

21 November 2019

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Education and Training Bill

Purpose

1. We have considered whether the Education and Training 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 21113/8.0).¹ 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 sections 9 (right not to be subject to torture or cruel treatment), 13 (freedom of thought, conscience, religion, and belief), 15 (manifestation of religion and belief), 14 (freedom of expression), 17 (freedom of association), 18 (freedom of movement), 19 (freedom from discrimination), 21 (freedom from unreasonable search and seizure), 22 (liberty of the person), and 25(c) (presumption of innocence). Our analysis is set out below.

The Bill

4. The Bill repeals the Education Act 1989 (the 1989 Act), Education Act 1964 (the 1964 Act), and Industry Training and Apprenticeships Act 1992 and replaces them with a new Education and Training Act. The Bill updates various provisions, removes redundant provisions, and gives effect to policy changes including:

Early childhood education

- requiring police vetting of all adults who live, or may be present, at a home in which children are receiving early childhood education and care;
- providing the Education Review Office with the power to enter homes where home-based early childhood education is taking place;
- allowing the Minister of Education to approve or decline applications to open new early learning services based on specified criteria, and to request further information if required;

¹ Many of the internal cross-references between provisions in the Bill are wrong in this version as they have not been adjusted to take account of re-numbering. In addition, some provisions have also not been sequentially numbered (i.e. the numbering bears no relationship to the position of the provisions within the Bill).

Primary and secondary education

- requiring school boards who wish to allow religious instruction in the schools that they govern to do so on an “opt-in” basis;
- shifting the responsibility for developing and consulting on enrolment schemes from school boards to the Ministry of Education;
- specifying that physical force is to be used only as a last resort;
- updating and clarifying legislation that supports on-line and distance education;
- refocusing school boards on a wider range of objectives, not just educational achievement, in recognition of the important role that they play in developing all aspects of New Zealand’s future generations;
- creating new objectives for school boards, including giving effect to the obligations under Te Tiriti o Waitangi;
- requiring a school board to consult with students (as appropriate), staff, and its school community when making school rules;
- establishing minimum eligibility criteria for appointing principals;
- establishing a mandatory Code of Conduct for members of school boards, with sanctions for non-compliance;
- establishing dispute resolution panels to help students and their whānau resolve complaints and disputes with their school;
- prohibiting the awarding of the National Certificate of Educational Achievement (NCEA) offshore, except in limited circumstances;

Performance, funding and support

- enabling the Education Review Office to obtain governance and management information from controlling entities (e.g. parent companies) where the information relates to early learning services under their control; and

Administration of the education system

- changing the student loan and allowance regime to enable more efficient and effective use of client information and aligning the limitation period for laying charges for information-related offences with those applying to other offences.

Consistency of the Bill with the Bill of Rights Act

Section 9 – torture or cruel, degrading, or disproportionately severe treatment or punishment

5. Section 9 of the Bill of Rights Act affirms that everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.
6. The Bill re-enacts, with some amendments, the current provisions around the use of physical force or seclusion against primary and secondary school students. Clause 82 of the Bill re-enacts the prohibition on corporal punishment and seclusion in ss 139A and 139AB of the 1989 Act. Clause 83 of the Bill re-enacts (with some amendments) s 139AC of the 1989 Act, which provides that:

- a teacher or authorised staff member at a registered school may use physical force on a student only where this is necessary to prevent imminent harm to the student or another person; and
 - any physical force used must be reasonable and proportionate in the circumstances.
7. However, the Bill amends the existing provision by also requiring that physical force only be used if the teacher or authorised staff member reasonably believes there is no other option available in the circumstances to prevent the harm.
 8. The Bill also re-enacts, with some amendments, the current requirements in ss 139AD and 139AE of the 1989 Act that the Secretary make rules prescribing the practice and procedure to be followed relating to the use of physical force and issue guidelines on the use of physical force.²
 9. In light of the safeguards, we do not consider that cl 83 of the Bill engages s 9 of the Bill of Rights Act.

Section 13 and section 15 – freedom of thought, conscience, religion, and belief, and manifestation of religion and belief

10. Section 13 of the Bill of Rights Act provides that everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference. Section 15, which is a related right, provides that every person has the right to manifest that person’s religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.
11. The Bill re-enacts, with some amendments, a number of provisions in the 1964 and 1989 Acts that relate to religious instruction and observances.

State integrated schools

12. State integrated schools offer ‘education with a special character’, meaning education within the framework of a particular or general religious or philosophical belief, and associated with observances or traditions relating to that belief. The Bill and the current law contain an underlying assumption that a student enrolled at a State integrated school will participate in the general school programme that gives the school its special character.³ Similarly, where religious instruction forms part of the special character of a State integrated school, a willingness and ability to take part in religious instruction appropriate to that school is a condition of appointment to certain positions.⁴ We do not consider that these matters limit religious freedom for the reasons that follow.
13. Enrolment, or acceptance of a position, at a State integrated school is voluntary. Anyone seeking to enrol a child, or applying for a position, at a State integrated school will do so in full knowledge of the school’s special character and because they wish to be associated with it. The provisions of the Bill do not attempt to change or prevent the pursuit of an individual’s belief system, or impose any other belief system. Further, they do not prevent activities undertaken by individuals in pursuit of manifesting their religion

² Cls 84 and 85 of the Bill.

³ s 443 of the 1989 Act, re-enacted in cl 27 of Sch 7 of the Bill.

⁴ ss 464 – 467 of the 1989 Act, re-enacted in cls 47 – 50 of Sch 7 of the Bill.

or belief. In fact, cl 29(2) of sch 7 provides that if religious instruction and observances form part of education with a special character, the school must be responsive to the sensitivities of students and parents of different religious or philosophical affiliations, and may not require a student of a different religious or philosophical affiliation to participate in religious observances and religious instruction if a parent of the student states that they do not wish that student to participate.

14. Consistent with previous advice on the existing provisions regarding religious instruction and observance in State integrated schools,⁵ we do not consider that the Bill's provisions on this subject limit religious freedom.

State primary schools

15. The Bill also re-enacts, with some amendments, the provisions in the 1964 Act relating to religious instruction and observances at State primary schools. Teaching in every State primary school must, while the school is open, be entirely of a secular character.⁶ However, Boards may choose to close their school to allow religious instruction or observances, including during school hours, by voluntary instructors for up to 60 minutes per week to a maximum of 20 hours per year.⁷ The Minister may also authorise additional religious instruction if satisfied that the majority of parents at the school wish their children to receive additional religious instruction and this will not be to the detriment of the normal curriculum.⁸
16. Student attendance at religious instruction or observances is not compulsory under the existing law or the Bill, but the Bill changes attendance at religious instruction⁹ from an 'opt-out' to an 'opt-in' model, whereby a student may only attend if a parent confirms in writing to the principal that they want their child to attend.¹⁰ Attendance at religious observances remains 'opt-out'.¹¹
17. The current 'opt-out' model for religious instruction has been controversial and has prompted legal proceedings in recent years, although there have not to date been any determinations on the merits.¹² The opt out model carries the risk that children will take part in religious instruction or observances without the full and informed consent of parents and caregivers, who may not be aware that religious instruction or observances are taking place or what they involve, or how to withdraw their child. Parents and

⁵ See the Ministry of Justice's advice to the Attorney-General dated 12 August 2016 – 'Consistency with the New Zealand Bill of Rights Act 1990: Education (Update) Amendment Bill, publicly available at <https://www.justice.govt.nz/assets/Documents/Publications/education-update-amendment-bill.pdf>.

⁶ s 77 of the 1964 Act, re-enacted in cl 81 of the Bill.

⁷ s 78 of the 1964 Act, re-enacted in cl 54 of the Bill.

⁸ s 78A of the 1964 Act, re-enacted in cl 55 of the Bill.

⁹ The Ministry of Education Guidelines on Religious Instruction in state primary schools, intermediate schools and nga kura, May 2019, available at <https://www.education.govt.nz/school/boards-information/religious-instruction-guidelines/>, defines religious instruction as "the teaching or endorsing of a particular faith. It is the non-neutral partisan teaching of religion which supports or encourages student belief in the religion being taught."

¹⁰ Compare cl 56 of the Bill with s 79 of the 1964 Act.

¹¹ s 79 of the 1964 Act, re-enacted as cl 57 of the Bill.

¹² One long-running set of proceedings (*McClintock v Attorney-General*) lapsed, and another (*Hines and Jacob v Attorney-General*) is still in process. For a general discussion of this topic see Paul Rishworth "Religious Issues in State Schools" (paper presented to NZLS Education Law Conference, May 2006).

caregivers may also feel pressure to allow their child to attend, and students may feel embarrassment or peer pressure. We note the current *Ministry of Education Guidelines on Religious Instruction in state primary schools, intermediate schools and nga kura* recommend requiring informed consent from a parent or caregiver before allowing a student to participate in religious instruction.¹³

18. In a pre-Bill of Rights Act case, the Court of Appeal held that school assemblies which included some religious observance were lawful as long as the parents could 'opt out' their children.¹⁴ It is not clear whether a court would come to the same conclusion now under the Bill of Rights Act.
19. The courts in Canada and the United States have considered the consistency of 'opt out' models of religious instruction and observances with the right to freedom of religion on a number of occasions.
20. In *Zylberberg v Sudbury Board of Education*¹⁵, the Ontario Court of Appeal considered a regulation that required a public school to open or close each day with "religious exercises consisting of the Bible or other suitable readings and the Lord's Prayer or other suitable prayers". The regulation conferred a right on pupils not to participate. The Court held that the regulation was incompatible with the right to freedom of religion in the Canadian Charter of Rights and Freedoms because it imposed Christian observances on non-Christian pupils and religious observances on non-believers. Similarly, in *Corp of the Canadian Civil Liberties Assn v Ontario (Minister of Education)*,¹⁶ the Court struck down a regulation imposing two periods of religious education per week, even though parents had the right to opt out, as contrary to freedom of religion.
21. In *Engel v Vitale*,¹⁷ the United States Supreme Court considered a state law requiring public schools to open each day with a prayer. The law allowed students to absent themselves if they found this objectionable. The Court struck down the law on the basis of the 'establishment clause' in the First Amendment to the Constitution, which has been interpreted as prohibiting laws that suggest state support, endorsement or non-neutrality in matters of religion. However, the justices were of the view that the law did not appear to be coercive enough to violate the 'free exercise clause', which provides that Congress shall make no law prohibiting the free exercise of religion. This echoed the dicta of Justice Jackson in *McCullum v Board of Education* that the risk of embarrassment in students seeking exemption from religious instruction did not amount to coercion.¹⁸
22. However, in *Abington School District v Schempp*, Brennan J came to a different conclusion on the 'free exercise clause'. That case involved a state law requiring public schools to start each day with readings from the Bible. Students could be excused upon written request by a parent. While the Court struck down the law on the basis of the 'establishment clause', Brennan J considered that the excusal procedure itself violated the 'free exercise clause' because "the State could not constitutionally require a student

¹³ Above, n 9, at p 9.

¹⁴ *Rich v Christchurch Girls' High School Board of Governors (No 1)* [1974] 1 NZLR 1 (CA)

¹⁵ *Zylberberg v Sudbury Board of Education* (1988) 65 OR (2d) 641 (Ont CA)

¹⁶ *Corp of the Canadian Civil Liberties Assn v Ontario (Minister of Education)* (1990) 71 OR (2d) 341 (Ont CA)

¹⁷ *Engel v Vitale* 370 US 421 (1962)

¹⁸ *McCullum v Board of Education* 333 US 203 (1948) at 232.

to profess publicly his disbelief as the prerequisite to the exercise of his constitutional right of abstention.”¹⁹

23. In our view, the ‘opt in’ model for religious instruction in the Bill does not limit religious freedom. A student will only receive religious instruction if their parent specifically agrees to it.
24. Attendance at religious observances remains ‘opt-out’, which *prima facie* limits religious freedom. Where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of s 5 of that Act.
25. The s 5 inquiry may be approached as follows:²⁰
 - a. does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
 - b. if so, then:
 - i. is the limit rationally connected with the objective?
 - ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
 - iii. is the limit in due proportion to the importance of the objective?
26. We consider that the opt out model for religious observances is, in a New Zealand context, a justified limitation on religious freedom because:
 - there are a number of such observances that may or may not be considered religious depending on a person’s point of view; e.g. singing the national anthem, carols or waiata, or celebrating events that traditionally have a religious or spiritual basis, such as Easter or Diwali;²¹

¹⁹ *Abington School District v Schempp* 374 US 203 (1963) at 288.

²⁰ *Hansen v R* [2007] NZSC 7 at [121].

²¹ In the United States Supreme Court case of *Elk Grove Unified School Dist v Newdow* 542 US 1 (2004), the mandatory practice of reciting the pledge of allegiance at school (although students may abstain) was challenged because it contains the words “one nation under God”. The dissenting Justices (the majority having dismissed the case on the basis of standing) did not consider that this breached the constitutional right to religious freedom. Rehnquist CJ (at 14) said that:

The phrase “under God” is in no sense a prayer, nor an endorsement of any religion, but a simple recognition of the fact noted in H.R. Rep. No. 1693, at 2: “From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God.” Reciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one; participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church.

The authors of Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015), at 739, express the view that the reference to God in the New Zealand national anthem infringes the rights of those who do not share a Christian belief, but that it may be that such infringement is justified because of New Zealand’s history and that the anthem was written at a time when reference to God was commonplace.

- such observances may often be brief in nature and form a very small part of some other school event, such as an assembly or prizegiving; and
- there are benefits of inclusiveness and understanding of different cultures and belief systems that such traditions foster.

27. We also note that, unlike the Canadian and US cases cited above, the Bill does not require religious observance (with an opt-out option); it allows it if a school's Board decides to do it. In addition, we note that in applying the opt-out model, schools must act consistently with the Bill of Rights Act, which means that:

- parents should be made aware of religious observances at their child's school;
- religious observances should be conducted in a way that does not cross the line into religious instruction (in which case it should be opt-in);
- parents should be made aware that they can opt out their child and the process for doing so; and
- children who opt out of religious observances should be provided with an equivalent secular activity.

28. Paul Rishworth has expressed the view that providing a meaningful chance for parents to opt their children out is virtually the same as asking whether they would like to opt their children in.²²

29. Returning to the s 5 test, we consider that providing for attendance at religious observances serves an important purpose of fostering inclusiveness and understanding of different cultures and belief systems, and that a meaningful chance for parents to opt out is a rationally connected and proportionate limit on the right to religious freedom.

30. We also note that teachers may also request to attend religious instruction and observances and their position and opportunities for appointments or promotions must not be adversely affected because they do not take part in such instruction and observances.²³ We do not consider that this limits religious freedom.

31. In summary, we consider that, to the extent that the provisions providing for religious observances on an opt out basis limit religious freedom, those limits are justified.

Section 14 – Freedom of Expression

32. Section 14 of the Bill of Rights Act affirms the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. The right to freedom of expression has also been interpreted as including the right not to be compelled to say certain things or to provide certain information.²⁴

33. The Bill contains various provisions of a regulatory nature that *prima facie* limit the right to freedom of expression, such as requirements to: make and keep records; prepare and publish plans, policies and reports; and provide information requested by the Minister or an oversight body in certain situations. They mostly apply to schools, institutions and

²² Paul Rishworth *The Religion Clauses of the New Zealand Bill of Rights* [2007] New Zealand Law Review 631, at 652.

²³ s 80 of the 1964 Act re-enacted in cl 58 of the Bill.

²⁴ *RJR MacDonald v Attorney-General of Canada* (1995) 127 DLR (4th) 1.

other entities that deliver education, rather than students or their families. These provisions are necessary for the efficient and effective operation of the education sector and are clearly justified.

34. The Bill also contains provisions restricting the use of specified terms. Clause 528(1)(b) re-enacts the offence in s 374(1)(b) of the 1989 Act for a person who is not a registered teacher to use the term “registered teacher”, or any other words or initials likely to make any person believe the person is registered teacher, in connection with the person’s name or business. We consider that restricting the use of the term “registered teacher” is a clearly justified limitation on the right to freedom of expression.²⁵
35. Similarly, we consider that the limits on the use of the term Kura Kaupapa Māori (cl 147), and the terms university, polytechnic, institute of technology, degree, bachelor, master, doctor, and post graduate, and awards which include the words national or New Zealand (cl 302) are justified in the relevant contexts.
36. Accordingly, we consider that any limits on freedom of expression in the Bill are justified under s 5 of the Bill of Rights Act.

Sections 17 and 18 – Freedom of association and movement

37. Section 17 of the Bill of Rights Act affirms that everyone has the right to freedom of association. The ambit of s 17 is “broad and encompasses a wide range of associational activities”.²⁶
38. Section 18(1) of the Bill of Rights Act affirms that everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand. Liberty of movement and residence is considered a fundamental right in a free and democratic state and includes the right of an individual not to move. The right is closely aligned with the right to freedom of association.
39. The Bill re-enacts a number of provisions in the 1989 Act (corresponding section numbers in the 1989 Act are in brackets) that *prima facie* limit the right to freedom of association and movement:
 - Clause 26 (s 319A) provides that a parent of a child has a right of entry to a licensed early childhood education and care centre or a licensed home-based education and care service when the child is there, unless the parent:
 - is subject to a relevant court order prohibiting access or contact, or is trespassed;
 - is suffering from a contagious or infectious disease likely to have a detrimental effect on the children;
 - is, in the opinion of a person responsible for the centre, under the influence of alcohol or any other substance, or exhibiting disruptive behaviour;

²⁵ Compare the *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Education (Protecting Teacher Title) Amendment Bill*, 29 January 2018, available at [https://www.justice.govt.nz/assets/Documents/Publications/Publications/bora-education-protection-teacher-title-amendment-bill-s7.pdf](https://www.justice.govt.nz/assets/Documents/Publications/bora-education-protection-teacher-title-amendment-bill-s7.pdf), where the Attorney-General concluded that restricting the use of the term “teacher” in the same way limited the right to freedom of expression more than reasonably necessary.

²⁶ *Turners & Growers Ltd v Zespri Group Ltd* (No 2) (2010) 9 HRNZ 365 (HC) at [72].

- Clause 35 (s 25) requires a student to attend a registered school whenever it is open if the student is enrolled, or required to be enrolled, at a registered school;
- Clause 44 (s 28) provides that the Secretary may require a parent to enrol a student at a distance school in specified circumstances;
- Clause 72 (s 19) provides that a principal of a State school may preclude a student from the school if they have reasonable grounds to believe that the student may have a communicable disease;
- Clause 21.3²⁷ (s 14) provides that a principal of a State school may stand down or suspend a student for up to 5 school days (to a maximum of 10 school days in a year) if the student's gross misconduct or continual disobedience is a harmful or dangerous example to other students at the school; or it is likely that the student, or other students at the school, would be seriously harmed by the student's behaviour if the student is not stood down or suspended. There are duties on a principal if a student is stood down or suspended (cl 21.7²⁸ (s 17A));
- Clause 21.4²⁹ (s 15) provides that the Board of a State school may extend the suspension of a student under the age of 16 subject to reasonable conditions for a reasonable period or, if the circumstances justify the most serious response, exclude the student and require them to be enrolled at another school.³⁰ If a student is excluded, the principal must try to arrange for them to attend another school that is suitable and which the student can reasonably conveniently attend. If the principal does not arrange for the student to attend another school, the Secretary must return the student to the school from which they were excluded, direct the student be enrolled at another school, or direct a parent of the student to enrol the student at a distance school (cl 21.5³¹ (s 16));
- Clause 21.6³² (s 17) provides that the Board of a State school may extend the suspension of a student aged 16 or over subject to reasonable conditions for a reasonable period or expel the student. The Secretary may direct the Board of another State school to enrol a student who has been expelled (cl 21.10(3)³³ (s17D(3))).

40. We consider the limitations the Bill imposes on students' and parents' freedom of association and movement are demonstrably justified under s 5 of the Bill of Rights Act. In reaching this view, we note that the purpose of the provisions is to minimise disruption to the delivery of education to students, and protect the health, safety and wellbeing of students. The provisions are rationally connected to these objectives and minimally impairing of the rights to freedom of association and movement.

²⁷ This provision, on p 78 of the Bill, has not been sequentially numbered in the current version of the Bill.

²⁸ This provision is on p 81 of the Bill.

²⁹ This provision is on p 79 of the Bill.

³⁰ A student, their parent, or a representative is entitled to be heard before the Board makes a decision to lift or extend a suspension, or exclude or expel the student; cl 21.8 (p 82) (s 17B).

³¹ This provision is on p 80 of the Bill.

³² This provision is on p 81 of the Bill.

³³ This provision is on p 83 of the Bill.

Section 19 - freedom from discrimination

41. Section 19(1) of the Bill of Rights Act affirms that everyone has the right to freedom from discrimination on the prohibited grounds in the Human Rights Act 1993, including age, sex, religious belief, and national origin.
42. A legislative provision will limit the right to freedom from discrimination if:
 - the legislation draws a distinction based on one of the prohibited grounds of discrimination; and
 - the distinction involves material disadvantage to one or more classes of individuals.
43. In determining if a distinction arises, consideration is given to whether the legislation proposes that two comparable groups of people be treated differently on one or more of the prohibited grounds of discrimination.

Age

44. Discrimination on the basis of age commences at the age of 16 years.³⁴ While age limits of any kind are likely to involve a degree of arbitrariness, Parliament has chosen 16 as the starting point for discrimination on this basis.
45. Age based distinctions necessarily involve a degree of generalisation without regard for the particular abilities, maturity or other qualities of individuals within the age group. Any age limit is necessarily arbitrary. However, where it is not practical to engage in individualised assessments, it is legitimate to use a 'bright line', imposing age restrictions which are rationally connected and proportionate to an important objective.³⁵
46. The education system is made up of three sub-systems: early childhood education; primary and secondary schooling; and tertiary education and vocational training. The age limits discussed below must be viewed in that context. The Bill re-enacts the existing age limits in the 1989 Act.

Free education at State school until age 19

47. Under the current law and the Bill, education at primary and secondary school is compulsory for children and young people between the ages of 6 and 16, and free but optional from ages 17 to 19 (in some situations special education is available up to the age of 21).³⁶ This *prima facie* discriminates against those aged 20 or older (or 22 or older in the case of special education).
48. The cut-off point of 19 is intended to differentiate primary and secondary schooling (which is intended for children and young people) from tertiary education and vocational training (which is intended for adults). We consider this is a sufficiently important objective to justify some limitation on the right to freedom from discrimination.
49. We also consider that an upper limit of 19 is rationally connected and proportionate to the objective of differentiating between youth and adult education. An upper age limit of 19 allows sufficient time for a student to complete year 13, even if the student has to

³⁴ Section 19(1) Bill of Rights Act and s 21(1)(i) Human Rights Act 1993.

³⁵ *R v Secretary of State for Work and Pensions ex parte Reynolds* [2005] UKHL 37 at [41] and [91].

³⁶ Sections 3, 9 and 20 of the 1989 Act, re-enacted in cls 32, 34 and 36 of the Bill.

repeat a year.³⁷ It is also logical given that open entry to tertiary or vocational learning begins at the age of 20.

Open entry to tertiary or vocational learning at age 20

50. Clause 187 of the Bill re-enacts the eligibility criteria for students seeking to attend a tertiary institution in s 224 of the 1989 Act. A person is eligible to be enrolled if they:
- are a domestic student (or the institution's council consents); and
 - meet the minimum entry requirements for the programme or training scheme (as determined by the institution's council); and
 - have attained the minimum age for enrolment at the institution, programme or training scheme (if any).
51. However, a person can be admitted to a programme or training scheme who has not satisfied the minimum entry requirements if they have turned 20 years of age, or the institution's council is satisfied the person is capable of undertaking the programme or scheme concerned.
52. Clause 187 *prima facie* discriminates on the basis of age in that people aged 20 or over do not have to meet the minimum entry requirements for the programme or training scheme, whereas people aged 16 to 19 (depending on the minimum age for enrolment) do. However, we consider that any discrimination is justified under section 5 of the Bill of Rights Act.
53. The objective of 'open' entry once a person has reached a certain age is to provide an opportunity for those persons who may not otherwise meet the minimum entry requirements for a programme or training scheme to enrol when they are more mature. This is a sufficiently important objective to justify some limitation on the right to freedom from discrimination and we consider that the age threshold of 20 is rationally connected and proportionate to that objective, particularly given:
- free secondary education continues until age 19; and
 - persons who have not satisfied the minimum entry requirements or attained the age of 20 may still satisfy the institution's council that they are capable of undertaking the programme or scheme concerned.

Religious belief

54. Clause 26 of Schedule 7 provides that children of parents who have a particular or general philosophical or religious connection with a State integrated school must be preferred to other children for enrolment at the school. In regard to religious connection (philosophy is not a prohibited ground of discrimination), this *prima facie* constitutes discrimination as children of parents with a particular religious connection are preferred to other children for enrolment.

³⁷ The exception for special schools recognises that some students with disabilities and special learning needs need more time in the schooling system to be adequately equipped with the knowledge and skills required to participate fully in society and to go on to further learning, training or employment.

55. We have previously considered this issue in greater detail³⁸ and have come to the same conclusion that any discrimination is justified. Ensuring a State integrated school's student population generally has the same philosophical or religious beliefs is a fundamental means of preserving that school's special character. In addition, we do not consider that this removes the element of choice inherent to school selection – i.e. to enrol at another school – such that it constitutes a material disadvantage.

Sex

56. Clause 135 of the Bill re-enacts s 146A of the 1989 Act, which provides that the Minister may declare any school to be single-sex (and specify the number or proportion of the roll, if any, that may be the opposite sex). There are valid educational reasons for operating single sex schools. In addition, we do not consider that this removes the element of choice inherent to school selection – i.e. to enrol at another school – such that it constitutes a material disadvantage. Consequently, we consider any discrimination on the basis of sex is justified.
57. For the same reasons, we consider any discrimination on the basis of sex arising from the ability of the Minister to declare any school to be single-sex (cl 135 of the Bill, re-enacting s 146A of the 1989 Act) is justified.

Disability

58. There are number of clauses in the Bill that re-enact provisions that provide that a person is not eligible for appointment to an office if they are subject to a property order, or personal order that reflects adversely on their competence to manage their own affairs in relation to their property, or capacity to make or communicate decisions relating to any particular aspect(s) of their personal care and welfare, under the Protection of Personal and Property Rights Act 1998.
59. We have previously considered such limits on s 19(1) justified because they are rationally connected to the important objective of ensuring that only those people capable of discharging relevant functions of office are appointed.³⁹ We consider that the provisions in the current Bill are justified for this reason.

Nationality

60. A number of clauses in the Bill re-enact provisions in the 1989 Act that prioritise domestic students⁴⁰ over foreign students. For example, cl 32 provides that every domestic student attending primary and secondary school (aged 5 to 19) is entitled to free enrolment and free education at any State school. This distinction recognises that

³⁸ See the Ministry of Justice's advice to the Attorney-General dated 12 August 2016 – 'Consistency with the New Zealand Bill of Rights Act 1990: Education (Update) Amendment Bill, publicly available at <https://www.justice.govt.nz/assets/Documents/Publications/education-update-amendment-bill.pdf>.

³⁹ See the Ministry of Justice's advice to the Attorney-General dated 19 August 2019 – 'Consistency with the New Zealand Bill of Rights Act 1990: Vocational Education Reform Bill', publicly available at <https://www.justice.govt.nz/assets/Documents/Publications/Vocational-Education-Reform-Bill.pdf>.

⁴⁰ The definition of domestic student is wide. Domestic student is defined as an individual who is a New Zealand citizen, the holder of a residence class visa under the Immigration Act 2009, or a person of a class or description of persons required by the Minister, by notice in the *Gazette*, to be treated as if they are not international students.

primary and secondary education is funded through taxation and, without placing restrictions on who can access state-funded education the system, would be under considerable financial strain.

61. Another example is clause 11 of Schedule 9, which re-enacts the preference for domestic students over international students for access to secondary-tertiary programmes in s 31L of the 1989 Act. We have previously considered this provision to be a justified limitation on the right to freedom from discrimination because secondary-tertiary programmes are not appropriate for international students with no long-term right to stay in the country and there are a range of other study options available.⁴¹
62. We consider that the various clauses in the Bill that prioritise domestic students over foreign students are justified limitations on the right to freedom from discrimination on the basis of nationality.

Section 21 – Freedom from unreasonable search and seizure

63. Section 21 of the Bill of Rights Act affirms that everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, correspondence or otherwise. The right protects a number of values including personal privacy, dignity, and property.⁴²

Inspection powers of Education Review Officers

64. Clause 365 of the Bill re-enacts s 327 of the 1989 Act, which provides that a review officer may enter any place occupied by an applicable organisation or applicable person for the purposes of: conducting inspections or inquiries; reviewing and making copies documents or information; taking statements; inspecting work; and meeting and talking with relevant people. Clauses 369 and 373 re-enact similar powers in respect of enrolment exemptions and student hostels respectively, and cl 501 creates a new power to inspect homes used by home-based early childhood education services.
65. We consider that cls 365, 369, 373 and 501 do not authorise unreasonable search or seizure for the following reasons:
 - The powers to search are in respect of an important objective:
 - clause 365 provides for review of the performance of applicable organisations;
 - clause 369 ensures that students with enrolment exemption are being taught as regularly and well as they would at school;
 - clause 373 ensures a safe physical and emotional environment for students which supports learning; and
 - clause 501 provides for review and evaluation of curriculum delivery and health and safety in homes used by home-based early childhood education services;
 - There are restrictions on entering living spaces:

⁴¹ See the Ministry of Justice's advice to the Attorney-General dated 28 May 2010 – 'Consistency with the New Zealand Bill of Rights Act 1990: Education Amendment Bill (No 2)', publicly available at <https://www.justice.govt.nz/assets/Documents/Publications/bora-education-amendment-bill-two.pdf>.

⁴² See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J.

- clauses 365 and 369 do not provide authority to enter dwelling houses without consent;
- clause 373 does not allow for the review officer to enter a room or sleeping area of a student unless it is deemed necessary and the student is present during the inspection; and
- clause 501 only allows a review officer to inspect areas of the home that are used to provide the home-based early childhood education service;
- The clauses provide for the type of documents/information that may be copied, and statements that may be gathered;
- Reasonable notice must be given, and the inspections/inquiries carried out at a reasonable time; and
- Review officers must produce their certificate of designation before exercising their powers.

Inspection powers generally

66. Subpart 6 of Part 6 the Bill re-enacts ss 35S, 78A, 144D, 255A, 319B, and 319C of the 1989 Act, which confer powers on authorised persons to enter and inspect early childhood education services, schools, school hostels, and private training establishments.
67. We consider that the warrantless powers in cls 502, 504, 508, and 510 do not authorise unreasonable search or seizure for the following reasons:
- the purpose of the powers is explicitly set out in each circumstance and serve an important objective;
 - the manner in which those powers can be exercised is limited; and
 - there are protections for parties subject to inspection.
68. Clauses 503 and 505 give powers to authorised persons to obtain a warrant and enter a premise for the purposes of determining if the premises are being used in contravention of the Bill. The powers that may be exercised under a warrant are wider than the warrantless powers. However, we consider that these clauses do not engage s 21 for the following reasons:
- the purpose of the powers is explicitly set out;
 - the person obtaining a warrant must have reasonable cause to believe the premises are being used in contravention of the Bill;
 - a Judge or other authorised person must be satisfied that there are reasonable grounds to believe the premises are being used in contravention of the Bill; and
 - the powers conferred by the warrant are only valid for four weeks from the date of issue.

Inspection powers of teachers

69. Subpart 4 of Part 3 of the Bill re-enacts, with minor changes, the existing provisions regarding searches and surrender of property in the 1989 Act (ss 139AAA – 139AAI). This includes provisions allowing teachers and authorised staff members to require students to produce and surrender items in their possession or control that the teacher

or authorised staff member has reasonable grounds to believe are likely to endanger the safety of other persons or detrimentally affect the learning environment.

70. We considered these powers when they were introduced in 2012 and found them to be reasonable in terms of s 21 of the Bill of Rights Act due to the low level of intrusion into students' privacy, the limited powers, and the safeguards in place.⁴³ Our current assessment is consistent with our earlier view.
71. We consider that the Bill is consistent with the right to be secure against unreasonable search and seizure as affirmed in s21 of the Bill of Rights Act.

Section 22 – Liberty of the person

72. Section 22 of the Bill of Rights Act affirms that everyone has the right not to be arbitrarily arrested or detained. Detention is arbitrary when it is “capricious, unreasonable, without reasonable cause: if it is made without reference to an adequate determining principle or without following proper procedures.”⁴⁴
73. Clause 47 of the Bill re-enacts s 31(4) – (9) of the 1989 Act, which provides that an attendance officer or constable may detain and question any person who appears to be between the age of 5 and 16 and absent from school. If the attendance officer or constable is not satisfied that the person has a good reason for not being at school, the attendance officer or constable may take the person to the person's home, or to the school at which the attendance officer or constable thinks the person is enrolled.
74. In our view, the power to detain in cl 47 is not arbitrary and so does not engage s 22 of the Bill of Rights Act. The objective is to ensure children and young people stay in school and continue to be engaged in education, and the power is rationally connected and proportionate to the importance of that objective.

Section 25(c) – Right to be presumed innocent until proved guilty

75. Section 25(c) of the Bill of Rights Act affirms that everyone who is charged with an offence has, in relation to the determination of the charge, the right to be presumed innocent until proved guilty according to law. The right to be presumed innocent requires the prosecution to prove an accused person's guilt beyond reasonable doubt.
76. The Bill provides for various strict liability offences.⁴⁵ Strict liability offences prima facie limit s 25(c) of the Bill of Rights Act because the accused is required to prove a defence, or disprove a presumption, in order to avoid liability.
77. We consider that any limits on the presumption of innocence by the strict liability offences in the Bill are justified because:
- a. The offences are in the nature of public welfare regulatory offences;

⁴³ See the Ministry of Justice's advice to the Attorney-General dated 28 September 2012 – 'Consistency with the New Zealand Bill of Rights Act 1990: Education Amendment Bill', publicly available at <https://www.justice.govt.nz/assets/Documents/Publications/bora-Education-Amendment-Bill-.pdf>

⁴⁴ *Neilsen v Attorney-General* [2001]3 NZLR 433; (2001) 5 HRNZ 334 (CA) at [34].

⁴⁵ Typical examples include cls 171 (offence relating to failure to comply with notice given under section 28), 173 (offence relating to irregular attendance), and 181 (offences relating to operation of private schools).

- b. The alleged offender is in the best position to justify their apparent failure to comply with the law, rather than requiring the Crown to prove the opposite; and
- c. The penalties for the offences are at the lower end of the scale (the highest maximum penalty is a fine of \$50,000 and the majority have a maximum penalty of \$10,000 or less) and proportionate to the importance of the relevant objective.

Conclusion

78. 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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