



INFORMATION, ANALYSIS
AND ADVICE FOR THE PARLIAMENT

INFORMATION AND RESEARCH SERVICES

Bills Digest
No. 38 2002–03

Education Services for Overseas Students Amendment Bill 2002

ISSN 1328-8091

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Published by the Department of the Parliamentary Library, 2002

I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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No. 38 2002-03

Education Services for Overseas Students Amendment Bill
2002

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25 September 2002

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Education Services for Overseas Students Amendment Bill 2002

Date Introduced: 28 August 2002

House: House of Representatives

Portfolio: Education, Science and Training

Commencement: Royal Assent.

Purpose

To amend the *Education Services for Overseas Students Act 2000* (ESOS Act) in order to address some issues which have arisen in the interpretation and implementation of the Act.

The amendments:

- provide greater specificity in the compliance and sanctions regime with respect to courses run by registered providers and the States in which the courses are run
- provide greater flexibility in the compliance and sanctions regime with respect to financial failure by providers which results in inability to provide courses or refunds
- preserve the rights of a person other than the student in terms of refunds, etc., and
- transfer certain administrative functions from the Minister to the Secretary,

Background

The regulation of providers of education services to overseas students is a responsibility shared by the Commonwealth and the State and Territory governments. The States and Territories have primary responsibility for the quality control of education providers and their courses and exercise this through their processes of approving, registering and monitoring providers and their courses. The Commonwealth's interest is in ensuring that its immigration laws are not being breached and in protecting the reputation of this \$4 billion per year export industry, and in so doing the interests of the overseas students which invest in it. The regulatory framework therefore involves Commonwealth and State/Territory legislation and the administrative effort of the Commonwealth

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Departments of Education, Science and Training and of Immigration, Multicultural and Indigenous Affairs and the State/Territory education and training authorities.

The ESOS Act introduced substantial changes to the Commonwealth's arrangements for regulating the providers of education services to overseas students, which were first put in place in 1991. The 1991 legislation had been subject to a sunset clause. However, though the arrangements had come under the scrutiny of the Senate Employment, Workplace Relations, Small Business and Education Committee and its predecessor on various occasions, and some legal and administrative limitations had been highlighted¹, the sunset clause had been extended.

Therefore, despite the continuation of the 1991 Act which included measures to protect the interests of students and to regulate the activities of providers, there were still cases where institutions which had closed, for one reason or another, had not adequately provided for their students. In addition, there were allegations that some providers were facilitating illegal immigration activities. Based on the conclusions of a Departmental review which had involved consultations with major stakeholders, the ESOS Act was enacted with the aim of strengthening the regulatory arrangements².

The arrangements under the ESOS Act include:

- provisions for the registration of education providers and their courses on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS)
- the compulsory membership by providers of a tuition assurance scheme
- contributions by providers to an assurance fund to ensure that there are funds to pay for student tuition in cases of provider collapse
- reporting obligations on providers eg. in relation to disclosure of provider activities such as previous breaches or breaches of associates, and in relation to student breaches
- a compulsory national code which sets standards and benchmarks for providers and their courses in order to qualify for registration and which serves to guide States and Territories in their approval, registration and monitoring activities
- compulsory compliance with the national code, and sanctions for being in breach of both the Act and the national code, and
- Commonwealth powers to investigate providers, impose sanctions and remove non *bona fide* operators from the industry including:
 - the issuing of suspension certificate by the Minister for Immigration and Multicultural and Indigenous Affairs to a registered provider
 - the issuing of production and attendance notices by the Secretary of the Department of Immigration and Multicultural and Indigenous Affairs to providers

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who it is believed have access to information or documents relevant to the monitoring purpose, and

- monitoring powers to authorised Department of Employment Science and Training (DEST) employees which enable them to enter a premises to search, examine, take photos and extracts, secure a thing, ask questions etc. for a monitoring purpose. This can be done either with the consent of the provider or under a monitoring warrant, and search powers to authorised DEST employees which enable them to enter a premises to search and examine, take photos and extracts, seize, ask questions etc for the purpose of looking for evidential material. This can be done either with the consent of the provider or under a search warrant.

The proposed amendments notwithstanding, the ESOS Act is to receive a more thorough review before December 2003.

Main Provisions

Item 1 seeks to make clear that 'registered as a provider' specifically means 'entered on the Register as a provider' where the Register is CRICOS.

Items 2, 3, 5, 6, 9 and 29 introduce greater clarity in relation to which specific courses and States would be covered.

Items 4, 7 and 8 replace 'the Minister' with 'the Secretary' in relation to the responsibility for notifying the designated authority if there is suspicion of non-compliance with the Act or the national code. Presently, where the Minister reasonably believes that a yet-to-be-registered provider is or may end up failing to comply with the Act or the national code, s/he must give information to the designated authority in the relevant State and Territory.

Ordinarily, it might be expected that, for administrative necessity, this function would not be exercised personally by the Minister, but would be exercised by the Secretary. This result might be achieved by implied delegation or agency, but it is clearly preferable for the power to be vested directly in the Secretary to avoid any uncertainty.

Items 11-15 provide for a refund to be paid to a person other than the student where this person is specified in a written agreement which sets out the refund requirements that apply in that situation.

Items 16 - 19 amend section 83 which deals with the imposition of sanctions. Broadly the sanctions include conditions, suspension or cancellation of registration. **Items 16, 17 and 19** effectively extend or diversify the Minister's powers in all of these areas.

Item 16 substantially extends the Minister's powers beyond taking actions in relation to a provider who s/he reasonably believes is or may have been in breach of the Act, etc. The

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powers would include taking actions in relation to those who may not be able to provide courses or refunds because of financial difficulties *or for 'any other reason'*.

Item 17 is also an extension of powers insofar as it allows the Minister to impose conditions not just in respect of any one or more specified courses but also 'generally'.

Item 17 effectively generalises a specific power in relation to conditions.

Item 18 provides greater flexibility in relation to the actions that can be taken in that it allows for course-specific sanctions. Suspensions and cancellations of a provider's registration need not apply to all its courses but to 'any one or more specified courses'.

Item 19 makes it clear that sanctions may be imposed in respect of a particular course for a State even if the situation that resulted in the action relates to a different course or State.

Items 18 and 19 diversify general powers in relation to suspension and cancellation.

Together, these provisions allow the sanctions regime to apply selectively to a person or body for any or all of its courses in respect of any or all of its possible compliance failures.

Concluding Comments

Evidence presented to the Senate from the Department of Education, Science and Training suggests that the Commonwealth has exercised its considerable powers under the ESOS Act to suspend and cancel registrations on many occasions³. While many of these proposed amendments are of a minor technical nature others will considerably extend, strengthen and diversify the Commonwealth's powers particularly in relation to the imposition of sanctions and conditions. In addition to those providers who are in breach of the Act or the national code, the Minister's powers will be extended to cover those providers who, because of financial difficulty or for any other reason, may not be able to meet their course and refund obligations. At the same time the Minister will have access to less severe sanctions in that suspension or cancellation of registration would need no longer apply to all courses, but could apply to one or more specified courses.

On one view, the proposed amendments effect a measured balance between a stronger sanction regime and a more flexible regulatory environment. In introducing the sanctions measures the Minister emphasised their flexibility. He said that the Government would 'have the option of imposing less severe and more suitable sanctions than are currently possible'.⁴ Moreover, he said that it could 'take a more flexible approach to providers believed to be in financial difficulties' by imposing conditions in addition to suspensions or cancellations 'giving providers greater opportunity to trade their way out of trouble'.⁵

On another view, the proposed amendments simply diversify and strengthen the sanctions already available without providing anything constructive from a provider's perspective. Implicit in the argument above is a suggestion that there is a gap between the severe suspension and cancellation powers and the moderate powers relating to conditions. But it is difficult to see where the gap exists. There are no express restrictions on the types of

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conditions that may be imposed on a provider. Moreover, the Minister may already impose a condition that a provider 'not provide a specified course' (paragraph 86(1)(e)), which may apply 'for any one or more courses for any one or more States' (paragraph 83(3)(a)). This would seem to have virtually the same purpose and reach as the measures in **item 18**.

If the 'flexible regulatory environment' argument is ignored, the amendments look to have the effect of strengthening the sanction regime and widening the discretions involved.

Endnotes

1 The reports were:

- *Education Services (Export Regulation) Bill 1990* (tabled 7 May 1991) *Operation of the Education Services for Overseas Students (Registration of Providers and Financial Regulation) Act 1991 (ESOS Act)* (tabled 1 December 1992)
- *The Efficacy of the Education Services for Overseas Students (Registration of Providers and Financial Regulation) Act 1991 in the light of the collapse of the Australian Business College in Perth in January 1993* (tabled 19 August 1993)
- *Overseas Students Tuition Assurance Levy Bill 1993 and Education Services for Overseas Students (Registration of Providers and Financial Regulation) Amendment Bill 1993* (tabled 9 December 1993)
- *The Nature, Implementation and Effects of the Statutory Rules 1994 Nos 146 and 154 – Being Regulations Pertaining to the Education Services for Overseas Students (Registration of Providers and Financial Regulation) Act 1991* (tabled 28 June 1994)
- *Consideration of the Provisions of the Education Services for Overseas Students (Registration of Providers and Financial Regulation) Amendment Bill 1998* (August 1998).

2 For details on the background to these changes, see [Bills Digest, Nos. 62, 2000-01](#).

3 'Overseas student colleges suspended', *Canberra times*, 22 June 2002 reports that (based on DEST evidence to the Senate) since June 2001, 33 providers were suspended for breaches of the *ESOS Act*, one provider was suspended for breaches of both the Act and the national code and two providers had their registration cancelled. Figures reported in the *Sydney Morning Herald*, 1 July 2002, 'Students in illegal visa scam', vary. They say that 100 colleges had been suspended or closed in the past year and that 33 of them were in NSW.

4 Brendan Nelson MP, [Education Services for Overseas Students Amendment Bill 2002](#), Second Reading Speech, House of Representatives, *Debates*, 28 August 2002, p. 5909.

5 *ibid.*

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