



## Education Report: Further options to clarify the physical restraint framework

To:	Hon Chris Hipkins, Minister of Education		
Date:	11 September 2019	Priority:	Medium
Security Level:	In Confidence	METIS No:	1175955
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Messaging seen by Communications team:	N/A		

### Purpose of report

This paper provides you with further advice on clarifying the physical restraint framework following joint work undertaken by the Teaching Council of Aotearoa New Zealand (the Teaching Council) and the Ministry of Education (the Ministry).

### Summary

1. The Ministry and the Teaching Council have worked together on options to improve the regulatory framework for physical restraint in schools, in consultation with representatives of the teaching profession, disability sector, and Office of the Children's Commissioner.
2. Following consultation, we have worked on three revised proposals that could be progressed to provide greater clarity to staff, while also addressing representatives' feedback that physical restraint should be a last resort that is regulated in the Education Act 1989.
  - a. Make legislative amendments by:
    - changing the language from "physical restraint" to "physical force", with consequential amendments to relevant definitions;
    - changing the threshold for when staff can use 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"; and
    - changing the authorisation to use restraint from restrictive wording that a staff member "must not physically restrain unless" to permissive wording that a staff member "may be justified in using physical force if the teacher or authorised staff member reasonably believes...";

- adding a purpose statement to the provisions to reinforce the expectation that restrictive physical force, such as restraint holds, must be used as a last resort.

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

c. Work with the teaching profession to develop scenarios or examples in practice of behaviour that promotes (and does not promote) learners' wellbeing in situations of physical restraint / force. These examples would show how the regulatory framework for physical restraint and *the Code of Professional Responsibility and Standards for the Teaching Profession* (Our Code Our Standards) align.

3. These proposals are not mutually exclusive and we recommend progressing all three options.
4. Legislative changes could be progressed through the Education and Training Bill due to be introduced at the end of November.

### Recommended Actions

The Ministry of Education and Teaching Council recommend you:

a. **note** that this paper outlines revised proposals for clarifying the physical restraint framework following engagement with selected representatives from the teaching profession, disability sector and Office of the Children's Commissioner

**Noted**

b. **note** that, due to the diverse range of views on the need for changes to the legislative framework, these proposals have been balanced to try to address all stakeholders' concerns

**Noted**

c. **note** that the Teaching Council considers that the term physical restraint should be replaced with the term physical force to align the Education Act terminology with the Crimes Act 1961

**Noted**

d. **indicate** your preferred option(s):

i. make legislative amendments by:

- changing the language from "physical restraint" to "physical force", with consequential amendments to relevant definitions

**Yes / No**

- changing the threshold for when staff can use force from when safety is reasonably believed to be at "serious and imminent risk" to when a staff member reasonably believes physical force is necessary to prevent "imminent harm"

**Yes / No**

*harm must be defined as physical +/or emotional harm to any person.*

- changing the authorisation in section 139AC from restrictive limits on the use of physical restraint in schools, drafted as "must not physically restrain unless" to a permissive authorisation for teachers and approved staff members to use physical force in schools, drafted as "may be justified in using physical force if the teacher or authorised staff member reasonably believes..."

Yes / No

- adding a purpose statement to the provisions to reinforce the expectation that restrictive physical force, such as restraint holds, must be used as a last resort

Yes / No

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

Yes / No

- iii. work with the teaching profession to develop practical scenarios or examples on physical restraint/force, which show how the regulatory framework for physical restraint and *Our Code Our Standards: the Code of Professional Responsibility and Standards for the Teaching Profession* align

Yes / No

- e. **note** that as we work through any changes to the legislative framework, we will consider whether the Secretary for Education should make any changes to the reporting requirements in the Education (Physical Restraint) Rules 2017, as enabled by section 139AD of the Education Act 1989

Noted

- f. **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

- g. **note** that, while we have considered inserting into the Education Act 1989 an authorisation for staff members to have positive physical contact with students in limited circumstances, we do not recommend this option

Noted

- h. **note** that legislative changes could be included in the Education and Training Bill due to be introduced at the end of November

Noted

- i. **agree** to forward this report to the Associate Ministers of Education for their information

Agree / Disagree

Proactive Release

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- j. **agree** that this Education Report will be proactively released once any legislative changes have been introduced to Parliament.

Agree/Disagree



Dr Andrea Schöllmann  
Deputy Secretary  
Education System Policy  
11/09/2019



Lesley Hoskin  
Interim Chief Executive  
Teaching Council of Aotearoa New Zealand  
11/09/2019



Hon Chris Hipkins  
Minister of Education  
23/9/19



## Background

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1. In March 2019 (Metis 1175955 refers), we provided you with options to clarify the physical restraint legislative framework.
2. Since then, the Ministry and Teaching Council have worked together on revised options to improve the workability of how the use of physical restraint and other physical contact in schools is regulated, and address the concerns of the education sector.
3. The Teaching Council provided you with a range of options to test with representatives of the teaching profession and disability sector groups (EC-1674 refers). The Council also provided a briefing on 3 July updating you on the feedback given by representatives from the teaching profession (EC-1686 refers).
4. On 22 August, we provided a briefing outlining key points on the range of views expressed during engagement with sector representatives, including teaching profession representatives, disability sector groups, and the Office of the Children's Commissioner (Metis 117955 refers).
5. This report outlines proposals that take account of this feedback.

## Options for change following feedback

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6. As outlined in previous advice, the education sector has raised a number of questions and concerns about the physical restraint framework since its implementation in August 2017. There has continued to be confusion as to how the legal framework in the Education Act 1989 interacts with the Crimes Act 1961, and whether or not the framework that regulates physical restraint in schools aligns with *Our Code Our Standards*. Specifically, the education sector is unsure about when and how school staff can use physical restraint, when and how to report incidents of physical restraint, and what types of other physical contact with students are acceptable.
7. We consider that there are three changes (one legislative and two non-regulatory) that could help to address the concerns that have been raised by education sector representatives, while also ensuring the rights and wellbeing of students remains central.

### **Option 1: Make legislative changes to improve how the use of physical restraint and other physical contact in school is regulated**

8. We have identified an option for legislative change that would balance the range of views of stakeholders. This change would amend the Education Act 1989 by:
  - a. replacing the terms "physically restrain" and "physical restraint" with "physical force", with consequential amendments to relevant definitions;
  - b. changing the threshold for when force can be used from when a teacher or authorised staff member reasonably believes that safety is at "serious and imminent risk" to when a staff member reasonably believes physical force is necessary to prevent "imminent harm"; and
  - c. changing the authorisation from restrictive to permissive ("must not physically restrain unless..." to "may use physical force if...");
  - d. adding a purpose statement to the provisions to reinforce the expectation that restrictive physical force, such as restraint holds, are used as a last resort.

9. We do not propose any changes to the requirement for the Secretary for Education to set rules and guidelines. The guidelines provide detailed best practice guidance to schools on when and how to use physical restraint, while the rules set out the mandatory reporting requirements schools must comply with following physical restraint incidents. These are both important for the provisions to be implemented effectively.
10. Furthermore, these changes would only apply to the schooling sector. The early childhood sector has a separate framework regulating conduct similar to physical restraint in early childhood settings.<sup>1</sup>

*Replacing "restraint" with "force"*

11. The Teaching Council considers that the language of "physical force" would better reflect the language used by teachers in their day to day work. It 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.
12. If you decide to change the language from "restraint" to "physical force", we would need to work through a number of matters of detail. For example, we would need to consider how to define, and provide guidance to the sector on, what types of physical contact are permissible within the definition of "physical force" (such as holding a child's hand to stop them from pulling another child's hair).

*Changing the threshold to prevent "imminent harm"*

13. The Teaching Council considers that changing the threshold for when force can be used would align the language in the provision with *Our Code Our Standards*, which requires teachers to "prevent harm".
14. We may need to define "imminent harm", including determining whether "harm" encompasses both physical and emotional harm.
15. Given the concepts of "physical restraint" and "serious and imminent risk" haven't been well understood by the education sector, we consider there is a risk that these proposed language changes won't be well understood either. We will therefore need to consider how to communicate what any changes mean to the sector in a way that is accessible and easily understandable.

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

16. We propose changing the framing of the authorisation from restrictive to permissive to reflect the intention to build a high trust environment for the teaching profession, and to give statutory authority for the use of "physical force" that could be relied upon as a defence.
17. However, we also need to ensure that it remains clear that using force for the purposes of correction or punishment is still prohibited (as set out in section 139A of the Education Act 1989).
18. We therefore consider that the authorisation, while framed as permissive, would need to be narrowly defined, limited to situations where a staff member reasonably believes that physical force is necessary to prevent "imminent harm". As is the case currently, we

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<sup>1</sup> See section 56(1)(b), Education (Early Childhood Services) Regulations, 2008.

also consider that the force used would need to be reasonable and proportionate in the circumstances.

*Adding a purpose statement to reinforce that restrictive physical force should only be used as a last resort*

19. Furthermore, we consider that a purpose statement for the provisions could be included to reinforce the expectation that restrictive physical force, such as restraint holds, are used as a last resort. The exact wording of this purpose statement will need to be worked through with the Parliamentary Counsel Office.

*Considering how restraint must be reported to the Ministry of Education*

20. As we work through these changes, we will need to consider what types of incidents we would want reported to the Ministry. We would need to amend the statutory Rules on physical restraint to take account of the proposed changes. Reporting of serious incidents is important as it enables the Ministry to follow up with, and where necessary, provide support to, schools to prevent further incidents from occurring. National level data also helps with understanding the extent to which and where physical restraint is occurring and the roles of the people exercising it, and helps to inform further resourcing decisions.
21. Reporting will, however, need to ensure that there is not an undue administrative and compliance burden on schools given the potentially large number of incidents of other types of "physical force" (such as the hair pulling example described in paragraph 13).
22. Currently, schools need to report every incident of physical restraint to the Ministry. They are also required to take appropriate steps to ensure restraint incidents are notified to parents/caregivers as soon as possible on the day they take place. While we consider the requirement to notify parents/caregivers is entirely appropriate, we will investigate whether the Ministry's purposes could be met through the provision of collated data about the use of physical restraint/force. Such a change could be achieved by the Secretary amending the Rules.

s 9(2)(f)(iv)

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

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s 9(2)(f)(iv)



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

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**Option 3: Work with the teaching profession to develop practical scenarios or examples of physical restraint / force which would be enabled by the legal framework (non-regulatory option)**

30. A key piece of feedback received during the 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.
31. We will therefore work with teaching practice experts to develop such practical scenarios or examples and incorporate them into guidance on physical restraint/force. This guidance could include but is not limited to, the Ministry's physical restraint guidelines.
32. These scenarios should show how the regulatory framework for physical restraint and *Our Code Our Standards* align.

Other options we have considered but do not recommend

**Remove the legal framework from the Education Act 1989 entirely**

33. As in the advice we provided in March, one option we have considered is removing the physical restraint framework from legislation and continuing to provide guidance and further training to staff about acceptable physical contact with students. This would mean that teachers would need to rely on the general defences in the Crimes Act 1961 (e.g. self-defence) if charged with an offence, such as assault on a child.

wide training and coaching programme, PB4L Restorative Practice, Resource Teachers: Learning and Behaviour (RTLb).

<sup>3</sup> Lawes, E. & Boyd, S. *Making a difference to student wellbeing – a data exploration*. New Zealand Council for Educational Research, Wellington, NZ. 2018.



34. However, as previously stated, the defences in the Crimes Act 1961 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 state servants who are expected to meet professional standards in exercising their responsibilities over students, who are often minors. If a school staff member was charged and found guilty of an offence relating to physical restraint, this context could be considered to meet the definition of aggregating factors during sentencing under sections 9(1)(f) and (g) of the Sentencing Act 2002. School staff are also operating within a New Zealand Bill of Rights Act context.
35. To address this issue, the legal framework has created an authorising environment 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.
36. 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 other staff members could no longer rely on the authorisation that the legal framework provides.
37. Furthermore, most disability sector representatives and the Office of the Children's Commissioner considered that regulating physical restraint in legislation is an important protection for students given the power imbalance between students and teachers. With restraint now covered in education legislation, they also considered that removing it would send a negative signal.
38. Removing the framework from legislation would also remove the requirement to report on the use of physical restraint. Internal and external reporting on the use of physical restraint is consistent with good practice in other sectors in which it is used. It is associated with improving the quality of practice and preventing further occurrences of physical restraint. It also enables follow-up support and provides a safeguard for the person doing the restraining by providing a written record of what happened if there is a complaint to the Ministry and/or Teaching Council.
39. Furthermore, most disability sector groups considered reporting requirements essential to ensure families are informed and other ways to manage behaviour can be found.
40. We therefore do not recommend this option.

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

41. Another option we have considered is leaving the physical restraint provisions unchanged and inserting a provision specifically authorising staff members to have "physical contact" with students in certain circumstances. The intention of this would be to address the uncertainty teaching profession representatives have told us they feel about having physical contact with students by removing any doubt that teachers can have positive or guiding physical contact with students in limited circumstances. For example "shepherding" a group of younger children from one place to another, or providing comfort to a child through a hand on the shoulder.
42. While the intent of this option would be to provide clarity, there is a risk that in practice, adding in an authority and statutory definition around physical contact would create further ambiguity and complexity. Furthermore, a grey area would arise in terms of the line between what constitutes "physical contact" and what constitutes "physical

restraint." For example, if the physical contact intended to provide comfort was resisted by the child for a period of time and was thus not providing comfort.

43. 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, given our limited dispute resolution mechanisms.
44. We therefore do not recommend this option.

#### Next steps

45. We would like to discuss these options and potential next steps with you at the next agency meeting.
46. Should you wish to progress legislative changes, we will work to include these in the Education and Training Bill due to be introduced at the end of November.