

Cabinet Paper material Proactive release

Minister & portfolio	Hon Jan Tinetti, Minister of Education
Name of package	Amending the Education (When State Schools Must Be Open) Regulations 2022: Policy Decisions
Date considered	28 August 2023
Date of release	5 October 2023

These documents have been proactively released:

Cabinet Paper: Amending the Education (When State Schools Must Be Open) Regulations 2022: Policy Decisions

Date considered: 28 August 2023

Author: Office of the Minister of Education

Social Wellbeing Committee Summary: SWC-23-MIN-0114

Date considered: 28 August 2023

Author: Committee Secretary

Social Wellbeing Committee Minute: SWC-23-MIN-0114

Date considered: 28 August 2023

Author: Committee Secretary

Cabinet Minute: CAB-23-MIN-0398

Date considered: 28 August 2023

Author: Secretary of the Cabinet

Education Report 1314830: Cabinet Paper: Policy decisions on amending the Education (When State Schools Must Be Open) Regulations 2022

Date considered: 2 August 2023

Author: Ministry of Education

Material redacted

Some deletions have been made from the documents in line with withholding grounds under the Official Information Act 1982. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

The applicable withholding grounds under the Act are as follows:

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<http://legislation.govt.nz/act/public/1982/0156/latest/DLM64785.html>

In Confidence

Office of the Minister of Education

Chair, Social Wellbeing Committee

Policy decisions on amending the Education (When State Schools Must Be Open) Regulations 2022

Proposal

1. I seek Cabinet's approval to amend the Education (When State Schools Must be Open) 2022 Regulations (the Regulations) to enable the Minister of Education (the Minister) to determine, by notice, matters relating to school opening hours.

Relation to Government Priorities

2. This paper does not relate to any Government priorities. It covers a technical issue that seeks to restore the Minister's authority under regulations to determine matters relating to school opening hours as previously set out in Schedule 21 of the Education and Training Act 2020 (the Act).

Executive Summary

3. Schedule 21 of the Act provided the framework for the Minister of Education to specify school opening hours and was repealed on 1 January 2023 with the intention that it be converted into regulations.
4. In July 2022, Cabinet agreed to 'lift and shift' Schedule 21 into regulations [SWC-22-MIN-0119]. However, during drafting, Parliamentary Counsel Office and Crown Law Office advised that the regulation-making power under the Act did not allow for the sub-delegation of powers through regulations to enable the Minister to set opening hours. This prevented the replication of Schedule 21 in regulations.
5. In November 2022, Cabinet agreed to rescind its decision to replicate Schedule 21 and instead agreed to make the Education (When State Schools Must Be Open) Regulations 2022 [LEG-22-MIN-0196]. These regulations specified opening hours for schools' 2023 and 2024 years. However, they did not provide the Minister with the authority to vary school opening hours or to authorise multiple timetables, alternative term dates, and specify circumstances for exceptions.
6. The Education and Training Amendment Act 2023 restoring the Minister's ability to determine school opening hours was recently passed by Parliament. As part of this Act, a minor change was made to broaden the Minister's delegation powers to the Secretary for Education (the Secretary) in relation to school opening hours for individual schools. This replaced clause 7 of former Schedule 21.¹ Any decision to use this power of delegation would remain with the Minister.
7. I recommend that the Regulations be amended to replicate provisions in former Schedule 21, except clause 7, and for drafting instructions to be issued to Parliamentary Counsel Office.

¹ Clause 7 provided the Minister with a limited ability to delegate decisions on school opening hours to the Secretary of Education.

Background

8. Schedule 21 of the Act provided the framework for the Minister to specify school opening hours including school year lengths, term dates and holidays. Clause 7 of Schedule 21 also enabled the Minister to delegate to the Secretary the power to authorise any individual school board to open and close at times that differ from any requirements under the Act. Schedule 21 was automatically repealed on 1 January 2023 as part of streamlining the Act, with the intention of being converted into regulations.
9. On 4 July 2021, Cabinet agreed to a “lift and shift” of Schedule 21 into regulations [SWC-22-MIN-0119]. However, during drafting, Parliamentary Counsel Office and Crown Law Office advised that the regulation-making power under the Act did not allow for the sub-delegation of power from the Governor-General to the Minister to enable the Minister to set opening hours. This meant that while some parts of Schedule 21 could be replicated into regulations, those parts that empowered the Minister to specify terms, days, and circumstances for exceptions could not.

The interim solution – the 2022 Regulations

10. Cabinet agreed to rescind its decision to replicate Schedule 21 into regulations and instead agreed to make the Education (When State Schools Must Be Open) Regulations 2022. These Regulations specify the opening hours for schools’ 2023 and 2024 years [LEG-22-MIN-0196].
11. However, the Regulations did not and could not include those provisions that provided the Minister with the flexibility to determine matters related to opening hours as previously set out in the Act. This meant that the Minister could no longer specify the days on which schools must be open or closed, circumstances in which boards may open on Saturdays or Sundays, or approve alternative term dates that differ from those otherwise required in the Act.
12. Without these amendments, new regulations would have to be made for schools’ opening hours each year. It is important to retain flexibility for the Minister to set term dates and minimum days schools must be open to account for calendar fluctuations (e.g., around Easter) and to respond to situations that require half-day and term amendments.
13. There are currently three kura that have been approved to operate alternative terms in 2023. However, the interim regulations prevented any other school or kura from being able to operate alternative terms for 2023 and this had an impact on kura seeking to transition to alternative terms, in particular, to follow the Maramataka Māori (the Māori Lunar calendar).
14. Not enabling alternative terms risks the Crown’s ability to honour its obligations under Te Tiriti o Waitangi / The Treaty of Waitangi, as the Ministry has not been able to support kura to operate in a way that meets the needs of their whānau and communities. However, the risk remains the same as before the interim regulations were made because it is operationally not feasible in the short-term for the Ministry of Education’s payroll capacity, with manual workarounds for alternative terms required.

Longer-term solution – amending the Education and Training Act 2020


15. In November 2022, Cabinet agreed to broaden the regulation-making powers in the Act to enable the Minister to be authorised to determine matters relating to school opening hours. This was to give effect to the intent of Cabinet’s original decision in July 2022 to ‘lift and shift’ Schedule 21 into regulations [SWC-22-MIN-0119].

16. An amendment has recently been made through the Education and Training Amendment Act 2023, to clarify that the Governor-General can make regulations authorising the Minister to, by notice, provide for a range of matters relating to school opening hours including:
- 16.1 term dates and the number of half-days on which schools must be open and providing for exceptions in particular cases;
 - 16.2 the time at which any one or more half-days take place, subject to specified preconditions or requirements;
 - 16.3 running multiple timetable arrangements, unconditionally or subject to any specified preconditions or requirements; and
 - 16.4 the delegation of these powers to the Secretary for Education in relation to any individual school.
17. Regulations are now required to give effect to the changes in the Act to reinstate the Minister's ability to determine, by notice, matters related to school opening hours.

Changes to the Education (When State Schools Must Be Open) Regulations 2022

18. I seek agreement for the Regulations to be amended to replicate the content of the former Schedule 21, except clause 7, and to reflect the new delegation powers. I am also seeking agreement to issue drafting instructions to Parliamentary Counsel Office.

Implementation

19. Schools, kura and the wider sector have been advised that a technical legal error in the original drafting of the regulations had prevented the Minister from being able to approve applications for alternative terms in 2023. The Ministry advised the sector earlier this year that legislative changes to reinstate the Minister's power to approve alternative term dates was progressing and is intended to come into effect from January 2024.
20. I am aware that some kura are in the process of consulting their communities on alternative term dates and that some may wish to transition to the Maramataka Māori by the end of June 2024 to align with Matariki. As I previously advised Cabinet last year, the Ministry is undertaking further work on the approach to facilitating alternative terms from 2024 onwards. The Ministry intends to have undertaken this work to enable some kura to transition for 2024, subject to resource and capacity constraints.
21. s9(2)(g)(i)
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² LEG and Cabinet dates are subject to dates as set out by Cabinet Office for the next Parliamentary term.

Cost-of-living Implications

22. The proposed amendment to the Education (When State Schools Must Be Open) Regulations 2022 will not have any cost-of-living implications.

Financial Implications

23. There are no financial implications associated with this proposal.

Legislative Implications

24. Section 638 of the Education and Training Act 2020 allows for the making of regulations providing for the control, management, organisation, conduct, and administration of schools.
25. I am seeking Cabinet's approval to amend the Education (When State Schools Must Be Open) Regulations which were made under section 638 of the Act.

Impact Analysis

Regulatory Impact Statement

26. The Treasury's Regulatory Impact Analysis team has determined that the proposal to amend the Education (When State Schools Must Be Open) Regulations 2022 to replicate those parts of former Schedule 21 in the Education and Training Act 2020 that enable the Minister of Education to determine, by notice, matters relating to opening hours is exempt from the requirement to provide a Regulatory Impact Statement on the grounds that it has no or only minor impacts on businesses, individuals, and not-for-profit entities.

Climate Implications of Policy Assessment

27. The Climate Implications of Policy Assessment (CIPA) team has been consulted and confirms that CIPA requirements do not apply to this proposal as it is not expected to result in any significant, direct emissions impacts.

Population Implications

28. Requirements for State school opening hours have wide-ranging impacts on all population groups with school-aged children, those employed in the schooling sector, working parents and the wider community including businesses and organisations that have a relationship with schooling (e.g., care services, sports).
29. The proposal in this paper seeks to amend a technical matter to restore the Minister's ability to determine school opening hours, including alternative term dates. This may have a positive impact for those seeking to apply to use alternative term dates by allowing groups to adopt term dates that best reflect their beliefs and values. This includes, for example, the use of the Maramataka Māori which would allow kura to meet and reflect the interests and values of their communities.

Treaty of Waitangi implications

30. The Government has an enduring focus on improving educational outcomes for Māori students and giving effect to Te Tiriti o Waitangi / The Treaty of Waitangi and its principles. Officials have assessed the proposals in this paper against:

- 30.1 *Kāwanatanga/Governance* – the proposal in this paper restores the ability of the Minister to approve alternative term dates and provides the legislative framework for the Minister to approve any future kura who want to transition to the Maramataka Māori. This proposal supports enabling kura to operate in a way that meets the needs of their whānau and communities.
- 30.2 *Rangatiratanga/Chieftainship* – the proposal in this paper restores the Minister's ability to approve alternative terms, which can support kura to exercise their agency and authority over the terms and calendar of the kura.
- 30.3 *Ōritetanga/Equity* – the proposal in this paper restores the Minister's ability to approve alternative terms, including Maramataka Māori, which may support more equitable outcomes by enabling kura to operate in accordance with term dates that better meet the needs of their whānau and communities.

Human Rights

- 31. The proposal in this paper appears to be consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. A final determination as to the consistency of this proposal with the New Zealand Bill of Rights Act will be made when the amended regulations for when State schools must be open have been drafted.

Use of external resources

- 32. No external resources were used in the preparation of the policy advice in this paper.

Consultation

- 33. The Treasury, Department of Prime Minister and Cabinet, Public Service Commission, Ministry for Pacific Peoples, Ministry for Women, Ministry of Business, Innovation and Employment, Te Arawhiti, the Office of the Auditor-General, Ministry of Social Development, Ministry of Youth Development, Whaikaha–Ministry of Disabled People, Ministry of Justice, Oranga Tamariki, Ministry for Ethnic Communities, Department of Internal Affairs, Education Review Office and the New Zealand Qualifications Authority have been consulted. Te Puni Kōkiri was informed.

Communications

- 34. The Ministry of Education will communicate changes to the sector once the amended regulations have come into force.

Proactive Release

- 35. I intend to release the material within this Cabinet paper within 30 days after decisions have been made by Cabinet, subject to redaction as appropriate under the Official Information Act 1982.

Recommendations

- 36. The Minister of Education recommends that the Committee:
 - 1 **note** that Schedule 21 of the Education and Training Act 2020 was repealed on 1 January 2023 with the intent of being converted into regulations;

- 2 **note** that in the drafting process for the new regulations, Parliamentary Counsel Office and Crown Law Office advised that the regulation-making power under the Act did not allow for the sub-delegation of power from the Governor-General to the Minister to enable the Minister to set opening hours by notice;
- 3 **note** that in November 2022, Cabinet agreed to rescind its decision to replicate Schedule 21 into regulations because it is not possible to replicate the parts of Schedule 21 that involve a power of the Minister in regulations made under the Act's current provision;
- 4 **note** that it is important to retain flexibility for the Minister of Education to set terms dates and minimum days schools must be open without changes to the Regulations being required every year;
- 5 **note** Cabinet also agreed to the 2022 Regulations specifying when schools must be open for 2023 and 2024 while legislative change to the Education and Training Act 2020 was progressed [LEG-22-MIN-0196];
- 6 **note** that the Education and Training Act Amendment Act 2023 has recently been passed by Parliament and enables regulations to be made allowing the Minister of Education to determine, by notice, matters relating to school opening hours including:
 - 6.1 term dates and the number of half-days on which schools must be open and providing for exceptions in particular cases
 - 6.2 the time at which any one or more half-days take place, subject to specified preconditions or requirements
 - 6.3 running multiple timetable arrangements; and
 - 6.4 authorising the Minister to delegate the above powers to the Secretary for Education in relation to any individual school;
- 7 **agree** that the *Education (When State Schools Must Be Open) Regulations 2022* be amended to replicate the former Schedule 21, with the exception of clause 7, to allow the Minister of Education to determine, by notice, matters relating to school opening hours and to reflect the new delegation powers;
- 8 **invite** the Minister of Education to issue drafting instructions to the Parliamentary Counsel Office to amend the *Education (When State Schools Must Be Open) Regulations 2022* to give effect to the above proposal;
- 9 **authorise** the Minister of Education to make minor and technical decisions during the drafting of the Regulations that are consistent with the intent of the proposal.

Authorised for lodgement

Hon Jan Tinetti

Minister of Education



Cabinet

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Report of the Cabinet Social Wellbeing Committee: Period Ended 25 August 2023

On 28 August 2023, Cabinet made the following decisions on the work of the Cabinet Social Wellbeing Committee for the period ended 25 August 2023:

Out of Scope

SWC-23-MIN-0114

Amending the Education (When State Schools Must Be Open) Regulations 2022: Policy Decisions
Portfolio: Education

CONFIRMED

Out of Scope

Rachel Hayward
Secretary of the Cabinet



Cabinet Social Wellbeing Committee

Summary

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Amending the Education (When State Schools Must Be Open) Regulations 2022: Policy Decisions

Portfolio Education

Purpose This paper seeks agreement to amend the *Education (When State Schools Must Be Open) Regulations 2022* to enable the Minister of Education (the Minister) to determine, by notice, matters relating to school opening hours.

Previous Decisions In June 2022, SWC agreed to transfer the existing requirements in Schedule 21 of the Education and Training Act 2020 (the Act) into new regulations for when State schools must be open [SWC-22-MIN-0119];

In November 2022, the Cabinet Legislation Committee:

- noted the Parliamentary Counsel and Crown Law advice that the regulation-making power under the Act did not allow a sub-delegation of power from the Governor-General to the Minister and so parts of Schedule 21 could not be replicated in regulations;
- agreed to recommend that Cabinet rescind the June 2022 decision and instead create regulations for when State schools must be open in 2023 and 2024 while changes to the Act were sought [LEG-22-MIN-0196].

Cabinet confirmed the rescinding of the June 2022 decision [CAB-22-MIN-0526].

Proposal The Education and Training Amendment Act 2023 was recently passed. This clarifies that the Governor-General can make regulations authorising the Minister to determine school opening hours, and broadens the Minister's delegation to the Secretary of Education in relation to school opening hours for individual schools.

Amendments to the 2022 regulations are now required to reflect the above changes. These changes reflect the former Schedule 21 with the exception of clause 7 (which gave the Minister limited ability to delegate decisions to the Secretary of Education).

Impact Analysis Treasury has determined these proposals are exempt, as the changes have no or only minor impacts.

Financial Implications	None from this paper.
Legislative Implications	The <i>Education (When State Schools Must Be Open) Regulations 2022</i> will be amended.
Timing Matters	A paper seeking approval for the amended regulations to go to Executive Council will be sought in December 2023.
Communications	The Ministry of Education will advise the sector when the Regulations come into force.
Consultation	<p>Paper prepared by MoE, ERO, NZQA, Treasury, DIA, MoJ, OAG, DPMC (Prime Minister), MfW, MPP, OT, Te Arawhiti, Te Kawa Mataaho, MSD, MBIE (Social Development and Employment), Ethnic Communities, and Whaikaha were consulted. TPK was informed.</p> <p>The Minister indicates that the Cabinet Legislation Committee (LEG) was consulted.</p>

The Minister of Education recommends that the Committee:

- 1 note that:
 - 1.1 in June 2022, SWC agreed to transfer the existing requirements in Schedule 21 of the Education and Training Act 2020 (the Act) into new regulations for when State schools must be open [SWC-22-MIN-0119];
 - 1.2 Schedule 21 was repealed on 1 January 2023 with the intent of being converted into regulations;
- 2 note that in the drafting process for the new regulations, Parliamentary Counsel Office and Crown Law Office advised that the regulation-making power under the Act did not allow for the sub-delegation of power from the Governor-General to the Minister of Education (the Minister) to enable the Minister to set opening hours by notice;
- 3 note that in November 2022, Cabinet confirmed the rescinding of the June 2022 decision above because it is not possible to replicate the parts of Schedule 21 that involve a power of the Minister in regulations made under the Act's current provision [CAB-22-MIN-0526];
- 4 note that it is important to retain flexibility for the Minister to set terms dates and minimum days schools must be open without changes to the Regulations being required every year;
- 5 note that in November 2022, the Cabinet Legislation Committee agreed to create Regulations specifying when schools must be open for 2023 and 2024 while legislative change to the Act was progressed [LEG-22-MIN-0196];

- 6 note that the Education and Training Act Amendment Act 2023 was recently passed and enables regulations to be made allowing the Minister to determine, by notice, matters relating to school opening hours including:
- 6.1 term dates and the number of half-days on which schools must be open and providing for exceptions in particular cases;
 - 6.2 the time at which any one or more half-days take place, subject to specified preconditions or requirements;
 - 6.3 running multiple timetable arrangements;
 - 6.4 authorising the Minister to delegate the above powers to the Secretary for Education in relation to any individual school;
- 7 agree that the *Education (When State Schools Must Be Open) Regulations 2022* be amended to replicate the former Schedule 21, with the exception of clause 7, to allow the to determine, by notice, matters relating to school opening hours and to reflect the new delegation powers;
- 8 invite the Minister to issue drafting instructions to the Parliamentary Counsel Office to amend the *Education (When State Schools Must Be Open) Regulations 2022* to give effect to the above decisions;
- 9 authorise the Minister to make minor and technical decisions during the drafting of the Regulations that are consistent with the intent of the above.

Rachel Clarke
Committee Secretary

Hard-copy distribution:
Cabinet Social Wellbeing Committee



Cabinet Social Wellbeing Committee

Minute of Decision

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Amending the Education (When State Schools Must Be Open) Regulations 2022: Policy Decisions

Portfolio Education

On 23 August 2023, the Cabinet Social Wellbeing Committee (SWC):

- 1 **noted** that:
 - 1.1 in June 2022, SWC agreed to transfer the existing requirements in Schedule 21 of the Education and Training Act 2020 (the Act) into new regulations for when State schools must be open [SWC-22-MIN-0119];
 - 1.2 Schedule 21 was repealed on 1 January 2023 with the intent of being converted into regulations;
- 2 **noted** that in the drafting process for the new regulations, Parliamentary Counsel Office and Crown Law Office advised that the regulation-making power under the Act did not allow for the sub-delegation of power from the Governor-General to the Minister of Education (the Minister) to enable the Minister to set opening hours by notice;
- 3 **noted** that in November 2022, Cabinet confirmed the rescinding of the June 2022 decision above because it is not possible to replicate the parts of Schedule 21 that involve a power of the Minister in regulations made under the Act's current provision [CAB-22-MIN-0526];
- 4 **noted** that it is important to retain flexibility for the Minister to set terms dates and minimum days schools must be open without changes to the Regulations being required every year;
- 5 **noted** that in November 2022, the Cabinet Legislation Committee agreed to create regulations specifying when schools must be open for 2023 and 2024 while legislative change to the Act was progressed [LEG-22-MIN-0196];
- 6 **noted** that the Education and Training Act Amendment Act 2023 was recently passed and enables regulations to be made allowing the Minister to determine, by notice, matters relating to school opening hours including:
 - 6.1 term dates and the number of half-days on which schools must be open and providing for exceptions in particular cases;
 - 6.2 the time at which any one or more half-days take place, subject to specified pre-conditions or requirements;

- 6.3 running multiple timetable arrangements;
- 6.4 authorising the Minister to delegate the above powers to the Secretary for Education in relation to any individual school;
- 7 **agreed** that the Education (When State Schools Must Be Open) Regulations 2022 be amended to replicate the former Schedule 21, with the exception of clause 7, to allow the Minister to determine, by notice, matters relating to school opening hours and to reflect the new delegation powers;
- 8 **invited** the Minister to issue drafting instructions to the Parliamentary Counsel Office to amend the Education (When State Schools Must Be Open) Regulations 2022 to give effect to the above decisions;
- 9 **authorised** the Minister to make minor and technical decisions during the drafting of the regulations, consistent with the intent of the above decisions.

Rachel Clarke
Committee Secretary

Present:

Hon Kelvin Davis (Chair)
Hon Grant Robertson
Hon Dr Megan Woods
Hon Dr Ayesha Verrall
Hon Andrew Little
Hon Priyanca Radhakrishnan
Hon Ginny Andersen
Hon Barbara Edmonds
Hon Jo Luxton

Officials present from:

Office of the Prime Minister
Office of the Chair
Officials Committee for SWC



Education Report: Cabinet paper: Policy decisions on amending the Education (When State Schools Must Be Open) Regulations 2022

To:	Hon Jan Tinetti, Minister of Education		
Date:	31 July 2023	Priority:	High
Security Level:	In Confidence	METIS No:	1314830
Drafter:	Daniel Kwon	DDI:	9(2)(a)
Key Contact:	Maria Kirkland	DDI:	
Messaging seen by Communications team:	No	Round Robin:	No

Purpose of Report

This paper seeks your agreement to circulate the attached draft Cabinet paper (Annex 1) for Ministerial consultation. The draft Cabinet paper seeks agreement to amend the Education (When State Schools Must be Open) Regulations 2022 to enable the Minister of Education (the Minister) to determine, by notice, matters relating to school opening hours as previously set out in former Schedule 21 of the Education and Training Act 2020 (the Act).

Summary

1. Schedule 21 of the Act provided the framework for the Minister of Education (the Minister) to specify school opening hours. As part of streamlining the Act, Schedule 21 was repealed on 1 January 2023 with the intention that it be converted into regulations.
2. During drafting, Parliamentary Counsel Office and Crown Law Office advised that the regulation-making power under the Act did not allow for the sub-delegation of powers from the Governor-General to the Minister to enable them to set opening hours, therefore preventing the replication of Schedule 21 in regulations. This meant that while some parts of Schedule 21 could be replicated into new regulations, the parts that empower the Minister to specify terms, days and circumstances for exceptions could not.
3. In November 2022, Cabinet agreed to a two-staged approach to:
 - a. make interim regulations specifying opening hours for schools' 2023 and 2024 years; and
 - b. changes to the Act through the Education and Training Amendment Bill No 3 (the Bill) to broaden the regulation-making power so that the Minister can specify when state schools must be open or close [LEG-22-MIN-0196 refers]. The Bill also includes a minor change to broaden the Minister's delegation powers to the Secretary for Education (the Secretary) in matters relating to schools opening hours for individual schools.
4. The Bill is intended to pass by the end of August 2023 and amendments now need to be made, in order for the substantive regulations to be in place in early 2024, which has previously been communicated to the schooling sector.

5. The attached draft Cabinet paper (Annex 1) seeks policy decisions to amend the regulations to replicate those provisions in former Schedule 21, with the exception of clause 7 (relating to delegations). We recommend you circulate this paper for Ministerial Consultation, ahead of consideration by the Social Wellbeing Committee on 30 August 2023.

Recommended Actions

The Ministry of Education recommends that you:

- a. **note** that Schedule 21 of the Education and Training Act 2020 was repealed on 1 January 2023 with the intent of being converted into regulations [SWC-22-MIN-0119] **Noted**
- b. **note** that in the drafting process for the new regulations, Parliamentary Counsel Office and Crown Law Office advised that the regulation-making power under the Education and Training Act 2020 did not allow for the sub-delegation of powers from the Governor-General to the Minister to enable the Minister to set opening hours by notice **Noted**
- c. **note** that in November 2022, Cabinet agreed to the Education (When State Schools Must Be Open) Regulations 2022 that specified opening hours for schools' 2023 and 2024 years but did not include provisions to provide the Minister with the flexibility to determine matters related to opening hours as previously set out in the Education and Training Act 2020 **Noted**
- d. **note** that it is important to retain flexibility for the Minister of Education to set terms dates and minimum days schools must be open without changes to the Regulations being required every year **Noted**
- e. **note** that the Education and Training Amendment Bill No 3 is expected to be passed by the end of August 2023 which restores this flexibility by enabling regulations to be made allowing the Minister of Education to determine, by notice, matters relating to school opening hours including:
- i. term dates and the number of half-days on which schools must be open and providing for exceptions in particular cases
 - ii. the time at which any one or more half-days take place, subject to specified preconditions or requirements
 - iii. running multiple timetable arrangements, unconditionally or subject to any specified preconditions or requirements; and
 - iv. authorising the Minister to delegate these powers to the Secretary for Education in relation to any individual school **Noted**

- f. **note** that policy decisions are needed to amend the Education (When State Schools Must Be Open) 2022 Regulations in order to have the substantive regulations in place in early 2024, which has previously been communicated to the schooling sector

Noted

- g. **agree** to amend the Education (When State Schools Must Be Open) 2022 Regulations to replicate the former Schedule 21 except for clause 7 to allow the Minister of Education to determine, by notice, matters relating to school opening hours and to reflect the new delegation powers contained in the Education and Training Amendment Bill No 3

Agree / Disagree

- h. **agree** to circulate for Ministerial consultation the attached draft Cabinet paper (Annex 1) which seeks agreement to these policy decisions

Agree / Disagree

- i. **note** that we will provide you with a final Cabinet paper by 22 August for lodgement ahead of consideration at Social Wellbeing Committee on 30 August

Noted

Proactive Release Recommendation

- j. **agree** that the Ministry of Education release this paper in full once Cabinet decisions have been made.

Agree / Disagree



Jennifer Fraser
General Manager, Schools Policy
Te Pou Kaupapahere

31/07/2023



Hon Jan Tinetti
Minister of Education

2 July 2023

Background

The regulation making powers in the Act were not broad enough to enable a 'lift and shift' of Schedule 21 into regulations

1. Schedule 21 of the Act provided the framework for the Minister to specify school opening hours including school year lengths, term dates, holidays, when schools may open and close, exceptions for fewer half-days, alternative term dates, and multiple timetable arrangements. Schedule 21 was automatically repealed on 1 January 2023 as part of streamlining the Act, with the intention of being converted into regulations.
2. On 4 July 2021, Cabinet agreed to a "lift and shift" of Schedule 21 (When State Schools Must Be Open) into regulations ahead of its automatic repeal [SWC-22-MIN-0119]. However, during drafting, Parliamentary Counsel Office and Crown Law Office advised that the regulation-making power under the Act did not allow for the sub-delegation of power from the Governor-General to the Minister to enable the Minister to set opening hours. This meant that while some parts of Schedule 21 could be replicated into regulations, those parts that empowered the Minister to specify terms, days, and circumstances for exceptions could not.
3. On 22 November 2022, Cabinet agreed to rescind its decision to replicate Schedule 21 in regulations and instead agreed to make interim regulations specifying school opening hours for 2023 and 2024 while an amendment to broaden section 638(2)(e) of the Act was progressed through the Education and Training Amendment Bill No 3 [LEG-22-MIN-0196]. Without these amendments, new regulations would have to be made to set schools' opening hours each year.
4. On 1 January 2023, the Education (When State Schools Must Be Open) Regulations 2022 (the Regulations) came into effect specifying school opening hours for 2023 and 2024 consistent with the statutory requirements and Minister's notices already made under Schedule 21.

It is important that there is flexibility within the regulatory framework for the Minister to respond to calendar fluctuations without needing to make new regulations each year

5. While the 2022 Regulations set the times, dates, limited exceptions and timetable arrangements for the 2023 and 2024 school years, they could not include those provisions that provided the Minister with the flexibility to determine matters related to opening hours as previously set out in the Act. This meant that the Minister could no longer specify the days on which schools must be open or closed, circumstances in which boards may open on Saturdays or Sundays or approve alternative term dates that differ from those otherwise required in the Act.
6. It is important to retain flexibility for the Minister to set term dates and minimum days schools must be open to account for calendar fluctuations and to respond to situations that require half-day and term amendments without needing to make new regulations each year. For example, there is an ongoing need for flexibility to adjust terms so that Easter and school holidays align each year.
7. We also know that there is increasing interest from kura wanting to transition to alternative terms to follow the Maramataka Māori (the Māori Lunar calendar). There are currently three kura that have been approved to operate alternative terms in 2023. However, the current Regulations prevent any other school or kura from being able to operate alternative terms for 2023 and 2024.
8. In the long-term, not allowing alternative term dates could risk the Crown's ability to honour its obligations under Te Tiriti o Waitangi / The Treaty of Waitangi, as the Ministry would not be able to support kura to operate in ways that meet the needs of their whānau and communities. However, this risk remains the same as before the 2022 Regulations

as it is currently operationally unfeasible in the short-term for the Ministry of Education's payroll capacity, with manual workarounds for alternative terms required.

9. The Ministry is currently undertaking further work on the approach to facilitating alternative terms from 2024 and has begun scoping potential impacts across operational systems. Preliminary analysis has identified impacts in systems areas including employment terms and conditions, data collection and reporting, school transport, procurement, and NCEA external assessments. Payroll remains the primary financial implication with around \$700,000 per annum quoted for manual workarounds until a new payroll system comes into effect from 2027.

The Education and Training Amendment Bill No 3 is expected to be passed by the end of August which restores the Minister's powers to specify in regulations when schools open and close

10. An amendment to widen the regulation making power under section 638(2)(e) of the Act to allow sub-delegation of powers to the Minister is being progressed through the Bill, which is expected to be passed in late August 2023.
11. Clause 34 of the Bill contains the following proposals to amend section 638(2)(e) of the Act to clarify that the Governor-General can make regulations that authorise the Minister to, by notice, provide for when schools must or may be open and closed for instruction, including:
 - i. specifying term dates and the number of half-days on which schools must be open and providing exceptions in particular cases;
 - ii. allowing boards to vary the time at which any 1 or more half-days take place subject to any specified preconditions or requirements;
 - iii. allowing boards to run multiple timetable arrangements unconditionally or subject to any specified preconditions or requirements.
12. The Bill also broadens the regulation-making power concerning the Minister's ability to delegate the above decisions to the Secretary in relation to any individual school. However, this delegation is not mandatory and the decision whether or not to delegate this authority ultimately sits with the Minister.

The attached draft Cabinet paper seeks policy decisions to amend the Regulations to restore it to the previous Schedule 21 provisions, with the exception of clause 7

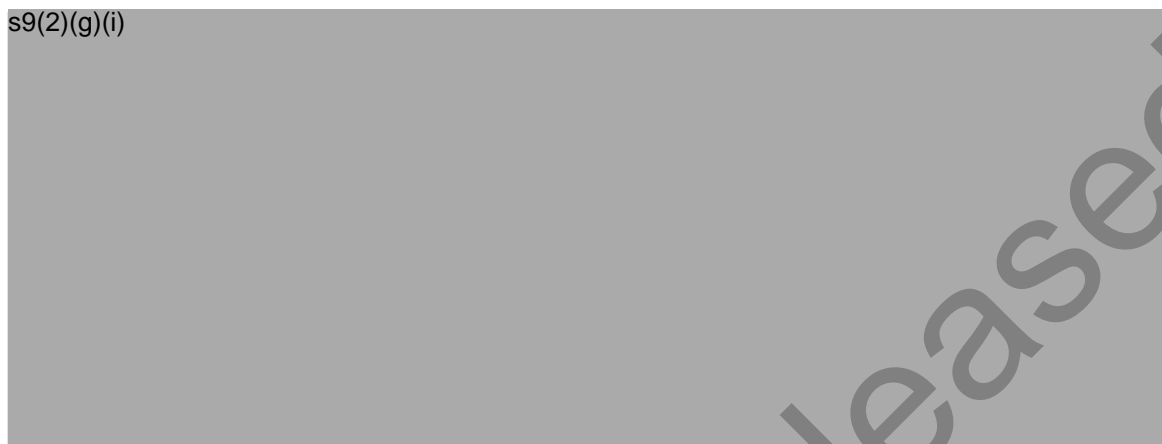
13. The 2022 Regulations were only intended to be in place for 2023. While they include the dates for when schools must be open for 2023 and 2024, this was intended to help the transition between the 2022 Regulations and the substantive regulations and provide the sector with certainty around term dates. This is because it was not possible for the Minister to set 2024 term dates under the substantive regulations before 1 July 2023, which is the minimum notice requirement for schools.
14. The draft Cabinet paper seeks policy decisions to replicate the content of Schedule 21, with the exception of clause 7 to allow the Minister to, by notice, provide for when schools must or may be open and closed for instruction, and to reflect the new delegation powers contained in the Bill.
15. Policy decisions will enable the Ministry to issue instructions to Parliamentary Counsel Office to draft the substantive regulations. It is intended that these regulations will be made by early 2024.

Next Steps

16. We have undertaken departmental consultation on the draft Cabinet paper and received no substantive feedback.

17. Subject to your agreement, we recommend you circulate the attached draft Cabinet paper for Ministerial consultation. We will provide you with a final Cabinet paper to lodge ahead of consideration by the Social Wellbeing Cabinet Committee on 30 August 2023. **Table 1** sets out a timeline on the progression of the work to amend the Regulations.

s9(2)(g)(i)



Annexes

Annex 1: *Draft Cabinet paper: Policy decisions on Proposed Education (When State Schools Must Be Open) Amendment Regulations*

¹ LEG and Cabinet dates are subject to dates as set out by Cabinet Office for the next Parliamentary term.