

Issues in residential care: Response to challenging behaviour, including use of physical restraint

Background	<p>Most young people in residential care—</p> <ul style="list-style-type: none">• have experienced significant trauma and/or• are disabled and/or• have unmet physical and mental health needs and/or• do not respond to rewards and consequences in the same way as the average young person.
Draft problem	<p>Because of their background, young people in residential care can become distressed. As a result, they can sometimes be unable to regulate their behaviour:</p> <ul style="list-style-type: none">• They can harm, or put at risk, themselves or other people, e.g.<ul style="list-style-type: none">○ self-harm, suicide○ assaults on staff and other young people○ absconding that places them at risk, exposes them to further legal consequences, or can lead to offending in the community.• Their behaviour can impact the ability for staff to care for them and others effectively.
Principles	<p>Everyone should be safe in residential care.</p> <p>Staff should not use force on young people.</p>
Draft objectives	<p>The primary objectives are:</p> <ul style="list-style-type: none">• to keep everyone safe and protected in residential care <p>The secondary objectives are:</p> <ul style="list-style-type: none">• to enable the wellbeing of young people who present challenging behaviour, especially by<ul style="list-style-type: none">○ supporting each young person to be their best self○ upholding their mana, preserving and strengthening their identity○ preventing the misuse of force or punishment against young people in residential care○ providing a te ao Māori approach to their care where appropriate, including by preserving their relationships with whānau and community○ recognising their disabilities○ de-escalating incidents with no or minimal use of physical restraint

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- avoiding further violence, fear and trauma as much as possible
 - using a restorative approach after the incident and
 - limiting the impact of challenging behaviour on the effective care of young people in residential care.
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Draft issues

If a young person in residential care is violent, what statutory authority will most effectively limit the harm they cause while supporting the well-being of that young person as much as possible?

- How can the use of physical restraint be trauma-informed and therapeutic?
- Should staff have *less* statutory authority to use physical restraints than a parent, *more* authority, or the *same* authority?
- In what contexts should staff have the authority to use physical restraints?
 - Should different rules apply as between Care and Youth Justice residences?
 - In different types of residential care?
 - Outside the home itself?

If a young person's behaviour in residential care is undermining the effective care of themselves or others, what statutory authority (if any) should staff have to impose consequences on a young person for their behaviour?

Application

Does the current Act need to be amended to provide the desired level of statutory authority?

Assumption

The particular challenges of caring for high needs children justify specific statutory provisions.

Considerations

Residential care is shifting to a more trauma-informed and therapeutic approach.

Being physically restrained, or watching others be physically restrained, has a traumatising impact.

Different types of residential care may call for different thresholds.

For those acting in the place of parents, the Crimes Act provides an alternative statutory authority to use physical restraints in certain circumstances.

There is legal risk associated with the use of physical restraint in residences that have not been formally 'established'.

Current legislation

'Discipline'

- s 384 covers 'Discipline of children and young persons in residences'. It enables staff to use discipline in 'established' residences, provided it is
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reasonable and within the limits permitted by regulations. 'Discipline' and 'reasonable' are not defined.

- Part 2 of the Regulations covers 'Limitations on powers of punishment and discipline'. This Part relates only to 'established' residences and includes:
 - Reg 17 – Behaviour management programmes include the behaviour expected of that child or young person under that programme and any rewards and sanctions that may be used.
 - Reg 18 – No member of staff of an 'established' residence can punish or sanction a child unless it is reasonable in all the circumstances and prescribed by the chief executive.
 - Reg 19 – Sets out the process to follow when a child objects to the imposition of punishment or sanctions, or to its nature or duration.
 - Reg 20 – Prohibits corporal punishment.
 - Reg 21 – Prohibits torture, cruelty, and inhuman, humiliating, or degrading discipline and treatment.
 - Reg 23 – No child shall be required to remain silent for any period of time as a punishment or sanction.
 - Reg 24 – Imposes certain limits on how long a child may be confined (not locked) to a room, while exempting secure care, illness or injury situations.

Use of force

- s 384H provides for the use of (minimum necessary) physical force to avoid or mitigate a serious and immediate risk to the safety of the child when conducting a body search (s 384C) or a strip search (s 384E).
- In addition to Regs 20 & 21 noted above, the Regulations include:
 - Reg 22(1) – No staff member shall use physical force unless that member of staff has reasonable grounds for believing that the use of physical force is reasonably necessary—
 - (a) "in self-defence, or in the defence of another person, or to protect that child or young person from injury; or
 - (b) to prevent that ...young person from damaging any property; or
 - (c) to prevent that ...young person from leaving the residence if not authorised to do so; or
 - (d) to secure the containment of that ...young person in secure care; or"
 - (e) for the purpose of carrying out any search.

Summary

- Although the Act enables it (s 384), because the required steps have not been taken (under Reg 18), there is currently no statutory authority to punish or sanction a young person in an 'established' residence.

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- The only specific statutory authority to use physical restraints in an ‘established’ residence is found in Reg 22 (as above) and s 384H (searches).
 - *Except* to the extent of the default statutory authority available to everyone (see considerations below)—
 - there is no statutory authority to punish, sanction or use physical restraints against a young person in any other form of residential care
 - there is no statutory authority to use physical restraints outside of residential care (e.g. should the young person try to abscond when making a visit away from the residence).
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Comparison with the Crimes Act

To protect a person from harm, there would appear to be no substantive difference between the statutory authority available to all parents to use force (s 59(1)(a) and ss 41, 48 & 152 of the Crimes Act) and that specified for staff working in residential care (reg 22(1)(a)).

Using force to prevent a young person from ‘damaging any property’ is not specifically authorised in the Crimes Act, so may go beyond the powers available in that Act in some circumstances. However, preventing a young person from continuing to engage in ‘offensive or disruptive behaviour’ and in ‘conduct that amounts to a criminal offence’ is authorised (s 59(1)(b) & (c) and s 41 of the Crimes Act).

The authority to use force to conduct a search (s 384H) is not specifically authorised in the Crimes Act, other than to the extent that some limited type of search may be authorised when ‘performing the normal daily tasks that are incidental to good care and parenting’ (s 59(1)(d) of the Crimes Act).

Nor does the authority to use force in the context of absconding (reg 22(1)(c)), containment in secure care (reg 22(1)(d)), and the ability to search, seize and destroy personal effects (regs 5, 6 & 11), have any direct equivalent in parents’ statutory authority under the Crimes Act.