



Issues Paper 4

Modern, best practice legislation

Introduction

Feedback to the Training and Skills Commission's (TaSC's) Future-proofing the South Australian Apprenticeship and Traineeship System revealed a preference for the administration processes anchored in the Training and Skills Development Act (T&SD Act) to be more efficient, and to better cater to the way participants understand and use the system.

Participants are less likely to engage in apprenticeships and traineeships if the systems and processes that support it are opaque. To ensure the T&SD Act meets the standard set by modern, best practice legislation, the following issues need to be addressed:

- The T&SD Act is seen by some as too prescriptive and inflexible.
- The T&SD Act uses terminology which is inconsistent and confusing. For example, it refers to parties "entering into" a training contract¹, "executing" a contract by which an employer "undertakes" to train a person²; and "executing" a contract with a person that is "intended" to be a training contract³. In contrast to this, Queensland's Further Education and Training Act 2014 states that the employer must ensure a training contract is "signed" by the parties⁴.
- Some provisions are anachronistic, for example, section 36A of the T&SD Act (Appointment of an administrator).
- Some sections of the T&SD Act prescribe processes that bypass the TaSC, however it may be preferable that the TaSC has involvement in an aspect of the training contract⁵.
- Breaches can be difficult to substantiate, and penalties are rarely triggered. Penalties may not be in proportion the breach and fines have not been updated to reflect analogous penalties in other legislation.
- The development of TaSC Guidelines which are currently at the discretion of the Minister, the TaSC and the Department could be better connected with the needs of stakeholders.
- The T&SD Act does not reflect the current Commonwealth regulatory environment, which is a product of the 2012 referral of state-based powers to the Commonwealth.

CONSULTATION QUESTIONS

1. Is the balance and level of prescription of obligations in the T&SD Act, T&SD Regulations and TaSC Guidelines appropriate having regard to the issues mentioned above?
2. How should T&SD Regulations made under the T&SD Act be used? Are there elements of the T&SD Act that would be better served by having T&SD Regulations which can be changed more easily, to meet new and emerging issues?
3. Are the TaSC Guidelines developed under the T&SD Act effective? If not why not?

Penalty provisions

The T&SD Act contains a range of penalty provisions, summarised in the following table:

| Conduct | Maximum penalty | Expiation fee |
|---|-----------------|---------------|
| S6(1) An employer must not undertake to train a person in a trade except under a training contract. | \$5,000 | \$315 |
| S46(4) An employer must not enter into a training contract to train a person unless the employer is— a registered employer; and operating within the scope of the registration of the employer; and complying with any other condition of the registration. | \$5,000 | \$315 |
| S48(1) An employer must, within 4 weeks after executing a contract by which the employer undertakes to train a person in a trade, apply to the Commission for approval of the contract. | \$5,000 | \$315 |
| S48(2) An employer must, within 4 weeks after executing a contract with a person that is intended to be a training contract under this Part, apply to the Commission for approval of the contract | \$5,000 | \$315 |
| S51(1) Subject to this Part, no person, other than the Commission, may terminate or suspend, or purport to terminate or suspend, a training contract | \$5,000 | \$315 |

| Conduct | Maximum penalty | Expiation fee |
|---|-----------------|-----------------|
| S51(7) If a training contract is terminated during the probationary period, the employer under the contract must, within 7 days of the termination, notify the Commission in writing of the termination. | \$5,000 | \$315 |
| S52(2) If a training contract is transferred or assigned from 1 employer (the former employer) to another (the new employer), both the former employer and the new employer must, within 21 days of the transfer or assignment, notify the Commission in writing of the transfer or assignment | \$5,000 | \$315 |
| S53(1) A person must not exert undue influence or pressure on, or use unfair tactics against, a person in relation to entering into a training contract. | \$5,000 | None prescribed |
| S53(2) A person must not exert undue influence or pressure on, or use unfair tactics against, a party to a training contract in relation to— (a) the making of an application to the Commission in relation to the contract under section 49(5); or (b) variation of the contract; or (c) the transfer or assignment of the contract from 1 employer to another; or (d) the termination or suspension, or purported termination or suspension, of the contract. | \$5,000 | None prescribed |
| S63(2) An employer who fails to comply with a compliance notice within the time allowed in the notice is guilty of an offence. | \$5,000 | \$315 |
| S64(1) If an employer has reasonable grounds to believe that an apprentice/trainee employed by the employer is guilty of wilful and serious misconduct, the employer may (without first obtaining the approval of the Commission) suspend the apprentice/trainee from employment and must, in that event— (a) immediately refer the matter to the South Australian Employment Tribunal; and (b) within 3 days of the suspension—confirm the reference in writing. | \$5,000 | \$315 |

| Conduct | Maximum penalty | Expiation fee |
|---|-----------------|-----------------|
| S70(2) An employer must retain prescribed apprenticeship/traineeship records for at least 7 years after the expiry or termination of the training contract to which the record relates. | \$5,000 | \$315 |
| <p>S72(A) A person must not divulge or communicate information acquired by reason of being, or having been, employed or engaged in, or in connection with, the administration of the Act, except—</p> <p>(a) with the consent of the person to whom the information relates; or</p> <p>(b) in connection with the administration of the Act; or</p> <p>(c) to a member of the police force of this State or of the Commonwealth or another State or a Territory; or</p> <p>(d) to a person concerned in the administration of a corresponding law; or</p> <p>(e) for the purposes of legal proceedings.</p> | \$20,000 | None prescribed |

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| <p>S74(3) A person must not—</p> <p>(a) hinder or obstruct an authorised person in the exercise of a power conferred by this section; or</p> <p>(b) refuse or fail to answer truthfully to the best of the person's knowledge or belief a question put to the person under this section; or</p> <p>(c) without lawful excuse, fail to comply with a requirement made under this section.</p> | \$10,000 | |
| S75 A person must not make a statement that is false or misleading in a material particular (whether by reason of the inclusion or omission of any particular) in any information provided under this Act. | \$10,000 | |

A number of provisions proscribe conduct, which is not the subject of the fine (note: the conduct may be remedied through other means, for example, through enforcement of the training contract), including:

- T&SD Act, s46(7) An employer under a training contract must comply with the employer's obligations specified in the contract.
- T&SD Act, s46(8) An apprentice/trainee must comply with the obligations specified in the training contract.
- T&SD Act, s46(9) An employer must permit an apprentice/trainee to carry out their obligations specified in the training contract.

CONSULTATION QUESTIONS

4. Are there any provisions in the current T&SD Act that fail to clarify what conduct constitutes a breach and triggers a penalty?

5. Do the T&SD Act's penalty provisions reflect the seriousness of the conduct to which they relate, and the level of risk?

6. Is there conduct under the T&SD Act that should attract a penalty, but currently doesn't? Or conduct that attracts a penalty that shouldn't?

7. Should there be more discretion vested in the regulatory body (technically, the TaSC) to determine the type of conduct it seeks to proscribe and the level of intervention?

Alignment with the Commonwealth regulatory framework

South Australia referred its powers of regulation of training providers and accreditation of VET courses to the Commonwealth in 2012. These functions are now exercised by the Australian Skills Quality Authority (ASQA).

Stakeholder feedback has highlighted inefficiencies in this arrangement, resulting in training products (VET courses) taking longer to be approved for use by industry. Recent reviews⁶ of the VET system have underlined this as an area in need of reform.

CONSULTATION QUESTIONS

8. In your view what if any gaps or shortcomings are there in national training products that need to be addressed at State level?

References

1. T&SD Act, section 46 and throughout.
2. T&SD Act, section 48(1).
3. T&SD Act, section 48(2).
4. Further Education and Training Act 2014 (Qld), section 15.
5. For example: under section 64, an employer may suspend an apprentice or trainee for serious misconduct (without first obtaining the approval of the Commission) by referring the matter to the South Australian Employment Tribunal. In this situation, it may preferable that the employer is required to first notify the TaSC.
6. Strengthening Skills. Expert Review of Australia's Vocational Education and Training System ('Joyce Review').