

To: The Secretary of Education
Re: The Education Amendment Bill no 2 2014
For the attention of: Education and Science Select Committee
From: Professor Kevin Broughan
Date: 30th April 2014.

1. I write to oppose the sections of the Amendment Bill relating to governance because they are antithetical to the nature of the institutions.
2. I am Kevin Alfred Broughan. I have been a member of staff at the University of Auckland and the University of Waikato. I have been a Senior Visiting Fellow at Cambridge University and the University of California at Berkeley. I have a PhD in mathematics from Columbia University in the City of New York. While at the University of Waikato, with others, I founded the School, now Faculty, of Computing and Mathematical Sciences and Engineering degrees. I have been a member of the University Council for 5 years and Chair of the Mathematics Department for 6 years. In the last month I chaired a subcommittee of the University of Waikato Academic Board which considered the text of the amendment bill, currently before the committee.
3. Universities are places of great challenge for staff and students. They are dedicated to the pursuit of truth, excellence, new knowledge, and to the transfer of that pursuit and knowledge to new generations. They attract staff of the highest caliber from around the world. These talented and highly committed folk dedicate their lives to their disciplines in order that our store of available knowledge and skill might become ever deeper and more pervasive.
4. Modern University councils are the governing bodies of their institutions. Governance means they are charged with planning for the universities future activities and needs, negotiating government funding with the Tertiary Education Commission, setting student fees and providing for the physical and intellectual needs of staff and students. They appoint the Vice-Chancellor. These are weighty responsibilities in that a modern university has a wide range of fundamental and professional programmes of study which need to be fostered. They run the gamut from pure science, mathematics and philosophy to law, engineering and the training of teachers and social workers. It is hard to imagine a modern society functioning well without graduates in, for example, computer science and medicine.
5. So a modern university is multifaceted and its council should, and currently does, reflect that diverse range of activities and connections. Following wide ranging discussions within NZ communities during 1987-1989, a largely democratic structure was laid down for the councils describing their roles and constitution. For example there were to be up to three places for each of the academic staff, the support staff and the students. There were to be representatives from the Employers Federation and the Council of Trade Unions. At Waikato it was common to have three Maori representatives, the Mayor of the city, the Director of the then Ruakura Research Station and the Chief Executive Officer of the polytechnic. At different times there have been members of the legal profession, including justices of the high court. Four members appointed by the Minister of Tertiary Education were to be appointed last, to ensure that the geographic, ethnic and gender balance of the Council was reasonable. The wise legislators who enacted this legislation,

wanted the universities to be in good contact with their communities and the professional bodies which accredit professional degrees.

6. The 1989 legislation was carefully worded. Universities were to be autonomous and have protected status, called academic freedom. This status has been in the charters of universities throughout the world since medieval times. The meaning of autonomy and academic freedom was spelt out in some detail: university staff and students are free to put forward new ideas, test received wisdom, articulate unpopular opinions, engage in research, determine the content of courses and programmes of study and teach and examine students in the manner they consider best promotes learning. This freedom is conditioned by the need to act responsibly and ethically and allows for public scrutiny. There is certainly plenty of this - NZ academic staff must be one of the most looked at and measured in today's world. Universities work very hard indeed to spend every dollar of student fee income, government income and research income wisely and well.
7. Now the government proposes to change the structure of the university councils. It wants to make them, apparently, "leaner and more entrepreneurial". Since taxpayer government funding is typically less than half of a university's income (at Waikato in 2011 it was less than 44%), there is even no basis in equity in this take-over of control. And in any case, the universities are already very entrepreneurial. There are many links between companies and researchers and between crown research institutes and researchers. For example the University of Waikato was one of the prime movers in the development of the successful Waikato Innovation Park. There are two CRI's on the University campus and many NZ examples of spin-off companies formed from ideas hatched within the universities. University staff make important contributions to their communities in a huge variety of ways, not just entrepreneurial. But their main contribution to the development of society and its peoples includes undergraduate teaching, which on no account should be downgraded.
8. Universities play a fundamental role in the on-going development of our civilization. They date back to ancient times, with well-known examples such as the great library of Alexandria. They continue to thrive as institutions, attracting the best minds of each generation among their staff and students, which underlines their importance for society and culture. They are devoted to "higher learning" which is mostly to do with knowledge, its development, codification or representation, and communication, including the arts. They are concerned with deepening our insight and understanding of material and human realities, and this applies in equal measure to the sciences, arts, and professions.
9. Knowledge is quite different from business in that its value is not lost or diminished if transferred or shared. It is also distinct in that new knowledge in an academic context is subject to rigorous evaluation by peers and communicated openly. Teaching in the main in universities is performed by staff active in pursuing new knowledge, and they readily and willingly pass on this skill to students, encouraging intellectual independence. These are qualities of universities that all parts of society value and have underpinned the unparalleled contribution universities have made over this long period of time. To

provide good governance, members of university councils need to understand these realities at a deep level, and all appointments to councils should reflect them.

10. This concept of a university is enshrined in the Education Act 1989, and has been for 25 years without challenge. Some examples: the nature of universities is described in 162(4)(a)(i)-(v) where we read that universities meet international standards of research and teaching. In 161 (1) we see the unequivocal declaration that “It is declared to be intention of Parliament in enacting the provisions of this Act relating to institutions that academic freedom and the autonomy of institutions are to be preserved and enhanced. In 161 (2) we see a detailed elaboration of what the Act means by academic freedom. In (c) for example it implies “the freedom of the institution and its staff to regulate the subject matter of courses taught at the institution”.

It follows that amendments to the Act must be consistent with these overarching definitions and not, in particular, introduce ministerial control through control of councils.

11. The bill contains a number of sections which need revision because of contradictions with existing parts of the Education Act or other acts, lack of clarity in the wording, and practical difficulties. They include the potential for a significant reduction in academic participation in councils, the duty owed by council members not to the institution but to the minister and the council, stripping back the protected rights of council members, the one sided procedures for the removal of council members, the almost total silence to be imposed on members, transition arrangements which mean all council members, other than those appointed by the minister, would be appointed by the minister’s appointees. Indeed, the drafting of the bill is so flawed, should the government wish to continue to pursue it, it should be redrafted and a further round of consultation initiated.
12. Below there are detailed recommendations including proposed revised wording for sections of the bill. In particular I would like to draw the attention of the committee to the revised transition time-table which would enable any new constitution and transfer to a new council to be managed by a university in a reasonable manner.

Detailed Recommendations regarding Bill drafting

3AA (page 7) Replace “The annual financial statements” by “Subject to (3) the annual financial statements”.

Comment: The preparation of these reports should include the elements specified in the Act and not require undefined additional elements. 3AA should relate only to the formatting and not the scope of the reports. Preparing these reports incurs significant compliance costs for institutions.

171A (a) (page 8) Replace “any institution of any kind” by “any institution as defined in section 159”.

Comment: The proposed wording is too broad in its scope. Any, even informal, organization could have a council.

171B (page 8) While being broadly in favour of these requirements, there will be difficulties to achieve the aims of this part of the Bill. The Minister would have the greatest scope to achieve socio-economic, ethnic and gender balance on each council, since he would make 3 or 4 appointments. It implies he should make his appointments last, depending on the balance of earlier appointments. Regarding 171B(2)(b)(i),(ii) and (iii), any nominations for elected members should only be accepted if they meet the prior requirements of (i) and (ii), so this might mean, for example, candidates for election submitting biographical material which would show they met those requirements.

In addition, the minister should be required, in this part of the Act, to supply for each of his or her nominations, sufficient biographical material to show that each of the nominations complies, on the face of it, with the requirements of the Act for individual skill and experience, and how these nominations have been made to assist with the socio-economic, gender and ethnic balance of the council. If they do not do as suggested the council will not be able to achieve the correct balance of skills, and almost certainly imbalances will arise.

171B (2) (page 9) Replace “or” by “and”. Comment: both minister and council have this responsibility, not one or the other. Alternative wording: “each of the Minister and council”.

171B(2)(b)(i)(page 9) Replace “have relevant knowledge, skills, and experience” by “have knowledge, skills and experience relevant to 159AAA Object of provisions relevant to tertiary education and 161 Academic freedom.”

Comment: This answers the question “relevant to what?” with an answer which says in a manner consistent with the Education Act 1989. In 161(4) we read “in the performance of their functions the Councils and chief executives of institutions, Ministers, and authorities and agencies of the Crown shall act in all respects so as to give effect to the intention of Parliament as expressed in this section.”

Before 171(2) (a) insert

“(a0) must ensure that at least two members of the council are members of the academic staff of the institution; and

(a1) must ensure that at least one member of the council is a student of the institution; and”

Comment: given the academic nature of universities, and the expected increased proportion of non-academic ministerial appointments, it is essential that council has strong academic representation, guaranteed by statute. If it is deemed important to guarantee Maori representation by statute in the terms of 171B(2)(a), then it is more important to reflect the orientation of each university in a comparable manner.

171D (page 10) Comment: It was considered that an upper limit in terms of years should be set in the Act and that it should be 10-12 years, as being a reasonable maximum for an individual to make their contribution as a member of a university council. Replace (1) and (2) by

- (1) The constitution of the council of an institution must contain a provision limiting the number of years in which a person may serve as a member of the council.
- (2) A person cannot be appointed as a member of the council of an institution if he or she has previously served on that council for the number of years or more given in (1).

176A (1) (c) (page 13) The rules in the Bill on non-disclosure are far too restrictive. In a democratic organization, wide discussion of important issues is to the institution's advantage, since changes will have to be accepted and implemented, and not by the council. It has always been the case that matters discussed in the public part of each Council meeting were able to be discussed openly, indeed even in the media. This facility should be retained and supported. The "in any circumstances" followed by "must, must, must" needs to be qualified if it is to be sensible, and in particular consistent with (1)(a)(iii).

Rules for council meetings are covered by Schedule 2 of the Local Government Official Information and Meetings Act 1987, which instantiates Part 7 of that Act for universities. This ensures meetings are to be publicly notified, the rights of members of the public to receive copies of agendas and minutes, and privileged oral statements etc. A reference to this provision should be written into the Bill explicitly. Suggested wording: insert after 176E

"176EE Application of the Local Government Official Information and Meetings Act 1987

- (1) An institution is a local authority for the purposes of Part 7 of the Local Government Official Information and Meetings Act 1987.
- (2) Subsection (1) is for the avoidance of doubt."

I have very grave doubts regarding the good sense of sections 176B, 176C and 176D and proposes they all be removed from the Bill. There is no evidence given that these draconian powers are necessary. Healthy dissent often goes with intellectual independence and involvement with issues, which should be encouraged. The current provisions will provide a disincentive for independent minded individuals, of all backgrounds, who act as a necessary corrective to all forms of herd mentality, from joining the council. It looks like a recipe for a compliant council, rather than a governing body with an intelligent and robust approach to its tasks.

If there is no agreement to remove these parts then, without prejudice, I would seek relief by the following amendments:

176B (1) (page 14) The University is an autonomous institution. Elected members of the Council owe their duties to the institution, not the group which arrived at their nomination. See 176A(1)(a) and (b). Similarly, once the Minister has made his appointments, the individuals owe their duty to the institution, not the Minister. Replace "are duties owed to the Minister and the council" by "are duties owed to the institution".

Comment: It is the university as a whole that is entitled to the proper performance by council members of their duties. This is consistent with legislation such as the Companies Act 1993.

The duties should not be owed to the council. Again, to take the analogy of the Companies Act, a company director does not owe his or her duties to the board of directors. The unfortunate result is to draw a distinction between the university and its council. A duty to the council becomes a duty to the *majority* of the council. That creates a difficulty for members who are not regularly part of a majority of council members. It raises the perception of a duty not to dissent.

The duties should not be owed to the Minister. To owe a duty to the Minister injects confusion and dual responsibility into the relationship between the individual council member and the university. The proposal creates an entirely new relationship between the government and universities. It detracts in a substantial way from the autonomy of universities.

176B (3)-(7) (page 14) This proposal is inconsistent with existing statutes – see for example Education Act 1989 section 183 Personal Liability:

“No member of the council of an institution is personally liable for any act done or omitted by the member of the council - (a) In good faith; and (b) In pursuance or intended pursuance of the functions of the institution or of the council.”

176 (1) (page 13) Replace “when acting as a member of the council in any circumstances,-” by “when acting as a member of the council in any circumstances, subject to section 183,-“.

176C and D (page 14 and 15) Removal of Members. Add “(d) Information that the member concerned has been made aware of the action that has been proposed, the grounds on which it is based, and given an opportunity to make an explanation to the council.”

Comment: Since the procedures in the proposed Bill in 176C are explicit, these additional rights must be included to be consistent with common law and 176D(a). The current wording is unsafe. The Bill imposes a greater degree of ministerial intervention than currently exists for Crown Entities which universities are not – they are more independent of the ministers and government. Under section 39 of the Crown Entities Act, only the Governor-General may remove a member of an independent Crown Entity (not the minister), and for “just cause” that is more carefully and tightly defined than in this proposal. It is poor institutional design to impose more intrusive and more easily-used controls on university council members than are in place for Crown entities.

Part 2: Consequential Amendments

Schedule 1 inserting a **Proposed Schedule 19** (page 71) into the principal Act: **Transitional provisions**.

There are obvious and serious flaws in the Bill in this section. Institutions are to prepare draft council constitutions by 1 October 2015. The Minister, provided institutions meet the law as enacted, must approve these and Gazette them by 31st December 2015 (the “transition date”). He also makes his own 3 or 4 appointments by that date, and the old council membership ceases to exist. Councils then have 3 months to make appointments to the other 5-8 council positions. Firstly, this means the minister’s appointees will select a chancellor from their own number and make all the other appointments. What does that mean for autonomy or simple good sense! Secondly, the minister has all the time he desires to make his selections, yet the institutions need to wait until their constitutions are approved. There might be some gazetted earlier, but the Bill would not give any guarantee that this would happen before the transition date. Institutions have many needs and procedures to arrange and institutions need certainty around such matters if they are to fulfill requirements.

Thirdly, arriving at a constitution will take time, and won't simply be done by decree. For example each university council has to consult with its academic board. Staff and students, Maori, Courts of Convocation, indeed all stakeholder groups will need to go through several rounds of consultation, one initial and one once a preliminary draft constitution has been forged. There will need to be significant debate if the number of members is reduced.

Fourthly, the legislation would need to have been enacted. Assuming this is not done until August at the earliest, it would make sense for institutions to wait until after the election before commencing procedures to resolve issues regarding the constitution. This relates to the unpopularity of the changes, and the probability that they would not survive a change in government.

Schedule 19 1 (b) (i) replace "close of 31 December 2015" by "close of 31 December 2016". If the Bill is enacted before the end of 2014, universities could plan to evolve their new council constitutions through 2015 and the early part of 2016. If this occurred a year earlier the institutions would have just a month or two in 2015 (under the time-table given below set back one year) to consult with stakeholder groups. This time period is quite insufficient. Changed dates proposed to ensure the new council is completely specified and ready to be appointed at the end of the transition period:

31 March 2016: Councils submit their draft constitutions to the minister by this date.

30 June 2016: The minister gazettes the constitutions by this date.

31 October 2016: Universities make their nominations by this date.

31 December 2016: This is the proposed new "transition date". The Minister makes his nominations by this date. The old council ceases to exist and the new council is established. It then elects the Chancellor and takes over the governance function.

K. A. Broughan

30th April 2014