



Education Report: Advice on issuing Boards of Trustees a mandatory code of conduct and next steps

To:	Hon Chris Hipkins, Minister of Education		
Date:	2 June 2020	Priority:	Medium
Security Level:	In Confidence	METIS No:	1227279
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Purpose of Report

This paper provides advice on issuing a mandatory code of conduct for school boards of trustees, and seeks your agreement for us to engage with key stakeholders to develop a draft code, in preparation for the passing of the Education and Training Bill.

Summary

1. As part of the Government's Tomorrow's Schools reforms, Cabinet agreed to provisions in the Education and Training Bill (the Bill) that will give you the power to issue a code of conduct for the members of state and state-integrated school boards which sets out the minimum standards of conduct that each member is required to meet [CAB-19-MIN-0539].
2. These provisions also allow boards to censure a member for code breaches, as well as giving the Minister a power to remove a board member for just cause.
3. The mandatory code of conduct is part of a wider work programme to enhance the capability of board governance in schools. Other inter-related pieces of work include providing advice on mandatory board training, improve diversity and representation on boards, and Leadership Advisor roles to improve the support and guidance given to boards.
4. The introduction of sanctions will require a well-detailed and robust process that is applicable to each board. The penalties for non-compliance are potentially severe, including Ministerial removal of someone from a democratically elected position.
5. After the Education and Training Bill is reported back to Parliament on 8 June, we propose to engage with key stakeholders on developing the draft code of conduct, and to provide you with further advice in October 2020 on the proposed draft code and associated guidelines for addressing breaches.

Recommended Actions

The Ministry of Education recommends that you:

- a. **note** that as part of the Government's response to the Tomorrow's Schools reforms, Cabinet agreed to provisions in the Education and Training Bill that will give you the power to issue a code of conduct for the members of state school boards. This code will set out the minimum standards of conduct that each member is required to meet

Noted

- b. **note** that Cabinet also agreed to provisions around consulting on the code of conduct before it is issued, giving boards the power to censure a board member for significant and/or persistent breaches of the code of conduct, and giving the Minister the power to remove a board member if there is just cause

Noted

- c. **agree** to the proposed objectives for a mandatory code of conduct, including:

- i. Ensure consistency, transparency and accountability of board expectations and behaviour;
- ii. Improve board member capability;
- iii. Build strong relationships;
- iv. Encourage board diversity;
- v. Manage risks effectively;
- vi. Ensure that poor performing members are removed from boards;
- vii. Align with the new objectives in the Education and Training Bill; and
- viii. Commitment to child-centred decision making and engagement

Agree / Disagree

- d. **agree** that, once the Education and Training Bill is reported back to Parliament, the Ministry commence engagement with key stakeholders on the objectives and principles for development of the draft code of conduct, and then report back to you for approval of a final set of objectives and principles.

Agree / Disagree

Proactive Release Recommendation

The Ministry of Education recommends that you:

- e. **agree** that this Education Report will be proactively released with any appropriate withholdings under the Official Information Act 1982.

☒ **Agree** / ☐ **Disagree**



Dr Andrea Schöllmann
Deputy Secretary
Education System Policy

02/06/2020



Hon Chris Hipkins
Minister of Education

17 / 6 / 2020

Background

1. In October 2019, as part of the reset of Tomorrow's Schools, Cabinet agreed to a suite of changes aimed at improving board capability. The changes included ensuring diversity, providing further advice on mandatory board training, and more support from the Leadership Centre, particularly through the proposed creation of Leadership Advisor roles.
2. As a part of these initiatives to strengthen boards, Cabinet agreed to the establishment of a power for the Minister of Education to issue a mandatory code of conduct for school boards.

Provisions in the Education and Training Bill

3. The Education and Training Bill contains enabling provisions for the Minister of Education (the Minister) to issue, by notice in the Gazette, a code of conduct for the members of state school boards¹ which set out the minimum standards of conduct that each member is required to meet [CAB-19-MIN-0539].
4. The Bill also includes the following provisions around consultation and sanctions:
 - a. Before a mandatory code of conduct can be issued, the Minister must consult with national bodies representing the interests of governing bodies of schools, and any other stakeholders that the Minister considers ought to be consulted.
 - b. School boards may censure a member for significant and/or repeated breaches of the code of conduct, except where that member is also a school principal.
 - c. Where a member of a school board, who is not also a school principal, breaches one or more of the minimum standards of conduct and the board believes that the member's failure to comply with the minimum standards of conduct may justify their removal from the board (and there is just cause), the Minister is able to remove the member.
5. The Education and Training Bill is due to be reported back by the Education and Workforce Select Committee by 8 June 2020.

Wider work supporting board of trustees' capability

6. The mandatory code of conduct is part of a wider work programme to enhance board governance and capability. Other key pieces of work include providing further advice on mandatory board training, improving diversity and representation on boards, Māori engagement in school governance, and establishing Leadership Advisor roles to improve support and guidance given to boards.
7. In addition, in December 2019 you invited the Children's Commissioner to conduct a review of the requirements for children and young people's participation in school/kura governance and provide recommendations on what improvements could be made, if any [METIS 1214988 refers].
8. This suite of work commissioned by Cabinet to improve board capability needs to be considered as an inter-related set of proposals. We will ensure that these work streams are well aligned as they develop further.

¹ State school means a school that is a primary school, an intermediate school, a composite school, a secondary school, or a specialist school. This also includes state integrated schools.

School boards and codes of conduct

9. Boards have responsibilities to establish and maintain appropriate standards of conduct and personal integrity. The Office of the Auditor-General advises that boards should, at all times, take all practicable steps to ensure that its members and employees maintain high standards of conduct and personal integrity. They advise that boards should document expected standards of conduct and personal integrity in a "Code of Conduct" and, where applicable, support these with policies and procedures.
10. Codes of conduct are common for governing bodies in both the public and private sectors. In the public sector, the code of conduct for the State Services² applies to public service departments, departmental agencies, and Crown entities. However, school boards are not covered by the State Services code of conduct.
11. Instead, school boards are encouraged to use the New Zealand School Trustees Association's (NZSTA) voluntary Code of Behaviour. The majority of boards who are members of NZSTA have adopted this code.

The problem

12. The Tomorrow's Schools Review highlighted a number of concerns with the current school board of trustees system, including governance capability and the potential for relationship management challenges.
13. Compounding the issue is that boards do not have individual or collective duties laid out in legislation that set out how they must operate. Boards need set rules, outlining their governance role and responsibilities, in order to govern effectively. In the absence of any statutory-based individual or collective duties or code, some schools either develop their own codes of conduct or adopt NZSTA's voluntary Code of Behaviour.
14. However, whether they are taken up or not, voluntary codes are difficult to enforce, and are not consistent across schools with similar governance arrangements.
15. Further, the lack of individual or collective duties or code means that there is no clear recourse for when board members display poor behaviour; for instance, behaviour which is derogatory, intimidating, defamatory, or omits conflicts of interest. This means that board members' undesirable behaviour would go uncensured as there is no ability for boards to remove members from their role. This behaviour can have a significant impact on the ability for a board to be effective, and can lead to breakdowns in working relationships with wider school leadership, employees and the school community more broadly.
16. It is difficult to determine the extent of the problem as there is no mechanism for reporting on uptake of a voluntary code and application of any sanctions, as well as there being no collation of board self-assessments. But through extensive Tomorrow's Schools Review consultation this issue came up frequently, particularly in discussions about broader board capability issues.

Principles for a mandatory code of conduct

17. A code of conduct for boards will ensure that:
 - a. all school boards have the same basic accountability for their individual and collective behaviour;
 - b. there is enough flexibility for including local community-held values; and

² Referred to as Standards of Integrity and Conduct.

- c. standards are effective in that they are legally enforceable.
18. A well-designed code of conduct provides greater flexibility to set out commonly held expectations as to minimum standards of conduct expected of members, which can then be tailored as appropriate for particular types of members. Boards can expand upon minimum standards to reflect local expectations, provided these are consistent with those in the code of conduct. This is beneficial as boards are both self-managing and are unique to each community, meaning a mandatory code, to be effective, needs to align with the school priorities.
 19. In developing the code, it is beneficial to set out what we are seeking to achieve with the code (the objectives) and principles to guide the content of the code. We analysed NZSTA's voluntary code of behaviour, as well as guidance from the State Services Commission, to inform the ideal objectives and principles.
 20. We propose the following objectives and principles for the first phase of consultation on a code of conduct that would be effective in addressing the issues outlined above:

Objectives

Ensure consistency, transparency and accountability of board expectations and behaviour	A code of conduct needs to set out consistent and clear expectations in order to improve practice and performance of boards. A code also needs to define expected behaviours, in order to not inadvertently silence members who seek to raise concerns about the board or school.
Improve board member capability	As well as setting out expectations on member behaviour and responsibilities, a code should allow members to improve their capability through professional development such as training. This would improve governance at individual schools, as well as lift the collective capability of boards which is needed for a wider system shift.
Build strong relationships	A code needs to encourage boards to build relationships based on trust and respect in order to govern more effectively. This includes respect for student, Māori and Pacific voices and participation on boards and in the wider community the board serves.
Encourage board diversity	There is an issue with lack of diversity in boards, meaning boards may not reflect the school communities they serve. It is important that the code does not deter people, particularly Māori, Pacific and student community members, from joining boards.
Manage risks effectively	Boards have a leading role in establishing proper procedures to identify and manage potential risks both to the school and the board's operations. These procedures would need to be aligned with the board's objectives, strategic plan and expectations.
Ensure that poor performing members are removed from boards	The code needs to ensure that boards have the appropriate mechanisms in place to remove board members who are found, following investigation, to have acted or displayed behaviour which has significantly or persistently breached the code of conduct.
Align with the new objectives in the Education and Training Bill	The code will need to be consistent with the new objectives set out in the Education and training Bill. These objectives include: ensuring that every student is able to attain their highest possible educational standard; ensuring that schools are a physically and emotionally safe place for all students and staff and

	gives effect to student rights; ensuring that schools are inclusive of and cater for students of differing needs; and are consistent with giving effect to Te Tiriti o Waitangi. In addition, for schools to achieve these objectives they must align their board responsibilities with objectives of the National Education and Learning Priorities ³ .
Commitment to child-centred decision making and engagement	The code should lay out a board's commitment to ensuring decisions are child-centred and promote children and young peoples' wellbeing and achievement. To be effective, boards need to engage with students to understand their experiences, ideas and involve them in decision making.

21. We seek your agreement on the above objectives for a code of conduct as these objectives will form the basis of the final code and ensure it fits with our wider work programme and objectives.
22. We will use the following principles as a means to consult with stakeholders and also to ensure that the draft code of conduct appropriately addresses the key concerns raised by the Tomorrow's Schools Review Taskforce.

Principles

- a. **Clear roles and responsibilities** – Boards have legislative objectives that they are required to meet, along with responsibilities to enable them to achieve these objectives; these need to be clearly stated in the code. These responsibilities also need to elucidate the board chair's role, as well as separate governance and management.
- b. **Be flexible and fit-for-purpose** – As boards are self-governing entities the code needs to be adaptable, culturally appropriate, and fit their diverse communities. This means that the code cannot be so prescriptive that it becomes unenforceable for boards. The code also needs to include matters of conduct regarding the board's relationship with iwi and Māori.
- c. **Ensure good information, systems and controls** – In order for the code to be effective there must be clear procedures in place not only for addressing breaches⁴ and remedying undesirable behaviour, but also procedures around probity prior to members being elected onto boards.
- d. **Alignment** – The draft code will also seek to align with the Teaching Council's code of conduct for teaching professionals, the State Service Commission's Standards of Integrity and Conduct, the NZSTA's Code of Behaviour, and codes of community organisations laid out in the Incorporated Societies Act 1908.

³ The National Education and Learning Priorities (NELP) include objectives such as helping children attain education achievement, form good relationships and social skills, participate in community life, and fulfil civic and social responsibilities.

⁴ Any procedures for addressing breaches will need to consider how boards identify legitimate breaches, rather than allegations made on the basis of personality differences with board members, and so on.

Developing a code of conduct

23. For a mandatory code of conduct and associated sanctions to be effective, they need to strike a balance between ensuring that candidates are ‘appropriate’⁵ while ensuring that potential board members are not discouraged from joining boards, with a robust and transparent process when addressing breaches to the code.

Electing board members

24. The Education and Training Bill has provisions on eligibility criteria for community⁶ representatives on boards⁷. This criteria is laid out in Annex 1.
25. Clause 11, Schedule 22 of the Bill states that before a person is elected, co-opted, or appointed as a board member, the person must confirm to the board that the person is, to the best of their knowledge, eligible to be a board member, having regard to the grounds of ineligibility laid out in the Bill.
26. It is important to ensure the board appointment process allows for probity as this will be queried if a board member commits a breach of the code. The board could use the probity process as a means for determining whether information was not declared, and also whether at the time of appointment the member was fit to serve.

During board membership

27. Once candidates have been elected, boards will sign onto a code of conduct that sets out their responsibilities, accountabilities and behavioural expectations.

Sanctions process

28. The code will also need to lay out the sanctions process, including how to receive and address complaints about potential breaches to the code. As part of this, boards will need to develop and implement new procedures for addressing potential breaches to the code, and undertake investigations of any complaints. The Ministry will consider what training would be required for boards to be effective in this role. Legislative requirements of the sanctions process is set out below.

Procedure for addressing breaches

29. There are provisions in the Bill that require board members to comply with the mandatory code of conduct, when issued, with sanctions for non-compliance. These sanctions are laid out in section 156 of the Bill and allow for:
- a. censure of a board member for any significant or persistent breach of a code issued;
 - b. removal of the board member for any significant and persistent breach of a code issued, and where there was just cause for their removal.

These provisions are set out in Annex 2.

30. These provisions will form the foundation of the sanctions process for the mandatory code of conduct. As we develop the draft code, we will also work on a sanctions process that is transparent for boards and board chairs to follow, so that should a breach occur it is clearly set out.

⁵ ‘Appropriate’ in this instance refers to those who meet the eligibility criteria for community representatives.

⁶ Community representatives includes parent and non-parent representatives.

⁷ Eligibility criteria is also laid out in section 103 of the Education Act 1989.

31. The sanctions process will not be a mechanism for punishing boards who are not meeting their performance requirements, as there are other intervention frameworks for addressing poor-performing schools. These frameworks would be more appropriate mechanisms for addressing educational quality issues within schools.
32. We will engage with key stakeholders on both the draft code of conduct and sanctions process.

Supporting boards to develop appropriate sanctions processes

33. It is envisaged that Leadership Advisors, once established out of the Education Service Agency, will work with boards directly, and be the Ministry's first response when a board receives notice of a breach to the code. The intent is that with the introduction of Leadership Advisors, they would mentor and provide guidance to boards, as well as support any investigations into a breach of the code. In the interim, boards will be supported by the Director of Education in the Ministry's regional offices if any procedural issues arise concerning breaches. The Director of Education and wider staff in the regional offices will require training to undertake this role.

Risks

34. One potential risk is the impact that a code of conduct may have on a person's decision to run as a board member.
35. It is important to ensure that any communications and training that go alongside the introduction of a code emphasise that a code should not be a deterrent, nor does it denote any specific skillset that a community member is expected to have. A code is a guide to ensure that a board understands its governance role, and the expected behaviour that goes alongside the responsibility of a democratically-elected community position.

Next steps

36. The Ministry proposes to engage with NZSTA, Te Rūnanga Nui and Ngā Kura-ā-Iwi o Aotearoa on the objectives and principles for development of the draft code of conduct. We will report back to you for approval of a final set of objectives and principles.

Annexes

- Annex 1: Eligibility criteria for community representatives on boards of trustees
- Annex 2: Proposed sanctions provisions for breach of code (Education and Training Bill)

Annex 1: Eligibility criteria for community representatives on boards of trustees

Schedule 22, clause 9: Certain persons ineligible to be board members

- (1) The following persons may not become an elected, an appointed, or a co-opted board member:
- a. a person who is an undischarged bankrupt
 - b. a person who is prohibited from being a director or promoter of, or being concerned or taking part in the management of, an incorporated or unincorporated body under the Companies Act 1993, or the Financial Markets Conduct Act 2013, or the Takeovers Act 1993
 - c. a person who is not capable of being a board member under **clause 10(1)**
 - d. a person who is subject to a property order under the Protection of Personal and Property Rights Act 1988
 - e. a person in respect of whom a personal order has been made under the Protection of Personal and Property Rights Act 1988 that reflects adversely on the person's—
 - i. competence to manage their own affairs in relation to their property; or
 - ii. capacity to make or to communicate decisions relating to any particular aspect or aspects of their personal care and welfare
 - f. a person who has been convicted of an offence punishable by imprisonment for a term of 2 years or more, or who has been sentenced to imprisonment for any other offence, unless that person has obtained a pardon, served the sentence, or otherwise suffered the penalty imposed on the person
 - g. a person who is not a New Zealand citizen and—
 - i. to whom section 15 or 16 of the Immigration Act 2009 applies; or
 - ii. who is obliged by or under that Act or any other enactment to leave New Zealand immediately by or within a specified time (being a time that, when specified, was less than 12 months); or
 - iii. who is treated for the purposes of that Act as being unlawfully in New Zealand.
- (2) Any permanently appointed member of the board staff may, if otherwise eligible for election, be elected as a staff representative, but no permanently appointed member of the board staff may be otherwise elected to the board or be appointed or co-opted onto the board.
- (3) A non-permanently appointed member of the board staff may, if otherwise eligible, be elected, appointed, or co-opted onto the board.
- (4) A person who has been appointed returning officer for an election of board members is not eligible to be nominated as a candidate in the election.

Annex 2: Proposed sanctions provisions for breach of code (Education and Training Bill)

Section 156: Sanctions for failures to comply with code of conduct

- (1) A board may, by resolution, censure a board member (other than a principal) for any significant or persistent breach of a code issued under **section 153** (or a code augmented under **section 154**).
- (2) The Minister may remove a board member (other than a principal) if –
 - a. the board member has significantly or persistently breached a code issued under **section 153** (or a code augmented under **section 154**); and
 - b. the board –
 - i. considers the board member's failure to comply with the code warrants the removal of the board member; and
 - ii. has presented the Minister with a written report about the board member's failure that recommends the removal of the board member; and
 - c. the Minister is satisfied that there is just cause to remove the board member.
- (3) The removal must be made by written notice to the board member (with a copy to the board).
- (4) The notice must state –
 - a. the day on which the removal takes effect, which must be no earlier than the day on which the notice is received; and
 - b. the reasons for the removal.
- (5) The minister must notify the removal in the *Gazette* as soon as practicable after giving the notice.
- (6) The Minister may remove a board member with as little formality and technicality, and as much expedition, as permitted by –
 - a. the principles of natural justice; and
 - b. a proper consideration of the matter; and
 - c. the requirements of this section.
- (7) For the purposes of this section, **just cause** includes misconduct, inability to perform the functions of office, neglect of duty, and breach of any of the collective duties of the council or the individual duties of members (depending on the seriousness of the breach).