



Education report: Cabinet Paper - Education (Domestic Tertiary Student Contract Dispute Resolution Scheme) Rules 2021

To:	Hon Chris Hipkins, Minister of Education		
Date:	20 October 2021	Priority:	High
Security Level:	In Confidence	METIS No:	1271113
Drafter:	Lauren Bell	DDI:	04 463 8519
Key Contact:	Julie Keenan	DDI:	9(2)(a)
Messaging seen by Communications team:	N/A	Round Robin:	No

Purpose

We have attached, for your feedback and Ministerial consultation, a Cabinet Legislation Committee (LEG) paper. The paper is seeking approval of the rules for the functioning and administration of the Domestic Tertiary Student Contract Dispute Resolution Scheme (DRS) drafted by the Parliamentary Counsel Office (PCO). This will allow for DRS rules to be made in mid-November, before the DRS starts on 1 January 2022.

Summary

As Minister of Education, you are legally required, under section 536 of the Education and Training Act 2020 (the Act), to establish a student DRS. Transitional provisions of the Act mean that when the new Education (Pastoral Care of Tertiary and International Learners) Code of Practice 2021 (the code) takes effect on 1 January 2022, there must be a DRS. The DRS will be established by a set of rules, made by Order in Council on your recommendation under section 539 of the Act.

We propose the paper be considered by LEG on Thursday 11 November, and by Cabinet on Monday 15 November. We have included talking points to support your discussion of the paper with Cabinet. Subject to Cabinet approval, the DRS rules will also go to Executive Council on 15 November to be made by Order in Council.

Cabinet Business Committee previously agreed for PCO to draft the rules, based on its decisions and feedback to come from consultation [CBC-21-MIN-0065 refers]. The attached rules reflect feedback from a 2-week targeted consultation held between 25 August and 8 September, which included providers, learners, and dispute resolution organisations who had shown interest in the rules in the previous 6-week public consultation.

Feedback from targeted consultation was largely supportive of the draft rules, and most suggestions were minor or technical changes to wording or to clarify details in the rules.

One suggestion will require changes to the Act. This was feedback from Universities New Zealand, which raised concerns about the lawfulness of the adjudication approach outlined in the rules, and whether this approach is authorised by the Act. We propose you use your

authority to make changes during drafting of the Education and Training Amendment Bill (No.2) to respond to this feedback. The change would, for the avoidance of doubt, clarify the nature of the scheme's adjudication approach (in particular, that it is an alternative dispute resolution process for resolving disputes based on what is fair and reasonable) in the Act.

We have completed agency consultation on the draft Cabinet paper and have reflected feedback in the paper and addressed any questions.

Recommended actions

The Ministry of Education (the Ministry) recommends you:

- a. **agree** to the proposed changes, outlined in the table below, to the DRS rules following targeted consultation (the revised DRS rules are attached as **Annex One, Part a**):

Key changes	Agree
i. To make the scheme more inclusive, and ensure users of the scheme are better supported from end-to-end, we propose to expand on definitions regarding people who can accompany student claimants during the dispute process as well as add in further support provisions for disputing parties.	Agree Disagree
ii. To make the scheme more user-centric , we propose to clarify and increase the number of points in the dispute resolution process at which the practitioner must have regard to the parties' views when making decisions.	Agree Disagree
iii. To help ensure the scheme works well for all Māori users (student claimants as well as the other parties and participants), we propose to broaden the scheme's requirement to have regard to tikanga Māori as appropriate to the situation.	Agree Disagree
iv. To better protect users' privacy as appropriate , we propose to clarify parts of the rules regarding confidentiality of parties' personal information as well as the outcome of the dispute process.	Agree Disagree
v. To enable greater flexibility in the scheme's processes , we propose to clarify when and how parties can move between consensual and adjudicative processes to help resolve their dispute.	Agree Disagree
vi. To respect academic freedom , we propose to modify the rules so that the DRS operator can only make recommendations to providers, rather than rulings on their practices and by-laws.	Agree Disagree
vii. To help with the clarity of the rules overall, we propose to make minor and technical changes to wording where appropriate.	Agree Disagree

- b. **provide feedback** on recommendation (a) above and any changes needed to the draft Cabinet paper before Ministerial consultation (attached as **Annex Two**) by Tuesday 26 October, so that the Ministry can work with PCO to make any changes to the rules and update the paper for Ministerial consultation, enabling it to be considered by Cabinet Legislation Committee on Thursday 11 November.
- c. **note** the talking points provided (in **Annex Three**) to support discussion at Cabinet.

- d. **agree** to officials discussing upcoming changes to the DRS rules and the Act with Universities New Zealand to address its concerns about adjudication within the scheme.

☒ **Agree** ☐ **Disagree**

- e. **agree** to proactively release this education report within 30 days of decisions being made on the final DRS rules 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

20/10/2021

4 / 11 / 2021

Background on the DRS rules and consultation

1. The Education and Training Act 2020 (the Act) establishes a dispute resolution scheme (DRS) to resolve financial and contractual disputes between tertiary learners and their education providers (section 536). Under the Act, you must appoint a person or agency to be responsible for operating the scheme. The DRS operator will administer the scheme according to the rules made by Order in Council on your recommendation. The DRS must be operating when the new code for wellbeing and safety of learners (the code) comes into effect on 1 January 2022.
2. This DRS fills a regulatory gap for domestic tertiary learners and complements the existing scheme for international learners (iStudent Complaints). Both schemes are established under section 536 of the Act, and so share the same scope of contractual and financial disputes between learners and their providers. The proposed rules for the domestic tertiary learner DRS differ because they reflect more up-to-date dispute resolution best practice¹ and were made specifically for New Zealand learners, including that the rules have a more explicit tikanga Māori focus and grounding in Te Tiriti o Waitangi.
3. Cabinet has already set the overall framework and policy intent of the rules following the 6-week public consultation held during April-May this year [CBC-21-MIN-0065 refers]. This included, for example, a scheme that is underpinned by principles of flexibility, accessibility, and inclusivity; focuses on resolution rather than penalties; and operates in a way that protects user's privacy but is transparent where appropriate to enable system-wide improvement.
4. Some of the changes made to the rules under Cabinet's direction included, for example, rephrasing around the operator's obligation to develop and evaluate their service under the rules with Māori. This change is to ensure the rules are consistent with Te Tiriti o Waitangi and can have proper regard to tikanga Māori, and are better structured to reflect the learner's journey through the scheme to support navigability of the scheme and its rules.
5. Cabinet also agreed to changes to the Act regarding the provisions for a DRS to be progressed via the Education and Training Amendment Bill (No.2). These amendments include, for example, broadening the scope of the DRS so that it can consider breaches of the code alongside financial and contractual complaints, and better providing for the appointment, reporting, and operation of a scheme operator.
6. We ran a second, more targeted 2-week consultation on the Parliamentary Counsel Office (PCO) drafted rules from 25 August to 8 September. We invited 23 groups and organisations to this targeted consultation that had explicitly signalled they would like to be involved.
7. The consultation was run online (primarily by email). We gave invited stakeholders a one week's heads up prior to opening the consultation to help with the time pressure. Three stakeholders raised concerns with the timing and length of the consultation. Although we enabled one stakeholder to submit late, we were unable to shift out or extend the consultation period for all stakeholders as it would have compromised our ability to have the DRS operating by 1 January next year. Moreover, the purpose of the targeted consultation was for minor and technical suggestions to the rules to ensure they achieve the agreed policy, rather than substantive or fundamental changes. We expected

¹ The rules were informed by the Government Centre for Dispute Resolution's Aotearoa best practice dispute resolution framework.

stakeholders to have already provided their significant feedback via the 6-week consultation held earlier in the year.

Targeted consultation feedback

Feedback on the rules and proposed changes

8. In total, we received 14 responses to the targeted consultation (see **Annex Four**). Of these, four submitters indicated they had no feedback on this next iteration of the DRS rules. Of those who did provide feedback, it was mostly regarding minor and technical changes to the rules.
9. Key changes, including examples of the changes, that we have made to the rules based on targeted consultation feedback is detailed in the table below.

Key changes to DRS rules	Examples
i. To make the scheme more inclusive and ensure users of the scheme are better supported from end-to-end, we propose to expand on definitions regarding people who can accompany student claimants during the dispute process, as well as add in further support provisions for disputing parties.	<ul style="list-style-type: none"> include definitions of caregiver and family/whānau group in relation to the student claimant (so that a greater range of whānau members can represent and/or support the student claimant) add in a clause that the DRS operator must refer student claimants who have had their dispute declined by the DRS operator to support services outside of the operator clarify that a student claimant can have an advocate, support person, or both during the dispute resolution procedures.
ii. To make the scheme more user-centric , we propose to clarify and increase the number of points in the dispute resolution process at which the practitioner must have regard to the parties' views when making decisions.	<ul style="list-style-type: none"> clarify in the rules that the practitioner must have regard to the parties' views when considering combining disputes and also before making a decision on whether to use consensual or adjudicative processes.
iii. To help ensure the scheme works well for all Māori users (student claimants as well as the other parties and participants), we propose to broaden the scheme's requirement to have regard to tikanga Māori as appropriate to the situation.	<ul style="list-style-type: none"> change phrasing in the rules so that the DRS operator and its practitioners must, where appropriate, have regard to all parties' tikanga, as opposed to only having regard to tikanga at the student claimant's request. This is consistent with Te Tiriti o Waitangi principles – by recognising and supporting rangatiratanga.
iv. To better protect users' privacy as appropriate , we propose to clarify parts of the rules regarding confidentiality of parties' personal information as well as the outcome of the dispute process.	<ul style="list-style-type: none"> rephrase rules to achieve an appropriate balance between personal privacy in relation to individuals' information disclosed as part of the dispute resolution process and the need for thematic or descriptive information to be made available to other bodies to assist with their quality assurance functions and for evidential purposes.
v. To enable greater flexibility in the scheme's processes , we propose to clarify when and how	<ul style="list-style-type: none"> clarify in the rules that the DRS operator and practitioner (after taking into account the views of the parties) can refer the parties from consensual

parties can move between consensual and adjudicative processes to help resolve their dispute.	processes to adjudication if consensual processes are not working for the parties, or can refer them from adjudication back to consensual processes after attempting adjudication.
vi. To respect academic freedom , we propose to modify the rules so that the DRS operator can only make recommendations to providers, rather than rulings on their practices.	<ul style="list-style-type: none"> change provisions in the rules so that practitioners can only issue recommendations to tertiary education providers regarding their practices (e.g. rules, policies, bylaws), rather than require changes to providers' practices.
vii. To help with the clarity of the rules overall, we propose to make minor and technical changes to wording where appropriate.	<ul style="list-style-type: none"> reduce detail regarding support that disputing parties can access, to avoid unnecessary duplication in the rules reformulate wording in relation to restorative and natural justice requirements to align with other legislative references to the concepts change and align wording to ensure consistency throughout rules (e.g. facilitation and mediation now referred to under umbrella term of 'consensual methods').

Feedback on the parameters of the DRS set in the Act

10. Universities New Zealand (UNZ) was the only submitter that raised significant concern with the rules, with reference to the lawfulness of the adjudicative process. UNZ argued that the rules requiring an adjudicator to determine a dispute on merit without being bound by the rules of evidence, strict legal obligations, or technicalities is a modification of the general law of contract and is not provided for in the Act.
11. We consider that the adjudication approach in the rules is consistent with the policy intention in the Act for the DRS to operate as an alternative dispute resolution scheme, rather than a tribunal or a quasi-judicial body. One public policy objective is to redress the power imbalance between tertiary education providers and tertiary students. Conversely, if the scheme were to apply strict legal process and contract law then it would be likely to reinforce this imbalance, because tertiary providers are more likely to have access to legal expertise than tertiary students.
12. Although the DRS operator, and the practitioners appointed by it, are not bound by the rules of evidence or to give effect to the strict legal obligations of the parties, they are required to have regard to the law, dispute resolution best practice, and professional standards. Moreover, practitioners appointed by the DRS operator will be trained and qualified professionals with the expertise to balance legal or contractual rights with the need to be fair and reasonable in the resolution of disputes. Both practitioners and the DRS operator will aim to maintain their professional standing.
13. The parties will also have recourse to the District Court to seek modification of decisions that are manifestly unreasonable, which will act as a procedural safeguard against improper or unbalanced decisions.
14. It is also useful to note that the international student DRS has similar provisions regarding adjudication as the domestic DRS and is empowered by the same section of the Act. The international scheme has been operating without concern from the university sector since 2016.

15. Given the above points, we do not see UNZ's concerns as a major risk to standing up the new DRS. However, for the avoidance of doubt, it would be appropriate to clarify the jurisdiction and procedural requirements for the DRS through legislative change. The Education and Training Amendment Bill (No.2) (the Bill) includes changes to the scope and functions of the DRS operator, so is an appropriate vehicle for change. Cabinet authorised you to make any further decisions that may arise during the drafting process for the Bill, consistent with Cabinet policy decisions. We have worked with PCO so that this change can be included and noted in the draft Cabinet Legislation Committee paper for the Bill which will provide further information.
16. The proposal for the Bill is that the Act is amended to clarify that the DRS operator is required to resolve disputes based on what is fair and reasonable but must have regard to the general law and alternative dispute resolution best practice. In addition, an adjudicator must determine disputes on merit rather than by applying strict legal obligations, legal technicalities, or the rules of evidence. This should enhance certainty for learners and the sector around the scheme's powers and scope.
17. In line with the government response to the Education and Workforce Committee Inquiry into student accommodation, we also intend to do work on shifting towards a single, combined DRS for domestic and international learners. A single scheme with one set of rules will enable us to address any inconsistencies between the two schemes. Establishing a single DRS was supported by most submitters, including UNZ, in both the comprehensive and targeted consultations run this year.

Next steps

Finalising the DRS rules

18. We have completed agency consultation on the DRS rules. We will provide your office with a list of potential Ministers for the Ministerial consultation on this paper.
19. We seek your feedback on the rules and any changes needed before Ministerial consultation on the draft Cabinet paper by Tuesday 26 October. This will allow for the finalised Cabinet paper and PCO drafted rules to go to Cabinet Legislation Committee on 11 November 2021. PCO will provide the certified DRS rules directly to Cabinet for lodging.
20. Subject to Cabinet's agreement, the Order in Council can be made on 15 November. You will signal that the rules have been made as an Order in Council via the Gazette. PCO will prepare and publish the Gazette notice for you.

Appointing the DRS operator

21. A Ministry-convened evaluation panel is currently assessing the 5 responses to the contract opportunity for ministerial appointment of the DRS operator. We expect to provide you with a recommendation on a DRS operator, and any conditions on appointment, in the next two weeks.
22. We recommend you issue the Gazette notice confirming the DRS operator appointment after we have finalised the funding agreement with the operator you propose to appoint. We will provide you with a draft of this Gazette notice with the advice regarding the DRS operator recommendation.

Further conversations with UNZ

23. Subject to your agreement, we will discuss upcoming changes to the rules and the Act with UNZ to address its concerns about adjudication within the scheme. We will keep your office informed on these conversations.

List of Annexes

Annex One: Revised PCO-drafted and compare versions of the DRS rules

Part a) Revised PCO-drafted DRS rules

Part b) Revised PCO-drafted rules compared with rules consulted on in August-September targeted consultation

Annex Two: Draft Cabinet Legislation Committee paper

Annex Three: Talking points to support your Cabinet discussion

Annex Four: List of targeted consultation submitters

Annex Three: Talking points to support your discussion of the Cabinet paper

Summary

As part of a package of proposals aimed to improve learner wellbeing and safety in tertiary education, a dispute resolution scheme to help resolve financial and contractual disputes between learners and their providers was provided for in the Education (Pastoral Care) Amendment Act 2019. This fills a gap for domestic tertiary learners who do not currently have a bespoke, accessible dispute resolution mechanism. These proposed regulations set out rules for the functioning and administration of this scheme, including its design and process.

Today, I am seeking your approval to submit the Education (Domestic Tertiary Student Contract Dispute Resolution Scheme) Rules 2021 to the Executive Council, to set rules for the functioning and administration of the dispute resolution scheme for domestic tertiary learners under section 539 of the Education and Training Act 2020.

You have previously made decisions on the policy proposals for the scheme's design, operation and monitoring [CAB-21-MIN-0095]. As agreed, the rules:

- draw on the existing International Student Contract Dispute Resolution Scheme Rules 2016, but are tailored to meet the needs of domestic students;
- have been developed in collaboration with the Government Centre for Dispute Resolution to ensure they align with the Aotearoa Best Practice Dispute Resolution Framework, and reflect feedback from Parliamentary Counsel Office;
- prioritise consensual forms of dispute resolution over determinative, adjudicative processes;
- reflect the learner's journey through the scheme to ensure clarity and make the scheme more navigable for learners;
- expect the scheme operator to develop and evaluate its service under the rules with Māori, to ensure consistency with Te Tiriti o Waitangi;
- have been designed so that the scheme works well for all learners and is consistent with the Crown's obligations under Te Tiriti o Waitangi and with the Privacy Act 2020.

Managing costs

There are no financial implications for this paper. I provided details on the contingency for funding the delivery of the dispute resolution scheme in April 2021 [CAB-21-MIN-0095].

Communication and implementation

My officials are currently undertaking an evaluation process to make a recommendation for a scheme operator. Following this, I will appoint an operator.

At the time the rules are made, I will work with officials to ensure that the rules are communicated appropriately, including in alternative formats.

Once the scheme is in operation, the scheme operator has a responsibility under the rules to publicise the scheme, including how the scheme can be accessed and will work, as well as providing case studies.

Annex Four: List of targeted consultation submitters

Submitter groups/organisations who provided feedback on the DRS rules
<ul style="list-style-type: none">• Government Centre for Dispute Resolution (Ministry of Business, Innovation, and Employment)• New Zealand Qualifications Authority• Office of the Privacy Commissioner• Universities New Zealand• Academic Quality Agency• Office of the Ombudsman• YouthLaw Aotearoa• New Zealand Union of Students' Associations• Talk – Meet – Resolve (Alternative Dispute Resolution Service)• Aspire Dispute Resolution Aotearoa NZ Limited
Submitter groups/organisations who responded to the targeted consultation but had no further feedback to provide on this iteration of the DRS rules
<ul style="list-style-type: none">• Resolution Institute (Australia and NZ dispute resolution membership organisation)• Arbitrators' and Mediators' Institute of New Zealand (NZ dispute resolution professional body)• Ministry of Justice• FairWay Resolution Limited