"Court in the Act"
A regular newsletter for the entire Youth Justice
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THE YOUTH COURT OF NEW ZEALAND | TE KŌTI TAIOHI O AOTEAROA

Special Edition—The new legislation

The Children, Young Persons and Their Families (Youth Courts Jurisdiction and Orders) Amendment Act 2010

In this issue...

This special edition of Court in the Act is dedicated to examining the implementation of the Children, Young Persons and Their Families (Youth Courts Jurisdiction and Orders) Amendment Act 2010.

This legislation has been in force for five months and is described by the Principal Youth Court Judge Andrew Becroft as the most significant legislative change in youth justice in two decades. The Amendment Act was part of the government's "Fresh Start" policy and made changes in the following key areas —

- Some 12 or 13 year olds who have committed very serious offences can now be dealt with in the Youth Court;
- There are longer and more targeted Youth Court orders;
- There are extra sentencing options for the Youth Court (parenting education programmes, mentoring programmes, alcohol and drug rehabilitation programmes, judicial monitoring, and intensive supervision orders); and
- Some miscellaneous amendments, such as hearings for Judges to decide whether young people should be released early from a youth justice residence

If you wish to read any of the new decisions mentioned in this Edition, summaries may be available on the Youth Court website at www.justice.govt.nz/courts/youth/legislation-and-decisions. Or you can contact the Editors for an electronic copy on linda.mciver@justice.govt.nz or tim.hall@justice.govt.nz.

12 and 13 year olds in the Youth Court

The new legislation permits proceedings to be commenced in the Youth Court against some 12 or 13 year olds who commit very serious offences (s272).

Five months after the introduction of the legislation, the Editors have heard of only two 12 or 13 year olds charged in the Youth Court.

We watch with interest as the Court and youth justice professionals work with the new procedures for dealing with these child offenders. In particular, a number of key issues remain to be resolved—

- How will the Youth Court satisfy itself that the child knew either that the act or omission constituting the offence was wrong or that it was contrary to law (s272A(1)(d))?

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- How will the Youth Court implement it's power under s280A(2)(a) to refer the matter to the informant to consider whether to make an application for a declaration under section 67 or to deal with the matter in some other way?
- Does the informant's power in s280A(2)(a) to deal with the matter in "some other way" include re-filing the information?

The recent report of the United Nations Committee on the Rights of the Child expressed concern at the expansion of the Youth Court's jurisdiction to include 12 and 13 year olds. However, the legislation has been passed and the Youth Court's responsibility is now to implement it and give it statutory effect.

Longer Youth Court Orders

1. Supervision with Activity Orders

The new legislation increased the maximum term of a Activity order from three months to six months (s307(1)) . Likewise, the maximum term of any accompanying Supervision order increased from three months to six months (s307(2)).

In addition, the legislation -

- Removed the need for the young person to consent to the making of the order; and
- Removed the need for the Activity order and the Supervision order to be in respect of the same person or organisation;
- Replaced the old criteria for making the order (in s290) with new criteria (now in s289) - to assess the restrictiveness of the outcome in accordance with the hierarchy in s283, and not impose that outcome unless satisfied that a less restrictive outcome would be clearly inadequate; and
- Enabled "split sentencing" - the Supervision order no longer has to be made at the same time as the Activity order. It can now be delayed until the end of the Activity order, thereby enabling the terms of the Supervision order to reflect any changed needs of the young person (s307(2)); and
- Provided for a "custody" order to be made where the Activity order cannot be undertaken while the young person lives at home (s307(4)).

Longer Activity orders have been ordered on a number of occasions. See for example—

Police v CGN, 16 Dec 2010, YC Manukau, Judge Malosi;

Police v JC, 2 Nov 2010, YC Manukau, Judge Malosi;

Police v KWH, 11 Nov 2010, YC Manukau, Judge Malosi;

Police v ST, 11 Oct 2010, YC Auckland, Judge Tremewen.

(a) "Custody" orders following Activity Orders

Facilities such as Hillcrest House and Odyssey House are operated on a residential basis. When making an Activity order in respect of such a programme the Court must also decide whether to make a Custody order in respect of the Chief Executive.

Where the requisite conditions are met (the programme cannot be provided while the young person lives at home (s307(3), and the programme provider consents (s307(5)), a Custody order in respect of the Chief Executive is sometimes considered beneficial because it clarifies the rights and obligations of parents/ caregivers, programme staff, and young people when they are living away from home.

While the "custody" order may be made in respect of the programme provider (if it is approved under s396 as an iwi social service, cultural social service or child and family support service), we understand that the complicated obligations of custody will mean that a Custody order will often be made in respect of the Chief Executive instead of the programme provider.

(b) Expiry of Custody orders following Activity orders

It is interesting to note that a custody order made in respect of an Activity programme has the same effect as a custody order made under s101 of the Act (see s307(6)). This means that it expires when the young person reaches 17 years of age, even though the Activity order may continue to have effect until

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the young person turns 18 years old.

2. Supervision with Residence Orders

Under the new legislation the term of the Residence order increased from a mandatory three months, to a period of not less than 3 months and not more than six months (s311(1)). The term of the Supervision order which must follow a Residence order increased from a period of up to six months, to a period of not less than six months and not more than 12 months. In addition -

- The Youth Court can now make a Residence order subject to a condition that the young person undertake a specified programme or activity while in the residence (s311(2));
- Section 311(2) is also the authority for MAC camps (Military-style Activity Camps). In practice a MAC camp is simply a short term, 6 –9 day camp conducted outside the residence by the army. It is part of the overall Supervision with Residence sentence. At the conclusion of the camp the young people are returned to the residence to complete the residential order, but with on-going involvement of army personnel;
- Split sentencing is now allowed— The supervision part of the Supervision with residence order can now be made at any point before the expiry of the Residence order or the young person is released. This enables the terms of the Supervision order to reflect any changed needs of the young person (s311 (3)). It is anticipated this will usually be made at the early release hearing;
- Before the expiry of two-thirds of the period of the Residence order, the Youth Court must determine whether early release should be granted (See page 4 for more detail on Early Release Hearings).

(a) Examples of longer Residence orders

It is interesting to note that so far the longer six month order is not the new default position for Residence orders (that is, what were three month orders, are not just being lengthened to the new six month maximum).

Instead, in nearly every case where longer Residence orders have been made the Judge has made it clear that, but for the provision of longer Residence orders in the new legislation, he or she would have ordered a conviction and transfer to the District Court for sentencing (s283(o)).

These decisions indicate that the new legislation appears to be enabling more young people to stay within the Youth Court system so that fewer young people are convicted and transferred to the adult court for a adult prison sentence. This seems to have been one of the aims of the new provisions.

The following are examples of longer Residences orders explicitly imposed instead of a s283(o) conviction and transfer to the District Court for sentencing order—

Police v JR, 13 Oct 2010, YC Lower Hutt, Judge Walker;

Police v HRR, 8 Dec 2010, YC Nelson, Judge Russell.

(b) Impact of longer Residence orders on residences

At least partly as a result of fewer young people being transferred to the District Court for sentence, and of longer Residence orders being made by the Youth Court, the five youth justice residences were at or near capacity.

However, the numbers of young people in the youth justice residences has dropped in early 2011.

The following are examples of Residence orders made for a period of five or six months—

Police v ERW, 27 Oct 2010, YC Nelson, Judge Russell;

Police v BMH, 19 Oct 2010, YC Palmerston North, Judge Ross;

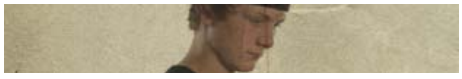
Police v BH, 19 Oct 2010, YC Palmerston North, Judge Ross;

Police v WA, 21 Dec 2010, YC Rotorua, Judge Munro.

The following are examples of Residence orders made for a period of three months—

Police v BP 11 Nov 2010 YC Manukau, Judge Malosi;

Police v SP, 25 Nov 2010, YC Manukau, Judge Malosi.



Early Release Hearings

Background

Previously the Chief Executive of Child, Youth and Family Service (CYFS) was required to decide whether a young person on a Residence order should be released at two months instead of serving the full three months.

The new legislation shifts the responsibility for granting early release to the Youth Court. From a practical point of view this turns the Youth Court into a Parole Board, so that the Court not only imposes the original sentence but also determines whether the young person will receive early release.

This is a very complicated aspect of the Amendment Act, and one which the Judiciary, CYFS, the Ministry of Justice and Youth Advocates are working together to apply and manage.

The legislation

When a Judge makes a Residence order under s311(1) he or she must also adjourn the proceedings to a future date to consider early release. That date must be a date before the expiry of two-thirds of the period of the order (s311(2A)(a)).

The terms of the Supervision order to follow the Residence order will usually be determined at the early release hearing also. Therefore, the social worker's report and plan (ss334 and 335) should usually be available at the early release hearing, other than in cases where it is utterly obvious that early release could not be granted.

Whether early release will be ordered

Section 314(1) provides that the Court must release the young person from custody if the young person has served two-thirds of the Residence order and -

- He or she has neither absconded nor committed any further offences; **and**
- His or her behaviour and compliance with their s335 plan in the residence has been satisfactory or any misbehaviour and non-compliance has been minor; **and**
- He or she has complied satisfactorily with any condition of the order to undertake a specified programme or activity.

CYFS must provide a report to the Court on the young person's compliance with those conditions.

To date the Youth Court has been sending a signal that early release needs to be earned, rather than being automatic. Young people who have behaved consistently badly, or who have not participated with programmes in residence have been refused early release.

See for example the following case—

Police v HTB, 27 Jan 2011, YC Taupo, Judge Munro.

A question arises over what amounts to "further offences" in terms of s314(1)(a).

The following cases touch on the subject of further offending for the purposes of s314 —

Police v WF , 6 Jan 2011, YC Auckland, Judge Fitzgerald;

Police v RMTN, 26 Jan 2011, YC Whakatane, Judge Harding.

The following are examples of decisions where early release has been ordered -

Police v SB 31 Jan 2011 YC Dunedin, Judge O'Driscoll;

Police v CW, 27 January 2011, YC Taupo, Munro.

Determining the date and location of the early release hearing

In effect, s311(2A)(a) requires the Judge to determine the date and location for the early release hearing at the time of making the Residence order.

So far the Youth Court has taken the view that the location of the hearing will normally be the young person's home court (or nearby Court). This will sometimes mean that the young person and residence staff will have to travel. The home court will usually be the preferred venue because the Judge will be familiar with the young person. Also the family, the youth advocate, the field social worker and any programme provider can be present to assist the Court and the young person. This is particularly important when early release is opposed and/or the conditions of the Supervision order must also be determined at the early release hearing.

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The date for the hearing should be before the two-thirds date, but as close as possible to it. This will minimise the potential for the young person to misbehave at the residence after early release has been ordered.

The date and location for the early release hearing should be carefully considered. If, for example the home court is the preferred location, but the only available hearing date at the court is three or four weeks before the two-thirds date, it may be better to have the hearing at a different, but nearby court on a closer date. For example, the hearing could be moved from Te Kuiti to Hamilton, particularly if it means that the same Judge will preside.

Case conferences before early release hearing

Once the date for the early release hearing has been determined, it is understood that CYFS will schedule a date about two weeks earlier for a case conference to discuss early release and the terms of the supervision order.

Case conferences will be held at the residence and will be attended by at least one significant family member (or other adult significant to the young person), possibly the youth advocate, the residential and field social workers, residence staff, and any programme providers who might become involved during the subsequent Supervision order. It is still unresolved who will pay for the Youth Advocate's attendance at the conference.

It is not envisaged that the Judge will attend the case conference.

These conferences should help to establish any points of dispute, and will give the Youth Advocate an opportunity to prepare for the early release hearing.

Transport of the young person after early release order

Unfortunately there will always be a gap in time between the date of approval of early release and the actual two-thirds release date. This means that the young person must remain in CYFS custody until release, and will often mean that he or she must be transported back to the residence to complete the remaining days of the full two-thirds of the order. This will sometimes seem impractical when the home court and the residence are a long distance apart and the release date is quite close.

There is no power in the Youth Court to release the young person before the young person has been in custody for at least two-thirds of the duration of the order (s314(1)). There is also no power for CYFS to release the young person on a more convenient date shortly before the two-thirds date. So there is no power for CYFS to release a young person on a Friday when the release date is a Sunday.

Conditional early release orders

The gap between the early release hearing and the actual release date also gives rise to the potential for the young person to misbehave so badly that they are no longer entitled to early release.

Judges will sometimes make the early release order conditional upon the young person continuing to comply with the good behaviour specified in s314(1) until the date of release.

When the order is made conditional in this way, the Judge will usually specify how the order will be finalised on the morning of release. The Judge, the residence staff and the Youth Advocate need to ensure that they are available at that time, with the required information.

Examples of conditional early release orders are found in the following decisions—

Police v BP, 21 Dec 2010, 13 Jan 2011, YC Manukau, Judge Malosi

New Sentencing Options

The new legislation provides for the following new orders or directions in the Youth Court—

- Parenting education programme orders (s283 (ja));
- Mentoring programme orders (s283(jb));
- Alcohol and drug rehabilitation programme orders (s283(jc));
- Judicial monitoring direction (s308A);
- Intensive supervision orders (s296G).

Parenting education programme orders

These orders can be made in respect of any young person, if he or she is a parent or is soon to become a parent or guardian or otherwise have the care of a child.

They can also be made in respect of the parent or guardian of a young person appearing before the Youth Court.

The programme provider must first agree to provide the programme to the young person or parent (s286A(2)).

The order can be made subject to any conditions the Court thinks fit (s286A(3)).

The following is an example of a decision where a parenting order was made against the parents of the young person—

Police v BP 11 Nov 2010 YC Manukau, Judge Malosi;

Police v FM 17 Feb 2011, YC Manukau, Judge Malosi.

Mentoring programme orders and Alcohol and drug rehabilitation orders

Mentoring orders and alcohol and drug rehabilitation programmes are likely to be used more frequently as part of family group conference plans, rather than formal Youth Court orders. However, we have seen a few decisions where mentoring programmes have been ordered by the Youth Court.

Examples of decision where a mentoring programme has been ordered—

Police v BP, 11 Nov 2010 YC Manukau, Judge Malosi; and

Police v CGN, 16 Dec 2010, YC Manukau, Judge Malosi.

Judicial Monitoring Directions

Judicial monitoring means that the young person is ordered to appear before the Youth Court at specific times at least every three months, for the Judge to monitor his or her compliance with a Supervision order or an Activity order.

Judicial monitoring can only be imposed if (s308A(1))-

- The Youth Court has made a declaration of non-compliance of a Supervision or Supervision with activity order in respect of the current offending; **or**
- The young person has previously had a s283(k) Supervision order (or more restrictive Youth Court order) made against him or her; **or**
- the young person has previously been convicted and sentenced in the District Court to imprisonment, home detention, or a community -based sentence.

Note that judicial monitoring is different from the review of longer orders under s319A. Under that section, if the Youth Court makes -

- a mentoring programme order;
- an alcohol or drug rehabilitation programme order; or
- a supervision order accompanying a residence order -

for a period of more eight months, it must also fix a date not later than six months after the order comes into force, to review the s335 plan in respect of the young person. The Court then has powers under s319A(5) to cancel or suspend the order, or to suspend or vary any condition of the order.

The following is an example of judicial monitoring imposed in connection with a Supervision with activity order. In this case the young person had previously had a s283(n) Supervision with residence order made against him in respect of other offending—

Police v DEH 17 Feb 2011 YC Manukau, Judge Malosi.

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Intensive supervision orders

An Intensive Supervision order may only be imposed if the Court has made a declaration of non-compliance with an order that was judicially monitored (s296G).

If the order is imposed, it means that the young person will be placed under the supervision of CYFS (or another person or organisation) for a specified period of not more than 12 months. It may be made subject to conditions.

The Editors are not yet aware of any orders of Intensive Supervision in the Youth Court.

That is largely because there has not been sufficient time since the provisions came into force, to satisfy the prerequisites.

Consolidated Version of the Children, Young Persons and Their Families Act 1989

The consolidated Act is now available on the government legislation website.

It can be found at www.legislation.govt.nz.

1. Click on "Search" under 'Acts'
2. Enter 'Children, Young Persons' and click "Search"
3. Click on the entry 'Children, Young Persons and Their Familes Act 1989 No 24 (as at 29 November 2010), Public Act
4. You can search this web version of the Act, or click on 'View PDF copy' at the top of the page. If you want the PDF version, you then need to click on 'Download PDF' on the following page.

Remember the Youth Court website

For back issues of Court in the Act, summaries of Youth Court decisions, and lots of other youth justice information can be found on the Youth Court website at http://www.justice.govt.nz/courts/youth.

"Court in the Act"

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We welcome contributions to the newsletter from anyone involved in youth justice in New Zealand or internationally.

Back copies of the newsletter can be viewed or downloaded from our website.

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