

Restricted career paths for overseas students graduating from Australian medical schools: legal and policy considerations

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Australian medical schools produce fewer doctors than are needed to meet the national demand for health care services. For most of the past decade, the chief strategy for bridging this gap has been to import international medical graduates (IMGs). However, the strategy has shifted recently to make self-sufficiency within the Australian medical workforce a policy priority.¹ Since 2000, 10 new medical schools have been established, and the student body in existing schools has expanded.² The number of medical school graduates per annum is projected to rise by 86% (from 1586 to 2945) between 2007 and 2012.³

The extent to which this larger cadre of new graduates is able to alleviate the national workforce shortage depends on their ability to complete their professional training, starting with internship. The number of intern training places has increased in some states, and there are plans afoot for further increases, but it is now evident that the number of places is unlikely to keep pace with growth in the number of medical graduates.^{2,4,5} For the first time in the history of Australian medical education, some medical graduates are likely to have no opportunities to undertake internships in Australia. Who will miss out?

Under current government policies, students at Australian medical schools who are not Australian residents or citizens (hereafter, "overseas students") will be disproportionately affected by the shortfall.⁶ Although extensive efforts are being made to create new intern positions, the focus is clearly on generating enough positions to accommodate graduating domestic medical students, not overseas students. Indeed, the recent communiqué from the Australian Health Ministers Conference has been criticised for only offering guarantees of internship places to medical students who held Commonwealth-supported places.^{7,8} Overseas students are reportedly "extremely disappointed and shocked" by the prospect that they may miss out on internships; some appear to view it as discrimination.^{9,10}

This situation raises questions of law, fairness and public policy. Does the internship placements policy thwart the legitimate expectations of medical students in a manner that is unlawful? Is it unfair? And, from a policy standpoint, does placing obstacles in the career paths of *any* graduates from Australian medical schools make sense in the current environment? We begin this article by reviewing the relevant regulations, and then we tackle each of these questions.

The rules

In December 2002, as a result of the shortage of medical practitioners in Australia, the federal Department of Health and Ageing announced that overseas students would be permitted to stay and work as interns in the public hospital system in 2003, filling any positions still remaining "after all Australian graduates have been appointed".¹¹ In July 2003, this arrangement was extended on the basis that it would be subject to annual review.¹²

Each state has developed its own criteria for allocating internship positions.¹³ Generally, Australian permanent residents or citizens ("Australians") who are graduates of a university within

ABSTRACT

- A sharp increase in the number of students graduating from Australian medical schools over the next few years looks set to outpace available intern positions.
- Graduating overseas students will be the first to miss out.
- While this treatment of overseas students is unlikely to be found unlawful, questions of fairness remain.
- From a policy standpoint, the bottleneck in intern places could be quite damaging as:
 - it encourages Australian-trained medical graduates with high-quality training and culturally-relevant skills to leave; and
 - it extinguishes a valuable opportunity to steer some of these graduates into geographical areas with the greatest medical workforce needs.

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the relevant state or who completed Year 12 in that state get first priority. Second priority typically goes to Australians who are graduates of medical schools in other states or in New Zealand. After graduates from those categories have been allocated internship places, overseas students graduating from Australian medical schools are considered.

How New Zealand citizens graduating from Australian medical schools are prioritised varies by state. For example, in South Australia, they enjoy the same priority status as Australian graduates; in Queensland, on the other hand, they are treated the same as other overseas students who graduate from Australian medical schools.^{13,14}

Before taking up an offer of an intern position, medical graduates from overseas must meet immigration requirements to be permitted to remain in Australia. The standard overseas student visa expires about 2 months after course completion, necessitating applications for another type of visa from former overseas students who wish to stay. For most who are offered an intern position, this will be a Temporary Business (Long Stay) — Standard Business Sponsorship (Subclass 457) visa.¹⁵

Legal considerations: a legitimate expectation?

Recent news reports have highlighted situations in which prioritisation of intern places and Medicare billing rules conflict with the strong preferences of former and current overseas medical students. The resulting protests have included claims of "being ambushed" and being "unfairly treated". Are the outcomes lawful?

Public authorities have a general duty at common law to act fairly when making decisions that affect a person's interests, including legitimate expectations that the person may have.¹⁶ A legitimate expectation arises and attracts legal force if it is judged to be reasonable in the circumstances. Reasonableness often turns on whether the person had some objective basis on which to hold the expectation; an undertaking, a representation, or the conduct

of a public authority may provide such a basis.¹⁷ The High Court has held, for example, that a departmental policy document may give rise to a legitimate expectation that the department will conform to that policy.¹⁸ Similarly, “the existence of a regular practice which the person affected can reasonably expect to continue” may give rise to a legitimate expectation.¹⁹

For aggrieved persons who can show that their legitimate expectations were thwarted, the available remedies are limited. This is because courts scrutinise the process by which the decision of a public authority was made, not the substantive merits of the decision itself. Consequently, “success” for the aggrieved person is merely an order that the decisionmaker revisit the decision, paying appropriate regard this time around to the aspects of the decision-making process that were unfair. But when it is repeated through a lawful process, the resultant decision may not (and frequently does not) change.

As a matter of law, then, do overseas students have a legitimate expectation that they will be provided with an intern position on graduation? In our view, they do not. While intern positions may have been routinely granted in the past, that practice cannot create a legitimate expectation in the face of the clear statement from the federal government in 2002, that intern places would only be available to overseas graduates if places remained after allocations to Australian graduates. Moreover, the statement in mid-2003 extending the policy included an explicit statement that it would be reviewed annually.

An additional factor that undercuts the reasonableness of overseas medical students’ expectations about intern places is the separate visa requirement. The Department of Immigration and Citizenship specifically warns overseas students that they “should not make educational choices solely on the basis of hoping to achieve a particular migration outcome”.²⁰ Some might argue that the internship year is essentially a continuation of training, but the fact that it cannot be completed while on a student visa indicates that this is not the government’s view.

In summary, overseas students who come to Australia to study medicine are gambling on postgraduate employment, including internship. Although some may assume or expect that internship will follow, those expectations do not appear to have been legitimised by a public authority, at least not in a legal sense.

Fairness

Although it is highly unlikely that overseas students graduating from Australian medical schools will gain succour from the courts if they bear the brunt of a shortfall in intern positions, it does not necessarily follow that the outcomes of applying these rules represent fair or sound public policy.

While published and technically available to all, it is unclear whether active steps are taken to highlight the speculative nature of intern places at the time overseas students are applying to or enrolling in Australian medical schools. The recent unrest among overseas students suggests not. Apparently eager to dispel such ignorance, and possibly also to pave a path for future rejections, the Dean of the Sydney Medical School recently wrote to all current and prospective overseas students explicitly discouraging expectations of intern places.⁵

At a minimum, medical schools themselves should take pains to spell out limitations — both definite and potential — on career paths for these students, relative to their Australian counterparts.

Ethical obligations demand no less. Given that overseas students pay about \$200 000 in fees to study medicine, and there is fierce competition to attract them, universities may have short-term incentives not to advertise information that might chill interest. In the long run, however, with higher education becoming the country’s third biggest export earner,²¹ damage to the confidence of overseas markets could be far more corrosive. The recent spate of international publicity reporting violence against Indian students in Australia is instructive in this regard.²²

Fairness also calls for a reconsideration of how New Zealanders are treated. A medical student who is permitted to live and work in Australia indefinitely, pays domestic university fees, and is eligible for a Commonwealth supported place, may be justifiably surprised to find that, in some states, he or she is treated as an overseas student on graduating, with adverse consequences for their internship allocation priority. The Health Ministers’ recent communiqué⁷ suggests that this may change for New Zealanders who held Commonwealth-supported places while at university.

Health policy

Through a wider policy lens, the bottleneck on intern places appears especially dysfunctional. At a time when millions of dollars are spent annually on recruiting and assessing IMGs to address shortfalls in the national medical workforce, the current rules will effectively point Australian-trained medical practitioners, including many who would prefer to stay, back to their homelands to continue their careers. Yet these same doctors are close to completing qualifications that would surely trump those sought in any IMG recruitment drive: their medical school training, by definition, meets national standards; they are familiar with Australian culture; and they have recent experience working in the Australian health care system.

In addition, this cadre of graduates with excellent training and cultural familiarity can also, in some cases, be later directed to locations where they are most needed. Section 19AB of the *Health Insurance Act 1973* (Cwlth) prevents former overseas students from billing on Medicare for a period of 10 years from their date of initial medical registration in Australia, unless working in a “District of Workforce Shortage” (DWS), as specified by the Department of Health and Ageing. (As of 1 April 2010, when the *Health Insurance Amendment (New Zealand Overseas Trained Doctors) Act 2010* [Cwlth] was passed, the definition of former overseas student will no longer include New Zealanders educated in Australia or New Zealand.) However, the stepping stone to using this policy lever is allowing such graduates to first complete their training through internship. Without this, these valuable practitioners are lost to the system.

Explanations for the misalignment between medical school and intern places are not hard to find. Traditionally, the federal government has funded the former, while state-run hospitals have provided the latter. Work is currently underway to alleviate the bottleneck,^{2,23} and the federal government’s proposal to become the majority (60%) funder of public hospitals may help to address such misalignment in the longer term.²⁴ In the meantime, to combat the likelihood that students will miss out on “traditional clinical placements in public hospitals”, state health departments and postgraduate medical councils are exploring possibilities for providing internships in other settings, such as general practice and community health facilities.²

Conclusion

Courts in Australia would be unlikely to find that overseas students graduating from Australian medical schools hold a legitimate expectation of an intern position. Nonetheless, questions remain about whether those students have been dealt with fairly, in terms of providing them, before and after enrolment, with full and frank information about what lies ahead. From a policy perspective, a failure to accommodate such graduates into intern positions will likely backfire to Australia's detriment. When they depart our shores, they will carry away a valuable set of Australian-specific skills, medical knowledge, and cultural familiarity. Elsewhere in the health system, for the foreseeable future, substantial effort and resources will continue to be devoted to recruiting thousands of IMGs with highly varied training, skills and cultural literacy.

Competing interests

None identified.

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