

Submission by the  
Commonwealth Ombudsman

**Inquiry into Australia's tourism and  
international education sectors**

Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT)

Submission by the Commonwealth Ombudsman, Iain Anderson

**19 December 2022**

## **Introduction**

This submission outlines the role of the Office of the Commonwealth Ombudsman (the Office), which is also the Overseas Students Ombudsman and describes that specialist function. It highlights relevant issues the Office has identified from handling complaints from international students and provides suggestions for the Committee to consider.

## **Background**

The purpose of the Office is to:

- provide assurance that the organisations we oversee act with integrity and treat people fairly, and
- influence systemic improvement in public administration in Australia and the region, and in the administration of private sector agencies we oversee.

We seek to achieve our purpose through:

- correcting administrative deficiencies through independent review of complaints
- fostering good administration that is accountable, lawful, fair, transparent and responsive
- assisting people to resolve complaints about administrative action of government and prescribed private sector agencies, and
- providing assurance that Commonwealth, State and Territory law enforcement, integrity and regulatory agencies are complying with statutory requirements and have sound administrative practices in relation to certain covert, intrusive and coercive powers.

### **The Overseas Students Ombudsman (OSO):**

- investigates individual complaints about the actions or decisions of private registered education providers in connection with intending, current or former overseas students
- works with private registered education providers to promote best practice handling of overseas students' complaints
- reports on trends and broader issues that arise from complaint investigations.

## **Response to Terms of Reference**

Our submission responds to the international education elements of the inquiry's terms of reference, specifically the item relating to international student experience.

We recognise the international education sector has adapted to online delivery and may wish to maintain flexibility to deliver a larger proportion of study online to international students. Our comments reflect issues the Office has identified in complaints received from international students about their experiences with online studies.

## **Ensuring positive international student experience**

The pandemic demonstrated that students can combine offshore online study with onshore face-to-face study. It also showed that some students may only tolerate a proportion of online study while onshore.

### ***Offshore online study***

In the period from 1 January to 7 December 2022, the Office received 760 complaints from international students. Around 9 per cent of those complaints were from international students who intended to complete a significant portion of their studies in Australia but commenced their studies online from their home country while waiting to travel here. Pandemic-related border closures and other factors have lengthened visa processing times for many international students, leading some students to elect to commence study online before obtaining a student visa.

Problems arise if a visa is refused, and the student withdraws from study because they never intended to complete the qualification entirely online.

In complaints to the Office, international students have reported that their education provider has not approved their request for a refund of amounts pre-paid for courses they will not continue in these circumstances. In some cases, students have also claimed they were encouraged by their education provider to commence study before receiving a visa outcome, despite their own reluctance.

We note that where the Office has made enquiries about these complaints with the students' education provider, it has agreed to refund the students.

To protect the experience of students commencing online study offshore with the intention of studying in person in Australia, we suggest education providers be required to:

- a) ensure students apply for and are granted a student visa before commencing online study offshore, or
- b) ensure students who wish to commence online study offshore before receiving a student visa understand and accept the risk they may not be granted a student visa, and
- c) not encourage or place any pressure on students to commence online study offshore before their student visa is granted, including by indicating this may improve chances of a positive visa outcome.

### ***Onshore online study***

Between 20 March 2020 and 20 February 2022 (a significant period of pandemic-related disruption to studies), the Office received 199 complaints about dissatisfaction with the cost or quality of online learning. Most of these complainants (76 per cent) sought either a reduction in fees or a refund.

This inquiry flags consideration of online innovations in education delivery as a way to improve the sector's resilience. The Department of Education also conducted a consultation process in April 2022, indicating the Australian Government may consider allowing education providers flexibility to deliver more than the current limit of one-third of units online (in the Higher Education and Vocational Education and Training sectors)<sup>1</sup>. We note that the Australian Skills Quality Authority (ASQA) and the Tertiary Education Quality and Standards Agency (TEQSA) currently do not enforce the one-third limit but have announced a transition to full compliance by 30 June 2023, where safe and practicable.<sup>2</sup>

In the context of permitting providers to deliver more than the current official limit of online study, the Office offers three suggestions to improve student experience.

1. Education providers be required to agree with students the maximum proportion of the course they will deliver online, ahead of confirming enrolment. Any changes without the student's consent would be viewed as the provider defaulting on the agreement, with specific remedies for the student in existing legislation. Students who complained to the Office about this issue during the pandemic objected to having the online mode of study forced upon them, without being asked for their consent and without any re-negotiation of the fees they would pay.
2. A limit still be legislated. International students who complain to the Office are sometimes surprised by the terms of the written agreements they have signed with education providers. As explained in the Office's issues paper on improving fairness in written agreements between international students and Australian education providers, written agreements can be very difficult for international students to read and understand.<sup>3</sup> A legislated limit would therefore still serve to protect students who may not fully understand the terms of their agreement.
3. Students be given a pathway to resolve complaints about course quality. When students contact the Office to complain about course quality issues, we can only advise them that there is currently no body with jurisdiction to which we can refer them to consider their complaint. Examples of the issues students have raised about online study include:
  - being placed in an English class with too many participants
  - trainers and assessors not responding to queries or requests for help
  - all learning being passive, e.g. trainers advising students to watch videos on sites such as YouTube.

Although ASQA and TEQSA are responsible for regulating course quality issues, they are not complaint handlers and do not resolve complaints for individual students.

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<sup>1</sup> National Code of Practice for Providers of Education and Training to Overseas Students 2018 (National Code), standard 8.19

<sup>2</sup> <https://www.teqsa.gov.au/about-us/news-and-events/latest-news/education-services-overseas-students-esos-national-code-return-compliance>, accessed 7 December 2022 and <https://www.asqa.gov.au/news-events/news/education-services-overseas-students-esos-national-code-return-compliance>, accessed 19 December 2022.

<sup>3</sup> Issues paper: Improving fairness in written agreements between international students and Australian education providers, [https://www.ombudsman.gov.au/\\_data/assets/pdf\\_file/0022/117157/Issues-paper-Improving-fairness-in-written-agreements-between-international-students-and-Australian-education-providers-A2287202.pdf](https://www.ombudsman.gov.au/_data/assets/pdf_file/0022/117157/Issues-paper-Improving-fairness-in-written-agreements-between-international-students-and-Australian-education-providers-A2287202.pdf), accessed 19 December 2022.

We also note that online study, both offshore and onshore, requires students to meet system requirements and have stable internet connections. Students cannot always predict when they may encounter problems with these services. It may benefit students and providers to check their system compatibility and test access speeds from their proposed study location prior to agreeing to study with an education provider.

### ***Improving fairness in written agreements between international students and Australian education providers***

Also relevant to the international student experience is the underlying fairness of the refund terms applied to students if they withdraw from study for which they have pre-paid. The Office has published an issues paper on the subject.<sup>4</sup> In summary:

- The most common complaint international students make to the Overseas Students Ombudsman is about refunds of pre-paid fees. Students withdrew from studies and expected a larger refund.
- The terms that providers rely on to retain fees are in standard form consumer contracts. Such contracts are subject to Australian Consumer Law provisions around Unfair Contract Terms.
- The Office views that providers should only retain a fair and reasonable amount from students, which closely relates to the amount that a provider has expended because a student agreed to study.
- Providers should also try to mitigate their losses in other ways that have a less detrimental effect on the student.

Although the Office is working to improve refund terms throughout the industry through direct dispute resolution and education, the committee may also wish to consider ways to reduce the likelihood of disputes arising over refund terms.

## **Conclusion**

The Office welcomes the committee's consideration of online innovations in education delivery and enhancement of the international student experience. We hope the information shared in this submission assists in progress towards these aims.

In summary, the Office suggests this inquiry considers:

1. safeguards for international students commencing online study offshore with the intention of completing study in person in Australia once they are able to travel here
2. ensuring international students are not required to complete a higher proportion of study online than they have agreed to
3. defining an upper limit for the proportion of online study an international student onshore in Australia can do as part of each course
4. pathways for resolution of complaints about course quality from international students, and
5. ways to mitigate the impact of technical difficulties for students required to complete study online.

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<sup>4</sup> Improving fairness in written agreements between international students and Australian education providers, [https://www.ombudsman.gov.au/\\_data/assets/pdf\\_file/0022/117157/Issues-paper-Improving-fairness-in-written-agreements-between-international-students-and-Australian-education-providers-A2287202.pdf](https://www.ombudsman.gov.au/_data/assets/pdf_file/0022/117157/Issues-paper-Improving-fairness-in-written-agreements-between-international-students-and-Australian-education-providers-A2287202.pdf), accessed 19 December 2022.

The Office also suggests the inquiry consider the experience of international students whose study journey does not go as planned, and who withdraw from their studies. Availability of a fair refund for fees they have pre-paid will strengthen Australia's reputation as a desirable study destination.

**Responses from the Office of the Commonwealth Ombudsman, in its capacity as the Overseas Students Ombudsman to additional Questions on Notice from the Joint Standing Committee on Foreign Affairs, Defence and Trade, relevant to its inquiry into Australia's tourism and international education sectors**

**Questions relating to education agents**

***Introduction***

The Office of the Commonwealth Ombudsman (the Office) receives few complaints specifically about the behaviour of education agents, which was raised in only 7 complaints received by the Office between 1 July 2022 and 14 June 2023 (comprising 0.7 per cent of all complaint issues). However, we recognise that education agents have an influence on many complaint scenarios, given their involvement in recruiting international students, assisting them to select appropriate courses, and setting expectations about the student's experience with education providers.

With this in mind, we make the following suggestions based on insights from handling student complaints.

**7. Should providers be required to have formal written agreements with all education agents they use?**

Under current requirements, providers must have written agreements with the agents they engage to formally represent them but can still accept students from other education agents. Without a written agreement between providers and agents, complaints about agent behaviour are difficult to assess, as:

- the provider's expectations of agent behaviour have not been formalised, and
- the status of the agent as 'representing the provider' becomes harder to establish, and therefore the provider may not be as clearly accountable for the agent's behaviour.

The Office would find it easier to assess complaints about education agent behaviour if providers were required to have formal written agreements with all education agents they use. We suggest that such a requirement might also influence providers to consider more carefully which agents they engage with, given that:

- the provider would recognise they may be held more easily accountable for the actions of their agent
- the increased effort of arriving at a written agreement would need to be balanced against a provider's confidence in the agent's performance, and
- the provider could consider any pushback from the agent about legitimate terms in the agreement as a warning sign.

This may also have the effect of encouraging unscrupulous agents to improve their conduct.

**7a. Should the Government mandate such contracts and have a list of required conditions?**

If the government mandates such contracts, including a list of required conditions, we suggest it considers including conditions that address common issues raised by international students in complaints to the Office. Suggested types of clauses include:

1. *Clarification that the agent is an agent of the education provider, not the student, and the education provider remains responsible for the agent's actions as though they were its own. This could include clarification that references to the agent's actions also encompasses sub-agent*

*behaviour, and a requirement for the agent to declare use of any sub-agents to the education provider.*

This would address a misconception we observe in complaints whereby education providers and students think of the education agent as the 'student's agent', meaning that providers do not accept responsibility for the agent's conduct.

2. *Education agents are obliged to keep records of important discussions with students, including:*
  - a. *Explaining transfer restrictions*

Sometimes, international students tell the Office that the agent advised them they would be able to change their providers once they arrive in Australia. This is despite there being quite strict and limited circumstances in which this is possible.

- b. *Explaining the provider's refund policy*

International students who complain to us about refunds often seem surprised about their limited entitlement to a refund. If education agents explain the relevant policy/ies to students at the outset, it may prevent disappointment at later stages and/or assist students to mitigate their loss.

- c. *Explaining the provider's fee policy*

Sometimes, students are liable for fees for future study periods, even if they withdraw before the study period commences. It is clear from their complaints to our Office that some students do not expect this liability. In our experience, students are also often not aware of other fees, such as those for late submission, re-assessment, suspension, deferral or re-sitting an examination.

- d. *Explaining the provider's policy on suspending studies*

In our experience, some providers do not allow suspension for reason of pregnancy or childbirth, while other providers require normal tuition fees to be paid during periods of suspension. Whatever the provider's position, it should be fair and clear to the student.

- e. *Confirming the student's free and informed consent to undertake the chosen course of study*

In complaints, some students tell us that they agreed to study a particular course only because the agent didn't provide them suitable alternatives. The agent should ensure the student understands their options and freely consents to the selected course.

3. *An obligation on education agents to refund the provider a proportion of the commission they received for recruiting a student, if that student does not remain enrolled with the provider beyond a specific and reasonable period of time.*

Education providers pay commissions to education agents in exchange for the agent selecting a genuine and suitable student for the provider's course. If the student does not commence or continue beyond a specified time, it is likely the agent has not fulfilled its obligation. Complaints to our Office indicate that in such situations, providers use commission paid to agents as a reason for withholding a refund to students of pre-paid fees, rather than requiring the agent to return a proportion of the commission.

## **8. Should the existing regulation be strengthened to require providers actively monitor agent performance and behaviour?**

Currently, education providers must have processes to monitor the activities of agents in representing the provider, including that agents give students accurate and up-to-date information.



Government may consider imposing more specific obligations, for example:

1. *To query, analyse and act on performance data identifying:*
  - a) *agents supplying students who do not commence or continue studies or fail to progress at a rate equivalent to or above that expected for that cohort.*

This approach could influence providers to work with education agents to identify potential problems with their recruitment strategies. It could also eventually support improvement against issues we see in complaints such as students not engaging with the course due to dissatisfaction with their experience, students not being academically or otherwise suited to the course, or students not having a genuine intention to study the course.

- b) *agents that recruited students potentially in breach of standard 7.1 (as the student was still transfer restricted at the time).*

This could result in providers reinforcing obligations not to approach students who are still transfer restricted. Poaching students who are still transfer restricted is a serious concern of education providers that the Office deals with regularly when handling complaints about transfer decisions.

2. *To regularly survey students on the information they were given by the education agent on the provider's behalf, including when a student lodges a complaint or appeals a provider's decision.*

A survey of this kind could provide contemporaneous intelligence about areas of potential misinformation or miscommunication that could be used to give feedback to the education agent. It may also give providers, complaint handlers and regulators greater insight into agent behaviour across the sector.

3. *To regularly review the results of monitoring activities to determine overall compliance with the education agent code of ethics, the terms of their written agreements, and identify any required improvements to written agreements.*

The aim of monitoring agent performance and behaviour should be to identify problems in agents' conduct and effect improvements, where possible. By holding providers responsible for scrutinising the conduct of agents with which they are affiliated and tasking them with actively responding to problems through revised agreements, government could focus providers on the influence that agents' conduct can have on student experience and, by extension, the financial sustainability of providers. Over time, this could influence improved practice across the sector.

## **Questions relating to Written Agreements**

### ***Introduction***

Complaints about written agreements make up the largest category of complaint to the Office from international students, comprising almost half (45.5 per cent) of all complaint issues received in the Overseas Students Ombudsman jurisdiction for the period from 1 July 2022 to 14 June 2023.

The majority of those complaints were from students who expected a refund of fees they had pre-paid for studies they withdrew from, but received no refund or less than they expected.

### **5. What can be improved in written agreements between provider and students to combat exploitation and ensure best practice?**

In November 2021 the Office published an issues paper outlining several concerning practices we observed when considering complaints about written agreements. The issues paper, called *Improving fairness in written agreements between international students and Australian education providers* (Issues Paper), is attached for your information.

One of the fundamental issues we observed in these complaints was that most international students complaining to the Office did not appear to have read or understood the terms of their written agreements.

In turn, we suggest Committee consider the following suggestions to seek to improve international students' understanding of written agreements:

1. The current National Code of Practice for Providers of Education and Training to Overseas Students only requires a certain subset of information in written agreements, listed under standard 3.3, to be in 'plain English'. A strict reading of this requirement could lead a provider to conclude that items under standard 3.4, including about refunds, do not need to be in plain English.

Given that many international students may not have sufficient English skills to read and understand legal contract terms, the Office suggests that the committee considers requiring that all agreement content is explained in plain English or – even better – requiring the agreement to be written in Easy English (with or without accompanying pictures).

2. A critical information summary, again in Easy English or translated into their native language, could alert students to key or potentially unexpected terms.
3. It may be appropriate to require students or parents/guardians to wait at least one full day before accepting a written agreement. This approach occurs in the Banking Code of Practice, which requires guarantors to wait a set period before their guarantee can be accepted.
4. Written agreements could provide all international students a cooling off period after signing. While some providers allow a cooling off period of 3 days, the practice is not common in the industry.

In our view, changes such as these would give the students an opportunity to review written agreements without pressure, ask questions, seek assistance in interpreting and understanding the contract and compare terms with other agreements offered. They would also emphasise the importance of reading and understanding the terms.

#### **5.a Should there be clearer conditions that must be included in a student's written agreement such as:**

- i. **More transparency on fees, including itemisation and charges/fee per item including clarity on what is and what is not refundable under the Tuition Protection Scheme.**
- ii. **Declaration of education or migration agent commissions and how that commission is recouped through student fees.**

#### ***Conditions in written agreements***

Another concern the Office outlined in its Issues Paper is the underlying fairness of refund terms.

For example, the Office has received complaints from students outside Australia who paid more than \$10,000 in course fees to their Australian education provider. More than 2 months before the proposed start date of their course, the students withdrew, as they decided not to study in Australia.

The students had also not applied for a student visa to study in Australia. Their education provider denied their requests for a refund because under the terms of the refund policy in their written agreement, the provider was only obliged to give a refund if the student's visa was refused, or if the provider failed to deliver the course.

Based on our research, such practices are likely to be contrary to Australian Consumer Law (ACL), but there are no penalties for breaching the ACL in international student contracts (though we note penalties will apply from November 2023). The Committee may wish to consider requiring providers to include statements in written agreements that they will comply with ACL requirements for fairness in standard form consumer contracts and will not seek to retain more than a reasonably necessary amount from pre-paid fees if they will not be delivering education to the student.

In relation to other conditions that are or may be included in written agreements, the Office suggests the Committee consider:

1. Whether providers should be able to build into agreements the option to apply price increases during the term of the agreement. As some agreements cover years (up to 5 years in packaged courses), it may appear reasonable to allow for increased costs during the period of the agreement. However, this practice may be contrary to ACL, which does not allow terms in standard form consumer contracts to include the ability for one party to vary the terms of the contract without the other party's agreement.
2. The effect of variations to a student's study program due to deferment and suspension of study; specifically whether a new written agreement is required to capture the new period of study, and whether the included conditions can change significantly between agreements.
3. The effect on a student's entitlement to request and receive a refund in circumstances other than visa refusal (when a student visa is refused, students usually have a statutory right to a reasonable refund). The Office has observed situations where students *withdrew* their visa application after very long processing times, fearing visa refusal. As the visa was not *refused*, the student's provider then refused to refund any pre-paid fees. The Office has also observed similar situations when a student's visa is cancelled.
4. The effect of a student not meeting a condition of the written agreement; for example, not meeting an English entry requirement to an AQF course even after completing their English language course.
5. The effect of *force majeure* type events which prevent a student from commencing or returning to study.

### **Commissions**

In relation to education or migration agent commissions, complaints to the Office suggest that many students do not consider or understand that a proportion of the fees they pay go to the education agent/s.

Making agent commissions more transparent may have several positive effects on student experience, by:

- increasing the data available to students to support them to make an informed decision

- making students more aware of the costs that providers incur in recruiting students, which affects the amount withheld from refunds, and the funds the providers receive to actually deliver the course
- revealing the agent's interest in enrolling them with a particular provider, and
- permitting students to shop around on the basis of agent commission.

### **Questions relating to Whistleblowing**

#### **6. What is currently in existence to support whistle-blowers (students, providers, other education or migration agents, and third parties) to safely report unethical migration and education agent or provider behaviour?**

International students studying with private education providers can make an external complaint to the Overseas Students Ombudsman, outlining their concerns about unethical education agent and provider behaviour. In practice, very few international students do this.

In some instances, international students have asked us to investigate their provider without sharing their identifying information, as they are concerned about the risk of repercussions. We are also aware of international students who withdrew complaints about their provider due to threatened repercussions. Such repercussions might include explicit statements about the provider 'cancelling their visa' (which the provider cannot do) through to more subtle behaviours, such as giving remedies to other affected students but not the student who complained to the Office.

To make a complaint to the regulator for Vocational Education and Training, the Australian Skills Quality Authority (ASQA), international students need to create an account on 'asqaconnect', which requires students to share their personal information.

We understand that ASQA receives some complaints through other mechanisms such as email, and more frequently as referrals from the National Training Complaints Hotline (NTCH) managed by the Department of Employment and Workplace Relations. The NTCH does not require students to create an account.

Nevertheless, the requirement to create an account with a password on ASQA's site may act as a disincentive to students sharing information with ASQA, and some students may not wish to share their details at all due to fear of repercussions, depriving ASQA of potentially insightful but anonymous complaints.

#### **6a. What can be done to improve this whistle blower capability and to make it more visible to students and the sector?**

We suggest the committee considers:

1. legislating an explicit prohibition (with associated penalties) against education providers causing or threatening disadvantage to a student for making an internal or external complaint, or reporting a matter to a regulator or other relevant body. Examples of similar protections can be found in the *Public Interest Disclosure Act 2013* (PID Act) and the *Corporations Act 2001* (Corporations Act). The PID Act requires agencies to have procedures to assess and mitigate the risk of reprisal against whistle blowers or suspected whistle blowers, while the Corporations Act provides protections for corporate sector whistle blowers with civil penalties and access to compensation for any detriment caused by legitimate whistle blowing.
2. allowing students to submit online complaints to ASQA without creating an account
3. allowing students to submit online complaints to ASQA anonymously.