



Education Report: Moving detailed legislative provisions to regulations

To:	Hon Chris Hipkins, Minister of Education		
Date:	24 October 2019	Priority:	Medium
Security Level:	In confidence	METIS No:	1206256
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Messaging seen by Communications team:	N/A	Round robin:	No

Purpose of report

This paper provides you with further advice on what aspects of the Education Act 1989 can be grouped in Schedules and subject to a sunset clause, for updating and eventual movement into regulations.

Summary

1. In September 2019, you agreed that provisions that are minor or deal with technical detail in the Education Act 1989 (the Act) should be moved into new regulations [Metis 1200361 refers]. You also agreed that the provisions relating to the operation of school boards of trustees would be appropriate for immediate conversion into regulations.
2. As part of the tranche 5 cabinet paper, it was agreed that the provisions relating to international students should also be moved into regulations. The Education (Pastoral Care) Amendment Bill will replace these provisions with ones that also cover the pastoral care of domestic tertiary students. With the exception of the penalty provision, these provisions are matters of technical detail that could be moved into regulations.
3. There are several other provisions that could be converted into regulations. These include provisions dealing with the constitution of boards of trustees of State schools; electing and co-opting trustees to boards of State schools; enrolment records; enrolment schemes; inspection of school hostels; national student numbers; stand-downs and suspensions; teacher registration; and when State schools must be open.
4. These provisions require rework to be fit-for-purpose as regulations. In addition, some of these provisions cover matters where there are existing legislative instruments that are prescriptive and outdated. Sufficient time will therefore be required to prepare the regulations.
5. Since the regulations covering the topics in para 3 above would not be ready in time for the proposed introduction of the Bill, you agreed that the provisions in question would be moved into Schedules and subject to a sunset clause, for updating and eventual

movement into regulations. This will provide time to develop the regulations, and mean that subsequent legislation would not be needed to move the provisions into regulations.

6. Some specific powers will be needed to enable some of the provisions to be moved into regulations, including the provisions relating to the codes of practice for domestic tertiary and international students.

Recommended Actions

The Ministry of Education recommends that you:

- a. **note** that provisions relating to the operation of school boards of trustees will be converted immediately into regulations

Noted

- b. **note** that it was previously agreed that the provisions relating to the code of practice for international students should also be moved to regulations

Noted

- c. **agree** that the provisions set out in the Education (Pastoral Care) Amendment Bill relating to the code of practices for domestic tertiary and international students should be included in the regulations, with the exception of the penalty provision

Agree / Disagree

- d. **agree** that the following provisions are grouped into Schedules, and subject to a 12 month sunset clause, for updating and eventual movement into regulations:

- ✓ i. provisions requiring a school to keep an enrolment record for each student
- ✓ ii. provisions allowing the use of national student numbers for specified purposes, and
- ✓ iii. provisions permitting the inspection of hostels

Agree / Disagree

- e. **agree** that the following provisions are grouped into schedules, and subject to a 24 month sunset clause, for updating and eventual movement into regulations:

- X i. provisions governing the constitution of boards of trustees of State schools
- ✓ ii. provisions relating to electing and co-opting trustees to boards of State schools
- iii. provisions relating to enrolment schemes
- ? iv. provisions allowing the stand-down, suspension, exclusion and expulsion of students
- ? v. provisions relating to teacher registration, certification and limited authority to teach, and
- ✓ vi. provisions specifying when State schools must be open

Agree / Disagree

Provisions in 11A setting out purpose of an enrolment scheme should be returned to primary legislation.

f. **agree** that the Bill contains specific regulation-making powers relating to:

- i. the pastoral care of domestic tertiary and international students ✓
- ii. the constitution of boards of trustees of State schools ✕
- iii. national student numbers ✓
- iv. stand-downs, suspensions, exclusion and expulsion of students, and ?
- v. teacher registration, certification and limited authority to teach ?

Agree / Disagree

g. **agree** to seek cabinet approval to include the regulation-making powers mentioned above as part of the LEG paper requesting approval to introduce the Education and Training Bill.

Agree / Disagree

Proactive Release Recommendation

h. **agree** that this Education Report be proactively released once the Education and Training Bill is introduced into the House of Representatives.

Agree / Disagree



Dr Andrea Schöllmann
Deputy Secretary
Education System Policy

24/10/2019

Hon Chris Hipkins
Minister of Education

___/___/___

Background

1. Since it was enacted, the Education Act 1989 (the Act) has become an increasingly confusing combination of substantive law and matters of detail that would be more appropriately located in regulations. Removing the clutter that is found in certain parts of the Act would make the legislation more accessible for users, ensuring that it is easy to navigate and understand. It would also make it easier for the government to amend provisions if it becomes apparent that changes are required to implement the underlying policy.
2. In September 2019, you agreed that provisions that are minor or deal with technical detail should be moved into new regulations [Metis 1200361 refers].

Moving provisions to regulations without update

3. We have previously indicated that the provisions relating to the operation of school boards of trustees will be moved out of the Education and Training Bill (the Bill) and converted to regulations to take effect at the same time as the Bill. Only minor changes are needed to these provisions (for example, updating the language to refer to “chair” instead of “presiding trustee”).
4. We also discussed moving the provisions relating to international students into regulations (namely, sections 238F to 238M which are set out in Part 18A of the Act): a proposal that was recently agreed to as part of the tranche 5 cabinet paper.
5. Since this discussion, the Education (Pastoral Care) Amendment Bill has been introduced. The Bill addresses regulatory gaps relating to the pastoral care of tertiary students, ensures consistency and effectiveness of the codes of practice for domestic tertiary and international students, and holds providers accountable for pastoral care standards.
6. The provisions in the Education (Pastoral Care) Amendment Bill are matters of technical detail that could be moved into regulations. The only exception is the offence provision, which provides that providers who are responsible for the death of or serious harm to a student may be liable for a fine of up to \$100,000. Given the amount of the fine, the penalty provision should be set out in the body of the Bill.

Converting provisions to regulations following commencement of the Bill

7. We have identified the following provisions that contain matters of technical detail that are also amenable for inclusion in regulations. These provisions will be grouped into schedules, and subject to a sunset clause, for updating and eventual movement into regulations.
8. The length of the sunset clause will depend on the complexity of the rework required. Where the rework is likely to be minor and uncomplicated, the relevant sunset clause will expire 12 months after the commencement of the Bill. Reworking the remaining provisions will require more time to ensure they are fit-for-purpose. For instance, some provisions cover matters where there are already existing legislative instruments. Converting these provisions into regulations will require consideration of these instruments, which in many instances appear to be outdated and require policy review. In such cases, the relevant sunset clause will expire 24 months after commencement.

Provisions with a sunset clause expiring 12 months after commencement

Enrolment records

9. A registered school is required to keep an enrolment record for each student who attends the school. This requirement is set out in section 77A of the Act, which also specifies the form of these records and other duties of principals relating to the records.

National student numbers

10. Authorised persons are permitted to use national student numbers for specified purposes in order to facilitate the accurate use and transfer of information relating to individual students. These provisions are set out in sections 341, and 343 to 345.

School hostels

11. An authorised person may enter any hostel premises and inspect the premises and facilities. The provisions relating to the inspection of hostels are found in sections 144D and 144E of the Act.
12. These provisions, including the offence relating to failing to comply with the instructions of persons authorised to inspect hostels, should be moved into the Education (Hostels) Regulations 2005. These regulations govern the safety of students who board at hostels, including provisions relating to the licensing of hostels. As the Education (Hostels) Regulations were recently reviewed, we do not expect that additional policy work will be required associated with converting the inspection provisions to regulations.

Provisions with a sunset clause expiring 24 months after commencement

Constitution of boards of trustees of State schools

13. The requirements relating to the constitution of boards of trustees of State schools, as well as the process for combining boards to administer two or more schools or institutions are set out in sections 94 to 98C, and 110 to 116 of the Act. Since these provisions are not minor or uncomplicated, sufficient time will be needed to rework the provisions and consult with the sector on the new regulations.

Electing and co-opting trustees to boards of State schools

14. The Act contains various provisions governing electing and co-opting trustees to boards of State schools, and the eligibility and the terms of office of trustees. These provisions are found in sections 99 to 101B, 102, 103A to 105, 156AB and 156AC of the Act.
15. The provisions should be moved into the Education (School Trustee Elections) Regulations 2000 which set out the procedural rules applying to the way in which parent representatives, staff representatives and student representatives are elected to boards of trustees. These regulations are currently being reviewed as they are overly-prescriptive and outdated. For instance, the regulations contain references to paper based processes and forms of communication that are not relevant to modern practices. To ensure the revised regulations are enabling and provide for best practice in conducting elections using new technology, sufficient time will be needed to undertake the required policy work, rework the provisions and consult with the sector.

Enrolment schemes

16. A State school is permitted to establish an enrolment scheme to avoid overcrowding at the school. The provisions relating to the content of enrolment schemes and the effect of the home zone (which are set out in sections 11C and 11D of the Act) deal with matters of substantive policy and should remain in the body of the Bill. The remaining provisions are matters of technical detail that would be appropriate for inclusion in regulations (namely, sections 11A, 11E to 11Q of the Act). This includes provisions relating to the purpose of an enrolment scheme, how applicants living outside the home zone are selected; the process for developing and adopting enrolment schemes; commencement of enrolment schemes and how they can be amended, annulled and reviewed.
17. Some of these provisions contain a considerable amount of detail that could be simplified. We are also aware that the sector would like some of the provisions amended, for example, to rearrange the priority order for out-of-zone enrolments to enable children of teachers to have a higher priority. These provisions are being reviewed over the next 12 to 18 months as part of the response to the Tomorrow's Schools Taskforce.

Stand-down, suspension, exclusion and expulsion of students

18. A State school is permitted to stand-down, suspend, exclude or expel a domestic student on specified grounds. This range of responses cater for varying degrees of seriousness and are designed to minimise the disruption to a student's attendance at school and facilitate their return when that is appropriate. The relevant provisions are found in sections 13 to 18AA of the Act.
19. Sufficient time will be needed to undertake the necessary rework and consultation. This work will also need to consider whether any consequential changes are needed to the Education (Stand-Down, Suspension, Exclusion, and Expulsion) Rules 1999, which regulate the procedure that needs to be followed to ensure individual cases are dealt with in accordance with the principles of natural justice.

Teacher registration, certification and limited authority to teach

20. Sections 352 to 373 of the Act set out the process for teacher registration and certification, as well as holders of limited authorities to teach. While some matters do not appear to be technical in nature, such as the appeal process from decisions of the Teaching Council, the inclusion of the relevant provisions in regulations appears to be appropriate. Since the sector is likely to be interested in the proposal to move these provisions to regulations, sufficient time is needed to rework and consult on the new regulations.

When State schools must be open

21. A State school is required to be open during specified periods of the year. The relevant provisions are set out in sections 65A to 65G of the Act. Sufficient time will be needed for necessary reworking and consultation on these provisions to be undertaken before they are moved to Regulations.

Regulation-making powers

22. Some of the provisions identified for movement to regulations fall within the scope of the general regulation-making power in section 301 and specific regulation-making powers

in sections 78 (how State schools must be run), 118 (board elections), 144C (school hostels), and 238H (export education levy).

23. However, we need to insert a regulation-making power that will allow us to prepare the regulations relating to the codes of practice for domestic tertiary and international students. Specific regulation-making powers also need to be inserted relating to:
- a. the constitution of boards of trustees of State schools;
 - b. national student numbers;
 - c. stand-downs, suspensions, exclusion and expulsion of students;
 - d. teacher registration, certification and limited authority to teach.

Next steps

24. We propose to seek cabinet approval to include the regulation-making powers mentioned above as part of the LEG paper requesting approval to introduce the Bill.
25. The regulations relating to the operation of school boards of trustees and the codes of practice for domestic tertiary and international students will be prepared this year. This will avoid any concerns around the absence of the provisions from the Bill, and enable the proposed regulations to be consulted on around the same time as the select committee considers the Bill, which will reduce any confusion for stakeholders. Cabinet approval for this consultation to occur will be sought in early December 2019, once the regulations have been drafted.