Te Tāhuhu o te Mātauranga
Ministry of Education

Education Report: Further advice about urgent legislation proposals

To:	Hon Penny Simmonds, Minister for Tertiary Education and Skills		
Date:	11 June 2024	**Priority:**	High
Security Level:	In-Confidence	**METIS No:**	1330444
Drafter:	9(2)(a)	**DDI:**	9(2)(a)
Key Contact:	9(2)(a)	**DDI:**	9(2)(a)
Seen by the Communications Team:	No	**Round Robin:**	No

Purpose of Report

This report provides further advice on the urgent legislation proposal included in the draft Cabinet paper "Consultation Options for Vocational Education Reforms".

Summary

You are consulting on a draft Cabinet paper that proposes legislating under urgency to enable you, as Minister, to direct Te Pūkenga to establish regional ITP subsidiaries by 1 January 2025.

We gave you initial advice on the risks and limitations of this proposal on 4 June. We have since had the time to consider the proposal more fully, 9(2)(h)

The benefit of the envisaged direction power is that it would overcome some impediments in the Education and Training Act 2020 that currently prevent the Government exercising significant control over Te Pūkenga's decisions. The direction power would provide a legal basis for what we understand to be Ministers' intent to stand up a significant number of regional ITPs (over 5 and up to 8) as subsidiaries of Te Pūkenga at the start of 2025.

9(2)(h) :

- 9(2)(h)
- 9(2)(h)

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- 9(2)(h)
- The challenges of getting Cabinet support for the use of any powers, particularly given that it would need to be exercised in a matter of weeks, and the likelihood that Ministers would be strongly advised against widespread use of them.
- The risk of a flawed legislative design, given the speed and lack of scrutiny of the proposed process.
- 9(2)(h)

All of these constraints ultimately relate to issues of financial viability, and financial risk tolerance, which no legislation can resolve.

On balance, we do not think that the powers proposed would enable the Government to stand up more than a very small number of regional ITP subsidiaries at the start of 2025 (AM-24-00390 refers). The only way to be confident that the powers could be used to stand up 5 or more ITP subsidiaries would be to provide significant capital or funding injections into Te Pūkenga, which is not possible within the Government's fiscal constraints and has been ruled out by Ministers.

If you do choose to go ahead with urgent legislation, then our advice is to create a requirement for Te Pūkenga to establish subsidiaries and a power for the Minister to direct the number and nature of them. 9(2)(h)

9(2)(h) It is important that your colleagues understand these limitations and that the process of disestablishing Te Pūkenga is unlikely to be significantly advanced through the proposed urgent legislation.

The one factor that is fully within the Government's control is the timeframes for the policy process. Signalling the Government's intent in 2024, legislating in 2025 while creating establishment advisory groups to manage the transition to the new entities in 2026 under clear and considered legislative powers, is our recommended approach. The TEC will engage with Te Pūkenga to accelerate this work, and can consider existing mechanisms such as specialist help, as required.

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Recommended Actions

The Ministry of Education recommends you:

a. **note** that our advice is to not proceed with the proposal for urgent legislation to create Ministerial powers to direct Te Pūkenga to establish subsidiaries

Noted

b. **indicate** whether to:

i. remove the proposal for urgent legislation from the draft Cabinet paper [Ministry recommends] OR

Agree / Disagree

ii. propose narrowly focussed legislation requiring the establishment of subsidiaries, the number and nature of which would be determined by the Minister OR

Agree / Disagree

iii. retain the current proposal of a power of direction, modification of Te Pūkenga's objectives and functions, and changes to thresholds for appointing a Crown Manager or Commissioner

Agree / Disagree

Proactive Release

c. **agree** that the Ministry of Education release this paper only, with appropriate redactions, after full Cabinet consideration of the issues, and as part of a communications strategy associated with Government announcements on the proposed vocational education and training (VET) changes.

Agree / Disagree



Andy Jackson
Hautū - Kaupapahere | Deputy Secretary - Policy

11/06/2024

Hon Penny Simmonds

Minister for Tertiary Education and Skills

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Background

1. At your meeting with Tertiary officials on 29 May 2024, you directed officials to explore options for establishing a number of subsidiary ITPs by 1 January 2025, including through urgent legislation. On 4 June 2024, we provided you with initial advice about what potential urgent legislation could consist of, the risks, and an indication of what it might achieve [METIS 1330013 refers], noting that it was prepared in a limited time frame and elements still needed to be tested.

2. We have now better explored the risks and limitations of such an approach for you to consider before submitting the Cabinet paper on Thursday. This report provides supplementary advice and is a companion piece to the TEC report on forecasts of the ITP business divisions of Te Pūkenga (AM-24-00390 refers).

9(2)(h)

3. The proposal, as currently set out in the Cabinet paper, includes a delegation to joint Ministers (Minister of Finance, Minister for Social Development and yourself) to finalise the policy and issue drafting instructions to Parliamentary Counsel Office (PCO). This was based on the early initial advice which, given the short turnaround time, was at a broad and indicative level.

9(2)(h)

4. Any directions to Te Pūkenga will be constrained in their effect because the Council must ensure that it acts in a manner consistent with its existing duties, functions and obligations under the Education and Training Act 2020 (the Act). Many of these are essential to operating an educational institution and include the overall objectives of Part 4 of the Act, and any other applicable Acts, which would not change through the proposed urgent legislation. 9(2)(h)

5. We understand your primary priority is to exert greater control over the establishment of subsidiaries. 9(2)(h)

6. A direction under a power for a specific purpose such as this would override Te Pūkenga's other duties and functions that might otherwise be a barrier to them establishing a subsidiary. 9(2)(h) Legislation could also give the Minister the role of appointing directors, which would allow for greater continuity with the subsequently established ITPs. This would then need to be operationalised and will have a high degree of complexity and be resource intensive.

7. 9(2)(h)

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8. 9(2)(h)

9. 9(2)(h)

10. We would explore whether there are other supporting amendments that could be tied to a requirement to establish subsidiaries (for example, using non-compliance with such a direction on the part of the Council as a ground for appointment of a Commissioner or a Crown Manager). We would also want to look at arrangements for the appointment of subsidiary directors, which would ordinarily be a decision for Te Pūkenga. There is a risk that their choice of directors for the subsidiaries will not align with you preferred final appointments, noting that continuity to support long-term decision making is important.

The most significant barriers to the Government's intended policy are not able to be solved by urgent legislation, but by sufficient time to achieve viability

11. It is important to note that there are still significant limitations to this proposal and it will not, on its own, be sufficient to deliver the establishment of subsidiaries from 1 January 2025. To do so, the subsidiaries need to be solvent, or have a pathway to viability.

12. TEC reports that the ITP modelling provided by the specialist advisors suggests that they would be confident that only one or two subsidiaries would be able to be established on 1 January 2025 (the Open Polytechnic and Ara). It may also be possible, but likely more challenging, to establish SIT, NMIT and EIT (AM-24-00390 refers). Longer term, other ITPs could become sustainable depending on how these institutions are supported during the transition.

13. 9(2)(h)

14. Therefore, in order to put directors in place, funding is likely to be required, sourced from the Budget contingency and Te Pūkenga's cash reserves, to capitalise them at the outset. However, if there is no clear pathway to viability without some form of assurance of Crown support, it will be difficult to engage directors in the first place.

15. Ultimately these are problems that are not able to be solved through legislation. Fundamentally, any director of any organisation needs to be assured that it has sufficient cash to ensure staff are paid, and other bills can be serviced in an ongoing way. If this cannot be provided for, it will not be possible to set up subsidiary companies.

9(2)(g)(i)

16. 9(2)(g)(i)

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We would also note that a Commissioner has the same duties, functions and obligations as the Council.

17. Where a solvent subsidiary can be established, incoming directors would want a significant degree of comfort of the ongoing viability of the subsidiary or that there is otherwise significant external support. This support would very likely have to come from the Crown, because Te Pūkenga is not likely to provide it. Without the final legislation that disestablishes Te Pūkenga and directs it to work towards setting up ITPs, the Council would be being asked to put very significant resources towards this when it also needs to resource the educational mission and support the viability of the network as a whole. If the subsidiaries are set up piecemeal, the Council would not be able to commit such resources without risking under-resourcing other subsidiaries in the future.

It also is unlikely to be possible without significant Crown support, which is not likely to be considered in the public interest

18. Based on the modelling reported in TEC's Aide Memoire AM-24-00390, very few prospective subsidiaries will be able to meet the financial viability hurdle without additional money. 9(2)(h)

19. Treasury has provided the following advice about the possibility of a Crown guarantee, which our previous advice suggested would be a minimum for Directors to take on their positions.

9(2)(h) *The Treasury has indicated they are unlikely to support a Crown guarantee at this time. This is because it is inconsistent with the Minister of Finance's direction to provide options that do not impose additional fiscal obligations on the Crown, and because the high bar to meet the public interest test would require proposals to be supported by significantly more analysis. Additionally, given the high likelihood of insolvency for some ITPs, tools other than a Crown guarantee (e.g. capital injection) are likely to be more appropriate should Ministers choose to provide additional investment.*

20. While some funding is available from the contingency agreed at Budget 2024, using that for providing capitalisation for some subsidiaries only is likely to create an unquantified risk for the overall transition, and the need for further funding, which Ministers have ruled out.

21. Establishing only a very small number of subsidiaries on 1 January 2025 could be detrimental to your objective of ensuring regional coverage if it draws attention to the parlous financial state of the rest of the ITP network. This could result in public comment focussed on the fragility of the network, and impact on students' confidence to enrol and industry's confidence in the VET system.

9(2)(h)

22. 9(2)(h)

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24. While it is possible that urgent specific legislation could achieve this, doing so without Select Committee review could result in inferior legislation, which could make any proposals impossible to implement. For example, a number of flaws were corrected during Select Committee stage of the RoVE legislation.

25. In addition to the practical and legal barriers set out above, there are also a series of risks that we are able to identify, although we have not yet had the time to assess their likelihood or severity. The primary risks that we have identified are:

- You may not be able to pass legislation in time on what would be complex and controversial powers. You would need to test the process in detail with the Leader of the House for consistency with Standing Orders, and you would likely see concerns raised by the Select Committee and, in terms of instruments to create ITPs, the Regulations Review Committee.
- The speed of the legislative process, and the fact that we have not put in place similar powers before, mean that we cannot guarantee that the legislation would be drafted in such a way that it would work. If this is the case, the likelihood is that we would discover this at the point when you tried to use the powers.
- Once the powers were in place, you would need advice from officials, and a Cabinet decision in order to use them, with decisions needing to be made in a matter of weeks. Our advice would need to cover both legal and fiscal issues. The likelihood of Education agencies, key officials and Ministers supporting widespread use of the powers to create more than a small number of subsidiaries, if any, is very low.
- 9(2)(h)
- Use of the powers to create ITP subsidiaries that are not financially viable will increase fiscal risk to the Crown and the likelihood of urgent appropriations being required.

26. We note that there may be “unknown unknowns” that we are not yet able to advise on.

The best way through is therefore to stay the course and not establish subsidiaries before they can be viable

27. The reforms you are seeking are achievable, albeit very difficult due to the position the sector is in and the constraints acting on the process.

28. The process and timeline previously set represents the best chance to succeed in your overall goals. This includes:

a. Getting Cabinet’s agreement to the overall direction, and permission to consult on it in 2024

b. Consultation and engagement with key communities and stakeholders on their needs and interests, which can influence a final set of decisions.

c. Legislation on the whole future framework introduced in time for the work to be done in earnest, and passed with sufficient runway before January 2026.

d. Providing strong support for Te Pūkenga to complete preparatory work during 2024 and 2025 including design and cost-out work once it is clear about the future direction. This work can start immediately, and the TEC is working closely with Te

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Pūkenga on how to resource and support the required work to be undertaken. This is discussed further in AM-24-00390.

e. Other important work completed including establishment advisory groups and further policy work on the feasibility and operation of the federated model.

Next steps

29. The Cabinet paper is due to be lodged on Thursday 13 June. We will make adjustments to the Cabinet paper in response to your decisions about the proposed urgent legislation based on this advice.

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