

Submission to the Education and Science Committee on the Education (Update) Amendment Bill Supplementary Order Paper no 250

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Introduction

1. The Human Rights Commission ('the Commission') welcomes the opportunity to provide this submission to the Education and Science Committee on Supplementary Order Paper number 2015 ('SOP'). The SOP proposes amendments to the Education (Update) Amendment Bill ('the Bill') that will prohibit the use of seclusion in schools and limit the use of physical restraint to circumstances where the safety of the student or another person is at serious or imminent risk.
2. The Commission strongly supports the SOP. Seclusion and restraint practices have a disproportionate impact on the human rights of students with disabilities, particularly those with learning and communication impairments. These practices also occur within a wider social context in which children with disabilities are much more likely to experience neglect and maltreatment¹, and much less likely to report maltreatment², than non-disabled children.
3. It is notable that recent reports of the use of seclusion rooms in schools have involved students with disabilities³. Furthermore, in 2016 the Chief Ombudsman commenced an investigation into the use of seclusion rooms in schools following allegations regarding the seclusion of autistic students in locked rooms at two primary schools⁴.
4. The Commission makes three specific recommendations regarding the proposed content of the amendment. These recommendations are summarised at paragraph 19 of this submission and relate to the desirability of developing Operational Guidelines, the insertion of a "last resort" requirement in relation to physical restraint and the need for robust practical oversight of seclusion and restraint practices in the education setting.

¹ Desch, L. W., & Hibbard, R. A. (2007). Committee on Child Abuse and Neglect, Council on Children With Disabilities, Maltreatment of Children With Disabilities. *Pediatrics*, 1018-1025.

² Irish National Disability Authority, "A Review of the Literature on Qualitative Studies of Sexual Abuse and People with Disabilities: Findings and Methodologies". Available at: <http://nda.ie/File-upload/Researching-abuse-of-people-with-disabilities1.pdf>.

³ See <http://www.stuff.co.nz/national/education/85633841/Seclusion-room-parents-receive-formal-apology-from-Ministry-of-Education>.

⁴ <http://www.stuff.co.nz/dominion-post/news/wellington/85346354/chief-ombudsman-will-investigate-use-of-seclusion-rooms-in-schools>.

Human rights implications

5. Seclusion and restraint practices have inherent human rights implications and their use in other sectors has tarnished New Zealand's human rights record. In 2014, the UN Committee on the Rights of Persons with Disabilities expressed its concern at the use of seclusion and restraint practices within medical facilities in New Zealand and recommended the immediate cessation of those practices⁵.
6. In addition, in its 2016 report on New Zealand's implementation of UNCROC, the UN Committee on the Rights of the Child recommended that the New Zealand Government strengthen its efforts to combat the marginalisation and discrimination of children with disabilities within the education system⁶, prioritise the establishment of inclusive education practices⁷ and provide adequate social and psychosocial support to children with disabilities.⁸
7. Against this context, the amendments proposed in the SOP should improve the education system's compliance with the UN Convention on the Rights of the Child and the UN Convention on the Rights of Persons with Disabilities.

Areas requiring further clarification

8. However, there are some aspects of the SOP that the Commission considers require further clarification.

Definition of "seclusion" under s 139AB

9. Proposed new section 139AB (3) establishes a general prohibition against taking any action to seclude a student or child at a school or early childhood service. "Seclude" is defined as follows:

To place the student involuntarily alone in a room from which he or she cannot freely exit or from which the student and child believes that he or she cannot freely exit

10. Section 139AB does not allow for exceptions in any circumstances, nor provide for any clause that establishes some purposive context.

⁵ CRPD/C/NZL/CO/1, paragraph 32.

⁶ CRC/C/NZL/CO/5, paragraph 30(b).

⁷ Ibid paragraph 30(c).

⁸ Ibid paragraph 37(c).

11. While the Commission firmly supports the intention of s 139AB, the broad nature of the provision may have unintended practical implications in certain transitory circumstances.
12. In order to avoid creating unnecessarily risk averse practice by teachers in their interaction with students, guidance for schools and early childhood services is required. The Commission considers the Ministry of Education's "Guidance for New Zealand Schools on Behaviour Management to Minimise Physical Restraint" document, published in October 2016, provides some useful guidance in this respect, and differentiates practices such as timeout from seclusion. However, given that s 139AB has the potential to apply to a very broad set of circumstances, these guidelines ought to be updated to specifically refer to the new section and address its interpretation and implementation in practice.
13. Further to this point, it would make sense for sections 139AD and 139AE of the SOP to require the Secretary of Education to issue rules and guidelines on physical restraint *and* seclusion, consistent with the Ministry's current approach.

Addition to Physical Incident Form

14. Additionally, in updating the current guidelines, there is an opportunity for the Ministry of Education to revise the physical restraint incident form⁹ to include a section to record impairment/diagnosis, including a section to note no formal diagnosis and/or recommended referrals. The purpose of this would be to help to ensure children are being given the appropriate behavioural support and if not, are able to be referred to a social services professional if necessary.

Introduction of "last resort" requirement to s 139AC

15. New Zealand's obligations under UNCROC require that any action that deprives a child of their liberty must be a last resort measure¹⁰. The last resort principle is reflected in statutes such as the Children, Young Persons and their Families Act 1989.¹¹

⁹ Physical Restraint Incident Form, Page B.

¹⁰ Article 37(b) UN Convention on the Rights of the Child.

¹¹ See s 208 Children, Young Persons and their Families Act 1989.

16. In order to better reflect this UNCROC principle, the Commission accordingly considers that s 139AC ought to be strengthened further by adding a “last resort” clause as a new s 139AC(1)(c), that provides:

- (1) A teacher or authorised staff member must not physically restrain a student unless—*
(a) the teacher or staff member reasonably believes that the safety of the student or of any other person is at serious and imminent risk; and
(b) the physical restraint is reasonable in the circumstances; and
(c) there are no other non-physical methods reasonably available to the teacher or staff member in the circumstances.

Oversight and monitoring

17. The Commission considers that it will be important for the Ministry of Education to work with the Education Review Office (‘ERO’) to closely monitor the implementation of new sections 139AB-139AE following enactment.

18. At a more general level, the Commission considers that there is a need for recognition of the right to inclusive education in the Education Act and for greater oversight of how schools are supporting the rights of students with disabilities, including in specialist units and special schools. The Commission has raised these matters in its main submission on the Education Update Bill¹² and in previous submissions to the Education and Science Committee¹³.

19. The Commission encourages the Ministry of Education and ERO to develop systematic monitoring and evaluation of inclusive education practices and outcomes in schools. The Ministry and ERO should also work closely with agencies such as the Human Rights Commission, the Office of the Ombudsman and Office of the Children’s Commissioner to address school practices or sector processes that prevent or fetter inclusive education rights.

Conclusion and recommendations

¹² Human Rights Commission, Submission on Education (Update) Amendment Bill, paras 18-27.

¹³ Human Rights Commission, Submission to the Education and Science Committee on its Inquiry into the identification and support for students with significant challenges of dyslexia, dyspraxia and autistic spectrum disorders in primary and secondary schools, in particular paras 15, 18, 37-38.

20. In conclusion, the Commission commends the SOP as a concrete step towards improving the safety and enhancing the rights of children at school, particularly those with disabilities.

21. The Commission recommends that the Committee:

- (a) Consider amending sections 139AD and 139AE of the SOP to require the Secretary of Education to make rules and issues on physical restraint and seclusion.**
- (b) Consider the introduction of a “last resort” provision in s 139AC as regards the limitation on physical restraint.**
- (c) Note the need for greater Ministry and ERO oversight and monitoring of the school environment as regards both the use of seclusion and restraint practices in schools and inclusive education practices more generally.**