

28 March 2018

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Education (Social Investment Funding and Abolition of Decile System) Amendment Bill

Purpose

1. We have considered whether the Education (Social Investment Funding and Abolition of Decile System) 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 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 14 (freedom of expression). Our analysis is set out below.

The Bill

3. The Bill amends the Education Act 1989 ('the Education Act') and the Official Information Act 1982 ('the Official Information Act').
4. The Bill inserts a new Part 8AA to the Education Act. New Part 8AA prohibits the decile system being used as a basis for public funding, and establishes in its place the "needs index". The needs index is designed to target funding for State schools, State integrated schools, and partnership schools kura hourua based on the risk of students' underachievement. The needs index would be calculated by reference to a school's students' "need indicators" (to be prescribed by regulations), which would indicate students who are at risk of not achieving NCEA Level 2. The Bill also provides for review of the funding distribution based on the needs index, and for privacy matters and regulations.
5. The Bill also exempts information concerning the needs index, and the amount of grants or supplementary grants made under it, from the scheme of the Official Information Act.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of expression

6. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. The Supreme Court has interpreted freedom of expression under s 14 as affirming an "independent civil right to apply" for information,¹ and has noted that a core value of this right is the ability to participate in political decision making.² The right

¹ *Mafart v Television New Zealand Ltd* [2006] 3 NZLR 18 at [39].

² *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [114].

to receive information prevents the state from restricting a person from receiving information that others may be willing to impart to that that person.³

7. Clause 5 of the Bill (new s 79AJ) specifies that data collected for calculating the needs index (including need indicators of a student or students), the needs index calculation, and the needs index for any school, are not subject to the Official Information Act. Clause 6 also amends the definition of official information in the Official Information Act to exclude any information held by the Minister of Education or the Ministry of Education concerning the same information as specified in cl 5, as well as information concerning the amount of any grants or supplementary grants allocated to a board or sponsor.
8. We do not consider that these exemptions from the Official Information Act engage the freedom of expression protected by s 14. The Bill does not prohibit seeking, receiving or imparting information, but rather removes one avenue (albeit a constitutionally important avenue) for seeking access to and receiving that information.⁴
9. The traditional view is that freedom of expression does not mean that an individual has a right to be given certain information. While there have been some indications in European Courts that a broader view of the notion of the freedom to receive information could be taken, thereby moving towards recognition of a right of access to information,⁵ we are not aware of any New Zealand authority extending s 14 to include a substantive right of access to information.
10. We note that if New Zealand law were to recognise a right of access to information, we consider it unlikely that the limitations imposed on such a right by the Bill would be justified. The Bill exempts from the Official Information Act a wider range of information than that required to protect students' privacy and to ensure schools were not stigmatised on the basis of their levels of funding; for example, it is likely to exempt information such as the total number of enrolled students at a school. Given the breadth of the exemption and that the Official Information Act is a key mechanism to access information about how public funds are allocated, and thereby a strong tool to ensure Government accountability, it would be difficult to conclude the limitation was in due proportion to the importance of the objectives.

Conclusion

11. 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 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [13.7.45].

⁴ We note that other provisions in the Education Act, for example, require school boards to publish annual reports which include financial statements covering a school's cash flows (see Education Act 1989, ss 87, 87AB, 87C).

⁵ Butler and Butler *The New Zealand Bill of Rights Act: A Commentary* above n 3, at [13.7.48] and [13.7.51].