University of Sydney response to TEQSA consultations on public reporting, Submitted, Friday 3 May 2013

1. Are there any policy principles listed in section four (Policy Principles) that should not be applied by TEQSA? If so, please provide a rationale?

YES. The public disclosure by TEQSA of regulatory decisions about an individual higher education provider would appear to represent an exercise of a power given to TEQSA by Sections 134(1)(e), 196 and 198 of its Act. As the Consultation Paper notes (pp.2-3), when exercising a power under the Act in relation to a regulated entity, TEQSA is required to comply with the three basic principles for regulation - ‘regulatory necessity’, ‘reflecting risk’ and ‘proportionate regulation’. We note that the first proposed TEQSA publication policy principle on page 5 of the Consultation Paper is:

‘The need for TEQSA to be consistent in its approach to reporting across providers, irrespective of the provider category in which a provider is registered or the particular circumstances of the provider’.

This proposed principle is inconsistent with the regulatory principle of ‘reflecting risk’, which requires TEQSA, when exercising a power under the Act in relation to a regulated entity, to have regard for the entity’s particular history and operating circumstances. This principle was included in the Act to ensure, among other things, that the administrative and reporting burden imposed on providers due to TEQSA’s regulatory requirements was reasonable and in proportion the risk posed by each provider individually. If TEQSA takes an approach to the publication of regulatory decisions that is consistent across all providers ‘irrespective of the provider category in which a provider is registered or the particular circumstances of the provider’, it would be acting inconsistently with at least one of the basic principles of regulation with which it is required to comply. Moreover, it is difficult to see how the second proposed TEQSA publication policy principle on page 5:

‘The need for TEQSA to avoid the publication of information that may unnecessarily prejudice a provider’s ability to operate in the market’,

could be applied without TEQSA having regard for the particular circumstances of the provider.

Given these inconsistencies, the first proposed TEQSA publication principle on page 5 should not be included, or it should be amended to ensure that it is consistent with both the basic principles of regulation, and the second proposed principle on that page.

2. Are there other policy principles that TEQSA should take into account?

YES. The three basic principles of regulation should be added at the top of the list of proposed TEQSA publication principles, with the other principles amended (as suggested in our response to Question 1) to ensure that they are consistent with the three fundamental principles of regulation.

Additionally, a principle should be added to make it clear that TEQSA’s approach to the timing of the publication of its regulatory decisions will ensure that it does not prejudice relevant legal review processes. The inclusion of this principle would be consistent with the statement on page 6 of the Consultation Paper that the disclosure of additional information on the National Register is a reviewable decision under section 183 of the Act, and that accordingly TEQSA will not publish such reports, except in ‘exceptional circumstances’, at least until after the relevant period applying for review by the Administrative Appeals Tribunal (AAT) has expired. It would be helpful if TEQSA could provide further guidance about the types of circumstances it would be likely to consider exceptional in advance of commencing to disclose the proposed reports.

3. Are there any disadvantages with the proposed format for public reports as outlined in section five (Format of Reports)?

YES. The proposed structure and content of TEQSA’s public reports relating to regulatory decisions taken about an individual provider are, on the whole, reasonable. There are three aspects of the proposal, however, that require further consideration.
First, more details are required about the timeframe and process by which a provider will be given an opportunity to comment on a draft public report relating to its operations, before the report is made publicly available.

Second, the possible inclusion in the reports of ‘other information that may be in the public interest to be recorded, such as key areas that may require attention by the provider’, is very broad and open-ended. The types of ‘other information’ that can be included in the reports should be specified in TEQSA’s public guidance, and there should be separate consultations with providers to develop this list and amend it over time. Moreover, in the interests of transparency, TEQSA should apply clear criteria consistently when deciding whether the publication of such additional information is in the public interest, and its reports should include a statement of the reasons that led it to conclude that publication was in the public interest.

Third, in the event that TEQSA publishes a decision before the period applying for a review of the decision has expired (or before the conclusion of an actual review) it should detail the exceptional circumstances that led to this ‘early release’ decision, and explain the review options that are open to the provider.

It is not clear from the Consultation Paper whether the proposed reports are intended to be prepared in relation to all TEQSA decisions (positive, negative, conditions etc). One way of reducing the administrative burden for large self-accrediting providers arising from the need to consider many such reports, would be to confine them to the most significant regulatory decisions (initial registration, renewal of registration, change of provider category, compliance assessment etc) and to those that involve a negative decision in relation to the provider, or otherwise adverse findings such as the imposition of conditions.

We would see value in TEQSA preparing a hypothetical version of one of the proposed reports to inform the next phase of the consultations. This would particularly assist providers with the task of determining how much work would be involved for staff in reviewing and commenting on the proposed reports.

4. Is there other information, aside from the proposed content outlined at section five (Format of Reports), that should be included?

YES. See response to Question 3 for background.

The types of ‘other information’ that can be included in the reports should be specified, along with the criteria that TEQSA has considered in determining that the inclusion of this information is in the public interest. Each report should include a statement of the reasons relied upon by TEQSA to form the view that the inclusion of the additional information (or observations) is in the public interest. Where a provider has disputed TEQSA’s regulatory decision or aspects of the report on that decision during the consultation phase, and the provider’s comments on the draft report have not resulted in a change of decision or relevant content (and where the provider does not appeal the decision before the expiry of the application period) the provider should be given the option of having its response to the report included on the register, or linked to the register.

5. Are there particular sensitivities that should be taken into account in publishing the information proposed?

It will be important to ensure that commercial in-confidence information is not disclosed publicly, as well as information about individuals that is of a private and/or confidential nature. The risk of this occurring inadvertently would be reduced by TEQSA specifying the range of ‘other information’ that it may include in its report, and ensuring that adequate time is provided for providers to review the draft reports prior to their release.

6. TEQSA proposes to amend the Tertiary Education Quality and Standards Agency (Register) Guidelines 2012 to indicate that “TEQSA will include information on the Register specifying a decision made (where the decision is within the scope of decisions on which TEQSA will report) and, where relevant, the date on which the review period expires or the status of any application for review.” Are there other considerations that TEQSA should take into account in amending these Guidelines?

We question the appropriateness of specifying a regulatory decision on the register before the expiry of the application period for review, or in cases where an application has been made for review, before the completion of the AAT review process. This proposed amendment to the guidelines appears to be inconsistent with the intent evident in Section 7 of the Consultation Paper regarding the timing of the release of the reports by TEQSA. Except in well-defined exceptional circumstances, rather than specifying the
outcome of a decision before the conclusion of an application period or an actual review, TEQSA should wait until these processes have ended. Alternatively, TEQSA could simply indicate on the register that it made a regulatory decision of a certain type on such a date, and that the outcome of the decision will be included on the register at the expiry of the application period for review or, in the event that the provider has lodged an application for review, when the AAT hands down its decision.

7. TEQSA proposes to introduce public reporting on all its regulatory decisions, apart from those relating to CRICOS registration at this point in time. Are there any other decisions that you believe should not be published? If so, why?

In the interests of transparency it is appropriate that TEQSA introduce public reporting of major decisions resulting from applications for registration, compliance and accreditation assessments at the institution level. We question, however, whether a full report in the proposed format is required for all positive decisions (positive and negative), and in particular for decisions relating to the accreditation of every individual course of study offered by a provider. For routine positive decisions in relation to the registration and renewal of individual courses of study, we see no need for TEQSA to enter into consultations with providers on the draft reports, or for providers to review a final report prior to its release. Templates with standard wording should be developed for these types of routine decisions and agreed with provider categories prior to their use. This again raises the issue of the application of the Act’s basic principles of regulation, and the question of whether it is appropriate for TEQSA to apply its processes arbitrarily to all providers regardless of their provider category, history of provision and scale of operations. While it may be feasible for a small provider, offering just a few units of study, to deal effectively with the proposed reports, the burden of reviewing and process large numbers of such reports may be significant for very large providers offering hundreds of courses and potentially thousands of units of study.

8. Do you support TEQSA’s proposal not to publish its regulatory decisions relating to CRICOS at this point in time? If not, please provide reasons.

YES. Replicating this information on the National Register is not desirable. There is already too much duplication and we support proposals currently under consideration to move to a single framework regulating the provision of educational services for domestic and international students at some point in the future. If that ever occurs, there would also be merit in also amalgamating the reporting of regulatory decisions.

9. TEQSA proposes to release public reports about its decisions at the expiry of an application period for review to the Administrative Appeals Tribunal (AAT) (28 days) or at completion of an AAT review process. Are there any disadvantages to this approach? If so, what are they?

This strategy is supported, however, 28 day may not provide sufficient time for a provider to consider its position and lodge an application for review. Whether this timeframe is adequate will depend on factors such as the nature of the regulatory decision, the content the report, the adequacy of consultation process with the provider on the decision and draft report, the size of the provider, and the timing of the receipt of the decision and supporting report. There may need to be some flexibility built into these timeframes, to allow providers more time in circumstances where they can demonstrate that 28 days is unrealistic.

10. Are there other considerations that TEQSA should take into account in determining a timeframe for releasing public reports? If so, what are they?

The adequacy of the consultation process between TEQSA and a provider in relation to a negative regulatory decision and the draft report in relation to that decision will have a considerable bearing on provider’s attitudes about the timeframe for the inclusion of decisions and their accompanying reports on the register. We note the absence in the consultation paper of details about timeframes and other details for these pre-release consultation processes, and would welcome further guidance on these. Once again, depending on the nature of the decision and other factors, a period of consultation of just one month may not be adequate.

We strongly agree that public disclosure should normally only occur after the expiry of the relevant application period for review, or in cases where an application for review is made, after the AAT hands down its decision. We note, however, that the Consultation Paper suggests on page 6 that TEQSA may include the proposed reports on the national register before the conclusion of these review processes in ‘exceptional circumstances’. As mentioned elsewhere, further guidance about the types of circumstances that would be
considered exceptional should be provided, along with details of the processes that will followed before such ‘early release’ of decisions and reports occurs. For example, in cases where TEQSA believes it has sound evidence that a provider is offering regulated awards at a level of quality that is substantially deficient, and forms the view that the imposition of conditions will not be sufficient to remedy the situation, we recognise that TEQSA may need to act quickly in order to fulfill its objects, notwithstanding the potential reputational and commercial impacts that such action could have on the provider. In such instances, care will need to be taken to ensure that the release of the proposed report does not prejudice any legal appeal processes that may ensue.

11. Are there any other comments that you would like to make about TEQSA’s proposed approach to public reporting?

We would simply urge TEQSA to ensure that in developing its approach to the public reporting of regulatory decisions it does so consistently with the Act’s basic principles of regulation, and with a sound appreciation of the cumulative impact that its various activities are having on self-accrediting providers, and their staff who must invariably be diverted from other activities to satisfy its requirements and requests for information or feedback on proposals.

The basic principles of regulation are meant to underpin TEQSA’s overall approach to the exercise of its functions and powers in relation to the entities it regulates – including the public dissemination of information about significant regulatory decisions relating to individual providers as a core aspect of its regulatory work. We appreciate the need for TEQSA, as regulator, to make information about its work and decisions available to the public. We are concerned, however, that by taking a one-size-fits-all approach to the process of public reporting across all providers, TEQSA will be acting inconsistently with the principle of ‘regulatory necessity’ and ‘reflecting risk’ in relation to many self-accrediting providers.

As a result there is potential that the administrative processes required to facilitate the proposed public reporting will add to an already rapidly growing TEQSA-related compliance burden for large, relatively low risk, self-accrediting providers.

Alignment with the regulatory principles could be achieved, for example, by establishing differential public reporting (and consultation processes) for decisions relating to self-accrediting providers, and by restricting the production of such reports to the most significant regulatory decisions and those that result in a negative decision, or which involve findings that are otherwise adverse in relation to a provider.