

Workforce Development Council – Orders in Council update

To:	Hon Chris Hipkins, Minister of Education		
Date:	20 November 2020	Priority:	High
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Key Contact:	Katrina Sutich Gillian Dudgeon	DDI:	9(2)(a)
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Purpose

1. This paper aims to:
 - a. update you on the progress made finalising the six Workforce Development Council (WDC) Order in Council proposals ahead of statutory consultation,
 - b. outline the content of ongoing discussions between interim Establishment Boards (iEBs), including Kāhui Ahumahi, a subgroup of iEBs Māori members, and officials about the impact of te Tiriti on the WDCs Orders in Council,
 - c. support discussion at your meeting with Education Agencies meeting on Monday 23 November, with direction informing further advice.

Recommended Actions

The Ministry of Education (MoE) and the Tertiary Education Commission (TEC) recommend that you:

- a. **agree** to having six bespoke Orders in Council, the content of which will be shared with you in further advice;

AGREE/DISAGREE
- b. **note** that the six iEBs and the Kāhui Ahumahi wish to ensure recognition of te Tiriti in their six Orders in Council, and that officials are working alongside the iEBs to ensure this is the case to the extent appropriate for subordinate legislation;
- c. **note** that officials intend to consult with the Regulatory Review Committee on particular sections of the Orders in Council that include te Tiriti ahead of completing the final drafting;
- d. **note** that officials have received significant feedback regarding the timeframes for the development of the six Orders in Council and for consultation, and that there are several risks associated with the current timeline; and

- e. **agree** to discuss the content of this paper at the Education Agencies meeting on Monday 23 November.

AGREE DISAGREE



Katrina Sutich
Deputy Secretary, Graduate Achievement,
Vocations and Careers
Ministry of Education

20/11/2020



Gillian Dudgeon
Deputy Chief Executive
Tertiary Education Commission

20/11/2020



Hon Chris Hipkins
Minister of Education

21/11/2020

Background

2. In April, you agreed to accelerate aspects of the Reform of Vocational Education (RoVE) to support the government's response and recovery from COVID-19 [METIS: 1226204].
3. As part of this acceleration, you agree to a process of accelerating WDCs by appointing six WDC interim Establishment Boards (iEBs) that would engage with industry and develop the proposed content of each WDC's Order in Council.
4. The six iEBs were announced on Thursday 25 June, and have since been developing their six Order in Council proposals, including
 - a. The proposed name of the WDC;
 - b. The industry coverage of the WDC;
 - c. The proposed governance arrangements of the WDC; and
 - d. The capability required by the proposed WDC to perform and exercise its functions, duties, and powers efficiently and effectively.
5. At the Education Agencies meeting on Monday 7 September you indicated that by the end of the first quarter in 2021 (31 March 2021):
 - a. the Order in Councils process should be completed;
 - b. Workforce Development Councils (WDC) should be established; and
 - c. leadership appointments should be made/in place.
6. On Tuesday 22 September, we provided you with an aide memoire that outlined a preferred timeline for achieving this following the 2020 General election [METIS: 1241627].

As a result of an industry-led Order in Council process, the content of the six Orders in Council will be bespoke

7. When drafting the Education and Training Act 2020 (the Act), a decision was made to establish the six WDCs via six Orders in Council, rather than via primary legislation.
8. The rationale for using an Order in Council process to create the six WDCs was to empower industry and reflect the intention that WDCs are autonomous industry-driven organisations, and therefore less able to be directed by government. It also enabled greater flexibility in the establishment and disestablishment of individual WDCs without requiring changes to primary legislation.
9. To reflect the policy intent, it was expected there would not be complete consistency across Orders in Council to reflect the unique circumstances and needs for the industries covered by each WDC.
10. As a result of an industry-led Order in Council process, the six Orders in Council will be bespoke, with different governance arrangements and different provisions. However, officials have been working closely with the iEBs to ensure a level of consistency between the Orders in Council where appropriate.

Officials intend to consult with the Regulatory Review Committee on sections of the Orders in Council that include te Tiriti

11. While the Order in Council process is industry-led, the Orders in Council need to fit within the constraints and the intent of the primary legislation.

12. From the outset, the six iEBs and Kāhui Ahumahi members have been strongly committed to ensuring through the Orders in Council that WDCs act consistently with the reference to te Tiriti in section 4 of the Act, which states that

The purpose of this Act is to establish and regulate an education system that –

d) honours te Tiriti o Waitangi and supports Māori-Crown relationships.

13. Some iEB and Kāhui Ahumahi members have expressed a desire to expand on the high-level purpose statement discussed above with the intention of explaining exactly how the WDC is to fulfil its treaty obligations in relation to each article of te Tiriti.
14. Current legal conventions would not allow a detailed te Tiriti purpose statement including reference to specific articles to be included in the Orders in Council, as it would be considered ultra vires. Officials have proposed to the iEBs that a detailed statement may be better suited to be contained within subordinate internal governance and strategic documents of the WDC, rather than their Order in Council.
15. Officials have worked closely with the iEBs to reflect their desire to honour te Tiriti by adding in the purpose statements wording to mirror section 4 of the Act, respecting legal conventions that subordinate legislation may not expand on primary legislation.
16. Furthermore, for each of the Orders in Council, te Tiriti is embedded throughout, including but not limited to the following sections:
- a. a high-level purpose statement, and corresponding accountability measures,
 - b. board composition,
 - c. criteria for appointment to the board, and
 - d. duties of board members.
17. Officials support including a reference to section 4 and Te Tiriti in the Orders in Council to recognise the role WDCs play in the education system. As WDCs are currently established as body corporates in the Act section 365, the decision to add a Treaty obligation in the Orders in Council may be considered potentially ultra vires.
18. Notwithstanding that there may be other ways to resolve this matter in the medium to long term through legislation, officials intend to consult with the Regulatory Review Committee early this week on particular sections of the Orders in Council that include te Tiriti, like the purpose statement, to test their views ahead of completing the draft Orders in Council.

Risks associated with the current timeframes for the development of the six Orders in Council and for consultation

19. As the process to establish the six WDCs is industry-led, officials have had limited ability to drive the Order in Council development process. Officials are now working on a significantly compressed timeline to see the Order in Council process completed by 31 March 2021.
20. While we are still on track with the previously advised timeline, there are some risks associated with the current timeframes:

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