

Issues in Residential Care: Authority to restrict freedom of movement or freedom of liberty

What is the issue?

Some children and young people in the custody of the Chief Executive require residential out-of-home care, either in response to their alleged or proved offending (Youth Justice) or due to trauma, health and well-being needs (Care & Protection).

The Oranga Tamariki Act provides authority for Oranga Tamariki to detain or restrict the liberty or freedom of movement for children and young people in certain circumstances, for example on remand within Youth Justice residences or within the secure units in both the Care and Protection and Youth Justice residences.

Additionally, where the Chief Executive has custody, Oranga Tamariki has the authority of a natural parent to place appropriate restrictions to contain a child for their safety and development.

There is no definition of “detention” within the Oranga Tamariki Act.

As part of considering the residential framework, it is necessary to ensure that the legislation provides clarity and certainty about when and how any detention or restrictions on liberty and movement is permitted. In particular, through expressly providing for specific use of appropriate detention or restrictions on freedom of movement and freedom of liberty within the Act, rather than relying on the normal parental control common law powers, which depending on the nature of the residential environments that we may wish to provide for in legislation, may not provide sufficient authority in some circumstances.

We aim to identify the appropriate circumstances for detention and restrictions, ensuring that when such powers are used there are good outcomes for the child or young person.

When considering the use of detention or restrictions of freedoms of movement or freedom of liberty, issues include:

- confirming the form and scale of any potential authority that is desirable in future residential care and practice
- to ensure specific statutory authority restricting freedoms of movement or freedom of liberty within residential care, where appropriate
- ensuring that there are safeguards, protections and reviews in relation to the use of such authority; and
- ensuring that any statutory authority to restrict liberty or movement within the Act & regulations is sufficiently enabling to support future practice, models of care and residential environments.

Current legislation

Oranga Tamariki Act 1989 expressly provides for detention (by the use of the word detention in statute) in certain circumstances:

- secure care provisions: ss367-383 (noting that these apply to s364 residences only)
- in youth justice, rangatahi on remand can be “detained in the custody of the Chief Executive, an iwi social service, or a cultural social service” under s238(1)(d).

Part 5 of the Residential Care Regulations 1996 relates to detention within Secure Care within the 9 residences established under s364.

The Oranga Tamariki (National Care Standards and Related Matters) Regulations 2018 apply across all forms of care.

Circumstances which may be construed as restricting the freedom of liberty or movement within current residential environments could include:

- Controlling egress through security or perimeter fences; locked doors to areas or rooms.
 - Surveillance or close monitoring through physical oversight or electronic monitoring.
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- Use of secure care units.

Why would restricting freedom of liberty and freedom of movement be necessary? Residential care provides a safe and stable placement for children and young people when they aren't able to be placed in the community. At the upper end of the care continuum, there is a range of intensive, specialised programmes (including the care and protection residences) to meet the needs of children and young people in care with the highest needs and most challenging behaviour.

Within these environments, confinements or restrictions on liberty might be necessary for periods of time for the wellbeing of the young person and to prevent harm to that young person or others. (Note: The use of secure care is the subject of a separate paper).

Objectives To consider what authority (if any) should carers/staff have to restrict the liberty or movement of a child or young person beyond what would be ordinarily be permitted for a person acting in the place of a parent at common law?

To ensure there is greater clarity on:

- when children and young people can have their liberty or movement restricted when in care
- for which purposes (therapeutic, punitive or other purposes)
- who can make the decision, and
- what the checks and balances are to ensure that this authority is used appropriately.

Other considerations Residential care is changing and Oranga Tamariki is working towards an exit out of the Care and Protection Residences to smaller, more therapeutic, less institutional settings. Engagement with strategic partners, sector stakeholders and other government departments is still to be undertaken to design and develop alternative specialised individual or group out-of-home care options for our most high needs children and young people who may require residential care for periods of time.

Out-of-home care for children involving specialist support is referred to in the literature as Therapeutic Residential Care (TRC). The design of the homes and the practice models within them is likely to be informed by research and evidence on TRC, along with the practice and kaupapa of different homes and providers.

Given that TRC may be delivered by a range of groups (iwi, Māori organisations, NGOs) and with different focusses and approaches, consideration may need to be given to what forms of restrictions on liberty and movement may arise in different care models.

Alternatives to legislative change Other alternative changes that could be considered include:

- Practice changes – amending or enhancing practice guidance or procedures
- Physical environment changes – changing physical features such as security fences, gates, doors capable of being locked and continuing transition from large institutional style residences to more home-like group residences.

As part of this consideration, it would need to be determined whether these alternatives are sufficient to deliver on the objectives for residential care and meeting the needs of tamariki, their whānau and community.

Priority Medium to high:

- to ensure clear and express statutory authorisation for any restriction of liberty or restriction of movement that is a necessary part of residential care
- opportunity to align legislation with new residential model of care and practice.