



Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

12 January 2021

Submissions relating to the *Regulatory Powers (Standardisation Reform) Bill 2020*

To whom it may concern,

The Council of International Students Australia (CISA) is the national peak student representative body for international students in Australia. Formed in 2010, we are a non-profit, non-partisan and non-commercially aligned organization in response to the need for a national voice and unified advocacy for the more than 650000 international students in Australia.

We thank the Committee for inviting us to draft a submission to this inquiry and welcome the opportunity to contribute. Our submissions will address the proposed amendments to the *Regulatory Powers (Standard Provisions) Act 2014*, the *Education Services for Overseas Students Act 2000* and the *Tertiary Education Quality and Standards Agency Act 2011*.

We will first state a summary of our submissions. We will then state our general opinion on the proposed reforms. We will then address the proposed reforms to the three aforementioned acts, outlining specific submissions with respect to each.

We would like to clarify that we do not express an opinion on whether the current legislative framework to ensure quality education for international students is adequate. Answering that question is not the focus of this submission and should be reserved for a more appropriate inquiry. Rather, we respectfully submit that this bill should be passed or rejected on whether it improves or detracts from existing legislative frameworks.

We welcome the opportunity to answer any questions from the Committee relating to our submission. We can be contacted via



Summary of Submissions

Submission 1.1 The Committee should recommend that the expansion of the scope of monitoring powers to include 'matters' should be passed.

Submission 1.2 The Committee should seek clarification as to why a similar expansion was not undertaken with respect to investigation powers of the *Regulatory Powers (Standard Provisions) Act 2014* and, if appropriate, recommend its expansion.

Submission 2.1 The Committee should recommend that s 151 of the *Education Services for Overseas Students Act 2000* be completely or partially retained.

Submission 2.2.1 The Committee should consult with relevant regulatory bodies such as TEQSA and National VET Regulator regarding the impact of the proposed reduction of penalties for failing to answer questions or produce documents at the request of authorized officers acting under a monitoring warrant.

Submission 2.2.2 The Committee should consult with the government as to the potential impact of the said reduction of penalties.

Submission 2.2.3 If appropriate, the Committee should recommend amendments to the suggested penalty reduction to reflect what is needed for effective exercise of the monitoring powers.

Submission 3.1.1 The Committee should consult with TEQSA and the government as to the impact of the proposed reduction of the proposed repeal of s 74 of the *Tertiary Education Quality and Standards Agency Act 2011*.

Submission 3.1.2 If appropriate, the Committee should recommend the retainment of s 74.



Introduction and General Opinion

CISA believes that all international students are entitled to a high and the highest possible education quality and educational experience in their time in Australia. This is so whether regardless of the institution they are studying and whether they are onshore and offshore. After all, it is precisely Australia's reputation for high quality of education and experience that made many students choose Australia in the first place. Therefore, it is also precisely this reputation that allows international education to be such an important sector of the Australian economy.

We submit that a strong, comprehensive, and strictly enforced framework of standards and protections as outlined by the legislation such as *Education Services for Overseas Students Act 2000* ('ESOS Act'),¹ explicated by the National Code² and the ELICOS and Foundation Program Standards, is essential to ensuring the quality of Australian higher education and the robustness of its international education sector.

As such, CISA supports and commends the government's regulatory standardization efforts in so far as it helps ensure efficient enforcement and easier compliance with the relevant legislative framework.³ At the same time, we respectfully urge caution in this effort. We submit that in some circumstances bespoke⁴ provisions may prove preferable to standard provisions. The Commonwealth Parliament have passed legislation regulating many and diverse fields. The Acts mentioned in the Schedule of this bill is evidence of that fact. What is required for enforcing legislation relating to higher education for international students may differ from, say, those dealing with discipline of defence forces⁵ or Australia fisheries.⁶

¹ See also Explanatory Memorandum, Regulatory Powers (Standardisation Reform) Bill 2020 (Cth) 52 [290] ('Explanatory Memorandum').

² Gaby Ramia, Simon Marginson and Erlenawati Sawir, *Regulating International Students' Wellbeing* (Bristol University Press, 2013) 82.

³ Explanatory Memorandum (n 1) 5[6].

⁴ See *Ibid* 22 [106].

⁵ Regulatory Powers (Standardisation Reform) Bill 2020 (Cth) sch 1 ('Bill').

⁶ *Ibid* sch 4.



In sum, in the effort to standardize, we must be careful that we do not inadvertently hamper the ability of the regulatory agencies tasked with enforcing these laws. It is this concern that underlie our submissions.

Schedule 1: Regulatory Powers (Standard Provisions) Act 2014 ('RPA')

We commend the proposed expansion of the scope of the monitoring powers⁷ in the RPA to include 'matters.'⁸ We submit that this expansion would allow for better enforcement of the provisions subject to the monitoring powers of the RPA.⁹

However, we must respectfully ask why a similar expansion was not undertaken with respect to the RPA's investigation powers as well.¹⁰ We respectfully suggest that such an inclusion may better achieve the underlying goal of the bill of ensuring that the penalty and offence provisions of the acts that trigger the RPA can be effectively enforced.¹¹

We respectfully recommend that the Committee seek a clarification from the government as to why such an expansion was not included and, should the committee deem it appropriate, recommends said expansion in its report.

Schedule 3: Educational Services for Overseas Students Act 2000 ('ESOS Act')

We welcome and commend the retainment of Part 7 Division 2 of the ESOS Act as there does not appear to be provisions that are equivalent to it in the RPA. Nevertheless, we must respectfully raise concerns regarding parts of the bill

First, the bill would repeal s 151 of the ESOS Act. This section allows an authorized officer to seize evidence of an offence against the act or the *Crimes Act 1914* or the *Criminal Code* if they believe it necessary to prevent said evidence from being destroyed. We submit that this may hamper the enforcement of the ESOS Act in that it limits investigators' ability to seize

⁷ *Regulatory Powers (Standard Provisions) Act 2014* (Cth) pt 2 ('RPA').

⁸ See, eg, Bill sch 1, item 4–12.

⁹ See Explanatory Memorandum (n 1) 38 [211].

¹⁰ *RPA* (n 7) pt 3.

¹¹ See Explanatory Memorandum (n 1) 5 [6].



evidence discovered 'on the spot' in some circumstances. If the bill is passed, a person assisting¹² the Chief Executive of TEQSA is entering a premise for investigation purposes with the consent¹³ of the educational provider. Said person noticed an evidence for an offence against the ESOS Act. Under the RPA, they cannot seize the evidence given that they do not currently have an investigation warrant.¹⁴ The person of course is able to take photographs of said evidence¹⁵ but if the educational provider withdraw consent, the investigator may have little choice but to leave the premises.¹⁶ In the meantime that the investigator applies for a warrant, said evidence could be concealed, altered, or even destroyed.

This is not to say that we do not recognize the dangers of warrantless investigations and seizures to a free society and human rights. Indeed, the effect of the bill may well encourage investigators to apply for a warrant before launching any investigation, an outcome which can be reasonably welcomed. We also recognize that, in some circumstances, the conduct of the education provider described above would itself be an offence.¹⁷ Nevertheless, we submit that the possibility of investigators being unable to seize evidence they discovered on the spot are strong reasons for considering the complete or partial retainment of s 151.

We also express concerns that another proposed reform may also constrain enforcement of the ESOS Act. Although we welcome the increased penalties for those who failed to provide reasonable assistance and facilities for the execution of a monitoring and investigation warrant,¹⁸ we are respectfully concerned with the proposed reduction of applicable penalties for failing to answer questions or produce documents at the request of authorized officers acting under a monitoring warrant. Under the current ESOS Act, this is an offence carrying the maximum penalty of 6 months imprisonment.¹⁹ If the bill is passed, the penalty will be reduced to a maximum of 30 penalty units.²⁰

¹² RPA (n 7) s 53.

¹³ Ibid s 49(a).

¹⁴ See *ibid*. Cf *ibid* ss 22, 52; *Education Services for Overseas Students Act 2000* (Cth) s 142(7) ('ESOS Act').

¹⁵ RPA (n 7) s 49(d).

¹⁶ See *ibid* s 55 (4)–(5).

¹⁷ See *Crimes Act 1914* (Cth) s 43.

¹⁸ Compare *ESOS Act* (n 14) s 155 and *RPA* (n 7) ss 31, 63.

¹⁹ See *ESOS Act* (n 14) ss 132–4.

²⁰ See *RPA* (n 7) s 24(3),(5).



It should be noted that we do not necessarily submit that a penalty of 6-month imprisonment is appropriate, or that higher penalties necessarily equate to higher compliance with a particular law. Nor do we submit that the defence available under the current s 134(2) is adequate. Indeed, we commend the fact that under the RPA an individual would not be punished if they simply do not have or is unable to obtain the requested information or document,²¹ if giving information or document could lead to self-incrimination²² or if the information subject to legal professional privilege.²³

We do respectfully submit that the Committee should consider the possible impact the reduction may have on the ability of the regulators to monitor compliance with the ESOS Act. This is particularly so given that some of the regulators, such as TEQSA, may be relatively small agencies.²⁴ Further, the monitoring powers has particularly significance since it extends to the National Code and the ELICOS and Foundation Program Standards as well.

In sum, we respectfully submit that the Committee should place particular weight on submissions from regulatory bodies such as TEQSA and the National VET Regulator regarding the potential impact of the reduction in sentence, or to seek their opinions if such submissions are not forthcoming. We also respectfully encourage the Committee to consult with the government regarding this matter as well. Finally, we submit that if the Committee deem it appropriate, the Committee should recommend amending the proposed penalty reduction.

Schedule 5: Tertiary Education Quality and Standards Agency Act 2011 ('TEQSA Act')

We respectfully express concerns regarding the proposed removal of the ability for TEQSA to use force against things in execution of a warrant, as per s 74 of the current *TEQSA Act*.²⁵ We note that TEQSA would still be able to do so if they are monitoring or investigating the compliance of a provider with the ESOS Act.²⁶ However, this repeal still concerns us as compliance with the TEQSA Act is relevant as it determines which providers are allowed to

²¹ See *ibid* s 24(4).

²² *Ibid* s 17(1)

²³ *Ibid* s 17(2)

²⁴ See, Explanatory Memorandum (n 1) 97 [430].

²⁵ See Bill (n 5) sch 5 item 5; Explanatory Memorandum (n 1) 88.

²⁶ See, eg, *ESOS Act* (n 14) s 147; Explanatory Memorandum (n 1)



provide courses to international students and which courses can be offered to international students.

We again respectfully submit that the Committee should put particular consideration on any submissions from regulatory bodies such as TEQSA and the National VET Regulator regarding the potential impact of the reduction in sentence, or to seek their opinions if such submissions are not forthcoming. We also respectfully encourage the Committee to consult with government regarding this matter as well. Finally, we submit that if the Committee deem it appropriate, the Committee should recommend the retainment of this provision.