

2 October 2024

Committee Secretary
Senate Education and Employment Committees
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Dear Committee Secretary,

Thank you for the opportunity to assist the Senate Education and Employment Committees with its consideration of the *Universities Accord (National Student Ombudsman) Bill 2024 (Bill)*.

UQ's position

The University of Queensland (UQ) welcomes the establishment of a National Student Ombudsman (NSO) as a new statutory function of the Commonwealth Ombudsman with investigative powers of tertiary provider actions impacting students (including activities, processes and service delivery).

However, there are some practical concerns and a question of how the NSO fits in with the other regulators that already scrutinise UQ's actions. Students have ready access to various internal and external complaint mechanisms when aggrieved about UQ's actions.

UQ invites the Committee to consider the following matters identified by UQ in consideration of the Bill.

UQ's feedback

The Bill introduces a broad range of new powers, responsibilities and potential penalties. Areas of concern in relation to the Bill are outlined below.

1. Potential for an unsustainable complaints volume

As the Explanatory Memorandum to the Bill reflects, the establishment of the NSO was the first action of the *Action Plan Addressing Gender-based Violence in Higher Education* agreed to by all Education Ministers on 23 February 2024. It is understood that a central motivation for the Bill was to create an escalated complaints-handling mechanism for students in relation to matters about gender-based violence and other forms of violence and bullying and harassment.

However, the scope of complaints that can be made to the NSO under the Bill is now particularly broad, with the Explanatory Memorandum anticipating the NSO may field complaints about such matters as:

- a) student safety and welfare, including gender-based violence and other forms of violence, and bullying and harassment;
- b) course administration, such as timeliness and accuracy of information provided to students;
- c) teaching provision and facilities, such as sufficiency of staffing to meet educational, academic and administrative needs of students;
- d) disciplinary processes, such as procedures to address misconduct;
- e) reasonable adjustments for students with disability or experiencing special circumstances;
- f) and student accommodation, where owned and/or operated by the provider.

The University notes that the breadth of the potential complaints allowed to the NSO might result in the NSO receiving a substantial number of complaints, many of which will require a significant investment of time and resources to consider and resolve. Further, in circumstances where the central motivation of the establishment of the NSO was to hear complaints about gender-based violence and other forms of violence, and bullying and harassment, UQ holds some concern that the NSO's resources for considering these important complaints may be overwhelmed by the breadth and volume of complaints about other matters (such as those identified at (b) to (f) above), when there are other mechanisms available for such complaints to be considered.

2. Concerns regarding 'excluded action' definition

The Bill allows for complaints to the NSO to be about any action taken by the University, with the only exceptions being those identified in the 'excluded action' definition. There are two matters in the definition of 'excluded action' that UQ anticipates might cause difficulties in practice.

- a) Clause 21AD(3)(c) – 'academic judgement'

The Bill excludes student complaints 'to the extent that the action involves the exercise of academic judgment' (section 21AD(3)(c)). The Bill's Explanatory Memorandum gives as examples of excluded complaints, 'decisions about the academic merit of a grade awarded, the content of a curriculum, and teaching and assessment methods.'

The Explanatory Memorandum appears to class 'disciplinary and misconduct procedures' as non-academic, even if these may directly relate to academic matters. It reflects that '[p]olicies and procedures about academic matters can be considered by the National Student Ombudsman as the content of these policies and procedures does not involve the exercise of academic judgment'. However, in UQ's view, academic misconduct will almost always involve academic judgment. This is likely to create confusion on behalf of complainants in respect of what matters can and cannot be complained of to the NSO, and difficulties for the NSO in ascertaining which complaints about actions ought to be excluded. We welcome greater clarity for our students on this matter and can provide further details if it would assist.

b) Clause 21AD(3)(e) and clause 21AD(4) – National Student Ombudsman Rules

While clause 21AD(3)(e) provides that the National Student Ombudsman Rules may prescribe a kind of action as an 'excluded action', (and thereby a complaint may not be made to the NSO about such actions), it appears that clause 21AD(4) allows for exceptions to be over-ridden by the National Student Ombudsman Rules. The Explanatory Memorandum says that 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 NSO's ability to provide an effective complaint handling process'.

UQ's concern is that the ability in clause 21AD(4) for the National Ombudsman Rules to override the exceptions in clause 21AD(3)(e) will create some uncertainty for universities as to what types of complaints may or may not be excluded. Further, given that the National Student Ombudsman Rules will be a legislative instrument made by the Minister for Education, the Minister would have the authority and autonomy to prescribe actions that they consider should not be excluded actions (despite clause 21AD(3)). UQ welcomes further clarity for the application of clause 21AD(4) and can provide further details if it would assist.

3. Concerns regarding complaints mechanisms and NSO powers

We noted the following concerns regarding complaint mechanisms and NSO powers:

a) Complaints can be made direct to the NSO

The Explanatory Memorandum states that there is a general expectation that 'students will seek to resolve their complaint with their provider before complaining to the National Student Ombudsman unless there are reasons for not doing so'. However, it appears that students are not required to complain to their provider before making a complaint to the NSO.

Ordinarily, the functions of an ombudsman involve investigating complaints about actions and decisions made by an organisation and to make recommendations on how the decision or process could be improved.

Allowing students to complain directly to the NSO without first contacting their provider prevents providers from addressing students' complaints in a timely manner, reviewing the University's decisions, or even (conceivably) making decisions if one has not already been made. In addition, it is feasible that both the NSO and the provider might be investigating a matter at the same time.

We believe it would be in the best interests of the complainant and the University for the complainant to contact the provider in question first, before contacting the relevant ombudsman. This would remove a resourcing burden from the NSO and provide the University with an opportunity to address the complaint in a timely manner, review their decision, or make a decision if one has not already been made. UQ therefore suggests the Committee to consider whether there is benefit in requiring students to address complaints with their providers in the first instance, before referring their complaint to the NSO.

b) Anonymous complaints

The Explanatory Memorandum states that complaints can be made anonymously or under a pseudonym by or on behalf of a student.

In UQ's view, it will be difficult for providers to respond to requests from the NSO in relation to anonymous or de-identified complaints given the University may be unable to determine from its records whether it has knowledge of or information about the complaint in circumstances where limited details are provided to the University.

UQ acknowledges that there may be circumstances where it is acceptable to make an anonymous complaint directly to the NSO, for example, where there is a general concern which may require the provider's attention but does not directly relate to the complainant. In this case there may not be a specific need to require the complainant to identify themselves. However, UQ therefore invites the Committee to consider whether this process could be improved or whether that balance is reasonable.

c) Investigative powers

The NSO's investigative powers include entering the University's premises, requiring a person or University to provide information and requiring a person to attend a specified place and answer questions. Given these powers are already existing powers of the Commonwealth Ombudsman, the Bill duplicates complaint mechanisms already in place for students who can already complain to the Commonwealth Ombudsman about the matters listed in the scope of the Bill.

d) Limited timeframe to respond to NSO's notices

The minimum timeframe (at least 14 days) for which universities would be required to provide the NSO with information, documents or records is challenging, and is concerning given the potential imposition of significant penalties. It is foreseeable that compliance with such notices may place considerable administrative burden upon providers, requiring corresponding additional resourcing.

e) Alternative dispute resolution process

The University can be compelled to participate in an alternative dispute resolution process with the complainant (again, on pain of attracting significant penalties for failing to do so). Again, it is foreseeable that such participation will expose the University to additional administrative burdens and demand corresponding resourcing.

4. Duplication of complaint mechanisms already in place

The reforms will supplement, but may in some respects duplicate, complaint mechanisms already in place for students who can already complain to other regulators about the matters listed in the scope of the Bill, including:

- a) TEQSA;
- b) Department of Education;
- c) The Commonwealth Ombudsman;
- d) The Queensland Ombudsman;
- e) The Australian Human Rights Commission;
- f) The Queensland Human Rights Commission;
- g) Work Health and Safety Queensland.

The Explanatory Memorandum records that:

While the National Student Ombudsman is intended to be the primary escalated complaints-handling pathway for higher education students, it is possible that complaints may continue to be made by students to state and territory ombudsmen and other Commonwealth, state and territory bodies. This ensures that state and territory ombudsmen, and other complaint handling bodies as relevant, can effectively transfer complaints to the National Student Ombudsman.

The University considers, in view of the nature of the different processes and potential outcomes that might be pursued via complaint mechanisms available through other state and territory bodies, that there is a risk of jurisdictional (and at a minimum, procedural) difficulties that are likely to arise, potentially requiring an additional investment of resources to respond to and resolve those matters. UQ welcomes further clarity relating to processes of complaint resolution between the NSO and other regulators that articulates the inter-relationships between the NSO and other bodies. The University can provide further details if it would assist.

There are also concerns around the workability of the proposal that state and territory ombudsmen, and other complaint handling bodies, may effectively transfer complaints to the NSO, given the predictable jurisdictional and procedural issues. In particular, UQ observes that the intention of the NSO to be the primary pathway for complaints-handling for higher education students may be difficult to achieve where there are already federal and state federal complaint-based regulators who currently field and deal with complaints by students regarding University actions. Providing an additional pathway for students might predictably create some confusion for aggrieved students as to whom they ought direct their complaint. UQ welcomes greater clarity of the relationship between the NSO and state and territory ombudsmen, and other complaint handling bodies and can provide further details if it would assist.

5. Self-incrimination and other immunities

A final area of concern is the abrogation of the privilege against self-incrimination and other privileges and immunities (including legal professional privilege).

Despite the broad investigative powers to compel universities and individuals to provide information, documents and answer questions, and the offences for not complying with the investigative powers, the Bill abrogates the following privileges and immunities:

- a) the privilege against self-incrimination;
- b) the privilege against self-exposure to a penalty;

- c) legal professional privilege; and
- d) public interest immunity.

The abrogation of the above immunities and privileges is said to be justified on the basis that it is necessary to ensure the NSO can 'conduct full, genuine and independent investigations'.

The University does not agree. In UQ's view, these reforms go beyond what is required to conduct a 'full, genuine and independent investigation' as they place an unreasonable burden on providers to disclose information in the broadest sense without any protections which are essential for ensuring that investigations are conducted fairly and without undue influence.

Review mechanism

Finally, UQ observes that, in view of the fundamental reform brought about by the Bill, the Committee consider how a mechanism might be incorporated that results in an independent implementation review should follow after 12 months.

We thank the Committee for its consideration of our submission. Should the Committee have any questions or require further information, we would be delighted to provide assistance.

Yours sincerely

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Deputy Vice-Chancellor (Academic)