Submission by the Overseas Students Ombudsman

NATIONAL CODE REVISION

Submission by the Commonwealth and Overseas Students Ombudsman,
Mr Colin Neave

March 2014

Introduction and Summary

The Overseas Students Ombudsman is a statutorily independent, external complaints body for overseas students complaining about the actions or decisions of a private registered education provider. The Overseas Students Ombudsman has been investigating complaints from international students about private education providers since April 2011.

We support the revision of the National Code to ensure that registered providers can clearly understand and comply with their obligations under the Code. We believe the National Code standards are critical in supporting the ESOS framework and protecting the interests of overseas students.

The National Code underpins our decisions whether to investigate a complaint and whether to recommend preventative and/or remedial action. In the two years that we have been investigating overseas student complaints, we have developed considerable experience in working with the National Code and observing the ways in which providers misinterpret or misapply certain standards. We have also identified gaps and ambiguities that we believe should be addressed.

Our comments focus on those standards which we believe require revision. We trust this submission will assist the Department in its revision of the National Code and we welcome any opportunity to discuss our recommendations and suggestions.

Background

In the last two years, the Overseas Students Ombudsman has received around 1,500 complaints about more than a quarter of the approximately 950 private providers in our jurisdiction. We focus on achieving practical remedies where a student has been adversely affected by a provider's incorrect actions. We also uphold complaints in support of the provider where the provider has followed the Education Service for Overseas Students Act 2000 (ESOS Act), the National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007 (National Code) and its own policies and procedures. In other cases, we assist both parties to come to a resolution where there has been fault on both sides.

In addition to our Overseas Students Ombudsman role, we also investigate complaints from domestic and overseas students about the Australian National University (ANU) (under our Commonwealth Ombudsman jurisdiction), and the University of Canberra (UC) and the Canberra Institute of Technology (CIT) (under our ACT Ombudsman jurisdiction).

The most common complaints to the Overseas Students Ombudsman involve appeals against the decisions of providers to report students to the Department of Immigration and Border Protection (DIBP) for failing to meet course progress or attendance requirements under Standards 10 or 11 of the National Code, or refusing to releasing the student so that they can transfer to another provider under Standard 7.

We also receive a significant number of complaints about unpaid refunds. We transfer straightforward complaints, where the student is clearly eligible for a refund, to the Tuition Protection Service (TPS). However, we investigate complaints involving disputes about

whether the provider owes the student a refund according to the written agreement signed under Standard 3 of the National Code. Fee disputes make up a significant proportion of complaints we investigate, again with reference to Standard 3 of the National Code. Provider decisions to refuse deferral requests and decisions to cancel a student's enrolment under Standard 13 for non-commencement, disciplinary reasons or non-payment of fees are other sources of complaint.

Our comments on the consultation draft of the revised National Code are drawn from our experience in investigating these types of complaints, and speaking with hundreds of overseas students and private providers in the process.

SUMMARY OF RECOMMENDATIONS

Recommendation 1
We recommend that Standard 1 be amended to require providers to comply with the consumer protection provisions of the Australian Consumer Law (ACL).

Recommendation 2
We recommend that Standard 3 be amended to:

- state that providers must enter into a written agreement with the student which is signed or 'otherwise accepted through an online enrolment system' to make it clear that 'otherwise accepted' requires more than the student paying tuition fees for the course.
- set out all the information the provider is required to include in a written agreement with a student by s 22 and s 47B of the ESOS Act.
- require providers to include in written agreements an itemised list of all fees payable by the student including tuition fees, Overseas Students Health Cover (OSHC) and any other consequential costs that may apply such as homestay fees, airport pick up fees, books and materials, and to specify which of these fees are refundable, or remain liable to be paid, if the student defaults
- specify that a home stay parent should not sign the written agreement of enrolment unless that person has been separately appointed as the student's legal guardian
- require providers to specify the agreed starting day for the course/s in the student's written agreement
- require providers to include their refund policy and eligibility criteria for a refund in case of student default in the written agreement
- require written agreements to specify the person to receive any refund, prohibiting this person being the provider's education agent.
- require providers to specify in their written agreement, their policy on pursuing students for unpaid fees and charging students a cancellation fee for withdrawing before completing the course.
- insert a statement that the Confirmation of Enrolment (CoE) should be created in the Provider Registration and International Student Management System (PRISMS) within 14 days following the signing of the written agreement.

Recommendation 3
We recommend that Standard 4 be amended to:
- require agency agreements to include a requirement for the agent to comply with all National Code standards and the ACL
- impose an explicit obligation on registered providers to consider and investigate complaints from students about the provider's education agents
- require registered providers to provide remedies to individual students affected by the actions of the provider's agent that were in breach of the National Code standards or ACL
- require registered providers to take other corrective and remedial action as warranted, including terminating the agreement with the education agent, and
- require agency agreements to include power for the provider to require the agent to take remedial action, and power for the provider to terminate the agency agreement, in circumstances where the agent breached the standards or the ACL.

Recommendation 4
We recommend that Standard 7 be amended to:
- include the wording from the preamble to this standard regarding providers granting transfer requests where the transfer will not be to the student's detriment
- specify the exceptions to the requirement for a release letter to enrol a student who has not yet completed six months of study in Australia with their original provider.
- expand the list of exceptions at 7.1 to the limitation on enrolling a student prior to the student completing six months of his or her principal course. An additional exception should be 'where the student is no longer enrolled in the principal course because their enrolment has been cancelled'.

Recommendation 5
We recommend that Standard 8 be amended to
- recognise the Ombudsmen's statutory jurisdiction
- require providers to advise students of their right to complain to the relevant ombudsman
- better reflect the role of an Ombudsman's office by removing the references to 'appeal', and substituting the term 'recommendation' for 'decision'.

Recommendation 6
We recommend that Standard 10 be amended to:
- clarify whether providers are required to 'provide' or 'make available' their course progress policies and intervention strategy to staff and students
- include a cross reference to Standard 6.3 drawing providers' attention to their responsibility to provide the opportunity for students to access welfare-related support services as well as separately implementing an intervention strategy for students at risk of not meeting satisfactory course progress requirements.
- require providers to notify an overseas student as soon as the provider reports that student to DIBP under s 19 of the ESOS Act for unsatisfactory course progress.

Recommendation 7

- We recommend that Standard 10 and the definition of study period in Appendix A of the National Code be amended to make the length of a study period consistent with the requirements of s 22 of the ESOS Act

Recommendation 8
We recommend that DE liaise with DIBP to draft a template notice for providers to use when notifying students that the student has been reported to DIBP, including advice about what the report means for the student's visa status, and who the student should contact with any questions.

Recommendation 9
We recommend that Standard 11 be amended to:

- include a cross reference to Standard 6.3 drawing providers' attention to their responsibility to provide the opportunity for students to access welfare-related support services to assist with course attendance issues, as part of the attendance process
- require providers to contact and counsel a student at risk of not attending at least 80 per cent of the scheduled course contact hours before their maximum possible attendance falls below 80 per cent
- require the Notice of Intention to Report be sent as soon as reasonably practicable after the student's attendance drops below 80 per cent, preferably before the student's attendance falls below 70 per cent, so that the provider can consider whether Standards 11.8 or 11.9 apply during the internal appeal process
- to specify a timeframe for students to lodge an external appeal against their provider's intention to report them for unsatisfactory attendance, to provide certainty and consistency for providers
- require providers to notify an overseas student as soon as the provider reports that student to DIBP under s 19 of the ESOS Act for unsatisfactory attendance

Recommendation 10

- We recommend that DE consider whether or not Standard 11.3d needs to be amended to specify that providers should report on attendance over study periods no more than 24 weeks long, to meet s 22(3) of the ESOS Act.

Recommendation 11
We recommend that Standard 12 be amended to require that when a provider grants a student course credit, the provider advise the student that the student is responsible for considering, and if necessary obtaining independent advice, about the effect that the grant of course credit, and any consequent shortening of their course duration, may have on their future immigration options.

Recommendation 12
We recommend that Standard 13 be amended to:

- require providers to grant a retrospective deferral in limited circumstances, as per the National Code Explanatory Guide
- clarify the grounds for cancellation under s 19(1)(c) and s 19(1)(d) of the ESOS Act.
- specify that providers should attempt to contact the student to confirm their study intentions, before cancelling a student for cessation of studies.

Standard 1 – Marketing information and practices

Australian Consumer Law
The purpose of the National Code is to ensure that appropriate consumer protection mechanisms exist to protect the interests of overseas students. The National Code acknowledges that overseas students usually cannot evaluate the quality of a course before they enrol and pay tuition fees. Additionally, if students are dissatisfied with the education services they have received, they may not be able to remain in Australia to pursue the consumer protection remedies provided through the Australian courts, due to their student visa expiry date.

For this reason, certain National Code standards are equivalent to those contained in the Australian Consumer Law (ACL). For example, Standard 1.2b states:

> the registered provider must … not give false or misleading information or advice in relation to:
> i. claims of association between providers
> ii. the employment outcomes associated with a course
> iii. automatic acceptance into another course
> iv. possible migration outcomes, or
> v. any other claims relating to the registered provider, its course or outcomes associated with the course.

This is similar to s 18 of the ACL which states:

> 18 Misleading or deceptive conduct
>
> (1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

However, the National Code does not directly reflect all of the relevant provisions of the ACL that apply to a registered provider's business dealings with overseas students. For example, the ACL prohibits providers from engaging in unconscionable conduct or imposing unfair contract terms on overseas students. These provisions have no direct analogy in the National Code. Even the current requirement of Standard 1.2b (i-v) not to give false or misleading advice is limited to claims relating to the provider, its course or outcomes associated with the course. However, in our experience, providers or their agents may also give false or misleading advice on other matters related to a student's stay in Australia. For example, we investigated a complaint about an education agent giving false or misleading advice about the standard of accommodation the agent arranged in Australia for an overseas student. This type of false or misleading advice is not prohibited by Standard 1 of the National Code.

We have also considered complaints from students about providers imposing unfair contract terms, such as the provider retaining the entire course fee if the student 'defaults' by withdrawing from the course, even if this happens well in advance of the course start date. Another example is complaints about providers imposing fees that exceed what is reasonably necessary to protect the provider's legitimate interests, such as fees for the resubmission of assignments and fees for being absent or late to class, that go well beyond what is necessary to recover the provider's actual costs.

The ACL prohibits unfair contract terms, however, the National Code does not directly apply a similar requirement to providers.

We **recommend** that Standard 1 be amended to make it clear that registered education providers must comply with the consumer protection provisions in the ACL, and that any breach of the ACL is itself be a breach of the National Code. This would protect the interests of overseas students as consumers and Australia's reputation as a provider of quality international education services.

Standard 2 – Student engagement before enrolment

Standard 2.1 states that 'prior to accepting a student, or an intending student, for enrolment in a course, the registered provider must provide, in print or through referral to an electronic copy, current and accurate information regarding…

The inclusion of the words 'intending student' appears unnecessary as the phrase 'prior to accepting a student' makes it clear that the student is an intending student at that stage.

We **recommend** that the redundant words 'intending student' be deleted from the first sentence in Standard 2.1.

Standard 3 – Formalisation of enrolment

Written agreement – signed or 'otherwise accepted'

Standard 3.1 states the written agreement must be 'signed or otherwise accepted by the student or the student's parent or legal guardian, if the student is under 18 years of age'.

In the course of investigating complaints, it has come to our attention that some providers consider the words 'otherwise accepted' to mean that payment alone is sufficient evidence of acceptance of the terms and conditions in the written agreement. In our view, the National Code Explanatory Guide makes it clear that payment of itself is not enough to demonstrate acceptance. However, there does not appear to be universal awareness of this by providers.

We consider that business practices which are modelled on acceptance of agreements by payment alone, in a context where agreements are formed at arm's length, and usually with the involvement of a third party, may expose students and providers to an increase risk of misunderstandings and disputes.
In our view, a written agreement is not entered into by a provider and an overseas student until a student expressly accepts the terms and conditions of the written agreement. Payment of itself does not constitute acceptance. Acts that constitute acceptance include:

- signing a letter of offer or enrolment agreement
- online notification of acceptance of the provider's terms and conditions

We recommend that Standard 3.1 be amended to state that providers must enter into a written agreement with the student which is signed or 'otherwise accepted through an online enrolment system' to make it clear that 'otherwise accepted' requires more than the student paying tuition fees for the course.

Written agreement – s 22 requirement to include study periods

On 1 July 2012, the ESOS Act was amended to insert s 22, which states that (s 22(1)(a)) the written agreement must set out the length of each study period for the course and (s 22(3)) a study period must be no more than 24 weeks.

We have seen written agreements where the provider has specified a study period in the written agreement which is more than 24 weeks long. A failure to validly specify study periods can lead to a written agreement not containing a refund policy that properly complies with s 47B.

One provider included the study periods for the student's VET courses but not for the ELICOS course, which was 30 weeks in length. We are still investigating this complaint to determine the reason for this, although one possible option is that the provider may have thought ELICOS courses were not subject to the s 22 requirement to set out study periods in the written agreement, based on the National Code Explanatory Guide for Standard 11. A question and answer in the National Code Explanatory Guide gives providers the option of not dividing an ELICOS CoE into study periods for the purpose of reporting on unsatisfactory attendance.

> **How is the 80 per cent attendance point calculated in ELICOS courses?**
>
> **A** Standard 11 requires providers to ensure overseas students attend a minimum of 80 per cent of the scheduled course contact hours and to regularly monitor students' attendance.
>
> An ELICOS provider can calculate the 80 per cent point by:
>
> 1. Making it 80 per cent of the period of the CoE or
> 2. Divide the course into discrete study periods and monitor compliance against 80 per cent attendance of weeks/days/hours in each study period.

In light of this, the provider may have understood that as they chose to report on attendance for the 30 week ELICOS course over the total period of the CoE, without dividing the course into study periods, that they were not required to set out a study period in the written agreement for the purpose of meeting s 22.

We **recommend** that Standard 3 be updated to set out all the information the provider is required to include in a written agreement with a student by s 22 and s 47B of the ESOS Act.

Written agreement – itemised list of course money

Standard 3.1b of the Code requires providers to include in the written agreement, 'an itemised list of course money payable by the student'. We support this requirement as it ensures there is a written record of all the fees the student has agreed to pay in relation to a course or multiple courses.

We note that the 1 July 2012 amendments to the ESOS Act removed the term ‘course money’ from the Act, replacing it with the narrower term ‘tuition fees’.[1] We understand that DE may intend to change the wording at Standard 3.1b of the National Code to replace ‘course money’ with ‘tuition fees’, to reflect the 1 July 2012 changes to the ESOS Act. However, we are concerned that an unintended consequence of this would be to remove the requirement for providers to document in the written agreement the total fees paid by the student, including tuition fees and other consequential costs of study (non-tuition fees) such as OSHC, homestay fees, airport pick up fees, books and materials.

This would make it difficult for the Overseas Students Ombudsman to investigate complaints about fee disputes involving non-tuition fees agreed to by the provider and student but not documented in the written agreement. Given the written agreement is the authoritative record of the fees the student has agreed to pay the provider, in our view, it is important that providers still be required to document in the written agreement non-tuition fees in addition to tuition fees.

Furthermore, the provider should set out in their refund policy which fees may or may not be refundable in the case of a student default. In this way, even if some or all of the tuition fees or non-tuition fees are not refundable, there is a clear record of all the fees the student has paid and a clear statement of what will and will not be refundable under certain conditions. Similarly, if the student withdraws before paying all of the tuition and non-tuition fees they have agreed to pay in the written agreement, the agreement should provide a record of what fees are still owed and may be pursued as a debt by the provider.

We **recommend** that Standard 3.1b be amended to require the provider to include in the written agreement an itemised list of all fees payable by the student including tuition fees and any non-tuition fees such as Overseas Students Health Cover (OSHC) homestay fees, airport pick up fees, books and materials. The written agreement should also specify which of these fees are refundable or liable to be paid in the case of a student default.

Written agreement – under 18 year olds

Standard 3.1 requires the registered provider to enter into a written agreement with the student signed or otherwise accepted by that student, or the student’s parent or legal guardian if the student is under 18 years of age.

Our experience in investigating complaints involving students under the age of 18 years is that some education providers confuse the role of homestay parents with legal guardianship, and accept written agreements signed by homestay parents who are not the student’s legal guardian. In these circumstances, we have recommended providers refund or do not pursue payment of unspent course fees.

We **recommend** that Standard 3.1 be amended to clarify that a homestay parent should not sign the written agreement of enrolment unless that person has been separately appointed as the student’s legal guardian.

Prior to the 1 July 2012 changes, s 7 of the ESOS Act defined course money as including tuition fees and Overseas Students Health Cover (OSHC) fees and ‘any other amount that the student had to pay the provider, directly or indirectly, in order to undertake the course’. However, s 7 of the ESOS Act from 1 July 2012 states that tuition fees means ‘fees … that are directly related to the provision of a course that the provider is providing, or offering to provide, to the student’. The Australian Education International (AEI) Frequently Asked Questions (FAQs) on the 1 July 2012 ESOS changes states at 4.41 that tuition fees do not include OSHC, homestay or ‘similar consequential costs not directly related to the provision of the course’ https://www.aei.gov.au/Regulatory-Information/Education-Services-for-Overseas-Students-ESOS-Legislative-Framework/ESOS-Review/Documents/Final%20FAQs%2031%20July%20numbered.pdf

Starting day

Standard 3.1(a) – (e) set out the information that must be included in the written agreement. However, the required information does not include the starting day for the course, even though this date is critical to determining if and when a provider defaults under s 46A, and/or if and when a student defaults under s 47A of the ESOS Act. The agreed starting date is also necessary to determine whether a provider has met their obligations to notify the Secretary of DE and the TPS Director of a student default under s 47C, and to pay refunds under ss 47D and 47E. The agreed starting date is also necessary to determine if a provider has committed an offence under s 47G (failing to pay a refund as required) or s 47 H (failing to notify the Secretary and the TPS Director as required).

In our view, Standard 3 should expressly require that the start date be specifically included in the written agreement.

We **recommend** that Standard 3.1 be amended to require providers to specify the agreed starting day for the course/s in the student's written agreement.

Refund policy

Standard 3.1(c) requires education providers to 'provide information in relation to refunds of course money' in the written agreement. In our experience, some providers provide inadequate information about refunds, for example by failing to specify the amount or percentage of fees a student can expect to be refunded in case of student default under various circumstances. Some providers also simply include a reference or link to their refund policy in the written agreement, without capturing the refund policy as it was on that date, even though the current National Code Explanatory Guide states that this is not acceptable.

In our view, Standard 3 should specifically state that providers must expressly set out their refund policy in the written agreement, including eligibility criteria for refunds in student default cases.

We **recommend** that Standard 3.1(c) be amended to require providers to include their refund policy and eligibility criteria for a refund in case of student default in the written agreement.

Refund recipient

We have investigated a number of complaints where the education provider has paid a student's refund to the provider's education agent, even though the agent was not listed in the written agreement, and the agent then failed to pass the refund on to the student. The providers in these cases have then claimed they have met their responsibilities under the ESOS Act to refund the money to the student, even though the student has not received their refund. This leaves the student in an untenable position, particularly in the case of an overseas education agent, where there is no power to force the agent to pay the money to the student, even if the provider terminates the agreement with the agent under Standard 4.

In our view, Standard 3.2 should require that the written agreement specify the person to receive the refund, and prohibit this person being the provider's education agent.

We **recommend** that Standard 3.2 be amended to require that the written agreement must specify the person to receive the refund, and a statement that this person must not be the provider's education agent.

Unpaid fees and cancellation fee policy

Many providers charge students a cancellation fee for withdrawing before completing the course. Other providers pursue students for unpaid fees if the student agreed to pay all the tuition fees but then withdrew before the course end date. The fees may be for study already completed (spent but unpaid) or not yet completed (unspent, unpaid).

In our view:

- providers have the right to pursue a student for unpaid spent tuition fees
- it is not unreasonable for a provider to charge a cancellation fee if a student withdraws from their course before the end date, provided this is stated in the written agreement and reflects the provider's actual loss caused by the withdrawal (unspent but unable to be recovered by 'selling' the student's place within a given period e.g. the next term or semester)
- a cancellation fee that exceeds the actual loss suffered by the provider due to the student's withdrawal is not reasonable as this amounts to a penalty fee rather than a recovery of what the provider will lose on the lost place.

Standard 3 requires providers to include their refund policy in the written agreement but does not require providers to include their policy on pursuing unpaid fees or charging a cancellation fee for student defaults due to withdrawal. This causes many students to complain to the OSO that the provider's actions are unfair.

If Standard 3 was revised to require provides to include their policy on cancellation fees and pursing unpaid fees, students would be better able to understand their rights and responsibilities when signing or otherwise accepting a written agreement. This would prevent fee disputes, saving providers time and money in dealing with internal appeals. It would also make it easier for the OSO to explain the provider's policy to the student and resolve fee disputes at the external appeal stage.

We **recommend** that Standard 3 be amended to require providers to specify in their written agreement their policy on pursuing students for unpaid fees and charging students a cancellation fee for withdrawing before completing the course.

Confirmation of Enrolment

We have investigated some complaints where the provider has failed to create a CoE after the student has signed the written agreement. While s 19(1) of the ESOS Act already requires providers to issue CoEs, reiterating the requirement in Standard 3 would strengthen the link between signing the written agreement and creating the CoE clear.

We **recommend** that Standard 3 be amended to insert a statement that the Confirmation of Enrolment (CoE) should be created in the Provider Registration and International Student Management System (PRISMS) within 14 days following the signing of the written agreement.

Standard 4 – Education agents

While the Australian Government has limited capacity to directly regulate the activities of overseas-based education agents, Standard 4 provides an opportunity to establish a framework requiring registered providers to hold their agents to the same standards of conduct that apply to registered providers themselves. Standard 4 currently goes some ways towards this, but the framework is incomplete.

In our view, to ensure that registered providers hold their agents to the same standards of conduct that apply to registered providers themselves, Standard 4 should, in addition to the existing requirement for providers to have written agreements with each agent they engage to formally represent them:

1. require these agency agreements to include a requirement for the agent to comply with all the National Code standards
2. impose an explicit obligation on registered providers to consider and investigate complaints from students about the provider's education agents,
3. require registered providers to provide remedies to individual students affected by the actions of the provider's agent that were in breach of the National Code standards
4. require registered providers to take other corrective and remedial action as warranted, including terminating the agreement with the education agent, and
5. require agency agreements to include power for the provider to require the agent to take remedial action, and power for the provider to terminate the agency agreement, in circumstances where the agent breached the standards.

We elaborate on our reasons for this proposition below.

Agent misconduct

Standard 4 indirectly imposes some standards of conduct on education agents by requiring providers to take corrective and preventative action if their agents do not meet specified requirements. However, the specified circumstances do not cover the full range of inappropriate actions by agents that "could harm the integrity of Australian education and training" (Standard 4.5).

For example, the Overseas Students Ombudsman investigated a complaint that an education agent had arranged sub-standard and overcrowded accommodation for an overseas student. While this action was inappropriate, it did not fall into any of the circumstances currently specified in Standard 4.

We recommended above that Standard 1 be amended to make explicit the requirement that education providers comply with the ACL. We further **recommend** that Standard 4 be amended to require providers include in their agency agreements an obligation on agents to comply with all the National Code standards. This would indirectly contractually bind agents to similarly comply with the ACL, and would mean that all cases of misleading, deceptive or unconscionable conduct by agents would breach the agency agreement with the relevant provider.

Providers to investigate alleged agent misconduct

Standard 4 requires providers to take corrective or preventative action when they 'know or reasonably suspect' or 'become aware' that an agent has not met the specified requirements. However, the Standard does not currently require providers to inquire into possible failures by their agents to meet the specified requirements.[2]

For example, in one complaint we investigated, the provider simply ignored a student's complaint about an agent having enrolled her with the wrong provider, on the basis that student had not provided enough evidence to prove her claim.

In our view, providers should not be able to avoid their obligations under Standard 4 simply by turning a blind eye to possible breaches by their agents. The onus should be on the provider to consider and investigate, as appropriate, any complaints made about its agent, in order to determine whether or not the provider needs to take corrective or preventative action.

We therefore **recommend** that Standard 4 be amended to require education providers to consider and investigate, as appropriate, all complaints made against an education agent with whom they have a written agreement. If this leads to the provider becoming aware of, or reasonably suspecting, the engagement by that education agent of the conduct set out in Standard 4.3, then the provider should be required to take corrective and preventative action under Standard 4.5.

Expand the list of actions requiring corrective action

Standard 4.3 requires providers not to accept students from an education agent or enter into an agreement with an education agent if the provider knows or reasonably suspects the education agent to be: engaged in dishonest practices, including deliberately recruiting a student in conflict with Standard 7; facilitating the enrolment of a student who the education agent believes will not comply with the conditions or his or her student visa; using PRISMS to create a CoE for a non bona fide student or; providing immigration advice where not authorised under the *Migration Act 1958*.

Standard 4.5 states that a provider must take immediate corrective and preventative action upon becoming aware of an education agent 'being negligent, careless or incompetent or engaged in false, misleading or unethical advertising and recruitment practices, including practices that could harm the integrity of Australian education and training'.

We have investigated complaints about education agents committing the type of actions listed in Standard 4.3. However, Standard 4.5 does not require the provider to take corrective or preventative action for these actions, only those specifically specified in Standard 4.5, which is more limited than those actions set out in Standard 4.3.

We have also investigated complaints where the education agent breached other parts of the National Code, for example, Standard 3.1, by accepting course money from the student, prior to the student signing the written agreement with the provider.

Standard 4 currently does not require the provider to take any corrective action in these circumstances. We therefore **recommend** that Standard 4.5 be amended to require providers to take corrective and preventative action upon becoming aware of any breach by an education agent of any of the National Code standards.

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[2] Nor does Standard 8 require this, as it is directed to student complaints about the provider itself.

Further, in our view, appropriate corrective action should include providing a remedy to any individual student affected by an education agent's misconduct, where the provider has an agreement with that agent for the agent to formally represent it. As noted in the current National Code at Part A, point 6, while overseas students have the right to take action through the courts under the ACL, overseas students may not be able to remain in Australia to pursue the consumer protection remedies provided through the Australian courts, and overseas agents may not be subject to the ACL in any case. Requiring education providers to give a remedy to individual students affected by an agent's breach of the National Code or the ACL would protect the rights of overseas students and the reputation of the Australian international education sector.

Standard 7 – Transfer between registered providers

Incorporate preamble to Standard 7 within the standard

The preamble to Standard 7 states that, 'Registered providers, from whom the student is seeking to transfer, are responsible for assessing the student's request to transfer within this restricted period. It is expected that the student's request will be granted where the transfer will not be to the detriment of the student'.

In our experience, many providers overlook the preamble, and fail to consider whether the transfer will be to the detriment of the student when deciding whether to approve a transfer request. Incorporating the preamble in to the Standard will clarify that this is a mandatory consideration.

We **recommend** that Standard 7 be amended to include the wording from the preamble to this standard regarding provider's granting transfer requests where the transfer will not be to the student's detriment.

'Stranded' students

The Overseas Student Ombudsman has received a number of complaints in which a provider refused to provide a release letter to a student, but then cancelled the student's enrolment. The student has then had difficulty enrolling with a new provider, due to the second provider's concern not to breach Standard 7 by enrolling the student without sighting a release letter. These students are in effect 'stranded' between providers, and in danger of breaching their visa condition to maintain enrolment.

The relevant Fact Sheet[3] states:

> **Exceptions to the release letter requirement**
> In addition to the conditions listed in Standard 7.1 of the National Code, a release letter is not required in the following circumstances: …
>
> - Where a student's enrolment may have been cancelled under Standard 13 of the National Code ("Deferring, suspending or cancelling the student's enrolment"), there is no need for the provider to also issue a release letter - in this situation the cancellation would be sufficient.

We understand that Education intends that this exception should only apply where the provider has initiated the cancellation of enrolment, not where the student has withdrawn from the course. However, it is not clear how providers can determine whether the provider or student initiated the cancellation.

If the exception is to have this limited operation, then a student whose enrolment is cancelled at their own request will not be able to enrol with a new provider on their current visa without a release letter. Without a new CoE, the 'stranded' student will either have to depart Australia within 28 days or breach of their student visa condition relating to maintaining enrolment.

In our view, Standard 7 does not apply to students who have had their enrolment cancelled, either at the provider's initiative or the request of the student. Standard 7.1 states, 'the receiving registered provider must not knowingly enrol the student wishing to transfer from another registered provider's course …' A student cannot 'transfer from' a course if they are no longer enrolled in it. Therefore, in our view, a student whose enrolment has been cancelled in all their packaged courses, is no longer subject to Standard 7.

We **recommend** that DE expand the list of exceptions at 7.1 to the limitation on enrolling a student prior to the student completing six months of his or her principal course. An additional exception should be 'where the student is no longer enrolled in the principal course because their enrolment has been cancelled'.

Standard 8 - Complaints and appeals

We support DE's intention to ensure that overseas students have access to a 'statutorily independent' external complaints-handling body. Indeed, this has already been achieved by virtue of the combined coverage of the statutory jurisdictions of the Overseas Students Ombudsman, State Ombudsmen, Commonwealth Ombudsman and the SA Training Advocate.

The current requirement in Standard 8.2 is therefore somewhat redundant, as providers do not need to have in place the arrangements specified there, in order for students to have access to a free and independent external complaint handling mechanism.

[3] 'Standard 7 – The Basics': https://aei.gov.au/Regulatory-Information/Education-Services-for-Overseas-Students-ESOS-Legislative-Framework/ESOSQuickInformation/Documents/ESOS%20Factsheets/ESOS%20Factsheets%202012/Standard%207.pdf

Furthermore, Standard 8.2 currently has the potential to cause confusion for students, in circumstances where a provider has made an arrangement for another external body to handle complaints, as students then have parallel external review avenues available.

Standard 8.3 is also currently deficient because it does not directly require providers to inform students about their statutory right to complain to the relevant Ombudsman's office (or the Office of the Training Advocate (OTA) in South Australia). Where providers have arrangements with other external bodies, Standard 8.3 only requires them to inform students about that arrangement.

In our view, Standard 8 should be amended to expressly recognise the statutory jurisdictions of the relevant Ombudsmen and the Training Advocate, and to expressly require providers to inform students of their right to complain to the relevant Ombudsman's office or the Training Advocate.

We also consider that there is currently a disconformity between Standard 8's language, and the statutory role and powers of the relevant Ombudsmen.

Under ss 19ZJ and 19ZQ of the *Ombudsman Act 1976*, the Overseas Students Ombudsman has the power to investigate complaints, and make recommendations to providers. We have no power to 'hear appeals' or to make binding 'decisions'. State Ombudsmen similarly have power to investigate complaints and make recommendations powers under their enabling legislation. In addition, the SA Training Advocate's Charter of Functions, established in accordance with s21 of the *Training and Skills Development Act 2008,* enables the investigation of complaints and to make recommendations relating to the provision of education services to clients of a provider.

Standard 8.2, in contrast, refers to 'appeals' as well as complaints, while Standard 8.5 refers to 'a decision that supports the student'.

We **recommend** that Standard 8 be revised to:

- recognise the Ombudsmen's statutory jurisdiction
- require providers to advise students of their right to complain to the relevant ombudsman
- better reflect the role of an Ombudsman's office by removing the references to an 'appeal' process and substituting the term 'recommendation' for 'decision'.

Standard 8.5 would thus read:

> 'If the internal or any external complaint handling ~~or appeal~~ process results in a ~~decision~~ recommendation that supports the student, the registered provider must immediately implement any ~~decision~~ recommendation and/or corrective and preventative action required and advise the student of the outcome.

Standard 10 – Monitoring Course Progress

Provision versus access to policies

Standard 10.2 states that providers must 'provide' their course progress policies and procedures to staff and students. However, Standard 10.4 states that the intervention strategy must 'be made available' to staff and students. It is not clear if the different wording is intentional or what distinction there may be between 'providing' a document and 'making it available'.

Some providers publish their course progress and intervention policies on their websites or send students a link to the webpage in an email. It is not clear if these meet the definition of 'provide' or 'make available'.

We **recommend** that Standard 10 be amended to clarify how providers are required to 'provide' or 'make available' their course progress policies and intervention strategy to staff and students.

Access to support services – course progress

Standard 10.2(c) requires providers to document their procedure for intervention for students at risk of failing to achieve satisfactory course progress. Standard 6.3 similarly requires providers to 'provide the opportunity for students to access welfare-related support services to assist with issues that may arise during their study, including course progress and attendance requirements…'

However, we have observed some cases in which providers have not done enough to provide students with access to welfare services, so as to assist them to manage the issues affecting their course progress. In these cases, the providers' Standard 10.2(c) intervention strategies appear to be disconnected from their Standard 6.3 welfare services.

We also find that some providers think that if they '*provide the opportunity* for students to access welfare-related support services' under Standard 6.3, they have met the requirements of Standard 10.5 to '*implement* the intervention strategy for any student at risk of not meeting satisfactory course progress requirements'. In our view, the requirement to 'implement' an intervention strategy is higher and requires the provider to do something proactive to assist the student rather than just 'providing an opportunity' for a student to access welfare-related services.

To address this, we **recommend** that Standard 10(2)(c) be cross referenced with Standard 6.3, reinforcing providers' responsibility to provide access to welfare services as well as separately implementing an intervention strategy for students at risk of not meeting satisfactory course progress requirements. DE could also address the difference between 'providing access' to services for general welfare purposes as opposed to 'implementing' an intervention strategy more directly when a student is identified as being at risk of failing.

Study periods

Standard 10.3 requires providers to assess the course progress of each student at the end point of every 'study period'. Standard 10.5 requires providers to activate the intervention strategy where the student has failed or is deemed not yet competent in 50% or more of the units attempted in any study period.

Appendix A of the National Code defines a study period as:

> A discrete period of study within a course, namely term, semester, trimester, short course of similar or lesser duration, or as otherwise defined by the registered provider as long as that period does not exceed six months.

Similarly, the DIISTRE-DIAC Course Progress Policy[4], which Vocational Education and Training (VET) providers may elect to use, states that:

> While the length of a study period is determined by the provider, study periods are usually terms or semesters. Ten weeks is usually considered the minimum length of time in which it is reasonable for the provider to make an assessment of a student's course progress. For the purposes of this policy, the maximum length for a study period is six months.

On 1 July 2012, the ESOS Act was amended to insert s 22 which states that (s 22(1)(a)) the written agreement must set out the length of each study period for the course and (s 22(3) a study period must be no more than 24 weeks.

It appears this amendment introduced an inconsistency between the ESOS Act and the National Code in defining the length of a study period. While the ESOS Act requires that a study period is no more than 24 weeks, the National Code states that the maximum length of a study period is 6 months.

We **recommend** that Standard 10 and the definition of study period in Appendix A of the National Code be amended to make the length of a study period consistent with the requirements of s 22 of the ESOS Act.

Timeframe for lodging an external appeal

Standard 10.6 states that when the provider notifies the student of its intention to report the student to DIBP for unsatisfactory course progress, the provider must advise the student that they have 20 working days in which to access the registered provider's complaints and appeals process, as per Standard 8 (Complaints and appeals).

DE and OSO have interpreted this to mean that students have 20 working days to access the provider's *internal* appeals process. However, the Code is silent on the timeframe students have to access the *external* appeal process (such as the OSO, South Australian Training Advocate, State or Territory Ombudsman).

The OSO receives enquiries from providers on this point, asking what deadline they should give students to lodge an external appeal before reporting them to DIBP. We advise providers that they should set their own timeframe for students to lodge an external appeal in their Standard 8 Complaints and Appeals Policy. In our experience, some providers give students as little as 3 calendar days to lodge an external appeal. Others allow up to 20 working days.

We **recommend** that Standard 10.6 be amended to specify a timeframe for students to lodge an external appeal against their provider's intention to report them for unsatisfactory course progress, to provide certainty and consistency for providers and overseas students.

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[4] https://www.aei.gov.au/Regulatory-Information/Education-Services-for-Overseas-Students-ESOS-Legislative-Framework/ESOSQuickInformation/Documents/ESOS%20Factsheets/ESOS%20Factsheets%202012/DIISRTE-DIAC%20Course%20Progress%20Policy.pdf

Notifying students reported to DIBP

The provisions in the *Migration Act 1958* around automatic cancellation of student visas, in circumstances where students have been reported under s 19 of the ESOS Act for unsatisfactory course progress or unsatisfactory attendance, were repealed by the *Migration Legislation Amendment (Student Visas) Act 2012*.

We understand the purpose of this change is to allow DIBP officers to take into account the circumstances of an individual student in deciding whether to cancel their visa, including the circumstances leading to their poor attendance and/or progress.

We support this change. However, we note that while providers continue be obliged to report students for unsatisfactory course progress and unsatisfactory attendance, the associated repeal of s 20 of the ESOS Act means that providers are no longer required to notify students that they have been reported.

In our view, students are entitled to know whether their provider has reported them, and if so on what date. To address the gap created by the repeal of s 20 of the ESOS Act, we **recommend** that Standard 10 be amended to require providers to notify an overseas student, as soon as the provider reports that student to DIBP under s 19 of the ESOS Act. The notice should advise the student the date they were reported, and what may happen next in relation to their visa.

We **recommend** that DE liaise with DIBP to draft a template notice for providers to use for this purpose, including advice about what the report means for the student's visa status, and who the student should contact with any questions.

Standard 11 – Monitoring Attendance

Access to support services – attendance

Standard 11.4 requires providers have procedures for counselling students who are at risk of failing to meet attendance requirements. As part of this, providers should in appropriate cases refer students to their Standard 6.3 support services. However, as we observed above in relation Standard 10, we have observed some cases in which the providers' Standard 11.4 counselling process appears to be disconnected from their Standard 6.3 welfare services, and the providers have not done enough to provide the student with the opportunity to access welfare-related services to assist with the issues affecting their course attendance.

We therefore **recommend** that Standard 11 also include a cross reference to Standard 6.3, reinforcing providers' responsibility to provide access to welfare services as part of their attendance monitoring process.

Study periods

Standard 11.3d requires providers who monitor attendance to have an Attendance Policy which specifies the process for determining the point at which the student has failed to meet satisfactory attendance. The National Code Explanatory Guide states:

- … where there are structured study periods (for example a term or a semester), it is recommended that providers monitor attendance over the length of each study period for a course.
- Where there are no structured periods of study, attendance is recorded and calculated over the period of the course. However, if the length of the CoE is more than six months, attendance should be monitored over six month periods.
- For ELICOS courses, if a student changes course and gets a new CoE, or extends his or her enrolment in the current course, thereby getting a new CoE, the student's attendance is monitored over each of the CoEs separately, rather than over the entire period of the student's enrolment with a provider.

We note that Appendix A of the National Code defines a study period as:

> A discrete period of study within a course, namely term, semester, trimester, short course of similar or lesser duration, or as otherwise defined by the registered provider as long as that period does not exceed six months.

We further note that since 1 July 2012, when the ESOS Act was amended to insert s 22(3), providers have been required to set out in their written agreements, the length of a study period, which must be no more than 24 weeks long.

It is not clear if s 22(3) of the ESOS Act and Standard 11.3d combine to require providers to assess whether a student has met or failed to meet satisfactory attendance every 24 weeks or whether providers still have discretion to set a different point at which to assess attendance, including the total period of the CoE.

We **recommend** that DE consider whether or not Standard 11.3d needs to be amended to specify that providers should report on attendance over study periods no more than 24 weeks long, to meet s 22(3) of the ESOS Act.

Calculating attendance

Standard 11.4 requires the provider to contact and counsel the student where the student is at risk of not attending at least 80 per cent of the scheduled course contact hours. This requires a provider to calculate the student's maximum possible attendance over the total scheduled contact hours of either the course or the study period (where the provider choses to monitor over study periods), and to contact the student once their maximum possible attendance is at risk of falling below 80 per cent.

A student's maximum possible attendance is the maximum number of hours the student could attend by the end of the study period or course, assuming they attend 100 per cent from the date on which the attendance is calculated, and taking into account the hours the student has already missed. In our experience, providers sometimes confuse current attendance with maximum possible attendance.

For example, in one case, the provider contacted the student after the student had missed a number of days of classes. The provider calculated the student's current attendance that week as 9 per cent, and placed the student on an attendance contract. The contract required the student to attend 100 per cent of classes from that time until the end of the semester.

However, the student's maximum possible attendance had already fallen below 80 per cent for the semester, and it was impossible for the student to improve their attendance to a satisfactory level. The provider had failed to contact and counsel the student before their attendance fell below 80 per cent, as required by Standard 11.4, because the provider was monitoring student's current (weekly) attendance, rather than calculating their maximum possible attendance over the study period.

To address this problem, we **recommend** that Standard 11.4 be amended to require providers to contact and counsel students at risk of not attending at least 80 per cent of the scheduled course contact hours before their *maximum possible attendance* falls below 80 per cent.

Timeframe for lodging an external appeal

Standard 11.6 states that when the provider notifies the student of its intention to report the student to DIBP for unsatisfactory attendance, the provider must advise the student that they have 20 working days in which to access the registered provider's complaints and appeals process, as per Standard 8 (Complaints and appeals).

DE and OSO have interpreted this to mean that students have 20 working days to access the provider's *internal* appeals process. However, the Code is silent on the timeframe students have to access the *external* appeal process (such as the OSO, South Australian Training Advocate, State or Territory Ombudsman).

The OSO receives enquiries from providers on this point, asking what deadline they should give students to lodge an external appeal before reporting them to DIBP. We advise providers that they should set their own timeframe for students to lodge an external appeal in their Standard 8 Complaints and Appeals Policy. In our experience, some providers give students as little as 3 calendar days to lodge an external appeal. Others allow up to 20 working days.

We **recommend** that Standard 11.6 be amended to specify a timeframe for students to lodge an external appeal against their provider's intention to report them for unsatisfactory attendance, to provide certainty and consistency for providers and overseas students.

Timing of the Notice of Intention to Report

Standard 11.6 requires a provider to send a Notice of Intention to Report to a student, where the provider has assessed that the student as not achieving satisfactory course attendance. Once the student has been given an opportunity to access the internal appeals process, Standards 11.7 requires the provider to report the student as soon as practicable, unless the exceptions in Standards 11.8 and 11.9 apply. The exceptions in Standards 11.8 and 11.9 can only apply if the student is attending at least 70 per cent of the scheduled course contact hours.

In our view, the intent of the standard is that the provider should send the Notice of Intention to Report as soon as reasonably practicable after the student is assessed as not achieving satisfactory course attendance, i.e. as soon as reasonably practicable after the student's attendance drops below 80 per cent, and preferably before the student's attendance drops below 70 per cent. This allows the provider to consider whether the relevant exception in Standard 11.8 or 11.9 applies as part of the internal appeal process.

In practice, we have encountered a number of cases where the provider has not sent the Notice of Intention to report as soon as reasonably practicable, with adverse consequences for the student. For example, one provider waited five months after the student fell below 80 per cent to send the Notice of Intent to Report. By this time, the student's attendance had fallen well below 70 per cent, meaning the provider no longer had scope to decide under Standard 11.8 not to report her.

We **recommend** that Standard 11.6 be amended to expressly require the provider to send the Notice of Intention to Report as soon as reasonably practicable after the student's attendance drops below 80 per cent, so that the provider can consider whether Standards 11.8 or 11.9 apply during the internal appeal process.

Notifying students who have been reported to DIBP

As with Standard 10, we **recommend** that Standard 11 be amended to require providers to notify an overseas student as soon as the provider reports that student to DIBP under s 19 of the ESOS Act for unsatisfactory attendance. The notice should advise the student the date they were reported, and what may happen next. We **recommend** that DE and DIBP draft a template notice for providers to use for this purpose.

Standard 12 – Course credit

When a provider grants course credit to a student, Standard 12.1(b) states that the provider must provide a record of the course credit to the student, which must be signed or otherwise accepted by the student. Standard 12.2 states that if the course credit leads to a shortening of the student's course, the provider must report the change of duration through PRISMS.

We have investigated a number of complaints where students were granted and accepted course credit, without realising that the consequent shortening of their course duration affected their eligibility for a skilled visa at the end of their studies. The 'Australian study requirement' requires students to have studied in Australia for two academic years (92 weeks). The students who complained to our office could not meet this requirement as the granting of course credit had reduced their course duration to less than 92 weeks.

In our view, while students are responsible for understanding the implications of obtaining course credit for their subsequent plans, it is reasonable to expect providers to alert students to the need to consider this aspect as part of the course credit process.

We therefore **recommend** that Standard 12 be amended to require a provider, when it receives an application from a student for course credit, to advise the student to seek independent advice about any effect the granting of course credit, and the possible consequent shortening of their course duration, may have on their future immigration options.

Standard 13 – Deferring, suspending or cancelling the student’s enrolment

Retrospective deferral

The National Code explanatory guide confirms that, under Standard 13, providers can grant retrospective deferrals to students in exceptional circumstances, but this is not made explicit in the standard itself. In our experience, the providers are sometimes unaware of their ability to consider granting a retrospective deferral.

To make this option clearer to providers, we **recommend** that Standard 13 be amended to state that providers may grant a retrospective deferral in exceptional circumstances, as per the current Explanatory Guide.

Standard 13 allows providers to cancel the student’s enrolment, where the cancellation is not initiated by the student, after providing a right of internal appeal. The Student Course Variations (SCV) Options Quick Reference Guide on the PRISMS website sets out a number of reasons for cancellation, including non-commencement/cessation of studies, non-payment of fees, disciplinary reasons, provider being unable to deliver the course, the student transferring to another provider, the student no longer holding a student visa, and student having died.

However, Standard 13’s application in these circumstances is not apparent from the standard’s own terms, particularly for students. We therefore **recommend** that Standard 13 be amended to provide greater clarify regarding cancellation on these grounds.

Cancellation for non-commencement or cessation of studies

Standard 13.4 states that the provider must inform the student of its intention to cancel the student’s enrolment, where the cancellation is not initiated by the student and notify the student that he or she has 20 working days to access the provider’s internal complaints and appeals process as per Standard 8.1.

However, the Student Course Variation (SCV) Report Options Quick Reference Guide, available from the PRISMS home screen, states:

> **Student notifies cessation of studies ***
> Select this option when the student has actively (or inactively) advised you that they will not be continuing their studies with you. ‘Inactive’ advice may be where the student just does not return after an arranged holiday break, suspension or deferment, or fails to enrol in any subjects for a compulsory study period. This variation report will set the status of the CoE to ‘Cancelled’.
>
> **Note:**
> *You should report using this variation within 14 days after the event occurs.

We receive numerous complaints from students about their provider cancelling their enrolment without their knowledge. The provider did not inform them of their intention to cancel their enrolment or advise them once their CoE had been cancelled. After investigating, we generally find the provider has cancelled the student under standard 13 for inactive advice of cessation of studies.

Our concern is that in most of these cases the provider could have reasonably contacted the student to find out why they had not enrolled for the next study period. This includes cases where the student had previously deferred for compassionate and compelling reasons. The provider was aware of the student's situation. In our view, the provider should have contacted the student to check on their welfare and confirm their study intentions.

Furthermore, we have seen providers cancel students for inactive advice of cessation of studies where the provider has previously warned a student that they are at risk of failing to meet satisfactory attendance or are in the process of implementing an intervention strategy for poor course progress. In these circumstances, the provider should try to contact the student when they stop attending or fail to enrol in the next study period, to check on their welfare and study intentions, before cancelling their enrolment. However, it appears providers are cancelling students for cessation of studies, without first contacting the student to confirm whether they have ceased studies or need to extend their deferral or are experiencing welfare-related difficulties. This denies the student the opportunity to appeal the intended cancellation and in many cases, to even know that the provider has cancelled their enrolment.

We **recommend** that Standard 13 be amended to specify that providers should attempt to contact the student to confirm their study intentions, before cancelling a student for cessation of studies.