

1 October 2024

Committee Secretariat
Senate Education and Employment Legislation Committee
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Dear Senate Education and Employment Legislation Committee,

Re: Submission to Inquiry into Universities Accord (National Student Ombudsman) Bill 2024

Thank you for the opportunity to provide a submission in relation to the inquiry into the *Universities Accord (National Student Ombudsman) Bill 2024*.

My submission focuses on how the new National Student Ombudsman will enhance student safety and welfare, most particularly in relation to the handling of complaints of sexual assault and sexual harassment in university settings. It also comments on the vulnerability of higher degree researchers.

By way of background, in 2023 I was awarded my doctorate with the Australian Human Rights Institute at the University of NSW. My thesis, *Regulatory responses to sexual assault and sexual harassment in Australian university settings*, focused on student peer-to-peer experiences and took a system-wide structural approach to interrogate why there had been so little progress in reducing campus sexual violence over the decade 2011-2021. Prior to commencing my doctoral studies, I was the Campaign Director of The Hunting Ground Australia Project (2015-2018), which has been credited with “dramatically rais[ing] awareness in the university sector and Australian community of sexual violence at universities.”¹ More recently, I served as a member of the Commonwealth Department of Education's Gender-based Violence Stakeholder Reference Group in 2023 and the Expert Reference Group on the National Higher Education Code to Prevent and Respond to Gender-based Violence this year. I am currently leading a national research study on 'Understanding HDR candidate-supervisor relationship challenges' with 10 Australian universities.

I would be happy to appear before the Committee to further discuss issues raised in this submission.

Yours sincerely,

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¹ Indira Rosenthal and Robin Banks, *An Initial Review of Sexual Assault and Sexual Harassment Prevention and Response at the University of Tasmania* (March 2018), p.3, http://www.utas.edu.au/data/assets/pdf_file/0009/1115982/SASH-Review-Report-Final-23-April-2018-002.pdf.

Introduction

I warmly welcome the *Universities Accord (National Student Ombudsman) Bill 2024*, providing for the establishment of a new statutory function, the new National Student Ombudsman (NSO), within the Commonwealth Ombudsman. I was consulted on the Bill prior to its introduction and am pleased to advise that several concerns raised at that time were addressed.

The Bill marks the first legislative step in implementing the national *Action Plan Addressing Gender-based Violence in Higher Education* endorsed by Australia's Commonwealth and State and Territory Education Ministers in February 2024.² The *Action Plan* itself responded to the University Accord's July 2023 *Interim Report*, which had identified governance improvements to address staff and student safety as one of five priority actions, having determined that "Staff and student safety, including in relation to sexual assault and sexual harassment, requires concerted action."³

The establishment of the new NSO is a long overdue acknowledgement that the complaints processes currently in place in Australian university settings have consistently and often catastrophically failed student survivors of sexual violence.

Reflecting my doctoral and further research, my submission focuses on how the new NSO will enhance student safety and welfare, most particularly in relation to the handling of complaints of sexual assault and sexual harassment in university settings. My submission also comments on the vulnerability of higher degree researchers and how they may interact with the NSO. However, I welcome the introduction of an escalated complaints mechanism for other higher education students and for other matters identified by the Government.

Necessary regulatory intervention

The establishment of the NSO represents a major regulatory intervention in Australia's higher education sector and will particularly impact on the highly valued autonomy of universities.

The necessity for such intervention was a key finding of my doctoral research, which took a system-wide structural approach to interrogate why there had been little advancement in reducing the

² Department of Education (Cth), *Action Plan Addressing Gender-based Violence in Higher Education* (Report, 23 February 2023) <https://www.education.gov.au/action-plan-addressing-genderbased-violence-higher-education>

³ Department of Education (Cth), *Australian Universities Accord: Interim Report* (Report, 19 July 2023) 15 <https://www.education.gov.au/australian-universities-accord/resources/accord-interim-report>

prevalence of sexual violence, in improving support and responses to student complainants, or in boosting institutional accountability and transparency.⁴ My thesis attributed the lack of substantive progress to an over-reliance on the self-regulating university sector to lead the reform effort and deficiencies in the regulatory approach adopted by the Tertiary Education Quality and Standards Agency (TEQSA), amongst other factors.

The university sector's rhetoric around 'zero tolerance' for sexual violence over the past decade has not been matched by robust action. My research has established that efforts by universities have instead been characterised by regulatory ritualism, described as when "where people or businesses choose actions which look good to avoid regulatory interference instead of actions which really make a difference and maximise positive outcomes."⁵

As I have argued elsewhere, TEQSA's approach to regulating the higher education sector's management of sexual violence has also been deeply flawed, leading to illusions of accountability.⁶ Despite the former Coalition government identifying TEQSA as "the best-placed institution to hold universities and higher education providers to account and to ensure they are meeting their legislative requirements and community expectations when it comes to addressing sexual assault",⁷ TEQSA was always ill-equipped to lead this work. The regulator was not provided with any additional funding, never had the requisite specialised expertise around sexual violence, and was limited to administering the Threshold Standards, a broad regulatory framework for higher education that does not mention sexual assault or sexual harassment. Beyond these constraints, as the Senate Legal and Constitutional Affairs References Committee found in September 2023, "the regulator has continually failed to exercise the full breadth of its powers to hold universities accountable for their woeful responses."⁸

These regulatory failures left student survivors without adequate remedy or recourse, from either their institution or the national higher education regulator, not only compounding their trauma,

⁴ Allison Henry, *Regulatory responses to addressing and preventing sexual assault and harassment in Australian university settings* (Doctoral thesis (UNSW), 2023) <https://doi.org/10.26190/unsworks/24894>

⁵ Valerie Braithwaite, 'Ten things you need to know about regulation but never wanted to ask' (Regulatory Institutions Network Occasional Paper 10, December 2006)

<https://regnet.anu.edu.au/sites/default/files/publications/attachments/2015-07/10thingswhole.pdf>

⁶ Allison Henry, 'Illusions of accountability: the Tertiary Education Quality and Standards Agency's regulation of sexual violence in Australian university settings', *Australian Journal of Human Rights* (2023) 29(2) 401-408, <https://doi.org/10.1080/1323238X.2023.2265559>

⁷ The Hon Dan Tehan MP (Minister for Education), *Statement on TEQSA report* (Media Release, 25 January 2019).

⁸ Senate Legal and Constitutional Affairs References Committee, *Current and proposed sexual consent laws in Australia* (Report, September 2023) [5.102]

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/sexualcontentlaws/Report

causing frustration and disillusionment, but also adversely impacting the students' educational outcomes.

The broad functions of the new NSO (section 21AC) – including handling complaints (Division 3), conducting investigations (Division 4), reporting and making recommendations (Division 5) and giving higher education providers advice and training about the best practice for the handling of student complaints – offer an opportunity for necessary cultural change across Australia's higher education sector, enabling the better protection of student's human rights. As such, I believe the establishment of the NSO (together with the forthcoming *National Higher Education Code to Prevent and Respond to Gender-based Violence (National Code)*) will address many of the current regulatory shortcomings and promises to be transformative for student survivors.

Streamlined escalated complaints process

It is important to recognise that the current complaints framework available to higher education students acts as an effective disincentive to pursue further action. Student survivors require an awareness and understanding of the myriad avenues available, and the time, resources and support required to pursue an escalated complaint.

Under the existing arrangements, when students who have been subjected to sexual violence are dissatisfied with their higher education provider's response and seek redress beyond the administrative or disciplinary mechanisms offered by the provider, they must navigate various complaint options available under State and Territory legislation including anti-discrimination or equal opportunity statutes, Ombudsman complaint pathways and work health and safety procedures. Alternatively, student survivors can lodge a 'concern' with TEQSA, a process End Rape on Campus Australia found so harmful it stopped recommending it as a pathway for students.⁹

By establishing a streamlined escalated complaints process (Division 3 Subdivision A) and transfer and referral powers to and from other prescribed Commonwealth and state and territory bodies (sections 21AE, 21AH), the Bill offers an opportunity to replace this confusing array of student complaints options with a more accessible, and nationally consistent, complaints mechanism.

⁹ *Ibid*, [4.116].

Broad coverage of NSO complaints process

I welcome the broad definition of ‘higher education student’ inserted by the Bill, and the broad grounds for complaints (under section 21AD(2)), which will ensure comprehensive access to the NSO complaints mechanism.

The NSO being able to accept complaints from prospective, current and former higher education students of TEQSA registered higher education providers, including offshore students (section 21AD(1)(a)), and the intended ordinary broad meaning of ‘course of study’, recognises the multiple sites, times and circumstances where sexual violence has been experienced by higher education students, as detailed in the two national student safety surveys.¹⁰

The ability for past students to make complaints to the NSO responds to long term frustrations with existing reporting pathways. The large number of qualitative submissions made to the two national student survey processes suggests that the NSO will likely receive a significant number of historical complaints from past student survivors. As noted in the Bill’s Explanatory Memorandum, the restorative engagement processes may be an appropriate tool for the NSO in these cases.¹¹

The Bill provides for complaints made (with consent) on behalf of higher education students (section 21AD(1)(b)), which will assist student survivors of sexual violence who are already traumatised by their experiences and the complaints processes at their institutions. However, at this time it appears that the NSO model does not make provision for supporting the organisations that provide assistance to student survivors in making complaints, such as End Rape on Campus Australia. This important work has been performed unpaid for many years and is not sustainable.

To ensure that the complaints mechanism is accessible to all students, as intended, I recommend that the NSO promptly establishes formal support for organisations aiding complainants.

Given the stated legislative intent of the Bill, the excluded actions defined in section 21AD(3) appear reasonable.

¹⁰ Australian Human Rights Commission, *Change the Course: National report on sexual assault and sexual harassment at Australian universities* (1 August 2017) <https://www.humanrights.gov.au/our-work/sex-discrimination/publications/change-course-national-report-sexual-assault-and-sexual>; *National Student Safety Survey* (Web Page, 23 March 2022) <https://www.nsss.edu.au>

¹¹ Explanatory Memorandum, Universities Accord (National Student Ombudsman) Bill 2024, para 124.

Broader consideration of issues in NSO complaints process

I strongly support section 21AV(1)(b) of the Bill, which empowers the NSO to consider whether actions taken by higher education providers are unlawful, unreasonable, unjust, oppressive, discriminatory or otherwise wrong.

As noted above, TEQSA's consideration of the management of sexual violence issues by higher education providers has been limited to its administration of the Threshold Standards, which do not mention sexual violence. The regulator's concerns / complaints process has focused on assessing a provider's compliance with the Threshold Standards¹² and "the provider's policy framework, as well as evidence of implementation and the effectiveness of the systems in place to address risks."¹³ In accordance with this framework, TEQSA has resolutely adhered to assessing risks in university systems rather than consider whether those policies and procedures represent good practice, and are reasonable and just for all parties.

This focus has resulted in some perplexing outcomes, for example in a case where a complainant, who had been stalked and harassed by a fellow student, was unable to achieve a satisfactory response from their university. After a prolonged investigation, the university concluded that a letter of apology from the male student to the registrar, and a requirement that they stay a 'reasonable' but undefined distance away from the complaint, was a sufficient institutional response. Escalating the complaint, the student subsequently secured a five-year domestic violence order through the courts against the perpetrator. Meanwhile, TEQSA determined that the university had fully complied with its policies, albeit finding 'room for improvement'. By that time, 17 months after raising a concern with TEQSA, the complainant had abandoned her studies and left the university.

I believe the broader conception of issues to be considered in the NSO model will result in more effective remedies for student survivors of sexual violence, leading to improved student safety outcomes.

¹² Senate Standing Committees on Education and Employment, Parliament of Australia, *Additional Estimates 2017-18*, Question on Notice SQ18-000119.

¹³ Senate Standing Committees on Education and Employment, Parliament of Australia, *Additional Estimates 2017-18*, Question on Notice SQ18-000121.

Handling of complaints – higher degree researchers

I note that the NSO is generally intended to be an escalated complaints-handling mechanism for students who have already complained to their provider and are unsatisfied with the response received. However I welcome the clarification in the Explanatory Memorandum, in relation to the operation of section 21AJ, that:

It is not a requirement that a student complain to their higher education provider before seeking to access the National Student Ombudsman and in some cases, there may be compelling reasons to complain directly to the National Student Ombudsman.¹⁴

I am currently completing a research project with the Australian Human Rights Institute at UNSW, examining relationship issues between higher degree researchers (HDRs) – PhDs and Masters by research candidates – and their supervisors across 10 Australian universities.¹⁵ Emerging themes confirm the findings of the pilot study, that the power dynamics inherent in the structure of HDR programs led to the extreme reluctance of HDR candidates to report or complain to their institution when they were experiencing issues with their supervisors, such as bullying and intimidation, conflicts of interest, research integrity issues and sexual harassment.¹⁶ As noted in the pilot study report:

Interviewees reported that many candidates expressed concerns about long term ramifications in raising or reporting issues, not only in terms of their candidature but also in relation to future research and career prospects. These concerns were particularly acute in smaller schools or in fields where there was concentrated academic expertise.¹⁷

I suggest that these circumstances represent compelling reasons for HDRs to complain directly to the NSO and recommend that the NSO consider ways to particularly promote the availability of the NSO complaint pathway to HDR candidates.

¹⁴ Explanatory Memorandum, Universities Accord (National Student Ombudsman) Bill 2024, para 87.

¹⁵ Australian Human Rights Institute, *Understanding university responses to HDR candidate-supervisor relationship challenges (Phase 2)*, (Web Page) <https://www.humanrights.unsw.edu.au/research/current-research/university-responses-HDR-candidate-supervisor-relationship-phase-2>

¹⁶ Australian Human Rights Institute, *Understanding university responses to HDR candidate-supervisor relationship challenges (Phase 1)*, (Web Page) <https://www.humanrights.unsw.edu.au/research/current-research/university-responses-HDR-candidate-supervisor-relationship>

¹⁷ Australian Human Rights Institute, *Pilot study: Understanding University Responses to HDR Candidate-Supervisor Relationship Challenges* (Report, July 2021), p.10, accessed at <https://www.humanrights.unsw.edu.au/research/current-research/university-responses-HDR-candidate-supervisor-relationship>

Trauma informed processes

I welcome the inclusion of trauma informed processes in the Bill, such as ensuring the consent of student complainants before proceeding with particular actions (sections 21AH, 21AK, 21AY) or disclosing information to other bodies (section 21AZG) and keeping student complainants informed about the progress of investigations and copies of recommendations given to a provider (application of section 12 of the *Ombudsman Act 1976* (Cth)). These provisions will address some of the key critiques of TEQSA's concerns process.

The potential use of alternative dispute resolution processes (Subdivision D of new Part IIF Division 3) and restorative engagement processes (Subdivision E of new Part IIF Division 3), which the Commonwealth Ombudsman already employs in exercising its other functions, is also welcomed. As noted above, restorative engagement processes – bringing together the student complainant and a senior leader of the relevant higher education provider, to provide the student with an opportunity to share their personal account of the action complained of, and the harm and impact caused – may be particularly effective in relation to historical complaints. Restorative engagement processes may also provide an antidote to student's experiences of institutional betrayal, such as when institutions have been dismissive or questioning of a survivor's experience, insensitively responded to a disclosure or neglected to proactively investigate a report.

Protection from reprisals

The strong protection from reprisal provisions in the NSO Bill (new sections 35D, 35E, 35F) are an important acknowledgement that students raising concerns with their institutions have on occasion been academically or otherwise punished for reporting. As the two national student safety surveys and HDR research undertaken by the Australian Human Rights Institute have all found that fear of reprisal has been a significant barrier to reporting, I anticipate the inclusion of these protections will help to deter these behaviours and build student confidence in the NSO complaints process.

Own motion power offers opportunity to address systemic issues

I welcome section 21AT(1)(b) of the Bill which provides the new NSO with the power to initiate investigations. My doctoral research found that higher education providers and TEQSA have adopted an episodic approach to manage incidents of sexual violence, which has effectively suppressed systemic analysis and responses. The own motion power will provide an opportunity for the NSO to consider issues occurring across the sector, rather than just focusing on one provider or jurisdiction.

I suggest that the widespread use of non-disclosure agreements (NDAs) by universities in relation to the resolution of sexual violence complaints is an issue that may appropriately fall within the NSO's investigatory mandate. While the use of NDAs (unless requested by the complainant), is expected to be prohibited by the forthcoming *National Code*, I recommend that the NSO urgently consider how students who have been subject to NDAs in the past have had their access to effective remedies curtailed, and whether those students may now have limited capacity to pursue a historical complaint through the NSO's complaints mechanism.

Timely response to recommendations

Following investigations, if the NSO finds that "some particular action could be, and should be, taken to rectify, mitigate or alter the effects of the action taken", that "a policy or practice on which the action taken was based should be altered", "reasons should have been, but were not, given for the action taken" or "any other thing should be done in relation to the action" taken, the NSO can make recommendations for rectification or change to the principal executive officer of the higher education provider and request, within a specified time, that the provider advise the NSO of actions taken in response (section 21AV). Given the lengthy delays many complainants to TEQSA faced, I welcome this process including a requirement for report backs within specific timeframes.

Greater transparency in reporting will enhance institutional accountability

As noted above, the NSO will be able to make any recommendations it sees fit to a higher education provider and consider whether a provider has taken appropriate action in response. While these recommendations are not binding on higher education providers, the reporting provisions outlined in the Bill (new Part IIF Division 5) are a major improvement on the current TEQSA processes and promise to greatly enhance institutional transparency and accountability.

TEQSA only publishes information about the outcomes of their regulatory decisions on the National Register of Higher Education Providers, available on the TEQSA website, where regulatory action is taken. Over recent years TEQSA has finalised dozens of complaints ('concerns') and other investigations regarding the handling of sexual violence matters by higher education providers, but never found a breach of the Threshold Standards it administers, or taken regulatory action, so there has been no public recording of its investigations. TEQSA has also refused to disclose to Senators which Australian universities have been subject to complaints processes. This approach has meant that current and prospective students and their families, university staff and governments have not been able to determine which institutions have been subject to TEQSA's scrutiny.

By contrast, the new NSO will be required to make annual and other reports to the Higher Education Minister, which will be tabled in Parliament. Higher education providers subject to complaints, recommendations made by the NSO, and actions taken in response, will all be publicly available, providing a basis for robust public monitoring and better enforcement.

Over the past decade the Australian university sector has repeatedly demonstrated its reputational sensitivity in relation to the management of sexual violence. I agree with the Explanatory Memorandum, that the ‘escalation pathway’ provided in the Bill will:

support accountability of providers in the event they do not comply, or engage genuinely, with the recommendations of the National Student Ombudsman.¹⁸

Advice to higher education providers

I welcome the intention that the NSO provide advice on best practice complaints-handling and resolution of student complaints to higher education providers (section 21AC(d)). Research undertaken by the Australian Human Rights Institute¹⁹ earlier this year demonstrated that there was wide variance in complaints mechanisms across Australia’s universities. I anticipate that advice and training from the NSO will be particularly valuable for smaller higher education providers and should lead to consistent systemic improvements across the higher education sector.

Conclusion

I note in conclusion that while the new NSO is a very welcome first step in implementing the *Action Plan*, it is vital that the forthcoming *National Code* be legislated and implemented as soon as possible. The Australian Human Rights Institute’s February 2024 research into university responses to campus sexual violence²⁰ demonstrated that

[U]niversity responses continue to be inconsistent and fragmented across the sector, leaving staff and students who have been subjected to sexual violence with a postcode lottery: the institutional response and support they will receive is highly dependent on the university, and sometimes the campus, they attend. Researchers observed a pattern of initiatives being introduced but then

¹⁸ Explanatory Memorandum, Universities Accord (National Student Ombudsman) Bill 2024, para 149.

¹⁹ Australian Human Rights Institute, *How Australian Universities are Responding to Campus Sexual Violence* (Report, 22 February 2024) <https://www.humanrights.unsw.edu.au/news/how-does-your-university-respond-campus-sexual-violence>

²⁰ *Ibid.*

neglected, including out of date policies and action plans, abandoned working groups and broken links on key websites.²¹

It is anticipated that the *National Code* will provide vital guidance to higher education providers, establishing nationally consistent standards around how they prevent and respond to gender-based violence. As such, the *National Code* will also provide certainty to higher education students around what they can legitimately expect of their institutions. The establishment of a new expert unit in the Commonwealth Department of Education to oversee the *National Code* will also be critical in providing regulatory oversight.

²¹ Allison Henry, 'A snapshot of Australian university responses to campus sexual violence', *Alternative Law Journal* (2024) <https://doi.org/10.1177/1037969X241284744>