



Australian Government
**Department of Education,
Skills and Employment**

Higher Education Legislation Amendment (Provider Category Standards and Other Measures) Bill 2020

Submission from the Department of Education, Skills
and Employment to the Senate Standing Committees
on Education and Employment



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Introduction

The Department of Education, Skills and Employment (the department) welcomes the opportunity to make a submission to the Senate Education and Employment Legislation Committees Inquiry into the Higher Education Legislation Amendment (Provider Category Standards and Other Measures) Bill 2020 (the Bill).

The Bill supports amendments to the Higher Education Standards Framework Threshold Standards made under Section 58 of the *Tertiary Education Quality and Standards Agency Act 2011* (TEQSA Act), that were recommended by Emeritus Professor Peter Coaldrake AO in his 2019 final report of the independent Review of the Higher Education Provider Category Standards (PCS Review), as well as a number of other measures to improve the regulation of providers in Australia's higher education sector.

The Bill will:

- facilitate implementation of the PCS Review's recommendations to simplify the categorisation of higher education providers in Australia and provide new opportunities for the highest quality non-university providers to differentiate their product;
- strengthen the administration of the TEQSA Act and TEQSA's regulatory role through a small number of technical amendments;
- amend the *Higher Education Support Act 2003* (HESA) to replace references to 'Indigenous students' with 'Indigenous persons', to confirm that higher education providers can use Indigenous student assistance grants to assist prospective, as well as existing Indigenous students.

The Bill will support innovation, aspiration, quality and the regulatory flexibility that the Australian higher education sector needs now more than ever to keep producing high quality graduates and world-class research.

The Higher Education Standards Framework

Part 1 of Schedule 1 of the Bill makes technical amendments to the TEQSA Act to support the making of a revised Threshold Standards legislative instrument under Section 58, after the Bill has received the Royal Assent. The Bill before Parliament does not itself amend the Threshold Standards but adjusts terminology to manage the transition to the proposed new Threshold Standards that, indicatively are expected to come into effect from 1 July 2021.

Establishment and previous reviews

Section 58 of the TEQSA Act establishes the Threshold Standards legislative instrument. Registered higher education providers must comply with the Threshold Standards which are made up of:

- Part A: Standards for Higher Education, which represent the minimum acceptable requirements for the provision of higher education in or from Australia by higher education providers registered by TEQSA.
- Part B: Criteria for Higher Education Providers, which describe the categorisation of different types of higher education providers according to certain characteristics; and the requirements for a provider to be approved to self-accredit the courses of study it delivers.

The initial Threshold Standards, created in 2011, were specified in the TEQSA Act as four distinct types of standards relating to provider registration, course accreditation, qualification design and provider categories. These initial standards were comprehensively reviewed by the Higher Education Standards Panel (the Panel) from 2012 to 2014. The current (2015) legislative instrument updated the Threshold Standards. Part A encompassed the Panel's more streamlined and integrated framework of standards across seven activity domains that removed a significant amount of duplication that was present in the initial standards. Part B encompassed the Provider Category Standards (PCS) and criteria for seeking self-accrediting authority, which have remained unchanged since TEQSA's establishment.

Provider Category Standards Review

The 2017-18 Commonwealth Budget Higher Education Reform Package included a measure to review the PCS. Professor Coaldrake, former Vice Chancellor of the Queensland University of Technology, was appointed to lead the review to ensure the PCS remain fit for purpose, lift the cachet and reputation of all higher education providers, create greater differentiation of provider types, protect the international reputation of 'brand Australia' and confirm the roles and functions of universities in Australia.¹ The final report was released on 15 October 2019. This report was certified by the department as equivalent to a regulation impact statement (RIS) and is included in the Bill's supporting documentation.

The key policy issues identified in the final report include:

- A need to simplify the PCS.
- The undifferentiated nature of the current 'Higher Education Provider' category:
 - it is the only category for non-university providers, although they make up more than three quarters of registered providers.

¹ The PCS Review's Terms of Reference are available here: <https://www.education.gov.au/terms-reference-review-higher-education-provider-category-standards>.

- confusion arises because ‘higher education provider’ in the TEQSA Act refers to all registered providers, including universities, as well as being a category distinct from universities in the PCS.
- The PCS no longer reflect an expanded and diverse higher education sector.
- There are currently no provisions for entities to establish ‘greenfield’ universities.
- There is poor public awareness of different provider categories.

The Government accepted the intent of all 10 of Professor Coaldrake’s recommendations, with minor changes in relation to nomenclature and proposed research benchmarks in response to stakeholder comment and a need to ensure smaller universities including those operating in regional, rural and remote locations are not disadvantaged.²

Following consideration and advice from the Panel, the key amendments proposed to be enacted in new Threshold Standards are to:

- reduce the number of domestic university categories from three to one – to be called ‘Australian University’
- Reduce the number of overseas university categories from two to one – to be called ‘Overseas University’
- expand the types of non-university provider from one to two, to provide a discrete category for mature providers with a track record of high-quality student outcomes – to be called ‘Institute of Higher Education’ and ‘University College’
- create an entry pathway for new entity (or ‘greenfield’) universities to be established passing through the ‘University College’ category
- clarify the quality of research required to achieve or maintain university status.
- clarify expectations that providers in both the ‘University College’ and ‘Australian University’ categories demonstrate engagement with employers, industry and the professions and demonstrate civic leadership, community engagement and a commitment to social responsibility
- streamline and simplify the requirements for a provider to achieve authority to self-accredit courses of study.

New ‘University College’ category

While Professor Coaldrake has proposed a different name, the Government adopted the title, ‘University College’ for the new category of highest quality, high performing non-university higher education providers. This is to recognise concerns put forward by some stakeholders at the loss of a discrete ‘Australian University College’ category, which was always intended to be a transitional category for providers seeking eventual registration in the ‘Australian University’ category. Several technical issues in the current ‘Australian University College’ criteria linked to the process and time required for transition to

² Australian Government Department of Education, Skills and Employment, 2019. Review of the Higher Education Provider Category Standards—Australian Government Response.
<https://docs.education.gov.au/node/53191>.

university status have limited its utility and uptake. While providing a high benchmark of quality, the criteria under the proposed 'University College' are more attainable and provide a transitional pathway for providers wishing to become an 'Australian University'.

Consultation

Amendments to the Threshold Standards facilitated by the Bill were recommended by the PCS Review and the Panel following extensive sector consultation. These changes have been the subject of wide consultation through various stages with universities and independent higher education providers, their peak bodies, academics and the broader public.

- Professor Coaldrake undertook a range of stakeholder engagement to support his review, including face-to-face meetings, workshops, and 67 written submissions.
- the Higher Education Standards Panel drafted new Threshold Standards to implement Professor Coaldrake's recommendations, drawing on a face-to-face stakeholder forum with around 250 attendees in November 2019, a webcast and various other stakeholder meetings. It received over 40 written responses to a February 2020 consultation paper and consulted extensively with TEQSA.

Stakeholders indicated strong support for both the broad direction of the proposed changes to provider categories and their expression in the draft standards.

As required by Section 58 of the TEQSA Act, Mr Tehan has received advice from the TEQSA Chief Commissioner that TEQSA supports the draft amendments to the Threshold Standards and has sought comments from state and territory education ministers. Their comments will be taken into account when finalising the new Threshold Standards legislative instrument.

The process mandated by Section 58 of the TEQSA Act to amend the Threshold Standards, while time-consuming, ensures engagement with and ownership of the standards by higher education stakeholders, including the providers that are subject to regulation against the standards, and by all jurisdictions in the Federation. In addition, the process means that any proposed changes or amendments receive significant and informed scrutiny by the Panel, higher education stakeholders, state and territory governments, and the opportunity for Parliamentary review and disallowance of the final instrument.

Measuring the quality of university research

The statement of reasons set out in Appendix 2 of the Selection of Bills Committee Report No. 9 of 2020 indicates that the reason for referral or principal issue for consideration by this inquiry is to investigate the implications of the Bill on universities maintaining their university status. The department interprets this to relate largely to the new research quality benchmarks proposed by the PCS Review; and the likelihood of Australian universities meeting those benchmarks into the future.

Australia has one of the best university research systems in the world, as measured by multiple global ranking systems. Australia is consistently ranked third in terms of the

number of institutions in the top hundred on the major rankings, behind only the United States and the United Kingdom. The Australian Research Council's Excellence in Research for Australia (ERA) quality measurement process shows a continuing increase in Australian research rated at or above world standard.

The new research benchmarks for university category providers set out in an amended Threshold Standards instrument will:

- establish benchmarks for the quality of research undertaken by universities for the first time, giving the Government assurance of value from our investment in this vital pursuit.
- allow TEQSA to take into account matters specified in a legislative instrument when assessing research quality.

These benchmarks are not a new requirement, as such, but essentially clarify how the existing requirement to undertake research that leads to new knowledge should be assessed. The addition of a benchmark responds to an issue raised by TEQSA in its submission to the PCS Review that the lack of an explicit indication as to the quality of research activity required for registration as a university made it difficult to assess whether new applicants or existing providers met the standards. TEQSA proposed that any future university category should include indications of the quantity and quality of research required, and provide support for TEQSA to undertake benchmarking against comparable registered providers.

The PCS Review proposed that by 2030, universities should be expected to undertake research 'at or above world standard' in at least three or 50 per cent of the broad fields of education it delivers, whichever is greater. Until that level of performance is required, there should be a lower benchmark of at least three or 30 per cent of the broad fields of education the university delivers, whichever is greater. The Government response added an additional benchmark of research quality — research of national standing in fields specific to Australia — to encourage research in the national interest.

Wherever possible, TEQSA will assess compliance with the benchmarks using existing measurement and evaluation exercises, requiring no additional action or provision of evidence by the universities concerned. For example the ERA evaluation is undertaken periodically by the Australian Research Council. The last evaluation was in 2018. The next is due in 2023. In cases where ERA or another nationally recognised exercise is not available, as will potentially be the case when a provider seeks entry to the university category for the first time, the provider would need to demonstrate that the quality of their research activity satisfies the benchmark using other evidence. However, this is no different to the current situation.

Given the consistently high research standards set by Australian universities, the department is confident that established universities will have little trouble demonstrating the quality and significance of their research against the benchmarks.

Based on the most recent data available from the 2019 Higher Education Student Data Collection, all current Australian universities would meet the research benchmark to deliver Doctoral Degrees (Research) in at least three, or at least 50 per cent, of the broad fields of education they deliver (all fields for specialised universities). Given the substantial financial incentives provided through the department's Research Training Program for completions in research doctorate courses it is unlikely that any current university will fail to meet this benchmark in the foreseeable future.

Analysis of 2018 ERA data suggests that all public Australian universities would meet the proposed initial research quality benchmark requiring research at or above world-class standard that leads to the creation of new knowledge and original creative endeavour in at least three, or at least 30 per cent, of the broad fields of education they deliver (all fields for specialised universities). However, it is arguable that some of Australia's smaller private universities may struggle to meet these standards if assessed on ERA ratings alone. This is partly due to low volume thresholds applied through the ERA assessment process which requires a minimum of 50 research publications in a field of research in order to receive a rating against that field of research. For these smaller universities, TEQSA would need to consider alternative data sources, potentially including citation analysis, in assessing performance against the research quality benchmarks. It is anticipated that a transitional provision in the new Threshold Standards instrument will provide a period of five years to demonstrate compliance with this benchmark.

Universities will have 10 years from implementation before the benchmark increases to at least three or at least 50 per cent of the broad fields of education they deliver (all fields for specialised universities). 2018 ERA data also suggests the vast majority of universities would already meet this benchmark on ERA performance alone. It seems likely that when other quality measures, other evidence such as publications and citations and the alternative 'national standing' criteria are taken into account most would readily achieve this benchmark also.

No university has indicated any concern or risk that they would not satisfy the benchmark. This is a testament to the already high quality of research in Australia. If they have a concern, however, both TEQSA and the department are available to discuss options to guide institutions toward improved performance or greater specialisation that would enable them to meet the standards. As with any element of the Threshold Standards, if TEQSA were to find that a provider was unable to demonstrate compliance with research quality benchmark, any regulatory action would also include scope for remedial action and a period of grace within which to improve performance before any regulatory sanction might be warranted.

The amendments in the Bill do not set the new research benchmarks. The new benchmarks and thresholds will be described in a new Threshold Standards instrument, which has been the subject of extensive consultation and sector input, as described above. Item 15 of the Bill enables (but does not require) TEQSA to make a written determination setting out factors it will consider when assessing the quality and quantity of research to meet the new

benchmarks to be set out in the Threshold Standards. This determination would give universities clarity on which existing measures of research quality or other factors TEQSA may take into account, including ERA assessments. In submissions to the Panel's consultation process, several universities indicated they were keen to work with TEQSA to develop this type of guidance on how the research benchmarks will be assessed.

Other measures in the Bill

TEQSA Act amendments

Other amendments in the Bill to strengthen the administration of the TEQSA Act and TEQSA's regulatory role, which are largely technical in nature, will:

- respond to an outstanding recommendation from the 2017 Review of the Impact of the TEQSA Act on the Higher Education Sector, to reframe references to the Threshold Standards as a single unified framework, instead of the four distinct types of Threshold Standards specified in the 2011 Act
- include the new Australian Qualifications Framework (AQF) 'undergraduate certificate' qualification type in the definition of 'higher education award'
- provide TEQSA with the legislative authority to assume control of higher education student records from a registered higher education provider in the event the provider ceases operations
- allow TEQSA to extend the period of a provider's registration or course accreditation more than once, which will help TEQSA manage its regulatory workload better and provide low-risk providers with additional flexibility, including in response to the COVID-19 pandemic
- allow review by the Administrative Appeals Tribunal or TEQSA of a decision by TEQSA not to change provider category; and
- ensure protection of the word 'university' in Australian Internet domain names, by requiring ministerial consent to use an Australian Internet domain name containing the word 'university' or derivatives.

Reframing references to the Threshold Standards

The amendments at Items 2 to 5 in Part 1 of Schedule 1 of the Bill respond to an outstanding recommendation from the 2017 Review of the Impact of the TEQSA Act on the Higher Education Sector. The recommendation proposed reframing references to the Threshold Standards as a single unified framework, instead of the four distinct types of Threshold standards specified in the 2011 Act, in recognition of the simpler, clearer structure developed by the Panel in 2012-14 and given effect in the 2015 legislative instrument. It will remove the need for a concordance matrix in the current instrument which will make the new instrument somewhat clearer to read and understand.

This amendment does not affect the Threshold Standards themselves but will simplify their presentation in the legislative instrument.

Addition of the 'undergraduate certificate' to the definition of 'higher education awards'

Item 20 in Part 2 of Schedule 1 expands the definition of 'higher education award' to include the new Australian Qualifications Framework qualification type 'undergraduate certificate'. This technical amendment takes account of the creation of this new qualification type in April 2020 in response to the COVID-19 pandemic.

The Government created the 'undergraduate certificate' to support workers displaced by the pandemic to retrain or upskill, and to support higher education providers to respond flexibly. In 2020, maximum student fees for Commonwealth supported places in short courses in areas of national priority have been set at significantly reduced rates. In the 2020-21 Budget, the Government announced an additional \$251.8 million for 50,000 subsidised places in higher education short courses across a range of discipline areas.

Higher education providers can issue undergraduate certificate qualifications until at least December 2021. The COAG Education and Skills Councils will decide whether the qualification should continue to be made available after that date.

The amendment to include 'undergraduate certificate' in the definition of 'higher education award' will ensure that people completing short courses at undergraduate levels of study receive a formally recognised qualification that will continue to be recognised as a valid higher education qualification, whether or not the qualification becomes a longer-term feature of the AQF.

Student records measure

Items 21 and 28 provide TEQSA with the legislative authority to assume control of higher education student records from a registered higher education provider in the event the provider ceases operations. This measure was announced on 19 June 2020 as part of the Job-ready Graduates higher education reform package.

Currently a student may face a complex task to obtain their records if a higher education provider has gone out of business, needing to find and approach a number of different entities. In some cases their records may be incomplete or unusable.

The amendment will give TEQSA similar powers to those of the Australian Skills Quality Authority (ASQA) to help the former students of providers that cease operating gain ready access to their academic records.

As a Commonwealth Government agency, TEQSA and its staff are subject to the terms of the Privacy Act 1988 and the Australian Privacy Principles (APPs) established under that Act. TEQSA will undertake a privacy impact assessment as part of its implementation of this measure to ensure that its handling of personal information under the new provisions in the Bill complies with the Privacy Act.

Additional extensions of provider registration

In response to pressures on providers from the COVID-19 pandemic, TEQSA anticipates extending a number of provider registrations and course accreditations over coming months. The TEQSA Act currently allows a maximum of only one period of extension. Where a registration or accreditation has previously been extended—even for a short period—no further extension is possible under the Act as currently drafted.

Items 22 and 26 in the Bill will give TEQSA greater flexibility to manage the regulation of low risk providers, by giving it the capacity to extend a provider's registration or course accreditation where warranted, even if a previous extension had been granted. This will enable TEQSA to respond more easily to unexpected circumstances, including in response to the impacts of the COVID-19 pandemic.

Reviews of decision not to change provider category

Items 23 to 25 and 27 respond to a request from TEQSA to provide a right of review where a decision to change provider category is sought under Section 38 of the TEQSA Act but not approved. Currently, where TEQSA receives an application from a provider to change provider category under Section 38 (e.g. to move from the 'Higher Education Provider' category to the current 'Australian University College' category), but decides the category should not change, the decision cannot be reviewed either by TEQSA or by the Administrative Appeals Tribunal. To have a decision considered again – say where the provider is able to offer additional supporting evidence – it would need to submit a new application, pay the required fees, etc. TEQSA requested that the Government amend the TEQSA Act to remove this barrier to efficient and cost-effective reconsideration of such decisions.

Protecting the word 'university' in Internet domain names

Item 29 amends the TEQSA Act to place a legal requirement to seek the consent of the Minister for Education to use an Australian internet domain name that contains the word 'university' or words or expressions of like meaning. This measure will enable an existing policy and approval process, which was suspended in late 2017 due to changed legal interpretation, to be reinstated.

This amendment and the associated policy and approval process are consistent with the Government's policy to protect use of the word 'university' (and derivatives such as 'uni' where it is intended to imply 'university') in company names, under the *Corporations Act 2001* and *Corporations Regulations 2001*, and business names, under the *Business Names Registration Act 2011* and *Business Names Registration (Availability of Names) Determination 2012*.

The policy helps to prevent individuals or groups from operating or purporting to operate an entity that appears either to be a university or be related to an established university or the

university sector, when in fact it is not. Protection of use of the word university will be even more important in future, given the likely broader use of the word 'university' in higher education provider names through introduction of a new 'University College' higher education provider category in the proposed new Provider Category Standards.

A domain name issued before the legislation takes effect will not be impacted by the new provision unless it is relinquished and a new applicant subsequently seeks a licence to use it.

Higher Education Support Act 2003 (HESA) amendments

Schedule 2 of the Bill amends HESA to replace references to 'Indigenous students' with 'Indigenous persons' to clarify the purpose for which Indigenous student assistance grants under Part 2-2A of HESA may be made. These amendments confirm that higher education providers can use Indigenous student assistance grants to assist prospective, as well as existing, Indigenous students. Types of assistance could include university outreach programs into schools and communities, to widen aspiration to attend university.