



Australian Government
Department of Education

Education Services for Overseas Students Amendment (Quality and Integrity) Bill 2024

Submission to the Senate Standing Committee on
Education and Employment Legislation



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Introduction

The Department of Education (the department) welcomes the opportunity to make a submission to the Education and Employment Legislation Committee's Inquiry into the Education Services for Overseas Students Amendment (Quality and Integrity) Bill 2024 (the Bill).

The Australian Government is committed to supporting the quality, integrity and long-term sustainability of the international education sector.

The release of the *Rapid Review into the Exploitation of Australia's Visa System* (Nixon Review) and the *Review of the Migration System* (Migration Review) brought urgent attention to integrity issues in international education.

Further, the 2023 interim report of the Joint Standing Committee on Foreign Affairs, Defence and Trade, entitled *Quality and integrity – the quest for sustainable growth: Interim report into international education* (Interim Report) demonstrated quality and integrity issues in international education.

To ensure the long-term sustainability of the international education sector, the Australian Government is committed to implementing a managed system to deliver sustainable growth over time for onshore international education. Addressing integrity and infrastructure pressures will ensure international and domestic students have access to an education system that delivers high-quality learning experiences.

The Bill amends the *Education Services for Overseas Students Act 2000* (the ESOS Act) to include measures which directly respond to issues identified in the Nixon and Migration Reviews, and is also informed by the Interim Report. The ESOS Act regulates education services for overseas students and provides access to the Australian education system. The ESOS agencies responsible for regulating providers under the ESOS Act are the Australian Skills Quality Authority, the Tertiary Education Quality and Standards Agency, and for the school sector, the Secretary of the Department of Education (the Secretary).

Key amendments to the ESOS Act

The Bill amends the ESOS Act to support the quality, integrity and sustainable growth of the international education sector. The provisions within the Bill are examined below.

Part 1 - Education agents and commissions

Part 1 of the Bill introduces a new requirement for ESOS agencies to consider when determining whether a provider is fit and proper to be registered under the ESOS Act. The changes proposed under the Bill amend section 7A of the ESOS Act to expand the fit and proper considerations and require ESOS agencies to take into consideration any ownership or control between providers and education agents, and the extent of that ownership.

The measure is not intended to prevent cross-ownership which is transparent, well-governed and documented, but to prevent collusion.

This measure further updates the definition of an education agent and introduces a definition of education agent commission. The proposed amendments also require providers to give to the Secretary information about education agent commissions that were given to an education agent in connection with the recruitment of accepted students of the provider.

These amendments are designed to engender transparency of relationships between providers and education agents, with the intent of limiting opportunities for collusive behaviour and improving the standard of conduct required by providers to gain and hold registration under the ESOS Act.

The amendments take into account feedback from international education sector stakeholders concerning the administrative burden of reporting education agent commissions. Stakeholders suggested reporting commissions over a specific period, for example 12 months. By allowing for periodic reporting of commissions information, it is ensured that compliance with the new requirement does not create an unnecessary administrative burden on providers.

The Nixon Review identified that some education providers formed business relationships and worked with education agents to facilitate student movements for the purposes of profit only, rather than the genuine education needs of the student.

All providers who wish to be registered under the ESOS Act must satisfy their ESOS agency that they are fit and proper to be registered. Further, all current registered providers must continue to satisfy the fit and proper test. There are no exemptions from the 'fit and proper' test.

Registered providers are required to notify their ESOS agency if they begin to have ownership or control of an education agent, where there is a change in that ownership or control. Notification is also required if the provider begins to be owned or controlled by an education agent or if there is a change in ownership or control. Notification must be within 10 business days.

Cross-ownership is not an individual ground for an ESOS agency to refuse to register a provider and an ESOS agency will consider the existence of any cross-ownership arrangements when making their overall determination of whether a provider is fit and proper to be registered.

Education agents

The new definition of 'education agent' does not rely on an agent's formal relationship with an education provider. The new definition provides an activity-based approach to defining persons or entities who are considered to be education agents

The creation of a definition of 'education agent commission' is necessary to complement new powers for the Secretary to request providers to give education agent commission information and to strengthen the ability of an ESOS agency, or the Secretary, to share this information with registered providers.

The department took into account feedback from sector representatives when drafting the definition of 'education agent commission'. It has been drafted to be broad to address concerns that a narrow definition could provide the opportunity for providers and agents to change their practices and not capture some forms of financial compensation.

This definition will also be relied on following amendments to the *National Code of Practice for Providers of Education and Training to Overseas Students 2018* (National Code) concerning education agent commissions, which will be required to implement a ban on payment of commissions for onshore transfers.

Part 2 - Giving information to registered providers

Part 2 of the Bill expands the ability of the Secretary, or an ESOS agency, to give information about education agents to registered providers for the purposes of protecting and enhancing Australia's reputation for quality education and training services for accepted students.

The amendment will enhance transparency of education agent practices and behaviours and assist providers to make better decisions about which agents to engage with. Information that a provider may consider when engaging education agents may include selecting those who have a lower rate of course transfers or not using agents who have a pattern of high visa refusals.

Evidence received by the Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry indicated the current international education market is hyper competitive around student recruitment, which places providers at a disadvantage in managing agents. The Interim Report highlighted that this environment fostered the payment of large commissions to agents. The Committee considered the case for mandating transparency in agent commissions to be overwhelming. The amendment gives effect to this finding of the Committee.

The provisions under Part 2 do not allow the Secretary or ESOS agencies to publish this information to the general public, rather they enable the provision of information to registered providers in a controlled, access restricted platform.

Part 3 - Management of provider applications

Part 3 of the Bill enables the Minister for Education (the Minister) to, by legislative instrument, suspend the making or processing of initial applications for the registration of providers and applications for the registration of new courses by registered providers for a specified period. The period specified must not be more than 12 months.

This measure allows ESOS agencies to properly consider all applications and divert resources to addressing emerging integrity issues. It also allows for improved management of sector growth, and provides flexibility to address concerns in specific cohorts of high-risk providers or courses.

This amendment addresses Recommendation 14 in the Interim Report to pause, for at least 12 months, the processing of new provider applications for registration and the addition of new courses by existing providers.

The Minister must personally exercise his powers under the new provisions included in this Part. The Minister requires the prior written agreement of the Minister for Skills and Training (or the Minister responsible for administering the *National Vocational Education and Training Regulator Act 2011* (NVETR Act)) before making an instrument under these new provisions. The Minister must also consult with ESOS agencies but does not require their agreement before making the instrument.

This measure introduces a definition of ‘processing activity’. The definition of processing activity clarifies that where a determination is made that an ESOS agency must not undertake any processing activity, an ESOS agency will not accept new provider applications and will not perform any work to progress existing provider applications that have not been approved before the determination commences.

Where a determination is made that an ESOS agency is not required to undertake any processing activity, the ESOS agency would have discretion to decide whether to continue progressing existing applications.

The Minister is able to direct ESOS agencies to suspend the processing of all applications or one or more specific classes of applications, which for example, may include classes of applications for specific VET or Higher Education courses.

It is intended that the Minister will exercise this power in circumstances, where the Minister has concerns relating to the integrity or sustainability of the international education sector. This will help protect overseas students by ensuring that, where there are significant concerns associated with all, or a specified class of, registration applications, the Minister can direct the ESOS agencies to pause the processing of these applications, while allowing processing of other applications to continue as appropriate, in order to undertake further investigation.

A legislative instrument made under this Part of the Bill is not subject to disallowance. Subjecting the legislative instruments to the disallowance process may result in further uncertainty in this period of change for the international education sector, in respect of affording providers with commercial and business certainty once an instrument has been made. The matters covered by an instrument are intended to be under Executive control, given the primary purpose of the instrument will go to the functioning and operations of ESOS agencies and their role in regulating providers where integrity risks are present.

The legislative instruments under this part of the Bill can apply to applications for registration (for new providers or the addition of courses by existing providers) made before, on or after the commencement of the Bill. This is necessary to avoid the risk of a situation arising where non-genuine providers seek to circumvent increased regulatory scrutiny ahead of changes being introduced, for example, by quickly submitting an application prior to commencement. It ensures that all providers are subject to the same considerations regardless of the time of their application.

Part 4 - Registration requirements

Part 4 of the Bill changes the registration requirements for education providers. Education providers seeking registration will be required to demonstrate their ability to deliver effectively first to domestic students by providing one or more courses for consecutive study periods totalling at least 2 years in Australia to students other than overseas students.

This amendment is aimed at deterring non-genuine providers from entering the international education sector purely for facilitating migration outcomes or trafficking people into bonded labour rather than providing a quality education outcome. It further addresses a recommendation in the Interim Report to require at least 12 months of operation and delivery to domestic students prior to registering as an education provider under the ESOS Act.

To give effect to the policy objective, this measure also introduces a definition of ‘study period’. A study period is defined as a period of study within a course that meets the requirements (if any) set out in the National Code, such as a term or semester. Breaks that ordinarily occur, during or between one or more study periods count towards the total of 2 years.

Providers that deliver only English Language Intensive Courses for Overseas Students (ELICOS) or only a Foundation program are exempt from the new registration requirements as such providers only deliver to overseas students. Providers listed in Table A of the *Higher Education Support Act 2003* (Table A providers) are also exempt from these requirements as these providers have demonstrated a commitment to delivering quality education services through meeting the eligibility criteria under the *Tertiary Education Quality and Standards Agency Act 2011* to be able to self-accredit courses. This also ensures that, in the event of mergers or corporate restructures by Table A providers that result in the creation of a ‘new’ provider that has demonstrated commitment to delivery of quality courses, the new provider is not penalised or subject to this provision.

This provision does not apply to existing registered providers or providers seeking to renew their registration. However, should a provider’s registration be cancelled or end without being renewed, the provider will be subject to the requirement should they seek to re-enter the sector and apply for registration.

Part 5- Automatic cancellation of registration

Part 5 of the Bill introduces a new provision specifying that a provider’s registration is automatically cancelled if they have not provided a course at a location to an overseas student in a period of 12 consecutive months beginning on or after 1 January 2024 (the measurement period).

This amendment addresses integrity risks posed by dormant providers who may be using their registration for non-genuine purposes and providers who are not demonstrating a genuine commitment to course delivery. It further addresses a recommendation in the Interim Report to cancel a provider’s registration if they have no delivered training within a 12-month period.

Approved school providers are exempt from this amendment as intakes of overseas students at such providers are generally small and they may not enrol an overseas student every year.

The Bill uses the term ‘cancelled’ in reference to a provider’s registration as this terminology is consistent with existing provisions in the ESOS Act (for example, section 92 of the ESOS Act). The term ‘lapse’ is used for a similar provision in the NVETR Act because the VET registration scheme operates differently to the ESOS Act, but in application, these terms have the same meaning and result in the same outcome (i.e. a provider no longer being registered).

As the cancellation of a provider’s registration under this provision would occur by force of law, it is not subject to merits or judicial review.

The amendment includes provisions enabling a provider to seek an extension of the measurement period from their ESOS agency. The application for an extension must be made at least 90 days before the measurement period would otherwise end. Subject to the passage of the Bill, the first measurement period can commence after 1 January 2024 to ensure providers have 90 days to seek an extension. Legitimate circumstances for an extension may include where:

- a newly registered provider is facing operational challenges preventing successful delivery of courses to overseas students (for example, lack of staff or funding), and
- where a provider may be affected by a natural disaster or circumstances that are beyond their control impacting on the delivery of a course (for example, fire, flooding, or a pandemic event).

A provider is able to request an extension to each measurement period. An ESOS agency can extend a measurement period more than once but not for a total period exceeding 12 months. The decision to not extend a measurement period is an exercise of administrative power by an ESOS agency and is subject to merits and judicial review.

As the first measurement period will apply on or after 1 January 2024, the amendments will apply retrospectively to providers who were registered on that date. Any education provider that has not delivered courses for a period of 12 consecutive months from commencement of the first measure period (currently 1 January 2024) will be affected.

Regulatory action will not commence until 1 January 2025, giving genuine providers until the end of 2024 to recommence delivery without being subject to cancellation. The ESOS agencies will contact those providers affected and provide them with an opportunity to seek an extension to the 12-month period as provided for in the Bill.

Part 6 - Investigation of offences

Part 6 of the Bill introduces a new requirement for ESOS agencies to consider when determining whether a provider is fit and proper to be registered under the ESOS Act. The changes proposed under the Bill amend section 7A of the ESOS Act to expand the fit and proper considerations and require ESOS agencies to take into consideration whether a provider or related person of the provider is being investigated for a specified offence.

The specified offences include offences under the ESOS Act, offences under Division 270 and 271 of the *Criminal Code* (relating to human trafficking and slavery), an offence under section 590 of the *Corporations Act 2001* and an offence specified in a legislative instrument made by the Minister.

These are serious offences, and providers who are being investigated for these offences are placing students at risk of serious exploitation if left unaddressed. Suspending providers who are no longer fit and proper because an ESOS agency is required to consider if they are under investigation for a serious offence ensures that vulnerable students are protected, and further exploitation is limited while investigations are underway.

This amendment further addresses a recommendation in the Interim Report to automatically suspend a provider's recruitment of overseas students if the provider is under serious regulatory investigation.

This amendment to the fit and proper provider test is included in section 7A of the ESOS Act to ensure that a strong message is sent to providers about the serious consequences that may affect their registration if they are under investigation for a specified offence. Section 89 of the ESOS Act provides that if an ESOS agency is no longer satisfied that a registered provider is fit and proper, their registration is automatically suspended. As the suspension is automatic, the ESOS agency does not need to give the provider procedural fairness in relation to the suspension and the provider is

not able to seek review of the suspension. This is consistent with the existing operation of the fit and proper test.

The new consideration in the fit and proper test applies to providers applying for registration or reregistration after commencement and providers who applied for registration or re-registration before commencement.

These amendments apply retrospectively in relation to investigations, including ongoing investigations, of providers who are already registered and providers that have applied to be registered prior to commencement whose applications have not yet been decided.

Many investigations for serious offences commence years post the event. Where a provider is under investigation for the serious offences stated in this provision, suspension of enrolment should be able to apply to any provider under investigation, to ensure that vulnerable students are not exploited or otherwise continue to be detrimentally affected.

It is important to note that the fact a provider is under investigation does not mean a provider is automatically unfit to be registered – it is a factor that ESOS agencies will consider when determining whether a provider is fit and proper to be registered.

Part 7 – Enrolment limits

Part 7 of the Bill empowers the Minister to determine the maximum number of overseas students at registered providers, including in specific courses at registered providers, in one or more years. The Minister can apply enrolment limits by legislative instrument to a class of providers, and by individual notice to a provider. These may relate to either a provider level ‘total enrolment limit’, or at the course level impose a ‘course enrolment limit’.

Limits set via legislative instrument may apply to a class of provider, and a course or class of courses. The total enrolment limit must be specified in the instrument or worked out in accordance with a method specified in the instrument.

The Minister can exempt courses from counting towards a registered provider’s total enrolment limit. For example, the instrument could exempt courses addressing Australia’s critical skill needs, such as teaching and nursing and a provider could enrol any number of students in these courses.

Enrolment limits will not apply to school providers and the Government may consider the appropriateness of excluding other classes of providers or courses from the new settings.

Limits set via written notice are specific to an individual provider and determine the number of overseas students that may be enrolled with the provider in respect of one or more specified years. As with instruments, the Minister is able to exempt certain courses from counting towards a provider’s total enrolment limit.

Course enrolment limits set via legislative instrument or written notice determine the number of overseas students that may be enrolled in a specified course, or a course in a specified class of courses, delivered by the providers to which the limit applies in respect of one or more specified years.

The Minister must obtain written agreement from the Minister responsible for administering the NVETR Act (currently the Minister for Skills and Training), prior to setting limits for VET providers or VET courses.

Changes to the system are being made to ensure that providers will not be able to exceed their total enrolment limits of overseas students. Once a provider reaches its limit, the provider will not be able to issue any further confirmations of enrolment for the remainder of that calendar year and therefore will not exceed its enrolment limit. This will not apply to exempt courses. Confirmations of enrolment are required for the processing of an international student visa. The same system will operate in relation to course enrolment limits in any instance where it applies.

Providers' normal operations will not be impacted. Providers will still be able to recruit international students for subsequent years. Overseas students who have already enrolled and commenced and have valid confirmations of enrolment issued will be unaffected.

These provisions give flexibility to the Minister to make an instrument that will appropriately reflect the Government's policy objectives at any given time. This flexibility is necessary for the Minister to be able to respond appropriately to Australia's migration needs and to determine the appropriate size and composition for the management of a sustainable international education sector into the future.

Transitional provisions ensure that the enrolment limits for 2025 can only apply to new enrolments for the 2025 calendar year. For 2026 and later years, the enrolment limits can apply to new enrolments for the year or a combined total of new and ongoing enrolments for the year, to the extent that ongoing enrolments were new enrolments in 2025 or later years.

The Minister must personally exercise his powers to make instruments in relation to setting limits on the number of enrolments of overseas students. This power is expected to have a material effect on providers and the integrity of the international education sector and is not appropriate to be delegated.

Australia's international education system must have the right settings to provide the highest quality student experience and maintain Australia's world-class reputation for delivering education.

The Government has released a draft International Education and Skills Strategic Framework and is undertaking targeted consultations with universities on how sustainable growth can be managed over time.

Part 8 - Automatic cancellation of specified courses

Part 8 of the Bill enables the Minister to, by legislative instrument, specify certain classes of courses that will be automatically suspended and cancelled. The Minister may exercise this power in relation to classes of courses if satisfied that there are systemic issues in relation to the standard of delivery of the courses, or if the courses provide limited value to Australia's skills and training needs and priorities, or if it is in the public interest to do so.

These amendments respond to concerns raised in the Nixon Review and support the integrity and sustainability of the international education sector by enabling the Minister to take decisive action to prevent providers from delivering courses where there is a demonstrated reduction in quality of delivery.

The Minister must obtain written agreement from the Minister responsible for administering the NVETR Act (currently the Minister for Skills and Training), prior to making an instrument that includes VET courses. The Minister is also required to consult with the ESOS agencies.

The Minister can make an instrument in relation to a course that a provider is registered to provide before, on, or after commencement of the Bill. This is to ensure that courses currently being offered with systemic issues in relation to the standard of delivery, or that provide limited value to Australia's skills and training needs and priorities, or that raise public interest concerns, can be specified in an instrument.

Courses specified in an instrument will not be automatically cancelled if there are students enrolled or studying 30 days after the instrument commences. No new enrolments for the courses will be allowed to enrol, however, providers will be able to teach out any students that have already commenced studying the affected courses. The courses would be cancelled on completion or withdrawal of the final student.

Consultation

The Council for International Education, sector peak bodies, and state and territory representative bodies were regularly engaged during development of Parts 1 and 2 of the Bill. Direct consultation with the sector was not undertaken on the measures under Parts 3 to 8 of the Bill to avoid the risk of non-genuine providers seeking to circumvent future increased regulatory scrutiny ahead of changes being introduced.

Following the Bill's introduction to Parliament, the department has engaged with, and continues to actively engage with the sector on the draft International Education and Skills Strategic Framework. The Strategic Framework seeks to establish a managed system to deliver sustainable growth over time and provide clarity to providers and students in managing growth via Part 7 of the Bill. Targeted consultation on the Bill and Strategic Framework is being undertaken with the Council for International Education, the International Education Stakeholder Forum, the Commonwealth State and Territory International Education Forum and other international education stakeholders.

The department considered advice and regularly engaged with relevant Government agencies in the development of the Bill, and in relation to matters relating to the *Migration Act 1958*, NVETR Act, Australia's free-trade obligations, and the new disallowance exemptions.

The department regularly consulted with ESOS agencies on all Parts of the Bill. The department has worked with ESOS agencies to ensure that the amendments in the Bill can be implemented to achieve their purpose, without imposing an excessive administrative or operational burden on the ESOS agencies.

Commencement of the Bill

Subject to the Bill passing Parliament, the whole of the Bill's provisions will commence either on the day after the *Education Services for Overseas Students Amendment (Quality and Integrity) Act 2024* receives Royal Assent or 1 July 2024, whichever comes later.

Transitional arrangements will be in place. The department will engage the international education sector through forums, peak bodies and written information via the departmental and Provider Registration and International Student Management System websites to inform stakeholders of the new requirements.

Amendments under Parts 3, 7 and 8 of the Bill require legislative instruments to give effect to the provisions of the Act.

Amendments under Parts 3, 5, and 6 of the Bill can be applied retrospectively to ensure the relevant sections operate as intended.