



Note: Neither the Minister for Children nor the Minister of Corrections has received any advice, nor made any decisions regarding the draft policy proposals in this paper. These proposals do not represent Government policy and should be treated solely as ideas for feedback. They are preliminary proposals that are under review and may change.

Children and young people sentenced to imprisonment in the adult jurisdiction and detained in Oranga Tamariki residences

Purpose

This options paper reviews the legislation that applies to children and young people who are sentenced to imprisonment in the adult jurisdiction and detained in an Oranga Tamariki residence. It sets out the background, problem definition, objectives, criteria and proposed options for this work.

The overall aim is to address the current lack of clarity regarding the legislative framework that applies to these children and young people in a way that will lead to better outcomes for them.

Background

Children and young people can serve a sentence of imprisonment in an Oranga Tamariki residence under section 34A of the Corrections Act 2004

Under [section 34A](#) of the Corrections Act 2004 ('s34A') any child or young person serving a sentence of imprisonment¹ **may** (for a young person) or **must** (for a child) be detained to serve that sentence in any residence² jointly approved by Oranga Tamariki and the Department of Corrections (a 'residence').

The decision to place a young person in either a residence or a Corrections run prison is made jointly by Oranga Tamariki and Corrections after assessing their vulnerability and risk.³ For the purposes of this paper these children and young people placed in a residence are referred to as the "s34A cohort".

The residence and a Corrections facility jointly manage the s34A cohort

For the duration of their stay in the residence, Oranga Tamariki has legal custody of the child or young person. However, Corrections is still involved in the operational management of the s34A cohort.

The s34A cohort will typically serve a much longer sentence than young people who are subject to a supervision with residence order of 3-6 months. They will remain in the

¹ Children or young people (as defined in the Oranga Tamariki Act 1989) who commit serious offences, such as murder/manslaughter, or 17-year olds who commit offences in Schedule 1A of the Oranga Tamariki Act, have their case transferred to the District/High Court and can face a sentence of imprisonment.

² As defined in section 2 of the Oranga Tamariki Act 1989. This is a broad definition that captures just about anywhere, provided it is recognised "as a place of care or treatment for the purposes of this Act."

³ The "Young Person's Placement Assessment" process is used to assist joint CEs in making a decision about whether a young person should be placed in an Oranga Tamariki residence. Note that this process is currently under-review.

residence until their 18th birthday. If they have not completed their sentence, they then transition to the facility selected for them by Corrections. As of May 2022, there were no children or young people in the s34A cohort, but there had been as many as five in the previous year.

The s34A cohort are subject to the provisions and associated regulations made under the Corrections Act 2004 and Parole Act 2002 “with necessary modifications”

Section 34A(2) of the Corrections Act provides that the provisions of the Corrections Act, the Parole Act 2002, and regulations made under those Acts, continue to apply to the s34A cohort but, as stated in the Corrections Act, “with any necessary modifications”.

No further guidance is provided in legislation on which provisions are applicable, or how provisions should be modified. The legislation is also silent on how the application of the Oranga Tamariki Act and associated regulations⁴ interact with these provisions.

It is unclear which Corrections Act and Parole Act provisions should apply and how they should apply

The Corrections Act and its associated regulations contain hundreds of detailed provisions relating to the management and rights of prisoners and their sentences. For many provisions it is not obvious whether the provision would (or should) apply when a child or young person is serving their sentence in a residence rather than a prison.

In practice the s34A cohort are treated the same as other children and young people in the residence, with some exceptions

In practice, with some exceptions, the s34A cohort are managed in the same way as other young people in the residence. Operational guidance sets out some of the circumstances in which the s34A cohort are managed differently from other young people in a residence. The guidance is not comprehensive, and only addresses areas that have been raised as being problematic. Areas where different management applies include:

- **Escorting:** Corrections staff are responsible for escorting the s34A cohort offsite from their residence.
- **Admission post sentencing.**
- **Assessment planning and review:** The s34A cohort do not require an Oranga Tamariki individual care plan.⁵ Instead, they complete an offender plan with their Corrections Case Manager.
- **Care:** They cannot leave the Residence (except in an emergency) without permission from the director of the relevant Corrections facility (being the prison where they are registered). School is also not mandatory for young people over the age of 16 detained under s34A.
- **Security:** They are locked in their bedrooms at night; and do not have the same requirements regarding Court approval for continued detention in secure care.
- **Leaving Youth Justice:** They may leave the residence for limited reasons including:
 - to attend Parole Board hearings

⁴ Particularly the Oranga Tamariki (Residential Care) Regulations 1996.

⁵ As required by regulations 3(1)(e), (2) and (3) of the Residential Care Regulations.

- if they have reached the age of 18 and are required to complete their sentence in a prison
- because their sentence is complete or granted parole/temporary release
- in a medical emergency where they need treatment off-site.

Problem definition

The legislative provisions/regulations that apply to the s34A cohort are unclear. The phrase “with necessary modifications” leaves it to Oranga Tamariki and Corrections to determine which out of hundreds of provisions should apply to the s34A cohort and how. The law is also silent on the application of the Oranga Tamariki Act and Residential Care Regulations to the s34A cohort. This creates a range of issues, including the following.

- Applying powers under the Corrections Act that are not suitable for application to a child or young person and have not been considered against international obligations in this context.
- Applying powers that are context-specific to prisons and are sometimes very prescriptive, e.g., using the Corrections regulations to lock the s34A cohort in their rooms overnight without also transferring minimum cell requirements as set out in the Corrections regulations.
- Difficulties for residence staff applying two different sets of regulations, and the two groups of children and young people in the same residence being treated differently (i.e. the s34A cohort and young people who are subject to a supervision with residence order).
- Creating scenarios where the s34A cohort’s rehabilitation is disadvantaged by legislation, e.g., they cannot go offsite to participate in residence activities or vocational training.

These problems are caused by the fact that both the Oranga Tamariki Act and its regulations *and* the Corrections Act and its regulations can apply to the residential care of the section 34A cohort but they can conflict as to how young people should be treated in a residence:

- The Oranga Tamariki Act and its regulations govern the operation of youth justice residences. Although there is no reference to this legislation in section 34A,⁶ because youth justice residences have been established under the Oranga Tamariki Act, it is this legislation that applies to the care of children and young people in youth justice residences.
- By virtue of section 34A, the Corrections Act and its regulations (“with any necessary modifications”) also govern the operation of youth justice residences, but only with regard to the section 34A cohort. The effect is that the Corrections Act and its regulations become an added layer of legislation that applies in addition to the Oranga Tamariki Act and its regulations. This means that two sets of legislation, which both govern the same thing, but not always in consistent ways, apply to one group of children and young people in a residence (the s34A cohort), but not the other group (young people who are subject to a supervision with residence order).

The result is inherent ambiguities and tensions in the application of the law.

⁶ Beyond importing the definitions of “child”, “young person” and “residence” from the Oranga Tamariki Act.

In contrast, no immediate issues have been identified with respect to the application of the Parole Act and its regulations (which also apply to the s34A cohort “with any necessary modifications”).

Stakeholder views

Stakeholders agreed that the current law is not fit for purpose and that there needs to be clarity on which piece of legislation takes priority.

The NZ Law Society considers amendment is necessary to ensure the framework that applies to the s34A cohort in a residence upholds te Tiriti. The NZ Law Society believes that the framework should be consistent with the principles of the Oranga Tamariki Act first and foremost, alongside relevant international obligations.

Māori subject matter experts noted that the identified problems with section 34A are symptoms of larger problems within the youth justice system. They considered that:

- Schedule 1A offences should not be dealt with in the adult jurisdiction, as transferring these 17-year-olds from the youth court leads to inequitable outcomes when young people are subject to more severe penalties that are less effective at reducing offending.
- The youth court age threshold should be higher, potentially considering offences committed by those of up to 24 years of age. This would enable more young people to access wellbeing and whānau-focused approaches available in the youth justice system.
- The predominant societal view that children and young people who commit serious crimes are underserving of care and restoration of their mana causes the system to still focus on punishment rather than rehabilitation.
- The overrepresentation of Māori, and in particular wahine Māori, in prison populations and the lack of support for this cohort has led to perpetual intergenerational harm and trauma contributing to children and young people committing these offences.

Objectives and draft criteria

The first objective is that the legislation be clear and certain

The overriding objective is to ensure that the legislation that applies to the s34A cohort is **clear and certain**. The legislative settings and related policies and processes should be easily understood by children and young people, staff, whānau and others; and provide certainty as to their rights and obligations.

To fulfil the first objective, we must give primacy to a single Act and its regulations

In order to fulfil the first objective and overcome the problem of two sets of legislation both governing the same things, it must be clear and certain which Act and regulations take precedence. Accordingly, the other overriding objective is to **give primacy to the Oranga Tamariki Act** and its regulations, rather than the Corrections Act and its regulations.

This is particularly important with regard to which purposes and principles take priority. Under the Oranga Tamariki Act, the well-being and best interests of the child or young person are the paramount consideration in matters relating to the operation of residences,

including youth justice residences.⁷ In contrast, the maintenance of public safety is the paramount consideration under the Corrections Act. If New Zealand is to fulfil its international obligation to “emphasise the well-being of the juvenile”,⁸ the rules need to prioritise the Oranga Tamariki Act over the Corrections Act.

Accordingly, all options put forward in this paper give primacy to the Oranga Tamariki Act. Where options contemplate retaining existing provisions from the Corrections regulations, the proposal is to import them into the Oranga Tamariki Act. Depending on which option is preferred, further work may be needed to determine how best to give this effect.

There are six other objectives and associated criteria

In order to assess options, we propose several other criteria in addition to these two overriding objectives of providing clarity and certainty about which legislation applies to the s34A cohort. These additional criteria would apply when assessing the preferred option and when assessing the application of individual provisions:

- **Promotes wellbeing:** The extent to which the option promotes the well-being of the s34A cohort and recognises their likely longer period of detention in a residence compared to young people who are subject to a supervision with residence order.
- **Consistent:** The extent to which the option enables staff to apply the same set of rules and recognise the same rights for all children and young people in a residence, regardless of status.
- **No more punitive:** The extent to which the option avoids disadvantaging the section 34A cohort as compared to other young people serving supervision with residence orders and to adults in prisons.
- **Protects safety:** The extent to which the option protects the safety of the public, staff, and other children and young people who reside in the residence.
- **Fulfils Te Tiriti / The Treaty commitments:** The extent to which the option reduces disparities for tamariki Māori who have committed offences, strengthens the relationship between the child or young person and their whānau, hapū and/or iwi (e.g., through enabling visitation), and actively protects the viability and availability of kaupapa Māori youth justice services.
- **Aligns with operations:** The extent to which the option can be implemented in current youth justice secure residence settings, considering the skills of staff and the structure of residences and the need for additional staff training and structural modifications. This criterion includes considering the cost of each option and the scale of change necessary to implement the option.

⁷ Note that residential care is governed by Part 7 of the Oranga Tamariki Act, which is not one of the Parts that are expressly excluded from the application of the paramount principle in s4A(1) of the Act (being Part 4: Youth Justice, and Part 5: Provisions relating to procedure in the Youth Court). Also note that the “4 primary considerations” stipulated for Parts 4 and 5 in s4A(2) still give priority to the well-being and best interests of the child or young person alongside three other considerations, whereas the Corrections Act nowhere gives this same priority.

⁸ Article 5, United Nations Standard Minimum Rules for the Administration of Juvenile Justice.

Draft options

In addition to the status quo, we propose two broad options:

- **Mixed model:** Certain provisions from the Corrections Act and regulations are imported into the Oranga Tamariki Act and Corrections staff continue to undertake certain functions. There are two variations of this model that provide for greater or lesser retention of Correction regulations that operate inside the residence.
- **Stand-alone model:** The Oranga Tamariki Act and regulations replace the Corrections Act and regulations in full. Oranga Tamariki staff undertake all of the functions currently undertaken by Corrections staff, but have the flexibility to call in Corrections staff if desired.

Note that the status quo includes the ability to transfer a young person to prison before they turn 18 years old if Oranga Tamariki and Corrections both agree. As no change is proposed in this regard, a young person who presents a particularly high risk to themselves and others' safety in youth justice residences can be transferred to prison, thereby providing the means to manage those with the highest safety risks.

Option 1 – Counterfactual

In the absence of intervention, the first option is the status quo, in which operational guidance is used to identify which Corrections Act provisions and regulations apply. We could continue to develop the guidance when there are serious operational issues raised by either Oranga Tamariki or Corrections about the settings for imprisoned young people that require immediate analysis and solutions.

It is difficult to predict how quickly or comprehensively we could develop new guidance to cover all the legislative provisions in both Acts. However, we expect it would take a long time to reach full coverage of all settings that should or shouldn't apply in practice and in what circumstances.

More fundamentally, retaining the status quo will not overcome the underlying uncertainty regarding which Act and its regulations should take priority.

Option 2A – Mixed model: Importing certain Corrections regulations and functions both inside and outside of youth justice residences

Under this option, the substance of certain Corrections provisions and regulations would be stated in the Oranga Tamariki Act or regulations, and certain functions would continue to be provided by Corrections staff. These have been selected to minimise changes to current processes that are not as problematic, and to minimise risks to the safety of the public, staff, and other children and young people within and outside of residences:

- Corrections would continue to be responsible for sentence management. Corrections would manage pre-prison induction processes, including adding the young person to the relevant prison roll. A Corrections case manager would prepare an offender plan and meet regularly with the young person to check on progress relative to that plan. The case manager would be responsible for preparing reports to the Parole Board and managing all parole proceedings. The young person would continue to have access to a Corrections psychologist.
- Corrections would continue to provide all escorting duties off-site and authority over any off-site movement the child or young person can take (except in emergencies). Powers connected to escorting under the Corrections Act, such as the use of physical restraint, would also continue to apply and be available to Corrections staff if the child or young person is being escorted.

- Corrections settings for visitation, phone calls and mail would apply to the s34A cohort. In practice this would mean a higher bar or more thorough vetting process than is currently available within the Oranga Tamariki regulations for visitors intending to visit imprisoned children and young people. Private visits would also be reduced, with a residence staff member having to be present for visits. Phone calls could be monitored by residence staff, and mail to imprisoned children and young people could be withheld if certain criteria are met. For both phone calls and mail, the monitoring would extend beyond what is already allowed in the Oranga Tamariki legislation.

Option 2B – Mixed model: Importing certain Corrections regulations and functions outside of residences

This option is the same as Option 2A, except that the Corrections settings for visitation, phone calls and mail would not apply (the last bullet point above). The effect would be that Corrections would retain responsibility for all aspects related to processes that occur outside a residence, such as escorting and Parole Board proceedings, leaving the management of the child or young person inside the residence to the Oranga Tamariki Act, regulations and staff.

Option 3 – Stand alone model: Oranga Tamariki takes responsibility for all aspects, with flexibility to call on Corrections assistance

This option would reduce Corrections involvement with the s34A cohort as far as possible, with Oranga Tamariki legislative settings applying during their imprisonment in the residence and Oranga Tamariki staff taking responsibility for all functions currently undertaken by Corrections staff. However, it would retain the flexibility for Oranga Tamariki staff to call on Corrections staff to supply the functions 'outside' of residences if desired (e.g. escorting a young person who presents a high safety risk).

This would mean that residence staff would take responsibility for off-site activities and escort the child or young person using the existing powers available under the Oranga Tamariki Act and regulations. Oranga Tamariki would be responsible for providing access to psychologists and other support programmes, but could call on Corrections staff if needed.

In addition, Oranga Tamariki staff would undertake all Parole Board proceedings (together with Corrections staff if appropriate) and take responsibility for all aspects of the sentence while the child or young person is in a youth justice residence. This would mean that the child or young person would not need to have an offender's plan or be included in a prison placement, nor be visited regularly by a Corrections case manager (unless it was considered there were advantages in doing so). Instead, they would have the same sort of plan as other children or young people detained in youth justice, together with personalised case management by Oranga Tamariki staff.

Corrections staff would be involved in the transition to prison

Where relevant, prior to the young person's 18th birthday, provision would be made for a transition period in the lead up to the young person being transferred to a Corrections prison. Corrections induction processes and a Corrections case manager would be introduced during this period to support the young person to be able to transition to prison.