



Dr Michael Spence AC

Vice-Chancellor and Principal

14 March 2017

Professor Nick Saunders AO
Chief Commissioner
TEQSA
GPO Box 1677
Melbourne Vic 3000

By email: consultation@teqsa.gov.au;

Dear Professor Saunders,

Proposed changes to the publication of TEQSA's regulatory decisions

Thank you for the opportunity to provide feedback on TEQSA's latest proposed changes to the publication of its regulatory decisions. We understand that Universities Australia and the Group of Eight universities will provide submissions on behalf of their respective members. We have provided input to both of these submissions and our comments here are intended to complement the submissions made by our representative bodies.

Our responses to the Consultation Paper's four questions are **attached**. In summary, while we agree it is important for students and other stakeholders to have access to information about higher education providers, we do not support TEQSA's proposals regarding the future publication of information about its decisions relating to providers registered under the "Australian University" category. Our assessment is that insofar as the proposed changes would apply to Australian universities, they would be inconsistent with the TEQSA Act's basic principles of regulation: *regulatory necessity*, *reflecting risk*, and *proportionate regulation*, and with the overarching requirement for TEQSA to respect the rules of procedural fairness.

We have particular concerns, on procedural fairness grounds, about TEQSA's proposal to publish information about "significant" decisions it makes in relation to Australian universities. Our main concerns are:

1. That TEQSA's proposals could result in the publication and promotion by TEQSA of information with potentially serious reputational, financial and other implications for the university to which the decision relates, but also for all other registered Australian universities.
2. For matters that may be reviewable by the Administrative Appeals Tribunal under Section 187 of the TEQSA Act, the university that is the subject of the decision may not be provided with an opportunity to provide feedback to TEQSA prior to the publication of the information, which could occur before the expiry of the 28 days required for decisions that may be referred for review to the AAT.
3. For decision made by delegates of TEQSA that are reviewable internally by TEQSA under sections 184 and 185 of the TEQSA Act, the information may be published before the expiry of the minimum 30 days required by section 184 (4)(a) for a person dissatisfied with the decision to apply for review.



4. In both instances outlined in 2 and 3 above, TEQSA's publication and promotion of its decisions could impact negatively on the provider, and all registered Australian universities by association, even when the decision may be overturned following internal or external review.

Please be assured that we recognise and support the government's and TEQSA's desire for transparency, and the benefits for the system as a whole of students and other stakeholders having access to timely information about TEQSA's regulatory decisions relating to individual providers.

In our considered view, however, some of the TEQSA's proposals as currently drafted do not strike an appropriate balance between the need for such transparency and the critical importance of ensuring that higher education providers receive procedural fairness.

Yours sincerely,

(Signature removed)

Professor Stephen Garton
Acting Vice-Chancellor

University of Sydney submission in response to TEQSA's Proposed changes to the publication of TEQSA's decisions, Consultation Paper, March 2017

We understand TEQSA's key proposed changes to include:

1. TEQSA would in the future publish information about its decisions when they are made, or as soon as practicable thereafter. (p. 2)
2. TEQSA would no longer wait for the expiry of the 28-day period for providers to lodge an appeal against a decision that is reviewable by the Administrative Appeals Tribunal. (p.2)
3. TEQSA's approach to publishing such information would be guided by a new and simplified set of "publication principles": *transparency, compliance, fairness and consistency*. (p.2)
4. The method of publication would be primarily via summary entries TEQSA would make on National Register of Higher Education providers. However, TEQSA would also publish news announcements and media releases about "significant decisions" made by TEQSA, drawing public attention to these decisions. An example of a "significant decision" is one where TEQSA rejects a provider's application for renewal of registration. (pp.4&5)
5. The published information would be confined to a description of TEQSA's decisions, the provisions of the TEQSA Act or the Higher Education Standards Framework on which the decision was based and, where relevant, a description of the review rights available to provider. (p.3)
6. TEQSA would ensure that the information it publishes is updated to reflect the status of any review process. (p.3).
7. TEQSA would start publishing information about decisions to reject an application for initial registration and for the initial accreditation of a course of study (two things TEQSA currently does not do). (p.3).

The Consultation Paper sought feedback in response to four specific questions arising from these proposed changes. We have responded briefly to each of these below.

Our positions on the various substantive issues under consideration have not changed materially since TEQSA last consulted on similar proposals in 2013. We refer TEQSA to our submission to that process, [available here](#), as it provides more detail on the reasoning behind our positions on the various issues TEQSA is revisiting with this current process.

Question 1: Do you agree with the proposed principles to guide TEQSA's approach to publishing information about its decisions?

Not as currently proposed.

We reiterate the feedback we provided in 2013 about the need for the TEQSA Act's three basic principles of regulation: *regulatory necessity, reflecting risk, and proportionate regulation* to be applied and included explicitly in TEQSA's "publication principles". We note that the 2017 Consultation Paper includes no references to the basic regulatory principles. As a result the proposed new "publication principles" do not give sufficient emphasis to the Act's requirement that, when exercising any of its powers TEQSA must, for example in relation to the principals *reflecting risk*, have regard for the particular history and operational circumstances of each provider.

What will the principle: "*TEQSA will adopt a consistent approach to the publication of information*" (p.2) actually mean in practice? If it would mean — as TEQSA proposed in 2013 — that providers across all registration categories will be treated the same by TEQSA when publishing information about decisions relating to them, then we do not support the principle. However, if TEQSA's



intention is to treat all providers within a registration category consistently, then, subject to our other concerns outlined below being addressed, we would be open to supporting the inclusion of this principle.

Directly related to our concerns about the absence of the basic regulatory principles in TEQSA's new proposals, we note the potential implications for providers registered under the "Australian University" Category of TEQSA's proposed removal of the following principles from its previous list:

"The need for TEQSA to avoid the publication of information that may unnecessarily prejudice the provider's ability to operate in the market."

"The need to maintain confidentiality to effectively investigate an issue, and whether any public comment might prejudice TEQSA's ability to investigate a matter or the right of a person or body to a fair hearing."

"The need for TEQSA to give each provider an opportunity to comment on a draft public report pertaining to its higher education operations prior to its publication."¹
(TEQSA's approach to public reporting of regulatory decisions, Consultation Paper, March 2013, p.5)

Removing these principles would be inconsistent with one or more of TEQSA's basic regulatory principles, as well as with the overarching principle of procedural fairness.

Finally, the Consultation Paper refers to TEQSA's publication and promotion of decisions applying to "significant" decisions, though no definition of the term is provided. We recommend that TEQSA include a definition of the type of decisions to which the "publication principles" will be applied. As a starting point it would appear that all decisions that may be reviewable by the Administrative Appeals Tribunal under section 183 of the Act would qualify as "significant".

Question 2: Do you agree with the proposed approach to the timing of the publication of information about TEQSA's decisions?

Certainly not as currently proposed and/or without much more detail about how these proposals would work in practice for providers registered under the "Australian University" Category.

For similar reasons to those outlined in our response to Question 1 above, we are strongly opposed to TEQSA publishing summary information about its regulatory decisions regarding registered Australian universities, potentially:

- i. without first giving the provider involved an opportunity to provide feedback to TEQSA on the proposed decision and the proposed content of the information to be published about the decision; and
- ii. before the expiry of the periods required for all TEQSA decisions that are reviewable internally (30 days) or by Administrative Appeals Tribunal (28 days).

Here we note that in its 2013 Consultation Paper TEQSA acknowledged that a decision to publish additional information about a provider on the National Register was itself a reviewable decision, and the importance of ensuring procedural fairness:

"A decision to include additional information on the National Register is a reviewable decision under section 183 of the TEQSA Act. TEQSA will not publish, apart from in exceptional circumstances, a public report on the National Register until the period

¹ TEQSA's approach to public reporting of regulatory decisions, Consultation Paper, March 2013, p.6



for applying for review of either: i) the decision that is the subject of a report; and/or ii) the decision to include the report on the register has expired.”²

For providers registered under the “Australian University” Category we recommend that TEQSA only publish the proposed information under the following circumstance:

- i. the provider to which the decision applies is given a reasonable opportunity to respond to TEQSA’s proposed decision prior to information about the decision being published on the National Register (including for publication decisions where these are potentially reviewable by the Administrative Appeals Tribunal under section 198(4)); and
- ii. for all TEQSA decisions that are reviewable internally or on application to Administrative Appeals Tribunal, after the expiry of the required 30- and 28-day waiting periods respectively.

Question 3: Do you agree with the proposal to publish information about the rejection of applications for initial registration and course accreditation?

While these proposals would not apply directly to the University of Sydney, the same inconsistencies with the principle of procedural fairness discussed above are apparent. In such cases, the provider should be given a reasonable time to respond to TEQSA’s proposed decision prior to its publication, and the summary information should not be published until after the expiry of the relevant waiting period for internal or external administrative review.

Question 4: Do you agree with the proposed amendments to the National Register Guidelines?

We agree with the proposed changes, except for point 3.

As discussed or recommended in our responses to the previous questions, each provider should not only be notified in advance of TEQSA’s impending decision, but be allowed a reasonable timeframe within which to provide comments back to TEQSA about its regulatory decisions (including decisions to publish additional information on the National Register) where these may be subjected to administrative review. Unless such an approach is taken, particularly in relation to providers registered under the “Australian University” Category, we cannot see how TEQSA will be acting consistently with its basic principles of regulation, and with the rules of procedural fairness.

² TEQSA’s approach to public reporting of regulatory decisions, Consultation Paper, March 2013, p.6