



Government of Western Australia
Department of Training
and Workforce Development

Review of the *Vocational Education and Training Act* 1996

March 2019

**Undertaken by the Department of Training and Workforce
Development on behalf of the Minister for Education and Training**

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Executive summary

The *Vocational Education and Training Act 1996* (VET Act), together with the *Vocational Education and Training (Colleges) Regulations 1996* (VET Colleges Regulations) and *Vocational Education and Training (General) Regulations 2009* (VET General Regulations), provide the framework for the administration and regulation of the State's training system.

The VET Act allows for the:

- functions and powers of the Minister;
- constitution of the State Training Board (STB) and the Training Accreditation Council (TAC);
- establishment of colleges, governing councils and other VET institutions;
- regulation of TAC registered training organisations (RTOs); and
- regulation of apprentices under training contracts with employers.

Section 70 of the VET Act requires a review of its operation and effectiveness as soon as practical after every fifth anniversary.

The Department of Training and Workforce Development conducted the review on behalf of the Minister for Education and Training. A range of bodies including TAFE colleges, government agencies, industry representatives and unions provided submissions.

The review found that overall, the VET Act is considered to be operating effectively and significant change is not required.

While priorities for the training sector have changed over time, generally these have been accommodated through changes to existing policies and practices or, where required, changes to the VET Colleges or General Regulations. The VET Act has generally been broad enough to allow the training system to evolve to meet emerging needs. As a result, a number of issues raised in stakeholder submissions to the review were addressed without the need for legislative change.

The review identified a small number of issues which can only be resolved by amending the VET Act. Eleven recommendations have been made to address these issues. Should the decision be made to progress these recommendations, stakeholders will be consulted prior to drafting any legislative changes.

Introduction

The VET Act was introduced in 1996 to modernise and consolidate existing training legislation with the aim of improving co-ordination across the VET system and responsiveness to client needs.

The original Act established:

- an autonomous network of TAFE colleges designed to meet the needs of their local communities and enterprises;
- a separate Department of Training, separating regulatory and policy functions undertaken by the Department from the provision of training services to the public undertaken by the TAFE network; and
- a competitive training market and modernised apprenticeship and traineeship arrangements.

Following a substantial review in 2008, the *Training Legislation Amendment and Repeal Act 2008* came into operation on 10 June 2009, amending the VET Act and repealing the *Industrial Training Act 1975*. It provided a new legislative framework to allow for greater flexibility and a more contemporary training system.

The VET General Regulations were introduced at the same time to support the operation of the Act.

The amended VET Act allows for the:

- functions and powers of the Minister;
- constitution of the STB and TAC;
- establishment of colleges, governing councils and other VET institutions;
- regulation of TAC RTOs; and
- regulation of apprentices under training contracts with employers.

A formative review of the VET Act and VET General Regulations was conducted in 2011 to investigate changes to the Act relating to the State's apprenticeship and traineeship system. No legislative or regulatory changes were recommended as a result of this review.

The current review commenced in 2014 and was completed in 2018, reporting at intervals to Ministers for Training and Workforce Development including the Hon Kim Hames MLA and the Hon Liza Harvey MLA, and the Minister for Education and Training the Hon Sue Ellery MLC.

Terms of reference

Section 70 of the VET Act requires the Minister to undertake a review of the operation and effectiveness of the Act as soon as practical after every fifth anniversary. The Minister must prepare a report based on the review to be laid before each House of Parliament.

Pursuant to section 70, the Minister established a review to:

- 1 examine the operation and effectiveness of the Act;
- 2 report on the currency and relevance of the objects of the Act;
- 3 consider the need for the continuation of the functions, powers and activities as laid out in the Act, including consideration of their appropriateness relative to Government policies and priorities; and
- 4 consider other matters that arise in the course of the review that are relevant to the operation and effectiveness of the Act.

Review methodology

The Department of Training and Workforce Development convened a meeting with the following stakeholders to set the direction for the review:

- the Minister's office;
- Department of Premier and Cabinet;
- TAC;
- Department of Treasury;
- the STB; and
- the TAFE college managing directors.

Operational and administrative issues arising from the current legislation and regulations were identified through consultation within the Department. An environmental scan of key issues and trends impacting the VET sector was also undertaken.

A public call for submissions, and letters to key stakeholders advising of the submissions process, resulted in the receipt of 17 written submissions from TAFE colleges, unions, government and industry.

Analysis

Just over 60 issues were raised, across the 17 submissions received through the process. The majority related to the VET Act, although some issues were raised around the VET Colleges and VET General Regulations.

Overall, the VET Act was considered to be operating effectively and significant change was not required. While some issues were raised about the fundamental operation of the State's training system and therefore proposed major changes to the Act, more frequently suggestions were around fine-tuning the legislation.

The majority of suggested changes related to:

- the overall co-ordination of the VET system;
- the STB;
- TAC;
- TAFE college functions and governing council responsibilities;
- the administration and regulation of apprenticeship and traineeship contracts; and
- fees and charges issues.

Principles of assessment

Each issue was assessed against the following guiding principles to ensure that potential recommendations aligned with the review's objectives:

- Does the recommendation align with Government priorities?
- Is the recommendation likely to improve the operation and effectiveness of the Act?
- What are the proposed key benefits to the community and are there possible negative impacts? These may include accountability; regulatory burden; risks/costs and impact on other legislation.
- Is the recommendation consistent with the current intent of the Act?
- Can the issue be addressed without changes to the Act? This may include regulation changes as part of normal business practices.

Assessment outcomes

As a result of this assessment:

- three issues are review recommendations;
- 38 issues proposing legislative or regulatory change were not supported;
- 12 issues were addressed without changes to the VET Act, including five through changes to the VET Colleges or VET General Regulations; and
- seven issues were out of the scope of the review.

In addition to the externally raised issues, the Department and TAC identified eight issues requiring legislative change that have been included as review recommendations.

Summary of issues

A summary of the externally raised issues arranged by the relevant part of the VET Act or Regulations is provided below.

General comments and Part 1 – Preliminary

Part 1 outlines the objects of the VET Act, defines the terms used within it and enables the Minister to approve schools and universities to deliver VET, in concurrence with the Minister responsible for the *School Education Act 1999* or the legislation that establishes the university. Issues raised focused on:

- equitable access to the VET system in the regions and by under-represented groups;
- the design of the training system;
- arguments for and against a competitive training market; and
- the capacity of students to seek redress under the Act.

Part 2 – Coordination of the State vocational education and training system

Part 2 establishes the VET (WA) Ministerial Corporation and provides for the Minister's function and powers. Issues raised focused on:

- the Minister's powers with respect to TAFE college curriculum, selection processes and third party access;
- funding arrangements; and
- Ministerial guidelines.

Part 3 – The State Training Board

Part 3 establishes the STB and provides for its constitution, powers and functions.

Issues raised focused on:

- the independence of the STB from the Department of Training and Workforce Development;
- expanding the remit of the STB, including through its membership;
- the capacity of the STB to consult with a range of stakeholders; and
- the training councils.

Part 4 – The Training Accreditation Council

Part 4 establishes TAC and provides for its constitution and selected administrative functions. Issues raised focused on:

- the need for a single national regulator;
- quality of training delivery; and
- the appointment terms for TAC members.

Part 5 – Colleges

Part 5 establishes TAFE colleges and college governing councils and empowers the Minister to establish, amalgamate or close colleges as required. It provides for the constitution and functions of both entities; college staffing; and college planning and financial administration requirements. Issues raised focused on:

- rationalising the number of colleges;
- amending college functions to include higher education, operating as a school, international delivery and a more general provision, and removing adult and community education;

- governing council membership and nomination processes;
- expanding the remit of the governing councils to include undertaking managing director performance reviews, greater responsibility and accountability for reporting, and repealing by-laws without Ministerial approval;
- college industrial agreements;
- college planning, funding and reporting requirements; and
- the capacity of colleges to raise funds to provide student scholarships.

Part 6 – Other vocational education and training institutions

Part 6 enables the Minister to establish other VET institutions as required. No issues were raised for this Part.

Part 7A – Regulation of the provision of some vocational education and training

Part 7A sets out TAC's regulatory functions and powers, offences relating to unauthorised training delivery and the appeals process for decisions made by TAC.

Issues raised focused on:

- the capacity of TAC to deal with unethical marketing and poor student facilities and support services; and
- providing greater clarity around the appeals process, including the role of the STB and what is subject to appeal.

Part 7 – Obtaining prescribed VET qualifications and approved VET qualifications

Part 7 sets out the process for classifying prescribed VET qualifications and provides for the administration and regulation of the apprenticeship and traineeship system. Issues raised focused on:

- penalties for non-compliance;
- terminology and definitions;
- the process for classifying qualifications;
- apprenticeship employment arrangements, including with multiple parties, group training organisations or under other hosting arrangements, remuneration and following the termination of a training contract;
- competency based wage progression; and
- recognition of prior learning for training contract only (Class A) qualifications.

Part 8A – Enforcement matters

Part 8A provides for the appointment and powers of VET inspectors. No issues were raised for this Part.

Part 8 – Miscellaneous

Part 8 provides for the remuneration of board, council, review panel or committee members; protection from liability; the Governor's regulation making powers and the review of the Act. No issues were raised for this Part.

Schedule 1 – Provisions relating to the board, council and governing councils

Schedule 1 sets out administrative and operational processes for the STB, TAC and governing councils. No issues were raised for this Schedule.

VET General Regulations

The VET General Regulations provide the operational details to support Parts 7A and 7 of the Act. Issues raised focused on:

- administrative processes relating to training contract and training plan lodgements and amendments;
- training contract terminations and completions;
- appeals for training contract issues; and
- minor changes to the training contract template.

VET Colleges Regulations

The VET Colleges Regulations set the fees, charges and related administrative arrangements for publicly funded training. Issues raised focused on:

- course fee arrangements, including concession schemes, caps on fee-for-service fees and refunds;
- definitions used in the Regulations; and
- the deregulation of course fees.

Recommendations

The review found that overall, the VET Act is considered to be operating effectively and significant change is not required.

While priorities for the training sector have changed since the amended Act came into effect, generally these have been accommodated through changes to existing policies and practices or, where required, changes to the VET Colleges or General Regulations.

The VET Act has generally been broad enough to allow the training system to evolve to meet these emerging needs. However, a small number of issues require resolution to:

- enable TAC to align its regulatory functions with the nationally agreed approach;
- allow TAFE colleges to deliver higher education in their own right and receive philanthropic donations for the purpose of providing student scholarships;
- provide greater clarity around the appeals process against TAC decisions;
- streamline the process for updating the training contract; and
- address administrative errors or inconsistencies in the Act.

The following recommendations all require legislative change, which, if implemented, will resolve these issues.

Part 4 – The Training Accreditation Council

Under the VET Act, STB members are appointed for a period of up to three years and the Chair for a period up to five years, although either can be re-appointed.

The VET Act does not specify the terms of appointment for TAC members, however their appointment terms mirror those of the STB. Specifying the appointment terms for TAC members would provide consistency within the Act.

Recommendation 1

Amend the VET Act to provide for three-year terms for TAC members and five years for the Chair, to align with the terms for STB members.

Part 5 – Colleges

The VET Act enables TAFE colleges to provide education on behalf of another educational institution. It does not enable the colleges to offer school or higher education in their own right.

There is a growing market for dual sector providers who can deliver VET and higher education courses concurrently, or provide a seamless pathway between the sectors to meet student needs. State Government strategic priorities include growing the international education market, which may be achieved by enabling TAFE colleges to deliver higher education. This could be tested through stakeholder consultation.

To deliver higher education, a provider must be registered with the national higher education regulator, the Tertiary Education Quality and Standards Authority, and must meet the Authority's legislated standards. There is no State legislative mechanism to enable a TAFE college to deliver higher education in its own right, and for the Minister to provide direction on what is delivered, by whom and to whom.

Recommendation 2

Amend the VET Act to enable TAFE colleges to deliver higher education in their own right, subject to Ministerial approval of the delivery.

A number of TAFE colleges have received offers of philanthropic donations to be used for student scholarships and awards. There is no mechanism in the VET Act to enable TAFE colleges to receive and use this funding, or for the Minister to develop policy or procedural guidelines governing the administration of such schemes.

Recommendation 3

Amend the VET Act and/or VET General Regulations to enable colleges to receive philanthropic donations to provide for student scholarships.

The VET Act enables TAFE colleges to employ whatever persons are necessary. However, the colleges are established as individual statutory authorities, and there is no provision in the Act to enable their staff to be transferred or seconded to another college or public sector employer.

Before the passage of the VET Act in 1996, the Minister for Education and the Department of Training chief executive were the respective employing authorities for college lecturing and administrative staff, bringing them under the provisions of the *Public Sector Management Act 1994* (PSMA). It was intended these employment conditions would not change when governing councils became the employing authority after the VET Act came into effect. However, this was not reflected in the original VET Act nor rectified in the 2009 amendments.

The lack of legislative authority to transfer and second college employees is currently being addressed through provisions in industrial agreements; however, the legal efficacy of this has always been questionable. This is particularly the case where the agreements have purported to provide authority for college employees to be seconded or transferred into the Department of Training and Workforce Development. There is inconsistency with the provisions of the PSMA which negates the effect of the agreement provisions.

Enabling the transfer and secondment of college staff under the VET Act will ensure consistency with the PSMA provisions, and provide greater flexibility to meet the State's training needs.

Recommendation 4

Amend the VET Act to provide for the transfer and secondment of college staff to another college or public sector agency.

Part 6 – Other vocational education and training institutions

In addition to establishing colleges, Part 6 of the VET Act enables the Minister to establish other VET institutions as required. The Muresk Institute is an example of an institution established under Part 6 of the VET Act.

The VET Act allows college governing councils, with the approval of the Minister, to make by-laws for the operation and management of college lands and facilities. There is no corresponding power in the VET Act to make regulations or by-laws to manage the use and operation of other VET institutions, such as Muresk and other Department of Training and Workforce Development managed land and facilities.

As a result, Muresk Reserve has been included on the Schedule to the *Land Administration (Land Management) Regulations 2006* (LAMR), administered by the Department of Planning, Lands and Heritage, so the Department of Training and Workforce Development can regulate inappropriate access to, and conduct on, the site.

Under this arrangement, offences that occur at Muresk could be dealt with through legal processes that are prescribed in the LAMR rather than processes or penalties endorsed by the Minister. To impose penalties using the LAMR is likely to be costly to administer, not afford a speedy remedy, and is unlikely to change risky student behaviour in the short term. In addition, the LAMR only applies to reserves. If the Minister establishes an institute under the VET Act that operates from freehold land or a leased property, the LAMR could not be used to deal with any offences that occur on the property.

Introducing a head of power so that regulations and/or by-laws can be made for other VET institutions established under the VET Act will enable the Minister to regulate access to, and conduct on, sites within her jurisdiction.

Recommendation 5

Amend the VET Act to enable regulations and/or by-laws to be made for institutions established under Part 6.

Part 7A – Regulation of the provision of some vocational education and training

In 2011, the Australian Government established a national VET regulator, the Australian Skills Quality Authority (ASQA), through the passage of the *National Vocational Education and Training Regulator Act 2011* (NVR Act). With the exception of Western Australia and Victoria, all states referred their regulatory powers to ASQA, and the exercise of the Commonwealth's constitutional powers brought the territories into its remit.

The three VET regulators have the following jurisdiction:

- ASQA is the regulatory body for:
 - all RTOs that operate outside of Western Australia and Victoria; and
 - Western Australian and Victorian RTOs that offer courses to overseas students and/or students in other states or territories.
- TAC is the regulatory body for RTOs delivering nationally recognised training to domestic students in Western Australia only or both Western Australia and Victoria.
- The Victorian Registration and Qualifications Authority (VRQA) is the regulatory body for RTOs delivering nationally recognised training to domestic students in Victoria only or both Victoria and Western Australia.

Despite the decision by Western Australia and Victoria to retain their regulatory powers, there is agreement that TAC and the VRQA will mirror national legislation to ensure a nationally consistent approach to regulating the VET sector where possible.

In most instances, TAC has been able to mirror the national regulatory approach through changes to its policies and procedures, and where required, minor amendments to the VET General Regulations. However, three aspects of the national regulatory approach require the VET Act to be amended:

- 1 offences relating to the unethical marketing of VET courses by third parties;
- 2 enabling the delegation of TAC's function of varying an RTO's scope to the RTO; and
- 3 the publication of TAC's audit results and regulatory decisions.

In 2009, the Australian Government introduced VET FEE-HELP, a loan scheme for students studying higher level VET qualifications modelled on the Higher Education Loan Program. An unintended consequence of the introduction of the scheme was the rise in third party brokers who employed a number of unethical strategies to recruit students into VET courses on behalf of RTOs, including offering inducements, targeting disadvantaged people, failing to provide adequate information about courses to prospective students and enrolling students in courses that were not suitable for them.

In response, the Australian Government amended the NVR Act to make it an offence, capable of being committed by an RTO or a third party contracted by an RTO but not itself registered as a provider, of advertising a VET course without listing the RTO's name and registration code.

Section 58A of the VET Act establishes a number of offences relating to persons claiming to be an RTO when they are not, and to RTOs operating outside of the scope of their registration or an order by TAC not to operate in this State. However, it does not enable the potential prosecution of third parties who market VET courses in an unethical manner.

Recommendation 6

Amend section 58A of the VET Act to introduce a new offence relating to the unethical marketing of VET courses by third parties.

The NVR Act also includes provisions which enable ASQA to delegate selected regulatory functions to its RTOs, including managing their scope of registration and accrediting courses. In response to the Australian Government's commitment to reduce the regulatory burden on business, ASQA announced in September 2014 that it intended to use its delegation power to enable its eligible low risk RTOs to add new qualifications or units of competency to their scope of registration without having to submit an application and pay a fee to ASQA each time they make a change. To date, ASQA has not delegated its course accreditation function to any of its course owners.

Although TAC has a delegation power under section 28 of the VET Act, this does not enable it to delegate these regulatory functions to its RTOs.

Recommendation 7

Amend the VET Act to enable the delegation of TAC's function of varying an RTO's scope to RTOs with a track record of compliance with the Standards as an RTO.

A key regulatory focus for the VET sector in recent years has been supporting consumers to make informed decisions about their choice of RTO by providing timely and accurate information about providers. To support this focus, in July 2016 ASQA commenced the practice of:

- publishing its audit findings of RTOs and its regulatory decisions prior to the outcome of the appeals function provided under the NVR Act; and
- applying the condition on RTOs that they must publish ASQA's decisions on their website.

This practice was endorsed by the Council of Australian Government's Industry and Skills Council, and changes made to the *Standards for VET Regulators 2015*, to allow all VET regulators to operate in this manner.

There is no provision in the VET Act that enables TAC to publish its audit findings and regulatory decisions or require its RTOs to publish its decisions on their website.

Recommendation 8

Amend the VET Act to enable TAC to publish the audit findings of its RTOs, publish its regulatory decisions prior to the outcome of any appeal under the VET Act and require RTOs to publish TAC's regulatory decision/s on their website.

Part 7A Division 2 of the VET Act establishes the appeals process for individuals who are dissatisfied with a decision made by TAC under sections 58B, 58C or 58E. The STB is the body that deals with these appeals.

Changes to the wording for the appeals process that occurred during the 2009 amendments to VET Act have created some ambiguity about the scope of appeal allowed for under section 58G(2), and how upheld appeals are dealt with under section 58J.

Legislative change is required to:

- clarify and increase the scope of appeal that can be considered by the STB to include all policies, procedural guidelines and VET sector standards used by TAC in carrying out its regulatory functions; and
- refer upheld appeals back to TAC for reconsideration.

Recommendation 9

Amend the VET Act to provide greater clarity around the appeals process for TAC decisions, including the scope of appeals that can be considered by the STB.

Part 7 – Obtaining prescribed VET qualifications and approved VET qualifications

The chief executive's power to delegate his or her functions under Part 7 of the VET Act and the associated Regulations is currently incorrectly enabled through Regulation 35 of the VET General Regulations. The VET Act needs to be amended to provide for a head of power to enable the *intra vires* delegation of chief executive functions.

Recommendation 10

Amend the VET Act to enable the delegation of the chief executive's functions under Part 7 of the VET Act and associated regulations.

Section 60 of the VET Act enables regulations to be made to provide for the content or form or both of training contracts. As a result, the training contract is Schedule 1 of the VET General Regulations and regulatory change is required every time it needs amending.

In addition to being the contractual arrangement between an employer and an apprentice, the training contract is utilised by the Australian Government as a mechanism to record information for the assessment of employer incentive payments. The content of the training contract often requires updating to ensure currency.

To enable payment of these incentives, Australian Government definitions such as those for new and existing workers, are included in the training contract. By default, these definitions, which are not always aligned with State definitions or requirements, are embedded in the State's legislation. Flexibility is needed to enable changes to be made to the training contract, to address inconsistencies between the Australian Government and State definitions as they arise.

The capacity to update the training contract in a more responsive and streamlined manner will be achieved by removing the training contract from the Regulations and placing it in another type of legislative instrument; for example, a 'prescribed form' that is approved by the Minister, Director General of the Department of Training and Workforce Development or delegate.

Recommendation 11

Amend the VET Act to enable the training contract to be placed into a legislative instrument that is easier to update.