

# YouthLaw Aotearoa

## Te oranga me te haumaruru akonga: Wellbeing and Safety for Tertiary Domestic and International Learners Submission

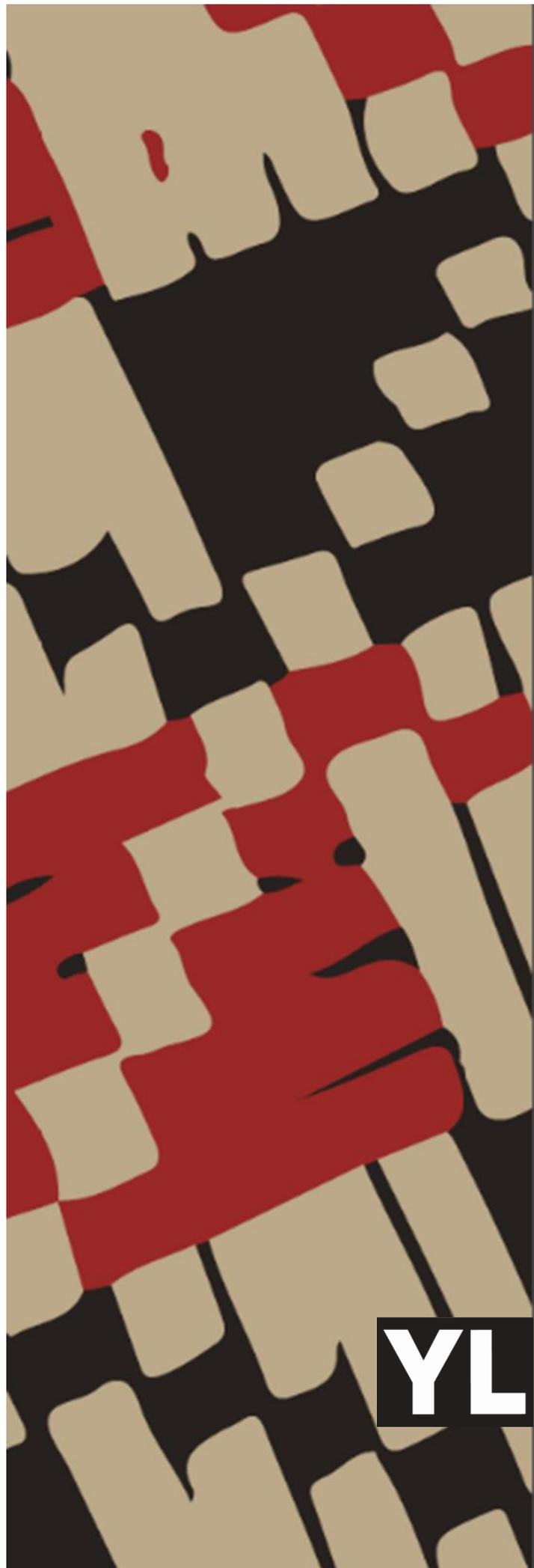
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# Who We Are

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YouthLaw Aotearoa is a Community Law Centre vested under the Legal Services Act 2000. We are a charity and part of the nationwide network of twenty-four community law centres throughout Aotearoa. Our service provides free legal advice and advocacy specifically for children and young people under 25 years of age. We help young people facing issues with their tertiary providers in the following ways:

- Our lawyers in the legal advice team support students with information and advice to help them navigate conflicts with their tertiary providers. In 2020 our legal advice team helped young people in over 200 education cases.<sup>1</sup>
- We run legal education workshops for young people or those supporting them.
- We publish youth-friendly information resources, undertake research, and make submissions on law and policy affecting children and young people.

This submission is informed by YouthLaw Aotearoa's insights from working with children and young people across New Zealand for over thirty years.

The submission has been prepared by Sarah Butterfield, a solicitor on our legal team, Isabella Docherty, law reform volunteer, and our YouthLaw Aotearoa staff and board.

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<sup>1</sup> This figure is inclusive of matters related to Early Childhood, primary, secondary, and tertiary. Tertiary cases will comprise a smaller portion of this amount.



# YouthLaw Aotearoa Submission

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YouthLaw Aotearoa acknowledge and support the Ministry of Education's ("MOE") focus on tertiary domestic and international learner wellbeing and safety. We offer the following comments on the Te oranga me te haumarua akonga: Wellbeing and Safety for Tertiary Domestic and International Learners consultation:

## Core Focuses

YouthLaw Aotearoa share many of the concerns related to learner safety and wellbeing identified by the MOE in the consultation document. We share concerns about mental health, Maori, and minority groups. However, we also submit that there are significant issues relating to sexual harm, the vulnerability of age, and disability. It is essential that the MOE prioritise these groups/issues as core focuses for all changes.

## Mental Health and Disability

We are concerned by the approach that some tertiary institutions have adopted to students struggling with their mental health. We were particularly concerned by reports in 2020 about a University of Auckland international student whose enrolment was cancelled after a suicide attempt.<sup>2</sup> We were also concerned by the institution's response in a case that we assisted with, and detailed in our annual general report:

*"S was stood down from their tertiary institution because of an allegation that they were struggling with their mental health. The tertiary provider told S that*

*they could not return to study until they were assessed by a psychiatrist. S was unnerved by the stand-down because the tertiary provider had not investigated the allegation, interviewed S, nor had they provided any documentation about the standdown process or procedure. S was particularly upset they had not been interviewed, as had the tertiary provider asked them, they would have discovered that S had overcome their earlier mental health struggles and was receiving support. YouthLaw represented S through a letter to the tertiary provider highlighting process errors and discrimination on the grounds of disability. Following this letter, S decided that they did not wish to continue study at the tertiary provider and instead wanted to undertake a course elsewhere. S is now studying at a new tertiary provider, making good progress and enjoying their course."*

In these instances, our advice is focused on the students' potential recourses through their institution's internal complaint processes and/or through a Human Rights Commission ("HRC") complaint. Unfortunately, these options are often unsatisfactory and fail to resolve our clients' concerns.

There is no standard internal student complaint process for institutions. Instead, each institution has individualised complaint procedures. Often, the internal complaint processes are complicated and unwieldy, with multiple complaint levels and staff involved. When we advise these clients, our staff must

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<sup>2</sup> Lincoln Tan "'Shameful and disgusting': University of Auckland slammed for kicking out student over mental health issues" *NZ Herald* (New Zealand, 9 January 2020) <<https://www.nzherald.co.nz/nz/shameful-and->

[disgusting-university-of-auckland-slammed-for-kicking-out-student-over-mental-health-issues/FDEF7RIRFMKT3CJ6E4YLAZDU/](https://www.nzherald.co.nz/nz/shameful-and-disgusting-university-of-auckland-slammed-for-kicking-out-student-over-mental-health-issues/FDEF7RIRFMKT3CJ6E4YLAZDU/)>

spend many hours locating the relevant institution's policies, understanding the individualised complaint process for that institution, and then communicating the process to the client. Our clients are often confused and frustrated by their institution's internal complaint process. The complexity, confusion and timeliness of the internal complaint process can also exacerbate students' mental health and further traumatise them.

Students can make an HRC complaint if they have been discriminated against on a specified ground under the Human Rights Act 1993 (for example, disability). A HRC complaint can be helpful, as a student may be able to address their complaint through mediation. However, institutions are not required to attend or reach a resolution in HRC mediation. If agreement cannot be reached at HRC mediation, then the next option is the Human Rights Review Tribunal ("HRRT"). However, this is not a realistic option for many students because of the cost of proceedings and the time involved from application to hearing date to decision, which can be several years.

YouthLaw Aotearoa submit that the code and the dispute resolution scheme must specifically recognise obligations to safeguard student mental health and well-being. We recognise that the scope of the Disputes Panel is currently limited, but we submit that this should be an area of future priority. We submit that the code should have clear and express expectations about institutions responsibilities towards students with mental health challenges.

### **Sexual Harm**

In 2020, Te Whare Tāwharau, the University of Otago's Sexual Violence Support and Prevention Centre published a study that reported that 28 per cent of students in the

study had experienced sexual assault during their time as a student.<sup>3</sup> The study also found that one third of students did not tell anyone about their experience, and another third only told one person about the sexual assault.<sup>4</sup>

We are concerned about the prevalence of sexual harm in New Zealand institutions. Students should not be at risk of sexual harm while attending their tertiary institution. Students should have access to appropriate avenues of support and to clear processes of complaint and investigation. These systems should be set up in ways that ensure that students feel comfortable, safe, and listened to. There should also be recognition of the added risk of sexual harm occurring when learners live in halls or other student accommodation.

We submit that the proposed changes must recognise the responsibility of institutions to respond to and prevent sexual harm.

### **Vulnerability of age**

YouthLaw Aotearoa submit that there should be recognition in the code of the vulnerability of many students given their age. Many tertiary students in New Zealand have entered institutions directly from secondary school. These students may lack knowledge of their rights and obligations as adults and may be particularly vulnerable to inequities.

### **Maori**

We must acknowledge that we are not experts in te Tiriti and should not be treated as such. However, we are committed as an organisation to holding the Crown to account in relation to te Tiriti obligations. If our views differ from the views of iwi and other Māori law experts, we submit that greater weight should be given to their views over ours.

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<sup>3</sup> Melanie A Beres, Zoran Stojanov, Katie Graham, Gareth J Treharn "Sexual assault experiences of

university students and disclosure to health professionals and others" (2020) 133 NZMedJ.  
<sup>4</sup>As above.

We are concerned about the extent of Māori involvement in the MOE consultation. We submit that the MOE should prioritise consulting with Māori student groups such as Titahi ki Tua, Te Mana Akonga, Manawatahi (Palmerston North), Te Waka o Ngā Ākonga Māori (Auckland), Kokiri Ngātahi (Wellington), Ngai Taurira, Ngā Taurira Māori, Te Akatoki, Te Awhioraki, Te Roopū Māori and other Māori student groups at polytechnics. Māori student groups for different specialities should also be consulted with.

### **Minority Groups**

YouthLaw Aotearoa agree with the focus on minority groups in the consultation document. We share MOE concerns about the vulnerabilities of students who are ethnic minorities and LGBTQI+.

### ***Ethnic Minority Students***

We are concerned by reports of discrimination and harassment on campus occurring between students and in interactions with staff.<sup>5</sup> In particular, we are concerned that the response from institutions can be defensive or inadequate.<sup>6</sup>

We submit that proposed changes should recognise the obligations of tertiary institutions to prevent and adequately respond to discrimination and harassment and to establish inclusive learning environments. Support and complaint services should also be accessible and mindful of cultural considerations.

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<sup>5</sup> Alice Webb-Liddall “University of Auckland racism hui highlights huge problems” (1 May 2019) The Spinoff <<https://thespinoff.co.nz/atea/01-05-2019/university-of-auckland-racism-hui-highlights-huge-problems/>>

<sup>6</sup> Sherry Zhang “The many problems with Auckland University’s racist coffee” (11 December 2020) The Spinoff <<https://thespinoff.co.nz/society/11-12-2020/the-many-problems-with-auckland-universitys-racist-coffee/>>

<sup>7</sup> Youth19 “Same- and multiple-sex attracted students: A Youth19 brief” (April 2021) Youth19 A Youth2000

There should also be added recognition of the vulnerability of refugee learners.

### ***LGBTQI+ students***

A recent Youth19 survey found that more than half of the surveyed same-sex attracted teenagers experienced significant depressive symptoms.<sup>7</sup> Similarly high numbers were reported for transgender/gender diverse teenagers.<sup>8</sup> Although this survey provides data for secondary school students, it still signals a vulnerability that should be recognised, particularly for younger tertiary students.

Proposed changes should therefore also recognise the responsibility of tertiary providers to have routes of support and redress for LGBTQI+ students.

Survey

<[https://static1.squarespace.com/static/5bdbb75ccef37259122e59aa/t/607cb9d833521c74d11fd160/1618786781847/Youth19+Brief\\_Same+and+multiple+sex+attracted+students+April2021.pdf](https://static1.squarespace.com/static/5bdbb75ccef37259122e59aa/t/607cb9d833521c74d11fd160/1618786781847/Youth19+Brief_Same+and+multiple+sex+attracted+students+April2021.pdf)>

<sup>8</sup> Youth19 “Transgender and diverse gender students: A Youth19 brief” (April 2021) Youth19 A Youth2000 Survey

<[https://static1.squarespace.com/static/5bdbb75ccef37259122e59aa/t/607cb8431453ca0b05c53bb8/1618786373138/Youth19+Brief\\_Transgender+and+diverse+gender+students+April2021.pdf](https://static1.squarespace.com/static/5bdbb75ccef37259122e59aa/t/607cb8431453ca0b05c53bb8/1618786373138/Youth19+Brief_Transgender+and+diverse+gender+students+April2021.pdf)>

## **Code of Practice about Student Well-Being and Safety**

YouthLaw Aotearoa support the creation of a broad and comprehensive pastoral code (“the code”). The code must clearly outline institutions obligations and student rights and obligations. The code must also have a strong focus on the core areas we have identified above and provide minimum standards for specific areas, such as complaint procedures, student discipline, residential accommodation, and support services.

### **The issue**

A significant issue that we have identified with our tertiary clients, is that it can often be difficult to determine what the student’s rights are in relation to their institution. The opposite also applies, as it can be difficult to ascertain institutions’ obligations to their students. Typically, students’ rights and institutions’ obligations to their students are outlined in internal policies and practices. Whilst we appreciate the need for individualised internal policies and practices, we are concerned that individual policies can lead to inconsistencies, student confusion, and injustice.

### **Specific provision for priority areas**

YouthLaw Aotearoa support the MOE focus on mental health, Maori, ethnic minorities, and LGBTQI+. We also ask that the vulnerability of age, disabilities, and sexual harm be acknowledged and provided for in the code. We acknowledge that the MOE may need to undertake further consultation with these student groups and about these issues.

### **Minimum obligations**

#### ***Complaint procedures***

The code should contain minimum standards about student rights and institutions’ obligations in relation to student complaints. All tertiary institutions in New Zealand have complaint policies and procedures that

students can follow if they are unhappy with their institution. For example, students can make complaints about misconduct (by staff or other students), academic issues, or about how they have been treated by their institution (i.e. if they have been discriminated against, or if they are unhappy with a grade etc.). We are often told by clients that their institutions complaint processes are complicated with multiple levels of complaint, are not easily available (they must ask the provider for the policy) and may limit appeal grounds.

The minimum standards should provide obligations that all institutions:

- Have fair, straightforward, and accessible complaint policies and procedures.
- Have set timeframes (i.e. institutions must respond to a student complaint within a certain number of days).
- Provide clear rules about what students can base an appeal on. We have been told by students that often the first level of complaint is concerned with the actual decision-making by the institution (for example, the decision to award a certain grade), but subsequent appeals are limited to a consideration of process errors. We submit that this is unfair and can result in unfair decisions being allowed to stand.

There should also be an acknowledgement in the code that students can complain about unfair complaint procedures and policies to the code administrator.

There also must be clear guidance about tertiary providers’ obligations in relation to sexual misconduct allegations. We acknowledge that the MOE will need to consult with experts about the best way to do this.

### **Student discipline**

Tertiary providers can initiate disciplinary procedures against students for misconduct

(academic or otherwise). Most providers have comprehensive policies and procedures about disciplinary procedures. Our understanding is that providers create their own disciplinary procedures and that there are government imposed minimum standards related to what that disciplinary policy must say. We are concerned by this, as disciplinary decisions by tertiary providers can have a significant detrimental impact on students short-term and long-term. Discipline committees (or equivalent), can impose serious consequences on students for misconduct, including:

- failing a paper
- failing a course
- losing their place at their institution
- being fined
- being barred from their institution for a period.

Having an adverse disciplinary record at University may also bar students from following their chosen profession after study, if that profession has “good character” requirements. Significantly, international students who are “expelled” from their institution, may have their student visa revoked.

Disciplinary procedures can also seriously impact student’s wellbeing. Students often feel shamed and embarrassed by disciplinary actions and may struggle emotionally and mentally to cope with the disciplinary process and the aftermath. Unfortunately, students may not reach out for legal help or support if they are facing disciplinary procedures. This failure may be because of shame or lack of knowledge about advocacy avenues. International students, students with mental health difficulties, students with disabilities and students who are part of minority groups may be hesitant to reach out for advice or

support because of the stigma attached to disciplinary procedures, lack of knowledge, or lack of ability to seek support. In some situations, students may attend their disciplinary meetings alone and without the benefit of legal advice. Without legal support, students may not be able to present the best argument or appropriately question factual or process errors by their institutions. As a result, students may have disciplinary outcomes imposed on them that are unjust.

YouthLaw Aotearoa strongly submit that the code should set minimum expectations and provide minimum rights to students, regarding student disciplinary processes.

Minimum obligations on institutions should include:

- Obligation pre disciplinary meeting to advise students of their rights to seek legal advice and representation.
- Obligation pre disciplinary meeting to advise students of local free advocacy services, including the institutions advocacy service (if in existence), institutions’ student union advocacy service (if in existence), community law centres, and citizen advice bureaus.<sup>9</sup>
- Obligation to provide counselling services to students with disciplinary issues.
- Obligation to have counselling support at meeting.

Youthlaw Aotearoa, submit that the MOE should create a tertiary student discipline fact sheet. The fact sheet could be modelled off the MOE “suspension and stand-down” factsheet, which is provided to every student facing disciplinary procedures under the Education and Training Act 2020. The MOE factsheet should be provided to every student facing disciplinary proceedings at their institution as soon as the disciplinary

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<sup>9</sup> Manukau Institute of Technology has a provider funded advocacy service that students can access and make complaints through. We are also aware that the University of Auckland currently encourages students facing disciplinary procedures to seek advice from the

student union provided advocacy service. We commend these organisations, but again stress concerns about a lack of consistency across institutions.

processes begins against them. The factsheet could also encourage students to seek support from counselling services.

### ***Support services***

The code should also set minimum standards for tertiary providers around support services. The primary standard should be that institutions should have counselling or support services.

### ***Students living in tertiary accommodation***

YouthLaw Aotearoa support the proposed part 5 of the code, which provides for additional wellbeing and safety practices for students in University accommodation. However, we are concerned about students who are resident advisors and the applicability of the code to externally owned and managed student accommodation providers.

We are concerned about the wellbeing of university accommodation resident advisors, considering the significant responsibilities these students have. We are aware of the ongoing Education and Workforce Select Committee inquiry into student accommodation. We hope the MOE will implement new standards in the code of practice following the inquiry.

We are also concerned about the applicability of the new code of practice to externally owned and managed student accommodation providers. We submit that the code should also apply to these types of providers.

## **Dispute Resolution Scheme**

YouthLaw Aotearoa submit that the Dispute Resolution Scheme (“DRS”) should be able to hear a wider range of disputes than financial and contractual disputes. We also submit that the DRS should incorporate an advocacy service to assist students through the dispute process.

## **Wider scope**

We submit that the DRS should be able to hear a wider range of student and provider disputes, than only financial or contractual issues. The DRS should be empowered to hear complaints about breaches to the code, misconduct, and disciplinary decisions. We recommend that the DRS adopt a similar structure and process to the primary and secondary Dispute Resolution Panels. Similar powers and functions, could include:

- Power to consider serious disputes. Serious disputes could mean any issue that has not been resolved between the institution and the student. See section 217 of the Education and Training Act 2020.
- Mediation as a first step, unless inappropriate. See section 225 of the Education and Training Act 2020.

We also submit that the DRS should be empowered to make binding decisions that must be followed by the student and the institution.

## **Advocacy**

YouthLaw Aotearoa submit that an advocacy service should be incorporated into the DRS. Students are often at a disadvantage when they have a dispute with their tertiary provider. The tertiary provider will usually have extensive legal support and advice through in house lawyers or through lawyers who are on retainer. In contrast, students may lack the funds to hire a lawyer or receive legal advice. Students from minority groups, with disabilities

or mental health difficulties may particularly struggle to access and afford legal advice. We are concerned that students without advocacy support will not be given fair treatment in the DRS. Not having support may also cause stress and strain for students.

We agree with the proposed change that an advocate can bring a claim on a student’s behalf.

## **General Comments**

We also wish to make the following general comments:

- We submit that the domestic and international tertiary learner DRS schemes should be combined. This would minimise confusion for students and ensure equality.
- We support the decision-maker in the DRS having the power to inquire into the applicant and defendants’ cases. However, we submit that greater guidance needs to be given about how this power is to be exercised fairly. For example, in the interests of equity, it may be appropriate for the decision-maker to inquire into the student’s case in greater depth, if for example, they have failed to provide necessary or important information that helps their case. Decision-makers may not need to inquire into institutions cases in such depth, as presumably legal teams would put forward the relevant information.
- We question whether restorative justice could be an option for DRS matters about misconduct.

## **Law Changes**

We agree with the addition of the word “safety” to section 534(1) and (2). This places a greater emphasis on the importance of students’ mental and physical health, instead of a vague requirement for ‘wellbeing’.

We agree that there should be consultation with Māori about the most appropriate ways to incorporate the principles of Te Tiriti.

We submit that students should also be consulted about substantive changes, as they are the most affected.

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