

# Regulatory Impact Statement: Changes to Private Training Establishment registration cancellation due to immigration breaches

## Coversheet

Purpose of Document	
Decision sought:	Analysis produced for the purpose of informing final Cabinet decisions
Advising agencies:	The Ministry of Education
Proposing Ministers:	The Minister of Education
Date finalised:	30 July 2021
Problem Definition	
<p>The New Zealand Qualifications Authority is currently required to cancel the registration of Private Training Establishments (PTE) which are convicted under the Immigration Act 2009 of enrolling an international student without the appropriate immigration authority. In many cases, deregistration may be disproportionate to the level and circumstances of the offence; it may also have unreasonable impact on other learners. As a result, Immigration New Zealand has declined to take prosecutions against PTEs where there is a likelihood that these would result in a discharge without conviction. Separating these offences and penalties is also consistent with best regulatory practice, meaning that the offending parties would not be automatically penalised twice for the same conviction.</p>	
Executive Summary	
<p>Section 350(2) of the Education and Training Act 2020 states that the NZQA must cancel the registration of a PTE under certain circumstances. This includes if a PTE is convicted of an offence under section 352(1) of the Immigration Act 2009 – allowing a person to undertake a course of study if they are not entitled to do so under the Immigration Act.</p> <p>Deregistering a PTE for offences under the Immigration Act will in some cases be a proportionate response, effectively maintaining the integrity and quality of the international education and immigration systems, and protecting students from unscrupulous or exploitative behaviour. However, the current provisions mean that registration must be removed without consideration for the circumstances of the offending, the quality of the PTE as a whole, or the impact on students and the wider education system.</p>	

In recent years, Immigration New Zealand (INZ) have decided not to take forward five prosecutions of PTEs because of the likelihood that requirement to deregister the PTE would be considered by judges to be disproportionate to the seriousness of the offending, therefore resulting in a discharge without conviction pursuant to Section 106 of the Sentencing Act 2002. This has compromised INZ's ability to enforce immigration law independent of education considerations.

We are therefore proposing legislative change to enable cancellation of a PTE's registration for these immigration breaches to happen at the discretion of NZQA, rather than automatically. This is in line with NZQA's discretion to cancel a PTE's registration for other reasons under section 350(1) of the Act, for example breaches of registration conditions. This will ensure that deregistration of PTEs is undertaken with due consideration, while also improving INZ's ability to enforce immigration law without being hampered by the impact of additional penalties under the Education Act.

This legislative framework means that PTEs can be penalised twice for the same conviction, which is not consistent with best regulatory practice. Legislative change is required to separate these immigration and education offences and penalties, as the status quo effectively means that PTEs are not appropriately held to account for immigration offences. Separating immigration and education penalties, while retaining the ability for immigration offences to be considered grounds for deregistration, will therefore enhance the clarity and effectiveness of the regulatory system.

We also considered three other options:

- Removing any obligation to cancel a PTE's registration for immigration breaches entirely
- Narrowing the criteria under which NZQA must cancel a provider's registration for immigration breaches
- Imposing an alternative penalty

We sought feedback on the costs, benefits and impacts of the proposal during the public consultation period. All seven submitters supported the proposal.

The proposed option would still ensure that PTEs are held appropriately accountable for breaches of section 352(1) of the Immigration Act 2009, including deregistration where this is proportionate. This change would also enable INZ to better enforce immigration law, and ensure that international students have appropriate protections (including reducing the risk of exploitation), without disproportionate impact on the PTE in question. We consider that the impacts, costs and risks of the proposed option are low.

### **Limitations and Constraints on Analysis**

We have publicly consulted on this proposal, and used submissions for the analysis in this document.

Prior to receiving these submissions, we worked closely with Immigration New Zealand (INZ) and the New Zealand Qualifications Authority (NZQA) to understand the impact of the status quo on INZ's ability to enforce immigration law and exercise their regulatory function.

The requirement to cancel a provider's registration if convicted of enrolling an international student without the appropriate immigration authority is specified in legislation. Therefore, the range of options we have identified is limited to the status quo and legislative amendment.

### Responsible Manager

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Ministry of Education**

30 July 2021

### Quality Assurance (completed by QA panel)

Reviewing Agency: Ministry of Education

Panel Assessment & Comment: The Ministry of Education's Quality Assurance Panel has reviewed the Regulatory Impact Statement: *Changes to Private Training Establishment registration cancellation due to immigration breaches* dated 30 July 2021.

The panel considers that it **meets** the Quality Assurance criteria. The Regulatory Impact Statement (RIS) provides a convincing case for amending legislation to address the disincentives to the prosecution of Private Training Establishments (PTE) under the Immigration Act 2009 when they enrol international students without the appropriate immigration authority. As indicated in the RIS, the proposal will ensure that PTEs continue to be held accountable for breaches of section 352(1) of the Immigration Act 2009, including deregistration where this is proportionate to the nature of the offending. Stakeholder views on the proposal has been sought, including through public through consultation, and are reflected in the RIS.

## Section 1: Diagnosing the policy problem

### What is the context behind the policy problem and how is the status quo expected to develop?

1. [Section 350\(2\) of the Education and Training Act 2020](#) states that the New Zealand Qualifications Authority (NZQA) **must** cancel the registration of a Private Training Establishment (PTE) under certain circumstances. This includes if a PTE is convicted of an offence under [section 352\(1\) of the Immigration Act 2009](#) – allowing a person to undertake a course of study if they are not entitled to do so under the Immigration Act.
2. The penalties for breaches of this section of the Immigration Act are fines of up to \$50,000.
3. INZ can, and has, successfully prosecuted other providers<sup>1</sup> for allowing a person to undertake a course of study without the appropriate immigration authority, as these providers are not subject to the same restrictions under the Education Act. Providers usually receive an official warning before the decision is made to prosecute.
4. INZ have advised that they find it difficult to successfully prosecute PTEs for enrolling international students without the appropriate immigration authority (visa), as deregistration is often considered a consequence that is not proportionate to the seriousness of the immigration offending.
5. There have been five cases in 2018 and 2019 where Immigration New Zealand has decided not to prosecute a PTE due to concerns about the disproportionate consequence of the requirement for NZQA to cancel registration under the Education Act, and the likelihood of a discharge without conviction. These cases have generally directly involved 8-16 international students.
6. In the view of the Ministry of Education, NZQA, and INZ, As noted by INZ in its response, the consequences of cancelling a PTE's registration is often far out of proportion to the immigration offence.
7. For example, several of the PTEs that INZ chose not to pursue prosecutions against for immigration breaches have hundreds of students. If NZQA had been required to cancel these PTEs' registrations, the students would have had to find new education providers, with assistance from NZQA. Students may not have been able to continue study, or to transfer credits towards the new provider's programme.
8. It's also likely that NZQA would have needed to draw on the Export Education Levy to help cover those transfer costs. This can have significant flow-on effect within the international education sector, with costs borne either by increased Levy rates for providers, or additional risk taken on by the Crown in relation to the balance of the Levy.
9. The status quo is expected to remain unchanged unless the provisions in the Act are amended, and further prosecutions will not be progressed by INZ.

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<sup>1</sup> This does not apply to providers of compulsory education – they cannot be prosecuted for enrolling a child unlawfully in New Zealand.

### What is the policy problem or opportunity?

10. The current provisions mean that INZ is restricted in its ability to appropriately enforce immigration law and fulfil their regulatory function.
11. Deregistration has a significant impact on the organisation, its staff and other students, and this may also be disproportionate compared to the offence of enrolling an international student without the appropriate immigration authority. NZQA notes that the consequences of cancelling a PTE's registration on its students and staff can significantly outweigh the seriousness of the immigration offence.
12. There is an opportunity to enable the New Zealand Qualifications Authority to have discretion to cancel a PTE's registration for these breaches, as they currently can for breaches of registration conditions or criteria (under section 350(1) of the Act). There are also a number of statutory actions and other mechanisms by which NZQA can address these issues instead (in addition to any actions INZ may take).
13. The problem does not disproportionately affect any particular population groups.

### What objectives are sought in relation to the policy problem?

14. We are proposing change in order to:
  - effectively hold providers to account for immigration breaches;
  - improve the ability to enforce immigration law and enable INZ to exercise their regulatory discretion;
  - increase compliance by increasing the likelihood of taking prosecutions against less serious offending, thus deterring similar behaviour;
  - recognise that there are already appropriate penalties under the Immigration Act, and immigration breaches should have consequences under immigration provisions, rather than education ones;
  - enable NZQA to build a stronger case for cancelling a PTE's registration, rather than automatic deregistration triggered by immigration issues;
  - better align with the current PTE deregistration provisions for breaches of registration conditions or criteria;
  - align the consequences for these immigration breaches with PTEs with those for other provider types.

## Section 2: Deciding upon an option to address the policy problem

### What criteria will be used to compare options to the status quo?

15. We have identified the following decision criteria:
  - enables better enforcement of immigration law
  - holds providers to account
  - improves protections for international students
  - improves alignment of PTE registration cancellation across the range of different possible breaches (for example, PTEs may have registration cancelled if they no

longer meet the criteria set out for registration, if they fail to comply with conditions set by NZQA, or if they provide false information in applying for registration).

- align with immigration consequences for other provider types.

### What scope will options be considered within?

16. The scope of feasible options has not been limited by Minister’s commissioning, previous policy decisions or stakeholder engagement.
17. As the requirement to cancel a PTE’s registration is in the Act, the only non-regulatory options available to agencies are to decline to proceed with prosecutions.

### What options are being considered?

18. The options have been summarised in the below table:

<b>Option 1 - the status quo</b>
<p><b>Description</b></p> <ul style="list-style-type: none"> <li>• NZQA must cancel the registration of a PTE convicted of immigration breaches</li> </ul> <p><b>Advantages</b></p> <ul style="list-style-type: none"> <li>• The consequences for PTEs are very clear as there is no room for discretion in decision making</li> </ul> <p><b>Disadvantages</b></p> <ul style="list-style-type: none"> <li>• Difficult for INZ to enforce immigration law and hold providers to account</li> <li>• Education agencies and INZ consider that automatic cancellation of registration cancellation is disproportionate to the seriousness of offending under Section 352 of the Immigration Act.</li> <li>• Penalises the provider twice for the same offence</li> </ul>
<b>Option 2 – removing any requirement to cancel a PTE’s registration for immigration breaches entirely</b>
<p><b>Description</b></p> <ul style="list-style-type: none"> <li>• No requirement for NZQA to cancel, or consider cancelling, a PTE’s registration when convicted of immigration breaches.</li> </ul> <p><b>Advantages</b></p> <ul style="list-style-type: none"> <li>• Separates immigration and education provisions, offences and penalties, which allows for clearer and more effective regulation</li> <li>• Enables INZ to enforce immigration law and hold providers to account, as registration cancellation is often considered disproportionate to the level of offending</li> </ul> <p><b>Disadvantages</b></p> <ul style="list-style-type: none"> <li>• Less serious offences by providers will not automatically result in deregistration</li> <li>• Is more time consuming for the regulator who will be required to consider the merits of each case</li> <li>• Inconsistent with the requirement to consider cancelling a PTE’s registration for breaches of other registration requirements</li> <li>• Would mean that PTEs who continue offending could continue operating, despite possible risks to international students</li> <li>• Leaves international students vulnerable to sub-standard legal protections and exploitation</li> </ul>

### **Option 3- narrowing the criteria under which NZQA must cancel a provider's registration for immigration breaches**

#### **Description**

Establish a narrower set of criteria under which NZQA must cancel a provider's registration for enrolling an international student without the appropriate immigration authority, for example repeated or particularly severe offences.

#### **Advantages**

- Would ensure that PTEs whose offending met the threshold were no longer able to continue operating
- Removes double jeopardy
- Simple for regulator to administer
- Less serious offences by providers will not automatically result in deregistration

#### **Disadvantages**

- Difficult to establish an appropriate set of criteria to take into consideration all relevant circumstances, and may be confusing for providers. May not make it easier for INZ to enforce immigration law and hold providers to account, as there would be no option to manage registration cancellation on a case by case basis.

### **Option 4- enabling NZQA discretion to cancel a PTE's registration for enrolling an international student without the appropriate immigration authority**

#### **Description**

NZQA would have discretion as to whether or not to cancel a PTE's registration if they are convicted of enrolling an international student without the appropriate immigration authority, in line with NZQA's discretion to cancel a PTE's registration for breaches of other registration conditions.

#### **Advantages**

- Enables INZ to enforce immigration law appropriately, and hold PTEs to account
- Consistent with processes for breaches of other registration conditions, and aligns with provisions for other provider types
- Less serious offences by providers will not automatically result in deregistration

#### **Disadvantages**

- Potential for the regulatory gap to remain in relation to the deregistration of PTEs, if agencies do not effectively adjust to the separation of immigration offences and education penalties.
- There could be uncertainty for PTEs in relation to the consequences for breaches of Section 352 of the Immigration Act, particularly the criteria used by NZQA to consider whether convictions warrant deregistration.

#### **Public consultation on option 4**

19. A total of seven submitters commented on this proposal, including four peak bodies. The other three submitters commented as individuals. All submitters supported the proposal, with five noting that Immigration New Zealand is best placed to investigate and manage breaches of the Immigration Act 2009.

20. One noted that interests of staff and students should not be automatically compromised due to the actions of a provider which result in a breach of section 352(1) of the Immigration Act 2009, and supported a move to a discretionary approach.
21. One individual submitter commented that it is important that there be a transparent set of criteria for NZQA to make their decision, and that there should also be a transparent, clear and prompt appeal process. The same submitter noted that the possibility of administrative errors, misinformation, and delays from INZ should be taken into consideration when investigating possible enrolment of an international student without the appropriate immigration authority.

## How do the options compare to the status quo/counterfactual?

	Option One – Status Quo	Option Two – removing any obligation to cancel a PTE’s registration for immigration breaches entirely	Option Three - narrowing the criteria under which NZQA must cancel a provider’s registration for immigration breaches	Option Four - enabling NZQA discretion to cancel a PTE’s registration for enrolling an international student without the appropriate immigration authority
<b>Enables better enforcement of immigration law and holds providers to account</b>	0	+ somewhat better than the status quo Will enable better enforcement of immigration law but PTEs with continued or serious breaches could still operate	+ somewhat better than the status quo Will enable better enforcement of immigration law, but difficulty setting criteria for registration cancellation to cover every eventuality could limit NZQA’s ability to hold some PTEs to account when appropriate	++ much better than the status quo Will enable better enforcement of immigration law and ensure that PTEs are appropriately held to account under both immigration law and education provisions
<b>Improves protections for international students</b>	0	0 similar to status quo PTEs with continued or serious breaches could still operate, so future international students could still be at risk	0 similar to status quo Difficulty setting criteria for registration cancellation to cover every eventuality could limit NZQA’s ability to hold some PTEs to account when appropriate, thus not improving international student protections	++ much better than the status quo NZQA would have the ability to cancel registration where appropriate, or to take other action to ensure protection of international students, as required
<b>Improves alignment of PTE registration cancellation across the range of different possible breaches, and alignment with consequences for</b>	0	+ somewhat better than the status quo Would align with provisions for other provider types, but not with other provisions for cancelling the registration of a PTE found to breach other registration criteria	0 similar to the status quo Would not align with provisions for other provider types, or with other provisions for cancelling the registration of a PTE found to breach other registration criteria	++ much better than the status quo INZ would have the ability to take prosecutions in the same way as they currently can for other provider types, without the current constraints  Aligned with criteria and processes for registration cancellation for other

	<b>Option One – Status Quo</b>	<b>Option Two – removing any obligation to cancel a PTE’s registration for immigration breaches entirely</b>	<b>Option Three - narrowing the criteria under which NZQA must cancel a provider’s registration for immigration breaches</b>	<b>Option Four - enabling NZQA discretion to cancel a PTE’s registration for enrolling an international student without the appropriate immigration authority</b>
<b>other provider types</b>				breaches of PTE registration criteria by NZQA
<b>Overall assessment</b>	<b>0</b>	Not preferred option	Not preferred option	Preferred option

**What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?**

22. We consider that Option 4 – giving NZQA discretion to cancel a PTE’s registration if convicted of enrolling an international student without the appropriate immigration authority - is the preferred option as it best meets the decision-making criteria and is the best response to the problems identified in section 1.

**What are the marginal costs and benefits of the option?**

Affected groups	Comment	Impact	Evidence Certainty
<b>Additional costs of the preferred option compared to taking no action</b>			
International students	No impact	None	High. We did not hear from submitters that the proposal will cause additional costs or have a significant cost impact.
Private Training Establishments	PTEs breaching section 352(2) of the Immigration Act are more likely to be prosecuted	Low for the sector as a whole, but high for PTEs who are prosecuted	
Other education providers	None	None	
Regulators (Immigration New Zealand, New Zealand Qualifications Authority)	Ongoing. Immigration New Zealand may see an increase in cases progressing to prosecution, and the New Zealand Qualifications Authority may see an increase administrative processes related to managing the discretionary process.	Low – both agencies will include any additional costs in baselines.	
<b>Total monetised costs</b>		Low	
<b>Non-monetised costs</b>		Low	
<b>Additional benefits of the preferred option compared to taking no action</b>			
International students	Effectively holding providers accountable for correctly enrolling international students has the ongoing benefit of reduction in risk of inadvertently breaching visa conditions (leaving them vulnerable to	High for students who are not correctly enrolled	High. Submitters agreed on the importance of ensuring immigration provisions can be appropriately enforced

	exploitation), and ensuring all appropriate protections in place		
Private Training Establishments	The penalty for a successful prosecution is likely to be proportionate to the seriousness of the immigration offence, and deregistration would no longer be an automatic consequence.	Low	
Other education providers	The international education sector as a whole benefits from ensuring that immigration laws are upheld and international students have appropriate protections	None	
Regulators (Immigration New Zealand, New Zealand Qualifications Authority)	INZ will be better able to enforce immigration law and fulfil their regulatory functions	High	
<b>Total monetised benefits</b>			
<b>Non-monetised benefits</b>		High	

## Section 3: Delivering an option

### How will the new arrangements be implemented?

23. Legislative change is required to implement this proposal, and if it is agreed to, it will be added to the Education and Training Bill (No 2).
24. NZQA and INZ will update internal processes and public guidance and information to reflect the changes.
25. Communications will be provided through the Ministry's standard publications and other channels, such as the Ministry's website and social media. We will also work with NZQA and INZ on communications to the sector.

### How will the new arrangements be monitored, evaluated, and reviewed?

26. The Ministry of Education will work with INZ to monitor and evaluate the impact of the changes on INZ's ability to prosecute providers for enrolling international

students without the appropriate immigration authority. We will work with NZQA to identify and resolve any operational issues.

27. We will also use regular peak body meetings (which include PTE and international student representation) to monitor whether there are unintended consequences, especially on international students.