order would only be up to 12 months in duration.

213. There were two options considered:

- **Option 1 – Able to make a supervision order after an MSA order**: This would involve providing a similar ability (and processes) to the making of a supervision order following a Supervision with Residence order.
- **Option 2 - No ability to make a supervision order after an MSA order**: This would mean that there would be no ability of the Youth Court to make a supervision order following an MSA order.

Assessment of powers to make supervision order options against criteria

Condition	Public Safety	Human Rights	Efficiency	Treaty of Waitangi	Overall assessment
Option 1 – Able to make supervision order following an MSA (preferred by officials)	++ (improves public safety – short and long-term)	0 (may impact on youth justice principles as lengthens overall order, but in manner consistent with existing orders)	+ (supports ongoing monitoring of young person following reintegration but increases the costs of the overall order)	- (extends State involvement in lives of young people, impacting on principle of rangatiratanga under Treaty of Waitangi, and their whānau, hapū, and iwi)	+
Option 2 – No ability to make supervision order following an MSA	- (reduces ability to monitor and support young person in their reintegration, thus not improving public safety)	+ (no additional impact on youth justice principles or other human rights)	- (reduces ability to monitor and support young person in their reintegration, impacting on overall efficacy and effectiveness of order)	0 (reduces State involvement in lives of young people and their family / whānau, but may mean young person and their family / whānau do not receive support needed following MSA order)	-

Preferred option and analysis

214. Officials support the application of similar processes, where appropriate, between the Supervision with Residence order, and the MSA order, given that both orders involve custodial components. As a result, officials support option 1, providing the Youth Court with an ability to make a supervision order following a MSA order.

215. Providing the power to make a supervision order also provides the Youth Court with monitoring powers over the young person following the completion of the MSA order. This supports ongoing support with rehabilitation and reintegration, which will promote public safety in the short and long term.

216. However, providing the ability to make a supervision order increases the overall length of the sentence associated with the proven charge, which may give rise to concerns around youth justice principles, particularly proportionality of the response. It could also engage section 9 of the NZBORA, which protects against disproportionately severe treatment or punishment. This is partly mitigated by ensuring that the ability to make a supervision order would only apply where the Youth Court had not already made another order to follow the MSA order, and a maximum of a 24 month sentence would also apply.

217. Officials note that the power to make a supervision order would disproportionate impact rangatahi Māori as they are likely to be overrepresented in the MSA cohort. However, the supervision order also enables Oranga Tamariki and other providers to further support the integration of the young person back into their community, and also to enable whānau, iwi and communities to support the ongoing rehabilitation of the young person.

Powers

218. This parameter considers the powers that would be needed to support the operation of an MSA. The following options were considered, with options 2, 3 and 4 able to operate independently from each other, or as an overall package of powers:

- **Option 1 - status quo**: this would mean there would be no additional powers beyond that already available in a youth justice residence.
- **Option 2 – providing an express power of detention**: this would provide an express power of detention of the young person to the Chief Executive of Oranga Tamariki. A provider who was delivering a module (or part of a module) outside a residential setting would also have the power of detention in relation to the young person.
- **Option 3 – ability to remove a young person from a youth justice residence**: this would provide the ability for a young person to leave the youth residence for an overnight or multi-night outing (for instance, a noho marae or camp).
- **Option 4 – extending use of force powers outside a youth justice residence and to providers**: currently, use of force powers exist in youth justice residences. This would extend the use of these powers, in the form of physical restraint / physical holds, outside the youth justice residence in relation to components of a MSA order held outside the residence. It would also extend the use of these powers to providers delivering that component. The powers, which would be limited to that no greater than reasonably necessary, would be aimed at preventing a young person from absconding, from being harmed, or from harming themselves or someone else.

[Legally privileged]

219. 9(2)(h) [redacted]

220. [redacted]

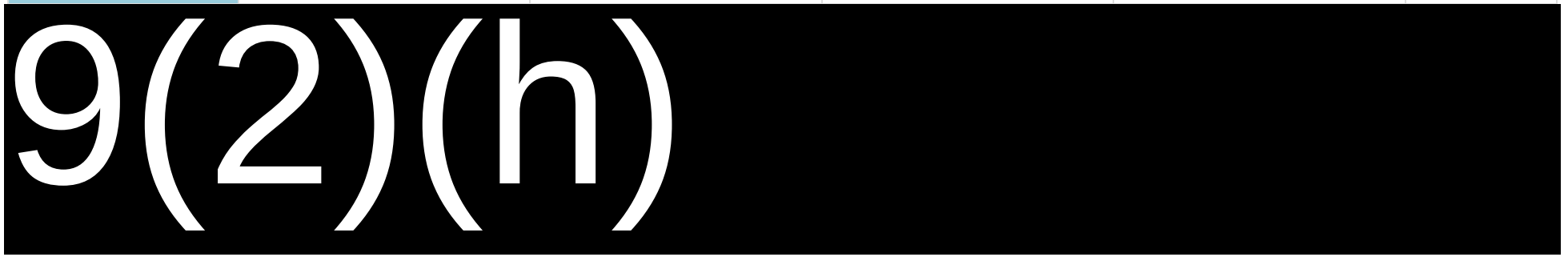
221. [redacted]

222. [redacted]

223. [redacted]

Assessment of powers against criteria

Powers	**Public Safety**	**Human Rights**	**Efficiency**	**Treaty of Waitangi**	**Overall assessment**
Option 1 – Status Quo	0	0	0	0	0
Option 2 – Express power of detention (preferred by officials)	++ (would provide strong public safety protections)	- (strong power however reflects nature of MSA and that significant control needed across all components)	++ (support operation of MSAs and recognises nature of youth justice residential setting and that significant control needed even for components held outside residential setting)	- - (rangatahi Māori disproportionately impacted as they are likely to be overrepresented in MSA cohort; raises obligations of active protection under Treaty of Waitangi)	0/+
Option 3 – Ability to remove young person from youth justice residence (preferred by officials)	+ (likely to increase public safety in long-term even though young person able to be outside youth justice residential setting due to the rehabilitative purpose of outing)	+ (meets youth justice principles as reduces impact of MSA order through rehabilitative and educational activity outside residential setting)	+ (support operation of MSAs as permits engagement in rehabilitative and educational activity outside residential setting)	+ (supports rehabilitation and reintegration of MSA participants; may support connection with whānau, hapori, and culture, meeting Crown's active protection obligations under Treaty of Waitangi)	+
	++ (would provide strong public safety protections)	- (likely to impact on young person's human rights; may result in harm to young person if not used appropriately)	+ (support operation of MSAs; requires training and monitoring, especially of use by providers, however needed to support ability for young person to be removed from youth justice residence)	- - (disproportionate impact for rangatahi Māori as likely to be overrepresented in MSA cohort; impacts on obligations of active protection under Treaty of Waitangi)	0



Analysis and preferred option

224. Officials from Oranga Tamariki support options 2 – 4, as a package of powers to support the operation of the MSA order.

225. While providing additional powers have human rights implications, these powers are important for ensuring the safe and effective operation of an MSA order, in particular, to ensure that MSA orders can operate in a way that promotes both short-term and long-term public safety. For instance, not having the ability to remove a young person from a residence for short periods, such as for a night or multi-night outing, would reduce the rehabilitative and reintegration opportunities available. These would include opportunities aimed at improving cultural connection, such as noho marae and similar outings. Not being able to provide these experiences would impact on the ability of the MSA order to promote long-term public safety. It would also reduce the ability of the Crown to meet its obligations under the Treaty of Waitangi, such as active protection of rangatahi Māori.

Power of detention

226. The powers of detention reflect the need for the young person to be held accountable for their offending, and the protection of the public. It also recognises that there will need to be a high level of control, supervision and restriction of liberty over a young person while they are on the MSA order – and that this would apply whether the young person is within a youth justice residence, or is on a component or module delivered wholly or partly outside the youth justice residence.

227. Without providing a power of detention, then the MSA order would be unable to deliver programmes or community activities outside a youth justice residential setting, including outings such as a noho marae, and this may impact on the effectiveness of the MSA programme.

228. Officials from Oranga Tamariki note that there may be some concern about potential future providers on an MSA programme being able to have the power of detention. However, there is precedent in the Oranga Tamariki Act 1989 for this to occur. For instance, under section 238(1)(d), a young person may be detained in custody pending hearing, and may be detained in the custody of the Chief Executive of Oranga Tamariki, or an iwi or cultural social service.

229. Regulations under the Oranga Tamariki Act 1989 would be developed in relation to the implementation, operation and monitoring of the YSO regime and MSA orders, and these are likely to include provider approval processes.

Use of force powers

230. Currently, use of force powers exist in youth justice residences. However, these powers do not extend outside the youth justice residence

231. Where a young person on an MSA order is outside a youth justice residence (for example, while attending a rehabilitative or training programme not provided onsite), there would need to be an express power for Oranga Tamariki staff or providers to use force (in the form of physical restraint / physical holds) to prevent that young person from absconding or from harming themselves or others.

232. Not providing these powers would mean that activity outside a youth justice residence, such as overnight noho marae or multi-night camps would not be able to occur in a way that upholds the integrity of the MSA order, while still promoting public safety. Not

being able to engage in these activities would also reduce rehabilitation and reintegration opportunities, which would potentially reduce long-term public safety.

233. 9(2)(f)(iv) [redacted]

234. However, providing these powers outside of residences, and to staff and providers, means impacting on the rights of young people, and may result in harm to young people. It is for these reasons that the extension of use of force powers would be limited only to physical restraints / physical holds so as to lessen the potential impact and harms on a young person. Officials also note that extension of the use of force powers is likely to impact disproportionally on rangatahi Māori due to their likely overrepresentation in the MSA cohort.

235. Apart from the limited physical restraint / physical hold power, there would be no expectation that staff or providers would have to track down a young person who absconded. In such situation, it would be a matter for New Zealand Police, who have additional powers available to them. There is an agreement between New Zealand Police and Oranga Tamariki that Oranga Tamariki can apply for and execute search warrants as Oranga Tamariki is likely to have information on where a young person may go if they abscond.

[Legally privileged]

236. 9(2)(h) [redacted]

237. [redacted]

Compliance

238. Two elements were considered as part of compliance with an MSA order:

- how compliance with an order would be monitored and enforced
- how to address situations requiring a compassionate or humanitarian response.

[redacted] 9(2)(f)(iv) [redacted]

Monitoring and enforcing MSA orders

239. This element considers how an MSA order would be monitored and enforced, for instance to address matters such as non-compliance with the order or absconding.

240. Options considered include:

- **Option 1 - No MSA specific processes**: as there would be no specific MSA processes available to address compliance issues, the only processes that would apply would be YSO processes, such as non-compliance with an order while the subject of a YSO declaration.
- **Option 2 - MSA specific provisions**: this would set out specific provisions relating to non-compliance or absconding while on an MSA order. These processes would be based on those that exist in relation to other orders, specifically Supervision with Residence orders.

Assessment of monitoring and enforcement options against criteria

Monitoring and enforcement	Public Safety	Human Rights	Efficiency	Treaty of Waitangi	Overall assessment
Option 1 – No specific powers for MSA (only relevant YSO powers would apply)	0 (may provide some public safety, but lack of specific provisions may limit ability to address non-compliance, thus decreasing public safety)	- (may impact on appropriateness of responses to breaches as mechanisms would not be specifically targeted to responding to breaches of MSA order)	0 (would provide some additional support for operation of MSAs but would not be targeted specifically towards MSA order	- (may result in rangatahi Māori being more heavily penalised for non-compliance, especially given overrepresentation of rangatahi Māori in cohort)	-
Option 2 – New MSA-specific processes (preferred by officials)	+ (developing MSA specific processes would help protect public safety by ensuring processes and applicable for the MSA order)	0 (providing processes that are relevant and appropriate may help to protect human rights)	0 (developing new processes increases complexity, but it also provides certainty that would support the operation of the MSA in the long-term)	0 (may make it easier to penalise rangatahi Māori for non-compliance, but may also improve processes to support rangatahi Māori to comply)	+

Analysis and preferred option

241. Officials' preference is option 2, the development of new processes specific for the MSA to address compliance issues. This is because there are no generic compliance processes under the Oranga Tamariki Act 1989 that would automatically apply to MSA orders. Without any specific processes, then only processes available would be the more generic processes relating to the YSO declaration regime (this is because the MSA order is a response that becomes available upon the making of a YSO declaration, and therefore these compliances processes would also apply to a MSA order).

242. Given this, officials considered there needed to be specific processes that would apply in relation to the MSA order. In identifying what these processes were, officials considered the residential component of the MSA order, and proposed the adoption of similar processes as those available under Supervision with Residence orders. This means that, in the case of a absconding or non-compliance:

- the Youth Court would be able to suspend or cancel the MSA order, and if cancelling the order, may substitute it with any other order that could have been made at the time the MSA order was made
- the time that the young person was unlawfully at large would not count as part of the period during which the young person was in custody of the Chief Executive of Oranga Tamariki under that order.

243. Providing new processes will also provide clarity and certainty for the Youth Court as to what its responses can be in cases of non-compliance / absconding. It also provides certainty for staff as to the process that apply when seeking a judicial response for absconding or non-compliance. As these processes largely replicate existing ones, there is a risk they would not support improved outcomes for Māori, particularly in relation to the obligation of active protection under the Treaty of Waitangi.

Addressing situations that require a compassionate or humanitarian response

244. This element considers how situations that require a compassionate or humanitarian response would be dealt with while a young person was on an MSA order.

245. Options considered include, with options 2 and 3 able to apply individually or as a package of responses:

- **Option 1 - No specific response**: There would be no specific response or ability to respond to situations that require a compassionate or humanitarian response.
- **Option 2 - Variation on compassionate or humanitarian grounds**: enabling a specific ability for Youth Court to vary or substitute if young person unable to comply due to factors outside their control.
- **Option 3 - Temporary release / removal**: enabling a specific ability for the Chief Executive of Oranga Tamariki or the Youth Court to temporarily release or remove a young person from a youth justice residence for medical or humanitarian reasons, such as having to attend appointments or other places, or attend funerals during the time on the MSA order.

Assessment of responses based on humanitarian / compassionate grounds against criteria

Humanitarian and compassionate responses	Public Safety	Human Rights	Efficiency	Treaty of Waitangi	Overall assessment
Option 1 – No specific response	0 (may provide some public safety, but lack of specific provisions may result in young person reoffending due to anger / frustration with system)	- (may impact on human rights as would not recognise rights and needs of young person as situations - including health needs - changed)	0 (would not create additional processes and Court hearings, but may impact on efficacy of youth justice system given that changes in circumstances would not be able to be brought back to the court)	- (unlikely to reflect principles of Treaty of Waitangi, particularly active protection as would fail to allow consideration of varying orders if there are significant changes in circumstances of rangatahi Māori)	-
Option 2 – Variation or substitution on compassionate or humanitarian grounds (preferred by officials)	- (enabling ability for Court to vary or substitute order may reduce public safety in short-term as could result in MSA order being substituted with lower level response)	++ (better reflects rights of children as this recognises that young person might not be able to complete order through no fault of their own)	- (creates additional processes and Court hearing but would provide additional support for operation of MSAs; complicates system as similar provisions not available for other residential orders under Act)	+ (may better reflect principles of Treaty of Waitangi as provides opportunity for variation of order due to significant changes in circumstances of rangatahi Māori)	+
Option 3 – Temporary release or removal from youth justice residence (preferred by officials)	- - (enabling temporary release / removal may reduce public safety as young person will be out in community and could therefore reoffend)	+ (better reflects rights of children by enabling young person to attend appointments, funerals and similar)	- (creates additional processes and Court hearing but would provide additional support for operation of MSAs; complicates system as similar provisions not available for other residential orders under Act)	++ (likely to better reflect principles of Treaty of Waitangi - such as active protection and rangatiratanga - by enabling rangatahi Māori to attend appointments, tangi and similar, therefore supporting maintenance of cultural connection and whakapapa links)	+ / 0

Analysis and preferred option

246. Officials preferred options are option 2 and 3 as it is important that mechanisms be included as part of the MSA order that enable a response on compassionate or humanitarian grounds. These options would protect the human rights of the young person, and are also a key element of active protection under principles and articles of the Treaty of Waitangi.

247. While there is some risk to public safety, particularly around temporary release / removal, this can be balanced in terms of the overall public safety risks that not respecting compassionate or humanitarian needs may have, including trust and confidence in the youth justice system, and respecting the young person's human rights overall.

Section 3: Delivering an option

How will the new arrangements be implemented?

YSO declaration regime

249. An intensive rehabilitative and transitional support package will be developed by Oranga Tamariki for young people with a YSO status and their whānau. Implementation will require increases of staff (quantity, role and discipline), training for staff, contracts with external providers and community partners, infrastructure, ICT systems, and equipment and logistics including the development of clinical assessment and treatment models appropriate to the needs of this small but complex group of young people with serious and persistent offending behaviour. High levels of additional funding would be needed to achieve this.

250. Delivery would likely require intensive case management and multi-agency approaches to ensure that the young person's needs were being addressed to reduce offending behaviour. These approaches would provide an increased level of intensity to individualised and tailored support for young people and whānau to prevent reoffending, facilitated in part through higher levels of contact, immediate information sharing, and constant reviewing and updating of supports as circumstances for the young person and whānau shift. Again, such approaches will require funding to be implemented and sustained.

251. Leveraging off existing relationships, services and contracts where possible will allow for a quicker implementation process, given the ambitious timeframes Ministers have set for passing of legislation. However, it is also likely that there will also be relationships with new providers to implement some orders / aspects of orders.

252. Implementation of the new YSO declaration will also require cross-agency case management and information sharing. For New Zealand Police, implementation will include training, communications, practice guidance, and ICT changes. The extent of ICT changes and required funding will depend on the operational design of the YSO regime and the ICT solution that is agreed to enable frontline staff across agencies to respond to YSOs with up-to-date information on status and conditions. New Zealand Police has indicated that the implications for staff resources are likely to be met through the Government's proposed increases in trained Youth Aid and frontline staff but notes that the proposed timing for commencement of the new law will mean those staff are not in place by the time the law is in force.

253. Introducing a new YSO category with additional legislative powers may increase the number of court events and timeframe that it takes for a case to proceed through the Youth Court. Some proposals, such as removing the mandatory requirement for FGCs may reduce the time that it takes for a case to move through the Youth Court, whereas other changes, such as increased judicial monitoring will have the opposite effect. In particular, the requirement that the YSO declaration be considered at the same time as the disposition (sentencing) hearing will also have impacts on scheduling in the Youth Court. Given the uncertainty in this area, timeliness of proceedings will continue to be monitored, in line with existing practice, by the Ministry of Justice. Implementation of Youth Court changes more generally will also be managed by the Ministry of Justice, including any judicial training required.

254. Given the operational complexity of electronically monitoring young people there will need to be further consideration given to the implementation of any electronic monitoring provisions. This includes any changes that may be required to the

Oranga Tamariki operational model to allow timely and effective responses to breaches. 9(2)(f)(iv) [redacted]

255. The YSO declaration, and MSA orders, may increase pressure on capacity at youth justice residences, particularly given that some beds will be taken offline from June 2024 for the operational MSA pilot. There is an existing issue relating to residential capability, and pressure from those who are remanded into custody. If maximum residential capacity is reached, this could lead to an increase in detention in New Zealand Police custody for a broader cohort of young people (not necessarily YSOs), and less capacity for vulnerable 18- and 19-year-olds to be transferred from Corrections custody. This will disproportionately impact rangatahi Māori who account for around 81 percent of young people in custody.[86] There is also the existing recruitment and retention challenge that exists in youth justice residences to fully staff all existing residential beds, exacerbated by the need to release existing experienced staff to pilot the military-style academy.

256. Consideration will also need to be given to situations where a young person is subject to a YSO at the same time as either being on bail or serving a sentence in the adult jurisdiction following further offending.

257. Finally, sourcing specialist staff (skilled youth workers, social workers, programme facilitators and psychologists) is, and will continue to be a challenge under the YSO regime as this is a workforce in high demand. Oranga Tamariki is competing with other government agencies, and increasingly the private sector in a tight labour market. This would apply whether or not the staff were employed directly by Oranga Tamariki, or contracted through NGO providers.

258. The Ministry of Justice faces similar challenges. For example there may be difficulties in obtaining specialist reporting due to the scarcity and high demand for psychologists and other specialist services nationally, and there may challenges attracting counsel to act in increasingly complex cases.

MSA orders

259. The implementation approach for MSA orders will be informed by the MSA pilot scheduled to commence in late July 2024. Implementation will require increases of staff (quantity and role type), training for staff, contracts with external providers and community partners, infrastructure, ICT systems, and equipment and logistics.

260. There is an operational implementation risk that the linking of YSO status with eligibility for the making of an MSA order would create a period following legislation commencement where a piloted academy programme will be available, but a limited number of young people may be eligible for the MSA order through a YSO declaration. This will be mitigated through exploring transitional processes whereby the operational MSA pilot will continue to operate for those on a Supervision with Residence order.

86 Oranga Tamariki. (2023). Youth justice custody trends. Retrieved from https://www.orangatamariki.govt.nz/assets/Uploads/About-us/Research/Latest-research/Youth-Justice-custody-trends/Youth-justice-custody-trends.pdf.

How will the new arrangements be monitored, evaluated, and reviewed?

Monitoring and evaluation of YSO declaration and associated MSA orders

261. Existing mechanisms will provide oversight of changes in legislative powers and their effectiveness, including the Courts (which would be responsible for exercising the new power set out in legislation) and Justice Sector monitoring through Justice Sector targets (although these will not show the specific impact of the YSO declaration regime).

262. Oranga Tamariki, in conjunction with the Ministry of Justice and New Zealand Police, intends to review the performance of the legislative changes after they have been in force for at least three years as part of ongoing regulatory stewardship responsibilities. This period allows for new powers and orders to be implemented and embedded, and for required data gathering. Any review would be subject to the Government's other priorities at the time.

Process evaluation of the Military-style Academy operational pilot

263. Separately, we propose a mixed-methods process evaluation of the pilot of Military- style Academies. This would involve interviews during multiple operational changes, including during the residential phase and during the supervision phase.

264. Analysis would involve a document and case note review (including transition plans), a profile of participants including demographics and a summary of previous offending, and any incidents, offending or breaches during residence or supervision phase.

265. Interviews would also include Oranga Tamariki staff, any providers, co-ordinators, social workers, young people, family and whānau, and support people.

266. Reoffending outcomes of those involved in the Military-style Academy pilot would also be monitored for each cohort.

Appendix One: Model for Military style academies

Key Parameter	Proposed model
Eligibility	• Young people who have had a YSO declaration made in respect of them • 15–17-year-old at the time of offending
Decision-making	• A Youth Court may make an MSA order where a charge against a YSO is proven in the Youth Court, including at the same hearing that a YSO declaration is made • New Group 6 response under section 283 of the Act (to follow Supervision with Residence orders in the hierarchy of Youth Court responses) • Existing Youth Court order processes and mechanisms under the Act would apply

Conditions of order	• Up to 12 months in duration
	• Requires the young person to be detained in the custody of the Chief Executive of Oranga Tamariki
	• Be a modular based programme, approved by the Youth Court through a plan (that may be varied by the Youth Court upon application), consisting of:
	  ○ a core residential component
	  ○ rehabilitation and education programmes that may be delivered inside or outside of a residential setting, including overnight programmes
	  ○ community reintegration and intensive support
	• Must be followed by a supervision order of between six – 12 months in length

Powers	• The MSA order provides authority for the Chief Executive of Oranga Tamariki to detain the young person, both within a residential setting and while in the community
	• The MSA plan may involve modules or part modules being delivered outside a residential setting by Oranga Tamariki, or another Government agency, Crown entity or other provider, including for overnight or multi-night stays
	• Where a module is delivered outside a residential setting by a provider other than Oranga Tamariki, the Chief Executive of Oranga Tamariki would retain custody of the young person, but the agency or provider will have authority to detain the young person when placed with them
	• An MSA provider and their staff, whether Oranga Tamariki or another agency or provider, would have the power to use force in the form of physical restraint / physical holds (no greater than reasonably necessary) to prevent:
	  ○ a young person from absconding from a residential location, while in transit to / from a residential location, while outside the residential location for other activities / reasons, or while at any other location used as part of the MSA from time to time
	  ○ a young person from being harmed, harming themselves, or harming another

Compliance	• Should a young person abscond or be non-compliant with an MSA order then:
	  ○ the Youth Court may cancel or suspend the MSA order and may substitute with any other order that could have been made at the time the MSA order was made;
	  ○ the time that they are unlawfully at large would not count as part of the period during which the young person was in custody of the Chief Executive of Oranga Tamariki under that order;
	• If necessary, due to compassionate or humanitarian reasons, the young person could be brought back to the Youth Court for variation of the MSA order, cancellation of the order, or substitution with another order
	• The Chief Executive of Oranga Tamariki or the Youth Court may approve a temporary removal or release when a young person on an MSA order needs to attend appointments or other places during their MSA order (for example, for medical or humanitarian reasons)

Appendix Two: Overview of Australian approaches to a YSO category in legislation

State	Eligibility criteria					Response for YSOs
	Seriousness (maximum sentence)	*No of previous offences*	*Age (years)* [87]	*Other*	*Duration*	*Powers*
Queensland (Strengthening Communities Safety Act 2023)	14 years	1 previous detention order for offending with a 14+ year penalty	10	Pre-sentence report Regard to previous offending, bail history, and rehabilitation efforts Court satisfied a high probability of reoffending	12 months	New stronger sentencing principles introduced for serious repeat offenders related to harm caused.[88] Longer maximum duration of conditional release when part of a detention sentence is suspended from up from three to six months and a recall to serve the suspended time if the order is breached. Wider changes not specific to serious repeat offenders in the same Act include lowering the age for electronic monitoring from 16 to include 15 year olds and making arrest for breach of bail easier.
Victoria (Children and Youth Justice Legislation Amendment (Youth Justice Reform) Act 2017)	15 years	1 previous order with 15+ year maximum sentence, or a prescribed offence with 20+ year penalty (for example, murder)	16	Aged 16 or over at time of offence or committed murder, manslaughter	n/a	A presumption of uplift to higher courts for several serious youth offences,[89] meaning full range of sentencing options available for consideration. Happened 12 times in first 3 years (June 18- June 21). Mandatory parole considerations – for example, for supervision and reporting.
Western Australia (Young Offenders Act 1994)	10 years	2 previous offences that lead to custodial sentences rather than a maximum sentence threshold.	10	Court satisfied a high probability of reoffending at a level where custodial sentences could be imposed	up to 18 months	Special orders can be made for serious repeat offenders for up to 18 months detention with supervised release possible after 12 months. Mandatory minimum sentencing for young people with repeat burglary, grievous bodily harm and serious assault on Police offending.

87 While the age in Queensland and Western Australia is the same as their minimum age of criminal responsibility, it takes time for a child to reach entry criteria, such as offence serious requirements. Some aspects may only be available when older, such as a young person has to be 15 to be eligible for electronically monitored bail in Queensland.

88 The five new sentencing principles to be prioritised are: 1) the need to protect members of the community, 2) the nature or extent of any violence used during the offence, 3) the extent of any disregard by the child for public safety during the offence, 4) the impact of the offence on public safety, and 5) the child's criminal and bail history.

89 In addition to the existing uplift for murder and manslaughter to offences added for up lift of serious young offenders are: child homicide, homicide by firearm, arson causing death Intentionally causing serious injury in circumstances of gross violence, aggravated home invasion, aggravated carjacking or terrorism-related offending.