



Briefing Note: Existing offences that are comparative to the proposed fees free offence provision

To:	Hon Chris Hipkins, Minister of Education		
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Messaging seen by Communications team:	N/A		

Summary

- At the Cabinet Legislation Committee meeting on Wednesday 25 January, the Committee asked for further information on what offences the Ministry of Justice compared the fees free offence provision to in making their recommendation for a \$5000 fine, rather than a \$10,000 fine. This note provides you with that information, to provide to Committee Members.



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Key messages

1. The Ministry of Education initially proposed a fine of \$10,000 for the new offence provision, which was based in part on an analysis of the penalties for the similar offences in the Education Act 1989. For example, under sections 292 A and C of the Act, a person commits an offence who:
 - falsely represents, expressly or by implication, that a programme is an approved programme; or that a training scheme is an approved training scheme; or that a body is a registered establishment,
 - knowingly or recklessly issues an award that falsely represents, expressly or by implication, that a person has achieved a qualification listed on the Qualifications Framework.
2. Both offences are liable on conviction to a fine not exceeding \$10,000.
3. However, these offences typically affect tertiary education providers who are typically experienced business owners, who have a relatively greater ability to pay a significant fine and are less likely to be deterred by a small fine.
4. In this case, Justice suggested that the appropriate penalty for an individual student (having regard to the likely seriousness of the offence in its worst cases and degree of culpability required to be proved by the prosecution) is a fine of up to \$5,000.
5. Maximum penalties would normally be proposed with reference to comparable offences in the relevant statute. The offence in section 307AA of the Education Act, provides an example, as it concerns false information knowingly provided by a student for the purpose of claiming a student allowance or a loan and is punishable by up to \$2,000.
6. However, there are a few distinguishing features of the new offence proposed in the Bill that need to be considered:
 - a. On one hand, students may have fairly large financial motives for committing the offence (potentially up to \$12,000 free tuition for up to three years once the policy is fully implemented).
 - b. On the other hand, large financial penalties are unlikely to be necessary to deter students on top of the threat of criminal conviction and the fact that the tuition fees would be recovered from the student.
 - c. Thirdly, Justice is not aware of any offences involving the provision of false or misleading information that do not include a degree of knowledge as an element of the offence to be proved by the prosecution. This offence has been constructed in a way that reduces the burden on the prosecution to establish the *mens rea* (guilty mind) of the defendant. It only requires proof that the false representation was made in the application, unless the defendant can raise evidence of a “reasonable excuse” that the prosecution would need to rebut (to the usual criminal standard of beyond reasonable doubt). This made Justice particularly cautious about setting a maximum penalty in excess of \$5,000.