

Independence
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Joint thematic review of young persons in Police detention

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integrity

October 2012



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FOREWORD

There is no disputing the inappropriateness of detaining young people in Police cells. The aim of the youth justice system is to help young people to face up to, and move on from, their offending. In addition to calling into question New Zealand's compliance with international obligations, detention in a Police cell can be seen as a missed opportunity to respond constructively to a young person's offending. The importance of treating these young people in a fair and humane manner should not be underestimated.

Neither can this issue be seen in isolation. Just as the young person's rights are indivisible and interdependent, so too their detention in Police custody cannot be properly understood without reference to wider justice and social issues. There is a need for continued focus on preventing and reducing youth offending as well as identifying alternatives to Police detention.

This review is also significant because it is the first joint thematic review to be conducted under the Optional Protocol to the Convention Against Torture (OPCAT) mandate in New Zealand. As National Preventive Mechanisms under OPCAT we are required to take proactive steps to prevent the ill-treatment of people who are detained.

Young people in Police detention are our first area of collective focus because we believe this is an area where improvements can, and should, be made. Young people are entitled to special protections. They warrant specific attention because their age and developing maturity make them vulnerable to breaches of their rights and also because the effect of any breach, at this formative stage of life, can be long lasting.

We must redouble our efforts to make sure that Police detention is only ever used as a last resort and for the shortest possible period of time. We must also strive to improve the conditions of detention and to ensure young people are always treated with respect and in a way that builds their sense of dignity and worth rather than undermining it.

The generous and constructive contribution made by all those who have taken part in this review is acknowledged, particularly that of Police and Child, Youth and Family as the principal stakeholders subject to the findings and recommendations.

This issue is not new and the Youth Court, youth advocates and committed individuals working in the non-government sector, as well as Police and Child, Youth and Family, are to be commended for the work they have done, particularly over the last decade, to reduce the numbers of young people who are detained in Police cells and the length of time they spend there.

Nevertheless last year 213 young people were detained in Police cells for an average of 1.9 days and indications are that numbers are again trending upwards. We hope that this report will contribute to a sustained reduction in these numbers and that, for those young people who do end up detained in Police cells, it will help to ensure appropriate attention is paid to their needs and rights while in custody.

Judge Sir David J. Carruthers
Authority Chair
Independent Police Conduct Authority

Dr. Russell Wills
Children's Commissioner

David Rutherford
Chief Human Rights Commissioner

EXECUTIVE SUMMARY

1. This review of young people in Police detention was launched in December 2010 by the Independent Police Conduct Authority, the Office of the Children's Commissioner and the Human Rights Commission as part of each agency's mandate under the Optional Protocol to the Convention against Torture (OPCAT). OPCAT's expansive preventive mandate enables monitoring bodies to consider a range of human rights treaties and standards in their work and to identify methods beyond site visits that will contribute to the prevention of ill-treatment. It is on this basis that this joint thematic review has been conducted.
2. Since 2009 there has been a steady increase in the number of young people spending time in Police detention which has resulted in criticism of New Zealand from both international and domestic bodies, including from the United Nations Committee on the Rights of the Child. However, it should be noted that the situation has improved dramatically since the very high levels of youth detention in 2006.
3. With more than a million children and young people in New Zealand and thousands of young people dealt with by the Police and Child, Youth and Family every year, the number held in Police cells is relatively small. Last year 213 young people were detained in Police cells, with an average detention period of 1.9 days. While, ideally, no young person should be in a Police cell and certainly not for more than 24 hours, with a small population and a large geographical area to cover, this can be, at times, the only practical option to ensure community safety. However, care must be taken to avoid pragmatism becoming a justification for ill-treatment. It is a matter of balancing these practical realities against New Zealand's human rights obligations to ensure that young people are treated in a fair and humane way.
4. New Zealand's commitment to protecting and advancing the human rights of children and young people, including those who are in the justice system, is well established and reflected in our domestic legislation. The Children, Young Persons and their Families Act 1989 (CYPFA) establishes a system of youth justice which recognises that children and young people who have offended, or who are alleged to have offended, should be held accountable in ways that:
 - take into account their age
 - maximise, rather than undermine, their well-being
 - contribute to them going on to lead fulfilling and constructive lives.
5. However, while the basic legal and operational framework for protecting the rights of children and young people is sound it can be very difficult, in practice, to put the principles espoused into action.
6. Both of these situations can call into question New Zealand's compliance with various human rights agreements and guidelines, which provide that young people should only be held in detention in accordance with the law, as a last resort and for the shortest time possible. New Zealand has ratified two international conventions that are particularly relevant to this review:

- (i) The Optional Protocol to the Convention Against Torture (OPCAT) provides the mandate for this review. The aim of the Convention and its Optional Protocol is to prevent the torture, or other ill-treatment, of people in detention. The Optional Protocol provides for National Preventive Mechanisms (NPMs) to be established to monitor the places and circumstances of detention in order to prevent ill-treatment of detainees. This joint thematic review is the first of its kind to be conducted by New Zealand's NPMs.
 - (ii) The United Nations Convention on the Rights of the Child (UNCROC) is the most widely ratified of all the human rights conventions. Under the Convention all children, without discrimination, are entitled to have their best interests taken into account, to be kept safe and healthy, to be able to grow to their full potential, and to participate in their family, social and cultural life. The Convention is based on the premise that children (all those under 18) are entitled to special care and assistance because they are still growing and developing. This principle extends to those children and young people who are in trouble with the law and for whom there are specific provisions and rights.
7. The practice of detaining young people in Police custody raises significant human rights issues because it is very difficult, in those circumstances, to ensure the young person will be dealt with in a way that meets their needs and entitlements. These issues have been consistently noted as concerns by both national and international monitoring bodies. The variety of human rights issues raised by the detention of young people in Police cells includes:
- the level of care and availability of basic, youth appropriate, amenities in Police detention
 - whether young people are shown respect and treated in a way that takes into account their particular rights (for example whether family visits are facilitated, whether specialist staff, with appropriate training, are involved in their case)
 - the potential for age-mixing and other safety issues
 - the potential for discrimination both with regards to the adequacy of responses to children and young people from minority groups, and age (the treatment of young people on remand as compared to adults).
8. This review focused on systemic issues and what might be done to ensure conditions of youth detention are safe, humane and in compliance with international standards. Practice around the country appears to be variable, with many of the issues identified stemming from the fact that Police cells were never intended for the detention of young people.
9. The sorts of practices highlighted by submissions to this review that are, or risk being, inconsistent with accepted human rights standards include:
- having cell lights on 24 hours a day (to allow suicide monitoring)
 - it being difficult for family to visit
 - a lack of ventilation and natural light
 - cells being unclean

- a lack of showering facilities/privacy
 - inadequacy of food
 - lack of access to exercise, recreation and education.
10. The reported experiences of those who are detained in Police custody further illustrate the practical realities for the young person of New Zealand failing to meet human rights standards. Young people reported:
 - being treated as an adult, not as a young person (i.e. not having their special needs, as a young person, taken into account)
 - being treated unfairly
 - the use of force
 - feeling discriminated against
 - not having their medical and/or mental health needs met.
 11. The detention of a young person in Police custody is the culmination of several different points of decision-making. The decision to arrest, the assessment as to likelihood of violence or absconding, what level of engagement is possible with family/ whānau, the availability and proximity of suitable alternative placements, the availability of transport to an alternative placement, and the consideration given to bail options, are all factors that can affect whether a young person ultimately ends up in Police detention. Often the detention of a young person in a Police cell can come down to what day of the week it is and their geographical location.
 12. At each step of the process, and with every decision taken, there is opportunity to minimise the rates of youth detention by: attending to the attitudes and practices of the individual social workers, constables, youth advocates, and judges or justices of the peace involved; planning for, properly recording and communicating the availability of suitable alternative care options; planning for and providing transport to a suitable alternative placement. Much could be learnt as well from better monitoring of the youth detention process to identify areas where practice could be better, where there are gaps in the provision of potential alternative placements and, generally, how compliance with domestic and international standards might be improved. Accordingly this review examines what might be done to:
 - (i) reduce the numbers of young people being detained in Police custody, and the length of time they spend there
 - (ii) improve the treatment of those young people who are detained
 - (iii) strengthen monitoring and feedback mechanisms in order to identify systemic issues and ensure best practice.

(i) Reducing the rates of youth detention

13. There are several ways to try to reduce the rates of youth detention. Steps can be taken in relation to the exercise of Police discretion, the availability of alternative placements, the use of bail, and the information and support provided to the young person.

The Exercise of Police Discretion

14. Police exercise discretion at three key points of contact with young people, all of which directly influence the number of young people in Police detention: the decision to arrest without a warrant; the decision to charge; and the decision to remand in Police custody. A common theme of this review is that there is a lack of information available to monitor and assess how Police are exercising their discretion at each of these points.
15. The decision to arrest without a warrant can only happen in limited circumstances, set out in section 214 of the CYPFA. An arrest must be deemed necessary in order to ensure the young person appears before the court, or to prevent the commission of further offences, the destruction of evidence or interference with witnesses. A young person may also be arrested in regard to a purely indictable offence where the arrest is required in the public interest. Submissions suggest a lack of national consistency in the way section 214 is applied reinforcing the need to properly monitor the use of this discretion.
16. Currently, the way section 214 is applied is monitored through a reporting and feedback process. Following a section 214 arrest the constable is required to report the reasons for that arrest to the Police Commissioner. Police National Headquarters Youth Services Division then complete a weekly random sample of these reports and feedback is given to districts. Two problems were identified during the course of this review. Firstly, the detail provided in these reports tended to be insufficient to assess compliance with section 214 or identify trends in non-compliance. Secondly, it was not clear that detailed findings from these surveys are always fed back to districts. As a result it could be difficult for Police to ensure consistency of practice across districts and districts are not in a position to address practice shortcomings. Changes to the electronic reporting template in June 2011 mean that reports now must include comments on the justification for using section 214.
17. The next point at which Police discretion is exercised is the decision to charge. Under the CYPFA, unless the public interest requires otherwise, criminal proceedings can only be taken when there is no alternative means of dealing with the matter. The Police do operate an Alternative Action programme which sets out the factors officers should take into account when exercising their discretion. But, once again, there is no information on how these factors are, in practice, applied. However, Youth Justice statistics suggest that, like the decision to charge, the use of alternative action also varies significantly between districts and that this ultimately impacts on the number of young people in Police detention.
18. The Alternative Action programme also risks being inconsistent with international guidelines, as set out in the Beijing Rules, because it is established and administered by Police rather than having criteria established by law, and because it is not subject to review by an independent monitoring body.
19. Finally, Police, together with Child, Youth and Family, also exercise discretion when deciding whether to keep a young person in Police detention for a period exceeding 24 hours. Section 236 of the CYPFA requires the decision to be made by both a senior sergeant, or a constable who is of or above the level of inspector, and senior social worker. They must complete a joint certificate and furnish reports to the Police Commissioner and Chief Executive of Child, Youth and Family, specifying the circumstances in which the certificate came to be

issued and the length of time the young person has spent, or is likely to spend, in custody. Each Police report is subject to review by the Police National Headquarters Youth Services Team and feedback is given to districts. However, as with section 214 reports, section 236 reports tend to lack the necessary detail to properly assess compliance or identify, and address, trends in non-compliance.

20. Improving reporting under sections 214 and 236 would mean that Police and Child, Youth and Family would be better able to monitor the exercise of discretion at these points and assess compliance with the provisions of the CYPFA. It would also enable them to identify trends in the way discretion is being exercised and, where necessary, to provide guidance or support to ensure best practice.

Alternatives to Police custody

21. The use of alternatives to a remand in detention reflects the youth justice principle that a young person should be kept in the community unless there is a need to safeguard the public. The CYPFA provides that a young person can only be held in Police custody if:

- the young person is likely to abscond or be violent if released; and
- suitable facilities for their detention in safe custody are not available to Child, Youth and Family.

22. Other options available include releasing the young person, releasing him or her on bail, or delivering the young person into the custody of a care-giver¹. Child, Youth and Family will generally look to whether the young person can be placed back with family or wider family/ whānau or with an approved caregiver. For those young people who also have care and protection statuses with Child, Youth and Family, placements are co-ordinated through regional 'hubs'.

Generally though, placement options for adolescents, particularly those who are in trouble with the law, are relatively limited. Options will include placement with local care-givers, 'special group homes' for young persons on remand, or family homes with the expertise and appropriate designation to take youth justice placements. (There are two homes in Auckland and one in Southland). Young people can also be remanded to Iwi Social Services where these are approved and have the appropriate services available.

23. Residential placements are also generally available but the viability of this option will depend on how close an available bed is to the place of arrest and what transport is available.

Options are particularly limited if it is considered necessary to detain the young person as opposed to placing him or her in custody. Detention requires the ability to restrain a young person and prevent them from behaving in ways that put the community at risk.

24. Several bail options, in particular Supported Bail, also offer alternatives to detention in Police custody. Supported Bail is a Child, Youth and Family initiative designed to assist young people charged with an offence who would

¹ CYPFA, s234, s238(1) (a),(b) and (c)

otherwise be remanded in custody while on bail due to the risk that they will breach their bail conditions or reoffend if released. It is frequently used to support the placement of a young person with family/whānau or an approved caregiver.

25. Supported Bail programmes across the country appear to have been successful. A 2007 report carried out by Elaine Mossman found that of the then 95 participants to the programme:
 - 80 percent were categorised as “*high risk*” and, but for the Supported Bail programme, would have been remanded in Child, Youth and Family or Police custody
 - 75 percent completed the programme
 - 66 percent did not reoffend while on the programme.
26. It would seem that Supported Bail is not being used as widely as it could be because: parents and caregivers are often not aware of the programme; only a small number of young people can receive the benefit of the programme due to lack of resourcing; and, generally, the duration of the programme does not reflect the length of time the young person will spend on bail (although there is now more flexibility to extend the time limits). Given the success of Supported Bail and, in particular, its scope to increase the numbers of potential community placement options available to Child, Youth and Family, there would be merit in addressing these limitations.
27. The availability of alternative placements is the crux of the problem of young people being detained in Police custody. The development of Supported Bail and also the relatively new initiative of placement ‘hubs’ are very positive. Nevertheless there is scope for a more coherent strategy around the provision of alternatives to detention in Police custody so that social workers have a range of options to consider when looking for placements. Greater use could be made of section 238(1)(c) orders perhaps with supports put around its use in much the same way the Supported Bail programme has been developed. Those areas with high rates of Police detention should be a priority. Consideration could also be given to extending Supported Bail and widening ‘hubs’ so that they cover youth justice clients. At present the situation appears to be somewhat ad hoc, with regional variations, increasing the risk that Police custody will be the only real option available to a social worker who needs to arrange somewhere for a young person to be detained.

Section 238(1)(e) orders

28. It is a judge or justice of the peace who determines (on the basis of information submitted by Police, Child, Youth and Family, and the young person’s youth advocate) whether a section 238(1)(e) order should be made to detain a young person in Police custody for longer than 24 hours. Challenges in finding suitable facilities for the safe detention of a young person arise here too. At times, alternative placements are not able to be made within the 24-hour period following arrest and a section 238(1)(e) order is required.
29. Again, it would be good to see joint planning, before the need arises, around contingencies should a young person need to be detained so that when a section 238(1)(e) order is sought the social worker and, ultimately, the Court can be assured that there are options and they have all been fully and properly explored.

30. This planning should extend to transport arrangements so that residential beds can also be used, if a local placement is not available, regardless of their location. The statistics analysed as part of this review showed that the four youth justice residences are very rarely full to capacity. Although in any given case it may be decided, on balance, that it is better to detain the young person in Police cells than to make use of an available bed in a residence this decision should not be taken solely for want of transport.
31. Bail is also a potential alternative to Police custody. Many young people who spend greater than 24 hours in Police detention are ultimately being granted bail. In 2011 this accounted for 46 percent of such young people. This figure suggests that section 238(1)(e) orders are being made in cases where it may have been initially possible to grant bail. Special consideration should be given to bail when the young person appears on a Friday or Saturday and is likely to remain in Police custody over the weekend if a section 238(1)(e) order is made.
32. Another issue is that, once a section 238(1)(e) order has been made placing the young person in Police custody, a section 238(1)(d) order is required to transfer custody to Child, Youth and Family. This can mean that if a young person is placed in Police custody under section 238(1)(e) on a Friday or Saturday and a bed subsequently becomes available, the young person cannot be moved until they are able to appear before a Youth Court judge or a justice of the peace, generally on the following Monday. Judges and justices of the peace are aware of this issue and do convene Saturday sittings to monitor the situation if a section 238(1)(e) order was made on a Friday.
33. Also, judges and justices of the peace can, and in some cases do, make a section 238(1)(e) order which allows for Police detention only until a Child, Youth and Family placement becomes available.

Young people's knowledge of their rights

34. At each stage of the process the young person's knowledge of their rights and the degree and quality of support they receive are critical to ensuring they are treated fairly, that legal requirements are complied with, and that the risks associated with detention in a Police cell are mitigated.
35. The law requires that in every case a child or young person is informed of their rights in a way that is appropriate and, takes into account their age and level of understanding². Because every young person is different, and Police will deal with a range of ages and abilities to understand, it is important that Police take care in each case to ensure the young person understands their rights and has access to support. This point needs continued emphasis in Police training.

Youth advocates and nominated people

36. Youth advocates play an important role in safeguarding the rights of young people both when the decision is being made about potential Police detention and also while a young person is in custody.
37. However, submissions to this review suggest that young people are not always able to contact a lawyer while in Police detention and that the standards of practice amongst youth advocates vary. This report will be shared with the New Zealand Law Society so that they can ensure appropriate professional

² CYPFA, s 218.

development is, and continues to be, available to those lawyers who act as youth advocates.

38. The role of the nominated person is also a very important safeguard against breaches of young people's rights during the detention process. It is the role of the nominated person to:
- ensure the child or young person understands their rights prior to and during Police questioning
 - offer the child or young person adequate support prior to and during Police questioning.³
39. A child or young person may select any adult to be their nominated person and this is usually a parent, caregiver or member of their family/whānau/iwi/hapū.⁴ If a person of the child or young person's choice cannot be located, the Police will continue to ask the child or young person to nominate someone. However, if the young person refuses or fails to nominate an adult of their choice Police can provide an alternative from a list they keep of potential nominated persons.⁵ Two issues were raised during this review. Firstly, that inadequate information is provided to nominated people who are family members. And, secondly, whether a nominated person selected from the Police list is sufficiently independent.
40. The issue of the training provided to nominated persons, is currently being considered by the Criminal Practice Committee⁶ as part of their work looking into Nominated Persons and the questioning of young people.

(ii) Improving the treatment of young people in detention

41. Overall the treatment of young people in Police cells is variable. In part this is to do with the physical conditions of detainment including the state of the particular cell in which the young person is detained. Police cells were not intended or designed to detain people for any length of time, especially young people. But also there are issues around training and levels of understanding about best practice in dealing with young people in custody.

Training

42. There is a general lack of training for those involved in the custodial care of young people in Police detention.
43. Police offer some very general youth-specific training for constables but no youth-specific custody training (although there is specialised training available for those who want to pursue a career in the Youth Aid Section). Authorised

³ CYPFA, s 222.

⁴ CYPFA, s 222(1).

⁵ R v Kurariki (2002) 22 FRNZ 319 (CA)

⁶ Established in 1988 the Criminal Practice Committee is a judicial committee which brings together all those professionally involved in the criminal justice system at a senior level to progress matters of importance to the operation of the criminal justice system and to inform the Executive. Members include legal practitioners, Ministry of Justice policy and registry advisers, Police, the New Zealand Law Commission, Crown Law, judges and Law Society representatives.

officers,⁷ who regularly perform constabulary duties in the watchhouse, will have had custody training but, most often, no youth-specific training. There are also potential training gaps for social workers applying the custody provisions of the Act. After-hours Child, Youth and Family social workers may be care and protection workers who are not trained in the youth justice provisions of the CYPFA and may not be familiar with the legal framework for youth detention. This is problematic as the provisions of the Act can be difficult to apply.

44. A youth-specific custody training module for Police and social workers would help to ensure consistent good practice no matter who is on duty when a young person is arrested. Consideration should also be given to offering joint training sessions.

(iii) Monitoring for best practice: collection and sharing of information

45. There is a need for data collection and reporting requirements to be improved so that a better understanding of the circumstances surrounding the decision to detain young people in Police custody can be developed. Continuing to improve collaboration between all those involved in the youth justice sector and, in particular, between Child, Youth and Family and Police, is essential if practice standards are to be met consistently. Improving feedback mechanisms and information sharing, both vertically within each organisation and across the two organisations would also help to raise the standard and consistency of practice.
46. The Police are currently developing a youth-specific custody module to address the lack of youth specific information collected in either their national database (the Police National Intelligence Application (NIA)), or the Police Custody Module (an electronic database of custody-related information). Implementation of the youth-specific custody module is currently being considered by an internal approval process. As well as improving data collection this module should help to ensure that every step of the custody process under the CYPFA is adhered to, including timely communication between Police and Child, Youth and Family.
47. The Care and Protection, Youth Justice, Residences, and Adoption System (CYRAS) database, Child, Youth and Family's full case recording system, allows records to be maintained and constantly updated concerning all Child, Youth and Family interaction with an individual child or family. When a young person is held in Police detention certain information must be recorded in CYRAS by the Child, Youth and Family social worker responsible for visiting the young person every 24 hours. However, a review of 40 CYRAS records on young people who spent longer than 24 hours in detention between July 2009 and December 2010 found only eight cases showing good levels of recording, suggesting room for improvement.
48. Once effective methods of data collection and inter-agency information sharing are in place, these processes should be subject to review by an authority at the operational level. Local mechanisms for monitoring the use of Police detention for young people are needed. To be effective these will need to include Child,

⁷ Authorised officers are not sworn constables and have not been through the same recruitment and training process.

Youth and Family and Police, but they also require an element of independent oversight. Youth Offending Teams, or similar mechanisms, are one potential option as they include representatives from agencies with an interest in reducing and responding to youth offending, and are responsible for identifying local issues and coordinating with each other to find solutions.

Conclusion

49. Police cells are intended for the short-term detention of adults awaiting bail or transfer to a remand facility. They are not suitable for long-term detention of any prisoner, and are particularly unsuitable for the detention of young people. The continued use of Police cells for the detention of young people risks being in breach of New Zealand's international obligations and goes against the fundamental principles that underpin the CYPFA. The object of this review has been to establish recommendations aimed at reducing the number of young people spending time in Police cells and, for situations where this cannot be avoided, ensuring that the conditions of detention, and treatment of those young people, are consistent with internationally recognised obligations and guidelines.

50. It is therefore recommended that:

Recommendation 1 – Police continue to work with the IPCA to improve conditions of detention and the treatment of young people while in their custody and to ensure compliance with OPCAT expectations.

Recommendation 2 – Police improve the collection, evaluation of, and provision of feedback on, section 214 reports, at district and national levels.

Recommendation 3 – Police record their decisions and reasoning in cases where Alternative Action is taken in order to identify trends in decision-making and address district variations.

Recommendation 4 – Police and Child, Youth and Family work together to collate, evaluate and identify trends from section 236 reports at district and national levels.

Recommendation 5 – Police and Child, Youth and Family work together to develop national guidelines on identifying and using local options for transporting young people between residences, their place of arrest and court.

Recommendation 6 – Child, Youth and Family undertake a review of, and develop a coherent strategy around, the provision of suitable facilities for the safe detention of young people so that social workers have a range of options to consider when looking for placements for young people who are alleged to have offended and that particular consideration be given to:

- extending the work of 'hubs' to cover youth justice clients
- enabling greater use of section 238(1)(c) orders
- expanding the use of Supported Bail, especially where it may help to secure placement with family/whānau or an approved caregiver
- prioritising the resourcing of such initiatives.

Recommendation 7 – the IPCA work with the Ministry of Justice to draw the attention of judges and justices of the peace to the possibility of making

238(1)(e) orders which only remain in effect until a Child, Youth and Family placement becomes available.

Recommendation 8 – the Children’s Commissioner reviews the pamphlet provided to family/whānau members who act as nominated persons to ensure this includes adequate information about the role including the importance of seeking legal advice.

Recommendation 9 – the Children’s Commissioner works with other relevant agencies to review the nominated persons scheme and assess whether it is independently administered and whether there would be merit in extending the role of a nominated person so that they are involved in the custody process.

Recommendation 10 – when building any new Police stations, or making alterations to existing ones, Police give consideration to how the needs of young people in custody, including the right to be kept separate from adult detainees, might be better planned for and accommodated.

Recommendation 11 – Police work with Child, Youth and Family and the Ministry of Justice to minimise the need to transport young people to and from court, especially when the young person has been detained a long way from the court where they are to appear.

Recommendation 12 – Police develop a comprehensive and nationally consistent youth-specific training programme for all front line staff, custodial staff and supervisors.

Recommendation 13 – Police ensure that authorised officers receive the same youth-specific training recommended for all custodial staff.

Recommendation 14 – Child, Youth and Family ensure that all care and protection social workers who cover after-hours duty receive nationally consistent training on youth custody procedures.

Recommendation 15 – Police and Child, Youth and Family develop a joint training plan enabling Police officers and social workers to effectively carry out their roles in the youth custody process, including refresher courses that take into account any developments in the law and practice.

Recommendation 16 – Police and Child, Youth and Family review how youth custody issues are treated within their Memorandum of Understanding to ensure currency as well as ongoing analysis and evaluation of policy and operational compliance.

Recommendation 17 – Police ensure that the youth-specific information recorded in NIA includes youth-specific records of Police custody and provides reasoning for the course of action taken.

Recommendation 18 – Police and Child, Youth and Family develop an information-sharing protocol specifically with regard to youth custody issues.

Recommendation 19 – Police and Child, Youth and Family make arrangements for Police to make a notification or “report of concern” each time a young person spends time in Police custody.

Recommendation 20 – Police implement the youth-specific custody module to ensure that the correct processes are followed in every case and to increase the consistency and standard of record-keeping.

Recommendation 21 – Child, Youth and Family send daily status reports on bed availability in each of the four youth justice residences to the Police.

Recommendation 22 – Child, Youth and Family develop a national compliance framework to ensure that social worker visits to young people in Police cells are accurately and consistently recorded, subject to a quality assurance process, and include completion of a mandatory checklist, the requirements of which could be automatically flagged in the CYRAS database.

Recommendation 23 – Police and Child, Youth and Family develop a protocol to ensure that records kept of young people in Police detention are monitored at the operational level.

Recommendation 24 – Police and Child, Youth and Family contribute data relating to young people in Police detention for inclusion in the Youth Justice Dataset in order to make that information publically available aiding monitoring, research and evidence-based policy development.

INTRODUCTION

"I believe there should be a different standard of care provided by the Police for a young person held in Police custody than that provided to an adult. There should be a certain level of friendliness without making Police detention appealing or a non-event in the life of the young person" (Police constable).

The purpose of this review

51. This joint thematic review of young people⁸ in Police detention was launched in December 2010 to examine the treatment and conditions experienced by children and young people detained in Police cells in order to ensure that they are safe, humane and consistent with international standards.⁹
52. Detaining children and young people in Police custody raises significant human rights issues. Because of their age, and the fact that they are still developing, children and young people can be particularly vulnerable to breaches of their rights and are therefore entitled to special protections. Both international law and domestic legislation acknowledge the inherent vulnerability of young people and require responses to youth offending which are designed to protect young people's rights.
53. However, there are several challenges to be overcome before New Zealand can be sure that its practice in this area complies with established international obligations and guidelines. Some young people in Police detention are being treated in a way that is, and held in conditions that are, entirely unsuitable and potentially in breach of their basic human rights.
54. All parties involved in the youth justice sector agree that the use of Police cells for the detention of young people should be avoided whenever possible, and that the continued detention of young people in Police cells is problematic from both a practical and a rights-based perspective. Much good work has been done by Police, Child, Youth and Family, the Youth Court and concerned individuals within the non-government or voluntary sector. As a result there is no doubt that the situation has improved in the past decade, particularly with the constant monitoring that was provided by the Young People in Police Cells Steering Group between 2005 and 2008.¹⁰ However the practice remains a significant concern, especially as numbers have increased again since 2009¹¹. In 2011 213 young people were detained in Police cells, with an average period of detention of 1.9 days.

⁸ Young people are defined as those aged over 14 and under 17 years of age, CYPFA s 2.

⁹ IPCA *Review of treatment and conditions for young people in Police custody* (media release, 10 December 2010).

¹⁰ This Steering Group was comprised of members of Police, Ministry of Justice, Youth Court judges, the Children's Commissioner, and the Ministry of Social Development (Child, Youth and Family). Meetings were held every 3 to 4 months between late 2005 and early 2008 to closely monitor the numbers of young people in Police cells and the length of time they spent there. At the final meeting in March 2008 it was decided that due to the excellent results achieved by the Group, no further meetings were required.

¹¹ In 2009, 76 young people were held for more than 24 hours, for a total of 140 days and an average of 1.8 days. In 2011, 213 young people were held for more than 24 hours, for a total of 394.2 days and an average stay of 1.9 days. (See pages 37 and 38 below).

55. It is important therefore that this issue be given priority and that there is a continued focus on the situation of young people detained in Police custody. This report takes a human rights-based perspective on assessing the current situation and making recommendations for change. There is a need to be pragmatic, creative and open to what solutions are most likely to be in the best interests of the young people involved. It is hoped this report will provide the impetus, and some direction, for further improvement in both the numbers of young people being detained and their treatment while in detention.

OPCAT mandate

56. The implementation of the Optional Protocol on the Prevention of Torture (OPCAT) in New Zealand represents a significant step forward in the treatment and protection of persons in places of detention, including young people. This review is the first of its kind under the OPCAT in New Zealand and it has been conducted by the Independent Police Conduct Authority (IPCA), the Office of the Children's Commissioner and the Human Rights Commission in accordance with their collective mandate as National Preventive Mechanisms (NPMs).
57. The role of a NPM is to monitor policies, practices, and procedures within places of detention in order to prevent torture and other ill-treatment. While the focus of the NPM is on systemic issues rather than any specific individual case, monitoring how individuals experience detention is central to the overall task of preventing torture or other ill-treatment.
58. This joint thematic review, and the observations and recommendations it contains, aims to advance the preventive impact of NPMs in New Zealand and lay a foundation for further preventive projects in the future.
59. The process of conducting this review involved an examination of the relevant international literature relating to human rights standards and guidelines for children and young people in detention, including the comments on the issue made by international and domestic human rights monitoring agencies, such as the United Nations Committee on the Rights of the Child. To build a snapshot of the problem relevant statistics were analysed, for example the numbers of young people detained, the length of time they spent in Police custody, and where they moved on to once released. In order to develop a deeper understanding of the nature of the problem and the issues identified, submissions were considered from various stakeholders, including young people, Police, Child, Youth and Family, youth advocates, and academics.

The structure of this report

60. This report is divided into two parts. The first part provides background information and context for considering the issues raised by the detention of young people in Police custody. It includes: an outline of the relevant international and domestic legal framework; the policies and procedures that govern the detention of young people; information about the numbers of young people held in Police detention; information about young people's experiences of detention and the problems identified by them and those who work with them. Also covered in this part of the report is the situation for children in de facto Police detention (children and young people in need of care and protection, children and young people being interviewed, lost children, children whose parents have been involved in a violent incident).

61. The second part of this report considers the issues raised by this review. They are covered in three groups:
- (i) Factors that can result in young people being placed in Police detention - these include the legal framework and operational policy around the exercise of Police discretion, the level of support and information available to young people about the process and their rights, and the availability of suitable alternative custodial placements.
 - (ii) Issues to do with the treatment of young people once they are detained in Police custody – for example being kept safe (both from self-harm and other detainees), adequacy of food, access to private toileting/bathing facilities, and interactions with adults during the detention period.
 - (iii) Thirdly consideration is given to what information sharing, data collection and monitoring could help to identify systemic issues and thereby improve the treatment and conditions of detention of young people in Police cells.

Recommendations are made throughout the body of the report and also drawn together in the conclusion.

Definition of a child and young person

62. For the purposes of this report the term “children” is used to refer to all those under the age of 18 years. “Young person” is the term used most often and it refers to older children, in the main those over the age of 14 and under the age of 17 as it is these young people who, if they offend, are dealt with in the youth justice system and who can be detained longer than 24 hours by Police. It should be noted that there is no provision for a child under the age of 14 to be held in Police detention for longer than 24 hours although, due to the 2010 amendments to the CYPFA, there is provision for some children to be dealt with in the youth justice system. It should also be noted that there is a gap created by the different definitions of a “child” under UNCROC and the CYPFA which means that 17 year olds are covered by international but not domestic youth justice principles.

BACKGROUND

The human rights framework : New Zealand's obligations

63. New Zealand's international human rights obligations, particularly but not exclusively those under the OPCAT, form the backdrop to this review. The United Nations Convention on the Rights of the Child is also especially relevant. Monitoring and reporting requirements under these international instruments are not only a means of identifying issues of concern, they also provide a framework in which to address those concerns.

OPCAT

64. The mandate of the IPCA, Children's Commissioner and the Human Rights Commission to conduct this review, and their power to make recommendations, stems from New Zealand's obligations under the OPCAT and their collective responsibilities as National Preventive Mechanisms (NPMs).
65. The United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) was adopted by the United Nations (UN) General Assembly in 1984. Under this Convention all States Parties are obliged to take effective measures to prevent torture and other forms of ill-treatment. The Committee against Torture (CAT) monitors implementation of the UNCAT by receiving periodic reports from States Parties. The CAT may also, in some circumstances, consider communications from individuals claiming their rights have been violated, consider inter-state complaints and undertake inquiries. New Zealand ratified the UNCAT in 1989 after enacting the Crimes of Torture Act 1989 (COTA).
66. The OPCAT was adopted by the UN General Assembly in 2002 to supplement the regime under the UNCAT. It establishes a system of regular visits to places of detention by international and national monitoring bodies. New Zealand ratified the OPCAT in 2007 following amendments to the COTA providing the necessary designations.
67. The international monitoring body established by the OPCAT is the United Nations Subcommittee for the Prevention of Torture (SPT). The role of the SPT is to periodically visit each State Party, inspect places of detention and make recommendations concerning the protection of persons deprived of their liberty.¹² SPT visits can be unannounced and do not necessarily result from receiving a complaint. The SPT also has a mandate to advise and assist States Parties in the establishment of National Preventive Mechanisms (NPMs) and to engage and cooperate with NPMs for the prevention of torture in general.¹³
68. NPMs are independent bodies empowered under the OPCAT, through domestic legislation, to regularly visit places of detention and make recommendations to the relevant authority aimed at strengthening protections, improving treatment and conditions, and preventing torture or ill-treatment.

¹² *Optional Protocol to the Convention Against Torture* (opened for signature 18 December 2002, entered into force 22 June 2006), art 11(a) [OPCAT].

¹³ OPCAT, art 11(b).

69. In New Zealand the following organisations have been designated as NPMs:
- The Office of the Ombudsmen in relation to prisons, immigration detention facilities, health and disability places of detention and residences established under section 364 of the CYPFA
 - The Independent Police Conduct Authority in relation to people held in Police cells and otherwise in the custody of the Police
 - The Office of the Children’s Commissioner in relation to children and young people in residences established under section 364 of the CYPFA
 - The Inspector of Service Penal Establishments of the Office of the Judge Advocate General in relation to Defence Force service custody and service corrective establishments
 - The Human Rights Commission has a coordination role as the designated Central NPM. This role includes coordination and liaison with NPMs, addressing systemic issues, and liaising with the SPT.
70. The main vehicle for prevention envisaged by the OPCAT is the system of visits to places of detention by the SPT and NPMs. The aim of SPT visits is to enable experts to make effective recommendations to the State Party and advise on their implementation. NPMs generally follow the same process as the SPT when conducting visits. As NPMs are situated within the State Party they are able to conduct more frequent visits and maintain more regular contact with those responsible for the care and custody of people who are detained.
71. OPCAT work may also include other preventive measures, such as raising awareness of human rights and commenting on legislation and policy. The OPCAT preamble states that:
- “... the effective prevention of torture and other cruel, inhuman or degrading treatment or punishment requires education and a combination of various legislative, administrative, judicial and other measures”.*
72. In addition, article 2(1) of the OPCAT emphasises that *“each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”*. The expansive preventive mandate of the OPCAT enables monitoring bodies to take into account a range of human rights treaties and international human rights standards in conducting their work, and identify methods beyond site visits that will contribute to the prevention of ill-treatment.¹⁴ Such methods may include, for example, a thorough examination of the legal system, criminal justice system issues, medical factors, social care, and education.¹⁵
73. Article 19(b) of the OPCAT provides that NPMs shall be granted the power to *“make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty ... , taking into consideration the relevant norms of the United Nations”* and Article

¹⁴ Rachael Murray and others *The Optional Protocol to the UN Convention Against Torture* (Oxford University Press, Oxford, 2011) at 133.

¹⁵ Ibid, at 103; see also Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment *Approach of the SPT to the Concept of Detention* (CAT/OP/12/6 30 December 2010).

19(c) provides that NPMs shall be granted the power to submit proposals and observations concerning existing or draft legislation. With respect to the implementation of NPM recommendations, Article 22 of the OPCAT provides that “[t]he competent authorities of the State Party concerned shall examine the recommendations of the national preventive mechanism and enter into a dialogue with it on possible implementation measures.”¹⁶

74. In New Zealand, the recommendatory powers of NPMs are provided in section 27(b)(i) to (iii) of COTA. In addition, section 34 of this Act provides that an NPM has the same powers in exercising its functions as a NPM as it has under any other Act. This considerably strengthens the operational capability of each NPM.

The rights of children and young people

75. While they have the same human rights as adults, children and young people also warrant special attention because of their age and associated developmental needs, and because they are often reliant upon others to give effect to their rights. The United Nations Convention on the Rights of the Child (UNCROC), which New Zealand signed on 1 October 1990 and ratified on 6 April 1993¹⁷, is a comprehensive statement of the universally accepted survival and development, protection, and participation rights of children. It applies to all those aged under 18 years of age¹⁸. There are also a number of other binding international treaties and instruments¹⁹, as well as principles encapsulated in New Zealand’s domestic law and policy, which recognise and protect children’s rights.

United Nations Convention on the Rights of the Child

76. As with other human rights, children’s rights are indivisible and interdependent. In particular, there are four key principles under the UNCROC which must be taken into account when considering the application of specific rights such as those relating to children in custody. They are that:
- in decisions affecting children the best interests of the child is a primary consideration
 - children have a right to express their views and have those views taken into account in accordance with their age and maturity
 - children’s rights apply without discrimination
 - every child has the right to maximum possible survival and development.
77. Also, Article 5 expressly recognises the importance of family and provides for a child’s parents, family or others responsible for the care of the child, to provide guidance and direction in the exercise by the child of their rights.

¹⁶ Further information on the basic principles applicable to NPMs, as well as their functions and powers, can be found in the SPT’s *Guidelines on National Preventive Mechanisms*, UN Doc CAT/OP/12/5 (2010) available online at www2.ohchr.org/english/bodies/cat/opcat/mechanisms.htm.

¹⁷ See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.

¹⁸ UNCROC, Article 1.

¹⁹ Further detail on these obligations is provided in Appendix 1.

78. Article 37 of UNCROC is particularly relevant to this review as it sets out the rights of children in custody including the right to be protected from torture or other cruel, inhuman or degrading treatment or punishment. Article 37(b) specifically requires that any detention of a child be lawful, only used as a last resort and for the shortest possible time. In accordance with this Article, States Parties agree to ensure that:
- a) *No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;*
 - b) *No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest possible time;*
 - c) *Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;*²⁰
 - d) *Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to prompt decision on any such action.*
79. Article 40 of UNCROC emphasises the need to ensure that children who have come into conflict with the criminal law are treated in a way that reinforces their respect for human rights. The child's age must be taken into account, and the aim must be to reintegrate the child into society so that they can assume a constructive role. States Parties are required to establish laws which apply specifically to children who have come into conflict with criminal law and, wherever appropriate and desirable, to adopt measures for dealing with such children without resorting to judicial proceedings. Under UNCROC every child has the following minimum guarantees:²¹
- the right to be presumed innocent until proven guilty according to law
 - to be informed promptly and directly of the charges against them – where appropriate this should be done by a parent or guardian – and to have legal or other appropriate assistance

²⁰ New Zealand has entered a reservation on article 37(c) stating that New Zealand will not separate young people from adults “in circumstances where the shortage of suitable facilities makes the mixing of juveniles and adults unavoidable” or “where the interests of other juveniles in an establishment require the removal of a particular juvenile offender or where mixing is considered to be of benefit to the persons concerned”. Available online at: <http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en>.

²¹ UNCROC, art 40(2)(b).

- to have the matter determined without delay by a competent, independent and impartial authority or judicial body
- not to be compelled to give testimony or confess guilt
- to have the free assistance of an interpreter if necessary
- to have his or her privacy respected.

International Instruments Specific to Children and Young People in Detention: the “Beijing Rules”, the “Havana Rules”, the “Riyadh Guidelines”

80. In addition to the rights contained in the UNCROC there are other international instruments which provide greater detail on the standards for dealing with children in trouble with the law, including those who are detained as a result. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty ("Havana Rules"), and the United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines) establish guidelines for States to follow to ensure that the rights of children and young people in detention are upheld.
81. The specific measures contained in these instruments are that:
- deprivation of liberty be a last resort, and for the shortest appropriate period of time
 - all standard minimum rules relating to the detention of adults apply to children and, in addition, child-specific rules focusing on the well-being of the child are required²²
 - children in detention are kept separate from adults
 - specialised training be required
 - cruel, inhuman or degrading treatment is prohibited
 - communication and contact with family and others be allowed
 - access to legal and other assistance and services be allowed
 - a safe and healthy environment be provided
 - complete, secure and confidential records be kept.
- (Additional detail on these measures is provided in Appendix 1.)

²² *Beijing Rules*, rules 7, 13.3 and 9.

Children and Young People belonging to Other Minority Groups

82. While all children and young people in detention warrant special attention because of their age and vulnerability within this group there are also young people who have additional rights that must be upheld. These include rights of equality and non-discrimination for girls and young women, for indigenous children and young people, for children and young people belonging to other minority racial, ethnic or linguistic groups, and for children and young people with disabilities.²³

New Zealand's reservations

83. The CYPFA establishes a youth justice system which is largely consistent with the principles and approach encouraged by international agreements and guidelines. However there are two areas where New Zealand falls short of international standards. These are New Zealand's reservations on age-mixing and age definitions within domestic legislation which do not align with the UNCROC.
84. New Zealand has entered reservations to the general principle that young people in detention should be kept separate from adult prisoners reserving the right not to comply with that particular aspect of the Convention²⁴. This allows New Zealand to, without breaching its obligations under a Convention, mix young people with adults in detention *"in circumstances where the shortage of suitable facilities makes the mixing of juveniles and adults unavoidable"* or *"where the interests of other juveniles in an establishment require the removal of a particular juvenile offender or where mixing is considered to be of benefit to the persons concerned"*.²⁵
85. The age definition issue relates to the definition of a child under the UNCROC which differs to that under the CYPFA. The UNCROC defines a child as a person under the age of 18 years.²⁶ However, the CYPFA covers those people aged up to 17 years. Seventeen year olds are not included in the definition of a young person. Consequently, 17 year olds do not come within the youth justice system and are treated as adults under New Zealand's criminal law, including while in Police detention. Theoretically the UNCROC still covers 17 year olds but, because they are not dealt with under the CYPFA, there is less clarity about how internationally accepted youth justice principles apply. And, as a basic

²³ See for example: *Convention on the Elimination of all forms of Discrimination Against Women* (opened for signature 18 December 1979, entered into force 3 September 1981) [CEDAW]; *International Convention on the elimination of all forms of Racial Discrimination* (opened for signature 21 December 1965, entered into force 4 January 1969) [CERD]; *Convention on the Rights of Persons with Disabilities* (opened for signature 30 March 2007, entered into force 3 May 2008).

²⁴ International Convention on Civil and Political Rights (opened for signature 16 December 1966, entered into force on 23 March 1976) [ICCPR], Article 10(2)(b); United Nations Convention on the Rights of the Child (opened for signature 20 November 1989, entered into force 2 September 1990) [UNCROC], Article 37(c).

²⁵ See New Zealand's reservation to the ICCPR, arts 10(2)(b) and 10(3) available online at <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec>; see also New Zealand's reservation to UNCROC art 37(c) available at <http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en>.

²⁶ UNCROC, art 1.

principle of international law, where there is any inconsistency between New Zealand's international obligations and domestic legislation the domestic legislation prevails.

86. These issues, along with the unsuitable conditions of detention in Police cells, have been of concern to a number of organisations monitoring New Zealand's compliance with its human rights obligations.

Monitoring the rights of children and young people

87. There are several reporting regimes that are used to monitor the implementation of children's rights. The purpose of reporting is to encourage States Parties to progressively implement human rights obligations by identifying and remedying areas of non-compliance or situations where respect for rights could be enhanced, with assistance from the relevant expert authority or committee. Non-government organisations, as well as national human rights institutions play an important role in these reporting processes.

United Nations Committee on the Rights of the Child

88. Since it ratified the UNCROC, New Zealand has submitted four reports to the United Nations Committee on the Rights of the Child (UNCRC)²⁷, the body of independent experts that monitors implementation of the Convention by its State Parties. The role of the Committee is to examine each report, express any concerns it has and make recommendations with a view to improving compliance. Amongst other things, the Committee has consistently noted issues relating to the detention of young people in Police custody in its concluding observations.
89. In its initial report to the Committee in 1995, New Zealand explained that it had entered the reservation on age-mixing because sometimes it is necessary to detain young people with adults due to a shortage of suitable facilities and because in some cases it is in the interests of the young person, or other young people, to remove the young person from the youth facility.²⁸ In their concluding observations in 1997 the UNCRC stated their concern over New Zealand's reservations and encouraged New Zealand to withdraw them.²⁹ Then in 2003, the UNCRC expressed its disappointment at the slow pace of the government's moves to withdraw its reservations and specifically recommended that NZ *"ensure the availability of sufficient youth facilities so that all juveniles ... are held separately from adults"*.³⁰ And in 2011, while noting the efforts made to remove obstacles to the withdrawal of the reservation, the Committee deeply regretted that that work had not resulted in

²⁷ Note reports 3 and 4 were consolidated so New Zealand has been through the reporting process three times.

²⁸ New Zealand State Party Report to the Committee on the Rights of the Child CRC/C/28/Add.3 (1995), at [360].

²⁹ Concluding observations of the Committee on the Rights of the Child: New Zealand CRC/C/15/Add.71 (1997), at [8].

³⁰ Concluding Observations of the Committee on the Rights of the Child: New Zealand CRC/C/15/Add.216 (2003), at [6].

withdrawal and reiterated its previous recommendations urging New Zealand to do so.³¹

90. The second New Zealand government report to the Committee in 2001 noted submissions from young people that Police targeted them more than others, particularly Māori youth.³² It also noted concerns raised in submissions about a lack of residential care placements leading to young people being held on remand in Police cells for extended periods of time.³³ The government explained that all cases were actively managed to ensure alternative placements were identified wherever possible. In addition to reiterating its concerns about New Zealand's reservation on age-mixing and the detention of young people in Police cells, the Committee raised concerns about discrimination towards Māori children and children belonging to other minority groups, recommended that the CYPFA be extended to cover 17 year olds, and recommended that more training be required for officials dealing with young people.³⁴
91. New Zealand's State Party Report in 2008 noted that Police do receive training on managing children and young people, that increased inter-agency monitoring of young people in Police cells has decreased the average length of stay, and that following the new Evidence Act 2006, guidelines for Police interviewing of young people have been developed and put into practice to ensure their rights are upheld.³⁵
92. In 2011, the Committee commended New Zealand on its Police training initiatives, but expressed concern at the ongoing discrimination of Māori and other minority young people, suggesting that affirmative action may be required for the benefit of children in vulnerable situations, such as Māori and Pacific children, refugee children, migrant children, children with disabilities and lesbian, bisexual, gay and transgender children and children living with persons from these groups.³⁶ It further recommended that New Zealand raise the age of criminal responsibility and set the age of criminal majority at 18, and that New Zealand fully implement the standards of juvenile justice found in the UN guidelines and rules.³⁷
93. New Zealand's next UNCROC report is due in May 2015.

United Nations Committee Against Torture, New Zealand Human Rights Commission, Action for Children and Youth Aotearoa, and Save the Children

94. Similar concerns and recommendations have been raised in various reports by the United Nations Committee Against Torture, the New Zealand Human Rights

³¹ Concluding observations of the Committee on the Rights of the Child: New Zealand CRC/C/NZL/CO/3-4 (2011), at [8].

³² New Zealand State Party Report to the Committee on the Rights of the Child CRC/C/93/Add.4 (2001), at [265]

³³ Ibid, at [910].

³⁴ Concluding Observations of the Committee on the Rights of the Child: New Zealand CRC/C/15/Add.216 (2003), at [49], [50], [22], [20] and [18].

³⁵ New Zealand State Party Report to the Committee on the Rights of the Child CRC/C/NZL/3-4 (2008), at [96], [185] and [427].

³⁶ Concluding observations of the Committee on the Rights of the Child: New Zealand CRC/C/NZL/CO/3-4 (2011), at [20] and [25],

³⁷ Ibid, at [55].

Commission, Action for Children and Youth Aotearoa, and Save the Children New Zealand. While these reports recognise that there is a lot of good practice, and that Police often have a positive impact on young people's lives, they also note that experiences of young people with the Police vary considerably and highlight the detention of young people in Police cells as a key human rights issue in New Zealand. The ratification of OPCAT has been seen, by these organisations, as a positive step towards greater protection of young people's rights in places of detention.

95. Specific issues noted by these reports include:

- the lack of basic amenities available to young people when they are held in Police cells due to a chronic shortage of suitable alternative accommodation³⁸
- young people's experiences of unfair Police treatment and desire for respect from Police³⁹
- safety of young people in Police custody⁴⁰
- Māori and Pacific young people feeling unnecessarily targeted by Police with some Māori young people reporting that they experienced racism from Police⁴¹
- requests from young people to stop discrimination in general and particularly by Police came from Māori, Pacific, Asian and Indian young people and young people with disabilities
- young people thought there should be education and respect for other cultures and religions and the elimination of racism and stereotypes⁴²
- the lack of official information available on the numbers, characteristics and experiences of young people in detention⁴³
- the lack of a common database available to Police, courts, prisons and Child, Youth and Family.⁴⁴

Young people in Police detention in New Zealand

The domestic legal framework

96. Although the ideal is that no young person should be in a Police cell, the small population, geographical layout of the country and the need to ensure individual and community safety can leave no other option. Decisions as to whether a child or young person will be detained in Police custody, and how long they stay there, are governed by the principles and processes established

³⁸ Philipa Biddulph *New Zealand Action Plan for Human Rights: Children's Rights Component: Stocktake Report* (Children's Issues Centre, University of Otago, February 2004) at 30.

³⁹ Ibid, at 54; Fiona Beals and Anna Zam *Hear our Voices We Entreat: New Zealand's Child Participation Report to the United Nations Committee on the Rights of the Child* (Save the Children New Zealand, 2010) at 22.

⁴⁰ Philipa Biddulph, above n 38, at 25; Fiona Beals and Anna Zam, above n 39, at 22.

⁴¹ Philipa Biddulph, above n 38, at 49; Fiona Beals and Anna Zam, above n 39, at 22.

⁴² Philipa Biddulph, above n 38, at 49; Fiona Beals and Anna Zam, above n 39, at 22.

⁴³ Human Rights Commission *Mana ki te Tangata: The New Zealand Action Plan for Human Rights: Priorities for Action 2005 -2010* (Human Rights Commission, 2004) at 11.

⁴⁴ Ibid, at 12.

by the CYPFA. There are also significant practical considerations that impact on the decision-making and the scope to apply youth justice principles within the specific circumstances of a case. These include the availability and proximity of suitable alternative placements, and the practicality of transporting a young person to a suitable placement.

Discretion and the New Zealand Bill of Rights Act 1990

97. The piece of legislation that protects the rights of every person who is detained is the Bill of Rights Act 1990 (BORA).
98. All children and young people have the same basic rights as adults. Accordingly, all the provisions contained in BORA relating to detention apply to young people, including the right:
 - not to be subject to unreasonable search and seizure
 - not to be arbitrarily arrested or detained
 - to be notified of their rights
 - to a lawyer.
99. Under BORA an accused has the right to be “released on reasonable terms and conditions unless there is just cause for continued detention”.⁴⁵ In addition, BORA specifically states that children charged with an offence have the right to be dealt with in a manner that takes their age into account.⁴⁶
100. BORA also provides that everyone has the right not to be arbitrarily detained and to be presumed innocent.⁴⁷ Under section 5 these rights may only be limited when it is “*demonstrably justified in a free and democratic society*”. The Supreme Court decision of *Hansen v R* determined that this test is one of proportionality:⁴⁸
 - Does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?
 - Is the limiting measure rationally connected to its purpose?
 - Does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?
 - Is the limit in due proportion to the importance of the objective?
101. It follows that the objective or purpose of the Police decision to arrest, detain or charge a young person must be proportionate to the limitation on their rights. Holding young people in very poor conditions in Police cells is a greater limitation on their rights than other forms of detention. Therefore the objective in detaining them (minimising the risk of violence or absconding) must be great enough to justify such a limitation.
102. Another potential issue under BORA is discrimination. Section 19 of BORA outlines the right to freedom from discrimination, including on the basis of

⁴⁵ New Zealand Bill of Rights Act 1990, s 24(b).

⁴⁶ Ibid, s 25. “Child” is not defined in the Bill of Rights Act.

⁴⁷ New Zealand Bill of Rights Act 1990, s 22 and s 25(c).

⁴⁸ *Hansen v R* [2007] 3 NZLR 1 at [104].

age.⁴⁹ Arguably young people are discriminated against when they are detained in Police custody because, in comparison, adults would spend the period of remand in a remand centre under far more suitable conditions. That is not to say that young people should be remanded to adult facilities. However their detention in Police cells, rather than more suitable custody arrangements, is a detriment they suffer in part because of their age.

The Children, Young Persons and their Families Act 1989 (CYPFA)

103. The CYPFA establishes a separate justice system for children and young people in New Zealand based on a set of general and youth justice principles that encourage a very similar approach to that envisaged by international human rights instruments. The CYPFA applies to all children and young people⁵⁰ under 17 years of age⁵¹.

Objective of the CYPFA

104. The general objective of the CYPFA is to promote the well-being of children, young persons, and their families and family groups. Where a child or young person commits an offence this objective is to be achieved by ensuring:
- (i) they are held accountable, and encouraged to accept responsibility, for their behaviour; and
 - (ii) they are dealt with in a way that acknowledges their needs and that will give them the opportunity to develop in responsible, beneficial, and socially acceptable ways⁵².

General principles

105. A set of general principles⁵³ guide the exercise of powers conferred by the CYPFA. These principles, which are set out in full in appendix 2, emphasise the need to:
- give due regard to the child or young person's family, whānau, hapu, iwi and family group and to, wherever possible, involve them in decision-making and maintain and strengthen their relationship with the child or young person
 - consider how a decision will affect the welfare of the child or young person and the stability of their family
 - consider the wishes of the child and give them appropriate weight having regard to the age, maturity, and culture of the child or young person

⁴⁹New Zealand Bill of Rights Act 1990, art 19 states that “everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act”, s 21(1)(i) of the Human Rights Act 1993 prohibits discrimination on the grounds of age. Age is defined to include any young person aged 16 years but excludes children and young people under that age.

⁵⁰ Under CYPFA, s2 a child means a boy or girl under 14 years of age and a young person means a boy or girl of or over the age of 14 but under 17 years; but does not include anyone who is or has been married or in a civil union.

⁵¹ All those aged up to 18 years are considered children under UNCROC, which New Zealand ratified in 1993.

⁵² CYPFA, s 4(f)(i) and (ii).

⁵³ CYPFA, s 5.

- seek the support of the child or young person, and those who care for them, to any proposed action
- as far as possible make and implement decisions within a time-frame appropriate to the child's sense of time.

Youth Justice Principles

106. Section 208 of the CYPFA sets out the principles which guide the exercise of powers, such as the power to detain, under the youth justice part of the Act. These include the principles that:

- any measures for dealing with offending by children or young people should be designed to strengthen their family/whānau/iwi/hapū and family group and to foster the ability of these groups to develop their own means of dealing with such offending;⁵⁴
- children and young people should be kept in the community so far as that is practicable and consonant with the need to ensure the safety of the public;⁵⁵
- age is a mitigating factor when deciding the appropriateness of sanctions and whether sanctions should be taken at all;⁵⁶
- any sanctions imposed should take the form most likely to maintain and promote the development of the child or young person within their family, whānau, hapū and family group and should take the least restrictive form that is appropriate in the circumstances;⁵⁷
- any measures for dealing with offending by a child or young person should so far as it is practicable to do so address the causes underlying the child's or young person's offending;⁵⁸
- in the determination of measures for dealing with offending by children or young persons, consideration should be given to the interest and views of any victims of the offending;⁵⁹
- the vulnerability of children and young people entitles them to special protection during investigation of alleged offences.⁶⁰

107. It should be noted that the welfare and interests of the child are not the first or paramount consideration in youth justice matters, unlike proceedings under the care and protection provisions of the CYPFA⁶¹.

The power to detain a young person in Police custody

108. The custody of a child or young person following arrest or pending a hearing is dealt with in section 234 to 243 of the CYPFA. The power to detain a young person who has been arrested derives from sections 235, 236, 238, 239 and 242.

⁵⁴ CYPFA, s 208(c).

⁵⁵ CYPFA, s 208(d).

⁵⁶ CYPFA, s 208(e).

⁵⁷ CYPFA, s 208(f).

⁵⁸ CYPFA, s 208 (fa).

⁵⁹ CYPFA, s 208(g)(ii).

⁶⁰ CYPFA, s208(h).

⁶¹ CYPFA, s6.

109. The basic premise under the Act is that if a child or young person is arrested they must be released. Following the arrest of a young person a constable has three options: to release the child or young person 'at large'; release him or her on bail; or deliver him or her into the custody of their parent or guardian or alternatively, and if the child or young person agrees, into the custody of any iwi social service, cultural social service or any other organisation approved by the chief executive or a constable for the purpose⁶².
110. No later than 24 hours⁶³ after arrest, Police can refuse to release a young person and instead place him or her into the custody of the Chief Executive of Child, Youth and Family. This can happen if the constable has reasonable grounds to believe that:
- the young person is unlikely to appear before the court if released, or
 - the young person may commit further offences, or
 - it is necessary to prevent the loss or destruction of evidence relating to an offence, or
 - it is necessary to prevent interference with any witness in respect of an offence.⁶⁴

The effect of this provision is to allow for the continued detention of a child or young person in a Police cell for up to 24 hours.

111. However, and this is where detention for a longer period can start to occur, section 236 provides that a young person can be detained in a Police cell for a period exceeding 24 hours and until their appearance in court if Child, Youth and Family are unable to immediately provide suitable facilities for detaining the young person in safe custody.⁶⁵ A suitable placement is in one of the four youth justice residences or with an approved caregiver⁶⁶.
112. In order for a young person to continue to be detained both a senior social worker and a constable, being a senior sergeant or a constable who is of or above the level of position of inspector, must be satisfied on reasonable grounds that:⁶⁷
- if released, the young person is likely to abscond or be violent; and
 - suitable facilities for their detention in safe custody are not available.
113. Such detention is transitory by nature and generally resorted to when a young person is arrested over the weekend and must wait until Monday to appear in court⁶⁸. In such cases it is often not possible or deemed impractical to transport the young person to and from a youth justice residence which, depending on the location, may be some distance from the place of arrest, and there may be no suitable community placements available.

⁶² CYPFA, s234.

⁶³ There is no provision enabling the Police detention of a child for longer than 24 hours.

⁶⁴ CYPFA, s235(1).

⁶⁵ CYPFA, s236.

⁶⁶ CYPFA, s235(3).

⁶⁷ CYPFA, s 236.

⁶⁸ Information from submissions to this review.

114. Once a young person is arrested Police are obliged to ensure that he or she is taken to court as soon as possible for the case to be dealt with⁶⁹. Under section 238 the Youth Court has several, graduated, options available to it. It can:
- release the young person “at large”
 - release the young person on bail
 - order that young person be delivered into the custody of his or her caregivers or any person approved by a social worker
 - order that the young person be detained in the custody of the Chief Executive of CYF, an iwi social service or a cultural social service
 - order that the young person be detained in Police custody.
115. An order to detain the young person in custody can only be made if: it is likely the young person might abscond; or they may commit further offences; or if detention is necessary to protect evidence or witnesses.
116. If the judge, or in some cases a justice of the peace, orders the young person to be detained in custody, Child, Youth and Family are again required to provide a placement in a suitable facility. Such a placement must be safe for the young person and capable of preventing him or her from behaving in ways that put the community at risk. Detaining a young person usually requires that they are placed in residential care because the physical attributes of a residence restrict a young person’s behaviour. In contrast, the CYPFA does not enable community providers to physically restrain a young person. The Youth Court, when making a section 238(1)(d) order, generally expects the young person to be placed in a residence.
117. On occasions where detention in Child, Youth and Family custody is not immediately possible, section 238(1)(e) of the Act allows for the continued detention of the young person in a Police cell. Before such an order can be made it must be shown that:⁷⁰
- if released, the young person is likely to abscond or be violent; and
 - other suitable facilities for their detention in safe custody are not available.
118. Once a section 238(1)(e) order has been made, placing the young person in Police custody, a further section 238(1)(d) order is required to remove the young person and order them into the custody of Child, Youth and Family. In some cases this can mean that, if a young person is placed in Police custody under section 238(1)(e) on a Friday or Saturday and a bed subsequently becomes available over the weekend, the young person cannot be moved until they are able to appear before a Youth Court judge or a justice of the peace, generally on the following Monday.

The role of Police

119. The Policing Act 2008 allows for the Commissioner to make general instructions for Police.⁷¹ Police general instructions are limited to the most important rules

⁶⁹ CYPFA, s237.

⁷⁰ CYPFA, s 239(2).

⁷¹ Policing Act 2008, s 28.

and compliance with them is mandatory.⁷² Commissioner's circulars, which provide for temporary policy and interim measures to be made, also require mandatory compliance.⁷³ Both the general instructions and the Commissioner's circulars operate at a national level. However, the New Zealand Police is divided into 12 policing districts,⁷⁴ and Police policy can vary between districts. Local orders, also requiring mandatory compliance where applicable,⁷⁵ can be made as long as they are compliant with national requirements.

120. The Police Manual consolidates all Police rules and policy, including relevant law, and contains chapters on each aspect of policing. It contains standard operating practice, principles and procedure which should be followed although Police may work outside this standard operating practice where it is justified to do so.
121. The Police Manual chapter on youth justice begins by stating the importance of holding young people accountable for their actions and of working with young people, families and victims to decide appropriate outcomes.⁷⁶ The Manual notes that youth offending is often opportune and that unnecessary prosecution and labelling of young people may cause lasting damage.⁷⁷ Police are encouraged to take alternative action, such as giving warnings or making referrals to the Police Youth Aid Service. In particular, the Manual notes that: *"Dealing with children and young people is difficult. Police must be patient, understanding and objective. Remember that your actions and the image you project will have exaggerated importance and could have a lifelong effect on the child or young person's attitude towards Police"*.⁷⁸
122. The Police Youth Aid Section (YAS) is a separate section within the Police dedicated to dealing with children and youth who offend. YAS is available to provide specialist advice to constables in serious cases of child or youth offending.⁷⁹ In such cases constables are advised to speak with YAS before deciding how the offending in question should be dealt with, for example whether or not to charge the child or young person with an offence.⁸⁰

Young people detained by Police in New Zealand: the statistics

123. The most recent Ministry of Justice report on youth justice statistics notes that:
 - overall rates of youth apprehensions declined between 1995 and 2008⁸¹

⁷² Policing Act 2008, s 30: "every Police employee must obey and be guided by the general instructions, the Commissioner's circulars and any applicable local orders".

⁷³ Ibid.

⁷⁴ Northland, Waitematā, Auckland City, Counties Manukau, Waikato, Bay of Plenty, Eastern, Central, Wellington, Tasman, Canterbury, and Southern; available online at <<http://www.Police.govt.nz/district>>.

⁷⁵ Policing Act 2008, s 30: "every Police employee must obey and be guided by the general instructions, the Commissioner's circulars and any applicable local orders".

⁷⁶ Police Manual *Youth Justice*.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Ministry of Justice *Child and Youth Offending Statistics in New Zealand: 1992 to 2008*, (Ministry of Justice, 2010) [Child and Youth Offending Statistics] page 15.

- significantly more young males are apprehended than females, but while the rate of young males being apprehended is decreasing, the rate of young females is not⁸²
 - apprehension of Māori young people is almost three times the rate of Pacific or New Zealand European youth and apprehension of Māori children is almost five times the rate of Pacific or New Zealand European children.⁸³
124. The New Zealand Police manage the custody of people detained prior to charge: in Police cells, in some court cells, and when transporting people in custody between Police stations, courts and Department of Corrections' facilities. There are 371 Police stations in New Zealand.⁸⁴ Some Police stations are open 24 hours a day. There are no custom-built facilities for Police detention of young people.
 125. It is clear from the provisions in the CYPFA that the detention of young people in Police cells was intended to be a last resort; to deal with overflow on the occasions where suitable Child, Youth and Family placements are not available, or over the weekend where transport to a Child, Youth and Family residence would be impracticable.⁸⁵
 126. Following the implementation of the CYPFA, the Residential Services Strategy was adopted in 1996 which determined that there should be additional placements for young people detained under the provisions of the Act. The first of these new residences, Lower North, opened in 1999 in Palmerston North. This increased the number of available beds by 10. In 2003/4 Korowai Manaaki opened in Auckland adding a further 16 beds to those that had been available at Weymouth. The opening of Te Puna Wai in Christchurch 2005/6 added an additional 12 beds and a further eight beds were added to the residence in 2008. At this time Child, Youth and Family also changed the status of the six beds designated for Criminal Justice clients at Korowai Manaaki so that they could be used for young people. In 2010, 30 further beds were opened in Te Maioha. Therefore, over the 10 years between 1999 and 2010, there have been an additional 70 beds made available, an increase in capacity of 46 percent.
 127. Accordingly, there are now four secure youth justice residences in New Zealand and a total of 146 beds.⁸⁶ These residences are designed to accommodate young people on supervision with residence orders as well as those on remand. However, notwithstanding the steady addition of residential beds over the last decade and the addition of the Supported Bail programme, the number of young people spending greater than 24 hours in Police detention, and the length of their stay, over the same period has fluctuated:

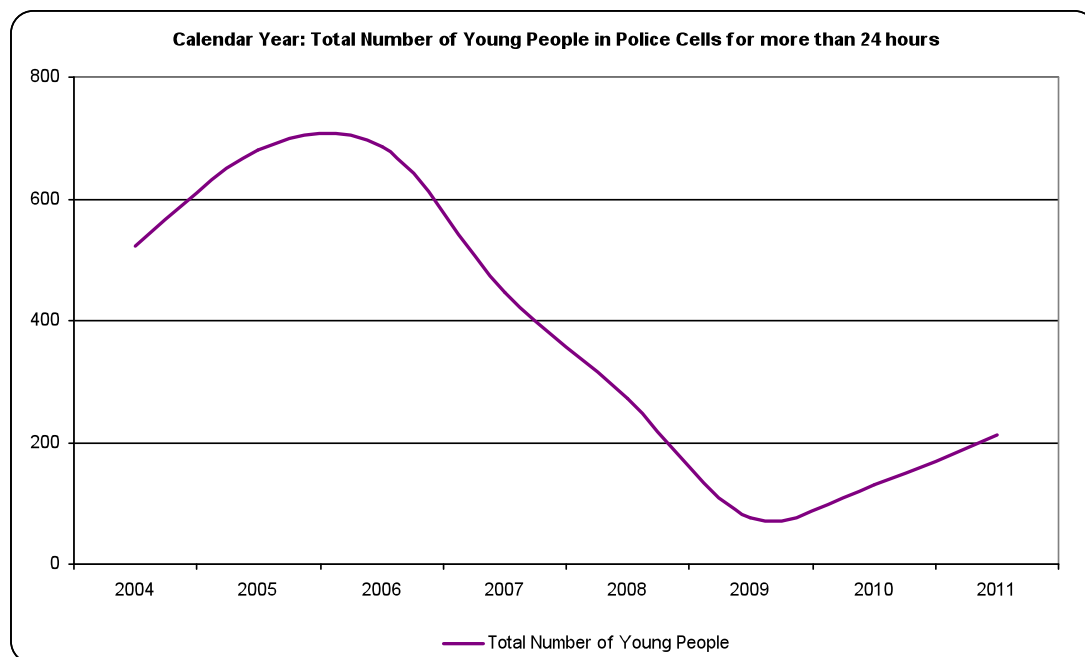
⁸² Ibid, figures 2.4 and 2.5.

⁸³ Ibid, figure 2.6.

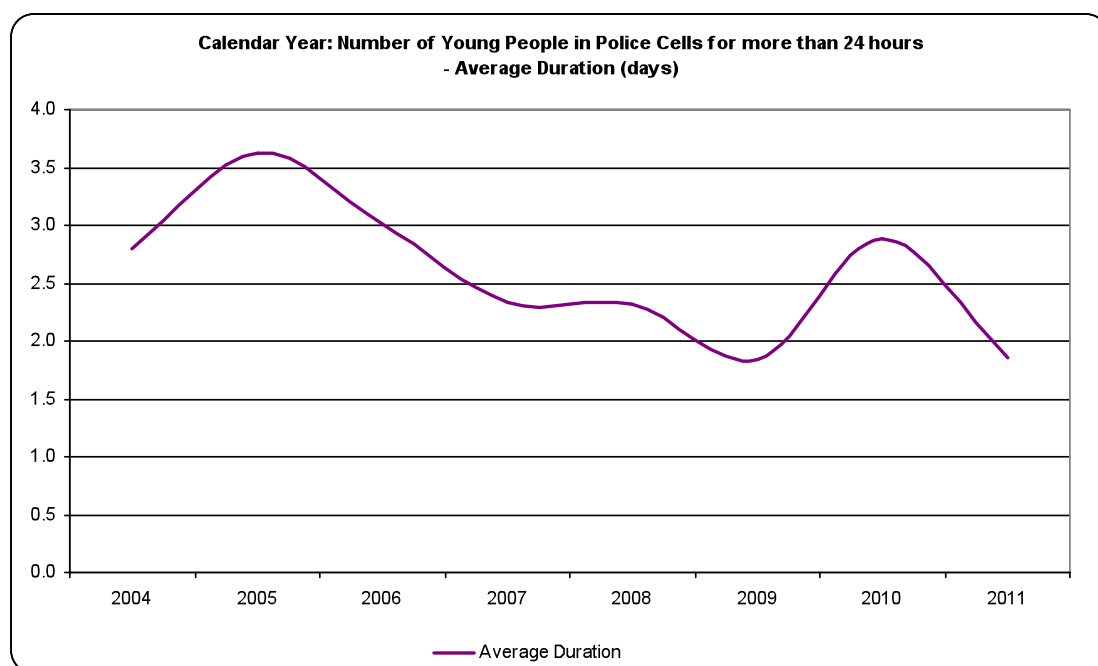
⁸⁴ Independent Police Conduct Authority *Briefing to Incoming Minister 2011* at [46]. Available online at: <www.ipca.govt.nz/Site/publications/Accountability/2012-Briefing-to-Incoming-Minister.aspx>.

⁸⁵ CYPFA s 239(2); Brookers *Youth Justice: Placement of Child or Young Person Pending or During Hearing* (available online) at [8.4.22].

⁸⁶ Korowai Manaaki in South Auckland (46 beds), Te Maioha o Parekarangi in Rotorua (30 beds), Lower North in Palmerston North (30 beds), and Te Puna Wai O Tuhinapo in Rolleston (40 beds).



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In 2006, 740 young people were remanded in Police custody. Remands of three to six days were not uncommon.⁸⁸

⁸⁷ The total duration (days) is the amount of time that the young person stayed in a Police cell from start date-and-time to end date-and-time of the placement as recorded in the Child, Youth and Family CYRAS computer system.

⁸⁸ Child, Youth and Family Service Statistics 2006.

In 2007, 446 young people were held for more than 24 hours, for a total of 1,041 days and an average of 1.9 days.⁸⁹

In 2008, 271 young people were held for more than 24 hours, for a total of 630 days and an average of 2.3 days.⁹⁰

In 2009, 76 young people were held for more than 24 hours, for a total of 140 days and an average of 1.8 days.⁹¹

In 2010, 131 young people were held for more than 24 hours, for a total of 370.9 days with an average of 2.8 days.⁹²

In 2011, 213 young people were held for more than 24 hours, for a total of 394.2 days and an average stay of 1.9 days.⁹³

Numbers for this year appear to be tracking similarly to 2011 with figures to May 2012 indicating slightly more young people have been held in Police cells, but for shorter periods, resulting in a slightly lower average duration of stay.

128. Between late 2005 and early 2008, a concerted effort was made by the youth justice sector to reduce rates of youth detention in Police custody which led to a dramatic decrease in the number of young people spending over 24 hours in Police cells. However since then there has been a steady increase. Although numbers are nowhere near 2006 levels, they have more than doubled since 2009.
129. The precise cause of this rise is difficult to identify. Statistics on the occupancy rates of the four youth justice residences in New Zealand from both 2010 and 2011 show that they are very rarely full to capacity: from 1 January 2010 to 31 December 2010 there were only 31 days where it was recorded that no beds were available, one to nine beds were available on 129 of these days and more than 10 beds were available on 188 days;⁹⁴ and from 1 January 2011 to 31 December 2011 there were only nine days where it was recorded that no beds were available, one to nine beds were available on 22 of these days and more than 10 beds were available on 328 days.⁹⁵ These figures suggest that young people are being held in Police cells due to the unavailability of local placement options and the inaccessibility or impracticality of those residential placement options which are available. Even if it is possible it is, arguably, not practical for authorities to transport young people to one of the four residences only to have to return them to the place of arrest to attend court, often only a day or two later.
130. Further, in 2011, of the 213 young people detained in Police custody for greater than 24 hours, 148 (69 percent) were initially arrested on a Friday, Saturday or Sunday and generally held until the Monday although in some

⁸⁹ Child, Youth and Family Service Statistics 2007.

⁹⁰ Child, Youth and Family Service Statistics 2008.

⁹¹ Child, Youth and Family Service Statistics 2009.

⁹² Child, Youth and Family Service Statistics 2010.

⁹³ Child, Youth and Family Service Statistics 2011.

⁹⁴ Child Youth and Family Analysis of Vacant Residential Beds. Note that the number of beds available was not recorded on 24 days during this period.

⁹⁵ Child, Youth and Family Analysis of Vacant Residential Beds. Note that the number of beds available was not recorded on six days during this period.

cases their stay extended to Tuesday or even longer.⁹⁶ These statistics further evidence the suggestion that Police detention is generally resorted to over the weekend, where it is often not possible or deemed impractical to transport the young person to and from a residence which, depending on the location, may be some distance from the place of arrest.

131. The statistics collected from 2011 also show that not all young people detained in Police custody that year were eventually transferred to one of the four youth justice residences. Of the 213 young people detained: 97 (46 percent) were eventually granted bail; 88 (41 percent) were sent to a youth justice residence; and 28 (13 percent) were moved to a community placement.⁹⁷ These statistics suggest that Police detention may not be being used as a last resort in every case, warranting further analysis on how these decisions are ultimately being made.

Issues raised in submissions: the experiences of young people in Police detention

“We seem to be entering another phase where [more] young people are spending time in Police custody” (Police constable).

132. Young people who come into contact with the Police are generally at a formative stage in their lives and so the actions of Police towards them can have an ongoing effect, influencing future interactions. In this context it is important to ensure that the processes in place recognise young people’s specific needs and reinforce their respect for human rights. The UN Committee on the Rights of the Child has commented that:⁹⁸

“If the key actors in juvenile justice such as Police officers ... do not respect and protect these guarantees how can they expect that with such poor examples the child will respect the human rights and fundamental freedoms of others”.

Conditions of detention in Police cells

133. A range of submissions were received as part of this review, from Police officers and social workers, as well as from young people themselves and those who work with or for them. Below is an illustrative list of issues raised:

- Young people detained in Police custody should be separated from adult prisoners. This can mean that young people are confined to a Police cell in what is essentially **solitary confinement**. *“The worst thing is you just stare at the walls. It is you, a bed, a toilet, and the walls. You sit and stare at the walls all day. You can’t have books because they think that if you have a book you will block the toilet with it. If you are lucky you sleep” (young person detained in Police custody).* Most young people who made submissions stated that they had been alone in their cell the entire time they were in Police custody.

⁹⁶ Child, Youth and Family Service Statistics 2011.

⁹⁷ Ibid.

⁹⁸ United Nations Committee on the Rights of the Child *General Comment no. 10* CRC/GC/10 (2007) at [13].

- Not all Police cells are ‘youth suicide-proof’, so round the clock supervision can be difficult. Remand in a Police cell can therefore mean the **cell lights are on for 24 hours a day**. *“This is a huge risk for Police solely due to the nature and layout of the current cell block ... the placement of the current suicide cell in my opinion makes this difficult at times to manage” (Police constable).*
- In some cases, submitters reported that Police cells are ill-equipped to facilitate **family visits**. *“[T]he set up of cells makes the allowing of people (family etc) to visit the young person almost impossible” (Police constable).* The majority of young people who made submissions stated that it was not easy for their family to visit, although a few highlighted family visits as a positive feature of being in Police custody. One Child, Youth and Family file noted a visit made by a social worker with two aunts; only the social worker was allowed to see the young person. Many others noted that young people had not seen their family at all while in Police detention.
- A lack of **ventilation and natural light** is a problem in some Police cells. *“[A]ir ventilation is a major concern and the lack of such is what causes a very overwhelming environment with stagnant air” (Police constable).*
- In some cases Police cells are **unclean**. A few submitters reported finding vomit and urine in their cell. *“[The Police cells were] not comfortable, dirty, piss and vomit in corners” (young person detained in Police custody).*
- Young people are not guaranteed suitable **showering facilities** in Police custody. *“[C]ells at Hastings Police Station are substandard for this purpose ... [there are] inadequate shower and hygiene facilities” (Police constable).* The majority of young people who submitted stated that they had not had access to showering facilities while in Police detention. *“[B]eing able to have a shower would be better” (young person detained in Police custody for five days).* One young person had access to a shower, but no clean clothes. The showers that are provided sometimes lack privacy. One Child, Youth and Family file noted that a young woman refused to take a shower while in Police detention due to this lack of privacy.
- The **food** that young people receive in Police detention has been criticised as unsatisfactory. *“[Y]oung people are fed on takeaways and other unsuitable food” (youth justice academic).* *“They need ... more/better food to eat while us young people are there ...” (young person detained in Police custody for five days).* Most young people who made submissions felt that they did not have enough to eat or drink while in Police detention. *“When you are in the Police cells you should get more to eat and ... a drink of water to calm you down – not a tap in the toilet ...” (young person detained in Police custody for three days).*
- Generally, there is a lack of facilities for **exercise, recreation and education**. Often young people have nothing to do while they are detained. *“[T]here are no activities or day room available for young people being detained at the Blenheim Police Station. Young people are given books to read whilst being detained” (Police constable).*

134. The conditions described in submissions are inconsistent with the general right to a safe and healthy environment. At a minimum, this should include: the ability to communicate with family,⁹⁹ a properly maintained and clean environment,¹⁰⁰ available natural light,¹⁰¹ adequate bathing and shower facilities,¹⁰² food of adequate nutritional value,¹⁰³ and a period of suitable exercise in the open air.¹⁰⁴ One submitter expressed the view that *“the biggest risk surrounding the custody and management of children and young people in Police custody is not around the legal framework but around the design and suitability of the buildings or areas being used”* (Police constable).
135. The situations described in submissions underscore the unsuitability of Police cells as places of detention for young people. The fact that Police cells are not specifically designed to meet the needs of young people can have a significant, detrimental effect on those held. That is why international guidelines stress the importance of having specific laws and procedures to promote and protect the rights and well-being of detained young people.¹⁰⁵ Holding a young person in the sorts of conditions identified above is unlikely to be in their best interests or advance their well-being.¹⁰⁶

The treatment of young people in Police detention

136. The treatment of young people in Police detention was highlighted as an issue in many of the submissions and it appears that, in many instances, young people in Police detention are treated no differently from adult prisoners. Generally, young people themselves felt they were treated unfairly by the Police. *“There should be no such thing as Police policy. Why? Because they are rude and don’t show respect for you and others ...”* (young person detained in Police custody for three days).
137. However, there were also positive responses which suggest that, as with the conditions of Police cells, the treatment provided by Police and Child, Youth and Family may vary depending on the particular station and individuals involved. Submissions raised the following specific concerns:
- On occasion, young people reported being subjected to **the use of force** while in Police detention.
 - Some young people feel **discriminated against** while in Police detention. Submissions from young people described experiencing discrimination from Police on the basis of ethnicity, sexuality and gender.

⁹⁹ UNCROC, art 37(c); *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* GA Res 40/33 (1985), rule 10.1[*Beijing Rules*]; *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* GA Res 45/113 (1990), rule 60 [*Havana Rules*]; *United Nations Guidelines for the Prevention of Juvenile Delinquency* GA Res 45/112, art 17 [*Riyadh Guidelines*]; *United Nations Standard Minimum Rules for the Treatment of Prisoners* GA/RES/45/110, A/RES/45/110 (1990), art 37.

¹⁰⁰ *Havana Rules*, rules 33 and 34.

¹⁰¹ *Standard Minimum Rules for the Treatment of Prisoners*, art 11(a).

¹⁰² *Havana Rules*, rule 34; *Standard Minimum Rules for the Treatment of Prisoners*, art 13.

¹⁰³ *Havana Rules*, rule 37; *Standard Minimum Rules for the Treatment of Prisoners*, art 20(1).

¹⁰⁴ *Havana Rules*, rules 17 and 47; *Standard Minimum Rules for the Treatment of Prisoners*, art 22(1).

¹⁰⁵ *Riyadh Guidelines*, art 52.

¹⁰⁶ UNCROC, articles 3, 6 and 37.

- There is a general **lack of adequate health care** while in Police detention. *"[I]f someone has breathing difficulties they should be allowed proper help instead of being told to shut up and stop complaining" (young person detained in Police custody).*
- Police cells are also entirely **unsuitable for accommodating young people with mental illness**. In one case, a young woman was held for five nights in Police detention receiving no medication or medical care despite suffering from medical and mental health problems. She also reported that for several days she did not have access to suitable food, showering facilities or exercise. In this case, ¹⁰⁷ Justice Allan remarked that *"she is one of a number of young people who are currently remanded in Police custody, simply because insufficient alternative accommodation is available for them elsewhere ... Police cells are inherently unsuitable for the accommodation of remand prisoners and especially for young persons, who ... have special needs"*.¹⁰⁸ One social worker noted on file that Police failed to organise medical care for a young person whose bandages on a pre-existing back injury needed changing, and that it fell to the social worker to facilitate a nurse's visit to the Police cells. Most young people submitted that there had been no access to health care while they were in Police cells. While there was a successful pilot scheme of District Health Board nurses in three Police stations in 2008,¹⁰⁹ and other Police stations employ watchhouse medical staff on their own initiative, there is no consistent practice.
- Child, Youth and Family records suggest that some **young people are not seen by Child, Youth and Family social workers every 24 hours** they spend in Police detention. In a random sample of 40 young people who spent over 24 hours in Police detention between July 2009 and December 2010, 18 percent had records of social worker visits every day, 33 percent had some recorded visits but not daily, and the remaining 50 percent had no recorded visits¹¹⁰. This data does not necessarily mean young people were not seen by social workers in each case, however, if those visits occurred they were not recorded. Some young people submitted that they had not seen a social worker at all while in Police custody.

138. These experiences of young people in Police detention are inconsistent with the right to be protected from cruel, inhuman or degrading treatment. In order to meet this standard, violence and the use of force against children and young people should only be used in exceptional circumstances, as a last resort, as explicitly authorised, and for the shortest possible period of time.¹¹¹ Further,

¹⁰⁷ *P v Commissioner of Police* 26/10/06 HC Auckland CIV-2006-404-6493 Allan J.

¹⁰⁸ *Ibid*, at [17].

¹⁰⁹ Rotorua, Hamilton and Christchurch have watchhouse medical staff that are employed by the local District Health Board.

¹¹⁰ Numbers rounded

¹¹¹ *Havana Rules*, rules 63 – 65.

young people must have access to sufficient medical treatment.¹¹² Finally, young people must be free from all forms of discrimination.¹¹³

Young people in “de facto” Police detention

139. In addition to detaining young people after their arrest sometimes Police cells are used to hold children and young people who find themselves in Police care because they are in need of care and protection, are being interviewed, are lost or whose parents have been involved in a violent incident. This highlights the inappropriateness of children and young people being detained in Police custody.

“Having traumatised and upset young people in the Police interview room environment is not ideal” (Police constable).

“[Police] need ongoing reminding and education ... that section 48 DOES NOT give Police the power to place a child or youth in the custody area of the Police station” (Police constable).

“Police tend to use s 48 when they can think of nothing else ... some of those detained under s 48 have been placed in locked rooms and sometimes cells, yet it is a care and protection provision ... Police have poor knowledge in relation to care and protection and from my experience s 48 is the most misused and misunderstood section of the Act” (Police constable).

140. Children and young people detained for care and protection reasons (such as running away from home or Child, Youth and Family placements) are usually held in interview rooms at Police stations until suitable accommodation can be arranged. This can take several hours. Interview rooms are typically stark, and there is little to do. Further, adult victims and offenders may be being interviewed nearby, and the availability of interview rooms is dependent on incident demand and the priority of other investigations being carried out. One Police submission indicated that children and young people in need of care and protection are sometimes locked in Police cells. This is both inconsistent with Police policy and the CYPFA. A child or young person in need of care and protection cannot be treated by Police in the same way as a child or young person who offends. This submission also identified situations where a child or young person has absconded from a Child, Youth and Family placement, and Child, Youth and Family has asked the Police to keep the child or young person overnight to allow their social worker to deal with them in the morning. The only place available to Police is a Police cell, which is obviously inconsistent with both law and policy, but the submitter suggested that Police are sometimes agreeing to such requests in ignorance of the law.
141. Lost children and children whose parents have been violent, or have been injured in violent incidents, also often end up at Police stations. Police interview rooms are not appropriate places to hold these children and young people, who are often traumatised and upset. Some Police stations have child-friendly areas with toys and books available, but this is not usually the case. As

¹¹² *Beijing Rules*, rule 13.5.

¹¹³ *Beijing Rules*, rule 10.3.

a result, Police often care for these children in meal rooms, medical rooms or muster rooms.

142. Children and young people who are interviewed as part of an investigation are also often detained in interview rooms while they wait for their nominated person to be located.

IPCA Monitoring Standards

143. The IPCA has considered the issues identified by this review and their fit with international standards regarding the prevention of ill-treatment of young people in detention. On the basis of this a checklist has been developed and will be used by the IPCA when conducting future visits to Police sites where young people are detained. The factors that will be taken into account when assessing OPCAT compliance are as follows:

Treatment

- Watchhouse staff are respectful in their day-to-day contact with young people.¹¹⁴
- Any use of force is monitored and subject to a review.¹¹⁵

Protection measures

- There is a youth-specific policy in place for dealing with young people in custody.¹¹⁶ This should include: a procedure to ensure that the young person's family/whānau/caregivers are contacted as soon as possible; release procedures to ensure that young people who have been arrested are released as soon as possible; and where the young person is not to be released, a procedure is in place to ensure that Child, Youth and Family are contacted as soon as possible.
- Youth-specific rights information is provided to young people in Police detention, in addition to the youth-orientated oral explanations given by Police.¹¹⁷
- All young people are adequately monitored while in Police detention.¹¹⁸
- Sufficient records are kept. NIA records should include: the reason for arrest; if and when a risk assessment was done and the outcome; social worker visits; and, where applicable, that the decision to detain the young person for a period exceeding 24 hours has been made, along with the reasons for that decision.

Staff

- Watchhouse staff are adequately trained on the youth-specific policy.¹¹⁹ This should include: sufficient knowledge of the CYPFA and behavioural

¹¹⁴ *Beijing Rules, rule 10.3.*

¹¹⁵ *Havana Rules, rules 63 – 65.*

¹¹⁶ *Beijing Rules, rules 7, 9 and 13.3; Havana Rules, rule 28.*

¹¹⁷ *Riyadh Guidelines, art 52.*

¹¹⁸ *Havana Rules, rule 33.*

¹¹⁹ *Riyadh Guidelines, art 58; Havana Rules, rules 81- 87; Beijing Rules, rule 12.*

exercises to ensure that young people are consistently treated in a way that takes into account their particular vulnerability.¹²⁰

Material conditions

- Young people are held in a clean and decent environment in which their safety is protected and their specific needs are met.¹²¹
- Processes are in place to ensure that young people are always separated from adults.¹²²
- Each cell used for holding young people has natural light and sufficient ventilation.¹²³
- Cells are cleaned regularly.¹²⁴
- Young people are provided with adequate: bedding;¹²⁵ clothing, when required;¹²⁶ meals;¹²⁷ and showering facilities.¹²⁸

Activities and Access to Others

- Special provision should be made for family and social worker visits to young people.¹²⁹
- Where appropriate, entertainment is provided. This could include books or magazines.¹³⁰
- Outdoor recreation is available.¹³¹

Medical conditions

- Sufficient medical treatment is available when required.¹³²

These standards give a clear indication of the factors that must be taken into account when detaining a young person if OPCAT expectations are to be met. The process envisaged by OPCAT is that the Police, as the agency responsible for preventing the ill-treatment of a young person while in their custody, need to continually work towards meeting these standards in consultation with the IPCA.

¹²⁰ *Beijing Rules*, rules 7, 13.3 and 9.

¹²¹ *Havana Rules*, rule 32.

¹²² *Havana Rules*, rules 17 and 29; *Beijing Rules*, rule 13.4.

¹²³ *Standard Minimum Rules for the Treatment of Prisoners*, art 11(a).

¹²⁴ *Standard Minimum Rules for the Treatment of Prisoners*, art 14.

¹²⁵ *Havana Rules*, rule 33.

¹²⁶ *Havana Rules*, rule 36.

¹²⁷ *Havana Rules*, rule 37.

¹²⁸ *Havana Rules*, rule 34.

¹²⁹ *Havana Rules*, rule 60; *Riyadh Guidelines*, art 17; *Standard Minimum Rules for the Treatment of Prisoners*, art 37.

¹³⁰ *Havana Rules*, rules 47 and 17.

¹³¹ *Havana Rules*, rules 47 and 17.

¹³² *Beijing Rules*, rule 13.5.

Summary - Background

It is widely accepted, both internationally and within New Zealand, that the detention of a young person should only ever be used as a measure of last resort and for the shortest possible period of time.

After improvements in the rates and duration of youth detention last decade, the numbers of young people being detained in Police cells is once again on the rise and cause for concern.

Police cells were never intended to detain people for any length of time, especially young people. As a result it is extremely difficult to meet a young person's needs and rights while they are in Police custody.

The negative consequences of detaining a young person in a Police cell were well illustrated by submissions to this review, many of which raise significant human rights issues for the young people involved.

The IPCA has developed monitoring standards and will continue to work with Police to improve the conditions of custody and treatment of young people in their care.

Recommendation 1 – That Police continue to work with the IPCA to improve conditions of detention and the treatment of young people while in their custody to ensure compliance with OPCAT expectations.

The nature of the problem

144. The purpose of this thematic review is to assess what might be done to ensure that the detention of young people in Police custody is safe, humane and consistent with international standards. It is agreed, across the youth justice sector, that too many young people are being held in Police cells for too long. This calls into question New Zealand's compliance with its international obligations because, generally speaking, Police detention does not provide the level of care and support that a young person is entitled to. The inappropriateness of detaining young people in Police custody is reflected in the UNCROC requirement that *"the arrest, detention and imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest possible time"*.¹³³
145. However, as the law recognises, there are situations where detaining a young person in Police custody is unavoidable. Two core issues have been raised by this review. Firstly, how can the numbers of young people being detained in Police custody be reduced? Secondly, what can be done to improve the treatment of those young people who are detained in Police custody? It has also become apparent that there are also issues to do with monitoring and collaboration that merit further consideration.
146. The legislative framework for youth custody is predominantly sound and in keeping with international standards. The CYPFA makes it clear that Police detention should only be used as a last resort and case law expressly recognises that the incarceration of young people in adult facilities is contrary to the philosophy and principles of the Act.¹³⁴ Extended stays of young people in Police cells have been described as *"unfortunate and unsatisfactory"* by the Youth Court.¹³⁵
147. The issues raised by this review are, therefore, largely to do with the operation of the legislation. They relate to how decisions are made and the availability, and use of, options other than Police custody following a young person's arrest.
148. Considering alternatives to Police detention is in line with the preventive mandate of NPMs under the OPCAT. The Protocol requires a range of legislative, administrative, judicial and other measures to be considered as part of a NPM's work because successful prevention must involve a holistic approach and address the root causes of detention issues.¹³⁶
149. There is a degree of frustration within the Youth Justice sector at the inconsistency between the legislative objectives, which are based on human rights principles, and the practical realities and challenges involved in trying to meet those objectives.

¹³³ UNCROC, art 37(b).

¹³⁴ *Police v BT* 27 April 2004 YC Manukau CRI-2004-255 Judge Harvey.

¹³⁵ *Police v HB* 7 October 2010 YC Taupo CRI-2010-269-000034 Judge Munro at [12].

¹³⁶ Rachael Murray and others, above n 14, at 20.

150. Recent decisions indicate that in some instances, Youth Court judges are refusing to be constrained by certificates from Child, Youth and Family social workers citing unavailability of suitable Child, Youth and Family placements and are ordering young people into the custody of the Chief Executive despite the advice that no placements are available.¹³⁷ Some judges, when making an order for Police custody, also direct that the young person be kept separate from adult prisoners, that they have access to a Child, Youth and Family social worker at all reasonable times, and that a Cage Kessler Suicide Screen (CKS) is done upon entry to custody to assess risk of self-harm.¹³⁸ Despite the judicial reluctance to place young people in Police custody, orders for Police cell remand are regularly made. From 1 January 2011 to 31 December 2011 there were 246 orders made. Over the same period 213 young people were detained reflecting the fact that multiple orders may be made in relation to one young person's Police cell remand.
151. In an attempt to ensure that young people spend the shortest time possible in Police detention, the Department of Courts finalised a protocol in 2002 requiring a case conference to be held if a young person is in Police custody for more than two days. In addition, young people in Police detention under a section 238(1)(e) order are to have daily court hearings. One child rights advocate submitted that this *"puts pressure on CYF to find accommodation for the young person but does not resolve the underlying problem of lack of beds"*.
152. Indeed, it is easy to point to a shortage of placements as the reason for the numbers of young people who end up in cells. However, although having no suitable alternative placement available is a legislative pre-requisite to detaining a young person in Police custody there are also other factors that contribute to the decision to detain. For example:
- the attitudes and practices of the individual social workers, constables, youth advocates, judges and justices of the peace involved
 - the availability and awareness of other suitable placement options
 - the unavailability or perceived impracticability of transporting a young person to a suitable residential facility.
153. On this latter factor, Child, Youth and Family submitted that:
- "a key issue is the proximity of the [four] national residences to the location at which the young person is held. For short term remands, the implications of travel and the accessing of escorts is a disincentive to plac[ing] young people in residential beds on weekends. In addition, there is a pragmatic issue as to whether the resourcing required to provide placements in every community serviced by courts when many may only be used one or two times a year, is good use of resources"*.
154. Efforts to identify and address the issues that contribute to the rates of detention of young people in Police custody are not helped by the fact that

¹³⁷ *Police v W* 18 July 2002 YC Auckland CRN 229901413 cited in Brookers, above n 85 at [8.4.24]; *Police v BT* above n 133.

¹³⁸ See *Police v JS* 27 May 2011 YC Hamilton CRI-2011-219-113 at [42]. The CKS Screen helps the social worker to determine any substance abuse/dependence, gives an indication of current distress and possible mental health issues, and helps to determine whether the young person has any active thoughts about suicide.

nationally there is no clear data available on what the contributing factors are each time the decision is taken for Police to detain a young person in Police custody. Neither has it been possible to identify the number of young people being held in Police detention under section 236 certificates nor to compare this to the number of young people being held under section 238(1)(e) orders.¹³⁹ However, as any decision to hold a young person in Police detention is guided by the same factors, the analysis and recommendations included in this review apply, in general terms, across the spectrum of decisions and decision-makers.

155. To summarise, there are three aspects of this problem that need to be considered:

- (i) the decision to detain
- (ii) the treatment of young people once detained
- (iii) monitoring to improve the situation.

Summary – the nature of the problem

The legislative framework which allows young people to be detained in Police custody is consistent with international principles in that it recognises that any such detention should be used as a measure of last resort and for as short a time period as possible.

Given that the law recognises that there will be situations where the detention of a young person in Police custody is unavoidable, two core issues are raised:

- (i) how to reduce the number of young people being detained in a Police cell
- (ii) how to ensure those young people who are detained are treated fairly and humanely

(i) The decision to detain

The exercise of Police discretion

156. Under the CYPFA, Police exercise discretion at three key points of contact with young people: the decision to arrest; the decision to charge; and the decision to detain in Police custody. Each of these decisions directly influences the number of young people in Police detention. Therefore, understanding and monitoring the way that the Police exercise their discretion at each of these points could significantly reduce the number of young people spending time in Police detention.

The decision to arrest without a warrant under s 214

157. Due to problems with data collection and record-keeping (discussed below) it is not possible to be certain that the decision to arrest is being taken, in all cases, in accordance with domestic and international youth justice principles.

¹³⁹ From 1 January 2011 to 31 December 2011 246 s 238(1)(e) orders were made. It is important to note that multiple orders may be made in relation to one young person's Police cell remand.

158. Constables exercise their discretion to arrest without a warrant in accordance with Section 214 of the CYPFA and Police policy. The basic presumption is that an enforcement officer shall **not** arrest, where they have the power to do so, unless that officer is satisfied on reasonable grounds that the arrest is necessary in order to:
- ensure the appearance of the child or young person before the court
 - prevent the child or young person from committing further offences
 - prevent the destruction of evidence or interference with witnesses¹⁴⁰.
159. The presumption against arrest does not apply where a constable has reasonable cause to suspect that the child or young person has committed a purely indictable offence and believes, on reasonable grounds, that the arrest is in the public interest.
160. It is Police policy that if a child or young person is arrested, their parent, guardian or other caregiver must be informed of their arrest, regardless of their wishes, as soon as practicable.¹⁴¹
161. Under section 214 every enforcement officer who arrests a child or young person is required to report on why the arrest was made within three days of the arrest¹⁴². A written report to the Police Commissioner, stating the reasons for arrest, is submitted electronically to Police National Headquarters Youth Services Division where a weekly random sample audit is completed and feedback given to districts. However the reporting that occurs generally lacks the necessary detail to properly assess compliance with section 214 or identify trends in non-compliance. Further, one submitter suggested that detailed findings from section 214 reports were not being fed back to districts:
- “Each time an arrest is made a report is sent to the Commissioner. However, those reports are sent to Police National Headquarters, and the system is such that they cannot advise districts the details of the notifications that have been sent. Therefore, districts have no means of checking to see if the report has been sent for every arrest or whether the arrest was justified” (Police constable).*
162. One submitter from the Canterbury District was able to provide some insight into the way the discretion has been exercised in that district. The information collected suggested that in a significant number of cases young people processed through the Christchurch watchhouse were being arrested solely for breach of bail. In 2009 this accounted for 17 percent of all arrests of young people. For the years of 2010 and 2011 this figure rose to 20 percent. The submitter reported that:
- “The various interpretations around s 214 cause many issues around the question of whether or not a young person in breach of their Court Bail should be arrested to prevent further offending. This of course raises the question were those young people arrested before they were going on to commit further crimes or were they just breaching their bail conditions and was the arrest justified” (Police constable).*

¹⁴⁰ CYPFA, s 214(1).

¹⁴¹ Police Manual *Managing Prisoners*.

¹⁴² CYPFA, s 214(3) and (4).

163. Another submitter, this time from Hastings, identified problems with the interpretation of section 214:

"If a youth is not being held in custody for an appropriate or more importantly for a lawful reason then YAS will and does ensure their immediate release. This does not happen often and in fact I cannot recall the last time I came across such a situation but it has arisen out of non-compliance with s 214" (Police constable).

164. The issues raised by submissions concerning Police discretion have also been identified as problems in Canada. In Canada several surveys of youth apprehension have found that, in practice, the Canadian Police exercise very little discretion when arresting and charging young people with *"administration of justice offences"* (including breach of bail). Generally, Police in Canada charged young people with administration of justice offences at a higher rate than any other offence.¹⁴³ To remedy this situation the Canadian Government has released a consultation paper considering the introduction of clear rules specifying that young people charged with less serious offences cannot be arrested or detained.¹⁴⁴
165. Although there is insufficient information available to identify whether this Canadian trend is also a problem in New Zealand the fact that problems with section 214 were raised in several submissions suggests it could be. A more robust process of conducting sample audits and analysing section 214 reports would help to ensure that in every case the discretion to arrest is exercised in a way that is proportionate and thus consistent with the New Zealand Bill of Rights Act.
166. The Police have been giving attention to the way that they record, and review, the exercise of their discretion to arrest without a warrant. The Youth Policing Plan 2012-2015¹⁴⁵ includes a proposal to double the number of section 214 reports subject to a random sampling by the Youth Services Division (from 10 reports weekly to 20 reports) in order to improve the quality of the monitoring. Also, a Decision Making Model is to be developed to ensure that consistent interventions are made in every case.
167. In addition to these initiatives section 214 reports would benefit from the inclusion of more contextual information to assist in determining whether, in each case, the arrest was objectively justified. For example, it could be shown that the provisions of section 214 were met by asking constables to include the following potentially relevant information:¹⁴⁶
- the nature of the offence

¹⁴³ Department of Justice Canada *Pre-Trial Detention under the Youth Criminal Justice Act: A Consultation Paper* (Department of Justice, 2011) at [7].

¹⁴⁴ Ibid.

¹⁴⁵ The *Youth Policing Plan 2012-2015* is the Police blueprint for policing children and young people over that period. Key agencies have been consulted in the development of the Plan, predominantly through the Youth Justice Inter-agency and Youth Justice Independent Advisory Groups, which include, Child Youth and Family, Ministry of Justice, Te Puni Kōkiri, Ministry of Health, Ministry of Education and non-government organisation representation. Youth Court judges have also been consulted through the Principal Youth Court Judge.

¹⁴⁶ Craig Horsley *Arrests and the Nominated Persons: Youth Advocate Conference* (New Zealand Law Society, 2011) at 131.

- whether or not the young person has a history of offending
- whether or not the young person is known to the enforcement officer
- the time and circumstances of the alleged offending
- the young person's attitude to the Police and co-operation.

Recommendation 2 – That Police improve the collection, evaluation of, and provision of feedback on, section 214 reports, at district and national levels.

The decision to charge

168. Generally children and young people who offend are dealt with at the lowest level possible by Police. Section 208(a) of the CYPFA states that *“unless the public interest requires otherwise, criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter”*.
169. Before determining whether or not to charge a child or young person with an offence the constable must consider whether it would be sufficient to give the child or young person a warning unless it would be clearly inappropriate to do so due to:¹⁴⁷
 - the seriousness of the offence; and
 - the nature and number of previous offences committed by the child or young person.
170. Police Youth Aid Section administers a Police Alternative Action policy which provides options for dealing with offending in addition to the provision of a warning. In each case, youth aid officers, using their own discretion, must determine the appropriate response to a child or young person who offends guided by the principles of the CYPFA and the following factors:¹⁴⁸
 - nature and circumstances of the offence
 - degree of involvement of the child or young person
 - attitude of the child or young person to the offence
 - response of the child's or young person's family
 - attitude of the family to the child or young person
 - proposal to make reparation or apologise to the victim
 - effect of the offence on the victim
 - victim's views on the proposed course of action
 - the child's or young person's previous offending
 - effect of previous sanctions imposed on the child or young person
 - public interest – whether the offending requires criminal proceedings.

¹⁴⁷ CYPFA, s 209.

¹⁴⁸ Police Manual *Youth Justice*.

171. In order to determine the likelihood of a child or young person re-offending and the level of intervention necessary Police Youth Aid Section are encouraged¹⁴⁹ to refer to the Youth Offending Risk Screening Tool (YORST) which takes into account the child or young person's:
- offending and care and protection history
 - family factors
 - drug and alcohol issues
 - education and employment history
 - peer groups.
172. The Alternative Action scheme is an informal process and there is no information available on the way that this discretion is exercised in any given case. Further, the most recent youth justice statistics released by the Ministry of Justice suggest that the use of alternative action varies significantly in different Police districts. For example, in Waitematā a 2008 study showed that only 26 percent of criminal offences committed by young people were dealt with by alternative action, while in Tasman 62 percent of such cases were dealt with by use of alternative action in the same year.¹⁵⁰ While many other factors may also contribute to young people being held in Police detention in these areas it is interesting to note that in 2011 at least 20 young people in Waitematā were held in Police detention for a period exceeding 24 hours. In comparison, in the same year, no young person in Tasman spent longer than 24 hours in a Police cell.
173. In any case where a warning is not considered appropriate and alternative action is not used, a Family Group Conference (FGC) may be convened to determine the appropriate response to the alleged offending. Generally, the FGC may be attended by the child or young person alleged to have committed an offence, their family/whānau members, Police, and the victim.¹⁵¹ Alternatively under section 246 Police may decide to charge a young person with an offence and following arrest take them before the court immediately where the matter will either be dealt with by sections 273 to 276 or a FGC will be convened.¹⁵² Where it is established that the child or young person has committed an offence the FGC may formulate a plan to deal with the offending. A large proportion of these cases do not result in charges being laid at the Youth Court because alternative ways of dealing with the offending are often resolved by the FGC.
174. There are several inconsistencies between the way the Alternative Action programme is currently implemented and international guidelines. The Beijing Rules state that the discretion to exercise alternative action should be made in accordance with criteria established by law¹⁵³ and that the exercise of this

¹⁴⁹ Current Police policy does not require a YORST to be carried out in every case for an alternative action.

¹⁵⁰ Ministry of Justice *Child and Youth Offending Statistics in New Zealand: 1992 to 2008*, n81 above, at 55.

¹⁵¹ see CYPFA, s 251 for full list of those entitled to attend an FGC.

¹⁵² CYPFA, s 245(1)(c).

¹⁵³ *Beijing Rules*, rule 11(2).

discretion should be subject to review by a competent authority.¹⁵⁴ However, the Alternative Action Scheme is informal, it is not written into legislation and neither is it part of Police General Instructions. Consideration should be given to providing further guidance to constables on how to use the Alternative Action Scheme in order to ensure consistency of approach and establish criteria.

Recommendation 3 – That Police record their decisions and reasoning in cases where Alternative Action is taken in order to identify trends in decision-making and address district variations.

The decision to detain in Police custody

175. It is the responsibility of the Police area commander to ensure that suitable procedures are established for children and young people who offend to be placed in Child, Youth and Family custody rather than being detained by Police.¹⁵⁵ Police policy states that this should occur as soon as practicable in the circumstances: *“the 24 hour limit [that a child or young person can spend in Police custody] does not entitle you to hold the child or young person for that length of time”*.¹⁵⁶
176. When the Police make contact with Child, Youth and Family requesting a young person be placed in the chief executive’s custody under section 235, the duty social worker is obliged to go to the Police station to meet with the Police and have a discussion about the grounds for placement and potential options. It is the role of the duty social worker to:¹⁵⁷
 - raise with the Police any doubts they have about the appropriateness of a remand in the chief executive’s custody
 - ensure that the child or young person’s family/whānau have been contacted and considered as an alternative to a remand in the chief executive’s custody
 - agree on a placement by involving the duty supervisor, potential carers, and family/whānau
 - ensure that the Police provide a copy of a fully completed section 235 certificate which will subsequently be placed on the child or young person’s file and a copy forwarded to the Regional Director
 - confirm the young person’s court appearance date with Police.
177. All section 235 placements are recorded as a youth justice intake on the Child, Youth and Family database, CYRAS, and, when it is appropriate to do so, a placement record must also be added.¹⁵⁸
178. Under section 236 of the CYPFA the decision to detain a young person for a period exceeding 24 hours should only be made as a last resort. In each case it

¹⁵⁴ *Beijing Rules*, rule 11(3).

¹⁵⁵ Police Manual *Youth Justice*.

¹⁵⁶ Ibid.

¹⁵⁷ Child, Youth and Family Policy *Process Map 5: CE Custody Following Arrest* (2006).

¹⁵⁸ Ibid.

must be shown that the young person is likely to abscond or be violent. For this standard to be met there should be compelling evidence of this likelihood.¹⁵⁹ And there must be no other suitable facilities for the detention of the young person available. On this point it was submitted that:

“A community placement should, save for the most extreme circumstances, be preferred to a remand in the cells” (youth advocate).

179. It is Child, Youth and Family policy that when a section 236 certificate is sought by Police, the social worker should:¹⁶⁰
 - understand and agree with any evidential material that supports a reasonable belief that the young person is likely to abscond or be violent
 - consider whether this evidence will still apply after the young person has been in custody for 24 hours (for example, once they have sobered up or family/whānau have been contacted)
 - check the kind of custodial arrangements the Police intend to seek when the young person appears in the Youth Court. (Young people that the Police agree can be bailed once they appear in court are unlikely to meet the criteria for section 236).
180. In an after-hours situation, including evenings and weekends, a National Contact Centre supervisor may be the signatory to the joint certificate. In such a case, an after-hours duty social worker will visit the young person in custody and may advise the National Contact Centre supervisor of the current situation and what avenues have been pursued in order to avoid the continued detention of the young person. The National Contact Centre supervisor will take into consideration the view of the after-hours duty social worker before determining whether to sign a joint certificate.¹⁶¹
181. When a young person is detained in Police custody for a period exceeding 24 hours a senior sergeant, or a constable of or above the level of inspector, and senior social worker must jointly complete a certificate and furnish a report to the Police Commissioner and chief executive within five days of the decision to detain.¹⁶² This report must include the circumstances in which the certificate came to be issued and the duration of the period which the young person has spent or is likely to spend in custody. Section 236 reports are electronically submitted to Police National Headquarters Youth Services Division where all of the reports are audited and feedback is given to districts.
182. As with section 214 reports, these section 236 reports tend to lack the detail necessary to properly assess compliance with section 236 and identify trends in non-compliance. Such an analysis could help to identify the reason why a large proportion of young people spending greater than 24 hours in Police detention are ultimately being released on bail. Child, Youth and Family Service Statistics

¹⁵⁹ Gary Earley *Custody and Bail: the Care and Custody of Young People Pending Disposition by the Youth Court: Youth Advocate Conference* (New Zealand Law Society, 2011) at 10.

¹⁶⁰ Child, Youth and Family *Policy Process Map 6: Manage Police Detention Following Arrest s 236* (2007).

¹⁶¹ See Child, Youth and Family “Practice Centre: Custody for Children and Young People Following Arrest : <www.practicecentre.cyf.govt.nz/policy/youth-court-processes/key-information/custody-for-children-and-young-people-following-arrest.html>.

¹⁶² CYPFA, s 236(2).

show that in 2011 this accounted for 46 percent of such young people. Although a very rare occurrence, in one extreme instance in August 2010 a 15 year old girl spent seven days in Police detention before being released home on bail. In some cases the young person may have originally posed a risk to the community justifying Police detention only for that risk to have subsided after a period of days, thereby justifying their release.

183. The section 236 reporting process would be more effective if more specific information was recorded. A 2008 report carried out by the Scottish Government entitled *Care of Detained and Arrested Children* (Scottish Review) recommended that Scottish Police put in place a formal structure to review the decision to detain a young person in custody, and that it could include an explanation of the following:¹⁶³

- adherence to the guidelines of the legislation
- efforts made to trace and notify a parent or guardian
- access to child by parent or guardian
- endorsement by Police superintendent and the nature of contact with that officer
- any comments by the social work department and/or other agency staff
- joint Police/social work/other agency risk assessment
- eventual release for citation or liberation on undertaking to parent/guardian or other suitable person
- efforts made to identify a place of safety away from a Police station
- the completion of a certificate citing justification by both Police and social work staff for detention in a Police station, including endorsement of the same by a Police superintendent.

184. The guidelines set out in the Scottish Review provide a helpful template for effective reporting. Section 236 reports could similarly be required to include:

- the compelling evidence of the likelihood that the young person would abscond or be violent, including a joint Police and Child, Youth and Family risk assessment
- the steps taken to ensure there were no other suitable facilities available
- the efforts made to trace and notify a parent or guardian
- what access a parent or guardian had had to the child or young person
- any comments by the social worker and/or other Child, Youth and Family or Police staff.

185. Regional and national reviews of this information could then help to ensure that in every case the discretion to detain is exercised in a way that is proportionate and consistent with the New Zealand Bill of Rights Act.

¹⁶³ Her Majesty's Inspectorate of Constabulary for Scotland *Thematic Inspection: Care of Detained and Arrested Children* (HMICS, 2008) at [35].

Summary - The exercise of discretion

Under the CYPFA, Police exercise discretion at three key points of the youth custody process:

the decision to arrest;
the decision to charge; and
the decision to detain in Police custody.

Guidance and support is available to assist with decision-making at each of these points.

It is very difficult to assess how, in practice, discretion is being exercised due to the variability in reporting and monitoring.

Strengthening reporting requirements would have the added benefit of clarifying the criteria for decision-making by effectively providing a checklist of the factors that need to be considered in order for Police, and Child, Youth and Family, to properly exercise their discretion.

Recommendation 4 – That Police and Child, Youth and Family work together to collate, evaluate and identify trends from section 236 reports at district and national levels.

Options under section 238

186. Section 238 of the CYPFA provides the Youth Court with a graduated list of options for dealing with the custody of a child or young person pending a hearing. The child or young person can be: released 'at large'; released on bail; delivered into the custody of a caregiver (either their guardian or carer, or a person approved by a social worker); detained in the custody of Child, Youth and Family; or detained in Police custody.
187. One way to potentially reduce the numbers of young people being detained in Police cells is to increase the use of the lower level orders. In particular, greater use of section 238(1)(c) orders, perhaps with supports put around its use in much the same way the Supported Bail programme has been developed in relation to bail orders, could provide sufficient protection to the community without the need to resort to a detention order.
188. Ideally, social workers, youth advocates and the Youth Court should have a range of options to consider when looking for placements. There appears to be scope for a more coherent strategy around the provision of alternatives to Police custody, which takes into account and responds to the variety of needs young people might present with including, for example, drug and alcohol, mental health, health and disability needs. It is recognised that there would be resource implications in such an approach but there could also be significant efficiencies in using a young person's arrest as an opportunity to triage and respond appropriately to their needs. If such an approach were to be developed those areas with high rates of Police detention should be a priority.

Summary – options under section 238

There is a need to continue developing a range of suitable alternative placement options for young people to minimise the need to resort to Police custody.

Specifically, better use of section 238(1)(c) orders has the potential to reduce the numbers of young people being detained.

In light of resource constraints, priority should be given to developing alternative placement options in those areas that have higher levels of youth detention in Police custody.

Section 238(1)(e) Orders

189. It is a judge or justice of the peace who determines whether a section 238(1)(e) order should be made to detain a young person in Police custody. In such cases the Youth Court has to be satisfied, on the basis of information provided by the Police, Child Youth and Family, and the youth advocate, as to two criteria:

- the young person is likely to abscond or be violent
- no suitable alternative facilities for the young person's detention in safe custody are available.

190. Once a young person is detained in Police custody for a period exceeding 24 hours the social worker that authorised the detention must visit daily to ensure the appropriate risk screens are undertaken, including¹⁶⁴ the Cage Kessler Suicide Screen (CKS) which helps the social worker to determine any substance abuse/dependence, gives an indication of current distress and possible mental health issues, and helps to determine whether the young person has any active thoughts about suicide.¹⁶⁵ In addition, the social worker should make sure that the basic needs of the young person have been met, including:¹⁶⁶

- making sure that the young person has access to showers and clean clothing
- informing the young person's family/ whānau of their needs
- informing the youth advocate of any concerns about the young person's treatment in Police detention.

191. Finally, the social worker must document the following details of the young person's detention in the Child, Youth and Family database, CYRAS:¹⁶⁷

- the name of the young person
- the circumstances surrounding Police detention
- time and date of social work visits, and CKS results

¹⁶⁴ Child, Youth and Family *Policy Process Map 8: Manage Police Detention Pending Court Hearings 238(1)(e)* (2006).

¹⁶⁵ See Child, Youth and Family "Practice Centre: Use of the Cage Kessler Suicide (CKS) Screens and Well-being and Suicide Assessment Tools" at <www.practicecentre.cyf.govt.nz/policy/practice-tools/key-information/cks-wellbeing-and-suicide-assesment-tools.html>.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

- number of days in cells
 - extent of family and youth advocate contact with young person
 - general attitude and morale
 - whether their personal needs are being met.
192. It was submitted that section 238(1)(e) orders result in young people spending longer periods of time in Police detention compared to a section 236 certificate which will only remain in force until the young person's appearance in court. Some submitters suggested removing the option of Police detention under the CYPFA:
- "[T]here is in my mind the lingering question of whether the practice needs to remain a last resort option or whether the CYPF Act should be amended to remove this option altogether. I would be in favour of it being removed as an option altogether, although I realise this would require an additional resource commitment to ensure the availability at all times of appropriate, specific custodial facilities for children and young people" (youth advocate).*
193. Amending the CYPFA to remove the power to detain in Police cells would mean that alternative placement options would be required in every community serviced by courts. Child, Youth and Family have suggested that this may not be a good use of resources given that many of these placement options may only be used once or twice a year.
194. There are several aspects of the way section 236 certificates and 238(1)(e) orders are currently operating that warrant further investigation in order to assess whether Police detention is indeed being used as a last resort and for the shortest period necessary. These include:
- the availability of beds in youth justice residences
 - the availability of other placement options
 - the use of bail instead of remanding the young person in custody
 - whether a section 238(1)(d) order is required to transfer the young person from Police detention into the custody of Child, Youth and Family.

The availability of beds in residences

195. Whether a bed in a residence is a viable alternative to Police detention depends on whether a bed is available, whether the social worker and Police are aware of its availability, the proximity of that available bed to the place of arrest and whether transport is available to get the young person to the facility and back again to appear in court.
196. Child, Youth and Family have substantially increased the numbers of beds available through alternatives to residential options such as supervision with activity, and over the last two years the uptake of these options has increased. As a consequence there has been an increase in the numbers of young people serving supervision with activity orders and a reduction in supervision with residence orders. Approximately 20 percent of Child, Youth and Family's residential capacity is currently being used for supervision with residence. This means remand capacity in the residence has increased and this has been reflected in figures that show in general around 70 percent of capacity was

used for remand in the last two years. The introduction of supported bail since 2005 provides over 200 places as alternatives to residential remands too, which is a significant increase in available options.

197. The statistics analysed as part of this review showed that the four youth justice residences are very rarely full to capacity.¹⁶⁸ If an otherwise suitable bed is available, regardless of its location, a section 238(1)(e) order should not be made solely for want of transport. In order to ensure that transportation is available as often and as soon as possible Police and Child, Youth and Family should, ideally, have planned for this contingency and have some options on stand-by.

Recommendation 5 – Police and Child, Youth and Family work together to develop national guidelines on identifying and using local options for transporting young people between residences and their place of arrest and court.

Other placement options

198. Section 235 (3) of the CYPFA provides that placing a child or young person in the custody of the chief executive is sufficient authority for a social worker to detain that young person in a residence or under the care of any suitable person approved by the social worker. The availability of local placement options is critical to keeping young people out of Police detention because placing a young person in a residence is not always possible, practical or in the best interests of the young person (for example it might be too far away for family/ whānau to visit).
199. However it is often very difficult to find suitable alternative placements for adolescents, especially if they are alleged to have offended. Options are particularly limited if it is considered necessary to detain the young person as opposed to placing him or her in custody. Detention requires the ability to restrain a young person and prevent them from behaving in ways that put the community at risk. In reality this usually requires a residential placement because the CYPFA does not enable community providers to restrain young people.
200. Whilst Child, Youth and Family sites are aware of their own local options, there is no national inventory kept. Options may include placements with local caregivers, in the 'special group homes' for young people on remand under section 238(1)(d), or family homes where there is expertise and which have been designated for the purpose of holding youth justice clients. In the Auckland region the Lighthouse Trust operates two community-based homes. At times remand placements at the Lighthouse may be accessed by agreement between the Regional Directors of Midlands¹⁶⁹ and Auckland. In the lower South Island remand placements occur at Wills St, a facility in Dunedin. Remand options can also occur with Iwi Social Services where these are approved and have the appropriate services available.
201. Most often when a remand in custody is being considered, the social worker will seek a placement back with the family, wider family/ whānau or with an

¹⁶⁸ See paragraph 127.

¹⁶⁹ Waikato and Bay of Plenty sites.

approved caregiver. Supported bail (discussed below) is frequently used to assist in the management of these young people by ensuring that they are supervised during the day and undertake suitable activities. Around 150 placements were accessed in 2010. In the 2010-2011 period 221 supported bail placements were accessed.

202. A relatively new development is that each Child, Youth and Family region now has a 'hub' through which out of home placements are co-ordinated. Primarily these are for young people with care and protection statuses although they do offer options for young people who have a dual status (both care and protection and youth justice). Accessing the 'hub' opens up all of the placement options available under the Youth Specialist Services programmes. It would be good to see a similar approach taken to co-ordinating the placement of youth justice clients.

Bail options

203. It appears that section 238(1)(e) orders are being made in cases where it may have been initially possible to grant bail¹⁷⁰. Many young people who spend longer than 24 hours in Police detention are ultimately being granted bail. In 2011 this accounted for 46 percent of such young people. Young people subject to section 238(1)(e) orders undergo 24 hourly reviews of their custody, providing an opportunity for bail options to be explored even if not initially available.¹⁷¹ Special consideration should also be given to bail when the young person appears on a Friday or Saturday and is likely to remain in Police detention over the weekend if they are remanded in custody.
204. There are several bail options:
- supported bail
 - electronic bail
 - bail accommodation.

Supported Bail

205. The Supported Bail programme is a Child, Youth and Family youth justice initiative that has been in place since the beginning of January 2005. It is a community-based programme designed to assist young people charged with an offence who would otherwise be remanded in Child, Youth and Family or Police custody due to a risk that they will breach their bail conditions or reoffend if released.
206. A key feature of Supported Bail is that a youth worker (not a Police officer) works one-on-one with the young person and their family/whānau to put a plan in place to ensure that bail conditions are complied with.¹⁷² Generally, a

¹⁷⁰ CYPFA, s238(1)(b).

¹⁷¹ See paragraph 190.

¹⁷² Elaine Mossman *Supported Bail Pilot Programme: Final Research Report* (Ministry of Social Development, 2007) at [1.1].

young person who is eligible for supported bail will have some or all of the following as part of their case history:¹⁷³

- previous multiple breaches of bail
 - a history of failing to appear in the Youth Court
 - an escalation in the rate and/or the severity of their offending
 - current or previous detention in the custody of Child, Youth and Family or Police pending determination of youth justice matters under section 238(1)(d) or (e) of the CYPFA
 - failure to comply with an order under section 283 of the CYPFA.
207. So far the Supported Bail programmes across the country appear to have been successful.¹⁷⁴ This is demonstrated in the findings of a 2007 report carried out by Elaine Mossman which showed that of the then 95 participants to the programme:¹⁷⁵
- 80 percent were categorised as “*high risk*” and, but for the Supported Bail programme, would have been remanded in Child, Youth and Family or Police custody
 - 75 percent completed the programme
 - 66 percent did not reoffend while on the programme.
208. Such success rates could significantly reduce the numbers of young people remanded in custody and, therefore, the number of young people spending time in Police detention, because it is often these young people who have failed to comply with bail conditions set in the past.
209. In the Republic of Ireland an observational study of the Children’s Court in Dublin carried out in 2008 showed that almost half of the prisoners interviewed in the study had originally been released on bail but ended up in remand custody due to re-offending, failure to attend court, or the breach of bail conditions during the bail period.¹⁷⁶ Having identified this trend it became apparent that providing more support for young people on remand could significantly reduce the number of young people remanded in custody in the future.¹⁷⁷
210. In addition to reducing the number of young people held in Child, Youth and Family or Police custody while on remand, the Mossman report in 2007 identified the following strengths of the programme:
- young people are offered mentoring by their youth worker¹⁷⁸

¹⁷³ Ministry of Social Development *Supported Bail: Service Specifications* (Version Two, 2011) available online at <www.msd.govt.nz/about-msd-and-our-work/publications-resources/service-guidelines/supported-bail-services.html>.

¹⁷⁴ Mossman, above n 171, at [6].

¹⁷⁵ Ibid, at [4.1] and [4.2].

¹⁷⁶ Sinead Freeman *The Experience of Young People Remanded in Custody: A Case for Bail Support and Supervision Schemes* (2008) 5 Irish Probation Journal 91 at 93.

¹⁷⁷ Ibid.

¹⁷⁸ Mossman, above n 171, at [5.2].

- as part of their Supported Bail plan young people undertake recreational, educational, and cultural activities aimed at self-development¹⁷⁹
 - the youth worker helps to strengthen the relationship between the young person and their family/whānau.¹⁸⁰
211. Since the completion of the Mossman report the number of Supported Bail placements has increased to 243 and the duration of the programme, initially six weeks, is more flexible and extensions can be considered on a case by case basis. There are now 14 Supported Bail providers delivering the service nationwide.

“The main factor that should be celebrated is that this programme helps in no small way to keep youths out of a custodial situation” (Police constable).

212. The success of the programme suggests it is a good alternative to detention in Police custody and may help to fill the gap in available community placements by providing the means to support placement with family, whānau or an approved caregiver. Submissions to this review indicate that there is room for development and extension. In fact more flexibility has already been built into the programme with the six week time-frame able to be extended on a case by case basis.

“A common theme we have experienced is that parents/caregivers really welcome the support offered by Supported Bail, and ask why they didn’t know about the service previously when their young person started in the youth justice process” (Supported Bail provider).

“In Napier/Hastings there are three youth workers who can take on two young people each at a time. Ultimately, this means that only six youths can receive the benefit of the programme at any given time” (Police constable).

“Young people are supported for up to six weeks [with a two-week extension option] before they are exited. This time-frame does not reflect the length of time a young person will generally spend on bail, which is often longer than six weeks due to lengthy court processing” (Police constable).

Electronically monitored bail

213. Generally, electronically monitored bail (EM bail) requires the young person to remain at a particular residence at all times, unless he or she is allowed to leave for an approved purpose. This is a highly restrictive condition and as such is only available to young people who have been remanded in custody. Once the decision to remand in custody has been made the young person is entitled to apply for EM bail. At present there is no legislation governing the use of EM bail in New Zealand. Instead, EM bail is treated as a bail condition under the Bail Act 2000. The Ministry of Justice has issued a report outlining when an application for EM bail should be allowed. It should be noted that this outline is

¹⁷⁹ Ibid, at [4.5].

¹⁸⁰ Ibid, at [4.3].

not youth specific but EM bail could be used when all of the following criteria are met:¹⁸¹

- the defendant has been remanded in custody
- EM bail will adequately address the concerns that have led to the defendant being remanded in custody
- the proposed residence is suitable, it is close to a 24-hour Police station and has an adequate signal for the monitoring equipment
- the other people living at the residence understand what EM Bail involves, consent to the defendant living at the residence, and have been informed that they may withdraw consent at any time
- the defendant has been made aware of, understands, and agrees to comply with the requirements of EM bail.

214. Like the Supported Bail programme, EM bail helps to keep young people out of a custodial environment. However, this scheme does have some limitations. Proceedings can be delayed while the Police carry out a full assessment as to the availability of an electronically monitored bail address.¹⁸² Also, EM bail does not share the same rehabilitative traits as Supported Bail. Indeed, the emphasis of EM bail is reactive with young people monitored so that Police can react quickly to a breach of bail. *“Offenders choose whether to comply and/or offend [while on EM Bail] as they are able to cut off their tag or leave their address at any time although the chances of detection are heightened and there are likely to be consequences for doing so”*.¹⁸³ In contrast, Supported Bail is preventative with young people and their families assisted to prevent a breach of bail from occurring. Nevertheless, EM bail may be the appropriate action in some cases and enable Police detention to be avoided, for example, where the young person and/or their family/whānau are unwilling or unable to participate in the Supported Bail programme.

Bail accommodation

215. In some jurisdictions, temporary bail accommodation services provide young people with supervised accommodation within the community while on remand.¹⁸⁴ This offers an alternative to holding a young person without appropriate accommodation on remand in custody as international research shows that homelessness is likely to increase the young person’s chances of being remanded in custody: *“Most notably it is linked to community ties, which, if strong, make it less likely, in theory, that defendants will abscond before trial. Accommodation can also be related to the risk of reoffending and interference with victims/witnesses. Therefore accommodation can be linked to the three main exceptions to the right to bail”*.¹⁸⁵

¹⁸¹ Ministry of Justice *Bail in New Zealand: Review of Aspects of the Bail System* (Ministry of Justice, 2011) at [213].

¹⁸² Earley, above n 158, at 12.

¹⁸³ Anthea Hucklesby *Vehicles of Desistance? The Impact of Electronically Monitored Curfew Orders* [2008] 8(1) *Criminology and Criminal Justice* 51 at 53.

¹⁸⁴ Mathew Ericson and Tony Vinson *Young People on Remand in Victoria: balancing individual and community interests* (Jesuit Social Services, Victoria, 2010) at [2.5].

¹⁸⁵ *Ibid.*

216. Bail accommodation services are not generally available in New Zealand but have been implemented in other jurisdictions including England and Wales, and Australia. In England and Wales they are run by the Bail Accommodation and Support Scheme. Studies of bail accommodation services report success rates of up to 50 percent with regard to non-offending and bail condition compliance.¹⁸⁶ In New Zealand, Child, Youth and Family can and in some cases do provide a similar service to this by way of short term respite facilities. For example the Lighthouse Trust in Auckland is an emergency short term respite facility for young people who have either youth justice or care and protection custody status with Child, Youth and Family. It operates under the auspices of Youth Horizons in partnership with Youthlink. The express aim of this service is to *“address the lack of suitable options for youth who would otherwise spend time in Police cells”*.¹⁸⁷
217. Bail accommodation services could, in some limited circumstances, provide an alternative to holding a young person in custody, particularly when EM bail and Supported Bail would otherwise be unavailable due to a lack of suitable accommodation. In this way they could provide a useful supplement to the other programmes. However, careful consideration would need to be given to ensuring it is clear who is responsible for the care of a young person, and that the standard of care is adequate, while he or she is in bail accommodation. Young people are not in Child, Youth and Family custody while on bail. Also, such services have been criticised for bringing together alleged offenders and perpetuating criminal behaviour,¹⁸⁸ there is general opposition to placing accused sex offenders in suburban communities,¹⁸⁹ and services are occasionally ill-equipped to meet the needs of clients (for example accused people with drug addictions might be turned away).¹⁹⁰

Net widening

218. It is important to note that all of these alternatives impose restrictions on the liberty of the young person and international research shows that such reform can result in net-widening.¹⁹¹ For example, a young person who would otherwise have been granted bail may instead be subjected to greater restrictions by placement under supported bail. This concern can only be met by providing decision-makers with clear guidance as to when any particular alternative should be implemented.

¹⁸⁶ Ibid.

¹⁸⁷ Available online at www.youthhorizons.org.nz.

¹⁸⁸ Ibid at [2.5.6].

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ Ibid at [2.3.2].

Recommendation 6 – That Child, Youth and Family undertake a review of, and develop a coherent strategy around, the provision of suitable facilities for the safe detention of young people so that social workers have a range of options to consider when looking for placements for young people who are alleged to have offended and that particular consideration be given to:

- extending the work of ‘hubs’ to cover Youth Justice clients
- enabling greater use of section 238(1)(c) orders
- expanding the use of Supported Bail, especially where it may help to secure placement with family/whānau or an approved caregiver
- prioritising the resourcing of such initiatives.

Need for a s238(1)(d) order

219. Once a section 238(1)(e) order has been made, placing the young person in Police custody, a section 238(1)(d) order is required to remove the young person and place them into the custody of Child, Youth and Family. This can mean that, if a young person is placed in Police custody under section 238(1)(e) on a Friday or Saturday and a bed subsequently becomes available, the young person cannot be moved until they are able to appear before a Youth Court judge or a justice of the peace, often on the following Monday.
220. Judges and justices of the peace are aware of this issue and do convene Saturday sittings to monitor the situation if a section 238(1)(e) order was made on a Friday. It was submitted that judges and justices of the peace can, and in some cases do, make a section 238(1)(e) order which allows for Police detention only until a Child, Youth and Family placement becomes available, in which case a section 238(1)(d) order comes into immediate effect. If all judges and justices of the peace who sit in the Youth Court were aware of this option it might result in fewer young people being kept in Police custody until a section 238(1)(d) order was made.

Summary - Section 238(1)(e) orders

Amending the CYPFA to remove the power, under section 238(1)(e), to detain young people in Police cells for more than 24 hours is an option. However it would require the provision of alternative placements in every community serviced by courts.

Arguably providing alternative placement options, and other means of reducing the need for Police detention, should be a policy objective. However, amending the legislation in the absence of appropriate alternatives may lead to unintended negative consequences for young people.

Although there is usually capacity to place a young person in a residence, rather than a Police cell, the viability of this option will depend on the circumstances of each case, including the availability of transport. However, a young person should never be detained in a Police cell solely because there is no way to transport them to an otherwise suitable placement.

Bail options are another means of avoiding young people being detained in Police custody. Supported Bail in particular offers a positive alternative.

The timing of arrest continues to be an important factor in whether a young person is detained in a Police cell. It appears that many detentions occur over a weekend, despite efforts by the Youth Court to convene Saturday sittings and make section 238(1)(e) orders which only remain in effect until an alternative placement becomes available.

Recommendation 7 – That the IPCA work with the Ministry of Justice to draw the attention of judges and justices of the peace to the possibility of making 238(1)(e) orders which only remain in effect until a Child, Youth and Family placement becomes available.

Support for the young person

221. At each stage of the process the level of support available to the young person is critical to safeguarding their rights and mitigating the risks associated with detention in a Police cell. This support includes empowering young people themselves by making sure they are aware of their rights, as well as providing access to a nominated person and youth advocate.

Young person's knowledge of their rights

222. When a child or young person is arrested, there are several stages at which the Police must advise them of their rights.¹⁹² And in every case a child or young person should be informed of their rights in a way that is appropriate, takes into account their age and level of understanding¹⁹³ and explains all of the following:¹⁹⁴
- they are under no obligation to make any statement
 - if they consent to making any statement, they may withdraw that consent at any time
 - any statement they make may be used as evidence in any proceedings
 - they are entitled to consult with a lawyer or nominated person and have them present while making a statement.
223. It is Police policy, based on legislation, that a child or young person must be advised of their rights in the following circumstances:¹⁹⁵
- before questioning when the constable has reasonable grounds to suspect the child or young person has committed an offence¹⁹⁶
 - when the child or young person asks about their rights¹⁹⁷
 - when the constable has decided to charge the child or young person with an offence¹⁹⁸

¹⁹² CYPFA, s 215.

¹⁹³ CYPFA, s 218.

¹⁹⁴ CYPFA, s 215.

¹⁹⁵ Police Manual *Youth Justice*.

¹⁹⁶ CYPFA, s215.

¹⁹⁷ CYPFA, s215A.

¹⁹⁸ CYPFA, s216.

- when the child or young person has been arrested¹⁹⁹
 - immediately after a spontaneous statement is made if there are reasonable grounds to believe the child or young person has committed an offence²⁰⁰.
224. Despite this, some young people who contributed to this review felt they did not understand their rights while in Police detention, with one young person submitting that the Police “*did say the [rights] caution*”, but didn’t explain it so he understood (*young person detained in Police custody for three days*).

Role of the youth advocate in Police cell remands

225. Youth advocates can play an important role in determining whether a young person ends up in Police cell remand. Their role is to stress to the court that remand in Police custody is an extraordinary measure and to ensure that all the criteria for Police cell remand are met, rather than accepting it simply because they have been informed that suitable facilities are not available to Child, Youth and Family.
226. Youth advocates must follow up on young clients if they are remanded in Police custody. It is up to the youth advocate to seek a review of a section 238(1)(e) order if a young person has been in Police cells for greater than 24 hours. It is also important for the youth advocate to stay in regular contact with the young person and to ensure that their basic needs are being met, that they have access to their family/whānau, a social worker, and adequate food and hygiene.
227. However, a number of young people submitted that they had not been allowed to contact a lawyer while in Police detention. “*When I was in the Police cell they chucked me in there and left me for ages. I wasn’t allowed to ring anyone*” (*young person detained in Police custody for two days*). One young person also submitted that “*they just chucked me in Police cells, took me to court, then told me to talk to my lawyer afterwards*” (*young person detained in Police custody for two days*).
228. Anecdotal evidence also suggests that some youth advocates do not always fulfil their role with enthusiasm and do little for young clients in Police detention.

“You should call them lawyers, not youth advocates, because they hardly ever do any advocacy for the young person” (Child, Youth and Family social worker).

229. This report will be shared with the New Zealand Law Society so that they can ensure appropriate professional development is, and continues to be, available to those lawyers who act as youth advocates.

Nominated persons

230. A child or young person may select any adult to be their nominated person, usually a parent, caregiver or member of their family/whānau/iwi/hapū.²⁰¹ It is the duty of the nominated person to support the child or young person and to ensure that they understand all the matters being discussed during

¹⁹⁹ CYPFA, s217.

²⁰⁰ CYPFA, s223.

²⁰¹ CYPFA, s 222(1).

questioning or while making a statement.²⁰² If a person of the child or young person's choice cannot be located, Police will continue to ask the child or young person to nominate someone. However, if the young person refuses or fails to nominate an adult of their choice it is envisaged that Police can provide an alternative,²⁰³ usually selected from a list kept by the Police. Any statement made to a constable by a child or young person who has been arrested will be inadmissible unless it was made in the presence of a lawyer or nominated person.²⁰⁴ A statement will also be inadmissible if a child or young person wishes to speak with a nominated person before their interview and is not given that opportunity.²⁰⁵

231. The role of the nominated person under the CYPFA is two-fold:

- First, they must ensure the child or young person understands their rights prior to and during Police questioning.
- Second, they must offer the child or young person adequate support prior to and during Police questioning.²⁰⁶

232. The provision of a nominated person reflects the principle of the Act that children and young people require special protection while in Police detention because of their age and vulnerability.²⁰⁷ The appropriate level of involvement of the nominated person has been subject to judicial, Police, and advocate debate since its implementation,²⁰⁸ and the following issues have been identified:

Family/whānau members acting as nominated persons often have little understanding, if any, of their dual role. *"[T]o be effective in their role the nominated person needs to not only be familiar with, but also understand, the rights that the young person has" (youth advocate).*²⁰⁹ This lack of understanding has led to nominated persons misdirecting the child or young person, for example by not insisting on the presence of a lawyer where the alleged offence is serious in nature or advising the young person only to *"tell the truth"*.²¹⁰

The pamphlet used to inform nominated persons of their duties provided by the Police (Appendix 3) has been criticised as inadequate. *"[T]he pamphlet is produced by and for the Police. The independence or objectivity of the information contained in the pamphlet is open to question" (youth advocate).*

²⁰² CYPFA, s 222(4).

²⁰³ *R v Kurariki* (2002) 22 FRNZ 319 (CA); CYPFA, s222(1)(d)

²⁰⁴ CYPFA, s 221.

²⁰⁵ CYPFA, s 221(2)(b).

²⁰⁶ CYPFA, s 222.

²⁰⁷ CYPFA, s 208(h).

²⁰⁸ For example see Sandra Porteous *Advocating for Children: The Role of the Independent Nominated Person* (Unpublished, 2002).

²⁰⁹ Craig Horsley, above n145, at 136.

²¹⁰ *R v S* [1997] 16 FRNZ 102.

When the nominated person is chosen from a Police list there is a perception that they are not independent and may not be acting in the best interests of the child or young person.

233. In summary, when the nominated person is a family member there tends to be a lack of adequate information available to ensure they are able to fulfil their role. Alternatively, when the nominated person is chosen by the Police there is a suggestion that they lack the necessary independence to fulfil their role in accordance with the child or young person's right to legal and other assistance and services while in Police detention.²¹¹

Family/whānau nominated persons

234. The nominated persons system has been criticised for not providing adequate information to family/whānau who perform the role. The Canadian approach is often cited as an example of a system that adequately informs nominated persons who are the family of the young person. In *R v Z* the Court of Appeal approved of the Canadian approach which tries to ensure legal advice is recommended by the nominated person in each case.²¹²

"The brochure given to parents and guardians ... positively encourages [them] to ensure that legal advice is obtained for their children. It also tells parents not to urge their children to confess straight away as that will rarely be in their best interests".

235. The Canadian pamphlet (Appendix 4) contains a large amount of information for family nominated persons and, as noted in *R v Z*, expressly encourages them to seek legal advice for their child. In contrast, the pamphlet provided to nominated persons in New Zealand (Appendix 4) contains only a small amount of information and does not expressly encourage legal advice.

Recommendation 8 – That the Children's Commissioner review the pamphlet provided to family/whānau who act as nominated persons to ensure this includes adequate information about the role including the importance of seeking legal advice.

Role and training

236. In England and Wales the authorised adult system (equivalent to nominated persons) is administered by an independent organisation, Local Authority Youth Offending Teams, rather than the Police. This organisation is charged with recruiting volunteer authorised adults and providing training to both volunteers and family members. A recent review of the authorised adult system suggested that the Local Authority Youth Offending Team work on ensuring prompt responses to Police call outs and that adequate information is received from the Police concerning the particular child or young person in custody.²¹³

²¹¹ UNCROC, art 37(d).

²¹² *R v Z* [2008] 3 NZLR 342 (CA) at [93].

²¹³ See Criminal Justice Joint Inspection *Who's Looking Out for the Children: A Joint Inspection of Appropriate Adult Provision and Children in Detention after Charge* (England and Wales, 2011) at 26 and 28.

237. The role of the nominated person in New Zealand is to support the child or young person, and ensure that they understand their rights, prior to and during questioning. This is a more limited role than that played by the appropriate adult in England and Wales, where the appropriate adult is involved in the custody process and must:²¹⁴
- be allowed to review the custody record as soon as practicable after their arrival, and on request be given a copy of that record
 - be consulted by Police at reviews of detention.
238. There could be scope for a nominated person in New Zealand to provide an additional check on Child, Youth and Family and Police procedure for young people detained in Police custody. This would apply particularly in cases where youth advocates are not already involved in the young person's case.

Recommendation 9 – That the Children's Commissioner work with other relevant agencies to review the nominated persons scheme and assess whether it is independently administered and whether there would be merit in extending the role of a nominated person so that they are involved in the custody process .

239. Generally, nominated persons from the Police list are not given any specific training. A recent survey conducted by Youth Law *Support for Young People in Police Stations* showed that half of the stations surveyed did not have such a list.²¹⁵ In England and Wales, when a family member is unavailable the Independent Local Authority Youth Offending Teams are able to provide specifically trained volunteers. Volunteers recruited by these teams reflect the diversity of local communities and are provided with training programmes which include:²¹⁶
- shadowing an experienced appropriate adult
 - mentoring
 - presentations from Police and other partners such as health
 - visits to Police custody units
 - refresher training
 - support meetings.
240. The issue of the training provided to nominated persons, is currently being considered by the Criminal Practice Committee²¹⁷ as part of their work looking into nominated persons and the questioning of young people. A working party

²¹⁴ See PACE codes of practice available at <www.homeoffice.gov.uk>.

²¹⁵ Cited in Brookers, above n 85, at [6.4].

²¹⁶ See Criminal Justice Joint Inspection, above n 212, at 24.

²¹⁷ Established in 1988 the Criminal Practice Committee is a judicial committee which brings together all those professionally involved in the criminal justice system at a senior level to progress matters of importance to the operation of the criminal justice system and to inform the Executive. Members include legal practitioners, Ministry of Justice policy and registry advisers, Police, the New Zealand Law Commission, Crown Law, judges and Law Society representatives.

consisting of representatives from Youth Law Auckland, the Law Society, the Ministry of Justice, Child, Youth and Family, and Police, have been considering the issue. The Ministry of Justice has been asked to look into which agency/organisation should most appropriately “own” the training of nominated persons.

Summary - Support for the young person

It is a fundamental principle that young people be informed of their rights in a way that is appropriate and takes into account their age and level of understanding.

Youth advocates have an important role to play in protecting their client’s rights when they have been remanded to a Police cell. Submissions suggest that practice of Youth Advocates is variable.

Two problems arise with the nominated persons scheme:

- (i) Where the nominated person is a family/ whānau member there are questions about the adequacy of the information they receive to fulfil their role.
- (ii) When the nominated person is selected from the list administered by Police questions of independence are raised.

Work is being done within Police and the wider Justice sector to address these issues.

(ii) The treatment of young people once detained

241. Despite the efforts to minimise the numbers of young people who are detained by Police it is inevitable that some young people will end up being detained in Police cells. This report now turns to the treatment of young people while in Police custody, and the implications for their human rights including their rights not to be detained with adults, to be appropriately cared for and protected from harm, to have their health needs met, and generally to have their rights as young people respected during the youth justice custody process.

Age-mixing

Police cells

242. In some Police stations there are limited facilities for keeping young people separate from adult detainees. Although Police General Instructions state that “[m]ales, females and children and young persons held in Police custody are to be kept separate and where possible prevented from communicating with each other”,²¹⁸ sometimes it is just not possible. One submission stated:

“Cells at the Hastings Police station are substandard ... some of the issues are being unable to segregate adequately youth from the general adult population ...” (Police constable).

243. Because of New Zealand’s reservation to article 37(c) of the UNCROC this practice is lawful. However, as discussed above, (paras 82 to 85) it risks being inconsistent with international human rights standards.

²¹⁸ Police General Instructions *Separation of Prisoners*.

244. When building any new Police stations or making alterations to existing ones, consideration should be given to how the needs of young people in custody, including the right to be kept separate from older detainees, might be better planned for and accommodated.

Recommendation 10 – That when building any new Police stations, or making alterations to existing ones, Police give consideration to how the needs of young people in custody, including the right to be kept separate from adult detainees, might be better planned for and accommodated.

Police transportation of young people

245. Following the murder of a young prisoner by an adult prisoner in a privately contracted transport vehicle travelling between court and prison in 2006, the Ombudsman released a report recommending that the Department of Corrections and Police review their transport practice. As a result, the Police have aligned their transport practice with Corrections. The Police Manual requires Police, when transporting prisoners, to separate adult prisoners from children and young people under the age of 17, which is in line with the age definitions in the CYPFA. It also states that Police should, if possible, make best endeavours to separate those aged 17 years old from adults as well. This is a Corrections requirement and is in line with the international standards.
246. However, transporting young people is always going to be a risk, and is particularly problematic when long distances are involved. Technological developments could be used to help avoid this risk. For example greater use of teleconferences and videoconferences could minimise the need to transport young people to and from court. All residences have video conferencing available but not all courts do and at times youth advocates are opposed to its use.

Recommendation 11 – That the Police work with Child, Youth and Family and the Ministry of Justice to minimise the need to transport young people to and from court, especially when the young person has been placed in custody a long way from the court where they are to appear.

Court cells

247. Age-mixing in court cells does sometimes occur. There are 65 courthouses across New Zealand (excluding the Court of Appeal and the Supreme Court). The number of court cells in each courthouse varies. Some courts do not have any cells. In order to comply with basic requirements of separation (men, women, adults, young people), four cells are required. The Cabinet Social Development Committee noted in 2007 that at that stage only 28 of the 65 courts would be able to comply. This does not take into account the possibility of scheduling to minimise the risk of mixing or use of alternative holding arrangements but nor does it take into account other reasons for separating

prisoners such as 'at-risk' status, mental health issues, gang affiliations, and the separation of accused and convicted prisoners.²¹⁹

Summary - Age-mixing

Ensuring young people are kept separate from adults while they are detained is an ongoing challenge.

Police stations and courts have limited facilities for separating young people from adults and issues also arise when transporting young people.

Suitability of cells

248. Police cells are intended for the detention of adults for short periods only, pending court appearances or transfer to a remand prison. These cells are not suitable for the detention of adults for longer periods of time and are even less suitable for the detention of young people. Despite this, in 2011 213 young people spent an average of 1.9 days in Police detention and, in the past, some young people have spent up to, and sometimes over, a week in Police cells.
249. It must be noted that the conditions of Police cells vary significantly throughout the country. In most cases the cells were constructed many years ago without an understanding of the specific requirements and vulnerability of young people in the criminal justice system. As a consequence, Police stations generally have only basic meals available and limited facilities for washing, toileting, exercise and family visits. Further, the Children, Young Persons and Their Families (Residential Care) Regulations 1996, which govern the treatment of young people in Child, Youth and Family residences, do not apply to Police cells.
250. Submissions to this review highlight how unsuitable Police cells are for detaining young people. As noted above, Police cells are neither designed to meet nor, often, are they capable of accommodating the particular needs and rights of young people. While a short time in a Police cell might, on balance, be in the best interests of the young person (for example by keeping them near family) the longer they are detained the greater the chances that their rights will be breached. In practice, this breach of rights means that a young person may:
- be effectively subject to solitary confinement
 - be in a room with the lights on for 24 hours (to allow suicide monitoring)
 - not be able to have visits from family
 - be subject to a lack of ventilation and natural light
 - be confined to an unclean space
 - be unable to shower
 - have little privacy
 - have inadequate food

²¹⁹ Cabinet Social Development Committee *UNCROC Reservation on Age-Mixing when Children are Deprived of their Liberty* (Cabinet Social Development Committee, 2007) at 7.

- be unable to exercise or have access to recreation or education.

(These are based on submissions to this review by young people and those who work with them²²⁰).

251. Young people may also be detained by Police in court cells. Court cells are located on premises owned or occupied by the Ministry of Justice. When detained people are moved through the buildings they are under the authority of court officials. Although the law is unclear, in practice, the supervision and monitoring of children and young people while they are in cells in the lower courts, such as the District Court and the Youth Court, is the responsibility of the Police. While young people are not held in court cells for any extended periods of time, it should be noted that court cells also lack most basic facilities, and many of the same issues arise as in Police cells. Young people held in Youth Court cells while awaiting hearings reported that the cells smelt bad, and felt they lacked information about what was going on.²²¹ One submission stated: *"[I] got assaulted at the courts cells by some cops" (Young person detained in Police custody for four days).*

Summary – Suitability of cells

Police cells are inherently unsuitable for detaining young people.

Given that youth detention is an occasional function of Police cells every opportunity should be taken to improve their suitability for this purpose, including considering how young people might be kept separate from older detainees.

Staffing – availability of specialist staff

252. As well as the condition of the cells themselves, young people's experience of detention in Police custody will depend to a large extent on how they are treated. This in turn depends on having well trained staff who appreciate the need to treat young people in a different way to adults and can act accordingly, within the principles of the Youth Justice system. Although it is clear that practices vary across the country, again submissions to this review reflect some cause for concern.²²² There are reports of young people:

- not having their special needs taken into account but being treated as adults
- being treated unfairly
- being subject to the use of force
- feeling discriminated against
- having inadequate health care while in detention
- not having their mental health needs met.

²²⁰ See paragraphs 133 and 137 above.

²²¹ For example see Ministry of Justice *Youth Court Research: Experiences and Views of Young People, their Families and Professionals* (Ministry of Justice, 2011) at [4.4.2] and [5.4].

²²² See paragraphs 133 to 137 above.

253. It is Police policy that if, because of their health, medical condition, intoxication, drug use, or any suicidal warning signs, a young person is considered to be in need of care and monitoring, custodial staff must undertake additional steps. These include searching the young person, arranging for him or her to be examined by a medical and/or mental health officer, calling a medical practitioner if required, giving medication if necessary and providing care and monitoring.²²³ However, a child or young person is not automatically considered an 'at risk' prisoner.

Role of Police Youth Aid in Police custodial situations

254. Police are not in a position to provide the level of youth-specific care and supervision that is available in Child, Youth and Family residential facilities. For example, custody sergeants and other watchhouse constables do not necessarily receive any specific training on how to deal with young people in custodial situations.
255. It is the Police Youth Aid Section (YAS) who specialise in dealing with children and young people who offend. However, there is no consistent national practice concerning the role of youth aid constables when young people are in Police custody and their level of involvement differs greatly depending on the time of arrest, the seriousness of the offence, whether there is a pre-existing youth case, and the Police district in which the young person is detained. Sometimes there is no involvement at all.
256. Some Police districts have on-call Youth Aid constables. For example, in Hastings, the Youth Aid Co-ordinator has implemented a practice whereby he, or one of the Youth Aid constables, checks the cells every morning to assess the wellbeing and safety of any young people in the Police cells. They also make themselves contactable after-hours to give advice to sectional staff. In this way the Hastings YAS ensure that the detention is appropriate and lawful, that the young person is released or bailed to a suitable court date in a timely manner, and that they appear in the Youth Court without delay.

"If a youth is not being held in custody for an appropriate, or more importantly, for a lawful reason then the YAS will and does ensure their immediate release" (Police constable).

257. Without detracting from the very good practice in many areas, the lack of a consistent standard of YAS involvement calls into question compliance with the requirement that Police dealing with young people should be specifically trained.²²⁴

Staffing – youth specific training

258. The treatment of young people in Police detention reported in some submissions suggests a lack of adequate training and resources available to custodial staff in the watchhouse. Police constables are not required to be specialised in custodial management. Most districts rotate constables off the front line to work in the watchhouse, rather than employing dedicated custody staff with specialist custodial experience. Ideally, all those involved in the custody of a young person should be adequately trained and any training

²²³ Police Manual *Managing Prisoners*.

²²⁴ *Riyadh Guidelines*, art 58; *Havana Rules*, rules 81- 87; *Beijing Rules*, rule 12.

received should be nationally consistent to ensure practice throughout the country complies with youth justice principles.

Constables

259. There has been an ever-increasing focus on youth-specific training for constables since the introduction of the CYPFA. Consequently, youth-specific training is now provided to all new Police recruits. Generally, any additional youth training is only provided to Youth Aid Section officers. As Youth Aid officers are not commonly involved in front-line policing, for many young people their first experience of Police is with constables who have received relatively little training on how to deal specifically with young people. This concern extends to watchhouse staff as there is no youth-specific custody training available.

“At times Police acting as sergeants do not have knowledge of the CYPFA and often it is the CYF Supervisor explaining the process around young people detained in Police custody” (Child, Youth and Family social worker).

“While the Police have a responsibility to ensure that legislation is complied with, those familiar with the [CYPFA] find it a complex piece of legislation. Because of complexity this can lead to defensive decision-making or even no decisions and when you look at custody issues for care and protection and youth justice it can be a minefield” (Police constable).

“With the exception of Youth Aid Officers, generally there is poor knowledge about the Act ... which leads to poor decision-making. As a result of this poor decision-making, children and young persons are detained when other options should have been considered, but also others who should have been detained are not” (Police constable).

260. There are Police training modules which include specific information and guidance on issues relating to children and young people. They include:
- (i) Investigative interviewing for level one Police recruits which is delivered by the Police training service centre. All Police constabulary staff beyond recruit level must complete one further investigative interviewing assessment. Additional investigative interviewing training is available for more experienced constables such as detective trainees.
 - (ii) The Te Puna course, a 90-minute online training programme which consists of eight different modules intended to provide an introduction to the CYPFA is available to all constables. Constables who complete this training programme become eligible to attend the Youth Services Introduction course.
 - (iii) A Youth Services Introduction course is offered to Youth Aid, Youth Development staff, and other interested constables, three times per year. This involves testing the constables’ knowledge of the objects and principles of the CYPFA and, specifically, how these relate to arrest and interview procedures. It also covers diversionary action such as warnings, alternative action, Family Group Conferencing, Youth Court and care and protection action.

- (iv) A Youth Aid Qualifying course is provided to Youth Aid staff that have completed the Youth Services Introductory course and have been working in a Youth Aid role for a minimum of 18 months. This involves an exam which tests the constables' knowledge of the CYPFA. A Youth Aid advanced course is offered to Youth Aid staff with considerable experience. Constables are required to give a 20-minute presentation on a local youth justice initiative or relevant legal theme to the Principal Youth Court Judge.
- (v) A Youth Development course is offered to Youth Development officers once a year. Course requirements include completion of a "*reflective log*", testing on the CYPFA, and an assignment including the things they have learnt around "*cognitive behavioural therapy in the work place*".
- (vi) A CYPFA session is delivered as part of a number of training programmes, including: CIB induction; basic investigators courses; sergeants qualifying course; community constables courses. This involves written assessment on the content of the CYPFA and, in some cases, constables are required to give a 20-minute presentation on a local youth justice initiative or relevant legal theme to a panel of experts including the Principal Youth Court Judge. This course is supplemented by refresher training on the Act which is available to all operational constabulary staff.
- (vii) Additional training courses with a youth component, or that are relevant to Police work with young people, include:
 - Leaders in Crime and Crash Reduction Programme
 - Standard Operating Procedures
 - Initial Training Workplace Assessment programme
 - Initial Training Recruit programme
 - Child Protection Investigator course.

261. Although a base-level of youth-specific training is provided to all constables there is no specific training for watchhouse staff. This means that custody specific issues must be resolved by district policies on custody training, which is often "*on the job training*" with the watchhouse keeper. Given the complexity of the CYPFA, particularly in relation to its custody provisions, this lack of training raises issues for watchhouse staff who may not fully understand their obligations under the Act. The Police are currently reviewing the training received by constables to ensure best practice under the CYPFA and a compulsory online youth training module is under development. This training module should include a focus on the provisions of the CYPFA. Further, refresher courses for all constables on youth justice issues should be frequently available. Subject matter experts, along with well qualified staff within the Police, could provide oversight of and support to those who deliver youth-specific training.

Recommendation 12 – That Police develop a comprehensive and nationally consistent youth-specific training programme for all front line staff, custodial staff and supervisors.

Authorised officers

262. Authorised officers²²⁵ are not sworn constables and have not been through the same recruitment and training process. Although they are trained on the custody process, they do not receive any youth-specific training. These officers are used to carry out limited and specific constabulary roles where Police have determined that fully trained constables are not always necessary. This includes the constabulary roles carried out in the watchhouse.²²⁶ The number of authorised officers and their whereabouts is set out below.

DISTRICT/AREA	PART TIME/CASUAL	FULL TIME EMPLOYEES AO and Temp Sworn
EASTERN	(7)	
AUCKLAND CITY -		(7)
SOUTHERN	(22)	
PNHQ - CVIU		(14)
TASMAN	(3)	
WELLINGTON		(5)
BAY OF PLENTY		(5) AO and (16) TS
CANTERBURY	(5)	(4)
MANUKAU	(1) AO and (3) TS	(19) AO and (22) TS
WAIKATO		(2)
RNZPC - Driving		
WAITEMATĀ - M'WAY SUPPORT		
NORTHERN	(14)	
CENTRAL	(45)	
TOTAL	100	94

263. In total there are currently 194 authorised officers working within the Police. Because, from time to time, some of these officers are employed in the watchhouse they, unlike sworn constables, are specifically trained to carry out this role. This includes:

- a two-day first aid course

²²⁵ Before the Policing Act 2008 authorised officers were known as temporary sworn officers. While this is no longer a position within the Police, some temporary sworn officers are still used and referred to as such.

²²⁶ See Policing Act 2008, s 24(1)(a) and (b). See also New Zealand Police Association *A Quiet Revolution: the rise of the authorised officer* available online at <www.Policeasn.org.nz/new-training-new-role>.

- custodial management and suicide awareness training, including information on local/district orders concerning the transportation and management of prisoners
- radio protocol training
- 'on the job training' on the transportation of prisoners in an emergency
- prisoner management training including information on the chapters of the Police Manual concerning the supervision and processing of prisoners
- self-defence training
- driving training
- information on the care and protection of intoxicated people.

Recommendation 13 – That Police ensure that authorised officers receive the same youth-specific training recommended for all custodial staff.

Social workers

264. Child, Youth and Family social workers include both specialist youth justice social workers and specialist care and protection social workers, each trained in accordance with their role. For Youth Justice social workers training includes a two-day workshop, by the end of which participants are expected to:²²⁷
- identify and describe the legal framework for youth justice under the CYPFA
 - identify and describe those aspects of criminal law relevant to the legal framework for youth justice
 - demonstrate the ability to draft and complete court reports and papers
 - demonstrate an understanding of applying key learning outcomes in their practice.
265. However, after-hours duty social workers include both youth justice social workers and care and protection social workers. While youth justice social workers are trained on the procedures required in Police youth custody situations, care and protection social workers are not and some are unaware of what is required of a social worker when they are called into a Police custodial situation. To some extent this issue has been addressed by the implementation of an after-hours contact centre. If a social worker is called in after-hours, a Child, Youth and Family National Contact Centre supervisor is available for information and advice. But ultimately it is the after-hours social worker's responsibility to find a placement for a detained young person who Police have refused to grant bail and some training on the significance of these decisions would be useful.

²²⁷ Child Youth and Family *Youth Justice Law: Participant Work Book* (CYF, revised May 2011) at 3.

Recommendation 14 – That Child, Youth and Family ensure that all care and protection social workers who cover after-hours duty receive nationally consistent training on the youth custody procedures.

Joint training

266. Constables in the watchhouse and Child, Youth and Family social workers could benefit from joint training. Currently, Child, Youth and Family staff can attend some Police training, but there is not often a large take-up. This may be because there is no training programme specifically about holding young people in custody. A joint training programme should be developed, focusing on the practical issues involved in holding young people in Police detention and identifying the respective roles of Police and Child, Youth and Family. The Scottish Review recommended the creation of a training plan to introduce practical scenarios, specifically tailored to highlight the content of the policy, relevant legislation, and good practice, and ensure that these are clearly understood by all persons involved in the custodial care of young persons.²²⁸ Something similar could be considered here in New Zealand.

Summary - Specialist staff and youth specific training

Not all Police officers and social workers that deal with the youth custody process are specifically trained in youth justice or in the youth custody process.

Although Police Youth Aid section specialise in dealing with young people, the level and nature of their involvement in a case can differ depending on such things as the time at which a young person is arrested, what the practice is in that area and whether they are already involved with the young person.

There is a need for all Police officers and social workers who are, or may be, involved in the youth custody process to have sufficient training to enable them to carry out their role effectively and in accordance with the relevant youth justice principles.

Recommendation 15 – That Police and Child, Youth and Family develop a joint training plan enabling both Police and social workers to effectively carry out their roles in the youth custody process, including refresher courses that take into account developments in the law and practice.

(iii) Systemic issues: collaboration, data collection and monitoring

Inter-agency collaboration

*“In the last several years ... standards have improved and I believe this is a result of [Child, Youth and Family’s] better collaboration with Police”
(Child, Youth and Family social worker).*

267. The custody process under the youth justice system established by the CYPFA is dependent on the involvement and interaction of both Police and Child, Youth and Family. These agencies are required to work together to ensure that young people are not remanded in Police custody for longer than is absolutely

²²⁸ HMCIS, above n 162, at [54].

necessary and only ever as a last resort. The submissions received suggest that this process is not running smoothly in every case:

“It is extraordinary how often a bed/placement becomes mysteriously available through a mixture of judicial and advocate pressure” (youth advocate).

“There are issues with communications within CYF where the manager of [a] YJ [Residence] states that [they have] beds available but in Court the CYF representative tells the judge that there are no beds available” (Police constable).

268. In order for the custody process to work effectively, and to address any systemic issues inhibiting its effective operation, both agencies need to exercise effective and accurate record collection of youth-specific information and be capable of sharing that information with each other in a timely manner.

The Memorandum of Understanding

269. The Memorandum of Understanding between the Police and Child, Youth and Family is a formal agreement which emphasises the importance of maintaining strategic relationships between the two agencies at the national, regional, and local level. For example, at the local level, each Child, Youth and Family site manager and Police area commander are required to meet at least twice a year in order to:

- maintain a positive working relationship at the operational level
- discuss operational matters arising in their district
- manage disputes at the regional level
- discuss any other matters as necessary.²²⁹

270. The Memorandum of Understanding lays the foundation for developing and maintaining strong relationships between constables and Child, Youth and Family social workers who are involved in the custodial care of young people, and to aid data collection and information sharing at all appropriate levels. The Memorandum of Understanding notes that *“effective communication is the key to a good working relationship”* and states that parties must *“take reasonable steps to exchange information as authorised within existing legislation and agreements made between the parties for the purpose of ensuring the safety and well-being of children and young people, the accountability of offenders, and the management of care and protection and youth justice systems”*.²³⁰ Child, Youth and Family are currently looking into the Memorandum of Understanding with the Police in relation to family violence, reducing the rates of total crime, violent crime and youth offending, and reducing reoffending. Youth custody issues should also be included in this review.

²²⁹ Memorandum of Understanding between Child, Youth and Family and the Police at [6].

²³⁰ Ibid, at [5].

Recommendation 16 – That Police and Child, Youth and Family review how youth custody issues are treated within the Memorandum of Understanding to ensure currency as well as ongoing analysis and evaluation of policy and operational compliance.

Data Collection

271. This review has identified a lack of consistently recorded and publically available data on young people in Police detention in New Zealand. Although records have notably improved in recent years with the development of online database systems, and this review has benefited greatly from the information collected by Child, Youth and Family on young people who are in Police detention for more than 24 hours, this information is not in the public domain.
272. As well as the individual agencies' databases, the Ministry of Justice has developed a Youth Justice Dataset containing youth justice information from Police and the Youth Court. Using the Dataset, the Ministry of Justice has released three reports containing youth justice statistics.²³¹ These statistics do not contain any information on the frequency or numbers of young people being held in Police detention for any period of time. They do, however, note Police apprehension rates of young people from 1992 to 2008. An apprehension is recorded when a person has been dealt with by the Police in some manner.²³² Apprehensions represent the number of alleged offences, not the number of young people, and do not always result in arrest or Police detention.²³³ This information is nevertheless useful to consider as it indicates some of the general trends in Police dealings with young people.

National Intelligence Application: Youth Cases

273. The New Zealand Police's National Intelligence Application (NIA) is the national database in which all Police records are stored. With a youth case the following information must be recorded (in addition to the core information required for each entry):²³⁴
- any interim action
 - the status of the youth case
 - the Police station where the youth aid officer responsible for the case is based
 - the contact details of parent/care provider and who the primary/first point of contact is (parent/care provider)

²³¹ Ministry of Justice *Child and Youth Offending Statistics in New Zealand: 1992 to 2006* (Ministry of Justice, 2008); Ministry of Justice *Child and Youth Offending Statistics in New Zealand: 1992 to 2007* (Ministry of Justice, 2009); Ministry of Justice *Child and Youth Offending Statistics in New Zealand: 1992 to 2008* (Ministry of Justice, 2010) [Child and Youth Offending Statistics].

²³² Ministry of Justice *Child and Youth Offending Statistics in New Zealand: 1992 to 2008*, above n 81, at [2.1].

²³³ Ibid.

²³⁴ New Zealand Police Manual *National Reporting Standard: What to record for a Youth Case*.

- the name of the school or educational institution that the young person is enrolled at and the attendance at that school/educational institution, the date and type of enrolment, or if not enrolled, the reason for this.
274. When an action has been decided in a youth case, the following must be recorded:
- the type of action decided
 - the officer's identification number
 - the dates and outcomes of any family group conference
 - details of any alternative action taken.
275. The use of a Youth Offending Risk Screening Tool (YORST) is also recorded in the NIA. A YORST evaluates a young person's risk of offending by taking into account their background and highlighting factors that may contribute to a risk of offending, and can be used to help determine the appropriate response to offending in any given case.
276. A YORST assessment is shared between Child, Youth and Family and Police, allowing each agency to make better and more informed decisions about how to deal with a particular young person. The use of a standardised assessment tool enables serious consideration to be given to the causes of offending in any given case and provides a basis for best practice and inter-agency collaboration. While the NIA records this limited youth-specific information it does not include any youth-specific record of the custodial experience nor is any reasoning provided for the course of action taken in a given case. If a YORST assessment is made by Police that information is then shared with Child, Youth and Family.
277. It is essential that decisions about the detention of a young person in Police custody are fully informed. The development of an information sharing protocol between Child, Youth and Family and Police would provide a basis for the continued development and strengthening of information sharing interfaces between the two agencies regarding the custody of a young person. A protocol could cover, for example: the sharing of NIA information about a young person with Child, Youth and Family; the development of an electronic interface between the Police and Child, Youth and Family; and collation and sharing of information regarding young people in Police detention for less than 24 hours. It is understood that there is ongoing work with the Ministry of Justice on potential amendments to schedule 5 of the Privacy Act which will enable more sharing to occur. It may be also that proposed amendments to the Privacy Act provide a framework for developing a protocol. In any case this piece of work should be prioritised.

Recommendation 17 – That Police ensure that the youth-specific information recorded in NIA includes youth-specific records of Police custody and provides reasoning for the course of action taken.

Recommendation 18 – That Police and Child, Youth and Family develop an information-sharing protocol specifically with regard to youth custody issues.

Police Custody Module

278. The Police Custody Module is an electronic database that assists watchhouse staff with the custody process. At each step of the process information is recorded and stored in the custody module and, consequently, this information is available to watchhouse staff in future cases throughout the country. The module has significantly enhanced the quality of data collection carried out in the watchhouse and the accessibility of that data. The ease with which this information can be shared and accessed across all Police custodial sites is of great benefit to Police. The custody module was piloted in 2008-2009. It was made available to all Police custodial sites in 2010 and was introduced in the final three districts by the end of 2011.
279. Furthermore, because the custody module makes records from the very beginning of the custodial process, information regarding prisoners in a Police cell for less than 24 hours is available. However, this information is not shared or evaluated. Child, Youth and Family policy requires that they respond when they are advised that a young person is being held in cells, regardless of the time-frame but they are reliant on Police advice as to the detention. Police advise Child, Youth and Family of a young person's detention once he or she has been held for longer than 24 hours. This means that Child, Youth and Family may never be informed of, or involved with, a young person who has been in and out of Police custody numerous times but never for longer than 24 hours. (Unless the young person is already known to Child, Youth and Family for care and protection reasons.) Just as Police notify all cases where children are part of a family that has come to their notice for Family Violence reasons, Police could notify each young person who has spent time in Police cells. Arrangements for this to happen could be agreed within the Memorandum of Understanding between Police and Child, Youth and Family.

Recommendation 19 – Police and Child, Youth and Family make arrangements for Police to make a notification or “report of concern” each time a young person spends time in Police custody.

280. A youth-specific custody module is currently being developed by the Police and its implementation is being considered by an internal approval process. Not only would a youth-specific custody module greatly improve the quality of the data able to be collected on young people in Police detention, it would also capture those young people held for less than 24 hours. The prototype being developed by the Police initiates at the receipt of the young person into custody. From this point it would be possible to ensure that every step of the custody process under the CYPFA is recorded and therefore adhered to. In particular, it could record that:
- the arrest meets the conditions of section 214 and that an electronic notification is sent to the Commissioner
 - the young person's parents/caregivers are notified as soon as possible
 - if bail is denied, a Child, Youth and Family social worker is contacted and the young person meets the criteria set out in section 235

- if the young person is to spend longer than 24 hours in Police detention the conditions of section 236 are met and an electronic notification is sent to the Commissioner.
281. By incorporating these as mandatory requirements, the youth-specific custody module could address some of the concerns raised by submissions, for example that there has been contact with family, and ensure that section 214 and section 236 reports are consistently made. While section 236 reporting has increased since it has been possible to submit electronic reports, there are still many instances where these reports are not made meaning that Police figures on young people in Police detention for over 24 hours can differ significantly to Child, Youth and Family figures. The data from the youth-specific custody module could also be used to corroborate Child, Youth and Family records on the involvement of the social worker in Police custodial situations.

Recommendation 20 – That Police implement the youth-specific custody module to ensure that the correct processes are followed in every case and to increase the consistency and standard of record-keeping.

CYRAS

282. The CYRAS database is Child, Youth and Family's full case recording system. It allows records on all of Child, Youth and Family's interaction with an individual child or family to be maintained and constantly updated. Cases are allocated to individual social workers who are then responsible for recording any contact they make with that client, including any interaction with a young person while in Police detention. Child, Youth and Family also operate an after-hours duty system. If a duty social worker visits a young person in a Police cell, they are required to input a case note and alert that young person's social worker. Where a young person is held in Police detention certain information must be recorded in CYRAS:
- (i) Where Police have arrested and detained a child or young person for less than 24 hours and wish to place that child or young person in the custody of the Chief Executive under section 235 of the CYPFA, a Youth Justice Intake must be recorded in CYRAS and a placement record must be opened.
 - (ii) When a young person is in Police custody for more than 24 hours:
 - the name of the young person
 - the circumstances surrounding Police detention
 - time and date of social work visits, and Cage Kessler Suicide Screen results
 - number of days in cells
 - extent of family and youth advocate contact with young person
 - general attitude and morale
 - whether their personal needs are being met.
283. Child, Youth and Family also provide daily status reports on bed availability in each of the four youth justice residences. This information is sent to Child,

Youth and Family staff and staff at the Ministry of Justice. However, no arrangement is currently in place for Police to receive this information.

Recommendation 21 – That Child, Youth and Family send daily status reports on bed availability in each of the four youth justice residences to the Police.

284. CYRAS provides an excellent framework for the management of young people in custodial facilities, including Police stations. Nevertheless, in order for this framework to be effective it must be properly complied with at the operational level. Child, Youth and Family policy requires that a social worker visit a young person at least once every 24 hours that they are in Police detention. However, as already noted, these visits do not occur as frequently as required, or if they do occur, the visits are not always recorded.
285. A review of 40 CYRAS records for young people who spent over 24 hours in Police detention between July 2009 and December 2010 found that all 40 had the Police cells recorded as a placement in their CYRAS records. In all cases CYRAS provided an accurate record of their length of stay in Police detention. Sixty percent of the young people whose files were reviewed had a record of a Cage Kessler Suicide Screen (CKS) screen being undertaken by a social worker. However, some of those who had a CKS screen recorded had no records of any social worker visits, and only 18% had records of the required daily visits. One young person spent a week in Police detention but had only one recorded visit. Another file outlined details of an alleged assault by a Police officer, but no outcome of this allegation, no injuries were viewed by the social worker and the allegation was passed on to Police. Eight of the 40 files surveyed had examples of excellent case notes. Some files used a template with headings to ensure that a comprehensive assessment was made of the young person's situation. In the Northern region, a checklist has been developed to ensure that visits are consistently recorded and include all the relevant information.
286. It is clear that, apart from the required social worker visits not taking place, those that do occur are not being consistently or accurately recorded. All social workers dealing with young people in Police custodial situations need to be aware of the procedures required when visiting a young person in Police custody. Child, Youth and Family are in the process of addressing this issue by adopting electronic technology that would allow for the information gathered in assessments to be automatically transferred onto CYRAS.

Recommendation 22 – That Child, Youth and Family develop a national compliance framework to ensure that social worker visits to young people in Police cells are accurately and consistently recorded, subject to a quality assurance process, and include completion of a mandatory checklist, the requirements of which could be automatically flagged in the CYRAS database.

Monitoring at the local level

287. Currently, youth justice regional practice advisors from Child, Youth and Family report records of young people in Police detention for greater than 24 hours

not only internally but also to external stakeholders such as the Principal Youth Court Judge. Weekly reports are also submitted to the Minister for Social Development. Generally, these reports include the information collected under CYRAS. There does not appear to be any involvement of the Police in this reporting.

288. Local mechanisms for monitoring the use of Police detention for young people are needed. In addition to Child, Youth and Family and Police involvement, it would be good to have an element of independent oversight from the community. Reviewing youth detention records at the operational level with feedback to both Police and Child, Youth and Family, and with input from local health and social services, could help to ensure that those involved in the day to day care of young people in Police cells are well informed and supported. This task could be performed, for example, by Youth Offending Teams (YOTs) or a similar interagency group.²³⁵
289. Thirty-three YOTs operate throughout New Zealand providing a forum for the principal agencies involved in the operation of the youth justice system to identify local issues and to co-ordinate with each other to find solutions.²³⁶ Each YOT is required to have two representatives from Police, Child, Youth and Family, Health and Education. Ministry of Justice guidelines suggest that this might be: a Police youth aid officer and youth aid or station sergeant; a Child, Youth and Family youth justice coordinator and practice leader, site manager or youth justice manager; a medical clinician and District Health Board manager; and a manager and practitioner from either Group Special Education or National Operations at the Ministry of Education.²³⁷ All of these agencies have an interest in youth justice and specifically in the Police detention of young people which is generally only used for recidivist offenders who are more likely to have underlying health and education issues. YOTs must meet monthly and are responsible for:²³⁸
 - ensuring coordination and collaboration between key agencies and providers, making sure the right people are connected and working well together
 - supporting best practice through joint training, problem solving and information sharing
 - monitoring overall outcomes for children and young people in the youth justice system and designing system improvements
 - monitoring data about local level offending and re-offending trends
 - linking with the wider community – identifying service gaps, developing initiatives to solve identified problems and educating the community about the youth justice system.
290. The Youth Justice Inter-agency Group, a group of senior officials from the relevant national offices, is charged with overseeing the YOTs and ensuring they run effectively. Additionally, there is an adviser at the Ministry of Justice

²³⁵ YOTs are currently under review by the Ministry of Justice.

²³⁶ See Ministry of Justice *Youth Offending Strategy* (Ministry of Justice, 2004).

²³⁷ See Ministry of Justice *Guidelines for Youth Offending Teams* available online at <<http://www.justice.govt.nz/policy/crime-prevention/youth-justice/e-flashes/e-flash-2#6>>.

²³⁸ Ibid.

who is available to provide support and guidance to the YOTs and to aid communication between the teams and the Youth Justice Inter-agency Group.²³⁹

291. YOTs provide a platform for interagency collaboration at a local and national level. However, under the current framework they do not have any specific tasks and it is up to each to implement their own youth justice initiatives. This has led to a general lack of understanding within the teams as to their particular purpose. This issue was highlighted in a 2007 evaluation report, where one member submitted:²⁴⁰

“That [the purpose] is one we all struggle with all the time. I always start off and explain to people that it was mandated by the Government that we should meet, so that is the purpose, but that is actually the bottom line. We will meet because we have been told that we have to meet ... the second purpose is that we have dialogue, that we have good relationships between these major sectors” (YOT member).

292. One of the recommendations made by the 2007 evaluation report was that there needs to be greater clarity of purpose, role and expected outcomes for YOTs.²⁴¹ One specific task YOTs could be assigned is monitoring records of young people in Police detention in order to provide an additional check on trends in compliance. This role would fit well with their broad responsibility for monitoring outcomes for children and young people in the youth justice system and any privacy concerns could be addressed by removing the identifying particulars of young people from any information handed over to YOTs.

Recommendation 23 – That Police and Child, Youth and Family develop a protocol to ensure that records kept of young people in Police detention are monitored at the operational level.

The Youth Justice Dataset

293. As already discussed²⁴², this review has not benefited from clear data on the contributing factors to every young person’s detention in each case. Neither has it been possible to identify the number of young people being held in Police detention under section 236 certificates nor to compare this to the number of young people being held under section 238(1)(e) orders.²⁴³ Further, the submissions received towards this review expressed a general concern over the lack of consistently recorded, accurate and up-to-date youth justice data:

“The lack of more up-to-date information on young people in custody is frustrating” (youth justice academic).

²³⁹ See Anne Harland and Amanda Borich *Evaluation of Youth Offending Teams in New Zealand* (Ministry of Justice, 2007).

²⁴⁰ Ibid, at [2.1].

²⁴¹ Ibid, at [9.2].

²⁴² See paragraphs 161, 165, 167, 172 and 182 above.

²⁴³ From 1 January 2011 to 31 December 2011 246 s 238(1)(e) orders were made. It is important to note that multiple orders may be made in relation to one young person’s Police cell remand.

“A lack of good quality information on the offending and reoffending rates of young people has been an issue of concern to the New Zealand justice sector for a number of years”.²⁴⁴

“Effective and proactive policy and programme development requires reliable, robust and readily available data. The management of custodial remands would significantly benefit if a seamless interagency information system existed, developed between CYF, Police and Courts. This collaborative system would allow each agency to add to, not duplicate, information already in the system”.²⁴⁵

294. Child, Youth and Family do collect and collate data for young people held in cells for over 24 hours. This information is sent to the Minister for Social Development, the Principal Youth Court Judge and is logged on a database where other stakeholders such as the Office of the Children’s Commissioner can locate it. However, this information is not publically available. The Ministry of Justice’s Youth Justice Dataset, first piloted in 2004,²⁴⁶ is a developing initiative designed to collate youth justice data from the Youth Court and the Police.²⁴⁷ The intention is that the Dataset will also contain information from Child, Youth and Family in the future.²⁴⁸ The data collected since its inception has enabled the 2010 publication of youth justice statistics in *Child and Youth Offending Statistics 1992-2008*.²⁴⁹
295. A feature of the Youth Justice Dataset is that young people are given a unique identifier code which is used by the Police and the Youth Court in order to gain a holistic picture of the young person’s journey through the youth justice system.²⁵⁰ It is hoped that in the future this will allow information to be shared with Child, Youth and Family as well as between the youth and adult justice systems.²⁵¹
296. At present the Youth Justice Dataset does not collate information concerning young people who are held in custody while on remand, either in the Police station or a Child, Youth and Family residence.²⁵² A further limitation of the Youth Justice Dataset is that it was never intended to provide assistance at the operational level. Instead, its purpose is limited to providing statistics in aid of research. In its 2004 pilot study the authors stated that *“any deficiencies in the case management information that is available to operational agencies would*

²⁴⁴ Philip Spier and Tanya Segessenmann *Youth Justice Minimum Dataset: Data Integration Pilot* (Ministry of Justice, 2004) at 7.

²⁴⁵ Ministry of Social Development *Review and Analysis of Youth Justice Custody Placements of Children and Young People under the Children Young Persons and Their Families Act 1989: Saxon Report* (Ministry of Social Development, 2006) at 35. See also Ministry of Justice *Child and Youth Offending Statistics in New Zealand: 1992 to 2008*, above n 81, at [1.6].

²⁴⁶ Spier and Segessenmann, above n 243.

²⁴⁷ Ibid.

²⁴⁸ Ministry of Justice *Child and Youth Offending Statistics*, above n 81, at [1.6].

²⁴⁹ Ibid.

²⁵⁰ Ibid.

²⁵¹ Ibid.

²⁵² Statistics New Zealand *Review of Crime and Criminal Justice Statistics Report* (Statistics New Zealand, 2009) at 45.

*be better addressed through agreed electronic interfaces between the operational agencies”.*²⁵³

297. To aid monitoring, research and evidence-based policy development Police and Child, Youth and Family should contribute data relating to young people in Police detention for inclusion in the Youth Justice Dataset. This would make that information publically available. At a minimum, data on the number of section 236 certificates and section 238(1)(e) orders made, and any use of section 242 of the CYPFA should be included.

Summary – Monitoring to improve practice

The effective operation of the youth custody process under the CYPFA depends on the timely and accurate recording and sharing of youth specific information between Police and Child, Youth and Family.

While the Police and Child, Youth and Family databases provide a strong foundation for collaboration, more consistent data recording and collection, and information sharing protocols, are needed if decision-making about detaining a young person is to be fully informed in every case.

Improved recording processes would also have the added benefit of serving as checklists to prompt good practice and enable better monitoring of trends in practice so that, where necessary, improvements could be made. Aggregated data could also then be made available to aid monitoring, research and evidence-based policy development.

Recommendation 24 – That Police and Child, Youth and Family should contribute data relating to young people in Police detention for inclusion in the Youth Justice Dataset in order to make that information publically available, aiding monitoring, research and evidence-based policy development.

²⁵³ Spier and Segessenmann, above n 243, at 19.

CONCLUSION

298. Police detention can be a frightening and demoralising experience for young people. This is particularly so when it is for any significant length of time. Submissions for this joint thematic review have highlighted that conditions in Police cells are generally inadequate to cater for young people's needs and that Police could improve the treatment of young people in their care. There was a lot of good practice noted by submissions too but the positive interaction that does already happen is by no means universal. This is problematic as Police behaviour towards young people occurs at a formative stage in their lives and will likely have an ongoing effect on the interactions they will have with Police in the future.
299. Police cells are intended for the short-term detention of adults awaiting bail or transfer to a remand facility. They are not suitable for long-term detention of any prisoner and are particularly unsuitable for the detention of young people. The continued use of Police cells for the detention of young people risks being in breach of New Zealand's international obligations and goes against the fundamental principles that underpin the CYPFA. Nevertheless the CYPFA does provide for this practice and, short of amending the statute, some young people will continue to spend time in Police detention as a legitimate remand option, albeit one of last resort. Therefore, the object of this review has been to establish recommendations aimed at reducing the number of young people spending time in Police cells and, for situations where this cannot be avoided, ensuring that the conditions of detention, and treatment of those young people, are consistent with internationally recognised obligations and guidelines.
300. Despite the improvements made in recent years, too many young people are still spending too long in Police cells. Without constant attention and monitoring, issues relating to children and young people's rights can be lost sight of without being adequately addressed.
301. While it must be recognised that the problems associated with the detention of young people in Police cells often stem from wider social issues that come into play much earlier than first contact with Police, there is much that can be done to improve the standards of Police detention of young people. It is hoped that this review, and the recommendations it makes, will contribute to continued, ongoing improvement and encourage Police and Child, Youth and Family to engage with other relevant agencies, evaluate operational policy and contribute the necessary resources to ensure young people spend minimal periods of time in Police detention.

RECOMMENDATIONS

Recommendation 1 – That Police continue to work with the IPCA to improve conditions of detention and the treatment of young people while in their custody and to ensure compliance with OPCAT expectations.

Recommendation 2 – That Police improve the collection, evaluation of, and provision of feedback on, section 214 reports, at district and national levels.

Recommendation 3 – That Police record their decisions and reasoning in cases where Alternative Action is taken in order to identify trends in decision-making and address district variations.

Recommendation 4 – That Police and Child, Youth and Family work together to collate, evaluate and identify trends from section 236 reports at district and national levels.

Recommendation 5 – That Police and Child, Youth and Family work together to develop national guidelines on identifying and using local options for transporting young people between residences, their place of arrest and court.

Recommendation 6 – That Child, Youth and Family undertake a review of, and develop a coherent strategy around, the provision of suitable facilities for the safe detention of young people so that social workers have a range of options to consider when looking for placements for young people who are alleged to have offended and that particular consideration be given to:

- extending the work of ‘hubs’ to cover Youth Justice clients
- enabling greater use of section 238(1)(c) orders
- expanding the use of Supported Bail, especially where it may help to secure placement with family/whānau or an approved caregiver
- prioritising the resourcing of such initiatives.

Recommendation 7 – That the IPCA work with the Ministry of Justice to draw the attention of judges and justices of the peace to the possibility of making 238(1)(e) orders which only remain in effect until a Child, Youth and Family placement becomes available.

Recommendation 8 – That the Children’s Commissioner review the pamphlet provided to family/whānau who act as nominated persons to ensure this includes adequate information about the role including the importance of seeking legal advice.

Recommendation 9 – That the Children’s Commissioner work with other relevant agencies to review the nominated persons scheme and assess whether it is independently administered and whether there would be merit in extending the role of a nominated person so that they are involved in the custody process.

Recommendation 10 – That when building any new Police stations, or making alterations to existing ones, Police give consideration to how the needs of young people in custody, including the right to be kept separate from adult detainees, might be better planned for and accommodated.

Recommendation 11 – That Police work with Child, Youth and Family and the Ministry of Justice to minimise the need to transport young people to and from court, especially when the young person has been placed in custody a long way from the court where they are to appear.

Recommendation 12 – That Police develop a comprehensive and nationally consistent youth-specific training programme for all front line staff, custodial staff and supervisors.

Recommendation 13 – That Police ensure that authorised officers receive the same youth-specific training recommended for all custodial staff.

Recommendation 14 – That Child, Youth and Family ensure that all care and protection social workers who cover after-hours duty receive nationally consistent training on youth custody procedures.

Recommendation 15 – That Police and Child, Youth and Family develop a joint training plan enabling Police officers and social workers to effectively carry out their roles in the youth custody process, including refresher courses that take into account any developments in the law and practice.

Recommendation 16 – That Police and Child, Youth and Family review how youth custody issues are treated within their Memorandum of Understanding to ensure currency as well as ongoing analysis and evaluation of policy and operational compliance.

Recommendation 17 – That Police ensure that the youth-specific information recorded in NIA includes youth-specific records of Police custody and provides reasoning for the course of action taken.

Recommendation 18 – That Police and Child, Youth and Family develop an information-sharing protocol specifically with regard to youth custody issues.

Recommendation 19 – That Police and Child, Youth and Family make arrangements for Police to make a notification or “report of concern” each time a young person spends time in Police custody.

Recommendation 20 – That Police implement the youth-specific custody module to ensure that the correct processes are followed in every case and to increase the consistency and standard of record-keeping.

Recommendation 21 – That Child, Youth and Family send daily status reports on bed availability in each of the four youth justice residences to the Police.

Recommendation 22 – That Child, Youth and Family develop a national compliance framework to ensure that social worker visits to young people in Police cells are accurately and consistently recorded, subject to a quality assurance process, and include completion of a mandatory checklist, the requirements of which could be automatically flagged in the CYRAS database.

Recommendation 23 – That Police and Child, Youth and Family develop a protocol to ensure that records kept of young people in Police detention are monitored at the operational level.

Recommendation 24 – That Police and Child, Youth and Family contribute data relating to young people in Police detention for inclusion in the Youth Justice Dataset in order to make that information publically available, aiding monitoring, research and evidence-based policy development.

APPENDIX 1

Applicable International Law and Guidance

International law is made up of a combination of binding and non-binding international instruments.

Conventions, treaties and reservations

Treaties are legally binding agreements between states. If a state agrees to be bound by a treaty, they must adhere to its provisions. Upon becoming bound, or at a later date, states may also make reservations on their commitment to adhere to the treaty, thereby limiting the legal effect of certain provisions of the treaty within that state.

United Nations resolutions and other non-binding international instruments

Guidelines, declarations and other non-binding international instruments are developed as a model of best practice. They are recommendations and, as such, they are not strictly binding on states.

Where New Zealand has agreed (through signature and ratification) to be bound by an international convention, it is legally obligated to adhere to its provisions. While guidelines do not have the same binding legal force, they play an important part in the development of international law and norms. Therefore, compliance with their provisions is expected.

International Instruments Specific to Children and Young People in Detention: the “Beijing Rules”, the “Havana Rules”, the “Riyadh Guidelines”

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (“Havana Rules”), and the United Nations Guidelines for the Prevention of Juvenile Delinquency (“The Riyadh Guidelines”) establish guidelines for states to follow to ensure that the rights of children and young people in detention are upheld.

The specific measures contained in these instruments are:

1. Deprivation of liberty should be a last resort, and for the shortest appropriate period of time.
 - Deprivation of liberty of children, including pre-trial detention, shall be in conformity with the law, and used only after careful consideration, as a last resort, for the shortest possible period of time and in exceptional circumstances;²⁵⁴ no child shall be deprived of his/her liberty arbitrarily.²⁵⁵

²⁵⁴ *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* GA Res 40/33 (1985), rule 17.1[*Beijing Rules*]; *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* GA Res 45/113 (1990), rule 2: detention shall not be used unless the juvenile has been involved in serious acts of violence or repeated commission of other serious offences and there is no other appropriate response [*Havana Rules*]; *Beijing Rules*, rules 13.1 and 17.

²⁵⁵ *UNCROC*, art 37(b); *Beijing Rules*, rule 17(1); *Havana Rules*, rule 2.

- An effective package for alternatives to detention must be available.²⁵⁶ Such alternative measures to detention pending trial include: close supervision, intensive care or placement within a family or in an educational setting or home.²⁵⁷ Governments should take measures to promote family cohesion and harmony and to discourage the separation of children from their parents unless circumstances affecting the welfare and future of the child leave no viable alternatives.²⁵⁸
2. All standard minimum rules relating to the detention of adults apply to children. In addition, there should be child-specific rules focusing on the well-being of the child.²⁵⁹
 - Each state should establish a set of laws, rules and provisions specifically applicable to child offenders and institutions and bodies entrusted with the functions of the administration of youth justice.²⁶⁰ Governments should enact specific laws and procedures to promote and protect the rights and well-being of all children.²⁶¹
 - Independent inspectors and medical inspectors should regularly report on compliance with standards.²⁶²
 - The well-being of the child will be the guiding factor in his or her particular case.²⁶³ Reaction to offending should be proportionate and there must be appropriate scope for discretion.²⁶⁴ Detention should take full account of the child's particular needs and requirements according to age, personality, sex, type of offence, mental and physical health.²⁶⁵
 3. Children in detention should be kept separate from adults.
 - Children in detention should be separated from adults unless they are members of the same family.²⁶⁶
 4. Specialised training is required.
 - Law enforcement, and other personnel dealing with children, should be specially trained to respond to their needs.²⁶⁷ Contact between law enforcement and children should be managed in such a way as to avoid harm and promote well-being.²⁶⁸

²⁵⁶ *Beijing Rules*, rule 13.2.

²⁵⁷ *Beijing Rules*, rule 13.2.

²⁵⁸ *United Nations Guidelines for the Prevention of Juvenile Delinquency* GA Res 45/112, art 17 [*Riyadh Guidelines*].

²⁵⁹ *Beijing Rules*, rules 7, 13.3 and 9.

²⁶⁰ *Beijing Rules*, rule 2.1.

²⁶¹ *Riyadh Guidelines*, art 52.

²⁶² *Havana Rules*, rules 72 – 74.

²⁶³ *Beijing Rules*, rule 17.1(d).

²⁶⁴ *Beijing Rules*, rules 5.1 and 6.1.

²⁶⁵ *Havana Rules*, rule 28.

²⁶⁶ *Havana Rules*, rules 17 and 29; *Beijing Rules*, rule 13.4.

²⁶⁷ *Riyadh Guidelines*, art 58; *Havana Rules*, rules 81 – 87; *Beijing Rules*, rule 12.

²⁶⁸ *Beijing Rules*, rule 10.3.

5. Cruel, inhuman or degrading treatment is prohibited.
 - Disciplinary procedures amounting to cruel, inhuman or degrading treatment is prohibited. These could include: corporal punishment; dark cells; solitary confinement; reduction of diet; denial of contact with family; and labour as punishment.²⁶⁹
 - Restraint and force should only be used in exceptional circumstances, as a last resort, as explicitly authorised, for the shortest possible period of time and not as means of humiliation or degradation. Carrying of weapons by personnel around children should be prohibited.²⁷⁰
6. Communication and contact with family and others should be allowed.
 - Upon apprehension of a child, parents/guardians must be notified within the shortest time possible.²⁷¹
 - The families of children in detention should be informed of their health and changes in their health.²⁷²
 - Children in detention should have the right to receive regular and frequent visits and correspondence, particularly from family,²⁷³ and to have adequate communication with outside world.²⁷⁴
7. Access to legal and other assistance and services should be allowed.
 - Children in detention have the right to prompt access to private and confidential legal and other appropriate assistance, including free legal aid.²⁷⁵
 - Children in detention shall receive care, protection and all necessary individual assistance that they may require, including: social, educational, vocational, psychological, medical and physical.²⁷⁶ They have a right to medical care, including mental health, medication, and to have their dietary requirements met.²⁷⁷ As soon as possible after admission, each child should be interviewed, and a psychological and social report identifying factors relevant to specific type and level of care required.²⁷⁸
 - Children in detention should have the opportunity to make requests and complaints, including the right to challenge the legality of the deprivation of liberty.²⁷⁹ There should be an independent office to receive and investigate such complaints, and children should have the right to request assistance from family members, legal counsellors, humanitarian groups, or others in order to make a complaint.²⁸⁰

²⁶⁹ *Havana Rules*, rule 67; *Riyadh Guidelines*, art 54.

²⁷⁰ *Havana Rules*, rules 63 – 65.

²⁷¹ *Beijing Rules*, rule 10.1.

²⁷² *Havana Rules*, rules 56 and 57.

²⁷³ *Havana Rules*, rule 60; *Riyadh Guidelines*, art 17.

²⁷⁴ *Havana rules*, rules 59-62.

²⁷⁵ *Havana rules*, rule 17.

²⁷⁶ *Beijing Rules*, rule 13.5.

²⁷⁷ *Havana Rules*, rules 49 – 55.

²⁷⁸ *Havana Rules*, rule 27.

²⁷⁹ *Havana rules*, rule 17(a); *UNCROC*, art 40(2).

²⁸⁰ *Havana Rules*, rules 75 – 78.

- A judge/competent authority shall consider the release of a child detained without delay.²⁸¹
8. A safe and healthy environment should be provided.
 - Children in detention have the right to a safe physical environment.²⁸²
 - Children in detention should have: regularly and unobtrusively supervised sleeping accommodation to ensure safety;²⁸³ clean, separate and sufficient bedding;²⁸⁴ sanitary installations enabling them to comply with their physical needs in privacy and in a clean and decent manner;²⁸⁵ safe-keeping of personal effects;²⁸⁶ adequate clothing;²⁸⁷ clean drinking water at all times; satisfactory food at normal meal times, taking into account hygiene, health, and as far as possible, religious and cultural requirements;²⁸⁸ and a suitable amount of time for daily exercise and recreation.²⁸⁹
 9. Complete, secure and confidential records should be kept.
 - Complete and secure records of children in detention should be kept, including the following:²⁹⁰ information on the identity of the child; the fact of and reasons for detention; the day and hour of admission transfer and release; details of the notifications given to parents/guardians; and details of the known physical and mental health problems, including drug and alcohol abuse. All reports and records should be confidential.²⁹¹

²⁸¹ *Beijing Rules*, rule 10.2.

²⁸² *Havana Rules*, rule 32.

²⁸³ *Havana Rules*, rule 33.

²⁸⁴ *Havana rules*, rule 33.

²⁸⁵ *Havana Rules*, rule 34.

²⁸⁶ *Havana Rules*, rule 35.

²⁸⁷ *Havana Rules*, rule 36.

²⁸⁸ *Havana Rules*, rule 37.

²⁸⁹ *Havana Rules*, rules 17 and 47.

²⁹⁰ *Havana Rules*, rule 21.

²⁹¹ *Havana Rules*, rule 19.

Other International Instruments relating to Rights of People in Detention

All international instruments relating to the rights and treatment of prisoners and detainees apply equally to children and young people.²⁹² These instruments establish basic procedural rights, rights to legal and other assistance, as well as rights to clean water, food, adequate clothing and bedding and sanitation. Some of these instruments also contain special provisions relating to children and young people in detention.

- The International Covenant on Civil and Political Rights states that all children deprived of their liberty shall be accorded treatment appropriate to their age and legal status, separated from adults and brought as speedily as possible for adjudication.²⁹³
- The Standard Minimum Rules for the Treatment of Prisoners states that young prisoners should be kept separate from adults, and that they should only sleep in dormitories where suitable and with regular supervision.²⁹⁴
- The Code of Conduct for Law Enforcement Officials advises that use of firearms should be considered an extreme measure and every effort should be made to exclude their use, especially against children.²⁹⁵
- The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states that if a child has been arrested or transferred from one place of detention or imprisonment to another, the competent authority shall, on its own initiative, notify parents or guardians.²⁹⁶

²⁹² See: *Basic Principles for the Treatment of Prisoners* GA Res 45/111 (1990); *Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* GA Res 37/114 (1982); *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders 7 September 1990); *Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care* GA Res 46/119 (1991); *Advisory Council of Jurists to the Asia Pacific Forum of National Human Rights Institutions Minimum Interrogation Standards* (Reference on Torture: Final Report, August 2005) at 20; European Committee for the Prevention of Torture *The CPT Standards: 'Substantive' sections of the CPT's General Reports CPT/Inf/E (2002)*; United Nations Human Rights Committee CCPR *General Comment No. 20: Article 7* (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) 10 March 1992; United Nations Human Rights Committee CCPR *General Comment No. 21: Article 10* (Humane Treatment of Persons Deprived of Their Liberty) 10 April 1992; *Convention on the Elimination of Discrimination Against Women* (adopted 18 December 1979, entered into force 3 September 1998); *International Convention on the Elimination of All Forms of Racial Discrimination* (adopted 21 December 1965, entered into force 4 January 1969); *Convention on the Rights of Persons with Disabilities* (adopted 13 December 2006, entered into force 3 May 2008).

²⁹³ *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976), arts 10(2)(b) and 10(3). New Zealand has entered the same reservation on the International Covenant on Civil and Political Rights age-mixing provision as on the age-mixing provision in article 37(c) of the *UNCROC*.

²⁹⁴ *United Nations Standard Minimum Rules for the Treatment of Prisoners* GA/RES/45/110, A/RES/45/110 (1990), arts 8(d), 9(2), and 85(2).

²⁹⁵ *United Nations Code of conduct for law enforcement officials* GA/RES/34/169, A/RES/34/169 (1980), art 3.

²⁹⁶ *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* GA/RES/43/173, A/RES/43/173 (1988), art 16.

International reports

Many international reports contain discussions of these standards and state obligations. The reports reiterate the importance of a child-orientated youth justice system recognising children as the subject of fundamental rights and freedoms and with the best interests of the child as a primary consideration.²⁹⁷

Other points raised include:

- the importance of giving children the right to participate in proceedings, to be informed and aware of processes, and to have their views taken into account;²⁹⁸
- the importance of ensuring children are aware of their rights and can access mechanisms to protect their rights;²⁹⁹
- the fundamental nature of the role of, and access to, family;³⁰⁰
- that Police detention of children should be limited to allowing the investigation of an offence and gathering initial information from the suspect child and/or ensuring the child's attendance before court;³⁰¹
- that professionals involved in the youth justice system should be adequately and appropriately trained and there should be codes of conduct and clear standards of practice that are adhered to;³⁰²

²⁹⁷ Committee on the Rights of the Child *The Administration of Juvenile Justice [The Administration of Juvenile Justice]* CRC/C/43, Annex VIII, 10th Session, (1995); Carolyn Hamilton et al. *Administrative Detention of Children: a global report* (The Children's Legal Centre and UNICEF, March 2011), section 3; Committee on the Rights of the Child *General Comment No 10* CRC/C/GC/10 (2007).

²⁹⁸ Committee on the Rights of the Child *The Administration of Juvenile Justice* CRC/C/43, Annex VIII, 10th Session, (1995); Committee on the Rights of the Child *General Comment No 10* CRC/C/GC/10 (2007); Paulo Sergio Pinheiro *Report of the independent expert for the United Nations study on violence against children* A/61/299 (2006), at [103].

²⁹⁹ Paulo Sergio Pinheiro *Report of the independent expert for the United Nations study on violence against children* A/61/299 (2006), at [112].

³⁰⁰ Committee on the Rights of the Child *The Administration of Juvenile Justice*, above n 214; Carolyn Hamilton et al. *Administrative Detention of Children: a global report* (The Children's Legal Centre and UNICEF, March 2011), section 3.5; Committee on the Rights of the Child *General Comment No 10* CRC/C/GC/10 (2007).

³⁰¹ Carolyn Hamilton et al. *Administrative Detention of Children: a global report* (The Children's Legal Centre and UNICEF, March 2011), section 3.

³⁰² Paulo Sergio Pinheiro *Report of the independent expert for the United Nations study on violence against children* A/61/299 (2006), at [54] and [101]; Office of the High Commissioner for Human Rights :1995/41; *Human Rights in the Administration of Justice* GA Res 50/181 (1996).

- that all children in conflict with the law must be treated equally. Particular acknowledgement must be given to the special vulnerability of indigenous children, girl children, disabled children, and children belonging to other minorities. These children and their families should be provided with culturally-based support and care services, and social workers ought to have adequate training to work effectively with them. All professionals involved in the administration of youth justice should receive proper training in order to avoid discrimination against these groups;³⁰³
- that governments are encouraged to provide training in human rights and youth justice to all professionals concerned with youth justice matters, including Police.³⁰⁴

³⁰³ Committee on the Rights of the Child *General Comment No 10*, above n 214, at [6]; *Report of the Independent Expert for the United Nations Study on Violence against Children* (A/61/299) (2006) at [112].

³⁰⁴ Office of the High Commissioner for Human Rights: 1995/41; *Human Rights in the Administration of Justice*, above n 219.

APPENDIX 2

Children, Young Persons and Their Families Act 1989: general principles

The general principles in the Children, Young Persons and Their Families Act 1989 are that³⁰⁵:

- (a) wherever possible, a child's or young person's family, whānau, hapū, iwi, and family group should participate in the making of decisions affecting that child or young person, and accordingly that, wherever possible, regard should be had to the views of that family, whānau, hapū, iwi, and family group:
- (b) wherever possible, the relationship between a child or young person and his or her family, whānau, hapū, iwi, and family group should be maintained and strengthened:
- (c) consideration must always be given to how a decision affecting a child or young person will affect—
 - (i) the welfare of that child or young person; and
 - (ii) the stability of that child's or young person's family, whānau, hapū, iwi, and family group:
- (d) consideration should be given to the wishes of the child or young person, so far as those wishes can reasonably be ascertained, and that those wishes should be given such weight as is appropriate in the circumstances, having regard to the age, maturity, and culture of the child or young person:
- (e) endeavours should be made to obtain the support of—
 - (i) the parents or guardians or other persons having the care of a child or young person; and
 - (ii) the child or young person himself or herself—

to the exercise or proposed exercise, in relation to that child or young person, of any power conferred by or under this Act:

- (f) decisions affecting a child or young person should, wherever practicable, be made and implemented within a time-frame appropriate to the child's or young person's sense of time.

³⁰⁵ CYPFA, s5

APPENDIX 3

NZ nominated persons pamphlet

If at any time you are not satisfied with the conduct of the interview:

- A) Tell the interviewer of your concerns.
- B) At the end of the interview, advise the police officer in charge of the station of your concerns.

DETAILS OF NOMINATED PERSON

NAME: _____

ADDRESS: _____

PHONE: _____ (home)

_____ (business)

_____ (mobile)

POLICE FORM 388A 04/09

CHILDREN, YOUNG PERSONS & THEIR FAMILIES ACT 1989

ADVICE TO

AND

DUTIES OF A NOMINATED PERSON

Information sheet for people
(of or over 20 years) supporting a child
or young person during an interview

(The term "young person" is a boy or a girl under 17 years and
a "child" is a boy or girl under 14 years of age)



NOMINATED PERSON

A police officer wants to ask

some questions.

(First name)

(Last name)

is under 17, and can ask

(First name)

to talk to an adult before the questions are asked, and to have that adult present while being questioned.

YOU HAVE BEEN ASKED TO BE THAT PERSON

YOU WILL BE TOLD:

- A) The circumstances why the child or young person is at the police station. You must understand the jeopardy the child is in; basically the seriousness of the alleged offending.
- B) If the child or young person is or is not under arrest.
- C) If not under arrest that they can leave at any time.
- D) If the child or young person has been asked to give a statement about the offence
- E) You can speak with the child or young person.
- F) You can speak with the child or young person alone, but the police officer who is guarding the young person may remain if the police consider it necessary.

THE RIGHTS OF THE CHILD OR YOUNG PERSON:

When you arrive at the police station the police officer will explain to you in language you can understand that:

- A) A statement will only be taken if the child or young person wants to make one.
- B) If the child or young person wants to make a statement, he/she can stop at any time.
- C) Any statement the child or young person makes can be used as evidence.
- D) The child or young person is allowed to talk to a lawyer and yourself. A lawyer can tell the child or young person what their rights are and give advice about whether they should answer police questions.
- E) If the child or young person makes a statement, you and/or the lawyer can be present
- F) The right to talk to a lawyer can be exercised for free at no cost to you or the child or young person.

YOU ARE ASKED TO:

- A) Support the child or young person before and during any questioning.
- B) Make sure the child or young person knows what is happening. You must be satisfied their rights have been explained and he or she understands them.
- C) Ensure the child/young person considers whether they should talk to a lawyer.
- D) During the interview make sure the child or young person is treated in a fair way, and help if he/she does not understand the person asking the questions.

APPENDIX 4

Canadian Nominated Persons Pamphlet

CAN nominated persons pamphlet available at: <www.justice.gc.ca/eng/pi/yj-jj/index.html>

If Your Child is in Trouble with the Law

Information for Parents and Guardians

This fact sheet contains general information for parents and guardians of children who are in trouble with the law. It is not intended as a substitute for professional legal advice.

If your child is in trouble with the law, it is best to seek professional legal advice as soon as possible. Having a child involved in the youth criminal justice system is stressful and confusing for both you and your child.

You can help by:

- giving your child support and encouragement through the process;
- making sure that he or she gets legal advice;
- finding out how certain decisions can affect your child, both in the short term and in the long term;
- learning how the youth justice system works and what role you can play at various stages; and
- staying informed about what is happening with your child.

The *Youth Criminal Justice Act* recognizes the important role that a parent or guardian's support and guidance play in a young person's life. That is why the Act says that parents and guardians should be kept informed of their child's involvement in the youth justice system. The Act also provides opportunities at different stages of the process for parents and guardians to get involved.

Your Child Needs Professional Legal Advice

Your child has a right to a lawyer. The *Charter of Rights and Freedoms* gives this right to anyone who is detained. The *Youth Criminal Justice Act* confirms and reinforces this right. It also says that the right to a lawyer applies at any stage of the youth justice process. This means that your child has a right to a lawyer whether he or she has been charged, arrested or detained. One of the most important things you can do to help your child is to make sure he or she has the assistance of a knowledgeable criminal lawyer as soon as possible.

Your child should have a lawyer:

- whether or not you think he or she is guilty;
- regardless of how serious you think the offence is;
- who is experienced in criminal law; and
- as soon as possible.

Getting a Lawyer

Your child has a right to a lawyer. The police must tell your child about this right upon arrest. If your child has to go to court, then he or she has a guaranteed right to a lawyer. This means that even if your child cannot afford to pay for a lawyer, the law says that he or she can get a lawyer anyway. The government will pay for the lawyer in such a case. However, in certain cases, the provincial government may seek reimbursement for the costs of the lawyer after all the court proceedings are done.

Your Child is the Client

It is important to remember that your child's lawyer works for your child, not for you, even if you are paying for the lawyer's services. Your child is the client. This means that the lawyer cannot reveal any information about the case to you without your child's consent. The lawyer's duty to maintain confidentiality about a case applies to all their clients - in this case, your child. Decisions about how to handle the case will be made by the lawyer and your child, working together.

At the Police Station

Your son or daughter has the right to consult a lawyer and to have a parent or other adult with them when being questioned by police.

Parents often – understandably – respond emotionally when they are called down to the police station to meet their child. You may intuitively want your child to “confess” right away. This is usually not the best way to help your child.

If your child is being questioned at the police station, you should:

- not try to “fix” the problem yourself;
- not try to address all of the issues immediately;
- not make statements to the police;
- not force your child to make statements to the police; and
- not encourage your child to waive his or her right to consult with a lawyer.

You should:

- recognize that your child needs professional legal advice;
- help your child obtain legal assistance as quickly as possible;
- take your child home as soon as you can;
- allow yourself some time to collect your thoughts and to calm down before taking action or making decisions; and
- provide moral and emotional support for your child, even though it may be difficult to do so.

Understanding the Possible Consequences

Your child may have to live with some long-term negative consequences as a result of his or her involvement in the youth criminal justice system.

Custody and Detention

Any amount of time spent in custody or detention can have negative effects on your son or daughter's life. Whether your child is being held while waiting to appear in court for a bail hearing or trial, or is already sentenced to custody after having been found guilty of an offence, he or she is deprived of freedom in a most serious way. Moreover, young people in custody and detention often learn negative lessons from other young or adult offenders who may have more experience with the criminal justice system. Custody and detention do not necessarily provide a "good lesson" for youth who have committed offences.

Youth Records

Many people are misinformed about the consequences of having a youth record. A common belief is that a youth record automatically disappears when a young person reaches the age of 18. This is not necessarily true. A youth record may stay open longer or may be closed sooner, depending on such factors as the type of offence, the type of sentence, and whether the youth commits another offence while the record is still open.

Having a youth record can affect your child's ability to apply to college or university, to get certain jobs and to travel to other countries, whether for work, school or pleasure.

Being Well-Informed

The youth justice system sometimes involves long and complicated processes. Your child needs to know this, and to understand the different parts of the youth justice system as well as the possible consequences he or she may face. Being well-informed will help your child make better decisions about his or her situation.

You should make sure that your child gets all the information he or she needs from the lawyer. A good idea is to help your child prepare some questions before he or she meets with their lawyer.

How to Know What's Going On

The *Youth Criminal Justice Act* says that “parents should be informed of measures or proceedings involving their children and encouraged to support them in addressing their behavior”.

Specifically, the law says that:

- parents will be notified if an extrajudicial sanction (see below) is used with their child;
- the police will notify a parent as soon as possible if their child has been arrested or detained or is required to appear in court;
- the youth court has the power to order a parent to attend court with their child, and failure to do so can result in criminal sanctions against the parent;
- before a youth court decides to detain a young person in custody while waiting for trial, the court must find out if there is a “responsible person” (see below) available to care for and supervise the child instead of placing the child in detention; and
- a youth has the right both to consult a lawyer and to have a parent or other adult present when they are being questioned by police.

Maintaining an open and honest dialogue with your child during this time will go a long way toward making sure everyone is kept informed about what is happening.

How You Can Take Part in the Process

The *Youth Criminal Justice Act* says that measures taken against young people who commit offences should:

“be meaningful for the individual young person given his or her needs and level of development and, where appropriate, involve the parents, the extended family, the community and social or other agencies in the young person’s rehabilitation and reintegration.”

Extrajudicial Measures

In order to hold young people accountable for their actions in a fair and meaningful way, the *Youth Criminal Justice Act* encourages the use of measures outside of the formal court system when appropriate. These out-of-court options are called extrajudicial measures. They include:

- the police taking no further action;
- the police giving a warning;
- the police or the Crown attorney giving a formal caution;
- the police referring the young person to an agency that can help them to make better choices; and
- extrajudicial sanctions.

Extrajudicial sanctions are the most formal type of out-of-court or extrajudicial measure. Although extrajudicial sanctions programs may differ from region to region, they usually involve a process that results in an agreement that the young person will perform specific tasks to make up for the harm caused by the offence. Your child should know that he or she must consent to participate in an extrajudicial sanctions program and that such participation results in a record that lasts for two years.

If your child is going to participate in an extrajudicial sanctions program, the people who run the program may contact you and invite you to attend too. Participating in such a program as a support person for your child is a good way for you to help.

Conferences

Whether or not your child is charged or is going to court, the *Youth Criminal Justice Act* allows for the use of conferences to help key people in the justice system make decisions about your child. Conferences can be called by judges, police officers, justices of the peace, Crown attorneys, youth workers and other decision-makers under the Act.

Usually, conferences pull together people who know the young person and who can advise the decision-maker on things like what extrajudicial measure should be used, what bail conditions should be imposed, what kind of sentence would be best, and what kind of rehabilitation plan should be set up for the youth.

If you are asked to participate in a conference, you should know that this is a good opportunity for you to be heard.

Court-based (or Judicial) Measures

If your child has been charged and is facing a court process, there are still ways that you can participate in the process.

Responsible Person

If it is possible for you to do so, one of the most effective ways you can help your child is by making sure the court knows that you are available as a “responsible person” at your child’s bail hearing. Before a youth court decides to detain a young person in custody while waiting for his or her trial, the court must find out if there is a responsible person available to care for and supervise the child instead of placing the child in detention.

Pre-sentence Report

If your child is found guilty in court, the judge will often look at a pre-sentence report before deciding on the sentence. The person who prepares this pre-sentence report (usually a youth worker) may interview a number of people who know your son or daughter to get as complete a picture as possible of your child’s situation. The judge then reads and considers this report before deciding on a sentence.

If you are interviewed by the person who is preparing the pre-sentence report, keep in mind that offering a supportive environment can go a long way toward obtaining a better result for your child.

Sentence

If your child is found guilty in court, the judge will impose a sentence. A wide range of sentences is available to the judge, from a discharge or a reprimand to a custody and supervision order. It is important that your child fully understand what is expected of him or her. For example, if your child is given a probation order, there will be conditions to follow and people to report to at certain times. It is critical that your child understand these obligations and that he or she could be charged with another offence if the conditions are violated. You should make sure that the lawyer explains all of this to your child. You can also help your child schedule and remember appointments, such as weekly meetings with the probation officer.

If your child receives a custody and supervision sentence, you should know that the *Youth Criminal Justice Act* says that the youth custody and supervision system should encourage the involvement of the young person’s family. Maintaining links with family members is important to your child’s rehabilitation and reintegration. Even though this can sometimes be difficult for everyone involved, you should encourage family members to visit your child while he or she is in custody.

When your child comes out of custody, he or she will be under supervision in the community for a certain length of time. There will be conditions to meet, and your child will need your encouragement and your support to meet these obligations.

The period following custody is often a crucial time during which a youth learns how to stay on track and to avoid earlier patterns. It is very important that your child be well supported during this critical time.

How You Can Help Your Child

- Even though it may be difficult, give your child emotional support and encouragement.
- Make sure your child has access to legal advice from an experienced criminal lawyer.
- Try to stay informed about what is happening with your child.
- Make sure your child is aware of the possible consequences of being involved in the youth criminal justice system.
- Make sure your child is informed about the different stages of the process.
- Encourage your child to ask questions.
- Learn how the process works and get actively involved.

For more information, please visit the Youth Justice Renewal page on the Department of Justice Canada Web site at the following address:
<http://canada.justice.gc.ca/eng/pi/yj-jj/index.html> or e-mail youth-jeunes@justice.gc.ca

GLOSSARY OF TERMS

BORA – New Zealand Bill of Rights Act 1990

CAT – Committee against Torture

CE – Chief Executive (Child, Youth and Family)

CKS – Cage Kessler Suicide Screen

CYPFA – Children Young Persons and Their Families Act 1989

CYRAS – Care and Protection, Youth Justice, Residences, and Adoption System

EM bail – electronically monitored bail

IPCA – Independent Police Conduct Authority

NIA – National Intelligence Application

NPM – National Preventive Mechanism

OPCAT – Optional Protocol to the Convention against Torture

SPT – Subcommittee for the Prevention of Torture

UNCAT – United Nations Convention against Torture

UNCRC – United Nations Committee on the Rights of the Child

UNCROC – United Nations Convention on the Rights of the Child

YAS – Youth Aid Section

YJLG – Youth Justice Interagency Group

YORST – Youth Offending Risk Screening Tool

YOT – Youth Offending Teams





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