



Education Report: Response to Regulations Review Committee on revised Interim Code of Pastoral Care

To:	Hon Chris Hipkins, Minister of Education		
Date:	12 March 2021	Priority:	High
Security Level:	In Confidence	METIS No:	1252531
Drafter:	Jenni Barrett	DDI:	s 9(2)(a)
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Messaging seen by Communications team:	No	Round Robin:	No

Purpose of Report

The purpose of this report is for you to respond to additional concerns raised by the Regulations Review Committee and consider a final revised Education (Pastoral Care of Domestic Tertiary Students) Interim Code of Practice 2019, ideally by 19 March 2021.

Summary

The Regulations Review Committee (the Committee) previously raised concerns with the design and content of the Education (Pastoral Care of Domestic Tertiary Students) Interim Code of Practice 2019 (the Interim Code). In response to its concerns and to ensure the Interim Code remains fit for purpose, the Ministry of Education met with staff of the Committee and recommended you make minor and technical changes to the Interim Code, which you approved and referred to the Committee for its comment.

On 26 February 2021, the Committee raised additional concerns about the suggested changes, namely that parts of the Interim Code repeat primary legislation, and that powers of a code administrator to enter and inspect student accommodation should not breach students' rights and liberties. The Ministry of Education therefore proposes additional minor and technical changes to respond to the Committee's most recent concerns.

We recommend a final revised Interim Code is published by 31 March 2021 to avoid confusion with planned sector engagement on the replacement Code from April (subject to Cabinet approval). If it is not possible to confirm minor and technical changes before consultation on the proposed replacement Code begins, we recommend you pursue change through the replacement Code rather than issuing minor and technical changes to the Interim Code.

Recommended Actions

The Ministry of Education recommends you:

- a. **note** that on 16 February 2021 you approved draft minor and technical changes to the Education (Pastoral Care of Domestic Tertiary Students) Interim Code of Practice 2019 (the Interim Code)
- b. **note** that the Regulations Review Committee provided feedback on the proposed minor and technical changes on 26 February 2021
- c. **agree** to the following additional minor and technical changes for the Interim Code in response to the Committee's comments:
 - i. replace sub-clauses 33(1) to 33(5) of the revised Interim Code with a single clause referencing section 633 of the Education and Training Act 2020, to avoid duplication of primary legislation in the Interim Code

☒ Agree / ☐ Disagree
 - ii. more clearly clarify how powers of entry and inspection may be used by a code administrator, including requiring a code administrator to provide evidence of identity and authorisation to enter and inspect premises, and setting out the protocols to be followed if documents are removed from the premises by a code administrator

☒ Agree / ☐ Disagree
 - iii. amend references to legislation in the first line of the Interim Code to state that the Interim Code was made "pursuant to clause 26(2) in Schedule 1 of the Education Act 1989, and with minor and technical amendments made under clause 67 of Schedule 1 of the Education and Training Act 2020"

☒ Agree / ☐ Disagree
 - iv. remove references to the Privacy Act 2020 in clause 34

☒ Agree / ☐ Disagree
- d. **sign and send** the draft response letter to the Committee (**annex 1**), along with the final revised Interim Code (**annex 2**) by Friday 19 March 2021

☒ Agree / ☐ Disagree

- e. **proactively release** this Education Report, once decisions have been made and a revised Interim Code has been issued, with any redactions in accordance with the provisions of the Official Information Act 1982.

Release Not release



Julie Keenan
Policy Director
Te Ara Kaimanawa
12/03/2021



Hon Chris Hipkins
Minister of Education

21/ 3/ 21

Background

Regulations Review Committee: further concerns about the Interim Code

1. The Ministry of Education recommended making minor and technical changes to the Education (Pastoral Care of Domestic Tertiary Students) Interim Code of Practice 2019 (the Interim Code); to respond to concerns raised by the Regulations Review Committee (the Committee) and ensure the Interim Code remains fit for purpose until its expiry on 1 January 2022 [METIS 1245064 refers]. You approved these changes on 16 February 2021 [METIS 1249916 refers].
2. You offered the Committee the opportunity to comment on the proposed changes to the Interim Code before they were made final, and sent letters to the Committee about this on 29 January 2021 and 17 February 2021 [METIS 1245064 and METIS 1249916 refer]. The Committee responded on 26 February 2021. It was satisfied with some of the proposed changes, but has again raised issues with:
 - a. Restating of primary legislation in the revised Interim Code (specifically the proposed amendment to clause 33(1)); and
 - b. That powers of entry and inspection of student accommodation must not be in breach of students' rights and liberties.
3. The Ministry of Education has consulted with the New Zealand Qualifications Authority (NZQA), staff at the Office of the Privacy Commissioner, and our lawyers about the Committee's latest feedback. We consider additional minor and technical changes are desirable to respond to the Committee's concerns and ensure the Interim Code remains fit for purpose and empowered by legislation until its expiry.
4. In developing the following proposed additional changes, we have considered powers of entry and inspection in non-educational legislation, and those laid out in Part 6, subpart 6, of the Education and Training Act 2020, including:
 - a. NZQA's powers to enter private training establishments (section 634);
 - b. The Education Review Office's (ERO's) powers to enter and inspect schools (section 628);
 - c. ERO's powers to enter and inspect hostels (section 631); and
 - d. ERO's powers to enter and inspect homes used by licensed home-based education and care services (section 624).

Further minor and technical changes

Changes suggested by the Committee

5. The Committee expressed concern that sub-clauses 33(1) to 33(5) of the revised Interim Code restate primary legislation (that is, section 633 of the Education and Training Act 2020). We propose replacing sub-clauses 33(1) to 33(5) of the revised Interim Code with a single clause that reads, "The following provisions apply to a code administrator's powers of entry into student accommodation in addition to section 633 of the Act."

6. The Committee raised specific concerns with a code administrator's powers of entry into student accommodation, noting the risk of infringing students' rights and liberties to be free from unreasonable search. We propose the addition of new sub-clauses 33(2) to 33(4) to better clarify how powers of entry and inspection may be used by a code administrator. This includes requiring a code administrator to provide evidence of identity and authorisation to enter and inspect premises, and setting out the protocols to be followed if documents are removed from the premises by a code administrator.
7. The Committee also noted a technical drafting matter about the references to legislation in the first line of the Interim Code. We propose stating that the Interim Code was made "pursuant to clause 26(2) in Schedule 1 of the Education Act 1989, and with minor and technical amendments made under clause 67 of Schedule 1 of the Education and Training Act 2020."

Change suggested by the Office of the Privacy Commissioner

8. Staff at the Office of the Privacy Commissioner have raised issues with the reference to the Privacy Act 2020 in clause 34 (relating to information-sharing). This reference was suggested in response to the Committee's earlier concerns that any sharing of personal information should be consistent with the Privacy Act and its principles [METIS 1245064 refers]. However, staff at the Office of the Privacy Commissioner have noted that the Interim Code – as a whole – is subject to the Privacy Act. Explicitly including reference to the Privacy Act in only one clause implies other clauses are exempt from the Privacy Act, which is not the case. We therefore propose removing the proposed reference to the Privacy Act in clause 34.

Additional change suggested by the Committee which we do not propose actioning

9. The Committee suggested limiting a code administrator's powers of entry and inspection to clause 28 only, which relates to maintenance of building facilities and services. However, the Ministry and NZQA consider this suggested scope to be too narrow. Reducing the scope of a code administrator's powers of entry and inspection may go beyond 'minor and technical' changes, and possibly requires consultation with public and the education sector. We do not recommend further limiting a code administrator's powers of entry and inspection at this time but will consider the Committee's comments during consultation on the replacement Code during 2021.

Next steps

10. If you approve the additional minor and technical changes to the Interim Code, we recommend signing and sending the attached response letter to the Committee (**annex 1**), along with the revised Interim Code with minor and technical changes (**annex 2**) by Friday 19 March 2021. The response letter outlines our proposed course of action and does not seek further feedback from the Committee on the proposed changes. If you would like to seek further feedback from the Committee, we can supply an alternative draft letter for you to sign and send.
11. It is proposed that the revised Interim Code be gazetted no later than 31 March 2021 to avoid confusion with planned sector engagement on the replacement Code from April (subject to Cabinet approval). If it is not possible to confirm minor and technical changes before consultation on the proposed replacement Code begins, we recommend you pursue change through the replacement Code rather than issuing minor and technical changes to the Interim Code.

Annexes

Annex 1: Draft response letter to the Regulations Review Committee

Annex 2: Revised Interim Code with minor and technical changes

Proactively Released

Annex 1: Draft response letter to the Regulations Review Committee

Chris Penk
Chairperson
Regulations Review Committee
Parliamentary Buildings
Wellington

Dear Mr Penk,

Thank you for your letter of 26 February 2021 responding to the proposed minor and technical changes to the Education (Pastoral Care of Domestic Tertiary Students) Interim Code of Practice 2019 (the Interim Code). I note our previous correspondence with the Committee on this matter in 2020 and January and February 2021. The present letter is intended to respond to your latest comments and update you on my proposed course of action.

Amendment to clause 33(1) to 33(5)

I note the Committee's continued concerns that clause 33(1) to 33(5) restate primary legislation (namely, Section 633 of the Education and Training Act 2020 (the Act)). I will therefore replace sub-clauses 33(1) to 33(5) of the revised Interim Code with a single clause that reads, "The following provisions apply to a code administrator's powers of entry into student accommodation in addition to section 633 of the Act."

Powers of entry and inspection

The Committee has raised concerns with a code administrator's powers of entry into, and inspection of, student accommodation, noting the risk of infringing students' rights and liberties to be free from unreasonable search. I will therefore add new sub-clauses 33(2) to 33(4) to better clarify how powers of entry and inspection may be used by a code administrator. This includes requiring a code administrator to provide evidence of identity and authorisation to enter and inspect premises, and protocols to be followed if documents are removed from the premises by a code administrator.

The additional sub-clauses were developed after consideration of powers of entry and inspection across government legislation, especially those detailed in Part 6, subpart 6, of the Education and Training Act 2020, including:

- NZQA's powers to enter private training establishments (section 634);
- The Education Review Office's (ERO's) powers to enter and inspect schools (section 628);
- ERO's powers to enter and inspect hostels (section 631); and
- ERO's powers to enter and inspect homes used by licensed home-based education and care services (section 624).

The Committee also suggested limiting a code administrator's powers of entry and inspection to clause 28 only, which relates to maintenance of building facilities and services. However, I consider that reducing the scope of a code administrator's powers of entry and inspection at this time may go beyond 'minor and technical' changes, and therefore requires consultation with public and the education sector. The Ministry of Education will continue to consider the Committee's comments on this during consultation with public and the education sector on the replacement Code during 2021.

Additional changes

The Committee previously suggested amending clause 34 (which relates to information-sharing) to include references to the Privacy Act 2020. However, staff at the Office of the Privacy Commissioner have raised issues with this proposed inclusion. It was noted that the Interim Code – as a whole – is subject to the Privacy Act, and explicitly including reference to the Privacy Act in only one clause implies other clauses are exempt from the Privacy Act, which is not the case. Following these discussions, I have therefore removed the proposed reference to the Privacy Act in clause 34.

I note your technical drafting comment on legislative references in the first line of the Interim Code. I have therefore updated the first line to read that the Interim Code was made “pursuant to clause 26(2) in Schedule 1 of the Education Act 1989, and with minor and technical amendments made under clause 67 of Schedule 1 of the Education and Training Act 2020.”

Other comments

I note that you have expressed satisfaction with other proposed minor and technical changes, including updating legislative references from the Education Act 1989 to the Education and Training Act 2020.

I intend to gazette a final revised Interim Code by 31 March 2021 and have attached a draft for your information. Thank you again for your feedback on the Interim Code to ensure it remains fit for purpose.

Yours sincerely,

Hon Chris Hipkins
Minister of Education

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