

# Education Regulation Review – Draft Legislation

## Response from the Board of the TRB, its Registrar and Staff

The Teachers Registration Board (TRB) and its Board Office Staff welcome the opportunity to provide feedback concerning:

- whether the Bill, as it is drafted, gives effect to the recommendations in the Report, and
- any unforeseen consequences that need to be considered by Government.

### Executive Summary

It is notable that *“In establishing the Review, the Minister sought to achieve the following outcomes:*

- *the provision of independent cross sectoral advice as it relates to the entities’ existing functions (education regulation)*
- *the strengthening of the governance framework for delivery of the entities’ existing functions*
- *the sustainable funding of education regulation*
- *the adoption of better practice regulation with a focus on education outcomes.”*

Thus, *“The Terms of Reference for this review established a cross-sector Steering Committee to provide advice to the Minister on how to strengthen the governance framework for the delivery of education regulation in Tasmania and the sustainable funding of this framework.”*

The Steering Committee was to make recommendations to update the TRB framework using the elements of a modern regulatory framework as a guide.

The Board and its Registrar **welcomed the move to a modern regulatory framework** and the **adoption of better practice regulation** with a focus on education outcomes.

**The amending Bill** as it is currently drafted, while likely to achieve these valuable results, **does appear to have created potential consequences of concern, some of grave concern**, that need to be considered by Government.

In this summary, we set out those of grave concern in overview and direct the attention of the reader to the more detailed discussion of these points in the body of our response.

### Purpose/Objects/Principles of the Act -

In the initial discussion paper, the steering committee noted that the *Teachers Registration Act “does not include a clear statement of purpose, eg objects and principles to guide administration of the Act”* and asked, *“Do you think that the Teachers Registration Act 2000 should be updated to include a clearer statement of purpose (object) and principles to guide how the TRB regulates?”*

We do not believe that what is drafted as the statement of purpose/principles in the proposed Bill (Clause 143) achieves what was intended or recommended. The Board, its Registrar and staff continue to believe that **Section 7A of the current Teachers Registration Act is a clear statement of purpose for the regulator.**

**Section 7A:** *“In performing its functions and exercising its powers, the Board must consider the welfare and best interests of students to be of paramount importance”* We are very concerned about the unintended consequences we see arising from the repeal of this section and importation of the Principles of the *Education Act* into the *Teachers Registration Act*:

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Section 7A (clause 145 in amendment Bill) **the repeal of this section must NOT be progressed** – it is a retrograde step and weakens the Board’s remit regarding its functions and powers.

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**Please see our response to Recommendation 1 for a detailed argument regarding these vital matters.**

**A single position to hold all the powers and functions of all the Boards, while simultaneously the independence of the regulators is to be improved -**

We are very concerned about the unintended consequences we see arising from the recommendation to *“combine the responsibility for administrative outcomes and delivery of functions under a single Director of Education Regulation, which will take on the functions and powers of the Registrar Education, the TRB Registrar, and the TASC Registrar”*. Strictly speaking, we are unable to direct the Government to reconsider this as it is not being legislated via the Bill as currently drafted; however, it **appears to mitigate against Recommendations 6 and 16 and the intent to strengthen the regulators, keep them as separate entities and ensure transparency** concerning lines of reporting on administrative matters versus regulatory (legislated functions and powers) matters. As discussed in more detail under Recommendations 8, 9 and 17 in our response, **claiming that a single position could take on the regulatory, legislated functions and powers of all the regulators while simultaneously retaining them as separate entities is a logical impossibility.**

### Director of Education Regulation

A single position to hold all the powers and functions of all the Boards; Boards required to delegate their legislated functions and powers to that one unlegislated individual role in contradiction to the intent of the Acts themselves; at the same time improve the independence of the regulators and the clarity of reporting lines for administrative and legislative outcomes – *contradictory and risky*

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**Section 7B Delegation is missing from the draft Bill we received -**

Given there is no statement that it has been repealed, we expect this is purely an editing error but it is vital that this section is retained. Section 7B of the current TRA states “The Board may delegate any of its functions and powers under this or any other Act other than this power of delegation.” The effective and efficient functioning of the TRB is reliant on this power of delegation remaining as-is.

## Detailed responses to the Draft Bill by Recommendation

The Teachers Registration Board (TRB) and its Board Office Staff have been thankful for the opportunity to hear from the Chair of the Steering Committee and to meet with and discuss matters about which we required greater clarity and various areas of concern over the past several months. We especially thank Alice Blake for her time. While a high proportion of the concerns expressed in this paper have already been communicated, we felt it prudent to also set them out formally in this response so that legislators and the public will also have the opportunity to consider the matters raised.

In setting out this response, we have first listed the Recommendation and then commented on whether it has been captured in the Draft Bill in a manner that seems likely to give effect to the recommendation as we have understood it, and then on any unforeseen consequences we believe should be considered by Government. Finally, we have included in an appendix a draft Board Skills Matrix and any additional resource material of relevance.

**Recommendation 1** (Clauses 4 & 5 Education Act (EA); Clauses 142 & 143 Teachers Registration Act (TRA))

*Update the Section 4(1)(g) of the Education Act 2016 (Principles) to include education regulators.*

RESPONSE: While it remains unclear what purpose is intended to be achieved by including all the regulators in the *Education Act 2016*, the Bill, as it is drafted, gives effect to this aspect of the recommendation. We have not perceived unintended consequences because we do not have clarity as to the intended consequences of this change.

*Require a more explicit focus on learner outcomes by the TRB and TASC through the application of the Education Act 2016 Principles.*

RESPONSE: The Bill, as it is drafted, appears to give effect to this aspect of the recommendation. However, **it is arguable that many of the Principles are not within the legislated ambit of the Teachers Registration Act 2000 (TRA) so that no effect can be given to them.** In any event, the wholesale incorporation of the *Education Act 2016* principles into the TRA is likely to lead to multiple consequences in respect of the TRB about which we believe the Government and legislators should be concerned and therefore re-consider.

**The purpose of the TRB is to regulate for the wellbeing and best interests of Tasmanian students thereby enhancing community confidence in our teaching profession.** We draw this from the policy and context statements in the second-reading speeches in 2000 and 2009. Indeed, the Review of Education Regulation Discussion Paper on Page 15 notes:

- *The Board must consider the welfare and best interests of students to be of paramount importance*
- *All students are taught by appropriately qualified and competent teachers of good character and meet community expectations regarding their fitness to teach.*
- *One of the aims is to improve the existing status of the teaching profession and to increase the professional standing of teachers and the desirability of teaching as a profession. As well as optimising the educational outcomes of students through setting minimum standards for entry to the profession, the introduction of the legislation will protect children in government and non-government schools from the possibility of sexual or other abuse.*

Further, we say that the recent Royal Commission into Institutional Responses to Child Sexual Abuse, has highlighted that **it is more important than ever that our role in protecting students from sexual or other abuse is not lost in a myriad of other principles purporting to be of equal (or greater)**

**importance.** There are principles that, while in a policy sense are worthy for all education regulators to have some regard, we cannot possibly be drawn into regulating (indeed, the TRA would need significant amendment to enable us to do so) and that **far from making our role transparent, has the likely and deplorable outcome of obscuring our purpose and watering down our power to provide the community with confidence their vulnerable young people (in particular) have a ‘cop on the beat’.**

Additionally, a number of these Principles **may lead to an increase in complaints from parents, more properly addressed by employers and unintentionally lead to an impression of over-regulation** rather than proportionate regulation.

The Principles move the TRA away from the purpose envisaged by Parliament in its second reading speeches and how the TRA was drafted. The Principles are not given legislative effect by Section 6a, in particular. The fact that Section 7A was added as a stand-alone section at the start of the Act outlines the prominence of this. In addition, with no objects of the Act, only Section 7 and ancillary materials will provide overarching guidance.

While we can see that the Principles are in general statements of expectation about the outcomes for students of education in the State of Tasmania which promote the objective of providing learning for students. We are concerned that many of these principles are outside the intended purpose or object of the *Teachers Registration Act* and could have serious unintended consequences which are elucidated further, later in this response

**If the generic Principles are to be imported, it is recommended that the *Teachers Registration Act (TRA)* have an expressly stated purpose or object added to avoid doubt and reduce the likelihood of an interpretation based on the intended importation of the *Education Act* Principles into the TRA.** This would reduce the likelihood of an interpretation that does not promote the purpose or object as understood from Section 7A of the current TRA—and also from the Official reports of proceedings in Assembly in relation to the bill that became the TRA, the presentation speech made to the House of Assembly during passage of the bill and subsequent amendments, the Explanatory statement for the bill (and subsequent amending bills) that form the current Act and other relevant documents presented to the House of Assembly before the TRA was passed, relevant reports of committees of inquiry (and other similar entities) presented to Assembly before TRA passed and Relevant report of Assembly committee made to Assembly before the current version of the Act was passed)—namely that the purpose of the TRA is to protect students and provide them with suitably qualified teachers who are of good character, fit to teach and with a suitable level of numeracy and English literacy. In this context, the ‘prime directive’ of the TRA is to consider the wellbeing and best interests of students.

**The outcomes of the Royal Commission into Institutional Responses to Child Sexual Abuse strongly suggest that it should be of concern that the one regulator in the education sphere with functions enabling it to protect vulnerable students from those in whom society places its trust and with whom are posited power over students (namely teachers), could have its focus blurred, and its purpose and object diluted to such an unconscionable extent by the inclusion of principles the TRA**

**has no current legal right to regulate.** The Principles themselves may be appropriate at a policy level but are not when enacted in black letter law (especially when many of the terms/concepts are not defined).

An alternative view of the interaction of a number of these principles with the TRA is that the Board Office would require a massive injection of public money to enable it to BOTH regulate for its current purpose AND for these additional curricula, pedagogical, and education setting principles that are arguably more in the realm of TASC on the one hand, and the non-government schools registration board on the other. **The TRB remains keen to collaborate with employers in all sectors on embedding the Teacher Standards into professional knowledge, practice, and engagement, to drive teacher focus on positive impacts on student wellbeing/safety, learning and engagement in learning. However, it is not currently equipped with a fit for purpose Act to properly regulate for this, nor with the staffing structure and funding model needed to do so against this vastly broadened remit.** (see appendix parts 1 & 2 for Acts interpretation principles)

*Develop regulator and function-specific principles, to guide the administration of the respective Acts by all the Regulators*

RESPONSE: The Bill, as it is drafted, does **not** give effect to this aspect of the recommendation. **The imported Education Act (EA) Principles are generic and far from regulator and function specific.** The proposed Principles do not accord with the current Section 6A of the TRA. The Bill, as drafted, has added all the Principles of the Education Act to the *Teachers Registration Act* and taken our 'prime directive' (Section 7A) "In performing its functions and exercising its powers, the Board must consider the welfare and best interests of students to be of paramount importance" and made it just one of the second-order principles of the amended Act (not even in subsection 1). **This mitigates against the recommendation to develop regulator and function-specific principles to guide the administration of the TRA by the TRB.**

We are also gravely concerned that the generic Principles (in subsection (1)) are directive – subsection (1): "*The following principles are the principles on which this Act is based*" while those that relate more closely to the Board (in subsection (2)) "*are to be taken into consideration*" and many of them in both subsections are **not suitable to be the Principles on which the *Teachers Registration Act* is based nor to be taken into consideration on every determination and decision of the Board (and its Officers) without opening up to judicial interpretation a probable cause to undo or to severely limit the very functions of the Board upon which the community is relying for the safety and welfare of their young people in schools and colleges, and TasTAFE.**

Given that without a Purpose/Object/s section of the Act, the Act must be interpreted and applied in a manner to give effect to these Principles (used to solve uncertainty or ambiguity; used to interpret detailed provisions of the legislation), **the Principles that should be removed from the *Teachers Registration Act* are Subsection (1) (a), (b), (d), (f), (h), (i), (j), (k)**

We reiterate that, they are directive, and many are incapable of being given effect under the *Teachers Registration Act* (TRA) itself.

They would be excellent as policy positions or fashioned into appropriate Ministerial directions or as guiding concepts for the development of annual plans and strategic documents, etc but are inappropriate in the TRA itself given the possible use of them by legal representatives to undermine the protection of students and the standing of the profession in the eyes of the community. **Their ambiguity imports the potential for the Act to be re-interpreted and divert resources from the Section 6A functions of the Board.**

The TRA is silent on Parents as teachers and indeed it should remain so as **the purpose of the Act is to ensure that professional teachers are appropriately qualified, of good character and fit to teach**, it would not be wise to open the door to parents claiming they have a right to be registered without such qualifications, and character and fitness tests.

While the TRA does give the Board the function of accrediting initial teacher education courses, determining “category of registration”, and to develop and improve teaching standards, **it is not wise to require the Board in all its deliberations (see particularly current sections 17 and 19 of the TRA) to have to consider learning frameworks in use by teachers**, a competence threshold that is more properly the sphere of the employer (providing the foundation for life-long learning (1)(i) and education of a quality that is capable of enabling them to reach their potential . . . (1)(k)).

The TRA gives the Board no power or functionality to in any way ensure Principles (d) or (h), especially if the Board is to remain as an independent regulator of teachers. **We have not stated that Principles (c) or (e) should be removed, as parents have a right to complain about teachers under the TRA and thus these are somewhat relevant to the Act but should NOT be stated as determinative principles**, especially as presently the TRA is poorly structured in section 19 (no floor under the competence or other complaint issues is explicitly defined) and these proposed principles have the possibility of further exposing the Board to complaints that are outside the intent of the Act and regulation to “consider the welfare and best interests of students to be of paramount importance” which **in this post-Royal Commission world must surely focus limited resources on serious omissions or commissions by teachers that endanger students**.

**Subsection (2) (a) – this should remain as Section 7A of the Act itself and not be weakened to a principle of the Act;** (b) (c) & (d) are all acceptable concepts/principles but not as a lens through which the functions and powers, determinations and decisions under the Act must be interpreted – the wording is directive and should be discretionary. Further, we have problems with the interpretation of key concepts and who arbitrates on whether the Board has: “unnecessarily impeded”, “communicated in a clear, targeted and effective manner” (especially given communication is a two-way process), who measures the proportionality referred to in (d) and what does (e) mean? **Are the key concepts defined somewhere?**

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There is much work required to ensure that statutory interpretation does not throw up some very unwelcome results for the public and the Government. Surely these excellent principles are better dealt with outside of legislation in a framework that regulators must commit to in order to receive funding or similar

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**Recommendation 2** (Clauses 6, 8, 9, 10, 11, 13, 15, 30, 31 & 36 EA; Clauses 148 & 150 TRA)

*Adopt a performance framework for all Regulators that provides for:*

- *the setting of relevant objects and principles;*
- *the Minister must set policy expectations for each Regulator which are to be reviewed at least annually;*
- *the Regulator to prepare a corporate plan including outcome-based performance targets for approval by Minister;*
- *the Regulator to report against these performance targets in its annual report; and » the Minister to be able to commission an external review of a Regulator if required.*

RESPONSE: The Board and its Registrar **welcomed the move to a modern regulatory framework and the adoption of better practice regulation** with a focus on education outcomes. The Bill as drafted

appears to achieve these aims and Recommendation 2 with no currently visible unintended consequences.

**Recommendation 3** (Clause 4 EA; Clause 143 TRA)

*Provide a mechanism that requires Regulator coordination and collaboration with relevant bodies to achieve regulatory outcomes and shared objectives.*

RESPONSE: We were unable to discern how Clause 4 of the *Education Act 2016* in the Amendment Bill (mirrored in Clause 143 TRA) is to give effect to this recommendation. To answer whether the Bill as drafted would have unintended consequences would require clarity as to the mechanism the drafters envisaged was to spring from this legislative change. We are particularly interested to know how this will overcome the impediments of the Privacy Information Protection (PIP) Act, especially in light of the Office of the Solicitor General advice, received by the Department of Education, that advises them to take a narrow interpretation of information sharing.

**Recommendation 4** (Clauses 11 & 15 EA; Clause 149 TRA)

*Strengthen the visibility of the appeals process for each Regulator by requiring them to publish it on their respective websites.*

RESPONSE: The Bill, as it is drafted (clause 149), gives effect to this aspect of the recommendation. We have not perceived unintended consequences and while we already publish our appeals process in some instances, will ensure it is made more readily accessible and clear.

**Recommendation 5** (not legislated)

*If an appropriate appeals mechanism is not established through the forthcoming Tasmanian Civil and Administrative Tribunal (TasCAT) model, establish an independent internal review panel to hear appeals of regulator decisions before they go to the Magistrates Court (Administrative Appeals Division).*

RESPONSE: Since appeals to the Magistrates Court are already legislated and published in every relevant piece of documentation regarding Board decisions, the draft Bill did not need to address this aspect for the TRA. Many TRB decisions made by Board Officers under Board Policy currently clearly indicate a right for teachers to appear before the Board as a form of internal review but the appellate mechanism indicated in this recommendation is not currently in place and the draft Bill does not appear to have attempted to address this. It should be noted that while disciplinary decisions do not currently have an appellate mechanism internally, there could be one; but legislation would not be required to enact such.

**Recommendation 6** (Clauses 9 & 12 EA; N/A TRA – no legislative change for the TRB)

*Maintain the existing governance models of a board supported by Registrar functions, for the TRB and NGSRB and a single regulator for the Registrar Education – no legislative change made or required.*

**Recommendation 7** – not relevant to the TRB

**Recommendation 8** (Clauses 12 EA; N/A TRA – no legislative change for the TRB found)

*Retain each regulator as a separate entity responsible for regulatory decision making and combine the responsibility for administrative outcomes and delivery of functions under a single Director of Education Regulation, which will take on the functions and powers of the Registrar Education, the TRB Registrar, and the TASC Registrar*

RESPONSE: We cannot logically or legislatively reconcile the points made in the Recommendation itself. **How is it possible to retain each regulator as a separate entity yet combine the functions and powers in one unlegislated position?**

Combining some of the administrative functions and outcomes for all Boards could achieve efficiencies (e.g. communications and marketing, aspects of HR, secretariat for the Boards, production of Annual Reports – this is not a determinative list, rather, it is provided for clarity to highlight functions which are not regulatory and legislated functions but rather are administrative functions and outcomes that are separable (at least to a major extent) from the regulatory and legislated functions) and makes sense in the context of improving coordination and collaboration with relevant bodies. However, while relevant administrative functions could be centralised, the fundamental powers of the Boards are too extensive to be managed by one director. **Claiming that a single position could take on the regulatory, legislated functions and powers of all the regulators while simultaneously retaining them as separate entities is a logical impossibility.**

Further, we noted that the table of changes to the TRA states that Recommendation 8 is Not Applicable to the TRB: “There is no legislative change associated given the TRB is already in existence.” While this is strictly true (the TRB is in existence and the Director of Education Regulation position has not been legislated) there has nevertheless been a change made to Section 7C that we believe is not warranted, required or adequately explained (it seems to be seen by others to lay the foundation for Recommendation 8 to enable the removal of a dedicated Registrar for the TRB). This is arguably outside the remit of the Review given it is likely to result in significant **operational changes** for the regulator.

**Recommendation 9** (Clause 15 EA; Clause 147 TRA – but note this is NOT a legislative change the existing s7D and particularly s7D(3) permits the Executive Officer/Registrar to delegate its functions and powers)

*Ensure the Registrars have the power to delegate their functions or powers.* [NOTE: under section 7D of the TRA this is already the case]

RESPONSE: We note; however, that there is an amendment to Section 7D of the existing TRA that is not related to Recommendation 9 but to Recommendation 17. The amendment proposed sets up a potential conflict (i.e. an unintended consequence that the Government may wish to reconsider) in that the Board can delegate any of its functions—including “any other functions imposed by this or any other Act” (Section 6A (m))—and it seems that the amendment seeks to have the Registrar responsible (under clause 147 which amends Section 7D (f) by adding (4)(b) “to the Secretary of the Department in relation to functions and powers performed by the Registrar in accordance with this or any other Act”). **Far from clarifying reporting arrangements and separating regulatory responsibilities from administrative responsibilities for greater transparency, this appears to legislate for murky waters regarding what is the duty of the Board and its Officers to report to the Secretary and what is their independent regulatory remit.**

*Note: The Director Education Regulation will take on the functions and powers of the three Registrars and will be able to delegate them.*

RESPONSE: The notes at Recommendations 8, 9 and 17 are confounding. They are not enacted by the legislative changes in the draft bill and do not appear to achieve any of the identified aspects of the governance model. Further, no-one has been able to state the remit of the Director role nor how it is proposed that Independent Boards are to be made to delegate their powers and functions to the position when Section 7B of the current TRA makes delegation of powers and functions a matter that the Board determines for itself (“The Board **may** delegate any of its functions and powers under this or any other Act other than this power of delegation”[bold added]). *Please note that in the draft*

*Bill provided, Section 7B does not appear. It is not stated that it has been repealed or replaced it is just simply missing (see pages 143 and 144 of the draft Bill).*

When the notes at Recommendations 8, 9 and 17 are read in conjunction with Recommendation 7 (that ONLY applies to TASC) and the change at section 7C (clause 146) of the TRA draft amendment bill, it appears to both overstep the remit of the review by going beyond governance, making a retrograde change to the professional standing and responsibilities of the executive officer/registrar of the TRB for no apparent legitimate reason and is clearly in contradiction to Recommendation 6

*[Maintain the existing governance models of a board supported by Registrar functions, for the TRB and NGSRB and a single regulator for the Registrar Education – no legislative change made or required].*

Is the change to section 7C in the TRA draft amendment bill purely a drafting directive (to make as much of each amending bill common as possible) that has had an unintended outside of remit result or is it the intent of the review to downgrade the functions and powers of the registrar of the TRB (clearly outside the Terms of Reference and in contradiction to Recommendation 6)?

If the latter, **the public has a right to know** why.

Certainly, **it is very difficult to see how forcing the three boards** (in contradiction to the ordinary construction of the intent of the Acts) **to delegate their legislated powers and functions to a non-legislated, undefined role** of “Education Regulation Director” (which appointee is to be a directly appointed public servant whose affiliation with the largest of the regulated entities is not to be spelled out in the public domain) **will further safeguard the independence of the regulators “through greater transparency and clarity”**.

It is not seen as transparent, clear or sufficient to state that the position will “take on the functions and powers of the three regulators and will be responsible to the Board (singular) and Head of Agency respectively” – what does this even mean?

What will the Registrars be doing? Does the steering committee still (wrongly) believe there is sufficient overlap in the regulatory functions of each Board office that one individual can reassure the public that all are being fully and properly discharged?

Is it intended that one or all of the registrars will cease to need to exist?

Has the Minister been briefed on the incompatibility of what at a distance appear to be the same regulatory tasks but are, in fact, quite specialised and distinct?

Is the Minister aware that placing these distinct regulatory functions under the control of one person could result in conflicts of interest?

Is it not obvious that such a structure is contrary to the stated intent of safeguarding further the independence of the regulators?

**Recommendations 10, 11 and 12** are not covered by the Draft Bill

**Recommendation 13** (Clauses 9 & 15 EA; Clause 148 TRA)

RESPONSE: Continues to *permit the TRB to form committees* – no change. This is welcomed, especially with the recommendations to have a smaller Board.

**Recommendation 14** - not covered by the Draft Bill

**Recommendation 15** (Clauses 8 & 15 EA; Clause 151 TRA)

RESPONSE: The TRB was already *subject to Treasurer's Instructions* so Clause 151 (S34AA) just sets this out in the TRA. We can see no unintended consequences of this change that would give rise to the Government reconsidering.

**Recommendation 16** (Clause 6 EA; Clause 148 TRA)

*Provide for each Regulator to be:*

- *accountable to the Minister through its performance framework*
- *subject to Ministerial direction but not in respect of individual regulatory decisions.*

RESPONSE: The Bill, as it is drafted (clause 148), gives effect to this aspect of the recommendation. Until a performance framework has been developed and implemented, we feel there is little opportunity to discern unintended consequences. We welcome the clear statements regarding the Ministerial statement of expectations at S10(3); we note that S10(3)(c), in particular, gives effect to the "*subject to Ministerial direction but not in respect of individual regulatory decisions*" aspect of this Recommendation.

**Recommendation 17** (Clauses 9 & 15 EA; Clause 147 TRA)

*Provide for each Registrar to be:*

- *responsible to the respective Board for any delegated functions*
- *responsible to the Head of Agency (Secretary) for all other functions.*

*Note: The Director Education Regulation will take on the functions and powers of the three Registrars and will be responsible to the Board and Head of Agency respectively.*

RESPONSE: The Note on this Recommendation has been extensively discussed earlier.

**Recommendation 17 is confusing.** The delegated functions and powers of the Boards (including the TRB) and that assumed by the Director Education Regulation are poorly defined and unlikely to result in a clear separation of lines of responsibility for either the Director role or the Registrar roles. It appears that the TRA will need to be amended to give effect to this, but see also the comments earlier on the separation of responsibilities – it may well have unintended consequences that the Government may wish to reconsider especially regarding the manner in which it has been suggested to be only part-legislated.

**Recommendation 18** (Clauses 10 & 15 EA; Clause 148 TRA)

*The independence of the regulators should be further safeguarded through greater transparency and clarity on administrative support provided by DoE. This should be achieved through a legislated requirement for a framework agreement between Head of Agency (Secretary) and the Regulator that specifies:*

- *The overall budget*
- *Staffing numbers, selection, performance assessment, corporate support*
- *Information sharing policies*
- *Application of government policies*
- *The accountability of the Registrars to the Regulator and to the Head of Agency (Secretary)*
- *Accountability of each Regulator to the Secretary for its budget outcomes*
- *Any cost recovery arrangements.*

RESPONSE: The Bill, as it is drafted, appears to give effect to what is already achieved by the TRB and the Department via Memoranda of Understanding and our Service Level Agreements. We are certainly interested in the "Information Sharing policies" aspect of this Recommendation but wonder if this can overcome the current narrow interpretation of the PIP Act followed by the Department (mentioned earlier) and thereby assist the regulator to have less impact on those it regulates.

**Recommendation 19** (Clause 13 EA; Clause 144 TRA)

*Establish skills-based boards as the governing body for the TRB, TASC and NGRSB with the following requirements:*

- *The Boards be appointed by the Minister informed by advice from the ERAC*
- *The Minister appoints members who collectively have skills in the following:*
  - *general board governance skills*
  - *skills relevant to the performance of the Board's functions.*
- *The Regulators to provide advice to the Minister on the skills and experience required when vacancies arise*
- *In appointing members, the Minister has regard to ensuring that the composition of the boards are a fair and balanced reflection of the diversity of the community*
- *That board positions would be filled following a public advertisement process*
- *Each Board has a minimum of 5 and maximum of 7 members, including the chair.*

**RESPONSE:** The Bill, as it is drafted, gives effect to this aspect of the recommendation. The Board welcomes transparency in this new approach but points to a potential risk of those with vested interests being appointed if the only mechanism is public advertising of vacancies. Appended to this submission is a draft skills matrix for consideration for the TRB. We are concerned that despite continuing to be able to form committees to undertake the work of the Board, there is little understanding of the load that has been carried in the past by Board members in this regulatory work and for little or no remuneration. It is likely the change to a smaller skills-based Board will have the consequence that professional conduct and registration oversight matters, in particular, will be much more financially costly in the operation of the Board in future. Please see Appendix 3.

**Recommendation 20** (Clause 13 EA; Clause 144 TRA)

*Provide for:*

- *Selection criteria, termination provisions and public notification of changes to board membership through the Regulator's annual report*
- *Staggered three-year appointment terms, as well as the number of terms for board members, subject to advice from ERAC*
- *A transition, where relevant, to the new board structure as existing board member positions become vacant.*

**RESPONSE:** The Bill, as it is drafted, gives effect to this aspect of the recommendation. We have not perceived unintended consequences that should give the Government cause to re-consider.

**Recommendations 21 – 24 – not effected via legislation**

*21. Request Regulators to examine the scope for minor additional revenue to be raised having regard to the sustainable funding principles and report to the Minister, noting that TRB fees currently remain appropriate.*

*22. The base level of funding of \$4.3 million, currently provided from DOE's budget allocation, be moved to a separate Output Group, not under Output Group 1 – Education in the Tasmanian Budget*

*23. Capital and recurrent outlays for education regulation in excess of the base level of funding for Education Regulation (\$4.3 million) will need to be identified and considered through the State Budget process.*

*24. DoE to commission the independent development of a methodology, with input from the boards, to determine the sustainable funding for each of the Regulators. Such a methodology would need to cover both operational and capital requirements and would be applied on an annual basis.*

## Board Matrix of Skills and Experience

**Please see Appendix Section 3 for a Board suggested approach**

Additionally, the Board believes that the establishment of one or more “reference committees/groups” (these would NOT have delegations but rather could be called upon to provide advice to the Board or its decision-making committees) could be valuable to establish to provide the needed teacher, parent, student, ITE and school leadership input. They might also be stood up on a limited period basis for specific strategic objectives. For example:

### Education Reference Group

- ITE and school student experience
- Primary, Secondary and Senior Secondary experience
- School leadership experience (small and isolated school; large metro school; Independent school; Catholic CET School; etc)
- Remote and regional experience
- Parent/s
- TasTAFE
- UTas

ICT Reference Group – could be established just while this is a focus of the Board’s Strategic Plan

Mental and Physical Health reference group – a ‘board’ of practitioners to whom the Board or its committees can go for advice etc

# Appendices:

## 1. ACTS INTERPRETATION ACT 1931 - SECT 8A Regard to be had to purpose or object of Act

### ACTS INTERPRETATION ACT 1931 - SECT 8A

#### Regard to be had to purpose or object of Act

(1) In the interpretation of a provision of an Act, an interpretation that promotes the purpose or object of the Act is to be preferred to an interpretation that does not promote the purpose or object.

(2) Subsection (1) applies whether or not the purpose or object is expressly stated in the Act.

[\[63\]](#) (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ) (citations omitted):

the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy.

[\[64\]](#) (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ) (citations omitted):

the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.

[\[65\]](#) [\[2009\] HCA 41](#); [\(2009\) 239 CLR 27](#). See especially at 46–7 [47] (Hayne, Heydon, Crennan and Kiefel JJ) (citations omitted):

This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.

[\[66\]](#) [\[2012\] HCA 55](#); [\(2012\) 250 CLR 503](#). See at 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ) (citations omitted):

'This court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text'. So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself.

[67] It is worth noting that some authors have queried whether the articulation of the modern approach to statutory interpretation outlined in *Alcan* and *Consolidated Media Holdings* is consistent with the earlier description in *CIC Insurance* and *Project Blue Sky*. According to these authors, the later decisions represent a shift or recalibration towards a more text-focused approach. See Mark Moshinsky, 'Current Issues in the Interpretation of Federal Legislation' (Speech delivered at the National Commercial Law Seminar Series, 3 September 2013); Juliet Lucy, 'Recent Trends in Statutory Interpretation (13<sup>th</sup> Floor St James Hall, May 2014) <<http://13stjames.net.au/wp-content/uploads/2014/05/Recent-Trends-in-Statutory-Interpretation.pdf>> .

[68] *Consolidated Media Holdings* [2012] HCA 55; (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ), quoting *Alcan* [2009] HCA 41; (2009) 239 CLR 27, 46 [47] (Hayne, Heydon, Crennan and Kiefel JJ).

## 2. ACTS INTERPRETATION ACT 1931 - SECT 8B Use of extrinsic material in interpretation

### ACTS INTERPRETATION ACT 1931 - SECT 8B

#### Use of extrinsic material in interpretation

(1) Subject to subsection (2), in the interpretation of a provision of an Act, consideration may be given to extrinsic material capable of assisting in the interpretation –

- (a) if the provision is ambiguous or obscure, to provide an interpretation of it; or
- (b) if the ordinary meaning of the provision leads to a result that is manifestly absurd or is unreasonable, to provide an interpretation that avoids such a result; or
- (c) in any other case, to confirm the interpretation conveyed by the ordinary meaning of the provision.

(2) In determining whether consideration should be given to extrinsic material, and in determining the weight to be given to extrinsic material, regard is to be given to –

- (a) the desirability of a provision being interpreted as having its ordinary meaning; and
- (b) the undesirability of prolonging legal or other proceedings without compensating advantage; and
- (c) other relevant matters.

(3) In this section –

**extrinsic material** in relation to a provision of an Act, means material not forming part of the Act, including –

- (a) material that is set out in the document containing the text of the Act as printed by the Government Printer; and

(b) a relevant report of a Royal Commission, Law Reform Commission or Commissioner, board or committee of inquiry, or a similar body, that was laid before either House of Parliament before the provision concerned was enacted; and

(c) a relevant report of a committee of Parliament or of either House of Parliament that was made to Parliament or that House of Parliament before the provision was enacted; and

(d) a treaty or other international agreement that is mentioned in the Act; and

(e) any explanatory note, clause note or memorandum relating to the Bill that contained the provision, or any other relevant document, that was laid before, or given or otherwise made available to the members of, either House of Parliament by the member bringing in the Bill before the provision was enacted; and

(f) the speech made to a House of Parliament by a member of the House in moving a motion that the Bill be read a second time; and

(g) relevant material in the Votes and Proceedings of either House of Parliament or in any official record of debates in Parliament or either House of Parliament; and

(h) a document that is declared by an Act to be a relevant document for the purposes of this section;

**ordinary meaning** means the ordinary meaning conveyed by a provision having regard to its context in the Act and to the purpose or object of the Act.

### 3. Creating and disclosing a board skills matrix

#### Board Skills Matrix

A skills-based board **comprises members who collectively have the skills, knowledge and experience to effectively govern and direct the organisation** along with an effective Director.

A skills matrix **identifies the skills, knowledge, experience and capabilities desired of a board to enable it to meet both the current and future challenges of the entity.**

The Board as a whole should also encompass desirable diversity in aspects such as gender, age or different perspectives.

#### Some Personal Qualities for Board Members:

- Demonstrated good judgment.
- Integrity and honesty.
- Intellectual curiosity.
- Discipline.
- Genuine interest.
- Knowledge of Tasmanian Education setting
- Extensive experience in teaching and learning
- Experience in the leadership of teachers
- Communication skills.
- Active contributor.
- Confidence.

The board skills matrix should always be tailored to the unique circumstances and requirements of the company concerned.

The board needs to consider the criteria that will be applied for assessing the existing skills, knowledge, experience and capabilities on the board and the requirements for the future. Several different lenses can be applied to the assessment process, including identifying:

- executive and non-executive experience
- industry and sector experience or knowledge
- leadership
- governance
- strategic thinking
- desired behavioural competencies
- geographic experience
- subject matter expertise - accounting - capital management - corporate financing - industry taxation - risk management - legal - IT expertise - HR expertise and/or experience in workplace health and safety - marketing - environment and sustainability - public policy or government relations - community relations
- other factors of relevance to the particular company.

This list is not exhaustive.

Each board will need to decide for itself which lenses are most suitable to apply to the assessment of skills for that company. For example, the lens of industry and sector experience is likely to trigger an examination of other competencies related to the particular industry or sector.

When assessing the skills and competencies desired to align with the strategic objectives of the entity, the board can also assess the current and desired diversity that it seeks in its membership, taking into account all aspects of diversity.

A board may also wish to take tenure into account when considering its composition. A board also needs to consider whether it wishes to give a weighting to the skills, experience, knowledge and capabilities of directors, through the use of a rating system, such as 'High', 'Medium' and 'Low' and/or whether this has been gained in a management or non-executive context. This also gives the benefit of gaining a deeper understanding of skills.

It is good governance for the board to be actively engaged in the discussion as to how the company will disclose the skills matrix and whether all elements of the skills matrix prepared as an internal document for the board will be disclosed.

### **The TRB**

In establishing a matrix and then recruiting members of the board, it is crucial that the current context and identified future challenges for the organisation are **considered and documented**.

This will enable the selection of applicants to match the knowledge, skills and experience requirements for future board members and will also ensure that the corporate experience of the full board is more than sufficient to meet the current and possible future challenges to which the board will need to respond and to manage.

## An example of a matrix: (Initial DRAFT)

E – essential    D – desirable    Ex – can be gained externally

Skill Area	Description	Importance of Skill (E, D, Ex)	Members						
			Chair	2	3	4	5	6	7
<b>Governance</b>									
Strategic Planning	Ability to think strategically and identify and critically assess strategic opportunities and threats and develop effective strategies for the organisation.								
Financial Performance	Qualifications and experience in accounting and/or finance and the ability to: <ul style="list-style-type: none"> <li>• analyse key financial statements</li> <li>• critically assess financial viability and performance</li> <li>• contribute to strategic financial planning</li> <li>• oversee budgets and the efficient use of resources</li> <li>• oversee funding arrangements and accountability</li> </ul>								
Risk and Compliance Oversight	Ability to identify key risks in a wide range of areas including: legal and regulatory compliance, and monitor risk and compliance management frameworks and systems.								
IT strategy and Governance	Knowledge and experience in the strategic use and governance of information								

	management and information technology, including personal information privacy and security risk management.									
Executive Management Experience	Experience at an executive level including the ability to: <ul style="list-style-type: none"> <li>• evaluate the performance of the CEO and senior executive managers</li> <li>• oversee strategic human resource management including workforce planning.</li> </ul>									
Board Experience	Experience as a member of a board in or relevant to an educational setting.									
<b>Experience in Education</b>										
Teaching Experience	Experience as a teacher									
Leadership of Education	Significant leadership experience in schools and/or colleges.									
Leadership of Teachers	Significant experience in the leadership of teachers in an educational setting.									
Experience in Teacher Performance Management	Experience in the performance management of teachers in a school or college.									
<b>Personal Qualities</b>										
Integrity	A commitment to: <ul style="list-style-type: none"> <li>• understanding and fulfilling the duties and responsibilities of aboard member, and maintaining knowledge in this regard through</li> </ul>									

	<p>professional development</p> <ul style="list-style-type: none"> <li>• putting the organisation's interests before any personal interests</li> <li>• being transparent and declaring any activities or conduct that might be a potential conflict</li> <li>• maintaining Board confidentiality</li> </ul>								
Influencer and Negotiator	The ability to negotiate outcomes and influence others to agree with those outcomes, including an ability to gain broad stakeholder support for the Board's decisions.								
Critical and innovative thinker	The ability to critically analyse complex and detailed information, readily understand key issues, and develop innovative approaches and solutions to problems								
Leader	<p>Leadership skills including the ability to:</p> <ul style="list-style-type: none"> <li>• appropriately represent the organisation</li> <li>• set appropriate Board and organisational culture</li> <li>• make and take responsibility for decisions and actions</li> </ul>								

NB: The Chair should also have the personal attributes to effectively undertake usual Chair functions such as: chairing Board meetings; developing a constructive relationship with the CEO; successfully managing Board succession planning and Board performance, and representing/being a spokesperson for the organisation.