

A Submission To The Senate Education And Employment Legislation Committee Inquiry Into The Tertiary Education Quality And Standards Agency Amendment Bill 2014

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1.0 Introduction

Thank you ever so much for your letter dated 9th April 2014 inviting me to submit my views to your inquiry into the Tertiary Education Quality and Standards Agency Amendment Bill 2014.¹

I am a former student politician having been, inter alia, an elected member of the University of Melbourne Students' Representative Council in 1980. In addition, between 1978 and 1984, I was a member of at least seven different student clubs promoting various causes then popular amongst the more politically involved students.

May I say that the idea of having a Tertiary Education Quality and Standards Agency is, in itself, quite sound.

Nevertheless my opinion is that the original legislation, as passed in 2011, was badly conceived and ill executed, not to mention that some think the act has a problematic constitutional basis, both in respect of Commonwealth legislative power, and, more importantly, in respect of the Commonwealth financial power.²

I submit to the inquiry that this 2014 bill, is, likewise, badly conceived and ill executed. Therefore it should be sent back to the Cabinet and the Ministerial Education Council for reconsideration and redrafting.

¹ See the 2014 bill (2014).

² See the 2011 bill (2011).

2.0 Social Outcomes And Higher Education

The Tertiary Education Quality and Standards Agency Act 2011 addressed a pressing need in the modern world for Australia to deal with the technological consequences of modern changes in the utilisation of educational technology in the University sector.

Reading Ernst & Young's 2012 report "University of the future: A thousand-year-old industry on the cusp of profound change"³ it is obvious that something must be done about getting some apposite just and effective regulation of Australian higher education to avoid systemic disaster.

"The massive increase in the availability of knowledge online ..." (p. 4)

"Global mobility will grow for students academics and university brands." (p. 4)

"Fiercely competitive domestic and international student markets." (p. 6)

"Ubiquitous content." (p. 6)

"Bring the University to the device - Massive Open Online Courses and the rise of online learning." paraphrased (p. 6)

"University libraries, faculty domains, and research institutes were where knowledge was created, stored and shared." (p. 7)

"Campuses will still exist as places of teaching and learning, research, community engagement, and varied forms of student experience - assuming universities can deliver a rich, on-campus experience." (p. 9)

"There will be 15-20 independent, global brands ... the rest will be playing for the silver medal." (p. 10)

"Several university executives also highlighted the new regulatory regime being implemented by TEQSA as a potential brake on the speed of change." (p. 15)

"Regardless of the target segment - metropolitan students, regional students or international students - and the pressure on institutional finances, universities will need to find ways to maintain academic excellence and deliver quality teaching and research." (p. 24)

³ See (Justin Boker et al, 2012)

An earlier generation of education reformers read John Vaizey's "Education for Tomorrow" originally published in 1962 and then went on to extend the so-called red brick university system in England that allowed so many more students to attend university.⁴

"Apart from selection by wealth, the realisation that dividing children up according to 'types' not only shows a misguided attitude towards the children, a mistaken idea of their differing abilities, but is quite inappropriate to our modern economic needs, has gradually dawned on the country." (1966, p. 48)

"By the end of the decade there will be about 200,000 university students, over 100,000 in the training colleges and, say, 80,000 in other institutions of higher education." (1966, p. 69)

Nowadays there are signs of possible systemic disaster in university education in several countries. The Economist's remarks last April 5th in the article entitled "Is college worth it?", say, in respect of recent research:-

"Of the 153 arts degrees in the study, 46 generated a return on investment worse than plonking the money in 20-year Treasury bills. Of those, 18 offered returns worse than zero." ⁵

That 18 credentialled and approved arts degree programmes in the United States are today so dumbed down or so ill-regarded or both that prospective students would be better off in lifetime earnings seeking unskilled work, say, flipping burgers, appalls me.

The issue of nature and nurture is often raised by those committed to mediocrity in seeking to avoid taking blame for not caring about education. I submit that many of the students of these 18 courses really are being failed in great deliberation by educators politically committed to 'dumbing down', and that this failure to attain a worthwhile qualification is not by reason of any lack of drive or lack of effort by the students, nor by reason of any lack of natural talent.

As futurist Alvin Toffler predicted in 1970:-

"Computers, for example, make it easier for a large school to schedule more flexibly. They make it easier for the school to cope with independent study, with a wider range of course offerings and more varied extra-curricular activities." ⁶

⁴ See (Vaizey, 1966) the quotes are from the revised 1996 edition.

⁵ See The Economist of 5th April (2014, p. 27).

⁶ See (Toffler, 1970).

After all there is no point training engineers to build bridges that fall down, just as there is no point training dentists in academic knowledge whose technical skills amount to little more than a deft capacity in teeth-pulling.

Of note is that recent technological change is causing the dumbing down political movement to abolish themselves, in that the contestability of markets and the unwillingness of students to knowingly enroll in courses that are vocationally useless to said students seems to be doing so to the institutions that resolve politically to offer a second rate educational experience. If in response to such expressed student choices the powers that be try to shunt students into courses of proven doubtful vocational worth by the orchestrated capping of places and the use of quotas, certainly a plausible interpretation of some social grievances in the media, then the creation of the Tertiary Education Quality and Standards Agency is an opportunity to remedy both related situations by fixing up directly said institutions!

The reduction of stratification of higher education from the 1970's onwards does not seem to me to have been associated with raising the academic standards of the second-tier institutions and technological colleges upwards towards the standards of the leading edge universities. Instead, in the newly described un-stratified 'university sector', there has been widespread dumbing down of the academic content of most courses. The best one can say is that for most of the courses some continuance of the necessary education in the necessary technical skills required by many vocational qualifications has continued.

Whether these events have occurred as part of the life-cycle of academic knowledge as the subset of all human knowledge past present and future that proves to be of utility in vocational training in the present era, or whether some institutions have problems, is a question, perhaps, best interpreted after a reading of Nonaka and Takeuchi's *The Knowledge Creating Company*.⁷ Nonaka very well considers not the ontological status of knowledge, but instead its role in the modern corporation and the typical life cycles of useful knowledge as used in the modern corporation. No doubt some dated academic knowledge in some courses is no longer of much more than historical interest. Just as some skills such as the skills of commercial glass blowers have been forgotten, perhaps some current fields of academic knowledge will be in 2100 mostly forgotten?

One academic opponent of centralised national control of the curriculum, and also centralised national control of educational standards, in the United States today, Dianne Ravitch, in *The Language Police* argues persuasively for a secular education for all. She has concerns about "right wing Christian groups."⁸ Given that in the Australian situation not only does the federal government fund chaplains at the secondary level and subsidise

⁷ See (Ikuujiro Nonaka and Hirotaka Takeuchi, 1995).

⁸ See (Ravitch, 2003, p. 76).

chaplains at the university level, in contravention of the Constitution's section 116, but it also funds religious-run institutions of education at the secondary level, the situations may be quite different, nevertheless her commentary does to my mind establish that educational theorists all across the spectrum do not so much as disagree about the facts of education, but instead disagree about how to decide what to do about the difficult political choices any education system must make in respect of policies and priorities.⁹

This committee has previously considered the 2011 bill.¹⁰ On pages viii and ix of the committee's May 2011 report eight recommendations were made. Recommendation 2 in the 2011 report refers to a proposed negotiated intergovernmental agreement between the Federal State and Territory governments that, *inter alia*, would cover this agency. Unfortunately as far as I'm aware due to political bickering between the two sides of politics no satisfactory resolution to a number of important matters in dispute in relation thereto has yet been negotiated.¹¹

No doubt one intent held by some backers of the original 2011 bill was to address these various problems by the establishment of the Tertiary Education Quality and Standards Agency to, in the name of education, uphold the rights of the students to be treated honorably and decently by the educational institutions they attend, by apposite enforcement action directed to raising the standards, and by monitoring action in assessing the quality of university courses, with a view to apposite and just enforcement actions either direct, or indirect via recommendation to the Minister of further legislative action.

Though it be almost universally acknowledged that there should be apposite just and effective regulation of higher education in Australia in the name of education the promotion of commerce and industry and to better provide a high quality liberal education to all, there does not seem to exist the necessary consensus as to the best way so to do.

It is disappointing to me to find the federal government abandoning the field of quality assessments as proposed in Schedule 1 Part 1.¹²

Perhaps when the Ministerial Council has been persuaded of the necessity to address the dumbing down of academic knowledge in the university sector in an apposite and just way, putting the rights of the students first, there might then be a another and more successful attempt to better regulate quality in the higher education sector?

⁹ See (Ravitch, 2003).

¹⁰ See the committee's report on the 2011 bill (2011)

¹¹ I studiously read The Australian's higher education section every Wednesday.

¹² See the Explanatory Memorandum (2014, p. Schedule 1 Part 1) and the bill (2014, p. 3).

3.0 A Second Order Social Outcome: Leadership Education

John McWhorter in “Doing Our Own Thing: The Degradation Of Language And Music, And Why We Should, Like, Care” argues passionately that societies’ leaders need to be well educated in rhetoric so as to be able to inspire people with their speech-making.¹³

Sad to say, some right-wingers object per se to practical leadership education being facilitated in universities by the traditional means of elective student representation.¹⁴ On the other hand, I, believing that both graduates and undergraduates should be represented on university councils, find this disappointing.¹⁵ Unfortunately this matter I understand was dealt with at federal level by placing such considerations into “A voluntary code of best practice for university governance” rather than by finding any consensus for putting any specific provisions in this bill or any other bill.¹⁶

That leadership education is necessary in our society should be taken as read.

Nevertheless there is an inherent problem in the teaching of academic knowledge of such limited utility in terms of vocational application as, say, Ancient Greek and Latin and Classics. The number of teachers in these subjects required in Australia, perhaps by no more than half a dozen of the most elitist private ruling class schools, would be so few? Whether such courses deserve public funding, in the light of the social role said courses play in the reproduction of elite societal relations via the valuation of social structures that so do, is questionable.

A more modern democratic and meritocratic approach to leadership education is to select the leadership of society by the mechanism of elective office in university student representation. Paraphrasing the traditional adage, those who do not learn the lessons of history are doomed to repeat them. Should the powers that be attempt to prevent such leadership education of the reformist left as prove necessary for the reformist left to effectively represent the section of the community who support social reforms by parliamentary action, the likely result is that revolutionaries will fill the void.

Leadership education in the university sector is very much promoted by strong guarantees of academic freedom.

¹³ See Chapter 2 “Mere Rhetoric: The Decline Of Oratory” which compares the great public speakers of the nineteenth century with today’s. (McWhorter, 2003).

¹⁴ See (Peter Costello, with Peter Coleman, 2009, pp. 10-32) and (Howard, 2011, p. 612).

¹⁵ See for example the Melbourne University Act 1958 (Anon., 1984, pp. 115-136) sections 5 (1) (b) ten graduates, 5 (1) (db) one graduate student, 5 (1) (e) two undergraduate students, 5 (1) (f) the President of the Students’ Representative Council *ex officio*.

¹⁶ See (Ross, 2011).

The freedom of enquiry to research social issues and help in the addressing of social grievances thereby requires that the power of the Minister to issue personal directions in order to discipline or dismiss individual university academics for political ground be circumscribed.¹⁷

As I remarked in my submission to the 2011 enquiry, “unfortunately almost all policy considerations are delegated”, perhaps because there is not yet agreement on said policy considerations at the Ministerial Council?¹⁸

I submit the committee should approve the proposed reduction in scope of the power of Ministerial direction¹⁹ to matters of a general nature only as being productive of academic freedom in that it would circumscribe the Ministerial powers by preventing interventions with a view to dismissal of individual academic staff members for political ground.

If an academic staff member’s politics be so malevolent to the body politic as to warrant sanction, my opinion is that that sanction should in peace time be criminal prosecution under the ordinary criminal law by the ordinary prosecution authorities, and that in time of war additionally by the Attorney General for good ground, certainly not by the Minister for Education!

And perhaps some ‘motherhood’ statement about academic and political freedom should be included in Part 1 Division 2 in a section “General Aims” inserted before section 3 Objects?

¹⁷ See the 2014 bill (2014, p. 19)

¹⁸ See (Oliver, 2011).

¹⁹ See the Explanatory Memorandum (2014, p. Schedule 1 Part 7).

4.0 The Proposed Dismissal Of The Commissioners

I would submit that any removal of persons from established offices of such seniority as the TEQSA Commissioners prior to the agreed upon ends of their set terms should proceed by a process of the Minister arranging prayers for their removal for ground to be read out in the Parliament.

I say this in part because the original legislation gave the “privileges and immunities of the Crown” to the Commissioners and Standards Panels Members.²⁰ It could be argued in the High Court, for example, that, because the Commissioners and Standards Panels Members have roles in the regulation of higher education that mix policing roles and semi-judicial roles with administrative responsibilities, that Part 4 and Part 5 section 45 of this 2014 bill are null and void and of no effect.²¹ And, because, in addition, the bill provides for the immediate reestablishment of the positions for re-advertisement and filling.²²

A 1944 British judicial appeal against dismissal by an established civil servant is detailed in Phillips.²³

If the Minister were of the opinion that the TEQSA Commissioners should be dismissed before the end of their set terms for proved misbehaviour or incapacity, the situation would be different, and the office holders should be offered natural justice and due process of law.

The slippery slope of legislative dismissal of such established offices endangers the body politic with the politicisation of other such positions as the Auditor General.

²⁰ See the 2011 bill (2011, p. Sections 137 p99 and 169 p116).

²¹ See The Annotated Australian Constitution (Attorney General's Department, 1980) sections 72 and 73. The Interstate Commission was intended to be a semi-judicial dispute settling body in nature.

²² See the 2014 bill (2014, pp. 9-11, 16)

²³ See (Phillips, 1967, pp. 72-4)

5.0 Constitutional Proprietaries: Powers

It has to be said that the Tertiary Education Quality Standards Agency Bill 2011 was *ultra vires*.^{24 25 26 27 28 29} It was not passed by the necessary constitutional procedures. This I believe was due to the lack of policy consensus in the respective Ministerial Educational Council.

I would submit that this is so because that the Federal government has no direct responsibility for the provision of higher education.

The real question that then needs to be asked now is how to best address this situation in order to remedy the situation?

I note it is said, that, in respect of general legislative responsibilities, where it prove necessary to address a political question at the national level, said political question relating to state responsibilities, section 51 (xxxvii) provides a mechanism for enactment of such necessary legislation by referral of State powers, or, by States afterwards adopting and ratifying the requisite legislative solution.

Therefore the best remedy to the unconstitutionality of the 2011 act is for the Minister to persuade the Ministerial Council to get the six state parliaments to so refer by so said adoption and ratification.

I would contend that providing quality of education experience to university students is a worthwhile Federal government endeavour totally supportable and I appeal to the government and the opposition both federal and state to get their act together with a view to remedying the situation.

²⁴See the 2011 bill sections 8 and 9 (2011, p. 17).

²⁵See The Annotated Australian Constitution (Attorney General's Department, 1980).

²⁶See the committee's 2011 report (2011, pp. 26-8).

²⁷See my 2011 submission (Oliver, 2011).

²⁸See Bernard Lane's press comment (Lane, 2011).

²⁹ I would contend that section 51 (xxiiiA) allows the Federal government to provide direct benefits to students as students is not relevant. Likewise the corporations power is not relevant in that bodies politic and corporate under state legislation of such nature as universities are in essence simply not trading and financial corporations.

6.0 Constitutional Proprietaries: Finance

In a sense Australia has had what we now call vertical fiscal imbalance ever since the Constitution came into force in 1901. One interpretation of the Constitution Alteration (State Debts) referendum of 1909 and further of the Constitution Alteration (State Debts) referendum of 1928 is that each referendum authorised a general transfer of surplus to requirements Federal revenues to the States, with a view to addressing said vertical fiscal imbalance, said general transfer of funds not being subject to the express and specific restrictions on federal spending in sections 51 and 52; furthermore I believe that said authorisation under the principle of Jubilee should stand for a period of 50 years.^{30 31}

I note that the 1st of January 1978 has passed us by, further note that the irresponsible politicians of Australia have not got their act together and not addressed Australia's vertical fiscal imbalance in any major way, other than the Constitution Alteration (Social Services) referendum of 1946.

That the Federal government has an inherent executive power does not authorise expenditure. That the Federal government has an express and specific power to spend revenues on administration of regulation in respect of a matter covered under another head of power does not help either.

However my opinion what it's worth is that the administrative expenditures of the Tertiary Education Standards and Quality Agency could have any irregularity authorised by retrospective declarative legislation, and that the financial irregularities could thus be remedied by the Ministerial Council agreeing by consensus to remedy the legislative powers situation by the mere act of the six state parliaments adopting and ratifying the original bill, perhaps in terms that include an agreed upon specific and limited referral of powers to the Commonwealth to regulate tertiary education in respect of quality and standards.

Please do not consider TEQSA however to be a toothless tiger. I am sure that the Australian National University and the Charles Darwin University have always been validly regulated by the 2011 act, and that such of the expenditures of the agency as could be fairly allocated in good faith by the ordinary rules of accountancy as being expenditures incurred in regulating universities in the Australian Capital Territory and the Northern Territory have always been validly appropriated and expended under the Constitution.

³⁰ See The Australian Constitution Annotated (Attorney General's Department, 1980).

³¹ Some of the legal theory underlying my views in this matter is from a law textbook I read when at Burwood Heights High School in the 1970's, which I had borrowed from a local council library a few times, the title of which I do not remember, in addition to more recent press comment and views I've read on social media.

7.0 Conclusion And Proposed Recommendations

Might I submit the following proposed recommendations to the committee as being the sort of recommendations that I think might be moot and just in the situation given my concerns about the text of the bill and the tabled explanatory memorandum?

Proposed Recommendation 1. The committee recommends to the Senate that this bill be rejected in its current form.

Perhaps the committee should it become of the opinion that some of my concerns merit amendments to the bill instead could get drafted up such amendments as the committee think fit?

Proposed Recommendation 2. The committee recommends to the Minister to take apposite and appropriate action in respect of recommendation 2 of this committee's 2011 report on the Tertiary Education Quality and Standards Agency Bill 2011, being the recommendation proposing an intergovernmental agreement to be negotiated between Federal State and Territory governments.

Proposed Recommendation 3. The committee recommends to the Minister to seek legal advice in respect of the legalities of the proposed dismissal of the TEQSA Commissioners en bloc pursuant to Part 4 and Part 5 section 45.

Thanks again for the opportunity to put my views to the committee in relation to this important piece of legislation. I might mention that in addition to my views on education this submission also makes a few points in relation to my views on the implications of the theory of responsible government to government financial relations. To be honest and sincere I am a republican and these views relate to what I regard as the correct political strategy to force the issue of the republic, by consistently standing on governmental fiscal proprietaries to by so doing cause the replacement of Australia's horse and buggy constitution with a new republican one. Therefore take what I say with a grain of salt, knowing one subtext of some of my concerns.

Yours Faithfully, Andrew Oliver, Tuesday 15th April 2014

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