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**Submission by the  
Commonwealth and  
Overseas Students Ombudsman**

**INQUIRY INTO BILLS REFERRED ON  
22 SEPTEMBER 2011**

**RESPONSE TO THE PROPOSED CHANGES TO THE  
EDUCATION SERVICES FOR OVERSEAS STUDENTS  
LEGISLATION**

Submission by the Commonwealth and  
Overseas Students Ombudsman, Allan Asher

**6 October 2011**

## **INTRODUCTION AND SUMMARY**

This submission discusses the Ombudsman's response to proposed amendments to legislation within the Education Services for Overseas Students legislative framework. Our submission draws on the experience of the Ombudsman in investigating complaints and pursuing issues on his own motion in his jurisdiction as Commonwealth Ombudsman, ACT Ombudsman and Overseas Students Ombudsman.

The Committee seeks submissions in relation to Bills referred to it on 22 September 2011. Those Bills are:

- Education Services for Overseas Students Legislation Amendment (Tuition Protection Service and Other Measures) Bill 2011
- Education Services for Overseas Students (TPS Levies) Bill 2011
- Education Services for Overseas Students (Registration Charges) Amendment Bill 2011
- Higher Education Support Amendment Bill (No. 2) 2011.

## **OMBUDSMAN BACKGROUND**

The Commonwealth Ombudsman safeguards the community in its dealings with Australian Government agencies by:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action
- fostering good public administration that is accountable, lawful, fair, transparent, just and responsive
- assisting people to resolve complaints about government administrative action, and
- developing policies and principles for accountability.

The Ombudsman has jurisdiction relevant to the concerns of Overseas Students through a number of roles. As Commonwealth Ombudsman he has jurisdiction over the Department of Education, Employment and Workplace Relations (DEEWR) and the Australian National University, and as Immigration Ombudsman, over the Department of Immigration and Citizenship (DIAC). As the ACT Ombudsman, he has jurisdiction in relation to two public education providers: the University of Canberra and the Canberra Institute of Technology.

The Ombudsman is also the Overseas Students Ombudsman. The Overseas Students Ombudsman's role was created arising from a recommendation of the Baird Review, *'Stronger, simpler, smarter ESOS: supporting international'*. It commenced on 9 April 2011. Since then, the Overseas Students Ombudsman has investigated complaints about action taken by private registered education providers in relation to intending and accepted overseas students, other than in South Australia. In that state, the Office of the Training Advocate investigates student complaints.

## **OMBUDSMAN'S RESPONSE TO THE BILLS REFERRED**

The Ombudsman welcomes the implementation of further recommendations of the Baird Review, and the further refinement of the framework within which overseas students study in Australia.

The comments which follow draw mainly on the office's experience of investigating complaints in circumstances where students have defaulted following visa refusal or under a written agreement, or a provider has defaulted, for instance in closing. These are common triggers for students contacting the Ombudsman. The submission also reflects on the office's experience of financial losses students suffer where refunds are delayed.

### **Full and partial refunds where a provider defaults**

Under the proposed legislation before the Committee students will only be entitled to refunds for tuition not already delivered because they 'may obtain credit for part study already completed'. The Ombudsman notes that the inverse is also true, that is, a student may not be able to obtain credit for part study completed. The legislative changes proposed in the *Education Services for Overseas Students Legislation Amendment (Tuition Protection Service and Other Measures) Bill 2011* evidence a changed policy approach to tuition fee assurance in this scenario.

### **Provider default: failure to provide a course in relation to a person**

The Ombudsman notes the positive change reflected in the wording of s46A(1)(a)(i). It recognises that a provider may in fact provide a course at a location on an agreed starting day, but may not offer it to a *particular student* if, for instance, the course is over-subscribed. Under the proposed amendment, this situation will constitute a provider default. This is appropriate. As the case of one student who complained to this office demonstrated, the experience of this scenario is just as much one of 'default' as if the course were not offered at all.

### **Delayed refunds and student compensation**

The Overseas Students Ombudsman has received complaints from students who have paid tuition fees in advance and then been unsuccessful in obtaining a student visa. In those circumstances under the current legislation, refunds must be paid to the students within 4 weeks of the default day, and students have come to the Overseas Students Ombudsman complaining of delays of up to 18 months in getting their refund. The clarity afforded by the creation of strict liability offences, for instance where a tuition refund is not paid within the legislative timeframe, is welcome. The Ombudsman notes that the effectiveness of these fines as deterrents to poor practice will be directly related to the consistency and predictability with which they are applied.

Anecdotally, many students and their families take out loans in order to pay their tuition, and refund delays can be very costly in terms of interest owed on loan amounts. While strict liability offences and fines may act as a deterrent, the fines levied do not put a student whose refund has been delayed back to the position they would have been in had the delay not occurred. The Ombudsman believes

consideration should be given to requiring providers in those circumstances to compensate students for financial losses flowing directly from the delay, or to applying the revenue from fines levied to compensate students affected.

### **Notification of discharge of obligations in cases of default**

Under sections 46F and 47H, providers are required to notify details of the amounts paid where the provider or the student has defaulted. There is provision in both sections for the Minister to specify the requirements of those notices by legislative instrument. The Ombudsman suggests that those requirements include advice on how the amounts detailed were calculated. Even where figures are correct, complainants to this office have expressed confusion and dissatisfaction where the calculation is not understood.

### **Certificate from designated authority**

In investigating complaints, the Overseas Students Ombudsman frequently finds that the policies and procedures of providers are clearly not compliant with the relevant legislation and the regulations. This occurs, for instance, where there is no definition of a 'study period' over which the student must attend a specified percentage of classes or risk being reported to DIAC, or where the provider's policies do not describe any circumstances in which a student will be released to a different provider. The National Code clearly requires both. These are fundamental omissions, with consequences both for the student in knowing their rights and responsibilities, and for the provider acting with rigour and certainty to support or report students as the framework intends. The Ombudsman looks forward to further clarification of the form of the certificate which designated authorities will provide under 9AH, particularly as they relate to the provider's compliance.

### **Record keeping requirements**

A clear requirement for providers to regularly update or confirm the accuracy of student contact details is a positive step. Student contact details are liable to change after their initial arrival in Australia, and many aspects of good management of the student-provider relationship require speedy and effective communication. Where, as now, education providers notify a student whose course attendance or progress is apparently unacceptable that they will report them to DIAC unless the student lodges an appeal, and with no appeal made, will report and set in train an automatic cancellation of the student's visa 28 days later, accurate contact details are essential. Complainants to this office have asserted that they have not received any Notice of Intention to Report and were not aware that they were on a countdown to visa cancellation, or even that their visas had already been cancelled, until for instance they went to return to their country for a holiday. On investigation providers have been found to have sent notices to addresses at which students do not live.

### **Amendments to the Ombudsman Act 1976**

The office of the Commonwealth Ombudsman has considered the proposed amendments to the Ombudsman Act that are currently contained in Schedule 5 of the *ESOS Legislation Amendment (TPS and Other Measures) Bill 2011*. We understand that the effect of the amendments is to extend the jurisdiction of the

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Overseas Students Ombudsman to the investigation of actions taken by private registered providers in connection with *former accepted students*.

We support this change but note that, once amended, s19ZJ(3) of the *Ombudsman Act 1976* will in part read ‘with an overseas student, an intending overseas student, an accepted student, or a former accepted student, *within the meaning of the Overseas Student Act*’ (our emphasis). We note, however, that while the Overseas Student Act currently defines the first three, the Bill does not appear to insert a definition of ‘former accepted student’.

Sub-item (2) provides that the amendments to the Ombudsman Act 1976 that are made by this Schedule apply in relation to any complaint made, or investigation commenced, after commencement. The Ombudsman supports this approach, noting that the complaint and investigation may relate to actions taken prior to the commencement of the amendment.