

New Zealand Law Society

SUBMISSION ON THE EDUCATION AMENDMENT BILL (NO 2)

Introduction

1. The New Zealand Law Society (Society) welcomes the opportunity to comment on this Bill. The Bill amends the Education Act 1964 (the Act or the principal Act). The Society's submission addresses various aspects of the Bill, generally of a technical nature.
2. A substantive issue commented on relates to cl 6. This amends s 11F(1) of the principal Act, which relates to enrolment schemes for schools, to give a degree of priority to out-of-zone children of former pupils of a school and out-of-zone children of current board members. The Society queries whether the policy behind this provision, as it relates to children of former students, is consistent with s19 of the New Zealand Bill of Rights Act 1990 (NZBORA) and the Human Rights Act 1993.
3. The Society wishes to be heard in support of its submission.

Clause 4: Interpretation

4. Clause 4 amends s2(1) of the principal Act by inserting a number of definitions.

“Managers of a private school”

5. One of the definitions inserted is of the phrase “managers of a private school”. The phrase is defined as follows:

“managers of a private school means all the people who control and manage the school, whether or not they have a proprietary interest in it ...”
6. The term “**managers** of a private school” appears in two places in the Bill, in cl 11 (new ss35C(g) and 35S(3), which are to be inserted into the principal Act). The term “**manager** of a private school” appears twice in the Bill, again in cl 11, in new ss35C(1) and (2).
7. Elsewhere in the Bill similar terms are used referring to managers of private schools, but without using the actual phrase “manager [or managers] of a private school”. A common term is “managers [or manager] of a school registered under section 35A”.¹ Other examples are

¹ See para (a)(ii) of the definition of “tertiary component” (cl 4 amending s 2(1)), cl 5 inserting new s 4E(1); cl 10 inserting new ss 31B(1)(a)(ii), 31F(b), and 31G(2)(b); cl 11 inserting new ss 35E(1)35G(1), 35G(1)(e), and 35H.

“managers of an unregistered or proposed private school”,² “managers of a school that is not registered under section 35A”,³ and “manager” or “managers”.⁴

8. Section 35A(1) of the principal Act currently contains the following definition, which applies for the purposes of that section:

“**managers**, in relation to a private school or proposed private school, means all the people who control and manage it, whether or not they have a proprietary interest in it.”

9. This is broad enough to apply to all references to “managers”, provided those references relate to a private school or proposed private school. This definition is to be repealed by the Bill.
10. It is likely that the definition of the term “managers of a private school” in the Bill will not be wide enough to extend to other references to “managers” or “manager” (alone or used as part of a different phrase) in the provisions to be inserted into the principal Act. It may well be that the narrowness of the definition was intended, but the Society suggests that the definition be reviewed.

Recommendation

11. That the Select Committee **satisfy** itself that the definition of “managers of a private school” is a workable one.
12. Clause 21 of the Bill contains a transitional provision. Clause 21(3) provides that the “managers” of an existing registered school must comply with the criteria for registration as a private new school under new s35A as if it had been registered under new s35A.
13. The definition of “managers of a private school” in cl 4 will not apply to the term “manager” in cl 21(3). This is both because of the point made above and because s2(1) of the principal Act, where the definition will be inserted, applies only to Parts 1, 2, 3 and 11 of the principal Act. It does not apply to cl 21 of the Bill. It may well be that the drafter is satisfied that the meaning of cl 21(3) is clear without “managers” having to be defined but the Society raises this issue for consideration.

² See for example cl 11, new s 35A(1).

³ For example cl 11, new s 35B.

⁴ For example cl 11, new ss 35D(2), 35E(2), 35G(1), 35G(1)(d), 35G(2), 35G(3), 35I(2)(a)(ii) and (b), and 35I(4)(b).

Recommendation

14. That the Select Committee satisfy itself that the meaning of “managers” in cl 21(3) is sufficiently clear.

“Serious criminal activity” and “crime involving dishonesty”

15. The term “serious criminal activity” is used in a number of provisions that the Bill will insert into the principal Act. These relate to assessment of the suitability of the school managers,⁵ which in turn flows through to whether the criteria for registration as a private school are being or will be met; action the Secretary may take against a private school registered under s35A;⁶ and cancellation of the registration of such a school.⁷
16. Serious criminal activity is defined as meaning “any offence involving fraud, violence, or harm to children, any sexual offence, or any crime involving dishonesty”. A “crime involving dishonesty” is defined as having “the same meaning as in s2(1) of the Crimes Act 1961”. This includes theft of items with a value of less than \$500, e.g., a ballpoint pen. Therefore, while the term “serious criminal activity” suggests one thing, in fact the content of the term extends to minor criminal activity.
17. It is not good law-making practice to include widely defined terms, which give rise to overly-broad powers and discretions, which then need to be hedged about by legislative or administrative law restraints. It cannot be assumed that persons applying the Act will always act benevolently or wisely. A provision which, to be acceptable, has to have the assurance that discretion would never be exercised in a particular way is bad law. Such powers need to be limited to exclude such exercise of discretion, rather than leave it open and expect the courts to solve the problem by judicial review decisions.
18. In relation to the assessment of the suitability of school managers the wide definition may not make the legislation unworkable, but this is only because a “conviction for a serious criminal activity” does not preclude a person from being deemed suitable as such, but rather is a factor to be “taken into account”.⁸
19. Under new s35K(1)(d) the Secretary may take action against a school under s35K(2) if he or she has reasonable grounds to believe that “serious criminal activity” is occurring at the

⁵ Section 35G(1)(a).

⁶ Section 35K(1)(d).

⁷ Section 35N(1)(c).

⁸ Section 35G(1)(a).

school. This could include petty theft on the part of students. The Secretary would only need reasonable grounds for his or her belief.

20. The Secretary may also take action based on circumstances relating to the school's meeting the criteria for registration, which include the suitability of the managers, an issue discussed above.
21. The Society notes that new s35K(3)(a) provides some safeguard in that any action taken by the Secretary under s35K(2) must be "proportionate to the seriousness of the school's situation". Consideration should be given to supplementing this safeguard by reviewing the definition of "serious criminal activity" to ensure that it is limited to criminal activity that would be viewed by reasonable people as "serious".
22. When it comes to cancellation of registration of a private school under new s35N(1)(a) or (c), the concept of "serious criminal activity" also plays a part, both directly and because of its relevance to the criteria for registration. The direct impact relates to the fact that registration may be cancelled if "serious criminal activity" continues to occur in the school. The indirect impact exists because failure to meet the criteria for registration, coupled with unlikelihood that they will be met within a future reasonable time, is a reason to cancel registration.

Recommendation

23. That the Select Committee **consider** recommending a more limited definition of "serious criminal activity", to reflect the general understanding of that term.

Clause 6: How to select applicants who live outside home zone

24. This clause amends the order of priority for out-of-zone applicants for places in a school:
 - 24.1. Children of former students of the school will be accorded some priority, as will be children of current members of the school board;
 - 24.2. Children of former students will have priority after siblings of former students and before children of current staff or board members; and
 - 24.3. Children of current board members will have priority after children of former students, and on a par with children of current staff members, followed by applicants with no priority.
25. This provision limits the right to freedom from discrimination based on family status affirmed by s19 of the New Zealand Bill of Rights Act 1990 (NZBORA). Children with a parent who is a former pupil of the school are advantaged over children from a family where neither parent

was a former pupil. This implicates s21(1)(iv) of the Human Rights Act 1993, by which “being a relative of a particular person” is a prohibited ground of discrimination. The Ministry of Justice in its advice on this Bill also takes this view, but considers that the disadvantage visited upon those children who are demoted in the ballot priority is, in terms of s5 of NZBORA, a justified limitation on that right.⁹

26. The Ministry’s position is set out as follows in its advice:

We consider that maintaining a family connection with an out-of-zone school is an important and significant objective. Maintaining family connections with schools strengthens both the engagement of families and whānau with schools and supports their children’s education. The priority list also rationally and proportionally reflects the descending degrees of family connection ranging from keeping siblings together to children of an employee of the board of the school or of a member of that board.

27. The Society considers that this view is contestable. The factors which could justify, in terms of s5, giving preference to siblings of present (or even past) students, or to children of persons serving the school in the capacity of employee or board member, do not apply where the only qualifying factor is that of being the child of a former student of the school. When it comes to competing for a limited public resource, it is difficult to see why the children of past pupils should be elevated over the children of non-past pupils, let alone over the children of current staff and board members. The position may be different for private schools that depend on financial support from families with an inter-generational connection to a school, but in State schools it does not seem right to suggest that maintaining a “family connection” and “support” for a child’s education at a State school turns on preferring the sons and daughters of former pupils over others. Engagement and support are a proper expectation of all parents.

Recommendations

28. That the Select Committee **reconsider:**

- 28.1 The fact that *any* priority is accorded to the children of past students; or, alternatively,
- 28.2 The according of priority to the children of past students *above* the priority accorded to children of current staff and board members.

⁹ Ministry of Justice, 28 May 2010: <http://www.justice.govt.nz/policy-and-consultation/legislation/bill-of-rights/education-amendment-bill-no-2>

Clause 10: New sections 31A to 31L inserted***New s31G(3) – Lead provider to co-ordinate secondary-tertiary programme***

- 29 The new ss31A-31L relate to secondary–tertiary programmes and replace the Education (Polytechnics) Amendment Act 2009, which is repealed. They come into force the day after assent.
- 30 The scheme is for programmes run by either a “provider group” or a “lead provider”, i.e., a group of providers or a single provider. In each case a programme has to be agreed with the Secretary. No doubt by oversight, while a provider group may unilaterally cancel an agreement on 6 months’ notice, as can the Secretary (new s31C(4)), a lead provider cannot do so but only the Secretary can (new s31G(3)).
- 31 The courts would be likely to imply a right to cancel on 6 months’ notice (that being the “reasonable time”), but it is not appropriate that this should be left to the courts to have to determine.
- 32 There also does not seem to be any provision to cancel for cause with appropriate natural justice processes. In the Society’s view, in areas such as this the starting position should be reciprocal rights and remedies unless there is appropriate policy justification otherwise. This comment applies also to cancellation of agreements with provider groups.

Recommendations

33. That the Select Committee:
- 33.1 **Consider** whether s31G(3) should be amended to allow a lead provider to withdraw from providing a secondary-tertiary programme on 6 months’ notice;
- 33.2 **Consider** whether ss31C and 31G should be amended to provide for cancellation for cause with appropriate natural justice processes.

New s31K –Withdrawal from secondary-tertiary programme

34. New s31K(2) allows a provider group or lead provider to withdraw approval for a student’s participation “after consulting with the student”. Given the express vocational importance of these secondary-tertiary courses, and the paramount effect of s27(1) of the New Zealand Bill

of Rights Act,¹⁰ the Society does not think that this power should be conferred unless there are appropriate natural justice protections. While the lead provider or members of a provider group may be schools to which the processes in the Education Act on discipline, etc might be able to be implied, that will not necessarily be so. The concept of consultation in an area such as this seems to be seriously inadequate.

Recommendations

35. That the Select Committee:

35.1 **Satisfy** itself; and

35.2 If appropriate **recommend** amending s31K to ensure

that there are adequate natural justice protections where a provider group or lead provider proposes to withdraw approval for a student's participation in a secondary-tertiary programme.

Clause 11: New headings and sections 35A to 35S substituted

New section 35A(4) - Provisional and full registration of private schools

36. Under the current principal Act, the provisional registration of a school can last for only 12 months, unless it is revoked earlier. There is no power to renew or extend this term. Under the Bill, the usual maximum term for provisional registration will continue to be 12 months, subject to earlier revocation. However, new s35A(4) will allow the Secretary to renew the provisional registration of a school once, under certain circumstances.

37. The Secretary may renew the provisional registration "for a period specified by the Secretary". He or she must be satisfied (among other things) that the school is likely to meet the criteria for registration as a private school within that period.

38. The Society queries whether the renewal period should be left as open-ended as this, or whether there should be a maximum period. Potentially the Secretary could renew a provisional registration for, say, three years, if satisfied that the school was likely to meet the criteria for registration in that period (and if there were the required exceptional circumstances). This potentially allows provisionally registered schools a long period to meet the requirements for full registration.

¹⁰ s27(1) NZBORA states: "Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law."

39. One reason for concern about the possibility of renewal of provisional registration, particularly for a lengthy period, is due to the way the provisions for reviewing the operation of private schools will operate. Section 35I provides for two sorts of review:
- 39.1 Of a provisionally registered school under s35I(2). This must occur either between 6 and 12 months after provisional registration or earlier by agreement with the managers. It leads to a report, which the Secretary must consider under s35A(5) in deciding whether or not to fully register the school.
- 39.2 Of a fully registered school under s35I(3) and Part 28. This does not apply to a provisionally registered school.
40. It is likely that a school will operate under a renewed period of provisional registration without there being any review after the initial review that takes place under s35I(2). Furthermore, when the Secretary comes to make a decision on full registration under s35A(5), he or she may be required to act on the report based on the initial review, which may be outdated.
41. The Society also notes that the Secretary may take action, against any school registered under s35A, under s35K or 35L. This applies to a school whose provisional registration has been renewed. One of the grounds for taking action under s35K relates to concerns raised by a “review conducted under section 35I”. Because a school whose provisional registration has been renewed is not likely to undergo any review after the initial one, there will not be any later report which could bring such concerns to the Secretary’s attention. It would be necessary for the Secretary to rely on the other grounds for taking action that are available under s35K(1) and 35L, but this assumes the Secretary becomes aware of the existence of those grounds outside of the review process.

Recommendations

42. That the Select Committee **consider** whether:
- 42.1 The period of renewal for provisional registration should be open-ended;
- 42.2 Further provision should be made for reviews of schools whose provisional registration has been extended, either compulsorily or as a condition of extension;
- 42.3 If further reviews are provided for, those reviews should be relevant to the processes provided for in new ss35A(5) (decisions on full registration) and 35K(1)(b) (actions by Secretary with regard to registered schools).

New section 35B - Secretary may require application for registration of school

- 43 This provision, together with part of new s35A(1), effectively replaces s35A(2) of the current Act, which provides:
- “(2) No premises shall be deemed not to be operating as a school by reason only of the fact that certificates of exemption under section 21 are held in respect of all or any of the students being taught there.”
- 44 There are restrictions in the Act on the operation of private schools, including a requirement for registration. The intent of current s35A(2) is to make it clear that a school will be deemed to be operating as a school, and therefore subject to those restrictions, even if all (or some) of the students are subject to certificates of exemption.
- 45 The substituted provisions inserted by the Bill are less clear in their effect.
- 46 One issue relates to the interrelationship between new ss35A(1) and 35B. New s35A(1) provides that the managers of an unregistered or proposed private school *must* apply for its provisional registration. New s35B provides that the Secretary *may require* the managers of a school that it not registered under s35A to apply for registration if he or she considers that it is operating as a school, whether or not any or all of the students are subject to certificates of exemption. New ss35S(1) and (2) then create offences relating to the operation of schools.
- 47 It is likely that the intention behind new s35A(1) is to create an absolute duty to apply for provisional registration, and that this duty applies whether or not any or all of the students of the school are the subject of certificates of exemption. However, because of new s35B it may be suggested that, if a school has students with certificates of exemption, the duty to apply for provisional registration only arises once the Secretary has issued a requirement under s35B. At the very least there may be some doubt about this, which may afford a defence in criminal proceedings brought under new s35S(1).
- 48 If there is an absolute duty to apply for registration under s35A(1), it is difficult to see what s35B adds by empowering the Secretary to require the managers of an unregistered school to apply for registration, unless s35A(1) does not mean what it appears to.
- 49 The elements of new s35B which are of value and should be retained are:
- 49.1 A provision to make it clear that the duty to apply for provisional registration exists under s35A(1) even if some or all of the students in the school are subject to certificates of exemption;

49.2 A provision to make it clear that operating a school within the meaning of new ss35S(1), (2) and possibly (3) - the offences provisions – includes operating a school where some or all of the students are subject to certificates of exemption.

50 A second issue with the drafting of new s35B is that it allows the Secretary to issue a requirement to the managers of any unregistered school, which could include a State school. This cannot have been intended. If there is a power to issue requirements it should be directed towards the managers of unregistered private schools.

Recommendations

51. That the Select Committee **consider** whether:
- 51.1 New s35B is required;
 - 51.2 If it is required:
 - (a) The interrelationship between it and s35A(1) should be reviewed and clarified, and
 - (b) The issues in paragraphs 49-50 should be addressed;
 - 51.3 If it is not required, the issues in paragraph 49 should be addressed in the Bill.

New section 35E – Additional and substituted premises to be approved

52 It is not entirely clear from the wording of new s35E(2)(b) that approval must be sought where a school is to remain on the same premises but relinquish part of them.

Recommendation

53. That the Select Committee **consider** whether new s35E(2)(b) should be amended to make it clear that s35E applies where a school is to remain on the same premises but relinquish part of them.

New section 35G – Managers to be fit and proper persons

54. When the suitability of managers is assessed, new s35G(1)(c) requires account to be taken of any adjudication of bankruptcy under the Insolvency Act 2006. Bankruptcy under the Insolvency Act 1967 is not referred to expressly and would be relevant, if at all, only under s35G(1)(g), as another “relevant [matter]”. [Section 35G(1)(g) is a “wash-up” provision.] It may be that this is intended because bankruptcies preceding the coming into force of the 2006 Act are regarded as being too remote to be a specific factor as such, but the Society draws it to the Select Committee’s attention.

55. New s35G(1)(f) requires account to be taken of “any conviction for an offence under section 35S” . This would not apply to convictions under s35A(12) of the current Act, which is the predecessor to the new s35S. The Society accepts however that convictions under s35A(12) could potentially be relevant under other paragraphs in new s35G(1). The Society queries whether there should be express reference to convictions under s35A(12) of the current Act as well as those under s35S of the amended Act.
56. The Society notes that many of the suitability criteria are based on the assumption that the manager has spent much of his or her working life in New Zealand. The criteria in paras (a), (b) and (g) are cast more widely and would apply equally to someone whose working life has been spent overseas. Section 35G(1)(g) in particular will be important when it comes to assessing properly the suitability of a manager of this type. This raises an issue as to whether the suitability criteria are sufficiently wide, especially where managers with foreign backgrounds are to be assessed.

Recommendations

57. That the Select Committee **consider** whether the suitability criteria in new s35G(1) are sufficiently wide having regard to the matters raised in the preceding paragraphs.
58. The Bill appears to contemplate a reasonably thorough assessment of suitability for managers of a private school at the initial stage. This is emphasised by new s35G(2), which provides that the assessment must be applied to the directors of a company which is the manager of a school, and to the members of an incorporated society or incorporated trust board which is the manager.
59. Changes to the management of a school are dealt with in new s35G(3). This requires a further assessment of suitability when the management of a registered school “changes in its entirety or is transferred to a new entity”. It would be possible for the management of a school to change radically without changing entirely. For example, a single individual from the previous group of managers could be left in place so that the new group would not have to be assessed for suitability. The Society queries whether the trigger point for a reassessment should be set lower than at a complete change of management.

Recommendation

60. That the Select Committee **consider** whether new s35G(3) should be amended to apply where there is a substantial change in management, or a change in the control of management, or some other trigger point falling short of a complete change of management.

New section 35I – Review of schools registered under section 35A

61. New s35I(2)(a) contains the phrase “school in action” to refer to provisionally registered schools that must be reviewed. The intent is apparently to avoid imposing a duty to review proposed schools that provisionally register but never actually start operating. The Society assumes that “school in action” means a school that is operating. Other provisions of the Bill (such as new ss35H and 35S) use the concept of a school operating. The current Act (s35A(7)) refers to a school having “been established”.

Recommendation

62. That the Select Committee **consider** whether new s35I(2)(a) should be amended to refer to a school operating or having been established, rather than a “school in action”.

New sections 35K-35M

Duration of suspension

63. The Secretary may suspend the registration of a school under either new s35K(2)(d) or new s35L. Where s35K(2) applies, suspension is one of five actions the Secretary may take.
64. New s35M(1) deals with the duration of suspensions under s35K(2)(d). A suspension of this kind lasts until the school’s registration is cancelled or until the managers of the school have complied with all requirements imposed by the Secretary under paras (a), (b) or (c) of s35K(2). Such requirements would take the form of a notice to comply, requirement to inform parents, or imposition of conditions.
65. While the Secretary may impose requirements under any or all of paras (a), (b) or (c) of s35K(2) at the time he or she suspends registration under para (d), he or she does not have to do so. If the Secretary just imposes a suspension, then it would appear from new s35M(1) that the only way for the school to come out of suspension is cancellation of the school’s registration. There is no other way for the suspension to be terminated.
66. If this is correct, there is nothing in s35K(2) to signal it. The Secretary will need to be aware that there is a danger that, if he or she fails to impose a requirement under at least one of paras (a), (b) or (c) when he or she suspends a school’s registration under s35K(2)(d), it will not be possible for the school to escape the suspension without its registration being cancelled. This is more likely to occur at an early stage after the relevant provisions of the Bill coming into force, while people are becoming familiar with the way the provisions operate.

Recommendation

67. That the Select Committee **review** the drafting of new ss35K(2) and 35M(1) to address the issue identified in paras 51-54 above.

Grounds for suspending registration under new s35L

68. Under clause 4, the Society has expressed concern about the breadth of the terms “serious criminal activity” and “crime involving dishonesty”, which results in the Secretary having an overly-broad power to take action against a school under s35K(2).
69. New s35L raises similar problems with a power to suspend registration of a private school where the Secretary “has reasonable grounds to believe that the welfare of the students is at risk”. No part of the test in this power is defined. “Welfare” is defined in the Compact Oxford Dictionary as “health, happiness, or fortune of a person or group”. The power is considered to be too wide, for reasons similar to those advanced earlier in relation to the scope of new s35K because of the breadth of the definition of “serious criminal activity”. A suspension under s35L will continue until the school’s registration is cancelled or the Secretary is satisfied that the “welfare” of the students is “no longer at risk” – new s35M(2)(a). In this context also, the concept of “welfare” is one that should be clear.

Recommendation

70. That the Select Committee **recommend** amendments to clarify what is meant by “welfare”.

Cumulative nature of Secretary’s powers

71. New s35K(3)(b) provides that any action taken by the Secretary under subs (2) is in addition to any fine incurred or other penalty imposed. There is no equivalent provision in s35L, which also allows the Secretary to suspend a school’s registration. The Bill is silent on whether a fine or penalty may be imposed on the managers cumulative on a school’s registration being suspended under new s35L.
72. It may be that this is intentional because s35L is seen as being remedial rather than punitive in nature, as compared with s35K. However, the fact that there is a provision in s35K but none in s35L may lead to uncertainty whether the managers of a school (or anyone else) can be fined or penalised at the same time as a suspension is imposed under s35L, based on the same circumstances.

Recommendation

73. That the Select Committee **consider** whether new s35L should contain a provision similar to new s35K(3)(b).

New section 35N – Process for cancellation of registration

74. New s35M(2) deals with the duration of suspension under s35L. This continues until the Secretary either is satisfied that the students' welfare is no longer at risk or cancels the school's registration under s35N.
75. However, s35N only applies where the Secretary has taken action under any of paras (a) to (d) of s35K(2). Section 35N needs to be amended so that it works in a situation where the suspension was imposed simply under s35L and no action was taken under s35K(2).

Recommendation

76. That the Select Committee **review** new s35N so that it works where a suspension was imposed under s35L only.

Clause 18: Meaning of early childhood education and centre

77. Clause 18 inserts a new para (ha) in s310(2) to provide that care centres which are not pre-school education centres, such as crèches at shopping centres, do not have to pass through the hoops appropriate to pre-school education centres. Paragraph (ha) contains various cumulative criteria, including:
- 77.1 No child attending for more than 2 hours a day;
- 77.2 Parents or care givers in close proximity to the children, and able to be contacted; and
- 77.3 Parents or care givers able to resume responsibility for the children "at short notice".
78. The Society considers that the criterion of "close proximity" is both redundant and so unclear that it is not satisfactory in terms of principles of administrative law.

Recommendation

79. That the Select Committee **review** the criterion of "close proximity" in new s310(2)(ha).



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Vice-President
 5 August 2010