

[Responsible member]

Real Estate Agents (Political Neutrality) Amendment Bill 2024

[Government] Bill

[Bill number]

Explanatory note

This Bill is a consequence of the Real Estate Authority's misuse of its powers to regulate the real estate agency industry. The Real Estate Agents Act 2008 confers powers to set and enforce industry competency and honesty standards. They require agents, managers and salespersons to hold licences, to promote and protect the interests of parties in real estate transactions.

The Authority develops practice rules and sets professional standards and oversees a disciplinary regime. It recommends regulations establishing qualifications for obtaining licences and continuing to hold them.

The Authority has required enrolment in courses of 'cultural' continuing education that have no solid connection with ensuring that agents know what is required to be competent and ethical for consumers of real estate services. Instead requirements have been specified that promote particular and politically partisan viewpoints on social and political issues on which there is a substantial division among New Zealanders. The Authority and the Registrar appear to have considered that they were not obliged to be politically impartial. They have insisted that agents take a course of study with no genuine relationship to the interests of consumers in effective and ethical agency services, including agents who have made it known to the Authority that they found offensive some of the religious and political alignment of the course material. .

This Bill also recognizes that a range of professional associations administering licensing regimes have recently shown willingness to express and to promote institutional policies or statements of policy on behalf of their professions, on issues that have little or no proven relevance to the interests of consumers in professional competence and honesty. They are frequently matters on which the New Zealand Bill of Rights Act obliges the state to respect freedom of belief, and opinion, including freedom of religion. They may also be issues, including political opinion, race and sexual orientation which are identified in the Human Rights Act as prohibited grounds of discrimination. The Bill accordingly establishes for the real estate regulators a general duty to maintain institutional viewpoint neutrality on contentious issues. The purpose is to protect licensees against having the resources and mana of their state-empowered industry regulator applied against them and their beliefs and preferences and freedoms, in spheres which the state must respect as matters for personal belief, opinion, practice and expression.

That requirement for viewpoint neutrality on contentious issues is qualified to the extent that neutrality would impede judgment on matters genuinely related to consumer interests that

must be protected by licensing and disciplinary processes. But the regulators must facilitate alternative ways to protect consumers to limit departures from upholding viewpoint neutrality. Those alternatives include enabling licensees to opt out of courses or qualifications or parts of them to which they object on a conscience basis, and informing consumers if a licensee is not qualified in a particular sphere where most are.

This Bill makes it clear to the real estate service industry that professional regulatory powers are to be exercised impartially to promote professional integrity and competence. The relevant bodies established under the Real Estate Agents Act must avoid, so far as is feasible, the appearance or fact of partisanship on contentious political social and cultural issues.

Clause by clause analysis

Clause 1 is the Title clause

Clause 2 relates to commencement. The Bill, if enacted, comes into force on the day after the date of Royal assent.

Clause 3 identifies the Act being amended, as the Real Estate Agents Act 2008.

Clause 4 adds definitions of **contentious issue** and **neutrality** to section 4, the interpretation section of the Principal Act.

An issue is not contentious as defined unless it causes hostility among groups or communities of New Zealanders. That is to limit claims of breach of neutrality to serious issues of conscience, to reduce the risk of opportunistic claims that the Authority is not neutral if it applies consensus values in upholding professional standards. For example not all people take the same view on the requirements for courtesy. Some do not consider it wrong to favour friends or whanau ahead of strangers, and real estate clients may be ‘strangers’ in this context. Applied consensus morality is inevitably intrinsic to professional standard setting.

The definition of neutrality does not require avoidance of all involvement in a contentious issue. The requirement is that involvement must be neutral or non-partisan.

Clause 5 This clause adds new subsections to s 12. Section 12 prescribes the Authority’s functions. The new subsections add the obligation of viewpoint neutrality on contentious issues. It is not an absolute requirement. An Authority tasked with upholding standards of conduct must sometimes unavoidably apply majority consensus views which might conflict with minority preferences.

The new subs (4) contains exceptions complementary to the definitions in clause 5 so that neutrality requirements cannot not prevail over requirements for honesty, and merit decision-making on matters of competence.

New subs (5) extends the Authority’s obligations of neutrality to the Registrar and Complaints Assessment Committees which help enforce the licensing regime. The Bill does not affect the right of the Real Estate Institute to take positions on contentious issues that are not neutral.

Clause 6 inserts new sections 19A and 19B in the Principal Act.

Section 19A(1) contains an expanded definition of qualifications to encompass practice rules, provisions of a code of professional conduct and client care (s14(2) and requirements of continuing education (s15(1)(b)).

The peculiarities of drafting in s 14(2) of the Principal Act may leave uncertainty about its relationship to the regulations: In particular, “mandatory qualifications to obtain or hold a licence”, in subpara (i) of the definition n of “practice rule” may be “prescribed qualifications” referred to in s36(1)(d) & (2)(d), s54(c) (cf para (e)) and s156(1)(b). The definition in subs (1) is intended to be comprehensive and include professional standards referred to in s12(1)(i).

The other subsections in **s 19A** detail the way in which viewpoint neutrality affects the design and implementation of practice rules and standards, and the requirements for qualifications. It requires the Authority to try to minimise the extent to which a standard or rule or requirement will impinge on a licensee’s opinions and conduct in matters of contentious belief.

Section 19B requires the Authority to allow a licensee to opt out of requirements (courses, qualifications and practices) that involve or would reasonably be seen to indicate an alignment by the licensee on a contentious issue, with which the licensee disagrees.

The Authority may mitigate any consequent risk to consumers from the licensee’s opting out by requirements for informing consumers of that opt-out and its significance to them.

Clause 7 amends s 156 by adding provisions requiring application of the neutrality lens to the making of regulations under the Act, to secure consistency with the obligations governing practice rules, standards and qualifications

Clause 8 adds a new **section 110B** to confirm a right of action in court for breach of the duty or viewpoint neutrality. It goes further to address the likely inequality in resources between a person who has suffered from a breach, and the Authority or another body or person in breach. A person affected by the breach can seek exemplary damages, and recover their full costs of having to go to court to uphold their rights in respect of the breach (instead of the normal court award on success, that is commonly about one third of the actual cost). Further, the affected person may recover their actual legal costs even if the person in breach withdraws opposition before trial.

Contents

	Explanatory note	
1	Title	4
2	Commencement	4
3	Principal Act	4
4	Section 4 (Interpretation) amended	4
5	Section 12 amended	5
6	New sections 19A and 19B inserted	
7	New subsections added to s 156	
8	New section 110B inserted	

The Parliament of New Zealand enacts as follows—

1 Title

This Act is the Real Estate Agents (Political Neutrality) Amendment Act 2024.

2 Commencement

This Act comes into force on the day after the date on which it receives the Royal Assent.

3 Principal Act

This Act amends the Real Estate Agents Act 2008 (the Principal Act).

4 Section 4 amended (adding definitions of ‘contentious issue’ and ‘viewpoint neutrality’)

In **section 4**, insert in their appropriate alphabetical order:

contentious issue is a political, ideological, religious, moral or cultural issue on which there are differences of opinion or belief that are or may be expressed as hostility between communities or groups of New Zealanders, including views on gender identities, sexual preferences, race relations and the role of Te Tiriti, but does not include;

- (i) an issue of fact
- (ii) the paramountcy of honesty, in the provision of professional services, to both consumers and to other professionals
- (iii) the prevention of abuses of privilege or power for advantage or benefit of any person who, or cause that, is not intended by this Act to be a beneficiary of the power or privilege
- (iv) the priority of competence in matters pertinent to consumers, having regard to competition within the industry, in the performance of the functions of the Authority and the Registrar.

neutrality means the eschewing of direct or indirect endorsement, promotion or support of or opposition to perspectives or positions on a contentious issue including avoiding the appearance of any such alignment, in accordance with and subject to section 19A, but neutrality does not prevent:

- (i) involvement in research of factual questions if the research is not prompted by partisan purposes and adheres to rigorous standards;
- (v) publication of research results in a way that is consistent with intellectual integrity.

5 Section 12 amended (Real Estate Agents Authority must be politically neutral)

After section 12(2), insert:

- (3) The Authority must, so far as it practicable, be neutral on contentious issues in the performance of its functions and in serving the purpose set out in section 3.
- (4) Where the Authority is unavoidably drawn into involvement in or consideration of contentious issues, it:
 - (a) must make take care to avoid any action that is inconsistent with the rights set out in sections 13, 14 and 15 of the NZ Bill of Rights Act 1990; and
 - (b) maintain neutrality in its dealing with contentious issues, for example by fairly acknowledging the range of perspectives likely to be found among agents; and
 - (c) must minimize grounds for grievance by agents that their resources are being applied for partisan purposes against their opinions or beliefs, without prejudicing the proper performance of its functions; and
 - (d) may, if it considers that the purpose of this Act makes it desirable for providers of real estate services to participate in public discussion on contentious issues, provide facts to help equip agents and/or the REINZ for that participation, but otherwise minimize the Authority's participation.
- (5) The obligation of neutrality in this section extends as the context permits, to –
 - (a) Complaints Assessment Committees appointed by the Authority as if references to the Authority are references to each Committee; and
 - (b) members, employees or contractors or agents of the Authority and the persons and bodies referred to in paragraph (a), in relation to their statements or other representations which are on behalf of or appear to express the views of such persons or bodies.

6 New sections 19A and 19B inserted (Real Estate practice rules etc must be neutral)

After section 19, insert:

19A Neutrality in practice rules, qualifications and professional standards

- (1) In this section and in **section 19B**:
 - (a) references to the Authority extend as the context permits to the Registrar and to each Complaints Assessment Committee in relation to their respective roles in applying practice rules
 - (b) **agent** includes an applicant for a licence as the context permits.
 - (c) **involvement** in a contentious issue includes participation in continuing education that studies a contentious issue.
 - (d) **practice rule** includes -
 - (i) a mandatory qualification to obtain or to hold a licence and the requirements for that qualification or licence;

- (ii) any criteria applied to determine whether a person is fit and proper to hold a licence
- (iii) a rule of or under a code of professional conduct and client care;
- (iv) a rule for the undertaking of continuing education
- (v) a requirement of a professional standard; where

qualification includes an element of the qualification or of the continuing education or other requirement (including practical experience) needed to obtain or to maintain the qualification.

- (2) This section –
 - (a) applies to the performance by the Authority of its functions of developing and applying practice rules; but
 - (b) does not limit what is required of the Authority under section 12(3) and 12(4).
- (3) The Authority must so far as is practicable ensure that practice rules –
 - (a) are neutral on contentious issues; and
 - (b) do not require involvement by an agent in contentious issues against the will of the agent.
- (4) If a practice rule might require involvement by an agent in a contentious issue without the agent’s consent, the Authority must in good faith seek to limit that involvement to the minimum that is consistent with being satisfied that the agent:
 - (a) is of good character and will deliver professional services to consumers, and deal with other professionals in the course of those services, honestly and in accordance with any applicable legal obligations; and
 - (b) will bring to those professional services technical competence and practical efficiency; and

has any special expertise or qualification or experience that is indicated by the nature of the licence or other representation the agent is authorized to make by the licence or the Registrar.
- (5) In applying any practice rule the Authority must so far as is practicable:
 - (a) maintain neutrality on contentious issues; and
 - (b) not discriminate on the basis of an agent’s opinion on a contentious issue except as necessary to be satisfied about the matters set out in subsection (4).
- (6) When determining how much involvement in a contentious issue may be required of an agent by a practice rule, the Authority must take into account the costs to consumers of restrictions on competitive entry to the profession.
- (7) The Authority must, so far as is practicable, ensure that a practice rule that necessarily involves an agent in a contentious issue:
 - (a) is designed to minimise circumstances in which the agent reasonably:
 - (i) feels obliged to appear to assent to or to give credence to contentious beliefs that they do not hold; or
 - (ii) considers that the agent’s involvement unavoidably appears to indicate support or opposition to a position on the contentious issue contrary to the agent’s belief; or

- (iii) considers that the agent's involvement will indicate support or opposition to people who hold a contentious opinion, contrary to the agent's view of those people; and
- (b) is presented in a way that displays the neutrality of the Authority on the contentious issue.

19B Opt-out arrangements to respect viewpoint neutrality

(1) A practice rule must enable an agent to opt out of adherence to the practice rule if the agent reasonably believes that adherence to the practice rule will give rise to a circumstance referred to in **section 19A(7)(a)** that the agent cannot reasonably avoid by other means.

(2) The opt-out provision or arrangement must enable the agent to avoid without undue cost or inconvenience, the adverse effects referred to in that provision, of the circumstance and the practice rule.

(3) An agent who intends to opt out of adherence to a practice rule must notify the Authority in writing of their reasons and intention.

(4) On receiving a notification, the Authority must allow the agent to opt out of adherence to the practice rule –

- (a) if the Authority is satisfied that the agent has the reasonable belief described in subsection (1);
- (b) at least to the extent necessary to achieve the purpose described in subsection (2).

(4) The Authority must notify the agent of its decision under subsection (4) including:

- (a) its reasons;
- (b) if the opt-out is allowed, any terms or conditions of the opt-out that are not standard under the applicable practice rule;
- (c) if the opt-out is not allowed, advising of any appeal or review procedures.

(5) If the Authority is satisfied that the agent opting out under this section might pose a risk to consumers, among the terms or conditions that the Authority may impose are requirements for informing consumers of that opt-out and its significance to consumers. The Authority may publish such information at the expense of the agent.

7 New subsections (1A) and (1B) inserted in s 156 (requiring that regulations be consistent with neutrality obligations)

Insert into section 156 new subsections (1A) and (1B) as follows

(1A) The Minister shall review any regulations extant under subsection (1) at the commencement of this subsection to ascertain whether they respect or are conducive to maintaining the neutrality on contentious issues required by sections 12A and 19A, and within one year of that commencement recommend to the Governor-General any amendments, or replacement or repeal as the case may require, to secure consistency with those obligations of neutrality.

(1B) Any regulations made under subsection (1) that might present a risk of being inconsistent with the neutrality on contentious issues required by sections 12A and 19A. may be made only on the recommendation of the Minister given in accordance with subsection (1C).

(1C) The Minister must not make a recommendation under subsection (1B) unless the Minister is satisfied that the proposed regulation will not create or exacerbate risks to the neutrality required by sections 12A and 19A of this Act.

8 New section 110B inserted after section 110 A to provide for particular reimbursement of costs

110B Cost reimbursement for breach of duty of neutrality

(1) A person may bring civil proceedings against any person or body subject to the duties to maintain neutrality on contentious issues in conformity with the New Zealand Bill of Rights Act and reflected specifically in sections 12A and 19A of this Act to recover loss caused in whole or in part by a breach of any of those duties.

(2) In such proceedings under this Act a Court may make orders:

- (a) for the recovery of costs or expenditure in preparation for any application or defence occasioned as a result in whole or in part of a breach of such a duty;
- (b) for exemplary damages against the person in breach in such sum as the Court thinks fit; and
- (c) for payment by the person in breach on a solicitor client basis of the costs the claimant reasonably incurred in obtaining advice on the application of the pertinent provisions of this Act and in commencing proceedings notwithstanding withdrawal of opposition by person alleged to be in breach at any time before judgment.