

Submission by the Commonwealth Ombudsman  
**Education Services for Overseas Students (ESOS) Review 2022**

Submission by the Acting Commonwealth Ombudsman, Penny McKay

**29 April 2022**

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<b>Sector of delivery (eg VET, higher education)</b>	All sectors
<b>Are you a member of an industry body? If yes, please specify</b>	N/A

I consent to this submission being published in full on the DESE website.

**OR**

I do NOT consent to this submission being published on the DESE website.

## Background

The role of the Office of the Commonwealth Ombudsman (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.

We seek to achieve our purpose through:

- fostering good public administration that is accountable, lawful, fair, transparent and responsive, and fostering best practice administration in the industries we oversee
- assisting people to resolve complaints about government administrative action and complaints about industries we oversee
- 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

In our capacity as the Overseas Students Ombudsman (OSO), the Office:

- handles individual complaints from overseas students about the actions or decisions of private registered education providers
- promotes best practice handling from overseas students to private registered education providers
- reports on trends and broader issues that arise from investigating complaints.

Since commencing its OSO role in 2011, the Office has finalised more than 9,500 complaints from overseas students originating from over 100 countries, more than 3,000 of which were formally investigated.<sup>1</sup>

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<sup>1</sup> Complaints finalised from 1 April 2011 to 31 March 2022. Unless otherwise stated, all complaint data in this submission is from the Commonwealth Ombudsman's internal case management systems.

**Figure 1: Total number of OSO complaints received by the Office per year**

Year (1 July to 30 June)	Total OSO complaints
2018–2019	1334
2019–2020	1525
2020–2021	1079
2021–2022 (to 31 March 2022)	578

Where we identify that a student is adversely affected by a provider’s incorrect, unfair or unreasonable actions, we focus on identifying and influencing a practical remedy. Where a provider’s action or decision appears fair and reasonable,<sup>2</sup> we may provide a better explanation to the student. In some instances, both parties have contributed to the problem, in which case we work with the complainant and the provider to negotiate an appropriate resolution.

The most common complaints from overseas students are about:

- refund fee disputes
- providers refusing to release a student so they can transfer to another provider under Standard 7 of the National Code
- provider decisions to report students to the Department of Home Affairs (Home Affairs) for unsatisfactory course progress or unsatisfactory attendance.

Our response to the ESOS review (the review) questions is informed by our experience from investigating complaints and working with private registered education providers and overseas students. Where we offer suggestions, these are intended to inform good practice but are not prescriptive. We recognise the Department of Education, Skills and Employment (the Department) must consider a range of views and may find alternative solutions to the concerns we raise.

We trust this submission will assist the Department in its considerations, and welcome any opportunity to discuss or expand on our comments.

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<sup>2</sup> Reasonable outcomes also must comply with the *Education Service for Overseas Students Act 2000* (ESOS Act), the *National Code of Practice for Providers of Education and Training to Overseas Students 2018* (National Code), and a provider’s own policies and procedures.

## Response to Review Questions

QUESTIONS	COMMENTS
<b>Expansion and diversification</b>	
<p>1. What are the barriers in the current ESOS framework to the sector's expansion and diversification into online and offshore delivery?</p>	<p>The protections for international students in the ESOS framework are not available to international students studying offshore if their program of study does not include an onshore component. For example, students studying exclusively offshore with private education providers cannot access the Overseas Students Ombudsman as an external complaints body, or access the Tuition Protection Service.</p> <p>If the ESOS framework was to formally permit offshore and fully online study to international students, prescriptions about the proportion of a course that can be delivered online may need to change. Currently Standard 8 of the National Code does not permit more than one third of a VET or Higher Education course to be delivered online (noting that regulators advised providers this requirement would not be enforced during the pandemic).</p>
<p>2. What lessons have we learnt through flexible delivery, online modes of study and other changes in response to the pandemic that could be incorporated into the ESOS framework?</p>	<p>The pandemic has shown that students can combine offshore online study with onshore face-to-face study and some proportion of onshore online study may be tolerated by students.</p> <p>If students commence study offshore with the intention of studying in Australia, it is important for them to either:</p> <ul style="list-style-type: none"> <li>a) apply for and be granted a student visa before commencing offshore study, or</li> <li>b) understand and accept the risk they may not be granted a student visa to study in Australia when making the decision to commence the offshore study.</li> </ul> <hr/> <p><b>Example 1</b></p> <p><i>Student A planned to study in Australia and enrolled in a course with an Australian education provider<sup>3</sup>. Due to COVID-19 restrictions in their home country, it took Student A some time to get medical checks to support their visa application. Once they lodged their application, the student agreed to start studying online while waiting for the visa application to be processed. The student signed up for one unit and participated in classes for 2 weeks before they were notified their visa application was refused.</i></p>

<sup>3</sup> All students and providers are de-identified in this submission. Details including, but not limited to, course names and fee amounts are modified to ensure anonymity.

QUESTIONS	COMMENTS
	<p data-bbox="560 177 1906 277"><i>The student immediately ceased studying and asked for a refund of pre-paid fees. The provider declined to refund most of the fees as the student had commenced study and according to the terms of their written agreement, the student was not eligible for a refund after their course commenced.</i></p> <hr data-bbox="560 308 1919 311"/> <p data-bbox="560 352 2029 485">In Example 1, the provider did not apply the ESOS protections correctly because the student had an entitlement to a refund of ‘unspent’ tuition fees. However, this demonstrates a potential problem for students who agree to commence study before their visa is approved, especially if it takes a long time for their visa to be refused, in which case their refund will be smaller.</p> <p data-bbox="560 531 2000 596">Online study also requires students to meet system requirements and have stable internet connections. Students cannot always predict when they may encounter problems with these services.</p> <hr data-bbox="560 639 1919 643"/> <p data-bbox="560 671 689 699"><b>Example 2</b></p> <p data-bbox="560 743 1872 844"><i>A student was in Australia and agreed to participate in a course of online study. They previously participated in online study without any problems. The student attempted to commence their course but was prevented from doing so by problems with their internet connection which they were not able to resolve.</i></p> <p data-bbox="560 888 1897 989"><i>The student also had medical issues so decided to withdraw rather than asking to defer. The student asked for a refund of the fees they paid. The provider agreed to refund only the fees the student paid for units which had not yet commenced based on terms in their written agreement.</i></p> <hr data-bbox="560 1018 1919 1021"/> <p data-bbox="560 1062 1984 1198">Example 2 demonstrates the financial risks associated with internet stability during online study which can be borne by students. Students who withdraw after a unit’s commencement date are usually asked to forfeit payment for the entire unit while providers who cease delivering a unit part-way through are only required to refund fees relating to the undelivered weeks.</p> <p data-bbox="560 1243 2011 1343">While not all situations of this nature can be avoided, students and providers may benefit from a separate process related to online study which requires students to check their system compatibility and test access speeds from their proposed study location before a letter of offer is issued.</p>

QUESTIONS	COMMENTS
	<p>We also note that Standard 6.4 and Standard 8.22 of the National Code include requirements for providers to support students undertaking online study. However, this support only applies in relation to disadvantage caused by additional costs, other requirements, and lack of access to a provider’s resources, community and engagement with other overseas students. The National Code does not include a general requirement for providers to assist students with technical problems related to online study.</p>
<p>3. What percentage of a course should the ESOS framework allow to be studied online? How could the ESOS framework support delivery models such as mixed-mode study where students may move from ESOS non-regulated to a ESOS regulated environment (for example, a student studying part of their degree offshore and part onshore)?</p>	<p>During the first 2 years<sup>4</sup> of the pandemic, 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.</p> <p>We consider that a framework which allows more flexibility for online course delivery should also ensure that any changes to a student’s ratio of online study can only be made with their informed consent. These changes can have a significant impact on a student’s experience of study in Australia and, if they are proposed after an agreement is made, should be negotiated separately.</p> <p>Overall, it may be helpful for most face-to-face study to allow limited, ad-hoc participation via online means to allow students who are ill or have caring responsibilities to attend.</p>
	<p>(No comment on questions 4—7)</p>

<sup>4</sup> Data from 20 March 2020 to 20 Feb 2022

## Supporting the quality of third-party relationships

<p>8. What kinds of measures to increase the transparency of third-party arrangements could be effective in improving student and provider choice?</p>	<p>We note there is no requirement for providers to publish the terms of their written agreements with agents. We discuss the impact of publishing commissions at question 9 below, however, there may be other terms of interest to international students, especially if the requirements for agent agreements are expanded (see response to question 12).</p> <p>For example, if written agreements between an agent and a provider specify that the agent must keep records of important discussions with students, including explanation of transfer restrictions, students are more easily able to hold their agent to account if this does not occur.</p> <p>In some complaints to our Office, providers refer to education agents as ‘the student’s agent’ and we also see students refer to education agents as ‘my agent’. This indicates that providers do not clearly see the agent as their own representative and students assume the agent is working on their behalf and, therefore, in their best interest. While publishing contractual documents would not solve this issue completely, it would make the agent’s interest in recruiting them to a certain provider more transparent to the student.</p> <p>Requiring providers to publish the details of their written agreements with education agents may also improve the operation of the sector by allowing providers to learn from each other about effective practices for managing education agent behaviour. The differences in provider agreements with their agents would be transparent and encourage more robust terms and conditions particularly around agent monitoring requirements.</p>
<p>9. What are the effects of increasing transparency of agent commissions? Would transparency measures improve student and provider choice? Would they drive down high remuneration rates over time? What are other potential outcomes from</p>	<p>Complaints to our Office from international students indicate that many students do not consider or understand that a proportion of the fees they pay go to the education agent/s.</p> <p>Making agent commissions more transparent may have several positive effects:</p> <ul style="list-style-type: none"><li>• it would increase the data available for students to make an informed decision</li><li>• it could make students more aware of the costs that providers incur in recruiting students, which affects the amount withheld from refunds</li><li>• students are more likely to understand that the agent may have an interest in enrolling them with a particular provider</li><li>• it could prompt students to negotiate reduced course costs by going through a cheaper agent</li><li>• it could encourage students to pick the provider they want to study with and shop around for a cheaper agent, which could increase price-based competition between agents, and</li></ul>



<p>increasing agent transparency?</p>	<ul style="list-style-type: none"> <li>• it could increase students' expectations of agents, including prompting them to approach agents to remedy problems.</li> </ul> <p>Alternatively, the Department may wish to consider the risks to the sector of requiring transparency of commission rates, given that international education providers rely heavily on education agents.<sup>5</sup> It appears that rising commission rates for education agents, which result in lower operating funds for providers, is affecting education providers all over the world.<sup>6</sup></p>
<p>10. What information, such as education agent performance outcomes, can the Government make available to providers to help them decide the agents with which to engage?</p>	<p>In complaints to our Office about student transfers, providers explained they did not release students because they believed the students were targeted by onshore education agents and releasing the student would make them an easy target for poaching.</p> <p>This belief reflects a broader perception in the industry, including among education agents based outside Australia, that problematic recruitment practices occur among onshore agents rather than offshore agents.<sup>7</sup></p> <p>In either case, it may be useful for providers or a regulatory body to access information indicating which agents are involved in recruitment of students onshore during the student's restricted period.</p>

<sup>5</sup> <https://www.dese.gov.au/international-data/resources/international-education-agents-overview> , accessed 6 April 2022.

<sup>6</sup> <https://thepienews.com/news/commission-creep-elt-sector-concerns-rise-over-agent-costs/>, accessed 31 March 2022

<sup>7</sup> For example, the Association of Australian Education Representatives in India (AAERI), discusses the 'poor behaviour' of onshore agents in several public forums, such as their South Asia Education Strategy 2020-25 as reported on <https://agentbee.net/sub-agents-aaeri/>, accessed 1 April 2022

<p>11. Should providers be required to have written agreements with all agents from whom they accept students, it could result in more information for students and improve data reporting on provider and agent activity. Are there any other positive or negative outcomes for students in this change?</p>	<p>The current requirements in Standard 4 oblige providers to have written agreements only with agents they engage to formally represent them. This means they can also accept students from education agents who are not required to adhere to the terms of any written agreement.</p> <p>To resolve complaints about agents where there is no written agreement, the Office relies on providers accepting responsibility for an agent's conduct. A positive outcome for students, in requiring providers to have written agreements with all agents from whom they accept students, would be the visible establishment of a principal-agency relationship between providers and agents in all situations where students are enrolled with a provider.</p>
<p>12. What information should written agreements between agents and providers contain to protect providers and better inform students and government?</p>	<p>Since the Overseas Students Ombudsman function commenced in 2011, providers' decisions not to refund pre-paid fees are the most common cause of complaints to our Office from international students. These make up 23 per cent of complaint issues.<sup>8</sup></p> <p>To justify not refunding an amount the student deems acceptable, providers often cite the costs involved in recruiting the student, implying they paid significant fees to the agent. Some providers explicitly say they paid a commission to an agent for the recruitment of the student.</p> <p>In our view, this could be dealt with in the written agreement between the agent and the provider. Additional terms could have the effect of:</p> <ul style="list-style-type: none"> <li>• requiring the education agent to refund commission paid for a student that does not remain enrolled with the provider beyond a specific and reasonable period of time</li> </ul>

<sup>8</sup> Complaints closed by the Office, in Overseas Students Ombudsman jurisdiction, from 11 April 2011 to 31 March 2022.

- ensuring the education provider is responsible for the payment of the refund according to the fair and reasonable terms of their written agreement with the student.

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### **Example 3**

*Student Y enrolled in a course through an education agent. They paid the agent the full course fees, Overseas Student Health Cover (OSHC) fees and applied for their visa. When the visa was refused, the student requested a refund of the course fees and OSHC fees. Student Y's agent, who deducted its non-refundable commission, told the student it only received a partial refund from the provider and had not yet received the OSHC fee refund.*

*When the student complained to the provider, the provider stated it had discharged its obligations by refunding the student's agent.*

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A theme which runs through many complaints to our Office is that students appear not to fully understand the terms of their written agreements with providers or the restrictions (like transfer restrictions) that apply to them (see questions 15-18 on transfers and 19-22 on written agreements).

This problem could be addressed in the written agreement between the education agent and the provider, by requiring agents to keep records showing they explained (and the student understood) specific aspects of the student's potential study experience. Based on complaints to our Office, we consider it would be useful to include the following clarifications:

- provider's refund policy:
  - When can the student withdraw without penalty?
  - Which fees are not refundable?
  - What happens if the student defers?
  - What happens if the student's visa takes a long time to process?
  - What happens if the student withdraws their visa application before a decision is made?
- provider's policy on fees owed:
  - If the student commences study with the provider, but withdraws before commencement of the provider's next study period, will they be liable to pay fees towards the next study period, even if they are not going to participate in any study?
  - What other fees does the provider charge, such as re-assessment, suspension, deferral or examination re-sitting?

- transfer restrictions:
  - At which point in their proposed study program will the student be able to transfer to another provider without the provider's agreement?
  - What Australian Qualifications Framework (AQF)<sup>9</sup> level will they need to ensure they are transferring to, if they do transfer to another provider?
  - Will the student be liable for fees owed with their original provider even after they transfer?
  - If the student wants to transfer to another education provider during their restricted period, what process do they need to follow, and are they guaranteed to be approved?
- policy on suspension of studies:
  - Some providers have restrictive policies and do not allow suspension for reason of pregnancy or childbirth.
  - Some providers also require normal tuition fees to be paid during the period of suspension.

In written agreements dealing with the education agent's ability to sub-contract their representation work it would be useful to ensure that providers understand they are responsible for the information sub-agents give to students on their behalf.

While rare, we receive complaints from students who claim that education agents forced them to enrol in a particular course of studies. We also receive complaints from students where the education agent signed the student's written agreement for them without consent or copied the student's signature from their passport.

It may be useful for written agreements between providers and their education agents to include a requirement for the agent to obtain and store evidence of the student's free and informed consent to undertaking the chosen course of study.

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**Example 4**

*Student Q enrolled in a course but fell pregnant and deferred their studies twice on medical advice. The student then advised the provider they wished to cancel their enrolment to return to their home country. The student applied for a refund which was rejected on the grounds they accepted a deferment and agreed to terms that precluded a refund with their new letter of offer.*

*The student claimed they did not accept any new terms. On investigation, it appeared the education agent signed the new letter of offer on behalf of the student, which the student claimed not to have authorised. The provider*

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<sup>9</sup> The Australian Qualifications Framework (AQF) is the national policy for regulated qualifications in Australian education and training and consists of 10 levels.

	<p><i>claimed the education agent was acting on the student's behalf, not on its behalf, and the agent's signature bound the student.</i></p>
<p>13. What is the potential impact on providers regarding increased administrative activity if they are required to monitor all agents?</p>	<p>Under the current National Code, providers are required to monitor all agents they have an agreement with. This change may require providers to add some agents to that cohort and, consequently, to the number of agents they need to monitor.</p> <p>However, by effectively monitoring more agents, a provider may more readily identify an agent who does not act ethically.</p> <p>The Department may also consider supporting education providers by providing guidelines on monitoring best practice.</p> <hr/> <p><b>Example 5</b></p> <p><i>Student N was studying with their provider for a term, the fees for which they pre-paid when they enrolled with the provider. When their next instalment became due, the student asked the provider's receptionist how to pay and the receptionist advised the student to pay the money to their education agent.</i></p> <p><i>Student N paid the education agent in cash instalments for several months, sometimes in one of the education provider's classrooms, until the provider sent Student N an email warning that their enrolment would be cancelled for non-payment of fees because they were in arrears.</i></p> <p><i>Student N could no longer contact the education agent and the receptionist had also left the school. Other students told Student N that the receptionist and the education agent were associates.</i></p> <p><i>After hearing Student N's explanation, the provider identified a term in the student's written agreement stating that all fees must be paid directly into the provider's account. The provider created a payment plan for the student to pay the arrears in instalments.</i></p> <hr/>

## Course transfers

14. How can the ESOS framework enhance optimal student choice and safeguard the ability of providers to deliver a quality education experience?

Problems related to transfers between providers are the second most common issue raised in complaints to our Office, totalling 15 per cent of all issues.<sup>10</sup> Measures that remove barriers to transferring providers may assist in reducing student complaints.

Currently, the only point at which an international student can exercise choice about their courses freely is before they apply for their student visa. Once their student visa is granted they are subject to transfer restrictions.

Many international students have never travelled to Australia, may not yet be confident in their English language skills and are unfamiliar with the rights, responsibilities and limitations of international students in Australia. Therefore, they have limited ability to understand the information providers give them and the context to which it applies.

As a result, even if a student is released, they are sometimes asked by the releasing provider to pay for the forthcoming study period that the student withdraws from. This can be a significant sum and can result in the student paying fees to 2 providers at the same time.

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### **Example 6**

*Student O was completing the first 6 months of their principal course with their provider. The student noticed their provider did not offer an elective unit that they were interested in but another provider did. Student O notified their current provider that they would be transferring to the other provider for their next term.*

*Their current provider advised they could not transfer without release as their next term commenced just within the student's 6-month restricted period. The student applied for release which the provider declined, stating there was no benefit for the student in transferring to another provider to study the same course.*

*Student O informed their original provider they would wait until the principal course restriction expired and would not be studying with them. The provider warned the student they would still be liable for all the fees related to their next term of study as the student could not cancel until they completed 6 months with them. Under the terms of their written agreement, the student would need to withdraw at least 30 days before the commencement of their next term to avoid liability.*

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<sup>10</sup> Complaints closed by the Office in Overseas Students Ombudsman jurisdiction from 11 April 2011 to 31 March 2022.

<p>15. How can the framework and providers ensure course packaging requirements are transparent to students and support student choice and wellbeing?</p>	<p><b>Impact of visa settings</b></p> <p>Students may have an incentive to limit their future choices by enrolling in long course packages as they are more likely to obtain a student visa or be granted one for a longer period.</p> <p>Enrolling in longer packages seems a more secure and sensible option for students who want to study several courses in Australia, and it appears that some students do not fully understand that doing so may restrict their options to transfer courses.</p> <p><b>Requirements for students to be informed of transfer restrictions</b></p> <p>The greatest barrier to transparency under the current framework is the lack of requirement for students to understand transfer restrictions before agreeing to undertake a package of courses. It is not mentioned in Standard 3 of the National Code, which outlines information that must be in the written agreement, or in Standards 1 and 2 which deal with pre-enrolment marketing information and recruitment practices (except to require providers and their agents to refrain from recruiting a student during their transfer restricted period).</p> <p><b>Transfers and student wellbeing</b></p> <p>All students who complain to the Office about transfer restrictions have their request for release denied by their provider. In some cases this was despite specifically raising wellbeing concerns.</p> <p>The Department may wish to consider the following ways of ensuring students make informed choices about their study plans:</p> <ul style="list-style-type: none"> <li>• reduce incentives to apply for longer initial visas (in cooperation with the Department of Home Affairs)</li> <li>• require international students in packaged courses to demonstrate understanding and acceptance of transfer restrictions.</li> </ul>
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<p>16. What are the benefits to providers and students in restricting a student from changing providers within the first 6 months of their primary course, and what would be alternatives to support student choice?</p>	<p><b>Benefits to providers and students of transfer restrictions</b></p> <p>We understand there are significant benefits to providers knowing that a student is restricted from transferring away from them.</p> <p>We consider the potential benefits to some students include:</p> <ul style="list-style-type: none"> <li>• for students enrolled in one course, being compelled to allow themselves to settle in and get over initial periods of culture shock and homesickness, engage with the support their providers can offer and give providers an opportunity to understand their student</li> <li>• for all students, not being approached by agents to study other, potentially lower quality, courses.</li> </ul> <p>Despite these benefits, students in packaged courses sometimes feel trapped by choices they made prior to commencing the training, which they are unable to change. The restrictions may also act as a disincentive to competition and quality improvement among providers as providers may feel that students are tied to them as long as they maintain minimum standards for regulatory approval.</p> <p>Although our Office does not have data to show how many of the students who complain about transfer restrictions are enrolled in packaged courses, compared to single courses, anecdotally our complaint handlers report getting very few, if any, transfer complaints from students who are enrolled in single courses.</p> <p><b>Alternatives to support student choice</b></p> <p>The Department may consider these alternatives to support student choice:</p> <ul style="list-style-type: none"> <li>• providers may be able to recover their recruitment costs by charging specific non-refundable enrolment fees rather than attempting to recover them from the student's tuition fees</li> <li>• providers may be able to recover commissions paid to education agents contractually for students who do not remain with the provider beyond a period specified in the contract</li> <li>• changing maximum student visa grant to less than 5 years, with recognition that further applications are more likely, and lower fees for subsequent applications</li> <li>• potential changes to the definition of the restricted period to balance competing interests, for example, the student to complete any of the following:</li> </ul>
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- 6 months of principal course (or 6 months of the school's sector course),<sup>11</sup> or
- 12 months of a foundation course,<sup>12</sup> or
- 12 months of first AQF level course

**Potential changes to release process**

An alternative or complementary approach to giving more weight to student choice could involve changes to the legislation and process for releasing students from restrictions.

Currently, Standard 7 of the National Code requires providers to have a policy and process for deciding student applications for release. This gives the provider, who has a commercial interest in retaining the student, the power to determine whether the student should be allowed to transfer to another provider. It also requires the provider to assess the student's request by reference to the student's best interests. This is a difficult position for providers as their commercial interests unavoidably conflict with the student's desire to leave them.

Providers must not look at the student's best interests in isolation, but must assess them with reference to criteria, including:

- the student is not progressing in their course but is engaging with the provider's intervention strategy
- the student was misled about the course, and due to being misled, the course is not suitable for them
- compassionate or compelling reasons.

In complaints to our Office, most students argue their situation falls within the compassionate or compelling criteria. However, whether the situation meets this criterion will depend on the provider's subjective assessment. We observe that many providers have limited compassionate or compelling circumstances to situations that are beyond the control of the student and directly impact their ability to study. For example, death of a close family member, personal injury or natural disaster in the student's home country.

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<sup>11</sup> Noting that applying a strict calendar definition of 6 months is also problematic. We have received complaints from students who have finished their first semester of their principal course, did not have any more study to complete in the 6-month period, but were not able to obtain a Certificate of Enrolment to study with the provider they wished to transfer to (without being released by their original provider, who did not agree to release them).

<sup>12</sup> Like the point above, the strict calendar definition of 12 months may not be appropriate if a student has completed one academic year, but 12 months has not yet elapsed.

Providers can add other criteria for release and must include, in their policies, reasons for denying an application for release. The reasons to deny release are completely at the discretion of the provider.

Reasons we observe in provider policies to deny release include:

- a) the student has outstanding fees owing to the provider
- b) the student is transferring to a course at a lower AQF-level
- c) the student is seeking release to avoid being reported in PRISMS for unsatisfactory attendance or course progress
- d) the student's new study plan is different to the study plan they submitted when they applied for enrolment
- e) the provider does not release for change of mind or change of career aspirations
- f) the student is attempting to change course to get a migration outcome and is not a Genuine Temporary Entrant (GTE).

In relation to reason (b), the student transferring to a course at a lower AQF level may result in a student being in breach of their visa conditions. International students who wish to change to a course at a lower AQF level are advised to apply for a new visa.<sup>13</sup> However, without their original provider's release, the student cannot get a Confirmation of Enrolment (CoE) from their new provider which they need to be granted a new visa.

The Office advises providers that their reasons to deny release should not be overly restrictive. For example, reasons (d) and (e) could be used to deny release to nearly any student's request.

We also advise providers it is not their role to determine whether a student is seeking a migration outcome or is a GTE when assessing their release requests, like in reason (f). Home Affairs has delegated decision makers who have resources to assist them in making these assessments.

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**Example 7**

*A student was studying a package of VET courses in cookery with a provider. They were progressing well in their studies but were diagnosed with a condition of the spine which affected their ability to cope with some of the physical aspects of their studies. This greatly affected the student's future in the industry. The student decided to change to Environmental Science and obtained an offer from a university to commence a Bachelor of*

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<sup>13</sup> <https://immi.homeaffairs.gov.au/what-we-do/education-program/what-we-do/simplified-student-visa-framework>, under heading "Changing courses", accessed 31 March 2022.

	<p><i>Environmental Science. The university also gave the student a 25 per cent scholarship on fees for the entire program.</i></p> <p><i>The student’s VET provider refused to release them and said the transfer would put them at risk of not being able to progress through their package of VET courses. In relation to the student’s medical condition, the provider stated they could make reasonable accommodations to the course to enable the student to continue and become qualified.</i></p> <hr/> <p>In view of the issues identified above, the Department may wish to consider modifying the release process by:</p> <ul style="list-style-type: none"> <li>• allowing applications for release to be considered by a body other than the education provider, for example, but not necessarily, Home Affairs</li> <li>• clarifying that provider reasons to deny release should not: <ul style="list-style-type: none"> <li>○ be overly restrictive</li> <li>○ involve an implied or explicit assessment of a student’s GTE status.</li> </ul> </li> </ul>
<p>17. Should ‘concurrent study’ as an option remain within PRISMS and if so, what provisions should be made to ensure it is not abused?</p>	<p>The Office understands that concurrent study may be the only practical option available to some students wanting to change their study pathway if their provider refuses to release them. If concurrent study is not available, these students may choose to give up studying in Australia altogether.</p> <p>We suggest the Department accompanies any removal of the option with other reasonable relaxations of course restrictions, or ways for students to apply to another body for release, for example by applying to Home Affairs for a new visa.</p> <hr/> <p><b>Example 8</b></p> <p><i>Student D was enrolled in a package of 3 courses leading to an Advanced Diploma of Accounting with a provider. While studying the second course in their package, they worked in disability services and decided to qualify as a registered nurse. They applied to their provider for release but it refused their application.</i></p>

	<p><i>While disputing the provider's decision, student D enrolled with another provider in a Diploma of Nursing leading to a Bachelor of Nursing. Student D's complaint to our Office resulted in their original provider granting release because we found its release assessment policy included invalid considerations.</i></p> <hr/> <p>In Example 8, the student maintained enrolment and course progression requirements in both courses but it was our view the provider did not fairly assess their initial request for release.</p> <hr/> <p><b>Example 9</b></p> <p><i>Student E was enrolled in a package of hairdressing courses with a provider. While studying the first course in their package, student E was very unhappy. They were introverted and did not feel comfortable interacting with clients, which was compounded by their struggle with English language skills. They approached their provider for assistance but felt the provider did not care about their struggles. They applied for release to study accounting courses with another provider but their original provider refused their application.</i></p> <p><i>While disputing the original provider's decision, Student E enrolled in accounting studies concurrently. Student E's complaint to our Office resulted in the provider granting release because we found it had not appropriately assessed the student's English language skills when accepting them for study in its hairdressing course.</i></p> <hr/> <p>In Example 9, the student did not return to study with their original provider saying they felt too anxious to continue the hairdressing course.</p>
<p>18. What restrictions, if any, should there be on the transfer of adult international students where they wish to transfer between providers?</p>	<p>Complainants often inform our Office they want to make their own choices about their future study and career rather than leaving it to providers.</p>

Written agreements	
19. How effective are written agreements in consistently setting out and protecting the rights and obligations of students and providers?	<p><b>Setting out rights and obligations</b></p> <p>Given that disputes about fees and refunds form the largest international student complaint issue to our Office, we analysed many written agreements. Since the commencement of the 2018 National Code, 35 per cent of complaints to our Office raised concerns about terms in written agreements and we finalised 558 investigations into written agreement issues.<sup>14</sup> Some written agreements follow the requirements of the ESOS framework well but others are poorly designed. Of the 558 investigations, we found that providers were substantially compliant and reasonable in 36 per cent of cases and they were not substantially compliant or reasonable in 49 per cent of cases. In the remaining 15 per cent of cases, we did not form a view, for example because the provider and student resolved the issue between them.</p>
	<p><b>Protecting rights and obligations</b></p> <p>We observe that some students who raise a complaint can be surprised by the terms in their written agreements. The most common complaints to the Office relate to provider refund policies, which Standards 3.4.1-3.4.3 require to be in plain English.</p> <p>Despite the requirement in Standards 3.3 and 3.4.4 of the National Code for certain elements of written agreements to be in plain English, some international students struggle to read and understand these agreements, especially those accepted into courses requiring a lower English score. We also note that some written agreements are extremely long - 55 pages in one example.</p>
	<p><b>Allowing for price increases during term of written agreement</b></p> <p>We observe written agreements where providers retain the right to increase prices during the term of the written agreement. In some situations this may appear reasonable given that costs to providers may increase during the period of the agreement, especially for packaged courses or long degree programs. This practice maybe contrary to Australian Consumer Law (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.<sup>15</sup></p>

<sup>14</sup> Complaints finalised 1 January 2018 to 31 March 2022.

<sup>15</sup> Australian Consumer Law Part 2-2, s 25(d)

If the government policy is to allow providers to make allowances for price increases, we suggest this position be clarified in ESOS and include guidance about reasonableness of permitted increases.

### Variations due to deferrals and suspension of study

Complaints to our Office indicate that a student's progress on their chosen study pathway is often delayed due to unexpectedly long visa processing times, course progression issues (including needing more English language training), COVID-19 or other circumstances over which the student has limited control. While providers are often flexible in allowing students to commence courses later or extend their studies, we note that providers often do not establish new written agreements with students to reflect the changed dates and courses of study.

The Department may wish to include direction to providers within the ESOS framework about their obligations when contracts are varied.

A common complaint issue relates to the consequences of deferrals on pre-paid fees. Many providers include clauses in their written agreements which allow a student to defer commencement of study but, if the student later withdraws, they are not entitled to a refund of fees pre-paid for that course. This occurred during the pandemic, when students were not able to travel to Australia to commence or continue their courses but, initially hoped that travel restrictions would be short-lived. After several deferrals, some students decided to withdraw from courses and requested refunds.

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#### ***Example 10***

*Student G paid for a course that they were due to start studying in Australia in April 2020 but was unable to travel due to pandemic-related border closures. When the borders reopened, the student arranged to commence study in February 2022. Unfortunately, Student G's child was diagnosed with a temporary but serious medical condition that required intensive therapy. Student G asked for a deferral until the end of 2022 to care for their child. The provider refused and instead offered Student G a refund of half their pre-paid tuition fees.*

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### Potentially unfair contracts

We observe written agreements between students and private education providers where refund policies appear to penalise international students unfairly and unreasonably for withdrawing from their courses. Under the ACL international

	<p>students should be protected against unfair contract terms. However, written agreements and the practices of some providers may not treat requests for refunds reasonably. The Office is currently considering complaints about this issue further.</p> <hr/> <p><b>Example 11</b></p> <p><i>A student enrolled in a package of courses with an education provider, which was due to commence in 4 months from the time of enrolment. They pre-paid \$4,100 towards their first study period. Only 7 days after paying, the student decided to withdraw due to concerns about the pandemic. The student returned to their home country and applied for a refund. The provider agreed to refund \$1,750 which was 50 per cent of their pre-paid tuition fee, minus a \$300 cancellation fee, as per the terms of their written agreement.</i></p> <hr/> <p><b>Refunds refused for visa refusal</b></p> <p>One observed area of non-compliance across some written agreements is where providers attempt to limit a student’s refund due to visa refusal citing reasons for the visa refusal.</p> <p>Sections 47D-47E of the ESOS Act, as well as the Education Services for Overseas Students (Calculation of Refund) Specification 2014, stipulate that a provider has 4 weeks to refund a student who cannot commence or continue their course because their visa is refused, in accordance with an amount calculated in line with the instrument.<sup>16</sup></p> <p>A noted practice is for written agreements to attempt to remove a student’s right to a refund if the reason for the visa refusal is due to presentation of fraudulent information or documents to support the visa application.</p> <p>Aside from the ESOS Act not including discretion for providers to limit student refunds for this reason, in our view this practice does not recognise the complex situations in which students may find themselves. For example, many students entrust the visa application process to education agents or trust that their parents provide them legitimate documents.</p>
<p>20. What measures could be introduced to</p>	<p>Our observation is that an international student’s understanding of their rights and obligations is just as important as the setting out of their rights and responsibilities in their written agreement.</p>

<sup>16</sup> We note the maximum amount retainable by providers, \$500, has not changed since the instrument was published in 2014. It may be appropriate to consider whether to increase this amount in line with inflation or in line with other considerations providers may put forward.

<p>increase transparency of written agreements, for the benefit of students and providers?</p>	<p>We suggest the Department considers ways to ensure that students understand key terms of their agreements. This could take the form of a critical information summary translated into the student’s language or written in plain English, that the student would need to acknowledge separately to their written agreement.</p> <p><b>Waiting and cooling off periods</b></p> <p>The Department may consider measures such as requiring students or parents/guardians to wait at least one full day before accepting their 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.<sup>17</sup></p> <p>The Department may also consider requiring providers to afford international students a cooling off period after signing written agreements. Some providers give a cooling off period of 3 days, but the practice is not common in the industry.</p> <p>These changes would give the student an opportunity to review the written agreement without pressure, ask questions, seek assistance in interpreting and understanding the contract and compare terms of other offers. It would also emphasise the importance of reading and understanding the terms.</p>
<p>21. If model clauses or model written agreements are introduced, what would they look like and how can they best be leveraged to reduce regulatory compliance costs and promote best practice in the areas of refunds, deferrals and transfers?</p>	<p>If model clauses or model written agreements are introduced, this would simplify our analysis of the terms in dispute given all agreements would follow the same structure and fewer new questions of interpretation would arise.</p> <p>Assuming the model clauses or model written agreements are drafted according to best-practice accessibility principles, these would also be likely to be better understood by international students.</p> <p>Certain areas we identify in our complaint handling which could be targeted in model clauses or model written agreements (include those identified in response to question 19) include:</p> <ul style="list-style-type: none"> <li>• the effect of a student not meeting a conditional offer, for example not meeting an English entry requirement to an AQF course even after completing their English language course</li> <li>• statements to clarify that students will not face reprisal for making an internal or external complaint or appeal about the provider</li> <li>• refund clauses</li> <li>• a cooling off period</li> </ul>

<sup>17</sup> <https://www.afca.org.au/about-afca/codes-of-practice/code-of-banking-practice>, chapter 27, p. 35. Accessed 6 April 2022.



	<ul style="list-style-type: none"> <li>• related to our discussion in question 19, an explicit statement from providers that refund clauses will only seek to retain reasonable costs incurred in relation to the student</li> <li>• the effect of a student withdrawing due to their visa application taking longer than expected to process, which results in the student not being able to commence on their agreed commencement date</li> <li>• the effect of a student’s visa being cancelled</li> <li>• force majeure type events</li> <li>• compassionate and compelling circumstances, for example serious illness or death of the student or close family member or a significant change in financial circumstances</li> <li>• the effect of a student withdrawing shortly after accepting the agreement</li> <li>• the effect of a student withdrawing after entering into the agreement but shortly before study was due to commence (currently, many private providers’ refund policy does not allow for a refund for withdrawals less than 14 days before commencement)</li> <li>• the effect of a student withdrawing when they entered into the agreement with the provider after study was due to commence</li> <li>• the effect of a student withdrawing more than 3 months before commencement</li> <li>• timeframes for payment schedules with reference to study period commencement dates, noting that according to s 27 of the ESOS Act, providers can consider all fees payable once a course commences</li> <li>• limitation on the types of fees a provider can consider non-refundable.</li> </ul> <p>We also suggest the Department considers including guidance about terms which are not appropriate for inclusion in written agreement with students, for example terms which limit a student’s ability to post a negative review about their experience with the provider where the review is not misleading.</p>
<p>22. How could refund regulations be revised to ensure consistency between providers and better reflect the different circumstances in which they may be requested?</p>	<p>Our response to question 21 outlines the types of terms which could be included as model clauses or form part of model written agreements. Alternatively, regulatory changes could require minimum standards for acceptable refund terms.</p>
<p><b>English language</b></p>	
	<p>No comment on question 23</p>

<p>24. Would it be beneficial to introduce an independent assessment of international students English proficiency before they commence their first AQF course?</p>	<p>Complaints to the Office do not give us specific insight into the potential benefits of introducing independent assessment of international students English proficiency before they commence their first AQF course.</p> <p>If the government introduces the requirement for students to undergo such assessments, we suggest:</p> <ul style="list-style-type: none"> <li>• It is made clear to the student whether they are responsible for the cost of this assessment before the student accepts their study package, and</li> <li>• direction is given about the potential outcome if the student does not satisfy the requirements of the independent assessment to enter their AQF course, including whether the student has the option of abandoning their original plan and receiving a refund of fees paid for the AQF course.</li> </ul>
	<p>No comment on questions 25, 26 and 27.</p>
<p><b>General Questions</b></p>	
<p>28. How can the ESOS framework be strengthened and improved to deliver an optimal student experience?</p>	<p><b>Disputes about course quality</b></p> <p>In 2019, the Office made a submission to government (the Expert review), noting the lack of a dispute resolution pathway for students in the VET sector who are concerned about the quality of the course they are undertaking.<sup>18</sup> This is a common issue in complaints to our Office where students are seeking a refund based on dissatisfaction with the course. We cannot consider this complaint issue as we are not the appropriate body to assess quality issues. Instead, we transfer the complaints to the appropriate quality regulators being the Australian Skills Quality Authority (ASQA) and the Tertiary Education Quality Standards Agency (TEQSA). Since 2015, when we commenced recording the number of complaints we transfer that raise quality concerns, our Office has transferred 339 complaints to ASQA and TEQSA.</p> <p>We note that ASQA and TEQSA use complaints to inform their regulatory activity, but do not provide outcomes to students.<sup>19</sup> In turn, students who complain about course quality and believe they are entitled to a remedy appear to have limited pathways to pursue their concern. Legal action through the ACL consumer guarantee remedy for a major problem with services that were not done with due care and skill is a potential pathway. This may deter students from pursuing legal remedies as the costs and difficulties of legal action may be significantly more than the cost of a course.</p>

<sup>18</sup> [https://www.ombudsman.gov.au/\\_data/assets/pdf\\_file/0031/98491/Commonwealth-Ombudsman-Submission-VET-Review-2019.pdf](https://www.ombudsman.gov.au/_data/assets/pdf_file/0031/98491/Commonwealth-Ombudsman-Submission-VET-Review-2019.pdf)

<sup>19</sup> <https://www.asqa.gov.au/about/complaints/complaints-about-training-providers>, and <https://www.teqsa.gov.au/raising-complaint-or-concern>, accessed 2 April 2022

We note the Expert review recommended that a new Ombudsman service be created with appropriate powers and information to resolve consumer complaints about VET providers.<sup>20</sup>

### Disputes about cancellation of enrolment

Standard 9 of the National Code details reasons that providers can cancel a student's enrolment. These appear to be limited to student misbehaviour, student failure to pay fees or a breach of course progress or attendance requirements. The National Code does not specify that a student can request cancellation of their enrolment at any stage.

In some complaints to our Office, providers refused to cancel a student's enrolment on the student's request. These providers implemented barriers to cancellation, for example requiring students to apply for release, requiring students to pay cancellation fees or requiring students to pay other fees it believes are owed.

Some students do not realise that cancelling their enrolment will not automatically release them to study with another provider. We support providers in counselling students about this and confirming the student's understanding before moving ahead with the student's cancellation. It is also sensible to advise the student to contact Home Affairs about any impacts of the cancellation on their visa. However, it is not reasonable for providers to retain students who make informed decisions to cancel their enrolments.

In relation to withholding cancellation due to a fee dispute, including requiring students to pay a cancellation fee, our view is that although the provider may consider the fee to be owed, the provider should not prolong the student's enrolment and potentially increase the students' liability on this basis. The Department may wish to consider imposing a direction for providers on cancelling enrolment on student request.

### Debt collection

In some fee dispute complaints, the student is pursued for payment by external debt collectors. While our Office recognises that providers can pursue collection of a debt, it is not appropriate for such activity to occur while the debt is in dispute with the provider or this Office. The Department may find it appropriate to clarify this in Standard 10 of the National Code.

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<sup>20</sup> [https://www.pmc.gov.au/sites/default/files/publications/strengthening-skills-independent-review-australia-vets\\_1.pdf](https://www.pmc.gov.au/sites/default/files/publications/strengthening-skills-independent-review-australia-vets_1.pdf), recommendation 3.15, accessed 2 April 2022

### Intervention strategies

Standard 8 of the National Code requires providers to document their policy and process to monitor a student's course progress. The policy should include details of the provider's intervention strategy to identify, notify and assist students at risk of not meeting progress requirements in sufficient time for those students to rectify any issues to avoid being reported in PRISMS.

In some complaints, we see policies with little detail about what a provider will do to intervene. Some providers also advise the Office they feel they have adequately intervened to help a student simply by notifying them of their course progress risk and providing counselling service contact details. The Department may wish to consider giving more guidance about the minimum expectations of an intervention strategy policy and process.

### Complaints process accessibility

Standard 10 of the National Code requires providers to have easily accessible information about their internal complaints and appeals process and policy.

In complaints to our Office, we observe that some providers require students to lodge complaints from within student portal systems the student cannot access either due to being blocked or because they finished their studies. One provider's policy specifically excluded former students or students without an active enrolment from making a complaint or appealing a decision.

This is not appropriate as students who are not actively studying with the provider may have legitimate disputes that warrant access to the provider's process. The Department may consider amending standard 10 to require providers to make complaints processes accessible to intending, current and former students.

### Provider default

If a provider defaults part-way through delivery of a student's course, the provider or the Tuition Protection Service (TPS), may need to refund the student their unspent tuition fees if the student cannot be placed in a suitable alternative course.

	<p>This may be problematic in instances where:</p> <ul style="list-style-type: none"><li>• students already completed significant periods of their study and only be due a small refund, but other providers require them to re-do and pay for study already completed</li><li>• students paid for fees towards an aviation course including amounts for expensive flight training, but they spent significant time studying theoretical components before the provider defaulted. In this situation the averaging of pre-paid fees over course weeks would not recognise the more expensive component was not yet delivered.</li></ul> <p>The Department may consider making other means available to the TPS to protect students' time and fees when a provider defaults.</p>
	<p>No comment to questions 28, 29</p>