



Dr Michael Spence

Vice-Chancellor and Principal

13 April 2011

Committee Secretary
Senate Education, Employment and Workplace Relations Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia
By email: ewwr.sen@aph.gov.au

Dear Committee Secretary,

Inquiry into the provisions of the Tertiary Education Quality and Standards Agency Bill(s) 2011

The University of Sydney is pleased that the above legislation is being subjected to scrutiny by the Committee in advance of being debated by both houses of Parliament.

The University provided the Government with the **attached** submission on the consultation draft of the legislation on 10 March 2011.

We understand that the bills introduced to the Senate on 23 March 2011 were substantially the same as those that were released for public consultation on 24 February.

The University's views about the principal Bill have not changed since our earlier submission. We understand and support much of what the Government is seeking to do through the establishment of a national regulator for the Australian higher education sector. Nevertheless, we continue to have concerns about the possible implications of the proposed reforms for the future powers and autonomy of university governing bodies.

Our position has been informed by the receipt of the **attached** independent legal advice, which suggests among other things that the legislation could be used to fetter the powers of university governing bodies – in our case the University's Senate.

Critically, we are advised that the legislation could be used not only to restrict the academic or other activities that an Australian university may pursue, but also to direct a university to undertake prescribed activities according to requirements set by TEQSA.

Under powers granted to it by the NSW Government in 1850, the Senate of the University of Sydney has a long and distinguished history of determining the academic and operational affairs of the University.

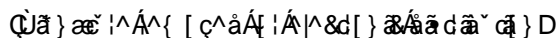
Given that our legal advice is that, as drafted, the legislation could potentially be used to restrict the powers of the University's Senate in ways that have not been possible previously, we felt obliged to place on the record our concerns about such an eventuality.

Our submission to the Government suggested areas where we thought the legislation could be strengthened by better aligning the text of the Bill with what we understand to be the Government's policy intent. In this regard we have noted Minister Evans' statements in his second reading speech and the media release that accompanied the introduction of the legislation to the Senate, which emphasised the Government's intention to ensure that the reforms preserve the independence of university governing bodies.

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.

We trust that the attached documents assist the Committee to suggest practical amendments to the legislation, which enable the Government's important quality assurance objectives to be achieved in a way that ensures that the independence of university governing bodies is respected and protected.

Yours sincerely



Michael Spence

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| Attachment 1 | University of Sydney TEQSA submission 10 March 2011 |
| Attachment 2 | University of Sydney legal advice on TEQSA legislation – legal and professional privilege waived through provision to the Senate Committee |



Dr Michael Spence

Vice-Chancellor and Principal

10 March 2011

The Hon Chris Evans

Minister for Tertiary Education, Skills, Jobs and Workplace Relations

By email: teqsa@deewr.gov.au.

Dear Minister,

I welcome the opportunity to provide a brief comment on the exposure draft of the *Tertiary Education Quality and Standards Agency Bill 2011* on behalf of the University of Sydney. I apologise for not providing our input on the Department's preferred template, but as I just wanted to stress a few key points, I thought a letter would suffice.

The views of the University in relation to the draft TEQSA legislation will be represented by the Group of Eight Universities (Go8) and Universities Australia, both through submissions and engagement with your department and the Parliamentary process over the coming weeks. Nevertheless, given the importance of the TEQSA legislation for the future of the Australian higher education sector, and the potential operational implications for the University of Sydney, I thought it important to place a brief complementary submission on the record at this stage in the process.

The University of Sydney strongly supports the Government's efforts to establish a national regulator for the higher education sector in order to ensure that domestic and international students (and prospective students) as well as others with an interest in the sector, can have confidence in the quality of all Australian higher education providers. We recognise the need for stronger and more consistent regulation, particularly following the challenges the sector has faced in recent years in relation to the provision of education services for international students, and as we enter the demand-driven funding arrangements for domestic undergraduate students from 2012.

We have contributed to the development of the Go8 submission on the draft legislation in particular, and strongly support the Go8's efforts to ensure that the self-accrediting authority of universities is made explicit within the principal legislation, and that a clear definition of a standards-based quality framework is included, with clear processes enshrined in the legislation to ensure that all of the standards will be developed in consultation with the higher education providers and other stakeholders.

We recognise that the exposure draft of the legislation is the result of considerable consultation with the peak bodies of the higher education sector, student and staff representative groups. We welcome your willingness to engage with the sector on the detail and to release the legislation for public consultation in advance of its introduction to Parliament. We further welcome your commitment to refer the legislation to the Senate Committee on Education, Employment and



Workplace Relations when it is introduced to Parliament. Opening up the policy development process to this level of scrutiny should result in a more robust outcome than would have been achievable otherwise. It should also ensure that any gaps or unintended consequences are identified and addressed.

Key issues for consideration

We welcome the inclusion in the principal legislation of the 'basic principles for regulation' and appreciate that it is your Government's intention that once the legislation is in place the principles will be used to ensure that TEQSA's approach to regulation and intervention in the affairs of higher education providers will take into account the 'scale, mission and history' of each provider. We have three key concerns, however, which we hope can be addressed before the legislation passes Parliament.

First and most significantly, we are concerned that the power proposed for TEQSA under Section 32 of the draft bill to impose a range of conditions on the University, could be used to override the powers of its governing body – the Senate. Currently, subsection 16 (1) of the *University of Sydney Act 1989 NSW (as amended)* gives the Senate the power, on behalf of the University, to determine as it sees fit the courses that the University offers and the degrees that it awards. The powers set out in subsections 32 (1) (c)-(f) of the draft bill appear to be inconsistent with subsection 16 (1) of the *University of Sydney Act*. As the draft bill does not state that the establishing legislation of universities will continue to apply in all circumstances, our advice is that to the extent that there is any inconsistency between the TEQSA legislation and the enabling legislation of universities, the TEQSA powers will prevail by virtue of Section 109 of the Constitution. For reasons that I elaborate upon below, even the possibility of the powers of the Senate being fettered by TEQSA is of serious concern to the University of Sydney.

Second, we are concerned by advice that we have received to the effect that the basic principles for regulation are not enforceable except by challenge in the Federal Court. We understand from the draft bill that only decisions of TEQSA covered by Section 183 will be reviewable internally by TEQSA and externally by the Administrative Appeals Tribunal under Section 187. This means that in the event that TEQSA were to decide to launch a review, assessment or investigation into the operations of a part of the University under Section 59, 60 or Part 6, there would be no administrative remedy available to the University. Should the University disagree with a procedural decision taken by TEQSA, its only option would be to seek a remedy at common law, with the expense and time delays entailed by such action. We therefore urge the Government to amend the legislation to include a general power for a higher education provider to apply to the AAT for a review of any TEQSA decision which the provider believes is inconsistent with the basic principles of regulation.

Third, there does not appear to be any requirement in the legislation for TEQSA to formally notify a provider of its intention to investigate an aspect of the provider's activities, or to give the provider an opportunity to respond to TEQSA's concerns in advance of such action being taken. We might trust that once established TEQSA will develop reasonable processes to ensure operational certainty for providers. We believe, however, that there is a need to make explicit in the legislation, the requirement that TEQSA must exercise its powers in ways that are procedurally fair, and which



respect Australian university traditions of institutional autonomy, as well as the principle of academic freedom endorsed by their Academic Boards and Senates.

I reiterate that we appreciate that it is not the intention of the Government to use the TEQSA legislation to fetter the powers and institutional autonomy of Australian universities with a long standing presence and sound record of high quality provision. The inclusion of the basic principles in the legislation demonstrates that intent. Nevertheless, given 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 its 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. The existence of universities that are independent from government and have autonomy over their activities is in our view simply fundamental to the maintenance of a strong democracy and civil society, and must be protected.

We trust that by continuing to work with the sector's peak bodies the Government will be able to bring forward amendments to the draft which address the concerns I have outlined here, and which the Go8 has addressed in more detail in its submission.

Yours sincerely

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Michael Spence



Richard Fisher AM
General Counsel

07 April 2011

Dr Michael Spence
Vice-Chancellor and Principal
A14 – Quadrangle
University of Sydney
NSW 2006 AUSTRALIA

Dear Vice-Chancellor,

Attached is a letter of advice received by me from Sarah Heesom concerning aspects of the operation of the Tertiary Education Quality and Standards Agency Bill.

By way of background Sarah has a high degree of expertise in legislation providing for the regulation of tertiary education.

I have read and had an opportunity to consider Sarah's advice and I endorse it.

I would make one additional comment so far as concerns the operation of clause 32(1) of the Bill. Sarah's analysis of that provision focuses on the power of the Agency, if that clause is enacted, to impose stipulations with a negative or restrictive operation on a university. That focus reflects the exemplification of the clause's operation which is found in the Bill. In my opinion, though, there is no warrant for limiting the operation of the clause by reference to those examples. Accordingly, the Agency would also be empowered to impose positive or mandatory obligations on a university under the clause such as, for example, an obligation, subject to funding, to conduct a prescribed course of tuition.

Yours sincerely

(Signature removed for electronic distribution)

R H Fisher

My ref: 2011/06

15 March 2011

Mr Richard Fisher
General Counsel
Room K2.03
The Quadrangle A14
The University of Sydney NSW 2006

Privileged and Confidential

Dear Richard

Memorandum of Advice

Thank you for your instructions to review the draft Tertiary Education Quality and Standards Agency ('TEQSA') bill 2011, and advise the University on any difficulties with its operation from a legal perspective.

I have reviewed the draft TEQSA bill and the draft explanatory memorandum. I have also briefly reviewed the TEQSA (Consequential Amendments and Transitional Provisions) bill, which amends the *Educational Services for Overseas Students Act 2000* and the *Higher Education Support Act 2003*. The Consequential Amendments and Transitional Provisions bill is complex, because it lists consequential amendments that will have effect only if the TEQSA bill is enacted before the proposed National Vocational Education and Training Regulator bill, and amendments to take effect once the vocational education and training law has commenced. I note that, due to time constraints, I have not considered the consequential amendments in detail.

Advice

I have identified the following significant legal issues with the operation of the draft TEQSA bill from the University's perspective.

Basic principles for regulation

In accordance with clause 13 of the TEQSA bill, TEQSA must comply with the following principles when exercising a power under the Act in relation to a regulated entity, including the University:

- (a) the principle of regulatory necessity – which means that in exercising its powers, TEQSA must not burden the higher education provider any more than is reasonably necessary;

- (b) the principle of reflecting risk – which means that in exercising its powers, TEQSA must have regard to a range of factors, including the provider’s history of scholarship, teaching and research; its student experiences; its financial state and capacity; and its history of compliance with the Act;
- (c) the principle of proportionate regulation – which means that TEQSA must exercise its powers in proportion to any non-compliance, or the risk of future non-compliance, by the provider.

These principles were developed jointly with representatives of the higher education sector through the earlier consultation process, and are set out in clauses 14-16 of the TEQSA bill. According to the explanatory memorandum:

Together these principles underpin TEQSA’s risk-based regulatory approach which will take into account the scale, mission and history of each provider. The focus will be on marginal and higher risk providers, allowing higher quality, lower risk providers to operate without unnecessary intrusion.

Notwithstanding the stated purpose of the basic principles of operation, there is no express or implied reference made to them in the simplified outline of the bill in clause 4. The corresponding part of the explanatory memorandum confounds this problem. It relevantly states:

Registered higher education providers must have their courses of study accredited by TEQSA before they are allowed to provide those courses of study in connection with regulated higher education courses.

In my opinion, clause 4 of the TEQSA bill should be amended to incorporate reference to the existence and purpose of the basic principles of operation.

A second issue concerning the basic principles for regulation relates to the proposed review powers in the TEQSA bill. Clause 183 of the bill provides a list of ‘reviewable decisions’. Subclause 184(1) provides that persons who are affected by and dissatisfied with a reviewable decision may apply to TEQSA to reconsider the decision. Subclause 185(1) provides that, upon receiving the application, TEQSA must consider the reviewable decision and affirm, vary or revoke the reviewable decision. Clause 187 states that an application may be made to the Administrative Appeals Tribunal for review of a decision of TEQSA under clause 185 to affirm, vary or revoke a reviewable decision.

A list of the reviewable decisions that may be subject to reconsideration by TEQSA and subsequent review by the AAT is attached*. They are specific in nature, and do not allow for a higher education provider to challenge the operational decisions of TEQSA including, for example, a decision by TEQSA to exercise its investigative powers. There is no general power for a higher education provider to seek review of a decision by TEQSA that fails to comply with the basic principles for operation.

Operation of State and Territory laws

Subclause 9(1) of the bill provides that a higher education provider is not required to comply with a State or Territory law purporting to regulate the provision of higher education. However, pursuant to paragraph 9(2)(a), subclause 9(1) does not apply in relation to a State or Territory law to the extent that the law establishes the higher education provider or regulated entity. Subclause 9(1) also does not apply in relation to a State or Territory law if that law purports to regulate a matter, of which the provision of higher education is only a part, unless that law is of a kind specified in regulations made for the purposes of the subsection.

The effect of clause 9 is that higher education providers will not have to comply with NSW laws governing higher education exclusively. The University will be required to comply with all other NSW laws that currently apply, including privacy laws, fair trading laws, auditor-general laws and ombudsman laws. The University will also be required to comply with the *University of Sydney Act 1989*.

It is important to note, however, that the TEQSA bill does not provide that the University of Sydney Act will continue to apply in all circumstances. As a consequence, the TEQSA Act will, by virtue of section 109 of the Constitution, prevail to the extent of any inconsistency.

For example, subclause 32(1) of the TEQSA bill provides that TEQSA may impose conditions on a registered higher education provider's registration. Relevantly, these conditions may include:

- (c) restricting or removing the provider's authority to self-accredit one or more courses of study;
- (d) restricting or removing the provider's ability to provide an accredited course;
- (e) restricting the number of students that may enrol in a particular accredited course provided by the providers;
- (f) restricting or removing the provider's ability to offer or confer a regulated higher education award.

Subsection 16(1) of the University of Sydney Act states:

Without limiting the functions of the Senate under subsection (1A), the Senate may, for and on behalf of the University in the exercise of the University's functions:

- (a) *provide such courses and confer such degrees (including ad eundem degrees and honorary degrees) and award such diplomas and other certificates, as it thinks fit.*

In my opinion, paragraphs 32(1)(c)-(f) of the TEQSA bill are inconsistent with paragraph 16(1)(a) of the University of Sydney Act. Therefore, the Senate's power to provide such courses and confer such

degrees as it sees fit will be limited by any condition imposed by TEQSA under subclause 32(1). If the TEQSA bill is enacted in its current form, the Senate's powers will be fettered in a way that has not previously been possible.

Schedule 3 of the Consequential Amendments and Transitional Provisions bill prescribes the transitional arrangements, which make clear that a higher education provider established by a State or Territory act is taken to be registered, and that this deemed registration includes the authority to accredit courses of study. I note that the last day of automatic accreditation for the University of Sydney is 31 August 2018. I also note that Part 2, Item 12(3) of Schedule 3 expressly states that nothing in that item (Transferring an authorisation to self-accredit courses of study) prevents an authorisation to self-accredit one or more courses of study from being removed or restricted under the TEQSA Act.

Compliance and quality assessments

In accordance with clause 59 of the TEQSA bill, TEQSA may review or examine any aspect of an entity's operations to assess whether a higher education provider continues to meet the Threshold Standards (as defined).

In accordance with clause 60 of the TEQSA bill, TEQSA may review or examine any aspect of an entity's operations to:

- (a) assess the level of quality of higher education provided by one or more registered higher education providers; or
- (b) assess whether there are any systemic issues relating to a particular course of study leading to a particular regulated higher education award; or
- (c) assess the level of quality of, or whether there are any systemic issues relating to, the courses of study that lead to one or more kinds of regulated higher education awards.

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.

Disclosing information to the public

Clause 196 of the TEQSA bill states that TEQSA may disclose to the public higher education information that relates to anything done, or omitted to be done, under the Act. Higher education information is defined in clause 5 of the bill as information relating to a regulated entity:

- (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*).

In my opinion, the meaning of this clause is not sufficiently clear. The preceding clauses impose limits on the disclosure by TEQSA of higher education information, consistent with the purpose and functions of the receiving entity. These preceding clauses would appear to have no effect or import if clause 196 is interpreted and applied literally. The explanatory memorandum states:

This provision 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.

In my opinion, clause 196 requires substantial revision to reflect its stated intention.

Please let me know if I can be of any further assistance in this matter.

Yours sincerely

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Sarah Heesom

Tertiary Education Quality and Standards Agency Bill

Part 10 – Administrative law matters

Division 1 – Review of decisions

183 Reviewable decisions

For the purposes of this Act, each of the following decisions of TEQSA are a ***reviewable decision***:

A decision under paragraph 19(1)(a) that an application for registration in a particular provider category is inappropriate.

A decision under paragraph 19(1)(a) that it would be appropriate for an application for registration to be in a particular provider category, when that provider category differs from that sought by the applicant.

A decision under subsection 21(3) to extend the time within which TEQSA may decide an application for registration.

A decision under section 21 to register an applicant for registration in a particular provider category.

A decision under section 21 to reject an application for registration.

A decision under subsection 32(1) to impose a condition on a registration.

A decision under subsection 32(2) to vary a condition imposed on a registration.

A decision under section 36 to refuse to renew a registration.

A decision under section 38 to refuse to change the category in which a registered higher education provider is registered.

A decision under section 41 to refuse to authorise a registered higher education provider to self-accredit one or more courses of study.

A decision under section 43 to reject an application to withdraw a registration.

A decision under subsection 49(3) to extend the time within which TEQSA may decide an application for accreditation.

A decision under section 49 to reject an application for accreditation.

A decision under subsection 53(1) to impose a condition on an accreditation.

A decision under subsection 53(2) to vary a condition imposed on an accreditation.

A decision under section 56 to refuse to renew an accreditation.

A decision under section 99 to shorten the period of an accreditation.

A decision under section 99 to cancel an accreditation.

A decision under section 100 to shorten the period of a registration.

A decision under section 101 to cancel a registration.

A decision under subsection 198(4) to enter details on the Register.