



Further Education and Training (Training Ombudsman) and Another Act Amendment Bill 2015

Report No. 10

**Education, Tourism and Small Business Committee
February 2016**

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Chair	Mr Scott Stewart MP, Member for Townsville
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Staff	Ms Sue Cawcutt, Research Director Ms Kym Christensen, Principal Research Officer Ms Joanne Walther, Executive Assistant
Technical Scrutiny Secretariat	Ms Renee Easten, Research Director Mr Michael Gorringe, Principal Research Officer Ms Kellie Moule, Principal Research Officer (part-time) Ms Tamara Vitale, Executive Assistant
Contact details	Education, Tourism and Small Business Committee Parliament House George Street Brisbane Qld 4000
Telephone	+61 7 3553 6657
Fax	+61 7 3553 6699
Email	etsbc@parliament.qld.gov.au
Web	www.parliament.qld.gov.au/etsbc

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Abbreviations and glossary

the FET Act	<i>Further Education and Training Act 2014</i>
ASQA	Australian Skills Quality Authority
the Bill	Further Education and Training (Training Ombudsman) and Another Act Amendment Bill 2015
chief executive	Director General of the Department of Education and Training
<i>compliance matter</i>	“means a matter about compliance with this Act (the FET Act) by an apprentice, trainee, employer or supervising registered training organisation.” (section 112A)
the department	Department of Education and Training
LSA	<i>Legislative Standards Act 1992</i>
the Minister	Attorney-General and Minister for Justice and Minister for Training and Skills
<i>referral entity</i>	“..for a complaint, means an entity other than the chief executive, whose functions include dealing with a matter the subject of a complaint.” (section 112A) This includes, for example, the ASQA, the Office of Fair Trading and the Overseas Students Ombudsman.
<i>pre-qualified supplier</i>	“means a registered training organisation that has entered into a current Vocational Education and Training Pre-Qualified Supplier Agreement with the department.” (section 112A)
QCAT	Queensland Civil and Administrative Tribunal
QCAT Act	<i>Queensland Civil and Administrative Tribunal Act 2009</i>
RTO	registered training organisation – registered with the ASQA
VET	vocational education and training

Chair's foreword

On behalf of the Education, Tourism and Small Business Committee of the 55th Parliament of Queensland, I present this report on the Further Education and Training (Training Ombudsman) and Another Act Amendment Bill 2015.

The Bill was introduced into the Legislative Assembly by the Attorney-General and Minister for Justice and Minister for Training and Skills on 1 December 2015. The committee was required to report to the Legislative Assembly by 15 February 2016.

In considering the Bill, the committee's task was to consider the policy to be given effect by the Bill, and whether the Bill has sufficient regard to the fundamental legislative principles in the *Legislative Standards Act 1992*. The fundamental legislative principles include whether legislation has sufficient regard to the rights and liberties of individuals and to the institution of Parliament.

On behalf of the committee, I thank the organisations that made written submissions on this Bill. Thanks also to officials from the Department of Education and Training who briefed the committee, the committee's staff, and the Technical Scrutiny Secretariat.

A handwritten signature in black ink, appearing to read 'Scott Stewart', is positioned in the center of the page.

Scott Stewart MP
Chair

Recommendations

Recommendation 1 **1**

The committee recommends that the Further Education and Training (Training Ombudsman) and Another Act Amendment Bill 2015 be passed.

Recommendation 2 **12**

The committee recommends that proposed section 112D of the Further Education and Training (Training Ombudsman) and Another Act Amendment Bill 2015 be amended to include a function for the Training Ombudsman of promotion and education about the Training Ombudsman's role.

Recommendation 3 **15**

The committee recommends that the Further Education and Training (Training Ombudsman) and Another Act Amendment Bill 2015 be amended to correct a numbering error in proposed section 112D.

1 Introduction

1.1 Role of the committee

The Education, Tourism and Small Business Committee (the committee) was established by resolution of the Legislative Assembly on 27 March 2015. The committee consists of three government and three non-government members.

The committee's areas of portfolio responsibility are:

- education, and
- tourism, major events, small business and the Commonwealth Games.¹

In relation to a portfolio committee's responsibility for examining legislation, section 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
- the application of the fundamental legislative principles to the Bill.

1.2 Referral of the Bill

The Further Education and Training (Training Ombudsman) and Another Act Amendment Bill 2015 (the Bill) was introduced into the Legislative Assembly on 1 December 2015 by the Hon Yvette D'Ath MP, Attorney-General and Minister for Justice and Minister for Training and Skills. The Bill was initially referred to the Legal Affairs and Community Safety Committee, and the Committee of the Legislative Assembly varied the referral of the Bill to the Education, Tourism and Small Business Committee, as advised to the House on 1 December 2015. The committee was required to report to the Legislative Assembly by 15 February 2016.

1.3 Committee inquiry process

The committee received an oral briefing on the Bill from the Department of Education and Training on 4 December 2015. A transcript of the briefing is available on the committee's website.

The committee invited submissions by notice on its website, and by email to subscribers and 28 stakeholder organisations. Submissions closed on 22 January 2016 and four submissions were received. The submissions are available on the committee's webpage at www.parliament.qld.gov.au/work-of-committees/committees/ETSBC.

The committee resolved that in light of the submissions, it would not hold a public hearing on the Bill.

1.4 Should the Bill be passed?

Standing Order 132(1) requires the committee to recommend whether the Bill should be passed. The committee considered the Bill, information provided by the department and the information and views expressed in submissions.

After considering the policy issues discussed in this report, and considering whether the Bill has sufficient regard to the fundamental legislative principles, the committee recommends that the Bill be passed.

Recommendation 1

The committee recommends that the Further Education and Training (Training Ombudsman) and Another Act Amendment Bill 2015 be passed.

¹ Schedule 6 of the *Standing Rules and Orders of the Legislative Assembly*, effective from 31 August 2004 (amended 17 July 2015).

2 Vocational education and training

2.1 Regulation of the vocational education and training sector

The vocational education and training (VET) sector is complex. Services are delivered by public sector and private sector organisations, and regulation of VET spans both Australian and State government agencies. In 2012 Queensland referred powers to the Australian government to regulate the VET sector.

Queensland VET services are provided by TAFE Queensland and a large number of private providers which are regulated by Australian Skills Quality Authority (ASQA). Many of the registered training organisations (RTOs) are also prequalified suppliers with the Department of Education and Training (the department).

2.1 Agencies that may receive complains about vocational education and training

2.1.1 Introduction

Concerns and complaints about apprenticeships, traineeships and RTOs are dealt with by a number of state and national agencies, depending on the subject matter of the complaint and the entity that is the subject of a complaint. A summary of the various complaint agencies that are able to deal with particular complaints in the VET sector follows.

2.1.2 Australian Skills Quality Authority

The ASQA is the national VET regulatory body for the following VET providers:

- registered training organisations
- providers delivering VET courses to overseas students studying in Australia on student visas, and
- providers that deliver intensive English language courses to overseas students.

Other responsibilities of ASQA include accreditation of vocational education and training courses and registration on the Commonwealth Register of Institutions and Courses for Overseas Students.

Complaints may be made to ASQA by students and other stakeholders about the:

- quality of training and assessment services being delivered by ASQA-registered providers, and
- marketing and advertising practices of RTOs and organisations claiming to be RTOs.²

In 2014-15 ASQA received 1512 complaints about VET providers. The most common categories of complaints were training, marketing and assessment, trainers and assessors, dishonest conduct and behaviour. Those complaint categories constituted just over 60 per cent of complaints received. Common issues identified in complaints in 2014–15 included:

- marketing of providers and courses to vulnerable individuals, including courses paid for through government funding and courses where the student incurs a debt
- courses where the amount of training delivered to achieve the qualification did not allow the student to gain the necessary skills and knowledge
- training relating to childcare
- marketing practices of third parties, such as brokers, recruitment agents, and non-registered training organisations.³

2.1.3 Office of Fair Trading

The Office of Fair Trading in the Department of Justice and Attorney-General receives consumer complaints. A consumer guarantee applies to any service that costs less than \$40,000 that is purchased

² <http://www.asqa.gov.au>

³ Australian Skills Quality Authority, *Annual Report 2014-15*, http://www.asqa.gov.au/verve/resources/ASQA_Annual_Report_2014-15.pdf, accessed 15/12/15

from a business. A provider of a VET course must honour any promise made about their service (consumer guarantee). A student could seek a remedy if the service provider does not meet the consumer guarantee.

2.1.4 Queensland Ombudsman

The Queensland Ombudsman deals with complaints about state agencies. In 2013-14 the Ombudsman received 57 complaints about TAFE Queensland; in the preceding two years the Ombudsman received 74 and 59 complaints.⁴

2.1.5 Overseas Students Ombudsman

The Overseas Students Ombudsman (OSO) started operation in 2011 after amendments to the *Ombudsman Act 1976* (Cwth) in response to an earlier review of education services for overseas students.⁵ In 2013-14 the OSO received 518 complaints about private-registered education providers. Complaints were about: refunds and fee disputes; provider's decisions to refuse a student transfer to another provider; provider's decisions to report students to the Department of Immigration and Border Protection for failing to meet attendance requirements or failing to meet course progress requirements. Some complaints were transferred to ASQA (or equivalent state bodies), the Tuition Protection Service and the Human Rights Commission.⁶

2.1.6 Tuition Protection Service

The Tuition Protection Service (TPS) is an Australian Government agency established under the *Education Services for Overseas Students Act 2012* (Cwth) to assist international students whose education providers are unable to fully deliver their course of study. If a provider is unable to deliver a course and does not meet their obligation to offer an alternative course or refund fees, the TPS assists international students to find an alternative course or obtain a refund of fees.⁷

2.2 Former Training Ombudsman

The role of Training Ombudsman was previously established under the (now repealed) *Vocational Education, Training and Employment Act 2000*, however, the role was abolished in November 2012. While there are substantial similarities between the role of the former Training Ombudsman and the role proposed by the Bill, the Bill specifies additional functions for the new Training Ombudsman. The proposed functions are outlined in section 3 of this report.

The former Training Ombudsman dealt with complaints through both formal and informal investigations, informal resolution and mediation and by referring matters to other entities. For example, in 2010-2011 the Training Ombudsman received 1,677 contacts, conducted 31 formal investigations and 386 informal investigations.⁸ In the following year contacts remained stable (1,660) but the number of formal investigations increased by 33 per cent to 45. Most matters (80 per cent) related to apprenticeships.⁹

⁴ Queensland Ombudsman, *Annual Report 2013-14, 2012-13, 2011-12*

⁵ Overseas Students Ombudsman, *Annual Report 2011-12*

⁶ Overseas Students Ombudsman, *Annual Report 2013-14*

⁷ Tuition Protection Service, www.tps.gov.au

⁸ Training Ombudsman, *Annual Report 2010-2011*, p 10

<http://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2011/5311T5407.pdf>

⁹ Training Ombudsman, *Annual Report 2011-12*, pp 3 and 13

<http://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2012/5412T1172.pdf>

2.3 Interim Training Ombudsman

An interim Training Ombudsman was established by the Attorney-General and Minister for Justice and Minister for Training and Skills on 14 September 2015 through a Ministerial charter.¹⁰ The web page for the interim Training Ombudsman describes the ombudsman's role:

The Training Ombudsman provides a free, confidential, and independent service to review and resolve enquiries and complaints from apprentices, trainees, students, employers and other stakeholders about the VET system.

The Ombudsman can help you navigate the complex VET sector and find the best way to address your concerns as well as provide free and impartial advice about rights and responsibilities within the VET sector.

The Training Ombudsman will look at your circumstances and assist you to resolve issues appropriately by:

- *reviewing the issue and recommending the most appropriate action to take*
- *referring the complaint to another agency if they are best suited to assist*
- *mediating between parties to come to a mutually beneficial solution.*

The Training Ombudsman also plays an advocacy role for the VET sector by reporting on systemic issues and advising the State Government on ways to improve the VET system.¹¹

During the committee's briefing on the Bill in early December 2015, the department advised that since 14 September 2015, 25 complaints had been received, of which 13 had been completed.

¹⁰ Explanatory Speech, p 2793

¹¹ Training Ombudsman, <https://www.qld.gov.au/education/training/training-ombudsman/pages/about-trainingombudsman.html> accessed 9 December 2015

3 Examination of the Bill

3.1 Structure of the Bill

The Bill proposes to amend the *Further Education and Training Act 2014* (the FET Act) by inserting a new Chapter 4A “Training Ombudsman”. The Bill also makes a minor amendment to the *Public Service Act 2008* which is consequential to establishing the office of the Training Ombudsman. Clause 5 inserts proposed new Chapter 4A, which contains the substantive provisions of the Bill - proposed sections 112A to 112ZI.

3.2 Policy objectives – establishment of Training Ombudsman

The Training Ombudsman is intended to “ensure that Queensland’s VET students, employers and other significant stakeholders have a clear pathway for complaints and that systemic problems can be readily identified.”¹²

3.2.1 Complaints

One of the policy objectives of the Bill is to establish a single point for complaints about the VET sector, in a complex system where complaints about specific matters are dealt with by one of a number of agencies (see summary of agencies in section 2 of this report). The Explanatory Notes state:

*Queensland consumers do not currently have access to a sector specific independent complaints mechanism to deal with the wide range of issues that may arise in the VET sector. VET consumers can face challenges in identifying the most appropriate avenue to direct concerns or complaints. There is still a need for further support for consumers to navigate the VET system, make complaints and be assisted to resolve disputes. Consumers and governments invest significant resources in VET and it is appropriate that action be taken to support consumers in this regard.*¹³

The department advised the committee that it can be difficult to know where to direct complaints and seek resolution of issues.¹⁴ The Interim Training Ombudsman explained the complexity for consumers who have a complaint that might involve more than one of the existing complaint agencies:

*One of the issues with complaints about the VET sector is that it invariably covers a number of areas. So the Ombudsman, and certainly the interim ombudsman at the moment, is providing that conduit for people to monitor their complaints and refer parts of it to the various centres but keep an eye on how it is tracking. Quite often it is not just an ASQA issue, or it is not just a Commonwealth government issue or an Office of Fair Trading issue it covers everything. So that is part of the benefit of the Training Ombudsman.*¹⁵

3.2.2 Systemic issues and the quality of VET in Queensland

The establishment of the Training Ombudsman aims to further assist the Government to improve the quality of VET in Queensland. While the Queensland Government no longer regulates RTOs, “quality within the VET sector is a key focus for the Government”. The Queensland Government provides significant funding by purchasing training from pre-qualified suppliers.¹⁶ The Training Ombudsman

¹² Attorney-General and Minister for Justice and Minister for Training and Skills, *Media release: Training Ombudsman Bill to restore VET protection*, 1 December 2015

¹³ Explanatory Notes, p 1

¹⁴ Transcript / Hansard, Public Briefing, 4 December 2015, p 1

¹⁵ Departmental briefing 4 December 2015, p 4

¹⁶ Explanatory Notes, p 1

“will be tasked to identify systemic issues” and to report to the Minister on strategies to resolve them.¹⁷

3.2.3 Stakeholder's views

The Consumer Action Law Centre welcomed establishment of state Training Ombudsman roles in Victoria and Queensland, however considers a single national ombudsman is the preferred model for dispute resolution.¹⁸

The Australian Industry Group (the Ai Group) welcomes the proactive approach to strengthen the quality of VET outcomes by reintroduction of the Training Ombudsman. The Ai Group stated that it and its members:

*have been deeply concerned at both a national and state level at low levels of apprenticeship commencements and completions, the ongoing reputation damage to the VET system as a result of the VET FEE-HELP crisis, and the inconsistent application of contestable funding models. Confidence in the training system by both students and employers has been seriously eroded by a steady flow in stories of poor performance, rorts and injudicious spending. Industry leadership in the training system has been eroded and the crucial contract between public investment in training and the delivery of economic and productivity improvements has been damaged.*¹⁹

Central Queensland University commented that the Training Ombudsman role would be valuable in relation to pre-qualified supplier compliance and performance in a contestable market where state funding is used. It also noted that the Training Ombudsman will assist to clarify the impact of national issues in relation to Queensland reporting and funding issues.²⁰

3.3 Functions of Training Ombudsman

The functions of the Training Ombudsman are summarised below, and discussed in later sections of the report. The functions in proposed new section 112D are broader than those of the former training ombudsman, and include functions relevant to a role in identifying issues about the quality of VET, undertaking reviews and research and providing advice to the Minister. In summary the functions are to:

- receive complaints about:
 - the provision of, or quality of vocational education and training by a RTO, a supervising RTO, or an employer of an apprentice or trainee
 - a matter relating to an apprenticeship or traineeship, including decisions by the Director-General of the Department about a training contract or the declaration of or nominal term for an apprenticeship or traineeship
 - compliance with the FET Act by an apprentice, trainee, employer or supervising registered training organisation
 - a *prescribed decision*²¹ made under the Act by the Director-General of the department
 - a matter involving a pre-qualified provider
- help people in making complaints to a *referral entity*, for example, the ASQA
- refer a complaint to a *referral entity* or deal with it under the FET Act
- give complainants information or advice
- monitor the outcome of complaints

¹⁷ Explanatory Notes, p 1

¹⁸ Consumer Action Law Centre, Submission 4

¹⁹ Australian Industry Group, Submission 3

²⁰ Central Queensland University, Submission 1

²¹ See section 3.4.6 below

- make recommendations to the chief executive about apprenticeship and traineeships, including the declaration of, or nominal term for, an apprenticeship or traineeship
- identify and report to the Minister about issues in the provision of VET and its quality
- make recommendations to the Minister about
 - ways to improve the department’s systems, policies and processes regarding pre-qualified suppliers and supervising RTOs
 - matters relating to apprenticeships and traineeships
 - strategies to improve the quality of VET
- carry out promotional and educational activities relating to VET
- undertake or promote reviews of, or research into, matters relating to the Training Ombudsman’s functions, including reviews or research requested by the Minister
- other functions conferred on the Training Ombudsman by the FET Act or another Act.

3.4 Complaints

3.4.1 *Anyone with sufficient interest may complain*

The Bill does not specify who may complain, which enables any interested person or organisation to use the Training Ombudsman’s services. A brochure about the Training Ombudsman states that assistance, information or advice about any aspect of the VET system may be sought by:

- students enrolled with RTOs
- apprentices and trainees
- employers
- trainers
- other government agencies
- training providers
- industry bodies
- parents and/or guardians.²²

The Bill provides the Training Ombudsman with discretion to decline to deal with a complaint if he or she reasonably believes that the complainant does not have sufficient interest in the matter, or that a complaint lacks substance, is frivolous or vexatious, or that dealing with the complaint is unnecessary or unjustifiable.²³

3.4.2 *Complaints the Training Ombudsman may not deal with*

The Bill specifies, in proposed section 112G, matters that the Training Ombudsman must not deal with as complaints. They are matters where: the complaint is about a decision that QCAT has reviewed, or there is an application for review; an appeal about the matter has started in the industrial relations commission or industrial court, or a decision has made an appeal by one of those bodies.

3.4.3 *General powers to deal with complaints*

The Bill provides for the ways that the Training Ombudsman may deal with complaints. Proposed section 112E gives the Training Ombudsman a broad power to “do all things necessary or convenient to be done for, or in connection with, the performance of the training ombudsman’s functions.” Specific processes and powers apply to complaints about *prescribed decisions*, *compliance matters* and *pre-qualified suppliers*, which are discussed in sections 3.5.5 and 3.5.6 below.

²² Training Ombudsman, <https://www.qld.gov.au/education/assets/documents/training-ombudsman-brochure.pdf>

²³ Proposed section 112F

The Central Queensland University (CQU) submission sought clarification about how those powers would be used and particularly whether any additional reporting requirements would be imposed on RTOs such as CQU.²⁴ In response to the committee's request for comment, the department advised that proposed section 112E does not prescribe the processes for dealing with complaints, and that the way the Training Ombudsman will deal with complaints depends on the nature of the complaint and the type of entity the complaint is about. The department's response describes how complaints about *compliance matters, pre-qualified suppliers* and *prescribed decisions* must be dealt with (see later sections of this chapter for a summary).²⁵

On the issue of whether any additional reporting requirements were anticipated for RTOs as a consequence of establishment and operation of the Training Ombudsman, the department advised that it will not provide additional reporting requirements for RTOs.²⁶

Proposed section 112O of the Bill provides that the Training Ombudsman may keep documents or other things given in relation to complaints for a reasonable period to assess a complaint, and extracts or copies of documents may be made. A person who would normally have access to a document or thing that is in the Training Ombudsman's possession must be allowed access to it.

The QTU submission suggested that consideration needs to be given also to electronic copies of documents in the Training Ombudsman's possession. The committee noted the QTU's concern, and also noted that the definition of 'document' in the *Acts Interpretation Act 1954* includes electronic copies of documents or other material "from which sounds, images, writings or messages are capable of being produced or reproduced."²⁷ The department's advice cited the definition of 'document' and also advised that the Bill would create the Office of the Training Ombudsman as a public authority, bound by the *Public Records Act 2002* in regard to making, managing, keeping and preserving public records.²⁸

Proposed section 112M of the Bill enables the Training Ombudsman to enter into arrangements with government entities for the purpose of information sharing or exchange about complaints regarding compliance with the FET Act, a pre-qualified supplier or a prescribed decision.²⁹

3.4.4 Informal resolution and referral

As noted above, the Training Ombudsman's functions include receiving complaints, helping people make complaints to another body, and giving information and advice to a complainant about their complaint. The Bill does not explicitly specify that complaints may be resolved informally or mediated, however the policy intent is that the Training Ombudsman will informally resolve complaints. The Explanatory Notes state:

For matters that fall within the jurisdiction of another agency, such as the Australian Skills Quality Authority or the Office of Fair Trading, the training ombudsman can assist the parties to attempt to resolve the matter in the first instance.

Where a resolution cannot be reached, the training ombudsman can refer the complaint to the relevant agency to progress the complainant's concerns or assist the complainant to make the complaint to the other agency.³⁰

²⁴ Submission 1,

²⁵ Correspondence from Department of Education and Training, 3 February 2016, pp 1-3
<http://www.parliament.qld.gov.au/documents/committees/ETSBC/2015/Further%20Education%20and%20Training/04-cor-3Feb2016.pdf>

²⁶ Correspondence from Department of Education and Training, 3 February 2016, p 3

²⁷ *Acts Interpretation Act 1954*, section 36 (Meaning of commonly used words and expressions)

²⁸ Correspondence from Department of Education and Training, 3 February 2016, p 5

²⁹ Proposed section 112M

³⁰ Explanatory Notes p 3

The interim Training Ombudsman told the committee that he aims for quick resolution of complaints, and “it is an informal process first and foremost to try to get the parties together to resolve the matter.”³¹ Agencies to which complaints are referred “might include the Department of Education and Training and other Queensland agencies such as the Office of Fair Trading, as well as the national VET regulator, the Australian Skills Quality Authority.”³²

The Consumer Action Law Centre (CALC) was concerned that, in the absence of authority to make decisions on disputes, the Training Ombudsman risks becoming a complaints referral service. The CALC noted that other industry-based ombudsman schemes have the power to make binding decisions on matters.³³

The department advised the committee that it was not possible to legislate to enable the Training Ombudsman to make binding decisions:

In June 2012, Queensland referred its power to register and regulate training organisations based in Queensland to the Commonwealth through the Vocational Education and Training (Commonwealth Powers) Act 2012. Therefore, it is not within the legislative power of the Queensland parliament to establish a training ombudsman with the power to make binding decisions in relation to the registration and regulation of training organisations.

As outlined in section 2.1 of this report, the ASQA regulates registration and training and assessment standards for all RTOs in Queensland. The department also noted that other agencies have the power to make binding decisions about VET matters, and:

*..it is not desirable to duplicate these and add further confusion into the marketplace. The training ombudsman role will be to support consumers within the existing system by providing support to assist individuals to navigate the VET system, make complaints or have their dispute resolved. The key functions of the training ombudsman will include receiving complaints about the provision of VET and assisting complainants to have their issue addressed by other state and federal entities, as required.*³⁴

The committee considers that, given the complexity of the VET sector and the absence of power for Queensland to legislate for the Training Ombudsman to make binding decisions, it is reasonable for the Training Ombudsman’s role to include informal resolution and referral of complaints to other bodies.

3.4.5 Provision and quality of training

Recent concerns about student recruitment to VET courses

There has been considerable public comment about the way some RTOs and agents recruit students, including offering inducements to enrol, such as free laptops or overseas trips. Most of the public discussion about inducements and other inappropriate practices has arisen from the Commonwealth VET FEE-HELP scheme.

In response to those issues the Commonwealth Government introduced new standards for RTOs and banned enrolment inducements from April 2015. Commencing in July 2015 the Commonwealth banned fees for withdrawing from a course (which stopped students cancelling before they incurred a loan), made training providers responsible for their (marketing) agents, and banned marketers from claiming that VET FEE-HELP made courses ‘free’ or ‘government funded’. Further changes that came into effect on 1 January 2016 include preventing VET providers from charging a student the total tuition

³¹ Departmental briefing, 4 December 2015, p 4

³² Explanatory Speech, p 2973

³³ Submission 4, pp 2-3

³⁴ Correspondence, Department of Education and Training, pp 7 – 8

fee up-front, and requiring a two day ‘cooling off’ period after enrolment in a VET course.³⁵ It was reported in December 2015 that despite the Commonwealth ban on enrolment inducements in April 2015, there was evidence that the practice of offering incentives such as laptops or iPads has continued.³⁶

Training Ombudsman’s role regarding the provision and quality of training

The committee asked the department about the Training Ombudsman’s role with issues such as inducements and questionable student recruitment practices. The department advised that the Training Ombudsman will:

*.. provide an avenue that if somebody feels aggrieved or wants to lodge a complaint about that behaviour, and ...(if these are) matters that span both state and federal jurisdictions, that particular matter they could take up with the Training Ombudsman and they would then be in a position to assist that complainant to have that matter resolved.*³⁷

In response to the committee’s question about the Training Ombudsman’s potential role in an investigation by ASQA, the department explained that the Training Ombudsman would facilitate processes.³⁸ As noted above, the Training Ombudsman could refer a complaint to ASQA, or could assist a person to make a complaint. In addition, a Memorandum of Understanding with ASQA about information sharing is expected “to make sure that there is free flow of (information) through to the right authorities and if that is not resolved appropriately that the Ombudsman take further action”.³⁹

Some complaints about the provision and quality of training could also be dealt with directly by the Training Ombudsman. If an RTO receives Queensland government funding under the “Certificate 3 Guarantee” or “User Choice” programs, the Training Ombudsman can investigate the concerns and make recommendations to the department about whether to continue the arrangements or take other action under the funding arrangements to address the concerns.⁴⁰

3.4.6 Complaints about prescribed decisions made under the Act

The Training Ombudsman may deal with complaints about *prescribed decisions* made by the Director-General under the FET Act, and defined in proposed section 112A as decisions:

- to register or refuse to register a training contract (s.17(2) of the FET Act)
- to approve or refuse to approve a proposed amendment to a registered training contract (s.20(8) of the FET Act)
- to approve or refuse to approve an extension to the nominal term of a registered training contract (s.23(4) of the FET Act)
- whether to issue a completion certificate for an apprenticeship or traineeship under s.47(1) or s.50(2) of the FET Act
- a decision on an application for a certificate of achievement in a calling (s.101(1) of the FET Act).

People who are affected by those decisions do not currently have access to any independent external review. The Minister said that, “Giving the Training Ombudsman capacity to consider complaints about

³⁵ The Senate, Education and Employment References Committee, *The operation, regulation and funding of private vocational education and training (VET) providers in Australia*, Coalition Senators Minority Report, 15 October 2015

³⁶ Mary Leahy, *Reforming vocational education: it’s time to end the exploitation of vulnerable people*, The Conversation, 16 December 2015

³⁷ Departmental briefing, 4 December 2015, p 3

³⁸ Departmental briefing, 4 December 2015, p 3

³⁹ Departmental briefing, 4 December 2015, p 3

⁴⁰ Explanatory Speech, p 2973

such decisions will ensure parties aggrieved by any decisions can have their concerns heard and recommendations made by an independent person.”⁴¹

After assessment of a complaint about a *prescribed decision* the Training Ombudsman must give a written report of the findings and any recommendations to the complainant and the Director-General. The Training Ombudsman may ask the Director-General to report on the steps taken in relation to recommendations in a report, or why no steps have been taken.⁴²

3.4.7 Complaints about compliance with the Act and about pre-qualified suppliers

Complaints about *compliance matters* and about *pre-qualified suppliers* are proposed to be dealt with in a similar way under the Bill.

Proposed section 112A defines a *compliance matter* as “.. compliance with this Act (the FET Act) by an apprentice, trainee, employer or supervising registered training organisation.” Compliance matters could include, for example the following:

- a complaint by an apprentice or trainee that the employer has not provided the appropriate facilities, range of work, or supervision and training
- a complaint by an employer that they have not received a signed copy of their apprentice or trainee’s training plan from the supervising RTO
- a complaint by a supervising RTO that an employer has made a false or misleading statement in a training plan for an apprentice or trainee.

A *pre-qualified supplier* is defined as “..a registered training organisation that has entered into a current Vocational Education and Training Pre-Qualified Supplier Agreement with the department.”⁴³ The department advised that an RTO must be a *pre-qualified supplier* in order to be eligible to deliver training subsidised by the Queensland Government through its funded programs, such as “User Choice” or “Certificate 3 Guarantee.”⁴⁴ A large proportion of RTOs in Queensland fall within a *prequalified supplier contract*.⁴⁵

The Training Ombudsman will be required to refer complaints about *compliance matters* and about *pre-qualified suppliers* to the Director-General of the department, who must investigate the complaint. The Director-General must report to both the complainant and the Training Ombudsman on the investigation findings and the action taken (or proposed).⁴⁶

A complainant who is not satisfied with the outcome of the department’s investigation, may ask the Training Ombudsman to further deal with the complaint under proposed section 112I. The Training Ombudsman is required to assess the complaint and the department’s investigation and report to the complainant and the Director General. The report may ask the Director-General to report to the Training Ombudsman on the steps taken to implement the recommendations in the report.⁴⁷ The department advised the committee that the Training Ombudsman’s recommendations might include “methods to improve DET’s systems, policies and processes in relation to pre-qualified RTOs or that

⁴¹ Explanatory Speech, p 2973.

The current Certificate 3 Guarantee policy is available at <http://www.training.qld.gov.au/resources/training-organisations/pdf/c3g-policy.pdf>, and information about the User Choice program is available at <http://www.training.qld.gov.au/training-organisations/funded-programs/user-choice/index.html>

⁴² Proposed section 112K

⁴³ Proposed section 112A

⁴⁴ Departmental briefing, 4 December 2015, p 2

⁴⁵ Departmental briefing, 4 December 2015, p 4

⁴⁶ Proposed section 112H

⁴⁷ Proposed section 112J

the pre-qualification status of a specific RTO be terminated.⁴⁸ The department also confirmed that the Training Ombudsman could:

*.. recommend the termination of a pre-qualified supplier by the department. Certainly, in a federal context there is referral that can be made to ASQA as well, but that would be at the discretion of ASQA as to whether they cancel the RTO.*⁴⁹

Proposed section 112N would give the Training Ombudsman powers to require a person, at a stated reasonable time, to give information required for assessment of a complaint, or to attend before the Training Ombudsman to answer questions or produce documents required for assessment of the matter. Those powers apply when the Training Ombudsman is dealing with a complaint about a *compliance matter, a pre-qualified supplier, or a prescribed decision*.

The QTU submission suggested that proposed section 112N should specify a specific period of time, and should state that a person has a right to be represented if they receive a notice to provide information or answer questions. In response, the department advised that a 'reasonable time' is considered appropriate as it provides flexibility depending on the circumstances of the person who is to attend, or the information to be given. The department also advised that it is not necessary for the capacity to be represented to be enshrined in legislation.⁵⁰

The committee notes the department's response and considers proposed section 112N to be appropriate.

3.5 Promotion and education

One of the Training Ombudsman's functions (proposed section 112D) is to carry out "promotional and educational activities relating to vocational education and training in Queensland"⁵¹. The QTU suggested that the promotional and educational activities should focus more specifically on "the role of the ombudsman, especially with regards to the provision of vocational education and training in Queensland and its quality"⁵².

The committee notes that the proposed promotion and education function of the Training Ombudsman in proposed section 112D(1)(i) does not include promotion of the role of the training ombudsman. As currently drafted the function could be understood to be only to promote and educate about the VET sector. The committee sought the department's response to the issue raised by the QTU and was advised that an amendment would be considered, to include promotion and education about the training ombudsman's role.⁵³

The committee recommends that proposed section 112D (Functions of training ombudsman) be amended to include the function of promotion and education about the role of the Training Ombudsman.

Recommendation 2

The committee recommends that proposed section 112D of the Further Education and Training (Training Ombudsman) and Another Act Amendment Bill 2015 be amended to include a function for the Training Ombudsman of promotion and education about the Training Ombudsman's role.

⁴⁸ Departmental briefing, 4 December 2015, p 2

⁴⁹ Departmental briefing, 4 December 2015, p 5

⁵⁰ Correspondence, Department of Education and Training, 3 February 2016, p 5

⁵¹ Proposed section 112D(i), inserted by clause 5

⁵² Queensland Teachers Union, Submission 2, p

⁵³

3.6 Systemic issues in the VET sector

The Training Ombudsman's functions include (proposed section 112D (e) and (f)) monitoring the outcome of complaints and making recommendations to the Director-General of the department about apprenticeships and traineeships. In addition proposed section 112D(h) provides that the Training Ombudsman may make recommendations to the Minister about improving:

- the department's systems, policies and processes for pre-qualified suppliers
- apprenticeships and traineeships, and
- the quality of VET.

3.7 Research and reviews

One of the Training Ombudsman's functions is to promote or undertake reviews or research in matters relevant to his or her functions. The Minister may refer a matter and ask the Training Ombudsman to review or research it and report to the Minister and give advice or make recommendations. The Training Ombudsman must comply with a request from the Minister.⁵⁴

The QTU was concerned about:

the potential threat to the impartiality of the ombudsman under this provision. The QTU cites the former state government's agenda of making TAFE's public assets subject to contestability and the establishment of the Queensland Training Assets Management Authority (QTAMA) as an example of how a state government might abuse this provision to advance its own political agenda. Under this provision, the former Minister for Training could have been requested to undertake research into models of private use of public assets.⁵⁵

In response, the department advised that:

Proposed new section 112D(1)(j) works in conjunction with new section 112Q which outlines the Minister's powers to refer matters to the training ombudsman. In accordance with new section 112Q(1)(a) the Minister may refer a matter relevant to the training ombudsman's functions to the training ombudsman and ask the training ombudsman to review or research the matter.

It is clear from the operation of these provisions that the function to undertake or promote reviews of, or research into, matters is limited to matters relating to the training ombudsman's functions and would not include models of private use of public assets.

The ability of the Minister to direct the training ombudsman to undertake reviews or research is considered necessary, for example, where there are emergent issues relevant to the training ombudsman's functions, such as quality in a sector of the VET market.⁵⁶

The committee is satisfied that the power to request that the Training Ombudsman undertake research or a review is limited to matters that are within the Training Ombudsman's functions in proposed section 112D.

3.8 Training Ombudsman's appointment and conditions

The Bill provides for the Training Ombudsman to be appointed by Governor in Council under the *Further Education and Training Act 2014* for a term of up to four years, with remuneration set by Governor in Council. Certain people would be disqualified from appointment, including members of the Legislative Assembly, local government councilors, people who have a conviction for an indictable

⁵⁴ Proposed section 112Q,

⁵⁵ Submission 2, p 3

⁵⁶ Correspondence from Department of Education and Training, 3 February 2016, p 4

offence or are insolvent or disqualified from managing corporations. The Bill also provides for leave, resignation and removal of the Training Ombudsman, criminal history checking and delegation of his or her functions.⁵⁷

3.9 Training Ombudsman – independence and accountability

3.9.1 Independence

The Bill provides (proposed section 112C) that the Training Ombudsman controls the office, however this does not prevent it being attached to the department to ensure it has the administrative support services required to carry out its functions.

The Training Ombudsman is not subject to direction from the Minister or any person, other than the Training Ombudsman's obligation to comply with a request under proposed section 112Q to review or research a matter (see section 3.7 above). Proposed section 112ZH provides that the Training Ombudsman is not subject to direction by any person about the way that he or she performs the Training Ombudsman's functions. In addition, staff are not subject to direction from outside the office of the training ombudsman about the way complaints are dealt with.

Under proposed section 112S, the Minister may request information or documents about a matter relevant to the Training Ombudsman's functions, and the request must be complied with.

3.9.2 Minister's statement of expectations

The Minister may issue a statement of expectations to the Training Ombudsman under proposed section 112R about the performance of the Training Ombudsman's functions. The statement may be for a specified period, and may include provisions about strategic or operational activities, reporting to the Minister about strategic or operational activities, and key priorities for the Training Ombudsman, other than priority to be given to complaints. The Training Ombudsman must have regard to the statement.⁵⁸

The department advised the committee that the Minister's statement of expectations is where "the Minister outlines their vision and expectations ... in an objective sense for the organisation as to what they will deliver upon", and "you would not expect to see that statement of expectations vary frequently, if at all."⁵⁹

Both the QTU and the CLAC raised concerns that a statement of expectations from the Minister to the Training Ombudsman has the potential to run counter to the independence of the Training Ombudsman.⁶⁰

The department's comments on submissions noted that proposed section 112ZH provides that the Training Ombudsman is not subject to direction about the way the Training Ombudsman performs their functions. Further, the office of the Training Ombudsman is not under the control of the Minister or the chief executive of the department.⁶¹

The committee considers that independence of the Training Ombudsman is important, and notes that proposed new section 112ZH of the Bill states that, subject to the Act and other Acts or law, "the training ombudsman is not subject to direction by any person about the way the training ombudsman performs the training ombudsman's functions."

3.9.3 Annual report

Proposed section 112ZI requires the Training Ombudsman to give an annual report to the Minister within three months of the end of the financial year. The annual report must include copies of any

⁵⁷ Proposed sections 112T to 112ZE

⁵⁸ Proposed section 112R

⁵⁹ Departmental briefing, p 5

⁶⁰ Submissions 2 and 4

⁶¹ Correspondence, Department of Education and Training, 3 February 2016, p 6

notices given to the Training Ombudsman by the Minister requesting information or documents under proposed section 112S. The Minister must table the report in the Legislative Assembly within 14 days.

3.10 Public Service Act and staffing

The “office of the Training Ombudsman” is established by proposed section 112B, consisting of the Training Ombudsman and staff.

Clause 11 of the Bill amends the *Public Service Act 2008* to add the office of the training ombudsman and the Training Ombudsman to Schedule 1 of that Act. The effect is to make the office a *public service office* to which the *Public Service Act 2008* applies, with the Training Ombudsman as the head of that office.

Staff of the office would be appointed as public servants under proposed section 112ZG of the Bill. As noted above, the Training Ombudsman would not be appointed under the *Public Service Act 2008*, but by Governor in Council under the *Further Education and Training Act 2014*.

3.11 Numbering error

The QTU submission identified a minor error in the numbering of proposed section 112D, and the department advised that an amendment could be considered to correct the error.⁶² The committee recommends an amendment to correct the numbering error.

Recommendation 3

The committee recommends that the Further Education and Training (Training Ombudsman) and Another Act Amendment Bill 2015 be amended to correct a numbering error in proposed section 112D.

⁶² Correspondence, Department of Education and Training, p 4

4 Compliance with the Legislative Standards Act

4.1 Fundamental legislative principles

4.1.1 Introduction

Section 4 of the *Legislative Standards Act 1992* 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
- the institution of Parliament.

The committee has examined the application of the fundamental legislative principles to the Bill and brings the following to the attention of the Legislative Assembly.

4.1.2 Rights and liberties of an individual- criminal history checking and protection from civil liability

Proposed section 112W(10(c)-(e)) provides that a person is disqualified from becoming, or continuing as, the Training Ombudsman if the person has a conviction for an indictable offence, is an insolvent, or is disqualified from managing corporations under the *Corporations Act*. Proposed section 112ZC enables the Minister obtain a written criminal history report about a person proposed for appointment, or about the Training Ombudsman. Under section 112ZE the Training Ombudsman, if convicted of an indictable offence, must advise the Minister immediately unless the person has a reasonable excuse. The maximum penalty is 100 penalty units.

The Explanatory Notes acknowledge that obtaining the private information of a prospective Training Ombudsman to conduct an integrity check potentially breaches section 4(2)(a) of the *Legislative Standards Act 1992* which requires that sufficient regard be given to the rights and liberties of individuals. The Explanatory Notes state that this is justified because:

..criminal history checking is appropriate to maintain the integrity of the position of the training ombudsman. In addition, the Bill provides for safeguards around the access and disclosure of the information:

- *the criminal history may only be obtained with consent of the individual (new section 112ZC(2)); and*
- *it is an offence for a person to directly or indirectly disclose criminal history information to any other person unless the disclosure is authorised by law, with a maximum penalty of 100 penalty units (new section 112ZD).*⁶³

Committee comment

The committee noted that criminal history checks are standard for public sector roles. Given the importance of the role of Training Ombudsman, and the safeguards provided in the Bill, the committee considers that an integrity check on a prospective candidate is appropriate in the circumstances.

4.1.3 Rights and liberties of individuals – civil liability attaches to the State

Clause 8 amends section 194(4) of the Act so that the Training Ombudsman, a person acting under their direction, or a staff member is a ‘prescribed person’. A prescribed person is not civilly liable for an act or omission made honestly and without negligence under the Act.

It could be argued that providing an indemnity to the Training Ombudsman does not have sufficient regard to the rights and liberties of individuals who will be restricted from taking legal action about a decision made by the Training Ombudsman. Instead, civil liability would attach to the State.

⁶³ Explanatory Notes, p 5

The Explanatory Notes argue that the potential breach of fundamental legislative principles is justified as the provision operates to attach civil liability to the State instead. The Explanatory Notes state that it is not considered appropriate for a person to be made personally liable as a consequence of carrying out his or her responsibilities under the legislation.⁶⁴

The committee considers that the protection from civil liability is justified and has sufficient regard for fundamental legislative principles.

4.1.4 Reversal of onus of proof, new sections 112ZE and 112N

As noted above, proposed new section 112ZE(2), requires the Training Ombudsman, if convicted of an indictable offence during their appointment, to give notice of the conviction to the Minister unless the Training Ombudsman has a reasonable excuse. A failure to do so incurs a penalty of 100 penalty units.

Clause 5, new section 112N(2)(a)-(c) provides that the Training Ombudsman may, by written notice, require a person to give the Training Ombudsman stated information or a document or attend before the Training Ombudsman at a stated reasonable time and place to answer questions or produce documents reasonably required for assessment of a complaint.

A person must comply with the requirement unless the person has a reasonable excuse. A failure to comply incurs a penalty of 100 units. Section 112(4) provides that it is a reasonable excuse for an individual not to comply with the requirement if complying might tend to incriminate the individual.

Both proposed sections 112ZE(2) and 112N(3) reverse the onus of proof by requiring the defendant to provide a 'reasonable excuse' if they fail to comply with the provision. This potentially breaches section 4(3)(d) of the *Legislative Standards Act 1992* which provides that the onus of proof should not be reversed without adequate justification. "For a reversal to be justified, the relevant fact must be something inherently impractical to test by alternative evidential means and where the defendant would be particularly well positioned to disprove guilt".⁶⁵

The Explanatory Notes state that:

*The existence of a reasonable excuse is information that is particularly within the defendant's knowledge in these circumstances. It would be difficult for the prosecution to prove the lack of a reasonable excuse. Given this, the reversal of the onus of proof in the circumstances of these provisions is considered to be appropriate.*⁶⁶

The committee noted that the Bill provides that it is a reasonable excuse not to comply with the requirement to provide information or attend before the Training Ombudsman if doing so might tend to incriminate the individual, and that the information about a reasonable excuse is in the defendant's knowledge. The committee considers that, on balance, there is sufficient justification for reversing the onus of proof in proposed new sections 112N and 112ZE.

4.2 Explanatory Notes

Part 4 of the LSA 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.

The Explanatory Notes contain the information required by section 23 of the *Legislative Standards Act 1992*.

⁶⁴ Explanatory Notes, pp 6-7

⁶⁵ Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p 36

⁶⁶ Explanatory Notes, p 6

Appendices

Appendix A – List of Submissions

Sub No.	Submitter
001	Central Queensland University
002	Queensland Teachers' Union
003	The Australian Industry Group
004	Consumer Action Law Centre