

Education Report: Vocational Education and Training: Advice on legislative change for Industry Training Boards

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| To: | Hon Penny Simmonds, Minister for Tertiary Education and Skills | | |
| Date: | 29 February 2024 | Priority: | High |
| Security Level: | In Confidence | METIS No: | 1322890 |
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| Seen by the Communications Team: | No | Round Robin: | No |

Purpose of Report

1. This report seeks your agreement to proposed legislative change for returning to a system of industry-led training organisations. Once agreed, these provisions can be included in a table for Cabinet decisions on policy and drafting instructions to Parliamentary Council Office (PCO).

Summary

2. The decisions in this paper will support Cabinet policy decisions and PCO drafting instructions about legislation settings for Industry Training Boards (ITBs)¹. The decisions for the legislative settings are based on the five core decisions you have made which form the basis of a new, ITB-based system for Workplace-based Learning (WBL) and standards-setting (METIS 1321429 refers). These are:
 - a. workplace-based learning will be overseen by ITBs;
 - b. providers will not be able to offer workplace-based learning;
 - c. there will be a distinction between 'arranging' and 'delivering' training;
 - d. ITBs will take over standards-setting from Workforce Development Councils (WDCs); and
 - e. ITBs will be established as independent statutory bodies through Orders in Council.
3. Legislation setting up the new VET system is intended to be in place by 1 January 2025. We will therefore be using prior legislation – mainly the Industry Training and Apprenticeships Act 1992 (the ITA Act) – as the basis to amend the Education and Training Act 2020 (E&T Act). This paper discusses our intended approach to this.
4. To give effect to ministerial establishment of ITBs in the primary legislation, we recommend drawing on the approach taken for WDCs, through the provisions in sections 363 (establishment) and 364 (disestablishment) in the E&T Act.

¹ We are using the working title of Industry Training Boards as an interim term for the industry-led training organisations that will be established, acknowledging that a name will be agreed in the future.

Recommended Actions

The Ministry of Education recommends you:

- a. **note** that Annex 1 of this paper proposes that to enable Industry Training Boards (ITBs) to be created relatively quickly, relevant provisions from the former Industry Training and Apprenticeships Act 1992 can be re-enacted in the Education and Training Act 2020 Noted
- b. **indicate** your decisions in relation to the recommendations in the far right-hand side column of Annex 1 Indicated
- c. **note** that we will add the proposals in Annex 1 that you agree into a table for Cabinet decisions on policy and drafting instructions to Parliamentary Counsel Office (PCO) Noted
- d. **note** that ITBs will be established through Orders in Council, which will reflect your decisions about governance requirements Noted

Proactive release:

- e. **agree** that the Ministry of Education proactively release this paper only after full Cabinet consideration of the issues, and as part of a communications strategy associated with Government announcements on the proposed VET changes. Agree / Disagree



Eleonora Sparagna
Senior Policy Manager
Tertiary and Evidence Policy
29/02/2024



Hon Penny Simmonds
Minister of Tertiary Education and
Skills
23/24

Background

5. Work is progressing on the disestablishment of Te Pūkenga and Workforce Development Councils (WDCs), and the establishment of Institutes of Technology and Polytechnics (ITPs) and Industry training Boards (ITBs).
6. You have received a series of papers including two on legislative design, which will be completed with further advice on transition provisions, following your feedback on TEC's report. These decisions will allow us to provide you a first draft of a legislation Cabinet paper in the week of 11 March.

You have made decisions about the direction of legislation for setting up ITBs

7. You confirmed decisions on your vision for Workplace-Based Learning (WBL) and standards-setting (METIS 1321429 refers) that:
 - workplace-based learning will be overseen by ITBs;
 - providers will not be able to offer workplace-based learning;
 - there will be a distinction between 'arranging' and 'delivering' training;
 - ITBs will take over standards-setting from WDCs; and
 - ITBs will be established as independent statutory bodies through Orders in Council.

This paper identifies straightforward provisions that can be easily transferred into the new settings for ITBs...

8. Annex 1 seeks your approval to 'tick through' straightforward administrative provisions that are in current or previous legislation and that align with your feedback so far regarding re-establishing ITOs. Your decisions will be included in a table in the Cabinet paper, to support drafting-instructions to PCO.
9. Generally, relevant provisions from the Industry Training and Apprenticeships Act 1992 (the ITA Act) can be adopted either directly or with minor amendments. There are also existing provisions in the Education and Training Act 2020 (E&T Act) that can be amended to achieve the desired operative effect in relation to ITBs.
10. Annex 2 gives an overview of the parts of the ITA Act and our assessment of the legislative changes needed to reflect these in the new system.

...and how to give effect to Ministerial establishment of ITBs

11. As per your decision for Ministerial establishment of ITBs (METIS 1321429 refers), we outline here how Ministerial establishment can be achieved, drawing on the relevant sections of the E&T Act, and through Orders in Council. Annex 1 then considers the other key provisions required for giving effect to your vision for WBL and standards-setting, drawing on provisions from the ITA Act, many of which can be shifted directly into the E&T Act, or with minor changes.
12. To give effect to Ministerial establishment each ITB will be established through Orders in Council as an independent statutory body. The Orders in Council would include names of

the organisations, purposes, scope and coverage, obligations, governance and accountability structures, and requirements for industry involvement in these.

13. This establishment approach provides for the key system functions and powers regarding standards-setting to be held by ITBs. To give effect to this Ministerial establishment in the primary legislation, we recommend drawing on the approach taken for WDCs, through the provisions in sections 363 (establishment) and 364 (disestablishment) in the E&T Act. The Act would establish a name for Industry Training Boards.
14. The policy intent would be for establishment and disestablishment provisions to be responsive to the needs of industry, therefore retaining the requirements for the Minister to consult with and take into account the views of industry when making, or changing the Orders in Council. Likewise, for disestablishment, that this should be mainly triggered by significant and persistent industry concerns, failure to perform obligations, or persistent engagement in unlawful activities. ✓
15. As is the current approach in the E&T Act, the amended provisions for the establishment of ITBs would provide for the name and the governance arrangements relating to the appointment, composition, suspension, or removal of members of each of the ITBs to be put in place through Orders in Council. We understand from your response to our previous advice that you would like the establishment approach to provide for industry ownership but with ministerial levers for managing behaviours around the arranging and delivery of training, such as some ministerial appointments to the ITBs [METIS 1321429 refers]. The Orders in Council will be developed to reflect your decisions about this. ✓
16. In alignment with the current settings for WDCs, we suggest that the governance arrangements provided for in the E&T Act itself would have the same policy intent to reflect the collective representation of employers and employees for ITBs' industries, and for the representation of Māori employers on ITBs. There are risks associated with removing provisions which were designed to reflect Māori interests and/or support Māori-Crown relationships. ✗
17. In addition, the general Te Tiriti clauses (sections 4(d) and 9) of the E&T Act mean that decision-makers under the Act and Orders in Council will arguably need to consider Te Tiriti and its principles when exercising any powers or functions. A key issue will be the extent to which any repeal of Te Tiriti-related provisions in either the primary legislation or in Orders in Council reduce the likelihood that Te Tiriti interests are met in the system, and that the ITBs meet the expectations and aspirations of Māori. 9(2)(g)(i)
18. The Act would also reflect that matters relating to an ITB's use of its assets should be prescribed in Orders in Council including any assets allocated to the ITB as part of transitioning arrangements from providers and WDCs. ✓
19. ITBs would be required to comply with the TEC's and NZQA's monitoring provisions, and the process for this would give those agencies oversight of ITBs' compliance with their obligations and overall performance. Agencies would report to you on this. The relevant provisions in the E&T Act can be adapted to reflect this intent. ✓
20. We also suggest that given ITBs would be established as independent statutory entities with obligations of a public interest, it is appropriate that the Auditor-General would have an auditing role for them (as provided for WDCs in section 373, and as defined in section 4 of the Public Audit Act 2001). ✓

Next Steps

21. We will provide you with additional advice on further matters, including transition provisions, once you have considered advice from TEC on the operational steps needed to disestablish Te Pūkenga and WDCs.
22. We intend to provide you with a first draft of the Cabinet paper in the week of 11 March for agreement to policy decisions that will achieve your objectives for the VET sector and provide for drafting-instructions to PCO.

Annexes

The following are annexed to this paper:

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| Annex 1: | Assessment of and decisions sought for Parts 2, 2A and 5 of the Industry Training and Apprenticeships Act 1992 for re-enactment in the Education and Training Act 2020 |
| Annex 2: | Overview of level of change required for reflecting the settings of the Industry Training and Apprenticeships Act 1992 in the Education and Training Act 2020 |

Annex 1: Assessment of and decisions sought for Parts 2 and 2A of Industry Training and Apprenticeships Act 1992 for inclusion into Education and Training Act 2020²

| Sections in Part 2, Industry Training and Apprenticeships Act 1992 | No change recommended | Change recommended | Notes on recommendation | Decision |
|--|-----------------------|-------------------------------------|---|----------------|
| Recognition of Industry Training Organisations (ss5-9) | | | | |
| S 5 Minister may recognise industry training organisations Provides for the Minister to recognise an ITO. | - | Amend based on s363 E&T Act wording | We recommend drawing on s363 (Establishment of WDCs) of the E&T Act with relevant amendments to terminology, governance provisions to allow for ministerial appointments, and to reflect use of assets from TP, WDCs, and PTEs. | Agree/Disagree |
| Funding of industry training (ss 10,10,11,11A) | | | | |
| S 10 Industry Training Organisation's proposed plan Outlines the activities that must be included in an ITOs' proposed plan for which it seeks funding under funding mechanism. | ✓ | - | We consider there are other activities such as working with schools, and undertaking analysis to support standard setting which will be important for ITBs to do as well. We would look to manage this through operational settings, such as the TEC investment plan guidance. | Agree/Disagree |
| S 10A Power to fund if employer switches industry training organisation. | ✓ | - | We recommend shifting this provision into the E&T Act, as it would provide flexibility for employers to change ITBs. Note that it had very little uptake under the previous legislation. | Agree/Disagree |
| S 11 Matters to which Commission must have regard in determining whether to give funding approval to proposed plan. | ✓ | - | | Agree/Disagree |
| S 11A Persons other than industry training organisations may receive funding for industry training. | ✓ | - | This provision enabled an employer to be directly funded to arrange their own industry training, provided they met appropriate quality criteria. While that scheme saw little uptake, we recommend shifting this provision into the E&T Act as it would allow the creation of a similar but more effective scheme in the future to support employer choice. | Agree/Disagree |

² The provisions are presented in the order they appear in the Industry Training and Apprenticeships Act 1992

| Sections in Part 2, Industry Training and Apprenticeships Act 1992 | No change recommended | Change recommended | Notes on recommendation | Decision |
|---|-----------------------|---|--|-------------------------------------|
| Obligations of industry training organisations (ss 11B, C, D, E, F) | | | | |
| <p>S 11B(1)(a) – requirement to carry out core activities</p> <p>ITOs must develop and maintain: (i) skills standards; and/or (ii) arrangements for the delivery of training.</p> | - | Amend standard-setting role based on s 366 E&T Act wording; adopt arranging training provision. | <p>We consider that the core activities as set out in the ITA Act do not adequately describe the core activities needed by ITBs to provide for strong standard-setting responsibilities. For example, they will also be required to develop and maintain micro-credentials, industry qualifications for listing on the Qualifications and Credentials Framework, national curricula and to carry out moderation activities.</p> <p>We therefore recommend drawing on the comparable clauses in s366 of the E&T Act for this, and drawing on s369 for expectations of how ITBs would perform their core activities.</p> <p>There may be further activities which are required for ITBs as standard-setters, and we would consider the merits of adding those through a later amendment.</p> | Agree/Disagree |
| S 11B(1)(c) requires ITOs to comply with quality assurance requirements. | ✓ | - | | Agree/Disagree |
| S 11B(1)(d) requires ITOs to develop and maintain arrangements for collective representation of employees in governance of the ITO. | - | Adopt provision with minor amendments | Decision makers under the Act and Orders in Council will arguably need to consider Te Tiriti and its principles when exercising any powers or functions. To reduce the risk of a Te Tiriti o Waitangi claim, or judicial review, we recommend that arrangements for collective representation of employees in governance of the ITB could also include representation of Māori employers. This is currently provided for in s 363(3)(b) of the E&T Act, “from any or all of the 1 or more specified industries”. | Agree/Disagree 9(2)(g)(i) |
| S 11B(2) requires ITOs to have regard to the needs of Māori and other population groups identified in the TES when carrying out their core activities. | - | Adopt provision with minor amendments | As with the rationale above, we recommend adding the requirement to consult by applying the same intent and using appropriate clauses from s369 of the E&T Act. This would provide that ITBs must have regard to the needs of Māori and other population groups identified in the tertiary education strategy, and must consult the persons or bodies it considers on reasonable grounds | Agree/Disagree 9(2)(g)(i) |

| Sections in Part 2, Industry Training and Apprenticeships Act 1992 | No change recommended | Change recommended | Notes on recommendation | Decision |
|--|-----------------------|---|--|----------------|
| | | | represent the interests of Māori and those population groups. | |
| S 11C sets out the circumstances under which NZQA may issue an improvement notice, and what a notice must specify. | ✓ | - | We recommend shifting s 11C in ITA Act into the E&T Act. Can be given effect by amending s371 of the E&T Act. | Agree/Disagree |
| S 11D provides for NZQA to issue compliance notices and sets out consequences if an ITO does not comply. | - | Adopt provision with minor amendments | Can be given effect by amending s372 of the E&T Act. References to conditions on recognition will not be relevant. Escalation would be for NZQA to notify the Minister, as is currently allowed for under s372. | Agree/Disagree |
| S 11E Provides that ITOs cannot operate or have an interest in a registered PTE. | - | Adopt provision with minor amendments | We recommend shifting with the word “registered” deleted to prevent ITBs having an interest in any PTE, whether registered or not. | Agree/Disagree |
| S 11F Provides that ITOs must an annual fee prescribed by NZQA. | ✓ | - | | Agree/Disagree |
| S 12 TEC may require ITO to provide information (repealed in 2004). | - | Amend based on s412 (1-3) E&T Act wording | We recommend providing for the TEC to have the ability to require info from ITBs about their financial position or operations (or both), as with E&T Act s412 (1-3), and related to this, that the TEC’s ability to commission an independent audit be provided for, drawing on s 413. | Agree/Disagree |
| S 13 Provides additional functions for the TEC regarding industry training. | ✓ | - | We recommend shifting this provision to the E&T Act returns the responsibility for the apprenticeship training code to the TEC – including developing and recommending this to the Minister and monitoring the performance of persons carrying out apprenticeship training activities. | Agree/Disagree |
| S 13A Additional functions of NZQA. | ✓ | - | We recommend shifting this provision into E&T Act provides for NZQA to monitor ITB compliance with the prescribed quality assurance requirements, to address non-compliance, and to monitor the quality and results of an ITB’s system and procedures for the moderation of vocational training. | Agree/Disagree |

| Sections in Part 2, Industry Training and Apprenticeships Act 1992 | No change recommended | Change recommended | Notes on recommendation | Decision |
|---|-----------------------|---|---|---|
| S 13B Qualifications Authority may prescribe quality assurance requirements. | ✓ | - | <p>We recommend the provision for NZQA to prescribe quality assurance requirements be adopted into the E&T Act.</p> <p>Note that there are other sections in E&T Act (for example, s 433(1)(f) and s 452 (1) (h, i, r, and s) relating to quality assurance for WDCs.</p> <p>We recommend that these be amended to reflect the quality assurance requirements for ITBs, including NZQA's responsibility for monitoring them.</p> | <p>Agree/Disagree</p> <p>Agree/Disagree</p> |
| Part 2A Apprenticeship Training | | | | |
| Sections 13C-I define apprenticeship training, and provide for ITOs having responsibility for this. | - | Minor amendment to E&T Act, ss 376-380 | <p>The apprenticeship training provisions in the ITA Act have been superseded by E&T Act ss 376 -380, which includes several updates such as removal of text around Gazetting requirements (as Gazette is published online now) and the obligation to help persons of any age entering into an apprenticeship training agreement (which was for under 18 years in ITA Act).</p> <p>We recommend amending the sections in the E&T Act to reflect ITBs' responsibility for apprenticeship training.</p> | Agree/Disagree |
| Part 5 Training Levies and schedule 4 (Matters to be specified in levy orders) | | | | |
| Sections 24-53 enable the making of Orders in Council imposing a training levy on the members of an industry, payable to an industry training organisation. | - | Minor amendments to E&T Act, ss 382-385, and to schedules 16 & 17 | To date this part of the legislation remains unused but we recommend it be retained with amendments to ss 382-5 and schedule 16 and 17 to refer to "ITBs" instead of "workforce development councils". | Agree/Disagree |

Annex 2: Overview of level of change required for reflecting the settings of Industry Training and Apprenticeships Act 1992 in the Education and Training Act 2020.³

| Parts of IT Act 1992 | Description | Level of change - not needed in E&T Act or straight shift into E&T Act or minor changes needed | Recommendation |
|--|---|--|--|
| Part 1 Preliminary | Includes purpose of the Act, Interpretation, Training contracts & apprenticeship training agreements. | Already in E&T Act. Training contracts & apprenticeship training agreements is already integrated in E&T Act s 362. | Does not need to be transferred into E&T Act |
| Part 2 Recognition of Industry Training Organisations and funding of training activities | Includes <ul style="list-style-type: none"> Recognition of Industry Training Organisations (ss 5-9) Funding of industry training (ss 10, 10A, 11, 11A) Obligations of ITOs (ss 11B-F, 12) Functions of Commission and Qualifications Authority (ss 13, 13A-B) | Discussed in Annex 1. Provisions relating to recognition are not needed. ITBs can be established under amended s363 (Establishment of WDCs) of the E&T Act. | Refer to recommendations in in Annex 1 |
| Part 2A Apprenticeship Training | (Sections 13C-I) covers apprenticeship training, and provides for ITOs having responsibility for this. | See Annex 1 for recommendations on minor amendments to E&T Act ss376-380. | Refer to recommendations in Annex 1 |
| Parts 3 and 4 relate to earlier legislation and were repealed | | | |
| Part 5 Training Levies and schedule 4 (Matters to be specified in levy orders) | Sections 24-53 enables the making of Orders in Council imposing a training levy on the members of an industry, payable to an industry training organisation. | See Annex 1 for recommendations on minor amendments to E&T Act ss 382-385 and schedules 16 and 17 | Refer to recommendations in Annex 1 |
| Schedules 1AA, 1, 2, 3 | This covers technical provisions to support transitional arrangements from previous reforms. | Not needed in E&T Act | Does not need to be transferred into E&T Act |

³ The shaded rows indicate the Parts for which we have made recommendations in Annex 1 regarding which excerpts can be directly shifted into the E&T Act and where minor amendments are required.