

Cancellation of access between parent and rangatahi due to COVID lockdown

Legislation	Ombudsmen Act 1975
Agency	Oranga Tamariki – Ministry for Children
Ombudsman	Chief Ombudsman Peter Boshier
Case number(s)	524040
Date	May 2020

Cancellation of face-to-face access due to lockdown—Oranga Tamariki applied blanket rule not required by the Health Act Notices and failed to consider individual circumstances—Access reinstated so Chief Ombudsman recommended apology

Background

The complainant was the parent of a rangatahi in the care of Oranga Tamariki. The parent ordinarily had overnight, unsupervised access with the rangatahi each week. The parent lived alone, and the rangatahi lived elsewhere in the same city.

On 3 April 2020, a Health Act Notice was issued to put in place the requirements of the COVID-19 Alert Level 4 lockdown. This required everyone to stay at their current place of residence except for essential personal movement.

In preparation for the lockdown, Oranga Tamariki advised the complainant that their weekly face-to-face access with their rangatahi was cancelled. Instead, contact would be by telephone and other electronic means.

The complaint was concerned and felt it was contrary to government advice. Advice on the COVID-19 website (and provided during press conferences) advised that shared care of children could continue, where the caregivers lived in the same city or town. In the weekend of 4–5 April, further guidance had been given about single households joining with other ‘bubbles’.

The complainant believed that because shared care arrangements could continue, they were still permitted to have face-to-face access with their ranagtahi, or otherwise to join their 'bubble'. By acting against government guidance, Oranga Tamariki was unfairly disadvantaging families they worked with.

Investigation

The Chief Ombudsman notified Oranga Tamariki that he was investigating the decision to cancel the complainant's face-to-face access with their child.

Oranga Tamariki explained that it had first conveyed the decision to the complainant very early on in the Level 4 lockdown, and before national guidance was fully developed. Once developed, this guidance provided that during the Level 4 lockdown, face-to-face access arrangements could not take place unless there was a critical or very urgent need. This was a complex decision to reach, taking into account a wide range of factors:

- The Health Act Notices, and the responsibility of Oranga Tamariki to take steps to prevent the transmission of COVID-19 and to follow government directives.
- Oranga Tamariki has legal responsibility for the care of children and young people who live with caregivers.
- Oranga Tamariki staff members would generally have to supervise access, increasing the amount of contact. Public spaces where access often took place were now closed.
- Private shared care arrangements are usually between individuals who no longer reside together but continue to share the care of their children. This is not the case for children in the care of Oranga Tamariki, where they must also consider the presence of unsafe adults.
- Children in the custody of Oranga Tamariki, and their family, have a greater rate of disability and underlying health needs than the general population. This puts them at greater risk of COVID-19 transmission and associated complications.

As part of their response to COVID-19, Oranga Tamariki decided to reduce movement of children outside of their 'bubble', and to have face-to-face contact only where there were critical or urgent needs.

The Health Act Notices

The Chief Ombudsman then considered the Health Act Notice.

The first matter raised by the complainant was that their situation was similar to shared care, which was allowed to continue.

The Health Act Notice allowed a child to leave the home of one joint caregiver, in order to stay at the home of another joint caregiver, as long as there was a 'shared bubble' arrangement.

The Health Act Notice defined 'joint care-giver' as *'a person who, under an agreement or a parenting order or interim parenting order made under of the Care of Children Act 2004 has the role of providing the day to day care of the child'*.

The complainant did not have a parenting order under the Care of Children Act 2004, or day-to-day care of their rangatahi. Therefore, this part of the Health Act Notice did not apply to them.

However, the Health Act Notice also allowed 'shared bubble' arrangements between two homes, if one of the homes was a person living alone. The homes had to be in the same health district as defined by government, or in adjacent health districts, and all of the residents had to agree to the arrangement.

A 'shared bubble arrangement' might have been able to apply the complainant, allowing them to share their 'bubble' with their child. The circumstances of the complainant were very relevant:

- Access was unsupervised, so did not require Oranga Tamariki staff involvement.
- The caregivers did not care for any other children.
- The complainant lived alone.
- Access did not take place in a public setting.
- There were no identified risk factors for the rangatahi or the adults they lived with.
- The access was weekly and overnight, so it was a regular part of the young person's life.

However, Oranga Tamariki did not take these factors into account and had considered only whether there were critical or urgent circumstances. It was the opinion of Oranga Tamariki that critical or urgent circumstances did not exist.

The Chief Ombudsman considered that by setting such a high threshold for face-to-face access to continue (urgent or critical circumstances), Oranga Tamariki had essentially created a blanket rule that was not required by the Health Act Notice.

Blanket rules can have unfair and unjustified impacts, because they can mean that individual circumstances are not considered. The Health Act Notice did not require that all face-to-face access be cancelled; it depended on the circumstances of children and their caregivers and whānau. Decision-makers should always retain a level of meaningful discretion in order to mitigate the risk of making unjustified and/or unfair decisions, particularly in matters of this importance.

Outcome

The Chief Ombudsman formed the final opinion that Oranga Tamariki had acted unreasonably when it failed to consider the complainant's circumstances, and instead looked only at whether there was an urgent or critical need for access to take place.

This did not mean access should have automatically been allowed. It also did not mean the consideration given by Oranga Tamariki for the safety of children and staff members was unreasonable. It meant that Oranga Tamariki should have *considered* whether access could take place, in accordance with the Health Act Notice requirements, and not impose a blanket rule.

Oranga Tamariki had reinstated access during Alert Level 3, and so the Chief Ombudsman recommended an apology be made to the complainant.

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