



Submission on the National Student Ombudsman bill– October 2024

Senate Education and Employment Legislation Committee inquiry into the
Universities Accord (National Student Ombudsman) Bill 2024

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Table of Contents

<i>List of tables</i>	3
<i>Overview</i>	4
<i>1. Existing Ombudsman coverage for higher education students</i>	6
<i>2. The National Student Ombudsman power to review higher education provider policy decisions</i>	10
<i>3. The National Student Ombudsman and interaction with other government polices ...</i>	12
<i>4. The National Student Ombudsman and academic matters</i>	14
<i>Appendix A – Comparison of Queensland Ombudsman and National Student Ombudsman.....</i>	17
<i>References</i>	20

List of tables

Table 1: Legal right to make an Ombudsman complaint	6
Table 2: Public university complaints made to the Queensland Ombudsman.....	7
Table 3: Status of complaints about Queensland public universities	8
Table 4: Status of complaints about Western Australian public universities	8

Overview

- There is a case for a National Student Ombudsman modelled on the state and territory Ombudsman systems:
 - Most but not all current higher education students have an existing right to complain to an ombudsman. There is a gap for domestic students in private higher education providers that a National Student Ombudsman would fill.
 - The reporting requirements of the National Student Ombudsman would provide an overview of which issues are the source of most complaints. This overview is not provided by most state and territory Ombudsman systems.
 - The state and territory systems focus on administrative actions with limited scope for making judgments about broader policy and resourcing issues, avoiding many of the problems of the National Student Ombudsman.
- The National Student Ombudsman's power to recommend substantive policy changes is over-reach:
 - The National Student Ombudsman will have the power to suggest policy changes based on one or a small number of substantiated complaints.
 - The National Student Ombudsman will not have sufficient knowledge of the trade-offs and other practical issues involved in provider policy to come to reliably good, all things considered, conclusions.
 - While – except perhaps in some sexual misconduct matters – the provider will not have to accept the National Student Ombudsman policy recommendations, they will be subject to a name-and-shame process if they do not.
 - Higher education providers have limited resources and exist in a sometimes contradictory regulatory environment. The providers and not the Ombudsman should make the trade-offs involved.
- The National Student Ombudsman does not have the power to recommend that a government policy should be changed – an omission if the Ombudsman has a wide brief.
- Matters relating to the exercise of academic judgment are excluded from Ombudsman review:
 - However the bill's explanatory memorandum classes matters such as special consideration and academic misconduct cases not to be covered by the academic judgment exception.
 - This exception could make it harder for academics to maintain academic integrity.
 - The bill allows the minister, by a legislative instrument, to make an exercise of academic judgement reviewable by the National Student Ombudsman.

- To breach the principle of academic freedom in this way the minister should have to amend the legislation, ensuring proper parliamentary scrutiny of the proposed change.

1. Existing Ombudsman coverage for higher education students

Higher education students already have the right to complain to state and territory-level Ombudsman offices, the Commonwealth Ombudsman (ANU students) and the Overseas Student Ombudsman.

However, as shown in Table 1 these Ombudsman offices have only partial jurisdiction, with domestic private higher education students not currently having an option to complain to an Ombudsman. Under the *Universities Accord (National Student Ombudsman) Bill 2024* (from here, ‘the bill’) all higher education students, along with prospective and former students, would have access to the National Student Ombudsman.

Table 1: Legal right to make an Ombudsman complaint

Student category	State/Territory/National Ombudsman	Overseas Student Ombudsman	National Student Ombudsman
Domestic public university students	Yes	No	Yes
International public university students	Yes	No	Yes
Domestic private higher education provider students	No	No	Yes
International private higher education students	No	Yes	Yes

In the limited time I could allocate to this submission, I could only find detail of the grounds of student complaints from the Queensland Ombudsman, shown in Table 2. Disputes about assessment are the most common source of complaints .

Table 2: Public university complaints made to the Queensland Ombudsman

	2021– 22	2022– 23	2023– 24
Grades, assessment, examinations	53	39	58
Fees, refunds, charges, written agreements	29	31	38
Attendance, progress, course duration, course content	20	30	26
Enrolment	11	22	23
Student grievance	21	21	22
Deferral, suspension, cancellation	14	37	14
Management of academic misconduct	7	8	8
Provider complaints and appeal process	5	2	7
Conduct	13	7	6
Request for academic transcript, certificate or other records	1	1	3
Employee grievance	11	6	2
Internal review/appeal	9	11	1
Other ¹	48	38	37
Total	242	253	245

Source: Queensland Ombudsman Annual Report 2023-24, table 7

Unfortunately, the Queensland Ombudsman's decisions are not classified by the reason for complaint. The numbers are also hard to match with the case resolution figures in Table 2. The same complainant can make complaints with multiple grounds and complaints can be made and finalised in different years. It is clear, however, that most complaints are not upheld, with success rates ranging from 7% to 13% in the years shown. In Western Australia similarly only 14% of public university cases were classed as 'resolved' by the Ombudsman in 2023-24 (Table 4).

Table 3: Status of complaints about Queensland public universities

	2021– 22	2022– 23	2023– 24
No further investigation warranted	38	28	11
No error identified	47	82	91
Rectified	13	9	10
Withdrawn	4	2	0
Total	102	121	112

Source: Queensland Ombudsman Annual Report 2023-24, table 15

Table 4: Status of complaints about Western Australian public universities

Finalised complaints	2023-24
Issue not in jurisdiction	7
More appropriate body to handle complaint	8
Referred back to the public authority	25
Investigation not warranted	21
Resolved	14
Not sustained, cannot be determined	21
Withdrawn	6
Total	102

Source: Ombudsman Western Australia Annual Report 2023-24, appendix 1

While I raise significant concerns about the scope of the bill in the subsequent sections, in a more constrained form – analogous to the powers of state and territory Ombudsman offices – it would have benefits.

A National Student Ombudsman would give private higher education providers an opportunity to make ombudsman complaints they currently do not have.

The bill would allow higher education complaints to state and territory Ombudsman offices to be transferred to the National Student Ombudsman: section 21AE.

Consolidation of complaints and the detailed reporting of activity required of the National Student Ombudsman (section 21AX of the bill) would provide a national overview of patterns of complaint.

The filling of jurisdictional ombudsman gaps and better national reporting would be positive developments.

2. The National Student Ombudsman power to review higher education provider policy decisions

In the time available, I have only made limited comparisons of the National Student Ombudsman and the state and territory ombudsman offices. I chose the Queensland Ombudsman for more detailed analysis because its annual report includes the most comprehensive statistics on higher education (Table 2). The Queensland and National Student Ombudsman functions and powers are compared in detail in Appendix A.

A key difference between the proposed National Student Ombudsman is the scope of matters on which it can accept complaints and make recommendations.

The Queensland Ombudsman, in line with general ombudsman operations, is restricted to investigating ‘administrative action’, including a failure to make an administrative decision. The Queensland legislation specifically excludes policy decisions when made by a minister or cabinet. In general, ombudsman offices can review the actions of the ‘executive’ branch of government but not the legislative or judicial branches.¹

The National Student Ombudsman’s brief, by contrast, extends to ‘any action (other than an excluded action)’: section 21AD(2) of the bill.

Excluded actions include employment related matters, matters relating to VET students, and matters involving the exercise of academic judgment. The academic judgment excluded action is discussed in section 4.

The bill’s explanatory memorandum clearly intends for ‘any action’ to have a wide meaning, allowing complaints about (p. 22):

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

Some of these ‘any action’ matters would, in the Queensland framework, be analogous to policy decisions made by a minister or Cabinet. These are not just administrative process issues. They include substantive decisions about what services to deliver, institutional priorities, and how best to use scarce resources.

The ‘policy’ aspect of the National Student Ombudsman is most clearly the case for complaints about facilities and the ‘sufficiency of staffing’ but could also apply to the standard of student accommodation and ‘reasonable adjustments’ for disability, where the

¹ M. Head et al., *Douglas and Jones's Administrative Law* (The Federation Press, 2024), pp. 162-163.

current rules allow costs and benefits, including costs to other students and staff, to be taken into account.

While the bill puts some constraints on the National Student Ombudsman's powers of recommendation, the Ombudsman can make subjective judgments such as that a policy decision was 'unreasonable' or 'in all the circumstances, wrong': section 21AV(i)(b).

The National Student Ombudsman can recommend that a policy be changed: section 21AV(c)(ii).

While the provider can reject a National Student Ombudsman recommendation, this will result in a name-and-shame report to Parliament: section 21AW.

In the case of gender-based violence, the government has foreshadowed forcing higher education providers to implement National Student Ombudsman recommendations.² This would require separate legislation.

I am concerned that this bill involves over-reach. While providers have the right to input into National Student Ombudsman inquiries, and to comment on recommendations, the bill licences the National Student Ombudsman to make policy suggestions based on one or a small number of cases. This is insufficient information on which to base a policy recommendation beyond minor process issues.

The National Student Ombudsman will never have a strong understanding of the conflicting demands and priorities involved in managing a higher education provider. The National Student Ombudsman will not see the cost of changing a policy, the redirection of time and money from other university activities. As a result, there is a significant risk that the Ombudsman will make poor recommendations, all things considered.

² DofE, *National Higher Education Code to Prevent and Respond to Gender-based Violence & National Student Ombudsman* (Department of Education, 2024), p. 2.

3. The National Student Ombudsman and interaction with other government policies

Prospective students

A prospective student can complain to the National Student Ombudsman: section 3(1) definition of a student.

This is quickly going to cause problems for higher education providers due to government policy on international student caps.

The *Education Services for Overseas Students Amendment (Quality and Integrity) Bill 2024* creates a near certainty that significant numbers of prospective international students will have grounds for complaint. To manage their enrolments providers will have to cancel offers if enrolments turn out to be above projections when the offer is made. If a provider has reached their cap they cannot allow accepted students to commence their course: section 96(2) of the ESOS Bill.

Cancellation of offers or enrolments may occur too close to the start of the academic year for the student to find alternative options, forcing them lose a semester or more. In some cases, students may already have spent significant amounts of money. These seem like straightforward cases of very poor treatment of prospective students. Yet other than through very conservative offers, which are likely to lead to provider under-enrolment relative to the cap (with disappointed students and revenue loss), providers will find it hard to avoid these situations.

What is the National Student Ombudsman to say in this situation? It raises the issue of whether the Ombudsman should have a power to highlight defects in the regulatory environment as a significant cause of complaints.

Provider costs

The National Student Ombudsman is a further example of how the government is increasing costs to higher education providers while reducing revenue.

Added costs to date include industrial relations changes, distributing student places through complex application and acquittal processes, and the support for students policy. Added foreshadowed costs include management of international student numbers, the means test for Commonwealth Prac Payments (although with some offsetting funding in this case), and compliance with Australian Tertiary Education Commission requirements.

The broader grounds for complaint compared to existing ombudsman systems will generate a larger, more complex caseload for higher education providers compared to existing ombudsman systems. From 2027, the government plans to charge higher education providers for the cost of running the National Student Ombudsman, adding additional costs.³

At the same time as the government is increasing higher education costs it is through other bills currently before the Parliament reducing international student revenue and re-directing amenities fee money to student-led organisations.

³ DofE, *National Student Ombudsman: Model Overview* (Department of Education, 2024), p. 8.

4. The National Student Ombudsman and academic matters

On the surface, the bill excludes matters involving the exercise of academic judgment from the National Student Ombudsman's jurisdiction: section 21AD(3)(c).

The bill's explanatory memorandum gives as examples of excluded complaints (p. 23): 'decisions about the academic merit of a grade awarded, the content of a curriculum, and teaching and assessment methods.'

Borderline academic judgement cases – special consideration

In describing what is *not* a matter of academic judgment, the explanatory memorandum gives the grant of special consideration as an example (p. 23).

Special consideration is a borderline case – it is a decision about whether the circumstances used to support the special consideration claim warrant a change in how or when academic assessment occurs.

Anecdotally, claims for special consideration have increased significantly over recent years. The increase in claims has been documented in schools and is likely flowing forward into higher education.⁴ Some patterns observed in schools data – such as higher rates of applications from private schools – raise suspicion that some of this increase is gaming the system.

The National Student Ombudsman will not necessarily side with the student in special consideration cases, as the low success rate of complaints to state ombudsman offices suggest.

But if the National Student Ombudsman decides that there might be something to the student's claim, academics could be required to provide information and appear in person to discuss the case: sections 21AZA(1).

If students know that academics want to avoid time-wasting bureaucratic processes they can weaponise the National Student Ombudsman – accept my claim to special consideration or I will lodge a complaint.

Borderline academic judgement cases - disciplinary and misconduct matters

The bill's explanatory memorandum also classes 'disciplinary and misconduct procedures' as non-academic, even when they are about academic matters. It says that (p. 23):

'Policies 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.'

Making it harder for academics to penalise cheating and other academic misconduct would exacerbate one of the higher education sector's biggest problems.

⁴ H. Thompson, 'The system is holding him back': The WA students facing ATAR hurdles', *WAtoday*, 1 October 2024; C. Harris, 'Rise in HSC students given extra help in exams for anxiety, concentration issues', *Sydney Morning Herald*, 1 October 2023; J. Baker and N. Gladstone, 'A complex problem': Richest schools claim most HSC disability provisions', *Sydney Morning Herald* 23 November 2021; N. Towell, 'Private school students more likely to get VCE special exam exemption', *The Age* 30 November 2024.

The cheating industry is already very aggressive. The contract cheating organisation behind a large-scale case of academic misconduct at the University of Sydney made a bomb threat to deter further investigation.⁵ It would be naive to think that the cheating industry would not facilitate National Student Ombudsman complaints to deter universities that already face high costs when penalising cheats.⁶

Academic judgement exception can be lifted

Along with the borderline cases of academic judgment, the bill gives the minister power to over-ride the exclusion of academic judgments. Section 21AD(4) states that exceptions can be over-ridden by the National Student Ombudsman Rules.

The National Student Ombudsman Rules would be a legislative instrument made by the minister for higher education.

The explanatory memorandum says this provision ‘gives additional flexibility in the event that the definition of excluded action was inappropriately limiting the matters that students could complain about’ (p. 24).

This government, however, does not reliably observe the historical divides between its right to decide which courses it wants to fund and the detail of curriculum.

The *Higher Education Support (START-UP HELP) Guidelines 2023* include the detail of what start-up courses must teach.

The Strong Beginnings Fund, enacted through the *Higher Education Support (Other Grants) Guidelines 2022* creates a funding incentive to adopt ‘core content’ in initial teacher education courses.

As I noted in my submission to the *Universities Accord (Student Support and Other Measures) Bill 2024* inquiry:

“The government also says that it will ‘work with providers to professionalise and increase the quality and consistency of FEE-FREE Uni Ready courses, and seek to increase portability of credentials for students’.⁷ ...

While there is nothing inherently wrong with developing more standardised preparatory programs, the Department’s desire for involvement in the ‘quality’ and ‘consistency’ of courses needs boundary setting.”

All these cases are in grey areas. Start-up courses were not previously regulated qualifications and so the funding rules need to state, at least in broad terms, which courses are eligible. The Strong Beginnings Fund was developed in the context of the Education Ministers Meeting, where state governments as major teacher employers have historically had legitimate influence over what skills and knowledge their staff should have. The government may yet set up an independent process around standardising the FEE-FREE

⁵ D. White, ‘Hundreds of Sydney students were embroiled in a cheating scandal. Then came the bomb threat’, *Sydney Morning Herald* 9 September 2024.

⁶ J. Panagopoulos, ‘International students involved in 80 per cent of university misconduct referrals’, *The Australian*, 16 September 2024.

⁷ <https://www.education.gov.au/higher-education/feefree-uni-ready-courses>

Uni Ready courses, while exercising its legitimate right to decide what kinds of courses it will fund. But none of these cases have attracted much pushback, partly because legislative instruments get much less attention than legislation.

In the context of the politics of the ombudsman legislation, the action plan on gender-based violence contains the following statement, emphasis added:

“As part of a whole-of-organisation approach to prevent gender-based violence, teaching staff should be supported to build their own capacity and the capacity of others to promote gender equality, respect, diversity and inclusion in how, *and what*, they teach and research.”⁸

If academics were put under Ombudsman scrutiny for *what* they teach, in the context of gender issues or any other matter, that would be a clear and serious breach of the principles of academic freedom.

Whatever people might think about gender issues, normalising this kind of pressure, enforced with Ombudsman complaints or other methods, would set a bad precedent.

As the National Student Ombudsman Rules would be a legislative instrument, an amendment breaching academic freedom could be disallowed by either the House of Representatives or the Senate. But the grey area cases discussed above have not attracted much pushback, partly because legislative instruments get much less attention than legislation.

Section 21AD(4) should be removed from the bill. If the government feels that it is necessary to over-ride academic freedom it should have to bring an amendment to the Parliament, where it would receive the necessary scrutiny, including from a Senate inquiry.

⁸ EMM, *Action plan addressed gender-based violence in higher education* (Education Ministers Meeting, 2024), p. 11.

Appendix A – Comparison of the Queensland Ombudsman and the National Student Ombudsman

Topic	Queensland Ombudsman	National Student Ombudsman
What organisations are covered?	Established for a public purpose under an Act, i.e. public universities	All higher education providers and persons who ‘provide services for or on behalf of the provider’, potentially bringing in third parties such as tertiary admissions centres, student unions, and third-party teaching providers.
Who can complain?	Anyone with a complaint against an organisation covered by the Act. Scope to accept complaints by a representative of the complainant.	Students enrolled with higher education providers or someone acting on behalf of a student. VET students excluded.
Own initiative action by Ombudsman	Yes	Yes
Power for parliament to refer a matter	Yes	No
What complaints can the Ombudsman consider?	Administrative actions or failure to make an administrative decision.	Any action or inaction other than employment, the exercise of academic judgment, or in relation to VET students.
Policy decisions excluded?	Excluded if made by minister or Cabinet.	EM says students can complain about student safety, student welfare, course administration, teaching quality, facilities, disciplinary matters, student accommodation when owned or operated by the provider – which may reflect policy decisions around allocating limited resources.
Personal actions of employees unrelated to official duties	Not covered, not an administrative action.	Yes, covered whether or not connected to or incidental to official duties.

Topic	Queensland Ombudsman	National Student Ombudsman
Time limit on applications	Within one year of complained about action.	None that I could identify. Former students can complain.
Ombudsman capacity to reject within-scope complaints at first stage	<ul style="list-style-type: none"> * It would be reasonable for the complainant to first pursue other complaint processes *The complaint is trivial, vexatious or not made in good faith *The complainant does not have sufficient interest in the issue 	Essentially the same
Complaints confidential at first stage	Yes	Yes
Complained-about organisation to be informed	Yes	Yes
Power to require relevant documents to be produced	Yes	Yes, must allow at least 14 days
Power to enter premises to collect evidence	Yes	Yes
Power to require a person to appear before the Ombudsman to give evidence	Yes	Yes
Protection against self-incrimination	No, but evidence not admissible in court	No, but evidence not admissible in court
Protection of complainants or people giving evidence	Yes	Yes
Legal professional privilege protected	No	No
Grounds for adverse finding – a decision was	<ul style="list-style-type: none"> *contrary to law, or *unreasonable, unjust, oppressive, or improperly discriminatory, or * taken for an improper purpose or based on irrelevant grounds, or *reasons should have been given but were not, or * based wholly or partly on a mistake of law or 	<ul style="list-style-type: none"> *contrary to law, or *unreasonable, unjust, oppressive, or improperly discriminatory, or * (if none of the above) wrong in all the circumstances

Topic	Queensland Ombudsman	National Student Ombudsman
	fact, or * wrong	
Findings of personal misconduct	Yes	Yes
Adverse comment about a person	Must fairly state the person's defence	Person can make written submission
Finding that action can and should be taken to rectify, mitigate or alter the effects of an action/inaction	Yes	Yes
Finding that a practice should be changed	Yes	Yes
Finding that a policy should be changed	No	Yes
Finding that reasons should have been given but were not	Yes	Yes
Finding that other things should have been done	Yes	Yes
Provider to give comment on report	Yes	Yes
Alternative dispute resolution	No	Yes
Restorative engagement process	No	Yes
Ombudsman report sent to relevant minister	Yes	Yes, also to Department and TEQSA
Power to require provider to give Ombudsman, within a specified time, particulars of action taken in response to findings	Yes	Yes
Power if satisfactory action not taken	Given to premier for tabling in Parliament	Given to minister for tabling in Parliament, with provider's comments

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