



MINISTRY OF EDUCATION
Te Tāhuhu o te Mātauranga

Submission No: S00/1561

IN CONFIDENCE

27 February 2001

Minister of Education

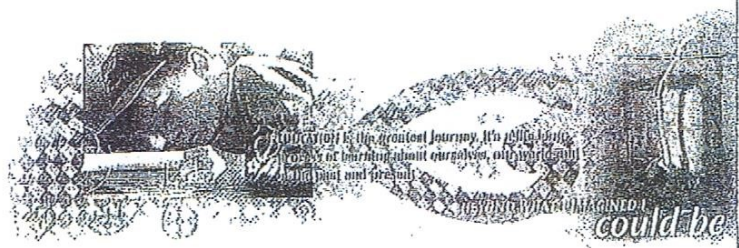
Compliance with Human Rights Act 1993 – Ministry of Education Legislation and Policy

Proposal

- 1 This paper reports to you, as required by Cabinet, on the inconsistencies which have been identified by the Ministry between education legislation, policies and practices and the Human Rights Act 1993 ("HRA"). The paper investigates possible options for addressing these inconsistencies and seeks your approval on proposed solutions.

Background

- 2 The amendment to the HRA, which came into force on 1 October 1999, extended the timeframe in which government policy and practice has to comply with the Act until 31 December 2001. The amendment also requires the Minister of Justice to report to Parliament on government progress in remedying significant inconsistencies between existing legislation and the HRA.
- 3 On 13 November 2000 Cabinet agreed that a process be established to improve the compliance of legislation, government policies and practices with the provisions of the HRA [POL (00) M 36/11, CAB (00) M 42/4E refers]. The priority of four streams of work were identified and agreed to.
- 4 Cabinet also agreed that the relevant Ministries and Departments were to report to their Ministers and the Ministry of Justice on recommended solutions to address identified significant inconsistencies with the HRA.



Stream One : Provision of core social services

- 5 This stream is for inconsistencies in legislation or policies that involve the provision of core social services. The Ministry of Education comes within this stream because of its policy involvement with the Student Allowances Regulations 1998 and the Student Loans Scheme. A separate report on this work is nearly complete and is to be sent to the Associate Minister of Education (Tertiary Education) on Friday 2 March.

Streams Two and Three : Other significant or minor issues in legislation

- 6 These streams require the Ministry to identify and to decide how to resolve all legislative inconsistencies other than the Student Allowances Regulations. Much of the legislative non compliance identified as part of the Consistency 2000 exercise has already been addressed by amendment or repeal in the Education Amendment Act 2000 and in the Education Bill No. 2 currently in the House.

- 7 The remaining inconsistencies in legislation are :

- Sections 3 and 9 Education Act 1989 - discrimination on the grounds of age.
- Section 25A Education Act 1989 and sections 78 and 78A Education Act 1964 - discrimination on the grounds of religious belief.
- Sections 224(3) and 257 Education Act 1989 - discrimination on the grounds of age.
- Regulation 36 Education (Early Childhood Centres) Regulations 1998 and clause 5(48) Education (Home-Based Care) Order 1992 - discrimination on the grounds of age.
- Regulation 8(2)(b) Māori and Polynesian Scholarship Regulations 1973, regulation 4(a) United World Scholarships Regulations 1980, regulation 5(2) Secondary School Bursaries Regulations 1977, and regulation 8(c) Secondary Schools Technical Bursaries Regulations - discrimination on the grounds of age.

- 8 Sections 3 and 9 Education Act 1989 - Section 3 provides for a right to free education and free enrolment in state schools for 5 to 19 year olds and section 9 provides that special education is available for students up to 21 years of age. This could be regarded as discriminatory because adult students do not have a right to free enrolment and free education.

- 9 Adult students are currently enrolling in state schools without having to pay fees but the Ministry considers that the existing provisions should be retained, allowing for the possibility of future policy whereby adult students could be refused enrolment or could be charged fees.

- 10 An exception in the HRA which applies to age discrimination in the education sector does allow a school to refuse to enrol a student who is over 19 years old. But whether, having accepted the enrolment of an older student, a school could require the student to pay a fee is less clear.

- 11 If you agree that the present provision should be retained, it is proposed that the Ministry recommends a minor amendment to section 58(1) and 58(5) of the HRA in its report to the Ministry of Justice to extend the present exceptions to allow for different fees for different ages.

12 Section 25A Education Act 1989 and sections 78 and 78A Education Act 1964 raise issues of discrimination on the grounds of religious belief.

- 13 Section 25A allows students to be released from particular classes or subjects because of sincerely held religious or cultural views. This arguably amounts to indirect discrimination on the grounds of ethical belief as those who do not have religious views do not have this option.

- 14 As this discrimination would be indirect discrimination under the Human Rights Act, the exception of good reason would allow the Ministry to show that the provision is designed to take into account the views of those who hold religious or cultural views which are in conflict with mainstream state school curriculum requirements. It is therefore recommended that the provision be retained in its current form on the grounds that it is not inconsistent with the HRA.

- 15 Sections 78, 78A, and 79 provide exceptions to the rule in section 77 of the Education Act 1964 ("the '64 Act") that teaching in state primary schools is to be entirely secular. They allow boards to close their schools for up to 1 hour a week for religious instruction and they allow the Minister to authorise an extension to the time for religious instruction. Section 79 then provides an opt out for students whose parents do not wish their children to have religious instruction.

- 16 It is intended to retain these provisions in their current form in the 1964 Act, however there is a possibility that the provisions will be subject to challenge under the HRA. It can be argued that the provisions authorise indirect discrimination on the grounds of both religious belief and ethical belief, in that, should a board elect to have religious instruction, students who do not hold any religious views or who have religious beliefs that are different from those being instructed, must either attend instruction which is against their beliefs or must absent themselves from such instruction.

- 17 An allegation of indirect discrimination could be defended by evidence that there is good reason for the discrimination but there is also the possibility that the provisions could be challenged on the grounds of direct discrimination, for which there is no such defence.

- 18 While it is proposed that these provisions remain in their current form in the 1964 Act, future policy on the repeal of the 1964 Act and the incorporation of its provisions in the Education Act 1989 will need to include consideration of the religious instruction issues to determine to what degree, if any, there should be religious education/instruction in state schools. The HRA issues will need to part of this consideration.

- 19 Sections 224(3) and 257 Education Act 1989 discriminate on the grounds of age. These provisions discriminate on the grounds of age by providing that students under 20 have to have required minimum entry qualifications or other prerequisites to enrol at a tertiary institution compared with those over 20.

- 20 These provisions discriminate on the grounds of age by providing that students under 20 have to have required minimum entry qualifications or other prerequisites to enrol at a tertiary institution compared with those over 20. In a meeting with you and the Associate Minister (Tertiary Education) on 20 February you indicated that you did not support any change to these provisions at this time. Although the government exemption under section 151 of the HRA expires on 31 December this year, the risk of a successful challenge under the HRA after that date is low, given that the HRA cannot override other legislation but must be interpreted alongside specific requirements in other statutes such as the Education Act.
- 21 Regulation 36 Education (Early Childhood Centres) Regulations 1998 and clause 5(1a) Education (Home-Based Care) Order 1992 discriminate on the grounds of age.
- 22 The regulation requires all staff to have turned 17 and the Order requires caregivers to be 20 or older. It is recommended that these clauses be revoked or amended so that they do not discriminate on the grounds of age.
- 23 Regulation 8(2)(b) Maori and Polynesian Scholarship Regulations 1973, regulation 4(a) United World Scholarships Regulations 1980, regulation 5(2) Secondary School Bursaries Regulations 1977, and regulation 8(e) Secondary Schools Technical Bursaries Regulations all directly discriminate on the grounds of age.
- 24 These regulations directly discriminate on the grounds of age. The Ministry is currently reviewing bursaries policies and it is recommended that once the review is complete, any changes to the regulations arising out of the review include amendments to the eligibility requirements so that they are set without using age based criteria.

Stream Four : Inconsistencies in education policies and practices

- 25 This stream requires the Ministry to identify and address all inconsistencies in Ministry policy and practice. All policy and practice documents examined during the Consistency 2000 review and which were identified as possibly inconsistent with the provisions of the Human Rights Act have been reviewed and those which were considered to contain discriminatory treatment have been amended to ensure consistency with the Human Rights Act. All policy and practice documents since that review are required to be subject to a Human Rights compliance audit.
- 26 The only remaining inconsistency in policy is contained in the Student Loans Scheme Guidelines, which is included in stream one, para 5 above.
- 27 Note however that there is also a proposal in a draft cabinet paper currently being prepared for your recommendation, which may contain policy which is inconsistent with the HRA. This policy is in relation to the Teachers International Relocation Grant and one option has suggested that an increase in the international relocation grant to teachers should go to NZ trained teachers only.

- 28 The proposal would amount to indirect discrimination on the grounds of national origin as non NZ trained teachers will for the most part be non New Zealanders. If you approve this option, the Ministry will need to ensure that any challenge under the HRA to the policy can be defended on the grounds of good reason under section 65.

Recommendations

It is recommended that you:

a note that the Human Rights Amendment Act 1999 requires government policy and practice to comply with the HRA by 31 December 2001;

b note that the Cabinet has agreed to a process to improve the compliance of legislation, government policies and practices with the provisions of the HRA [POL (00) M 36/11, CAB (00) M 42/4E refers];

c note that with regards to stream one, concerned with the provision of social services and which includes Student Allowance Regulations and the Student Loan Scheme, a separate report on this work will be sent to the Associate Minister of Education (Tertiary Education) on 2 March 2001;

d agree/disagree with the following actions for resolution of the issues in streams 2 which are concerned with other legislative issues:

(i) that sections 3 and 9 of the Education Act 1989 should be retained and that the Ministry recommends a minor amendment to section 58(1) and 58(5) of the HRA in its report to the Ministry of Justice to remedy the inconsistencies;

Agree / Disagree

(ii) that section 25A of the Education Act remain unchanged because this provision is designed to take into account the views of those who hold religious or cultural views which are in conflict with mainstream state school curriculum requirements;

Agree / Disagree

(iii) that sections 78, 78A, and 79 of the Education Act 1964 should be retained in their current form;

Agree / Disagree

(iv) that regulation 8(2)(b) of the Māori and Polynesian Scholarship Regulations 1973, regulation 4(a) of the United World Scholarships Regulations 1980, regulation 5(2) of the Secondary School Bursaries Regulations 1977, and regulation 8(e) of the Secondary Schools Technical Bursaries Regulations, be amended to remove the discriminatory references to age;

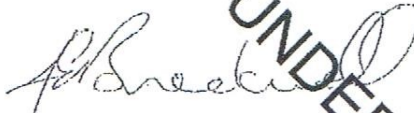
Agree / Disagree


- (v) that regulation 36 of the Education (Early Childhood Centres) Regulations 1998 and clause 5(48) of the Education (Home-Based Care) Order 1992 be amended to remove the discriminatory references to age;

Agree / Disagree

- e note that the inconsistency in the Student Loans Scheme policy is being considered as part of the core social services in stream one;

note that the proposal in relation to the Teachers International Relocation Grant policy may contain HRA inconsistencies and that, should the proposal be approved, it will be necessary to establish good reason in support of the policy.


Jan Breakwell
Manager
Legal Division

SEEN/APPROVED MINISTER OF EDUCATION

21/2/01

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