

Responding to Abuse in Care Legislation Amendment Bill

Submission of the New Zealand Law Society Te Kāhui
Ture o Aotearoa

11 December 2024

1 Introduction

- 1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Responding to Abuse in Care Legislation Amendment Bill (**Bill**).
- 1.2 This omnibus Bill provides the initial suite of responses to the report of the Royal Commission of Inquiry into Historical Abuse in State and Faith-based Care (**the Royal Commission**), which made 139 recommendations.¹ The objective of the Bill is to improve the safety and well-being of children, young people, and vulnerable adults in care. It aims to do this by amending the:
- (a) Children’s Act 2014;
 - (b) Crimes Act 1961;
 - (c) Oranga Tamariki Act 1989 (**OTA**); and
 - (d) Public Records Act 2005 (**PRA**).
- 1.3 Whilst not clearly stated in the Bill, the proposed changes to the Children’s Act and Crimes Act appear to at least partially address recommendations 26 and 58. The proposed changes to the OTA and the PRA do not appear to be directly related to recommendations of the Royal Commission.
- 1.4 The Law Society commends the goal of enhancing the safety and well-being of children, young people, and vulnerable adults in care, and generally supports the passage of the Bill. However, we consider some amendments are necessary to better ensure this objective is achieved. This submission sets out drafting and workability concerns, as well as some concerns for the rights and well-being of young people which are raised by the proposed amendments to the OTA.
- 1.5 This submission has been prepared with input from the Law Society’s Family Law Section,² Criminal Law Committee, Youth Justice Committee, and Human Rights and Privacy Committee.³
- 1.6 The Law Society **does not wish to be heard** on this submission.

2 Part 1 - Amendments to Children’s Act 2014

- 2.1 The Law Society supports the proposed amendments to extend the current workforce restrictions on core children’s workers. These amendments aim to include convictions for overseas offences that are equivalent to specified New Zealand offences, as well as offences against children and young people under the Prostitution Reform Act 2003.⁴

¹ A further 95 recommendations were made in the interim report on redress in 2021.

² More information on the Law Society’s Family Law Section can be found here: <https://www.lawsociety.org.nz/branches-sections-and-groups/family-law-section/>

³ More information on the Law Society’s law reform committees can be found here: <https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/>

⁴ Clauses 4 and 10.

2.2 We note that the proposed amendments only partially respond to the recommendations of the Royal Commission, and recommend that further consideration is given to whether it may be appropriate, at this time, to expand the definition of ‘children’s worker’⁵ to include volunteers, for example.⁶ This would enable better protection of children, young people and vulnerable adults in care in the interim period, before the proposed new Care Safety Act can be enacted.

3 Part 2 – Amendments to Crimes Act 1961

3.1 Clause 12 amends the definition of ‘vulnerable adult’ in section 2(1) of the Crimes Act to include reference to disability, to ensure that disabled people are covered by the duties and offences in sections 151, 195, and 195A.

3.2 The Departmental Disclosure Statement (**DDS**) states that:⁷

the words “any other cause” in the definition can be read to include disabled people who are unable to withdraw themselves from the care or charge of their carer. The Bill amends the Crimes Act 1961 to include disability and avoid doubt.

3.3 The Law Society supports this amendment, which simply makes explicit what would otherwise be implied – that ‘disability’ was included in ‘any other cause’.

4 Part 3 – Amendments to Oranga Tamariki Act 1989

Repeal of strip search provisions

4.1 Clause 21 repeals section 384E of the OTA, which authorises a strip search of a child or young person in care. The Law Society supports the removal of this power.

Searches carried out on entry to a youth justice residence

4.2 Clause 28 inserts new provisions 384KA to 384KN, which apply to searches of people or vehicles upon entry to a youth justice residence. While some of these proposed provisions are a positive step to better support the safety and well-being of young people, the Law Society has general concerns about the changes representing a shift to introduce more ‘adult prison’ elements into youth justice facilities, contrary to the intended purpose of the Bill, which is to address recommendations of the Royal Commission. Such a shift will impact on a young person’s experience in the facility, and their relationship with staff. It further risks undermining the youth jurisdiction, including its rehabilitative and therapeutic focus.

New section 384KB

4.3 Proposed section 384KB sets out that an authorised person may use physical force to search a youth justice resident under new section 384KA. It proposes the qualifier that

⁵ Children’s Act 2014, s 23.

⁶ At recommendation 64.

⁷ Departmental Disclosure Statement, at 5.

the use of force is ‘no more than the minimum amount of force that is reasonably necessary in the circumstances.’

- 4.4 We acknowledge that qualifying the amount of force that may be used is a positive step. However, we consider that further safeguards should apply. Proposed section 384KB(2) applies a qualifier only to the *amount* of force that may be used, not to *when* force may be used. While this will involve some consideration of whether the use of force was appropriate at all, we consider it preferable to specify in proposed section 384KB(1) that force may be used when *necessary* to carry out a search authorised by section 384KA. The Select Committee may wish to consider section 83 of the Corrections Act 2004, which applies a similar qualifier to both the use and amount of force.
- 4.5 Section 83 of the Corrections Act also requires that a prisoner is examined by a registered health professional after a use of force incident (unless the use of force is limited to application of handcuffs). We note that no similar safeguard is proposed by the Bill, and invite the Select Committee to consider this discrepancy. The use of force against a young person has the potential to cause greater physical or emotional harm than to an adult prisoner.

New sections 384KC to 384KH

- 4.6 Across sections 384KC to 384KH reference is made to a search being conducted to detect an ‘unauthorised item’. These sections relate to the proposed power to search all visitors and vehicles entering a youth justice residence premises. The definition of an ‘unauthorised item’ is:⁸

Unauthorised item means any article, drug, or substance –

- (a) That is a harmful item; or
 - (b) That may not be lawfully possessed by any child or young person in the residence
- 4.7 The proposed amendments expand the definition of ‘harmful item’ within a youth justice residence to include not just ‘any’ item that may be harmful, but also specified items such as electronic devices, and any further items designated as ‘harmful’ under the new regulation-making power in proposed new section 447(caaa). This in fact reflects the definition of ‘unauthorised item’ in the Corrections Act. The Law Society queries why the decision has been made to instead list these items as ‘harmful’ within the youth justice context, and notes that the RIS suggests it was intended the Bill would instead amend ‘unauthorised item’.⁹
- 4.8 Retaining these items within the definition of ‘harmful item’ may inappropriately colour the exercise of the regulation-making power in proposed new section 447(caaa), to encompass further items which are not necessarily ‘harmful’ or likely to be used to cause harm, but are instead items which – due to nuisance or other undesirable behaviours –

⁸ Oranga Tamariki Act 1989, s 384A.

⁹ Page 22.

Oranga Tamariki would prefer are prohibited from the facility. Such use of regulations would be undesirable, given the associated availability of coercive powers.

- 4.9 The Law Society also has concerns about the potential breadth of the definition of an ‘unauthorised item’ and its application to members of the public. There can be differences in practice across the youth justice residences as to what is considered a ‘harmful item’ within the definition of ‘unauthorised item,’ and although the amendments introduce some specificity, this potential remains.¹⁰ There is also no requirement for a reasonable belief that the visitor has an unauthorised item, before requiring a search.
- 4.10 While this may be understandable for practical reasons, and motivated by safety concerns, the Law Society is concerned that the lack of clarity, alongside the potential for a visitor to be denied entry to the youth justice residence as a result of either:
- (a) refusing a search;
 - (b) retracting consent for a search; or
 - (c) being found (whether intentionally, or quite possibly, accidentally given the potentially broad definition) with an unauthorised item;

will result in residents having less contact with their family and other visitors. This would be contrary to the young person’s well-being, is inconsistent with the learnings of the Royal Commission, and adds to the introduction of ‘adult prison’ characteristics, as raised at 4.2.

New section 384KF(3)(iii)

- 4.11 Proposed section 384KF(3)(iii) restricts the ability to conduct a pat down search of a youth justice resident to only times when one of three listed types of people are also present. This includes parents and an ‘authorised person’. The third option is when a constable is present. However, we query whether it is appropriate for a constable’s presence to enable a pat-down search of a youth justice resident to be conducted. In the Law Society’s view, the presence of a constable does not act as a safeguard like the presence of the people noted in (i) and (ii).

New section 384KL

- 4.12 The Law Society considers that the requirement to record the fact of a pat-down search, and the grounds for the pat-down search should be expanded to include a record of whether or not any unauthorised item was found on the person subject to the search, and a description of that item. This is because the detail of items found on the person will help to contextualise the legitimacy of the search and potential issues arising around an abuse of power. For example, repeated episodes of requiring a pat-down search of a particular person where nothing is found on them would alert oversight authorities to a potential problem.

¹⁰ See general ‘catch all’ provision in proposed new section 384A(2)(b)(i).

Searches carried out in all secure residences

New section 384AA to 384AC

- 4.13 The Law Society supports the introduction of approved search plans for a child or young person placed in residence. This aligns well with the objective of improving the safety and well-being of children and young people in care.
- 4.14 However, we are concerned about the inclusion of a subjective caveat to the duty to comply with the search plan in proposed section 384AB(1)(b) and 384AC(2)(b)(ii). These subsections state that a search must be conducted in accordance with the approved search plan, unless in the circumstances the chief executive considers that:
- (a) It is not reasonably practicable to do so; or
 - (b) There is another good reason not to do so.
- 4.15 Consideration of whether it is reasonably practicable is not objectionable, however, the degree of subjectivity that can be applied to the phrase ‘another good reason’ is concerning and we suggest that further refinement of the phrase would be preferable when it relates to search powers being used against children and young people.

5 Part 4 - Amendments to Public Records Act 2005

- 5.1 The Law Society does not object to the proposed amendments to the PRA. However, we suggest that the Committee consider whether the reports required under section 35 should include reference to, or an account of the action plan under the proposed section 35A, or performance notices under the proposed section 35B. This would increase transparency and public oversight of the public office involved.



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