



Education Report: Draft Cabinet paper – Education and Training Bill: policy approvals for Supplementary Order Papers

To:	Hon Chris Hipkins, Minister of Education		
Date:	7 May 2020	Priority:	Medium
Security Level:	In Confidence	METIS No:	1224540
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Purpose of Report

This paper seeks your agreement to begin departmental consultation on the attached draft Cabinet paper – *Education and Training Bill: policy approvals for Supplementary Order Papers (SOPs)*.

Summary

1. Proposals related to the following policy areas are included in the attached Cabinet paper for possible inclusion in Supplementary Order Papers (SOPS) to be introduced at the Committee of the Whole House stage:
 - a. extending the expiry date of the Education (Pastoral Care of Domestic Tertiary Students) Interim Code of Practice (METIS 1224552);
 - b. enabling the Minister of Education to vary a funding mechanism relating to the Tertiary Education Commission, without a stand-down period (METIS 1224798);
 - c. enabling students based offshore to continue their New Zealand schooling during the COVID-19 pandemic (METIS 1225063);
 - d. providing new powers for the Secretary for Education to act when a state of emergency or epidemic notice is in force, and to direct a board to reopen a school that has been closed due to an emergency. This includes new offence provisions and penalties to be included in the Education and Training Bill (the Bill). (METIS 1224798);
 - e. extending the commencement date for the Ministry to take over school enrolment scheme development and modification processes;
 - f. enabling the Secretary for Education to allow for grandparenting provisions for siblings of existing students when an enrolment scheme is introduced or changed (METIS 1223696); and,

- g. enabling the Minister of Education to recognise sub-categories of (private training establishments (PTEs) (METIS 1216484).

2. **s 9(2)(f)(iv)**
[Redacted]
[Redacted]
[Redacted]
[Redacted]
3. To ensure that SOPs are ready for Committee of the Whole House in late June, we recommend the Cabinet paper be lodged on 21 May 2020 for consideration by the Cabinet Social Wellbeing Committee (SWC) on 27 May 2020.

Recommended Actions

The Ministry of Education recommends that you:

- a. **note** that the attached draft Cabinet paper contains a number of proposed policy changes to be given effect through the Education and Training Bill by Supplementary Order Paper at the Committee of the Whole House stage
- Noted**
- b. **s 9(2)(f)(iv)**
[Redacted]
- Noted**
- c. **agree** to the Ministry consulting government officials from 11 May to 14 May to enable the paper to be lodged on 21 May 2020

Agree **Disagree**

Proactive Release Recommendation

- d. **agree** that this Education Report, and the final version of the attached Cabinet paper, be proactively released once any SOPs relating to the relevant policy proposals have been tabled in the House of Representatives.

Agree **Disagree**



Dr Andrea Schöllmann
Deputy Secretary
Education System Policy

07/05/2020



Hon Chris Hipkins
Minister of Education

11/ 5/ 2020

Background

1. The Bill is due to be reported back to the House of Representatives (the House) by 8 June 2020.

Policy proposals previously provided in separate Education Reports

2. The attached draft Cabinet paper seeks approval for SOPs to be drafted in time for them to be tabled at the Committee of Whole House stage. The policy issues addressed in the attached paper are to:
 - a. delay the expiry date of the Education (Pastoral Care of Domestic Tertiary Students) Interim Code of Practice, in response to the disruption from COVID-19, to enable the Interim Code to remain in place until 1 January 2022;
 - b. amend clause 9 of Schedule 17 of the Bill to allow the Minister of Education to vary a tertiary funding mechanism immediately following consultation, when the change(s) respond to or support recovery from an epidemic or national/local state of emergency;
 - c. with respect to the provision of education and NCEA offshore:
 - i. insert a time-limited power for the Minister of Education to approve State and State-integrated schools on a case-by-case basis to offer distance education to students based offshore, with the approval only applying to students who have an existing enrolment with the school that has been disrupted by COVID-19, with the power and the approval to expire by the end of the 2022 school year;
 - ii. amend clause 426 to state that NCEA cannot be delivered outside New Zealand except in accordance with Rules made by NZQA under clause 423, with these Rules to expire at the end of the 2022 school year;
 - iii. amend clause 423 to temporarily expand NZQA's rule-making power to prescribe the process for, and the information required in, an application for offering NCEA outside of New Zealand, and to prescribe the criteria that NZQA must apply when considering such an application, with the additional power set to expire at the end of the 2022 school year;
 - iv. amend clause 423 to enable NZQA to approve standards that may be assessed by schools providing NCEA to students based offshore under the temporary additional rule-making power;
 - d. with respect to state of emergency or epidemic powers for the Secretary for Education:
 - i. provide a new set of powers for the Secretary for Education to act when a state of emergency or epidemic notice is in place to ensure that the response to the emergency or epidemic, and the recovery from it, by the education sector, can be provided in a way that avoids, remedies or mitigates any actual or potential adverse effects, and facilitates coordinated processes and planning across the education sector and government agencies;
 - ii. create a new offence of failure to follow a direction of the Secretary without reasonable excuse;

- iii. provide a power for the Secretary for Education to direct a board to reopen a school that has been closed under clause 6, Schedule 20, due to an emergency, and the Secretary considers that the closure is no longer justified; and
- iv. move clause 6 of Schedule 20 from the Schedule into the body of the Bill, to be located with the Secretary's new powers to be exercised when a state of emergency or an epidemic notice is in place;
- e. delay the commencement date to 1 January 2021 for the provisions that transfer responsibility for school enrolment zones from school boards of trustees to the Ministry of Education;
- f. add a provision to allow for the use of grandparenting provisions in relation to enrolment schemes at the discretion of the Secretary for Education, where their use is considered to be consistent with the purposes and principles of enrolment schemes in clause 69 of the Bill; and,
- g. allow the Minister of Education to establish sub-categories of private training establishments (PTEs) by *Gazette* notice, by replacing clause 323 with a provision to that effect.

s 9(2)(f)(iv)

- [Redacted]
- [Redacted]
- [Redacted]
- [Redacted]
- [Redacted]
- [Redacted]
- [Redacted]

New powers for the Secretary for Education when a state of emergency or epidemic notice is in force

7. On 24 April 2020, we briefed you on options for progressing possible amendments to education legislation arising from the COVID-19 response [METIS 1224798 refers].
8. We advised you that we had identified gaps in the Secretary for Education's powers to respond in the event of an emergency and the subsequent recovery period, including an inability to direct school boards to:
 - a. open and close for physical attendance and/or instruction;
 - b. restrict attendance of students and workers; and
 - c. provide online and distance learning as part of instruction while schools are closed for physical attendance.
9. These gaps have been temporarily addressed for schools and all other education entities by the COVID-19 Response (Urgent Management Measures) Legislation Act 2020 while an epidemic notice remains in force for COVID-19¹. However, without permanent legislative change, these gaps will return once the epidemic notice is lifted, and will be carried over to the Education and Training Act if the Bill is passed through the House as currently drafted.
10. You indicated that you want to address these gaps now by developing proposed amendments to the Bill through Supplementary Order Papers, and that, at a minimum, the powers given to the Secretary under the COVID-19 Response (Urgent Management Measures) Legislation Act 2020 should be reinstated whenever an epidemic notice is in place under the Pandemic Preparedness Act 2006, or whenever a National State of Emergency is declared under the Civil Defence and Emergency Management Act 2002.

Policy proposals for new emergency powers

11. The attached draft Cabinet paper contains policy proposals that incorporate the key features of the temporary powers provided to the Secretary in the COVID-19 Response (Urgent Management Measures) Legislation Act 2020 into the Education and Training Bill. In particular, the policy proposals:
 - a. create a new set of emergency powers that the Secretary for Education can use when a state of emergency is in place under the Civil Defence and Emergency Management Act 2002 (including for both a national and local state of emergency) or when an epidemic notice is in place under the Epidemic Preparedness Act 2006;
 - b. apply to all education entities in the education system: early childhood education (ECE) providers, state, state-integrated and private schools, tertiary education providers, and other service providers such as hostels;
 - c. provide the Secretary for Education with the ability to direct the governing authority of an education entity (or the governing authorities of a class of education entities) to:

¹ An epidemic notice is currently in place under the Epidemic Preparedness Act 2006.

- i. close and open an education entity or any part of it (including in relation to all or any specified category, class or year group, of children or students);
 - ii. specify whether an education entity (or groups of entities) are to be open and closed for physical attendance, instruction, or both physical attendance and instruction;
 - iii. set restrictions on the attendance of children, students, and those working at an education entity, after having due regard to any relevant employment and health and safety legislation;
 - iv. comply with specified requirements for the operation, management and control of the education entity; and
 - v. provide education or instruction through the education entity in any specified ways (e.g. through distance or online learning);
 - d. clarify that 'instruction' may include the provision of education services through online, remote and distance learning, as well as through other means, to reflect the critical role that these forms of instruction play in ensuring that many students can continue to learn when schools and other education entities are required to be closed for physical attendance for any period of time.
12. In addition, the policy proposals address matters not currently covered in the COVID-19 Response (Urgent Management Measures) Legislation Act 2020, including:
- a. making it an offence with a penalty under the Education and Training Act for an education entity not to comply with a directive that has been issued by the Secretary; and
 - b. preventing boards of trustees of schools from exercising their powers to close schools under clause 6 of Schedule 20 in an emergency when a directive from the Secretary is in place.
13. As well as creating the new emergency powers for the Secretary, the policy proposals create a new power for the Secretary to direct a board to reopen a school that has been closed under clause 6 of Schedule 20 due to an emergency, where the Secretary has consulted the board and relevant others, and considers that the closure is no longer justified.
14. Also, Schedule 20 will become regulations within two years of the commencement of the Bill. We propose that clause 6 be moved back into the body of the Bill, to be located with the Secretary's new powers to be exercised when a state of emergency or an epidemic notice is in place. Emergency powers should not be located in regulations, and this ensures that all of the relevant powers are easily accessible through being located in the same statute.

Sanctions for non-compliance

15. As noted above, to support compliance with the new emergency powers, we have been considering alternative options for imposing sanctions and/or penalties on education entities that do not comply with a direction issued by the Secretary without a reasonable excuse.
16. The draft Cabinet paper currently includes a proposal that any education entity that does not comply with a direction without a reasonable excuse is liable for a fine of up to

\$50,000. This is in line with penalties imposed under the Civil Defence and Emergency Management Act 2002.

17. We have not yet had the opportunity to discuss the proposed offence and associated penalty with the Ministry of Justice. We will do this over the coming week prior to finalising the Cabinet paper, subject to your approval.
18. An alternative option is to use existing sanctions already available under the Education Act 1989 to enforce compliance by the different types of education entities (rather than impose a financial penalty). There is some scope to do this for State schools, private schools, and ECE providers (i.e. through the interventions framework and registration and licensing regimes); however, the practicalities of using these types of sanctions during an emergency response are uncertain (e.g. imposing restrictions on licences could make it harder to achieve the ultimate objective of a directive). In addition, there are no clear options available for imposing sanctions on tertiary providers. Therefore, we do not consider this to be a viable option at this stage.

Impacts of the policy proposals

19. Based on our COVID-19 experience, the exercise of the proposed new powers is likely to have industrial relations and payroll implications, and these will need to be worked through at the time a decision is made to use the powers. This may also involve some financial costs to the Crown.
20. Furthermore, the new powers will mean that the Secretary will be able to direct private businesses (e.g. ECE, tertiary providers, and some hostels) on matters related to their operation and management during a state of emergency or when an epidemic notice is in place, in ways that are not possible or appropriate at other times. While this may be justified in a state of emergency or pandemic, it is likely to raise concerns for some service providers in terms of uncertainty about the potential impact on their business.
21. Subject to your agreement, we will work with key agencies over the next week with a view to gaining a clearer understanding of the potential impacts of the proposals signalled above.

Other matters – location of clause 2 of Schedule 20

22. We note that Schedule 20 will become regulations within two years of the passage of the Bill. Therefore we propose that clause 6, which deals with emergencies, be moved back into the body of the Bill, to be located with the Secretary's new powers to be exercised when a state of emergency or an epidemic notice is in place. Emergency powers should not be located in regulations, and this ensures that all of the relevant powers are easily accessible through being located in the same statute.

Preparation of Regulatory Impact Assessment

23. The Ministry is currently working with the Treasury on a Regulatory Impact Assessment (RIA) relating to the Secretary's powers when an epidemic notice or state of emergency is in force. This RIA assessment will be incorporated in the final version of the Cabinet paper.

Next steps

24. With your agreement, we will undertake departmental consultation on the attached Cabinet paper from 11 May to 14 May 2020.

25. To enable the SOP to be drafted before Committee of Whole House stage and Cabinet Legislation Committee's (LEG) approval to be sought on 23 June 2020, we propose you seek SWC policy approval on 27 May. The SWC date leaves less than a desirable amount of time for PCO to draft the SOPs, and for LEG approval to be sought, if the Bill is to progress to final stages in June. However Parliamentary Counsel Office (PCO) has indicated it's prepared to draft ahead of SWC approval if necessary, in recognition of the Government's commitment to this Bill.
26. The proposed timetable for seeking the relevant approvals and drafting the relevant SOPs is set out below:
- 11 May – Agency meeting seeking agreement to COVID response and proposed SOP changes, and to departmental consultation on the Cabinet paper
 - 11 to 14 May – Departmental consultation
 - 15 to 20 May - Ministerial consultation
 - 21 May - Lodge the attached paper for consideration by SWC
 - 27 May - SWC consideration of the attached paper
 - 2 June – Cabinet confirmation of SWC's decision
 - 2 to 9 June - PCO drafting of SOPs and Ministry review of the drafts
 - 10 June - Draft Cabinet Legislation Committee (LEG) paper provided to Minister's Office
 - 15 June – Agency meeting seeking agreement to concurrent departmental and Ministerial consultation on the LEG paper and SOPs
 - 15 to 17 June – Concurrent departmental and Ministerial consultation
 - 18 June – Lodge paper for LEG consideration
 - 23 June – LEG consideration of SOPs
 - 29 June – Cabinet confirmation of LEG decisions.

Annexes

- Annex 1: (Draft) Cabinet paper - *Education and Training Bill: policy approvals for Supplementary Order Papers*