**Briefing Note:** Privacy Commissioner letter regarding the Education (Pastoral Care) Amendment Bill

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<th>To:</th>
<th>Hon Chris Hipkins, Minister of Education</th>
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<tr>
<td>Date:</td>
<td>19 November 2019</td>
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<td>Priority:</td>
<td>High</td>
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<td>Security Level:</td>
<td>In Confidence</td>
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<td>METIS No:</td>
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<td>Drafter:</td>
<td>Helen Baker</td>
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<td>Key Contact:</td>
<td>Julie Keenan</td>
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<td>Messaging seen by Communications team:</td>
<td>N/A</td>
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<td>Round Robin:</td>
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**Purpose of paper**

The purpose of this briefing note is for you to:

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

- **provide any feedback** to the Ministry of Education on this briefing note including the Ministry’s suggested response to the Privacy Commissioner’s recommendations by Tuesday 19 November.

**Proactive release**

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

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Julie Keenan  
Policy Director  
Graduate Achievement, Vocations and Careers  
19/11/2019

Hon Chris Hipkins  
Minister of Education  
19/11/2019
Background

1. The Education (Pastoral Care) Amendment Bill (the Bill) is currently being considered by the Education and Workforce Committee (the Committee).

2. The Committee requested the following information from the Privacy Commissioner on the Bill:
   a. The Committee is interested in parents' access to information about their children who are in residential accommodation away from home. For example, if the parent of an 18-year-old living in tertiary residential accommodation had concerns about their child's wellbeing and tried to contact the accommodation asking for an update about their child, what would be the privacy implications at play?
   b. The Committee would greatly appreciate if the Commissioner could provide a written response to the above-mentioned scenario as well as any other provisions in the bill, he deems relevant.

3. The Committee received a letter from the Privacy Commissioner on Monday 18 November, which it forwarded to the Ministry of Education (the Ministry), attached as Annex 1. The letter addressed the Committee's question about parents' access to information about their children who are in tertiary student accommodation. It set out that young people have a right to privacy under the Privacy Act 1993 but an accommodation provider may have a policy in place that allows disclosure of a student's information in certain circumstances such as where the safety of a student is at risk.

4. The Privacy Commissioner also recommended three amendments to the Bill. These are discussed below, along with the Ministry's proposed responses to these recommendations, if asked about the recommendations by the Committee.

5. We seek your feedback on this briefing by Tuesday 19 November. The Committee will consider a revised tracked version of the Bill on Wednesday 20 November.

Recommendations and Ministry response

6. The Privacy Commissioner recommended the following three amendments to the Bill.

Explicit requirement to protect privacy

7. The Privacy Commissioner recommended that the Bill is amended to include an explicit requirement to protect the privacy of any individual who makes a statement or whose accommodation is entered or inspected, including in reports or quality improvement notices issued by the code administrator. These protections could include providing students with the ability to object to a code administrator's inspection of their room in certain circumstances and requiring that individual students are not identified in reports or quality improvement notices.

Ministry response

8. The Ministry notes that new section 238H of the Bill creates new entry and inspection powers. In response to submissions, the Ministry has recommended the following amendments to this section to protect the privacy of students:
a. at least 24 hours' prior notice to a student is required before entry by the code administrator is permitted;

b. the student’s consent must be obtained, unless it is unreasonable to do so in the circumstances; and

c. the student should only need to be present if their consent for entry and inspection is conditional on being present.

9. In response to the Privacy Commissioner's recommendation, the Ministry considers that an amendment to the Bill is not required. There is a risk in creating a greater protection for students that may undermine existing protections for others. The Privacy Act already requires the protection of an individual who makes a statement or whose room is entered. The addition of a provision to protect student privacy in this Bill would strengthen this requirement for students in relation to code matters. However, this could be seen as implying a lesser standard in other statutory actions and may weaken it for other matters or for non-students in the same matter.

10. The New Zealand Qualifications Authority (NZQA) is the code administrator for the current code of practice for international students. It is anticipated that NZQA would also be the code administrator for a code of practice for domestic tertiary students. NZQA’s privacy policy, which all staff must comply with, ensures it meets its legal obligations under the Privacy Act 1993 and in relation to its functions under section 246A of the Education Act 1989. NZQA does not include names or details of students in reports released publicly except after consulting them.

11. There have been no privacy breaches previously by NZQA in relation to students in statutory actions, so there is no history to suggest such a requirement is needed for NZQA’s new statutory function as code administrator for a code of practice for domestic tertiary students.

Requirement to consult

12. The Privacy Commissioner recommended that the Bill is amended to require the Minister to consult with the Privacy Commissioner, and with other affected parties such as representative student body groups, when issuing a code of practice.

Ministry response

13. In response to submissions, the Ministry has recommended the insertion of a new subsection for new section 238G that requires the Minister to consult before issuing a code of practice. Parliamentary Counsel Office has amended the Bill so the Minister must consult with those parties the Minister considers likely to be affected by the code, including representatives of students, parents, providers, signatory providers, and the staff of providers and signatory providers.

14. The new proposed subsection (4A) of section 238G addresses some of the Privacy Commissioner’s recommendations but does not explicitly require consulting the Privacy Commissioner. The Ministry notes that the consultation requirement is non-exhaustive and the Minister could consult with the Privacy Commissioner, as the subsection is worded now.

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15. The Ministry does not consider the subsection needs to be amended. However, if the Committee thinks it would be beneficial to list the Privacy Commissioner in addition to the current consultation requirements, the Ministry does not have concerns about this change.

Nominated contact person

16. The Privacy Commissioner recommended that the Committee consider adding a provision for a code of practice to include some obligation on providers to explicitly ask students to nominate a preferred contact person and the circumstances in which that contact person will be engaged, or to expressly decline to identify a preferred contact person.

Ministry response

17. The Ministry considers this third recommendation relates to the content of a code of practice and therefore, that change is not required to the Bill. The Ministry does not think this requirement should be specified in the Bill, as it would suggest that a matter of detail, like specifying a contact person and reasons for contacting them, is more important than other parameters for a code.

18. The Ministry considers that this is a matter for code development and the recommendation could potentially be included in the interim code or in an ongoing code of practice. The Ministry also notes that it could also consult the Privacy Commissioner on the content of the interim code, but this does not need to be set out as a requirement in the Bill.

Annexes

Annex 1: Letter from the Privacy Commissioner