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Senator the Hon Simon Birmingham
Minister for Education and Training
Parliament House
Canberra ACT 2600

Dear Minister

I write to convey the advice of the Higher Education Standards Panel (the Panel) on opportunities to deter and prevent organised and commercial cheating in Australian higher education.

In June 2015, then Minister for Education, the Hon Christopher Pyne MP, wrote to me agreeing terms of reference for the newly appointed Panel membership. He also requested the Panel's advice on options to deter commercial cheating activity that had been identified by the Tertiary Education Quality and Standards Agency (TEQSA) in a confidential report to the Minister on sector responses to the 2014 MyMaster contract cheating service incident.

TEQSA's report noted that all higher education providers had appropriate policies and practices in place to meet the requirements of the Higher Education Standards Framework concerning academic integrity, but that additional legislation and/or prosecution activity could be useful to further manage the risk of cheating. TEQSA's report identified three options for future action to consider:

- the creation of new offences in legislation specifically targeting commercial cheating activity, along the lines of an approach taken by the government of New Zealand;
- support for more effective prosecution by police and others under current laws; and
- a central register of detected providers of contract cheating services.

The Panel believes that if cheating activity is inadequately constrained it has the potential to cause great damage to the domestic and international reputation of Australian higher education. Indeed, we have been given examples of this already occurring in the wake of the MyMaster incident. The Panel considers this is an issue which should be further addressed to reduce the incentives, rewards and opportunities for cheating to occur – particularly on an organised or commercial basis.

Following detailed consideration of these matters, including reviewing two separate tranches of detailed advice from the Australian Government Solicitor on the constitutional issues raised, the Panel makes the following recommendations.

Recommendation 1

The Panel recommends that the Government consider advocating or requiring higher education providers to adopt a template or standardised statement of personal

commitment to academic integrity, which all students would be required to sign upon entering Australian higher education.

The statement should indicate that the student understands they have an obligation to undertake their studies and associated assessment activities with honesty and integrity; and that in the event the student is found to have cheated, misrepresented the work of another as their own, or wilfully plagiarised the work of others, this could lead to the student's enrolment being cancelled or their academic results being invalidated. In the case of international students, cancellation of enrolment could lead to their student visa being cancelled also.

Recommendation 2:

The Panel recommends that the Government consider introducing legislation making it an offence for any person to provide or advertise cheating services, modelled on section 292E of New Zealand's *Education Act 1989*. This would need to be done in cooperation with states and territories to minimise any constitutional risks. An applied laws approach appears the most efficient way to achieve this.

Recommendation 3:

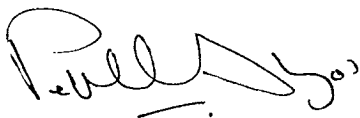
The Panel recommends that the Government, in cooperation with the states and territories, consider appointing the Tertiary Education Quality and Standards Agency to act as the single national regulator with responsibility for oversight of the new cheating provisions.

The Panel believes that assuring the quality, standards and reputation of Australian higher education is of utmost importance. Legislative change to make commercial cheating activities an offence will assist in protecting Australian higher education.

I enclose a detailed discussion of the basis for these recommendations. Copies of the analysis of current laws prepared by Panel member Karen Thomas and of the constitutional advice received from the Australian Government Solicitor are available from the department should you wish to review these in detail.

I would be happy to discuss these matters at your convenience, should you wish to do so.

Yours sincerely, *Warm regards*



Professor Peter Shergold AC
Chair, Higher Education Standards Panel

March 2017

Encl.

Student Academic Integrity and Cheating in Australian Higher Education

Consideration by the Higher Education Standards Panel

In June 2015 the Minister for Education requested the Higher Education Standards Panel's advice on options identified by the Tertiary Education Quality and Standards Agency (TEQSA) to deter commercial cheating activity. These options were canvassed in advice to the Minister on responses by higher education providers to the 2014 'MyMaster' contract cheating service incident.

TEQSA's advice noted that all providers had appropriate policies and practices in place to meet the relevant Higher Education Standards concerning academic integrity, but that additional legislation and/or prosecution activity were options that could be considered to help address and deter cheating by higher education students – particularly commercial or other organised services intended to facilitate cheating activity. TEQSA's report identified three options for future action that could be considered, some of which had been suggested by stakeholder providers with which it had engaged to assess the response to 'MyMaster':

- the creation of new offences in legislation specifically targeting commercial cheating activity, along the lines of an approach taken by the Government of New Zealand;
- support for more effective prosecution by police and others under current laws; and
- a centralised register of detected cheating services

The Panel believes that inadequately constrained cheating activity has the potential to cause great damage to the domestic and international reputation of Australian higher education. Indeed, we have been given examples of this already occurring in the wake of the MyMaster incident. The Panel considers this is an issue which should be further addressed to reduce the incentives, rewards and opportunities for cheating to occur – particularly on an organised or commercial basis.

In 2011, New Zealand introduced penalties for cheating services into its *Education Act 1989* (Section 292E – see [Attachment A](#)), which make it an offence to provide or advertise cheating services. A person convicted under this section is liable for a fine of up to \$10,000. The Panel understands that when New Zealand introduced these provisions, there was an immediate deterrent impact without any actual convictions.

1. **Legislative support**

No Australian jurisdiction currently has offences on the books specifically aimed at deterring or punishing cheating by students or organised cheating services. Panel member Karen Thomas, Managing Partner Fisher Jeffries Barristers and Solicitors Adelaide, provided the Panel with a comprehensive survey of laws that may be applicable to cheating where it is detected. These include criminal offences for fraud, deception and dishonestly obtaining an advantage, conspiracy to defraud, forgery and related offences. Civil actions can revolve around breach of contract, the tort of deceit, and misleading or deceptive conduct under the Australian Consumer Law.

In many of these cases, the burden of proof is significant and may rely on being able to demonstrate a financial or commercial loss by an injured party in order to establish that an offence has occurred. This can be problematic for institutions to demonstrate, where reputation may be the commodity

primarily at risk. Where an actor in the activity is or might be located overseas (e.g. an overseas academic paper authoring service), the difficulty is compounded. This complexity is one reason cited by stakeholders for the lack of enthusiasm from police and institutions to pursue cheating through the courts in other than the most serious and clear-cut cases.

Student awareness of responsibilities and consequences

In relation to individual students caught cheating or plagiarising, the clear preference of institutions is to take an educative approach as a first response. This is particularly the case where plagiarism is detected and may have been influenced by different cultural expectations. In the Panel's view, this approach is appropriate. However, the Panel also considers it would be appropriate for the Government and individual institutions to proactively seek to counter such perspectives – both as students enter an institution and throughout their engagement in Australian education.

To ensure student awareness of the seriousness of the consequences from such activity, the Panel considers that wide adoption of the practice of some institutions to have enrolling students (particularly international students) make a signed commitment to academic integrity could be very beneficial. This would provide a clear basis to contrast any subsequent dishonest or criminal practice with the student's explicit commitment at enrolment; providing no doubt about the gap between the agreed expectation and actuality.

Recommendation 1

The Panel recommends that the Government consider advocating or requiring higher education providers to adopt a template or standardised statement of personal commitment to academic integrity, which all students would be required to sign upon entering Australian higher education.

The statement should indicate that the student understands they have an obligation to undertake their studies and associated assessment activities with honesty and integrity; and that in the event the student is found to have cheated, misrepresented the work of another as their own, or wilfully plagiarised the work of others, this could lead to the student's enrolment being cancelled or their academic results being invalidated. In the case of international students, cancellation of enrolment could lead to their student visa being cancelled also.

Constitutional advice

The Panel asked the Department of Education and Training to seek advice from the Australian Government Solicitor (AGS) on the constitutionality of Commonwealth legislative action to provide better support to institutions and regulators to deter, prevent and penalise cheating activity. The department received advice from the AGS in two separate tranches – on the constitutional powers of the Commonwealth to pursue a legislative response and options to address cheating activity within the bounds of the constitution, including joint action with the states and territories. The AGS' advice and the Panel's subsequent consideration focused on the potential for and appropriateness of such action targeting any or all of:

- commercial cheating activity

- domestic student individual cheating; and
- international student individual cheating.

Constitutionally, the situation is problematic, particularly in relation to domestic students and commercial or organised cheating activity that does not involve a corporate entity. The AGS confirmed its view that the Commonwealth does not have sufficient legislative power to neatly or adequately regulate this area. While reliance can be placed on a number of constitutional heads of power, such as the communications, the territories and the trade and commerce powers, significant regulatory gaps would remain.

The AGS noted the complexity of the policy issues involved in determining:

- when a student has cheated
- how a spectrum of penalties would be applied, and
- how any penalties would fit with universities' own systems for policing cheating.

Organised cheating

In the Panel's view, organised or commercial cheating presents a clear and possibly the biggest current reputational risk to Australian higher education. The Panel recommends the Government give consideration to legislative changes that would make commercial cheating activities an offence. This legislation should create an offence that would enable prosecution of organised cheating services targeting students enrolled with Australian institutions, including any individuals or organisations that facilitate or profit from such services. A secondary but significant aim of the legislation would be to discourage and frustrate organised cheating services, whether the service is located, facilitated or benefited from financially in Australia or overseas.

The approach taken by New Zealand in section 292E of its *Education Act 1989* appears an appropriate model for Australia to adopt. However, the Commonwealth's limited constitutional heads of power mean this could not be achieved unilaterally. Were a purely Commonwealth legislative solution to be pursued, AGS advice identifies that regulatory gaps would remain where the provision of cheating services:

- is purely within a state;
- does not involve a constitutional corporation;
- is by means other than a communication service (for example, in person) and
- is directed purely at domestic students.

Cooperation with the states and territories appears to be the only basis on which the Government could develop a comprehensive legal solution. Relying on the broader powers of the states and territories could enable a simpler approach to be taken, along the lines of New Zealand's model. Based on the AGS' advice, an applied laws legislative model would appear the most practicable approach. Under this model, The Commonwealth could enact a law - for example, regulating the provision of cheating services in the ACT – and each State and remaining Territory would agree to apply that law by reference in legislation in each of the other jurisdictions.

The advantage of this approach is that any amendments to the law can apply automatically in the states and the other territory. In contrast, mirror legislation schemes are more likely to result in inconsistency as laws are amended.

Alternatively, in line with the approach taken for the Australian Consumer Law, the Commonwealth could enact a law applying across Australia relying on its legislative powers (e.g. regulating the conduct of constitutional corporations) and the States and Territories could agree to apply that law.

If a cooperative approach were to be pursued with other jurisdictions, the panel understands that the process would normally involve an intergovernmental agreement being entered into by the Commonwealth and the states and territories. This would be followed by the development and enactment of 'model' legislation by the Commonwealth with each state and the remaining territory subsequently enacting legislation which applied the Commonwealth model law in that jurisdiction. There are a variety of methods of achieving this, subject to agreement by the states. AGS have advised it would be necessary to engage the Office of Constitutional Law in the Attorney-General's Department in relation to the constitutional policy issues relating to a cooperative legislative approach.

Legislation to address commercial cheating would necessarily be new legislation, rather than an amendment to existing legislation. The Tertiary Education Quality and Standards Agency (TEQSA) could potentially be appointed as a single national regulator with responsibility for the laws' oversight. Further AGS advice would be required to confirm whether there are any constitutional difficulties with TEQSA undertaking such a role.

Recommendation 2:

The Panel recommends that the Government consider introducing legislation making it an offence for any person to provide or advertise cheating services, modelled on section 292E of New Zealand's *Education Act 1989*. This would need to be done in cooperation with states and territories to minimise any constitutional risks. An applied laws approach appears the most efficient way to achieve this.

Recommendation 3:

The Panel recommends that the Government, in cooperation with the states and territories, consider appointing the Tertiary Education Quality and Standards Agency to act as the single national regulator with responsibility for oversight of the new cheating provisions.

Domestic students

For domestic students, under the students benefits power, the Commonwealth could place conditions on the provision of support to students, for example access to a Commonwealth Supported Place or to a HELP Loan. However the AGS notes that there would be difficulty in enforcing penalties such as cancellation of awards for a number of reasons, including:

- the awarding institution would need to be induced or required to take action to cancel awards or enrolments, and it is unclear whether the Commonwealth would have the power to enforce this action
- there would likely be issues relating to 'acquisition of property' under such an arrangement.

Given the sensitive nature of taking action in the courts against individual students, and the issues outlined in the AGS advice, the Panel does not recommend pursuing the creation of offences against individual students at this stage.

As noted above, an educative approach in the first instance appears the better response. Cancellation of enrolment, where warranted by the seriousness of an offence, is a response that is

available to institutions now. Supplementing this with the possibility of criminal or civil penalties would seem overreach in the Panel's view.

International students

For international students the issue is more straightforward as the aliens power provides wide scope for action. However, there already appears to be sufficient coverage under current arrangements for the Commonwealth to cancel the visa of an international student found to have cheated, if their higher education enrolment is terminated.

The Department of Immigration and Border Protection (DIBP) confirmed that if a student visa holder fails to maintain enrolment, does not achieve satisfactory course progress or does not achieve satisfactory course attendance, there are grounds for considering visa cancellation under section 116(1)(b) of the Migration Act 1958 for breach of visa condition 8202. Considering cancellation under this ground relies on the education provider reporting the conduct to DIBP. Essentially, if a student's enrolment is terminated by their higher education provider, the student's visa would be cancelled. If the offence was not serious enough to warrant termination of enrolment, there would be no impact in relation to the student visa.

The Panel does not consider additional legislative authority is required to enable action to be taken against an international student found to have cheated or acted outside of their academic integrity obligations.

2. Support for prosecutions

TEQSA noted concerns raised by Macquarie University about the lack of interest from police in pursuing criminal charges against those operating contract cheating websites. These types of concerns have been expressed by others in the sector also. In the Panel's view such reluctance is understandable, given the complex array of criminal and civil provisions that could potentially apply and the lack of clarity about jurisdiction and constitutional authority created by the mix of Commonwealth policy and funding but largely state and territory-enacted university establishing Acts.

This reluctance is a two-way street, though. As noted above, where individual student activity is concerned, the most appropriate action in the first instance may be to take an educative approach – to encourage the student towards good practices and correct their behaviour, rather than seek to punish. Providers – rightly in many cases – are also reluctant to take too swift action. Where they do so, in some cases the lack of jurisdictional clarity has led students to challenge punitive actions. The requirement under tort law for the aggrieved party establish a financial impact from the wrongdoing, can severely limit the chance of success.

In the Panel's view, such reluctance and lack of confidence in legal authority would best be addressed by creating a clear legal framework for future action, as proposed at Recommendation 2.

3. Intelligence gathering

TEQSA noted suggestions from Deakin University and Queensland University of Technology that a national register of contract cheating providers may be beneficial. While the Panel has no formal understanding of the cost or challenges involved in developing such a tool, the dynamic nature of the processes, technologies and participants involved in such activity would seem to present significant challenges. Simply maintaining the currency of information would be a significant task. As

would be the challenge of gathering relevant information, given the variety of languages, social media and localised information platforms that can and have been exploited to promote and facilitate this activity.

The Panel considers that provider awareness, proactive monitoring and generalised good practice approaches to promoting academic integrity and discouraging cheating activity are likely to be as effective. Indeed, the existence of such a platform could lead some to believe the risks are being managed when, in fact, perpetrators have simply changed their practices to adapt to its presence.

If the Government wishes to consider such an approach, advice from the department and appropriate technology experts should be sought.