



Submission

Submission of the Ombudsmen on the Education Amendment Bill (24 January 2013)

This submission relates to clause 158X of the Education Amendment Bill currently before the Education and Science Committee.

Clause 158X provides that "*The Ombudsmen Act 1975 and Official Information Act 1982 do not apply to a sponsor of a partnership school kura hourua*".

I have a number of concerns about the exclusion of partnership schools from the Official Information Act and the Ombudsmen Act which are expressed below.

Unconstitutional nature of exclusion

1. The Ombudsmen Act 1975 and the Official Information Act 1982 are twin pillars of accountability that play a pivotal role in New Zealand's constitution. The Official Information Act contributes to transparency, accountability and ultimately good governance within the public sector. The Ombudsmen Act provides a mechanism by which aggrieved persons can seek redress for unreasonable actions that affect them. Both Acts help to ensure that public bodies that are funded by the tax payer are accountable to the stakeholders whom they serve.
2. I consider that the exclusion of partnership schools from the jurisdiction of the Ombudsmen and the Official Information Act would be a constitutional anomaly.
3. Historically, state funded agencies, particularly those which operate under a statutory regime have been subject to the Ombudsmen and Official Information Acts. The application of both regimes ensures that the state funded agencies are accountable to the taxpayer for the expenditure of government funds.
4. Private prisons under the Corrections Act 2004 are directly analogous to charter schools in their operational make up. Under the Corrections Act, the functions of prisons may be subcontracted to private operators, who are nevertheless subject to various statutory constraints and funded by the crown. Similarly under the partnership school model, the

functions of schools are subcontracted to non-state sponsors who can deliver school services, with state funding, subject to certain statutory constraints.

5. I can see no substantive difference between private prisons and partnership schools that justifies their different constitutional treatment.
6. Inclusion of partnership schools under the Ombudsmen and Official Information Acts would not only avoid the anomalous constitutional situation that the current bill creates, but enhance public confidence in the operation of the partnership school model. This would be of benefit to partnership school sponsors, students, the government and the wider public.

Compromised statutory functions of partnership schools

7. I consider that in the absence of oversight by the Ombudsmen, and the transparency that the Official Information Act regime provides, certain of the statutory functions of partnership schools will be compromised.

Requirement to provide a safe physical and emotional environment for students

8. I consider that clause 158F(a) of the Education Amendment Bill, under which Sponsors are required to "*provide a safe physical and emotional environment for students*" will be compromised by the exclusion of partnership schools from the Ombudsmen and Official Information Acts. Clause 158F(a) reflects Article 3(3) of the United Nations Convention on the Rights of the Child (UNCROC) under which state parties are required to ensure that institutions and facilities responsible for the care or protection of children conform with standards of safety and health.¹
9. The existence of a complaints mechanism for aggrieved individuals is fundamental to ensuring that schools maintain standards of best practice, especially in the areas of safety and health. Bullying in particular is a safety and health issue in New Zealand schools which is of significant and, might I suggest, mounting public concern. In 2011 my colleague, Ombudsman David McGee, tabled a report in Parliament detailing systematic sexualised group violence that had occurred in one school, that the school had failed to adequately address. It was only with the oversight of the Ombudsmen that the full facts of that case could come to light, and lessons could be learned for the future.
10. I commend the Government's decision to render Charter Schools subject to oversight by the Education Review Office (ERO) and the Ministry of Education. Oversight by both of these bodies will provide a degree of accountability with respect to charter schools. However, I do not consider those mechanisms in themselves provide sufficient safeguards to avoid the possibility of adverse practices developing within a charter school that could impact on the health and safety of children. My concern in this regard is informed in part by the shortcomings in the ERO and Ministry of Education oversight identified by Mr McGee in his report to Parliament on bullying. Mr McGee found that

¹ Article 3(3) of the Convention on the Rights of the Child.

violence and bullying at the school concerned had been identified prior to the systematic assaults that prompted the investigation but that were inadequately dealt with by both the Ministry of Education and the ERO.

11. Oversight by the Ombudsmen and the application of the Official Information Act are fundamental safeguards to ensure that all partnership schools operate best practice and their pupils are not endangered. The application of both regimes will also assist in ensuring that New Zealand adheres to its international obligations under UNCROC.²

Suspension and exclusion

12. I also consider that the operation of section 158U of the Education Amendment Bill may be compromised by the exclusion of partnership schools from the Ombudsmen and Official Information Acts.
13. Under clause 158U of the Education Amendment Bill, partnership schools are subject to the Education (Stand-down, Suspension, Exclusion and Expulsion) Rules 1999. These rules set out in detail the procedural and substantive requirements for standing down, suspending and excluding students.³
14. A decision to stand down, suspend, exclude or expel a student is a significant one that can impact directly on the pupil concerned in a number of ways, including the student's ability to access education. Decisions to expel or exclude a pupil can affect a student's future opportunities. It is therefore of fundamental importance for students of partnership schools that they, like state schools, have fair and transparent suspension and exclusion processes. Clause 158U attempts to ensure this. However, as the Bill is currently drafted there is no mechanism to ensure that a school complies with the Education (Stand-down, Suspension, Exclusion and Expulsion) Rules 1999 to which they are subject. Clause 158U would in practice appear to be unenforceable.
15. Currently, the adherence of state schools to the Education (Stand-down, Suspension, Exclusion and Expulsion) Rules 1999 is subject to investigation by an Ombudsman. Additionally school policies including those relating to suspensions and exclusions are subject to public scrutiny through the operation of the Official Information Act. Ombudsmen deal with a number of complaints from the parents of suspended or excluded students. Often schools are well motivated but do not have the legal or procedural knowledge to ensure the maintenance of natural justice in school disciplinary

² Article 19 of the Convention on the Rights of the Child requires states parties to "take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

³ These rules are relevant to New Zealand's international obligations under Article 28 of the UNCRD, under which state parties are required to take all appropriate measures to ensure that school discipline is administered in a manner consistent with human dignity and in conformity with the Convention.

procedures. Oversight by the Ombudsman can help schools develop and maintain fair disciplinary processes.

16. In order to avoid inconsistent standards of compliance with the Education (Stand-down, Suspension, Exclusion and Expulsion) Rules between partnership schools and state schools subject to the regulations, a right to complain to an Ombudsman about partnership school decisions to stand down, suspend or exclude children from charter schools is a fundamental safeguard.
17. I also note that in the absence of independent oversight, partnership schools could potentially employ expulsion or exclusion procedures as a means of indirectly circumventing the requirement to accept all students, irrespective of background or ability, who apply for entry.

Concern about vexatious complaints

18. The only rationale cited for excluding Partnership Schools from the Ombudsmen and Official Information Acts in the Cabinet Social Policy Committee paper setting up the partnership schools model is as follows:

"This will help to ensure Partnership Schools/Kura Hourua are not susceptible to costly and vexatious requests."

19. Any concern that making partnership schools subject to the Official Information Act and Ombudsmen Act will result in "*costly and vexatious requests*" is ill founded.
20. Under section 18(h) of the Official Information act, a request for information may be refused if the request is "*frivolous or vexatious*" or the information requested is "*trivial*". Reasonable charges for costs associated with adherence to the Official Information Act can usually be passed on to the requester - section 15(1)(a) of the Official Information Act expressly allows agencies to charge for making information available in response to a request.
21. In addition, Ombudsmen do not investigate vexatious or other complaints that are without merit. Under section 17(2) of the Ombudsmen Act an Ombudsman can refuse to investigate a complaint if the subject matter of the complaint is trivial, the complaint is frivolous, vexatious or not made in good faith, the complainant has insufficient personal interest in the subject matter, or the subject matter of the complaint is over a year old. The Government has recently agreed to augment the Ombudsmen's powers to decline to investigate complaints that are without merit through an amendment to section 17 empowering an Ombudsman to decline to investigate a complaint if investigation is considered unnecessary.⁴

⁴ Government Response to Report of the Officers of Parliament Committee on Alterations to the 2011/12 appropriations for Vote Audit, Vote Ombudsmen, and Vote Parliamentary Commission for the Environment, and 2012/13 draft budgets for the Office of the Controller and Auditor-General, the Office of the Ombudsmen, and the Office of the Parliamentary Commissioner for the Environment.

22. While there may be some resource implications involved in responding to an Ombudsman's complaint, the costs would generally be minor and likely be outweighed by the enhanced accountability and outcomes that oversight by the Ombudsman would help to ensure.

Official Information Act - access to reasons for decisions

23. Inclusion of partnership schools within the Official Information Act will ensure that pupils affected by a decision of the school will have access to the reasons for the decision that was made. Sections 22 and 23 of the Official Information Act confer fundamental legal rights on individuals to request access to information about or affecting them from an agency; rights **not** conferred by the Privacy Act 1993, to which partnership schools will be subject.
24. Section 23 of the Official Information Act provides a statutory right to a written statement of reasons why an agency made a decision or recommendation affecting an individual in their personal capacity. The absence of this right means that students and their caregivers will have limited ability to hold the partnership school to account for adverse decisions made about them. Teachers would also be affected as they would not have a statutory right to seek access to reasons why they were not appointed to certain roles, or did not receive certain benefits or professional development opportunities.
25. Section 22 confers a statutory right of access to all policies, principles, rules and guidelines that an agency applies when making decisions or recommendations in respect of an individual. Removing this statutory right of access to this type of information means that students and their caregivers will no longer have a right to obtain school policies.
26. The application of the Privacy Act but not the Official Information Act to partnership schools would result in an unjustified disadvantage to students and their caregivers. Individuals cannot request a statement of reasons for decisions or recommendations about themselves under the Privacy Act.

International anomaly

27. The decision to exclude partnership schools from the Official Information Act is out of step with international practice. Comparable overseas charter school regimes upon which partnership schools are modelled are subject to freedom of information legislation.
28. The United Kingdom equivalent of partnership schools, Academies or Free schools, are covered by the Freedom of Information Act 2000. There is also a statutory complaints mechanism for individuals complaining of unreasonable actions by academies. Complaints about academies may be made to the Secretary of State, who has broad powers of redress.⁵

⁵ Section 496 Education Act 1996.

29. Similarly, charter schools in Canada are subject to the Freedom of Information and Protection of Privacy Act, and in New York are subject to the New York State's Freedom of Information Law.

Conclusion

30. Clause 158X of the Education Bill runs the risk of creating a state funded schooling regime which is shrouded in secrecy and is unaccountable. This is likely to hamper the ability of partnership schools to achieve their central goal of achieving better outcomes for students. Applying the Official Information Act and Ombudsmen Act to partnership schools will assist partnership schools in exercising their statutory functions, enhance transparency and accountability, bring New Zealand into line with international models and avoid the constitutional anomaly inherent in the current Bill.
31. I urge the Committee to recommend the removal of clause 158X from the Education Amendment Bill and to make partnership schools subject to the Ombudsmen and Official Information Acts.