SECURE DETENTION OF YOUNG PEOPLE IN RESIDENCES IN NEW ZEALAND

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IN CERTAIN CIRCUMSTANCES YOUNG PEOPLE MAY BE PLACED IN SECURE care in a Social Welfare residence in New Zealand. Secure care is a form of close confinement. It is not solitary confinement. But it is confinement in a residence in a locked room or enclosure with visible physical barriers.

It is not viewed as a standard procedure for the confinement of young people in a residence. It is considered to be an extreme course of action with safeguards imposed to ensure that its use is justified and is not imposed arbitrarily.

It is the purpose of this paper to describe the circumstances in which young people in residences may be detained in secure care. This paper also briefly discusses the nature of a residence and its purpose, the overriding principles of the Children, Young Persons and Their Families Act 1989 and the provisions and principles that govern retention of a young person in secure care.

Definitions and Principles

It is important to note that young people should not be held in custody pending disposition of their cases where that can be avoided. Even where offenders between the ages of 17 and 20 are held in custody in the remand wing of a prison it is common for the judge to order that the young person be kept apart from adult prisoners.

There is a statutory prohibition upon the imposition of a sentence of imprisonment in respect of a person under the age of 16 years unless the offence is purely indictable (Section 8, Criminal Justice Act 1985).

The sentence of corrective training, which is a full-time custodial sentence lasting 3 months for offenders between the ages of 16 and 20 is available in certain restricted circumstances.

Residences

It is important to understand the concept of *residence* as it applies to the Children, Young Persons and Their Families Act.

A residence is any residential centre, family home, group home, foster home, family resource centre, or other premises approved by the Director-General of Social Welfare. The function of a residence is as a place of care or treatment for the purposes of the Act.

Not all residences have facilities for secure care. Two residences in the North Island, one at Weymouth just south of Auckland, and one at Epuni near Lower Hutt, have secure care provision. Only one residence in the South Island has secure care facilities.

Purposes of residences: The major purpose of residences is to provide for the care and control of children and young persons. The Director-General must endeavour to establish a sufficient range of residences to cater effectively for the variety of special needs of such children and young persons.

In particular, residences are to be established and maintained for:

- Remand observation, assessment, classification and short-term training purposes;
- The provision of a variety of programs of special training and rehabilitation;
- The provision of periodic training, of recreational, educational, vocational activities, or of work either in a residence or in the community under supervision.
- The provision of secure care.

(Section 364 Children, Young Persons and Their Families Act 1989)

Mr Campbell and Ms Neilson will be dealing with the question of detention in Social Welfare residences (*see* pp. 83-95 of this volume) and this paper does not intend to cover that aspect of the matter in any detail.

Principles of Children, Young Persons and Their Families Act 1989

General: By way of introduction, however, it is important to note that the Children, Young Persons and Their Families Act has three specific sections relating to general objects, principles and duties. The objects and principles that are apposite for our consideration are contained in sections 4, 5 and 6 of the Act.

The objects of the Act are set out in section 4. In the context of youth justice, section 4(f) is significant. The object of the Act is to promote the wellbeing of children, young persons and their families and family groups by:

> . . . ensuring that where children or young persons commit offences:
>
> (i) They are held accountable, and encouraged to accept responsibility, for their behaviour; and
>
> (ii) They are dealt with in a way that acknowledges their needs and it will give them the opportunity to develop responsible, beneficial, and socially acceptable ways.

Section 5 sets out the general principles that are to be applied in the exercise of powers conferred by the Act. These sections are helpful from the judicial perspective.

In summary, the principles are:

- participation by the family in the making of decisions affecting the child and young person;
- the maintaining and strengthening of relations between a child and his or her family;
- the consideration of how a decision affecting the child will affect the welfare of the child and the stability of the child's family;
- the principle that the wishes of the child as far as they can reasonably be ascertained should be given weight appropriate to the circumstances having regard to the age, maturity and culture of the child;
- the principle that endeavours should be made to support of the parents, guardians, or other persons having the care of the child;
- the principle that decisions affecting a child should wherever practicable be made and implemented within a time frame appropriate to the child's sense of time.

The focus therefore in terms of section 4 is on accountability and responsibility on the part of the youthful offender and in terms of empowerment for families in terms of general principles.

In relation to secure residential care, section 6, which provides that where there is any conflict interest arising, the welfare and interests of the child or young person should be the deciding factor.

The Youth Justice provisions of the Act are contained in Part IV. The secure care provisions are contained in Part VII. Section 6 makes the interests of the child the deciding factor only where there are conflicts in the administration or application of certain parts of the Act. Part IV is not one of those specified.

However, it is my view that the general principles must always be kept in mind in the discharge of one's duties under the Act and certainly, the Youth Justice principles are subject to section 5 of the Act. But the interests of

the child may be the deciding factor where there are conflicts in administration or application within the secure care regime.

Youth justice principles: The youth justice principles contained in section 208 are subject to section 5 of the Act. In examining the issue of secure care, a constant philosophical thread is present—that close custody may only be used in certain limited circumstances. For this reason an examination of other circumstances where a young person may be held in custody is helpful.

Youth justice principles emphasise:

- that alternatives to criminal proceedings should be considered unless the public interest otherwise requires;
- that criminal proceedings should not be used solely as a means of obtaining assistance or services to advance the welfare of the child or his/her family;
- that any measures for dealing with a young offender be directed to strengthen the family group and foster its ability to deal with its young;
- that a young offender be kept in the community as far as is practicable having regard to the safety of the community; recognising that age is a mitigating factor in determining whether or not to impose sanctions, and the nature thereof;
- that when sanctions are imposed they should take the form most likely to promote the development of the young person within his/her family, and also that such sanctions should take the least restrictive form appropriate;
- that the interests of the victims should be taken into account; that the particular vulnerability of young people entitles them to special treatment during any investigation relating to the commission or possible commission of an offence by that young person.

It is quite clear therefore that the focus of the principles is upon empowering families, maintaining the child in the community, delivering appropriate sanctions, taking into account victims, and recognising the particular difficulties that a child may have experience in an encounter with investigative authorities.

Custodial Situations

It is with these principles in mind therefore that there are certain limited circumstances where a young person may be arrested without a warrant and kept in custody. But there are restrictions upon these powers. I shall refer to them in a cursory manner, for the circumstances demonstrate the application

of the principles and also demonstrate certain ways by which a young person may reach a residence.

Arrest without warrant-generally

In certain limited circumstances a young person may be arrested without a warrant. There is a difference in the approach based on arrest for an offence that is not purely indictable and an arrest for a purely indictable offence.

If a child or a young person is arrested without a warrant the enforcement officer making the arrest must within three days furnish a written report to the Commissioner of Police stating why the child or young person was arrested without warrant. The circumstances by which a child may be taken into police custody are strict and limited.

After arrest

After an arrest either with or without a warrant has been effected, the young person should be released from police custody and placed in the care of his or her family or a person approved by the Department of Social Welfare or the police.

Placement with Department of Social Welfare

In certain circumstances a young person may be placed with the Department of Social Welfare in a residence.

Placement of the child in the custody of the Director-General should be sufficient authority for the detention of the child or young person by a social worker or in a residence under the Act. It is expressly prohibited for the police to exercise the power merely because the police believe the child or young person is in need of care and protection.

Police custody

In very rare circumstances a young person may be detained in police custody. Approval must come from a senior social worker and a senior sergeant or commissioned officer of police. The preconditions for police custody are that there is a likelihood that the young person may abscond or be violent and that suitable facilities for detention and safe custody are not available to the Director-General of Social Welfare.

Powers of the Court as to Custody

Where a child appears before the court and pending a hearing the court shall either:

- Release the child or young person; or
- Release the child or young person on bail; or

- Order the child or young person be delivered into the custody of the parents or the guardians or other persons having the care of the child or young person or any person approved by a social worker; or

- Order that the child be detained in the custody of the Director-General, an *iwi*[1] authority or a cultural authority (s. 238(1)(d)); or

- Order the child or young person be detained in police custody. Effectively, section 238(1)(d) will place the child in a residence.

Restrictions

There are restrictions on the power of the court to make an order under section 238(1)(d). It must appear to the court that:

- pending the determination of the charge the child or young person is likely to abscond or commit further offences, or

- it is necessary to prevent the loss or destruction of evidence relating to the offence or to prevent interference with witnesses.

The young person shall not be ordered into police custody unless the child is likely to abscond or be violent or suitable facilities for the detention in safe custody of the child or young person are not available to the Director-General.

The provisions of section 238(1)(e) effectively amount to secure care in police custody. However, when a child or young person is placed in a residence, secure care does not automatically follow.

Secure Care

Grounds

The grounds for placement in secure care are contained in section 368 of the Act:

> A child or young person may be placed in secure care in a residence if, and only if, such placement is necessary:
>
> (a) To prevent the child or young person absconding from the residence where:
>
> (i) The child or young person has, on one or more previous occasions, absconded from a residence or from Police custody; and
>
> (ii) There is a real likelihood that the child or young person will abscond from the residence; and

[1]. "Iwi" or "bene" refers to the extended family group, where members are related by blood (*see* Brown 1993, p. 99).

> (iii) The physical, mental, or emotional wellbeing of the child or young person is likely to be harmed if the child or young person so absconds; or
>
> (b) To prevent the child or young person from behaving in a manner likely to cause physical harm to that child or young person or to any other person.

An examination of the grounds emphasises the significance that Parliament has attached to the question of secure care and that it is a remedy to be exercised only in extremis.

- The placement must be necessary.
- It is seen as a step of last resort by use of the words "if, and only if".
- Under the grounds contained in section 368(a) all the criteria must be satisfied.

There has to be a previous absconding from a residence or from police custody on one or more previous occasions. There must be a real likelihood that the young person will abscond from the residence. Furthermore, the judge must be satisfied that the physical, mental or emotional wellbeing of the child or young person is likely to be harmed if he absconds.

The question of previous absconding has been dealt with on the basis that there must be some proximity to previous absconding to the present application for that ground to be satisfied. The fact that a young person showed a tendency to abscond some two or three years before will not satisfy section 368(a)(i).

The question of real likelihood is demonstrated by propensity. There must be evidence of the likelihood of harm to the physical, mental or emotional wellbeing should the child abscond.

Section 368(b) again requires the necessity of placement as a last resort to prevent the child or young person from behaving in a manner where he or she is likely to cause physical harm to him or herself or to any other person.

Duration of care

The young person is not to be kept in secure care for a continuous period of more than 72 hours or on more than three consecutive days unless approval is granted under section 376 of the Act. That approval can only be given by a court presided over by a Youth Court Judge. Where approval is given by the Youth Court Judge the approval is only for continued custody in secure care for a period of 14 days. At the end of that period of time, if it is considered necessary for a fresh secure care application to be made, approval must be sought for a further 14 days. Effectively, the application for continuation of detention in secure care amounts to a fresh hearing and it is not enough that the young person has been kept in secure care for the previous 14 days. The grounds must be established for a renewal.

If the young person is being held pending disposition of proceedings, secure care orders will expire on the next court day, if that is within the 14-day period. The reason for that is that there may be some disposition of the matter by the Court which would render secure care to be nugatory or which may be complicated were the young person to remain in secure care.

Statistical information: The following information may be of assistance in considering the way in which secure care is used. The figures below are derived from the Weymouth Residential Centre and cover the period 1 January 1992 to 31 December 1992. During that time 418 young persons were admitted to the Secure Unit at Weymouth.

The length of stay of young people in the Secure Unit was:

Less than one day	113
One day	71
Two days	104
Three days	34
Four days	19
Five days	8
Six days	22
Over six days	47

The number of times that a young person was admitted to the Secure Unit are as follows:

Once	80
Twice	38
Three	21
Over three	29

The number of admissions where a continued retention in secure care was sought was 112.

The number of continued retentions approved by the Youth Court was 103 and nine were declined. There were 29 applications based on section 368(a), 48 based on section 368(b) and 35 based on both grounds.

The secure care regime

Before a young person is placed in secure care, he or she may be required to undress and be searched for any articles, drugs or other substances which could be harmful to the young person or others.

Once a placement in secure care has been made, it must be reviewed daily by the person in charge of the secure care unit. In addition, it must be reviewed weekly by the principal of the residence or some senior member of the staff designated for that purpose.

A young person in secure care is entitled to mix with other residents in the unit between 9.00 am and 5.00 pm. This includes eating meals with other residents and having access to appropriate forms of sporting or recreational

activity. Generally, therefore, secure care is not a form of solitary confinement.

However, these rights may be restricted. The young person may be confined to his or her room where such confinement is necessary:

- on account of any illness, injury or extreme emotional disturbance suffered by the child or young person; or
- in any case of emergency, or in order to maintain or restore order in the residence.

Steps to be taken

If the Director-General wishes to continue the detention in secure care for more than 72 hours, application must be made and if a hearing cannot be promptly scheduled the Registrar on ex parte application may make an order for secure care of up to three days, but only if the Registrar is satisfied that it is necessary on either or both of the grounds specified in section 368 to detain the child and young person in secure care pending the determination of the application.

Notifications: Where a young person is to be kept in secure care, a parent, or a guardian or a previous caregiver must be notified, together with any person nominated by the child, and the child's barrister or solicitor or youth advocate. Notices are to be given where practicable by telephone forthwith, and by letter within 24 hours of the child's secure care placement. The letter must specify the basis upon which the young person has been placed in secure care and contain a clear statement of the right to apply under section 380 for a review of the placement of the child in secure care.

Hearing: Where there is a hearing before a Youth Court Judge, no one shall be present apart from

- officers of the court,
- the child or young person,
- any parent or guardian or near relative of the child or young person, or any member of the child's *whanau*[2] or family group, or any person who was the caregiver immediately before the child was placed in the residence,
- a barrister and solicitor or youth advocate and any lay advocate who represents the child,
- the director of the residence,
- any social worker, witnesses or any person whom the court permits to be present.

[2]. "Whanau" is the smallest social unit within the biological family and literally means "to give birth". The term covers the two preceding generations of grandparents and parents, the generation of the person concerned and the two succeeding generations of children and grandchildren.

The hearings have to be held at the residence where practicable and this occurs in almost all cases in South Auckland. However, in Lower Hutt the hearings take place in the Youth Court at the courthouse. Where the hearings are unopposed, they may be conducted by teleconference.

Evidence and procedure: The court has the power to take into account any oral or documentary material that it considers relevant, whether or not it would be admissible in a court of law, and the Judge must record in writing the reasons for granting the approval and may impose such conditions relating to the continued detention of the child or young person in secure care as it sees fit.

Before an application is made for continued detention there may be an application for review of the Director-General's or Registrar's decisions. This may be carried out by a Family Court Judge, a Youth Court Judge or a District Court Judge. The High Court has a power to review a decision authorising continued secure care made by a Youth Court Judge.

Judicial decisions

Most of the decisions interpreting the secure care provisions of the Act are made by Youth Court Judges at hearings on applications for secure care. These are not always granted. There are occasions at a hearing where it becomes perfectly clear that secure care is being used for disciplinary purposes. In such a case an application will be refused. There have been occasions where there has been no evidence of mental or emotional or psychological harm, and generally evidence will be required from a specialist to support this ground.

The significance of the guiding principles of the Act are important. I held that section 6, which requires the Court to take into account the welfare of the child where there is a conflict in principles or interests, justified the placement in secure care where the young person was in the Director-General's care pursuant to the care and protection provisions of the Children, Young Persons and Their Families Act 1989. It was established that the young person had absconded, was likely to do so again and that if she absconded her well-being could be at risk from the use of drugs (*DSW v. TF* 8 March 1993).

However, in another case I held that the grounds for secure care were not established where the young person had been compliant in both the open and secure care units, had made no attempt to run away, but had told a residential social worker that he would do so. He later said that the earlier statement had been a joke. Furthermore, there was no evidence that the young person's well-being was likely to be harmed if he did abscond (*DSW v. RF* 11/3/93).

This emphasises the fact that all of the ingredients must be made out, and the Judge must be satisfied that secure care is necessary. The court will require evidence supporting all of the elements that must be established.

Evidence of the risk of physical or emotional harm must be from a source more substantial than a newspaper report (*DSW v. BC* 11/6/93). In the same case I held that a Judge need not look only at a past history of absconding to demonstrate a propensity to abscond but may also take into account other incidents of behaviour that demonstrate a wilfulness of attitude where the young person absents him or herself from a place where she or he ought to be.

Judge McElrea had to deal with a similar issue. All the absconding mentioned was from placements in the community, either with the young person's father, her uncle or *whanau* placements. The question was whether her previous history of absconding in the community was something that could be taken into account in deciding whether she may behave in a manner likely to cause harm to herself or any other person. He noted that the regularity with which she had absconded from placements within the community raised very real concerns that she may well abscond from Weymouth, and she had shown a likelihood of getting involved in offences of aggravated robbery—that is, offences involving violence or threats of violence (*DSW v. MM* 4/6/93).

However, secure care cannot be used merely to manage a difficult young person. In *DSW v. NK* (11/6/93) I said:

> It is not appropriate in my view for the Judge to take on the role of a social worker or a social analyst. One must deal with this matter in accordance with the law as it has been stated by Parliament and although evidence may be admitted that would not otherwise be admissible in a Court, although one may take into consideration such extraneous circumstances that one would be unable to take into account in a fully constituted District Court hearing, nevertheless, there are some basic parameters that have to be set in these type of applications. If Parliament intended that secure care be used to stop people from absconding per se it would have said so. If Parliament had intended that secure care be used as a form of management it would have said so. If Parliament intended that secure care be used to deal with questions of discipline it would have said so. But, against that, Parliament has decreed in the Children, Young Persons and Their Families Act certain principles which basically put the balance in favour of the child and the young person, recognising the susceptibility and vulnerability of children and young people and it is against that background and having regard to those principles that these applications must be considered along with the very stringent requirements of s. 368.

As I have already indicated it is not sufficient merely to rely upon a previous grant of an application for secure care to support a further application for continuation of secure care. In one of the few High Court cases *T v. DSW* (1989) 6 FRNZ 100 there was an application for review of a decision of a Youth Court Judge detaining the applicant in secure care. Gault

J reviewed the legislative provision and the history of the matter, observing that:

> the welfare and interests of the child or young person were paramount factors and that the very fact that the Act limits the period for which an order can be made to maximum of 14 days indicates that it is not intended as a long term form of detention unless that is shown to be necessary.

Gault J also referred to the principle that decisions affecting a child or young person should wherever practicable be made and implemented within a time frame appropriate to the child or young person's sense of time. He referred to a duty imposed upon the Director-General under section 7(ii)(e) to establish procedures to ensure that the cases of children and young persons in respect of whom action has been taken under the Act are regularly reviewed in order to assess the adequacy and appropriateness of that action. He held that upon an application for renewal of approval he would expect the Department to present the court with its assessment of the appropriateness of continued detention in light of the detention under the previous order or orders, any response to counselling and other programs, and any relevant changes in the attitudes of the family or *whanau* and to bring to the court such material as will assist it at the time of the application for renewal in determining whether continued secure care is necessary.

The learned Judge also considered the question of the location of the hearing. Quite clearly the direction that the hearing should be heard in the residence was, when read with the guiding principles in section 5, "to avoid the threatening or inhibiting environment of a court when dealing with issues of care of a child or young person".

He held secure care is not to be approved as a punishment for absconding or otherwise nor is it merely to prevent the nuisance of young people absenting themselves. Unless the grounds are made out an order cannot be made. The considerations relevant to applications for bail, such as the seriousness of the charges, likely failure to appear, likely reoffending and likely interference with witnesses can be taken into account only to the extent that they fall within one or other of the statutory grounds and it is to be noted that there are other provisions in the Children, Young Persons and Their Families Act (section 238(1)(e)) which cover such a situation. Section 368(a) requires not only previous absconding and a real likelihood of future absconding but also a likelihood of harm to the physical, mental or emotional wellbeing of the child or young person if he or she absconds. This last requirement is very broad. It extends the impact on the child or young person, not only of the further absconding but also of his or her likely conduct, company and lifestyle, having absconded.

However, secure care does not only apply to young persons in a residence awaiting disposition of their cases. It may be imposed upon young persons who are in a residence pursuant to an order for supervision with residence, or who are in a residence as a result of having been sentenced.

This latter situation was the case in *Director-General of Social Welfare v. V* (1992) 8 FRNZ 598 where the young person was found guilty of murder and received a mandatory sentence of life imprisonment. He was placed in the

Epuni Residential Centre pursuant to the provisions of section 142A of the Criminal Justice Act 1985 and was transferred to the Weymouth Residential Centre in South Auckland. It was the view of the Director-General of the Department of Social Welfare that V should be retained in secure care but that the maximum amount of time that he may remain in secure care was 14 days. It was the Director-General's contention that a fresh application must be made every 14 days to continue his retention in secure care. The Justice Department differed.

I heard the case at first instance. V had been transferred to a residence pursuant to section 142A of the Criminal Justice Act which provided that where a child or young person who was serving a sentence of imprisonment may be detained not only in accordance with the Penal Institutions Act 1954 (in a penal institution) but also in any residence for the time being approved by the Director-General of Social Welfare and the Secretary for Justice.

The Superintendent of a penal institution has legal custody of the person detained in that institution, but where the detention is in a residence the Director of the residence has legal custody of the person detained in that residence. The case focussed on the question of custody. Since V had been sentenced to a term of life imprisonment it was implicit in such sentence that it was of a custodial nature and confinement was an ingredient of the sentence of imprisonment. Apart from secure care the concept of confinement could not be guaranteed at the Weymouth residence. I made the comment:

> In my view the care of a young person vested in the Director-General pursuant to section 142A comprises an entirely unique situation. It arises of course because of the inappropriateness of the prison environment pursuant to the Penal Institutions Act for a child or a young person. It is considered that a Social Welfare residential environment is perhaps less harsh on a young person from the psychological and physical point of view and is more appropriate towards that person's age. But the concept of confinement is not eliminated. What the Director of the residence is being asked to do is to keep the young person in secure confinement in the residence as an institution rather than having that person retained in a prison as the institution. If it had been the legislative intention under s. 142A for the provisions of the Children, Young Persons and Their Families Act to apply, including those provisions relating to secure care, then I believe the legislature would have said it. It is quite clear that the legislature intended that the concept of incarceration in a penal institution would predominate and for that reason has put the emphasis in s. 142A upon the provisions of the Penal Institutions Act together with modifications. It is significant that there is no provision in the Penal Institutions Act relating to secure care.

That case went on appeal and was largely upheld.

The only qualification that the learned Judge Mr Justice Fisher made was as to the concept that the Director-General is *required* to keep a young person such as V in secure care and in confinement at a residence. The true position appears to be directed to the overriding control of the Director-General. The principal of a children and young persons' residence has a discretion whether or not to physically confine. Although physical confinement in some form

would no doubt be the normal expectation, it is not mandatory. The important point is that if the principal does physically confine there are no procedures or preconditions to satisfy and multiple applications for secure care need not be made.

Conclusion

It will be seen that the concept of secure care or close confinement both for convicted persons and for young persons held in a residence pursuant to the provisions of the Children, Young Persons and Their Families Act is very limited. Stringent preconditions must be satisfied. Such an approach is entirely consistent with the principles and goals of the children, young persons and their families legislation. The thrust is against confinement. It is towards allowing, on the contrary, as much liberty to the young person as possible recognising that without such liberty, rehabilitation, reintegration, a recognition of responsibility and the necessary empowering of the family group cannot take place where the young offender has been isolated from the family group and cannot take an effective part in such reintegration and rehabilitation.

References

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