

**Submission by the
Commonwealth and
Overseas Students Ombudsman**

**FUTURE DIRECTIONS FOR
STREAMLINED VISA PROCESSING
DISCUSSION PAPER**

Submission by the Commonwealth Ombudsman, Colin Neave

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BACKGROUND

The Commonwealth Ombudsman safeguards the community in its dealings with Australian Government agencies by:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- assisting people to resolve complaints about government administrative action
- developing policies and principles for accountability, and
- reviewing statutory compliance by law enforcement agencies with record keeping requirements applying to telephone interception, electronic surveillance and like powers.

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

The Overseas Students Ombudsman:

- 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 Overseas Students Ombudsman 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).

INTRODUCTION AND SUMMARY

Thank you for the opportunity to comment on the Department of Immigration and Border Protection's (DIBP) discussion paper 'Future directions for Streamlined Visa Processing'. Streamlined Visa Processing (SVP) is relevant to the work carried out by the Ombudsman in relation to several of our functions, in particular we:

- investigate complaints from student visa applicants about DIBP, and
- determine appeals from overseas students when a private education provider refuses to issue a release letter.

In our role as Overseas Students Ombudsman (OSO) we receive complaints and appeals from students with issues associated with transferring to another education provider before completing six months of their principal course. Education Providers must have a policy setting out how they will consider transfer requests. It is generally expected that providers will release students unless to do so would be to a student's detriment.

The introduction of SVP has added a layer of complexity to many transfer complaints and we consider that it is important for DIBP to engage with the Department of Education (DE) in relation to the reform process for the Education Services for Overseas Students (ESOS) legislative framework when considering and implementing any changes to SVP.

Under our Commonwealth Ombudsman jurisdiction we can investigate complaints about visa processing, including complaints about student visas. These complaints can relate to matters such as delay, misapplication of the Genuine Temporary Entrant (GTE) criteria or incorrect advice from DIBP.

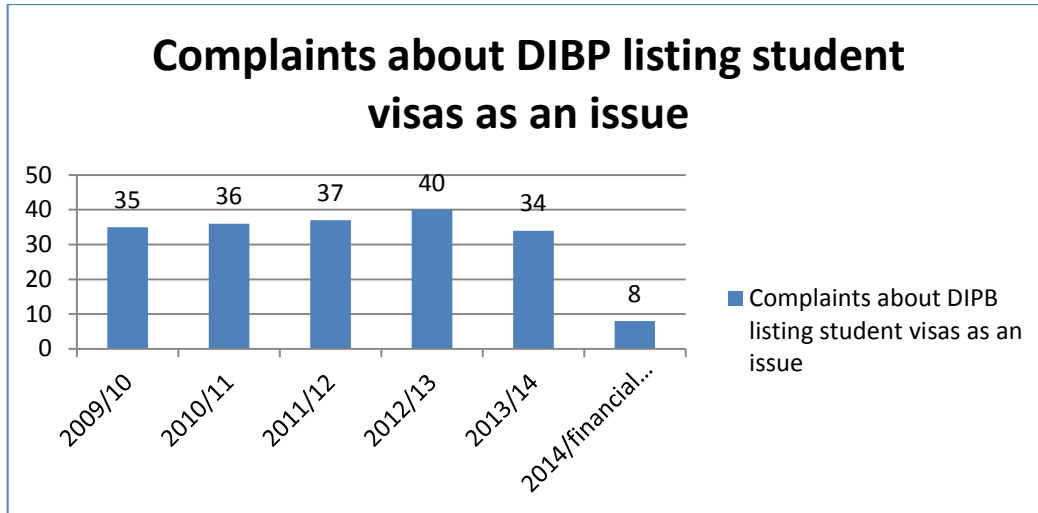
We recently conducted an own motion investigation into DIBP sending an advice letter to 1400 overseas students stating that they were in breach of their student visa conditions, when in fact they were only potentially in breach. We will be providing DIBP with the opportunity to comment on our investigation shortly.

RESPONSE TO THE DISCUSSION PAPER

Student visas and immigration complaints

The international student sector is growing and there has been a marked increase in the number of complaints from overseas students to the OSO in the past 18 months. However, as the chart below shows, the number of complaints about the administration of student visas by the DIBP is small and may be decreasing¹.

¹ In this financial year up to 9 December we have received only 8 complaints about student visas but during the same period last year we 15 student visa complaints. In the same period in 2012 we received 16 student visa complaints.



Maintaining the Genuine Temporary Entrant Criteria for all applicants

We note that, under the proposal to combine provider and country risk migration, the GTE criteria will continue to apply to all student visa applicants.

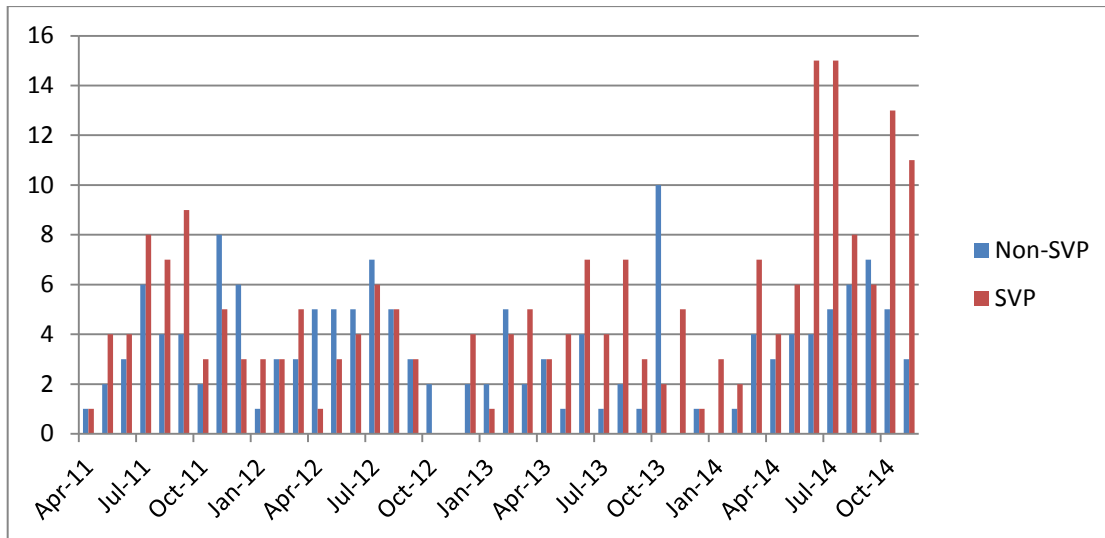
In August 2013 the Commonwealth Ombudsman provided DIBP with a discussion paper highlighting some areas of concern regarding the application of GTE criteria that we had identified in our investigations of complaints about visa refusal decisions.

In its response early this year DIBP advised that it had implemented a number of quality assurance measures designed to improve the quality and consistency of GTE decision-making. DIBP also advised that education stakeholders indicated that concerns regarding the application of the GTE requirement had decreased significantly.

The effect of SVP on Standard 7 student transfer appeals to the Ombudsman

In 2013-14, the second most common type of complaint to the OSO were requests for external appeals from overseas students who had been refused a release letter by their original provider under Standard 7 of the The National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007 (the National Code), preventing them from transferring to another provider, prior to completing six months of their principal course.

Since the OSO began on 9 April 2011, we have received 368 complaints/external appeals relating to Standard 7 student transfers. Of these, 59 per cent (217) related to SVP providers and 41 per cent (151) related to non-SVP providers. The number of appeals relating to SVP providers has increased markedly in recent months, as shown by the following graph.



The increase in Standard 7 appeals could be due to the extension of the SVP arrangement on 22 March 2014 to include 19 eligible non-university providers in the higher education sector, in addition to the original 42 universities.

From 23 November 2014, the SVP arrangement has been extended to include 55 Vocational Education and Training (VET) education providers that offer advanced diploma level courses. Based on the trends to date, it is likely this increase in SVP providers will result in a further increase in Standard 7 transfer appeals to the Overseas Students Ombudsman.

For reasons we have set out below, we consider that the administration of Standard 7 has become more complex since DIBP introduced SVP on 24 March 2012.

The preamble to Standard 7 of the National Code states that, 'Registered providers, from whom the student is seeking to transfer, are responsible for assessing the student's request to transfer within this restricted period. It is expected that the student's request will be granted where the transfer will not be to the detriment of the student'.

Students who have been granted a visa to study with an SVP provider/s may or may not be in breach of their student visa condition, or may or may not be granted another visa if they transfer to another provider, depending on a range of factors including whether or not the:

- receiving provider is an SVP provider
- the course is in a different education sector
- student's country of passport is Assessment Level 1 for their current visa
- student has held their current student visa for at least 12 months².

The number of variables involved means that it is difficult to determine whether a student's proposed transfer would put them in breach of their student visa condition and therefore be to their detriment.

If an SVP provider states that they have refused a student's transfer because it would put the student in breach of their student visa, it is difficult for the OSO to verify that this would actually be the case, or if the student will be successful in applying for a subclass of visa appropriate to the new course or provider.

² <http://www.immi.gov.au/Study/Pages/changing-courses.aspx> Accessed 16 October 2014.

Similarly, if a provider does not raise an argument about detriment due to the SVP program and fails to demonstrate any other detriment, the Ombudsman's office may recommend that the provider release the student. There is a risk that the student will think this means they are free to transfer to the new provider under their student visa conditions whereas the latter is a matter for DIBP to determine.

To minimise misunderstandings, we state in our template letters that 'If you want to change your course of study, you need to ensure that you continue to meet all the conditions that apply to your student visa. Visit the DIBP website for more information: www.immi.gov.au/Study/Pages/changing-courses.aspx'

However it remains the case that uncertainty about the visa implications of transfers complicates the application of Standard 7. Under the proposal to combine a country and provider risk matrix the DIBP would need to consider how students attracting different country risk ratings seeking to transfer from low to high risk providers would be dealt with. It is important that new processes or policies are clearly communicated to education providers and students alike.

The DE is currently considering possible changes to Standard 7 of the National Code as part of its Reform of the ESOS Framework. We have noted to DE that it is important then that any changes to the transfer process under the ESOS Framework take into account DIBP's SVP policy. In particular, the relationship between standard 7 and the SVP arrangements or any new arrangements should be very clearly articulated in the revised National Code.

It is also important that, if DIBP extends the SVP arrangements, it explains to education providers what they are expected to do to assess student's immigration risk for SVP purposes and what is not appropriate. For example, we have seen one education provider include compliance with student visa condition 8202 as a criterion in their admissions/enrolment policy. We understand this may be appropriate if the provider is responsible for managing its SVP risk rating.

However, in another complaint we investigated, we found the education provider had included the GTE requirement in its Student Transfer Policy, stating it would refuse a transfer under Standard 7 of the National Code if the student did not meet the GTE requirement.

We advised the provider that the GTE was applied by DIBP in assessing student visa applications and should not be used by education providers to make decisions under Standard 7 of the National Code regarding student transfer requests. We recommended the provider remove the GTE criteria from its Student Transfer Policy, which it did.

Current and accurate risk ratings

We note the various proposals for the future direction of the SVP arrangements, including the combined provider and country immigration risk model. We do not have a view on the possible alternative models. However, we note that any model using risk ratings needs to be supported by timely and regular internal review to ensure the risk ratings being used to make administrative decisions were current and accurate.

For example, in 2008 the Commonwealth Ombudsman released an own motion investigation report into DIBP's Safeguards system³, which found that some Safeguard risk profiles were not being updated in a timely manner or were being renewed without any supporting data.

³ www.ombudsman.gov.au/files/investigation_2008_07.pdf

Our report also noted that the Risk Factor List (RFL), which is used to determine the immigration risk of certain visa applicants and informs some Safeguards profiles, had not been updated since 2001, even though a 1996 Parliamentary Committee recommended it be updated every year.⁴

This meant that in 2008 DIBP staff were still using risk ratings based on data from the 1999-2000 year. This highlights the need for any alternative SVP model using risk ratings to be supported by regular, timely, evidence-based reviews to ensure administrative decisions are based on relevant, accurate, current data rather than out-of-date and potentially irrelevant and erroneous data.

Review of decisions

Education providers, who disagree with the risk rating that DIBP could assign to them under this proposed alternative model, must have a right to an internal review right. This also requires the usual natural justice principles to inform them of the basis for the decision. If the education provider was not satisfied with the outcome of the DIBP internal review, the education provider could complain to the Commonwealth Ombudsman.

CONCLUSION

Although we do not have a view about the efficacy of SVP or the proposed changes we hope the observations set out above will be helpful to the DIBP.

We suggest that the DIBP:

- continue to work closely with the DE and other education stakeholders in reviewing SVP
- take steps to ensure that risk ratings are based on current and accurate information
- provide a process of review for providers in relation to their risk ratings.

Thank you again for the opportunity to comment.

⁴ Ibid. page 9.