Education Report: Delegation of Ministerial Appointments to Boards of Constitutions

To: Hon Chris Hipkins, Minister of Education

Date: 16 July 2019

Security Level: In Confidence

Drafter: Deborah Tenet

Key Contact: Jann Marshall, Associate Deputy Secretary

Messaging seen by Communications team: No

Purpose of Report

Your office has commissioned this report on your behalf. The purpose of this report is to advise you of the options for replacing Ministerial Appointments on boards of trustees with alternative constitutions.

Recommended Actions

The Ministry of Education recommends you:

a. **Note** that it is not possible for you to delegate the Ministerial Appointments in an alternative constitution or in the constitutions of Kura Kaupapa Māori or other designated character schools without amending the constitution. Replacing Ministerial Appointments with appointments by the Secretary or another office holder can only be done by amending the constitution.

b. **Note** that an amendment to a constitution cannot proceed unless the requirements set out in the Education Act are met, for example the board requests an amendment or there is consultation with the board concerned.

Noted

c. **Agree** that when setting up any new alternative constitutions or when current Ministerial appointments near the end of their terms, the Ministry ask each board if it would consider another appropriate authority to make the appointments (eg. The Secretary for Education);

Agree / Disagree
d. **Agree** to the delegation to the Secretary, and further delegation to a Ministry employee determined by the Secretary, of your power under section 98A of the Act to approve (and amend) an alternative constitution and the Ministry will then proceed to work with the boards of trustees as in c. above.

Agree / Disagree

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e. **Agree** to the delegation to the Secretary, and further delegation to a Ministry employee determined by the Secretary, of your power under sections 155D(4) and 155AA(4)(c) of the Act to amend the constitutions of boards of Kura Kaupapa Māori and other designated character schools and the Ministry will then proceed to work with the boards of trustees as in c. above.

Agree / Disagree

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f. *(if you agree to d and/or e above) Sign* the attached instrument of delegation.

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g. **Agree** that this Education Report is proactively released as part of the next publication.

Release / Not release

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Katrina Casey
Deputy Secretary
Sector Enablement and Support

Hon Chris Hipkins
Minister of Education

16/7/2019

31/7/19

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1 The Education (Update) Amendment Act 2017 repealed section 105A and replaced it with section 98A

2 Provisions applying to Kura Kaupapa Māori established before commencement of Education (Te Aho Matua) Amendment Act 1999
Background

Boards with alternative constitutions under section 98A

1 There are approximately 30 school boards of trustees that have an alternative constitution, approved by the Minister under section 98A of the Act, that require a number of trustees to be appointed by the Minister. The requirement to appoint is set out in the constitution in a notice published in the New Zealand Gazette rather than in the Act.

2 The Gazetted Ministerial appointment requirement in a constitution cannot be delegated to another person or organisation. To amend a Ministerial Appointment requirement in a constitution requires an amendment to the constitution itself.

3 Even though the Minister has the power to approve (and therefore to amend) an alternative constitution, before exercising this power, the Act requires that the Minister must have reasonable cause to believe it is in the best interests of the school or schools the board administers. In addition, the Act requires that the Minister may not approve (or amend) an alternative constitution unless:
   a. a request is made by the board, or 20 percent of parents of students enrolled at the school or schools, or a recommendation is made by the Chief Review Officer in a written report to the Minister; and
   b. the Minister has consulted such persons or organisations as the Minister considers appropriate.

4 Consequently, without an amendment request from the board concerned, it is not possible for you to remove a Ministerial Appointment requirement from an alternative constitution or to replace the Minister as appointee with appointments by another person or organisation.

5 Although you cannot delegate your appointment requirements in an alternative constitution, with your direction the Ministry can consult with the relevant boards before the end of their Ministerial appointees term of office to seek from them a request to either:
   • remove the Ministerial Appointment requirement from the constitution, or
   • amend the constitution to replace appointment by the Minister with appointment by the Secretary for Education or other appropriate person or organisation.

6 Alternatively you could agree to the delegation to the Secretary and further delegation to a Ministry employee determined by the Secretary, of your power under section 98A of the Act to approve any board requests. This would mean that the Secretary or employee could consult with the boards on his or her own behalf and could then proceed with an amendment to the constitution if the requirements in the Education Act were met. Regardless of whether a delegation is made, the Ministry could still consult on your behalf with the relevant boards.

7 If you wish to delegate your approval power under section 98A of the Act you can sign the attached instrument of delegation. As Minister, you will always retain the power to make these decisions yourself.
Delegating your power under sections 155D and 156AA to amend the constitutions of designated character schools

8 There are approximately ten designated character schools with Ministerial appointments in their constitutions. Subsections 155D(4) and 156AA(4)(c) of the Act authorise the Minister from time to time, after consultation with the board, to amend the constitution of the board of a designated character school. A request from the board is not necessarily required. However, the board and any named body that has a special affiliation with the school or has responsibility for the different character of the school, must be consulted. The Ministry can undertake this consultation on your behalf.

9 Alternatively you could agree to the delegation to the Secretary, and further delegation to a Ministry employee determined by the Secretary, of your power to amend the constitutions of designated character schools under sections 155D(4) and 156AA(4)(c) of the Act. A delegation to the Secretary or Ministry employee, similar to that currently in place under section 95(1), could be made so that the Secretary or Ministry employee can amend the constitutions of agreeable boards. As Minister, you will always retain the power to make these decisions yourself. Regardless of whether a delegation is made, the Ministry can still work with the boards concerned to provide them an opportunity to consider if they want to have the Minister or some other appropriate person or organisation make appointments.

10 If you wish to delegate your amendment power under sections 155D(4) and 156AA(4)(c) you can sign the attached instrument of delegation.

Risks

11 The Ministry has previously, as required, discussed with individual boards possible appointment changes in their constitutions. One of the reasons given by some boards not wanting to make changes is that a Ministerial Appointment may contribute to the Board’s mana. Ministerial Appointments can also, particularly after a Commissioner’s appointment ends, provide reassurance to an incoming board and its school community.

12 There is a small risk that seeking a board’s agreement to either remove the Ministerial Appointment requirement in constitutions or replace the Minister as the appointer may cause offence to a board, a named body or the school community. This risk can be managed through the consultation process and by providing appropriate replacement options, for example iwi appointments.

Proactive Release

13 It is intended that this Education Report is proactively released as per your expectation that information be released as soon as possible. Any information which may need to be withheld will be done so in line with the provisions of the Official Information Act 1982.

Annex

Annex: Instrument of Delegation
Delegation of Minister's powers

I delegate to the Secretary for Education, the powers and functions set out in the attached Schedule in accordance with section 28 of the State Sector Act 1988.

Under section 41 of the State Sector Act 1988 I consent to the further delegation by the Secretary for Education of these powers and functions to Ministry employees as determined by the Secretary.

Hon Chris Hipkins
Minister of Education

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# DELEGATION OF MINISTER'S' POWERS AND FUNCTIONS

## EDUCATION ACT 1989

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<thead>
<tr>
<th>Section</th>
<th>Power</th>
<th>Delegation</th>
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<tr>
<td>98A</td>
<td>The power, by notice in the Gazette, to approve an alternative constitution for a board or a combined board in accordance with the requirements of this section.</td>
<td>Secretary for Education&lt;br&gt;Any employee of the Ministry as determined by the Secretary</td>
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<td>155D(4)</td>
<td>The power, after consultation with the board of the Kura concerned, to amend the aims, purposes, and objectives of the Kura or the constitution of the board.</td>
<td>Secretary for Education&lt;br&gt;Any employee of the Ministry as determined by the Secretary</td>
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<td>156AA(4)(c)</td>
<td>The power by notice in the Gazette and after consultation with the board, to amend the statement of the constitution of the board of a designated character school.</td>
<td>Secretary for Education&lt;br&gt;Any employee of the Ministry as determined by the Secretary</td>
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