

In Confidence

Office of the Minister of Education

Cabinet Business Committee

## **Proposed Amendments to the Education (Tertiary Education and Other Matters) Amendment Bill:**

### **Proposal**

- 1 I am seeking Cabinet agreement to amend the Education (Tertiary Education and Other Matters) Amendment Bill, to align it with Government policy and to reflect public submissions on the Bill.

### **Executive summary**

- 2 The Education (Tertiary Education and Other Matters) Amendment Bill (the Bill) has been reinstated following the 2017 General Election. The Bill is currently being considered by the Education and Workforce Committee, which is yet to request the departmental report.
- 3 I propose to remove two provisions from the Bill as introduced, based on public submissions made to the then Education and Science Committee, prior to the General Election. These provisions would:
  - ensure in legislation the equal funding treatment of public and private tertiary education providers; and
  - change the term 'private training establishment' (PTE) to 'independent tertiary establishment'.
- 4 I also propose to include a further provision in the Bill, which creates a subtype of PTE called a community tertiary education provider. This recognises that some PTEs are non-profit organisations that have special roles or intentions, such as providing tertiary education for the public good. Making this change now, gives us flexibility to consider differentiated policy settings for these organisations in the future.
- 5 There are two other provisions where issues have been identified with the underlying policy proposals. I am seeking Cabinet's agreement to the following amendments to address these issues.
  - The removal of clause 29, which allows tertiary education institution (TEI) councils to make resolutions in writing without the need for a meeting. This clause contradicts the Local Government Official Information and Meetings Act 1987 (LGOIMA), which applies to TEIs, and which requires council meetings to be open to the public.
  - The removal of the reference to partnerships schools in the Bill, as this type of school is to be discontinued.
- 6 Cabinet agreement is needed to make these amendments. Cabinet decisions will then inform the Departmental Report that will be provided to the Education and Workforce Committee by the end of the year.

**Background: The contents of the Education (Tertiary Education and Other Matters) Amendment Bill**

- 7 The Bill seeks to support better outcomes from the tertiary education system by:
- giving government agencies better tools to identify and manage questionable behaviour in tertiary education organisations (TEOs), and by imposing higher consequences where contract breaches, or illegal activities, are confirmed; and
  - broadening legal protection and accountability arrangements for students studying across our system.
- 8 The amendments in the current Bill, as introduced to the House on 8 February 2017, are outlined below:

*Strengthen accountability in the tertiary education system*

- allow the Minister to amend a funding mechanism and set funding conditions during an investment plan period;
- clarify the scope of significant plan amendments and plan replacements;
- allow the Tertiary Education Commission (TEC) to recover the costs of investigating a breach of a condition on funding approval, where a breach of a condition on funding approval is found to have occurred;
- allow the TEC to set conditions on TEO funding;
- require TEIs to maintain accurate records on their use of government funding;
- introduce new offence provisions, with higher penalties, for falsely awarding credits towards a qualification;

*Equitable treatment of tertiary education providers*

- allow wānanga to apply to use a protected term, such as university, in their title;
- ensure funding rates are applied consistently to public and private providers;

*Broaden student protection and accountability arrangements*

- give schools the tools to meet their responsibilities for managing international student misconduct outside of school hours;
- align refund entitlements for domestic students enrolled in a short programme at a PTE, with those of international students;
- use the Export Education Levy to reimburse international students should a private or partnership school | kura hourua fail;
- update the accountability settings of compulsory student services fees;

### *Technical amendments*

- allow TEIs to manage their trust funds by pooling them to create a common fund (and therefore, improve their returns on investments);
- change the name of private training establishments to independent tertiary establishments;
- modernise some TEI council arrangements; and
- make technical changes to TEO funding and reporting requirements.

### **Proposed amendments to the Bill as introduced**

- 9 I propose amending the Bill as introduced, to reflect Government policy and feedback from submitters. I have also identified minor issues with two policies that the Bill implements, which I am seeking to address.

### *Equity of funding treatment*

- 10 This amendment was included in the Bill to set in legislation the principle that providers that offer similar provision with similar outcomes for students receive the same rate of funding. In our manifesto, we indicated the intention to scrap the previous Government's plan to change tertiary education legislation in this way.
- 11 Over 2,000 people submitted to the then Education and Science Committee opposing the policy change. The current legislative settings are enabling, as they allow the Government to fund different provider types at the same or different rates, depending on the Government's policy framework. This means that legislative change is not required to fund providers at a consistent rate, as this can be done through a funding determination.
- 12 Therefore, I propose to rescind this clause from the Bill.

### *PTE name change*

- 13 I am also seeking to rescind the clause changing the name of private training establishments to independent tertiary establishments. The Committee received 1,969 submissions opposing the amendment and none supporting.
- 14 I consider the name change as unnecessary and that both the term 'private' and 'independent' indicates a provider is not a Crown Entity. In practice, PTEs may call themselves whatever they like, with the exception of a term that is protected under the Act (such as university).

### *Create a new category of community tertiary education provider*

- 15 The previous amendment to change the term private training establishment to independent tertiary establishment was included in the Bill following requests from PTE peak body representatives. Their key concern was that 'private' suggests that they are for-profit, when, in practice, PTEs cover a range of types of institutional forms, from small trusts and not-for-profits, to large conglomerate for-profit education providers.



- 16 The then Education and Science Select Committee received several submissions<sup>1</sup> which argued that there should be a clear distinction between for-profit and not-for-profit PTEs to better reflect their intentions.
- 17 I am also concerned about tertiary education providers, which provide community tertiary education, or were established in the national interest. These providers are currently PTEs under the Act, but they often have special roles, or intentions, such as providing education for the public good. Therefore, I consider they should be a different type of provider.
- 18 I propose to create a subtype of PTE called a community tertiary education provider. I intend to include a definition in section 159 of the Act (the interpretation section). Subject to legislative drafting requirements, this definition will indicate that a community tertiary education provider is a PTE, which is recognised by the responsible Minister as a community tertiary education provider.
- 19 The criteria for being recognised as a community tertiary education provider would then be published and the responsible Minister would recognise those organisations that meet the criteria.
- 20 Making such a change in the Act now gives Government the flexibility to explore options that may differentiate policy settings across not-for-profit, community and for-profit PTEs in the future, should we wish to do so.
- 21 However, including a new definition in the Act may create an expectation from providers that Government has a policy objective in terms of differential funding, or regulation treatment of community tertiary education providers. This may encourage some PTEs to change their structures to meet the new definition.
- 22 It may also create some confusion in the sector, as there are already community education providers, who mainly provide adult and community education. These providers may think they need to become a PTE.
- 23 I intend to mitigate these risks, in my communications with the House and the public, as the Bill progresses.

*Allowing councils to pass resolutions in writing without the need for a meeting*

- 24 I am proposing to rescind clause 27 of the Bill, which allows a TEI council to pass resolutions in writing without the need for a meeting.
- 25 Clause 27 would allow a council to discuss a topic through email and then make decisions via email. This would, in effect, remove the need for a council meeting. However, TEIs are also subject to the LGOIMA, which requires that council meetings be open to the public.<sup>2</sup> The LGOIMA has provisions that mean it cannot be overridden by the Education Act.<sup>3</sup>
- 26 Therefore, if the Bill allowed TEIs to make resolutions in writing without the need for a meeting, this would be immediately overridden by the LGOIMA requirements, and therefore would not achieve the policy intent. In addition, the policy intent is to modernise council meetings, not to exclude the public from these meetings.

<sup>1</sup> From the Council of Trade Unions, Tertiary Education Union, New Zealand Nurses Organisation, New Zealand Union of Students' Association, Victoria University of Wellington Students' Association, Auckland University Students' Association, Otago University Students' Association.

<sup>2</sup> [http://www.legislation.govt.nz/act/public/1987/0174/latest/DLM123080.html?search=sw\\_096be8ed81637e0e\\_54\\_25\\_se&p=1](http://www.legislation.govt.nz/act/public/1987/0174/latest/DLM123080.html?search=sw_096be8ed81637e0e_54_25_se&p=1)

<sup>3</sup> [http://www.legislation.govt.nz/act/public/1987/0174/latest/DLM123610.html?search=sw\\_096be8ed81637e0e\\_54\\_25\\_se&p=1](http://www.legislation.govt.nz/act/public/1987/0174/latest/DLM123610.html?search=sw_096be8ed81637e0e_54_25_se&p=1)

- 27 I expect the impact of removing clause 27 to be minimal. Clause 28, which allows councils to conduct meetings using audio visual means, will substantially modernise council meeting arrangements and increase a TEI council's flexibility.

*Extending the Export Education Levy to reimburse international students should a private or partnership school | kura hourua fail*

- 28 The Bill extends the use of the Export Education Levy (EEL) to reimburse international students should a private or partnership school | kura hourua fail.
- 29 I propose to remove the reference to partnerships schools | kura hourua in the Bill, as this type of school is to be discontinued.
- 30 I expect the impact of removing the reference to partnership schools| kura hourua to be minimal. Under their current contracts, partnership schools cannot enrol international students. The purpose of extending the EEL to cover the failure of partnership schools | kura hourua was a future proofing measure, as it was possible a future policy change would allow a partnership school | kura hourua to enrol international students.

### **Consultation**

- 31 The Education and Science Committee received 2,054 public submissions on the Bill in June and July 2017.
- 32 TEIs, PTEs, their peak bodies, and relevant education Crown Entities were consulted on an exposure draft of the Bill in October 2016.
- 33 TEIs and their peak bodies, and relevant education Crown Entities were consulted on the proposed changes to protected terms during the Ministry of Education's policy review in 2014-2015.
- 34 Student bodies, PTEs, TEIs and the New Zealand Qualifications Authority (NZQA) were asked to provide input on whether changes to the Act were required regarding student fee protection.
- 35 The Ministry of Education undertook consultation with the sector on compliance with the compulsory student services fees regulatory environment, as part of its review in 2015.

### **Financial Implications**

- 36 There are no financial implications arising from this paper.

### **Legislative Implications**

- 37 If agreed to, the necessary amendments to the Bill will be included in the Departmental Report to be presented to the Education and Workforce Committee.
- 38 If agreed to by the Education and Workforce Committee, Parliamentary Counsel Office will draft the necessary amendments into the Bill, to be reported back to the House of Representatives by 29 March 2018.
- 39 The proposed amendments to the Bill will not be binding on the Crown. This is consistent with the Acts being amended.

### **Regulatory Impact Analysis**

40 There is no regulatory impact associated with these changes.

### **Human Rights**

41 The proposals in this paper are consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

### **Gender Implications**

42 There are no gender implications arising from this paper.

### **Disability Perspective**

43 There are no disability implications arising from this paper.

### **Publicity**

44 If the amendments are agreed to by the Education and Workforce Committee, they will become public once the Bill is reported back to the House of Representatives on or before 29 March 2018.

45 Accompanying publicity material will be made available on the amendments post report back.



## Recommendations

The Minister of Education recommends that the Committee:

- 1 **agree** to rescind the decision recorded in Cab 16 Min 0364 that requires the Minister and the Tertiary Education Commission to have regard to the principle that funding under a funding mechanism for comparable programmes and activities must be allocated to tertiary education providers on the same basis;
- 2 **agree** to rescind the decision recorded in Cab 16 Min 0364 that changes the term 'private training establishment' to 'independent tertiary establishment';
- 3 **agree** that the Education Act 1989 be amended to include a definition of a community tertiary education provider, which is a PTE that is recognised by the responsible Minister as a community tertiary education provider;
- 4 **agree** to rescind the decision recorded in Cab 16 Min 0364 that allows tertiary education institution councils to pass unanimous resolutions in writing (without a meeting);
- 5 **agree** to amend the decision recorded in Cab 16 Min 0364 that extends the export education levy reimbursement provisions to include private schools and partnership schools | kura hourua, so that the new amendment does not apply to partnership schools | kura hourua;
- 6 **authorise** the Minister of Education to make decisions on the details of the changes, for the purpose of drafting legislation, without any further reference to Cabinet, subject to these details being consistent with the policy intent set out in this Cabinet paper.

Authorised for lodgement

Hon Chris Hipkins

Minister of Education

## Appendix A: Key types of tertiary education organisations

The table below outlines the key types of tertiary education organisations in New Zealand.

| Term                                  | Meaning  |
|---------------------------------------|--|
| Tertiary education institution (TEI)  | Tertiary education institutions are Crown Entities. These are universities, institutes of technology and polytechnics, and three wānanga. <sup>4</sup> |
| Private training establishment (PTE)  | Privately owned tertiary education providers. These include private companies, incorporated societies and charitable trusts.                           |
| Tertiary education organisation (TEO) | Includes all TEIs, PTEs and industry training organisations.   |

<sup>4</sup> The three wānanga that are Crown Entities are Te Whare Wānanga o Awanuiārangi, Te Wānanga o Raukawa, Te Wānanga o Aotearoa.