

12 August 2016

Hon Christopher Finlayson QC, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Education (Update) Amendment Bill**

### **Purpose**

---

1. We have considered whether the Education (Update) 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 18953/1.35). 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 13 (freedom of thought, conscience and religion), s 15 (manifestation of religion and belief), s 19(1) (freedom from discrimination) and s 21 (right to be secure against unreasonable search and seizure). Our analysis is set out below.

### **Summary**

---

4. The purpose of the Bill is to put children and young people and their learning at the centre of the Education Act 1989 ('the principal Act'); to make improvements to the areas of the Act where the law needs modernising; to ensure that there is strong accountability throughout the system; and to acknowledge the greater diversity of the education system that has emerged since the principal Act was first drafted in 1989.
5. The Bill engages a number of rights and freedoms, namely s 13, s 15, s 19(1) and s 21. We consider these limitations to be justified and conclude that the Bill is consistent with the Bill of Rights Act.

### **The Bill**

---

6. The Bill makes a number of consequential amendments that update the principal Act, specifically by:
  - a. providing for new provisions to acknowledge the diversity of education service provision in New Zealand's 0-18 education system
  - b. more strongly defining the roles and responsibilities for school boards of trustees, and planning and reporting measures
  - c. providing voluntary, enabling frameworks for the evolution of Communities of Learning

- d. allowing schools to enable children to start school as a group at the start of a term
  - e. putting in place additional interventions to enable faster, more tailored responses for schools struggling to ensure the achievement of their students
  - f. updating the state integrated schools system, and
  - g. dissolving Careers New Zealand and transferring its functions to the Tertiary Education Commission.
7. In particular, the Bill replaces the Private Schools Conditional Integration Act 1975 and carries over most of the provisions of that Act to the principal Act in an updated form. These provisions are contained in new Part 33.
8. State integrated schools are schools that provide 'education with a special character'.<sup>1</sup> They were formally private schools that have been integrated into the state education system through an integration agreement between the Crown and the proprietors of the private school. Each integration agreement sets out the school's particular special character, which is a religious or philosophical belief. A state integrated school's proprietors retain ownership of the school land and buildings, and their representatives sit as trustees on the school's board of trustees.
9. State integrated schools must follow the nationally-set curriculum, but the general school programme may reflect the special character.<sup>2</sup> State integrated schools that have a religious special character are exempt from the religious instruction restrictions of state schools, and may hold religious education classes and religious services while the school is open for instruction.<sup>3</sup>

## **Consistency of the Bill with the Bill of Rights Act**

### **Section 13 and Section 15 – freedom of thought, conscience and religion, and manifestation of religion and belief**

10. Section 13 of the Bill of Rights Act provides that everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference. Section 15, which is a related right, provides that every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.
11. The Bill contains a number of new sections that relate to religion and belief:
- a. new section 442(1) – provides that the children of parents who have a particular or general philosophical or religious connection with a state integrated school over other children must have preference of enrolment over other children
  - b. new section 464(1) – provides that where religious instruction forms part of the special character of a state integrated school, advertisements must state that a willingness and ability to take part in religious instruction appropriate to that school must be a condition of appointment for the special positions of: principal; Director

<sup>1</sup> The Bill defines 'education with a special character' as education within the framework of a particular or general religious or philosophical belief, and associated with observances or traditions appropriate to that belief (new s 414(1)).

<sup>2</sup> This is set out in s 31 of the Private Schools Conditional Integration Act 1975, which is brought over into the Bill as new s 444.

<sup>3</sup> As compared to state schools which are not permitted to do so while they are open.

of Religious Studies; any other proportion of teaching positions provided for in the school's integration agreement; and deputy principal at a primary school or a position of assistant principal with responsibility for supervising junior classes, and

- c. new section 465 – provides that where an advertisement for a position as specified in new s 464(1) states the requirement of a willingness and ability to take part in religious instruction as a condition of their appointment, any person appointed to that position must accept that requirement as a condition of their appointment.
12. These new sections concern the philosophical or religious beliefs of parents of the prospective students and potential applicants to special positions at state integrated schools. However, preferential enrolment and the requirement of a willingness and ability to take part in religious instruction as a condition of employment do not impose, attempt to change or prevent the pursuit of an individual's belief system. They further do not prevent activities undertaken by individuals in pursuit of manifesting their religion or belief. Accordingly, we consider that the Bill does not limit religious freedom.

### **Section 19(1) – Freedom from discrimination**

13. Section 19(1) of the Bill of Rights Act affirms the right to be free from discrimination on the prohibited grounds in the Human Rights Act 1993. Those grounds include religious and ethical belief.<sup>4</sup> Section 19(2) contains a qualification against the prohibition against discrimination. It provides that measures taken in good faith, to assist or advance persons or groups of persons disadvantaged because of unlawful discrimination, do not constitute discrimination.
14. A legislative provision will limit the right to freedom from discrimination if:
- a. the legislation draws a distinction based on one of the prohibited grounds of discrimination, and
  - b. the distinction involves material disadvantage to one or more classes of individuals.
15. In determining if a distinction arises, consideration is given to whether the legislation proposes that two comparable groups of people be treated differently on one or more of the prohibited grounds of discrimination.<sup>5</sup> The distinction analysis takes a purposive and un-technical approach to avoid artificially ruling out discrimination.<sup>6</sup> Once a distinction is identified, the question of whether disadvantage arises is a factual determination.<sup>7</sup>

### *Preferential enrolment*

16. New section 442(1) enables children whose parents have a particular or general philosophical or religious connection with a state integrated school to receive preferential enrolment in that school over children whose parents do not have such a connection.

---

<sup>4</sup> Human Rights Act 1993, ss 21(1)(c) and (d).

<sup>5</sup> *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at [573] per Tipping J (dissenting) relied on in *Atkinson v Minister of Health and others* [2010] NZHRRT 1 at [199]; *McAlister v Air New Zealand* [2009] NZSC 78 at [34] per Elias CJ, Blanchard and Wilson JJ and at [51] per Tipping J; and *Child Poverty Action Group v Attorney-General* [2008] NZHRRT 31 at [137].

<sup>6</sup> *Atkinson v Minister of Health and others* [2010] NZHRRT 1 at [211]-[212]; *McAlister v Air New Zealand* [2009] NZSC 78 at [51] per Tipping J; and *Child Poverty Action Group v Attorney-General* [2008] NZHRRT 31 at [137].

<sup>7</sup> See, for example, *Child Poverty Action Group v Attorney-General* [2008] NZHRRT 31 at [179]; and *McAlister v Air New Zealand* [2009] NZSC 78 at [40] per Elias CJ, Blanchard and Wilson JJ.

17. New section 442(1) therefore draws a distinction between the parents of the particular philosophical or religious belief associated with the state integrated school and parents who do not possess the same philosophical or religious belief. In practice, the section would disadvantage the children of the latter class of parents as they would be less likely to be enrolled in that school.

*Is the limitation justified and proportionate under s 5 of the Bill of Rights Act?*

18. Where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of s 5 of that Act.
19. The s 5 inquiry may be approached as follows:<sup>8</sup>
- a. does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
  - b. if so, then:
    - i. is the limit rationally connected with the objective?
    - ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
    - iii. is the limit in due proportion to the importance of the objective?
20. The historic objective of the Private Schools Conditional Integration Act 1975 in integrating schools providing education with a special character into the state education system was to ensure that the special character of these schools was preserved. As the Bill carries over most of the provisions of that Act into the principal Act, this objective is replicated.
21. We consider this objective to be sufficiently important to justify some limitation on the right to freedom from discrimination. There is a historic tradition of providing religious or philosophical education in New Zealand. Schools that endeavour to do so are generally accepted as part of the country's educational landscape.
22. The limitation is rationally and proportionally connected to the objective. Ensuring a state integrated school's student population generally has the same philosophical or religious beliefs would be a fundamental means of preserving that school's special character. Controlling enrolment through preferential enrolment would be one of the only ways of achieving this objective.
23. The limit does not impair the right to freedom from discrimination more than is reasonably necessary for sufficiently achieving the objective for a number of reasons. Broadly, new s 442(1) does not impair the ability of parents to send their children to another school, such as a state school, private school or another state integrated school to which they may have a philosophical or religious connection.<sup>9</sup> The element of choice inherent to school selection is untouched by the section. The section would have a strongly discriminatory effect only if there were no other schools in the vicinity for a prospective student to attend. This is unlikely to be the case.

---

<sup>8</sup> *Hansen v R* [2007] NZSC 7 [123].

<sup>9</sup> Section 3 of the principal Act upholds the right of all persons aged 5 to 19 years old to free primary and secondary education. Section 35 of the Private Schools Conditional Integration Act 1975, brought over into the Bill as new s 441, affirms this right for students enrolled at state integrated schools in accordance with the same conditions as children enrolled at State schools.

24. Specifically, new s 442(2)(a) provides that, subject to new s 442(1), no prospective student may be refused enrolment at a state integrated school on the grounds of religion, race, socio-economic background. The effect of this subsection on new s 442 as a whole is that it would enable schools to admit a number of non-preference students after all preferential enrolments, up to the maximum school roll set in the school's integration agreement.
25. Finally, the Bill specifies that only the Minister of Education may approve the establishment of a state integrated school. This must be signified by an integration agreement which, amongst other things, describes the school's education with a special character and prescribes the religious instruction and observances that will form part of its programme after integration. This requirement of Ministerial approval ensures that schools based on extreme beliefs would not become state integrated schools, curtailing the possibilities of further discrimination.

*Willingness and ability to take part in religious instruction as a condition of employment*

26. New sections 464(1) and 465 limit the appointment of special positions at state integrated schools to those individuals who have a willingness and ability to take part in religious instruction appropriate to that school.
27. The application of these sections turns on the definition of "ability". We interpret it to mean both the possession of fundamental characteristics or completion of rites essential to be a member of that religion (e.g. being baptised in the case of Catholicism); and the possession of qualifications that would enable an individual to provide religious instruction.
28. Accordingly, new ss 464(1) and 465 draw a distinction, in effect, between applicants for special positions at a state integrated school with the same religious belief associated with that school, and applicants who do not possess that religious belief. In practice, the sections would materially disadvantage the latter class of applicants as they would be barred from applying to special positions at that state integrated school.
29. Similar to new s 442(1) above, new ss 464(1) and 465 serve the objective of preserving the special character of state integrated schools, which is sufficiently important to justify some limitation on the right to freedom from discrimination.
30. The limitation is rationally and proportionally connected to the objective. Ensuring that special positions in a state integrated school are staffed by individuals of the same religious or philosophical belief associated with that school would enable preserving its special character. In the case of the positions of Director of Religious Studies and other positions carrying a responsibility for religious instruction, controlling for religious belief in this way would be a significant means of preserving a state integrated school's special character.
31. The limit does not impair the right to freedom from discrimination no more than is reasonably necessary for sufficiently achieving the objective for a number of reasons. First, the "willingness" element of the requirement ensures that a state integrated school cannot compel a potential applicant to a special position to take part in religious instruction. In effect, the new sections create a degree of self-selection among potential applicants to special positions, which reduces the chances of discrimination.
32. Secondly, the requirement of a willingness and ability to take part in religious instruction as a condition of employment applies only to the special positions specified in new s

464(1). New section 466 provides that this requirement cannot be imposed on any other teaching positions and that no other appointed teacher may be required to take part in religious instruction.

33. Accordingly we consider that the Bill is consistent with s 19(1) of the Bill of Rights Act.

### **Section 21 – right to be secure against unreasonable search and seizure**

34. Section 21 of the Bill of Rights Act affirms the right of everyone to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

35. New section 35S of the Bill replicates existing s 78B in the principal Act. This section provides powers to authorised persons to enter and inspect premises to ascertain whether those premises are being used as a private school in contravention of the Act. These powers constitute search and seizure powers in terms of s 21 of the Bill of Rights.

36. In determining whether these powers are consistent with s 21, we noted and considered a number of limiting factors contained in the Bill. First, the purposes of the inspection and seizure powers are explicitly set out (i.e. to ascertain whether those premises are being used as a private school in contravention of s 35R of the principal Act).

37. Secondly, the manner in which the powers can be exercised is limited. A person must hold an authorisation from the Secretary of Education and must have reasonable cause to believe that any premises are being used as a private school in contravention of s 35R of the principal Act in order to apply for a warrant to enter those premises. The warrant may only be issued by a District Court Judge, Justice of the Peace, or Registrar or Deputy Registrar of any court who must be satisfied that there is reasonable cause to believe the premises are being used as a private school in contravention of s 35R.

38. Finally, the Bill includes safeguards to provide protection for the parties in question. An authorised person can only enter at a reasonable time within four weeks of the date on which the warrant was issued. That person must present the issued warrant and evidence of their identity to the occupier of the premises concerned on first entering the premises and whenever subsequently reasonably required to do so by that occupier.

39. In light of the limits and safeguards outlined above, we conclude that the entry and inspection powers are reasonable and, therefore, not inconsistent with s 21 of the Bill of Rights Act.

### **Conclusion**

---

40. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

Jeff Orr  
**Chief Legal Counsel**  
**Office of Legal Counsel**