

17 February 2020

Dear [REDACTED]

Thank you for your email of 12 December 2019 to the Ministry of Education requesting the following information:

1. *Copies of cabinet papers regarding force / restraint*
2. *Copies of advice to the Minister and associate minister about changing legislation, rule and guidelines (no need to provide me what you've already given me, but from memory one paper was withheld because it was still under consideration, and I suspect there have been others since)*
3. *Copies of advice MOE received from others on changing legislation, rules and guidelines, including but not limited to copies of submissions or feedback on the limited consultation mentioned in the RIS - specifically we are after the submissions/feedback from those mentioned in the RIS as well as input from stakeholders into the development of the final policy option.*
4. *Analysis of complaints about use of restraint / force - either by yourselves, or if you hold material given to you by others (eg Teachers Council). Would love to see this at school level, but I suspect that information is not collated? I'm not asking for new analysis here, just copies of what has been done, particularly to support legislation change. Specifically any advice about how the change of language (restraint to force) relates to the Crimes Act.*
5. *Moe's intentions for updating the rules guidelines should the legislation change, including process and timeframe*
6. *If MOE has taken any additional actions to improve teacher knowledge of the current regime, since it has become clear teachers feel confused (eg, while you started with an implementation / training programme) was this revised / expanded or altered in any way since moe has been given feedback about teachers not understanding the current regime.*

Your request has been considered under the Official Information Act 1982 (the Act).

Our responses to your questions have been answers individually below:

#### **Question One - Copies of cabinet papers regarding force / restraint**

I am refusing this part of your request under section 18(d) of the Act as this information is publicly available at the following link:

<http://education.govt.nz/our-work/information-releases/issue-specific-releases/education-and-training-bill/>

## **Question two - Copies of advice to the Minister and Associate Minister about changing legislation, rule and guidelines**

We have identified three documents in scope of the request. These are itemised, along with our decision as to their release, in **Appendix A**

## **Question three - Copies of advice MOE received from others on changing legislation, rules and guidelines, including but not limited to copies of submissions or feedback on the limited consultation mentioned in the RIS**

We have identified 12 documents within scope of this part of your request. These are itemised, along with our decision as to their release, in **Appendix B**.

## **Question four - Analysis of complaints about use of restraint / force - either by yourselves, or if you hold material given to you by others (e.g. Teachers Council)**

The Ministry's complaints database does not have a specific category to record complaints made to the Ministry specifically related to the use of physical restraint or physical force on students.

While there are likely to be instances of such concerns being logged, this data has not been extracted for the purpose of analysis. As such, this part of your request has been refused under section 18(e) of the Act as the document alleged to contain the information does not exist.

Complaints about the conduct or competence of teachers including the use of restraint or force should be raised with the teacher's school in the first instance. School boards have a legal responsibility for having a complaints policy in place and a set of procedures for dealing with complaints effectively. Parents and guardians can also raise concerns and make formal complaint to the Teaching Council.

Further information about complaints is available at the following link:

<http://www.education.govt.nz/our-work/contact-us/complaints/>

In addition no specific advice has been provided about how the change of language (restraint to force) relates to the Crimes Act. Some general advice has been provided and this is included in the papers provided to you in **Appendix A** and **B**

## **Question five– Intentions for updating rules and guidelines**

Should the legislation change, the Ministry will update the rules and guidelines to align with these changes and provide clear guidance on managing situations where there is a risk of harm. As set out in the Bill, this would include defining physical force in the rules within six months of the Bill receiving Royal Assent. The Ministry will work with the Teaching Council and representatives of the education sector, disabled community and children and young people and their whānau to inform this.

We have not made any final decisions or set out in writing the process for updating the rules and guidelines should the legislation change.

However we can advise we did consult with a number of agencies regarding updating the rules and guidelines and these have been provided as **Appendix B** as noted earlier.

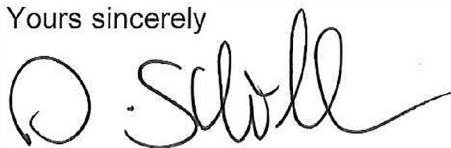
## **Question six – Additional actions to improve knowledge**

No additional actions have been carried out by the Ministry to improve teacher knowledge of the current regime.

Please note, the Ministry now proactively publishes OIA responses on our website. As such, we may publish this response on our website after five working days. Your name and contact details will be removed.

Thank you again for your email. You have the right to ask an Ombudsman to review this decision. You can do this by writing to [info@ombudsman.parliament.nz](mailto:info@ombudsman.parliament.nz) or Office of the Ombudsman, PO Box 10152, Wellington 6143.

Yours sincerely

A handwritten signature in black ink, appearing to read 'A. Schollmann', with a stylized flourish at the end.

Andrea Schollmann  
**Deputy Secretary**  
**Education System Policy**

**Appendix A - Copies of advice to the Minister and Associate Minister about changing legislation, rule and guidelines**

No.	Date	Document	Decision on release
1.	14 March 2019	Education Report Options to improve the physical restraint framework (1175955)	Refused in full under Section 18(d) of Act as this information is available at the following link <a href="http://education.govt.nz/our-work/information-releases/issue-specific-releases/education-and-training-bill/">http://education.govt.nz/our-work/information-releases/issue-specific-releases/education-and-training-bill/</a>
2.	22 August 2019	Briefing Note: Summary of feedback on options to clarify the physical restraint framework (1175955)	Refused in full under Section 18(d) of Act as this information is available at the following link <a href="http://education.govt.nz/our-work/information-releases/issue-specific-releases/education-and-training-bill/">http://education.govt.nz/our-work/information-releases/issue-specific-releases/education-and-training-bill/</a>
3.	11 September 2019	Education Report Further Options to clarify the Physical restraint framework (1175955)	Refused in full under Section 18(d) of Act as this information is available at the following link <a href="http://education.govt.nz/our-work/information-releases/issue-specific-releases/education-and-training-bill/">http://education.govt.nz/our-work/information-releases/issue-specific-releases/education-and-training-bill/</a>



**Appendix B - Copies of advice MOE received from others on changing legislation, rules and guidelines option.**

<b>Summaries of meetings we had with stakeholders when developing the proposal</b>			
<b>No.</b>	<b>Date</b>	<b>Document</b>	<b>Decision on release</b>
1.	18 June 2019	Meeting with the DPO Coalition on Physical Restraint Options	Release in full.
2.	19 June 2019	Meeting with the Human Rights Commission on Physical Restraint Options	Release in full.
3.	11 July 2019	Education for all	Release in part. Some information withhold under 9(2)(a) of the Act.
4.		IHC meeting summary	Release in full
5.	20 August 2019	Physical restraint – meeting with the Office of the Children’s Commissioner	Release in full.
<b>Feedback we received from other agencies on the proposal</b>			
<b>No.</b>	<b>Date</b>	<b>Document</b>	<b>Decision on release</b>
6.	3 October 2019	Email: From Warren to Claire and Sophie FW: Draft Cabinet Paper - Education and Training Bill - tranche 5 of policy approvals	Release in part. Some information withheld under section 9(2)(a) of the Act.
6A.	Attachment: Education and Training Bill - tranche 5 of policy approvals		Refused under Section 18(d) of the Act as this is publically available online on the Ministry of Education website at the following link:  <a href="http://www.education.govt.nz/assets/Uploads/R-5-Fifth-Tranch.v2-Redacted.pdf">http://www.education.govt.nz/assets/Uploads/R-5-Fifth-Tranch.v2-Redacted.pdf</a>
7.		Email: from Sophie to Warren RE: Te Puni Kōkiri feedback on Education and Training Bill - fifth tranche of policy	Release in part. Some information withheld under section 9(2)(a) of the Act.

**Appendix B - Copies of advice MOE received from others on changing legislation, rules and guidelines option.**

8.	8 October 2019	Email: From Sophie to Ben  FW: Draft Cabinet Paper - Education and Training Bill - tranche 5 of policy approvals	Release in part. Some information withheld under section 9(2)(a) of the Act.
9.	9 October 2019	Email: from Rawinia to Clare  RE: Draft Cabinet Paper - Education and Training Bill - tranche 5 of policy approvals	Release in part. Some information withheld under sections 9(2)(a) and 9(2)(f)(iv) of the Act.

**Briefings from the Teaching Council**

No.	Date	Document	Decision on release
10.	17 May 2019	Briefing note: Update on work to provide clarity about physical restraint in schools	Release in full
11.	3 July 2019	Briefing note:  Feedback from the teaching profession on options to provide clarity about the use of physical restraint in educational settings	Release in full

**Ministry Education Weekly Update**

No.	Date	Document	Decision on release
12.	15 August 2019	Education Weekly update	Release in part. Some information has been removed as it is out of scope.

## Appendix B Doc 1

### Meeting with the DPO Coalition on Physical Restraint Options

On Wednesday 18 June, Ministry officials (Ben O'Meara, Erin Gough, Clare Old, David Wales) and representatives from the Teaching Council (Angela Yeoman, Julia Cook-Weir, Erin Fitzherbert) met with DPO Coalition representatives (from Balance, Deaf Aotearoa, DPA, Blind Citizens NZ) about their thoughts on options for clarifying the physical restraint framework. Brian Coffey and Catherine Brennan from the ODI were also present.

#### Summary

Overall feedback was that making changes to legislation isn't how you fix this. Rather, the guidelines should address confusion and adequate training/resourcing should be available to support teachers and staff in classrooms to deal with challenging behaviours.

#### Notes

Ben began by giving the background to the framework and recent work that the Ministry and TC have been doing together on options in light of ongoing concerns from sector groups. He said that the Ministry are interested in DPO's views on this in the context of what DPOs have heard about restraint in schools.

Representatives shared experiences they have heard about:

- Restraint is still being used as a first port of call rather than a last resort (so, inappropriately), incident reports aren't being filled in, and parents are still being asked to sign consent forms for physical restraint.
- Families have been separated as a result of having to move schools to avoid restraint;
- There are students who are barred from school because of restraint.

Representatives also noted that people did not necessarily make complaints to the TC or Ministry as it is too difficult to be heard and/or they are not aware of the mechanisms to do so.

In response to being asked whether we should consider putting more in legislation about physical contact, a representative from Deaf Aotearoa made the point that physical contact is an important part of Deaf culture so banning contact wouldn't work for this community.

There was some discussion of concerns about the message asking schools to sign consents to restrain send – that they expect to have to restrain; an attitudinal issue that still requires shift.

Representatives considered this may also be partly a training issue, including for some teacher aides, but they noted that younger teachers do not seem to have this attitude, so how to shift the attitudes of older teachers needs to be considered.

In terms of the current framework, DPO representatives considered that the legislation provided an important signal that physical restraint is a last resort, and that if staff followed behaviour plans, restraint wouldn't need to be used.

There was some discussion about a large proportion of restraint is done by Teacher Aides, and questions around how this is dealt with. It was explained that the Teaching

Council only has jurisdiction over registered teachers, and that it is up to school boards to authorise staff members to restrain, which may include people in non-teaching roles.

One representative queried if it would be possible to only authorise staff members who had undergone training. David Wales advised that given the 'serious and imminent' nature of situations where restraint is authorised, this may not be possible.

There was then some discussion of 139A of the Act (prohibition on use of force for purposes of correction or punishment) and whether representatives thought that having this in legislation was enough and restraint could be dealt with through the Code. Representatives responded that they thought the intent of the sections were different, so there needed to be both. They saw 139A as focused on force for the purposes of punishment or correction after the fact, whereas the restraint provisions are focused on preventing harm.

The Teaching Council raised the idea of putting the restraint framework into secondary legislation, to allow for nuances to be considered etc. DPO representatives again emphasised that rather than changing the legal framework, or putting it into secondary legislation, the focus should be on training – both in ITE and PD - and investing in resourcing. They considered that nuances could be included in the Guidelines. They also made the point that putting the framework into secondary legislation (like the Code) relies on it being reported – which doesn't always happen.

They also suggested that there should be more briefings between the school and parents when challenging behaviour first presents, as well as debriefings after incidents of restraint, to set expectations from the start.

Brian Coffey suggested that the focus could be on promoting safe practice, preventing poor practice, preventing the use of seclusion and using this as a base to decide what needs to stay in legislation, centred around wellbeing.

DPO representatives agreed that building towards this wellbeing framing would be useful for both disabled and non-disabled children, while also ensuring it is clear that there are some behaviours that won't be tolerated.

## Appendix B Doc 2

### Meeting with the Human Rights Commission on Physical Restraint Options

On Wednesday 19 June 2019, Ministry officials (Ben O'Meara, Erin Gough, Clare Old, David Wales) and Julia Cook-Weir from the Teaching Council, met with members of the Human Rights Commission's legal team and one of the Disability Rights Commissioner's advisors, to discuss their thoughts on options for clarifying the physical restraint framework.

#### Summary

Overall, HRC were comfortable with the present wording in the legislation and associated guidance. They saw the challenge as communicating what it means to the profession in a way that is clear, coupled with more training provided centred on promoting wellbeing and good behaviour management practices. Similar to previous meetings, they emphasised that the use of restraint is a symptom of broader systemic issues that need to be addressed in a holistic way.

#### Notes

Ben began by giving the background to the framework and recent work that the Ministry and TC have been doing together on options in light of ongoing concerns from teachers that it has had a chilling effect on teachers having physical contact with children. He asked whether the Commission had heard much about this.

Janet Anderson-Bidios (HRC Chief Legal Advisor) responded that it hasn't had much of a profile within the legal team but that she can check if the Commission has received any enquiries and complaints about it. Ben noted that this would be helpful.

Heather Lear (Disability Rights Advisor) said she had heard a few concerns about teachers being reluctant to have contact with children, both from teachers directly and through her involvement in the Education For All cross-agency group. She also noted that some schools have interpreted the reporting regime as meaning that they have to report all incidents of contact. She noted that she worked for IHC when the law was coming in, and they always argued restraint is a symptom of a systemic issue and capability needs to be built within the system first.

Janet noted that from her perspective, the legislation and guidelines do seem to provide a fair degree of clarity and that it is important to look at whether it is more of a capability/resourcing issue rather than a legal one. She questioned whether having both the Guidelines and the Code could be adding to the confusion.

Julia responded that the Code has landed well with teachers, but from the Teaching Council's perspective, there is conflict between the legislation and the Code in that the Code requires teachers to take wellbeing into account generally whereas the legislation focuses on preventing harm to the child being restrained.

Janet responded that "any other person" is mentioned in the provision, but the challenge is how to translate this in a way that teachers understand. Janet also noted that she wouldn't perceive the physical contact teachers are worried about as coming within the definition of restraint, and that the physical restraint provisions appear to provide more protection than the defences in the Crimes Act, but there is clearly a need to communicate this better.

She noted that there were similar concerns when the ban on corporal punishment came into effect and wondered if there was a similar 'bedding in' period here where the focus should be on strengthening the guidance before considering changes to the legislative framework.

She considered a possible change, if any, would be to leave s. 139AC as it is, and just add a sentence to the definition of restraint that made it clear that restraint does not include appropriate physical contact.

In regards to the "serious and imminent" threshold in s.139AC, she noted that the "imminent" element in the Privacy Act had been removed recently which could be something to look into. Julia noted that requiring "imminence" was appropriate in this context from the Council's point of view.

John Hancock (HRC Legal Advisor) considered that a focus on holistic wellbeing is important and that it is encouraging that the Code provides this context to teachers within schools. He also noted that promoting good behaviour management practices mitigates against the risk of restraint being used unnecessarily, and considered that there is a place for more training in initial teacher education and professional learning and development to enable this shift. He suggested that the wider changes to Part 1 of the Act in terms of strengthening the right to education should be aligned with the restraint framework.

There was also some discussion about how reporting has been useful in giving the Ministry oversight and support to be offered to schools. Heather asked whether the Ministry holds data on students being restrained who are receiving a learning support service. David Wales responded that the Ministry does not currently collect such information, but acknowledged that we need to think about further information we can gather and how to streamline reporting processes.

NB. It should be noted that staff from the Human Rights Commission involved in this meeting were providing their thoughts and feedback on the Ministry of Education's options to clarify the legal framework regarding the use of physical restraint in schools. The discussion had with the Ministry of Education staff was undertaken on the understanding that it was a free and frank discussion and that views and comments by Commission staff did not constitute legal advice.

# education for all

Contact

Bernadette Macartney

s 9(2)(a) OIA

July 11, 2019

Kia ora Erin

Please find below *Education For All's* feedback on current discussions between the Ministry of Education and the Teachers' Council regarding the legislative framework around restraint in schools. While EFA have not had sufficient time to formulate an official response to the discussion the MOE and Teachers' Council are having regarding restraint, we have had a robust discussion among our members and would like to share that feedback with the MOE and have it considered within the discussion. Please keep us informed about and involved with on-going discussion and work on this issue. Also attached are EFA's Priorities for Action (2018).

## EFA Member Feedback

s 9(2)(a) OIA

This feedback was part of an email discussion amongst EFA members and was collated and prepared by [REDACTED], on behalf of EFA.

Overall, our members felt that:

- The wellbeing of children must remain central to the legislation, Guidelines and Code.
- A child's rights focus must remain paramount in any discussion on restraint
- That there should be a focus on de-escalation and whole school culture for schools rather than readily using restraint
- That 'harmful' restraint must remain illegal and not used for a wider set of behaviours or to modify behaviour
- That there needs to be a Code of Professional Responsibility for Teacher aides as well as a Code of Professional Responsibility for Teachers
- That the Guidelines are good and that because schools must by law read the Guidelines in conjunction with the law, the difference between 'harmful' and 'good' restraint is explicit.
- That teachers and school staff might need more training and that there is no evidence that teachers are being unreasonably censured for incorrect types of restraint

- Several of our members are very keen to ensure that the wellbeing of disabled and neurodiverse children are considered with any revisions to the law, the Guidelines on restraint or the Code of Responsibility for Teachers. It is particularly important for policy makers to retain insight into the traumatic nature of harmful types of restraint for disabled and neurodiverse children.
- Several of our members are concerned that in focussing on restraint, the real issue of de-escalation and the identification of triggers is overlooked. Further, members are concerned that there has been insufficient training and awareness given to the teachers and staff. Observations included:
  - 'I think rather than focusing on the whole restraint idea, we need to get people to focus on child well-being. With that as a primary focus restraint should rarely ever be necessary because one would look at events that might trigger a student and employ better methods to avoid restraint being necessary.'
  - 'Should we not be focussing on de-escalation for teachers and teacher aides?'
  - 'Up until now there has not been a strong focus on the rights of the child to Reasonable Accommodation (UNCRC, 2007)  
To be in an environment that responds to his needs and interests  
To be protected  
To be seen and valued as a child and as a child who communicates thru behaviour  
To be understood  
To not be demonised'
  - 'So for all the hyper vigilant schools out there are schools still turning to physically abusive techniques with no interest in learning about behaviour and ignoring guidelines altogether.'
  - '[T]he the ministry has failed us in following up with whole school culture changes and support for individual teachers and teacher aides.'
  - 'It is application of theory to practice that is causing the challenge'
  - 'MAPA training that has been mentioned is not readily available. Even the initial low-level training around the guidelines has waiting lists or is not available to many schools.'
  - 'If we have good training, good policies promoting child well-being, good supports for students and their families I don't think we would be talking about restraint. Tinkering with legislation seems a cop out to avoid dealing (at a govt funding level) with the very real issues ths need addressing.'
  - 'I think good mentoring - real time - and looking at environmental factors and actual helpful behavioural psych would be more helpful for the teachers' council to be looking



at'

- 'The modern learning environments (as open learning environments) without supported teacher development, quiet spaces or adequate resourcing, has increased issues. This was seen in the 70s and 80s with open plan classrooms of increased use of restraints, exclusion and the sociology of mass hysteria around teachers not being allowed to touch children'
- 'It is reasonable that triggers need to be identified and a proactive social skills programme should be in place. Three staff only involved with the young person and family. Everyone informed including peers and letter – we are working on social skills development. The degree of vulnerability of the young person and their family are acknowledge[d], triggers and steps to avoid 'meltdown' or agreed language. Parent comes to school – the child does not need to leave the school. The goal is future capability.'
- Some members felt that using 'harmful' restraint for more types of behaviour, including verbal abuse, is unwise as the interpretation of behaviour is highly subjective and disabled children largely remain misunderstood in the system. Further, they agreed that harmful restraint is not helpful in modifying behaviour but rather represents power relations between adults and children.
  - 'This is very different from using restraint as a response to a "behavioural incident" or "meltdown" (the quotation marks are because these can be very subjective categories as people have acknowledged). The aim is de-escalation there. Restraint is not likely to help with that plus it can be very dangerous/disempowering. It would have to be a very serious situation indeed before restraint was needed/justified. I think the key is letting schools know the difference. '
  - 'Further, please consider that from the child's view such behaviour on the part of adults -restraint- may serve to break trust and end up backfiring in terms of modifying behaviour anyway. I think the risk of restraint outweighs the benefit.'
  - 'to the non-disabled eye, many offences seem to be unforgivable offences immediately labelled 'inappropriate' and 'dangerous' entirely buying into pervasive and immovable 'able' standards and we need to change that mindset if we're really going to break the barriers in mainstream education and empower teachers and non-disabled with skills. And if we're going to stop focusing on in-child deficit. Why just continue in the same way?'
  - 'Restraint is from psychiatry as you all know. This places the individual as subservient, and where difference is deviant. There is a wealth of literature on this. (Foucault - power of institutions, power relations etc). For children and young people this approach of deficit as deviant is more pronounced if there is intellectual disability or ASD, under framework of psychiatric / mental health, any view of 'challenging' behaviour – the stigma of 'othering'. Restraint is based on power and inadequacy of capability of person being restrained - this is the power of institutions and in this case the institution of the school. This is seldom applied without process

to adults.'

- 'All behaviour has meaning – the adult behaviour is sending a message of who and what is valued.'
- Several of our members believe that while the law and Guidelines are good for both teachers and teacher aides and others working with children, the Code is insufficient in that it is applicable only to teachers and not teacher aides. A Code of Responsibility could be devised for Teacher aides and overseen by the Teachers Council to rectify this. Further, training to teacher aides should be offered, with some members observations that:
  - 'Did you know data (incident reports) shows 40% of cases of restraint is by those who are not registered teachers (so people like Teacher Aides). This highlights a huge need around training.'
  - 'TAs are also highly represented in restraint incidents as they are one of the groups most likely to be working with children that may be restrained.'
  - 'My concern is how will the teachers' council be able to impact teacher aides, if at all. 40% of those using restraint won't be covered by their work unless huge changes are made for TAs to come under the Code or get their own Code and undergo some sort of training.'
  - 'The guidelines include all authorised staff who may use restraint. This includes TAs. The Teachers Council, however, have no jurisdiction over TAs. the responsibility to act is on the employing school.'
  - '[The] Teaching Council Code of Practice is only applicable and limited to teachers, and for genuine inclusion wellbeing and shift in attitudes to genuinely understand issues related to restraint we need everyone onboard not just teachers. I believe in general we need to start widening the range of professionals we have discussions with to get better understanding of inclusion, and make sure everything isn't targeted at teachers alone but rather start expecting more from management, governance and other agencies so they are held responsible for inclusion too.'
- Several of our members believe that the law and Guidelines are adequate as they stand, that by law they must be read in conjunction with each other and that the Guidelines make clear the distinction between 'good' restraint and 'harmful' restraint. For instance, holding a child's hand and leading them away from danger is in theory restraint, under the law, but the Guidelines specify that this sort of restraint is acceptable.

Some members noted that young children or those who do not communicate via spoken language do require more guiding than other children and that this was an acceptable form of restraint, as indicated in the Guidelines under the section 'Acceptable Physical Contact':

- 'Technically young children need restraining very regularly (under the definition in the Act of using force to prevent movement). You need to stop them running on the

road, hitting children, hitting animals, sticking fingers in plug sockets etc...'

- 'The reported restraint incidents need a lot more understanding than they currently get. There is higher reporting in early primary schools because that is where a lot of children are still learning social skills. Another factor at that age is they are in the first stages of learning support that will help them be successful at school.'
- 'By this I mean that technically holding a child's hand and leading them away from danger is in theory restraint yet this could be acceptable in terms of gentle guidance and redirection.'
- 'There can be a lot of physical contact required with folks who do not communicate using spoken language. It can be a key part of the way you interact and communicate with people with higher support needs (not everyone, of course, because some people do not like physical contact).'
- 'I reckon that guide is pretty good. If anything, the section on Acceptable Physical Contact needs to be made more predominate / come sooner.'

One member felt that the Guidelines did not offer explicit advice on whether a teacher can guide a child away when they are being verbally abusive.

- Some members felt that changing the law and the Guidelines was a backwards step for disabled children, who are by turn the most affected by restraint and the least understood children in the system:
  - 'Parents and disability advocates would regard removal of legislation as a betrayal and as leaving their children vulnerable.'
  - 'So I don't think the law should be changed - it does cater for sparing use of restraint'
  - 'If a school feels threatened by the law then I would say that they have some serious issues regarding their understanding of behaviour. If a school starts suspending students then again, I think that reflects issues with the school and it should be followed up.'
  - 'Teachers Council want "less legislation" and I personally do not agree with that. Way more thinking and some new strategies are required.'
- One member pointed out that there is no evidence that teachers are getting censured for holding a child's hand and that there are several layers of bureaucracy protecting the teacher before a teacher became censured for this type of 'restraint':
  - 'Even if a parent tried to report a teacher for holding hands with a student the first step is to report it to the board. Failing that they would report to teachers' council who triage the matter. Unlikely that holding a hand would be classed as misconduct and taken any further. The police will not further investigate holding hands and will

refer the matter back to the school.'

- 'Yes teachers will make mistakes- but I see no reason why the procedures cannot be followed in a non-vindictive and sensible way looking at patterns of teacher behaviour and teaching style and attitude.'
- All the commenting members agreed that excessive and harmful restraints need to be eliminated. Further, several members felt that other types of restraint are not included in the legislation or the Guidelines, including mechanical and medical restraint, and that they should be restricted too:
  - 'The issue for me is restraint that is excessive, undignified (I think maintaining the dignity of the person is important here), putative (restraint should never be a punishment or done in anger) or dangerous.'
  - 'Sorry just to add, the standards for disability services on restraint, set rules for physical restraint alongside rules on mechanical restraint (using equipment to restrain). They also ban chemical restraint (using medication just to sedate). The current wording of the Education Act could be read to only restrict physical restraint from staff, not mechanical restraint (it only talks about physical force). This is dangerous.'
  - 'There is a real danger that the current focus on just physical restraint causes schools to switch to using more mechanical restraint. Mechanical restraint definitely needs to be explicitly covered too.'
  - 'I do agree re mechanical and medical restraint - I have seen both in action I in special school - also my son was advised to go on Ritalin by special school - a young man ieag is supporting was advised to go on psych medication or he couldn't stay in the unit - in both cases the medication was unnecessary and in fact my son had seizures'
- Several members made the observation that while they understood teachers concerns, the rights of the child must also remain central to the discussion:
  - 'I believe we need an approach which gives clarity for teachers and also makes clear childrens rights wellbeing and interests and how those things are developed in schools.'
  - 'I get teachers concerns but I want to see positive ways forward.'
  - 'The discussion generated in our emails show how much interpretation is still needed for what could be high stakes decisions for educators who do not have the luxury of time when deciding what is and is not appropriate. '

- 'acknowledgement that adult interests were driving developments in this space. I believe we need an approach which gives clarity for teachers and also makes clear children's rights wellbeing and interests and how those things are developed in schools. Yes capacity resourcing and development.'
- 'the concerns raised by teachers seem to reflect less that they are worried about being censured and more about validating restraint for 'inappropriate' behaviour.'
- Some members made the observation that if the Guidelines were to be updated then drawing from other professions might be helpful:
  - 'Children's rights and human development framework are paramount and drawing from other avenues of professional practice are essential.'
  - 'I have just shared on Facebook guidelines from UK which I suggest have a great children's rights focus. '
  - 'TC is looking at other professions that have guidelines and descriptions that may work better.'
- One member made the suggestion that a 'duty of care' approach should be adopted in schools with regards to the use of restraint:
  - 'I recommend the school adopt a Duty of Care approach as used in parts of Australia. A moral and legal obligation of workplace / premises to ensure the safety and wellbeing of others
    - The school has a moral obligation to ensure [the] wellbeing of its pupils as a workplace and as an education provider - the school environment
    - Legal or mandatory obligations: What are the school and staff doing to ensure this duty of care for the children on their premises / school site / workplace?
    - Legal or mandatory obligations: What training, approaches, policies are available to show what is in place
    - What process has been followed to identify the preceding events on several occasions and professional advice sought
    - Legal or mandatory obligations: What are the measures of the Duty of Care, Is the school doing everything in order to achieve the best social skills and personal development for all students, what are these measures for all (same rules apply)'
    - 'The young people are taught phrases– Do not touch me, ring mum. I am going to sit and think etc (this is a life strategy) Child centred autonomy
    - A space/ place is made for this – timeout, quiet time. Or bounce ball, hoops, run field – whatever is agreed, and peers may be involved etc
    - Emotional vocab and visual aides – self regulation
    - Other students then also learn strategies and use these

- If there is change/stress/a relief teacher – the peers provide support- this has worked successfully for example twice in a secondary school incident with student with ASD throwing furniture and one with scissors - the peers put the intervention approach into action. The students with ASD were not excluded – the adult approaches were reviewed’
- Special rules can exist for the establishment of duty of care however I think it is better as a broader approach, it is a positive, proactive approach for adults to take responsibility for their workplace practice.’

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## Appendix B Doc 4

### IHC meeting summary

Ministry officials (Ben O'Meara, Erin Gough, Clare Old, Mary Pupich, and Olga Berezovsky) and Kathy Moy-Low (Lead Investigator at the Teaching Council), met with Trish Grant, Director of Advocacy at IHC, to discuss her thoughts on options for making changes to the physical restraint framework.

Ben began by explaining the context – that since the physical restraint regime came into force in 2017, the TC have been fielding concerns from teachers who are worried about restraining students or even having physical contact, even when this may be appropriate, because they are concerned they will be censured or charged with assault. This is despite the intent of the provision to be an authorising one – there seems to have been an unintended 'chilling effect'. So in light of this, we are informally testing some options the TC has tabled on how we could change the framework.

Trish was interested in understanding the number of such concerns and the information collected on restraint (including how the patterned differed in special schools), as well as how the physical restraint guidance is used. Trish noted she saw the guidelines as a small part within the wider context of things schools were doing to ensure the health and wellbeing of students.

The Ministry gave a brief outline of the reporting data – including the spread across schools, and explained restraint is used in some special schools more than others. It was noted that reporting is useful in that it is a way for the Ministry to have oversight of what is happening in schools, including a way to identify which schools may need support. It was also noted, however, that we know restraint is somewhat underreported – because schools aren't sure what to report and also potentially because it is a manual process still.

In terms of the options, Ben characterised them as either putting more into legislation or less, and asked for Trish's thoughts on that based on what IHC is hearing about restraint.

Trish pointed to IHC's original submission where they cautioned putting restraint into legislation, especially without the inclusive education settings. She noted that schools need to be supported more to respond more holistically to needs before resorting to restraint. She noted that avenues of enforcement and review (including through TC complaints) are too slow, leaving parents/families feeling frustrated that they can't get a timely response. So it's about ensuring dispute resolution processes are adequate.

Trish was interested in where this 'chilling effect' has come from. Kathy, drawing on her experience as a principal, said she saw a shift from staff when legislation came in of teachers suddenly standing back and being scared that they would do the wrong thing; also thought that having forms to fill out would add to this perception, as well as the wider context of what was happening in education at the time. The Ministry talked briefly about the physical restraint advisory group and said that it has been an issue that has come up repeatedly there too.

Ultimately, it's not what is written into legislation that matters for IHC – it's teachers/schools knowing what to do, and schools being appropriately resourced, and if something goes wrong, how to make sure it doesn't happen again, coupled with a robust reporting process so we know how much it is happening.

For Trish, there wasn't an option that covers off children's rights while also providing support for professionals involved. She mentioned being worried that giving teachers

further authorisation in legislation doesn't build the good practice that we want as just because it is in legislation doesn't mean it will flow through in practice. She noted therefore that, while providing clarity to teachers is important, it shouldn't supersede teachers' ethical obligations. On this point, it was noted that the Code can be useful in changing teachers' practice, and in some ways, the restraint framework has made teachers reflect and change their practice for the better too.

Kathy from the TC mentioned that the policy arm of the Council has been doing some work on the relevant pieces of legislation and considers restraint is covered by the Crimes Act, Children's Act etc. Clare asked she send this information when it's ready.

Trish mentioned that another recommendation IHC has made – as outlined in recent submissions it has made in Ministry consultation processes – is that all education agencies should collate complaints and the subsequent responses annually, so there can be a more joined up approach.

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## Appendix B Doc 5

### Physical restraint – meeting with the Office of the Children’s Commissioner 20 August 2019

Present: Clare Old, Ben O’Meara, Erin Gough, Olga Berezovsky, Pauline Barnes, Julia McCook Weir, Ellie (Teaching Council Policy Team), Kathleen Logan (OCC)

- The meeting focused on testing options for changes to the physical restraint framework with the Office of the Children’s Commissioner, to ensure we get a children’s rights perspective alongside the perspectives of the teaching profession and the disability sector.
- The OCC pointed to their original submission on the SOP in which they were supportive of the framework and guidelines.
- Their position is still that having it in legislation is protective and that repealing it would send a bad signal particularly as there is a power imbalance between students and teachers. At the same time, they recognise that teachers need to be reassured about what actions they can take through guidelines and training.
- They consider that the current guidelines uphold the rights of children, and that having scenarios in the guidelines would be helpful.
- There was a discussion about the threshold and in particular, the proposal to remove the word “serious”. OCC considered the motivation of the teacher applying the force to be an important factor – if it is to protect the child and is proportionate, it seems justifiable. This is also one of the reasons to have a reporting regime – so teachers can explain why they used force.
- OCC considered option 3 to be preferable over the other two regulatory options, but emphasised that in their view, the non-regulatory options focused on training and practice examples are also very important.

Other points of discussion:

- The Teaching Council said that they agree that the framework should remain in legislation, but the ‘what’ in legislation needs to be changed to be more focused on harm and physical force to reflect the reality that teachers need to balance how to protect all children. They explained that this context informed option 3.
- There was a discussion about the concept of “imminent harm” under this option, which the Council considers needs to be broader than just physical harm (e.g. taking the hand of a kid who is about to pull another kid’s hair, or leading a kid repeatedly bullying another kid away). It was emphasised that the force used should be reasonable and proportionate and a last resort.
- There was a brief discussion about the need to have another conversation outside of the regulatory environment focused on proactively changing the behaviour/culture of some schools which do not have inclusive practices and are not reporting restraint incidents. This should bring in the perspectives of relevant agencies e.g. ERO.

Charmaine McAra

---

**From:** Warren George  
**Sent:** Thursday, 3 October 2019 9:04 AM  
**To:** Clare Old; Sophie Smith  
**Subject:** FW: Draft Cabinet Paper - Education and Training Bill - tranche 5 of policy approvals  
**Attachments:** 1204420 (updated) Cabinet paper - Education and Training Bill fifth tranche of policy approvals 021019.docx  
**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

Hi Clare and Sophie, please see MSD's comments on Cab paper 5 on restraint. I have attached the latest version of the paper is you wish to consider any changes to your section.

Regards  
W

s 9(2)(a) OIA

Warren George | Senior Policy Analyst | Governance, Legislation and Accountability  
DDI +6444638504 | Mobile [REDACTED]

---

**From:** Warren George  
**Sent:** Thursday, 3 October 2019 8:59 a.m.  
**To:** [REDACTED]  
**Cc:** Lachlan Cartwright [REDACTED]  
**Subject:** RE: Draft Cabinet Paper - Education and Training Bill - tranche 5 of policy approvals

s 9(2)(a) OIA

Mōrena [REDACTED]. Thanks very much for your comments on the paper. I will ask the relevant analysts here to see how we can address your comments.

Kind regards  
W

s 9(2)(a) OIA

Warren George | Senior Policy Analyst | Governance, Legislation and Accountability  
DDI +6444638504 | Mobile [REDACTED]

s 9(2)(a) OIA

---

**From:** [REDACTED]  
**Sent:** Wednesday, 2 October 2019 4:07 p.m.  
**To:** Warren George <Warren.George@education.govt.nz>  
**Cc:** Lachlan Cartwright <[REDACTED]>  
**Subject:** RE: Draft Cabinet Paper - Education and Training Bill - tranche 5 of policy approvals

s 9(2)(a) OIA

Kia ora Warren,

Thanks for providing the opportunity for us to comment on the Cabinet Paper. We support the proposals overall, and have some suggestions to improve understanding.

**Alternative wording suggestions:**

- We support replacing the terms "physically restrain" and "physical restraint", but don't believe "physical force" is the correct substitute. The term "force" is generally used when adding something rather than removing it, so "physical force" could evoke imagery of pushing a child. We suggest using a term such as

“physical restriction”/“physical intervention” and “physically restrict”/“physically intervene”. This correctly conveys the intention behind the behaviour, i.e. removing a child from a hazard to prevent harm, rather than causing the child harm.

**General suggestions for completeness:**

- There are no listed implications for disabled children and young people. Disabled children and young people with high and complex needs are more likely to require physical intervention from teachers. For instance:
  - Disabled children and young people who have limited understanding about dangers, correct classroom etiquette, etc
  - children and young people who are physically disabled may need assistance to move out of harm’s way quickly
  - Children who are deaf or hearing impaired may not notice what is happening around them.
- In the recommendations section, it’s outlined that in addition to concerns about how and when teachers can use physical restraint, the education sector has also been concerned about when and how to report incidents of physical restraint. There is nothing in this Cabinet Paper to address that concern. Given this, we suggest creating a small section on improving or clarifying instructions for reporting incidences.
- We suggest adding the information above (about what has been said by the education sector) to the *Background* section of the Cabinet Paper, to give an explanation for what has sparked the proposed changes.
- Also, the background section gives information of the status of the first, second, and third tranches of policy proposals, but not the fourth tranche. This could be included too, for completeness. It could also be good to have a very high level description of the areas of change proposed in those tranches too.
- A definition has been included for “imminent harm” but not for “physical force” in the recommendations section. Would this fit better under *Proposed changes to the physical restraint framework*? Also, a definition for (whichever variation of) “physical force” could be included too, so that it’s clear what is and isn’t okay from teachers.

Happy to chat about any of these suggestions if you have any questions or comments.

Kind regards,

[Redacted]

[Redacted] Policy Analyst | Disability, Children and Youth  
Community and Families Policy | Ministry of Social Development  
[Redacted] The Aurora Centre, level 9 | 56 The Terrace



**MINISTRY OF SOCIAL  
DEVELOPMENT**  
TE MANATŪ WHAKAHIA TO ORA

s 9(2)(a) OIA

**From:** Warren George <Warren.George@education.govt.nz>

**Sent:** Tuesday, 1 October 2019 4:24 PM

**To:** [Redacted] Linda Cameron [Redacted]  
[Redacted] Claire Turner [Redacted] Hurd, Chris'  
[Redacted] Ralph Johnson  
[Redacted] Brian Coffey

Jess Price <[Redacted]>; Juanita Rapana [Redacted]; Tama Braithwaite-Westoby [Redacted]

>; Rawinia Thompson <[Redacted]>

Julia Bergman [Redacted]

Shan [Redacted]

Pather [Redacted]

Elizabeth Templeton [Redacted]

Johnny Tramoundanas-Can [Redacted]

TEC - Tim Fowler [Redacted]

Cc: Rachel Voller <Rachel.Voller@education.govt.nz>; Cindy O'Brien <Cindy.O'Brien@education.govt.nz>; Jo Jansen-Thomson <Jo.Jansen-Thomson@education.govt.nz>

**Subject:** Draft Cabinet Paper - Education and Training Bill - tranche 5 of policy approvals

Please see attached a draft paper for your feedback please by **COB Monday 7 October 2019**. Apologies for the rapid turnaround. The paper will be lodged on 10 October and is due to be considered by SWC on 16 October.

If you have any queries, please feel free to contact me.

Thanks in advance  
Warren

s 9(2)(a) OIA

**Warren George** | Senior Policy Analyst | Governance, Legislation and Accountability  
DDI +6444638504 | Mobile [REDACTED]  
33 Bowen Street, Wellington

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*He mea tārai e mātou te mātauranga kia rangatira ai, kia mana taurite ai ōna huanga*



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## Appendix B Doc 7

**Charmaine McAra**

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**From:** Sophie Smith  
**Sent:** Tuesday, 8 October 2019 10:16 AM  
**To:** Warren George  
**Subject:** RE: Te Puni Kōkiri feedback on Education and Training Bill - fifth tranche of policy approvals draft Cabinet paper.

Physical restraint comments in blue

**Sophie Smith** | Policy Analyst | Wellbeing and Learning Support  
DDI +6444637760

---

**From:** Kirsty Macdonald  
**Sent:** Tuesday, 8 October 2019 10:00 a.m.  
**To:** Warren George <Warren.George@education.govt.nz>; Siobhan Murray <Siobhan.Murray@education.govt.nz>; Sophie Smith <Sophie.Smith@education.govt.nz>  
**Cc:** Rachel Voller <Rachel.Voller@education.govt.nz>  
**Subject:** RE: Te Puni Kōkiri feedback on Education and Training Bill - fifth tranche of policy approvals draft Cabinet paper.

Hi Warren

Notes on the TPK comments below in red....

Cheers  
Kirsty

**Kirsty Macdonald** | Senior Policy Analyst | ECE Policy  
DDI +6444638760

---

**From:** Warren George  
**Sent:** Tuesday, 8 October 2019 9:25 a.m.  
**To:** Siobhan Murray <Siobhan.Murray@education.govt.nz>; Kirsty Macdonald <Kirsty.Macdonald@education.govt.nz>; Sophie Smith <Sophie.Smith@education.govt.nz>  
**Cc:** Rachel Voller <Rachel.Voller@education.govt.nz>  
**Subject:** FW: Te Puni Kōkiri feedback on Education and Training Bill - fifth tranche of policy approvals draft Cabinet paper.

Please see TPK's comments particularly in relation to ECE licensing and restraint. Could I please have any comments by 12.00 at the latest. Thanks.

Regards  
W

**Warren George** | Senior Policy Analyst | Governance, Legislation and Accountability  
DDI +6444638504

---

**From:** Maia Te Koha [REDACTED]  
**Sent:** Monday, 7 October 2019 5:15 p.m.  
**To:** Warren George <Warren.George@education.govt.nz>

Cc: Rachelle Ehler [REDACTED]; Orepa Fiaali [REDACTED]  
**Subject:** Te Puni Kōkiri feedback on Education and Training Bill - fifth tranche of policy approvals draft Cabinet paper.

Kia ora Warren,

Thank you for providing us with an opportunity to feedback and comment on the *Education and Training Bill - fifth tranche of policy approvals* draft paper.

Overall, we agree with the recommendations in this paper and see no major issues. However, we would like to know if whānau, hapū and iwi were consulted on these proposed changes? Particularly the new licensing framework to kōhanga reo.

Just a couple of comments/whakaaro:

Specific comments:

Paragraph 20 and 21. – We would recommend using the Whānau-Centred framework policy as a tool to help navigate working with agencies and Māori (whānau) towards better partnership with Māori and meeting Treaty expectations/ implementing actions.

Paragraph 22 – It would be good to understand how the changes to restraint in schools would affect Māori, is there a disparity here? What is being done to support Māori learners better in this way?

Our data shows that boys are 4.9 times more likely to be physically restrained than girls. It also shows that students who are Māori or who have disabilities and additional learning needs are overrepresented in physical restraint incidents. We are continuing to provide Understanding Behaviour Responding Safely Training to minimise the use of physical restraint in schools. We are also implementing Te Hurihanganui to help build the education workforce's capability to support Māori achieving success in education and developing a work programme to work towards freeing children and young people from racism and discrimination.

Paragraph 47 – Will the proposed changes to the licensing framework for kōhanga reo mean an increase in fees for whānau, as will it increase compliance costs? We would recommend more clarity on the risks to whānau are stated directly in the paper, along with a clear mitigation plan. We are not anticipating any cost impact for parents and whānau so I have made that explicit in the opening sections (new para 40 from the version you sent me)

Additional comments:

Future ECE network planning needs to take into account Māori whānau population demographics, need and future forecasting of population changes for Māori in their rohe. Also, ECE networking that considers where bilingual ECE or kōhanga are, so that children attending can easily transition to Māori medium school for their primary and secondary schooling, as part of their community/neighbourhood. It has always been the plan that these matters would be considered as part of the network capacity view so I have made a couple of minor amendments through the paper to make this more explicit.

We hope that this feedback and recommendations are helpful to you work.

Āku mihi  
Maia Te Koha

Maia Te Koha  
Advisor  
National Office

Tauwaea DDI : [REDACTED] Waea Pūkoro M : [REDACTED]  
Waea Whakaahua F : 0800 875 329

Te Puni Kōkiri, Te Puni Kōkiri House, 143 Lambton Quay, Wellington 6011, New Zealand  
PO Box 3943, Wellington 6140, New Zealand



**Te Puni Kōkiri**

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## Appendix B Document 8

### Charmaine McAra

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**From:** Sophie Smith  
**Sent:** Tuesday, 8 October 2019 4:47 PM  
**To:** Ben O'Meara  
**Subject:** FW: Draft Cabinet Paper - Education and Training Bill - tranche 5 of policy approvals

Kia ora Ben,

Can confirm that OCC is comfortable with sharing feedback with the teaching council.

Ngā mihi,

**Sophie Smith** | Policy Analyst | Wellbeing and Learning Support  
DDI +6444637760

**From:** Kathleen Logan [REDACTED]  
**Sent:** Tuesday, 8 October 2019 4:45 p.m.  
**To:** Sophie Smith <Sophie.Smith@education.govt.nz>; Erin Gough <[REDACTED]>  
**Cc:** Katie Bruce <[REDACTED]>; Holly Walke <[REDACTED]>  
**Subject:** RE: Draft Cabinet Paper - Education and Training Bill - tranche 5 of policy approvals

Thanks for raising that with Sector Enablement and Support – patu mahi 🙏

Yes, we are comfortable sharing this with Teaching Council.

K

**From:** Sophie Smith <Sophie.Smith@education.govt.nz>  
**Sent:** Tuesday, 8 October 2019 4:37 PM  
**To:** Kathleen Logan <[REDACTED]>; Erin Gough <[REDACTED]>  
**Cc:** Katie Bruce <[REDACTED]>; Holly Walker <[REDACTED]>  
**Subject:** RE: Draft Cabinet Paper - Education and Training Bill - tranche 5 of policy approvals

Kia ora Kathleen,

Thanks for all of this feedback. Are you comfortable with us sharing it with the Teaching Council, since we have been working with them on our policy proposals on this?

I agree that it is important to fulfil our UNCROC responsibilities to engage with children and young people about policies that affect them, and this would definitely be one. I am meeting with my colleagues in Sector Enablement and Support about next steps, and will ensure this is raised for the next part of the work (both in terms of the non-regulatory options such as case studies and the Select Committee stage for the proposals).

Ngā mihi,

**Sophie Smith** | Policy Analyst | Wellbeing and Learning Support  
DDI +6444637760

**From:** Kathleen Logan [REDACTED]  
**Sent:** Tuesday, 8 October 2019 4:13 p.m.  
**To:** Sophie Smith <Sophie.Smith@education.govt.nz>; Erin Gough <[REDACTED]>



Cc: Katie Bruce [REDACTED]; Holly Walker [REDACTED]  
**Subject:** RE: Draft Cabinet Paper - Education and Training Bill - tranche 5 of policy approvals

Kia ora Sophie

Thanks for the opportunity to be involved in these definitions. If the wording is going to change to 'force', then we are more supportive of the new definition of 'restrictive force' than 'physical force'.

The term 'physical restraint' holds within it the reason why the movement is being done – to *restrain* a child from doing something or moving somewhere. However the word 'force' does not hold such an explanation within it, and could be read – in the new 'permissive' framing of the legislation, to imply that one may use force on children based on the beliefs of the teacher at the time. The previous wording - limiting *use of physical restraint* to when the criteria are met, is a more clear description of why one would be using it at all.

The important part – the definition given – is aligned to what we were originally considering is appropriate. So our support is conditional on that definition, yes.

We support the proposed definition of imminent harm.

We reiterate that it would be useful for the Ministry to **ask the perspectives of children and young people** who have witnessed or experienced physical force/restraint by a teacher. We believe they can provide useful insights to inform how teachers are trained and the standards to which teachers are held accountable. To that end, OCC is willing to work with MoE and the Teaching Council to advise on best practice child and youth engagement, and how learner voices can inform training resources for teachers.

Thank you for getting back to us, and for your hard work on this.

[REDACTED] Removed as out of scope

Ngā mihi,  
 Dr Kathleen Logan  
 Lead, Education Advocacy Work Programme  
 Senior Advisor, Strategy, Rights & Advice  
 Office of the Children's Commissioner



s 9(2)(a) OIA

s 9(2)(a) OIA

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s 9(2)(a) OIA

**From:** Sophie Smith <[Sophie.Smith@education.govt.nz](mailto:Sophie.Smith@education.govt.nz)>

**Sent:** Tuesday, 8 October 2019 2:47 PM

**To:** Erin Gough [REDACTED]; Kathleen Logan [REDACTED]

**Cc:** Katie Bruce [REDACTED]; Holly Walker [REDACTED]

**Subject:** RE: Draft Cabinet Paper - Education and Training Bill - tranche 5 of policy approvals

s 9(2)(a) OIA

Kia ora koutou,

Thank you for your initial feedback, could I confirm whether you would support, conditionally support or not support the proposed changes to

a.) "Physical restraint" to "physical force"

- a. Would you be more comfortable if the force used was limited to "restrictive force" that was defined similarly to "preventing, restricting or subduing movement" and was "reasonable and proportionate in the circumstances" and force to discipline or punish continued to be prohibited?

b.) "Serious and imminent risk to safety" to "imminent harm"

- a. Includes physical and emotional harm to the student or any other person (thresholds for emotional harm to be determined)
- b. Does not include property (unless the harm to property risked harm to a person)

Ngā mihi,

**Sophie Smith** | Policy Analyst | Wellbeing and Learning Support  
DDI +6444637760

s 9(2)(a) OIA

s 9(2)(a) OIA

s 9(2)(a) OIA

**From:** Erin Gough [REDACTED]  
**Sent:** Tuesday, 8 October 2019 1:36 p.m.  
**To:** Sophie Smith <Sophie.Smith@education.govt.nz>; Kathleen Logan <[REDACTED]>  
**Cc:** Katie Bruce <[REDACTED]>; Holly Walker <[REDACTED]>  
**Subject:** RE: Draft Cabinet Paper - Education and Training Bill - tranche 5 of policy approvals

Kia ora Sophie

Some quick thoughts below.

Overall, as per our previous feedback, we consider that the current definitions and guidelines already allow teachers to use reasonable force. Therefore, rather than changing the language in legislation, we consider that the focus should be on providing teachers with adequate training and ongoing professional development, and on enforcing *Our Code, Our Standards*.

However, should the proposal to change the language from "physical restraint" to "physical force" go ahead, we request the opportunity to have input into the definitions to ensure "physical force" is narrowly defined, as we are concerned it has the potential to be broad. We endorse the point in paragraph 30 about it being necessary to ensure it remains clear that using force for the purposes of correction or punishment is still prohibited and consider this consideration very important.

In terms of the "imminent harm" threshold, we want to ensure that the wording in paragraph 24.3 does not include property and is focused on "imminent harm" to students or any other person, to keep it consistent with wording in current legislation.

The example in paragraph 34 in terms of tripping a student seems extreme; changing it to something like "forcefully pulling" on a child's arm may be better.

In OCC's recently released report, *A Hard Place to be Happy*, which recounted the experiences of children and young people living within care and protection residences, children and young people told us being restrained is hard, and sometimes people are injured. As per page 21:

*We heard about carpet burns, sprained wrists and bruises. We also heard it can be frightening to see other people being restrained. Children and young people told us that, when staff are doing restraints, sometimes things go wrong and injuries can happen.*

*One young person told us they were happy staff aren't allowed to take people to the ground anymore and that there are new restraint techniques. Others said staff still need more training around restraints.*

*"I hate restraints ... they hurt me ... like, they grab the back of my shirt and ergggh! ... They hold me, and it hurts when they squeeze too hard." (Māori girl)*

*"I don't like restraints 'cause some people do it hard. And, like, they don't mean to, but when [staff member] did my restraint, he left a huge bruise on my arm ... He was swearing at me and he told me I couldn't talk." (Māori young woman)*

While these restraint incidents happened within the context of Oranga Tamariki, which is regulated differently to schooling settings, the above passage provides important insights into the harms of restraint from the perspective of children and young people.

We consider that in making these legislative changes, there should be a focus on seeking, and being informed by, the views of both children witnessing restraint and children being restrained. Their voices should also inform the training given to staff. We would be happy to provide advice on best practice in engaging with children and young people.

---

**From:** Sophie Smith <Sophie.Smith@education.govt.nz>

**Sent:** Tuesday, 8 October 2019 10:39 AM

**To:** Kathleen Logan

**Cc:** Erin Gough

**Subject:** FW: Draft Cabinet Paper - Education and Training Bill - tranche 5 of policy approvals

Kia ora Kathleen,

Apologies for the late notice, I only just discovered you were not on the agency consultation list for this Cabinet paper.

We are seeking your feedback on this Cabinet paper, particularly the physical restraint proposals in paras 22-34.

This paper is due to MO at COP today, if you could provide feedback by 1.30pm today, I can get it incorporated for signout. Apologies once again for the very short turn-around.

Erin, I've copied you in as I know you are familiar with the subject matter.

Ngā mihi,

**Sophie Smith** | Policy Analyst | Wellbeing and Learning Support  
DDI +6444637760

---

**From:** Warren George

**Sent:** Tuesday, 1 October 2019 4:24 p.m.

**To:**

<[REDACTED]> Linda Cameron (Treasury) [REDACTED] 'Claire Turner [TSY'

[REDACTED] 'Hurd, Chris' <[REDACTED]> 'Adele Hogan'

[REDACTED] ; 'Brian Coffey'

'Amy Evanson' <[REDACTED]>

[REDACTED] ; 'Jess Price' <[REDACTED]>

[REDACTED] 'Juanita Rapana'

'Tama Braithwaite-Westoby' <[REDACTED]> 'Rawinia Thompson' ; 'FAURE,

Jemma (WELLHO' [REDACTED]

[REDACTED]

[REDACTED] 'Shan Pather'

[REDACTED] 'Elizabeth Templeton' [REDACTED]

'Johnny Tramoundanas-Can'

'TEC - Tim Fowler'

Cc: Rachel Voller <Rachel.Voller@education.govt.nz>; Cindy O'Brien <Cindy.O'Brien@education.govt.nz>; Jo Jansen-Thomson <Jo.Jansen-Thomson@education.govt.nz>

Subject: Draft Cabinet Paper - Education and Training Bill - tranche 5 of policy approvals

Please see attached a draft paper for your feedback please by **COB Monday 7 October 2019**. Apologies for the rapid turnaround. The paper will be lodged on 10 October and is due to be considered by SWC on 16 October.

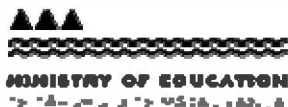
If you have any queries, please feel free to contact me.

Thanks in advance  
Warren

Warren George | Senior Policy Analyst | Governance, Legislation and Accountability  
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Charmaine McAra

**From:** Rawinia Thompson [REDACTED]  
**Sent:** Wednesday, 9 October 2019 9:38 AM  
**To:** Clare Old; Sophie Smith  
**Cc:** Darius Paschke; Phillipa Campbell  
**Subject:** RE: Draft Cabinet Paper - Education and Training Bill - tranche 5 of policy approvals

Kia ora Clare and Sophie

Our initial comments on this paper were only in relation to the proposals on strengthening Te Tiriti in the legislation. We didn't have any substantive comments on the physical restraint proposals at that stage, but our resident expert on physical restraint regulations has provided some comments this morning which should be helpful for you guys.

Please see below, and let us know if you have any further questions.

s 9(2)(f)(iv) OIA

- We recently reviewed our regulatory framework around physical restraint in residential care. This framework deals with physical restraint in high-end, often dangerous situation (eg, preventing or stopping serious incidents).
- We are currently seeking Ministerial decisions for changes to our regulatory framework. [REDACTED]

- [REDACTED]
- [REDACTED] You have highlighted in the Cabinet paper that 'physical restraint' is more used in 'special institutions' – our residences would be an example of these.
- The Education Act seems more focused on less dangerous, more common uses of physical force short of physical restraint, like the example described in the Cabinet paper. These provisions therefore deal with different situations. We consider the changes you have outlined make sense for these different situations. Some suggestions:

- It may be useful to highlight in legislation that the physical force used should be no more than the absolute minimum required. The Cabinet paper states something similar, that the force used should be proportional to the situation.
- We note the proposals may not provide enough clarity for education professionals who may need to intervene in more serious situations (ie, more similar to situations like Oranga Tamariki staff commonly face). In para 26, you highlight 'restrictive physical force' should be used as a last resort, but some more clarity might be needed around what should happen if or when these situations do happen. Our regulatory framework may be useful as a guide here.
- You note physical force should be used as a last resort – but it may be useful to note what should be used in its stead beforehand.

Ngā mihi

Rawinia Thompson

Kaitātari Kaupapa – Policy Analyst  
Level 14, The Aurora Centre, 56 – 66 The Terrace, Wellington | PO Box 546, Wellington 6140  
T: 64 4 918 9305 [REDACTED] E: [REDACTED]

s 9(2)(a) OIA

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**From:** Clare Old [mailto:Clare.Old@education.govt.nz]  
**Sent:** Tuesday, 8 October 2019 5:09 p.m.  
**To:** Michelle Sheriff; Phillipa Campbell; Jacinta Dalgety  
**Cc:** Sophie Smith  
**Subject:** FW: Draft Cabinet Paper - Education and Training Bill - tranche 5 of policy approvals  
**Importance:** High

Hi guys

Just wondering if you'd seen this via Ralph, or where in OT it might have gone? We're really interested in OT's views on the physical restraint changes because from our scan of the various Acts you and Justice are the only other agencies with restraint in primary legislation. I'd be super grateful if you could take a look and provide any thoughts?

We need an updated cab paper for Ministers on Thursday so unfortunately the turnaround is super tight!!

Ngā mihi  
Clare

**Clare Old** | Senior Policy Manager | Wellbeing and Learning Support  
DDI +6444395359 | Mobile [REDACTED]

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**From:** Sophie Smith  
**Sent:** Tuesday, 8 October 2019 5:05 PM  
**To:** Clare Old <Clare.Old@education.govt.nz>  
**Subject:** FW: Draft Cabinet Paper - Education and Training Bill - tranche 5 of policy approvals

**Sophie Smith** | Policy Analyst | Wellbeing and Learning Support  
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**From:** Warren George  
**Sent:** Tuesday, 8 October 2019 10:31 a.m.  
**To:** Sophie Smith <Sophie.Smith@education.govt.nz>  
**Subject:** FW: Draft Cabinet Paper - Education and Training Bill - tranche 5 of policy approvals

**Warren George** | Senior Policy Analyst | Governance, Legislation and Accountability  
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**From:** Warren George  
**Sent:** Tuesday, 1 October 2019 4:24 p.m.

**To:** [REDACTED]  
[REDACTED] Linda Cameron [REDACTED] Claire Turner [TSY'  
[REDACTED] 'Hurd, Chris [REDACTED]  
[REDACTED] Brian Coffey' [REDACTED]  
'Amy Evanson' [REDACTED]  
[REDACTED] 'Jess Price' [REDACTED] Juanita Rapana' [REDACTED]

'Tama Braithwaite-Westoby [REDACTED] Rawinia Thompson [REDACTED] 'FAURE,  
Jemma (WELLHO) [REDACTED]

z'

; 'Shan Pather'

'Elizabeth Templeton'

'Johnny Tramoundanas-Can'

Cc: Rachel Voller <Rachel.Voller@education.govt.nz>; Cindy O'Brien <Cindy.O'Brien@education.govt.nz>; Jo Jansen-Thomson <Jo.Jansen-Thomson@education.govt.nz>

**Subject:** Draft Cabinet Paper - Education and Training Bill - tranche 5 of policy approvals

Please see attached a draft paper for your feedback please by **COB Monday 7 October 2019**. Apologies for the rapid turnaround. The paper will be lodged on 10 October and is due to be considered by SWC on 16 October.

If you have any queries, please feel free to contact me.

Thanks in advance  
Warren

**Warren George** | Senior Policy Analyst | Governance, Legislation and Accountability  
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**MINISTRY OF EDUCATION**

Te Kaitiaki Take Kōwhiri Mātauranga

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### TEACHING COUNCIL

NEW ZEALAND | Matatū Aotearoa

## Briefing note:

### Update on work to provide clarity about physical restraint in schools

Date:	17 May 2019	Priority:	High
To:	Minister Hipkins	File:	EC-1674
From:	Lesley Hoskin, Interim Chief Executive	Security Level:	In Confidence

#### Purpose

1. Your agreement is sought to test some options to provide clarity about the use of physical restraint in schools with the teaching profession and disability sector groups. The Ministry has been consulted on this briefing.

#### Background

2. The Teaching Council of Aotearoa New Zealand (the Council) and the Ministry of Education (the Ministry) have been working together to progress options to provide clarity about the use of physical restraint in schools.
3. The Education Act 1989 (the Act) was amended in May 2017 to provide for legislated limits on the use of physical restraint in schools, to require rules to be made about reporting arrangements, and to authorise Ministry-led Guidelines about restraint being developed (section 139AC to AE refer). The details of these provisions are noted in **Appendix 1**.
4. Teachers provided feedback that they found section 139AC of the Act and associated Guidelines to be confusing and to conflict with 'Our Code, Our Standards'. Following the introduction of the amendment, they were concerned that any physical contact might be viewed as restraint, given the breadth of the definition of physical restraint.
5. 'Our Code Our Standards', which was co-constructed by the Teaching Council with the teaching profession, came in force on 1 July 2017. It guides teacher behaviour and teaching practice expectations.<sup>1</sup> The Code requires teachers to promote wellbeing and prevent harm occurring to any learners.

#### Agreed principles

6. The Council and the Ministry agree on the principles underpinning consideration of physical restraint in schools, as below:
  - a. The physical restraint regulatory framework should aim to ensure the safety of learners and provide clarity for teachers, families and whānau.
  - b. Teachers should be able to use physical restraint but only as a last resort and in situations where it would prevent harm.
  - c. The use of physical restraint in schools should be minimised.

<sup>1</sup> Our Code Our Standards: Code of Professional Responsibility and Standards for the Teaching Profession.





- d. Teachers need to be supported to do the right thing in instances of last resort. Without this, teachers will remain confused and will continue to default to not restraining, in fear of breaching either the Act or the Code.

## Proposed process and timeline

- 7. To potentially achieve consensus on the way forward with providing clarity around the physical restraint provisions, we propose the process and timeline as outlined below.
  - a. We are discussing this update with you on Monday 20 May 2019.
  - b. If you agree to preliminary, selective testing of a range of options:
    - i. The Council will approach selected representatives of the profession. **Appendix 2** tables some of the options which the Council could discuss with the profession.
    - ii. The Ministry will approach selected representatives of the disability sector.
  - c. First week of June - joint Ministerial briefing.
  - d. June - Cabinet paper seeking wider approval to consult on any proposed legislative change.
  - e. July – consultation on an agreed option:
    - i. Ministry-led Restraint Advisory Group; Commissioner for Children; key sector groups and stakeholders; parents and whanau.
    - ii. Council-led consultation with the profession, its Board and unions.
  - f. August/September - Cabinet approval of proposal and of instructions to Parliamentary Counsel Office, followed by drafting.
  - g. November - introduction of the Bill into the House.
  - h. Subsequently - the Guidelines can be further revised, and communications/messaging updated.

## Key Council messages for preliminary testing of options

- 8. The Teaching Council has continued to work on behalf of teachers on the physical restraint legislation and Guidelines, to be sure that they meet the needs of teachers.
- 9. We want to seek the views of the teaching profession and key stakeholders in order to address the things they told us were worrying them.
- 10. Teachers had wanted legislative settings about physical restraint to protect them from legal action when using physical restraint in approved ways.
- 11. The current legislative settings do not give teachers the level of clarity and comfort they were seeking. In fact, teachers have said that they are now wary of using any type of physical contact in case it be misconstrued as physical restraint.
- 12. There are a range of options worth further consideration which could provide more clarity about when restraint may be used and when contact may be used, to prevent different levels of harm.
- 13. *Our Code Our Standards* requires teachers to take into account the impacts of behaviour on all students and others in the classroom, rather than the behaviour of a single child in isolation of the wider needs in a classroom. It is proposed that any legislative/regulatory changes should be supported by communications and messaging around the *Code and Standards* and the proposed revised Guidelines to help teachers know how to interpret the proposed revised legislative provisions in the context of their broader commitments.

## Legislated provisions in the Education Act 1989 on physical restraint in schools

### 139AC Limits on use of physical restraint in schools

- (1) A teacher or authorised staff member must not physically restrain a student unless—
- (a) 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
  - (b) the physical restraint is reasonable and proportionate in the circumstances.
- (2) In this section and in sections 139AD and 139AE,—
- **authorised staff member** means an employee of a registered school who is authorised by the employer to use physical restraint in accordance with this section
  - **employer** means—
    - a board;
    - the managers of a school registered under section 35A
  - **physically restrain**, in relation to a student, means to use physical force to prevent, restrict, or subdue the movement of the student's body or part of the student's body
  - **teacher** means a person who holds a teaching position (as defined in section 348) at a registered school.

### 139AD Rules on physical restraint

- (1) The Secretary must make rules prescribing the practice and procedure to be followed by employers, principals, teachers, and authorised staff members in relation to physical restraint.
- (2) The rules must include—
- a) requirements to keep written records on the use of physical restraint, including requirements to notify, monitor, and report on the use of physical restraint; and
  - b) a procedure for authorising staff members to use physical restraint in accordance with section 139AC.
- (3) Rules made under this section are disallowable instruments, but not legislative instruments, for the purposes of the Legislation Act 2012 and must be presented to the House of Representatives under section 41 of that Act.

### 139AE Guidelines on physical restraint

- (1) The Secretary must, by notice in the Gazette, issue guidelines on the use of physical restraint in registered schools.
- (2) The guidelines must include—
- a) best practice examples for the use of physical restraint; and
  - b) other examples of best practice in behaviour management.
- (3) Employers, principals, teachers, and authorised staff members must have regard to the guidelines.

### Education (Physical Restraint) Rules 2017

Include Rule 8: "Every staff member who uses physical restraint must complete a staff physical restraint incident report. The employer must place a copy of the form in the student's file and provide a copy to the student's teacher/s, parents and/or caregivers."

## Options for change to physical restraint regulatory settings tabled by the Teaching Council, for testing and further analysis

	WHAT IS THE OPTION?	PROS AND CONS
<b>Option 1:</b> Do nothing	No change.	Problems will remain. Not recommended.
<b>Option 2:</b> Minimal change	Align the Guidelines around s139AC with the Code and Standards.	Not enough. Confusion would continue to exist.
<b>Option 3:</b> Remove reliance on the primary legislation and beef up reliance on the Code and the Teaching Council mandate	<p><b>Option 3 is made up of four supporting parts:</b></p> <p><b>PART 1:</b> Amend the Act to remove s139AE and the need for the Guidelines. Rely on the Code; <b>AND</b></p> <p><b>PART 2:</b> The Code becomes secondary legislation; <b>AND</b></p> <p><b>PART 3:</b> Require the Code to have regard to physical restraint being a last resort action (either through s337(2) of the Act or through the Government Policy Statement); <b>AND</b></p> <p><b>PART 4:</b> Repeal the <i>Education (Physical Restraint) Rules 2017</i>.</p>	<p>Would reduce confusion at a practical level. Would remove duplication. Would make expectations for teacher behaviour clear.</p> <p>But the repeal or significant change of s139AC would weaken the statutory protections available to school staff. s139AC has created an authority for the use of physical restraint in schools in certain circumstances which would be removed if the section was repealed.</p>
<b>Option 4:</b> Significant amendments to s139AC	<p><b>There are two possible ways of approaching Option 4:</b></p> <p><b>OPTION 4A:</b> s139AC could be amended to be more in line with expectations under the Code. Terms could be reconsidered. The relationship between s139AC and Code and Crimes Act could be addressed.</p> <p><b>OPTION 4B:</b> s139AC could be an authorising provision to allow Ministerial approval of a Safety in Classroom disallowable instrument including definitions (compare Safe Work instrument s227 of the Health and Safety at Work Act 2015 (HSWA)).</p>	<p><b>OPTION 4A:</b> The Code is not be sufficiently clear to form a legal test. It does not currently specify when restraint is and is not appropriate. There may be a risk that the policy intent of s139A could be undermined.</p> <p><b>OPTION 4B:</b> May help to reduce confusion but would not contain the same legal authority as a primary legislation option.</p>

	WHAT IS THE OPTION?	PROS AND CONS
<p><b>Option 5:</b> Small amendments to s139AC plus introduce a new provision to clarify when physical contact permissible.</p>	<p>Option 5 has four parts:</p> <p><b>PART 1:</b> Amend s139AC about <b>physical restraint</b> to be permissive e.g. <i>“teachers may restrain a student, but only for the purpose of preventing serious and imminent risk to the safety of a child or another person and where the physical restraint is reasonable and proportionate”</i> AND</p> <p><b>PART 2:</b> Consider if we need to amend the definition of <b>physical restraint</b>: for example, to provide clarity about what ‘serious’ means AND</p> <p><b>PART 3:</b> Introduce a new legislative section about <b>physical contact</b> to reflect the policy intent that <i>teachers may have physical contact with a child to prevent harm to themselves or another person, if the contact is reasonable and proportionate</i> AND</p> <p><b>PART 4:</b> Define <b>physical contact</b>: if a new legislative section was introduced. The term physical contact would need to be defined. It could:</p> <p><b>EITHER:</b> be tightly defined as contact provided for the purposes of redirection or care or comfort (i.e. positive).</p> <p><b>OR:</b> it could also promote wellbeing in addition to preventing harm.</p>	<p><b>PART 1:</b></p> <ul style="list-style-type: none"> <li>The proposal is to provide an authorising environment.</li> </ul> <p><b>PART 2:</b></p> <ul style="list-style-type: none"> <li>Are there things we could make better in the definition of physical restraint, to support the overall approach of Option 5?</li> </ul> <p><b>PART 3:</b></p> <ul style="list-style-type: none"> <li>To address the concerns of teachers (that any type of physical contact might be viewed as restraint, currently) the proposed slight amendments to s139AC need to be supported by the additional proposal relating to physical contact.</li> <li>But is there a risk that adding additional statutory requirements around physical contact could create further ambiguity?</li> </ul> <p><b>PART 4:</b></p> <ul style="list-style-type: none"> <li>How can we define physical contact in a way that avoids opening it up for use for reasons of discipline and punishment, which would again undermine s139AC?</li> <li>Are the more positive aspects of physical contact better suited to guidance and communications, with only the negative aspects covered off in the legislation?</li> <li>We need to test a range of scenarios with practice experts.</li> </ul>

Other options may emerge.

Any of the options could be accompanied by:

1. Further revision of the Ministry’s Guidelines to be more user friendly (the Victorian Guidelines could be a good model) and to showcase Our Code Our Standards.
2. Messaging around Our Code Our Standards could help support understanding with respect to both the positive and the undesirable types of physical contact, and how the legislation interacts with the Our Code Our Standards. The Examples of Practice which accompany Our Code Our Standards could be further elaborated.

Looking to the future, the ITE Programme Approval, Monitoring and Review Requirements (to be in force from 1 July 2019) will support messaging about student safety. ITE programmes must be designed and delivered in a way that ensures that graduates can meet the expectations and behaviours in Our Code Our Standards, including those relating to student safety.

## TEACHING COUNCIL

NEW ZEALAND | Matatū Aotearoa

# Briefing Note:

Feedback from the teaching profession on options to provide clarity about the use of physical restraint in educational settings

Date:	3 July 2019	Priority:	High
To:	Minister Hipkins	File:	EC-1686
CC:	Ministry of Education		
From:	Lesley Hoskin, Interim Chief Executive.	Security Level:	In Confidence

### Purpose

1. This briefing note updates you on the feedback from representatives of the teaching profession about the current regulatory settings for physical restraint in educational settings, with a particular focus on section 139AC of the Education Act 1989 (the Act).<sup>1</sup> We have copied this feedback to the Ministry of Education (the Ministry).

### Background

2. The Teaching Council of Aotearoa New Zealand (the Council) and the Ministry have worked together to consider how to clarify the rules about use of physical restraint in educational settings.
3. Our briefing of 16 May 2019 sought your agreement to test some options to provide clarity about the use of physical restraint in educational settings. You agreed that the Council and the Ministry should test the thinking of the profession and other key stakeholders about the physical restraint regulatory settings.
4. The complexity of current regulatory settings for children relating to physical restraint, physical force, ill-treatment, protection and harm is illustrated in **Appendix 1**.
5. The Council sought feedback from 28 representatives from all sectors of the teaching profession, including outgoing and incoming Council Board members) on a range of possible options (**Appendix 2** refers). Of the 28 representatives, 18 (64 percent) responded. **Appendix 3** lists the representatives we approached. This list is not ordered according to the unique numbers noted in **Appendix 4**, in order to maintain confidentiality. **Appendix 4** provides an anonymised collation of responses.

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<sup>1</sup> Section 139AC of the Education Act 1989 provides that: "A teacher or authorised staff member must not physically restrain a student unless –  
(a) 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  
(b) the restraint is reasonable and proportionate in the circumstances."

## Feedback from respondents on the current situation

6. Of the 18 respondents, only one considered the current situation to be adequate and appropriate. All others believed a change was required and told us that teachers:
- a. Consider the current regulatory settings to be confusing and unclear about what they can, cannot and should not do.
  - b. Do not feel safe under the regulatory settings and so are wary of using any type of physical contact in case it be misconstrued as physical restraint; the current provisions put them at risk.
  - c. Are worried that children are more at risk now too, because teachers are wary of controlling difficult situations.
  - d. Do not feel that they are trusted.
  - e. Do not find current guidance helpful. They want best-practice guidance and examples of what to do and not do in a range of situations and scenarios in order to provide reassurance to parents and the Ministry, as well as clarity for teachers. This is because classrooms and centres are complex. Teachers want guidance that is contextualised and nuanced to different situations, and that is differentiated, digestible and understandable.
  - f. Consider that messages about the use of restraint contained in primary legislation are unable to achieve the nuanced approach necessary, even if they are (or were to be) supported by useful resources.
7. Some respondents considered that the use of the term 'restraint' needed to be reviewed because it has pejorative connotations. Other sectors impact children use terms such as 'excess force', 'ill-treatment', 'protection' or 'harm'. Even in the context of prisons, the term 'restraint' is only used to relate to handcuffs.
8. Currently, s139AC applies to schools only and is not setting neutral. The view was also expressed that regulatory settings about physical force or restraint in educational settings should be 'setting neutral' across early learning centres and schools. It was agreed, however, that the specifics of what might be acceptable may differ between educational settings and this should be expanded upon in supporting resources.

## Feedback on options for change to the regulatory settings

9. In general, the respondents said that they wanted to see a more common-sense approach.

### Crimes Act, s139A and s139AC of the Education Act

10. Fifteen of the 18 respondents told us they wanted to see s139AC of the Act repealed. In addition to this, representatives told us that s139A<sup>2</sup> of the Act together with provisions in the Crimes Act 1961<sup>3</sup> provide all the primary legislative provisions necessary to send strong messages that children in educational settings should not be harmed through force.

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<sup>2</sup> Section 139A of the Education Act 1989 bans: "force, by way of correction or punishment, towards any student or child enrolled at or attending the school, institution, or service".

<sup>3</sup> Sections 48, 59(1), 62, 151, 152, 194, and 195 of the Crimes Act 1961 may all be relevant.



11. Two respondents preferred a combination of refining the current s139AC (with caution about definitions of physical restraint and physical contact) while also putting the Code at the centre of the restraint framework.

### **Taking a wellbeing approach**

12. Looking at restraint through the lens of the wellbeing of the learners was supported by some respondents who proposed the following:
- EITHER: A new provision in the Children's Act 2014<sup>4</sup> to regulate the use of physical force/restraint of children in all settings (i.e. wider than just educational settings).
  - OR: An amendment to s18 of the Children's Act, which requires School Boards to develop Child Protection Policies, to require these policies to include the circumstances in which physical force/restraint can or should not be utilised. These policies already include the identification and reporting of child abuse and neglect (s19 of the Children's Act refers). This option, however, may require oversight or additional measures to ensure consistency and legality of approaches.
13. Use of a different primary legislation (the Children's Act rather than the Education Act), as described above, may be helpful to avoid objections from the disability sector that any repeal of s139AC of the Education Act would send signals to the teaching profession that physical restraint is acceptable.

### **Guidance**

14. In general, respondents found the Guidelines for Registered Schools in New Zealand on the Use of Physical Restraint (provided for under s139AE of the Act) to be confusing, difficult to navigate and lacking the scenario-based guidance that teachers seek.
15. They favoured seeing use of restraint or excess use of force embedded in the profession's Code, supported by examples in practice, in order to be differentiated by situation and context. Feedback was that the Code could provide the nuanced guidance required by teachers, in support of any regulation.
16. Some respondents also pointed out that this would need to be supplemented for non-registered teachers, as only registered teachers are required to comply with the Code. This is important, as the Ministry's statistics show that approximately 40 percent of reported incidents involve non-registered teachers.

### **Training**

17. Respondents signalled a desire for more training (for both registered teachers and other staff in educational settings) in de-escalation and behavioural techniques. This could help avoid the need to use restraint, except as a last resort. It was also noted that the cost of additional training should not be a burden on schools or centres.
18. We heard from respondents that training in de-escalation techniques (to avoid the need for the use of restraint) is not available to all teachers and other staff who need it. This is the key resource in which it would be helpful if the Ministry invested more heavily.

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<sup>4</sup> The Children's Act 2014 is jointly administered by the Ministry of Education and Oranga Tamariki.



## Reporting requirements

19. Some respondents also noted that the restraint reporting requirements<sup>5</sup> are a compliance exercise with no added value for teachers, children or their whānau because:

- Whānau is already involved when an incident occurs. In many cases, an individual plan for a child is in place which has been co-designed with whānau.
- Reporting to the Council already occurs if there is a competence or conduct issue (provided for in ss 392 to 412A of the Education Act).

## Next steps

20. The Ministry is completing its testing with the disability sector.

21. The Council and the Ministry have undertaken to provide you with a joint briefing, with recommendations agreed by both entities, as soon as possible.

22. The respondents to the Council's testing requested that any proposed changes to the regulatory settings for the use of physical force/restraint in educational settings be consulted on more widely.

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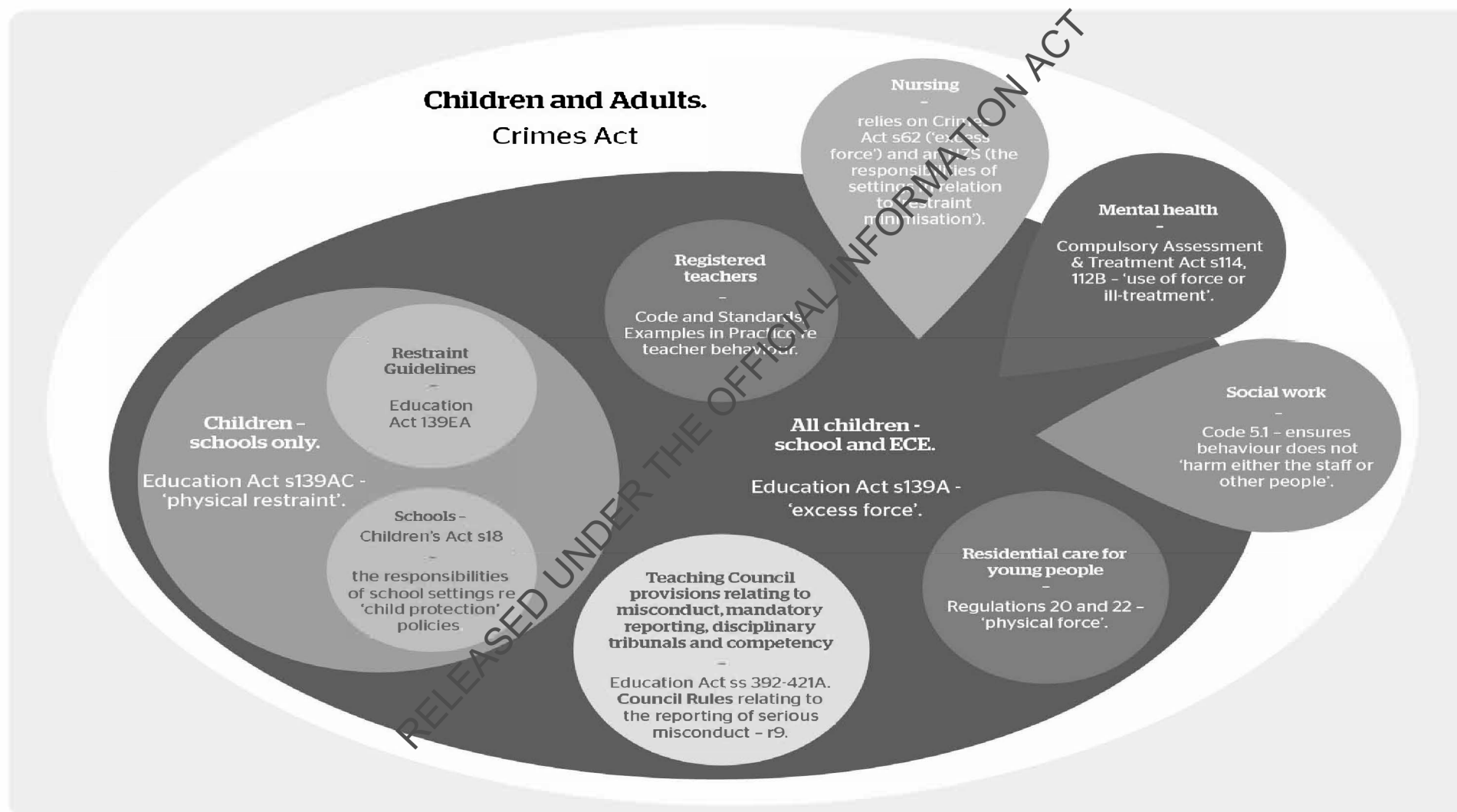
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<sup>5</sup> Provided for in the Education (Physical Restraint) Rules 2017.





## Illustration of the complex regulatory framework governing the use of restraint or force in relation to children



## Options the Teaching Council tested with representatives of the teaching profession

Option one	No regulatory change.
Option two	Repeal s139AC and s139AE (Guidelines); AND
	Establish the Code in secondary legislation; AND
	Require the Code to have regard to physical restraint or excess force (through a Government Policy Statement).
Option three A	Significantly amend s139AC to address the relationship between the Code, the Crimes Act and this provision; AND Amend the definition of physical restraint.
Option three B	Significantly amend s139AC so that it becomes an authorising provision for a lower level instrument (approved by the Minister) that prescribes matters to do with restraint (and is a creature of a Regulation, to provide oversight).
Option four	Make small amendments to s139AC to make it more permissive e.g. <i>“teachers may restrain a student, but only for the purpose of preventing serious and imminent risk to the safety of a child or another person and where the physical restraint is reasonable and proportionate; AND</i>
	<ul style="list-style-type: none"> <li>Consider if we need to revise the definition of physical restraint (e.g. to clarify what ‘serious’ means); AND</li> </ul>
	Introduce another provision clarifying when physical contact is permissible e.g. <i>teachers may have physical contact with a child to prevent harm to themselves or another person, if the contact is reasonable and proportionate; AND</i>
	<ul style="list-style-type: none"> <li>Define physical contact – should it be for the purposes of redirection or care to prevent harm, or should it also include the promotion of wellbeing?</li> </ul>
Additional options	The Council also asked if respondents could think of other options for improving the regulatory setting with regard to excess force or physical restraint in education.

# List of teaching profession representatives approached for about the restraint regulatory settings

Name	Organisation	Name	Organisation
Pat Walsh	Incoming Teaching Council Board member.	Watson Ohia	Ngā Kura a Iwi
Pat Newman	Incoming Teaching Council Board member.	Lynda Stuart	NZEI
Jenny Ritchie	Incoming Teaching Council Board member.	Jack Boyle	PPTA
Clair Edgeler	Incoming Teaching Council Board member.	Whetu Cormick	NZPF
Anna Mackinnon	Incoming Teaching Council Board member.	Rawiri Wright	Ngā Kura a Iwi
Lorraine Carr	Incoming Teaching Council Board member.	Lorraine Kerr	President, NZSTA
Pip Woodward	Incoming Teaching Council Board member.	Lisa Neilson	Manager, Kimi Ora School
Barbara Ala'alatoa	Outgoing Teaching Council Board Chair.	Mark Potter	Principal, Berhampore School, NZEI representative
Anthony Mackay	Outgoing Teaching Council Board member.	Rosey Mabin	Executive member, NZSPA
Clare Wells	Outgoing & Incoming Teaching Council Board member.	Stuart Armistead	Normal and Model Schools Association
Claire Amos	Outgoing Teaching Council Board member.	Myles Ferris	Te Akatea – Māori Principals' Association
Michael Rondel	Outgoing & Incoming Teaching Council Board member.	Dirk Winnie	Principal, Avalon School
Ripeka Lessels	Outgoing & Incoming Teaching Council Board member.	Jason Swann	Pasifika Principals Association
Simon Heath	Outgoing Teaching Council Board member.		
Nicola Ngarewa	Outgoing Teaching Council Board member. Incoming Board member and Chair.		

## Feedback from respondents on restraint options and issues

Unique #	Status Quo	Opt 1	Opt 2	Opt 3	Opt 4	Preferred Approach	Comment
1	Hard to get the nuances right in primary legislation with respect to restraint in schools. Section 62 of the Crimes Act already provides all the necessary legal safeguards: it includes intent, which signals to Courts the need for a high threshold.	No			No	Need to take restraint provisions out of the Education Act and rely on the Crimes Act, reinforced by professional development and teacher support.	The legislation is an over-reaction and is tantamount to poking a stick at a hornet's nest. Restraint is different to seclusion. If a child goes into riot mode, what would a parent do at home? Schools need to be able to take a common-sense approach. Need a practical and workable solution. Would be good to get a small group together (including the Children's Commissioner) to talk with MoE about this.
2	The current restraint clause in the Education Act and the way it is applied have teachers running scared. Even if teachers guide a child back into their seat, this is considered to be restraint under the current clause. Most teachers have a number of students with high behavioural issues but they now feel that they can't respond to the behaviours. They don't want to take the risk. Do we need the current clause? What is the intent of the clause? Remove s139AC. And the Guidelines are useless. In situations where a child is throwing computers around a room, even if other children are not at risk of physical harm, teachers should be able to stop them. Parents are saying that this sort of disruption is not on. This is stressful for the other children in the class and can leave them feeling unsafe/psychologically damaged. Teachers are under strain.	No			No	Legislation doesn't help. What teachers need is PD to help them deal with high end behavioural issues. This principal's school has 400 students and 25 paraprofessionals, but there is not enough support. Some students are so volatile that even working 1:1 doesn't help. MoE's Positive Behaviour for Learning (PB4L) is not enough. Need help to understand individual triggers and how to mitigate them, to avoid the need to use restraint.	The Teaching Council's complaints assessment committees need to take a common-sense approach to rulings, with the understanding of what parents would want us to do. Teachers are scared of losing their teaching 'ticket'; scared of being taken to court; and scared of having their name dragged through the mud in public. The legislation relating to conduct and competence issues 'needs to reinsert the AND between considerations of if something is 'serious' AND 'if it should be referred on'.  Section 139AC arose out of a situation where a child in a small provincial school threw things around. The child was a nephew of the principal. The principal removed the child from the room, but also took the child home when they'd calmed down. The Court said that removing from the room was okay, but taking the child off the school property was not.
3	The status quo is not appropriate. There is a complete lack of support to train the teachers. Teachers are so scared that they are not even able to shepherd distressed children into the classroom or away from other children. The status quo undermines the potential for teachers to be seen by the community and by parents as a point of trust.	No	Yes		No	Any approach needs to consider the needs of the entire classroom, not just a single child who is acting out. The best long-term option is option 2. The Code could be strengthened with real-life examples that provide reassurance for parents and the Ministry, and clarity for teachers.	The key is for schools to have quality, trusting relationships with their whānau. Communication is key. We need to build trust for the teacher and the teaching profession.
4	Agrees with current wording in s139AC and does not see cause for confusion.	Yes				It is imperative that the law protects those who are most vulnerable and at disadvantage in power relations such as those between teachers and children. Agrees that teachers need clear guidance which should be provided by the Teaching Council. It is also imperative that any such guidance recognises the spiritual and emotional wellbeing aspects, especially in early childhood care and education and with younger primary school-aged children, and not impose constraints on teachers' capacity to demonstrate warmth, affection and emotional support in the form of hugs and cuddles. "Training in restraint techniques" is not stipulated as a required aspect of teacher education qualifications. Maybe it should be?	Taking a wellbeing lens goes to the overall pedagogical philosophy of teachers. In early childhood care and education, wellbeing (mana atua) is one of the five key interwoven strands of our curriculum (Te Whāriki). From a Māori perspective, spiritual and emotional wellbeing are paramount, and need to be proactively and holistically catered for, along with the more obvious aspects of physical wellbeing (including nutrition and sleep). In early childhood care and education, physical and emotional comfort is regularly provided through physical contact such as hugs and, for example, stroking a child's back to help them get to sleep. The wellbeing of teachers is also a consideration. Currently, teachers are striking over their poor and often very stressful working conditions. Stress is often a contributing factor to poor decision-making, such as the unintended consequences of using excessive force in restraining a child.
5	Classrooms in any setting are complex. In the ideal world, teachers would be trained to use verbal strategies to de-escalate situations. They would also get an IDP in place (agreed with all) including the options of leading the child away from the place where the situation is happening, and bringing close (enveloping/holding tight). Leading by the hand is not a good strategy as the child can drop to the ground or yank away, potentially dislocating their shoulder. Teachers are now afraid to do anything, because they are confused and not well trained. There is no wraparound support for teachers who have to deal with behavioural issues.  It is tough being a teacher when learners are not engaged. Teachers need supportive strategies to help build cultures of reflective standards.	No			No	Need a shared understanding across departments, educational settings, people, rules and regulations of a differentiated approach - e.g. in these situations, you can do xy; in these situations, however, do yz etc... Need agreed thresholds.  Also need strategies to avoid even needing to use differentiated approaches. Every situation is different. Context is important. We have an opportunity to do better together, not do more in isolation. We need to empower teachers in tricky situations. If we don't, teachers will keep leaving. We need to shine a light on what works.	There are too many rules in different places each with their own definitions of what constitutes ill treatment. Education Act, Crimes Act, Vulnerable Children's Act, s56 of the Education (Early Childhood Services) Regulations 2008 etc... Confusion.  Need to look at the intersecting plates of: wellbeing; families; mental health (teacher and child); learning support; and the complexities around restraint. We want teachers to feel good about what they do. Making small tweaks to legislation will not help - teachers will roll their eyes and say "they are not hearing us".



Unique #	Status Quo	Opt 1	Opt 2	Opt 3	Opt 4	Preferred Approach	Comment
6	There have to be changes in order to protect staff and remove confusion.	No	Positive option	3A positive option. 3B not sure.	No	Under option 2, there would need to be considerable communication to all schools and staff about the changes, with attention drawn to the Code and Education Council Rules. Small amendments such as those proposed in option 4 will not change the problem.	If option 3A was progressed, we would need clarification of the following: - when physical contact is permissible (there should not be another legislative provision about this) - the definition of physical restraint - the definition of physical contact (e.g. physical contact may be necessary for promoting wellbeing. There is a fine line and this needs to be defined).
7	Non-response						
8	Sections 139 and s139AC are not both required. S139 is setting-neutral (i.e. school or early learning) but s139AC is not.	No	Yes		No	Boards should be required to have school policies that implement expanded material in the Code and Standards about restraint. Boards and their interpretations are supported by NZSTA. Scenarios underpinning the Code and Standards should provide clarity, which is missing currently, including in situations where there are teachers of different genders - should they approach situations differently? Teachers need PD in how to handle difficult situations to avoid the need to restrain.	How are all the various pieces of legislation and associated requirements working together: NEGS, NAGS, Codes and Standards, Crimes Act, s139AC etc?
9	The status quo is confusing and the paper work is terrible. If you take a child by the hand to lead them somewhere, you have to write it up as restraint. What we have currently is a sledgehammer to crack a nut, but the hammer misses the nut.	No	Yes		No	Need a nuanced approach - differentiated, digestible, understandable. Need to include some guidance in the Code and Standards as well as exemplars of what you can do and not do.	Need to find a way to bring along the hearts and minds of teachers.
10	Sections 139 and s139AC are not both required. S139 is setting-neutral (i.e. school or early learning) but s139AC is not.	No			No	Need to take a wellbeing lens - utilise the Children's Act (re-named) with a new provision that applies to all children in all situations; or section 18 of the Children's Act to require Boards and early learning services to develop a Child Protection Policy (including the circumstances in when force can or should not be utilised). If a provision is used (or if an alternative one is developed) it should be setting-neutral, although it might operate differently in early learning, primary and secondary settings, and be differentiated by the level of independence of the child.	If we were to use the Code as the main way of improving our understanding about and use of restraint, then we will miss reaching all the non-registered teachers e.g. teacher aides and paraprofessionals. The stats show that 40% of reported restraint episodes are carried out by non-registered teachers.
11	The legislation (s139AC etc) is a dilemma for MM settings. MM teachers always hold children close/envelop them/ hug them when the children are acting out. They do this in kura Māori, at home, and in the marae. The aim is (in a loving way) to quieten the children down and avoid them hurting others or themselves. It is better than taking the children by the hand and taking them away. S139AC disallows teachers in kura Māori to do this.	No	Yes		No	Repeal s139AC. Rely on the provisions in the Crimes Act and in s139A of the Education Act. Put something else in the Code and Standards (co-constructed with the profession) to provide a Standard to aim for and examples in practice.	Note: the children in kura Māori are often related to the teachers.
12	The current situation is too confusing. Teachers are not bouncers or lawyers; they don't understand what they can and cannot do, and so they do nothing - hands off. The 2017 amendments (s139AC etc) have made teachers very nervous. The legislation has taken away common-sense. The phrase 'reasonable and proportionate' is very open to interpretation given the circumstances; the gender of the teacher; and whether it is observed by a parent or a colleague or another child.	No	Yes		No	Require, through legislation, every school to include restraint in its charter, and then Boards can develop/implement policies. The word 'restraint' needs to be reviewed. Likes the way that the Oranga Tamariki (Residential Care) Regulations 1996 (reg 22) regulate against physical force. Common sense and nuanced. Using the Code to include key statements, definitions, and situational scenarios would be the best place to be able to support teachers to know what they can and cannot do.	Teachers want to be trusted to do their jobs. Isn't it better to support and train teachers to do better than to haul them over the coals so that 25 years of a teaching career goes down the gurgler?
13	Currently, the sector finds the legislative framework and requirements around restraint confusing. There are anomalies.	No	Yes		No	The profession has faith in the Code - it is simple, they understand it and use it on a daily basis. Need to use the Code for messages about restraint. Doing this would remove current anomalies but also provide some teeth.	The paper on restraint is a workable coherent document, and the profession would appreciate seeing it. How could we support paraprofessionals to work towards the same standards as registered teachers - more training in MAPA relational, de-escalation techniques?



Unique #	Status Quo	Opt 1	Opt 2	Opt 3	Opt 4	Preferred Approach	Comment
14	No explicit comment on status quo.	No	No	3A Some merit	No	<p>The preferred option is to:</p> <ul style="list-style-type: none"> <li>- repeal s139AC.</li> <li>- ensure schools are properly resourced to have sufficient and adequately trained adults.</li> <li>- ensure that schools are supported by guidance material.</li> </ul> <p>Option 3A (better harmonise s139AC, the Crimes Act and the Code and Standards) has some merit, depending on what amendments are proposed.</p> <p>The other options are unclear, unnecessary or will do nothing to improve the situation for children and/or those adults who have to apply restraint.</p> <p>The Code provides good guidance to teachers about expected behaviours. Best practice guidance for all adults in schools is critical, and therefore there is no need to remove s139AC relating to the requirement to publish guidance material. (It is not clear whether this participant preferred the Teaching Council or the Ministry to lead this Guidance.) Given that 40% of reported restraint incidents relate to adults who are not teachers or principals and who may not be trained in restraint techniques, guidance must not just be for teachers but for all adults in schools. The Understanding Behaviour Responding Safely (UBRS) training focuses on de-escalation techniques. But it is important that those likely to be applying restraint know how to perform it appropriately and safely.</p>	Restraint is a complex matter that needs careful consideration. A wellbeing stance is supported, although it is not helpful to label children based on the life choices of their parents and to place the wide range of needs of children into what appears to be a homogenous group (referring to a paragraph in the material provided which describes some of the issues facing children). There should be no additional financial burden placed on schools associated with training more adults in a school in behavioural or restraint techniques.
15	Non-response						
16	Concerned about the lack of clarity in the current restraint framework where, for example, a student is damaging property. This is not an uncommon concern from the profession,	No	Combo		Combo	<p>Supports an approach of: (1) the Code being central to the design, (2) permissive statements used in the legislation, and (3) clarity made to the Guidelines and the Code in practice examples.</p>	The benefit of placing the Code at the centre of the restraint framework means that teachers who find themselves in a situation where students are damaging property are permitted to be guided by those parts of the Code which deal with the wellbeing of all learners, for example "2. Commitment to Learners - I will work in the best interests of learners by: promoting the wellbeing of learners and protecting them from harm". In practice, this would mean that a teacher is allowed to (or, in fact, is supposed to) intervene as appropriate where safety for all learners is at risk. Sometimes this may mean restraining a child, or removing them (guiding them) to a safer place.
17	Non-response						
18	No comment on the status quo.	No	Yes		No	<p>Option 2 is preferred so long as -</p> <ul style="list-style-type: none"> <li>- there is clarity between the use of physical restraint for the purposes of safety for the teacher, the child and other children</li> <li>- noting all the relevant Acts that sit alongside Option 2 that prohibit excess force and restraint including the Crimes Act</li> <li>- the Crimes Act incorporates the notion of 'intent'.</li> </ul>	
19	<p>There is a lot of confusion currently. In the process of trying to send messages that you can't forcibly hold people down, we've ended up in a situation where even hugging a child close to calm them is described as restraint and is censured. If a child is smashing up expensive property, teachers are not allowed to stop them. Teachers are left in unsafe positions.</p> <p>Sections 139AC to AE need to go. They have been designed to leave teachers without any protection at all, regardless of context. You cannot say that one size fits all in these situations, and this is what primary legislation tries to do. We've created more of a problem than before s139AC was introduced. The legislation ignores the reality of what teachers are often faced with. The teacher can leave the classroom and take the other children with them, but a screaming child will usually follow. If the child runs out of the school, teachers are not allowed to stop them even if they might be killed on the road. Teachers also have an obligation to protect other children from the harm of dealing with a screaming, abusive child.</p>	No	Yes		No	<p>Need more training and resources, not rules. Need advice on how to restrain and when to. What would justify restraint? Currently, teachers are advised to call the Police. Need MAPA training about behavioural techniques, but have no access to this. Existing training in restraint is not what is needed.</p> <p>A better option would be to know how to avoid getting to the point of needing restraint. Including signals in the Code along with exemplars of good practice would help.</p>	<p>Section 139AC gave the Ministry a way of looking like it was achieving something, but it made things worse for teachers instead.</p> <p>What would you expect to be able to do if you were abused on the street or in a café? Should be able to take a common sense approach.</p>



Unique #	Status Quo	Opt 1	Opt 2	Opt 3	Opt 4	Preferred Approach	Comment
20	The bottom line is that as much (as one would wish otherwise) there are times when a student may need to be physically restrained. It should not be a crime and needs to be permitted from time to time. But the current legislation results in disinclination on the part of a teacher to intervene in a situation which warrants intervention.	No	Combo		Combo	A combination of options 2 and 4 might be a way forward.	Keep things simple. Cautious about having to define physical restraint or physical contact, because how can every scenario be covered off?
21	Teachers are scared of touching; scared of censure. Teachers put a huge amount of work into the Code and Standards. It is nuanced work and takes account of the realities of day to day teaching, in a way that s139AC does not. Teacher aides are dedicated to their children with special needs but are now unsure about what they can and can't do. Classrooms are complex. Some children come from homes of violence and so their primary response is to react with violence when in school. One child who goes off can wind another 15 children up. If a classroom goes off, teachers are now too scared to intervene even to de-escalate. Sometimes, teachers and teacher aides need to hold the children tight to calm them down. This would be viewed as restraint.	No			No		
22	Non-response						
23	Non-response						
24	Non-response						
25	Non-response						
26	Non-response						
27	Non-response						
28	Non-response						

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# Need to know

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## Update on physical restraint work

We have worked together with the Teaching Council on options to improve the regulatory framework for physical restraint in schools, in consultation with representatives of the teaching profession and disability sector.

There were areas of agreement during this consultation. For example, both groups wanted to ensure that the school environment is physically and emotionally safe for students and staff and considered that physical restraint should be used as a last resort. They agreed that staff need more training in best practice de-escalation and behaviour management techniques and that any proposed changes should be tested with a broader group of people. However, there were a range of views on the need for legislative changes to the physical restraint framework. Some people considered that significant changes to the regulatory framework are necessary, while others considered it should remain unchanged.

Given the range of views on the need for legislative changes, we propose testing key options with the Office of the Children's Commissioner (OCC) to ensure we get a stronger children's rights perspective. We are in the process of setting up a meeting with the OCC for next week. Following this, we will provide you with a report outlining the proposed options and next steps. The Teaching Council is also planning on giving their new Board a progress update on this issue at their next meeting on 22 August.

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