

Issues in Residential Care: Searches

What is the problem?

Proportionality: the need to ensure safety without unduly retraumatising

It is a significant impingement on personal liberties to search young people, and this is especially the case for strip searching. It can be retraumatising, especially given that a majority of young people in youth justice residences have experienced significant trauma that includes physical and/or sexual abuse. A majority also have at least one disability, neurodiversity, or mental health condition, with many having a cluster. Common conditions include FASD, ADHD, ODD/conduct disorder, learning disabilities, anxiety/depression/complex PTSD, reactive attachment disorder, and ASD. We may also have young people in our care who have recently been released from compulsory detention under the Mental Health Act. These young people may find a search more traumatic than the average person. Those who have a neurodisability such as FASD may not have the same level of understanding as to why the search is happening as a neurotypical young person might. Therefore, the trauma of searches under current legislation is potentially disproportionate to the safety risk that must be responded to.

Nevertheless, there is still a safety risk that must be appropriately managed.

Rangatahi may at times attempt to conceal items that may be used to inflict harm to another person, or to engage in self-harm or attempt suicide. These may be weapons or other contraband (eg drugs, cigarettes). There is a risk that if powers are changed without ensuring adequate alternatives such as technology, we may create an unsafe residential environment and make rangatahi feel unsafe because we will not be able to detect all harmful items. It would therefore not be wise, for example, to remove the provision to strip search as a last resort without first ensuring there are suitable alternative measures.

In considering the needs of the broader cohort, we also must consider the small numbers of young people who are detained in Oranga Tamariki residences but detained under and subject to the Corrections Act. This could create an anomaly if some young people in residences are subject to significantly more invasive search powers than others – for example, if a few rangatahi could be strip searched but others could not. This issue needs to be considered in line with the issue regarding children and young people subject to the adult jurisdiction and placed in Oranga Tamariki care.

We also must consider the needs of gender diverse young people, for whom it may be appropriate to allow their election of the gender of the staff member searching them. Generally young people must be searched by a staff member of the same gender, but current legislative wording does not necessarily guarantee gender diverse and/or intersex young people will experience this right as cisgender and/or endosex young people do. While legal advice has indicated that ‘sex’ should be read purposively to include gender identity, it may be desirable to explicitly reflect this in legislation to fully protect young people. There may also be other reasons as to why it would be appropriate to permit young people to make this election, such as them having been sexually assaulted by a person of their own gender. This will be analysed further.

Proportionality is not necessarily ensured through the current legislation

Strip searches are particularly retraumatising for young people. International data shows that in most cases strip searches do not recover harmful items. Search powers do not reflect new or emerging technology and are not designed for the community based and partnership models of care towards which Oranga Tamariki is moving. The provisions frame behaviour in a punitive way that does not acknowledge the key disability, mental health, and trauma-related needs of rangatahi, including those which may lead to the behaviour that must be managed. This issue raises questions around where, when, and towards whom the different search powers ought to be available. For example, visitors have brought harmful items into residences, so it may

be appropriate to extend search powers to groups such as these, and to consider whether power to search on entry would be beneficial (we do not currently have this). While search powers currently only apply to the few residences established under section 364 of the Oranga Tamariki Act, there are also issues of safety in other types of residential care, including for services delivered by contracted NGOs. This means it may be appropriate to extend search powers to broader types of residential care and custody, though there is a question as to whether more home-like settings are more appropriately governed by the existing general law rather than a specific search regime designed for an institutional model of care. It may also be beneficial to have search powers when rangatahi are physically outside of the residential setting (eg in the community).

Assumption

Some level of impingement on liberty is needed to ensure safety. However, this can be done in a more therapeutic and mana enhancing way than current practice. Legislative change is needed to give effect to the change in practice being sought.

Issues

The overarching issue:

What is the minimum impingement on rights needed to ensure safety and wellbeing? The impingement on rights must be demonstrably justifiable as a proportionate response, with reference to the needs of rangatahi. These needs include disability, mental health, and trauma needs; cultural needs; and needs related to gender identity.

There are a number of practical issues to consider as part of the overarching one:

What are the benefits and drawbacks of having search powers in broader settings than those larger secure residences currently established under section 364 of the Oranga Tamariki Act? (i.e. in community remand homes and/or specialist NGO care services)

What are the benefits and drawbacks of being able to search other people than rangatahi eg whānau, other visitors, staff?

In considering all of these policy questions, how could the application of these powers be best utilised? For example, there may be some situations in which a blanket approach would be more effective, eg everyone is searched as a condition of entry, similar to comparable settings (court, airport, prison) - but then there are also powers to search while inside a residence where there is an objectively reasonable belief that someone may have an item that presents a risk to safety

What, if any, need is there for search powers physically outside residences, ie when young people go into the community?

How do we reconcile changes to search powers that apply to rangatahi detained under the Oranga Tamariki Act with the different powers for young people detained under the Corrections Act? [OT Issues Paper - Summary - Adult Criminal Jurisdiction detained.docx](#)

Law

The legal authority to use search powers on rangatahi in residences established under section 364 of the Oranga Tamariki Act comes from the Oranga Tamariki Act 1989 (ss 384A -384K), and the Residential Care Regulations (rr 39, 45), but are also subject to the New Zealand Bill of Rights Act 1990 (see sections 6 and 21 in particular). Before any searches (for unauthorised items) take place there must be reasonable grounds to believe an unauthorised item is in the possession of the young person, and the young person must have been given the opportunity to hand it over but refused to. Scanner

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searches, pat down searches, and a search of the child or young person's room or sleeping area are the types of searches that are permitted. Mail can be inspected if there are reasonable grounds. Dogs can be used in mail inspections and searches (excluding strip searches). Other provisions address recording requirements, complaint processes, and the power and obligations around seizure of an item. The walk-through metal detectors and associated wands trialled at youth justice residences fall within the legal definition of a scanner search.

Key legal principles that must inform this mahi may be found in ss 4, 5, 4A (2) and 13 of the Oranga Tamariki Act 1989. Some of the particular provisions we must pay mind to in considering how to treat tamariki/rangatahi are:

- Promoting wellbeing by establishing services that advance this and protecting them from harm
- Encouraging and assisting the young person to express their views, and considering them
- Addressing the impact of harm and the steps to enable their recovery
- Providing protection and assistance to address their particular needs (including physical, health, and emotional)

Children and young people in residences have the right to a high standard of professional care consistent with the Residential Care Regulations (see rr 21, 10, 14, 3), the National Code of Practice, the Care Standards (16), the purposes and principles of the Act (which incorporate UNCROC (37 (c), 39, 40 (1)) and UNCRPD) and their court approved plan or FGC plan.

Other (narrow) legal authority for searches can be found in the general law.

Objectives

We need to achieve the following with this work:

- Search powers address the risk of harm and contribute to an environment where everyone can feel safe (rangatahi, kaimahi, others eg whānau, visitors, community)
 - However, they operate without unduly retraumatising and impinging on rights and liberties – it is the bare minimum needed for safety and does not exceed this
 - The approach supports working in a way that is disability centric (including mental health) and trauma informed (especially regarding violence and sexual abuse)
 - The approach is mana upholding/enhancing and culturally responsive (eg the head is considered tino tapu in tikanga Māori and should not be touched without invitation).
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Stakeholder views from previous engagement

- On removing strip searches*
- Strong support for removing strip searching from most stakeholders including children and young people, their whānau, iwi and Māori partners, the Office of the Children's Commissioner (OCC) and Barnardos.
 - Some staff in youth justice residences felt there was an infrequent, but definite need to strip search. They felt the removal of strip searching would make residences less safe and make it harder for them to do their jobs.
- On substituting scanner searches and extending search powers to visitors*
- Broad support for introducing broader scanner searches from stakeholders, including whānau, on the grounds that it would reduce the burden of searches on young people and the need to restrict visit privacy.
 - Residence staff strongly supported the additional security this proposal would provide and supported the use of x-ray machines to scan possessions
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as this may facilitate young people's whānau to bring in items without staff worrying that this could contain contraband.

- Some young people in residences felt these more visible scanner types were too extreme and could put their family and whānau off from visiting.
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