



SUBMISSION

to the

EDUCATION AND SCIENCE SELECT COMMITTEE

on

Supplementary Order Paper No. 250
(Seclusion and Restraint)

EDUCATION (UPDATE) AMENDMENT BILL

January 2017

About PPTA

1. PPTA represents the majority of teachers engaged in secondary education in New Zealand, including secondary teachers, principals, and manual and technology teachers.
2. Under our constitution, all PPTA activity is guided by the following objectives:
 - (a) To advance the cause of education generally and of all phases of secondary and technical education in particular;
 - (b) To uphold and maintain the just claims of its members individually and collectively; and
 - (c) To affirm and advance Te Tiriti O Waitangi.

Key recommendations

3. PPTA makes the following key recommendations to improve Supplementary Order Paper No. 250 (“**the SOP**”):
 - (a) That the definition of “seclude” in clause 96 (new section 139AB(3)) be amended so that it reads:

“Seclude, in relation to a child or student, means to place the student or child alone in a room or area, at any time and for any duration, from which they cannot freely exit.”
 - (b) That new sections 139AC and 139AD be deleted; and
 - (c) That new section 139AE(3) be amended so that it is limited to Boards having regard to the guidelines when they are developing other policy documents and giving effect to existing legal requirements relating to managing student behaviour; and
 - (d) That the SOP (as amended above) be delayed until there has been a comprehensive review of inclusive education and a government response. This could be done by stating that these new sections in the SOP come into force at a later date by Order in Council.

Background to the SOP

4. A couple of high profile [cases](#)¹ involving the use of seclusion rooms for students in primary schools has triggered the government to propose amendments to the Education Act 1989 (“**the Act**”) via the SOP to the Education (Update) Amendment Bill (“**the Bill**”).
5. While PPTA agrees with the intent of the Bill - to stop schools using the practice of seclusion on students - seclusion is a high level intervention that should only be used by medical personnel in very specific situations and under careful guidance and supervision, and is not appropriate for use by teachers in schools. It is our experience that it would be extremely rare, if used at all, by teachers working in secondary schools.

¹ See, for example, <https://news.fuseworksmedia.com/c2c7d446-3a81-4a30-bc98-e4fafacd7ba9> (last accessed 6/12/2017).

6. However, we have concerns about how broad the drafting of the SOP is, and believe that it will lead to unintended consequences that go beyond stopping the use of seclusion, and may inadvertently make some practices that are widely, and appropriately, used in schools illegal. We have suggested amendments to the wording of the SOP to address this.
7. The SOP is not solely limited to seclusion rooms but extends to:
 - The introduction of new limits on “seclusion” of a student performed by any teacher, employee or authorised contractor at a state school, charter school, private school or early childhood service – including a new overly broad definition of “seclusion”;
 - The introduction of new statutory limits on the use of physical restraint in relation to a student;
 - The introduction of new legislative rules relating to the use of physical restraint in relation to a student; and
 - The introduction of new legislative guidelines relating to the use of physical restraint in relation to a student.

Bad process makes bad policy

8. As noted above, the starting point for these proposals appears to be in response to high profile cases involving seclusion rooms in primary schools.
9. A more robust starting point is to do a comprehensive review of how we can better support teachers and students to make inclusive education work. We know that there needs to be an investment approach. These cases are a symptomatic outcome of the Government creating a sector that is drastically overworked and underfunded. There needs to be more resources injected at secondary school level – not just shifting the existing inadequate funding in the secondary sector to early childhood. There also needs to be appropriate and resourced funding available for teachers’ professional learning and development in this area.
10. What are the tools that the Government is proposing to introduce to help schools and teachers work with high-needs students / students with behavioural problems? The SOP reads like a not-to-do list rather than any proactive, constructive actions. In particular:
 - We note that there has been no review of the (brand new) non-legislative restraint guidelines², and that the standard within the existing guidelines is currently best practice rather than a legal requirement. This creates a document of a very different nature when you are a person who may instead be held legally liable for any actions;
 - We are aware that not all schools are receiving the training referred to in the Regulatory Impact Statement (“**the RIS**”). Demand for appropriate professional development in this area is higher than supply. We are also not aware of any review of the effectiveness of this training; and

² *Guidance for New Zealand Schools on Behaviour Management to Minimise Physical Restraint* (3 November 2016).

- There are students that have unmet needs because they do not qualify for ORS funding.
11. We note that there has been no consultation on these proposals becoming law before the SOP was introduced, that the SOP includes proposals relating to both seclusion and the additional issue of restraint of students, and that submissions on the SOP to the Select Committee close on 31 January 2017 – which is the worst time of year for the sector to be able to meaningfully engage with and respond to these proposals (being either the summer holidays or the beginning of the school year).
 12. There also does not appear to be any analysis of the problem in light of existing legal responsibilities – such as the duties under the Health and Safety at Work Act 2015 (which outlines clear health and safety obligations for staff, other students and volunteers that may be harmed by an individual student’s behaviour) or the Vulnerable Children Act 2014, or international obligations, such as the rights of children under the Universal Declaration on the Rights of the Child (e.g. the right to education and the right to physical safety) or the practical realities of running a school where a principal may need to leave a student in an office temporarily while they, for example, grab the student’s file or another student to be part of a discussion.
 13. Overall, we are concerned that this is a bad process for creating policy and that this has led to an SOP that needs significant amendments to make sure that it will actually work in the sector. As noted in the PPTA submission on the Bill itself, there is a completely different reaction from the sector to policy that has undergone a significant consultation phase (for example, early intervention changes to better support struggling schools) compared to the proposals in the SOP or the last-minute addition of COOLs to the Bill.

Seclusion

14. New section 139AB inserts a new framework that is intended to prevent the use of seclusion rooms or a student being placed in seclusion. The SOP would amend the Act to ban teachers (and other staff or people supervising or controlling any student or child on behalf of a Board of Trustees) from secluding a student or child who is enrolled at or attending a registered school or early childhood centre.³
15. The key term is the definition of “seclude”. It is defined as:

“, 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.”⁴

[Emphasis added]
16. There is a direct clash between the requirement for principals and staff to eliminate or minimise health and safety risks (including violent behaviour) under the Health and Safety at Work Act 2015 and the seclusion proposals in the SOP. The Minister of Education is on record responding to criticism about this proposal by saying that:

“... School staff could use 'low sensory spaces' instead of seclusion rooms. Seclusion is defined as being a room, lockable from the outside, into which a child is put involuntarily and cannot remove

³ Clause 96A (new section 139AB(1)).

⁴ Clause 96A (new section 139AB(3))

themselves from. A low sensory room... is a safe place, where the children understand that they can take themselves to, or a teacher can send them to, because there is an unacceptable behaviour."⁵

17. However, the drafting in the SOP goes further than banning a child or student from being placed alone in a room with a lockable door. It also extends to placing a child or student alone in a room from which they **believe** they cannot leave. This is a subjective test from the point of view of the student and is difficult to understand and act upon in practice.
18. Under the SOP, time out rooms of the type that the Minister describes would not be permitted.
19. Such a restrictive approach in the SOP fails to recognise the compulsory nature of primary and secondary education up to the age of 16 years.⁶ Primary and secondary education is based on the fact that students are legally required to be there and that any directions from a teacher are generally believed to be a requirement. Many (if not all) students believe that they have to be at school, attend the correct classes at the right time, follow instructions from teachers and that they cannot leave the grounds or their designated classroom. None of this can really claim to be voluntary.
20. As a result, the Minister's stated intention of continuing to allow time out rooms will not be met by the current drafting, as a student in this situation may genuinely believe that they cannot leave even when a door is unlocked.
21. The proposal to remove time out rooms cannot be resolved by techniques in restorative justice initiatives such as PB4L alone and, in the absence of adequate resources and appropriate training, is likely to lead to more students either being excluded or expelled on a more permanent basis or encouraged / pushed into the controversial COOLs (communities of online learning) proposed in the Bill – which evidence suggests are highly unsuitable for many of these students.
22. We note that this definition is also out of step with the definition of "seclusion" used in statutory guidelines in the mental health sector – i.e. *Seclusion under the Mental Health (Compulsory Assessment and Treatment) Act 1992*:

"... where a consumer is placed alone in a room or area, at any time and for any duration, from which they cannot freely exit"⁷
23. Note that this definition is also the one used in the New Zealand Health and Disability Services Standards 2008.
24. The definition of seclusion in the SOP is too broad and should be amended to remove the phrase "*or from which he or she believes that he or she cannot freely exit.*" We recommend that the definition of "seclude" in clause 96 (new section 139AB(3)) be amended so that it reads:

"Seclude, in relation to a child or student, means to place the student or child alone in a room or area, at any time and for any duration, from which they cannot freely exit."

⁵ http://www.radionz.co.nz/news/national/319253/seclusion-rooms-needed-for-student-safety_-school-says (last accessed 6/12/2016).

⁶ Section 20 of the Education Act 1989.

⁷ <https://www.health.govt.nz/system/files/documents/publications/seclusion-guidelines-feb10.pdf> (last accessed 16/01/2017) (February 2010, Ministry of Health), pg.1.

25. Alternatively, you could replicate the definition of seclude used in the mental health context outlined above substituting “consumer” with “student”.

The proposed limits on the use of physical restraint by teachers

26. New section 139AC would amend the Act so that a teacher or staff member was unable to physically restrain a student unless –
- The teacher or staff member believes that the safety of the student or of any other person is **at serious and imminent risk**; and
 - The physical restraint is **reasonable** in the circumstances.

27. The definition of “physically restrain” is as follows:

“, 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 student’s body.”⁸

28. Further requirements about the use of restraint will be outlined in rules⁹ and guidelines¹⁰. The rules will include requirements to keep written records on the use of physical restraint, including requirements to notify, monitor, and report on the use of physical restraint and a procedure for authorising staff members to use physical restraint in accordance with the Act. Guidelines would include best practice examples for the use of physical restraint and other examples of best practice management. The guidelines would be compulsory and principals, teachers and authorised staff members must have regard to them.

29. The definition of physical restraint is incredibly broad, does not require actual touching and will have unintended consequences. For example:

- if a student was found by a teacher to be taking a school computer out of a classroom, this definition would prevent a teacher from being able to “prevent, restrict or subdue” the student from leaving the classroom by standing in front of the door or taking the computer from their hands;
- a situation where a person may have been victimised by a student, including stalking or violence, that would prevent a teacher from physically moving on the student where they are breaching a restraining order or other school-based interventions that are intended to keep the two individuals apart. Such a case may fall short of the proposed threshold of “serious and imminent risk” but in the context and history of the case poses a potential threat of harm to another person.

30. The approach proposed in the SOP is more restrictive than what the Crimes Act 1961 and case law states that an average member of the public is able to do in self-defence of themselves, another person, or their property. For example, if a member of the public saw a student damaging a car or being involved in low-level bullying of another person that may escalate they could intervene and use reasonable force to restrain the student by blocking their ability to walk to the intended victim or until further assistance came but a teacher would be unable to under the government’s proposal in the SOP.

⁸ New section 139AC(2).

⁹ Clause 96A (new section 139AD).

¹⁰ Clause 96A (new section 139AE).

31. It is unclear why teachers would need to have additional limits placed on their power to restrain and intervene to protect themselves, another person (including other students) or personal / school property compared to an average member of the public.
32. It is over thirty years since corporal punishment was permitted in schools (abolished in 1987 and legislated against in 1990). PPTA members took a lead role in advancing this reform and passed conference policy opposing the use of corporal punishment several years before such a position became the law.
33. Secondary teachers and PPTA spent the next thirty years challenging and changing the culture of secondary teaching and student behaviour management by, for example, developing and adopting a PPTA code of ethics and working to develop the New Zealand Teachers Council's code of ethics, taking a leadership role in initiatives such as PB4L (Positive Behaviour for Learning), and developing the registered teaching criteria alongside the New Zealand Teachers Council.
34. Within a school setting there are a number of laws that already regulate teachers' obligations in respect of the safety of students. This includes, for example:
 - the Vulnerable Children Act 2014 (including a school developing a child protection policy, restrictions on people who can become teachers because they have a specified conviction, teachers being recognised as core workers and professionals that collaborate with other children's agencies, such as Police);
 - the Health and Safety Act 2015 (as discussed above); and
 - the National Administration Guidelines, specifically, NAG 5 which states that:
Each board of trustees is also required to:
 - (a) **provide a safe physical and emotional environment for students;**
 - (b) promote healthy food and nutrition for all students; and
 - (c) **comply in full with any legislation currently in force or that may be developed to ensure the safety of students and employees.**

[Emphasis added]
35. This sits alongside a comprehensive regulatory framework. There are professional regulatory consequences for a teacher that engages in misconduct, including violence against a student. Such a matter would be dealt with by the Education Council's disciplinary bodies and a teacher may have conditions imposed on their ability to teach or lose their practising certificate and livelihood entirely. Unless there are extraordinary circumstances (such as the best interests of the student involved), the decisions of the Education Council are made publicly available and remain on the public record indefinitely. They may also result in a separate criminal conviction for assault.
36. In addition, there are government agencies, including the Education Review Office and the Ministry of Education, that are there to monitor whether a school and its staff are meeting their legal obligations, including ensuring the hauora (wellbeing) of its students.
37. As a result, we believe that the introduction of new legal requirements for restraint in new sections 139AC and 139AD are unnecessary and simply creating dual regulation and more paperwork.
38. While there is benefit in having restraint guidelines in place, these are better used as a document that an employer, such as a board of trustees, refers to when they are

developing other policy documents and giving effect to existing legal requirements relating to managing student behaviour or child protection.

Oral Submission

39. We have currently been allocated a timeslot of 9:30am on Friday 3 February to make an oral submission on the substantive Bill. We request either an extension to that timeslot or an additional separate timeslot to make an oral submission on the SOP.