

TQM's presence within legal systems: Example of impact on higher education

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Abstract:

Purpose of the paper: This paper attempts to provide a frame of reference of the impact TQM has had on the legal system in different countries, an area seldom investigated in the Quality or legal literature.

Methodology: Documentary and policy analysis of legislation, rules and rulemaking documentation are used to demonstrate how key elements of TQM have been embedded into national legal frameworks in the oversight of higher education institutions and systems.

Main Findings: Using Australia's *Tertiary Education Quality and Standards Agency Act of 2011* and supporting legal documents such as Guidance Notes as an example of how TQM is embedded within an administrative law scheme demonstrates that, while challenging, regulatory compliance schemes do use many practices and tools to undergird procedures both, through primary (regulatory guidance or requirements) and secondary rules (internal process regulation within the regulatory agency). However, oftentimes, it is the supporting legal documentation that provides the basis to identify and understand the presence and use of TQM practices.

Practical implications: Understanding TQM's impact on legal systems sheds insight on regulatory requirements imposed on a sector through enactment of policy and provides a perspective on the standing TQM has within policymaking.

Originality/value: There are few research papers or literature review pertaining the subject of TQM concepts embedded in laws and regulations.

Type of paper: This is a research paper based on a review of primary and secondary sources of legal documents.

Keywords: impact, law, legal system, regulation, rulemaking, TQM

Introduction

For a while now, practitioners in the field of quality (Big Q) have become concerned with the question “*What’s next for the field?*” The American Society for Quality (ASQ) has been conducting their triennial *Future of Quality Study* for more than 20 years and in the 2015 Report, there is optimism combined with the need to move forward. As William Troy, ASQ’s CEO wrote, “We must begin to truly think differently about things we assume we already know quite well” (p. 5). Apprehension seems to emanate from concerns that matters like globalization, customer sophistication, talent management and leadership issues, environmental concerns and social responsibility are forcing quality professionals into a crossroad (Gutner & Adams, 2008). Like Antony (2013) wrote at the beginning of his article, the definition of quality has evolved over the years and context helps shape that definition. However, this evolution’s roots are based on the narrow and mechanistic statistical quality control (Dahlgaard-Park, 2008) and, while there has been a conceptual evolution, the role of the quality professional has not changed from technical specialist to collaborators, leaders and/or partners that those in the field believe should be the case (Kimberlin, 2015; Nash, 2014). As a result, one concern is the loss of place as a key discipline in companies as noted by Professor Andrew Thomas (Antony, 2013).

A second concern is the need to adapt and develop new skillsets and different techniques to maintain and improve corporate excellence. Some scholars have even argued that the field of quality has not changed in a corresponding manner to the changes seen in the business environment (e.g., Moonsamy & Singh, 2012). Other scholars have gone the other way, proposing that there has been the emergence of a fourth paradigm based on emergence, but this new paradigm has yet to receive the attention it should (e.g., van Kemenade & Hardjono, 2019). In other words, has the evolution of quality concepts kept the field of quality fit for purpose? Is a need for an updated, changed or rebranded version of Total Quality Management (TQM – Lilja, Hansen, Fredrickson, & Richardsson, 2017)? What is the new paradigm for Big Q (da Fonseca 2015)? As Oakland and Turner (2014) pointed out, quality concepts need to be kept on the organizational agenda and quality leaders have to shake off the negative perceptions of quality as a ‘bolt-on’ policing function that audits and restricts flexibility” (p. 8).

While these concerns are relevant, it is difficult to argue that TQM has not had a major impact on companies, society in general and government. Indeed, the ASQ triennial study does reflect the many positive contributions. Quality has given to the private sector and society more broadly. However, two areas that have been under-researched in terms of the impact the field of Quality has had is in government and law (Evans, 2013; Padró & Green,



2018; Vinni, 2007). Swiss (1992) argued that transitioning TQM into government agencies was not good unless it was adapted to fit its unique characteristics, but events since then have seen the objection somewhat overturned. Instead, what has been noted is how TQM has informed government processes in particular by promoting a more responsive “customer service” approach toward improving internal processes alongside increasing accountability. As Karyotakis and Moustakis (2014) pointed out, quality is an expectation and is the most important criterion for making decisions.

For some, neoliberalism and its impact in the public as well as private sectors have been the main driver for the success of TQM. From a philosophical perspective, this does make sense in terms of stakeholder expectations because of its focus on decentralization, market-focus and personal gain rather than public good perspective. Yet, this point-of-view risks an oversimplification or reductionism because there are so many different meanings and mechanics attached to the term (e.g., Gamble, 2001). Public policies shape the direction of which sector prevails: government, the market or individual organisations.

Attention to TQM’s impact and success is often attached to ISO 9001 and other related ISO standards (e.g. ISO 26,000 and ISO 31,000 to mention a couple. However, one area that people do not often consider to see the success TQM has had as a ‘philosophy’ or approach is in the area of law (Padró & Green, 2018). A look at some of the legislation (statutes) and regulatory mechanisms that have been put in place can show direct and indirect influences from TQM specifically and Quality more broadly. One reason why more attention has not been given to this source of validation is possibly due to the field’s interest in organisational action over policymaking and policy steering (cf. Padró, 2009). A second reason is that the different types of legal documents that are in place within government frameworks to make government work. Unless one knows what exists, where it can be found and what to look for the search is a challenging proposition. Legal documents are more than court cases, legislation (statutes) or treaties. These also include government agency rules and regulations, regulatory guidance notes and related technical documents helping explain rules, regulations, their application, enforcement and processes. Guidance notes and related documents exist because formal rulemaking (which includes rules and standards) cannot provide all of the needed information and these documents fill the gap (Epstein, 2016). A third reason could be the fact that these series of documents generate a pastiche of legal documents piled on top of one another making an analysis as this one difficult (Shapiro 2005).

A number of other factors have aided TQM’s inroads into government and legal frameworks. Two of these factors are worth talking about in more detail because they frame out a place where TQM sits. One of these factors is the advent of national Administrative Procedure Acts (APA) that define administrative procedures through regulation and statutes. In some instances, their creation antedate TQM, but the requirements set within these acts required an approach and mechanism that TQM fills to a high degree. The second factor is



the restructuring of the public sector approach toward government administration through the tenets from the New Public Management movement.

A question that probably comes up at this point is, “can examples of TQM’s influence be seen in statutes and regulatory schemes impacting different business sectors? The answer is probably yes. The issue is that it may be easier to do this type of investigation in some sectors rather than others. For example, education, particularly higher education, given its high degree of regulatory compliance or oversight schemes is one that provides a good place to begin this type of investigation. To begin with, neoliberal attitudes are discernible in the manner in which governmental intervention is structured (Sahney, Banwet, & Karunes, 2004). Also notable at this macro-level is how sector predominance found in other areas vis à vis deregulation or market oversight is not accorded to this sector (Padró & Green, 2018). From a more practical level, sectors that have broader social interests and implications to national wellbeing tend to be regulated more directly (and indirectly) through a primary regulatory scheme and often, based on the sector needing to meet other legal mandates such as employment rules, sexual harassment and other discrimination laws, often fall under other regulatory schemes as well. The different statutes and regulatory structures provide examples of how TQM logic and/or methodology exists either in a purer form as originally found in industrial settings or in a modified form to fit regulatory needs (Swiss, 1992).

This paper looks at a ‘low hanging fruit’ exemplar to illustrate the how the analysis is performed. An analysis of Australia’s Tertiary Education Quality and Standards Agency Act of 2011 (No. 73, 2011) [TEQSA] and some guidance notes are provided. Before these analyses, a working definition of TQM is provided as well as discussions of the key elements of APAs and NPM. Then a description of the methodology is provided to use as a guideline on how to proceed with this type of analysis.

Defining TQM

There is more than one definition of TQM based on context and purpose (Kontoghiorghes, 2003). The same applies to New Public Management as will be noted below. As the field of Quality continues to evolve, the inclusion of new practices and modification of perspectives provide an impetus for a name change. The term Quality Management Systems (QMS) is now used either as a synonym for TQM or as its new moniker, although it is often more directly linked to ISO9001 as can be seen in the American Society for Quality’s (ASQ – <https://asq.org/quality-resources/quality-management-system>) definition of QMS. Regardless, there is little in legal documentation related to QMS outside the possible mention of the ISO 9000 family of standards and thus it makes sense to continue using the TQM umbrella to frame the parameters of the concepts that help identify the extent of their embedding within legal structures.

To be consistent with the authors’ original work (Padró & Green, 2018), ASQ’s definition of TQM (<http://asq.org/learn-about-quality/total-quality-management/overview/overview.html>) is used for the purposes of this analysis:



... a management system for a customer-focused organization that involves all employees in continual improvement. It uses strategy, data, and effective communications to integrate the quality discipline into the culture and activities of the organization.

TQM is based on three general components: managerial philosophy, improvement processes and quality tools and its effect of TQM is well described by the cliché “the sum is greater than its parts” (Swift, Ross, & Omachonu, 1998; Tague, 2005). These components have focused on quality management (quantitative measurement to generate improvement), systems management (using systems and procedures for controlling quality), people management (focusing on customers, staff and stakeholders), forming a new management paradigm to generate positive change and re-engineering (cultural transformation – Yong & Wilkinson, 2001). The operational framework used here is based on Kanji and Asher (1993), van der Wiele, Dale and Williams (1997) and Vlăsceanu, Grünberg, and Pârlea (2007):

- All work as a process (people make quality)
- Continuous improvement
- Cultural change
- Defined performance indicators/standards
- Delighting the customer/customer satisfaction (external and internal)
- Distributed leadership
- Education and training
- Explicit systems/processes
- Management by fact/measurement and feedback tools and processes
- People-based/expertise management
- Prevention/[and more recently risk management]
- Strategic planning and management
- Teamwork
- Top-down leadership

Administrative Procedure Acts (APA)

Many countries base government agency practice and their administrative law structures on an APA. An APA is legislation that defines the processes government agencies must follow when proposing, establishing and enforcing rules and regulations, with interpretation and enforcement of formal and informal rulemaking occurring through the courts (Aman & Maynton, 2014; Epstein, 2016). These are instruments of good administration and their credibility and effectiveness in meeting regulatory obligations is dependent on how well these are able to adapt to the needs of a nation to ensure the public wellbeing (Barnes, 2010).

APAs provide the framework for rulemaking in the most general of terms. The regulatory system that comes out from an APA is the mechanism through which statutes are

administered in an equitable and rational manner. Rulemaking should be treated as a response to issues and mandates from different sources such as legislative or executive branch requests as part of their administrative or oversight roles or from statutes requiring the agency to make rules and statutes authorizing but not requiring the agency to generate a rule (West & Raso, 2013). However, it should be noted that if the USA's experience is a harbinger of the legislative process creating APAs, the legislation is at times deliberately ambiguous in order to maintain flexibility as well as navigate the political waters that created and maintain them (cf. de Figueiredo & Vanden Bergh, 2001; Oren, 2004).

APAs, as instruments of administrative law, spell out how:

- legislative and judicial powers are delegated to agencies and the limitation of the powers conveyed to the agencies,
- establish the procedural requirements that agencies have to follow,
- identify (or imply) obligations imposed on the agencies and establish and
- institute or legitimize judicial control over agency actions/decisions.

Within this framework, APAs require agencies to set rules of notice, standing, information gathering, and judicial review processes (de Figueiredo & Vanden Bergh, 2004). These act as procedural safeguards such as participation rights for affected and/or interested persons and the separation between adjudication and rulemaking (Meuwese, Schuurmans, & Voermans, 2009). Delegating policy-making authority to agencies allows elected officials to “write simpler statutes, allows the details of policy to adjust to new knowledge and changed circumstances, and creates an expert body that can provide useful information about the needs for changes in either legislation or appropriations” (McNollgast, 1999, p. 184).

H.L.A. Hart (1997) distinguished between two types of rules: primary rules, which impose legal obligations or duties and secondary rules that provide for operations that can result in the creation or variation of obligations or duties, i.e. rules about rules. Lowi (1985) followed on this distinction by placing regulatory policy as a primary rule because issues of compliance and noncompliance are involved related to the obligations and sanctions regulations impose on those who are intended to fall under the rule's jurisdiction. Lowi (1985) then identifies internal governmental agency organisational policies (e.g. budgetary and personnel) and processes as secondary rules. Concepts from TQM are particularly noticeable in the construction of secondary rules because these rules need to be informed by approaches to make the processes accountable and successful.

Rulemaking is expected to improve the quality of policy decisions while decreasing the cost of the process. Rulemaking entails the creation of rules and standards, much of which occurs at the discretion of the agencies themselves (West & Raso, 2013) and is so complex that intermediate systems to complete the governance system is often required (Epstein, 2016). Standards within legal frameworks typically represent imprecise criteria on which

legal decisions are based. These lack precision and rationality, which is contrary to the thinking and application of standards in the field of Quality. In a sense, while at times there is sufficient precision, these standards are to one extent or another partially developed (Gifford, 1971). This lack of precision can be intentional as a trade-off against efficiency to ensure their broader applicability (Diver, 1983). In this environment, laws are promulgated either as a rule or as a standard (Kaplow, 1992). A rule sets out an advanced (*ex ante*) expectation of what is permissible while a standard provides the specification. “[T]he only distinction between rules and standards is the extent to which efforts to give content to the law are undertaken before or after individuals act” (p. 560, bolding in the original not included).

The original APA that has served as a model for numerous countries is the USA’s *Administrative Procedure Act*, Pub.L. 79–404, 60 Stat. 237, passed in 1946. The act was, in part created based on experiences from World War II, which highlighted “how procedures used by agencies were not always imposed by statute or required by the White House” (Cuellar, 2014, p. 1429). The rationale for passing the Act was to codify administrative procedure; achieve uniformity, standardization and simplification; curbing administrative excess; and the publicizing of administrative acts (Parker, 1951).

New Public Management (NPM)

NPM represented a move away from tenets established under the banner of Public Administration that came about in the 1930s into a market-based, decentralized (disaggregated) and incentive-based approach of practice within public agencies (Clark, 1996; Dunleavy, Margetts, Bastow, & Tinkler, 2006). NPM is an umbrella term coined by Hood (1991) to describe these different norms and practices, which used markets and incentives as their key mechanisms (Pollitt & Bouchaert, 2011). It assumed “that public sector organisations need to learn from private sector and private companies” (Ehsan & Naz, 2003, p. 33) to satisfy public needs. This assumption was based on:

- An emphasis on performance and the measurement of outputs
- A preference for lean, flat, small and specialised units rather than broad, large, multi-functional agencies.
- Coordination through hierarchical relations instead of formalized contracts.
- Use of market-type mechanisms like competitive tendering, public sector league tables and performance-related pay.
- Treating service users as ‘customers’ and the application of generic quality improvement techniques such as TQM (Pollitt, 2007, p. 110).

NPM relied on new processes and non-governmental institutions to meet the service commitments of government agencies (Kettl, 2000). There has been no one specific model because its realization has occurred in different ways in different contexts (Pollitt, 2007). NPM came into prominence because the coming to prominence of neoliberalism in the 1980s along with four other administrative trends:

1. attempts to slow down or reverse government growth,

2. a shifting toward privatization and quasi-privatization from government agencies,
3. the rise of information technology and
4. the development of a more international agenda regarding “general issues of public management, policy design, decision styles and intergovernmental cooperation” (Hood, 1991, p. 3).

The effect of the paradigm shift NPM represented a different perspective on public accountability. The earlier, ‘progressive era public administration as Hood (1995) called it, was based on a sharp distinction between public and private sectors “in terms of continuity, ethos, methods of doing business, organizational design, people, rewards and career structure” (pp. 93-94). NPM erased this differentiation, reflecting a belief (if not an ideology) that better management offers society the best chance for progress (Pollitt, 1998). Hood (1995) also pointed out that NPM was aimed to counter the maintenance of “buffers against political and managerial discretion by means of an elaborate structure of procedural rules designed to prevent favouritism and corruption’ and the keeping of “arms-length relations between politicians and the entrenched custodians of particular public service “trusts”” (p. 94). This meant viewing agencies and other governmental units as a chain of low-trust principal/agent relationships instead of fiduciary or trustee-beneficiary relationships (Dunleavy & Hood, 1994). Emphasis was on the benefits of managerialism emanating from a shift in focus from inputs and processes to outputs and outcomes; the use of more measurement and quantification, performance indicators and/or standards; and shifting value priorities toward efficiency and individualism (Pollitt, 2003). The view was that a focus on output incentivizes results. In what could be paradoxical for some, managerialism was also touted as a means of facilitating creative leadership, entrepreneurship and cultural change (Pollitt & Bouchaert, 2011).

TQM has often been linked to NPM in the literature (e.g. Vinni, 2007). TQM, however, only represents one paradigm of many that have changed the approach of public administration (Raadschelders, 2010). Table 1 shows shared aspects between NPM, TQM and what Swiss (1992) termed “reformed” TQM (based on reforms that Swiss felt were needed to work in the public sector) constructed from Vinni’s (2007) review of the literature. Viewing the alignment from this point-of-view allows for a nuanced view of how NPM shares attribute from TQM as quality or systems management, people management, management paradigm or re-engineering approaches (cf. Yong & Wilkinson, 2001).

Table 1. Shared aspects between NPM, TQM and “reformed” TQM

NPM	TQM	“Reformed” TQM
Being close to its customers	Customer-orientation	Not just immediate clientele, but all citizens; taxpayer is the ultimate determiner of the quality and quantity
Being performance-driven (targets, standards) not rulebound; greater emphasis	Quality requires continuous improvement of outputs as well as of inputs and	Emphasis on human resource management (HRM) instead of process

on output controls	processes; process flow management is crucial	management output goals and measurements
Using performance-related systems for recruiting, posting, promoting and paying staff	Performance management has to consider “personal factors” as well as “organizational/system factors”	TQM can be first step in introducing performance management extrinsic motivation (individual rewards) important in low-salary positions
Displaying a commitment to continuous quality improvement (targets, standards)	Continuous improvement; plan-do-check-act cycle	Indicators of quality must be defined, depending on the kind of public service, to create common understanding of quality, involve employees and create continuous improvement
Definition of goals, targets, indicators of success, preferably expressed in quantitative terms; performance auditing; practicing tight cost control	Quality data and reporting; measurement and feedback on the cost of quality and on client reactions; using (quantitative) quality management techniques and tools to improve the performance of processes	Focus on improvement of efficiency and effectiveness due to limited resources; quantitative tracking of product quality and of client reactions
Empowerment of street-level staff for them to be flexible and innovative	Involvement and teamwork (everybody has responsibility for quality)	Employee empowerment
Move away from “military-style” public service ethics, greater flexibility in hiring and rewards; changed management style	Culture change; positive work attitudes of employees	More quality-oriented culture than in traditional public administration, but quality is not the sole parameter of excellence
Active, visible, discretionary control of organizations through performance planning and contracts; strategic planning and management	Planning and organization	
Personnel management (incentives)	Education and training	Emphasis on HRM instead of process management
Freedom to manage	Commitment and leadership of top management	
Decentralization and break up of formerly “monolithic” units to create “manageable”	The development of the single dominant organizational culture to	Heterogeneity of personalized services may be used to increase choice

units; rivalry between public agencies as the key to lower costs and better standards	improve the participation rates and commitment of employees and to enable the organization to become more competitive; collaboration with stakeholders (internal and external customers, suppliers)	
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Source: adapted from Vinni (2007)

Methodology

Galanter and Edwards (1997) argue that the legal world “is not to be understood on its own terms, but requires the application of some method or substance provided by other disciplines” (p. 376). This approach to interdisciplinarity in the study of law is becoming more acceptable (e.g. Dubber, 2015). Consequently, this type of exercise provides benefits not only to quality professionals but also to policy analysts and lawyers interested in administrative law.

Looking for TQM within legal structures and documents is both difficult and simple. It is simple if a researcher conducting document and policy analysis activities understands the language of Quality and its effects alongside having the necessary methodological skillsets to perform these analyses. It is difficult because if one looks to the literature for an active literature stream, few studies have been published based on finding and analyzing the links (Padró & Green, 2018). More problematic is that the few studies published are from the late 1980s and early 1990s, the time when TQM was touted as a means for providing governments an operational meaning to rulemaking (Deming, 2000/1986).

There are two general types of sources of information, data and ideas in policy-based research: documents and people (Bardach, 2012). Policy analysis mainly looks at the effects of legal rules and government agencies on outcomes (Kornhauser, 2017). Data analysis provides a systematic procedure for reviewing and/or evaluating documents (Bowen, 2009).

There are three main reasons for collecting evidence in policy analysis: assessing the nature and extent of a problem, assessing the particular features of the concrete policy situation (or documents in this instance) or assess the effectiveness of policies (Bardach, 2012). This type of analysis represents the second type of assessment, although in a slightly varied form because what is being assessed is the presence of identified features within the documentary framework. Policy analysis often involves interviewing of key people along with looking at key documents and that can be done, but in this case, the focus was strictly document analysis. The rationale for this is that the legal documents are not simply mere props for action and considering them in terms of how they function is an important consideration (Prior, 2003). Investigators should establish the meaning of these documents and how they provide evidence of meaning and/or use (Bowen, 2009). “The classical way of



dealing with textual information is defined by means of keyword-based document representation combined with Boolean search expressions” (Schweighofer & Merkl, 1999, p. 156). Table 1 above provides a beginning list of key terms and ideas that can be used to do a Google-based search.

Triangulation of documents is an issue only in terms of how key terms and concepts from TQM can be identified within the different texts. A limitation of this approach, however, is that investigators cannot determine or evaluate the effectiveness of approach only the presence of TQM concepts and, at times, their application. A second limitation because it is out of scope is establishing a process for information retrieval within the legal databases (cf. Moens, 2001).

Finding TQM elements is primarily an indirect proposition within the procedural aspects of law rather than the substantive elements of statutes and often requiring the deconstruction of the documents (Epstein, 2016). Much of what can be found is within the intermediate systems of governmental agencies and departments relying on codes, guidelines and other non-legislative materials, i.e. what some term ‘soft law’ (Metcalf, 2010). A complicating factor, however, is the application of standards within legal frameworks and these interact with rules. The semantical difference between what is meant by standard in the legal sense and how quality professionals define and use the term can create confusion (please refer to the discussion on standards in the APA section above). Another challenge in looking for TQM concepts in legal documents is that rules can have standard-like traits and vice versa. However, rules and standards can be sufficiently differentiated to identify the normative differences (Korobkin, 2000), which is useful to an endeavour such as what was done in this study.

Australia’s Tertiary Education Quality and Standards Agency Act of 2011 (No. 73, 2011) [TEQSA] (<https://www.legislation.gov.au/Details/C2017C00271>)

In a number of legal jurisdiction (especially in those based on common law), historical analysis is one tool in legal analysis. Its purpose is to analyse the legitimacy of legal practice past and present (Dubber, 1998). What it does is provide normative context as it relates to understanding the meaning and application of laws and rules, especially in regards to the creation of obligations and duties under those obligations (cf. Alschuler, 1997). Applicability of the rule of law requires the discovery of facts from documents as well as experienced situations. Legal reasoning is not mechanical, requiring identification of valid sources of law, how these are interpreted and enacted (Leiter, 2010). According to the noted American jurist Oliver Wendell Holmes, Jr. (2009/1897):

The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. (p. 24).

The creation of TEQSA actually represented a change from traditional quality assurance (QA) review processes to a risk-based approach to regulatory compliance. What



this piece of legislation provides is an example of how QA practices based on traditional TQM approaches were adapted to meet the needs of the public sector in meeting its obligations. This legislation, a world first, can be seen from two perspectives. One is a replacement of one framework with another. The second approach is a contrary view based on treating the inclusion of risk as part of the evolutionary development of QA activities and TQM as a framework as noted in the changes found in the Malcolm Baldrige National Quality Award criteria from the mid-2000s onward. This point-of-view sees risk and quality frameworks working alongside each other as part of the overall institutional quality framework (Williams et al., 2006). The discussion below begins with a historical backdrop before providing an analysis of the legislation itself.

Historical background of TEQSA

The *Bradley Review* was the document that set forth the creation of TEQSA in that it was their recommendation that “a significantly strengthened accreditation and regulatory framework should be implemented for the higher education sector” (Bradley, Noonan, Nugent, & Scales, 2008, p. 86). TEQSA replaced the national QA framework for higher education developed in the late 1990s – Australian University Quality Agency (AUQA) – that was considered best practice in the international arena however, it was not deemed strong enough to meet the needs of accountability, especially in regards to the increasing public expenditure going to the higher education sector:

- The QA framework focused too much on input and processes and not enough to outcomes and meeting of standards
- Too many overlapping frameworks regulating the quality and accreditation of universities, other higher education providers and vocational education
- Responsibility was divided between the federal government and the states and territories that had their own regulatory frameworks
- Uneven application of accreditation decisions on a regular basis
- A lack of reliable comparative information available to underpin student choices of institutions and choices (Bradley et al., 2008, p. 115)

What the *Bradley Review* envisioned was a strong federal-level regulatory body to work in concert with an autonomous sector with decision-making ability in areas normally falling under the accepted standards of practice regarding admission, subject matter taught and content delivery, pursuit of research activities and staffing. One aspect of the *Review* that was not adopted was combining universities, other higher education providers and vocational education under one umbrella. The *Dow and Braithwaite Report* from 2013 found TEQSA to be a costly and burdensome process because of the extent of evidence required. One recommendation from this *Report* was that the Government needs to reduce duplication between the four legislative Acts defining the Australian higher education sector. Other recommendations included better alignment with other entities within or related to TEQSA and streamlining of the accreditation process. Embedded within the recommendations proposed by Dow and Braithwaite (2013) was more consultation with the differing



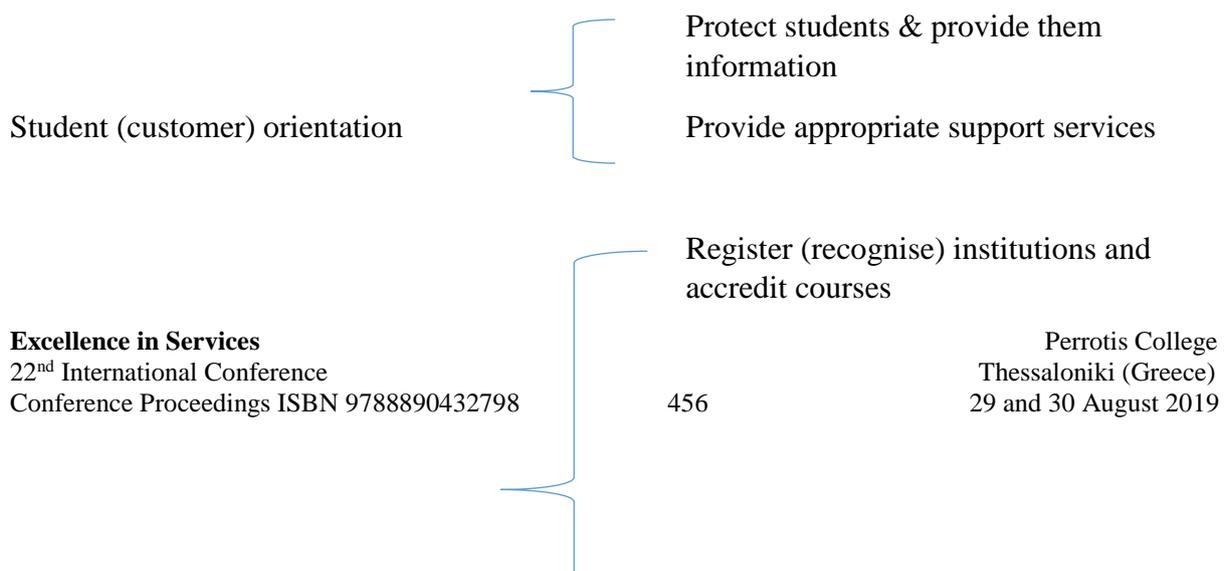
stakeholders and treating the regulatory relationship as a partnership. The principal ideas that can be related to TQM (or risk) were not found problematic as such, it was the approach taken to actuate these precepts that needed recalibration.

Analysis of the TEQSA Act of 2011

Table 2 provides an analysis of the TEQSA Act of 2011 using the terminology (key words) from TQM suggested by Vinni (2007). There are many terms associated with TQM, some at the broader conceptual level while other terms are specific techniques and tools. As previously indicated in this paper and throughout the literature, quality looks different because of context and circumstances. It therefore helps to look at legal documents such as statutes using the lens of broader concepts or competences as this provides an interpretive lens that allows an investigator to determine the connections either through the ‘eyeball’ method or by using qualitative software such as N-Vivo. For the purposes of this study, preference was to look at known statutes and supporting documents such as Guidance Notes to look at the extent of what was notable through word searches rather than thematic analysis, which is a logical next step in this type of analysis.

Vinni’s (2007) article provided a context that adds more than just word searches to the analysis. He provides the context of a more traditional, enterprise focused conceptualisation alongside a variant of TQM based on Swiss’ belief that adaptations were needed to make TQM effective in the public sector. This provides direction in terms of providing a focus of attention. Other competencies or concepts that could be applied include agility, assessment/evaluation of processes and outputs, change and change management, excellence, future focus, innovation, learning from others, long-term focus, management by fact, prevention of defects, process management and orientation, results focus, social responsibility, stakeholder input and relationship, systems perspective, value creation (cf. Sorqvist, 2014).

Table 2 displays the connections between TQM principles and the statutory language. The table includes statutory language that does not necessarily demonstrate a direct linkage to the TQM; however, it is included to illustrate how the language does reflect some of the TQM concepts and principles either directly or indirectly based on reader interpretation (a strength and a weakness because the investigator needs to provide a justification for the judgement(s) made). Direct linkage of the principles to statutory language that can be found include:





Advise and make recommendations to the Minister on matters relating to the quality or regulation of higher education providers

Continuous improvement

Collect, analyse, interpret and disseminate information relating to: quality assurance practice, and quality improvement, in higher education



Performance management – staff and/or organizational focus

Employee empowerment

Commitment and leadership from top management

Universities need to maintain a particular staffing profile

TEQSA staff are persons engaged under the Public Service Act 1999

TEQSA staff protected from criminal or civil actions

Measurement and feedback (Monitoring)

Monitoring powers of authorised officers

Planning

Planning processes and authorization procedure

What is noticeable is that these elements can comply with TQM principles, but these are written in statutory language based on administrative procedure. Is this sufficient evidence to demonstrate that TQM is embedded within the statute? The answer depends on whether a reviewer wants to see the connection or not. This illustrates the difficulty of performing the analysis at too granular a level. A broader reading of the statutory language along with supporting documents like Guidance Notes is necessary to make an attribution.

Table 2. Analysis of the TEQSA Act of 2011 based on key terms from TQM and “reformed” TQM

Terminology from TQM	TEQSA Act of 2011 Section where term is found
Student (customer) orientation	Part 1 Introduction Division 2 Objects and simplified outline 3 Objects The objects of this Act are: (a) to provide for national consistency in the regulation of higher education; and (b) to regulate higher education using: (i) a standards-based quality framework; and (ii) principles relating to regulatory necessity, risk and proportionality; and (c) to protect and enhance: (i) Australia’s reputation for quality higher

	<p>education and training services; and</p> <p>(ii) Australia’s international competitiveness in the higher education sector; and</p> <p>(iii) excellence, diversity and innovation in higher education in Australia; and</p> <p>(d) to encourage and promote a higher education system that is appropriate to meet Australia’s social and economic needs for a highly educated and skilled population; and</p> <p>(e) to <i>protect students undertaking, or proposing to undertake, higher education in Australia by requiring the provision of quality higher education</i>; and</p> <p>(f) to <i>ensure students undertaking, or proposing to undertake, higher education, have access to information relating to higher education in Australia</i>.</p> <p>...</p> <p>Part 2—Basic principles of regulation</p> <p>§15 Principle of reflecting risk</p> <p>(1) TEQSA complies with the principle of reflecting risk if its exercise of the power has regard to:</p> <p>(a) the entity’s history, including the history of:</p> <p>(i) its scholarship, teaching and research; and</p> <p>(ii) its <i>students’ experiences</i>; and</p> <p>(iii) its financial status and capacity; and</p> <p>(iv) its compliance with the Threshold Standards, this Act, this Act’s associated provisions and other laws regulating education; and</p> <p>(b) matters relating to the risk of the entity not complying with the Threshold Standards, this Act or this Act’s associated provisions in the future, including:</p> <p>(i) its internal quality assurance mechanisms; and</p> <p>(ii) its financial status and capacity; and</p> <p>(iii) the history of persons related to the entity.</p> <p>...</p> <p>§32 Other conditions</p> <p><i>TEQSA may impose conditions on registrations etc.</i></p> <p>(1) TEQSA may impose other conditions on a registered higher education provider’s registration. Examples of the kinds of conditions that may be imposed (which need not be imposed at the time of registration) include the following:</p> <p>...</p> <p>(e) restricting the number of students that may enrol in a particular accredited course provided by the provider; ...</p>
Continuous improvement	<p>§134 Functions and powers</p> <p>(1) TEQSA has the following functions: (a) to register</p>

	<p>regulated entities as registered</p> <ul style="list-style-type: none"> (a) higher education providers in accordance with this Act; (b) to accredit courses of study in accordance with this Act; (c) (c) to investigate whether this Act or this Act’s associated provisions have been or are being complied with, including by: <ul style="list-style-type: none"> (i) conducting compliance assessments and quality assessments; and (ii) (ii) conducting accreditation assessments of accredited courses; (d) to advise and make recommendations to the Minister on matters relating to the quality or regulation of higher education providers, if requested by the Minister or on its own initiative; (e) to collect, analyse, interpret and disseminate information relating to: <ul style="list-style-type: none"> (i) higher education providers; and (ii) regulated higher education awards; and (iii) quality assurance practice, and quality improvement, in higher education; and (iv) (iv) the Higher Education Standards Framework; <p>...</p>
<p>Performance management – staff and/or organizational focus</p> <p>Employee empowerment</p> <p>Commitment and leadership from top management</p>	<p>§32 Other conditions <i>TEQSA may impose conditions on registrations etc.</i></p> <p>(1) TEQSA may impose other conditions on a registered higher education provider’s registration. Examples of the kinds of conditions that may be imposed (which need not be imposed at the time of registration) include the following:</p> <p>...</p> <p>(b) that the provider do any or all of the following for one or more accredited courses:</p> <ul style="list-style-type: none"> (i) maintain a particular staffing profile; (ii) provide access to particular facilities; (iii) provide particular support services; <p>...</p> <p>Division 4—Injunctions</p> <p>...</p> <p>§127 Injunctions <i>Performance injunctions</i></p> <p>(2) If:</p> <ul style="list-style-type: none"> (a) a regulated entity has refused or failed, or is refusing or failing, or is proposing to refuse or fail, to do a thing; and

	<p>(b) the refusal or failure was, is or would be in contravention of this Act or this Act’s associated provisions; the Federal Court or the Federal Circuit Court may, on the application of TEQSA (on behalf of the Commonwealth), grant an injunction requiring the entity to do that thing.</p> <p>...</p> <p>§130 Certain limits on granting injunctions not to apply</p> <p>...</p> <p><i>Performance injunctions</i></p> <p>(2) The power of the Federal Court or the Federal Circuit Court under this Division to grant an injunction requiring a regulated entity to do a thing may be exercised:</p> <p>(a) whether or not it appears to the Court that the entity intends to refuse or fail again, or to continue to refuse or fail, to do that thing; and</p> <p>(b) whether or not the entity has previously refused or failed to do that thing; and</p> <p>(c) whether or not there is an imminent danger of substantial damage to any other person if the entity refuses or fails to do that thing.</p> <p>...</p> <p>§ 134 Functions and powers</p> <p>...</p> <p>(4) TEQSA has the power to do all things that are necessary or convenient to be done for or in connection with the performance of its functions.</p> <p>...</p> <p>Division 5—Staff</p> <p>§156 Staff</p> <p>(1) The staff of TEQSA are to be persons engaged under the Public Service Act 1999.</p> <p>(2) For the purposes of the Public Service Act 1999:</p> <p>(a) the Chief Executive Officer and the staff of TEQSA together constitute a Statutory Agency; and</p> <p>(b) the Chief Executive Officer is the Head of that Statutory Agency.</p> <p>§157 Staff to be made available to TEQSA</p> <p>(1) TEQSA is to be assisted by:</p> <p>(a) officers and employees of Commonwealth authorities whose services are made available to TEQSA in</p>
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	<p>connection with the performance of TEQSA’s functions or the exercise of its powers; and (b) persons whose services are made available under arrangements made under subsection (2).</p> <p>(2) The Chief Executive Officer may arrange for officers or employees of an appropriate State or Territory authority to be made available to TEQSA to perform services in connection with the performance of TEQSA’s functions or the exercise of its powers.</p> <p>...</p> <p>§202 Protection from criminal or civil actions (1) No action, suit or proceeding (whether criminal or civil) lies against a protected person in relation to anything done, or omitted to be done, in good faith by the person:</p> <p style="padding-left: 40px;">(a) in accordance, or purportedly in accordance, with this Act; or</p> <p style="padding-left: 40px;">(b) in the performance, or purported performance, of TEQSA’s functions; or</p> <p style="padding-left: 40px;">(c) in the exercise, or purported exercise, of TEQSA’s powers.</p> <p>...</p>
Measurement and feedback (Monitoring)	<p>§71 Monitoring powers of authorised officers (1) The following are the monitoring powers that an authorised officer may exercise under section 70 in relation to premises:</p> <p style="padding-left: 40px;">(a) the power to search the premises and any thing on the premises;</p> <p style="padding-left: 40px;">(b) the power to examine any activity conducted on the premises;</p> <p style="padding-left: 40px;">(c) the power to inspect, examine, take measurements of or conduct tests on any thing on the premises;</p> <p style="padding-left: 40px;">(d) the power to make any still or moving image or any recording of the premises or any thing on the premises;</p> <p style="padding-left: 40px;">(e) the power to inspect any document on the premises;</p> <p style="padding-left: 40px;">(f) the power to take extracts from, or make copies of, any such document;</p> <p style="padding-left: 40px;">(g) the power to take onto the premises such equipment and materials as the authorised officer requires for the purposes of exercising powers in relation to the premises;</p> <p style="padding-left: 40px;">(h) the powers set out in subsections (2), (3) and (5).</p> <p>...</p> <p>§72 Enforcement powers of authorised officers (1) The following are the enforcement powers that an authorised officer may exercise under section 70 in relation to premises:</p> <p style="padding-left: 40px;">(a) if entry to the premises is with the occupier’s</p>

	<p>consent—the power to search the premises and any thing on the premises for the evidential material the authorised officer has reasonable grounds for suspecting may be on the premises;</p> <p>(b) if entry to the premises is under an enforcement warrant:</p> <p>(i) the power to search the premises and any thing on the premises for the kind of evidential material specified in the warrant; and</p> <p>(ii) the power to seize evidential material of that kind if the authorised officer finds it on the premises;</p> <p>(c) the power to inspect, examine, take measurements of, conduct tests on or take samples of evidential material referred to in paragraph (a) or (b);</p> <p>(d) the power to make any still or moving image or any recording of the premises or evidential material referred to in paragraph (a) or (b);</p> <p>(e) the power to take onto the premises such equipment and materials as the authorised officer requires for the purposes of exercising powers in relation to the premises;</p> <p>(f) the powers set out in subsections (2), (3) and (6).</p> <p>...</p>
Culture change, employee attitudes	NA
Planning	<p>Part 8 Division 7 Planning §160 Approving corporate plans</p> <p>(1) The Commissioners must give a copy of a corporate plan prepared under section 35 of the Public Governance, Performance and Accountability Act 2013 to the Minister for approval before:</p> <p>(a) 30 April before the first reporting period to which the plan relates; or</p> <p>(b) such later day as the Minister allows.</p> <p>(2) Subsection (1) does not apply to a corporate plan if the Minister decides the plan does not need approval.</p> <p>(3) A corporate plan comes into force on:</p> <p>(a) if the plan needs Ministerial approval—the later of:</p> <p>(i) the day it is approved by the Minister; and</p> <p>(ii) the first day of the period to which it relates; or</p> <p>(b) otherwise—the first day of the period to which it relates.</p> <p>...</p>
Education and training	NA
Increase participation	NA



rate and commitment of staff	
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TEQSA supporting regulatory documents

If one goes to the TEQSA website (<https://www.teqsa.gov.au/guidance-notes>), there are 28 current Guidance Notes. One of these is on *Academic Quality Assurance* (<https://www.teqsa.gov.au/latest-news/publications/guidance-note-academic-quality-assurance>). In this Guidance Note, there is a discussion of two prerequisites to QA: definition (inputs, processes, outputs or outcomes) and judgement of attainment (quantitative measures, qualitative judgements or both). There is also a clear statement regarding continuous improvement being an integral part of academic QA. Furthermore, “[c]ontinuous improvement is typically based on an on-going reflective feedback cycle involving monitoring, review and consequent evidence-based improvements both of courses and of major controls on academic quality such as assessment policies and procedures.” The Guidance Note also refers to benchmarking, moderation and peer review as means of external referencing. Effectively, key elements of TQM from QA and quality control (QC) perspectives are discussed. There are references to the standards found in the Higher Education Standards Framework (HESF) implemented in 2015, with section 5.3 of the Standards focusing on monitoring, review and improvement requirements. This section requires “a provider will need to demonstrate in particular that reviews of courses of study involve considered oversight by the institutional academic governance processes, external referencing (which can include moderation of assessment against other programs, benchmarking of student success and course design against programs at other providers) and feedback from students” (<https://www.teqsa.gov.au/hesf-domain-5>). Note how the language in the Standards and the Guidance Note now have specific references to practices normally associated with TQM, providing more direct evidence of its embedding within a regulatory framework.

One Guidance Note currently not in effect is on benchmarking because it has yet to be linked to the HESF Standards

(https://www.teqsa.gov.au/sites/default/files/benchmarkinggnfinal_0.pdf?v=1507592618).

Expectations found within this document include:

- Identifying areas for improvement and areas of good practice (e.g. benchmarking reports)
- Analysis of reasons for variation or commonality
- Formulation of improvement strategies (e.g. action plans, elements of other plans)
- Internal reporting of benchmarking results and consideration of results by the appropriate governance body
- Implementation of agreed action plans
- Review of outcomes of implemented actions against expected outcome and subsequent benchmarking results



Institutions and professional associations were expected to use these principles as part of their management-by-fact decision-making processes, this in spite of internal political considerations and governance contexts (e.g. Sankey & Padró, 2016). The language used in this Guidance Note provides specific references to TQM practices without using the term TQM or its more current version, QMS. Just referencing these two documents, one active and the other one awaiting updating illustrates the extent to which TQM is embedded. Looking at the statute and these supporting documents and then returning to the statute provides meaningful evidence that practices from the field of Quality have been adopted and used to steer policy preferences.

Discussion and conclusion

Looking forward to the next evolutionary steps in the field of Quality should not be done with either fear of diminishing viability or overenthusiasm based on the value ascribed to TQM. Retrospection shows a high degree of success within organisations and replacing TQM's with a new paradigm is going to take some time in any case because of the inroads it has made in the policy-regulatory arena. What this paper has attempted to demonstrate is that TQM has made a major impact in how government performs its administrative functions. There are various reasons for this positive impact, with principal reasons being the focus on accountability, rational process that clearly help define and justify decisions, results and improvements. TQM's emphasis on stakeholder inputs and relations to create a positive exchange of ideas and approaches has informed the manner in which government agencies enact their rulemaking and enforcement of statutorily defined expectations.

This study shows that TQM practices can be found within legal documents, including statutes. It looked at the originating statute and Guidance Notes from Australia's higher education quality assurance scheme, TEQSA to look at identifying linkages. Although not discussed, TEQSA's predecessor AUQA's quality assurance scheme also took on a number of TQM practices on board such as benchmarking (Padró & Sankey, 2018; Stella & Woodhouse, 2007). Issues of consistency in approach were evident (Winchester, 2010). Combined with perceived inconsistencies in the accreditation process and decisions (Bradley et al., 2008), the change in agencies reflected a desire to improve and streamline quality assurance of the higher education sector rather than replace the basis of practice.

There are other legislative acts and supporting documents similar to the TEQSA legislation that can also act as another example of how to parse legal documents in search of TQM concepts. An example from the USA is the Sarbanes-Oxley Act of 2002 (Pub.L. No. 107-204, 116 Stat. 745 (July 30, 2002)), a.k.a., SoX. Its focus is primarily risk-based, but there are TQM elements as well reflective of the mutuality of both frameworks. For those looking at a higher education application of SoX will have greater difficulty finding applicable legal documents given its focus is the securities and exchange sector. A beginning place for the analysis in this instance is a professional association, the National Association of College and University Business Officers (NACUBO) created a set of guidelines on how to implement Sarbanes-Oxley in campuses in 2003. The next step is to go to the voluntary regional



accrediting agencies in the USA to see how they apply the NACUBO recommendations. There is a linkage between the accrediting bodies and the regulatory framework of states who oversee higher education because institutions usually require recognition from a state and accrediting body. From here, the search then goes into the statutes framing the oversight or regulatory agencies. Two issues are present. First, there is a difference between national and state or regional jurisdictions, meaning that there are different sets of laws and rules that have to be researched. Second, it requires an investigator to know the lay of the land in terms of government regulatory schemes and the sector as well as a solid knowledge of TQM.

As alluded to previously, this is a beginning step in performing this type of research. The next step is to refine search processes using key words and Boolean logic bases on TQM as applied to legal databases. The importance of this line of research lies beyond the fact that it is an under-researched area in Quality. The importance of this line of research rests in demonstrating the extent to which process and systems thinking has impacted the way in which sectors are seen, treated and valued by government, whose responsibility it is to ensure the public wellbeing.

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