

# Rights, Protections, Safeguards and Mitigations for Use of Powers in Residential Settings

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## Background

Oranga Tamariki is shifting its residential care away from larger institutional residences towards smaller, more family-like homes, with an associated practice shift towards more therapeutic and trauma-informed residential care.

To align with this shift, Oranga Tamariki is reviewing what significant powers should be available to those caring for children and young people who are in residential care.

These powers include:

- The use of force (physical restraint)
- The ability to search children and young people
- The ability to lock doors, including bedrooms
- The use of secure care and seclusion
- Actions that can be taken under behavioural management systems
- Powers when a child or young person is outside of a residence

Any system designed to regulate these powers should have a corresponding system that regulates the rights, protections, safeguards, and mitigations in respect of these powers, which is the focus of this paper.

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## Definitions

**Rights** are an affirmation of the inherent dignity of people. The rights of children and young people are interwoven and inseparable from those of their parents, whānau and community. This means upholding the rights of tamariki/mokopuna, rangatahi and whānau Māori as expressed in Te Tiriti o Waitangi, asserting the rights of all children, young people, families and whānau under the United Nations Convention on the Rights of the Child, the United Nations Convention on the Rights of Persons with Disabilities,<sup>1</sup> and the specific rights that apply to children and young people in residential care.

**Protections** are the system-level mechanisms that give effect to these rights e.g., communicating rights, powers, and circumstances for their use, recording requirements, training.

**A safeguarding approach** provides a continuum of responses and activity, specific to the child or young person and their circumstances, that protects, enhances, and promotes their rights, health, culture, participation, and wellbeing.

**Mitigations** are the processes during and after a power has been used to manage any harm, trauma potentially experienced, reduce risk to the child or young person, reduce the likelihood that the power may be used again, and steps to enable restorative processes.

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## Scope

The scope for this work is to develop a regulatory system for the rights, protections, safeguards, and mitigations when the above significant powers may be available.

This includes:

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<sup>1</sup> The Oranga Tamariki Practice Framework [Rights](#) | [Practice Centre](#) | [Oranga Tamariki](#)

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- prior to the use of any significant power i.e., when a child or young person enters an environment, or a situation arises where there is authority to use these powers.
  - when a power is contemplated or used i.e., in the immediate situation where the use of the power is being considered and when it is applied to the child or young person or in the residential environment
  - after the use of a power.
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**Interactions**

The **oversight of Oranga Tamariki** is currently being reformed to strengthen independent oversight by clarifying three core functions<sup>2</sup>:

- The Children's Commissioner will provide system level **advocacy** for all New Zealand children and young people
- The Independent Children's Monitor will provide independent **monitoring and assurance** of the operations and obligations delivered under the Act and associated regulations
- The Ombudsman will investigate **complaints**, relation to the application of the Act and/or children in the custody of the State.

The rights, protections, safeguards, and mitigations framework in respect of significant powers will provide information for these three core functions. Therefore, how these protections mechanisms can support external monitoring mechanisms will be considered but external monitoring itself is not in scope.

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**Draft problem**

**There is not a cohesive regulatory framework that governs the protections and mitigations necessary when significant powers are used in respect of children or young people in residential settings.**

**Current mechanisms are based on regulations designed for institutional settings.**

As we change our approach to residential care, the regulatory system for protections and mitigations in respect of the use of significant powers should be fit for purpose.

Current protection mechanisms are highly prescriptive, and typically tied to the relevant power, rather than enabling a more flexible approach that reflects the child or young person's circumstances and needs. The key concern is that staff must comply with the prescriptive requirements prior, during and after a power is used, while ensuring that the principles<sup>3</sup> and duties<sup>4</sup> contained within the Act are applied. For example, there is specific criteria for when the use of the power may be justified, but the exercise of the power must also be in the wellbeing and best interests of the child or young person. It can be challenging for staff to apply and reconcile these various requirements.

Moreover, the review of residential care from 2017-2019 revealed several issues with specific existing protections, and a number of gaps that could enable further protection mechanisms to be introduced. An overview is provided at appendix 1.

**The system is not sufficiently clear, transparent, or consistent.**

The regulatory framework for rights, protections, safeguards, and mitigations sits across legislation, regulation, and operational policy, making it difficult for children,

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<sup>2</sup> Oversight of Oranga Tamariki System and Children and Young People's Commission Bill.

<sup>3</sup> Section 4A and section 5 Oranga Tamariki Act.

<sup>4</sup> Section 7 and section 7AA.

young people, whānau, caregivers, staff, and providers to clearly identify their rights and obligations.

Currently, it is challenging to access, and aggregate information about the use of significant powers. Information is gathered primarily through annual reviews that highlight there are often gaps in the record. This limits children, young people, and their family, whānau, hapū and iwi from accessing information about their experiences, limits staff and providers from gathering insights to improve practice in real time, and limits internal and external monitoring. There may be opportunities to address these issues operationally.

Finally, there are inconsistencies between powers regarding the protection mechanisms available. For example, the Oranga Tamariki Act stipulates that “a member of staff must consult with the manager or a senior member of staff before carrying out a search” unless impracticable.<sup>5</sup> However, for secure care this is only provided for in operational policy.<sup>6</sup>

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**Draft objectives**

The regulatory framework for the rights, protections, safeguards, and mitigations for the use of significant powers in residences should:

- Ensure that it upholds the rights of children and young people, through the following approaches:
  - Applying trauma-informed models of care
  - Giving effect te ao Māori principles
  - Using a social and rights-based model of disability
  - Enabling children and young people to actively participate and apply their rights
- Ensure that the rights of children and young people, the types of powers and when they may be used, and all relevant mechanisms are clear and easy to understand.
- Prevent any unnecessary use or misuse of these significant powers to prevent children and young people in residential care from experiencing harm, abuse, neglect, and violence.
- Provide a suitable response following the use of a power, including to address potential harm, trauma, and risk.
- Enable the system to be transparent and monitored, so to be able to accurately record the child or young person’s journey and to gather insights to improve practice
- Be future proofed, including supporting the future operating model and enabling further work in partnership with and devolution to, iwi-Māori.

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**Key policy questions**

What types of protection mechanisms should be designed for the use of significant powers in respect of children or young people in residence?

- To what extent do we extend/ apply existing protection mechanisms?
- How do we address specific issues with current protections?
- What protection mechanisms, if any, should be introduced?

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<sup>5</sup> Section 384G.

<sup>6</sup> [Use of secure care in care and protection and youth justice residences | Practice Centre | Oranga Tamariki](#)

Where, and how should these protection mechanisms be applied in different residential care settings?

- How do we enable consistency in practice and clarify expectations?
- How do we enable flexibility to reflect the different settings, providers, models of care, and application to children and young people in different circumstances?

Where should protections sit within the regulatory framework?

- Should they be in legislation, regulations, operational policy, partnership agreements, contracts with providers?
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**Appendix 1: Issues and gaps with specific protection mechanisms contained in the Oranga Tamariki Act 1986 and the Residential Care Regulations 1996**

Protections prior to the use of the significant power	Issue
The rights of a child or young person	<p>The rights in the residential care regulations could be strengthened to give effect to te ao Māori principles, including having regard to mana tamaiti, by recognising the young person’s whakapapa and the whanaungatanga responsibilities of their family, whānau, hapū, iwi and family group.</p> <p>The rights articulated in the residential care regulations were created before New Zealand adopted the United Nations Convention on the rights of people with disabilities.</p>
Communicating the rights of a child or young person to them	<p>The regulations require that their rights under the regulations and the powers available be explained on admission.<sup>7</sup> This is when young people are often unable to take in the information and the process can be confronting.</p>
Communicating what types of powers could be used in respect of a child or young person, and in what circumstances it is justified to use them	<p>This inhibits welcoming the young person and distracts from staff building initial rapport and relationships.</p> <p>The required copy of the regulatory framework is not accessible for children and young people. This is compared to the child-friendly statement of rights and other resources provided to explain the National Care standards.</p> <p>The rules and regulations may be explained inconsistently across residences, with young people having inconsistent understanding of their rights.</p> <p>There may be opportunities to address these issues operationally.</p>
Training for providers and staff in the use of powers	<p>There is a general duty on the Chief Executive to provide adequate training and resources to the staff of residences to enable them to carry out their function and duties.<sup>8</sup> However, there are currently no express regulatory provisions on how a staff member should physically restrain a young person, place a young person in secure care, or undertake a search. Operational practice requires that all staff members are trained appropriately in these powers.</p>
The authority that enables the residence to use that power (legislation, regulation, operational guidance).	<p>There are inconsistencies concerning where the authority for a power sits in the regulatory framework. For example, the physical restraint provisions that apply to searches are in the Act and the general restraint provisions are in the regulations.</p>
Protections when a significant power is contemplated or used	Issues
Specific criteria for when the use of the power may be justified	<p>The review of the use of significant powers in residential care includes reviewing the specific criteria for when a power can be used, and the purpose of having the power. There needs to be consistency where possible across powers.</p>

<sup>7</sup> Regulation 4 Oranga Tamariki (Residential Care) Regulations 1996.

<sup>8</sup> Section 7 Oranga Tamariki Act 1989 and Regulation 25 Oranga Tamariki (Residential Care) Regulations 1996.

Supervision, consultation, and senior decision-making authority	There are inconsistencies across powers, with operational guidance filling gaps. E.g., searches requiring senior staff approval in legislation <sup>9</sup> but for secure care this is only provided in operational guidance.
Informing, consulting, or obtaining the support from the child or young person	There may be an opportunity to extend consulting/ obtaining support to the family, whānau, hapū or iwi for the use of powers in appropriate circumstances.
Gender considerations – e.g., the person searching a child or young person must be the same gender as them	Currently, this only applies to searches, and does not consider children and young people who are non-binary, transgender, or intersex. This issue is more appropriately covered in the review of searches.
Internal review of ongoing use of the power	Internal reviews primarily apply to secure care, where the placement of a young person in secure care must be reviewed daily. <sup>10</sup> This is an opportunity to consider whether daily reviews are an appropriate time frame.
Court oversight/ approval for continued use of the power	Court oversight primarily applies to secure care, where any placement of a young person in secure care for longer than 3 days must be approved by the Court. <sup>11</sup> This is an opportunity to consider whether this is an appropriate timeframe, and whether Court review is appropriate when exercising other powers.
Time limits for the use of the power	Time limit provisions for secure care are challenging to apply operationally for staff and are also unclear. <sup>12</sup>

Protections after a power is used	Issues
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Staff recording	<p>Current recording of information requirements are cumbersome, at times unnecessarily prescriptive, and require information to be duplicated across several different recording platforms.</p> <p>Family, whānau, hapū and iwi are not entitled to access records. There may be opportunities to address these issues operationally.</p> <p>The residential care regulations do not specify a right for children and young people have to record their version of events, other than in a formal grievance process.<sup>13</sup></p> <p>Allowing young people to record their own version of events would give external and internal monitors access to their side of the story at the time of the event, rather than several weeks/months after, as could be the case if they are recounting it through a monitoring process interview.</p>
Notification to those that are important in the life of the child or young person	Regulations require that notice be given if a child or young person placed in secure care to at least one person (parent, guardian or caregiver, any person nominated by the child or young person, or their lawyer for child or youth advocate).

<sup>9</sup> Section 384G Oranga Tamariki Act 1989.

<sup>10</sup> Regulation 47 Oranga Tamariki (Residential Care) Regulations 1996.

<sup>11</sup> Section 371 Oranga Tamariki Act 1989.

<sup>12</sup> Section 370 Oranga Tamariki act 1989.

<sup>13</sup> Under section 22 of the Privacy Act 2022, principle 7 articulates that an individual is entitled to request the agency to correct information, including with a statement of correction.

	<p>Notification is not explicitly specified under the regulations for powers e.g., searches, use of force. The Oranga Tamariki Act specifies a parent, guardian or any person having care of the child or young person must be informed, wherever practicable, of any action or decision under the Act, that significantly affects any child or young person.<sup>14</sup></p> <p>There may be opportunities to address these issues operationally.</p> <p>No provision that notice could be provided to a member of the whānau, hapū or iwi.</p> <p>Notice must be given by ‘telephone or letter’. This is technologically outdated.</p>
Grievance and complaints procedures	<p>The grievance procedure outlined in the schedule requires that it is made in writing. This is not accessible to many children and young people in residences.</p> <p>The requirement to make a complaint through a staff member compromises the anonymity of the complaint and is a barrier to children and young people accessing the process.</p> <p>There may be opportunities to address these issues operationally.</p>
Advocates	<p>The regulations specify that the manager must ensure that the young person has a reasonable access to an advocate when they make a grievance or a subject to a punishment. There is a lack of clarity on staff obligations to ensure reasonable access to advocates when a young person is subject to other powers e.g., secure care or searches.</p> <p>Advocates are primarily volunteers, with high turnover and may not receive the training needed to represent children and young people well.</p> <p>There may be opportunities to address these issues operationally.</p>
Internal monitoring	<p>Residences are inspected internally annually. However, internal auditors are not explicitly required to have training in engaging with children and young people, including applying te ao Māori principles or working with complex needs.</p> <p>There may be opportunities to address these issues operationally.</p>
Reintegration processes	<p>Reintegration processes are only considered for secure care in operational guidance.</p> <p>There is no express regulatory requirements on how staff should support children and young people following the use of a power. For example, this could include working with a health (mental and physical) professional, connecting with their family, whānau, hapū or iwi, processes to reconcile the relationship between the child or young person and staff/ their peers and debrief processes for staff.</p>

<sup>14</sup> Section 8 Oranga Tamariki Act.