



# LEGISLATION DESIGN AND ADVISORY COMMITTEE

4 November 2019

Dr Parmjeet Parmar MP  
Chair  
Education and Workforce Committee  
Parliament Buildings  
Wellington

## Submission on the Education (Pastoral Care) Amendment Bill

### Introduction

1. The Legislation Design and Advisory Committee (LDAC) was established by the Attorney-General in June 2015 to improve the quality and effectiveness of legislation. In particular, LDAC's terms of reference include these dual roles:
  - a. providing advice to departments in the initial stages of developing legislation when legislative proposals are being prepared; and
  - b. scrutinising and making representations to the appropriate body or person on aspects of bills that raise matters of particular public law concern.
2. The LDAC has been given a mandate by Cabinet to provide advice on legislative proposals and to review Bills against the *Legislation Guidelines* (2018 edition) (**Guidelines**). The Guidelines have been adopted by Cabinet as the government's key point of reference for assessing whether draft legislation is well designed and accords with fundamental legal and constitutional principles. Our focus is not on policy, but rather on legislative design and the consistency of a Bill with the principles contained in the Guidelines.
3. The Education (Pastoral Care) Amendment Bill was not considered by LDAC prior to introduction. LDAC has therefore reviewed this Bill and wishes to make a submission on the Bill as introduced.
4. We do not submit on the policy underlying the Bill.

### Background

5. The Explanatory Note provides that this Bill is intended to address regulatory gaps relating to the pastoral care of domestic tertiary students by enabling the Minister of Education to create a mandatory code for domestic students alongside the existing Education (Pastoral Care of

International Students) Code of Practice 2016, and providing for code compliance to be monitored and enforced.

6. This submission is focused on improvements that could be made to the Bill to ensure that it complies with the Guidelines while meeting its laudable objective.

### **Consultation on the code of practice**

7. This Bill will provide for replacement of the Education (Pastoral Care of International Students) Code of Practice 2016 with a code issued under the provisions of this Bill and expands the Education Act 1989 to also allow for a new code of practice for pastoral care of domestic tertiary students. The Bill proposes that codes be issued by the Minister and that the codes be disallowable instruments but not legislative instruments.
8. The proposal for these codes to be disallowable instruments made by the Minister seems appropriate given the technical nature of the matters likely to be covered in these codes. However, non-compliance with codes can result in sanctions being imposed by the code administrator and (unlike with the existing international students' code), for serious non-compliances, an offence being committed. It is important, therefore, that checks and balances are built into the process for making codes.
9. The Guidelines provide that all secondary legislation should be subject to an appropriate level of scrutiny, a good process, publication requirements, and review.<sup>1</sup> In particular, the Bill does not appear to contain any express requirement for the Minister to consult on a proposed code. If this is correct, LDAC recommends that the Bill would benefit from an express requirement for the Minister to:
  - consult on draft codes with affected persons; and
  - have regard to any submissions made.<sup>2</sup>
10. LDAC notes that the transitional provisions expressly exclude an obligation to consult on interim codes. LDAC acknowledges that, given the tight timing for the issuing of an interim code, there is a case for excluding an obligation to consult on an interim code (although the same Guidelines issues as outlined in paragraphs 8 and 9 above will arise with any lack of consultation). We note, however, that this would not prevent the Minister providing a limited opportunity for affected parties to comment on a draft code (a matter of days). Even limited opportunities for consultation can be helpful to mitigate the risk of unintended consequences, which is particularly acute when rules are drafted quickly.

### **Statutory right of appeal or review**

11. The Bill provides for code administrators to exercise powers and to make decisions that could affect the rights and interests of providers and other persons. In the case of domestic students, administrator decisions can include the issuing of compliance measures such as quality improvement notices that require providers to address the administrator's concerns within a specified time.

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<sup>1</sup> *Legislation Guidelines* (2018 edition), chapter 14.4

<sup>2</sup> *Legislation Guidelines* (2018 edition), chapter 19

12. The exercise of this power could have a significant effect on a provider – failure to comply with a notice can result in sanctions, including sanctions on the provider’s power to enrol students. There is a wide discretion for the administrator to assess whether the provider’s systems, practices, training or procedures raise concern, what the provider must do to address the concerns, the time period within which the concerns must be addressed, and for assessment of whether the concerns have been addressed accordingly.
13. The Guidelines provide that legislation should include safeguards that will provide adequate protection for the rights of individuals affected by a decision. The Guidelines provide that the following protections should normally apply to the exercise of a statutory power:
  - The rules and criteria by which the power will be exercised should be specified in the legislation.
  - A fair procedure should apply (this may include the right to make submissions, the right to be heard, and the right to produce evidence in support).
  - Decisions that affect a person’s rights or interests should be reviewable in some way.<sup>3</sup>
14. The Bill does not propose to provide prescriptive detail on the criteria within which administrators power can be exercised. For this reason, it is all the more important for decisions made by the administrator to be made using a fair procedure and subject to a right of appeal.<sup>4</sup> LDAC recommends that providers be provided with a right of appeal against a code administrator’s decision (or at the very least a right to review by a person independent of the code administrator).

## Recommendations

15. We **recommend** that the committee consider:
  - **amending** the Bill to include an express requirement to consult on draft codes with affected persons.
  - **amending** the Bill to include a right of appeal against a Code Administrator decision.
16. Thank you for considering our submission. We do not wish to be heard in person.

Yours sincerely



Karl Simpson  
**Chair**  
**Legislation Design and Advisory Committee**

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<sup>3</sup> *Legislation Guidelines* (2018 edition), chapter 18.6

<sup>4</sup> *Legislation Guidelines* (2018 edition), chapter 28