

# Legislation 24 June 2024

## Legislation can be found here

Key sections of legislation: Clause 40 – inserting new Part 6A, Clause 46 inserting new section 504A

## Cabinet paper can be found here

## Briefing on Lessons Learnt and International Evidence – notes in purple

This is an amended version of the summary previously provided on the cabinet paper on legislative settings for charter schools. We have managed to populate some of the outstanding areas, in particular around employment provisions, and add detail elsewhere.

Most parts of the legislation amend the Education and Training Act by adding charter schools/sponsor. This means that unless the Education and Training Act is specifically changed the provisions relating to state schools apply. Sometimes the responsibilities are significantly moderated so that they are at sponsors discretion rather than school board or Secretary of Education.

New information is in red

## Summary

- Further advice on the funding mechanism will be/has been provided to cabinet in a separate paper (which may not be publicly released).
- A lot of detail will be contained in the charter contracts and so we will never see it.
- Timelines are short. We anticipate the legislation having its first reading, possibly under urgency, this week. While this should mean there is a select committee process including submissions, it may be truncated.
- A review of the charter school initiative from 2014 to 2017 noted issues caused by short time frames including the ability to select appropriate sponsors, secure property and curricula development. Ideally, a new school should be given at least 12 months to open after being established (meaning about 24 months in total). Despite this schools are intended to open in time for term 1 2025.
- The directed conversion process excludes Kura Kaupapa Māori, and designated character schools (including Ngā Kura ā Iwi, and other Kaupapa Māori and Māori medium provision) due to their distinct settings (including in governance, property, and establishment).
- Employment is transferred, on a “no less favourable” basis to the charter school with no entitlement to redundancy or related provisions.

## Timeline

- Bill presented June/July 2024 ✓
- Authorisation Board starts after Bill is presented.

- Application and approvals process for new and converting charter schools – July until October 2024
- Bill passed mid to late September
- Authorisation Board becomes a statutory board when bill is passed
- Contracts negotiated – October 2024
- Successful applicants prepare to open and transition measure in place – October 2024 to January 2025

### **Pathways to becoming a charter school**

1. New charter schools (these will be limited in number)
2. State conversions.
  - a) Voluntary
  - b) Directed by Minister to enter conversion process.

### **Legislative nature of Charter Schools**

Charter schools will share many policy settings with State schools. These include requirements for free enrolment and free education, stand downs, suspensions, expulsions and exclusions, student safety, and international students. Regulations relating to how schools must be run can be applied to charter schools by Order in Council in the same way as state schools.

Enrolment, exclusion etc apply as to state schools – as expected. Looks like a student can only be re-enrolled at state school if expelled from state school and charter if expelled from charter. This may be a drafting error.

However, a charter school may refuse to enrol a student if a parent refuses to accept that the school operates in accordance with a character approved by the Authorisation Board. Priority order for enrolments, including the application of home zone schemes prior to conversion where applicable, are set out in the legislation.

Charter schools will also be included in the definitions for “registered schools” and “relevant school” in the Act. Being a “registered school” means provisions in the Act including on compulsory enrolment, attendance, powers of entry and inspection will apply to charter schools. Being a “relevant school” will include making charter schools subject to the monitoring and review functions of the New Zealand Qualification Authority (NZQA).

While student attendance requirements apply to all registered schools, the keeping of attendance records (reporting) will only apply to state schools and is incorporated in legislation in this Bill.

Sponsors can be body corporate, corporate sole or limited partnership, can also be an institution as defined in the Act. If an institution owns a charter school (e.g. a Polytech) then the students are not considered to be students of the institution but of the charter school.

The school board, or **1 or more** members of the school community, with the support of the proposed sponsor, may apply for a state school to be converted to a charter school. The evidence required to support the application, including required community consultation or support, will be specified on the application form.

*“The Minister may, in the Minister’s absolute discretion and after considering whether it is appropriate in all the circumstances, direct the board of a State school to make an application to the Authorisation Board to convert the State school to a charter school.”*

The Minister must consult with the Authorisation Board before making the direction and specify the proposed sponsor.

Specialist schools cannot apply and the Minister cannot direct specialist, state integrated, distance and special character schools or Kura Kaupapa Māori.

Obligations under the Bill of Rights will apply to sponsors and employees in the course of their role. The Official Information Act does not apply. If an institution is a sponsor and would normally be covered by the OIA and the Public Service Act, they are exempt when functioning as a sponsor, the latter exempting them from requirements around advertising jobs and expectations on appointments.

The Ministry may publish data relating to the socio-economic status of children attending a charter school and their families, that may identify individuals or organisations, if it is for the purposes of funding for charter schools or performance measurement. Sponsors are subject to the Children’s Act in the same way as School Boards.

### **Authorisation Board**

There will be an authorisation board which will approve, disestablish and monitor performance of sponsors and charter schools as well as provide strategic advice to the Minister. It will be made up of between five and nine people selected by the Minister and set its own rules of operation.

The Authorisation Board may, either generally or specifically, delegate any of its functions, duties, or powers to a public service chief executive.

The legislation sets out mandatory factors that the Authorisation Board must take into account when making a decision to approve a sponsor:

- The capability of the sponsor (ie experience and knowledge of the schooling system, financial and governance capability)

- Financial and network implications for the Crown
- The proposed focus of the school
- The standard of tuition including mode of delivery and regularity of instruction
- The level of support from community, staff, students and whānau for the proposed sponsor and new or converted charter schools and
- Any other factor the Authorisation Board consider relevant

The Authorisation Board *must* consult the Secretary and Chief Review Officer.

For conversions they must also consider:

- The performance of the State school
- Community, staff and student support for the proposed sponsor and for the conversion generally

For the conversion criteria the Authorisation Board must consult the school board, school community, staff and students. There is no further detail about what this consultation will look like, or how much weighting the Authorisation Board must give to this.

The actual establishment or conversion of approved schools would be conditional on the agency and sponsor agreeing a contract within the available funding.

The Authorisation board must consider whether a proposed sponsor, and its governing members, are a fit and proper person. This includes *taking into account*:

- Whether they have been convicted of fraud or dishonesty offenses
- If they owe or have owed money to the Crown
- Interventions, or whether they have committed a serious or repeated breach of statutory duties, related to any other Charter schools they may operate

If a governing member, partner or company director has:

- Been convicted of serious criminal activity
- Have been declared bankrupt or been prohibited from being a director of a company
- Had interventions, or whether they have committed a serious or repeated breach of statutory duties, related to any other Charter schools they may operate

## **Conversions**

If a school is approved to convert all currently enrolled students must be allowed to attend the charter school if they wish to and the character of the school (special, state integrated, or Kura Kaupapa Māori) must be maintained.

## **Consultation**

There will be **no requirements for new charter schools** to consult with impacted or interested parties – such as nearby local schools.

There will be **no requirements for consultation prior to the Minister directing** that a state school enter the conversion application process. It appears that there will still be the requirement for consultation as part of the conversion process as below.

## **Transparency and community input**

Charter schools will not be required to have community input as part of governance or in any other specific way.

The Cabinet paper says that contract provisions around property will, where relevant, include continued usage and access rights for the community. This needs more clarification, it may mean an access hours model like PPPs.

The establishment of a charter school must be notified in the Gazette including name, location, name of sponsor, year levels and type of school, characteristics of the school e.g. religious and if single sex.

Sponsors, in replacing Boards as the schools governing body, must ensure a safe physical and emotional environment, that they remain a fit and proper person, that there is a chief executive and a person responsible for teaching and learning (PRTL – replaces Principal). They must also have regard to NELPs and meet contractual obligations regarding registered teacher ratios, qualifications, curriculum and reporting to parents.

“A sponsor has complete discretion to control the management of the school as the sponsor thinks fit.”

A sponsor may make any “bylaw” (i.e. school rule) they see fit so long as it is not counter to legislation and following consultation with staff, students and school community.

“A sponsor may, either generally or specifically, **delegate any of its functions, duties, or powers under this Act to any person.**”

However they must not delegate the power of delegation, the power to make bylaws and the powers relating to exclusions.

## **Curriculum, teaching and learning**

### ***Limited authority to teach in charter schools***

The Bill amends the Act so that charter schools can permanently appoint teachers without practicing certificates. Police vetting requirements for employees will apply.

Charter schools LATs would be subject to the professional disciplinary (conduct) processes of the Teaching Council **but not to the competency** processes, as LATs currently are.

A sponsor may employ a person with a limited authority to teach in a charter school even if the person's skills are not in short supply and are not specialist skills, the Teaching Council need only consider that the applicant is of a suitable disposition and has the appropriate skills and experience. The competency provisions, including the powers of the Complaints Assessment Committee and Disciplinary Tribunal are limited in how they will apply to holders of a LAT in a charter school.

There will be a certain number of qualified teachers and certain positions that are required to be qualified in the contracts (the number will not be publicly available).

Charters can use their own curriculum provided the tuition standards are at least equivalent to other state schools (like for private schools) and must give access to national and internally recognised qualifications.

Assessment of performance standards from the previous iteration of charter schools shows that while they were reasonably successful in enrolling priority learners the reporting was insufficient to demonstrate impact on learning outcomes for these groups. It also notes that performance measures were all attainment based so do not provide rich data, may have been set at unattainable levels and that systemic non-performance was not acted upon. As measures were contained in contracts and set during successive selection rounds they were inconsistent and created an administrative burden. This time they are proposed to also be set in contracts rather than legislation meaning they will not be transparent and the same issues may arise.

Charter schools may offer full time distance education.

The sponsor has to appoint someone to be the "chief executive" and must also ensure that a **person responsible for teaching and learning** (PRTL) is appointed who has a practising certificate and a proven background in educational leadership. This may be the same person but does not have to be.

The Authorisation Board may impose an upper limit on the number of international students a sponsor can enrol but doesn't have to. Charter schools are included in all provisions of the Education and Training Act relating to international students.

Students enrolled at a charter school may, by agreement between the sponsor of a charter school and the board of a State school, receive tuition at or from a State school, or another charter school. The charter school may pay the school board or sponsor for this service.

A charter school may provide religious instruction and observances only if permitted under, and in accordance with, its charter school contract. The appointment of a

teacher to a position in a charter school may not be conditional on the willingness and ability of that teacher to take part in religious instruction, and no appointed teacher may be required to take part but the Chief Executive and PRTL may be. Release from tuition on religious or cultural grounds, or for specified parts of health curriculum applies to charter schools.

There will be no formal requirement to ensure that charter schools plans, policies and local curriculum reflect local tikanga māori, mātauranga māori and Te Ao Māori as well as offer instruction in tikanga and te reo Māori.

The regulatory impact statement notes that “If there is not a specific Te Tiriti provision or the ability to issue guidance, there is likely to be uncertainty and inconsistency relating to how charter schools and other relevant decision makers give effect to the Crown’s obligations under Te Tiriti”

### **Learning Support**

Students with special education needs will have the right to education as in the Act.

There is no evidence from the New Zealand ‘trial’ that charter schools enrolled the expected proportion of students with learning support barriers.

We assume that, other than for ORS students, services will be cashed up. We will see if we can access the funding model paper. It is not clear from these papers if there will be access to MOE services of some kind.

### **Accountability and interventions**

The contracts will be for a fixed term which is not specified in legislation, however the Cabinet paper referred to 10 years (unless terminated earlier or extended in accordance with the terms of the contract) with two rights of renewal of 10 years each with the Crown having the right to extend the contract subject to the school continuing to meet the terms of its contract.

The contract will set out:

- The physical capacity of the school premises
- Conditions of approval e.g. those for converting schools allowing all current students to enrol
- Performance targets and outcomes
- Measures for meeting those targets or outcomes
- The time period for annual financial statements
- The self-audit report on performance, compliance and financial statements requirements
- The number or percentage of teaching positions requiring a practising certificate
- The number or percentage of teaching positions requiring a LAT

- The curriculum and its mode of delivery
- The qualifications offered
- The renewal and termination of the contract
- The obligations of the sponsor following expiry or termination to transfer the operation of the school
- The requirement for the charter school to have a complaints policy
- The grounds and process for intervention
- Property maintenance fees charged to parents

There will be powers of entry and inspection under the Act.

There will be self-reviews and performance targets, and for complaints an independent reviewer specified in the contract, the Ombudsman Act also applies. Assessment of the 2014-2017 “pilot” of charter schools notes that the self-reporting approach had the potential to create perverse incentives, reporting was often lacking detail, required data was disputed and it was unlikely the Ministry would have been able to identify misreporting. The Ministry noted that tying funding to performance outcomes is difficult to reconcile with the need to manage risks to students.

The Ministry also noted that previous experience was that where sponsors fell below performance standards interventions were rarely used. They suggested this was because there was a preference for a relational approach and because decision making lay with the Minister the ability to quickly respond to contract breaches was limited. This indicates a risk that for political reasons charter schools may be less accountable than state schools.

The previous trial saw a reduction in the funding to charter schools to make them responsible for sourcing some of their own operational funds, with the objective of sharing a greater proportion of the risks and incentivise them to seek third party funding.

The Authorisation Board can only apply formal interventions if less serious measures are insufficient and self-review or complaint leads them to believe the sponsor has breached the contract or legislation or is at risk of doing so. The intervention framework is:

1. ERO review
2. Require the sponsor to provide specified information
3. Specified actions (in contract – secret)
4. Replacement of sponsor
5. Termination of contract
6. Termination of contract and replace with new sponsor – if replacing the sponsor must consult with sponsor, school community, school staff, and students



Note this does not provide for re-conversion of schools to state schools specifically. Other interventions, or situations giving rise to them, may be specified in contracts.

The Authorisation Board can approve, subject to the same conditions, a replacement or temporary sponsor without an application process following an intervention.

The Ministry review of the previous charter school trial noted that sponsors tend to focus on their contract rather than the broader framework they are required to operate within.

### **Terms and conditions of employment**

The PPTA constitution doesn't currently cover employment in a charter school.

#### *New Charter Schools*

Employees will be employed on individual employment agreements.

Collective Bargaining can be initiated by a union with coverage in the school – this could include NZEI, ISEA, E Tu or even PSA if there is a boarding hostel.

### **State School Conversions**

Conversions are not provided for in the collective agreement.

It is technically impossible that all employees' terms and conditions are protected as many are 'collective' and would be lost in individual agreements in a private school – for example, the study awards, study grants, Kapa Haka days and kāhui ako payments. Terms and conditions include teaching the NZ curriculum.

As with new charter schools collective bargaining can be initiated by a union with coverage in the school – this could include NZEI, ISEA, E Tu or even PSA if there is a boarding hostel.

On the conversion date the board is dissolved, if a state integrated school the integration agreement is cancelled. On the conversion date, all rights, assets, and liabilities of the converted school vest in the Minister on behalf of the Crown unless it is property held in trust.

Every employee becomes an employee of the sponsor on an individual employment agreement which must have terms and conditions no less favourable than their current. All rights, duties, liabilities, or obligations of the board of a converted school relating to a transferred employee are vested in the sponsor.

Transferred employees are not entitled to any notice, payment, benefit or compensation based on either their employment ceasing to exist or them ceasing to be employed by the board of the converted school. In layman's terms, no redundancy or similar

entitlements. The employment of a transferred employee does not constitute a new period of employment.

No less favourable terms and conditions means:

- Position is substantially the same
- In the same general locality (*side note - there is no definition of locality anywhere, so while converting schools unlikely to move, this is a terrible clause*)
- Treats service, including recognised previous service, as continuous
- Has the same or better provisions including, but not limited to, the employee's overall remuneration and any service-related, redundancy, or superannuation conditions

However, this is subject to *necessary modifications* to reflect that it is an IEA and **the employer is no longer a state schools for example for the purposes of funding and payment of remuneration and any awards, grants and associated leave.**

We will undertake further analysis of how this may affect the application of the collective agreement. An example is that a charter school may run a multiple timetable arrangement with sponsors approval only and how this may interact with hours of work provisions.

The IEA at transfer continues to apply until either a variation is agreed or a new collective agreement is negotiated.

**These provisions override Part 6A of the Employment Relations Act and any employment protection provisions in existing employment agreements.**

**All employment information held by the board, Ministry or EPL will be transferred to the sponsor – the Privacy Act does not apply.**

### ***Pay Equity***

The rights duties and obligations of the Secretary relating to existing pay equity claims and settlements become vested in the sponsor at conversion. The sponsor is treated as a party to the Settlement Agreement.

### ***Liability for holidays and leave***

Liability for leave taken by a transferred employee before conversion (i.e. remediation) transfers to the Crown.

### ***GSF***

Those already in the scheme can continue to be so while employed by the charter school.

International evidence from both the USA and UK show teachers in charter schools tend to be younger, have less experience, less training and lower rates of certification. There is higher turnover and on average teachers in charter schools earn less than those in public schools, often due to working longer hours without compensation. In both jurisdictions there are examples of a percentage of teachers earnings being tied to student performance.

### **Finances and Funding**

Separate advice is to be provided to the Minister/Cabinet on a funding model for charter schools and PPTA has requested a briefing on this from the MoE Charter Schools Team.

We assume that the funding will be the equivalent to the average staffing costs, operational and property funding for a similar size school of the same equity index and location.

Sponsors will be able to charge parents property maintenance fees if they own the property for the purposes of meeting property costs or making improvements and capital works as specified in the contract. This includes mortgages – which means sponsors can buy property on mortgage, pay for the mortgage through fees and own the property plus have the capital gains on the property.

The Ministry advice noted that, for schools where the property does not remain in the control of the state, improvements to the property ultimately lead to gain for private landlords.

The revenue must not be used to improve the facilities to a standard higher than that of a comparable state school, and the fees and expenditure are part of annual financial reporting. Non-payment of property maintenance fees could result in a student being suspended or excluded as long as there is enrolment at another school.

A charter school may participate in a school risk management scheme.