

SUBMISSION TO THE SENATE EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS COMMITTEE

TERTIARY EDUCATION QUALITY AND STANDARDS BILL 2011

This submission is made on behalf of the Hon Dr Elizabeth Constable MLA, Minister for Education, Western Australia, who administers the Western Australian *Higher Education Act 2004* and the establishment Acts of the State's 5 universities.

INTRODUCTION

Western Australia does not support the Tertiary Education Quality and Standards Bill 2011 (TEQSA Bill) nor does it consider that the operations of TEQSA as currently proposed are likely to improve quality and standards in higher education in Australia.

In a Federal system there are advantages in a balance of competition and collaboration between States and Territories in developing good policy and promoting operational effectiveness. In any event in a Federation the question is always to decide the matters that are best handled centrally by the Commonwealth and those that the States and Territories should be responsible for, as is the approach taken in the Australian Constitution. Operational matters such as the delivery of regulatory services are best undertaken where the institutions operate and the students reside. A Commonwealth takeover of State and Territory roles and responsibilities is unlikely to promote effective and efficient regulation in higher education in Australia.

With the introduction of TEQSA the Commonwealth is proposing to expend \$57 million over four years to take over functions which are currently undertaken and funded by the States and Territories. TEQSA will be based in Melbourne and is expected to undertake regulatory functions on a fly-in-fly-out basis. This will diminish the links between States and Territories and their higher education institutions and students. TEQSA will not involve States and Territories in their regulatory processes. It will not even have a complaints mechanism so it will be further removed from an understanding of emerging problems in the States and Territories.

The only role for the States and Territories under the TEQSA legislation is to be informed by TEQSA when it intends to make major decisions which impact on state universities. In general if there are regulatory problems in a State with a higher education provider the State will need to make an application to the Chief Executive Officer of TEQSA. As experience shows, if there are problems with a provider the State must be able to react quickly. Any problem in Western Australia will be a problem for WA-based students and staff and for the relevant state departments and the relevant State Minister. Such matters must be addressed within the State, not by referral to a remote Commonwealth agency.

SUMMARY

Western Australia recognises the Commonwealth's prime responsibility for higher education funding and supports national higher education regulatory and quality assurance arrangements. However the arrangements must be truly national in character, with a balance of roles between the States, Territories and the Commonwealth.

Western Australia does not support the TEQSA Bill under which the Commonwealth will be able to determine who can operate universities, their governance structures and most importantly their operations including the courses of study to be offered. With the introduction of TEQSA, universities will no longer be self-accrediting institutions under State legislation.

Universities are fundamental to the general economic and social wellbeing of all States and Territories. They are central to providing skilled manpower and research to support economic development in key areas such as resource extraction and agriculture. Western Australia considers that there should be a separate provision in the TEQSA legislation for universities which are peak bodies generally established by State legislation and which have a continuous and direct involvement with the Commonwealth.

Under the TEQSA Bill, the States and Territories who currently fund and maintain the national higher education regulatory system and who developed the *National Protocols for Higher Education Approval Processes* (National Protocols) which will underpin the proposed "provider standards" under TEQSA, will have no role in establishing standards in higher education or in the operations of TEQSA. In a national system this is absurd and is unacceptable.

It should be noted that a proposed Intergovernmental Agreement which covers the roles of the various parties in relation to TEQSA and the national regulation of higher education has not been finalised and the latest version was circulated after the TEQSA Bill was introduced to Parliament.

Given the significance of these issues, Western Australia asks that the consideration of the TEQSA legislation be deferred, pending further negotiations on amendments to the functions of TEQSA and the finalisation of an appropriate Intergovernmental Agreement.

BACKGROUND

Current Quality Assurance and Higher Education Regulatory Practices in Australia

Currently regulation and quality assurance in higher education is carried out by the States and Territories under the *National Protocols* which is an intergovernmental agreement involving all jurisdictions including the Commonwealth. Regulation functions of the States and Territories have focused on the non-university sector, although the *National Protocols* provide processes for the establishment and recognition of new universities. The *National Protocols* were established in 2000 to regulate the developing non-university sector and to ensure that the title "university" was uniformly protected in Australian legislation and to protect against the establishment and operation of "degree mills" and sub-standard providers. The catalyst for the development of effective national standards was the approval by the Commonwealth of a degree-mill called "Greenwich University" to operate out of Norfolk Island. The Commonwealth subsequently closed

down "Greenwich University" and it was agreed that the *National Protocols* would be the basis for uniform national standards in higher education in Australia. The *National Protocols* are enshrined in legislation in all jurisdictions and are subject to amendment as circumstances require.

In the current national system, the *National Protocols* are complemented by the operations of the Australian Universities Quality Agency (AUQA) which is owned and funded by the States, Territories and the Commonwealth and which undertakes quality audits of the universities, the non-university providers of higher education and the government accreditation authorities.

Within the national system universities, which are self-accrediting entities established under State legislation and major State assets, are responsible to State Parliaments for their operations.

The current national higher education regulatory and quality system has been very successful since its establishment in 2000 and there have been no systemic problems involving the collapse of higher education providers and sub-standard operations.

Proposed Commonwealth TEQSA legislation

Despite, the relative success of the current higher education regulatory system, the Commonwealth has decided to take over this State function using its corporations powers. Legally universities are corporations, however there must be significant doubts that corporation powers provide the legal authority for the Commonwealth to control all university operations including teaching and learning functions and curriculum content.

Education is after all a State responsibility under the Australian Constitution.

In effect with the TEQSA legislation the Commonwealth seeks to take control from the States of the establishment (recognition), operations and regulation of all higher education institutions including universities. This is a significant advance from the current constitutional position where the Commonwealth provides funding to the universities under Section 51 (xxiiiA) covering 'benefits to students' and Section 81 which covers appropriation powers.

The Commonwealth by use of ordinary constitutional powers cannot cover the whole field of education and training. An effective national regulation system will always need to be underpinned by complementary State legislation if the entire range of functions are to be covered.

The Commonwealth TEQSA legislation will override existing State legislation and the Commonwealth Minister via TEQSA will determine who can offer what education programs, the recognition and establishment of higher education institutions including universities and the de-registration of such institutions including universities.

In general Western Australia shares other State and Territory concerns on the proposed TEQSA legislation and does not support the Commonwealth's use of its corporations powers to override the State's powers and responsibilities in relation to the regulation and quality assurance of the higher education sector.

Policy Issues

Western Australia does not support the TEQSA legislation in its current form and supports amendments to the legislation to address substantive policy issues around the governance and operation of TEQSA. WA concerns include:

- The all encompassing role of the Commonwealth Minister (bypassing the Ministerial Council for Tertiary Education and Employment - MCTEE) in the establishment of standards for higher education providers, as well as the enforcement of those standards by TEQSA. In effect States and Territories and MCTEE (and its successors) will have no real role in higher education regulation or in the setting of standards in the proposed new 'national' system;
- The level of regulation proposed by the TEQSA legislation which has the potential to be overly intrusive on university governance and which will erode academic autonomy and the current State ownership of and relationship with its universities.
- The uncertainty around how the TEQSA legislation would align with State legislation and State powers to establish and disestablish universities in legislation.

THE TEQSA BILL

Western Australia has reservations with many aspects of the Bill. These include –

- The Bill appears to have been adopted from templates that would be more appropriate to registration of any other kind of business.

For example the powers conferred on investigators are so extensive that the Bill should make express provision for the protection of university intellectual property. The protections and immunities of the Commonwealth should not be available to TEQSA or to any officer of the Commonwealth for infringement of the rights of the universities in this regard.

- No separate provision is made for universities which are peak bodies generally established by State legislation and which have a continuous and direct involvement with the Commonwealth.

Western Australia objects to any requirement that universities established under a law of the State will be subject to registration by the Commonwealth or any instrumentality of the Commonwealth. The State does not object to the audit of the universities for compliance with standards established with the agreement of the States. The standards should not impinge on the State's power to establish universities.

- The Bill appears to contemplate a registration scheme for providers which does not set out in itself the prerequisites for registration but leaves those matters to subordinate legislation as though these matters are of lesser consequence to the persons affected by them or indeed to the Parliament itself

The principal requirements that higher education providers will be required to meet under the Bill are to be found in the Higher Education Standards Framework which include the following –

- (a) the Provider Standards which include –
 - (i) the Provider Registration Standards; and
 - (ii) the Provider Category Standards; and
 - (iii) the Provider Course Accreditation Standards;
- (b) the Qualification Standards; and
- (c) the Teaching and Learning Standards; and
- (d) the Research Standards; and
- (e) the Information Standards; and
- (f) any other standards made under paragraph 58(1)(e).

and a process of Ministerial consultation if the application relates to a university.

As a matter of legislative principle, unlike the *National Education and Training Regulator Act 2010* of the Commonwealth, the Bill does not include any indication of what these standards are to contain as these are left to legislative instruments which have not been the subject of discussions with the States.

In relation to the “registration” of a university which is normally established by an Act of a State Parliament, for instance, will a subordinate legislative instrument made under the TEQSA legislation establish the standards that a State Act must conform to in order that the university established by that Act is registered?

The wide range of standards proposed will impose additional red-tape, particularly for the universities which are already highly regulated. There are inconsistencies between the standards in that some are well developed, such as the ‘qualification standards’ based on the Australian Qualifications Framework and the ‘provider standards’ which are based on the National Protocols for Higher Education Approval Processes. Other standards, including the Teaching and Learning Standards are only in the early stages of consideration.

- The proposed “provider registration standard” would be an affront to decisions made by State Cabinet and the universities themselves as it raises the question as to whether fit and proper persons are appointed or elected to university governing bodies. It is assumed that like other provider registration standards the standards will include the requirement that any person who is a member of the governing body of the provider must be a “fit and proper person”. Most governing bodies of universities are composed of persons elected to office and persons who are appointed by the State Governor on the advice of State Ministers or Cabinets.
- The proposed compliance and quality assessments would be an affront to university staff and the reputation of the universities themselves.

The members of the Academic Boards, the core educational standards bodies of universities, are elected by their peers based on their academic standing and expertise. Will a proposed standard for registration be able to express adequately the breadth of experience and learning for such persons? And who exactly is to be the judge of these persons for their positions?

- The proposal to keep secret, even from State governments, any assessment of risk made by the registration authority (TEQSA) would offend the principle of disclosure which normally applies to information required to be given to any other shareholder body and certainly would conflict with the basic principles of natural justice. As State governments often loan significant funds to their universities there would be considerable concern if TEQSA were to develop a risk assessment of a state university without reference to the State Government.

The Bill makes express requirements in relation to the financial viability of an applicant. In this context it would be interesting to be informed of what is to be required of universities in the proposed standards. It is noted that usually university financial statements are audited by the State Auditor General. It is also assumed that the Commonwealth already has abundant information about university financial resources. In general the development of a risk assessment by TEQSA will be very intrusive on universities which are already heavily regulated under Commonwealth and State legislation.

- It would appear that every higher education course provided will be required to meet the course accreditation standards. The question is whether even a panel as envisaged under Part 9 of the Bill could possibly be qualified to accredit every course delivered by a university for every qualification that may be issued by the university. Another problem is that it brings within the control of a Commonwealth government the entire content of higher education in Australia. The prospect of government control of every aspect of higher education may well raise concerns.
- In Division 4, Clause 9 - 'Act excludes State and Territory higher education laws' there is considerable uncertainty as to which State laws or parts of State laws are to be overridden by the TEQSA legislation and which are to be operational. For example 9(2)(b) provides that the exclusion does not encompass State and Territory laws 'to the extent that' the law regulates who may carry on an occupation. There are a number of State Acts to which this provision might apply, such as the *Health Practitioner Regulation National Law (WA) Act 2009*, drafted under Commonwealth "guidance" which confers on the National Regulator accreditation functions and the assessment and approval of accredited programs of study and the education providers that provide the programs of study, to determine whether the programs meet approved accreditation standards. The Act also provides for the National Board to give advice to the Ministerial Council on registration and accreditation which raises possible conflicts between the Minister for Health and Aging and the Minister for Tertiary Education, Skills, Jobs and Workplace Relations in relation to accreditation standards and the approval of programs of study. Clause 9 (3) hopes to address the inconsistencies between Commonwealth and State legislation by providing for these matters to be dealt with in regulations. The regulations have not been drafted and the State has no real idea what the impact of the TEQSA legislation will have on State legislation.

It should be noted that many professional bodies have the power to accredit courses and providers so that the answer that sub clause (2) may prevent this clause from affecting an occupational licensing body cannot be sustained.

Any resort to the regulation making power in some cases will encourage a whole range of requests for exemption. Prior to approving the TEQSA legislation consideration must be given to existing State Acts and the extent or otherwise of the impact of the TEQSA legislation on them. State Acts or parts of Acts may need to be repealed or amended.

These are only some of the matters which require further consideration. Many issues require detailed consideration of the drafting which goes some way beyond the nature of this submission. For example:

- Clause 134(1)(c) and (g) are remarkable - (1)(c) confers powers to conduct compliance assessments and quality assessment and accreditation assessments of accredited courses – it is not clear whether this is to be by academic experts or by Commonwealth public servants, and, (1)(g) confers powers to conduct training to improve the quality of higher education – is the regulator becoming a provider?
- Clause 135 and 136 leave the relationship between TEQSA and the Commonwealth Minister ambiguous.

The State of Western Australia takes the view that there are substantive matters of policy and drafting detail which need further consideration, negotiation and clarification in relation to TEQSA. This work should be progressed through the Ministerial Council and operational arrangements outlined in an Intergovernmental Agreement.

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