

10 March 2023

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Education and Training Amendment Bill (No 3)

Purpose

1. We have considered whether the Education and Training Amendment Bill (No 3) (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 in relation to the latest version of the Bill (PCO 24483/15.1). We will provide you with further advice if the final version 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 14 (freedom of expression). Our analysis is set out below.

The Bill

4. The Bill amends the Education and Training Act 2020 (the Principal Act) and makes consequential amends to various other legislation (the Crown Entities Act 2004, the Data and Statistics Act 2022, the Income Tax Act 2007, the Local Government Official Information and Meetings Act 1987, the Ombudsmen Act 1975, and the Tax Administration Act 1994).
5. The Bill makes changes to the Principal Act to better recognise the mana and rangatiratanga of wānanga, and their unique role in the tertiary education system. The Bill does this by establishing an enabling wānanga sector framework within the Act, which:
 - a. Enables, subject to Cabinet approval, existing wānanga to reconstitute themselves through an Order in Council as either a Crown entity wānanga or a Non-Crown entity wānanga (that is primarily accountable to iwi, hapū, or another Māori organisation while retaining some accountability to the Crown); and
 - b. Sets out the requirements for those that wish to establish a new wānanga in the future and for what must, and may, be covered in an Order in Council.
6. The Bill clearly articulates the characteristics that define wānanga collectively, sets out the wānanga disestablishment provisions, and provides for new accountability and monitoring arrangements for non-Crown entity wānanga.
7. The Bill makes other changes to the Act to improve governance and administration across the education system, including strengthening school board eligibility criteria and changes to permit Statistics NZ to provide data to the Ministry of Education for the proposed early childhood education (ECE) Equity Index.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of expression

8. Section 14 of the Bill of Rights Act affirms the right to freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind in any form. The right to freedom of expression has also been interpreted as including the right not to be compelled to say certain things or to provide certain information.¹
9. There are several provisions in the Bill which *prima facie* engage the right to freedom of expression. These provisions can be summarised as follows:
 - a. Proposed new section 91(4) – a person or body responsible for appointing or electing a person to fill a vacancy on the council of a wānanga must give notice to the council of that wānanga
 - b. Proposed new section 398S(2) – a wānanga must forward to the Auditor-General annual financial statements or other information required to audit
 - c. Proposed new section 398U(1) – a council member of a non-Crown entity wānanga, or a council committee member who has an interest in a matter being considered by the council must disclose the nature of the interest
 - d. Proposed new section 306(4)(g) – university or wānanga must include in their annual report a statement of the number of employees or former employees who received remuneration of \$100,000 or more and the number of those employees or former employees in brackets of \$10,000
 - e. Proposed new clause 9(6) of Schedule 23 – the Secretary of a board for a wānanga may audit a board member’s continuing eligibility to be a board member. Subclause (7) states, for the purposes of subclause (6), the board member must permit the Secretary to obtain any relevant information to enable the Secretary to conduct the audit.
 - f. Proposed new section 90(3) of the Act – the Governor-General may, by Order in Council made on recommendation of the Minister, reconstitute the council of a wānanga which may require relevant information from the wānanga
 - g. Proposed new section 106 of the Act – each wānanga that is converted from a Crown entity to a non-Crown entity wānanga must provide a final report to the Minister, in relation to the wānanga that was a Crown entity, in accordance with section 45J(1) of the Public Finance Act 1989. The Minister may specify the contents of the final report and the date or dates by which the contents of the report must be provided.
2. 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 demonstrably justified in terms of section 5 of that Act.
3. The section 5 inquiry asks whether the objective of the provision is sufficiently important to justify some limitation on the freedom of expression and, if so, whether the limitation is

¹ See for example *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

rationaly connected and proportionate to that objective and limits freedom of expression no more than reasonably necessary to achieve that objective.²

4. We consider that any limits on the freedom of expression contained within the Bill are justified under section 5 of the Bill of Rights because:
 - a. the Bill seeks to create an enabling framework for the wānanga sector, and the purpose of wānanga is ensuring excellent education outcomes for ākonga Māori; meeting the needs and aspirations of their whānau, hapū and iwi; and contributing to the protection, advancement, and dissemination of te reo Māori and mātauranga Māori. This is a sufficiently important objective to justify some limitation on section 14;
 - b. the requirements to provide certain information imposed on entities acting within the establishment, oversight, and disestablishment of wānanga are rationally connected to this objective. Ensuring that the relevant information is provided in the prescribed manner is fundamental to ensuring the overall function and efficiency of the establishment, oversight, and disestablishment of wānanga; and
 - c. the provisions requiring information impair section 14 no more than reasonably necessary and are in due proportion to the importance of the Bill's objective. The information required is largely factual in nature and contains limited expressive value. Accordingly, any limits to section 14 are justified under section 5 of the Bill of Rights Act.

Conclusion

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



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² Hansen v R [2007] NZSC 7, [2007] 3 NZLR 1.