

Redacted Final Report
Full investigation - *Ombudsman Act 1972*

Complainant	The complainant
Agency	TAFE SA
Ombudsman reference	2015/05125
Agency reference	TAFE/16/24975 - BRIEFCTAFE/16/209
Date complaint received	3 July 2015
Issues	<ol style="list-style-type: none">1. Whether TAFE SA was wrong in issuing a first formal warning to the complainant2. Whether TAFE SA was wrong in issuing a second formal warning to the complainant.3. Whether TAFE SA failed to deal with the complainant's complaint under its Student Complaint Procedure for Non-academic matters.

Jurisdiction

The complaint is within the jurisdiction of the Ombudsman under the *Ombudsman Act 1972*. In this case, I consider it is proper to investigate the complaint.

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from TAFE SA
- clarifying the response with the Office of the Chief Executive, TAFE SA
- considering the following policies, procedures, guides and website information of TAFE SA:
 - Student Code of Behaviour
 - Code of Practice
 - TAFE SA Rules
 - TAFE SA Assessment Policy and Procedures
 - Student Conduct and Student Disciplinary Policy
 - Student Complaint Resolution Policy for Non-academic Matters
 - Student Complaint Resolution Procedure for Non-academic Matters
 - A Guide for Students with a Disability or Medical Condition
 - ¹Access and Equity Policy
 - ²Social Sustainability Policy
 - Disability Access and Inclusion Plan 2015-2020
 - Disability Support (www.tafesa.edu.au)

¹ TAFE SA Access and Equity Policy was superseded the Social Sustainability Policy

² TAFE SA Social Sustainability Policy superseded the Access and Equity Policy

- Discrimination (www.tafesa.edu.au).
- providing the parties with my provisional report for comment, and considering their responses
- preparing this report.

Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decisions in *Briginshaw v Briginshaw* (1993) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were upheld. That decision recognises that greater care is needed in considering the evidence in some cases³. It is best summed up in the decision as follows:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved...⁴.

Response to my provisional report

Both parties have advised my Office that they have no comments to make in relation to my findings in the Provisional Report dated 28 July 2016. Therefore, my views remain the same.

Background

1. At the relevant time, the complainant was enrolled in a course offered by TAFE SA.
2. The complainant has advised my Office that he has been diagnosed with a medical condition.
3. In early 2015 TAFE SA introduced Moodle as part of its online eLearning educational delivery platform. Students, current and new, were expected to use Moodle to submit assignments and assessments.
4. On 17 March 2015 the complainant met with a SL to discuss his concerns about using Moodle. At this meeting, the complainant was provided with guidelines and assistance in the use of Moodle including working through any application issues he identified. It is unclear with which SL this discussion took place.
5. TAFE SA have advised my Office that on 19 March 2015, the complainant lodged a complaint with the SL about his dissatisfaction about having to use Moodle. The complainant requested that he be given the option of submitting assignments on paper or by email. TAFE SA has further advised that it was negotiated that the complainant '...could complete the subjects he was currently enrolled into for Semester 1, 2015 and that he would be able to hand in hardcopy assignments or submit them by email.' It is unclear which SL received the complaint and whom allowed him to submit assignments via hardcopy or by email.
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³ This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at pp 449-450 per Mason CJ, Brennan, Deane and Gaudron JJ.

⁴ *Briginshaw v Briginshaw* at pp 361-362, per Dixon J.

7. On 23 March 2015 the complainant emailed SC and LI about a proposed meeting and stated:

I don't want a meeting. I'm pretty sure something is [causing my medical episode]. I haven't experienced [this] in years. I don't mind using Moodle. I need to work out what is messing with me.

8. On 25 March 2015 the complainant emailed LI, SC and CC and stated that:

This matter keeps coming up and disturbing my peace of mind and causing me a great deal of unrest. I have not been able to sleep...since bringing it up to start with, it is interfering with my studies - I have been unable to work on any assignments since. I cannot rest and I cannot even control my emotions. I have even thought of harming myself on several occasions over it. It is not going away as I hoped it would but continues to become worse. Last night the thought of taking my own life came to mind. I know this isn't normal behaviour...I have strong and very deep issues that you and the administration of [TAFE SA] need to make concessions for. I wish I were [sic] upset when I write this but I am not. I am very calm, not emotional and have looked at this from an outside point of view: it is clearly upsetting me and is only getting worse. I have to do something about it.

9. On 26 March 2015 (7:28 AM), SC emailed the complainant and advised the complainant that:

However, given the content of your email below (25 March 2015 - 11.15 pm) I would strongly recommend that you go directly to your [health care provider]...or even Emergency at the local hospital. You need some professional help. You are well aware that your thinking is not right and you said so yourself in an email over the weekend.

Given you should be seeing a [health care provider], I am not expecting you at our allotted appointment time.

Let me know how the meeting goes with your health care provider please.

10. On 26 March 2015 (8:52 AM) EM emailed the complainant and in part advised the complainant of the following:

[CC] will be in touch with you in relation to any concerns that you may have with your studies in due course.

In relation to the concerns you have raised about Moodle. Moodle is the platform that TAFE SA has elected to use as the online delivery tool for all programs. [The TAFE SA course] has developed online learning programs for subjects within the Advanced Diploma as well as for short courses.

I understand and appreciate your frustrations in coming to terms with online delivery and we will certainly support you through this process to the best of our abilities, as has already been done by [LI and CC]. My understanding is that the lecturer facilitating your current subject has agreed to let you submit your work using email to assist with this transition process. I do need to make it clear that the program lecturers are not in a position to counsel you in relation to the ongoing personal issues that you have referred to in your communications. I urge you to seek support through the appropriate channels within TAFE SA and to contact Learner Services and the student counsellors on 8207 8200. They are equipped to assist you in working through the issues in relation to [your medical condition] etc., that you have referred to. I also need to make it clear that the prolific number of contradictory emails received from you over the past week is not appropriate.

...the lecturers will support you in your studies as much as possible and can provide advice in relation to support studies that you may wish to undertake. Outside of this

you need to seek advice through Learner Services. I have attached both the Learner Services and Student Code of Behaviour [(Student Code)] brochures for your reference.

11. On 26 March 2015 (10:06 AM) EM advised the complainant that:

I appreciate that...and acknowledge that I am not appropriately trained or qualified to understand or deal with your individual situation in regards to any [medical conditions] you have, which [sic] are obviously having a significant impact on your capacity to deal with study and changes. Neither are the lecturers. That is why I am strongly advising you to seek the appropriate assistance. As things are currently, we will not be able to achieve a positive outcome for anyone, which is not what we want.

12. On 26 March 2015 (10:41 AM) the complainant emailed SC, LI and CC and stated:

Of course it's not just a matter of "what I want" but has become a matter that nobody is listening to MY needs and are only imposing their viewpoints on me. My feelings in this matter have been denied, declared blatantly wrong by everyone, including [SC].

Not only do I feel bullied by [TAFE SA] but I feel completely ostracized by the people I went to for help.

Lecturers will support you in your studies as much as possible and can provide advice in relation to support studies that you may wish to undertake, outside of this you need to seek advice through Learner Services - attached Learner Services brochures and a copy of [the Student Code] brochure.

13. On 26 March 2015 (10:59 AM) the complainant emailed EM and stated: 'I don't think you understand. I don't think anyone does.'

14. On 26 March 2015 (12:09 PM) CC emailed the complainant and advised of the following:

Dear [complainant]

I am writing to you concerning emails received from you on 26/3 (10.41am); 25/3 (11.58pm); 19/3 (11.11pm); 19/3 (4.17pm); 19/3 (4.07pm).

I have attached the [Student Code] for your information.

This is a first formal warning that you are currently not compliant with the following expectations, following [EM's] informal warning dated 26/3:

-it is expected that students will behave in a manner that is acceptable to the wider community

-while on any campus of TAFE SA or engaged in any TAFE SA sponsored activity, all students, staff, contractors and visitors are expected to behave in a considerate and courteous manner when dealing with other staff, students and members of the public.

-TAFE SA expects its students to contribute to the orderly, effective and safe functioning of TAFE SA, comply with all lawful directions given by staff while on TAFE SA property or engaged in a TAFE SA controlled or sponsored activity, abstain from acts of self-harm and adhere to program requirements and class norms established in class

Please note that should remain not compliant that you may be excluded from a learning activity, all or part of TAFE SA's grounds or restricted in access to TAFE SA facilities for up to two working days.

I will refer to CC's email as set above as the first warning.

15. On 6 April 2015 the complainant emailed CC and in part stated:

[CC]: This official [first warning] is inexcusable. You of all people should know the difference between someone telling you how they feel and what [sic] stating they intend to do. I never said I intended to harm myself. I said the thoughts come to mind but that isn't the same thing. That's not even remotely the same thing. You have basically told me that I am wrong for having the feelings that I feel and for standing up for myself and that is unacceptable.

[SC]: I trusted you and you let me down. How dare you tell me I'm wrong for feeling bullied? How dare you try to **force** me to change my way of seeing things? That is not your place. You were right, though, I did need professional help and I'm glad I got it because you know what? My [health care provider] agreed with ME, not you. Don't worry, I won't be making any more appointments with you. I don't trust you anymore.

[TAFE SA] "...violated its own [TAFE SA Assessment Policy and Procedures] (4.1.2) when trying to force people to submit online and I'm the only one bothered to stand up for my rights. This is a point the [Office of the Training Advocate] pointed out to me. You call my behaviour inappropriate - I call yours abusive. I have every right to approach the [Office of the Training Advocate] in regards to this matter and **no one** has the right to penalise me for it.

If you refuse to remove the warning from my record I will have no choice but to take this matter up with the State Ombudsman as advised to me by the [Office of the Training Advocate] in our discussions.

16. On 15 April 2015 the complainant emailed CC with the following:

Hi [CC]

I am still waiting for a response from you regarding the warning on my record. The State Ombudsman advised me to give you until the 18th of this month to reply.

17. On 16 April 2015 (12:22 PM) EM emailed the complainant and advised:

Good afternoon [complainant]

[CC] has forwarded this email to me as the [EM]. I need to reiterate that sending targeted personal emails to any staff is not acceptable behaviour and the veiled threat, in relation to the State Ombudsman is tantamount to bullying and harassment. Given that I have previously provided you with an [informal warning on 26 March 2015] in relation to this behaviour and have also endorsed a [first warning] I am now advising you that this is your second formal warning.

[the complainant], you have been provided with ongoing support in regards to your studies by all of the lecturers involved in the delivery of the [TAFE SA course] as well as the offer for support and assistance in relation to counselling through Learner Support Services, which you have now declined.

I am also aware that you have determined not to continue with your studies and to withdraw from the program completely.

Should you wish to discuss this any further then it will need to be done so through me, as the [EM] and in accord with current TAFE SA policy.

I have also included [MLS] into this communication as well as [DPS] who has been communicating with the [Office of the Training Advocate] in relation to your situation.

I will refer to EM's email as set above as the second warning.

18. The complainant approached the Office of the Chief Executive, TAFE SA (received by TAFE SA on 23 April 2015) about a number of issues, including the use of Moodle and the first and second warnings issued to him by TAFE SA. Furthermore, the complainant stated that he believed that the second warning issued as a result of him approaching the Ombudsman was illegal and unfair. In the complaint, the complainant sought:

1. The removal of [first and second warnings] from [complainant's] record.
2. To be allowed to turn in my assignments on paper, should I choose to continue with this course or any other course at TAFE SA in the future.
3. A formal written apology from the administration of Arts TAFE SA
4. The refund of tuition for the class in which I am still enrolled, should I choose to cease my studies.
5. To be allowed to drop the class in which I am still enrolled without penalty, should I choose to cease my studies.

(Your response will determine whether I continue to study at [TAFE SA] not.)

My original request, to be allowed to submit assignments on paper, was reasonable and in line with [TAFE SA Assessment Policy and Procedures] 4.1.2. I do not understand why this has escalated to this point.

19. On 22 June 2015 the CE provided his response to the complainant's complaint and advised that:

I note many of your concerns relate to your ability to hand in your assignments using means other than Moodle. I am advised that as a result of discussions with program staff it was agreed that you could submit assignments in hard copy or via email. I can confirm that TAFE SA will continue to allow you to submit assignments outside of Moodle, consistent with advice provided to you by the program area and provided to the [Office of the Training Advocate].

I note that you also raise concerns regarding two formal warnings on your student record. Having reviewed the circumstances surrounding these warnings, I accept that they were made appropriately and consistently with relevant TAFE SA policies and procedures. I do not accept that these formal warnings were issued improperly or as an act of retribution.

20. On 3 July 2015 the complainant raised a complaint with my Office. The complainant stated that he believes that the first and second warnings issued to him by TAFE SA were unfair. In support of his allegation, the complainant advised my Office of the following:

I received two warnings on my record because of my behaviour but when I asked what rule I broke in my meeting with [EM and SC], [SC] shushed [EM] and nobody would tell me anything about what I did wrong.

My new complaint [to the Ombudsman] is that the [first and second warnings] were given to me unfairly. The second one was given to me for following YOUR directions. That does not seem fair or even legal to me. They have refused to remove the warnings. I would like you to look into the matter and compel them to remove the warnings from my record as they now know I [have a medical condition] and that that has been explained to them by [the advocate] (an expert who has advocated for me at that meeting yesterday) that [a medical condition] was the cause of my behaviour. To penalise me now that they know about this would be discrimination and I request that you make it clear to them that this is the case.

21. I note in that in her email dated 16 June 2015 EM advised the complainant's advocate, that a meeting with TAFE SA staff and the complainant was scheduled for 1 July 2015 at 10 AM. According to information provided by TAFE SA, on 9 June 2015 EM advised the complainant that it was important that the Advocate and MCS also attend the meeting.

22. TAFE SA has advised my Office that:

...Student Services has been actively engaged with [the complainant] for an extensive amount of time and made several attempts to continue this engagement following the issuance of the warnings. Notwithstanding TAFE SA's best efforts, [the complainant] elected not to have any further involvement with TAFE SA staff.

23. I acknowledge that subsequent to the issuance of the first and second warnings TAFE SA continued to communicate with the complainant and made clear that although the first and second warnings would remain on his student file, agreed to meet with the complainant and his advocate to discuss his studies with TAFE SA and the development of an Access Plan to determine what support he required. I note also, that subsequent to the second warning being issued, the complainant advised TAFE SA that he had been diagnosed with a medical condition.

24. The CE advised my Office that:

[The complainant] negotiated an Access Plan with Student Services which was put in place in 2013. The program area made reasonable accommodation and adjustments for [the complainant] to support his learning as a result of this [Access Plan]. The program area was not aware of the specific details relating to [the complainant's] medical conditions...as this detail was not included in the Access Plan and the complainant had not disclosed this information to the program area directly.

At the time of issuing the warnings, neither Student Services, nor the program area were aware that [the complainant] had been advised to undergo testing to determine [his medical condition]. [The complainant] only advised TAFE SA of this in June 2015, prior to meeting with staff to discuss requirements of a new Access Plan.

[The complainant] had not previously raised any concerns regarding the use of Moodle and it had not been identified in his Access Plan as an issue for which he required a reasonable adjustment.

On 27 March 2015, the Office of the Chief Executive received advice from the Office of the Training Advocate [(OTA)] that [the complainant] had contacted them directly expressing concern with the use of Moodle.

The Office of the Chief Executive in TAFE SA confirmed with the OTA that arrangements were already in place for [the complainant] to submit his coursework via email, or in hard copy - but that he would need to renegotiate this for Semester 2.

The program area issued [the first and second warnings] to [the complainant] as it was determined that he was not adhering to the [Student Code].

It only became apparent after the [first warning] was issued that [the complainant] had contacted the OTA. TAFE SA was contacted by the OTA regarding the Moodle access issue on 27 March 2015. The issuance of the first warning therefore had no connection to his contact with the OTA.

The second warning that was issued on 16 April 2015 was in response to the perception from individual lecturers of continued, targeted harassment from [the complainant] regarding the issuance of the first warning.

I am advised that the review that was previously undertaken considered that the second warning was issued in the context of ongoing and persistent harassment of staff.

While references to contacting the Ombudsman did form part of the materials that resulted in the warning being issued to [the complainant], TAFE SA is not of the view that the warning was made in retribution.

The program area is confident that the warnings have been issued in accordance with TAFE SA's policies and procedures.

On receipt of [the complainant's] formal request to the Office of the Chief Executive to have [the first and second warnings] issued to him removed from his file, the issue was investigated by the then [DES]. Evidence provided supported that [the complainant] had breached the [Student Code]. Subsequently, I wrote to [the complainant] on 22 June 2015...advising that I accepted the warnings were made appropriately and consistently with relevant TAFE SA policies and procedures.

25. TAFE SA advised my Office:

In the case of [the complainant], the extent of his [medical condition] was not provided by his health care provider. It acknowledged [the medical condition], and recommended additional time be provided to [the complainant] to complete tasks. [The complainant], nor his [health care provider] provided any information to TAFE SA to suggest that inappropriate behavior was part of his [medical condition].

Whilst the Student Counsellor was aware of [the complainant's] [medical condition] (but not the extent of it), this information was not contained in his Access Plan (as is standard practice), therefore from the perspective of the Access Plan, the program area/ lecturer was not aware of the specifics relating to [the complainant's] [medical condition].

TAFE SA is not aware of [the complainant] disclosing the specific nature of his [medical condition] to his lecturer.

[The complainant] was encouraged by the Student Counsellor to seek support from his [health care provider] once his behavioral issues became apparent.

26. TAFE SA further advised my Office that:

...[the complainant] was issued numerous verbal warnings by his lecturer in relation to his behaviour over a substantial period. It is understood that the lecturer advised [the complainant] that should his behaviour not change, it may result in a formal warning. [The CE] has advised my Office that TAFE SA was unable confirm this advice as the lecturer is no longer an employee of TAFE SA.

It is the intention of the Access Plan to provide information to lecturing and support staff so that they may adapt their services and make reasonable accommodations and adjustments to better support a student's needs.

27. At the time of issuing the first warning, the complainant had in place a current Access Plan (effective from [xx/xx/xxx] to [xx/xx/xxx]) and specifically I note in part that:

The disability/medical condition will impact on [the complainant] studies in the following ways:

- The student has a fluctuating medical condition. Unexpected changes in health may interfere with participation and completion of work.
- [the complainant] can't stand for long periods. [The medical condition] may cause reclusive behaviour. May go home unexpectedly to cope with above.

28. Furthermore, the complainant's Access Plan stipulated that counselling support and case management services were to be arranged by TAFE SA Learner Services. From information provided to my Office, including discussions with the complainant, it appears that as a result of a loss of trust with SC the complainant has advised TAFE SA that he will no longer utilise assistance from Learner Services.

Relevant law and policies

29. TAFE SA's: *A Guide for Students with a Disability or Medical Condition (Disability Guide)* states that TAFE SA will comply with requirements under the *Equal Opportunity Act 1984* (S.A.) (**EO Act**) and the *Disability Discrimination Act 1992* (Cwth) (**DD Act**). In part, the Disability Guide states:

In working with individual students, TAFE SA should consult with the student to understand their needs and capacities look at ways in which TAFE SA can work with the student to accommodate learning needs and focus on what can be done.

Both the [EO Act] and the [DD Act] apply to staff, students, applicants and prospective students.

TAFE SA aims to provide a working and learning environment free from discrimination caused by harassment or victimisation on the basis of disability.

There is an expectation under the [DD Act] that educational institutions will at times need to make reasonable accommodations and adjustments to ensure equal opportunity for students with disabilities to access and participate in training opportunities. These could include administrative, physical or procedural adjustments depending on the need of the individual student.

Access Plans

An Access Plan is one way we can assist you in achieving a successful learning outcome. The purpose of the [Access Plan] is to provide information to lecturing and support staff so that they can adapt their services to support your needs.

You are the most important person in this process. It is critical that you discuss any concerns you have as soon as they arise. It is also your responsibility to articulate your needs and to work with staff to address these needs.

You should also give some thought to the assistance you think you will require to address your needs. You may have examples from previous study, work or other activities you participate in that can help identify reasonable and necessary adjustments.

Reasonable Accommodations & Adjustments during your study at TAFE SA

It is your responsibility to advise relevant staff at TAFE SA such as a lecturer, course coordinator or Student Services staff that you may require reasonable accommodations/adjustments and to provide supporting documentation outlining your specific needs.

You have every right to expect that reasonable accommodation/adjustments will be made to assist you to undertake your studies and achieve the expected course outcomes.

There is no simple way to define reasonable accommodations/adjustments, as there are a broad range of disabilities which have differing impacts for individuals, and also considering the diverse range of course requirements at TAFE SA.

Determining appropriate accommodation/adjustments often requires negotiation and interpretation of what is reasonable in the individual circumstance: there are no hard and fast rules.

If possible, discuss your specific needs with the Student Counsellor or Student Welfare and Career Officer before the course starts and you may, where relevant, arrange modified assessments in consultation with your Lecturer.

These accommodations and adjustments could include:

- additional reading/or writing time
- assessment in an alternative format
- a change in the learning environment to create physical access.

Mental Health or Psychiatric Illness - Assessment Arrangements

The range of mental health and/or psychiatric illnesses is broad and requires a range of different supports.

Consult your Student Counsellor, Student Welfare & Career Officer or your Lecturer as soon as possible and explain the nature of your particular disability and clarify your requirements so that accommodation can be made at the beginning of the module.

Assessment Arrangements

Arrangements may include:

- flexibility of course delivery or the provision of a support person to assist you to maintain focus
- altering the format of assessment e.g. dividing the three hour paper into three one hour papers or replacing some exams with assessments.

Complaint Resolution

- All students have the right to seek a resolution of their concerns quickly and effectively. If you believe that you are being discriminated against or harassed because of your disability you may seek advice from:
 - Student Counsellor
 - Student Welfare & Career Officer
 - Lecturer
 - Educational Manager
 - Disability Access and Equity Officer

TAFE SA outlines its commitment to the provision of proper and fair avenues for resolving student concerns in the [Student Conduct and Disciplinary Policy and Student Complaint Resolution Procedures for Non-academic Matters].

TAFE SA has a commitment to implementing effective complaint resolution procedures which, where possible, resolve complaints quickly at the local level with the minimum number of people involved.

The resolution process focuses on rapidly re-establishing good educational working relationships and positive outcomes. Procedures aim to avoid blame and undue investigation.

30. The TAFE SA Student Complaint Resolution Procedures for Non-academic Matters (**Student Complaint Procedure**), underpinning the Student Complaint Resolution Policy for Non-academic Matters (**Student Complaint Policy**), provides for a ‘...transparent student complaint resolution [procedure]...that is available to students...and...for students to easily access a fair, inexpensive, confidential and equitable complaint and appeal process.’ The Student Complaint Procedure provides the following:

6 Procedure Details

Students may elect, according to the nature and seriousness of their complaint, to seek resolution using one or more of the following options:

Option 1 - Informal Complaint Resolution Process

Option 2 - Formal Complaint Resolution Process

Option 3 - Using external agency process (e.g. Equal Opportunity Commission)

Procedures for Options 1 and 2 are (in part) guided by the following principles:

- Students and staff are to be protected from victimisation and discrimination.
- Natural justice principles will be adhered to in order to ensure procedural fairness.
- Resolution of a complaint is to be achieved as quickly as possible, preferably at the local level and involving necessary parties.

31. The TAFE SA Assessment Policy and Procedures (**Assessment Policy**) enables fairness, flexibility and consideration of a student’s needs for conducting assessments. Specifically, I note that the Assessment Policy provides that TAFE SA will:

3.1 Ensure quality assessment outcomes are achieved through basing the development of assessment processes and instruments on the principles of assessment:

- Fairness
- Flexibility
- Validity
- Reliability
- Sufficiency

3.5 Apply special considerations and reasonable adjustments to assessments as appropriate

4.1.1 **Fairness** in assessment requires consideration of the individual student’s needs and characteristics, and any reasonable adjustments that need to be applied to take account of them.

TAFE SA accommodates individual students’ needs in accord with processes outlined in Item 4.5.

4.1.2 Flexibility

TAFE SA accommodates individual students’ needs in accord with processes outlined in Item 4.5.

4.5 Applying special considerations and/or reasonable adjustments:

4.5.1 TAFE SA is committed to the promotion, application and outcome of equality of opportunity in education. Assessment procedures should consider and support the needs of all students who meet the inherent requirements of the course

4.5.2 Applying special consideration encompasses making appropriate adjustments to assessment processes whilst maintaining the integrity of the assessment outcome

- 4.5.3 Reasonable adjustments refers to measures or actions taken to provide a student with a disability the same educational opportunities as everyone else through making appropriate adjustments to assessment processes whilst maintaining the integrity of the assessment outcome.

Special consideration

- 4.5.9 Students seeking a reasonable adjustment in an assessment must discuss their requirements with a Student Services Officer and their class lecturer prior to the start of the component of study or at the earliest possible time once the class has commenced. Students may be required to provide documentation to support their request for reasonable adjustment.
- 4.5.12 If a student is refused reasonable adjustment in an assessment, an appeal may be lodged (in accordance with the appeal process detailed in this document).

Providing a process for students to appeal against assessment processes and decisions

- 4.11.1 TAFE SA recognises the rights of students to lodge an academic appeal related to student progress and assessment.
- 4.11.2 There are three stages through which an appeal may progress. Each stage of the process is free of charge.
- 4.11.3 In the first instance the student should discuss their complaint with the lecturer involved to resolve the disputed matter. The lecturer will endeavour to make a decision regarding the matter and inform the student of the outcome as soon as possible, but always within 1 week.
- 4.11.4 If unsatisfied with the response or time taken to resolve the matter a student may lodge an appeal in writing to the Educational Manager outlining the nature of the dispute.
- 4.11.5 If unsatisfied with the decision by the Educational Manager, the complainant may request that the matter is dealt with through an independent dispute resolution process external to the program. In this case the student may refer their appeal to the Training Advocate.
- 4.11.6 At each stage of the process, complainants and/or respondents are entitled to full explanations in writing. If requested, of any decisions or actions taken as part of these procedures.
32. I note that in CE's letter dated 22 June 2015, he advised the complainant that the warnings were '...made appropriately and consistently with relevant TAFE SA policies and procedures.' In this letter, CE does not properly reference the policies and procedures under which the first and second warnings were issued. I note however, in the email dated 2 December 2015, TAFE SA has advised my Office that '...the [first and second warnings] were issued to [the complainant] under TAFE SA's [Student Conduct and Disciplinary Policy [(Student Disciplinary Policy)] [that encompasses the Student Code].'

Issue 1: Whether TAFE SA was wrong in issuing the first warning to the complainant

33. TAFE SA's Assessment Policy and Procedures (**Assessment Policy**) enables fairness, flexibility and consideration of a student's needs for conducting assessments. Part 4.5 *Applying special needs and/or reasonable adjustments* of the Assessment Policy states:

TAFE SA is committed to the promotion, application and outcome of equality of opportunity in education. Assessment procedures should consider and support the needs of all students who meet the inherent requirements of the course.

Reasonable adjustments refers to measures or actions taken to provide a student with a disability the same educational opportunities as everyone else through making appropriate adjustments to assessment processes whilst maintaining the integrity of the assessment outcome.

To request special consideration, students must discuss their requirements with their lecturer and submit appropriate evidence or documentation as follows. Grounds for special consideration in assessment include but are not limited to:

- illness / medical condition

34. The complainant's Access Plan dated xx/xx/xxx (updated to xxxx) states that the complainant had '...consulted with Learner Services Staff and is eligible for services and 'reasonable adjustments' until: xx/xx/xxxx'. This Access Plan, in part, states the following:

The [complainant] has a [medical condition] as defined by the DD Act. The DD Act and the TAFE SA ⁵Access and Equity Policy require the provision of services and accommodations where necessary to ensure fair and equitable access to teaching and learning.

[The complainant] has consulted with Learner Services Staff and is eligible for services and 'reasonable adjustments' until: [xx/xx/xxxx]

The disability/medical condition will impact on the student's studies in the following ways:

- The [complainant] has a fluctuating medical condition. Unexpected changes in health may interfere with participation and completion of work
- Can't stand for long periods. [The medical condition] may cause reclusive behavior. May go home unexpectedly to cope with above.

The following adjustments are to be implemented by the program area:

- Extensions on written assessments.
- Alternative assessment / test arrangements.

Student Responsibility Statements

- I understand that I am responsible for informing staff in a timely manner of any reasonable adjustments or services that [the complainant] require;
- I understand that I am responsible for advising staff of difficulties I may have in accessing my learning, or services, at TAFE SA;
- [The complainant] authorises the release of information contained in [the complainant's] Access Plan to relevant TAFE SA staff for the purpose of supporting me in my studies.

⁵ In 2013 the TAFE SA Social Sustainability Policy superseded the Access and Equity Policy.

35. In all of the circumstances, it is not evident that TAFE SA considered the complainant's Access Plan and therefore any rights and considerations that may have been afforded to him under TAFE SA's Social Sustainability Policy and the Assessment Policy when advising the complainant of the move to Moodle.
36. In my provisional view therefore, it is reasonable to expect that with the implementation of Moodle, TAFE SA should have, in the case of the complainant, turned its mind to the complainant's specific needs as outlined in his Access Plan. Whilst I acknowledge that TAFE SA may not have been aware of his particular medical condition, the existence of an Access Plan should have alerted relevant staff that the complainant's dissatisfaction with Moodle should be further explored. Although TAFE SA offered the complainant with tutorial assistance for Moodle, it is evident that this was not an adequate solution for the complainant. My view is formed upon the correspondence that continued between the complainant and TAFE SA which culminated in the verbal warning about his behaviour being issued. It is evident that the complainant became increasingly frustrated that his needs were not considered by TAFE SA which, in my opinion, contributed to those behaviours that TAFE SA considered were in breach of the Student Code and which resulted in the first warning being issued.
37. Although the complainant raised with TAFE SA and CE that under part 4.1.2 of the Assessment Policy he was entitled to continue to submit assignments on paper, there is no evidence to suggest that the matter was appropriately considered by TAFE SA. That is, there is no evidence to suggest that TAFE SA considered the complainant's grievance about Moodle in light of his rights and entitlements under the Disability Guide and Assessment Policy. If that had occurred, the complainant may have received a proper assessment of his needs and what options and considerations were available to him. It is therefore my view that if the complainant's grievances were assessed in consideration of the Disability Guide and Assessment Policy, those behaviours demonstrated by him that were, in my view, directly attributable to the failure by TAFE SA to afford him his rights may have been better managed to the point where it may not have been necessary to issue him with the first warning. For that reason, my provisional view is that TAFE SA was wrong to issue the first warning.
38. Notwithstanding my provisional view in relation to the issuance of the first warning, I acknowledged that the first warning issued to the complainant was for behaviours which TAFE SA considered were in breach of the Student Code. Specifically I am drawn to the comments (and Student Code) that states that a student must abstain from acts of self-harm. My Office raised with TAFE SA the issues of self-harm and how it was considered to be a breach of the Student Code. TAFE SA have advised me that 'TAFE SA does not have a policy that deals with student medical conditions that occur outside of 'TAFE SA study hours' such as the circumstances relating to [the complainant]. TAFE SA referred to 'Dot point 6, page 13...' of the Student Disciplinary Policy, which states:

8.1 Specific responsibility of TAFE SA staff

All TAFE SA staff have a responsibility to:

NB Staff should be mindful at all times to model appropriate behavior when managing inappropriate student conduct.

- Under no circumstances should staff accompany a student manifesting symptoms of serious disturbance off-campus, e.g. to a hospital. If someone appears to be in danger of seriously harming themselves or other people, staff should call security and/or emergency services immediately.

5.2.1 Unacceptable behaviour/misconduct

What are the first steps that need to be taken in addressing non-academic inappropriate student conduct?

- Non-academic inappropriate behaviour conduct may range from disruptive behaviour - persistent inattentiveness or non-participation that inhibits the learning of others or the ability of lecturer to teach, through to aggression, physical violence/assault, self-harm, threats of suicide and criminal damage. These actions may require Police intervention;
- The response to these different situations will depend upon the assessment of the nature, severity, frequency and effect of the behaviour.

39. The Student Disciplinary Policy states that this policy ‘...applies to all TAFE SA students on TAFE SA property or engaged in TAFE SA related activities offsite...’ I note that the complainant mentioned thoughts of self-harm in an email to TAFE at 11:50 PM on 25 March 2015 so it is therefore reasonable to assume that this did not occur on campus. Furthermore, from the information before me, there is no evidence to suggest that the complainant has previously or continually made threats of self-harm or suicide.

Opinion

In light of the above, it is my final view that TAFE SA failed to consider the complainant’s situation in light of the Access Plan, Assessment Policy and the Disability Guide, and acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act in relation to the first warning.

Issue 2: Whether TAFE SA was wrong in issuing a second warning to the complainant

40. In relation to the second warning, TAFE SA has advised my Office that:

The second warning that was issued on 16 April 2015 was in response to the perception from individual lecturers of continued, targeted harassment from [the complainant] regarding the issuance of the first warning.

While reference to contacting the Ombudsman did form part of the materials that resulted in the warning being issued to [the complainant], TAFE SA is not of the view that the warning was made in retribution.

Whilst the evidence submitted by TAFE SA appears to support this, in issuing a second warning, TAFE SA omitted to specify the following:

- a. the correlation between the complainant’s behaviour and what policies, codes or other documents TAFE SA considered were breached;
- b. reference to the policy under which the formal warnings were issued; and
- c. what rights of review or appeal were available.

41. For the reasons discussed above in relation to the first warning it is not evident that TAFE SA appropriately considered the complainant’s Access Plan, the Assessment Policy and the Disability Guide when issuing the second warning.

Opinion

In light of the above, my final view is that TAFE SA failed to consider the complainant’s situation in light of the Access Plan, Assessment Policy and the Disability Guide and failed to specify the basis of the warning and advise on review and appeal rights, and acted in a

manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act in relation to the second warning.

Issue 3: Whether TAFE SA failed to deal with the complainant's complaint under its Student Complaint Procedure.

42. On 2 December 2015 TAFE SA advised my Office that the first and second warnings were issued by TAFE SA under its Student Disciplinary Policy. Under the Student Disciplinary Policy, a warning issued under Level 1 (part 5.3.1) does not provide a student with a right of review (part 6.4.2). Therefore, it is my view that under the Student Disciplinary Policy, TAFE SA were not required to advise the complainant of his right to have the decision reviewed. However, the complainant was entitled to have his complaint to the CE considered under the Student Complaint Policy and related Student Complaint Procedure, whereby, if dissatisfied with the outcome, the complainant could have elected to have his complaint resolved through an informal or formal complaint resolution process.
43. In consideration of the information before me, it does not appear that the complainant's complaint to CE was considered and consequently dealt with under the Student Complaint Policy and related Student Complaint Procedure.

Opinion

In light of the above, it is my final view is that TAFE SA acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act by failing to consider the complainant's complaint under its Student Complaint Policy and Student Complaint Procedure, and on that basis, denying the complainant procedural fairness.

Recommendation

To remedy this error, I recommend under section 25(2) of the Ombudsman Act that TAFE SA:

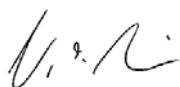
1. reconsider its decision not to remove the first and second formal warnings issued to the complainant and remove the first and second warnings from the complainant's student file.
2. ensure all disciplinary notices issued contain clear references to:
 - a. the acts or behaviours that were considered to be in breach of TAFE SA policy or codes;
 - b. the policy or codes that were breached;
 - c. the policy under which the disciplinary warnings or actions were issued; and
 - d. the review or appeal rights available to the recipient of the disciplinary notices.
3. review current policies to ensure information and cross references are current and correct
4. ensure its website and information portals and the like provide information to staff, students and visitors in situations where threats of self-harm are identified and include contact numbers of appropriate TAFE SA staff and or external support services to manage such situations.

Final comment

In accordance with section 25(4) of the Ombudsman Act TAFE SA should report to the Ombudsman by **9 September 2016** on what steps have been taken to give effect to the recommendations above; including:

- details of the actions that have been commenced or completed
- relevant dates of the actions taken to implement the recommendation.

In the event that no action has been taken, reason(s) for the inaction should be provided to the Ombudsman.



Wayne Lines
SA OMBUDSMAN

19 August 2016