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Chair  
Education and Science Committee  
Parliament Buildings  
P O Box 18 041  
Wellington 6160

**Education Amendment Bill (No 4)**

1. This submission is made by the Legislation Advisory Committee (LAC).
2. The LAC was established to provide advice to the Government on good legislative practice, legislative proposals, and public law issues. The LAC has produced and updates the Legislation Advisory Committee Guidelines: Guidelines on the Process and Content of Legislation (LAC Guidelines) as appropriate benchmarks for legislation. The LAC Guidelines have been adopted by Cabinet.
3. The terms of reference of the LAC include:
  - (a) to scrutinise and make submissions to the appropriate body on aspects of Bills introduced into Parliament that affect public law or raise public law issues:
  - (b) to help improve the quality of law-making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the LAC Guidelines, and discouraging the promotion of unnecessary legislation.
4. The LAC considered the Bill at its meeting on 6 May 2011. The LAC has concerns about the breadth of the entry and inspection powers proposed for NZQA, the breath of the new cheating services offence, the blanket exception from the Commerce Act of all the activities of the new Crown entity, Education New Zealand and the carrying

over of polices under the current Act as rules under the new Act. In this regard, LAC draws the Committee's attention to the following issues:

*Entry and inspection powers*

5. Under the entry and inspection powers contained in new section 255A the Chief Executive of NZQA may authorise "any person" to exercise powers under that section for the purposes of ensuring that a private training establishment and any agent of the establishment comply with the provisions of the Act and any rules, approvals or consents issued under it. The powers could potentially be exercised by a private agent or company appointed to undertake the inspection function.
6. The LAC considers that there should therefore be a requirement that anyone appointed to exercise the powers be suitably qualified and trained in the exercise of such powers. In other inspection regimes, such as that in section 319B of the Education Act 1989 covering early childcare centres, the power of appointment is restricted so that a person may only be authorised to exercise inspection powers if that person is suitably qualified and trained in the exercise of these types of intrusive powers. LAC invites the Committee to consider imposing a similar restriction here.
7. LAC also considers that, as currently drafted, the inspection power is too broad and unrestrained. It authorises any person undertaking an inspection to enter and inspect any premises (other than a dwelling-house) occupied by a private training establishment at any reasonable time. The inspector may require any person at the premises to produce any documents or information under their control. The inspector may also copy and remove any relevant documents. There is no express obligation to provide any information about which documents have been copied or removed. There is also no express requirement for the return of documents.
8. Where inspectors or enforcement officers are given powers to remove documents under other regulatory regimes they are normally required to account for those documents. In section 88 of the Animal Products Act 1999, for example, an enforcement officer may only remove records for the purposes of copying them and must return any documents or records removed for copying within a reasonable time. Similarly, section 319B of the Education Act 1989 requires the inspecting officer to provide a list of all documents removed and to return the originals unless this would prejudice any investigation. LAC invites the Committee to consider imposing a similar constraint on the exercise of the new power here.
9. Finally, the provision seems to give an inspector an unfettered right to question any employee or member of the establishment being inspected and to require that person to make or provide statements in any form that the inspector requires. Again this power is an unusually broad one. It is more usual, where a person is required to provide information, to expressly state that the person is not required to answer any question if the answer may tend to incriminate him or her. LAC considers that the power is too broad and it should be amended to expressly state that it is subject to the privilege against self-incrimination.

*The exemption of Education New Zealand from the Commerce Act 1986*

10. New section 274 provides that “Despite section 6 of the Commerce Act 1986, nothing in that Act applies to Education New Zealand.” Section 6 of the Commerce Act applies that Act to instruments of the Crown and to Crown entities in so far as they engage in trade. In the LAC’s view new section 274 raises two issues. Firstly, it is not clear why Education New Zealand should be exempt from the application of the Commerce Act in regard to its trading activities. Secondly, if it is considered appropriate to exempt some of Education New Zealand’s trading activities from the Commerce Act, then LAC submits that the best approach is to specifically authorise activities for the purposes of section 43 of the Commerce Act. Section 43 provides for statutory exceptions to the application of the Commerce Act. The approach taken in section 274 would seem to exempt all trading activities of Education New Zealand rather than specific ones undertaken in pursuit of its statutory functions. LAC believes that is unnecessarily broad.

*Breadth of section 292E*

11. As drafted the offence of providing and advertising cheating services in new section 292E may be too broad. A person commits the offence if he or she provides any of the services specified in the section. The list of services includes “completing an assignment or any other work that a student is required to complete as part of a programme or training scheme” as well as “providing or arranging the provision of an assignment or any other work that a student is required to complete”. We think that there is some uncertainty as to what “completing” means in this context and whether it is necessary in addition to “providing”. The term “completing” would seem to be intended to cover “doing” the assignment for the student, but could alternatively mean “finishing” the work for the student.
12. In addition, the provision will also catch non-commercial activities that are unethical (and may be the basis for academic disciplinary procedures against a student) but which should not, in our view, constitute a criminal offence on the part of the person providing the student with assistance. For example, if a friend finishes off an assignment for a student, or if a parent crosses the line between assisting and “completing” an assignment for their child their conduct may technically be an offence. The LAC invites the Committee to consider clarifying subclause (4)(a), which makes “completing an assignment or any other work” a service caught by the offence. In addition, LAC invites the Committee to consider whether an additional element should be introduced so that the offence is only committed where the offending services are of a commercial nature, or where consideration (money or money’s worth) is being provided by the student for the services.

*Deeming of policies and criteria under the current Act to be rules under the new Act*

13. New section 253 delegates a power to the Authority to make rules prescribing a range of matters. Such rules are deemed to be regulations. The provision specifies closely the matters on which rules can be made. In addition, the new section requires that most rules must be approved by the responsible Minister before they are made. However, clause 40 of the transitional provisions will carry over all the existing policies, criteria and rules made by NZQA under current sections 253 and 265 and

deem these to be rules made under the new provision. LAC is concerned that this deeming provision will give these policies, criteria and rules the force of regulations as though they have been validly made under the new section 253 when they may not come within the terms of the new section. New section 253 is a far more prescriptive provision than the current section. It lists the specific matters on which rules can be made. In contrast the current section 253 authorises NZQA to establish policies and criteria on a broad unspecified range of matters and section 265 allows it to make rules in respect of examinations and assignments. It is therefore not clear that all the existing policies, criteria and rules would come within the scope of the rule-making powers granted to NZQA by the new provision.

14. In view of the fact that the Bill plainly envisages that existing policies, criteria, and rules will be replaced by rules, LAC submits that new rules should be made rather than carrying over the existing policies, criteria, and rules and treating them as if they were rules. There is always the risk that once carried over they will remain in place without new rules being made.

The LAC does not wish to be heard in support of the submission.



George Tanner QC  
Acting Chair  
Legislation Advisory Committee