



LAW COMMISSION  
TE AKA MATUA O TE TURE

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# PRIVATE SCHOOLS AND THE LAW

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The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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## FOREWORD

There are often strange provisions inhabiting forgotten portions of the New Zealand Statute Book. The law concerning the regulation of private schools is one such area. It has never had systematic attention. The reasons for the original provisions are lost in the mists of time. The Law Commission does not think that it is an area requiring great or significant reform. But it is an area that requires some modest tidying up. That is the thrust of this Issues Paper. We look forward to submissions on it.



*Geoffrey Palmer*  
President

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**ACKNOWLEDGEMENTS** The Law Commission is grateful to the individuals and organizations that have written to us or met with us to discuss the issues in this review. They include:

Ministry of Education

Education Review Office

New Zealand Qualifications Authority

New Zealand Teachers Council

Independent Schools of New Zealand

New Zealand Association for Christian Schools

Independent Schools Teachers' Association of New Zealand

New Zealand Educational Institute

Post Primary Teachers' Association

Michael Drake

Mindalive

We are also grateful to all the private schools and organizations that responded to our April 2008 consultation document. The views expressed in these responses have been valuable to us in formulating options for reform of the law.

# Call for submissions

Submissions or comments on this Issues Paper should be sent to the Law Commission by **20 March 2009**, to **Sara Jackson**, Legal and Policy Adviser.

**Law Commission**

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Any enquiries or informal comments can be made to **Sara Jackson**, phone **04 9144 827**.

There are questions in each chapter of the paper on which we would welcome your views. It is not expected that each submitter will answer every question.

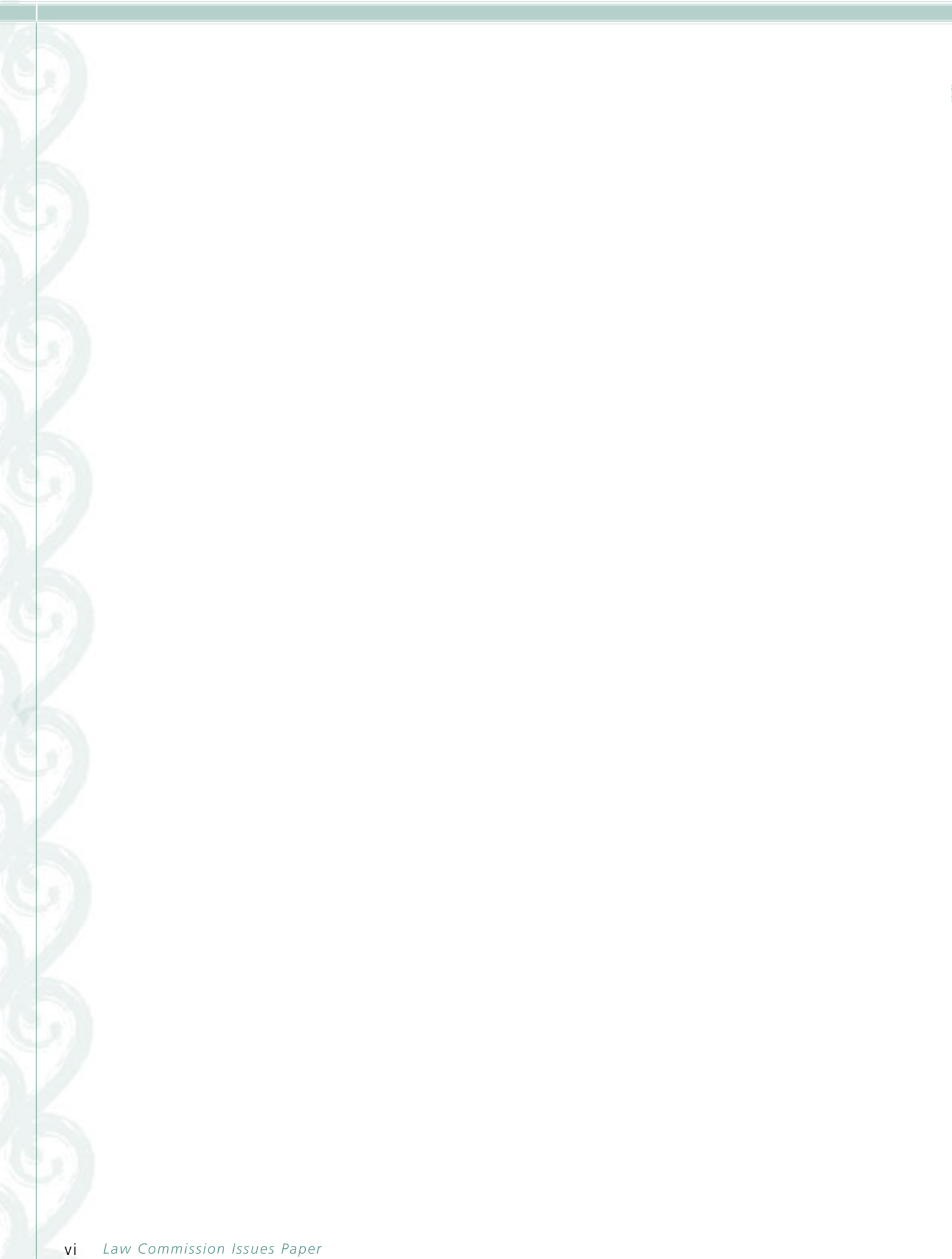
Your submission can be set out in any format but it is helpful to specify the number of the question you are discussing.

This Issues Paper is available at the Commission's website: [www.lawcom.govt.nz](http://www.lawcom.govt.nz)

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The Law Commission's processes are essentially public, and it is subject to the Official Information Act 1982. Thus copies of submissions made to the Commission will normally be made available on request and the Commission may mention submissions in its reports. Any request for the withholding of information on the grounds of confidentiality or for any other reason will be determined in accordance with the Official Information Act.





# Private Schools and the Law

## CONTENTS

Foreword .....	iii
Acknowledgements.....	iv
Call for submissions .....	v

## PRIVATE SCHOOLS AND THE LAW

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### CHAPTER 1

Introduction to the review .....	3
----------------------------------	---

### CHAPTER 2

The nature and development of private schools .....	5
State and integrated schools distinguished.....	5
Private schools in New Zealand.....	5
The current landscape .....	7
The interface between private schools and homeschooling.....	8

### CHAPTER 3

The state and private schools.....	10
------------------------------------	----

### CHAPTER 4

The legal position in New Zealand .....	16
1877 to 1914 – voluntary registration and inspection.....	16
1921 to 1964 – compulsory registration and inspection .....	16
1964 – consolidation .....	17
Private Schools Conditional Integration Act 1975 .....	18
Education Act 1989 – existing law .....	18
Interaction of agencies.....	25
Are private schools subject to public law remedies?.....	25

### CHAPTER 5

The position elsewhere.....	28
Australia .....	28
United Kingdom.....	33

### CHAPTER 6

Summary of issues .....	38
Introduction .....	38
Registration and deregistration.....	38
Role of agencies.....	40
Other issues.....	41

**CHAPTER 7**

Registration criteria and process .....42  
 Introduction .....42  
 A public register? .....42  
 The registration criteria.....44  
 Registration process.....60

**CHAPTER 8**

Compliance and enforcement.....67  
 Introduction .....67  
 Powers of state agencies .....68  
 Breach of duties.....68  
 Compliance assurance process .....70

**CHAPTER 9**

Remaining issues and conclusions.....77  
 Suspensions/expulsions.....77  
 Distance learning .....79  
 Statutory architecture .....80  
 Conclusions .....82

**APPENDIX A**

List of questions .....83  
 Chapter 7 Registration criteria and process .....83  
 Chapter 8 Compliance and enforcement .....85  
 Chapter 9 Remaining issues and conclusions .....85

# Chapter 1

## Introduction to the review

- 1.1 In October 2007, the Government asked the Law Commission to review the law relating to private schools. There are 99 registered private schools in New Zealand.<sup>1</sup> Their combined roll is in excess of 30,000 students. Private schools are subject to a different regulatory system from state schools. They enjoy considerable freedom and, by their very purpose, they should continue to do so. They may choose their own curriculum, qualifications frameworks and assessment methods, and they may offer education within an educational environment of their design. Furthermore, in general, private schools operate effectively and in a way that does not call their educational standards into question.
- 1.2 However, as this paper will demonstrate, the legislation governing private schools is old-fashioned. In places it is unclear, leaving schools and agencies uncertain as to their responsibilities. It is also incomplete, containing insufficient power to deal with some serious problems should they ever arise. The aim of our project is not to upset the current balance, but rather to ensure that the legislation is adequate to achieve its purpose, now and for the future.
- 1.3 In April 2008, we conducted an information gathering exercise by sending a questionnaire to all New Zealand private schools and to other organisations, including private school associations, education sector unions and government agencies. We received 35 responses to our questionnaire. We refer to many of the submissions we received in this Issues Paper. We have also met with a number of those associations and organisations and with some private school representatives and these meetings have also informed our review thus far.
- 1.4 In this Issues Paper we describe the private school sector in some detail and set out our preliminary views on the appropriate relationship between the state and private schools. We go on to describe the law relating to private schools in New Zealand. In chapter 5 we describe the law relating to private schools in Australia and the United Kingdom to provide a comparative perspective. Drawing on the preceding chapters, in chapter 6 we summarise what we consider to be the issues or problems to be addressed in this review. Finally, in chapters

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<sup>1</sup> As at 1 August 2008.

7 to 9 we set out our suggestions and options for the reform of the law relating to private schools in New Zealand. We seek your feedback on these suggestions and options.

- 1.5 It is important to state upfront that our review has not uncovered any significant problems in the private school sector. The changes we suggest are therefore directed at ensuring that the law is clear, meets modern expectations, is appropriate for future development, and contains measures to deal effectively with any serious problems which might arise. We do not consider our proposals to amount to a fundamental change to the status quo.

# Chapter 2

## The nature and development of private schools

### STATE AND INTEGRATED SCHOOLS DISTINGUISHED

- 2.1 State schools are established by the Minister of Education and funded by the state.
- 2.2 Integrated schools were originally private schools. The Private Schools Conditional Integration Act 1975 provides for private schools to integrate into the state system. These schools receive the same amount of government funding per student as state schools do. However they retain their special character and, although they must teach the New Zealand curriculum, teaching can reflect their special character. The proprietors of an integrated school own or lease, and maintain, the school's buildings and facilities.
- 2.3 Private schools are schools owned, run and supported by private persons and organisations rather than by the state, although they may receive a funding subsidy from the state. This paper is concerned solely with private schools.

### PRIVATE SCHOOLS IN NEW ZEALAND

- 2.4 The development of private schools in New Zealand began before the development of the state school system. Originally, churches and private secular organisations ran schools, assisted by limited grants from public funds.<sup>2</sup>
- 2.5 When the provincial government system was established in 1852, education became the responsibility of the provincial councils. At first, most provinces supported the existing private schools, which were mostly church schools, with limited funding. However by 1870 most provinces had begun to develop a public school system.<sup>3</sup>

2 "Education, Special Aspects – Private Schools" in A H McLintock (ed) *An Encyclopaedia of New Zealand* (Wellington, 1966, reissue 18 September 2007) [www.TeAra.govt.nz/1966/E/EducationSpecialAspectsPrivateSchools/en](http://www.TeAra.govt.nz/1966/E/EducationSpecialAspectsPrivateSchools/en) (accessed 29 May 2008).

3 "Education, Special Aspects – Private Schools" in A H McLintock (ed) *An Encyclopaedia of New Zealand* (Wellington, 1966, reissue 18 September 2007) [www.TeAra.govt.nz/1966/E/EducationSpecialAspectsPrivateSchools/en](http://www.TeAra.govt.nz/1966/E/EducationSpecialAspectsPrivateSchools/en) (accessed 29 May 2008).

- 2.6 The provinces were abolished in 1876. The new central government was then responsible for establishing and running a national education system. The Education Act 1877 established a system of state primary schools at which education would be free, secular and compulsory. The Act did not provide for any funding for private schools, as it was thought that this could lead to a proliferation of small, inferior schools.<sup>4</sup>
- 2.7 Despite the lack of state funds, over the next 50 years there was significant growth in the number of private schools, which were mostly Catholic.<sup>5</sup> By 1914 there were 186 private primary schools, 10 private Māori secondary schools and 13 other private secondary schools.<sup>6</sup> During and after World War I there was concern in the community at the growth of private schools, which was seen as a threat to the state education system.<sup>7</sup>
- 2.8 In the latter half of the 20th century there appears to have been a resurgence in Christian education, spurred by the arrival of Dutch Christian immigrants. This led to the establishment of new private schools. Middleton Grange School, the first of these schools, was established in 1964 by a group of concerned evangelical and Reformed Christians. In the late 1970s, a leader of the New Life stream of Pentecostal churches toured New Zealand promoting Accelerated Christian Education, a curriculum borrowed from the USA. Around 20 new schools were set up in response to this.<sup>8</sup>
- 2.9 The issue of state funding for private schools has been contentious throughout the history of their development. From 1929 the state began to provide small amounts of financial assistance to private schools. This amount gradually increased over the next four decades, and by 1969 all political parties accepted that there ought to be at least some state assistance for private schools.<sup>9</sup> The concept of private schools integrating into the state system was developed in part as a response to controversy over the appropriate levels of state assistance. In 1975 the Private Schools Conditional Integration Act was passed, based on the concept that private schools would receive more government funding provided that they accepted a higher level of government oversight. The Act caused a drop in the number of private schools as many private schools, particularly Catholic schools, integrated into the state system. By 1983, 249 Catholic schools and nine non-Catholic schools had integrated.<sup>10</sup>

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4 Rory Sweetman *A fair and just solution? A history of the integration of private schools in New Zealand* (Dunmore Press, Palmerston North, 2002) 24.

5 “Education, Special Aspects – Private Schools” in A H McLintock (ed) *An Encyclopaedia of New Zealand* (Wellington, 1966, reissue 18 September 2007) [www.TeAra.govt.nz/1966/E/EducationSpecialAspectsPrivateSchools/en](http://www.TeAra.govt.nz/1966/E/EducationSpecialAspectsPrivateSchools/en) (accessed 29 May 2008).

6 Ian Cumming and Alan Cumming *History of State Education in New Zealand 1840-1975* (Pitman Pacific Books, Wellington, 1978) 169.

7 Rory Sweetman *A fair and just solution? A history of the integration of private schools in New Zealand* (Dunmore Press, Palmerston North, 2002) 29.

8 New Zealand Association for Christian Schools *A Brief Summary of the History of Christian Schooling in New Zealand* [http://www.nzchristianschools.org/index.php?option=com\\_content&task=view&id=60&Itemid=48](http://www.nzchristianschools.org/index.php?option=com_content&task=view&id=60&Itemid=48) (accessed 9 June 2008).

9 Rory Sweetman *A fair and just solution? A history of the integration of private schools in New Zealand* (Dunmore Press, Palmerston North, 2002) 44.

10 Rory Sweetman *A fair and just solution? A history of the integration of private schools in New Zealand* (Dunmore Press, Palmerston North, 2002) 15.



- 2.10 Over the last 25 years the number of private schools has again grown, with 38 new private schools having registered since 1998. There are now 99 registered private schools in New Zealand.<sup>11</sup> Together they have more than 30,000 students, comprising four per cent of school-aged children in New Zealand.<sup>12</sup> This proportion is very low by comparison with that in Australia, which we discuss in chapter 5.
- 2.11 Private schools represent a diverse range of beliefs, philosophies and educational approaches, although some follow fairly traditional methods of schooling and attract students through high quality facilities, low teacher-student ratios and special character. Many are affiliated to a religion. A large number are associated with a particular Christian denomination. In addition, one private school is based on Jewish teachings, and another on the Muslim faith.
- 2.12 A particular feature has been the continuing growth of Christian schools. In the last 25 years many more Christian schools have been established, together with two Christian teacher education establishments.<sup>13</sup>
- 2.13 A number of private schools are associated with an educational philosophy, for example Montessori and Rudolf Steiner schools. Some private schools cater for students with learning disabilities, for gifted students, for students with problems such as drug addiction or for students who for any other reason benefit from special attention.
- 2.14 In addition, private schools offering alternative educational approaches have developed recently. For example, in one school students develop their own personal study plan, not necessarily covering core areas of the New Zealand curriculum. Instead of traditional classes, there is a mix of lectures, small group tutorials, seminars and independent study. Another school teaches a project-based, “integrated” curriculum, where students work on projects spanning a number of different learning areas rather than studying separate subjects. Another teaches through “free play” mixed with more formal learning. Several schools cater for students with learning or behavioural difficulties who have encountered difficulties in mainstream schools. There are also several Māori private schools.
- 2.15 Forty-four private schools belong to the Independent Schools of New Zealand (“ISNZ”) association. These tend to be the larger schools. Together they represent 80 per cent of private school students.<sup>14</sup> Another association involving private schools is the New Zealand Association for Christian Schools, which represents both private and integrated Christian schools. Nineteen private schools are

11 As at 1 August 2008.

12 Education Counts *Student Numbers as at 1 July 2007* [http://www.educationcounts.govt.nz/statistics/schooling/july\\_school\\_roll\\_returns/student\\_numbers/student\\_numbers\\_as\\_at\\_1\\_July\\_2007](http://www.educationcounts.govt.nz/statistics/schooling/july_school_roll_returns/student_numbers/student_numbers_as_at_1_July_2007) (accessed 9 June 2008).

13 New Zealand Association for Christian Schools *A Brief Summary of the History of Christian Schooling in New Zealand* [http://www.nzchristianschools.org/index.php?option=com\\_content&task=view&id=60&Itemid=48](http://www.nzchristianschools.org/index.php?option=com_content&task=view&id=60&Itemid=48) (accessed 9 June 2008).

14 Independent Schools of New Zealand *About ISNZ* <http://www.isnz.org.nz/main.cfm?id=2764> (accessed 19 June 2008).

members of this Association.<sup>15</sup> The Independent Schools Teachers' Association of New Zealand represents staff in private schools, and some private school staff belong to mainstream unions.

- 2.16 Some private schools cater for only primary school or only secondary school students, while others are composite schools. There are both co-educational and single-sex private schools. Their size varies widely. Some have less than ten students, while the largest private schools have more than 2,000.<sup>16</sup>
- 2.17 While many private schools teach the New Zealand curriculum and in particular the National Certificate of Educational Achievement (NCEA), a considerable number do not. Many prepare students for the International Baccalaureate or Cambridge International examinations, sometimes alongside NCEA. Some Christian schools teach the Accelerated Christian Education curriculum. Steiner and Montessori schools teach the New Zealand curriculum but imbue it with their own educational philosophy. In a few schools students develop their own personal educational programme rather than following a particular curriculum.
- 2.18 Private schools have a variety of ownership and management structures. Often they are owned by a charitable trust, incorporated society or private company, and managed by a board of governors. At least one school is owned by an overseas company. Some individuals also own and operate private schools.
- 2.19 Private schools receive some government funding, the amount of which varies according to the number and year level of the students. In 2008 the subsidy per student ranged from \$914.68 for Years 1 to 6, to \$1,946.83 for Years 11 to 13.<sup>17</sup> In addition to this, private schools charge fees, which range from \$1,000 to over \$18,000 per year for New Zealand students. Fees for international students are often considerably more. One school provides a full scholarship for every student, so that there are no fees.

THE INTERFACE  
BETWEEN  
PRIVATE  
SCHOOLS  
AND HOME-  
SCHOOLING

- 2.20 Private schools and home schools are distinct, and operate under different legislative frameworks. However, the relationship between the two is not entirely clear.
- 2.21 Parents who wish to educate a child at home may apply for an exemption from the requirement that children attend a registered school. In order to receive an exemption, a child must be taught at least as regularly and at least as well as in a registered school.<sup>18</sup> The Chief Review Officer has the power to review the education provided to these children.<sup>19</sup>

15 New Zealand Association for Christian Schools *Member Schools* [www.nzchristianschools.org](http://www.nzchristianschools.org) (accessed 9 June 2008).

16 Independent Schools of New Zealand *Choice in Education in New Zealand* <http://www.isnz.org.nz/main.cfm?id=2786> (accessed 9 June 2008).

17 Ministry of Education *Education Circular 2007/15* <http://www.minedu.govt.nz/educationSectors/Schools/PublicationsAndResources/Circulars/Circulars2007/Circular200715.aspx> (accessed 3 September 2008).

18 Education Act 1989, s 21.

19 Education Act 1989, s 328A.



2.22 The ambiguity in the boundary between homeschooling and private schools comes from the definition of “efficient” in relation to private schools. Efficient is defined as meaning, among other things, “usually providing tuition for 9 or more students who have turned 5 but are under 16.” It is not clear whether this means that an establishment must register if it has 9 or more students. Furthermore, s 35A(2) provides that 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 of this Act are held in respect of all or any of the students being taught there. Again this is unclear, but it seems to suggest that a group of homeschooled students could be found to be a school. We understand that some families with homeschooled children join together for lessons, and that some private schools began in this way. The provision seems to suggest that such a group would not be precluded from registering as a school. It is not clear whether they might in fact be required to register. We discuss this further in chapter 7.

# Chapter 3

## The state and private schools

- 3.1 Private schools play an important role in the provision of education in any healthy democracy. There are good reasons why the state should not have a monopoly on providing education. In *On Liberty*, J S Mill said:<sup>20</sup>

That the whole or any large part of the education of the people should be in State hands, I go as far as any one in deprecating. All that has been said of the importance of individuality of character, and diversity in opinions and modes of conduct, involves, as of the same unspeakable importance, diversity of education. A general State education is a mere contrivance for moulding people to be exactly like one another ... An education established and controlled by the State, should only exist, if it exist at all, as one among many competing experiments, carried on for the purpose of example and stimulus, to keep the others up to a certain standard of excellence.

- 3.2 Similar sentiments influenced the United States Supreme Court in *Pierce v Society of Sisters*<sup>21</sup> when it established that, while the state had the power to compel education, there were limits on its authority to eliminate or circumscribe educational choices.
- 3.3 Private schools provide healthy competition for the state sector in a way that should promote high standards. They may also be better placed to cater for the increasing linguistic, religious and cultural pluralism in society. There are limits on the extent to which state schools can be fully sensitive to the cultural needs and expectations of all parents and children, and individual private schools are likely to do a better job of providing for the minority community that they serve, by “teaching in an informed way about their culture and religion, placing it in a historical context, and giving them a sense of pride in their cultural heritage”.<sup>22</sup>
- 3.4 The existence of private schools, and an emphasis on freedom in how they can operate, can also be supported from the perspectives of freedom of expression, freedom of religion and parental autonomy. Education, and religion in particular, may be considered matters which fall primarily within the realm of private,

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20 J S Mill *On Liberty and Other Essays* (Oxford University Press, Oxford, 1991) 117–118.

21 *Pierce v Society of Sisters* 268 US 510 (1925).

22 Jane Fortin *Children's Rights and the Developing Law* (2nd ed, LexisNexis UK, London, 2003) 352.

family life and parents' rights to educate their children and instil their values in them. These are important social freedoms that find support in international and domestic laws.<sup>23</sup>

- 3.5 Sections 13, 14 and 20 of the New Zealand Bill of Rights Act 1990 are relevant. They provide:

13 Freedom of thought, conscience, and religion

Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.

14 Freedom of expression

Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

20 Rights of minorities

A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.

- 3.6 Furthermore, article 13(3) of the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>24</sup> states that:<sup>25</sup>

[t]he States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

- 3.7 Balanced against these interests, New Zealand legislation has placed some minimum requirements on private schools since 1914,<sup>26</sup> and it has allowed for the inspection of private schools since 1877.<sup>27</sup> As set out in chapter 5, this practice is replicated in other jurisdictions to greater or lesser degrees.

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23 In *Pierce v Society of Sisters*, the US Supreme Court recognised "... the liberty of parents and guardians to direct the upbringing and education of children under their control ... The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with high duty, to recognize and prepare him for additional obligations." (268 US 510, 535 (1925).)

24 (16 December 1966) 993 UNTS 3. New Zealand ratified the covenant on 28 December 1978.

25 See also Protocol 1 to the European Convention on Human Rights (4 November 1950) CETS 005, art 2 which refers to the right of parents to ensure the teaching of their children in accordance with the parents' religious and philosophical convictions. Section 9 of the Education Act 1996 (UK) also contains the "general principle that pupils are to be educated in accordance with the wishes of their parents".

26 Education Act 1914, s 133.

27 Education Act 1877, s 98.

Recognition that the state may legitimately impose standards on private schools through a system of inspection and licensing, such as that in our legislation, has formed the foundation of court decisions in a number of jurisdictions.<sup>28</sup>

- 3.8 A number of factors suggest that the state has a valid interest in setting some minimum standards for private schools. First, the importance of the right to education is recognised internationally. The Universal Declaration of Human Rights states that “[e]veryone has the right to education.”<sup>29</sup> Article 13 of the ICESCR states that “[t]he States Parties to the present Covenant recognize the right of everyone to education” and that “[t]he development of a system of schools at all levels shall be actively pursued ...” Article 28 of the United Nations Convention on the Rights of the Child (UNCRC)<sup>30</sup> also sets out the right of children to receive education.
- 3.9 Sections 3 and 20 of the Education Act 1989 put these rights into effect by providing for free primary and secondary education, and by requiring that children aged between 6 and 16 must be enrolled in a registered school. We consider that the state has a duty to ensure that the education provided is meaningful, and that it would be abdicating its duty by failing to provide some definition of what amounts to a “registered school” and to an “education”. Giving effect to the right to education justifies the state having a supervisory role in ensuring that an “education” is indeed provided by all schools in New Zealand. Arguably, this duty needs to be fulfilled whether or not the state is providing funding to the school.
- 3.10 The difficulty, of course, arises in defining what amounts to an “education”. Without question, it will mean different things to different people and is likely to vary depending on differing cultural, religious, philosophical and gender perspectives. Further, overly prescriptive, state-enforced definitions could defeat the very point of private schools. It may, however, be possible to identify certain minimum criteria that apply across the board.
- 3.11 Secondly, New Zealand legislation relating to children is rightly founded on the international standard that the child’s welfare and best interests are paramount.<sup>31</sup> Article 3 of the UNCRC provides that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration ...

28 United States – *Pierce v Society of Sisters* 268 US 510 (1925); Canada – *Jones v The Queen* [1986] 2 SCR 284 (SCC): certification requirements for private schools infringed the applicant’s freedom, but the infringement was “reasonable”; South Australia – *Grace Bible Church Inc v Reedman* 54 ALR 571 (SC): a requirement for private schools to be registered, which entailed meeting minimum standards, cannot be said to interfere or diminish religious freedom; United Kingdom – *R v Secretary of State for Education and Science ex p Talmud Torah Machzikei Hadass School Trust* The Times, 12 Apr 1985: judicial review of the competence of the schools inspectorate to review a school and the standards against which the school should be reviewed; South Africa – *Christian Education South Africa v Minister of Education* [2001] 1 LRC 441 (CC): a prohibition against corporal punishment in private schools did not deprive parents of their right and capacity to bring up their children according to their Christian beliefs.

29 UNGA Resolution 217A (III) (10 December 1948), art 26.

30 (20 November 1989) 1577 UNTS 3. New Zealand ratified the Convention on 6 April 1993.

31 See for example, Care of Children Act 2004, s 4, which provides: “(1) The welfare and best interests of the child must be the first and paramount consideration—(a) in the administration and application of this Act, for example, in proceedings under this Act; and (b) in any other proceedings involving the guardianship of, or the role of providing day-to-day care for, or contact with, a child. (2) The welfare and best interests of the particular child in his or her particular circumstances must be considered ...”

States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

- 3.12 Article 3 recognises that it is right that the state should set out minimum standards to ensure that private schools protect children’s welfare and best interests. While limits on a parent’s autonomy to parent must be closely circumscribed and no more than necessary, the law has long recognised that the state has a protective role to play in relation to children.<sup>32</sup> The paramountcy principle of the best interests of the child is a well-established part of our domestic law.<sup>33</sup>
- 3.13 Thirdly, there is significant public interest in schools educating New Zealanders to a degree where they can leave school to become useful members of society. English courts have identified the twin aims of preparing children for life within their own particular faith community, and ensuring that they are left with the capacity to choose some other way of life later on.<sup>34</sup> This approach focuses on achieving “equality of opportunity” for students by ensuring they are able to fulfil their potential and decide their own life paths once they reach adulthood.<sup>35</sup>
- 3.14 Similarly, there is also a public interest in ensuring students leave school equipped to participate in their communities and the wider New Zealand society. Students should understand their rights and responsibilities as members of society, and in particular should be equipped to exercise their right to vote.<sup>36</sup>
- 3.15 This standard does not require that private schools must teach in the same manner as state schools, but recognises that there are minimum standards to be met and skills that students must leave school with – thus, a case for concern might be a school that does not equip its students to master basic literacy and numeracy skills. The standard is also reflected in article 13 of the ICESCR which sets out that education should “enable all persons to participate effectively in a free society”. While a primary measure may be how a school caters for students from its own community, there are also considerations as to the students’ place in the wider New Zealand society.

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32 Evidenced, for example, by the “protective jurisdiction” described in B D Inglis *New Zealand Family Law in the 21st Century* (Brookers, Wellington, 2007) Part 5. Judge Inglis notes that State intervention into the lives and care of children and young persons is justified. This is evidenced by the Family Court’s protective jurisdiction under the Children, Young Persons, and Their Families Act 1989 and Care of Children Act 2004.

33 See Children, Young Persons, and Their Families Act 1989, s 6 and Care of Children Act 2004, s 4.

34 *R v Secretary of State for Education and Science ex p Talmud Torah Machzikei Hadass School Trust* The Times, 12 Apr 1985, CO/422/84 reported by www.lexis.com 3.

35 See Jane Fortin *Children’s Rights and the Developing Law* (2nd ed, LexisNexis UK, London, 2003) 350, referring to H Cullen “Education Rights or Minority Rights?” (1993) 7 International Journal of Law and the Family 143, 152.

36 See, eg, *Campaign for Fiscal Equity Inc v State of New York* (2003) 100 NY 2d 893, where the New York Court of Appeal held that a sound basic education is one that provides students with the literacy, numerical and verbal skills to eventually function productively as civic participants capable of voting and serving on a jury. The goal is “meaningful civic participation in contemporary society.”



- 3.16 The Commission considers that the three factors set out above support the argument that the state has a valid interest in expressing some minimum standards for private schools. The balance is captured by a quote from the United States Supreme Court:<sup>37</sup>

On one side is the obviously earnest claim for freedom of conscience and religious practice. With it is allied the parent's claim to authority in her own household and the rearing of her children. The parent's conflict with the State over control of the child and his training is serious enough when only secular matters are concerned. It becomes the more so when an element of religious conviction enters. Against these sacred private interests, basic in a democracy, stand the interests of society to protect the welfare of children, and the State's assertion of authority to that end ... It is the interest of youth itself, and of the whole community that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens ... neither rights of religion nor rights of parenthood are beyond limitation.

- 3.17 The difficult question is what those minimum standards should be. The standards relating to private schools need to properly balance the various interests. Standards which limit choice or unreasonably restrict their freedom will not be sustainable.<sup>38</sup> We consider that the statutory framework needs to promote parental choice by recognising parents' rights to choose a school for their children and to instil their values. However, it also needs to recognise the state's interest in ensuring minimum standards of education and welfare are met.
- 3.18 The need to achieve an appropriate balance was echoed by the United Kingdom Department for Education and Standards when it proposed standards for private schools.<sup>39</sup> The Department committed itself to "minimise regulation" so that areas such as the spiritual, moral, social and cultural development of pupils would be matters for the schools (and indirectly parents, through the choice of school) so long as the aim was that pupils, on leaving school, would be "likely to become well adjusted citizens".<sup>40</sup>
- 3.19 Ultimately, we consider that the standards should be based on clear aims and set clear parameters for those charged with establishing and monitoring the standards in the schools. It is important therefore to attempt to clearly articulate the aims of the educational system and of any minimum standards that are set.<sup>41</sup>

37 *Prince v Massachusetts* 321 US 158, 165–166 (1944).

38 Decisions of the US Supreme Court have suggested that States should not regulate private education in such an intrusive manner as to convert private schools into public schools in all but name. See *Meyer v Nebraska* 262 US 390 (1923) and *Farrington v Tokushige* 273 US 284 (1927). In *Wisconsin v Yoder* 406 US 205 (1972) the Supreme Court went so far as to say that religious freedom had to be protected to the extent that Amish schools could not be required to keep students in school past the age of 14.

39 Department for Education and Standards *Draft Regulations for Registration and Monitoring of Independent Schools* (London, 2001).

40 Neville Harris *Education, Law and Diversity* (Hart Publishing, Oxford, 2007) 441.

41 Jane Fortin *Children's Rights and the Developing Law* (2nd ed, LexisNexis UK, London, 2003) 347.

- 3.20 In this issues paper, we make suggestions about the minimum standards that should apply to private schools. We welcome comment and suggestions on whether we have appropriately achieved this balance and, if not, what adjustments to our proposals might need to be made.
- 3.21 In developing the proposed minimum standards, we have been guided by the following principles. Minimum standards for private schools should:
- not unreasonably infringe upon freedom of choice and parental autonomy;
  - recognise that the state has a duty to ensure that effect is given to the right to an education;
  - go no further than reasonably necessary to protect the private and public interests in promoting children's best interests and ensuring students leave school equipped for their lives in New Zealand society.

# Chapter 4

## The legal position in New Zealand

### 1877 TO 1914 – VOLUNTARY REGISTRATION AND INSPECTION

- 4.1 Private schools are subject to a different regulatory system from state schools under our education legislation. That system, and the concept of “efficiency” on which it is based, have not changed significantly since 1914. Private schools were first mentioned in the Education Act 1877 to the extent that where the teacher or managers of any private school desired to have their school inspected they could apply to the district Education Board for it to authorise such an inspection.<sup>42</sup>
- 4.2 The notion of “efficiency” as the standard for registered private schools to attain first appeared in section 133 of the Education Act 1914. “Efficient” meant, in respect of any private school, that the “premises, staff, and equipment are suitable and efficient, and that the instruction is as efficient as in a public school or secondary school, as the case may be”. A private school was a registered school if it was registered in accordance with section 133. However, registration was not compulsory. The 1914 Act also provided for the voluntary inspection of private schools.
- 4.3 Registration meant that a school was obliged to keep records of attendance. Registered schools could be removed from the register if they no longer fulfilled the prescribed conditions. Section 133(6) provided for a list of registered private schools to be published each year in the *Gazette*. The 1914 Act also defined a private school as “any private school where there are more than eight children over five years of age receiving instruction”.<sup>43</sup>

### 1921 TO 1964 – COMPULSORY REGISTRATION AND INSPECTION

- 4.4 The registration of private schools became compulsory under the Education Amendment Act 1921. Section 7 replaced and extended section 133 of the 1914 Act. “Efficient” now meant that “the premises, staff, equipment, and curriculum of the school are suitable; that the instruction afforded therein is as efficient as in a public school of the same class; that suitable provision is made for the inculcation in the minds of the pupils of sentiments of patriotism and loyalty.” The introduction of the latter phrase was accompanied by a new requirement that all persons employed as teachers, in state or private schools, had to take the

<sup>42</sup> Education Act 1877, s 98. The provision was repeated in the Education Act 1908, s 170.

<sup>43</sup> Education Act 1914, s 2.



oath of allegiance, and an oath that he or she would not be disloyal to the King.<sup>44</sup> The parliamentary debates relating to the passage of the 1921 Act clearly reveal the degree of concern at the time about the dissemination of “disloyal” sentiments.

- 4.5 The requirement that schools be registered was explained as follows:<sup>45</sup>

It is thought that all the private schools should be asked to apply for registration and inspection. The Government feels that it is not sufficient that we should allow any person to open a school in any sort of building and with any sort of instruction. To the children who attend these private schools the Government owes some duty to see that the schools are reasonably efficient, just as in the case of nursing-homes, private hospitals, dentists, and plumbers we insist upon registration to protect the public and to secure efficiency.

- 4.6 It is interesting to note that there was some mention in the parliamentary debates of the lack of clarity in the term “efficient”. One Member said “I am in agreement with those who think the time may come when we shall have to give a proper definition to the word ‘efficient’.”<sup>46</sup>

- 4.7 The 1921 Act introduced greater detail about the registration process.<sup>47</sup> Thus, no private school was to be established unless an application for registration was made to the Director of Education. On receipt of an application for registration, the Director was to cause the school to be inspected to assess whether it was efficient or not. Again, there was a power to remove an inefficient school from the register and a requirement for the Director to publish a list of registered private schools in the *Gazette* each year. Notably, the Act introduced a requirement that every private school (“whether registered or not”) be inspected annually. Finally, every private school was to maintain a register of attendance “and such other records as may be prescribed”.

## 1964 – CONSOLIDATION

- 4.8 The Education Act 1964 consolidated the previous legislation. Section 186 dealt with the “efficiency” standard and the registration process. The only significant change was that reviews of private schools were now to take place every three years, rather than annually. Section 186 was amended in 1982 so that greater detail was set out in relation to the registration process.<sup>48</sup> There was a clearer distinction between provisional and full registration, with a 6 month expiry date for provisional registration. Further detail about the registration

44 Education Amendment Act 1921, s 11. This requirement disappeared from education legislation in the 1964 Act.

45 Hon Mr Parr (28 October 1921) 191 NZPD 931.

46 Hon Mr Cohen (15 December 1921) 193 NZPD 18.

47 Education Amendment Act 1921, s 7.

48 Education Amendment Act (No 2) 1982, s 14.

process was added in 1987.<sup>49</sup> A notable addition was that the Director-General could cancel a school’s registration if its managers “prevented or hindered the school’s inspection”.

- 4.9 The 1964 Act retained the previous definition of a private school, that is:<sup>50</sup>

Private school means any private school where there are more than 8 children over 5 years of age receiving instruction.

This definition is still in force.

- 4.10 Some elements of the policy of the 1964 Act were introduced by way of the Education Amendment Act 1964. That Act was brought into force on 13 November 1964 for the purpose of enabling essential changes to be made without having to wait for the passage of the main Act through Parliament.<sup>51</sup> Section 9 of the Amendment Act provided for regulations to be made for the making of grants to the governing bodies of registered private schools. Regulations made under the section could apply to all registered private schools or to any registered private school or to any class or classes of those schools.<sup>52</sup> It does not appear that any regulations relating to grants to private schools were in fact made under those provisions.

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PRIVATE  
SCHOOLS  
CONDITIONAL  
INTEGRATION  
ACT 1975

- 4.11 It is worth noting here that the landscape for many private schools altered significantly with the Private Schools Conditional Integration Act 1975. The Act made provision for the conditional and voluntary integration of private schools into the state education system on a basis that would preserve and safeguard the special character of the schools’ education.
- 4.12 A school opting to integrate was to instruct its pupils in accordance with the curricula and syllabus prescribed by the Education Act 1964 and by regulations made under that Act.<sup>53</sup> While the proprietors of an integrated school retain ownership of the land and buildings and are responsible for bringing the facilities up to state standard, in all other respects they are funded like state schools. As noted in chapter 1, the 1975 Act had the impact of significantly reducing the number of fully private schools. This review is not concerned with integrated schools.

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EDUCATION  
ACT 1989 –  
EXISTING LAW

- 4.13 The existing law relating to private schools is now, largely, found in the Education Act 1989. The 1989 Act has been the subject of numerous, piecemeal amendments since it became law and is now a long and complicated piece of legislation that is difficult to navigate. The 1989 Act does not define what constitutes a school, and indeed no such definition has been included in any of the legislation mentioned above. The main provisions relating to private schools are found in Part 3, headed “Enrolment and attendance of students”, but other provisions that apply to private schools are scattered throughout the Act.

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49 Education Amendment Act (No 2) 1987, s 28.

50 Education Act 1964, s 2(1).

51 The Education Act 1964 did not come into force until 15 October 1965.

52 The Amendment Act became spent on the introduction of the Education Act 1964 and the provision relating to grants became s 192 of that Act.

53 Private Schools Conditional Integration Act 1975, s 31.

The main focus of our review is section 35A.<sup>54</sup> Other than the definition in section 2 of the 1964 Act, private schools can only be said to be defined in the legislation by way of reference to the criteria laid down in section 35A.

### “Efficiency”

4.14 As noted, the standard against which the registration, review and deregistration of private schools is measured is “efficiency”. Section 35A(1) defines “efficient” as follows:

Efficient, in relation to a private school or proposed private school, means—

- (a) Having suitable premises, staffing, equipment, and curriculum; and
- (b) Usually providing tuition for 9 or more students who have turned 5 but are under 16; and
- (c) Providing suitably for the inculcation in the minds of students of sentiments of patriotism and loyalty; and
- (d) Giving students tuition of a standard no lower than that of the tuition given to students enrolled at—
  - (i) Primary schools of the same class, where the school’s managers want it to be registered as a primary private school:
  - (ii) Secondary schools of the same class, where the school’s managers want it to be registered as a secondary private school:
  - (iii) Special schools of the same class, where the school’s managers want it to be registered as a special private school.

4.15 Section 35A is drafted in broad terms and contains some archaic language. The legislation gives no further guidance as to how the concepts of “efficiency”, “suitable” and “tuition of a standard no lower than” are to be measured.

4.16 Paragraph (b) of the definition of “efficient” is relatively new. The reference to nine students and the implication of the term “usually” require consideration. It is not clear whether an establishment must register once it has nine or more students, although that reading is possible when account is taken of the definition in section 2 of the 1964 Act, which is still in force.<sup>55</sup> Nor is it clear whether establishments with less than nine students are, or should be, precluded from registering. In practice, we understand that some private schools currently have less than nine students.

4.17 Paragraph (c) of the provision has not changed since its addition in 1921.

### Registration and review

4.18 Subsections 35A(3) to (9) deal with the registration process and with ongoing review of private schools by the Education Review Office:

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54 In fact, s 35A was not included in the original 1989 Act, with s 186 of the 1964 Act remaining in force. Section 35A was added, and s 186 repealed, by the Education Amendment Act 1989, s 9, only a matter of months after the principal Act came into force. Arguably, the gradual migration of provisions from the 1964 Act to the 1989 Act has had a negative impact on the architecture of the 1989 Act as a whole.

55 “Private school means any private school where there are more than 8 children over 5 years of age receiving instruction.”

- (3) The managers of an unregistered or proposed private school may apply to the Secretary for its provisional registration as a primary, secondary, or special private school, or as a school of 2 or all of those descriptions.
- (4) If satisfied that the premises, staffing, equipment, and curriculum of a school or proposed school in respect of which an application is made under subsection (3) of this section are or are likely to be suitable, the Secretary shall provisionally register the school as a school of the description or descriptions concerned.
- (5) Provisional registration of a school or proposed school shall (unless earlier revoked) continue in force for 12 months only, and then expire.
- (6) As soon as is practicable after provisionally registering a school or proposed school, the Secretary shall tell the Chief Review Officer.
- (7) Unless a proposed school has not in fact been established, the Chief Review Officer shall—
  - (a) Between 6 and 12 months after the provisional registration of a school or proposed school; or
  - (b) By agreement with its managers, earlier,—  
ensure that a review officer reviews the school in action, and prepares a written report on the review to the Secretary and the school’s managers.
- (8) If satisfied, having considered the review officer’s report, that a provisionally registered school is efficient, the Secretary shall fully register the school as a school of the description or descriptions concerned.
- (9) The Chief Review Officer shall ensure that—
  - (a) While registered under this section, a school is reviewed in action by a review officer—
    - (i) Before the 1st day of January 1993 or the 3rd anniversary of its registration (whichever is the later); and
    - (ii) Thereafter, at intervals of no more than 3 years; and
  - (b) The review officer prepares a written report on the review and gives copies to the Secretary and the school’s principal (or other chief executive) and managers.

4.19 Thus a school can now operate as provisionally registered for up to 12 months. Unlike previous incarnations of the provision, there is no express provision for a school to apply for a further period of provisional registration, but nor is there anything to prevent it. We understand that the Ministry of Education (“the Ministry”) will allow this. Private schools continue to be required to be reviewed every three years. Neither the requirement that the Director-General publish an annual list of private schools, nor the provision that a school can be deregistered if its managers “prevent or hinder” review, have been retained in section 35A.

4.20 There are no limits on who can apply to register a school under the Act. While teachers and other school staff must meet certain criteria and undergo a police vet, there is no such requirement for an owner or manager of a private school.

### Education Review Office

4.21 Notwithstanding these specific inspection provisions for private schools, Part 28 of the Act provides generally for the Education Review Office (ERO). Section 325 states that the Chief Review Officer’s functions are to:

- administer, when directed by the Minister or on his or her own motion, reviews, “either general or relating to particular matters, of the performance of applicable organisations in relation to the applicable services they provide”;
- administer the preparation of reports to the Minister on such reviews; and
- give the Minister such other assistance and advice on the performance of applicable organisations as required.

4.22 Part 28 of the Act applies to educational services whose provision is (wholly or partly) regulated by or under statute. It appears, therefore, that the effect of section 325 is that ERO is empowered to review private schools on a wider basis than under section 35A.

### Deregistration and penalties

4.23 Subsections 35A(10) to (12) deal with deregistration and the penalty for operating an unregistered school:

(10) Subject to subsection (11) of this section, the Secretary may at any time cancel a school’s registration under this section.

(11) The Secretary shall not cancel a school’s registration under this section unless, after having—

- (a) Taken all reasonable steps to get all the relevant information; and
- (b) Considered a report on the school from a review officer,—  
the Secretary is not satisfied that the school is efficient.

(12) Where—

- (a) A school that is not a registered school operates as a school; or
- (b) A school registered under this section as a school of a particular description or descriptions operates as a school of another description; or
- (c) A school registered under this section whose managers have not told the Secretary that it will stop operating does not operate,—  
the school’s managers commit an offence against this Act, and shall be liable on summary conviction to a fine not exceeding \$200 for every day or part of a day on which the offence took place.

4.24 The procedural details around deregistration were introduced to ensure that a fair process is pursued before a school is deregistered. However, the provision lacks the incorporation of fair process principles. In particular, it provides a school with no statutory right of response. The principles of natural justice apply at common law, so a private school that is unfairly deregistered would be able to apply for judicial review if these principles had not been followed, so would have a remedy. However, it is now considered best to clearly set out in the statute what procedural protections apply to the exercise of a decision-making power.<sup>56</sup>

4.25 Subsection (12) makes it clear that registration is compulsory.

56 Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (Wellington, 2007) 13.6.1 and 13.6.2.



### Remainder of s 35A

- 4.26 Subsection 35A(13) is a transitional provision. Subsection (14) provides for the managers of a private school where more than 29 foreign students are enrolled to pay a proportion of the cost of every review of the school. Subsection (2) should also be noted. It provides:

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 of this Act are held in respect of all or any of the students being taught there.

- 4.27 As noted in chapter 1, it is thought that this provision provides for the scenario where a number of homeschooling groups come together in such numbers that the Ministry of Education may, in its discretion, determine that a “school” is in fact in existence.

### School hostels

- 4.28 Under the 1989 Act a “hostel” is a boarding establishment used mainly or solely for the accommodation of students enrolled at a “registered school”, which includes private schools. Sections 144C to 144E of the Act are aimed at helping to ensure the safety of students who board at hostels<sup>57</sup> and regulations may be introduced and inspections carried out for this purpose. As a result, the Education (Hostels) Regulations 2005 were introduced and contain 75 provisions regulating school hostels. The provisions relate to the granting, content and cancellation of licences for hostels, minimum standards for hostel premises and facilities, and complaints by students or parents. They include a “code of practice” relating to the management of hostels. Private school hostels are covered to the same extent as state school hostels, provided they are used for the accommodation of five or more students of whom none is in any way a family member of, or related to, the owner; and the accommodation is provided for valuable consideration and for one or more periods each of which is longer than three consecutive nights.<sup>58</sup> The Regulations provide for offences for failing to comply with the conditions, standards or codes of practice, with a fine of up to \$10,000.

### Staff in private schools

- 4.29 Like state schools, private schools are required to employ registered teachers.<sup>59</sup> The managers of a private school can be convicted of an offence and fined up to \$5,000 for employing unregistered teachers.<sup>60</sup> Registered teachers are required to be of good character; be fit to be a teacher; be satisfactorily trained to teach; and have satisfactory recent teaching experience.<sup>61</sup> They must also be police vetted.<sup>62</sup> Schools can also employ provisionally registered teachers.<sup>63</sup>

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57 Education Act 1989, s 144B.

58 Education (Hostels) Regulations 2005, r 5.

59 This requirement was introduced in 1989.

60 Education Act 1989, ss 120A, 120B, 137(2).

61 Education Act 1989, s 122.

62 Education Act 1989, s 124B.

63 Education Act 1989, s 123.

- 4.30 The managers of a private school may also be convicted of an offence if they fail to report dismissals and resignations, complaints, and possible serious misconduct of teachers, and matters relating to their competence.<sup>64</sup>
- 4.31 Again, like state schools, private schools can employ persons with a “limited authority to teach” (LAT). A LAT is granted where a person has “skills and experiences that are appropriate to advance the learning of a student or group of students in any particular institution, but who may not have a specific qualification normally associated with teaching”.<sup>65</sup> The person must also be of good character; fit to be a teacher; likely to be a satisfactory teacher; and police vetted.<sup>66</sup> There is some debate about the purpose of a LAT. One view is that a LAT is a temporary status, only to be granted where the person is working towards registration as a teacher. This view is perhaps reinforced by section 120A(2) which states that “[n]o employer shall permanently appoint to any teaching position any person who does not hold a practising certificate.” However, this limitation is not entirely evident from the strict wording of the Act, and this interpretation is not shared by all relevant agencies. In particular, section 130E(3) expressly provides for LAT authorisations to be renewed.
- 4.32 In effect, section 120B(3) of the Act provides for a third tier of teaching staff. Schools may employ any other person in a teaching position provided they have not worked more than 20 half-days in that year.<sup>67</sup> Such staff must also be police vetted.<sup>68</sup>

### Other provisions applying to private schools

- 4.33 Private schools are under other statutory duties but, other than the ultimate possibility of deregistration if the school has thereby ceased to be “efficient”, these apparently carry no sanction. They are:
- providing information about suspensions and expulsions;<sup>69</sup>
  - obtaining approval of courses for foreign students;<sup>70</sup>
  - complying with conditions placed on the provision of grants to private schools, and attendant reporting requirements;<sup>71</sup>
  - keeping an enrolment record for each student enrolled at the school and providing enrolment information;<sup>72</sup>
  - obtaining a police vet of non-teaching staff employees and contractors;<sup>73</sup>
  - no corporal punishment by an employee;<sup>74</sup> and

64 Education Act 1989, ss 139AK, 139AL, 139AM, 139AN.

65 Education Act 1989, s 130A.

66 Education Act 1989, ss 130B and 130C(2).

67 Education Act 1989, s 120B(3), (4).

68 Education Act 1989, s 78C and 78CA.

69 Education Act 1989, s 35AA.

70 Education Act 1989, s 35B.

71 Education Act 1989, s 35C.

72 Education Act 1989, s 77A.

73 Education Act 1989, ss 78C and 78CA.

74 Education Act 1989, s 139A.

- providing information to the Secretary of Education for the proper administration of the Act.<sup>75</sup>
- 4.34 Section 35C provides that grants may be made to private schools out of public money. Grants may be awarded conditionally or unconditionally. Records relating to grants must be maintained and available for inspection, and accounts provided to the Secretary of Education each year.
- 4.35 The Education (School Attendance) Regulations 1951 apply to private schools<sup>76</sup> and provide that “the head teacher of every school shall be responsible for the accurate keeping of an admission register and a register of daily attendance for all the pupils attending his school”.<sup>77</sup> They also set out some requirements about the days on which a school must give instruction.<sup>78</sup>
- 4.36 Finally, the Ministry has powers to enter and inspect a registered school, and to enter a school suspected of being unregistered.<sup>79</sup> ERO also has such powers, which apply to all schools, in relation to its review role, but they are less extensive than the Ministry’s.<sup>80</sup>

### Education (Secondary Instruction) Regulations 1975

- 4.37 The Education (Secondary Instruction) Regulations 1975 were the last incarnation of regulations that had been in force since 1945. The 1975 regulations were not revoked until the Education Amendment Act (No 2) 1998. The regulations applied to “every registered private secondary school”<sup>81</sup> and stated, amongst other things, that:<sup>82</sup>

Subject to the following provisions of this regulation, every pupil enrolled for full-time instruction in any school or class to which these regulations apply shall be given instruction in English language and literature, social studies, general science, elementary mathematics, music, a craft or one of the fine arts, [health] and physical education, in accordance with the syllabus from time to time prescribed for each subject by the Minister by notice to the Principal of every school or class to which these regulations apply.

- 4.38 It appears that in effect these regulations did, for more than 50 years, place some requirements on what private schools were required to teach, but we understand that they were never applied to private schools in this way.

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75 Education Act 1989, s 144A.

76 They apply to private schools registered under the Education Act 1989: r 2.

77 Education (School Attendance) Regulations 1951, r 3.

78 Education (School Attendance) Regulations 1951, r 6: “Instruction shall be given at every school on the morning and afternoon of every day on which the school is not closed for holidays and on which at least one pupil attends the school for the purpose of receiving instruction before the first half hour of the ordinary school opening time for the morning or afternoon, as the case may be, has passed.”

79 Education Act 1989, ss 78 and 78B.

80 Education Act 1989, ss 327, 328C and 328G.

81 Education (Secondary Instruction) Regulations 1975, r 3.

82 Education (Secondary Instruction) Regulations 1975, r 4(1).



## INTERACTION OF AGENCIES

- 4.39 At present, three government agencies are involved in the oversight of private schools. The Ministry is responsible for registering, deregistering and enforcing the duties of private schools. ERO is responsible for the qualitative review of standards in private schools both at the registration stage, and as the ongoing review body. The New Zealand Qualifications Authority (NZQA) accredits all national qualifications (for example, NCEA). All schools which provide these national qualifications must be NZQA accredited. NZQA does not have any role in assessing private schools which do not offer any national qualifications.
- 4.40 This approach is not unique to the private sector – state schools are also subject to the oversight of all three agencies. For the most part, the interaction of the three agencies in relation to private schools is not within our remit for this project. However questions do arise, relating, in particular, to the respective roles of the Ministry and ERO in the registration process. We consider these roles further in chapters 7 and 9.

## ARE PRIVATE SCHOOLS SUBJECT TO PUBLIC LAW REMEDIES?

- 4.41 Courts in the United Kingdom and Australia have found that private schools are not amenable to public law remedies.<sup>83</sup> Private schools have not been considered of the requisite nature and status, and the statutory regimes involved have not exerted sufficient statutory control, for the decisions of private schools to have the required public law character.<sup>84</sup> The Australian position was summarised by Einstein J in *Bird v Campbelltown Anglican Schools Council*:<sup>85</sup>
- merely because a non-government school has some public aspects or some funding or is registered under an Education Act does not make it a body carrying out a public function and therefore amenable to judicial review.
- 4.42 In the United Kingdom, this position has been maintained, notwithstanding the significant increase in prescription in its regulatory regime relating to private schools.
- 4.43 In those jurisdictions, the relationship between the school and pupil has been considered to be of a private, contractual nature, rather than being “public” in character.<sup>86</sup>

83 For the United Kingdom situation see: *R v Fernhill Manor School ex p A* [1993] 1 FLR 620; *R v Muntham House School ex p R* [2000] LGR 255; *M v W* [2006] EWHC 575 (QB); and *Gray v Marlborough College* [2006] EWCA (Civ) 1262 (UK CA). See also *R v Servite Houses; ex p Goldsmith* (2000) 3 CCL Rep 325; *Heather v The Leonard Cheshire Foundation* [2001] EWHC Admin 429, para 90 (QBD Admin Ct). For the Australian situation, see *Seymour v Swift* (1976) 10 ACTR 1 and *Bird v Campbelltown Anglican Schools Council* [2007] NSWSC 1419. See also John Caldwell “Judicial Review of School Discipline” (2004) 35 VUWLR 240, 252.

84 See *R v Muntham House School ex p R* [2000] LGR 255, 5 and *Bird v Campbelltown Anglican Schools Council* [2007] NSWSC 1419. But compare *R v Cobham Hall School, ex p S* [1998] ELR 389 where judicial review was available in relation to state assisted places at a private school.

85 [2007] NSWSC 1419.

86 Express or implied conditions in a contract can still, however, give rise to requirements of fairness of a comparable standard to that required by the public law principles of natural justice: see *Gray v Marlborough College* [2006] EWCA Civ 1262, paras 56 and 57 (UK CA).

- 4.44 In contrast, the Ontario Divisional Court has found that although a private school was supported entirely from private funds, there was a public law component involved when the education of a pupil was interfered with by the drastic punishment of expulsion. This was sufficient to merit judicial review.<sup>87</sup>

### Judicial review in New Zealand

- 4.45 It has been suggested that since, in New Zealand, judicial review now focuses firmly on the nature of the power being exercised, rather than its source, private schools may be considered to be exercising a sufficiently “public” function for them to be susceptible to the general principles of judicial review.<sup>88</sup> In particular, the Court of Appeal has held that:<sup>89</sup>

The decisions of this Court in *Electoral Commission v Cameron* [1997] 2 NZLR 421 and in *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1 each recognised a principle, in relation to the scope of judicial review, previously stated by Lord Donaldson in *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815, pp 159–160. The principle is that the Courts, in considering the amenability of administrative action to judicial review, are less concerned with the source of the power exercised by decision makers (and in particular whether or not it was statutory) and now more ready than in the past to treat as reviewable the exercise of any power having public consequences. This is so even if the power is exercised by a private organisation.

- 4.46 The courts have not, however, had cause to consider whether private schools fall within this category.

### New Zealand Bill of Rights Act 1990

- 4.47 Similarly, it is not yet clear whether private schools are subject to the provisions of the New Zealand Bill of Rights Act 1990 (NZBORA). Section 3 of NZBORA provides:

This Bill of Rights applies only to acts done:

- (a) by the legislative, executive, or judicial branches of the government of New Zealand; or
  - (b) by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.
- 4.48 The question, then, is whether private schools carry out a “public function, power, or duty conferred or imposed on that person or body by or pursuant to law”. The Court of Appeal has held that that phrase should be given “a generous

87 *Burke v Yeshiva Beit Yitzchak of Hamilton* [1996] OJ No 937. Subsequent Canadian cases appear to have focussed more on procedural rights arising from an implied contractual term, however: *Malec v Canadian Institute of Dental Hygiene Inc* [2005] OJ No 1019 and *Lisyikh v Canadian Law Enforcement Training College* [2007] OJ No 3621.

88 See John Caldwell “Judicial Review of School Discipline” (2004) 35 VUWLR 240, 253. Compare D Brown “Are private schools really private? Judicial review of discipline decisions in private schools” (1998) 8 Education and Law Journal 453.

89 *Wilson v White* [2005] 1 NZLR 189, 196 (CA) McGrath J for the Court.

interpretation”.<sup>90</sup> In *Ransfield v Radio Network Ltd*,<sup>91</sup> Randerson J set out a detailed framework for considering when a function or power will count as public.

- 4.49 Among other things, he considered that the fact that the entity in question is performing a function which benefits the public is not determinative, nor is whether the entity is amenable to judicial review. The primary focus is on the function, power, or duty rather than on the nature of the entity at issue. Nevertheless, the nature of the entity may be a relevant factor in determining whether the function, power, or duty being exercised is a public one for the purposes of section 3(b). Also relevant is how closely the particular function, power, or duty is connected to or identified with the exercise of the powers and responsibilities of the state.
- 4.50 Other relevant factors include whether the entity is publicly or privately owned and exists for private profit; whether the source of the function, power, or duty is statutory; the extent and nature of any governmental control of the entity (the consideration of which will ordinarily involve the careful examination of a statutory scheme); whether and to what extent the entity is publicly funded in respect of the function in question; whether the entity is effectively standing in the shoes of the government in exercising the function, power, or duty; and whether the function, power, or duty is being exercised in the broader public interest as distinct from merely being of benefit to the public.
- 4.51 The High Court has found that a wananga was bound by NZBORA, stating that: “the defendant is a body which performs a public function, namely education, and its right to do so is conferred by law, namely the Education Act 1989”.<sup>92</sup> However, in *M v Palmerston North Boys High School*,<sup>93</sup> while the school in question was a state school, Goddard J found that the specific relationship between the school and the pupil in relation to boarding was a private commercial arrangement. Again, the courts have not had cause to consider the relationship between NZBORA and private schools.

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90 *R v N* [1999] 1 NZLR 713, 721 (CA) Richardson P for the Court.

91 [2005] 1 NZLR 233, 247–248 (HC).

92 *Waara v Te Wananga o Aotearoa* (30 September 2004) HC WN CIV 2003-485-2481, Gendall AJ, para 11.

93 (1996) 3 HRNZ 515 (HC). See also Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ Ltd, Wellington, 2005) 102.

# Chapter 5

## The position elsewhere

### AUSTRALIA

- 5.1 In Australia, state governments are primarily responsible for primary and secondary education within their state. All states have legislation relating to private schools, which are generally referred to as non-government schools in Australia. A number of states have recently reviewed and modernised their legislation.<sup>94</sup> In most cases this took place as part of wider education law reforms.
- 5.2 The situation of non-government schools in Australia is quite different from that in New Zealand. In 2007, 33.6 per cent of Australian students attended non-government schools,<sup>95</sup> compared to four per cent of New Zealand students.<sup>96</sup> Non-government schools in Australia tend to receive quite generous government funding. For example, in the Australian Capital Territory (“ACT”) projected funding for non-government schools in 2008 to 2009 is \$6,869 per student, compared to \$11,288 per student in government schools.<sup>97</sup> While state governments provide some funding, the federal government provides much of non-government schools’ funding.

### Underlying principles

- 5.3 The ACT and Victoria have set out a number of underlying principles upon which their legislation governing non-government schools is based. The ACT principles refer to ideals such as “innovation, diversity and choice;” “developing the spiritual, physical, emotional and intellectual welfare of its students”

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94 See, eg, Warren A Grimshaw *Review of Non-Government Schools in New South Wales: Report 1* (Sydney, 2002); *School Legislation in the ACT* (Report to the ACT Minister of Education, Canberra, 2000).

95 Australian Bureau of Statistics 4221.0 – *Schools, Australia, 2007* [www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/4221.0Main % 20Features22007?opendocument&tabname = Summary&prodno = 4221.0&issue = 2007&num = &view =](http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/4221.0Main%20Features22007?opendocument&tabname=Summary&prodno=4221.0&issue=2007&num=&view=) (accessed 18 June 2008).

96 Education Counts *Student Numbers as at 1 July 2007* [www.educationcounts.govt.nz/statistics/schooling/july\\_school\\_roll\\_returns/student\\_numbers/student\\_numbers\\_as\\_at\\_1\\_july\\_2007](http://www.educationcounts.govt.nz/statistics/schooling/july_school_roll_returns/student_numbers/student_numbers_as_at_1_july_2007) (accessed 18 June 2008). Note however that around 11 per cent of New Zealand students attend integrated schools.

97 Department of Education and Training *Fact Sheet: Government and Non-Government Schools Funding* (Canberra, 2008).

and “preparing students for their full participation in ... a democratic society.”<sup>98</sup> The Victorian principles apply equally to government and non-government schools, and include concepts such as “support[ing] and promot[ing] the principles and practice of Australian democracy,” “all Victorians should have access to a high quality education” and “parents have the right to choose an appropriate education for their child.”<sup>99</sup>

### Registration and review

- 5.4 All states require non-government schools to be registered and provide that it is an offence to operate an unregistered school.<sup>100</sup> However, New South Wales allows non-government schools to apply for an exemption from the requirement to be registered where they conscientiously object to registration on religious grounds.<sup>101</sup> In fact very few schools are exempted.

### Criteria for registration

- 5.5 All states have some criteria or standards that non-government schools must satisfy in order to be registered.<sup>102</sup> Some states impose relatively few requirements, while in others non-government schools must meet very detailed and extensive standards. South Australia is the least prescriptive and Victoria is the most, having eliminated the distinction between government and non-government schools.<sup>103</sup> By way of example, private schools in Queensland are governed by a 238-provision Act and further regulations.<sup>104</sup>
- 5.6 Most states set standards around governance structures and administrative arrangements in non-government schools. The ACT, New South Wales, the Northern Territory and Queensland require that a school’s proprietor or governing body is constituted as a corporation or other legal entity. Other states have more vague standards around governance: for example Western Australia requires that “the constitution of the governing body of the school is satisfactory for the purposes of the Act.”<sup>105</sup> In addition, New South Wales,

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98 Education Act 2004 (ACT), s 75.

99 Education and Training Reform Act 2006 (Vic), s 1.2.1.

100 Education Act 2004 (ACT), s 82; Education Act 1990 No 8 (NSW), s 65; Education Act (NT), s 68A; Education (Accreditation of Non-State Schools) Act 2001 (Qld), s 10; Education Act 1972 (SA), s 72F; Education Act 1994 (Tas), s 51; Education and Training Reform Act 2006 (Vic), s 4.7.1; School Education Act 1999 (WA), s 154.

101 Education Act 1990 No 8 (NSW), ss 75-78.

102 Education Act 2004 (ACT), s 88(6); Education Act 1990 No 8 (NSW), s 47; Education Act (NT), s 68A; Education (Accreditation of Non-State Schools) Regulation 2001 (Qld), Part 2; Education Act 1972 (SA), s 72G(3); Education Act 1994 (Tas), s 53; Education and Training Reform Regulations 2007 (Vic), sch 2; School Education Act 1999 (WA), ss 159 and 160.

103 Note, however, that South Australia is currently reviewing its entire education law, including that relating to non-government schools.

104 Education (Accreditation of Non-State Schools) Act (Qld) 2001 and Education (Accreditation of Non-State Schools) Regulation (Qld) 2001.

105 School Education Act 1999 (WA), s 160.



Victoria and Western Australia require proprietors and members of the governing body of a school to be of good character. Victoria also requires that schools be not-for-profit.

- 5.7 Most states have a standard regarding curriculum. The least prescriptive is South Australia, which requires that the nature and content of the instruction offered at the school is satisfactory. Tasmania requires schools to provide a statement of curriculum, which should be broadly based on the Adelaide Declaration on National Goals for Schooling in the Twenty-First Century.<sup>106</sup> Queensland requires schools to have a written educational programme that enables students to at least achieve Queensland standards of learning, or comparable standards. Non-government schools in the ACT, New South Wales, Victoria and Western Australia are required to follow the state curriculum.
- 5.8 All states except South Australia require teachers in non-government schools to be qualified. Most also require teachers to be registered.<sup>107</sup> New South Wales provides that registration of teaching staff is a relevant consideration, but other relevant matters relating to teachers' experience and qualifications should also be taken into account. In relation to staffing requirements, Queensland also provides that the number and type of staff must be sufficient.
- 5.9 Most states have standards relating to schools' premises, buildings and facilities. Many are quite general. For example, New South Wales requires that school premises and buildings be satisfactory, Victoria mandates that educational facilities should be suitable for the educational programmes offered by the school, and Queensland requires that a school have the educational facilities and materials necessary for the effective delivery of the school's educational programme. Western Australia is the most prescriptive. Its standards include that school buildings and facilities provide a pleasant environment, have safe access, are suitable and sufficient for the learning experiences required by the curriculum and that the school has plans and procedures for managing safety risks. A number of states also require that the school buildings comply with relevant building and health and safety requirements.
- 5.10 Most states have criteria related to the safety and welfare of students. For example, New South Wales requires that a safe and supportive environment is provided for students, ACT requires that the school has policies and processes in place to provide for student safety and welfare, and South Australia requires that the school provide adequate protection for the safety, health and welfare of its students. Several states explicitly require that there be no corporal punishment.<sup>108</sup>
- 5.11 Some states set standards to do with monitoring and reporting. For example, schools in the ACT must have satisfactory processes to monitor quality educational outcomes. Queensland requires schools to have a demonstrable,

106 Schools Registration Board *Standards* [www.srb.tas.gov.au/standards/default.htm](http://www.srb.tas.gov.au/standards/default.htm) (accessed 18 April 2008). The Adelaide Declaration is available at [www.dest.gov.au/sectors/school\\_education/policy\\_initiatives\\_reviews/national\\_goals\\_for\\_schooling\\_in\\_the\\_twenty\\_first\\_century.htm](http://www.dest.gov.au/sectors/school_education/policy_initiatives_reviews/national_goals_for_schooling_in_the_twenty_first_century.htm).

107 Note that teacher registration does not exist in all states.

108 Education Act 1990 No 8 (NSW), s 47; Education and Training Reform Act 2006 (Vic), s 4.3.1(6).

systematic approach to improvement processes, including regular monitoring and reporting to the school's community. Most states require non-government schools to be financially viable.

- 5.12 A few states require the impact of a new non-government school on existing schools in the area to be considered in deciding whether to grant registration.<sup>109</sup>
- 5.13 Several states require schools to have in place policies and processes for dealing with grievances, disputes or complaints.

### Registration processes

- 5.14 Most states have a system similar to New Zealand's, where schools first apply for a period of provisional registration and then apply for full registration at the end of that period. Some states have a slightly more complex process. For example in the ACT schools may first apply for in-principle approval, then for provisional registration, then full registration. Conversely, in some states there is no provisional registration stage and schools must apply for full registration at the outset. Applications for registration are assessed against the applicable standards or criteria, as set out above.
- 5.15 There are a variety of ways in which applications for registration are assessed. New South Wales, Queensland, South Australia, Tasmania and Victoria have statutory Boards that assess applications for registration. These generally contain representatives of the non-government schools sector. In the ACT the Minister must appoint a panel to report on applications for provisional or full registration.<sup>110</sup> In other states, the Minister or Secretary for Education determines applications.

### Reviews of registration

- 5.16 Most states require that non-government schools' registration be reviewed periodically, generally every three to five years. As a part of this process there are generally inspections, although some states provide for reviews using only documentation. Where a state has set up a separate Board to assess registration, officers or delegates of the Board usually carry out reviews. Otherwise, the relevant Minister or Chief Executive will appoint authorised people to enter and inspect schools.

### Deregistration and penalties

- 5.17 Some states provide for a range of penalties where a school is not meeting the required standards. These are generally linked to an inspection or review of registration, as this is how the state will discover whether a non-government school is complying with the standards. In relation to registration, there are generally a range of possible actions that may be taken, short of deregistering a school. Some examples include:

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109 Education Act 1994 (Tas), s 53(1)(fc); Schools Registration Board *Standards* [www.srb.tas.gov.au/standards/default.htm](http://www.srb.tas.gov.au/standards/default.htm) (accessed 18 April 2008) 3.9; School Education Act 199 (WA), s 159; Department of Education Services *Registration and Renewal of Non-Government Schools in Western Australia: Standards and other Requirements* (Perth, 2007) 3.

110 Education Act 2004 (ACT), ss 86 and 88.

- varying or revoking an existing condition on the school's registration;
  - imposing conditions on a school's registration;
  - limiting or reducing the period of the school's registration;
  - preventing the school from enrolling new students;
  - requiring the school to report to parents that it does not comply with the minimum standards; and
  - suspending the school's registration.<sup>111</sup>
- 5.18 In addition, all states provide for cancellation of a school's registration, generally where it is not complying with the required standards or is not complying with a condition of its registration. Some states set out additional grounds upon which registration may be cancelled, such as:
- the school was registered because of a false or misleading representation;<sup>112</sup>
  - the school's proprietor or principal has contravened the Act;<sup>113</sup> and
  - cancellation is in the best interests of the students at the school.<sup>114</sup>
- 5.19 Some states have procedures whereby schools not complying with the required standards are issued with a notice and given the opportunity to rectify the situation before further action is taken. For example, in Queensland, if the Non-State Schools Accreditation Board believes that a school is not complying with a registration requirement it may issue a compliance notice requiring the school's governing body to rectify the matter. The notice must state the steps that the governing body must take, and a period of time within which this must be done. Following this process, if the Board still believes that a ground for cancellation exists, it must issue a "show cause" notice, giving the school's governing body the opportunity to show cause why its registration should not be cancelled.<sup>115</sup>

### Duties on schools

- 5.20 States impose a range of duties on non-government schools. In some cases, these are covered by the registration criteria. The most common duty is keeping records of enrolments and attendance. However some states have more extensive duties. For example, in the ACT schools must establish procedures to encourage students to attend school regularly and to help parents to encourage their children to attend school regularly,<sup>116</sup> establish procedures for reporting to parents about students' academic progress and social development, and give a report to parents at least twice a year.<sup>117</sup> Similarly, in Queensland schools must provide at least two written reports per year on students' performance and

111 See, eg, Education and Training Reform Act 2006 (Vic), s 4.3.3; Education Act 1972 (SA), s 72G.

112 Education (Accreditation of Non-State Schools) Act 2001 (Qld), s 63.

113 Education Act 2004 (ACT), s 95; School Education Act 1999 (WA), s 167.

114 Education Act 1994 (Tas), s 61; School Education Act 1999 (WA), s 167.

115 Education (Accreditation of Non-State Schools) Act 2001 (Qld), ss 61 and 67.

116 Education Act 2004 (ACT), s 102.

117 Education Act 2004 (ACT), s 103.



must provide parents with the opportunity to meet their child's teachers at least twice each year to discuss the child's educational performance.<sup>118</sup> In several states schools must also publish an annual report.<sup>119</sup>

## Conclusion

5.21 Australian states all have a legislative framework for private schools, which includes compulsory registration, a set of standards or criteria for registration, provision for inspections, reviews of registration and actions that may be taken if schools do not comply with registration criteria, and some duties with which schools must comply. Some states have much more extensive legislation than others. In general Australian states tend to have more detailed legislation relating to private schools than New Zealand.

## UNITED KINGDOM

5.22 The United Kingdom (UK) independent school sector educates 671,000 children in around 2,600 independent schools. This represents just under 7% of the total number of schoolchildren in the UK.<sup>120</sup>

5.23 The registration and regulation of "independent schools" in the UK was previously fairly liberal, as in New Zealand, but has become progressively more prescriptive. It is now governed by the Education Act 2002 and by regulations made under that Act. An Education and Skills Bill is currently before the United Kingdom Parliament. Part 4 of the Bill would replace the relevant provisions of the 2002 Act. Any proposed material changes are noted below.

5.24 A consultation exercise which preceded the 2002 Act concluded that greater prescription was required because of the increasing diversity of private schools. It was suggested that, while prescription was not needed when independent schools were uniformly elite schools teaching a broad curriculum, the increase in the number and variety of schools and philosophies in the sector gave rise to concerns about standards and welfare in some schools.<sup>121</sup>

5.25 The reforms were aimed at "putting in place arrangements that will provide a safe, secure and healthy environment for pupils and provide greater transparency for parents". The intention was to "minimise the burden of regulation on good schools, and to provide powers to act decisively and quickly where independent schools are failing their pupils" and "provide a light touch for those schools where standards are high, but quick and effective penalties in those rare cases where children are placed at risk."<sup>122</sup>

118 Education (General Provisions) Act 2006 (Qld), ss 424 and 425.

119 See, eg, Education (General Provisions) Act 2006 (Qld), s 423.

120 Independent Schools Council <http://www.isc.co.uk/> (accessed 10 October 2008).

121 Department for Education and Skills *Registration and Monitoring of Independent Schools* (Consultation Document, London, 2001).

122 Department for Education and Skills *Registration and Monitoring of Independent Schools* (Consultation Document, London, 2001) 3.

## Registration

- 5.26 Before the 2002 Act, the United Kingdom had a two-stage registration process for independent schools. This was removed because of concerns that schools could operate provisionally for two years without meeting the required standards. A proprietor must now apply to be registered before the school opens and must provide the following information:<sup>123</sup>
- (a) the age range of pupils;
  - (b) the maximum number of pupils;
  - (c) whether the school is for male or female pupils or both;
  - (d) whether the school provides accommodation for pupils;
  - (e) whether the school admits pupils with special educational needs.
- 5.27 The government's inspection body, Ofsted, will then inspect the school and report on whether the Independent School Standards (see below) are, or are likely to be met. After considering that report and any other evidence, the registration authority will determine whether the standards are met and, if so, will enter the school on the register of schools.<sup>124</sup> Both these roles of inspection and registration will be carried out by the Chief Inspector of schools if the Education and Skills Bill is passed. Schools must re-register where there is a change of proprietor or address, or any change relating to the matters in s 160(2).
- 5.28 It is an offence to operate an unregistered school, carrying a penalty of a fine or a maximum of six months imprisonment. Section 159 of the 2002 Act gives the Chief Inspector a new power to enter premises and inspect and take copies of documentation where he or she has reasonable cause to think an offence is being committed.

## Independent School Standards

- 5.29 The Education (Independent School Standards) (England) Regulations 2003<sup>125</sup> are made under s 157 of the 2002 Act. They were the subject of a further extensive consultation exercise and set out six pages of standards under various headings. Examples are:

### Quality of education provided

1. ... (2) The school shall draw-up and implement effectively a written policy on the curriculum, supported by appropriate plans and schemes of work, which provides for ... (a) full-time supervised education for pupils of compulsory school age, which gives pupils experience in linguistic, mathematical, scientific, technological, human and social, physical and aesthetic and creative education;

### Spiritual, moral, social and cultural development of pupils

2. The spiritual, moral, social and cultural development of pupils at the school meets the standard if the school promotes principles which— ... (c) encourage pupils to accept responsibility for their behaviour, show initiative and understand how they can contribute to community life;

<sup>123</sup> Education Act 2002 (UK), s 160(2).

<sup>124</sup> Education Act 2002 (UK), ss 160 and 161.

<sup>125</sup> SI 2003/1910.

Welfare, health and safety of pupils

3. (2) The school shall draw up and implement effectively a written policy to—(a) prevent bullying...

Suitability of proprietors and staff

4. The suitability of the proprietor and staff at the school meets the standard if—(a) the proprietor is subject to a check with the Criminal Records Bureau...

Premises of and accommodation at schools

5. The premises of and accommodation at the school meet the standard if—  
(a) the water supply meets the requirements of the Education (School Premises) Regulations 1999...

- 5.30 Regulation 7 sets out the process according to which schools must handle complaints. The regulations were also amended in 2007 to enhance the checks required on proprietors and staff.

### Process for deregistration

- 5.31 Section 165 sets out the process to be followed where a school is failing to meet any of the standards. The school must be served a notice identifying the standards in question, and requiring the proprietor to submit an action plan specifying the steps that will be taken to meet the standards, and the time by which each step will be taken. The registration authority may reject the action plan or approve it with modifications. Where a plan is rejected, or where any of the steps in the action plan are not taken, the registration authority may remove the school from the register. Alternatively, it may order, under s 165(8), that the school cease using part of the school premises, close part of the school's operation, or cease to admit any new pupils. Failure to adhere to such an order is an offence, and may lead to deregistration.
- 5.32 The registration authority may determine that a school should be deregistered without recourse to the process described above where it considers that there is a risk of serious harm to the welfare of pupils at the school. Under the new Education and Skills Bill, this role is passed to a justice of the peace.<sup>126</sup> The Chief Inspector may apply to a justice for an order that a restriction is imposed on the school or that it be removed from the register, and the justice will make the order if he or she considers that a student is suffering or is likely to suffer significant harm. "Harm"<sup>127</sup> is to be defined as "ill-treatment or the impairment of health or development", which in turn would mean physical, intellectual, emotional, social or behavioural development. "Significant" is to be considered by reference to "that which could reasonably be expected of a similar child".
- 5.33 A school has a right of appeal to the Care Standards Tribunal<sup>128</sup> in respect of any of the determinations or orders described above (including those proposed in the new Bill). In the case of an order under section 165(8), the order shall not have effect until the appeal has been determined. However, deregistration

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126 Education and Skills Bill 2007-08, cl 105.

127 These definitions are to be by reference to the Children Act 1989 (UK), ss 31(9) and (10).

128 Education Act 2002, ss 166 and 167.

may still take place pending the appeal where the tribunal considers that there is a risk of serious harm occurring to the welfare of pupils before the appeal is determined.

### Restrictions on who may manage an independent school

5.34 The 2002 Act was amended in 2006 to introduce a prohibition on the participation of certain persons in the management of independent schools.<sup>129</sup> New sections 167A to 167D<sup>130</sup> provide for directions to be given that “a person” may not take part in the management of an independent school, or may only do so in limited circumstances. A direction can be appealed to the Tribunal. The Act does not give any indication as to the criteria according to which a direction may be given.

### Provision of information

5.35 Section 168 of the 2002 Act provides for regulations to be made requiring proprietors to provide prescribed information. The Education (Provision of Information by Independent Schools) (England) Regulations 2003<sup>131</sup> resulted, and were amended in 2004.<sup>132</sup> The Regulations contain a 4 page Schedule setting out the information to be provided:

- in an application to register a school;
- within three months of admission of pupils;
- in an annual return;
- by a proprietor following dismissal, resignation, etc.

5.36 The regulations provide for a school to be removed from the register for failing to provide the prescribed information; and for an offence relating to a proprietor’s failure to provide information.

### Disqualification of unsuitable persons

5.37 Schools can be removed from the register for employing a person subject to an order under section 28 or 29 of the Criminal Justice and Court Services Act 2000 relating to disqualification from working with children.

### Responses to greater prescription

5.38 The proposals for greater prescription did not encounter significant opposition from most independent schools. The Independent Schools Council supported the changes. However, it appears that there was significant opposition from schools operated by faith groups. Indeed, the Department has divided responses in its summary of submissions into those from “faith” schools and those from “non-faith” schools. Generally speaking, faith groups were opposed to any further regulation on the basis that it interfered with the independence of their schools, and their right to educate their children as they wished. Non-faith respondents were almost uniformly in favour of the proposals.

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129 It was also amended in 2005, in respect of inspection powers for Welsh schools.

130 Introduced by Education and Inspections Act 2006 (c 40), s 169.

131 SI 2003/1934.

132 SI 2004/3373.

## Inspection

- 5.39 The Chief Inspector has the power to inspect registered schools at any time. This power is delegated, with around half of all independent schools being inspected by Ofsted (a quasi non-governmental organisation). Those schools affiliated to the Independent Schools Council (ISC) are inspected by the Independent Schools Inspectorate (ISI), and those schools that belong to Focus Learning Trust (FLT) are inspected by the Schools Inspection Service (SIS). ISI and SIS are approved to undertake inspections by the Secretary of State and are monitored by Ofsted.
- 5.40 At present, the inspection function is separate from the regulation function – the inspectors report to the Secretary of State who is responsible for registering, making complaints about and deregistering schools. A recent consultation document has suggested placing all inspection and regulation functions in the hands of Ofsted.<sup>133</sup> This proposal would be given effect if the Education and Skills Bill is passed into law.

## Definition of an “Independent School”

- 5.41 In November 2006 the Department for Education and Skills launched a consultation on a proposal to provide further guidance as to what constitutes full time education in independent schools. The consultation focuses on the definition of an “Independent School” in section 463 of the Education Act 1996:

any school at which full-time education is provided for five or more pupils of compulsory school age (whether or not such education is also provided at it for pupils under or over that age) and which is not—

- (a) a school maintained by a local education authority,
- (b) a special school not so maintained, or
- (c) a grant-maintained school.

- 5.42 The consultation document asked questions relating to defining a school by its number of hours of education per week.
- 5.43 The majority of respondents were home educators, who were concerned that the education they provided for their own children could fall within the definition of an independent school, particularly if home educators educate their children together in informal learning groups. Respondents felt that it would be unreasonable to require home educators to register as an independent school.

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133 Department for Children, Schools and Families (DCSF) *Consultation about the transfer of responsibility for the registration of independent schools and the regulation of independent and non-maintained special schools (NMSSs) to Ofsted* (2007). The ISC’s submission on the document is very critical of the proposals, in particular because of its very positive view of ISI and recent criticisms and concerns about Ofsted voiced by the Education and Skills Select Committee. A draft Education and Skills Bill is attached to the consultation which largely replicates the detail of the registration / complaint / deregistration procedure described above.



# Chapter 6

## Summary of issues

- INTRODUCTION** 6.1 In its review thus far, the Law Commission has not uncovered significant concerns about the state of the private school sector. Many private schools are of a very high standard. Furthermore, the Commission does not consider that the manner in which the state oversees private schools should be subjected to fundamental change. As suggested in chapter 3, we are clear in the view that the state has a duty and right to express minimum standards of education and welfare in private schools. However, a balance needs to be achieved. Those standards should not unreasonably infringe upon freedom of choice and parental autonomy. Also, they should go no further than reasonably necessary to protect the private and public interests in promoting children’s best interests and ensuring students leave school equipped for their lives in New Zealand society.
- 6.2 Against that background, however, we see a number of problems with the existing legal provisions that relate to private schools. They are antiquated. They have not been reviewed since 1921. We also consider that the state of the law does not assist the Ministry and other agencies to carry out their roles effectively and does not provide much clarity for the schools themselves. There are also gaps in the statutory criteria which could make it difficult for the state to take action in some rare, but possible, situations where the welfare of children was seriously at risk. In the light of these concerns, in chapters 6 to 9 we make suggestions and set out options for the amendment of the legislation relating to private schools.

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**REGISTRATION AND DEREGISTRATION** **Open-ended language**

- 6.3 The terms “efficient” and “suitable”, which recur in the legislation, are very broad and the legislation gives little or no guidance as to how the concepts should be measured. In particular, “efficiency”, when given its most common meaning (“productive with minimum waste or effort”<sup>134</sup>), seems a limited standard against which to measure modern educational establishments.
- 6.4 The use of such broad terms means that there can easily be a lack of clarity in their application. This creates uncertainty for the Ministry in provisionally registering schools, and the Education Review Office (ERO) in its review role,

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<sup>134</sup> The Concise Oxford Dictionary (9th ed, Clarendon Press, Oxford, 1995). “Efficiency” is also defined as “(of a person) capable; acting effectively”.



in deciding whether the requirements are satisfied. The Ministry itself suspects that there are regional variances in how private school applications are assessed and processed. This is inevitable when a statute fails to give clear direction. In this regard, section 35A fails to meet modern standards of legislative drafting. The Legislation Advisory Committee Guidelines state that where a power is granted under an Act, the “legislation should state, as far as possible, broadly what the power is; in what circumstances it can be exercised; what matters can be considered; and what is the purpose of the power.”<sup>135</sup> It is clearly desirable that the scope and purpose of the power be clear to the agency or person exercising it, as well as to the citizens affected.

- 6.5 ERO also finds it difficult to apply the “efficiency”, “suitable” and “tuition of a standard no lower than” criteria. For example, if ERO considers that a private school has a problem with bullying, it may be forced to place an artificially broad interpretation on the term “tuition” to be able to comment. ERO reports also suggest that clarity is lacking. In one example of a review report, the review places emphasis on reviewing the school’s curriculum against suitability criteria “as defined by the community” that the school serves. We do not dispute that community involvement in a school is highly valuable and desirable. But it is not clear from section 35A that this should be the only standard against which the suitability of the curriculum should be measured. (There may have been particular circumstances of which we are unaware, perhaps relating to the approval of the original registration application, which explain the example we have given.)

### Outdated drafting

- 6.6 Another issue relates to the dated nature of the legislation. We have already noted that the reliance on “efficiency” does not meet modern drafting standards. In addition, the requirement that private schools “provide suitably for the inculcation in the minds of students of sentiments of patriotism and loyalty” is not expressed in a way that would be found in modern New Zealand legislation. That provision was introduced in 1921, influenced by concerns about treason following World War I. The terms patriotism and loyalty, while representing important values, may no longer entirely reflect modern society’s expectations of the kinds of values students should be taught. The New Zealand curriculum now uses the idea of “community and participation for the common good,” as one of the eight values underpinning the curriculum. The requirement for private schools could be modernised to reflect contemporary understandings of New Zealand citizenship.

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<sup>135</sup> Legislation Advisory Committee *Guidelines on Process & Content of Legislation* (Wellington, 2007) Chapter 8.

### “Efficiency” as the overriding criterion

- 6.7 A further point for consideration is whether the criteria as they are currently drafted are appropriately structured. Currently suitable premises and so on are all framed as elements of “efficiency”. Thus there are effectively two “levels” of criteria, with efficiency being the overriding consideration and the other criteria treated as aspects of it. A more straightforward approach might be to have a single list of requirements for registration, treating the suitability criteria as standalone requirements rather than elements of efficiency. The question then becomes whether it is necessary to retain efficiency as one of the criteria for registration at all, or whether it might take its place, perhaps under another name, as a separate requirement.

### Gaps

- 6.8 Another issue is that there are gaps in the existing registration criteria. As noted, feedback we have received suggests that ERO considers itself constrained by the criteria set out in section 35A when it reviews and reports on private schools. ERO’s focus is on welfare and learning and the criteria for both those matters are far more transparent in the state sector. This is unsatisfactory. The registration criteria ought to provide a sufficient basis for ERO to report on matters in which the state has a legitimate interest, such as the welfare of the students.
- 6.9 Moreover, at present in some instances the legislation does not clearly provide the Ministry with sufficient powers if it has real concerns about a private school. Our consultation suggests that the Ministry feels unable to act in some circumstances or chooses not to because of uncertainty about the extent of its powers. One instance would be if it were to be suspected that corporal punishment was occurring in a private school. While that constitutes an offence there appears to be no action which can be taken against the school itself. Likewise, while there is power to require private schools to supply information,<sup>136</sup> there is no provision for what might happen in the event of a failure to supply it.

### Deregistration

- 6.10 At present, the legislation is premised on an all-or-nothing approach to the deregistration of private schools. Deregistration is the sole method of dealing with most problems within private schools. The process that leads to deregistration is inadequate: we consider that a clear and fair process should be in place. We also suggest that lesser sanctions or interventions might appropriately be available when deregistration is seen as too extreme a solution.

### ROLE OF AGENCIES

- 6.11 In chapter 4, we noted that there are three government agencies involved in the oversight of private schools. In particular, the registration, review and deregistration roles are shared across the Ministry of Education and ERO. We query in chapter 7 whether there might be some readjustment of roles.

<sup>136</sup> Education Act 1989, s 144A.

- 6.12 It is our impression that oversight of the private school sector suffers not just because of the lack of clarity in the legislation, but also because monitoring the state sector is resource-intensive. Our proposals would be likely to result in more attention being paid to the private school sector. We revisit this in chapter 9.

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## OTHER ISSUES **Other duties**

- 6.13 Two issues arise in relation to the statutory duties on private schools. First, in chapter 4 we noted that some of the statutory duties on private schools are, essentially, unenforceable since they are not accompanied by any form of sanction. This is an anomalous situation and we discuss it further in chapter 8. Secondly, some duties that relate to welfare and discipline apply to state schools but not to private schools. We consider whether this is appropriate in chapter 9.

### Distance learning

- 6.14 There is an issue whether the Act as currently drafted allows private correspondence schools to be registered and, if not, whether it should do so. We discuss this in Chapter 9.

### Statutory architecture

- 6.15 The law relating to private schools is currently scattered through the Education Act 1964 and the Education Act 1989. It is not easy to find or assimilate. We discuss in chapter 9 how the various provisions could be better presented.

# Chapter 7

## Registration criteria and process

**INTRODUCTION** 7.1 There is no question, in the Commission’s view, that private schools should continue to be registered. Registration is a means by which the state can ensure that an education is being provided to all school-aged children in New Zealand. It also serves as a clear indication to parents that a school meets the state’s minimum standards.

7.2 In this chapter, we consider the registration process and the criteria that should be met before registration is granted to a private school. As previously noted, the options and proposals discussed here are not fundamental changes to the status quo. Elements of what we suggest already do, or should, take place as a matter of good practice. However, greater clarity and definition in the legislation will assist government agencies and schools themselves better to understand and apply the requirements.

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**A PUBLIC REGISTER?** 7.3 As we have seen, section 35A requires private schools to register with the Ministry of Education. However, at present no actual “register” of private schools is maintained. Until 1990, the head of the Ministry of Education was required to maintain a list of all registered private schools which was to be available for inspection at any office of the (then) Department of Education.<sup>137</sup> This requirement was not retained in the 1989 Act. The reason for this change is not apparent.

7.4 While the Ministry does maintain a list of private schools, it is not a statutorily recognised register, and the Ministry itself doubts its completeness, in particular with regard to provisionally registered schools, schools that have failed to progress to full registration, and data about the ownership of private schools.

7.5 In its 2008 report on *Public Registers*,<sup>138</sup> the Law Commission considered the reasons why information is collected and retained on registers. It described a variety of public interest reasons, including the provision of specific information

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<sup>137</sup> Education Act 1964, s 186(5).

<sup>138</sup> New Zealand Law Commission *Public Registers: Review of the law of privacy Stage 2* (NZLC R101, Wellington, 2008) 30–32.

for members of the public or for research; ensuring public confidence through transparency and accountability; enabling government to contact those on the register; and maintaining the integrity of the information.

- 7.6 We consider that all of these reasons apply to private schools. For example, there is a public interest in parents being able to find out which private schools exist in their area and to check their registration status. Furthermore, government, and others, should have confidence in the accuracy of the information held on private schools for general administrative reasons, as well as to maintain public confidence in the system.
- 7.7 The purpose of maintaining a register is not necessarily the same as the purpose of allowing public access to it.<sup>139</sup> However, we consider that the desirability of transparency as well as parents' and the public's interest in knowing what schools exist mean that a public register is desirable. Information about private schools is already available on the Ministry of Education, Education Review Office and New Zealand Qualifications Authority websites. Given the administrative advantages to be gained and the facilitation of the free flow of information, we cannot see any reason against a public register of private schools.
- 7.8 Such a public register would, we suggest, contain a limited amount of personal information (such as the names of the owners or managers of the school). Any register that contains publicly accessible personal information should be created as a "public register" under Part 7 of the Privacy Act 1993. Under the current law, this would mean that the protections in that Act's Information Privacy Principles and Public Register Privacy Principles would apply.<sup>140</sup> Proposed legislation creating a public register should address the purpose for creating the register and for making it open to search by the public; the register should include necessary personal information only.<sup>141</sup>
- 7.9 In *Public Registers*, the Law Commission proposed that the regulation of public registers should be removed from the Privacy Act 1993 and dealt with in each register's own legislation.<sup>142</sup> If the law were to be changed in this manner, matters such as the purposes for which the register was set up, the application of the Information Privacy Principles to the register, and access to it, would need to be considered and included in the Education Act 1989.

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139 New Zealand Law Commission *Public Registers: Review of the law of privacy Stage 2* (NZLC R101, Wellington, 2008) 32.

140 Privacy Act 1993, s 59. These principles address search references, uses for the information (including its electronic transmission), and charging for register access. In addition, public registers are subject to Part 6 of the Domestic Violence Act 1995, which covers the non-publication of certain personal information on public registers.

141 See Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (Wellington, 2007) Chapter 15.

142 New Zealand Law Commission *Public Registers: Review of the law of privacy Stage 2* (NZLC R101, Wellington, 2008) R1 and R4. These recommendations will be considered by the Government when the Commission completes its wider review of the Privacy Act 1993 in 2009.



## Information to be held on register

7.10 We suggest that the register should record the:

- name of the school
- address of the school
- address of any additional campuses
- name and contact details of the owners/managers
- date of registration
- type of school (i.e. primary, secondary, etc).

7.11 The register could also designate a school as being fully or provisionally registered. Depending on the deregistration process for schools, it may be that the register should record each school's registration status more generally. For example, the register could state whether a school is subject to any warnings (see our proposals in chapter 8).

7.12 The integrity of such a register will depend upon the accuracy of the information held. We suggest that there should be a requirement for a school to notify the Registrar if any of the information on the register changes. For example, schools should be required to inform the Registrar if there are any changes in its ownership, or if it opens any new sites. Below, we suggest that any change in the location or ownership of the school, as well as the opening of additional campuses, should be approved according to the registration criteria.

Q1 We propose that there should be a public register of private schools, and that it should contain the following information:

- name of school
- address of the school
- address of any additional campuses
- name and contact details of the owners/managers
- date of registration
- type of school (i.e primary, secondary etc.)

We also propose that the register should designate the school's registration status, including whether it is subject to any warnings.

Do you agree? Should any other information be held on the register?

Q2 Do you agree that changes in the information on the register should be required to be updated and that any changes in ownership, premises and additional campuses should be subject to fresh assessment according to the registration criteria?

## THE REGISTRATION CRITERIA

### Introduction

7.13 This section considers whether the existing criteria for the registration of private schools are adequate, whether more guidance could be given as to how they apply, and whether additional criteria are needed.



- 7.14 As previously outlined, the existing registration criteria centre on the concept of a school's efficiency. To be registered a private school must be "efficient," which is further defined as meaning:<sup>143</sup>
- having suitable premises, staffing, equipment and curriculum;
  - usually providing tuition for nine or more students aged 5 to 16;
  - providing suitably for the inculcation in the minds of its students of sentiments of patriotism and loyalty; and
  - giving students tuition of a standard no lower than a state school of the same type.
- 7.15 In chapter 6 we noted some difficulties about the broad nature of these criteria. They give schools, and Ministry and ERO staff, very little guidance as to what is actually required; give very broad discretion to those assessing and registering schools; and do not reflect modern drafting standards and expectations. The question is whether we can do any better.
- 7.16 In chapter 5 we described the legislative provisions that apply to private schools in the Australian states and territories and in the United Kingdom. Private schools are more heavily regulated in most of those jurisdictions. At the extreme, private schools in Queensland are subject to a 238-provision Act and further regulations.<sup>144</sup> The United Kingdom and other Australian jurisdictions have detailed legislation and regulations in place that set out specific standards in terms of contact hours, curriculum, welfare and other matters.
- 7.17 New Zealand's Education (Hostels) Regulations 2005 set out the minimum standards for hostels in a far more detailed manner than that adopted for private schools themselves. ERO have commented to us that they find their reviews of hostels far more straightforward now that the regulations are in place.
- 7.18 We reiterate our view that the standards for private schools need to achieve a balance between establishing minimum standards and facilitating parental choice and autonomy. Nor do we wish to create a complicated bureaucracy. Furthermore, we believe there are limits to how specific any legislation can be about many educational standards. Despite its greater detail, the standards in much of the Australian legislation are still framed in terms of being "satisfactory" or "adequate for the courses of study provided". Ultimately, trust has to be placed in the reviewing body to exercise its judgment and expertise in assessing whether a school is operating to a satisfactory standard. In some cases, very broad statements of what is required will be the best that can be achieved. However, where direction or guidance can be provided about what is suitable or satisfactory, we consider that this should be done.

### What should be registered?

- 7.19 The Education Acts 1964 and 1989 contain several definitions of different types of school. Thus, section 2 of the 1964 Act provides definitions for primary, secondary, intermediate and composite schools. It also defines a "private school"

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143 Education Act 1989, s 35A.

144 Education (Accreditation of Non-State Schools) Act (Qld) 2001 and Education (Accreditation of Non-State Schools) Regulation (Qld) 2001.

as “any private school where there are more than 8 children over 5 years of age receiving instruction.” “Private primary school” and “private secondary school” are also defined and those terms are used in the Income Tax Act 2007.<sup>145</sup>

- 7.20 By a circuitous route of cross-references, the 1989 Act unhelpfully defines different levels of schools as schools established under the Act as either primary, secondary, composite or intermediate schools.<sup>146</sup> Part of the Act’s complexity comes from the different use of terms in different sections of the legislation. Nowhere does it define “school” itself. Section 35A talks of the registration of “private schools” but nowhere is a private school defined in the 1989 Act. Section 2 of the Act defines a “registered school” as a “school that is a state school, or a school registered under section 35A of this Act”.
- 7.21 The result is that some difficulty is encountered in assessing what form of educational establishment needs to be registered under section 35A. Clearly one element is that the school is owned by a private individual or entity, other than the state. Otherwise, section 35A(12)(a) suggests that an establishment that “operates as a school” must be registered to avoid prosecution.
- 7.22 Also, section 35A(1)(b) states that a school is “efficient” if it is “[u]sually providing tuition for 9 or more students who have turned 5 but are under 16”. This, combined with the definition of a private school in section 2 of the 1964 Act,<sup>147</sup> suggests that there is some size threshold before a school is required to be registered. However, the use of the word “usually” is curious. The Ministry itself does not have a clear view of what the word means in relation to registration. One interpretation is that, in most cases, private schools should have a roll of at least nine students before they will be considered “efficient”. Thus schools will be registered if they can establish that their roll will exceed that number. However, exceptions will be made and the Ministry will register schools of, say, four students, if the school meets the other criteria. Another interpretation is that private schools must always maintain a roll of nine or more students, but that the Ministry will allow for the roll to vary on a temporary basis due, for example, to illness. This lack of certainty is undesirable and could lead to the unfair (that is, inconsistent) application of the legislation. We understand that some registered schools may currently be operating with a roll of under nine.

*Should there be a threshold for registration, based on the school’s roll?*

- 7.23 Schools have given us some interesting feedback on this question. There was a fairly even spread of views as to whether there was a need to specify minimum numbers. Some schools in favour noted the need for a school to maintain a “critical mass” of students to be financially viable, and this suggested that perhaps a number higher than nine was required. Two schools suggested that flexibility could be introduced by requiring schools to have 20 students, with the ability for exceptions to be made. A number queried whether there was any evidence that the number 9, while arbitrary, was causing any problems. Some schools thought that any statutory minimum requirement was an

145 Income Tax Act 2007, s LC3.

146 Education Act 1989, ss 2, 145 and 146.

147 “Private school means any private school where there are more than 8 children over 5 years of age receiving instruction.”

unnecessary barrier to registration. Others stated that excellence and safety were more important standards to be met and that those were not necessarily dependent on the number of students.

- 7.24 We think that there is an interest in the state assuring itself that a school has a critical mass of students to operate. We do not consider that the state should provide its endorsement to a private school when it cannot be confident that the school will have an enduring presence. It is undesirable that students should be placed in a new private school when it may have to close down within a number of months. This would mean further, avoidable, upheaval for the student.
- 7.25 The size of the school roll may be one indicator of its ability to endure. However, we suggest that other factors are relevant, including the age range of the students, and the ability of the school to attract and retain staff, and to generate enough income to maintain the school in its particular premises. We discuss below whether a school should provide other evidence of its financial viability or ability to endure, and propose that a separate requirement based on viability should be a feature of the legislation.
- 7.26 From this perspective, we do not think that the legislation needs to retain an arbitrary nine-student registration requirement. It should not form part of the registration or review criteria. This would make it clear that there is no impediment to a school with less than nine students registering, provided it fulfilled the remaining registration criteria. We query whether there are any other reasons to retain a numerical threshold in the statute. For example, does it assist in distinguishing private schools from homeschooling situations? Home schools, which are outside the terms of reference for this review, do not have to meet the section 35A registration criteria. We note, however, that section 35A(2) of the 1989 Act provides that 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 of the Act are held in respect of all or any of the students being taught there. This is not entirely clear, but seems to suggest that a group of homeschooled students could be found to be a school. We understand that some families with homeschooled children join together for lessons, and that some private schools began in this way. The provision seems to suggest that such a group would not be precluded from registering as a school, irrespective of the number of students.

Q3 Do you agree that the reference to a private school usually having nine students should be omitted from the legislation?

#### *Should “private school” be defined?*

- 7.27 Some submitters did not consider that any definition of school is possible because it would be difficult for it to remain meaningful over time. A few noted that the meaning of “school” has evolved and is still evolving.
- 7.28 Where schools did attempt a definition, the most common approach was to fit the definition within the current requirements of compulsory attendance at school between the ages of 6 and 16, following a particular curriculum.

A few attempted a more rounded definition, for example, one school suggested “an organization existing for the education of children, with structures and facilities designed for, and designated to, that purpose”.

- 7.29 We are of the view that it is unnecessary to come up with a definition of “school” or “private school” and that any attempt to do so could be unduly restrictive. Although it makes assessing what is a private school rather circular, we think the position should remain that a private school is essentially defined by its adherence to the registration criteria. However, as noted, greater definition can be added to these criteria.

Q4 Do you agree that it is not necessary to define a “private school”?  
If not, how should a “private school” be defined?

### Who should be able to register or own a school?

- 7.30 At present, there is no restriction on who can apply to register a school. An application for registration cannot be turned down on the basis of the character of the applicant. In contrast, all registered teachers must be police vetted and must be of good character and fit to be a teacher. Staff practising under a “limited authority to teach” and persons employed in teaching positions under s 120B of the Act are also subject to police vetting and, in the case of LATs, good character requirements. Contractors and their staff who regularly work at a school during school hours are also required to be police vetted.
- 7.31 It seems anomalous that persons applying to register a school are not subject to some character requirement. It cannot be assumed that such a person will always fall into the category of people listed above who will be police vetted under the Education Act 1989. It is entirely feasible that a person might be integrally involved in the direction and management of the school but not be subjected to any checks on their suitability. This problem can arise in relation to state schools as well. It is of course impossible to have complete assurance that a person involved with a school will not, for example, offend against children. However, we consider that checks can and should be in place to ensure that unsafe persons cannot themselves apply to register schools or be integrally involved in their management and operation.
- 7.32 In responses to our consultation document, there was wide support for declining applications by persons with certain criminal convictions, such as violent offending or offending against children. A number of schools also suggested that convictions relating to fraud and financial malpractice should exclude applicants. A number of schools suggested that managers and/or trustees should be subject to character checks (in one case it was suggested that trustees should also be subject to police vetting). One school suggested that mandated disclosure of a manager’s criminal record to parents would avoid the need for further state involvement – parents could then make their own decisions. However, eight schools did not think any further grounds should be set out in the legislation.

- 7.33 It is hard to dispute that government should not be registering schools if they are to be run by people it knows, or should reasonably have been able to find out, are entirely unsuitable. However, if it were determined that a “fit and proper person” standard should be in place, determining what that standard might be and how it might be enforced is not straightforward.
- 7.34 In part, this is because of the wide variety of ownership and governance models for private schools. The Ministry of Education does not hold comprehensive information about who owns or manages private schools. Certainly, however, there are examples of schools with a sole owner/manager, schools owned by incorporated societies and trusts (including charitable trusts) and schools owned and managed by domestic companies and overseas corporations. Applications to register schools can come from any one of these sources. While it is more straightforward to require police vetting or other character checks on individual applicants, it is not impossible where an applicant is a company or trust board. There are many examples in legislation of company directors and trustees being subject to a “fit and proper person” test.<sup>148</sup>
- 7.35 Other models can be drawn upon. In particular, the Education (Hostels) Regulations 2005 and Education (Early Childhood Services) Regulations 2008 have sought to tackle a similar problem. The 2005 Regulations, which apply to private school hostels, state that a hostel licence will only be granted if the owner *or, if the owner is a body corporate, every director, and every person concerned in the management, of the body corporate* is a “fit and proper person” to hold a licence.<sup>149</sup> Matters to be taken into account in considering whether those persons are fit and proper persons are:
- 13 ... (a) any previous cancellation of a licence involving 1 or more of the same individuals as a (or the) licensee or, if the licensee is a body corporate, as a director, or a person concerned in the management, of the licensee; and
  - (b) any conviction for any offence against these regulations, any crime involving dishonesty, any offence involving harm to children or violence, or any sexual offence; and
  - (c) any history of mental illness or serious behavioural problems; and
  - (d) any adjudication of bankruptcy under the Insolvency Act 2006, or prohibition from being a director or promoter of, or being concerned or taking part in the management of, a company under any of sections 382, 383, and 385 of the Companies Act 1993.
- 7.36 Regulation 8 of the Education (Early Childhood Services) Regulations 2008 sets out similar criteria in relation to early childhood services, but includes the catch all “any other matters that the Secretary considers relevant”. Regulation 7 requires that every application for a licence for a service must be accompanied by a statutory declaration about the fit and proper status of the applicant. Where an application is made on behalf of a group, the applicant is to make a statutory declaration on behalf of every member of the group covered by the definition of

148 See, eg, Overseas Investment Act 2005, s 16.

149 Education (Hostels) Regulations 2005, r 11(2)(c).



“service provider”.<sup>150</sup> Thus, it is likely that the applicant will be required to make a declaration on behalf of every trust board member or every person who has a significant influence over the management or administration of the centre.

- 7.37 Section 103 of the Education Act 1989 places restrictions on who cannot be members of state school trust boards.<sup>151</sup> These include persons who are mentally disordered;<sup>152</sup> undischarged bankrupts; prohibited from being a director of an incorporated or unincorporated body;<sup>153</sup> ineligible to be a trustee because of their financial interests;<sup>154</sup> subject to certain orders under the Protection of Personal and Property Rights Act 1988; or have been convicted of an offence punishable by imprisonment for a term of 2 years or more, or 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. There is no requirement that trustees be police vetted.

#### *Practice overseas*

- 7.38 As set out in chapter 5, some Australian states require proprietors and members of the governing bodies of a school to be of good character or to be fit and proper persons to operate a school.<sup>155</sup> In Western Australia guidelines state that, in order to be fit and proper persons, members of the governing body must be of good character and have no conviction that renders them unfit for involvement in the governance of a school.<sup>156</sup> In Victoria the requirement includes that they must not have been found guilty of an indictable offence and must not be bankrupt.
- 7.39 Under the United Kingdom Education Act 2002, directions can be given that certain persons may not take part in the management of an independent school. Grounds on which such a direction may be given are to be set out in regulations.<sup>157</sup>

#### *Options*

- 7.40 We consider that a “fit and proper person” test should be in place for applicants wishing to register private schools. There are two issues to be addressed: what should the fit and proper person test be; and to whom should it be applied? In relation to what the test should be, we suggest that it could closely mirror the one that relates to school hostels. The test should be one that will catch those who, because of serious past criminal conduct or behavioural problems, might be a danger to children, or whose past business record might suggest a threat to the financial viability of the school.

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150 “Service provider” will be defined in the new Part 26 of the Education Act 1989, as amended by the Education Amendment Act 2006 which comes into force on 1 December 2008. The definition captures: “the body, agency, or person who or that operates the centre”.

151 Our interpretation is that these provisions apply only to state school trust boards.

152 Within the meaning of the Mental Health (Compulsory Assessment and Treatment) Act 1992.

153 Under the Companies Act 1993, or the Securities Act 1978, or the Securities Markets Act 1988, or the Takeovers Act 1993.

154 Under s 103A(2) of the Education Act 1989.

155 Education Act 1990 (NSW), s 47; Education and Training Reform Regulations 2007 (Vic), sch 2; School Education Act 1999 (WA), s 160.

156 *Registration and Renewal of Non-Government Schools in Western Australia: Standards and Other Requirements* (Department of Education Services (WA), 2007) 23.

157 Education Act 2002 (UK), s 167A. To date no regulations have been made.



- 7.41 Determining to whom the test should apply is more problematic. In our view, the test should be directed principally at the applicant/owner who establishes a private school. Such a person might conceivably have nefarious motives for doing so. It might also extend to a person other than an employee who is to have an active role in the day-to-day management of the school, and thus be in contact with its students. These are the key gaps in the legislation: all school employees (including managers and teachers) are already required to be police-vetted. We have considered whether trustees and members of the governing body should be subject to the same requirements. If they are unsuitable damage can be done to the school's viability. In this respect they are like the directors of a company, in respect of whom there are statutory criteria. However our provisional view is that it would be unnecessarily onerous for schools to have to demonstrate that all trustees or board members meet the "fit and proper" test. Our main concern is for the safety and welfare of the students. The role of the board is a governance role, and does not entail day-to-day involvement in the school and contact with students. Generally, too, they are appointed for a limited term. So, our present view is that the "fit-and-proper" test need not apply to them.
- 7.42 Therefore, we propose that the fit and proper person test apply to the natural person(s) making the application to register a school, the owner(s) of the school and anyone, other than an employee, who will be involved in the management of the school. If a company is the owner or applicant, the test should apply to the directors of the company.
- 7.43 As noted above, we suggest that there should be a requirement to notify the Ministry if the ownership of the school changes, and that the new ownership would need to be satisfactorily assessed against the fit and proper person criterion before the registration could be transferred.

Q5 Do you agree that there should be a "fit and proper person" test in the criteria for registering a private school?

Q6 We propose that the matters to be taken into account in determining whether a person is a "fit and proper person" should be the same as those in the Education (Hostels) Regulations 2005. Do you agree?

Q7 To whom should the "fit and proper person" test apply?

### Efficiency/viability

- 7.44 At present, "efficiency" is the overriding consideration for the registration of a private school. We think that consideration should be given to unlinking "efficiency" from the other registration criteria, so that there is a single list of criteria, and the concept captured by "efficiency" is placed on an equal footing with the others.
- 7.45 The question then becomes what role "efficiency" should have in the legislation. In our view, the concept has a useful purpose, although the name given to it might be improved upon. We think the word "viability" better expresses what

we envisage. It imports considerations such as whether a school has sufficient students and resources to operate in an effective way, and whether its governance arrangements are such as will ensure this. Given that we propose to dispense with the requirement that a school usually have nine students as part of the registration criteria, we think that the legislation should still provide some scope to consider whether a school has enough students to be *viable*. This links to the concept of a school having an enduring presence. The students will be adversely affected if it does not. As noted, we suggest that the state has an interest in ensuring that a school it endorses will be able to remain in existence.

### *Position overseas*

- 7.46 Most Australian states have some requirement relating to the financial status of the school. In the ACT,<sup>158</sup> Queensland,<sup>159</sup> South Australia<sup>160</sup> and Tasmania,<sup>161</sup> legislation requires that the school be “financially viable”. Accountability in terms of the financial viability of schools is ensured in a different way in New South Wales where schools must publicly disclose their financial performance measures and policies.<sup>162</sup> In the Northern Territory, in their application for registration, schools must disclose their financial position and the means by which it is proposed to finance the continued operation of the school. Finally, in Western Australia, a school’s financial resources must be sufficient to provide a satisfactory standard of education.<sup>163</sup> Financial viability is assessed in the ACT by audits carried out by specialist staff in the Department of Education and Training. There, on application and subsequent review, a school is required to provide information – akin to a business plan – which shows the Department how it will remain financially viable for the next 5 year period.
- 7.47 In addition, most Australian states set standards around governance structures and administrative arrangements in non-government schools. It is of note that the ACT, New South Wales, the Northern Territory and Queensland require that a school’s proprietor or governing body is constituted as a corporation or other legal entity. This is another measure that may tend towards the longevity of a school, instead of it being solely dependent on the ownership and dedication of one individual. Western Australia has a vaguer standard concerning governance, requiring that “the constitution of the governing body of the school is satisfactory for the purposes of the Act.”<sup>164</sup>

### *Conclusion*

- 7.48 We think that the concept of efficiency should remain in the legislation to give recognition to a school’s need to assure the state that it is stable, and will have an enduring presence. However we would rename the concept “viability”.

158 Education Act 2004 (ACT), s 88(6).

159 Education (Accreditation of Non-State Schools) Regulation 2001 (Qld), Part 2.

160 Education Act 1972 (SA), s 72G(3).

161 Education Act 1994 (Tas), s 53(1)(fa).

162 Education Act 1990 No 8 (NSW), s 47.

163 School Education Act 1999 (WA), s 159.

164 School Education Act 1999 (WA), s 160.

On the other hand, we do not wish to involve schools in continuing and bureaucratic reporting requirements. There could be a list of factors that should be taken into account when determining “viability”. In particular, the list could include the projected roll of the school – this would have to be the most obvious and measurable indicator of a school’s sustainability. Also included could be the age range and number of students, the school’s financial viability, and whether the governance structure and administrative arrangements are such that they lend themselves to stability. These matters should have to be demonstrated before registration, and should be reassessed on the periodic reviews of the school. The ongoing viability of a school should be relevant at subsequent reviews as well as on registration to encourage good practice and so that ERO and the Ministry are aware of a school’s position. This would also enable them to provide constructive advice if necessary.

7.49 As for financial viability, this could be assessed at a review by:

- an external body undertaking an audit of the school’s accounts at each three yearly review; or
- the school providing its own audited accounts to the review body, or answering tailored questions about the school’s financial status; or
- a simple certification of viability provided by the school’s accountant to the review body.

7.50 We prefer the third option. We reiterate that we are wary of any requirement that places an unnecessary administrative onus on schools. Any requirement to provide evidence of financial viability should be designed with this in mind. However we also consider that a well-managed school that employs good practices should be carrying out its own internal audit and planning processes as a matter of course. These processes should be able to form the basis of any financial reporting.

Q8 What role, if any, should the concept of “efficiency” play in the registration criteria? Should it continue to be the overarching criterion, or just one of a number of criteria?

Q9 Do you agree that schools’ “efficiency” should be renamed “viability” and be assessed as part of the registration criteria?

Q10 If “viability” is to be assessed, we suggest that the following factors should be taken into account on registration and subsequent review:

- the projected roll;
- the number of students in each age range;
- the school’s financial viability;
- the governance structure and administrative arrangements.

Do you agree with these criteria? Are any other criteria relevant to the assessment?

## Premises

- 7.51 It is of course vital that premises be safe. Almost all submitters agreed that in order to ensure safety there should be minimum standards that schools must adhere to. Most considered that compliance with the general law (including the Building Act 2004, Resource Management Act 1991, Health and Safety legislation and local body requirements) is sufficient to ensure that premises are safe, without further specific requirements for private schools. A few submitters thought that there should be minimum standards in the Education Act 1989.
- 7.52 We agree that the existing law is sufficient to ensure safe premises. We suggest that the legislation should state expressly that private schools must adhere to all relevant statutory rules. This is no more than what is already required, but it clarifies the position. It seems a more helpful approach than simply stating that premises must be suitable.
- 7.53 The concept of suitability plays a useful role, however, in that premises, as well as being safe, should be suitable for the type of education that the school provides. Because of the variety of private schools, this should remain a flexible standard that will differ from school to school. It is one that ERO already tends to comment on in some detail in its reports on private schools. We are not sure that the statute can contain more detail about what amounts to “suitable premises” for each school, although it may be that some indication about teaching and exercise space can be given. In chapter 9, we ask whether the Ministry should publish guidelines about some of the registration criteria for private schools and this might be an area where further non-statutory guidance might be useful.
- 7.54 We propose that there should be two requirements in relation to a private school’s premises:
- first, that the school complies with all relevant statutory rules relating to building, health and safety; and
  - secondly, that the premises are suitable for the type of education being delivered at the school.
- 7.55 We note that any change in the location of a school should be notified to the Ministry, and new premises should be required to be assessed against the registration criteria. Below, we also suggest that these requirements should be met each time an additional school campus is opened.

Q11 Do you agree that the statute should make it clear that a school’s premises should comply with all relevant statutory requirements, and that it should be “suitable for the type of education being delivered at the school”?

Q12 Should any further guidance about premises be given in legislation, or by any other method such as guidelines?

## Equipment

- 7.56 This is an area where it is difficult to see how more detail can usefully be added to the legislation. Most submitters felt that what constitutes suitable equipment in a private school ought not to be further specified in the Act. It was felt that this would be unnecessary and might limit schools' flexibility. We agree, and suggest that equipment should simply be required to be suitable for the curriculum being delivered. ERO can assess this in the context of individual schools' circumstances. Again, however, we would like to hear any different views, and in particular whether further guidance might be useful.

Q13 Do you agree that the statute should state that schools should have equipment that is "suitable for the curriculum being delivered"? Would any further guidance be useful?

## Staffing

- 7.57 There was a range of views among submitters as to what is suitable staffing. Many supported the current position that teachers must be registered or have a limited authority to teach ("LAT"), but a significant number believed that private schools should have more freedom to determine appropriate staff, including the ability to employ unregistered teachers. There was broad consensus that private schools should be free to decide administrative aspects of staffing, such as determining student-teacher ratios. One submitter suggested that private schools could be required to offer professional development for teachers, at the same level as state schools.
- 7.58 Our view is that private schools often require some flexibility in their staffing levels and skill base. This will particularly be the case where a school is small and has a range of age and ability levels among its students. However, we consider that this is achievable within the current legal rules that relate to teaching staff, as described in chapter 4. The current requirement that all teachers in private schools, as in state schools, must be registered or hold an LAT should remain.<sup>165</sup> The primary interest has to be to ensure that teachers are appropriately skilled to fulfil their teaching roles and that students are safe with them. This is assured through the registration and LAT process. But the legal rules should be enforced so as not unnecessarily to hinder private schools. We would hope that the work and delay involved in renewing LAT approvals are kept to a minimum.
- 7.59 Again, these requirements could be reflected in the statute by the mere retention of the phrase "suitable staffing". However, additional criteria may go to make staffing suitable in a particular school. Thus, while one element is that the staff meet the statutory requirements, the state should also be able to assure itself that there will be a suitable number and range of staff for the size and age range of the school in question and the type of learning in which the school engages. There may be different staffing requirements, for instance, if the school caters for students with special needs. We do not think it is possible or desirable to include staff to student ratios in the legislation, but it should be clear that these

<sup>165</sup> Education Act 1989, ss 120A, 120B and 137(2).



issues are relevant to whether a private school is meeting the required minimum standards. Registration must ensure that parents and the community can have confidence in the quality and numbers of teaching staff in a private school.

Q14 We suggest that the legislation might state that factors to be taken into account in assessing whether the staffing is suitable should be:

- whether the teaching staff meet the relevant statutory requirements;
- whether the number and range of staff is suitable for the size of the school and the age range and needs of its students.

Do you agree?

## Curriculum

- 7.60 Defining what the curriculum should be is perhaps the most controversial element of this review. It is also the most difficult. We are strongly of the view that private schools should remain free to teach according to their own educational philosophies, and certainly do not think that the national curriculum should be required to be taught in private schools. Any other approach would unreasonably impinge upon freedom of choice and would largely defeat the very point of the private school sector. It is clear from submissions that private schools strongly hold this view too.
- 7.61 Notwithstanding this starting point, we believe that the legislation should set out some guidelines as to what amounts to a suitable curriculum.
- 7.62 There is a public interest in schools educating New Zealanders so that they can leave school to become useful members of society. Arguably, this means being able to live within both their own particular community but also the New Zealand community as a whole, and achieve their full potential. This approach focuses on equality of opportunity for students. This does not require that private schools teach in the same way as State schools, but recognises that there are desirable outcomes to be met.
- 7.63 Currently the legislation provides no guidance as to what a “suitable curriculum” is, leaving ERO with a very broad discretion in making its assessment. We think that there needs to be more definition of “suitable curriculum”. We acknowledge the difficulty of such an exercise. Some schools suggested standards which could provide some definition. The most common suggestion was to have standards involving literacy and numeracy. Others mentioned curriculum areas such as science, social studies and te reo Māori.
- 7.64 We think it is desirable to set out some indicative factors to be taken into account in determining whether a school’s curriculum is suitable. However, it may be that establishing what the indicative factors should be cannot be achieved through the Law Commission’s review. It may be helpful for a working party including representatives from the private school sector to be established to define the standards. Here, we raise some options for how the minimum standards may be set. The options are not necessarily mutually exclusive.



## Options

- 7.65 *First*, one might list the particular skills that should be learnt at school. For example, a “suitable curriculum” could be one that ensures that schools develop students’ numeracy and literacy.
- 7.66 *Secondly*, aspects of the national curriculum could be drawn upon, while not requiring that curriculum itself to be taught. Thus, the legislation could describe minimum standards in the form of key competencies. The key competencies listed under the national curriculum are thinking, using language, symbols, and texts, managing self, relating to others, and participating and contributing.
- 7.67 *Thirdly*, it could be made clear that schools are expected to teach in key learning areas. Seven key learning areas are identified in the national curriculum: English, the arts, health and physical education, languages, mathematics and statistics, science and social sciences. Some might find this too prescriptive.
- 7.68 *Fourthly*, an approach could focus on outcomes. The statute could state that:
- Primary schools should generally prepare students for secondary education;
- Secondary schools should generally prepare students for tertiary education and/or employment and enable them to achieve their full potential.
- This approach appeals to us, since it focuses on ensuring equality of opportunity and students’ ability to have a range of choices open to them when they leave school.
- 7.69 *Fifthly*, (another outcome-focussed option) the statute could focus on the twin outcomes mentioned above of students leaving school able to live within and contribute to both their own particular community and also the New Zealand community as a whole. The concept would be that of students leaving school as competent, contributing citizens.
- 7.70 There is a further question of whether all the guidance should be set out in the Act, or whether more detailed assistance might be contained in non-statutory guidelines published by the Ministry. We discuss this option further in chapter 9.

Q15 What guidance should be provided in the legislation about what constitutes a “suitable” curriculum? Do you have a preferred option among those set out in paras 7.65 – 7.69?

Q16 Do you think the Ministry might usefully issue non-statutory guidelines about curriculum?

## Tuition of a standard no lower than at equivalent level of state school

- 7.71 At present, section 35A(1) states that “efficiency” includes:
- (d) Giving students tuition of a standard no lower than that of the tuition given to students enrolled at—
    - (i) Primary schools of the same class, where the school’s managers want it to be registered as a primary private school:

- (ii) Secondary schools of the same class, where the school’s managers want it to be registered as a secondary private school:
- (iii) Special schools of the same class, where the school’s managers want it to be registered as a special private school.

7.72 As with the other criteria there is vagueness about this one. It is not immediately clear what is encompassed by the term “tuition”. Presumably it includes the substance of what is taught at the school – that is, the breadth and quality of the curriculum. If that were all, there would be a question as to whether this criterion could be merged with the “suitable curriculum” standard. However, the term no doubt also relates to the standard of the teaching provided and to the outcomes achieved by the school – that is to say the success achieved by the students. The ability of a school to demonstrate matters such as its lesson planning, monitoring of standards and student development, and modes of assessment may also be relevant. Another way of viewing section 35A(1)(d) is that it suggests that students should not be academically disadvantaged by attending a private school. Given the standard of private schools in New Zealand, we consider that this would very rarely be the case, but we consider that the growing breadth and variety in the sector means this should not be lost sight of.

7.73 There is also a question of regularity of instruction. There is no requirement that private schools be open for any particular number of hours each day, or days each year. While the majority of private schools have hours similar to those of state schools, we have heard reports of some whose opening hours are much less (for example 3 days per week). ERO felt that none of the existing criteria clearly enabled them to report on this. We do not wish to be prescriptive: we believe that private schools should have flexibility, and should be able to develop alternatives to the traditional 9am – 3pm, 5 days per week model. Learning can take place elsewhere than in a school building. However there must be regular contact with, and availability of, teachers. We note that students who are homeschooled must be taught “at least as regularly” as in a school.

7.74 We suggest, without being prescriptive about it, that “regularity of instruction” should be one of the factors to be weighed in considering the requirement that private schools provide tuition of a standard no lower than that in a state school.

Q17 What guidance should be provided in the legislation about the required standard of tuition? Are the matters listed in paras 7.72 – 7.73 helpful?

Q18 Should “regularity of instruction” be a factor to be taken into account in determining whether tuition is of the appropriate standard?

### Patriotism and loyalty

7.75 Most submitters considered that, while the current wording of this provision could be modernised, it is important that private schools encourage values such as patriotism and citizenship. Some thought that the New Zealand curriculum’s formulation, “community and participation for the common good,” could be applied to private schools.

- 7.76 Likewise, we believe that the values underlying the current provision are important, but could be expressed to better reflect today's society. One approach could be to base the provision on New Zealand's democratic status. Some Australian states have incorporated ideals such as "preparing students for their full participation in a democratic society"<sup>166</sup> and "supporting and promoting the principles and practice of Australian democracy," including concepts such as the rule of law and equal rights for all before the law.<sup>167</sup> We think it is these sorts of interests to which the provision is directed: as noted, the New Zealand provision was introduced in 1921, influenced by concerns about treason following World War I.
- 7.77 If it were determined that some similar concepts should be retained, there is a question as to what the new provision might say. It could set out a more detailed set of values that private schools should encourage. For example, the New Zealand curriculum refers to concepts such as community, civic mindedness, participation, family, peace, justice, unity, common good and citizenship as values that the curriculum should promote.<sup>168</sup>
- 7.78 An alternative to having this requirement as a stand-alone criterion is that it could be expressed as one of the factors to be taken into account in determining whether a school's curriculum is suitable.

Q19 We suggest that a modern redrafting of the "patriotism and loyalty" provision could refer to "supporting and promoting the principles and practice of New Zealand democracy, including concepts such as the rule of law and equal rights for all before the law." Do you agree, or do you prefer some other formulation? Should this be treated as part of the "suitable curriculum" criterion, or as a separate requirement?

### Welfare of students

- 7.79 As we have already noted, the existing criteria arguably do not give ERO sufficient scope to report on some matters of legitimate concern. We believe that at least one new criterion should be added, relating to the welfare of students.
- 7.80 Currently the legislation does not require private schools to ensure the welfare of students, either physical or emotional, although the requirement for suitable premises helps to ensure that students are physically safe. Some submitters believed that there should be explicit standards relating to the welfare of students. Conversely, some believed that parents would withdraw their children from a school if their physical or emotional welfare was at risk, so that a legislative requirement is not necessary. Notwithstanding this, we believe that schools should have a duty to care for the welfare of students, and that the state also has a duty to ensure that private schools adhere to minimum standards in this regard.

166 Education Act 2004 (ACT), s 75.

167 Education and Training Reform Act 2006 (Vic), s 1.2.1.

168 Paul Keown "Value Clusters" [www.nzcurriculum.tki.org.nz/the\\_new\\_zealand\\_curriculum/values/more\\_reading](http://www.nzcurriculum.tki.org.nz/the_new_zealand_curriculum/values/more_reading) (accessed 5 August 2008).

It seems odd to have requirements about teaching, curriculum, premises and equipment, yet nothing about student welfare. Perhaps this is simply indicative of the age of the statutory provisions: they are more than 80 years old.

- 7.81 Therefore, we propose that providing for the physical and emotional welfare of students be added to the existing registration criteria. Examples of how this might be done can be found in overseas legislation. Section 47(h) of the NSW Education Act 1990 refers to a “safe and supportive environment ... that include(s) school policies and procedures that make provision for the welfare of students”. Western Australia provides that the Minister must be satisfied that “the school will provide satisfactory levels of care for the children concerned.”<sup>169</sup>
- 7.82 Again, the statute should set out some indicative factors to be taken into account. We are interested in views on what these should be. Based on example from the UK<sup>170</sup> and Australia,<sup>171</sup> some possibilities might include:
- adequate supervision;
  - the provision of medical and pastoral care;
  - dealing with bullying and harassment;
  - having appropriate and clear disciplinary procedures (including for suspensions and expulsions), and informing students and parents of the procedures;
  - fair complaints procedures.

Q20 Do you agree that providing for the physical and emotional welfare of students should be added to the registration criteria? What further guidance could the legislation give as to how this should be assessed?

## REGISTRATION PROCESS

### Provisional registration

- 7.83 Section 35A provides for a two-step process to registration. First, the managers of an unregistered or proposed private school may apply to the Secretary of Education for its provisional registration as a primary, secondary, or special private school, or as a school of 2 or all of those descriptions. The Ministry then makes a preliminary assessment as to whether the premises, staffing, equipment, and curriculum of the school are or are “likely” to be suitable. In practice, this assessment is made by its regional field officers, who are directed by a desk file. The decision may be made on the papers, although there is generally a site visit.
- 7.84 If satisfied, the Secretary provisionally registers the school. Provisional registration of a school can continue in force for 12 months. There is no longer a specific provision for extensions of provisional registration in the legislation.<sup>172</sup> However, there is no

169 School Education Act 1999 (WA), s 160(1)(e).

170 Education (Independent School Standards) (England) Regulations 2003, r 3.

171 Education Act 1994 (Tas), s 53(1)(fd); Schools Registration Board “Standards” [www.srb.tas.gov.au/standards/default.htm](http://www.srb.tas.gov.au/standards/default.htm) (accessed 7 October 2008); School Education Act 1999 (WA), s 159; *Registration and Renewal of Non-Government Schools in Western Australia* (Department of Education Services (WA), 2007) 16; Education Act 2004 (ACT), s 94.

172 Compare Education Act 1964.

statutory prohibition on a school making a subsequent application for provisional registration if it does not succeed in obtaining full registration, and the Ministry allows schools to do this.

- 7.85 Between 6 and 12 months after the provisional registration of a school, ERO reviews the school in action, and provides a report to the Ministry and the school's managers. If the Secretary is satisfied that the school is efficient, he or she must fully register the school.
- 7.86 We have considered whether a two-stage registration process should be retained. On one view, any school that opens its doors to students should already have persuaded the Ministry that it adheres to all the requisite welfare and educational standards. The well-being of the students is at stake. However, the other view is that a school needs to achieve a provisional level of state recognition before, for example, being able to engage staff. The majority of schools responding to our questionnaire recognised the need for a balance between these two interests. A number stated that the process of provisional registration worked well in giving schools some time to get fully up and running.
- 7.87 We agree that there is practical advantage in the two-stage registration process, and propose that it be retained. However we believe that the criteria and process should be more clearly defined in the legislation.

### Overview of proposed criteria and process

- 7.88 Depending on the outcome of the consultation on the criteria which we have proposed earlier in the chapter, the legislation might contain something like the following:
1. The Secretary of Education should be satisfied that the registration criteria are or are likely to be met before provisionally registering a school.
  2. Between 6 and 12 months from provisional registration, ERO should review the school in action and report to the Secretary on whether the registration criteria are in fact being met. (It is important to allow a reasonable "settling in" period.) If the Secretary is satisfied that the criteria are being met, he or she should fully register the school.
  3. The registration criteria should be:
    - (a) That owners and/or managers are fit and proper persons (according to criteria set out in the Act);
    - (b) That the school complies with all relevant statutory rules relating to building, health and safety;
    - (c) That the premises and equipment are suitable for the type of education being delivered at the school;
    - (d) That the school is viable. The following factors should be taken into account:
      - (i) the projected roll;
      - (ii) the number of students in each age range;

- (iii) the school's financial viability;
- (iv) the school's governance structure and administrative arrangements.
- (e) That the staffing is suitable for the type of education being delivered at the school. Factors to be taken into account are:
  - (i) whether the teaching staff meet the relevant statutory requirements;
  - (ii) whether the number and range of staff is suitable for the size of the school and the age range and needs of its students.
- (f) That the curriculum is suitable for the type of education being delivered at the school (according to criteria set out in the Act or in guidelines). (This might include a replacement for the present "patriotism and loyalty" criterion).
- (g) That the standard of tuition is no less than that offered in an equivalent state school. Factors to be taken into account include:
  - (i) the breadth and quality of the curriculum;
  - (ii) the standard of the teaching provided;
  - (iii) the outcomes achieved by the school;
  - (iv) the school's lesson planning, monitoring processes and modes of assessment;
  - (v) the regularity of instruction at the school.
- (h) That the school provides a safe physical and emotional environment for its students.

Q21 Do you have any comments on the criteria and process for registration?

### Ministry and ERO roles in the registration process

- 7.89 At present, the registration and qualitative review of all schools are separate. The Ministry of Education is responsible for the registration of private schools. It receives applications for provisional registration and makes a preliminary assessment as to whether the premises, staffing, equipment, and curriculum of the school are or are likely to be suitable.
- 7.90 The review function lies with ERO which also plays a role in the registration process, by reviewing the school "in action" between 6 and 12 months after the date of provisional registration. It assesses schools against the same "efficiency" criteria. It is for the Secretary of Education to then decide whether to finally register the school, if satisfied, having considered the ERO report, that the school is "efficient".



- 7.91 ERO’s role in the ongoing review of private schools means it is well-placed to assess “efficiency” criteria. Its expertise in reviewing schools suggests that it is particularly well-placed to review a school’s curriculum and tuition. There is a question as to whether ERO should play a greater role in the initial registration process particularly as regards provisional registration.
- 7.92 In the United Kingdom, the Education and Skills Bill which is currently before Parliament would give the responsibility for registration to Ofsted, a similar body to ERO. Under the proposals, the head of Ofsted, the Chief Inspector, would be responsible for receiving and assessing applications for registration, maintaining the registration, and making decisions about deregistration.
- 7.93 Adopting the proposed United Kingdom model in New Zealand would amount to a substantial change to ERO’s existing role. There may be an argument that placing the decision-making process concerning registration in ERO’s hands will not sit well with its general approach of seeking to assist schools to meet the requisite standards. It could also compromise the necessary perception of independence of ERO. Furthermore, the administration and review roles are separate for state schools. Because of these issues, our provisional view is that the registration and review roles should be kept separate, but we consider that clarification is required in terms of what the Ministry should be persuaded of before it provisionally registers a school. However, we are keen to hear feedback on the current division of responsibilities.
- 7.94 If the Ministry is to remain responsible for provisionally registering a school before ERO becomes involved, it must have means of being fully confident that the requirements for provisional registration are met. A provisionally registered school runs for 6 to 12 months before any substantial review of the school takes place.

Q22 Does the division of responsibilities between the various government agencies work well for private schools?

Q23 Should the Education Review Office be given a greater role in the registration, including provisional registration, of private schools?

### Should extensions of provisional registration be allowed?

- 7.95 As noted, while extensions of provisional registration are not dealt with in the statute, we understand that the Ministry does allow extensions. If a school can receive students when it is provisionally registered, any extensions of provisional registration could in effect allow it to continue in operation (presumably for another year) at a standard below that required for a fully registered school. This defeats the purpose of the registration system. However, we suggest that some middle ground can be found: it is also undesirable for a new school, which may be very close to achieving the required standards, to have to close its doors to students if a small amount of effort will enable it to achieve those standards.

- 7.96 We suggest that if a school is not passed by ERO for full registration, it may apply for one further 6 month period of provisional registration. It may be that an extension should only be granted where clear directions are provided to the school as to what it needs to achieve. In our consideration of deregistration in chapter 8, we place emphasis on the need for assistance to be provided to schools to enable them to remain in existence. The same approach should be taken here.

Q24 Do you agree that schools should only be able to seek one six-month extension of provisional registration?

### Registration of additional campuses

- 7.97 The legislation does not expressly deal with additional campuses, by which we mean entirely new school campuses opened by an already registered school.<sup>173</sup> It is not clear whether additional campuses should themselves be registered through the normal registration process and thus subject to the same checks that are required for private schools. There appears to be an inconsistent approach to this at present: some schools have registered a new school when opening an additional site, whereas other schools with several campuses only carry one registration. The Ministry refers to these campuses as “offsite units” and expects to be informed of them so that it can assess the suitability of the premises. However, there is no express statutory requirement for schools to do this and the Ministry is not always informed by the school. ERO have adopted a practice of treating each campus separately by conducting a full review of each against the efficiency criteria.
- 7.98 While additional campuses will presumably have the same owner as the original school and may be guided by the same educational philosophy, clearly the premises, equipment and staffing differ. In some instances additional campuses are receiving well in excess of 100 students. We think the law relating to the registration of additional campuses should be clarified. If it is accepted that private school standards are to be assessed by the state we cannot see any justification for not requiring this of additional campuses.
- 7.99 Additional campuses are dealt with separately in the ACT Education Act 2004. It requires that all the private school registration criteria should be met by satellite campuses before they can open.<sup>174</sup> The New South Wales Act requires that where a school relocates, the criteria relating to its premises, buildings and facilities should be considered by the Minister.<sup>175</sup> Western Australia allows the registration of a school “system.” This is a group of schools with a single governing body. Under a “system agreement” with the governing body of the system, the Minister may delegate their functions in relation to the registration of private schools to the governing body.<sup>176</sup>

173 We do not include in this instances where a private school may run satellite classes that take place, for example, at the premises of another school nearby.

174 Education Act 2004 (ACT), ss 88A and 88B.

175 Education Act 1990 (NSW), s 61(2).

176 School Education Act 1999 (WA), ss 169-175.

- 7.100 There is a question as to whether additional campuses should be assessed against all of the registration criteria before they open, and whether they should follow the two-stage registration process. Our preliminary view is that the full application and registration process should be followed for all new campuses. The law should also make it clear that each campus should be reviewed by ERO as part of the registration process and the ongoing 3-yearly review cycle. The only entirely consistent criterion between a “parent” school and its campus will be the owner(s) of the school. All the remaining criteria have the potential to vary.

Q25 Do you agree that additional campuses should be registered in the same way as their parent schools?

Q26 Do you agree that new campuses should be assessed against all the registration criteria on their establishment and in periodic reviews?

### ERO’s ongoing review role

- 7.101 Part 28 of the Education Act contains provisions about ERO. Section 325 states that the Chief Review Officer’s functions are to:
- administer, when directed by the Minister or on his or her own motion, reviews, “either general or relating to particular matters, of the performance of applicable organisations in relation to the applicable services they provide”;
  - administer the preparation of reports to the Minister on such reviews; and
  - give the Minister such other assistance and advice on the performance of applicable organisations as required.
- 7.102 Section 35A(9) provides specifically that the Chief Review Officer shall review private schools in action at 3-yearly intervals. ERO has powers of entry and inspection for its reviews.<sup>177</sup> It also has powers to enter and inspect hostels.<sup>178</sup>
- 7.103 Our consultation suggests that ERO generally has a good working relationship with private schools and that it adopts a constructive approach to reviewing schools. Furthermore, ERO reviews are very influential marketing tools for private schools. A good ERO report can have a very positive impact on a school. Schools are, naturally, keen to avoid negative ERO reports.
- 7.104 ERO takes the view, having regard to private schools’ independence and the relatively small government expenditure on private schools, that its reviews of private schools should, usually, be limited to the efficiency criteria. As a result, ERO reports on private schools tend to be shorter than for state schools and their content is normally restricted to those criteria. That is appropriate. Parents have made a deliberate choice to opt out of the state system with its greater regulation. Nevertheless, it appears that section 325 probably empowers ERO to review private schools on a wider basis if it chooses. This is not as clear as it might be, however, and that is unhelpful. ERO have found that their role in reviewing

<sup>177</sup> Education Act 1989, s 327.

<sup>178</sup> Education Act 1989, s 328F-H.

school hostels has been made easier since the introduction of the Education (Hostels) Regulations 2005, which contain more specific detail about the standards required of hostels.

- 7.105 We suggest that it would be better for the limits of the ERO's powers to review private schools to be made more explicit in the legislation than they currently are. Perhaps section 35A(9) could explicitly state that, in reviewing private schools, the Chief Review Officer has all the powers set out in Part 28 of the Act. This would assist ERO in its task and would avoid any confusion or disagreement about the breadth of its review role. The type of review undertaken by it should not be constrained by doubt as to its powers. This is not to say, however, that longer reviews should become the norm. For the reasons given at the beginning of the last paragraph reviews of private schools should generally be more constrained than those of state schools.

Q27 Do you agree that the basis for and scope of ERO reviews of private schools should be made more explicit in the legislation?

Q28 Do you have any other comments about ERO's ongoing review role?

# Chapter 8

## Compliance and enforcement

- INTRODUCTION** 8.1 We are concerned in this chapter with compliance issues. The vast majority of private schools operate well and comply with the law. We anticipate that serious problems in private schools will be rare. Rather, our focus is on ensuring that the law is able to deal with issues should they arise in the future.
- 8.2 Under the existing law there are fines available for breaches of some, but not all, statutory duties. Apart from these limited fines, deregistration is the only available sanction when a private school does not comply with the registration criteria or statutory duties. We see a number of problems with this situation.
- 8.3 First, there are no intermediate sanctions available to deal with relatively small breaches of the law. Deregistration is a very heavy sanction and should not be used in any but the most serious cases. Smaller breaches, then, must either be dealt with in a disproportionately severe way (by deregistering the school) or not be dealt with at all. In Chapter 6 we noted that the Ministry do not always feel able to act. We also understand that fines are rarely imposed.
- 8.4 A second problem is that there is no clear process for the Ministry to follow if it is considering deregistering a school. This could result in an unfair process.
- 8.5 Thirdly, currently deregistration may only occur on the basis that the school is not “efficient.”<sup>179</sup> Thus the only grounds for deregistration are breach of one or more registration criteria. Some problems that could occur may not fall within the efficiency criteria. In particular, if serious criminal behaviour was occurring in a private school, the statute does not currently explicitly provide for a school to be deregistered on this basis.
- 8.6 This chapter considers the measures available to ensure that private schools comply with the registration criteria and with their statutory duties, as well as to deal with the rare, but nonetheless possible, situation of criminal activity. We propose some further actions that could be taken, short of deregistration, to deal with comparatively minor problems, as well as some changes in the

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179 Education Act 1989, s 35A(11).

deregistration process to ensure that it is fair. We believe that the emphasis throughout should be on assisting private schools to comply with the law rather than being heavy-handed about it.

## POWERS OF STATE AGENCIES

- 8.7 The Ministry and ERO have powers at their disposal should they have concerns about private schools. The Ministry may enter and inspect private schools under section 78A of the Act, which provides that:<sup>180</sup>
- (1) Any person holding an authorisation under subsection (2) may, at any reasonable time, -
    - (a) enter and inspect any registered school:
    - (b) inspect, photocopy, print out, or copy onto disk any documents (whether held in electronic or paper form) that the person believes on reasonable grounds to be those of the board of the school:
    - (c) remove any document described in paragraph (b), whether in its original form or as an electronic or paper copy.
  - (2) The Secretary may authorise in writing any person to exercise the powers in subsection (1).
  - (5) For the purposes of this section, inspection, in relation to any school, includes –
    - (a) access to the written and recorded work of students enrolled there; and
    - (b) meeting and talking with students enrolled there.

In addition, the Secretary of Education has the power to require information for the proper administration of the Act.<sup>181</sup>

- 8.8 ERO and its officers also have powers of entry and inspection. They may enter and inspect any place, require any person to produce documents or information and to make statements, inspect student work and talk to students.<sup>182</sup>
- 8.9 We believe that the above powers provide ample scope for the Ministry and ERO to take any actions necessary as part of our suggested compliance assurance process, which is outlined below. The proposals set out in this chapter do not anticipate any expansion of these powers.

## BREACH OF DUTIES

### Outline of duties and sanctions

- 8.10 As we have set out in Chapter 4, currently there are fines for breaches of certain duties on private schools, but some duties do not have a corresponding sanction for their breach. There is a general offence of contravention of statute that may be able to be used, but this offence is little known and infrequently used.<sup>183</sup>

180 We note that the drafting of the Education Act 1989 creates some confusion about whether this power applies to private schools. The term “registered school” is defined as including a private school in s 2. However, s 78A is placed in Part 7, entitled “Control and Management of State Schools.” Furthermore, s 60 defines “school” for the purposes of Part 7 as meaning a state school, unless the context otherwise requires. This illustrates the general lack of clarity in the Act’s drafting.

181 Education Act 1989, s 144A.

182 Education Act 1989, s 327.

183 Crimes Act 1961, s 107.



- 8.11 The managers of a private school can be convicted of an offence and fined up to \$5, 000 for:
- employing unregistered teachers;<sup>184</sup> and
  - failing to report dismissals and resignations of teachers, complaints about teachers, possible serious misconduct of teachers and teachers' failure to reach a required level of competence.<sup>185</sup>
- 8.12 The following duties apply only to private schools and do not have any corresponding sanction:
- notifying the Secretary about suspensions and expulsions;<sup>186</sup>
  - obtaining approval of courses for foreign students;<sup>187</sup> and
  - complying with conditions placed on the provision of grants to private schools, and attendant reporting requirements.<sup>188</sup>
- 8.13 The following duties apply to both private and state schools and do not have any corresponding sanction:
- keeping an enrolment record for each student enrolled at the school and providing enrolment information;<sup>189</sup>
  - obtaining a police vet of non-teaching and unregistered staff, and contractors and their employees;<sup>190</sup>
  - not using force by way of correction or punishment towards students;<sup>191</sup> and
  - providing information to the Secretary of Education for the proper administration of the Act.<sup>192</sup>

We note that, while state schools are not subject to formal penalties such as fines if they breach these duties, breaches can be dealt with through the range of interventions that the Ministry has at its disposal for state schools.<sup>193</sup> These interventions include requiring the Board to supply information, requiring the Board to engage specialist help, requiring the Board to prepare and carry out an action plan, the appointment of a limited statutory manager and the dissolution of the Board and appointment of a commissioner.<sup>194</sup> The Secretary may take one or more of these actions where he or she has reasonable grounds to believe that there is a risk to the operation of a school or to the welfare or educational performance of its students.<sup>195</sup> Thus, while neither state nor private schools are subject to fines for breaching these statutory duties, in fact the Ministry has considerable scope to intervene if state schools breach them, whereas there is no

184 Education Act 1989, ss 120A, 120B and 137(2).

185 Education Act 1989, ss 139AK-AO.

186 Education Act 1989, s 35AA.

187 Education Act 1989, s 35B.

188 Education Act 1989, s 35C.

189 Education Act 1989, s 77A.

190 Education Act 1989, ss 78C and 78CA.

191 Education Act 1989, s 139A.

192 Education Act 1989, s 144A.

193 Education Act 1989, Part 7A.

194 Education Act 1989, s 78I(1).

195 Education Act 1989, s 78I(2).

scope to enforce them in private schools, unless they could be brought within the efficiency criteria. Even then, the only possible enforcement action would be deregistration.

### Reform

- 8.14 Almost all submitters generally agreed that there should be consequences for private schools that breach statutory duties. In terms of what the consequences should be, submitters were concerned that sanctions should be proportionate to the breach. Some suggested that sanctions must be reasonable and pertinent to private schools, and not put private schools in the position of being state schools without the equivalent funding.
- 8.15 It is problematic that under the existing law private schools can breach some of their statutory duties without incurring any legal consequences for this. These duties are effectively meaningless if they cannot be enforced. In our view, there must be consequences for breaches of statutory duties. We agree with submitters that these consequences should be reasonable, proportionate and appropriate for private schools.
- 8.16 We suggest that fines be available for breaches of all duties that apply to private schools. This is consistent with the existing approach in the legislation, where fines are generally used as the sanction for those breaches that carry penalties.<sup>196</sup> The fact that a fine is available would not mean that one would necessarily be imposed in all cases.
- 8.17 The compliance assurance process, outlined in the next section, would be the mechanism through which breaches of statutory duties would be sanctioned, including by way of a fine. As is described in more detail below, a school breaching its duties would ordinarily be warned and given time to comply, and if it did not, be subject to a fine or other sanction.
- 8.18 Deregistration would be the potential ultimate outcome of this process. However, in the majority of cases breaches of statutory duties would be dealt with by one of the smaller sanctions outlined in para 8.36, or by a fine. As discussed in more detail below, we think that consistent or serious failure to comply with statutory duties should be a ground for deregistering a private school. However, breaches of some ‘smaller’ duties would realistically never lead to deregistration.
- 8.19 We envisage that this approach would provide a full ‘menu’ of options for dealing with breaches of duties. The Ministry would choose from a fine, another sanction, or even deregistration in the worst cases, depending on the nature and seriousness of the breach.

### COMPLIANCE ASSURANCE PROCESS

- 8.20 As we have already discussed, currently the only action that may be taken against a private school is deregistration, and this may only occur on the basis that the school is not efficient. In our view, there should be a more flexible, graduated and clear process, which provides actions short of deregistration so that problems

<sup>196</sup> We note that this would create an inconsistency in the position of private and state schools. However, as already noted, the Ministry has considerably more power to intervene in state schools that breach their duties.

can be addressed in a proportionate way. Therefore, in this section we refer to ‘intervention’ rather than deregistration, as we are not only talking about the ultimate possibility of deregistration, but also lesser steps that may be taken.

### Grounds for intervention

8.21 In our view, the grounds for intervention need to be expanded to ensure that the statute provides adequate scope to protect private school students. We envisage that the actions set out in this section would be available in the following situations:

- where a private school is not complying with one or more of the registration criteria;
- where a private school breaches statutory duties; and
- where there is serious criminal activity occurring in a private school.

In relation to the serious criminal activity ground, we see the types of criminal activity that would trigger the process as being conduct that poses a serious threat to the welfare of the students. The types of offences relevant to the “fit and proper person” test for the school’s managers, as outlined in Chapter 7, provide some guidance as to what kind of conduct should be a ground for intervention, however not all would be appropriate grounds for intervention. We propose that relevant conduct should include offences involving harm to children, violence, sexual offences, fraud and theft. The Ministry would need to work closely with the Police in situations where there is alleged criminal activity in a private school.

### Types of intervention and process

8.22 In our view, there should be a graduated process, with a range of possible actions increasing in seriousness. Ultimately, this process may lead to deregistration.

8.23 Most submitters agreed that there should be a broader range of interventions and sanctions available, rather than having deregistration as the only option. Many thought that an increase in ERO reviews would be appropriate. Others suggested processes including a range of options such as warnings, fines for not heeding warnings, an increase in inspections, and deregistration as the last resort. Conversely, some submitters felt that there should be no change to the existing system.

8.24 Submitters felt that the focus should be on positive assistance to schools. We agree entirely. Feedback we have received so far indicates that private schools appreciate ERO’s approach, which focuses on offering constructive assistance to schools. We do not intend that this should change as a result of our proposals in this section.

### *Roles of the Ministry and ERO in process*

8.25 In terms of the respective roles of the Ministry and ERO in monitoring compliance, the Ministry is responsible for registering and deregistering schools, while ERO is responsible for evaluating whether schools satisfy the requirements for registration. Given ERO’s experience of evaluating schools, and their general

approach of working with schools to identify strengths and potential improvements, they are well placed to assess private schools and work with them to improve, should that be necessary.

- 8.26 It is worth pointing out that before any action can be taken, the Ministry must first become aware that there is a problem. This would generally occur through an ERO review of a school, although the Ministry sometimes also receives complaints from parents or others.

*Warnings/notices and action plans*

- 8.27 Ordinarily we would suggest that the first step should be that the Ministry give a school notice that it is not complying with one or more registration criteria, or is breaching a statutory duty. The school should then be given a reasonable time within which to rectify the problem. The notice should state clearly what the problem is, how long the school has to rectify it and the potential consequences if the school does not.
- 8.28 There may be some cases, for example where a school has repeatedly been warned and has not rectified the problem, where a warning may not be necessary before action can be taken.
- 8.29 There is then a question of what happens after a school has been given such a notice. It seems to us that a distinction can be drawn between problems that involve a school breaching one or more duties and those that involve a breach of one or more of the registration criteria. Breaches of duties, such as those to provide information or obtain a police vet of staff, are relatively straightforward to remedy. Schools are unlikely to need assistance to do so and it is immediately obvious whether the school has now complied with the duty.
- 8.30 However, cases where schools are not satisfying one or more of the registration criteria, such as having a suitable curriculum or suitable premises, may be considerably more complex. Schools would need to take a number of different actions over a period of time in order to remedy the problem, and may need outside assistance to do so. In this critical period the emphasis should be on assisting the school rather than adopting a heavy-handed approach. Therefore, we suggest that an action plan could be a useful tool to help schools satisfy the criteria. A plan could set goals and identify the steps that need to be taken to reach those goals, together with time estimates for each step. This would also be helpful for the Ministry, ERO and others who might be involved, because it provides identifiable actions and goals against which progress can be measured, and enables them to provide targeted assistance around the particular steps identified as necessary.
- 8.31 The action plan would be submitted to the Ministry, as the agency that issued the warning and would ultimately be responsible for any enforcement action. However, we would suggest that ERO play a key role in working with schools to implement the action plan, as this is directly within their field of expertise and they will be responsible for assessing whether the school ultimately achieves compliance.

- 8.32 The United Kingdom system is worth noting. Where the registration authority is satisfied that any one or more of the independent school standards are not being met, it must serve a notice on the proprietor of the school, identifying the standard(s) in question and requiring the proprietor to submit an action plan by a specified date.<sup>197</sup> The action plan must set out the steps that will be taken to meet a standard and the time by which each step will be taken. The registration authority may reject an action plan or modify it.<sup>198</sup> If a school does not submit an action plan as required, the action plan is rejected or the school does not carry out the action plan, the authority may deregister the school or make one of a number of lesser orders, such as to cease to use part of the school premises, or to cease to admit new pupils or a category of pupils.<sup>199</sup> If a school's proprietor fails to comply with one of these orders, they might face sanctions personally, or as a last resort the school might be deregistered.<sup>200</sup>
- 8.33 The emphasis should be on assisting schools to meet the required standards. As noted, we envisage that ERO would work with a school to carry out the action plan. The Ministry may be able to help in other ways. We are seeking feedback on what types of assistance could be given. It is crucial that those providing assistance understand, and are in sympathy with, the philosophy and culture of the school concerned. It may be that the Ministry could maintain a list of approved and experienced private school administrators who are willing to help other schools, and put schools wanting help in touch with someone from the list.

#### *Further ERO review*

- 8.34 Once the time the school has been given to rectify the problem has ended, there will need to be an assessment of whether the problem has in fact been cured. In some cases this will be obvious. For example, if the problem was a breach of a statutory duty such as providing information, all that needs to be done is to provide the information. The problem is then resolved. ERO would obviously not need to be involved in this type of situation. However, where the problem was that the school was not complying with one or more of the registration criteria, ERO would need to assess whether the school now complies. If it does, it can continue as normal. It might then be desirable to bring the regularly scheduled general ERO inspection forward to, say, a year after the notice was issued, to ensure that there are no further problems. There should be a power to impose such a requirement.

#### *Intermediate steps where the problem is not rectified*

- 8.35 If a school still does not comply after being given a reasonable time, further steps will need to be taken. First, if a school can show good reason why they have not been able to cure the problem within the time given, and that they expect to be able to cure it within a certain time, they could be given further time.

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197 Education Act 2002 (UK), s 165(1) and (3).

198 Education Act 2002 (UK), s 165(4).

199 Education Act 2002 (UK), s 165(6) - (8).

200 Education Act 2002 (UK), s 165(9).



8.36 However, if the problem has not been resolved and the school shows no intention of resolving it, there needs to be provision for enforcement. This is not likely to be a common situation, but it would not be satisfactory if the legislation failed altogether to provide for it. The Ministry could proceed immediately to deregistration if it considered that the problems were particularly serious. However in most cases we anticipate that lesser sanctions would be used. A fine could be appropriate in many cases, particularly where the problem is that a school has breached a statutory duty and refuses or fails without reason to rectify the breach. We would also suggest that there be a range of other available actions that could be taken. Orders along the lines of those available in the United Kingdom and many Australian states might be considered. These include imposing conditions on a school's registration; requiring that a school not enrol new students; requiring the school to discontinue use of part of its premises; requiring the school to cease part of its operation; requiring the school to inform parents that it does not comply with the registration criteria; and suspending the school's registration.

### *Deregistration*

- 8.37 We see deregistration as a last resort because of its effect on the students. We envisage, therefore, that it would be considered only where there has been a consistent and/or serious failure to comply with one or more registration criteria or with statutory duties, or where criminal activity is occurring at a school. The grounds would not need to be cumulative. That is, failure to comply with one registration criterion or one duty, if it was serious enough, could lead to deregistration. In other cases the cumulative effect of the breaches of several duties might be enough.
- 8.38 As set out in Chapter 4, currently the Secretary may cancel a school's registration after having taken all reasonable steps to get all the relevant information and considered an ERO report on the school.<sup>201</sup> We think that these steps should continue to be required before a school's registration can be cancelled.
- 8.39 We note that, where deregistration is the culmination of a process in which ERO has already reported problems in a private school, we would not envisage that a further ERO report be required for deregistration, in addition to the one referred to in para 8.34. Rather, the report that the Secretary considers in making the decision to deregister a school would be the most recent ERO report.
- 8.40 In terms of process, we think that the legislation should set out in more detail the requirements of natural justice, to ensure that a fair process is followed. This would entail giving the school adequate notice that deregistration is being considered and the reasons for this, disclosing any relevant information not already known to the school and giving them an opportunity to make submissions and contest the deregistration. These requirements already apply at common law, but we think there is value in spelling them out in the legislation. The Education Act 1989 does spell out such a process in the case of disestablishing tertiary institutions.<sup>202</sup>

201 Education Act 1989, s 35A(11)(1).

202 Education Act 1989, ss 164 and 237.



*Should there be a right of appeal against deregistration?*

- 8.41 A further point for consideration is whether a school that has been deregistered ought to be able to appeal the decision to deregister it. As a general principle, it is desirable for legislation to provide a right of appeal against decisions where those decisions affect citizens' rights, interests or legitimate expectations. Appeals are important because they correct errors, but the value of an appeal must be balanced against other factors including cost, delay, the need for finality, the nature of the subject matter and the competence and expertise of the first decision maker.<sup>203</sup>
- 8.42 In the overseas jurisdictions that we have looked at there is often a right of appeal to a tribunal or to the courts. Similarly, both hostels and early childhood education centres whose licences are cancelled may appeal the decision to the courts.<sup>204</sup> We believe that private schools should have the same opportunities to appeal.
- 8.43 The main considerations that might weigh against providing a right of appeal against deregistration relate to delay and the need for finality. If the process of deregistration is delayed, students' education would be disrupted and may be adversely affected. The costs of an appeal might also be a factor. Furthermore, a school can apply for judicial review of the decision, so would have some opportunity for redress if a deregistration decision was wrongly made. On the other hand, a court on appeal can consider the merits of the decision, while a court on judicial review cannot.

*Immediate action in case of criminal behaviour or serious threat to students*

- 8.44 There may be a situation where there is a serious threat to students' safety or welfare. In this case, there must be an ability to remove children from the situation immediately. We suggest that the school should be closed temporarily, to ensure student safety. The ordinary steps required for deregistration would then occur. In this type of situation the Secretary's obligation to obtain all relevant information before deregistering a school might include obtaining a report from the police or other agencies.
- 8.45 This process would ensure that students are safe, while also ensuring the school would have the opportunity to express its views and show that it can in fact provide a safe environment. The process should be fast-tracked in this situation to provide certainty for the school and its community.

Q29 Do you agree that all statutory duties on private schools should carry sanctions for their breach?

203 Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (Wellington, 2007) para 13.1.1.

204 Education (Hostels) Regulations 2005, r 71; Education (Early Childhood Services) Regulations 2008, r 39.

Q30 Do you agree with the approach to enforcement that we have outlined in paras 8.14 – 8.45? Do you have any alternative suggestions? Are there other sanctions which might be imposed?

Q31 Do you agree with the proposed roles of ERO and the Ministry of Education in the processes we have suggested? Are there other ways in which private schools might be assisted to comply?

Q32 Do you agree that a process for deregistration of the kind we outline in para 8.40 should be contained in the legislation?

Q33 Should a school that is deregistered have a right of appeal?

*Provision for students of a deregistered school*

8.46 When a school is deregistered, there will of course be students left without a school. These students have the right to receive an education and are under a legal obligation to attend school. We therefore need to consider what, if any, assistance is given to those students. Further consideration should be given to whether the Ministry should have any obligation to assist the students to find a new school or to help them in any other ways. The Ministry may be able to provide some assistance with enrolment at a local state school, or help to identify an alternative private or integrated school to which a student could apply.

Q34 What, if any, role should the Ministry have in assisting students of a private school that is deregistered?

# Chapter 9

## Remaining issues and conclusions

### SUSPENSIONS/ EXPULSIONS

- 9.1 Section 35AA of the Education Act 1989 places a duty on private schools to provide written notice to the Secretary of Education about suspensions and expulsions of students. The notice is to state the student's name and last known address; the day on which the student was suspended or expelled; and a written statement of the reasons for the suspension or expulsion. The Secretary of Education then has a duty to ensure that the student is enrolled at another school.
- 9.2 The Education Act places a greater onus on state schools to deal with suspensions, expulsions, stand-downs and exclusions by way of a particular process. Section 13 states that:
- The purpose of the provisions of this Act concerning the standing-down, suspension, exclusion, or expulsion of a student from a state school is to—
- (a) Provide a range of responses for cases of varying degrees of seriousness; and
  - (b) Minimise the disruption to a student's attendance at school and facilitate the return of the student to school when that is appropriate; and
  - (c) Ensure that individual cases are dealt with in accordance with the principles of natural justice.
- 9.3 Sections 14 to 19 set out the reasons for which a student may be suspended, etc and place various duties on state school boards, principals and the Secretary of Education. An important difference is that the Secretary can overrule a school to lift a suspension, etc and can direct a state school to enrol a student who has been expelled from it or another school. State school principals also have a duty to ensure a suspended student receives reasonable and practicable guidance and counselling and, in certain circumstances, that the student is provided with an appropriate educational programme. Clearly it would be inappropriate for those provisions to apply to private schools and for the Secretary to be able to dictate enrolments to those schools in that way.

- 9.4 The Act also provides for regulations to be made about the processes relating to suspensions etc in state schools and the Education (Stand-Down, Suspension, Exclusion, and Expulsion) Rules 1999 are in place. The rules set out the process that must take place in the event of a suspension, including what information must be provided to the student and parents and what their rights are.
- 9.5 We wonder whether the Act or Rules should also set out a process for dealing with suspensions and expulsions from private schools. At present, the procedure and route of appeal or complaint available for suspended private school students are far less clear than for those at a state school. In private schools the student's relationship with the school is governed by the school's contract with his or her parents. Where a dispute arises over a suspension, complex legal issues can arise as to whether the school's disciplinary procedures have been followed, what those procedures are and whether they form a part of that contract. Further complex legal issues can arise over the extent to which the process adheres to common law procedural fairness requirements, and whether those requirements also form part of the contract. This can make it very difficult for students to ensure that they are treated fairly and to protect their rights. It is of note that Wellington Community Law Centre's helpline for parents of school children receives an average of 550 enquiries a year, about 30 percent of which are related to suspensions.<sup>205</sup> Our present view is that it would be appropriate for private schools to be required by legislation to ensure that individual cases are dealt with in accordance with basic principles of natural justice.
- 9.6 As noted, the requirements in sections 14 to 19 of the Act do not appropriately reflect the different relationship between the state and private schools. This is also the case for many of the requirements in the 1999 Rules. However, we suggest that a brief process could be set out in the Education Act 1989 which could place some procedural requirements on private schools when suspending or expelling a student. Those requirements should be appropriate to their independence from the state, but should ensure that all parties are aware of their rights and natural justice duties. The procedural requirements we have in mind relate to:
- the school's duty to notify the student and his or her parents;
  - the student's and parents' right to request and be present at a disciplinary meeting and to have their views heard;
  - the school's duty to provide parents with details of its disciplinary procedures.

This would not render ineffective any contract made between the school and parents, but would require that any such contract be consistent with the basic requirements provided for in the Act.

Q35 Do you agree that the Act should set out basic procedural requirements that private schools must adhere to when suspending or expelling a student?

205 Felicity Tay "An Independent Student Appeal Authority?" (September 2008) *Council Brief* 11.

- 9.7 The provisions of the Education Act 1989 relating to private schools make no mention of the possibilities of distance learning. The Act shows its age in this regard. Web-based learning plays a part in many educational establishments these days.
- 9.8 Forms of distance learning occur in private schools now, although only for part of a student's education. For example a school might allow individual students electronic access to particular courses offered by another provider if the school itself cannot offer those courses. Students who are temporarily overseas with their parents, or who are confined at home through illness, may be provided with material and exercises to work on while they are away. We can see no difficulty with this, provided proper standards are maintained. In the case of private schools this will require that the curriculum be "suitable" and that the standard of tuition be "no lower" than that at a state school.
- 9.9 However the question is whether the legislation currently allows for the registration of a private school whose business is, or includes, the provision of an entire curriculum by distance learning: whether, in other words, the Act envisages the registration of a private "correspondence school." The Act is not clear on this, and the Ministry is uncertain about it.
- 9.10 The Act, in somewhat circular fashion, provides as follows:
- Section 2 provides that "correspondence school has the same meaning as in s 145(1)."
- Section 145(1) provides that "correspondence school means a school for the time being designated under s 152(1) as a correspondence school."
- Section 152(1) provides that "the minister may, by notice in the *Gazette* ... designate a state school that is not an integrated school as a correspondence school."
- 9.11 On one argument this rules out a private correspondence school. Section 152 allows the minister to designate only a *state school* as a correspondence school. There might be thought to be further support for this argument in section 35A, which provides that a private school must have "suitable premises". On the other hand nothing in the Act expressly prohibits a private correspondence school. The minister plays no part in establishing any private school: they are established by private owners and *registered* by the Secretary of Education. As to the argument based on premises, it could be argued that the only "suitable" premises needed for a correspondence school are premises which contain offices for some or all of the staff.
- 9.12 We tend to the view that the Act currently imposes no barrier to the registration of a private correspondence school. However we agree that the Act is not clear about this, and there would be benefit in having it spelt out one way or the other.
- 9.13 The question of whether a private correspondence (or "distance learning") school should be permitted raises interesting policy questions. Currently parents living in remote rural communities have four options: to send their children to



a local school, which may involve considerable travel; to home-school them; to send them to boarding school; or to enrol them with the state correspondence school. The existence of a private correspondence school would offer another option which might possibly be more congenial to their own philosophy.

- 9.14 However there are significant challenges in providing distance education. The first is how to determine the criteria for who is eligible to receive it: the state correspondence school has strict rules about that. The second is how to give proper individual attention to each student's needs, emotional as well as educational, and to monitor students at risk. A private correspondence school would be in competition with the large state correspondence school which has experience, resources and organisation. Any registration criteria for a private correspondence school would have to be carefully formulated and rigorously administered.

Q36 Do you think the Act should allow for the registration of a private correspondence, or distance learning, school?

## STATUTORY ARCHITECTURE

### A separate "Part" of the Act?

- 9.15 The provisions relating to the registration of private schools can be found at the end of Part 3 of the Education Act 1989, which otherwise relates to the enrolment and attendance of students at schools generally.<sup>206</sup> As we have shown, other provisions relating to private schools, whether concurrently with state schools or separately, are scattered through the 1989 Act. The Education Act 1964 also contains a provision about private schools.
- 9.16 In this issues paper we suggest a number of clarifications and adjustments to the existing law. Adoption of our proposals would be likely to lead to a rewrite of the existing sections. There is a question as to whether the law relating to private schools would be more readily accessible if it were contained in its own Part of the Act, perhaps with its own definitions. The Education Act 1989 is a cumbersome piece of legislation which, due to frequent amendment, is difficult to navigate. The more modern formulation and greater number of provisions that would be likely to result from our proposals seem to us to justify a new Part of the Act, in which the reader could find all the provisions relating to private schools in one place. Where provisions govern both state and private schools there could be cross-reference to them in this Part. It would be complete and self-contained. We do not, however, suggest that any amendments to the law relating to private schools demand the introduction of an entirely new "Private Schools Act".

### Format of the criteria, guidance or regulations

- 9.17 There are a number of ways that a new Part of the Act could provide greater guidance and specification of the standards required of private schools. It could list detailed and specific criteria that all need to "ticked off" before a school may

<sup>206</sup> There are presently 4 provisions relating to private schools in Part 3: s 35A Registration and inspection of private schools, s 35AA Suspensions and expulsions of students from private schools to be notified to Secretary, s 35B Courses for foreign students and s 35C Grants for private schools.



be registered. Generally, we do not favour this approach as it would tend to cement numerous inflexible requirements in statutory form. Given the wide variety and size of private schools in existence, greater flexibility is required.

- 9.18 Another option is for the statute to set out some broader criteria, but to list indicative factors that are to be taken into account when the Ministry or ERO assess whether each broad criterion has been met. This approach has the benefit of retaining flexibility and leaving reviewers to exercise their discretion as to whether the broad criterion has been met. It would be an improvement on the current situation, because it would make it clear to schools and reviewers that certain factors are relevant to the reviewer's determination. Generally we favour this approach and a number of the suggestions we make in the preceding chapters have adopted it.
- 9.19 The final option is that some of the "factors to be taken into account" or detail about the law relating to private schools could be contained in secondary legislation or non-statutory guidelines. Secondary legislation, like the Education (Hostels) Regulations 2005, could be used to contain technical or procedural details about the application and registration process, or set out the format and content of forms. Regulations, which are easier to amend than primary legislation, can sometimes be used where flexibility is required.
- 9.20 Alternatively, the Ministry could publish non-statutory guidance to inform schools of what is required under each of the statutory criteria. This model is used in Western Australia. There, the School Education Act 1999 lists standards that are to be met before a school is registered.<sup>207</sup> In addition, the Department of Education Services has published a document called "Standards and Other Requirements".<sup>208</sup> Under each of the criteria set out in the Act, the Standards document sets out detailed guidelines about the matters that will be taken into account in assessing whether the criteria are met. The document was developed in consultation with the Association of Independent Schools of Western Australia and the Catholic Education Office. It may be worth considering whether such a document, devised in consultation with private school representatives, should be developed here.

Q37 Should the law relating to private schools continue to be placed throughout the Education Act 1989, or be contained in a dedicated part of the Act, or a separate Act?

Q38 What do you think could usefully be done by regulations rather than in the Act?

Q39 Would it be useful for the Ministry to publish non-statutory guidance on what is required under the statutory criteria for private schools on matters such as suitable equipment, curriculum and standard of tuition?

207 School Education Act 1999 (WA), s 160.

208 See *Registration and Renewal of Non-Government Schools in Western Australia* (Department of Education Services, Perth, 2007) [www.des.wa.gov.au/files/pdf/Standards\\_March07.pdf](http://www.des.wa.gov.au/files/pdf/Standards_March07.pdf).

- CONCLUSIONS
- 9.21 In this Issues Paper we have proposed some ways in which we believe the law on private schools could be updated and improved.
- 9.22 As we have noted at a number of points in this paper, we have not found serious problems in New Zealand's private schools. To the contrary, most private schools provide an excellent education for their students.
- 9.23 Serious problems are unlikely to arise often, but we believe that the current law is inadequate to deal with them if they do. For example, the current law does not provide sufficient safeguards against the risks posed by people with criminal intentions becoming involved in private schools. There is also an insufficiently flexible and effective regime for dealing with other kinds of non-compliance. We make suggestions for improvement.
- 9.24 Furthermore, the law in some places is unclear, outdated and has some obvious gaps. It provides insufficient guidance for private schools and for the government agencies involved in overseeing the private school sector. The law needs to state clearly what is expected of private schools and the relevant government agencies. The processes, especially for registration and deregistration of schools, should be clear, flexible and meet the needs of contemporary New Zealand. Gaps in the law, such as the uncertainty as to whether a private correspondence school may be registered, need to be filled.
- 9.25 We reiterate our view that the current balance between parental choice and the state's duty to set minimum standards of education and welfare is the right one. The changes we suggest are not intended to disturb that balance.
- 9.26 We anticipate that the reforms we propose will impose some additional costs and burdens, but not of significant dimensions. The Ministry of Education would incur an extra cost in maintaining the proposed public register of private schools. The scope of ERO reviews would widen due to the addition of new registration criteria. Both the Ministry and ERO would have more criteria to examine in the registration process and in the event of non-compliance by schools (not a frequent occurrence) they would both have a greater role than now in ensuring compliance. For the private schools themselves compliance with the new criteria – in particular the need to provide evidence of financial viability – will not be a large burden. Most of the new requirements – such as those to ensure the welfare of students and to comply with natural justice in suspension and expulsion proceedings – do no more than spell out what the great majority of schools do now as a matter of course.
- 9.27 We look forward to receiving your views on the proposals set out in this paper.

# Appendix A

## List of questions

### CHAPTER 7 REGISTRATION CRITERIA AND PROCESS

- Q1 We propose that there should be a public register of private schools, and that it should contain the following information:
- name of school
  - address of the school
  - address of any additional campuses
  - name and contact details of the owners/managers
  - date of registration
  - type of school
- We also propose that the register should designate the school's registration status, including whether it is subject to any warnings.
- Do you agree? Should any other information be held on the register?
- Q2 Do you agree that changes in the information on the register should be required to be updated and that any changes in ownership, premises and additional campuses should be subject to fresh assessment according to the registration criteria?
- Q3 Do you agree that the reference to a private school usually having nine students should be omitted from the legislation?
- Q4 Do you agree that it is not necessary to define a "private school"? If not, how should a "private school" be defined?
- Q5 Do you agree that there should be a "fit and proper person" test in the criteria for registering a private school?
- Q6 We propose that the matters to be taken into account in determining whether a person is a "fit and proper person" should be the same as those in the Education (Hostels) Regulations 2005. Do you agree?
- Q7 To whom should the "fit and proper person" test apply?
- Q8 What role, if any, should the concept of "efficiency" play in the registration criteria? Should it continue to be the overarching criterion, or just one of a number of criteria?
- Q9 Do you agree that schools' "efficiency" should be renamed "viability" and be assessed as part of the registration criteria?

Q10 If “viability” is to be assessed, we suggest that the following factors should be taken into account on registration and subsequent review:

- the projected roll;
- the number of students in each age range;
- the school’s financial viability;
- the governance structure and administrative arrangements.

Do you agree with these criteria? Are any other criteria relevant to the assessment?

Q11 Do you agree that the statute should make it clear that a school’s premises should comply with all relevant statutory requirements, and that it should be “suitable for the type of education being delivered at the school”?

Q12 Should any further guidance about premises be given in legislation, or by any other method such as guidelines?

Q13 Do you agree that the statute should state that schools should have equipment that is “suitable for the curriculum being delivered”? Would any further guidance be useful?

Q14 We suggest that the legislation might state that factors to be taken into account in assessing whether the staffing is suitable should be:

- whether the teaching staff meet the relevant statutory requirements;
- whether the number and range of staff is suitable for the size of the school and the age range and needs of its students.

Do you agree?

Q15 What guidance should be provided in the legislation about what constitutes a “suitable” curriculum? Do you have a preferred option among those set out in paras 7.65 – 7.69?

Q16 Do you think the Ministry might usefully issue non-statutory guidelines about curriculum?

Q17 What guidance should be provided in the legislation about the required standard of tuition? Are the matters listed in paras 7.72 – 7.73 helpful?

Q18 Should “regularity of instruction” be a factor to be taken into account in determining whether tuition is of the appropriate standard?

Q19 We suggest that a modern redrafting of the “patriotism and loyalty” provision could refer to “supporting and promoting the principles and practice of New Zealand democracy, including concepts such as the rule of law and equal rights for all before the law.” Do you agree, or do you prefer some other formulation? Should this be treated as part of the “suitable curriculum” criterion, or as a separate requirement?

Q20 Do you agree that providing for the physical and emotional welfare of students should be added to the registration criteria? What further guidance could the legislation give as to how this should be assessed?

Q21 Do you have any comments on the criteria and process for registration?

- Q22 Does the division of responsibilities between the various government agencies work well for private schools?
- Q23 Should the Education Review Office be given a greater role in the registration, including provisional registration, of private schools?
- Q24 Do you agree that schools should only be able to seek one six-month extension of provisional registration?
- Q25 Do you agree that additional campuses should be registered in the same way as their parent schools?
- Q26 Do you agree that new campuses should be assessed against all the registration criteria on their establishment and in periodic reviews?
- Q27 Do you agree that the basis for and scope of ERO reviews of private schools should be made more explicit in the legislation?
- Q28 Do you have any other comments about ERO's ongoing review role?

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CHAPTER 8  
COMPLIANCE  
AND  
ENFORCEMENT

- Q29 Do you agree that all statutory duties on private schools should carry sanctions for their breach?
- Q30 Do you agree with the approach to enforcement that we have outlined in paras 8.14 – 8.45? Do you have any alternative suggestions? Are there other sanctions which might be imposed?
- Q31 Do you agree with the proposed roles of ERO and the Ministry of Education in the processes we have suggested? Are there other ways in which private schools might be assisted to comply?
- Q32 Do you agree that a process for deregistration of the kind we outline in para 8.40 should be contained in the legislation?
- Q33 Should a school that is deregistered have a right of appeal?
- Q34 What, if any, role should the Ministry have in assisting students of a private school that is deregistered?

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CHAPTER 9  
REMAINING  
ISSUES AND  
CONCLUSIONS

- Q35 Do you agree that the Act should set out basic procedural requirements that private schools must adhere to when suspending or expelling a student?
- Q36 Do you think the Act should allow for the registration of a private correspondence, or distance learning, school?
- Q37 Should the law relating to private schools continue to be placed throughout the Education Act 1989, or be contained in a dedicated part of the Act, or a separate Act?
- Q38 What do you think could usefully be done by regulations rather than in the Act?
- Q39 Would it be useful for the Ministry to publish non-statutory guidance on what is required under the statutory criteria for private schools on matters such as suitable equipment, curriculum and standard of tuition?

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