Overseas Students OMBUDSMAN

Submission by the Overseas Students Ombudsman

Inquiry into the provisions of the Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015

Submission by the Commonwealth and Overseas Students Ombudsman,
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BACKGROUND

On 15 October 2015, the Education Services for Overseas Students Amendment (Streamlining Regulation) Bill 2015 and the Education Services for Overseas Students (Registration Charges) Amendment (Streamlining Regulation) Bill 2015 were referred to the Senate Education and Employment Legislation Committee.

The Overseas Students Ombudsman (OSO) is pleased to provide a submission to the inquiry. Our comments are based on our experience in investigating international student complaints about private registered providers, with reference to the ESOS Act and the 'National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007'.

The value of international education lies in creating positive experiences for international students that lead to long term connections and relationships across the globe. The quality of these relationships rests in part on the experiences of international students with their education providers, from pre-enrolment to post-graduation. If problems arise, the availability of an independent, impartial complaints and appeals body, such as the OSO, can be critical to resolving problems and restoring student confidence in Australia's international education services.

In 2009-10, the international education sector experienced a crisis with a high number of provider closures affecting thousands of international students. The Baird Review[1] introduced a suite of measures designed to increase protections for international students. Baird noted that the unparalleled growth in the sector up to 2009 had resulted in damaging pressures affecting education quality, regulatory capacity, and students' tuition protection infrastructure.

The Baird Review recommended an enhanced Tuition Protection Service (TPS) and the introduction of a statutorily-independent complaints body for international students enrolled with private providers (the OSO). This was to ensure international students studying in the private sector had equal access to an independent complaints body, as international students with public providers already had with the relevant State and Territory Ombudsman offices.

The Commonwealth Ombudsman's Act and jurisdiction was extended and the OSO commenced operating on 9 April 2011. International students in all education sectors, with public and private providers, now have access to an independent complaints and appeals body.

The OSO has three main functions:

- investigate individual complaints about the actions or decisions of private CRICOS-registered education providers in connection with intending, current or former international students
- work with private registered education providers to promote best-practice handling of international students' complaints, and
- report on trends and broader issues that arise from our complaint investigations.

[1] Stronger, simpler, smarter ESOS: *Supporting International Students: Review of the Education Services for Overseas Students (ESOS) Act 2000,* February 2010.

There are approximately 1,000 private providers in our jurisdiction and we have received complaints about nearly a third of them. We received 2,150 complaints and appeals in our first four years of operation. We investigated 879 of these by contacting the provider and resolved 1,271 based on the documents the student provided. We made recommendations for improvements in many cases we investigated.

The number of complaints and appeals we receive continues to rise as international student numbers increase and as students and providers become more aware of our services. For example, we have experienced a 33% increase in complaints and appeals in 2014-15 following a 14% increase in 2013-14.

The most common complaints to the OSO are:

- refund complaints and fee disputes
- external appeals about providers refusing to release a student so that they can transfer to another provider under standard 7 of the National Code
- external appeals against the decisions of providers to report students to the Department of Immigration and Border Protection (DIBP) for unsatisfactory attendance under standard 11 or course progress under standard 10 of the National Code.

We provide assurance to international students that they have been treated according to the rules, even when the outcome may not be in their favour. This gives international students confidence that they have received fair treatment and that Australia respects the rights of international students as set out in the ESOS framework. Where we find that a provider has not met its legislative obligations or followed its policies, we recommend a remedy for the student and improvements to ensure the same problem does not happen again. In serious cases, we report the provider to the relevant regulator.

One of the problems highlighted in the ‘perfect storm’ of 2009 was the lack of information the sector had about the type of problems international students were experiencing. As part of our role, we report on the issues we see through our complaints. We also highlight ways to address and prevent these problems through our:

- quarterly and annual reports
- issues papers and student fact sheets
- submissions to reviews, enquiries and research projects
- education provider and student e-newsletters
- education provider workshops, training webinars and conference presentations
- presentations at key student events.

COMMENTS ON THE ESOS AMENDMENT (STREAMLINING REGULATION) BILL 2015

Schedule 1 – Streamlining the roles of government agencies – revised, broader definition of education 'provider'.

In relation to the proposed change to the definition of provider, we would like to ensure that the definition of 'registered provider' is retained in s 5 of the ESOS Act as: 'registered provider for a course for a location means an approved provider that is entered on the Register as a provider for the course for the location'.

Our jurisdiction relies on this definition under s 19ZJ of the *Ombudsman Act 1976*, which states: 'the Overseas Students Ombudsman is authorised by this Act to investigate complaints about action taken by a private registered provider in connection with an overseas student, an intending overseas student, an accepted student, or a former accepted student, within the meaning of the Overseas Students Act'. The reference in s 5 of the ESOS Act to 'a registered provider for a course for a location' gives meaning to the reference in our Act of a 'registered provider'.

Schedule 1 – Use of other relevant information by the ESOS agency to assess applications for registration or reregistration or adding courses at locations where information has been received for other purposes but is relevant to the application under ESOS, for example registration under the TEQSA Act or NVETR Act.

The OSO has the power under s 35A of the *Ombudsman Act 1976* to disclose information regarding providers of concern to the national regulators, ASQA and TEQSA. In 2014–15, we used our power on three occasions to report to ASQA details of complaints where we considered it was in the public interest to advise the regulator. On the first two occasions we advised ASQA that we had not formed a view and believed ASQA was better placed to determine if the provider had complied with the legislation applying to Vocational Education and Training (VET) providers. In the third case we disclosed allegations made in an anonymous complaint to the agencies those allegations related to, including ASQA, the Department of Education and Training (DET), DIBP, the Australian Federal Police and Australia Post.

Once we refer a matter, it is up to the agency to whom we provide the information to decide what regulatory action, if any, it should take. We support the proposal to allow the regulator as the ESOS agency to use this information where relevant in the performance of its regulatory functions.

Schedule 2 – Providers will be allowed to seek an internal review of some decisions made by the relevant ESOS agency where previously only appeal to the Administrative Appeals Tribunal was available.

We support this change as consistent with best practice complaint handling principles, which support the provision of an internal review right within the decision-making body prior to a review application being made to an independent, external complaints/review/appeal body. This change would allow the ESOS agency to correct any errors it identifies at the internal review stage rather than the provider having to apply and wait for a review by the AAT.

Schedule 4 – The TPS Director can make a recommendation to an ESOS agency that the agency take enforcement action under section 83(1A) of the ESOS Act. The ESOS agency must consider the TPS Director's recommendation when deciding to take action against a provider.

The OSO transfers certain complaints to the TPS, where it is better suited to deal with those complaints. This includes complaints about provider closures and complaints about an unpaid refund following a student visa refusal, where the TPS can pay the refund directly to the student. Where the TPS identifies a serious breach by the provider, we understand the TPS can report this to the relevant regulator. Therefore, we support this change to ensure the TPS can provide relevant information about potential breaches of the ESOS Act or National Code to the ESOS Agency for consideration.

Schedule 5 – Information about accepted students (including student course variation). Reporting period extended to be within 31 days, except where the student is under 18 years of age, which requires reporting within 14 days.

We find through our complaints that many providers appear to be unaware of the requirement to report information about accepted students in instances of non-commencement or cessation of studies under s 19(1) of the ESOS Act. We recommended in our August 2015 submission to DET on these proposed changes that it provide training to providers about this requirement when implementing any change to the timeframe for making any such reports.

Schedule 5 – Changes to the collection of tuition fees. Students or third parties will be allowed to pay more than 50 per cent of tuition fees up front if:

- **a request is made to do so (by the student or a third party), or**
- **the course has a duration of 25 weeks or less (is a short course).**

We understand the introduction in July 2012 of the 50% limit on fees paid before course commencement caused problems for scholarship students whose home countries wished to pay their course fees in full up front. We understand this change will address that situation for scholarship students.

However, in relation to non-scholarship students, we would like to note the concerns raised about this change at the National Overseas Student Complaint-Handlers Forum, which we hosted in Melbourne on 9 July 2015 with over 30 complaint-handlers from a range of organisations around Australia. Concerns were raised about how it can be demonstrated that it was the student or payee's choice to pay more than 50% of the fees upfront. For example, could some providers or education agents seek to pressure students to request to pay 100% of the fees prior to course commencement for the provider's benefit, without a genuine desire on the part of the student to pay the total fees? Alternatively, could providers request more than 100% of the fees upfront without telling students they have a right to choose to only pay 50% upfront? We expect we may receive complaints where the student claims they did not request to pay more than 50% of the fees upfront but the education provider states that it received such a request from the student or the student's education agent.

To ensure there are sufficient safeguards in place in introducing this change, we recommended in our submission to DET that it provide clear guidance to education providers and students about what constitutes a request to pay more than 50% of tuition fees prior to commencement for courses over 25 weeks long.
We recommended that DET include a requirement that such a request be recorded in writing and retained by the provider to be produced in case of any future disputes.

Fee and refund disputes are the most common type of complaint the OSO receives, amounting to nearly a third of all international student complaint issues raised with our office. In our first four years of operation, the OSO received and assessed 680 complaints about fee disputes and refunds relating to written agreements. We investigated 224 of these and in 114 of these cases our outcome supported the student and recommended that the provider refund the student or cease pursuing the student for fees. In 22 cases the provider reconsidered its decision after we contacted it and refunded the student or ceased pursuing the student for fees.
Where we have recommended that a provider refund a student, this was generally because:

- the written agreement was not compliant with the ESOS Act or the National Code and therefore the student was entitled to a refund under s 47E,
- the student was entitled to a refund under the terms of the written agreement even though the provider had declined to pay, or
- the written agreement was ambiguous about refund and fee matters and therefore it was fair and reasonable for the ambiguity to be resolved in the students favour.

In March 2015, we published an issues paper on problems with written agreements between international students and private registered education providers[2]. Accompanying this was a written agreements checklist[3] to help providers ensure their written agreements comply with all the legislative requirements set out in the ESOS Act and the National Code. Complaints about refunds and fee disputes continue to be our number one complaint type.[4]

Currently, even with the 50% limit on the collection of upfront fees, we see refund and fee disputes involving tens of thousands of dollars. This is especially the case with packaged courses where students have enrolled in a series of courses covering several years. DIBP advised at our 2014 Overseas Students Complaint Handlers Forum that it is now common for students to apply for a student visa to cover a package of courses lasting up to seven years. This increases the likelihood that the student may wish to transfer out of the package at some point over the years resulting in a possible refund or fee dispute. In most cases we resolve the complaint on the basis of the provider's written agreement, depending on whether it is compliant. However, we are concerned that the removal of the 50% limit on upfront fees will increase the amount of money at stake in these disputes.

The proposed change may also affect the consumer choice of students to withdraw from a course if they are unhappy with the quality of the course without recourse to a refund, if the written agreement states that no refund is paid after course commencement. It is possible that this change may therefore result in an increase in complaints and disputes between international students and education providers.

[2] http://www.oso.gov.au/docs/attachment_a_waip.pdf
[3] http://www.oso.gov.au/docs/attachment_b_waip_external_checklist.pdf
[4] http://www.oso.gov.au/publications-and-media/reports/quarterly/OSO_Quarterly_Statistical_Report_Jul_Sep_2015.pdf

We note paragraph 6 of the preamble to the National Code 2007 states:
Consumer protection must be appropriate for overseas students who usually cannot evaluate the quality of a course before purchase. If there is reason for discontent with the services they have obtained, they may not be able to remain in Australia to pursue the consumer protection remedies provided through the Australian courts.

It is important to note that the OSO would not be in a position to determine if the course quality was substandard, if a student complained that they should be entitled to a refund due to poor course quality. We would not be able to assist if the written agreement stated that the student was not entitled to a refund after course commencement and the written agreement was compliant with the ESOS Act and National Code requirements.

We would refer the complaint about quality to the relevant regulator, ASQA or TEQSA. However, we understand that ASQA and TEQSA would use this information to inform their regulation of the provider but would not necessarily investigate to determine and advise the student if their complaint about quality was substantiated. This would mean the student would need to pursue a claim under the Australian Consumer Law through a legal service such as the Redfern Legal Centre's International Student Legal Advice Clinic. However, not every state has such a service, which is free and easily accessible to international students. This may result in students having unresolved fee and refund disputes based on allegations of substandard course quality without easy access to an appropriate legal service to purse their complaint.

Schedule 5 – Removal of the definition of 'study period'. Remove the definition of and references to a 'study period' and associated requirements.

Currently, s 22 requires education providers to make a written agreement with the student specifying the length of each study period and amount of tuition fees for each study period. This requirement was introduced in July 2012 in connection with the limit on a provider receiving more than 50% of the total fees before course commencement (except for a course of less than 24 weeks in duration). To facilitate this, providers have been required to specify the study periods in the written agreement.

We note the intention to remove the requirement to specify a study period in a written agreement between the provider and student. This should not have any effect where the refund policy and fee cancellation policy refer to the course start date when setting out whether a student is eligible for a refund or liable to pay further fees in case of a student default. However, if the refund policy or fee cancellation policy refers to withdrawing from a course before or after the start of a study period, then a definition of study period should be included in the refund policy and any fee cancellation policy, to give meaning to this term in the written agreement.

For example, we see some written agreements which state that if the student withdraws from the course without giving a certain amount of notice, the fees for the next term or semester will still be payable. In order to apply this policy a definition of term or semester, and the proportion of the fees that apply to that period, would be necessary. Otherwise, providers may not be able to implement their refund policy or fee cancellation policy if a reference to study period is made without a definition and without an explanation of what percentage of the total tuition fees this amounts to, in the absence of a list of tuition fees for each study period.

The *Education Services for Overseas Students (Calculation of Refund) Specification 2014*[5] sets out the method for calculating a refund owed in provider default and s 47E student default cases. It uses 'weeks in the default period' and 'weekly tuition fees'. This means the written agreement must contain the course start and end dates and the total tuition fees payable so it is possible to divide the course and tuition fees into weeks, to calculate the refund.

Conclusion

We appreciate the opportunity to submit this submission to the Senate Education and Employment Legislation Committee. We would be happy to discuss the information we have provided or answer any queries the committee may have.

[5] https://www.comlaw.gov.au/Details/F2014L00907