catalyst for change
The whole is greater than the sum of its parts

The Use of Physical Restraint and Seclusion in Schools: Legal Issues

Name	Position	Title
Terri Johnstone	Project Lead	Director, Catalyst for Change Limited
9(2)(a)	Peer Reviewer	Senior Lecturer, University of Canterbury
9(2)(a)	Research Assistant	Masters Student

Introduction

The intention of this report is to examine the legal issues pertaining to the use of physical restraint and seclusion in schools. This report will be complemented by a series of separate papers, with the intention of each being to: review the literature on seclusion; review the literature on physical restraint; review the current practice of physical restraint and seclusion in New Zealand schools; use national and international guidelines and research to determine best practice; and propose policies and guidelines based on these to promote safe practices of restraint and seclusion within New Zealand schools.

This paper will examine laws and policies from the New Zealand Bill of Rights Act, 1990, the United Nations Convention on the Rights of the Child, the Education Act, 1989, the Crimes Act, 1961, and Health and Safety legislation. It will conclude with a summation of legal issues related to the use of physical restraint and seclusion schools, and make recommendations based upon these.

New Zealand Bill of Rights Act 1990

When we look at the rights of New Zealanders, including children, the New Zealand Bill of Rights Act 1990 (NZBOR) is the primary document in New Zealand Law. The New Zealand Bill of Rights applies to acts done: *by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law* (Section 3).

Schools derive their powers from the Education Act 1989 as: ..*students are required by the Act to attend school, and schools are required by the Act to enrol them, the whole edifice of state education rests on that mandate from the state."* (Rushmore, The lawful powers of schools - territorial and substantive limits (2001)) Therefore the Bill of Rights Act will apply in the educational context as schools have a duty conferred on them pursuant to the Education Act.

Section 9 of the New Zealand Bill of Rights Act provides that:

> *Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.*

We therefore need to consider whether removing a child from a classroom into a seclusion room or the restraint of a child is cruel, degrading, or whether it could be considered a disproportionate punishment. This needs to be considered in the context of the literature currently being reviewed and in each individual situation. From the review of the literature provided to us for the purpose of this review, it is clear that there is a strong view among psychologists that the very fact that a child is removed and placed in isolation is likely to be considered cruel or a punishment by them. The exception to this would be where this form of treatment was part of a planned intervention programme approved by the professional responsible for treating the child, and even then it is likely that this recommendation would only be very short term (and incidentally, legally still potentially problematic).

The physical restraint of the child, either to remove them from the situation into seclusion, or for some other reason such as to prevent them from lashing out, is also likely to be a breach of section 9 of the NZBOR. This is likely to be done in front of their peers, which is likely to

be considered degrading. Then there is the deprivation of their liberty and isolation in seclusion which is likely to be considered disproportionately severe treatment. The location of the seclusion and nature of the place the child was required to stay would also be relevant. Extreme care would therefore need to be taken both in restraining or removing the child from the situation, and to the location and nature of the seclusion. Consideration would also need to be given to the behaviour of the child and whether the action taken was proportionate to the child's behaviour.

Section 22 of the NZBOR provides that: *Everyone has the right not to be arbitrarily arrested or detained.*

This right relates more to the right to lawful imprisonment, particularly when this right is considered in the context of where it lies in the legislation under the heading: *Search, arrest and detention.* However as detention is defined in the Concise Oxford English Dictionary as: *the action or state of detaining or being detained or the punishment of being kept in school after hours,* it is also relevant in the situation where a child is removed and held in a secure environment such as a "seclusion room" as this falls within the definition of "detention" and would therefore breach the child's rights contained in section 22 of the NZBOR.

In most cases the restraint or seclusion of a child is likely to breach the child's rights and would be unlawful. In a few exceptional situations the breach of the child's rights may be justified where the child's behaviour was so extreme that the rights needed to be breached in order for the school to comply with other statutory and moral obligations. These will be discussed later.

United Nations Convention on the Rights of the Child

In addition to the rights contained in the NZBOR, New Zealand children also enjoy the rights contained in the United Nations Convention on the Rights of the Child (UNCROC) which was adopted by New Zealand on 6 April 1993. These rights go even further than those contained in the NZBOR, and expand on the basic principles contained in that Act as they apply to children.

At the time the convention was adopted, the New Zealand Government determined that the rights contained in the convention were adequately provided for in New Zealand law, and therefore any doubt that the NBOR is not intended to apply to children are removed.

When we examine the legal framework surrounding the physical restraint of a child in the educational context, it is therefore essential that these conventions are also considered. The relevant articles to be considered are:

a) Article 19: *the states shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence.*

   Violence is defined as behaviour involving physical force intended to hurt, damage or kill (Concise Oxford English Dictionary). The intent of the person performing the act on the child would therefore be relevant when considering whether Article 19 had been breached. In most instances there would not be a violent intent by the party as

the action is more likely to be taken to diffuse a situation or prevent the child from harm.

b) Article 28: (1) *children have the right to education.*

(2) *State Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present convention.*

The basic right for education contained in the convention is twofold. On the one hand, the child who was being secluded from the classroom for a period, whether it be to cool down or as a punishment, is being denied the right to education as that child is missing out on the classroom activities for the period of their seclusion. However, not taking some steps to stop the child from preventing other children from the right to hear a lesson or learn is likely to be denying the other children their right to education. The rights of the majority therefore need to be balanced against the rights of the child causing the disruption.

Any disciplinary action taken in the school environment must also be done in a manner consistent with the child's human dignity. The term human dignity is not defined, but means the child's intrinsic worth.

c) Article 37: *State parties shall ensure:*

a. *No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years;*
b. *No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.*
c. *Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interests not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.*
d. *Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority and to a prompt decision on any such action.*

It is clear from the wording of Article 28 (2) that the authors of the convention did foresee the need for discipline in the educational system of member states. However, any discipline in the educational sector must consider the child's human dignity and Article 37.

Any form of seclusion without due process is likely to be a breach of the child's' rights. Extreme caution must be exercised if this approach is to be used. The nature of the seclusion, the place this is to occur and how this is managed would all be key.

Rights in the Educational Context - Education Act 1989

Schools derive their authority from The Education Act 1989. The relevant sections of the Education Act 1989 are:

Section 72: *Subject to any enactment, the general law of New Zealand, and the school's charter, a school's board may make for the school any by-laws the school thinks necessary or desirable for the control and management of the school.*

Section 75: *Except to the extent that any enactment of the general law of New Zealand provides otherwise, a school's board of trustees has complete discretion to control the management of the school as it thinks fit.*

Section 76: *(1) A school's principal is the board's chief executive in relation to the school's control and management.*

(2) Except to the extent that any enactment or the general law of New Zealand, provides otherwise, the principal::

(a) shall comply with the board's general policy directions; and

(b) subject to paragraph (a) of this subsection, has complete discretion to manager as the principal thinks fit the school's day to day administration.

In each of the sections referred to above, the powers given are made subject to any other enactment. This means that the NZBOR and UNCROC therefore prevail over the powers of the school/board.

Some would argue that the rights of children outlined above have to be tempered somewhat in the educational context. The view expressed in the Unites States Supreme Court case *Tinker v Des Moines Independent Community School District* 393 US 503, 50;21 L Ed 2nd 731,737 (1969) is that:

1. Students do not shed their constitutional rights at the school gates; and
2. Those rights are necessarily tempered by the school environment.

(Rushworth: Guiding principles in education law 1999)

However, any act which occurs in the Educational context is subject to judicial review where the rights of the child will be balanced against the powers of the school and its board. For this reason, the courts recognise that decisions made in the educational context should only be judicially reviewed in exceptional circumstances.

In Maddever v Umawera School Board of Trustees [1993] 2 NZLR 478 it was held:

The remedy of judicial review should be sparingly utilised in the context of the Education Act 1989. Against the statutory background of the education system it seems clear that outside of the areas where the status or educational options of the child are involved and specific rights are explicitly recognised, there is no warrant for an expansive approach to judicial review. The Courts should respect the evident "trade off" between reduced judicial review in return for a wider public (ie parent) participation in decision making (p504 line 43).

This case was decided before the adoption of the UNCROC and it is possible that the international mandate of the rights contained in the UNCROC may lead the courts to be more proactive in review in the educational context.

The Courts are not, however, the only review authority which could be used to review any decision or act undertaken by a school or board in the seclusion or restraint of a child. The Ombusdman's office could also be used.

In the Submission of the Ombudsmen on the Education Amendment Bill (24 January 2013), it is recorded that:

Oversight by the Ombudsmen and the application of the Official Information Act are fundamental safeguards to ensure that all partnership schools operate best practice and their pupils are not endangered. The application of both regimes will also assist in ensuring that New Zealand adheres to its international obligations under UNCROC.

These comments were made in the context of Partnership schools but it is clear that oversight by the Ombudsmen in other matters of school related discipline are key to compliance with the UNCROC where: *"...particular attention will be given to due process and natural justice"* (Report of Ombudsmen Volume 11, Issue 2, July 2005).

In the Ombudsmen's annual report to Parliament in 1996 (in the context of suspension and expulsion from schools) the report concludes:

"Resort to an Ombudsman results in an independent assessment of the facts and objective recommendations to address the concerns which the investigation reveals without involving the school or parents in time-consuming and expensive legal proceedings." This view was supported in: Maddever v Umawera School Board.

Any breach of a child's rights involves the right to legal challenge, therefore any action taken by a school to restrain or seclude a child automatically gives rise to a right of legal review. The Ombudsman sees it as an essential element of compliance with New Zealand's obligations under the UNCROC that school/board decisions and actions in the treatment of children are reviewed, and has shown a willingness to do so. This view is supported by the courts. Schools must therefore be very careful when either of these methods are used, regardless of the circumstances.

Crimes Act 1961

The Crimes Act 1961 provides at section 59 that:

(1) *Every parent of a child and every person in the place of a parent of the child is justified in using force if the force used is reasonable in the circumstances and is for the purpose of:*

(a) preventing or minimising harm to the child and another person; or

(b)...

(c) preventing the child from engaging or continuing to engage in offensive or disruptive behaviour; or

(2) *Nothing in subsection (1) or in any rule of common law justifies the use of force for the purpose of correction.*

(3) *Subsection (2) prevails over subsection (1)*

(4) ...

The question therefore arises, can schools rely on section 59 of the Crimes Act to justify restraint or the seclusion of a child for the purposes referred to in (a) or (c)?

The answer is, in our view, no for two reasons:

1. Section 139A of the Education Act bans the use of corporal punishment in schools. If we examine the wording of this section, it goes further than banning force for the purposes of punishment. The section provides: *No person....shall use force, by way of correction or punishment....*

   Correction is not defined but it could be argued that "correction" could be the use of restraint or seclusion as it is being used to "correct" or stop unacceptable behaviour. In any event the section prevents the use of force in schools.

2. The view that teachers, schools or boards stand "in loco parentis" is no longer valid in New Zealand law, and section 59 cannot therefore be used to argue that the section 59 gives teachers, schools or boards the powers of parents in the use of force in the circumstances referred to in that section.

   In loco parentis is the principle where teachers can stand in for parents while children are at school. It is widely accepted that this principle is no longer applicable in the modern educational environment as:

   (a) in the modern environment of compulsory education parents no longer have the discretion to decide whether or not they will delegate their authority to their child's teachers;

   (b) children now have rights independent of their parents (Hall and Manins, In loco parentis - the professional responsibilities of teachers, Waikato Journal of Education 7:2001); and

   (c) Teachers need to exert authority over each student to achieve educational objectives for all students. Parents cannot therefore control or modify the extent of control over their own children by teachers. (Rishworth, The Lawful powers of schools, 2001)

Would parental consent in some circumstances authorise the use of force to restrain a child in certain circumstances? The short answer is no. Even if parents agree, Section 59 (2) prohibits the justification of the use of force. This is reaffirmed in the educational context by section 139A of the Education Act. Parents cannot give consent for the school to do something that they themselves are prohibited from doing. This would also clearly breach the child's rights.

Health and Safety

Under Health and Safety legislation school boards have an obligation to provide a safe working environment for employees and to prevent harm for employees and others on school property. Schools also have to take practical steps to ensure no one is harmed or causes harm to others on school property. Currently H&S law (under review and certain to change) requires the identification of hazards and employers to take all practical and reasonable steps to isolate or minimise potential harm.

Therefore, although it has been established that any physical restraint or seclusion of children will breach their rights under the NZBOR and UNCROC, and that this is not permitted by the Crimes Act or the Education Act, schools do have a duty to prevent children from lashing out and harming others. The only practical step may therefore be immediate restraint to prevent any harm occurring.

In the article Sparing the Rod: Reflections on the abolition of Corporal Punishment, and the Increase in Violence in British Classrooms (Parker-Jenkins, Australia & New Zealand Journal of Law & Education, Vol 13, Number 1, 2008, p11) it was argued that: *Physical restraint of pupils should be regarded as part of overall behaviour management strategies.* And the restraint used should be gentle and to restrict movement. It should be such as a parent or carer would consider reasonable given the situation and the circumstances pertaining to the child. The need for specialist training was also emphasised.

The author of this article infers that there should be some discussion between the parent and the school on what is considered appropriate given the child's behavioural problems and the situation when the need to restrain may arise. Parental consent does not, however, permit the use of force on a child in the education context.

The article later goes on to say that guidelines in Britain:

> "*...on restraining pupils which are essentially about the safety of pupils, staff and property is that there is little or no reference to the issue of children's rights, and the country's obligations under the European Convention on Human Rights. It was Britain's need to reconcile treaty obligations under Article 3 of the Convention which led to the abolition of corporal punishment...Teachers cannot be empowered to act illegally and in way which contravenes these legal obligations, and therefore there is a continual tension between two sets of rights, those of teachers and those of pupils, and two sets of issues, protection for and from pupils.*

> The duty to protect employees in the work place from assault from children has to be carefully considered and such a duty could only be discharged by careful precautionary measures including hazard reporting systems and involvement of staff in health and safety committees. Whether the abstract concept that a child could be

declared a significant health and safety hazard is questionable conceptually, it is theoretically possible and should be carefully considered when planning safety measures. No prosecutions from Worksafe NZ have been tried on behalf of employees but under forthcoming changes to H & S legislation more care and ongoing monitoring will be needed to ensure adequate safeguards are in place.

Conclusion

The physical restraint or seclusion of a child is a breach of the child's rights and is prohibited by NZ statute, and parents cannot lawfully give authority for the use of force. However, this has to be balanced against the obligation to protect others from harm under Health and Safety legislation.

There is therefore a grey area, where the use of force to restrain may be justified in exceptional circumstances to prevent harm to others. This would need to be done in a way that maintained the child's dignity and recognised their rights as a human. Clearly the child's capacity to understand reason, consequence etc. would play a part in determining whether this was the appropriate course of action as would the circumstances which gave rise to the restraint. The restraint would need to be used only to stop the immediate harm from occurring and would need to end as soon as the immediate threat of harm was over.

While parental consent would not make the restraint legal, if it was foreseeable that there may be situations where physical restraint may be needed in the future (because of the child's particular condition or difficulties) it would be preferable to consult with the child's parent before any such action was taken. From a practical perspective it is the parents, in most circumstances, who will have the ability to enforce the children's legal rights.

The seclusion of a child is not as grey. There would only be very exceptional circumstances where this would be justifiable. Those circumstances are likely to be where a suitably qualified health professional working directly with that child recommends such treatment because of that child's particular condition. Even then, there would need to be very strict parameters about when this would be used, and the nature of the seclusion.

In passing, we note that we are aware of anecdotal evidence where parents have affirmed or approved restraint that would otherwise be unlawful – to be clear, this does not exempt a school from legal liability (nor, arguably, the parent, who could be deemed a party to an assault). In addition school staff are vulnerable to being charged under the Crimes Act for assault on children (although this is a rare occurrence). In some cases staff can avail themselves of the defence of necessity if they or others are under physical threat, but it is unwise to build training around knowledge of this defence. Rather, there must be an emphasis on adequate restraint in emergency situations being taught, and staff being very clear about boundaries around the use of physical force.

Overall, using an analogy of the current Euthanasia debate, legislative intervention clarifying "grey" areas is unlikely and schools should simply ensure:

- Staff are well trained to de-escalate conflict and where appropriate "safe" restraint techniques to use in very, very limited circumstances.
- Policies are clear and regularly reviewed and actively work-shopped with staff.

- Strict adherence to a child's human rights are reinforced in training, maintained in practice and reinforced by management.
- Appropriate disciplinary action is taken against staff transgressing policies.
- Confinement is used in only very, very exceptional circumstances and does not become the norm.