

4 November 2021

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Oranga Tamariki Amendment Bill

Purpose

1. We have considered whether the Oranga Tamariki Amendment Bill (the Bill) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 21106/16.0). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 21 (right to be secure against unreasonable search and seizure). Our analysis is set out below.

The Bill

4. The Bill amends the Oranga Tamariki Act 1989 (the principal Act). The stated purpose of the Bill is to resolve provisions in the principal Act which are not fit for purpose or are inconsistent with the agency's objectives to support children and their whānau.
5. The Bill:
 - a. repeals 'subsequent children' provisions as they apply to parents who have had a previous child permanently removed from their care, so that these provisions, which require a parent to demonstrate that they will not inflict harm in order to continue to care for a subsequent child, only apply when a child has a parent who has been convicted of the murder, manslaughter, or infanticide of a child;
 - b. repeals s 66D of the principal Act to remove the requirement for any agency that creates a dataset from more than one source of information to publicly notify details of that dataset; and
 - c. makes a number of remedial technical amendments to correct errors and clarify ambiguities that have been identified since the most recent Oranga Tamariki Legislation Act 2019.
6. The technical amendments include cl 12, which amends s 104(3) of the principal Act to clearly state the entry and search powers, rather than applying powers in s 105 with all the necessary modifications.

Consistency of the Bill with the Bill of Rights Act

Section 21 - Right to be secure from unreasonable search and seizure

7. Section 21 of the Bill of Rights Act affirms that everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise. The right protects a number of values including personal privacy, dignity, and property.¹
8. Clause 12 of the Bill inserts the warrantless search power, that is currently in s 105(2) and (3) of the principal Act, as new s 104(3)(c). New s 104(3)(c) provides that any constable or chief executive (acting through the chief executive's delegate) or any other person authorised by the chief executive, may, for the purpose of giving effect to the custody order, enter and search any dwelling house, building, aircraft, shop, carriage, vehicle, premises, or place, with or without assistance and by force if necessary. A person exercising the power must on first entering produce evidence of identity and disclose that they are exercising the authority under the principal Act.
9. This power (currently in s 105) already applies, with all necessary modifications, with respect to the enforcement of a custody order under s 104. Clause 12 therefore does not represent a new policy direction, rather the intent of this amendment is to clarify how the search power in s 105 relates to s 104 in the principal Act.
10. The application of s 105(2) and (3) with all necessary modifications in giving effect to custody orders under s 104 has caused confusion operationally. Therefore, the purpose of the re-enactment of these powers in new s 104(3)(c) is to make the power clearer and easier to apply. Nevertheless, as the amendment in cl 12 results in a re-enactment of a warrantless search power, this engages s 21 of the Bill of Rights Act.
11. Ordinarily, a provision found to limit a particular right or freedom may be consistent with the Bill of Rights Act if it can be considered reasonably justified in terms of s 5 of that Act. However, the Supreme Court has held an unreasonable search logically cannot be demonstrably justified and therefore the inquiry does not need to be undertaken.²
12. Whether a search will be unreasonable turns on a number of factors, including the nature of the place or object being searched, the degree of intrusiveness into personal privacy and the rationale of the search.³ The greater the degree of intrusiveness, the greater the need for justification and attendant safeguards.

Consistency with s 21 of the Bill of Rights Act

13. In assessing whether the search power in cl 12 is reasonable, we have considered the importance of the objective sought to be achieved and whether the provisions are rationally connected and proportionate to that objective.

¹ See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J.

² *Hamed v R*, above n 1, at [162] per Blanchard J

³ *Hamed v R*, above n 1, at [172].

14. On balance, we consider that the search power in new s 104(3)(c) is reasonable for the purposes of s 21 of the Bill of Rights Act. While the power enables a warrantless search with a high degree of intrusiveness into personal privacy, it may only be undertaken for the purposes of enforcing a custody order that has been granted by the Family Court.
15. The Family Court may make a custody order (placing the child or young person in the care of certain persons identified in the order) where it is satisfied that the child or young person is in need of care or protection. The principal Act provides that a child or young person is in need of care or protection if they are suffering, or are likely to suffer, serious harm.
16. Giving effect to a custody order sometimes requires the removal of a child or a young person from a situation or environment that could subject them to abuse, neglect, deprivation or abandonment. Uplifting a child or a young person who is the subject of a custody order sometimes involves entering into people's homes, often in hostile circumstances, and physically removing the child or young person. And in some instances, it may be necessary to enter by force. Without this power, many custody orders would be unenforceable. Clause 12 therefore helps achieve the important objective of protecting a child or young person who is in need of care or protection and is rationally connected and proportionate to that objective.
17. The Bill also contains some safeguards which help to ensure that the right to be secure from unreasonable search and seizure is impaired no more than is necessary:
 - a. the power can only be exercised in relation to a custody order awarded by the court;
 - b. the court can only issue a custody order where it is satisfied that the child or young person is in need of care or protection;
 - c. while the power can be exercised using force, it may only be used "if necessary" for the purpose of exercising the authority; and
 - d. a person exercising this power must, on first entering and, if requested at any subsequent time:
 - (A) produce evidence of identify; and
 - (B) disclose that they are exercising that authority under the principal Act.
18. Additionally, we understand that the following safeguards are also in place:
 - a. some social workers responsible for carrying out custodial orders undertake management of actual or potential aggression training online which focuses on de-escalation and getting the child or young person to co-operate; and
 - b. police officers enter with social workers where it is appropriate to do so, but only if de-escalation and co-operation efforts have failed.

Conclusion

19. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



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