



TAFE Queensland Bill 2013

Report No. 15
Education and Innovation Committee
May 2013

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Acknowledgements

The Committee thanks those who briefed the Committee, made submissions, gave evidence and participated in its inquiry. In particular the Committee acknowledges the assistance provided by the Department of Education, Training and Employment.

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Abbreviations

ACPET	Australian Council of Private Education and Training - Queensland
AMMA	Australian Mines and Metals Association
AQF	Australian Qualifications Framework
CEO	Chief Executive Officer
Committee	Education and Innovation Committee
CQU	Central Queensland University
DETE	Department of Education, Training and Employment
FLP	fundamental legislative principle
FWA	<i>Fair Work Act 2009</i>
HCSWC	Health and Community Services Workforce Council
IRA	<i>Industrial Relations Act 1999</i>
LLCQ	Lifelong Learning Council Queensland Incorporated - Caboolture
LSA	<i>Legislative Standards Act 1992</i>
Minister	Minister for Education, Training and Employment
PPP	Public Private Partnership
PSA	<i>Public Service Act 2008</i>
QCU	Queensland Council of Unions
QTU	Queensland Teachers' Union of Employees
RTO	Registered Training Organisation
RRTO	Resources Registered Training Organisation Association Incorporated
STI	Statutory TAFE Institute
TAFE	Technical and Further Education
Taskforce	Skills and Training Taskforce
VET	Vocational Education and Training

Chair's foreword

This report presents a summary of the Committee's examination of the TAFE Queensland Bill 2013.

The Committee's task was to consider the policy outcomes to be achieved by the legislation, as well as the application of fundamental legislative principles – that is, whether it has sufficient regard to rights and liberties of individuals and to the institution of Parliament.

The public examination process allows the Parliament to hear the views of the public and stakeholders, from whom they may not have otherwise heard, which should make for better policy and legislation in Queensland.

On behalf of the Committee I thank those individuals and organisations who lodged written submissions on this Bill, and others who have informed the Committee's deliberations: the Parliamentary Service secretariat staff and officials from the Department of Education, Training and Employment.

I commend the report to the House.

A handwritten signature in black ink, reading "Rosemary Menkens .". The signature is written in a cursive style with a large, looping initial 'R'.

Rosemary Menkens MP
Chair

May, 2013

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The Committee recommends that the Minister amend clause 69(b) to delete the words “as soon as possible” and replace them with “as soon as practicable”.	
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Points for clarification

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<p>The Committee seeks clarification from the Minister regarding the rationale for the breadth, and lack of specificity, of those powers intended to be transitional powers to support the restructure.</p> <p>It also seeks clarification from the Minister about whether:</p> <ul style="list-style-type: none"> - a transfer direction can be made to implement a transfer regulation; - a transfer direction can override a transfer regulation, in any way circumvent or avoid a transfer regulation or affect matters otherwise subject to a transfer regulation, but in a different way to the way specified in the transfer regulation; - it is intended that clause 51 be interpreted more narrowly than clause 50, given the former clause's specific reference to the process of restructure; and - what the word "convenient" in clause 51 might mean in practice. 	
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1 Introduction

1.1 Role of the Committee

The Education and Innovation Committee (the Committee) was established by resolution of the Legislative Assembly on 18 May 2012, consisting of government and non-government members.

Clause 93 of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for considering:

- the policy to be given effect by the Bill, and
- the application of the fundamental legislative principles to the Bill.

The TAFE Queensland Bill 2013 was referred to the Committee on 16 April 2013, and the Committee is required to report to the Legislative Assembly by 16 May 2013.

1.2 Inquiry process

The Committee was briefed by the Department of Education, Training and Employment (DETE) on 18 April 2013 (see Appendix B), and received eight submissions from stakeholders (see Appendix A). The Committee held a public hearing on 2 May 2013 at Parliament House, Brisbane and heard from two witnesses (see Appendix C). Transcripts of briefings, hearings and submissions received and accepted by the Committee are published on the Committee's webpage at www.parliament.qld.gov.au/committees.

1.3 Background

Queensland's Vocational Education and Training (VET) system includes an extensive network of public and privately owned training providers.

These include:

- the Queensland government-owned Technical and Further Education (TAFE) Queensland system, with 13 institutes delivering training across the state
- the Australian Agricultural College Corporation delivering agricultural education across five campuses
- more than 900 Registered Training Organisations (RTOs), including privately owned colleges, local governments, community bodies and industry enterprises.

TAFE institutes operate across 95 campuses, comprising:

- 11 TAFE institutes overseen by DETE (including 2 semi-commercial business units); and
- 2 statutory TAFE institutes (STIs), which operate commercially and are accountable to the Minister for Education, Employment and Training (these are the Southbank and Gold Coast institutes).

1.4 Context

Queensland's VET sector has been subject to numerous reviews over the past decade. Most recently, the Queensland government commissioned the Skills and Training Taskforce (the Taskforce), which delivered its report to the Minister for Education, Training and Employment (the Minister) on 5 November 2012. The TAFE Queensland Bill 2013 implements part of the

government's response to that report, in establishing TAFE Queensland as a statutory body, with a commercial focus, as the public provider of VET.

The changes to the TAFE model deliver part of the government's commitment to shift from the traditional supply driven model to a demand driven model – that is, one where demand from service users drives service provision.

Several submissions focused on the broad VET system reforms, and less specifically on the Bill. However, given the broader reforms set the context for this Bill, the views expressed will be touched on briefly here.

Demand for VET comes from students, industry and the labour market. Stakeholders who support a demand driven model seem to take a slightly different focus as to whose demand should drive the provision of VET.

Focusing on service responsiveness to student demand, the Australian Council of Private Education and Training – Queensland (ACPET) supplied statistics to the Committee which aimed to demonstrate that TAFE reforms in Victoria had led to increased enrolments in both TAFE and private training organisations. ACPET support a system of greater student choice and entitlement, as has been implemented in Victoria. Its view is that TAFE is to deliver training that is focused on economic and employment priorities. However, it is worth noting that critiques of the Victorian model which focus on meeting student demand, have identified a surplus of students in some courses, yet a dearth in others. In some industries, this has resulted in disequilibrium between industry demand and numbers of skilled individuals in the marketplace. This was identified as an issue by the Queensland Council of Unions (QCU) at the Committee's public hearing on this Bill. In response to a question about private providers with a profit focus responding to demand, Mr Martin replied: *"There was an explosion in a couple of areas. One was sport and rec and the other was in business administration..... This has had the impact of degrading vocational education and training."*¹

In its submission to this inquiry, the Lifelong Learning Council of Queensland – Caboolture (LLCQ) discuss the goal of improved responsiveness to industry demand, that is, addressing skills shortages. The LLCQ does not think the Bill's focus on TAFE Queensland operating as a commercial provider, potentially in competition with other education providers who deliver, say, VET in schools or courses traditionally offered by universities, *"...in any way ensures that TAFE Qld has a charter to deliver on the governments stated aims of TAFE Qld helping to build a four pillar economy and reduce unemployment."*² It further notes that the stated objective of the Bill is to reform VET in Queensland, yet the Bill merely restructures the governance of TAFE Queensland.

In support of VET being more broadly responsive to business and industry needs, the Health and Community Services Workforce Council (HCSWC) argue that, in planning the VET sector's future, *"...consideration needs to be given to industry intelligence from the critical employment and skills growth areas which will support economic productivity gains for the whole community..."*³, including and beyond the 'four pillars'. For example, the health and community services industry is one of the most significant employment sectors in the state. HCSWC, like the Australian Mines and Metals Association (AMMA), stresses the importance of including Industry Skills Bodies in the implementation of new VET arrangements.

¹ Hansard transcript, 2 May 2013, p4.

² Lifelong Learning Council of Queensland – Caboolture, *Submission 4*, p2.

³ Health and Community Services Workforce Council, *Submission 7*, p2.

The Resources Registered Training Organisation Association Incorporated (RRTO) also stresses the importance of board composition and that board members reflect the needs of the sectors they represent.⁴

Committee comment

It is important the VET system responds to industry demand. The Bill supports that goal by establishing TAFE Queensland as a body that can be more responsive and flexible, and by referencing direct industry experience as criteria for board membership provisions (clause 14).

While the Bill supports the broader VET reform goals, it is just one element of a broader suite of reforms. The Bill does not implement all of the Taskforce recommendations accepted by the government.

The government's broader approach to VET reform will:

- establish direct links between government, industry and employers to better meet industry skill needs
- promote a more open and competitive VET market
- refocus the role of the public provider, TAFE Queensland
- carefully consider TAFE asset rationalisation through a strategic asset management plan
- open up public training facilities to other providers
- introduce an entitlement to a government subsidised training place from mid-2013
- introduce an additional contestable training pool of \$42 million for entitlement in 2013-14
- incentivise training directly linked to employment outcomes
- introduce more flexible trade training arrangements, including a Registered Trade Skills Pathway
- streamline and modernise apprenticeship and traineeship arrangements.⁵

For example, the Bill does not in itself establish a more open and competitive VET market. Much of that will occur through the suite of reforms outlined above, including introducing the student entitlement model. However, in establishing TAFE Queensland, the Bill ensures the public provider can operate effectively in such an environment.

The government response to the Taskforce report specifically commits to directing public training investment towards qualifications that are more likely to lead to employment. The Committee is confident the government has considered, and continues to consider, the issues raised in the submissions to this inquiry when formalising the policy and law intended to implement the broader reforms.

The remainder of this report addresses the objectives and provisions of the TAFE Queensland Bill 2013.

⁴ Resources Registered Training Organisation Ltd, *Submission 2*, p2.

⁵ Government Response to the Queensland Skills and Training Taskforce Final Report, November 2012, p2.

1.5 Policy objectives of the TAFE Queensland Bill 2013

The policy objectives of the TAFE Queensland Bill 2013 are provided in the explanatory notes. They are to:

- establish TAFE Queensland as an independent, public provider of VET; and
- ensure that TAFE Queensland operates in an effective and efficient way and is commercially successful.

The Bill, as explained in explanatory notes, focuses on the following aspects in establishing TAFE Queensland:

- an independent body;
- a commercially focused board;
- protection of TAFE brand;
- industrial relations; and
- transitional arrangements.

An independent body

TAFE Queensland will be a commercially focused and independent statutory body, accountable directly to the Minister. It will have control of its own budget, revenue and staffing arrangements and will be a not-for-profit entity, performing the role of public provider of VET.

TAFE Queensland will be at arm's length from government and unrestricted by government agency requirements. The intent is this will enable it to be more responsive to industry needs, be more flexible in its service delivery, reduce costs and thus maximise the government's investment in publicly funded training.

Commercially focused board

A board will oversee TAFE Queensland's operations. Board members will possess qualifications and experiences in commerce and industry, similar to those of the board of a large private training provider. The board will develop TAFE Queensland's strategic vision and ensure delivery of that vision.

TAFE Queensland's Chief Executive Officer (CEO) will be responsible for daily management of the public provider and be accountable to the board.

Protection of TAFE brand

The TAFE brand will be protected through the creation of an offence prohibiting unlawful use of the brand. The Minister will be entitled to apply for injunctive relief to restrain the unlawful use of the terms "TAFE" and "technical and further education".

Industrial relations

The Bill's stated intention is to enable a contemporary, more flexible and more productive approach to employment arrangements; and to make the public VET provider more competitive and commercially focused.

Currently, TAFE employees are employed under the *Public Service Act 2008* (PSA) and employees' terms and conditions of employment are prescribed in a number of awards and certified agreements.

TAFE Queensland will:

- employ staff directly, rather than under the under the PSA;
- negotiate a new enterprise bargaining agreement for TAFE teachers (this is underway);
- be regulated under the Queensland industrial relations system, in accordance with the *Industrial Relations Act 1999* (IRA);
- be excluded from the *Fair Work Act 2009* (FWA) by regulation (with the agreement of the Commonwealth government). Statutory bodies would otherwise be covered by the FWA, rather than state legislation; and
- need the flexibility to engage in interchange and work performance agreements (similar to public service departments under the PSA).

Transitional arrangements

The establishment of TAFE Queensland will result in a single governance arrangement. The process requires the following steps:

- Step 1:
 - i. TAFE Queensland to commence on 1 July 2013 (subject to passage of the Bill);
 - ii. appointment of board members and CEO to take effect on 1 July 2013;
 - iii. dissolution of the STIs on 1 July 2013; and
 - iv. former STIs to be established administratively as TAFE institutes and their operations to be transferred to DETE.
- Step 2:
 - i. gradual transfer of TAFE institutes' operations from DETE to the new TAFE Queensland entity (to be completed by 30 June 2014).

RECOMMENDATION 1

The Committee recommends that the TAFE Queensland Bill 2013 be passed.

2 Examination of the TAFE Queensland Bill 2013

2.1 Policy issues

Quality of TAFE services

Both union and industry submitters to the Committee's inquiry acknowledge the need to reform TAFE. The Queensland Teachers Union of Employees (QTU) supports the Bill in principle⁶, and the QCU suggests qualified support.⁷ The RRTO believes the changes will stimulate further competition within the existing private training sector and assist TAFE Queensland to become the provider of choice by driving it to develop innovative business practices and an ability to deliver in a competitive market place.⁸ However, the QTU identifies a misplaced faith in the capacity of markets and competition to deliver high quality vocational education and to address skills shortages.⁹

In the public hearing held on 2 May 2013, both QTU and QCU expressed concerns about the high quality of TAFE services being adversely affected by the focus on commercial success and contestability – in this case, testing whether the private sector can provide a better and/or more cost-effective service. For example, in many subjects, TAFE institutes require teachers to possess a teaching degree, while the minimum requirement for VET teaching generally is a Certificate IV training qualification. A teaching degree is particularly important for successful delivery of TAFE programs targeting people who have disengaged from education and training, and bridging programs for university entry. Maintaining these standards results in greater costs, which may reduce TAFE's competitiveness. To be competitive, TAFE may need to lower its standards.

QTU points out that *"better educated trainers lead to a better educated workforce, which leads to higher productivity"*.¹⁰

Committee comment

Contestability in this context is a process whereby government tests the market to ensure it is providing the public with the best possible solution at the best possible price. The Committee expects that market contestability will result in a mix of public, non-government and private sector delivery, as is the case in other Australian states. Encouraging such a mix is positive, increasing choice for consumers and encouraging provider responsiveness to industry. Contestability increases the likelihood that optimum and cost-effective service delivery may be achieved.

QTU make a valid point in relation to the qualifications of TAFE staff in respect of pathways to university. More university students than ever before are entering university via the VET system, rather than the traditional OP system.

The Committee understands that the community service obligations to be recognised by the government in its VET funding model will ensure recognition of some of the additional costs of being the public provider – such as courses which are pathways to further education, and TAFE's ability to engage students who have previously been disengaged from education and training.

⁶ Hansard Transcript, 2 May 2013, p1.

⁷ Ibid, p4.

⁸ Resources Registered Training Organisation Association Incorporated, *Submission 2*, pp1-2.

⁹ Queensland Teachers' Union of Employees, *Submission 3*, p1.

¹⁰ Hansard transcript, 2 May 2013, p2.

Board composition

Clause 12 of the Bill provides that the Governor in Council appoint as board members: one nominee of the Minister and six to eight persons who are eligible for appointment as a member under clause 14. Clause 14 outlines requirements to be met by eligible board members, including direct industry/sector experience or expertise in certain disciplines.

QTU considers that board composition would be improved if the Bill specified that:

- one board member be a vocational educator employed by TAFE Queensland and nominated by the QTU, and
- a second board member possess relevant industry experience and be nominated by the QCU.¹¹

HCSWC, AMMA and RRTO also stress the importance of the board's composition, noting that the board must possess sufficient experience in commerce and industry and encompass the right mix of skills and experience¹², supporting a greater level of engagement between industry and TAFE Queensland.¹³

RRTO considers that *"The board members are critical to the success of the new TAFE Queensland and the experience that each member has, must reflect the needs of the sectors they represent."*¹⁴

Committee comment

The Committee supports the requirement in clause 14 that eligible board members possess relevant qualifications and experience; and notes that this could vary from time to time as the broader social and economic context changes. It acknowledges that the Bill does not require the board to include an existing TAFE vocational educator or require a board member to be nominated by the QCU.

However, as advised by DETE, the Bill does not prohibit the appointment of an existing TAFE vocational educator as a board member and does not prohibit the QCU from making recommendations as to whom it considers to be a suitable candidate. The Committee is satisfied that the Bill provides that appropriately experienced and skilled persons be eligible for appointment as board members, and ensures the board has sufficient flexibility to respond to the broader social and economic environment.

Public VET provider and private training providers

QTU argues that the rationale for the Bill:

- fails to reflect an understanding of the unique role of TAFE as public VET provider and to distinguish this role from that of private training providers;
- fails to acknowledge that TAFE sets the benchmark for high quality VET delivery; and
- misrepresents TAFE and its workforce as inefficient.¹⁵

ACPET, representing private RTOs, seeks greater clarity about TAFE Queensland's role as the public VET provider and, once clarified, suggests that government funding for TAFE Queensland be

¹¹ Queensland Teachers' Union of Employees, *Submission 3*, p2.

¹² Health and Community Services Workforce Council, *Submission 7*, p2.

¹³ Australian Mines and Metals Association, *Submission 8*, p2.

¹⁴ Resources Registered Training Organisation Association Incorporated, *Submission 2*, p2.

¹⁵ Queensland Teachers' Union of Employees, *Submission 3*, p1.

restricted to that role.¹⁶ ACPET argues that TAFE is not the only credible option for disadvantaged learners.¹⁷ However, the Committee notes that funding arrangements are not the subject of this Bill. DETE advises that operational plans will provide further detail of TAFE Queensland's role.

LLCQ seeks clarification of the scope of TAFE services, arguing that the Bill generates "...confusion of what TAFE Qld will actually be responsible for providing."¹⁸ Specifically, it refers to clause 8 of the Bill (which lists the functions of TAFE Queensland) and notes that "vocational education", "training services", "further education" and "other forms of education" are undefined.¹⁹ LLCQ view the ambiguity as a possible avenue to widen the scope of TAFE services to include:

- Australian Qualifications Framework (AQF) levels 6 or 7-10 VET (the traditional domain of universities); and/or
- AQF levels 1 and 2 (the traditional domain of years 11 and 12 at secondary schools).²⁰

Clause 8(1)(a) and (b) of the Bill states, respectively, that TAFE Queensland has the following functions: "to provide vocational education and training services" and "to provide further education, and other forms of education, to support and complement the provision of vocational education and training services".

In its briefing to the Committee on 18 April 2013, DETE said that the Bill explicitly intended to allow TAFE the ability to move into areas of higher education where that is going to support it achieving its objectives, and that: "The Bill specifically provides for the ability to operate interstate and internationally".²¹

RRTO notes that "an opportunity exists to work with private providers and RTOs to develop processes to work together to give the industries a total package. There is great opportunity for the two groups to be able to work together which will raise the profile of TAFE and individual RTOs".²²

Committee comment

In the Committee's view, a flexible TAFE Queensland structure can comfortably co-exist with mandated minimum requirements. TAFE Queensland should not be restricted from pursuing commercial opportunities, in circumstances where doing so supports it achieving its objectives. The Committee particularly notes the opportunities for TAFE to work, not only with private providers, as identified by the RRTO, but with schools and universities, to provide integrated training responses that support broader economic objectives. It does not wish to see limitations placed on the new structure's potential to extend into new areas, whether currently contemplated or otherwise. The Committee is satisfied that the terms used in clause 8(1)(a) and (b) of the Bill do not require specific definition.

¹⁶ Australian Council of Private Education and Training – Queensland, *Submission 6*, p9.

¹⁷ Ibid, p7.

¹⁸ Lifelong Learning Council Queensland Incorporated – Caboolture, *Submission 4*, p1.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ms Jodi Schmidt, Deputy Director-General, Training and Employment, Department of Education, Training and Employment, public briefing 18 April 2013, *Transcript*, p6.

²² RRTO, *Submission 2*, p2.

Applicability of Part 4 – restructuring TAFE

The heading of Part 4 of the Bill is “Restructuring TAFE”. The heading of clause 50 (which is located within Part 4) is “Transfer of assets, liabilities etc. to relevant TAFE entity”. Despite these headings, the Bill does not, in effect, limit Part 4 to restructuring matters or limit clause 50 to transfer issues.

For example, clause 50(1)(k) provides that a “transfer regulation” may, for a “relevant TAFE entity”, make provision about “*the employees of the relevant TAFE entity transferred under paragraph (j), and their terms and conditions of employment, rights and entitlements;*”.

In relation to clause 50 of the Bill, DETE states: “*It is **likely** (emphasis added) that any change in terms and conditions (of employment) made under a regulation would be limited to those changes necessary to facilitate the restructuring of TAFE entities*”.²³ This suggests the effect of clause 50(1)(k) is not technically restricted to changes necessary to facilitate the restructure of TAFE.

In addition to the transfer of assets and liabilities to a relevant TAFE entity, clause 50 allows for a transfer regulation to provide for other matters, including the variation or extinguishment of a lease, easement or other right held by a relevant TAFE entity; and the amendment of a lease held by a relevant TAFE entity under the *Land Act 1994* to change the purpose of the lease or to change a condition of the lease.

Committee comment

Part 4 as a whole, and clause 50 specifically, are not captured by the transitional provisions outlined in Part 6 of the Bill and are not subject to a sunset date.

While the intent may be to limit the effect of transfer regulations to those changes necessary to facilitate the restructuring of TAFE entities, technically the Bill appears to allow for changes outside of that context. Entitling Part 4, “Restructuring TAFE”, does not in itself guarantee that the attending clauses are limited in scope to provide only for that process.

It is understood that the process of restructuring TAFE may take considerable time and that including a sunset clause may be impractical. However, it is important that the Bill, and consequent Act, be unambiguous. Therefore, an amendment to the Bill is recommended.

RECOMMENDATION 2

The Committee recommends that the Minister amend the headings of Part 4 and clause 50 to ensure clarity and reduce the likelihood of misinterpretation.

Clause 30 - industrial conditions/transitional provisions

Clause 30 of the Bill provides for the CEO to enter into a “work performance arrangement” with certain employees. QTU queries the clause:

It is unclear in what situations and circumstances a ‘work performance arrangement’ would be deemed to be appropriate or why such an arrangement would be necessary. At a briefing about the Bill provided to the QTU by DETE, we were told that this clause was not intended to be used in the long term, but related to the transitional

²³ Department of Education, Training and Employment, *Response to Submissions*, p4.

*arrangements attending the creation of TAFE Queensland as a statutory authority. If this is the case, it would be appropriate to specify this in the legislation.*²⁴

DETE notes that the ability to enter into work performance and interchange agreements is a power given to public service agencies generally.²⁵ The Bill ensures that TAFE Queensland is granted that same power.²⁶ DETE supports the flexibility of allowing access to staff, without directly employing them and without loss of their entitlements.²⁷

DETE observes that:

*Initially, these arrangements **may** (emphasis added) be used as a transitional measure... The future use of this power will be a matter for TAFE Queensland to determine. It would allow TAFE Queensland to secure the services of public service agency staff without employing them under the Bill.*²⁸

Committee comment

Regardless of stated or assumed intentions, it would seem that, in effect, clause 30 is not merely transitional in nature. The duration and extent of its relevance will depend on decisions made by TAFE Queensland. During the restructuring process and beyond, it will be necessary that public sector employees continue to work in TAFE institutes.

The Committee supports the Bill's flexibility in allowing for employees to move between public sector entities and TAFE Queensland. The Committee would not support limitations on opportunities for staff to move between the agencies.

Clause 34 – criminal history checking

Clause 34 empowers TAFE Queensland to procure criminal history information from the commissioner of police about employees and prospective employees and to make decisions about their appropriateness for performing duties. QTU wishes to protect these employees by requiring that, before the decision is made, TAFE Queensland provide these employees with copies of material obtained from the commissioner and allow them reasonable opportunity to make a written submission.²⁹

DETE advises that the criminal history checking provisions are standard provisions used in Queensland legislation:

*It reflects current practice for public service appointments and criminal history checking. It reflects current practice for appointment of employees of TAFE institutes as these staff are public service officers. This provision is necessary because TAFE Queensland is not a public service agency and the Public Service Act 2008 criminal history check provisions do not apply.*³⁰

²⁴ Queensland Teachers' Union of Employees, *Submission 3*, pp1-2.

²⁵ Department of Education, Training and Employment, *Response to Submissions*, p2.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Queensland Teachers' Union of Employees, *Submission 3*, pp2-3.

³⁰ Department of Education, Training and Employment, *Response to Submissions*, pp9-10.

DETE further states that: “A person must consent to a check before it is conducted” and notes that TAFE Queensland must decide its own procedure for criminal history screening once it is established.³¹

Committee comment

It is important that employee rights be appropriately balanced against TAFE Queensland’s ability to operate effectively, with adequate protections for service users and the government. It seems particularly appropriate that the current TAFE requirements for criminal history checking continue to apply.

Clause 50 – broad powers/transitional provisions

There are a number of clauses in the Bill which provide fairly broad powers to the Minister, and this is the subject of some concern, as articulated by the QTU, who said that: “One of the key problems with some of the breadth of it is the potential for the minister to therefore overrule certified agreements and some of the industrial relations legislation; and: “Although the intent is clear behind it its actual application can be quite broad and, within that breadth, quite scary for want of a better word for TAFE employees and TAFE staff who are moved into this arrangement”.³²

Clause 67 empowers the Governor in Council to make regulations under the Act (that is, the Bill, once enacted) **or** (emphasis added) relating to any or all of the functions of TAFE Queensland under the Act. The subject matter of a “transfer regulation” is identified in Clause 50. Such a regulation may provide for various things to occur in relation to a relevant TAFE entity, some of which were discussed in the above section relating to Recommendation 2. Amongst other matters, clause 50 states that a transfer regulation may make provision about:

- the transfer of an employee between relevant TAFE entities – clause 50(1)(j);
- such an employee and his or her terms and conditions of employment, rights and entitlements – clause 50(1)(k);
- the application of a particular “industrial instrument”, as defined in the IRA (including awards and certified agreements), to:-
 - such an employee;
 - the relevant TAFE entity to which such an employee is transferred; or
 - other employees of that relevant TAFE entity; – clause 50(1)(l).

Clause 50(2)(b) provides that a transfer regulation has effect despite any other law or instrument.

Clause 50(3) states that a transfer regulation applies, despite the IRA and any industrial instrument.

³¹ Ibid, p10.

³² Hansard Transcript, 2 May, p2.

QTU is concerned:

- with the broad nature of matters that may be subject to a transfer regulation, and advocates restrictions;
- that the power to make transfer regulations is not identified as a transitional provision and is not subject to a sunset date; and
- that the government will possess power to unilaterally override industrial instruments and alter working conditions by making a transfer regulation.³³

In reference to clause 50(3), QTU commented during the public hearing that:

I understand, again from speaking with the department and colleagues at the department, that the intention is clear that it was to have a specific restructure, let us say, for that section... However, the drafting provides enormous power with very little limitation. Potentially, it employs people on a whole range of reasons... All it would simply take would be a very few short limiting words to perhaps limit the time frame or the context of it and it would completely change the scope.³⁴

In relation to concerns of the broad nature of regulation making power, DETE states that:

The regulation making power is broad because it is necessary to provide for a range of restructuring activities that will occur over time... The clause adopts current Queensland drafting practice for legislation restructuring public bodies and ensures there is sufficient power to deal with restructuring of TAFE Queensland. Regulations will only be made as necessary and to deal with matters listed in the clause.³⁵

With respect to concerns surrounding the lack of a sunset date for the regulation making power, DETE comments that it is necessary “...as a number of future transfer regulations will need to be made subject to how TAFE Queensland is restructured.”³⁶

In relation to concerns pertaining to the treatment of staff under the regulation making power, DETE states that: “The Government’s policy and stated intention is to negotiate a new enterprise bargaining agreement with staff which will determine the conditions of TAFE Queensland employees.”³⁷ DETE observes that clause 55 limits the scope of transfer regulations, as such regulations must not reduce the transferred employee’s total remuneration; or prejudice the transferred employees existing or accruing rights to superannuation or recreation, sick, long service or other leave – clause 55(2)(a) and (b), respectively. DETE states that a transfer regulation can only change terms and conditions of employment that are unprotected by clause 55, such as hours of duty.³⁸ TAFE staff hours of duty has been specifically referenced as an area requiring change, for example, in the government response to the Taskforce recommendations.

³³ Queensland Teachers’ Union of Employees, *Submission 3*, pp2-3.

³⁴ Ms Thalia Edmonds, Industrial Advocate, Queensland Teachers’ Union of Employees, public hearing 2 May 2013, *Transcript*, p2.

³⁵ Department of Education, Training and Employment, *Response to Submissions*, pp2-3.

³⁶ *Ibid*, p4.

³⁷ *Ibid*, p3.

³⁸ *Ibid*, p4.

DETE further states that:

*A regulation can only be made under clause 50 as part of a restructure and a transfer of staff from one entity to another. The regulation making power does not provide for changes to conditions of employees generally.*³⁹

Clause 51 – broad powers

Clause 51 empowers the Minister to give a “transfer direction” relating to the restructure of a “relevant entity” (including, TAFE Queensland). A transfer direction may include a direction on the timing of the transfer of employees and can direct a relevant entity or its board, who must comply with the direction. QTU is concerned that there are no limitations on the Minister’s capacity to issue a transfer direction or what it will be about.⁴⁰

DETE states that:

*This power supplements the regulation making power in clause 50. It allows the Minister to direct an entity about how to deal with a transfer matter, such as signing documents or when particular events should occur.*⁴¹

Clause 56 – broad powers

Clause 56 provides that things done under Part 4, including the making of a transfer regulation and transfer direction, override other laws or instruments.

QTU is concerned about the breadth of this power and identify the clause as “...perhaps the most startling example of the breadth in which some sections of the Bill are framed”.⁴²

DETE states that:

*Clause 56 ensures that a regulation made under clause 50 can be made even if another instrument would otherwise prohibit it. For example, a TAFE entity may have leased premises and promised the lessor that it would not transfer the lease without the lessor’s approval. This type of clause would allow the transfer to be made without the lessor’s approval. This type of provision is necessary to ensure that the Government’s policy of restructuring TAFE Queensland can be implemented effectively.*⁴³

Clause 57

In certain circumstances, clause 57 affects third party consent and approval, and automatically deems that notice has been given to third parties whether it has or not. QTU identifies these provisions as exempting the Minister from requirements enshrined in laws, regulations, policies or other instruments. These clauses appear to grant unfettered power to the Minister.

³⁹ Ibid, p5.

⁴⁰ Queensland Teachers’ Union of Employees, *Submission 3*, p2.

⁴¹ Department of Education, Training and Employment, *Response to Submissions*, p5.

⁴² Queensland Teachers’ Union of Employees, *Submission 3*, p2.

⁴³ Department of Education, Training and Employment, *Response to Submissions*, pp7-8.

Committee comment

The Committee acknowledges that sufficient regulation making power must exist to facilitate the TAFE restructuring process, but draws attention to the breadth of powers provided by the Bill.

Although it may not be the intent that the Minister would wield inappropriate power despite other laws and instruments – such as contracts or the Criminal Code - questions of legality exist in circumstances where the Minister is empowered to act “despite any other law or instrument” (see 3.1 of this report). The Committee notes that, should this power be used too liberally, the lawfulness of transfer regulations may be challenged.

The Committee is concerned by the scope of the powers included in clause 50. For example, in addition to enabling leases to be transferred to the new entity (as per DETE’s example in support of the powers) the clause could allow for the breaking, or unilateral variation, of leases. Potentially, such a power, if it is lawful, may severely affect the rights of current tenants of TAFE institutes.

The Committee notes that employees’ hours of duty are unprotected by clause 55 and are, therefore, subject to any relevant transfer regulation.⁴⁴ The current hours of duty arrangement was identified by the Taskforce as an impediment to TAFE’s present level of functioning, and the Taskforce recommended, at a minimum, “*the need for a wider spread of hours and contact time, including removal of the in-built systemic barriers to evening classes*”.⁴⁵ It is also noted that negotiations are occurring at the time of writing this report, towards a new enterprise bargaining agreement for TAFE teachers. The Bill, when enacted, will provide the capacity for these impediments to be addressed.

The Committee is unclear as to what other matters may be subject to a transfer regulation and considers that community concerns would be allayed somewhat if the scope of the Minister’s power was specified more tightly in the legislation.

In relation to transfer directions (clause 51), the Committee considers that the Ministerial powers granted are more clearly defined than the powers granted in clause 50. However, some points for clarification are raised.

POINT FOR CLARIFICATION 1

The Committee seeks clarification from the Minister regarding the rationale for the breadth, and lack of specificity, of those powers intended to be transitional powers to support the restructure.

It also seeks clarification from the Minister about whether:

- a transfer direction can be made to implement a transfer regulation;
- a transfer direction can override a transfer regulation, in any way circumvent or avoid a transfer regulation or affect matters otherwise subject to a transfer regulation, but in a different way to the way specified in the transfer regulation;
- it is intended that clause 51 be interpreted more narrowly than clause 50, given the former clause’s specific reference to the process of restructure; and
- what the word “convenient” in clause 51 might mean in practice.

⁴⁴ Ibid, p4.

⁴⁵ Government response to Skills and Training Taskforce final report, p14.

*Financial viability of TAFE institutes following restructure***Committee comment**

In fulfilling its functions under the *Parliament of Queensland Act 2001* relating to public accounts, the Committee has become aware of a matter involving an unfunded liability that relates to a STI.⁴⁶ In respect of transferring businesses, assets or liabilities of one TAFE entity to another, as will occur during the process of establishing TAFE Queensland, the Committee queries the intended treatment of any unfunded future Public Private Partnership (PPP) liabilities.⁴⁷

The Committee is aware of the possible merger of Central Queensland University (CQU) and a local TAFE institute. Given the Bill's transfer provisions, the Committee queries what effect the merger will have on that university's existing debts (as recently outlined by the Auditor-General)⁴⁸ and whether there is a risk of any detrimental financial impact on that TAFE institute.

POINT FOR CLARIFICATION 2

The Committee seeks clarification from the Minister as to:

- the proposed treatment of any unfunded PPP liabilities; and
- the anticipated effect the merger will have on CQU's existing debts and whether it will result in detrimental financial impact on that TAFE institute.

Clause 55 – industrial conditions/broad powers

Clause 55 grants rights, or protections, to employees transferred under a transfer regulation. Clause 55(3) provides that the transfer has effect despite any other contract, law or instrument.

QTU's view is that clause 55 allows wide scope for unilateral alteration of working conditions.⁴⁹ It supports the considerable broadening of the existing protections included in the clause.⁵⁰

DETE's advice, though, rejects the claim that clause 55 provides for the unilateral alteration of working conditions and reiterates comments relating to the breadth of power given by clause 50.⁵¹ It further states that:

*It is necessary to provide for the transfer to have effect despite any other contract, law or instrument because an employee may have a contract of employment which prevents transfer. In order for the restructure of TAFE Queensland to be implemented it is necessary for the transfer of employees to occur despite such a clause in a person's contract of employment. It should be noted that employees who are transferred will not have their remuneration reduced or rights and entitlements affected as a result of the transfer.*⁵²

⁴⁶ Auditor-General report to Parliament no. 5 for 2012-13.

⁴⁷ Auditor-General report to Parliament no. 5 for 2012-13.

⁴⁸ Auditor-General report to Parliament no. 11 for 2012-13 – Education Sector Entities 2012.

⁴⁹ Queensland Teachers' Union of Employees, *Submission 3*, p2.

⁵⁰ Ibid.

⁵¹ Department of Education, Training and Employment, *Response to Submissions*, p6.

⁵² Ibid, pp6-7.

In relation to conditions of employment, QCU comments that:

Those are conditions of employment that have been developed over years of negotiation and decisions of arbitral tribunals. It has been a practice of this government to simply override those existing conditions either with legislation and/or regulation....we would consider such a practice to be unfair and, quite frankly, undemocratic.⁵³

Committee comment

The Committee acknowledges concerns by stakeholders that employee protections included in the clause are not sufficiently extensive. It is important that an appropriate balance be struck between the requirements of the TAFE restructure, including the need to ensure hours of duty support the aim of TAFE Queensland being a flexible, commercially successful entity, and the rights of employees.

The Committee notes that clause 55 is limited in application to employees transferred under a transfer regulation. No reference is made to protections for employees under any transfer direction made under clause 51. The relevance of this observation depends on the intended and actual scope of clause 51, and the Minister's advice has been sought (Point for clarification 1).

Section 3 of this report, titled 'Fundamental legislative principles', more thoroughly addresses the application of clause 56 and the question of whether it is lawful that this legislation apply despite any other contract, law or instrument.

The Committee supports the appropriate balance between the practicalities of the restructuring process and the rights of employees.

POINT FOR CLARIFICATION 3

The Committee seeks clarification from the Minister regarding the following aspects of clause 55:

- the lawfulness, or otherwise, of clause 55(3); and
- the appropriateness of the extent of included employee protections.

Protection of TAFE Brand

Committee comment

The Committee acknowledges the importance of the State protecting its valuable intellectual property and protecting the interests of consumers who, in good faith, understand they are purchasing TAFE services. The Committee supports the TAFE branding protection provisions included in the Bill.

Delegations

Clauses 60-62 grant TAFE Queensland, the CEO and the Minister power to delegate their respective functions to specific individuals, some of whom must be "appropriately qualified". Submission 1 expressed concerns that certain delegates, such as those who possess "standing" only, may not possess appropriate qualifications and/or expertise. As a result, the submission suggests a strengthening of the definition of "appropriately qualified".

⁵³ Mr John Martin, Research and Policy Officer, Queensland Council of Unions, public hearing 2 May 2013, *Transcript*, p4.

The Bill's definition of "appropriately qualified" is consistent with definitions in other, similar legislation. In response to Submission 1, DETE identify it as a standard definition used in Queensland legislation. DETE also observe that it is the responsibility of the delegator to consider whether the delegate possesses appropriate qualifications, experience or standing.

It is noted that such definitions are generally detailed at a level lower than an Act; such as in guidelines or in position descriptions.

Committee comment

The delegations granted under the Bill are appropriate.

3 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* (LSA) states that “fundamental legislative principles” are the “*principles relating to legislation that underlie a parliamentary democracy based on the rule of law*”. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals, and
- the institution of parliament.

As well as considering the policy to be given effect by the legislation, portfolio committees are required to review Bills in respect of their lawfulness, and advise the Legislative Assembly on whether fundamental legislative principles (FLPs) have been given appropriate regard.

3.1 The institution of parliament

Amendment of an Act only by another Act

Whether a bill has sufficient regard to the institution of Parliament, is informed by whether that bill “*authorises the amendment of an Act only by another Act*” (s.4(4)(c) of the LSA).

The Bill contains a number of broad regulation and direction making powers related to the employment rights of individuals, which raise FLP issues:

- Clause 50(2)(b) provides that a transfer regulation has effect despite any other law or instrument;
- Clause 50(3) provides that a transfer regulation applies despite the IRA and any industrial instrument;
- Clause 55(3) provides that a transfer under a transfer regulation has effect despite any other contract, law or instrument; and
- Clause 56 provides that a thing may be done under ‘Part 4 – Restructuring TAFE’ of the Bill despite any other law or instrument.

It is generally contrary to FLPs for an Act to authorise a regulation that could override the Act or to grant regulation making power which is not subject to another control, such as sunseting. For these reasons, the above clauses may not have sufficient regard to the institution of Parliament.

However, an Act authorising a regulation that will over-ride the Act itself, is sometimes justified if it facilitates transitional arrangements. Despite concerns that Part 4 of the Act is not subject to sunseting and may extend beyond mere restructuring, the Part will likely apply to some transitional arrangements. Certainly, this intention is expressed in the policy objectives of the Bill set out on page 4 of the explanatory notes. Given the identified clauses are included in Part 4, it can be argued that the clauses are justified and not contrary to FLPs. Further, the powers in Part 4 are limited to relevant TAFE entities.

Section 109 of the Commonwealth Constitution⁵⁴ provides that “*when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid*”. Accordingly, the above clauses shall be invalid to the extent they are inconsistent with Commonwealth law. Any such conflict will reduce the practical effect of the Bill.

⁵⁴ The Commonwealth of Australia Constitution Act

Committee comment

In this Report, the Committee has observed the inclusion of broad and general ministerial powers. These powers are evident in the above clauses, along with clause 51 and clause 57.

POINT FOR CLARIFICATION 4

The Committee seeks clarification from the Minister regarding the breadth of Ministerial powers included in the Bill, with specific reference to the relationship this Bill has with other laws or instruments.

Delegated legislative power subject to scrutiny by the Legislative Assembly

Whether a bill has sufficient regard to the institution of Parliament, is informed by whether that bill “sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly” (s.4(4)(b) of the LSA).

Clause 50(2)(c) provides that a transfer regulation may provide for a matter by reference to a document held by an entity.

It is generally contrary to FLPs for an Act to incorporate as law, documents (as they exist from time to time) made by non-government entities. For this reason, clause 50(2)(c) may adversely affect the institution of Parliament by delegating law-making power to such entities.

Concerns may be diminished where:

- incorporation of a document is practical;
- the document is a fixed document, readily accessible to readers of legislation;
- the document must be incorporated under subordinate legislation (which may be disallowed) and is attached to the subordinate legislation, or required to be tabled with it;
- amendments to the document must be approved by subordinate legislation, which must provide for access to those amendments where the amendments are not included in the subordinate legislation;⁵⁵
- the document is lengthy, detailed and technical in nature;
- the document will require future, rapid amendments.

Committee comment

Clause 50(2) lacks detail and may arguably fail to have sufficient regard to the institution of Parliament. However, this could be justified depending on the type of document. The Committee does not have information about what the government envisages in this respect, and asks that the Minister provide clarification to the Legislative Assembly before the Bill is passed.

⁵⁵ *Alert Digest* 2006/5, p3.

POINT FOR CLARIFICATION 5

The Committee seeks clarification from the Minister regarding the following aspects of clause 50(2)(c):

- the type and nature of documents envisaged to be incorporated by a transfer regulation;
- anticipated accessibility to incorporated documents;
- expectations of the extent, and frequency, of amendments to incorporated documents;
- anticipated accessibility to amended incorporated documents or the amendments to incorporated documents; and
- expectations of the extent to which government will prepare or amend incorporated documents, and to which non-government entities will assume this role.

3.2 Rights and liberties of individuals

Natural justice

Whether legislation has sufficient regard to rights and liberties of individuals, is informed by whether that legislation “*is consistent with principles of natural justice*” (s.4(3)(b) of the LSA).

Clause 59 provides that the Minister may apply to the Supreme Court of Queensland for an injunction restraining an offending party from engaging, or continuing to engage, in conduct in contravention of clause 58 (that is, using the term “TAFE” or “technical and further education” without Ministerial approval). Sub-section (3) provides that the court may grant an interim injunction pending a decision about the application.

Where a court is satisfied adequate reasons exist, an injunction or interim injunction may be granted *without notice* to the restrained party – clause 59(6).

Interim injunctions without notice, may be justified where there is an urgent need to prevent anticipated, or stop actual, offending conduct or to preserve the status quo, pending further judicial consideration. They raise fewer FLP concerns than injunctions without notice.

Interim injunctions without notice, are an available remedy under other legislative provisions in Queensland.⁵⁶ Interim injunctions can sometimes be granted, without the restrained person having an opportunity to be heard, for example, in s.119 of the IRA and s.59 of the *Queensland Civil and Administrative Tribunal Act 2009*.

In the process which ends with a successful application for an *injunction without notice*, a restrained party enjoys no right to be heard. The right to be heard is a principle of natural justice. Williams JA of the Queensland Court of Appeal in *Re Criminal Proceeds Confiscation Act 2002* (Qld) [2003] QCA 249 stated:

One of the requirements [of natural justice] is that a party likely to be affected by the decision shall be duly notified when and where the matter will be heard and then be given full opportunity of stating the case in response. There are throughout the law reports innumerable cases containing statements to the effect that a person may not be

⁵⁶ For example, an injunction under the *Explosives Act 1999*, part 6, division 4, may be granted at any time.

*condemned unheard or without being given reasonable opportunity of putting forward a case. That is a universal principle which applies to both civil and criminal proceedings.*⁵⁷

Providing a party adequate notice of a hearing is an aspect of procedural fairness, which in turn is an element of natural justice.

Committee comment

The Committee believes that the importance of protecting the TAFE brand warrants the lack of notice.

Clarity

Whether legislation has sufficient regard to rights and liberties of individuals, is informed by whether that legislation “*is unambiguous and drafted in a sufficiently clear and precise way*” (s.4(3)(k) of the LSA).

Clause 69 provides for TAFE Queensland’s first operational plan and includes a minor drafting issue.

Committee comment

The Committee considers that a minor drafting correction will ensure the clause is compliant with current drafting practices and enhance clarity.

RECOMMENDATION 3

The Committee recommends that the Minister amend clause 69(b) to delete the words “as soon as possible” and replace them with “as soon as practicable”.

Clause 12 provides for the establishment of TAFE Queensland’s governing board. The board is to consist of one nominee of the Minister, and six to eight persons who are eligible for appointment as a member under clause 14. The latter clause lists membership eligibility requirements, including possession of relevant skills or experience.

Committee comment

The Committee assumes the intent of the Bill is that the Ministerial nominee should be subject to the same rules as members, including the membership eligibility requirements under clause 14.

RECOMMENDATION 4

The Committee recommends that the Minister amend clause 12 to ensure that the Minister’s nominee is intended to be a member for the purposes of Part 2, Division 3, Subdivisions 2 and 3.

⁵⁷ Cited in Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, 2008, p26.

3.3 New penalties

Committee comment

The Committee notes proposed penalties for certain matters, including, for example, the presence of a board member during board discussions whilst that board member has a conflict of interest or the unauthorised use of the TAFE Queensland brand. The Committee considers these penalties to be appropriate.

*Explanatory notes***Committee comment**

Part 4 of the LSA relates to explanatory notes. It requires that an explanatory note be circulated when a bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the Bill. The notes are fairly detailed and contain the information required by Part 4 and a reasonable level of background information and commentary to facilitate understanding of the Bill's aims and origins.

Appendices

Appendix A – List of Submissions

Sub #	Submitter
1	[name suppressed]
2	Resources Registered Training Organisation Association Incorporated
3	Queensland Teachers' Union of Employees
4	Lifelong Learning Council Queensland Incorporated - Caboolture
5	Queensland Tourism Industry Council
6	Australian Council of Private Education and Training - Queensland
7	Health and Community Services Workforce Council
8	Australian Mines and Metals Association

Appendix B – Witnesses at public briefing – 18 April 2013**Witnesses**Department of Education, Training and Employment

- Mr Christopher Roney, Principal Adviser, Policy and Legislation
- Ms Jodi Schmidt, Deputy Director-General, Training and Employment
- Ms Aleisha Straughan, Director, Skills-Reform
- Dr Jim Watterston, Director-General
- Ms Annette Whitehead, Deputy Director-General, Policy and Programs

Appendix C – Witnesses at public hearing – 2 May 2013

Witnesses
<u>Queensland Teachers' Union of Employees</u> <ul style="list-style-type: none">- Ms Thalia Edmonds, Industrial Advocate- Mr Mark Anghel, Assistant Secretary – Services
<u>Queensland Council of Unions</u> <ul style="list-style-type: none">- Mr John Martin, Research and Policy Officer

Statement of reservation

The Opposition has substantial reservations and concerns about several aspects of the *TAFE Queensland Bill 2013*. Further details about the Opposition's reservations will be outlined in Parliament during the second reading debate on the Bill. The Opposition will also be seeking clarification from the Minister on a number of issues of concern.



Desley Scott
Member for Woodridge
Deputy Chair, Education and Innovation Committee