**Briefing Note:** Regulations Review Committee letter regarding the Education (Pastoral Care) Amendment Bill

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<th>To:</th>
<th>Hon Chris Hipkins</th>
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<td>Date:</td>
<td>15 November 2019</td>
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<td>Medium</td>
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<td>Drafter:</td>
<td>Helen Baker</td>
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<td>Julie Keenan</td>
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<td>Messaging seen by Communications team:</td>
<td>N/A</td>
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<td>DDI:</td>
<td>Round Robin: No</td>
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**Purpose of paper**

The purpose of this paper is for you to:

- **note** the recommended amendments to the Education (Pastoral Care) Amendment Bill suggested by the Regulations Review Committee to the Education and Workforce Committee, and

- provide any feedback to the Ministry of Education on this briefing including the Ministry's response to the Regulations Review Committee's recommendations and the attached timeline by Monday 18 November.

**Proactive release**

Agree that this Briefing will be proactively released after the Education (Pastoral Care) Amendment Bill is reported back to the House of Representatives.

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Andy Jackson
Group Manager
Tertiary Education Policy
Graduate Achievement, Vocations and Careers
15/11/2019

Hon Chris Hipkins
Minister of Education
17/11/19
Background

1. The Education (Pastoral Care) Amendment Bill (the Bill) is currently being considered by the Education and Workforce Committee (the Committee). Submissions closed on the Bill on Friday 1 November and the Committee is due to report back on the Bill on Tuesday 3 December 2019.

2. The Education and Workforce Committee received a letter from the Regulations Review Committee (RRC) on Monday 11 November 2019 recommending amendments to the Bill. The Ministry of Education (the Ministry) was not able to address this letter through the Departmental Report as the Ministry did not receive a copy of the letter until after presentation of the Departmental Report.

3. The recommendations in the letter from the RRC are discussed below, along with the Ministry’s proposed responses to these recommendations, if asked about the recommendations by the Education and Workforce Committee.

4. We seek your feedback on this briefing by Monday 18 November. The Education and Workforce Committee will consider a revised tracked version of the Bill on Wednesday 20 November.

Indicative timeframes for the Bill

5. The Education and Workforce Committee has also asked for a timeline for officials’ work developing the interim code, how this relates to the Bill, and to the independent investigations underway on the recent death of the University of Canterbury student.

6. Officials have developed the timeline attached as Annex 1 for the Committee and will provide this to the Committee on Wednesday 20 November. It sets out timeframes for the Bill, and how this relates to development of the interim code, Tertiary Education Commission (TEC) collation of information from Tertiary Education Institutions (TEIs), and publicly available information about the independent investigations underway. The timeline is attached to this briefing for your reference.

7. We have not included any internal Ministerial or Cabinet decisions in the timeline as this information is typically confidential, and advice to the Committee is likely to be publicly released after Committee deliberations.

Recommendations and Ministry response

8. The RRC recommended amendments to three main areas of the Bill. These three areas are discussed below.

Minister’s power to issue codes of practice

9. The RRC expressed concerns about the broad, open-ended nature of the Minister’s power to make delegated legislation under new section 238G of the Bill. The RRC said that delegated legislation should be described as clearly and precisely as possible.

10. The RRC said there is little guidance in the empowering provisions for the codes of practice as to what Parliament intends for the content of the codes and to indicate what level of regulation is intended. The RRC noted that the code for domestic tertiary students could cover the whole range of university experience, not just student accommodation.
11. The RRC expressed concern about the scope of the codes of practice given the introduction of the new penalty and offence provisions. The RRC also said, in relation to the interim code, the Bill provides no guidance as to what the code is for.

12. **RRC recommendation:** the RRC recommended that the Education and Workforce Committee may wish to amend the bill to provide more detail about what types of activities, outcomes and processes Parliament intends the codes in new section 238G and new clause 27 of Part 9 of Schedule 1 to cover.

**Ministry response**

13. The Ministry notes that new section 238G transfers the existing code of practice for international students and introduces a new code of practice for domestic tertiary students.

14. The power for the Minister to issue an international code was introduced in 2001 and the scope and purpose of this code was updated in 2016. As new section 238G broadly reflects the existing provisions for the code of practice for international students (with a small amendment on the advice of submitters¹), Ministry officials consider that the purpose and scope provisions as currently set out in the Bill are sufficient. Additionally, altering the purpose and scope sections in the Bill for either code of practice would involve substantial policy work as this is not just a technical change.

15. The content of a code of practice is a policy decision for the Minister to make. The priorities and focus of a code of practice are for a Minister issuing the code of practice to decide, based on the Government's strategy for tertiary education, evolving needs of students and the sector, and the wider policy environment. At this time, the Minister has decided that student accommodation is a priority for the interim code, but this may not be the case for future codes of practice.

16. Ministry officials also note that new section 238G does not limit the application of a code of practice to student accommodation. It is the policy intention, agreed by Cabinet, that the scope of a code of practice, as described in the Bill, can apply to all domestic tertiary students, not just those in student accommodation.

17. Regarding the RRC’s concerns about the Bill providing no guidance on the content of the interim code, Ministry officials agree that new Part 9 of Schedule 1 could be clearer about whether the interim code is a code of practice as defined in new section 238D. Parliamentary Counsel Office (PCO) has amended the Bill so it is explicit that the provisions of the Bill apply to an interim code. This means the purpose and scope requirements of new section 238G will apply to the interim code.

**Framework for setting fees for the dispute resolution scheme**

18. New section 238P provides for the Governor-General, by Order in Council on the recommendation of the Minister, to make rules for the functioning and administration of the dispute resolution scheme (DRS). Those rules may prescribe fees or a means by which fees may be calculated or ascertained.

19. The RRC stated there should be no ambiguity about what is authorised by an empowering provision that enables setting fees through secondary legislation. The RCC

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¹ In response to submitters' concerns about the requirement to 'protect' domestic tertiary students, officials have recommended that section 238G(2)(a)(i) be amended to require providers to take all reasonable steps to maintain the well-being of domestic tertiary students.
did not consider it is clear what the fees authorised by new section 238P are intended to be for, who collects the fee, who must pay the fee, or whether the rules may set grounds for waiving the fee.

20. The RRC was also concerned about the power in new section 238M(7), for the DRS operator to waive fees, without the Bill giving an indication of how Parliament intends that discretion to be exercised and without providing for rules to set the circumstances in which the waiver of fees should occur.

21. **RRC recommendation:** the RRC recommended that the Education and Workforce Committee may wish to:
   
   a. amend the absolute discretion of the DRS operator to waive fees and instead provide for it to be exercised in accordance with rules prescribed under new section 238P; and
   
   b. amend new section 238P to specify what the fee is intended to be for, how the fees are intended to be set, who is expected to pay the fee, and providing a power to determine the circumstances under which the fees may be waived.

**Ministry response**

22. The Ministry agrees with the RRC’s recommendation that any waiver of fees should be exercised in accordance with rules prescribed under new section 238P, and consider that an amendment to this effect could be made to the Bill if the Education and Workforce Committee is concerned about this.

23. Ministry officials do not consider amending new section 238P to specify more detailed information about fees in the Bill is necessary. Similar to new section 238G, the provisions relating to the DRS are unchanged and transfer across the existing DRS for international students and extend it to apply to domestic tertiary students as well. These provisions have been in place since 2016.

24. Additionally, Ministry officials have been unable to locate any other Act of Parliament, which provides for the making of regulations prescribing fees, which goes into the detail recommended by the RRC. The Ministry considers that it is sufficient for more details to be set out in rules, rather than in the Bill.

25. **The International Student Contract Dispute Resolution Scheme Rules 2016** for the code of practice for international students do not currently provide for fees. Subsection 238P(2) requires the Minister to consult relevant bodies and sector representatives about the creation of rules. In the future, if it was proposed that fees were included in the rules, the Minister would then be required to consult with any relevant bodies and sector representatives about the details of those fees.

**Interim code**

26. The RRC was concerned that the interim code in new clause 26 of Part 9 of Schedule 1 is not described as a disallowable instrument and does not need to be presented to the House of Representatives (the House).

27. The RRC also expressed concern that given the lack of detail around the content of the interim code, it is unclear the extent to which the interim code will affect the current processes of tertiary institutions.
28. **RRC recommendation:** the RRC recommended that the Education and Workforce Committee may wish to discuss with officials the appropriate mechanisms for parliamentary scrutiny of the interim code.

**Ministry response**

29. As noted above, Ministry officials agree that new Part 9 of Schedule 1 could be clearer about whether the provisions of the Bill apply to an interim code. PCO has amended the Bill to make it explicit that an interim code is subject to the provisions in the Bill. This addresses the RRC's concerns and will make it clear that the interim code is a disallowable instrument and subject to the scrutiny of the House. This also aligns with the policy intention of Ministry officials.

30. Ministry officials note that the interim code will provide for minimum standards of pastoral care that it is expected many providers will already be meeting. It is not expected that the interim code will require most providers to change their pastoral care practice significantly.

**Annexes**

Annex 1: Indicative timeframes for the Bill

Annex 2: Letter from the Regulations Review Committee
Annex 1: Indicative timeframes for the Bill

Indicative timeframes for the Education (Pastoral Care) Amendment Bill and related information until 1 January 2020

The timeframes outlined below are an indication of likely timings for processes before the end of the year. They are not set timings and are subject to government or external priorities and processes.

Note that the indicated timings for the ongoing external investigations are based on publicly available information. Campus Living Villages has also signalled it is conducting an investigation but the Ministry is not aware of the timeframes for this investigation.

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<th>Timeframes</th>
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<th>Interim code</th>
<th>TEC collation of information from TEIs</th>
<th>Ongoing external investigations</th>
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<td>Report from Coroner</td>
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<td>Select Committee consideration of Departmental Report</td>
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<td>TEC analysis of responses to information request to TEI councils Step 1: overview of information provided to Minister and Select Committee Step 2: analysis of operating procedures provided to Minister</td>
<td>(Original signalled date for results of the University of Canterbury investigation by former Judge Toogood)</td>
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<td>Week starting 18 November</td>
<td>Select Committee to review revised tracked version of the Bill</td>
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<td>Step 2: analysis of operating procedures to be provided to Select Committee</td>
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<td>New signalled date for results of the University of Canterbury investigation by</td>
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<td>Week starting 2 December</td>
<td>Select Committee report back to House on the Bill</td>
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<td>Week starting 9 December</td>
<td>Second reading of the Bill</td>
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<td>Mid-December</td>
<td>Dates for the rest of the Bill's passage through the House, if it passes second reading, to be confirmed</td>
<td>Interim code intended to be issued by the Minister after the Bill has been passed, if the Bill passes</td>
<td>Step 3: TEC due to receive information on independent audits from TEIs by the end of December (extended from the end of November)</td>
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11 November 2019

Pamjeet Parmar
Chairperson
Education and Workforce Committee
Parliament Buildings

Dear Chairperson

Education (Pastoral Care) Amendment Bill

On 6 November 2019, the Regulations Review Committee (RRC) considered the Education (Pastoral Care) Amendment Bill (the bill). Standing Order 318(3) provides that we may consider matters relating to regulations in a bill before another select committee.

We have a number of concerns with the powers to make delegated legislation in this bill. For the reasons set out below, we invite the Education and Workforce Committee to consider our recommendations. Legislative Counsel is available to brief your committee about our concerns, if your committee would find that helpful.

Our advice

Broad, open-ended powers to make delegated legislation

The committee has concerns about the broad, open-ended nature of the following two powers to make delegated legislation:

- Clause 4, new section 238G, which provides a power for the Minister to issue codes of practice for the pastoral care of both domestic tertiary students and international students:
- Clause 5, new clause 26 of Part 9 of Schedule 1, which provides a transitional power for the Minister to issue an interim code for domestic tertiary students.

RRC’s usual approach is that powers to make delegated legislation should be described as clearly and precisely as possible. These powers should not be drafted more broadly than
necessary in case they are used for purposes that were not intended by Parliament, or cross over into matters of substantive policy that are more suitable for an Act.

In this case, there is very little guidance in the empowering provisions for the main codes as to what Parliament intends for the content of the codes. The only guidance is:

- that the codes’ purposes are to require providers to take all reasonable steps to protect students and to ensure, as far as is possible, that students have a positive experience; and
- the codes’ scopes are to prescribe outcomes sought from providers for their students and key processes required of providers to support the well-being, achievement, and rights of students.

There is very little in the bill to indicate what level of regulation is intended. In relation to domestic tertiary students, the code could cover the whole range of university experience from lectures, to field trips, to clubs—not just student accommodation (as the Departmental Disclosure Statement indicates the code is intended for). Without further guidance in the empowering provision, the code could prescribe outcomes more suitable for enactment by Parliament directly or matters that Parliament intends should continue to be determined by the tertiary institutions themselves.

The lack of clarity regarding the scope of these codes is particularly problematic given that breaches of the code without a reasonable excuse is an offence carrying a maximum fine of $100,000 and serious breaches make a provider liable to a pecuniary penalty of up $100,000.

In relation to the interim code, the bill provides no guidance at all as to what the code is for. Therefore, the same concerns as above apply to the interim code as well (except that the bill does not provide procedures for enforcement of the interim code).

**Recommendation**

We recommend that the Education and Workforce Committee may wish to:

- **amend** the bill to provide more detail about what types of activities, outcomes and processes Parliament intends the codes in new section 238G and new clause 27 of Part 9 of Schedule 1 to cover.

**Sub-delegation of fee setting power**

Clause 4, new section 238M provides that the dispute resolution scheme operator may charge fees to a student or provider according to the rules prescribed under new section 239P and may, in its absolute discretion, partially or completely exempt a person from paying those fees.

New section 238P provides for the Governor-General, by Order in Council on the recommendation of the Minister to make rules for the functioning and administration of the dispute resolution scheme. Those rules may prescribe fees or a means by which fees may be calculated or ascertained.

There are two problems identified with this framework for fees.
First, this committee has been clear that there should be no ambiguity about what is authorised by an empowering provision to make secondary legislation to set fees. In this case, it is not clear what those fees are intended to be for, who collects the fee, who must pay the fee, or whether the rules may set grounds for waiving the fee.

Second, new section 238M(7) is, in effect a sub-delegation of Parliament’s law-making function to the DRS operator without any safeguards. That power allows the DRS operator to waive fees without the Act giving any indication as to how Parliament intends that discretion to be exercised and without providing for rules to set the circumstances in which the waiver of fees should occur. Usually, we would expect to see the power to make rules include provision for how the circumstances in which fees are waived should be prescribed.

Recommendation

We recommend that the Education and Workforce Committee may wish to:

- amend the absolute discretion in the DRS operator to waive fees to provide for it to be exercised in accordance with rules prescribed under new section 238P;
- amend new section 238P to specify what the fee is intended to be for, how the fees are intended to be set, who is expected to pay the fee, and providing a power to determine the circumstances under which the fees may be waived.

Providing for parliamentary scrutiny and control

Unlike the main codes, the interim code in new clause 26 of Part 9 of Schedule 1 is not described as a disallowable instrument and does not need to be presented to the House of Representatives. Therefore, it is not clear how this exercise of Parliament’s delegation of its law-making function should be scrutinised by Parliament.

Given the lack of detail around the content of the interim code and any enforcement mechanisms, it is also unclear the extent to which the interim code will affect the current processes of tertiary institutions.

Recommendation

We recommend that the Education and Workforce Committee may wish to:

- discuss with officials the appropriate mechanisms for parliamentary scrutiny of the interim code.

Conclusion

We would appreciate being informed of what action your committee decides to take in relation to our advice.

Yours sincerely

Alastair Scott
Chairperson
Regulations Review Committee