



LEGISLATION DESIGN AND ADVISORY COMMITTEE

29 June 2017

Jian Yang MP
Education and Science Committee
Parliament Buildings
PO Box 18 041
Wellington 6160

Dear Mr Yang

Education (Tertiary Education and Other Matters) Amendment Bill

1. The Legislation Design and Advisory Committee (**LDAC**) was established by the Attorney-General in June 2015 to improve the quality and effectiveness of legislation. LDAC provides advice on design, framework, constitutional and public law issues arising out of legislative proposals. It is responsible for the LAC Guidelines (2014 edition), which have been adopted by Cabinet.
2. In particular, LDAC's terms of reference include these dual roles:
 - a. providing advice to departments in the initial stages of developing legislation when legislative proposals are being prepared; and
 - b. through its External Subcommittee, scrutinising and making representations to the appropriate body or person on aspects of bills that raise matters of particular public law concern.
3. The External Subcommittee of LDAC referred to in paragraph 2b above is comprised of independent advisers, from outside Government, who have been appointed by the Attorney-General. Under LDAC's mandate, that External Subcommittee is empowered to review and make submissions on those bills that were not reviewed by LDAC prior to their introduction¹.

¹ Legislation bids identify whether Bills will be referred to LDAC for design advice before introduction. This is determined when Cabinet settles the Legislation Programme. Generally, significant or complicated legislative proposals are referred to LDAC before introduction. Other legislative proposals with basic framework/design issues, matters relating to instrument choice, issues relating to consistency with fundamental legal and constitutional principles, matters under the LAC Guidelines, or with the ability to impact the coherence of the statute book may also be suitable for referral to LDAC.

4. The Education (Tertiary Education and Other Matters) Amendment Bill was not referred to LDAC prior to introduction. The External Subcommittee has therefore reviewed it, and desires to make the attached submission.
5. Thank you for taking the time to consider the Subcommittee's submission.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'P. Rishworth', with a stylized flourish at the end.

Paul Rishworth QC
Chairperson
Legislation Design and Advisory Committee



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Education (Tertiary Education and Other Matters) Amendment Bill

1. Introduction

- 1.1. The Legislation Design and Advisory External Subcommittee (the **Subcommittee**) has been given a mandate by Cabinet to review introduced Bills against the LAC Guidelines on Process and Content of Legislation (2014 edition) (the **Guidelines**). The Guidelines have been adopted by Cabinet as the government's key point of reference for assessing whether draft legislation is well designed and accords with fundamental legal and constitutional principles. Our focus is not on policy, but rather on legislative design and the consistency of a Bill with fundamental legal and constitutional principles.
- 1.2. This submission focusses on aspects of the Education (Tertiary Education and Other Matters) Amendment Bill (the **Bill**) that appear to be inconsistent with the Guidelines or could be refined to improve the quality of the legislation. In particular, the Subcommittee makes the following recommendations:
 - (a) that the Committee consider whether the existing powers under ss 159L(3)(d), 159YC(2)(a) and 159ZD(2) are adequate to allow the Minister, when determining the design of a funding mechanism, to specify, as a condition of a funding approval, that a Tertiary Education Organisation (**TEO**) that has breached its funding approval, pay a proportion of the investigation costs of the Tertiary Education Commission (**TEC**), having regard to the nature and seriousness of the breach and, if so, those Ministerial powers be used to specify such a condition as they will be simpler and

- more efficient for TEC to administer, and cl 10, new s 159E concerning charging, be deleted from the Bill, as it will be unnecessary;
- (b) that if the Committee considers the current Ministerial powers in ss 159L(3)(d), 159YC(2)(a) and 159ZD(2) above are not sufficient, a new provision be inserted to expressly allow TEC to impose a condition on a funding approval under ss 159YA and 159ZC that a TEO, in breach of its funding approval, pay a proportion of TEC's investigation costs, having regard to the nature and seriousness of the breach, as such conditions will be simpler and more efficient to administer than the proposed fee in cl 10 new s 159E;
 - (c) that if cl 10 new s 159E is retained it be amended to expressly set out the investigation powers of TEC in respect of which a fee may be imposed;
 - (d) new s 167 be amended to make it clear that the provision does not limit the ability of a council to execute documents by means other than a common seal, as long as that method of execution is not inconsistent with the Council's statute relating to the use of the common seal.

2. Clause 10, new s 159E - Charging

- 2.1. Clause 10, new s 159E, provides that TEC may charge a TEO a fee to recover TEC's costs relating to an investigation. The TEC may only charge a fee if it finds a TEO has breached or is breaching a funding condition under ss 159YA or 159ZC.
- 2.2. The Subcommittee has concerns that this provision appears to overlap with the existing powers of the Minister to specify conditions that TEC may attach to a funding mechanism under ss 159L(3)(d), 159YC(2)(a) and 159ZD(2), which could also be used by the Minister to specify that TEC require a TEO, as a condition of a funding approval, to pay a proportion of TEC's investigation costs if a TEO breaches its funding approval.
- 2.3. Assuming the powers of the Minister to impose such conditions are considered sufficient, new s 159E will duplicate the existing powers of the Minister in ss 159L(3)(d), 159YC(2)(a) and 159ZD(2) to impose such a condition.
- 2.4. Guidelines 2.1 and 2.3 provide:
 - 2.1 Any existing legislation that relates to the same matters or implements similar policies to those of the proposed legislation should be identified.
 - 2.3 New legislation should not re-state matters that are already addressed in existing legislation.

- 2.5. The relevant parts of ss 159L, 159YC and 159ZC, which enable the Minister to specify conditions on a funding approval and could be used to the same effect as the new s 159E power to impose a fee requiring a TEO to pay a proportion of TEC's investigation costs, provide:

159L Minister determines design of funding mechanisms

- (1) The Minister must, from time to time, determine the design of the funding mechanisms that the Commission must use to fund organisations.

...

- (3) Without limiting subsection (1), in making a determination under that subsection, the Minister may—

...

- (d) specify conditions that the Commission must attach to funding that is provided under any funding mechanism including, without limitation, conditions setting limits on the fees that an organisation may charge domestic students; ...

159YC Conditions on receiving funding under section 159YA

...

- (2) The Commission may give funding approval subject to conditions, but only if the conditions are—

- (a) conditions the Minister has determined the Commission must attach to funding under section 159L(3)(d); or

...

- (3) The Commission may at any time (including during a funding period) amend any condition imposed under subsection (2).

- (4) The amendment to the condition takes effect when the organisation has been given reasonable notice of it.

159ZD Conditions on funding received under section 159ZC

...

- (2) The Commission may impose conditions on funding received by an organisation under section 159ZC, but only if the Minister has provided that, under the funding mechanism under which that funding is provided,—

- (a) any or specified conditions may be imposed; or

- (b) specified conditions must be imposed.

- (3) The Commission may at any time (including during a funding period) amend any condition imposed under subsection (2).

- (4) An amendment to a condition takes effect when the organisation has been given reasonable notice of it.

- 2.6. Sections 159L(3)(d), 159YC(2)(a) and 159ZD(2) all appear to provide adequate power for the Minister to specify, as part of the determination of a funding mechanism, the types of conditions TEC may place on the provision of funding to a TEO, and such conditions could include a condition that a TEO pay a proportion of TEC's investigation costs if a TEO breaches its funding approval.

- 2.7. The use of such conditions would be a simpler and more efficient way for TEC to recover its investigation costs from a TEO in breach of its funding approval. The use of such conditions would make use of existing powers in the Act and avoid the need for new s 159E.
- 2.8. The Subcommittee notes that the fee proposal in new s 159E along with the associated regulations appears to be an overly complex response for the recovery of TEC's investigation costs, which should be a fairly straightforward matter.
- 2.9. The Subcommittee also has concerns that the fee in new s 159E could be regarded as a conflation of a fee with a penalty, which the Subcommittee considers would be inappropriate. Guideline 15.1 provides:

Fees should only be charged where the nature of the service or function is appropriate and the fee can be quantified and efficiently recovered.

- 2.10. The Regulatory Impact Statement notes that two options were considered relating to funding conditions, but these were not proceeded with because it was suggested they were not permitted by existing legislation². It is unclear why the RIS did not consider those options for funding conditions as amendments to the Act. However, given the provisions of this Bill are now before the Committee, the absence of a legislative amendment is no longer an obstacle.
- 2.11. The Subcommittee submits the Committee should take the opportunity to consider whether the Minister's powers to specify conditions TEC may attach to a funding mechanism under ss 159L(3)(d), 159YC(2)(a) and 159ZD(2) are adequate to enable TEC to require a TEO that has breached its funding approval, to pay a proportion of TEC's investigation costs, having regard to the nature and seriousness of the breach. If the Minister's powers are considered adequate, the Subcommittee submits that those Ministerial powers should be used to specify such conditions and cl 10, new s 159E concerning charging, be deleted from the Bill, as it will be unnecessary.
- 2.12. If, for some reason, the powers in ss 159L(3)(d), 159YC(2)(a) and 159ZD(2) are not considered adequate for the Minister to provide for TEC to impose such a condition in a funding approval, the Subcommittee notes that cl 16 of the Bill will insert a new 159YC(2)(c) adding a new type of condition TEC may impose in respect of a funding approval under s 159YA. The condition inserted by cl 16 as new s 159YC(2)(c) will provide that TEC "may give funding approval subject to conditions, but only if the conditions are":

- (c) conditions that the Commission considers reasonably necessary to enable the Commission to effectively monitor the performance of organisations and the tertiary education sector generally.

² Regulatory Impact Statement: Increasing funding flexibility and strengthening monitoring and compliance, Ministry of Education, 4 November 2016, at p 17.

- 2.13. Therefore, one solution could be that, in addition to new s 159YC(2)(c) in cl 16, another provision could be inserted in s 159YC(2) to expressly allow TEC to impose a condition on a funding approval under s 159YA, that a TEO in breach of its funding approval pay a proportion of TEC's investigation costs having regard to the nature and seriousness of the breach.
- 2.14. If the Committee agrees to such an amendment, a similar amendment should also be made to insert a new power for the Minister to specify a similar condition TEC could impose in respect of the funding of a TEO other than via a plan under s 159ZC.
- 2.15. The Subcommittee recommends—
- (a) that the Committee consider whether the existing powers under ss 159L(3)(d), 159YC(2)(a) and 159ZD(2) are adequate to allow the Minister, when determining the design of a funding mechanism, to specify, as a condition of a funding approval, that a TEO that has breached its funding approval, pay a proportion of the investigation costs of TEC, having regard to the nature and seriousness of the breach and, if so, those Ministerial powers be used to specify such a condition as they will be simpler and more efficient for TEC to administer, and cl 10, new s 159E concerning charging, be deleted from the Bill, as it will be unnecessary;
 - (b) that if the Committee considers the current Ministerial powers in ss 159L(3)(d), 159YC(2)(a) and 159ZD(2) above are not sufficient, a new provision be inserted to expressly allow TEC to impose a condition on a funding approval under ss 159YA and 159ZC that a TEO, in breach of its funding approval, pay a proportion of TEC's investigation costs, having regard to the nature and seriousness of the breach;
 - (c) that if cl 10 new s 159E is retained it be amended to expressly set out the investigation powers of TEC in respect of which a fee may be imposed;
 - (d) new s 167 be amended to make it clear that the provision does not limit the ability of a council to execute documents by means other than a common seal, as long as that method of execution is not inconsistent with the Council's statute relating to the use of the common seal

The "investigation" referred to in new s 159E should more clearly relate to TEC's powers in the Act

- 2.16. If the Committee retains cl 10 the Subcommittee makes the following submission in respect of cl 10.
- 2.17. New s 159E provides for TEC to charge a fee relating to "the cost of the Commission investigating whether the organisation has breached or is breaching a condition subject to which the organisation was given funding approval under s 159YA or funding under section 159ZC". It is not clear what existing TEC powers in the Act amount to "investigating" a TEO.

2.18. The Regulatory Impact Statement provides³:

If the TEC considers that a provider or industry training organisation may not have complied with funding conditions and an initial review does not alleviate these concerns, it can open a more comprehensive investigation.

2.19. Legislation should clearly set out the matters in respect of which a fee may be imposed (Guidelines 15.4). If the subject of the fee is not clear, it risks being used unlawfully as a tax. The subject of the fee in this case is the costs of “investigations”, therefore the legislation should make it clear what “investigations” are.

2.20. TEC’s relevant powers of investigation would appear to include requirements that:

- an organisation supply to TEC any financial, statistical, or other information TEC requires, as a condition of an organisation receiving funding under s 159YA – s 159YC(1);
- a recipient of funding under s 159ZC supply to TEC any financial, statistical, or other information TEC requires, as a condition of the recipient receiving funding under s 159ZC – s 159ZD(1);
- a TEO maintains records in a form required by TEC that fully and fairly show whether any conditions on which the funding approval was given have been complied with and those records are available for inspection by the Commission at all reasonable times – s 159YD(1) (as amended by cl 17 of the Bill);
- a TEO maintains records in a form required by TEC that fully and fairly show whether any conditions on a grant of funding under s 159ZC have been complied with and those records are available for inspection by the Commission at all reasonable times – s 159ZD(1) (as amended by cl 22 of the Bill).

2.21. The Subcommittee recommends that if s 159E is retained it be amended to expressly set out the investigation powers of TEC in respect of which a fee may be imposed.

3. Clause 24, new s 167 – Common seal

3.1. Subclause (2)(a) provides that the council of an institution may, by statute, specify the type or class of documents that may be executed by affixing the common seal to them.

3.2. The Subcommittee suggests new s 167 be amended to make it clear that the provision does not limit the ability of a council to execute documents by means other than a common seal, as long as that method of execution is not inconsistent with the Council’s statute relating to the use of the common seal.

³ Above n1 at p 15.

4. Conclusion

4.1. Thank you for taking the time to consider the Subcommittee's submission.

Yours sincerely



Brigid McArthur

Chairperson (Acting)

Legislation Design and Advisory External Subcommittee