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University complaints, reviews and appeals

A student's progress through university studies is not always plain sailing. There are multiple reasons for this, and multiple perspectives. What is to be done if a student has a complaint about University administration? If the University decides to terminate a student's enrolment due to unsatisfactory progress, what recourse does the student have? What if the University sanctions a student for cheating or misbehaving? What if a student is dissatisfied with teaching standards? Or administration of the car park?

The legal context

Any complaint, review or appeal takes place in the context of a regulatory framework. This might be established by statute, by contract or by a mix of the two.

A *contractual context* is created if an enrolling student agrees to comply with requirements as a condition of becoming a student. For example, an enrolling research student might agree to specified requirements about the management of intellectual property rights. An agreement created in this way is binding on the parties (the university and the student) and will be enforced by the courts.

Statutory regulation derives from an Act of Parliament. Many Acts apply to university operations. Many (but not all) public universities are empowered to make their own legislation - university statutes¹ and regulations. and regulations. These are supported by university policies and procedures.

¹ Not to be confused with parliamentary Acts, which are often referred to as statutes.

External review

Many decisions by universities are subject to review by *external* bodies. The external review is generally not the first step in a complaints process - it is generally preceded by an *internal* consideration process.

Discrimination, harassment and victimisation

Victoria's educational institutions must not (with some exceptions) discriminate against:

- persons who apply to be admitted as students; or
- students, by denying or limiting their access to benefits, by expulsion or by subjecting them to any other detriment.²

Complaints can be made to the Equal Opportunity and Human Rights Commission by persons who believe they have experienced discrimination, sexual harassment, victimisation or racial or religious vilification.

² Section 38 of the *Equal Opportunity Act 2010* (Vic). See also: the *Racial and Religious Tolerance Act 2001*.

Employment issues

Workplace disputes are within the jurisdiction of the Fair Work Commission. An object of the *Fair Work Act 2009* (Cth) is to provide “accessible and effective procedures to resolve grievances and disputes.”

Information Privacy

Victoria’s public universities and TAFEs are required to comply with the information privacy principles established under the *Privacy and Data Protection Act 2014* (Vic). Individuals have a right to complain if they consider that personal information or “health information” has been mishandled. Complaints can be made to the Office of the Victorian Information Privacy Commissioner, and if the complaint is not resolved to the Victorian Civil and Administrative Tribunal.

The *first step* in the complaint process is to attempt to resolve the complaint with the university’s privacy officer.

Access to documents

A person may apply to a university for access to “documents” (which can include electronic data). Under the Freedom of Information Act a university is an “agency” which must have an “authorised person”³ who is able to consider applications. The Act provides for review of agency decisions by the Information Commissioner and by the Victorian Civil and Administrative Tribunal.

State/Territory and Commonwealth Ombudsmen

The local (State or Territory) Ombudsman considers complaints about administrative actions by public universities.⁴ The Victorian Ombudsman generally requires, as a precondition, that a complaint first be made to the university, advising

³ Section 26 of the *Freedom of Information Act 1982* (Vic).

⁴ Section 13 of the *Ombudsman Act 1973* (Vic).

members of the public:

“... we may not look into your complaint if, for example ... you have not already made a complaint to the organisation. All public organisations should have procedures to respond to complaints.”⁵

Under the Victorian legislation the Ombudsman may conduct a review of the complaint practices and procedures of an authority on the Ombudsman’s own motion or in response to a complaint.

A recent example of an investigation of administrative actions of a university (and others!) is the Ombudsman’s report on *Outsourcing of parking fine internal reviews*. The report was critical of the use of contractors by agencies to review parking fines. In a 2021 follow up report,⁶ the Ombudsman noted:

“..., in response to the provision of an earlier draft of this report, Monash University said it would also set up a refund scheme, although it maintains its internal review practices have always been lawful.”

For international students studying at “private registered provider” the Overseas Students Ombudsman⁷ has jurisdiction to consider complaints. A “**private registered provider**” is defined to mean a registered provider that is not owned or administered by the Commonwealth, a state or a territory. The Ombudsman will investigate complaints about issues such as:

- refusing admission to a program
- fees and refunds;
- program or provider transfers;
- program progress or attendance;
- cancellation of enrolment;

⁵ Taken from the Victorian Ombudsman website (September 2021) www.ombudsman.vic.gov.au/complaints/#common-questions

⁶ *Outsourcing of parking fine internal reviews - a follow-up report* (March 2021).

⁷ Under Part IIC of the *Ombudsman Act 1976* (Cth) this is the same person as the Commonwealth Ombudsman.

- accommodation or work arranged by the provider;
- the behaviour of education agents;
- failure to provide results in the normal timeframe or to provide agreed services.

ASQA and TEQSA

These two Commonwealth bodies administer registration systems - AQSA⁸ registers VET⁹ and English language course providers¹⁰ and TEQSA¹¹ registers higher education providers.

ASQA (in its website)¹² advises that it “can receive” complaints about the registered organisations:

“ASQA considers complaints about CRICOS providers where the provider is alleged to have breached the required standards, and failed to provide quality training and assessment. ASQA will use this information (and other data) to determine whether further regulatory scrutiny of providers is needed.

ASQA does not act as a consumer advocate and is not able to resolve disputes between students and their providers.

The most effective and timely way to resolve complaints is through your provider’s complaints and appeals process. Providers that offer courses to domestic and overseas students are required to have a complaints process in place that ensures students’ complaints are managed effectively and efficiently.”

This may seem a little like a restaurant owner saying, yes, we will receive your order but you

would do better to go to the restaurant down the road. In short, a complaint relating to registration will be of interest to ASQA, but for a consumer dispute the University’s own complaint system should be used.¹³

A similar approach is taken by TEQSA:

TEQSA is not a complaints resolution body and typically does not have a role in addressing individual complainants’ requests or grievances. We prioritise broader systemic issues.¹⁴

The individual grievances which TEQSA will *not* handle (“outside our responsibility”) and which “should be raised with the provider” include:

- matters of academic judgement, such as examination results;
- requests for providers to re-mark work;
- disputes with the provider about recognition of prior learning;
- guidance on interpreting a provider’s policies and procedures;
- concerns regarding fees, refunds or cancellations, scholarships/financial assistance.

Internal review

Ombudsmen’s Best Practice Guidelines

Australian and New Zealand Ombudsmen have established complaint handling guidelines for universities - *Complaint Handling at Universities: Australasian Best Practices Guidelines* (2016). The *Guidelines* are “tailored specifically for universities and are intended to assist them to make their complaint-handling systems more robust and

⁸ Australian Skills Quality Authority.

⁹ Vocational Education and Training.

¹⁰ The providers and their programs (“courses”) are registered on *CRICOS* - the Commonwealth Register of Institutions and Courses for Overseas Students.

¹¹ Tertiary Education Quality and Standards Agency.

¹² www.asqa.gov.au/faqs

¹³ An indication of the scope of ASQA’s complaint handling is given by the list of “civil penalties” that can be enforced by infringement notice under the *National Vocational Education and Training Regulator Act 2011* (Cth).

¹⁴ www.teqsa.gov.au/when-teqsa-cant-take-action. The website indicates that TEQSA uses complaints to inform its assessment of providers’ compliance.

effective.¹⁵ The *Guidelines* divide complaints into three broad categories:

- *disputes* - issues about university administration that are not systemic. For example, complaints about assessments, exclusions, discontinuation of courses, lack of procedural fairness, and grievances about bullying or transient workplace conditions lodged by staff;
- *mismanagement* - such things as unreasonable decisions, inconsistent application of policy, denial of procedural fairness, failure to provide rights, failing to consider relevant matters, wrong advice leading to detriment, and negligence;
- *misconduct* - ethical and integrity issues such as plagiarism, unethical or biased marking, conflicts of interests, fraud, bribery, dishonesty, improper favouritism, discrimination and harassment.

The *Guidelines* note that universities providing services to overseas students are also required under the ESOS Act (about which more below) to develop complaints and appeals processes. The *Guidelines* are said to “assist universities to comply with these requirements.”¹⁶

Victorian standards

The Victorian *Education and Training Reform Act 2006* (Vic) empowers the Minister to issue policies, guidelines, advice and directions to education or training institutions in or related to Victoria.¹⁷ In 2015 the Minister issued a *Ministerial Direction - Standards for Registered Training Organisations* which directs the VRQA¹⁸ to issue guidelines to implement specified requirements, including requirements relating to complaints and appeals. The purpose is to ensure that providers of VET meet substantially the same regulatory standards,

and to “supplement” the Australian Quality Training Framework.

Commonwealth standards

The Acts under which public universities operate impose some limitations on their administration, for example by requiring universities to establish academic boards and to seek (State) Ministerial approval of their statutes. Largely, though, decision-making processes are created and managed by the universities themselves.

There are, however, practical constraints. Another tier of government - the Commonwealth Government - has established standards which apply generally to education providers, including universities. Registration with the Commonwealth is contingent on compliance with the standards. Funding and recognition of awards, in turn, is contingent on registration.

There are multiple standards, all of which apply or potentially apply to universities:

- the *Higher Education Standards (Threshold Standards) 2021* apply to the providers of “higher education”;
- universities with overseas students (all public universities) are required to comply with a *National Code* made under the ESOS Act;
- for providers of VET courses (in Victoria, the “dual sector” universities), there are *Standards for Registered Training Organisations (RTOs) 2015*.

As the terms *standards* and *code* suggest, the requirements are performance based rather than prescriptive, using terms such as “transparent” and “timely.” It is for education providers to find ways of meeting the requirements.

The HES Framework (Threshold Standards)

The *Threshold Standards* set out minimum acceptable requirements for the provision of higher education in or from Australia by registered higher education providers. They include five clauses

¹⁵ Foreword by the Commonwealth/Overseas Students Ombudsman.

¹⁶ At page 2 of the *Guidelines*.

¹⁷ Section 5.2.1 of the *Education and Training Reform Act 2006* (Vic).

¹⁸ Victorian Registration and Qualification Authority.

relating to student grievances and complaints.¹⁹ These require that:

1. *Current and prospective students have access to mechanisms that are capable of resolving grievances about any aspect of their experience with the higher education provider, its agents or related parties.*
2. *There are policies and processes that deliver timely resolution of formal complaints and appeals against academic and administrative decisions without charge or at reasonable cost to students, and these are applied consistently, fairly and without reprisal.*
3. *Institutional complaints-handling and appeals processes for formal complaints include provision for confidentiality, independent professional advice, advocacy and other support for the complainant or appellant, and provision for review by an appropriate independent third party if internal processes fail to resolve a grievance.*
4. *Decisions about formal complaints and appeals are recorded and the student concerned is informed in writing of the outcome and the reasons, and of further avenues of appeal where they exist and where the student could benefit.*
5. *If a formal complaint or appeal is upheld, any action required is initiated promptly.*

The ESOS Code

For registered providers of education to overseas students, a *National Code of Practice*²⁰ applies. It would be impracticable to establish two sets of procedures, so, in effect, universities must also comply with the *National Code* requirements in respect of *all* students.

The *National Code* includes *Standard 10*

¹⁹ Standards 2.4 *Student Grievances and Complaints*.

²⁰ *National Code of Practice for Providers of Education and Training to Overseas Students 2018*, made under the *Education Services for Overseas Students Act 2000* (Cth).

Complaints and appeals. The overarching requirement is as follows:

The registered provider must have and implement a documented internal complaints handling and appeals process and policy, and provide the overseas student with comprehensive, free and easily accessible information about that process and policy.

The VET Standards

Registered providers of VET programs are expected to comply with *Standards for Registered Training Organisations (RTOs) 2015*. The *Standards* provide for RTOs to have a complaints policy to manage and respond to allegations involving the RTO, third parties and students (“learners”), as well as an appeals policy. The RTO’s policies are to provide for review by an appropriate party independent of the RTO if the processes fail to resolve the complaint or the appeal.²¹

How do universities deal with complaints?

Finally, we offer some observations on university complaint, review and appeal processes. Our overview comment is that the *Commonwealth Standards* and *Code* necessarily shape university processes. We mention in particular:

- the “mechanisms” must be capable of resolving grievances about “any aspect” of the student experience;²²
- “policies and processes” must deliver timely resolution;²³
- there must be provision for review by an “appropriate independent third party.”²⁴

²¹ Standard 6 of the *Standards*.

²² Standard 2.4 of the *Threshold Standards*.

²³ Standard 2.4 of the *Threshold Standards*. *ESOS Code* (Standard 10) requires commencement of consideration within 10 days, with finalisation as soon as practicable.

²⁴ Standard 2.4 of the *Threshold Standards* and Standard 10 of the *ESOS Standards*. See also Standard 10 of the

University ombudsmen

Some universities, but not all, have appointed ombudsmen to accept complaints about university administration. Generally, the ombudsman considers a complaint only after attempts at resolution have failed. At Griffith University (Qld), for example, the Student Ombudsman will consider an issue only after a “formal complaint” has been made.

Process requirements

As can be seen in the Griffith University procedure, the making of a “formal” complaint can be a pre-requisite to what follows (if the complaint is not resolved). It is possible also to establish a three step approach (step 1 being a formal complaint) in which an internal appeal lies from the resolution of a complaint. In that model, an appeal is available on specific grounds relating to the review decision. Here is an example of specific grounds for an internal appeal:²⁵

- that new and relevant material exists that was not reasonably available to the student before the review decision was made and that would have a significant impact on the decision
- that there was a misapplication of policy or procedure resulting in some real disadvantage to the student
- that the sanction applied was manifestly excessive, or
- that there was a bias or a conflict of interest on the part of the reviewer.

Avoiding duplication

If there are multiple channels for considering complaints, it is important to avoid duplication, to avoid unnecessary expense as well as the possibility for inconsistent outcomes.

National Code (for international students).

²⁵ Flinders University *Student Review and Appeal Policy*, clause 3.4.

Complaints that lack substance

Not all complaints have substance, and there is the possibility of some being made for tactical reasons (for example, to delay the implementation of a decision).

The tight-rope that universities must walk is compliance with Commonwealth standards, and the argument the complaint handling process, if it too readily dismisses complaints and appeals, is non-compliant.

The concept of dismissing complaints that lack substance is embedded in the Victorian *Ombudsman Act 1973* (Vic) (section 15A). This allows the Victorian Ombudsman to refuse to deal with a complaint if the Ombudsman considers that:

- the subject-matter of the complaint is trivial;
- the complaint is frivolous or vexatious or is not made in good faith; or
- the complaint lacks substance or credibility.

Leaving the gate open for external review

The *Threshold Standards* and *VET Standards* refer to “review by an appropriate independent third party,” the *National Code* (for international students) refers to “the appropriate complaints handling and external appeals body.”

The ASQA and TEQSA websites (and the TEQSA *Guidance Note: Grievance and Complaint Handling*) suggest that ASQA and TEQSA do not consider themselves to be complaints handling and appeal bodies.

Here is what the TEQSA *Guidance Note* says:

All students at public higher education providers have an avenue of appeal to the relevant Commonwealth, State or Territory Ombudsman, about administrative actions or decisions and the related processes, but only after all internal processes for resolution have been followed and concluded.”²⁶

²⁶ *Guidance Note*, page 6.

This appears to indicate that access to the Ombudsman is considered to be sufficient to constitute an avenue of “appeal.” However, the *Guidance Note* goes on to say:

Providers may make arrangements for grievances to be considered by an external qualified dispute resolver. This arrangement must provide for matters to be determined by the dispute resolver if mediation is not acceptable to either party or if mediation is undertaken but does not prove to be successful.