

10 March 2023

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Regulatory Systems (Education) Amendment Bill

1. We have considered whether the Regulatory Systems (Education) Amendment Bill (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 PCO 25138/6.0. 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 19(1) (freedom from discrimination). Our analysis is set out below.

The Bill

4. The Bill is an omnibus bill that makes minor and technical amendments to the Ngarimu VC and 28th (Maori) Battalion Memorial Scholarship Fund Act 1945, the Pacific Education Foundation Act 1972, the Children's (Requirements for Safety Checks of Children's Workers) Regulations 2015 and the Health and Safety at Work (General Risk and Workplace Management) Regulations 2016.

Consistency of the Bill with the Bill of Rights Act

Section 19 – Freedom from discrimination

5. Section 19(1) of the Bill of Rights Act affirms the right to freedom from discrimination on the grounds set out in the Human Rights Act 1993 (the Human Rights Act).
6. Two factors must be met for discrimination to be identified under section 19(1) of the Bill of Rights Act:¹
 - a. there is a differential treatment or effect as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination; and
 - b. that treatment has a discriminatory impact (i.e. it imposes a material disadvantage on the person or group differentiated against).
7. Differential treatment will arise if the legislation treats two comparable groups of people differently on one or more of the prohibited grounds of discrimination. Race and ethnic or

¹ *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 CA at [55].

national origins are prohibited grounds of discrimination under section 21 of the Human Rights Act. Whether disadvantage arises is a factual determination.²

Functions and membership of the Ngarimu VC and 28th (Maori) Battalion Memorial Scholarship Fund Board

8. Clause 4 of the Bill inserts new section 4(2)(h) into the Ngarimu VC and 28th (Maori) Battalion Memorial Scholarship Fund Act 1945 to require a member of the Ngarimu VC and 28th (Maori) Battalion Memorial Scholarship Fund Board (the Board) to be Māori and to have served or be currently serving in the New Zealand Defence Force.
9. Clause 5 of the Bill also amends the functions of the Board to administer the Scholarship Fund in accordance with the provisions of the Act, for the purpose of granting assistance for the education of any Māori, or for the purpose of promoting study and encouraging the maintenance of Māori language and of Māori history, tradition, and culture.
10. These provisions *prima facie* limit the right to be free from discrimination on the basis of race.

Definition of 'Aotearoa Pacific Person'

11. Clause 7 of the Bill amends section 2 of the Pacific Education Foundation Act 1972 (PEF Act) by replacing the existing definition for the term 'Pacific Person' with a new definition for the term 'Aotearoa Pacific Person'. The new definition specifies that a person must have indigenous Pacific cultural heritage from at least 1 of the countries listed in Schedule 2 to be eligible for assistance from the Pacific Education Foundation.
12. This provision *prima facie* limits the right to be free from discrimination on the ground of ethnic or national origins, which includes nationality or citizenship.

Discussion

13. Section 19(2) of the Bill of Rights Act provides that "measures taken in good faith for the purpose of assisting or advancing persons or groups of person disadvantaged because of discrimination that is unlawful . . . do not constitute discrimination". We consider that clauses 4, 5 and 7 of the Bill promote affirmative action, with the purpose of overcoming any disadvantage that certain groups might otherwise experience. To the extent clauses 4, 5 and 7 are designed to address educational barriers for Māori and Pacific peoples in Aotearoa, these clauses does not involve discrimination on the basis of race or ethnic or national origins.
14. To the extent that these clauses may be considered to engage discrimination on the basis of race or ethnic or national origins, we consider that they are justified for the reasons set out below.
15. Both the Ngarimu VC and 28th (Maori) Battalion Memorial Scholarship Fund Act 1945 and the PEF Act were originally enacted for charitable purposes.
16. The purpose of the Ngarimu VC and 28th (Maori) Battalion Memorial Scholarship Fund Act 1945 is to grant assistance for the education of Māori or to promote the study, and encourage the maintenance of, Māori language, history, tradition, and culture. A scholarship fund was established for that purpose.

² See, for example *McAlister v Air New Zealand* [2009] NZSC 78, [2010] 1 NZLR 153 at [40] per Elias CJ, Blanchard and Wilson JJ.

17. The functions of the Board that administers the Māori Scholarship Fund, and the provision of assistance for the education of any Māori, are rationally connected to the charitable purposes of the advancement of education for Māori. The requirement for certain Board members to be Māori reflects the importance of having Māori representation on the Board and acknowledges that Māori will have certain knowledge and experience of Māori language, history, tradition and culture necessary to administer the Fund in accordance with its purpose. The requirement for certain Board members to be Māori is therefore rationally connected to the purpose of that Act and the functions of the Board.
18. We also consider that because not all Board members are required to be Māori, the limit on the right to freedom from discrimination is no more than reasonably necessary and is in due proportion to the importance of the objective of ensuring the Board has sufficient Māori representation.
19. The purpose of the PEF Act is to promote and encourage the better education of Pacific people and to provide financial assistance for that purpose. The definition of Aotearoa Pacific Person as requiring an eligible person to have Pacific cultural heritage is rationally connected to the purpose of the PEF Act. The purpose and effect of the amended definition is to broaden the group of Pacific peoples to which the PEF Act may apply. We therefore consider that the limit is no greater than reasonably necessary to achieve the objective and is in due proportion to the importance of the objective.

Conclusion

20. We consider that, for these reasons, any limit on the right to freedom from discrimination can be justified under the Bill of Rights Act.

Conclusion

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



Jeff Orr
Chief Legal Counsel
Office of Legal Counsel