

Submission - Inquiry into the Universities Accord (National Student Ombudsman) Bill 2024 [Provisions] 1 October 2024

ACKNOWLEDGEMENT OF COUNTRY

Monash University recognises that its Australian campuses are located on the unceded lands of the people of the Kulin Nations, and pays it respects to their Elders, past and present.

INTRODUCTION

Monash supports the establishment of a National Student Ombudsman (NSO) with jurisdiction to handle complaints over a wide range of issues of concern to students.

Since 2007 Monash has had its own University Student Ombudsman (USO), who is independent of internal processes and who reports directly to the University Council. In addition, students can refer complaints to the Victorian Ombudsman. We therefore have considerable experience to inform our response to the Bill. We offer feedback on aspects of the Bill that we consider run counter to legal principle, that are ambiguous, or might not lead to the intended policy outcome.

In principle –

- Getting the policy and process right is of paramount importance. The NSO should serve students - the process for accessing the NSO must be clear and easy for students to navigate; it should provide timely resolution for complainants.
- At the same time, it is essential that the Bill is drafted to avoid the NSO intruding upon academic decision-making, and we have significant concerns on that point.
- We are also concerned that the legislation not be rushed and that appropriate time is allowed to plan for implementation - both to establish the NSO, and for higher education institutions to incorporate NSO policy and procedures into their own existing processes, noting that the *National Higher Education Code to Prevent and Respond to Gender-based Violence* is yet to be released for consultation and will likely need to be considered before NSO arrangements can be finalised.

Monash recommends –

- To avoid jurisdictional overlap and forum shopping, that either:
 - (i) the NSO's jurisdiction in respect of higher education providers as defined be exclusive of an ombudsperson established by State or Territory legislation; or
 - (ii) The Bill provide for comity as between the jurisdiction of the NSO and that of an ombudsperson established by State or Territory legislation.
- Amending the Bill to be more consistent with other Commonwealth ombudsman legislation, including:
 - A fixed remit that can only be changed by the Parliament (not by the Minister);
 - Removing the power for the NSO to compel production of legally privileged material; and
 - Introducing a limitation period for complaints;
- Strengthening the exclusion of matters involving academic judgement status to avoid intrusion into academic matters and/or conflict with the legislated principle of academic freedom.

We look forward to working with the NSO as the office is established to discuss our own experience with the full complaints handling process. In the meantime, we would appreciate the opportunity to talk with the Committee to ensure the legislation achieves the goal of protecting students, while not inadvertently creating new problems.

DISCUSSION

STUDENT FOCUS AND IMPLEMENTATION TIMEFRAME

The NSO is not a substitute for all higher education providers having strong, rigorous and timely processes of their own to serve students and maintain a culture of institutional accountability. Indeed, higher education providers are required to have such processes.

We understand the desire to introduce the NSO as soon as possible, especially in jurisdictions where there is no current independent complaints avenue outside universities.

It is important to have an independent complaints review office, but it is also important that the NSO be staffed by people with knowledge of higher education in practice.

- For example, the NSO office should comprise staff who understand and respect the diverse backgrounds and identities of students, and can create a safe and confidential space for all students to raise complaints. Processes need to ensure cultural appropriateness for certain cohorts, particularly First Nations people, and the integration of advice from experts and students on a continuous basis. This should involve enduring partnerships with peak student bodies and other relevant sector experts who can disseminate information about the NSO service to particularly vulnerable cohorts.

Given the broad scope of the NSO to hear complaints from across the higher education sector, including offshore students, there might be a very large volume of complaints, especially in the initial operating period, due to the raising of historical grievances.

We assess that 1 February 2025 is an ambitious target for implementation and recommend more time is taken to consult with diverse student stakeholders before the legislation commences.

PROBLEMS WITH THE BILL

1. Avoiding jurisdictional overlap

The Bill does not sufficiently address potential overlap between the NSO and Australian State/Territory ('State') ombudsmen. .

Complaints are taken to be made to the NSO if they are made to a prescribed body (i.e. a State ombudsman) and then transferred to the NSO (s21AE). However, the Bill does not make explicit when or how such a transfer is to occur nor the consequences of transfer. For example, if after such a transfer the NSO rejects the complaint, is the complainant still at liberty to pursue their complaint with the prescribed body? A complainant should not be able to engage in 'forum shopping' of that kind.

Similarly, the NSO has a discretion to deal with a complaint that has already been or is being dealt with by another ombudsman/ State body (s21AJ(e)). Where a complaint has been dealt with by another ombudsman or State body, the NSO should be precluded from dealing with it to avoid inconsistent outcomes and unreasonable behaviour by complainants, and to promote resource efficiency.

To avoid the above issues and prevent forum shopping, we recommend that either:

- **the NSO's jurisdiction in respect of higher education providers as defined be exclusive of an ombudsperson established by State or Territory legislation; or**
- **The Bill provide for comity as between the jurisdiction of the NSO and that of an ombudsperson established by State or Territory legislation.**

2. Respecting academic freedom

Proposed section 21AD(3) carves out a number of matters from the jurisdiction of the NSO ('excluded matters'). Among these excluded matters is any action 'involving the exercise of academic judgement', which is appropriate given the statutory requirement for universities to uphold academic freedom.¹

We note that the Explanatory Memorandum classifies policies and procedures about academic matters ("for example, matters such as granting of special consideration, reasonable adjustments, research supervision, provision and standard

¹ *Higher Education Support Act 2003* (HESA), s.19-115.

of teaching facilities and disciplinary and misconduct procedures”) as being within the jurisdiction of the NSO, because “the content of these policies and procedures does not involve the exercise of academic judgement”.

- It is our experience that policies and procedures about academic matters necessarily involve academic judgement, as much as individual cases involving the application of such policies and procedures. At Monash, all Education, Graduate Research and Research policies are approved by the University Academic Board, relying upon the expertise of academic staff to ensure those policies will support the integrity and delivery of quality education and research.
- It is therefore very difficult to separate academic judgement from the application of an academic policy. Where the application of an academic policy (for example, about special consideration or research supervision) is in issue, the remedy for an initial decision that is perceived to be unfair lies in a more senior academic decision-maker reviewing the matter. The NSO should not become involved in such cases.
- We cannot imagine that it is intended for the NSO to interfere in such matters of academic judgement. We highlight the above matters to convey the nuanced context in which academic judgement is presently enacted.

The Bill should be amended to exclude from the NSO’s jurisdiction any policy or procedure, the primary purpose of which is to regulate academic matters, as well as the application of such a policy or procedure in an individual case.

Proposed s21AD(4) allows NSO Rules to “prescribe actions that are not excluded actions, despite anything in subsection 21AD(3)”. When read with proposed section 21AZ, which gives the Minister capacity to make by legislative instrument National Student Ombudsman Rules, s21AD(4) would allow the Minister to derogate from the specified excluded matters without amendments to the legislation. That subsection is problematic.

- To allow the Executive Government of the Commonwealth to override primary legislation made by the Parliament via a ‘Henry VIII’ clause of this kind is to invert a fundamental constitutional principle. The Senate has rightly objected to such clauses in many other contexts. The longstanding position of the Senate Standing Committee for the Scrutiny of Bills is that ‘provisions authorising delegated legislation to modify the operation of primary legislation may limit parliamentary oversight and subvert the appropriate relationship between Parliament and the Executive. Consequently, the committee expects a sound justification to be included in the explanatory memorandum for the use of any clauses that allow delegated legislation to modify the operation of primary legislation’.²
 - According to the Explanatory Memorandum, this provision ‘gives additional flexibility in the event that the definition of excluded action was inappropriately limiting the matters that students could complain about or affecting the National Student Ombudsman’s ability to provide an effective complaint handling process’ (para. 62).
 - The justification given for this provision – “additional flexibility” - is thin. That is particularly so given the nature of the principle in issue. Academic freedom is a fundamental principle of universities and is therefore enshrined in HESA and the Higher Education Standards Framework.
 - Moreover, the ability to expand the scope of the NSO without changing the legislation is inconsistent with the approach to most other Commonwealth ombudsman legislation, in which the remit of the relevant ombudsman is fixed by legislation (for example Commonwealth Ombudsman, the Overseas Students Ombudsman and the VET Student Loans Ombudsman).
 - If the jurisdiction of the NSO - already very broad - is considered inadequate, the Government of the day should bring an appropriate amendment to the Parliament for consideration.
- It is true that NSO rules could be disallowed by either House of the Parliament. But, as Professor Andrew Norton has pointed out, legislative instruments get much less attention than legislation. Of the various examples he cites of governments straying into academic territory in recent years under governments of both persuasions, only one - the previous Government’s veto of some Australian Research Council grants - attracted significant negative public comment.³

We recommend that, consistent with the fixed remit of other Commonwealth ombudsman legislation, proposed s21AD(4) be removed from the Bill.

² https://www.aph.gov.au/-/media/Committees/Senate/committee/scrutiny/scrutiny_digest/2024/d5_24.pdf?la=en&hash=843EA9A61A5B061D3DDCDDFF5758F64333FEB81CF.

³ <https://andrewnorton.net.au/2024/09/18/the-national-student-ombudsman-and-academic-life/>

3. Maintenance of legal professional privilege

The Bill includes power to compel production of legal advice and other communications protected by legal professional privilege. This position is inconsistent with other Commonwealth ombudsman legislation.

- The position in relation to legal professional privilege for Commonwealth departments (eg. Commonwealth Ombudsman, Law Enforcement Ombudsman, Immigration Ombudsman, Defence Force Ombudsman) is that the ombudsman has the power to compel production of privileged material but the legislation expressly provides that such information is not admissible in evidence against the person who produced it.
- The position in relation to legal professional privilege for statutory authorities and private sector bodies (e.g. Postal Industry Ombudsman, Overseas Student Ombudsman, Private Health Insurance Ombudsman, VET Student Loans Ombudsman, Fair Work Ombudsman) is that the ombudsman cannot compel production of privileged material.
- If there is concern that legal professional privilege might be used to cloak investigations into reports of sexual harm, it would be better to make provision in the National Code to prevent such usage.

We recommend that the NSO information gathering powers match those of other Commonwealth ombudsman legislation for statutory authorities and private sector bodies, in which there is no power to compel production of privileged material.

4. Complaint limitation period

Existing Commonwealth ombudsman legislation typically allows the ombudsman to decide not to investigate a complaint where the incident to which the complaint relates occurred more than 12 months before the complaint was made. This principle should apply explicitly to the NSO.

- To ensure a timely outcome, Monash policy requires students to lodge review requests with the University Ombudsman within 20 working days of receiving Stage 3 outcome (i.e. formal investigation by nominated case officers and complaints officers who have not had previous involvement with the complaint⁴).
- The Victorian Ombudsman may refuse to deal with a complaint if it is submitted more than 12 months after the decision or action that is the subject of the complaint and a satisfactory explanation for the delay has not been provided (s15A(2), Ombudsman Act 1973 (Vic.)). And the UK [Office of the Independent Adjudicator for HE](#) provides a 12-month window from the date of the institution's Completion of Procedures Letter.

We recommend that proposed s21AJ should include discretion for the NSO not to deal with a complaint where the passage of time would significantly affect the availability of information or the ability to offer an appropriate resolution.

⁴ refer to Appendix for explanation of Monash process for Complaints Handling



APPENDIX - COMPLAINTS HANDLING AT MONASH

To support timely and effective resolution of complaints, Monash takes a tiered approach to complaints handling, with its Student Complaints Policy outlining a complaints framework comprising the following five stages:

Stage 1: Informal, direct complaint raised directly with the staff member or area responsible for the decision or service related to the complaint.

Stage 2: Informal, escalated complaint raised with a staff member within the faculty, school, department or other area who has the ability to review a stage 1 decision.

Stage 3: Formal investigation by nominated case officers and complaints officers who have not had previous involvement with the complaint.

Stage 4: Internal review conducted by the University Student Ombudsman (USO).

Stage 5: External review by the Victorian Ombudsman (VO) (noting that a student can choose to make a complaint to the VO at any time, without having to exhaust the internal process).

Complaints received traverse a broad range of themes and administrative functions, ranging from assessment and marking, special consideration, and administration of assessment, to decisions about withdrawn incomplete applications or review of remission of debt decisions.

A key feature of a complaint is that the student is seeking a specific resolution in response to one or more issues. A complaint is considered to be different from feedback, where a student brings an issue to the attention of the university, but is not seeking a specific resolution.