

Date: 24 January 2013

EDUCATION AMENDMENT BILL

Introduction

1. Thank you for the opportunity to provide this submission on the Education Amendment Bill ('the Bill').
2. As Children's Commissioner, I have a statutory responsibility to advocate for children's interests, rights and welfare, including advancing and monitoring the application of the UN Convention on the Rights of the Child (UNCROC) by departments of State and other Crown instruments¹. My powers, functions and responsibilities are contained in the Children's Commissioner Act 2003 and the Children, Young Persons and Their Families Act 1989. I am an independent Crown entity.

Initial observations

3. This Bill is of considerable significance to New Zealand children. If enacted, it will potentially impact upon thousands of children in our schools.
4. International reports indicate that New Zealand's current education system is, overall, a strong performer when compared with similar countries. New Zealand performs significantly above the OECD average for both educational attainment and literacy (including mathematical and scientific literacy)². In addition, the results of the 2009 Programme for International Student Assessment (PISA), which compares educational outcomes for 470,000 15 year old students across 65 countries (including all 34 OECD nations) confirmed New Zealand's high ranking internationally.³
5. However, for some time there has been considerable concern that disproportionate numbers of children from some key population groups struggle to achieve their full educational potential, in particular children who are Māori or Pasifika, or come from lower socio-economic status (SES) backgrounds. For example, around half of Māori rangatahi leaving school in 2011 had not attained NCEA level 2⁴, which is becoming the minimum qualification benchmark for successful entry into the labour market. The figures for Pasifika and European/Pākehā leavers were 63 percent and 77 percent respectively.
6. This differentiated pattern of achievement is apparent from the early years of schooling⁵ and is clearly unacceptable. Not only does it impact on the lives of individuals, but it

¹ Children's Commissioner Act 2003, section 12(1)(f)

² http://www.stats.govt.nz/browse_for_stats/government_finance/central_government/nz-in-the-oecd/education.aspx

³ Telford, M. and May, S (2010) *PISA 2009: Our 21st century learners at age 15*. Wellington: Ministry of Education, page 3

⁴ <http://www.educationcounts.govt.nz/indicators/main/education-and-learning-outcomes/1781> accessed 22 January 2013

⁵ For example, as measured by year 5/age 10 literacy tests: see <http://www.educationcounts.govt.nz/indicators/main/education-and-learning-outcomes/748> accessed 22 January 2013

burdens the health, welfare and criminal justice systems, contributing in turn to our persistently low levels of productivity.

7. Furthermore, such inequitable outcomes do not reflect well on our performance against our UNCROC obligations concerning the rights of children to education and in particular the two fundamental principles expressed in Articles 28.1 and 29.1(a):
 - The right of the child to receive education on the basis of equal opportunity (Article 28.1); and
 - The right of the child to receive education that enables development of the child's personality, talents and mental and physical abilities to their fullest potential (Article 29.1(a)).

Partnership schools kura hourua

8. It is in this context that the Bill seeks to establish a new type of school - *partnership schools kura hourua* - based on “charter school” models implemented in countries such as Sweden, the United Kingdom and the United States.
9. I believe that the education system must do better, and that we need to be innovative and willing to embrace change to make this happen. I understand that that is the Government's intent with this Bill.
10. I agree that it is worth exploring relieving compliance burdens on schools and moving their focus from inputs to outcomes to help achieve better outcomes for children and young people.
11. The Bill aims to increase innovation in education provision. I agree that this is desirable. However I do not agree that an entirely new system is needed to achieve this goal. Rather, I believe that Government's time would be better spent by exploring other ways to free all schools to spend more time on their ‘core business’ of teaching and learning. For example, it is worthwhile reviewing governance, reporting and contracting models from time to time. That said, the promotion of innovation must always be balanced with optimising what is already known works in a given area.
12. There is little evidence that compliance burdens are to blame for the education system's poor performance in Māori and Pasifika achievement. There is, however, good evidence that what leads to good outcomes for Māori, Pasifika and children from lower SES backgrounds is *quality teaching*. This particularly includes having well-trained, qualified and supported teachers and fostering supportive reciprocal relationships between teachers, students, and homes⁶ - also known as *home-school partnerships*⁷. There is also

⁶ Alton-Lee, A. (2003) *Quality Teaching for Diverse Students in Schooling: Best Evidence Synthesis Iteration* Wellington: Ministry of Education found that quality teaching was as a key influence on high quality outcomes for diverse students, with up to 59 percent of variance in student performance attributable to differences between teachers and classes, but only around 20 percent or less of variance attributable to school level variables. McKinsey & Company (2007) *How the world's best performing school systems come out on top* found that “the available evidence suggests that the main driver of variation in student learning at school is the quality of the teachers” (p12) Bishop, R., Berryman, M., Cavanagh, T., and Teddy, L. (2008). A culturally responsive pedagogy of relations: Effective teaching for Māori students. In A. St George, S. Brown and J. O'Neill (Eds), *Facing the Big Questions in Teaching: Purpose, Power and Learning* (pp 165-172). Melbourne: Cengage Learning. This research reported that good pedagogy includes integrating cultural identity, rejecting deficit theorising, and taking responsibility

evidence of improved outcomes for Māori and Pasifika students in learning environments that embed or respond positively to the *cultures and aspirations* of the students and the school community⁸.

13. It follows that these key elements should be at the heart of the partnership school kura hourua pilot proposals, but presently they are missing from the Bill.
14. In my view, if Government wishes to design a new model for education success, we need to draw as much information from research as possible, including using evidence from service provision outside of education, in order to establish the best possible outcomes for students in the pilot schools, should they go forward. The vulnerability of the likely groups means they require significant levels of protection from adverse effects of policy experimentation.
15. There is a mixed evidence base of overseas experiences of charter schools, which suggests a cautious approach should be taken. This is because it mostly compares students in charter schools with similar students in public schools in those countries. New Zealand has a unique education system that already includes some of the characteristics of some overseas charter school models, such as a large degree of autonomy from central government, and the requirement that each school have a charter *to establish the mission, aims, objectives, directions, and targets of the board that will give effect to the Government's national education guidelines and the board's priorities, and provide a base against which the board's actual performance can later be assessed*⁹.
16. This research body overall is inconclusive, but tends more to the negative than the positive in my view. It tends to measure what it is easy to measure (such as amount of instructional time), rather than harder-to-measure elements (such as teacher quality). Mixed, negative or no effects have been found in some studies¹⁰, and educational benefits have been found that appear to derive from practices that are not linked to the structural features of schools, such as longer instructional time and rigorous behaviour management¹¹.

for children's learning and understanding, and that the relationship between teacher and student is of crucial importance for Māori learners.

⁷ Biddulph, F., Biddulph, J. & Biddulph, C. (2003). *The complexity of community and family influences on children's achievement in Aotearoa New Zealand: Best evidence synthesis*. Wellington: Ministry of Education. This research found that genuine home-school partnerships can lift children's achievement significantly, as long as families are treated with dignity and respect.

⁸ The Government's Māori Education Strategy 2008-2012 *Ka Hikitia – Managing for Success* includes a wealth of research references to this point, such as Bishop, R. et al (2008) op cit

⁹ Education Act 1989 s61(2)

¹⁰ For example, CREDO (2009) *Multiple choice: charter school performance in 16 states*. Center for Research on Education Outcomes, Stanford University. This report found substantial variation in academic performance between the schools studied, but overall found that "charter school students on average see a decrease in their academic growth in reading of .01 standard deviations compared to their traditional school peers. In math, their learning lags by .03 standard deviations on average. While the magnitude of these effects is small, they are both statistically significant" (p 6). It also found that while children in primary and intermediate schools had higher rates of learning than the controls, students in high schools had lower levels and that black and Hispanic students seemed to do worse in charter schools, while children living in poverty did better. Gorard, S. (2009) *What are academies the answer to?* Journal of Education Policy 24:1 pp 101-113 found no evidence of better educational outcomes from academies.

¹¹ Angris J.D, Pathak, P.A. & Walters, C.R (2012) *Explaining charter school effectiveness*. Massachusetts Institute of Technology Department of Economics Working Paper Series, Working Paper 12/11. This report found charter schools offered

17. I note that recently released Treasury papers on the issue reported that evidence is ‘mixed’ as to whether charter schools increase educational achievement amongst disadvantaged children and are more efficient than state equivalents¹².
18. Useful New Zealand evidence and experience to inform contracting for outcomes in the education sector may be found in the lessons from purchasing models such as the Investing in Services for Outcomes programme being led by the Ministry of Social Development (MSD), the experience of purchasing or commissioning of services for outcomes by District Health Boards (DHBs), the Accident Compensation Corporation (ACC) and the Ministry of Health and the private public partnership arrangement under which Serco is currently operating an Auckland prison.
19. Examples of useful contracting tools include High-Trust contracting, Expressions of Interest, Requests for Proposals, jointly agreed outcomes, regular performance monitoring, payment only on achievement of agreed outcomes and financial sanctions for non-delivery. Some of these elements are already in operation in other parts of the education system.
20. Contracting for outcomes has not been previously undertaken in the schooling sector and there is as yet insufficient research evidence to draw firm conclusions about its applicability to our education system. This underscores the importance of robust evaluation of the partnership school kura hourua pilot.
21. Purchasing or commissioning is more than the skills of writing a watertight contract however. To get the best outcomes from providers, commissioning skills include population-needs assessment, assessment and development of providers’ governance and management skills, analysis of performance and quality data, negotiation skills and cultural competency. In my experience, commissioning works best when there are strong relationships between the purchaser or commissioner and providers. This almost always requires a local commissioner. Without these skills, old-fashioned “arms-length” contracting frequently fails to deliver outcomes.
22. I therefore believe that if partnership schools kura hourua proceed, the Ministry of Education will need to quickly develop its commissioning skills by working closely with experts in commissioning for outcomes and private public partnerships. Expertise can be found in Treasury, MSD, the Ministry of Health, DHBs, ACC and the Department of Corrections.

Focusing the education system on what works for Māori, Pasifika and children from low SES backgrounds

23. The stated rationale for partnership schools kura hourua is to improve educational

more instructional time and were more likely to have a ‘no excuses behaviour policy’ than traditional schools. Abdulkadiroglu, A., Angrish, J.D., Dynarski, S.M., Kane, T.J. & Pathak, P.A. (2011) Accountability and flexibility in public schools: evidence from Boston’s charters and pilots. *The Quarterly Journal of Economics* 126(2): 699-748. This research found that charter schools tended to have lower student teacher ratios and longer instructional time.

¹² <http://www.treasury.govt.nz/publications/informationreleases/education/partnershipschools/pdfs/oia-20121116.pdf>

outcomes for Māori and Pasifika students and those from low socio-economic status backgrounds¹³.

24. Whether or not partnership schools kura hourua proceed, either school system could be structured differently to improve outcomes for these children. Developing further the brief summary of what we know works noted above, changes that could be made to improve the current system, that would also be helpful in partnership schools kura hourua, include ensuring teachers and schools meaningfully acknowledge that 'culture counts' and is a source of strength not deficit¹⁴ and developing powerful home-school partnerships in learning.
25. I understand that this is already a focus of the Ministry of Education, but it still could be more embedded in policies and practices. This could be achieved by increasing or changing requirements, rewards and sanctions on schools, changing teacher registration or professional development requirements, and by supporting families and whānau to understand and engage better in the formal education of their children. A professional development programme for teachers, Te Kōtahitanga, follows these principles and has achieved positive results¹⁵.
26. Related to this, we must recognise that highly-skilled and highly effective teachers are of crucial importance for good outcomes for all learners¹⁶. The current requirements for teacher qualification and registration should be considered the minimum requirements in this regard. I am deeply concerned at the proposal in the Bill to allow schools to employ unregistered teachers. Registration achieves three main aims:
 - a. It gives the school leadership and parents confidence that the teacher has achieved a known standard in their training
 - b. It gives confidence that the teacher has maintained their professional development
 - c. It provides a disciplinary system.
27. I am also concerned that the Bill excludes parents from governance of the school. If the Bill's aim is to improve learning outcomes for Māori and Pasifika children, parent and whānau engagement in the child's school is crucial. In my view, parent representation in the governance of a school is a critical aspect of parent and community engagement in a school.
28. Either system should also improve the focus of learners at risk of disengaging or being disengaged from education. The current system does not focus sufficiently on engagement and retention – for example, regulations provide that if a student is absent

¹³ Associate Minister of Education's Cabinet Paper, *Developing and Implementing a New Zealand Model of Charter Schools*, paragraphs 4 and 5

¹⁴ Bishop, R., Berryman, M., Cavanagh, T., and Teddy, L. (2008). A culturally responsive pedagogy of relations: Effective Teaching for Māori Students. In A. St George, S. Brown and J. O'Neill (Eds), *Facing the Big Questions in Teaching: Purpose, Power and Learning* (pp 165-172). Melbourne: Cengage Learning

¹⁵ Meyer, L.H., Penetito, W., Hynds, A., Savage, C., Hindle, R and Sleeter, C (2010) *The Evaluation of Te Kōtahitanga, 2004-2008*. Wellington: Ministry of Education

¹⁶ See footnote 6

without explanation for 20 consecutive days they may be summarily removed from the school's roll¹⁷. The approach of these regulations, the Education (School Attendance) Regulations 1951, misses early opportunities to engage with such students and their families. There are perverse financial incentives on schools to remove from their rolls students with certain problematic characteristics, such as frequent truancy and behaviour issues, rather than to work to retain them. Again, these issues should be addressed in the current system and in any partnership school kura hourua contract.

29. Conversely, many of the provisions that the Bill does propose for partnership schools kura hourua could also be available to state schools under the current system. An argument can be fairly made that staff with specific skills (for example, in language or culture, or from other disciplines) can contribute to a quality educational experience for learners. However the current system already allows these staff to be registered and employed in state schools through the Limited Authority to Teach (LAT) provision of the Education Act¹⁸. The Act provides additional requirements on a school to support the LAT holder, to ensure teaching meets quality standards. Schools can already design their own curricula to meet local needs. New provisions could be made for them to set their own school day and year, and to focus more tightly on educational outcomes.
30. As far as I am aware a review of the implementation of the Education Act 1989 and its associated regulations, policies, and practices, with focuses on improving achievement for all, and on children and young people's interests, has not been conducted. Such a review may be timely in light of the urgent need to improve the performance of the education system for Māori, Pasifika and low socio-economic status learners, those with special education needs, and boys.
31. In summary, there is already significant scope to support innovation and improve outcomes for Māori and Pasifika students in the current education system. Changes can (and should) be made to encourage more innovation and improve the quality of teaching for these students. I am not convinced that an entirely new system is necessary to foster innovation and improve outcomes. There are considerable costs and risks to establishing a new system. However if the Government proceeds with partnership schools kura hourua, there are a number of safeguards that I believe should be put in place to ensure the policy delivers the outcomes that Government is seeking.

Specific comments on the Bill – partnership schools kura hourua

32. With regard to the contents of the Bill, a key point I wish to make to the Committee is that important system quality features must not be 'traded away' in pursuit of improved outcomes for vulnerable children and young people.
33. The main policy rationale for the trialing of the partnership school kura hourua model is to determine if trading some administrative compliance requirements off in favour of specified performance measures using a contract can improve educational outcomes for "Māori, Pasifika, learners from low socio-economic backgrounds and learners with special education needs". The explanatory note to the Bill states that partnership schools kura hourua *"will have more flexibility than State schools to make decisions about how they*

¹⁷ Education (School Attendance) Regulations 1951, cl 11

¹⁸ Education Act 1989 s 130B

operate and use funding to deliver specific school level targets”.

34. However, there is a clear distinction between compliance measures that ensure minimum quality standards and those purely focused on administration. The Bill as currently drafted blurs this distinction. For example, the current qualification requirements for school teachers are essential in ensuring that all teachers have met a requisite professional benchmark which duly qualifies them to teach. This is a minimum quality standard. Similarly, the National Education Goals (appended for your reference), which under current proposals will not apply to partnership schools kura hourua unless specified in each school's contract, are not compliance burdens but important statements of what standards and objectives the education system is expected to meet: in effect, they set out the way in which the education system should contribute to citizenship.
35. I note that partnership schools kura hourua will, for the most part, be required to meet the same set of statutory criteria as state schools, such as those provisions that mandate open enrolment, no tuition fees, the requirements to offer a qualification, a safe physical and emotional environment, equal rights of access for students with special educational needs, and that prohibit corporal punishment. I am supportive of this approach as it guarantees students of partnership schools kura hourua the same statutory protections and entitlements as those attending state schools.
36. In particular, I am pleased that s158G mirrors the proposed amendment to s75 of the Act. Section 158G and new s75 signal a significant purposive shift, introducing a positive duty on a Board of Trustees and partnership school kura hourua sponsors to focus on individual educational achievement as the primary function.
37. I am supportive of the approach, as it requires that a child-centred (or student-focused) approach is undertaken in the exercise of all their functions and duties as a matter of first principle. In doing so, it also brings school management functions more closely in alignment with the more general obligations under Articles 3.1 and 29.1 of UNCROC. However I recommend that this obligation be framed in a broader way that reflects a more holistic set of development outcomes for young people. I address this point more specifically below.

Recommendations – partnership schools kura hourua

Recommendation 1: Amend s158F of the Bill as follows, to insert a primary duty upon sponsors of partnership schools kura hourua towards improving educational outcomes for Māori and Pasifika students, students from low socio-economic status backgrounds and students with special educational needs:

158F Sponsor's duties

- (1) A sponsor of a partnership school kura hourua must demonstrate, as a primary duty, a commitment to improving educational outcomes for Māori and Pasifika students, students from low socio-economic status backgrounds and students with special educational needs***
- (2) In carrying out their primary duty under subsection (1), a sponsor of a partnership school kura hourua must -***
 - (a) provide a safe physical and emotional environment for students; and***
 - (b) ensure that the school delivers a curriculum that is in line with any foundation curriculum policy statements published under section 60A(1)(aa); and***
 - (c) assign the functions of the principal under the sections specified in section***

158T(1) to an appropriately qualified person or to appropriately qualified persons;
and

(d) assign the role of supervising teaching practice to an appropriately qualified person; and

(e) at intervals specified in the partnership school contract, inform parents of—

(i) the progress of their children at the school; and

(ii) any barriers to progress

38. **Rationale:** The main policy rationale for the trialing of the partnership school kura hourua model is to determine if trading some administrative compliance requirements off in favour of specified performance measures using a contract can improve educational outcomes for “Māori, Pasifika, learners from low socio economic backgrounds and learners with special education needs”¹⁹. It is for this reason that partnership schools kura hourua “will have more flexibility than State schools to make decisions about how they operate and use funding to deliver specific school level targets”²⁰. There is however no reference back to the rationale, either in the policy statement or in the Bill itself. Given the importance of this goal, I consider it should be made explicit in legislation.

Recommendation 2: Amend s 158G as follows to implement a broader set of objectives as regards student outcomes:

158G Sponsor to control management of partnership school kura hourua

(1) A sponsor of a partnership school kura hourua must perform the sponsor's functions and exercise the sponsor's powers in such a way as to ensure:

(a) **The development of every student's personality, talents and mental and physical abilities to his or her fullest potential; and**

(b) That every student is able to attain his or her highest possible standard in educational achievement; and

Recommendation 3: Similarly, I recommend that Clause 16 of the Bill is amended to inset a new s75(1)(a) incorporates this broader approach, as set out below:

75 Functions and powers of boards

(1) A school's board must perform its functions and exercise its powers in such a way as to ensure:

(a) **The development of every student's personality, talents and mental and physical abilities to his or her fullest potential; and**

(b) That every student is able to attain his or her highest possible standard in educational achievement.

39. **Rationale:** I believe that this framing is broader and more suitable. While academic achievement is a central concern, schools play a vital social and pastoral role in the lives of children, particularly those children with special educational needs.

40. When considering how a more holistic objective may be framed, Article 29.1(a) of UNCROC provides a useful precedent, namely that a primary function of an education

¹⁹ Associate Minister of Education's Cabinet Paper, Developing and Implementing a New Zealand Model of Charter Schools, paragraphs 4 and 5

²⁰ Education Amendment Bill 2012, Explanatory Note

system is to enable “the development of the child's personality, talents and mental and physical abilities to their fullest potential”. This approach ensures that state schools take a broader approach towards fostering an environment where all students can thrive and provides some statutory basis for implementing pro-social strategies, for example anti-bullying programmes. I understand the need for practical goals that are quantifiable. This approach is measurable for schools: for example, by rates of attendance, levels of engagement in cultural and sporting activities, and not being engaged in the criminal justice system.

Recommendation 4: Add a clause to section 158D Partnership school contracts stating that the terms of the contract must not be in opposition to the National Education Goals/that the Goals apply to partnership schools

41. Rationale: The National Education Goals are not compliance measures or burdens but statements of principle about the goals of education for New Zealand as a society, which should continue to be the goals of partnership schools kura hourua as part of the New Zealand education system. These goals work in partnership with the principles, values, key competencies and achievement outcomes of the New Zealand Curriculum that any locally-developed curricula would need to be able to map to.

Recommendation 5: Amend section 158G (2) to require a sponsor to:

- make public the content of its contract and;
 - to require sponsors to consult with parents in the management and governance of the school.
42. Rationale: One of the assumptions that the policy design of the partnership schools kura hourua trial is based on is that improving parents' choice can to improve their children's educational outcomes. In order to ascertain the accuracy of this assumption, parent choice needs to be informed - for example, by how many unregistered teachers a given school intends to employ, and what its performance measures as agreed with the Crown are. Related, as noted, research finds that genuine home-school partnerships are important in improving educational outcomes.
43. Children and young people have also told this Office that they would like home-school partnerships to be better than they are. Completely excluding parents from school governance and management is not in line with this knowledge. Involving parents should not be considered a compliance burden that could potentially be removed in pursuit of efficiencies, but an important statement about the role of education in our society and about known ways of achieving educational success.

Recommendation 6: delete section 158X, in order to ensure that functions of partnership schools carried out under the Education Act are subject to the Ombudsmen Act 1975 and Official Information Act 1982.

44. Rationale: Information about the funding of partnership schools kura hourua has not been made public. However it seems likely that they will be fully state funded as the Bill makes clear that they will not be private schools, and cannot charge tuition fees. Education is a public function. Public institutions that are conducting public functions with public money need to be amenable to public scrutiny. This clause also has the potential to affect the evaluation and monitoring of the trial, which must be robust in order for an assessment of

the success or failure of the pilot to be made in due course. I note that the Freedom of Information Act applies to academies in the United Kingdom.

45. In addition, partnership schools kura hourua will be empowered to undertake a number of statutory functions under this Bill, including disciplinary functions such as stand-down suspension, exclusion and expulsion procedures under ss13-17 and the proposed surrender and retention functions under s139AAA-AAF. State schools are subject to the jurisdiction of the Ombudsmen in respect of these functions and it is unjust to deny partnership school kura hourua students and their families recourse through this channel of review in cases where improper or unlawful practice on the part of the school may have taken place. It is entirely appropriate that partnership schools kura hourua are subject to the same level of accountability when administering delegated authority under the Act. To exempt partnership schools kura hourua from such oversight may also lead to sub-standard practices which could be detrimental to student welfare.
46. There may be a perceived risk of partnership schools kura hourua being flooded with trivial or vexatious Official Information Act requests that would take time away from teaching and learning, and go into commercially sensitive areas. However the Official Information Act contains sufficient explicit protection against these risks, and the risks are not commensurate with the public interest inherent in the schools' operation.

Recommendation 7: Amend section 158D (d) Partnership school contracts to address the number of teaching positions that must be filled by registered teachers or holders of limited authority to teach to state that persons with these qualifications must make up the entire teaching staff.

Recommendation 8: Replace the words “appropriately qualified person” with the words “appropriately qualified registered teacher” in section 158F (c) and (d) Sponsor’s duties

47. Rationale: A substantial evidence base finds that the quality of teaching and quality of leadership are the most influential levers on education success that can be applied within a formal education setting. As noted the current system already provides for people with unique skills to be employed through the LAT provision. I cannot conceive of how a person who is not qualified and registered to teach in New Zealand could be an appropriate person to be a professional practice leader in a partnership school kura hourua.
48. I also believe that the employment of non-qualified staff could lead to an increase in bullying and other behaviour problem in schools, and delays in the identification of children with special education needs. Qualified and registered teachers have training and skills in these areas, and can access support and further professional development.

Recommendation 9: That the Education Review Office be mandated to enquire into any aspect of teaching and learning in partnership schools kura hourua

49. Rationale: The Bill does not mention the role of the Education Review Office. However the Associate Minister of Education’s Cabinet Paper suggests that it would be permitted to

assess only the elements of practice that were contained in the school's contract²¹. In my view this is overly constrained, especially given that the partnership schools kura hourua will be pilots and that the model needs to be subject to a robust evaluation.

Recommendation 10: That the Ministry of Education work with the Treasury, the Ministry of Social Development (MSD) and the Department of Corrections, ACC and DHBs in order to learn from their experiences with different models of contracting social services.

50. I would be happy to facilitate this.

Recommendation 11: that a robust, independent evaluation be established for the partnership school kura hourua trial, should it go ahead, at the same time as or before the schools' contracts are negotiated and operational policy designed.

51. Rationale: It is profoundly unethical to experiment with the education of children and young people without a robust and independent evaluation in place. The Government, the public, the education sector, and affected parents and children need to have confidence that the partnership schools kura hourua are innovating, safe and achieving the Government's goals for them.

²¹ See Appendix 2 to the Associate Minister of Education's Cabinet Paper

52. To be credible, the partnership schools kura hourua pilot must be robust and the findings must be generalisable to the rest of the education system. This means that the funding must be comparable, the students' demographic and other characteristics, and the governance, leadership, teaching methods and outcomes all well described. Appropriate comparison schools should be chosen and assessed using the same methodology. While random allocation of students is impractical, student and teacher characteristics should be as closely matched as possible to remove confounding variables so the differences being studied are the only ones remaining.
53. If partnership schools are found to have a positive effect on outcomes, then their provisions should be rolled out to the rest of the education system. Most Māori, Pasifika and low SES children and children with special education needs will not be in the trial, so if it works, they need to have immediate access to the improved system settings. However if the pilot is found to be leading to worse outcomes for the children it is serving, this finding should be published. Arrangements will need to be in place to support students to immediately resume their education in a high-quality school setting that meets their needs.
54. My final recommendation may reflect a drafting error rather than a policy choice.

Recommendation 12: Insert the phrase 'recognised by tertiary providers and industry' immediately before the word 'qualifications' in 158E (3)(f)

55. Rationale: This appears to have been intended by the Associate Minister's Cabinet Paper as it is referenced in Appendix 2, but has not been carried forward into the drafting process. I believe that students in partnership schools kura hourua have the right to gain a recognised qualification as a result of their time at school.

Surrender and retention powers

56. Clause 28 of the Bill introduces statutory powers that enable teachers to require a student to produce and "surrender" an item that *"is likely to endanger the safety of any person or detrimentally affect the learning environment"*²² This includes the production and surrender of items stored on computers or electronic devices²³.
57. In addition, items that have been surrendered may be retained for a reasonable time by the teacher and either returned to the student or passed on to an appropriate person or agency. If appropriate, an item may be disposed of. However, there is little guidance in the Bill as to the circumstances under which such disposal will take place. Computers and electronic items appear to be implicitly exempt from disposal given the criteria in s139AAA(7) for return or passing on of an item.
58. The Bill does not enable teachers to conduct a search of a student or a student's personal property without their permission. Nor can students be forced to surrender an item, although s139AAD provides that a teacher may consider disciplinary steps should a student refuse such a request.

²² Section 139AAA(1) and (2)

²³ Section 139AAA(3)

59. In some respects, the Bill codifies current practice regarding the seizure and confiscation of a student's personal property which is potentially harmful or disruptive. This is confirmed by the Ministry of Education's Regulatory Impact Statement on the Bill (RIS) which notes that *"for the majority of schools the amendments will simply embed current practice in a more formal manner"*²⁴. It does not create a power that enables a search without consent to take place and it explicitly prohibits the use of physical force against the student to enable either a search or an item to be surrendered.
60. I am supportive of these limitations. Incorporation into the Act of broad statutory search powers would, in my view, be counter-productive and potentially dangerous for both student and teacher. I note that the RIS also expresses concern that the incorporation of strong search and seizure provisions would likely breach New Zealand Bill of Rights Act protections and, in addition, would not provide teachers with any further clarity about the exercise of such a power. Instead, such provisions would *"simply change the point at which personal judgments need to be made"*²⁵.
61. I note that the Bill intends that surrender and retention practices will be regulated by rules made under s139AAF, particularly as regards to the administration, storage, return and disposal of items surrendered. It therefore would be prudent for the provisions under Clause 28 to come into force upon the implementation of the s139AAF rules to ensure that practice is lawful and appropriate. There are many complex issues that arise. For example, electronic devices that have been surrendered and retained in respect of a specified 'item' of information will contain other personal information, applications and software that are the personal property of the student and which fall outside the parameters of the statutory grounds under which the device was surrendered. Clear protections need to be in place to ensure that such devices are not unduly interfered with following retention.
62. It follows that Clause 28 raises a number of important human rights and civil liberties issues. From a children's rights perspective, Article 16 of UNCROC provides New Zealand children with the following rights:
- The right to protection from arbitrary or unlawful interference with his or her privacy, family, or correspondence (Article 16.1); and
 - The right to protection of the law against such interference or attacks (Article 16.2).
63. As they are currently drafted, the provisions of Clause 28 only partially line up with the above UNCROC standards insofar as they provide "reasonable grounds" criteria and limitations under s139AAB which prohibit searches without consent from being conducted. The lack of clarity or guidance on issues pertaining to practices concerning the retention of items, their storage and disposal and, importantly, in respect of disciplinary action taken under s139AAD, opens up a risk that practices may be undertaken in such a manner which breaches the above rights and potentially other legal protections that exist in statute and the common law.

²⁴ <http://www.minedu.govt.nz/theMinistry/PublicationsAndResources/RIS/EducationAmendmentBill2012/SchoolSearchAndSeizure.aspx>

²⁵ <http://www.minedu.govt.nz/theMinistry/PublicationsAndResources/RIS/EducationAmendmentBill2012/SchoolSearchAndSeizure.aspx>

64. This is recognised by s139AAA(8) which provides that any powers utilised by a teacher under that section must comply with rules made under s139AAF. This underlines the importance of ensuring that before these provisions come into force, that s139AAF rules are developed.
65. The surrender and retention powers proposed under Clause 28 also give rise to a broader question as to whether it would be preferable to have such a regime set out in non-legislative guidelines, given that what is proposed is essentially the codification of current practice. In any event, it will be important that detailed guidelines are produced, similar to those available for Principals and Boards of Trustees concerning the administration of stand-down and suspension procedures.
66. I also note that the Bill proposes that partnership schools kura hourua will be able to undertake surrender and retention powers under s139AAA-AAF²⁶, yet by virtue of s158X a school's sponsor will be exempt from review by the Office of the Ombudsmen should a student and their family wish to raise a complaint alleging misuse of these powers. I consider that this is a problematic oversight and I reiterate my view raised in paragraph 46 that it is essential that partnership schools kura hourua are subject to this level of accountability when exercising statutory functions, particularly those which impact upon the legal rights of its students.

Recommendation 13: That the surrender and retention powers proposed under s139AAA-AAF only come into force upon the development and implementation of rules under s139AAF.

Recommendation 14: That the Bill is amended to make it clear that actions undertaken under s139AAA-AAF by teacher and staff of partnership schools kura hourua will be subject to the jurisdiction of the Ombudsmen Act 1975.

National Student Numbers

67. The current lack of information about children who are not participating in early childhood education (ECE) makes it very difficult to design effective policy and programmes to engage them. Given that these children tend to be Māori, Pasifika, from lower SES backgrounds and with special education needs, and the importance of quality early learning experiences to children's development and later educational outcomes, I support the provisions in principle.
68. I note that it is intended a full Privacy Impact Assessment be prepared by the Ministry of Education in due course.

²⁶ s158T Education Amendment Bill 2012

69. Thank you for the opportunity to submit on the Bill. If you require further information, please contact my Principal Advisor (Education), Kirsten Sharman on (04) 470 8718 or *k.sharman@occ.org.nz*; or my Principal Advisor (Legal), John Hancock on (09) 374 6102 or *j.hancock@occ.org.nz*.

A handwritten signature in black ink, appearing to read 'Russell Wills', with a stylized flourish at the end.

Dr Russell Wills
Children's Commissioner

Date: 24 January 2013

Appendix – National Education Goals²⁷

1. The highest standards of achievement, through programmes which enable all students to realise their full potential as individuals, and to develop the values needed to become full members of New Zealand's society.
2. Equality of educational opportunity for all New Zealanders, by identifying and removing barriers to achievement.
3. Development of the knowledge, understanding and skills needed by New Zealanders to compete successfully in the modern, ever-changing world.
4. A sound foundation in the early years for future learning and achievement through programmes which include support for parents in their vital role as their children's first teachers.
5. A broad education through a balanced curriculum covering essential learning areas. Priority should be given to the development of high levels of competence (knowledge and skills) in literacy and numeracy, science and technology and physical activity.
6. Excellence achieved through the establishment of clear learning objectives, monitoring student performance against those objectives, and programmes to meet individual need.
7. Success in their learning for those with special needs by ensuring that they are identified and receive appropriate support.
8. Access for students to a nationally and internationally recognised qualifications system to encourage a high level of participation in post-school education in New Zealand.
9. Increased participation and success by Māori through the advancement of Māori education initiatives, including education in Te Reo Māori, consistent with the principles of the Treaty of Waitangi.
10. Respect for the diverse ethnic and cultural heritage of New Zealand people, with acknowledgment of the unique place of Māori, and New Zealand's role in the Pasifika and as a member of the international community of nations.

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<http://www.minedu.govt.nz/theMinistry/EducationInNewZealand/EducationLegislation/TheNationalEducationGoalsNEGs.aspx>