



PRIVATE SCHOOLS AND THE LAW

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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The Hon Simon Power
Minister Responsible for the Law Commission
Parliament Buildings
WELLINGTON

16 September 2009

Dear Minister,

NZLC R108 – PRIVATE SCHOOLS AND THE LAW

I am pleased to submit to you Law Commission Report 108, Private Schools and the Law, which we submit under section 16 of the Law Commission Act 1985.

Yours sincerely

A handwritten signature in blue ink, reading "Geoffrey Palmer". The signature is fluid and cursive, with a horizontal line drawn underneath it.

Geoffrey Palmer
President

FOREWORD

Private schools have been with us a long time. They provide parents with a choice as to how their children are educated. That freedom of choice is very important. Overall the private school sector is strong. But the key legislative provisions governing it have been with us for nearly 90 years, and the language in which they are couched is in places outdated and unclear. More importantly the provisions contain serious gaps.

In particular, they leave the responsible agencies all but powerless to deal with some potential, albeit rare, situations where the safety and welfare of the students could be at serious risk. These gaps obviously need to be filled.

This report certainly does not recommend a root-and-branch reform. It advocates a modernisation and rounding out of the provisions relating to private schools in the Education Act 1989, and puts some safeguards in place to deal with serious problems should they arise. There is no need to do more than that.

A handwritten signature in dark ink, appearing to read 'Geoffrey Palmer', with a horizontal line underneath.

Geoffrey Palmer
President

ACKNOWLEDGEMENTS We are most grateful to the Parliamentary Counsel Office for their time and attention in drafting the Education (Private Schools) Amendment Bill, attached to this report.

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St Kentigern Trust Board

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Independent Schools Education Association (formerly Independent Schools Teachers' Association of New Zealand)

New Zealand Educational Institute

Post Primary Teachers' Association

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The Commissioner responsible for this reference was John Burrows. The legal and policy advisers were Susan Hall and Sara Jackson.



Private schools and the law

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CHAPTER 2

- R1 The requirement of nine students should be removed from the Act.
- R2 The current section 35A(2) should be redrafted to clarify its meaning, and the Secretary should have power to require a teaching enterprise to be registered as a school even though some or all of its students have exemptions under section 21.
- R3 The Ministry of Education should keep an up-to-date list of all registered private schools, and make it available for inspection at its offices, and on its website.
- R4 Managers applying to register a private school should be subject to a “fit and proper person” requirement.
- R5 The matters to be taken into account in determining whether persons are “fit and proper” should be analogous to those in the Education (Hostels) Regulations 2005.
- R6 If the management of a school changes in its entirety, or is transferred to a new entity, the new managers should also be assessed against the “fit and proper” requirement.
- R7 The word “efficient” should no longer be part of the registration criteria.
- R8 It should be a criterion that premises be suitable for the type of education delivered at the school.
- R9 This criterion should apply to premises used for the regular delivery of courses, whether or not they are owned or leased by the school.
- R10 It should be a criterion that equipment be suitable for the education delivered at the school.
- R11 It should be a criterion that teachers must meet statutory requirements, and that the staffing of the school be appropriate to the age range and level of the students, the curriculum taught at the school, and the size of the school.
- R12 It should be a criterion that the curriculum be such as to enable students to leave school able to participate in and contribute to their own community and New Zealand society as a whole.
- R13 In reviewing the standard of tuition matters to be taken into account should include the mode of curriculum delivery and the regularity of instruction.

- R14 It should be a criterion that the school provide a safe and supportive environment that includes policies and procedures that make provision for the welfare of students.
- R15 The current “patriotism and loyalty” requirement in s 35A(1)(c) should be replaced by a requirement that the school support and promote the principles and practice of New Zealand democracy, including respect for the law and the rights of others.
- R16 Section 162 of the Education Act 1964 should be repealed.
- R17 It should be a criterion that the school have sound governance and management structures and practices.
- R18 Where a school establishes a new campus catering for a different body of students, the new campus should be required to undergo the same registration process as a new school.
- R19 Where a school moves premises, or acquires additional premises, it must notify this to the Secretary, who must assess the suitability of the premises.
- R20 The Secretary should be able in exceptional cases to extend the expiry date of provisional registration.
- R21 It should be clarified that the Education Review Office has power to review a private school on the same basis as a state school when that is desirable.

CHAPTER 3

- R22 The legislation should contain a purpose provision stating that any action taken in relation to a private school must be proportionate to the problem sought to be resolved.
- R23 The Secretary should be empowered to act where:
- a private school is not complying with one or more of the registration criteria;
 - a private school has breached one or more statutory duties; or
 - there are reasonable grounds to believe that serious criminal activity is occurring in a private school.
- R24 Serious criminal activity should be defined as offences involving fraud, harm to children or violence, sexual offences, and crimes involving dishonesty.
- R25 The following actions should be available if one or more of the grounds for action exist:
- Issuing a notice to comply;
 - Prosecution (for breach of the existing offence provisions);
 - Withdrawing some or all of the government subsidy, or placing conditions on funding;
 - Requesting that the school produce an action plan;
 - Requiring a further ERO review;
 - Requiring the school to inform parents that it does not comply with the registration criteria;

- Imposing conditions on a school's registration;
- Suspending a school's registration;
- Deregistration.

R26 The legislation should set out a more detailed process that must be followed before a private school can be deregistered. That process should incorporate the current requirements to take all reasonable steps to get relevant information and consider any ERO report, and there should also be new requirements to:

- Give the school adequate notice that deregistration is being considered and the reasons for it;
- Disclose any relevant information not already known to the school; and
- Give the school an opportunity to make submissions and contest the deregistration.

R27 Where the Secretary considers that there is a serious threat to student safety or welfare, there should be a power to close a school temporarily, pending an investigation into whether deregistration is appropriate.

CHAPTER 4

R28 The Act should set out the following basic procedural requirements that schools must adhere to after suspending and before expelling or excluding a student:

When a student has been suspended, the student's parents should have the right to request that the suspension be lifted or varied, and to make submissions in support of their request.

Before expelling or excluding a student, schools should be required to:

- Give adequate notice of the proposed expulsion or exclusion to the student and his or her parents; and
- Provide the student and his or her parents with a reasonable opportunity to attend and be heard at a meeting.

R29 Details of a school's disciplinary procedures should be required to be available upon request, and be provided to students and their parents when the students are facing suspension, exclusion or expulsion.

R30 The Act should be amended to make it clear that it does not allow for the registration of a private school that operates as a correspondence school, distance learning school, or school of a similar description.

R31 The law relating to private schools should be contained in a dedicated part of the Education Act 1989.

Chapter 1

Introduction

- 1.1 The Law Commission has been asked to review the law on private schools. Although most of the present law on private schools was enacted in 1989 and 1990, some of the key provisions in the legislation were simply brought forward unchanged from the past. Some of the most important of those provisions have been with us since 1921, and have become increasingly unfit for purpose over the years. For ease of reference we have set out a few of the key provisions currently applying to private schools in an appendix to this report.
- 1.2 Private schools have been with us a long time, and have operated without many serious problems. The sector is strong. But we need to be sure that the legislation is able to deal with problems should they arise, and that it is appropriate for the 21st century. The purpose of this review is to update the legislation, not radically change it.
- 1.3 In late 2008 we published an issues paper¹ in which we set out what we believed after research and extensive consultation to be the main difficulties with the current legislation. We do not repeat in this report all the detail that was contained in that issues paper. It is available for those who may wish to refer to it.² But we do wish at this point to summarise the principles on which we have proceeded, and the matters which we believe will benefit from legislative attention.

PRINCIPLES

- 1.4 The principles are as follows:
 - (a) The freedom of parents to decide how and where their children are educated is important. Private schools provide healthy competition for the state sector in a way that promotes high standards. Private schools can also be better placed to cater for the increasing religious, philosophical and cultural diversity in society.
 - (b) Nevertheless the state has a valid interest in expecting some minimum educational standards. This is not just because it makes a financial contribution to private schools. More importantly it is because the state has international obligations to further the best interests of children, and also because there is a public interest in schools educating New Zealanders in a way that enables them to leave school to be useful members of society.

1 New Zealand Law Commission *Private schools and the law* (NZLC IP12, Wellington, 2008) (“the issues paper”).

2 It is available on the Publications section of the Law Commission’s website: www.lawcom.govt.nz.



- 1.5 Any state intervention in private schools should not unreasonably interfere with the freedom expressed in (a) and should go no further than reasonably necessary to protect the interests of the state outlined in (b). We are also concerned to avoid placing unnecessarily bureaucratic administrative burdens on private schools.

- 1.6 We repeat the views we expressed in the introductory chapter of the issues paper:³

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.

... 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.

- 1.7 Nothing in the course of our further investigations has led us to change those views.

THE ISSUES

- 1.8 The main issues which we set out in the issues paper and on which we sought submissions fall into several categories. They can be summarised in the following way:

Language

- *Open-ended language* – The criteria which private schools must meet to become and to remain registered are open-ended and elusive. Private schools must be “efficient.”⁴ Their curricula, premises, equipment and staffing must be “suitable.”⁵ Such language can lead to inconsistency of treatment in the assessment of applications. It gives little assistance to the authorities (the Ministry of Education and the Education Review Office) in performing their statutory functions. It provides little guidance to schools in assessing what they need to do to demonstrate compliance.
- *Archaic language* – Some of the language of the Act simply needs to be updated to accord better with modern usage. For instance, private schools are currently required “to provide suitably for the inculcation in the minds of students of sentiments of patriotism and loyalty.”⁶ No doubt those are worthy sentiments, but it should be possible to reword them in a way which conveys more to a modern reader, taking into account the freedoms contained in the New Zealand Bill of Rights Act 1990.

3 Ibid paras 1.1 and 1.5.

4 Education Act 1989, s 35A(1).

5 Education Act 1989, s 35A(1)(a).

6 Education Act 1989, s 35A(1)(c).

- *Ambiguity* – On some things the Act is simply unclear, in that two different readers might give two different interpretations. For instance, it is not clear whether it is possible to register a private correspondence school – that is to say, a school which engages in distance learning. It depends on how you read certain provisions of the Act.⁷ Likewise it is not clear whether an enrolment of 9 students is an essential requirement for a private school. Two different legislative provisions put it in different ways.⁸

Gaps

- 1.9 We believe that in some areas the Act needs to provide for more than it does. There are some significant gaps such as the following:
- There are currently no controls over who can set up a private school. Even a person with a list of serious criminal convictions could in theory do so, unless it could be found that the school which that person proposed to set up was not “efficient.”
 - The criteria against which private schools are assessed include curriculum, premises, equipment and teaching, but they do not include making provision for the welfare of students. Considering New Zealand’s international obligations that seems to us to be a strange omission in this day and age.
 - The Act makes no provision for notifying or registering a new campus set up by an existing school.

Enforcement measures

- 1.10 The regulation of private schools should be light-handed, but the provisions of the current legislation are unsatisfactory in a number of ways:
- Although a number of duties are expressly imposed on private schools, some of them are not accompanied by any form of sanction. They include duties to make financial reports, to keep enrolment records, and to obtain police vets of non-teaching staff.⁹
 - Except for a limited number of duties where a fine is available, the only sanction available if a school fails to comply with the Act’s requirements is deregistration, an extreme measure. Moreover, deregistration is only available if the school has ceased to be “efficient” in that it has failed to meet one or more of the statutory criteria.¹⁰ One of the questions we asked in the issues paper was whether there should not be a graduated scheme of compliance measures proportionate to the gravity of the failure to comply.
 - While de-registration is, and should remain, the ultimate sanction against a school which is not performing, the current legislation provides no process which must be followed when that step is taken. There is nothing to ensure a fair right to be heard, for example.

7 Education Act 1989, ss 7, 145(1) and 152(1).

8 Education Act 1964, s 2(1); Education Act 1989, s 35A(1)(b).

9 See New Zealand Law Commission *Private schools and the law* (NZLC IP12, Wellington, 2008) paras 8.12 – 8.13.

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

- 1.11 In our issues paper we set out and discussed these problems in some detail. In some cases we proposed answers to them, in others we provided a series of options. We called for submissions. We received 20 submissions, some of them from organisations representing large numbers of schools, persons or agencies. We have had discussions with the Ministry of Education and the Education Review Office. As a result of these submissions, discussions and further deliberations, we have arrived at a set of recommendations which we shall set out in this report. In some cases we have modified the provisional views we put forward in the issues paper. Parliamentary Counsel Office has drafted a bill for the Law Commission based on our recommendations. It is appended to this report.

Chapter 2

Registration criteria and process

WHAT CAN BE REGISTERED?

- 2.1 It is unlawful to operate a private school unless it is registered. The first question is whether “private school” and “school” need to be defined in the Act. We think not. Both terms are well enough understood in ordinary language. We can colloquially define private schools as schools which are owned, run and supported by private persons and agencies rather than by the state, even though they may receive a funding subsidy from the state. That is the ordinary meaning. Everyone knows it, and it seems superfluous to capture it in the Act itself. Some of our submitters did put forward definitions of “school” for our consideration. One which commanded our attention was:

An establishment set up to:

- (1) Fulfil the requirement of compulsory schooling;
- (2) Provide instruction to students beyond the immediate family; and which is
- (3) Open to public scrutiny by the registrar of schools, ERO and financial auditors.

This definition has the attraction that it distinguishes a school for the purposes of the Act from, say, a Sunday school or a dance school. But we are still of the view that this is not necessary, because the scheme and purpose of the Education Act 1989 makes it clear that these latter types of “school” are not within its ambit.

- 2.2 There are, however, two matters which need attention. First, one of the surviving sections of the Education Act 1964 provides that “private school” means:¹¹

any private school where there are more than eight children over five years of age receiving instruction.

- 2.3 Section 35A of the Education Act 1989 provides that one of the ingredients of “efficiency” is:¹²

usually providing tuition for 9 or more students who have turned 5, but are under 16.

11 Education Act 1964, s 2(1).

12 Education Act 1989, s 35A(1)(b).



- 2.4 We are not clear why the figure of nine (or more than eight) has been chosen. As it is, its presence in section 35A coupled with the word “usually” has caused difficulty. The word “usually” could have several possible connotations. We have concluded that there is little point continuing with this requirement of nine students. The number is arbitrary, and seems to serve no clear purpose. Even if it were meant to distinguish private schools from home schooling, it is still arbitrary. In the end what matters is not the size of a school, but whether a good education is provided, and that is dealt with by the other criteria: teaching, equipment, premises, curriculum and so on. We recommend therefore that the number of nine be removed from the legislation.

RECOMMENDATION

R1 The requirement of nine students should be removed from the Act.

- 2.5 The second matter is the distinction between a “school” and so-called “home schooling.” This is apparently the rationale for the rather obscure section 35A(2):

No premises shall be deemed not to be operating as a school by reason only of the fact that certificates of exemption under section 21 of this Act are held in respect of all or any of the students being taught there.

- 2.6 The double negative does not assist ready comprehension, and we recommend a redrafting of this provision to convey more clearly the message: that there may come a point where a collective arrangement between a group of parents who are avowedly “home-schooling” their children really means that a school has been set up. Matters to be considered would no doubt include such things as the number of students, the number of families, the premises where the instruction takes place, who does the teaching, and the formality and regularity of the instruction. We believe also that the Secretary should have power to direct such a school to register as a private school.

RECOMMENDATION

R2 The current section 35A(2) should be redrafted to clarify its meaning, and the Secretary should have power to require a teaching enterprise to be registered as a school even though some or all of its students have exemptions under section 21.

NAME

- 2.7 There is a question of the name “private school.” The word “private” is perhaps a little old-fashioned, and might seem to convey to some a sense of seclusion or even exclusivity. These days the word “independent” is preferred by many. Some of the organisations in the sector prefer to use that term. We have considered whether we should recommend a change of name, but have decided not to. The fact is that private schools are not entirely independent of the state: most receive a funding subsidy, albeit small; and the state has long had a degree of oversight under the legislation we are reviewing.

A LIST OF
PRIVATE
SCHOOLS

- 2.8 There is currently no authoritative list of registered private schools readily available to the public, either on the Ministry of Education's website or anywhere else. There is a long list of *all* schools on the website www.educationcounts.govt.nz, but private schools are there mixed with state and integrated, and it takes time and effort to extract them. Another website, www.teamup.co.nz provides a search facility where one can search for details of an individual school if its name is known.
- 2.9 The Ministry can generate and provide a list of private schools in hard copy on request.
- 2.10 We believe it would be advantageous for an up-to-date official list of registered private schools to be available on the Ministry of Education's website. It would enable the public, including parents, researchers and educators, to see in one place at a glance what private schools there are in New Zealand. It would enable parents and others to be assured that an organisation calling itself a "school" is properly registered.
- 2.11 If requested under the Official Information Act the Ministry is currently obliged to provide such information anyway: proactively making it available would short-circuit that process.
- 2.12 Under the Education Act 1964 there was a duty on the Ministry to maintain a list. Section 186(5) provided:
- The Director-General shall cause to be prepared annually a list of all registered private schools, which shall be available for inspection at any office of the Department.
- For some reason that duty was not re-enacted in the 1989 Act. We believe it should be reinstated.
- 2.13 We considered whether the legislation should require the keeping of a formal, searchable, register as is the case with the providers of many other professional services: lawyers, doctors, and even retirement villages. But we think the proposed list would sufficiently serve the purpose we have in mind.
- 2.14 So we recommend that a list of private schools should be available on the Ministry's website. It should contain the categories of information presently contained in the full list of schools on the "educationcounts" website, namely: name of school; type of school (primary, secondary etc.); special definition or character (eg. boarding, bilingual etc.); gender of students; address and contact details; Principal's name; and school roll. The list should be kept up to date.

RECOMMENDATION

- R3 The Ministry of Education should keep an up-to-date list of all registered private schools, and make it available for inspection at its offices, and on its website.

WHO CAN APPLY FOR REGISTRATION?

- 2.15 The Act places no restriction on who can apply to register a private school. As we intimated in chapter 1, currently it would not appear to be a ground for refusing registration that, for example, the applicant has convictions, even of a serious sexual nature, or that he or she has health problems of a nature which could impact on the proper running of the school. Provided the prospective school meets the criteria listed in section 35A, registration would have to follow. Teachers and other persons working in the school must undergo a police vet, but not the persons establishing the school, even though such persons may have a central part in its operation. In an environment where the welfare of children and young persons is at stake this is obviously unsatisfactory.
- 2.16 There are “fit and proper person” requirements for other operations which involve the care and welfare of children. For example persons applying for licences under the Education (Hostels) Regulations 2005 and the Education (Early Childhood Services) Regulations 2008 must meet such a requirement. We recommend that there should be a “fit and proper” person requirement for a person applying to register a private school.
- 2.17 There are two questions. The first is what the test of “fit and proper” should be, and the second is the persons to whom that test should apply. As to the first question there was general agreement amongst submitters that the Education (Hostels) Regulations 2005 provide a suitable model. They provide that the matters to be taken into account are:¹³
- (a) any previous cancellation of a licence involving one 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 or 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.
- 2.18 We recommend that those criteria, suitably adapted and with some modernisation of language, should apply to those applying to register a private school.
- 2.19 The second question is more difficult. We conclude that the managers of the school should be required to meet this “fit and proper person” test. Under the Act as it currently stands, the “managers” are those who apply for registration; they are defined as the persons who control and manage the school.¹⁴ That is sufficient for our purposes. The managers should have to meet that test when they apply for registration. Where “the manager” is a company, the directors should be required to meet the test. If it is an incorporated society or trust board, it should be the members. If the management of the school were later to be transferred in its entirety to another entity, that new manager (or managers) should also be required at the time of transfer to be approved as meeting the test. There was an opinion amongst some submitters that every time over the years

¹³ Education (Hostels) Regulations 2005, r 13.

¹⁴ Education Act 1989, s 35A(1).

that a new trustee or board member is appointed approval should be required for that person. However we decided, in line with the provisional view expressed in the issues paper, that it would be unnecessarily intrusive and would impose an unnecessary administrative onus, on both the school and the state, to have to have every such new member formally “vetted”. It might indeed be thought inappropriate for the state to be continually involved in this way. However the “fit and proper” criterion would be a continuing *requirement*, and if in the course of a periodic review ERO were to become concerned at the progressive involvement of unsuitable persons in the management of the school, this could be a matter of report to the Ministry.

RECOMMENDATIONS

- R4 Managers applying to register a private school should be subject to a “fit and proper person” requirement.
- R5 The matters to be taken into account in determining whether persons are “fit and proper” should be analogous to those in the Education (Hostels) Regulations 2005.
- R6 If the management of a school changes in its entirety, or is transferred to a new entity, the new managers should also be assessed against the “fit and proper” requirement.

THE REGISTRATION CRITERIA

2.20 As the Act currently stands, if the Secretary of Education is satisfied that the premises, staffing, equipment and curriculum of an applicant school are, or are likely to be, “suitable” then he or she must provisionally register the school. Between six and twelve months after the provisional registration the Education Review Office (“ERO”) must review the school. If satisfied, after considering the ERO report, that the school is “efficient”, the Secretary must fully register the school. Registration can be cancelled if the Secretary ceases to be satisfied that the school is “efficient”.

2.21 “Efficiency” is thus the cornerstone of the present system. It is fully defined in the Act as follows:¹⁵

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;

¹⁵ Education Act 1989, s 35A(1).

(iii) Special schools of the same class, where the school's management want it to be registered as a special private school.

- 2.22 The word “efficient” adds nothing to the list of criteria in the definition. It is simply a catchword, coined to summarise that list of criteria. In this day and age it is not a particularly appropriate term. The Oxford dictionary defines efficient as “producing the desired result with the minimum wasted effort.” The list of criteria seems to amount to rather more than that. We suggested in our issues paper that the word “efficient” be no longer used. Submitters agreed. Nothing more is necessary than to list the criteria themselves.

RECOMMENDATION

R7 The word “efficient” should no longer be part of the registration criteria.

- 2.23 The first of the current criteria for registration, initial and ongoing, is that the school must have suitable premises, equipment, staffing and curriculum. The term “suitable” is problematic on several counts. One submitter was of the view that it sets too low a threshold. Private schools, he said, should be striving for excellence rather than mere suitability. However the legislation cannot sensibly hold private schools to a higher standard than state schools. Moreover, while suitability is the standard against which ERO does its first reviews of private schools, it is quite entitled to, and in fact sometimes does, indicate excellence and high performance in later reports where that is appropriate. So, while we are in sympathy with the sentiments of the submitter, we do not think that they in themselves justify dispensing with the term “suitable”.
- 2.24 The main difficulty with “suitability” is that without proper definition it is open-ended and uncertain. It gives little guidance to the agencies which have to assess schools, and indeed to the schools themselves. It provides no express benchmark against which a school can be assessed. If a school were to be declined registration, and the only reason given was that its curriculum was “unsuitable,” there could be understandable accusations of subjective judgement. Moreover, vague criteria like this can lead to inconsistency of application; this is particularly so at the stage of provisional registration where the initial assessments are often made by district offices of the Ministry of Education.
- 2.25 So we are of the view that greater guidance would be beneficial. That was the view of many submitters also.
- 2.26 Yet when it comes to trying to formulate that additional guidance, it is not so easy. The very freedom which private schools should continue to enjoy would be compromised if the guidance were to be too specific; yet guidelines of a very general kind may leave the situation little better than at present. However, we feel that it is possible to do better than what we currently have. We take each of the items of section 35A(1)(a) in turn.

Premises

- 2.27 It goes without saying that school premises must comply with the several Acts of Parliament regulating health and safety, and building standards. There is a question whether there needs to be a reference to such other legislation in the Education Act. On one view it would simply repeat the obvious and be superfluous. The other view is that there is virtue in a provision in the Education Act itself which in general terms draws the requirement of statutory compliance to the attention of those affected, so that the Act tells the full story. However we incline to the first view: a statutory reminder that other Acts apply should not be necessary. We do believe, however, that the Act should spell out that the premises should be “suitable for the type of education delivered at the school”. Curriculum and modes of instruction will obviously differ from school to school. Some will rely more on information technology than others; some will have teaching methods which will have different space requirements. It should not be assumed that “one size fits all”.
- 2.28 There is a further question. Does the requirement about premises apply only to premises owned or leased by the school? Some schools may have the use of public, or indeed private, facilities for some of their instruction: gymnasia, laboratories etc. Given that the focus is on the safety and the education of students, it is the *use* by them of the premises, rather than any proprietary rights in the school, which is important. We therefore recommend that the test of suitability should apply to premises *used* by the school as part of the regular delivery of courses. We deal in 2.68 with the related question which arises when a school acquires new premises.

RECOMMENDATIONS

- R8 It should be a criterion that premises be suitable for the type of education delivered at the school.
- R9 This criterion should apply to premises used for the regular delivery of courses, whether or not they are owned or leased by the school.

Equipment

- 2.29 It is our view that the Act should provide, as in the case of premises, that equipment must be “suitable for the education delivered at the school.” It would not be helpful to say more and could be too constraining. As one submitter put it:

We believe that equipment should be suitable for the curriculum being delivered, and that the legislation should not be prescriptive. Schools should have the flexibility to cater for their own specific needs, and in so doing create their own point of difference, which will form part of their value proposition to the parents and students.

RECOMMENDATION

- R10 It should be a criterion that equipment be suitable for the education delivered at the school.

Staffing

2.30 We first consider the question of whether teachers in private schools should be required to meet the same statutory requirements as apply to teachers in state schools. Currently the Education Act recognises three types of teacher.¹⁶ First, to be permanently appointed to a teaching position a person must hold a practising certificate, which entails that that person must be registered as a teacher. Secondly, a person without any specific teaching qualification may be granted a limited authority to teach, or LAT as it is colloquially known. Such an authority usually lasts only for a year, but the Teachers Council has power to grant it for a longer term where desirable.¹⁷ Thirdly, a person without a practising certificate or other authorisation may be appointed to teach for a time which is less than 20 half days a calendar year (or such longer time as the Teachers Council may allow).¹⁸

2.31 We heard arguments from some submitters that these requirements are too restrictive, and deny schools the opportunity to employ persons who would be excellent teachers, but who lack the necessary qualifications. One submitter said:

There are two areas in particular where the requirement of statutory registration of teachers imposes damaging impediments upon private schools and weakens the whole sector. First is the artificial and bureaucratic restriction which impedes the employment of previously registered teachers who have a desire to return to the classroom part time or full time after their children have grown, but have had their registration lapse in the meantime. The second area is the great need to source male teachers so as to achieve a gender balance in the classroom. We have found that older men approaching retirement years are effectively prevented from part time teaching in private schools by the existing restrictions. Many of these have a lifetime of experience, are themselves parents and grandparents – thus having years of experience with children – and have extensive and relevant (to the subjects they would teach) educational qualifications.

2.32 Another said:

There are sometimes people who are very capable teachers but do not have the standard qualifications. We believe it should be the right of the proprietor of the school, whether the state or a private owner, to choose the staff they employ.

2.33 We also heard concerns that there should not be impediments placed in the way of international teachers with expertise in subjects that may be offered, for example, in the International Baccalaureate.

2.34 This subject has not been without controversy over the years. Compulsory registration, having been abandoned as a requirement, was reintroduced in 1996 as the result of a member's bill. This review is not the appropriate vehicle to revisit this matter. The rationale for compulsory registration is to ensure quality and protect the safety of the students, so there is no reason why private schools should be any different from state schools in this matter. It is important that only persons fit for the task teach in our schools. If the requirement is ever to be

¹⁶ Education Act 1989, ss 120A(2) and 130.

¹⁷ Ibid ss 130A – 130E.

¹⁸ Ibid s 120B(3)(4).

reviewed it should be done generally, and not solely in the context of private schools. We thus do not recommend any change to the current requirements about registration.

- 2.35 The Limited Authority to Teach was introduced in 1996 in the same Act that imposed compulsory teacher registration.¹⁹ Its intention was to impose a qualification on the need for registration. The measure was introduced as a member's bill and underwent much amendment in Parliament during its passage. The provisions about LATs changed significantly in the course of that process, and as a result now sit somewhat uneasily with the registration provisions. The legislation bears on its face evidence of compromise between opposed views. The main current statutory provisions about LATs are included in the Appendix to this report.
- 2.36 On our reading of the Act's provisions, the only relevant questions in deciding whether a person should be granted an LAT are those listed in section 130B(2): whether the applicant is of good character; is fit to be a teacher; and is likely to be a satisfactory teacher. These questions all relate to the character and ability of the person involved, and nothing else. There was a requirement in the introduction copy of the bill that an LAT could only be granted to a person who was not eligible for registration, but it was taken out before the bill was enacted. There is provision in the Act that a permanent teaching position requires a practising certificate,²⁰ and thus registration, but there seems to be nothing in the Act to constrain the type of *temporary* teaching position to which an LAT may apply: a teaching position is defined simply as "a position which requires its holder to instruct students." Again, a clause in the original bill providing that an LAT could only be granted "if no holder of a practising certificate is available" did not survive into law. Yet the dilemma is clear: an LAT which is readily granted and regularly renewed could be an easy method of circumventing the registration requirement.
- 2.37 Some people to whom we spoke thought that LATs are sometimes harder to obtain than they should be. One difficulty may be that they are presumptively limited to one year,²¹ in which case if a person wishes to be reappointed there must be a further application the following year. That requirement can result in a lot of applications which take time to process. It may be worth considering whether an LAT might more readily be granted for a period of up to, say, three years. We think a general review of the provisions of the Act relating to LATs would be desirable.
- 2.38 We return to the concept of "suitable" staffing as a requirement for initial and ongoing registration. The first component of suitability of staffing is that teachers must meet statutory requirements. We do not think that teachers in private schools should be exempted from them. Even though this is clear from reading the Act, we think there is value in reiterating this in the definition of "suitable."
- 2.39 We think there should be a second element too, namely that the staffing at the school should be appropriate to the age range and level of the students, the curriculum taught at the school, and the size of the school. There was a division of opinion amongst submitters on this last matter. Some were concerned

19 Education Amendment Act 1996.

20 Education Act 1989, s 120A(2).

21 Education Act 1989, s 130E.

that we were supporting the introduction of a staff-student ratio. We are not. We know that there is no magic formula for the calculation of class sizes. It depends on the teaching methods used. But it seems to us that the size of the school can never be unrelated to the number of teachers. A small country school will obviously need less teachers than a large city one.

RECOMMENDATION

R11 It should be a criterion that teachers must meet statutory requirements, and that the staffing of the school be appropriate to the age range and level of the students, the curriculum taught at the school, and the size of the school.

Curriculum

- 2.40 We found the formulation of criteria for curriculum the most difficult of all the questions. The freedom to choose an appropriate curriculum is one of the hallmarks of a private school. The curriculum it offers is often one of its most important points of difference. While most private schools do in fact teach to the national curriculum there is no requirement that that be so. Some schools teach to the International Baccalaureate, others to the Cambridge International Examinations. Yet others have innovative curricula of their own. How then does one assess what is “suitable”?
- 2.41 It is important that any definition not be too prescriptive. We noted in the issues paper that for some time regulations in New Zealand laid down a prescriptive requirement for curriculum which expressly purported to apply to every registered private secondary school.²² These regulations were neither applied nor enforced for many years before their repeal in 1998. It appears likely that their express application to private schools was ultra vires in any event, at least since 1964.
- 2.42 In our issues paper we put forward five possibilities for deciding what is a “suitable” curriculum. One which attracted a degree of support was one that ensured that students develop numeracy and literacy skills. Yet by prescribing only two elements it might be thought not to say enough; on the other hand the element of prescription it introduces (however minimal) may not be an appropriate precedent.
- 2.43 Some of our submitters put forward suggestions which did not lack attraction. One was that a school should have a curriculum which
- is defined, structured, and internally consistent;
 - reflects the unique character and educational ethos of the school; and
 - gives students the opportunity to achieve nationally or internationally recognised standards in the core subjects of language, mathematics and science.

22 Education (Secondary Instruction) Regulations 1975, r 4(1). These dated back to 1945. It seems doubtful whether their continuance was authorised by the Education Act 1964.

- 2.44 However most submitters tended to favour a provision which is outcome-based: one, in other words, which concentrates on the purpose and effect of the education. The issues paper put forward two possibilities for an outcome-based formulation. We have settled on a slightly modified version of the second of those:²³

The curriculum should be such as to enable students to leave school able to participate in and contribute to their own community and New Zealand society as a whole.

- 2.45 As one submission put it, by following an outcome-focussed approach “one protects the schools’ right to follow their own unique approach to achieve the desired outcome. We favour this degree of flexibility.”
- 2.46 We repeat that settling on a definition of suitable curriculum is no easy matter, and even though we are clear about the definition we propose we acknowledge that even this might be criticised as too open-ended. But we believe it is a step forward from what currently exists.

RECOMMENDATION

R12 It should be a criterion that the curriculum be such as to enable students to leave school able to participate in and contribute to their own community and New Zealand society as a whole.

Guidelines

- 2.47 We asked in the issues paper whether it would be helpful to have non-statutory guidelines in some of the above matters which might go into greater detail than the Act is able to. There was a division of opinion amongst submitters on the desirability of this. We have decided to make no recommendation on this matter. There is a danger that guidelines might over time take on a normative character which could compromise the freedom which we have said is so important in the private school sector.

Standard of tuition

- 2.48 Under section 35A another ingredient of efficiency is:²⁴

Giving students tuition of a standard no lower than that of the tuition given to students enrolled at [a state school of equivalent level].

- 2.49 Students therefore are not to be disadvantaged by attending a private school. If, as some do, they transfer to a state school they should be able to make that transition without undue difficulty.
- 2.50 This is not a requirement at the provisional registration stage. It is assessed when the school is actually operating.

²³ We note the formulation of the New York Court of Appeal in *Campaign for Fiscal Equity Inc v State of New York* (2003) 100 NY 2d 893 where it said that the goal of education is “meaningful participation in contemporary society.” It made particular reference to voting and jury service.

²⁴ Education Act 1989, s 35A(1)(d).

- 2.51 “Standard of tuition” is an expression which might be thought to convey both mode of curriculum delivery and the outcomes achieved. The question, in other words, is: is the school educating its students effectively? Although in some ways this is the most important criterion of all there was not much enthusiasm amongst submitters for trying to tease out the concept any further by analysing and listing components such as lesson planning, modes of assessment and monitoring of standards. To do this would be to state the obvious.
- 2.52 However one matter did generate some discussion: the question of whether *regularity of instruction* should be specifically referred to as a component of the standard of tuition. As we noted in our issues paper there should be no rigid prescription about this.²⁵ There is no magic in a 9am to 3pm day and schools might, if they wish, be able to develop effective alternatives to it. Innovative methods of facilitating learning might require less staff-student contact than we have been used to in the past. Yet there must be a limit. Contact cannot be allowed to be so infrequent that students are unable to get proper guidance and help when they need it. We note that one of the few requirements of home schooling is that students must be taught “at least as regularly” as in a school.²⁶ So while we do not wish to be so prescriptive as to lay down a requirement of actual contact hours we believe that regularity of instruction should be one factor to be considered under this criterion. Our recommendation is that this criterion should provide that in considering the standard of tuition, matters to be taken into account include the mode of curriculum delivery, and the regularity of instruction.
- 2.53 We considered also including a reference to “the outcomes achieved by the students”. The standard of tuition might be expected to be reflected in the performance of the students. But in the early stages of a school’s existence there may be insufficient evidence of this, and even later it could be difficult to assess. So we have opted to omit it.

RECOMMENDATION

R13 In reviewing the standard of tuition matters to be taken into account should include the mode of curriculum delivery and the regularity of instruction.

Student welfare

- 2.54 In this day and age one expects schools to pay attention to the welfare, both physical and emotional, of their students. In the hardier days of the early twentieth century when the Act’s provisions were devised such considerations were less thought of. Today an absence of pastoral care and counselling, and a tolerance of bullying, for example, would be legitimate cause for criticising a school. ERO believes that the existing criteria do not give it sufficient power to comment on such matters, unless it can fit them under some other head such as “standard of tuition” or “suitable staffing.” We think that the registration criteria, both initial and ongoing, should contain a requirement that a school must provide for the welfare, both physical and emotional, of its students.

25 New Zealand Law Commission *Private schools and the law* (NZLC IP12, Wellington, 2008) para 7.73.
 26 Education Act 1989, s 21(1)(b).

A form of words which attracts us is that used in the NSW legislation: “The school provides a safe and supportive environment that includes policies and procedures that make provision for the welfare of students.”²⁷

- 2.55 There was widespread support in the submissions for such a provision, although one or two thought it was so “motherhood and apple pie” that it should be left to go without saying. However if one is to list criteria for registration against which a school is to be assessed and reviewed, it would be strange in the 21st century to omit this one.
- 2.56 The only remaining question is whether one needs to spell out the requirement any more fully, by providing for example that there should be adequate provision for counselling and advisory services, pastoral care, provision for dealing with students who are ill at school, the availability of a fair complaints system and adequate supervision. We do not think it is necessary to go into this level of detail. We think the general statement we propose is sufficient.

RECOMMENDATION

R14 It should be a criterion that the school provide a safe and supportive environment that includes policies and procedures that make provision for the welfare of students.

Patriotism and loyalty

- 2.57 The legislation currently requires that a private school must provide suitably “for the inculcation in the minds of students of sentiments of patriotism and loyalty.”²⁸ This requirement dates back to 1921.²⁹ Given that time of origin, its presence in the legislation is perhaps not surprising: anti-New Zealand sentiment was understandably feared when war was so fresh in the memory. Today, no doubt, pride in one’s country is still praiseworthy, and, as one submitter told us, loyalty is no bad thing either. Nor is it thinkable that a school should be able to be set up with the principal purpose of training saboteurs or terrorists.
- 2.58 But in an age when the freedom to impart information and opinions is protected by the Bill of Rights Act, the language of section 35A seems strangely outdated. The Education Review Office has difficulty assessing schools against such a criterion. What is needed today is a form of words which reflects the ideals of good citizenship and respect for the law. As one submitter put it “private schools should encourage virtues such as patriotism and citizenship, community and common good as part of the school curriculum.” Most submitters agreed that there should be some modernisation of language, although there was a lack of unanimity as to how best to express it. There was however some support for the wording we suggested in our issues paper. We recommend a revised form of words as follows:

Supporting and promoting the principles and practice of New Zealand democracy, including respect for the law and the rights of others.

²⁷ Education Act 1990 (NSW), s 47(h).

²⁸ Education Act 1989, s 35A(1)(c).

²⁹ Education Amendment Act 1921, s 7(1).

RECOMMENDATION

R15 The current “patriotism and loyalty” requirement in s 35A(1)(c) should be replaced by a requirement that the school support and promote the principles and practice of New Zealand democracy, including respect for the law and the rights of others.

- 2.59 There are three further comments we would make on this matter. First, this requirement will, and should, be met in different ways by different schools in accordance with their own philosophy and special character. There is no set way in which these sentiments can be introduced to students. Secondly, there is a question as to whether this requirement should be part of the curriculum and thus included as an element of the suitability of the curriculum, or whether it should be a stand-alone requirement. There was a division of opinion amongst submitters on this, but we prefer that it should be a stand-alone requirement. It will often not be something that is taught as a separate segment of the curriculum, but rather an attitude which colours the teaching throughout. Thirdly, the requirement of section 35A is accompanied by a little-known provision which remains unrepealed and unamended in what is left of the Education Act 1964. Section 162 of that Act provides:

162 Teachers to take oath of allegiance

- (1) No person shall be employed or shall continue to be employed, or shall act as a teacher, in any State primary school, secondary school, technical institute, community college, teachers college, endowed school, or private school or in any teaching position under the control of the Ministry of Education or under an education board unless, in the case of a New Zealand citizen, he has made and subscribed an oath or affirmation of allegiance, and, in any other case, he has made and subscribed in the prescribed form an oath or affirmation that he will not, directly or indirectly, use words or be concerned in any act which would be disloyal to Her Majesty if those words were spoken or written, or that act was committed, by a New Zealand citizen.
- (2) If any person is employed or continues to be employed, or acts, in a private school in contravention of this section, the managers of that private school commit an offence, and shall be jointly and severally liable on summary conviction to a fine not exceeding \$100.
- 2.60 This provision again dates back to 1921. The fact that the offence provision in subsection (2) applies only to private schools suggests a concern that at that time they were more likely to harbour dissidents and opponents of the state. Some organisations and persons with whom we raised this had never heard of this provision. It is clear that it is generally honoured in the breach rather than the observance. The fact that the fine has remained the same for 88 years suggests that no one is much concerned about it. It was proposed for repeal in the Oaths Modernisation Bill 2005, but that bill remains unenacted. We recommend that section 162 be repealed as part of the current reform, even though subsection (1) applies to both state and private schools.

- 2.61 Any teacher who incited unlawful conduct could be dealt with under the provisions of the Crimes Act,³⁰ as could any school managers who encouraged such incitement. Moreover the school itself would fail to meet the reworded criterion for registration which we have recommended in paragraph 2.58.

RECOMMENDATION

R16 Section 162 of the Education Act 1964 should be repealed.

Governance and management

- 2.62 In the issues paper we suggested that “viability” should be added to the list of criteria for registration, initial and ongoing.³¹ We suggested that if viability were to be assessed the following facts 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.

Submissions on this topic varied, and some legitimate concerns were expressed.

- 2.63 We believe that it is entirely appropriate that robust governance structures and administrative and management arrangements should be a criterion. It should be evident that a school will be, and is being, properly run. However the other aspects of the proposed viability criterion are more controversial. The requirement that there be suitable premises, equipment and staffing themselves imply that the means are available to provide them. Any impending financial failure is likely to manifest itself in a decline in these essentials. There is a question whether it is necessary to make financial viability a separate requirement.
- 2.64 The criterion would be difficult to demonstrate and assess with any degree of confidence. The income of a private school is dependent on its roll, and rolls are unpredictable from year to year. In harsher economic times there can be sudden reductions in enrolment which could not have been readily foreseen. Moreover, some private schools have begun their existence with surprisingly little in the way of resource, yet through the dedication and faith of teachers, managers and parents they have not only survived, but have grown in strength in ways which would have been difficult to predict at the outset. We have been impressed by the degree of dedication and commitment in many private schools. Many small businesses take a risk at their inception. Private schools are no different, and we should be reluctant to discourage enterprise. Even in hard times schools which are struggling cope in different ways: by borrowing, by realising assets, by merging with other schools, or perhaps by applying to become an integrated school. This happens now without the intervention of the state. One submission put it this way:

30 Crimes Act 1961, s 311(2).

31 New Zealand Law Commission *Private schools and the law* (NZLC IP12, Wellington, 2008) para 7.48.

In the current economic climate, private schools are experiencing significant pressure on roll, both with regards to new applications and students withdrawing for financial reasons. Schools need to cut back costs accordingly to offset decreased revenue. However any audit of the roll as part of such a review could be quite short-sighted and flawed unless the wider context was taken into consideration. We also wonder how viability would be assessed. Schools manage their budgets differently and a school with significant reserves or assets could operate at a loss in a particular year because of a large capital investment (i.e. high loan interest charge). If the annual accounts were considered in isolation, it may appear that they are no longer viable.

- 2.65 Our principal concern should be with the provision of proper education for the students who are enrolled at the school. If, whether because of failing finances or any other reason, the quality of that education is at risk, action can be taken under the other criteria. There is also a real issue as to how far the state should take on itself the responsibility of certifying that there is no risk that a school will fail financially. The state is not a guarantor, and should not be in any position where it could be perceived as one.
- 2.66 We note that the Australian position where financial viability is a strong feature is different. The state subsidy there is significant, and the state therefore has an interest in protecting its investment; moreover a much higher proportion of students are in private education.
- 2.67 So we recommend that sound governance and management structures and practices should be a criterion, but not “viability” as we initially envisaged that concept.

RECOMMENDATION

R17 It should be a criterion that the school have sound governance and management structures and practices.

NEW PREMISES AND CAMPUSES

- 2.68 Private schools sometimes acquire new premises and even new campuses. There is no requirement in the current legislation that such acquisitions be notified, nor any requirements for assessment or review of them. We understand that sometimes there is in fact no notification of such developments to the Ministry or ERO.
- 2.69 There are a number of possible variants. First, a school may expand by the acquisition of a new building (for example a classroom or gymnasium) on the same site. That is a frequent occurrence. We do not think there need be any formal notification of this. ERO will obviously take note in its next review.
- 2.70 Secondly, sometimes, rather than acquiring a new building on the same site, a school may acquire additional premises in the same city or town. It may perhaps use them for teaching a particular set of subjects, and students may need to move between the two sites in the course of a day. In this case we believe that there should be notification of the acquisition to the Ministry, and that the new premises should be inspected and approved as “suitable.” The other criteria for registration of the school will remain the same, and are not in need of separate attention.

- 2.71 A third scenario is where a school, which has perhaps outgrown its original site, abandons it and moves in its entirety to new premises. Here ownership, management, curriculum and teaching staff and probably equipment remain the same, but the entire premises are new. We believe here there should also be notification of the change and a fresh assessment of the premises' suitability.
- 2.72 The fourth scenario is where the school establishes an additional campus, which may be in a different city, or in a different suburb, from the original school. Sometimes this may happen as the result of a school taking over another. This scenario is different from the previous two, in that the new campus is effectively a separate school catering for a different body of students. Its management, ownership and (presumably) curriculum will be the same as the original school, but its premises, equipment and all or most of its teachers will be different. We believe that in this case the new campus should require notification and registration. We believe this should follow the normal procedure of provisional registration and a review by ERO followed by full registration. It is effectively a new school.

RECOMMENDATIONS

- R18 Where a school establishes a new campus catering for a different body of students, the new campus should be required to undergo the same registration process as a new school.
- R19 Where a school moves premises, or acquires additional premises, it must notify this to the Secretary, who must assess the suitability of the premises.

REGISTRATION PROCESS

- 2.73 Currently the process for registration is that the Ministry of Education assesses the application in the first instance and decides whether premises, staffing, equipment and curriculum are likely to be suitable. If that assessment is favourable the school is provisionally registered. Then, within 6 to 12 months, ERO will review the school in operation and assess it against all the criteria in the Act. If that review is favourable the school will be fully registered.³²
- 2.74 We see no reason to change the present process, and there was no wish amongst submitters that that should happen. It is difficult to see how full registration could be granted at the outset: one cannot really know how good a school is until it has students, and can be observed in actual operation. There is no doubt some degree of risk to the initial intake of students if the school in which they have commenced their education may not survive beyond 6 to 12 months, but there is no obvious way of avoiding this. We do however suggest that one change could be made. The current legislation provides no indication as to whether the period of provisional registration can be extended if a school does not quite measure up on the first review. We know that on occasion a very short extension beyond the due date has been informally allowed by the agencies. We think this should be formalised, to forestall any argument that on the expiry of the 12 month period the provisional registration expires and any subsequent final registration is thus invalid. Most submitters agreed with the suggestion in our issues paper

³² Education Act 1989, s 35A(6) and (8).

that provisional registration should be able to be extended. This should be exceptional, and would happen only where the areas for improvement were few, and improvement was clearly achievable.

RECOMMENDATION

R20 The Secretary should be able in exceptional cases to extend the expiry date of provisional registration.

ERO REVIEWS

- 2.75 ERO's review function is referred to three times in the current legislation:
- (i) Under section 35A(1), ERO must review a school between 6 and 12 months after provisional registration. On the basis of that review the Secretary of Education will decide whether or not to fully register the school.
 - (ii) Under section 35A(9) ERO must review a school at the end of no more than three years and every three years thereafter.
 - (iii) Under section 325 ERO administers, when directed by the Minister, or on ERO's own motion, reviews of "applicable organisations". Such reviews may be either general or relating to particular matters. There are powers of entry and inspection. The definition of "applicable organisation"³³ seems clearly to cover private schools as well as state schools.
- 2.76 Nevertheless there has been some uncertainty as to whether ERO can currently do more than review a private school against the "efficiency" criteria in section 35A. We take the view, which ERO itself shares, that the current section 325 does enable ERO to go wider than this in appropriate cases. If there were perceived difficulties with a school the Ministry could request, or ERO could decide, that there be a review, which might be general, or "related to a particular matter". Even if in the course of an ordinary triennial review ERO had particular concerns about a matter going beyond the current efficiency criteria (student welfare for instance) we believe it would even now be entitled to report on it under the current legislation. Given the fact, however, that some have questioned this, we think it would be desirable for the matter to be clarified in the Act.
- 2.77 Currently ERO review reports for private schools tend to be shorter than review reports for state schools. This different approach is reasonable. Parents, for whatever reason, have opted to take their children out of the state system, and many feel that it is inappropriate that private schools should be reported on as extensively as state schools. This is ERO's own view, and we believe that even if it were made clear in the legislation that ERO has wider powers than this, there would usually be no change in the style of report they produced on a private school. They are not funded for a more extensive exercise in any event.
- 2.78 At the time of writing an Education Amendment Bill is before Parliament. It is independent of this review. It provides that the present section 35A(9) be repealed and replaced by a provision that ERO reviews of private schools should take place under part 28 of the Act, the part in which section 325 appears. The purpose of this is to remove the requirement that private schools be reviewed

33 Education Act 1989, ss 323 and 324: an "applicable organisation" is one which provides an "applicable service" which includes one, inter alia, whose provision is "regulated by statute".

every three years. There is currently no three-year requirement in respect of state schools and it does seem anomalous that whereas an excellent state school may be reviewed no more frequently than every four or five years an excellent private school is subject to a triennial review. The proposed amendment would also accomplish what we have suggested. It would be clear that the power to review a private school is as extensive as the power to review a state school. And if our recommendations for the expansion of the legislative criteria for private schools are adopted, much of the current doubt disappears anyway. As to the *style* of report, in exceptional cases where there were clear difficulties with a private school the review report could be more detailed than usual. However in an ordinary case there would be no reason to depart from the current short reporting style for private schools.

RECOMMENDATION

- R21 It should be clarified that the Education Review Office has power to review a private school on the same basis as a state school when that is desirable.

Chapter 3

Compliance and enforcement

- INTRODUCTION 3.1 We anticipate that serious problems in private schools will be rare. One purpose of the recommendations set out in this chapter is to ensure that the law is capable of dealing with serious problems should they ever arise. A second purpose is to develop a range of options that are proportionate and appropriate to deal with more minor problems. The emphasis where possible would be on assisting the school rather than punishing it.
- 3.2 Under the existing law there are fines available for breaches of some, but not all, statutory duties to which private schools are subject. Apart from these limited offence provisions, deregistration is the only available sanction. We have noted several problems with this situation:³⁴
- (1) There are no intermediate sanctions available to deal with relatively small breaches of the law. Smaller breaches, then, must either be dealt with in a disproportionately severe way (by deregistering the school) or not be dealt with at all.
 - (2) Currently deregistration may only occur if a school breaches one or more of the registration criteria and thereby becomes not “efficient.” Some problems that could occur, and which might warrant deregistration, may not fall within the registration criteria: persistent and serious breaches of statutory duties, for example.
 - (3) There is no clear process for the Ministry to follow if it is considering deregistering a school. This could result in an unfair process.
- ISSUES PAPER PROPOSALS³⁵ 3.3 In our view, there should be a flexible, graduated and clear process. There needs to be the ability to take actions short of deregistration, so that problems not meriting such drastic action can be addressed in a proportionate way. We also believe that there ought to be sanctions available if private schools breach statutory duties which fall outside the registration criteria. In the issues paper, we set out a proposal for such a process.

³⁴ See further New Zealand Law Commission *Private schools and the law* (NZLC IP12, Wellington, 2008) 67-68.
³⁵ This section summarises proposals that are set out in more detail in New Zealand Law Commission *Private schools and the law* (NZLC IP12, Wellington, 2008) 68-75.

Breach of duties and compliance assurance process

- 3.4 In the issues paper, we proposed that sanctions be made available for breaches of all duties that apply to private schools. We proposed that the compliance assurance process, outlined below, would be the mechanism through which breaches of statutory duties would be sanctioned.
- 3.5 Deregistration would be the potential ultimate outcome of this process, but would only very rarely be used.
- 3.6 The key elements of the process we proposed in the issues paper were:
- The actions set out below would be available where:
 - a private school is not complying with one or more of the registration criteria;
 - a private school breaches one or more statutory duties; or
 - there is serious criminal activity occurring in a private school.
 - In the ordinary course of events, the first step would be for the Ministry to give the school notice. The school would be given a reasonable time within which to rectify the problem.
 - In a case where a number of different actions needed to be taken over a period of time in order to satisfy the registration criteria, the school might be asked to produce an action plan. ERO would work with the school to implement the action plan.
 - After the expiry of the time the school had been given to rectify the problem, there might be a further ERO review to assess whether the school now complies. This would not be necessary in the case of a simple breach of duty.
 - If a school still did not comply after being given a reasonable time, there would be a range of intermediate sanctions available. These could include:
 - fines;
 - 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; or
 - suspending the school's registration.
 - Deregistration would continue to be available as a last resort, where there had been a consistent and/or serious failure to comply or where criminal activity is occurring. The grounds for deregistration would not need to be cumulative.
 - There would be an expanded process that the Ministry would have to follow if it wished to deregister a school. The Secretary would be required to take all reasonable steps to get all relevant information and to consider an ERO report, as now.³⁶ There would also be new requirements to ensure that a fair process was followed. The Secretary would have to give the school adequate notice that deregistration was being considered and the reasons for this, disclose all information not already known to the school and give the school an opportunity to make submissions and contest the deregistration.

³⁶ Education Act 1989, s 35A(11)(1).

- We tentatively proposed that there should be a right of appeal against deregistration.
- If there was a serious threat to students' safety or welfare, the school could be closed temporarily, pending deregistration. The deregistration process would be fast-tracked in this situation.

SUBMISSIONS

- 3.7 Submitters generally agreed with the approach set out above.
- 3.8 The majority of submitters agreed that all statutory duties on private schools should have sanctions for their breach. One submitter noted that this is already the case, as the Crimes Act 1961 contains an offence of contravention of statute.³⁷ But this is not a satisfactory position in which to leave matters. While it is true that there is such an offence, it is very infrequently used. Its ambit is unclear. It is virtually obsolete in practice.
- 3.9 The majority of submitters agreed with our proposed compliance assurance process, and with the roles of the Ministry and ERO in relation to it. Some noted that the process should be appropriate to private schools, and that it should not lead to a greater degree of intervention in private schools than has been the case until now. A few submitters felt that there are not enough problems in private schools to justify the development of a new process.
- 3.10 Almost all submitters believed that the Act should set out a process for deregistration, and that there should be a right of appeal against deregistration. One submitter believed that the Ministry should not have the right to deregister a private school. A few suggested that an independent body such as a tribunal, rather than the Ministry, ought to make decisions about deregistration.

RECOMMENDATIONS

- 3.11 On the whole, we believe that the proposals set out in the issues paper should be adopted, although with some slight modification. We set out our recommendations below.
- 3.12 The intention of these recommendations is to provide a menu of options that can be used if necessary. Any action taken should be proportionate to the circumstances of the case and the school in question. Sometimes the emphasis would be appropriately placed on assisting rather than taking punitive action. We recommend that this part of the legislation contain a purpose provision to reflect this.

RECOMMENDATION

- R22 The legislation should contain a purpose provision stating that any action taken in relation to a private school must be proportionate to the problem sought to be resolved.

³⁷ Crimes Act 1961, s 107, noted in New Zealand Law Commission *Private schools and the law* (NZLC IP12, Wellington, 2008) 68.

Grounds for action

- 3.13 The grounds upon which the Secretary may take action should be:
- That a private school is not complying with one or more of the registration criteria;
 - That a private school has breached one or more statutory duties; or
 - That there are reasonable grounds to believe that serious criminal activity is occurring in a private school.
- 3.14 An outstanding question from the issues paper was the threshold at which the serious criminal activity ground should be applicable before the Secretary can take any action. Obviously unsubstantiated allegations should not be enough. However, waiting for a conviction before taking any action at all could in some cases expose students to an unacceptable level of risk. Their welfare must be the primary consideration. We therefore favour requiring reasonable grounds to believe that serious criminal activity is occurring in a school. Whether action should be taken would obviously depend on the level of the alleged offending. Even then, of course, only *some* of the actions we list below would be appropriate in such a situation. We think that this strikes an appropriate balance.
- 3.15 In our view, “serious criminal activity” should be defined as offences involving fraud, harm to children or violence, sexual offences, and crimes involving dishonesty.

RECOMMENDATION

- R23 The Secretary should be empowered to act where:
- a private school is not complying with one or more of the registration criteria;
 - a private school has breached one or more statutory duties; or
 - there are reasonable grounds to believe that serious criminal activity is occurring in a private school.

RECOMMENDATION

- R24 Serious criminal activity should be defined as offences involving fraud, harm to children or violence, sexual offences, and crimes involving dishonesty.

Types of action and process

- 3.16 We recommend a graduated process, with a range of possible actions increasing in seriousness. Ultimately this process may lead to deregistration, but this should be a last resort. We envisage this process as a flexible ‘menu’ of options: while in the ordinary course of events it would be appropriate to follow the process through as set out below, there should be flexibility to add or dispense with some steps, as required by particular circumstances.

Notices

- 3.17 Ordinarily, the first step should be that the Ministry would give the school notice that, for example, it is not complying with one or more of the registration criteria, or is breaching a 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 possible consequences if the school does not.
- 3.18 There may be some cases, for example where a school has been repeatedly warned and has not rectified the problem, where a warning may not be necessary before action can be taken.

Action plans

- 3.19 In some instances, particularly where a school is failing to meet registration criteria such as having a suitable curriculum or equipment, the school might need to take a number of different actions over a period of time in order to remedy the problems. In this critical period the emphasis should be on assisting the school. Therefore we recommend that an action plan would be a useful tool to help the school reach the required standard. A plan would set out goals and identify the steps that need to be taken to reach those goals, together with time estimates for each step. We understand that this has been done informally in the past: it makes sense to provide for it expressly in the legislation.
- 3.20 An action plan would be submitted to the Ministry, and we envisage that it and ERO would play a role in assisting a school to implement the action plan. An action plan would assist the Ministry and ERO because it provides identifiable actions and goals against which progress can be measured, and enables them to provide targeted assistance around the steps identified as necessary. It may be that an experienced person from the private school sector might be recommended as a mentor.

Further ERO review

- 3.21 Once the time the school has been given to rectify the problem has ended, there would need to be an assessment of whether the school now satisfies the required standards. Where this assessment involves consideration of the registration criteria, there would need to be an assessment by ERO.

Intermediate steps where the problem is not resolved

- 3.22 If a school still does not comply after being given notice and reasonable time to resolve the problem, a range of further actions should be available.
- 3.23 First, if a school can show good reason why it has not been able to resolve the problem within the time given, and that it expects to be able to resolve it within a certain time, it could be given further time.

3.24 However, if the problem has not been resolved and the school is unable or unwilling to resolve it, there needs to be provision for enforcement. The Ministry could proceed immediately to deregistration if it considered that the problems were particularly serious. However that would be unusual. We recommend that a range of lesser actions also be available. These should include:

- Prosecution (for those duties breach of which is currently an offence);
- Withdrawing some or all of the government subsidy to the school, or placing conditions on such funding;
- Imposing conditions on a school's registration (which might for example be that it ceases to use part of its premises or teach part of its curriculum);
- Requiring the school to inform parents that it does not comply with the registration criteria; or
- Suspending the school's registration.

All these actions were proposed in the issues paper, except for the possibility of withdrawing some or all government funding or placing conditions on this funding. This seems to us to be an appropriate incentive.

3.25 We envisage that most of the above actions would only rarely be needed. But it is important that they be available if required.

Deregistration

3.26 Deregistration is the final option available where a school still does not satisfy the registration criteria or consistently and seriously breaches statutory duties, or where serious criminal activity continues. The grounds should not need to be cumulative. That is, serious failure to comply with one registration criterion might sometimes be enough.

3.27 Section 35A(11) of the Education Act 1989 requires the Secretary to take all reasonable steps to get all relevant information and consider an ERO report before cancelling a school's registration. We think that these steps should continue to be required. In addition, we think that the legislation should set out some additional procedural requirements 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 cancellation of their registration. These requirements already apply at common law, but we think there is value in spelling them out in the legislation. Similar requirements exist for other educational institutions.³⁸

A right of appeal against deregistration?

3.28 While we tentatively proposed in the issues paper that a school that has been deregistered should have a right of appeal, and the majority of submitters agreed, we do not now recommend this. The decision to cancel a private school's registration is effectively a Ministerial decision, which will often be based on educational criteria which do not sit comfortably within the purview of a court. Judicial review, going to matters other than the substantive merits, would be

³⁸ Education Act 1989, ss 164 and 237 (relating to tertiary institutions and private training establishments).

available. We note that the Education Act provides for no appeal in the similar cases of the disestablishment of tertiary institutions and deregistration of private training establishments.

- 3.29 Perhaps at some future time consideration might be given to setting up an educational appeal authority, but that is beyond the scope of this review.

RECOMMENDATION

- R25 The following actions should be available if one or more of the grounds for action exist:
- Issuing a notice to comply;
 - Prosecution (for breach of the existing offence provisions);
 - Withdrawing some or all of the government subsidy, or placing conditions on funding;
 - Requesting that the school produce an action plan;
 - Requiring a further ERO review;
 - Requiring the school to inform parents that it does not comply with the registration criteria;
 - Imposing conditions on the school's registration;
 - Suspending the school's registration;
 - Deregistration.

RECOMMENDATION

- R26 The legislation should set out a more detailed process that must be followed before a private school can be deregistered. That process should incorporate the current requirements to take all reasonable steps to get relevant information and consider any ERO report, and there should also be new requirements to:
- Give the school adequate notice that deregistration is being considered and the reasons for it;
 - Disclose any relevant information not already known to the school; and
 - Give the school an opportunity to make submissions and contest the deregistration.

Immediate action in case of criminal behaviour or serious risk to students

- 3.30 If there is reasonable cause to believe that students' safety or welfare is at serious risk (in that harm is occurring or likely to occur), there must be an ability to remove children from the school immediately. In such cases, we recommend that the school's registration should be able to be suspended so that it can be closed pending further investigation. That investigation would determine whether deregistration was appropriate. If so, 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.

RECOMMENDATION

- R27 Where the Secretary considers that student safety or welfare is seriously at risk, there should be a power to close a school temporarily, pending an investigation into whether deregistration is appropriate.

Provision for students of a deregistered school

- 3.31 We raised the question in the issues paper whether there ought to be any obligation on the Ministry to assist students of a school that has been deregistered. Submitters generally felt that this was not necessary: information about what schools exist in an area is already available and if the students' parents wished to enrol them in the local state school the school would have to take them. We therefore make no recommendation on this matter.

Chapter 4

Other issues

SUSPENSIONS AND EXPULSIONS

Issues paper and submissions

- 4.1 In the issues paper, we proposed that the Act should set out some basic procedural requirements that private schools must adhere to when suspending or expelling a student. These would ensure that individual cases are dealt with in accordance with natural justice. They would include:
- Notice to 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.
- Contracts between private schools and parents might contain supplementary provisions consistent with these requirements, but not be inconsistent with them.
- 4.2 The majority of submitters supported this proposal. One submitter argued that schools should not have to provide details of their disciplinary procedures in advance, but rather they should be required to provide details promptly upon request, or when notifying a student and their parents of a proposed suspension or expulsion. Many schools told us that they already strive to ensure that their disciplinary procedures are in accordance with the principles of natural justice. Thus our proposals would impose no extra burden on them.
- 4.3 One school told us that all its students attend the school on full scholarships and that all students must board. They submitted that their position is not suited to requirements such as we are proposing. Rather than expelling a student, the student's scholarship is withdrawn at the board's discretion. This is often for reasons associated with "unsuitability for boarding" rather than the student's behaviour during class time. It is not seen as a disciplinary matter.

Recommendations

- 4.4 We continue to believe that the Act should spell out some basic procedural requirements to ensure a fair process, although we have modified the proposal we put forward in our issues paper.
- 4.5 The terms “suspension” or “stand-down”, as currently used in the Act in relation to state schools, refer to a temporary and immediate action taken by the school. State schools that suspend or stand-down a student are not required to give notice in advance. Often immediate action is required, and prior notice is impracticable. Rather, the student’s parents are entitled to attend a meeting of the board and to have their views considered before the board decides whether to lift or extend the suspension or to exclude or expel the student.³⁹
- 4.6 While we are still of the view that prior notice should desirably be given to parents prior to suspension where that is practicable, we have decided to recommend a process which is consistent with that in state schools. After a student has been suspended the parents should be notified, and the student and his or her parents should have the right to request that the suspension be lifted or varied, and to make submissions in support of that request.
- 4.7 For expulsions or exclusions, we continue to believe that the proposals set out above are appropriate.
- 4.8 In relation to providing details about disciplinary procedures, we think that schools should be required to provide details of their disciplinary procedures upon request. Information about disciplinary procedures should also be provided to students and their parents where the students are facing suspension, exclusion or expulsion. This is in line with the requirements for state schools.
- 4.9 We have considered the situation of the school referred to in paragraph 4.3 and understand its concerns. However it would be difficult to provide a definition of “exclusion” which did not cover their situation. The requirements we propose are not onerous.

³⁹ Education Act 1989, s 17B; Education (Stand-Down, Suspension, Exclusion, and Expulsion) Rules 1999, r 11, 12, 15 and 17.

RECOMMENDATION

- R28 The Act should set out the following basic procedural requirements that schools must adhere to after suspending and before expelling or excluding a student:
- (a) When a student has been suspended, notice should be given to the students' parents as soon as practicable afterwards, and they should have the right to request that the suspension be lifted or varied, and to make submissions in support of their request.
 - (b) Before expelling or excluding a student, schools should be required to:
 - Give adequate notice of the proposed expulsion or exclusion to the student and his or her parents; and
 - Provide the student and his or her parents with a reasonable opportunity to attend and be heard at a meeting.

RECOMMENDATION

- R29 Details of a school's disciplinary procedures should be required to be available upon request, and be provided to students and their parents when the students are facing suspension, exclusion or expulsion.

DISTANCE LEARNING AND CORRESPONDENCE SCHOOLS

Issues paper and submissions

- 4.10 In the issues paper we noted that there is some uncertainty as to whether the Act presently allows the registration of a private school that delivers its curriculum through distance learning. Our tentative view was that the Act probably does not prevent a private distance learning or correspondence school from being registered, but we believed this should be clarified. A school which has physical classes, supplemented on occasion with online materials, is not of concern. Nor are we concerned about organisations which are in the business of supplying software or online courses to schools. We are considering in this section a private school that delivers courses *entirely or substantially* through distance learning.
- 4.11 We noted some issues that would need to be addressed if a private distance learning school was to be permitted. First, the state correspondence school has strict rules about who is eligible. Only students who, for reasons such as geographic isolation, are unable to attend a local state school may be enrolled.⁴⁰ Would there be equivalent criteria for a private school? Another issue is how to give proper individual attention to each student's needs, emotional as well as educational, and to monitor students at risk. Finally, consideration would need to be given to how "suitable premises" would be assessed for such a school, or indeed whether premises should be required at all.⁴¹
- 4.12 Most submitters felt that the Act should allow a private distance learning school to be registered.

40 Education Act 1989, s 7; Ministry of Education *Correspondence School Enrolment Policy 2009* http://www.minedu.govt.nz/educationSectors/Schools/CurriculumAndNCEA/NationalCurriculum/CorrespondenceSchoolEnrolmentPolicy/Years_113_Enrolments.aspx (accessed 20 May 2009).

41 See New Zealand Law Commission *Private schools and the law* (NZLC IP12, Wellington, 2008) 79-80.

The current law

- 4.13 While we agree that the current law is not beyond argument, we now think after further consideration that it is more likely that it does not permit the registration of a private distance learning or correspondence school, for the following reasons. First, section 35A provides that the managers of an unregistered or proposed private school may apply for its provisional registration as a primary, secondary, or special private school, or as two or all of these. A correspondence school is not listed as one of the categories of private school that may be registered.
- 4.14 Secondly, the Act defines a correspondence school 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.” The reference is only to a state school.
- 4.15 Finally, it is difficult to see how the current Act’s requirement of “suitable premises” for a private school could be assessed in the context of a school that does not teach students on-site.
- 4.16 On the other hand, it could be argued that the Act does not expressly prohibit a private correspondence school. The minister plays no part in establishing any private school, so it could be argued that section 152(1) does not prevent the registration of a private correspondence school. There might also perhaps be a question whether a ‘virtual’ school is the same thing as a correspondence school.
- 4.17 While there are arguments that could be made both ways, on balance we now tend to the view that the legislation as it stands probably does not allow a private correspondence, or distance learning, school to be registered.

Recommendations

- 4.18 The question, therefore, is whether the Act should be amended to provide clearly that there can be a private correspondence, or distance learning, school. Such a school could provide competition for the state correspondence school, and give parents living in remote areas a choice. However, after deliberation, we have decided against such a proposal. If it were thought that the Act should allow the registration of such a school, there would be difficulties as to how that would be achieved. One problem would be determining whether there should be any restrictions on who may attend a private distance learning school. Eligibility for the state correspondence school is tightly circumscribed. Section 7 of the Education Act 1989 provides:

- (1) The Minister may from time to time, by notice in the *Gazette*, fix criteria for enrolment in early childhood, primary and secondary classes at correspondence school ...
- (2) No person shall be enrolled at a correspondence school unless –
 - (a) the board is satisfied that the person’s enrolment meets criteria then fixed under subsection (1); or
 - (b) the person is entitled under section 3 to free education at a State school, and the Secretary has directed the board to enrol the person.
- (3) The Secretary shall not direct the board of a correspondence school to enrol a person unless satisfied that the person cannot conveniently attend any State school (being a school offering education at the level, and in the subjects, required by the person’s parents or, as the case requires, the person) that is not a correspondence school.

This seems to reflect a policy that a correspondence school is a kind of ‘last resort,’ and students should only be able to receive their education this way if there are good reasons why they cannot attend a local school.⁴² There is perhaps an argument for saying that private schools should not be subject to these types of restrictions: if freedom of choice and parental autonomy are guiding principles in the private school sector, parents should arguably be able to choose a private school that operates entirely through distance learning. On the other hand, it would seem anomalous to have such different policies for state and private correspondence schools.

- 4.19 There would also probably need to be modified registration criteria, or even a separate set of registration criteria, for a private correspondence school. There would be a real question as to how the new registration criterion relating to student welfare would be met. Caring for, and monitoring the progress of, students enrolled in distance learning programmes is a most difficult exercise. Moreover reviewing such a school’s performance is itself not straightforward.
- 4.20 As a more general point, we have heard doubts expressed in some quarters about distance learning as a model of education for children and young people. There is a concern that it may be used as a kind of alternative education for some students who would arguably benefit from more face-to-face attention and care rather than less.
- 4.21 Given these concerns, we feel that there is a risk in increasing the availability of this kind of education, and are presently not convinced that private correspondence schools should be able to be registered. While, as we have set out above, we think that the Act as it stands probably does not allow for it, for the avoidance of doubt that should be spelled out.

RECOMMENDATION

- R30 The Act should be amended to make it clear that it does not allow for the registration of a private school that operates as a correspondence school, distance learning school, or school of a similar description.

⁴² The criteria of eligibility for 2009 appear on the Ministry of Education’s website, www.minedu.govt.nz.

STATUTORY
ARCHITECTURE

- 4.22 The current law about private schools is not contained in one place in the present education legislation. Section 35A, which contains the provisions about registration of private schools, is at the end of Part 3 of the 1989 Act, which otherwise relates to the enrolment and attendance of students at schools generally. Other provisions about private schools are scattered through the Act, and there are also provisions in the Education Act 1964.⁴³ It can take a very long time to discover them all.
- 4.23 Access to law is important. In the issues paper, we suggested that the provisions about private schools be collected in a separate part of the Education Act 1989, with a further composite reference to all provisions that apply to both state and private schools. This would make it easier for private schools and others with an interest to find and understand the law that applies. We also noted another possibility: that there could be a new Private Schools Act rather than having the law about private schools contained in the Education Act, but we did not favour this option.
- 4.24 Almost all submitters agreed that there should be a dedicated part of the Education Act for private schools. We recommend this.

RECOMMENDATION

R31 The law relating to private schools should be contained in a dedicated part of the Education Act 1989.

- 4.25 The issues paper also raised a number of points to do with the way the registration criteria are expressed: whether they should be in statute, regulations or non-statutory guidance. We noted that our preferred approach, and the one which we have taken in formulating our proposals for reform, is for the statute to list indicative factors to be taken into account in assessing whether the broad criteria (for example, “suitable curriculum”) are satisfied. This approach has the benefit of retaining flexibility, as the factors are indicative rather than being a list of rules. It also provides more guidance than the existing law, as it specifies the relevant factors. We continue to favour this approach, and our recommendations are based on it.
- 4.26 Submitters generally did not support the idea of further regulations or other guidance. We agree, and prefer that the provisions relating to private schools, and any amplification of them, be contained in primary legislation (that is, the Education Act).

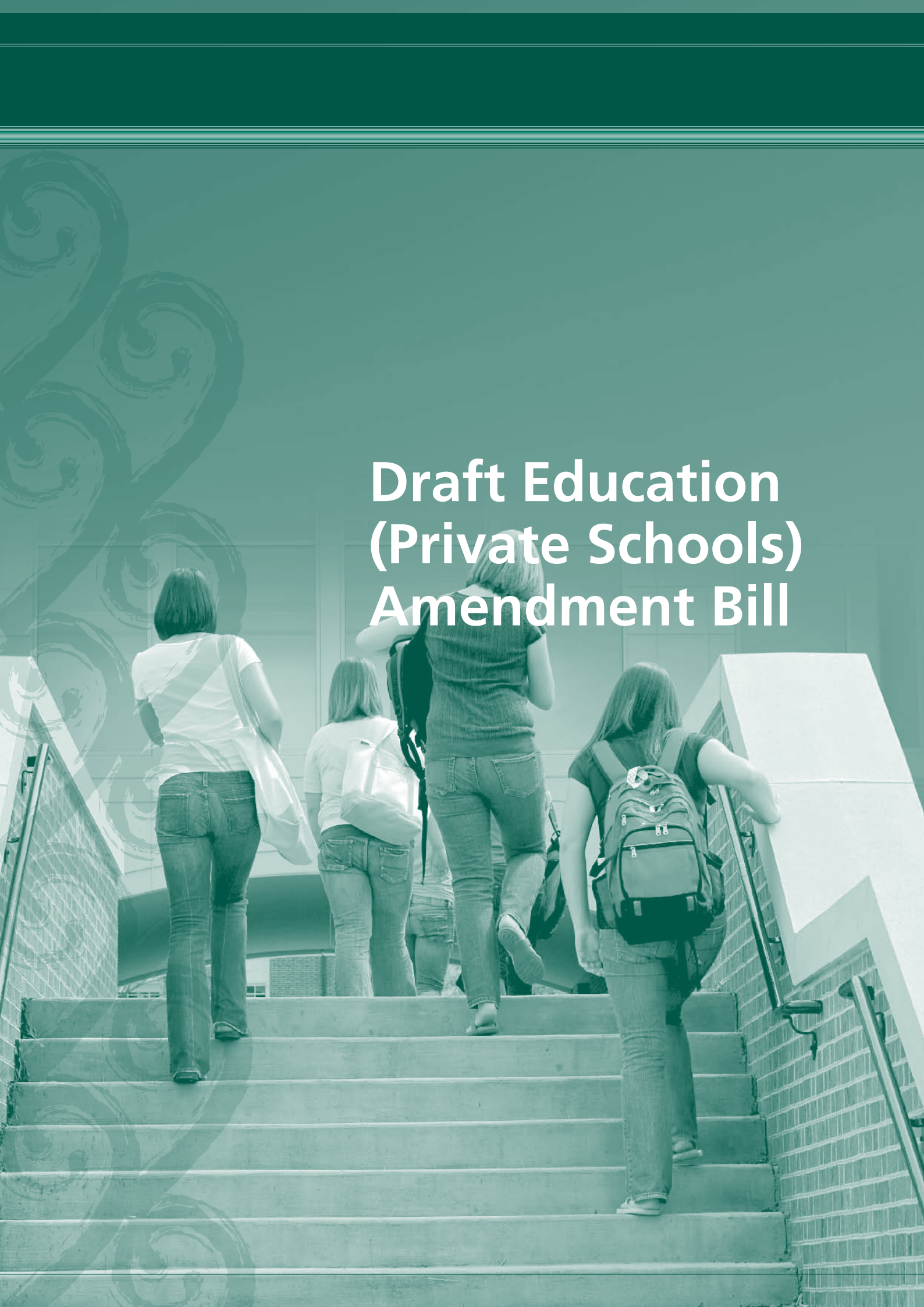
43 For a description of the existing law relating to private schools, see New Zealand Law Commission *Private schools and the law* (NZLC IP12, Wellington, 2008) Chapter 4.

Chapter 5

Conclusions

- 5.1 The recommendations in this report serve a number of purposes.
- 5.2 First, some of them are necessary to ensure the safety and the welfare of students. To this end they close gaps in the present legislation. Among them are the requirement that managers applying to register a private school are fit and proper persons; that a school must provide a safe and supportive environment for its students; and that there be power to suspend registration if criminal activity is occurring in a school. Some of these eventualities may be unlikely, but it is obviously necessary that they be able to be dealt with should they arise.
- 5.3 Secondly, some give more flexible power to take action against schools which are not meeting the criteria which the Act imposes on them. The current position, when the remedy is deregistration or nothing, is manifestly unsatisfactory.
- 5.4 Thirdly, some go to ensuring that processes are fair and in accord with natural justice: for students and their parents in the cases of suspensions or expulsions, and for a school in the rare case when deregistration is in contemplation.
- 5.5 Fourthly, some go to clarify provisions which were previously uncertain or ambiguous: whether a private school must have nine students, for example, and whether there can be a private correspondence school.
- 5.6 Fifthly, some give more clarity and detail to open-ended criteria: “suitable” curriculum and premises, for example. Criteria like that allow too much subjective judgment, and could lead to inconsistency of application.
- 5.7 The interests of the students have been foremost among the matters which influenced our deliberations. But we have had to weigh other interests in the balance. One is the right of parents to choose the education they want for their children. We have had to be alive to the importance of flexibility in matters such as curriculum, otherwise the very *raison d’être* of a private school would be damaged.
- 5.8 We have also tried to ensure that any additional burdens placed on the schools themselves are proportionate and reasonable. In fact the new requirements will incur very little in the way of compliance costs for the vast majority of schools. Those new requirements are:

- That the managers must be fit and proper persons. (This will involve a small administrative burden, but only on the initial application for registration or when the management shifts in its entirety to another entity).
 - That a safe and supportive environment must be provided for students.
 - That the school must have sound governance and management structures and practices.
 - That if new premises and new campuses are acquired they should be notified and processed.
 - That fair processes must be adopted when suspending and expelling students.
 - That if a school is failing to meet its statutory obligations it can be required to modify its practices so that it complies.
- 5.9 The vast majority of schools meet these new requirements now. Fresh compliance costs will be minimal. Moreover, if ERO reviews are held less frequently than once every three years the burden of preparing for reviews will be proportionately reduced.
- 5.10 Finally, we have tried to ensure that the government agencies which have involvement with private schools (mainly the Ministry of Education and the Education Review Office) have sufficient powers to do their job effectively, but that they too do not have to incur compliance costs which are out of proportion to the benefits gained. There will be new criteria to take into account in assessing registration applications and undertaking periodic reviews, but they will not require significant resource. The list of schools which the Ministry will be required to publish will contain information currently held by it. The expanded range of actions which can be taken against non-complying schools will not often be needed, and when they are should lead to swifter and more efficient resolution of the problem than is possible at the moment.

A photograph of four students walking up a wide set of concrete stairs. The students are seen from behind, moving away from the camera. They are dressed in casual attire like jeans and t-shirts. Two of the students are carrying backpacks. The stairs are flanked by brick walls and metal railings. The background shows a modern building with large windows. The entire image is overlaid with a teal color and a decorative swirl pattern on the left side.

Draft Education (Private Schools) Amendment Bill

**Education (Private Schools)
Amendment Bill**

Draft prepared by Parliamentary Counsel for
the New Zealand Law Commission

Education (Private Schools) Amendment Bill

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The Parliament of New Zealand enacts as follows:

- 1 Title**
This Act is the Education (Private Schools) Amendment Act **2009**.
- 2 Commencement**
This Act comes into force on [date to come].
- 3 Principal Act amended**
This Act amends the Education Act 1989.

Part 1
Amendments to principal Act

- 4 Interpretation**
 - (1) Section 2(1) is amended by inserting “**3A**,” after “3,”.
 - (2) Section 2(1) is amended by inserting the following definitions in their appropriate alphabetical order:

“**crime involving dishonesty** has the same meaning as in section 2(1) of the Crimes Act 1961

“**criteria for registration**, in relation to a private school or proposed private school, means the criteria set out in **section 35F**

“**managers of a private school** means all the people who—

“(a) control and manage the school, whether or not they have a proprietary interest in it; and

“(b) have the primary responsibility for determining and supervising the character and direction of the school

“**review officer** has the same meaning that it has in section 323

“**serious criminal activity** means any offence involving fraud, violence, or harm to children, any sexual offence, or any crime involving dishonesty”.

- (3) The definition of **Minister** in section 2(1) is amended by inserting “**3A.**” after “3,”.
- (4) The definition of **Ministry** in section 2(1) is amended by inserting “**3A.**” after “3,”.

5 New section 4E inserted

The following section is inserted after section 4D:

“4E Courses for foreign students

- “(1) The board of a State school or the managers of a school registered under **section 35A** must not establish, or permit any student to enrol or continue to be enrolled in, any class, course, or programme, intended exclusively or mainly for foreign students, unless the class, course, or programme is for the time being approved by the New Zealand Qualifications Authority.
- “(2) The New Zealand Qualifications Authority must not approve a class, course, or programme under **subsection (1)** unless satisfied on reasonable grounds that—
- “(a) the school has or will have adequate staff, equipment, and premises to provide it; and
- “(b) the standard of instruction provided in it will be no lower than the standard that would be expected in any similar class, course, or programme for domestic students.”

6 Sections 35A to 35C repealed and new Part 3A substituted

Sections 35A to 35C are repealed and the following Part is substituted:

**“Part 3A
“Private schools**

“Registration

“35A Provisional and full registration of private schools

- “(1) The managers of an unregistered or proposed private school must apply to the Secretary, on a form provided by the Secretary for the purpose, for its provisional registration as a primary, secondary, or special private school, or as a school of 2 or all of those descriptions.
- “(2) The Secretary must provisionally register a school in respect of which an application is made under **subsection (1)** as a school of the description or descriptions concerned if he or she is satisfied that the school or proposed school meets or is likely to meet the criteria for registration as a private school.
- “(3) Provisional registration of a school or proposed school continues—
- “(a) for 12 months (unless it is revoked earlier); or
 - “(b) until the expiry of any period specified by the Secretary under **subsection (4)**.
- “(4) The Secretary may renew the provisional registration of a school only once, for a period specified by the Secretary, if he or she is satisfied that—
- “(a) exceptional circumstances exist in relation to the school; and
 - “(b) the school will meet the criteria for registration as a private school in that period.
- “(5) The Secretary must fully register a school as a school of the description or descriptions concerned if he or she is satisfied, having considered the review officer’s report under **section 35M(2)**, that a provisionally registered school meets the criteria for registration as a private school.

“35B Private school not to be registered as correspondence school

The Secretary must not provisionally or fully register any private school as a correspondence school, distance learning school, or school of a similar description.

“35C Secretary may require application for registration of school

The Secretary may require the managers of a school that is not registered under **section 35A** to apply for its registration under that section if he or she considers that the school is operating as a school, whether or not certificates of exemption under section 21 are held in respect of all or any of the students being taught there.

“New, additional, and substituted campuses

“35D New campus to be registered

- “(1) The managers of a school registered under **section 35A** who propose to open a new campus must apply to the Secretary for registration of the campus as if the campus were a proposed private school, and **section 35A** applies to the application as if the new campus were a newly proposed private school.
- “(2) In this section, **new campus** means premises that are in addition to the premises occupied by a school registered under **section 35A** and are to be attended by students other than those enrolled at the school at its current premises.

“35E Additional and substituted premises to be approved

- “(1) The managers of a school registered under **section 35A** must, in the circumstances set out in **subsection (2)**, notify the Secretary and obtain his or her approval of the new premises.
- “(2) The circumstances are that the managers of the school propose that the school is to occupy —
- “(a) premises that are in addition to its current premises and are to be attended by students enrolled at the school at its current premises; or
- “(b) different premises that are to replace the premises currently occupied by the school.
- “(3) When considering whether to grant approval of premises under **subsection (1)**, the Secretary must consider whether the premises are suitable, as described in **section 35G**.

*“Criteria for registration as private school***“35F Criteria for registration as private school**

The criteria for registration as a private school under **section 35A** are that the school—

- “(a) has premises that are suitable, as described in **section 35G**; and
- “(b) has staffing that—
 - “(i) is suitable to the age range and level of its students, the curriculum taught at the school, and the size of the school; and
 - “(ii) complies with the requirements of this Act, including (without limitation) sections 120A and 120B, which relate to the appointment and continued employment of registered and authorised teachers; and
- “(c) has equipment that is suitable for the type of education being delivered or to be delivered at the school; and
- “(d) has a suitable curriculum, as described in **section 35H**; and
- “(e) has suitable tuition standards, as described in **section 35I**; and
- “(f) provides a safe and supportive environment with policies and procedures that make provision for the welfare of students; and
- “(g) has managers who are fit and proper persons (as described in **section 35J**) to be managers of a private school; and
- “(h) supports and promotes the principles and practice of New Zealand democracy, including respect for the law of New Zealand and the rights of others; and
- “(i) has sound governance and management structures and practices.

“35G Suitable premises

- “(1) Suitable premises for a school registered under **section 35A** are premises that are suitable for the type of education delivered or to be delivered at the school.

- “(2) **Subsection (1)** applies to all premises used by the school for the regular delivery of courses, whether or not the managers of the school own or lease the premises for the school.

“**35H Suitable curriculum**

A suitable curriculum for a school registered under **section 35A** is one which enables students, when their education at the school is completed, to participate in and contribute to their own community, and to New Zealand society as a whole.

“**35I Tuition standards**

- “(1) Tuition of a suitable standard at a school registered under **section 35A** must include giving students tuition of a standard no lower than that of the tuition given to students enrolled at—
- “(a) primary schools of the same class, where the school’s managers want it to be registered as a primary private school:
 - “(b) secondary schools of the same class, where the school’s managers want it to be registered as a secondary private school:
 - “(c) special schools of the same class, where the school’s managers want it to be registered as a special private school.
- “(2) In assessing the standard of tuition, the mode of curriculum delivery and the regularity of instruction must be considered.

“**35J Managers to be fit and proper persons**

- “(1) In assessing whether a person who is a manager of a school is a fit and proper person to be a manager of a school registered under **section 35A**, the following matters must be taken into account:
- “(a) any conviction for a serious criminal activity:
 - “(b) any health problems that may affect the person’s ability to comply with his or her obligations towards the school and its students:
 - “(c) 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 man-

agement of, a company under any of sections 382, 383, 385 and 386A of the Companies Act 1993:

- “(d) any previous cancellation under **section 35A** of this Act or section 186 of the Education Act 1964 of the registration of a school of which the person was a manager:
- “(e) any serious breach of the person’s statutory duties as manager of a school registered under **section 35A** of this Act or section 186 of the Education Act 1964:
- “(f) all other relevant matters.
- “(2) If the manager of a school is—
 - “(a) a company, the assessment under **subsection (1)** applies to its directors:
 - “(b) an incorporated society or an incorporated trust board, the assessment under **subsection (1)** applies to its members.
- “(3) When the management of a school registered under **section 35A** changes in its entirety or is transferred to a new entity, the new managers must give notice to the Secretary and an assessment under **subsection (1)** must be made of the new managers of the school.

“List of schools registered under section 35A

“35K List of private schools

- “(1) The Secretary must keep a list of all schools registered under **section 35A**.
- “(2) The list must be—
 - “(a) updated annually; and
 - “(b) available for public inspection—
 - “(i) at offices of the Ministry; and
 - “(ii) on the Ministry’s website.

“35L Managers must advise Secretary of school ceasing operation

The managers of a school registered under **section 35A** that is about to cease to operate as a school must inform the Secretary—

- “(a) that the school will cease to operate as a school; and

- “(b) of the date on which the school will cease to operate as a school.

“Review of schools registered under section 35A

“35M Review of schools registered under section 35A

- “(1) As soon as is practicable after provisionally registering a school or proposed school under **section 35A(2)**, the Secretary must inform the Chief Review Officer of the provisional registration.
- “(2) The Chief Review Officer must ensure that a review officer—
- “(a) reviews any school in action that is provisionally registered under **section 35A(2)** either—
- “(i) between 6 and 12 months after the provisional registration of the school or proposed school; or
- “(ii) earlier, by agreement with its managers; and
- “(b) prepares a written report and gives copies of it to the Secretary and the school’s managers.
- “(3) The Chief Review Officer must ensure that a school, while registered under **section 35A(5)**, is reviewed in accordance with Part 28.
- “(4) The Chief Review Officer must also ensure that the review officer who conducts a review under **subsection (3)**—
- “(a) prepares a written report on the review; and
- “(b) gives copies of it to the Secretary and the school’s principal (or other chief executive) and managers.
- “(5) A review officer’s written report on a review under this section must also include—
- “(a) information as to whether the school meets the criteria for registration as a private school; and
- “(b) information as to the areas in which improvement is required, if it does not meet the criteria.

“35N Private schools with significant number of foreign students to pay proportion of review costs

- “(1) The managers of a school registered under **section 35A** at which a significant number of foreign students are or will be enrolled must pay a proportion of the cost to the Chief Review Officer of every review of the school undertaken by a review officer.

- “(2) The proportion of the cost of a review payable under **subsection (1)** is the proportion that bears the same relation to the review’s total cost as the proportion that the number of foreign students enrolled, or to be enrolled, at the school bears to the total number of students enrolled, or to be enrolled, there.
- “(3) The proportion of the cost of a review that is payable under **subsection (1)** is—
 - “(a) payable to the Chief Review Officer; and
 - “(b) payable on written demand by the Chief Review Officer; and
 - “(c) a debt due to the Chief Review Officer.
- “(4) In this section, **significant number of foreign students** means 29 or more foreign students.

“Actions by Secretary

“350 Secretary’s actions in regard to schools registered under section 35A

- “(1) The Secretary may take action in regard to a school registered under **section 35A** if—
 - “(a) he or she considers that the school is not meeting all or any of the criteria for registration as a private school; or
 - “(b) a review conducted under **section 35M** indicates that the school does not, or is not likely to, meet all or any of the criteria for registration as a private school; or
 - “(c) the managers of the school have breached or are breaching their statutory duties in relation to the school under this or any other enactment; or
 - “(d) he or she has reasonable grounds to believe that serious criminal activity is occurring in the school.
- “(2) If the Secretary is satisfied that any 1 or more of the grounds set out in **subsection (1)** exist in relation to a school registered under **section 35A**, he or she may do any 1 or more of the following:
 - “(a) issue the school’s managers with a notice to comply;
 - “(b) request the school’s managers to produce and comply with an action plan, if there are a number of actions that need to be taken over a period of time;
 - “(c) require that the school undergo a further review by a review officer:

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- “(d) recommend that the Minister adjust the amount of, or impose conditions on, the State funding of the school:
- “(e) require the managers of a school to inform parents of the students at the school that the school is not meeting the criteria for registration as a private school:
- “(f) impose conditions on the school’s registration:
- “(g) suspend the school’s registration:
- “(h) cancel the school’s registration under **section 35R**.
- “(3) Any action taken by the Secretary under **subsection (2)**—
 - “(a) must be proportionate to the seriousness of the school’s situation; and
 - “(b) must ensure, if possible, that the school is encouraged to reach a satisfactory standard; and
 - “(c) is in addition to any fine incurred or other penalty imposed under **section 35X** or under any other enactment.

“35P Suspension of registration

The Secretary may at any time suspend the registration of a school registered under **section 35A** if he or she considers that the welfare and safety of the students at the school are at serious risk, and—

- “(a) that it is unlikely that the risk can be avoided by any practicable means other than by suspension of the registration; or
- “(b) that, although the risk could be avoided by means other than by suspension of the registration, the amount of time necessary to do so is likely, in the opinion of the Secretary, to be excessive.

“35Q Duration of suspension

- “(1) Suspension under **section 35O(2)(g)** continues until the Secretary—
 - “(a) is satisfied that the managers of the school have complied with all requirements imposed by him or her under any of **paragraphs (a) to (f) of section 35O(2)**; or
 - “(b) cancels the school’s registration under **section 35R**.
- “(2) Suspension under **section 35P** continues until the Secretary—

- “(a) is satisfied that the welfare and safety of the students at the school are no longer at serious risk; or
- “(b) cancels the school’s registration under **section 35R**.

“35R Process for cancellation of registration

- “(1) The Secretary may cancel the registration of a school if, following an action by him or her taken under any of **paragraphs (a) to (g) of section 350(2)**,—
 - “(a) the school—
 - “(i) does not improve sufficiently to meet the criteria for registration under **section 35A**; and
 - “(ii) is not likely to do so, in the opinion of the Secretary, within a further reasonable time; or
 - “(b) the managers of the school are continuing in breach of their statutory duties in relation to the school; or
 - “(c) serious criminal activity continues to occur in the school.
- “(2) Before cancelling a school’s registration under **subsection (1)**, the Secretary must—
 - “(a) take reasonable steps to obtain relevant information; and
 - “(b) consider all relevant information; and
 - “(c) consider any report by a review officer; and
 - “(d) give written notice to the managers of the school that he or she is considering cancelling the school’s registration, and give reasons; and
 - “(e) disclose all relevant information to the managers of the school; and
 - “(f) give the managers of the school a reasonable opportunity to respond to the notice; and
 - “(g) consider any submissions made by the managers of the school in response to the notice.

“Grants for private schools

“35S Grants for private schools

- “(1) The Minister may make grants to the managers of schools registered under **section 35A** out of money appropriated by Parliament for the purpose.

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- “(2) The Minister must determine the amount of each grant made under **subsection (1)**.
- “(3) A grant may be made unconditionally, or subject to conditions determined by the Minister.
- “(4) The managers of a school to which a grant is made subject to conditions must take all reasonable steps to ensure that the conditions are complied with.

“35T Record-keeping in relation to grants

- “(1) The managers of a school to which a grant has been made unconditionally under **section 35S** must ensure that records are kept—
 - “(a) in respect of the year in which the grant was made and the year after; and
 - “(b) in a manner approved by the Minister.
- “(2) The records must—
 - “(a) show fully and correctly all the managers’ financial transactions, assets, liabilities, and funds; and
 - “(b) be available for inspection at all reasonable times by any employee of the Ministry approved by the Secretary for the purpose.
- “(3) The managers of a school to which a grant under **section 35S** has been made subject to conditions must ensure that all necessary records are kept—
 - “(a) in respect of the year in which the grant was made and the year after; and
 - “(b) in a manner approved by the Minister.
- “(4) The records must—
 - “(a) show fully and fairly —
 - “(i) any of the managers’ financial transactions, assets, liabilities, and funds, as relate to or are or were affected by the making of the grants; and
 - “(ii) that the conditions have been complied with; and
 - “(b) be available for inspection at all reasonable times by any employee of the Ministry approved by the Secretary for the purpose.
- “(5) For the purposes of this section and **section 35U**, the financial year of a school’s managers ends—

- “(a) at the close of the day specified by the Minister for the purpose; or
- “(b) at the close of 30 June, if the Minister has not specified a day for the purpose.

“35U Providing accounts to Secretary

As soon as is practicable after the end of each financial year during which a school’s managers are required by **section 35T** to keep records, they must—

- “(a) have prepared an income and expenditure account, showing all financial transactions for the year records of which are required to be kept; and
- “(b) have the account audited by a chartered accountant; and
- “(c) give the Secretary copies of the account and the audit report on it.

“Suspensions and expulsions

“35V Procedural requirements for suspensions and expulsions

- “(1) The managers of a school registered under **section 35A** must, at any time when requested to do so by a parent of a student at the school, provide the parent with a copy of the school’s disciplinary procedures, including its procedures for the suspension and expulsion of students.
- “(2) The managers of a school registered under **section 35A** who suspend a student must, as soon as is practicable after suspending the student,—
 - “(a) notify the student’s parents of the suspension; and
 - “(b) provide the student and his or her parents with a reasonable opportunity to attend a hearing for the purpose of deciding whether the suspension should be varied or withdrawn; and
 - “(c) provide the students’s parents with a copy, or a further copy (as the case may be), of the school’s disciplinary procedures.
- “(3) The managers of a school registered under **section 35A** must, if they are considering whether or not to expel or exclude a student,—
 - “(a) give adequate notice to the student and the student’s parents; and

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- “(b) provide the student and his or her parents with a reasonable opportunity to attend, and be heard at, a disciplinary meeting before any expulsion or exclusion takes effect; and
- “(c) provide the student’s parents with a copy, or a further copy (as the case may be), of the school’s disciplinary procedures.
- “(4) To the extent that there is any inconsistency between this section and a contract between the managers of a school and a parent or the parents of a student at the school, this section prevails.

“35W Suspensions and expulsions of students from private schools to be notified to Secretary

- “(1) Immediately after a student has been suspended from attendance at, or expelled from, a school registered under **section 35A**, the school’s principal or head teacher must give the Secretary —
 - “(a) written notice of—
 - “(i) the student’s name and last known address; and
 - “(ii) the day on which the student was suspended or expelled or, if the student was first suspended and later expelled, the days on which the student was suspended and expelled, and the length of the suspension; and
 - “(b) a written statement of the reasons for the student’s suspension or expulsion.
- “(2) Unless the student is within a reasonable time reinstated at the school or enrolled at some other registered school, the Secretary must (if the student is younger than 16) and may (if the student is 16 or older)—
 - “(a) arrange for the student to be enrolled at some other reasonably convenient registered school that the student can attend; or
 - “(b) direct the board of a State school that is not an integrated school to enrol the student at the school; and, in that case, the board must do so; or
 - “(c) direct a parent of the student to have the student enrolled at a correspondence school.

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- “(3) The Secretary must not give a direction under **subsection (2)** unless he or she has also made all reasonable attempts to consult the student, the student’s parents, the board, and any other person or organisation that, in the opinion of the Secretary, may be interested in, or able to advise on or help with, the student’s education or welfare.
- “(4) A direction under **subsection (2)(b)** overrides section 11M.
- “(5) To the extent that there is any inconsistency between this section and a contract between the managers of a school and the parents of a student at the school, this section prevails.

“Offences

“35X Offences in relation to operation of private schools

- “(1) A manager of a private school that is not registered under **section 35A** commits an offence if—
- “(a) the school operates as a school; and
- “(b) the manager knows or ought reasonably to know that it is doing so.
- “(2) A manager of a private school that is registered under **section 35A** as a school of a particular description or descriptions commits an offence if—
- “(a) the school operates as a school of another description or of other descriptions; and
- “(b) the manager knows or ought reasonably to know that it is doing so.
- “(3) A manager of a private school that is registered under **section 35A** commits an offence if—
- “(a) the school ceases to operate before the manager tells the Secretary that it will cease to operate; and
- “(b) the manager knows or ought reasonably to know that it is about to cease to operate as a school.
- “(4) A person who commits an offence under this section, and, if the person is a company, incorporated society, or incorporated trust board, every director of the company, or member of the incorporated society or incorporated trust board, is liable on summary conviction—
- “(a) in the case of a natural person, to a fine not exceeding \$200, and, if the offence is a continuing one, to a further

fine not exceeding \$200 for every day or part of a day during which the offence continues; and

- “(b) in the case of a company, incorporated society, or incorporated trust board, to a fine not exceeding \$500, and, if the offence is a continuing one, to a further fine not exceeding \$500 for every day or part of a day during which the offence continues.

“35Y Overview of provisions of this Act that apply to private schools

- “(1) The provisions of this Act that apply to private schools are set out in **Schedule 13B**.
 “(2) If there is an inconsistency between **Schedule 13B** and any other provision in this Act, the other provision prevails.”

7 Entry where school suspected of being unregistered

- (1) The heading to section 78B is amended by inserting “**private**” after “**where**”.
 (2) Section 78B(1) is amended by omitting “school in contravention of section 35A(12)” and substituting “private school in contravention of **section 35X**”.
 (3) Section 78B(3) is amended by omitting “school in contravention of section 35A(12)” and substituting “private school in contravention of **section 35X**”.
 (4) Section 78B(5) is amended by omitting “school in contravention of section 35A(12)” and substituting “private school in contravention of **section 35X**”.

8 No corporal punishment in early childhood services or registered schools

- (1) Section 139A(1)(b) is amended by omitting “(within the meaning of section 35A(1) of this Act) of a private school” and substituting “of a school registered under **section 35A**”.
 (2) Section 139A(2)(b) is amended by omitting “(within the meaning of section 35A(1) of this Act) of a private school” and substituting “of a school registered under **section 35A**”.

9 Secretary may require information for proper administration of Act

- (1) Section 144A(1)(c) is amended by omitting “(within the meaning of section 35A(1) of this Act) of any private school registered under that section” and substituting “of any school registered under **section 35A**”.
- (2) Section 144A is amended by repealing subsection (2) and substituting the following subsection:
 - “(2) For the purposes of **Part 3A**, information is relevant to the question of whether or not a school meets the criteria for registration as a private school if the information is—
 - “(a) required under subsection (1) to be given to the Secretary; and
 - “(b) reasonably necessary or desirable for the Secretary to have for the proper administration of this Act.”

10 New Schedule 13B inserted

The **Schedule 13B** set out in the **Schedule** of this Act is inserted after Schedule 13A.

Part 2
Transitional provision, and amendments
to other enactments

Transitional provision

11 Continuation of registration if school registered under repealed section 35A

- (1) In this section,—
 - (a) **old section 35A** means the section 35A of the Education Act 1989 repealed by **section 6** of this Act; and
 - (b) **new section 35A** means the **section 35A** of the Education Act 1989 substituted by **section 6** of this Act.
- (2) A school that, immediately before new **section 35A** comes into force, is or is deemed to be fully registered as a school of a particular description or descriptions under old section 35A is to be regarded as fully registered as a school of that description or those descriptions under new **section 35A**.

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- (3) Despite **subsection (2)**, the managers of a school to which that subsection applies must comply with the criteria for registration as a private school under new **section 35A** as if it had been registered under that section.
- (4) A school that, immediately before new **section 35A** comes into force, is provisionally registered as a school of a particular description or descriptions under old section 35A is to be regarded as provisionally registered as a school of that description or those descriptions under new **section 35A** when that section comes into force.
- (5) Despite **subsection (4)**, when the Secretary is deciding whether to fully register a school to which that subsection applies, he or she must do so as if—
 - (a) old section 35A had not been repealed by **section 6** of this Act, but continued in force; and
 - (b) he or she were considering under old section 35A whether to fully register a provisionally registered school.

Amendments to Education Act 1964

12 Education Act 1964 amended

- (1) This section amends the Education Act 1964.
- (2) Section 2(1) is amended by repealing the definitions of **private primary school**, **private school**, and **private secondary school**.
- (3) The definition of **secondary education** in section 2(1) is amended by omitting “private secondary school” and substituting “secondary private school registered under **section 35A** of the Education Act 1989”.
- (4) Section 162 is repealed.

Schedule**s 10****New Schedule 13B inserted in principal Act****Schedule 13B****s 35Y****Overview of provisions of Act applying to private schools**

Provision	Brief description
<i>Part 1</i>	<i>Rights to primary and secondary education</i>
2	Interpretation
4E	Courses for foreign students
<i>Part 3A</i> (All)	<i>Private schools</i>
<i>Part 7</i>	<i>Control and management of State schools</i>
77A	Enrolment records
78A	Powers of entry and inspection
78B	Entry where school suspected of being unregistered
78C	Police vetting of non-teaching and unregistered employees at schools
78CA	Police vetting of contractors and their employees who work at schools
78CB	Internal procedures relating to police vets
<i>Part 10</i>	<i>Teacher registration</i>
120A	Restrictions on appointment of teachers
120B	Restrictions on continued employment of teachers
<i>Part 10A</i>	<i>New Zealand Teachers Council</i>
139AK	Mandatory reporting of dismissals and resignations
139AL	Mandatory reporting of complaints received about former employees
139AM	Mandatory reporting of possible serious misconduct

Schedule	Education (Private Schools) Amendment Bill
Provision	Brief description
139AN	Mandatory reporting of failure to reach required level of competence
139AO	Offence to fail to report
<i>Part 11</i>	<i>Miscellaneous</i>
139A	No corporal punishment in early childhood services or registered schools
144A	Secretary may require information for proper administration of Act
<i>Part 18A</i>	<i>International students</i>
238E	Signatories to code may enrol persons as international students
238G	Sanctions
238H	Export education levy
<i>Part 25</i>	<i>Student allowances and administration of student loans</i>
303	Student allowances
<i>Part 28</i> (All)	<i>Review of educational services</i>
<i>Part 30</i>	<i>National student numbers</i>
344	Use of national student numbers

Appendix



Appendix

Key provisions of the Education Act 1989

35A Registration and inspection of private schools


(1) In this section, –

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

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

- (2) No premises shall be deemed not to be operating as a school by reason only of the fact that certificates of exemption under section 21 are held in respect of all or any of the students being taught there.
- (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.

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- (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) 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 1 January 1993 or the third 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.
 - (10) Subject to subsection (11), 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
- (a) 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.

(13) Every school that, on 31 December 1989 was or was deemed to be fully or provisionally registered under section 186 of the Education Act 1964 as a school of a particular description or descriptions, shall be deemed to have been fully or provisionally (as the case may be) registered under this section on 1 January 1990 as a school of that description or those descriptions.

(14) The managers of a private school where more than 29 foreign students are (or, as the case may be, will be) enrolled shall pay to the Chief Review Officer (on written demand by the Chief Review Officer, and as a debt due to the Chief Review Officer) a proportion of the cost to the Education Review Office of every review of the school undertaken by the Education Review Office under this Act bearing the same relation to its total cost as the number of foreign students enrolled (or to be enrolled) there bears to the total number of students enrolled (or to be enrolled) there.

120A Restrictions on appointment of teachers

(1) No employer shall appoint to any teaching position –

- (a) any person –
 - (i) whose registration as a teacher has been cancelled; and
 - (ii) who has not since been registered as a teacher again; or
- (b) any person whose authorisation has been cancelled, and who has not since –
 - (i) been granted an authorisation again; or
 - (ii) been registered as a teacher.

(2) No employer shall permanently appoint to any teaching position any person who does not hold a practising certificate.

130A Purpose of limited authority to teach

Where any 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, and provided that person meets the tests set out in section 130B, that person shall on application to the Teachers Council, be granted a limited authority to teach.

130B Limited authority to teach

- (1) Any person may apply to the Teachers Council, on a form provided by it for the purpose, for limited authority to teach.
- (2) The Teachers Council shall authorise an applicant if (and only if) satisfied that the applicant –
 - (a) is of good character; and
 - (b) is fit to be a teacher; and
 - (c) is likely to be a satisfactory teacher.
- (3) Subject to subsection (2), and subsection (2) of section 130E, a person who has previously been authorised may be authorised again, whether before or after the expiry or cancellation of the previous authorisation.

130E Period of authorisation

- (1) Subject to subsection (2), a teacher's authorisation expires after 12 months.
- (2) Notwithstanding subsection (1), the Teachers Council may grant the authorisation for a period longer than 12 months.

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