Law schools groan under burden of government compliance

Professor David Dixon says a new system to regulate higher education represents a “major threat” to legal education. While he’s been told that his concerns are “overstated”, other law deans are also concerned. Anne Susskind reports.

The Tertiary Education Quality and Standards Agency Act 2011 (TEQSA Act) and the agency it establishes may preclude law schools from using many of their current teachers, as well as establish such a heavy “burden of compliance” that it will stifle new initiatives in teaching and drain resources and energy, says UNSW’s Dean of Law, Professor David Dixon.

This is aside from other “major problems” that will be caused by having to fit the structure of law degrees into a new, compulsory framework, Professor Dixon argues in a strongly-worded paper which is circulating among law deans and university leaders, and will be “high on the agenda” at the next meeting, in November, of the Council of Australian Law Deans (CALD).

CALD has also expressed its concerns, alongside its “cautious optimism”, that there might still be room to move.

Particularly relevant to the profession, Professor Dixon told LSJ, is how the new “qualified to teach” requirements will affect students. TEQSA’s requirements are due to be operational soon: “If they enforce this, it would be very difficult to have the kind of people we get from the law firms and the bar to teach.

With every practitioner who wants to teach, we’d have to go through the process of justifying their inclusion on the basis that their professional practice is the equivalent of a masters or PhD degree.

“What this new system says is you have to have a degree above the level of the one you are teaching, so to teach a masters or JD, you’d have to have a PhD, or we’d have to provide evidence that you’ve got professional practice which is equivalent.”

In trying to provide simple, economical quality assurance, regulators had turned to “proxies of quality”, Professor Dixon said in his paper.

UNSW’s law school was committed to small group, interactive teaching done by teams which included excellent sessional teachers, many of whom brought to the classroom professional knowledge and experience to illuminate student learning.

“The implication of TEQSA is that legal education should revert to traditional, mass, mono-directional lectures by pure academics.”

Heavy-handed

The Australian Universities Quality Agency (AUQA), which TEQSA has replaced, Professor Dixon said, used to offer advice, and “we could take it or leave it”. Under new legislation, embodied in the Higher Education Standards Framework, TEQSA adopts the Australian Qualifications Framework (AQF), a classification of educational awards of all kinds with criteria for each level.
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But while the AUQA regulation had been light, TEQSA is heavy-handed.

The TEQSA Act, Professor Dixon said, made it an offence to offer a degree not compliant with its requirements. Everything that had been purely advisory was now compulsory, backed by inspections and possible punishment.

In relation to the change in the way degrees are structured, Professor Dixon told LSJ, TEQSA would be “trying to force our square pegs into a series of round holes” provided in the AQF.

The most important change would be to the honours system. “At present, honours at most law schools are awarded to top students as part of an ordinary undergraduate degree, but TEQSA is saying it has to be a completely separate program.

“It would be a disaster if we aren’t able to award honours.

They don’t understand that most law students study dual or combined degrees, typically over five years. They don’t want to stay at university for another year to get honours.”

Professor Dixon says there are related problems for masters degrees. “The regulators have a fixed Euro-idea of a single undergraduate degree, followed by a two-year masters. But – like the UK and USA – we have a one-year LLM.

“Australian students don’t want to study for longer after a five-year dual degree, and international students won’t find longer masters attractive.”

Time wasting

Attempting to comply with TEQSA was stopping academics from getting on with the things they should be doing, Professor Dixon said.

“We are spending time doing pointless bureaucratic regula-

Above: Academics are spending time on pointless bureaucratic compliance which is draining intellectual energy and commitment, says UNSW’s Professor Dixon, who is leading the charge against the new higher education regulation system, TEQSA.

Left: Monash University’s Professor Arie Freiberg says the new accreditation standards for teaching fail to understand the use of sessional staff who are experienced and knowledgeable but do not have the theoretical requirements.
Leading Australian universities are very effective, lean operations and do a great job in teaching and research, but just don’t have the resources to spend time on regulation of this sort.”

One of his senior colleagues, an associate professor and an excellent teacher, was working full-time on compliance, and the faculty would probably have to employ a full-time compliance officer as well. Instead of working out how to improve teaching and develop research, academics had to work on committees and compliance work to such an extent it was draining intellectual energy and commitment.

The effects were being felt in other disciplines – “the architects, the engineers, the medical school would tell you the same story”. Professor Dixon said law schools would try to minimise impact on students. Academics would work harder to maintain standards, but, generally, would be less able to innovate, in a context where the law was changing a great deal.

Zealots
While the legislation is excessive, the bureaucracy is also at fault, Professor Dixon says: “They get an idea of what their role is, and become zealots about the way it should operate. It is in the agency’s interests to expand its role and get more budget, more people – it already has a very substantial budget ($17,535 million) and is employing 90 people.”

It was not, he said, the government’s intention to have, as was occurring, people “trawling through websites and looking to see if we are complying”. “Generally around Australia, the approach is ‘get on and comply’, rather than do what I’m doing, which is to speak out about it. The starting assumption is ‘how are we going to comply’? I don’t want to talk about how we’re going to comply – I want to talk about ‘should we comply?’”

His paper, he said, had a lot of support from his colleagues and his vice chancellor, Professor Fred Hilmer, also backed his approach.

Professor Dixon said he was not suggesting that academics should not be accountable. But they were already accountable, answering to the legal profession, and state level admitting authorities (with nationally coordinated accreditation) as well as CALD’s own accreditation standards for law schools. Universities had regular institutional checks, and they were also held to account by students, and an advisory council of distinguished lawyers.

At Monash
Monash University’s Dean of Law, Professor Arie Freiberg, said Monash had been one of the early universities involved in the accreditation process this year. While the university authorities had found TEQSA to be bumbling and accommodating, it had, at the faculty level, seen a “large regulatory burden” and absorbed “quite a deal of the faculty’s resources, just in relation to one of the faculty’s law degrees – and there are five”. A lot of resources were taken up in relation to detailed enquiries.

In relation to the structure of law degrees, the proposals had created some confusion in the market place by making distinctions Monash would not have chosen between different qualifying degrees, Professor Freiberg said. In particular, an extension of masters to two years would probably “kill off” many masters degrees around the country.

The accreditation standards for teaching failed to understand the use of sessional staff, he said, and would create huge problems because many were barristers and judges, who were experienced and knowledgeable but did not have the theoretical requirements.

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Misunderstandings

TEQSA’s communications manager, Tony Mithen, told LSJ there was misunderstanding of TEQSA’s role as the national higher education regulator.

“It is incorrect to imply that TEQSA has ownership of the creation and development of masters course lengths – TEQSA is not responsible for any changes to degree structures. The Australian Qualification Framework Council (AQFC) sets the criteria for AQF awards.”

TEQSA was not responsible for the drafting or development of the Higher Education Threshold Standards, which were determined by the Higher Education Standards Panel, an independent body appointed by the federal Minister for Tertiary Education, Skills, Science and Research. The setting of standards was clearly separated from monitoring and enforcement functions carried out by TEQSA.

Regarding academic qualifications for staff, TEQSA was on the record stating that the Provider Course Accreditation Standards were to be interpreted in the context and circumstances of an individual provider.

As well as appropriate qualifications, a range of factors could be considered, including: equivalent professional experience; a sound understanding of current scholarship and/or professional practice in the discipline that they teach; and an understanding of pedagogical and/or adult learning principles relevant to the student cohort being taught.

The TEQSA legislation and the threshold standards were created after extensive consultation with the higher education sector to ensure the future health of the sector in a changing and increasingly globalised market, Mithen said. TEQSA had stated publicly and on multiple occasions that it was keen to reduce any unnecessary regulatory burden.

“We welcome constructive criticism and feedback from all stakeholders.”

Remaining silent – a fundamental right

The NSW government’s proposal to modify the right to silence tampers with the presumption of innocence in our criminal justice system.

A reform of the right to silence in NSW is unnecessary and will only disadvantage the vulnerable, say Jeremy Styles, principal legal officer with the Aboriginal Legal Service (ALS) NSW/ACT and Jane Sanders, principal solicitor with the Shopfront Legal Centre, both members of the Law Society Criminal Law Committee.

The government’s draft bill (tinyurl.com/9b7udc7) amends the right to silence to allow juries and the judiciary to draw an adverse inference against an accused who refuses to speak to the police “but later produces ‘evidence’ at trial”.

Sanders says the main problem is that the proposed change tampers with a very fundamental principle of the criminal justice system.

“Allowing the courts, juries or magistrates to draw an