



EDUCATION COUNCIL
NEW ZEALAND | Matatū Aotearoa

BRIEFING NOTE: Physical Restraint in Education

Date:	4 May 2018	Priority:	Medium
Approved by:	Graham Stoop	DDI:	027 689 9039

Purpose

1. Following public interest in cases where teachers have been disciplined for using force unreasonably or without justification, you asked the Education Council of Aotearoa New Zealand (**the Education Council**) to facilitate discussions on the use of physical restraint in education.
2. This paper provides you with an update on those discussions.

Background

3. In 2017 there were changes to the Education Act 1989 (**the Education Act**), with accompanying guidelines, making it explicit that teachers can use physical restraint when someone's safety is at "serious and imminent risk" (section 139AC (1)(a) of the Education Act).
4. Since then we have heard from teachers and parents about how strongly they feel about the appropriate use of physical contact in education settings especially when situations involve health-related behavioural issues.

Discussing physical restraint

5. It is clear from discussions with teachers, parents, and others involved with supporting children and young people in education, that the use of restraint is not an issue that can be considered in isolation.
6. There are three key stages that have been identified:
 - (1) Preventing the need to use physical restraint which includes understanding behaviour
 - (2) Knowing when and how to use physical restraint appropriately when it is necessary
 - (3) After restraint is used, making sure children and teachers are supported and that lessons learned can affect change.

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Prevention

7. The reasons why teachers sometimes need to consider using restraint are fundamental to any discussion on resolving concerns about its use. We consistently heard that the use of physical restraint on learners, even for the purposes of preventing harm, is not a desirable option for anyone.
8. Both teachers and parents say schools need to work more closely with whānau to understand the needs of each learner so that appropriate responses to manage behaviour are in place when needed. More emphasis and investment is needed to support teachers to avoid the use of restraint and to better understand their learners.

Knowing when and how to restrain appropriately

9. The current guidelines have widespread support from parent and teacher groups we spoke with. However, teachers have asked for clarification in the guidelines to support decision making and action when physical restraint is required.
10. Consistent with the Education Council's submission opposing the proposal in the Supplementary Order Paper that resulted in s 139AC,¹ those proposing the repeal of that section say it is necessary because it conflicts with defences available under other legislation including the Crimes Act 1961. This has created confusion and angst in the profession, leading to teachers walking away from situations because they are not confident to use restraint because they fear punitive action.
11. For example, even where there is a clear serious and imminent danger of harm, such as a child running onto a busy road, some teachers said they would be worried about restraining the child. There has also been concern expressed about whether a teacher would be acting lawfully to prevent harm, such as by stepping in to prevent a fight between students.
12. The point made is that at the moment in time when a child or young person may be putting themselves or others at risk in some way, teachers need clarity around what they can do.

After physical restraint is used

13. Although concern has been expressed about the arduous reporting requirements if restraint is used, it is acknowledged that data can be used to identify and target support. We have heard that this will only be effective if the right data is collected and interpreted in the right way.
14. Continuous improvement should also be part of the training and support package to support schools, learner and communities.

Key themes

15. Key themes from the discussions on restraint are attached at appendix B. The discussions facilitated by the Education Council were:

¹ The relevant part of the Education Council's submission dated 30 January 2018 is appended to this briefing.

Forum	Stakeholders involved
Blog "Fact Check"	Readers were invited to share their thoughts on restraint directly through an email address.
Workshop	<ul style="list-style-type: none"> • 9(2)(a) Principal Welcome Bay School • 9(2)(a) Executive Officer New Zealand Principals' Federation • 9(2)(a) President New Zealand School Trustees Association • 9(2)(a) Manager Kimi Ora School • Mark Potter, Principal Berhampore School and NZEI representative • Tom Haig, Deputy Secretary General PPTA • 9(2)(a) Executive Member New Zealand Secondary Principals' Council • 9(2)(a) Board Member Autism New Zealand • 9(2)(a) National Policy Coordinator CCS Disability Action • 9(2)(a) Executive New Zealand Normal and Model Schools • 9(2)(a) Member Te Akatea - Māori Principals' Association • 9(2)(a) Principal Avalon School • Ministry of Education policy and legal teams • Ministry of Education psychologist • 9(2)(a) parent of a child who has been restrained
Parent focus group	We brought together three parents to share their experiences of restraint. This included one parent whose experience had instigated the change to legislation.
Panel podcast	Tom Haig, Deputy Secretary General PPTA Mark Potter, principal Berhampore School and NZEI representative Mandy Coupe, professional manager Kindergarten Taranaki Heather Henare, Chief Executive Skylight Trust (Special Education Principals' Association was unable to attend)

16. The podcast will be released on Friday 4 May on the Education Council website and promoted on our website and through social media. The purpose of the podcast is to encourage engagement of the profession and communities in a public forum. Interested parties can also email us directly with their thoughts and comments.

17. We have also approached the Children's Commissioner to hear his views.

Summary

18. Although these discussions about physical restraint in education were initiated following concerns raised about whether the law was achieving the right balance, the issues are more complex, and the solution multifaceted.

19. While there is some support for a change to the law, a legislative change on its own will be ineffective in reducing a need for teachers to use physical restraint. It will also not adequately reduce the confusion teachers and staff are experiencing.

20. For change to be impactful, we have heard that the guidelines need to be aligned with other relevant legislation and provide specific guidance on what teachers can do, with an increased investment in training and support.
21. Underpinning this must be a strong partnership and agreement between teachers, other experts, whānau and communities.

Next steps

22. As the Ministry of Education (the Ministry) is the agency responsible for the Education Act and accompanying guidelines, and for providing much of the support currently available to schools, we suggest the next step is to discuss matters with the Ministry.

Released under the Official Information Act 1982

Appendix A

Extract from *Education Council Submission on the Supplementary Order Paper 250 regarding seclusion and restraint – Education (Update) Amendment Bill 30 January 2017*

Physical Restraint

Limits on the use of physical restraint (section 139AC)

We do not agree there should be additional provisions placed in primary legislation to set out the circumstances where teachers or other educational staff members can justifiably use physical restraint on a student. We consider the existing legal and regulatory provisions are sufficient to protect the rights, health and safety of students and others, and provide adequate protection for teachers to use physical restraint in specified circumstances. Instead, we consider best practice guidelines to be a much more appropriate lever to achieve consistent best practice.

Definition

We have serious concerns that proposed definition of physical restraint² is too broad and the threshold for using physical restraint is too high. We consider that this proposed amendment may lead to a raft of unintended consequences through misinterpretation or misunderstanding, whereby teachers fear that cannot have any physical contact with children and young people in the course of their valid professional role. Likewise, it may result in a wave of complaints against teachers who may have used physical contact in reasonable circumstances, but where the high threshold of the safety of someone being at serious or imminent risk is not met. A spike of unwarranted complaints would undermine confidence in the profession.

There are numerous situations where it may be entirely appropriate for a teacher to use *“physical force to prevent, restrict or subdue the movement of a student’s body or part of their body”* and where the safety of someone is not at **serious and imminent risk**. Examples include:

“We have serious concerns that proposed definition of physical restraint is too broad and the threshold for using physical restraint is too high.”

² **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 students body”

“We have particular concerns that the proposed wording of the legislation does not take into account best practice for working with children and students with disabilities, where holding or using physical contact (which may involve “restricting or subduing the movement of a student’s body or part of their body”) is often necessary and appropriate.”

- Physically escorting using physical contact to gently assist or prompt a child or student in performing a task or move them from one area to another
- Gently holding the hand of a young student to provide comfort
- Picking up or holding a child or young student to comfort them
- Holding a child or student with disabilities to move them to another area or help them get into a vehicle
- Guiding or ushering a child or young student who is engaged in disruptive behaviour (such as throwing water or paint) away to another area
- Briefly holding (without undue force) a very young child or a child or student with cognitive or developmental disorders in order to calm them
- Using calming techniques which involve physical contact such as “deep touch pressure techniques” for students with autistic spectrum disorders
- Physically moving students from one another to break up a minor altercation where they are not responding to verbal instructions to desist from fighting, but where the safety of the students or others is not deemed to be at “serious or imminent risk” (e.g. where they are pulling each other’s hair or are pushing at each other in a non-harmful way)
- Lifting a young child or student into a car restraint or placing them in a wheelchair, push chair or high-chair
- Holding or supporting a young child or student with disabilities in order to perform or assist them with personal care tasks, such as toileting, changing diapers or bathing.

We have particular concerns that the proposed wording of the legislation does not take into account best practice for working with children and students with disabilities, where holding or using physical contact (which may involve “restricting or subduing the movement of a student’s body or part of their body”) is often necessary and appropriate. Indeed, the recent Ministry of Education publication *Guidance for New Zealand Schools on Behaviour Management to Minimise Physical Restraint* (p.3) refers to examples which they state are not physical restraint, but which could arguably still meet the definition in the proposed Bill.

This adds further weight to our recommendation that policy on the use of physical restraint is best addressed in best practice guidelines where the complexity of the issues, and the range of circumstances where physical restraint can be reasonably used, can be more fully explained.

Existing provisions against inappropriate or excessive use of force

We consider the current legal and regulatory provisions, definitions and interpretations which prohibit the use of inappropriate or excessive force are sufficient to protect the rights of children and young people and are already well understood. Again, we disagree there needs to be new legislation specific to the education sector. Current provisions against the excessive use of force already exist, and include:

Crimes Act 1961. Section 62: Excess use of force: Everyone authorised by law to use force is criminally responsible for any excess, according to the nature and quality of the act that constitutes the excess.

“There are already legal and professional consequences if a student is harmed or physical force is used inappropriately.”

Crimes Act 1961. Section 194: Assault on a child: Everyone is liable to imprisonment for a term not exceeding 2 years who (a) assaults³ any child under the age of 14 years; or (b) being a male, assaults any female.

Crimes Act 1961. Section 196. Common assault: Everyone is liable to imprisonment for a term not exceeding 1 years who assaults any other person

The Education Act 1989, Section 139A: This essentially banned the corporal punishment and prohibits the use of force “by way of correction or punishment towards any student or child”.

Rule 9 of the Education Council Rules 2016: These rules set out the criteria for reporting serious misconduct of teachers. This includes (a) the physical abuse of a child or young person, (c) the psychological abuse of a child or young person, (f) ill treatment of any child or young person in the teacher’s care.

There are already legal and professional consequences if a student is harmed or physical force is used inappropriately. They could be charged with assault under the Crimes Act and the incident could be investigated by the New Zealand Teachers Disciplinary Tribunal which has the powers to cancel, or suspend a teacher’s registration and practicing certificate, impose fines and impose conditions.

There are likely to also be employment consequences for a person who is found to have acted inappropriately or illegally.

Existing legal provisions which set out the justifiable use of force

We consider the existing legal provisions which set out the circumstances where people *can use* physical force protect them or other people from harm are sufficient, and that specific legislation for the education sector in this regard is unnecessary.

Provisions in The Crimes Act 1961 which allow justifiable force to be used are set out in sections 41⁴, 42⁵, 43⁶, and 48⁷.

Furthermore, the proposed amendments would actually establish a higher legal threshold for teachers and authorised persons for the circumstances when they can use physical force than exists for the general public as set out in sections 42, 43 and 48 or the Crimes Act. We see this as unhelpful and unnecessary. It also actually does the opposite of what this legislation was intending in part to address, that is, to remove the risk of legal liability for school personnel who use physical restraint.

3 The Crimes Act, Section 2(1) interpretation: “assault” means the act of intentionally applying or attempting to apply force to the person of another, directly or indirectly, or threatening by any act or gesture to apply such force to the person of another, if the person making the threat has, or causes the other to believe on reasonable grounds that he or she has, present ability to effect his or her purpose; and “to assault” has a corresponding meaning.

4 Section 41: For the prevention of suicide

5 Section 42: “Preventing breach of the peace: Everyone who witnesses a breach of the peace is justified in interfering to prevent its continuance or renewal, and may detain any person committing it in order to give him or her into the custody of a constable...provided that the person interfering shall use no more force than is reasonably necessary for preventing the continuance or renewal of the breach of peace, or than is reasonably proportionate to the danger to be apprehended from its continuance or renewal.”

6 Section 43: “Suppression of riot: Everyone is justified in using such force as is necessary to suppress a riot, if the force used is not disproportionate to the danger to be apprehended from the continuance of the riot”.

7 Section 48: Self-defence and defence of another: Everyone is justified in using, in the defence of himself or herself or another, such force as, in the circumstances as he or she believes them to be, it is reasonable to use.

“As the professional body for teachers, we consider it important that all teachers are held to the same high standard of conduct, whether they are employed by at a state school, partnership school or an independent (private) school.”

“We consider guidelines to be a much more appropriate tool to set out the expectations and to achieve consistent practice on this complex matter, than primary legislation.”

Private schools are excluded from this proposed provision

Notwithstanding our strong recommendation that the proposed amendments do not include physical restraint, if the decision is made to include it, it should apply in all early childhood education centres and schools, including private and partnership schools. As currently drafted, private schools are excluded.

We understand this is consistent with Section 139AAA Surrender and Retention of Property, but we see no valid reason why private schools should be exempt. As the professional body for teachers, we consider it important that all teachers are held to the same high standard of conduct, whether they are employed at a state school, partnership school or an independent (private) school. Likewise it is important that our legislation entitles all New Zealand children and young people to be safe and receive a high quality education, including the right to be free from assault or from arbitrary detention.

Guidelines on Physical Restraint (proposed Section 139AE)

We support this proposed section which places into legislation the requirement for the Secretary of Education to issue guidance on the use of physical restraint and that boards, principals and teachers must have regard to the guidelines.

We consider guidelines to be a much more appropriate tool to set out the expectations and to achieve consistent practice on this complex matter, than primary legislation.

We note that, as currently drafted, private schools are excluded from this clause. As stated previously, we have major concerns about this exclusion and strongly recommend s139AE is amended to include private schools. We know of no good reason why private schools should be exempt from applying best practice on this issue.

We welcome the recent guidance issued by the Ministry of Education *Guidance for New Zealand Schools on Behaviour Management to Minimise Physical Restraint*. We are also pleased to see that the Ministry of Education is supporting this guideline with the professional development workshops to teachers on responding to challenging behaviour. We do have some suggestions on ways to strengthen the guideline, in order to remove any ambiguity about the circumstances where physical restraint can be used. We will be raising this with the Ministry of Education separately from this submission.

Early childhood education sector

We note that the proposals on physical restraint are for the schooling sector only and exclude the early childhood education sector. The Ministry of Education's regulatory impact statement on this proposal suggests making consequential amendments for similar provisions for early childhood education services and ngā kōhanga reo through the Education (Early Childhood) Regulations 2008 and the Education (Playgroups) Regulations 2008. We welcome any opportunity to be involved in these discussions and the drafting of any regulation and guidance for this sector.

Appendix B

Key feedback themes from restraint discussions

Area	Feedback
1. The legislation	<p>There are discrepancies about what is in the Education Act and what is in other law (including the Crimes Act) creates confusion. This lack of clarity is making teachers and staff nervous to take action – it creates paralysis which can create significant risk for children and young people.</p> <p>Other jurisdictions similar to New Zealand have quite a different framework for the use of physical restraint. New Zealand has gone further with explicit limits on teachers. While this may not be wrong, the absence of sufficient discussion prior to the legislative change has led to inconsistencies.</p> <p>The law needs to make the issue less complicated, not more. It is ambiguous. It was intended to provide an “authorising environment” to enable teachers to use restraint but it has created angst because teachers and staff are unsure when they are subject to the Education Act and the Crimes Act for example. The law change seems to protect the legislators but not those out in the field.</p> <p>Any legislative change (or repeal) must come with a sufficient and useful support package (guidelines, training and support), and currently it is not quite there.</p> <p>Some parents have said the legislation is fine and the issue is with implementation, training and support.</p>
2. The guidelines	<p>The guidelines are helpful and the strategies for de-escalation and minimisation of risk are its strengths. However, for the use of restraint, they focus on what a person should not do but provide insufficient guidance on what a person can do if restraint is a necessary option of last resort. Positive guidance on appropriate physical contact will give teachers and staff greater confidence in managing complex behaviour, for example when there is violence or threat of violence towards people or property.</p> <p>A stronger child or young person’s voice, sector specific guidance and cultural specific violence can strengthen the guidelines.</p> <p>The guidelines rely on other legislation which means there are grey areas such as injury or likely injury to animals in the school or classroom, or spitting.</p> <p>The guidelines need to recognise the Code of Professional Responsibility and the Standards for the Teaching Profession</p>

	<p>because they set out the expectations of behaviours and practice in teaching.</p>
<p>3. Reporting</p>	<p>Agencies need to be careful when establishing reporting requirements. Teachers and staff say the reporting forms and process make reporting onerous.</p> <p>Reporting only has value if there is follow-up to resolve the issues the reporting exposes. There needs to be a clear strategy (what is being done with the data and why) and the value of it needs to be explicit to everyone.</p> <p>We need to improve the understanding of what the data means rather than making assumptions about it. Some of the reporting has led to people questioning the practice of some teachers rather than looking at what is behind the need to restrain (for example, high restraint numbers among younger children is actually expected because of behaviours and required care of younger children rather than necessarily poor teacher performance).</p> <p>Parents and communities need to be able to trust that information held about their child is safe and is treated sensitively.</p> <p>Some parents have said reporting is a huge asset and that some schools are concerned because it will highlight that children with special needs are being restrained the most and therefore schools are not appropriately responding to health-related behavioural needs. Reporting, done right, has its place in understanding issues and targeting resource, and in being transparent. But the right data must be collected, the process not arduous, and the data interpreted appropriately.</p>
<p>4. Training and support</p>	<p>Training and support is critical for successful implementation and outcomes. The current resources are inadequate and investment is needed. Current training is variable and often does not add value. Not everyone or every scenario is the same and so the training needs to be tailored – currently resources are being wasted. One size does not fit all particularly as some schools need more detail and structure than others because of background of children and young people they enrol.</p> <p>Best practice sharing is essential – resources and scenarios are needed to model this practice. Good training and support can help minimise reporting requirements because teachers and staff are better equipped to manage behaviours.</p> <p>Good training is about care, not compliance. It tells the story simply to remove confusion and is collaborative with a student and parent voice. It is not about blame but it needs a robust framework to operate from whether its legal or guidance, and</p>

	<p>it should be about practice and treatment rather than about policy and procedure.</p> <p>We need to be clear about who is responsible for professional development and consider if it should be mandatory in this area. Some parents have suggested a national programme should be rolled out.</p> <p>Beginning teachers need to be better prepared.</p>
5. Engagement	<p>Some parents have said that schools are not being honest about the use of restraint and this is what is making it hard for parents to engage. Instead they are having to fight the system rather than working together.</p> <p>Schools agree it is important to work together – teachers, school, child, parent, community, education and health professionals. A child does not come into education alone. There is a collective responsibility by everyone to be open and honest and have a plan to understand and best support each child and young person. It is also important there is a seamless transition of the child and knowledge between each sector – from early childhood into primary into secondary schooling.</p> <p>Child-centred decisions need everyone involved.</p> <p>Schools need strong engagement within their own school environment to talk about what they already do, what works and what needs to change.</p> <p>The system is massively devolved and principals and boards are on their own.</p>
6. Societal issues	<p>There are broader societal issues impacting on teachers doing their job. Are teachers also social workers and police officers?</p> <p>There are more extreme behaviours being exhibited by children and young people, and society's expectations are that every school will fix every problem as well as teach students. It is incredibly complex. Teachers are asking how much training they are expected to undertake to stay on top of these problems which often sit outside of their skill set and role.</p>