

## Duty of Care Model for the Higher Education Sector: Submission for the Accords Panel

### **The underpinning motivations for the model proposed:**

Educational outcomes are inextricably linked to student welfare and safety. Sexual assault and harassment (SASH) victims suffer higher course failure and non-attendance rates due to the trauma they face.<sup>1</sup> The low enrolment, and then retention, of students from a marginalised background indicate a systematic inability to properly cater to their needs. It is clear the legislative frameworks and regulatory bodies are not sufficient to create an equitable tertiary education experience.

Students are partners with teachers and academics in the higher education sector as we experience the learning process.<sup>2</sup> Without our voice, the analysis of the sector is one-sided and cannot develop efficiently. This model seeks to incorporate this in the pre-existing systems to make them more efficient and aware of the issues students face when attaining their education.

Transparency and accountability of our higher education institutions matters. This model recognises that there are inequalities in information, money, time and other resources that creates a power imbalance between a tertiary education provider and a student. This raises concerns about whether students can protect themselves from discrimination, abuse and exploitation when the gap is so high. The Government must intervene to ensure that everyone is protected against such harm.

These ideas have been successfully implemented in the New Zealand model of Tertiary Learner Wellbeing and Safety.<sup>3</sup>

The following recommendations are described in more detail below:

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<sup>1</sup> Molstad, T. D., Weinhardt, J. M., & Jones, R. (2023). Sexual assault as a contributor to academic outcomes in university: A systematic review. *Trauma, Violence, & Abuse*, pp.218-230.

<sup>2</sup><https://static1.squarespace.com/static/5f0515b1b1a21014b5d22dd6/t/60b46e06e39ebd5295615de5/1622437384673/NZUSA+Submission+on+Wellbeing+Code+Final.pdf>

<sup>3</sup>[https://www.nzqa.govt.nz/assets/Providers-and-partners/Code-of-Practice/Tertiary-and-International-Learners-Code-2021/NZQA\\_Pastoral-Care-Code-of-Practice\\_English.pdf](https://www.nzqa.govt.nz/assets/Providers-and-partners/Code-of-Practice/Tertiary-and-International-Learners-Code-2021/NZQA_Pastoral-Care-Code-of-Practice_English.pdf)

- Allow the Commonwealth Ombudsman to take student welfare and academic complaints
- Develop a National Duty of Care standard for welfare and safety embedded student voice
- Establish a Disability Education Commissioner
- Create a National Taskforce into Sexual Assault and Sexual Harrassment (SASH) at universities and TAFEs
- Establish Student Voice on Student Experience
- Create a Dispute Resolution Scheme to properly settle student grievances with student empowerment as a focus

## Recommendations:

### I Legislative Changes

#### Allow the Commonwealth Ombudsman to take student welfare and academic complaints

##### *Rational:*

Currently only the state and territory ombudsman can handle complaints from public universities.<sup>4</sup> Changing the *Ombudsman Act* ensures the Federal Government has more accurate data when making decisions on student welfare for higher education.

##### *Key Change:*

Change s5 of the Ombudsman Act 1976 to include all Australian universities and TAFEs as an authority the Ombudsman can investigate and receive complaints from.

#### Develop a National Duty of Care standard for welfare and safety embedded student voice:

##### *Rationale:*

Safety of students is paramount to a good education. Universities must be required to make their campuses and learning process safe and inclusive for everyone, including those from marginalised backgrounds.

##### *Key change:*

- 1) Legislate for a duty of care on universities for student welfare and safety. This should align with other higher education standard legislation where delegated legislation is used to determine the nature of the obligations to give flexibility. For example, see the Disability Standards for Education.
- 2) Require universities and TAFEs to develop action plans addressing issues of student safety, such as SASH, and retention of students from marginalised

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<sup>4</sup> <https://www.ombudsman.gov.au/complaints/international-student-complaints>

backgrounds. These action plans must be codesigned by a diversity group of student stakeholders, publicly published and reviewed every three years so they do not become outdated.

- 3) Tertiary education providers must be required to include the following in their action plan:
- Processes to address systemic discrimination, bias and emergencies and professional development for staff;
  - New practices to develop and maintain relationships with marginalised groups of students;
  - Processes to document commitments made by the institution in response to student concerns;
  - Dispute resolution processes led by trauma informed staff.

## II Establish New Bodies to Develop a Duty of Care:

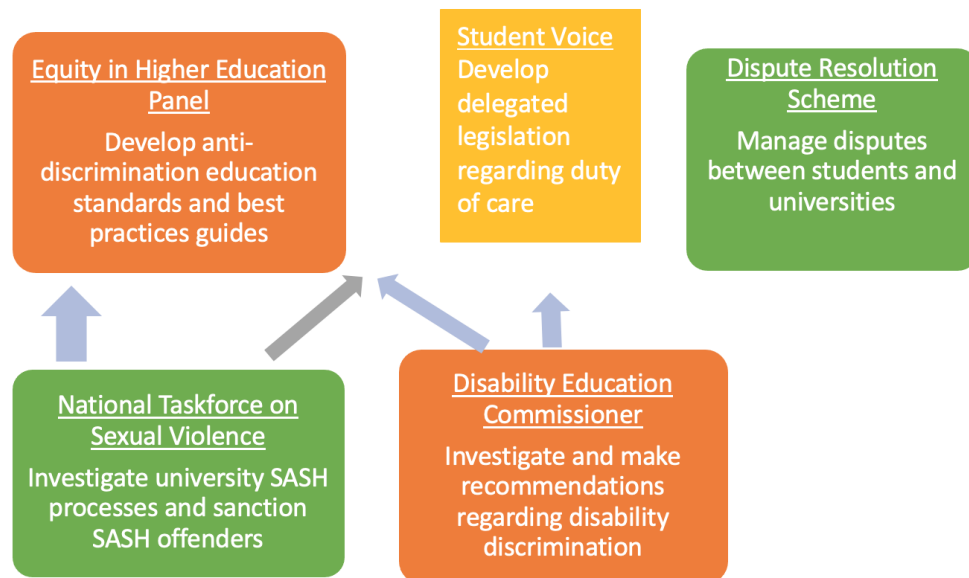


Figure 1: Overview of the key roles of the different bodies and how they should connect

Imposing a duty of care will take specialised knowledge, consistent consultation and dispute resolution options. The university regulator, Tertiary Education Quality and Standards Agency (TEQSA), is not sufficient to provide this level of insight as it does not take individual complaints and has insufficient power to impose effective consequences on both the institution and an individual. The bodies are designed to provide scrutiny independently from the higher education sector with built in student insight.

### Establish a Disability Education Commissioner:

#### *Rationale:*

There must be accountability mechanisms to ensure the Anti-Discrimination Act and the right for d/Disabled students to pursue tertiary education is upheld in public and private universities. Currently, there is no investigative body with the expertise in disabilities anti-discrimination legislation to make recommendations for law reform. An ideal example is the Regional Education Commissioner which ensures *regional* education at all levels is of high quality. With the defunding of the National Disability

Coordination Officer program (NDCOs), there needs to be a similar national body that manages the enrolment of students with disabilities to higher education, but goes further in reducing the institutional barriers that make d/Disabled students leave. The lessons learnt from the inefficiencies of the NDCO program is that national education must have a central network with a contactable, public figure who can independently scrutinise tertiary education providers' enrolment and retention rates.

Additionally, there must be significant law reform to protect against discrimination for d/Disabled people. As figure 2 demonstrates, using the width of the green arrows, there is a gradual reduction in protections as the obligation to not discriminate develops between legislation and court interpretation of the Disability Discrimination Act. The best model providing all-encompassing protection against discrimination is the Canadian model in the first box. The DDA provides weaker protection that has been narrowed by the Sklavos decision and the Disability Standards for the Education 'the Standards.'

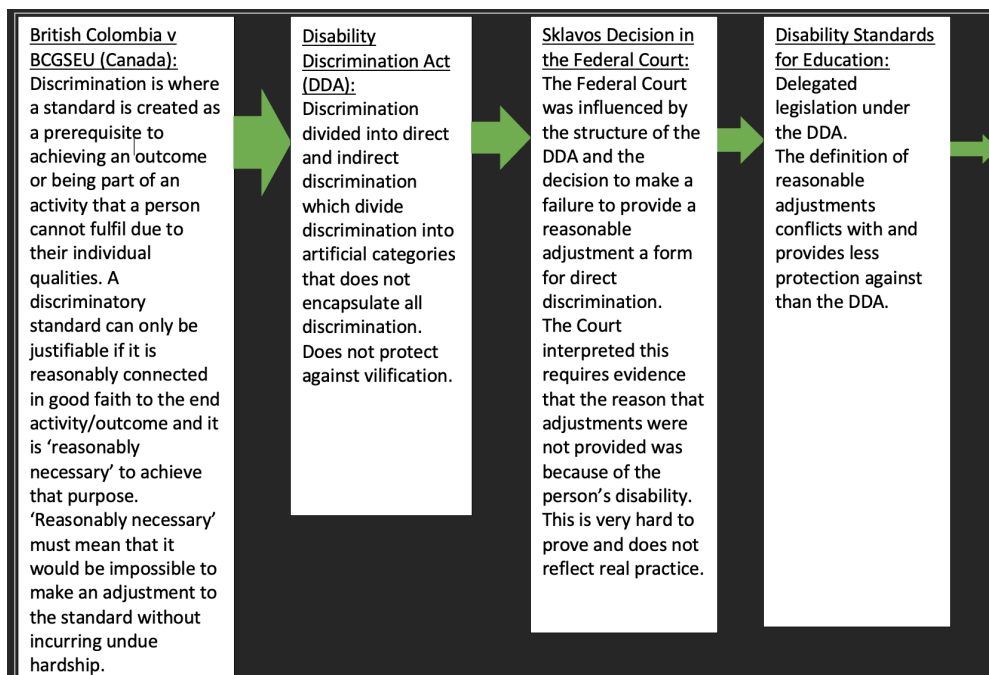


Figure 2: The reductions in protections offered in Australian legislation.

**Key changes:**

- 1) Dissolve the separations between direct and indirect discrimination contained

in section 5 and 6 of the DDA.

- 2) Replace this with a positive duty to provide reasonable adjustments unless it can be demonstrated that it would be impossible to make an adjustment without causing unjustifiable hardship. Ensure that all standards imposed must be reasonably linked to the outcome/activity and imposed by the discriminator in good faith to achieve that outcome.
- 3) Amend the definition of a reasonable adjustment in the Standards to be on par with the DDA and require universities and TAFEs to have the same positive duty to provide accommodations.
- 4) Empower the Disability Education Commissioner investigate whether the DDA and Standards are complied with
- 5) Memorandum of understanding for consultation with the NUS Disabilities Officer to ensure communication between student representatives and higher ed oversight bodies
- 6) Ensure universities receiving DSP funding have up to date disability action plans co-designed with d/Disabled students and they include spending under DSP in their annual financial statements

Create a National Taskforce into Sexual Assault and Sexual Harrassment (SASH) at universities and TAFEs:

*Rationale:*

SASH in university is an ongoing issue that has both individual and institutional dimensions. We have the information relating the demographics and experiences of students outlined in the National Student Safety Survey. It is clear that to improve the student experience, there must be a body with sufficient expertise to ensure appropriate review of the university's handling of a SASH complaint. This currently does not exist. The current system based on the Ombudsman does not work because they have no power to sufficiently combat institutionalised SASH if they can only make recommendations.

*Key changes:*

- 1) Establish a National Taskforce on University and TAFE sexual violence. This body must be independent from all tertiary education providers and staff with trauma informed experts.
- 2) This body should handle student complaints relating to the university/residences' process for handling complaints in the first instance.
- 3) This body should receive information about the number of reports and the education provider's response to them including sanctions given.
- 4) This body should be empowered to give sanctions where the minimum standards for an anti-SASH process haven't been met.

Establish Student Voice on Student Experience:

*Rationale:*

The majority of legislation concerning the obligations on higher education institutions has a matching organisation designed to update these obligations. This gives greater flexibility. Likewise, a duty of care should have a matching duty of care code that outlines the precise content of the obligations to student safety and welfare. This includes discrimination as it is a threat to student welfare. However, for this duty to be effective and accurate when dealing with the student experience, it must have at least 50% student voting membership. This is to provide expertise and feedback to have the safest institutions with equity front of mind.

*Key changes:*

- 1) Develop a duty of care code that underlies the statutory duty of care. Allow this code to be delegated legislation made by an independent body in the Department of Education
- 2) This body in the Department of Education should have a membership that is at least 50% student-based to provide better representation of the student experience. Ensure that the National SASH Taskforce and the Equity Education Commissioners (e.g. the Disability Education Commissioner, the Regional Education Commissioner, etc.) are ex-officio members on this body to ensure the Taskforce and the Equity Education Commissioners can make



recommendations to the law reform agency.

Create a Dispute Resolution Scheme to properly settle student grievances with student empowerment as a focus:

*Rationale:*

Disputes between educational institutions and individual students have been litigated in the past in the court system. However, this requires extensive resources on behalf of the student and they may risk being an unrepresented litigant or not pursuing their valid claim. This is especially egregious if an academic institution has discriminated against a student. There must be a specialised tribunal that can assist students navigate disputes between them and their academic institutions.

*Key changes:*

- 1) Develop a Dispute Resolution Scheme similar to the NZ model that can enforce the duty of care code and resolve disputes including discrimination against students.
- 2) Allow this body to issue remedies such as fines or deregistration of a tertiary provider or limited exclusions of individuals from tertiary administration or teaching. These penalties are based on the sanctions available when a director breaches their statutory duties. Similarly, individuals who have seriously breached their duty of care when conducting their responsibilities to student welfare should not be permitted to undermine our academic institutions.