

# **State Sector Amendment Bill (No.3) 2003**

2 December 2003

Attorney-General

LEGAL ADVICE:

COMPLIANCE WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:  
STATE SECTOR AMENDMENT BILL (NO 3) 2003

1. We have considered as a matter of urgency whether the State Sector Amendment Bill (No 3) (PCO 5604/4) is consistent with the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act). We understand that this Bill is to be considered by the Cabinet Policy Committee on Wednesday, 3 December 2003 and introduced later that day.
2. The State Services Commissioner has the responsibility of negotiating collective agreements for employees of Boards of Trustees of Schools. This Bill amends the State Sector Act 1988 by providing the State Services Commissioner with the same powers that an employer has under the Employment Relations Act 2000 while negotiating collective agreements. These powers include the ability to lock out employees, the power to suspend striking workers and the ability to deduct salaries during the time of the suspension. The Bill also precludes compensation for technical redundancies in situations arising out of the re-organisation and merger of schools.
3. We consider that the Bill does not appear to be inconsistent with the rights and freedoms contained in the Bill of Rights Act. However, the Bill does raise one issue that we wish to draw to your attention.

## **ISSUES OF CONSISTENCY WITH THE BILL OF RIGHTS ACT**

### **Section 27(1) Observance of the principles of natural justice**

4. The Bill amends the State Sector Act to provide the State Services Commissioner ("the Commissioner") with the powers of any employer who may be negotiating a collective agreement with his or her employees (new section 74AA(1)). These powers include the ability to lock out or suspend striking employees. Although the Commissioner currently has the responsibility for negotiating collective agreements, he does not have the power to suspend striking employees, or deduct the salaries of striking employees or lock out employees. These powers currently reside with individual Boards of Trustees.
5. Under the Bill, all teachers covered by a collective agreement will be deemed to be on strike if the union to which they belong notifies the Commissioner of its proposed strike and the strike proceeds (new section 74AC(4)). The effect of the deeming provision is that the Commissioner may direct that the teachers are suspended (new section 74AA(2)) during the period of the strike

or lockout. Their salary may also be stopped during this period (new section 74AA(4)). However, the deeming provision does not apply to a teacher whom the Board of Trustees has notified the Commission as not participating in the strike (new section 74 AC(4)(b)). Boards of Trustees are required by the Bill to notify the Commissioner of the names of teachers not participating in the strike as soon as reasonably practicable after they have received notice of the commencement of the strike (new section 74AD(1)).

6. The effect of the deeming provision is that conceivably teachers could have their pay cut in circumstances where they are not on strike because of the failure of the Board of Trustees to accurately notify which teachers are on strike and which are not. The procedure does not require notice to the individual teacher. We have therefore considered whether the process for determining whether or not employees are on strike is consistent with the requirement to observe the principles of natural justice described in section 27 (1) of the Bill of Rights Act.
7. The Court of Appeal has stated that observance of the principles of natural justice is a flexible concept and is very much fact specific.<sup>[1]</sup> We note that the deeming provision helps to address the problem of geographical and organisational proximity. It is not feasible for the Commissioner to independently verify whether individual teachers are on strike. The Commissioner is reliant on the employers of teachers to provide the information that he or she requires to perform the powers of suspension.
8. Furthermore, the new sub-sections 74AD(5) and (6) encourages Boards to provide the Commissioner with prompt and accurate information. Where the Commissioner has reasonable grounds to believe that Boards are failing to comply with section 74AD, he or she may report to the appropriate Minister. The Minister may, in some circumstances, reduce the size of a grant payable to the Board if he or she thinks it is necessary to do so to encourage the Board's compliance with the notification requirement. In an individual case, if the pay of a teacher was inadvertently suspended, the teacher could have this situation remedied by way of drawing this matter to the attention of the Board and/or by lodging a personal grievance with the Employment Authority. Proceedings for judicial review against the Board might also lie.
9. Although there appears to be the potential for an unfair outcome, we consider that the legal requirements on the Board, coupled with the availability of remedies in individual cases substantially addresses the issue of natural justice.

## **Conclusion**

10. We consider that although the Bill does not appear to be inconsistent with the Bill of Rights Act, the procedures in the Bill could be strengthened to protect the interests of individual teachers. This might be done by an administrative or legislative requirement to advise teachers, at the time the Board of Trustees reports to the Commissioner the names of non-striking teacher, whether or not they are on the list. That would facilitate early correction of any error.

11. 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 for State Services if you agree.

Val Sim  
Chief Legal Counsel  
Bill of Rights/Human Rights Team

Boris van Beusekom  
Senior Legal Adviser  
Bill of Rights/Human Rights Team

cc Minister of Justice  
Minister for State Services  
Copy for your information

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