Australian Government
Department of Immigration and Citizenship

Submission to the Inquiry into the Migration Legislation Amendment (Student Visas) Bill 2012

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The Department of Immigration and Citizenship (the Department) welcomes the opportunity to provide comment to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Legislation Amendment (Student Visas) Bill 2012, following the introduction of this Bill into the House of Representatives on 22 March 2012.

1.0 PURPOSE OF THE BILL

The Migration Legislation Amendment (Student Visas) Bill 2012 (the Bill) introduced by the Hon Chris Bowen MP, Minister for Immigration and Citizenship, seeks to amend the *Migration Act 1958* (the Migration Act) and the *Education Services for Overseas Students Act 2000* (the ESOS Act) to implement recommendation 24 of the *Strategic Review of the Student Visa Program*, conducted by the Hon. Michael Knight AO (the Knight Review).

Recommendation 24 of the Knight Review is to abolish automatic cancellation of student visas and for the regime to be replaced by a system in which information conveyed by student course variations is used as an input into a more targeted and strategic analysis of non-compliance. The Knight Review found that the current enforcement arrangements for breaches of student visa conditions were patently not working as a compliance and integrity tool. The amendments also respond to similar concerns raised in the 2011 Australian National Audit Office (ANAO) report *Management of Student Visas*. The ANAO recommended that the Department review whether the student visa cancellations regime applying to visa conditions for student course attendance and progress is addressing the Department's integrity and compliance objectives (Recommendation 4).

The amendments in this Bill give effect to the Government's policy to cease the automatic cancellation regime in place for student visa holders who breach the satisfactory academic progress or attendance requirements of their student visa. The amendments are intended to support the international education sector which is one of Australia's largest export industries and is integral to Australia in maintaining bilateral ties with key partner countries, supporting employment in a broad range of occupations throughout the Australian economy, as well as delivering high-value skills to the economy.

In addition to ceasing automatic cancellation, the amendments also address the continued need for relevant government agencies to access the most up-to-date contact information held by education providers for accepted students. The amendments require education providers to provide details of any change in contact details of accepted students to the Secretary of the Department of Innovation, Industry, Science, Research and Tertiary Education (DIISRTE) within 14 days after the provider becomes aware of a change. This amendment is considered necessary by the Department for ensuring a smooth transition from an automatic to a discretionary cancellation regime without compromising immigration integrity because it will better enable contact with students and give them greater procedural fairness.

2.0 BACKGROUND

2.1 Existing automatic cancellation regime for student visa holders

Student visa holders are subject to a number of visa conditions that reflect the intention of the student visa program. Key to the integrity of the program is visa condition 8202 that requires international students to maintain satisfactory course progress and attendance in class. The ability of a student visa holder to maintain course progress and attendance is considered an indicator of their genuine engagement in studies.

Providers are required to monitor the course progress of their international students and their attendance in class under the provisions of the *National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007*, a legal instrument under the ESOS Act. While providers are required to define their own policies in relation to course progress or attendance, at a minimum, they must intervene to assist an international student who has failed more than 50% of the units attempted in any one study period or who is at risk of failing to attend between 70 and 80 percent of total course contact hours. Where a provider assesses the international student as not achieving satisfactory course progress or attendance despite intervention, they must report them for a breach of condition 8202.

Under the current regime, an education provider is required under section 19 of the ESOS Act to report breaches of student visa condition 8202 to the Secretary of DIISRTE. The report of a breach is made through the Provider Registration and International Student Management Systems (PRISMS) administered by DIISRTE and which links to departmental systems. The provider must first give the student 20 working days notice in which to access complaints and appeals processes.

Following this process, the education provider is required to notify the student visa holder of the breach under section 20 of the ESOS Act. The provider reports the student to the Department through PRISMS and they complete a notice in PRISMS to send to the student. The notice instructs the student visa holder to attend an office of the Department in person within 28 days after the date of the notice to explain the breach, ie to make any submissions about the breach and the circumstances that led to it. It is this notification that triggers the application of the automatic cancellation provisions in section 137J of the Migration Act. If the student visa holder fails to comply with the notice, their visa is automatically cancelled under section 137J of the Migration Act by operation of law at the end of the 28th day after the date of the notice.

If a student complies with the notice they attend a departmental service counter and are issued with a Notice of Intention to Consider Cancellation before their visa is considered under mandatory cancellation provisions in Regulation 2.43(2)(b) of the Migration Regulations 1994 (the “Regulations”).

As a result of the automatic cancellation by operation of law, any family dependent visa holders also have their visas cancelled. International students whose visa was automatically cancelled are subject to a bar on applying for further visas while in Australia and an exclusion period for applying for further visas to re-enter Australia for up to three years. A student may apply to have the automatic cancellation revoked under section 137K of the Act. An application for revocation is considered by the Department under section 137L of the Act and the cancellation may be revoked if the applicant satisfies the Minister that they did not in fact breach condition 8202 or that the breach was due to exceptional circumstances beyond their control. Students who are refused a revocation may be entitled to seek a review of the decision through the Migration Review Tribunal (MRT).

2.2 Shortcomings of the automatic cancellation regime and recommendations of the Knight Review

In December 2010, the Government appointed the Hon Michael Knight AO to conduct a strategic review of the student visa program to help enhance the quality, integrity and competitiveness of Australia's student visa program. Mr Knight reported to the Government in June 2011 with 41 recommendations and on 22 September 2011 both the report and the Government response were released. The Government supports all of Mr Knight's recommendations.

A principal focus of the Knight Review report is on improved integrity measures in the student visa program. To this end, the Knight Review recommended that the automatic cancellation of student visas be abolished and replaced with a more targeted and strategic analysis of non-compliance.

This Bill addresses the specific findings of the Knight Review, which found that the:

> '*...automatic cancellation regime is patently not working as a compliance and integrity tool and is in fact hindering the effective use of available student compliance resources'*.

The Department agrees with the Knight Review recommendation to abolish the automatic cancellation regime and, along with issues identified by the Knight Review, provides the following broad reasons for doing so:

i) Lack of discretion in cancellation decisions can be deleterious to genuine students whose circumstances are not individually considered

The current automatic cancellation regime provides no discretion for a decision-maker to distinguish between a genuine student visa holder who may be struggling academically and one who deliberately breaches the conditions of their student visa.

The Knight Review found that the automatic cancellation process was harmful for some genuine students who require assistance and monitoring in their course of study, rather than having their visas automatically cancelled for perceived breaches of course progress or attendance. The automatic cancellation regime was found to fail to properly account for the severity of a breach, any exceptional circumstances or whether or not a breach actually occurred.

The Knight Review provided the following example to demonstrate the dysfunctional nature of the current regime and the need for comprehensive reform.

Example 1

> *A student is struggling with his studies for an architecture degree at an Australian university. The student is very bright but lacks design flair. His teachers urge him to switch to engineering which they believe would be ideally suited to his talents. However the student insists on persevering with architecture, perhaps because there is a family expectation.*
>
> *The student fails several subjects and the university is obliged to report him for "unsatisfactory course progress". That in turn leads to an NCN 10 being issued which requires automatic cancellation of the student's visa. Not only will the student have to leave Australia, but if he leaves due to a cancelled visa he would not be eligible for another student visa (or many other temporary visas, including a visitor visa) for a period of three years unless he were able to present compelling or exceptional reasons.*

The student in this example may genuinely be capable of continuing studies in Australia in a different course. It is not in Australia's interests to cancel the visas of genuine international students.

ii) Process has attracted continued adverse commentary from courts

The Knight Review also found that the regime has attracted continued adverse commentary from the Federal Court, with the majority of automatic cancellations between May 2001 and December 2009 having been overturned, affecting some 19 000 cases. In fact, the Knight Review highlighted that there is only a five month period during the 2001 and 2009 timeframe where automatic cancellations have not been overturned. On the whole, automatic cancellation has not been a successful immigration integrity strategy.

iii) Departmental resources are predominantly allocated to automatic cancellation notices, causing significant impediments to efficiency.

Another finding of the Knight Review included the significant impost on the Department's compliance resources which are predominantly allocated to automatic cancellation notices. The Review found that the Department's compliance regime is driven by the automatic cancellation regime rather than by any conscious and applied consideration of risk. The Knight review estimated that because up to 80 per cent of student compliance officer time is taken up dealing with reports that may lead to automatic cancellation. The result of this allocation of resources is that the investigation of more serious non-compliance activity was compromised. The Knight Review gave the following example of how the automatic cancellation regime fails to allow the Department to adequately follow up on higher risk breaches:

Example 2

> *A young man enters Australia on a student visa but his real intention is to work full time and, if possible, never return home. On arrival in Australia this man goes straight to work for an employer who pays him less than award wages but always in cash. He never commences his course. The course provider notifies DEEWR and an NCN is generated. But the process stops there. An NCN for failure to start a course is not one of those NCNs which leads to automatic cancellation.*
>
> *Overwhelmed by the number of NCNs generally, and forced to concentrate on those which lead to automatic cancellation of a student visa, DIAC doesn't have the resources to follow up a "student" who is deliberately and seriously rorting the system. There is anecdotal evidence to suggest that some agents of dubious repute, sometimes in collusion with particular education providers, are exploiting this situation.*

The Knight Review recommended that the Department concentrate integrity resources on the areas of highest risk and be more proactive in detecting and managing breaches which are not reported in PRISMS (recommendation 26 and 27). The removal of automatic cancellation will free up resources to enable this to occur. These resources are currently dedicated to managing reports that may lead to automatic cancellation, dealing with students who approach an office within 28 days of receiving a notice under section 20 of the ESOS Act and applications for revocation of an automatic cancellation.

iv) Education providers are given extraordinary power over students

The Knight Review found that automatic cancellation gives education providers extraordinary power over international students and whether they are able to remain in Australia. Education providers are expected to assist students before the automatic cancellation process is initiated. However, the Knight Review argued that the increase in automatic cancellations in recent years has been driven, in part, by the emergence of some providers who will use the automatic cancellation mechanism 'carelessly or even maliciously' to report students who may not have in fact breached requirements.

2.3 Recommendations of the ANAO Audit Report

On 31 May 2011 the ANAO presented the independent performance audit of the program, entitled *Management of Student Visas*. The audit report preceded the findings of the Knight Review and similarly noted 'systemic flaws and vulnerabilities in the regime for automatic and mandatory cancellation of student for breaches of condition 8202 relating to course progress and attendance'. The audit report further suggested that the Department 'progress its planned review of the student visa cancellation regime' to 'critically examine the performance of the regime in achieving DIACs integrity and compliance objectives in a cost-effective manner' (recommendation 4). This Bill is intended to more broadly address the ANAO's recommendations in this area.

The ANAO also identified the high rate of legal challenges to the validity of automatic cancellations made under section 137J of the Migration Act. The expense of litigation and costs of remedial measures, in addition to cost to the Department's reputation were outlined as areas of concern.

The ANAO shared the views of the Knight Review in respect of the resource-intensive process that the regime requires whereby integrity and compliance units must respond to every education provider report rather that pursue targeted areas of compliance concern.

This Bill is intended to broadly address the concerns of the ANAO audit report by allowing the Department to replace automatic cancellation with a more targeted, risk-based and strategic analysis of non-compliance.

3.0 CONTENT OF THE MIGRATION AMENDMENT (STUDENT VISAS) BILL 2012

3.1 Amendments to the ESOS Act

Abolition of automatic cancellation

This Bill would amend section 20 of the ESOS Act to remove the requirement for a registered education provider to send a notice to a student visa holder who breaches condition 8202 (satisfactory attendance and course progress). It is intended that on or after the day the amendments in this Bill commence, registered education providers will no longer be required, or able, to send a notice under section 20 of the ESOS Act. As a consequence, student visas will no longer be subject to automatic cancellation under the Migration Act.

Under the proposed changes student visa holders who breach condition 8202 by not achieving satisfactory course attendance or progress will be considered under the existing discretionary cancellation framework in section 116 of the Migration Act. Under this framework the education provider would still be required to report a breach of a prescribed condition of a student visa under section 19 of the ESOS Act. Details of the reported breach would be considered by the Department for possible compliance action.

Under the discretionary cancellation framework of the Migration Act, student visa holders must be notified that their visa is being considered for cancellation and be given an opportunity to show that the grounds do not exist or there is a reason why it should not be cancelled. This will provide decision makers the discretion to consider the circumstances of the student and to decide if cancellation is warranted based on the merits of the case put forward. This will lead to fairer outcomes for students, whilst also allowing the Department to focus compliance resources on areas of the highest risk.

It is important to note that the removal of automatic cancellation would not result in breaches of attendance and course progress being considered any less seriously by the Department. In addition to following up on these breaches, the Department will be in a position to better prioritise other reports that may indicate serious non-compliance, as was recommended by the Knight Review.

In cooperation with DIISRTE, the Department is working to develop reports and improvements to systems to assist in identifying all types of breaches associated with the student visa program and targeting those that represent the highest risk, including those that may indicate that a student is deliberately and seriously rorting the system. This would be a significant improvement on the current regime, whereby departmental officers are forced to primarily focus on notices which lead to automatic cancellation of a student visa.

In preparation for the cessation of automatic cancellation, the Student Integrity network have established a national coordination team to provide oversight of national integrity projects, ensure consistency of approach across the network, and provide input into integrity analysis and the development of risk profiles based on information from a variety of sources.

Following the removal of automatic cancellation, a proportion of resources will be directed towards the targeted consideration of cancellation of high-risk cohorts within the student visa program on a discretionary basis, providing for fairer, more transparent, merits-based decision making, whilst retaining a strong focus on the integrity of the Student Visa program. The network has recently completed a number of operations aimed at refining DIAC's processes for targeting and addressing non-compliance in a coordinated way. These have informed the development of departmental reporting capabilities to assist in the identification of higher risk student cohorts, enabling the Department to better focus its resources.

The Department is also increasing stakeholder engagement, including through joint audit activity with DIISRTE and state and national regulators. This will form a key component of the new operating framework which will include a risk matrix and strategic work plan to ensure a consistent approach across the departmental network.

Registered education providers to provide details of changes to student contact details

This Bill would also make amendments to section 19 of the ESOS Act to require an education provider to give particulars of any change in contact details or other prescribed details of a student visa holder within 14 days after the provider becomes aware of the change. This is broadly consistent with other obligations on education providers under section 19, for example for a provider to report any changes in the identity or duration of a student's course within 14 days after the event occurs.

The contact details provided by the education provider would be given to the Secretary of DIISRTE through the PRISMS system. This information would then be transmitted to departmental systems for use by integrity officers. This amendment is supported by the current legislative framework and will comply with the requirements of section 14 of the *Privacy Act 1988*. Standard 3 of the *National Code* requires that education providers enter into a contract with each student they engage and that this contract include an acknowledgement that personal information may be shared between registered providers and the Australian Government.

The Department is aware of some concern among education providers about the potential increase in administration associated with the proposal to require details of changes in contact details to be given within 14 days after the provider becomes aware of the change. The Department notes that this potential increase would be offset to a certain extent by the removal of the requirement for providers to download, complete and send a notice to a student under section 20 of the ESOS Act where they have failed to maintain satisfactory academic progress or attendance.

Education providers are already prompted to update contact details when they enter a student course variation into PRISMS. This process assists the Department to ensure that a student receives a notice that may need to be sent to them as a consequence.

However, there are circumstances where the Department may need to contact students that do not involve student course variations advised by education providers. The Department may consider compliance action in circumstances where outside allegations or information has been brought to the Department's attention that the provider is not aware of. For example, where adverse information is received by the Department through external channels such as the Immigration dob-in-line or targeted integrity operations. For this reason, it is important to have access to the most up to date contact details at all times, rather than just when a student course variation is made.

The Knight Review recommended not only that automatic cancellation be ceased (recommendation 24), but also that the Department concentrate integrity resources on the areas of highest risk and be more proactive in detecting and managing breaches which are not reported in PRISMS (recommendations 26 and 27). Without access to up to date contact details for students who may not have been subject to a student course variation, it is more difficult for the Department to ensure that the student can be contacted to respond to any notice that may affect their visa status.

For the reasons outlined above, the change to require updated contact details to be provided within 14 days is considered necessary to ensure procedural fairness to students and that the Department is able to implement these recommendations without compromising immigration integrity.

Penalties in the form of fines may apply if a registered provider breaches section 19 of the ESOS Act. Decisions are taken on a case by case basis by the relevant regulator, currently DIISRTE. The Department intends to work closely with DIISRTE and registered education providers to ensure that they have sufficient information about this change and are able to implement it with minimal disruption to existing practices.

3.2 Amendments to the Migration Act

The Bill would amend section 137J of the Migration Act to insert a note that cross references the amendment to section 20 of the ESOS Act, that is, new subsection 20 (4A). The note provides that under subsection 20 (4A), a registered education provider must not send a notice on or after the day that the section of the ESOS Act commences. It is intended to retain the remaining automatic cancellation provisions in Subdivision GB of Division 3 of Part 2 of the Migration Act until the residual caseload is addressed as outlined below.

The amendments in the Bill would apply to student visas in effect at the time of commencement unless the international student has been sent a notice by an education provider under section 20 of the ESOS Act before the commencement of the Bill. Any student visa holder sent a notice under section 20 of the ESOS Act before the date of commencement would still need to comply with the section 20 notice and attend a DIAC office within 28 days of the date of the notice or face the automatic cancellation of their student visa. However, if automatically cancelled, the former student visa holder would still be able to apply for revocation of the cancellation. Revocation applications would be available where the former student's visa would have still been in effect had it not been cancelled under section 137J if the former visa holder is onshore, or within 28 days after the day of cancellation if the former student visa holder is not in Australia.

Following commencement of the amendments, the Department would identify and contact former student visa holders that were sent a notice by an education provider under section 20 before commencement of the Bill, in order to resolve their visa status.

The automatic cancellation provisions in the Migration Act will remain unamended so as to allow the Department to manage circumstances where former student visa holders are still able to apply, or have applied, for revocation, merits review to the MRT or judicial review. Once the visa status of the remaining caseload has been resolved, it is intended to remove the provisions in the Migration Act that provide for the automatic cancellation of student visas.

4.0 SUMMARY OF KEY BENEFITS

The amendments in this Bill are intended to benefit genuine international students in Australia and the international education industry more broadly. Under the discretionary cancellation framework that is intended to replace the automatic regime, students who are reported for a breach of condition 8202 will have the opportunity to explain the circumstances of their case and for departmental officers to make an assessment of whether a whether cancellation is warranted. For genuine students, the abolition of automatic cancellation may allow changes in course or extra tuition as opposed to cancellation and exclusion from Australia. Facilitating stay in Australia for genuine students is of benefit to the international education industry and Australia more broadly.

The amendment to require an education provider to give particulars of any change in contact details of a student visa holder within 14 days after the provider becomes aware of the change will also benefit student visa holders. It will allow the Department to contact them to convey important information affecting their visa status. Without the ability to contact a student at their most recent address, the student may not receive crucial requests to address their visa status, which, if not attended to, may ultimately result in visa cancellation. It is in the interests of students, the Department and industry to give individuals adequate opportunity to comment on any action that may affect their stay in Australia.

This amendment to require any changes in contact details to be provided will also benefit the international education industry more broadly by ensuring that the Department is able to hold international students to account for breaches of visa conditions. The Australian community expects there to be consequences if a visa holder breaches visa conditions. Maintaining a strong, yet fair, immigration integrity regime will assist to uphold and improve the reputation of the international education industry both within Australia and internationally.