

Education (Pastoral Care) Amendment Bill 2019

Universities New Zealand submission

Introduction

This submission is from Universities New Zealand – Te Pōkai Tara, the operating name of the New Zealand Vice-Chancellors’ Committee, a statutory body established under Part 19 of the Education Act 1989, which has statutory responsibilities and represents the interests of New Zealand’s eight universities on a wide range of matters.

This submission reflects the views of the Vice-Chancellors, senior university staff and practitioners engaged in the provision of pastoral care and accommodation services.

We wish to appear before the Select Committee in support of this submission.

Executive summary

New Zealand universities accept the inevitability of mandatory standards for the pastoral care of students and want to work with Government to develop a workable, realistic Code of Pastoral Care for domestic and international students. Ensuring that the scope of such a code is clear will be key to preventing unnecessary, costly or unintended consequences.

The delay in the discovery of the death of Mason Pendrous in his student accommodation was tragic, and universities are awaiting the findings of three separate investigations to provide details on the circumstances of his death. The universities will work together to update any policies and practices as necessary once these are known.

We are concerned that the Bill’s urgency is pre-empting the findings of current reviews underway related to recent events in Canterbury. Legislation driven by emotional considerations is often flawed and not well positioned to achieve the right outcomes. Working with findings from the investigations would better inform and focus any required change.

The sector favours a robust code based on the current self-regulating model used to quality assure the pastoral care of international students, administered by the New Zealand Qualifications Authority (NZQA) through delegation to UNZ. Ensuring that the scope of such a code is clear will be key to preventing unnecessary, costly or unintended consequences.

Universities take their responsibilities to deliver pastoral care very seriously and already provide and manage a safe environment. Managing the increasing complexities of individual student care are challenging, however, and a safe environment does not mean that harm will not ever occur.

Some of the measures proposed in the legislation remove the rights of adults to live independently in their home in their own way. Universities strongly caution against over-prescribed or intrusive

codes but reiterate that any introduced code be principles-based, reasonable, practical and consistent.

Context

Universities have nearly 179,000 enrolled students and provide around 16,500 beds across accommodation that includes halls of residence for first year students through to independent living and apartment living for more mature students. Around 60% of university accommodation is for first-year students and another 14% for a mix of first and subsequent year students; 27% is for mature and postgraduate students. Provision of about 1/5th of these beds is via non-university providers. The remainder are operated by universities.

Universities must balance the following factors when thinking about pastoral care:

- Universities are primarily places of learning, teaching and research.
- Universities are obliged to provide a safe and healthy environment for their staff and students. Pastoral care, however, incorporates many other dimensions, including health, wellbeing (social, emotional, spiritual and physical) community engagement and academic support for all students based on circumstance and need. Any code must therefore allow for flexibility to achieve the best possible pastoral care outcomes.
- Most students are adults (only 0.2% of students are under 18 years of age) with expectations of privacy and independence. Overly intrusive practices and interventions drive students off campus into less safe, less supportive environments.
- Assessing risk levels is a critical part of care planning and management. It is not possible to completely eliminate risk. Risks within universities are currently well monitored and regularly reported to senior management and governance.
- Currently universities and students have a relationship that establishes responsibilities and obligations for both parties. While universities are being held to account in this proposed legislation, students must also have a responsibility to engage with the services provided.
- Intrusive practices and interventions may not be tolerated or accepted by students who have a right to act as independent adults. This could lead to higher risk behaviours of non-reporting concerns in relation to self or others to avoid restrictions or controls on their privacy and right of choice.
- Under the proposed legislation, providers are required to take all reasonable steps to protect students and ensure, as far as possible, that students have a positive experience that supports their educational achievement. It may not always be possible to provide a positive experience as—at times—individual rights may not align with the safety, welfare or care of others within that community.

Universities take their provisioning of accommodation seriously. Students pay fees for a level of pastoral support and universities provide a system to develop caring communities. Results indicate that students have better learning outcomes when they have a sense of belonging. In the main, universities take a holistic approach, focused on the students and helping them become independent learners.

Ensuring physical and mental safety, and building a community, are key components in creating a safe environment for students to grow into their full potential. Pastoral care extends far beyond university accommodation and spans the whole institution and university community, and universities offer a complex and varied selection of pastoral care to students.

Though the incidence of serious harm is relatively limited at university,¹ universities investigate it every time it occurs and use this information to inform policy and practice. All universities systematically identify risks and report them and their mitigations to their councils and the Tertiary Education Commission (TEC).

Since the Voluntary Code of Pastoral Care of Students in Accommodation was promulgated in 2004, universities have adopted all its key principles and guidelines to best meet the needs of the students across the different types of accommodation. The environment and complexity of demands have changed considerably since 2004 and universities have adapted to meet those demands.

Determining within a code the make-up and level of staffing that may be required in halls or across the university is arbitrary and misguided. Delivery of pastoral care is not limited to accommodation staff. Staffing roles across each university contribute to students' pastoral care (eg, ancillary staff, professional services and academics). Universities must have the ability to determine a staffing capability relating to pastoral care that best serves the complexity of need—not just within halls but across the wider scholarly community.

That stated, the university sector acknowledges that it is useful there are:

- consistent standards for pastoral care for all students, and
- quality assurance arrangements to ensure they are being met.

However, the sector is concerned that the proposed Bill:

- provides no limits around what the Minister can impose on the sector through the Mandatory Code of Practice
- gives Code Administrator very invasive powers, such as the ability to enter and inspect rooms of students who have expectations of privacy
- does not appear to provide much discretion or guidance for the Code Administrator to determine whether pastoral care arrangements were reasonable in instances of 'serious harm'.

The proposed Bill allows for a Minister to impose one or more codes of conduct that could produce unintended consequences, such as students becoming more reluctant to seek help, and a shift in emphasis from caring communities to one of compliance. Such consequences may lessen the quality of student experience, placing students and providers in situations of greater risk. New Zealand universities pride themselves on being open to all and on embracing diversity. The proposed legislation has the potential to reduce diversity by promoting unconscious bias and encouraging exclusion.

It also increases the risk of accommodation becoming too expensive and exacerbating a socio/economic divide amongst students/families who cannot afford to reside in halls. We are sure Government does not want to add to the perception that universities are only for rich kids.

¹ On average 10-20 university students die every year from a wide variety of causes – accidental, medical, and self-inflicted. This is almost exactly 1/5th the mortality rate of the wider population of the same age.

Potentially rural and regional school leavers who are required to leave home to attend university may be further disadvantaged.

It may prompt university accommodation providers, including independent suppliers, to drop out of the market as it becomes “too hard” to meet the requirements while keeping prices at an affordable level. New Zealand already struggles to attract a variety of suppliers due to its population size.

All the above may then create a further problem in the private rental market. If demand for private flats increases because university accommodation is either too expensive or there are fewer beds, then the risk is that the private rents will increase as the demand increases. Students already find it difficult in some centres to find affordable accommodation.

Finally, **universities strongly recommend** one code for all students, incorporating any specific requirements relating to international students and /or residential care within sections of a single code.

Specific clauses

Before commenting on specific clauses, it should be noted that universities are required to comply with a myriad of legislations and codes. Many specialist staff (such as GPs, nurses, counsellors, psychiatrists to name a few) have professional codes they are required to adhere to.

Relevant legislation includes not only the Education Act but the Health and Safety in Employment Act, Human Rights Act, Health and Disabilities Act, and the Privacy Act. How all of these intersect must be considered; if definitions are inconsistent then monitoring and compliance becomes exceedingly difficult. The Employment Act also intersects, as students move in and out of employment within the institution. This adds to the complexity of not only pastoral care needs and student experience but also employee relationships. Careful thought must be given to managing risk without driving unnecessary cost burdens.

Our comments on specific clauses in the Bill follow:

Part 18A, Clause 238D Interpretation and 238S Offences and penalties

Serious harm

The Bill’s current definition of serious harm is prescriptive and immediately escalates every issue to a serious harm issue, which may not always be appropriate or proportional, and may prevent precautionary steps being taken early on. Currently no statutory definition of “serious harm” appears in the Education (Pastoral Care of International Students) Code of Practice 2016, the Education Act 1989, or the Health and Safety at Work Act 2015. Rather, it appears as an open-ended phrase, which under common law’s “reasonable person test” most people are expected to understand and manage accordingly.

Harm operates on a continuum from potentially serious to moderately serious to extremely serious. **Universities strongly recommend** the definition and scope of serious harm be aligned with other relevant legislation.

Government wants to see education accessible to all. The Bill as currently worded may have the unintended consequences of providers screening out high-risk students and refusing them access to programmes or halls.

Universities also emphasise that 18-25-year olds are intrinsically a high-risk population. Unforeseen deaths will occur in this age group. Integrated Data Infrastructure (IDI) data analysis indicates that mortality amongst university students is a very rare event. Additionally, if harm is to be managed in a rigid statutory sense, then residential hall and college rules may then need to be more restrictive, making such residences less popular or attractive to students.

Students' pastoral care, wellbeing and welfare are paramount to universities. While universities provide healthcare through health and counselling services, they are first and foremost educational institutions and not health providers of complex services.

Pastoral care is a whole of institution responsibility. Student needs are complex, and the code requires flexibility to cater to the complexity of needs.

Universities recommend consulting widely with practitioners and students.

S238G Pastoral care codes of practice

The Bill places no limits on any Code of Practice issued by the Minister.

Universities recommend that the legislation include principles the Minister must consider before issuing any Code of Practice.

We recommend inserting the following between 238G(1) and 238G(2):

“Before issuing a code of practice, the Minister will ensure it is:

- *Non-prescriptive and principles-based – allowing signatory providers to set pastoral care arrangements in line with the assessed risk for particular groups of students in their specific circumstances insofar as is reasonably practicable.*
- *Consistent with section 159AAA, and 160 of the Education Act and other relevant legislation, including, but not limited to the Privacy Act, Health and Safety at Work Act, and the Human Rights Act.*
- *Preserving the independence and freedom of tertiary institutions to make academic, operational, and management decisions as is consistent with the nature of the services they provide, the efficient use of national resources, the national interest, and the demands of accountability. (drafting note: as per S160 of the Education Act).”*

Clause 238G (1) Issue

The Bill currently makes provision for two codes. Universities support a code for domestic students and **recommend** having one code for all tertiary students. Specific or special clauses pertaining to international students could be being included as an addendum.

At present code requirements around pastoral care of international students require universities to carry out annual self-reviews of all key services and support arrangements provided to students. Most services and support arrangements are effectively identical for domestic and international students—with just some additional language support for international students when accessing some services. It would be both unnecessary and onerous to have to run two parallel reporting and quality assurance processes over the same range of services.

Clause 238G (2) Purpose

What is *reasonable* or *so far as possible* is not defined in the draft Bill, making criminal liability an undefined risk for universities. The purpose of the code is extremely broad: requiring providers both to take all reasonable steps to protect domestic students (but does not say from what), and to

ensure domestic students have a positive experience that supports educational achievement; something that is hard to measure and assess.

Universities support the purpose of the Bill with caveats. Universities regard pastoral care, wellbeing and welfare of students as paramount. **We recommend** a definition that is aligned and consistent with existing legislation that the tertiary education sector must adhere to.

Clause 238G (3) Scope of the Code

Regarding former students, a statute of limitations needs to be applied. **We recommend** a limit of seven years—bearing in mind universities’ retention of student records is aligned to the Public Records Act.

238H Code administrators

We support the proposal that allows the code administrator to delegate responsibilities.

Universities strongly recommend the current model used for universities’ international student pastoral care be applied for administration purposes, with one code administrator for both domestic and international students (ie, NZQA as the code administrator, with delegation to UNZ for self-regulated administration).

235H (5-7): While student accommodation is defined in 238D, clarification is needed. Currently the clause is ambiguous, implying an unrealistic requirement for pastoral care responsibilities for all domestic and international students, irrespective of where they are living. The code administrator’s powers to enter and inspect a student’s private room are too wide. It may be done simply for the purposes of monitoring compliance with the code. It should only be allowed if there is belief, on reasonable grounds, of a breach.

Universities are extremely concerned about the extraordinary rights being proposed in the Bill and question the proposed range and over-riding of the Human Rights and Privacy Acts. **Universities recommend** clarification and a realistic definition.

238I, 238J, 238K, 238L Quality Improvement Notices, Compliance Notices, Providers and signatory providers to comply with notices, Sanctions for breach of code

Rather than encouraging best practice (and incentivising), the Bill penalises. The quality improvement notices section allows a code administrator to publicly publish a notice after issuing it. They do not need to consider how serious the concern is, or whether it has been immediately remedied. A provider should first be given an opportunity to respond to a notice or remedy the situation/appeal if they feel it is unfair before public notification. The discretion of the code administrator also seems extremely wide: the code administrator may issue a notice setting out “any concerns with a providers systems, practises, training or procedures”; ie, potentially wider than the matters contained in the pastoral care code. **Universities recommend** the scope of notices should be limited to matters contained in the code.

Further, **we recommend** the code administrator’s role should include the fostering of good practice and code administrators should be required to develop via consultation a process that allows a stepped approach to reporting, investigation, notification and appeal of breaches. Such a system should place compliance at the end of the options, with good practice being fostered and incentivised in the first instance.

Currently the accommodation provider provides all reasonable and practical care for the student, but under the proposed legislation there would also be a legal liability. In relation to students who are also staff, they could seek redress under both employer/employee legislation and this proposed legislation.

Universities recommend the scope of responsibility for pastoral care be clearly defined, noting that where a counselling service responds to a student who is in a Hall and the student is enrolled elsewhere, there is a professional registration responsibility to continue with that student.

The code administrator has the power to impose limits on the provider's power to enrol students for either a breach of the code or failure to comply with a notice. There is no requirement that the breach be serious/or that the subject matter of the notice was serious. Placing limits on the enrolment is a harsh sanction if the matter is a minor one.

Universities operate a complex range of accommodation models (including university colleges and halls, not for profit, out-sourced accommodation) targeting different stages of a student's journey. All operate multiple facilities. Some facilities that would be covered in this code house students from multiple institutions. Many students live in multi-institution accommodation. There are instances of students enrolled in multiple institutions and/or in accommodation provided by another provider.

238M-P Dispute resolution

The dispute resolution process established by the bill has a wider application than purely to disputes relating to the code of practice. A student claimant may lodge a claim relating to any contractual/financial dispute with the provider. This is likely to have an enormous impact as there is potential for it becoming heavily used.

'Student claimant' is also very widely defined to include both prospective and former students.

Universities recommend the definition of student claimant be limited to students currently enrolled at the university and should not apply to students enrolled prior to this Bill/code of practice coming into effect or to 'prospective students', which is clearly a limitless group.

238S and 238T Offence relating to breach of code resulting in serious harm to or death of students, Pecuniary penalty relating to breach of code

The penalties imposed by these sections are hefty and it is difficult to assess their impact properly without first understanding what will be in the code. It would be unjust to impose these sanctions for breach of the interim code, as this is will be issued after little or no consultation with the relevant sectors and will take immediate effect. Providers will have little time to prepare or ensure they can meet their obligations. **Universities recommend** the penalty section should be reviewed/ and implemented once the permanent code of practice is finalised in 2021.

Conclusion

In conclusion, the Bill in its current form creates several issues and inconsistencies that will not deliver the intended outcomes.

The university sector is in favour of actively working to establish a principles-based pragmatic and deliverable code of practice for domestic and international students, informed by evidence of areas that require addressing and including adequate consultation with stakeholders, including practitioners and students.

Recommendations

Universities recommend:

1. one code for all students, incorporating any specific requirements relating to international students and /or residential care within sections of a single code.
2. the definition and scope of serious harm be aligned with other relevant legislation
3. consulting widely with practitioners and students.
4. that the legislation includes principles the Minister must consider before issuing any Code of Practice.
5. inserting the following between 238G(1) and 238G(2):

“Before issuing a code of practice, the Minister will ensure it is:

 - *Non-prescriptive and principles-based – allowing signatory providers to set pastoral care arrangements in line with the assessed risk for particular groups of students in their specific circumstances insofar as is reasonably practicable.*
 - *Consistent with section 159AAA, and 160 of the Education Act and other relevant legislation, including, but not limited to the Privacy Act, Health and Safety at Work Act, and the Human Rights Act.*
 - *Preserving the independence and freedom of tertiary institutions to make academic, operational, and management decisions as is consistent with the nature of the services they provide, the efficient use of national resources, the national interest, and the demands of accountability. (drafting note: as per S160 of the Education Act).”*
6. a definition of *reasonable* or *so far as possible* that is aligned and consistent with existing legislation that the tertiary education sector must adhere to.
7. a limit of seven years to the scope of the proposed code—bearing in mind universities’ retention of student records is aligned to the Public Records Act.
8. the current model used for universities’ international student pastoral care be applied for administration purposes, with one code administrator for both domestic and international students (ie, NZQA as the code administrator, with delegation to UNZ for self-regulated administration).
9. clarification and a realistic definition of *student accommodation*.
10. the scope of notices should be limited to matters contained in the code.
11. the code administrator’s role should include the fostering of good practice and code administrators should be required to develop via consultation a process that allows a stepped approach to reporting, investigation, notification and appeal of breaches. Such a system should place compliance at the end of the options, with good practice being fostered and incentivised in the first instance.
12. the scope of responsibility for pastoral care be clearly defined, noting that where a counselling service responds to a student who is in a Hall and the student is enrolled elsewhere, there is a professional registration responsibility to continue with that student.
13. the definition of student claimant be limited to students currently enrolled at the university and should not apply to students enrolled prior to this Bill/code of practice coming into effect or to ‘prospective students’, which is clearly a limitless group.
14. the penalty section be reviewed/ and implemented once the permanent code of practice is finalised in 2021.