

Education Amendment Bill

24 November 2004

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:
Education Amendment Bill:

1. We have considered whether the Education Amendment Bill (the "Bill") (PCO6105cy/10) is consistent with the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act"). We understand that the Bill will be considered by the Cabinet Business Committee at its meeting on Wednesday, 24 November 2004.
2. We have concluded that the Bill appears to be consistent with the Bill of Rights Act. In reaching this conclusion, we considered potential issues of inconsistency with sections 21 and 25(c) of the Bill of Rights Act. Our analysis of these potential issues is set out below.
3. The Bill is the first stage of a reform of education legislation. The two major policy changes proposed by this Bill are:
 - the introduction of a new regulatory regime in the early childhood education sector; and
 - the extension of the use of the National Student Number to compulsory and early childhood sectors.

In addition, the Bill is intended to update the education system through several amendments to the Education Acts 1989 and 1964, the State Sector Act 1988, the Education Lands Act 1949, and the School Trustees Act 1989.

ISSUES OF INCONSISTENCY WITH THE BILL OF RIGHTS ACT

Section 21: right to be secure against unreasonable search and seizure

4. Section 21 of the Bill of Rights Act provides the right to be secure against unreasonable search and seizure. There are two limbs to the section 21 right. First, section 21 is applicable only in respect of those activities that constitute a "search or seizure". Second, where certain actions do constitute a search or seizure, section 21 protects only against those searches or seizures that are "unreasonable" in the circumstances.
5. The Bill amends the Education Act 1989 (the 1989 Act) to give powers of entry and inspection to authorised persons to ensure that early childhood centres comply with the relevant legal requirements. Clause 43 - new section 319B (Powers of entry and inspection without warrant) enables an authorised person without a warrant to inspect an early childhood centre, to audit the

centre, or assess whether it is complying with: the 1989 Act, regulations made under the 1989 Act, and the conditions of any licence, certificate, or grant. These powers constitute search and seizure powers in terms of section 21 of the Bill of Rights Act, and have been considered for consistency with the Bill of Rights Act.

6. In determining whether the powers are consistent with section 21, we noted and considered the following limiting factors contained in the Bill:

(a) The purposes of the inspection and seizure powers are explicitly set out (e.g: perform an audit, and assess compliance with the relevant legal requirements);

(b) The manner in which the powers can be exercised is concisely stated and limited, (e.g: the following have been specified: 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 to provide protection for the parties in question, (e.g: 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).

7. Overall, we have formed the view that the entry, inspection, and seizure powers, in light of the restrictions and safeguards outlined above, are reasonable and, therefore, not inconsistent with section 21 of the Bill of Rights Act.

Section 25(c): right to be presumed innocent until proved guilty

8. Section 25(c) of the Bill of Rights Act affirms the right to be presumed innocent until proved guilty. This means that an individual must not be convicted where reasonable doubt as to his or her guilt exists; therefore, the prosecution in criminal proceedings must prove, beyond reasonable doubt, that the accused is guilty. We have identified several strict liability offences in the Bill. These offences give rise to a *prima facie* issue of inconsistency with section 25(c) because the accused is required to prove (on the balance of probabilities) a defence to avoid liability; whereas, in other criminal proceedings an accused must merely *raise* a defence in an effort to create reasonable doubt. This means where the accused is unable to prove the defence, then he or she could be convicted even though reasonable doubt exists as to his or her guilt.

9. We have identified the following offences as being strict liability offences.

Clause 26 (Section 139AZ amended) - Offences related to witnesses

10. This clause makes it an offence for a person to breach, without lawful excuse, a Disciplinary Tribunal's order that:

(a) provides for a hearing to be held in private; or

(b) provides for evidence at a hearing to be given in private; or

(c) imposes restrictions on the publication of any information relating to a particular hearing.

11. This is a strict liability offence by virtue of the phrase "without lawful excuse" and section 67(8) of the Summary Proceedings Act 1957 which places a burden of proof for the lawful excuse on the accused.

12. The objective underlying the offence is to ensure that witnesses, particularly children, can give evidence before the Disciplinary Tribunal without worrying that their identity and evidence will be made public despite an order by the Disciplinary Tribunal. The offence aims to:

(a) prevent the disclosure of names or identities of children who are witnesses who may be vulnerable to subsequent emotional damage if their testimony is revealed; and

(b) to reduce any unwillingness of people to testify if they know that there is a possibility that their testimony may be made public; and

(c) avoid prejudicing a fair hearing for the accused teacher by preventing the potential for outside influence on Tribunal processes.

The effectiveness of such an order would be undermined if it is easily breached, and there is no recourse for that breach. As it is the defendant who makes the decision to contravene the order, the reason he or she breached the order is particularly within his or her realm of knowledge. It is also relevant that it is a public welfare regulatory offence.

Clause 44 - New section 346: Offences

13. New section 346 creates two associated offences for the misuse of a National Student Number (NSN). New section 346(2) creates a strict liability offence by making it an offence for a non-authorized user to, without reasonable excuse, keep a record, or require the disclosure, of a person's NSN. By virtue of the application of section 67(8) of the Summary Proceedings Act 1957, any reasonable excuse must be proven by the defendant.

14. The provisions around the NSN in the Bill extends the government's and an authorised agent's ability to gather and hold information about all children and young people. These amendments are proposed in order to improve the reliability of information collected, create longitudinal records to gain knowledge about student outcomes based on an individual or different populations, and reduce inefficiencies in current data collection. If this power to collect and use information, and the information were misused the integrity of the NSN would be undermined, and would result in reduced trust by society. Therefore, the offences proposed in new section 346, including that in new section 346(2), are designed to reflect the seriousness with which the

misuse of such information is viewed, and to act as a deterrent for such behaviour. This is a public welfare regulatory offence.

Conclusion

15. In our view the limits these strict liability offences place on section 25(c) of the Bill of Rights Act are justified in terms of section 5 of the Bill of Rights Act.

CONCLUSION

16. We have concluded that the Bill appears to be consistent with the Bill of Rights Act.

17. In accordance with your instructions, we attach a copy of this opinion for referral to the Minister of Justice. A copy is also attached for referral to the Minister of Education, if you agree.

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cc
Minister of Justice
Minister of Education

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