



Briefing Note: Proposed changes to the physical force section of the Education and Training Bill

To:	Hon Chris Hipkins, Minister of Education		
Date:	12 March 2020	Priority:	High
Security Level:	In Confidence	METIS No:	1223109
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Messaging seen by Communications team:	No	Round Robin:	No

Purpose of paper

This paper provides Ministry of Education and Teaching Council advice on proposed changes to the physical force section of the Education and Training Bill arising from the Select Committee process.

Summary

- The Education and Training Bill makes a number of changes to the provisions on the use of physical restraint in schools, including replacing the term “physical restraint” with “physical force.” The purpose of this change was to better align with the everyday language of staff in schools and provide greater clarity to staff about what they can and cannot do.
- Submitters have raised a number of concerns about these changes, including that the term “physical force” is too broad and may result in an increase in the use of force. You have asked for advice on replacing “physical force” with “physical restraint,” defined as including “physical intervention to remove a student from a situation that is dangerous to that student or another person”.
- The proposed change would not address teachers’ concerns about a lack of clarity. We therefore do not recommend replacing “physical force” with this definition of “physical restraint.” Instead, we propose to do further work on developing a definition of “physical force” that specifies the types of force that may be permissible.

Proactive release

Agree that this Briefing will be proactively released.

Agree / Disagree

Ben O'Meara

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12/03/2020



Hon Chris Hipkins
Minister of Education

16/3/20

Proactively Released

The physical force section of the Education and Training Bill

1. Section 239AC of the Education Act 1989 limits the use of physical restraint in schools to when a “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.” Physical restraint is defined as using “physical force to prevent, restrict, or subdue the movement of [a] student’s body or part of [a] student’s body.”
2. Members of the education sector have reported being unsure about what physical restraint is, when and how they can use it, and what other physical contact with students is acceptable. Clauses 95-97 of the Education and Training Bill are intended to address these issues by:
 - a. replacing the terms “physically restrain” and “physical restraint” with “physical force”;
 - b. including a requirement that physical force is used only as a last resort;
 - c. changing the threshold for when physical force can be used from when a teacher or authorised staff member reasonably believes “the safety of the student or of any other person is at serious and imminent risk” to when a teacher or authorised staff member reasonably believes “it is necessary to prevent imminent harm to the student or another person”;
 - d. defining “harm” for the purpose of these provisions as “harm to the health, safety, or well-being of the student or the person including any significant emotional distress suffered by the student or person”;
 - e. requiring the Secretary for Education to make rules defining ‘physical force’ within six months of the Bill receiving Royal Assent.

Proposed changes to the Bill

3. Through the Select Committee process, a number of concerns have been raised about the provisions relating to the use of physical force in schools. In response to these, you have requested that the Ministry work with the Teaching Council to provide advice on the following proposed changes:
 - a. replacing “force” with “restraint” and defining physical restraint as “to physically prevent, restrict, or subdue the movement of the student’s body or part of the student’s body [including] physical intervention to remove a student from a situation that is dangerous to that student or another person”;
 - b. applying the physical force provisions to ECE centres;
 - c. including consultation requirements in clause 97 e.g. “In preparing the guidelines the Secretary must consult with:
 - i. Children and young people, including in particular disabled students;
 - ii. Teachers, principals, and their representative bodies;
 - iii. Parents, including parents of disabled students and their representative bodies;
 - iv. The Children’s Commissioner;
 - v. The Disability Commissioner.”
4. You have also requested advice on the term “physical intervention.”

Summary of submitters' views on "physical force"

5. As of 11 March 2020, 55 submitters had commented on the provisions relating to physical force.¹
6. Of these, 30 submitters opposed the change from "physical restraint" to "physical force." They considered that "physical force" was too broad and provided less clarity than the term restraint. It could, for example, include such actions as punching, slapping and pushing. They were concerned that the change would increase the use of force in schools, resulting in increased harm to students.
7. Most of these submitters recommended either keeping the term physical restraint, or changing it to restrictive physical force. The Office of the Children's Commissioner, Disabled Persons Assembly NZ and Inclusive Education Action Group suggested that expanding the current definition of "physical restraint" to include moving the child to a safe place would better address some of the issues teachers have raised with the current legislation. Child Advocacy NZ suggested using "restraint" to encompass both physical and psychological restraint.
8. The Teaching Council and NZ Kindergartens specifically supported the change from "restraint" to "force" as the term was better understood and consistent with other legislation, including clause 94 of the Bill (on corporal punishment) and the Crimes Act 1961. The Teaching Council noted that they are not wedded to this specific term.
9. While supporting expanding the scope of permissible action beyond "physical restraint", NZEI suggested that those working in the sector may find the word "force" problematic and recommended the term "physical intervention" instead. The Office of the Ombudsman also suggested this term.
10. The PPTA supported the term "force" as they thought it was more appropriate in the secondary school environment. They commented that it is not always possible to restrain secondary students, so other types of force may need to be applied.

Replacing "physical force" with an expanded definition of "physical restraint"

11. The Ministry agrees with submitters that there is a risk that replacing "restraint" with "force" could in practice increase the use of force against students.
12. The intention of replacing "restraint" with "force" through the Education and Training Bill was to better align with the everyday language of staff in schools and address confusion about how the Education Act 1989 interacts with the Teaching Council Rules 2016.
13. The proposed definition of physical restraint differs from the definition in the current Education Act. It specifically includes removing a student from a dangerous situation. Following discussion with the Teaching Council, we believe that this definition may be confusing, as teachers do not generally consider this kind of action "restraint". Adding the term "dangerous" may also be confusing, because it would not enable redirection of a student who is not in danger.
14. On balance, we do not recommend changing "physical force" to the proposed definition of "physical restraint."
15. The term "physical intervention" is more neutral than "force", but is not commonly understood. It could be perceived as encompassing a broader range of physical contact

¹ As the oral submissions have not all been heard, this number is subject to change.

than either force or restraint (e.g. consensual touch for comfort or communication purposes) that should not be subject to the same conditions as the use of force. It would therefore not meet the policy intent of providing clarity.

16. To address submitters concerns about the broadness of the term “physical force” and to provide greater clarity to school staff, we agree that a definition of “physical force” should be included in the Bill, rather than being deferred for development as a part of the Rules. There are a variety of views, as shown by submissions, on how “physical force” should be defined, and deferring this issue for consideration as a part of the Rules is unlikely to result in a consensus view on a definition.
17. We therefore propose to do further work with the Teaching Council on developing a definition to be included in the Education and Training Bill that specifies the types of force that may be permissible.

Extending the force provisions to ECE services

18. Early Childhood Services and Kōhanga Reo are regulated differently to schools. The Education (Early Childhood Services) Regulations 2008 and the Education (Playgroups) Regulations 2008 already make it clear that immobilisation, which is very similar to inappropriate physical restraint, is unacceptable.

Requiring the Secretary to consult on the guidelines

19. The Ministry and Teaching Council agree that the groups listed should be consulted as part of preparing the guidelines on the use of physical force. It does intend to do so, however, to provide assurance of this, clause 97 could be amended to require that the Secretary consult these groups.