

13 April 2011

Committee Secretary
Senate Standing Committees on Education, Employment
and Workplace Relations
PO Box 6100
Parliament House
Canberra ACT 2600
eevr.sen@aph.gov.au

Dear Committee Secretary

The Group of Eight (Go8) welcomes the opportunity to submit comments on the Tertiary Education Quality and Standards Agency (TEQSA) establishment legislation.

At the outset, we note our appreciation of the Government's willingness to work closely with Universities Australia (UA) on earlier drafts of the legislation. This cooperation has substantially improved the draft Bill. At the UA Plenary in March, the Go8 universities, along with other members of UA, broadly endorsed the proposed legislation, with the caveats that: (a) the self-accrediting nature of universities should be recognised explicitly in the primary legislation (not only in the associated standards), and (b) there is a need to clarify a number of issues around the setting of standards and transitional arrangements.

The Go8 supports consistent national regulation of higher education in Australia which will guarantee public confidence in the quality and bona fides of providers and uphold the integrity of degrees.

The legislation introduced to the Parliament on 23 March, which includes the *Tertiary Education Quality and Standards Agency Bill 2011* and the *Tertiary Education Quality and Standards Agency (Consequential Amendments and Transitional Provision) Bill 2011* and related Explanatory Memoranda, includes several concessions to universities' concerns about previous drafts of the Bills.

We welcome the inclusion in the revised draft Bill of the important principles of regulatory necessity, risk and proportionality in the objects of the legislation and in particular clauses relating to decisions about registration and accreditation. Because these principles are recognised in the legislation, unreasonable actions of TEQSA will be appealable in the Federal Court.

The import of these changes is that in its approach to regulation TEQSA will be required to take into account the diversity, missions, curriculum and approach to delivery of established universities. TEQSA will be obliged also to adopt an escalating approach to enforcement. To reinforce this commitment, we would like to see the following statement included in the Explanatory Memorandum: "*TEQSA will exercise its discretionary powers in a flexible manner using the minimum powers and interventions necessary to safeguard quality higher education*".

While the Government has made a welcome effort to recognise universities' autonomy and distinctive characteristics, there remain two fundamental omissions in the legislation – and in the TEQSA policy architecture. These are:

- Self-accreditation – now recognised, but obliquely – needs to be more prominent and better explained.
- The scope of the various Standards – especially the Threshold Standards – and the process for drafting them need to be better defined. In particular, the Go8 argues for a requirement that the process for setting Threshold Standards include meaningful, active consultation with the sector. The Bill should include clearer limits on the Minister’s power to set standards and explicitly outline the expertise needed for the Higher Education Standards Panel members.

We recognise that the TEQSA legislation has been designed primarily to eradicate rogue providers in the non-university sector and that it looks towards a more diverse system of higher education with a wider range of provider types. We are concerned, however, that universities are caught up in that broader framework, since the primary legislation does not distinguish between provider types. In the context of growing diversity in the sector, it is important to ensure we do not lose those understandings and values which have underpinned the distinctive nature and role of universities as independent entities essential to democratic civil society.

The Government has acknowledged that universities are a unique type of higher education provider and has recognised their autonomy. This needs to be explicitly reflected in the primary legislation for the establishment of TEQSA. We support the push by Universities Australia to ensure the self-accrediting status of universities is more clearly recognised in the TEQSA Act.

The Go8 would like to note that considerable uncertainty has been created by the misalignment in the timing of the development of the TEQSA legislation and the related standards. In particular, the provider standards which underpin the basis of the regulatory decision making of TEQSA are still in draft mode and subject to ongoing debate and consideration within the sector.

The Go8 is seeking an amendment that removes clause 58 (1) (e) “*other provider standards against which higher education providers can be assessed*” from the definition of Threshold Standards. This clause is too open-ended. Threshold Standards, by their nature, should be known and clearly defined instruments, as they form the legal basis for intervention by the regulator. As it is currently drafted, clause 58 (1) (e) potentially gives the Minister and TEQSA unpredictable and unnecessary powers.

Further, the Go8 would propose clause 167 (2) (a) be amended to state “ensure an appropriate balance of professional knowledge and demonstrated expertise in the setting of standards in higher education and their implementation at an institutional level”.

For a panel that is intended to develop five very distinctive sets of standards (including provider, qualifications, teaching and learning, research and information), it is possible that it could be constituted by experts, each of whom has a deep knowledge of one of the standards domains, but none or only a few of whom have broad expertise across all of the domains, including their implementation. This is a potentially important point, because the setting of standards across the various domains needs to take adequate account of, and be kept in balance with, the broader purpose of higher education and its evolving nature.

While we appreciate that it is not the Government’s intention to impose disproportionate regulation on universities, or to intrude unduly in their academic affairs, our assessment is that the draft legislation, as it currently stands, presents a risk that unintended, and undesired consequences could arise, possibly in the longer term, under a future Government.

The Go8 has consistently argued that tougher standards for provider registration, combined with more effective monitoring of providers – in proportion to their risk profile – would solve most of the problems of provider quality in the higher education sector. This is where the focus of TEQSA’s activities should lie.

The Go8 also notes the advice provided to the TEQSA inquiry by the University of Sydney's General-Counsel and asks Senators to consider this advice in their deliberations.

In particular, there is an important issue about the basic principles for regulation and the ability of higher education providers to request a review of decisions by TEQSA that fail to comply with the basic principles in its operations. It is important the legislation and Explanatory Memorandum make it clear decisions and actions of TEQSA in breach of the basic principles can be subject to review by the Administrative Appeals Tribunal (AAT), in addition to those specific decisions listed in clause 183.

Finally, the Go8 acknowledges the concerns outlined in detail by some of its member universities in relation to the meaning of clause 26. We believe this needs to be clarified. It is important that the TEQSA Bill encourages the well-developed practices universities have developed to facilitate institutional collaboration and exchange and does not stymie activity which brings significant benefits to students, society and the economy both domestically and globally.

We appreciate the opportunity to work with the Government and the Parliament to achieve a regulatory framework which both guarantees the quality of Australian higher education and ensures that appropriate safeguards are built into the principal legislation. The legislation must guarantee that the autonomy of Australia's self-accrediting universities can only be restricted as a result of a process that is demonstrably fair and transparent.

Yours sincerely

Professor Paul Greenfield AO
Chair