
NZEI TE RIU ROA SUBMISSION

to the

NEW ZEALAND TEACHERS COUNCIL

on a proposed amendment to the

**NEW ZEALAND TEACHERS COUNCIL
(MAKING REPORTS AND
COMPLAINTS) RULES 2004**

March 2008

Profile of NZEI TE Riu Roa

1. NZEI Te Riu Roa is the professional and industrial organisation that represents the interests and issues of its 47,000 members. Our members include teachers in the early childhood and primary sectors, support staff in the primary, intermediate, and secondary sectors, advisers employed by the Colleges of Education, and Special Education staff employed by the Ministry of Education.
2. The main objective of NZEI Te Riu Roa is to advance the cause of education generally while upholding and maintaining the just claims of its members individually and collectively.
3. NZEI Te Riu Roa is one of the largest professional bodies in the country, and has a long history of playing a constructive role in the education sector. It recognises the importance of professional discipline, and supports the appropriate regulation of teachers' conduct.

Executive Summary

4. NZEI views the proposed amendment to the *New Zealand Teachers Council (Making Reports and Complaints) Rules 2004* as objectionable and unnecessary. NZEI believes that the Council should not be seeking to regulate every aspect of teachers' lives.
5. If the New Zealand Teachers Council is intent on inserting any "bringing discredit to the profession" into the definition of "serious misconduct", NZEI urges the Council to explicitly limit the amendment to conduct occurring in the professional context or otherwise arising out of teachers' professional responsibilities.

Commentary

6. The New Zealand Teachers Council is proposing to add a new paragraph to R 9(1) *New Zealand Teachers Council (Making Reports and Complaints) Rules 2004*. The proposed amendment would have the effect of broadening the existing definition of "serious misconduct" as that term is used in both the *Education Act 1989* and the Councils' rules about its disciplinary processes.
7. NZEI views this proposal as objectionable and unnecessary.
8. Teaching is already the single most intensely regulated profession in the country. As the Council's members should be all too aware, it is a demanding and highly "public" occupation. NZEI strongly believes that, accordingly, teachers must have some rights to a private life, in which they are free to do as they wish, subject of course to the general laws governing all citizens. NZEI further believes that, as their professional body, the Council should be

protecting those rights. Instead, the Council appears to be arrogating to itself the right to govern every aspect of teachers' lives.

9. It is unclear why the Council has proposed this amendment.
10. The existing definition of "serious misconduct" already seems to capture the most serious forms of "private" behaviour by teachers that the public might legitimately be concerned about. It includes any serious conviction; any abuse, neglect or ill-treatment of children or animals; theft or fraud; involvement with controlled drugs; and having anything to do with the vilest kinds of pornography.
11. The Council asserts that cases coming before its disciplinary bodies have "revealed gaps in the present criteria". However the Council has not provided any examples to support that assertion. If the existing list is glaringly deficient in any way, then it should be a simple matter for the Council to add further specific elements.
12. While it may be superficially attractive, a generic "catch-all" addition, such as proposed, is not an appropriate way to seek to regulate teachers' behaviour. It is a fundamental jurisprudential principle that punitive provisions should be precise. If certain actions are to be punishable, then basic justice demands that those actions are clearly defined, so that everyone can be certain in advance. The proposed provision leaves teachers attempting to second-guess whether or not they might be "crossing the line", and what forms of behaviour are actually proscribed.
13. Furthermore, the Councils' assertion ignores the wider regime that already exists within the Act and the Council's own Rules. The Complaints Assessment Committee must charge a teacher with "serious misconduct", if it appears that grounds to do so exist, and it is appropriate in the circumstances to do so: s. 139AT(4). However, it may also "at any time", refer a matter to the Disciplinary Tribunal for a hearing: s 139AT(3). The Disciplinary Tribunal's various powers are equally exercisable in either case: s 139AW(1).
14. The clear legislative intent behind Part 10A of the Act as a whole is that the Complaints Assessment Committee will *in general* deal with matters of teacher misconduct that do not amount to "serious misconduct", but the option is always there for such matters to be referred to the Tribunal. In such cases, the Tribunal is to assess whether such matters adversely affect student welfare, or reflect adversely on a teacher's fitness to be a teacher: *NZTDT 2007/6*. The Council's current approach to assessing "fitness" is well-settled, and, while any Tribunal hearing such a case must come to its own conclusion, NZEI expects that it would be closely guided by that approach, and would apply the sanctions available to it accordingly.
15. A robust and well-understood avenue is therefore available if there **is** a need to deal with conduct matters that both arise from a teacher's private life and that fall outside the current definition of "serious misconduct".

16. The Council goes on to assert that this proposal simply reflects provisions applicable to other professions. With respect, NZEI rejects this assertion. The professions most similar to teaching are the various professions operating in the wider health sector, and most (if not all) of them are now covered by the *Health Practitioners Competence Assurance Act 2003*. Annex A of this submission contains a more detailed analysis of the grounds on which a health practitioner can be disciplined, but in short, one of the grounds is conduct that has (or was likely to) bring discredit to the profession *where that conduct arose in the professional context or was otherwise connected to the practitioner's professional responsibilities*.
17. While NZEI remains of the view that this amendment is unnecessary, the *HPCAA* approach is relatively sensible and robust. It is tolerably easy to see how the profession may be discredited by misconduct that arises in a professional context. It is much more difficult to see a real connection between a teacher's private actions, and damage to the profession's reputation.
18. If the Council is intent on pursuing this proposal any further, NZEI strongly urges it to limit the scope of any provision in a similar fashion.
19. I certify that this submission reflects the views of NZEI Te Riu Roa and that I am authorised to make this submission on its behalf.

Frances Nelson
National President
Te Manukura

March 2008

Annex A: Relevant Provisions of the *Health Practitioners Competence Assurance Act 2003*

Section 100(1)(b) of the *Health Practitioners Competence Assurance Act 2003* provides that health practitioners (in the 20 or so professions covered¹), can be disciplined *inter alia* on the grounds that

“... *the practitioner has been guilty of professional misconduct because of any act or omission that ... has brought or was likely to bring discredit to the profession ...*”

Bringing “discredit to the profession” has been defined as harming the profession’s reputation: Gendall J in *Moore v Nursing Council of New Zealand* (unreported, High Court, AP 100/00, 18 December 2000).

However it is clear that it is not every action of a health professional is open to scrutiny and discipline. “Discrediting the profession” is explicitly a form of “professional misconduct”, which is a technical legal term of long standing in the medico-legal environment, and was previously found in particular in the *Nurses Act 1977* (s 42(1)), and the *Medical Practitioners Act 1968* (Part 2). The High Court had this to say about “professional misconduct”:

“... *“professional misconduct is not just any variety of misconduct by a person who happens to be a professional. Basically, it is misconduct “as part of the conduct of his profession...” (sic)*
(*Cullen v Preliminary Proceedings Committee* [1994] 3 NZLR 801, 807).

The Court in *Moore* applied that case, and the nurse was disciplined for accepting substantial sums of money from a frail and elderly couple. She was held to have brought discredit to the profession, not because she took advantage of the couple, but because she had breached **on-going professional duties** owed to former patients.

Section 100(1) has not yet been considered by the Courts. However, following the standard canons of statutory interpretation, Parliament was aware of the technical definition of “professional misconduct”, and, in deliberately using the phrase in s 100(1)(b), must have intended to limit its scope accordingly. Therefore it intended that the provision only encompass conduct that arose in the professional context or was otherwise connected to the practitioner’s professional responsibilities.

¹ Including chiropractors, dietitians, dentists and related professions, doctors, medical laboratory technicians, midwives, nurses, occupational therapists, optometrists, osteopaths, pharmacists, physiotherapists, podiatrists, psychologists and radiographers.