

Education and Training (Freedom of Expression) Amendment Bill

Member's Bill

Explanatory note

General policy statement

Freedom of expression and academic freedom are critical values for institutions of higher learning. Tertiary education institutions like universities are funded by taxpayers for the purpose of freely and openly inquiring into difficult ideas. Fostering the ability of students to discuss and debate such ideas is an essential part of their educational mission.

Indeed, tertiary education institutions are required by the Education and Training Act 2020 and the New Zealand Bill of Rights Act 1990 to uphold academic freedom and freedom of expression, but it is currently not a condition of funding that institutions adhere to these requirements.

There is, however, a growing trend of universities using health and safety obligations, in particular the risk to the mental wellbeing of students, as a pretext for 'deplatforming' speakers and cancelling events where they might be perceived as controversial or offensive. For example, Massey University's recently released policy on freedom of expression cites 'mental harm to students' as a reason that speakers may be 'deplatformed' or events cancelled.

The Education and Training (Freedom of Expression) Amendment Bill requires that tertiary education institutions protect freedom of expression, including by issuing codes of practice that set out the procedures students and staff should follow to uphold freedom of expression, and by ensuring that the requirements of codes of practice are met.

Tertiary education institutions will not be allowed to rely on their duty to eliminate or minimise potential risk of mental harm to students, staff, or visitors under the Health and Safety at Work Act 2015 as a reason not to comply with their duty to ensure freedom of speech.

Tertiary education institutions will be ineligible for funding, and may have funding suspended, revoked, or withdrawn, if they fail to comply with the requirement to protect freedom of expression.

Clause by clause analysis

Clause 1 is the Title clause.

Clause 2 is the commencement clause and provides for the Bill to come into force 3 months after Royal assent.

Clause 3 identifies the Education and Training Act 2020 as the Act being amended by the Bill (the **principal Act**)

Part 1

Amendments relating to code of practice

Clause 4 amends section 280 of the principal Act to insert a new function of councils of tertiary institutions in respect of codes of practice on free speech.

Clause 5 inserts *new sections 281A and 281B* into the principal Act. *New section 281A* requires tertiary institutions to protect freedom of speech within the law, including a requirement to have codes of practice that set out the procedures their staff and students should follow to uphold free speech. This new section is modelled on section 43 of the Education (No 2) Act 1986 (UK). *New section 281B* clarifies how the duty in new section 281A interacts with the duties on tertiary institutions under the Health and Safety at Work Act 2015.

Part 2

Amendments relating to funding

Clause 6 inserts a *new section 427A* into the principal Act to require the Tertiary Education Commission to refuse to process a proposed funding plan if it relates to an institution that is not complying with *new section 281A*.

Clause 7 amends section 428 to clarify that an institution to which *new section 281A* applies is not eligible for funding under other funding mechanisms unless it complies with the requirements of *new section 281A*.

Clause 8 amends Schedule 18 of the principal Act to allow the Commission to suspend, revoke, or withdraw funding under section 425 where an institution fails to comply with *new section 281A* (clause 16 of that Schedule) and to suspend, revoke, or withdraw funding granted under section 428 where an institution fails to comply with *new section 281A* (clause 26 of that Schedule).

Dr James McDowall

Education and Training (Freedom of Expression) Amendment Bill

Member's Bill

Contents

		Page
1	Title	2
2	Commencement	2
3	Principal Act	2
Part 1		
Amendments relating to code of practice		
4	Section 280 amended (Functions of councils)	2
5	New sections 281A and 281B and cross-heading inserted	2
<i>Freedom of speech</i>		
	281A Code of practice on free speech	2
	281B Duty to ensure freedom of speech and Health and Safety at Work Act 2015	3
Part 2		
Amendments relating to funding		
6	New section 427A inserted (Commission must decline to assess proposed plan in certain circumstances)	3
	427A TEC must decline to assess proposed plan in certain circumstances	3
7	Section 428 amended (Funding other than via plans)	3
8	Schedule 18 amended (TEC)	4

The Parliament of New Zealand enacts as follows:**1 Title**

This Act is the Education and Training (Freedom of Expression) Amendment Act **2021**.

2 Commencement

5

This Act comes into force on the day that is 3 months after the date on which it receives the Royal assent.

3 Principal Act

This Act amends the Education and Training Act 2020 (the **principal Act**).

Part 1

10

Amendments relating to code of practice**4 Section 280 amended (Functions of councils)**

After section 280(1)(d), insert:

(da) to prepare, issue and keep up to date the institution's code of practice on free speech (*see* **section 281A**):

15

5 New sections 281A and 281B and cross-heading inserted

After section 281, insert:

*Freedom of speech***281A Code of practice on free speech**

(1) An institution's council must take all reasonable steps to ensure that freedom of speech within the law is secured for staff and students of the institution and for visiting speakers.

20

(2) The duty imposed by **subsection (1)** above includes (in particular) the duty to ensure, so far as is reasonably practicable, that the use of any premises of the institution is not denied to any person on any ground connected with—

25

- (a) the beliefs or views of that person; or
- (b) the policy or objectives of that person.

(3) An institution's council must issue and keep up to date a code of practice on free speech setting out how the institution will meet the duty imposed by **subsection (1)**, including—

30

- (a) the procedures to be followed by staff and students of the institution in connection with the organisation—
 - (i) of meetings which are to be held on premises of the institution and which fall within any class of meeting specified in the code; and

- (ii) of other activities which are to take place on those premises and which fall within any class of activity specified in the code; and
 - (b) the conduct required of staff and students of the institution in connection with any such meeting or activity; and
 - (c) any other matter the council considers necessary and appropriate to meet the duty. 5
- (4) The Governor-General may, by Order in Council, in accordance with a recommendation of the Minister, make regulations prescribing additional requirements in respect of codes of practice on free speech.
- (5) The chief executive of an institution must take all reasonable steps (including, where appropriate, the initiation of disciplinary measures) to ensure that the requirements of the code of practice for that institution are met. 10
- 281B Duty to ensure freedom of speech and Health and Safety at Work Act 2015**
- (1) An institution's council must not rely on its duty to eliminate or minimise potential risk of mental harm to staff, students, or visitors under the Health and Safety at Work Act 2015 to avoid compliance with its duty to ensure freedom of speech under **section 281A(1)**. 15
- (2) To avoid doubt, a council's duty to ensure freedom of speech under **section 281A(1)** is a requirement to which regard may be had in determining whether a duty imposed on a person by or under the Health and Safety at Work Act 2015 is being or has been complied with, for the purposes of section 35 of that Act. 20

Part 2

Amendments relating to funding

- 6 New section 427A inserted (Commission must decline to assess proposed plan in certain circumstances)** 25
- After section 427, insert:
- 427A TEC must decline to assess proposed plan in certain circumstances**
- (1) TEC must decline to assess a proposed plan under section 425 if satisfied on reasonable grounds that the organisation that submitted the proposed plan is an institution to which **section 281A** applies and that organisation has not complied, or is not complying, with the requirements of that section. 30
- (2) TEC must give its reasons to the affected organisation if it declines to assess the organisation's proposed plan.
- 7 Section 428 amended (Funding other than via plans)** 35
- After section 428(2), insert:

**Education and Training (Freedom of Expression)
Amendment Bill**

Part 2 cl 8

- (3) If an organisation is an institution to which **section 281A** applies, that organisation is not able to be funded under this section unless it complies with the requirements of **section 281A**.

8 Schedule 18 amended (TEC)

- (1) In Schedule 18, after clause 16(1)(a), insert: 5
- (aa) an organisation that is an institution to which **section 281A** applies has not complied, or is not complying, with the requirements of that section; or
- (2) In Schedule 18, after clause 26(1)(a), insert: 10
- (aa) has not complied, or is not complying, with the requirements of **section 281A** (in the case of the organisation that is an institution to which that section applies); or