

YouthLaw Aotearoa Submission on the Education and Training Bill

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Introduction

Who we are

YouthLaw Aotearoa is a Community Law Centre vested under the Legal Services Act 2000. We are part of the nationwide network of twenty four community law centres throughout Aotearoa / New Zealand.

YouthLaw Aotearoa was established in 1987 as a national centre providing free legal advice and advocacy specifically for children and young people under 25 years of age. Around one third of our casework, or between of our 350-400 clients each year, relates to education issues. This includes helping children and young people with issues such as school disciplinary decisions, support for children with special educational needs and enrolment issues. Our lawyers support children and their families with information and advice to help them resolve an issue themselves and, where the case is more complex, we provide further assistance including representation at Boards of Trustees' meetings or before courts and tribunals. We run legal education workshops for children and young people or those supporting them including sessions on education law. We also publish youth-friendly information resources and undertake research and make submissions on the law and policy affecting children and young people.

This submission is informed by YouthLaw Aotearoa's insights from working with children and young people across New Zealand for over thirty years. It has been prepared by Sarah Butterfield, a solicitor on our legal team, Jennifer Braithwaite, our General Manager, and Simon Judd, the Chairperson of our board and a barrister specialising in education law. It also includes contributions of a group of young people who attended the YouthLaw Young Creatives Camp in January and is informed by the draft submission from Auckland Disability Law.

Summary of views

YouthLaw Aotearoa strongly support many aspects of the Education and Training Bill. In

particular, we support the establishment of the new Disputes Panels to consider serious disputes between children and young people and their schools. We have long advocated for a forum to consider Board of trustees' decisions in relation disciplinary matters and we see this as a significant step forward for children and young people. We also strongly support the inclusion of a statutory right to education and the provision for the children and their whānau to raise disputes about whether schools have given effect to this right.

However, we do have some concerns about other aspects of the Bill and consider that a number of improvements could be made to better give effect to children's rights and support their wellbeing.

Structure of the submission

This submission will begin by addressing a number of cross cutting issues then follow the structure of the Education and Training Bill ("the Bill").

We would like to make an oral submission to the Education and Workforce Committee.



Sarah Butterfield, Solicitor



Jennifer Braithwaite, General Manager



Simon Judd, Chairperson

14 February 2020

Children's Rights

Scope of Children's Rights

YouthLaw Aotearoa strongly support the explicit inclusion of the right to education in the Bill and the references to student's rights in the clause relating to Board of Trustees's objectives. However, although these provisions are a welcome recognition of children's rights and a step forward from the existing Education Act, they do not go far enough as they do not include the full breadth of children's rights at international law including under the UN Convention on the Rights of the Child ("UNCROC"), the UN Convention on the Rights of People with Disabilities ("UNCRPD"), and the UN Declaration on the Rights of Indigenous Peoples ("UNDRIP").

The failure to make any reference to UNCROC is particularly surprising given the New Zealand Government's very recent recommitment to the Convention on 20 November 2019.¹

Inclusion of guiding principles based on Children's Rights

Clause 4 of the Bill provides that the purpose of the Act is to establish and regulate an education system that has a series of outcomes. YouthLaw Aotearoa endorses these outcomes however, we submit that the education system should also advance children's rights under UNCROC and other international conventions and clause 4 should be amended accordingly.

We submit that clause 4 should be amended by adding a new sub-clause (e):

“(e) advances children's rights including those rights set out in UNCROC, UNCRPD and UNDRIP.”

¹ 30th anniversary of the Convention on the Rights of the Child New Zealand pledge (Ministry of Foreign Affairs and Trade, November 2019).

We further submit that these clauses should be supported by a new clause setting out guiding principles for the exercise of any powers under the Act based on children's rights similar to the approach taken in the Oranga Tamariki Act 1989 (as amended by section 11 of the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017).

We submit that a new clause 5 be inserted into the bill which provides:

“5 Principles to be applied in exercise of powers under this Act

(1) Any person who, exercises any power under this Act must be guided by the following principles:

(a) the well-being of a child or young person must be at the centre of decision making that affects that child or young person, and, in particular, the child's or young person's rights (including those rights set out in UNCROC, UNCRPD and UNDRIP) must be respected and upheld.”

Clause 122 – Board of trustees Objectives

YouthLaw Aotearoa welcome the expansion of the objectives of Boards of Trustees in governing schools as discussed in greater detail below. However, we are concerned that the objective in relation to students' rights is extremely limited in recognising only those rights in the Human Rights Act, Bill of Rights Act and those provided for elsewhere in the Act rather than the full range of rights that children have under international law.

We submit that clause 122(1)(b)(ii) is amended to include the full range of relevant student rights:

“gives effect to relevant student rights set out in this Act, the Bill of Rights Act 1990, the Human Rights Act 1993 and those rights set out in UNCROC, UNCRPD and UNDRIP.”

Participation

Article 12 of UNCROC provides that children² have the right to freely express their views about all matters that affect them and to have those views given due weight in accordance with their age and maturity.³ Children are also the experts in their own lives and are uniquely qualified to speak about any problems they are experiencing and what might work to solve them. The input we received from high school students during a workshop with them in relation to this submission is a great example of this.⁴ As a result, hearing and incorporating children and young people’s voices is not only required to give effect to their rights under UNCROC, but also results in better decisions.

We also know that children and young people want to be involved in decisions about their education. For example, one of the key insights the New Zealand School Trustees’ Association and the Office of the Children’s Commissioner drew from their 2017 engagement with 1,674 children and young people in relation to their views on education was that:⁵

“Children and young people experience a lack of choice or participation in decision making about their own lives and schooling. They really want to have a say in their education, and they want teachers to involve them in their learning.”

² Defined in article 1 of the United Nations Convention on the Rights of the Child UNTS1577 3 (open for signature 20 November 1989, entered into force 2 September 1990) as those up to the age of 18.

³ UNDRIP and the UNCRPD also contain participation rights for these groups.

⁴ See “New Board of Trustees’ Objectives” at page 23.

⁵ New Zealand School Trustees Association and Office of the Children’s Commissioner *Education matters to me: Key insights* (January 2018) at 9.

One of the outcomes of the newly adopted Child and Youth Wellbeing Strategy is also that: “[c]hildren and young people are involved and empowered”. The education system is the primary way that the government touches the lives of most children and young people and accordingly to achieve this outcome, the education system must ensure children and young people are able to express their views and their views must be given weight.

As set out above, we submit that a new clause 5 should be inserted into the Bill. We further submit that a sub-clause (b) should be inserted that provides for the right to participate”

“(b) a child or young person must be encouraged and assisted, wherever practicable, to participate in and express their views about any process, or decision affecting them, and their views should be taken into account:”

Constitution of Boards of State schools

No change has been made to the composition of Boards of State schools – section 94 of the Education Act 1989 has simply been repeated in clause 115 of the Bill. This clause provides for a single member of each Board of trustees to be a student representative.

The Tomorrow’s Schools taskforce recognised the issues with the Board composition stating “real questions about whether a sole learner/ākonga on a secondary school/kura board can effectively represent a learner/ākonga population of hundreds, if not thousands, of diverse young people” and recommended that “the Children’s Commissioner be tasked with reviewing the requirement for learner/ākonga participation in school/kura governance with a view to updating current requirements.” We agree with those concerns and note that to our knowledge no review has been commissioned or is underway.

In our submission, good practice in relation to involving young people in governance would require at least two at any meeting to ensure that they are never the lone youth voice in a room full of adults. Given that young people generally have many other commitments and will not always be able to attend Board meetings, we submit that there should be at least three student representatives.

We submit that clause 115(1)(f) of the Bill be amended to provide that at least 3 members of Boards administering schools with students above year 9 be student representatives.

Consultation and engagement with students

A number of sections of the bill provide for an obligation to consult with variously the school community, students and students' parents. There are a number of inconsistencies and in many cases, there is either no obligation to consult with students or significant limitations on that obligation to consult contrary to children's rights under UNCROC.

- Clause 5 - Consultation before issuing a statement of educational priorities (reasonable efforts only);
- Clauses 78 and 87 - Before Secretary lifts a suspension or directs enrolment of a student under 16 or directs enrolment of a student over 16 they must make all reasonable efforts to consult the student;
- Clause 87 – The Board of trustees must consult the school community before adopting a statement on the delivery of the health curriculum. One of the stated purposes of the consultation is to ascertain the wishes of the community and the health education needs of the students. However, the definition of school community does not include its students (although the board could decide that the students are a group of persons that are part of the school

community).⁶ This provision is extremely problematic because it disregards students' own views in relation to their health needs and it is easy to anticipate situations where these may conflict with the views of their parents, e.g. in relation to sexual health, or children may be reluctant to tell their parents, e.g. mental health, self-harm, leaving students in a position where their health needs are not met.

Section 36 of the Care of Children Act 2004 also states that children over the age of 16 years can give consent as if they are adults and in our submission, it is likely that New Zealand courts would follow the *Gillick* competence approach⁷ that parental consent is not always necessary for medical procedures or treatment for persons under 16 years. Given that in many cases students can consent to their own medical treatment, it is illogical that there is no obligation to seek their views on the health curriculum. It is also clear that students have a lot to say about health issues. An example of this in relation to suicide is included in this submission at page 24.

- Clause 121 – Although this clause does provide for the obligation to consult with students before making bylaws this obligation is only “to the extent that the board considers appropriate” which allows Boards an unacceptable level of discretion without any element of objectivity;
- Clause 134 – Similarly, Boards must only consult students before preparing a strategic plan “where appropriate”. It is unclear whether this is intended to be a partly objective test or the

⁶ Boards of trustees can decide that the students are a group of persons that are part of the school community but there is no requirement that they do so.

⁷ Based on the United Kingdom House of Lords' decision in *Gillick v West Norfolk and Wisbech Area Health Authority (Gillick)* [1985] UKHL 7; [1986] AC 112 (HL)

determination of what is appropriate will be left solely to the Board of trustees. In either case, this provision is inappropriately vague and “where appropriate” should be deleted;

- Clause 193 – This clause provides that the Minister can only merge State schools if it is satisfied that the Board of trustees has made reasonable efforts to consult with the parents of students other than adult students. Not only is there no obligation to consult students, but this also applies even in the case of adult students (defined as those who have turned 20) whose their parents do not need to be consulted. Oddly, the parallel provisions in Schedule 6, clause 15 relating to State integrated schools do include an obligation to consult adult students. It is unclear whether this is a drafting error or an intentional distinction. In any event, we submit that there should be an obligation to consult students in all cases;
- Schedule 21, clause 1 – parent representatives are elected by other parents other than where the students are now adults (defined as aged 20).
- Definition of adult students – Adult students are defined as those who have turned 20 which runs counter to almost every other piece of legislation in relation to legal ages.⁸ This definition is only used in the clauses relating to consultation over merging schools and the election of parent representatives. The only logical reason for setting the age at 20 appears to be to limit the role of students. Strangely, adult students do not get to vote for the student representatives on the Board (Schedule 21, Clause 2(2)).

We submit that the following amendments need to be made to the clauses set out above:

Clause 87: insert: “students enrolled at the school”.

Clause 134(3): delete “where appropriate”.

Clause 193: delete “(other than adult students)” and “insert “students and” before “the parents”.

Schedule 21, Clause 2: delete sub-clause (1)(b) and sub-clause (2)(b) and “(other than adult students)” in every case where it appears.

Schedule 21, Clause 2: delete “(other than adult students)” in every case where it appears.

⁸ See YouthLaw Aotearoa, “Legal Ages” for a summary of the legal ages in various contexts <<http://youthlaw.co.nz/rights/legal-ages/>>

Te Tiriti o Waitangi / the Treaty of Waitangi

Youthlaw position

YouthLaw Aotearoa has Māori staff and Board members but we are not a Māori organisation and accordingly do not claim to speak for or represent Māori. However, we have an organisational commitment to Te Tiriti o Waitangi and see advocating for the Government to meet its obligations to Māori as part of our wider role as advocates for children and young people. Accordingly, although we make submissions on those provisions in the Act that relate to Te Tiriti o Waitangi, we defer to representative Māori organisations.

In drafting this section of our submission we have engaged with Ngā Kaiāwhina Hapori Māori o Te Ture, the Māori Caucus of community law centres' representative body Community Law Centres o Aotearoa.

Clause 4 - Inclusion of Te Tiriti o Waitangi

YouthLaw support the inclusion of Te Tiriti o Waitangi in clause 4 which sets out the purposes of the Act. However, in our submission, the phrase “honour the Te Tiriti o Waitangi” is too weak the relevant subclause should be amended to provide that the purpose of the education system is to “give effect” to Te Tiriti. The phrase “give effect to” is well understood and defined whereas “honour” is less clearly defined and weak.

We submit that clause 4(d) be amended to provide:

“The purpose of this Act is to establish and regulate an education system that—

...

(d) Gives effect to Te Tiriti o Waitangi and its principles and

**supports
relationships.**

Māori-Crown

Clause 5 National education and learning priorities

It is positive that this clause provides that one of the objectives of the education system include instilling an appreciation of the importance of Te Tiriti o Waitangi and te reo Māori in each child and young person. The young people we spoke to in preparing our submission made it clear that they thought it was important that Te Tiriti o Waitangi, Te Reo Māori and New Zealand history be taught in all schools.⁹ This is also supported by the findings of the Office of the Children's Commissioner and the School Trustees Association.¹⁰ Accordingly, we submit that clause 5(4)(c)(iii) should be amended to include a reference to New Zealand history.

YouthLaw Aotearoa also acknowledge the obligation on the Minister in clause 5(6)(b)(viii) to make reasonable efforts to consult national bodies representing the interests of Māori education organisations. However, this falls well short of the Crown's Treaty obligation to consult Māori. First, as the Waitangi Tribunal has found in a number of its reports, consultation with Māori will not always suffice to fulfil the Crown's Treaty obligations.¹¹ Where there are disparities, as there are for rangatahi and tamariki Māori in

⁹ See the further discussion in relation to “Clause 122 sub-clause (1)(d)(i) – (iii) Te Tiriti o Waitangi” on page 30.

¹⁰ New Zealand School Trustees Association and Office of the Children's Commissioner *He manu kai mātauranga: He tirohanga Māori / Education matters to me: Experiences of tamariki and rangatahi Māori* (March 2018).

¹¹ For example see Waitangi Tribunal *Whaia Te Mana Motuhake/In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Wai 2417, - 2014), at 43 and Waitangi Tribunal *Te Urewera Report Part (VI)* (Wai 894, 2015) at 659.

the education system,¹² the Crown obligation to reduce those disparities must be fulfilled in both good faith and in partnership with Māori. Secondly, this obligation is limited to national bodies representing Māori education organisations and therefore does not include other national Māori organisations that do not fall within this definition, any regional organisations or Iwi and hapū organisations which are not be national by their very nature.

We submit that a new subclause (7) be inserted that sets out the Crown's duty to Māori:

“(7) The Minister must work in good faith and in partnership with Māori.”

Subclause (5) should also be amended to include a reference to subclause (7).

Clause 6 Statement of expectations

YouthLaw Aotearoa support the obligation on the Ministers of Education and Māori Crown Relations: Te Arawhiti to issue a Statement of expectations for the purposes of providing equitable outcomes for all students. However, we are concerned that there is no form of accountability. We are also concerned that limiting the obligation to consultation does not fully comply with the Crown's obligations.

We submit that clause 6 be amended to ensure that agencies will be accountable for failing to meet the Statement of Expectations and by amending subclause (3) to include the obligations to work in good faith and in partnership with Māori.

Clause 9 Te Tiriti o Waitangi

Although this clause is useful in bringing together the relevant clauses elsewhere in the Bill, it makes it clear that these provisions do not reflect the full breadth of Crown obligations under Te Tiriti o Waitangi. This

concern will be partly addressed if the other amendments set out in this part of our submission are made, but it is important that this clause is not read as setting out an exhaustive list or the limit of the Crown's obligations to Māori.

Clause 122(1)(d) Board Objectives

As set out in more detail on page 26, YouthLaw Aotearoa support the inclusion of the Board objective relating to Te Tiriti o Waitangi. In particular, we strongly support the focus on outcomes in subclause 122(1)(d)(iii). However, this subclause should also reflect the Te Tiriti duty of active protection which can require 'affirmative action' or the deployment of additional resources and effort¹³, the guarantee of tino rangatiratanga or Māori self-determination and mana motuhake¹⁴ and the principle of options, which requires services to be provided in a culturally appropriate way.¹⁵

We submit that clause 122(1)(d)(iii) be amended to provide:

“(iii) achieving equitable outcomes for Māori students including through the application of additional resources and effort where necessary, culturally appropriate delivery and delivery in partnership with Māori.”

Kura Kaupapa Māori

YouthLaw Aotearoa do not make any submissions on the provisions relating to Kura Kaupapa Māori on the basis that it is the right of Māori to determine how Kura Kaupapa Māori operate in accordance with the guarantee of tino rangatiratanga. In particular, we support the right of Te Runanga Nui o Nga Kura Kaupapa Māori o Aotearoa to speak on these matters.

¹² See Education Counts, “Stand-downs, suspensions, exclusions and expulsions from school” <<https://www.educationcounts.govt.nz/statistics/indicators/main/student-engagement-participation/Stand-downs-suspensions-exclusions-expulsions>>

¹³ Waitangi Tribunal *Tu Mai Te Rangi - Department of Corrections and Reoffending Prisoners Urgency Report* (Wai 2540, 2017) at page 35.

¹⁴ Waitangi Tribunal *Hauora - Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2572, 2019) at page 163.

¹⁵ *Ibid.*

Early Childhood Education

Additional requirements for new ECE's

We support the additional requirements for new Early Childhood Education ("ECE") centres.

Police vetting

We support the requirement of police vetting of all adult members of a household where licensed home-based Early Childhood Education ("ECE") is being provided. However, we do not agree with the exception made to this requirement by schedule 4 clause 5 (1)(b) which provides that if one child in the home-based ECE lives in that home that every adult in that home does not need to be police vetted. This will lead to continued uncertainty within the industry and fails to protect many vulnerable students.

We submit that schedule 4, clause 5, sub-clause 1(b) be removed.

Education Review Office additional powers

We support the introduction of clauses 589, 590 and 591. We recognise that there is some resistance to this change on that basis that the entry is into someone's home rather than a school building.¹⁶ However, we submit that these powers are reasonable and concerns about intrusion into private homes are outweighed by the need to ensure the consistency and quality of home-based ECE's and to protect young children. In particular, the requirement in clause 589 that ERO give "reasonable notice" of entry to the home-based ECE is fair, and minimises the intrusion into the home.¹⁷

We support the addition of clauses 589, 590 and 591.

¹⁶ (5 December 2019) 743 NZPD (Education and Training Bill – First Reading, Nicola Willis).

¹⁷ Education and Training Bill 2019 (193-1), cl 589.

Primary and Secondary Education

Right to attend school fulltime

Clause 32(2) – need for right to “Inclusive education” and “reasonable accommodation”

Our research findings and casework experience have continuously demonstrated that children with learning support needs are being excluded from education despite local and international law.¹⁸ A recent survey completed by IHC has also indicated that over 30 percent of the students with disabilities surveyed had been denied enrolment or had restricted enrolment at school in the last five years.¹⁹ The survey also found that nearly 50 percent of parents of children with disabilities surveyed believed that teachers did not have the capacity to teach students with disabilities.²⁰

The right to attendance, in itself, will not improve outcomes for students with learning support needs. Meaningful change will only occur if schools are required to provide reasonable accommodation and inclusive education. We acknowledge and commend the addition of “inclusive education” as a core objective for Board of trustees. However, we submit that clause 32 sub-clause (2)

should also include an express right to “inclusive education” and “reasonable accommodation”. In the IHC survey 44 percent of the teachers surveyed acknowledged that their schools were not doing enough to include students with disabilities.²¹ Having the right to an “inclusive education” would mean that students, parents and teachers could validly argue that their schools are not upholding the right to education for all students, particularly students with disabilities.

We further submit that a legislative schedule be created to assist in educators’ interpretation of “inclusive education” and “reasonable education”.²² This schedule should include specific guidance and examples of what inclusive education and reasonable accommodation may look like in a school context.

A critical barrier to achieving the right to education is the lack of adequate resourcing for students with learning support needs. In the IHC survey 63 percent of the teachers surveyed stated that their school had difficulties accessing specialised learning support.²³ This is consistent with what our clients have told us about their struggles applying for learning support funding.²⁴ It is essential for more funding to be provided for learning support so that all students in

¹⁸ Kenton Starr and Naushyn Janah *Challenging The Barriers: Ensuring Access To Education For Children With Special Educational Needs* (YouthLaw Aotearoa Inc, New Zealand, 2016). Local and international law; Education Act 1989, sections 3 and 8, *New Zealand Disability Strategy 2016-2026* (Office for Disability Issues, 29 November 2016) outcome one, United Nations Convention on the Rights of Persons with Disabilities A/RES/61/106 (opened for signature 30 March 2007, entered into force 3 May 2008), United Nations Convention on the Rights of the Child UNTS1577 3 (open for signature 20 November 1989, entered into force 2 September 1990).

¹⁹ IHC “Survey: Students with disabilities face discrimination, bullying” (press release, 12 February 2020).

²⁰ Above, n 19.

²¹ Above, n 19.

²² We support the submissions made by Auckland Disability Law in relation to this issue which we have seen in draft form. Auckland Disability Law, “Auckland Disability Law’s Submission on the Education and Training Bill.”

²³ Above n 19.

²⁴ Jennifer Walsh *Barriers to Education in New Zealand: The Rise of Informal Removals of Students in New Zealand* (YouthLaw Aotearoa Inc, New Zealand, 2016).

New Zealand may be able to have equitable access to education.²⁵

The “backbone” of an effective and meaningful right to education is powerful enforcement mechanisms. We will discuss below how the proposed Disputes Resolution Panel could be adjusted to provide this “backbone”.

We submit that the right to education in clause 32 should be amended to expressly provide for students’ rights to “inclusive education” and “reasonable accommodation”.

We also recommend that a legislative schedule be created to assist in the interpretation of these terms and clarify the obligations on schools.

Clause 41

We acknowledge the Ministry’s attempt to address concerns that the right to full-time attendance is difficult for some students through the introduction of the well-being plan and transition plan exceptions.²⁶ However, we have several concerns about how these clauses will operate, and be interpreted.

Clause 41(1) “wellbeing needs”

We are concerned how “well-being needs” in clause 41(1) will be interpreted. The clause states that the parent, the principal, and the secretary “may, if they consider it is in the student’s best interests, agree a plan that reduces the student’s hours of attendance to help meet the student’s well-being needs”.²⁷ The context for the introduction of the well-being plan seems to be that; “[d]uring consultation in May and June this year, some parents were concerned that the right to attend school

fulltime could disadvantage students with disabilities or additional learning needs whose families consider that their needs are best met by attending for fewer hours.”²⁸ Given this context, it would appear that “well-being needs” refers to “students with disabilities or additional learning needs”. We support this interpretation, but we are concerned that families of students with disabilities or additional learning support needs will be coerced into requesting well-being plans due to a lack of adequate support in the school.²⁹

It is our view that “well-being” should also apply to a situation where a young person has significant mental health difficulties, and attending school full-time is not in their best interests. A well-being plan is preferable over current approaches such as schools imposing an informal suspension by asking the student not to return until they are well, or formal disciplinary actions if the school considers that the young person is a danger to themselves or others (because of self-harming and/or suicide ideation). However, we are concerned that well-being plans will be used in the context of students who are being bullied, and schools who are unable to address bullying, as an easy way out.

Accordingly, we submit that “well-being needs” should be defined in the Act. Mental health, learning support needs and disabilities should all be included in the definition of “well-being needs.”

We submit that “well-being needs” be defined in the legislation, and that there be a requirement that practical guidance be developed in relation to the application of “well-being needs”.

²⁵ Please see YouthLaw Aotearoa “Submission to the Tomorrow’s Schools Independent Taskforce on the *Our Schooling Futures: Stronger together Whiria Nga Kura Tuatinitini*” in particular the sections about learning support and where it is most needed <http://youthlaw.co.nz/resources/>.

²⁶ Education and Training Bill 2019, cl 41.

²⁷ Education and Training Bill 2019, cl 41 sub-cl 1.

²⁸ *Education-and-Training-Bill-Info-Sheet* (Ministry of Education, December 2019).

²⁹ We will address this under “Clause 41(1) “on the request of a parent””.

Clause 41(1) “on the request of a parent”

We note that under clause 41(1) the parent can request a well-being plan.³⁰ We submit that the term parent should be amended to whānau as parent is defined in the Bill as a mother, father or guardian, and will exclude students who are being cared for by family or others that are not legal guardians.³¹ It is appropriate for the student’s whānau to have the ability to request a plan.

We are concerned that families of disabled students with high or complex support needs may feel coerced into requesting a plan in situations where learning support has yet to be provided. Our casework experience has demonstrated that it is predominately the school who advise a student and their family that the student cannot attend school full-time. A recent survey by IHC has also found that almost 30 percent of the children with disabilities surveyed had been unlawfully denied enrolment, or had their enrolment restricted by their schools.³² School resistance to enrolment of students with disabilities is almost always because the school does not have the resources to support the student’s learning or behavioural needs.³³ This situation also occurs in the context of informal removals from school.³⁴

As a result, we are concerned that well-being plans will occur in the context of a school telling a family that they cannot support the student. In particular, we are concerned that situations will arise where schools tell students and their families that they need to request a well-being plan

because if the student attends school full-time without the appropriate supports and resources in place some sort of “misbehaviour” may occur and disciplinary action will be taken. We are also concerned that families will be coerced into requesting a well-being plan if Board of trustees impose it as a return to school suspension condition.

Generally, students and their families are extremely unsatisfied when they are told by their child’s school that the student cannot attend full-time. Students and their families tell us that part-time attendance arrangements can make the student with learning support needs feel even more isolated and excluded. Part-time attendance can also cause stress to the family because the caregiver’s ability to work may be impacted as they have to care for the student during school hours. In this situation the most practical course of action is often for the family to cooperate with the school and the Ministry to come to an arrangement that will allow the student to eventually attend school full-time with learning support funding. This clause will enable these situations to continue while doing nothing to address the real issue, which is; the absence of learning support, and the time it takes to arrange learning support.

It is essential to acknowledge that schools are doing their best, and that part-time attendance is a last-resort action caused by a void of support for students with learning support needs. As we have stated above, the critical barrier to true inclusive education is the lack of funding for learning support. The same inequities for students with disabilities will continue to occur under the new legislation, unless adequate funding and resourcing is provided to students, schools and families.

Regulations should be created by the Ministry that clearly explain student eligibility for well-being plans, the process,

³⁰ Education and Training Bill 2019, cl 41 sub-cl 1.

³¹ Education and Training Bill 2019, cl 10.

³² IHC “Survey: Students with disabilities face discrimination, bullying”, above n 19.

³³ Jennifer Walsh *Barriers to Education in New Zealand: The Rise of Informal Removals of Students in New Zealand*, above n 24.

³⁴ Above n 24 at 35.

and the Ministry's involvement in well-being plans. The regulations should also provide that the Ministry be empowered to have a final oversight power over well-being plans. As part of this power the Ministry should be able to "veto" well-being plans if they believe that the plan is not the result of a genuine request by the family, and/or not in the best interests of the student.

We submit that the word parent be replaced with whānau.

We submit that regulations be created that provide that:

- **The Ministry has final oversight over well-being plans.**
- **The Ministry can "veto" well-being plans that are not made by genuine request, and/or are not in the best interests of the student.**

Section 41(1) – certification by medical practitioner or psychologist

The proposed section 41(1) also requires that the student's well-being needs be identified in writing by a medical practitioner or psychologist and that the plan be made in accordance with that opinion. Questions then arise as to who is responsible for obtaining and paying for that medical practitioner/psychologist opinion. These costs may be prohibitive for many families. It would also be particularly unfair for this burden to fall on families if the family has been coerced into requesting a plan.

Another issue is timing. The process of obtaining an opinion from a medical practitioner, any subsequent disagreements about that opinion, and then the eventual creation of an attendance plan could take several months. During this period the student may not be at school even though they have the right to be there under clause 32.

We submit that the regulations address:

- **Who is responsible for obtaining the medical practitioner's opinion.**
- **The circumstances in which the Ministry can fund a medical practitioner to assess the student.**
- **The process if there is a disagreement about a medical practitioner's opinion.**

41(2) transition plan

We support clause 41(2) transition plans being used to transition new entrants into a school. However, we are also concerned that this provision may be used to exclude students with disabilities from school. Accordingly, clear guidance is needed in relation to the process for agreeing to a transition plan and how the plan will be managed by the school and the family.

We submit that regulations address when a transition plan may be appropriate, provide practical examples, and a process for how transition plans are made by the school, the family and the Ministry.

School Disciplinary Processes

In our submission to the Tomorrow Schools Independent Taskforce we argued that the current punitive approach to student discipline in the Education Act 1989 needs to be radically overhauled.³⁵ In particular, we argued that the terminology used in the student disciplinary sections is unhelpful and unduly punitive;

- The expressions “stand-down”, “suspension”, “exclusion” and “expulsion” are not well understood by students, their parents or the general public. Most people do not know the difference between the four terms or what they mean. The language is very aggressive and punitive in tone. It would be better and clearer to replace the complex and loaded terms with a statement that a student is “directed not to attend the school”. To differentiate; a stand-down would be a direction not to attend school for a period of no more than five days, a suspension would be an indefinite direction not to attend school, and exclusions and expulsions would be an upheld direction not to attend school.
- It is also not helpful or necessary to focus on the conduct of the student in terms of “gross misconduct” or “continual disobedience.” These terms are more evocative of the criminal justice system than the education system. They also strongly emphasise student fault. “Gross misconduct” and “continual disobedience” are also complex and loaded terms that have been assigned different definitions by different schools when imposing a suspension.

³⁵ YouthLaw Aotearoa “Submission to the Tomorrow’s Schools Independent Taskforce on the Our Schooling Futures: Stronger together Whiria Nga Kura Tuatinitini”.

- The focus in any decision to direct a student not to attend a school should be on the consequences of a student’s behaviour for the student and for other students in the school. A direction that a student not attend school should only be if the behaviour of the student is likely to cause serious harm to the student or other students, or cause serious disruption to the education of the student or other students that a direction that the student not attend might be considered.

We are also concerned that the current school disciplinary system feeds into the “school” to “prison” pipeline.³⁶ The current wording of the school disciplinary sections is punitive and strongly focused on assigning fault and blame. Simply changing the wording of these clauses will not “interrupt” the pipeline, but it does start the process of moving student discipline from being punitive to being restorative, and transformational.

Accordingly, we submit:

That the terms “stand-down”, “suspension”, “exclusion” and “expulsion” should be deleted and replaced with “directed not to attend the school” as required in clauses 76 - 85. To assist in the differentiation; a stand-down would be a direction not to attend school for a period of no more than five days, a suspension would be an indefinite direction not to attend school, and exclusions and expulsions would be an upheld direction not to attend school.

That clause 76 should be amended by replacing (1)(a) and (b) with:

“(1) The principal of a State school may direct that a student not

³⁶ Above n 35, from paragraph 4.1 onwards.

attend the school if satisfied on reasonable grounds that because of the student's behaviour:

(a) it is likely that the student, or other students at the school, will be seriously harmed if the student continues to attend the school; or

(b) the education of the student or of other students at the school will be seriously disrupted if the student continues to attend the school."

Updating the physical restraint framework

We understand that many teachers have expressed negative views about the current physical restraint framework.³⁷ Their primary concern appears to be perceived powerlessness to use physical restraint on students when they believe it to be necessary. However, many of the examples used by teachers in the media to justify their frustration are actually permissible uses of physical restraint under section 139AC and the guidelines. For example; physical fights between students³⁸, or a student harming others.³⁹ We submit that the problem is a result of a lack of understanding about the current section 139AC and the physical restraint guidelines, rather than an actual failure of the law and regulations about physical restraint. The most appropriate solution to a lack of understanding is to improve training.

We recognise that student discipline is stress-inducing and difficult for teachers.⁴⁰

³⁷ *Education-and-Training-Bill-Info-Sheet* (Ministry of Education, December 2019), Simon Collins "Physical contact rules that led to bans on teachers hugging children may be relaxed" (19 October 2019) New Zealand Herald <<https://www.nzherald.co.nz/nz/news/article.cfm?id=1&objectid=12277552>>, Simon Collins "Schools use force 13 times a day as classroom 'chaos' escalates" (12 January 2019) New Zealand Herald <<https://www.nzherald.co.nz/nz/news/article.cfm?id=1&objectid=12188171>>

³⁸ Kymberlee Fernandes "Physical restraint laws making teachers feel 'powerless'" (11 September 2018) Stuff <<https://www.stuff.co.nz/national/education/106952559/physical-restraint-laws-making-south-auckland-teachers-feel-powerless>>

³⁹ Nicole Lawton and Anna Loren "Call for 'common sense' after teacher censured for carrying child" (9 November 2017) Stuff <<https://www.stuff.co.nz/national/education/98706191/call-for-common-sense-after-teacher-censured-for-carrying-child?rm=m>>, "Horror stories fail to shift Education Ministry on the right to restrain" (20 September 2018) Northland Age <<https://www.nzherald.co.nz/nz/news/article.cfm?id=1&objectid=12128520>>

⁴⁰ Ramon Lewis, "Teachers Coping with the Stress of Classroom Discipline" (1999) 3(3) Soc Psychol Educ 155.

We respect teachers and the amazing job that they do, particularly in relation to the difficult situations that require physical restraint to be used. However, we submit that clause 95 will not alleviate teacher concerns. Instead, clause 95, if enacted, will increase teacher confusion about permissible physical restraint, and result in physical restraint being used more frequently on students, and particularly on students with disabilities.

We do not support the government's proposed new standard for physical restraint.

"Physical force"

We strongly disagree with the change of wording from physical restraint to physical force. We understand that this change has been made to better reflect the "language used by teachers in their day to day work".⁴¹ However, we submit that the term "physical force" does not capture the intent of "physical restraint". The term physical restraint implies that physical force is only to be used for restraint. Physical force is a much wider term given the wider definition of force: "violent physical action used to obtain or achieve something".⁴²

We submit that the term "physical force" be replaced by the original terms "physical restraint" and "physically restrain".

Clause 95 – Limits on the use of physical force

Clause 95(2)(a)

We submit that the terms "prevent" and "risk" in the context of clause 95(2)(a) and section 139AC, in effect, have the same meaning. The difference in clause 95 is

⁴¹ *Education-and-Training-Bill-Info-Sheet*, above n 28.

⁴² "Force" (2020) Oxford Learner's Dictionaries <https://www.oxfordlearnersdictionaries.com/definition/english/force_1>

that physical force can be used to “prevent imminent harm to the student or another person” and the current law states “that the safety of the student or of any other person is at serious and imminent risk.” The Ministry has specified that the purpose of this change is to move the language from being “preventative” to “permissive” of physical force.⁴³ We disagree with this change in language, and submit that it is important for the language about physical restraint to remain preventative. A move to permissive language would be a retrograde step inconsistent with the Government focus on children’s wellbeing. It is also necessary for the reasonable belief standard in section 139AC(1)(a) to continue.

We submit that the current wording of section 139AC(1)(a) be used in place of clause 95 sub-clause (a).

Clause 95 2(c) and (b)

We support the addition of the explicit requirement that physical force is only to be used if there is no other option.⁴⁴ We also support the continued inclusion of the provision that any physical restraint used be reasonable and proportionate.

We support clause 95 2(b) – (c).

Clause 95(3)

We do not support the definition of harm in clause 95 sub-clause (3).⁴⁵

The definition of harm: “harm to health, safety, or well-being of the student or the person, including any significant emotional distress” will only increase ambiguity about when physical restraint can be used. The new definition of harm will also place a greater burden on teachers to identify harm that requires physical

restraint. The current standard that intervention should only occur if there is a risk of physical harm to a student or any other person is appropriate because it is less ambiguous and subjective than harm to health, safety, well-being and significant emotional distress. We are concerned that more students will be physically restrained under this new definition of harm because it is much wider than the current standard. Under this definition of harm if a teacher is suffering from significant emotional distress because a student is bullying them, destroying classroom equipment, or having a tantrum, it is arguable that teacher could lawfully restrain that student. In our view, it should not be permissible for teachers to restrain students in these situations.

Although we are not aware of any New Zealand based research, overseas research in relation to physical restraint incidents has found that physical restraint is disproportionately used on students with disabilities.⁴⁶ This is reflected in our casework experience with physical restraint. In our experience, students who have been restrained for violent or destructive behaviour are frequently children with disabilities who have inadequate support for their needs. We are concerned that expanding the definition of “harm” will result in even more students with disabilities being restrained. As an example, we have seen many cases where teachers have “evacuated” other pupils from the classroom if one student is having behavioural difficulties (which may be related to their disability). Under the new definition of harm, it seems likely that the student with disabilities

⁴³ *Education-and-Training-Bill-Info-Sheet*, above n 28.

⁴⁴ Education and Training Bill 2019, cl 95 sub-cl 2(b)

⁴⁵ Education and Training Bill 2019, cl 95 sub-cl 3.

⁴⁶ USA examples: Perry Zirkel and Caitlin Lyons “Restraining the Use of Restraints for Students with Disabilities: An Empirical Analysis of the Case Law” (2010) 10 Conn Pub Int L J 323, “Classrooms in Crisis: Examining the Inappropriate Use of Seclusion and Restraint Practices” (2019) 116-1 HRG-2019-EDL-1910747 H341-1910747.

could be physically restrained, on the grounds their behaviour is causing “significant emotional harm” or harm to the well-being of the other students. Further questions arise in the case of specific conditions for example, whether a student with Tourette syndrome could be restrained because their involuntary movements and vocalisations cause “harm” to the well-being of the teacher or other students.

In our submission, it is inappropriate and unjust for students with disabilities to be restrained because of their disabilities. We submit that restraint of students with disabilities should be limited, and not encouraged. The government also needs to seriously consider how the new definition of harm will undermine their obligations under international law to ensure that people with disabilities are protected from inhuman treatment.⁴⁷

Furthermore, the act of physical restraint can cause significant emotional distress to the student being restrained, the teacher administering the restraint, and any witnesses (i.e. other students).⁴⁸ We question whether teachers will be required to determine if the prevention of “serious emotional distress” justifies the potential “serious emotional distress” of using

physical restraint on a student. Teachers will also be required under this definition to prioritise whose health, safety, well-being or significant emotional distress is the most important, and in need of protection. This could lead to student distrust of a teacher for choosing to protect one student over another.

The Minister has given the example that the new physical restraint framework would allow a teacher to physically restrain a student who is destroying another student’s work.⁴⁹ It appears that physical restraint intervention may be allowable in that example situation in order to prevent “significant emotional harm” to the student whose work is being destroyed. We accept that the destruction of a student’s work may be quite upsetting, but students who are subject to physical restraint could suffer from injury, and ongoing emotional distress that could have a significant effect on them and their families. Furthermore, property can almost always be replaced or repaired, but physical restraint could have a lasting impact on a student and their family, other students, and teachers.

The Minister’s example also fails to contemplate situations where a student might be acting in a destructive way in connection with their disability or because they have been traumatised or abused, rather than from a desire to cause serious emotional distress to that student whose work they have destroyed.

We submit that the situation that the Minister has specified would be better addressed through restorative justice

⁴⁷ United Nations Convention on the Rights of Persons with Disabilities, article 15 above n 15 and article 16 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment UNTS 1465 85 (opened for signature on 10 December 1984, entered into force 26 June 1987) provides for the prevention of ‘cruel, inhuman or degrading treatment or punishment’. We don’t have the total figures for New Zealand but a NZ Herald article reported that in the first three months of reporting on 24 November 2017 that of the 186 schools that reported using restraint 79 were special schools. See “Pupils restrained by school staff 423 times in three months, OIA release shows” New Zealand Herald

<https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11947787&ref=art_readmore>

⁴⁸ Ministry of Education *Guidelines for Registered Schools in New Zealand on the Use of Physical Restraint Guidelines* (August 2017) at page 5.

⁴⁹ The Minister has given an example that if a student spent many weeks working on a project and then another student began to destroy that project that the teacher could intervene with physical restraint see “Education Minister Chris Hipkins details changes in big new bill” (3 December 2019) Radio New Zealand

<<https://www.rnz.co.nz/news/national/404702/education-minister-chris-hipkins-details-changes-in-big-new-bill>>.

approaches such as apologies and other reparations. It could also be a valuable teaching moment about respect of property, resilience, consequences and disability and difference.

We submit that clause 95 sub-clause (3) should state; “In subsection (2), harm means physical harm to the student or any other person.”

Clauses 96 and 97

It is essential for there to be clear rules and procedures about when physical restraint can be used. Accordingly, we support clauses 96 and 97.

In particular, we support clause 96 sub-clause (2)(b). It is necessary for records of incidents of physical restraint to be kept to determine how often students are being restrained, particularly students with disabilities. We understand school frustration about the administration time required to create such records, but we submit that protecting the vulnerable student population of students with disabilities outweighs this concern.⁵⁰ We also submit that it is essential for there to be requirements about notifying parents when physical restraint is used. This is especially important for students with disabilities who may “be unable to clearly or fully communicate their experience and any associated thoughts and feelings.”⁵¹

We also support clause 97(b) that requires that the physical restraint guidelines include “other examples of best practice in behaviour management.”⁵² Our practice experience has shown that students with comprehensive individual education plans

that detail de-escalation strategies, and are created by the school, the student and the family, have been able to avoid situations being escalated to the point that physical restraint needs to be used. In the guidelines the Ministry should encourage all schools to work with students and their families to create individual education plans with de-escalation strategies. The Ministry should also offer support and practical suggestions of how such an individual education plan can be created.

We support clauses 96 and 97.

⁵⁰ "Physical contact rules that led to bans on teachers hugging children may be relaxed", above n 37.

⁵¹ Comment by Ombudsman Peter Boshier about the need to inform parents of seclusion for all students and particularly students with disabilities see Peter Boshier *Investigation into Miramar Central School seclusion complaint*, (18 December 2017) at 30.

⁵² Education and Training Bill 2019, clause 97.

New Board of Trustee objectives

On 23 January 2020 YouthLaw Aotearoa hosted a “South Auckland young creatives and change makers” camp for 16 to 19 year olds. The purpose of the camp was to plan for the creation of legal information, education resources, and to discuss law reform. During the camp our staff hosted a workshop about the Education and Training Bill 2019 clause 122 “Objectives of boards in governing schools”. We did a “bus stop” activity where the young people moved from one objective to another and wrote comments about each objective on post-it notes. The focus questions for the young people were; what they thought of the objectives, whether they had any stories in relation to the objectives, and whether they thought their Board of trustees would follow the objectives.⁵³

We also asked for young people’s opinions about the board of trustee

objectives on social media with responses through a survey using google forms. This section of the submission is based on what we were told by the young people through the camp and online.

Clause 122 (1)(a) Educational achievement



Overall, the young people that we spoke to supported this objective remaining as a primary objective. However, general themes emerged about what educational achievement means, and barriers to educational achievement.

What educational achievement means

“Culture appreciation. Should be considered part of our achievement.”⁵⁴

The young people told us that educational achievement meant more to them than just “passing”. Educational achievement to them means; making friends, cultural activities, wellbeing, sports, and



⁵³ There were ten young people in attendance ranging in age from 15 – 18 years old.

⁵⁴ We have not changed the spelling or grammar of the quotes in order to preserve the authenticity of the comments made.

commitment to attending school. Students expressed to us that they would also like schools to have a greater focus on preparing students for life after school, whether that be at University or through apprenticeships.

Barriers to educational achievement

“Schools shouldn’t focus only on one content/group. They should encourage all types and motivate them so that they know that their wanted and that the schools appreciate their values and etc.”

Many comments were made about how students are treated differently depending on their academic ability. The common opinion was that students who achieved higher academically were treated better and given more support by the school than students who were struggling to achieve. The young people suggested that the inequality in treatment could be resolved by removing “accelerate and elite classes”.

“Too many rules stopping us from learning”

The young people told us stories about students not being allowed to attend graduation because of incorrect uniform.

“Do assemblies with different year levels every 2 weeks.”

A significant theme that emerged was young people commenting on practical changes that they thought would improve educational achievement at their school. Suggestions were made about useful tutorials, classes, NZQA standards, and better use of technology. Many of these suggestions were about the young people’s own school context.

These comments demonstrate that students are attentive to educational achievement in their schools, and that they have thought deeply about ways to improve learning, not just for them, but for all learners. Board of trustees should be

actively consulting with their student body about how to improve educational achievement, because students have valid opinions and practical suggestions for improvement.

Clause 122 (1) (b) “Safe place”

Many of the young people that we spoke to told us that they did not believe that their school was a safe place. We were told personal stories about bullying, racism, and suicide, and the impact of those things on their physical and emotional safety at school.



Clause 122(1)(b)(i) – is physically and emotionally safe

“There was a boy who had serious autism who will always get picked on by other students, and one day when I was walking back to class, I see 3 junior boys bullying him. Making him mad to the point where he was getting really upset and wanted to cry. So I stood up for him, because it was the right thing to do.”

We were told about times that the students had been bullied, or had witnessed other students being bullied at school (like the brave student’s quote above). The young people told us that they did not think that their school was doing enough, or taking the appropriate actions in regards to bullying.

“If it happens, we just have one assembly when they talk to us and that’s it. Why bother having an assembly?”

The young people stressed the need for schools to focus on prevention rather than just responding. One young person told us that there was a need for more guidance counsellors at their school, and several others told us about the impact of a lack of guidance counsellors.

“Reported a friends self-harm, had to wait months for a response - by then it got real bad.”

Some of the young people expressed concerns that counsellors were being overwhelmed by students who did not need the support, but were using counsellors as a way to avoid class.

“Go to counsellors to get away from “school” nicer spaces – easier.”

We were also told of multiple occasions where the student who was the victim of the bullying was “punished”. The young people told us that some victims who went to the school for help were told to not come to school to avoid the bullies, or while investigations took place. We were told of times where the bully faced no consequences, but the victim was too scared/told not to go to school.

“Fights – get stood down for a whole week for being threatened for safety. The ones threatening, nothing.”

We were also told about some of the good things that schools were doing around bullying too.

“School does cyber-bullying well. School find out about it before we do!”

“Strive counsellors in school are safe – building relationships, bribe with food.”

“All the safe places left [listed specific teachers at their school]”

Suicide

“My school sometimes do not want to address the issue of suicide but I think they should, if they want to raise awakeness. They should take into consideration that some students want to hear their issues being discussed.”

Multiple young people told us about their frustration that suicide was not discussed, or allowed to be discussed at their schools. One student told us that a dance that they and their classmates had choreographed addressing suicide was stopped because their teacher “*didn’t believe/want emotive music.*” Another student told us that;

“Singing performance on suicide was criticised after performance, by students and teachers!!!”

This again demonstrates the value of



consultation with students. Students should be involved in setting the health curriculum for their school, and be able to specify what topics are important to them.

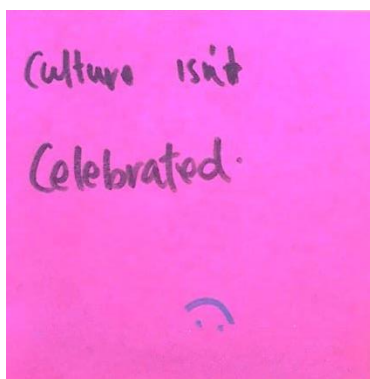
Clause 122 (1)(b)(ii) – (iii) Racism and discrimination

"In our school, our culture is not appreciated. Cultural performances cancelled. Cultural assemblies to celebrate culture stopped because 'it's getting in the way of academics.'"

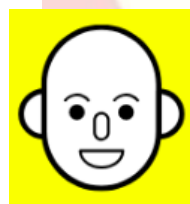
Many young people told us personal stories about racism that they had faced in school. Significantly, some of the young people told us that culture was often disregarded because of the primacy of academics.

We were also told that often teachers were the perpetrators of racism in school.

"Teachers may make a snarky comment but generally try to hide it behind humour 'just kidding.'"



Clause 122 (1)(c) Inclusive



"I witnessed a girl with disabilities get picked on. This boy fake proposed to her for ball and his friends recorded it, and posted it on Instagram"

The young people told us stories about bullying of disabled students in their schools. The young people we spoke to were angry about the bullying, and thought it was unacceptable.

Some students when talking about a disabled student at their school said; [One student] *"We don't laugh at her... just at what she does."* [Second student] *"So we're laughing at her..."*

Students excluded because of differing needs

We were also told that students with disabilities were often excluded, or just not seen at their schools.

"Our school has a disability section. We don't see them they're secluded and excluded. We only see them after school when they go home."

[Student talking about disability unit in their school] *"School could let the special needs kids hang out with us. They don't even come to school events it's like they go to a different school"*

Students also told us that their schools often do not understand different cultural needs of the students, and that students are excluded because of this.

"Responsibility is a lot for Pacific island kids have to give back to family because parents push for it. Need good education but also money to look after family."

"Schools nowadays only look at reputation... If you're not achieving you don't matter. There were a lot of drop-outs. Schools should cater to kids who have more responsibilities. One of my friends got signed out without them knowing – she was working more than going to school. She has to work to look after her sick grandad."

Inclusivity is important

Students suggested that inclusivity was undermined by:

"Students are ignorant and don't know what people with disabilities look, act like."

"Lack of consistency in teachers. Teachers can't form bonds with their students so they can't understand them."

"Teachers cant treat people like some are better than others."

Overall, the young people agreed that more needs to be done to achieve inclusive education.

"I feel as if the government should've done something to address the issue, instead of waiting for it to become worst."

"It should have always been. It should be a top priority."

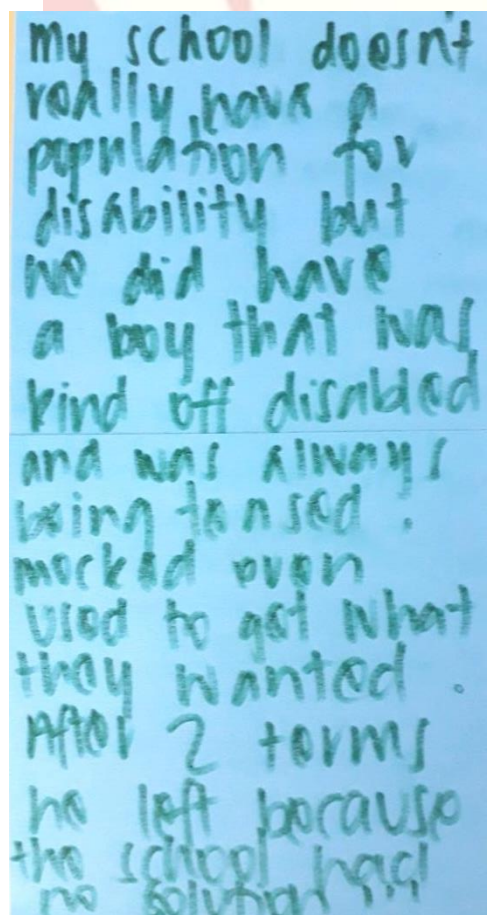
Students suggested the following improvements;

"Teachers need to also be trained to teach students with disabilities."

"Different types of classes for different types of learners e.g. visual etc."

"Inclusive looks like: More support - one on one time with teachers. System that actually helps students."

"Boards/teachers/students need to care and look after people with disabilities."



Clause 122 sub-clause (1)(d)(i) – (iii) Te Tiriti o Waitangi

Generally, we were told by students that Te Tiriti o Waitangi and New Zealand history was not taught, that tikanga Māori was not visible, and that tuition in Te Reo Māori was not easily accessible at their schools. Students explained why this objective is necessary;



[When asked about their schools relationship with Te Tiriti o Waitangi] *"We don't. Should be more Māori everywhere. I wish I learnt Māori. I wish I had the option but I never did."*

"Our school waiata doesn't get sung well and they don't care."

A student told us a story about a quiz they did in class that asked "who discovered/founded New Zealand?" The

student answered Kupe and was told that this was incorrect, and that the answer was Captain James Cook. Student tried to dispute this with teacher but the teacher refused to change the answer or their thinking.

“Teachers have a lot of bias e.g. towards not teaching it. The older the more likely they don’t teach Māori.”

“If I had kids in NZ I would want them to know history. It’s their 2nd home. They deserve to know.”

“A lot of teachers + parents think there’s no need to learn Māori whereas we have a period where we could be learning.”

In the above quote the student was talking about how te reo could be taught in a period that is currently free for many of the older students at their school.

Many students also expressed that history, te reo and respect of Māori culture needs to be compulsory at school.

“It should be a main subject like English it should be compulsory.”

“Maori culture should be compulsory in

school!!!!”

Students told us that it would be beneficial to have compulsory classes about Te Tiriti o Waitangi, te reo Māori, tikanga Māori and te ao Māori because;

“It would help Māori in school to feel more confident in who they are they because they think no one else cares about it.”

“Maori in mainstream are less attended to. We had to mix year levels [to learn Te Reo Māori].”

Students also told us that learning about Māori culture could help to resolve conflict within their schools;

“It would look like multiple cultures getting along, instead of having beef/problems.”

“I think this will have a good impact on my school as there are a number of students that attend but different cultures, but it could also resolve some verbal/physical issues.”



Conclusion

"I think the new objectives will change what parents vote for when picking reps. I think they'll change how representatives see their role, and I think over time, these objectives will be achieved."- Manisha Morar, 24.

"Possibly, I think they can and it is as important. I think that if it was to be put into place it would take time to implement and function but I think they would be able to do it. Even if the action is small." Unknown, 15.

Overall, the young people we talked to were very happy with the proposed board objectives. We were told multiple stories about the focus on academics, current lack of inclusivity, safe spaces, and the treatment of Te Tiriti o Waitangi, te reo Māori, tikanga Māori and te ao Māori. The common opinion was that more needed to be done and that the new board objectives were a positive step.

To reinforce these objectives we submit that board members should be required to undertake training about the objectives. Ideally this training would occur before members begin their term. There should also be a requirement that boards need to report on what training they have undertaken.⁵⁵

We further submit, that the Ministry should develop guidelines about the objectives. The guidelines should specifically explain what each of the objectives means and give practical examples of a board upholding an objective. As an example, many of the students that we talked to told us that they thought "educational achievement" was interpreted too narrowly and did not recognise cultural performances (as an example) as

achievements. An explanation of "educational achievement" should clearly specify what that actually means, and that it includes other achievements at school. There should also be a requirement that each board member is given these guidelines when they are inducted into the position.

As demonstrated in the quotes above, there was great hope and positive feelings about how Board of trustees will treat the new objectives. We also have great hope that the objectives will result in positive change for schools and their students.

We submit that a new sub-clause should be added to clause 122 that the board "must ensure that each board member receives training on how to meet the objectives and obligations of a board member under this or any other Act."

We submit that the Ministry should develop guidelines to aid in the interpretation of the objectives.

We submit the new board objectives be retained subject to the amendments set out elsewhere in this submission.

⁵⁵ See below '30Clause 153 – Code of Conduct' and our submission that a new reporting requirement about training to be added to clause 129 of the Education and Training Bill 2019 at page 30.

Board of trustees Code of conduct

In our submission, the proposed code of conduct for board of trustee members is much-needed and long overdue.

Clause 153 – Code of Conduct

A code of conduct is needed to set minimum standards for board of trustee members. Minimum standards are needed so that members of Board of trustees can know what is expected of them. A code of conduct also increases member's accountability to the school community. To reflect the importance of the code of conduct, we submit that the wording of clause 153 sub-clause (1) should be changed from "may" to "must".

The code of conduct should also specify the circumstances in which members should undertake training, and/or professional development. In our experience, many board members lack knowledge about school discipline procedures, disability, and complaint procedures. Our clients are often frustrated at their Board of trustees for not being able to guide them, being insensitive, and for not following processes. Often our clients attribute these failures to board bias. However, we would argue that most of the boards are not biased against the student and their family, but rather, ignorant of appropriate procedures. We have also had experience in the past of board members asking insensitive questions or making inappropriate statements about a student's disability to families. Once again, we think that this can be attributed to ignorance, rather than an intention to upset the student and their family.

We submit that it is essential for Board of trustees to be required to undertake training about their obligations as members. Training should be required about the new objectives under clause

122, complaints processes, and also in relation to disciplinary matters. A requirement should be added to clause 129 that boards must report on what training has been undertaken about the board's obligations by the board members.

Knowledgeable and experienced boards should minimise the number of complaints being made to the Panel.

We submit that "may" in clause 153 sub-clause (1), be changed to "must".

We submit that a new sub-clause be added to clause 153(1)(c) that states that the code of conduct should "set out the requirements for Board of trustees training."

We submit that a new sub-clause should be added to clause 129 that boards must report on what training about board obligations has been undertaken by board members.

Clause 156 – Censure or removal of board of trustee members

Clause 156 which allows boards to censure and potentially remove members who do not meet the expected standards of board members is a much needed change to the Education Act 1989. We consider this ability is particularly important given the new board objectives, and the training requirement (if accepted). We submit that it is appropriate for members to face consequences if members refuse to uphold the clause 122 objectives or attend training.

We support clause 156.

Disputes Resolution Panel

YouthLaw Aotearoa has advocated for the creation of an Independent Education Review Tribunal for many years.⁵⁶ We still submit that an Independent Education Review Tribunal would be the best avenue to resolve educational disputes. However, in the absence of the Tribunal, we strongly support the creation of a Dispute Resolution Panel (“the Panel”) to resolve serious education disputes.⁵⁷

In this section we will discuss our concerns about the Panel. The most significant concern that we will raise is that the Panel cannot issue binding decisions. The absence of this power will mean that disputes before the Panel will only be resolved if the parties agree, which will mean that the most challenging disputes will continue to be left unresolved. The rationale against the power to make binding decisions is that such a power would require appeal rights, which would undermine the Panel’s purpose to “resolve complaints and disputes at the lowest possible level”.⁵⁸ However, the “lowest possible level” of dispute resolution is the school. We will strongly argue that the Panel should be regarded as a higher level of dispute resolution that can make binding decisions.

⁵⁶ YouthLaw Tino Rangatiratanga Taitamariki, *Out of School Out of Mind – The Need for an Independent Education Review Tribunal* (YouthLaw Aotearoa Inc, New Zealand, 2012), Jennifer Walsh *Barriers to Education in New Zealand: The Rise of Informal Removals of Students in New Zealand* (YouthLaw Aotearoa Inc, New Zealand, 2016), YouthLaw Aotearoa “Submission to the Tomorrow’s Schools Independent Taskforce on the *Our Schooling Futures: Stronger together Whiria Nga Kura Tuatinitini*”.

⁵⁷ Education and Training Bill 2019, subpart 9 – Resolving Serious Disputes.

⁵⁸ Cabinet Office Circular “Reform of the Tomorrow’s Schools system: Paper 2 – legislative provisions Cabinet Paper” (16 October 2019) at [80].

Clause 203

We commend the Ministry for taking an inclusive approach to the educational issues that could be considered as “serious disputes”. However, we do have concerns that the unintended consequence of this approach may be that the Panel is overwhelmed by applications if the Panel is not adequately resourced.

We are also concerned that having such a broad range of grounds without any form of prioritisation (i.e. in order of importance or time), could result in injustices. A potential injustice could be that “more serious” and “less serious” disputes may be dealt with on a “first in, first served” basis, rather than through consideration of the impact on the student, or the time in which the dispute needs to be resolved. As an example; a less time critical dispute a dispute regarding out of zone enrolment might be dealt with in the same timeframe as a dispute about a student with disabilities not being able to access support at school, or the expulsion of a student.

At YouthLaw Aotearoa education queries form roughly a third of our caseload, which works out at around 350-400 cases each year.⁵⁹ The vast majority of these cases would meet one or several of the grounds under clause 203. In the past year we have also seen an increasing number of education disputes that are very complex and multi-faceted.⁶⁰ It takes us a significant amount of time to talk with these clients, assess their cases, draft advice, and then talk through that advice. Our experience suggests that the Panel will be overwhelmed by complicated

⁵⁹ Please see YouthLaw Aotearoa’s Annual Report 2018/2019 <<http://youthlaw.co.nz/wp-content/uploads/2016/07/YouthLaw-Aotearoa-Annual-Report-2019.pdf>>

⁶⁰ At 9 please see an example a dispute relating to sub-cl (d) about an exclusion could also be made sub-cl (f) if the student feels bullied or targeted by a teacher.

applications which will result in lengthy wait-times as the Panel assesses and then decides on these applications. To minimise these issues the Panel will need to be adequately resourced. We also submit that the Chief Referee be required to consider the impact of delay on the student when determining the priority with which disputes are allocated to disputes panels for resolution.

We are also concerned that the Ministry, the school, the student, and/or the family of the student will delay making decisions until the Panel process has been completed. The issue then, is that the student may not be at school whilst they wait for the Panel to make their decision. We are also concerned that the Ministry will delay making decisions about whether to exercise the power to lift exclusions, direct enrolments or allow out of zone of enrolments until the Panel process has been completed. This issue will be exacerbated if there are extended wait times for Panels.

Even when the Chief Referee or their delegate declines an application they will still have had to spend time assessing that application, informing the student, and then potentially defending their position.

Another issue is that grounds (e), (g) and (f) could potentially overlap with existing disputes resolution mechanisms such as the Human Rights Commission mediation, Human Rights Review Tribunal and the Teaching Council. We submit that there should be a clause that specifies that making an application to the Panel does not affect the right of any person to make any other complaint or claim that they are entitled to make under common law or statute and does not infringe on the jurisdiction of any other court or Tribunal to hear any claims that could have been made apart from under Subpart 9.

We submit that the Panel needs to be adequately resourced so that there will not be excessive delay's.

We submit that the Chief Referee be required to consider the impact of delay in allocating disputes for resolution.

We submit that there should be a clause that specifies that making an application to the Panel does not affect the right of any person to make any other complaint or claim that they are entitled to make under common law or statute and does not infringe on the jurisdiction of any other court or Tribunal to hear any claims that could have been made apart from Subpart 9.

Clause 204

In our submission the requirement that each Panel include "expert members" is too vague, and this critical aspect of Panel composition should not be left to regulations. The approach taken in clause 204 differs from that taken to the qualifications of members of other similar panels such as the Human Rights Review Tribunal where considerable detail in relation to the qualifications and attributes of members of the panel are set out in the Human Rights Act 1993.⁶¹

We submit clause 204 should provide that a lawyer must be a member of each Panel. This is essential given the Panel's obligations to uphold natural justice and procedural fairness throughout the disputes process. We further submit that it is insufficient to simply hold a Bachelor of Laws or equivalent, as the practice experience of acting as a lawyer is what is necessary not just the university qualification.

We further submit that the composition of the Panel should reflect the dispute and the parties to it. In particular, in the event

⁶¹ Human Rights Act 1993, ss 98, and 101.

that the panel is considering any matter in relation to a Kura Kaupapa Māori at least one member of the Panel should be appointed for their knowledge and experience in tikanga Māori and the Kura Kaupapa Māori system. Similarly, where the dispute relates to a student with disabilities the Panel should include someone with experience in the disability sector or lived experience of disability.⁶² We also support ADL's submission that the regulations governing clause 204 specify that expert members include disabled and deaf people with experience in regards to specialist education and/or learning support.⁶³

We submit that a sub-clause (3) should be added to clause 204 to provide “a member of each Panel must be a barrister or solicitor of the High Court of New Zealand of not less than three years practice.”

We also submit that clause 204 should be amended to require that the Panels members have the knowledge and experience required to deal with the parties, and disputes under consideration.

We also submit that regulations governing clause 204 specify that expert members include disabled and deaf people with experience in regards to specialist education and/or learning support.

Clause 205

Similarly, the clause 205(2)(a) requirement that the Chief Referee hold a Bachelor of Laws is insufficient. We submit the same criteria be applied as for the Chairperson of Human Rights Review Tribunal.⁶⁴

⁶² Auckland Disability Law “Auckland Disability Law’s Submission on the Education and Training Bill.” at 3.

⁶³ At 3.

⁶⁴ Human Rights Act 1993, s 99A .

We submit that clause 205(2)(a) be deleted and replaced with “is a barrister or solicitor of the High Court of New Zealand of not less than five years practice.”

Clause 206

We support ADL's submission regarding clause 206 sub-clause (1)(c) that deaf and disabled people should be able to have a say in the composition of the list of local community members that are suitable for being on the Panel.

Clause 206 sub-clause (1)(a) is confusing as it seems to imply that the Chief Referee could receive and determine applications without the aid of a Panel. For the avoidance of doubt, we submit that clause 206 sub-clause (1)(a) should be amended to specifically state that the Chief Referee has the power to “receive and process” applications, rather than “determine” applications.

We submit that the regulations about clause 206 sub-clause (1)(c) require the consultation of deaf and disabled people to create a list.

We submit that clause 206 sub-clause (1)(a) be replaced with: “to receive and process applications for resolution of serious disputes.”

Clause 207

Clause 207(1) states that a student or “a student and the student’s whānau” may apply for a dispute to be resolved. We are concerned that this subclause could lead to injustices for students in the care of Oranga Tamariki, or other students who are not in the care of whānau. For example; support people such as an advocate from Voyce or an Oranga Tamariki caregiver should be able to raise a serious dispute on behalf of a student in their care. Accordingly, we submit clause 207(1) should be amended to include support people who wish make an

application on behalf of the student including Oranga Tamariki caregivers, and community advocates.

Specific guidance is needed about what should qualify as the student or their whānau giving the “school an opportunity to resolve the dispute by agreement”. If such guidance is not given then this would require litigation which is contrary to the objective of the legislation. For example, it is unclear whether “an opportunity” could include the student or their whānau having an exchange with a teacher or whether a complaint to the board is required. We submit that the appropriate threshold is that the student and/or their family has raised their concerns with the school without any undue formality in relation to how that is done.

In particular, we submit that there should not be any obligation on the student or the family to meet with the school. Our clients often tell us that they have lost faith in school process, and that they do not see value in further engagement with the school. This is common in the circumstances that have been described in clause 203(c), (d), (e), (f) and (g).⁶⁵ As a result, further engagement by the students and their families with the school may not be constructive and could even worsen the situation. In these situations timely mediation by an independent third party is essential.

We further submit that the Chief Referee should have discretion to accept applications that have not met the requirements of clause 207(2) although the need for this discretion is also linked to what is required before a dispute can be raised.

We submit that 207(1) should be amended to include support people by

⁶⁵ Learning support, standing down, suspension, exclusion or expulsion, racism or other discrimination, students’ physical or mental health and physical force.

inserting: “or a student and their support person”.

We submit that clause 207(2) be amended to provide that students and their families are only required to raise their concerns with the school before they can apply to the Panel. The Chief Referee should also have the discretion to allow applications that have not raised their concerns with the school in appropriate cases.

Clauses 208 and 210

Mediation

We strongly support clause 208 sub-clause (1) that states that a mediator must be appointed by the Panel unless it is appropriate to do so. Mediation will help a number of serious disputes be resolved, and empower students and families to express their complaints to the school. We also support mediation being compulsory for the school to attend.⁶⁶

We strongly support mediation being part of the dispute resolution process.

Binding determinations

To have any meaning the right to education must be enforceable. However, under clause 208 the Panel is powerless unless both parties (the student and their family and the school) agree to be bound by the Panel’s determination.⁶⁷ As discussed above, we submit that the Panel must be empowered to issue binding decisions without the consent of the parties and that this power should exist in addition to the powers under sub-clause 3.⁶⁸

It is essential for the Panel to be able to make binding decisions because there are very limited effective or accessible appeal

⁶⁶ Education Training Bill 2019, cl 211(1)

⁶⁷ At cl 208(6).

⁶⁸ For example, the Panel should be able to make recommendations, consented to determinations, and non-consented to determinations.

options, and for many people the Panel will be their last and only option. For example; in the case of a student who has been expelled from school the appeal options of reconsideration by the Board of trustees, the ombudsman, and judicial review are simply ineffective and/or inaccessible. For these students the Panel is the only realistic option that could result in an unfair expulsion being overturned.

The power to make binding decisions should be a discretionary power that is only exercised when the Panel believes it to be necessary. It may be necessary for the Panel to make binding decisions when it is in the interests of fairness (i.e. overturning an unfair exclusion), or when the school or the student and/or their family refuse to be bound by the decision of the Panel but it is appropriate for them to be bound by that decision.

We submit that clause 208(6) be deleted and clause 210(2) be amended to provide: “Either party may enforce 1 or more of the orders made under subsection 1 through the courts by means specified in regulations made under section 607.”

Clause 209

We support all of the recommendation powers in sub-clauses (a) to (d). We also advocate for an additional power that would allow the Panel to make recommendations to the Ministry of Education. The Panel should be able to make recommendations that the Ministry assist schools and families to resolve their issues. The Panel should also be able to recommend that the Ministry lift exclusions.

If the Panel is considering making a recommendation to the Ministry notice should be given to the Ministry, and representatives should have the ability to appear and be heard prior to the Panel making such a recommendation.

We submit clause 209 should be amended to include the power to make recommendations to the Ministry.

Clause 209 should also be amended to include notice requirements to the Ministry and to expressly allow the Ministry to attend and be heard by the Panel when a recommendation could potentially be made to the Ministry.

Clause 211

Legal Representation

The government has said that allowing legal representation at Panel meetings “would substantially increase the cost and complexity of processes and procedures, and would disadvantage the party least able to afford representation”.⁶⁹ However, in our experience one of the reasons that students and their families are the most disadvantaged party in education disputes is that they do not have any legal experience or any ability to afford legal representation. To these students and their families the processes and procedures are already complex and difficult to navigate. As Auckland Disability Law have identified in their submission there is also a significant disparity between students with disabilities, their families, and the school or the Board of trustees or the Ministry.⁷⁰ Students and their families need to be able to access legal advice and representation because, in our experience, most Board of trustees have at least one member with legal experience or legal advisors who can advise them. Prohibiting students and their families from accessing legal representation during meetings furthers this imbalance. Legal assistance is also necessary to empower

⁶⁹ *Supporting all schools to succeed - Reform of the Tomorrow's Schools system* (Ministry of Education, November 2019) at 28.

⁷⁰ Auckland Disability Law “Auckland Disability Law’s Submission on the Education and Training Bill.” at 4.

the most vulnerable members of the community, including many Maori, Pasifika and refugee families to have equitable access to the disputes resolution service. Without legal assistance vulnerable members of the community may feel too intimidated to pursue valid disputes in the disputes resolution service. It is also necessary for this assistance to be funded.⁷¹

In our experience, having legal representation often leads to more positive outcomes as students and their families are navigated through the process and feel on a more equal footing to schools. We are concerned that not allowing legal representation could result in similar unfortunate consequences as the decision to restrict access to lawyers in the Family Justice system.⁷²

The government has also compared the Panel to the Disputes Tribunal.⁷³ We do not agree that this comparison is valid. The Panel should be distinguished as the Disputes Tribunal deals with financial and consumer issues whereas the Panel will be responsible for hearing cases about; the right to enrol or attend school, the right to education, and racism or other discrimination on the grounds specified in the Human Rights Act.⁷⁴ The Panel is therefore more akin to the Human Rights Review Tribunal, where legal representation is allowed as of right.⁷⁵

A possible “half-way house” could be that used in the Tenancy Tribunal where there

is a discretion to allow representation where appropriate.⁷⁶ The advantage of this approach is that the discretion can be used when needed to address the power imbalance between schools and students.

We submit that clause 211(3) be deleted and replaced with:

“The panel may allow any party to be represented by counsel if it considers that it would be appropriate to do so, having regard to—

- (a) the nature and complexity of the issue involved; or**
- (b) any significant disparity between the parties affecting their ability to represent their respective cases.**
- (4) Where any party to any proceedings before the Panel is represented by counsel, any other party to those proceedings may be represented by counsel.**

Attendance by Ministry of Education

In many cases it will also be appropriate for the Ministry of Education to be present during the disputes resolution process. This includes both where the Panel is considering recommendations to the Ministry and more generally, disputes about learning support, disciplinary matters, and physical force.

We submit clause 211 should be amended to add a new clause 211(1)(c) that provides that the Ministry of Education may [or must] participate in the disputes resolution process undertaken by the Panel.

Regulations

We support detailed matters such as panel procedures and processes, and

⁷¹ Please see the Advocacy Service section below at page 38.

⁷² The independent taskforce consulted with the Family Justice sector and concluded that the removal of access to early legal advice resulted in delays. See La-Verne King, Rosslyn Noonan and Chris Dellabarca *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, May 2019).

⁷³ *Supporting all schools to succeed - Reform of the Tomorrow's Schools system*, above n 69 at 28.

⁷⁴ Education and Training Bill 2019, cl 203.

⁷⁵ Human Rights Act 1993, s 108(3).

⁷⁶ Residential Tenancies Act 1986, s 93(3).

appointment processes for panel members being in regulations.⁷⁷

We also submit that the regulations should provide more detail about:

- **Panel processes** – Explicit guidance will be needed about the eligibility threshold, the application process, how mediation works, panel processes, panel meeting requirements, and panel meeting structures.
- **Expert members** – The regulations will need to provide more information about what qualities are required of expert members, and how expert members are chosen.⁷⁸
- **Restorative justice** – The regulations should require the disputes resolution process to use restorative practices. The regulations should also provide practical examples of restorative practice in the context of educational disputes.
- **Relationship with the Ministry of education** - We also think that the Panel's relationship to the Ministry will need to be better defined in the regulations. We question whether the Panel will be assisted by employees of the Ministry, and whether the Panel will sit under local Ministry offices.

⁷⁷ Education and Training Bill 2019 (193-1), (explanatory note).

⁷⁸ See the section on clause 206 above at page 33.

Advocacy Service

The Tomorrow's Schools Taskforce recommended the establishment of a whānau and student advocacy service. Although we had concerns about the lack of detail in the Tomorrow's Schools Taskforce report, we supported this proposal in principle due to the importance of students and their whānau being supported when engaging with schools and at that point, the proposed Education Hubs.⁷⁹ With the creation of the Panel there continues to be the need for funded, independent advocacy for students and their families.

Need for advocacy

In our experience, students and their families are exhausted and disillusioned with the education system by the time they have reached the Board of trustees or Ministry complaint stage. As a result of this exhaustion, students and their families may feel powerless and not listened to through the complaint process. When students and their families then engage with the school or the Ministry, it is not positive engagement.

As ADL has identified in their submission there is also a lack of advocates who can assist in education disputes, particularly in disputes involving disability or learning support.⁸⁰ Furthermore, as ADL has submitted, there are very few lawyers who represent students and families in education disputes. This is in contrast to Board of trustees and the Ministry of Education who seem to have ready access to legal advice and representation when complaints arise.

⁷⁹ YouthLaw Aotearoa "Submission to the Tomorrow's Schools Independent Taskforce on the Our Schooling Futures: Stronger together Whiria Nga Kura Tuatinitini".

⁸⁰ Auckland Disability Law "Auckland Disability Law's Submission on the Education and Training Bill." at 4.

Many of the students and the families that approach us in these situations strongly request our assistance and advocacy. Unfortunately, because of funding constraints we cannot provide the representation required to help these clients. Generally, the type of advocacy that would most benefit these clients is assistance writing complaints and liaising with the school. With the creation of the disputes resolution process the need for advocacy will continue. Under the new system it is likely that students and their families will need assistance to prepare their application to the Panel, preparation for mediation, representation at mediation, and preparation and representation for Panel meetings. This assistance will be particularly necessary for more vulnerable members of our community, including people with disabilities, Maori, Pasifika and refugee students and their families. We are aware that under the current bill that legal advice and representation is not currently available at mediation and Panel meetings. As we have stated above, this will only result in continued disparity between students and their families and the schools.⁸¹ To address this inequity a fully funded and independent advocacy service is needed.

Funded advocacy service

As we set out in our submission to the Taskforce, YouthLaw Aotearoa and other Community Law Centres would be very well placed to provide an advocacy service if sufficient resourcing was made available.⁸² YouthLaw Aotearoa and some other Community Law Centres already provide advice to students and their families but we have limited capacity to provide representation due to funding constraints. If YouthLaw Aotearoa were to receive Ministry support for this function

⁸¹ Please see above section "Legal representation" at page 35.

⁸² Above n 79.

we would be able to provide not only advice but also much needed representation at those meetings.

We support ADL's submission that the following wording be added to Clause 207 (3) "Where a student or the student's whānau advise that they feel unable to prepare or write a statement they will be referred to an independent advocate who will be paid to assist them, and support and represent them in mediation."

We submit that a new clause should be added that establishes the independent advocacy service. As part of this new clause there must be a requirement that regulations be created about how the service will be funded and operate.

Schedule 19 - Enrolment schemes

Schedule 19 clause 1 - enrolment zones

We understand that there has been opposition to the proposal to allow the Ministry to create enrolment zones in the place of Board of trustees.⁸³ However, we submit that it is appropriate for the Ministry to be able to create enrolment zones. It is appropriate because in our experience the majority of our clients do not care who has decided the zone, but only that it is fair.

We acknowledge the Minister's statement that the current arrangement allows schools to "manipulate the zone based on areas they may wish to take students from; for example, including high socio-economic neighbourhoods while excluding closer, yet more disadvantaged, neighbourhood[s]."⁸⁴ Whilst, this has not been our experience, we agree that there is a risk of this occurring, and it is more appropriate for the power to create school zones to rest with the Ministry.

We support schedule 19 (1).

Schedule 19, clause 4 – Ministry creating enrolment scheme

We support Schedule 19 (4). We agree that the board should be required to consult with the school community before consulting with the Ministry about an appropriate scheme.⁸⁵ It is appropriate for the board to consult with the school community because they are the representatives of that community.

We support schedule 19, clause 4.

Schedule 19, clause 14 – Secretary may direct board to enrol applicant

YouthLaw Aotearoa regularly advises clients who want to enrol into a school outside of their home zone. Most of our clients understand and respect that enrolment schemes exist to prevent overcrowding and to allow students to attend their local schools. However, our clients are often frustrated by the section 11P application process.

A primary concern with the section 11P process is the lack of information available about the process. Often when we talk to clients about out of zone enrolments they are not familiar with the section, or its operation. We have also had occasions where we have had to explain the section 11P process to professionals within the education sector because they have never heard of it. This is problematic because students who may be eligible under section 11P 2(b) and 2A, may not be aware that this option is even available to them.

When we explain what could be useful to include in an application (e.g. a doctors certificate) our clients are often shocked that they have to go to such lengths. Our clients are also surprised that they have to contact the Ministry for the section 11P application forms because they are not available online.

We submit that the Ministry should provide more information about the process online, and also through rules and regulations. In our submission, having this information available would actually reduce the number of applications because it would be much clearer that the threshold is very high.

Information required would be application forms, explanation of schedule 19, clause 14, practical examples, and information that would be required for the application.

⁸³ Education and Training Bill 2019, sch 19 cl 1.

⁸⁴ Simon Collins "Tomorrow's Schools: Govt takes over school zoning powers" (12 November 2019) New Zealand Herald <https://www.nzherald.co.nz/nz/news/article.cfm?id=1&objectid=12284431>.

⁸⁵ Education and Training Bill 2019, sch 19 cl 4(2)

We submit that a clause should be added to schedule 19, clause 14 that provides that the secretary must issue guidelines about the schedule 19, clause 14 process, and that the guidelines must provide application forms, an explanation of schedule 19 clause 14, and practical examples and information that would be required for the application. We also ask that this information be made available on the Ministry of Education website.

Tertiary and international students

Schedule 9 Clause 5 – Use of information held by MSD

YouthLaw Aotearoa does not support Schedule 9, clause 5(a) which specifies that social housing information may be held on the same database as allowance information, beneficiary information and student loan information.

The context of Schedule 9, clause 5 (f) indicates that this information will be used to determine eligibility for allowances and loans, and to investigate benefit fraud. The proposed clause indicates that there is a current lack of information sharing between government departments about social housing and student allowances, and that this clause is designed to allow that information to be shared. We understand the need to investigate benefit fraud, but we are concerned that clause 5 sub-clause (b) may infringe on students privacy rights. When students apply for student loans or allowances they will not know that their information is going to also be seen by the Ministry of Social Development. We are concerned that students who have signed up to only have themselves assessed for the purposes of student allowance and loans will then have the information that they have provided in good faith, potentially used against them or their family.

If students were aware that their information could be used against them/their families, we would question whether this would result in students being afraid to apply for student loan or allowance. This concerns us because

young people should be encouraged rather than discouraged into further education.

Whilst we understand the purpose of this clause, we are concerned about the breach of student's privacy and the possible adverse consequence of discouraging students from further education. We submit that a clause should be added allowing students to "opt-out" of their information about social housing being available to the Ministry of Social Development.

We submit that a clause should be added allowing students to "opt out" of their information being held in the same database as allowance information, beneficiary information and student loan information.

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