

Proposed changes to the publication of TEQSA's decisions **TEQSA Consultation Paper**

The Council of Private Higher Education welcomes the opportunity to comment on this paper and acknowledges the good practice of TEQSA in consulting with the sector.

The Council of Private Higher Education (COPHE)

COPHE represents 60 private providers (HEPs and private universities) with 80 campuses across Australia. COPHE members educate domestic and international students in undergraduate and postgraduate programs.

COPHE holds a unique position within the higher education sector as a representative peak body of higher education providers only. Whilst some members are dual sector, operating in both VET and HE, their registered higher education entity affiliates through COPHE membership.

All of COPHE's members are regulated by TEQSA.

The Regulatory Partnership

COPHE believes that effective regulation is built on a strong partnership between the regulator and entities it regulates. A successful partnership must include agreed common goals in the best interests of the regulated industry; a level playing field for regulated entities; and, relationships based on trust, procedural fairness and rights of review.

In the Australian higher education context successful partnership requires regulatory activity to uphold the principles of the TEQSA Act reflecting risk, proportionality and necessity.

COPHE believes that publishing decisions affecting providers and students prior to exhaustion of review rights is not consistent with the tenets of a regulatory partnership.

COPHE Consultation – Summary of Position

COPHE has consulted with its members on the proposals outlined in the consultation paper, canvassing a range of views.

We acknowledge TEQSA's concerns regarding quality issues impacting the VET sector, review timeframes not in TEQSA's control and the processes of other agencies. We do not accept these concerns validate sufficient risk to necessitate change to the current publication regime.

COPHE represents a significant number of smaller, private providers. These providers face increased likelihood of a catastrophic impact following negative regulatory decisions. Smaller providers are disproportionately affected by publication of that decision prior to exhaustion of review rights.

In the event of a negative regulatory decision, the protection of current students must be the primary concern. The current 28-day notice period and subsequent tribunal consideration of confidentiality provides the best protection to enrolled students.

COPHE does not support publication of regulatory decisions prior to exhaustion of review rights.

Proposed principles for publishing information

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

COPHE does not agree with the proposed principles to guide TEQSA's approach to publishing information about its decisions

COPHE supports the principles of transparency, compliance, fairness and consistency guiding the regulatory activities of TEQSA. There is no doubt that these reasonable principles reflect the broad expectations of regulated entities in a regulatory partnership.

In matters of dispute however, the application of these principles is frequently at the core of the dispute. There is an inherent inconsistency in these principles determining publication of decisions prior to exhaustion of review rights, where application of these principles is the substance of the review.

These principles provide inadequate guidance when publication may exacerbate failure to apply these principles in the substantive decision under review.

COPHE believes the legislated regulatory principles of risk, proportionality and necessity are the core principles to publication of decisions and these are best considered by the tribunal adjudicating the review.

Timing of publication

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

COPHE does not agree with the proposed approach to the timing of publication of information about TEQSA decisions.

Timeframes and Procedural Fairness

COPHE acknowledges that timeframes for resolution of reviewed decisions are not in the direct control of TEQSA and understands TEQSA's frustration regarding review timeframes. COPHE members also experience frustrations regarding TEQSA decision making timeframes.

Providers are subject to lengthy processes to reach substantive decisions, many reporting year long processes to determine re-registration and/or re-accreditation. Additionally, TEQSA is frequently unable to provide a fixed date for when decisions will be made. This uncertainty in turn affects enrolments, course planning, and governance decisions.

Following this uncertain timeframe, for decisions to be published on the day they are made, or shortly after, does not afford providers adequate opportunity to consider the reasons for decision and determine an appropriate response.

COPHE believes the current 28-day right period without publication of decisions is the critical minimum standard of procedural fairness.

Timeframes and procedural fairness concerns have particular impacts for private providers.

Whilst no publicly funded university has had a condition or restriction imposed by TEQSA on their re-registration, should this occur universities have significant resources, including public funds and in-house legal teams, to pursue review.

There is a disproportionate impact on smaller providers where the publication of a negative decision can be catastrophic. Cost, timeliness, likelihood of success and scale of impact on students increase the relative risk for smaller providers to lodge review of TEQSA decisions.

Further, publication of TEQSA decisions prior to review has the potential to greatly increase costs for providers and TEQSA. In current practice the AAT has appropriately determined confidentiality issues for decisions under review. Publication prior to review has the potential to trigger legal proceedings to injunct publication, taking these matters into higher courts. Published decisions overturned in these higher courts may also lead to damages claims.

COPHE believes that current practice of not publishing TEQSA decisions until exhaustion of review processes is essential to protecting procedural fairness and the proportionate impacts of publication for all providers.

Student Protections

Student protections are of primary concern in COPHE's deliberations on the issues raised in the paper. It is essential that any publication decision treats currently enrolled students as the key stakeholders. Superficially it may appear that publication provides transparency and thus student protection. In practice however this is not sustained.

The ultimate case in point is where a decision is made to deregister a provider. For a private provider such decision is likely to have catastrophic impacts with potential business collapse, financial hardship and legal action.

For students, this is similarly catastrophic with course discontinuance, reputational damage, and potential loss of fees, ongoing student loan debt and career disruption.

Whilst much of this damage commences at the point of decision, irreversible damage compounds at the point of publication.

In current practice the failure of a provider, although uncommon in the higher education sector, results in a sector led response. Tuition assurance schemes, teach out arrangements, mergers and acquisitions all serve to provide student protections.

COPHE believes that to best protect students, remedial measures need the opportunity for implementation before publication of decisions.

Currently the AAT determines confidentiality provisions of matters before it. Usually, providers seek suppression orders, TEQSA seeks publication approval and the tribunal makes orders on balance of protections. The AAT has made range of determinations relevant to this point.

The case of *JSRM v TEQSA* involved consideration of these issues. In this case the AAT determined that TEQSA's decision not be published, applying confidentiality orders. In conjunction the AAT ordered no enrolments be permitted before completion of the review proceedings. This balanced the protections of current, former and prospective students without diminishing the substance of TEQSA's decision.

These orders enabled a sector led response which delivered real student protections: the business was acquired by another provider; existing students experienced seamless continuation of their academic program; course amendments were negotiated to address TEQSA's accreditation concerns; and, the brand was maintained providing current students and alumni with reputational protection.

Early publication of TEQSA's decisions regarding JSRM would have seen business collapse, devaluation of the brand, major reputational damage to JSRM's alumni qualifications and immediate student displacement, including a large international student cohort.

COPHE does not believe that publication of decisions prior to exhaustion of review processes provides adequate student protections or public interest benefits.

Scope of Information Published

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

COPHE does not agree with the proposal to publish information about the rejection of applications for initial registration and course accreditation.

COPHE members have canvassed a range of views in consideration of this question.

In particular, COPHE recognises a contributory benefit publication may bring in establishing a high entry bar for higher education providers. This contributes to protections for students, recognition of regulatory compliance and sector-wide reputational protections.

COPHE acknowledges the public interest commentary of the consultation paper regarding the quality issues impacting the Vocational Education and Training sector. It is our view however that the considerable regulatory powers of TEQSA; the reforms undertaken in the establishment of the single national regulator; and, the established structure and functions of higher education student loan schemes, mitigate the likelihood of the VET sector issues being repeated in higher education.

In relation to publication of new registration applications COPHE has two concerns:

- There is little real benefit of publication where there are no students to protect
- There is potential reputational and competitive advantage damage to well intentioned applicants

In relation to publication of new course applications COPHE has similar concerns. In this case however, there is potential reputational damage to established registered providers who have a course application rejected due to conditions outside their control. This may include, for example accreditation agency issues, changed economic environments or simply impacts of the timeframes to approve accreditation.

We recognise the benefit in TEQSA publishing statistical data relating to rejections, but are opposed to the unnecessary identification of individuals and registered providers, particularly given there are no students protected by the proposal.

Method of Publication

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

COPHE does not agree with the proposed amendments to the National Register Guidelines.

The proposal to amend the National Register Guidelines is to give effect to the early publication of TEQSA decisions. As outlined in response to Question 2, COPHE does not support early publication of decisions.

COPHE believes that the practice of listing current re-registration and re-accreditation proceedings as decision pending is sufficient protection for both the duration of the normal regulatory activity and the exhaustion of review proceedings.

COPHE does not believe that the paper establishes legitimate interest for early publication and subsequently does not make the case for changes to the National Register Guidelines.

Question 5: Do you agree with the proposal to publish news announcements and media releases about significant decisions by TEQSA?

COPHE does not agree with the proposal to publish news announcements and media releases about significant decisions by TEQSA

COPHE believes that this proposal essentially undermines the partnership model of regulation. The proposal seeks to move away from the established register with codified protections to a model where TEQSA reports on decisions and deliberations through public media.

It is essential to the regulatory partnership that interested parties can access the National Register. The partnership is not advanced by TEQSA taking issues to the wider community on the basis that interested parties may not know where to look for the register. A better solution would be for TEQSA to improve awareness of the register through its normal sector engagement activities.

COPHE believes that the National Register, guidelines and interpretive advice and consultation papers (all published online) in conjunction with sector engagement programs, provide adequate opportunity for TEQSA to engage with interested parties and the broader community.

Additionally, there is reference in this section to 'significant decision' - a term without legislative definition. COPHE believes there are adequate provisions in the TEQSA Act for publication of TEQSA's regulatory activities without the need for further definitional frameworks.

The Council of Private Higher Education (COPHE) appreciates the opportunity to comment on this consultation paper. Proposals contained in the paper have very serious implications for the Higher Education Providers that COPHE represents.

COPHE is strongly opposed to changes to the current regime of publication of TEQSA decisions.

In the event that these proposals proceed further, COPHE seeks urgent advice and active consultation in their development and implementation.

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