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Report of the

# ***ATTORNEY-GENERAL***

under the New Zealand Bill of Rights Act 1990  
on the Education (Protecting Teacher Title)  
Amendment Bill

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Presented to the House of Representatives pursuant to  
Section 7 of the New Zealand Bill of Rights Act 1990  
and Standing Order 265 of the Standing Orders of the  
House of Representatives

1. I have considered whether the Education (Protecting Teacher Title) 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. I have concluded the Bill limits the right to freedom of expression affirmed in s 14 of the Bill of Rights Act and that limit cannot be justified under s 5 of that Act.
3. As required by s 7 of the Bill of Rights Act and Standing Order 265, I draw this to the attention of the House of Representatives.

### **The Bill**

4. The Bill's expressed intention is to lift the status of teachers by removing the ability of those who have not gained certain teaching qualifications to represent themselves as "teachers" by using that title. The explanatory note states there are occasions, particularly with the introduction of charter schools,<sup>1</sup> where it is unclear to the public whether the titles being used by individuals means those people are adequately qualified to warrant confidence in their professional judgement and practice.
5. Currently, s 374(1)(b) of the Education Act 1989 ('the Education Act') makes it an offence to use the title "registered teacher", or any words or initials that are intended or likely to make another person believe that person is a registered teacher, when they are not registered. The Education Act sets out the criteria for teacher registration, which includes a requirement to be satisfactorily trained to teach.
6. Clause 5 of the Bill replaces s 374(1)(b) of the Education Act to make it an offence for a person to use or permit to use, in connection with a person's name or business, the word "teacher", or any words or initials intended or likely to make any other person believe that the person is a qualified and registered teacher, when they are not so qualified or registered.
7. Clause 4 of the Bill also defines "qualified" to mean one or more of the following qualifications:
  - a. a 3-year Bachelor of Education (Teaching);
  - b. a Bachelor's degree and a 1-year Graduate Diploma of Teaching; or
  - c. a 4-year conjoint degree that combines study in teaching subjects with teacher training.
8. The Bill's effect is to prevent individuals from lawfully describing themselves as a "teacher" unless they are qualified and registered under the principal Act.

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<sup>1</sup> Referred to as partnership schools kura hourua in the Education Act 1989.

### **Inconsistency with s 14 — Right to freedom of expression**

9. 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 freedom of expression is “as wide as human thought and imagination”<sup>2</sup> and includes any activity which conveys or attempts to convey a meaning.<sup>3</sup>
10. The Bill is intended to provide clarity around the use of the title “teacher”, to avoid any misunderstanding by the public about the qualifications, registration status and professional oversight of those using the title of teacher. It creates an offence for individuals to describe themselves as “teachers” without specific qualifications and registration.
11. The right to freedom of expression is generally construed as having a wide ambit in New Zealand, as is the word “teacher”. Individuals, however qualified, who represent themselves as teachers (for example, on the basis that they are sufficiently expert in a particular subject or subjects to teach others) are exercising their right to freedom of expression. Therefore, I consider that the offence provision in the Bill constitutes a limit on the right to freedom of expression.

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

12. Where a provision appears 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 demonstrably justified in a free and democratic society under s 5 of the Bill of Rights Act. The s 5 inquiry may be approached as follows:<sup>4</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?

#### *Is the objective sufficiently important?*

13. As I have noted above, the Bill’s expressed intention is to lift the status of teachers by preventing those who have not gained certain teaching qualifications from lawfully using the title “teacher”. The explanatory note specifically refers to the potential lack of clarity regarding teachers in charter schools. The Education Act was amended in 2012 to introduce charter schools, and allow such schools to employ

<sup>2</sup> *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, (1999) 5 HRNZ 224 (CA) at [15].

<sup>3</sup> *Irwin Troy Ltd v Attorney-General (Quebec)* [1989] 1 SC 927, 969 – 970 (SCC).

<sup>4</sup> *Hansen v R* [2007] NZSC 7 at [123].

individuals in teaching positions who are not qualified and registered teachers under that Act. Accordingly, the Bill is intended to provide clarity around the use of the title “teacher” to avoid any misunderstanding by the public, particularly in charter schools, about the qualifications, registration status and professional oversight of those using the title of teacher.

14. At its highest level, the stated objective the Bill serves to address – ensuring the professional and qualified status of teachers is recognised – is important. This recognition helps protect the public and the integrity of the education system.
15. However, the professional status of registered (and therefore qualified) teachers is already recognised by the Education Act’s provisions for registration and the existing offence under s 374(1)(b). As protections for the registered teaching profession already exist, I am not convinced there is a pressing social objective (to the extent it differs from the objective of the current offence provision) that is sufficiently important to justify limiting s 14 in the manner proposed by the Bill.
16. If I were convinced of a pressing social objective for the Bill, I have set out below why I do not consider the Bill meets subsequent steps in the s 5 test.

*Is there a rational connection between the limit and the objective?*

17. I consider that restricting the use of the title “teacher” to those with certain qualifications is connected to the objective of ensuring those who call themselves teachers in fact do have those qualifications. On balance, I accept this in turn may assist to protect the status of teachers.

*Is the impairment on the right greater than reasonably necessary?*

18. I do not think the Bill as drafted meets this element of the s 5 test, which seeks to ensure the relevant right is preserved as much as possible. By restricting the title of “teacher” to those who have completed the qualifications prescribed in the Bill, the provision limits the freedom of expression of a wider group of persons than required to meet the Bill’s objectives.
19. There are a range of people who hold themselves out as “teachers” and teach in particular subject areas, but are not qualified and registered under the Education Act. Such individuals may work outside the general education system, and in some cases, they may have obtained specialist teaching qualifications in their field, such as music, ballet or yoga. The restriction imposed by the Bill would impose a significant limit on the ability of these people, ordinarily thought of as teachers, to conduct their business and describe themselves as teachers. The likelihood of confusion arising between teachers who are qualified and registered under the Education Act and specialist teachers who do not work in schools is low. I am not satisfied that it is necessary to limit their ability to call themselves “teachers” in order to protect that title within the education system.
20. The current registration system under the Education Act appears to provide adequate protections to ensure teachers in the general education system are properly qualified, registered and subject to professional oversight. If it is unclear to the public whether

teachers, particularly in charter schools, are adequately qualified, or if their presence in teaching roles gives the impression they are qualified and registered teachers under the Education Act when they are not, there are other ways of addressing that concern which would have less impact on the right to freedom of expression. One such alternative could be to require unqualified teachers in teaching positions under the Education Act to disclose that they are not registered (and therefore not qualified) in accordance with that Act.

21. As such, I consider the Bill limits s 14 more than is reasonably necessary.

*Is the limit in due proportion to the importance of the objective?*

22. The considerations discussed above also support my view that the limit on freedom of expression is not proportionate to the objective's importance.

23. Unlike other protected titles such as "lawyer", there are numerous people who legitimately use the title "teacher" to earn their livelihoods. Indeed, the natural reading of cl 5 would also prevent any businesses using the word "teacher" in their title – for instance if they were selling teacher supplies. The limit the Bill places on freedom of expression is significant.

24. On the other hand, as I have indicated above, I consider the Bill's objective to be of limited importance. In light of both the current protections for "registered teachers", and the related view that the offence goes further than required to achieve the Bill's stated objectives, I do not consider that adding extra protections under the Education Act to restrict the use of the title "teacher" is in due proportion to the objectives of the Bill (to promote the status of teachers and to protect the public by ensuring those holding themselves out as such have specified qualifications).

25. Accordingly, I do not consider the limitation placed on freedom of expression in the Bill is proportionate to its stated objective.

### **Conclusion**

26. For the above reasons, I have concluded the Bill appears to be inconsistent with s 14 of the Bill of Rights Act and the inconsistency cannot be justified under s 5 of that Act.



Hon David Parker

**Attorney-General**

*29/1* January 2018