Voluntary care agreements

Background

The Oranga Tamariki Act 1989 provides two pathways for families and whānau who are seeking care support voluntarily for their child or young person.

The first pathway is to seek a shorter duration care agreement:

- Section 139 Temporary Care Agreement. This is up to 28 days in length, may be extended once, and just requires agreement between the parent or guardian, and with the service provider or with Oranga Tamariki. These are for emergency-type situations.
- Section 140 Extended Care Agreement: These are up to 6 months or 12 months in length, depending on the child's age. (If the young person is 15 years or older and transitioning to independence, the agreement is renewable every 12 months). A Family Group Conference (FGC) is convened to form the agreement, and the Co-ordinator is required to certify that certain qualifying criteria are met. These are designed to facilitate and encourage reunification.

The second pathway is to seek a voluntary s.101 custody order, which is obtained through a court process. This is an application further to agreement at an FGC with whānau and made by consent with the parent(s). These are designed to provide legal certainty and rigorous oversight for all parties involved , and currently are sought when there is no immediately identifiable plan for return home.

A third pathway was disestablished as of 1 July 2019 due to being discriminatory in nature. These were s.141 care agreements for children and young people termed "severely disabled", which were renewable every 12 months.

Draft problem

What voluntary care agreement tools are needed to support the collective oranga of children, and their families and whānau?

The Oranga Tamariki Act 1989 does not provide a voluntary care agreement option for children, families and whānau who are seeking care support for longer than a short duration. They instead are required to pursue a s.101 custody order, which is relatively disempowering, and a heavy-handed solution for the situation. Improving access to voluntary care agreements would provide more options to families and whānau for finding a care solution in a way that better supports collective oranga.

Issues

Permanency vs reunification

When s.140 agreements were first established in the 1989 Act, an underlying consideration was permanency for the child. Research shows there are some benefits for the child or young person to planning for permanency at an earlier stage. Therefore, there were limitations placed on their use to encourage either reunification with the parent or guardian, or moving onwards to permanency.

As a consequence, families and whānau seeking care voluntarily may not be able to enter into a s.140 agreement due to the statutory requirements that must be met for this type of agreement to be available. These limitations include the maximum duration allowed for the agreement, and the requirement that when forming the agreement, the parent or guardian is committing to resuming care when the agreement ends.

Children and young people who may need care for longer than 6 or 12 months

In situations where the family and whānau are wishing to arrange care for longer than 6 months in the case of a child under the age of 7, or 12 months for a child aged 7 years or older, a s.140 agreement will not be available. This is because the parties to the agreement will not be able to satisfy themselves that the parent or guardian will resume care at the conclusion of 6 months or 12 months (as applicable). For example, the following situations are ineligible for the s.140 pathway:

- Children or young people with disabilities, who have care needs such that cannot be provided in the family home, or are unlikely to be available in the family home at the end of the 6-12 month period of the agreement. This includes children or young people who would have been eligible for the (disestablished) s.141 care agreement.
- Children or young people undergoing an out-of-home programme or treatment plan that is longer than 12 months. They may benefit from change, as they may not have commenced any programme or treatment plan when a s.140 agreement is being considered, and programmes may be (for example) 18 or 24 months in length.
- Families and whānau where the issues leading to seeking care support are unlikely to be resolved within the 6-12 month period.

Parents / guardians who cannot immediately commit to reunification

Some parents and guardian who are seeking care support have reached a point of crisis or burn-out, for example, from caring for a child or young person with high needs. With the benefit of a period of respite and time to arrange better support, they may in time be ready to commit to reunification. Section 140 agreements require the care and protection co-ordinator/youth justice co-ordinator to certify the criteria has been met before an agreement can be made. As the parent or guardian is unable to give that up front commitment, they are ineligible to use the s.140 pathway.

The custody order pathway is heavy-handed; has more protections

Custody orders may be with or without consent. They are at the more invasive end of care options for several reasons:

- They require a court process; families can find court processes increase the stress around their situation.
- The original parent or carer's legal role can significantly diminish under a s.101 custody order compared with a s.140 agreement depending on any related orders made under s.121 relating to the parent(s)' rights , potentially leaving little say in many aspects of their child's future arrangements aside from guardianship rights retained. This is especially difficult for parents and guardians of children and young people who, for many, often complex reasons, are unable to care for their tamariki at home. This cohort have, have sought voluntary care to provide the best support for their child's needs, and strongly desire to stay closely involved in those arrangements.

Balancing that picture, there are some advantages to obtaining a custody order:

- It provides certainty for all parties, including about the length of the order. Section 140 agreements by contrast in some circumstances can be ended with a short notice period given via written notice by either party.
- It includes extra safeguards, including court review of the order, and provision of a lawyer for the child.

Finding pathways to outcomes that support collective oranga

There is the opportunity to improve our current pathways to voluntary care by considering what approaches would best support collective oranga. This includes how to support family and whānau-led decision making, and how to support whānau in ways that work best for them, consistent with mana tamaiti, whakapapa and whanaungatanga obligations. It also includes considering what the right processes, roles and safeguards should be in the context of moving towards devolution.

Draft objectives

The primary objective is:

- to support individual and collective oranga by having the best long-term outcomes for the well-being of the child, family and whānau through mana-enhancing practices, including by:
    - providing every opportunity for the family and whānau to retain decision-making and connections with the child
    - supporting the child's voice in decision-making
    - providing longer-term stability for the child
    - providing the best support for the child's development
    - having appropriate safeguards for the child's interests

This objective is underpinned by Treaty/Te Tiriti and disability rights:

- Uphold the inherent rights of mana tamaiti, whanaungatanga and whakapapa; and partner with tangata whenua to achieve these

- Uphold disability rights consistent with a social and rights-based model of disability, including through reducing system barriers to reunification

Current legislation

Section 140 extended care agreements:

- s.140(1): The parent or guardian may make an agreement with the Chief Executive, or with an iwi social service, cultural social service, or child and family support service.
- s.140(2): Limits duration to 6 months for a child aged under 7 years, or 12 months if aged 7 years or over.
- s.144: Requires child or young person's consent if aged 12 years or over.
- s.145: Requires a Family Group Conference to make, extend or (in some cases) end an agreement.
- s.147(1): Cannot be entered into if the parent or child will not resume care when the agreement ends.
- s.147(2): Parent, guardian or family must be willing to maintain contact with the child or young person during the agreement.
- Ss. 361(a) and 362: May be placed in the charge of any person whom or organisation considered suitable to provide for the child's or young person's care, control, and upbringing.
- Ss.361(a) and 365(1): May be placed in a s.364 residence, but (s.367) not into secure care within the residence.

Amending the legislation for section 101 custody orders is out of scope.

Considerations

Other issues have been identified with current extended care agreements, which may be relevant to developing options:

- Regional differences may exist in how the current law is implemented. While Oranga Tamariki tries to ensure consistent application of the Act, including training as necessary, it is possible that families may experience differing levels of access to extended care agreements depending on where they live. This includes decisions in relation to:
  - Whether a subsequent extended care agreement can be an option for a child and family who have already completed one.
  - Whether the criteria around reunification are strictly enforced by the FGC Co-ordinator when an extended care agreement is made.
- Extended care agreements are formed through the FGC process, and therefore take on weaknesses that may exist more broadly with those processes. For example: biases that may exist in decision-making including whose knowledge is preferenced; the voice of te tamaiti; the

long-term ability to whanaungatanga and whakapapa; how sibling connections are considered especially in the context of large whānau or family groups; and, whether the process reflects partnership and devolution of decision-making with iwi partners

- Extended care agreements generally may be ended by the parent/guardian with a short period of notice, which potentially increases uncertainty for the caregiver, and instability for the child or young person.
- Residence beds are a limited resource, with not every option suitable for the range of needs experienced including disability requirements. A custody order has been the preferred legal option for children entering a residence:
    - It was only recently clarified that children on an extended care agreement could be placed in a secure residence. This is because children on a custody order may be placed into secure care within a secure residence, whereas children on an extended care agreement may not.
    - Extended care agreements generally may be ended by the parent/guardian with a short period of notice, which potentially increases uncertainty for the caregiver, and instability for the child or young person.
- Contractual arrangements with the existing third party-run residence Te Poutama may take time to catch up with current policy on placement of children on an extended care agreement. This means there may be a time lag before solutions can be implemented in practice.