

Submission

By



To the

Education and Science Select Committee

On the

**Education (Tertiary Reforms)
Amendment Bill**

29 June 2007

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**SUBMISSION BY BUSINESS NEW ZEALAND¹ ON THE EDUCATION
(TERTIARY REFORMS) AMENDMENT BILL
29 JUNE 2007**

1. INTRODUCTION

- 1.1. Business New Zealand welcomes the opportunity to comment on the Education (Tertiary Reforms) Amendment Bill [hereafter referred to as 'the Bill']. Employers have long expressed concerns about the extent to which the tertiary education system is preparing people for successful careers and meeting industry needs. As such, Business New Zealand supports efforts to enhance the quality and relevance of tertiary education.
- 1.2. Business New Zealand supports the proposals in the Bill to streamline the current accountability documents for the tertiary sector (Charters, Profiles, the Tertiary Education Strategy and Statement of Tertiary Education Priorities). Experience with Charters and Profiles suggested that they were relatively ineffective mechanisms for changing the behaviour of tertiary providers. Similarly, stakeholders and tertiary providers both raised questions about the efficacy of having two distinct policy documents (the Tertiary Strategy and the Statement of Tertiary Education Priorities). Folding the TES and STEP into one definitive policy statement would therefore seem to make sense.
- 1.3. Business New Zealand does, however, have a number of reservations about aspects of the Bill. These relate to:
 - The focus of the Bill on provider characteristics and inputs, rather than on the quality of outputs (namely, graduates and research);
 - The lack of clarity around which tertiary education 'stakeholders', Ministers or tertiary education organisations should consult with, or who qualifies as a 'stakeholder';
 - Insufficient public transparency around the plans of tertiary education organisations;
 - The lack of appeals processes for tertiary education organisations; and
 - Excessive compliance costs for tertiary education organisations.
- 1.4. Given problems the Tertiary Education Commission (TEC) has faced recovering public funds from providers in the past, there would also

¹ Background information about Business New Zealand is attached as Appendix 1

seem to be an opportunity in the Bill to clarify the TEC's powers in this area.

2. SUMMARY OF RECOMMENDATIONS

2.1. Business New Zealand **recommends** that:

- Section 3(a)(i) and the proposed new section 159L(3)(b) be deleted;
- Section 24(a)(i) be deleted;
- The Committee consider including an enabling definition of “stakeholder”, perhaps along the following lines:
 - “**stakeholder** means individuals or groups who affect, or are affected by, the activities of one or more tertiary education organisations. They include, but are not limited to, learners, employers and industries.”
- The proposed sections 159AA(3)(a) and 159AC(2)(a) be amended to simply say “stakeholders”;
- Section 159AC(1) be amended to say “The Minister may at any time after a strategy has been in force for two years, revoke and replace, or amend the strategy;
- Section 159YO(2)(a)-(c) be amended to:
 - establish the principle that the public should have access to as much of the full plan as possible; and
 - permit organisations to withhold plan information from the public where this would violate privacy or commercial sensitivity; and
 - ensure that members of the public are able to have any withholding of plan information by a funded tertiary education organisation reviewed by the Ombudsman.
- The Committee consider inserting into the Bill some form of appeal or review mechanism, for cases where plans have been declined, only partially approved, not assessed or suspended/revoked.
- Section 159YC(1) be amended to limit the sorts of information that can be requested from tertiary education organisations to that which is required to demonstrate:
 - compliance with an organisation's plan; and

- an organisation's financial viability.
- Section 159YD(2)(b) be deleted.
- The Committee consider requiring the TEC, when requesting data from a tertiary education organisation under section 159YC, to have regard to the amount of funding sought and received by that TEO and the TEO's size.
- The Committee consider including provisions in the Bill that would enable the TEC to recover public funds from tertiary education organisations where these funds had been used to support programmes or activities that:
 - had not been approved as part of a plan; or
 - had (in the case of programmes of teaching) not been appropriately quality assured; or
 - did not meet generally-accepted standards of ethical behaviour.

3. COMMENT ON THE BILL

4. '*Distinctive contributions*'

- 4.1. A key focus of the recent round of tertiary education reforms has been 'distinctive contributions'. According to the new Tertiary Education Strategy, this approach "recognises the key strengths and differences between tertiary education organisations."² What this approach appears to mean in practice is that specific provider 'types' will enjoy semi-monopolies over certain areas or levels of provision. For example, the recently-issued Investment Guidance states that universities should reduce their "proportion of sub-degree provision".³
- 4.2. Cabinet has recently decided to apply the 'distinctive contribution' principle to the funding system, and to determine the total amount of funding available for each sub-sector (i.e. universities, polytechnics, wananga, ITOs, etc). This decision is reflected in the proposed new section 159L (3)(b) of the Bill, which allows the Minister to "provide for funding to different groups of organisations or types of organisations."
- 4.3. From our perspective, this is a regrettable move. We are less concerned with *who* produces the outputs (graduates, research), than we are with *how good* and *relevant* these outputs are and how much

² Office of the Minister for Tertiary Education, *Tertiary Education Strategy 2007-12* (Wellington: Ministry of Education, 2006), p.14

³ Tertiary Education Commission, *Investment Guidance 2008-2010* (Wellington: TEC, 2007), p.10

value for money these outputs provide. If, for example, a university provides a sub-degree programme that effectively meets industry and learner needs, there is no reason in our view why that programme should not continue to be funded.

- 4.4. But more importantly, business has supported the tertiary reforms because they have promised higher levels of performance by tertiary organisations, and greater alignment to end-user needs. The corollary of these objectives is that resources must be able to flow to higher-performing tertiary education organisations and away from the poorer-performing organisations. Divvying up funding by sub-sectors undermines incentives for performance, by implicitly guaranteeing a certain level of funding to groups of providers. It also encourages provider bodies to lobby the Government and TEC, in order to protect or expand their ‘share’ of total funding. This would hardly be an efficient or desirable outcome.
- 4.5. If the Government requires some form of framework against which to allocate public funds, it would seem more sensible to use a system which mirrored the goals of the Tertiary Education Strategy. For example, one approach could be to allocate funding against types of education, e.g. foundation education, technical and trades-related education, research-based education, general higher education and so on.
- 4.6. On a point of legislative interpretation, we could not help wondering whether section 159L(3)(b) and section 159M(a) contradicted each other. There would at least seem to be some room for clarification.
- 4.7. Business New Zealand therefore **recommends** that section 3(a)(i) and the proposed new section 159L(3)(b) be deleted.
- 4.8. On a related issue, we also **recommend** that section 24(a)(i) be deleted, as it does not provide useful guidance for institutions. What would it mean in practice for the Council of a polytechnic to “apply its income and capital” in a manner which will “enable the institution to carry out the functions characteristic of an institution of the class to which the institution belongs”? Moreover, who judges which functions are “characteristic”? The focus of this section on inputs and functions appears undue and unnecessary, and may distract institutions from the primary objective of achieving “the outcomes set out” in their plans.

5. Stakeholders and consultation

- 5.1. According to the Government, a key goal of the reforms is to promote closer links between educational organisations, end-users and other stakeholders. This is a goal that Business New Zealand

wholeheartedly supports, and one which in our view must sit at the heart of all policy considerations.

5.2. It struck as somewhat odd, therefore, that the Bill:

- Repeatedly refers to “stakeholders”, but does not define the term (beyond the reference to ‘students’ in the new section 159P(b));
- Allows the Minister to “at any time, revoke and replace or amend a tertiary education strategy” [new section 159AC(1)]; and
- Essentially gives the Minister *carte blanche* to determine which “stakeholders” he or should consult with over the development, revocation or amendment of the tertiary education strategy [new sections 159AA(3)(a) and 159AC(2)(a)]

5.3. We note that the Select Committee grappled with the issue of how to define “stakeholders” when the Tertiary Education Reform Bill was introduced, and ultimately decided not to include a definition, because of the risk that some key groups or individuals may inadvertently be omitted. We acknowledge that this remains an issue in defining “stakeholders” in the current Bill.

5.4. That said, we also believe that the absence of a definition – or at least some guidance about who should be consulted – may lead to some key groups or individuals being *overlooked* by Ministers or tertiary education organisations. From our perspective, it is essential that students/learners (as direct consumers) and employers and industry (as both consumers *and* end-users of education services) be included in this definition or guidance.

5.5. We would **recommend** that the Committee consider including an enabling definition of “stakeholder”, perhaps along the following lines:

- “**stakeholder** means individuals or groups who affect, or are affected by, the activities of one or more tertiary education organisations. They include, but are not limited to, learners, employers and industries.”

5.6. We would also **recommend** that the proposed sections 159AA(3)(a) and 159AC(2)(a) be amended to simply say “stakeholders”.

5.7. Finally, we note that the new section 159AC(1) – which permits the Minister to amend, revoke or replace a tertiary education strategy “at any time” – represents a significant increase in Ministerial powers over current legislation. The current law states that the Minister may “revoke and replace or amend” the Statement of Tertiary Education Priorities “at any time after...[it]...has been in force for a year”.

- 5.8. It would seem sensible to us to have a similar (or stronger) restraint on Ministerial powers in section 159AC of the Bill, especially since the Statement of Tertiary Education Priorities is now being subsumed into the Tertiary Education Strategy, which focuses on the “long-term strategic direction for tertiary education.” Given this long-term focus and the extensive consultative process that goes into preparing the Strategy, it is difficult to envisage a scenario in which the Minister would need to completely replace or significantly amend a Strategy soon after its release.
- 5.9. We would **recommend** that section 159AC(1) be amended to say “The Minister may at any time after a strategy has been in force for two years, revoke and replace, or amend the strategy.”

6. *Transparency and accountability*

- 6.1. Under the current law, tertiary education organisations are required to make charters and profiles “available for inspection by the public” [section 159V and 159Z of the Education Act]. The Bill, however, only requires that organisations with approved plans provide a “plan summary” to the public [new section 159YO(2)(a)]. This would appear to reduce transparency and accountability to the public and to stakeholders.
- 6.2. In our view, the law should start from the principle that information regarding the use of public funds must be as freely available as possible. Exceptions from this principle should only be made where there are compelling reasons (e.g. national security, privacy of natural persons, or commercial sensitivity). We would **recommend** therefore that section 159YO(2)(a)-(c) be amended to:
- Establish the principle that the public should have access to as much of the full plan as possible; and
 - Permit organisations to withhold plan information from the public where this would violate privacy or commercial sensitivity; and
 - Ensure that members of the public are able to have any withholding of plan information by a funded tertiary education organisation reviewed by the Ombudsman.

7. *Natural justice*

- 7.1. Under the Bill, the Commission will be able to decline to approve a plan [section 159YA(2)(c)], approve only part of a plan [section 159YA(2)(b)], decline to assess a plan [section 159YB] or suspend or revoke all or part of a plan [section 159YG]. In none of these cases is

an organisation able to review or appeal the Commission's decision. Organisations *are* entitled to a "reasonable opportunity to be heard", although it is not clear from the Bill *who* should do the hearing. This absence of appeal or review mechanisms would seem to run counter to natural justice principles.

- 7.2. We would **recommend** that the Committee consider inserting into the Bill some form of appeal or review mechanism, for cases where plans have been declined, only partially approved, not assessed or suspended/revoked.

8. Compliance costs

- 8.1. The Bill creates new powers, and confirms existing powers, to collect information that appear excessive. For example, the new section 159P(d)(ii) authorises the TEC to collect information from providers about programmes that are not publicly-funded. It is not clear why the TEC would require such information.
- 8.2. In its submissions to the Government on the tertiary reforms, Business New Zealand has acknowledged that the TEC will need to understand what is going on outside of the publicly-funded education and training system. But our motivation for making this point was to ensure that public funding did not crowd out activity in the private sector, particularly where consumers (e.g. businesses purchasing training for their employees) were already satisfied with the services they were receiving and were happy to meet the full cost.
- 8.3. Collecting information about non-funded programmes in publicly-funded tertiary providers will only provide a very limited picture of the total training environment, such much of this activity is conducted by firms who do not seek any Government financial assistance. It will also increase costs for providers who already operate in a constrained funding environment (since student fees are regulated by Government).
- 8.4. Similarly, section 159YC(1) (which confirms powers in the current Act) obliges all tertiary organisations receiving funding to:
- “supply to the Commission or Ministry, from time to time as required by the Commission or Ministry, and in a form specified by the Commission or Ministry, *any financial, statistical, or other information that the Commission or Ministry requires the organisation to supply.*”
- 8.5. Comparable language also appears in section 159YD(2)(b).
- 8.6. No-one would disagree with the proposition that organisations receiving public funding should provide the information necessary for

the Government to assess whether those organisations are achieving the goals expected in return for public assistance. But the powers in section 159YC(1) go way beyond this principle, and effectively allow Government agencies to seek *any* information they want, at *any* point. There are no obligations on Government agencies to be reasonable or proportionate in the data demands they make, or to consider the costs that these demands incur. It is difficult to see how this will promote the “high trust, high accountability, and low compliance cost environment”⁴ sought by the TEC.

8.7. We would **recommend** that section 159YC(1) be amended to limit the sorts of information that can be requested from tertiary organisations to that which is required to demonstrate:

- Compliance with an organisation’s plan; and
- An organisation’s financial viability.

8.8. We would similarly **recommend** that section 159YD(2)(b) be deleted.

8.9. It may also be appropriate to require the Commission, when requesting data from a tertiary education organisation under section 159YC, to have regard to the amount of funding sought and received by that TEO and the TEO’s size (as per section 159YD(5)).

9. Clarifying powers to recover public funding

9.1. Committee members may recall Christchurch Polytechnic Institute of Technology’s (CPIT) COOL IT programme, which was a CD-ROM based course aimed at raising the basic computer skills of students. When concerns were expressed about aspects of the course (e.g. the use of incentives for enrolment and completion, no clear evidence that some students ever engaged in the course), the TEC sought to recover public funding provided to CPIT for COOL IT. CPIT challenged the TEC’s legal authority to recover these funds, but ultimately agreed to return \$3.5m to the Crown in late 2004.⁵ To date, however, this money has not been returned to the Government and recent press accounts suggest that CPIT will instead “repay” this funding by providing a “taster” course “that apparently helps recruit students for that polytechnic.”⁶

9.2. Regardless of what one thinks of the particular circumstances surrounding COOL IT, the case did illustrate a problem with the current law, which will not be resolved by the new Bill. The Bill, as currently

⁴ Tertiary Education Commission, *Investment Guidance 2008-2010* (Wellington: TEC, 2007), p.2

⁵ <http://www.tec.govt.nz/templates/NewsItem.aspx?id=1124>

⁶ “Resolution to COOL saga”, *New Zealand Education Review*, Vol.12, No.19, May 25 2007

drafted, allows the TEC to suspend or revoke funding approval for all or part of a plan where a tertiary education organisation is not performing to agreed standards, not complying with the plan, or not providing “adequate and timely information” [section 159YG]. But there is no subsequent provision in the law for the TEC to recover any public funds used for inappropriate or non-compliant activities.

9.3. The Committee may wish to consider including provisions in the Bill that would enable the TEC to recover public funds in some circumstances, as this could help ensure public credibility around the tertiary reforms and protect the taxpayers’ investment. Any powers to recover funding should, in our view, be restricted to cases where a tertiary education organisation was using public funds to support programmes or activities that:

- had not been approved as part of a plan; or
- had (in the case of teaching and learning programmes) not been appropriately quality assured; or
- did not meet generally-accepted standards of ethical behaviour (e.g. where conflicts of interest were involved in expenditure decisions).

APPENDIX 1

BACKGROUND INFORMATION ON BUSINESS NEW ZEALAND

Encompassing four regional business organisations (Employers' and Manufacturers' Association (Northern), Employers' and Manufacturers' Association (Central), Canterbury Employers' Chamber of Commerce, and the Otago-Southland Employers' Association), Business New Zealand is New Zealand's largest business advocacy body.

Together with its 66 member Affiliated Industries Group (AIG) which comprises most of New Zealand's national industry associations, Business New Zealand is able to tap into the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.

In addition to advocacy on behalf of enterprise, Business New Zealand contributes to Governmental and tripartite working parties and international bodies including the ILO, the International Organisation of Employers and the Business and Industry Advisory Council to the OECD.