Chair, Cabinet Business Committee

Policy Proposals for updating the Education Act 1989

Proposal

1 I seek Cabinet approval for policy proposals to be included in an Education Amendment Bill, which I propose to introduce into the House after Cabinet on 29 January 2018. The proposals in this paper result from policy included in Labour, New Zealand First and the Greens’ manifesto commitments for education, achieve technical changes, or resolve errors and omissions in the Education Act 1989 (the Act).

Executive Summary

2 The Government has comprehensive policy proposals for education. I am preparing bids for the 2018 Legislative Programme to give effect to these. The first Education Amendment Bill I intend to introduce covers three substantive policy issues that were proposed by all three parties involved in the Government during the election campaign and for which I consider there is widespread sector agreement. These are:

2.1 removing the legislative provisions for national standards;
2.2 removing the legislative provisions for charter schools (‘partnership schools kura hours’) from the Act, and adding necessary transitional provisions;
2.3 restoring places for staff and students on councils of tertiary education institutions (TEIs) and increasing the size of polytechnic councils;

3 I also propose amendments for:

3.1 a new offence relating to declarations for students seeking fee-free tertiary education;
3.2 changing the timeframe for school boards to develop their strategic plans from every four years to every three years and enabling the Secretary for Education to agree to a different time period for any school strategic plan.

4 Errors and omissions in the Act introduced by the Education (Update) Amendment Act 2017 (the Update Act) and minor technical changes will also be resolved through the Bill.

Consultation

5 The key elements of the proposed bill were widely discussed by Labour, New Zealand First and the Greens during the 2017 General Election Campaign. There will be further opportunities for public and sector consultation during the select committee process.

Next Steps

6 Subject to Cabinet agreement, drafting instructions will be issued to Parliamentary Counsel to implement the recommendations in this paper. I will proactively release this paper when the Bill is introduced.
Background

7 During the campaign for the 2017 General Election, Labour, New Zealand First and the Greens all set out comprehensive and compatible education policies designed to ensure that New Zealanders have access to high quality education to enable them to achieve their full potential. Our goal is to ensure children, young people and students are resilient, creative, and adaptable, have great communication and interpersonal skills, and are prepared to work collaboratively as well as independently.

8 To give legislative effect to this, I am preparing bids for the 2018 Legislative Programme. I intend to introduce the first Education Amendment Bill into the House in January 2018. I propose that this Bill makes a number of amendments to the Education Act 1989 as signalled in all of our election manifests, a range of technical amendments, and resolves drafting errors introduced to the Act as a consequence of changes made through the Update Act. These are discussed below.

Removing the legislative provisions for national standards and partnership schools kura hourua

9 Cabinet Business Committee agreed to the revocation of gazette notices concerning national standards on 6 December (CBC 17 MIN 0042 refers).

10 To give effect to the Labour, New Zealand First and the Greens’ shared manifesto commitments to remove national standards, legislative change is also required. Therefore, I propose amendments to repeal the provisions relating to national standards (section 60A(1)(ba) and section 61(4)(a)).

11 Note: under section 158D(3)(h)(ii), the partnership school contract must include reporting requirements in relation to national standards. This section will be repealed as below.

Removing the legislative provisions for charter schools (partnership schools kura hourua)

12 In line with the manifesto commitments of Labour, New Zealand First and the Greens, I proposed to start work on removing the partnership schools kura hourua model from the education system.

13 We simply don’t need the flawed charter schools model in New Zealand. Our schools already have one of the most autonomous governance regimes in the OECD and there is already huge opportunity for creativity and innovation within our school system. Charter schools don’t have to teach to New Zealand’s internationally respected curriculum, don’t have to employ registered and qualified teachers, and don’t have the same accountabilities that every other school in New Zealand have.

14 I propose the following amendments:

14.1 repealing of Part 12A, “Partnership schools kura hourua”, and associated provisions throughout the Education Act 1989, and providing for transitional arrangements;

14.2 for those partnership schools that apply to become a designated character school, provisions to enable these schools to have an alternative constitution from the date of opening if this is needed;

15 The repeal of Part 12A will require other consequential amendments.
16 Repealing the partnership school provisions will not impact on the partnership schools that remain open. Repeal does not impact on the valid Crown contracts. We will include transitional provisions for the schools that remain open, including continuing the existing legal framework for them until they close or their contracts are terminated.

17 The Ministry of Education will work with each school on a case by case basis to explore whether any of the existing models of schooling would be appropriate for them to transition to once their contract is terminated. The existing schooling options are designated character, State integrated and private.

18 The Ministry’s own assessment of fit, and early discussions with some of the partnership school sponsors, indicates that there is an interest in exploring, amongst other options, the designated character school model, established under section 156 of the Act1. While there is increased flexibility in the other models, they also involve increasingly less funding from the Government alongside a need for additional funding sources. Initial discussions have indicated that sponsors would seek greater flexibility with the governance model they would need to adopt as a designated character school.

19 Tai Wānanga is an existing example of a designated character school with an alternative constitution. The initial constitution for the board defined their board membership as three Minister of Education appointments, two Te Wānanga o Aotearoa appointments, two parent elected representatives, a maximum of two co-opted representatives and the principal.

20 Use of an alternative constitution could allow for the appointment of the sponsor’s representative(s) to the board of trustees. There are no restrictions on the sort or number of members that make up a board of trustees under an alternative constitution. However, a board of trustees made up solely of the sponsor and its representatives (without any parent representatives) would be out of step with the model for boards within the wider state schooling sector.

21 Flexible governance structures are currently possible via alternative constitutions, if requested by 20% of parents or by its board. However, this cannot happen until after the designated character school has opened. In practice and under legislation if a Partnership School were to move into the system it would first be “closed” as a Partnership School and then “reopened” as, for example, a special character school.

22 The delay in establishing an alternative constitution for any new designated character school may be a concern for sponsors and jeopardise the smooth change of a school from the Partnership School model into the state system. To mitigate this, I propose to progress a simple legislative provision to enable an alternative constitution from the outset for any schools established to replace a Partnership School.

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1 A designated character school is a State school that has a particular character which sets it apart from ordinary state schools and kura kaupapa Māori.
Restoring places for staff and students on councils of tertiary education institutions

The Education Amendment Act 2015 reduced the number of university and wānanga council members, and removed the requirements that staff and students must be represented on councils. Similar changes were made to Institutes of Technology and Polytechnic (ITP) council arrangements in the Education (Polytechnics) Amendment Act 2009.

Currently, most but not all universities have both staff and student representation in their constitutions, but in general ITPs and wānanga do not – ITP councils have not had staff representatives and only one, Nelson Marlborough Institute of Technology, has had a student representative.

As part of our commitment to ensuring that we have world-class tertiary education institutions, and to re-affirm the important role of staff and students in institutional decision making, I propose to restore guaranteed staff and student representation on the councils of universities, ITPs and wānanga – which are our tertiary education institutions (TEIs). In particular, I propose that the Act be amended to include a requirement that the council of a TEI include at least one member of staff and at least one student of the institution.

As was the case before the requirements for staff and students on TEI councils were removed, I propose that these members be appointed by the council following an election by the groups that they represent. That is, a student representative be elected by the student body of the TEI and the staff representative be elected by staff members of the TEI. These members will be council appointments, elected by the people they represent and appointed by the council by statute.

ITPs have a smaller total council size and a smaller number of institution-appointed council members than universities or wānanga (a maximum of eight council members with four Ministerial appointees, whereas universities can have up to 12 council members with a third being Ministerial appointees). For this reason, I also propose that the Act be amended to increase the size of an ITP council up to a maximum of ten members (from the current eight members). This will mean that the staff and student representatives on ITP councils will be additional to current members.

There are transition implications for TEIs as they may have to update their statutes to include election processes for the appointment of staff and students.

To address these issues, I propose including a transition period of six months in the legislation to give TEIs time to amend their constitutions and, where necessary, establish a process for appointing or electing staff and students to their councils.

New offence for false declarations for fees-free tertiary education

I recommend introducing a new offence provision specifically for false declarations relating to fees-free tertiary education. This would support a shift from statutory declarations (currently required for 2018 fees-free applicants whose eligibility can’t be established with administrative data) to ordinary declarations, decreasing transaction costs for students while maintaining enforceable provisions.

Students who would be affected by this change are those whose level of prior tertiary study is difficult to verify. These students are likely to be Australian citizens, some New
Zealand permanent residents, New Zealand citizens who have studied overseas or who have studied before 2003.

32 Under current settings, the Tertiary Education Commission requires these students to make statutory declarations that they have not previously accessed tertiary education above a certain level, in New Zealand or overseas. A statutory declaration is one made in accordance with the Oaths and Declarations Act 1957, and must be made before a Justice of the Peace, or other authorised person (such as a solicitor). This may be a high compliance burden for students who may need to pay for those services and may be a barrier to accessing fees-free tertiary education.

33 In order to resolve these issues for 2019, I propose that these students will be able to make an ordinary declaration (not a statutory declaration) relating to their eligibility for tertiary education. An ordinary declaration does not require a witness and making a false declaration of this sort is not an offence of itself.2

34 I propose to introduce a new offence provision under the Education Act 1989, for making a false representation, without reasonable excuse, in relation to an application to be considered eligible for fees-free tertiary education.

35 The new offence provision would require students to show that they had a reasonable excuse for providing false information on their application. If they could not, then they could be subject to a penalty. I propose that the penalty should be a fine of up to $10,000, which is in line with the burden of evidence required to establish wrongdoing. This is also consistent with similar offence provisions in the Act (for example, offences in section 292A relating to false representations in relation to programmes, qualifications and training omissions).

36 Currently, if a student was shown to have made a false declaration, then there are two adverse consequences. Firstly, the fees-free entitlement is withdrawn and any fees are payable by the student to the tertiary education provider. Secondly, if there was any intention to defraud, then the student can be prosecuted under the Crimes Act 1961. However, a prosecution under the Crimes Act 1961 would likely be costly and complex, the case would need to be referred to the Police, who may not prioritise low level fraud.

37 Introducing this new offence under the Education Act 1989 with a lower burden of proof and a lower penalty, should wrongdoing be established, would also make it easier to penalise false declarations and would not depend on the Police bringing a prosecution.

Strategic planning and reporting

38 The Update Act introduced a new planning and reporting framework for State and State integrated schools, due to commence on 1 January 2019. The changes to planning and reporting were claimed to increase accountability to parents and the government, to focus on lifting learning, and to remove unnecessary planning complexity. The new framework replaced the school charters, which were of variable quality, with a four-year strategic plan and an annual implementation plan. Strategic plans are required to set out the school board’s strategy for achieving objectives. They are required to be submitted to the Secretary for Education for review and approval, and published on an internet site.

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2 An ordinary declaration, if false, simply serves as evidence of the fact that the person asserted a falsehood, which is then strong evidence in support of any administrative action (such as removing the benefit or entitlement, or in any prosecution of an offence).
Annual implementation plans will focus on the school or kura’s actions and targets for the year. The annual plans also need to be published on a website.

39 Generally there has been qualified support for the new planning and reporting framework, with some significant exceptions:

39.1 concern has been expressed about the strategic plans having a four-year expiry timeframe when the school board electoral and accountability cycle is three years;

39.2 the commencement date for the new plans (1 January 2019) does not provide sufficient time for schools to implement the new planning and reporting framework;

39.3 school boards are not permitted to make significant amendments to plans or to replace them within the four years once they have been made and approved.

40 I therefore propose that the Act be amended to:

40.1 extend the commencement dates for planning and reporting from 1 January 2019 to 1 January 2020 to enable a smooth transition, including the development of associated regulations;

40.2 require school boards to develop a strategic plan at least once every three years, or, if the Secretary determines, at more frequent intervals. This amendment will ensure that the timeframes are more aligned with board electoral and accountability cycles;

40.3 provide for the expiry of strategic plans;

40.4 provide transitional arrangements for the strategic plan by specifying that the 2019 charter is to be regarded as the first strategic plan;

40.5 include requirements for amending strategic plans:

40.5.1 to enable school boards to ask the Secretary to approve significant amendments at any time;

40.5.2 before making significant amendments, require boards to consult the school community, staff, and, where appropriate, the school’s students, and any other person or group specified by the Secretary;

40.5.3 to enable the Secretary, at any time, to require the board to review the strategic plan with a view to significantly amending it;

40.5.4 include an avoidance of doubt provision clarifying that a board is not prevented from making minor changes without the Secretary's approval.

40.6 enable boards to amend annual implementation plans;

40.7 provide for transitional arrangements for the 2020 and 2021 annual report, with the Act to clarify that these reports will be based on the 2019 charter;

40.8 alter revised section 87, "Annual reports", to clarify that the required content of annual reports, in particular financial statements, can be set out in regulations;

40.9 to replace sub-sections that were erroneously removed from section 87;

40.10 any amendments to new section 118A to make sure that the regulation making powers are appropriate in view of the above changes, and to enable the replacement of strategic plans once they have expired.
Miscellaneous amendments

41 There are a range of small amendments that can be made to the Act in order to clarify meaning or fix errors. I propose to include the following amendments in the Bill.

42 Corrections to errors arising out of the Education (Update) Amendment Act 2017, include:

42.1 revise new section 71A(4) [Offsite locations], to make it clear that “except as otherwise provided in the Education Act 1989”, a board or boards may not operate on or host an offsite location for another school;

42.2 amend section 75A, “Appointment of principals”, by replacing the cross-reference to section 65 with clause 6 of Schedule 6.

43 Minor amendments including:

43.1 amend definition of “special institution” in section 92, “Interpretation” by removing the reference to health camps;

43.2 amend section 310(f) [“Meaning of early childhood education and care centre”] by replacing the reference to “The New Zealand Foundation for Child and Family Health and Development” with “an organisation funded by the crown for the purpose of providing a children’s health camp”;

43.3 amend Part 33, “State integrated schools”, to enable State integrated schools to use accrual accounting as an alternative to cash accounting;

43.4 amend section 319B [Powers of entry and inspection without warrant] to enable access to head/regional offices of ECE services and to remove requirements relating to service (electronic and paper documents).

Consultation

44 The following government departments have been consulted on this paper: the Treasury and the Department of the Prime Minister and Cabinet. The State Services Commission has been informed.

45 We have informed the Ministry of Justice about the new offence provision. We intend to consult with the Ministry of Justice on details of the new offence provision as part of the drafting process.

Financial Implications

46 There are no financial implications for proposals in this paper.

Human rights, gender and disability issues

47 There are no human rights, gender or disability issues in this paper.

Legislative Implications

48 The proposals in this paper will require legislative amendment to have legal effect. I propose to include the necessary amendments in a general education amendment bill, which will be available to be introduced on 29 January 2018. A bid will be made for a
I am seeking authority to issue instructions to the Parliamentary Counsel Office for the necessary amendments.

Over the course of the legislative drafting period, further decisions may be required regarding the detail of the amendments. I am therefore requesting that Cabinet authorise the Minister of Education to make decisions on any issues of detail that may arise during the drafting process without further reference to Cabinet, subject to the decisions being consistent with the policy decisions in this paper.

The majority of the amendments to be made through the Education Amendment Bill will not be binding on the Crown. With the exception of Part 33, the Education Act 1989 is not binding on the Crown.

Part 33, “State integrated schools”, is binding on the Crown. The amendment enabling State integrated schools to use accrual accounting as an alternative to cash accounting will be binding on the Crown.

Parliamentary Counsel Office comment

The Parliamentary Counsel Office has advised that, given the resources dedicated to the Government’s 100 day legislative programme and the limited time being allocated for drafting of the proposed Bill, meeting the proposed introduction date will be uniquely challenging. PCO advise that the current timeline also does not take into account the impending holiday period and the required quality assurance work (which includes two weeks for Bill of Rights vetting once the proposed Bill is reasonably settled). Given the tight turnaround time for drafting, there is also a risk that the Bill will require corrective amendments during the select committee consideration.

Regulatory Impact Analysis

Regulatory Impact Statements (RISs) have not been prepared due to the timeframe for developing this paper.

The Regulatory Quality Team at the Treasury considers that Regulatory Impact Analysis is required in relation to the following proposals:

- removing enabling provisions for national standards;
- removing partnership schools provisions;
- new offence for false statutory declarations for fees-free tertiary education;
- restoring places for staff and students on councils of tertiary education institutions.

The Regulatory Quality Team consider that exemptions do apply to the following proposals:

- delaying commencement of planning and reporting provisions for schools (from 2019 to 2020) – it is likely to have a minor impact on the schooling sector;
- strategic planning and reporting amendments – the relevant issues have already been adequately addressed by a previous Regulatory Impact Analysis.
56.3 miscellaneous amendments - they are minor and/or technical changes with only minor impact.

57 The Ministry will provide a RIS for the amendments proposed with the Approval for Introduction Cabinet paper.

Publicity

58 I propose to proactively release this paper when the Bill is introduced.

Recommendations

59 The Minister of Education recommends that the Committee:

1 note that I propose to introduce an Education Amendment Bill to the House of Representatives as soon as practicable after Cabinet meets on 29 January 2018

2 note that a bid for a place on the 2018 Legislation Programme will be made for the Education Amendment Bill is 9(2)(f)(iv) OIA

3 note that the Education Amendment Bill will amend the Education Act 1989 to address key educational issues, some of which were included in manifesto statements from Labour, New Zealand First and the Greens, for example:

3.1 repealing references to national standards

3.2 repealing references to partnership schools kura hourua and including transition arrangements for existing schools to ease transition for partnership schools that apply to become designated character schools

3.3 including elected staff and student representatives on Tertiary Education Institution councils

3.4 creating a new offence provision for false representation without reasonable excuse in relation to an application to be considered eligible for fees free tertiary education

3.5 making changes to the new planning and reporting framework for State and State integrated schools.

4 note that the Education Amendment Bill will also resolve a number of technical issues and errors and minor issues included in the Education Act 1989

5 agree to the legislative amendments set out in Annex 1 to this paper

6 invite the Minister of Education to issue drafting instructions to Parliamentary Counsel to implement the recommendations in this paper

7 authorise the Minister of Education to make decisions on any issues of detail that may arise during the drafting process without further reference to Cabinet, subject to the decisions being consistent with the policy decisions in this paper
8 note that the amendments set out in Annex 1 are subject to Parliamentary Counsel’s direction concerning how best to express these in legislation

9 note that I will proactively release this Cabinet paper when the Bill is introduced.

Authorised for lodgement

Hon Chris Hipkins

Minister of Education
Annex A: List of amendments for inclusion in the Education Amendment Bill

Removing reference to national standards
A The Education Act 1989 to be amended by the repealing of provisions relating to national standards (section 60A(1)(ba) and section 61(4)(a)) Note: under section 158D(3)(b)(ii), the partnership school contract must include reporting requirements in relation to national standards. This section will be repealed as below.

Removing reference to partnership schools kura hourua
B The Education Act 1989 to be amended by the:
  2. inclusion of provisions for transitional arrangements for existing partnership schools.
  3. inclusion of provisions for those partnership schools that want to apply to become a designated character school, that will enable them to have an alternative constitution from the date of opening.
  4. consequential amendments.

Restoring places for staff and students on councils of tertiary education institutions
C The Education Act 1989 to be amended:
  1. to the effect that tertiary education institution councils must ensure that at least one member of council is a:
     a. staff member, appointed by the council following an election by staff of the institution
     b. student enrolled at the institution, appointed by the council following an election by students of the institution.
  2. to increase the size of an institute of technology and polytechnic council to up to a maximum of ten members (from the current eight members).
  3. to include transitional arrangements including a six month transition period for institutions to amend their constitution.

New offence for false statutory declarations for fees-free tertiary education
D The Education Act 1989 to be amended to include a new offence provision for making a false representation, without reasonable excuse, in relation to an application to be considered eligible for fees-free tertiary education.
Planning and Reporting Requirements

E The Education Act 1989 amended to:

1. extend the commencement dates for planning and reporting from 1 January 2019 to 1 January 2020 to make it more practicable for school boards to comply, particularly with the proposed new legislative requirements.

2. require school boards to develop a strategic plan at least once every three years, or, if the Secretary determines, at more frequent intervals.

3. provide for the expiry of strategic plans.

4. provide transitional arrangements for strategic plans by specifying that the 2019 charter is to be regarded as the first strategic plan.

5. include requirements for amending strategic plans:
   • to enable school boards to ask the Secretary to approve significant amendments at any time.
   • before making significant amendments, require boards to consult the school community, staff, and, where appropriate, the school's students, and any other person or group specified by the Secretary.
   • to enable the Secretary, at any time, to require the board to review the strategic plan with a view to significantly amending it.
   • to include an avoidance of doubt provision clarifying that a board is not prevented from making minor changes without the Secretary's approval.

6. enable boards to amend annual implementation plans.

7. provide for transitional arrangements for the 2020 and 2021 annual report, with the Act to clarify that these reports will be based on the 2019 charter.

8. alter revised section 87, “Annual reports”, to clarify that the required content of annual reports, in particular financial statements, can be set out in regulations.

9. to replace sub-sections that were erroneously removed from section 87.

10. any amendments to new section 118A to make sure that the regulation making powers are appropriate in view of the above changes, and to enable the replacement of strategic plans once they have expired.

Miscellaneous and minor amendments

F The Education Act 1989 to be amended as follows:

1. revise new section 71A(4) [Offsite locations], to make it clear that “except as otherwise provided in the Education Act 1989”, a board or boards may not operate on or host an offsite location for another school.


3. amend definition of “special institution” in section 92, “Interpretation” by removing the reference to health camps.

4. amend section 310(f) (“Meaning of early childhood education and care centre”) by replacing the reference to “The New Zealand Foundation for Child and Family
Health and Development" with "an organisation funded by the crown for the purpose of providing a children's health camp".

5. amend section 319B [Powers of entry and inspection without warrant] to enable access to head/regional offices of ECE services and to remove requirements relating to service (electronic and paper documents).