

21 May 2021

Access & Participation Policy
Ministry of Education
Wellington

By email: CodeOfPastoralCare@education.govt.nz

Re: Draft Domestic Student Contract Dispute Resolution Scheme Rules – NZLS feedback

1. Introduction

- 1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the draft Domestic Student Contract Dispute Resolution Scheme Rules (**draft Rules**).
- 1.2 The draft Rules have been developed by the Ministry of Education to describe the design of a proposed new Domestic Student Contract Dispute Resolution Scheme (**Scheme**) to resolve financial and contractual disputes between domestic tertiary learners and their education providers.¹ The Scheme is intended to provide “*consistent and evolving supports for learner wellbeing and safety with clear expectations for the roles and responsibilities of tertiary education providers*”.²
- 1.3 The Law Society has reviewed the draft Rules. In accordance with its usual practice the Law Society has not commented on policy aspects of the Scheme but makes some recommendations below about operational issues and the drafting of the proposed Rules.

2. The proposed jurisdiction of the Scheme

- 2.1 Clause 10(3) of the draft Rules provides that a DRS operator may decide the procedures to be followed when resolving a dispute. Clause 10(5)(b) further states DRS operators and adjudicators are required to determine a dispute according to the substantial merits and justice of the case, and are not bound to give effect to strict legal obligations or to legal forms or technicalities.³
- 2.2 These clauses allow DRS operators and adjudicators to depart from what the law would require, if strict observance of the law would prevent the determination of the dispute according to the substantial merits and justice of the case. This creates a risk of injustice if the DRS operator or adjudicator fails to exercise their powers appropriately or consistently.

¹ Ministry of Education *Te oranga me te haumarū ākonga: Tertiary learner wellbeing and safety* (April 2021) at p3.

² Above n 1, at p3.

³ Draft Rules, cl 10(5)(b).

- 2.3 This aspect of the Scheme is comparable to the jurisdiction of the Disputes Tribunal, which is similarly required to determine disputes according to the substantial merits and justice of a case, without giving effect to strict legal rights or obligations or to legal forms or technicalities.⁴ However, the Disputes Tribunal has a jurisdictional cap of \$30,000, which acts as a safeguard against any potential risk of injustice and reflects a balance between the need for expeditious resolution and the protection of parties' rights.⁵
- 2.4 In contrast, the proposed Scheme has a significantly higher jurisdictional cap of \$350,000.⁶ This is on par with the jurisdiction of the District Court (which is required to determine disputes in accordance with the law and formal procedural requirements). We therefore suggest some further thought is given to the Scheme's jurisdictional cap to ensure the operation of the Scheme is consistent with the principles of natural justice.
- 2.5 If the proposed jurisdictional cap of \$350,000 is to be retained, it is important for consistency, justice and public confidence that decisions are made according to the general principles of the law, perhaps with some leeway to depart from the law only where it would be unjust to apply it. The Law Society therefore suggests the draft Rules could be amended to require adjudicators to address any legal rights or obligations in their decisions, and make it clear where a departure from the law is required by the substantial merits and justice of the case (with the reasons recorded in writing), if that is to be permitted.

3. The proposed 'student-focused' approach of the Scheme

- 3.1 Clause 8 sets out the general approach to resolving disputes, and includes the requirement that DRS operators must consider and deal with disputes in a 'student-focused' manner.⁷ The draft Rules do not define what is meant by a 'student-focused' approach, but it appears to result from a deliberate policy decision to design the Scheme in a manner that would address the power imbalance between education providers and students.⁸
- 3.2 If the Scheme is in fact designed to operate in a student-focused manner, the Ministry should consider how this would enable DRS operators to deal with disputes in a way that "*is consistent with the principles of restorative and natural justice*" (as is required by clause 8(g)).
- 3.3 If the requirement to deal with disputes in a 'student-focused' manner while also achieving natural justice proves difficult to reconcile, the underlying objectives of the Scheme may be met in a more even-handed manner by inserting a new introductory clause which explains the overall objective of the draft Rules – namely, to support learner wellbeing and safety by clearly setting out the roles and responsibilities of education providers, and to prescribe

⁴ Disputes Tribunal Act 1988, s 18(6).

⁵ The Rules Committee is currently seeking feedback on a proposal to increase the jurisdictional limit of the Disputes Tribunal (see the Committee's consultation paper: *Improving Access to Civil Justice Further Consultation* (May 2021)). If the limit is to be increased, the consultation paper notes, at [40], that a greater appeal right may be required to minimise the risk associated with disputes being resolved according to the substantial merits and justice of the case, rather than the law.

⁶ Draft Rules, cl 19(b).

⁷ Some other aspects of the Scheme also appear to have been designed to operate in a 'student-focused' manner – for example, clause 16(1) of the draft Rules grants students the right to agree to the appointment of a mediator or adjudicator, but does not extend this right to education providers.

⁸ Above n 1, at p 27.

procedural rules relating to the Scheme.⁹ The reference to the ‘student-focused’ approach in clause 8 would then be redundant and could be deleted, to read as follows:

The DRS operator must consider and deal with a dispute in a ~~student-focused,~~
~~streamlined,~~ timely, mana-enhancing, effective, flexible, culturally-safe and -
competent, inclusive, accessible, and fair manner

4. Extensions of time

4.1 Clause 24(1) of the draft Rules states:

24. DRS operator may extend time frames

(1) The DRS operator may, if it thinks fit, and with the agreement of both parties to a dispute extend the time within which something must be done under these rules in relation to consideration or resolution of a dispute.

4.2 Clause 24(1) appears to permit an extension of time only in circumstances where a DRS operator obtains consent from both parties. We suggest amending this clause to grant DRS operators the power to extend timeframes at the request of just one party, where it is reasonable to do so.

4.3 Without this option, every timeframe could potentially become a strict deadline. This would be detrimental, for example, to parties who fail to provide information within a specified timeframe and enable DRS operators to draw adverse inferences regarding their claim (as allowed under clause 13(3) of the draft Rules).

5. Ensuring relevant information is disclosed to parties involved in a dispute

5.1 Clause 14(2) states “[the] DRS operator may assume that a party to a dispute consents to the full disclosure to other parties of information supplied by it, unless the party supplying the information expressly limits disclosure”. Clause 15(b) further provides that “[the] DRS operator must ensure that each party has a reasonable opportunity to be informed of, and to respond to, the arguments or submissions of the other parties”.

5.2 The implication is that the Scheme allows DRS operators to provide parties with relevant information supplied by another party, but this is not explicitly stated in the draft Rules. We therefore recommend that the draft Rules are amended, to clarify that parties must be supplied with all relevant information, including any information supplied by another party (unless disclosure is expressly limited by the party supplying the information).

5.3 Further, the draft Rules do not address the position where one party provides information but does not consent for it to be shared with the other party. Ordinarily, a party would not be entitled to have information taken into account if they are not prepared to disclose that information to the other party, and there are mechanisms to ensure some limited disclosure is possible if wider disclosure is not appropriate.¹⁰ We therefore suggest this issue is given some further thought before the draft Rules are finalised.

6. Incorrect cross-references

6.1 We have identified a few drafting errors in various clauses (noted below).

⁹ Above n 1, at p3.

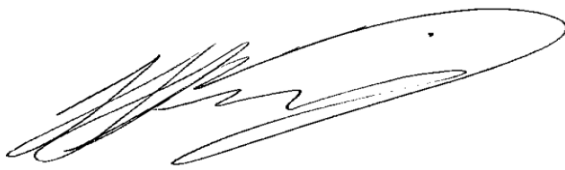
¹⁰ For example, there are provisions in civil procedure which allow parties to disclose confidential information to another party’s lawyer (without disclosing that information to the other party).

- a. Clauses 9 and 13(1) include cross-references to sub-clauses 11(2), 9(4)(a), 9(4)(b) and 9(5), which do not exist.
- b. Clause 18 includes an incorrect cross-reference to clause 16(4) – this should likely refer to clause 17(4).
- c. Clause 20(2) includes an incorrect cross-reference to clause 19(d) – this should likely cross-refer to clause 20(1)(d).

7. Next steps

- 7.1 We hope these comments are helpful and if you have any questions or would like to discuss the points, the Law Society’s Law Reform Committee can be contacted through Law Reform and Advocacy Advisor, Nilu Ariyaratne (Nilu.Ariyaratne@lawsociety.org.nz).

Nāku noa nā



Herman Visagie
NZLS Vice-President