



LEGISLATION DESIGN AND ADVISORY COMMITTEE

14 June 2019

Dr Parmjeet Parmar MP
Chair
Education and Workforce Committee
Parliament Buildings
Wellington

Submission on the Education (School Donations) Amendment Bill

Introduction

1. The Legislation Design and Advisory Committee (LDAC) was established by the Attorney-General in June 2015 to improve the quality and effectiveness of legislation. In particular, LDAC's terms of reference include these dual roles:
 - a. providing advice to departments in the initial stages of developing legislation when legislative proposals are being prepared; and
 - b. scrutinising and making representations to the appropriate body or person on aspects of bills that raise matters of particular public law concern.
2. The LDAC has been given a mandate by Cabinet to provide advice on legislative proposals and to review Bills against the *Legislation Guidelines* (2018 edition) (**Guidelines**). The Guidelines have been adopted by Cabinet as the government's key point of reference for assessing whether draft legislation is well designed and accords with fundamental legal and constitutional principles. Our focus is not on policy, but rather on legislative design and the consistency of a Bill with the principles contained in the Guidelines.
3. The Education (School Donations) Amendment Bill was not considered by LDAC prior to introduction. LDAC has therefore reviewed this Bill and wishes to make a submission on the Bill as introduced.
4. Our submission is directed at an apparent disconnect between the provisions of this Bill and the stated policy objective and, in particular, the lack of criteria to guide decision-making in this Bill.
5. We do not submit on the policy underlying the Bill.

Consistency with the policy objective

6. The Explanatory Note states that this Bill is intended to support “the implementation of a school donations scheme being established for decile 1 – 7 schools, whereby schools will be paid a nominal amount per student if the school agrees to comply with certain conditions upon choosing to participate in the scheme”. However, as drafted it appears that there may be a disconnect between the purpose as stated in the Explanatory Note and the drafting of this Bill.¹ In particular:

- The Bill does not provide the process for schools to choose to participate in the scheme.
- There are no criteria attached to the Minister’s decision whether to make a payment to a school.
- The amount to be paid is in the Minister’s discretion. The clause 79A(3) determination is not on a per student basis as outlined in the Explanatory Note. The Bill does not provide any criteria by which the Minister determines the amount (clause 79A(4) provides that in determining the amount of a discretionary grant, the Minister must take no account of the number of international students enrolled, suggesting that the grant is to be tied to student numbers but this is not stated in the Bill).
- The scheme is not limited to decile 1–7 schools.
- The mandatory consideration in clause 79B for the Minister to have regard to earlier non-compliances extends beyond the preceding financial year to any earlier financial year in which a school has failed to comply with any conditions of a grant. LDAC queries whether this is consistent with the intent and whether it is achievable.

Need for legislation

7. We note that legislation is not needed to empower the Government to create a grant scheme (other than to fall within an appropriation to spend given by Parliament). It is not clear to LDAC why this particular scheme is being provided for in legislation. It may be to provide a statutory basis for enforcement of the condition that voluntary contributions will not be sought.
8. The Guidelines provide that legislation should only be made when it is necessary and is the most appropriate means of achieving the policy objective. Unnecessary legislation should be avoided because it involves significant direct and indirect costs, and particular caution should be taken when the policy can be implemented equally well by non-legislative means.²

Scope of statutory powers

9. Having decided to use legislation to implement this grant scheme, the principles for good law set out in the Guidelines apply.

¹ Legislation Guidelines (2018 edition) chapter 2.2, *The provisions of proposed legislation should be consistent with the purpose and the policy objective that underlies it.*

² Legislation Guidelines (2018 edition) chapter 2.3, *Legislation should only be made when it is necessary and is the most appropriate means of achieving the policy objective.*

10. The Guidelines provide that legislation should not create a power that is wider than necessary to achieve the policy objective.³ There should be a clear statement of the power and how the power will be exercised.⁴ The Guidelines provide that where legislation creates a statutory power, the legislation should specify matters such as:
- The pre-requisite circumstances or procedural steps that must be taken before exercising the power.
 - The appropriate process for exercising the power.
 - Whether the exercise of the power requires the taking into account or exclusion of certain matters.
11. The decision-making powers granted to the Minister in this Bill do not appear to be tied to a purpose clause nor to any criteria that should guide the Minister’s decisions. This raises concerns not only that the Bill, as drafted, prescribes powers that are wider than necessary to achieve the policy objective but also that the Bill lacks criteria to ensure that a transparent, fair and defensible decision-making process is followed. We consider that criteria and/or a purpose clause should be considered for inclusion in the Bill to guide the following decisions:
- Whether a discretionary grant will be made to a school.
 - What the amount of the grant will be.
 - Whether and what “other conditions” in section 79A(5)(b) will be included.
 - How any lesser amount under section 79B in the case of non-compliance will be determined (other than consultation with the board).
12. It is clear from the Explanatory Note that the scheme is intended to be voluntary (“schools will be paid a nominal amount per student if the school agrees to comply with certain conditions upon choosing to participate in the scheme”). We consider it is important that the Bill expressly clarifies that schools have an ability to choose not to participate in the scheme given the consequence of removing the ability to seek voluntary contributions.
13. We note that clause 79A appears to be based on the wording used in current section 79 of the Education Act 1989. We do not consider that consistency with section 79 wording provides a justifiable basis for not incorporating criteria around the new clause 79A decision-making powers. There are key differences between the proposed discretionary grant and the supplementary grants under current section 79. In particular, a clause 79A discretionary grant replaces voluntary parent contributions in their entirety.

Recommendations

14. We **recommend** that the committee consider:
- (a) whether this Bill is necessary and the most appropriate means of achieving the policy objective.
 - (b) whether the scope of what is empowered by the Bill is consistent with the policy objective.

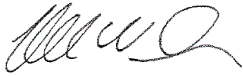
³ Legislation Guidelines (2018 edition) chapter 18.4

⁴ Legislation Guidelines (2018 edition) chapter 18.5

(c) including transparent criteria in the Bill to guide the Minister's decision making under new section 79A and 79B.

15. Thank you for considering our submission. We do not wish to be heard in person.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Karl Simpson', written in a cursive style.

Karl Simpson
Chair
Legislation Design and Advisory Committee