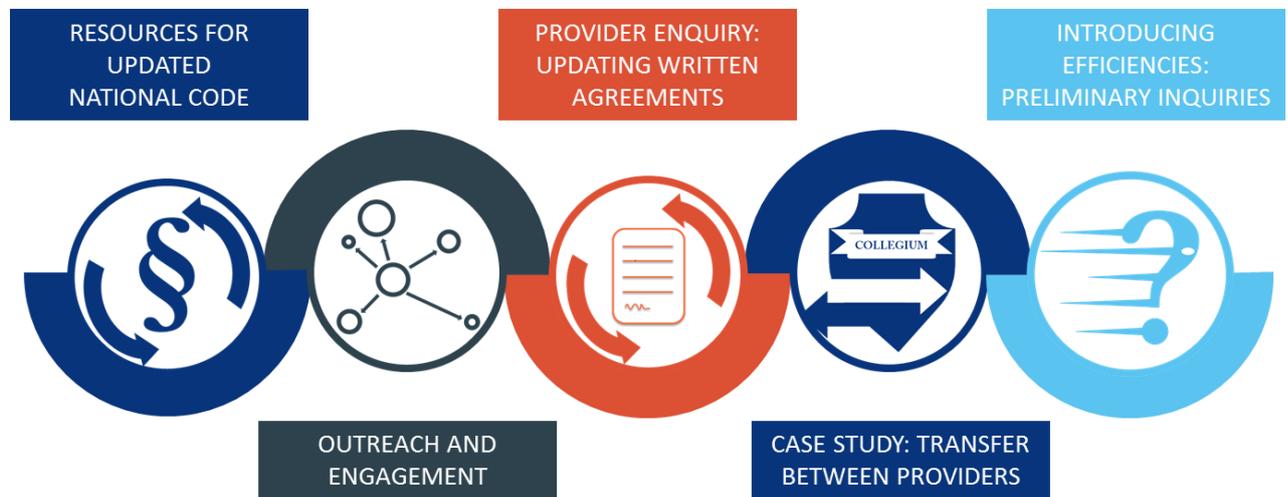


Provider e-newsletter

May 2018

In this edition



Quarterly summary for January–March 2018 is now available

You can download a copy of the latest [quarterly summary](#) from our website.

Quarterly summary at a glance

<p>12% decrease in complaints received this quarter compared to same time last year</p> 	 <p>Disputes arising from written agreements continues to be the most significant complaint issue</p>	<p>Of the complaint issues investigated and finalised:</p> <ul style="list-style-type: none"> 60% were in support of provider 23% were in support of student 17% were in support of neither 	 <p>We investigated complaints made by students from 25 countries or administrative regions this quarter</p>
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Provider resources for National Code 2018

The *National Code for Providers of Education and Training to Overseas Students 2018* (National Code 2018) came into effect on 1 January this year.

This update was the result of extensive consultation conducted by the Department of Education and Training (DET). Many stakeholders (including ourselves), made a [submission](#) to DET during the consultation phase.

About 60 per cent of complaints we received in the first quarter of this year were assessed under the previous version of the National Code, as the issues complained about arose before the new National Code came into effect.

We have updated some provider and student resources on [our website](#). We will continue to publish more as we become familiar with the common complaint issues which arise under the new code.

Updated resources

Provider fact sheets:

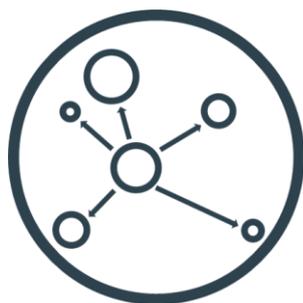
- [What to expect if a student contacts us](#)
- [Recommendations made by the Ombudsman](#)
- [Education agents](#)
- [Written agreements, fees and refunds](#)

Student fact sheets:

- [Attendance](#)
- [Course progress](#)
- [Education agents](#)
- [Fees and refunds](#)
- [Transferring between education providers](#)
- [Written agreements](#)

If there is something in particular you would like to see included in our list of resources, please send an email to overseas.students@ombudsman.gov.au.





Outreach and engagement

Tuition Protection Service

In late February and early March we participated in the Tuition Protection Service (TPS) information sessions for providers in Melbourne, Sydney, Brisbane, Perth, Adelaide and Canberra. In some locations we were joined by representatives from the local State and Territory Ombudsmen (and in the case of South Australia, the Office of the Training Advocate).

We were grateful for the opportunity these sessions gave us to reach a number of education providers in our jurisdiction, some of which didn't know who we were and what we did.

Did you attend any of the TPS information sessions, and see our presentations? We'd be very interested in your feedback so that we can make our next presentation even more useful. Please send your comments to overseas.students@ombudsman.gov.au

Provider-level meetings

We always try to make the most of our travel opportunities by scheduling meetings with providers based in the locations we travel to. We are a small team, but if you would like to meet with us please let us know. We will do our best to arrange a meeting when we are next in your part of the country. We could talk about your complaints and appeals policy, go through some of your complaint numbers, and get some feedback from you on how we conduct our investigations.

Recent enquiry from a provider

A provider contacted us recently enquiring about whether they could alter a written agreement with a student which was signed under Standard 3 of the National Code 2017, now that the National Code 2018 had different requirements for written agreements.

The provider explained that in their original written agreements, there was a clause which stated that the provider could make amendments to the agreement in future.

Although we can't provide definitive answers to interpretation questions, we can give an indication of how we would view a potential complaint about an issue.

In this case, our position would be informed by these considerations:

- 1) The updates to Standard 3 in the National Code 2018 do not invalidate previous written agreements. We would assess complaints on the basis of the written agreement which was in force at the time the dispute arose.
- 2) If a provider unilaterally makes amendments to a written agreement, it is likely that these amendments would not be considered valid under Australian Consumer Law (ACL) (*Competition and Consumer Act 2010—Schedule 2*). This is because the clause which allows the unilateral amendment to be made could be considered unfair.
 - i. According to s 24 of the ACL, a contract is unfair if:
 - a) it would cause a significant imbalance in the rights of the parties and obligations arising under the contract
 - b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term
 - c) it would cause detriment (financial or otherwise) to a party if it were to be applied or relied on.
 - ii. s 25 of the ACL gives specific examples of unfair contract terms, which include:
 - (d) a term that permits (...) one party (but not another party) to vary the terms of the contract.
- 3) If the provider presented the student with an updated version of the written agreement and asked them to sign the new version, this would also give rise to questions of fairness, especially if the changes would:
 - i. create a significant imbalance in the rights of the parties and obligations arising
 - ii. not be necessary to protect the provider's legitimate interests
 - iii. potentially be to the student's detriment.

In summary, the changes made to the National Code should not require providers to change existing written agreements already signed by students. If providers do make changes to existing agreements, they would need to have regard to the principles of fairness, and changes would need to be agreed to by the students.





Case study—Standard 7 transfer request

Lila¹ had been studying a Diploma of Nursing for four months with a private education provider, when she decided that nursing wasn't for her and she needed a change in direction. She asked her provider if she could transfer to another provider to study a Diploma of Leadership and Management. She told the provider that she was depressed and that her counsellor had recommended a change in direction.

Her provider considered her application, but found that the proposed transfer did not meet the criteria of their transfer policy.

Lila appealed the provider's decision, but the original decision was upheld.

Lila contacted the Office to request an investigation of her complaint. Our investigation officer requested further information from the student and provider, and after reviewing all documents, determined the following:

- Lila had missed several classes and had not submitted several assignments.
- The provider had attempted to engage Lila in an intervention strategy for her course progress issues, but Lila had missed all appointments.
- The provider had issued Lila with a Notice of Intention to Report (NOIR) for poor course progress. Lila responded to the NOIR by submitting that she was suffering from depression and requesting a transfer to another provider.
- The provider had asked Lila to submit evidence that she was receiving treatment for depression.
- Lila had provided a medical certificate but the certificate did not state the period that she was suffering depression and did not state that her condition affected her ability to study.
- The provider requested a more specific certificate, but Lila did not provide anything.
- Lila had not paid her course fees for her second term, and owed the school an outstanding sum.
- In refusing Lila's request for transfer, the provider referred to their transfer policy, which outlined circumstances for the refusal of a transfer request. Listed among these was a circumstance where a student was attempting to avoid being reported to the Department of Home Affairs for poor course progress. The provider determined that Lila's request to transfer was motivated by a desire to avoid being reported to Home Affairs.

Given the circumstances, the investigation officer determined that it was reasonably open to the provider to conclude that Lila may have wanted to change courses and providers to avoid being reported for poor course progress.

The investigation officer concluded that the provider's decision was not unreasonable, and advised Lila and the provider of the outcome of the investigation.

Commentary

This case was assessed under the National Code 2017 as the actions of the student and provider occurred before 1 January 2018, however the assessment would have been the same under the National Code 2018.

¹ Name changed to protect privacy

An important difference in the National Code 2018 standard in relation to transfers between providers (Standard 7), is that the new National Code specifies a new circumstance where the provider should approve a student's request for release where the student is unable to meet course progress requirements, even after the student has engaged in the provider's intervention strategy.

In this case, Lila did not engage with her provider's intervention strategy so this criterion for release would not be met.

The case also brings into question the provider's responsibility where medical evidence is presented. In our view, the provider acted reasonably in requesting evidence which specifically commented on Lila's capacity to study. If Lila had provided the evidence requested, the provider stated that they would have considered a compassionate deferral of studies (under Standard 9).

Providers are often faced with a dilemma about the weight they must give to medical evidence provided by a student, particularly where the diagnosis is depression, and a psychologist or counsellor recommends that the student change their course, their provider or their city (sometimes to access a support network).

We have observed that some providers have specific policies and procedures around medical evidence, including the requirement for students to see a specific independent medical professional for assessment. We would not support this if the costs to the student are potentially burdensome, however if the provider were to pay for the assessment, we would support this requirement.

It is not unusual for students to experience depression after arrival in Australia. Stress associated with being far from support networks, difficulties with accommodation and share houses, exhaustion from intense engagement in English and other concerns can overwhelm a student while getting established in Australia. While the requirement for a student to see out a six-month period in their principal course may allow time for the student to get past some initial challenges before deciding on major changes, we note that providers are still required to consider a student's individual circumstances in every case.

In cases where a student's principal course is at the end of a long package and they have completed a significant portion of their earlier courses, we would expect providers to give stronger weight to a student's desire to change when determining if a proposed transfer is in a student's best interest (per Standard 7.2.2). This stronger weight does not necessarily mean that we would expect the provider to release in all circumstances.



Ombudsman efficiency improvements

Step 1: Preliminary Inquiries

While we all recognise the importance of having an external and independent complaint-handler for international students, the process of investigating a complaint can be resource intensive for providers, students and investigators.

In response to education providers' feedback, the Office is looking at ways to reduce the time taken to resolve complaints.

As a first step, we are introducing a new 'preliminary inquiry' phase to our investigation procedures.

A preliminary inquiry may mean the Office does not need to conduct a full investigation if we can obtain a document quickly (for example, a copy of the student's written agreement) or an answer to a quick question, like 'has the student been through your internal complaints and appeals process?'

If we decide not to investigate the complaint after we receive your response, we will inform you that no further action is required.

If a formal investigation is commenced, the information we have obtained at the preliminary inquiry stage may help us to focus our requests for information, meaning we do not need to request as much information, saving your time.

We try to resolve preliminary inquiry matters quickly. We may make preliminary inquiries by phone and seek a short turnaround for the requested information (five days) with the option for education providers to advise if they need more time. The aim is to reduce the number of complaints the Office needs to investigate, which will save education providers time in responding to fewer and shorter requests for information.

We look forward to working with you on improving more aspects of our investigative process. If you have any ideas you would like to discuss, please send us an email at overseas.students@ombudsman.gov.au