

18 November 2021

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Education and Training Amendment Bill (No 2)

Purpose

1. We have considered whether the Education and Training Amendment Bill (No 2) (the Bill) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO23519/3.3). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 21 (unreasonable search and seizure). Our analysis is set out below.

The Bill

4. The Bill amends the Education and Training Act 2020 (the principal Act) to give effect to new policy decisions and to make other minor and technical amendments.
5. The new policy decisions the Bill gives effect to include:
 - a. aligning the Police vetting provisions in the principal Act more closely with the safety checking requirements in the Children's Act 2014;
 - b. strengthening Teaching Council disciplinary processes;
 - c. providing greater flexibility for the Government to regulate compulsory student services fees charged by tertiary education providers;
 - d. enabling National Student Numbers (NSNs) to be used when there is funding to support work-based training;
 - e. authorising NSNs to be assigned to students studying for NCEA in overseas jurisdictions with which New Zealand has entered into an arrangement for the teaching and assessment of NCEA, and authorising schools in those jurisdictions to be specified users of NSNs;
 - f. enabling the New Zealand Qualifications Authority to exercise discretion about whether to cancel the registration of a private training establishment in relation to immigration breaches;
 - g. simplifying qualifications and other credentials;

- h. amending the Education Review Office's mandate to enable it to review professional learning and development;
- i. ensuring that learner well-being and safety arrangements for international and tertiary students and the disputes resolution schemes for international and tertiary students are fit for purpose;
- j. introducing a new type of casual vacancy on school boards that relates to board members who are removed for breaching a code of conduct; and
- k. amending the principal Act's regulation-making powers so that regulations can provide for notices to specify the qualifications that must be held by persons controlling, or working as educators within, an early learning service.

Consistency of the Bill with the Bill of Rights Act

Section 21 – unreasonable search and seizure

6. Section 21 of the Bill of Rights Act affirms the right of everyone to be secure against unreasonable search and seizure, whether of the person, property, correspondence or otherwise. The right protects several values including personal privacy, dignity, and property.¹ A request for information or documents constitutes a search for the purposes of s 21 of the Bill of Rights Act.²
7. Clause 57 amends the principal Act by inserting new s 634A. This provision allows code administrators to authorise any person, at any reasonable time, to enter and inspect premises (other than a dwelling house) occupied by a provider or signatory provider³, and to require any person to produce documents or information under the control of the person. The nominated person is also authorised to:
 - a. inspect, photocopy, print, copy or remove any documents which are produced or are believed on, reasonable grounds, to belong to the establishment;
 - b. require any employee or member of the provider or signatory to make or provide statements;
 - c. inspect any education and training work and any related materials; and
 - d. meet and talk with any person.
8. This authorisation is to ensure that a provider or signatory provider complies with a code of practice for learner wellbeing and safety⁴. The purpose of the codes is to ensure providers and signatory providers are taking all reasonable steps to maintain the wellbeing and safety of students, and to ensure, so far as is possible, that students have

¹ See, for example, *Hamed v R* [2012] 2 NZLR 305 at [161] per Blanchard J.

² *New Zealand Stock Exchange v Commissioner of Inland Revenue* [1992] 3 NZLR 1 (PCP).

³ Education and Training Act 2020, s 10. **Provider** means, in relation to pastoral care, a person or body that is, (i) in respect of international students, a registered school, an institution, or a registered establishment; or (ii) in respect of domestic tertiary students, an institution or a registered establishment. **Signatory Provider** means a provider that is a signatory to a code issued under s 534(1)b) and (c) of the Education and Training Act 2020 (Pastoral care codes of practice).

⁴ The amendments in the Bill aim to strengthen the focus on student wellbeing and safety in section 534 of the Education and Training Act 2020 in part by replacing each reference to pastoral care with reference to wellbeing and safety.

a positive experience that supports their educational achievement. The codes prescribe the outcomes sought from the provider for their students and the key processes required of providers to support learner wellbeing and safety.

9. The codes are enforced by code administrators. Code administrators monitor and investigate providers' compliance with the codes, issue quality improvement notices, issue compliance notes and impose sanctions on providers where they breach the code or fail to comply with the notices.
10. Clause 61 expands the offence under s 665 of the principal Act to include the new s 634A, making it an offence to obstruct or resist a person exercising a power of entry conferred by the new s 634A.
11. Powers that may be exercised under cl 57 constitutes search and seizure powers for the purposes of s 21 of the Bill of Rights Act. Ordinarily, a provision found to limit a particular right or freedom may nevertheless be consistent with the Bill of Rights Act if it can be considered reasonably justified in terms of s 5 of the Bill of Rights Act. However, the Supreme Court has held that, logically, unreasonable search or seizure cannot be demonstrably justified with reference to s 5 of the Bill of Rights Act.⁵
12. In assessing whether the search and seizure powers in the Bill are reasonable, we have considered the importance of the objective sought to be achieved and whether the provisions are rationally connected and proportionate to that objective. Overall, we consider cl 57 does not authorise unreasonable searches and seizures as per s 21 of the Bill of Rights Act, for the following reasons:
 - a. The search is in respect of an important objective – to ensure that a provider or signatory provider complies with a code, where the purpose of the codes is to maintain learner wellbeing and safety. The Bill recognises that breaches of codes relating to the wellbeing and safety of students could potentially result in serious harm to, or the death of, students.
 - b. Inspections are to be carried out at a reasonable time and the person conducting the inspection is not authorised to enter a dwelling house.
 - c. There are safeguards in place to ensure that only trained individuals can carry out the search, including that the person must be of good character and have received appropriate training on the exercise of the powers available.
 - d. There are safeguards regarding the search process, including that the authorised person must produce evidence of their authorisation to the person in charge of the premises, must give the person in charge a list of all documents that have been removed, and must return any documents that have been removed unless to do so would prejudice any investigation.
 - e. The Bill recognises that the power to enter and inspect provider premises will need to be exercised only for the purposes of investigating compliance with the code. The codes are publicly available and are disallowable instruments that must be presented to the House of Representatives. This provides legislative oversight of the provisions of the codes.

⁵ *Cropp v Judicial Committee* [2008] 3 NZLR 744 at [33]; *Hamed v R* [2012] 2 NZLR 305 at [162].

13. It is also notable that similar powers already exist within the principal Act in relation to school hostels and tertiary accommodation.

Conclusion

14. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



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