

Impact Summary: Code of Conduct for School Boards of Trustees

Section 1: General information

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| Purpose |
| The Ministry of Education is solely responsible for the analysis and advice set out in this Regulatory Impact Statement, except as otherwise explicitly indicated. This analysis and advice has been produced for the purpose of informing final decisions to proceed with a policy change to be taken by Cabinet in relation to the proposal to establish a code of conduct for school boards of trustees. |
| Key Limitations or Constraints on Analysis |
| There are no limitations or constraints on the analysis. |
| Responsible Manager (signature and date): |
| Dr Andrea Schöllmann  Deputy Secretary Education System Policy Ministry of Education 11 / 10 / 2019 |

Section 2: Problem definition and objectives

2.1 What is the policy problem or opportunity?

This proposal is based on a recommendation of the Tomorrow’s Schools Review Independent Taskforce (Taskforce). The Taskforce consulted extensively over the past 15 months to determine what issues the schooling system has and how to address these problems. During its consultation the Taskforce was informed of a number of concerns with the current school board of trustees system, including situations where some board members have sought to progress their own interests rather than those of the board.

At present school boards of trustees do not have individual or collective duties or a code of conduct that they must comply with. In order for body corporates (which consist of individuals) to govern efficiently, they need to have rules governing the individual and collective behaviours of the body. For Crown entities these are statutory codes of conduct and/or statutory individual and collective duties. In the education sector, school boards of trustees are the only Crown entity governing body which does not have such duties specified in the legislation. For all other education sector Crown entities, these are specified in either the Education Act 1989 or the Crown Entities Act 2004.

In the absence of any statutory based individual or collective duties or code, some schools either develop their own codes of conduct or adopt the New Zealand School Trustees Association’s (NZSTA) voluntary Code of Behaviour. However, these existing mechanisms are not effective because voluntary codes are difficult to enforce and they are not consistent across schools. This has resulted in variable practice over time and variable levels of accountability for boards, with some board members’ undesirable behaviour going uncensured as currently there is no ability to remove individual board members.

2.2 Who is affected and how?

This proposal affects all school board members as they would be required to comply with a mandatory code of conduct. Failure to comply could result in board members, except those that are school principals, being censured or removed from the board. The situation regarding school principals is discussed on page 4.

School boards will also be affected as they would have a formal and consistent process for removing members that are acting in an undesirable way.

School communities’ confidence in school board members may increase as a result of this proposal, which is aimed at increasing the accountability of board members and encouraging good school governance.

2.3 Are there any constraints on the scope for decision making?

There are no constraints on the scope for decision making.

Interdependencies with other work

This proposal is based on a recommendation of the Taskforce and is part of a wider suite of proposals intended to reorient the role of school boards of trustees.

Section 3: Options identification

3.1 What options have been considered?

The three key objectives of this proposal are to ensure that:

- all school boards have the same basic accountability for their members' and their collective behaviour;
- there is enough flexibility for including local community-held values; and
- standards are effective in that they are legally enforceable.

Five options were considered in line with these objectives:

Option One – School boards of trustees do not have a mandatory code of conduct or individual/collective duties (status quo)

Under this option school boards would not have to comply with a mandatory code of conduct. Some schools would continue to abide by codes that they created, other schools would adopt the NZSTA's voluntary Code of Behaviour, or continue to comply with it if they've already adopted it, while other school boards would continue functioning without a code. This option does not address any of the issues identified in section 2.1. Boards would still not have a set of minimum conduct standards to work from or to comply with. This would continue to result in variable practice and variable levels of accountability for boards. The status quo would also continue to fail to deter or sanction the behaviour of certain board members who seek to progress their own interests rather than those of the board.

Option Two – Establishing a code of conduct with sanctions (preferred option)

Under this option the Minister of Education would have the power to issue, by Gazette notice, a mandatory Code of Conduct setting out the minimum standards of conduct expected of members of school boards of trustees. This addresses the concern that boards either do not have a code of conduct or do not operate by the same code of conduct as they either create their own or use the NZSTA's voluntary Code of Behaviour.

Under this option individual school boards would be able to specify additional standards, by way of resolution, provided these are consistent with education legislation and the standards set out in the Code of Conduct.

The Minister would be required to consult with the national bodies representing the interests of governing bodies of schools, and any other stakeholders that he or she considers ought to be consulted as part of the development of the Code of Conduct.

It is proposed that the Code of Conduct be a disallowable instrument. This would enable external scrutiny by the Regulations Review Committee.

Sanctions for breaches of the Code of Conduct

Under this option it is proposed that breaches of the Code of Conduct be sanctioned. For a mandatory code of conduct to be effective, there should be remedies available for addressing significant and or persistent breaches of the Code of Conduct. It is common for there to be remedies in the event of code breaches in other areas. For example, this occurs where there are breaches of Local Authority Codes of Conduct and the Code of Conduct for the Reserve Bank's Monetary Policy Committee. Such an approach is consistent with that adopted for the mandatory Code of Conduct for the teaching profession, breaches of which

can lead to disciplinary action.

It is proposed that in the first instance school boards should have the ability to censure a member for significant and/or repeated breaches of the Code of Conduct. This would happen by way of resolution. This reflects the autonomous position of school boards of trustees.

Where the breaches are of the minimum standards of conduct and the board believes that a member's failure to comply with the Code of Conduct may justify the member's removal from the board, the Minister, acting on written notice from the board, would be able to remove the member (if satisfied that there is just cause to do so). The proposal to remove a board member would also happen by way of resolution.

This removal process is similar to that provided for in the case of members of tertiary education institution councils, which have a similar status to school boards of trustees under the Crown Entities Act 2004.

It is not appropriate for the sanctions to apply to school principals. Under section 94 of the Education Act 1989, State school principals are required to sit on school boards. Removing a principal from the board would prevent that principal from meeting their employment obligations. The Board is the principal's employer and as such, already has the ability to deal with problematic behaviour.

Option Three – Establishing a Code of Conduct without sanctions

This option is the same as Option Two but a board member would not be sanctioned in case of a breach of the Code of Conduct. The key disadvantage of this option is that it is likely that the Code would be ineffective

Option Four – Specifying individual and collective duties in legislation

Specifying individual and collective duties in legislation is one of the two most common approaches to setting out governing boards' duties (the other is establishing a code of conduct). In the education sector we have examples of both, with the teaching profession having a Code of Conduct and the Teaching Council having individual and collective duties specified in the Education Act 1989.

Specifying individual and collective duties in legislation for school boards is problematic as generic statutory duties are designed to provide the same level of accountability as would be expected of professional board directors. This would be too complex for school boards. This is especially so given that school boards have a unique range of members with differing levels of experience and skills, and a strong emphasis on voluntary, representative members (such as student and parent representatives).

Option Five – State Services Commissioner issues school board Code of Conduct under the Public Service Act

Under this option the State Services Commissioner would issue a code of conduct for boards of trustees under the new Public Service Act. The key disadvantage of this option is that it would create an inconsistency between where the code for school boards and the rest of the legislation relating to the education workforce was located. The education service is being removed from the new Public Service Act and moved to the Education and Training Bill, so a code for boards in the Public Service Act would be inconsistent with that transfer. Additionally, codes of conduct for other entities are usually issued under relevant legislation, for example, the local authority codes of conduct are issued under local government legislation. Including the Code of Conduct in the Education and Training Act would make it

more accessible for boards, as boards are likely to be familiar with education legislation.

3.2 Which of these options is the proposed approach?

Our preferred option is Option Two as it directly addresses all of the concerns raised in section 2.1. A mandatory Code of Conduct would give all board members (across all schools) a set of minimum conduct standards to work from and encourage the development of good practice over time.

This option would also address situations where some board members may seek to progress their own interests rather than those of the board or where there would be other significant and, or persistent breaches of the Code. The remedies provided for would enable boards, in the first instance, to censure a member for significant and, or repeated breaches of the Code. Where the breaches are of the minimum standards of conduct and the board believes that a member's failure to comply with the Code of Conduct may justify the member's removal from the board, the Minister, would, if satisfied that there is just cause to do so, be able to remove the member. The Minister would only be able to do so based on written notice from the board.

This option would, however, still enable individual school boards to expand upon the minimum standards set out in the Code of Conduct and set out their own standards of conduct, provided these are consistent with those in the Code of Conduct and education legislation.

Section 4: Impact Analysis (Proposed approach)

4.1 Summary table of costs and benefits

| Affected parties (identify) | Comment: nature of cost or benefit (eg ongoing, one-off), evidence and assumption (eg compliance rates), risks | Impact <i>\$m present value, for monetised impacts; high, medium or low for non-monetised impacts</i> |
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Additional costs of proposed approach, compared to taking no action

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| Regulated parties | <p>There may be costs for boards which would be required to enforce the Code of Conduct by censuring members or requesting that the Minister remove members for significant and/or repeated breaches of the Code of Conduct.</p> <p>There may be legal costs for board members that wish to challenge a censure or a removal. There may also be legal costs for boards in defending any action that may be taken against them.</p> | Medium |
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| Regulators | <p>There may be some costs for:</p> <ul style="list-style-type: none"> • The Ministry in establishing the Code of Conduct and consulting with the national bodies representing the interests of governing bodies of schools, and any other stakeholders that the Minister considers ought to be consulted, as part of its development. • The Ministry and possibly NZSTA in implementing the new Code of Conduct and providing support to boards to understand the new minimum standards of conduct expected of them and their role when a member breaches the Code. • The Minister and Ministry in removing board members. It is anticipated that once a board requests for a board member to be removed, the Ministry will provide advice to the Minister who will have to make a determination. This is the same process as is currently used where a removal of a board member is requested by the Teaching Council, for example. | Medium |
| Wider government | N/A | N/A |
| Other parties | N/A | N/A |
| Total Monetised Cost | <p>There may be some costs for the Ministry in developing and consulting on the Code of Conduct and providing support as part of the Code's implementation.</p> <p>The removal of any board members would be part of the Ministry's BAU work and would be met within existing costs.</p> <p>The enforcement of a Code would be part of boards' BAU work and would be met within existing costs as well. However, becoming familiar with the new obligations set out in the Code and dealing with any breaches may involve some time commitment.</p> | Medium |
| Non-monetised costs | N/A | N/A |

Expected benefits of proposed approach, compared to taking no action

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| Regulated parties | The proposal provides all boards with a consistent set of standards that they will be accountable to. | Low |
| Regulators | N/A | N/A |
| Wider government | N/A | N/A |
| Other parties | There would be a benefit to school communities and the wider public across New Zealand in having an enforceable code of conduct to ensure that school board of trustees members behaved in an appropriate manner. | Medium |
| Total Monetised Benefit | There may be some low cost saving for schools that would be interested in creating a code of conduct as they would no longer be required to do so. | Low |
| Non-monetised benefits | There may be benefits to school communities and the wider public across New Zealand as boards of trustees members would now have to abide by a minimum set of conduct standards. This would reduce variability of practice, encourage good school governance and would guard against some board members seeking to progress their own interests rather than those of the board. | Low |

4.2 What other impacts is this approach likely to have?

There are no other impacts.

Section 5: Stakeholder views

5.1 What do stakeholders think about the problem and the proposed solution?

The Tomorrow's Schools Taskforce carried out a review, over 15 months, of the compulsory schooling system. The review included two consultation phases consisting of over 300 meetings with stakeholders and the public, over 5,000 online survey responses and over 2,000 written submissions.

During its engagement with stakeholders, including iwi, the Taskforce heard that there were significant issues with the current board model. Feedback from stakeholders included that board performance varies across the country and that there is a need for increased accountability for boards. Many people described situations where board members would seek to advance their own interests which may not necessarily align with best practice or the best interests of the whole school. Nepotism, favouritism and conflicts of interest were also identified.

There was support for the Taskforce's recommendations which sought to address the issues of board performance by reorienting the role of boards so that their core responsibilities were primarily focused on student progress and wellbeing. While people valued the community-led

principles of the boards of trustees' school governance model, they noted that there was a need for increased accountability for boards as there were insufficient checks on the power and actions of boards. As a result of this feedback, the Taskforce recommended that a national code of conduct for boards of trustees is established.

There will be a further opportunity for the public to provide their views on this proposal as part of the Select Committee process on the Education and Training Bill.

Section 6: Implementation and operation

6.1 How will the new arrangements be given effect?

Legislative vehicle

The proposals will be implemented through the Education and Training Bill.

Communications

There will be a communications strategy for publicly announcing the commencement of the new legislation (Education and Training Bill) that will give effect to this proposal. This will likely include communicating to all schools through the School Bulletin and informing relevant peak bodies, such as the NZSTA. The Ministry of Education and NZSTA's social media platforms will also publicise the law change.

Implementation of the new arrangements

Boards will be partly responsible for the implementation of the Code as they will be required to familiarise themselves with the code, and may need to take action in the case of breaches which would result in censure.

The Ministry will also be partly responsible for the Code's implementation, in particular around providing mandatory training, information or other forms of support once a Code is gazetted. The Ministry may also be required to give advice to the Minister on proposals to remove a board member. The Ministry is experienced in implementing and enforcing Codes of Conduct. It already does in relation to the Teaching Council and tertiary education institution councils.

Commencement of new arrangements

It is proposed that the provisions enabling the Code of Conduct would come into effect upon enactment of the Bill. However, the development of the Code and the consultation on the Code would take place after the Bill's enactment. This work would be signalled to the sector well in advance to ensure that sufficient preparation time is allowed for the regulated parties.

Section 7: Monitoring, evaluation and review

7.1 How will the impact of the new arrangements be monitored?

The Ministry of Education uses a range of monitoring, evaluating and reviewing mechanisms to find out about the impact of regulatory changes on education providers. These mechanisms occur in the context of regular and ongoing relationships between education providers and the Ministry of Education. Additionally, there are regular meetings with a range of advisory groups and peak bodies, which are both topic and sector specific, which are used to collect feedback on the impacts of regulatory changes.

As Ministry staff and NZSTA provide a range of services and supports to boards of trustees, monitoring of the arrangements and their impact is expected to occur in the context of regular and ongoing relationships that both the Ministry and NZSTA have with boards of trustees.

7.2 When and how will the new arrangements be reviewed?

As mentioned above, issues or concerns can be raised, and aspects of the arrangements reviewed, through regular and ongoing relationships between education providers and the Ministry.

If, as a result of monitoring and feedback, it becomes apparent that there may be unintended or unexpected consequences as a result of the new arrangements, or if there are issues with the Code of Conduct and its implementation, this would prompt a review of the arrangements. We would expect to hear from boards, as part of our ongoing relationships with them, about any issues with the Code itself or with the remedies.