



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: CLIC:PWaj1413888

10 November 2017

The Hon. Rob Stokes MP
Minister for Education
GPO Box 5341
SYDNEY NSW 2001

Dear Minister,

Education Amendment (School Safety) Bill 2017

I write in relation to the Education Amendment (School Safety) Bill 2017 (NSW) ('the Bill'). The Law Society was not consulted in relation to the Bill prior to its introduction into Parliament on 18 October 2017. Members of the Law Society's Children's Legal Issues, Indigenous Issues and Criminal Law Committees have contributed to this submission.

1. Summary of the Law Society's views

The Law Society opposes the passage of this Bill. In our view, the Bill is antithetical to the principle of access to education as a right, a principle protected by the *Education Act 1990* (NSW).¹ It is also contrary to the principle enshrined in section 6(c) of the *Children (Criminal Proceedings) Act 1987* (NSW) that 'it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption'.²

The Law Society queries the necessity of this Bill, noting that the power to suspend and expel students already exists.²

We submit that the Government has not demonstrated that the measures proposed in the Bill will achieve the stated aim outlined in the second reading speech to 'protect students and staff from the risk of seriously violent behaviour affecting the health and safety of a school'.³ In particular, the Bill does not address the underlying causes of a child or young person's behaviour, and may seriously affect their education and development.

The experience of members of the Law Society is that alienation from school significantly escalates the risk of a young person or child disengaging from their community and makes them vulnerable to anti-social or criminal conduct. We note that the NSW Ombudsman in its August 2017 report on its inquiry into behaviour management in schools on suspensions and expulsions found that there was no research evidence that the general use of suspension reduces disruptive classroom behaviour. Moreover, the NSW Ombudsman found that students who are over-represented in

¹ *Education Act 1990* (NSW) s 4(a).

² See for example, NSW Department of Education and Communities, 'Suspension and Expulsion of School Students – Procedures 2011' https://education.nsw.gov.au/policy-library/associated-documents/suspol_07.pdf

³ New South Wales, *Parliamentary Debates*, Legislative Council, 18 October 2017 (Minister Sarah Mitchell) [https://www.parliament.nsw.gov.au/bill/files/3459/2R%20Education%20\(School%20Safety\).pdf](https://www.parliament.nsw.gov.au/bill/files/3459/2R%20Education%20(School%20Safety).pdf).

suspensions include students with cognitive/learning impairments, students with a child protection/OOHC history, and Aboriginal students.⁴

The Law Society emphasises that in matters affecting children, the least restrictive approach must always be taken. We also hold serious concerns that the Bill may operate punitively on already marginalised children and young people, particularly on Indigenous children, and children with disabilities. Statistics from the Department of Education show that in 2015, Aboriginal children were 24% of the students subject to short suspensions (7,005 out of 29,651 students), and 27% of the students subject to long suspensions (3,399 out of 12,388 students).⁵

Accordingly, the need for short-term community safety must be balanced with the long-term considerations such as the impact of exclusion and social isolation on children.

While the Law Society opposes the Bill, if it is to pass, we submit that the following amendments should be made:

- there should be an exception for children or young people who engage in 'consensual' sexual offending;
- clause 16, which provides that the Minister is not required to consult with the student or parent of the student prior to issuing a non-attendance direction for the first time, should be deleted;
- a non-attendance direction of less than five days should be subject to review;
- the Minister's discretion to not disclose the reasons for a non-attendance direction, and to not disclose information obtained about a child, even in circumstances where the decision is subject to review, is inconsistent with the child or young person's right to procedural fairness, and to be heard. Clauses 3 and 32 should be amended to require the Minister to disclose information and provide reasons, unless the Minister can demonstrate the grounds set out in those clauses; and
- proposed section 26HA(3)(c) should be amended to require the Minister to develop a plan to support a student under a non-attendance direction and the matters set out in clause 27 (including in relation to internal review and the provision of education and support to children the subject of non-attendance directions) should be made explicit in primary legislation, rather than be left to compulsory guidelines which are not subject to public scrutiny in the same way.

2. Background

The proposed amendments to the *Education Act 1990* (NSW) ('the Act') allow the Minister for Education ('the Minister') to direct a student not to attend a particular school (or any school) ('non-attendance direction') if the Minister believes on reasonable grounds: there is a significant risk that the student will engage in serious violent conduct,⁶ or the student supports terrorism or violent extremism.⁷ The Department of Education ('the Department') also needs to be satisfied that issuing the direction is necessary to protect the health or safety of the students or staff of any school.⁸ The conduct the subject of a non-attendance direction also extends to conduct which occurs outside of school premises and school hours.⁹

⁴ NSW Ombudsman, *Inquiry into behaviour management in schools - A Special Report to Parliament under s 31 of the Ombudsman Act 1974*, August 2017, ix-x, available online:

https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0018/47241/NSW-Ombudsman-Inquiry-into-behaviour-management-in-schools.pdf

⁵ NSW Department of Education and Training, *Suspensions and Expulsions 2015*, available online:

<https://www.det.nsw.edu.au/media/downloads/about-us/statistics-and-research/key-statistics-and-reports/SuspensionData2015.pdf>

⁶ Education Amendment (School Safety) Bill 2017 (NSW) sch 1 item 13 cl 26HA(2)(a)(i).

⁷ Ibid sch 1 item 13 cl 26HA(2)(a)(ii).

⁸ Ibid sch 1 item 13 cl 26HA(2)(b); Schedule 1 item 13 clauses 26HA(3)(a)-(b) stipulates the steps the Minister must take while the non-attendance direction is in force.

⁹ Ibid sch 1 item 28.

While the Law Society acknowledges that a school owes a duty of care to protect students from foreseeable risk of harm,¹⁰ the Law Society is concerned that the proposed sections have not been drafted with proper consideration of the principles and objects set out in the Act, and include decision-making powers that are not in the 'best interests' of the child.¹¹

The objects of the Act state that:

1. Every child has the right to receive an education;¹² and
2. The State has the principal responsibility to provide public education for children.¹³

Persons who administer the Act are also required to have regard to assisting each child to achieve his or her educational potential¹⁴ and mitigating against educational disadvantages, including geographic, economic, social or other causes.¹⁵

There are a number of concerning features of the Bill, discussed in more detail below.

3. Definition of 'serious violent conduct'

'Serious violent conduct' is defined in the Bill¹⁶ as conduct constituting any of the following offences (regardless of whether the student cannot, or might not, be held to be criminally responsible for the conduct):

1. An offence involving loss of life, serious physical or psychological injury or serious damage to property;
2. A serious offence of a sexual nature; and
3. An offence involving serious animal cruelty.

The Law Society submits that the definition of 'serious violent conduct' is too broad. The definition also lacks clarity as it is unclear which offences satisfy the threshold of seriousness.

The Bill should, at least, be amended to exempt children or young people accused of engaging in 'consensual' sexual offending (e.g. s 66C *Crimes Act 1900* (NSW): or, for example, consensual sexting). For example, the Law Society considers that it would be inappropriate for the definition of 'serious offence of a sexual nature' to capture a sexual offence in which two teenagers, at least one of whom is under the age of 16, engage in consensual sexual intercourse.

Further, we note that the definition captures offences which are unlikely to have been contemplated when the Bill was drafted. For example, it would capture offences such as negligent driving occasioning death or grievous bodily harm,¹⁷ which have nothing to do with the object of the Bill.

The Law Society also expresses significant concern that the definition captures conduct of children under the age of 10 and potentially children as young as 4 years old.

¹⁰ *Commonwealth v Introvigne* (1982) 150 CLR 258.

¹¹ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 44 UNTS 25 (2 September 1990) art 3(1).

¹² *Education Act 1990* (NSW) s 4(a).

¹³ *Ibid* s 4(d).

¹⁴ *Ibid* s 6(1)(a).

¹⁵ *Ibid* s 6(1)(e).

¹⁶ Education Amendment (School Safety) Bill 2017 (NSW) item 13 sch 1 cl 26HA(4).

¹⁷ *Road Transport Act 2013* (NSW) s 117(1).

4. Right to review

In the Law Society's view, the Bill adversely impacts on procedural fairness.

We note that a young person who is given a non-attendance direction of less than five days does not have a right to internal or external review.¹⁸

We note also that the Minister is not required to consult with a student, or parent of the student, prior to issuing a non-attendance direction for the first time (clause 16), which would ordinarily require the Secretary to:

1. ensure a student is given access to the information that gave rise to the proposed direction;¹⁹
2. give written notice of the grounds for the proposed direction;²⁰ and
3. give an opportunity to make representations in relation to the proposed direction.²¹

The Law Society submits that this position is contrary to the principles of procedural fairness, and that the Bill should be amended to allow for the right to at least internal review of non-attendance directions of less than five days, and that clause 16 should be deleted.

The Law Society is also concerned about the inadequacy of the right to external review. We note that external review is only available to a young person who has been directed to not attend school for more than 20 school days in a 12-month period.²² Further, NCAT is only permitted to confirm the decision or recommend to the Minister that the direction be varied or revoked.²³ The Law Society submits that the Bill should be amended to allow for the right to (at a minimum) external review of non-attendance directions of more than five days and to allow NCAT to confirm, vary or set aside a direction.

5. Requirement to disclose information and give reasons

The Law Society is concerned that the proposed legislation purports to give discretion to the Minister not to disclose the reasons for a decision to give a non-attendance direction. This appears to include circumstances where the Minister's decision is subject to review.²⁴ The proposed legislation also provides the Minister with extremely broad grounds to refuse disclosing information obtained about a child or young person, for example, where the Minister believes to do so is not in the 'public interest'.²⁵

The Law Society submits that clauses 3 and 32 should be amended to require the Minister to disclose information and provide reasons, unless the Minister is able to demonstrate the reasons set out in those clauses.

The Law Society is concerned that if a child or young person is not provided with reasons for the non-attendance direction, then they are unable to respond to the allegations against them. Article 12(2) of the Convention on the Rights of the Child enshrines the child's right to be heard.²⁶ The Law Society submits that it is important for children and young people to be an active agent in the

¹⁸ Ibid sch 1 item 20 cl 26K(2).

¹⁹ *Education Act 1990* (NSW) s 26I(1)(a)(i).

²⁰ Ibid s 26I(1)(a)(ii).

²¹ Ibid s 26I(1)(a)(iii).

²² Education Amendment (School Safety) Bill 2017 (NSW) item 30 sch 1 cl 107(1)(i).

²³ Ibid item 31 sch 1 cl 108(1)(a2).

²⁴ Ibid item 32 cl 108(4).

²⁵ Ibid sch 1 item 3.

²⁶ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 44 UNTS 25 (2 September 1990) art 12(2).

exercise of their rights and to participate in decision-making in matters that concern them.²⁷ To protect the rights of children and young people affected by the proposed legislation, the Law Society recommends that the Minister issues guidelines which ensure that every child who is being accused of criminal conduct has the opportunity to receive legal advice.

The Law Society has previously raised concerns with the Department about the adequacy of existing Department guidelines to protect the rights of children accused of criminal conduct. This concern was recently highlighted in the case of *R v MG* [2016] NSWDC 274 in which a child with an intellectual impairment, who was accused of a criminal matter, was interviewed by a principal without a parent being present and without providing the child with an opportunity to obtain legal advice.²⁸ The Law Society is concerned that the proposed legislation may allow similar situations to *R v MG* to occur in the future.

6. Support for children under non-attendance directions

The Law Society submits that excluding children from school, on a short or long term basis, can have a serious effect on a child's education and development, particularly those who are already disadvantaged. Proposed s 26HA(3)(c) provides that the Minister "may" (as opposed to "must") develop a plan to support the student. The Law Society's view is that this does not ensure the child or young person is assisted to achieve his or her educational potential.²⁹ The Law Society submits that the proposed legislation should be amended to make it mandatory, and create a legal obligation for the Minister, to develop a support plan for any child or young person who is the subject of a non-attendance direction. Further, the matters set out in clause 27, particularly in respect of applications for internal review and the provision of education and support to students under a non-attendance direction should be set out in the Bill itself.

As a rule of law matter, the Law Society's view is that matters that affect rights, particularly the rights of vulnerable people such as children, people with disability and other marginalised groups, should be dealt with in primary legislation. There is little opportunity for the public to scrutinise legislative instruments such as the guidelines referred to in clause 27. This is particularly concerning given the guidelines are compulsory.

The Law Society also notes that the provision of adequate specialist support services for children under non-attendance directions is crucial to achieving the objects of the Bill. Accordingly, the Law Society is of the view that the Government should commit to additional funding of specialist services to enable children and their families to access intervention and support services while they are excluded from school.

7. Recording and reporting data on non-attendance direction

If the Bill is to pass, the Law Society recommends that the Department publish an annual report on exclusion data trends to promote transparency. This can be done in a similar way to the recording and reporting of data on suspensions and expulsions.³⁰

²⁷ UNICEF, 'Every Child's Right to Be Heard' (2011) https://www.unicef.org/french/adolescence/files/Every_Childs_Right_to_be_Heard.pdf p. 3.

²⁸ *R v MG* [2016] NSWDC 374, [6].

²⁹ Education Amendment (School Safety) Bill 2017 (NSW) item 13 sch 1 cl 26HA(3)(c).

³⁰ NSW Education, *Suspension and Expulsion*, <https://education.nsw.gov.au/student-wellbeing/attendance-behaviour-and-engagement/suspension-and-expulsion#Recording0>.

8. Conclusion

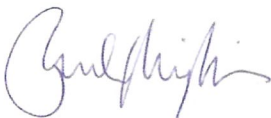
The Law Society supports progressive behavioural management prevention policies which avoid criminalising and penalising a child for behaviour that does not cause serious damage to the development of the child or harm to others.³¹ The Law Society supports policies and measures that involve:

1. The provision of opportunities, in particular education opportunities, to assist a young persons' personal development;³²
2. Official intervention that is pursued primarily in the overall interest of the young person and guided by fairness and equity;³³
3. Safeguarding the well-being, development, rights and interests of all young persons;³⁴
4. Consideration that youthful behaviour or conduct that does not conform to overall social norms and values is often part of the maturation and growth process and tends to disappear spontaneously in most individuals with the transition to adulthood;³⁵ and
5. Awareness that, in the predominant opinion of experts, labelling a young person as "deviant", "delinquent" or "pre-delinquent" often contributes to the development of a consistent pattern of undesirable behaviour by young persons.³⁶

The Law Society submits that Bill does not adequately provide the opportunity for children, particularly those from a disadvantaged background, to be heard on the important matter of school attendance. The Law Society notes the growing body of evidence which suggests taking children's views and experiences into account helps develop children's self-esteem, cognitive abilities, social skills and respect for others.³⁷

Thank you for considering this letter. Should you have any questions or require further information, please contact Amelia Jenner, Policy Lawyer on (02) 9926 0275 or email amelia.jenner@lawsociety.com.au.

Yours sincerely,



Pauline Wright
President

CC: Mr Paul Lynch MP, Shadow Attorney General, Mr Jihad Dib MP, Shadow Minister for Education, The Hon Robert Brown MLC, Reverend the Hon Fred Nile MLC, The Hon Mark Pearson MLC, Mr Alex Greenwich MP, Mr David Shoebridge MLC.

³¹ *United Nations Guidelines for the Prevention of Juvenile Delinquency* (the Riyadh Guidelines) (General Assembly resolution 45/112, annex) rule 5.

³² *Ibid*, rule 5(a).

³³ *Ibid*, rule 5(b).

³⁴ *Ibid*, rule 5(c).

³⁵ *Ibid*, rule 5(d).

³⁶ *Ibid*, rule 5(e).

³⁷ See for example, R Kränzl-Nagl and U Zartler, 'Children's participation in school and community. European perspectives' in B Percy-Smith and N Thomas (eds) *A handbook of children and young people's participation. Perspectives from theory and practice*, Routledge, London, 2009; K Covell and R B Howe, *Rights, respect and responsibility. Report on the RRR initiative to Hampshire County Education Authority*, Children's Rights Centre, Cape Breton University, Nova Scotia, Canada, 2005; and P Kirby with S Bryson, *Measuring the magic. Evaluating and researching young people's participation in public decision making*, Carnegie Young People Initiative, London, 2002.