

Department of Education, Employment and Workplace Relations
Submission to the Inquiry into the
Education Services for Overseas Students Legislation Amendment Bill 2010
(ESOS Legislation Amendment Bill)

1. Background

The provision of education and training services to overseas students in Australia is regulated by the Education Services for Overseas Students legislative framework. It comprises:

- *Education Services for Overseas Students Act 2000 (ESOS Act)*
- *Education Services for Overseas Students Regulations 2001 (ESOS Regulations)*
- *National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007 (National Code)*
- *Education Services for Overseas Students (Registration Charges) Act 1997*
- *Education Services for Overseas Students (Assurance Fund Contributions) Act 2000*

The ESOS Act and the ESOS Regulations set out the Commonwealth legislative requirements for the registration of providers, obligations on registered providers, the operation of the ESOS Assurance Fund, enforcement of the ESOS legislative framework and the establishment of the National Code. The principal objects of the ESOS Act are to:

- protect and enhance Australia's reputation for quality education and training services;
- provide financial and tuition assurance to overseas students for courses for which they have paid; and
- complement Australia's migration laws by ensuring providers collect and report information relevant to the administration of the laws relating to student visas.

ESOS Review

In August 2009 the Government asked the Hon Bruce Baird AM to review the ESOS legislative framework and report back to Government with changes designed to ensure Australia continues to offer world-class quality international education (the Baird review).

The Baird review considered the need for enhancements to the ESOS legal framework in four key areas: supporting the interests of students; delivering quality as the cornerstone of Australian education; effective regulation; and sustainability of the international education sector.

In March 2010, following his review of ESOS, Mr Baird recommended immediate changes to improve the experience of international students choosing to study and live in Australia.

Mr Baird's report, *Stronger, simpler, smarter ESOS: supporting international students*, makes 19 recommendations along the following themes:

- more support for international students and improved information;
- stronger consumer protection mechanisms to ensure students are protected from unscrupulous operators;
- improved regulation of Australia's international education sector, including better risk management and streamlining regulation with domestic quality assurance frameworks; and
- improved complaints and appeals mechanisms.

The recommendations followed extensive consultation with international students, education providers, state and territory governments, regulatory bodies, student organisations, international education professionals, education unions, industry bodies and diplomatic missions.

In releasing the report, the then Deputy Prime Minister, the Hon Julia Gillard MP, indicated a staged approach to implementation, and gave in-principle support to the following Baird Review recommendations for implementation, either as changes to the ESOS Act (marked with an asterix), or in further consultation with key stakeholders, as changes to associated legislative instruments such as the National Code or the ESOS Regulations:

- requirements for providers to demonstrate appropriate course delivery arrangements which support student visa integrity and quality, and that English language entry levels and support are appropriate for the course (recommendation 1);
- strengthened registration criteria to ensure a focus on financial viability and sustainability of management and business practices* (recommendation 2);
- a risk management approach to registration and ongoing monitoring*(recommendation 3);
- financial penalties to a broader range of non-compliance behaviour*(recommendation 5a);
- ensuring standards are objective and enforceable (recommendation 5b);
- publishing targets and regularly reporting on regulatory activity*(recommendation 5d);
- improved complaints and appeals processed for students*(recommendation 8); and
- strengthened obligations on providers to ensure ethical recruitment practices, including by the education agents they use (recommendations 12a,c and e).

The ESOS Legislation Amendment Bill was first introduced in Parliament on 23 June 2010, but lapsed when Parliament was prorogued.

The ESOS Legislation Amendment Bill was re-introduced in the Senate by the Hon Senator Chris Evans, Minister for Tertiary Education, Skills, Jobs and Workplace Relations, on 27 October 2010. The ESOS Legislation Amendment Bill makes adjustments to ESOS as well as to the *Ombudsman Act 1976* and the *Privacy Act 1988* to give effect to the above asterixed measures.

Additionally, the Government has already consulted with the sector on proposed regulatory change related to provider obligations for education agents, including three which are recommendations from the Baird review. This consultation feedback will inform the Government's second response to the Baird review in 2011.

2. Summary of the amendments

The ESOS Legislation Amendment Bill was re-introduced on 27 October 2010 as the Government's first response to the Baird Review.

The ESOS Legislation Amendment Bill is intended to:

- strengthen the registration requirements of approved providers by requiring that they have access to sufficient financial resources, a sustainable business model and the capability, governance structures and management to deliver education of a satisfactory standard;
- ensure resources are better targeted towards high risk providers and reduce regulatory burden for low risk providers by applying a risk management approach to all registrations and throughout the registration period;
- complement a risk management approach by applying conditions to a provider's registration, either at initial registration or anytime throughout the registration period as well as limiting a provider's registration period to no more than five years;
- address non-complaint provider behaviour by extending the use of financial penalties to a broader range of non-compliant activity; and
- allow the Secretary to publish targets and regular reporting on all regulatory activities taken under Part 6 – Enforcement and Part 7 – Monitoring by the Commonwealth.

The ESOS Legislation Amendment Bill will also make consequential amendments to:

- the *Ombudsman Act 1976* to extend the jurisdiction of the Commonwealth Ombudsman to include those providers currently without access to a statutorily independent complaints body as their external complaints and appeals process to deal with overseas student complaints (that is, non-government providers except where another statutorily independent body exists; and
- the *Privacy Act 1988* to enable any complaints, made initially to the Privacy Commissioner, to be transferred to the Commonwealth Ombudsman.

3. Rationale for the amendments

The purpose of the ESOS Legislation Amendment Bill is to make amendments to the *Education Services for Overseas Students Act 2000* (the ESOS Act) and the *Ombudsman Act 1976* to address the recommendations from the Baird review.

Stronger registration requirements

The ESOS Legislation Amendment Bill will introduce provisions to strengthen the registration process for approved providers. As part of proving their demonstrated capacity to provide education of a satisfactory standard, providers will have to demonstrate access to the financial resources to meet the objectives of the ESOS Act, have a sustainable business model, and the capability, governance structures and management to deliver education of a satisfactory standard. The purpose of this measure is to build on recent amendments to the ESOS Act, enacted in March 2010, which introduced stronger registration criteria, to further raise the bar of entry into the international education sector. Specifically, this amendment gives an emphasis to demonstrating financial capacity as part of meeting the new 'demonstrated capacity' registration criteria.

Risk Management Approach

Building on the risk managed approach to the re-registration process currently underway (also an amendment to the ESOS Act enacted in March 2010), this measure will extend a risk management approach to all registrations and throughout the registration period. The purpose is to better identify risk and ensure a consistent assessment of risk by all state designated authorities to reduce the number of high risk providers entering the international education sector, or to set appropriate conditions on registration, including for ongoing monitoring to better manage risk. This measure will mean that when assessing a provider for registration, the registering body will set a period of review, and any conditions that should apply arising from an assessment of the provider's risk profile. In addition to registration, a risk management approach will target regulatory activity to reduce duplication of effort and unnecessary regulatory burden on low risk providers.

Details of the risk management approach will be developed in close consultation with state and territory regulatory bodies and other stakeholders to ensure a nationally consistent approach to risk management.

Limiting a provider's registration period

The Commonwealth does not currently have the ability to limit the period of a provider's CRICOS registration. The risk management approach will be supported by the requirement to limit a provider's registration period to no more than five years. This will also introduce consistency into the registration regime to allow ESOS to formally recognise and align with limited periods of registration for each provider set by the states and territories under state/territory legislation and domestic quality assurance frameworks.

Conditions on registration

The Commonwealth can currently only recognise state/territory imposed conditions or impose new conditions as a sanction against non-compliance. Risk management will be further supported by enabling conditions to be placed on a provider's registration when the provider is first registered or at anytime throughout the registration period related to risk. This measure allows the Commonwealth delegate to impose a condition on a provider's registration on its own initiative, rather than on a recommendation by a state designated authority and for reasons other than non-compliance. Imposing a condition on a provider's registration will arise from a provider's risk profile provided by the state designated authority or where risk is identified separately by the Commonwealth as part of ongoing compliance monitoring.

Broader range of financial penalties

This measure will extend existing sanctions and strengthen the ability to take effective enforcement action by introducing financial penalties for a broader range of non-compliant behaviour. This will better address emerging issues confronting the international education sector, such as recruitment activity and maintenance of student records. This will give the Department more options and flexibility around enforcement activity, and will enable it to effectively take corrective action for relatively minor non-compliance without having to restrict a provider's ability to operate.

Publishing targets

To make ESOS stronger, the ESOS review recommended that targets and regular reporting on all regulatory activities undertaken be published. This measure will allow the Secretary to publish any actions taken by the Commonwealth under Parts 6 and 7 of the ESOS Act (which deal with enforcement action, and monitoring and searching activities respectively). The appeals of providers against the enforcement action taken will be no bar to the publication of this information, with the publication corrected if the appeal is upheld.

Extending the Commonwealth Ombudsman's jurisdiction

The jurisdiction of the Commonwealth Ombudsman will be extended to include students of private registered providers. While these providers must provide access to an external complaints body (as required under Standard 8 of the National Code), students of these providers currently do not have recourse to a statutorily independent external body, such as an ombudsman, competent to hear and investigate their complaints in a consistent and quality assured manner.

4. Related initiatives

Education Services for Overseas Students Amendment (Re-registration of Providers and Other Measures) Act 2010

On 3 March 2010, the *Education Services for Overseas Students Amendment (Re-registration of Providers and Other Measures) Act 2010* (ESOS Amendment Act 2010) received the Royal Assent. The ESOS Amendment Act 2010 provides for the re-registration of all providers of education to overseas students under strengthened criteria by 31 December 2010.

The re-registration process is guided by a risk-managed approach to ensure national consistency in assessing providers for re-registration, which will minimise the regulatory impost on low risk providers.

Under the ESOS Amendment Act 2010, all new and existing providers are subject to strengthened registration criteria for CRICOS registration purposes. These are:

- the principal purpose of the provider is to provide education; and
- the provider has demonstrated capacity to provide education of a satisfactory standard.

Other measures include a requirement for providers to publicly list the education agents they use. The amendments also include technical changes to improve the operation of the ESOS Act, such as exemptions from provider default obligations where the legal entity changes without practical impact on courses delivered or students.

The ESOS Legislation Amendment Bill builds on these recent amendments, particularly the strengthened registration criteria and the re-registration measure, to support quality and manage risk to reinforce the reputation and stability of the international education sector.

AQTF 2010

New Essential Conditions and Standards for Initial Registration and Continuing Registration of Training Organisations have been approved by the Ministerial Council for Tertiary Education and Employment and came into effect from 1 July 2010.

The Conditions and Standards were revised to strengthen the Australian Quality Training Framework (AQTF) and provide additional protection for all students undertaking Vocational Education and Training in Australia.

Key changes to the Essential Conditions and Standards include:

- clear requirements for the initial registration of new providers and strengthened requirements for continuing registration, including stronger financial viability, financial management, fee protection and governance conditions;
- compliance with the Conditions of Registration which will now be audited in the same way that compliance with the Standards is audited;
- compliance for an application with the Essential Conditions and Standards for Continuing Registration at the date that it is approved for registration; and
- non-compliance with the new Essential Conditions and Standards may result in a range of sanctions being placed on the RTO, which may include additional conditions being placed on an RTO's registration, an RTO being de-registered, or an application for registration being rejected.

The ESOS Legislation Amendment Bill complements the AQTF 2010 in that it similarly increases the registration requirements for providers with a focus on meeting obligations for overseas students and uses a risk management approach to inform registration and regulatory activity.

International Students Strategy for Australia

On 2 July 2009 the Council of Australian Governments (COAG) agreed to develop a comprehensive national International Students Strategy to improve the experience of international students in Australia and in turn benefit all of Australian society.

The International Students Strategy for Australia was released on 29 October 2010. It incorporates and complements the implementation of the Government's response to the Baird Review. It also builds on efforts undertaken at all levels of government to improve the safety and wellbeing of international students and to ensure the ongoing quality and sustainability of the sector.

The strategy promotes a broader vision of international education to encompass the benefits to Australia, students and their country of origin, and for placing Australia's international education on a more sustainable basis. It will also:

- improve the international student experience through improved pre- and post-arrival information and engagement with the ethnic and broader Australian community;
- enhance general educational offerings that develop cultural understanding, tolerance and language skills;
- achieve a clearer articulation between international education and migration policies; and
- support the quality of education providers.

TEQSA and the National VET Regulator

In March 2009, the then Minister for Education, the Hon Julia Gillard MP, announced that, in response to the Bradley review, a national regulatory and quality agency for higher education would be established, the Tertiary Education Quality and Standards Agency (TEQSA).

In 2009 COAG separately announced agreement to establish a national regulator for the VET sector in 2011. National regulation aims to promote a more consistent, enhanced and streamlined approach to the domestic quality assurance of education providers. It is intended that the national regulators take over a number of regulatory functions currently performed by the Commonwealth and the States for Higher Education and VET providers delivering education services for overseas students under ESOS. The details of this transfer of functions are to be finalised.

5. Consultation

Following Mr Baird's release of the ESOS Review issues paper on 23 September 2009, he spoke to nearly 200 students and education providers from the tertiary, school and English-language sectors and other stakeholders at consultation forums. He also met with provider and student peak bodies, regulators, state and territory government officials, embassies, education industry bodies and Members of Parliament.

The review received around 150 formal submissions and more than 300 people registered with the online discussion forum. Mr Baird also considered recommendations from the International Student Roundtable held in September 2009.

DEEWR has already consulted with key stakeholders on recommendations related to education agents. Further consultation is expected to commence shortly to inform the Government's response to the remaining Baird Review recommendations.

6. Response to submissions received by the Committee

Ten submissions were received when the ESOS Legislation Amendment Bill was first referred to the committee in July 2010.

Submission 1 - Universities Australia (UA)

- UA is supportive of the risk management approach used for the re-registration process and endorses a similar approach in these subsequent amendments.
Response: the risk management approach for all new registrations and ongoing monitoring will build on the approach developed for re-registration and will be developed in further consultation with regulators and the sector. Regulatory impacts will be considered in finalising this approach for consideration by Government.
- UA raises issues about current under-resourcing and the need to clarify roles and responsibility for effective regulation.
Response: funding for national regulators has been included in the portfolio's forward estimates.

Submission 2 - Commonwealth Ombudsman

- The submission from the Commonwealth Ombudsman outlines the provisions of the proposed ESOS Legislation Amendment Bill relating to the proposed role of the Commonwealth Ombudsman.
Response: no issues for response.

Submission 3 - Independent Schools Council of Australia (ISCA)

- ISCA objects to the proposal to publish results of enforcement and monitoring of a provider before the provider has had the opportunity to appeal a decision and is also concerned that an overly zealous approach to regulation for relatively minor non-compliance may result in undeserved reputational damage for a school.
Response: it is intended that only serious non-compliance action would be made public. The ability to use financial penalties for a greater range of non-compliance behaviour will give more flexibility for regulators to act without being excessively punitive. It should also be noted that any decisions reversed through an appeals process will be publicly noted.
- ISCA raises concerns about an increase in regulatory burden and associated costs related to risk management and asks about consultation and education about the risk management approach.
Response: the aim of the risk management approach is to better tailor regulation to risk and should result in reduced regulatory burden for low risk providers. Further consultation and communication with the sector on the risk management approach is intended to allay any concerns regarding increased regulatory burden.
- ISCA raises concerns that the Commonwealth Ombudsman proposal does not adequately address the requirements in Standard 8 of the National Code and suggests this be funded by Industry.
Response: the proposed amendments are aligned with Standard 8 of the National Code. Changes to the National Code will be made to reflect the changes to the Ombudsman Act when passed. Funding for the Commonwealth Ombudsman has been provided from the DEEWR portfolio.

Submission 4 - English Australia (EA)

- EA stresses the need for transparency, consistency and fairness in the application of the risk management approach and to ensure this is appropriate to the sector.
Response: further consultation on risk management and consideration of the likely regulatory impacts of the finalised approach will be undertaken to inform the Government's next stage response to the Baird review.
- EA raises concern about the current level of resourcing for regulation
Response: please see response to this issue raised in the UA submission.
- EA advocates minimisation of compliance costs for low-risk providers and raises concerns about the publishing of enforcement action prior to appeals.
Response: please see response to this issue raised in the ISCA submission.

Submission 5 - John Blahusiak

- Mr Blahusiak suggests that a complaint handling scheme should cover both domestic and overseas students studying with a registered provider, public or private, i.e. a National Education Ombudsman Scheme.
Response: given the particular vulnerabilities of overseas students, the ESOS Legislation Amendment Bill is specifically responding to the Baird recommendation to improve access by overseas students attending non-government institutions to a rigorous statutorily independent complaints and appeals process.
- Mr Blahusiak also asks whether the Ombudsman already has capacity to act as student ombudsman, or international student ombudsman (private and public) under the Ombudsman Act as currently drafted.
Response: the capacity for the Ombudsman to act for students under s5(1)(c) of the Ombudsman Act is unclear. This provision does not apply to domestic students and it is open to interpretation whether, under s5(1)(c), there is any Commonwealth enactment which gives rise to a licence or authority in relation to international students. Given this uncertainty the ESOS Legislation Amendment Bill aims to expand the jurisdiction of the Ombudsman to cover international students who currently do not have access to another statutorily independent body.

Submission 6 - International Education Association (ISANA)

- ISANA comments on risk management and professional standards.
Response: ISANA comments will be added to consultation feedback used to inform the development of the details underpinning the risk management approach.
- ISANA raises concerns that students with poor English proficiency or low levels of education will have difficulty accessing complaints handling services.
Response: the Commonwealth Ombudsman sees education and communication with students and providers as critical to their proposed new role. Access to an external complaints body will improve consistency and accessibility.

Submission 7 - Council of Private Higher Education (COPHE)

- COPHE raises concerns about the current requirements on defaulting providers to refund students their total prepaid course fees.
Response: this relates to a recommendation to be addressed in the Government's second phase response to the Baird review.

Submission 8 - Australian Federation of International Students (AFIS)

- AFIS suggests that the risk level of colleges should be accessible by potential students to inform student choice.
Response: risk varies across sectors and risk information is potentially commercially sensitive when used out of context. The details of the risk management approach and regulatory impacts will be developed in further consultation with students and the sector.
- AFIS suggests student access to external complaints options be mandated for private colleges and that there be information sessions during the implementation period.
Response: this is already a requirement in the National Code. If the current amendments to the Ombudsman Act are passed, the Commonwealth Ombudsman will be the only option, except where another statutorily independent body exists. The Commonwealth Ombudsman intends to provide information sessions for students and providers.
- AFIS proposes changes to student transfer policy to remove the principal course requirement.
Response: this is already a Baird recommendation and will be considered through further consultation to inform the Government's next stage response to the Baird review.

Submission 9 - National Education Union (NTEU)

- NTEU encourages a Senate Committee review of the risk assessment criteria to determine if they are sufficiently rigorous.
Response: the details of the risk management approach will be developed in further consultation with stakeholders.

Submission 10 - Australian Council for Private Education and Training (ACPET)

- ACPET seeks further consultation and independent expertise on the proposed risk management approach.
Response: as per the response to the UA submission, further consultation on the risk management approach is envisaged, including with those involved in establishing the national regulators for VET and Higher Education.
- ACPET suggests increased resourcing and professional development to implement a risk management approach to regulation.
Response: please see the response to the UA submission.
- ACPET seeks recognition of existing complaints and appeals mechanisms including that administered by ACPET.
Response: please see response to the AFIS submission.

7. Costs and impact on providers and students

The financial impact on providers in meeting requirements relating to financial viability and business capability is not expected to be different to that required under the demonstrated capacity requirement already introduced. With the risk managed approach to registration, not all providers will be required to undergo the same level of scrutiny, only those that have not already met the strengthened requirements through a complementary regulatory regime (such as for government funding purposes). This will enable better targeting of existing resources rather than additional resources. There may be a financial impact for some providers associated with conditions imposed on their registration based on their risk profile, for example, extra monitoring requirements or restrictions on the number of overseas students they are able to enrol (although this would not be a restriction on the number of domestic students enrolled within the overall capacity approved under domestic quality assurance). Consistent with proposed changes to the AQTF 2010, the use of conditions would target those providers assessed as higher risk and be aimed at protecting student interests.

Introducing a broader range of financial penalties will have a financial impact on providers not complying with their obligations under ESOS, which is anticipated to be a small proportion of providers.

There will be no financial impact on providers or students for accessing external complaints handling through the Commonwealth Ombudsman. The cost of extending the jurisdiction of the Commonwealth Ombudsman to hear complaints from providers who do not currently have access to a statutorily independent complaints authority is being funded by the Department of Education, Employment and Workplace Relations in the first instance.

A Regulation Impact Statement was included as part of the Explanatory Memorandum and can be accessed through the ESOS Legislation Amendment Bill's webpage on the Parlinfo website (www.parlinfo.aph.gov.au).

8. Implementation

Implementation of the measures contained in the ESOS Legislation Amendment Bill are planned to commence on Royal Assent or 1 July 2011, whichever is the later.

Reasonable transition periods will be built into the implementation phase so that providers will have specified timeframes to be compliant with the new requirements.

Subject to the passage and enactment of the legislation, there will also be communication with the sector to explain the details of the changes and timeframes for implementation.