Regulatory Impact Statement

Eliminating seclusion in schools, early childhood education services and ngā kōhanga reo, and ensuring appropriate use of physical restraint in schools

Agency Disclosure Statement

This Regulatory Impact Statement has been prepared by the Ministry of Education (the Ministry). It provides an analysis of options to eliminate seclusion in schools, early childhood education services and ngā kōhanga reo, and to ensure appropriate use of physical restraint in schools.

This is one of a suite of RISs on amendments to update the Education Act 1989 (the Act). The analysis and resulting policy proposals focus on meeting the needs of schooling and early childhood education now and into the future.

The Ministry considers this document to be a fair representation of available options.

Ellen MacGregor-Reid
Deputy Secretary, Strategy, Planning and Governance
Ministry of Education
**Status Quo**

Seclusion has been used in a small number of schools to manage challenging behaviour

1. Seclusion is when a child or young person is involuntarily placed in a room from which they cannot freely exit, or believe they cannot exit, at any time and for any duration. The door may be locked, blocked or held shut.

2. Seclusion has been used to explicitly manage challenging behaviour\(^1\) for over fifty years. It is an intervention that originated in mental health settings. It was only intended to be used in emergency situations where students or staff were in immediate danger of harm.

3. Seclusion is not the same as ‘time out’. This is where a child or young person voluntarily takes themselves to an agreed space or unlocked room to de-stimulate or calm down, or when a teacher prompts a disruptive child or young person to work in another space.

4. Research emphasises that eliminating seclusion in schools is both desirable and achievable\(^2\).

**Physical restraint is not common practice in schools**

5. Physical restraint is when a school staff member uses their own body to deliberately limit the movement of a child or young person. It is a serious step in behaviour management, and is not common practice in schools.

6. Physical restraint should only be used in situations where the student or others are in danger of harm and where less restrictive measures have been ineffective at de-escalating behaviour. It should never be used as a disciplinary or coercive tool.

**Guidance has been produced on eliminating seclusion and minimising physical restraint in schools**

7. In New Zealand, the focus has been on reducing the use of seclusion and physical restraint with most schools employing positive behavioural interventions and best practice alternatives instead. \(^3\) However, complaints by families and public reporting have brought to light examples of poor practice putting students at risk and renewed public concerns about the use of seclusion in particular.

8. In December 2014, the Ministry of Education (the Ministry) commissioned an independent inquiry into a complaint about the use of seclusion at a special school. The February 2015 report from this inquiry recommended that the Ministry convene a

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\(^1\) Examples of challenging behaviours in primary schools include verbal abuse, kicking, hitting, defiance and property damage. Examples of challenging behaviours in secondary schools include verbal abuse, kicking, hitting, defiance, property damage, fighting, drugs, bullying, cyber-bullying, mental health concerns, theft, self-harm and vandalism.

\(^2\) The consensus from research is that seclusion as a practice is risky, unnecessary, and potentially harmful, with no therapeutic benefits. Its use can result in physical and emotional trauma to the child or young person involved. Johnstone, T., Frost, A., Lattin, K. (2015). *The Use of Seclusion Practices in Schools: A Literature Review*.

working party to consider the use of seclusion and physical restraint in schools, and to investigate best practice models for managing difficult behaviour.

9. In response, the Ministry established a cross-sector advisory group\(^4\) to develop guidance on using seclusion and physical restraint. The advisory group agreed that seclusion, even in specialist settings, should be eliminated. It acknowledged that physical restraint may still be necessary in emergency situations when the student’s behaviour poses an imminent danger of physical injury to themselves and others.

10. *Guidance for New Zealand Schools on Behaviour Management to Minimise Physical Restraint* was released on 3 November 2016. It emphasises the use of preventative measures and de-escalation techniques so that seclusion is eliminated and physical restraint is less likely to be required. The priority is on the wellbeing and safety of students and staff.

11. In conjunction with the release of the guidance, the Acting Secretary for Education wrote to all schools stating her expectation that they should cease the practice of seclusion.

12. However, the guidance is voluntary, and schools can choose whether they follow all or some aspects of it. This means that schools where the practice of seclusion is well-established will still be able to use it if they choose.

13. In addition, the Ministry is providing support to schools to accompany the guidance. This includes a presentation for school leaders, and a training package on strategies to prevent or de-escalate challenging behaviour.

**Solitary confinement and immobilisation are prohibited in early childhood education services and ngā kōhanga reo**

14. The Education (Early Childhood Services) Regulations 2008 place restrictions on the practices that can be used in “guiding or controlling a child”, and are clear that the practices of solitary confinement and immobilisation are unacceptable in the early learning sector, i.e. early childhood education services and ngā kōhanga reo. (Depriving a child of food, drink, warmth, shelter or protection is also prohibited as is failing to ensure that the child is not ill-treated.)

15. Regulation 30 states that subjecting a child to solitary confinement or depriving a child of mobility are grounds for suspending a service’s licence.

16. Regulation 56 requires services to exclude any person who has subjected a child to solitary confinement or immobilisation from coming into contact with their children. If necessary, services must also bar that person from entering their premises while they are providing education and care.

17. The term ‘solitary confinement’ is not defined, but is effectively the same concept as seclusion. Immobilisation is very similar to inappropriate physical restraint, as translated to the circumstances of children aged 0-5.

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\(^4\) The advisory group comprised representatives from the New Zealand School Trustees Association, the Special Education Principals’ Association of New Zealand, the New Zealand Principals’ Federation, the Secondary Principals’ Association of New Zealand, the New Zealand Post Primary Teachers Association, the New Zealand Educational Institute Te Riu Roa, the High and Complex Needs Unit, the Ministry of Health and the Ministry of Education.


Problem Definition

Seclusion

18. There is nothing in the Education Act 1989 or any other legislation to make this prohibition on seclusion in schools explicit. While the issuing of guidance is likely to encourage schools to stop using seclusion, it may not end the practice entirely.

Physical Restraint

19. There is also nothing in legislation to cover appropriate use of physical restraint in schools. This may cause a problem for schools that correctly follow the guidance, but then have to defend themselves, potentially in court, over the use of physical restraint. The sector has contacted the Ministry with concerns that without appropriate legislative authority, schools could face legal liability when using physical restraint, even if staff follow the guidance.

Objective

20. The objective is to ensure the safety and wellbeing of children and young people and staff by eliminating seclusion in schools, early childhood education services and ngā kōhanga reo, and ensuring the appropriate use of physical restraint in schools.

21. Options to address the objective were assessed against the following criteria:

- the safety and wellbeing of children and young people and staff
- alignment with society’s expectation about what are acceptable methods of managing challenging behaviour
- is clear about when, why and how physical restraint could be used
- ensures safeguards are in place so that physical restraint is used reasonably and proportionately on children and young people
- leads to a change in behaviour
- consistency between the schooling and early learning sectors.

Options

22. Three options were considered:

- **Option A**: Status quo / Non-regulatory response – Provide guidance to schools on eliminating seclusion and using physical restraint appropriately, and prohibit the use of solitary confinement and immobilisation in early childhood services and ngā kōhanga reo through regulations.

- **Option B**: Regulatory response – Legislate to ban seclusion in schools, early childhood education services and ngā kōhanga reo, and regulate the appropriate use of physical restraint in schools.

- **Option C**: Regulatory response – Legislate to ban seclusion in schools, early childhood education services and ngā kōhanga reo, and regulate the appropriate use of physical restraint with additional legal protections for staff when using physical restraint in schools.
Impact analysis

Option A: Status quo / Non-regulatory response – Provide guidance to schools on eliminating seclusion and using physical restraint appropriately, and prohibit the use of solitary confinement and immobilisation in early childhood services and ngā kōhanga reo through regulations

23. Guidance has been issued to schools requiring them to stop using seclusion and to minimise the use of physical restraint. Issuing guidance makes it clear that seclusion should no longer be used in New Zealand schools, and helps schools to address the uncertainty staff experience when deciding whether or not to use physical restraint.

24. Guidance provides schools with clear information on when, why and how physical restraint could be used. This helps to ensure safe and consistent practice across the country. Following the guidance would also minimise a staff member’s risk of injuring a student or being hurt themselves, and mitigate the risk of legal liability.

25. However, while the issuing of guidance is likely to discourage schools from using seclusion and encourage them to minimise the use of physical restraint, it continues to be voluntary for schools to follow all or some aspects of the guidance. This means that schools could continue to use seclusion or choose to introduce it in the future. It also means that both seclusion and physical restraint could be used inappropriately, putting children and young people’s safety and wellbeing at risk.

26. At present, the issuing of guidance by the Secretary for Education is also voluntary. This means that a future Secretary could decide to withdraw the guidance.

27. Under this approach, the use of solitary confinement and immobilisation in early childhood services and ngā kōhanga reo would continue to be prohibited through the Education (Early Childhood Services) Regulations 2008.

28. As a result, there would continue to be an inconsistency in that the early learning sector would use a regulatory approach to address these practices as opposed to a non-regulatory approach for schools.

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Option B: Regulatory response – Legislate to ban seclusion in schools, early childhood education services and ngā kōhanga reo, and regulate the appropriate use of physical restraint in schools

29. Under this option, amendments would be made to the Education Act 1989 (the Act) banning seclusion and regulating the use of physical restraint in schools, early childhood education services and ngā kōhanga reo.

30. The amended Act would prohibit seclusion could be done in a similar way to section 139A which prohibits corporal punishment. This would send the clearest possible signal that seclusion is no longer to be used in New Zealand schools, early childhood services and ngā kōhanga reo.

31. The amended Act would also make it clear to all affected parties that the use of physical restraint is legitimate in a schooling context, but only in limited situations. The inclusion of safeguards, such as an objective requirement that the restraint used must be reasonable in the circumstances, will help to alleviate concern about possible abuse of the new power. The international literature is in agreement that physical restraint must be regulated if its use in schools is to continue. Such an approach is also consistent with equivalent regimes in the health, social welfare, and transport sectors.

32. An advantage of this approach is that it clearly and transparently sets out in law what the limitations are when using physical restraint in an education context. Currently, staff are left to interpret what general law, particularly the New Zealand Bill of Rights Act 1990 and the Crimes Act 1961, allows them to do when physically restraining a child or young person.

33. Physical restraint would be regulated via a combination of primary legislation, rules and guidelines. It would be a legal requirement for schools to apply the primary legislation, follow the rules and have regard for the guidelines. This follows the approach for other behaviour management regimes in the Act, where provisions that need to balance human rights with health and safety, i.e. the regimes for surrender and retention, and for stand-downs, suspensions, exclusions and expulsions.

34. This approach would also enable the early childhood and schooling sectors to be brought into line. Putting a ban on seclusion in the primary legislation for schools, early childhood education services and ngā kōhanga reo would mean that the practice is illegal in both sectors. Consequential amendments to the Education (Early Childhood) Regulations 2008 and the Education (Playgroups) Regulations 2008 would establish similar provisions to schools on physical restraint.

Alternative approach not further considered

35. This option could also have been achieved by making regulations under section 78 of the Act. We ruled out this alternative approach as regulations are not as visible or as transparent as establishing a seclusion and physical restraint regime in the primary legislation.


6 Section 78 enables the Governor-General from time to time to make regulations providing for the control, management, organisation, conduct and administration of schools.
Option C: Legislate to ban seclusion in schools, early childhood education services and ngā kōhanga reo, and regulate the appropriate use of physical restraint with additional legal protections for staff when using physical restraint in schools

36. This option would go further than Option B by giving additional legal protection to staff in schools, early childhood education services and ngā kōhanga reo when using physical restraint. This would be done by putting all of the seclusion and physical restraint regime into the Education Act 1989 with a provision that it overrides any other legislation (such as the New Zealand Bill of Rights Act 1990 and Crimes Act 1961).

37. Under this approach, as long as a staff member was acting in accordance with the seclusion and physical restraint regime in the Act, they would not be able to be challenged in the courts.

38. While staff in the early learning and schooling sectors would not necessarily have greater licence to use physical restraint than those in other sectors such as Corrections Officers, mental health nurses, and Police officers, they would have greater protection under the law so long as they follow the regime in the Act.

39. While many parents, caregivers and members of the public may accept there are some limited situations that require the use of physical restraint, they may be uncomfortable with staff in schools, early childhood education services and ngā kōhanga reo being able to use physical restraint more freely and openly than those managing the challenging behaviour of adults.

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Consultation

40. There has been a range of discussions on seclusion and physical restraint over the past few years that have informed our options development and analysis.

41. Recently, there has been widespread public debate about the use of seclusion following public reporting on the case of a primary school placing a student with learning support needs repeatedly in a seclusion room. The consensus was that seclusion is no longer considered an acceptable strategy for managing challenging behaviour in schools, and that the practice needs to stop immediately.

42. We explicitly consulted on Option A through the cross-sector advisory group. This group was established to develop guidance on seclusion and physical restraint in response to both a complaint about the use of seclusion and calls for more formal guidance on using physical restraint from the education section.

43. It undertook consultation with a wide range of groups on current and best practice when developing its guidance. This included school visits, and consultation with education sector representatives, parent and disability sector representatives (such as Autism New Zealand, Parent to Parent and the New Zealand Down Syndrome Association), and relevant government agencies.

44. The additional legal protection aspect of Option C emerged in response to concerns raised by the Secondary Principals Association of New Zealand (SPANZ) representative on the advisory group about the risk to teachers from any legal action resulting from the use of physical restraint.

45. If Option B or C is pursued, there will potentially be an opportunity for the public and key stakeholders to submit to the Education and Science Committee on the proposed amendments to the Act relating to seclusion and physical restraint.

Conclusions and recommendations

46. We consider Option B is the preferred option. The legal framework would then clearly signal that seclusion is no longer acceptable in New Zealand schools, early childhood education services and ngā kōhanga reo. It would signal that the use of physical restraint is legitimate in a schooling and early childhood context, but only in limited circumstances. It would also ensure appropriate safeguards are in place to prevent physical restraint being used unreasonably or disproportionately.

47. We therefore recommend amending the Act to ban seclusion in schools, early childhood education services and ngā kōhanga reo. This specific amendment would make the practice illegal.

48. We also recommend amending the Act to enable teachers and authorise support staff to use physical restraint in certain circumstances, and 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. These specific amendments would send the clearest possible signal that the use of physical restraint is to be minimised.
Implementation

49. Legislative amendments could be made through the Education (Update) Amendment Bill. As this Bill is being considered by the Education and Science Committee, a Supplementary Order Paper (SOP) would be needed to make these amendments to the Act. To do this, the Minister of Education would need to invite the Committee to consider the SOP.

50. The provisions eliminating seclusion and regulating the use of physical restraint in schools, early childhood education services and ngā kōhanga reo would come into effect upon assent of the Bill to update the Act, which is scheduled for March 2017.

51. We would then reframe the current guidance issued to schools into guidelines and rules.

52. We would communicate the change in legislation to stakeholders through:
   - issuing guidelines and rules
   - a notice in the Ministry Bulletin for School Leaders and Early Learning Bulletin
   - updating Ministry resources relating to seclusion and physical restraint, including information on http://www.parents.education.govt.nz
   - ensuring Ministry of Education staff have the required information they need to support schools
   - briefing key education sector groups, and parent and disability organisations.

Monitoring, evaluation and review

53. Once the Bill to update the Act is passed, there is an opportunity to consult with the education sector and refine practice when reframing the guidance into rules and guidelines.

54. In October 2016, the Chief Ombudsman initiated an investigation into the use of seclusion following complaints about the use of the practice by two schools. This will look at the actions of the schools concerned, the extent of the practice, and any related actions or omissions of government agencies. The findings from this investigation will be able to inform the rules and guidance, as well as any changes to our own practice.

55. Amending the Act to require schools to report any use of physical restraint will allow us to monitor when, why and how the practice is being used. This will enable us to analyse trends in the incidence of physical restraint, and update the rules and guidelines to reflect evolving practice or address areas of concern.

56. In addition, the Education Review Office (ERO) may review a school’s use of physical restraint as they would any other school operation or procedure.