



Briefing Note: Response to Regulations Review Committee letter about Education (Pastoral Care of Domestic Tertiary Students) Interim Code of Practice 2019

To:	Hon Chris Hipkins, Minister of Education		
Date:	16 April 2020	Priority:	Medium
Security Level:	In Confidence	METIS No:	1224331
Drafter:	Colleen Slagter	DDI:	9(2)(a)
Key Contact:	Julie Keenan	DDI:	
Messaging seen by Communications team:	No	Round Robin:	No

Purpose of paper

The purpose of this paper is for you to:


Sign the response to Alastair Scott, Regulations Review Committee, who wrote to you, on 17 March 2020, about issues that the Committee identified with the Education (Pastoral Care of Domestic Tertiary Students) Interim Code of Practice 2019

Summary

- On 17 March 2020, Alastair Scott from the Regulations Review Committee wrote to you about issues that the Committee has identified with the Education (Pastoral Care of Domestic Tertiary Students) Interim Code of Practice 2019.
- Officials have attached a draft response for your consideration.
- The draft response signals that there is sufficient mandate for the Interim Code and no legislative changes are needed.
- The Committee asked you to respond by 24 April 2020

Proactive release

Agree that this Briefing will be proactively released.



Julie Keenan
Policy Director
Graduate Achievement, Vocations and Careers

16/04/2020

☒ **Agree** ☐ **Disagree**



Hon Chris Hipkins
Minister of Education

23/6/2020

Proactively Released

Background

1. On 17 March 2020, Alastair Scott from the Regulations Review Committee wrote to you about the Committee's concerns with the Education (Pastoral Care of Domestic Tertiary Students) Interim Code of Practice 2019 (Interim Code). His letter requested you respond by 24 April 2020.
2. Under Standing Order 318(1), all regulations are subject to examination by the Regulations Review Committee. On 4 March 2020, as part of its usual scrutiny, the Committee considered the Interim Code.
3. The Committee's concerns are that:
 - a. some matters in Part 4 of the Interim Code might be better placed in the Education Act 1989
 - b. there needs to be clarity about whether the Interim Code allows the sharing of personal information.

No legislative change is needed

4. Officials consider that there is sufficient legislative mandate for the Interim Code and that no legislative changes are needed: the draft response to the Committee provides a detailed response to the specific provisions raised. Our legal and policy teams working on the Education and Training Bill have reviewed the response and are comfortable with it.
5. The Interim Code is not intended to create new powers and functions for the code administrator. Most of the identified sections reflect provisions that are already in primary legislation and are for clarification and completeness rather than to expand the role or duties of the code administrator. The exception is the requirement to take reasonable steps to publicise the code, which is broader than the legislative requirements and is intended to be helpful to tertiary education providers and students.
6. Officials consider that the powers of the code administrator in the Interim Code are consistent with the duties and powers set out in the Act or as otherwise authorised by other primary legislation such as the Privacy Act 1993.
7. The sections in Part 4 of the Interim Code result from section 238H(3)(b)(i) of the Act, which requires the code administrator to monitor and investigate the extent to which providers comply with a code following a process prescribed by a code. Without information about the process in the Interim Code, the code administrator would not be able to monitor and investigate the extent to which providers comply with the code. The Minister would also lack the information required to make judgements about the performance of the code administrator.
8. The provisions are the same as those setting out code administrator functions and obligations in the Education (Pastoral Care of International Students) Code of Practice 2016.

Next Steps

9. We recommend you sign or amend the attached response to the Regulations Review Committee.

Annexes

Annex 1: draft response to Regulations Review

Annex 2: Chair of Regulations Review Committee letter of 17 March 2020

Alastair Scott
Chairperson
Regulations Review Committee
Parliamentary Buildings
Wellington

Dear Mr Scott

Thank you for your comments regarding the Education (Pastoral Care of Domestic Tertiary Students) Interim Code of Practice 2019 (the Interim Code). You have identified a number of sections in the Interim Code that you consider are more appropriate for primary legislation and have suggested that Part 4 of the Interim Code should be amended to:

- ensure that it does not contain matters about code administrators that are more appropriate for Parliamentary enactment under the Act; and
- make it clear that section 34 of the Interim Code is not purporting to authorise the sharing of personal information.

Interim Code

The Interim Code is issued under Schedule 1, Part 9 of the Education Act 1989 (the Act) and is to be treated as a code issued under the Act (section 26(1) of Schedule 1, Part 9 of the Act refers). As such, the provisions in sections 238G-238L of the Act apply to the Interim Code.

Summary of response

The sections in Part 4 of the Interim Code result from section 238H(3)(b)(i) of the Act. This section requires the code administrator to monitor and investigate the extent to which providers comply with a code following a process prescribed by a code. Without information about the process in the Interim Code, the code administrator would not be able to monitor and investigate the extent to which providers comply with the code. I would also lack the information required to make judgements about the performance of the code administrator.

The provisions are the same as those setting out code administrator functions and obligations in the Education (Pastoral Care of International Students) Code of Practice 2016 (international student Code).

If we moved the sections from the Interim Code, for consistency we would also need to move the sections in the international student Code. The international student Code provisions have been in place since 2016.

Additionally, I note that the Interim Code is not intended to create new powers and functions for the code administrator. As you have noted, such provisions would more appropriately sit in primary legislation. Most of the identified sections reflect provisions that are already in primary legislation and are for clarification and completeness rather than to expand the role or duties of the code administrator. The requirement to publicise the code is broader than the legislative requirement. To that extent, I am satisfied that the powers of the code administrator in the Interim Code are consistent with the duties and powers set out in the Act or as otherwise authorised by other primary legislation such as the Privacy Act 1993.

For these reasons, I consider that it is appropriate to retain the sections you have identified in the Interim Code. I have addressed your concerns in relation to each specific section below.

Response to the issues raised about specific sections of the Interim Code

Section 29(1) – A requirement to include in its annual report a report on its activities in administering the code

It is important for a code administrator to include in its annual report a report on its activities in administering the code to ensure that there is adequate transparency and accountability for those activities. I consider that this requirement is necessary so that I can make an informed assessment about the effectiveness of the code administrator's operational responsibilities for administering the Interim Code.

In the case of the New Zealand Qualifications Authority (or other Crown entity appointed as code administrator), I consider that the requirement in section 29(1) of the Interim Code is authorised by the general reporting obligation of Crown entities in section 151(1)(k) and section 151(2) of the Crown Entities Act 2004.

Section 151(1)(k) of the Crown Entities Act 2004 provides that the annual report of a Crown entity must contain information on -

“any matters that relate to or affect the entity's operations that the entity is otherwise required, or has undertaken, or wishes to report on in its annual report.”

Section 151(2) of the Crown Entities Act 2004 provides that a Crown entity (in this case New Zealand Qualifications Authority) must in its annual report –

“...provide the information that is necessary to enable an informed assessment to be made of the entity's operations and performance for that financial year, including an assessment of the entity's progress in relation to its strategic intentions as set out in the most recent statement of intent.”

Additionally, this provision is equivalent to section 39(1) of the international student Code.

Section 29(2) – A requirement for a code administrator to report systemic issues related to education quality or serious breach of the Code to education quality assurance agencies and relevant government agencies

I consider that section 29(2) of the Interim Code underpins the purpose of the code of practice as set out in section 238G(2)(a) of the Act by ensuring that systemic issues or serious breaches are appropriately dealt by the responsible quality assurance and enforcement agencies, as the case may require.

In particular, the ability to report to the responsible agencies on systemic issues or serious breaches ensures that appropriate action can be taken by those agencies (ranging from intervention at an individual level through to prosecution or compliance action at provider level). This in turn promotes the policy objective in section 238G(2)(a) of the Act by ensuring as far as is possible, that domestic students in general have a positive experience that supports their educational achievement.

I also note that this section aligns with the role of the code administrator under section 238H(3)(b)(i) of the Act, to monitor and investigate the extent to which providers comply with the code, following the processes prescribed by the Interim Code.

This section is equivalent to section 39(2) of the international student Code.

Section 29(5) – A requirement for the code administrator to take reasonable steps to publicise this code

Section 29(5) of the Interim Code requires the code administrator to take reasonable steps to publicise the code for providers and domestic tertiary students. This requirement is aimed at ensuring that students and providers are fairly informed about their rights and obligations under the existing Code.

This goes beyond the minimum requirement in section 238G(7)(b) of the Act (which requires the Interim Code to be published on an Internet site maintained by or on behalf of the Ministry). However, I consider it important for the Interim Code to be publicised more broadly, through multiple channels, including by the code administrator in order for students and providers to be fully aware of the requirements of the Interim Code. Publicising the Interim Code more broadly than a single point on the internet is a way to maximise compliance among providers and is part of the function of administering and monitoring the code by the code administrator.

It is not clear that such a policy objective requires authorising or empowering legislation. Section 29(5) of the Interim Code is equivalent to section 39(5) of the international student Code. It also requires the code administrator to take reasonable steps to publicise the code for providers and domestic tertiary students.

Section 29(5) of the Interim Code requires the code administrator to provide guidelines for providers. The purpose of guidance is to ensure that providers have appropriate practices and procedures in place to meet the outcomes of the code. New Zealand Qualifications Authority is in the process of developing guidance for the Interim Code.

Section 32(2) – A requirement to monitor each tertiary education provider's performance against the required outcomes and processes

Section 32(2) of the Interim Code requires the code administrator to monitor each tertiary education provider's performance against required outcomes and processes and is equivalent to section 37(2) of the international student Code.

As with section 29(2), section 32(2) of the Interim Code underpins the role of the code administrator under section 238H(3)(b)(i) of the Act, to monitor and investigate the extent to which providers comply with the code, following the processes prescribed by the Interim Code.

Section 32(2) of the Interim Code specifically enables the monitoring process to occur through scrutinising the tertiary education provider's self-review reports and any other information that the administrator considers appropriate.

I consider that any information requested by the code administrator is constrained by their powers in primary legislation (such as section 238H(5)(b) of the Act) and privacy law principles.

For these reasons, I think it appropriate that section 32(2) remains in the Interim Code.

Section 33 – A power to enter and inspect student accommodation, inspect documents and interview staff and students

I consider that the provisions for entry into student accommodation, inspection of documents and taking statements are authorised by section 238H(5) of the Act.

Re-stating the code administrator's statutory powers of entry and inspection in section 33 of the Interim Code allows the Interim Code to be read as "standalone" document, without reference to the Act. This will then help education providers to understand the full extent of their obligations and the corresponding powers of the code administrator to ensure that those obligations are being met.

I also note that the provisions in section 33(1) of the Interim Code are based on the provisions of section 37(4)(b) of the international student Code.

Section 34 – Clarity about information sharing

Section 34 of the Interim Code provides that the code administrator may share information with education quality assurance agencies for the purpose of agreeing interventions for the improvement of the code or compliance with it. You have queried whether this extends to personal information.

Section 34 of the Interim Code does not purport to authorise the sharing of personal information between agencies as this level of personal information would not normally be necessary to give effect to the purpose of this section to identify and address any deficiencies in the Interim Code. Any inter-agency sharing of personal information would in any event be subject to the provisions of the Privacy Act 1993 and the relevant privacy principles.

As I do not think this section goes beyond the current legal framework and replicates section 37(6) of the international student Code, I consider it appropriate for this section to remain unchanged in the Interim Code.

Next steps

I consider that the sections in the Interim Code that are of concern to the Committee are appropriate for the reasons set out in this letter and should be retained.

Please contact Julie Keenan, Policy Director, Graduate Achievement, Vocations and Careers, Ministry of Education, PO Box 1666, Wellington 6140, (Julie.keenan@education.govt.nz) if you still have concerns about the content of the Interim Code.

Yours sincerely

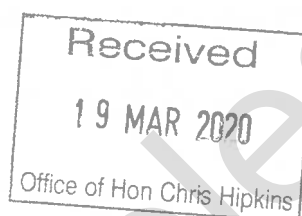
Hon Chris Hipkins
Minister of Education



REGULATIONS REVIEW COMMITTEE

17 March 2020

Hon Chris Hipkins
Minister of Education
Parliamentary Buildings
Wellington



Dear Mr Hipkins

Education (Pastoral Care of Domestic Tertiary Students) Interim Code of Practice 2019

The committee is writing to draw to your attention our concerns with the Education (Pastoral Care of Domestic Tertiary Students) Interim Code of Practice 2019 (the Interim Code).

Under Standing Order 318(1), all regulations are subject to examination by Parliament's Regulations Review Committee. As part of the usual scrutiny process, we examined the Interim Code at our meeting on 4 March 2020.

Clause 26 of Schedule 1 of the Education Act 1989 (the Act) provides that the Minister may issue an Interim Code. This is a very broadly drafted provision. Subclause 26(6) states that an interim code is to be treated as a code issued under the Act.

Part 18A of the Act provides for a code for pastoral care of students. Section 238H provides that the Minister may appoint code administrators to monitor and investigate compliance with a code, issue compliance notices, and impose sanctions on providers that breach the code. This section and the succeeding provisions give code administrators certain powers to perform those functions, including specific powers to issue quality improvement notices and compliance notices. Subsection 238H(5) gives code administrators powers to enter student accommodation, inspect information relating to the management of student accommodation, and ask any person at student accommodation to provide statements about any matter relating to the safety of students who board at the accommodation.

The committee has two concerns with how the Interim Code fits with the provisions of the Act:

Matters more appropriate for the Act

Part 4 of the Interim Code imposes obligations on and provides powers to code administrators. Of particular note:

- A requirement to include in its annual report a report on its activities in administering the code (clause 29(1))
- A requirement for a code administrator to report systemic issues related to education quality or serious breach of the code to education quality assurance agencies and relevant government agencies (clause 29(2))
- A requirement for the code administrator to take reasonable steps to publicise this code (clause 29(5))
- A requirement to monitor each tertiary education provider's performance against the requirement outcomes and processes (clause 32(2))
- A power to enter and inspect student accommodation, inspect documents, and interview staff and students (clause 33).

These obligations and power are fundamental requirements that shape the role of code administrators. As such, they are matters of substantive policy and are more appropriate for the Act. This is particularly the case in relation to the search and inspection power under clause 33.

Secondary legislation that contains matters more appropriate for an Act may breach the ground in Standing Order 319(2)(f). This Standing Order provides the grounds upon which committee may draw regulations to the special attention of the House.¹

The committee's usual approach to this ground has been that matters of principle and policy should usually be found in primary legislation, while detail and implementation should ordinarily be the domain of delegation. This is also the position adopted in the Legislation Guidelines.²

Unclear whether Interim Code gives power to share personal information

Clause 34 of the Interim Code provides that the code administrator may share information with education quality assurance agencies and relevant government agencies for the purpose of agreeing interventions for the improvement of the code or compliance with it.

It is not clear whether this provision extends to personal information. To the extent it does, that is matter of substantive policy that is more appropriate to be established by Parliament under the Act, than by the Minister under the code.

Conclusion

We suggest that Part 4 of the Interim Code should be amended to:

- ensure that it does not contain matters about code administrators that are more appropriate for parliamentary enactment under the Act; and

¹ Standing Order 319 is attached.

² Legislation Design and Advisory Committee *Legislation Guidelines*, at page 65.

- make it clear that clause 34 is not purporting to authorise the sharing of personal information.

Your response

Please email your response to the Clerk of Committee, Tara Elmes at rr@parliament.govt.nz, by Friday 24 April 2020.

If you have any queries about this letter please contact the clerk at the above address or by phone on 04 817 8305.

Yours sincerely

A handwritten signature in blue ink, appearing to be 'Alastair Scott', written over a faint, large diagonal watermark that reads 'Proactively Released'.

Alastair Scott
Chairperson



REGULATIONS REVIEW COMMITTEE

Standing Order 319

319 Drawing attention to regulation

(1) In examining a regulation, the committee considers whether it ought to be drawn to the special attention of the House on one or more of the grounds set out in paragraph (2).

(2) The grounds are, that the regulation—

- (a) is not in accordance with the general objects and intentions of the enactment under which it is made:
- (b) trespasses unduly on personal rights and liberties:
- (c) appears to make some unusual or unexpected use of the powers conferred by the enactment under which it is made:
- (d) unduly makes the rights and liberties of persons dependent upon administrative decisions which are not subject to review on their merits by a judicial or other independent tribunal:
- (e) excludes the jurisdiction of the courts without explicit authorisation in the enactment under which it is made:
- (f) contains matter more appropriate for parliamentary enactment:
- (g) is retrospective where this is not expressly authorised by the enactment under which it is made:
- (h) was not made in compliance with particular notice and consultation procedures prescribed by applicable enactments:
- (i) for any other reason concerning its form or purport, calls for elucidation.