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**NTEU Submission  
to the  
Inquiry into the Tertiary Education Quality  
and Standards Agency Amendment Bill  
(2014)**

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The National Tertiary Education Union (NTEU) represents the professional and industrial interests of 28,000 staff working in higher education, including staff in Australia's universities and research institutes. On behalf of our members, we welcome the opportunity to provide a submission to the Inquiry into the Tertiary Education Quality and Standards Agency Amendment Bill (2014).

The NTEU notes that the Bill proposes to amend the *Tertiary Education Quality and Standards Agency Act 2011 (Cwth)* (the Act) in relation to:

- Quality assessments of higher education providers;
- The delegation of decisions;
- Extending periods of accreditation or registration;
- The appointment of commissioners;
- The roles and responsibilities of the Chief Commissioner and Chief Executive Officer;
- Notifying providers of decisions;
- The scope of ministerial directions; and
- Ministerial approval being required for legislative instruments which determine fees to be charged.

## **1. Current Structure of TEQSA**

Before reviewing the proposed changes and their potential ramifications, the intended role of the Tertiary Education Quality and Standards Agency (TEQSA) and its associated functions should first be considered. TEQSA was established to provide nationally consistent regulation of higher education, with specific regard to:

- The registration of higher education providers, and
- Accreditation of higher education courses of study for providers that do not have self-accrediting status.

In regulating higher education providers, TEQSA is required to:

- Use a standards-based quality framework, and
- Apply principles relating to:
  - regulatory necessity,
  - risk, and
  - proportionality.

TEQSA's regulatory approach is framed in terms of the Higher Education Standards Framework, the Agency's Regulatory Risk Framework, the use of experts, and engagement with professional bodies. The Higher Education Standards are determined by the Minister on advice from the Higher Education Standards Panel, chaired by Professor Alan Robson.

### ***Regulation and the Standards Framework***

Currently, the Higher Education Standards Framework is comprised of the following standards:

#### *Threshold Standards*

- Provider Registration Standards;
- Provider Category Standards;
- Provider Course Accreditation Standards; and

#### *Other Standards*

- Teaching and Learning Standards;
- Research Standards; and
- Information Standards;

TEQSA registers and evaluates the performance of higher education providers against the Higher Education Standards Framework, specifically, the *Threshold Standards*.

### ***Risk Assessment Framework (RAF)***

Under its present structure, TEQSA undertakes a Risk Assessment of all higher education providers annually. The RAF is described as the way TEQSA gives effect to its underlining regulatory principles of reflecting risk, proportionality and necessity as outlined in the Act 2011.

The risk assessment exercise involves gathering data from each institution and from various other sources including relevant Government Departments, Graduate Careers Council of Australia surveys, and data from its very own Provider Information Request. Using the data and information related to each provider's history and previous regulatory reviews it undertakes an analysis of risk indicators.

Should this analysis identify any issues or concerns, TEQSA will invite the institution to discuss these with a case manager. It is also used to inform the scope and nature of scheduled reviews.

According to TEQSA (March 2014) the RAF is meant to:

- Reduce regulatory burden,
- Strengthen and protect of students interests,
- Support TEQSA case managers, and
- Support quality improvement.

### ***Quality Assessment***

In addition to the above roles and responsibilities which might be termed TEQSA's compliance roles, TEQSA was also originally given the scope to conduct quality assessments across the whole higher education sector, a sample of providers, or a single provider.

## 2. Summary of Concerns Regarding the Impact of Proposed Changes

The proposed amendments to TEQSA legislation will substantially change the purpose and role of TEQSA. According to the Minister for Education, Christopher Pyne, the changes to TEQSA are part of the Government's response to the recommendations of Lee Dow Braithwaite Review of University Regulation (2013).

In introducing the Bill, the Minister said it aimed to “*increase the efficiency of TEQSA and reduce the regulatory burden on higher education institutions*”,<sup>1</sup> and that the measures would allow TEQSA “*...to focus on its core functions of provider registration and course accreditation, and the development of more efficient processes around these functions.*”<sup>2</sup>

The removal of TEQSA's quality assessment functions was justified on the grounds that they did not relate directly to TEQSA's core functions and because quality assessment reviews are time and resource intensive for TEQSA and higher education providers.

### ***Lack of Appropriate Consultation in Relation to Proposed Amendments***

While NTEU has always been supportive of any review of the regulator and the introduction of processes to allow for more efficient decision-making (including the application of risk-proportional assessment), we are concerned at the Government's lack of consultation over the proposed amendments, which introduce a number of far reaching changes. In particular, the implications that arise in redefining TEQSA's core role (via the abolition of its quality assessment and standards), which was always regarded as part of TEQSA's duties after it subsumed the role of AUQA, must be properly considered.

We note there was no announcement of the Government's intention to amend the legislation before it was introduced into Parliament. Given the fundamental scope of the changes proposed the NTEU believes that it would have been appropriate to release an exposure draft for consultation. The amendments should not be seen in isolation but considered in the broader context in relation to Government higher education policies and initiatives, including, for example, the continued opening up of the international student sector, the recommendations of the Review of the Demand Driven system, and the Government's Commission of Audit. Furthermore, while Government has cited the recommendations arising from the *Review of Higher Education Regulation* (2013) as the impetus for the changes, it has been highly selective, and further discussion should be had regarding the implications of including some recommendations and not others.

### ***The Impact of Deregulation on Quality Assurance Mechanisms***

The NTEU is concerned that the push to reduce *regulatory burden* (such as eliminating duplication in reporting and reducing non-essential data collection), is being conflated with *deregulation* – and in doing so, removing an entire government mechanism that addresses quality in the sector. Indeed, there must be further consideration of the proposed removal of TEQSA's responsibility for quality assessment, as this substantively changes the nature of quality assurance in Australia's higher education sector. Whilst it was always going to be

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<sup>1</sup> Explanatory Memorandum, *Tertiary Education Quality and Standards Agency Amendment Bill* (2014), C2014B00013 [http://www.austlii.edu.au/au/legis/cth/bill\\_em/teqasaab2014556/memo\\_0.html](http://www.austlii.edu.au/au/legis/cth/bill_em/teqasaab2014556/memo_0.html)

<sup>2</sup> Ibid

problematic to resolve TEQSA's dual roles of regulation and quality assurance, removing the quality assurance role means providers will only be required to meet threshold standards to operate. The assumption by the Minister that all higher education providers have their own, robust quality assurance systems is a considerable leap of faith, particularly in relation to non self-accrediting providers, and leaves a worrying gap in relation to the quality assurance work previously carried out by the Australian Universities Quality Agency (AUQA).

Removing TEQSA's powers to "strengthen and protect" the interests of students once again leaves students without recourse over matters relating to quality, and there is no incentive for higher education providers to commit to improving quality of their course offerings. Indeed, it may have the impact of a 'race to the bottom' – where as long as the minimum standards are met, then the focus is on marketing and profit (particularly for the non self-accrediting providers within the market).

There also appears to be the view that TEQSA's processes were impacting negatively on the reputation of individual providers who were waiting for registration or re-registration approvals. Whilst the NTEU would support any changes that might improve the efficiency of the applications process we would be strongly opposed to any changes which are designed primarily to speed up the regulatory process for its own sake, or motivated by an apparent eagerness to implement policy settings designed to rapidly expand Australia's international education sector. This raises considerable concerns over potential impacts on quality and the student experience, particularly given the rapid expansion of the streamlining of student visas to the non university sector. In general, prospective students (and in particular prospective international students) are not appropriately equipped to make assessments regarding "quality" in educational institutions, and replacing peer assessment of quality will mean that the market is informed by institutional promotion and inadequate external rankings systems.

### ***Minimum Threshold Standards***

Without any formal quality assessment framework, NTEU would argue that minimum threshold standards must not only present a high bar for entry, but must be rigorously imposed. We do not want to return to the situation of the early 21<sup>st</sup> century when the operation of a number of rogue private operators caused considerable damage to the reputation of the entire sector.

The MCEETYA protocols, now subsumed into TEQSA's threshold standards, in combination with AUQA's quality assessment processes, did a great deal to assist the recovery of the Australian higher education sector's international reputation following this period. These twin governance strategies – standards-based accreditation *and* quality assessment – are both required to maintain the sector's strong reputation in an increasingly competitive student market. The student experience (whether domestic or international) is, in the end, the key to sustainability of our institutions – it is better protected by strong but efficient regulation coupled with peer-based risk-proportional quality assessment than by reliance on institutional PR and international rankings.

### ***Potential Ministerial Influence over TEQSA***

Finally, we have considerable concerns over the amendments that allow the Minister to have greater influence over TEQSA, from determining the number and status of Commissioners to the setting of fees and charges. We are especially concerned because Ministerial instructions do not constitute disallowable instruments, and therefore removes the accountability of the Minister's instructions to the Commonwealth Parliament. In effect it also removes the independence of the regulator, a move which NTEU strongly opposes; as the functions of TEQSA (even as just a regulator) must not be seen as being subject to either direct or indirect political influence. The changes also set a precedent by removing properly appointed officials (in this case, the Commissioners) through a legislative instrument. This is highly unusual and unfair and sets a very concerning precedent in terms of the legislative approach of this Government.

### **3. Review of Specific Clauses in Proposed Amendment**

NTEU's concerns in relation to specific sections of the Amendment are noted below in further detail. We also list a number of questions for Government regarding these proposed changes.

#### ***Part 1 - Removal of TEQSA's quality assessment function***

In effect this section reduces TEQSA's regulatory functions to reviewing or examining an entity's operations to determine whether they meet the *Threshold Standards (Provider and Qualifications Standards)*. This raises a number of questions, including:

- What becomes of the purpose and status of the non-Threshold standards, namely:
  - Learning and Teaching Standards,
  - Research Standards,
  - Information Standards.

NTEU notes that these standards have the potential to ensure a consistent approach to educational and research quality and the student experience more broadly. These are considerably developed and although controversial, the consultative expertise-based approach taken in their development process is more likely to inspire the trust of the sector and a sense of ownership as well as responsibility for their implementation. NTEU is highly concerned that there appears to be no role for expertise-based peer assessment in the proposed regulatory framework.

- Repealing Section 60 would mean that TEQSA would no longer have any authority to review or examine any issues related to the non-Threshold Standards. Do they simply become inspirational voluntary standards? Or will they simply disappear because of irrelevance?
- What are the implications of these changes to TEQSA's Risk Assessment Framework? Does this mean that the Risk Assessment Framework can only assess the risk of providers not meeting the Threshold Standards?

- In light of these changes, the NTEU asks should the Risk Assessment Framework (RAF) be maintained? Will the nature and scope of the RAF, which is without doubt the function of TEQSA which imposes the highest regulatory burdens and compliance costs on providers, be reassessed?

The NTEU's strong view is that, if the Government is serious about reducing the regulatory burden and ensuring that TEQSA is efficient and focused on its core activities, it is the Risk Assessment Framework which is in serious need of review and reform.

### ***Part 2 – Delegations***

This section allows for greater delegation of authority to TEQSA senior staff to improve the efficiency of TEQSA's procedures.

The NTEU agrees with these changes to the extent that they improve the efficiency with which TEQSA can perform its registration and accreditation roles, and gives providers greater access to internal appeals procedures. We do, however, have serious concerns with the amendment that removes restrictions on TEQSA to delegate the majority of its functions and powers, (exempting powers to make or change legislative instruments), to other Commonwealth authorities or even appointees who are not employed by TEQSA.

Therefore, we would strongly recommend that in addition to proposed amendments, that Section 199 (1) (c) and Section 199 (1) (d) also be repealed. The effect of this amendment would be to restrict the ability to delegate to TEQSA staff at APS Executive Level 1 or above or equivalent.

### ***Part 4 – Commissioners***

This amendment provides the Minister with power to reduce the number of Commissioners and to stop legislation as the determinant of the number of full-time and part-time Commissioners.

The NTEU has two concerns with these proposed changes. The first relates to transition arrangements being put in place which terminate the appointment of existing Commissioners, and the second relates to giving the Minister discretion over the number of Commissioners he or she might wish to appoint.

The effect of the transition arrangements contained in Items 45 and 36 of the Bill are to terminate the employment of existing Commissioners (within 21 days in the case of Chief Commissioner and three months in the case of the other Commissioners) as a consequence of this Bill being passed. That is, the Commissioners appointments are not being terminated because of their incapacity to undertake their roles due to ill health or because they have become bankrupt, or because they have misbehaved or for failing to show up for work or any other reasons specified in Section 146 of the Act.

From the NTEU's perspective this raises serious question about procedural fairness and natural justice for people who have entered into an employment contract in good faith. If the Minister wishes to have the power to dismiss a Commissioner or Commissioners on grounds

other than those currently specified in the Act, then he or she should amend the legislation to change the reasons and not use transitional arrangements associated with changes to the Act to remove people for unspecified reasons.

The only transitional arrangements which seem absolutely necessary are in relation to the Chief Commissioner, whose role will be significantly changed as a result of separating the Chief Commissioner and CEO functions.

On a more general level we are also concerned about the implications of giving Ministers the capacity to exercise greater flexibility in relation to appointment of the number of Commissioners. We are concerned that a Minister might elect not to appoint a Commissioner if he or she could not find someone who met all of the Minister's preferred attributes for the role. That is, we are concerned that the appointment of Commissioners will become political appointments rather than based on the operational/decision making needs of TEQSA. It is the strong view of the Union that legislation should set out not only the number of commissioners but clear criteria for their selection and appointment, to avoid the application of "the Minister's preferred attributes" and the politicisation of Australia's principal higher education regulatory body.

#### ***Part 7 – Directions from the Minister to TEQSA***

These amendments provide the Minister with greater capacity to give directions to TEQSA if the Minister considers this necessary to protect the integrity of the higher education sector.

The proposed changes extend the Ministers capacity to give TEQSA directions by way of written legislative instrument beyond the ***performance of its functions*** to include the ***exercise of its powers***.

Before TEQSA can set any fees by legislative instrument it must seek written approval from the Minister and provide the Minister with any information he or she may require in order to make a decision to approve such fees.

These amendments significantly impact on the independence of TEQSA and raise the following questions:

- 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?
- How is the Minister accountable to the Parliament given that Ministerial instructions are not disallowable instruments?
- To what extent will the approval of fees be determined by the relative political influence of different types of providers, as opposed to a genuine cost recovery basis? Indeed, history has shown that private, non self-accrediting providers are the most high-risk and thus should require the most rigorous assessment.



## Summary

As noted, NTEU has serious concerns with the lack of consultation over the proposed amendments to TEQSA. When TEQSA was initially introduced, the NTEU asked, was its purpose to regulate or to ensure quality provision? At the time, we were assured that it would do both. It is clear that these “amendments” to the TEQSA Act are establishing a new form of regulator quite different from that which was intended. TEQSA as a regulator had twin complementary roles. This was both accreditation/ reaccreditation and quality audit/review. Risk assessment was meant to underpin both of those processes. While it can be argued this became more of a focus than was necessary and that the dovetailing of TEQSA’s twin roles would be a challenge to implement, it is an extreme and ideologically-driven measure to effectively remove all quality assurance and standards mechanisms, particularly when there is nothing in place to ensure that quality in higher education is maintained, let alone improved.

We note that quality assurance was a task previously undertaken by the Australian Universities Quality Agency (AUQA), a quality assurance auditing body co-owned between government and universities. Whilst AUQA was focused on universities and had no authority to enforce its recommendations for improvements, it had a strong influence on the sector conducting over 120 quality audit reports (between 2001 and 2011) and the vast majority of institutions complied with its recommendations.

NTEU agrees that duplication in reporting and purposeless data-gathering should be eliminated, but this does not translate to whole-of-sector deregulation of quality processes. The regulatory framework and audit process set up originally by MCEETYA and AUQA, while not flawless, served the sector reasonably well and continued to do so under TEQSA, despite some operational inefficiencies and inadequacies that could be remedied through appropriate consultation. Alternatively, proposals to separate the functions of registration, quality assessment and setting of standard could also work given the appropriate policy planning, sector consultation and resourcing. However, abolishing any kind of monitoring and enforcement around provider quality and educational standards is not an appropriate solution for rectifying regulatory inadequacies. Indeed, it would appear that the purpose of these changes is not to better regulate tertiary education, but to open the sector up to unregulated competition.

The NTEU would propose that if the proposed amendments were to be adopted, what is needed is a version of AUQA with the independent authority to review all higher education providers in a transparent, efficient, even-handed and proportionally risk-based manner, with reports publicly available, as preferable to the current system. We would also recommend the creation of a Student Ombudsman, giving students an independent authority to appeal to in relation to higher education complaints and concerns. A Higher Education Student Ombudsman has been established in the UK and appears to have had some success in dealing with student concerns, reducing student litigation with providers and in improving quality assurance mechanisms of providers.

It is clear that the role of TEQSA, and what is required in terms of quality assurance and regulation across the entire tertiary education sector, needs further consideration. NTEU is concerned that, in the rush to reduce regulatory ‘red tape’, there is a risk of throwing the

proverbial baby out with the bathwater, and the reputation of Australia's higher education sector could suffer as a result. It certainly sends a negative message, both domestically and internationally, when a set of low level minimum standards are all that is required for an institution to qualify as higher education provider, and there are no mechanisms in place to subsequently ensure quality of course offerings or provide students with an independent arbitrator.