



Education Report: Outcomes of targeted consultation on tertiary investment system legislation changes

To:	Hon Chris Hipkins, Minister of Education		
Date:	14 July 2022	Priority:	Medium
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Messaging seen by Communications team:	No	Round Robin:	No

Purpose of Report

This paper advises you of the outcomes of recent targeted consultation on potential legislative amendments to support improvements in the tertiary education investment framework.

The paper recommends that you not progress the proposals to Cabinet for inclusion in the Education and Miscellaneous Amendment Bill (the Omnibus Bill) to amend the Education and Training Act 2020.

Recommended Actions

The Ministry of Education recommends you:

- a. **note** that recent targeted consultation on three proposals for amendments to the legislative framework for the tertiary education investment system identified significant sector concerns about their rationale, timing and potential implications

Noted

- b. **note** that although some support was expressed for the proposals, we consider the risks of proceeding warrant deferring the proposals for the time-being, with a view to a broader set of legislative and non-legislative proposals being developed in the future

Noted

- c. **note** that not progressing the proposals will not impact on the Tertiary Education Commission's ability to implement the UFS or give effect to advice from WDCs

Noted

- d. **agree** to not include the proposed legislative amendments in the 2022 Omnibus Bill to amend the Education and Training Act 2020

Agree / Disagree

- e. **note** that you will soon receive advice about the other proposals for the Omnibus Bill which (due to tight timeframes) anticipates your agreement to recommendation d

Noted

Proactive Release

- f. **agree** that the Ministry of Education release this briefing once it has been considered by you, with any redactions in accordance with the Official Information Act 1982.

Agree / Disagree



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Te Puna Kaupapahere

14/07/2022

Hon Chris Hipkins

Minister of Education

___/___/___

Background

1. In March 2022 we advised you of work to identify potential improvements to the framework in which the Tertiary Education Commission's (TEC's) investment function operates, including potential legislative amendments [METIS 1281856 / TEC B-22-00069 refers].
2. In May 2022, you were updated on proposals for inclusion in the Education and Miscellaneous Matters Amendment Bill to be introduced later in 2022 as an Omnibus Bill (the Omnibus Bill) [METIS 1287358 refers]. You noted that we would undertake targeted stakeholder engagement on proposals for amendments to the legislative framework for the TEC's investment function; specifically, to:
 - a. ensure the TEC is empowered to implement aspects of the Reform of Vocational Education (RoVE), including giving effect to Workforce Development Council (WDC) advice and the Unified Funding System (UFS);
 - b. broaden and clarify the grounds under which the TEC can initiate a significant amendment to an Investment Plan, including responding to the Tertiary Education Strategy and other priorities; and
 - c. allow for greater responsiveness to variations of funding mechanisms by amending current consultation and timeframe requirements for minor variations to funding mechanisms.
3. We sought feedback via a discussion document sent to sector peak bodies (including learner groups and WDCs) on 31 May 2022, requesting that submissions on the proposals be received by 25 June 2022. We subsequently extended the timeframe to 1 July due to concerns from some stakeholders about the timeframe.

Key messages from targeted consultation on proposed legislative changes

4. We received a total of 11 submissions. Submissions were received from:
 - Ara Institute of Canterbury
 - Quality Tertiary Institutes (QTI)
 - Toi Mai (creative, cultural, technology and recreation sectors' WDC)
 - Te Pūkenga
 - Te Wānanga o Aotearoa
 - Te Pōkai Tara | Universities New Zealand (UNZ)
 - Massey University
 - Muka Tangata (food and fibre WDC)
 - NZ Union of Students' Associations (NZUSA)
 - Te Hautū Kahurangi | Tertiary Education Union (TEU)
 - University of Waikato

Over-arching key messages from targeted consultation

5. Te Pūkenga, UNZ, Te Wānanga o Aotearoa and the TEU did not support the proposals, though there was some support from others. A summary of submissions is attached as Annex A.
6. Key themes from submissions related to concern about the use of strengthened powers for the TEC, a lack of clarity of the problem definition and that some respondents did not find the case for case compelling.
7. Alongside concerns about the proposals themselves, TEOs raised the significant scale of other changes already underway and the short timeframe available for them to provide feedback in that context. In particular, the consultation coincided with the time at which TEOs were trying to understand the UFS and what it means for their organisations.

Concerns about institutional autonomy and impacts on learners and Te Tiriti partners

8. Some submitters considered that the TEC already has a sufficiently wide range of levers to achieve the objectives sought, and that TEOs are generally happy to cooperate and make changes to Investment Plans in response to significant events or changes in Government priorities (often citing their responses to COVID-19 and adopting Learner Success Plans). We also heard from some stakeholders that strengthening the TEC's ability to require changes to Investment Plans was unnecessary (as well as unwelcome).
9. We heard that the TEC setting funding conditions that would enhance its ability to recover funding based on an agreed mix of provision and/or being able to initiate a significant amendment to an agreed Investment Plan would be a 'further' incursion into TEIs' institutional autonomy. Te Pūkenga, the universities and Te Wānanga o Aotearoa also expressed concern that such powers could impact on their relationships and commitments with Te Tiriti partners.
10. The universities strongly recommended that, if the proposals were necessary for RoVE, they should be done in a way that excluded university provision. The universities also noted that the statutory protection of learner choice appeared to have not been considered (ie, that providers had limited control over learners' choices about what to study and a stronger ability for the TEC to recover funding would be counter to that).
11. With regard to the proposed amendments to the process for varying a funding mechanism (proposal c), a key theme was concern about how a 'minor and/or technical' change to a funding mechanism would be defined (and who it would be defined by). We heard that while consultation might sometimes be burdensome, it was part of due process and key to testing whether something would actually be 'minor and/or technical'.

Some support was qualified by wanting to see broader changes

12. Five submissions expressed support for the proposals. Toi Mai and Muku Tangata saw the proposals as being an important adjunct to the TEC's existing levers that would help make providers' delivery more responsive to the needs of employers and industries.
13. QTI's submission also expressed support for the proposals, noting a need for greater flexibility to meet the changing needs of the sector, though it also recommended there be limitations placed on the scope of the funding conditions the TEC would be able to set.
14. NZUSA expressed support for the proposals, though consider that much more significant change is necessary. NZUSA would like to see a much more flexible system with stronger accountability for 'poor investment decisions and delivery'.

We propose not progressing the legislative amendments at this time

15. Our recommendation (reached in consultation with the TEC) is that the proposals not be progressed in their current form via the Omnibus Bill. There are two key reasons for this.
16. The first is that the consultation has identified significant concerns about the proposals, including from the organisations that represent the majority of tertiary education and training provision. While this is not necessarily a reason to not progress the proposals, we would want to spend more time working through these concerns than is available within the timeframes for the Omnibus Bill. We also note that further engagement at this time would add to concern across the sector about the scale of change underway.
17. Secondly, while the proposals were informed by challenges associated with implementing the UFS and broader RoVE reforms, the TEC is comfortable that it can effectively implement these under current legislative settings.

18. We note that a number of the submissions focussed on the appropriateness of the TEC setting funding conditions enabling it to recover funding based on an agreed mix of provision, even though the consultation document noted that such a condition could already be set by the Minister via the funding mechanism under current legislative settings.
19. You recently agreed that the funding determination for the delivery component of the UFS will include wording to enable the TEC to recover funding based on delivery compared to providers' commitments regarding subject areas and modes of delivery [METIS 1287493 refers]. This is key to providing the TEC with the tools it needs to implement the UFS and to give effect to WDC advice.
20. Finally, the feedback on the proposals highlights that there would be value in thinking through these targeted changes as part of a broader assessment of the current legislative framework for the tertiary investment system. We expect to be in a better position to develop this broader view alongside the TEC as its Investment Function Redesign work programme progresses.

Implications and risk mitigation

21. Exposure drafts of funding mechanisms for the UFS are to be provided to the sector on 1 August 2022, alongside consultation on amendments to existing funding mechanisms. We expect that the concerns we heard about the TEC recovering funding at a more granular level will be repeated in any feedback on the draft funding mechanism. We are working on a communications approach to ensure this risk is mitigated.
22. Should you agree to not progress the legislative proposals, there is a risk that the sector may see inconsistency with that decision and the draft funding mechanism for recovery based on providers' commitments. Communications will be clear that the decision relates to not proceeding with amendments to enable the TEC (rather than the Minister) to set such conditions, not that such conditions would not exist.

Next steps

23. Subject to your agreement, we will communicate your decision to those who provided submissions on the proposals. In doing so, we will foreshadow the forthcoming exposure drafts of the funding mechanisms.
24. Conversely, if you would prefer to progress the legislative proposals, we will work with our colleagues to include the proposals in the draft Cabinet paper seeking Cabinet's approval of proposals for inclusion in the Omnibus Bill.

Annex A: Overview of key points raised on proposals

<p>Proposal 1:</p> <p>Empowering the TEC to set necessary funding conditions, including ensuring it can give effect to agreed mixes of provisions (including modes of delivery)</p>	<ul style="list-style-type: none"> • Scope should be narrowed - just for RoVE (or exclude universities) as a risk of consequences beyond intent of changes • Legislative change not needed • Should have separation between Ministerial decisions on funding mechanisms (policy setting) and TEC functions (in administering funding on behalf of Minister): <ul style="list-style-type: none"> - Concern about the types of funding conditions – examples? - Concerns about how additional power would be used and checks/balances to prevent TEC from misusing this power - What evidence to support this and plans to review it? - Principles of protection, partnership and participation when setting conditions. Concerned about equity issues if TEC set conditions not agreed to in an Investment Plan. - What consultation would be involved or whether providers would be notified before setting a condition? - TEC could make significant and sudden changes to agreed mixes of delivery (eg, in the middle of a year) and not recognise the role of learner choice (and the statutory protection of this). - Outcomes may not be able to be met due to COVID. - Risk of an interruption to a funding stream during a specific period • Increased role and power for TEC to set funding conditions would undermine trust and erode universities' institutional autonomy • Reduction of autonomy would have an impact on Te Tiriti partners • Changes should be durable and have clear intention and definition – or they risk impacts on ākonga and communities • Not enough in proposal to support an assessment of impacts on Te Tiriti partners (including nature and magnitude of the problems, costs and benefits of what is being proposed, and whether alternative options are being considered) • Short-term changes would erode confidence of te Tiriti partners • Concern over time and resources needed by TEOs to respond to change in funding conditions
<p>Proposal 2:</p> <p>Broadening the grounds under which the TEC can initiate a significant amendment to an Investment Plan</p>	<ul style="list-style-type: none"> • Amendments to Plans can be and should be progressed within the status quo <ul style="list-style-type: none"> - changes relating to specific Government priorities can be managed through collaboration rather than intervention • TEC does not need this power (as the responsiveness of universities to COVID-19, the introduction of learner success plans and other policy changes shows). • Erosion of institutional autonomy and accountability • Need further rationale and examples for why this power is needed • Significant amendments should be made with consultation and transparency about intent and evidence, especially as engagement needed (partnership and participation principles) with te Tiriti partners on impacts
<p>Proposal 3a:</p> <p>Enabling timely implementation of changes to funding mechanisms</p>	<ul style="list-style-type: none"> • Importance of due process, particularly for changes with operational or funding implications that take time to work through (eg, at least 3 months before start of calendar year) • Not clear on what's "technical" or "minor" - this is best defined by TEOs who understand the implications of proposed changes • Consultation with TEOs is important – due process • Transparency and notice important, not just flexibility and efficient process • Funding changes should not be varied in-year without formal agreement by both parties <ul style="list-style-type: none"> - main risk is around budget planning and delivery plans. • Autonomy reduction would impact Te Tiriti partners.
<p>Proposal 3b:</p> <p>Reducing consultation requirements for minor and technical changes to funding mechanisms</p>	<ul style="list-style-type: none"> • Consultation with TEOs should remain regardless of the change – risk of unintended consequences (and consultation is key to identifying and mitigating unintended consequences) • Already communication channels in place • Not needed - changes have been made quickly in the past eg TTAF • Changes should be notified in writing • Autonomy reduction impact on Te Tiriti partners.