

11 November 2016

Education (Update) Amendment Bill (No 160-1)

SUBMISSION TO Parliament Education and Science Committee

REGARDING Education (Update) Amendment Bill (No. 160-1)

SUBMISSION BY YouthLaw Aotearoa, IHC, ACYA

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1 INTRODUCTION

- 1.1 YouthLaw Aotearoa (“YouthLaw”) is a Community Law Centre vested under the Legal Services Act 2000. We were established in 1987 as a national centre providing free legal advice and advocacy for children and young people under 25 years of age. We also work to promote the interests of children and young people at local and national levels when decisions, laws or policies affecting them are being created.
- 1.2 IHC was founded in 1949 by a group of parents who wanted equal treatment from the education, health and social service systems for their children with intellectual disability. Today IHC is still striving for these same outcomes and is committed to advocating for the rights, welfare and inclusion of all people with an intellectual disability. We support people with intellectual disability to lead satisfying lives and have a genuine place in the community as citizens. Through our charitable arm IHC raises awareness and advocates for the rights of over 50,000 people with intellectual disability at both a national and an international level. This includes an extensive advocacy programme, a one to one volunteer programme and the country’s largest specialist intellectual disability library.
- 1.3 ACYA (Action for Children and Youth in Aotearoa) is a coalition of non-governmental organisations which promotes the rights of children and young people through advocacy, monitoring and implementation of the UN Convention on the Rights of the Child and other international human rights instruments. ACYA is mandated to produce and present the civil society reports for the UN Committee on the Right of Child.
- 1.4 We welcome the opportunity to submit on the Education (Update) Amendment Bill (No. 160-1) (“the Bill”).
- 1.5 We would like to also have the opportunity to make oral submissions.
- 1.6 This submission will cover issues relating to the:
- Lack of consultation of children and young people in relation to the Bill;
 - Inclusion of the enduring objectives of education;
 - Communities of Online Learning;
 - Amendments to intervention and accountability measures within the Bill;
 - Lack of inclusion of an enforceable legislative right to education, or meaningful forms of recourse to ensure access to education for all students.

2 Lack of consultation

- 2.1 We echo the concerns by others, including the Office of the Children’s Commissioner (“OCC”), that children and young people were not brought into the process of consultation on this Bill. It is vital that children are seen as active participants in their own education and have a meaningful voice in influencing the direction and drafting of this Bill. Article 12 of the United Nations Convention on the Rights of the Child (“UNCROC”) provides that children have the right to express their views and for these views to be given due weight.

- 2.2 We agree with the OCC in recommending that this Bill is deferred until there has been substantial and meaningful consultation with children and young people. This consultation should cover the key themes the OCC has identified throughout their submission.
- 2.3 We also note the United Nations Committee for the Rights of the Child's ("UNCROC Committee's") comments in the recent Concluding Observations, calling for New Zealand to respect the views of the child in any new legislation – with specific mention to this particular Bill. (CRC/C/NZL/co/5 para 37(a))

3 Enduring objectives for education

- 3.1 We strongly support the incorporation of the enduring objectives of education into the primary legislation as this makes a clear statement about the aspirations and purposes of our education system. We do however have several concerns about how these have been framed within the Bill.
- 3.2 At present the enduring objectives within Section ("s") 1A(3) of the Act are only utilised to the effect of guiding the Minister when creating the medium term strategic National Education Learning Priorities ("NELPs") under s 1A(7). Our concern is that this disconnects the enduring objectives from schools' own strategic and operational plans. Under the current Act, school Boards of Trustees ("Boards") must give effect to the objectives within the National Education Goals by the maintenance of a School Charter under s 61 of the Act. Under the Bill, schools are only required to have regard to the medium term strategies (as per the new s 35GA for private schools, Clause ("cl") 115 for Charter Schools and Schedule ("sch") 6 cl 5(2)(b) for State Schools and Special Institutions) and will no longer be required to consider the enduring objectives. We consider that the current wording of the Bill obscures the enduring objectives within the NELPs instead of letting them stand alone.
- 3.3 We recommend containing the enduring objectives in s 1A(3) within a standalone purpose section for the Bill. This will further emphasise the importance of the enduring objectives as framing the purpose of education broadly and will assist with ensuring that the rest of the Act is interpreted consistently with these goals.
- 3.4 The current drafting for the enduring objectives is inconsistent with the language used in the current National Education Goals ("NEGs") and with the primary objective for Boards as stated in sch 6 cl 5(1) of the Bill. For example, NEG 1 connects the purpose of obtaining the "highest standards of achievement" as being to "enable all students to realise their full potential as individuals, and to develop the values needed to become full members of New Zealand's society." The enduring objectives by comparison appear to treat educational achievement as a separate abstracted goal to promoting the development of the student and teaching them about our New Zealand cultures and society. We recommend keeping the language consistent between the current NEGs, and between s 1A(3) and sch 6 cl 5 of the Bill.
- 3.5 The current enduring objectives also do not fully reflect the language of both Article 29 of the UNCROC and Article 24 of the United Nations Rights on Persons with Disabilities ("UNCRPD"). We recommend consulting the education sector about drafting for these enduring objectives which is in line with New Zealand's international obligations under both of these conventions.
- 3.6 We support the NZ Secondary Principal's Council and PPTA's suggestion of including an objective relating to equitable outcomes for learners.

- 3.7 It is unclear what is meant by s 1A(2)(b) about including “statements of the diversity of education provision”. This should be clarified. We draw attention to the Committee’s recent Concluding Observations for New Zealand raising concern with respect to the enduring disparities between Maori and other demographic groups. To that end the Committee recommends “[New Zealand] to develop a comprehensive, cross-sectorial strategy for the full enjoyment of the rights of Māori and Pasifika children, in close cooperation with them and their communities.” (CRC/C/NZL/CO/5 para 42).
- 3.8 Subsection 4 should specify that children and young people should be consulted (in accordance with Article 12 UNCROC) and in particular, should include a reference to specific priority groups of children – including those with disabilities, Māori and Pasifika (in accordance with Article 23 and 29c UNCROC). We note that the concluding observations issued by the UN Committee on the Rights of the Child in response to New Zealand’s fifth periodic report, recommend that New Zealand “Ensure that the ongoing review of the Education Act 1989 complies with the provisions and principles of the Convention and is made in consultation with children” (para 37(a)).

4 Online schools

Inadequate framing and investigation of the problem that online schools are supposed to address

- 4.1 The proposed Communities of Online Learning (“COOLs”) raise fundamental issues around the nature and quality of education and learning. COOLs emphasise individual learning over community based, face to face learning. There appears to be an unarticulated, underlying assumption that some children learn better outside of a traditional school environment. Yet several questions remain unanswered, such as ‘why are some children not learning well in a school environment?’, ‘are there things we can do to improve access within the current school environment for these children before relying on COOLs?’ and ‘what are the unintended consequences which might follow from educating children via COOLs?’ These questions have crucial implications for children’s rights to education, including their rights to inclusive education and reasonable accommodation under both the UNCROC and the UNCRPD.
- 4.2 Evidence suggests that students need the on-site expertise of educators to manage and guide them in the use of technology to enhance and deepen learning.¹ For students who are already at risk of disengagement the absence of guidance could mean the end of formal education.
- 4.3 We endorse the submission of the NZPPTA Secondary Principals’ Council that the introduction of the COOLs model introduces a contra-logical thread in the Bill which cuts directly across most of the positive elements of the other changes. Most importantly it changes the positive aspects of *Tomorrows Schools*², which is the direct relationship between schools and communities and replaces it with a contractual relationship between provider and the Crown and parents and students are positioned as consumers rather than having ownership.

¹ See, Bolstad and Lin, 2009 Students’ experiences of Learning in Virtual classrooms, available from <http://www.nzcer.org.nz/system/files/students-experiences-learning-virtual-classrooms.pdf>
See also, CREDO Online Charter School Study 2015, available from [https://credo.stanford.edu/pdfs/OnlineCharter School StudyFinal2015.pdf](https://credo.stanford.edu/pdfs/OnlineCharter%20School%20StudyFinal2015.pdf) and NPEC Virtual Schools Report 2016 Directory and performance Review, available from <http://npec.colorado.edu/publication/virtual-schools-annual-2016>

² Report of the Taskforce to Review Education (1988). *Administering for excellence. Effective administration in education* [The Picot Report]. Wellington: Government Printer.

4.4 To ensure that children’s rights are protected, and any potential unintended consequences of COOLs explored, we recommend that legislative changes regarding on-line schools be delayed until the necessary policy work and requisite consultation has been completed – including consultation with children and young people.

Potential fundamental change to the right to education

4.5 We are concerned at the potential for on-line schools to undermine the essence of children and young people’s right to education. The right to education under the current Act is predicated on physical attendance at a “bricks and mortar” school, with peers. It is inextricably linked to the expectation that all children should be able to attend their local school, within their local community. We question how the right to education will be defined, interpreted and applied with the development of on-line schools. There is potential for a cultural shift whereby the qualitative aspects of the right to education (as set out in Article 29 of UNCROC) are disregarded.

4.6 The qualitative aspects of education are a critical part of the overall educational experience and children’s learning. How will children attending an on-line school learn about sustainability and development, gardening, sports, physical development, socialisation? There is potential for digital and opportunity divide and changing the very nature of education.

4.7 Under the Bill, the Minister for Education could use his or her discretion to close a child’s local school on the basis that the child could still enrol and attend an online school based in a different part of the country. Although it could be argued that the child’s right to education is maintained the nature of this education would be limited.

4.8 We recommend that the Bill:

- Specify that the right to education is the right to attend a local school; and
- Include a requirement that the Minister for Education have regard to the presence of alternative local schools before making a decision to close a school (analogous to s 152(2) of the current Act).

Increases the use of online education as a ‘dumping ground’

4.9 We are extremely concerned that COOLs will be used as alternatives or ‘dumping grounds’ for schools who want to move students who are underperforming or who have behavioural concerns off their roll. As currently drafted there is a lack of safeguards to ensure enrolments in COOLs are not encouraged as a default option by non-inclusive schools.

4.10 Disabled children and young people are over-represented in alternative education settings including Te Aho o Te Kura Pounamu. We are concerned that the COOLs will compound this by providing an additional option for excluding disabled children and young people from their local school.

4.11 We note that the Treasury advice relating to COOLs identifies that the evidence on the educational impact of on-line learning is mixed and there are potential risks of vulnerable students being diverted in this form of provision. Further Treasury notes that it is not clear that the proposed accountability requirements will adequately address the educational risk. Treasury raises issues relating to system coherence and how the COOLs proposal will link into the wider settings and existing policies and legislation.

4.12 We recommend that, if the provisions relating to COOLs are retained in the Bill, safeguards be included to:

- Protect children and young people’s right to choose to attend a local school;

- Ensure that the quality of educational outcomes are monitored and reported on;
- Ensure children can access the same levels of guidance and counselling as they would in their local school; and
- Ensure children and young people are not diverted to enrolment in COOLs due to exclusion.

Lack of clarity around distinguishing the obligations of COOLs vs other providers

4.13 There is also a lack of coherence and clarity as to the varying obligations of different providers. The Bill assumes that COOLs may be formed from existing State schools, private schools or charter schools; all of whom have separate obligations under the current Education Bill. It is unclear how these obligations interact. For example if a State school is also a COOL provider, which set of obligations takes precedence? Neither is it clear how any conflicting obligations would be resolved.

4.14 We recommend that, if the provisions relating to COOLs are retained in the Bill:

- The obligations which apply to all schools are clearly set out in one section of the Bill;
- The obligations pertaining to particular providers are set out in the sections of the Bill dealing with those providers; and
- There is clearer direction in the Bill on how conflicting obligations are to be dealt with.

Several clauses are of specific concern –

4.15 cl 38 (new s 35T) – *Criteria and provisional accreditation of online schools*

Clause 38 has criteria that are similar, but weaker, to those for private schools. Sections 35F & 35G prescribe further details for tuition standards and managers for private schools than are prescribed for COOLs. We suggest these sections be cross referenced.

4.16 cl 38 (new s 35ZE) *Duties of COOLs*

The clauses relating to COOLs do not refer to NELPs (or s 60A). We note that this is in contrast to the requirement on private schools to have regard to NELPs (s 35GA). Clarification is required where a school is both a private school and a COOL as to whether they will have to comply with both sets of requirements (to the extent that this does not create a conflict).

4.17 The clauses relating to COOLs are also inconsistent with general requirements for State schools under s 60A (curriculum statements and national measures). Clarification is also required as to how conflicting duties when a State school is also a COOL might be resolved. It is also unclear whether COOLs would necessarily fall under the category of ‘State, State Integrated, private or Partnership School’ and, if so, whether the corresponding obligations would also apply.

4.18 cl 38 (new s 35ZO) *Wide range of matters left to regulation*

We question the appropriateness of leaving such a wide range of matters to be prescribed by Order in Council. Issues related to the registration of teachers and limits on the ability of school to refuse enrolment, for example, should be dealt with in primary legislation.

4.19 Clause 38 would also allow regulations around fees. It is possible that this could create a scenario where a state school becomes a COOL and can legitimately charge its students fees for parts of its learning programme undermining.

General issues overall with Part 3A

4.20 The provisions for COOLs do not include any clauses analogous to current ss 158W, 158X or 158Y clarifying the application of the Bill of Rights Act, Privacy Act and Official Information Act to COOLs. It is therefore unclear how these pieces of legislation will apply to COOLs.

4.21 cl 71 (s 91C) – *Salaries of teachers to be paid by Crown*

It is unclear whether cl 71 (new s 91B) will mean that state schools that become full communities of learning will no longer have salaried teacher positions. If this is the case we would be deeply concerned about the implications for the right of every child to access a quality public education.

4.22 cl 74 – *State schools and Special institutions to have Boards of Trustees*

We note that, unlike State schools and Special Institutions, COOLs are specifically excluded from the requirement to have a Board of Trustees. It is unclear whether there is an intended distinction between a COOL body corporate (or the governing body of a tertiary institution) and a State school Board of Trustees. This needs to be clarified.

Issue with monitoring COOL performance

4.23 cl 38 (new s 35ZI) *State schools/COOLs can sub-contract to other COOLs*

We are concerned that state schools or COOLs can sub-contract out part/all of educational services to other supplementary COOLs (possibly without the consent of whanau and without consulting the child). Termination of the sub-contract with the supplementary COOL could impact negatively on the students concerned if the principal school or COOL is unable to replace the programme at short notice. This creates a blurred distinction between a COOL's role simply as a correspondence service provider (responsibility for education being placed on the family and the COOL is a passive provider), or as an actual school (responsibility for education on the COOL as an active provider, as provided by s 35ZE(3)).

4.24 There is potential for COOLs to result in more segregated education settings and online special units. Disabled students are already overrepresented in correspondence and alternative education statistics. This would be contrary to the clear obligations, under both UNCROC and the UNCRPD, to provide quality education to all children and young people.

5 Intervention and accountability measures within the Bill

5.1 The requirement in s 62 for Boards to monitor and evaluate the performance of students in relation to the National Standards and other qualifications is overly narrow. Whilst the list provided is not exhaustive, there is no expectation set within the legislation that schools will monitor the performance of students against the New Zealand Curriculum generally, or for schools to use a range of evaluative measures to ensure that students with high learning needs are adequately monitored. We recommend the inclusion of a reference within s 62(2) to the New Zealand Curriculum and an additional subsection added to supplement Subsection 1 which requires Boards to ensure the use of evaluative measures that are appropriate for the particular students within their school population. Given the current lack of focused monitoring of the achievement of students with disabilities we suggest that this clause is strengthened by the following additions

- 62(1) read "The board of a school must ensure that the school's principal and staff monitor and evaluate the performance of the school's students, including students with high learning needs."

- 62(4) read “The board must report to the Secretary... on the performance of the school’s students, including students with high learning needs, in accordance with any regulations...”
- 5.2 We support the inclusion of specified performance measures for schools, but recommend linking these to the enduring objectives in a similar way to s 1A(2)(a). We also recommend the inclusion of a requirement that the National Performance Measures include measures relating to both the inclusion and achievement of students with disabilities in a way which is consistent with upholding the requirements of Article 24 of the UNCRPD. We suggest including the wording to cl 41 (s 60A), “these targets are to include how well a school values and includes and also supports the progress and achievement of all students, including students with disabilities.”
- 5.3 The recent (September 2016) government paper “A Blue print for Education Stewardship” identifies the seven agencies that have stewardship responsibility for different aspects of New Zealand’s Education system – the Ministry of Education, the Education Council, the Education Review Office, the New Zealand Qualifications Authority, the Tertiary Education Commission, Careers New Zealand, and Education New Zealand. The paper notes that the seven agencies charged with system stewardship acknowledge that a more coherent and systematic approach is required to generate the substantial lift in system performance necessary to ensure that every learner can succeed. We therefore suggest that the Update Amendment Bill be strengthened by statements that refer to and describe how system stewardship is linked to the legislative amendments proposed.
- 5.4 We supported the extension of the Secretary for Education’s powers of intervention in schools within cls 55-64.
- 5.5 We are highly concerned by the addition of the phrasing “at the Minister’s absolute discretion” into ss 146 (establishing schools), 153 (changing class of school), 154 (closure of schools) and 156A (merging of schools). While the Minister is still required to comply with the strict procedures contained within Part 12, this additional wording potentially broadens the Minister’s powers and limits any grounds for the judicial review of the Minister’s decisions – removing a vital and fundamental check on the Minister’s powers. We recommend not including these changes.
- 5.6 In conjunction with the changes regarding the Minister’s discretion to open, change, close or merge schools – we are also highly concerned by the amendments to the Minister’s obligation to consult within s 157. We view that the consultation of a school with regard to an imminent change to another school in their area, implies a different nature to a consultation which is part of a review of the provision of education in the area. Schools are likely to give different kinds of feedback in response to each kind of consultation. We recommend not including this change, or at least re-drafting so that it reads as follows:

“Subsection (3)(f) and (g) does not apply if the relevant board or boards have already been adequately consulted on the closure or merger option as part of a review of the provision of schooling in a particular area.”

6 Access to education

- 6.1 We are deeply concerned by the continued failure of the Government to establish an enforceable legislative right to education, or meaningful forms of recourse to ensure access to education for all students. We note the findings of the two recent reports YouthLaw has released which found children and young people:

- Being illegally barred or actively discouraged from enrolling in their local school;
- Receiving inadequate support in their schooling – particularly those with disabilities, Maori and Pasifika;
- Being subjected to unreasonable or illegal use of disciplinary action – including exclusion from school;

6.2 We note that the absence of an enforceable legislative right to education is inconsistent with New Zealand’s obligations under the UNCROC and the UNCRPD. In particular, we also note the UNCROC Committee’s urging within their recent Concluding Observations, for New Zealand to:

- “ensure that the ongoing review of the Education Act 1989 complies with the provisions and principles of the Convention and is made in consultation with children” Para 37(a)
- “bring domestic legislation relating to children into compliance with the Convention.” Para 6;
- “adopt a comprehensive, child rights and participatory approach to the fulfilment of the rights of children with disabilities.” Para 30(a);
- “strengthen its efforts to combat the marginalization and discrimination of children with disabilities in their access to... education” Para 30(b)
- “Take measures to end the over-representation of children with disabilities, Māori and Pasifika children in disciplinary processes including by providing adequate social and psychosocial support to children and only use the disciplinary measure of permanent or temporary exclusion as a means of last resort.” Para 38(d)

6.3 The Bill includes no changes to bring effect to these obligations. There is also still a lack of specified regulations or guidelines around aspects of the education sectors responsibilities towards children and young people.

6.4 With these points in mind, we strongly call for the Bill to address the following –

An enforceable legislative right to education

6.5 As well as the inclusion of the broad purpose statement recommended in paragraph 3.3, the Bill should include comprehensive mechanisms for enforcing the right to education contained within Sections 3 and 8 of the current Act.

6.6 This should include the provision of a Code of Practice outlining:

- The obligations of schools towards students with additional learning needs, such as:
 - What is meant by ‘inclusive education’, referring to the schools’ provision of an environment which enables active and meaningful participation in learning;
 - When and how students’ needs are to be assessed;
 - The maintenance of individual education plans for students;
 - The application and provision of additional funding for students;
 - Communication and involvement of the student’s whānau.
- A clarification of disciplinary standards for schools relating to:
 - Disciplinary protections for students with disabilities;
 - Use of informal disciplinary procedures;
 - Restorative Justice measures.
- The obligations of the Ministry of Education for:

- Providing adequate and mandatory training for school Boards in their legal obligations under the Act;
 - The provision of funding for students with additional learning needs;
 - The resolution of complaints relating to services provided by either the Ministry or by schools.
- The obligations of the Education Review Office and the Education Council relating to the investigation and review of schools provision of inclusive education for priority learners – including those with disabilities, Māori and Pasifika.

Measures of recourse

6.7 We also call for measures of recourse to be included within the Bill, including:

- Additional powers to be vested with the Office of the Ombudsman or the OCC, so that they have a better ability to respond to education related complaints;
- The creation of a mediation/disputes resolution process to help families, schools and the Ministry of Education resolve issues in education (related to disability or otherwise). This could be analogous to the mediation service already provided by the Human Rights Commission, but would be specialised in education issues, easily accessible, informal, relational and collaborative.
- The creation of an Education Tribunal to resolve education claims. This body would:
 - Have broad jurisdiction over all education issues (related to disability or otherwise);
 - Have power to make binding decisions and directions to schools and the Ministry of Education;
 - Be an alternative to Judicial Review that is more informal, accessible and less stigmatised;
 - Provide precedents that would help supplement the expanded guidelines and give schools a resource illustrating best practice;
 - Provide meaningful accountability for whānau and schools to access;
 - Strengthen education system stewardship and coherence through systematic review of individual cases for systems improvements.

Strengthening education systems

6.8 The Ministry of Education, Education Council and the Education Review Office all have a critical role to play individually in ensuring access to inclusive education. The inclusiveness of our education system will be enhanced, embedded and extended, if those key organisations work in a connected “systems oriented” way; sharing and responding to information about the links between school performance, professional standards and educator development, and the policy and budget levers to build an inclusive education system. We refer back to comments made at paragraph 5.3 above.

6.9 We recommend moving towards strengthening those systems, by ensuring the key components of quality inclusive education and responsibility to build practice, are shared across the Ministry of Education, the Education Council and the Education Review office. This will assist with enabling appropriate legislation reform, an adequate policy and resourcing framework based on accurate prevalence data, the capacity, capability and commitment of teachers and school leadership, underpinned by robust reporting frameworks for monitoring progress, timely access to quality specialist support or advice, external review and evaluation of school performance, and access to accountability mechanisms.

6.10 Ministry of Education advice to their Minister is that an increased joined up systems approach across those central agencies has the potential to reinforce legislative and policy 'bottom lines', build inclusive practice and professional development and create accountability.