

CHAPTER 2

Key issues

2.1 The majority of submissions received broadly supported the aim of the Bill in reducing the regulatory burden and multiple reporting requirements on higher education providers and increasing the efficiency of the Tertiary Education Quality and Standards Agency (TEQSA).

2.2 Submitters voiced specific concerns in relation to the implications of the proposed amendments, including the:

- removal of TEQSA's quality assessment function;
- delegations of powers;
- extension of the period of registration and accreditation; and
- minister's powers to give directions to TEQSA.

Quality assessments

2.3 Section 60 of the 2011 TEQSA Act sets out its powers to conduct quality (including thematic) assessments:

TEQSA may review or examine any aspect of an entity's operations to:

- (a) assess the level of quality of higher education provided by one or more registered higher education providers; or
- (b) assess whether there are any systemic issues relating to a particular course of study leading to a particular regulated higher education award; or
- (c) assess the level of quality of, or whether there are any systemic issues relating to, the courses of study that lead to one or more kinds of regulated higher education awards.

2.4 The Minister for Education explained in his second reading speech that the removal of TEQSA's quality assessment function, through the repeal of section 60, will allow TEQSA to focus on its core functions of higher education provider registration and course accreditation. The minister also noted that sector-wide thematic reviews are 'time and resource-intensive, of TEQSA itself but also of the higher education institutions which are asked to provide input to the reviews'.¹

1 The Hon. Christopher Pyne, MP, Minister for Education, Tertiary Education Quality and Standards Agency Amendment Bill second reading speech, *House of Representatives Hansard*, 27 February 2014, p. 1080.

2.5 A number of submitters expressed concerns about whether quality standards will continue to be maintained at a high level.²

2.6 In its submission the National Tertiary Education Industry Union (NTEU) stated that 'this substantively changes the nature of quality assurance in Australia's higher education sector' and found the assumption expressed in the Explanatory Memorandum 'that providers already have robust internal processes to ensure quality',³ a 'considerable leap of faith'. The NEU concluded that 'there is no incentive for higher education providers to commit to improving quality of their course offerings' and the proposed changes 'may have the impact of a "race to the bottom"'.⁴

2.7 The University of Sydney Students' Representative Council and the National Union of Students (NUS) both argued that TEQSA should retain its quality assessment function, the latter citing the 'possible damage to the reputation of the sector if Australia was seen to be getting rid of externally verifiable quality assurance processes beyond minimum thresholds'. NUS further suggested that the 'TEQSA Advisory Council would seem to be an avenue where the sector could be consulted over the design and appropriateness of thematic studies'.⁵

2.8 Flinders University, while broadly supporting the separation of regulation from quality assessment, noted:

If the Higher Education sector is to maintain and develop its national and international reputation, it must be able to demonstrate publicly the quality of its programs and operations with reference to independently determined, national parameters as well as institution-specific quality parameters and strategic plans.⁶

2.9 Monash University strongly supported the removal of the quality assessment function, but still saw a role for TEQSA in monitoring sector-wide issues, particularly in the application of the Higher Education Standards Framework used by TEQSA to evaluate education providers and courses:

Perhaps TEQSA could observe any particular trends across a range and or a number of providers that may require further investigation. This may relate to the Standards as interpreted or new developments not anticipated in the

2 National Tertiary Education Industry Union, *Submission 1*, pp 4–5; National Union of Students, *Submission 14*, pp 2, 7–10; Students' Representative Council The University of Sydney, *Submission 19*, p. 3.

3 Explanatory Memorandum, Tertiary Education Quality and Standards Agency Bill 2014, p. 3.

4 *Submission 1*, pp 4–5.

5 *Submission 19*, p. 3; *Submission 14*, [pp 7, 10]. See also: The Hon. Christopher Pyne, MP, Minister for Education, 'Upholding standards and quality in higher education', Media release on the establishment of the TEQSA Advisory Council, 22 April 2014.

6 Flinders University, *Submission 2*, p. 2.

Standards. In such cases, a referral to the Minister to consider whether or not an independent national review should be initiated may be appropriate.⁷

2.10 The Council of Private Higher Education advocated a similar position:

TEQSA should be in a position to report broad higher education quality issues it identifies to the Minister who can then undertake whatever review is called for using the most appropriate resources available which may be administered through the Department.⁸

2.11 The Department of Education informed the committee that TEQSA has carried out only one quality assessment under section 60, on third party teaching arrangements, that the 'sector was highly critical of the methodology used and the amount of time and resources required to complete the assessment', and that no results or analysis were released.⁹

2.12 TEQSA further explained that under the proposed amendments it still retained a number of core responsibilities for assuring quality. In particular it could deal with substandard higher education providers by conducting compliance assessments¹⁰ under section 59 of the Act which states:

TEQSA may review or examine any aspect of an entity's operations to assess whether a registered higher education provider continues to meet the Threshold Standards.

2.13 The Australian Council for Private Education and Training observed that 'if TEQSA is doing its job properly under clause 59, there is no need for clause 60'.¹¹

2.14 Other mechanisms detailed by TEQSA for dealing with provider integrity are the reregistration process and its power to shorten a registration period. The annual risk assessment process, which was not linked to threshold standards, would also ensure that students receive a 'quality learning experience'.¹²

2.15 Professor Kwong Lee Dow advised the committee that under the proposed amendments only three words were being removed from TEQSA's functions and

7 Monash University, *Submission 10*, p. 1.

8 Council of Private Higher Education (COPHE), *Submission 17*, p. 2.

9 Department of Education, *Submission 3*, p. 3.

10 Ms Dorte Kristoffersen, Acting Chief Commissioner, Tertiary Education Quality and Standards Agency, *Proof Committee Hansard*, 6 June 2014, p. 34.

11 Ms Claire Field, Chief Executive Officer, Australian Council for Private Education and Training, *Proof Committee Hansard*, 6 June 2014, p. 48.

12 Ms Dorte Kristoffersen, Acting Chief Commissioner, Tertiary Education Quality and Standards Agency, *Proof Committee Hansard*, 6 June 2014, pp 33–5.

powers under section 134 of the TEQSA Act, and that in this section 'very extensive' quality assurance powers remained.¹³

2.16 The committee heard that TEQSA's existing powers to 'collect, analyse, interpret and disseminate information relating to...quality assurance practice, and quality improvement, in higher education'¹⁴ were required by the regulator to check on institutions.¹⁵

2.17 Furthermore, the review of the Higher Education Standards Framework under Professor Alan Robson was strengthening standards and incorporating non-threshold standards (teaching, learning, research and information) into the threshold standards (provider standards and qualification standards).¹⁶

2.18 In Professor Lee Dow's view, while quality assessment elements were important:

what they need to be focused on are the institutions themselves. The regulator needs to simply test that the institutions are in fact conducting that work, rather than getting into the very detailed work that it was doing...that was just taking inordinate amounts of time and really tying up both it and the institutions in what could genuinely be called red tape.¹⁷

2.19 Professor Lee Dow expressed confidence that there will always be a capacity to investigate quality issues 'through the standards framework and through the curriculum and those underpinning aspects of the criteria for regulation'.¹⁸

2.20 Universities Australia (UA) added that it was not the role of TEQSA to pass judgement on how well providers met qualitative standards, but rather that they provided 'a bar to be overcome'. UA further pointed to 'very strong' internal quality mechanisms including 'academic boards, peer review, internal and external benchmarks'. At the point of registration institutions have to be able to demonstrate these standards and assure quality.¹⁹

13 Professor Kwong Lee Dow, *Proof Committee Hansard*, 6 June 2014, p. 12.

14 Paragraph 134(1)(e), *Tertiary Education Quality and Standards Agency Act 2011*.

15 Professor Kwong Lee Dow, *Proof Committee Hansard*, 6 June 2014, p. 14; Ms Belinda Robinson, Chief Executive, Universities Australia, *Proof Committee Hansard*, 6 June 2014, p. 27.

16 Mr Paul Kniest, National Tertiary Education Industry Union Policy and Research Coordinator, *Proof Committee Hansard*, 6 June 2014, p. 7; Mr Mike Teece, Deputy Executive Director, The Group of Eight, *Proof Committee Hansard*, 6 June 2014, p. 21.

17 Professor Kwong Lee Dow, *Proof Committee Hansard*, 6 June 2014, p. 11.

18 Professor Kwong Lee Dow, *Proof Committee Hansard*, 6 June 2014, p. 13.

19 Dr Nathan Cassidy, Policy Analyst, and Ms Belinda Robinson, Chief Executive, Universities Australia, *Proof Committee Hansard*, 6 June 2014, pp 25, 27.

Committee view

2.21 The committee agrees with stakeholders that the maintenance of quality standards is essential to protect students and to sustain and enhance the reputation and integrity of Australia's higher education system.

2.22 The committee acknowledges the concerns expressed by some submitters regarding the removal of TEQSA's quality assessment function. However, the committee considers this measure is necessary to reduce the administrative burden imposed upon higher education providers in participating in TEQSA's assessment reviews and to refocus TEQSA's efforts to reduce backlogs in other core areas.

2.23 Furthermore, the committee considers that under the proposed legislation, TEQSA will still be well equipped to undertake quality-related functions including monitoring and making recommendations to the minister on matters that affect the higher education sector as a whole.

Delegations

2.24 Subsection 199(1) of the TEQSA Act provides that any or all of TEQSA's functions and powers can be delegated to:

- (a) a Commissioner; or
- (b) a member for the staff of TEQSA who holds the classification of APS Executive level 1 or higher, or an equivalent classification; or
- (c) a Commonwealth authority; or
- (d) a person who holds any office or appointment under a law of the Commonwealth.

2.25 Subsection 199(2) outlines a number of decision-making powers relating to TEQSA's core functions which cannot be delegated, including provider registration and course accreditation. Section 200 specifies accreditation powers that can only be delegated to a Commissioner.

2.26 The Explanatory Memorandum observes that the restriction of the delegations to specific TEQSA staff in the legislation has contributed to a 'backlog in provider re-registration applications and course accreditation and re-accreditation applications'. It argues that unnecessary delays in course accreditation may 'impact on the sector's competitiveness and may discourage innovation':

Where decisions have been made at the highest levels within TEQSA, applicants are prevented from accessing TEQSA's internal review mechanisms. As a result, applicants seeking to appeal a TEQSA decision must request review through the Administrative Appeals Tribunal.²⁰

20 Explanatory Memorandum, Tertiary Education Quality and Standards Agency Bill 2014, p. 9.

2.27 To support swifter decision-making and faster turnaround of applications, Part 2 of schedule 1 proposes that section 200 and subsection 199(2) be repealed. The substitution of proposed subsection 199(2) will restrict the powers not delegable under subsection 199(1) to 'a power to make, vary or revoke a legislative instrument'.

2.28 Submitters generally supported the aim to improve the efficiency of TEQSA in performing its registration and accreditation roles through the delegation of powers from the Commissioners to senior TEQSA staff. They also supported the greater access of providers to internal appeals mechanisms.

2.29 RMIT considered however, that efficiency measures be 'balanced against the core principles of the Act, namely to reflect risk, proportionality and necessity ("the Basic Principles")', and that:

The ability for TEQSA to delegate under the amended provisions has not been clearly defined and it would be useful to clarify the delegation of functions and powers under Subsection 199 in the context of the Basic Principles of the Act. TEQSA's delegation of decision making responsibilities needs to be underpinned by a coherent and consistently applied principle-based risk assessment framework to inform its case management model.

2.30 NTEU and NUS expressed concerns that repealing subsection 199(2) would remove restrictions on delegating the majority of TEQSA's functions and powers to other Commonwealth authorities or appointees who are not employed by TEQSA. They recommend the repeal of paragraphs 199(1)(c) and 199(1)(d) to enable functions and powers to be delegated to TEQSA staff (at APS Executive Level 1 or above) only.²¹

2.31 The Department of Education informed the committee that the need for changes to delegations powers had been raised 'by the agency itself as a constraint on its capacity to operate effectively'.²² TEQSA also confirmed that these powers were important in enabling it to meet the recommendations of the Review.²³ The committee also heard that no delegation to employees of private agencies was permitted under the Act.²⁴

2.32 RMIT pointed out to the committee that 'the legislation is completely silent on how delegations will flow' especially regarding the role of the commissioners, noting:

21 National Tertiary Education Industry Union, *Submission 1*, p. 7.

22 Ms Jessie Borthwick, Acting Deputy Secretary, Higher Education Reform and Support, Department of Education, *Proof Committee Hansard*, 6 June 2014, p. 61; see also Kwong Lee Dow and Valerie Braithwaite, *Review of Higher Education Regulation: Report*, 2013, p. 88.

23 Ms Dorte Kristoffersen, Acting Chief Commissioner, Tertiary Education Quality and Standards Agency, *Proof Committee Hansard*, 6 June 2014, p. 37.

24 Dr Lyndal Groom, Branch Manager, Quality and Deregulation Branch, Department of Education, *Proof Committee Hansard*, 6 June 2014, p. 66.

Clearly, we will need very strong instruments of delegations, just as we have within universities and other large agencies. If this is not resolved, then there will always be some doubt in the minds of providers and in the minds of the public about how TEQSA's decisions are made and what happens if there is a disagreement between a commissioner and a CEO...²⁵

2.33 Specifically addressing the question of a potential disagreement between the Chief Commissioner and the CEO, the Education Department responded:

The proposal goes to allowing a separation of the roles so that the [CEO] can concentrate on the operations of the organisation...and the chief commissioner and other commissioners can concentrate on the regulatory activities that they are required to undertake and the management of the organisation in terms of setting corporate directions and so on. Given the clarity of those respective roles, I am not sure on what grounds or in what areas they would have disagreements.²⁶

Committee view

2.34 The committee is persuaded that the provisions relating to delegations by TEQSA achieve their aim of increasing the efficiency of TEQSA by reducing backlogs for processing re-registrations and accreditations and enabling TEQSA to better use its resources.

2.35 The committee acknowledges concerns expressed by some submitters about delegations to other Commonwealth agencies or appointees, but notes that under the proposed changes, the officials to whom TEQSA's functions and powers may be delegated under subsection 199(1) of the TEQSA Act remain unchanged.

2.36 The committee is of the view that the Bill does not address how delegations will flow under the proposed separation of functions of the Chief Commissioner and Chief Executive Officer and would benefit by further clarification on the roles of the commissioners and the Chief Executive Officer.

Period of registration or accreditation

2.37 Under the TEQSA Act, when granting or renewing applications for registration or course accreditation, TEQSA must also determine the period for which the registration or accreditation applies. In both cases, the period must not exceed 7 years.²⁷

25 Dr Julie Wells, RMIT University Secretary and Vice-President, *Proof Committee Hansard*, 6 June 2014, pp 39, 40–1.

26 Ms Jessie Borthwick, Acting Deputy Secretary, Higher Education Reform and Support, Department of Education, *Proof Committee Hansard*, 6 June 2014, p. 64.

27 See subsections 21(6), 36(4), 49(6) and 56(4).

2.38 Proposed new sections 37A and 57A provide that TEQSA may extend the period of a registered higher education provider's registration or the period of the accreditation of a course of study. In both cases, the extended period may exceed 7 years.

2.39 The advantages of the proposed changes were explained by the Minister for Education:

...in cases where institutions have multiple course accreditations with different end dates or which do not align with the period of registration, or where they are registered under both the TEQSA Act and the Education Services for Overseas Students Act, TEQSA would be able to adjust the period of accreditation or registration to achieve better alignment. This will make the processes much more efficient for higher education institutions.²⁸

2.40 Submitters appreciated the need for increased flexibility in managing registration and accreditation processes that were expected to result from the proposed amendments. The reduction in the number of required contacts between providers and TEQSA and the ability to extend accreditation to 'teach out' the remaining students in an old course that is being replaced were also welcomed by submitters.²⁹

2.41 Universities Australia noted the Bill does not provide for a maximum possible duration for extensions and emphasised:

...it will be important that any decision to extend registration or accreditation, and the duration of the extension, must be backed by robust internal guidelines and strict criteria to ensure that the decisions made are transparent, proportionate and necessary.³⁰

2.42 RMIT concurred with this view and suggested that enabling TEQSA to extend periods of registration beyond 7 years 'could present a real risk in ensuring consistency in the approach to, and assessment of, a provider's ability to meet the Higher Education Standards Framework'. It suggested that:

...upper limits on the duration of extensions should be considered to guide application of the three Basic Principles, and to ensure the integrity of the regulated sector. Consistency in the approach to regulatory activities is critical to representing good practice.³¹

28 The Hon. Christopher Pyne, MP, Minister for Education, Tertiary Education Quality and Standards Agency Amendment Bill second reading speech, *House of Representatives Hansard*, 27 February 2014, p. 1080.

29 Universities Australia, *Submission 4*, p. 2; COPHE, *Submission 17*, p. 3.

30 *Submission 4*, p. 2.

31 RMIT University, *Submission 18*, p. 2.

Committee view

2.43 While the committee considers that extending timelines will allow TEQSA to package applications more effectively, it also recognises the need for TEQSA to demonstrate that it will apply this power responsibly and with integrity. The committee is of the view that TEQSA should develop guidelines to apply to the extensions of periods of registration and accreditation.

Directions to TEQSA

2.44 The proposed amendments to subsection 136(1) of the TEQSA Act redefine the directions that ministers may issue to TEQSA, by legislative instrument, from those 'necessary to protect the integrity of the higher education sector' to directions 'in relation to the performance of its functions and the exercise of its powers'.

2.45 Proposed new subsection 136(2) provides that directions must be of a general nature only, while proposed new subsection 136(2A) allows for a specific direction to be made in relation to fees that TEQSA charges for its services.

2.46 The Explanatory Memorandum for the Bill notes the amendment 'broadens the scope and reduces the ambiguity' of the minister's powers.³² The Department of Education noted in its submission that the 'question of what would constitute such a need to "protect the integrity of the higher education sector" has caused uncertainty about a Minister's ability to give direction to TEQSA'.³³

2.47 Submitters raised issues relating to the perceived independence of the regulator. Monash University 'has reservations about the inclusion of ministerial powers of general direction and the impact they may have on the independence of the Agency'.³⁴ TAFE Directors Australia reported that its members expressed concerns should TEQSA be 'solely under the scope of ministerial direction'³⁵. NUS queried whether the minister could hypothetically give directions 'to suppress bad news about the sector'.³⁶

2.48 RMIT considered that the 'independence of the regulator (both perceived and actual) is fundamental to sector confidence' and that 'in a global market for higher education and research services, such confidence is crucial'. It concluded that:

32 Explanatory Memorandum, Tertiary Education Quality and Standards Agency Bill 2014, p. 22.

33 Department of Education, *Submission 3*, p. 5.

34 Monash University, *Submission 10*, p. 2.

35 TAFE Directors Australia (TDA), *Submission 9*, p. 4.

36 National Union of Students (NUS), *Submission 14*, p. 10.

the relationship of the Minister and the Commission and Chief Executive Officer ("CEO") and the extent of ministerial powers under the amended Act should be clarified.³⁷

2.49 For RMIT³⁸ and the NTEU, the phrase 'the exercise of its power' was particularly problematic, with the NTEU querying:

Does giving a direction in relation to the exercise of its power mean that the Minister can instruct TEQSA how it should interpret its roles and responsibilities as defined under the Act?³⁹

2.50 RMIT expressed the view that 'the Principles of necessity and proportionality should extend to Ministerial directions to frame the use of these powers'.⁴⁰

2.51 Several submitters framed comments in relation to ministerial accountability. NTEU observed that 'Ministerial instruments do not constitute disallowable instruments, and therefore removes the accountability of the Minister's instructions to the Commonwealth Parliament'.⁴¹ This view was also shared by the NUS and Students' Representative Council of The University of Sydney.⁴²

2.52 The potential for other legislation to serve as an administrative model was raised by RMIT⁴³ and Universities Australia, with the latter noting:

the equivalent sections in other regulatory agencies' Acts often impose other conditions on a Minister's ability to provide formal directions. Section 12 of the *Australian Securities and Investments Commission Act 2001*, for instance, contains clauses requiring the Minister to notify ASIC in writing that he or she is considering giving a direction, and allowing the Chairperson the opportunity to discuss the potential direction with the Minister.

UA considers that the inclusion of an equivalent clause in the TEQSA Act would be consistent with ministerial powers established by other regulatory agency legislation and help to assure administrative and procedural integrity.⁴⁴

2.53 The committee heard from Professor Kwong Lee Dow that the proposed changes gave him no cause for anxiety as the constraints in the original Act regarding

37 RMIT University, *Submission 18*, p. 2.

38 *Submission 18*, p. 2.

39 National Tertiary Education Industry Union (NTEU), *Submission 1*, p. 8.

40 *Submission 18*, p. 3.

41 *Submission 1*, p. 6.

42 National Union of Students (NUS), *Submission 14*, p. 10; *Submission 19*, p. 3.

43 *Submission 18*, p. 2.

44 Universities Australia, *Submission 4*, p. 3.

specific directions were still present in the Bill and the notion of protecting the 'integrity of the sector' was very general.⁴⁵

2.54 TEQSA addressed this point, confirming to the committee that the minister would be unable to give a direction relating to a specific provider.⁴⁶

2.55 The Department of Education further informed the committee that the proposed changes would bring the Act more in line with other regulatory agencies.⁴⁷

Committee view

2.56 The committee affirms it is persuaded that it is not the intention of the provisions in the Bill regarding ministerial directions to TEQSA, to compromise the independence of TEQSA. Furthermore, the committee is confident the ministerial directions give the CEO the powers to meet new challenges while still constraining the minister from giving directions regarding a specific institution or decision.

2.57 Nonetheless, the committee takes on board suggestions by some submitters for further consultation between the minister and TEQSA over the issuing of a ministerial direction.

2.58 The committee is persuaded that the Act could be improved by providing that the minister must not give a direction by legislative instrument to TEQSA, unless he or she has notified TEQSA in writing that he or she is considering giving the direction and given TEQSA an adequate opportunity to discuss with the minister the need for the proposed direction.

Conclusion

2.59 The committee supports a risk-based approach to the regulation of the higher education sector which reduces the burden on low-risk providers. The committee is satisfied that the proposed reforms strike a balance between meeting the needs of higher education providers, the community and the end-users—Australian and international students.

2.60 Measures such as the delegation of decision-making powers to case managers and the separation of the roles of the CEO and Chief Commissioner enhance the efficiency of the regulator, allowing resources to be pushed back as capacity builds.

45 Professor Kwong Lee Dow, *Proof Committee Hansard*, 6 June 2014, p. 12.

46 Ms Dorte Kristoffersen, Acting Chief Commissioner, Tertiary Education Quality and Standards Agency, *Proof Committee Hansard*, 6 June 2014, p. 33.

47 Ms Jessie Borthwick, Acting Deputy Secretary, Higher Education Reform and Support, Department of Education, *Proof Committee Hansard*, 6 June 2014, p. 63; Explanatory Memorandum, Tertiary Education Quality and Standards Agency Bill 2014, p. 1.

2.61 While the committee recognises that TEQSA has already made important changes in its practices and procedures, it maintains that legislative change is still necessary to overcome the core problem that TEQSA has been trying to do too many things and needs to focus its efforts. While cultural change is part of the solution, as Universities Australia observed:

if you are reliant on culture, then you can end up in this situation. But if you have got legislative underpinning, that provides the safeguard for the way that you would like to see the organisation operate.⁴⁸

2.62 As the Review of Higher Education Regulations was completed in August 2013 and the legislation introduced into parliament in February 2014, the committee can see no reason for the legislation to be further delayed.

Recommendation 1

2.63 The committee recommends that the Senate pass the Bill.

**Senator Chris Back
Chair, Legislation**

48 Ms Belinda Robinson, Chief Executive, Universities Australia, *Proof Committee Hansard*, 6 June 2014, p. 26.