



Australian Government
Department of Education and Training

Review of the impact of the TEQSA Act on the higher education sector

Australian Government response

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Protecting the reputation of higher education is fundamental to ensure the continued success of this important sector of the Australian economy. The education sector is Australia's third largest export, worth more than \$28 billion in export income in 2016-17. The higher education sector generates around two-thirds of this export income.

The Tertiary Education Quality and Standards Agency (TEQSA) is Australia's independent national quality assurance and regulatory agency for higher education. TEQSA's purpose is to safeguard student interests and the reputation of Australia's higher education sector by assuring the quality of higher education through a proportionate, risk reflective approach that allows higher education providers to pursue their individual missions and encourages diversity, innovation and excellence.

The *Tertiary Education Quality and Standards Agency Act 2011* (TEQSA Act) which establishes TEQSA as the national regulator, requires that the Minister must, before 1 January 2016, cause a review to be started of the impact on the higher education sector of the TEQSA Act. On 12 December 2015, the former Minister for Education and Training, Senator the Hon Simon Birmingham, determined the terms of reference for this review.

Terms of Reference

The review will assess the impact on the higher education sector of the TEQSA Act by examining:

1. what has changed for the sector in moving to a single national regulatory framework from multiple state- and territory-specific arrangements
2. the extent to which the TEQSA Act has contributed to improved quality in the delivery of higher education
3. the extent to which the TEQSA Act has contributed to improved regulation
4. whether there is unnecessary overlap with other legislation, for example, the *Education Services for Overseas Students Act 2000*, the *National Vocational Education and Training Regulator Act 2011* and the *Higher Education Support Act 2003*
5. whether there are amendments to the TEQSA Act or other changes that would enhance the Act's impact or its administration
6. whether the required functions of the Higher Education Standards Panel are adequately reflected in the TEQSA Act.

Consultants

The Department of Education and Training commissioned Deloitte Access Economics consultants to review the impact of the TEQSA Act on the higher education sector. The Government welcomes the Deloitte Access Economics report *Review of the impact of the TEQSA Act on the higher education sector* (the review). The review is a substantial body of work. The reviewers have carefully

considered submissions and consultations with the sector and have extensively analysed the TEQSA Act itself.

The review found that the move to a single national higher education regulatory framework has had a very positive impact on the sector's quality and reputation and that the value of TEQSA's role is understood and appreciated by the sector. The quality assurance and reputational value provided by TEQSA has been key to maintaining Australia's strong international reputation and standing as a source of robust, high quality higher education.

The review has made a number of recommendations for amendments to the TEQSA Act to improve its administration and reflect the evolution of the role of the Higher Education Standards Panel. Other recommendations are made to improve the functions and efficiency of TEQSA as the national regulator.

A detailed response to each recommendation is set out in the following pages.

Recommendations and response

The recommendations are numbered in the report (and reflected below) under the associated term of reference; for example, recommendation 4.2 is the second recommendation made under Term of Reference Four.

Recommendation 1.1

TEQSA and the Department should keep under review the number of Australian higher education providers that are not regulated entities and cannot apply for registration under the TEQSA Act. If the number increases significantly, or if the lack of regulatory controls detracts from the quality of the provision of higher education in Australia, consideration should be given to seeking a referral of legislative powers from the States and Territories to the Commonwealth; this would allow the Act to be amended to enable TEQSA to operate as a truly national regulator.

The review notes that the constitutional reach of the TEQSA Act means there are some gaps in the types of entities that fall within TEQSA's regulatory purview. This means there is a very small number of providers with unique characteristics that offer higher education but are unable to seek and achieve TEQSA registration, an issue that the review regards as immaterial.

Response

The Government accepts this recommendation.

The Government will ask TEQSA to establish and maintain a list of any higher education providers that cannot be registered under the TEQSA Act. This will allow TEQSA to monitor the extent of this situation and for the Government to assess the need for further regulatory changes.

Recommendation 2.1

Section 60 and sub-paragraph 134(1)(c)(i) of the TEQSA Act should be amended to allow TEQSA to undertake sector-wide quality assessments only by direction from the Minister for Education, drawing on advice from TEQSA, the Higher Education Standards Panel, and other sector stakeholders. The TEQSA Act should provide for the Minister to empower any other body or working group to undertake a sector-wide quality assessment, where such a review may draw on information collected by TEQSA and the information-collecting powers of TEQSA. That part of Ministerial Direction No. 2 of 2013 that deals with sectoral quality assessment activities should then be repealed (see also recommendation 6.1 regarding Ministerial Direction No. 2 of 2013).

This recommendation would remove the current limitation on TEQSA under *Ministerial Direction No. 2 of 2013* that allows TEQSA to work on sectoral quality assessment activities only if it has surplus resources after "fully achieving" its core regulatory functions. In the absence of that direction, the TEQSA Act empowers TEQSA to undertake sectoral quality assessments at its discretion.

Response

The Government accepts this recommendation in principle and intends to make an alternative amendment to the TEQSA Act.

The Government considers that TEQSA has matured both as an organisation and as a regulator since *Ministerial Direction No. 2 of 2013* was made. This is demonstrated through a more risk-based, proportionate and stakeholder focused regulatory approach, as noted in the review. Therefore, the need for a restriction as severe as that in the Ministerial Direction has passed. However, if such assessments were “only by direction from the Minister”, this would potentially undermine TEQSA’s independence as the national regulator.

Therefore, the Government intends to amend the TEQSA Act to require TEQSA to inform the Minister and the Higher Education Standards Panel before it undertakes a sector-wide quality review under section 60. Through the process of informing the Minister and the Panel, TEQSA would inevitably need to consider both the resource implications of such activity and the regulatory burden it would create for providers.

Recommendation 2.2

The definition of ‘qualified auditor’ in section 5 of the TEQSA Act should be amended to exclude paragraph (c). TEQSA should give adequate notice to providers who are affected so they are able to make the necessary adjustments to their auditing arrangements; if necessary, TEQSA should use sub-section 27(4) to allow for exceptions to provide the necessary time.

Paragraph (c) of the definition of ‘qualified auditor’ includes ‘a member of the Institute of Chartered Accountants in Australia, or of the Australian Society of Certified Practising Accountants’. Removing these classes of accountants ensures that only specifically qualified auditors can sign off on audited financial statements.

Response

The Government accepts this recommendation and has already implemented the proposed change through the *Education Legislation Amendment (Provider Integrity and Other Measures) Act 2017*. This change brings the definition in line with requirements for the auditors of companies.

Recommendation 4.1

Consideration should be given to amending the National Code to improve alignment between the ESOS audit cycle and the TEQSA and ESOS registration cycles. The extent to which there is duplication of compliance effort in adhering to both the Threshold Standards and the National Code should be examined and processes streamlined. The review of the National Code in 2017 as part of the overall reform of the ESOS framework is the most appropriate mechanism for examining these issues. That review could consider establishing a process so that, where the standards overlap, providers are not required to demonstrate compliance with both sets of standards, but only the ascendant standards.

This recommendation supports a single process of re-registration for higher education providers on both the TEQSA National Register and the Commonwealth Register of Institutions and Courses for

Overseas Students (CRICOS), instead of separate procedures aligned with two separate audit cycles, which reduces the regulatory burden on providers.

Response

The Government accepts this recommendation and has already implemented the proposed change through the *National Code of Practice for Providers of Education and Training to Overseas Students 2018* (National Code 2018) that commenced on 1 January 2018.

Recommendation 4.2

The next review of the AQF should clarify which courses leading to Diploma, Advanced Diploma, Graduate Certificate and Graduate Diploma qualifications are regulated by TEQSA and which are regulated by ASQA.

The review notes that there is no specifically stated mechanism currently in place to establish which of TEQSA or the Australian Skills Quality Authority (ASQA, as the national regulator for the vocational education and training sector) is to accredit courses that lead to these qualifications, which creates some uncertainty for providers, students, employers and other stakeholders.

Response

The Government accepts this recommendation. This issue will be considered in the review of the Australian Qualifications Framework announced in the 2017-18 Budget.

Recommendation 5.1

TEQSA or the Department should maintain a public register to provide information of value to students in Australia who might be considering enrolling in higher education awards offered online by providers that cannot apply for provider registration or course accreditation because they are beyond the constitutional reach of the TEQSA Act. The register might identify online higher education providers that have been accredited by recognised overseas quality assurance agencies or it might identify international accreditation bodies that accredit such providers.

The review notes that the TEQSA Act does not currently apply to higher education awards offered by overseas providers from a campus or office outside Australia by way of online delivery to students in Australia; and that the provision of online content that crosses national boundaries represents a significant policy challenge for the regulation of higher education in Australia.

The review argues that more should be done to protect the interests of Australian students by providing information on the provision of higher education by overseas providers via online learning.

Response

The Government accepts this recommendation but notes that the value of a public register of information on online courses available to Australian students from overseas needs further consideration. The review outlines some options identified by TEQSA that would be consistent with this recommendation, including creation of an information centre about options for studying

overseas and developing TEQSA's cooperation with international agencies to provide for publication of more detailed information relevant to Australian students.

The Government will ask TEQSA to consider the most effective means to provide useful information on providers of online courses available overseas, with a focus on the quality assurance arrangements in other jurisdictions.

Recommendation 5.2.1

Section 58 of the TEQSA Act should be amended to delete paragraphs 58(1)(f) and (g) and sub-section 58(2) (consequential amendments will be required to sub-sections 58(3) and 58(4)). Paragraph 58(1)(h) should remain in place so that, if the need arises, Standards may be made that are of a nature different from Threshold Standards, noting that Threshold Standards set minimum acceptable requirements for the provision of higher education.

Section 58 of the TEQSA Act relates to making the Higher Education Standards Framework. The review recommends an amendment to remove reference to “non-Threshold Standards” (that is, Teaching and Learning Standards, Information Standards and Research Standards). The review states that, as no non-Threshold Standards have been made and that the revised Threshold Standards created in 2015 include domains on teaching, research and information, reference to these particular standards in the Act should be repealed.

Response

The Government accepts this recommendation.

Paragraph 58(1)(h) of the Act, which allows “other standards against which the quality of higher education can be assessed” to be made, will be retained, as the review recommends, to allow for the continued flexibility to make aspirational non-threshold standards if considered necessary in the future.

Recommendation 5.2.2

The TEQSA Act should be amended to remove references to the categories of Threshold Standards, that is, the Act should not require the development of Provider Standards (the Provider Registration Standards, the Provider Category Standards and the Provider Course Accreditation Standards) and Qualification Standards. This amendment, and related consequential amendments, should not come into operation until the next formal review of the 2015 Threshold Standards.

The review considered the need for separate categories of Threshold Standards. It notes the submission from the Higher Education Standards Panel, which states that the standards framework revised in 2015 is structured around the operational lifecycle of a typical provider rather than the regulatory transactions of provider registration and course accreditation – as reflected within the definition of Threshold Standards under section 6 of the TEQSA Act and in the structure of the initial Threshold Standards (2011) which were issued as four separate sets of standards.

It is noted that the link between the revised standards framework and the four sets of standards currently defined as the Threshold Standards in the TEQSA Act, is achieved in the 2015 legislative instrument by virtue of a concordance matrix. This matrix specifies which parts of the revised framework relate to each of the four sets of standards defined in the Act. While effective, this is more complex than is ideal.

Response

The Government accepts this recommendation.

The next formal review of the current standards – the review of the Provider Category Standards announced in the 2017-18 Budget – will provide an appropriate opportunity to enact this change. The review of the Provider Category Standards is expected to be completed in 2019.

Recommendation 5.3

The TEQSA Act should be amended to include a new section:

“195B ‘Disclosing information in relation to complaints’: Where TEQSA receives a complaint which relates to a regulated entity’s compliance with:

(a) this Act; or

(b) the Education Services for Overseas Students Act 2000; or

(c) legislative instruments made under those Acts;

TEQSA may, with the consent of the regulated entity, disclose higher education information in relation to that regulated entity to the person who made the complaint.”

This recommendation would enable TEQSA to disclose higher education information about a regulated entity to a person who has lodged a complaint, where the information relates to the entity’s compliance with the TEQSA Act or the *Education Services for Overseas Students Act 2000* or their legislative instruments, subject to the entity’s consent for the information to be released.

Response

The Government accepts this recommendation in principle and intends to make an alternative amendment to the TEQSA Act.

The Government considers that requiring provider consent to release such information compromises TEQSA’s regulatory independence and that sufficient safeguards are already in place to ensure such power is used judiciously, such as the application of natural justice principles.

Therefore, the Government proposes to amend the TEQSA Act to enable TEQSA to release such information without the relevant entity’s consent. Common law principles of natural justice and procedural fairness would, in practice, require TEQSA to seek the views of an affected provider before the relevant information is disclosed under the proposed provision; and to consider those views when making its decision about the release of the information.

On a related matter, a proposed amendment to section 188 of the TEQSA Act (see under Recommendation 5.4 below) will establish an exception to the offence of disclosure or use of higher education information if the relevant entity consents to the disclosure or use of that information.

Recommendation 5.4

It is recommended that the proposed changes to the TEQSA Act adopted in Appendix A (of the Review) should be enacted.

Response

A range of essentially technical amendments to the TEQSA Act were suggested in submissions to the review, which did not fall under the main themes discussed in the report. Appendix A of the report includes an analysis of these suggestions and recommends that some be adopted. The Government's response to each of the recommended amendments in Appendix A of the report is outlined below.

Section 151 – Decisions without meetings

The review recommends that section 151 be amended to provide that a decision may be made without a meeting of TEQSA if:

- a) a majority of Commissioners who take part in making the decision indicate agreement with the proposed decision in accordance with the method determined by TEQSA under sub-section (2);*
- b) all Commissioners were informed of the proposed decision, or reasonable efforts were made to inform all Commissioners of the proposed decision; and*
- c) at least two Commissioners take part in making the decision.*

This recommendation would bring the provision on the minimum number of Commissioners required for decisions without meetings (section 151) into line with the quorum currently required for meetings (in section 149).

Response

The Government does not accept this recommendation and also intends to make a different amendment to the TEQSA Act.

The proposed amendment would be inconsistent with the formulation of 'decision without meeting' provisions for other Commonwealth entities. In an age of improved technology, the need for decisions without a formal meeting should be extremely rare and under normal circumstances would be unwarranted. Where such a decision is required, however, the Government considers that all Commissioners should be engaged in the process and a majority of Commissioners indicate agreement.

Following consideration of the issues raised by this recommendation, the Government intends to amend the quorum requirement in sub-section 149(3) of the TEQSA Act, to specify that a quorum is constituted by a majority of Commissioners. Up to five Commissioners in total may be appointed to TEQSA. The Government considers that the currently specified quorum of two Commissioners is inappropriate when more than three Commissioners are appointed.

Section 188 – Offence of unauthorised disclosure or use of information

The review recommends that section 188 should be amended to insert paragraph 188(2)(c) so as to provide that: “sub-section (1) does not apply if: ... (c) the regulated entity to which the information relates has consented, in writing, to the use or disclosure.”

The proposed amendment would enable TEQSA to disclose higher education information for a specified purpose, with the written consent of the regulated entity to which the information applies.

The review notes the proposed paragraph appears to be a sensible one, and in line with the objects of the TEQSA Act. The review further states that the proposed amendment was tested with a small number of providers and Universities Australia; no concerns were raised, particularly as consent is required from providers prior to use or disclosure of information by TEQSA.

Response

The Government accepts this recommendation. This will enable TEQSA to share information with relevant stakeholders to improve the quality and integrity of Australian tertiary education.

Section 192 – Disclosing information to the Minister and Secretary

The review recommends that section 192 should be amended to provide that “For the purposes of administering laws relating to higher education, TEQSA may disclose information covered by sub-section (2) to an APS employee in the Department of Education and Training.

Sub-section (2) covers the following information: (a) higher education information; (b) information that would be higher education information but for paragraph (c) of the definition of higher education information. Note: This section allows TEQSA to disclose personal information (within the meaning of the Privacy Act 1988) for the purposes of administering a law relating to higher education.

Currently, section 192 allows TEQSA to disclose higher education information to the Minister, the Minister’s staff or to the Secretary of the Department of Education and Training. This amendment will allow TEQSA and the department to more readily share information for the purposes of administering laws relating to higher education.

Response

The Government accepts this recommendation. The amendment will make disclosure of relevant information by TEQSA to the department consistent with information sharing provisions under the *Higher Education Support Act 2003*.

New section 195A – Disclosing information relating to research

The review recommends inclusion of a new section 195A dealing with disclosing information for research purposes.

The proposed new section will allow TEQSA to disclose information to relevant stakeholders for the purposes of research relating to the provision of higher education, for example on quality assurance matters or planning, with the consent of the body that generated the information. This provision will provide TEQSA with more flexibility to generate and share insights into new approaches to higher education provision.

The review states that the precise wording of the section will require detailed consideration, and notes that the lay draft provided by TEQSA (and reflected in Appendix A in the report) is merely illustrative of the amendment TEQSA seeks to have adopted.

Response

The Government accepts this recommendation.

The proposed new section will enable information sharing for research purposes in line with disclosure provisions in the *Higher Education Support Act 2003*. The Department of Education and Training will work with TEQSA to clarify details of the proposed amendment.

Section 108 – Regulated entity represents itself as university

The review recommends an amendment be made to section 108 “designed to address the potential incongruity involved where an overseas university is not capable of being registered with TEQSA but would commit an offence by operating in Australia without registration.”

There are some circumstances where an overseas university undertakes some activities in Australia that do not require or permit registration by TEQSA. Nevertheless, operating in the full name of the home university would technically be an offence against section 108 of the TEQSA Act, whereby an entity that is not on the National Register may not represent itself as a ‘university’.

The review notes TEQSA’s explanation that “this issue is currently managed by the department and TEQSA but aligning the rules will ensure providers are clear on the expectations. The evolving nature of partnerships between universities and other bodies is likely to further test the boundaries of the legislation in this area.”

Response

The Government accepts this recommendation. Whilst the department and TEQSA currently manage this issue, clarification through an amendment will ensure overseas providers are clear on the regulatory expectations.

The Government therefore intends to amend section 108 to allow that a university can provide an overseas course of study in Australia under its own name without needing to be registered by TEQSA, as long as the provision is not ‘wholly or mainly’ from Australian premises.

Section 186 – Deadline for internal review

The review recommends an amendment be made to sub-section 186(2), which concerns deadlines for TEQSA to review internal decisions, to clarify the difference between deadlines for decisions to be made and deadlines for notification of such decisions.

The TEQSA Act provides that TEQSA must make a decision on an internal review within 90 days of receiving an application for the review of a decision (sub-section 186(1)) and notify an applicant of the outcome of that review within 30 days of making its decision on the review (sub-section 185(5)).

The Act also provides that TEQSA is taken to have affirmed the original decision if it has not notified the applicant of its decision on the review before the end of the 90-day period. This means a decision to vary or revoke a reviewable decision could be made within the 90-day period, but would be of no effect if the applicant were not also notified of that decision within the same 90-day period.

The proposed amendment to sub-section 186(2) would allow TEQSA 90 days to review a decision and a further 30 days to notify the applicant.

Response

After further consideration, TEQSA has affirmed that 90 days is a sufficient period to both review a decision and notify the applicant and that no amendment to the Act is needed. Therefore, the Government does not intend to accept this recommendation.

New sub-section 185(2A) – Internal review by TEQSA

The review recommends a new sub-section be enacted to allow TEQSA to suspend a decision subject to consideration of an application for an internal review of that decision.

The proposed new section would enable TEQSA to ensure that an internal review of a decision could take place without the decision under review taking effect prior to the outcome of the review process being known, essentially by suspending the original decision pending the outcome of a review.

Response

After further consideration, TEQSA considers this issue can be managed under current provisions of the TEQSA Act and that no amendment to the Act is needed. Therefore, the Government does not intend to accept this recommendation.

Section 199 – Delegation by TEQSA

The review recommends an amendment to sub-section 199(1), to enable TEQSA to delegate its functions to the CEO.

This would correct a perceived anomaly whereby, at the time of the review, TEQSA could delegate functions to its Commissioners and certain staff members, but not to the Chief Executive Officer. The review noted that the proposed amendment would enable TEQSA to better manage its operations.

Response

The Government accepts this recommendation and has already implemented this change. An amendment to enable TEQSA to delegate functions to the CEO was enacted through the *Education Legislation Amendment (Provider Integrity and Other Measures) Act 2017*.

Recommendation 6.1.1

The responsibilities of the TEQSA Advisory Council as set out in Ministerial Direction No. 2 of 2013 should be formally transferred to the Higher Education Standards Panel (the HESP) via an amendment to section 168 of the TEQSA Act; the legislation should enable the HESP to provide advice to TEQSA and authorise TEQSA's Chief Executive Officer (CEO) to seek such advice rather than setting out a requirement that the CEO of TEQSA must perform his or her functions under the Act consistently with the advice. That part of the Ministerial Direction dealing with the TEQSA Advisory Council should then be repealed (see also recommendations 2.1 and 6.1.2 regarding Ministerial Direction No. 2 of 2013).

Response

The Government accepts this recommendation.

The recommended amendment would enable the TEQSA Act to appropriately reflect the oversight function of the Higher Education Standards Panel, which was previously given to the TEQSA Advisory Council by virtue of *Ministerial Direction No. 2 of 2013*, but passed to the Panel when the two bodies were amalgamated in 2015.

Recommendation 6.1.2

Clause 3i of Ministerial Direction No. 2 of 2013 dealing with advice from the National Advisory Group for Higher Education Data and Information (NAGHEDI), which is now the Higher Education Data Committee (HEDC), should be repealed.

Response

The Government accepts this recommendation.

It is noted that TEQSA no longer separately collects provider data, but is provided with data sets from the Department of Education and Training as appropriate following a joint data collection exercise managed by the department. Therefore, the clause in the Ministerial Direction is obsolete.

Recommendation 6.2

Sub-section 167(2) of the TEQSA Act should be amended to provide that the Minister must ensure that the Higher Education Standards Panel includes members with contemporary experience regarding the provision of higher education by university and non-university providers.

Response

The Government accepts this recommendation.

It is important that the collective expertise of the Higher Education Standards Panel members is compatible with both of its oversight and advisory roles. Therefore, the Government will amend sub-section 167(2) of the TEQSA Act to ensure Panel members will collectively have contemporary experience with the provision of higher education by university and non-university providers.

Repeal of Ministerial Direction No. 2 of 2013

The review refers to a number of matters, which are the subject of *Ministerial Direction No. 2 of 2013* under subsection 155(1) of the TEQSA Act. This Direction was made in October 2013 as part of the Government's response to the independent Review of Higher Education Regulation. The purpose of the instrument was to direct TEQSA's CEO to consult and seek advice on a range of matters and to detail deregulatory initiatives undertaken to improve the efficiency and timeliness of TEQSA's core compliance activities.

Most issues canvassed in the Direction are no longer relevant. The review proposes that two matters of relevance – issues relating to TEQSA's conduct of sector-wide quality reviews (recommendation 2.1) and the oversight role of the former TEQSA Advisory Council (recommendation 6.1.1) – be transferred into the TEQSA Act. As noted above, the Government agrees with this approach. Therefore, the Government will repeal the Direction once the proposed amendments to the TEQSA Act have commenced.