Regulatory Impact Statement

Legislative Amendments Related to the Pastoral Care of International Students

Agency Disclosure Statement

This Regulatory Impact Statement has been prepared by the Ministry of Education.

It provides an analysis of options to improve the effectiveness and efficiency of the Code of Practice for the Pastoral Care of International Students (the Code) and to establish a dedicated mechanism to resolve contract disputes between international students and their education providers, so as to better support the sustainable growth of the international education sector.

Analysis indicates that aspects of the current Code inadequately protect international students due to a convoluted sanction process, weaknesses in monitoring of compliance, and being overly prescriptive about process instead of focusing on outcomes. The Ministry concludes that the Code needs to be revamped to focus on outcomes sought from signatory providers, strengthen monitoring of compliance by closely aligning and integrating this work with the wider education quality assurance regime, and streamline the sanction process.

A focus on strengthening the enforcement of the Code and better supporting international students also leads to the conclusion that a dedicated and independent contract disputes resolution scheme is needed to focus on adjudicating international students' contract (including financial) disputes with their education providers, instead of having the same tribunal to sanction Code breaches too, as under the status quo. Sanctioning Code breaches is best carried out by the Code Administrator which has the most information on signatories, due to the Administrator's other functions of approving Code signatory applications and monitoring signatories' compliance with the Code.

The analysis assumes that international students are more vulnerable than domestic students, because they are far away from their home and social networks and are often challenged by a linguistically, culturally and socially different environment. It also assumes that by providing these students with more effective and comprehensive pastoral care and support they will have a more positive experience in New Zealand, contributing to the promotion of New Zealand as a desirable education destination. This outcome would contribute to the growth of international education, which brings significant economic and social benefits to New Zealand.

To improve the Code as discussed above and establish the independent disputes resolution scheme, changes must be made to the Education Act 1989. These will be included in the Education Amendment Bill (No 2) 2013.

These changes are expected to provide more effective protection for international students at no increased cost to affected education providers or government. We expect that compliance burdens will reduce for high-performing providers but will increase for poor quality providers.

Dr Andrea Schöllmann, Acting Deputy Secretary, Tertiary, International, System Performance

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Status quo and problem definition

1. The Government has set ambitious goals for growing the international education sector which will bring more economic and social benefits to New Zealand. To sustain this growth, it is crucial that international students are well supported and have a positive experience in New Zealand, as well as receiving a high quality education. Governments in those countries from which our international students come expect the New Zealand government and its agencies to ensure that high quality standards are set and monitored, and that poor quality is either improved quickly or removed. Effective quality assurance mechanisms must drive quality improvement across the whole export education industry.

2. Education providers have a key role. With respect to student care, the Code of Practice for the Pastoral Care of International Students (the Code) specifies standards of care and support that international students should expect to receive from their providers. Regulating the care and support for international students is necessary, because of their vulnerability associated with being young, often from very different cultural and linguistic backgrounds, and far away from their family and social networks.

3. Under the Education Act 1989 (the Act), all education providers which enrol international students must be signatories to the Code. Section 238 empowers the Minister to publish a Code and makes provision for:

    - designating the Administrator
    - regulating the way providers recruit international students and deliver support services to them
    - establishing signatories' self review and providing for an independent body's monitoring processes
    - establishing the International Education Appeal Authority (IEAA) to investigate and determine complaints from international students and the Code Administrator about alleged breaches of the Code, and to recommend suspending or removing a Code signatory to the International Education Review Panel (the Review Panel)
    - establishing the Review Panel to determine whether a signatory should be removed or suspended as a signatory to the Code.

4. The Code Administrator approves education providers' applications to become signatories. It requires signatories to conduct a self review and attest that they have done so. It also monitors compliance of signatories through the work of other education quality assurance authorities. When non-compliance is identified, the Code Administrator may refer the case to the IEAA as a complaint to be investigated and determined for any sanctions, and the Review Panel may be involved if there is a serious breach.

5. Costs of all activities carried out by the Code Administrator, the IEAA and the Review Panel under the Code are funded by the Export Education Levy charged to all education providers who are signatories to the Code. The Export Education Levy Annual Report for the financial year 2011/12 reports that those costs amounted to $753,000, with $503,000 spent on the Code Administrator, $233,000 spent on the IEAA, and $16,000 on the Review Panel.

6. A review of the current Code has revealed some issues with its monitoring and sanction processes as specified in the Act.

7. First, the legislation is unclear about the purpose and scope of the Code. It needs to clarify that the purpose is to ensure education providers take reasonable steps to protect their international students and help ensure these students have a positive experience in NZ, so as to support the Government's objectives for international education.

8. It should also stipulate the scope of the Code, ie: the Code should specify outcomes sought from and key processes required of education providers, in terms of supporting international students' wellbeing, progression and consumer rights, and that the Code is complementary to other education quality assurance standards.

9. In addition, there are weaknesses in the monitoring, review and auditing process and there is a need for better alignment with the wider education quality assurance mechanisms.

10. The current legislation is unclear about the Code Administrator's role in ensuring effective monitoring of Code compliance and collaborating with other education quality assurance authorities, but relies primarily on Code signatories' self reviews. As a result, there is no means of determining levels of risk and prioritising scrutiny on those providers posing the highest risk. Code compliance needs to be considered as part of the broad education quality assurance regime, which means there should be close alignment and integration between the monitoring and compliance activities under the Code and under other education quality assurance systems. The Code Administrator needs to be empowered to better coordinate these functions.

11. The current sanction process is unsatisfactory in protecting international students' interests and ensuring high standards of care and support by their providers. Two factors have contributed to this problem. One is that there are too many agencies[1] involved in decision making for sanctions, and the other is that the functions of resolving student complaints and sanctioning Code breaches have been mixed and carried out by the same tribunal.

12. Having too many bodies involved in sanctioning breaches of the Code has led to a drawn-out process. Since the Code was made mandatory in 2002, only six cases of alleged serious breaches have been referred to and determined by the Review Panel, and all took about a year to reach a final decision. This process should be streamlined.

13. Also, the IEAA only accepts complaints from current international students about their providers' breaches of the Code, after they have exhausted the providers' internal grievance procedures. The current jurisdiction of the tribunal means some students' complaints cannot be addressed by this tribunal (for example, if they have paid fees but are not enrolled yet), and this has put some students' interest at risk.

14. The IEAA data for 2012 reports that 30 out of 86 cases closed (nearly 35%) were found to be outside the IEAA's jurisdiction and dismissed, for reasons including:

    - refund disputes involving other regulations
    - students seeking compensation for loss
    - students having not exhausted providers' internal grievance procedures
    - complaint being about education quality

[1] That is: the Code Administrator, the IEAA and the Review Panel.

- provider gone out of business hence no longer a Code signatory
- the complainant not being an enrolled international student when the complaint is lodged (eg a person who has paid fees but not enrolled).

15. The Ministry considers that the process of applying regulatory sanctions against Code breaches needs to be separated from the process of addressing students' complaints. The Code Administrator is best placed to impose sanctions against breaches, because it has the fullest information about signatories as it also has other responsibilities such as approving Code signatory applications and monitoring and reviewing signatories' performance under the Code.

16. Student complaints are most often about contractual (including financial) disputes[2] which are best resolved by a quasi judicial or similar body, because adjudicating such disputes will involve quasi-judicial judgements with references to legislations and/or regulations beyond the Code[3]. The jurisdiction of this body needs to be carefully worded in the Act to ensure that all international students[4] could have their welfare complaints addressed either by this body or by the Code Administrator. Concerns about education quality will be referred to education quality assurance authorities.

17. Not taking actions to improve the effectiveness of the Code and of the disputes resolution would mean that international students' welfare and interests would continue to be less than optimally protected, which would jeopardise the Government's objective to grow the international education sector.

Objectives

18. The new Code and its key processes set out in the legislation should aim to ensure it is:

- effective for protecting international students and ensuring they have a positive experience in NZ, via: effective monitoring of Code compliance; swifter and more effective sanctions against breaches; and easier access to disputes resolutions by international students.
- sufficient support by the international education sector
- no additional cost to the Education Export Levy[5].

Regulatory impact analysis

19. Two models have been considered and consulted with the sector, following a discussion document outlining key issues and approaches to address those issues, drawing on information and evidence provided by the sector bodies and relevant government agencies, including the Code Administrator. Strengths and weaknesses of the two models are analysed below.

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[2] According to the IEAA data, 30 out of 50 new complaints received (nearly 60%) during the year 2012 were about refund disputes.

[3] Such as the Fair Trading Act 1989, and Consumer Guarantees Act 1993.

[4] Including the would-be international students who have paid fees but not enrolled yet.

[5] The Code Administrator and other authorities established under the Code are all funded by the Export Education Levy, which is paid by all Code signatories.

	Status Quo	Option 1	Option 2
Descriptions	The Administrator approves Code signatory applications and monitors the compliance of signatories by requiring signatories to conduct self reviews. An independent authority (ie IEAA) imposes sanctions against non serious breaches and addresses students' complaints about breaches. IEAA refers serious breaches to another independent body (ie the Review Panel) for sanctions.	The Administrator approves Code signatory applications and strengthens its monitoring of the compliance of signatories. An independent authority imposes all sanctions against all breaches and addresses students' complaints about breaches.	The Administrator approves Code signatory applications and strengthens its monitoring of the compliance of signatories. The Administrator imposes all sanctions against all breaches. An independent contract disputes resolution scheme adjudicates contractual (incl financial) disputes between international students and their education providers.
Strengths	Meets the sector's preference for independent bodies to impose all sanctions.	Meets sector's preference for independent bodies to impose sanctions. The Administrator's monitoring role strengthened and more proactive. Streamlines the sanctioning process by involving only one sanctioning body.	In-principle support from sector bodies after further consultation. Most effective and efficient for sanctioning Code breaches, because only the Administrator would be involved, who would also monitor performance. Separating dispute resolutions from compliance actions would mean better focus on student concerns and hence better support for students.
Weaknesses	Unsatisfactory protection of international students. Ineffective and inefficient for ensuring signatories' compliance with the Code.	Resolution of student complaints would still be limited to Code breaches and mixed with compliance sanctions, hence compromising support for students. The Administrator still has to transfer knowledge of Code breaches to another body for sanctions, hence less efficient and there would still be some delays in sanctioning.	Some sector bodies are wary of a potential increase to the Levy as a result of increased focus on monitoring and sanctioning of breaches by the Administrator. Universities have in the past been wary of extending NZQA's sanction powers to universities under the Code, but discussions between NZQA and Universities New Zealand since 1 August when NZQA became the Code Administrator have been very positive.

Costs	In year 2011/12: IEAA spent $233,000 on adjudicating students' complaints. The Review Panel spent $16,000 on considering two cases of serious breaches. The Administrator spent $503,000 for approving Code applications, supporting signatories for implementing the Code, and monitoring and investigating Code compliance. The total was about $753,000.	Would potentially save the money spent by the Review Panel, which is limited.	There may be no savings, but officials do not expect an increase to the Levy costs, either.

20. The Ministry recommends Option 2, because we consider this option would make most improvement to the status quo, and best meet the objective.

Code Administrator's functions and powers

21. Under Option 2, the Code Administrator should have the following functions to strengthen the approval and monitoring of Code signatory providers:

- Assess and approve applications to become signatories against criteria set in the Code
- Monitor and investigate signatory providers' compliance with the Code through close collaboration with education quality assurance authorities.

22. The Code Administrator should also have the following sanction powers for Code breaches, being of the same kind and application as the provisions in Part 20 of the Act for compliance notices, imposing conditions and withdrawals administered by NZQA for non-university tertiary providers:

- Issue compliance notices to require remedy by a particular time, failing which one or more conditions may be imposed or signatory status withdrawn
- Impose conditions on a Code signatory status to limit a signatory's right to enrol international students
- Cancel a provider's Code signatory status[6].

23. With the New Zealand Qualifications Authority (NZQA) being designated the Code Administrator and the sanction process under the Code closely aligned with the NZQA's quality assurance process, we expect that there will be efficiency and effectiveness gains in monitoring and ensuring Code compliance if Option 2 is adopted.

24. NZQA is having further discussions with the Academic Quality Agency for New Zealand Universities, Universities New Zealand and Education Review Office regarding how they may work closely on Code compliance matters while respecting agencies' respective jurisdictions.

[6] This would prohibit an education provider from enrolling international students.

Establishing an independent contract disputes resolution scheme

25. For resolving international students' contractual (incl financial) disputes with their education providers, we propose to create an independent contract disputes resolution scheme, using established infrastructure.

26. Under this proposal, the Education Act 1989 needs to be amended to enable the Minister responsible for international education to establish an independent dispute resolution scheme and appoint its operator. The scheme's rules will be specified in a regulation empowered by this Act.

27. We propose that the Education Act 1989 be amended to give effect to the following:

    a. An "International Students Contract Disputes Resolution Scheme" (the Scheme) be established to resolve contract (incl financial) disputes between prospective, current and former international students and their education providers, if the education provider has been given the opportunity to resolve the dispute but the international student is unsatisfied with the process and/or the outcome.

    b. The Minister responsible for international education will appoint the operator of the Scheme.

    c. On the recommendation of the Minister responsible for international education, the Governor General by Order in Council shall prescribe rules for this Scheme, including its procedures, sanctions, fees, reporting, and any other matters relevant to the operation of this Scheme.

    d. In relation to rules about fees and charges, the Scheme Operator may:

        i. charge fees to some or all users (ie international students and education providers) of the Scheme for some or all services, according to the rules of the Scheme

        ii. exempt some users from liability to pay a fee or charge in whole or in part

        iii. charge a fixed amount or an amount calculated by reference to the costs of investigating and resolving disputes.

    e. The Scheme Operator may receive funding from the Export Education Levy for the operation of this Scheme, as approved by the Minister.

    f. The Minister responsible for international education shall consult with relevant bodies and sector representatives as he/she considers appropriate, before recommending the rules of the Scheme to the Governor General.

    g. All education providers enrolling or intending to enrol international students must be subject to and comply with the Scheme rules.

    h. The Scheme Operator's adjudication decision shall be binding if the student accepts this decision.

    i. Court proceedings shall be available to resolve disputes as an alternative to the Scheme, or if the student is not satisfied with the decision (or lack thereof) of the Scheme Operator.

    j. On the application of the Scheme Operator, a District Court may make an order requiring a provider to:

        i. comply with the rules of the scheme

        ii. comply with a resolution of a complaint that constitutes a binding resolution under those rules.

    k. If an order requiring a provider to comply with a binding settlement includes a requirement that the provider pay an amount of money to a student, that order (or part of the order) may be enforced as if it were a judgment by a District Court for the payment of a sum of money.

l. The District Court may modify the terms of a binding resolution if satisfied that its terms are manifestly unreasonable.

28. It is anticipated that the scheme rules will require the scheme operator to share detailed case information with the Code Administrator, subject to the Privacy Act, to help ensure compliance with the Code.

29. There are potentially two existing operators of this scheme – one is the Crown company known as the Dispute Resolution Services Ltd (DRSL), and the other is the Ministry of Business, Innovation and Employment (MBIE). Both operators have established national infrastructure to deliver specified services. The Minister will appoint an appropriate operator once the above proposals are approved by the Cabinet.

30. The Ministry also considered some alternatives to this scheme:

    a. whether Tribunals already established under the Disputes Tribunals Act 1988 could be used by international students to resolve their disputes; or

    b. whether to establish a dedicated international education tribunal.

31. Alternative a. would mean that an estimated half of the student contract disputes would have to go to the Court directly, with the other half being resolved by Disputes Tribunals. This is because Disputes Tribunals have a claim limit of $15,000 or $20,000 if both parties agree, and its procedures are not designed for resolving larger sums of disputes. According to the data held by the Ministry of Justice, about half of the claims made to the IEAA in the last two years exceeded the Disputes Tribunals' claim limits, with the highest refunds granted by the IEAA at $55,000.

32. Court procedures are difficult, and in some cases inaccessible, for international students with limited English, resources and time in New Zealand. There is a filing fee of $200 to make a claim by filling out a claim form, followed by exchanging so called "information capsules" involving responses by both parties in writing (each party is allowed 20 working days to do this). If not settled during this process, the complainant (ie international students) will have to pay another $900 to have a court hearing.

33. In addition, doing away with a specialist tribunal (currently the IEAA) may create a perception that New Zealand is resiling from dedicated support for international students. We are concerned that this would not help with the marketing efforts to promote NZ as a desirable education destination.

34. Alternative b. could avoid the above perception, but is less cost-effective than the proposed option, mainly because:

    a. It only offers adjudication, whereas a disputes resolution scheme could resolve disputes through facilitation and mediation, without involving adjudication. This would mean faster and cheaper resolution of disputes.

    b. Poor geographical coverage due to limited number of tribunal members.

    c. Higher running costs annually and higher implementation cost.

    d. Limited ability to share information with government agencies (such as NZQA - the Code Administrator) due to the principle of keeping the judicial system separate from the executive wing of the government. In comparison, under the proposed option, the scheme rules can require the operator to share detailed case information (subject to the Privacy Act) with the Code Administrator and/or other relevant government bodies to help ensure the compliance of the Code, since disputes may reveal a provider's systemic failure in complying with the Code.

On balance an appeal process under the Code would be unnecessary

35. The Ministry has also considered options of having an appeal process for education providers to appeal against sanctions imposed by the Code Administrator. This is not recommended, because:

    - the sanction process follows the principle of natural justice – providers are given opportunities to rectify or make their cases before sanctions are imposed.
    - this process has been proven to be sound and fair, because a similar quality assurance process administered by the NZQA has withstood the scrutiny of judicial reviews.

36. The right of appeal must be balanced against cost of appeal proceedings; delay in implementation of decisions; trivial or unwarranted appeals; the competence and expertise of the decision-maker in the first instance; and the need for finality. The Ministry considers the need to swiftly implement regulatory sanctions to ensure all international students are protected under the Code outweighs the providers' preference for a review of the Code administrator's decisions, especially when the Administrator's process has proven to be sound and adheres to the principle of natural justice. On balance, the Ministry does not consider it necessary to have an appeal process under the Code. Providers still have access to judicial reviews.

Impact of the changes

37. The Ministry expects that changes proposed will reduce compliance burdens of high-performing education providers but increase compliance activities targeted at low-quality providers. Overall, it is not expected that costs to signatories or the government would increase. Increased responsibilities by the Code Administrator are expected to be offset by the integration of the Code compliance work into the wider education quality assurance systems. It is expected that international students would receive better care and support from their education providers as a result of these changes, and hence to help promote New Zealand as a desirable education destination.

Costs

38. Proposals made in this paper will not increase costs to the Crown or the Export Education Levy.

39. The Code Administrator will continue to be funded by the Export Education Levy. The operation of the proposed contract disputes resolution scheme can be funded fully or partially by the Levy, depending on whether charges to users are regarded as necessary to encourage disputes to be resolved at the facilitation and mediation level without requiring adjudication. This is a decision to be made after the legislative change, when making the rules for the scheme. The sector will be consulted when the rules are developed.

40. The Export Education Levy Annual Report for the financial year ended 30 June 2012 reported that the total cost of the Code was $753,000, including $503,000 for the Code Administrator's office and $250,000 for the IEAA and Review Panel.

41. Officials' cost estimates for the proposed disputes resolution scheme, based on using existing infrastructure, are under $180,000 annually, with all operations of this scheme funded by the Levy.

42. The Administrator may have more activities under the proposed new system, but this will be offset by the increased efficiency achieved by making NZQA the Administrator. NZQA is already tasked to conduct quality assurance and risk management of the non-university tertiary providers.

Consultation

43. International education sector bodies[7] have been consulted on the two models considered. The sector bodies consulted expressed in-principle support for the changes proposed. Main concerns include: the lack of an appeal process for signatory providers to appeal against sanctions, and potentially increased costs to the Export Education Levy (ie to education providers) as a result of more activities by the Code Administrator.

44. The Ministry does not consider an appeal process against regulatory sanctions to be necessary – paragraphs 35 and 36 refer.

45. If providers do not accept the disputes resolution scheme operator's decision, they can appeal to the District Court.

46. The Ministry does not expect the costs to the signatories, the sector and the government to increase, as a result of the proposals. Though the Code Administrator will strengthen its monitoring role and carry out new sanction powers, the additional demand on resources will be offset by efficiency gains when the Code process is integrated into the wider quality assurance systems and when NZQA as one of the quality assurance authorities is designated to be the new Code Administrator[8].

47. Education New Zealand, Education Review Office, Ministry of Business, Innovation and Employment (immigration and consumer affairs), Ministry of Justice, Ministry of Youth Development, Office of Ethnic Affairs, Parliamentary Counsel Office, and the Treasury have been consulted on the proposals, and their views are reflected. There is no objection to these proposals. Department of Prime Minister and Cabinet has been informed,

Implementation

48. The first step is to make legislative amendments to enable the implementation of the proposals, including the making of a new Code and rules for the disputes resolution scheme. Required legislative amendments will be included in the Education Amendment Bill (No. 2) 2013, which is expected to be introduced into the Parliament by the end of 2013.

49. The legislative amendments will take effect in six months after Royal Assent, so as to allow sufficient time to draft a new Code and rules for the disputes resolution scheme, consult with the sector, appoint the scheme operator, and allow affected providers sufficient time to make changes to comply with the new Code and legislation.

50. Under the proposals, the Code Administrator will integrate the Code compliance into wider quality assurance systems and/or processes. It is expected that there will be reduced compliance burdens for many providers due to the integration of the processes, but some high-risk providers will be identified and targeted with scrutiny and compliance activities. The Code Administrator will have new powers to impose sanctions against Code breaches and enforce the Code.

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[7] They are: New Zealand Principals' Federation, New Zealand School Trustees Association, Secondary Principals' Association of New Zealand, English New Zealand, Independent Tertiary Institutions, New Zealand Association of Private Education Providers, Metro ITPs, NZITP, Universities New Zealand, Academic Quality Agency for NZ Universities, International Education Appeal Authorities, International Education Review Panel, New Zealand Union of Student Associations, and NZ ISANA.

[8] NZQA officially became the Code Administrator on 1 August 2013.

Monitoring, evaluation and review

51. The Ministry plans to evaluate the new Code and the independent disputes resolution scheme in three years' time after they are implemented. The evaluation will focus on whether the new Code and the scheme and their enabling legislative framework achieve the objectives specified in the legislation and in this document.

52. Data will be collected by the Code Administrator and the operator of the independent contract disputes resolution scheme on:

- the types and nature of Code breaches and disputes
- the types and nature of complaints made by international students, broken down by ethnicity, types of providers involved (such as schools, ITPs, universities and private training establishments)
- time spent to resolve Code breaches and student complaints (including disputes)
- number and types of sanctions imposed by the Code Administrator
- decisions made by the disputes resolution scheme operator, including numbers, refunds awarded/settled, fees charged, etc, broken down by subsectors.

53. Existing regular international student satisfaction surveys will also be used to examine the effectiveness of the Code and disputes resolution scheme. In addition, the Ministry and NZQA will monitor the sector feedback and take this into consideration for the evaluation.