Regulatory Impact Statement:

Allowing tertiary education institutions to apply for ministerial consent to use protected terms

Agency Disclosure Statement

This Regulatory Impact Statement has been prepared by the Ministry of Education.

It analyses whether the Education Act (1989) should be amended so that public tertiary education institutions (TEIs, including wānanga, universities, and polytechnics / institutes of technology) can seek ministerial consent to describe themselves using a term protected under section 292(1) ('university', 'polytechnic', 'institute of technology', and 'college of education'), although that term, under the Act, refers to another class of TEI.

It recommends that the existing ministerial consent process (in section 253C), currently available only to private training establishments (PTEs), should be extended to wānanga. It also recommends amendments to clarify what types of conditions the Minister may attach to any consent to use a protected term.

This proposal follows a Ministry of Education policy review of protected terms legislation in 2014-15. That review focused on whether, and under what conditions, a wānanga should be able to use the term 'university' (in the phrase 'indigenous-university') to describe itself. The recommended approach would allow this formulation but does not prescribe the particular form – allowing a Minister to consider other formulations and use of other TEI titles.

The Ministry's earlier policy review excluded the following options from consideration, as being either unnecessary to address the issue in question, or undermining the policy intent of the existing law:

- make the term wānanga a protected term
- to remove altogether the existing protected terms provisions in the Act
- create a new class of TEI, such as an "indigenous university", or
- change the provisions in section 162 of the Act concerning establishment of tertiary education institutions.

The Ministry's policy review considered and rejected two alternative options:

- to make 'indigenous-university' a protected term for use only by wānanga, and
- to make the use of "university" by wānanga an approved use (an exception to the offence provisions).

Consultation on the policy review was limited to Crown Entity TEIs, their peak bodies, and the central education sector crown entities, NZQA, the Tertiary Education Commission (TEC) and Education New Zealand. Broader public consultation was also undertaken via an exposure draft of the Education (Tertiary and Other Matters) Amendment Bill on between 23 September and 14 October 2016.

This proposed a further option to allow wānanga only to apply for ministerial consent to use protected terms.

The economic benefits and costs to be considered are unquantified opportunities and risks.

- The potential benefits are the incentives and opportunities that wānanga might have to grow and develop, if they were able to seek consent to use a protected term to market themselves more effectively. There is no available quantifiable evidence of the extent to which the growth and development of wānanga or other TEIs is hindered by the existing law governing use of protected terms.
- The risks are in potential damage to the reputation and international education business of established universities and New Zealand's wider tertiary education system. These risks would arise if, after gaining consent to use a protected term and despite the consent requirements and audit processes, a wānanga were to act in a way that misleads students, employers or the general public, or that diminishes the perceived quality of the tertiary education system as a whole. Again there is no direct quantifiable evidence on which to rely.

As the existing ministerial consent mechanism for PTEs has not previously been used, there is no direct evidence from experience to inform this impact assessment.

Aside from the potential economic benefits and costs, the issues to be considered and balanced in determining the preferred option include:

- the appropriate limits on government regulation of speech, and
- the inconsistency and constraints that wānanga perceive, as the Māori term 'wānanga' is not protected and is freely used by other types of tertiary provider, while wānanga cannot use what they may consider to be appropriate English descriptions of their institutions.

The regulatory options covered in this assessment do not impose additional known costs on the education sector; impair private property rights and market competition, or the incentives on businesses to innovate and invest; or override fundamental common law principles.

Roger Smyth 4 November 2016
Group Manager, Tertiary Education

Executive summary

This Regulatory Impact Statement assesses whether the Education Act 1989 should be amended to allow wānanga, and possibly other tertiary education institutions (TEIs), to seek ministerial consent to describe themselves using a term protected under the Act ('university', 'polytechnic', 'institute of technology', or 'college of education'), and which refers to another class of TEI.

It recommends that an existing ministerial consent process set out in section 253C, currently available only to PTEs, be extended to wānanga. It also recommends amendments to strengthen the consent process by clarifying the types of requirements the Minister may attach to any consent to use a protected term.

This follows a policy review of protected terms legislation in 2014-15. That review focused on whether, and under what conditions, a wānanga should be able to describe itself using the term 'university' (in the phrase 'indigenous-university'). The recommended approach applies more broadly to wānanga using any of the four protected terms, in any formulation.

The law regulates use of institutional titles to prevent people being misled about the status and quality of a tertiary education provider, its programmes and qualifications. This is important not only to individuals, but also to protect the reputation of New Zealand's tertiary education institutions (especially universities), and the wider tertiary education industry – especially in the international education market.

However, the current law has been subject to objections from wānanga, especially Te Whare Wānanga o Awanuiārangi. They consider the law unfairly restricts and disadvantages them. The term wānanga (or whare wānanga) is not well understood outside of NZ. To expand its reach (not only to recruit students, but to build international academic and research partnerships), Awanuiārangi argues that it must be able to describe itself in a way the international market will understand. It wishes to append the term 'indigenous-university' after the institution's official name in its communications and marketing.

The current law is also inconsistent in that universities and other tertiary providers can freely use the term 'wānanga', while wānanga cannot even apply for consent to describe themselves using terms that refer to other types of TEI, in any form or in any situation.

There are clear policy reasons to regulate use of institutional names. However, the current law is, in the Ministry of Education's view, more restrictive than it needs to be to achieve its aim:

- If taken too far, regulations aiming to protect a sector's or industry's reputation tend to favour incumbents and current methods and to deter new entrants, innovation, and niche providers.
- As a principle of consistent treatment, wānanga (and other TEIs) should have the same option the law gives to PTEs: to apply for ministerial consent.

The ministerial consent process in section 253C, rather than outright prohibition, is the best way to manage any potential risks that may arise where protected terms are used by entities other than those established as TEIs of the relevant class under the Act. The consent process allows individual applications to be assessed on their merits after consultation, having regard to the characteristics of different classes of TEI, and considering the national interest and the interests of the tertiary education system as a whole. It also allows for any consent to be subject to requirements, and for auditing of continuous compliance.

Status quo and problem definition

The current legislation

1. The terms ‘university’, ‘polytechnic’, ‘institute of technology’ and ‘college of education’ are protected under section 292(1) of the Education Act (1989). It is an offence (punishable by fines of up to $10,000) for any person to describe an educational “establishment or facility” using the term ‘university’ unless:

   - it is (or was) a TEI of the relevant kind, established as such under section 162 of the Act, or
   - it is a registered PTE granted ministerial consent to use the term under section 253C.

2. The term ‘wānanga’ is not protected.

3. Section 253C(3) prescribes what the Minister must do when considering an application for consent to use a protected term. The Minister must:

   (a) take into account the characteristics of institutions as described in section 162(4); and

   (b) receive advice on the application from the Authority [New Zealand Qualifications Authority (NZQA)]*; and*

   (c) be satisfied that consenting to the application is in the interests of the tertiary education system and the nation as a whole; and

   (d) consult with the institutions, organisations representing institutions, and other relevant bodies that the Minister considers appropriate.

4. If consent is given, the Minister can audit “for continuous compliance with the requirements for consent to use the term” [section 253C(5)]. The Act does not explicitly state what “the requirements for consent” may be.

5. If not satisfied that an organisation is continuing to comply with the requirements for consent, the Minister may suspend or withdraw the consent [section 253C(6)].

6. TEIs, including wānanga, cannot apply for ministerial consent to use protected terms. Section 253C only applies to “registered establishments”, defined [section 159] as PTEs that have been granted registration by NZQA.

The policy objective of the law

7. The Act is not explicit about the policy intent of the protected terms provisions. However, in the Ministry’s assessment (supported in the consultation process of the policy review) the intent is clear: the law exists to prevent students, employers and the general public being confused or misled about the quality and status of tertiary education organisations and the qualifications they offer. This in turn protects the reputation of New Zealand’s universities and the wider tertiary system.

8. The reputation of individual institutions and of the New Zealand tertiary education system as a whole is important because:

   - part of the value students gain from qualifications comes from their affiliation with the reputation of the tertiary education organisation awarding the qualification
   - employers may rely in part on institutions' general reputation in assessing the quality of their graduates as candidates for employment, and
   - the reputation of individual providers and of the system as a whole is a major factor in the international education industry.
     - International education is a major export industry: the fifth largest export category after dairy, tourism/travel, meat and wood products. In 2014, total expenditure by 107,000 international students was an estimated $2.75 billion.[1] In the year to 31 March 2016, education travel expenditures were estimated at $3.095 billion, 4.4% of total exports.[2]

9. A clear statement of the legislative intent behind section 253C cannot be found in the documented the history of the legislation. However, it is most likely this process for PTEs to seek ministerial consent to use protected terms was created to provide a way for a private university and/or an overseas university to operate in New Zealand without being established as a public Crown Entity university under section 162.

10. No application for ministerial consent to use a protected term has, to the Ministry's knowledge, ever been made.

11. The legislature either did not contemplate, or did not wish to authorise, a TEI wishing to describe itself using the protected name of another kind of TEI.

Concerns of wānanga, and recent disputes

12. The current law has been subject to objections from wānanga, especially Te Whare Wānanga o Awanuiārangi. The wānanga consider the law unfairly restricts and disadvantages them.

13. Awanuiārangi considers that not being able to describe itself as an 'indigenous-university' is effectively a restraint of trade, limiting the wānanga's ability to market itself internationally. They argue that the term 'wānanga' (or whare wānanga) is not well understood outside of New Zealand. To expand its reach (not only to recruit students, but to build international academic and research partnerships), Awanuiārangi argues, it must be able to describe itself in a way the international market will understand.

14. The current law is also inconsistent in that while universities freely use the term 'wānanga' (seven of the eight universities have some variant of 'wānanga' in their official Māori names), the wānanga cannot even apply for consent to describe

---

1 *The Economic Impact of International Education 2014* report by Infometrics Ltd, for Education NZ www.enz.govt.nz/sites/public_files/ExportEd2014.pdf

2 *Goods and Services Trade by Country: Year ended March 2016*, Statistics NZ, 2 June 2016 www.stats.govt.nz/browse_for_stats/industry_sectors/imports_and_exports/GoodsServicesTradeCountry_HOTPYeMar16/Tables.aspx

themselves using a term such as ‘indigenous-university’ as a suffix to the institution’s official name.

15. On various occasions from 2009 to 2014, Awanuiārangi described itself using the phrase ‘indigenous-university’ in various publications, websites and signage. Universities New Zealand (UNZ) objected to this as being in breach of section 292(1) of the Act, and in February 2014 filed proceedings in the High Court seeking a declaratory judgement to this effect. The Ministry of Education was not a party to these proceedings. While also considering Awanuiārangi’s use of ‘indigenous-university’ to be in breach of the Act, the Ministry did not consider this reached a level warranting prosecution.

16. The Minister for Tertiary Education, Skills & Employment subsequently directed the Ministry to conduct a policy review of the law concerning protected terms. Following an agreement with Awanuiārangi, UNZ agreed to adjourn and subsequently withdraw its court proceedings while this review was completed and its findings considered.

Objectives

17. The Ministry’s review of the protected terms legislation, conducted in 2014-15, sought to ensure the right balance is achieved between the following objectives:

    a) **Upholding the policy objective of the current law:**
        - not confusing or misleading actual or potential students
        - not confusing or misleading graduates’ employers, and
        - ensuring and maintaining the reputation and quality of New Zealand tertiary education providers, and the graduates and research that they produce.

    b) the law should **allow for each wānanga’s distinctive mission and character** without unjustifiable constraints in how they can describe themselves

    c) the law **should not encourage disruptive disputes and confusion over the respective roles** of different providers or classes of institution

    d) legislation should be as **clear, consistent, and simple as possible**

18. These four objectives were used as the key criteria for assessing options.

19. The policy review was undertaken as part of the Ministry’s discretionary work programme, at the direction of the Minister for Tertiary Education, Skills and Employment. There is no statutory requirement to review the legislation, and no fixed timeframe or financial constraint that impacts on the timing of any change.

Options considered

20. The Ministry considered four options:

Status Quo:	No legislative change
Option A:	Make 'indigenous-university' a protected term for use only by wānanga
Option B:	Make the use of 'university' by wānanga an approved use (an exception to the offence provisions), and
Option C:	Allow TEIs to apply for ministerial consent to use protected terms ('university', etc) in the same way that PTEs can at present.

21. Four other options were explicitly excluded from the policy review and from consultation:

a) Making the term 'wānanga' a protected term.

The term 'wānanga' is in extensive common use, both in Te Reo Māori and borrowed into New Zealand English. Although the lack of legal protection for this term is a point of disparity in the current law, no party has proposed that the term 'wānanga' be protected in the way that 'university', 'polytechnic', etc are currently protected.

b) Removing the legal protection of institutional names entirely.

There are strong policy grounds to maintain protection of institutional names and other terms in the law. This is common practice internationally. Wholesale removal of the current protected terms legislation is not necessary to deal with the issues raised in the case of Awanuiārangi's use of the term 'university'.

c) Creating a new class of TEI, such as an 'indigenous-university'.

This is neither necessary nor appropriate to resolve the issues here. Wānanga do not wish to change their statutory characteristics. The issue is about appropriate regulation of the use of a word, not about any gap in the current menu of institutional models.

d) Any changes to the current provisions in section 162 concerning establishment of tertiary education institutions

The statutory characteristics of TEIs are highly valued by institutions and their stakeholders. Opening these to review is neither necessary nor appropriate to resolve the issues here, and would be highly disruptive to the tertiary sector.

Consultation

Policy Review Consultation

22. As part of its policy review, the Ministry of Education consulted Tertiary Education Institutions and central education Crown Entities and on potential changes to the law governing use of protected terms. This consultation was undertaken between May and September 2014.

23. The seven submissions received through this process are summarised in appendix one.

24. Submissions favoured either:

    - the current law (under which it will continue to be unlawful to describe wānanga using terms such as 'indigenous-university'), or

    - some variant of the consultation document's Option C – applying a consent process to TEIs wishing to use protected terms not related to their own class of institution.

25. Options A and B did not receive any support during consultation

Further Consultation

26. The Ministry undertook further consultation on a variation of Option C via an exposure draft of the Education (Tertiary and Other Matters) Amendment Bill on 23 September 2016. This proposal was to allow wānanga only to apply for ministerial consent to use a protected term.

    - Te Wānanga o Aotearoa, the Tertiary Education Union, the New Zealand Union of Students' Association, and OMEP Aotearoa (World Organisation for Early Childhood Education) supported the proposal.

    - Seven submissions, including five from the university sector, opposed the change. Those opposed expressed concern with reputational risk to their brand, and about potential confusion of prospective students. In particular, universities raise concern the change could degrade or dilute the quality of the definition of a university by lowering the bar in terms of requirements that would normally need to be met to use the term. Additionally, they indicate this could lead to confusion among both domestic and international students in the university marketplace.

27. The Ministry remains of the view that:

    a. the Ministerial consent process (which includes consideration of the national interest and of the interests of the tertiary education system) is the most appropriate way to manage the risks identified, rather than the current outright statutory ban

b. prospective students have greater and easier access to information than ever to help them make informed decisions – the risks of international or domestic students being misled as to the nature of the institution they are enrolling in is smaller than the current state, and is manageable through the consent process

c. the existing statutory bar on wānanga applying for Ministerial consent is inconsistent and unnecessary to achieve the underlying policy intent

d. protecting the advertising and marketing strategies of incumbents is not a sound policy rationale for regulating (with statutory offences) the speech of potential competitors.

Options analysis and Discussion

Summary: Compared to the *Status Quo*, how well do the options fit with the criteria?			
Meet the current law's policy objectives: - avoid confusing people - protect quality/ reputation of NZ's tertiary system	Allow each wānanga's distinctive mission / character without unjustifiable constraint on how they describe themselves	Don't encourage disruptive disputes/ confusion over the respective roles of different providers or classes of institution	Legislation should be as clear, consistent, and simple as possible
Status Quo: No legislative change			
Gives greatest weight to interests of universities and other TEIs with protected names. The PTE consent process (never used) has safeguards including - factors that must be considered before granting consent - consent can be subject to requirements, audited, and suspended or withdrawn.	Tertiary providers can describe themselves as they wish, except by using the four protected terms. Wānanga cannot use the term 'university' and unlike PTEs, cannot seek consent to do so.	Avoids risk of conflict or litigation over any future TEI application for consent. But fails to address the concerns wānanga have set out with current law.	The law is clear that TEIs cannot seek consent to use protected terms for other classes of TEI. The law treats TEIs and PTEs differently without a clear rationale.
Option A: Make 'indigenous-university' a protected term for use only by wānanga **and** **Option B: Make use of the term 'university' by wānanga an approved use**			
Poor Neither Option A or Option B has any mechanism regulate use of terms and manage risks	High	Low The term 'university' could be used by wānanga bearing few characteristics of a university. By applying different rules to wānanga than to institutes of technology and polytechnics (ITPs), could lead to further disputes.	Mixed Simple, but an ad-hoc legislative response. Would treat PTEs, wānanga and other TEIs differently without clear rationale.
Outcome: ✖ Not progressed further			

Option C: Allow wānanga (and possibly other TEIs) to apply for consent to use protected terms in the same way PTEs can.			
High May create positive incentives to build quality to improve prospects of a successful consent application. Some risk in future if a consent is granted but inadequately controlled and implemented.	Moderate The ability of wānanga to describe themselves as they wish is subject to Ministerial consent	Moderate Partly addresses concerns of wānanga with the current law A consent application could itself trigger conflict and/or controversy in the sector.	High The law would treat TEIs and PTEs the same, and apply an existing process.
Outcome: ✓ **Preferred** (with amendments to clarify purposes for which Minister may specify consent 'requirements')			
Awanuiārangi's proposed alternative approach (Alternate process and criteria for consent to use the term 'indigenous-university' or similar phrase)			
Partly Consent is subject to a test, but the test is framed more narrowly on the nature and mix of courses and qualifications offered	Moderate to high Consent process under this option sets lowest bar on wānanga applications	Avoids risk of opening sector to multiple applications from ITPs.	Poor Creates a new ad hoc and separate process solely for wānanga, with criteria different to the existing test for PTEs
Outcome: ✖ Not progressed further			

The Ministry's review concluded that Options A & B should be set aside

28. The Ministry's policy review recommended removing Options A and B from further consideration. These options did not meet the first criterion: that the current law's policy objective should be upheld to prevent students and employers being confused or misled about the quality and status of institutions and qualifications, and so protect the reputation of New Zealand's universities and the wider tertiary system.

29. Both these options would make it lawful for any wānanga to describe itself using 'university' (in some formulation or other). No further test of their characteristics and performance, or the potential risks for the broader tertiary education system, would be required.

30. While these risks of potential for reputational harm can be overstated, they are significant and involve flow on-impacts across the tertiary sector. A mechanism is required to ensure they are managed.

31. With Options A and B set aside, much of the discussion in submissions about the extent to which Awanuiārangi currently exhibits the characteristics of a university (set out in section 162(4)) can also be set aside. This would be an issue for future consideration, if an application for ministerial consent were made. Whether any institution is currently able to satisfy these considerations does not bear on the in-principle question of whether, in future, institutions should be able to apply for consent.

Assessment of Remaining Options:

Status Quo versus extending to wānanga (and possibly other TEIs) the current PTE consent process

What are the potential benefits and harms of a law change enabling wānanga to seek consent to use a protected term?

32. Affiliation with an institution's name and overall reputation is central to the value proposition universities and other degree-granting institutions offer their graduates – especially in the international labour market. Universities and other tertiary institutions are "multi-product brands": reputation in one field of study affects the reputation of an entire institution. The reputation of New Zealand's tertiary education system as a whole affects the reputation and value of individual institutions. This helps to explain why universities are highly protective of the term, why wānanga see the current law's constraints as harmful to them, and why the ITPs also have a stake in the debate.

33. The current law gives greatest weight to protecting NZ universities' reputation and status. It bars other TEIs from using the term 'university' unless they are formally re-established as universities. This minimises any risk that students, employers and others may be confused about the status of different institutions and qualifications, which may arguably damage the international reputation of New Zealand's universities and tertiary education system. It avoids potential costs and risks in managing non-university TEIs' applications for consent to use the term 'university', and ensures they cannot seek to boost perceptions of their quality with arguably misleading descriptions.

34. The economic benefits and costs to be considered are unquantified opportunities and risks.

35. The potential benefits are:

- the incentives and opportunities a wānanga or other TEI might have to grow and develop, if it were able to seek consent to use a protected term to market itself more effectively, and

- potential to induce greater innovation and responsiveness to changing patterns of demand by incumbent institutions exposed to greater competition.

36. There is no available quantifiable evidence of the extent to which the growth and development of wānanga or other TEIs is hindered by the existing law governing use of protected terms.

37. The risks are in potential damage to the reputation and international education business of New Zealand's established universities and wider tertiary education system. These risks would arise if (after gaining consent to use a protected term and despite the consent requirements and audit processes) a wānanga or other TEI were to act in a way that misled students and/or employers, or that diminished the perceived quality of the tertiary education system as a whole. Again there is no direct quantifiable evidence on which to rely.

38. These risks are, in the Ministry's assessment, likely to be small and manageable.

- The consent process itself, and ongoing audit for compliance with the requirements for consent, place a strong reputational incentive on any TEI granted consent to maintain this own status and its reputation for quality.

- Students pursuing a degree, and employers of graduates at this level, make significant investments. They can be expected to have the ability and incentive to investigate and understand their study and recruitment choices. Information is more readily available now than ever before to inform students' study decisions and employers' checks into the nature and quality of qualifications.

- Other systems internationally have globally-ranked traditional research universities coexisting with other institutions officially designated as 'universities' or that use the term their names, without apparent harm to the status and reputation of the established institutions.

- All non-university TEI degree programmes are accredited by NZQA and subject to its quality assurance processes. Although UNZ operates a separate quality assurance system for universities, in principle there should be no difference in the standard of degrees awarded by wānanga and ITPs.

39. The strength of universities' concern about the potential for confusion between wānanga and universities is questionable, given that seven of the eight universities have chosen to use the word 'wānanga' (or some variant) in their names and in their domestic and international marketing.

40. UNZ has not provided, and the Ministry has not found, any specific evidence of students or employers confusing wānanga, polytechnics or institutes of technology and the qualifications they offer for universities and university degrees.

A safeguard of industry reputation, or a barrier to entry and innovation?

41. Like other regulations that aim to protect a sector's or industry's reputation, the Act's protected terms provisions seek to prevent "spillover" risks where actual or perceived quality problems for one provider might harm the brand value and market share of others in the sector. An analogy can be made with product testing or occupational licensing requirements in other sectors.

42. Taken too far, however, laws and regulations intended to protect an industry's reputation tend to favour incumbents and established practices and technologies over new entrants, innovation, and niche providers. They can create or entrench a status difference in the marketplace and impose costs and barriers to entry for new entrants.

43. Awanuiārangi argues that the current law is, in effect, a restraint on trade and a barrier to them developing international academic and research relationships. These efforts align with the Tertiary Education Strategy's calls for providers to be more externally focussed and internationally connected, and to boost the quality of their research and research-led teaching. International students and prospective institutional partners do not know the meaning of 'wānanga', while 'university' is readily understood internationally and is, in Awanuiārangi's view, the most accurate English description.

44. On the other hand, while government should support wānanga to achieve their development objectives, we think it unlikely that being unable to use the term 'university' is a binding constraint on their ability to recruit international students and to develop research and teaching partnerships with overseas institutions:

- Recruitment of international students is likely to be in specific niche markets, and through international education partnerships. An institution's ability to promote itself in this context is perhaps less likely to depend heavily on use of a particular label.

- Use of a term such as 'indigenous-university' may make for easier initial engagements with potential international research and teaching partners, use of a particular name is unlikely to matter in developing deeper and real partnerships.

- It is unclear what the marginal value would be for wānanga in using a term including 'university' rather than some other (albeit possibly clumsier) English language description that they can already lawfully adopt, such as: 'higher education'; 'degree-granting'; 'undergraduate and postgraduate studies'; etc.

The Ministerial consent process offers a mechanism to manage risks to the system

45. The ministerial consent process in section 253C sets out how the Minister must approach a decision on whether an institution can use a protected term. It allows requirements to be placed on the use of a protected term. The Minister may audit for compliance and to withdraw or suspend consent. This provides considerable protection against potential reputational harm to the wider tertiary sector from an institution using a term other than that of its own class of TEI.

46. Should an amendment to extend the ministerial consent process to wānanga or all TEIs proceed, the Act could be amended to state more clearly what requirements the Minister can attach to a consent to use a protected term. This will reduce uncertainty for all parties as to the extent and limitations of a consent.

47. A statement of the requirements a Minister may apply to a consent should be framed in relation to the policy objectives, stating that the Minister may attach to a consent any requirements considered reasonably necessary to:

- ensure students, employers and the public are not misled as to the legal status of the tertiary education organisation (TEO) granted consent
- ensure the quality and reputation of TEIs of the class described by a protected term are adequately protected, and
- protect the interests of the tertiary education system and the nation as a whole.

48. This would be preferable to framing the scope of potential requirements in more specific terms reflecting a particular scenario. With reference to policy objectives, the Minister could still require that a term be used only in a particular form (e.g. 'indigenous-university') or with some disclaimer.

Potential risks and positive incentives from the consent process

49. Allowing wānanga to seek consent to use the term 'university' would not fully satisfy the concerns the wānanga have raised. Their freedom to describe themselves as they wish would still be subject to gaining Ministerial consent, a process that could impose a significant cost on applicants and the Government. It may take a long time for an institution to position itself to make the strongest possible case for consent, and for the application to be considered (including consultation). Deciding either to approve or decline the application could trigger judicial review or other litigation.

50. However, giving wānanga the future option of applying for consent could offer them an avenue and an incentive to pursue their development aims. It could encourage a wānanga aspiring to gain consent to further strengthen its higher-education teaching and research activities to improve its prospects for a successful application.

Should a law change apply only to Wānanga or to all TEIs?

51. The ministerial consent process for use of protected terms could be extended only to wānanga, or to all TEIs.

52. In advice to the Minister for Tertiary Education, Skills and Employment in 2015, the Ministry of Education recommended that all TEIs, not just wānanga, should be able to apply for consent. This was considered to be the clearest, simplest and most consistent way to amend the current law. Although Awanuiārangi's wish to use the term 'indigenous-university' triggered the policy review, the Ministry's preference was to frame legislation on common principles rather than for specific *ad hoc* cases.

53. However, this broader approach increases the risk of disruptive disputes and confusion over the roles of different providers or classes of TEI. Avoiding this was one of the policy review's four criteria. Allowing all TEIs to seek consent to use protected terms could lead to disruption, if multiple TEIs seek to use protected terms for other classes of institution (especially 'university') as a marketing tactic. Some ITPs have in the past aspired to become 'universities of technology', and to use the term 'university' (or variants on this) to boost their domestic and international profile and market share. Extending the ministerial consent process to include all TEIs could encourage a return to this behaviour, distracting ITPs from focusing on their established roles in the tertiary system, and undermining collaboration.

54. On balance, the Ministry's view was that the consent process is a more appropriate way to manage it than an outright prohibition on TEIs using terms that in the Act refer to other classes of TEI. Before consenting to an application, the Minister must be satisfied that to do so would be in the interests of the tertiary education system and the nation as a whole[3]. Clear signals can be given to the sector that, barring special and compelling cases, an application is unlikely to meet these tests. During the Ministry's policy review, the Metro Group of ITPs submitted that if TEIs are allowed to apply for consent to use the term 'university', a 'very high threshold for approval' should be applied.

55. Having considered this advice, the Minister for Tertiary Education, Skills and Employment has decided that a narrower approach is preferable, changing the law only in respect of wānanga. This is more directly focussed on the issue at hand. Amongst TEIs, only wānanga do not have their own name protected in law, and only wānanga need to find appropriate English translations/descriptions that reflect their distinctive mission and character.

56. In its submission to the Ministry's policy review, Awanuiārangi proposed an alternative option tailoring a narrow legislative response for their situation, while managing risks and avoiding the potential to 'open the floodgates' for applications from other non-university TEIs. This option would be available only to wānanga, and would only allow use of the term 'indigenous-university' or an approved variation. Awanuiārangi also proposed alternative criteria for approval, focussing on the nature and quality of the

---

3 This requirement now in section 253C(3)(c) was inserted by the Education (Tertiary Reform) Act 2002 after the debates of the late 1990s and early 2000s over polytechnics' applications to be re-established as universities. Unitec and the Auckland Institute of Technology (AIT) applied to be re-established as universities. AIT became the Auckland University of Technology (AUT).

courses and qualifications an institution offers, rather than the current considerations in section 253C.

57. While this is a pragmatic proposal, in the Ministry's view it would complicate the law with an ad-hoc response tailored to on particular case, and the narrower focus on courses and qualifications offered would be inconsistent with the broader characteristics required of universities under section 162(4).

Preferred option

58. Ultimately, the arguments for and against allowing TEIs to use protected terms that in the Act refer to other classes of TEI fall back to issues of principle rather than hard evidence of benefit, cost and risk.

59. In the Ministry's assessment, the current legislation is unnecessarily restrictive. The risks it aims to prevent could be appropriately managed through the ministerial consent process, rather than by completely prohibiting any TEI from describing itself using the term for another class of TEI. However, amongst TEIs, only wānanga are disadvantaged in not having their own title protected in law, and only wānanga face the difficulties of finding an appropriate English translation of their institutional title.

60. The preferred option therefore is to extend to wānanga (and *not* to other TEIs) the existing ministerial consent process for PTEs seeking to use protected terms, in section 253C of the Act.

61. The detail of these proposed changes (subject to Cabinet policy approval and drafting advice from Parliamentary Counsel) is set out in Appendix Two.

Implementation plan

- The proposed option simply extends the existing ministerial consent process for PTEs and makes it available to wānanga. Legislative amendment is the only step required to implement this change.
- The result of this change is that risks of reputational harm to the New Zealand tertiary education system will be managed through the ministerial consent process rather than through a statutory ban on wānanga using protected terms that refer to other classes of TEI.
- The recommended legislative amendment also seeks to reduce uncertainty for potential future applicants for consent by clarifying in the law the types of requirements that the Minister may attach to any consent to use a protected term.
- The proposed change does not interact with, or impact on, other existing regulation.

Monitoring, evaluation and review

- If an application for consent to use a protected term were approved, the Act provides that the Minister may audit for continuous compliance with the requirements of consent. If not satisfied, the Minister may suspend consent for a time, or withdraw consent.

Appendix One:

Summary of submissions received from TEIs and Education Crown Entities on the Ministry of Education's 2014 policy review

Te Whare Wānanga o Awanuiārangi

Awanuiārangi proposed an alternative change option that would apply only to wānanga, permit only use of the term 'indigenous-university' or an approved variation, and be subject to a ministerial consent based on criteria relating to the nature and quality of courses offered (a narrower test than the current section 253C)

Awanuiārangi argued that:

- Not being able to describe itself as an 'indigenous-university' is effectively a restraint of trade, limiting its ability to market itself internationally.
- The term *Whare Wānanga* is not understood outside NZ. To expand its reach, Awanuiārangi must be able to describe itself in a way the international market will understand.
- Preventing Awanuiārangi using a term that best describes itself to a non-Māori audience is potentially misleading.
- Reputational concerns raised by other parties are based on a pre-determined and uninformed view of Awanuiārangi and the quality of education it offers.
- Universities are attempting to stifle Awanuiārangi's ability to compete in the higher education marketplace, leveraging off the privileges and advantages they currently enjoy.

Awanuiārangi argued that if its situation is judged on its merits, there is no real risk to Universities:

- Awanuiārangi is held to the same levels of accountability for performance and is accredited through essentially the same process.
- In using 'indigenous-university' as an italicised, hyphenated phrase in lower case, Awanuiārangi has taken specific steps to avoid confusion with the University sector.
- There is international precedent for use of this term by institutions that are Awanuiārangi's academic peers.

For Option A ('indigenous-university' as a new protected term) to be acceptable, it would require some test based on the nature and quality of courses provided to distinguish between wānanga with differing characteristics.

Option B was not supported - allowing wānanga to use the term university without committing an offence, and without it being in a term such as 'indigenous-university' would be potentially misleading, and does not distinguish between wānanga with differing characteristics.

Option C as described goes further than necessary to address Awanuiārangi's specific situation, as it applies to all TEIs using any protected names. This has more potential to cause confusion and disputes.

Te Tauihu o Ngā Wānanga

Te Tauihu o Nga Wānanga is the peak body representing New Zealand's three wānanga. Its submission supported Awanuiārangi's position.

The current law is an unnecessary restriction on Awanuiārangi developing its national and international activities. Awanuiārangi is disadvantaged in being held to substantially the same performance, quality and regulatory standards as the universities, while being unable to describe itself domestically or internationally as an 'indigenous-university'.

Awanuiārangi's use of the term 'indigenous-university' doesn't create material risk for universities.

'Indigenous-university' is an appropriate English term to describe what the wānanga is, in the same way universities use the term wānanga to describe themselves in te reo Māori.

Universities New Zealand

Universities New Zealand is a statutory body (the Vice-Chancellors Committee) representing New Zealand's eight universities. UNZ supported the status quo.

UNZ acknowledged that the term wānanga is not well understood internationally, but argued there are many other ways wānanga can describe themselves.

UNZ argued that Awanuiārangi is not offering qualifications or delivering outputs that are comparable to those of universities, and does not meet the characteristics of a university. UNZ presents a selection of statistics comparing Awanuiārangi's teaching and research profile to the university sector average to support this.

UNZ identified risks of unintended consequences and/or opportunities for abuse:

- That potential students will be misled into thinking they are gaining a university qualification.
- That potential employers may assume wānanga graduates are university graduates.
- That once approved to use a term such as 'indigenous-university', a wānanga may then abbreviate this in a misleading way.
- That allowing a wānanga to use the term 'university' will undermine international marketing of NZ's university system using claims such as that all NZ universities are internationally ranked – as such claims will need to be qualified or explained.

UNZ considered section 253C is intended to apply to overseas universities seeking to operate in NZ as a PTE or to PTEs offering specific university courses from a NZ or overseas university.

UNZ argued that extending section 253C to wānanga is not necessary unless a minister would apply different standards in 'taking into account the characteristics of institutions' under this section and s162 which concerns recommendations to the Governor General to establish a University.

UNZ argued that wānanga wanting to use the term 'university' should have to apply to be established as a university under section 162, and so become subject to all the quality assurance mechanisms governing universities.

Victoria University of Wellington

Favoured the status quo, and supported the UNZ submission.

All change options create risks for the reputation of NZ universities and the wider tertiary education system, and may mislead and deceive prospective students. However, if a change is to be made, some variant of option C would be best.

The current requirements for ministerial consent to use the term 'university' are high hurdles to overcome. Wānanga do not and probably cannot meet the characteristics of a university.

Noted the risk of a 'snowball effect' if one non-university institution is permitted to describe itself as a university. The current line is clear and any change will create uncertainty.

Metro ITPs

The Metro group represents six of New Zealand's largest metropolitan institutes of technology and polytechnics. The group said that its reservations about any changes to the current law are:

- Potential confusion, especially internationally. People may find it hard to distinguish between a university and another institution using the same word but intending it to mean something different.
- Possible knock-on effects: if the term 'university' can be qualified once, then proposals for similar modifications further down the track may be harder to turn away, with each change further diluting the original meaning of the term.

The Metro ITPs did not support Option A, introducing "indigenous-university" as a new protected term, or Option B, extension of the current term to cover wānanga in general.

If a change is to be made, the group recommended allowing TEIs to apply for consent to use the term 'university' but with a very high threshold for approval.

Tertiary Education Commission

The TEC's submission favoured status quo.

The TEC noted the primary reason for the proposed change is to potentially make it easier for wānanga to participate in international indigenous studies research and education fora.

The TEC considered that this does not provide sufficient justification for amending the Act to enable wānanga to describe themselves as 'universities'.

Learners need to be able to make informed choices about where they study. Use of the term 'university' by institutions that are not universities could create market confusion.

Education New Zealand

Education New Zealand stated that its initial view is the status quo is least disruptive and most likely to protect international perceptions of the high quality of NZ's university sector – critical to success of the international education industry.

Option C removes an inconsistency in current law between PTEs and TEIs, and the ministerial consent process safeguards the quality on which our university system's reputation rests. Any ministerial consent must be able to set conditions on use of the term 'university' including use of clarifying terms to ensure students understand the specialist nature of an institution (such as a wānanga) using the term.

Option C may increase the likelihood that internationally recognised foreign universities will partner with ITPs and wānanga and increase the variety of products and pathways available to international students. It potentially helps wānanga market to international students.

Options A and B were not supported: they do not require wānanga to meet any test to use the term 'university' and risks undermining the perception of a high quality university sector, essential to the NZ education brand.

The status quo was preferred but ENZ could see merits in having Option C.

The New Zealand Qualifications Authority and NZITP did not make submissions.

Appendix Two:

Proposed changes to the Education Act's protected terms provisions.

TEI titles that are protected terms [section 292(1)]

Current law		Proposed change
University	College of Education	No change
Polytechnic	Institute of Technology	

TEI titles not protected [section 292(1)]

Current law	Proposed change
Wānanga	No change

Who can apply for consent to use protected terms [section 253C(2)]

Current law	Proposed change
Only registered Private Training Establishments (PTEs)	Both registered PTEs and wānanga

What the Minister must do before deciding whether to consent [section 253C(3)]

Current law	Proposed change
(a) take into account institutions' characteristics [set out in section 162(4)] (b) receive advice from the Authority (NZQA) (c) consult TEIs, their peak bodies and other stakeholders as appropriate (d) be satisfied that consent is in the interests of the tertiary education system and NZ as a whole.	Add: - receive advice from the Tertiary Education Commission (TEC)[4].

What "requirements for consent" can be imposed?

Current law	Proposed change
Not explicitly stated in the Act.	The Minister may attach to a consent any requirements considered reasonably necessary to: - ensure students, employers and the public are not misled as to the legal status of the TEO granted consent - ensure the quality and reputation of TEIs of the class described by a protected term are adequately protected - protect the interests of the tertiary education system and the nation as a whole.

Audit, suspension and withdrawal of consent [section 253C(5),(6)]

Current law	Proposed change
Minister may audit for continuous compliance with the requirements for consent to use a term. If not satisfied, the Minister may withdraw consent or suspend consent for a period.	No change

4 The TEC was not established when this subsection was last amended by the Education (Tertiary Reform) Act 2002.