

# Impact Summary: improving the workability of the physical restraint legislative framework

## Section 1: General information

<b>Purpose</b>
The Ministry of Education is solely responsible for the analysis and advice set out in this Regulatory Impact Statement, except as otherwise explicitly indicated. This analysis and advice has been produced for the purpose of informing final decisions to proceed with a policy change to be taken by or on behalf of Cabinet.
<b>Key Limitations or Constraints on Analysis</b>
<p>The evidence of the problem is based on testing with a small number of representatives of the teaching profession about:</p> <ul style="list-style-type: none"><li>• concerns expressed to the Teaching Council of Aotearoa New Zealand (the Teaching Council), and by teachers and authorised staff members (e.g. teacher aides) who must apply the legal framework; and</li><li>• possible solutions.</li></ul> <p>The criteria to assess the options are largely based on this problem definition and evidence.</p> <p>The impact analysis assumes that the changes to the legal framework to minimise the use of physical force in schools will be well communicated and implemented.</p> <p>Due to a constrained time period, consultation on initial options was limited to representatives of the teaching profession contacted by the Teaching Council, representatives of the disability community (including the parents of disabled children) and the Office of the Children’s Commissioner.</p> <p>Teacher representatives, and the disability community and the Office of the Children’s Commissioner had divergent views on the options engaged upon.</p> <p>Options were refined following this engagement to get the proposed approach, which has not been consulted on or engaged with by stakeholders.</p>
<b>Responsible Manager (signature and date):</b>
 Dr Andrea Schöllmann, Deputy Secretary Education System Policy Ministry of Education

## Section 2: Problem definition and objectives

### 2.1 What is the policy problem or opportunity?

Physical restraint is a high risk action that can emotionally and physically harm the ākonga | learner who is being restrained, the staff member doing the restraining and the people witnessing the restraining. There is a need for its use to be regulated and for robust policies and guidance, in order to uphold the rights of ākonga | learners under the United Nations Convention on the Rights of the Child and the United Nations Convention on the Rights of Persons with Disabilities.

The physical restraint legislative framework prohibits physical restraint in schools unless it is done by a teacher or authorised staff member who reasonably believes that the safety of the student or of any other person is at serious and imminent risk; and the physical restraint is reasonable and proportionate in the circumstances. It also enables the Secretary for Education to make rules prescribing the practice and procedure to be followed in relation to physical restraint, and guidelines which provide best practice in physical restraint and behaviour management.

The Education (Physical Restraint) Rules 2017 include a mandatory reporting requirement when physical restraint is used. This reporting requirement enhances Government visibility over when physical restraint is being used, to enable the Ministry to provide targeted support to improve practice where it is needed. It also helps make sure children's rights are being protected. However, education sector representatives are concerned about the administrative burden this reporting requirement places on the profession. The Ministry has heard anecdotal evidence that physical restraint is not always being reported in line with the requirements. The Teaching Council has also pointed out that the reporting does not differentiate between cases where restraint has been used appropriately and cases when it has not.

The education sector has raised a number of other questions and concerns about the physical restraint legislative framework since its implementation in August 2017. There has been confusion as to how the legislative framework in the Education Act 1989 interacts with the Crimes Act 1961. In particular, education sector representatives expressed concern that school staff now face greater restrictions than a member of the public would face in a similar situation.

The provisions regulating physical restraint were initially created in response to concerns from the Secondary Principals' Association representative on the Seclusion and Restraint Advisory Group that, without the appropriate statutory protections, teachers or authorised staff members could face legal action when using physical restraint even if they followed the (then non-statutory) guidance.

Education sector representatives are also unsure about how the framework that regulates physical restraint in our schools aligns with *Our Code Our Standards: the Code of Professional Responsibility and Standards for the Teaching Profession*. Much of this confusion is caused by the interpretation of language currently in the Education Act 1989.

Education sector representatives have told us that the framing of the current physical restraint legislative framework makes them feel like they are not trusted or respected to make

decisions in the best interest of their ākonga | learners.

The current provisions were introduced to minimise the use of physical restraint to instances that met the conditions outlined in the provisions. If no action is taken, the confusion is likely to undermine compliance with the framework, and may potentially contribute to a hands-off culture in schools, where teachers and other authorised staff members avoid appropriate physical contact with students in their professional role. They may also avoid contact that demonstrates empathy while providing pastoral care.

Teachers and other staff members are saying that because they do not know what they can and cannot do, they are choosing not to act. This could lead to harm for ākonga | learners or others (including other teachers).

Any cases of inappropriate physical restraint heard by the Teaching Council have all been upheld as they are well outside the authority provided by the scope of the legislation. The Teaching Council has not heard any cases where physical restraint was used appropriately but did not meet the threshold set out by the current legislative framework i.e. no teachers have been censured for appropriate physical restraint.

## 2.2 Who is affected and how?

Three groups are affected by these regulatory settings and the proposed changes: all ākonga who are or could potentially be restrained or are the subject of other physical contact, teachers who have physical contact with students and non-teaching staff within schools who have contact with students.

Teacher representatives see the current regulations as confusing and are unsure about what they can, cannot, and should not do. They do not feel safe to use physical contact in some situations in case it be interpreted as inappropriate physical restraint under the law, and are worried that children are not safe from harm as a result.

Together, this group expressed a preference for repealing section 139AC of the Education Act 1989, or using the Children's Act 2014 to regulate physical restraint, as well as repealing reporting requirements in the Education (Physical Restraint) Rules 2017, and instead using *Our Code Our Standards* as the centre of a regulatory framework for physical restraint.

On the other hand, disability sector groups including IHC, the Disabled People's Organisation Coalition, the Human Rights Commission and the Office of the Children's Commissioner believe a regulatory framework, including primary legislation, is an important protection for students and signalled restraint should only be used as a last resort. They were concerned about the impact of physical restraint on the child's rights and believe that the most important shift is cultural change in schools.

We do not have information on the perspectives of non-teaching staff in schools who may have physical contact with students. Ministry data indicates that about 40 percent of the reported cases of physical restraint were done by non-teaching staff.

### 2.3 Are there any constraints on the scope for decision making?

Ministers have ruled out maintaining the status quo as they do not believe the current legal framework to minimise the use of physical restraint in schools has achieved the right balance of protections and authorisations between all parties involved.

## Section 3: Options identification

### 3.1 What options have been considered?

#### Objectives:

Legislative changes:

- clarify the framework so that teachers and authorised staff members know what they can, cannot, and should not do when exercising physical force on children and young people;
- ensure that school environments are physically and emotionally safe places for all ākongā | learners;
- ensure teachers feel that the profession is trusted;
- ensure that teachers and authorised staff members are authorised to exercise physical restraint when it should be an option as a last resort; and
- ensure children's rights are protected through any changes.

#### **Non-regulatory option 1: *Working with the teaching profession to develop practical scenarios or examples of physical restraint / force that are enabled by the legal framework***

A key piece of feedback received during engagement was the need for school staff to have more scenarios or examples in practice relating to physical restraint so that they know how to deal with difficult situations.

These scenarios will show how the regulatory framework for physical restraint/ force and *Our Code Our Standards*, which requires teachers to "prevent harm" align. This will help clarify the framework so that teachers and authorised staff members know what they can, cannot, and should not do when exercising physical force on children and young people.

The examples will be developed with the teaching profession to show that we trust and respect their judgement.

The examples will take a children's rights approach to ensure that teachers and authorised staff members are shown best practice on the use of physical force.

#### **Non-regulatory option 2: *Continue to provide Understanding Behaviour Responding Safely: Minimising the use of Physical Restraint in Schools training for school staff***

All parties agree that further training to build teacher capability when responding to a child's actions, including physical force, is needed.

We are delivering *Understanding Behaviour Responding Safely* training to whole-school staff groups. *Understanding Behaviour Responding Safely* training focuses on prevention and de-escalation strategies and provides an opportunity to link the legal framework to practice. We have recently updated UBRS in response to feedback from the sector so that schools can customise and apply it more flexibly.

### **Comment on non-regulatory options**

Working with the teaching profession to develop practical scenarios or examples of physical restraint / force which would be enabled by the legal framework; and continuing to provide *Understanding Behaviour Responding Safely: Minimising the use of Physical Restraint in Schools* training for school staff are unlikely to be sufficient without legislative change. This is because the confusion has arisen from language used in the existing provisions.

These non-regulatory options can proceed regardless of whether a regulatory option is also proposed. However, the non-regulatory options will need to align with any regulatory option agreed to.

#### **Regulatory option 1: Make no changes to the Education Act 1989, section 139AC**

If no action is taken, the confusion is likely to undermine compliance to the existing framework, and may potentially contribute to a hands-off culture in schools, where teachers and other authorised staff members avoid appropriate physical contact with students in their professional role.

If teachers and other authorised staff members do not know what they can and cannot do in at-risk situations, there is potential they will choose to act, or not to act, incorrectly. This could lead to harm for ākonga | learners or others.

#### **Regulatory option 2: Repeal sections 139AC - 139AE of the Education Act 1989 entirely**

NZEI and the Teaching Council suggested the most effective way to address ongoing sector concerns would be to remove the framework from legislation and rely on secondary legislation as the authorising environment, is the case in other sectors involving children (nursing, mental health, social work etc). Secondary legislation can be more nuanced than primary legislation, which is what the teaching profession has stated it needs. However, prohibitions and authorisations cannot be made in secondary legislation.

Teachers and authorised staff members would have less guidance about what they can, cannot, and should not do when restraining children and young people. Removing these provisions would lead to teachers and authorised staff members only being able to rely on the defences in the Crimes Act. These apply to all people and all contexts and do not account for the different expectations on school staff, particularly teachers and principals when they are acting in a professional capacity. This professional capacity would be an aggregating factor in sentencing.

Removing physical restraint entirely may support teachers and authorised staff members to feel as though the profession was trusted. However, it could also signal that physical restraint can be used in more instances than a last resort. It would also remove the requirement to report, which would reduce visibility over why and how physical restraint is being used in schools and make it more difficult to respond to schools' requests for behaviour support. This would also impact on the rights of children.

#### **Regulatory option 3: Insert an authorisation in the Education Act 1989 for staff members to have positive or guiding physical contact with students in limited circumstances**

The intent of this option would be to address the uncertainty of the teaching profession by removing doubt that teachers and authorised staff members can have positive or guiding physical contact with students in limited circumstances. This type of contact is not generally considered to require statutory authority because it is part of everyday life. Inserting this authorisation may lead the profession to feel as though they are more trusted to have physical contact with ākonga | learners in a broader range of contexts.

However, there is a risk that in practice further ambiguity and lack clarity can be introduced. A grey area would be established in terms of what constitutes physical contact and what constitutes physical restraint, for example, if the physical contact intended to provide comfort which was resisted by the child for a period of time indicating comfort was not being provided. In these circumstances, physical restraint may not be deemed necessary, and undertaking it could undermine student's rights.

#### **Regulatory option 4: Make amendments to clarify what teachers and authorised staff members can and cannot do when using physical force in schools**

*New requirement - physical force should only be used as a last resort*

Currently, the Education Act 1989 does not specifically state that the use of physical force, including physical restraint, should only be used as a last resort. A new condition would be inserted to be met before the physical force could be authorised.

*Replacing the expression “restraint” with “force”*

The expression ‘physical force’ better reflects the language used by teachers in their day to day work. This change would help address confusion about how the Crimes Act 1961 and the Education Act 1989 interact, as “force” is used in the definition of assault. In contrast, “physical restraint” is seen as a more technical or specific type of physical force often used in special institutions (e.g. the *Health and Disability Services (restraint minimisation and safe practice) Standards* refer to restraint as a clinical decision).

*Changing the framing of the authority from restrictive to permissive*

Section 139AC of the Education Act 1989 restricts the use of physical restraint by teachers or authorised staff members to those situations where safety is at serious and imminent risk and the restraint is considered reasonable and proportionate.

By reframing these provisions to a permissive authorisation, we would give teachers and authorised staff members’ statutory authority for the use of ‘physical force’ that could be relied upon as a defence and would better reflect the Government’s intention to build a high trust environment for the teaching profession.

The authorisation, while framed as permissive, would need to be narrowly authorised through the inclusion of conditions, for example the force used would need to be “reasonable and appropriate in the circumstances”, as is currently the case (for example, it would be inappropriate to trip a child, causing them to fall, to prevent them from running away). Physical force would only be able to be used as a last resort. Physical force for the purposes of correction or punishment would still be prohibited.

*Changing the threshold to prevent “imminent harm”*

Section 139AC of the Education Act 1989 specifies that a teacher or authorised staff

member must not physically restrain a student unless the teacher or staff member reasonably believes that “the safety of the student or of any other person is at serious and imminent risk”, and the physical restraint is “reasonable and proportionate in the circumstances.”

Amending section 139AC by changing the threshold for when force can be used by removing the requirement that a teacher or authorised staff member reasonably believes that safety is at “serious and imminent risk”, and replacing it with when a staff member reasonably believes physical force is “necessary to prevent imminent harm”, and the physical force is “reasonable and proportionate in the circumstances”.

There are conflicting views as to whether the term “safety” extends to a student being safe from emotional harm. Some believe it must be interpreted as being limited to safety from physical harm. By reframing the use of physical force to be enabled to prevent harm, we will align the language of the provisions with the language in *Our Code Our Standards*, which also requires teachers to “prevent harm.” We will also be able to define harm as being to health, safety or welfare, including significant emotional distress in regulations.

Changing the threshold from acting when safety is at “serious and imminent risk” to prevent “imminent harm” will enable teachers and authorised staff members to feel more confident about being authorised to have certain types of physical contact with students in situations where the risk of harm may not be serious, but where preventative action should still be taken (for example, holding a child’s hand to prevent the child from running away when guiding them away from other students the child was disrupting).

### 3.2 Which of these options is the proposed approach?

Together, regulatory option 4 and non-regulatory options 1 and 2 are the preferred approach because they best clarify the framework so that teachers and authorised staff members know what they can, cannot, and should not do when restraining children and young people; ensure teachers feel as though the profession is trusted; ensure that teachers and authorised staff members are authorised to exercise physical restraint when it should be a last resort option to ensure children’s rights are protected and that school environments are physically and emotionally safe places for all ākonga | learners.

They achieve this by using positively framed language that aligns with *Our Code Our Standards* and the language teachers use every day. They also ensure that the policy intention that physical force is only used as a last resort remains to protect student rights.

Make amendments to clarify what teachers and authorised staff members can and cannot do when using physical force in schools by:

- adding a new condition before physical force was authorised - physical force can only be used as a last resort;
- replacing the expression “restraint” with “force” to align with teacher’s everyday language and the language of the Crimes Act;
- changing the framing of the authority from restrictive to permissive, under set conditions including the force used being reasonable and appropriate, and the force being used as a last resort; and
- changing the threshold to prevent “imminent harm” to encompass both physical and

emotional harm, rather than physical safety and to authorise certain types of physical contact with students in situations where the risk of harm may not be serious, but where preventative action should still be taken.

Working with the teaching profession to develop practical scenarios or examples of physical restraint / force which would be enabled by the legal framework.

Continue to provide *Understanding Behaviour Responding Safely: Minimising the use of Physical Restraint in Schools* training for school staff.

As we work through these options, we have signalled that we still need to work through what types of physical contact are permissible within the definition of physical force, as well as defining what would meet the conditions of imminent harm.

## Section 4: Impact Analysis (Proposed approach)

### 4.1 Summary table of costs and benefits

Affected parties (identify)	Comment: nature of cost or benefit (eg ongoing, one-off), evidence and assumption (eg compliance rates), risks	Impact \$m present value, for monetised impacts; high, medium or low for non-monetised impacts
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#### Additional costs of proposed approach, compared to taking no action

Regulated parties	There will be no new costs for the regulated parties for either proposal with one exception. Teachers and authorised staff members will need to take time out of the classroom to understand the legislative changes and undertake PLD. Time spent on reporting physical restraint use may decrease because there will be a better understanding of the level of reporting that must be taken for different instances of physical restraint.	Low
Regulators	There would be costs to develop resources to support implementation, covered through baseline funding.	
Wider government	Some agencies are unlikely to agree with the proposed approach.	Low
Other parties	The trust of some stakeholders, including the disability community and the Office of the Children's Commissioner may be reduced by the decision to make legislative changes. Children and young people who are subject to physical force, or witness physical force, may be negatively impacted.	Low
<b>Total Monetised Cost</b>	Continue to provide <i>Understanding Behaviour Responding Safely: Minimising the use of Physical Restraint in Schools</i> training for school staff.	No new funding required. Future funding could be sought to extend support for implementation.
<b>Non-monetised costs</b>		<i>(High, medium or low)</i>

#### Expected benefits of proposed approach, compared to taking no action

Regulated parties	Teachers and authorised staff members will be less confused about what they can, cannot, and should not do when deciding whether or not physical force could be used as a last resort. Better protection from prosecution on the lawful use of physical restraint in schools	Low
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	from the change in language.	
Regulators	Better data and data and understanding of physical restraint policy.	Low
Wider government	N/A	N/A
Other parties	Children and young people may be at lower risk of being in an environment that could cause harm because teachers or authorised staff members feel confident that they know how to act.	Low
<b>Total Monetised Benefit</b>		N/A
<b>Non-monetised benefits</b>		Low

#### 4.2 What other impacts is this approach likely to have?

There is a risk that the law change will in practice broaden and widen the perceived authorisation for restraint, leading to instances of restraint that is not used as a last resort. This would be inconsistent with the rights of the child.

The inclusion of conditions which must be met before physical force can be used should mitigate this risk. A better training package alongside scenarios or examples of when physical force could, and might not, be appropriate, should improve teachers and authorised staff members' capability to understand and respond to behaviour in ways that do not require physical restraint.

There is a risk that Teachers will not find it easier to understand what they can, cannot and should not do following the changes.

This risk will be mitigated through the updating of the Statutory rules and guidelines and the development of scenarios and practical examples.

## Section 5: Stakeholder views

### 5.1 What do stakeholders think about the problem and the proposed solution?

The Teaching Council of Aotearoa New Zealand and the Ministry of Education worked together to test a range of options with representatives of the teaching profession and disability groups. PPTA and NZEI were consulted on options by the Teaching Council. No consultation with iwi/hapū occurred, although Māori medium representatives were included in the Teaching Council testing.

The teaching profession is a group named as able to perform restraint under certain conditions. Disabled ākonga | learners are disproportionately represented in statistics regarding physical restraint use in schools.

From our engagement, we know that representatives from all groups want:

- to ensure the school environment is emotionally and physically safe for students and staff;
- to ensure physical restraint is used as a last resort;
- to know what to do when things escalate – for it to be clear what types of physical contact are acceptable and when;
- there to be accessible and effective mechanisms to resolve disputes about restraint;
- there to be transparency for students, parents, schools and the system around the use of physical restraint;
- school staff to receive more training in best practice behaviour management and de-escalation techniques to minimise the use of restraint, both in initial teacher education and through ongoing professional learning and development; and
- to test any proposed changes with a broader group of people given the range of perspectives on the topic and the technical nature of some of the options.

However, there were a range of views expressed about the need for changes to the legislative framework. Teaching profession representatives considered that significant changes to the regulatory framework are necessary to provide clarity to both staff and their families and whānau. The disability community considered that the existing regulatory framework should remain unchanged.

The Code of Professional Responsibility was seen as a useful tool for promoting good practice and providing guidance in this area. However, stakeholders recognised that the code can't be the only tool, because it only applies to registered teachers and restraint is done by a wider range of staff.

Some teachers saw the reporting requirements as a compliance burden with no added value. The disability community emphasised the need for robust reporting and monitoring processes, and said they found current dispute resolution processes too difficult to navigate.

As a result options were revised and modified to develop the proposed approach.

The Office of the Children's Commissioner emphasises that if the wording is going to change from "restraint" to "force" go ahead, the definitions need to ensure "physical force" is narrowly defined, due to concerns it has the potential to be broad.

Neither the Ministry of Education, nor the Teaching Council have engaged with sector stakeholders or publicly consulted on the final proposals.

The Office of the Children’s Commissioner, the Ministry of Social Development, Oranga Tamariki–Ministry for Children, and the Teaching Council have commented on the proposed approach.

The Office of the Children’s Commissioner and the Ministry of Social Development expressed concerns about the proposed change from ‘physical restraint’ to ‘physical force’. The focus of these concerns was that physical force is much broader than physical restraint, and could include actions such as pushing or tripping.

Oranga Tamariki–Ministry for Children also expressed concerns about the use of the expression ‘physical force’. Oranga Tamariki noted that ‘force’ was seen as being a more coercive term which did not speak to the intention of preventing students from hurting themselves or others. Oranga Tamariki–Ministry for Children noted that specific guidance around the use of physical force in serious situations would still be needed so teachers could be sure what they can and cannot do.

The Ministry of Social Development prefers definitions that recognise the “restrictive” nature of the interventions. The Children’s Commissioner commented that if the wording is going to change to “force” they are more supportive of a definition of “restrictive force” than “physical force” as it holds the reason why the intervention would be done.

The Teaching Council does not support the use of the terms “restricted physical force” or “physical restraint” or to the inclusion in primary legislation of a definition of any such term.

It is the Teaching Council’s view that aligning the language with the Crimes Act, which uses “physical force,” is the most appropriate language to avoid confusion and will assist in reinforcing the message that any force for correction or discipline is unlawful. In order to provide clarification to the profession about the use of force, the focus ought to be on the steps a person can take in the specific circumstances with which they are presented. These are captured in the legal test: justified, reasonable, risk of imminent harm, and last resort.

The Teaching Council also considers that situations when physical force might be necessary are highly unique and nuanced and the place for an explanation of what the primary legislation means is in guidance or in secondary legislation, and through scenarios of what good practice looks like in different situations. A definition in primary legislation cannot convey the degree of nuance required and would re-introduce the issues teachers currently experience with the definition of “physical restraint.”

## Section 6: Implementation and operation

### 6.1 How will the new arrangements be given effect?

We propose using the Education and Training Bill to make legislative amendments by:

- changing the language from “physical restraint” to “physical force”, with consequential amendments to relevant definitions;
- changing the threshold from when staff can use physical force from when “safety is believed to be at serious and imminent risk” to when physical force is “reasonably believed necessary to prevent imminent harm”;
- changing the authorisation to use restraint from restrictive wording that a teacher or authorised staff member “must not physically restrain unless...” to permissive wording that the teacher or authorised staff member “may be justified in using physical force if...”; and
- adding a new requirement to the provisions that physical force is only authorised to be used as a last resort.

We will work with the teaching council to develop scenarios or examples in practice of behaviour that promotes and does not promote learners’ wellbeing in situations of physical restraint or force. These examples would show how the regulatory framework for physical force and *Our Code Our Standards* align by showing that physical force will only prevent harm and promote wellbeing when the conditions set out in legislation are met.

A communication package will be prepared as part of the broader Education and Training Bill communications process.

*Understanding Behaviour Responding Safely: Minimising the use of Physical Restraint in Schools* training is available for schools. We have recently updated UBRS in response to feedback from the sector so that schools can customise and apply it more flexibly.

# Section 7: Monitoring, evaluation and review

## 7.1 How will the impact of the new arrangements be monitored?

Schools will report instances of physical restraint to the Ministry as required by the Education (Physical Restraint) Rules 2017.

The Ministry will also monitor correspondence and media on physical restraint, as part of Business As Usual.

## 7.2 When and how will the new arrangements be reviewed?

No plans for formal review of the physical restraint legislative framework are intended. However, if concerns are raised about how the physical restraint legislative framework is operating, or if data on physical restraint shows a significant increase in instances of restraint, the Ministry will consider whether a review is necessary.