



## Education report: Revised draft Cabinet paper – Policy approvals for the code of practice, dispute resolution scheme rules and legislative changes

<b>To:</b>	Hon Chris Hipkins, Minister of Education		
<b>Date:</b>	25 June 2021	<b>Priority:</b>	High
<b>Security Level:</b>	In Confidence	<b>METIS No:</b>	1263313
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<b>Messaging seen by Communications team:</b>	No	<b>Round Robin:</b>	Yes

### Purpose

This paper seeks your feedback on a revised Cabinet paper to seek policy approval for the new code of practice for pastoral care, the dispute resolution scheme for domestic tertiary learners, legislative changes and the proposed Government response to the Education and Workforce Select Committee inquiry into student accommodation (**Annex Two**).

The material reflects feedback from agencies, from legal review of the proposed code and dispute resolution scheme rules, and quality assurance of the three regulatory impact assessments. Tracked change versions are also attached. This builds on key changes we briefed you on last week, and that summary is provided in (**Annex One**) [METIS 1255734 refers].

We will incorporate your feedback and then test a draft of the proposed code with learner and sector peak bodies between 28 June and 1 July.

We previously recommended that the attached materials proceed directly to Ministerial consultation [METIS 1255734 refers]. This is to ensure lodging by 10 am on Thursday, 1 July, for Cabinet Social Wellbeing Committee's (SWC) 7 July meeting, and subsequent consideration by Cabinet on 12 July.

### Recommended actions

The Ministry of Education recommends you:

- provide feedback** on the attached revised draft Cabinet paper and its annexes, on Monday 28 June, so we can test the proposed draft code with learner and sector peak bodies before lodging for SWC's 7 July meeting
- note** that we arranged with learner and sector peak bodies to test the proposed code between 28 June to 1 July, using the next version (after your feedback)

- c. **note** that the Cabinet paper seeks SWC approval to make further changes to the code before Cabinet approval based on any feedback from learner and sector peak bodies
- d. **indicate your agreement** to the following changes to the proposed code, dispute resolution scheme and legislative amendments based on agency feedback and legal review (these are key changes, rather than an exhaustive list of all changes):

Proposal	Key changes	Indicate agreement
Cabinet paper	<p>We have:</p> <ol style="list-style-type: none"> <li>made revisions for clarification and accuracy of content;</li> <li>included a paragraph on Pacific perspectives in the population impacts section; and</li> <li>revised the framing of the legislative proposals following legal review and feedback from the Ministry of Justice.</li> </ol>	<p><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p> <p><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p> <p><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p>
New code of practice for pastoral care of domestic tertiary and international learners	<p>We have:</p> <ol style="list-style-type: none"> <li>added another training required for providers to ensure that staff understand the provider's obligations under the code;</li> <li>reworded clauses 42, 43, 63 and 64 to ensure fair processes are in place for termination and disciplinary action; and</li> <li>made small revisions (to further emphasis the diversity of learners in part 3 and clarify the intent of practices).</li> </ol>	<p><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p> <p><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p> <p><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p>
Proposed dispute resolution scheme rules	<p>We have:</p> <ol style="list-style-type: none"> <li>removed the provision added in response to sector feedback to require the scheme operator to have regard to Māori data sovereignty based on legal advice;</li> <li>removed the section regarding application to the district courts;</li> <li>removed explicit requirements for the annual report to be published in NZSL; and</li> <li>made additional minor revision to clarify proposals following legal review and based on feedback from the Government Centre for Dispute Resolution.</li> </ol>	<p><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p> <p><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p> <p><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p> <p><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p>
Proposed legislative amendments	<p>We have:</p> <ol style="list-style-type: none"> <li>revised the framing of the legislative proposals to ensure the code administrator's powers of entry and inspection are consistent with the Legislation Design and Advisory Committee's guidelines;</li> <li>amended the timeframe for dispute resolution scheme appeals from 10 to 20 days; and</li> <li>made additional minor revisions to clarify proposals following legal review.</li> </ol>	<p><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p> <p><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p> <p><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p>

- e. **note** that the proposed Government response to the student accommodation inquiry remains unchanged as there was no further feedback from agencies
- f. **note** that we will provide a revised version of the Cabinet materials, reflecting your feedback and any feedback from Ministerial consultation by Wednesday, 30 June, to allow for lodging by 10am on Thursday, 1 July
- g. **forward** this report to the Honourable Kelvin Davis, Associate Minister of Education (Māori Education) and the Honourable Aupito William Sio, Associate Minister of Education, for their information

☒ Agree / ☐ Disagree

- h. **agree** to proactively release this education report within 30 days of Cabinet policy decisions being made on the final code, dispute resolution scheme and legislative proposals with any redactions in line with the provisions of the Official Information Act 1982.

☒ **Agree** ☐ **Disagree**



Julie Keenan  
**Policy Director**  
**Graduate Achievement, Vocations**  
**and Careers**



Hon Chris Hipkins  
**Minister of Education**

25/06/2021

28 / 6 / 2021


## Approach to the revised draft Cabinet paper and proposals

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1. We recently briefed you on the changes to the learner wellbeing and safety proposals based on public consultation [METIS 1255734 refers]. This also included the Treaty principles analysis of Māori interests in the work.
2. The attached draft Cabinet paper (**Annex Two**) sets out proposals for SWC on 7 July, for announcements in mid-late July, to ensure:
  - a. certainty for providers regarding the code for 2022, and to enable appointment of a code administrator that will develop guidance material on the code, and work with the sector and learners to inform their planning for 2022;
  - b. timely development of Parliamentary Counsel Office (PCO)-drafted rules for the dispute resolution scheme, to inform the selection of a scheme operator, and Cabinet approval of rules, for announcements in November;
  - c. PCO drafting of law changes for inclusion in the Education and Training Amendment Bill (No 2), as policy approvals are needed before August; and
  - d. presentation to the House of the Government response to the Education and Workforce Committee inquiry into student accommodation, before the 6 August deadline.

### **We have updated the paper and proposals following agency consultation and legal review as well as quality assurance of the regulatory impact assessments**

3. Education and wider government agencies were supportive of the proposals and many offered constructive feedback for the implementation and development of guidance for the code. Several agencies commended the way the proposals incorporate their earlier feedback provided ahead of public consultation and how the proposals respond in a measured way to the significant feedback received from learners and providers during consultation.
4. We have provided clean and tracked copies of the materials for Cabinet. Key changes are:
  - a. *Regarding the Cabinet paper:*
    - i. We have made some revisions for clarification and accuracy of content, for example around expectations of the proposals to give effect to Te Tiriti o Waitangi as a whole (paragraphs 15 and 93 of the attached Cabinet paper) and around the impact of the code on providers (paragraph 39 of the attached Cabinet paper). This also includes consequential changes based on agency feedback on the code, rules, and legislative proposals.
    - ii. We have included a paragraph on Pacific perspectives in the population impacts section to help make the intent of the proposals for Pacific learners clearer (paragraph 94 of the attached Cabinet paper).
    - iii. We have revised the framing of the legislative proposals following legal review and feedback from the Ministry of Justice so that the code administrator's powers of entry and inspection, appeal timeframe, and other provisions are consistent with good legislative practices (recommendations 32-36 and Appendix D with any consequential changes in the body of the Cabinet paper).

- b. *Regarding the proposed code of practice (all changes are from legal or NZQA review):*
- i. We have added another training requirement for providers to ensure that staff understand the provider's obligations under the code.
  - ii. We have reworded clauses 42, 43, 63 and 64 to ensure fair processes are in place for termination and disciplinary action.
  - iii. We have made further small revisions, including wording changes to place further emphasis on the diversity of learners in part 3 of the code and to clarify the intent of practices.
- c. *Regarding the proposed dispute resolution scheme rules:*
- i. Based on sector feedback, we had revised the rules to require the scheme operator to have regard to Māori data sovereignty in relation to information it collects and disseminates. However, we have now removed this provision based on legal advice. 9(2)(h)  

  - ii. We have removed the section in the rules regarding application to the district courts. This is unnecessary as it is already detailed in the Act.
  - iii. We have removed the explicit requirement for the annual report to be provided in NZSL after internal and NZQA feedback. The rules continue to specify that the annual report be made available in formats that are accessible for disabled people (see 27(4)). The scheme operator may provide it in NZSL if there is demand.
  - iv. We have made additional minor revisions to clarify proposals following legal review and based on feedback from the Government Centre for Dispute Resolution, including some small additions relating to the data collection and sharing provisions in the rules to ensure alignment with best practice (see for example 10(7)(c), 11(2)(c) and 25(2)).
- d. *Regarding the proposed legislative amendments (see also paragraph 4(a)(iii) above):*
- i. We have revised the framing of the legislative proposals to ensure the code administrator's powers of entry and inspection are consistent with the Legislation Design and Advisory Committee's guidelines.
  - ii. We have amended the timeframe for dispute resolution scheme appeals from 10 to 20 days. This ensure learners, who may be less knowledgeable about the process, have a longer period of time to appeal.
  - iii. We have made additional minor revisions to clarify proposals following legal review.
5. There were no comments on the Government's proposed response to the Select Committee inquiry into student accommodation, so the draft attached has not changed.
6. The Ministry of Education Regulatory Impact Assessment Panel has reviewed the Regulatory Impact Statements attached to the Cabinet paper and considers that each

Statement will meet the Quality Assurance criteria after minor changes (see also paragraphs 89-90 in the attached Cabinet paper). We will provide final versions next week.

7. The attachments to the Cabinet paper now also include the summary of consultation feedback by Allan and Clarke Consulting. We recommend that you release this alongside Cabinet decisions on the package of proposals (see also paragraph 103 and recommendation 3 in the attached Cabinet paper).

## Next steps

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8. We seek your feedback on the draft Cabinet paper, including the attached materials, in **Annex Two** on Monday, 28 June.
9. We recommend you forward this paper to your colleagues, the Honourable Kelvin Davis – Associate Minister of Education (Māori Education), and the Honourable Aupito William Sio – Associate Minister of Education, for their information.

## Targeted engagement on a revised code, to test the response to feedback

10. You agreed that we engage confidentially with leaders of the five national students' associations we have partnered with, and six provider peak bodies, on the revised code [METIS 1255733 refers]. At the same time, we will share the overall submission analysis from consultation, so the peak groups can see the range of feedback.
11. We have arranged for this engagement to take place between 28 June and 1 July, once we have integrated your feedback on the draft code attached to this paper. Engagement feedback will inform the proposed code for Cabinet consideration on 12 July.

## Finalising the Cabinet paper for SWC on Wednesday 7 July

12. We recommend the attached versions proceed directly for Ministerial consultation, to allow Ministers to review and discuss it early in the week before lodging, if needed. We recommend wide Ministerial consultation, given the proposals' links beyond education to social and health policy, diversity and inclusion, Māori-Crown relationships, disputes resolution and tenancy law. This timetable means Ministerial consultation will occur in parallel with targeted sector engagement. We have provided your office with a list of Ministers for Ministerial consultation.
13. We will complete final quality assurance, editing and development of the materials in parallel with Ministerial consultation and targeted sector engagement, so the final paper can be lodged by 10 am Thursday, 1 July. The Cabinet paper includes a recommendation that allows scope for final feedback from targeted engagement to be incorporated following SWC consideration but before Cabinet confirmation, if needed.

## Annexes

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**Annex One:** Summary of key changes to the proposals based on public consultation [METIS 1255734 refers]

**Annex Two:** Revised draft Cabinet paper and annexes – *Policy approvals for tertiary and international learner wellbeing and safety: code of practice, dispute resolution scheme rules and legislative changes*



## Annex One: Summary of key changes to the proposals based on public consultation [METIS 1255734 refers]

We have made the following changes to the proposed code, dispute resolution scheme and legislative amendments based on consultation feedback (these are key changes, rather than an exhaustive list of all changes).

Proposal	Key changes
New code of practice for pastoral care of domestic tertiary and international learners	We propose to retain the structure and framework of the draft code consulted on.
	We have made changes to improve the clarity of obligations for providers by:
	a. clarifying that the code must be applied in a way that is appropriate to the provider's particular learning, communal and residential context, and to the specific needs of learners within these contexts (part 1);
	b. reducing the number of outcomes (from 31 to 22), grouping related processes into meaningful outcomes, restructuring clauses, and removing lengthy examples that would be better placed in guidelines (reducing the code's length by around 10 pages);
	c. rewording outcome 1 to clarify its purpose, that is: "Providers must take a whole-of-provider approach to maintain a strategic and transparent learner wellbeing and safety system that responds to the needs of their learners";
	d. distinguishing between specific requirements, and those for which providers must have processes in place but have appropriate flexibility to respond to learners' specific needs.
	We have made changes to:
Proposed dispute resolution scheme rules	a. emphasise providers working with diverse learners, as key stakeholders, ahead of other stakeholders;
	b. delineating consultation requirements on providers by defining 'other stakeholders' (other than learners and staff) as those who have a meaningful interest in the wellbeing and safety of learners; and
	c. use more empowering language when referring to learners to convey that they play an active role in their education, wellbeing and safety.
	We have removed clauses that go beyond learner wellbeing and safety (e.g. learners participating in the decision-making on the strategic management and governance of the provider), and to balance this, the code now requires provider to work with learners to develop, review, and improve their wellbeing and safety practices.
	We have removed proposals that were seen to encroach on teaching and learning or academic matters, as these are covered by educational quality assurance expectations.
	We have made changes to give Te Tiriti o Waitangi greater prominence in the code by including an overarching statement in Part 1 that the code.
	We have made changes to the code so that it reflects the Office of the Privacy Commissioner's feedback to:
	a. draw a distinction between "routine checks" (without cause, on 24 hours' notice) and "welfare checks" (where there are serious concerns, generally with consent);
	b. lower the "serious threat" threshold for checks with less than 24 hours' notice to cover situations where a provider has serious concerns about wellbeing or safety;
	c. require that providers first attempt to obtain consent to entry for a welfare check, but allow entry without consent where there are serious concerns about wellbeing or safety.
	We propose to retain the scheme framework consulted on, which is under-pinned by principles of flexibility, accessibility, and inclusivity.
	We propose that the structure of the scheme rules reflects the learner's journey through the scheme to provide greater clarity and make the scheme more navigable for users.
	We propose an adjudication process may be undertaken with a practitioner making a binding decision, where a consensual approach does not resolve the dispute or may not be appropriate.
	We propose to retain the proposed \$200,000 cap on payments awarded to students, as there is potential for a dispute to involve such an amount and the cap is in line with similar schemes.

Proposal	Key changes
	<p>We propose that the scheme operator will be expected to develop and evaluate their service under the rules with Māori to ensure it is consistent with Te Tiriti o Waitangi and can have proper regard to tikanga Maori.</p> <p>We propose the rules are clear that information must be collected, shared, and publicised in accordance with the Privacy Act 2020.</p>
Proposed legislative amendments	<p>We propose amendments to the provisions for a code of practice to:</p> <ul style="list-style-type: none"> <li>a. strengthen the focus on wellbeing and safety;</li> <li>b. provide for a responsive code by: <ul style="list-style-type: none"> <li>i. requiring the Minister to consult with Māori before issuing a code;</li> <li>ii. providing for tailored codes or for the Minister to gazette exemptions to the code for particular groupings of providers;</li> <li>iii. providing for the Minister to regularly set expectations about the code administrator's performance and priorities, and gather information from the code administrator; and</li> </ul> </li> <li>c. modernise code provisions by allowing the Minister to make minor and technical changes to the code.</li> </ul> <p>We propose amendments to the provisions for a code administrator to:</p> <ul style="list-style-type: none"> <li>a. ensure the code administrator has appropriate functions, powers and duties to administer the code;</li> <li>b. set out expectations for the code administrator to honour Te Tiriti o Waitangi and support Māori-Crown relationships;</li> <li>c. require annual reporting of the code administrator;</li> <li>d. provide for the code administrator to issue notices to providers to do or refrain from doing something in relation to their obligations under the code; and</li> <li>e. modernise the legislation through moving provisions for the code administrator's functions, powers and duties, from saved sections of the Education Act 1989 to the new Act.</li> </ul> <p>We propose amendments to the provisions for a dispute resolution scheme to:</p> <ul style="list-style-type: none"> <li>a. broaden the scope of the scheme so that it can consider breaches of the code alongside financial and contractual complains;</li> <li>b. better provide for the appointment, reporting, and operation of a scheme operator;</li> <li>c. set a time limit of 10 working days for appeals about scheme adjudications; and</li> <li>d. clarify and broaden the type of bodies that can be appointed as scheme operator.</li> </ul> <p>We propose to retain the \$200,000 cap on payments awarded to students for claims under the dispute resolution scheme, rather than increase it as we consulted on, in line with sector feedback.</p> <p>We propose amendments to the provisions for administrative arrangements to:</p> <ul style="list-style-type: none"> <li>a. allow for the scheme operator, code administrator, and quality assessor to share information about complaints and complaint resolution;</li> <li>b. clarify that the code administrator and the scheme operator are subject to the Ombudsman Act 1975 and Official Information Act 1982;</li> <li>c. enable the Minister of Education to regularly approve and gazette expectations about enrolment forms, associated processes, and the provision of information to learners; and</li> <li>d. enable providers to undertake fit and proper person checks on staff delivering learner accommodation.</li> </ul>