



Briefing Note: Establishing and disestablishing special schools and State schools

To:	Hon Chris Hipkins, Minister of Education		
Date:	10 April 2019	Priority:	High
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Drafter:	Cindy O'Brien	DDI:	s 9(2)(a)
Key Contact:	Ben O'Meara	DDI:	
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Purpose of paper

This paper provides advice on the implications of applying the tests for disestablishing special schools under the Education Act 1964 to all State school closures.

Summary

- It would be feasible to apply the 1964 Act special schools' disestablishment tests to all other State schools.
- However, doing so could increase legal uncertainty. Case law on what constitutes "sufficient provision" in the schooling network, which is one of the 1964 Act considerations regarding school closures, is specific to special schools and the needs of their students. It is not clear how a court would interpret these requirements if they were to be applied to all State schools.
- The change may also be perceived by disabled peoples' communities as diluting added protections for special schools, over and above those afforded to other State schools. This is because special schools would no longer be subject to a higher threshold test before a decision to close a special school could be made. The threshold for a school closure decision would be the same for both State and special schools.
- The Tomorrow's Schools Taskforce have recommended that Education Hubs make decisions on State school openings and closures. You may therefore wish to consider all state school establishment issues together, rather than consulting on a change now in advance of the Taskforce delivering its final report.
- On balance, we consider that the legal uncertainties created by the change would outweigh the benefits, so we recommend you continue with the approach proposed in the draft Education and Training Bill Cabinet paper provided to you last week for lodging.

Proactive release

Agree that this Briefing will **not** be proactively released at this time because final decisions are still to be made on what should be included in the Education and Training Bill.

Agree / Disagree



Dr Andrea Schöllmann
Deputy Secretary
Education System Policy

10/04/2019

Hon Chris Hipkins
Minister of Education

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Background

1. This briefing responds to your question at yesterday's agency meeting about our proposals regarding disestablishment of special schools.
2. You asked whether, if the 1964 Act has a higher disestablishment test for special schools, that test could be adopted for all state schools.

Applying the 1964 Act disestablishment tests to State schools

3. Special schools are disestablished under section 98(2) of the 1964 Act. Subsection (2) provides that the Minister may disestablish a special school if:
 - a. he or she is dissatisfied with the manner in which the school is being conducted (dissatisfaction test);
 - or
 - b. he or she "considers that sufficient provision is being made by another similarly established special school, class, clinic or service or by any other school or class in or reasonably near to the same locality..." (sufficient provision and locality tests).
4. In considering how to streamline the provisions relating to both establishment and disestablishment of special schools, the question of whether to prefer the 1964 or 1989 Act approaches appears to only be an issue for the disestablishment provisions. This is because protection against closure is of greater significance to communities than restrictions on the opening of new schools.
5. In our earlier advice, we have sought to bring the 1964 Act disestablishment provisions for special schools into line with the 1989 Act provisions for all other State schools. We have now considered the alternative of bringing the 1989 provisions for all other State schools into line with the 1964 Act special school provisions, but consider this risky for the reasons outlined below.

Risks

6. The 1964 Act doesn't contain any explicit consultation requirements. So, while the 1964 Act contains some additional matters that the Minister must consider regarding a proposed closure of a special school, the consultation requirements are much clearer for proposed state school closures under the 1989 Act. If we were to transfer the 1964 Act provisions to the 1989 Act, we propose that they would be added to the existing 1989 Act provisions, rather than substituting for them, because we would otherwise lose the explicit consultation obligations in the 1989 Act.
7. Applying the additional 1964 Act disestablishment tests to State schools would create legal uncertainty. It is not clear how a court would interpret the requirements regarding Ministerial dissatisfaction and sufficient provision, and the locality test, for disestablishing special schools in the 1964 Act if they were applied to all State schools.
8. The case law on "sufficient provision" is specific to special schools and the needs of their cohort of students, while the Ministerial dissatisfaction ground for closure has never been used. For example, alternative provision via Te Kura might not meet the locality test and there could be sufficient provision issues with single sex schools if these were considered as an alternative to co-educational schools.
9. The impression created by this change may be that special schools no longer have a higher threshold or added level of protection over and above other State schools. Disabled peoples' communities may be concerned about this change.
10. The current recommendation 11 of the Tomorrow's Schools Taskforce report, regarding Competition and Choice, proposes that the Education Hubs will have the responsibility to make defensible decisions on new schools and school closures to improve the strength of the network as a whole. Our previous proposal on special school

establishment and disestablishment had been focussed only on a transfer of the 1964 Act provisions into the 1989 Act, rather than changing the test for State schools.

11. If you were to proceed with public consultation in May on changes to establishment and disestablishment provisions for all State schools, this may be seen as pre-empting consideration of the Taskforce recommendations. You may wish to delay decisions on any changes to the State school test until the Tomorrow's Schools recommendations are considered by the Government.

Options

12. Applying the 1964 Act tests would make the decision making process more transparent but give greater scope for Courts to overturn decisions.
13. Our preferred option is the approach proposed in the Cabinet paper provided to you last week for lodging. We think the risks in applying the 1964 Act tests to other State schools outweigh the benefits.
14. An alternative option would be to apply the 1964 Act sufficient provision and locality tests to State schools with appropriate modifications to the locality test if necessary to enable Te Kura and other national or regional providers to be considered as an alternative to a school proposed for disestablishment.