

Departmental Disclosure Statement

Education (Tertiary Education and Other Matters) Amendment Bill

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill; and
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Education.

The Ministry of Education certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

11 November 2016

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Part One: General Policy Statement

The Education (Tertiary Education and Other Matters) Amendment Bill amends the Education Act 1989 (the **Act**). The public policy objectives of the Bill are to—

- increase funding flexibility in the tertiary education system to enable tertiary education organisations (**TEOs**) to respond quickly to changes in student demand and Government policy;
- further strengthen the accountability and monitoring of TEOs to ensure they continue to deliver improved outcomes for students;
- ensure consistent treatment of public and private tertiary education providers to encourage performance and innovation.

Increasing funding flexibility

The Bill addresses the public policy objective of increasing funding flexibility in the tertiary education system by amending the Act to allow the responsible Minister, when it is reasonably necessary, following consultation with affected TEOs, and an appropriate lead-in time, to—

- make changes to a funding mechanism; and
- place new conditions on funding.

These amendments will enable the Minister to shift funding across the tertiary education sector as required. Consequently, the Minister will be able to approve funding mechanisms for longer time periods. If funding mechanisms are approved for longer time periods, the Tertiary Education Commission (the **Commission**) is more likely to approve longer investment plans, up to the statutory limit of 3 years.

Flexible funding and longer term investment plans will:

- reduce the compliance burden for TEOs; and
- provide TEOs with incentives to innovate and focus more on student demand and outcomes.

Further strengthening of monitoring and compliance

The Bill addresses the public policy objective of strengthening the monitoring and compliance of TEOs by making amendments to the Act to—

- allow the Commission to set conditions on TEO funding, which will enable the Commission to more effectively monitor TEOs and the wider tertiary system; and
- require tertiary education institutions (**TEIs**) to maintain accurate records on their use of government funding and to make these records available for viewing by the Commission; and
- allow the Commission 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 and to authorise the making of regulations for determining the criteria and limitations on the application of the Commission's cost recovery.

These amendments will improve the ability of the Commission to monitor and investigate a TEO's compliance with conditions on government funding. This will help to ensure that funding is used appropriately.

Consistent treatment of TEOs

The Bill addresses the public policy objective of ensuring a more consistent playing field by making amendments to—

- insert a broad principle of consistent funding into the Act; and
- allow a wānanga to apply to use a protected term, such as university, in its title; and
- align refund entitlements for domestic students enrolled in a short programme at a private training establishment (**PTE**) with those of international students.

The Act treats public and private providers differently, and some of that differential treatment is not justified by the Government's ownership interest in TEIs.

Inserting broad principle of consistent funding treatment into Act

The Act allows different types of providers to be funded at different rates for the same provision. The amendment will insert a principle of consistent funding treatment into the Act. This will ensure that tertiary education providers that offer programmes of study that result in similar qualifications are funded at the same rate.

Allowing wānanga to apply to use protected term

The Act restricts use of 4 terms, university, college of education, polytechnic and institute of technology. It is an offence to describe an educational establishment using one of these terms unless it is—

- established as an institution of that type under section 162 of the Act; or
- a registered establishment that has been granted ministerial consent under section 253C of the Act to use a protected term.

To reflect modern developments, the amendment will allow wānanga to apply for ministerial consent to use a protected term in the same way that PTEs can.

Aligning refund entitlement of domestic students enrolled in short course at PTE with those of international students

The Act allows international students to withdraw from a short course at a PTE within a period of less than seven days, and receive a refund. However, the Act is silent on the rules for refund entitlements of domestic students withdrawing from such courses at PTEs. In these situations, the PTE decides how much to refund a domestic student, which could be nothing or the full amount.

The amendment will align the refund entitlements of domestic students enrolled in a short course at a PTE with the refund entitlements of international students.

Miscellaneous amendments

Miscellaneous amendments are made to the Act to—

- enable State and State-integrated schools to manage international student misconduct outside of school, including through the use of stand-down, suspension, exclusion, and expulsion, so they can uphold their contractual duty to ensure international students' health, safety, and wellbeing:
- extend the Export Education Levy reimbursement provisions to cover private and partnership schools kura hourua. This allows international students to be reimbursed for their fees and continue to study in New Zealand in the event that the school they are studying at should fail:
- make it an offence for a person to falsely award credits to a student studying towards a qualification. This allows the New Zealand Qualifications Authority to pursue action against TEOs for falsely awarding credits, to students who have not been appropriately assessed for those credits:
- allow TEIs to pool assets from a number of trusts to create a common fund for investment purposes. Pooling assets in to a common fund provides economies of scale and administrative efficiencies, and creates the opportunity to generate a higher return on an investment:
- change the term private training establishment to independent tertiary establishment to allay PTE concerns that that "private" implies they are for-profit, when, in practice, PTEs cover a range of types of organisational forms, from small trusts to large conglomerate not-for-profit and for-profit education providers:
- require providers to publish compulsory student services fee (**CSSF**) information on their websites (such as CSSF amount per equivalent full-time student, CSSF decision-making processes, and how students can be involved in CSSF decisions) so students have access to this information:
- modernise TEI council operations, such as allowing councils to convene meetings via teleconference or other electronic means:
- make changes to, or clarify, a number of technical matters relating to funding and reporting, such as clarifying that funding can be withdrawn, in whole or in part, on request by a TEO.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES
<p><i>Review of Tertiary Education Monitoring Framework</i>, New Zealand Qualifications Authority and the Tertiary Education Commission, 21 April 2015. This report can be accessed at: https://www.tec.govt.nz/Documents/Reports%20and%20other%20documents/Deloitte-Review-of-TEO-Monitoring-Framework-Report.pdf.</p>	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO
2.2.1. If so, was a National Interest Analysis report prepared to inform a Parliamentary examination of the proposed New Zealand action in relation to the treaty?	NO

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<p>“Increasing funding flexibility and strengthening monitoring and compliance” Ministry of Education http://www.education.govt.nz/increasing-funding-flexibility-and-strengthen-monitoring-and-compliance</p> <p>“Allowing tertiary education institutions to apply for ministerial consent to use protected terms” Ministry of Education http://www.education.govt.nz/allowing-tertiary-education-institutions-to-apply-for-ministerial-consent-to-use-protected-terms</p> <p>“Removing legislative barriers for schools to apply stand-down, suspension, exclusion and expulsion to international students” Ministry of Education http://www.education.govt.nz/removing-legislative-barriers-for-schools-to-apply-stand-down-suspension-exclusion-and-expulsion-to-international-students</p>	
2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	NO
<p>The regulatory impact statements identified above did not meet the threshold for receiving an independent opinion on the quality of the regulatory impact assessment from the Regulatory Impact Assessment Team based in the Treasury.</p>	

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	NO
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Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO
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2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	NO
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	NO
(b) the nature and level of regulator effort put into encouraging or securing compliance?	NO
Poor compliance with conditions set by the TEC has the potential to result in requirements for standard information provision, which could impose costs on organisations. However, this is indirect, and the same potential exists with the current legislation.	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?

The policies to be given effect by the Education (Tertiary Education and Other Matters) Amendment Bill do not affect New Zealand's international obligations.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

The legislative proposals were assessed against the Ministry's Treaty Policy Statement. This assessment was then reviewed by the Ministry's Māori policy team who specialises in Treaty of Waitangi issues. Te Puni Kokiri was consulted on proposals.

The assessment concluded that the Bill is consistent with the principles of the Treaty of Waitangi.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?	YES
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Advice provided to the Attorney-General by the Ministry of Justice is generally expected to be available on the Ministry of Justice's website at:

http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
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(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	YES
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(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	NO
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The Bill will amend existing offence provisions to make it an offence for a person to award false credits to a student studying towards a qualification.

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	NO
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External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
<p>TEIs, 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. Subject to Cabinet's agreement to the proposed amendment, I intend to inform submitters of the outcome and release the Ministry's policy review.</p> <p>Student bodies, PTEs, institutes of technology and polytechnics, wānanga, universities and the New Zealand Qualifications Authority (NZQA) were asked to provide input on whether changes to the Act were required regarding student fee protection. Overall, respondents thought current student fee protection arrangements set out in Part 18 of the Act were working well.</p> <p>The Ministry of Education undertook consultation with the sector on compliance with the CSSF regulatory environment as part of its review in 2015.</p> <p>The Ministry has discussed options to enable State and State-integrated schools to manage international student misconduct outside of school with the Ministry's School's Health and Safety Reference Group, the Secondary Principals Association of New Zealand, and the Schools International Education Business Association. The Ministry of Business, Innovation and Employment (Immigration New Zealand), Education New Zealand, and the NZQA have been consulted, and the Education Review Office has been advised.</p> <p>An exposure draft of the Education (Tertiary Education and Other Matters) Amendment Bill was released for public consultation on 23 September. The Ministry received 26 distinct submissions from a range of tertiary education institutions, private training establishments, Crown agencies, individuals and other stakeholders. We also received a form submission from 1,890 individual submitters.</p> <p>The majority of submissions commented on the draft Bill's policy proposals and a few submitters also made specific drafting suggestions. After consideration of the concerns raised by submitters, all policy proposals have been retained in the Bill. A number of recommended drafting changes have been made to improve the quality and clarity of the Bill.</p>	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	NO
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Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO
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Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO
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Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO
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Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO
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Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	YES
<p>Removing legislative barriers to enable State and State-integrated schools to apply stand-down, suspension, exclusion and expulsion to international students for misconduct outside of school, means that State and State-integrated schools can effectively manage their contractual pastoral care obligations to ensure international students' health, safety and wellbeing. Like all students in private schools, international students are enrolled in State and State-integrated schools by choice and by contract, and do not have a right to a free education in New Zealand. This proposal clarifies this situation.</p> <p>Any such disciplinary action or termination of enrolment would be in accordance with the enrolment contract and the Education (Pastoral Care of International Students) Code of Practice, helping to mitigate the potential for schools to apply disciplinary measures in an unfair or arbitrary way. If an international student feels that a school has breached the Code of Practice, they may complain to the Code Administrator, who can investigate and apply sanctions against schools if necessary. The International Student Contract Dispute Resolution Scheme is also able to help settle international student complaints against schools.</p> <p>This proposal therefore amends international students' right to remain enrolled in a State or State-integrated school as stipulated in the current section 4(2) of the Act. Under the proposed change, this section would become subject to a provision allowing State schools to take disciplinary action for conduct or behaviour in breach of the enrolment contract or to terminate enrolment.</p>	

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	NO
4.8. Does this Bill create or amend any other powers to make delegated legislation?	NO

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	NO
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