



NSW Legislative Assembly Hansard

University Legislation Amendment Bill

Extract from NSW Legislative Assembly Hansard and Papers Tuesday 26 October 2004.

Second Reading

Dr ANDREW REFSHAUGE (Marrickville—Deputy Premier, Minister for Education and Training, and Minister for Aboriginal Affairs) [7.44 p.m.]: I move:

That this bill be now read a second time.

The University Legislation Amendment Bill 2004 proposes amendments to each of the 10 Acts establishing the State's public universities. The amendments will ensure that New South Wales universities can demonstrate to the Commonwealth Government that they comply with the national governance protocols for higher education providers. For the information of members, because of their particular relevance to this bill, I seek leave to table copies of the national governance protocols for higher education providers.

Leave granted.

Protocols tabled.

The national governance protocols are part of the Commonwealth Grant Scheme guidelines issued by the Federal Government under its Higher Education Support Act 2003. The protocols were tabled in both Houses of the Australian Parliament on 21 June 2004. The Higher Education Support Act 2003 provides, at section 33.15, that higher education providers who satisfy the Commonwealth Minister that they meet the requirements of the protocols will have their basic Commonwealth Grant Scheme funding increased. If the Commonwealth Minister is satisfied that the requirements of the protocols are met, the universities will receive increases in the basic grant of 2.5 per cent in 2005, 5 per cent in 2006 and 7.5 per cent in 2007.

The Commonwealth Minister stated last year in media releases that universities complying with the protocols will share in an additional \$404 million nationally over the period 2005 to 2007. The Commonwealth Government has not provided the State with a breakdown of how the additional \$404 million will be allocated among the nation's universities. However, it is estimated that New South Wales universities' share would be in the order of \$104 million over the three years. Members would be aware that the Carr Government has long been concerned about the financial health of our universities under the Howard Government. That is why we have moved quickly to have a bill drafted, in consultation with the State's public universities, to ensure that New South Wales universities do not miss out on this additional, badly needed funding.

Turning now to the bill itself, the amendments to each of the State's university Acts, other than the Australian Catholic University Act 1990, are set out in 10 separate schedules containing near-identical provisions. The only variations are to take account of minor, local, or pre-existing differences between our public universities. A significant change to the constitution of governing bodies relates to the current arrangement where each governing body includes one member of the Legislative Council, elected by that Council, and one member of the Legislative Assembly, elected by the Legislative Assembly.

This arrangement can no longer continue because protocol 5 prevents current members of State or Commonwealth parliaments from also being members of university governing bodies, unless they are specifically selected by the governing body. However, it is interesting to note that after discussions with me, all the New South Wales universities have written to me to indicate that they value the input of the members of Parliament and that their governing bodies would like them to stay. The bill implements this change by removing from all university governing bodies the special categories of membership for parliamentarians. These two membership categories generally will be replaced with two additional ministerial appointees, with a total of six ministerial appointees on each university governing body.

It is important that the bill continues to provide for individual parliamentarians to be appointed as members of university governing bodies provided they are nominated by the governing body. The other significant changes are designed to meet the requirements of national governance protocols 5 and 6. These protocols require that financial and commercial expertise are always present among the membership, and that external, independent members—that is non-student, non-staff members—are always in a clear majority. They also require that non-elected members must possess the ability to contribute to the effective working of the governing body, that universities must adopt systematic procedures for nominating prospective appointed members and that governing bodies do not exceed 22 members in total. All these requirements are implemented through various straightforward provisions in the sections of the bill dealing with the constitution of governing bodies.

These requirements of protocols 5 and 6 have a significant consequential impact. To help universities meet these protocols, the bill provides governing bodies with as much flexibility as possible in deciding their own membership characteristics and numbers, with only minimum requirements set in the legislation. For universities that wish to do so and have the full support of their governing bodies, the bill allows them, through their by-laws, to determine the final make-up of their governing bodies, provided the membership does not exceed the maximum of 22 members. This flexibility is designed to ensure that universities can always meet the requirements of protocols 5 and 6, no matter what the circumstances.

Subject to the maximum membership limit, the bill allows governing bodies to appoint as many members of their own choosing as they feel is necessary to meet either the requirements of the protocols or perceived skill shortages. This is a change from the current arrangements, where all but one of the university governing bodies can appoint only a single member of their own choosing. The bill also allows governing bodies to vary the numbers or method of selecting graduate members—or members of convocation, as they are traditionally defined at some universities. The bill provides for one or more non-student, non-staff graduate or convocation members to be either elected or appointed to the governing body.

This represents a significant freeing up of the current arrangements where the number and method of selecting graduate or convocation members is set in the Act and cannot be varied to meet changing needs and circumstances. Where a university governing body decides that its graduate members should be appointed through a process defined in its by-laws, such appointments will be made by the governing body. At their request, and in consultation with all other New South Wales universities, differing provisions have been made for the University of Sydney and the University of New South Wales so they largely retain their existing situations in relation to graduate members.

Although the bill provides the other eight New South Wales universities with the option of changing their governing body-appointed or elected graduate member arrangements, there is no compulsion to do so. The bill has been drafted in such a way that universities are free to maintain exactly their current arrangements if they are serving them well. This is an important point because some erroneous assertions have been made along the lines that the Government is doing away with graduate elections. It is clear from the bill that that is not the case, and universities are free to maintain current graduate numbers and to hold elections as the method of selecting graduates. The key point is that the decisions will be made by the universities' governing bodies themselves.

Although the bill provides universities with the capacity to decide these aspects of their governance for themselves, it also requires that their decisions be given legislative force and effect through by-laws. Members of this House are no doubt familiar with universities' by-laws, which are tabled here from time to time. The requirement is important because it provides a means for the Minister to be assured that the decisions being implemented are a true expression of the will of the governing body. It is also important because it provides legislative assurance to any members whose position on the governing body is determined through these provisions. By-laws also present an opportunity for public scrutiny of these important decisions of universities.

Protocol 2 requires universities' governing bodies to adopt a statement of their primary responsibilities. The protocol mandates a number of features that these statements must include. This statement of responsibilities is not something that can be legislated: It is the responsibility of the governing body itself to implement. However, the bill does assist university governing bodies to adopt such a statement. The sections in the bill relating to a governing body's oversight of controlled entities are intended to ensure that when universities implement protocol 10, they are acting in accordance with, and are mandated by, their legislation. One of the national governance protocols that clearly places the onus for implementation onto universities' legislation is protocol 3.

Protocol 3 is already partly provided for in the existing New South Wales legislation. This protocol requires that the duties of governing body members be specified in a university's legislation and that members must always act in the best interests of the university—honestly and in good faith. It also mandates that there be provisions to ensure that conflicts of interest are disclosed and avoided, and that there be safeguards to limit the liability of members who have acted in good faith. Protocol 3 also requires that any member who is disqualified from acting as a director under part 2D.6 of the Corporations Act automatically loses office and that governing bodies have the power, by a two-thirds majority, to remove any member who breaches these duties. Each New South Wales university Act already includes provisions that cover many of these areas.

The bill includes provisions designed to implement the remainder of protocol 3. To this end, it lists the duties of governing body members in a new schedule to each of the Acts. These duties include the requirement that members must carry out their duties in good faith, for a proper purpose and in the best interests of the university as a whole. The bill also requires that governing body members act honestly and with reasonable care and diligence, and so as not to improperly use their position or information acquired through their position to gain an advantage or cause detriment to the university. The bill broadens the existing New South Wales conflict of interest provisions, which are currently in the context of a university's commercial activities only, to all aspects of a governing body's responsibilities.

The bill establishes more detailed provisions, requiring members of governing bodies to disclose and register any relevant material interest and preventing them from participating in discussion or determination of matters in which they have such an interest, except with the specific approval of the governing body. Unlike protocol 3, the proposed New South Wales provisions relating to the dismissal of members who are deemed to have breached these duties include some basic protections against the misuse of this power, as well as natural justice requirements. Under the provisions of the bill, removal from office may only be effected at a meeting for which notice has been duly given, including to the member concerned of the proposal to remove him or her.

To remove a member, the two-thirds majority must be a majority of the current membership of the governing body, not merely a majority of a particular meeting, and the member proposed to be dismissed must be given a reasonable opportunity to reply to the motion before it is put to the vote. The bill also enhances the existing vacation of office provisions, in line with protocol 3, to add that any member who is or becomes disqualified from managing a corporation under part 2D.6 of the Corporations Act automatically loses office. When there is a change in university governing body membership, it is vital that there be a continuity of skills and experience. That is why in the bill, in implementing protocol 6, members' terms of office are required to overlap and to not exceed 12 years in total unless a majority of the governing body agrees.

Finally, the bill includes savings and transitional provisions to provide university governing bodies with the means of transferring smoothly to their new governance arrangements. Consultation on the draft bill has taken place with chancellors

and vice-chancellors of New South Wales public universities. Chancellors and vice-chancellors were responsible for further consultation within their own institutions. The universities generally support the bill as currently drafted. The National Tertiary Education Union and the National Union of Students were also consulted. While they were not supportive of many aspects of the national governance protocols, they are supportive of the provisions in the bill relating to student and staff representation.

This bill will enable the adherence to the national governance protocols by our public universities in New South Wales and, as such, will allow their share of \$404 million to flow to them. The University Legislation Amendment Bill is an affirmation of the New South Wales Government's commitment to the autonomy and independence of universities. It grants universities freedom to govern themselves in the way they see fit, while also ensuring that appropriate and effective governance arrangements are in place. I commend the bill to the House.