

Privacy Commissioner's submission to the Social Services and Community Committee on the Responding to Abuse in Care Amendment Bill (97- 1)

Introduction

1. I am pleased to provide a submission on the Responding to Abuse in Care Amendment Bill (the Bill).
2. This Bill includes changes to the Oranga Tamariki Act 1989 designed to improve safety and well-being for children and young people, staff and visitors in care and protection and youth justice residences. Many of these changes have resulted from the Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith Based Institutions.
3. My comments relate to the use of imaging technology to carry out searches at care and protection and youth justice facilities, and the new powers to search all persons before entry to a youth justice facility.
4. My comments relate to parts 1 and 3 of the Bill as these have privacy implications.
5. These parts make changes to surveillance powers including
 - the use of imaging technology to carry out searches at care and protection and youth justice facilities,
 - new powers to search all persons before entry to a youth justice facility
 - removing power to conduct strip searches
 - and introducing a requirement for individual search plans
6. I support the proposals as the new search powers feature appropriate restrictions and safeguards and the other proposals are privacy protective. However, I **recommend** that staff and visitors have the ability to request the search be undertaken by an authorised staff member of a preferred gender.

Privacy Act 2020 and United Nations Convention on the Rights of the Child (UNCRC)

7. The Privacy Act 2020 is New Zealand's main privacy statute. One of the Privacy Commissioner's functions under the Privacy Act is to examine proposed legislation that may affect the privacy of individuals.
8. Central to my examination of any proposed legislation is the principle that policy and legislation should be consistent with privacy rights unless there is a good reason (and evidence) to override these rights. Privacy is not an absolute right and limits on individual privacy are necessarily justified in certain circumstances.

9. New Zealand is a signatory to the United Nations Convention on the Rights of the Child (UNCRC). As a signatory, the New Zealand Government is required to make policy decisions that are in the best interests of the child. Article 16 of the UNCRC enshrines a child's right to privacy.
10. Intrusions to privacy stemming from the collection and use of personal information are magnified when it comes to the collection of data from children, given their greater cognitive, emotional, and physical vulnerabilities.

Effects on Māori

7. Māori are currently overrepresented in youth justice residences. Data released October 2024 showed that 81% of young people in custody identify as Māori.¹ This means that tamariki and rangitahi (and their whānau) will be disproportionately affected by any privacy intrusion such as the search on entry power included in this Bill.
8. The ability to maintain relationships with whānau and family members is important for a young person's wellbeing and rehabilitation, particularly so for tamariki and rangitahi. Introducing search on entry powers may have the effect of creating a barrier to visiting and alienating whānau.

New entry search powers for youth justice residences

9. Current search powers can only be used when there is a belief on reasonable grounds that a resident of the facility has an unauthorised item in their possession. The identified policy problem is that the current search powers are not adequate or fit-for-purpose resulting in an increase of incidents involving unauthorised items over the past few years.²
10. The regulatory impact statement prepared to inform the main policy decisions taken by the Government for this Bill noted two main issues with current search powers:
 - Reasonable grounds to believe that a person has a harmful and unauthorised item in their possession are hardly ever present on entry to a residency, meaning that searches cannot be conducted; and
 - Visitors and staff are known and reported to be bringing in unauthorised items into residences but cannot be searched.
11. To resolve the issues with the current search powers, the Bill creates a new power to search all people entering a youth justice facility and authorises the use of imaging technology to carry out those searches.
12. I acknowledge that the youth justice environment is unique and poses significant challenges in terms of managing residents, ensuring their safety, and the safety of staff and visitors and understand the need for authorised staff to be able to search for unauthorised and harmful items.
13. Any search of a person involves an intrusion into both bodily and informational privacy. Concerns around security, valid as they may be, should not automatically override these rights. This is particularly so with respect to children and young people. Any privacy

¹ <https://www.orangatamariki.govt.nz/about-us/research/our-research/youth-justice-custody-updated-trends-and-outlook-2024/>

² Regulatory Impact Statement (RIS) at [15]

intrusion must have a strong justification and proportionate limitations to reflect the right to be free from unreasonable searches and expectations of privacy affirmed under UNCRC, the New Zealand Bill of Rights Act (BORA) and the Privacy Act 2020.

Safeguards for scanner and imaging technology searches

14. I am pleased to see that the Bill provides restrictions on searches before entry to a youth justice facility and legislative safeguards for the collection, use, and retention of personal information gathered using imaging technology searches.
15. Section 384KF provides restrictions on the types of images that may be displayed. It requires that an image produced as part of an imaging technology search must, so far as practicable, avoid showing a clear image of the body beneath the clothing, and obscure the genitals or make them not easily distinguishable.
16. An image of a person's naked body including genitals is extremely sensitive personal information. In the context of managing youth justice residents, using imaging technology is more effective at locating concealed contraband, is potentially less invasive of an individual's privacy, and may be less distressing for certain residents (such as those who have suffered sexual assault).
17. Section 384KF establishes further restrictions on the retention of imaging technology images requiring that an image must be disposed of within 24 hours. This will ensure that sensitive images are not retained longer than necessary, ensuring better compliance with Information Privacy Principle 9 of the Privacy Act.
18. Section 384KF (4) requires all scanner and pat down searches to be conducted with decency and sensitivity and in a manner that affords the person being searched the greatest degree of privacy and dignity.
19. I consider the restrictions in the Bill regarding the types of images that may be displayed when using imaging technology, preventing inappropriate use, retention or disclosure of those images, and ensuring the privacy and dignity of the person being search are respected, to be generally appropriate given these circumstances.
20. It will be essential that appropriate operational processes are in place before the changes provided for in the Bill are in force.

Additional privacy enhancing considerations

21. There will need to be transparency around the use of body scanners that is easily accessible to and understood by everyone who will be subject to them. At a minimum, residents, staff and visitors should be advised:
 - why the scanners (including imaging technology scanners) are being used,
 - what happens if you refuse,
 - what happens if you have a disability
 - how their privacy is protected and how long the images are kept for.
22. Children and young people will need to be informed in age-appropriate ways to ensure they fully understand the matters set out in paragraph 22. This includes providing age-

appropriate information for children and young people visiting the youth justice residence.

23. Officials should note that comprehensive and on-going staff training will be vital to ensure searches are carried out in accordance with the new provisions, are consistent across youth justice facilities and that the privacy enhancing safeguards are embedded within operational practice. Meaningful guidance on implementing the requirements of section 384KF (4) will be of particular importance.

Additional Comments

Alternative search methods

24. The Bill introduces a new definition of scanner search which includes the use of imaging technology for searches carried out in a youth justice facility. The new individual search plan requirements will ensure that factors relevant to each young person such as disabilities (both physical and mental) and height³ are considered when determining whether the use of imaging technology is appropriate in the circumstances.
25. There is no such requirement for staff or visitors to a facility. Staff and visitors may have disabilities or other factors that make the use of imaging technology inappropriate or require a person to disclose sensitive medical information.
26. To ensure the privacy of staff and visitors (especially children and young people) is protected, alternative search methods should be available. I recommend that s384KF include a provision allowing any other person to request the search be undertaken by a staff member of a preferred gender.

Removal of strip search powers

27. I support the repeal of the current powers to strip search children and young persons.

New individual search plan requirements

28. I support the new requirements for the development of individual search plans for children and young persons in care and protection or youth justice facilities.
29. Individual search plans ensure that the best interests of the child or young person are a primary consideration. They are a privacy enhancing approach that acknowledges potential trauma an individual has experienced and accommodates genuine personal preferences as to the preferred individual or sex of the person carrying out the search.

Extensions to workforce restrictions

30. I note that Part 1 of the Bill extends the workforce restrictions to include corresponding overseas offences. This may present a heightened privacy risk as more sensitive personal information will be shared. However, this change fills the current gap that allows individuals who have committed corresponding offences to work in roles with primary responsibilities over children. This presents safety risks for the children under the care of the individual.

³ Aviation security, which uses body scanners across six airports state that children under 1.02 metres and those who cannot stand unassisted cannot use body scanners: <https://www.aviation.govt.nz/about-us/media-releases/show/Our-new-body-scanners-explained%E2%80%93protecting-you-and-your-privacy>.

31. This amendment seems appropriate given the safety issues involved.

Conclusion

32. The restrictions in the Bill regarding the types of images that may be displayed when using imaging technology, preventing inappropriate use, retention or disclosure of those images, and ensuring the privacy and dignity of the person being search are respected, to be generally appropriate given these circumstances.

33. I **recommend** that staff and visitors have the ability to request the search be undertaken by an authorised staff member of a preferred gender.

34. I **support** the proposal to repeal the power to strip search children and young persons.

35. I **support** the introduction of the requirement for individual search plans to be developed for each child or young person in Care and Protection and Youth Justice residences.

36. I **support** the extension of the workforce restrictions in Part 1 of the Bill.

37. I trust my comments are of use to the Committee. I do not seek to be heard on my submission but am happy to appear before the Committee if that would be of assistance.

A handwritten signature in black ink, reading "Michael Webster". The signature is fluid and cursive, with the first name "Michael" and the last name "Webster" clearly distinguishable.

Michael Webster
Privacy Commissioner

11 December 2024