

18 January 2018

Hon Andrew Little, Acting Attorney-General

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

Purpose

1. We have considered whether the 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 with the latest version of the Bill (PCO 20886/10.0). We will provide you with further advice if the final version of the Bill 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 (freedom from unreasonable search and seizure) and s 25(c) (the right to be presumed innocent). Our analysis is set out below.

The Bill

4. The Bill amends the Education Act 1989 ('the principal Act') to:
 - a. remove the legislative provisions for national standards
 - b. remove the legislative provisions for charter schools
 - c. restore places for staff and students on councils of tertiary education institutions and increase the size of polytechnic councils
 - d. create an offence of false representation without reasonable excuse, in relation to an application to be considered eligible for fees-free tertiary education, and
 - e. make changes to the new planning and reporting framework for schools.
5. The Bill also resolves errors and omissions introduced by the Education (Update) Amendment Act 2017, and makes minor technical changes.

Consistency of the Bill with the Bill of Rights Act

Section 21 – Freedom from unreasonable search and seizure

6. 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, their property or correspondence, or otherwise. The right protects a number of values including personal privacy, dignity, and property.¹
7. 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.² 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.
8. The principal Act gives powers of entry and inspection to authorised persons to ensure that early childhood centres comply with the relevant legal requirements. Section 319B of the principal Act enables an authorised person without a warrant to inspect an early childhood centre, to audit the centre, or assess legal compliance. An authorised person can copy and remove relevant documents.
9. Clause 17 of the Bill amends the principal Act to extend these same entry and inspection powers to offices associated with an early childhood education centre. This is because relevant documents may be held at the head or regional offices of early childhood education services rather than the early childhood centre itself. These powers constitute search and seizure powers for the purposes of section 21 of the Bill of Rights Act.
10. The principal Act contains a number of constraints on the exercise of these powers:
 - a. the purpose of the inspection and seizure powers are explicitly set out (such as to perform an audit, or assess compliance with the relevant legal requirements)
 - b. the manner in which the powers can be exercised is explicitly stated and limited (including by specifying the authorisation of inspectors, the requirement to produce authorisation and evidence of identity, the types of premises that may be searched, and the form the inspection can take), and
 - c. safeguards are included on the exercise of the powers for the parties in question (for example, an authorised person can only enter at a reasonable time, and when documents are removed from the premises a list of the documents must be made and the copies must be returned as soon as is practicable).
11. As a result of these restrictions and safeguards, we consider the provision is not unreasonable for the purposes of s 21. We therefore consider that the Bill appears to be consistent with the right to be secure against unreasonable search or seizure as affirmed in s 21 of the Bill of Rights Act.

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

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

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

12. 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.
13. Clause 15 of the Bill provides that an offence is committed if a person makes a false representation in relation to an application to receive a fees-free tertiary education and this is done "without reasonable excuse".
14. "Without reasonable excuse" provisions were formerly considered to reverse the onus of proof (at least where the defendant was proceeded against summarily), thereby limiting a defendant's right to be presumed innocent until proved guilty. However, since the repeal of s 67(8) of the Summary Proceedings Act 1957, offences of this nature can be interpreted consistently with the presumption of innocence. Accordingly, the prosecution must prove beyond a reasonable doubt that a defendant did not have a reasonable excuse once an evidential burden is met.³
15. We, therefore, consider that the Bill appears to be consistent with the right to be presumed innocent until proved guilty affirmed by s 25(c) of the Bill of Rights Act.

Conclusion

16. 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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³ *King v Police* [2016] NZHC 977 at [24].