

Consultation by Daniel Johnson MSP
Proposed Restraint and Seclusion (Prevention in Schools)
(Scotland) Bill
29 September 2023

Introduction

1. NASUWT welcomes the opportunity to comment on the Proposed Restraint and Seclusion (Prevention in Schools) (Scotland) Bill.
2. NASUWT is the Teachers' Union, representing teachers and school leaders in all sectors of education.

Specific

1. Which of the following best expresses your view of the proposed Bill?

3. NASUWT agrees that, to date, there has been a clear and complete abdication of responsibility on the part of the Scottish Government in providing guidance for schools. NASUWT has publicly insisted that clearer and better quality guidance is urgently needed.
4. However, the Union is concerned that the proposals set out within the consultation document do not take sufficient cognisance of the nuances in this policy area, nor do they address some of the key challenges which were discussed in the Physical Intervention Working Group or raised more broadly in responses to the Scottish Government's physical intervention in schools guidance consultation.

5. Where the law and any tensions in definitions remain unresolved, by implementing a statutory duty the Scottish Government would be placing undue pressure on schools, local authorities and teachers. Where there is a lack of clear information, different employers will also interpret the legislation differently. There are clear implications in terms of additional workload and distraction for teachers from their core role of teaching and learning.

2. Do you think legislation is required, or are there are other ways in which the proposed Bill's aims could be achieved more effectively? Please explain the reasons for your response.

6. The Union responded in depth to the Scottish Government's physical intervention in schools guidance consultation back in October 2022. While NASUWT is frustrated with the length of time that this national process has undertaken, given the depth of the inquiry and the breadth of the engagement with this national consultation process it seems premature to move to discussions on statutory levers. The physical intervention working group has continued to put pressure on civil servants to deliver on next steps and, as of 07/06/23, was told that:

'I am working through the consultation analysis following the closure of the consultation at the end of last year. This has unfortunately been delayed; however, we are progressing as quickly as we can. Once that stage is complete, we will reconvene the working group over the summer to finalise the guidance for publication. Again, our aim is to publish the final guidance as quickly as possible.'

7. The consultation analysis requires to be expedited, not least of which because a number of councils have been looking at local policies, procedures and processes and have placed those developments on hold pending the publication of national guidance. However, statute at this stage would be a blunt tool to provide much needed progress.

3. What is your view on the proposal that guidance on restraint and seclusion should be statutory?

Please explain the reasons for your response, including setting out what you consider any statutory guidance should cover and how it should be enforced.

8. Statutory interventions are not always a quick fix: compare the situation with Co-ordinated Support Plans (CSPs), which is a process underpinned by statute. Some children with complex or multiple needs will have a CSP, but this will not apply to all children who have a disability. There are currently a great variety of approaches being undertaken in relation to the completion of the CSP, which is a statutory document.
9. The Union has previously explained to the Scottish Parliament that it should not be blind to the considerable variation in planning documents used on the ground, and stressed that greater time and effort is needed to build for this consistency with the use of better communication and training before adding further tiers of planning documentation.¹
10. While there has been some acknowledgement that very few CSPs are actually put in place, the Union remains concerned that the drivers for this variability have not been adequately acknowledged or addressed and, therefore, should the proposed Bill be enacted, a similar local variability might be anticipated.
11. This proposal for a Restraint and Seclusion (Prevention in Schools) (Scotland) Bill forms one part of a wider body of work which is necessary. In relation to evaluation, NASUWT remains concerned with the continued use of How Good is Our School? (HGIOS 4) as a self-evaluation tool, given that the terms of HGIOS 4 were never discussed and agreed with the profession. Feedback from members is clear that HGIOS 4 creates bureaucracy and excessive and unnecessary workload burdens for staff

¹ NASUWT evidence to the Scottish Parliament Education, Children and Young People Committee: 'Disabled Children and Young People (Transitions to Adulthood) (Scotland) Bill 6 February 2023'.

and schools; it is overdue for review. Equally updated guidance for schools on behaviour is also urgently required to reaffirm the options available to schools to build positive relationships and manage behaviour issues.

12. Policy is not created in a vacuum and it would be unwise to ignore the shifting sands in the wider landscape of Scottish Education, not least of which those resulting from the Muir recommendations, the Hayward Review and the National Discussion. We must avoid rushing to implement a statutory process which does not clearly align with the numerous moving parts in the system.

4. What is your view on the proposal that incidents should be recorded by schools and reported as standard to a body responsible for monitoring incidents?

Please explain the reasons for your response, including which existing body you consider would be best placed to perform the monitoring role and how the monitoring role would work in practice.

13. The Union acknowledges that there are currently considerable variations in local practice on recording, monitoring and reporting. We can see variations in practice across a number of policy areas. The Scottish Parliament should consider the National Thematic Review into bullying,² which demonstrated a very mixed national picture, with existing reporting mechanisms facing significant criticism in terms of ease of use. A statutory requirement to monitor, or a guidance document on its own, will be insufficient to embed practice and this will need to go hand in hand with a training, communication and support programme, as well as be built upon an IT system for recording which is fit for purpose.

14. NASUWT would also suggest that the Scottish Parliament looks to compare practice with the recording recommendations made by the

² <https://education.gov.scot/media/yffms1dx/nt-approaches-to-recording-and-monitoring-incidents-of-bullying-in-schools.pdf>

Equality and Human Rights Commission (EHRC) in England and Wales.³ The Union has supported those recommendations in principle as they link to compliance with equalities legislation, including the Public Sector Equality Duty (PSED).

15. It is essential that the Scottish Government better embeds equalities and that protected characteristics form part of any requirement on recording, monitoring and reporting.
16. The key will always be about how recording operates in practice. The case studies produced by the EHRC might be of interest as they set out some positive examples referring to staff wellbeing; NASUWT would consider these to be essential. However, the EHRC model is not perfect and the teacher/staff perspective and voice is missing from many of the examples, which NASUWT would also wish to stress as being essential.
17. It is also important that any advice, guidance or statutory process considers the workload burdens associated with the approach outlined. Steps must be taken to ensure that all staff in schools have the time to fulfil the responsibilities they will have. In particular, where staff may not be clear about the expectations on restraint, it is exceptionally important that there is a meaningful framework for monitoring.
18. A key part of monitoring is ensuring there is a shared understanding which involves having clear definitions. The definition of 'restraint', as one example in Annex A, is not consistent with the proposals within the Scottish Government's recent consultation. Definitions are important – and this needs further work.
19. The Union would not be in support of creating a further independent body outwith any recommendations made by Professor Muir in the *Putting Learners at the Centre: Towards a Future Vision for Scottish Education* Report, which was provided to Scottish Ministers on the replacement of

³ <https://www.equalityhumanrights.com/en/inquiries-and-investigations/inquiry-how-schools-are-monitoring-use-restraint>

the Scottish Qualifications Authority, or reform of Education Scotland and removal of its inspection function. Any national monitoring on restraint and seclusion should be undertaken by the new body undertaking an inspection function. Local authorities will have their own review mechanisms, in line with their existing statutory duties, and teachers would wish to see the interaction between existing statutory duties and any new duty exemplified through guidance.

20. NASUWT does agree, however, that the Scottish Government needs to clearly set out the procedure through which it will maintain an overview of ongoing practice in local authorities and schools. Teachers will need detailed training and exemplification in relation to any national processes. Furthermore, a review period should be built in so that all parties have an opportunity to reflect on the successes or otherwise of implementation, and amendments can be made accordingly. There must also be an agreed timeframe for any national review. It is anticipated that the public inquiry into the death of Sheku Bayoh may make recommendations for the public sector as well as the police, and so there must be appropriate mechanisms built in to allow for further revision as appropriate thereafter.

5. What is your view of the proposal for parents, carers and guardians to be provided with details of every incident to allow concerns to be escalated wherever necessary?

Please explain the reasons for your response including what information parents, carers and guardians should be entitled to.

21. Where there existed a suitable and appropriate national recording mechanism – please see comments under question 4 for further information on our suggested requirements thereof – the data gathered therein would likely be considered as personal sensitive data under existing statutory requirements and therefore accessible to parents, carers and guardians. It is not clear in these circumstances what an additional statutory duty would add.

22. It is acknowledged that there are existing complaints and escalation procedures. Where these are operating suboptimally, it would be better to improve existing mechanisms and address the barriers on the ground than to adopt a new system without addressing, head on, any pre-existing difficulties.

6. What is your view of the proposal to require data on restraint and seclusion to be published?

Please explain the reasons for your response including details of what data should be collated, who should be responsible for publishing it and how regularly.

23. On the ground, our local health and safety representatives are already encountering some difficulties, in a number of local areas, accessing data on teacher assaults and violence in the workplace. In this context, the following motion was passed at our NASUWT Scotland Conference in 2021:

'HEALTH AND SAFETY REPORTING TO HEALTH AND SAFETY REPRESENTATIVES

Conference condemns authorities who use the General Data Protection Regulation (GDPR) as an excuse not to share health and safety reports with health and safety representatives.

Conference calls upon the Scotland Executive Council to campaign to have all online health and safety reports designed in a format that enables automatic sharing of information with trade union health and safety representatives without breaching the GDPR and also calls upon the Scotland Executive Council to conduct a survey to find out the mechanism by and degree to which each Local Authorities enables sharing of this information.'

24. Any proposal must navigate the complex statutory landscape and address, head on, the potential for individual staff or students to be identified as one example. It must also be landed within existing reporting requirements under health and safety legislation. Indeed, it is worth noting at this point our disappointment that there was no specific reference or acknowledgement of the need to ensure that measures are in place to ensure the health, safety and wellbeing of staff and pupils within the drafted consultation document.

7. What is your view of the proposal to require all teachers and teaching assistants to complete mandatory training on restraint and seclusion?

Please explain the reasons for your response including details of what training should involve and how it could be delivered in practice.

25. It will be absolutely necessary to ensure that appropriate training and resources are provided to local authorities, schools, headteachers and teachers in order to support implementation of any guidance or legislation surrounding seclusion and restraint. It may be possible to incorporate training within existing models of training around child protection.

26. Whether training should be mandatory, however, is complex. NASUWT has always argued that such training should be voluntary, given many teachers are concerned about the risk of legal/personal injury claims and their own liability. The Union believes that all staff should have a right to training, but we would recommend any national guidance stops short of mandating training.

27. It is worth also considering the conclusions of the EHRC, which said:

'The evidence from families of children who had been restrained suggests that training may not always have a positive impact on the use of restraint. This raises questions about whether staff training promotes a

*human rights approach, such as in the Restraint Reduction Networks Training Standards, or whether it gives staff more confidence to use restraint. The evidence is anecdotal but shows that we cannot automatically assume that this specific action taken by schools leads to improvement in human rights safeguards. This underlines the need for national training standards for restraint.*⁴

28. NASUWT would, however, support moves to ensure teachers have recourse to professional support, which is referenced within the foreword. In 2022, the following motion was passed at the Scotland Conference:

‘TEACHERS’ WELLBEING AND SUPERVISION

‘Conference notes that schools and teachers have never been more engaged with the lives of young people in their care. From relationships frameworks, inter-service working to COVID recovery, staff are integral to the support of our young people’s wellbeing. And yet, unlike other professionals delivering this agenda, teachers have no built-in mechanism for supervision, and the piecemeal approach across authorities and establishments is leading to an increase in the number of teacher staff experiencing vicarious trauma, blocked care and ultimately burnout.

‘Conference believes that staff should have the right to access regular, structured, professional support as part of their working conditions in line with colleagues in educational psychology, social work and health. This will ensure not only the safety of our profession, but also the continuation of support so vital for our pupils.

‘Conference asks the Scotland Executive Council to campaign for counselling-style supervision for all teachers who request it.’

⁴ Page 39: <https://www.equalityhumanrights.com/sites/default/files/inquiry-restraint-in-schools-report.pdf>

8. Any new law can have a financial impact which would affect individuals, businesses, the public sector, or others. What financial impact do you think this proposal could have if it became law? Please explain the reasons for your answer, including who you would expect to feel the financial impact of the proposal, and if there are any ways you think the proposal could be delivered more cost-effectively.

29. Any statutory provision, or indeed guidance document, must provide a level of practical exemplification. For example, civil servants often assume that there are a multitude of free spaces within a school when, in practice, this is challenging in the majority of schools because of a lack of space and staffing. The impact on the school estate, both in terms of staffing and physical spaces, has not been sufficiently considered and there will likely be a substantial financial impact in order to improve both.

30. Scottish Government policy around the presumption of mainstream also impacts financing and forms a clear backdrop to the discussions on seclusion and restraint.

31. In the Union's submission to the Morgan Review, NASUWT highlighted that policy and practice in respect of additional support needs (ASN) were high priorities for the Union's members, but its experiences highlighted a range of issues and concerns about ASN. In particular, the Union noted that teachers had expressed concerns about management practices relating to ASN, including how ASN is prioritised within the school. Many ASN teachers and teachers working in special schools raised concerns that abuse and violence is now seen as 'part of the job'.

32. The context of the Morgan Review was that there had been an increasing national focus on inclusion and a clear expectation that every teacher is a teacher of ASN. Feedback from NASUWT members working in frontline roles with children and young people with ASN suggested that the demands being placed on teachers and schools were increasing, that increasing numbers of learners with more complex needs were being

taught in mainstream classrooms, and that, across the system, the range and complexity of needs were increasing.

33. NASUWT members also emphasised that cuts to specialist services were exacerbating the difficulties that schools face and inhibiting the ability of schools to access the support that children and young people with ASN need. Reports also indicated that schools and teachers were encountering significant challenges as a result of austerity, including issues arising from cuts to local authority and other education and health services.

34. In light of these concerns, NASUWT welcomed the Review's recommendations. NASUWT further concurred with the evidence from the Review which showed that additional support for learning (ASL) is not visible or equally valued within Scotland's education system, as evidenced by its total absence from these consultation questions.

35. There were 241,639 pupils (34.2% of all pupils) with ASN recorded in 2022. This was an increase of 1.2 percentage points in 2021. The numbers of children with ASN is increasing. Additional support provision cannot continue to be viewed as a minority area of interest, nor can it continue to be considered separately within the framework of Scottish education.

36. Austerity has imposed significant pressure on resources in all parts of the public sector, and ASN support has been disproportionately affected. Supporting children and young people with ASN requires urgent renewed investment in tailored services and education settings, to ensure that there is equality of opportunity and choice for all.

37. ASN deserves to be prioritised by the Scottish Government, not only to highlight awareness of the significant issues the system faces, but also as a vehicle for ensuring greater investment in the sector. Investment in, and collaboration between, wider children's services is key as pre-pandemic concerns about the fragmented nature of children and young

people's services have deepened. The Scottish Government must support action in this area through significant investment in these services, particularly in-school and out-of-school services focused on supporting the mental health and wellbeing of children and those who are most vulnerable and disadvantaged. The real-terms cuts in spending in the children's services sector experienced over the past decade must be reversed, with additional resources made available to meet recovery-related priorities.

38. Without investing in appropriate provision, it is to be anticipated that ASN children's education and mental health and wellbeing will continue to be compromised and, corresponding to that, it could be anticipated that those pupils might experience increased distressed behaviour at school – therefore relating to the frequency of seclusion or restraint required.

39. In light of the failure to support and invest in ASN provision, most recently at NASUWT Scotland Conference 2023, the following motion was passed:

'Failure of Inclusion

Conference notes that:

- a) *special schools in many local authorities have virtually disappeared;*
- b) *teachers are being assaulted in classrooms up and down the country;*
- c) *children with severe physical disabilities will qualify for full-time care;*
- d) *children with early life trauma, foetal alcohol syndrome, attachment disorder and other recognised severe neuro-divergent disorders are treated as naughty children and do not qualify for full-time, specialised, targeted support;*
- e) *teachers with these children in their classes have a large increase in workload, both in preparation and with risk assessments and Individualised Educational Programmes.*

Conference believes that:

1. *inclusion has been shown not to have worked;*
2. *children with severe neuro-divergency need to be treated as disabled;*

3. *the presumption of mainstream for all children is damaging the education of others;*
4. *instead of 'Getting It Right For Every Child', we are 'Getting It Right For Hardly Any Children';*
5. *children are being denied the right to an education;*
6. *because schools are 'firefighting', we are failing to close the attainment gap;*
7. *managing the behaviour in school is severely damaging the mental and physical health of the teachers in school;*
8. *education should be equitable across Scotland;*
9. *if, in one authority, a child would qualify for a special school with small class sizes, then the maximum class size in the mainstream class in other authorities should be reduced pro-rata.*

'Conference calls for the Scotland Executive Council to campaign for:

- i. the end of both automatic inclusion and the presumption of mainstream;*
- ii. the reopening of special centres for children with severe mental health issues and neuro-divergent disorders;*
- iii. support teachers to teach rather than to contain;*
- iv. the right of all children and adults to feel safe.'*

40. As the motion sets out, Scotland is not currently getting it right for every child – reversing years of austerity and cuts to education – and specialist provision is a necessary first step.

9. Any new law can have an impact on different individuals in society, for example as a result of their age, disability, gender re-assignment, marriage and civil partnership status, pregnancy and maternity, race, religion or belief, sex or sexual orientation.

What impact could this proposal have on particular people if it became law? Please explain the reasons for your answer and if there are any ways you think the proposal could avoid negative impacts on particular people.

41. The consultation takes no account of gender-based violence: there are no links to ongoing work within the Scottish policy context, including the work of the Gender Equality Taskforce in Education & Learning or the Gender Based Violence Working Group. The Union has noted that this issue arises frequently through casework, where female staff are targeted. As teaching remains a predominantly female workforce, a gendered lens needs to be applied to any guidance.

42. NASUWT is aware that seclusion has been used as an alternative to exclusion. In many settings, whether because the school wishes to avoid a formal process of exclusion or because the home environment of the pupil would not make this a viable option, arrangements have been made to keep a pupil in school but ensure they are apart from their peers. It does not appear that any thought has been given to recognising this current practice or providing a narrative or exemplification to accompany it. Although IEI2 set out clearly that 'cooling off' was no longer recommended, maintaining a pupil in school separate to their peers was permitted. It is, of course, to be anticipated that where this practice, now potentially defined as 'seclusion', occurs, exclusion numbers may increase. The Union would strongly suggest that an equality impact assessment is undertaken to establish whether this decision will disproportionately impact on looked-after children and young people, or those with protected characteristics.

10. Any new law can impact on work to protect and enhance the environment, achieve a sustainable economy, and create a strong, healthy, and just society for future generations.

Do you think the proposal could impact in any of these areas?

Please explain the reasons for your answer, including what you think the impact of the proposal could be, and if there are any ways you think the proposal could avoid negative impacts?

43. Please note comments made throughout and, in particular, under question 8 regarding the impact on the school estate.

11. Do you have any other additional comments or suggestions on the proposed Bill (which have not already been covered in any of your responses to earlier questions)?

44. There is a significant risk that publishing guidance before the UNCRC has been incorporated and before the judgment of the Supreme Court has been fully considered and implemented, will, in the longer term, create unforeseen challenges or conflicts in interpretation.

45. There are a limited number of UNCRC articles quoted in the consultation, but the Union is concerned that the duty of care to others, such as staff, may be missing. NASUWT has an overarching concern that rights issues are addressed almost exclusively in the proposal through the lens of the child who may be the subject of an intervention. This perspective is essential, of course, but decisions about the use of interventions involve taking into account the legitimate interests of other rights holders (i.e. other students and staff). The need to take these rights into account should be referenced explicitly in any legislation or guidance. Given the stated commitment of the Scottish Government to the UNCRC, it will have noted the provisions of General Comment No.13 on Article 19 of the Convention which is centred on the right of children to be protected from all forms of violence.⁵ Specifically, paragraph 27 of the General Comment confirms that in cases involving violence between children, there is a duty on all responsible adults to react to and prevent such violence so that the UNCRC rights of children who are subject to such violence are respected. Similar considerations pertain where the actions of a child impacts adversely on Articles 28 and 29 on the rights of children to education.

⁵ Committee on the Rights of the Child (2011). *General Comment No. 13.*

46. Recognising the status of children who suffer adverse consequences as a result of the behaviour of other children as UNCRC rights holders should be central to the approach of any government or administration that seeks to have its stated commitment to the Convention taken seriously. These children have a legitimate expectation that relevant authorities will act to uphold and protect these rights. The Scottish Government will be aware that in the context of the requirements of Article 3 of the Convention, in which relevant persons and authorities are required to act in the best interests of all children, the rights of children and adults impacted adversely by the actions of another child must be an active consideration in decision-making.⁶ As reflected in the comments made elsewhere in this submission, it is by no means clear that the approach recommended by the UNCRC in relation to the rights of other children and adults has been understood correctly in the development of this proposal.

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⁶ Committee on the Rights of the Child (2001). Article 3.