

Children, Young Persons, and Their Families Amendment Bill (No 3)

Government Bill

Explanatory note

General policy statement

Introduction

This Bill ensures that the principal powers relating to the searching of children and young persons in residences run by the Department of Social Welfare, and the seizure of items found during a search, are set out in the Children, Young Persons, and Their Families Act 1989 rather than in regulations made under that Act.

This Bill—

- includes in the principal Act the principal powers of search and seizure currently prescribed in the Children, Young Persons, and Their Families (Residential Care) Regulations 1996:
- makes it explicit that the regulation-making power contained in section 447 of the principal Act authorises regulations setting out search and seizure procedures:
- ensures, for the avoidance of doubt, that including these matters in primary legislation does not invalidate the existing Children, Young Persons, and Their Families (Residential Care) Regulations 1996.

Background

The Children, Young Persons, and Their Families (Residential Care) Regulations 1996 came into force in February 1997. These regulations set out procedures and matters designed to assist in the management of departmental residences. They specify—

- the rights of children and young persons in residences (including the right of access to a grievance procedure):
- the limitations on powers of punishment and discipline:
- the management and inspection of residences (including the establishment of grievance panels and Community Liaison Committees, the development of plans, and the process for the inspection of residences):
- the procedures for searching children and young persons in residences:
- the limitations on the provision of secure care:
- matters relating to the maintenance of records.

Part 4 of the regulations, which sets out the powers and procedures for searching children and young persons in residences, forms the basis of this Bill.

The safety of children, young persons, and staff within the residence is of paramount concern. Providing social work staff with the power to search children and young persons in residences helps to ensure the safety of all people in the residence. Children and young persons must also feel secure in their environment. That security comes not only from safeguarding their physical safety, but also by ensuring procedural fairness and making sure that powers are only used as necessary and are used in a respectful way. Security comes from guaranteeing that children and young persons have a procedure in place that allows them to express any concerns about what is happening to them.

In 1997, the Regulations Review Committee (RRC) completed an examination of the Children, Young Persons, and Their Families (Residential Care) Regulations 1996 (AJHR I. 16B). The RRC focused on 2 issues—

- whether the powers in the regulations relating to search and seizure in residences were excessive; and
- whether the powers in the regulations should be specified in primary legislation.

The RRC recognised that consideration must be given to the competing rights and interests of children and young persons in residences and the authorities who are administering the residences. The RRC made 2 recommendations for amendments to the principal Act. It recommended that—

- the powers contained in the Children, Young Persons, and Their Families (Residential Care) Regulations 1996 relating to search of children and young persons and seizure of items be specified in primary legislation; and
- legislation be enacted as soon as possible to replace the regulations in relation to the powers of search and seizure.

A third recommendation pertained to the appointment of grievance panels. This has been addressed and does not require legislative change.

The 2 RRC recommendations for legislative change received qualified support from the then Government. The then Government was of the view that the basic principal powers of search and seizure should be included in primary legislation so that the rights of the children and young persons involved are adequately protected. However, the then Government was also of the opinion that the detailed administrative provisions concerning search and seizure are more appropriately placed in regulations because they relate primarily to the internal management of residences. This Bill is based upon, and gives effect to, the then Government's response to the report of the RRC (AJHR A. 5).

Summary of key measures

Searches

The principal powers of search and seizure are included in the primary legislation as set out in the Children, Young Persons, and Their Families (Residential Care) Regulations 1996, but in a modernised form. As powers of search and seizure raise fundamental issues about the rights of children and persons, it is appropriate that they be included in primary legislation, rather than being in regulations, which are usually reserved for more minor matters of technicality and detail. The Bill also includes definitions of the key terms, and sections that describe procedures for the inspection of mail and the searching of children and young persons in residences, including pat down and strip searches, and the use of dogs for searching.

Regulations

Section 447 of the principal Act is expanded to include the power to make regulations in relation to the manner of search and seizure.

Clause by clause analysis

Clause 1 is the Title clause.

Clause 2 is the commencement clause. The Bill comes into force on **1 December 2000**.

Clause 3 sets out the purpose of the Act.

Clause 4 inserts a new heading and sections relating to searches of children and young persons.

New section 384A is the interpretation section and includes definitions of different types of searches.

New section 384B allows the person in charge of a residence to inspect mail.

New section 384C permits the searching of a child or young person for unauthorised items.

New section 384D relates to the use of dogs in searches.

New sections 384E and 384F set out the requirements of strip searching and restrictions on searches.

New section 384G provides that records of mail inspections and searches must be kept.

New section 384H provides that a child or young person who has had their mail inspected or has been searched may make a complaint.

New section 384I provides for the seizure and disposal of unauthorised items.

Clause 5 amends section 447 of the principal Act by inserting new regulation-making powers relating to searches of children and young persons. In particular, it provides for the making of regulations to enable the seizure, disposal, safe-keeping, and return of items.

Clause 6 is a savings provision to confirm that certain provisions of the Children, Young Persons, and Their Families Act (Residential Care) Regulations 1996 remain valid even though the amendments to the principal Act also deal with search and seizure, and provide for additional regulation-making powers relating to search and seizure.

Hon Steve Maharey

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The Parliament of New Zealand enacts as follows:

1 Title

(1) This Act is the Children, Young Persons, and Their Families Amendment Act **(No 3) 2000**.

(2) In this Act, the Children, Young Persons, and Their Families Act 1989¹ is called “the principal Act”.

¹ 1989 No 24

2 Commencement

This Act comes into force on **1 December 2000**.

3 Purpose

The purpose of this Act is—

(a) to include in the principal Act the principal powers of search and seizure currently prescribed in the Children, Young Persons, and Their Families (Residential Care) Regulations 1996 (SR 1996/354):

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- (b) to make it explicit that the regulation-making power in section 447 of the principal Act authorises the making of regulations setting out procedures for search and seizure:
- (c) to ensure, for the avoidance of doubt, that including matters relating to search and seizure in the principal Act does not invalidate existing regulations dealing with these matters. 5
- 4 New heading and sections 384A to 384I inserted**
- The principal Act is amended by inserting, after section 384, the following heading and sections: 10
- “Searches*
- “384A Interpretation**
- For the purposes of **sections 384B to 384I**,—
- “harmful item** means any article, drug, or substance that a member of staff has reasonable cause to believe is likely, while a child or young person is in a residence, to harm or to be used to harm that child or young person or any other person 15
- “mail** includes—
- “(a) a facsimile communication: 20
- “(b) electronic mail:
- “(c) an envelope or package
- “manager** means the person for the time being in charge of a residence
- “member of staff** means every person employed as a member of staff of a residence; and includes the manager of the residence 25
- “pat down search** means a search of a clothed child or young person in a residence in which the person conducting the search may do the following: 30
- “(a) run or pat his or her hand over the body of the person being searched, whether inside or outside the clothing (other than any underclothing) of that person:
- “(b) insert his or her hand inside any pocket or pouch in the clothing (other than the underclothing) of the person being searched: 35

- “(c) for the purpose of permitting a visual inspection, require the person being searched to do all or any of the following:
- “(i) open his or her mouth:
 - “(ii) display the palms of his or her hands: 5
 - “(iii) display the soles of his or her feet:
 - “(iv) lift or rub his or her hair:
 - “(v) remove, raise, lower, or open any outer clothing (including, without limitation, any coat, jacket, jumper, or cardigan) worn by the person being searched, except where the person has no other clothing, or only underclothing, under that outer clothing: 10
 - “(vi) remove any head covering, gloves, or footwear (including socks or stockings) being worn by that person: 15
- “(d) conduct a visual examination (whether assisted by any instrument or device designed to illuminate or magnify) of the person’s mouth, nose, and ears (not including the insertion of any instrument, device, or thing into such orifice) 20
- “**regulations** means regulations made under section 447 relating to search and seizure
- “**residence** means a residence established under section 364
- “**scanner search** means a search of a child or young person by means of an electronic device passed over the clothed body of the person being searched and that does not include any touching (except any accidental touching) of the person being searched 25
- “**strip search** means a search where the person conducting the search may require the child or young person being searched— 30
- “(a) to undress, or to remove any specified items of clothing and underclothing, and be visually examined; and
 - “(b) to have his or her clothing searched 35
- “**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.

“384B Inspection of mail

The manager may cause to be inspected, in accordance with the regulations, any mail intended to be sent or received by a child or young person in the residence if the manager believes, on reasonable grounds, that the mail contains— 5

“(a) any unauthorised item; or

“(b) any harmful item or any article, drug, or substance that may not lawfully be possessed by the person for whom the mail was intended; or

“(c) any material that would or might facilitate or encourage the commission of an offence by the person for whom the mail was intended; or 10

“(d) any material that would be likely to be offensive or harmful to the person for whom the mail was intended.

“384C Child or young person may be searched to detect unauthorised items 15

“(1) A member of staff, who believes on reasonable grounds that a child or young person in the residence has in his or her possession any unauthorised item, may carry out any of the following types of searches for the purpose of detecting that item: 20

“(a) a scanner search of the child or young person:

“(b) a pat down search of the child or young person:

“(c) a search of any room or sleeping area assigned to the child or young person. 25

“(2) Nothing in **subsection (1)(c)** limits or affects any power or authority to search or inspect any room or sleeping area in the residence for security purposes.

“(3) A member of staff may not carry out a search unless—

“(a) that member of staff requests that the child or young person hand over the unauthorised item that he or she believes on reasonable grounds to be in the child’s or young person’s possession; and 30

“(b) the child or young person refuses or fails to hand the item over. 35

“(4) Nothing in **subsection (3)** requires that a member of staff make a request if the same request has been made to the child or young person within the previous hour.

“384D Use of dogs for searching

- “(1) In exercising a power of search conferred by **sections 384B and 384C**, a member of staff may have with him or her, and use for the purposes of searching, any dog trained for that purpose.
- “(2) A dog must not be used unless it is under the control of another person (being a member of the police, or a customs officer, or a member of the Armed Forces, or an employee of the Department of Corrections), who may accompany the member of staff for the purposes of the search. 5
- “(3) A member of staff who uses a dog for the purposes of searching any child or young person must conduct the search with decency and sensitivity and in a manner that— 10
- “(a) affords to the child or young person being searched the greatest degree of dignity consistent with the purpose of the search; and 15
- “(b) prevents the dog coming into physical contact with the child or young person during the search.

“384E Child or young person may be strip searched

- “(1) A member of staff may, if that member of staff believes on reasonable grounds that a child or young person has in his or her possession a harmful item, conduct a strip search of that child or young person for the purposes of detecting the harmful item— 20
- “(a) if that member believes on reasonable grounds that a strip search is necessary in order to detect the item; and 25
- “(b) if a scanner search or a pat down search of the child or young person has already been carried out for that purpose.
- “(2) Before any child or young person is strip searched under **subsection (1)**, the member of staff who is to conduct the strip search must explain to the child or young person that the sole purpose of the strip search is to ensure the child’s or young person’s own safety and the safety of others. 30
- “(3) A child or young person required to undress or remove any clothing and underclothing under **subsection (1)** may be required to remain undressed or partly undressed only as long as is reasonably necessary for the purposes of the search. 35

“384F Restrictions on searches

- “(1) A member of staff must consult with the manager or a senior member of staff before carrying out a search under **section 384C or section 384E** unless consultation would, in the circumstances, be impracticable. 5
- “(2) A pat down search or a strip search of a child or young person must be carried out by a member of staff who is of the same sex as the child or young person being searched.
- “(3) A pat down search or a strip search must not be carried out in view of— 10
- “(a) a person who is not of the same sex as the child or young person, unless the person is a parent or guardian (other than the chief executive) of the child or young person or a person who would otherwise have the care of the child or young person: 15
- “(b) another child or young person in the residence.
- “(4) A pat down search or a strip search must not be conducted unless 1 of the following persons is also present: 20
- “(a) another member of staff;
- “(b) a member of the police;
- “(c) a parent or guardian (other than the chief executive) of the child or young person or a person who would otherwise have the care of the child or young person.
- “(5) A person who conducts a pat down search or a strip search must conduct the search with decency and sensitivity and in a manner that affords the child or young person being searched the greatest degree of privacy and dignity consistent with the purpose of the search. 25

“384G Recording of searches

The manager must ensure that a record is made in the daily log kept in accordance with the regulations of the details of any inspections or searches carried out under **sections 384B, 384C, and 384E.** 30

“384H Child or young person may make complaint

A child or young person who has had his or her mail inspected under **section 384B** or has been searched under **section 384C or section 384E** may make a complaint about that inspection or search in accordance with the regulations. 35

“384I Power to seize articles, etc, found on inspection or search

- “(1) Any unauthorised item found during any inspection or search may be seized in accordance with the regulations by the member of staff referred to in **subsection (2)**. 5
- “(2) The member of staff of the residence referred to in **subsection (1)** is,—
- “(a) in the case of an inspection carried out under **section 384B**, the member of staff conducting the inspection; or
 - “(b) in the case of a search carried out under **section 384C**, the member of staff who is conducting the search; or 10
 - “(c) in the case of a search carried out under **section 384E**, the member of staff who is conducting the search.
- “(3) Any unauthorised item seized may be dealt with in accordance with the regulations. 15
- “(4) The manager must ensure that a record is made in the daily log of the details of the seizure of any unauthorised item and of the action taken in respect of it.”

5 Regulations

Section 447 of the principal Act is amended by inserting, after paragraph (c), the following paragraph: 20

- “(ca) regulating searches and examinations of children and young persons placed in a residence established pursuant to section 364, and the inspection of incoming and outgoing mail, including (without limitation)— 25
- “(i) prescribing the manner in which searches and inspections may be carried out:
 - “(ii) prescribing the powers that may be exercised when conducting a search or inspection:
 - “(iii) providing for the seizure, disposal, safe-keeping, or return of any article, drug, or substance found during any search or inspection: 30
 - “(iv) prescribing conditions on the disposal of any seized article, drug, or substance:
 - “(v) prescribing procedures by which a child or young person may lay a complaint in relation to an inspection of mail or a search and how the complaint is to be dealt with:” 35

6 Saving

- (1) The enactment, by **section 4** of this Act, of **sections 384A to 384I** of the principal Act does not invalidate any of the provisions of the Children, Young Persons, and Their Families (Residential Care) Regulations 1996 (SR 1996/354).
- (2) The enactment, by **section 5** of this Act, of **paragraph (ca)** of section 447 of the principal Act does not imply that any regulations made under the principal Act before the commencement of this Act are invalid.

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