

# LABOR SENATOR'S DISSENTING REPORT

## Introduction

1.1 Australia's higher education sector rightfully has an international reputation founded on the quality of the institutions and the courses they provide. In economic terms it is Australia's largest non-resource export industry, earning in excess of \$15 billion annually. But the future prosperity of the sector is not a given – it depends on our ability to maintain standards. It is reasonable, therefore, to proceed cautiously when amending the regulatory architecture surrounding this sector.

1.2 The Senate would be well advised to recall the failures of the years before 2009 when unsustainable volumes of international students led to genuine questions about the quality of an Australian education and the soundness of providers in the market. This, coupled with other issues, caused overseas media and students to question the quality of an Australian education. It is, consequently, appropriate that the Senate proceeds cautiously on considering the TEQSA Amendment Bill, cognisant of the stakes involved and the risks that have increased proportionately following the release of the government's higher education package in May.

1.3 When the bill was introduced in February, without prior notice and without consultation with stakeholders, the government argued that the purpose of the legislation was to implement the recommendations of the *Review of Higher Education Regulation* report (2013) by Professors Valerie Braithwaite and Kwong Lee Dow. That is still the official explanation of why the bill is necessary. But the government has also announced, as part of the 2014-15 budget, a major overhaul of the higher education sector that it must have been planning when the bill was introduced. Consequently the legislation cannot sensibly be discussed in isolation from those proposed changes. If they are implemented, the environment in which TEQSA has to perform its function of regulator will change completely from that in which the Braithwaite-Lee Dow recommendations were originally formulated. At the very least, that should be grounds for caution about possible unintended consequences should the bill become law, and for consideration of possible amendments to avoid those consequences.

1.4 The Braithwaite-Lee Dow recommendations were intended to make TEQSA more user-friendly: they were a response to objections raised by universities about unnecessarily detailed, expensive and time-consuming demands for information. These objections were urged particularly strongly by Group of Eight (Go8) universities, which argued that because of their adherence to high standards and long tradition of self-assessment they should not be constrained by an unduly intrusive regulator. However even among the Go8 hostility to TEQSA's methods was not universal. For example, the vice-chancellor of the Australian National University and Go8 chairman, Professor Ian Young, publicly defended TEQSA in an opinion article in *The Australian's Higher Education Supplement* (30/10/2013), comparing it favourably with its predecessor, the Australian Universities Quality Agency (AUQA):

I have been through three AUQA audits and now one TEQSA re-accreditation. All have been stressful but all have been useful for the institutions involved ... The most onerous of these, one of the first TEQSA re-accreditations of an Australian university, was actually less onerous than an AUQA audit ... I agree TEQSA needs to get its balance between intervention and risk correct. If, however, we overreact now and strip TEQSA of any real power, I suspect we will ultimately regret what might be a short-term victory for some ... The job of TEQSA is to safeguard the international quality of Australian higher education.

1.5 A strong case can be made, even without regard to the radical restructure of higher education set out in the budget that it would be better to allow the evolving operational culture of TEQSA, rather than legislation, to respond to the stakeholders' objections. As Professors Braithwaite and Lee Dow cautioned in their report:

It is easy to recommend apparently straightforward amendments to the legislation which appear agreed by everyone. But this is worryingly simplistic. Patching individual pieces of legislation can fix functional irritations, but will not necessarily change the way in which legislation is being applied and why.<sup>1</sup>

1.6 TEQSA's initial tendency to treat established universities in the same way as it treats non-university providers was not a consequence of legislative prescription. That tendency can be expected to fade as the agency's operational culture matures, and remarks such as Professor Young's suggest that this has already begun to happen. Changing the legislation while ignoring the culture, however, would be exactly the kind of 'worryingly simplistic' reaction that Professors Braithwaite and Lee Dow have warned against.

1.7 The bill alters TEQSA's structure and purpose in fundamental ways. It substantially diminishes the agency's quality-assessment role, other than in assessing institutions against the 'threshold standards', i.e. those concerned with provider registration and course accreditation, in the Higher Education Standards Framework. It allows greater delegation of authority to TEQSA's senior staff, gives the minister the power to reduce the number of commissioners, and extends the minister's power to issue directives to the agency. All of these changes raise disturbing questions that the government has not fully answered.

## **Quality Assessment**

1.8 The bill repeals section 60 of the existing act, which gives TEQSA power to assess institutions, or the sector more broadly, against non-threshold standards in the Higher Education Standards Framework, namely: learning and teaching standards, research standards, and information standards. The minister justifies this change on the grounds that it will streamline the agency's operations by focusing them on

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1 K Lee Dow AO and V Braithwaite, *Review of Higher Education Regulation*, p. 4.

provider registration and course accreditation as core functions. Yet section 60 only states that TEQSA “may review any aspect of an entity’s operations ...”. It does not state that TEQSA must conduct comprehensive quality assessment of all institutions beyond the threshold level. In line with the perception that TEQSA has begun to move beyond a one-size-fits-all approach to institutions that characterised its initial operations, it is not obvious that the section needs to be repealed, especially since weakening the agency in this way might prevent it from dealing with unforeseen problems arising in new providers that have passed the threshold stage.

1.9 As the National Tertiary Education Union stated in its submission to the committee:

the push to reduce regulatory burden is being conflated with deregulation – and in doing so [is] removing an entire mechanism that addresses quality in the sector...<sup>2</sup>

1.10 By seeking to repeal section 60 of the TEQSA Act the government is treating quality assessment as a matter of process, rather than as essentially concerned with outcomes, i.e. with measuring the performance of institutions and the sector against the compacts – the standards, including the non-threshold standards – that secure the reputation on which the higher education sector depends.

1.11 Fears that adherence to the compacts will be eroded by the loss of TEQSA's quality-assessment function have been magnified enormously by the higher education changes announced in the budget. The government intends to create an open market by allowing private providers of all kinds to obtain the public subsidies previously available only to universities. In the minister's words:

For the first time in Australian history, students studying at any registered higher education provider will have their place directly supported by the Australian Government. This includes higher education students at public and private universities, TAFEs and private education colleges. It also includes all accredited higher education diplomas and advanced diplomas as well as associate degrees and degrees.<sup>3</sup>

1.12 This will substantially increase the number of providers and, potentially, greatly increase the risk of quality-assurance issues arising along with them. The argument that these issues can be dealt with effectively by a regulator limited to dealing with threshold standards is an extremely dubious one, not least because under the budget proposals TEQSA will lose 41 per cent of its funding. It will be asked to scrutinise more institutions with fewer resources, while being deprived of the power to extend that scrutiny beyond the initial stages. And in that context, a provision in the bill for TEQSA to extend registration periods beyond seven years is especially problematic.

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2 National Tertiary Education Union, *Submission 1*, p. 4.

3 The Hon Christopher Pyne MP, Minister for Education, *Destination Australia: Tapping into a New Generation of International Business Students*, Speech, 11 June 2014, <http://www.pyneonline.com.au/speeches/business-higher-education-round-table-bhert> (accessed 13 June 2014).

1.13 As RMIT University argued in its submission to the committee, this provision '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'. The conclusion that the government actually wants weak regulation to facilitate the entry of new providers into the market is difficult to avoid.

1.14 The potential for a lowering of standards already exists. When TEQSA was created the registration lists of the previous state-based regulators were transferred to it, and it still has not completed reassessment of all the providers on those lists. Indeed, only 40 out of 170 have been assessed. Representatives of the private-provider peak bodies testified to the committee that lax state regulation had generated quality-control problems only in VET, and not in higher-education, institutions. But since TEQSA's reassessment is incomplete there is very little evidence to corroborate the representatives' assurance - we are being asked to take it on faith. The example of the expanded VET market in Victoria, which has resulted in traditional public TAFE providers struggling to compete with a flood of new private providers - many of which offer only briefly fashionable lifestyle courses - in the face of rising costs should be a warning to the government about the need for a strong regulator. There is no indication, however, that it has heeded the warning.

1.15 In the context of the proposed restructure, the risk of dodgy, fly-by-night operators once again appearing in the market and tainting the reputation of other institutions cannot be ignored. In their evidence the private-provider representatives described the existence of dodgy operators such as Greenwich University or the University of Asia as 'an historic problem', implying that it is no longer of concern. But the history is hardly an ancient one; and in any case the relevant questions are: what risks will be generated in the government's proposed new higher-education framework, and how can we be confident that a substantially diminished regulator will be able to deal with them?

1.16 Already some private providers appear to be leaping over the threshold, as it were. *The Australian's Higher Education Supplement* (11/6/14) has reported instances of providers buying other providers that already have registration. How will a regulator focusing only on registration and course accreditation deal with them? Evidence presented to the committee in support of the bill's removal of TEQSA's quality-assessment function did not go beyond confident assertions that concentrating on an institution's compliance with threshold standards would still allow sufficient oversight of quality. In the circumstances, however, confidence that this will be so surely requires more than assertion.

1.17 The majority report argues that removal of TEQSA's quality assessment function 'is necessary to reduce the administrative burden imposed on higher-education providers in participating in TEQSA's assessment reviews ...' This implicitly acknowledges the NTEU's observation, cited earlier, that the change effectively conflates the need to reduce burdensome regulation with an agenda for deregulation. But it cannot be true that the only way to reduce an administrative burden is to remove a central reason for the regular's existence. The implications of this change have not been thought through.

## **Ministerial Directions**

1.18 The same judgment may be made of other changes to the regulator in the bill. Under the present Act, the minister may issue directions to TEQSA, by legislative instrument, 'to protect the integrity of the higher-education sector'. But the bill redefines the minister's power, allowing directions to be issued to TEQSA 'in relation to the performance of its functions and the exercise of its powers'. The explanatory memorandum to the bill states that this change 'broadens the scope and reduces the ambiguity of the minister's powers'; on the contrary, however, ambiguity is surely increased. Under what circumstances is it envisaged that the minister might issue a direction? Does a direction 'in relation to the performance of [TEQSA's] powers' mean that the minister can instruct the agency how to interpret its roles and responsibilities under the Act? And what protection is there against the politicisation of TEQSA's decisions by ministerial direction, given that the minister's power of direction is not a disallowable instrument? Thus far, the only answers to these questions have been blithe and unsatisfactory assurances that nothing sinister is intended or likely to happen. The majority report states that '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'. Whether or not that is so, the problem is that the proposed redefinition of the minister's powers have the potential to allow a minister to compromise TEQSA's independence.

## **Delegations**

1.19 The bill would also allow TEQSA to delegate its functions or powers to "a person who holds any office or appointment under a law of the Commonwealth". That might be seen as the innocuous secondment of officers from other Commonwealth agencies or departments to ease staffing or resource problems. But since the power of delegation is so broad it raises the possibility of a blurring of roles that should not be blurred: an immigration officer, for example, might bring concerns to the process of assessment that ought not to be TEQSA's concerns.

## **Commissioners**

1.20 The bill reduces the number of TEQSA's commissioners and separates the roles of chief commissioner and chief executive officer, which are now held by one person. This supposedly applies a corporate model to TEQSA's operation, allowing greater efficiency. But in business corporations a CEO is appointed by the company's board, whereas under the bill's new model for TEQSA the CEO will be appointed by the minister. As Dr Julie Wells, the University Secretary and Vice President of RMIT University, noted in her evidence, the commissioners' role is not clearly defined in the legislation and there is a real risk if the relationship between the commissioners and

the CEO is not understood.<sup>4</sup> Dr Wells' comment raises the disturbing question of whether the commissioners will effectively be reduced to the status of mere ciphers, especially given the change in the minister's power to issue directives. He will appoint the CEO; if he issues a directive will it therefore be to the CEO, sidelining the commissioners?

1.21 The number of commissioners will not be reduced by attrition but by spilling all the existing positions. The sacking of a board by legislation sets a disturbing precedent that goes beyond the regulation of higher-education regulation. Does this raise the prospect that all Human Rights commissioners, for example, might be dismissed in this way? Or the Fair Work Australia commissioners, perhaps?

1.22 Labor Senators are concerned that the legislation may well be premature. The Senate should be cautious about reshaping the powers of TEQSA at a time when the number and scope of higher-education providers is likely to expand rapidly.

### **Recommendation 1**

**1.23 Labor Senators recommend that TEQSA's discretionary power to conduct assessments of non-threshold standards should not be removed.**

### **Recommendation 2**

**1.24 Labor Senators recommend that an upper limit should be placed on TEQSA's ability to extend registration periods.**

### **Recommendation 3**

**1.25 Labor Senators recommend that the number of commissioners, their role, their relationship with the Chief Executive Officer and the grounds on which they may be dismissed should be clearly identified.**

### **Recommendation 4**

**1.1 Labor Senators recommend that the minister's power to issue directions to TEQSA should become a disallowable instrument.**

**Senator Sue Lines  
Deputy Chair, Legislation**

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4 Dr Julie Wells, University Secretary and Vice-President, RMIT University, *Proof Committee Hansard*, 6 June 2014, p. 38.