

Senate Committee Inquiry into Universities Accord (National Student Ombudsman) Bill 2024

1 October 2024

Key takeaways:

1. ATN Universities supports the introduction of the National Student Ombudsman which should bring simplicity and national consistency to the arrangements for review of higher education provider actions affecting students.
2. The Bill provides for a significant expansion of Commonwealth power to oversee the administration of universities, and it is currently unclear what the full extent of this potential expansion will be.
3. The Committee should consider whether there should be limits placed on the Ombudsman's investigative powers, which is currently not limited to just investigating student complaints.

The Australian Technology Network of Universities (ATN Universities) welcomes the opportunity to provide feedback to the Senate Inquiry on the Universities Accord (National Student Ombudsman) Bill 2024.

ATN Universities supports the introduction of the National Student Ombudsman which should bring simplicity and national consistency to the arrangements for review of higher education provider actions affecting students

ATN Universities welcomes the government's commitment to end gender-based violence in a single generation. ATN member universities are committed to taking institutional actions to ensure that universities are striving to eliminate both sexual harassment and gender-based violence.

ATN's member universities are supportive of the move to introduce a National Student Ombudsman (NSO). While the occurrence of sexual harassment and gender-based violence at universities provided the impetus for this Bill, the proposed NSO may consider complaints about an inadequate response to a matter concerning racism, discrimination, reasonable adjustment for people with disability, safety or welfare. The NSO may also consider complaints concerning broader operational issues such as course administration, teaching provision and facilities and disciplinary processes.

Students are currently able to lodge complaints about actions of their university with the relevant State/Territory Ombudsman. However, the current split of Commonwealth and State/Territory arrangements can be opaque and confusing. The diffusion of current arrangements does not support a national effort to remove gender-based violence, sexual harassment, racism or discrimination from our universities.

Concerns about the current overall arrangements that ATN Universities is aware of includes:

- inadequate coverage, for example in relation to student accommodation and other service providers;

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- the lack of consistency in arrangements between jurisdictions; and
- the impact of these factors on student awareness of their options for seeking redress; and
- the difficulties this creates for developing uniform national responses to reduce the problem.

The proposed NSO should bring simplicity and national consistency to the arrangements for review of higher education provider actions affecting students. It has the potential to provide a single, more comprehensive, independent and impartial mechanism for resolving complaints about universities and other providers. It may also improve the handling of complaints and build trust among students and the community in our universities. We propose that vocational education and training (VET) students should be included in the scope of the NSO to ensure procedural fairness for dual-sector universities and allow the tertiary sector to move towards further harmonisation.

While State and Territory Ombudsmen will continue to have jurisdiction, the Bill appears to provide appropriate mechanisms to allow referrals between these agencies and to prevent duplication of effort and waste. Any overlaps between State- or Territory-based Ombudsmen and the NSO should be clarified and resolved before the NSO is established, and these arrangements will need to be monitored to see how effective they are in practice with adjustments made to ensure coherence.

The Bill provides for a significant expansion of Commonwealth power to oversee the administration of universities, and it is currently unclear what the full extent of this potential expansion will be

The NSO will have a broad capacity to investigate the administration of universities with very limited exceptions. Essentially, the proposed NSO can initiate an investigation into any action taken by a provider as long as it is not an excluded action, which is currently only narrowly defined. The National Student Ombudsman Rules (the Rules) can be used to add actions to this list and to clarify that certain actions are not captured by items on this list. There is currently scope within the framing of the legislation to expand the NSO's remit further simply by amending the Rules.

The powers and functions of the NSO are not dissimilar to those that the Commonwealth Ombudsman has in respect of Commonwealth agencies. The NSO can provide a report to a higher education provider and may include in that report any recommendations the NSO thinks fit to make. The minimum requirement placed on the NSO for providing a provider with such a report is that in the NSO's opinion an investigated action taken by the provider was unreasonable. More information on how the NSO is better positioned to investigate and determine outcomes beyond that of the universities is required, as there are concerns that the Bill and NSO may inadvertently restrict the ability of university staff to exercise their professional judgement and discretion.

The Minister has foreshadowed the intention to introduce a second piece of legislation which will further support the work of the Ombudsman by implementing a mandatory National Higher Education Code to Prevent and Address Gender-Based Violence (the Code). It is currently unclear how the Code will intersect with the NSO. Unresolved questions around the Code include how universities can balance the obligations of procedural fairness and natural justice with a trauma-informed, victim-survivor-led approach, matters which

involve students who are also staff members, and the various regulatory duplication and overlaps created by the Code.

Broadening the range of matters on which the NSO can take complaints will require careful calibration and sufficient resources/staffing to enable both the kind of trauma-informed processes and staff expertise needed for gender-based violence complaints as well as those that stem from broader operational issues. One option is that the NSO is established in the first instance to deal with sexual harassment and gender-based violence complaints, and that additional areas are included once the processes for the former are fully developed. This will also allow for better alignment between NSO's operations and the Code.

The Committee should consider whether there should be limits placed on the Ombudsman's investigative powers, which is currently not limited to just investigating student complaints

As currently drafted, there are very few matters of university administration which could not be the subject of an investigation by the NSO. The Bill does not limit the scope of NSO investigations and recommendations in a way that meaningfully acknowledges any level of university autonomy.

The issue concerning the appropriate limits of the NSO's functions and powers becomes more acute at the interface between administration and academic matters. The documentation for the Bill implies that it is relatively easy to distinguish between a matter that involves the exercise of academic judgment and one that does not. For example, paragraph 59, page 23 of the Explanatory Memorandum states "...policies and procedures about academic matters can be considered by the National Student Ombudsman as the content of these policies and procedures does not involve the exercise of academic judgment".

However, it is not easy to draw a clean line between matters of pure administration and matters involving academic judgement in universities. Based on the above, the NSO appears to be able to investigate and make recommendations on university policies on academic freedom and freedom of speech. However, these policies are not simply an administrative matter and there is little evidence that the NSO will be better placed to make the difficult and complex judgements that they involve than senior academic staff within a university community. The Committee might consider the merit of limiting the NSO's ability to investigate and make recommendations on university policies on academic freedom and freedom of speech.

In another example of academic judgement being narrowly defined, the Bill identifies *special consideration* as falling within the Ombudsman's remit. *Special consideration* is an example of assessment policy and is used to grant a student an assessment adjustment if they have been disadvantaged by their circumstances. Claims for special consideration usually require a student to submit documents which outline the impact of circumstances on a student's capacity to complete or prepare for assessment. It is not clear that assessing such a claim would never involve an academic judgement. A similar issue relates to the territory of student misconduct, which could also be seen to be a policy and procedure yet invariably involves academic judgement of some kind.

It is also conceivable the NSO may consider matters which go to resource allocation decisions within the university or priority setting related to a university's mission. For example, paragraph 65 of the Explanatory Memorandum states that the NSO could consider mandatory training provided to academic or other staff, that such a matter is not related to the employment of a particular individual and is not captured by the exclusion. It might be reasonable for the NSO to make recommendations about the mandatory training of staff who interact with students on matters concerning student safety and welfare, but the NSO may also be able to make recommendations about the mandatory training of staff or the broader operations of universities.

We invite the Committee to consider whether there would be merit in placing limits on the NSO's ability to initiate investigations and make recommendations. There will be occasions not involving matters of law or regulation when there are genuine differences of opinion between universities and the NSO on these matters. There are likely also practical limitations on the ability of the NSO to scrutinise university decisions, for example resource limitations, and the NSO should focus its resources on student complaints rather than potentially broad scale investigations.

ATN Universities is committed to continuing to work with Government to co-create workable solutions that deliver the Government's policy intent.

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