

29 July 2021

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Education and Training (Teaching Council Fees) Amendment Bill

Purpose

1. We have considered whether the Education and Training (Teaching Council Fees) 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 the final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 23974/1.0). 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 26(1) (retroactivity) and s 27 (right to justice). Our analysis is set out below.

The Bill

4. The Bill amends the Education and Training Act 2020 (the Principal Act). The Principal Act establishes and regulates the education system in New Zealand.
5. The Teaching Council of Aotearoa New Zealand (the Council) is an independent statutory body responsible for the professional regulation of early childhood, primary and secondary schooling teachers.
6. An issue has arisen relating to the Council's ability to set fees relating to its legislative functions. Urgent legislative change is required that gives the Council the power to set fees to cover all of its functions and to validate earlier decisions to set fees.
7. The Bill amends the Principal Act to:
 - a. allow the Council to fix fees for all of its legislated functions, and to do so by way of a bundled amount like other professional regulatory bodies;
 - b. validate the receipt of fees from 1 February 2021;
 - c. validate any earlier decisions the Council, or its predecessor organisations, took in setting fees;
 - d. enable the Council to charge a fee, and require payment, in instalments; and
 - e. allow the Council to recover debts for unpaid fees.

Consistency of the Bill with the Bill of Rights Act

Section 26(1) – Retroactivity

8. Section 5 of the Bill will have retroactive effect by validating fees previously fixed by the Council to cover the costs associated with carrying out all of its functions. The Bill does this by inserting clause 66A into Schedule 1 of the Principal Act, which provides that any fee fixed by the Council is to be treated as valid.
9. While this engages the principle that legislation should not have retroactive effect,¹ it does not involve the retrospective application of a criminal offence. The Bill therefore does not engage section 26(1) of the Bill of Rights Act, which relates to retroactive offences.

Section 27 – Right to justice

10. Section 27(2) of the Bill of Rights Act protects the right of every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority to apply, in accordance with law, for judicial review of that determination.
11. A fee that will be retrospectively validated by the Bill has been subject to judicial review and found to be unlawful. One effect of the retrospective validation would be to override the outcome of that case. This raises the issue of whether the retrospective validation could be seen as limiting the right to judicial review.
12. In our view, the retrospective validation of the fee does not engage section 27(2). In *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council* the appellants argued that Parliament's decision to override extant judicial review proceedings by retrospective validation was a violation of its rights to challenge the Kaipara District Council's decision (about rates) by way of judicial review. The majority of the Court of Appeal held that it cannot be properly argued that validating legislation results in a deprivation of rights in a section 27(2) sense.²
13. Further, the majority agreed with the Attorney-General's submission that:

nothing in s 27(2) of BORA affirms as a general proposition a right to have the existing law preserved against retrospective amendment. As he put it, acceding to the MRA's argument would incorporate into s 27(2) whatever substantive entitlements happen to exist under the general law from time to time and require justification for their change under s 5 of BORA. We accept his submission that there is nothing in BORA that requires the court to proceed in that way.³
14. For these reasons, we do not consider that the Bill engages section 27(2).

¹ *Legislation Guidelines* (2018 edition), chapter 12.1.

² *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council* [2016] 2 NZLR 437 at [204].

³ *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council* [2016] 2 NZLR 437 at [206].

Conclusion

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

A handwritten signature in blue ink, appearing to read "Jeff Orr". The signature is stylized and cursive.

Jeff Orr
Chief Legal Counsel
Office of Legal Counsel