

# Regulatory Impact Statement

## Removing legislative barriers for schools to apply stand-down, suspension, exclusion and expulsion to international students

### Agency Disclosure Statement

This Regulatory Impact Statement has been prepared by the Ministry of Education (the Ministry). It provides analysis of options to enable schools manage international misconduct outside school, including through use of stand-down, suspension, exclusion and expulsion, in order to meet schools' contractual pastoral care responsibilities.

This is one of a suite of RISs on amendments to the Education Act 1989 (the Act) as part of the Education (Tertiary Education and Other Matters) Amendment Bill.

In order for the recommended option to be effective, the legislative change and the regulatory changes to the Education (Pastoral Care of International Students) Code of Practice 2016 must be aligned and implemented at the same time.

The Ministry considers that consultation with key stakeholders on the options in this Regulatory Impact Statement has been adequate.



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Claire Douglas

Deputy Secretary, Graduate Achievement, Vocations and Careers

Ministry of Education

## Executive summary

This Regulatory Impact Statement analyses three options to enable schools to effectively manage international student behaviour outside school through a range of appropriate measures, including stand-down, suspension, exclusion and expulsion, in order to meet schools' contractual pastoral care responsibilities to international students.

All education providers enrolling international students, including schools, must be signatories to the Education (Pastoral Care of International Students) Code of Practice 2016, which is designed to ensure that international students studying in New Zealand are well informed, safe, and properly cared for. However, due to constraints in the Act, State and State-integrated schools are currently unable to effectively ensure international students health, safety and wellbeing outside of school, as they do not have access to a full range of appropriate disciplinary measures. Private schools are not subject to the same constraints, and may apply disciplinary measures based on their enrolment contract with students.

The objective of this options analysis is to provide a simplified, transparent system which allows schools to uphold their contractual duty of pastoral care to international students to ensure their health, safety and wellbeing, while providing a fair and just process for international students in breach of their contracts.

The three options considered are:

- an enhanced status quo, with improvement of guidance, contracts and strengthening the Code of Practice
- removing disciplinary measures for international students from the Act and strengthening the Code of Practice
- extending the jurisdiction for State and State-integrated schools to apply stand-down, suspension, exclusion and expulsion for international students' misconduct *outside school*, based on the enrolment contract

## Status quo and problem definition

### International education and pastoral care in New Zealand

1. New Zealand has a strong international reputation as a provider of high quality education for international students. One of our strengths is the high quality of pastoral care and support. To ensure that all international students in New Zealand are well informed, safe, and properly cared for, the Government introduced a Code of Practice for the Pastoral Care of International Students (the Code) in 2002. The Code has been updated several times since then, and a new Education (Pastoral Care of International Students) Code of Practice 2016 (the Code of Practice) took effect on 1 July 2016.
2. All education providers enrolling international students, including schools, must be signatories to the Code of Practice. The Code of Practice sets out the minimum standards of advice and care that must be provided to international students. Due to the higher level of vulnerability of school-age international students, particularly those here without their parents or guardians, the Code of Practice includes additional requirements

on schools to guarantee appropriate pastoral care at all times – while at school, and outside of school hours in the community.

3. There are around 17,000 international students enrolled in New Zealand schools, approximately 84% of whom are in State or State-integrated schools. There are 1,992 State or State-integrated schools currently enrolling international students.

### **International students study in New Zealand by choice and contract**

4. International students (and their parents) make a choice to come to New Zealand to study. Unlike domestic students, international students enrolling in State or State-integrated schools are not entitled to a free education. They must pay fees to cover the full cost of their education. Their parents sign an enrolment contract with the school, similar to domestic students who enrol in private schools.
5. The enrolment contracts between international students (and their parents) and State and State-integrated schools set out the obligations and responsibilities of each side. These contracts align with the Code of Practice, and include the school's responsibility for international students' health, safety and wellbeing at all times, both within and outside the school.
6. In addition, most international students in schools live in homestays organised and overseen by the school. International students pay fees for this service, and the school has a contractual arrangement with the homestay family. In the absence of parents and guardians, homestay parents and students' parents expect schools to help manage students' behaviour while outside of school and in the care of the homestay family.
7. As temporary entry class visa holders, international students must also meet Immigration New Zealand (INZ) health and character requirements, and meet any conditions of their visa. The Code of Practice requires schools to inform INZ of any visa breaches or termination of enrolment.

### **The Education Act also applies to international students**

8. Section 4(2) of the Education Act 1989 (the Act) states that, once enrolled in a State or State-integrated school, an international student has the same rights to remain enrolled and to receive tuition as a domestic student. This means that the requirements set out in sections 13-18AA of the Act, which relate to stand-down, suspension, exclusion and expulsion<sup>1</sup> in State and State-integrated schools, also apply to international students.
9. Sections 13-18AA were designed to guarantee domestic students' right to receive a free education at State and State-integrated schools. They only allow disciplinary action for misconduct during school hours and school activities. Some of the provisions in sections 13-18AA are not appropriate for the voluntary contractual arrangement international students have with schools.
10. As enrolment in private schools is based on a contractual agreement, the restrictions in sections 13-18AA do not apply to international students in private schools. There are no requirements in the Act for private schools to follow a set process when applying stand-

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<sup>1</sup> **Stand-down** is a temporary removal of a student from school. **Suspension** is a formal removal of a student by the principal, until the Board of Trustees can meet to decide what to do. The suspension may be lifted or extended, with or without conditions, or may lead to **exclusion** (for students under 16) or **expulsion** (students over 16). Excluded or expelled students can no longer attend the school in question.

down, suspension, exclusion and expulsion to a student, apart from notifying the Secretary of Education. Private schools can therefore terminate the enrolment of any student according to their enrolment contract, although the process in the contract must meet the requirements of natural justice.

**There is a contradiction between the Act and the Code of Practice, so State and State-integrated schools are unable to effectively manage international students' misconduct outside school**

11. In June 2016, a High Court decision<sup>2</sup> clarified that, as per sections 13-18AA of the Act, State and State-integrated schools cannot stand-down, suspend, exclude or expel international students for misconduct outside of school.
12. Schools may discipline international students for misconduct outside of school in other ways, for example by removing certain privileges, based on the enrolment contract. However, the High Court decision clarifies that any action which would have the same effect as stand-down, suspension, exclusion or expulsion, such as terminating an enrolment contract, would put schools in breach of the legislation. The enrolment contract and Code of Practice requirements cannot override the Act.
13. This problem only affects State and State-integrated schools, and Partnership Schools | Kura Hourua. Private schools and tertiary education providers are not subject to the same provisions.

**This has potentially significant consequences for students' health, safety and wellbeing**

14. Schools have a responsibility not only for the safety of international students, but also for those around them, including other students and their homestay families. If an international student is engaging in behaviour which puts themselves or others at risk, it is important that the school has the appropriate tools to effectively manage this behaviour. Enrolment contracts may allow some disciplinary measures. However, in some serious cases, it would be safer, and in the international student's best interests, for the school to terminate their enrolment contract and return them to the care of their parents and guardians in their home country.
15. This is currently possible if in-school behaviour meets the threshold. However, even if out-of-school behaviour means, for example, that a student cannot be safely placed in a homestay family, schools do not have the appropriate tools to ensure the student's wellbeing.
16. Although stand-down, suspension, exclusion and expulsion are important so that schools have the full range of disciplinary tools available, they are used as a last resort: over the past five years, only 32 international students in State and State-integrated schools have been suspended. Seventeen of these suspensions resulted in exclusion or expulsion.
17. The Secondary Principals Association of New Zealand (SPANZ), on behalf of the School's Health and Safety Sector Reference Group, and the Schools International Education Business Association (SIEBA) have raised concerns with the Ministry of Education about the impact the current situation could have on individual students, and

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<sup>2</sup> Tauranga Boys College Board of Trustees v International Education Appeal Authority [2016] NZHC 1381.

on New Zealand's international reputation as a safe and high quality international education provider if it becomes clear that schools may be unable to manage international students in risky situations.

### **Problem definition**

18. State and State-integrated schools are currently unable to effectively ensure international students' health, safety and wellbeing outside of school, as they are unable to utilise a full range of disciplinary measures. In addition, the current framework is unclear and there are contradictions between the Act and the obligations under contractual arrangements and the Code of Practice.

## **Objectives**

19. The objective is to provide a simplified, transparent system which allows schools to uphold their contractual duty of pastoral care to international students to ensure their health, safety and wellbeing, while providing a fair and just process for international students in breach of their contracts.
20. The criteria against which we assessed whether options would achieve this objective are whether the option:
  - enables schools to fulfil their pastoral care obligations to international students and ensure their health, safety and wellbeing, as per the Code of Practice and the contractual relationship
  - ensures that a fair and just process is followed when disciplining international students or terminating an enrolment contract with an international student
  - provides a clear and well-aligned legal framework and ensures that schools have a range of appropriate tools to discipline international students
  - safeguards New Zealand's reputation as a safe place for international students

## **Options and impact analysis**

### **Option 1: Enhanced status quo: improving guidance, contracts and strengthening the Code of Practice**

21. This option would not change the Act. Changes to the Code of Practice by itself, improved guidelines and/or changes to enrolment and accommodation contracts could improve school practice. However, these changes would not achieve the objective, as any measures which had a similar effect to stand-down, suspension, exclusion and expulsion would still put schools in breach of the Act.

### Assessment of Option 1 against criteria

Criterion	Assessment
Enables schools to fulfil their pastoral care obligations to international students and ensure their health, safety and wellbeing, as per the Code of Practice and the contractual relationship.	The changes may help schools to improve their implementation of the health, safety and wellbeing requirements of the Code of Practice.
Ensures that a fair and just process is followed when disciplining international students or terminating an enrolment contract with an international student.	For misconduct in school, schools would follow the provisions in the Act. For misconduct outside school, disciplinary actions and processes would be outlined in the enrolment contract. There would be no possibility to stand-down, suspend, exclude or expel an international student for misconduct outside school.
Provides a clear and well-aligned legal framework and ensures that schools have a range of appropriate tools to discipline international students.	The current legal contradiction would still exist. Schools would not be able to apply stand-down, suspension, exclusion or expulsion (or take any action having the same effect) for misconduct outside school.
Safeguards New Zealand's reputation as a safe place for international students.	The current situation means that schools cannot effectively ensure the health, safety and wellbeing of international students, which creates a risk to New Zealand's international reputation.

### Option 2: removing international students from the ambit of sections 13-18AA and strengthening the Code of Practice (preferred option)

22. This option would amend the Act so that sections 13-18AA, relating to stand-down, suspension, exclusion and expulsion in State and State-integrated school, would no longer apply to international students. At the same time, the Code of Practice would be amended to ensure a fair and just process is followed when disciplining an international student or terminating an enrolment contract with an international student. The Code of Practice already states that enrolment contracts must include clear information about the conditions for terminating the contract and the student's enrolment.
23. Under this option, international students enrolled at State and State-integrated schools would be treated the same way as all students (domestic and international) enrolled in private schools for disciplinary matters.
24. This option is the most appropriate framework to reflect international students' contractual arrangements with schools, their different needs and living arrangements, and the schools' duty of pastoral care, both inside and outside school. This unique relationship means that the expectations on international student behaviour is different to domestic students, which may mean that international students are treated differently to domestic students for the same misconduct inside school.

*Assessment of Option 2 against criteria*

<b>Criterion</b>	<b>Assessment</b>
<p>Enables schools to fulfil their pastoral care obligations to international students and ensure their health, safety and wellbeing, as per the Code of Practice and the contractual relationship</p>	<p>Schools will be able to fully exercise their contractual pastoral care obligations to international students, including outside of school, in order to effectively ensure their health, safety and wellbeing at all times</p>
<p>Ensures that a fair and just process is followed when disciplining international students or terminating an enrolment contract with an international student</p>	<p>The changes to the Code of Practice would ensure that all schools enrolling international students would be required to follow a fair and just process when disciplining international students or terminating an enrolment contract with an international student.</p> <p>The Code of Practice already provides additional protections to international students, for example by requiring signatories to have fair and proper procedures for dealing with grievances. If a student considers a school has breached the Code of Practice, they may complain to the Code Administrator, who can investigate and apply sanctions against schools if necessary. The International Student Contract Dispute Resolution Scheme is also able to help settle international student complaints against schools.</p>
<p>Provides a clear and well-aligned legal framework and ensures that schools have a range of appropriate tools to discipline international students</p>	<p>This option would remove any potential conflict between the enrolment contract and the Act.</p> <p>State and State-integrated schools would have a full range of appropriate tools to discipline international students, including stand-down, suspension, exclusion and expulsion, or terminate their enrolment for their misconduct regardless of whether it happens in school or out of school, in line with the enrolment contract and the Code of Practice.</p> <p>Within the protections of the Code of Practice, the disciplinary measures in the enrolment contract can be flexible and tailored to students' age and stage.</p>
<p>Safeguards New Zealand's reputation as a safe place for international students</p>	<p>This option would maintain New Zealand's reputation as a safe place for international students, by ensuring schools have the ability to ensure international students' health, safety and wellbeing at all times.</p> <p>This option also aligns with current practice for international students at all schools in Australia.</p>

**Option 3: extending the jurisdiction for State or State-integrated schools to apply stand-down, suspension, exclusion and expulsion for international students' misconduct outside school, based on the enrolment contract**

25. Under this option, the current sections 13-18AA of the Act on stand-down, suspension, exclusion and expulsion would be extended to include international students' misconduct outside of school. A variation of this option would be to extend these sections and include a further provision identifying when it would be appropriate to use the stand-down, suspension, exclusion and expulsion provisions, and when it would be more appropriate to address the misconduct by other means.

*Assessment of Option 3 against criteria*

Criterion	Assessment
Enables schools to fulfil their pastoral care obligations to international students and ensure their health, safety and wellbeing, as per the Code of Practice and the contractual relationship	This option would partially support schools to manage international students' health, safety and wellbeing outside of school, as schools would only be able to apply disciplinary measures under certain restricted circumstances. The requirements of the Act do not align with the pastoral care obligations under the Code of Practice or the enrolment contract, and schools may not be able to effectively manage misconduct and risky behaviour.
Ensures that a fair and just process is followed when disciplining international students or terminating an enrolment contract with an international student	The process followed would be as outlined in the Act.

Criterion	Assessment
<p>Provides a clear and well-aligned legal framework and ensures that schools have a range of appropriate tools to discipline international students</p>	<p>This option would be complex, subject to many detailed criteria, and could create further confusions for schools, parents and students about how disciplinary actions should be applied to international students in and after school.</p> <p>This option does not provide schools with sufficient range of flexible tools to manage the behaviour of international students outside of school. Sections 13-18AA are primarily designed to ensure domestic students' access to free schooling in New Zealand, and therefore some of the requirements are not appropriate for managing students' behaviour outside school.</p> <p>This option could also expose schools to litigation if disciplinary actions were taken against an international student for their misconduct outside of school, with a similar effect to stand-down, suspension, exclusion or expulsion.</p>
<p>Safeguards New Zealand's reputation as a safe place for international students</p>	<p>This option maintains the legislative framework for stand-down, suspension, exclusion and expulsion for international students, but would be practically difficult and some measures may be inappropriate. This may create problems for both international students and schools, which has some level of risk for New Zealand's reputation as a provider of high quality pastoral care for international students.</p>

## Options summary table

	<b>Option 1: enhanced status quo</b>	<b>Option 2: removing disciplinary measures for international students from the Act and strengthening the Code of Practice (preferred option)</b>	<b>Option 3: extending coverage of the Act to include misconduct outside of school for international students</b>
Enables schools to fulfil their pastoral care obligations to international students and ensure their health, safety and wellbeing, as per the Code of Practice and the contractual relationship	Does not meet	Fully meets	Somewhat meets
Ensures that a fair and just process is followed when disciplining international students or terminating an enrolment contract with an international student	Somewhat meets	Fully meets	Somewhat meets
Provides a clear and well-aligned legal framework and ensures that schools have a range of appropriate tools to discipline international students	Does not meet	Fully meets	Does not meet
Safeguards New Zealand's reputation as a safe place for international students	Does not meet	Fully meets	Somewhat meets

## Consultation

26. The Secondary Principals Association of New Zealand (SPANZ), on behalf of the School's Health and Safety Sector Reference Group, and the Schools International Education Business Association (SIEBA) raised concerns with the Ministry of Education and Education New Zealand about the impact the current situation could have on individual students and on New Zealand's international reputation as a quality international education provider.
27. The School's Health and Safety Sector Reference Group were consulted on the approach and the preferred option. They provided feedback and agreed for SPANZ to work with the Ministry and report back to the group at an appropriate time. The Ministry has discussed this issue with SPANZ and SIEBA. Both school bodies strongly support the removal of international students from the ambit of sections 13-18AA.
28. We have also consulted with other agencies including the Ministry of Business, Innovation and Employment (Immigration New Zealand - INZ), Education New Zealand (ENZ), and the New Zealand Qualifications Authority (NZQA). The Education Review Office (ERO) has been advised.
29. ENZ and INZ support the recommended option.
30. NZQA raised concerns about international students potentially being treated differently from domestic students for misconduct within school under the preferred option, and preferred Option 3.
31. It was not feasible for the Ministry to consult with international students and their parents, however the proposal will be included in the Education (Tertiary Education and Other Matters) Amendment Bill. Details will be released through the Select Committee process.
32. The Ministry of Justice has been consulted on the human rights implications of the preferred option.

## Conclusions and recommendations

33. Option 1, enhancing the status quo, would not lead to a significant change in how schools are able to manage international students' misconduct and risky behaviour outside of school, as the Code of Practice, enrolment contracts and guidelines are overridden by the Act.
34. Option 3 (extending coverage of the Act to include misconduct of international students outside of school) does not achieve the objective of a simplified, transparent system which allows schools to fully uphold their contractual duty of pastoral care to international students to ensure their health, safety and wellbeing at all times.
35. Option 2 (removing international students from stand-down, suspension, exclusion and expulsion requirements of the Act, and changing the Code of Practice) meets all of the criteria to achieve the objective. It balances the need for a simple, clear system enabling schools to provide a high level of pastoral care as required by the Code of Practice and international student enrolment contracts with protections for international students through a fair and just process for international students in breach of their contracts. It

provides schools with a range of appropriate measures to discipline international students including, if necessary, stand-downs, suspensions, exclusions and expulsions for behaviour both within and outside school.

36. The requirements would mirror the contractual relationship all students in private schools have with the school. Option 2 best reflects international students' contractual arrangements with schools, their different needs and living arrangements, and the schools' duty of pastoral care.
37. We therefore recommend Option 2.

## Implementation plan

38. To implement this proposed policy change, amendments to the Education Act would be required so that:
  - sections 13 to 18AA apply to domestic students only; and
  - the international students' right to remain enrolled as stipulated in the current section 4(2) would be subject to a provision allowing State schools to take disciplinary action for conduct or behaviour in breach of the enrolment contract or to terminate enrolment. Any such disciplinary action or termination of enrolment would be in accordance with the enrolment contract and the Code of Practice.
39. The Ministry will also amend the Code of Practice to ensure that disciplinary actions and termination of enrolment will be applied following a fair, transparent and consistent process, and will not amount to unfair or arbitrary exercise of powers. These changes will be made alongside other changes to update the Code of Practice, after consultation with schools and sector bodies.
40. Implementation of the changes to the Act and the Code of Practice will be aligned, to be implemented at the same time.
41. Implementation risks will be mitigated through consultation with sector bodies, including the School's Health and Safety Sector Reference Group, New Zealand School Trustees Association (NZSTA), SPANZ and SIEBA.
42. There would be minimal additional compliance costs for schools which are already signatories to the Code of Practice, as these changes do not create additional requirements, but give schools the tools to fulfil existing responsibilities under the Code of Practice.
43. NZQA, as the Code Administrator, would be responsible for enforcing Code of Practice requirements. If a student considers a school has breached the Code of Practice, they may complain to the Code Administrator, who can investigate and apply sanctions against schools if necessary. The International Student Contract Dispute Resolution Scheme is also able to help settle complaints from international students about contractual matters.

## Monitoring, evaluation and review

44. There is no formal evaluation process in place to review these changes. However the Ministry will use data from the following sources to monitor the impact and effectiveness of the changes:

- Enrolment data on stand-downs, suspensions, exclusions and expulsions of international students
- An analysis of complaints from international students to the Code Administrator and International Student Contract Dispute Resolution Scheme
- Feedback from schools, the School's Health and Safety Sector Reference Group, NZSTA, SPANZ and SIEBA.