

“Teaching Them a Lesson”: the Accountability of Partnership Schools to Students and Parents

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Introduction

The Education Amendment Act 2013 introduced a new type of school to New Zealand, partnership schools kura hourua.¹ This dissertation analyses legal accountability of partnership schools; specifically, the ways in which partnership schools can or cannot be held to account by the parents of students enrolled at partnership schools and, if appropriate, the students themselves.

The introduction of partnership schools is the result of the confidence and supply agreement entered into by the National Party and the ACT Party following the 2011 general election.² In September 2013, Education Minister Hekia Parata and Associate Education Minister John Banks announced the names of New Zealand's first partnership schools. These are to open at the start of 2014.³

The introduction of partnership schools has generated much political controversy. Concerns have been raised about the lack of discussion about partnership schools during the 2011 election campaign, whether partnership schools would improve or harm New Zealand's education system and the accountability of partnership schools.

Chapter One outlines the statutory framework for partnership schools. Like State schools, partnership schools are State-funded. However, partnership schools are run by private bodies, called "sponsors", who are contracted by the Minister of Education ("the Minister") to provide education services. Chapter One outlines how partnership schools are established and sponsors' statutory powers and duties, and identifies where a partnership school is required to comply with legislation.

Chapter Two explores the accountability mechanisms available to parents, students and the public without needing to incur the expense and inconvenience of litigation. These mechanisms include complaints processes and information disclosure.

¹ Partnership schools kura hourua will be referred to as "partnership schools". Partnership schools are also commonly known as "charter schools".

² See "Partnership Kura Policy Development Process" (2013) Ministry of Education <www.minedu.govt.nz>.

³ Hekia Parata and John Banks "Ministers announce first Partnership Schools | Kura Hourua" (press release, 17 September 2013).

Chapters Three and Four explore if and when the courts could be used to hold partnership schools to particular standards. Chapter Three assesses the existence of private law relationships between partnership schools and their students and their parents, while Chapter Four explores whether partnership schools could be judicially reviewed for their decisions.

At the time of writing, negotiations between the Government and the sponsors of these partnership schools for partnership school contracts are still taking place. This dissertation will therefore analyse the accountability of partnership schools in general, rather than any particular partnership school. The analysis will be based on legislation, in particular the Education Act 1989, and, where appropriate, the generic agreement forming the basis for current partnership school contract negotiations (“the Draft Partnership School Contract”).⁴

⁴ "Contract between the Crown and the sponsor of a Partnership School - generic" (16 September 2013) Ministry of Education <www.minedu.govt.nz>.

Chapter One: Statutory Framework

The legislative framework for partnership schools, found in pt 12A of the Education Act 1989 (“the Education Act”),⁵ is much less prescriptive than the statutory scheme governing State schools. Partnership schools are governed by a contract between the partnership school and the Minister as well as the Education Act. This Chapter outlines the legislative framework for partnership schools and compares it to the framework for State schools.

The parties to a partnership school contract are the Minister, who enters a partnership contract “in the name and on behalf of the Crown”, and the “sponsor” of a partnership school.⁶ A partnership school contract entered into under pt 12A of the Education Act gives a body the authority to operate a partnership school.⁷ Partnership schools must comply with the requirements of pt 12A of the Education Act as well as their partnership school contract. By contrast, State schools are governed by regulations and school charters as well as the Education Act.

1.1 Entering a partnership school contract

The Education Act allows the Minister to decide who may sponsor a partnership school. Section 2(1) defines a sponsor as “a body approved by the Minister under section 158B to operate a partnership school kura hourua”. Section 158B gives the Minister authority to approve a body to be a sponsor of a partnership school, as well as “absolute discretion to refuse to approve a body to be a sponsor”. The Minister must appoint an advisory group, whose purposes include advising the Minister on the approval of sponsors.⁸

The Minister approves a body as a sponsor by notice in the *Gazette*.⁹ The notice must include the name of the sponsor and certain other matters.¹⁰ The Minister may then enter into a

⁵ Inserted into the Education Act 1989 by the Education Amendment Act 2013.

⁶ Education Act 1989, s 158D(1).

⁷ Education Act 1989, s 158F.

⁸ Education Act 1989, s 158C(1)(a).

⁹ Education Act 1989, s 158B(1).

¹⁰ Education Act 1989, s 158B. These include the name of the sponsor, the name and place of the school, whether the school is a primary, secondary or composite school, the class levels that can be taught at the school, any “religious, philosophical or other distinguishing characteristic of the school” and any class levels at the school that will be single sex.

contract with the sponsor for the operation of a partnership school in accordance with s 158D of the Education Act. Different class levels can be “phased in” at different times.¹¹

1.2 The contents of a partnership school contract

Partnership school contracts must be for a fixed term¹² and include the following matters:¹³

- (1) the sponsor’s objectives and performance standards for the partnership school’s operation;
- (2) the sponsor’s reporting requirements relating to the sponsor’s contractual objectives, performance standards and national standards;¹⁴
- (3) the partnership school’s maximum roll;
- (4) how many teaching positions at the partnership school must be filled by registered teachers or holders of limited authority to teach;
- (5) the curriculum taught at the partnership school;
- (6) if the partnership school is a secondary school or composite school, the qualifications it will offer;
- (7) an independent review procedure for complaints against the partnership school;¹⁵
- (8) the Minister’s and Secretary for Education’s powers of intervention in the partnership school;¹⁶
- (9) procedures to terminate the partnership school contract for breach of contract;
- (10) if the partnership school contract is terminated or expired, the sponsor’s obligations to cooperate with the Minister and comply with the Minister’s instructions “to ensure the orderly and efficient transfer of the operation of the school”; and
- (11) the intervals when a sponsor must inform parents of their children’s progress and barriers to progress at the partnership school.¹⁷

¹¹ Education Act 1989, s 158B(4).

¹² Education Act 1989, s 158D(2).

¹³ Education Act 1989, s 158D(3).

¹⁴ Published under s 60A(1)(ba) of the Education Act 1989.

¹⁵ Processes for investigating and reviewing complaints against partnership schools are discussed in Chapter Two.

¹⁶ In addition, s 158M of the Education Act 1989 specifically addresses the Secretary for Education’s powers to intervene in a partnership school.

¹⁷ This requirement can be found in a sponsor’s duties under s 158G, which refers to “intervals specified in the partnership school contract”. Such reporting to parents could be considered to fall under ss 158D(3)(a) and (b) (which relate to a sponsor’s objectives, performance standards and reporting requirements), but neither of these subsections clearly requires a partnership school contract to specify the intervals at which reporting to parents should occur.

These are the minimum requirements of a partnership school contract. Other provisions may be included if they are not inconsistent with the Education Act or “any regulations made under the [Education] Act”.¹⁸ A sponsor is not prohibited from operating a partnership school for a profit.¹⁹

1.2.1 Comparison: State school charters

Many of the matters to be included in a partnership school contract are prescribed by legislation for State schools.²⁰ The Education Act also requires boards of State schools to make school charters publicly available.²¹ The detail in the Education Act on the governance and operation of State schools and public disclosure of school charters help parents and the public ascertain what they can reasonably expect of State school boards of trustees (“boards”) and whether those expectations are being met. This enables parents and the public to take legal or political action if they feel standards are not being met. The Ministry of Education intends to publicly disclose the contents of partnership school contracts,²² but the Education Act does not require disclosure.²³

A board must prepare a school charter “to establish the mission, aims, objectives, directions, and targets of the board that will give effect to the Government’s national guidelines and the board’s priorities, and provide a base against which the board’s actual performance can later be assessed”.²⁴ The Education Act’s requirements of school charters are more comprehensive than its requirements of partnership school contracts. Every charter must include:²⁵

- (1) aims of developing policies and practices that reflect New Zealand’s cultural diversity and Maori culture, and ensuring that all reasonable steps are taken to provide

¹⁸ Education Act 1989, s 158D(4). The meaning of “any regulations” is discussed later in this Chapter.

¹⁹ The list of fully non-rateable land in pt 1, sch 1 of the Local Government (Rating) Act 2002, as amended by s 47 of the Education Amendment Act 2013, includes land used by and for the purposes of a partnership school “excluding any partnership school kura hourua that operates for profit”.

²⁰ In either the Education Act itself or regulations issued under the Education Act. For example, all teaching staff at State schools must be registered teachers (Education Act 1989, s 120A). Regarding the curriculum taught at schools, s 61(2) of the Education Act 1989 requires that State school charters give effect to national curriculum statements.

²¹ Education Act 1989, s 63B.

²² Email from Mark Ballinger (Education Private Secretary, Office of Hon John Banks Associate Minister of Education) to Dipti Manchanda regarding the content of partnership school contracts (29 August 2013).

²³ Whether a partnership school contract could be made available through other means, such as the Official Information Act 1982, is discussed in Chapter Two.

²⁴ Education Act 1989, ss 61(1) and 61(2).

²⁵ Education Act 1989, s 61.

instruction in tikanga Maori and te reo Maori to full-time students whose parents ask for it;

- (2) a long-term strategic planning section establishing the board's aims and purposes and an annually updated section establishing the board's aims, directions, objectives, priorities and targets relating to student outcomes, the school's performance and the use of resources;
- (3) the board's aims, objectives, directions, priorities and targets in student achievement; meeting Government policy objectives for all schools; management of the school's and the board's culpability, resources, assets and liabilities; and other matters determined by the Minister; and
- (4) a reference to, summary or copy of all annual or long-term plans required of a board.

Procedural requirements when preparing or updating a school charter are set out in s 62. They must be prepared and updated annually in accordance with national administration guidelines.²⁶ Boards can be held politically accountable by parents of students at State schools for the contents of school charters through elections of and interactions with boards; which must include parent representatives.²⁷

1.3 Sponsors' statutory duties and powers

A sponsor's role at a partnership school is comparable to the role of a board at a State school. This is reflected by similarities in the language describing the powers and duties of sponsors and boards. But in some instances, the Education Act gives sponsors greater ability to choose how to exercise these powers.

Sections 158U-158V apply certain State school provisions to partnership schools. Section 158U(1) imports to partnership schools provisions on enrolling international students;²⁸ suspensions, stand-downs, exclusions, expulsions and preclusions for health reasons;²⁹ release from tuition on religious or cultural grounds, from tuition in parts of the health curriculum and from school for tuition outside the school, and exemptions from attendance for short periods;³⁰ police vetting;³¹ surrender and retention of property and searches;³² and

²⁶ If the Secretary for Education determines that a charter was not developed or updated in accordance with the Act or is inconsistent with the Act or national administration guidelines, the Secretary has duties and powers to intervene under s 63A of the Education Act 1989.

²⁷ Education Act 1989, ss 78N(3)(c), 96 and 101.

²⁸ Education Act 1989, ss 4-6.

²⁹ Education Act 1989, ss 13-15, 17-17C, and 18-19.

³⁰ Education Act 1989, ss 25A (except subs (1B)), 25AA, 25B and 27.

the issue of certificates by a principal as proof of certain matters for proceedings under the Education Act.³³ Section 158V(1) applies the Education (Stand-Down, Suspension, Exclusion and Expulsion) Rules 1999³⁴ (“the Rules”) to partnership schools; except for r 3.³⁵ These sections apply as though:³⁶

- (1) references to a State school are references to a partnership school;
- (2) references to a board are references to a sponsor;
- (3) references to a principal are references “to the person or persons whom a sponsor has assigned the function or functions of the principal” under that section or the Rules;
- (4) section 25AA’s reference to the health curriculum is a reference to the health curriculum delivered by a partnership school; and
- (5) the definition of “teacher” in s 139AAA for the sections on surrender and retention of property and searches is replaced with the definition of “teacher” in s 158U(5). A “teacher” is a person holding a teaching position at a partnership school or assigned a function of a principal.

Sponsors’ statutory duties are set out in s 158G of the Education Act. A sponsor must:

- (1) Provide a safe physical and emotional environment for students. National Administration Guideline 5³⁷ places the same duty on boards.³⁸
- (2) Ensure that their partnership school delivers a curriculum in line with foundation curriculum policy statements published by the Minister under s 60A(1)(aa) of the Education Act.
- (3) Assign the functions of a principal³⁹ in the sections listed in s 158U(1) “to an appropriately qualified person or to appropriately qualified persons”. This does not

³¹ Education Act 1989, ss 78C-78CD.

³² Education Act 1989, ss 139AAA-139AAI; except the s 139AAE(1)(a) prohibition on contractors carrying out the surrender and retention of property and search powers in ss 139AAA and 139AAB.

³³ Education Act 1989, s 33.

³⁴ As rules made under s 18AA of the Education Act 1989.

³⁵ Rule 3 of the Education (Stand-Down, Suspension, Exclusion and Expulsion) Rules 1999 provides the meaning of “board”.

³⁶ Education Act 1989, ss 158U and 158V.

³⁷ “National Administration Guidelines” (29 October 2009) 157 *New Zealand Gazette* 3810.

³⁸ National administration guidelines are published by the Minister in the *Gazette* under s 60A of the Education Act 1989. Section 62(2) requires that charters of state schools “be prepared ... in accordance with national administration guidelines”. If a school board develops a charter that the Secretary considers inconsistent with national administration guidelines, the Secretary must take certain actions set out in s 63A.

encompass all of a principal's functions, such as a principal's s 77(a) duty to ensure that "students get good guidance and counselling".

(4) Assign the role of supervising teaching practice to an appropriately qualified person."

(5) Inform parents of their children's progress at the school and their barriers to progress, at intervals specified in the partnership school contract. Principals of State schools must inform a student's parents of matters that matters that "are harming the student's relationships with teachers or other students"⁴⁰ as well as matters that "are preventing or slowing the student's progress through the school".

1.4 Regulations

If sponsors must act consistently with regulations issued under the Education Act, parents may be able to challenge as ultra vires sponsors' actions and decisions (such as the creation of school rules) that are inconsistent with regulations. But the Education Act does not expressly extend the scope of all regulations concerning State schools and boards to partnership schools and sponsors.

A partnership school must comply with regulations issued under s 78F of the Education Act if it chooses to participate in a school risk management regime.⁴¹ Some regulations would apply to partnership schools despite silence in the Education Act, such as the Health and Safety in Employment Regulations 1995 in a partnership school's capacity as an employer.⁴² Some regulations would not apply to partnership schools. For instance, pt 7 of the Education Act requires boards, as Crown entities,⁴³ to comply with particular regulations issued under the Crown Entities Act 2004.⁴⁴ Neither sponsors nor partnership schools are Crown entities subject to those regulations. Similarly, partnership schools would not need to comply with regulations on electing trustees under s 118 of the Education Act, since partnership schools need not have a board of trustees.

Whether regulations issued under the Education Act that govern State schools' control and management apply to partnership schools is less obvious. The Education Act gives "complete discretion" to State school boards to make bylaws and control the management of a State

³⁹ A principal's role is to act as a board's chief executive of a State school: Education Act 1989, ss 2(1) and 76(1).

⁴⁰ Education Act 1989, s 77(b).

⁴¹ Education Act 1989, s 158L(2).

⁴² See the definition of "employer" in the Health and Safety in Employment Act 1992, s 2.

⁴³ Education Act 1989, s 65H.

⁴⁴ See Education Act 1989, ss 67, 67A, 67B and 73.

school⁴⁵ and to principals to control the day-to-day management of a school,⁴⁶ as they “see fit” but subject to “any enactment” and “the general law of New Zealand”.⁴⁷ Section 158H confers “complete discretion” on a sponsor “to control the management of the school as the sponsor sees fit” and s 158I empowers a sponsor “to make any rules the sponsor thinks necessary or desirable for the control and management of the school”. But both ss 158H and 158I are “subject to any enactment, the general law of New Zealand, and the partnership school contract”.

Section 29 of the Interpretation Act 1999 defines “enactment” to include regulations. “Any enactment” may need to be read down, so that “any enactment” only refers to enactments that Parliament could have reasonably contemplated would apply to partnership schools or regulations that a sponsor agrees to comply with. Whether particular regulations apply to partnership schools would depend on whether the regulations fit within the pt 12A framework.

The Governor-General may issue regulations on “the control, management, organisation, conduct, and administration of schools” under s 78 of the Education Act. The Education Act does not state whether s 78 regulations fetter a sponsor’s discretion under ss 158H-158I. But for the purpose of certain sections that include s 78, s 60 defines “school” as a “State school within the meaning of section 2”, “unless the context otherwise requires”. Section 2, in turn, defines a “State school” and a “partnership school” separately. Following this route, it appears that s 78 regulations would not fall within the words “any enactment” in ss 158H-158I.

The question becomes whether the relationship between ss 78 and 158H-158I is a context that requires a departure from the definitions in s 60.

Parliament chose to make sponsors’ discretions under ss 158H-158I “subject to any enactment”. Parliament’s use of “enactment”, defined by the Interpretation Act, rather than “Act of Parliament” demonstrates an intention to make sponsors’ control and management of partnership schools subject to regulations of some kind. Part 12A does not give the Minister the power to create regulations on the control and management partnership schools, so Parliament must be contemplating regulations made under other parts of the Education Act.

⁴⁵ Education Act 1989, ss 72 and 75(2).

⁴⁶ Education Act 1989, s 76(2).

⁴⁷ A board’s power to make bylaws is also subject to the school’s charter. A principal must also comply with a board’s general policy directions.

Section 78 of the Education Act contemplates regulations on the control and management of schools. Parliament could have excluded s 78 regulations (or State school regulations generally) from the meaning of the words “any enactment”, but did not. The interaction between s 78 and the words “any enactment” in ss 158H-158I supports a departure from s 60.

On the other hand, s 78 regulations can give powers or impose duties on “boards, principals, or both”. But s 78 was not amended by the Education Amendment Act 2013 to include sponsors. Section 78 is not included in s 158U’s list of provisions that apply to partnership schools with any necessary modifications.

Even if “schools” in s 78 could include partnership schools, ss 158L and 77A raise difficulties in bringing a partnership school’s equivalent of a board or principal⁴⁸ within the meaning of “board” or “principal” for the purpose of s 78. Section 158L(2) states that “regulations made under section 78F ... apply” to a sponsor that participates in a school risk management scheme “as if it were a participating school board”. Section 77A broadens the definition of “principal” to apply to partnership schools, but for the purpose of s 77A only.⁴⁹ Sections 158H-158I and 78 do neither of these things, indicating that regulations issued under s 78 are not “enactment[s]” that limit a sponsor’s ss 158H-158I discretion.

Overall, s 78 regulations do not appear to apply to ss 158H-158I. Partnership schools are governed by their “own” part in the Education Act. Parliament turned its mind to the matter of what particular aspects of the statutory scheme for State schools should apply to partnership schools, and did not carry over s 78 regulations.

The broader observation that can be drawn from the relationship between ss 78 and 158H-158I is that when determining whether Education Act regulations apply to partnership schools, the words “any enactment” really mean “any enactment applicable to partnership schools”. Unless a statutory provision expressly states that particular regulations apply to partnership schools or a sponsor agrees to comply with particular regulations, partnership schools are not required to comply with regulations issued under the Education Act. This

⁴⁸ Even if a partnership school’s governance structure includes a body called the “board” and an employee with the title of “principal”.

⁴⁹ Section 77A(5) states: “In this section, principal, in relation to a partnership school kura hourua, means the person to whom the sponsor has assigned the role of managing enrolment records”. Though s 77A relates to a principal’s statutory obligation to maintain enrolment records rather than the application of regulations, s 77A helps illustrate Parliament’s intention that the legislative regime for State schools does not automatically also apply to partnership schools.

appears to be the approach adopted in the first round of partnership school contract negotiations.⁵⁰

A related question is whether the terms of partnership school contracts themselves must be consistent with regulations. Section 158D(4) states that provisions included in a partnership school contract that are not required by s 158D(3) (“discretionary contractual terms”) cannot be “inconsistent with ... any regulations made under ... [the Education] Act”. But s 158D does not address whether “any regulations made under this Act”, for the purpose of discretionary contractual terms, carries a similar qualification to “any enactment” in ss 158H-158I.

The qualification on “any enactment” is likely to apply to “any regulations made under this Act” in s 158D(4). Both ss 158H-158I and 158D(4) use the word “any”. In ss 158H-158I, the meaning of “any” should be read down. Importing the same meaning to s 158D(4), regulations only restrict the content of discretionary contractual terms if regulations specifically refer to partnership schools.

Section 158D(3) lists terms that must be included in a partnership school contract (“mandatory contractual terms”), but makes no reference to regulations at all. While the Education Act does not appear to include powers to issue regulations on most mandatory contractual terms, cross-over does exist regarding the curricula taught at and qualifications offered by partnership schools. Section 78(4) contemplates regulations “prescribing a course of study”. Even though the Education Act allows for regulations on a matter specifically listed in s 158D(3), s 158D(3) makes no reference to regulations at all. This silence suggests that Parliament did not intend to require consistency between mandatory contractual terms listed in s 158D and regulations issued under the Education Act for State schools.

1.5 Application of the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993

Under s 158W of the Education Act, s 3(b) of the New Zealand Bill of Rights Act 1990 (“the NZBORA”) applies to sponsors and their employees, including contractors, when they are performing functions under the Education Act or in relation to a partnership school contract. So, for the purpose of the NZBORA, sponsors and partnership school employees and contractors are performing a “public function, power or duty” in the context of their roles at a partnership school.

⁵⁰ See “Contract between the Crown and the sponsor of a Partnership School - generic” (16 September 2013) Ministry of Education <www.minedu.govt.nz>, above n 4, at 1.3 and 5.

As a result, pt 1A of the Human Rights Act 1993⁵¹ also applies to sponsors and partnership school employees and contractors.⁵² Acts or omissions that are inconsistent with the right to freedom from discrimination under s 19 of the NZBORA and are not justified by s 5 also breach the Human Rights Act.⁵³ Of pt 2 of the Human Rights Act, only the provisions on discrimination in employment matters, racial disharmony, social and racial harassment and victimisation apply to partnership schools, as well as the aspects on ss 65 and 67-74 that apply to conduct unlawful under pt 2.⁵⁴

Part 2 of the Human Rights Act includes provisions on discrimination and access to educational establishments.⁵⁵ Partnership schools could be an “educational establishment” within s 57(2), as an “establishment offering any form of training or instruction”. But because pt 1A applies to bodies that fall within s 3(b) of the NZBORA to the exclusion of most of pt 2,⁵⁶ partnership schools would not fall within these provisions. Of State schools, State-integrated schools, partnership schools and private schools, only private schools are caught by pt 2 of the Human Rights Act.⁵⁷

1.6 Attending a partnership school

Every person aged between five and 19⁵⁸ “is entitled to free enrolment and free education at any State school or partnership school”.⁵⁹ International students cannot be accepted over domestic students.⁶⁰

The scheme for enrolling a student at a partnership school differs from enrolling at a State school in two key respects. First, a student cannot be enrolled at a partnership school without the consent of their parent(s).⁶¹ Second, the “home zone” enrolment scheme for State

⁵¹ “Discrimination by Government, related persons and bodies, or persons or bodies acting with legal authority”.

⁵² Human Rights Act 1993, s 20J.

⁵³ Human Rights Act 1993, s 20I.

⁵⁴ Human Rights Act 1993, s 21A.

⁵⁵ Human Rights Act 1993, ss 57-60.

⁵⁶ Human Rights Act 1993, s 20J(3).

⁵⁷ See Paul Rishwoth "Religious Issues in State, Integrated and Private Schools" (Paper presented at the New Zealand Law Society Education Law Seminar, Auckland, May-June 2006) 87 at 97.

⁵⁸ Until “1 January after the person’s 19th birthday”.

⁵⁹ Education Act 1989, s 3. This excludes international students.

⁶⁰ Education Act 1989, s 4 as applied by s 158U.

⁶¹ Education Act 1989, ss 16(2A), 17D(3A), 158R(3)(a) and 158S(3)(b) for enrolments at the direction of the Secretary for Education, and s 158N for other enrolments, which are made by application to the partnership school.

schools⁶² does not apply to partnership schools. However, partnership schools do not have discretion to “pick and choose” their students. Section 3 provides for the right to a free education at a State or partnership school. When the number of enrolment applications submitted to a partnership school exceeds the number of places available, s 158N requires partnership schools to determine the success of enrolment applications using a three-tiered ballot system. The Education Act does not address enrolment procedures if there is no shortage of places at a partnership school. But the Draft Partnership School Contract closes this gap:⁶³ a sponsor “must” accept all domestic students if it has the capacity to do so.⁶⁴

Much of the litigation against State schools to date has been the result of disciplinary decisions made by State school principals and boards.⁶⁵ Sections 158U-158V apply the legislative provisions for State schools regarding temporary absence from school, and stand-downs, suspensions, exclusions and expulsions, to partnership schools. Partnership schools can refuse to enrol a student who has been excluded or expelled from another school.⁶⁶ But if the Secretary directs a sponsor to enrol a student who has been stood-down, suspended, excluded or expelled from any school (including the particular partnership school itself) the sponsor must comply.⁶⁷

The Education Act does not allow partnership schools to charge enrolment fees. The Draft Partnership School Contract allows partnership schools to charge any fees that State schools are permitted to charge under Education Circulars or Ministry of Education guidelines.⁶⁸ Partnership schools may seek donations from parents. But a parent’s decision not to make a donation to a partnership school cannot affect their child’s tuition or disadvantage their child in any way, unless permitted by an Education Circular or Ministry of Education guideline.⁶⁹ So partnership schools are under the same restrictions as State schools when seeking financial contributions from students’ parents.

1.7 Summary

⁶² Found in pt 2 of the Education Act 1989.

⁶³ "Contract between the Crown and the sponsor of a Partnership School - generic" (16 September 2013) Ministry of Education <www.minedu.govt.nz>, above n 4, cl 7.2.

⁶⁴ With the exception of students who have been excluded or expelled from another school, discussed below.

⁶⁵ This litigation is discussed in Chapter Four.

⁶⁶ Education Act 1989, s 158S(2).

⁶⁷ Education Act 1989, ss 16(5), 17D(4).

⁶⁸ "Contract between the Crown and the sponsor of a Partnership School - generic" (16 September 2013) Ministry of Education <www.minedu.govt.nz>, above n 4, at 11.1.

⁶⁹ At 11.3.

While the instruments that govern State schools are all subject to democratic processes, partnership schools are governed by both the Education Act and a contract negotiated between a sponsor and the Minister. Parents are not involved partnership school contract negotiations in any way. But the Education Act requires that partnership schools recognise some of the most important values in the State education system: the right to a free education, and the rights protected by the NZBORA and pt 1A of the Human Rights Act.

Chapter Two: Complaints, Investigations and Information Disclosure

This Chapter explores the availability of accountability mechanisms to students at partnership schools and their parents that do not involve costly litigation processes, compared to the accountability mechanisms available to students at State schools and their parents. For the purpose of this Chapter, “accountability” includes the handling and investigation of complaints by parents and students, as well as transparency and provision of information to parents, students, and the wider public. The specific accountability mechanisms explored include:

- investigations by the Office of the Ombudsman, the Human Rights Commission and the Education Review Office (“ERO”);
- the New Zealand Teachers Council’s disciplinary processes; and
- information disclosure under the Official Information Act 1982 (“the OIA”) and to Parliament.

2.1 Complaints and investigations

2.1.1 The Office of the Ombudsman and the Independent Review Process

The Ombudsman’s jurisdiction over sponsors is restricted to when sponsors perform “a standing-down, suspension, exclusion or expulsion function”.⁷⁰ The Ombudsman’s jurisdiction over boards is not qualified.⁷¹

⁷⁰ Ombudsmen Act 1975, sch 1, pt 2. Section 2(5) of the Ombudsmen Act 1975 defines a “standing-down, suspension, exclusion or expulsion function” as a function under s 14 (“Principal may stand-down or suspend students”), s 15 (“Board’s powers when suspended student younger than 16”), ss 16(1)(a) and (5) (“Secretary’s powers when excluded student younger than 16”), ss 17-17C (“Board’s powers when suspended student 16 or older”, “Duties of principal when student stood-down or suspended”, “Who may attend board meeting concerning suspensions” and “Effect of suspension on school register”), ss 17D(3A) and (5) (“Re-enrolment of excluded or expelled student”), s 18 (“Notice requirements for stand-downs, suspensions, exclusions, and expulsions”), ss 158R(1)(c), (4) and (6) (“Secretary’s powers when student younger than 16 is excluded from partnership school kura hourua”), and ss 158S(1)-158S(3) (“Secretary’s powers when student younger than 16 is excluded from partnership school kura hourua”) under the Education Act 1989, or rules made under s 18AA of the Education Act 1989. Section 18AA of the Education Act allows the Secretary to make rules regulating the practice and procedure of boards, principals, students, parents and other persons under ss 14-18 on various matters relating to stand-downs, suspensions, exclusions or expulsions. The current operative rules are the Education (Stand-Down, Suspension, Exclusion and Expulsion) Rules 1999.

⁷¹ Ombudsmen Act 1975, sch 1, pt 2.

The Ombudsman's jurisdiction over partnership schools could encompass disciplinary decisions where an incident is serious enough to warrant considering a stand-down, suspension, exclusion or expulsion and not just when one actually occurs. A sponsor "may" stand-down or suspend a student if the conditions in s 14 are met.⁷² If a suspended student is under 16 years old and "the circumstances of the case justify the most serious response", a student "may" be excluded.⁷³ If a suspended student is older than 16, they "may" be expelled.⁷⁴ Though there is no additional test for expelling a student, a student can only be expelled if they have first been suspended.

So, stand-down, suspension, exclusion and expulsion functions involve an assessment of the gravity of a student's behaviour and the exercise of discretion.⁷⁵ It may therefore be within the Ombudsman's jurisdiction to investigate why a stand-down, suspension, exclusion or expulsion was not imposed on a student when one was warranted. For example, the Ombudsman could investigate complaints by bullying victims that a sponsor failed to sufficiently consider their interests when exercising a stand-down, suspension, exclusion or expulsion function, as in the Ombudsman's report on *Bullying at Hutt Valley High School*.⁷⁶ The Ombudsman investigated a State school's handling of bullying that amounted to criminal assault, including the adequacy of the stand-down penalties imposed on the responsible students.

However, the Ombudsman's ability to effectively investigate the performance of stand-down, suspension, exclusion or expulsion functions may itself be limited. If concerns about a partnership school's exercise of these functions are tied to other aspects of a partnership school's operation, like a violent student culture,⁷⁷ the Ombudsman could not fully investigate the complaint.

⁷² A sponsor must be satisfied on reasonable grounds that either "the student's gross misconduct or continual disobedience is a harmful or dangerous example to other students at the school", or "because of the student's behaviour it is likely that the student, or other students at the school, will be seriously harmed if the student is not stood-down or suspended" (Education Act 1989, s 14(1)).

⁷³ Education Act 1989, s 15(1)(c).

⁷⁴ Education act 1989, s 17(1)(c).

⁷⁵ *M and R v S and Board of Trustees of Palmerston North Boys' High School* [2003] NZAR 705 (HC) at 716. The importance of this discretion is discussed further in Chapter Four.

⁷⁶ *Report of David McGee, Ombudsman on Complaints Arising out of Bullying at Hutt Valley High School in December 2007* (2011) .

⁷⁷ McGee, above n 76.

Partnership school contracts must provide for “a procedure for the independent review of complaints against the school”.⁷⁸ Complaints that fall within the Ombudsman’s jurisdiction may be referred to either or both the Ombudsman and reviewer.⁷⁹

The effect of the Ombudsman retaining jurisdiction over a sponsor’s stand-down, suspension, exclusion and expulsion functions that can also be the subject of independent review is that students and parents at partnership schools have greater protection against misuse of these powers than students and parents at State schools.

The Ombudsman has investigated complaints about a board’s handling of complaints against a school,⁸⁰ a school’s bullying culture⁸¹ and non-custodial parents’ rights to be “advised of matters that are slowing a student’s progress or harming their relationship with teachers or other students” under s 77 of the Education Act.⁸² It is conceivable that the Ombudsman may be asked to investigate health and safety concerns and disciplinary action to respond to behaviour less serious than the standard required to stand-down, suspend, exclude or expel.

Such complaints at a partnership school could be dealt with by independent review. But the Education Act does not set minimum requirements for independent review processes. The Ombudsman cannot provide oversight of independent review processes.⁸³ How a reviewer would handle complaints depends on the process set out in a partnership school contract.⁸⁴ Independent review processes could vary between partnership schools. The Ombudsman’s and reviewers’ processes and powers could differ significantly.

Section 18(7) of the Ombudsmen Act allows an Ombudsman to “regulate his procedure in such manner as he thinks fit”,⁸⁵ allowing the Ombudsman to determine how to handle complaints on a case-by-case basis and improve their procedures. The Education Act does not indicate whether independent review processes are also flexible or if review processes could

⁷⁸ Education Act 1989, s 158D(3)(g).

⁷⁹ Education Act 1989, s 158E.

⁸⁰ See Beverley Wakem and David McGee *2011/2012 Report of the Ombudsman* (June 2012) at 40.

⁸¹ For example, see McGee, above n 76.

⁸² Anand Satyanand "Case No W45378" (2003) 13 Case Notes of the Ombudsmen 46. It should be noted that the Official Information Act 1982 was relevant to this investigation, which does not apply to partnership schools.

⁸³ The Education Amendment Act 2013 did not insert independent reviewers into the list in sch 1, pt 2 of the Ombudsmen Act 1975. This list names the organisations other than local organisations to which the Ombudsmen Act 1975 applies.

⁸⁴ Education Act 1989, s 158D(3)(g).

⁸⁵ “Subject to the provisions of this Act and of any rules made for the guidance of Ombudsmen by the House of Representatives and for the time being in force”.

only change by varying the applicable partnership school contract. The Education Act does not require that reviewers, like the Ombudsman, be able to initiate reviews of their own motion or broaden their reviews beyond the scope of a particular complaint.⁸⁶ Reviewers are unlikely to be able to review other agencies without statutory authority or an agency's consent. This would be problematic if multiple decisions of sponsors and other agencies interact to lead to a complaint. For example, in his report on *Bullying at Hutt Valley High School*,⁸⁷ the Ombudsman expanded his investigation beyond the scope of the complaint to include the involvement of the Ministry of Education. A reviewer could not do the same. Complex complaints could not be resolved through a single, comprehensive independent review.

The Education Act does not stipulate a reviewer's powers during or upon concluding an independent review, leaving them to be determined by contract. It is silent on whether a reviewer's recommendations are binding on a sponsor, or non-binding like Ombudsman recommendations. It does not specify a reviewer's powers if a sponsor does not follow their recommendations, whereas the Ombudsman can send copies of their reports and recommendations to the Prime Minister and report to the House of Representatives if their recommendations are not followed.⁸⁸

The Education Act does not indicate what should happen if an independent reviewer's recommendations are inconsistent with a sponsor's partnership school contract. State schools are governed by school charters and regulations that can be changed by politically accountable boards and legislators. Political pressure associated with an Ombudsman investigation could facilitate such change. But variation of a partnership school contract would need the consent of the unelected sponsor, making variation less likely.

The independent review process in the Draft Partnership School Contract⁸⁹ is considerably weaker than Ombudsman investigations. Like Ombudsman recommendations, a reviewer's recommendations do not bind a sponsor. But aspects of the review process do not appear "independent" and may be inconsistent with natural justice. To initiate the process, complainants must make a request in writing to a sponsor or their delegate. A "[s]chool's

⁸⁶ Ombudsmen Act 1975, s 13(3).

⁸⁷ McGee, above n 76.

⁸⁸ Ombudsmen Act 1975, s 22(4).

⁸⁹ "Contract between the Crown and the sponsor of a Partnership School - generic" (16 September 2013) Ministry of Education <www.minedu.govt.nz>, above n 4, sch 8.

management should render support to the complainant in drafting their request” so that the request “accurately reflect[s] the scope of the grievance”.⁹⁰ The complainant could then choose to proceed to mediation or review, but not both. A sponsor may notify the reviewer or mediator if they consider a complaint to be “unreasonable or vexatious”. The reviewer or mediator may then vary their process, but need not give the complainant an opportunity to respond. They may then report to the parties based on the written information the parties provided, concluding the process without meeting them.

Regardless of the details of the independent review process set out in a particular partnership school contract, an independent reviewer could not provide the same depth to its reviews as Ombudsman investigations. The independent review process proposed in the Draft Partnership School Contract gives sponsors a level of influence over processes and outcomes that call its independence into question.

2.1.2 The Human Rights Commission

If a sponsor has acted inconsistently with pt 1A of the Human Rights Act, a student or parent may lodge a complaint with the Human Rights Commission to initiate a dispute resolution process.⁹¹ If the Human Rights Commission cannot resolve the complaint through mediation, proceedings in the Human Rights Review Tribunal might result.⁹²

The Human Rights Commission could help mediate disputes with sponsors about a partnership school’s uniforms and religious activities. School uniform requirements could form the basis of discrimination allegations if students are unable to observe their religious or spiritual beliefs, or if uniforms for male and female students do not offer the same level of practicality. Parents of a child at a State school sought remedies through the Human Rights Commission and Human Rights Review Tribunal when their child was made to enter school assemblies late, after her parents objected to the religious prayers that began assemblies.⁹³

2.1.3 The Education Review Office

⁹⁰ At 72.

⁹¹ Human Rights Act 1993, s 77.

⁹² The Human Rights Commission may refer the complaint to the Director of Human Rights Proceedings. The Director of Human Rights Proceedings would then consider taking the complaint to the Human Rights Review Tribunal (Human Rights Act 1993, s 77). Alternatively, the student or parent could lodge their complaint with the Human Rights Review Tribunal directly (Human Rights Act 1993, s 90(1)(a)).

⁹³ Stuart Dye "School on the mat over weekly prayer" *The New Zealand Herald* (online ed, Auckland, 17 December 2005) .

The Chief Review Officer of ERO administers reviews of the performance of organisations that provide educational services and fall within pt 28 of the Education Act.⁹⁴ Section 324(1) sets out the ways an organisation could fall within pt 28. Partnership schools are captured by three of these, so would be subject to ERO reviews. Sponsors need ministerial authorisation to operate partnership schools,⁹⁵ partnership schools are wholly or partly “funded by public money appropriated by Parliament”⁹⁶ and are wholly or partly “regulated by or under statute”.⁹⁷

The Chief Review Officer can initiate reviews of his or her “own motion”.⁹⁸ When ERO receives a “medium” or “high” risk complaint about a school’s performance, it considers bringing forward its next review or scheduling a special review of the school in question.⁹⁹

ERO’s function of reviewing partnership schools’ performance overlaps with the functions of the advisory group appointed by the Minister under s 158C of the Education Act. The advisory group advises the Minister on “the educational performance of partnership schools”. The advisory group’s terms of reference are defined by the Minister; the Education Act does not distinguish its role from ERO’s role. The role of the advisory group has not yet been determined,¹⁰⁰ but it is expected that ERO and the advisory group will work together.¹⁰¹

The Education Act’s lack of provisions on ERO’s role regarding partnership schools can be compared to s 35I, which outlines matters that must be addressed in ERO reviews of private schools. ERO’s approach for reviewing partnership schools would differ from its approach to

⁹⁴ “The Chief Review Officer shall ... administer ... reviews, either general or relating to particular matters, of the performance of applicable organisations in relation to the applicable services they provide” (Education Act 1989, s 325).

⁹⁵ Education Act 1989, s 158F. Part 28 applies to an educational service “that is provided by an organisation ... forbidden by law to provide that service ... unless it holds a licence, permit, or other authority issued by or on behalf of the Crown” (Education Act 1989, s 324(1)(a)(ii)).

⁹⁶ Education Act 1989, s 324(1)(b)(i).

⁹⁷ Education Act 1989, s 324(1)(b)(ii).

⁹⁸ Education Act 1989, s 325(a)(ii).

⁹⁹ See “Process for Complaints to ERO about Schools or Early Childhood Education Services” (June 2010) Education Review Office <www.ero.govt.nz>.

¹⁰⁰ “Contract between the Crown and the sponsor of a Partnership School - generic” (16 September 2013) Ministry of Education <www.minedu.govt.nz>, above n 4, at 19.5(c).

¹⁰¹ John Banks “Partnership Schools/Kura Hourua: funding focuses on raising achievement” (press release, 15 May 2013).

State schools in some respects; in particular, the standards against which a school's performance is assessed would be influenced by the applicable partnership school contract.¹⁰²

But the Education Act does not restrict ERO's ability to review partnership schools and does not appear to authorise regulations or policies that restrict ERO's powers to assess partnership schools. So even if the roles of ERO and the s 158C advisory group are differentiated in an informal arrangement or policy, ERO would still have the power to investigate a complaint about a partnership school's performance as though the complaint were about a State school.

2.1.4 The Teachers Council

Sections 139AR and 139AZC of the Education Act allow any person, including a parent, to lodge a complaint with the New Zealand Teachers Council about the conduct or competence of a "teacher". A complaint must be lodged with the teacher's employer before it is taken to the Teachers Council, unless the complainant has reasonable grounds to believe that the teacher's employer "will not be able to deal with the complaint effectively because of an actual or perceived conflict of interest" or the teacher is not currently employed. Otherwise, complaints can be taken to the Teachers Council if a complainant is not satisfied with the way their complaint was handled or is being dealt with, or "in any other exceptional circumstance".

For the purpose of pt 10A of the Education Act, which governs the Teachers Council, a "teacher" includes a "registered teacher", a "former registered teacher", an "authorised person" and a "former authorised person".¹⁰³ An "authorised person" holds limited authority to teach.¹⁰⁴

Teaching positions at partnership schools can be held by persons who are not registered teachers and do not hold limited authority to teach under pt 10 of the Education Act.¹⁰⁵ While the pt 10A definition of "teacher" captures teaching staff who were formerly registered teachers or held limited authority to teach, some teaching staff at partnership schools may

¹⁰² For example, the New Zealand Curriculum may not be relevant to ERO's assessment of the curriculum taught at a partnership school (for the relevance of the New Zealand Curriculum to ERO's review of State school, see "Framework for School Review" (March 2011) Education Review Office <www.ero.govt.nz> at 4). Instead, the performance standards and curriculum details set out in the applicable partnership school contract would be relevant.

¹⁰³ Education Act 1989, s 139AB(1), definition of "teacher".

¹⁰⁴ Education Act 1989, s 139AB(1), definitions of "authorised person" and "authority". A person could have "limited authority to teach" under pt 10 of the Education Act 1989.

¹⁰⁵ Education Act 1989, s 158D(3)(d).

never have had this status. The s 139AB(1) definition of “teacher” is non-exhaustive: it uses the word “includes”. But r 5 of the New Zealand Teachers Council (Making Reports and Complaints) Rules 2004 uses “means” in its definition of “teacher”, leaving an accountability gap for some partnership school teaching staff.

So unlike their State school counterparts, parents of students at partnership schools with concerns about teaching staff may not be able to seek remedies through the Teachers Council since the Teachers Council might not have authority to investigate the complaint.

Presumably, complaints about the competence and conduct of teaching staff in this gap can be handled through the independent review process. But this process would not constitute a disciplinary investigation and hearing by a professional body and, as discussed above, carries procedural concerns.

2.1.5 Conclusion

Part 12A provides little guidance on the processes available to students and parents to have their complaints against a partnership school heard and investigated. The details of independent review processes are largely determined by individual partnership school contracts. The lack of empowering legislative provisions for independent review processes and their proposed framework suggest that students and parents at partnership schools cannot expect complaints processes comparable to those available to students and parents at State schools.

2.2 Information disclosure and availability

2.2.1 Personal information

Sponsors are subject to the Privacy Act 1993. A sponsor, as a “person or body of persons”, is an “agency” within s 2(1). A sponsor “when performing a standing-down, suspension, exclusion, or expulsion function” would also constitute an “organisation”.¹⁰⁶ A sponsor is treated as a “public sector agency” for the purpose of ss 35-36,¹⁰⁷ so like State schools, could not charge for processing Privacy Act information requests without the Privacy Commissioner’s authorisation.

¹⁰⁶ The definition of “organisation” in s 2(1) of the Privacy Act 1993 imports pt 2 of sch 1 of the Ombudsmen Act 1975, which includes “sponsors (within the meaning of section 2(1) of the Education Act 1989) when performing a standing-down, suspension, exclusion, or expulsion function”, to the Privacy Act 1993.

¹⁰⁷ Education Act 1989, s 158X.

If a sponsor stands-down, suspends, excludes or expels a student, the sponsor must inform the Secretary and the student's parent of that decision and the sponsor's reasons.¹⁰⁸

2.2.2 Other information

The Education Act does not require public disclosure of partnership school contracts, but the current intention is to release them.¹⁰⁹ It is conceivable that, at the request of a sponsor, a partnership school contract might not be proactively disclosed; particularly in light of the Partnership Schools Working Group's response to an OIA request for the names of groups who expressed an interest in establishing a partnership school. The Working Group refused to disclose the information. The Ombudsman found that the Working Group, despite being subject to the OIA, improperly assured two of the groups confidentiality and had no good reason to withhold the information.¹¹⁰

A sponsor must present their partnership school's annual financial statements to the Secretary for Education.¹¹¹ The Draft Partnership School Contract requires them to also be publicly disclosed.¹¹² But this requirement is not included in the Education Act, so might not be included in every final partnership school contract.

Boards must also provide annual financial statements to the Secretary under s 87C of the Education Act. But unlike the equivalent partnership school provision, s 87C states that the Minister must make annual financial statements provided by boards available to any Member of Parliament who so requests. Parents concerned with a State school's financial decisions may be able to relay their concerns to their local Member of Parliament, who could then examine that school's financial statements. If a partnership school's financial statements are not disclosed, this safeguard would not be available as an alternative.

Data on the educational achievement of a partnership school's students and the number of suspensions and expulsions at a partnership school could be of public interest. Such information would help ensure that schools meet the expected standards by building political pressure on underperforming schools to improve their performance. While a partnership

¹⁰⁸ Education Act 1989, s 18 (applied to partnership schools through s 158U of the Education Act). The requirement to inform a student's parent does not apply when the student has turned 20.

¹⁰⁹ Ballinger, above n 22.

¹¹⁰ Ron Paterson *Ombudsman's Opinion: Request for groups interested in setting up a charter school* (July 2013)

¹¹¹ Education Act 1989, s 158K.

¹¹² "Contract between the Crown and the sponsor of a Partnership School - generic" (16 September 2013) Ministry of Education <www.minedu.govt.nz>, above n 4, at 18.4.

school's performance relating to national standards would likely be disclosed in ERO reports, national standards only apply to certain age groups and ERO reports do not tend to disclose other performance data.¹¹³

OIA requests cannot be made directly to sponsors. The OIA's definition of "official information" includes information held by an "organisation",¹¹⁴ defined to exclude "sponsors ... performing functions under the Education Act 1989 or a partnership school contract".¹¹⁵ Section 158Y of the Education Act stipulates that the OIA does not apply to sponsors performing functions under the Education Act or a partnership school contract, overriding s 2(5) of the OIA.¹¹⁶

Parents have tried to obtain information about their children from their schools through OIA requests. Often, the child that the information is about has requested that the information not be disclosed to that parent.¹¹⁷ Parents of students at partnership schools could not use the OIA to make such requests. Instead, they would need to use independent reviews to enforce a sponsor's duty to inform parents of their child's progress at the school and barriers to their progress.¹¹⁸

The rest of this Chapter will ask whether the terms of a partnership school contract and information about a partnership school's performance, including its financial decisions, could be obtained from the Minister of Education or the Secretary for Education through the OIA. It

¹¹³ See "School Reports" (2013) Education Review Office <www.ero.govt.nz>.

¹¹⁴ Official Information Act 1982, s 2(1) definition of "official information", para (a).

¹¹⁵ Official Information Act 1982, s 2(1) definition of "organisation", para (a).

¹¹⁶ Section 2(5) deems information held by an independent contractor engaged by a Minister of the Crown to be held by that Minister.

¹¹⁷ Such circumstances include non-custodial parents seeking a school's prize list (Anand Satyanand "Case No W39955" (2000) 12 Case Notes of the Ombudsmen 92) and information about their child's suspension (Satyanand, above n 82) or educational achievement (Brian Elwood "Case Nos W32982 & W34275" (1998) 11 Case Notes of the Ombudsmen 71; Anand Satyanand "Case No A5861" (1998) 11 Case Notes of the Ombudsmen 72; and Anand Satyanand "Case No A5289" (1998) 11 Case Notes of the Ombudsmen 73). Custodial parents have also made OIA requests for information about their child, such as about a sexual harassment complaint their child laid with the school (Anand Satyanand "Mother's request for copies of teenage daughter's confidential statements alleging sexual harassment withheld to protect future supply of similar information (Case Reference: W50854)" (2007) 14 Case Notes of the Ombudsmen 131).

¹¹⁸ Education Act 1989, s 158G(e).

will also ask if the reasons for a stand-down, suspension, exclusion or expulsion could be obtained from the Secretary for Education by anybody other than the person disciplined.¹¹⁹

2.2.3 Obtaining the terms of a partnership school contract through the Official Information Act 1982

Is a partnership school contract “official information”?

A partnership school contract is “information” about the terms of a partnership school’s operation, “held by ... a Minister of the Crown in his official capacity” under the s 2(1) definition of “official information”. A partnership school contract would also be held by the Ministry of Education, making the contract “information held by ... a department” too.

Are there any grounds for the Minister or Ministry to withhold the terms of a partnership school contract?

Disclosing a partnership school contract could “unreasonably ... prejudice the commercial position of the person who supplied or who is the subject of the information” under s 9(2)(b)(ii). A sponsor may have a commercial position they wish to protect if they are engaged in other ventures or operate their partnership school for a profit.¹²⁰ Disclosing their partnership school contract could disclose financial information that prejudices their other ventures. Public pressure or protests following revelations that a partnership school operates for profit could affect a partnership school’s enrolment levels or a sponsor’s ability to meet community engagement obligations.¹²¹

If the Minister were in negotiations to establish a new partnership school, disclosing existing partnership school contracts could prejudice or disadvantage the Minister’s position under s 9(2)(j).

Are the reasons to withhold a partnership school contract outweighed by the public interest in their disclosure?

Unless students, parents and the general public are aware of partnership school’s performance standards and the terms on which they are permitted to operate, their ability to form their own

¹¹⁹ Section 18 of the Education Act 1989 requires that the reasons for a stand-down, suspension, exclusion or expulsion be provided to the Secretary and the disciplined student’s parents (unless the student has turned 20).

¹²⁰ The Ombudsman has recognised that an activity can be “commercial” for some persons, but not others. A purpose of profit is important in drawing this distinction. See Brian Elwood and Anand Satyanand “What is a “Commercial Activity”?” (1997) 3(2) Ombudsman Quarterly Review 2.

¹²¹ Clause 10.6 of the Draft Partnership School Contract (“Contract between the Crown and the sponsor of a Partnership School - generic” (16 September 2013) Ministry of Education <www.minedu.govt.nz>, above n 4) indicates that partnership schools may have some community engagement obligations, but the content of these obligations has not yet been determined.

expectations regarding educational services offered by partnership schools is limited. This would affect parents of current and prospective students at partnership schools. Certain processes in partnership school contracts, such as the independent review process, are included for parents' and students' benefit. They can only serve their purpose if parents and students are aware of them. There is therefore a public interest in partnership school contracts being publicly available, that is much stronger than the public interest in the terms of the Government's general supply contracts. The current public debate about partnership schools provides an additional public interest in disclosing the terms of their operation.¹²²

The public interest in disclosing the terms of a partnership school contract would outweigh any prejudice to a sponsor's commercial position. A funding model is already publicly available,¹²³ making any prejudice to a sponsor's commercial interests minimal. Sensitive aspects of a partnership school contract, such as terms disclosing financial information, could be withheld. But the public interest would still require disclosure of the rest of a partnership school contract.

The public interest would outweigh s 9(2)(j) considerations if the relevant negotiations are hypothetical future negotiations. If negotiations are pre-existing, disclosure might be appropriate after the negotiations' completion.

2.2.4 Obtaining information about a partnership school's performance under the Official Information Act

Is information about a partnership school's performance "official information"?

A partnership school's performance information would be "information held by ... a department; or a Minister of the Crown in his official capacity".¹²⁴

Are there any grounds for the Minister or Ministry to withhold information about a partnership school's performance?

The Education Act requires partnership school contracts to include a sponsor's reporting requirements regarding its performance.¹²⁵ So, performance information would constitute information a sponsor "could be compelled to provide under the authority of any enactment"

¹²² See Paterson, above n 110. The controversy surrounding partnership schools' introduction contributed to the Ombudsman's finding that there was a public interest in disclosure of the names of groups who had expressed an interest in establishing a partnership school.

¹²³ "Funding for Partnership Schools" (2013) Ministry of Education <www.minedu.govt.nz>.

¹²⁴ A sponsor is required to report to the Minister on performance-related matters under s 158D(3)(b) of the Education Act 1989.

¹²⁵ Education Act 1989, s 158D(3).

under s 9(2)(ba) of the OIA. It is in the public interest that a sponsor provides the Minister with accurate performance information. Prejudice based on the possibility of contractual penalties when sponsors disclose data showing poor performance is minimal: the Minister is likely to help a sponsor improve their performance before taking action that could harm students' interests.¹²⁶ But a sponsor could be deterred from providing such information if public disclosure could bring the sponsor negative publicity. So disclosure of performance information would be likely to prejudice the supply of performance information.

Are the reasons to withhold a partnership school's performance information outweighed by the public interest in its disclosure?

Unless the public has information about partnership schools' performance, they cannot assess the Minister's monitoring and enforcement of a partnership school contract's terms. Disclosing performance information would build political pressure on a Minister to ensure that sponsors meet their obligations and promote the accountability of the Minister and consequently the good government of New Zealand.¹²⁷

But if a sponsor does not supply accurate information the Minister cannot effectively enforce a partnership school contract, regardless of any political pressure to do so. So performance information could be withheld under s 9(2)(ba).

2.2.5 Conclusion: the terms of and performance under a partnership school contract

If a partnership school contract is not proactively disclosed, it is likely that an OIA request to the Minister or Ministry of Education for its disclosure would be successful (though some contractual terms might be withheld). But performance information about a partnership school is unlikely to be disclosed under the OIA. Disclosure of performance information would compromise the ability of the Minister to enforce the terms of partnership school contracts, contrary to the public interest.

2.2.6 Obtaining the reasons for a stand-down, suspension, exclusion or expulsion through the Official Information Act

A decision to stand-down, suspend, exclude or expel a student who bullied or otherwise harmed another student could affect the disciplined student's "victim". A victim or victim's

¹²⁶ See "Education Report: Determining At Risk Payments for Partnership Schools Part 1" (12 July 2013) Ministry of Education <www.minedu.govt.nz>; and "Education Report: Determining At Risk Payments for Partnership Schools Part 2" (12 July 2013) Ministry of Education <www.minedu.govt.nz>.

¹²⁷ Official Information Act 1982, s 4(a).

parent could not obtain the reasons for a disciplinary decision from the Secretary for Education through s 23 of the OIA. A disciplinary decision is made by a sponsor, who is not “a department or Minister of the Crown or organisation”.

The Secretary would hold information on the reasons for a stand-down, suspension, exclusion or expulsion, making them “information held by a department” and “official information” under s 2(1).

Withholding the reasons for a stand-down, suspension, exclusion or expulsion could be necessary to “protect the privacy” of the disciplined student under s 9(2)(a). Where other students have complained about the disciplined student and disclosure might prejudice the supply of similar information or information from the same source in the future, the information could also be withheld to “protect information which is subject to an obligation of confidence” under s 9(2)(ba). Whether the public interest in disclosure would outweigh these concerns would depend on the circumstances, but in most situations it is unlikely that the reasons for a stand-down, suspension, exclusion or expulsion could be obtained through the OIA.

2.2.7 Conclusion

Information relating to partnership schools is, in general, more difficult to obtain than information relating to State schools. A sponsor’s financial decisions could only be assessed if the Minister, Secretary or sponsor makes the information available, either voluntarily or if required by a partnership school contract. The OIA could not be used to obtain any information from a sponsor directly. If a partnership school contract is not proactively disclosed, it could be obtained through an OIA request to the Minister. But it is unlikely that other information about partnership schools, including performance information (including financial information) could be successfully requested through the OIA.

Chapter Three: Private Law Relationships

Identifying the type of legal relationship students enrolled at a partnership school and their parents have with a partnership school helps determine what each can expect of the other, and the remedies available if those expectations are breached. This Chapter explores whether parents and students can enforce a contractual relationship with partnership schools, and whether partnership schools owe a common law duty of care or fiduciary obligations to their students.

3.1 Does a contractual relationship exist between a sponsor and the parents of their partnership school's students?

If a contract exists between a sponsor and the parents of the students enrolled at a partnership school, parents would have contractually enforceable rights against a sponsor. This would be in addition to the obligations of a sponsor and rights of a student under the Education Act. Contractual rights could empower parents to enforce a wider range of obligations, such as requirements to teach certain matters. Parents could also seek remedies such as specific performance on matters that form part of the contractual relationship.

3.1.1 Is there a direct contractual relationship between sponsors and the parents of the students at their partnership school?

A child can only be enrolled in a partnership school with their parents' consent.¹²⁸ While the relationship between parents and sponsors may therefore be voluntary, it does not necessarily follow that a contractual relationship exists between parents and sponsors. The elements of a contractual relationship are agreement between the parties,¹²⁹ certainty of the contractual terms, consideration and an intention to create legal relations.¹³⁰

Agreement

When a body is approved as a sponsor and begins seeking enrolments, advertisements¹³¹ and documents published to promote a partnership school, such as a prospectus, could constitute

¹²⁸ Education Act 1989, ss 16(2A), 17D(3A), 158R(3)(a) and 158S(3)(b) for enrolments at the direction of the Secretary for Education, and s 158N for other enrolments, which are made by application to the partnership school.

¹²⁹ This usually requires an offer and acceptance.

¹³⁰ *McCreanor Estate Nominees Ltd v Trustees Executors and Agency Co of New Zealand Ltd* [1999] BCL 819 (HC).

¹³¹ In *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256, it was accepted that an advertisement could constitute an offer to those who perform a condition stipulated in the advertisement. In the context of partnership schools, an advertisement encouraging parents to enrol their child at a partnership school could constitute an offer to parents who do subsequently enrol their child at the partnership school.

an offer. A parent's application to enrol their child at a partnership school and their subsequent acceptance of a position at that partnership school could constitute acceptance.

In *Grant v Victoria University of Wellington*, the High Court accepted that the relationship between Victoria University of Wellington and its students (who were members of the University under s 163 of the Education Act) was partly based on contract and partly based on the Education Act 1989.¹³² The contractual elements of the relationship were based on the University's prospectus and certain University publications, including the "Practicum Guide" and university calendars.

To support this position Ellis J cited Wade and Forsyth, who emphasise the importance of students' contracts of membership and universities being the creature of charters as opposed to statutes.¹³³ Students enrolled at a partnership school would not be "members" of a partnership school in the same way as university students are members of the universities in which they enrol. But similarly to how students need to consent to having a relationship with a university, students at partnership schools would not have any relationship with the partnership school's sponsor without their parents' consent. Partnership schools are established by contract and, like universities, are also subject to the Education Act. So while the relationship in *Grant* is not directly analogous to the relationship between sponsors and their students' parents, *Grant* provides guidance on the types of documents that could frame aspects of that relationship that are not determined by the Education Act.

Section 158N does not allow much room for a sponsor's discretion in determining whether to accept or decline particular students' enrolment applications.¹³⁴ Children under the age of 16 must be enrolled at a school.¹³⁵ But these factors do not detract from the reality of consent between a sponsor and a parent to have a child attend a partnership school. By voluntarily entering into a partnership school contract with the Minister under the Education Act, a sponsor agrees to abide by the restrictions the Education Act places on sponsors when considering enrolment applications. Similarly, a parent is not required to enrol their child at any particular partnership school. Parents have the practical alternative of enrolling their

¹³² *Grant v Victoria University of Wellington* [2003] NZAR 185 (HC) at 191.

¹³³ William Wade and Christopher Forsyth *Administrative Law* (7th ed, Clarendon Press, Oxford, 1994) at 565 and 642-643.

¹³⁴ Subject to the discussion in Chapter One on the Education Act's silence on when a partnership school has more places available than enrolments.

¹³⁵ Education Act 1989, s 20.

child at a State school in their home zone,¹³⁶ but instead chose to enrol their child at the particular partnership school. So consent exists between a sponsor and parents.

Certainty

While all the terms of a contract need not be absolutely certain for the contract to be valid, the parties must have agreed on “all essential terms; or at least upon objective means of sufficient certainty by which those terms may be determined”.¹³⁷ Parents are likely to know of many essential terms as a matter of practicality, such as the qualifications offered by the school and when a student must attend school. This is regardless of whether partnership school contracts are publicly disclosed, since parents are unlikely to enrol their children in a partnership school without knowing these details.

Intention to create legal relations and consideration

Consideration is one indicator of an intention to create legal relations.¹³⁸ The absence of consideration and the lack of an intention to create legal relations between parents and sponsors mean that a contractual relationship between parents and sponsors does not exist.

Partnership schools must offer a free education, and cannot charge parents for educational services provided to their children. This means that parents do not provide sponsors with consideration for the educational services rendered. But a sponsor may receive consideration in the form of a practical benefit,¹³⁹ since at least part of the funding they receive from the Ministry of Education is based on how many students are enrolled at the school.¹⁴⁰ So, for each additional child enrolled at their partnership school, sponsors receive the practical benefit of additional government funding.

However, this is unlikely to constitute adequate consideration. The consideration from parents would be illusory, with no intention to create legal relations. Parents are required by statute to ensure their child is enrolled at a school, but this is a public obligation and not owed to a sponsor. A parent can withdraw their child from a partnership school at any time without penalty, provided they enrol their child at another school. By contrast, parents with children

¹³⁶ Other practical alternatives could include enrolment at a private school (depending on a family's financial means), and enrolment at another geographically convenient partnership school (if one exists).

¹³⁷ *Wellington City Council v Body Corporate 51702 (Wellington)* [2002] 3 NZLR 486 (CA) at 495.

¹³⁸ *Antons Trawling Co Ltd v Smith* [2003] 2 NZLR 23 (CA) at [93].

¹³⁹ *Williams v Roffey Bros Ltd* [1991] 1 QB 1 (CA).

¹⁴⁰ "Funding for Partnership Schools" (2013) Ministry of Education <www.minedu.govt.nz>, above n 123.

enrolled at private schools would likely be required to continue to pay fees for a certain period, such as until the end of the school term. This indicates that enrolling a child at a partnership school does not reflect an intention on the part of parents to create legal relations with a sponsor.

Conclusion

A direct contractual relationship would not exist between parents and sponsors for lack of consideration.

3.1.2 Can parents rely on the Contracts (Privity) Act 1982 to enforce the partnership school contract between a sponsor and the Minister?¹⁴¹

The parties to a partnership school contract are the partnership school's sponsor and the Minister.¹⁴² If parents can enforce partnership school contracts, this could reduce the importance of public law standards and remedies. For example, if parents were able to enforce a partnership school contract's reporting requirements¹⁴³ in a way that enabled parents to have direct access to information about a sponsor's performance, this would limit the significance of the availability of performance information under the OIA.

To enforce the terms of a partnership school contracts through s 8 of the Contracts (Privity) Act 1982, parents would need to show that:¹⁴⁴

- (1) the partnership school contract designates themselves or their children by name, description, or reference to a class; and
- (2) the partnership school contract confers or purports to confer a benefit on themselves or their children;¹⁴⁵ and
- (3) satisfaction of the first two conditions is not negated by the proper construction of the partnership school contract indicating that the sponsor and Minister did not intend to create an obligation that parents and students can enforce themselves. It is not yet clear if partnership school contracts will include a clause stating that ss 4 and 8 of the Contracts (Privity) Act are not intended to apply.

¹⁴¹ This discussion proceeds on the assumption that parents will have access to partnership school contracts, either because they are proactively disclosed or obtained through the OIA (as discussed in Chapter Two).

¹⁴² Education Act 1989, s 158D.

¹⁴³ See Education Act 1989, s 158D(3)(b).

¹⁴⁴ Contracts (Privity) Act 1982, s 4.

¹⁴⁵ Assuming that a parent litigates on behalf of their child.

Clause 3(a) of the Draft Partnership School Contract states that a “Sponsor is contracted by the Minister to provide educational services to students who enrol to attend the School”,¹⁴⁶ designating students enrolled at a partnership school as the class that benefits from that school’s partnership school contract.

Partnership school contracts confer a legal “benefit” upon students at partnership schools for the purpose of the Contracts (Privity) Act. A “benefit” is defined in s 2 as including an advantage, or an extension or improvement of a right to which a person is entitled. Assuming that a “benefit” need not be of economic value,¹⁴⁷ the argued “benefit” would be the advantage of specialised educational services.

But being able to enforce a partnership school contract would be of limited use to parents and may not eliminate the need for the availability of public law remedies. A parent’s grievance might relate to a sponsor’s discretion under a partnership school contract, or a matter not included in a partnership school contract at all. Because a sponsor is a party to a partnership school contract, contractual clauses phrased as limitations on a sponsor’s rights, such as restrictions on their ability to exercise discretion, would fall outside the s 2 definition of “benefit”. Contractual silence on a sponsor’s obligations cannot “confer a benefit” to a student. Further, even if a benefit can be established, parents would need to show that the partnership school contract itself “confers” the benefit. Some clauses in a partnership school contract would merely reference provisions of the Education Act that confer obligations on a sponsor or rights to a student. For instance, if a contractual clause reflects a sponsor’s statutory duties under ss 158G or 158H(1) of the Education Act, it does not “confer” a benefit and therefore cannot be enforced by parents through the Contracts (Privity) Act.

3.1.3 Can students and parents use the Declaratory Judgments Act 1908 to enforce the partnership school contract between a sponsor and the Minister?

A sponsor’s powers control the management of partnership schools and make rules under ss 158G-158I of the Education Act are “subject to ... the partnership school contract”. So a sponsor’s contractual obligations that relate to the management of a partnership school or rules at a partnership school are incorporated by reference into the Education Act, making them statutory obligations. Section 158G(e) imposes a duty on sponsors to inform parents of

¹⁴⁶ "Contract between the Crown and the sponsor of a Partnership School - generic" (16 September 2013) Ministry of Education <www.minedu.govt.nz>, above n 4.

¹⁴⁷ A benefit of no economic value may be sufficient, as long as the benefit is not illusory or illegal (Brian Coote "Implied Conferral and "Benefit" under the Contracts (Privity) Act 1982" (2006) 12 NZBLQ 13).

certain matters about their child “at intervals specified in the partnership school contract”, incorporating another contractual provision into the Education Act.

If a sponsor is not meeting contractual obligations that are incorporated into the Education Act, or it is suspected that they will breach those obligations,¹⁴⁸ parents and students may be able to seek a declaration under s 3 of the Declaratory Judgments Act 1908 on the proper construction of the relevant section of the Education Act. This would then bind the sponsor.¹⁴⁹ So parents and students could use the Declaratory Judgments Act to enforce contractual provisions that are not enforceable through the Contracts (Privity) Act, such as restrictions on a sponsor’s discretion – but only the contractual provisions that are incorporated into the Education Act.

3.2 When would a negligence action be available against sponsors?

If sponsors are subject to common law damages for harms that happen to be the result of system failures, common law damages may provide a sufficient incentive for sponsors to improve their systems and reduce the significance of partnership schools being outside the Ombudsman’s jurisdiction.

A common law duty of care owed by a partnership school or sponsor to its students or their parents is unlikely to be of much use to parents. Parents arguing that a partnership school has been negligent would face the same barriers as if the school were a State school. To argue negligence, a parent would need to show that:¹⁵⁰

- (1) they or their child¹⁵¹ suffered loss or damage;
- (2) the sponsor of a partnership school owed them or their child a duty of care to protect them against or avoid that type of loss or damage;¹⁵²
- (3) the sponsor breached that duty of care; and
- (4) the loss or damage suffered was caused by that breach, and was not too remote from the breach.

3.2.1 Physical and mental injury

¹⁴⁸ Declaratory Judgments Act 1908, s 9.

¹⁴⁹ Declaratory Judgments Act 1908, s 4.

¹⁵⁰ *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [9] and [34].

¹⁵¹ If a child suffered loss or damage, that child’s parent may be able to pursue a remedy on their behalf.

¹⁵² The duty of care must be owed to the same party who suffered the damage or loss. So, if a parent suffered damage or loss, but the partnership school owed a duty of care to their child and not to the parent, the parent would not be able to argue negligence.

In a school environment, the most likely types of loss or damage likely to occur are personal injury or mental injury. Circumstances that could give rise to such harms include bullying by other students, accidents, abuse by staff members or embarrassment resulting from a partnership school's handling of a disciplinary matter.

Section 317 of the Accident Compensation Act 2001 bars claims for damages¹⁵³ outside of the Accident Compensation Act for "personal injury covered by this Act". Students would receive ACC cover and be barred from common law damages for all physical injuries, and mental injuries that result from either physical injury or acts specified in sch 3.¹⁵⁴

This means that a student or parent could only seek common law damages from a partnership school for purely psychological bullying or abuse that caused¹⁵⁵ a recognised psychiatric condition,¹⁵⁶ unless the circumstances are extreme enough to warrant exemplary damages. It would be difficult to attribute a psychiatric condition to a school's breach of duty and not other events in a student's life.¹⁵⁷

3.2.2 Economic loss

The most conceivable type of economic loss that could result from a child's time at a particular school would be lost earning potential because of an inadequate standard of education.

A v Roman Catholic Archdiocese of Wellington accepted that teachers could owe a professional duty of care to a student associated with the student's education,¹⁵⁸ but "[t]here is substantial difficulty in the concept of a claim based on a failure to achieve any particular academic outcome".¹⁵⁹ Schooling is just one of many factors that are relevant to a person's success in life, many of which are outside a school's control.¹⁶⁰

¹⁵³ With the possibilities of exemplary damages and public law damages remaining.

¹⁵⁴ See s 21 and the definition of "personal injury" in s 26 of the Accident Compensation Act 2001. It is irrelevant if a person has not been charged with or convicted of the offence, or if the alleged offender is incapable of forming criminal intent.

¹⁵⁵ Where a plaintiff suffers mental injury that is caused by a combination of incidents, some of which fall within the s 317 bar, a plaintiff would need to show that the mental injury was not caused by acts within the bar. Success is unlikely if the acts can be considered to be an "interactive whole": *AB v Attorney-General* HC Wellington CIV-2006-485-2304, 22 February 2011, at [414]-[420].

¹⁵⁶ *van Soest v Residual Health Management Unit* [2000] 1 NZLR 179 (CA).

¹⁵⁷ See *AB v Attorney-General*, above n 155, at [382]-[391].

¹⁵⁸ See *A v Roman Catholic Archdiocese of Wellington* [2008] NZCA 48, [2008] 3 NZLR 289.

¹⁵⁹ *Anderson v Attorney-General* HC Wellington CIV-2004-404-2511, 6 June 2011 at [69].

¹⁶⁰ At [63]. The defendant could not "control the harm the plaintiff says he sustained, namely failing to meet expected levels of intellectual ability".

3.2.3 Conclusion

Negligence actions against partnership schools would face the same difficulties as negligence actions against State schools. Common law damages would only be available if a student's recognised psychiatric condition was caused by purely psychological bullying or abuse that took place at school. Public law processes and remedies remain important to students and parents dissatisfied with a partnership school's handling of bullying, abuse or disciplinary matters, or the quality of education offered by a partnership school.

3.3 Do sponsors owe statutory duties to their students that could give rise to an action for breach of statutory duty?

Section 158G of the Education Act imposes a number of duties on sponsors, including a duty to "provide a safe physical and emotional environment for students". Section 158H places a duty on sponsors to perform their functions and exercise their powers in a way that "ensure[s] that every student at the school is able to attain his or her highest possible standard in educational achievement".

An action for breach of either of these statutory duties would fail, because it is not clear that Parliament intended to confer a private law right of action on students if a sponsor fails to satisfy those duties.¹⁶¹ The statutory scheme suggests that if a sponsor breaches these duties, they are contractually liable to the Minister. Parliament did not intend that partnership schools be liable to students and parents.

3.4 Do sponsors owe fiduciary obligations towards their students?

The Education Act imposes duties on sponsors that protect the interests of students. Sponsors must "provide a safe physical and emotional environment for students",¹⁶² and perform their functions and exercise their powers in a way that "ensure[s] that every student at the school is able to attain his or her highest possible standard in educational achievement".¹⁶³ Students at

¹⁶¹ See *Twin Bright Shipping Co SA v Tauwhareparae Farms Ltd* HC Gisborne, CIV-2003-416-000001, 26 May 2006 at [83]-[94].

¹⁶² Education Act 1989, s 158G(a).

¹⁶³ Education Act 1989, s 158H(1).

a school have little ability to control a school's management and operation.¹⁶⁴ So these duties could constitute duties of loyalty.¹⁶⁵

When a sponsor deals with allegations of abuse or bullying, or disciplinary matters, it is conceivable that students or parents may allege that a sponsor has acted in bad faith towards a student accused of bullying. But if a sponsor's shortcomings are really a failure to exercise reasonable care and skill, fiduciary obligations are not helpful.¹⁶⁶ Where a fiduciary has failed to protect a beneficiary from abuse the courts have focussed on negligence actions, holding that fiduciary obligations add little to the beneficiary's claims.¹⁶⁷ There is no reason why courts would depart from this reasoning in a partnership school context. Stand-downs, suspension, exclusions and expulsions are governed by statute, making shortcomings in such disciplinary processes better characterised as breaches of administrative law standards or negligence.¹⁶⁸

3.5 Conclusion

The prospects of success for any parent seeking to hold a sponsor accountable for a partnership school's shortcomings through private law are extremely limited and public law may still have a role to play. A direct contractual relationship between partnership schools and parents does not exist; parents can only enforce provisions of a partnership school contract that are incorporated into the Education Act. The costly nature of litigation means that even if private law actions against sponsors were likely to succeed, private law actions would not be a desirable or realistic option for the families of many students at partnership schools. A parent could withdraw their child from a partnership school. But removing a child from familiar surroundings and friends could also negatively affect a child and, unless part of a large group of withdrawals, is unlikely to result in a sponsor improving a partnership school's systems and processes.

¹⁶⁴ *Cook v Evatt (No 2)* [1992] 1 NZLR 676 (HC) at 685: the "essence" of a fiduciary relationship is an "inequality in bargaining power brought about by the trust or confidence reposed in, and accepted by, the fiduciary to perform some function for another's benefit in circumstances where the beneficiary lacks the power adequately to control or supervise the exercise of that function".

¹⁶⁵ A common element in all fiduciary relationships is that the beneficiary is entitled to place trust and confidence in the fiduciary and rely on the fiduciary not to act in a way that is contrary to the beneficiary's interests: *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 at [80], per Blanchard and Tipping JJ.

¹⁶⁶ *S v Attorney-General* [2003] NZLR 450 (CA) at [77]-[78]; and *Marsh v Attorney-General* [2010] 2 NZLR 683 (HC) at [20].

¹⁶⁷ See *S v Attorney-General*, above n 166, at [75]-[80]; *AB v Attorney-General*, above n 155, at [423]; *A v Roman Catholic Archdiocese of Wellington*, above n 158, at [4]; and *M v L* [1998] 3 NZLR 104 (HC) at 124.

¹⁶⁸ As discussed above, a negligence action would likely fail.

Chapter Four: Judicial Review

Judicial review may be available to students and parents at a partnership school for a sponsor's exercise, refusal to exercise, or proposed or purported exercise of a statutory power of decision.¹⁶⁹ This would depend on the effect of pt 12A of the Education Act. Part 12A might delegate State power to sponsors, conferring powers on sponsors that they would not otherwise have. In this case, certain decisions of partnership schools might be amenable to judicial review. Alternatively, pt 12A might merely authorise the Minister to enter school funding contracts with sponsors. Subject to any conditions in the Education Act and a sponsor's partnership school contract, a sponsor would be free to exercise proprietorship over the school, including authority over students.

Analysis of the powers of State schools and private schools can help determine whether sponsors and partnership schools exercise statutory powers amenable to judicial review.

4.1 The powers of state schools and their reviewability

Courts are generally reluctant to judicially review State schools' exercises of power, with limited exceptions. Judicial review applications regarding a principal's and board's exercise of suspension and expulsion powers are sometimes successful.¹⁷⁰ Challenges to school rules are generally tied to a suspension or expulsion.¹⁷¹ *Maddever v Umawera School Board of Trustees*¹⁷² unsuccessfully challenged day-to-day managerial decisions.

4.1.1 Stand-downs, suspensions, exclusions and expulsions: ss 13-19 of the Education Act

The powers to stand-down, suspend, exclude or expel a student are statutory powers found in ss 13-19 of the Education Act. The exercise of these powers can be judicially reviewed.

¹⁶⁹ Judicature Amendment Act 1972, s 4(1).

¹⁷⁰ *M and R v S and Board of Trustees of Palmerston North Boys' High School*, above n 75; *D v M and Board of Trustees of Auckland Grammar School* [2003] NZAR 726 (HC); and *Bovaird and Board of Trustees of Lynfield College v J* [2008] NZCA 325, [2008] NZAR 667 are examples of successful judicial review applications. *Edwards v Onehunga High School Board* [1974] 2 NZLR 238 (CA); and *Rich v Christchurch Girls' High School Board of Governors* [1974] 1 NZLR 1 (CA) were unsuccessful.

¹⁷¹ See *Edwards v Onehunga High School Board*, above n 170; and *Rich v Christchurch Girls' High School Board of Governors*, above n 170.

¹⁷² *Maddever v Umawera School Board of Trustees* [1993] 2 NZLR 478 (HC).

In *Bovaird and Board of Trustees of Lynfield College v J*,¹⁷³ the Court of Appeal identified the right to a free education in s 3 of the Education Act as “an important backdrop to the consideration of the provisions in the [Education] Act” governing suspensions and expulsions.¹⁷⁴ The effect of exercising these powers is “to withhold schooling, however briefly, and to encroach on the student’s right in law to an education”.¹⁷⁵ So, a disciplinary decision under ss 13-19 of the Education Act is a “statutory power of decision” and a “statutory power” within s 3 of the Judicature Amendment Act 1972 (“the JAA”).¹⁷⁶

The courts generally defer to principals’ and boards’ judgment as to whether the s 14(1) criteria that trigger stand-down, suspension, exclusion and expulsion powers are met: principals and boards are in the best position to make such a judgment.¹⁷⁷ But the courts are willing to review whether a principal and board have acted consistently with natural justice and applied the correct test.¹⁷⁸ The use of “may” in ss 13-19 means that principals and boards must exercise discretion. A student’s individual circumstances must be taken into account and a school rule cannot predetermine when the powers in ss 13-19 will be exercised. A principal’s initial decision to stand-down or suspend a student must be made on reasonable grounds.¹⁷⁹ Decisions to stand-down, suspend, exclude or expel that are made inconsistently with these principles may be quashed.

4.1.2 Bylaws, management and administration: ss 72, 75 and 76 of the Education Act

Unless a principal’s or board’s application of a bylaw amounts to predetermination and a failure to exercise discretion under ss 13-19,¹⁸⁰ attempts to judicially review the bylaws of State schools have been unsuccessful. Instead, the courts defer to principals’ and boards’ judgment.

¹⁷³ *Bovaird and Board of Trustees of Lynfield College v J*, above n 170.

¹⁷⁴ At [25].

¹⁷⁵ *J v Bovaird and Board of Trustees of Lynfield College* [2007] NZAR 660 (HC) at [48].

¹⁷⁶ Judicature Amendment Act 1972, s 3, definitions of “statutory power of decision” and “statutory power”.

¹⁷⁷ *Bovaird and Board of Trustees of Lynfield College v J*, above n 170, at [49]; and *M and R v S and Board of Trustees of Palmerston North Boys' High School*, above n 170, at 718.

¹⁷⁸ See *D v M and Board of Trustees of Auckland Grammar School*, above n 170, at 736; *M and R v S and Board of Trustees of Palmerston North Boys' High School*, above n 75; and *Bovaird and Board of Trustees of Lynfield College v J*, above n 170.

¹⁷⁹ Education Act 1989, s 14.

¹⁸⁰ *Bovaird and Board of Trustees of Lynfield College v J*, above n 170; *M and R v S and Board of Trustees of Palmerston North Boys' High School*, above n 75; and *D v M and Board of Trustees of Auckland Grammar School*, above n 170.

*Rich v Christchurch Girls' High School Board of Governors*¹⁸¹ and *Edwards v Onehunga High School Board*¹⁸² were attempts to judicially review suspensions and expulsions following students' defiance of bylaws. The applicants also challenged the vires of the breached bylaws. *Rich* challenged a board's decision to include religious hymns in school assemblies. All students were required to attend school assemblies. A student could be excused from the religious components of school assemblies, but only if their parents requested that they be excused from religious instruction. *Edwards* challenged restrictions on the length of male students' hair. Both bylaws were allowed to stand.

Rich held that "somebody has to decide" questions involving religion at the school, and "in the absence of direct statutory direction [such decisions] must be a part of management". So school bylaws are tied to school management. Parliament left school management to boards; the Court of Appeal would not intervene.¹⁸³

Rich might be decided differently today. Both the Education Act 1964 and the Education Act 1989 confer discretion on boards to make bylaws and leave boards to control the management of schools. The Education Act 1964's controls on religious instruction in primary State schools remain in force. Under s 25A of the Education Act 1989, students and parents can request a student's release from a particular class or subject at a State school on religious or cultural grounds. By implication, boards can make bylaws and policy directions regarding religious instruction. But the NZBORA now applies to boards. School bylaws that are inconsistent with the NZBORA but not expressly authorised by Parliament could be ultra vires.¹⁸⁴ A bylaw that requires students who have been excused from religious instruction to enter school assemblies late could be inconsistent with those students' rights to freedom from discrimination,¹⁸⁵ as could uniform bylaws that prevent a student from observing their religion.¹⁸⁶

¹⁸¹ *Rich v Christchurch Girls' High School Board of Governors*, above n 170.

¹⁸² *Edwards v Onehunga High School Board*, above n 170.

¹⁸³ *Rich v Christchurch Girls' High School Board of Governors*, above n 170, at 6.

¹⁸⁴ *Drew v Attorney-General* [2002] 1 NZLR 58 (CA) at [68].

¹⁸⁵ New Zealand Bill of Rights Act 1990, s 19. The school rule in *Rich v Christchurch Girls' High School Board of Governors*, above n 170, resembles the dispute discussed in Chapter Two that went to the Human Rights Commission. But as the parents in that case chose not to litigate through the courts, it does not provide guidance on whether the passage of the New Zealand Bill of Rights Act 1990 would result in a different outcome should the fact pattern in *Rich* arise again.

¹⁸⁶ For the United Kingdom's experience with school uniform requirements, jewellery requirements and claims of discrimination, see *R (on the application of Watkins-Singh) v Governing Body of Aberdare Girls' High School* [2008] EWHC 1865 (Admin), [2008] All ER 376; *R (Begum (by her*

In *Edwards*, the Court of Appeal made obiter dicta statements on the effect of empowering a board to make bylaws that “in the opinion of the Board are necessary or desirable”.¹⁸⁷ The necessity or desirability of bylaws is subjective and can only be determined by members of the board. Bylaws can only be “attacked” if they are unreasonable.¹⁸⁸ This approach is supported by *Hawkins v Minister of Justice*.¹⁸⁹ *Hawkins* held that the adjective “desirable” in an empowering section does not amount to a precedent fact that, if not established, could allow review for illegality.

*Maddever v Umawera School Board of Trustees*¹⁹⁰ did not challenge a bylaw, suspension or expulsion. A school’s principal met with the mother of a boy accused of an assault in the school playground. The principal, concerned with the mother’s attitude and response, called a board meeting. The mother was not present at this meeting. She complained to the principal about how the principal handled the incident, who referred her complaint to the board. She brought judicial review proceedings against the board, alleging that its initial meeting with the principal and handling of her complaint breached administrative law standards.

The initial meeting did not involve a statutory power of decision. The principal and board exercised administrative and managerial functions and had complete discretion over the control and management of the school. If principals’ and boards’ day-to-day decisions were subject to judicial review, schools could not function efficiently. Natural justice obligations only apply “when some serious or major matter arises, affecting the status or the educational options of the child”. Even then, courts should exercise “very considerable judicial caution”.¹⁹¹ The High Court listed sections of the Education Act that fall within this category.¹⁹² This list was not exhaustive, but demonstrates that principals’ and boards’ decisions are only judicially reviewed in limited circumstances.

Litigation Friend, Rahman)) v Headteacher and Governors of Denbigh High School [2006] UKHL 15, [2007] 1 AC 100; and *R (on the application of X) v Head Teacher and Governors of Y School* [2007] EWHC 298 (Admin), [2008] 1 All ER 249.

¹⁸⁷ This phrase did not appear in the Education Act 1964, the applicable legislation at the time. However, s 72 of the Education Act 1989 allows a board to make “any bylaws the board thinks necessary or desirable for the control and management of the school.”

¹⁸⁸ *Edwards v Onehunga High School Board*, above n 170, at 243.

¹⁸⁹ *Hawkins v Minister of Justice* [1990] 3 NZLR 486 (HC).

¹⁹⁰ *Maddever v Umawera School Board of Trustees*, above n 172.

¹⁹¹ At 509.

¹⁹² At 496. The sections listed were the s 10 right to reconsideration of a direction that a pupil have a special education; ss 14-19 decisions to stand-down, suspend, exclude or expel a student; and s 21 appeals to the Secretary for Education from refusals to exempt a student from school.

Maddever held that the Education Act represents a “deliberate legislative policy” that schools determine their own management,¹⁹³ with a “trade off” between reduced judicial review in return for wider public (ie parent) participation in school board decision making”.¹⁹⁴ A board is accountable for its school management in three ways. First, boards are accountable to the Minister. Second, boards are accountable to parents, who elect boards and are represented on boards. Third, parents can complain to the Ombudsman, “a much preferable remedy”.¹⁹⁵

So a school’s management and administration are generally non-justiciable. But a bylaw could be judicially reviewed if it breaches the NZBORA and is ultra vires, or is unreasonable.

4.2 The powers of private schools and their reviewability

There are no reported judicial review applications against private schools, likely because the relationship between a private school and its students’ parents is governed by contract. The manager of a private school “owns” the school; private schools are independent from the State.

State schools are established by the Minister issuing a *Gazette* notice under s 146 of the Education Act, whereas private schools register with the Secretary for Education under s 35A. ERO assesses whether a private school meets the registration criteria set out in s 35C.¹⁹⁶ The Secretary must register private schools that satisfy s 35C’s criteria.¹⁹⁷ The Secretary’s powers to take action against a private school are very limited.¹⁹⁸

The Education Act does not confer powers on private schools.¹⁹⁹ Private schools’ power and authority over their students are instead derived from contracts between a private school’s manager and students’ parents. Parents pay fees to the private school and agree that their child will obey the school’s rules. In return, the private school provides educational services to their child.

¹⁹³ At 505-506.

¹⁹⁴ At 507.

¹⁹⁵ At 503.

¹⁹⁶ Education Act 1989, s 35I.

¹⁹⁷ Education Act 1989, s 35A.

¹⁹⁸ Education Act 1989, s 35J. The Secretary may intervene if the private school does not meet or is not likely to meet the registration criteria, the managers of the private school are in breach of their statutory duties or serious criminal activity is occurring at the school.

¹⁹⁹ The Education Act 1989’s only references to private schools relate to their registration (ss 35A-35G and 35I-35M), the Secretary for Education’s powers to intervene in a private school (s 35J), grants of State funds to private schools (ss 35N-35P), offences (s 35R) and a private school’s obligations to notify the Secretary if it ceases to operate (s 35H) or suspends or expels a student (s 35Q).

4.2.1 Stand-downs, suspensions, exclusions and expulsions

While ss 13-19 of the Education Act apply to State schools and partnership schools, the Education Act only once mentions private schools' disciplinary powers. Private schools must notify the Secretary if they suspend or expel a student under s 35Q. The Secretary can then ensure that expelled students who are younger than 16 enrol at another school.²⁰⁰ Private schools determine their own criteria and processes for suspensions and expulsions, subject to the terms of their contracts with parents.²⁰¹ Acting inconsistently with natural justice would constitute breach of an express or implied contractual term, not a judicially reviewable exercise of a statutory power.

*McGuinn v Board of Trustees of Palmerston North Boys' High School*²⁰² demonstrates that a private school's suspensions and expulsions would be governed by its contracts with parents. A student's parents entered into a contract with a State school allowing him to board at the school's hostel, administered by a board subcommittee. The student's parents agreed to the hostel's rules and regulations and that the student could be disciplined by the hostel. The rules included a policy on repeated disobedience and breach of the hostel's rules. All boarders received verbal warnings after numerous thefts at the hostel. The thefts continued. The student was caught stealing and removed from the hostel.

The decision to remove the student from the hostel was not reviewable: the board exercised a contractual right. The board was a creature of the Education Act, but did not have statutory powers or functions regarding boarding establishments.²⁰³ Its right to terminate the contract was sourced in the boarding contract: a private commercial contract providing for the exchange of money for accommodation services. Monetary grants from the State to help families make those payments did not alter the boarding contract's commercial nature.

Similarly, private schools enter contracts with their students' parents. State funding would not change the nature of private school's relationship with parents. A suspension or expulsion by a private school is a non-reviewable contractual decision.

²⁰⁰ As required by s 20 of the Education Act 1989.

²⁰¹ See *Te Tai Tokerau Mapo Trust v Chief Executive of Ministry of Health* HC Whangarei CIV-2010-488-307, 5 August 2011 at [97]: "[w]here ... the relationship between the parties was created by contract, and the plaintiff's complaints are in substance directed to failure to continue with the contract, the first and primary enquiry must be in contractual terms".

²⁰² *McGuinn v Board of Trustees of Palmerston North Boys' High School* [1997] 2 NZLR 60 (HC).

²⁰³ The High Court also observed that the Education Act did not contemplate hostels, but this is no longer the case. In 2001, a licensing regime for school hostels was inserted into the Education Act 1989 (Education Act 1989, ss 114B-114E and ss 328E-328H).

4.2.2 Rules, management and administration

The Education Act does not give private school managers powers to make rules or control the management and administration of private schools. These are matters addressed by contracts between private schools and parents, just as the hostel's rules in *McGuinn*²⁰⁴ formed part of the school's boarding contract with parents. Attempts to judicially review a private school's rules or managerial or administrative decisions would likely fail.

4.3 The powers of partnership schools and their reviewability

The Private Schools (Conditional Integration) Act 1975 states that an integrated school is "part of the State system of education".²⁰⁵ The Education Act has no equivalent provision on partnership schools. Sponsors enter contracts with the Minister, not parents, to provide educational services to students enrolled at partnership schools.²⁰⁶ But students cannot be enrolled at partnership schools without their parents' consent.

When a sponsor signs a partnership school contract, does the Education Act confer statutory powers on the sponsor? Or would the sponsor already have those powers, should they wish to manage a private school, meaning that a partnership school contract merely provides for funding in exchange for restrictions being placed on a sponsor's pre-existing powers?

4.3.1 Stand-downs, suspensions, exclusions and expulsions

Section 158U applies ss 13-19²⁰⁷ to partnership schools.

The application of ss 13-19 to State schools is tied to the general right to a free education in s 3.²⁰⁸ The State has obligations under s 3 and international conventions²⁰⁹ to ensure that children under 18 have access to free education. The State has chosen to meet these obligations through State schools. For this to work, principals and boards need to be delegated certain powers.²¹⁰ These include the powers in ss 13-19, if a student's health or behaviour affects other students' s 3 rights. These coercive powers interfere with a

²⁰⁴ *McGuinn v Board of Trustees of Palmerston North Boys' High School*, above n 202.

²⁰⁵ Private Schools (Conditional Integration) Act 1975, s 4.

²⁰⁶ "Contract between the Crown and the sponsor of a Partnership School - generic" (16 September 2013) Ministry of Education <www.minedu.govt.nz>, above n 4, cl 3(a).

²⁰⁷ With the exceptions of ss 16 (Secretary's powers when excluded student younger than 16) and 17D (Re-enrolment of excluded or expelled student).

²⁰⁸ *Bovaird and Board of Trustees of Lynfield College v J*, above n 170, at [25]; and *J v Bovaird and Board of Trustees of Lynfield College*, above n 175, at [48].

²⁰⁹ Universal Declaration of Human Rights, art 26 and Declaration of the Rights of the Child, art 7.

²¹⁰ Paul Rishworth "A parallel universe: foundations and guiding principles for education law" (Paper presented at the New Zealand Law Society Education Law Intensive Conference, Auckland, May 2012) 1 at 10, applying *Cropp v A Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774.

disciplined student's s 3 rights. Section 3 is a "general" right, not applicable to individual schools.²¹¹ But "in a practical sense, [disciplinary action] put[s] this statutory right at risk".²¹² A student cannot attend school for a certain period and might struggle to enrol elsewhere. So, the Education Act empowers and restricts principals' and boards' ability to stand-down, suspend, exclude or expel students. Sections 13-19 provide for statutory powers of decision, reviewable under the JAA.²¹³

The same rationale can be applied to ss 13-19 and partnership schools. Section 3 confers rights to education at State schools and partnership schools. So the State uses partnership schools to meet its education obligations. Sponsors need to be delegated the State's powers to stand-down, suspend, exclude and expel students if required,²¹⁴ whilst also protecting disciplined students' rights. Partnership school contracts are ministerial delegations of State responsibilities and powers to sponsors.

Under s 158J, a sponsor may delegate their functions and powers to any person, but not those in ss 13-19 or under s 18AA rules.²¹⁵ These powers may only be delegated to the person assigned the functions of a principal. Further, the Ombudsman has jurisdiction over a partnership school's stand-down, suspension, exclusion and expulsion functions. These limitations highlight the significance of ss 13-19 powers to the State: they are sponsors' most coercive powers.

A sponsor can stand-down, suspend, exclude or expel a student because the Education Act confers a statutory power on the sponsor to do so. Such decisions would be judicially reviewable.

4.3.2 Rules, management and administration

While some powers of principals and boards are reviewable statutory powers, others are not. Similarly, sponsors' powers to make rules and control a partnership school's management and administration may not be reviewable statutory powers simply because their powers under ss 13-19 are.

²¹¹ *Attorney-General v Daniels* [2003] 2 NZLR 742 (CA).

²¹² John Caldwell "Judicial Review of School Discipline" (2006) 22 NZULR 240 at 245.

²¹³ Judicature Amendment Act 1972, s 4.

²¹⁴ As set out in s 14(1) of the Education Act.

²¹⁵ Section 18AA provides for what are currently the Education (Stand-Down, Suspension, Exclusion and Expulsion) Rules 1999.

First, it must be asked whether a sponsor's powers to make rules and control the management of a school are conferred by statute or part of a sponsor's proprietorship over a school. If they are statutory powers, the next question is whether *Rich*,²¹⁶ *Edwards*²¹⁷ and *Maddever*²¹⁸ apply.

Section 158I of the Education Act states that a sponsor has "complete discretion" to control the management of a partnership school, subject to any enactment, the general law of New Zealand and the sponsor's partnership school contract. Similarly, s 158I states that a sponsor "may make any rules the sponsor thinks necessary or desirable for the control and management of the school", subject to the same provisos.

These provisions closely mirror the equivalent State school provisions, ss 72 and 75. But while s 76 refers to a principal's "complete discretion to manage as the principal thinks fit the school's day-to-day administration", neither the Education Act nor the explanatory note to the Education Amendment Bill 2012²¹⁹ address partnership schools' day-to-day administration. A principal is employed by a board as "chief executive in relation to [a] school's control and management": a principal is tasked with the day-to-day administration of a school and must comply with a board's general policy directions.²²⁰ So a school's administration is part of a school's management. A sponsor's discretion to control a partnership school's management under s 158H encompasses administration.

Section 20 of the Education Act requires children younger than 16 to be enrolled at a "registered school", defined as a State school, a partnership school, or a private school.²²¹ If a child is enrolled at a private school, their parents have entered a contractual relationship with the private school. A contract does not exist between State schools or partnership schools and their students' parents. The State requires that parents enrol their children at a school; without a contract, the relationship is coercive. State schools and partnership schools require statutory powers to enforce rules and manage a school in a way that restricts students' choices.²²²

²¹⁶ *Rich v Christchurch Girls' High School Board of Governors*, above n 170.

²¹⁷ *Edwards v Onehunga High School Board*, above n 170.

²¹⁸ *Maddever v Umawera School Board of Trustees*, above n 172.

²¹⁹ Education Amendment Bill 2012 (77-1) (explanatory note).

²²⁰ Education Act 1989, s 76.

²²¹ Education Act 1989, s 2(1), definition of "registered school".

²²² For example, school timetables limit a student's ability to spend their time as they wish. At certain times, schools require students to be in class.

The consensual nature of a parent's relationship with a partnership school does not make statutory authorisation to make rules and control the management of partnership schools unnecessary. The relationship between a parent and a State school might also be consensual if zoning arrangements give parents a choice between State schools.

England's experience with similar schools supports the conclusion that partnership schools derive management powers from the Education Act. *R v The Governors of Haberdashers' Aske's Hatcham College Trust, ex parte Tyrell*²²³ challenged a decision of a city technology college ("CTC") to not enrol a student. CTCs' legislative framework under the Education Reform Act 1988 was comparable to pt 12A. The Secretary of State entered into contracts with CTCs to provide specialist educational services. CTCs received public funding, could not charge fees and were not required to teach the national curriculum. CTCs exercised discretion in enrolment decisions, but the Secretary placed some controls on enrolment decisions through CTC contracts. CTCs were held to derive their existence from the Education Reform Act and the Secretary of State exercising powers under that Act. In principle, CTCs' decisions were amenable to judicial review.

So the Education Act confers powers on a sponsor to control the management of a partnership school and make school rules. But would the courts be willing to judicially review the exercise of those powers?

Maddever referred to a legislative policy in the Education Act that prefers parental involvement in decision-making over judicial review. Part 12A prefers contractual accountability to the Minister over political and public law accountability.²²⁴ *Maddever's* concern that excessive judicial review could interfere with a school's efficient operation would apply to partnership schools. Sections 158H-158I use the same subjective terms as the equivalent State school provisions. *Edwards'* observation that schools are better placed to judge whether particular bylaws are "necessary or desirable" than the courts would apply equally to partnership school rules.

But a more expansive approach to judicial review of partnership schools may be required. *Maddever* relied heavily on the availability of alternative, more appropriate accountability mechanisms: a board's accountability to the Minister, accountability to and engagement with

²²³ *R v The Governors of Haberdashers' Aske's Hatcham College Trust, ex parte Tyrell* [1995] COD 399 (QB).

²²⁴ The reduced emphasis on public law accountability is reflected by the limited jurisdiction of the Ombudsman and the exclusion of sponsors from the Official Information Act 1982.

parents, and Ombudsman investigations. But these are not all available against partnership schools. Sponsors are accountable to the Minister, but are not politically accountable to parents. Parents might be able to hold a Minister politically accountable for sponsors' actions and decisions, but such accountability is very indirect. Many other issues are relevant to the performance of the Minister, who is accountable to all of voting New Zealand and not just an individual school community. The Draft Partnership School Contract suggests that independent reviews are a poor substitute for Ombudsman investigations.²²⁵

Partnership schools do not squarely fit within the framework for judicial review of State schools. A student or parent at a partnership school could complain to the Human Rights Commission if a school rule appears discriminatory.²²⁶ But overall, the remedies available to students and parents dissatisfied with a partnership school's management are less powerful than the remedies available against State schools.

4.3.3 Consequences: the availability of judicial review

Students and parents would have the same ability to judicially review stand-downs, suspension, exclusions and expulsions by a partnership school as they do for State schools.

The courts are likely to develop a new framework for judicial review of partnership schools' rules and management. It is unlikely that students and parents could effectively engage with or challenge a partnership school's rules or management, contractually, politically or through complaints processes; increasing the need for and likelihood of remedies through judicial review.²²⁷

The conflict between the need for effective remedies against a sponsor and the danger of the courts intervening in matters more appropriately determined by schools themselves²²⁸ could be reconciled by distinguishing between justiciable and non-justiciable aspects of a partnership school's management and varying the intensity of review for partnership school rules.

²²⁵ See Chapter Two.

²²⁶ See Chapter Two.

²²⁷ See *Air New Zealand Ltd v Nelson Airport Ltd* HC Nelson CIV-2007-442-584, 16 June 2008 at [69].

²²⁸ Either because the courts are ill-equipped to make such decisions, or because judicial intervention would interfere with the efficient functioning of schools: *Maddever v Umawera School Board of Trustees*, above n 172.

Tying the justiciability of management decisions to the terms of a partnership school contract and student's and parents' rights would restrict judicial review of management decisions to areas within judicial expertise.

Courts frequently encounter questions of contract interpretation and compliance with contracts. Section 158H(3) makes a sponsor's statutory power to control a partnership school's management subject to their partnership school contract. The Declaratory Judgments Act provides a remedy for exercises of management powers that are inconsistent with a partnership school contract.²²⁹ But judicial review under s 4 of the JAA could provide remedies for refusals to exercise management powers, too. Management decisions that are inconsistent with a partnership school contract could be ultra vires and reviewable for illegality. If a sponsor's engagement obligations under a partnership school contract²³⁰ include obligations to consult with parents and families on management issues, management decisions that do not meet those consultation obligations could be reviewable for procedural impropriety.

Second, management decisions that affect rights could be justiciable. Courts frequently assess whether decisions or acts infringe on a person's rights. Management decisions that are inconsistent with the NZBORA could be reviewable for illegality. If the infringement is sufficiently serious, management decisions that are inconsistent with students' rights more generally could be reviewable for unreasonableness.

Like management decisions, s 158I makes rules at a partnership school reviewable for inconsistency with a sponsor's partnership school contract. State school bylaws are reviewable for unreasonableness and inconsistency with the NZBORA. Rules at partnership schools are an exercise of a similar reviewable statutory power. But the courts could apply a more rigorous standard of review to partnership school rules than *Wednesbury*²³¹ unreasonableness, in wider circumstances than where a rule infringes on a student's human rights.²³²

²²⁹ See Chapter Three.

²³⁰ Partnership school contracts are to address sponsor engagement with parents and families, but the contents of engagement obligations are not yet clear. See "Contract between the Crown and the sponsor of a Partnership School - generic" (16 September 2013) Ministry of Education <www.minedu.govt.nz>, above n 4, at 10.6.

²³¹ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA).

²³² In *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1998] NZAR 58 (CA), the Court of Appeal held that in cases involving human rights, a less restrictive approach to

Who makes a decision is relevant to the intensity of review.²³³ The Court of Appeal was reluctant to depart from *Wednesbury* in *Wellington City Council v Woolworths New Zealand Ltd (No 2)*²³⁴ partly because a democratically elected body made the challenged decision. In *Edwards*, parental membership put the board in a more appropriate position to assess a school rule's desirability than the courts.²³⁵ Sponsors are not democratically elected by parents and need not be parents themselves. Rules are coercive. Courts may be more willing to assess the reasonableness of a partnership school rule than a State school bylaw, but the subjective phrasing of s 158I and heavy policy content of school rules make a correctness standard inappropriate. Instead, a "hard look" approach to assessing the reasonableness of partnership school rules might be appropriate.

4.4 Conclusion

Parents and students could bring judicial review proceedings against a partnership school in appropriate circumstances. The alternative accountability mechanisms available to parents and students are very limited. Judicial review could be appropriate and even necessary to protect students' interests. The courts are likely to take a more expansive approach to judicial review of partnership schools than State schools, but remain wary of intervening in non-justiciable matters.

unreasonableness might be needed. The Supreme Court confirmed that a departure from the *Wednesbury* standard of review might be appropriate in cases involving important rights in *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597.

²³³ *Wolf v Minister of Immigration* [2004] NZAR 414 (HC) at [47].

²³⁴ *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA).

²³⁵ *Edwards v Onehunga High School Board*, above n 170, at 244.

Conclusion

Part 12A of the Education Act seems to reflect a legislative policy that partnership schools and sponsors should primarily be held accountable by the Minister of Education, against the standards set out in partnership school contracts. But students and parents, being those most affected by how a partnership school operates, need to be able to hold sponsors accountable themselves. The Education Act's response to this need is to require every partnership school contract to provide for an independent review process.

But students and parents cannot expect meaningful accountability from the independent review process currently proposed. Even if the independent review process is improved, it could not offer the same comprehensive investigation of complaints as the Ombudsman. Partnership schools are not politically accountable to their students' parents.

Partnership schools' students and their parents are left unable to complain to an individual body that offers a fair process and meaningful accountability. Instead, the actions available to a student or parent outside of an independent review process would need to be determined case by case. This position can be compared to the position of students at State schools and their parents, who could lay complaints with the Ombudsman, and students at private schools and their parents, who could turn to contract law. It may be that students at partnership schools and their parents can do very little.

A preliminary problem that students and parents with a complaint against a partnership school might face is obtaining the information they need to determine whether they have a legitimate complaint at all. Second, a complainant would need to determine whether their complaint relates to a term in a partnership school contract or a legislative provision. Finally, a complainant would need to determine if their complaint is actionable and identify the most appropriate legal course available. If a complaint relates to a term in a partnership school contract that is not incorporated into the Education Act, the complainant may not be able to take any legal action. Their only recourse might be to contact the Minister. If a complaint relates to a legislative provision, or a contractual provision incorporated into the Education Act, the courts may be able to assist depending on the circumstances.

The Minister could minimise the difficulties students and parents would face in their attempts to hold a partnership school accountable by negotiating partnership school contracts that

provide for robust independent review processes and require public disclosure of partnership schools' performance information.

But it appears that students and parents seeking to hold partnership schools accountable would not face a straight-forward process. To take action against a partnership school outside of an independent review process, students and parents would need to spend time and money assessing what their options are and, if appropriate, taking formal legal action against a sponsor.

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Appendix: Education Act 1989, pt 12A

(4) *[Repealed]*

Section 158: added, on 1 January 1990, by section 14 of the Education Amendment Act 1989 (1989 No 156).

Section 158(4): repealed, on 19 December 1998, by section 41(1) of the Education Amendment Act (No 2) 1998 (1998 No 118).

Part 12A

Partnership schools kura hourua

Part 12A: inserted, on 13 June 2013, by section 31 of the Education Amendment Act 2013 (2013 No 34).

158A Interpretation

In this Part, unless the context otherwise requires,—

body means a body corporate, corporation sole, or limited partnership

composite partnership school kura hourua means a partnership school kura hourua designated as a composite partnership school kura hourua by notice under section 158B

partnership school contract has the meaning given by section 2(1)

primary partnership school kura hourua has the meaning given by section 2(1)

secondary partnership school kura hourua means a partnership school kura hourua designated as a secondary partnership school kura hourua by notice under section 158B

sponsor has the meaning given by section 2(1).

Section 158A: inserted, on 13 June 2013, by section 31 of the Education Amendment Act 2013 (2013 No 34).

Approval and operation of partnership schools kura hourua

Heading: inserted, on 13 June 2013, by section 31 of the Education Amendment Act 2013 (2013 No 34).

158B Minister may approve sponsors

- (1) The Minister may by notice in the *Gazette* approve a body to be a sponsor of a partnership school kura hourua.

- (2) The Minister has absolute discretion to refuse to approve a body to be a sponsor under subsection (1).
- (3) A notice under subsection (1) must include—
 - (a) the name of the sponsor; and
 - (b) the place where the school is to be located; and
 - (c) the name of the school; and
 - (d) whether the school is to be a primary, secondary, or composite partnership school kura hourua; and
 - (e) the class levels for which education may be given at the school; and
 - (f) any religious, philosophical, or other distinguishing characteristic of the school; and
 - (g) whether all or any (and if so, which) class levels of the school are to be single-sex.
- (4) A notice under subsection (1) may provide for different class levels to be phased in over a specified period or specified periods.

Section 158B: inserted, on 13 June 2013, by section 31 of the Education Amendment Act 2013 (2013 No 34).

158C Minister must appoint advisory group

- (1) The Minister must appoint an advisory group, consisting of 1 or more members, for the purpose of advising the Minister in relation to—
 - (a) the approval of sponsors under section 158B; and
 - (b) the educational performance of partnership schools kura hourua.
- (2) The members of the advisory group must be appointed by the Minister, on terms and conditions to be determined by the Minister, by written notice to each member.
- (3) The Minister may define and vary the terms of reference of the advisory group as the Minister thinks fit.
- (4) The advisory group must comply with any terms of reference determined by the Minister under subsection (3).
- (5) The advisory group may determine its own procedure.
- (6) Every member of an advisory group appointed under subsection (1) is entitled—

- (a) to receive remuneration not within paragraph (b) for services as a member of the advisory group at a rate and of a kind determined by the Minister in accordance with the fees framework; and
 - (b) in accordance with the fees framework, to be reimbursed for actual and reasonable travelling and other expenses incurred in carrying out his or her duties as a member of the advisory group.
- (7) For the purposes of subsection (6), **fees framework** means the framework determined by the Government from time to time for the classification and remuneration of statutory and other bodies in which the Crown has an interest.

Section 158C: inserted, on 13 June 2013, by section 31 of the Education Amendment Act 2013 (2013 No 34).

158D Partnership school contracts

- (1) The Minister may from time to time, in the name and on behalf of the Crown, enter into a contract with a sponsor for the operation, by that sponsor, of a partnership school kura hourua.
- (2) A partnership school contract must be for a fixed term.
- (3) A partnership school contract must provide for—
 - (a) objectives and performance standards for the sponsor in relation to the operation of the school; and
 - (b) reporting requirements of the sponsor in relation to—
 - (i) the objectives and performance standards of the sponsor under the contract; and
 - (ii) any relevant national standards published under section 60A(1)(ba); and
 - (c) the maximum roll of the school; and
 - (d) the number or percentage of teaching positions (within the meaning of section 120) that must be filled by registered teachers or holders of limited authority to teach; and
 - (e) the curriculum to be taught at the school; and
 - (f) the qualifications to be offered by the school (if it is a secondary or composite partnership school kura hourua); and
 - (g) a procedure for the independent review of complaints against the school; and

- (h) powers of intervention in the school by the Minister and the Secretary; and
 - (i) the termination of the contract for breach of contract; and
 - (j) the obligations of the sponsor, in the event of the termination or expiry of the contract, to co-operate with the Minister and to comply with any instructions issued by the Minister in order to ensure the orderly and efficient transfer of the operation of the school.
- (4) A partnership school contract may contain other provisions, as agreed between the Minister and the sponsor, that are not inconsistent with—
 - (a) this Act; or
 - (b) any regulations made under this Act.

Section 158D: inserted, on 13 June 2013, by section 31 of the Education Amendment Act 2013 (2013 No 34).

158E Complaints

- (1) A person who refers a complaint about a sponsor to the Ombudsman may refer a complaint to a reviewer in respect of the same matter.
- (2) Subsection (1) applies—
 - (a) irrespective of whether or not the Ombudsman's investigation is complete at the time of the referral to the reviewer; and
 - (b) if that investigation is complete at the time of the referral to the reviewer, irrespective of the outcome of that investigation.
- (3) A person who refers a complaint to a reviewer about a matter that is within the jurisdiction of the Ombudsman may refer a complaint to the Ombudsman in respect of the same matter.
- (4) Subsection (3) applies—
 - (a) irrespective of whether or not the reviewer's investigation is complete at the time of the referral to the Ombudsman; and
 - (b) if that investigation is complete at the time of the referral to the Ombudsman, irrespective of the outcome of that investigation.

- (5) Subsection (3) is subject to section 17 of the Ombudsmen Act 1975.

- (6) In this section,—

Ombudsman means an Ombudsman appointed under the Ombudsmen Act 1975

reviewer means the person or body responsible under a partnership school contract for the independent review of complaints against a partnership school kura hourua.

Section 158E: inserted, on 13 June 2013, by section 31 of the Education Amendment Act 2013 (2013 No 34).

158F Prohibitions on operation of partnership schools kura hourua

- (1) A body that is not approved to be a sponsor under section 158B may not operate or purport to operate a partnership school kura hourua.
- (2) A sponsor may not operate a partnership school kura hourua unless there is in place a partnership school contract between the Minister and the sponsor.

Section 158F: inserted, on 13 June 2013, by section 31 of the Education Amendment Act 2013 (2013 No 34).

158G Sponsor's duties

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 158U(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.

Section 158G: inserted, on 13 June 2013, by section 31 of the Education Amendment Act 2013 (2013 No 34).

**158H 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 that every student at the school is able to attain his or her highest possible standard in educational achievement.
- (2) A sponsor of a partnership school kura hourua has complete discretion to control the management of the school as the sponsor thinks fit.
- (3) Subsection (2) is subject to any enactment, the general law of New Zealand, and the partnership school contract.

Section 158H: inserted, on 13 June 2013, by section 31 of the Education Amendment Act 2013 (2013 No 34).

158I School rules

- (1) A sponsor of a partnership school kura hourua may make any rules the sponsor thinks necessary or desirable for the control and management of the school.
- (2) Subsection (1) is subject to any enactment, the general law of New Zealand, and the partnership school contract.

Section 158I: inserted, on 13 June 2013, by section 31 of the Education Amendment Act 2013 (2013 No 34).

158J Sponsor's power to delegate

- (1) A sponsor may delegate any of the functions or powers of the sponsor under this Act, either generally or specifically, to any person or group of persons.
- (2) A delegation under this section must be in writing.
- (3) The sponsor must not delegate the general power of delegation.
- (4) The sponsor must not delegate the functions of the sponsor in sections 13 to 18 (as applied by section 158U, with the exception of sections 16 and 17D) and any rules made under section 18AA (as applied by section 158V) to the person to whom the

sponsor has assigned the functions of the principal in those sections and rules.

- (5) A delegate to whom any functions or powers of a sponsor are delegated may,—
 - (a) unless the delegation provides otherwise, perform the function or exercise the power in the same manner, subject to the same restrictions, and with the same effect as if the delegate were the sponsor; and
 - (b) delegate the function or power only—
 - (i) with the prior written consent of the sponsor; and
 - (ii) subject to the same restrictions and with the same effect as if the subdelegate were the delegate.
- (6) A delegate who purports to perform a function or exercise a power under a delegation—
 - (a) is, in the absence of proof to the contrary, presumed to do so in accordance with the terms of that delegation; and
 - (b) must produce evidence of his or her authority to do so, if reasonably requested to do so.
- (7) No delegation in accordance with this Act—
 - (a) affects or prevents the performance of any function or the exercise of any power by the sponsor; or
 - (b) affects the responsibility of the sponsor for the actions of any delegate acting under the delegation; or
 - (c) is affected by any change in the constitution of the sponsor.
- (8) A delegation may be revoked at will by written notice to the delegate.
- (9) A delegation under subsection (5)(b) may be revoked at will by written notice of the delegate to the subdelegate.

Section 158J: inserted, on 13 June 2013, by section 31 of the Education Amendment Act 2013 (2013 No 34).

158K Annual financial statements of partnership schools kura hourua

- (1) On a date specified in the partnership school contract, a sponsor of a partnership school kura hourua must give to the Secretary annual financial statements relating to the school for the year ending on a date specified in the contract.

- (2) The financial statements must be prepared in accordance with the partnership school contract.
- (3) The financial statements must have been audited by a chartered accountant.

Section 158K: inserted, on 13 June 2013, by section 31 of the Education Amendment Act 2013 (2013 No 34).

158L Partnership school kura hourua may participate in school risk management scheme

- (1) A sponsor may, with the consent of the Secretary, participate in a school risk management scheme established under section 78D(2).
- (2) Sections 78D to 78G, any regulations made under section 78F, and any legal instrument by which a school risk management scheme is established apply to any sponsor that participates in the scheme as if it were a participating school board.

Section 158L: inserted, on 13 June 2013, by section 31 of the Education Amendment Act 2013 (2013 No 34).

158M Intervention in partnership school kura hourua by Secretary

- (1) This section applies if the Secretary has reasonable grounds to believe—
 - (a) that—
 - (i) there exists in respect of a partnership school kura hourua an emergency affecting the education or welfare of its students; or
 - (ii) there is an imminent threat of such an emergency; and
 - (b) that the sponsor of the school is unwilling or unable to immediately deal with that emergency or, as the case requires, that threat to the satisfaction of the Secretary.
- (2) If this section applies, the Secretary may take over the management of the school from the sponsor for any period that the Secretary considers necessary in order to deal with the emergency or threatened emergency, and for that purpose the Secretary—

- (a) has and may exercise and perform, in respect of the school, all of the powers and functions that would otherwise be exercisable or performed by the sponsor:
 - (b) has all other powers necessary or desirable.
- (3) If the Secretary takes over the management of a school under this section, the Secretary must immediately give written notice to the sponsor of that action, and of the reasons for that action.
- (4) This section applies despite anything in any partnership school contract, and nothing in this section limits or affects—
 - (a) any other right or remedy available to the Secretary or the Crown, whether under any partnership school contract or otherwise; or
 - (b) any liability of the sponsor under the partnership school contract or otherwise.
- (5) Neither the Secretary, nor the Crown, nor any other person acting by or under the authority of the Secretary is under any civil or criminal liability for anything the Secretary or any such person may do or fail to do in the course of the exercise or performance or intended exercise or performance of any powers or functions under this section, unless it is shown that the Secretary or that other person acted, or failed to act, in bad faith.

Section 158M: inserted, on 13 June 2013, by section 31 of the Education Amendment Act 2013 (2013 No 34).

Enrolment in partnership schools kura hourua

Heading: inserted, on 13 June 2013, by section 31 of the Education Amendment Act 2013 (2013 No 34).

158N Enrolment in partnership schools kura hourua

- (1) If a partnership school kura hourua receives more applications than there are places at the school, the order of priority in which applicants are to be offered places at the school is as follows:
 - (a) first priority must be given to any applicant who is the sibling of a current student of the school:
 - (b) second priority must be given to any student who is the sibling of a former student of the school:
 - (c) third priority must be given to all other applicants.

- (2) If there are more applicants in any of the priority groups than there are places available, selection within the priority group must be by ballot.
- (3) If 2 or more siblings apply for places at the school at the same time, the applications of those siblings must be dealt with as a single application for the purposes of the ballot.
- (4) In this section, **sibling** has the meaning given by section 11F(3).

Section 158N: inserted, on 13 June 2013, by section 31 of the Education Amendment Act 2013 (2013 No 34).

158O Equal rights to primary and secondary education in partnership schools kura hourua

- (1) People who have special educational needs (whether because of disability or otherwise) have the same rights to enrol and receive education at partnership schools kura hourua as people who do not.
- (2) Nothing in subsection (1) affects or limits—
 - (a) those provisions of Part 2 and this Part that relate to the suspension, expulsion, and exclusion of students from partnership schools kura hourua; and
 - (b) section 158N (enrolment in partnership schools kura hourua).

Section 158O: inserted, on 13 June 2013, by section 31 of the Education Amendment Act 2013 (2013 No 34).

158P Special education in partnership schools kura hourua

Despite sections 5 and 6 (as applied by section 158U), if the Secretary and the person's parents agree,—

- (a) a person with special educational needs who is under 21 and who turns 14 in any year may, in any later year, be or continue to be enrolled at a primary partnership school kura hourua, or in a class below form 3 at a composite partnership school kura hourua; and
- (b) a person under 21 with special educational needs may be or continue to be enrolled at a secondary partnership school kura hourua, or in a class above form 2 at a composite partnership school kura hourua, who, in the opinion of the Secretary,—

- (i) has not completed the work of form 2; and
- (ii) has not completed work equivalent to the work of form 2; and
- (c) a person under 21 with special educational needs may be or continue to be enrolled at a secondary partnership school kura hourua, or in a class above form 2 at a composite partnership school kura hourua, on or after 1 January after the person's 19th birthday.

Section 158P: inserted, on 13 June 2013, by section 31 of the Education Amendment Act 2013 (2013 No 34).

Multiple timetable arrangements

Heading: inserted, on 13 June 2013, by section 31 of the Education Amendment Act 2013 (2013 No 34).

158Q Multiple timetable arrangements in partnership schools kura hourua

- (1) A sponsor may run a multiple timetable arrangement at a partnership school kura hourua for a specified period if the sponsor is satisfied that the arrangement is appropriate in the circumstances.
- (2) A sponsor must take all reasonable steps to notify every affected student and his or her parents in writing of—
 - (a) the multiple timetable arrangement; and
 - (b) the time periods for each day during which the affected student's timetable will run.
- (3) In this section, **affected student** and **multiple timetable arrangement** have the meanings given by section 25(8).

Section 158Q: inserted, on 13 June 2013, by section 31 of the Education Amendment Act 2013 (2013 No 34).

Exclusions

Heading: inserted, on 13 June 2013, by section 31 of the Education Amendment Act 2013 (2013 No 34).

158R Secretary's powers when student younger than 16 is excluded from partnership school kura hourua

- (1) If the Secretary is satisfied that the sponsor of a partnership school kura hourua has excluded a student who is younger than

16 from the school under section 15(1)(c) (as applied by section 158U), and that no person to whom the sponsor has assigned the functions of the principal under section 15(5) (as so applied) has arranged for the student to attend another school, the Secretary must,—

- (a) if satisfied that it is appropriate for the student to return to the school from which the student has been excluded, lift the exclusion; or
 - (b) arrange for and, if necessary, direct the board of a State school (that is not an integrated school) to enrol the student at the State school; or
 - (c) arrange for and, if necessary, direct a sponsor of another partnership school kura hourua to enrol the student at the other school; or
 - (d) direct a parent of the student to enrol the student at a correspondence school.
- (2) The Secretary may not give a direction under subsection (1)(b), or lift an exclusion under subsection (1)(a), unless the Secretary has also made all reasonable attempts to consult the student, the student's parents, the board, and any other person or organisation that, in the opinion of the Secretary, may be interested in, or be able to advise on or help with, the student's education or welfare.
- (3) The Secretary may not give a direction under subsection (1)(c) unless—
- (a) the student's parents agree; and
 - (b) the Secretary has made all reasonable attempts to consult the student, the sponsor, and any other person or organisation that, in the opinion of the Secretary, may be interested in, or be able to advise on or help with, the student's education or welfare.
- (4) If the sponsor of the school from which the student has been excluded is also the sponsor of another school, the Secretary (in exercising the power conferred by subsection (1)(c)) may direct the sponsor to enrol the student at that other school.
- (5) A board must comply with a direction under subsection (1)(b), and the direction overrides the provisions of any enrolment scheme the school may have in place.

- (6) A sponsor must comply with a direction under subsection (1)(c), and the direction overrides the provisions of any enrolment scheme the school may have in place.

Section 158R: inserted, on 13 June 2013, by section 31 of the Education Amendment Act 2013 (2013 No 34).

158S Re-enrolment by partnership school kura hourua of student excluded or expelled

- (1) The sponsor of a partnership school kura hourua from which a student has ever been excluded or expelled (whether under section 15 or 17 as applied by section 158U) may refuse to enrol the student at the school (unless, in the case of an exclusion, the Secretary has lifted the exclusion under section 158R(1)(a)).
- (2) Subject to sections 16(1)(ba) and 158R(1)(c), the sponsor of a partnership school kura hourua may refuse to enrol a student who is for the time being excluded or expelled (whether under section 15 or 17 as applied by section 158U) from a State school or another partnership school kura hourua.
- (3) The Secretary may, in the case of a student who has turned 16, direct the sponsor of another partnership school kura hourua to enrol the student at the school if—
- (a) the student has been expelled from a partnership school kura hourua under section 17 (as so applied); and
 - (b) the student's parents agree to the enrolment; and
 - (c) the Secretary has made all reasonable attempts to consult the student, the sponsor, and any other person or organisation that, in the opinion of the Secretary, may be interested in, or be able to advise on or help with, the student's education or welfare.
- (4) The Secretary may, in the case of a student who has turned 16, direct the board of a State school to enrol the student at the school if—
- (a) the student has been expelled from a partnership school kura hourua under section 17 (as so applied); and
 - (b) the Secretary has made all reasonable attempts to consult the student, the student's parents, the board, and any other person or organisation that, in the opinion of the

Secretary, may be interested in, or be able to advise on or help with, the student's education or welfare.

Section 158S: inserted, on 13 June 2013, by section 31 of the Education Amendment Act 2013 (2013 No 34).

Courses and visits

Heading: inserted, on 13 June 2013, by section 31 of the Education Amendment Act 2013 (2013 No 34).

158T Courses and visits outside partnership school kura hourua premises

A sponsor of a partnership school kura hourua may authorise any students to do any of the following outside the school premises:

- (a) undertake courses of education; or
- (b) obtain work experience; or
- (c) make visits.

Section 158T: inserted, on 13 June 2013, by section 31 of the Education Amendment Act 2013 (2013 No 34).

Application of Act to partnership schools kura hourua

Heading: inserted, on 13 June 2013, by section 31 of the Education Amendment Act 2013 (2013 No 34).

158U Application of this Act to partnership schools kura hourua

- (1) Sections 4 to 6, 13 to 15, 17 to 17C, 18 to 19, 25A (except subsection (1B)), 25AA, 25B, 27, 33, 78C to 78CD, and 139AAA to 139AAI (except section 139AAE(1)(a)) apply to partnership schools kura hourua with any necessary modifications.
- (2) In their application to partnership schools kura hourua under subsection (1), sections 4 to 6, 13 to 15, 17 to 17C, 18 to 19, 25A (except subsection (1B)), 25AA, 25B, 27, 33, 78C to 78CD, and 139AAA to 139AAI (except section 139AAE(1)(a)) must be read as if—
 - (a) any references to a State school were references to a partnership school kura hourua; and

- (b) any references to a board or a board of a State school were references to a sponsor; and
 - (c) any references to a principal were references to the person or persons to whom a sponsor has assigned the function or functions of the principal under the section in question; and
 - (d) any references to a primary school were references to a primary partnership school kura hourua; and
 - (e) any references to a secondary school were references to a secondary partnership school kura hourua; and
 - (f) any references to a composite school were references to a composite partnership school kura hourua.
- (3) In its application to partnership schools kura hourua under subsection (1), section 17B must also be read as if the reference to a meeting of the board were a reference to a meeting with the sponsor.
- (4) In its application to partnership schools kura hourua under subsection (1), section 25AA must also be read as if references to the health curriculum were references to the health curriculum delivered by a partnership school kura hourua.
- (5) In their application to partnership schools kura hourua under subsection (1), sections 139AAA to 139AAI must also be read as if the definition of **teacher** in section 139AAA(9) were replaced with the following definition:
- teacher** means—
- (a) a person holding a teaching position (within the meaning of section 120) at a partnership school kura hourua; or
 - (b) a person to whom the sponsor of the partnership school kura hourua has assigned any of the functions of the principal.

Section 158U: inserted, on 13 June 2013, by section 31 of the Education Amendment Act 2013 (2013 No 34).

158V Application of Education (Stand-Down, Suspension, Exclusion, and Expulsion) Rules 1999 to partnership schools kura hourua

- (1) The Education (Stand-Down, Suspension, Exclusion, and Expulsion) Rules 1999 (except rule 3) apply to partnership schools kura hourua with any necessary modifications.
- (2) In their application to partnership schools kura hourua under subsection (1), the Education (Stand-Down, Suspension, Exclusion, and Expulsion) Rules 1999 must be read as if—
 - (a) any references to a State school were references to a partnership school kura hourua; and
 - (b) any references to a board or a board of a State school were references to a sponsor; and
 - (c) any references to a principal were references to the person to whom a sponsor has assigned the function or functions of the principal under the rules.

Section 158V: inserted, on 13 June 2013, by section 31 of the Education Amendment Act 2013 (2013 No 34).

*Application of other Acts to partnership schools
kura hourua*

Heading: inserted, on 13 June 2013, by section 31 of the Education Amendment Act 2013 (2013 No 34).

158W Application of New Zealand Bill of Rights Act 1990 to partnership schools kura hourua

Section 3(b) of the New Zealand Bill of Rights Act 1990 applies to the following persons when performing functions under this Act or in relation to a partnership school contract:

- (a) a sponsor of a partnership school kura hourua;
- (b) a person employed by a sponsor of a partnership school kura hourua in a position at the school;
- (c) a person who works at a partnership school kura hourua under contract.

Section 158W: inserted, on 13 June 2013, by section 31 of the Education Amendment Act 2013 (2013 No 34).

**158X Application of Privacy Act 1993 to partnership schools
kura hourua**

When performing functions under this Act or a partnership school contract, a sponsor of a partnership school kura hourua is to be treated as a public sector agency for the purposes of sections 35 and 36 of the Privacy Act 1993.

Section 158X: inserted, on 13 June 2013, by section 31 of the Education Amendment Act 2013 (2013 No 34).

**158Y Official Information Act 1982 not to apply to partnership
schools kura hourua**

The Official Information Act 1982 does not apply to a sponsor of a partnership school kura hourua when the sponsor is performing functions under this Act or a partnership school contract.

Section 158Y: inserted, on 13 June 2013, by section 31 of the Education Amendment Act 2013 (2013 No 34).

**Part 13
General provisions relating to tertiary
education**

Part 13: added, on 23 July 1990, by section 35 of the Education Amendment Act 1990 (1990 No 60).

Part 13 heading: substituted, on 1 January 2003, by section 5 of the Education (Tertiary Reform) Amendment Act 2002 (2002 No 50).

159AAA Object of provisions relating to tertiary education

- (1) The object of this Part, Parts 13A to 18, and Part 19 (which relate to tertiary education), and of the provisions of Parts 18A and 20 to 24 that relate to tertiary education, is to foster and develop a tertiary education system that—
- (a) fosters, in ways that are consistent with the efficient use of national resources, high quality learning and research outcomes, equity of access, and innovation; and
 - (b) contributes to the development of cultural and intellectual life in New Zealand; and
 - (c) responds to the needs of learners, stakeholders, and the nation, in order to foster a skilled and knowledgeable population over time; and