

Coversheet: Offence provision to support fees-free declarations

Advising agencies	<i>Ministry of Education</i>
Decision sought	<i>Amend the Education Act 1989 to introduce a new offence provision for false declarations relating to eligibility for fees-free education</i>
Proposing Ministers	<i>Minister of Education</i>

Summary: Problem and Proposed Approach

Problem Definition

What problem or opportunity does this proposal seek to address? Why is Government intervention required?

The Government's fees-free tertiary education policy is being implemented from 1 January 2018. To be eligible for fees-free study, a person must not have previously undertaken more than half a year (60 credits) of tertiary study at Level 3 or above on the New Zealand Qualifications Framework (NZQF), including tertiary education at an equivalent level in any other country. They must also meet the residence criteria, outlined in the eligibility criteria (available on the fees-free website www.feesfree.govt.nz).

For some prospective students, verifying eligibility for fees-free study relies on information they provide concerning any previous tertiary study, their residency status, and other matters. Students who need to provide this information must currently complete a statutory declaration, witnessed by an authorised person (such as a Justice of the Peace, a solicitor or notary public, or a court registrar). This places a compliance burden on students – and for some, a cost burden. The penalties for making a false statutory declaration (a term of imprisonment of up to three years) may be disproportionate to the offence, as may be the cost and complexity to prosecute such cases.

Currently, students who claim but who are subsequently found to be ineligible for fees-free study may, in some circumstances, be prosecuted under existing dishonesty and fraud offences under the Crimes Act 1961.

Officials estimate that up to 80,000 people may be eligible for fees-free study in 2018. The eligibility status of up to 50,000 of these prospective students is unknown, and it is these students who may be required to complete a statutory declaration. By Friday, 12 January 2018, the Tertiary Education Commission had received around 3,200 statutory declarations.

There is no data available to estimate the likely incidence and cost of false declarations for fees-free study. The total cost of the fees-free payments made by the Tertiary Education Commission to tertiary education organisations is budgeted to be \$310 million 2017/18, rising to \$418 million in 2021/22 and outyears. In the absence of an effective mechanism to verify eligibility and deter false claims, a 1% increase in claims to fees-free study would cost taxpayers approximately \$3 million to \$4 million per year.

Proposed Approach

How will Government intervention work to bring about the desired change? How is this the best option?

This proposal seeks to enable a simpler process for students to declare their eligibility for fees-free study, supported by a new offence provision under the Education Act 1989. This will have a simpler enforcement process and more proportionate penalties for students who intentionally make inaccurate (false) declarations.

To reduce the compliance and cost burden for prospective students, we propose that where students must provide information to verify their eligibility for fees-free study, they make an ordinary declaration rather than a statutory declaration.

An ordinary declaration does not require a witness and making a false declaration of this sort is not an offence of itself. To deter false declarations, we propose a new offence provision under the Education Act 1989, for those who make a false declaration without reasonable excuse, punishable by a fine of up to \$5,000. By making this a lower order offence, the Tertiary Education Commission would be able to bring a prosecution (rather than the police) with a lower burden of proof and less severe potential criminal penalties for offenders.

Section B: Summary Impacts: Benefits and costs

Who are the main expected beneficiaries and what is the nature of the expected benefit?

Avoided cost of witnessing statutory declarations

Officials estimate that in 2018, up to 50,000 prospective students may need to complete a statutory declaration to apply for fees-free tertiary study due to their eligibility status being unknown.

The costs incurred in completing the statutory declaration process include:

- the opportunity cost of time and the inconvenience for students and for authorised persons required to witness statutory declarations
- costs tertiary education organisations may incur to ensure that authorised people are available to witness statutory declarations when students enrol
- a smaller number of students who may incur fees and charges if they pay a solicitor or notary public to witness their declaration.

The cost and compliance burden may be a barrier for some to access fees-free education – and this barrier may fall disproportionately on those we specifically want this policy to reach.

Reduced cost to investigate and prosecute cases where false declarations are made

The proposed change would mean the police would not be required to investigate or prosecute false declarations as the investigation and prosecution process would be handled by the Tertiary Education Commission (although more serious cases, for instance organised fraud, would be referred to the police for prosecution). As it is a new policy, there is no existing data available to estimate the likely incidence of fees-free false declarations.

Where do the costs fall?

Students and tertiary education organisations would not face any increased cost under the proposed option of ordinary declarations supported by a new offence provision under the Education Act 1989. The main cost to students is in the time and effort required to understand the fees-free eligibility rules and to gather information required to verify their eligibility, and this will not change. For some students, this will be a barrier to accessing fees-free education. Tertiary education organisations' costs are in providing the information and advice to support students who are enrolling with them and who need help to complete their applications for fees-free study.

The Tertiary Education Commission will bear the costs to monitor and audit fees-free eligibility rules and to take enforcement action where necessary. The Tertiary Education Commission does not anticipate a major number of prosecutions. It is not clear that these costs would be greater under the proposed approach than under the status quo (cost of criminal prosecution by the police).

What are the likely risks and unintended impacts, how significant are they and how will they be minimised or mitigated?

The key risk will be the time required by the Tertiary Education Commission to build its enforcement capacity and capability to investigate and prosecute the new offence. The Tertiary Education Commission intends to incorporate fees-free monitoring, including monitoring of statutory declarations, as part of its ongoing monitoring and audit programme. This would be funded out of monies allocated for fees-free implementation.

Identify any significant incompatibility with the Government's 'Expectations for the design of regulatory systems'.

There is no significant incompatibility with the Government's 'Expectations for the design of regulatory systems'.

Section C: Evidence certainty and quality assurance

Agency rating of evidence certainty?

How confident are you of the evidence base?

Evidence on the potential number of students with unknown eligibility status is robust, but we do not know how many of these may be required to complete statutory declarations. Because this is a new policy in its first year of implementation, our assessment of the potential benefits and avoided costs to verify eligibility for fees-free study is hypothetical.

The Ministry of Education and the Tertiary Education Commission estimate that the eligibility status of up to 50,000 prospective students may not be known, and these students may be required to complete statutory declarations to apply for fees-free tertiary study in 2018. This is our best estimate for the first year of operation of a new policy, based on analysis of historical enrolment patterns and the known characteristics of prospective students. For 2018, the only fees-free eligible students who will not be required to complete a statutory declaration are those who are recent school leavers who were previously enrolled in Year 13 in a school in 2017.

To be completed by quality assurers:

Quality Assurance Reviewing Agency:
Ministry of Education
Quality Assurance Assessment:
Partially meets
Reviewer Comments and Recommendations:
The Regulatory Impact Analysis Panel considered the Regulatory Impact Statement partially met the quality assurance criteria because there has been no consultation on the proposal, it involves a significant regulatory change (a new offence), and the new offence was not in itself a manifesto commitment. However, the panel finds the arguments for the new offence convincing.

Impact Statement: Offence provision to support fees-free declarations

Section 1: General information

Purpose

The Ministry of Education is solely responsible for the analysis and advice set out in this Regulatory Impact Statement, except as otherwise explicitly indicated.

This analysis and advice has been produced to inform stakeholders to be consulted on a government exposure draft of planned legislation.

Key Limitations or Constraints on Analysis

The fees-free policy was part of the Government's 100-days commitment. As this is a new policy in its first year of implementation, our assessment of the potential benefits and avoided costs to verify eligibility for fees-free study is hypothetical, based on analysis of historical enrolment patterns and the known characteristics of prospective students.

While we have an interim process in place for 2018, we are seeking to enable a simpler process going forward; a process that would be supported by new offence provisions under the Education Act 1989. Meeting the timeframes to enable the new provisions to go through the legislative process has meant limited public consultation. The proposal is aimed at reducing the current administrative/compliance cost burden on students and tertiary education organisations. If successful, students and tertiary education organisations should support the simplified process.

In preparing the Cabinet paper, we consulted with the Treasury and the Department of Prime Minister and Cabinet. We informed the State Services Commission and the Ministry of Justice. We consulted the Ministry of Justice on details of the new offence provision as part of the drafting process, and we also consulted with the Tertiary Education Commission on developing this Regulatory Impact Assessment.

Responsible Manager (signature and date):



Julie Keenan

Policy Director

Graduate Achievement, Vocations and Careers

Ministry of Education

18 January 2018

Section 2: Problem definition and objectives

2.1 What is the context within which action is proposed?

The Government's long-term goal is to remove barriers to tertiary education and training, including financial ones. As part of its manifesto commitments, the Government's new fees-free tertiary education policy is being implemented from 1 January 2018.

To be eligible for fees-free study, a person must not have previously undertaken more than half a year (60 credits) of tertiary study at Level 3 or above on the New Zealand Qualifications Framework (NZQF), including tertiary education at an equivalent level in any other country. They must also meet the residence criteria outlined in the eligibility criteria. The detailed eligibility criteria are published on the Tertiary Education Commission's website www.feesfree.govt.nz. The Cabinet papers and other advice to Ministers leading to implementation of the fees-free policy are published on the Ministry of Education's website at <http://education.govt.nz/ministry-of-education/information-releases/100-days/>.

For some prospective students, verifying eligibility for fees-free study relies on information they provide on previous tertiary study, their residency status, and other matters. Students who need to provide this information must currently complete a statutory declaration, witnessed by an authorised person (such as a Justice of the Peace, a solicitor or notary public, or a court registrar). This places a compliance and, for some, a cost burden on students. The penalties for making a false statutory declaration (a term of imprisonment of up to three years) may be disproportionate to the offence, as may be the cost and complexity to prosecute such cases.

There is no data available to estimate the likely incidence and cost of false declarations for fees-free study. The total cost of the fees-free payments made by the Tertiary Education Commission to tertiary education organisations is budgeted to be \$310 million 2017/18, rising to \$418 million in 2021/22 and outyears. In the absence of an effective mechanism to verify eligibility and deter false claims, a 1% increase in claims to fees-free study would cost taxpayers approximately \$3 million to \$4 million per year.

2.2 What regulatory system, or systems, are already in place?

Under the current (interim) process for 2018, the Tertiary Education Commission requires students to make statutory declarations where their prior tertiary study and residency status cannot be verified through the existing data sources. These declarations provide information agencies cannot access and verify through complete and "live" administrative data. This includes information on prior tertiary study undertaken overseas, or undertaken in New Zealand before 2003 when comprehensive administrative data became available. It also may include information to verify applicants' residency visa status and the duration of their residence in New Zealand and to confirm that students will not be enrolled in a school when their tertiary programme commences.

In 2018, if a student is found to have made a false declaration, and has consequently received fees-free study they were not entitled to:

- The tertiary education organisation may require the student to pay the relevant fees. This may be done by the student taking out a student loan (if eligible), or by the tertiary education organisation pursuing the debt with the student or through the Courts.
- The Tertiary Education Commission may refer cases to the police for prosecution under s 111 of the Crimes Act 1961, for making a false statutory declaration. Offences are punishable by a term of imprisonment of up to three years, although a Court can (under s 39 of the Sentencing Act 2002) impose a fine instead of imprisonment.
- Other criminal prosecution could also be considered, such as for dishonest use of a

document to gain a pecuniary advantage under s 228 of the Crimes Act 1961.

2.3 What is the policy problem or opportunity?

Up to 80,000 people will be eligible for fees-free study in 2018, of whom about 50,000 may be required to complete a statutory declaration. The costs and administrative/compliance burden involved in this process include:

- the opportunity cost of time and the inconvenience for students and for authorised persons required to witness statutory declarations
- costs tertiary education organisations incur to ensure that authorised people are available to witness statutory declarations when students enrol
- costs to individual students who may incur fees and charges if they pay a solicitor or notary public to witness their declaration.

The cost and compliance burden may be a barrier for some to access fees-free education – and this barrier may fall disproportionately on those we specifically want this policy to reach.

The penalties for making a false statutory declaration (a term of imprisonment of up to three years) may also be disproportionate to the offence, as may be the cost and complexity associated with such cases (i.e. the high burden of proof required and the need for the police to investigate and prosecute).

We are proposing legislative change that will:

- make the process easier and less complex for students by reducing the requirement from a statutory declaration (which must be witnessed by an authorised person) to a simple declaration they can complete on their own, and
- provide more flexible and proportionate enforcement options in the event a false declaration is made.

2.4 Are there any constraints on the scope for decision making?

The Government wants an efficient system that allows students to make declarations about their previous access to tertiary education, and which provides simple and cost effective enforcement should they make a false declaration.

There are time constraints on decision-making: the issue was identified in December 2017, legislative change is preferred, and a solution needs to be in place ahead of 2019.

2.5 What do stakeholders think?

The Tertiary Education Commission, which will bear most of the costs and resource impact from the proposal, is supportive of the change.

We have not engaged in public consultation on the proposed changes. However, the proposal is aimed at reducing the current administrative/compliance cost burden on students and tertiary education organisations. If it succeeds, then students and tertiary education organisations should support the simplified process.

In preparing the Cabinet paper, we consulted with the Treasury and the Department of Prime Minister and Cabinet. We informed the State Services Commission and the Ministry of Justice. We consulted with the Ministry of Justice on details of the new offence provision as part of the drafting process, and consulted on the Tertiary Education Commission on the drafting of the Regulatory Impact Assessment.

There are no human rights, gender or disability issues arising from this proposal, and it may help reduce barriers to tertiary education for Māori and Pasifika people.

Section 3: Options identification

3.1 What options are available to address the problem?

We identified five options that covered a range of different declaration and penalty regimes. These options were analysed using the following criteria:

- administrative and compliance cost burden on prospective students and tertiary education organisations
- effectiveness of option in deterring false declarations
- efficacy of prosecutorial process (for instance, complexity of prosecution)
- proportionality of punishment for offence.

Options considered

- a) *Maintain status quo - require students to make statutory declaration with enforcement of any false statements under the Crimes Act 1961*

Making a statutory declaration requires a student to access, and at times pay, for a person authorised to take a statutory declaration, to witness the declaration. This may be a barrier to accessing fees-free education.

Making a false statutory declaration is a criminal offence under s 111 of the Crimes Act 1961, and is punishable by a term of imprisonment of up to three years. Courts may substitute a fine instead of a term of imprisonment. This punishment may be disproportionate to the offence. There can also be complexity in prosecuting this type of offence.

- b) *Modified status quo – amend the Education Act 1989 to enable statutory declarations to be made without need for an authorised person as a witness*

This option would amend the Education Act 1989 to include provisions similar to a statutory declaration. While the student would still be required to make a statutory declaration, there would no longer be a requirement for that declaration to be witnessed. This would reduce the administrative/compliance and cost burden on the student and tertiary education organisations.

A false statutory declaration would still be a criminal offence punishable by up to three years imprisonment; and the same complexity in prosecuting would apply.

- c) *Enable students to make ordinary declarations but create a new strict liability offence*

A third option would be to require the student to make an ordinary declaration as part of their enrolment, and create a strict liability offence for a false declaration, similar to s 154M of the Biosecurity Act 1993. The prosecution would not be required to prove that the student intended to commit the offence.

While reducing the evidential burden on the Crown, it would potentially create a compliance burden for a student, and potentially increase the administrative burden on tertiary education organisations. This option could result in disproportionately high cost to students who honestly and reasonably believed they were eligible to fees-free education. It may also act as a barrier to accessing fees-free education.

- d) *Enable students to make ordinary declarations, and create a new offence provision in the Education Act 1989 (preferred option)*

This option – our preferred option – would require students to make an ordinary declaration (rather than a statutory declaration), and reduces the cost and compliance burden from them.

Making a false declaration of this sort is not an offence of itself. Introducing a lower level offence and associated penalty would promote compliance by being explicit that a false

declaration has consequences for students, and make it easier to enforce as there would be a lower burden of proof. The Crown would still be required to prove that a person had made a false statement *without reasonable excuse*, but would not need to prove intent to make a false statement that *would amount to perjury if made on oath in a judicial proceeding*.

The prosecutorial role would sit with the Tertiary Education Commission. A penalty up to \$5,000, in line with other similar offences under the Education Act 1989, would act as a deterrent, without the potentially disproportionate penalty of a term of imprisonment up to three years.

e) *Requiring students to make ordinary declarations but not creating a specific offence provision*

Under this option, students would be required to make an ordinary declaration, thus removing the cost and compliance burden on them. However, there would be no specific offence provisions relating to a false declaration. This would mean that any enforcement action would need to be either civil action or a complaint to the police of fraud under the Crimes Act 1961. Proceeding via a civil action would place a significant administrative burden on the Tertiary Education Commission, while the police may not prioritise investigation of alleged fraudulent activity of this nature. The uncertainty of either a civil or criminal action may therefore provide limited deterrence.

Our preferred option is option (d) – Requiring students to make ordinary declarations with new offence provisions in the Education Act 1989 – as this:

- make the process easier and less complex for students and tertiary education organisations by reducing the requirement from a statutory to an ordinary declaration
- provides deterrence for the making of false declarations, promoting compliance
- provides a lower level of evidential burden on the prosecutor (the Tertiary Education Commission)
- provides proportionality of punishment for the offence, and is consistent with other offences under the Education Act 1989.

3.2 What criteria, in addition to monetary costs and benefits, have been used to assess the likely impacts of the options under consideration?

The criteria used to assess the options set out above were:

- administrative and compliance cost burden on prospective students and tertiary education organisations
- effectiveness of option in deterring false declarations, promoting compliance
- efficacy of prosecutorial process (for instance, complexity of prosecution)
- proportionality of punishment for offence.

There are trade-offs between the objective to ensure that eligible students are able to access fees-free tertiary education (i.e. by reducing the compliance cost burden on prospective students and the associated administrative cost burden on tertiary education organisations), while creating a system that promotes compliance and provides for effective enforcement (that is, deterrence, prosecutorial efficacy and proportionality of punishment).

We consider the preferred option of enabling students to make ordinary declarations, with new offence provisions in the Education Act 1989 (option d) provides the appropriate balance between these respective interests.

3.3 What other options have been ruled out of scope, or not considered, and why?

N/A

Section 4: Impact Analysis

Marginal impact: How does each of the options identified at section 3.1 compare with the counterfactual, under each of the criteria set out in section 3.2? *Add, or subtract, columns and rows as necessary.*

	Maintaining status quo (statutory declaration)	Modified status quo	Ordinary declaration with strict liability	Ordinary declaration with new offence provisions	Ordinary declaration with no new offence provisions
Reduce student cost & burden	0	+ (reduces cost and burden on students)	0 (ordinary declaration would reduce but strict liability would increase)	++ (reduces cost and burden on students)	++ (reduces cost and burden on students)
Deterrence and promoting compliance	0	0	++ (strict liability offence)	++ (proposed penalty up to \$5,000)	-- (no deterrence value)
Prosecutorial ease	0	0	++ (very easy for prosecution)	+ (easier as lower level offence)	- (civil action and/or police prosecution)
Proportionality of punishment	0	0	- (penalty disproportionate to offence)	++ (penalty matches offence)	0
Overall assessment	0	0	+	++	-

Key:

- ++ much better than doing nothing/the status quo
- + better than doing nothing/the status quo
- 0 about the same as doing nothing/the status quo
- worse than doing nothing/the status quo
- much worse than doing nothing/the status quo

Section 5: Conclusions

5.1 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

Our preferred option is option (d) – Enabling students to make ordinary declarations with new offence provisions in the Education Act 1989 – as this:

- make the process easier and less complex for students and tertiary education organisations by reducing the requirement from a statutory declaration to an ordinary declaration
- provides deterrence for the making of false declarations, promoting compliance
- provides a lower level of evidential burden on the prosecutor (the Tertiary Education Commission)
- provides proportionality of punishment for the offence, and is consistent with other offences under the Education Act 1989.

5.2 Summary table of costs and benefits of the preferred approach

Affected parties (identify)	Comment: nature of cost or benefit (eg ongoing, one-off), evidence and assumption (eg compliance rates), risks	Impact \$m present value, for monetised impacts; high, medium or low for non-monetised impacts	Evidence certainty (High, medium or low)

Additional costs of proposed approach, compared to taking no action

Regulated (students and tertiary education organisations)	No additional costs for students or tertiary education organisations.	Low	Medium
Regulator: the Crown (Tertiary Education Commission)	Fees-free monitoring (including monitoring of statutory declarations) will be part of the Tertiary Education Commission's ongoing monitoring and audit programme. Any additional resourcing required for monitoring and prosecutorial role will be funded out of monies allocated for fees-free implementation.	Low	Low
Total Monetised Cost	No additional costs for students or tertiary education organisations. Any additional capacity required for monitoring or prosecutorial role will be funded out of monies allocated for fees-free implementation.	Low	Low
Non-monetised costs	No additional non-monetised costs for students or tertiary education organisations.	Low	Low

Expected benefits of proposed approach, compared to taking no action			
Regulated parties (students and tertiary education organisations)	The proposed approach will reduce the cost and compliance burden that may be a barrier to accessing fees-free education for some students – particularly those we seek to target with this policy. It may also reduce the administrative burden on tertiary education organisations. The penalty for false declarations would also be proportionate to the offence.	High	Medium
Regulators Crown (Tertiary Education Commission)	There may be some benefit to the Tertiary Education Commission of managing the prosecutorial process.	Low	Low
Wider government (for instance, the police)	If no change occurs, the police may be required to investigate and prosecute false fees-free related statutory declarations, which may not be the best use of police resourcing, and may not provide appropriate deterrence.	Low	Low
Total Monetised Benefit	The balance of costs will move from students and tertiary education organisations to the Crown (Tertiary Education Commission), and funded out of monies allocated for fees-free implementation.	Medium	Low
Non-monetised benefits	May result in improved deterrence and better compliance, and penalty would be appropriate to the offence.	Low	Low

5.3 What other impacts is this approach likely to have?

The main beneficiaries of the proposed change in declaration status would be for prospective students who find it difficult to confirm their fees-free eligibility status. This would reduce the current cost and compliance burden on them, and may also reduce the barriers to accessing tertiary education and training.

The proposed change would also mean that police would not be required to investigate or prosecute false declarations as the investigation and prosecution process would be handled by the Tertiary Education Commission.

The key risk will be the provision of the lead-in time required by the Tertiary Education Commission to build its enforcement capacity and capability, and implement the required process and procedures to investigate and prosecute the new offence.

5.4 Is the preferred option compatible with the Government's 'Expectations for the design of regulatory systems'?

The preferred option is compatible with the Government's 'Expectations for the design of regulatory systems'. For example, the preferred option:

- has clear objectives of reducing transaction costs on the regulated parties (students) while maintaining and implementing effective enforcement
- is proportionate, fair and equitable in the way it treats the regulated parties (for instance, the penalty is proportional to the offence and it is not a strict liability offence).

Further, by making the burden of proof lower than the status quo and other options, the prosecution can be brought by the Tertiary Education Commission. While there will be costs involved in establishing this enforcement function, this proposal has the least adverse impact on the criminal justice system (specifically the police), and overall reduces the burden from individual students.

Section 6: Implementation and operation

6.1 How will the new arrangements work in practice?

The proposal is to amend the Education Act 1989 to:

- make the process easier and less complex for students by reducing the requirement from a statutory declaration to a an ordinary declaration
- create a new offence provision for false declarations, with a penalty of up to \$5,000.

The Tertiary Education Commission will be responsible for the ongoing operation and enforcement of the new arrangements which would come into effect ahead of the 2019 academic year. This provides the Tertiary Education Commission with the lead-in time to enhance its current monitoring regime, and develop the processes and capability to undertake this additional enforcement function.

As part of this, the Tertiary Education Commission will need to develop a communications strategy for students and tertiary education organisations.

6.2 What are the implementation risks?

The key risk will be the time required by the Tertiary Education Commission to build its enforcement capacity and capability to investigate and prosecute the new offence.

Section 7: Monitoring, evaluation and review

7.1 How will the impact of the new arrangements be monitored?

Fees-free applies from 1 January 2018. While fees-free will be available to approximately 80,000 people in 2018, the Ministry of Education and the Tertiary Education Commission estimate that up to 50,000 prospective students may be required to complete statutory declarations to apply for fees-free tertiary study in 2018.

Data collection and analysis over 2018 will help to refine the prospective students required to complete a declaration in future years (for instance, in 2018, the only students not required to complete a statutory declaration are those who are recent school leavers who were previously enrolled in Year 13 in a school in 2017).

7.2 When and how will the new arrangements be reviewed?

The Tertiary Education Commission intends to incorporate fees-free monitoring, including monitoring of statutory declarations, as part of its ongoing monitoring and audit programme. As with any investigation and prosecutorial process, the new arrangements will be reviewed as part of any related court proceeding. Any issues identified through either mechanism would be addressed through legislative or procedure change.