

Submission on proposed changes to the National Code of Practice for Providers of Education and Training to Overseas Students 2007

Introduction

The Overseas Students Ombudsman (OSO) is a statutorily independent, external complaints and appeals body for overseas students and private registered education providers. The OSO commenced operations in April 2011.

The OSO:

- Investigates individual complaints about the actions or decisions of a private-registered education provider in connection with an intending, current or former overseas student;
- Works with private-registered education providers to promote best-practice handling of overseas students' complaints, and;
- Reports on trends and broader issues that arise from complaint investigations.

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

Since commencing, the OSO has received more than 3,800 complaints from overseas students originating from over 70 countries about almost half of the 1019 private registered providers in our jurisdiction¹.

We focus on achieving practical remedies where a student has been adversely affected by a provider's incorrect actions. We also uphold complaints in support of the provider where the provider has followed the *Education Service for Overseas Students Act 2000* (ESOS Act), the National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007 (National Code) and its own policies and procedures. Where there has been fault on both sides, we help negotiate an appropriate resolution.

¹ Data from the OSO's Resolve Case Management System for the period 9 April 2011 – 7 March 2017.

The most common complaints to the OSO are:

- Refund complaints and fee disputes
- External appeals about providers refusing to release a student so that they can transfer to another provider under Standard 7 of the National Code
- External appeals against the decisions of providers to report students to the Department of Immigration and Border Protection (DIBP) for unsatisfactory attendance under Standard 11 or course progress under Standard 10 of the National Code.

Our comments on the proposed changes to the National Code are informed by our experience in investigating complaints and working with hundreds of private registered education providers and overseas students and from our ongoing collaboration with regulators and consultations with peak and representative bodies.

We trust this submission will assist the Department of Education and Training (DET) in updating the National Code 2017 and we welcome any opportunity to discuss our comments.

Overview

| PROPOSED AMENDMENTS | COMMENTS <i>Please provide a comment if you do not support a proposed amendment, and suggest alternative wording if appropriate.</i> |
|--|--|
| <ul style="list-style-type: none"> • Parts A, B and C of the 2007 National Code have been streamlined to: <ul style="list-style-type: none"> ○ provide an overview of the ESOS framework ○ summarise the role of the National Code and its purpose ○ outline the quality assurance arrangements and roles of other relevant Commonwealth agencies | <p>Part A, 3, provides a summary of each of the 11 standards.</p> <ul style="list-style-type: none"> • The Standard 7 summary states providers must not knowingly enrol a student before they have completed six months of the principal course (with the exception of the school sector). It would be good to note in the Standard 7 summary that this standard also requires registered providers to ‘assess student transfer requests’ for those students seeking to transfer within the transfer limitation period as this is the other main part of Standard 7. • The Standard 10 summary should be expressed in the plural to capture both the internal and external complaints and appeals processes: ‘Registered providers must ensure students’ rights to natural justice are protected through access to a professional, timely, inexpensive and documented complaints and appeals processes.’ <p>Part A, 4 summarises the roles of those agencies responsible for administering the ESOS legislative framework.</p> <ul style="list-style-type: none"> • The department may wish to consult with the Tuition Protection Service (TPS) about whether its role description should include a reference to its ability to pay refunds to overseas students who default on their course; are owed a refund by their provider but; their provider fails to pay the refund within the provider obligation period. This particularly applies to refunds owed to intending overseas students who default on their course due to their visa being refused and are owed a refund by their provider under s 47E of the ESOS Act. |

Standard 1 – Marketing information and practices

| PROPOSED AMENDMENTS | COMMENTS <i>Please provide a comment if you do not support a proposed amendment, and suggest alternative wording if appropriate.</i> |
|--|--|
| <ul style="list-style-type: none"> Clarifies that providers must not engage in false or misleading marketing practices, consistent with Australian Consumer Law. | <p>We support the reference to the ACL.</p> |
| <ul style="list-style-type: none"> Marketing material must accurately identify the provider's association with any other providers, work-based or work-integrated learning opportunities, and prerequisites including English language. | <p>We support these requirements.</p> |
| <ul style="list-style-type: none"> Specific provisions prevent a provider from undertaking to or guaranteeing that it can secure a migration or successful education assessment outcome. | <p>We support these provisions as we have seen at least one case where an education agent and education provider were promising students a migration outcome from undertaking their courses.</p> |

Standard 2 – Enrolment of an overseas student

| PROPOSED AMENDMENTS | COMMENTS |
|---|--|
| <ul style="list-style-type: none"> 2.1.7 requires providers to include advice on the potential for changes to fees over the duration of a course, and the registered provider's cancellation and refund policies | <p><i>Please provide a comment if you do not support a proposed amendment, and suggest alternative wording if appropriate.</i></p> <p>We support the inclusion of a requirement for providers to include both a refund and a cancellation fee policy as the two are different.</p> <ul style="list-style-type: none"> A refund policy specifies the amount (if any) of pre-paid fees a provider will refund (pay back) to a student should they withdraw before commencing or completing the course. A cancellation fee policy is required if a provider wishes to charge the student outstanding, (yet to be paid) fees due to the provider incurring a genuine financial loss from the student withdrawing before commencing or completing the course. <p>A provider cannot use a refund policy to charge a student additional fees for withdrawing from a course. Therefore, providers needs to include both a refund policy and a cancellation fee policy in their written agreements and provide information about this to students prior to enrolment.</p> |
| <ul style="list-style-type: none"> 2.1.9 | <p>The provider must make available ... information on ... the ESOS framework, including official Australian Government material and links to this material online – should this be an 'and' or an 'or'?</p> |

Standard 3 – Formalisation of enrolment and written agreements

| PROPOSED AMENDMENTS | COMMENTS |
|---------------------|---|
| | <p><i>Please provide a comment if you do not support a proposed amendment, and suggest alternative wording if appropriate.</i></p> <p>Please see our detailed comments on this Standard at Attachment A.</p> |

Standard 4 – Education agents

| PROPOSED AMENDMENTS | COMMENTS |
|---------------------|--|
| | <p><i>Please provide a comment if you do not support a proposed amendment, and suggest alternative wording if appropriate.</i></p> |
| | <p>Please see our detailed comments on this Standard at Attachment A.</p> |

Standard 5 – Younger students

| PROPOSED AMENDMENTS | COMMENTS |
|--|--|
| <ul style="list-style-type: none"> 5.3 and 5.3.4 – references to legal guardian | <p><i>Please provide a comment if you do not support a proposed amendment, and suggest alternative wording if appropriate.</i></p> <p>We appreciate the inclusion of the reference to the CAAW arrangements not including guardianship, which is a legal relationship not able to be created or entered into <u>by a provider</u>. In previous submissions on the ESOS Reforms we commented that we have seen multiple occasions where providers had confused homestay parents with legal guardians.</p> <p>It would be good to include in the DET Fact Sheet accompanying the 2017 National Code a note that <u>homestay parents</u> are also not legal guardians unless specifically appointed as a legal guardian through the courts by the child's parent/s/legal guardian. We have seen multiple instances where providers treat homestay parents as legal guardians, for example by accepting a written agreement signed for an under 18 year old overseas student by a homestay parent where that person is not a legal guardian and has no authority to sign the written agreement. Similarly, we have seen homestay agreements drawn up by providers that purport to give homestay parents the right to make decisions about medical treatment for an under 18 year old overseas student when again only a parent or legal guardian has this authority.</p> |

| PROPOSED AMENDMENTS | COMMENTS <i>Please provide a comment if you do not support a proposed amendment, and suggest alternative wording if appropriate.</i> |
|--|---|
| <ul style="list-style-type: none"> Where a provider is no longer able to approve welfare arrangements, all reasonable steps must be taken to notify the student's parent or legal guardian immediately. | <p>It may be helpful to include the word 'cancel' in 5.3.5.3 to make it clear that 'no longer approve' amounts to a distinct action to 'cancel' a CAAW in PRISMS to advise DIBP that the provider is no longer responsible for the under 18 year old's accommodation and welfare arrangements, requiring DIBP to intervene to assist the under 18 year old.</p> |

Standard 6 – Student support services

| PROPOSED AMENDMENTS | COMMENTS |
|---|--|
| <ul style="list-style-type: none"> Requires providers to give information to students regarding a range of support services, including relating to English language, health, legal services, complaints and appeals avenues, and employment assistance (including resolving workplace issues). | <p><i>Please provide a comment if you do not support a proposed amendment, and suggest alternative wording if appropriate.</i></p> <p>The wording of the proposed Standard 6.2 is very broad: <u>The registered provider must give support, advice or relevant information as appropriate to overseas students who request assistance in relation to the services and programs set out in standard 6.1, at no additional cost to the student.</u> It is not clear to what extent a provider would be expected to provide ‘support’ and ‘advice’ in relation to these services or whether the standard envisages such ‘support’ and ‘advice’ would more likely amount to ‘providing information’.</p> <p>Disputes may arise where the student expects more ‘support’ and ‘advice’ than the provider believes it is required to give. If it is envisaged providers would not be expected to do more than provide information, it may be appropriate to delete the words ‘support’ and ‘advice’ and retain the reference to providers being required to provide ‘relevant information’ about student support services.</p> <p>Similarly, Standard 6.3 states, ‘the registered provider must support students to enable them to achieve expected learning outcomes regardless of the student’s place of study or the mode of delivery of the course’. Students and providers may have different expectations of the extent of support a provider should give the student, which may lead to disputes. It may be helpful to add the word ‘reasonable’ to ‘support’ and then note in DET Fact Sheet on Standard 6 the type of support a provider would be ‘reasonably’ expected to provide to comply with this standard or to state the provider must provide support ‘in accordance with its student support policy/processes’.</p> |

Standard 7 – Student transfers

| PROPOSED AMENDMENTS | COMMENTS |
|---------------------|---|
| | <p><i>Please provide a comment if you do not support a proposed amendment, and suggest alternative wording if appropriate.</i></p> <p>Please see our detailed comments on this Standard at Attachment A.</p> |

Standard 8 – Monitoring course progress and attendance

| PROPOSED AMENDMENTS | COMMENTS <i>Please provide a comment if you do not support a proposed amendment, and suggest alternative wording if appropriate.</i> |
|----------------------------|--|
| | Please see our detailed comments on this Standard at Attachment A . |

Standard 9 – Deferring, suspending or cancelling the student’s enrolment

| PROPOSED AMENDMENTS | COMMENTS <i>Please provide a comment if you do not support a proposed amendment, and suggest alternative wording if appropriate.</i> |
|----------------------------|--|
| | Please see our detailed comments on this Standard at Attachment A . |

Standard 10 – Complaints and appeals

| PROPOSED AMENDMENTS | COMMENTS <i>Please provide a comment if you do not support a proposed amendment, and suggest alternative wording if appropriate.</i> |
|----------------------------|--|
| | Please see our detailed comments on this Standard at Attachment A . |

Attachment A – Detailed comments on proposed Standards 3, 4, 7, 8, 9 and 10.

Standard 3 – Formalisation of enrolment and written agreements

Since the OSO began operations in April 2011, we have received 620 complaints/appeals about Standard 3 – Written agreements & fee and refund disputes. Of these, we investigated 240 complaints/appeals. In 32.9% of cases (79 complaints/appeals) we found in favour of the education provider and in 31.6% (76 complaints/appeals) of cases we found in favour of the student. In 35.4% cases (85 complaints/appeals) we recorded an outcome which supported neither party. By comparison, across all complaint and appeal issues, the OSO found in favour of the provider in 56.7% of cases and in favour of the student in 25.7% of cases. In 17.6% cases across all issues our decision supported neither party.

When considering complaints/appeals about Standard 3 the OSO found in favour of the student in a comparatively higher percentage of cases than across all issues (31.6% compared to 25.7%). The OSO also recorded an outcome which supported neither party in more Standard 3 cases than across all issues (35.4% compared to 17.6%). This highlights the problems we have seen with non-compliant written agreements and the number of disputes that arise around provider refunds and fee disputes.

Acceptance of the written agreement

Standard 3.1 states, 'The registered provider must enter into a written agreement with the overseas student or intending overseas student, signed or otherwise accepted by the student, concurrently with or prior to accepting payment of course money. A written agreement may take any form provided it meets the requirements of the ESOS Act and the National Code.'

When the registered provider and intending overseas student enter into a written agreement, they effectively form a legal contract for the provider to deliver certain educational and training services in exchange for the student paying the fees set out in the written agreement. As a legal contract, the written agreement is a crucial record of what was agreed between the provider and student, before, or at the time, the student paid the course money.

Standard 3.1 does not describe how the provider and student enter into a written agreement. Typically, the student completes an application form and either signs the application form in hard copy or applies through an online application process. The provider then assesses the application; the student's suitability for the course; whether any prerequisites for entry to the course have been met, including English language proficiency requirements, and; decides whether or not to offer the student a place in one or more of the courses in which they have applied to enrol. If the provider wishes to enrol the student, they typically send the student a 'letter of offer' to offer them a place in a course or courses, with all the terms and conditions of enrolment set out in the letter of offer. Typically, the student (or the student's parent or legal guardian where

the student is under 18) signs the letter of offer, thereby accepting the place in the course and the terms and conditions. The letter of offer is signed either before or concurrently with the payment of course money, to ensure there is a record of what the provider has agreed to deliver in exchange for the course money, at the time it is paid.

However, we understand the English Language Intensive Courses for Overseas Students (ELICOS) sector follows a streamlined version of this process whereby instead of signing and returning the letter of offer, ELICOS providers accept payment of the course money as evidence that the student has 'otherwise accepted' the terms and conditions set out in the application form and the (unsigned) letter of offer. In this case, the written agreement may still be viewed as the letter of offer, but instead of being signed, the letter of offer (and its terms and conditions) are 'otherwise accepted' by the student paying the course money.

In 2013-14 we conducted an investigation of an ELICOS provider which was applying this practice of deeming receipt of payment to constitute acceptance of the offer. At that time we applied our view that the text of Standard 3.1 of the National Code 2007 and the Explanatory Guide made it clear that acceptance of the offer is required, separate from, and in addition to, payment of course money, as denoted by the words, 'the written agreement ... [is] ... signed ... or otherwise accepted by the student, concurrently with or prior to, accepting payment of course money'.

However, we understand the proposed new sentence in 3.1, 'A written agreement may take any form provided it meets the requirements of the ESOS Act and the National Code', is intended to allow providers to view the application form as the written agreement so that it can be signed or otherwise accepted, concurrently with or prior to, payment of course money. We understand there is a history to this proposal.

In July 2014, the Overseas Students Ombudsman circulated a 'Consultation Issues Paper – Problems with Written Agreements between Overseas Students and Registered Education Providers', to consult with relevant stakeholders about the common issues we identified with written agreements through our investigation of fee disputes and refund complaints. In this paper we set out that written agreements between registered providers and overseas students are a type of legal contract (a legally binding agreement between at least two parties), governed by the general principles of contract law as well as the specific requirements of the ESOS framework. We explored the contract law principles of offer and acceptance. Our consultation paper stated that:

'The application form may itself amount to an offer, which the student accepts by signing and returning it. A written agreement therefore could be formed at that stage.

However, providers often do not intend the application form to be a legally effective offer, as they have not yet decided whether to enrol the student. If the provider assesses the application after receiving it, and only then sends a 'letter of offer' or 'offer of enrolment' or similar document to the student, then it is that subsequent document that constitutes the offer to the student'.

'In legal terms, the application form would be considered to be an 'invitation to treat' – in effect, a request from the student for an 'offer' from the provider that the student can then accept'.

We also noted that The Australian Consumer Law also applies to contracts between overseas students and registered providers.

In August 2014, we received a submission from English Australia (EA), the peak body representing quality ELICOS providers, which included comments about the requirements of Standard 3. EA explained that it considers the student's 'acceptance' of the offer of enrolment, including Terms and Conditions, should be deemed to have occurred upon payment, with a combination of the Application Form and Letter of Offer deemed to meet the needs of the written agreement requirement. EA commented that 'The compliance burden on providers [from having to wait for the student to sign and return the letter of offer] is seen as excessive and the process perceived to be unrealistic in the globally competitive environment in which ELICOS providers operate'.

We sought advice from the ESOS Policy Section of DET which advised that, under Standard 3.1 of the National Code 2007, payment of course money cannot be taken as evidence that the student 'otherwise accepted' the written agreement as the acceptance of the offer and payment of course money are two separate actions. In November 2014 we met with English Australia to discuss this issue. We advised EA that in the investigation of complaints, we would have to apply the our interpretation of Standard 3.1, which had been confirmed by DET, that the National Code 2007 required the written agreement to be signed or otherwise accepted, concurrently with or prior to the payment of course money. However, we noted we respected EA's right to advocate to DET to change the wording of Standard 3.1 if it believed it constituted an excessive compliance burden to ELICOS providers and alternative wording would enable its members to follow a streamlined offer and acceptance process. One way of changing Standard 3.1 to allow what EA had requested would be to remove the reference to the written agreement being accepted 'concurrently with or prior to' the payment of course money and instead insert the words 'accepted by the payment of course money'. However, we understand instead the proposal is to include the words, 'the written agreement may 'take any form' provided it meets the requirements of the ESOS Act and the National Code'.

Our office has previously accepted that a written agreement may take many forms and may be made up of multiple documents, for example, the application form, the letter of offer and a fees invoice taken together, can form the written agreement if they meet the requirements of the ESOS Act and the National Code *and* the student accepted them concurrently with or prior to the payment of course money.

DET may like to seek legal advice on whether an application form can be taken as an offer or whether a letter of offer is still required but may be accepted by payment of course money.

Use of the terms 'fees', 'amounts', 'course money', 'charges' 'tuition fees', 'non-tuition fees' and 'material fees'.

Standard 3 contains references to 'fees', 'course money', 'amounts' and 'charges' that must be included in the written agreement. However, these terms are not defined in the National Code or the ESOS Act. It is important that all terms are clearly defined and used consistently to

avoid confusion and prevent disputes arising. Fee disputes and refund complaints are the number one complaint issue the OSO receives. This underscores the need for terms around fees to be clearly defined and used consistently to prevent and help resolve complaints.

Course money was previously defined in Appendix A of the National Code 2007 as having the meaning given by section 7 of the ESOS Act. However, section 7 was previously changed to replace the term 'course money' with 'tuition fees'.

7 Meaning of tuition fees

In this Act:

tuition fees:

- (a) means fees a provider receives, directly or indirectly, from:
- (i) an overseas student or intending overseas student; or
 - (ii) another person who pays the fees on behalf of an overseas student or intending overseas student;
- that are directly related to the provision of a course that the provider is providing, or offering to provide, to the student;

...

Section 46A – obligations on registered providers in case of provider default – states providers may pay a refund of 'unspent tuition fees' and the Minister may, by legislative instrument, specify a method for working out the amount of 'unspent tuition fees'. This legislative instrument, the *Education Services for Overseas Students (Calculation of Refund) Specification 2014*, includes a definition of 'weekly tuition fees' for the purposes of calculating refunds owed in case of provider and student default:

$$\text{Weekly tuition fee} = \left(\frac{\text{total tuition fees for the course}}{\text{number of calendar days in the course}} \right) \times 7$$

However, providers commonly include other types of fees and costs in a student's written agreement, which are not covered by the definition of 'tuition fees'. For example, Overseas Student Health Cover (OSHC) premiums, books, materials, airport pick up, and homestay fees. If a student or provider defaults on a course, it becomes necessary to determine which of these fees should be included in any refund to the student and this is where disputes can arise if these amounts are not clearly defined and specified in the refund policy.

The DET ['Explanatory Guidance on the Education Services for Overseas Students \(Calculation of Refund\) Specification 2014'](#) seeks to provide further guidance on this issue by including a definition of 'tuition' and 'non-tuition' fees:

Tuition fees

Tuition fees are defined in section 7 of the ESOS Act. They are fees received by a provider (from or on behalf of an overseas student or intending overseas student) that are “directly related to the provision of a course that the provider is providing, or offering to provide, to the student”.

Tuition fees are typically compulsory fees for the delivery of the enrolled course and include items such as:

tutorials and tutoring sessions

lectures

additional requisite training including practicums and practice hours

ancillary costs for fieldwork, excursions or laboratories

specialist materials that are mandatory and relate to the provision of the course.

Non-tuition fees

Non-tuition fees cover other items not directly related to tuition, and may be compulsory or discretionary.

However, there have been different views expressed about whether some fees, such as material fees, are defined as ‘tuition’ or ‘non-tuition’ fees.

We are aware of one provider specifying in its written agreement that an approximately \$1,000 materials fee was a ‘non-tuition fee’ therefore not required to be refunded to the student in the case of provider default. However, the DET explanatory guidance lists ‘specialist materials’ as tuition fees that would then be included in the calculation of a provider default refund. We understand the TPS is seeking legal advice on this question and recommend DET liaise with the TPS to discuss this issue.

This highlights the need for all terms used to refer to money paid by a student as specified in a written agreement to be clearly defined and consistently used so that when a student or provider defaults on a course, the calculation of any refund owed to the student can be done in a clear, consistent and transparent manner. The use of conflicting and undefined terms only serves to increase the likelihood of disputes arising between providers and students, making it more difficult for complaints handling bodies to resolve such disagreements.

Payment of refunds

Proposed Standard 3.4 states, 'The registered provider must include in the written agreement the following information, which is to be consistent with the requirements of the ESOS Act, in relation to refunds of course money in the case of student and provider default:

- 3.4.1 amounts that may or may not be repaid to the student (including any course money collected by education agents on behalf of the registered provider)
- 3.4.2 processes for claiming a refund
- 3.4.3 any person who can receive a refund in respect of the student identified in the written agreement, consistent with the ESOS Act

Section 46D(3) of the ESOS Act states that in the case of a refund paid under the written agreement due to student default, the provider must pay the refund to a) the student or b) the person specified in the written agreement to receive any refund under s 46D(3).

To pay a refund to 'the person' specified in the written agreement implies that a specific person is nominated in the written agreement by the student to receive any refund they may be entitled to in the future. The wording of proposed Standard 3.4.3 '**any person**' is broader and seems to imply a provider could specify in the written agreement 'any person who can receive a refund', which could include the provider specifying that they will pay refunds to their education agent, where their education agent enrolled the student signing the written agreement. We have received a number of complaints about education agents receiving refunds from providers on behalf of students and then not paying the refund to the student.

We recommend DET make the language in 3.4.3 more specific and identical to that used in s 46D(3) 'the person specified in the written agreement to receive any refunds' rather than 'any person' which could be applied more broadly and could potentially be specified by the provider rather than the student.

There is a related issue about whether this specification of a person to receive any refund paid to the student can be later varied in writing by the student. We see complaints where the student did not specify a person in the written agreement to receive their refund but may later specify on the refund request form that they want their refund to be paid to a person or another person's bank account. In some of these complaints, there were disputes about whether the student really did specify on a refund request form for the provider to pay the refund to another person, including claims that the student did not sign the refund request form and instances where we have seen education agents copy and paste what is claimed to be an electronic signature of the student's which does not always match the student's actual handwritten signature on the written agreement or passport. We suggest DET seek legal advice on this issue as it is one which has also generated complaints to the TPS.

Depending on the legal advice, DET could consider including in Standard 3.4.3 words to clarify whether the refund authorisation can be later varied in writing by the student. The accompanying fact sheet could also provide advice to providers about checking the authenticity of

signatures where there are discrepancies between the student's signature on the written agreement and other documents such as a refund request form or passport.

Cancellation vs refund policy

http://www.ombudsman.gov.au/data/assets/pdf_file/0023/37346/Written-Agreements-Issues-Paper-January-2016.pdf

A typical scenario occurs where a student withdraws from a course because his or her circumstances or study preferences have changed, or because expectations have not been met. We receive complaints from students in this situation because:

- the student has applied for a refund of tuition fees and the provider has rejected the refund application, or
- the provider is pursuing the student for a cancellation fee such as the tuition fee for the semester following the student's withdrawal.

Where a written agreement is valid, the outcome of a defaulting student's request for a refund is determined by the provider's refund policy. In relation to the pursuit of unpaid fees for future terms or semesters, the outcome is determined by whether the provider has a cancellation fee policy in the written agreement, setting out what the student is obliged to pay, if anything, in the event that they withdraw before completing the course.

Refund policy

Although most written agreements we see do include a refund policy, we regularly identify refund policies that are not compliant with the requirements of the ESOS framework and therefore cannot be relied on by providers. Instead, s 47E requires providers to pay a refund where the written agreement (including the refund policy) are non-compliant. To address this systemic issue, in 2015 we produced a [Written Agreements Checklist](#) for registered education providers (updated in January 2016).

We recommend DET produce an updated written agreements checklist for providers to incorporate all the requirements of the ESOS Act and the revised Standard 3 of the National Code 2017, to assist education providers to update their written agreements and refund policies

While a refund policy is essential to specify amounts that may or may not be repaid to the student in the case of student and provider default, refund policies only deal with pre-paid fees (money the provider has already received). Students may choose to pay more than 50% of their fees before their course commences. However, they may also choose not to. In this case, disputes can arise where a student has not paid for future study periods and then withdraws from the course before completing it.

If the written agreement does not explicitly include a term allowing the provider to charge a ‘cancellation fee’ if the student withdraws after fees already paid to the provider have been spent, then the provider has no basis on which to pursue the student for such a fee. This results in disputes and disappointment for education providers who mistakenly believe they can use their refund policy (relating to refunds of pre-paid fees) to charge a student for future, unpaid fees. However, a refund policy cannot be used to charge additional fees to recover any financial loss the provider may incur due to the student withdrawing from their course early or with insufficient notice for the provider to fill their place in the course in time for the next study period. Instead, this requires the education provider to include in their written agreement with the student a cancellation fee policy or clause. Inclusion of a clear and transparent cancellation fee policy or clause in a written agreement increases certainty for the parties and can reduce the evidentiary burden on providers in the event of a dispute.

A written agreement that attempts to lock students into a lengthy study pathway by failing to make any allowance for withdrawal with reasonable notice could be considered unfair under the Australian Consumer Law. This is because such a clause may create an imbalance between the rights and obligations of the parties and providers would have less incentive to respond to any concerns or to complaints of ‘locked in’ students about quality issues.

On the other hand, providers have legitimate interests to protect from unexpected student withdrawals. Providers often invest heavily in recruiting overseas students, including paying commissions to education agents, and may not be able to fill a place left vacant in a course by a student if insufficient notice is given.

In our view, a cancellation fee that is no more than a genuine pre-estimate of the provider’s actual loss is in itself not unreasonable, provided that a clear and transparent term about this is expressly included in the written agreement with the student.

We recommend DET include in the proposed Standard 3, a requirement for education providers to include in their written agreements with students, both and refund policy and a cancellation fee policy or clause.

This could be incorporated at proposed Standard 3.3.5, which requires providers to ‘provide details of any additional charges the student may incur ...’ Alternatively, an additional paragraph could be inserted into 3.4 following the first three points about refund policies to then separately require providers to include a cancellation fee policy in their written agreement setting out the amounts, if any, that may or may not be charged in the event that a student withdraws from their course or cancels their enrolment before completing their course without providing sufficient notice, as defined in the provider’s cancellation fee policy or clause. The requirement should state that any cancellation fees should amount to a genuine pre-estimate of the provider’s actual loss from the student’s early withdrawal from the course and should not amount to a penalty fee (i.e. should not penalise the student by charging an amount over and above the provider’s actual loss from that student withdrawing with that amount of notice).

Proposed standard 3.3.8 states that, ‘the student is responsible for keeping a copy of the written agreement and receipts of any payments of fees for the course’. However, in our experience in dealing with more than 1,000 complaints about refunds and fee disputes involving written

agreements², most international students advise our office when we request a copy to assess their complaint that they have never received a copy from their education agent. Therefore, in order for students to meet this standard, there would need to be a preceding standard that required education providers and education agents to provide student with a copy of their written agreement and receipts for any payments of fees for the course.

² 1,278 complaints about refunds, fee disputes and written agreements receiving between 9 April 2011 – 28 February 2017 according to the OSO's Resolve case management system report.

Standard 4 – Education agents

The OSO investigates complaints about the actions or decisions of private CRICOS-registered education providers in connection with an intending, current or former overseas student. Therefore, we can investigate a provider's actions and decisions in relation to an education agent under Standard 4 of the National Code, where the education agent has a written agreement with a private CRICOS-registered provider to formally represent it. However, we cannot investigate the actions of education agents directly, outside of a written agreement with a private registered education provider. This means our jurisdiction is limited to education agents formally engaged by private registered education providers and does not extend to 'freelance' agent's which may act on behalf of an international student without having a written agreement with an education provider to formally represent it.

In our view, to ensure that registered providers hold their agents to the same standards of conduct that apply to registered providers themselves, Standard 4 should require the written agreement between the provider and agent to include a requirement for the agent to comply with all relevant National Code standards. For example, education agents are involved in marketing information and practices (Standard 1); the enrolment of overseas students (Standard 2); organising the student's acceptance of the written agreement and refunds (Standard 3); providing information to students about Standards 5 and 6, handling requests for transfers (Standard 7), providing information about course progress and attendance requirements and processes (Standard 8), providing information and making requests on behalf of students for deferrals and withdrawals (Standard 9), providing information about and helping some overseas students to access the internal and/or external complaints and appeals processes (Standard 10).

We note the requirement at Standard 4.4.4 for providers to require their education agents to 'have appropriate knowledge and understanding of the international education system in Australia, including the code of ethics for agents'. However, in our view this should go further to specifically require education agents to abide by the code of the ethics for agents and for providers to include this as a requirement in their written agreement with their agents set out at 4.2.

It would be helpful if all the standards agents are required to meet, which should be included in the provider's written agreement with the agent, were set out in the first half of Standard 4, with the latter Standards 4.5 and 4.6 referring back to any apparent breaches of these standards so that whatever type of misconduct the provider has reason to believe the agent has engaged in, 4.5 and 4.6 would apply in terms of requiring immediate corrective action or termination of the provider's relationship with the agent, as warranted. Currently, they do not correlate. For example, proposed Standard 4.5 and 4.6 do not refer back to any breaches of Standard 4.4; 4.6 only deals with false or misleading 'recruitment practices' but not the other requirements set out at 4.4.

We are also concerned that Standard 4.5 seems to give providers discretion to only *warn and educate* but not *terminate* their relationship with an agent who may have provided false information to students. Depending on the severity of the false information, termination may be warranted immediately rather than first making sure the agent understands the requirements and the consequences of (any future) non-compliance.

One act of non-compliance may be sufficient to warrant termination under 4.6, however, 4.5 appears to allow providers discretion and does not provide guidance about when a provider may educate an agent on the requirements and the need to comply (e.g. advertising without printing the provider's CRICOS code) vs giving false and fraudulent information to a student or failing to pass on a refund even once which should warrant more serious action such as that outlined in 4.6.

Additionally, more detail should be provided as to what it means for a provider to 'terminate their relationship with the agent' i.e. whether notice be given in writing and to require that the provider should also immediately update its agent list on its website as we have seen multiple cases where a provider advises our office it has terminated its relationship with its agent but still has the agent listed as an approved agent on its website. DET may also wish to consider whether a provider should be required to advise its students upon terminating its relationship with an agent.

One of the key ways a provider may become aware of issues requiring corrective action or termination of its agent is through complaints from international students. However, the current and proposed Standard 4 do not require providers to respond to complaints alleging inappropriate behaviour by their agents. Nor does the current Standard 8 or proposed Standard 10 (complaints and appeals) require this, as it is directed to student complaints about the provider itself.

In our view, as part of their responsibilities under the proposed Standards 4 and 10, education providers should ensure they have an easily accessible complaints process for any students who want to report concerns about their education agent/s. Education providers should investigate complaints and provide students with a written outcome explaining what they have done in response to the complaint and the reasons for any decisions made or actions taken in response. The education provider should also advise students of their right to complain to an external complaints and appeals body if they are not satisfied with the way their education provider has handled their complaint.

The OSO has received a number of complaints recently alleging an education agent has engaged in dishonest practices in enrolling international students with a number of Australian education providers and handling refunds of tuition fees. Some of the students have claimed they complained to their education provider first but their complaint was never responded to, necessitating their contact with our office. In our view, providers should not be able to avoid their obligations under Standard 4 simply by turning a blind eye to complaints about possible breaches by their agents. The onus should be on the provider to consider and investigate, as appropriate, any complaints made about its agents, in order to determine whether or not the provider needs to take corrective action or terminate its relationship with the agent.

We recommend that Standard 4 be amended to require education providers to consider and investigate, as appropriate, all complaints made against an education agent with whom they have a written agreement.

If this leads to the provider becoming aware of, or having reason to believe their education agent has engaged in the type of conduct prohibited by Standard 4 and the code of ethics for agents, then the provider should be required to take corrective action, which may involve terminating

its relationship with the agent. Corrective action should also include considering what remedies the provider may be able to provide to the student in response to a substantiated complaint where the student has suffered a loss or other damage due to the provider's agent's inappropriate behaviour.

Standard 7 – Student transfers

In 2015-16, the OSO recorded 620 issues about transfers regarding 186 registered providers, which is around 18% of all providers in our jurisdiction. Complaints concerning Standard 7 made up 15.4% of all complaint issues we received in the same period and is the OSO's second top complaint/appeal issue.

The table below shows the number of investigated complaint/appeal issues about Standard 7 compared with all investigated complaint/appeal issues, by sector, for the period 11 April 2011 – 18 November 2016. The proportion of transfer issues we investigate about each sector is generally consistent with the proportion of all issues we investigate about each sector, indicating that transfer issues investigated by our office are not highly represented in any particular sector. The lower proportion of transfer issues about ELICOS is likely attributed of the shorter duration of ELICOS courses.

Table A: Investigated complaint/appeal issues about Standard 7 transfers between providers and all issues, by sector (11 April 2011 – 18 November 2016).

| Sector | Standard 7 issues | % | All issues | % |
|--------------|-------------------|-------------|--------------|-------------|
| VET | 153 | 64% | 838 | 52% |
| HE | 48 | 20% | 318 | 20% |
| ELICOS | 20 | 8% | 220 | 14% |
| SCHOOLS | 15 | 6% | 78 | 5% |
| NON-AWARD | 5 | 2% | 132 | 8% |
| UNKNOWN | - | - | 21 | 1% |
| TOTAL | 241 | 100% | 1,607 | 100% |

In 2015-16 we commenced recording the outcomes of complaints/appeals to establish a new benchmark from which to measure improvement or change in providers' overall management of complaints relating to each issue. In 2015-16 complaints which included an issue about transfers between registered providers, we predominantly found in favour of the student whereas for all other complaints, the trend favoured the provider.

Table B: Outcome of investigated complaints/appeals and which included an issue about Standard 7 transfer between providers, compared to all issues (1 July 2015 – 30 June 2016)

| Outcome | Standard 7 issues | Standard 7 Outcome favoured % | ALL issues Outcome favoured ³ % |
|-----------------------------------|-------------------|-------------------------------|--|
| Outcome Supported Student | 21 | 42% | 26% |
| Outcome supported Neither | 17 | 34% | 17% |
| Outcome supported provider | 12 | 24% | 57% |
| TOTAL | 50 | 100% | 100% |

An investigation outcome favouring neither party was usually because the case was otherwise finalised e.g. the provider fixed the problem quickly before the office needed to fully investigate or the office decided after starting its investigation that the issue would be better dealt with by another complaint-handling body.

For issues we investigated about Standard 7 we found in support of neither in a higher proportion of cases than over all issues (34% compared to 17.6%). We consider that this is because a complaint may contain more than one issue, however we don't always investigate all recorded issues, for example, if the student raises new issues in the complaint to our office which have not yet been raised with the education provider, through its internal complaints and appeals process.

Standard 7 is sometimes recorded as a secondary issue to the student's primary complaint. For example, a student may complain to our office about their provider's intention to report them to DIBP for unsatisfactory course progress, which may also lead to the student seeking a transfer to another provider. Provider refusal leads to a complaint to us. In these circumstances we find it is common that the student has either not made a formal request to their provider for transfer or has not yet accessed the provider's internal appeal process.

As shown in Table B above, in the 2015-16 financial year, we found in support of the student in 42% of all transfer issues we investigated. This indicates that in these cases the provider either did not have a transfer policy that was substantially compliant with Standard 7, or that the provider did not comply with their transfer policy. Where we find that a provider does not have a compliant transfer policy or practice we make recommendations for improvement. When providers implement our recommendations, our investigations achieve outcomes for both the individual student and influence improvements to provider's policies and practices that benefit the providers' current and future students.

³ Overseas Students Ombudsman Annual Report 2015-16, http://www.ombudsman.gov.au/_data/assets/pdf_file/0024/42378/Overseas-Students-Ombudsman-Annual-Report-2015-16.pdf

The current Standard 7.2 requires providers to make their documented student transfer request assessment policy and procedure available to staff and students. This requirement appears to have been unintentionally removed from the new proposed Standard 7. It is important that staff and students have access to the provider's transfer policy so we recommend this requirement be reinserted and that the provider make the policy publically available, for example, on its website so that complaints bodies as well as students can access the policy.

The current requirement of Standard 7.4 that 'a letter of release, if granted, must be issued at no cost to the student' seems to have also been removed, perhaps unintentionally. We note the proposal to allow providers to record their agreement to release a student in PRISMS and the intention to reduce the paperwork for providers by removing the requirement to give the student an actual release letter. It may have been contemplated that without issuing an actual letter there was no need to include a prohibition on charging for that letter. However, the student may wish to have something in writing to take to another provider to demonstrate they have been released, so consideration may need to be given as to what form such written confirmation might take, for example, a print-out from PRISMS, if the student requests it and to ensure providers do not charge for their time in providing such evidence. We have seen at least one instance where a provider was charging students for issuing a release letter, sighting the administrative time involved in assessing their transfer request.

We recommend Standard 7 should retain a statement that providers should not charge students for assessing transfer requests; approving such requests in PRISMS or providing evidence of this, for example, by providing a PRISMS print out on request.

At various points in time in the past, a cancelled Confirmation of Enrolment (CoE) was accepted as an exception to the need for a release letter. A discontinued DET Fact Sheet on Standard 7 previously stated:

Exceptions to the release letter requirement

In addition to the conditions listed in Standard 7.1 of the National Code, a release letter is not required in the following circumstances: ...

- Where a student's enrolment may have been cancelled under Standard 13 of the National Code ("Deferring, suspending or cancelling the student's enrolment"), there is no need for the provider to also issue a release letter - in this situation the cancellation would be sufficient.

DET subsequently changed its policy to state that a cancelled CoE is not a substitute for a release letter. We have found ongoing confusion in the international education sector about whether the cancellation of the student's CoE has the effect of releasing the student from the limitation on transferring before completing six months of their principal course or not. We recommend DET provide advice on this either in the new Standard 7 or in any accompanying fact sheet.

We note the previous proposal to abolish Standard 7 in favour of allowing providers to include a cancellation fee in their written agreement with students to recover any financial loss incurred as a result of a student withdrawing and transferring to another provider before they completed six months of their principal course. We understand this proposal may have been less administratively burdensome on providers and complaints bodies as it would have removed the significant amount of time and work involved in assessing, approving, refusing and reviewing

transfer request decisions. However, we understand some providers wish to retain Standard 7 as the Department of Immigration and Border Protection (DIBP)'s Simplified Student Visa Framework (SSVF) creates a link between transferring students and the provider risk rating DIBP assigns to the original provider which recruited the student and for whom the student visa was granted. Unfortunately, this complicates the provider's assessment of the student's transfer request as it considers competing interests - whether the transfer is in the provider's best interests in terms of the effect of the student's transfer on its DIBP provider risk rating and whether the transfer is in the student's best interests, as defined by the examples given in the proposed Standard 7 of the National Code 2017.

We note Standard 7 has changed from putting the onus on the provider to release the student unless they can show the transfer would be to the student's detriment, to assessing the transfer request based on whether the transfer is 'in the student's best interests'. It is important that providers genuinely consider what is in the student's best interests rather than narrowly applying the examples set out in Standard 7 in order to refuse transfers to protect the provider's risk rating. To this end, we support the statement in Standard 7.2.2 that what may be in the student's best interests include but are not limited to the examples provided. Providers should ensure they consider each transfer request based on the student's individual circumstances and provide details of reasons for any decisions to refuse a transfer, setting out how they have considered the grounds for transfer that the student put forward in their request, rather than citing generic examples that may not even apply to the student in question. It is also important that providers assess students' requests for transfer, rather than advising the student that they cannot transfer before completing six months of their principal course without even considering the student's individual reasons for requesting a transfer.

One example of when a transfer may be in the student's best interests, in the proposed Standard 7.2.2.1, is 'the student is unable to achieve satisfactory course progress at the level they are studying, even after the provider has identified and implemented its intervention strategy to assist the student in accordance with standard 8 (course progress and attendance). This appears to replace an example from the current National Code Explanatory Guide of detriment; 'if the student is trying to avoid being reported to DIBP for failure to meet the provider's attendance or academic process requirements'. We recognise the intent is to release students where they cannot achieve satisfactory course progress, even after the provider has tried to assist them through an intervention strategy. We welcome the increased level of detail provided in the revised example (even after the provider has identified and implemented its intervention strategy to assist the student in accordance with standard 8). However, it is not clear whether a student could deliberately fail in order to meet this criterion for release.

We understand DET has consulted the peak bodies about this wording so this may have already been taken into account. We simply note this for consideration.

The proposed Standard 7.2 sets out examples of when a provider should release a student as the transfer may be considered to be in the student's best interests. However, the proposed standard no longer requires the providers to also include (as the current Standard 7.2b does) 'the circumstances the registered provider considers as providing reasonable grounds for refusing the student's request, including when a transfer can be considered detrimental to the student'. We recognise the provider will now be refusing transfer requests on the basis that the transfer is 'not in the best interests of the student'. However, providers currently rely on other grounds that would not be captured by this definition. For example, we see some providers refuse to release a student where the student has outstanding unpaid fees. We have generally

upheld such a release refusal, where the provider had clearly specified in its transfer policy that it considered unpaid fees as circumstances the registered provider considers as providing reasonable grounds for refusing the student's request'.

We note some providers may wish to continue to apply this ground as a basis for refusing transfer requests. However, the proposed Standard 7 no longer refers to the provider needing to specify the grounds on which a transfer request may be refused, in addition to when it may be approved.

We recommend DET reinsert this requirement in the proposed Standard 7, which could read: 'the provider's transfer policy must specify the circumstances the registered provider considers as providing reasonable grounds for refusing the student's request, including but not limited to, where the transfer is not in the student's best interests'.

Examples of grounds we have seen included that are not appropriate grounds to refuse a transfer request include a provider citing the DIBP Genuine Temporary Entrant (GTE) criteria, which are relevant to DIBP's assessment of a student's visa application rather than an education provider's assessment of whether a provider transfer would be in a student's best interests. This highlights the conflict that can arise between provider's assessing whether a transfer is in the student's best interests compared to its effect on the provider's DIBP provider risk rating, which relates to the provider's best interests.

Standard 8 – Monitoring course progress and attendance

Since the OSO began operations in April 2011, we have received a total of 731 course progress and attendance external appeals and, of these, we investigated 91% (666 appeals).

In 2014-15 we investigated 134 appeals about course progress and attendance. Of the completed investigations, 75.4 % were resolved in favour of the provider, 19.4% in favour of the student and 5.2 % in favour of neither party because the case was otherwise finalised.

In 2015-16 we investigated 139 appeals about course progress and attendance. Of the completed investigations, 75.6 % were resolved in favour of the provider, 12.9% in favour of the student and 11.5% in favour of neither party because the case was otherwise finalised.

The number of investigations resolved in favour of the provider has remained steady over the two year period from 2014-15 to 2015-16. The number of complaints/appeals resolved in favour of the student has declined from 19.4% in 2015 to 12.9% in 2016. This indicates we have seen improvements in provider compliance in this area although the latest figure of 12.9% indicates some providers are still making mistakes in monitoring and reporting on course progress and attendance.

All primary student visa holders have a mandatory visa condition (8202) imposed on their student visa which states:

You **must** maintain satisfactory attendance in your course and course progress for each study period as required by your education provider.⁴

To maintain the integrity of the Australian Government's student visa program, education providers are required to report overseas students who fail to achieve satisfactory course progress and/or attendance, to DET and DIBP. The authority for this is contained in s 19 of ESOS Act.

The National Code 2007 requires education providers to be proactive in warning and assisting students who are at risk of failing to meet course progress and/or attendance requirements. If a student subsequently fails to achieve satisfactory course progress and/or attendance, the provider must notify the student in writing that it intends to report them. The written notice must inform the student that they are able to access the registered provider's complaints and appeal process. If the student is not satisfied with the result or the process of the internal complaint handling and appeals process, the provider must advise the student in writing of his or her right to access the external appeal process.

The third and fourth most common type of complaints or appeals we receive concern unsatisfactory course progress and attendance appeals. In May 2015, we published an issues paper highlighting the good and poor practices we see in the way private registered providers monitor and report on course progress and attendance, [Overseas Students Issue Paper - Course Progress and Attendance Issues Paper - May 2015](#).

⁴ <http://www.border.gov.au/Trav/Stud/More/Visa-conditions/visa-conditions-students>

We recognise there are benefits to combining the current Standards 9, 10 and 11 into one new Standard 8, as proposed in the draft revised National Code 2017 however, some details of how providers are to monitor and report on course progress and/or attendance appear to have been omitted in the new proposed Standard 8. This is likely to make it very difficult for providers to consistently and fairly monitor and report on course progress and/or attendance and to realise the policy intent of this standard.

We understand the intent of this standard is to give effect to the requirement of s 19 of the ESOS Act for providers to report to DIBP students who breach their student visa condition 8202 by failing to meet course progress and/or attendance requirements. This standard sets out the steps that providers must take leading up to making such a report, to ensure providers first identify and help students at risk of failing, to help them avoid needing to be reported, if possible.

Currently, under Standards 10 and 11 this is done by the provider sending an attendance warning or implementing an intervention strategy for course progress. If students do reach the point of having to be reported, the steps in this standard should ensure they have first been afforded due process and the right to lodge an internal and external appeal prior to being reported.

The monitoring and reporting process starts with the provider's course progress policy and attendance policy (for certain sectors), which must:

1. define satisfactory course progress and/or attendance
2. define unsatisfactory course progress and/or attendance
3. define students who are 'at risk' of failing to meet satisfactory course progress and/or attendance requirements
4. set out the process the provider will follow to identify those students at risk
5. set out how the provider will contact the student to assist them to improve their course progress or attendance to have an opportunity to avoid being reported
 - a. for attendance, this involves the provider sending the student a warning before their projected attendance falls below 80%
 - b. for course progress, the provider must implement an intervention strategy to help them improve to hopefully meet satisfactory course progress.
6. set out how the provider will contact any student who has been absent without approval for more than five consecutive days, to check on the student's welfare and determine the reason for their absence.

We note the details of 2, 3, 4, 5a and 6 appear to have been omitted from the proposed Standard 8 so that there is no requirement in the proposed Standard 8 for providers to include these essential details in their course progress and any attendance policy.

We recommend DET reinsert these details into the sector specific standards of proposed Standard 8 to ensure there is sufficient detail to guide providers in how to implement the requirements of this standard in practice.

To illustrate our point, we note instead of the details outlined above, the proposed Standards 8.6.4, 8.7.3, 8.8.4, 8.9.4 and 8.12 introduce a generic intervention strategy for attendance and/or course progress for students at risk to be implemented 'in sufficient time for those students to improve their study outcomes'. We are concerned there is insufficient detail in the proposed revisions to guide providers in how to implement the standards in a way that meets the policy intent. We note that helping a student 'improve their study outcomes' is not the same thing as helping the student to achieve satisfactory course progress and avoid reaching the point where the provider determines the student has failed to meet satisfactory course progress, which is the trigger for reporting the student to DIBP under s 19 of the ESOS Act. The wording in the proposed Standard 8 therefore does not link back to the obligation on the provider to report students who have failed to maintain satisfactory attendance and course progress for each study period as required by the education provider.

For example, the proposed wording could see a provider not report a student who continues to fail to meet satisfactory course progress through multiple study periods while they implement an intervention strategy that sees the student 'improve their study outcomes' from an E to an E+ to a D to a D+, which is still a fail. This scenario could be allowable under the proposed wording of Standard 8 given the absence of a requirement to specify the point at which the student is determined to have failed to meet satisfactory course progress, and without a requirement to clearly define what unsatisfactory course progress constitutes, as currently required by Standard 10.2d.

Currently, Standard 10.5 requires as a minimum that the intervention strategy for course progress is activated where the student has failed or is deemed not yet competent in 50% or more of the units attempted in any study period. However, the proposed standard contains no minimum or defined point at which the intervention strategy must be implemented, meaning a provider could wait multiple study periods before implementing an intervention strategy, depending on their course progress policy.

Similarly, there is no minimum or maximum timeframe for implementing the intervention strategy in the absence of the current Standard 10.2d requirement to specify the process for determining the point at which the student has failed to meet satisfactory course progress. Again, this is important to ensure there is a time limit on how long the student should be given to improve, before needing to be reported if they continue to fail to meet satisfactory course progress.

In relation to attendance, the absence of the current requirement at Standard 11.4 in the proposed Standard 8 to send the student a warning before their projected attendance falls below 80% means there is no definition of when providers should contact students to implement an 'intervention strategy to identify and assist students at risk of not meeting attendance requirements in sufficient time for those students to meet attendance requirements'.

Projected attendance is the student's attendance at a point in time, counting their absences up until that point and assuming they attend every remaining class in the study period/total course hours/period of the CoE (whatever period over which the provider is monitoring and reporting on attendance – this must be specified in the provider's attendance policy). Projected attendance is the student's maximum possible attendance from that point forward, which can only stay the same or go down but not increase. Therefore, to give the student a meaningful opportunity to avoid being reported, the provider must contact and warn the student that they are at risk of falling below 80% attendance, before the student's projected attendance falls below 80%. Providers must send a warning or otherwise implement an 'intervention strategy' before the student's projected attendance falls below 80% if they are to do so '... in sufficient time for those students to meet attendance requirements'. Given this is such a clear point in time, it would be helpful if the proposed Standard 8 retained this definition of when the provider should contact the student to warn them that they are at risk of failing to meet satisfactory attendance – before their projected attendance falls below 80%.

We recommend that for clarity and consistency this requirement be reinserted into the proposed Standard 8.

The proposed Standard 8.15 would better sit at 8.13 as reporting students is the next step for those who do not meet the sector specific course progress and/or attendance requirements set out at 8.6 – 8.12. 8.15.2 would benefit from inserting the word 'intention to report' rather than just 'report' as the provider does not actually report the student until the internal and external appeal processes are complete. Therefore, at the time the provider notifies the student of the 'reasons for the report' it is still an 'intention to report' as currently expressed in Standards 10.6 and 11.6.

Proposed Standards 8.15.3 and 8.15.4 would benefit from revision to better capture the process of the provider:

- sending the student the Notice of Intention to Report (NOIR)
- advising the student in the NOIR of their right to first access the provider's internal complaints and appeals process within 20 working days (before being reported)
- if the student's internal appeal is unsuccessful, advising the student of their right to access an external complaints and appeals process, within the timeframe given in the provider's complaints and appeals policy (before being reported)
- reporting the student if the external complaints and appeals process finds in favour of the provider or if the student chooses not to access the internal or external complaints processes.

We would suggest the following revised wording:

The provider must: ...

8.15.3 advise the student in the NOIR of their right to lodge an internal appeal through the provider's internal complaints and appeals process within 20 working days of the date of the NOIR, in accordance with Standard 10

8.15.4 not report the student while the internal appeal process is underway, if the student chooses to access it, or report the student once the 20 working days has passed, if the student chooses not to access the internal appeal process

8.15.5 advise the student of their right to lodge an external appeal with an independent, external complaints and appeals body within the timeframe specified in the provider's complaints and appeals policy, if the student lodges an internal appeal but the internal appeal decision is not in favour of the student

8.15.6 not report the student while the external appeals process is underway, if the student chooses to access it

8.15.7 not report the student if the external appeal results in a decision that favours the student or; report the student if the external appeal results in a decision that favours the provider.

Proposed standard 8.16 contains the exceptions to reporting a student for unsatisfactory attendance that are currently contained in Standards 11.8 and 11.9. 11.8 has slightly different standards for VET and non-award courses compared to school and ELICOS courses in 11.9. We note the proposed Standard 8.16 contains the same standards for all course sectors required by the ESOS Agency to monitor and report on attendance. We are not aware if this is a deliberate change requested by the peak bodies for those sectors. We simply note that it will introduce changes for providers in these sectors.

For example, currently Standard 11.8 does not require providers to consider compassionate or compelling circumstances in order to not report a student who has at least 70% projected attendance and satisfactory course progress for VET and non-award courses. Standard 11.8a gives providers the discretion to decide to include compassionate or compelling circumstances as a grounds for not reporting in conjunction with 11.8b and c or not. We see many VET providers choosing not to include compassionate or compelling circumstances and to instead just assess whether the student is still meeting satisfactory course progress, despite having fallen below 80% but not below 70% projected attendance. However, the proposed Standard 8.16 has omitted this provider discretion to not report VET or non-award students who may not have compassionate or compelling circumstances but have nevertheless maintained satisfactory course progress and still have at least 70% projected attendance. In our experience in assessing attendance external appeals, VET providers do make use of this current exception to reporting which they would lose in the proposed Standard 8.16. We would ask DET to consider if this change is intentional and to consult with VET and non-award providers and peak bodies about whether they would wish to maintain this discretion, in which case it would need to be reinserted at 8.16. Proposed Standard 8.16 does not appear to change the current discretion not to report for ELICOS and schools courses.

The other part of 8.16 which we would like to comment on is the reference to the provider only being able to assess whether it can use this discretion to not report the student if the student successfully appeals the decision or provides genuine evidence of compassionate or compelling circumstances 'within 20 working days of being notified that the student is to be reported'. We understand this is a reference to the provider making the assessment of whether or not to exercise its discretion to not report a student in the '70-80% projected attendance window' at the internal appeal stage. This assumes the student would only provide this evidence in response to the NOIR at the internal appeal.

However, we have seen a number of VET providers who make this assessment before sending the NOIR and have written this into their attendance policies. These policies state that where the student's projected attendance falls below 80%, the provider will assess whether the student's attendance is still at least 70% and whether the student has satisfactory course progress. If the answer is yes, then the provider will exercise its discretion at this point to not report the student but not sending the NOIR to the student. This removes the need for the student to proceed through to an internal appeal in order to request this assessment to be made. We do not have a view on the matter but submit this as a practice we have seen providers adopt and write into their attendance policies which does not appear to conflict with the current requirements of Standard 11.8 but would be prevented by the proposed wording of Standard 8.16. Again, DET may wish to consult with the peak provider bodies to discuss what they would prefer as we can see advantages to this approach for both providers and students in terms of reducing red tape while allowing providers to exercise this discretion in accordance with the National Code provisions.

If DET decides to retain the requirement that providers make this assessment at the internal appeal stage, then it is important that the NOIR is sent before the student's projected attendance falls below 70% so the provider still has the discretion not to report them at the time of the internal appeal. For example, Standards 10.6, 11.6 and proposed Standard 8.15.1 do not contain a definite timeframe for sending the NOIR. 8.15.1 notes this should be done 'as soon as practicable'. If a student falls below 80% projected attendance and the provider sends the NOIR when their projected attendance is 75%, then the provider would have the discretion to consider the exception to reporting set out at 8.16 at the time of the internal appeal. However, if the provider does not send the NOIR to the student until their projected attendance has fallen to 68%, then the provider no longer has the discretion to not report set out at 8.16 at the time of the internal appeal. This deprives the student of their opportunity to show why they should not be reported, for example, due to compassionate or compelling circumstances, simply because the provider did not send the NOIR before they fell below 70% attendance. This could result in different treatment of overseas students if, depending on workloads, the provider is sometimes able to send the NOIR before the student falls below 70% but not at other times.

This also highlights our view that when providers are assessing the student's internal appeal, they should refer to the student's projected attendance as it was at the time the NOIR was sent. We are aware that some providers continue to mark attendance after the NOIR is sent and assess the attendance as it is at the time of the internal appeal. However, given providers may schedule internal appeals for different students with different lengths of notice, it seems fair to us that the attendance rate as at the time of the NOIR is the most fair and reasonable measure to use. However, we note the current Standards 10 and 11 and the proposed Standard 8.16 do not specify whether the reference to 70% attendance is a reference to attendance as at the time of the NOIR or the time of the internal appeal. We recommend DET consider clarifying this either in Standard 8.16 or in an accompanying fact sheet.

We suggest there should be an 'or' between 8.16.1 and 8.16.2 – provider cannot report if the student has compelling or compassionate circumstances or the student successfully appeals the decision through the provider's internal complaints and appeals process. The student may be successful at the internal appeal because the provider made a mistake such as calculating attendance incorrectly or failing to implement the intervention strategy in time – this would not necessarily meet the first test of 'compassionate or compelling circumstances' so the two should be separate as an 'either/or' not an 'and'.

We would suggest the paragraph on ‘course duration and allowable extensions’ come after the paragraph on ‘reporting breaches of visa requirements’. We recommend DET change the wording from ‘the provider must advise the student of any potential impacts on their visa, including the need to contact Immigration to obtain a new visa’ to ‘the provider must advise the student to contact Immigration to seek advice on any potential impacts on their visa including whether a new student visa is required’. In Australia, only registered migration agents are authorised to give immigration advice and assistance. Education providers should never give international students immigration advice about their visa or any potential impacts on their visa. Instead, they should advise the students to contact Immigration directly for this advice. Otherwise there is a real risk providers will provide unintentionally out of date or incorrect advice which could have serious adverse effects for students and providers. We note the wording at proposed Standard 7.4 reflects the change we are suggesting.

We note the proposed changes to the requirements around online and distance learning at proposed Standard 8.18 for international students, including the removal of the requirement in Standard 9.1 that a student must study at least one unit that is not by distance or online learning in each compulsory study period for the course. This requirement had the effect of ensuring the student was still studying face-to-face, in person, in Australia, in each compulsory study period. With the removal of this requirement, it is possible that students may choose to study for one or more study periods (up to the maximum allowable of one third of the units of the course) outside Australia. While we do not have a view on this change, we would seek clarification for providers, students and ourselves as an external complaints and appeals body about what this would mean for the requirement for providers to monitor course progress and attendance as a condition of the student’s visa.

We suggest DET seek advice from DIBP, if it has not already done so, and promulgate the results of this advice to providers, students and complaints and appeals bodies, particularly on the question of whether providers are required to monitor course progress and attendance while a student is outside Australia, depending on whether their visa is in effect and the conditions are in force even if the student is not within Australia during that study period. The other question would be how would providers know if the student is within or outside Australia and what if the student moves in and out of the country during a study period during which they are studying 100% online – does this effect whether or not the provider is required to monitor and report on their course progress and attendance?

Standard 9 – Deferring, suspending or cancelling the student’s enrolment

9.2 ‘a registered provider may defer or suspend the enrolment of a student if it believes there are compassionate and compelling circumstances (for example, illness where a medical certificate states that the student is unable to attend classes) ...’ The OSO has also seen cases that we viewed as compassionate or compelling which were of a more positive nature, such as pregnancy and needing to take time out from studies to go home to be married.

We suggest the DET Fact Sheet providing further guidance to providers on what may constitute compassionate or compelling circumstances as we have seen cases of sickness/death of a family member back home that require the student to suspend their studies to travel back to be with family or attend funerals.

9.3 ‘a registered provider may suspend or cancel a student’s enrolment on the basis of: ... 9.3.2 the student’s failure to pay an amount he or she was required to pay the registered provider according to the written agreement to undertake or continue the course’ – we suggest adding a reference to the amount being required to be paid ‘under the written agreement’ to ensure clarity and reference to the written agreement in case of any disputes between the student and provider as to what was owed. We have seen cases where the provider could not explain to our office how they had calculated outstanding fees so it is important there is clear evidence to show what the student owes in order to cancel for unpaid fees, to avoid disputes.

9.4, ‘If the registered provider initiates a suspension or cancellation of the student’s enrolment, before imposing a suspension or cancellation the provider must:

9.4.2 advise the student that he or she has 20 working days to appeal in accordance with Standard 10’. In the current Standard 13, the provider only has to give the student access to the internal complaints and appeals process before cancelling the student’s enrolment.

If the department intends to continue this practice, we suggest adding to 9.4.2:

‘advise the student that he or she has 20 working days to lodge an internal appeal in accordance with Standard 10. If the internal appeal decision favours the student, the provider should not suspend or cancel the student’s enrolment. If the internal appeal decision does not favour the student, the provider may suspend or cancel the student’s enrolment. The provider should also advise the student of their right to lodge an external appeal in accordance with Standard 10.’

We suggest 9.6 become 9.5 to follow the references to the internal appeal process in 9.4.

9.5 (which we suggest should become 9.6) states at 9.5.1 that the provider must 'inform the student of the potential impact on his or her student visa'. Providers are not authorised to give migration advice. Instead, the standard should require providers to **'advise the student to contact Immigration to seek advice about any potential impact on his or her student visa'**.

Standard 10 – Complaints and appeals

Standard 10.1 states, 'The registered provider must have an internal complaints handling and appeal process, and provide the student with comprehensive and easily accessible information about that process'. We would recommend adding that the process should be 'free and easily accessible'. This should include a requirement for the provider to make its complaints and appeals policy publically available on its website.

We find some providers do not make their complaints and appeals policy available to students at all while others include it in a student portal. However, intending overseas students who have not yet enrolled (including those who may have a complaint about dealing with an education agent) are not able to access documents in a student portal.

Therefore, it is important this policy and details of the provider's complaints and appeals policy is made publically available on the provider's website. This would also assist the OSO to refer students back to the provider's internal complaints and appeals process where the student contacts the OSO without first accessing the provider's internal complaints and appeals process.

10.2.1 ...the provider's internal complaints handling and appeal process must: respond to any complaint or appeal the student makes regarding the registered provider's dealings with the student or any dealings with the student by any other provider... It is not clear what the intention is to require that one provider must deal with complaints about another provider. The wording seems to imply that a student can complain to a provider about any matter relating to another provider, which may have nothing to do with the first provider, and that first provider would be required to deal with the complaint. If the intention is to ensure that where a provider is delivering a course in conjunction with another provider, it is open to complaints about that arrangement, this should be stated more specifically.

10.2.4 'the registered provider's internal complaints and appeals process must: ... finalise its assessment within 20 working days'. It is not clear what is meant by 'assessment' but we assume this means 'make a decision/finalise the complaint/appeal' within 20 working days. Given the provider has 10 working days from lodgement of the complaint to commence assessment, this only gives providers 10 working days to assess a complaint.

If assessment means finalise/make a decision on/complete the internal appeal, we would be concerned as to whether providers are able to meet this 20 working days timeframe for finalisation. By comparison, the median timeframe from lodgement to closure for all the complaints and appeals the OSO has *investigated* since we first began operations in April 2011 to March 2017, is 72 days. Over this period, we closed 62% of investigated complaints/appeals within 3 months of lodgement. Much of this time is taken up with requesting documents from students and providers and giving time for them to respond. Once we make a proposed decision, we also write to the person who the decision does not favour setting out the reasons for our proposed decision and giving them time to comment before we make a final decision. Gathering sufficient evidence to assess a complaint or appeal and providing natural justice take time.

We would be concerned to ensure that an overly restrictive timeframe for completing internal appeals did not see providers make quick decisions without sufficient evidence or providing a fair process, simply to meet the timeframe specified in the proposed Standard 10 of the National Code. It may be worth introducing a qualification to say assessment of an internal complaint or appeal 'should ideally' be finalised within 20 working days and if not, the student should be provided with an update on the progress of their internal complaint/appeal within 20 working days and the likely timeframe for a decision to be made'. Alternatively, given there is no current timeframe for assessing internal appeals, DET may want to consider consulting with providers about a timeframe they view as reasonable and/or requiring providers to specify in their complaints and appeals policy what they consider to be a reasonable timeframe for deciding 'most' internal appeals, to guide students and others as to what they can expect.

10.2.5 'ensure the student is given an opportunity to formally present his or her case at minimal or no cost to himself or herself...' We recommend the internal complaints and appeals process should be free for intending, current and former overseas students.

If the department wishes to retain the reference to 'minimal or no cost', guidance should be provided to providers and students in an accompanying fact sheet as to what the definition of 'minimal' is. We would also recommend the fact sheet include a requirement that at least one stage of internal complaint/appeal should be free and the student should be able to approach the external complaints and appeals body after completing the first, free stage of internal appeal rather than be required to go through a second or subsequent stages for a free before being permitted to lodge an external appeal. We have investigated one provider which has two stages of internal appeal. The first is free, the second costs \$150. Previously, the provider was requiring students to go through both stages and pay the \$150 before allowing them to appeal to the OSO. We recommended the provider abolish the \$150 fee or at least allow students to appeal to the OSO after completing the first, free stage of internal appeal.

We recommend:

- reordering 10.2 in chronological order for ease of interpretation i.e. 10.2.2 (have a process in place); 10.2.1 (respond to complaints); 10.2.4 (commence and finalise complaints); 10.2.5; 10.2.6; 10.2.7; 10.2.8
- adding a reference at 10.2.7 to the external appeals process: 'ensure the student is given a written statement of the outcome of the internal appeal, including details of the reasons for the outcome. If the internal appeal decision does not favour the student, the statement should advise the student of their right to access the external complaints and appeals process and include contact details for the relevant external complaints and appeals body.

This addition of words at 10.2.7 could replace 10.3 to ensure the student is advised of the external complaints and appeals process at the same time as being advised of the internal appeal decision, rather than up to 10 working days later and only 'if the student is not satisfied with the result or conduct of the registered provider's internal complaints handling and appeals process.' The provider may not know if the student is dissatisfied so providers should advise all students who receive an unfavourable internal appeal outcome of their right to lodge an external appeal, at the same time as advising them of the unfavourable decision and reasons for that decision.

We find many external complaints and appeals to the OSO could have been avoided if the provider gave the student specific reasons for refusing their internal appeal. Therefore, we recommend retaining the words ‘details of the reasons’ in 10.2.7 rather than just stating ‘reasons’ as some providers state very brief reasons that may even be incorrect. For example, ‘your request to transfer providers is refused because you have not yet completed 6 months of your principal course’ However, Standard 7 currently requires the provider to show the transfer would be to the students’ detriment to refuse the transfer and this should be explained to the student in detail.

Another example is where a provider refuses the student admission to a course without explaining why the student did not meet the entry requirements or refuses a deferral request without explaining why the provider did not accept the reasons the student put forward as constituting compassionate or compelling circumstances. Providing details for reasons at the internal appeal stage can help students understand and accept an unfavourable decision without the need to lodge an external complaint or appeal just to access those reasons.

We recommend revising 10.2.8 become 10.3 and state, ‘If the student chooses to access the internal and any external complaints handling and appeal process, the provider must maintain the student’s enrolment until the internal and any external complaints handling and appeal process has concluded.’

We appreciate the department including at 10.4 the reference to any external complaints handling or appeal process resulting in a ‘decision or recommendation’ to better reflect the wording of the different Ombudsman’s legislation.