

Appendix 2 - Regulatory Impact Statement

Education Amendment Bill (No.2) 2012 including search and seizure in schools

Disclosure Statement

This regulatory impact statement has been reviewed by the Ministry of Education (the Ministry). It has been assessed as being adequate according to the objectives defined by Cabinet [Cabinet Office Circular CO (07) 3 refers].

It considers options to provide legislative powers to teachers for school search and seizure.

The recommended approach aligns with the commitments in the Government Statement on Regulation. It is considered necessary to ensure schools know what they can and can't do in relation to school search and seizure. It takes a reasonable approach that gives teachers sufficient powers to keep their students safe and well managed, while not breaching the rights of those students.

It has been assumed that the changes will result in little change occurring in how schools approach the types of situations that require search and seizure. This is due to an assumption that teachers currently instruct their students to reveal items that could disrupt the learning environment, or pose a risk to the safety of others. It is also assumed that this occurs without the use of force, and in most instances, without any random or blanket searching.

School search and seizure is a complex issue and consideration has not been given to all the possible associated issues. For example, the ability of teachers to search and seize electronic devices has been raised as an issue, and has been given due consideration. However, the possibility for how this technology might change or be used in five years time has not.

Frances Kelly
Group Manager
Schooling Policy

— — / — — / — —

Executive Summary

This paper seeks to introduce search and seizure provisions into the Education Act 1989 (the Act). This will provide schools, students and parents with clarity about why search and seizure should be occurring at schools, as well as who can do it, where it can occur, and how it should occur.

The approach taken has focused on the requirement for schools to provide safe learning environments that enable and encourage improved student achievement. As such, some intrusive and invasive methods of search and seizure have been prohibited (such as random or blanket searches, or the use of force).

The approach taken includes a provision giving the Secretary for Education (the Secretary) the power to make rules to regulate the practice and procedures to be followed before, during, or after any school based search or seizure.

Status Quo and Problem

Schools are required to provide students with a safe physical and emotional environment (as per the National Administration Guidelines). However, there are no specific search and seizure powers granted to schools through formal means.

In the past few years, increased media attention has been given to weapon or drug related incidences within schools. This brought to light a number of practices that some schools had been using in relation to search and seizure (for example, the use of drug dogs). Questions of the reasonableness (in relation to Section 21 of the New Zealand Bill of Rights Act 1990 (BORA)) of these practices were included in some of the media reports.

There was a call to the Ministry to provide guidance on the legality of search and seizure in schools, including specific guidance around the use of drug dogs and random or blanket searches.

In 2011, the Ministry released guidelines for search and seizure in schools in response to this call. These guidelines were received positively, but they did not provide the clarity that was wanted, as they related only to safety concerns and did not specifically identify what was allowed and not allowed.

Objectives

- To provide schools with search and seizure powers to contribute to safe learning environments which are both safe and conducive to positive student achievement.
- To balance the needs of teachers to effectively manage their students and provide safe learning environments with students' rights to be free from unreasonable search and seizure.
- To prohibit methods of search and seizure that are considered to be overly intrusive and invasive (for example, random or blanket searches and the use of force).

Preferred Option

The preferred option for addressing the call for clarity is to amend the Education Act 1989 (the Act) through the inclusion of search and seizure provisions. This will provide clarity not only to teachers and Principals but also students and their parents (or guardians), about why search and seizure should be occurring at schools, as well as who can do it, where it can occur, and how it should occur.

This option would place a number of provisions in the Act (including the power for the Secretary to make rules).

Legislation will cover:

- The purpose that must be satisfied for search and seizure to occur
- Thresholds that must be adhered to (including who, when and how)
- Consequences of search and seizure or failure to comply with a teacher's instructions
- Restrictions of a number of methods of search and seizure, including random or blanket search and seizure, the use of force or drug dogs, and the collection of bodily fluids by a school.
- A power for the Secretary to make rules that would regulate the practice and procedures to be followed before, during or after any school-based search or seizure.

Focusing on the reasons for search and seizure, rather than specific items (with certain thresholds), will ensure that search and seizure powers are used by schools to provide safe learning environments that enable and encourage improved student achievement.

The provisions will expressly prohibit certain methods of search and seizure. This includes random or blanket searches, using force, use of drug dogs, and the collection of bodily fluids by the school. These powers are not considered necessary for the effective management of students and are likely to be considered unreasonable in relation to section 21 of the BORA.

Including a provision giving the Secretary power to make rules allows for a quick response where new problems arise. As the rate at which technology is being improved (and our use of it is evolving) being able to respond quickly is important. This power will allow the Secretary to make rules regulating the practice and procedure (but not inconsistent with the Act) to be followed before, during, or after any school-based search or seizure.

This option is preferred as it will meet all the relevant policy objectives without incurring the risks associated with alternative options.

The following issues were raised during consultation and were considered as part of developing the option.

Student safety in relation to electronic devices – can students' electronic devices (such as phones or laptops) be searched and seized?

If a teacher can justify that searching an electronic device is required for safety purposes or to effectively manage students' learning then they may do so; however, they must have reasonable cause for doing so and any search or seizure must be performed in good faith.

Strength of powers – why aren't random or blanket searches included or the use of force?

These methods of search and seizure are likely to breach the BORA and are not considered necessary to effectively manage students or keep them (and others in a school) safe.

Age of students being searched – should students of all ages be included?

The age of students may impact upon how often powers are used, but all teachers need to be able to manage their students and keep them safe.

Lack of parental involvement – should parents be more heavily involved?

The provisions do not restrict parents from being involved in search and seizure. This decision will lie with individual schools.

Increased number of suspensions, stand-downs or exclusions or expulsions – will these provisions lead to an increase in the number of suspensions, stand-downs or exclusions or expulsions?

It is not considered likely that the introduction of these powers will result in an increase in the need for these disciplinary methods. The provisions state that consequences must be reasonable in the circumstances. Because of these two points the number of suspensions, stand-downs or exclusions or expulsions is not expected to rise with the introduction of search and seizure powers.

What students can do when they feel powers have been abused – what can students do when they feel a teacher has abused search and seizure powers?

If a student feels there has been an abuse of power, they can deal with the matter through the current process for making a complaint about a teacher. This includes raising it with the Principal or Board, or contacting the Ombudsmen or Human Rights Commission.

Schools' jurisdiction – should the powers extend further than school?

Teachers are being granted these powers in order to be able to manage their students and keep them safe in school or at school-related events (such as sports days). Situations that require the use of search and seizure powers outside of school should be handled by the Police.

Finding dangerous items or drugs – what should a school do if they find a dangerous item or drugs?

The management of items seized is considered an issue best left up to guidelines drafted in consultation with the New Zealand Police. This ensures that solutions can be achieved that are appropriate for each particular community. Communities with a small Police presence, for example, may require more time for the collection of items from schools than communities with a large Police presence.

Can the police still perform search and seizure in schools - can Police still search students in school and use drug dogs to do so?

Police can use any powers granted to them in relation to the Search and Surveillance Act 2012 and the Misuse of Drugs Act 1974. This can include searching students, staff or visitors within a school or at a school related event.

Alternative Options

Status quo

If no change were to occur we envisage that the majority of schools would be unlikely to raise an issue with the lack of any search and seizure powers. Most schools would continue to use practices they currently have in place to manage student behaviour, and respond to the National Administration Guideline (NAG) 5 requirement of needing to provide a safe physical and emotional environment for students and the NAG 3 requirement of being a good employer.

As a number of sector organisations have stated that the informal nature of the guidelines has not been effective in providing the level of clarity wanted, it is likely they would not be satisfied with the status quo continuing. Some schools would also be likely to use, or continue to use, search and seizure methods that the Ministry considers unreasonable.

Regulatory approach: stronger search and seizure controls for schools

A stricter regulatory approach could be taken that gave schools stronger powers to carry out search and seizure. This could include random/blanket searches, and/or levels of force when carrying out searches.

This approach would give teachers a greater level of power in managing their students. It would also give schools the ability to make students paranoid about carrying certain items (for example, drugs) due to the possibility that they could be searched at any time. The ability to create paranoia in students is not a power the Ministry considers conducive to a positive learning environment.

The inclusion of such provisions would require a greater level of prescription in legislation and would take further time to consider.

It would create a number of rights-based issues. It is likely such an approach would breach BORA, and would not provide teachers with more clarity in regards to search and seizure as it would simply change the point at which personal judgements need to be made (does that student have X item and 'what level of force should I use to search?', rather than, 'why do I need to search that student?').

As this approach would allow for more invasive search and seizure practice, a greater level of accountability would need to exist. This would likely result in increased costs (either to the Ministry or schools) as accountability systems would need to be established (such as formal record keeping).

Costs and benefits

For the majority of schools the amendments will simply embed current practice in a more formal manner. Most schools will continue to use practices they currently have in place with any necessary adjustments made to ensure policies are consistent with the legislation.

There are unlikely to be any significant added costs for schools. There may be a need for some schools to update their policies, or create specific search and seizure policies. There may also be a need for some schools to provide (or update) training for Principals and teachers regarding behaviour management.

Benefits are unlikely to be able to be measured in monetary terms. The provision of clarity will give Principals and teachers more confidence in managing their students. This will lead to more stable learning environments, which better enable and encourage student achievement.

Due to the inclusion of provisions restricting the use of a number of methods of search and seizure, students are even more unlikely (than currently) to be subjects of unreasonable search and seizure.

Implementation and Review

General information on the new requirements will be issued to schools when the amendments come into force. This will be done primarily through guidelines.

No formal review process is planned. It is proposed that ERO will ask Boards and Principals to attest that they are meeting their legal requirements in relation to search and seizure. Where appropriate, ERO will also alert the Ministry to any arising issues that become apparent over time. This will be included in the standard ERO review process.

Consultation

Discussions occurred with the Ministry of Justice, New Zealand Police and ERO. These discussions included consideration of the approach taken, the stricter regulatory approach, and a number of issues in relation to school search and seizure (outlined below).

Discussions also occurred with a number of rights-based organisations (and experts) and education sector agencies. These discussions centred on specific issues or questions in relation to school search and seizure (outlined below). The overall approach to school search and seizure was discussed at a number of these meetings however it was not the prominent focus.

The Privacy Commissioner, Human Rights Commissioner, the Ombudsmen, Children's Commissioner and Youth Law were consulted, as well as Paul Rishworth, an expert on the New Zealand Bill of Rights Act.

The Secondary Principals' Association of New Zealand (SPANZ), New Zealand School Trustees Association (NZSTA), and the New Zealand Post Primary Teachers' Association (PPTA) were all consulted. The New Zealand Principals Federation (NZPF) were unable to meet due to availability conflicts. The New Zealand Educational Institute (NZEI) did not respond to meeting requests.

Issues raised during consultation included:

- Student safety in relation to electronic mediums
- Search and seizure powers not going far enough (no use of force, random or blanket searches and drug dogs)
- Age of students being searched

- No parental involvement
- Increases in the number of suspensions, stand-downs or exclusions
- Pathways for students where they feel powers have been abused
- Schools' jurisdiction when using the powers
- Managing seized items and when to involve the Police
- Police powers in relation to school search and seizure