



## Education Report: Options to improve the physical restraint framework

<b>To:</b>	Hon Chris Hipkins, Minister of Education		
<b>Date:</b>	14 March 2019	<b>Priority:</b>	Medium
<b>Security Level:</b>	In Confidence	<b>METIS No:</b>	1175955
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<b>Messaging seen by Communications team:</b>	N/A		

### Purpose of report

This paper responds to your request for advice on

- How we can ensure appropriate protections are in place for school staff when having physical contact with students;
- How we can continue to revise and strengthen the physical restraint guidelines; and
- How we can help staff move to best practice through providing further professional development that ensures school staff understand and can implement effective behaviour management practice.

### Summary

1. Physical restraint is a high risk action that can emotionally and physically harm the student being restrained, the staff member doing the restraining, and the people witnessing the restraining. It should only be used as a last resort when other prevention and de-escalation strategies have been unsuccessful. There is a need for its use to be regulated and for robust policies and guidance.
2. In May 2017, a new legal framework for physical restraint was created through the Education (Update) Amendment Act 2017. Physical restraint is now regulated via a combination of the Education Act 1989, the Education (Physical Restraint) Rules 2017, and the statutory Guidelines for Registered Schools in New Zealand on the Use of Physical Restraint (the Guidelines).
3. Since the introduction of the framework, the education sector have raised a number of concerns related to how the legal framework interacts with the Crimes Act 1961 (Crimes Act), how and when physical restraint can be used and what physical contact with students is acceptable (including physical escort), not being able to use physical restraint to protect property, and reporting requirements being a compliance burden.
4. We have recently re-drafted the Guidelines to address this feedback. We will soon provide draft Guidelines to the Advisory Group for sector feedback, including testing

them with selected schools. Subject to sector feedback, we intend to roll-out the re-drafted Guidelines, along with supporting materials over Term 2.

5. In addition to the Guidelines, we provide a range of support to help schools understand the legal framework and minimise the use of restraint. This includes property modifications, specialist support (through the Behaviour Service), a suite of positive behaviour supports, and prevention and de-escalation workshops: Understanding Behaviour, Responding Positively (UBRS) training. We have recently updated UBRS in response to feedback from the sector so that schools can customise and apply it more flexibly.
6. We do not recommend making substantive changes to the legal framework at this time, as we still consider the framework regulating physical restraint to be robust. It is consistent with other sectors in New Zealand where physical restraint is used, and other legislation such as the Crimes Act. It is flexible enough to apply to a wide range of situations within a school and strikes the appropriate balance between mitigating legal risk and ensuring the wellbeing of school staff.
7. However, there are four options that could help address some of the ongoing concerns: three regulatory and one non-regulatory:
  - a. Amend the Education Act to clarify that teachers can still rely on the defences provided in the Crimes Act in relation to the use of force.
  - b. Amend the Gazette requirements in the Education Act to provide the opportunity to make the physical restraint Guidelines more user friendly.
  - c. Change the wording in section 139AC of the Education Act from restrictive to permissive.
  - d. s 9(2)(f)(iv)
8. We recommend progressing all four options.
9. One potential way to address ongoing sector concerns would be to remove the physical restraint framework from legislation. However, this would weaken the statutory protections available to school staff. It would also remove the requirement to report which would reduce the visibility over how and why physical restraint is being used and make it more difficult to respond to schools' requests for behaviour support. We therefore do not recommend this option.
10. Another potential option would be to change the threshold for when physical restraint can be used from when there is a serious and imminent risk to safety to when students need protection from harm in line with the Code of Professional Responsibility. However, this would increase the risk of teachers being prosecuted under the assault provisions of the Crimes Act and have Bill of Rights Act implications. For these reasons, we do not recommend this option.
11. Regulatory changes could be included in the third tranche of policy proposals in the Education and Training Bill due to be considered by Cabinet at the end of July.

## Recommended Actions

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The Ministry of Education recommends you:

- a. **note** that we do not recommend making substantive changes to the legal framework on physical restraint **Noted**
- b. **indicate** your preferred option(s):
- i. amend the Education Act to clarify that teachers can still rely on the defences provided in the Crimes Act in relation to the use of force **Yes No**
  - ii. amend the Gazette requirements in the Education Act to provide the opportunity to make the physical restraint Guidelines more user-friendly **Yes No**
  - iii. change the wording in section 139AC of the Education Act from restrictive to permissive **Yes / No**
  - iv. s 9(2)(f)(iv) **Yes / No**
- c. **note** that, while we have considered removing the physical restraint provisions from the legislation to return to pre-2017 settings, we do not recommend this option **Noted**
- d. **note** that, while we have considered aligning the statutory threshold for physical restraint with the Code of Professional Responsibility we do not recommend this option **Noted**
- e. **agree** to discuss your preferred options and next steps with us **Agree/Disagree**
- f. **note** that regulatory changes could be included in the third tranche of policy proposals in the Education and Training Bill due to be considered by Cabinet at the end of July **Noted**
- g. **agree** to forward this report to the Associate Ministers of Education for their information **Agree/Disagree**

- h. **agree** that this Education Report is not proactively released at this time because decisions are yet to be made on the options.

**Agree/Disagree**



Dr Andrea Schöllmann  
**Deputy Secretary**  
**Education System Policy**

14/03/2019

Hon Chris Hipkins  
**Minister of Education**

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## Background

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1. Physical restraint is when a teacher or authorised staff member uses physical force to stop or restrict a student from moving their body or part of their body. It is a high risk action that can be emotionally and physically harmful to both the student being restrained and the person doing the restraining. There can be legal and reputational risks as a result of physical restraint being used (Metis 1118713 refers).
2. Reports of death and serious injury overseas, emotional trauma, inappropriate use, the potential for discrimination and limited data on efficacy show the need for physical restraint to be regulated to ensure the wellbeing of both students and staff. This includes the need for robust policies and guidelines focused on minimising the use of physical restraint in schools and promoting the use of positive interventions and best practice alternatives in line with other sectors where physical restraint is also used.
3. In May 2017, a new legal framework for physical restraint was created through the Education (Update) Amendment Act 2017. Physical restraint is now regulated via a combination of the Education Act 1989 (the Education Act), the Education (Physical Restraint) Rules 2017 (the Rules), and the statutory Guidelines for Registered Schools in New Zealand on the Use of Physical Restraint (the Guidelines).
4. The Education Act states that teachers and authorised staff members can only use physical restraint in situations in a school where there is a serious and imminent risk to the safety of a student or any other person. It requires the physical restraint used to be reasonable and proportionate in the circumstances.
5. The Education Act deals with the upper end of the spectrum of situations where school staff have physical contact with students, such as breaking up a fight; stopping a student who is throwing a computer close to others who could be injured; and stopping a student from running onto a road. Updated figures on the use of physical restraint are set out in Annex 1.

### **Since its implementation the education sector have raised a number of questions and concerns about the physical restraint framework**

6. The issue of physical restraint has continued to be the subject of public commentary. Feedback from the education sector, via the media, peak body groups, and the Seclusion and Restraint Advisory Group (the Advisory Group) mainly relates to how the legal framework interacts with the Crimes Act, confusion from school staff as to when and how they can use physical restraint, including to protect property, what types of physical contact are acceptable and the need to simplify the reporting regime.<sup>1</sup>
7. We consider that some of the concern about the legal framework is due to schools not knowing where and how to access guidance and support to help them understand it. Many situations described in the media as the framework not working are situations where restraint could actually be used (e.g. when breaking up a fight between students or to stop students putting others at risk of being injured by objects being thrown around the classroom).

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<sup>1</sup> Sector representatives have reported that, because they consider the reporting regime a compliance burden, some schools are either not reporting their use of physical restraint to the Ministry or are using poor practice (e.g. only reporting incidents that have been witnessed by a parent).

### **We are taking action to address sector feedback...**

8. We're focused on improving our approach by:
  - a. Working with the Advisory Group to update the Guidelines;
  - b. Providing a range of supports to help schools understand the legal framework and minimise the use of restraint; and
  - c. Proposing legislative changes aimed at providing clarity.

### **We have recently updated the Guidelines to take account of sector feedback**

9. In September and November 2018, we reconvened the Advisory Group to seek advice on a refresh of the Guidelines following the feedback we received over the previous 12 months. We also invited the New Zealand Police to join the Advisory Group, which they did in November 2018.
10. A number of opportunities to improve the Guidelines were identified, and we have made a number of changes in response. We informed you of the process we are taking to refine the Guidelines last year (Metis 1156582 refers). The changes aim to provide more information on positive behaviour supports, prevention and de-escalation strategies and acceptable physical contact, and clarify reporting requirements. They also better align the guidelines with the Code of Professional Responsibility and Standards for the Teaching Profession.
11. We will soon provide the draft Guidelines to the Advisory Group for sector feedback, including testing them with selected schools. Subject to feedback, we intend to roll-out the finalised Guidelines, along with supporting materials and a communications strategy, from Term 2. We will also continue to work with the Teaching Council of Aotearoa New Zealand (the Teaching Council) to consider how the Code of Professional Responsibility and Standards for the Teaching Profession, and related good practice examples can support the Guidelines.

### **We continue to provide a range of supports to help schools understand the legal framework and minimise the use of restraint**

12. There are a suite of positive behaviour supports available to schools to help minimise the use of physical restraint. This includes specialist staff support for individual students and preventative frameworks and resources to help to upskill school staff in positive behaviour management. Supports include the Behaviour Service, Positive Behaviour for Learning (PB4L) School-Wide, Teaching for Positive Behaviour resource, PB4L Restorative Practice, and Incredible Years Teacher.

### **The Understanding Behaviour, Responding Safely training has been updated**

13. We are continuing to deliver Understanding Behaviour, Responding Safely (UBRS) training to whole-school staff groups.<sup>2</sup> Training content and format has recently been refreshed, following feedback from the sector. It can now be flexibly applied and customised by Learning Support staff to meet the needs of schools. There is additional follow up to assist staff to embed the new learning in their practice. As at 15 February 2019, 361 schools have completed UBRS training.

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<sup>2</sup> UBRS training to schools can be provided by Ministry of Education staff and/or RTLB who have specialist knowledge of, and experience in, practice to support positive environments for learning and specialist knowledge of behaviour supports.

**We do not recommend making any substantive changes to the legal framework at this time...**

14. We still consider the framework regulating physical restraint to be robust. It is consistent with other sectors in New Zealand where physical restraint is used, and other legislation such as the Crimes Act. It is flexible enough to apply to a wide range of situations within a school and strikes the appropriate balance between mitigating legal risk and ensuring the wellbeing of school staff.

**...but there are four changes (three regulatory and one non-regulatory) that we consider would help address some of the concerns that have been raised**

### Options to address ongoing sector concerns

15. In considering whether there are any regulatory changes we could make to the physical restraint framework, we have re-examined the New Zealand regimes covering use of force, restraint, and escort. These regimes apply predominately to individuals who are subject to compulsory detention or incarceration.
16. The teaching regime is unique both in its coverage and application. The regime applies to all children and young people in compulsory education and is designed to address safety issues for both staff and students. Given that physical restraint involves the use of force, the regime is not intended to be disciplinary or punitive. One of the key factors is ensuring it does not become a de facto means by which the prohibition on corporal punishment (in s. 139A of the Education Act) is undermined.
17. We recommend three practical changes to help address some of the concerns that have been raised. These changes could be included in the Education and Training Bill currently being worked on.

#### **Option 1: Amend the Education Act to clarify that teachers can still rely on the defences provided in the Crimes Act in relation to the use of force**

18. The first change would clarify the relationship between the physical restraint regime and the Education Act with the defences in the Crimes Act.
19. We propose that the Education Act be amended to make it clear that the provisions do not limit or affect any provision of the Crimes Act that would provide a defence to a charge involving the use of force.

#### **Option 2: Amend the Gazette requirements in the Education Act to provide the opportunity to make the Guidelines more user-friendly**

20. The second change would assist with providing greater access to the statutory Guidelines. Currently, the Secretary must issue the Guidelines in the New Zealand Gazette. As the Gazette is a legal publication, this has placed constraints on the language and style of the Guidelines. It has also resulted in confusion with the Education Gazette that principals and teachers are more familiar with.
21. We propose therefore that the Education Act be changed to only require the Secretary to notify through the New Zealand Gazette where the Guidelines can be accessed. Only requiring notification would enable the Guidelines to be made more user-friendly. This is an approach taken, for example, in relation to the publishing of Curriculum statements in the Education Act<sup>3</sup> and used overseas (e.g. in Victoria, Australia).

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<sup>3</sup> See section 60A.

22. Once we have amended the Gazette requirements, we could make the Guidelines more user-friendly through the use of, for example, pictures, diagrams, and practice scenarios. We could also use this opportunity to consider how we could strengthen our communications strategy around the Guidelines, including investigating other channels for promotion (e.g. providing hard-copy versions to schools as well as information on the Ministry website).

**Option 3: Change the wording in section 139AC of the Education Act from restrictive to permissive**

23. This amendment would change the way the authorisation to use physical restraint is framed from restrictive to permissive, so teachers and authorised staff members clearly know when they can use physical restraint. This would involve changing the wording in section 139AC(1) from: “A teacher or authorised staff member **must not** physically restrain a student **unless...**” to: “A teacher or authorised staff member **may** physically restrain a student **only if....**”
24. This change would legally make no difference to how the framework operates. Teachers and authorised staff members would still have to use their professional judgement to determine if there is a serious and imminent risk to safety. The physical restraint they use would still need to be reasonable and proportionate.

s 9(2)(f)(iv)

25. s 9(2)(f)(iv)

26. s 9(2)(f)(iv)

27. s 9(2)(f)(iv)

28. s 9(2)(f)(iv)

s 9(2)(f)(iv)



## Other changes we have considered but do not recommend

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29. We have considered a number of other changes which we could make to the legislative framework but which we do not recommend including:
- a. Authorising physical escort or positive guidance in statute;
  - b. Authorising the use of physical restraint to protect property in the absence of imminent harm to a student or someone else;
  - c. Removing the physical restraint framework altogether; and
  - d. Aligning the current threshold for physical restraint with the threshold in the Code of Professional Responsibility.
30. Further detail on these changes is set out in Annex 3.

## Recommended approach

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31. We recommend progressing the following four options:
- a. Amend the Education Act to clarify that teachers can still rely on the defences provided in the Crimes Act in relation to the use of force
  - b. Amend the Gazette requirements in the Education Act to provide the opportunity to make the physical restraint Guidelines more user friendly.
  - c. Change the wording in section 139AC of the Education Act from restrictive to permissive.
  - d. Seek future Budget funding to deliver UBRS and post-training support to every school over a two year period (non regulatory option).

## Next steps

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32. Once you have indicated your preferred option(s), we would like to discuss next steps with you.

## Annexes

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Annex 1: Update on physical restraint use in schools

Annex 2: New Zealand Teachers Disciplinary Tribunal case examples

Annex 3: Other changes we have considered but do not recommend

## Annex 1: Update on physical restraint use in schools

1. As outlined in advice we provided in June 2018 (Metis 1118713 refers), a key aspect of the legal framework is the requirement for schools to report every incident of physical restraint to their employer and to the Ministry. We are using this data to build a comprehensive picture of how schools are using physical restraint.<sup>5</sup>
2. As at 17 January 2019, there have been a total of 3,559 reports of restraint since the legislative framework came into effect on 15 August 2017. This is an average of around seven reports of physical restraint per day. The total number of students who have been restrained is now 1,776.<sup>6</sup>
3. The number of students restrained now represents about 0.02% of the approximately 800,000 children and young people in our schools. The data indicates that the majority of children restrained are aged 10 and under, including a high number of five and six year olds,<sup>7</sup> and the vast majority are boys.
4. Seventy percent of reported physical restraint incidents have been in primary schools, 23% in special schools, 4% in secondary schools and 3% in composite schools.
5. About one-third of reported incidents involve someone being injured either before or during the use of physical restraint. Reported injuries are still mainly bruises and scratches, followed by a relatively small number of cuts.
6. The number of reported physical restraint incidents in Canterbury/Chatham Islands remains significantly higher than other regions. This is likely to be a combination of historically higher use of restraint, together with a concerted effort from schools in the region to comply with the reporting requirements in the legislation. Prior to the law change, a number of Canterbury schools had their use of seclusion and restraint publicly disclosed. As a result, Canterbury schools have been early adopters of UBRs, and have actively sought advice from us on their responsibilities under the legal framework.

Region	Restraints reported since 15 August 2017 (as at 17 January 2019)
Auckland	713
Bay of Plenty/Wairariki	150
Canterbury/Chatham Islands	1183
Hawkes Bay/Tairāwhiti	118
Neelson/Marlborough/West Coast	196
Otago/Southland	267
Tairāwhiti	122
Taranaki/Whanganui/Manawatu	207
Waikato	296
Wellington	307
<b>Grand Total</b>	<b>3559</b>

<sup>5</sup> This relies on schools complying with their reporting requirements. As incidents are self-reported, it is not possible to know if we have been notified of all physical restraint use. It is likely that there is a level of underreporting due to schools considering reporting to be a compliance burden and/or misunderstanding the requirements.

<sup>6</sup> Compared to a total of 1,128 students as of 13 June 2018.

<sup>7</sup> This includes three children who were restrained just before their 5<sup>th</sup> birthday.

## Annex 2: New Zealand Teachers Disciplinary Tribunal case examples

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1. In *CAC v Rowlingson*<sup>8</sup> the New Zealand Teachers Disciplinary Tribunal (the Tribunal) called for a “gentle dose of reality” in discussing the issue of assault. The Tribunal discusses the fact that, hypothetically, a teacher who taps a misbehaving student on the shoulder to get their attention has technically assaulted the student and has therefore committed a criminal offence. However, the Tribunal concludes that such behaviour is “plainly not” behaviour that falls within any of the components of serious misconduct or is abusive in any sense if it is “gentle contact in order to get the student’s attention for instruction purposes”.
2. In another case (*CAC v Teacher*<sup>9</sup>), the Tribunal considered whether a teacher pulling a eight-year-old student by the hand on the way to the school office amounted to serious misconduct. The student was being continually disruptive, so the teacher decided it was best to remove him from the classroom and lead him to the school office to be supervised until he calmed down. Worried the student would pull away from her and run when he realised where she was taking him, she “firmly” held his hand to guide him towards the office and away from other students he had been disrupting. The Tribunal concluded that, given the situation the teacher was in, it was “by no means an unconventional or improper decision” to do so.
3. On the other hand, it considered an incident that happened on the way to the office, whereby the student grabbed onto a netball pole with his free hand and the teacher pulled him “quite forcibly” to get him to release his grip, misconduct. This is because the teacher’s use of force against the student breached the absolute prohibition on the use of corrective and disciplinary force provided in section 139A of the Education Act.<sup>10</sup>

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NZTDT 2015/54  
NZTDT 2016/50.

<sup>10</sup> Serious misconduct” is defined in the Education Act as conduct by a teacher that:

- (i) adversely affects, or is likely to adversely affect, the wellbeing or learning of 1 or more students
- (ii) reflects adversely on the teacher’s fitness to be a teacher
- (iii) may bring the teaching profession into disrepute; and
- (iv) that is of a character or severity that meets the Teaching Council’s criteria for reporting serious misconduct

In this case, the Tribunal considered that the teacher’s conduct did not meet the threshold in regards to bringing the teaching profession into disrepute or being of a character or severity that meets the Teaching Council’s criteria for reporting serious misconduct because while the teacher pulled the student “quite forcibly”, this use of force did not amount to physical abuse, and was not done for a bad effect or purpose.

## Annex 3: Other changes we have considered but do not recommend

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### Defining what types of physical contact are acceptable...

1. In the Guidelines, we have recognised that there are situations where staff may have to physically support students day-to-day, and that this contact does not constitute physical restraint. This includes, for example, temporary physical contact to move students from one place to another, holding a younger student's hand or picking them up to comfort them for a short time if they are happy to do so, and assisting a student with toileting including changing a nappy.
2. However, there is concern in the sector about the legal situation when such touch, given for the purposes of redirection ("physical escort") or care and comfort ("positive guidance") becomes resisted e.g. when a child pulls away while being redirected or resists being held by a teacher while a parent leaves the room.
3. This is because resisted touch could technically constitute physical restraint, and that restraint would not be authorised by the current legislation as it is not in response to a risk of serious and imminent harm to the safety of any person. Sector representatives are concerned that this puts them at risk of liability under the assault provisions of the Crimes Act.

### Crown Law has advised that positive guidance or physical escort are not authorised by statute and may in some cases constitute a technical assault...

4. Crown Law has advised that existing physical restraint provisions do not provide a statutory basis for physical escort or positive guidance. The Education Act would therefore need to be amended if the Government wanted to authorise physical escort or positive guidance in statute.
5. Crown Law has also advised that physical escort or positive guidance might, in some cases, constitute a technical assault because it will not usually be done with the child's consent, and the defences in the Crimes Act (self-defence or necessity) would not apply. Crown Law considered that in such cases, a specific statutory defence would be needed in order to avoid any possible liability under the assault provisions of the Crimes Act.

### We do not recommend authorising physical escort or positive guidance in statute

6. Authorising physical escort or positive guidance in statute would shift the area in which staff are required to exercise professional judgement to the boundary between escort/guidance and physical restraint. An authorisation would also be inconsistent with regulatory settings in the early childhood sector.
7. In its advice, Crown Law stated that physical escort or positive guidance could cover a wide range of factual situations. It would be difficult to come up with a legislative definition and subsequent guidance to cover every possible scenario.
8. A grey area would therefore arise regarding the line between what constitutes "physical escort" or "positive guidance" and what constitutes "physical restraint". The difference would lie in the amount of force used, the length of time it was applied, and the child's response, but how much is appropriate would depend on the context and would require professional judgement. Disputes about this would not be able to be easily resolved.
9. A statutory change may not provide the certainty desired by the profession. Ultimately, teachers and authorised staff would still have to exercise their professional judgement as to what physical contact with students is acceptable.

10. Furthermore, while conduct similar to seclusion and physical restraint is prohibited in early childhood education services, there is no exemption for physical escort (touch provided for the purposes of redirection) or positive guidance (touch provided for the purposes of comfort or care).
11. This does not mean that no touch occurs in ECE settings. For instance, children can struggle or pull away while having their nappies changed, or attempt to run away from their ECE teachers when their parents drop them off or during sleep or meal times. In these cases, such “resisted touch”, while not authorised in regulation, occurs as an element of teacher practice.
12. Authorising positive guidance or physical escort/restraint in statute would create an inconsistency between early childhood and schooling sectors.

*Continuing to take a contextual and flexible approach is preferable to establishing a specific statutory defence*

13. Context is important in the case of assault. There is case law to establish that a “mere touching” can constitute an assault, which is a criminal offence. However, police take into account a wide range of factors in deciding whether to prosecute for assault, such as the amount of force applied, the length of time it was applied and the intentions of the person applying it.<sup>11</sup> Situations must therefore be considered on a case-by-case basis.
14. The relevance and importance of context in classroom situations is discussed in multiple decisions of the New Zealand Teachers Disciplinary Tribunal (the Tribunal). Attached as Annex 2 are two case examples which highlight the importance of context in classroom situations, and of supporting teachers to feel confident in exercising their professional judgement when having physical contact with students.
15. While positive guidance or physical escort might sometimes constitute assault in a legal sense, the actions of teachers in these situations would be unlikely to amount to a disciplinary charge of misconduct, or indeed a criminal charge of assault providing, as the Tribunal has put it, they are not “unconventional or improper”.
16. Physical restraint, on the other hand, is a different, much more severe form of interaction. The risks involved with this more severe interaction is the rationale for a statutory authorisation which clarifies when physical restraint can be used.
17. Given the importance of context, we consider that continuing to take a flexible and contextual approach to situations where positive guidance or physical escort/restraint constitute a technical assault is preferable to establishing a specific statutory defence to assault.

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<sup>11</sup> *Police v Raponi* (1989) 5 CRNZ 291 at 296: “It is well known that assault does not require such powerful action. A mere touching can amount to an assault ... a pat on the bottom or a kiss can be an assault, the mere brushing of some part of a person’s body can be an assault ...”; *T v T* [1988] Fam 52 (Fam), at 64–67; *R v Brown* [1992] 1 QB 491, 2 All ER 552 (CA); *R v Brown* [1994] 1 AC 212, [1993] 2 All ER 75 (HL), at 226; 90.

<sup>12</sup> The Solicitor General’s Prosecution Guidelines make it clear that not all offences for which there is evidence must be prosecuted. Prosecutors must exercise their discretion as to whether a prosecution is required in the public interest. The predominant consideration is the seriousness of the offence.

**We also do not recommend making changes in relation to using physical restraint to protect property**

18. Currently teachers and authorised staff members can use physical restraint in response to property damage, but only in the context of ensuring the safety of the student or any other person. For example, they could physically restrain a student who is throwing or smashing a computer where the shattering parts could injure either the student or somebody nearby.
19. In previous advice to Ministers, we have not recommended lowering the threshold for using physical restraint to enable school staff to protect property in the absence of imminent harm to a student or someone else because:
  - a. Health and safety implications for employers could arise from having their staff take such risks. Calling the Police has been considered to be the appropriate response in such situations.
  - b. The current approach in the Education Act is consistent with the one in the Crimes Act. Sections 52 to 56 of the Crimes Act permit a limited use of force to protect property. These sections put human life and safety even for the person doing wrong, above protecting or possessing property. They require the force used to only be what is necessary to protect the property and generally exclude striking or causing physical harm to another person.
20. While there can be financial implications for schools when students damage property, it would be difficult to set a legal test that would limit physical restraint to serious situations (physical restraint is unlikely to be justified in response to incidents such as throwing a stapler or doing graffiti on a desk). We consider that lowering the threshold to include property damage would make the legal framework too permissive, and would increase the likelihood of students and school staff being put at risk through inconsistent or poor practice.
21. For these reasons, we recommend keeping the threshold of physical restraint in relation to property as it is, limiting its use to situations where a person's safety is at risk.

**We could remove the physical restraint framework from legislation altogether**

22. The Ministry has recently met with both PPTA and NZEI to discuss options to address some of the concerns that have been raised by the sector.
23. In its meeting with the Ministry, NZEI suggested that one option would be to remove the physical restraint framework from legislation altogether. Their view was that removing the framework from legislation and continuing to provide guidance and further training to teachers about acceptable physical contact with students is the most effective way to sufficiently address ongoing sector concerns.

**Removing the statutory framework would weaken the statutory protections available to school staff...**

24. The decision to introduce a statutory framework in relation to physical restraint was made in response to concerns from the Secondary Principals' Association representative on the Advisory Group that, without the appropriate statutory protections, teachers could face legal action when using physical restraint even if they followed the guidance. Crown Law also recommended strengthening the guidance through a law change offering teachers statutory protections over the use of physical restraint (Metis 1027615 refers).

25. Using physical restraint on a student could result in a school staff member being charged with an offence, such as assault on a child. The Crimes Act has a range of possible defences that can be used by defendants in Court. These defences work by providing an explanation as to why the defendant was justified in committing the offence (e.g. self-defence).
26. However, the defences in the Crimes Act apply to all people in all contexts. They do not take into account the different expectations on school staff, particularly teachers and principals, when they are acting in their professional capacity. Unlike members of the public, teachers and principals are trained public servants with responsibility over children and young people. This means they would be less likely to be successful when using one of these general defences than members of the public in a similar situation.
27. To address this issue, the legal framework has created an authority that specifically deals with teachers and authorised staff members using physical restraint in schools. The authority removes any doubt they can physically restrain students and guides them as to what is acceptable force in the course of their work. Therefore, teachers and authorised staff members who comply with the Act, Rules, and Guidelines have a justification for using reasonable and proportionate force on a student if there is a serious and imminent risk to the safety of the student or any other person. In turn, they would be able to make out a defence to any potential action under the Crimes Act or the New Zealand Bill of Rights Act 1990.
28. In practice, this means that teachers and authorised staff members will have a good defence if they can show they acted in accordance with the legal framework. Removing the framework entirely would mean teachers and authorised staff members could no longer rely on this defence. We therefore do not recommend this option.

**It would also remove the requirement to report, which would reduce visibility over why and how physical restraint is used in schools and make it more difficult to respond to schools' requests for behaviour support**

29. Internal and external reporting on the use of physical restraint is consistent with good practice in the health, disability and justice sectors. It is associated with improving the quality of practice and preventing further occurrences of physical restraint. It also provides a safeguard for the person doing the restraining by providing a written record of what happened if there is a complaint.

**Aligning the current threshold for physical restraint with the threshold in the Code of Professional Responsibility**

30. Following a recent meeting with the Teaching Council, we have considered aligning the threshold for physical restraint with the threshold in the Code of Professional Responsibility (the Code). This states that teachers should work in the best interests of students by "promoting the wellbeing of learners and protecting them from harm".
31. The threshold in the Code is broader and lower than the current threshold in the Education Act, which states that physical restraint can only be used where there is a serious and imminent risk to safety. Teachers could apply physical force in a way that does not breach the Code, but may constitute assault under the Crimes Act (e.g. a teacher restraining a student shouting at other children to protect them from the emotional harm of being shouted at). Lowering the threshold to the level in the Code would therefore put teachers at increased risk of criminal prosecution.

32. Lowering the threshold would also have Bill of Rights Act implications as the current threshold is aligned with other sectors where physical restraint is used. Lowering the threshold could therefore lead to unintended consequences beyond the education sector.
33. For these reasons, we do not recommend this option.

Proactively Released