

10 October 2019

Hon Andrew Little, Acting Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Education (Pastoral Care) Amendment Bill**

### **Purpose**

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1. We have considered whether the Education (Pastoral Care) 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 received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 22442/12.0). 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 21 (unreasonable search and seizure). Our analysis is set out below.

### **The Bill**

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4. The Bill amends the Education Act 1989 ("the principal Act") to enable the Minister for Education to issue a mandatory pastoral care code binding tertiary education providers that enrol domestic students. The Bill also enables the Minister to issue a pastoral care code covering tertiary education providers that enrol international students. This code would be binding on all providers who are signatories to the code.
5. The codes will provide a framework for the pastoral care of students. The purpose of the domestic and international codes is to support the Government's objectives for the education of students by requiring providers to take all reasonable steps to protect students, and to ensure, so far as is possible, that students have a positive experience that supports their educational achievement. The codes will prescribe the outcomes sought from provider for their students and the key processes required of providers to support the wellbeing, achievement, and rights of students.
6. The codes will be enforced by code administrators. Code administrators may monitor and investigate providers' compliance with the code, issue quality improvement notices, issue compliance notices, and impose sanctions on providers where they breach the code or fail to comply with notices.
7. The Bill also introduces new offence and pecuniary penalty provisions for breaches of the codes.

## Consistency of the Bill with the Bill of Rights Act

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### Section 21 – unreasonable search and seizure

8. 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 a number of values including personal privacy, dignity, and property.<sup>1</sup> A request for information or documents constitutes a search for the purposes of s 21 of the Bill of Rights Act.<sup>2</sup>
9. Clause 238H(5) amends the principal Act to allow code administrators, in accordance with the requirements of the applicable code, to:
  - a. enter any student accommodation and inspect the premises and facilities:
  - b. inspect, and make and remove copies of, any information relating to the management of the student accommodation:  
  
...
10. Clause 238H(6) provides that a code administrator may exercise the powers in clause 238H(5) only for the purposes of monitoring or investigating compliance with the relevant code. Clause 238H(5) is also subject to the requirement that a code administrator may not enter or inspect the room or sleeping area of a student accommodated at any student accommodation unless—
  - a. the code administrator believes on reasonable grounds that entry or inspection is necessary for the purpose of monitoring or investigating compliance with the relevant pastoral care code; and
  - b. prior notice of the inspection is given to the student, and the purpose of the inspection is explained; and
  - c. the student is present during the inspection.
11. Clause 238H(5) 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.<sup>3</sup>
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 clause 238H(5) does not authorise unreasonable searches and seizures as per s 21 of the Bill of Rights Act. This is because—
  - a. the search is in respect of an important objective – the purpose of the codes is to protect students and support the well-being, achievement and rights of students,

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

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

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

and the Bill recognises that breaches of the codes of pastoral care could potentially result in serious harm to or the death of students (cl 238S);

- b. the code administrator may need statutory authority to enter and inspect student accommodation for the purpose of carrying out its monitoring and enforcement function (e.g. where a provider otherwise refuses to allow reasonable access). It is likely that information relevant to a complaint or possible breach of a code will be located at student accommodation;
- c. express statutory protections exist to ensure that highly private and sensitive areas of student accommodation (namely, students' rooms) can only be entered and searched where the code administrator believes on reasonable grounds that this is necessary for a purpose of monitoring or investigating compliance with the relevant pastoral care code, the student has been given prior notice of the inspection, and the student is able to be present during the inspection; and
- d. the Bill recognises that the power to enter and inspect student accommodation will need to be in accordance with the relevant pastoral care code and the powers may be exercised only for the purposes of monitoring or investigating compliance with the code. The codes will be 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. The codes will also have to be drafted in a manner that is consistent with the Bill of Rights, otherwise they may be open to challenge for being *ultra vires*.<sup>4</sup>

- 13. It is notable that similar powers already exist within s 144D of the principal Act in relation to school hostels.

## **Conclusion**

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- 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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<sup>4</sup> *Drew v Attorney-General* [2002] 1 NZLR 58 (CA).