



# EDUCATION COUNCIL SUBMISSION ON THE SUPPLEMENTARY ORDER PAPER 250 REGARDING SECLUSION AND RESTRAINT – EDUCATION (UPDATE) AMENDMENT BILL

## EDUCATION AND SCIENCE COMMITTEE

30 JANUARY 2017

### ABOUT THE EDUCATION COUNCIL

The Education Council of Aotearoa New Zealand is the independent professional body for teachers, representing all teachers from early childhood education through to primary and secondary schooling in English and Māori medium schools. There are currently around 101,000 practising teachers in New Zealand.

The statutory purpose of the Education Council is to ensure safe and high quality leadership, teaching and learning in early childhood, primary, secondary, and secondary schooling through raising the status of the teaching profession (s 377 of the Education Act 1989). We aim to maximise the success of every learner through supporting and developing highly effective leadership and teaching.

We act in the interests of teachers to:

- enable and support leadership to teachers and direction for the education profession, including teacher education, and continued professional and leadership development
- establish and maintain criteria for teacher registration, standards for ongoing practice and criteria for the issue of practising certificates of different kinds
- monitor and maintain the requirements relating to teacher conduct, competence and impairment
- establish and maintain a code of professional responsibility for teachers.

### Why this proposal is important to us

In providing leadership to the teaching profession, the Education Council has a key role in setting expectations for the teaching profession so children and young people learn in an environment which is safe and which promotes their wellbeing. The use of restraint and seclusion concerns the Education Council because of the impact they have on providing safe and high quality learning environments for learners. In particular, inappropriate use of force or seclusion may reflect on both a teacher's competence and conduct, and result in action by the Education Council through our competence and disciplinary processes.

“We support the proposal to prohibit the use of seclusion...”

“We do not support the proposal to legislate the circumstances where teachers or authorised staff members can justifiably use physical restraint on a student.”

“We support the proposal to include a provision for the Secretary of Education to issue guidelines on the appropriate use of physical restraint...”

As required by legislation, the Education Council is currently working towards a new code of professional responsibility for the teaching profession. This will set out the standards of integrity and conduct expected from all teachers. At the same time, we are consulting with teachers on new standards to replace the current practising teacher criteria and graduate standards. Together, this work is intended to promote safe and high quality leadership and teaching. Issues of restraint and seclusion are relevant to both works streams.

Another of our key roles is to support and develop high quality practice across the teaching career pathways so teachers are equipped with the skills they need to undertake their role. This includes having the skills to manage behaviour positively and to prevent and de-escalate challenging behaviour. National policies on the issues of seclusion and physical restraint in the education sector are therefore critical for our work.

### Oral submission

We have been invited to speak to the Education and Science Committee on 3 February 2017 about this submission as well as our previous submission on the Education (Update) Amendment Bill (the Bill).

## EXECUTIVE SUMMARY

### 1. Prohibiting seclusion

We support the proposal to prohibit the use of seclusion in all early childhood education services and schools. We do not believe seclusion is an acceptable 21st century practice for teachers to use for managing challenging behaviour at any early childhood setting or school. We recommend, however, some changes to the definition.

### 2. Limits and rules on physical restraint

We do not support the proposal to legislate the circumstances where teachers or authorised staff members can justifiably use physical restraint on a student. We are comfortable that existing legislative and regulatory provisions are sufficient to balance the rights, the safety and the wellbeing of students and others, and which set out the circumstances where teachers and others can justifiably use physical force to protect people from harm. We have serious concerns that the proposed definition of physical restraint<sup>1</sup> is too broad and the threshold for using physical restraint is too high. We have concerns that the proposed amendment may lead to a whole raft of unintended consequences, whereby teachers fear that they are not able to physically hold or have physical contact with children and young people in the course of their professional teaching role. It will also potentially expose the teaching profession to an avalanche of inappropriate complaints.

### 3. Guidelines on physical restraint

We support the proposal to include a provision for the Secretary of Education to issue guidelines on the appropriate use of physical restraint in schools and making it a legal requirement for schools to have regard for the guidelines. We consider guidelines, rather than legislation, to be a much more appropriate tool to achieve safe and consistent best practice on this matter. We note, however, that the current drafting proposal excludes the guidelines applying to private schools (i.e. schools registered under section 35A). We see no good reason for this. Best practice on acceptable methods of managing challenging behaviour must apply to all students, all teachers and to all schools.

<sup>1</sup> **Physically restrain**, in relation to a student, means to use physical force to prevent, restrict, or subdue the movement of the student's body or part of the students body”

## DISCUSSION

### Seclusion

#### 1. No seclusion at or on behalf of registered school or early childhood service (new clause 96A section 139AB)

We strongly support the proposal to prohibit the use of seclusion in all early childhood education services, ngā kōhanga reo and schools. We do not believe seclusion is an acceptable 21st century practice for teachers to use for managing challenging behaviour at any early childhood setting or school.

We support placing this into primary legislation, rather than simply *encouraging* schools to stop the practice as set out in the letter from the Secretary of Education (3 November 2016) to schools and the updated *Guidance for New Zealand Schools on Behaviour Management to Minimise Physical Restraint*. This sends the strong signal that this practice is to be eliminated.

#### Consistency across settings

We are pleased to see that the proposed amendments banning seclusion will apply to all early childhood education services and schools, whether they state, partnership or private schools. It is important that there are consistent rules and protections for all children and young people no matter what type of educational institution they attend.

“We are pleased to see that the proposed amendments banning seclusion will apply to all early childhood education services and schools...”

#### Definition of seclusion

Notwithstanding our support for the banning of seclusion, we recommend changes to the proposed definition as set out in new section 139AB (3), which reads:

**“seclude, in relation to a student or child, means to place the student or child involuntarily alone in a room from which he or she cannot freely exit or from which the student or child believes that he or she cannot freely exit.”**

“We recommend changes to the proposed definition...”

We recommend the word **“involuntarily”** is removed as it presents an unnecessary additional threshold for what constitutes seclusion. It may also create ambiguity and unintentionally create a loophole which may see the practice of seclusion continue if a child or young person follows the instruction of a teacher by entering a room **“voluntarily”**. For example, if a teacher uses the force of their authority to instruct a child or young person to go into a room alone, for the purposes of seclusion, and the child or young person does so *obediently*, is this still considered seclusion? Or is it simply that seclusion exists only when a child or young person is placed in a room against their will? We consider seclusion to exist whether the child or young person enters the room voluntarily or not. We would like to see a clear definition which provides certainty that the practice of seclusion in education settings is banned, whether the child was placed there against their will or not.

We recommend the additional proviso in the proposed definition of **“or believes that he or she cannot freely exit”** is removed. The phrase **“cannot freely exit”** is sufficient to encompass situations where the child or young person believes they cannot freely exit, or not.

A clear definition is vital to remove any confusion with the valid behavioural management practice of **“time-out”**, which is usefully defined in the recent

“We recommend the following definition...”

Ministry of Education publication *Guidance for New Zealand Schools on Behaviour Management to Minimise Physical Restraint*. The occasional school practice of “detention” would also sit outside of the definition of seclusion, whereby a student is instructed to stay on in a classroom as a disciplinary tool. Thus, “timeout” and “detention” can still be practiced as long as the child or young person is *supervised*, and the *child or student is not alone in a room or area, and they are able to freely exit*.

We therefore recommend the following definition:

“seclude, in relation to a student or child, means to place the student or child alone in a room or area at any time and for any duration from which he or she cannot freely exit.”

### Health schools and other sectors

We suggest there needs to be some examination of how this proposed legislation might impact on situations where teachers are working alongside other professionals, such as in the mental health, disability or youth justice sectors. For example, if a young person is at a health school, can mental health clinicians who work at the school, but are employed by the DHB, still place a young person into seclusion if it is deemed to be clinically necessary and the mental health standards for seclusion are met? It would be helpful for the Ministry of Education to issue guidance on these matters.

## Physical Restraint

### Limits on the use of physical restraint (section 139AC)

We do not agree there should be additional provisions placed in primary legislation to set out the circumstances where teachers or other educational staff members can justifiably use physical restraint on a student. We consider the existing legal and regulatory provisions are sufficient to protect the rights, health and safety of students and others, and provide adequate protection for teachers to use physical restraint in specified circumstances. Instead, we consider best practice guidelines to be a much more appropriate lever to achieve consistent best practice.

### Definition

We have serious concerns that proposed definition of physical restraint<sup>2</sup> is too broad and the threshold for using physical restraint is too high. We consider that this proposed amendment may lead to a raft of unintended consequences through misinterpretation or misunderstanding, whereby teachers fear that cannot have any physical contact with children and young people in the course of their valid professional role. Likewise, it may result in a wave of complaints against teachers who may have used physical contact in reasonable circumstances, but where the high threshold of the safety of someone being at serious or imminent risk is not met. A spike of unwarranted complaints would undermine confidence in the profession.

There are numerous situations where it may be entirely appropriate for a teacher to use “*physical force to prevent, restrict or subdue the movement of a student’s body or part of their body*” and where the safety of someone is not at **serious and imminent risk**. Examples include:

“We have serious concerns that proposed definition of physical restraint is too broad and the threshold for using physical restraint is too high.”

<sup>2</sup> **Physically restrain**, in relation to a student, means to use physical force to prevent, restrict, or subdue the movement of the student’s body or part of the students body”

“We have particular concerns that the proposed wording of the legislation does not take into account best practice for working with children and students with disabilities, where holding or using physical contact (which may involve “restricting or subduing the movement of a student’s body or part of their body”) is often necessary and appropriate.”

- Physically escorting using physical contact to gently assist or prompt a child or student in performing a task or move them from one area to another
- Gently holding the hand of a young student to provide comfort
- Picking up or holding a child or young student to comfort them
- Holding a child or student with disabilities to move them to another area or help them get into a vehicle
- Guiding or ushering a child or young student who is engaged in disruptive behaviour (such as throwing water or paint) away to another area
- Briefly holding (without undue force) a very young child or a child or student with cognitive or developmental disorders in order to calm them
- Using calming techniques which involve physical contact such as “deep touch pressure techniques” for students with autistic spectrum disorders
- Physically moving students from one another to break up a minor altercation where they are not responding to verbal instructions to desist from fighting, but where the safety of the students or others is not deemed to be at “serious or imminent risk” (e.g. where they are pulling each other’s hair or are pushing at each other in a non-harmful way)
- Lifting a young child or student into a car restraint or placing them in a wheelchair, push chair or high-chair
- Holding or supporting a young child or student with disabilities in order to perform or assist them with personal care tasks, such as toileting, changing diapers or bathing.

We have particular concerns that the proposed wording of the legislation does not take into account best practice for working with children and students with disabilities, where holding or using physical contact (which may involve “restricting or subduing the movement of a student’s body or part of their body”) is often necessary and appropriate. Indeed, the recent Ministry of Education publication *Guidance for New Zealand Schools on Behaviour Management to Minimise Physical Restraint* (p.3) refers to examples which they state are not physical restraint, but which could arguably still meet the definition in the proposed Bill.

This adds further weight to our recommendation that policy on the use of physical restraint is best addressed in best practice guidelines where the complexity of the issues, and the range of circumstances where physical restraint can be reasonably used, can be more fully explained.

#### **Existing provisions against inappropriate or excessive use of force**

We consider the current legal and regulatory provisions, definitions and interpretations which prohibit the use of inappropriate or excessive force are sufficient to protect the rights of children and young people and are already well understood. Again, we disagree there needs to be new legislation specific to the education sector. Current provisions against the excessive use of force already exist, and include:

Crimes Act 1961. Section 62: Excess use of force: Everyone authorised by law to use force is criminally responsible for any excess, according to the nature and quality of the act that constitutes the excess.

“There are already legal and professional consequences if a student is harmed or physical force is used inappropriately.”

Crimes Act 1961. Section 194: Assault on a child: Everyone is liable to imprisonment for a term not exceeding 2 years who (a) assaults<sup>3</sup> any child under the age of 14 years; or (b) being a male, assaults any female.

Crimes Act 1961. Section 196. Common assault: Everyone is liable to imprisonment for a term not exceeding 1 years who assaults any other person

The Education Act 1989, Section 139A: This essentially banned the corporal punishment and prohibits the use of force “by way of correction or punishment towards any student or child”.

Rule 9 of the Education Council Rules 2016: These rules set out the criteria for reporting serious misconduct of teachers. This includes (a) the physical abuse of a child or young person, (c) the psychological abuse of a child or young person, (f) ill treatment of any child or young person in the teacher’s care.

There are already legal and professional consequences if a student is harmed or physical force is used inappropriately. They could be charged with assault under the Crimes Act and the incident could be investigated by the New Zealand Teachers Disciplinary Tribunal which has the powers to cancel, or suspend a teacher’s registration and practicing certificate, impose fines and impose conditions.

There are likely to also be employment consequences for a person who is found to have acted inappropriately or illegally.

#### **Existing legal provisions which set out the justifiable use of force**

We consider the existing legal provisions which set out the circumstances where people *can use* physical force protect them or other people from harm are sufficient, and that specific legislation for the education sector in this regard is unnecessary.

Provisions in The Crimes Act 1961 which allow justifiable force to be used are set out in sections 41<sup>4</sup>, 42<sup>5</sup>, 43<sup>6</sup>, and 48<sup>7</sup>.

Furthermore, the proposed amendments would actually establish a higher legal threshold for teachers and authorised persons for the circumstances when they can use physical force than exists for the general public as set out in sections 42, 43 and 48 or the Crimes Act. We see this as unhelpful and unnecessary. It also actually does the opposite of what this legislation was intending in part to address, that is, to remove the risk of legal liability for school personnel who use physical restraint.

3 The Crimes Act, Section 2(1) interpretation: “assault” means the act of intentionally applying or attempting to apply force to the person of another, directly or indirectly, or threatening by any act or gesture to apply such force to the person of another, if the person making the threat has, or causes the other to believe on reasonable grounds that he or she has, present ability to effect his or her purpose; and “to assault” has a corresponding meaning.

4 Section 41: For the prevention of suicide

5 Section 42: “Preventing breach of the peace: Everyone who witnesses a breach of the peace is justified in interfering to prevent its continuance or renewal, and may detain any persona committing it in order to give him or her into the custody of a constable...provided that the person interfering shall use no more force than is reasonably necessary for preventing the continuance or renewal of the breach of peace, or than is reasonably proportionate to the danger to be apprehended from its continuance or renewal.”

6 Section 43: “Suppression of riot: Everyone is justified in using such force as is necessary to suppress a riot, if the force used is not disproportionate to the danger to be apprehended from the continuance of the riot”.

7 Section 48: Self-defence and defence of another: Everyone is justified in using, in the defence of himself or herself or another, such force as, in the circumstances as he or she believes them to be, it is reasonable to use.

“As the professional body for teachers, we consider it important that all teachers are held to the same high standard of conduct, whether they are employed by at a state school, partnership school or an independent (private) school.”

“We consider guidelines to be a much more appropriate tool to set out the expectations and to achieve consistent practice on this complex matter, than primary legislation.”

#### **Private schools are excluded from this proposed provision**

Notwithstanding our strong recommendation that the proposed amendments do not include physical restraint, if the decision is made to include it, it should apply in all early childhood education centres and schools, including private and partnership schools. As currently drafted, private schools are excluded.

We understand this is consistent with Section 139AAA Surrender and Retention of Property, but we see no valid reason why private schools should be exempt. As the professional body for teachers, we consider it important that all teachers are held to the same high standard of conduct, whether they are employed at a state school, partnership school or an independent (private) school. Likewise it is important that our legislation entitles all New Zealand children and young people to be safe and receive a high quality education, including the right to be free from assault or from arbitrary detention.

#### **Guidelines on Physical Restraint (proposed Section 139AE)**

We support this proposed section which places into legislation the requirement for the Secretary of Education to issue guidance on the use of physical restraint and that boards, principals and teachers must have regard to the guidelines.

We consider guidelines to be a much more appropriate tool to set out the expectations and to achieve consistent practice on this complex matter, than primary legislation.

We note that, as currently drafted, private schools are excluded from this clause. As stated previously, we have major concerns about this exclusion and strongly recommend s139AE is amended to include private schools. We know of no good reason why private schools should be exempt from applying best practice on this issue.

We welcome the recent guidance issued by the Ministry of Education *Guidance for New Zealand Schools on Behaviour Management to Minimise Physical Restraint*. We are also pleased to see that the Ministry of Education is supporting this guideline with the professional development workshops to teachers on responding to challenging behaviour. We do have some suggestions on ways to strengthen the guideline, in order to remove any ambiguity about the circumstances where physical restraint can be used. We will be raising this with the Ministry of Education separately from this submission.

#### **Early childhood education sector**

We note that the proposals on physical restraint are for the schooling sector only and exclude the early childhood education sector. The Ministry of Education's regulatory impact statement on this proposal suggests making consequential amendments for similar provisions for early childhood education services and ngā kōhanga reo through the Education (Early Childhood) Regulations 2008 and the Education (Playgroups) Regulations 2008. We welcome any opportunity to be involved in these discussions and the drafting of any regulation and guidance for this sector.