

STATUTORY INTERVENTIONS UNDER PART 7A OF THE EDUCATION ACT 1989, THAT INVOLVE THE APPOINTMENT OF A COMMISSIONER

This document is intended as a resource for Ministry staff that clarifies the legislative and regulatory parameters under which commissioners are required to operate, and defines the roles of the parties involved in the application of the statutory intervention framework. In addition it highlights key connections which are necessary for the commissioner to carry out her/his role effectively. In line with this resource being included on the deskfile, changes have been made to the relevant MOTs, letters to board chairs and letters to appointees to reflect the required information.

Governance vs Management

There is no statutory definition of the respective roles of governance or management, however, the *Education Act 1989* contains the following provisions:

Section 75

Except to the extent that any enactment, or the general law of New Zealand, provides otherwise, a school's Board has complete discretion to control the management of the school as it thinks fit.

Section 76

- (1) A school's principal is the Board's chief executive in relation to the school's control and management.
- (2) Except to the extent that any enactment, or the general law of New Zealand, provides otherwise, the principal -
 - a. shall comply with the Board's general policy directions; and
 - b. subject to paragraph (a) of this subsection, has complete discretion to manage as the principal thinks fit the school's day to day administration.

The governance/management relationship between the principal and the Board is bound up in the wider employment relationship, which is underpinned by mutual obligations of trust and confidence, fair and reasonable treatment and the requirement to act in good faith. In addition, the Board is required to be a good employer under the State Sector Act 1988 (section 56).

Commissioner Appointment

Terms of reference for the appointment of a commissioner are determined by the Minister/Secretary following advice from the Ministry. Those terms of reference should in general identify the specific matters of concern, and the desired outcome by reference to the criteria for the election of a functioning board of trustees and reinstatement of full powers of control and management of the Board. A Commissioner must exercise her/his own discretion on how best to address the areas of risk and achieve the desired outcomes and not be constrained in the exercise of her/his powers by instructions regarding the appropriate decisions.

The necessary functions and powers of a Commissioner and the date that the statutory appointment takes effect will be specified by the *New Zealand Gazette* notice(s). Any 'special duties' required of a Commissioner, and the date that the statutory appointment takes effect, will be stated in the letter of appointment and the Memorandum of Understanding.

A Commissioner must have read and signed the Memorandum of Understanding with the Manager of the Ministry's local office BEFORE commencing their statutory role.

If a Commissioner intends to be absent for any period of time, the Commissioner must advise the principal and the Manager of the Ministry's local office, with reasonable notice, so that appropriate arrangements can be made to ensure that the vested functions, powers and duties can continue to operate in practice. The Commissioner may need to consult with the Board's Insurer and the New Zealand School Trustees Association (NZSTA) industrial adviser regarding the absence. If required, the Secretary for Education may temporarily replace the commissioner for the period of the absence.

Role of Commissioner

The Commissioner has responsibility for leadership and decision-making on all issues that relate to the functions, duties and powers of the Board that have been vested in her/him. Decisions made by the Commissioner are attributable to and binding on the Board.

The Commissioner is required to act prudently with public resources and in accordance with the school's liability insurance cover and any relevant statutory or regulatory boundaries that may affect their functions, duties and powers.

Prior to taking any action at the school, the Commissioner should meet with the principal to clarify and reach understanding on the working arrangements in relation to their vested governance functions and powers, and having regard to the outcomes required by the Minister.

It should be made clear to all interested parties that, with the dissolution of the Board membership, the Commissioner acts for the Board in relation to all governance matters, but is not a Board member.

The Commissioner will work closely with the principal, and advise and consult with the school community.

The Commissioner has no greater powers, or power, to control the management of the school, than the Board itself. The Commissioner is not appointed to “step into the shoes” of the principal or assume direct responsibility for the administration functions and responsibilities of the principal. The Commissioner must respect the boundary between managing the day-to-day operation of the school (which is properly a matter for the principal) and overseeing the principal’s role in managing the operations of the school (as this relates to their statutory powers).

With respect to the powers vested in the Commissioner, there may be a need to modify the powers, delegations or duties of the position of principal where these might otherwise limit the ability to achieve the indicative outcomes (i.e. where a potential risk to the operation of the school arises from the manner in which the principal is exercising the Board’s powers and functions under delegated authority).

If the Commissioner does consider it necessary to alter the duties or delegated authority of the principal (for example, the authority to appoint staff or other member of senior management/staff) then this usually requires an amendment to the relevant Board delegation and policy (or new delegation and new policy if none exists). The Commissioner should do this in consultation with the principal and in accordance with a Board’s normal procedure (usually by way of Board minute revoking or suspending the existing delegation and policy, and adopting the revised or amended delegation and policy). A change to the delegated authority of the principal is likely to have some impact on the principal’s duties and responsibilities as an employee. The Commissioner will therefore need to seek advice from the Board’s legal or employment advisers before proceeding in these circumstances (the New Zealand School Trustees Association (NZSTA) advisory services, including industrial advisers and the 0800 advisory service on 0800 782 435) are available free of charge.)

If the Commissioner seeks to contact specific services relating to the intervention, they must have the prior approval of the Ministry to do so.

The Commissioner must advise the school’s insurance company of their appointment, as soon as possible following your appointment, in order to confirm liability cover in relation to the vested governance functions and powers. [Section 78Q of the Act states that no Commissioner is personally liable for any act done or omitted by her/him, or for any loss arising out of any act done or omitted by her/him, if the act or omission was in good faith and occurred in the course of carrying out her/his functions. A pre-forma letter is attached to the Memorandum, for the Commissioner to complete and send to the Board’s insurer.

Support and assistance is available to the Commissioner from a range of groups and organisations such as the New Zealand School Trustees Association (NZSTA) advisory services (including industrial advisers and the 0800 advisory service on 0800 782 435), professional advisers and legal experts. If the Commissioner needs to seek additional legal advice, it should be linked with that of the NZSTA industrial adviser to ensure consistency of advice and guidance. The Commissioner must also seek

advice and direction from the school's insurer as to the appropriate professional advisers to use and the potential to commit additional Board funds.

At an appropriate stage of the intervention the Commissioner may, at their discretion, establish a community advisory/reference group. This selected group of community representatives may then provide a community perspective to the governance of the school, at the same time as developing skills and knowledge in preparation for a return to governance by an elected board of trustees.

Employment Powers of the Commissioner

Being vested with full employment powers of the Board, the Commissioner is able to recruit and appraise staff, undertake disciplinary action, surplus staffing procedures or negotiations for an agreement on termination of the employment of a Board employee.

The Commissioner must consider the financial impacts of any employment decision/action and confirm that Board funds are available (without adversely impacting on school operations) to support a particular option.

The Commissioner should be aware of the role of the principal in relation to day-to-day employment related responsibilities. If necessary, the Board's policies and delegations on employment matters may need to be modified to transfer sole responsibility for such matters to them (but refer to "Role of Commissioner" above, on changes to delegated authority).

The Commissioner should work with the principal to clearly define responsibilities and boundaries for employment matters.

The Commissioner should not prudently expend public resources and in accordance with the school's liability insurance cover their actions should be consistent with the Office of the Attorney-General's advice regarding severance payments (<http://www.oag.govt.nz/2002/severance-pay/>). The Commissioner must seek the Ministry's concurrence under section 75 of the State Sector Act where a settlement includes the payment of additional remuneration or benefits. This does not extend to compensation payments under section 123(1)(c)(i) of the Employment Relations Act, although such payments must be disclosed in the Board's annual report in accordance with section 87(2)(a)(iv) of the Education Act 1989. (See chapter 3.4.3 of the Financial Information for Schools Handbook - www.minedu.govt.nz/goto/fish)

Note that the Commissioner may also have an obligation to report certain matters to the Teachers Council (ref www.teacherscouncil.govt.nz/cnc/complaints/reporting.stm).

Support and assistance is available free of charge to the Commissioner from the New Zealand School Trustees Association (NZSTA) advisory services (including industrial advisers and the 0800 advisory service on 0800 782 435). If the Commissioner needs to seek additional legal advice, it must be linked with that of the NZSTA industrial adviser to ensure consistency of advice and guidance. The Commissioner must also

seek advice and direction from the school's insurer as to the appropriate professional advisers to use, and the potential to commit additional Board funds.

Communication Powers of the Board

The Commissioner is vested with powers to manage communications with the media, communications within the school and communications between the school and its community. Those communications must only relate to the Commissioner's statutory functions and NOT extend to commenting on broader issues or issues of government policy.

The Commissioner should be aware of the role of the principal in relation to internal communications at the school and avoid undermining the principal's position. A consultative or joint approach to staff communications is generally desirable but, if necessary, the Board's policy on internal communications may need to be modified to transfer sole responsibility for such matters to the Commissioner (but refer to "Role of Commissioner" as above, on changes to delegated authority).

The Commissioner should work with the principal to clearly define responsibilities and boundaries for communication messages.

The Commissioner is encouraged to seek general advice on a communications framework through the Ministry's local office, or professional advice if necessary, through a private communications organisation.

The Commissioner should seek independent communications advice when seeking to prepare specific communications messages related to their statutory functions.

Financial Powers of the Board

The Commissioner is vested with Board powers to manage financial operations. While vested with these powers, their focus should be on monitoring and controlling school expenditure at the same time as ensuring resources are focused on student achievement. It is important the Commissioner maintains a sharp focus on the school's ongoing financial sustainability as s/he exercises the financial powers that have been vested in her/him.

The Commissioner must consider curriculum delivery and employment impacts of any financial decision/action.

The Commissioner must work with the principal to clearly define responsibilities and boundaries for financial commitment/liabilities.

The Commissioner should be aware of the role of the principal in relation to day-to-day financial management responsibilities. If necessary, the Board's policies and delegations on financial management may need to be modified to transfer sole responsibility for such matters to the Commissioner (but refer to "Role of Commissioner" as above, on changes to delegated authority).

Guidelines on financial management practice, including the Office of the Auditor General's guidelines, can be accessed through the Financial Information for Schools Handbook (ref www.minedu.govt.nz/goto/fish)

In addition, general and policy advice can be accessed through the Ministry's Regional Financial Adviser.

Property Management Powers of the Board

The Commissioner is vested with the Board powers of property management. While vested with these powers, their focus should be on monitoring and controlling school capital works, at the same time as overseeing required maintenance and development of property, and effective property management systems and processes.

The Commissioner must consider the financial impacts of any property management decision/action and first confirm that Board funds are available (without adversely impacting on school operations) to support a particular option.

The Commissioner should be aware of the role of the principal in relation to day-to-day property management responsibilities. If necessary, the Board's policies and delegations on property management may need to be modified to transfer sole responsibility for such matters to the Commissioner (but refer to "Role of Commissioner" as above, on changes to delegated authority).

The Commissioner should work with the principal to clearly define responsibilities and boundaries for property management.

Guidelines on property management practice can be accessed through the State Schools Property Management Handbook (ref www.minedu.govt.nz/Education/EducationPolicies/Schools/SchoolOperations/PropertyManagement/Stateschools/StateschoolsPropertyManagementHandbook.aspx)

In addition, advice can be accessed through the Ministry's local office.

Reporting Requirements to the Ministry and Board Filing Requirements

The Commissioner is required to report regularly to the local office of the Ministry. In particular, they must:

• following the initial scoping phase of the intervention (after approximately the first four weeks of their appointment), report to the Ministry's local office (in plain English) on the level and scope of risk, recommend any revision of the expected outcomes and develop a detailed action plan, the projected costs, and the exit strategy from intervention

- provide written monthly progress reports (in plain English), against the action plan, to the manager of the Ministry's local office throughout the course of the intervention, which must also include:

⇒ details of any unbudgeted financial transactions approved by the Commissioner

⇒ a copy of the Commissioner's monthly fees and expenses invoice to the school

- Keep accurate minutes of any meeting with the Principal, including any decisions made
- report immediately to the manager of the Ministry's local office on any matters of particular concern.

Regular monthly reports to the Ministry should outline progress made towards achieving the agreed outcomes and mention any barriers or challenges to be addressed. Reports should not include specific details about individuals, employment issues or complaints. Reports need not cover all issues or problems that arise as part of a school's day-to-day operations.

It should be borne in mind that correspondence with the Ministry (including email messages) may be accessible by the public under the Official Information Act and personal information about individual employees at the school may be accessible under the Privacy Act. The Commissioner may need to seek advice from the NZSTA Helpdesk (0800 782 435) and look at the Ombudsmen's guidelines (www.ombudsmen.govt.nz/Guidelindex.htm) to get a sense of what can be withheld.

In preparing for when the statutory intervention is revoked and/or their appointment ceases, the Commissioner should ensure that all relevant documentation that they have created and received in the course of their statutory role is appropriately filed in the Board's archiving system, giving consideration to the Ombudsman's guidelines and the 'in-committee' or confidential status of any documentation. This must include a record of decisions the Commissioner has made and their decision making processes.

Role of the Ministry

The Ministry regularly monitors progress of an intervention by way of Commissioner's reports, meetings with the Commissioner and the principal, ERO review reports, NZSTA industrial advisers, training providers, and the board's interests. In addition, the Ministry will formally review the intervention within its first year and annually thereafter.

In the interim, should the level of risk alter, the intervention may be amended or reduced accordingly based on Ministry advice to the Secretary/Minister.

When the Commissioner has completed the scoping phase of the intervention, risks may be identified that were not apparent at the outset. Options such as a change of appointee, or contracting in specific support, may need to be considered by the Ministry.

The Ministry cannot direct the Commissioner on the exercise of their statutory powers, nor is the Ministry able to provide legal advice and advice on specific issues at the school. The Ministry can support the Commissioner by providing high level general information and advice and where to access further information/advice, relevant Ministry or government education policy and resourcing.

The Ministry does not become involved in governance and management issues that are the responsibility of the Commissioner and/or Principal, or in day-to-day operational issues relating to the school. The Ministry does not make decisions for or on behalf of the Commissioner.

The Commissioner's appointment does not give the Ministry any control (or liability) in relation to the vested governance functions and powers at a school. The State Sector Act prevents the Ministry from becoming directly involved in employment matters in a school and Ministry officials shall accordingly refrain from any conduct or action which could be construed as interference in employment matters.

Relationship between the Commissioner and the Ministry

Although appointed by the Secretary for Education, the Commissioner is an independent statutory officer whose powers, functions and responsibilities are derived from statute, not the Ministry.

The Commissioner is accountable to the Ministry for achieving the outcomes of the intervention, but they are not an employee or agent of the Ministry. In carrying out their role, the Commissioner must use their own judgment and discretion in resolving those areas of risk and concern so that full control may be returned to the Board.

Crown Entities Act 2002

This purpose of this Act is to provide a consistent framework for the governance and operation of Crown entities and to clarify accountability relationships between them and the Crown. Every school board of trustees is a Crown Entity. The Crown Entities Act clarified the powers and duties of board members and boards. Changes have also been made to reporting and accountability requirements, as per Ministry Circulars 2805/16 and 2005/17.

As with earlier changes made by the *Education Standards Act 2001*, the *Education Act 1989* is still the central starting point for boards, limited statutory managers and commissioners.

Exit from Statutory Interventions

The aim of statutory intervention is always to return the school to full self-management as soon as required changes can be sustained without the intervention. Varying strategies are used for exiting an intervention, and will depend on the

particular circumstances, evidence of sustainable change, and actual and potential risk factors.

Interventions may be amended, reduced or revoked. This reflects a gradual withdrawal of support, as evidence of risk decreases, and there is sufficient capacity and capability to sustain the positive change that has been achieved.

In the case of a section 78N(3) intervention, it is only the Secretary that has the authority to revoke the intervention.

Before the Commissioner may appoint a returning officer to run elections for a Board, the Secretary must first be satisfied that must first be satisfied that an election of trustees will produce a functioning Board. At the appropriate time the Ministry will work closely with the Commissioner to gather evidence that recommends to the Secretary that a return to full governance by a Board is justified.

In preparation for return to governance by a Board, in some instances the assessment of risk may justify the appointment of a Limited Statutory Manager (under section 78M) to assume some of the powers of the newly elected Board, or the appointment of a Specialist Adviser (under section 78K) to advise the newly elected Board. If this is the case, and the Secretary/Minister has agreed to the application of a statutory intervention to a newly elected Board, then the electoral community should always be advised of this intention, and the reasons for it, before the Commissioner moves to setting a date for the election and appointing a returning officer.

In all instances the Commissioner should contact the NZSSTA advisory service on 0800 782 435 to ensure that the returning officer they appoint has access to the current elections papers and elections advice, and to agree on an election timeline that meets the requirements of the *Education (School Trustee Elections) Regulations 2000*.

In some circumstances a return to an elected Board may not be in the best interests of the school or the community, and an alternative Board constitution under section 105A of the Education Act 1989 may be considered. The Commissioner may request this option. The Ministry can provide relevant information regarding this option.

If a statutory intervention is revoked, then the Ministry will continue to monitor progress and maintain an informal level of support for whatever period is considered necessary to sustain the positive change. The exception to this is when the outcome of the intervention review is that school closure has been recommended and approved.

Commissioner's Fees and Expenses

Under section 78O(3) of the Act, the remuneration of the Commissioner must be determined by the Secretary and paid for out of funds of the Board. Reasonable expenses will include postage, stationery, toll calls, and travel (which will be paid at the public service rate). The School will provide the Commissioner with secretarial services, as agreed between them.

In cases where the Ministry assesses that a school's financial position prevents the Board funds from paying for the Commissioner's fees and expenses, the Ministry will discuss funding options with the Board. The Board funds are required to pay for at least the initial scoping phase of the intervention.

If, during the course of the intervention, fees and expenses are required to be committed beyond those anticipated/budgeted at the scoping phase, the Ministry local office (including Ministry Regional Financial Adviser) and the Commissioner will clarify and reach understanding on future funding options.

The Commissioner's fees will be at an agreed hourly rate (excl GST) up to an agreed maximum of hours per month, as agreed after negotiation between the Commissioner and the manager of the Ministry's local office, and notified to the Board by the Ministry.

The Commissioner should claim their fees and expenses by monthly invoice to the School. The invoice needs to be approved and signed by an appropriately delegated member of school management, and a copy provided by the Commissioner to the manager of the Ministry's local office, along with their monthly progress report.

If the Commissioner contracts specific services relating to the intervention, and has the prior approval of the Ministry to do so, it will be considered a valid intervention expense to be paid by the Board funds.

Irrespective of whether the Board or the Ministry funds the intervention, the local office of the Ministry must receive copies of the Commissioner's monthly invoices to the school to ensure that claims equate to the terms agreed to in the Memorandum of Understanding.

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