Regulatory Impact Statement: Domestic Tertiary Learner Dispute Resolution Scheme

Coversheet

Purpose of Document	
Decision sought:	This analysis and advice have been produced for the purpose of informing key policy decisions on the dispute resolution scheme rules to be taken by Cabinet.
Advising agencies:	The Ministry of Education is solely responsible for the analysis and advice set out in this Regulatory Impact Statement, except as otherwise explicitly indicated.
Proposing Ministers:	Minister of Education
Date finalised:	29 June 2021

Problem Definition

A dispute resolution scheme for domestic tertiary learners was provided for in the Education (Pastoral Care) Amendment Act 2019. These proposed rules set out the design and process of the scheme.

The proposals aim to address the problem that unresolved disputes can have a significant impact on learners and their education, particularly due to the power imbalance between learners and providers. Unlike for other learner groups, currently there is no bespoke, learner-centric, independent disputes resolution service for domestic tertiary learners. Existing options for making complaints are confusing to navigate for learners and not bespoke to the tertiary education context.

Executive Summary

Learner wellbeing and safety package

The proposed rules for the financial and contractual dispute resolution scheme (DRS) for domestic learners are part of a suite of proposals, building on earlier urgent changes to strengthen learner wellbeing and safety in tertiary education. They set out the design and process of the scheme that was provided for by the Education (Pastoral Care) Amendment Act 2019.

The other proposals in this package include:

- a new code of practice for the pastoral care of domestic tertiary and international learners; and
- legislative changes to support learner wellbeing and safety.

The legislative changes will come into effect after the dispute resolution scheme and code are in place. These rules are designed to enable an effective and sustainable scheme; however, we note that the legislative proposals include some changes to the provisions establishing the scheme, to further enhance it. This includes broadening the scope of the scheme and strengthening information sharing provisions. If these changes are progressed, these rules will need to be updated.

Regulatory impact statements for the proposed code and the proposed legislative changes are provided separately.

Key considerations in the design of the scheme

Improved learner wellbeing and safety contributes to better educational achievement. Disputes resolution is part of this, as unresolved disputes have a significant impact on learners and their education. Stopping disputes from arising and solving them quickly and effectively when they do happen is critical.

There is a power imbalance between learners (with their whānau) and providers. It is therefore particularly important to have an independent dispute resolution scheme available that helps manage this power imbalance.

Options considered

Two sets of options were considered:

1. Design options

    a. A scheme that replicates the international student scheme
    b. A scheme that is tailored to meet the needs of domestic learners

2. Process options

    a. the scheme should use consensual dispute resolution processes
    b. the scheme should use determinative dispute resolution processes, or
    c. the scheme should have a tiered scheme with both consensual and determinative processes

The preferred option is a combination of design option One B and process option Two C

a. The scheme will be tailored to meet the needs of domestic learners
b. The scheme will have a tiered process with consensual and determinative dispute resolution methods.

This option is reflected in the proposal presented in the Cabinet paper.

Impact of proposal

This will enable a flexible and accessible scheme that prioritises the needs of all learners and is able to deliver effective and sustainable dispute resolution. It will also allow for the scheme to have proper regard for tikanga Māori to ensure equitable outcomes, while making the complaints system easier for learners to navigate.

We do not expect that there will be high costs for providers related to compliance with the scheme, beyond initial upskilling of staff to understand the process. If providers are required to participate in a DRS process, the scheme will be fair and balanced, with the focus on helping leaners and providers solve disputes together in a way that works for both parties and is sustainable, rather than being a punitive scheme.

There will not be significant implications for regulatory bodies. The Ministry of Education will be able to build off similar processes that exist for the international student dispute resolution scheme for monitoring and evaluation. Quality assurers will also be able to build similar information sharing relationships with the new scheme.

Stakeholder views

Key stakeholders were broadly supportive of the scheme and its intent to fill the regulatory gap in the complaints system, and in particular, of its aim of being accessible and independent.

Users of tertiary education were particularly interested in the scheme being accessible and catering for the diverse range of needs that domestic learners have. Clear information and navigable pathways with support available was also important to help learners use the process and address the power balance between learners and providers.

Māori were also particularly interested in ensuring the scheme is accessible for Māori learners, with the capability for the scheme to have regard to tikanga Māori principles, that te reo Māori can be used throughout the process, and that Māori were involved in the development and evaluation of the scheme.

Providers emphasised the importance of the scheme being balanced, fair and reasonable in its process and outcomes. They had some concerns about costs related to the scheme.

Limitations and Constraints on Analysis

The options considered in this RIS are constrained by the primary legislation: the Minister of Education is legally required under section 536 of the Education and Training Act 2020 to establish a student dispute resolution scheme.

The purpose and the scope of the scheme are set out in primary legislation, with the Act providing that the scheme have the purpose of resolving contractual and financial disputes between students and providers or signatory providers. The legislation also sets out that a claimant can only lodge a complaint if they have given the provider an opportunity to resolve the dispute.

The legislation also sets out that the DRS may not require a provider or signatory provider to pay a student claimant more than $200,000 in relation to a claim.

Transitional provisions of the Education and Training Act 2020 mean that when a new code takes effect, there needs to be a dispute resolution scheme. There is a statutory obligation for the code to take effect on 1 Jan 2022, at which time the DRS must also take effect.

Responsible Manager(s)	
Julie Keenan Policy Director Te Ara Kaimanawa	Graduate Achievement, Vocations and Careers Ministry of Education 29 June 2021	

Quality Assurance	
Reviewing Agency:	Ministry of Education
Panel Assessment & Comment:	The Ministry of Education's Quality Assurance Panel has reviewed the Regulatory Impact Statement: *"Domestic Tertiary Learner Dispute Resolution Scheme"* dated 29 June 2021. The panel considers that this Statement **meets** the Quality Assurance criteria. It contains evidence of extensive and effective consultation with stakeholders and reflects their views on the proposed design of the new Scheme and dispute resolution processes. A convincing case is made that a design that is tailored and has a tiered process with consensual and determinative dispute resolution methods will best contribute to improved learner wellbeing and safety.

Section 1: Diagnosing the policy problem

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

Background – The new dispute resolution scheme rules are part of a suite of proposals building on earlier urgent changes

1. In 2019, urgent law changes were made to improve the welfare of domestic tertiary learners in student accommodation and reinforce learner wellbeing more generally. This included amending the Education Act 1989 through the Education (Pastoral Care) Amendment Act 2019 (carried over into the Education and Training Act 2020) to provide for the establishment of a dispute resolution scheme for tertiary learners to resolve financial and contractual disputes, among other matters. These rules propose the design and process of this scheme.

2. These changes were intended as a swift response and first step towards filling regulatory gaps to ensure learner wellbeing was supported while more comprehensive, system-wide changes could be developed. Meanwhile, COVID-19 significantly impacted the tertiary and international education sector, causing disruption for learners and providers. This has contributed further to concerns about learner wellbeing and inconsistency in practices across providers.

3. The dispute resolution scheme rules are part of a wider package of proposals that build on these initial urgent changes. Aside from the scheme, the package includes the following proposals, for which we have developed separate Regulatory Impact Statements:

   a. A new code of practice for the pastoral care of domestic tertiary and internationallearners (also to start by 1 January 2022 alongside the new scheme); and

   b. Legislative changes to support and reinforce the focus on wellbeing and safety, and to ensure the settings for the code, code administrator and dispute resolution scheme are fit for purpose for the future.

Status quo – There is a regulatory gap in the current complaints system, with no bespoke independent complaints service for domestic tertiary learners

4. Currently, when a tertiary learner has a complaint that has not been resolved by their education provider's internal complaints processes, there is no bespoke process for domestic tertiary students to pursue their complaints. Rather, there are a range of external bodies they can take their complaint to depending on its nature, which makes the process difficult for students to navigate, as it is not always clear which pathway should be followed. We have heard anecdotally from students that this often leads them to abandon complaints

5. The New Zealand Qualifications Authority (NZQA) complaints process can take complaints relating to education quality and pastoral care (including issues around student accommodation). This can be accessed by all learners, but is not a learner-centric process as it aims to change and improve providers' practices in the system as opposed to helping

learners resolve individual complaints. NZQA cannot make decisions about or get involved in compensation or redress.

6. The Disputes Tribunal can hear complaints related to financial or contractual matters where there are claims less than $30,000, but is not bespoke to the education context and is not widely viewed as an accessible mechanism for tertiary students.

7. iStudent Complaints is a dispute resolution scheme designed to resolve financial and contractual disputes between international learners and their providers. It is not accessible for domestic learners. It was established in 2016 under the same provisions as the proposed scheme.

8. The proposed rules will enable the operation of a scheme that fills this gap for domestic learners, providing a scheme that is designed with learners in mind and reflects an understanding of the education system and relevant regulatory and legal systems. This would be more accessible and able to deliver fairer outcomes for learners than existing pathways.

9. It is not clear how many domestic tertiary learners will seek to use the scheme. The iStudent Complaints scheme has the same scope as the proposed scheme, and received a total of 102 enquiries in 2019/20, and 94 in the previous year. [1] Not all claims require formal assistance through the scheme, with many being resolved through initial assistance and referral.[2] International learners are a smaller group than domestic learners, so we anticipate this figure will be higher. During the 2019 calendar year, the number of international fee-paying learners in New Zealand was 104,010. In 2019, there were 328,075 domestic tertiary learners (215,675 equivalent fulltime students).

There have been several strategic and statutory changes signalling Government's shift towards creating a learner-centred education system that ensures learner wellbeing and success

10. 'Learners at the centre' and 'barrier free access' are two of the main objectives of the new Tertiary Education Strategy and Statement of National Education and Learning Priorities (TES/NELP). This signals the Government's commitment to ensuring success and wellbeing for all learners through meaningful differences in these areas.

11. On 13 May 2021, the Education and Workforce Select Committee reported back to Parliament on its inquiry into student accommodation. The inquiry was launched after the COVID-19 lockdown because of growing concerns about the nature, ownership, regulation, and wellbeing and safety provisions of student accommodation in New Zealand. One of the inquiry's aims was to investigate and 'recommend some form of conflict resolution or recourse' for students.

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[1] iStudent Complaints Annual Report 2019-2020 https://www.istudent.org.nz/sites/default/files/2020-10/iStudent-Complaints-Annual-Report-2019-2020.pdf

[2] 51% of enquiries required more formal assistance (facilitation/mediation/adjudication) in 2019/20

12. The committee found that the disputes and complaints system needs to be strengthened, and highlighted the role that the proposed code and dispute resolution scheme could have in improving this area.

13. In addition, section 4(d) of the Act, passed since the interim code was introduced, requires the education system to honour Te Tiriti o Waitangi and support Māori-Crown relationships. In addition, Ka Hikitia, a cross-agency strategy for the education sector, sets out guiding principles for supporting excellent outcomes for Māori learners and their whānau and ensuring a sense of belonging across the education system.

There have been developments in the dispute resolution sector aimed at improving best practice

14. In 2020, the Government Centre for Dispute Resolution (GCDR) launched a maturity model assessment framework setting out best practice standards for government dispute resolution schemes. The proposed rules have been designed to reflect the GCDR standards and contribute to the work on improving best practice across the dispute resolution sector.

What is the policy problem or opportunity?

Key issues influencing scheme design

15. The proposed approach builds on the wider work being done to support learner wellbeing and safety, and the research and best practice standards developed by the GCDR. It also considers the type of scheme and interventions that are needed to ensure the scheme delivers accessible and effective results for domestic tertiary learners.

Improved learner wellbeing and safety contributes to better educational achievement. Unresolved disputes have a significant impact on learners and their education.

16. Disputes can have a significant emotional and financial impact on individuals and their whānau and communities. Where unresolved, they can have lasting impacts on a learner's experience in education, both academically and in terms of their relationship with their provider.

17. This means that stopping disputes from arising and solving them quickly and effectively when they do happen is critical.

In resolving disputes there is a power imbalance between learners and whanau and providers.

18. Providers have a key role in resolving disputes, as there is a power imbalance. Learners have limited ability to be heard and influence provider decision making. This is exacerbated in a disputes context as there is a disparity in information and resources, and a perception that the provider has power over the learner's educational future.

19. Because frequently learners and their providers will need to continue their relationship during/after the dispute, it is also important that relationships can be maintained where possible.

Accessibility is fundamental in developing an effective dispute resolution scheme

20. At present, pathways for dispute resolution are difficult for learners and providers to navigate or are inaccessible due to formality of process or cost.

21. There is an opportunity in designing this scheme to ensure it is accessible for all users, and reduces confusion in the system.

Who are the key stakeholders and what are their views?

22. A six-week formal consultation period on the package of proposals including the DRS was undertaken, enabling quality public participation. This feedback has informed the approach taken in the proposals.

Users of tertiary education

23. As users of the scheme, domestic tertiary students are primary stakeholders. Ensuring the scheme is accessible and easy to navigate was of significant priority to learners, particularly having clear information on pathways to access the scheme, how to use the process, and what it can deliver for them. The importance of taking into account the diverse needs of learners at every stage of the process was also highlighted in consultation, particularly by disabled learners, and Māori.
24. Learners also emphasised that it was vital to ensure the scheme helped address the power balance between learners and providers, and that learners were supported throughout the process (for example, through disability support services or an advocacy function).
25. All learners have a shared need for wellbeing and safety, but learners are diverse and any arrangements need to take account of:

    a. diverse educational settings, which include fulltime, part-time, onsite education, distance education, industry training, apprenticeships, offshore education, short-term and multi-year educational programmes

    b. diverse providers, including universities, wānanga, Te Pūkenga, private training establishments, and schools.

26. No changes are being proposed to the dispute resolution scheme for international students, which includes international school students as well as tertiary. This is partially because legislation and further policy work is needed to be able to do this and also ensures continuity and clarity as schools look ahead to the potential of returning international students when this is possible. As the international scheme fulfils the purpose of resolving financial and contractual disputes for international students, there is not a regulatory gap for these students for the DRS to fill. We are intending to undertake further policy work on combining the two schemes in the future, as recommended by the Education and Workforce Select Committee's inquiry into student accommodation.

Learner representative groups

27. Learner representative groups may be further impacted by the scheme as learners may look to them for support using the scheme, and they may have an interest in ensuring they can educate members in how the scheme works.

28. Ensuring there is transparency in the scheme and its reporting is also important for groups in being able to hold the scheme, and providers, accountable.

Māori interests

29. Ensuring the system of supports for learner wellbeing and safety honours Te Tiriti o Waitangi and works well for Māori is part of the Crown's responsibility under Te Tiriti o Waitangi. The education system has some way to go to ensure Māori receive their general citizenship rights under article 3 of Te Tiriti o Waitangi. It also has an important role in enabling Māori to exercise authority over their taonga, in particular te reo, tikanga and mātauranga Māori, under article 2 of Te Tiriti o Waitangi.

30. In our discussions with Māori and other participants regarding the impact of changes for Māori, the importance of ensuring the scheme is accessible to Māori learners was emphasised. This includes that the process can be conducted in te reo, and information about the scheme is available in te reo.

31. An approach that requires the practitioner have regard to tikanga Māori principles in resolving the dispute, which enables Māori to input into the process and ensure it works for them was highlighted as important and necessary by Māori. Some Māori organisations also emphasised the need for co-design and development with Māori.

Regulated parties – tertiary education providers and signatory education providers

32. Tertiary education providers are directly impacted by the dispute resolution scheme. Providers will be required to comply with the rules of the scheme and its decisions will be binding on them. They will be required to provide learners with information about the scheme, participating in the scheme's processes as required, for example responding to information requests and attending meetings, and complying with any adjudication decisions resulting from the schemes.

33. Providers largely supported the establishment of the dispute resolution scheme, though had some concerns about costs, and ensuring the scheme was balanced and fair. This included costs around administration and compliance with the scheme, and around decisions made by the scheme requiring payments to students. Providers were concerned that the cap on payments that the scheme can require them to pay student claimants is high relative to the level of legal procedure proposed, and wanted the rules to ensure outcomes are reasonable and fair. They were also supportive of an approach consistent with natural justice principles that gives them the right to try and address the complaint first.

Regulator

34. The Ministry of Education will be the agency responsible for regulating the scheme. There is an interest in ensuring there is sufficient information available and accessible for the Ministry to effectively monitor and evaluate the performance of the scheme. It is also important that there be pathways available for the Ministry to take action where the operation of the scheme is not meeting expectations.

Dispute resolution services

35. The scheme will not have a significant impact on the dispute resolution services as while we are aware that there are a number of companies interested in operating the scheme, it

is relatively small. However, the requirements proposed on the operator, for example, high expectations regarding cultural competency and the ability to understand and incorporate tikanga, may help lift best practice standards.

Accredited dispute resolution organisations

36. The DRS may have implications for accredited dispute resolution organisations such as Arbitrators and Mediators Institute of New Zealand, Resolution Institute, and the Māori Allied Dispute Resolution Organisation. If practitioners appointed by the operator of the scheme are required to be members of professional membership organisation, they will be expected to meet certain quality requirements, and be governed by the code of conduct of the relevant organisation. This will mean the organisation is responsible for disciplinary matters, and ensuring their members are trained.

Legal and advocacy services

37. There may be implications for legal and advocacy services, as the scheme may impact the work they are asked to do and will be a new scheme to understand and navigate. It is not clear that the volume of work services have will increase, as we do not expect an increase in issues arising, but more of their work may be related to the DRS and there may be costs associated with upskilling practitioners to understand the new scheme.

Wider government

38. The DRS will have implications for the quality assurance agency as they will need to have mechanisms for sharing and processing information regarding complaints that are progressing through the DRS. This is important so that the quality assurer can investigate compliance issues when they arise, and identify and monitor systemic issues, and ensure continued system learning.

39. NZQA has a complaints process, which investigates claims made against providers from a quality assurance perspective. The NZQA process cannot offer learners compensation, and the establishment of the DRS may have implications for the volume and type of complaints that go to the NZQA process as some claimants will instead use the DRS. This makes it essential that NZQA and the DRS have strong information sharing pathways so that where regulatory action is needed NZQA remains informed even if its process is not used. It is important that learners do not have to go to both the DRS, where they can get compensation, and the NZQA process where they can trigger investigation to ensure their issue is fully resolved.

40. Under section 538 of the Act, a provider or claimant or the operator, could apply to the District Court to enforce a binding resolution of the DRS, including paying any sum of money. The District Court can also make an order requiring the DRS operator to comply with the rules. The District Court can also modify a resolution if it considers the terms are manifestly unreasonable, serving as an appeal mechanism. There is an interest in ensuring that information sharing pathways are robust and efficient. The regulator also has an interest in being informed as to whether decisions require enforcement action through the District Court and whether they are upheld, in order to monitor the performance of the scheme.

41. The Government Centre for Disputes Resolution (GCDR) also has an interest in the scheme and how it tracks against their standards for best practice and what lessons can

be learned from the scheme. They are creating a community of learning for dispute resolution schemes across New Zealand, and it will be important for the scheme to be a part of this.

42. There may be implications for existing complaints bodies that can hear financial and contractual disputes, for example, the Disputes Tribunal. For the Disputes Tribunal this could mean some cases that would ordinarily have gone to the Disputes Tribunal will go to the DRS. This could be beneficial as we have heard they do not have the capacity to have specialist education knowledge for more complex disputes and have a high case load.

What objectives are sought in relation to the policy problem?

43. The overall purpose of the wider work programme, of which the dispute resolution scheme rules are one part, is to develop a system of supports for the wellbeing and safety of domestic and international learners that embeds the early focus on wellbeing and safety to support achievement that the interim code has started to encourage.

44. To achieve this purpose, the work programme has several key objectives, including to:

    a. strengthen and improve regulation relating to the wellbeing and safety of domestic tertiary and international learners and ensure it is fit for purpose so all learners are supported to achieve in their education;

    b. ensure the regulatory system is consistent and clear for all stakeholders, including education providers, accommodation providers, domestic students, international students, and communities; and

    c. honour Te Tiriti o Waitangi and support Māori-Crown relationships.

45. There are also several dispute resolution scheme specific objectives, to embed the best practice principles developed by the GCDR, to be:

    a. User focussed and accessible

    b. Independent and fair

    c. Efficient

    d. Effective

    e. Accountable

46. Ensuring the scheme is accessible and accounts for the diverse needs of all domestic tertiary learners will support the overall purpose and high-level outcomes of the work programme. It will do this by fostering conditions for success and support of more equitable outcomes for diverse learners, including Māori, Pacific, disabled, LGBTQIA+, ethnic or migrant and former refugee learners.

47. Although there are multiple objectives, they are complementary, not in competition. The option that is likely to best respond to the opportunities identified above and deliver the

highest benefits across all stakeholder groups is one that will meet all of the objectives above. This is reflected in the criteria for options analysis in Section 2.

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

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

48. The options set out below will be assessed against the following criteria:

    a. Is the option learner-focussed and accessible to all user groups?

    b. Does the option ensure that the scheme will be independent and fair?

    c. Does the option ensure that the scheme will be efficient, promoting timely and early resolution of disputes?

    d. Does the option provide effective and sustainable results?

    e. Does the option ensure the scheme will accountable, with effective monitoring and data stewardship, including supporting effective monitoring of compliance with the code?

    f. Does the option honour Te Tiriti o Waitangi and support Māori-Crown relationships?

49. All criteria are important to determining the best option, with criteria a particularly important in achieving the primary objective of improving wellbeing and safety of tertiary learners.

What scope will options be considered within?

50. The options considered below are constrained by the primary legislation. The student contract dispute resolution scheme has been established by section 536 of the Education and Training Act 2020. These rules are needed to establish the scheme and fulfil the intent of the legislation. Consequently, non-regulatory options to address the opportunities identified in section 1 would be complementary to the DRS and need to be considered alongside and in addition to the scheme. Transitional provisions require the scheme to be established by 1 January 2022. The status quo/counterfactual is not considered as an option, as a scheme must be established.

51. The scope of the scheme is also set in primary legislation (section 536): to resolve financial and contractual disputes between students (and former and prospective students) and providers or signatory providers. Section 536 also sets out that decisions of the scheme are binding (if the result of adjudication or mediation (where agreed by the parties), with section 537 setting a cap of $200,000 for payments to a student claimant resulting from the scheme.

52. The Minister has already signalled his intention that the scheme be accessible for domestic tertiary learners, without alteration to the options available to international students for resolving disputes. There is an expectation from the Minister that the scheme will be operating by 1 January 2022, alongside the new code of practice for pastoral care.

53. The tertiary education system is complex with a wide range of providers, learners, and a variety of contexts. This also constrains the range of options available, as the scheme must

be able to be accessible and flexible to meet the needs of a diverse range of learners and providers.

54. The scope of feasible options has also been limited by stakeholder engagement. There was a strong preference from providers for the scope to exclude issues related to academic quality, owing to the need for tertiary institutions to retain academic freedom and institutional autonomy.

We considered relevant experience from other NZ government dispute resolution systems in setting the scope for options identification and development

55. In considering the scope for option identification and development we considered relevant experience from across similar schemes in New Zealand. In particular, we considered information and advice from the Government Centre for Dispute Resolution. The Centre has worked with schemes across government to build from experience and expertise and develop best practice standards for dispute resolution schemes in New Zealand. The standards are intended to inform those developing new dispute resolution schemes and reviewing existing schemes to ensure continuous improvement across the sector.

56. The GCDR and practitioner groups have also been consulted to ensure that options identified are feasible for the sector.

Public consultation was undertaken on the package of proposals, including the DRS.

57. The options have also been informed by the feedback received during public consultation which took place in April-May 2021. Feedback included over 100 written submissions and survey responses from learners, whānau and associations, providers, sector peak bodies, community and health organisations and dispute resolution experts. Officials also conducted around 60 face-to-face and online engagements, with a particular focus on learners and communities representing groups that are underserved by the education system.

What options are being considered?

58. Given the statutory requirement to have a scheme to resolve contractual and financial disputes for tertiary learners, the options focus on structure and design of the scheme, as opposed to its scope. The options exist as two pairs that relate to different elements of the scheme. The most effective proposal will be a combination of the options from each pair. The options are:

    Option One: Structure and design

    a. A scheme that replicates the existing international student scheme for domestic learners

    b. A scheme that is tailored to the needs of domestic learners

Option Two: Process

a. A scheme that delivers consensual dispute resolution methods

b. A scheme that delivers determinative methods of dispute resolution

c. Option Two A and Two B are not mutually exclusive and could be combined in a tiered process that incorporates both consensual and determinative dispute resolution methods.

Option One A – A scheme that replicates the existing international student dispute resolution scheme

59. Under this option, the international student dispute resolution scheme (international scheme) rules would be replicated for domestic students, with no changes.

60. The international scheme has been running since 2016, and we have heard that it is working well for international learners and providers in terms of accessibility and effectively resolving disputes. The two schemes share the same scope - financial and contractual - and were designed specifically for the education context and to manage power imbalances between learners and providers.

61. This option may also be easier and more efficient to implement, as providers are familiar with the scheme and how it operates. It may also have a lesser impact than other options on one-off compliance and administration costs. The same or similar regulatory and monitoring systems could be used. There is an established system for information sharing and monitoring between the quality assurance agency and the scheme operator that could be expanded for the new scheme.

62. However, this option would not fulfil all the criteria and objectives set for this work, in particular regarding creating a learner-centric and accessible scheme, honouring Te Tiriti o Waitangi and supporting Māori-Crown relationships.

63. The international scheme rules have not been designed to encompass the diversity of the New Zealand population, and ensure the scheme works for Māori, to whom the Crown has particular responsibilities, including in the education context. Replicating the international scheme rules in the domestic context would not account for issues of equity and accessibility, in particular for Māori and Pacific student claimants. It would not allow space for tikanga Māori in the scheme, which we have heard from Māori is fundamental in providing a service that meets Māori needs and delivers equitable outcomes.

64. Replicating the international scheme may also be negatively perceived by users of the new scheme and reduce public trust and uptake, as it would appear that domestic learners have not been listened to or their views taken into account.

Option One B – A scheme that is tailored to the needs of domestic tertiary learners

65. This option would involve designing a dispute resolution scheme that is tailored for domestic tertiary learners. This includes ensuring that the scheme is designed with the diverse needs of domestic learners in mind regarding its accessibility, cultural competence,

process, and accountability measures. This could build off learnings from the international scheme and other existing dispute resolution models across New Zealand. It would also give us the opportunity to design the entire scheme in line with the new GCDR framework for best practice, and reflect the feedback of domestic tertiary learners and Māori.

66. While we have heard that the international scheme works well, the needs of international and domestic learners are different. For example, there may be different cultural needs that need to be accounted for in the design and process of the scheme, the types of disputes may differ, and the education and societal contexts in which learners and providers operate is different. Designing a tailored scheme would ensure we can take these needs into proper consideration throughout the process, so that it is accessible and effective for all stakeholders.

67. It is also particularly vital in the domestic context that the scheme is designed to have regard to Te Tiriti o Waitangi, and takes into account the interests and needs of Māori. This will ensure the scheme is able to deliver more equitable outcomes. This would give us the opportunity to ensure that proper regard is given to tikanga Māori in the dispute resolution process if the learner requests it, ensure that te reo Māori can be used in all processes, and that the scheme generates data that will help Māori to hold the scheme and system to account.

68. Building off the lessons learned from the international scheme but tailoring the scheme to meet the needs of domestic learners may also increase public confidence and trust in the new scheme compared to replicating the international scheme.

69. Designing the scheme from scratch will also present opportunities to improve the rules to align with the GCDR's best practice framework. The framework was developed in 2020, and reflects current understanding of best practice for dispute resolution in New Zealand.

70. There is a risk that using a new approach may create confusion by creating two different systems providers must comply with. In addition, it may create recurring inefficiencies, adding to the complexity of administration, reporting and monitoring for providers, the quality assurer, and the regulator. We consider that these risks can be mitigated. We do not expect that monitoring and evaluation mechanisms will be significantly different in structure from the international scheme. For example, we anticipate annual reporting and case studies will be the key mechanisms as with the international scheme, so it is likely existing systems could be used with minimal alteration. While the schemes may be different in structure and process, we do not envisage significant change for providers in their immediate or long-term compliance or administration obligations with the scheme compared to the international scheme. The dispute resolution scheme and any new compliance obligations, for example training staff, will be reasonable and will fit alongside those for the code.

71. This option was broadly supported during consultation, including by providers, learners, regulators, and other government agencies such as the GCDR. As part of developing this option, feedback from key stakeholders, including domestic learners, was taken into account in identifying components needed to ensure the scheme meets the needs of learners and works for all stakeholders.

Option Two A – A scheme that delivers consensual dispute resolution methods

72. In this option, the scheme would deliver a process that uses consensual dispute resolution methods. This could include facilitation, negotiation, or mediation, with the parties working together to find solutions, with differing levels of involvement from an independent practitioner. Resolutions could be binding and enforceable with the agreement of the parties to the dispute.

73. This option has benefits, but on its own may not maximise the potential of the scheme and ensure it works for all learners. Consensual processes are more accessible and less intimidating than other options for dispute resolution as they are less formal and less costly. They prioritise parties working together to understand each other and the issue and develop a mutually acceptable solution. This is particularly important in the education context as it improves the chances of maintaining or restoring relationships between learners and their education providers. They also are more flexible, for example, meetings could take place at the provider or the claimant's home, or a marae if preferred, and can be tailored to meet the specific needs of the involved parties.

74. However, in some cases, consensual processes may not be sufficient, or appropriate. This is particularly the case where complex legal issues are in dispute, where parties cannot agree a solution, or where relationships have deteriorated such that making parties work together may not be practicable. In these cases, under this option if implemented alone, parties could take disputes to the court system. This is not an accessible pathway for most learners, both in terms of cost and the ease of navigating the process. The likely direct impact of this would be that if consensual processes are not appropriate or do not resolve the dispute, a significant number of claimants may give up on seeking resolution. This is particularly the case for learners from more vulnerable population groups and would likely have inequitable outcomes. This can have long-lasting negative impacts for the claimant regarding their education, finances, and emotional wellbeing. Court cases are also significantly more costly for providers and would be less likely to meet the objective of promoting timely and early resolution.

75. Having the court as the only available next step would further reduce the scheme's ability to be learner-focussed and accessible, with a system that is easier to navigate for all stakeholders. To pursue a claim, learners would have to go to a separate court process after going through the DRS. This would also have implications on the cost for providers as the time spent for parties going through two different schemes is likely to be higher than having a process that can deliver determinative decisions.

Option Two B – A scheme that delivers determinative dispute resolution methods

76. Under this option, the scheme would resolve disputes through determinative methods, with the DRS making an independent, binding decision on the dispute. This could follow hearings or meetings with the parties. Determinative processes can be particularly appropriate where there are complex issues that require a decision based on rights-based determination or legal precedent. These allow for binding decisions to be made outside of the formality of the court system and are more accessible and less costly. They are also an appropriate option where it is not possible or desirable to have the parties work together to find a solution.

77. However, this option is not conducive to restoring or maintaining relationships between parties, and is more formal, intimidating and less accessible than consensual processes. This does not align strongly with the objective of providing learner-centric dispute resolution. It may be less consistent with our obligations to Māori as it does not leave significant space for tikanga based approaches and for learners to input into the design of the process.

Option Two C – A scheme that delivers a tiered dispute resolution process

78. The two options could be combined, and the scheme could offer both consensual and determinative processes. This would look like a tiered scheme, with consensual processes being the first step, with adjudication as a next step if consensual processes do not work. The scheme would also have the flexibility to use adjudication in the first instance if it is more appropriate or if a claimant requests it.

79. This option would combine the benefits of option Two A and B and address the cons of each. A tiered process would ensure that the scheme prioritises the accessibility and flexibility that is crucial to user-groups, being able tailor the process to suit the issue and parties. This will also increase choice for learners, which will help rebalance the power imbalance between learners and providers.

80. Having the consensual processes available will also ensure the scheme is focused on resolving disputes in a way that helps maintains relationships between parties and upholds mana, while promoting early and effective resolution.

81. Having a determinative process built into the scheme will ensure that there is a further step easily accessible for those who are unable to resolve disputes though consensual processes. This may help make the system easier to navigate for learners, providers, and regulators and reduce costs of compliance compared with options that would require courts as the second option.

82. This option received wide support in consultation, including from learners, providers, and dispute resolution specialists.

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

	Option One (a) A scheme that replicated the international scheme	Option One (b) A scheme that is tailored to the needs of domestic tertiary learners	Option Two (a) – A consensual process	Option Two (b) – A determinative process	Option Two (c) – A tiered process (combining A and B)
Learner-focussed and accessible	- Will not take into account the specific needs of domestic learners	++ Can tailor for domestic learners to meet their needs, builds off existing understanding of what works for learners, ensures is easier to navigate for learners	+ Less formal and intimidating and costly for learners but next step would be courts	+ Less costly and intimidating than court, but not as accessible as consensual processes	++ More flexible, accessible and easy to navigate
Independent and fair	++ Scheme will be required to be independent and fair	++ Scheme will be required to be independent and fair	++ Parties will work together to make decisions, with an independent third party	++ Independent adjudicator will make decisions that are fair and reasonable	++ Practitioners will be required to be fair and reasonable; the process will be balanced
Efficiency and early resolution	+	+ New bespoke scheme may be more efficient than other pathways (e.g. NZQA complaints or Disputes Tribunal)	+ Could require going on to a separate court process if consensual not appropriate	+ Does not align with principle of resolving disputes early in way that preserves relationships	++ Enables early resolution and more timely results as it has a determinative process inbuilt
Effective and sustainable results	- Does not account for needs of domestic tertiary learners and the domestic context, may not be sustainable results	+ May generate higher public confidence and trust in the scheme and process, leading to stronger outcomes	+ Helps parties work together to find a mutually acceptable solution but does not offer an appropriate way to resolve issues if consensual processes are not appropriate	+ Makes binding requirements on parties to resolve disputes but does not focus on rebuilding relationships, so less sustainable	++ Would enable effective, sustainable results in all types/levels of disputes

Accountable with effective monitoring	+ Would be able to use existing systems and processes for monitoring	++ Would be able to build off existing systems and processes, but ensures important performance indicators for domestic context are included	+ If cases that are not appropriate for consensual processes have to go to court or other pathway, may be harder to monitor dispute resolution in the system	++ Would be simpler to monitor and evaluate	++ Would be simpler to monitor and evaluate and enable monitoring of different types of disputes throughout the system
Honouring Te Tiriti and supporting Māori-Crown relationships	- Would not take the needs of Māori into account or embed Te Tiriti o Waitangi	+ Could develop whole system to reflect needs and interests of Māori, ensuring Te Tiriti o Waitangi is embedded	++ This option is flexible and enables tikanga to be taken into account in the process	+ The scheme will be required to have practitioners that are culturally competent	++ This option is flexible and enables tikanga to be taken into account in the process
Overall assessment	This may be an improvement on the status quo, and may be easy to implement but would not meet the objectives set for this work. In particular this option would not be designed with the needs of domestic tertiary learners in mind and would not deliver an accessible scheme.	This option would enable a tailored scheme for domestic tertiary learners. This will be able to build off what works well in the international scheme, what we have heard from stakeholders and be designed to align with current best practice. This would result in higher trust and confidence in the scheme, and stronger outcomes. Similar monitoring systems and compliance requirements will mean is not inefficient to implement.	This option is highly accessible and flexible but it would not allow for all disputes to be effectively resolved at the DRS, with those requiring determinative processes needing to go to less accessible mechanisms	This option enables determinative processes in a less formal mechanism than the courts, but is less learner-centric and does not prioritise relationships so may be less effective and user-friendly	This option enables the flexibility and accessibility of the consensual processes, while enabling a less formal mechanism for determinative dispute resolution where needed. This would also make it easier to monitor the system and resolution of disputes.

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

83. The most effective solution is a combination of options One B relating to design of the scheme, and Two C relating to its process.

84. The proposed option is for a scheme that is tailored to meet the needs of domestic learners and meets the GCDR's best practice framework, with a tiered resolution process. This process prioritises consensual dispute resolution, and has a determinative process, adjudication, as an option if consensual processes do not work or are not appropriate.

Design

85. One B is the preferred design option – a scheme tailored to meet the needs of domestic learners.

86. Replicating the international scheme would not deliver the accessible, learner-centric scheme that is required to address the regulatory gap at present, and would be less able to produce effective, equitable, and sustainable resolutions to disputes.

87. Developing a new scheme means we can ensure there is a focus on te reo Māori and that the scheme has proper regard to tikanga, with clear expectations regarding equitable outcomes, and Māori data collection and use.

88. Ensuring the scheme is tailored is more likely to ensure public confidence and trust in the scheme, compared to replicating the international scheme which could lead to a perception that the needs and voices of domestic learners had not been taken into account.

89. While replicating the international scheme may be more efficient to implement as existing systems could be used or replicated, we do not anticipate that there will be significant costs associated with developing monitoring and accountability mechanisms, or information sharing mechanisms for the new scheme. Similar systems could be used for the new scheme.

90. We also do not anticipate significant costs to providers resulting from having to comply with the new scheme. While this option would mean having to comply with two schemes, requirements will be similar and minimal administrative costs beyond training staff to understand the process. This option would also be simpler and more accessible for domestic learners to use.

Process

91. The preferred process option is a tiered process. This will prioritise consensual processes that focus on helping the parties work together to resolve issues and maintaining relationships where possible to ensure a long-lasting and effective resolution. If consensual processes do not work or are not appropriate or not preferred by the claimant, adjudication is available as a next step.

92. Adjudication will further enhance accessibility, as it will be simpler to navigate and more affordable for those intending to pursue their claims than going to another determinative forum like the courts for resolution. Unlike the courts, the scheme is also bespoke to the education context.

93. Combining the two processes is important as they both offer useful methods for resolving disputes in different ways, and this allows for flexibility so the process can be tailored to best suit the needs for parties. This flexibility is also beneficial in enabling the scheme to meet the needs of Māori, as the practitioner must have regard to appropriate tikanga in resolving the dispute and can work with the claimant to determine how the process should run, enabling choice and autonomy. Having either of the processes as the sole dispute resolution method for the DRS would not offer the holistic service the DRS should deliver to be effective and genuinely learner-centric.

94. Combining the processes may also be beneficial from the perspective of monitoring and evaluating the system as more disputes will be able to be resolved at the DRS without going to another body.

What are the marginal costs and benefits of the option?

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Regulated groups	**Tertiary education providers and signatory providers** a. Ongoing administrative costs related to training staff to understand the scheme b. Potential costs of complying with the scheme if a claim is accepted by the scheme e.g. time preparing information, attending meetings, potential payments to students	low	(a) is near certain, (b) is not likely to occur frequently
Regulators	**Ministry of Education** a. Ongoing cost of funding the scheme b. Ongoing cost of monitoring the scheme	low/medium The operation and establishment of the scheme is expected to be $300,000 a year.	(a) and (b) are certain
Learners	**Domestic tertiary learners** a. Time required to learn about the new scheme and its processes b. Potential time taken to make a complaint	low/no cost	(a) is near certain, (b) is not likely to occur frequently
Māori (whānau, hapū and iwi)	Potential costs are: a. Time taken to learn about the new disputes scheme b. Time taken making and participating in dispute process	low/no cost	(a) is near certain, (b) is not likely to occur frequently
Wider government	**The courts –** May be costs related to enforcing decisions where necessary **Code administrator/quality assurance agency –** May be costs associated with information sharing and administration pathways	low/no cost	**Courts**: not certain, not expected to occur frequently. **Code administrator/ quality assurance**

			agency: Not certain
Total monetised costs	Largely unknown	The operation and establishment of the scheme is expected to be $300,000 a year.	Not certain
Non-monetised costs		low	not certain
Additional benefits of the preferred option compared to taking no action			
Regulated groups	**Tertiary education providers** a. Less costly forum for resolving disputes than court b. Flexible process, focused on working collaboratively to resolve disputes, not punishing providers c. Clear and easy to navigate system with clear requirements for providers d. Builds off experience and learning from international student dispute resolution scheme – familiarity with rules and build confidence and trust in scheme e. Reduced learner withdrawals as conflicts can be resolved early and effectively	low/medium	(c) and (d) near certain, (a), (b), and (e) applicable if cases go to scheme
Regulators	**Ministry of Education** a. Builds off existing international scheme model so more efficient to monitor and operate	low	near certain
Learners	**Domestic learners** a. Clear and accessible process for resolving disputes, more affordable and informal and bespoke to education than other options b. Understanding of needs of learners and flexible process to take these into account c. Support measures built into the scheme to ensure it is user-friendly and addresses power imbalance	medium	near certain, when cases go to scheme

	d. Enables early and effective resolution of disputes, and prioritises relationships In addition, there are further benefits for the following learner groups: **Māori learners** e. Requirement for the practitioner to have regard to tikanga in resolving the dispute f. Support for the use of te reo Māori at all stages of the process, including information and annual reports g. Flexibility for process to take place on a marae or other preferred location **Disabled learners** h. Specific reference is made to the need for accessible formats for information i. Students with disabilities must have needs considered and met to enable equal participation in processes		
Māori (whānau, hapū, iwi)	Potential benefits are: a. The operator must develop and evaluate the scheme with Māori and have regard to Te Tiriti, offering opportunity to influence the scheme b. Whānau and hapū supporting Māori learners can support or represent learners in making claims c. The scheme operator must generate a range of data specific to Māori ensuring outcomes are equal and having regard to Māori data sovereignty principles	low	(a) and (c) are near certain, (b) applies when a relevant claim is made to the DRS
Wider government	Potential benefits are: a. A more efficient and clearer pathway for tertiary learner disputes to be resolved b. Stronger information sharing and monitoring across the system c. Improved dispute resolution practice across government by	low	(a), (b), (c) are near certain

	aligning with the GCDR best practice framework		
Total monetised benefits	Unknown	N/A	
Non-monetised benefits		medium/low	

95. The Ministry of Education is responsible for allocating funding to the scheme. The monetised costs and benefits of the scheme have been estimated, based on assumptions drawing from the international learner dispute resolution scheme, as the costs and modus operandi will be similar to the international learner scheme.

96. The higher funding estimated for the domestic tertiary learner DRS compared to the international learner DRS takes into account the number of learners and vulnerabilities. However, there is a level of risk and uncertainty about the volume, nature, and complexity of disputes. The international learner DRS was allocated $222,381 in 2020/21 but covers fewer learners. During the 2019 calendar year, the number of international fee-paying learners in New Zealand was 104,010. In 2019, there were 328,075 domestic tertiary learners (215,675 equivalent fulltime learners) and 60,655 international tertiary learners (43,090 equivalent fulltime learners).

97. The impact of non-monetised costs and benefits has been determined using information regarding the international disputes resolution scheme and what we have heard from stakeholder consultation.

Section 3: Delivering an option

How will the new arrangements be implemented?

98. The rules for the functioning and administration of the scheme will be made by Order in Council following Cabinet decisions. The rules will come into effect on 1 January 2022. Once the rules are in place, the Minister may appoint a scheme operator by Gazette Notice and may impose any conditions on the appointment that the Minister thinks fit. We intend that this will take place in November, in time for the scheme to begin operating by 1 January 2022.

99. It is expected that the implementation approach of the scheme will be similar to that of the international student dispute resolution scheme and focus on information and education for providers and learners. We have heard from consultation that promoting and building awareness of the scheme is critical to ensuring the scheme is accessible and works for learners. At present, learners are not aware of the pathways available to them to make and resolve complaints. We have also heard that staff in institutions are often unable to direct learners to appropriate external complaints processes as they also have limited awareness of such processes.

100. Once appointed, it is expected that the operator will:

    a. Ensure the rules of the scheme are upheld

    b. Work in partnership with stakeholders (including providers and student representative groups) to promote and publicise the scheme

    c. Develop the scheme in accordance with the rules, and with Māori (for example, on approaches for giving regard to tikanga Māori principles during dispute resolution processes, on developing scheme resources and outputs in te reo Māori, on building capability of practitioners appointed by the scheme around te ao Māori, tikanga Māori, mātauranga Māori).

    d. Develop accessible information in a variety of formats to ensure that students and providers are fully aware of the scheme and how to use it

101. There are also measures in the proposed code that require providers to comply with the scheme and ensure they are familiar with the scheme. Providers must also advise learners making complaints through internal processes how to seek further aid resolving the issue through the scheme. The code administrator will be responsible for ensuring providers understand their obligations in this area, for example through developing guidance material.

102. The scheme operator, Code administrator, and education quality assurance agency will be expected to share information to ensure the scheme enhances system performance and works effectively alongside other actors. This is required by the rules in regard to systemic issues identified by the scheme. At present, the international DRS operator and NZQA as the quality assurer and code administrator have a memorandum of understanding, enabling information to be shared so NZQA can investigate whether

regulatory action is required. We expect that a similar arrangement will be undertaken for this scheme.

103. Some smaller providers raised concerns in consultation regarding the cost of complying with the scheme. While we anticipate there will be some small administrative costs associated with educating staff about the scheme, we do not expect there to be high compliance costs. Providers will be required to strengthen their internal complaints processes as part of the proposed Code, which should lead to more complaints being resolved internally. On the occasion a case goes to the scheme, outcomes will be fair and proportionate, therefore providers will only be required to compensate students in the event they have not treated them reasonably.

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

104. The Ministry is currently proposing legislative changes to the dispute resolution scheme. If these are progressed, new rules will need to be made in consultation with stakeholders. This will present an opportunity to evaluate and review the performance of the scheme and address any structural issues.

105. Given this, a review cycle has not been set in the rules, however, the operator must co-operate with any person or agency appointed by the Minister to carry out an independent review of the scheme and its operation. This enables a review to be carried out if considered necessary.

106. The scheme operator is required to have a process for receiving and resolving complaints about the operation of the scheme, including a regular client satisfaction survey. This will collect data on a range of performance indicators such as efficiency of the scheme and durability of resolutions and enable identification of issues with its quality.

Data collection

107. Data will be collected by the operator of the scheme and included in the annual report including on:

a. the number and nature of disputes that were taken to the scheme, including those not accepted, and broken down in each category by the type of provider involved (such as wānanga, universities Te Pūkenga—New Zealand Institute of Skills and Technology and its Crown entity subsidiaries)

b. the average length of time taken to resolve disputes

c. the outcomes of disputes, for example, whether they were resolved, at what stage

d. examples of typical cases (with appropriate safeguards and redaction to preserve privacy)

e. financial statements demonstrating how the funding of the operator has been applied

f. an outline of the steps taken by the scheme operator to ensure it is operating in a way that is consistent with the principles of Te Tiriti o Waitangi

108. The operator must also generate a range of Māori specific data and insights, that are meaningful and appropriate for use by Māori, the operator, and the education quality assurance agencies. They are further required to track the input, output, and outcome indicators of the impact on outcomes for Māori.

System performance

109. The scheme operator must also report on any systemic issues or serious misconduct by providers identified in the course of investigating or resolving a dispute, and how they dealt with the systemic issues or misconduct. In addition, the operator is expected to report systemic issues to the quality assurer, which will enhance monitoring of the system more widely.

110. The court system forms another pillar of monitoring, evaluation and review for the scheme, as parties may appeal decisions to the District Court and may apply to the District Court to enforce decisions.