

CHAPTER 2

Key Issues

2.1 Rapid growth in the higher education sector in recent years has brought with it examples of bad practice which act to the detriment of the entire sector and the community. Establishing the Tertiary Education Quality and Standards Agency (TEQSA) as a national higher education regulator is a move to deliver consistent standards for all providers, building and maintaining confidence in the quality of Australian higher education domestically and abroad.

2.2 In recognition of the burden that the maintenance of nine separate regulators across the country places on the higher education sector, TEQSA would combine the regulatory functions currently performed in the states and territories with the quality assurance activities currently performed by the Australian Universities Quality Agency (AUQA).

2.3 The majority of submissions received supported the establishment of a national regulator for the higher education sector. Many were at the same time concerned about possible implications of the proposed reforms, and wished to see a number of points addressed before the legislation was passed.

2.4 The first submission the committee received, from AUQA, alluded to a potential drafting inconsistency in the Bill. Specifically, AUQA believed the requirement for TEQSA to 'have regard to' the Threshold Standards was insufficiently strong. The committee believes this concern is misplaced, and understands that 'have regard to' is a standard legal phrase which captures intended objectives.

2.5 Key issues raised throughout the course of this inquiry are outlined in this chapter.

Self-accrediting status of universities

2.6 Self-accreditation refers to the ability to enjoy academic autonomy in determining both course and degree content. The notion carries both symbolic and substantive weight, and is a central characteristic of universities as independent institutions of knowledge and learning.¹ As the peak body for Australia's universities, Universities Australia strongly expressed its concern that 'the overall implications of the Bill for university autonomy remain unclear.'² Universities Australia also pointed out that self accreditation was a first order principle of universities, and as such should be included in the primary, not secondary, TEQSA legislation.³

1 Universities Australia, *Submission 11*, p. 2.

2 Universities Australia, *Submission 11*, p. 2.

3 Professor Greg Craven, Committee Member, Universities Australia, *Proof Committee Hansard*, 19 April 2011, p. 1.

2.7 This concern was echoed by a significant portion of other submissions to this inquiry, many of which linked the question of self-accreditation to university autonomy, academic freedom and independence from political influence. As put by the University of Adelaide:

The legislation as it currently stands potentially allows the Commonwealth Government to intrude into matters of curriculum, assessment, awards and research. It effectively overrides the autonomy that is central to universities' status, and which is conferred by universities' establishment Acts.⁴

2.8 The University of Sydney—whilst supporting the government's efforts to establish a national regulator—stated that:

In our view, the existence of universities that have autonomy over their activities is fundamental to the maintenance of a strong democracy and civil society. While we might trust that the powers proposed for TEQSA will never need to be exercised in relation to a university with a long standing presence and sound record of high quality provision, it would be preferable if appropriate safeguards were embedded in the legislation from the outset.⁵

2.9 The Group of Eight, commenting that the legislation is 'designed primarily to eradicate rogue providers in the non-university sector', feared that universities would be 'caught up in the broader framework, since the primary legislation does not distinguish between provider types.'⁶

2.10 The Australian National University, which endorsed the Group of Eight position on the self-accrediting status of universities, considered that:

While a level playing field is a worthy object for higher education, this is not best achieved by reducing the status and autonomy of current leading players in the sector, i.e. universities.⁷

2.11 Innovative Research Universities (IRU) acknowledged that the legislation does not aim to abolish universities' self-accrediting power, but nonetheless concluded that:

[T]he means by which this is proposed to be done does not give sufficient credence to the lead role that universities have in setting and adjusting the standards required of higher education qualifications. It is not sufficient that it be covered through the criteria for a university laid down in the proposed provider standards.⁸

4 The University of Adelaide, *Submission 10*, p. 1.

5 The University of Sydney, *Submission 24*, pp 1–2.

6 Group of Eight, *Submission 15*, p. 2.

7 Australian National University, *Submission 27*, p. 2.

8 Innovative Research Universities, *Submission 22*, p. 3.

2.12 Similar views were put by a number of other submitters from the university sector.⁹

Committee view

2.13 The committee recognises that TEQSA does not have as its objective the standardisation of providers' operations, or the curbing of academic independence. The committee nevertheless takes on board the concerns expressed by some submitters that the proposed TEQSA Bill does not explicitly acknowledge the self-accrediting status of universities.

2.14 The committee recognises the necessary balance between community confidence in the academic independence of universities on one hand, and accountability across the higher education sector on the other. While the committee in no way opposes universities' status as self-accrediting authorities, it does not believe that this status should lift them above regulatory reach.

2.15 Nonetheless, the committee does not believe that including a reference to universities' self-accrediting powers would impede the objectives of a national regulator, as long as universities remain accountable for the quality and standard of the education they provide.

Recommendation 1

2.16 The committee recommends that the primary TEQSA Bill be amended to explicitly provide that universities have the authority to self-accredit courses of study, except where TEQSA limits or removes that authority consistent with the basic principles of regulation stated in Part 2 of the TEQSA Bill.

University autonomy and state legislation

2.17 Universities Australia contended that TEQSA's proposed powers regarding accreditation, particularly under sections 32 and 33 of the Bill, could provide 'an unwarranted potential for intrusion into a university's autonomy' as set out in state legislation.¹⁰

2.18 The University of Sydney went even further, arguing that the TEQSA legislation could potentially restrict academic activity, override the power of university governing bodies and direct universities to undertake activities prescribed by TEQSA. According to the university's submission, subclause 32 of the TEQSA Bill is inconsistent with section 16(a)(a) of the *University of Sydney Act 1989 NSW*, which establishes the university governing body's authority to determine courses and degrees offered.¹¹

9 See for example Southern Cross University, *Submission 8*; RMIT University, *Submission 7*; Bond University, *Submission 2*; Curtin University, *Submission 12*; University of Western Sydney, *Submission 19*; Australian National University, *Submission 27*.

10 Universities Australia, *Submission 11*, p. 2.

11 The University of Sydney, *Submission 24*, p. 4.

2.19 It is true that under subclause 9(1) of the TEQSA Bill higher education providers would not be required to comply with state or territory laws purporting to regulate the provision of higher education.¹² As the University of Sydney pointed out, however, providers would have to comply with other relevant state laws, such as privacy, fair trading, auditor-general and ombudsman laws. Ultimately, this means that the TEQSA legislation will supersede state law to the extent of any inconsistency.

2.20 Sydney University's Vice-Chancellor and Principal, Dr Michael Spence, concluded:

[G]iven the possibility that the draft bill provides scope for a Federal Government to intervene in the affairs of the University in a way that is unprecedented in history, I am obliged to advise you that the University is strongly opposed to the passage of legislation that does not include appropriate safeguards to protect the autonomy of self-accrediting universities.¹³

2.21 Universities Australia expressed additional concerns about the interaction between TEQSA and state legislation:

There are also concerns that the Bill does not adequately delineate the States' powers to establish universities through legislation and TEQSA's power to register them, or define the process to be followed should there be conflict between them (i.e. if a university is established through a State Act but refused registration by TEQSA). While such a conflict is considered very unlikely, the potential for it to happen suggests that more work needs to be done in this area.¹⁴

2.22 DEEWR addressed this point by explaining that these sorts of issues were common with legislation which seeks to establish national regulation of entities which are otherwise subject to state legislation. The only way to effectively establish a national regulator is to make it clear that where overlap exists, Commonwealth legislation will prevail, while state legislation will remain effective in all other cases.¹⁵

2.23 Specifically addressing the points raised by the University of Sydney, Mr David Hazlehurst, Group Manager of DEEWR's Higher Education Group, made a distinction between the governance of a university as established under state legislation and the regulation of higher education providers:

[I]t is entirely a matter for the state legislation to establish the university and to establish the governance arrangements for the university. It is then, of course, for those governance arrangements to operate consistent with the legislation under which they have been established. Naturally, if an activity

12 See subclause 9(1) of the Tertiary Education Quality and Standards Agency Bill 2011.

13 The University of Sydney, *Submission 24*, p. 5.

14 Universities Australia, *Submission 11*, p. 2.

15 Mr David Hazlehurst, Group Manager, Higher Education Group, Department of Education, Employment and Workplace Relations, *Proof Committee Hansard*, 19 April 2011, p. 44.

is being regulated, whether it is higher education or occupational health and safety, the governance arrangements of the university have to be subject to that regulation...

...It does not stop the university being accountable and making the decisions, particularly as a self-accrediting institution for accrediting its courses et cetera; it just means that axiomatically the regulator also has to regulate in that space... It would be a strange outcome if we set up a regulator but the powers of the university council could override the regulatory activity.¹⁶

2.24 Universities Australia expressed their view that the academic activities of universities were adequately provided for, and that national legislation should not be a cause for concern:

[I]t is good to introduce a note of reality into the discussion which is that the Senate of the University of Sydney is merely a creature of the statute of the New South Wales parliament which could require every member of the University Senate to come from Victoria tomorrow if it wanted. We should not get too carried away with the fact we have got another act of parliament dealing with the university governance.¹⁷

Committee view

2.25 The committee is mindful that the basic principles of regulation defined in the Bill will ensure that any action TEQSA takes will be the least burdensome and the most appropriate regulatory response. Furthermore, the committee notes that any action taken by TEQSA will be open to challenge in the Administrative Appeals Tribunal and the Federal Court.

2.26 The committee considers that a situation where universities established by state legislation and automatically registered by TEQSA is inconsistent with TEQSA's purpose as a national regulator for the entire higher education sector. The only way to ensure quality is protected is for all new higher education providers to be required to go through TEQSA's registration process. University governing bodies would remain central to managing university affairs, but TEQSA must have the capacity to act to protect students if a university refuses to act to address quality problems.

2.27 The committee believes that effective communication between federal and state governments is critical in the process of establishing and registering new universities, and that when this takes place, concerns such as those expressed above will be allayed.

Recommendation 2

2.28 The committee recommends that the Intergovernmental Agreement to be negotiated between the federal, state and territory governments include protocols

16 Mr David Hazlehurst, Group Manager, Higher Education Group, Department of Education, Employment and Workplace Relations, *Proof Committee Hansard*, 19 April 2011, p. 452.

17 Professor Greg Craven, Committee Member, Universities Australia, *Proof Committee Hansard*, 19 April 2011, p. 8.

for communication between TEQSA, state and territory governments to ensure that the process of registering new universities by TEQSA proceeds in parallel with the process of establishing universities through state and territory legislation.

The Standards Framework

2.29 Part 5 of the TEQSA Bill sets out the Higher Education Standards Framework against which higher education providers would be evaluated. These comprise the following:

- Provider Registration Standards
- Provider Category Standards
- Provider Course Accreditation Standards
- Qualification Standards
- Teaching and Learning Standards
- Information Standards
- Research Standards, and
- Other standards against which higher education providers and the quality of higher education can be assessed.¹⁸

2.30 Under the proposed legislation the Minister for Tertiary Education, Skills, Jobs and Workplace Relations (the Minister) would set the Standards, except for the Research Standards, which would be set by the Minister for Innovation, Industry, Science and Research (the Research Minister) following consultation with the Minister.

2.31 Some submitters were concerned by the perceived power of the Minister in establishing the Standards. The South Australian Department of Further Education, Employment, Science and Technology, for example, would prefer to see the Ministerial Council for Tertiary Education and Employment (MCTEE) play a more prominent role in developing and setting the Standards.¹⁹

2.32 A number of submissions also expressed disappointment that the Standards Framework would not be complete when the TEQSA Bills are considered by Parliament, believing that this impinged on stakeholders' capacity to make informed judgements on the legislation as a whole.

18 For more information see Part 5, Tertiary Education Quality and Standards Agency Bill 2011. See also DEEWR, *Submission 26*, p. 6.

19 South Australian Department of Further Education, Employment, Science and Technology, *Submission 9*, p. 1.

2.33 Universities Australia wrote that this meant stakeholders were required to comment on the TEQSA Bill from 'a background of some ignorance regarding crucial aspects of TEQSA's operation.'²⁰

The Higher Education Standards Panel

2.34 The process for the setting of Standards, however, requires consultation between the Minister and the Higher Education Standards Panel (the Panel), which will only come into existence if the TEQSA legislation is passed. Although the Minister will bear responsibility for *setting* the Standards, they will be *developed* by the Panel, which will in turn have to consult with stakeholders. The relevant Minister, therefore, would set Standards on the advice and recommendations of the Panel, which would be independent of TEQSA.²¹

2.35 When asked about the timing of the development of the standards, stakeholders appeared content to support the passage of the legislation prior to the Standards being finalised, if necessary, Universities Australia elaborated:

These things are not going to be able to be fully determined at a single point in time; it is going to take time to develop in both practice and in all of the detail being proposed. I think we have taken the pragmatic view that it was probably a bit idealistic to think that it would all be in place on day one or day minus one.

To get this right is going to require a continuing high level of engagement with the sector broadly across all parts of the sector. We would acknowledge there are significant aspects, particularly within the outline of the standards framework, that are not developed at this stage. We think the key aspect of what has been proposed as threshold standards are reasonably developed, perhaps with the exception of the definition of research. That aside, I think we are comfortable that the level of engagement and response we have had indicates that if that proceeds, together with the framework in the act, we think we have got a reasonable basis to proceed.²²

2.36 Professor Greg Craven of Universities Australia also pointed out that the TEQSA Bill contains two safeguards with respect to standards:

The first is that because the three fundamental principles are in part 2 and in the objectives of the act, the standards must be consistent with those principles. The other of course is that the standards are disallowable instruments, which of course would mean that if there was something odd about them, which we do not believe there will be, then there would be other legislative opportunities for correction.²³

20 Universities Australia, *Submission 11*, p. 2.

21 Australian Research Council, *Submission 16*, p. 5.

22 Mr Michael Beaton-Wells, Executive Director, Universities Australia, *Proof Committee Hansard*, 19 April 2011, p. 3.

23 Professor Greg Craven, Committee Member, Universities Australia, *Proof Committee Hansard*, 19 April 2011, p. 4.

2.37 During the course of its inquiry the committee was satisfied that by and large, sectoral representatives were satisfied that they would continue to be consulted as the standards evolved. The Australian Council for Private Education and Research supported the position taken by Universities Australia.²⁴ Similarly, Professor John Rosenberg—speaking on behalf of Innovative Research Universities—stated that although it would be preferable for the entire package to be available for review simultaneously, he was not concerned because a proper process for ensuring appropriate standards was in place.²⁵

2.38 The Council of Private Higher Education concluded:

The quality of process thus far has been such that we believe we have been heard. One is not then happy with every last bit but we have been heard and it reflects our key concerns. There is an element of ‘chicken and egg’ here: the agency needs to be established in order to have the standards committee operational and develop the agency.²⁶

Appointment of the Panel

2.39 Under the draft legislation, the Minister, in consultation with the Research Minister, would be responsible for appointing Panel members, taking into account professional knowledge and demonstrated expertise. The Bill provides for a Panel Chair and between four and ten other members. TEQSA Commissioners are precluded from being Panel members, assuring independence and a separation between standard setting and TEQSA's monitoring and enforcement activities.²⁷

2.40 Some submissions contended that the expertise required of Panel members should be clarified, recommending that 'demonstrated expertise in the setting of standards in higher education and their implementation at an institutional level' be specified.²⁸

2.41 The government has consistently held that backgrounds, expertise and interests of Panel members should not be overly prescriptive:

The point that is worth emphasising...is the fact that the panel is not intended to be a representative body. It is not meant to be constituted by members who kind of represent the interests of a particular stakeholder group or whatever. It is meant to be an expert panel. Of course, that does not rule out a blend of experience and background et cetera, being on the

24 Mr Ben Vivekanandan, National Manager, Policy and Research, Australian Council for Private Education and Training, *Proof Committee Hansard*, 19 April 2011, p. 20.

25 Professor John Rosenberg, Innovative Research Universities, *Proof Committee Hansard*, 19 April 2011, p. 26.

26 Mr Adrian McComb, Executive Officer, Council of Private Higher Education, *Proof Committee Hansard*, 19 April 2011, p. 32.

27 Department of Education, Employment and Workplace Relations, *Submission 26*, p. 5.

28 See, for example, Monash University, *Submission 18*, p. 4.

panel. It is certainly the government's intention that that balance of experience and skills be reflected there.²⁹

2.42 Other issues raised about the Panel included those relating to the Panel's operation. Section 167(2)(b) of the TEQSA legislation states that the Panel would be required to have regard to the interests of states, territories and students. The National Tertiary Education Union expressed its disappointment at this clause not having been amended to include the interest of staff following successive consultation rounds. Staff working in higher education, the NTEU contended, would be largely responsible for implementing the Standards, and should be considered and have a role to play in the development of the standards.³⁰

It just seems incongruous to us that it does not include the interests of the staff who actually work in the sector because, aside from being the people who actually implement a lot of the policy that goes on, these are the people who are faced by our own set of circumstances which are unique to higher education, such as the need for workforce renewal, and all sorts of issues regarding workloads and professional issues, et cetera,. These are outside of what happens to students and states and territories so these are quite specific. They do not only happen within universities; these issues are also across the board in TAFEs as well. There is a commonality there. We would just ask that the panel has regard to the professional interests of staff as well as students and the states and territories.³¹

2.43 This position was echoed by the National Union of Students.³²

The Threshold Standards

2.44 In its submission, DEEWR informed the committee that the Threshold Standards will comprise the Provider (Registration, Category and Course Accreditation) Standards and the Qualification Standards.³³

2.45 This, however, appeared initially to be inconsistent with the text of the primary TEQSA Bill, which clearly defines the Threshold Standards:

Threshold Standards means the following:

- (a) the Provider Standards, which are:
 - (i) the Provider Registration Standards; and
 - (ii) the Provider Category Standards; and
 - (iii) the Provider Course Accreditation Standards;

29 Mr David Hazlehurst, Group Manager, Higher Education Group, Department of Education, Employment and Workplace Relations, *Proof Committee Hansard*, 19 April 2011, p. 47.

30 National Tertiary Education Union, *Submission 20*, pp 3–4.

31 Ms Terri MacDonald, Policy Officer, National Tertiary Education Union, *Proof Committee Hansard*, 19 April 2011, p. 34.

32 National Union of Students, *Submission 23*, p. 3.

33 Department of Education, Employment and Workplace Relations, *Submission 26*, p. 6.

- (b) the Qualification Standards;
- (c) any other standards made under paragraph 58(1)(e).³⁴

2.46 Paragraph 58(1)(e) of the TEQSA legislation relates to 'other provider standards against which higher education providers can be assessed.'³⁵

2.47 The committee sought an explanation for the apparent inconsistency in the definition of Threshold Standards from DEEWR. The department explained that the definition it employed related only to the *first set* of Threshold Standards, which, as stipulated in the TEQSA (Consequential Amendments and Transitional Provisions) Bill 2011, consist only of subclauses (a) and (b), above. Under the proposed legislation however, subclause (c) would form part of subsequent Threshold Standards.³⁶

2.48 The Group of Eight, among others, sought the removal of (c) from the above definition of Threshold Standards, contending that including the paragraph 'potentially gives the Minister and TEQSA unpredictable and unnecessary powers.'³⁷

The first set of Threshold Standards

2.49 Part 6 of the Tertiary Education Quality and Standards Agency (Consequential Amendments and Transitional Provisions) Bill 2011 provides the Minister with the power to make the first set of Threshold Standards without input from the Panel, which, as previously stated, only comes into being if TEQSA is established.

2.50 DEEWR informed the committee that this will provide regulatory certainty for the sector and ensure a smooth transition to the new national regulatory system.³⁸

2.51 The draft legislation stipulates that in setting the first Threshold Standards the Minister must:

- (a) consult each of the following parties about the proposed standards:
 - (i) the Council consisting of the Ministers for the Commonwealth and each State and Territory responsible for higher education;
 - (ii) the Minister administering the Australian Research Council Act 2001;
 - (iii) TEQSA;
 - (iv) any other interested parties; and
- (b) have regard to any representations received from those parties.³⁹

34 Part 1, section 5, Tertiary Education Quality and Standards Agency Bill 2011.

35 Part 1, section 5, Tertiary Education Quality and Standards Agency Bill 2011.

36 Explained for the committee during a telephone conversation on 21 April, 2011, with Ms Erica Lewis, Director (A/g), Establishment Team, TEQSA Taskforce, DEEWR.

37 Group of Eight, *Submission 15*, p. 2.

38 Department of Education, Employment and Workplace Relations, *Submission 26*, p. 7.

2.52 The Tertiary Education Quality and Standards Agency (Consequential Amendments and Transitional Provisions) Bill 2011 also states that the Panel must review the first set of Threshold Standards within the first year of its operation.⁴⁰

Committee view

2.53 The committee understands that, except for the first set of Threshold Standards, the Minister must set the Standards on the recommendations of the Higher Education Standards Panel, which will only come into existence if the TEQSA legislation is passed. It is therefore impossible to present stakeholders with the completed Standards before the legislation is considered by Parliament.

2.54 While the committee understands some sectoral concern about this matter, it takes the view that this will dissipate as long as the sound consultation process applied by the government to date is continued following TEQSA's establishment.

2.55 Having regard to the constitution of the Threshold Standards as comprising the Provider Standards, Qualification Standards and 'any other standards' under section 58(1)(e), the committee sees merit in observations from submitters who consider the 'any other standards' provision to be excessively broad. The committee therefore recommends that subclause (c) be deleted from the definition.

2.56 In addition, the committee recognises the important role staff play in the higher education sector and agrees that the Panel should have regard to their interests—as well as those of students, states and territories as is currently proposed—when developing the Higher Education Standards Framework.

Recommendation 3

2.57 The committee recommends that the higher education sector be consulted on the development of the Standards Framework prior to the setting of the Standards by the Minister.

Recommendation 4

2.58 The committee recommends that the definition of Threshold Standards in section 5 be amended so that it does not include subclause (c) any other standards made under paragraph 58(1)(e).

Recommendation 5

2.59 The committee recommends that clause 167(2)(b) of the TEQSA Bill be amended to include reference to the interests of staff working in the higher education sector.

39 Part 6, section 29(2), Tertiary Education Quality and Standards Agency (Consequential Amendments and Transitional Provisions) Bill 2011.

40 Part 6, section 29(3), Tertiary Education Quality and Standards Agency (Consequential Amendments and Transitional Provisions) Bill 2011. See also Mr David Hazlehurst, Group Manager, Higher Education Group, Department of Education, Employment and Workplace Relations, *Proof Committee Hansard*, 19 April 2011, pp 40–41.

TEQSA decisions

2.60 Parts 3 and 4 of the TEQSA Bill set out details of the registration and course accreditation processes respectively.

2.61 Broadly speaking, higher education providers would have to apply for registration within a particular provider category. This preliminary application would be assessed within 30 days and the provider told whether they qualified to proceed through to the next stage of the application process, which would be the more substantive stage of assessment. If advised to proceed, providers would undergo a substantive assessment process by TEQSA, which would result in a decision within 12 months, with the possibility of extension to 24 months in certain circumstances. A similar process for preliminary and substantive assessment would apply for course accreditation.⁴¹

2.62 According to the Australian Council for Private Education and Training (ACPET), this process is too long. ACPET argued that allowing TEQSA to take up to 24 months to register a provider or accredit a course would prevent the regulator from providing 'timely and accurate assessments...of applications.' This, ACPET continued, 'does not bode well for institutions attempting to display ingenuity and diversity and meet the needs of industry.'⁴²

2.63 Asked to expand on this, ACPET contended that under the current system no upper time limit exists, and suggested that introducing an upper limit could potentially drag institutions towards the worst performance indicator, in this case up to 24 months, as opposed to the best performance indicator.⁴³

2.64 Mr Ian Hawke, Interim CEO of TEQSA, responded by saying that most states and territories actually apply similar provisions to those outlined in the TEQSA legislation:

In Queensland, for example, the statute provides for 12 months plus a capacity to extend. It is an open question as to what is the ideal. Under provisions in the bill at 162(2)(b), TEQSA will be obliged to provide performance indicator information as part of its operational plan, and therefore give in effect service standard expectations out to the sector so they can get a clear expression from the regulator about what service expectations they might have in dealing with applications. What happens typically in this area is that some providers are very good at providing documentation for applications and reaccreditation and re-registration work, and some are not.⁴⁴

41 For more information see Department of Education, Employment and Workplace Relations, *Submission 26*, pp 7–8.

42 Australian Council for Private Education and Training, *Submission 13*, p. 2.

43 See *Proof Committee Hansard*, 19 April 2011, p. 21.

44 Mr Ian Hawke, Interim CEO, TEQSA, *Proof Committee Hansard*, 19 April 2011, p. 48.

2.65 Asked whether the new system would lead to a change in the timeframes for course accreditation, which currently run to between three and six months, Mr Hawke replied:

I think three to six months would be a best case scenario now in the sector. It is not even an average. I would expect TEQSA's capacity to deliver at a rate much ahead of the pace of the average performance across the states and territories now. I have every confidence in that. All of the evidence—its resource base, its capacity to respond, the level of engagement it will have directly with providers—would suggest it will have a much greater capacity to respond and make decisions more quickly than is the case now.⁴⁵

Committee view

2.66 While the committee is encouraged by Mr Hawke's prediction with respect to reducing the time taken to accredit courses, it sees merit in recommending an amendment to the Bill to accommodate the understandable concerns expressed by ACPET. The committee recommends a maximum period of 18 months for consideration by TEQSA of course for accreditation, to consist of a nine month maximum period under proposed subsection 49(2) to be supplemented by a further nine months under proposed subsection 49(3) if required. This would result in a six month reduction in the maximum time take by TEQSA to accredit a course.

Recommendation 6

2.67 That the Bill be amended to provide for a nine month maximum period for TEQSA to accredit a course under sub-clause 49(2) and a further nine months under sub-clause 49(3).

Rights of review and appeal on registration and accreditation matters

2.68 DEEWR confirmed for the committee that all of TEQSA's decisions will be reviewable by the Federal Court, but also explained that significant decisions will be reviewable by the Administrative Appeals Tribunal. Those include decisions:

- that an application for registration in a particular provider category is inappropriate;
- that a particular provider category, different from the category sought by the registration applicant, is appropriate;
- to extend a timeframe for decision on application for registration/accreditation;
- to register a provider in a particular provider category;
- to reject an application for registration/accreditation;
- to impose a condition on registration/accreditation;
- to vary a condition on registration/accreditation;
- to refuse renewal of registration/accreditation;

45 Mr Ian Hawke, Interim CEO, TEQSA, *Proof Committee Hansard*, 19 April 2011, p. 48.

- to refuse to change the category of registration;
- to refuse to authorise self-accreditation for one or more courses of study;
- to reject an application to withdraw authorisation;
- to shorten the period of registration/accreditation;
- to cancel registration/accreditation; and
- to enter details on the National Register of Higher Education Providers.⁴⁶

2.69 The University of Sydney submitted that the three basic principles of regulation TEQSA will have to operate within—regulatory necessity, reflecting risk and proportionate regulation—will not be enforceable except through legal challenge in the Federal Court.

2.70 The submission went on to argue that the legislation does not enable higher education providers to challenge operational decisions which may fail to comply with the three basic principles of regulation. The university contended that the list of reviewable decisions was specific in nature and would not allow providers to challenge operational decisions, including those relating to TEQSA's proposed investigative powers.⁴⁷ These are outlined below.

Proposed investigative powers

2.71 The proposed legislation provides that TEQSA would have investigative powers and sanctions similar to those outlined in the *Education Services for Overseas Students (ESOS) Act 2000* and legislation establishing the National VET Regulator. It creates offences and civil penalties, including:

- pretending to be a university;
- offering or conferring an award without requiring a course to be completed;
- falsely representing that a course is accredited;
- providing unaccredited courses; and
- breaching conditions of registration or accreditation.⁴⁸

2.72 Any action TEQSA takes in response to a breach of legislation would have to reflect the three basic principles of regulation and could include:

- making recommendations to the provider to resolve the breach;
- imposing conditions on a provider's registration and/or course accreditation;

46 Department of Education, Employment and Workplace Relations, *Submission 26*, p. 9.

47 The University of Sydney, *Submission 24*, p. 4.

48 Department of Education, Employment and Workplace Relations, *Submission 26*, p. 8.

- accepting enforceable undertakings from the provider;
- applying to the Federal Court for injunctions; and
- seeking the application of civil or criminal penalties.⁴⁹

2.73 TEQSA's proposed investigative powers include the powers to:

- request information from a person connected with a higher education provider;
- exercise enforcement powers – e.g. searching premises to look for and seize evidential material; and
- ask questions and seek the production of documents.⁵⁰

2.74 A number of submissions expressed concerns about these powers, questioning why a national quality and standards regulator would need the same powers as those under the *ESOS Act*, since the latter requires those powers to protect individual student rights, or a distinct group of students. This, the National Tertiary Education Union (NTEU) argued, is substantively different to the duties of regulation and quality auditing TEQSA would deal with,⁵¹ and therefore TEQSA's proposed investigative powers outlined in Part 6 of the Bill 'are both excessive and disproportionate to TEQSA's roles and responsibilities.'⁵²

2.75 DEEWR explained that such powers might be necessary, for example, if there was a concern that evidence might be destroyed.⁵³

2.76 DEEWR explained that TEQSA would not be able to exercise its entry, search and seizure powers without a warrant or the consent of the occupier. Consent would need to be voluntary and could be withdrawn, in which case the authorised officers exercising these powers would leave the premises. A warrant would only be issued if a magistrate was satisfied that access to premises was necessary to determine whether legislation had been complied with. The magistrate would require evidence of the grounds on which a warrant is sought to be presented before any warrant was issued.⁵⁴

2.77 DEEWR noted also that the TEQSA Bills contain provisions against self-incrimination, which were relevant in this context. A person would not be excused from answering questions and must produce all requested documents, but information obtained as a result is not admissible in evidence against the individual concerned, but rather against the institution. TEQSA must reasonably believe the person is connected

49 Department of Education, Employment and Workplace Relations, *Submission 26*, p. 9.

50 Department of Education, Employment and Workplace Relations, *Submission 26*, pp 8–9.

51 National Tertiary Education Union, *Submission 20*, p. 4. See also Monash University, *Submission 18*, p. 4.

52 National Tertiary Education Union, *Submission 20*, p. 4. See also, for example, Bond University, *Submission 2*, pp 2–3.

53 Mr David Hazlehurst, Group Manager, Higher Education Group, Department of Education, Employment and Workplace Relations, *Proof Committee Hansard*, 19 April 2011, p. 45.

54 Department of Education, Employment and Workplace Relations, *Submission 26*, p. 9.

to a higher education provider and capable of producing relevant information in order to compel them to give evidence.⁵⁵

2.78 The University of Sydney submitted to the committee a copy of legal advice it had obtained, which stated that:

Pursuant to subclause 62(2), TEQSA must obtain an entity's consent before entering an entity's premises, or doing anything on those premises. However, this subclause has effect subject to the requirement to comply with the conditions imposed by TEQSA (clause 24) and the requirement to cooperate with TEQSA to facilitate the performance of its functions (clause 31). In my opinion, the requirement for TEQSA to obtain consent from the entity has little meaning in this context.

In accordance with subclause 62(4) of the TEQSA bill, the operations covered by clauses 59 and 60 are not limited to the entity's higher education operations. TEQSA would, by virtue of this subclause, have the power to conduct compliance and quality assessments of any part of the University's operations, including its research functions, provided that it was for the purposes outlined in clauses 59 and 60.⁵⁶

2.79 In response, DEEWR explained that TEQSA's proposed investigative powers would be subject to the same principles of regulation—regulatory necessity, reflecting risk and proportionate regulation—as its other activities. This means that TEQSA would have to take an escalating approach and not resort immediately to using its full investigative powers.⁵⁷

2.80 Mr David Hazlehurst, representing DEEWR, added:

I would also make the observation that, of course, the legislation has to cover all providers and all circumstances, so it is kind of necessary to have a range of enforcement powers ranging from quite modest initial action to raise an issue with a provider through to matters like search and seizure of documents, for example.

...So there is no question that there are powers in the act that are quite strong; it is a regulator being set up with teeth. The basis upon which it can use those powers is also conditioned quite significantly by the other relevant provisions that have been included in the legislation about the regulatory activity of TEQSA.⁵⁸

Committee view

2.81 The committee recognises that, in order to be effective, TEQSA must have powers of investigation and enforcement. The committee further recognises that only

55 Department of Education, Employment and Workplace Relations, *Submission 26*, p. 9.

56 The University of Sydney, *Submission 24*, p. 10.

57 Mr David Hazlehurst, Group Manager, Higher Education Group, Department of Education, Employment and Workplace Relations, *Proof Committee Hansard*, 19 April 2011, p. 45.

58 Mr David Hazlehurst, Group Manager, Higher Education Group, Department of Education, Employment and Workplace Relations, *Proof Committee Hansard*, 19 April 2011, p. 45.

a small number of submissions expressed concerns about the proposed powers, and is confident that most stakeholders are comfortable with this section of the legislation as it stands.⁵⁹

Public disclosure of information

2.82 All higher education providers operating in Australia would be listed on the National Register of Higher Education Providers, as set out in clause 198 of the Bill. Subclauses 198(3),(4) and (5) also stipulate:

- (3) The Register Guidelines may set out details that TEQSA must enter on the Register in respect of a registered higher education provider.
- (4) Subsection (3) does not prevent TEQSA from entering other details on the Register in respect of a registered higher education provider.
- (5) The Register is to be made available for inspection on the internet.⁶⁰

2.83 These subclauses generated a number of concerned responses from stakeholders. Bond University pointed out that they provided broad powers to enter details into a register which would be in the public domain, and sought an amendment requiring TEQSA to seek approval from registered providers before publishing any additional information.⁶¹

2.84 The University of Sydney drew the committee's attention to clause 196 of the Bill:

TEQSA may disclose to the public higher education information that relates to anything done, or omitted to be done, under this Act.⁶²

2.85 Clause 5 of the Bill defines 'higher education information' as it relates to a regulated entity. It consists of information:

- (a) That is obtained by TEQSA;
- (b) That relates to TEQSA's functions; and
- (c) That is not personal information (within the meaning of the *Privacy Act 1988*).⁶³

2.86 Furthermore, the explanatory memorandum states:

59 The committee asked a number of representative bodies whether they had concerns about TEQSA's proposed investigative powers at a public hearing held on 19 April 2011. With the exception of the National Tertiary Education Union, all those asked said they had no concerns. See for example Mr Michael Beaton-Wells, Executive Director, Universities Australia, *Proof Committee Hansard*, 19 April 2011, p. 8; Professor John Rosenberg, Representative, Innovative Universities Australia, *Proof Committee Hansard*, 19 April 2011, p. 26; Mr Adrian McComb, Executive Officer, Council of Private Higher Education, *Proof Committee Hansard*, 19 April 2011, p. 32.

60 Section 198, Tertiary Education Quality and Standards Agency Bill 2011.

61 Bond University, *Submission 2*, p. 2.

62 Section 196, Tertiary Education Quality and Standards Agency Bill 2011.

63 Section 5, Tertiary Education Quality and Standards Agency Bill 2011.

This provision [s196] will enable TEQSA to release a range of information to the public. For example, TEQSA might release good practice guides describing the work of registered higher education providers in a particular area. TEQSA might also release information to aid prospective students to make more informed choices about where to study.⁶⁴

2.87 The issue of disclosure of information was also raised by Monash University, which sought clarity on what would happen in circumstances where 'the nature of what was being presented were to be detrimental to the reputation or standing of the university.'⁶⁵ Representatives from Monash University added:

What we are suggesting is that TEQSA should have regard to the potential for any such disclosure to constitute an unfair or prejudicial position as far as the particular circumstances of a particular institution. If in fact the judgement of TEQSA were to be that public interest requires that the evidence be laid out in a clear and unequivocal way, we do not deny that is a legitimate judgement to be made by TEQSA. What we are asking is that in making that judgement, it has regard to the consequences of what it does.⁶⁶

2.88 Universities Australia pointed out that TEQSA would clearly be unable to publish any information which would be a breach of privacy and 'other protected interests,' and that:

We would expect again that the principles would need to be drawn on there to determine the right balance as well as the basic requirement in the proposed information sections of this bill which require the public officer to ensure that their conduct meets the object of the act. In that sense we do not read the provision as providing a complete open slather to publishing information; there will need to be a judgement used. Some of our members are quite concerned about that.⁶⁷

2.89 Mr Ian Hawke, Interim CEO of TEQSA, explained that clauses pertaining to the disclosure of information were not intended to be specific:

I think it is open-ended, deliberately, without being on the one hand prescriptive or overly restrictive of what the regulator might seek to do. In the case of universities, I think it is fair to say that universities are pretty open institutions now, and the measure of their public disclosure responsibilities are quite large, through annual reporting requirements, but equally through things like their experience with the AUQA process where reports of audits that AUQA conducts are already public domain once they are finalised on the back of an audit experience.

64 Explanatory Memorandum, Tertiary Education Quality and Standards Agency Bill 2011, p. 96.

65 Mr David Buckingham, Principal Adviser, Office of the Vice-Chancellor, Monash University, *Proof Committee Hansard*, 19 April 2011, p. 13.

66 Mr David Buckingham, Principal Adviser, Office of the Vice-Chancellor, Monash University, *Proof Committee Hansard*, 19 April 2011, p. 14.

67 Mr Michael Beaton-Wells, Executive Director, Universities Australia, *Proof Committee Hansard*, 19 April 2011, p. 9.

In one sense, the form of published works about individual universities that TEQSA may seek to make might have somewhat different form to the AUQA practice but in principle, they will be similar. If the regulator does a particular piece of audit work on an individual university and publishes the report, it is no different from the way AUQA conducts its business now. In fact, in the end, the regulator would have to make a judgment about what are the desirable pieces of information that should be on the public register that enable students to make more informed decisions about their prospective or current enrolments.⁶⁸

2.90 While the committee can understand the concerns expressed by some witnesses, it also notes the evidence of Mr Hawke that in practice the information placed on the public record will be similar to that currently published by AUQA, and is satisfied with the provisions as they stand.

Consistency in regulation

2.91 The government plans to merge TEQSA and the National VET Regulator (NVR) into a single regulator in 2013, following ongoing consultation and negotiation with state and territory governments.

2.92 RMIT pointed out that harmonisation of the quality assurance frameworks for the two regulators will be important as the system transitions to a single national regulator in 2013.

2.93 The Victorian Government (Victoria) contended that the proposed model for developing standards in the higher education sector was currently incompatible with the regulatory regime for the VET sector, and predicted 'significant difficulties in merging the two regulators from 2013.'⁶⁹ Victoria also sought clarification on the position of dual-sector institutions, namely, whether they were to be covered by the TEQSA Bill, the National VET Regulator (NVR) Bill, or both.

2.94 Alignment between TEQSA and NVR has similarly been a key consideration for TAFE Directors Australia (TDA) throughout the TEQSA consultation and drafting process. TDA sought alignment in the two regulators in the following key areas:

- A commission structure with the CEO being the Chief Commissioner;
- Commissioners being independent and appointed on the basis of their expertise rather than being representative;
- A risk management approach to regulation that balances proportionality with appropriate powers and which is based on individual provider capability rather than provider category;
- Emphasis in the Objects of legislation on the importance of meeting labour market demands, on currency with practice in the relevant industry/field of study and on equipping students for a global future;

68 Mr Ian Hawke, Interim CEO, TEQSA, *Proof Committee Hansard*, 19 April 2011, p. 50.

69 Victorian Government, *Submission 29*, p. 1.

- Efficient time-lines/turnaround times for decision-making that recognise the commercial pressures facing institutions in a demand-driven system;
- A comparable fee structure, that is based on cost-recovery and which would benefit from greater efficiency when the two agencies merge;
- A consistent approach to the separation or otherwise of the regulatory and standard-setting roles in the two sectors.⁷⁰

2.95 Mr Ian Hawke, Interim CEO of TEQSA, explained for the committee that the government was encouraging stronger relationships between universities and VET providers, and that both TEQSA and the NVR legislation are designed to facilitate ongoing conversation about consistency in both agencies' approach to risk and regulation.⁷¹

Recommendation 7

2.96 The committee recommends that the National VET Regulator work closely with TEQSA, once established, to harmonise and streamline the regulatory approach for multi-sector providers in advance of any future decision to combine TEQSA and the National VET Regulator in a single regulatory agency.

Position of the Victorian and Western Australian Governments

2.97 Victoria expressed in-principle support for a national regulator and noted that in 2009 the MCTEE agreed to cooperate towards developing a new national framework for the higher education sector:⁷²

Victoria supports the establishment of a national system of regulation to assure the quality of all providers and has been, and continues to be, willing and open to discuss and agree a best practice model to achieve this. However, there remain fundamental issues with the regulatory and governance arrangements of TEQSA that have yet to be resolved by States and Territories.⁷³

2.98 In its submission, however, Victoria contended that the Bill in its current form failed to recognise the state's legitimate and ongoing interests:

- under the Australian Constitution, the Commonwealth does not have a specific power to legislate for education. Education has traditionally been the responsibility of the State;

70 TAFE Directors Australia, *Submission 32, Attachment 1*, p. 5.

71 Mr Ian Hawke, Interim CEO, TEQSA, *Proof Committee Hansard*, 19 April 2011, p. 49.

72 Victorian Government, *Submission 29*, p. 1.

73 Victorian Government, *Submission 29*, p. 1.

- universities have been established under State law and have received significant State investment in their establishment and ongoing operation;
- higher education institutions play a significant role in the economic development and social cohesion of the State, including developing human capital, innovation and research, and employment; and
- the interaction between higher education and vocational education and training is significant (Victoria has several universities and other institutions operating across both sectors) and is growing.⁷⁴

2.99 Victoria identified three key issues with the proposed legislation.

2.100 First, the proposed governance arrangements give the Commonwealth Minister an all-encompassing role—responsibility for appointing key individuals to TEQSA and all aspects of setting standards and regulation. The states and territories would have no direct role in appointing the Commissioners or Panel members.

2.101 Second, although the Minister and the Research Minister would be required to 'have regard to' the views of the Ministerial Council on draft standards, they would not require the Council's endorsement of or agreement with the standards.

2.102 Third, Victoria contended that there is 'a significant risk of conflict of interest in the close interaction of TEQSA and the Standards Panel' due to shared secretariat functions and close involvement in the application of standards.

2.103 Victoria sought the following amendments to the proposed legislation:

- provision for the setting of standards for higher education by an advisory body reporting to the relevant Ministerial Council;
- provision for appointments to TEQSA to be endorsed by the relevant Ministerial Council;
- provision for the clear separation of the development of standards and the application of standards;
- retention of States' ability to establish and disestablish, and also to regulate the governance of State institutions, and to hold them accountable (including requiring the provision of information by State institutions to State Ministers, and the exercise of oversight powers by State bodies such as the Ombudsmen and Auditors-General); and
- formalisation of TEQSA's responsibility to investigate matters at the request of State and Territory ministers and to ensure the ongoing involvement of States and Territories in investigations relevant to individual jurisdictions.⁷⁵

74 Victorian Government, *Submission 29*, p. 1. See also InterMediate Government Liaison and Advisory, *Submission 30*, p. 6.

75 Victorian Government, *Submission 29*, p. 6.

2.104 Western Australia expressed similar views, and did not support the passage of the Bills. The committee was told by the Hon Dr Elizabeth Constable MLA, Western Australian Minister for Education, that the state supports a national approach to higher education regulation and quality assurance, but that the proposed legislation did not establish arrangements which were genuinely national in character, and which strike a balance between the roles of federal, state and territory governments.

2.105 Western Australia sought deferral of further consideration of the legislation pending amendments, further negotiations with the states and the finalisation of 'an appropriate Intergovernmental Agreement.'⁷⁶

2.106 Asked about Western Australia's position, Professor Peter Coaldrake, Chair of Universities Australia, contended that given the global environment Australia seeks to operate and be competitive in, it was 'absurd to have six, seven, eight or nine regulators or quasi-regulators.' He added that the state-based system had to date worked unevenly.⁷⁷

2.107 Professor Greg Craven, Committee Member of Universities Australia, made the point more strongly, stating that:

The sad reality is that federalism in relation to universities and state control of universities has not worked. I know that for a fact because I have spent quite a lot of my time trying to persuade premiers and education ministers that it should work, that they should invest in universities, that this was a great opportunity for their states. That has never succeeded. The reality is that the states, by and large, have left universities to the Commonwealth now for decades. It is only a question of for how many decades that has happened that you might want to argue about. Probably the most obvious statistic that is always tossed around is that in a majority of states the states take more money out in payroll tax from universities than they actually put in.⁷⁸

2.108 DEEWR stressed that the consultation process with states has been extensive, but that a fundamental divergence in views exists:

I think the issue is that there are some matters on which we simply do not agree. I do not think that is a fault of the consultation process, I just think there are things that we do not agree on. Those are of course expressed, as is entirely appropriate, in the submissions that you have received, particularly from Victoria, WA and South Australia.⁷⁹

76 Western Australian Minister for Education, *Submission 28*, pp 1–2.

77 Professor Peter Coaldrake, Chair, Universities Australia, *Proof Committee Hansard*, 19 April 2011, p. 2.

78 Professor Greg Craven, Committee Member, Universities Australia, *Proof Committee Hansard*, 19 April 2011, p. 2.

79 Mr David Hazlehurst, Group Manager, Higher Education Group, Department of Education, Employment and Workplace Relations, *Proof Committee Hansard*, 19 April 2011, p. 43.

2.109 The committee notes that South Australia expressed in-principle support for the establishment of TEQSA.⁸⁰

Consultation

2.110 The committee notes the large number of submissions which speak highly of consultation by DEEWR on the development of the TEQSA Bills, and the Standards which have been developed to date. Accordingly, the committee extends its congratulations to DEEWR for its efforts, which have resulted in a highly engaged and well informed response to the Bills.

Conclusion

2.111 The committee agrees that maintaining nine different regulatory and quality assurance bodies is a burden on the nation's higher education sector, and believes that establishing TEQSA is a step towards ensuring that expansion and diversification in the sector will not come at the expense of quality.

2.112 These reforms will raise the overall standard in the higher education sector and reward consistent quality. As put by the Council of Private Higher Education (COPHE):

The way...[TEQSA]...is to be structured will put incentives in place for well managed institutions to continue to improve and allow the regulator to respond early to any problems that emerge that might be a threat to quality.⁸¹

2.113 Like all stakeholders, the committee believes that maintaining standards across the sector is critical, because one provider operating below par has a detrimental effect on the entire sector. Introducing a new, national regulator will secure the reputation of Australia's higher education sector at home and abroad.

2.114 The committee once more commends the government on the consultation process it has employed in finalising the development of this legislation, and hopes to see this consultative approach continue as TEQSA evolves.

Recommendation 8

2.115 The committee recommends that the Senate pass the Bill subject to the committee's recommendations.

Senator Gavin Marshall
Chair

Senator Chris Back
Deputy Chair

80 South Australian Department of Further Education, Employment, Science and Technology, *Submission 9*, p. 2.

81 Council of Private Higher Education, *Submission 25*, p. 1.

