NEW ZEALAND LAW SOCIETY

NZLS EST 1869

Education (Pastoral Care) Amendment Bill

01/11/2019

Submission on the Education (Pastoral Care) Amendment Bill

Introduction

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Education (Pastoral Care) Amendment Bill (the Bill).

2. The Bill proposes to address regulatory gaps relating to the pastoral care of domestic tertiary students by enabling the Minister of Education to create a mandatory code for domestic students alongside the existing code for international students, and by providing for code compliance to be monitored and enforced.[1]

3. The Bill does this by entirely replacing Part 18A of the Education Act (the Act) with a new Part 18A.

4. Proposed sections 238S and 238T set out a new enforcement regime. These sections respectively purport to:

    a. Provide for a criminal offence of breaching the code without reasonable excuse, with the breach resulting in "serious harm" to or death of one or more students (with a maximum fine of $100,000); and

    b. Provide for a (civil) pecuniary penalty (of up to $100,000) to be imposed if a Court is satisfied that a provider has committed a serious breach of the regulatory requirements of the code.

5. The Law Society's comments below are limited to proposed sections 238S and 238T.

Executive Summary

6. The Law Society's key submissions are:

    a. The shortened process for development and scrutiny of the Bill creates a risk of poor quality legislation being enacted.

    b. Proposed sections 238S and 23T as currently drafted raise the following significant issues:

        i. It is uncertain whether or not section 238S is in fact a strict liability offence;

        ii. The definition of "serious harm" is not clear;

        iii. The pecuniary penalty does not provide for a burden of proof;

        iv. It is not clear what constitutes a "serious" breach in section 238T; and

        v. The "regulatory requirements" referenced in the code are not clear.

7. The Law Society recommends these provisions are carefully reconsidered to address the deficiencies that have been identified. As part of this, the Select Committee should consider alternative ways in which the regulatory gaps might be addressed through other legislative mechanisms.

8. The Law Society wishes to be heard by the Select Committee.

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[1] Explanatory Note to the Bill, p1.

Legislative process

9. The Law Society recognises the purpose of the Bill is to address regulatory gaps that may have been a contributing factor to the recent deaths of students in New Zealand. We appreciate the need for a swift response to ensure that the risk is appropriately addressed. However, the Law Society is concerned with the haste with which the Bill has been drafted and the inadequate time that has been applied to the policy considerations behind it.

10. The timeframe for considering the proposed legislative amendments has been very short. The Bill was introduced on 14 October 2019, had its first reading on 17 October and submissions to the select committee due on 1 November, leaving 9 working days for public input.

11. As a result of this quick timeframe, no Regulatory Impact Analysis has been done. An inadequate consultation timeframe reduces the ability of the Select Committee and submitters to undertake an effective review. This creates a risk of poor quality legislation being enacted.

12. The Law Society considers that a longer period should have been allowed for development and scrutiny of the legislation. There is no evidence that the Legislation Guidelines 2018 relating to justification for strict liability offences and civil pecuniary penalties have been considered. In addition, the Departmental Disclosure Statement (DDS) specifically records that very limited consultation has been undertaken.[2]

13. One result of a lack of regulatory analysis is that other approaches to address the regulatory gap do not appear to have been considered. For example, there does not appear to have been consideration as to whether liability for manslaughter is appropriate when a body corporate has "actual care or charge" of a person under 18 (section 152 of the Crimes Act 1961) or a vulnerable adult (section 151 of the Crimes Act 1961) and death results from a failure to provide "necessaries" (which will include medical care) to the deceased or from a failure to take reasonable steps to protect the deceased from injury. If so, and the omission is, in the circumstances, a major departure from the standard of care expected of a reasonable person to whom that legal duty applies or who performs that unlawful act, the Select Committee may wish to consider whether the provider should be liable for manslaughter. Although this might constitute a significant policy change, it would require only a small amendment to section 158 of the Crimes Act.

14. Similarly, the current offences created by sections 195 and 195A of the Crimes Act 1961 are apt to fit the situations of inadequate care of students by providers with only minor drafting amendments to them.

Section 238S

<u>Strict Liability</u>

15. The Legislation Guidelines 2018 state that officials should be able to provide policy reasons why strict liability offences are justified in a particular regulatory context.[3] The DDS simply states that proposed section 238S "…creates a strict liability offence. The offence is justifiable

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2 Departmental Disclosure Statement at [3.6] p7.

3 Legislation Design Advisory Committee, Legislation Guidelines 2018, at [24.3]: http://www.ldac.org.nz/assets/documents/adaed3dc25/Legislation-Guidelines-2018-edition-2019-05-15.pdf

in this instance as the provider or signatory provider will be best placed to establish absence of fault".[4] No further information is provided to support such a justification.

16. The Legislation Guidelines further state "if legislation is silent as to the mental element or the defences available, the courts will generally infer a mental element, but that can create uncertainty. This is undesirable because a person is entitled to know before engaging in conduct whether it is prohibited and, if so, in what circumstances".[5]

17. The Law Society considers proposed section 238S does not, on its face, involve one of strict liability. As a matter of construction, the absence of a reasonable excuse is an element of the offence to be proved by the prosecution. The defendant carries only an evidential onus of raising a live issue as to the excuse, in which case the prosecution then has the onus to prove the absence of excuse beyond reasonable doubt. The subject matter and size of the penalty also tells in favour of reading in a mental element into the offence.

18. Importantly, "reasonable excuse" is not the same as a "lack of fault". If the latter is intended, then clearer wording is needed within section 238S. If a strict liability offence is intended, then the section should specify that the defendant will avoid liability by proving a lack of fault.

19. The Law Society recommends that if strict liability is intended, clear words to that effect should be included in section 238S. However, in our view, the Select Committee will need to reflect carefully on whether strict liability is appropriate in these circumstances. The Supreme Court has recently observed in *R v Cameron* that the reverse onus in strict liability offences may need to be revisited, given that the concept of strict liability was developed in cases that pre-date the New Zealand Bill of Rights Act 1990.[6]

<u>"Serious harm"</u>

20. The requirement that the offence must result in "serious harm" is problematic for two main reasons. First, it is unclear and imprecise. Secondly, it appears to be unduly broad because it includes eventualities that might not ordinarily be considered to be "harm".

21. "Serious harm" is defined in proposed section 238D as:

> **serious harm**, in relation to a domestic tertiary student or an international student, means an event or circumstances that seriously and detrimentally affect the safety or well-being of the student, including (but not limited to) a physical injury or illness that requires immediate treatment (other than first aid), hospitalisation, or medical, psychological, or psychiatric intervention.

22. It is clear that physical harm actually suffered by a student is included within the offence as proposed. However, as currently drafted it includes psychological or psychiatric harm <u>only</u> where that harm requires "intervention". In this context, it is unclear what "intervention" means (noting that it is also a term used unrelatedly in sections 222A-222F of the principal Act). "Treatment" may be a better word, but even then, as a matter of policy, Parliament may wish to consider whether that should be an element of the offence when a student may choose to refuse treatment.

23. More importantly, the wording of the definition of serious harm also appears to cover cases where the breach results in the student being endangered but not physically or psychologically harmed. For example, a provider who allows student A to act so as to threaten

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4 Above n 2, at [4.4] p8.

5 Above n 3.

6 *R v Cameron* [2017] NZSC 89, [2018] 1 NZLR 161 at [63].

the safety or well-being of student B would probably commit an offence against proposed section 238S, even if student B is unaware of A's conduct, and is in fact not actually harmed by it. It appears to the Law Society that these types of circumstances do not involve "harm" as typically conceived.

24. The Law Society recommends the definition of serious harm is revisited.

Section 238T

Burden of proof

25. Proposed section 238T(1) provides that a penalty may be imposed where the court "is satisfied that the provider or signatory provider has committed a serious breach of the regulatory requirements" in the code.

26. As currently drafted, this provision does not expressly state the burden of proof required to establish the alleged contravention. The DDS states that the Bill does not reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding.[7] This is inconsistent with the use of the word "satisfied", which has been said by the Court of Appeal not to import any burden of proof (see *Hutton v R* [2018] NZCA 419 at [34]). It is desirable that there should be a clear statement within the section that the burden of proof lies on the party seeking the imposition of a penalty. It is also desirable to expressly state that the civil standard of proof applies (if that is Parliament's intention). This has been done in other statutes authorising proceedings for pecuniary penalties.[8]

What is a "serious breach"?

27. Proposed section 238T gives no indication of how a court is to determine what amounts to a "serious" breach of the code. The rest of the Bill also does not contain any direction on this question. The Law Society considers that some form of guidance to the courts should be included. This could involve, for example, that the court be directed to the degree of harm, if any, caused by the breach and/or the degree of risk of harm to which students were exposed by the breach, or the length of time that a known breach went unremedied.

No lack of fault or reasonable excuse defence to pecuniary penalty

28. The Law Society is concerned that section 238T as drafted does not contain the same "without reasonable excuse" wording as does the criminal offence under section 238S, or even a "lack of fault" defence. The current wording of section 238T may be read, on the standard canons of statutory interpretation, as preventing the person against whom such proceedings are taken from relying on a defence of reasonable excuse. That would seem unfair and unreasonable where such a severe penalty is possible. While a court might be ready to consider that some form of excuse defence or lack of fault defence should be recognised, obtaining an authoritative decision of an appellate court could take some time and considerable expense.

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7 Above n 4.

8 See for example Money Laundering and Countering Financing of Terrorism Act 2009 s 72(2); Biosecurity Act 1993, s 154(4).

29. The Law Society recommends that section 238T be amended to include the same "without reasonable excuse" wording as appears in section 238S. Or if there is an intention to bar any such defence, words should be added to make that intention clear.

30. Consideration could also be given to a wider statement of the matters on which a party may rely as a defence to proceedings for a pecuniary penalty (see for example section 154H(3) of the Biosecurity Act 1993).

What are "regulatory requirements"

31. It is unclear what "regulatory requirements" means in proposed section 238T. The use of the adjective "regulatory" suggests that some requirements in the code will be regulatory ones, and others not. If no such distinction is intended, then the adjective is unnecessary and confusing. The Law Society notes that the existing Education (Pastoral Care of International Students) Code of Practice 2016 does not specify whether requirements are regulatory or not.

Recommendation: fundamental reconsideration of proposed sections 238S and 238T

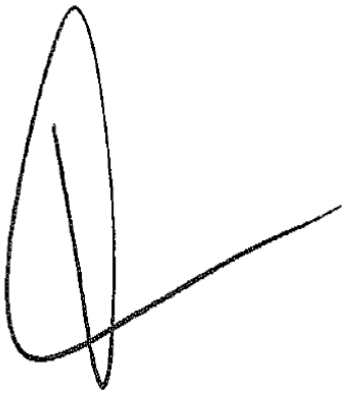
32. Given the issues outlined in this submission, the Law Society's overall recommendation is that proposed sections 238S and 238T be carefully reconsidered, both from a structural and drafting perspective.

33. One approach may be to redraft sections 238S and 238T to provide for two different criminal offences (with different penalties provided accordingly). For example:

    a. An offence of failure to comply with the code resulting in actual physical harm or mental distress to one or more students; and

    b. A lesser offence of failure to adhere to the code where in fact no actual physical harm or mental distress to a student occurs.

34. The Law Society invites the Committee to consider the issues outlined in this submission.



Andrew Logan
Vice President
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