

28 August 2008

ATTORNEY-GENERAL

**LEGAL ADVICE
CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:
EDUCATION AMENDMENT BILL (No 3)**

- 1 We have considered whether the Education Amendment Bill (No 3) (PCO 12865/8.0) ('the Bill') is consistent with the New Zealand Bill of Rights Act 1990 ('Bill of Rights Act'). We understand that this Bill is likely to be considered by the Cabinet Legislation Committee at its meeting on Thursday, 4 September 2008.
- 2 We considered potential issues of inconsistency with sections 27(1) (right to natural justice) of the Bill of Rights Act and assessed whether or not one of these issues is justifiable under section 5 (Justified limitations) of that Act. To that end we examined whether the relevant clause serves an important and significant objective and whether there is a rational and proportionate connection between this clause and that objective.¹
- 3 We have reached the conclusion that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

PURPOSE

- 4 The Bill amends the Education Act 1989 (the 'Act'). It aims to:
 - enhance student safety in both the early childhood and compulsory sectors;
 - improve accountability for student attendance and engagement in the compulsory sector;
 - enhance the efficient governance of the compulsory education system; and
 - enhance the efficient administration of the compulsory and tertiary education systems.
- 5 The Bill also amends existing provisions to clarify some definitions and correct minor technical and drafting errors in the Act.

BILL OF RIGHTS ACT ISSUES

Section 27(1) – Right to natural justice

Police vets

¹ In applying section 5, we have had regard to the guidelines set out by the Court of Appeal in *Ministry of Transport (MOT) v Noort* [1993] 3 NZLR 260; *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9; and *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754.

- 6 Clauses 26 and 78 provide for police vets to be made on a person who has unsupervised access to students at school or children at an early childhood service. Registered teachers, a holder of a limited authority to teach (essentially a non-qualified teacher regulated by the Teachers Council), those who have already been vetted in the last 3 years, and the parent of the child or children in question are exempted.
- 7 As the Bill does not describe the procedures by which information certified in a police vet is to be obtained and assessed, we have considered whether these clauses could be viewed as restricting the right to natural justice, as affirmed in section 27 of the Bill of Rights Act, of persons with unsupervised access to students at school or children at an early childhood service. To this end, we have been advised by the Ministry of Education that, *inter alia*:
- vetting can only be carried out with the consent of the person concerned;
 - the person has the opportunity to validate the vetting information. In practice validation is the process whereby a person is given the opportunity to clarify whether the information contained in the vet is correct;
 - where the person is an employee, a school or service is expected to act as “good employer”. Each service or school risks liability under employment law if the issue is not handled with due care.
- 8 We have concluded that police vets under clauses 26 and 78 are accompanied by sufficient safeguards and are, for that reason, not *prima facie* inconsistent with section 27 of the Bill of Rights Act. By way of general comment, we note that the provisions appear to be directed at ensuring that children at schools and early childhood services are in a safe learning environment.

Interim suspensions

- 9 Clause 49 of the Bill amends section 139AU(2) (Interim suspension until complaint of possible serious misconduct concluded) of the Act. The proposed subsection allows for an interim suspension by the chairperson of the Disciplinary Tribunal of a teacher’s practising certificate or authority *either with or without a hearing*. The possibility of suspension without a hearing raises a *prima facie* issue of inconsistency with the right to be heard, one of the principles of natural justice affirmed in section 27(1) of the Bill of Rights Act.
- 10 We have noted that one aim of suspending a teacher without a hearing in cases of alleged serious misconduct may be to ensure the safety of children and young people while there is uncertainty over the behaviour of the teacher concerned. We consider this an important and significant objective.
- 11 Clause 50 of the Bill proposes the insertion of a new section 139AUA(2) that provides that the chairperson of the Disciplinary Tribunal must review his or her suspension decision if the teacher, at any time during an initial period of suspension, asks him or her to do so and provides a written explanation or statement in support of his or her request. This effectively balances the safety concerns against the right of the teacher to be heard. The chairperson of the Tribunal has the power to subsequently lift or

revoke an interim suspension following reconsideration – see proposed new section 139AUA(1)(d).

- 12 Review of an interim suspension under section 139AUA(2) is not subject to a formal right of appeal. However, a decision of the chairperson of the Tribunal under this provision is likely to be amenable to judicial review.
- 13 In addition, the first period of interim suspension may not be any longer than three months, following which the Disciplinary Tribunal may renew the interim suspension of a teacher for further periods of no more than three months – see proposed new section 139AUA(3).
- 14 In those circumstances, the teacher may make representations to the Tribunal at a hearing. Such a hearing is subject to existing procedural provisions in the Education Act – the Tribunal may, amongst other things, receive evidence on oath, or require a person to give evidence in person and produce documents or other information in support. There is also the right to appeal the decision to a District Court – see proposed new section 139AUA(5), alongside sections 139AX to 139AZB of the Education Act.
- 15 These more substantive procedural rights are not available to a suspended teacher during the first period of suspension. However, we have concluded that the limitation of the right to natural justice in section 27(1) of the Bill of Rights Act can be justified under section 5 of that Act. In reaching this conclusion, we have considered the objective of interim suspension without a hearing, a maximum three month limit on the first period of interim suspension, and the right to have this interim suspension decision reviewed following this decision.

CONCLUSION

- 16 We have concluded that the Bill does not appear to be inconsistent with the rights and freedoms affirmed by the New Zealand Bill of Rights Act 1990

Michael Petherick
Manager, Ministerial Advice
Office of Legal Counsel

Stuart Beresford
Manager
Human Rights/Bill of Rights Team

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